05-6396

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOSE PADILLA,
Petitioner-Appellee,

v.

C. T. HANFT, U.S.N. Commander, Consolidated Naval Brig,
Respondent-Appellant.

APPEAL FROM A FINAL JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

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TABLE OF CONTENTS

PURL: https://www.legal-tools.org/doc/bb0285/

PURL: https://www.legal-tools.org/doc/bb0285/

TABLE OF AUTHORITIES

CASES

PURL: https://www.legal-tools.org/doc/bb0285/

PURL: https://www.legal-tools.org/doc/bb0285/

CONSTITUTION, STATUTES, AND REGULATIONS

PURL: https://www.legal-tools.org/doc/bb0285/

OTHER LEGISLATIVE AND REGULATORY AUTHORITIES

MISCELLANEOUS

PURL: https://www.legal-tools.org/doc/bb0285/

PURL: https://www.legal-tools.org/doc/bb0285/

STATEMENT OF THE ISSUE

Whether the Executive has the power to imprison in military jails, indefinitely and without criminal charge, American citizens seized from civilian settings in the United States.

STATEMENT OF THE CASE

In May 2002, Jose Padilla was arrested at Chicago O'Hare Airport on a material witness warrant and jailed in New York. When he was seized from his civilian jail cell in June 2002 by military agents acting on orders from the President, Donna R. Newman, the attorney appointed to represent Padilla in the material witness proceeding, filed a writ of habeas corpus seeking his immediate release from military custody. The District Court for the Southern District of New York ruled that the President had authority to detain persons seized in the U.S. as "enemy combatants," but held that Padilla was entitled to access to counsel and a meaningful hearing. Claiming that a meaningful hearing would pose a threat to national security, the government appealed.

The Second Circuit held that the President had no constitutional or statutory authority to detain Padilla as an "enemy combatant." *Padilla v. Rumsfeld*, 352 F.3d 695 (2003). The court held that the Constitution – via the Habeas Suspension Clause and other provisions – vests Congress rather than the President with the power to authorize domestic detentions in times of war as well as peace. *Id.* at 715.

PURL: https://www.legal-tools.org/doc/bb0285/

The court stated that clear and express congressional authorization is required before the military may imprison an American citizen seized on American soil outside a zone of combat. *Id.*; *see also id.* at 699. Finally, the court concluded that Congress had not provided the necessary clear and express authority for domestic detentions in the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001), or any other statute. *Id.* at 722-24. The court thus ruled that Padilla must be charged with a crime, held as a material witness, or released. *Id.* at 724.

The Supreme Court granted certiorari and reversed the Second Circuit on other grounds, holding that the suit should have proceeded in South Carolina rather than New York; neither the majority opinion nor a concurrence on the jurisdictional issue addressed the merits. *Rumsfeld v. Padilla*, 124 S.Ct. 2711, 2715 (2004); *id.* at 2727 (Kennedy, J., concurring). Four dissenting justices believed that jurisdiction was proper in New York, *id.* at 2729, 2730 (Stevens, J., dissenting), and they discussed the merits. "At stake in this case is nothing less than the essence of a free society," *id.* at 2735, they wrote, expressing the view that "[c]onsistent with the judgment of the Court of Appeals . . . the Non-Detention Act, 18 U.S.C. § 4001(a), prohibits – and the Authorization for Use of Military Force . . . does not authorize – the protracted, incommunicado detention of American citizens arrested in the United States." *Id.*

PURL: https://www.legal-tools.org/doc/bb0285/

Padilla's attorneys immediately re-filed in the District of South Carolina and moved for summary judgment. The district court agreed with the Second Circuit and the only Supreme Court justices to have reached the merits, holding that "the President has no power, neither express nor implied, neither constitutional nor statutory, to hold Petitioner" without criminal charge. JA181. "To do otherwise," the court found, "would not only offend the rule of law and violate this country's constitutional tradition, but it would also be a betrayal of this Nation's commitment to the separation of powers that safeguards our democratic values and individual liberties." JA180. The court thus declined the Executive's invitation to grant it historically unprecedented powers, concluding that doing so would be a simple act of "judicial activism." *Id.*

The Executive sought and received a stay and appealed.

STATEMENT OF MATERIAL FACTS

Since June 9, 2002, Jose Padilla – an American citizen born in Brooklyn, New York – has been held in solitary confinement in a military prison. He has not been charged with any crime or violation of the law of war. For almost two years, Padilla was denied any contact with a lawyer, his family, or non-military personnel. Even now, the government claims the discretionary power to restrict his communications with his lawyers and family. The government claims that it can

PURL: https://www.legal-tools.org/doc/bb0285/

hold Padilla under these conditions until the unforeseeable end of the "war on terrorism."

Padilla was not captured in combat. He was not captured on an overseas battlefield. To the contrary, his initial seizure occurred in an ordinary civilian context: civilian law enforcement agents arrested Padilla pursuant to a court-issued material witness warrant following his arrival via a regularly scheduled commercial airliner at Chicago O'Hare Airport on May 8, 2002. Padilla had already passed the immigration checkpoint and been admitted to the United States as a returning citizen before he was pulled aside in the customs inspection area. JA93 (Stipulations of Fact). At the time of his arrest, Padilla was wearing civilian clothing and carrying a valid United States passport. *Id.* He had no weapons or explosives. *Id.*

After his arrest, the government brought Padilla to New York, where the grand jury that had issued the material witness warrant was convened. The district court appointed counsel, and Padilla was allowed communications with his lawyer. Two days before the scheduled district court hearing on the motion to quash the warrant, ordinary procedures were swept aside. The President signed an order declaring Padilla an "enemy combatant" whom the government believed to be "associated" with al Qaeda. JA16. Military agents seized Padilla from the maximum security civilian detention facility where he was held and transported

PURL: https://www.legal-tools.org/doc/bb0285/

him to a military brig. The government held him completely incommunicado for nearly two years.

In the three years since he was seized from his jail cell by the military, the government has never charged Padilla with a crime. Nor has Congress authorized a new regime of domestic detention without charge by suspending the writ of habeas corpus or other legislative action.

These are the only facts relevant to this appeal. To be sure, the government has alleged other facts about Padilla's conduct. But while those allegations would matter in a factual dispute over whether Padilla is what the government claims he is, they are irrelevant in the legal dispute over whether the President has the power to detain, indefinitely and without charge, unarmed citizens seized in civilian settings in the United States.

SUMMARY OF ARGUMENT

The President has never been granted the authority to imprison indefinitely and without charge an American citizen seized in a civilian setting in the United States. The Constitution allows him no such power. History shows that the power to imprison citizens suspected of being enemies of the state is a power that is particularly subject to governmental abuse. To guard against the risk of that abuse, the Framers established numerous constitutional safeguards, safeguards repeatedly recognized by the Supreme Court and independently fortified by Congress.

PURL: https://www.legal-tools.org/doc/bb0285/

Yet the Executive now asks to set aside those carefully constructed protections. It asks this Court to sanction a radical new path - a shadow system of preventive detention without criminal charge for citizens suspected of wrongdoing. Before this Court considers ratifying such an unprecedented departure, Congress must at a minimum enact a clear and unmistakable authorization – an authorization that specifies precisely who may be detained, for how long, and under what conditions.

The AUMF is not such an authorization. To try to make it one, the government relies on *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004), and *Ex Parte Quirin*, 317 U.S. 1 (1942). Neither case compels – or even permits – such revolutionary transformation. Like the Framers of the Constitution, the Supreme Court in *Hamdi* and *Quirin* recognized the crucial roles played by Congress and the courts in guaranteeing that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Hamdi*, 124 S.Ct. at 2650 (plurality op.) (*citing Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 587 (1952)). *Hamdi* and *Quirin* are narrow decisions, carefully limited by the Supreme Court to their facts. But the government would strip away these careful limitations, leaving the Executive with unbridled power to create a novel system of detention that is fundamentally incompatible with the Constitution.

Quirin rested on clear and explicit Congressional authorization of trials by military commissions – authorization that was separate and distinct from the

PURL: https://www.legal-tools.org/doc/bb0285/

general authorization to use force in the declaration of war against Germany. Moreover, since *Quirin* was decided, Congress underscored its concerns about Executive detention by enacting a statute specifying that "no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." *See* 18 U.S.C. § 4001(a). Section 4001(a) was designed to prevent the President from invoking vague military powers to justify precisely the sort of detention at issue in this case.

In *Hamdi*, the Supreme Court plurality read the AUMF to "clearly and unmistakably" authorize the detention of individuals captured on an overseas battlefield in Afghanistan because the detention of such traditional prisoners of war is a "fundamental incident of waging war." 124 S.Ct. 2633, 2641 (2004). But the *Hamdi* plurality was careful to limit its decision to the "narrow circumstances" presented in that case: a "battlefield capture" in a "*foreign* combat zone." *Id.* at 2643 (emphasis in original).

The indefinite military detention without charge of U.S. citizens arrested in civilian settings in the U.S. is very different from overseas battlefield detentions. Far from being a "fundamental incident of waging war," the indefinite military detention of citizens arrested in the United States based on suspected wrongdoing is entirely unprecedented in American history.

PURL: https://www.legal-tools.org/doc/bb0285/

There is no indication that, without a single word of debate, Congress intended the AUMF to upset two centuries of constitutional tradition and create a system for the military detention of citizens in this country. Indeed, just a few weeks later, when it passed the PATRIOT Act, Congress vigorously debated a provision allowing the civilian detention without charge of suspected terrorist *aliens* for just *seven* days. It strains reason to believe that the same Congress that seriously deliberated over this far more limited provision in the PATRIOT Act had already implicitly authorized the detention of citizens for years at a time – without a single Member speaking one word of concern.

Because the AUMF does not authorize Padilla's military detention without trial, and § 4001(a) expressly prohibits it, the President's "power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 637 (1952) (Jackson, J., concurring); *see Padilla v. Rumsfeld*, 352 F.3d at 711. That ebb is far too low a tide to cover the unprecedented actions that the government seeks here to justify.

PURL: https://www.legal-tools.org/doc/bb0285/

ARGUMENT

I. The Executive Seeks Unprecedented Powers

Allowing the detention of citizens arrested in the United States based on suspected association with the enemy would dramatically upset our constitutional system in a way that overseas battlefield captures do not. The Executive's own recent statements make clear how dangerous it would be for courts to adopt, without legislative guidance, a definition of "enemy combatant" that reaches beyond the classic battlefield detainee scenario recognized in *Hamdi*. In oral argument in the U.S. District Court for the District of Columbia several months ago, Executive branch officials asserted that a "little old lady" who sent a check to "what she thinks is a charity that helps orphans in Afghanistan" could be detained in military custody indefinitely, without charge or trial, if unbeknownst to her the donation was passed on to terrorists. *Rasul v. Bush*, No. 02-0299, D.D.C., Tr. of 12/1/2004 hearing, at 25. As the Deputy Associate Attorney General starkly stated, "someone's intention . . . is not a factor that would disable the military from detaining the individual as an enemy combatant." *Id.* That was no slip of the tongue. Later in the argument, he stated that a teacher who taught English to the son of a terrorist could also be held because "Al Qaeda is seeking to train its operatives to learn English." *Id.* at 27. In the Executive's view – and these are its own words – teaching English to terrorists' children is tantamount to "shipping

PURL: https://www.legal-tools.org/doc/bb0285/

bullets to the front lines" and transforms the teacher into an "enemy combatant." *Id.*

Put simply, the Executive argues that it has the power to deprive anyone, anywhere and anytime, of the right to have accusations judged by a jury of his peers – merely by labeling him an "enemy combatant." The accumulation in a single branch of such unprecedented power over the nation's citizens would be constitutionally troubling even if wielded only for a brief time. *The Federalist* No. 47, at 301 (Clinton Rossiter, ed., 1961) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many . . . may justly be pronounced the very definition of tyranny."). But the Executive does not claim some "emergency" power with temporal limits. To the contrary, the President has acknowledged that the source of any military power over citizens – the war on terror – will most likely *never* end.[1] In the end, the Executive seeks a permanent enhancement of power that would dramatically upset our constitutional system.

II. Congress Has Not Authorized the Indefinite Detention Without Charge of Citizens Arrested in the United States

This case implicates the gravest constitutional perils against which the Constitution's Framers sought to guard: Executive imprisonment of citizens

[1] Mike Allen, *Bush Tones Down Talk of Winning Terror War*, WASH. POST, Aug. 31, 2004 at A06.

PURL: https://www.legal-tools.org/doc/bb0285/

without criminal trial, the assertion of military power over civilians, and the accumulation of unchecked and unbalanced power in a single Branch of government.[2] In reviewing both deprivations of individual liberty and actions of dubious constitutionality, the Supreme Court consistently has required, at a minimum, clear and specific authority from Congress. Such authority is completely lacking here.

A. The Constitution Requires that Congress Speak Clearly When It Authorizes the Infringement of Liberties

"In traditionally sensitive areas . . . the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Georgia v. Ashcroft*, 501 U.S. 452, 461 (1991) (internal quotation omitted); *Greene v. McElroy*, 360 U.S. 474, 507 (1959) ("[E]xplicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws."). This "clear statement" requirement applies most forcefully in the context of government attempts to erode citizens' freedoms. As the Supreme Court noted during the Vietnam War, "[w]here the liberties of the citizen are involved . . . we will construe narrowly all delegated powers that curtail

[2] These constitutional issues are discussed *infra* at Part II.

PURL: https://www.legal-tools.org/doc/bb0285/

or dilute them." *Gutknecht v. United States*, 396 U.S. 295, 306-07 (1970) (citation omitted).

The Supreme Court has vigilantly applied the clear statement rule in times of significant challenge to national security, always refusing to read Congressional authorizations for the use of force as a "blank check for the President." *Hamdi*, 124 S.Ct. at 2650 (plurality): *see also id.* 2655 (concurring op.) (describing constitutional rule "that subject[s] enactments limiting liberty in wartime to the requirement of a clear statement").[3]

That has been true since the Nation's very beginning. In the War of 1812, the U.S. Congress issued a full-blown declaration of war. Like today's terrorists, the enemy selected symbolic targets in the heart of America, burning the Capitol and White House. The young Nation felt itself to be at a moment of extraordinary peril. Yet even then, the Supreme Court recognized that an authorization to use force does not grant the President blanket authority to seize enemy persons or

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[3] The *Hamdi* Court issued a judgment only because Justices Souter and Ginsburg "join[ed] with the plurality to produce a judgment" to "give practical effect to the conclusions of eight members of the Court rejecting the Government's position." *Id.* at 2660 (concurring op.). Because no opinion commanded a majority, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds," *Marks v. U.S.*, 430 U.S. 188, 193 (1977) (internal quotation omitted), *reiterated with approval by Grutter v. Bollinger*, 539 U.S. 306, 325 (2003). Despite the government's repeated reliance on it, Justice Thomas's lone dissenting voice is not "the narrowest grounds" of "those Members who *concurred* in the judgments," *Marks*, 430 U.S. at 193-94 (emphasis added).)

PURL: https://www.legal-tools.org/doc/bb0285/

property in the United States; rather, clear Congressional approval was a prerequisite to the legality of any such seizure. Chief Justice Marshall explained that even a "declaration of war does not, of itself, authorize proceedings against the *persons* or property of the enemy found, at the time, within the [domestic] territory." *Brown v. United States*, 12 U.S. 110, 126 (1814) (emphasis added); *see also Little v. Barreme*, 6 U.S. 170, 177-78 (1804) (Marshall, C.J.) (striking down wartime seizure of ship traveling *from* French port as not clearly authorized because Congressional statute had authorized only seizure of ships traveling *to* French port).

Indeed, one great peril of that war was the presence of citizen "enemy combatants" within the Nation: unreformed Loyalists and their sympathizers spying on and sabotaging American encampments. These enemies were legion. Yet President James Madison – the man whom the Framers themselves called the Father of the Constitution – understood that he had no power to detain without charge citizens seized in the United States. President Madison never invoked the Commander-in-Chief Clause he had helped draft to justify a power to detain without charge citizen-combatants. In fact, Madison rejected any such power. In *Elijah Clark's Case*, an American citizen surreptitiously entering the country from abroad was seized near the border and charged with spying on American encampments. Brought before a military tribunal, Clark was convicted and

PURL: https://www.legal-tools.org/doc/bb0285/

sentenced to death. 1 Military Monitor 121, 121-22 (Feb. 1, 1813). Clark appealed, and his case ultimately reached President Madison, who conducted final reviews of appeals from convictions by military tribunals. *Id.* at 122. President Madison reviewed the federal espionage statute and found that it criminalized espionage by non-citizens – but not by citizens.[4] *Id.* As such, he found no statutory basis to hold Clark. Rather than claiming inherent power to detain citizens without charge, or implicit power to detain citizens without charge by virtue of Congress's declaration of war, President Madison ordered Clark released. *Id.* If the Constitution had allowed him to detain, as enemy combatants, citizens seized in the United States on suspicion of aiding the enemy, President Madison surely would have invoked that power. He did not. Absent clear Congressional authorization, Madison knew that neither the declaration of war nor some inherent power allowed him to detain without charge suspected citizen-combatants seized in the United States. He refused to transcend the limitations on Executive power that he had helped create.

Later Courts held true to the Framer's vision. In the military occupation of the former Confederacy that followed the Civil War, the Supreme Court reiterated that "[t]he clearest language would be necessary to satisfy us that Congress

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[4] Congress later amended the federal espionage statute to cover citizens. *See* 12 Stat. 339, 340, 34 U.S.C. §1200, art. 5; see also 12 Stat. 731, 737, 34 U.S.C. §1200, art. 5.

PURL: https://www.legal-tools.org/doc/bb0285/

intended" to give the military power over traditional judicial questions because "[i]t is an unbending rule of law, that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires." *Raymond v. Thomas*, 91 U.S. 712, 715-16 (1875) (ruling that even statutes that gave "very large governmental power to the military commanders" presiding over former Confederate states were not sufficient to authorize military commanders to void local court decrees).

Like its forbearers, the *Quirin* Court adhered to this clear statement requirement in wartime. Though the government ignores the plain language of the opinion, *Quirin* unequivocally held that "Congress ha[d] *explicitly* provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war." 317 U.S. at 28 (emphasis added); *cf. 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 also Padilla v. Rumsfeld*, 352 F.3d at 715-16 ("[T]he Quirin Court's decision . . . rested on *express congressional authorization* of the use of military tribunals to try combatants who violated the laws of war.") (emphasis added). Thus, the *Quirin* Court rested military jurisdiction to conduct a "trial, either by court martial or military commission, of those charged with relieving, harboring or corresponding with the enemy" on

PURL: https://www.legal-tools.org/doc/bb0285/

Congress's highly specific statutory authorization of such trials in the Articles of War,[5] *not* on the Declaration of War by the United States against Germany. 317 U.S. at 27-28. Far from supporting the government's position, *Quirin* thus supports the long-standing clear statement rule.

The Supreme Court again underscored the importance of the plain statement rule in *Duncan v. Kahanamoku*, a case involving both a declared war and statutory authorization of martial law – the very apex of the Executive's possible military power. Yet in *Duncan*, the Court held that the statute allowing the Governor of Hawaii to "place the Territory . . . under martial law," 327 U.S. 304, 307 n.1 (1946), must be narrowly construed, because Congress "did not specifically state to what extent the army could be used or what power it could exercise. It certainly did not explicitly declare that the Governor in conjunction with the military could

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[5] The Articles of War relied on in *Quirin* are the precursors to the current Uniform Code of Military Justice, 10 U.S.C. §§ 801-941. The statutes provided a clear statement authorizing "the *trial* and punishment of offenses against the law of war," *Quirin*, 317 U.S. at 27 (emphasis added), but cannot be read to provide a clear statement authorizing the indefinite and potentially permanent detention of an American citizen *without trial*. *See, e.g.*, 10 U.S.C. § 821 (referring to "offenders or offenses that by statute or by the law of war may be *tried* by military commissions") (emphasis added). The power to detain without trial cannot be viewed as a lesser-included part of the power to put on trial; among other things, detention without trial carries a much graver risk of error and abuse. *The Federalist* 84, at 512 (Alexander Hamilton) (Clinton Rossiter ed. 1961) ("'[C]onfinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a *more dangerous engine* of arbitrary government.'") (quoting 1 William Blackstone, *Commentaries on the Laws of England* 132 (1765)).

PURL: https://www.legal-tools.org/doc/bb0285/

for days, months or years close all the courts and supplant them with military tribunals." *Id.* at 315.

The "clear statement" rule remains a central tenet of the Supreme Court's jurisprudence. *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 298-300 (2001); *cf. Zadvydas v. Davis*, 533 U.S. 678, 682 (2001) ("Based on our conclusion that indefinite detention of aliens . . . would raise serious constitutional concerns, we construe the statute to contain an implicit 'reasonable time' limitation, the application of which is subject to federal-court review."). The Executive's claim that *Hamdi* rejected the clear statement rule, Gov't Br. at 44, is utterly without support. In fact, the *Hamdi* plurality *reiterates* the clear statement rule. Though the plurality thought the "specific language of detention" was not a prerequisite to a clear statement, it understood the continued detention of someone captured on a foreign battlefield to be "a *fundamental* incident of waging war" and therefore concluded that "in permitting the use of 'necessary and appropriate force,' Congress has *clearly and unmistakably* authorized detention *in the narrow circumstances considered here*." 124 S.Ct. at 2641 (emphasis added). The plurality's finding that Congress had "clearly and unmistakably" authorized

PURL: https://www.legal-tools.org/doc/bb0285/

foreign battlefield captures was a finding that the clear statement rule had been satisfied – not abandoned. *Id.* at 2641.[6]

Ever since President Madison and Chief Justice Marshall acknowledged it, the requirement that Congress clearly and unmistakably authorize any governmental curtailment of citizens' liberties has guaranteed that Washington bureaucrats are not left with the final word on our freedoms. Before liberties are eroded for the sake of security, our own Congressional representatives – accountable to the Nation in ways that military officers and Executive branch officials are not – must first say so clearly.

B. The Non-Detention Act Requires a Clear Statement of Authority to Detain

The clear statement rule is buttressed by the Non-Detention Act, enacted in 1972. The Act provides: "*No citizen* shall be imprisoned or otherwise detained by the United States *except pursuant to an Act of Congress*." 18 U.S.C. § 4001(a)

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[6] Just as the *Hamdi* plurality found the AUMF to have clearly and unmistakably authorized captures on foreign battlefields without using the language of detention, so too *Ex parte Endo* suggested that detention of a citizen spy or saboteur "might" in specific circumstances be "clearly and unmistakably" authorized by a statute lacking "the language of detention," 323 U.S. 283, 300-02 (1944). Yet *Endo* viewed clear and unmistakable authorization of detention in a statute not using "the language of detention" as a rarity: "We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used." *Id.* (relying on Fifth and Sixth Amendments and Habeas Suspension clause to reject Executive claim of authority to detain).

PURL: https://www.legal-tools.org/doc/bb0285/

(emphasis added). As the Second Circuit held, § 4001(a) plainly applies to Padilla's military imprisonment and prohibits that imprisonment absent specific authorization by Congress. *Padilla v. Rumsfeld*, 352 F.3d at 721 ("[T]he statute is unambiguous.").

The government contends that § 4001(a) is irrelevant here because it applies only to civilian, not military, detentions of citizens. Gov't Br. at 54. The government's argument cannot be squared with the plain text of the statute or with its history.

As the Supreme Court has recognized, the language of the Act is unambiguous: "the plain language of § 4001(a) proscrib[es] detention *of any kind* by the United States, absent a congressional grant of authority to detain." *Howe v. Smith*, 452 U.S. 473, 479 n.3 (1981) (emphasis in original). The text cannot be twisted to say that only detentions of citizens by civilian authorities are impermissible (absent authorization by Congress), but that this prohibition may be avoided if citizens are simply imprisoned by the military instead.

The plain text should be enough to resolve the issue, but the legislative history makes abundantly clear that the statute was designed to address *exactly* the sort of detention that is at issue in this case. Section 4001(a) was enacted in part to

PURL: https://www.legal-tools.org/doc/bb0285/

repeal the Emergency Detention Act of 1950 ("EDA").[7] Passed at the height of the Cold War out of concern that the "world Communist movement" was engaged in covert operations within the United States undertaken by citizen operatives whose mission was to engage in "treachery . . . espionage, sabotage, [and] terrorism,"[8] the EDA granted the Executive power to proclaim an "Internal Security Emergency" during an invasion, declared war, or insurrection in aid of a foreign enemy, and then to seize and detain persons whom the Executive reasonably believed "probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage." 50 U.S.C. §§ 812, 813, 64 Stat. 1021 (1950).[9] When Congress passed § 4001(a), it specifically rejected a proposal for the mere repeal of the EDA and chose instead a repeal accompanied by explicit prohibition because "[r]epeal alone might leave citizens subject to arbitrary executive action, *with no clear demarcation of the limits of executive authority*." *Id.* (emphasis added).

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[7] Section 4001(a) was also enacted to repudiate the notorious Japanese-American internment camps of World War II. *See Hamdi*, 124 S.Ct. at 2639. Although administered by civilians, the camps were directly and heavily controlled by military commanders, *see Ex parte Endo*, 323 U.S. at 285-90 (discussing military orders at length), and there is no indication that Congress would have looked *more* favorably on the camps if their daily administration had been military.

[8] 81st Cong., 2d Sess. (Sept. 23, 1950) at §§ 2(1), 2(7), 101(1), 101(6).

[9] Like the PATRIOT Act, *see infra* at C.1., the EDA provided procedural protections and made clear who could be detained, for how long, and under what conditions.

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The legislative debates further demonstrate that Congress meant what it said. The bill's primary opponent, Representative Ichord, argued that it would "deprive the President of his emergency powers and his most effective means of coping with sabotage and espionage agents in war-related crises." 117 Cong. Rec. H31542 (daily ed. Sept. 13, 1971). Indeed, Representative Ichord was quite clear that an authorization for the use of military force would not authorize the detention of a suspected American enemy combatant: "the language of [§ 4001(a)] . . . would prohibit even the picking up, at the time of a declared war, at a time of an invasion of the United States, a man whom we would have reasonable cause to believe would commit espionage or sabotage." *Id.* at H31549. The bill's primary drafter, Representative Railsback, agreed that it was intended to divest the President of exactly that power. *Id.* at H31551-52 (noting also that FBI Director J. Edgar Hoover - like the House Judiciary Committee - had thought such power unnecessary). As the Second Circuit observed, Congress's overwhelming passage of § 4001(a), "after ample warning that both the sponsor of the amendment and its primary opponent believed it would limit detentions in times of war and peace alike is strong evidence that the amendment means what it says." 352 F.3d at 720.[10] There is thus no doubt that Congress intended § 4001(a) to prohibit

[10] Congress recognized that "the constitutional validity" of the EDA was "subject to grave challenge," since it "would seem to violate the Fifth Amendment by providing imprisonment not as a penalty for the commission of an offense, but on

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Executive detention of suspected citizen-saboteurs or that an authorization to use force does not silently satisfy the prohibition.[11]

As this Court has recognized, "§ 4001(a) functioned principally to repeal the Emergency Detention Act," which "had provided for the preventive 'apprehension and detention' of individuals *inside* the United States 'deemed likely to engage in espionage or sabotage' during 'internal security emergencies.'" *Hamdi v. Rumsfeld*, 316 F.3d 450, 468 (4th Cir. 2003) (quoting H.R.Rep. No. 92-116, at 2 (1971)) (emphases added), *reversed on other grounds*, 124 S.Ct. 2633 (2004). This Court properly distinguished between § 4001(a)'s prohibition on "apprehension and detention of individuals inside the United States" and the capture and subsequent detention of "an armed and hostile American citizen captured on the battlefield." *Id.*

What the government asks this Court to validate – the imprisonment without criminal charge of a citizen arrested in the United States on suspicion that he may

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mere suspicion that an offense may occur in the future. The Act permits detention without bail even though no offense has been committed or is charged." House Report at 5, *reprinted in* 1971 U.S.C.C.A.N. 1435, 1438.

[11] If a declaration of war or lesser authorization for use of force were sufficient to satisfy § 4001(a), then § 4001(a) would be ineffective in preventing a recurrence of the Japanese internment camps, which had occurred in time of declared war. The Executive argues that § 4001(a) cannot cover military detentions because Congress did not discuss § 4001(a) when it passed the AUMF, Gov't Br. at 59, but that is exactly backwards: Congress did not discuss § 4001(a) because it had no reason to think an AUMF would authorize a new shadow system of detention for American citizens.

PURL: https://www.legal-tools.org/doc/bb0285/

commit sabotage – is precisely what Congress feared, and what it enacted § 4001(a) to prevent.[12]

C. The AUMF Does Not Authorize Detention of Citizens Arrested in the U.S.

1. Neither the AUMF's Text or History Can Be Read to Authorize This Detention

The government erroneously contends that congressional authority for Padilla's detention was conferred by the AUMF enacted by Congress in September 2001. Days after the attacks of September 11 – which were committed by aliens – Congress authorized the use of force. The authorization's language and legislative history show that Congress clearly contemplated troops and battlefields. 115 Stat. 224 (Sec. 2(b)(1)) ("SPECIFIC STATUTORY AUTHORIZATION.–Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution") (capital letters in original). But the AUMF says *nothing* about military detentions of citizens arrested in the United States based on suspected association with terrorist organizations - much less define who may be detained, for how long, or how detention decisions shall be made or reviewed. It simply cannot be viewed as authority – let alone a clear

[12] The government's statutory placement argument is unavailing. Sections 4001(a) and 4001 (b) share a code designation – not a common origin or meaning. *See Padilla v. Rumsfeld*, 352 F.3d at 721-22.

PURL: https://www.legal-tools.org/doc/bb0285/

statement of authority – for such an unbounded and extensive curtailment of individual liberties. *See Padilla v. Rumsfeld*, 352 F.3d at 723.

It is plain enough that § 4001(a) does not permit detention without charge of citizens suspected of sabotage on the basis of a declaration of war or lesser authorization to use force. *See supra* at II.B. But even without § 4001(a) – or any clear statement rule at all – common sense would compel the conclusion that Congress did not intend the AUMF to convey the power that the Executive asserts. The Executive views the AUMF to have eliminated – by silent implication – two of this nation's most basic constitutional principles: trial by jury and the primacy of civilian over military rule. No one can seriously deny that considerable debate in Congress would have been provoked by legislation proposing to grant the President the power to arrest Americans in America and jail them indefinitely without criminal charges in military prisons. Yet the legislative history of the AUMF reveals *no debate whatsoever* about the wisdom of such a radical change in the way our government can lock up its citizens. The obvious – and correct – explanation for this startling lack of debate is that Congress did not contemplate or intend to authorize such a scheme.

This lack of Congressional debate on detention of citizens becomes even more striking in light of the extensive debates just a month later over the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001) ("PATRIOT

PURL: https://www.legal-tools.org/doc/bb0285/

Act").[13] Among other things, the PATRIOT Act "*expanded* the government's authority to detain aliens" without charge, as the Executive has correctly noted. Gov't D.Ct. Opp. to Mot. for Sum. J. at 26 (emphasis original).[14] Congress vigorously debated that expansion of Presidential power. *See generally* Christopher Bryant and Carl Tobias, *Youngstown Revisited*, 29 Hastings Const. L.Q. 373, 386-91 (2002) (describing debates). It carefully limited the extent of that power. *See* 8 U.S.C. § 1226a (a) 5-7, (b). The PATRIOT Act *expressly* gave the Executive authority to detain without criminal charge aliens suspected of terrorist activity, for short periods of time before the initiation of criminal or removal proceedings. The PATRIOT Act provides a clear and contemporaneous example of what the

[13] The PATRIOT Act also greatly expanded federal criminal prohibitions on terrorism, as requested by the President. *See* PATRIOT Act §§ 802, 803, 805, 808, amending 18 U.S.C. §§ 2331, 2339, 2339A, 2339B. These provisions specifically encompass the unlawful acts attributed to Padilla.

[14] Indeed, if, as the government claims, the AUMF had already given the Executive unfettered discretion to detain any suspected terrorist without trial, the PATRIOT Act's provisions would have been redundant. For it not to be redundant, one would have to conclude that Congress deliberately enacted § 1226a of the PATRIOT Act to provide aliens with *more* protections than citizens. This is implausible. The Executive's argument that 8 U.S.C. § 1226a(a) covers a somewhat broader category of aliens than "enemy combatants" is beside the point. Whether or not § 1226a(a) is broader than the Government's shifting "enemy combatant" category, it is beyond cavil that Congress would not have meticulously defined the categories of *non-citizens* subject to detention without charge – but left utterly inchoate the categories of *citizens* subject to detention without charge.

PURL: https://www.legal-tools.org/doc/bb0285/

legislative record looks like when Congress debates who may be detained, for how long, and under what conditions.[15]

Yet the Executive would have this Court believe that, six weeks earlier, Congress had given the President an even more expansive *unlimited* detention power over *citizens* – without a single word of debate. Common sense would require rejecting that argument even if there were no clear statement rule. No rational review of the Congressional Record could conclude that Congress gave the Executive branch this awesome power over citizens – without any Presidential request, any Congressional debate, or any plain statutory language.[16]

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[15] As a result, this case is markedly different from *Dames & Moore v. Regan*, 453 U.S. 654 (1981), on which the Government relies. In that case, although the Court found no specific statutory authorization for the President to suspend claims pending in American courts, it relied on both (a) other statutes that clearly indicated that Congress approved the settlement authority at issue and (b) the absence of any contrary indication of legislative intent. *Id.* at 678-86. Here, the government can point to no other legislation indicating congressional approval of executive detention of citizens, and both the PATRIOT Act and § 4001(a) strongly indicate that Congress did *not* intend to allow indefinite military imprisonment of citizens without trial.

[16] Respondent argues that the AUMF "cannot plausibly be read" not to authorize "detention of combatants found within the United States – i.e., combatants identically situated to those that carried out the September 11 attacks." Opp. 25. That argument makes three fatal errors. First, it ignores the fact that every one of the 9/11 attackers were aliens, not citizens. Second, it ignores the fact that federal law already provided statutory mechanisms by which every single 9/11 attacker could have been detained if found in the U.S. *See supra* II.B. (describing Congressional conclusion in § 4001(a) debates that detention powers were sufficient). Third, it ignores that Congress explicitly addressed whether it was

PURL: https://www.legal-tools.org/doc/bb0285/

2. The Government Improperly Reads the AUMF to Convey Unlimited Authority

To justify the authority it seeks, the government turns to vague or inapposite phrases in the AUMF. But in no phrase can it find anything approaching a clear statement of authority – or any explanation why Congress would have meticulously defined the President's detention power over non-citizens in the PATRIOT Act while granting the President undefined power over the Nation's citizens in the AUMF without a word.

The Preamble, for instance, states that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." But while the Resolution recognizes that the President has authority to deter and prevent acts of terrorism, it does not begin to identify what the scope of that authority *is*. Under the government's view of the Preamble, Congress recognized the President's unlimited authority to do *anything* that he determines will "deter and prevent acts of international terrorism against the United States." The AUMF cannot reasonably be interpreted as conveying such unlimited power to the President. *Hamdi*, 124 S.Ct. at 2650 (plurality op.) ("We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.")

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advisable to augment the Executive's power to detain aliens in the PATRIOT Act, not the AUMF.

PURL: https://www.legal-tools.org/doc/bb0285/

The government also relies on § 2(a) of the AUMF, which provides that the President is authorized to use "all necessary and appropriate force" against those nations, organizations, or persons he determines were responsible for the September 11 attacks, "in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." This authorization to use "necessary" and "appropriate" force allows the President to order soldiers into battle; indeed, the Resolution provides clearly and unmistakably that "this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution." *See* 50 U.S.C. § 1541 *et seq.*[17] But it cannot plausibly be read to suggest that Congress intended to displace the criminal laws (and protections associated with those laws) with a wholly new, unbounded scheme of preventive military detention by Executive fiat.[18] In so concluding, the district court did not somehow "decide what is tactically 'necessary and appropriate' to defeat al Qaeda," as the Executive claims. Gov't Br. at 37. The district court merely rejected the Executive's argument that "just because the President states that Petitioner's detention is 'consistent with the laws

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[17] As the Second Circuit noted, Congress's clarity in specifying that the AUMF was meant to satisfy the War Powers Act makes it implausible that Congress would have left unstated a desire also to satisfy § 4001(a). *Padilla*, 352 F.3d at 723.

[18] The Executive vaguely argues that "phrases *like* 'necessary and appropriate' have been read broadly." Gov't. Br. at 38 (emphasis added). Yet the Supreme Court has *never* read a wartime statute to allow a curtailment of citizens' freedoms without clear and unmistakable authorization.

PURL: https://www.legal-tools.org/doc/bb0285/

of the United States, including the Authorization for Use of Military Force' that makes it so." JA178. The Executive's argument, the district court warned, directly contravened the separation of powers and "would totally eviscerate the limits placed on Presidential authority to protect the citizenry's individual liberties." *Id.*

In sum, the AUMF does not come close to being a "clear statement" of congressional intent to curtail the fundamental rights of citizens in this country against military detentions without trial.[19]

3. *Hamdi* Does Not Suggest that the AUMF Granted the President Power To Detain American citizens Seized in the U.S.

The *Hamdi* plurality took pains to emphasize that the "context of [Hamdi's] case" was that of a "battlefield capture" in a "*foreign* combat zone." 124 S.Ct. at 2643 (emphasis in original). Indeed, the *Hamdi* plurality not only marked the difference between a domestic arrest and a foreign battlefield capture, it emphasized the difference with italics. As the plurality unequivocally noted, *Hamdi* involved the rare situation where someone was alleged to have been

[19] The Executive also cites Congress's commonsensical conclusion that it is "necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad," 115 Stat. 224, § 2(a). But while protecting citizens at home is nearly always the goal of self-defense, authorizations of force do not somehow silently imply the authority to detain citizens at home without charge. *See supra* II.A.-B.

PURL: https://www.legal-tools.org/doc/bb0285/

"*captured* in a zone of active combat operations in a foreign theater of war." *Id.* at 2645 (emphasis added by Supreme Court).[20]

The government nonetheless tries to blur the crucial difference between an American "captured in a zone of active combat operations in a foreign theater of war" and an unarmed American seized by the military from a jail cell or airport. To the government, there is no meaningful difference between an Afghan battlefield and any street in any American town: each is merely a place in which it is free to deploy military might against citizens, what the government calls a "locus of capture." Gov't Br. at 27.[21] That antiseptic phrase ignores the very real differences between this Nation and the world beyond, differences that most Americans know instinctively. As importantly, the government's effort to conflate home and abroad would unsettle a century of constitutional understanding. Americans *are* entitled to greater liberty at home than overseas, as the Supreme Court has repeatedly recognized. *Youngstown*, 343 U.S. at 579; *United States v.*

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[20] Though the government is eager to erase *Hamdi*'s limits, *see e.g.*, Gov't Br. at 25 ("it was not fixing the outer limits of the class of enemy combatants") & *supra* Pt. I (Executive arguments broadly extending enemy combatant category), the plurality's repeated warnings about the limits of its holding were not accidental. *Padilla* and *Hamdi* were argued on the same day: the Court was well aware of the significance of emphasizing the foreign battlefield capture in *Hamdi*.

[21] The Executive repeatedly cites *Khalid v. Bush*, 335 F. Supp. 2d 311 (D.D.C. 2005) to support its argument. *Khalid*, which concerned the detention without charge of *aliens* who were both captured and detained *outside* the U.S., is completely inapposite. It also conflicts with *In re Guantanamo Detainees*, 355 F.Supp.2d 443 (D.D.C. 2005), and is on appeal.

PURL: https://www.legal-tools.org/doc/bb0285/

Curtiss-Wright Export Corp., 299 U.S. 304 (1936). Judge Wilkinson put it succinctly: "To compare [Hamdi's] battlefield capture to the domestic arrest in *Padilla v. Bush* is to compare apples and oranges." *Hamdi v. Rumsfeld*, 337 F.3d 335, 344 (4th Cir. 2003) (denying rehearing *en banc*) (Wilkinson, J., concurring).[22]

The *Hamdi* plurality understood the capture of an American citizen on a foreign battlefield to present a "narrow question" arising under "narrow circumstances." *Id.* at 2639, 2641; *see also id.* at 2642 (suggesting that *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), might have come out differently "[h]ad Milligan been *captured* while he was assisting Confederate soldiers by carrying a rifle against Union troops *on a Confederate battlefield*.") (emphasis added). As the

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[22] The government has now strategically chosen to emphasize certain facts rather than others in an attempt to shoehorn Padilla's case into the precedent set by *Hamdi*. While the government's emphasis has changed – and while it has regularly changed its story about what it imagines Padilla was planning – these are not "new" allegations that fundamentally alter the posture of the case. The government has always alleged that Padilla was in Afghanistan during the fighting in 2001-02. *See* Decl. of Michael Mobbs at ¶¶6-9, *available at* http://news.findlaw.com/hdocs/docs/padilla/padillabush82702mobbs.pdf (filed in *Padilla v. Rumsfeld*, S.D.N.Y. No. 02-4445) ("Mobbs Declaration"); *Padilla v. Rumsfeld*, 352 F.3d 695, 701 (2d Cir. 2003); Petr. Br. at 32, *Rumsfeld v. Padilla*, No. 03-1027 (S.Ct.). Indeed, the government has always argued that Padilla's and Hamdi's cases presented identical questions of presidential authority. *See Rumsfeld v. Padilla*, 2004 WL 1066129 at *17 (Oral Arg.) (U.S. April 28, 2004) ("The Court: .... [I]s Padilla just the same as someone you catch in Afghanistan? Mr. Clement: I think that for the purposes of the question before this Court, the authority question, he is just the same.").

PURL: https://www.legal-tools.org/doc/bb0285/

plurality concluded, it would be odd indeed for Congress to have authorized the President to send troops to war in Afghanistan but not to have authorized those troops to keep the prisoners of war they captured there. Because battlefield captures are a "fundamental incident of waging war," the plurality found that "in permitting the use of 'necessary and appropriate force,'" Congress had clearly intended to authorize detention in those "narrow circumstances." 124 S.Ct. at 2641. Where the military has authority to shoot enemy soldiers, such as on the battlefield in Afghanistan, the military has power to capture and detain those soldiers instead for some period of time. But unless the government genuinely contends it had the right to shoot Padilla where he was seized by the military – in a jail cell in Manhattan – there is no necessarily-included power to detain him militarily instead, let alone a clearly stated power to do so.

The detention of an American citizen seized on a foreign battlefield presented the *Hamdi* Court with "narrow circumstances." Stretching *Hamdi*'s foreign battlefield power over all of America would create circumstances far from narrow. Allowing the military arrest and detention without charge of citizens within the United States based on alleged association with terrorist organizations (whether those alleged associations took place here or overseas) would pose threats to freedom and constitutional government that are simply not present in the case of traditional battlefield captures. The "practical circumstances" of such arrests are

PURL: https://www.legal-tools.org/doc/bb0285/

"entirely unlike" the circumstances of the battlefield captures and seizures of enemy soldiers that "informed the development of the law of war." *Id.* at 2641 (plurality op.). In traditional armed conflicts, the President's power to detain prisoners of war without trial was inherently limited by the scope of the war. The persons subject to detention were easy to identify, since they were captured on the battlefield or, like the men in *Quirin*, asserted military status as agents of the opposing government. The end of the war would be marked by a peace treaty with the opposing government, at which time prisoners would be returned home to resume their peacetime occupations.

The "war on terror" knows no such limits, and the power the President seeks is thus unlimited and susceptible to error and abuse in two fundamental ways that are impossible to square with our constitutional system of limited government and legal protection for individual liberty. First, the power of detention asserted in this case would apply far more broadly than in a traditional war, since it could be used to detain any American, anywhere, and at any time. Second, the power might never end. Traditional wars like the conflict in Afghanistan end, but in the "war on terror," there may be no clear point at which prisoners suspected of posing a threat would have to be released.[23] Because of the potentially perpetual duration of the "war on terror," the extraordinary power over citizens the President seeks today

[23] *See supra* n.1.

PURL: https://www.legal-tools.org/doc/bb0285/

could become a permanent fixture of American law.

Finally, even were there emergency situations in which it might be "necessary and appropriate" for the President temporarily to seize a citizen on U.S. soil to prevent imminent catastrophic violence, that is not the situation presented by this case. *See Hamdi*, 124 S.Ct. at 2659 (concurring op.) ("[I]n a moment of genuine emergency, when the government must act with no time for deliberation, the Executive may be able to detain a citizen if there is reason to fear he is an imminent threat to the safety of the Nation" but such emergency power is not relevant once the prisoner "has been locked up for over two years."). Padilla has now been detained without charge for three years. If the military detention without charge of a man already behind bars in a civilian prison were ever "necessary and appropriate," it is not so today.[24]

It is thus not surprising that the *Hamdi* justices gave no reason to think that a "narrow" battlefield power could be stretched into a power militarily to detain citizens seized anywhere in the United States. Indeed, Justice Breyer, part of the *Hamdi* plurality, on the same day joined Justice Stevens' dissent in *Padilla*, which on the merits would have found that the AUMF does not authorize "the protracted,

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[24] Indeed, *Duncan* held that a far greater authorization – a declaration of war combined with martial law – did not continue to empower the Executive indefinitely. There, the Supreme Court held that *two years* after Pearl Harbor, with the Nation still at war, the Executive's power to shunt citizens to military courts had waned. 327 U.S. at 315.

PURL: https://www.legal-tools.org/doc/bb0285/

incommunicado detention of American citizens arrested in the United States." 124 S. Ct. at 2735 n.8. Given that four additional justices in *Hamdi* believed the AUMF was insufficient to support even the detention of a U.S. citizen captured on a conventional battlefield overseas, 124 S.Ct. at 2652 (Souter, J., concurring, joined by Ginsburg, J.); *id.* at 2660 (Scalia, J., dissenting, joined by Stevens, J.), at least five members of the Court were prepared to have held Padilla's detention unlawful had the Court reached the merits in his case.[25]

4. *Quirin* Does Not Suggest that Congress silently Granted the President Vast Unprecedented Powers over American Citizens Arrested in the U.S.

The government properly notes the "well-established presumption that Congress understands the state of existing law when it legislates," Gov't Br. at 33 (*quoting Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988)). But it errs in describing the existing law when it claims that the AUMF authorizes Padilla's detention merely because *Quirin* held that military trials of soldiers not captured on a foreign battlefield had been previously authorized.

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[25] In a final attempt to try to fit Padilla under *Hamdi*, the Executive argues that Americans are somehow not in America when they are in American airports, so Padilla's Chicago arrest was not "'in' the United States." Gov't Br. at 25 n.5. The government conceded the irrelevance of this argument below. JA158 ("I want to be very clear, your Honor, we actually don't think anything turns on it") (Motion Hearing). In any event, while some courts have held that an alien's physical presence in the U.S. does not always constitute "entry" into the U.S. in the immigration law sense, *see U.S. v. Kavazanjian,* 623 F.2d 730, 736 (1st Cir. 1980), no court has ever held that a citizen in an American airport is not "in" the United

PURL: https://www.legal-tools.org/doc/bb0285/

First, *Quirin* found that Congress had "*explicitly* provided" by statute for trial before military tribunals – i.e., *not* through the authorization to use force against Germany. 317 U.S. at 28 (emphasis added). If anything, that aspect of "existing law" would have made clear to Congress that it would have to separately and explicitly provide for the military detention without charge of American citizens seized in the U.S. – because the AUMF would not do so *implicitly*.

Second, the petitioners in *Quirin* were charged with crimes and tried. *Quirin* considered the question of *where* a detainee is to be tried (military or civilian tribunal), not *whether* he is to be tried at all. It simply did not consider whether citizens suspected of plotting with an enemy to commit sabotage could be detained without criminal charge or trial. For that reason, the question of the Habeas Suspension Clause was neither briefed nor argued – and the decision addresses only the very different question of whether persons associated with the army of a foreign government could constitutionally be tried by military commission rather than civilian jury.[26]

Third, *Quirin* was decided before Congress passed § 4001(a). Even if – contrary to its holding – *Quirin* could somehow be read to authorize military

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States – let alone that a citizen who has traveled abroad remains metaphorically overseas a *month* after returning home.

[26] The *Hamdi* plurality noted that the *Quirin* decision said nothing to indicate that the saboteurs could not have been detained, 124 S.Ct. at 2640 – though that silence was due, of course, to the fact that the issue was not briefed or argued.

PURL: https://www.legal-tools.org/doc/bb0285/

detention without charge of suspected citizen-saboteurs whenever there was an authorization to use force, the basis for that reading of *Quirin* was erased by § 4001(a). Congress passed § 4001(a) in 1972 in order to prevent the President from detaining, *inter alia*, citizens suspected of sabotage or espionage unless expressly authorized to do so by Congress. *See supra* II.B. Congress presumably knew that.

Fourth and finally, each defendant in *Quirin* asserted military status. 317 U.S. at 21. The saboteurs entered the United States wearing military uniforms and carrying explosives on the direct command of "an officer of the German High Command," 317 U.S. at 21-22, as they explicitly "stipulated," *id.* at 20, thus asserting military status.[27] Asserting military status by wearing uniforms allowed them to invoke the aid of the law of war: had the *Quirin* saboteurs been captured landing in uniform, with explosives, from enemy submarines, they could only have been detained as POWs – not punished or executed for their attempted military attack.[28] To be sure, that assertion of military status also carried risks, as it allowed them – including Haupt, the presumed American – to face a military rather than civilian trial. But the *Quirin* saboteurs were apparently willing to take the bitter

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[27] The government's citation of recent historical commentary suggesting that some of the *Quirin* saboteurs were actually not enrolled in the German army is beside the point, since the *Quirin* saboteurs asserted military status and the Supreme Court plainly assumed that they were soldiers. *Quirin*, 317 U.S. at 21-22. See also *Padilla v. Rumsfeld*, 352 F.3d 695, 716 (2d Cir. 2003).

[28] Hague convention, Oct. 18, 1907, Art. I of Annex, 36 Stat. 2295; *cf. Padilla v. Rumsfeld*, 352 F. 3d 695, 732 (2d Cir. 2003) (Wesley, J. concurring).

PURL: https://www.legal-tools.org/doc/bb0285/

with the sweet. As the Court made clear, the saboteurs could not first seek the protection of the law of war and later evade the consequences of violating the very same law. 317 U.S. at 37-40. There was equity in that.[29] Congress would not have presumed, contrary to *Quirin*, that an authorization to use force would allow the Executive to subject to military jurisdiction anyone whom it suspects of being a threat to national security – whether or not that person has asserted military status.[30]

Courts should "not read [a statute] to erode past . . . practice absent a clear indication that Congress intended such a departure," *Cohen v. De la Cruz*, 523 U.S. 213, 221 (1998), as the Executive itself concedes. Gov't Br. at 33. Yet the Executive would have this Court do exactly that by ignoring the clear statement rule, § 4001(a), and the careful limits set by *Hamdi* and *Quirin*.

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[29] *See Hamdi*, 124 S.Ct. at 2642 (plurality op.).

[30] Padilla has not invoked military status. In any event, the Executive has made clear that it would not grant any of the protections of the law of war even if they *were* invoked, meaning that the equitable *quid pro quo* described in *Quirin* – law of war consequences for law of war protections – would not sanction military jurisdiction even if Padilla had invoked military status. *See* White House Press Sec'y, Fact Sheet, Status of Detainees at G'tmo (2/7/02), www.white-house.gov/news/releases/2002/02/20020207-13.html.

PURL: https://www.legal-tools.org/doc/bb0285/

III. The President Has No Inherent Power To Detain, Indefinitely and Without Charge, Citizens Seized in Civilian Settings in the United States

Because the AUMF does not authorize Padilla's military detention without trial, and § 4001(a) expressly prohibits it, the President's "power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown*, 343 U.S. at 637; *see also Padilla v. Rumsfeld*, 352 F.3d at 711. The Executive makes the historically aberrant claim that it has inherent unilateral power to detain citizens without charge. That claim cannot withstand constitutional scrutiny. *See Hamdi*, 124 S.Ct. at 2659 (concurring op.) (noting "the weakness of the government's mixed claim of inherent, extrastatutory authority" and "recall[ing] Justice Jackson's observation that the President is not Commander in Chief of the country, only of the military") (*citing Youngstown*, 343 U.S. at 643-44) (Jackson, J., concurring)).[31]

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[31] *The Prize Cases*, 67 U.S. 635 (1862), do not help Respondent. President Lincoln responded there to a crisis when Congress was not in session. Congress had expressly authorized the President to call forth the militia in emergencies, and Congress quickly ratified Lincoln's decision to go to war when it returned. Here, the Executive ordered the military to seize Padilla more than two years ago; Congress was in session, and has never ratified the order – though it has enhanced criminal penalties for acts Petitioner is alleged to have planned. *See* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, §§ 6905, 6601 *et seq.*, 118 Stat. 3643 (enhancing criminal penalties for attending terrorist training camp or plotting dirty bomb). Moreover, *The Prize Cases* authorized an Executive

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Two long-standing constitutional principles make clear that any inherent power the President may have does not extend to the indefinite military detention without charge of American citizens arrested within the United States. First, Executive detention without criminal trial is extraordinarily disfavored in Anglo-American legal history, and the Framers erected the Habeas Suspension Clause specifically to guard against it. U.S. Const., art. I, § 9, cl. 2. Second, the Framers sharply limited the military's sphere of authority in domestic affairs in order to ensure that the military would remain subordinate to civilian government. Both of these bedrock principles are left intact by *Hamdi* and *Quirin*, but would be fatally undermined were the novel presidential power asserted in this case upheld.

A. The Constitution Precludes Executive Detention

The Habeas Suspension Clause establishes that the President has no inherent power to subject citizens arrested in the U.S. to detention without trial.[32] When the President detains without congressional authorization, he acts unconstitutionally.

Constitutional text and history demonstrate that Executive detention of precisely the sort at issue in this case was a core concern of the Framers. *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas

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seizure of *property* in a combat zone, not the seizure of a *person* outside a combat zone.

[32] The Due Process Clause and the criminal procedure protections of the Fourth, Fifth and Sixth Amendments also safeguard against unilateral Executive detention, and render unconstitutional Padilla's current detention without criminal trial.

PURL: https://www.legal-tools.org/doc/bb0285/

corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."); *see also Rumsfeld v. Padilla*, 124 S.Ct. 2711, 2721 (2004) ("While Padilla's detention is undeniably unique in many respects, it is at bottom a simple challenge to physical custody imposed by the Executive – the traditional core of the Great Writ."); *Hamdi*, 124 S.Ct. at 2659 (Souter, J., concurring) ("[W]e are heirs to a tradition given voice 800 years ago by [the] Magna Carta, which, on the barons' insistence, confined executive power by the 'law of the land.'"); *id.* at 2661 (Scalia, J., dissenting) ("The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive.").

The Constitution is no less concerned with Executive detention in war. If anything, it demonstrates the Framers' concern that assertions of national security might be particularly tempting justifications for detention. Indeed, as Justice Jackson explained, "[a]side from the suspension of the privilege of habeas corpus in time of rebellion or invasion," the Framers "made no express provision for exercise of extraordinary power because of a crisis" and "I do not think we rightfully may amend their work." *Youngstown*, 343 U.S. at 649-50 (Jackson, J., concurring). As the district court correctly noted, "[t]his Court sits to interpret the law as it is and not as the Court might wish it to be." JA180.

PURL: https://www.legal-tools.org/doc/bb0285/

The Suspension Clause expressly contemplates a "Rebellion or Invasion" in which the "Public Safety may require" detention without trial, and gives Congress the power temporarily to suspend the writ. U.S. Const. art. I, § 9, cl.2. Suspending the writ is, of course, tantamount to authorizing extrajudicial Executive detention, since a person imprisoned when the writ is suspended has no means of complaining of the error or illegality of his detention. *Cf. Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial."). Unlike Congress, the President has no power to suspend the writ. *Ex parte Bollman*, 8 U.S. 75 (1807). The situations of "Rebellion or Invasion" contemplated by the Suspension Clause are exactly the situations in which the "inherent" power claimed by the Executive to detain "enemy combatants" pursuant to the Commander-in-Chief Clause would be most relevant; and yet the Constitution allows Executive detention in those situations of domestic peril only when *Congress* has suspended habeas corpus. This allocation of power ensures that even in times of crisis, no one branch can unilaterally deprive citizens of liberty. *See Youngstown*, 343 U.S. at 652 (Jackson, J., concurring) ("[E]mergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them.").[33]

[33] Indeed, the Anglo-American law's concern with Executive abuse of the power to

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Nor can *Hamdi* be read to support a broad inherent power of detention in the Executive absent a congressional suspension of habeas. The *Hamdi* plurality found congressional authorization for the detention without charge of a citizen seized in a *"foreign* combat zone," 124 S. Ct. at 2643 (emphasis in original). But the plurality did not address the situation of a citizen seized in a civilian setting in the United States, and so did not analyze the applicability of the Suspension Clause to such situations. Indeed, the plurality's primary response to Justice Scalia's dissenting argument that the Suspension Clause precluded the AUMF from authorizing even the battlefield detention of American citizens was that the dissent "largely ignores the context of this case: a United States citizen captured in a *foreign* combat zone." *Id.* at 2643 (emphasis in original).

That distinction between an overseas battlefield capture and a domestic arrest is crucial. Congress is constitutionally empowered to suspend the writ of habeas corpus in times of "Rebellion" and "Invasion" – terms that plainly apply to times of *domestic* peril, when military conflict on our own soil may make ordinary

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detain "enemies" in times of crisis long predates the Constitution. Historically, the Great Writ evolved as a tool to limit Executive detention – a power that had frequently been exercised by the Crown based on claims that it was necessary to protect the security of the realm in time of emergency. *See Darnel's Case*, III How. St. Tr. 2, 44-45 (1627); William F. Duker, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 44-45, 141 (1980) (describing how Parliament refused to accept the King's claim to emergency power of arrest and detention, enacting first the Petition of Right and then the acts guaranteeing habeas corpus).

PURL: https://www.legal-tools.org/doc/bb0285/

civilian law impractical or dangerous. The Suspension Clause thus defines the situations when domestic detentions without charge may be required, and provides the exclusive mechanism for effectuating such detentions – Congressional suspension of habeas. Because Congress has not suspended the writ of habeas corpus, Padilla cannot be detained without charge and must be charged with a crime or released.[34]

B. The Constitution Strictly Limits the Use of Military Powers in Domestic Affairs

1. The President's assertion of unilateral power to subject U.S. citizens arrested on U.S. soil to military detention also runs afoul of the Constitution's limits on military jurisdiction. The Framers had a "fear and mistrust of military power." *Reid v. Covert*, 354 U.S. 1, 29 (1957). This was borne of the fact that "the King had endeavored to render the military superior to the civil power." *Duncan*, 327 U.S. at 320; *see also* DECLARATION OF INDEPENDENCE paras. 14, 20 (U.S. 1776) (noting that Crown "affected to render the Military independent of and superior to the Civil Power" and "deprive[ed them], in many Cases, of the Benefits of Trial by Jury."). As a result, the Framers made the military "subordinate to civil authority."

[34] Moreover, the Constitution contemplates citizens suspected of levying war against the United States being charged with treason – a charge which carries with it heightened, not reduced, requirements of proof. *See* U.S. Const. art. III, § 3, cl. 1 (stating that "[t]reason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and comfort" and

PURL: https://www.legal-tools.org/doc/bb0285/

Reid, 354 U.S. at 30.

The Framers granted Congress many of the war powers to ensure that military power would not become a tool of governmental oppression.[35] The President's authority to use military power as a tool of domestic policy is thus particularly circumscribed when he acts without Congressional authorization – or, even worse, against Congressional will.

The Supreme Court has been careful to police the boundaries of military jurisdiction throughout the Nation's history. Time and again, the Supreme Court has reaffirmed Alexander Hamilton's observation that the powers conferred on the President by the Commander-in-Chief Clause "amount to nothing more than the supreme command and direction of the military and naval forces," and grant no sweeping authority to seize people or property within American borders even in times of war. *The Federalist* No. 69, at 418 (Clinton Rossiter, ed., 1961); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14 (1955) ("assertion of military authority over civilians cannot rest on the President's power as commander-in-chief, or on any theory of martial law.").

The President's attempt to rely on his Commander-in-Chief powers to avoid the normal domestic law-making process was dramatically rejected by the Supreme

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establishing a heightened proof requirement of two witnesses in order to convict). Padilla's current detention thus violates the Treason Clause as well.

[35] See U.S. Const. Art. I § 8, cl. 10, cl. 11, cl. 14, cl. 15; U.S. Const. Amend. III.

PURL: https://www.legal-tools.org/doc/bb0285/

Court in *Youngstown*, which invalidated President Truman's seizure of steel mills for military purposes during the Korean War.[36] *Youngstown*, 343 U.S. at 646 (Jackson, J., concurring) ("No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role."). If the President cannot use his Commander-in-Chief power to deprive property owners of their steel mills in war time without congressional authorization, surely he cannot use that power to deprive citizens of their liberty.

2. Even when the President acts with the support of Congress, the Constitution limits the exercise of military jurisdiction over citizens, as demonstrated by *Ex parte Milligan*, 71 U.S. at 121, 123, 127. *Milligan* arose during the Civil War, when the very existence of our Republic was threatened, and large swaths of the country had become battlefields. In the context of that crisis, the Supreme Court held that military jurisdiction could not extend to civilians in areas "where the courts are open and their process unobstructed." *Ex parte Milligan*, 71 U.S. at 121.

Like Padilla, Milligan was charged with conspiring with a secret society to commit hostile and warlike acts against the United States. Milligan was alleged to have joined and aided a secret paramilitary group for the purpose of overthrowing

[36] Respondent seeks to diminish *Youngstown* by calling it a case about a "domestic economic initiative." Gov't. Br. at 58. Yet in *Youngstown* the Executive had

PURL: https://www.legal-tools.org/doc/bb0285/

the government; to have violated the laws of war; to have communicated with the enemy; and to have conspired to seize munitions, liberate prisoners of war, and commit other violent acts in an area under constant threat of invasion by the enemy. *Id.* at 6-7 (statement of case); *id.* at 140 (Chase, C.J., concurring). Milligan, like Padilla, was detained by the military. As in this case, the government argued that the President's role as Commander-in-Chief gave him the authority to subject Milligan to military jurisdiction. *Id.* at 14.[37] But despite Milligan's direct participation in planning wartime attacks on the Nation, the Supreme Court firmly rejected the expansion of military jurisdiction over a citizen and held that Milligan must be released from military custody. The *Milligan* Court reaffirmed that "it is the birthright of every American citizen, when charged with crime, to be tried and punished according to law." *Id.* at 119. The Supreme Court emphasized that the Constitution's requirements and guarantees apply "equally in war and peace" and are not "suspended during any of the great exigencies of government," *id.* at 120-21, save in situations where the Habeas Suspension Clause has been employed. *Id.* at 125.

Milligan recognized that military trials might be necessary where martial law prevailed – i.e., where battlefield conditions made it impossible for civilian

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invoked the Commander-in-Chief Clause as authority for its seizure of steel mills to ensure battlefield munitions during the Korean War.

[37] Unlike Padilla, Milligan was charged with crimes and given a trial.

PURL: https://www.legal-tools.org/doc/bb0285/

courts to operate. *Id.* at 126; *id.* at 142 (Chase, C.J., concurring). And it recognized that the Constitution allows soldiers and sailors in the regular armed forces to be tried under military jurisdiction. *Id.* at 123; *id.* at 142 (Chase, C.J., concurring); U.S. Const. amend. V; *see also Solorio v. United States*, 483 U.S. 435, 439 (1987) ("The Constitution [conditions] the proper exercise of court-martial jurisdiction . . . on one factor: the military status of the accused."). But it refused to equate Milligan with a soldier. As the Court explained, "[i]f he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties." Like Milligan, Padilla is entitled "to be tried and punished according to law." *Id.* at 119.

More recent cases likewise establish that, even with congressional authorization, the Constitution limits the ability of the government to subject citizens to military rather than civilian jurisdiction. *See Duncan*, 327 U.S. at 324 (rejecting military jurisdiction to try civilians even under martial law statute); *Reid*, 354 U.S. at 33-34 & n.60 (plurality) (notwithstanding statute, rejecting on constitutional grounds military jurisdiction outside "active hostilities" or "occupied enemy territory," and rejecting argument that "concept 'in the field' should be broadened . . . under the conditions of world tension which exist at the present time"); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23 (1955) (rejecting military authority to arrest and try discharged former soldier). The Supreme Court

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has continued to refer to *Milligan* as "one of the great landmarks in this Court's history," *Reid*, 354 U.S. at 30, repeatedly reaffirming its principles when the government claims that a threat to national security justifies the arrest, detention, or trial of an American citizen by the military.

Though the government would prefer it otherwise, the *Hamdi* plurality acknowledged the continuing precedential vitality of *Milligan*, and in the process underscored yet again the import of the fact of battlefield capture in *Hamdi*: "Had Milligan been *captured* while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate *battlefield*, the holding of the Court might well have been different," the plurality opined. *Id.* at 2642 (emphasis added). Like Milligan – and *unlike* Hamdi – Padilla was not captured bearing arms on a battlefield, but seized in a civilian setting in the United States far from any zone of active combat operations.

Even *with* congressional authorization, then, Padilla's military detention would likely violate the Constitution. It certainly cannot be upheld *without* such authorization – and in the face of explicit congressional prohibition in § 4001(a) – on the basis of some unarticulated penumbra of Presidential power.

* * *

In short, any inherent Presidential power cannot overcome the Constitutional barricades erected by the Framers to prevent both Executive detention without

PURL: https://www.legal-tools.org/doc/bb0285/

criminal trial and military incursions into domestic civilian life.

IV. No Principle of "Law or Logic" Requires Ignoring These Plain Rules.

The Executive repeatedly assails the fundamental distinction between its power to detain those rare citizens seized on a foreign battlefield and the millions of Americans who could be arrested in civilian settings in the United States. In the Executive's view, any such distinction is "truly perverse." Gov't Br. at 27.[38] To the contrary, as the preceding sections demonstrate, the distinction between foreign battlefield captures and domestic seizures is constitutionally required and legislatively mandated.

The Framers and the drafters of § 4001(a) had a common goal: avoiding the high risk of governmental error and abuse that accompanies Executive detention. The potential for error and abuse of the detention power is dramatically different in the case of foreign battlefield capture as compared to domestic arrest. A citizen who travels abroad to a zone of active hostilities and ends up captured by soldiers on a foreign battlefield holding a rifle is somewhat likely to be who the government thinks he is. While some kind of hearing is required to ensure that there has been no mistake, the practical circumstances of battlefield capture

[38] The Executive argues that a rule distinguishing between battlefield captures and domestic arrests provides a "perverse incentive" because it encourages American enemy combatants to come to the U.S. to evade military jurisdiction. Gov't Br. at 24-28. There is no reason to think that al Qaeda terrorists make decisions based on

PURL: https://www.legal-tools.org/doc/bb0285/

suggest a reduced need for the heightened procedural protections of criminal trial. The number of citizens likely to be found in such a situation is quite small, ensuring that normal constitutional protections remain the general rule for most citizens. In short, the risk of governmental error and abuse against which the Framers and the drafters of § 4001(a) wished to guard is low.

That is not true for citizens arrested in civilian settings in the U.S. When a citizen is seized in a civilian setting here at home based on suspicion of wrongdoing – whether or not that alleged wrongdoing involves conspiring with an enemy, or having been, at some point in the past, in a foreign combat zone – the odds of that individual not being who the government thinks he is are quite a bit higher. They are higher still when the government gets its information from informants who have lied to the government in the past.[39] And they are higher still when the government acknowledges that it has used unorthodox (to say the least) means to extract information[40] – means that the Executive's own officials and

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jurisdictional considerations. Even if they did, the resolution of this case would not attract them to the U.S. – because the odds of getting caught here are higher.

[39] *See* Mobbs Declaration, *supra* n.22 at n.1 (governmental acknowledgement that "these confidential sources have not been completely candid," that their statements "may be part of an effort to mislead or confuse U.S. officials," that one of the two sources subsequently recanted, and that "one was being treated with various sorts of drugs").

[40] *See* David Johnston & James Risen, "Aides Say Memo Backed Coercion for Qaeda Cases," *N.Y. Times* (June 27, 2004) (reporting that government officials

PURL: https://www.legal-tools.org/doc/bb0285/

documents concede contain no indicia of reliability.[41] It was precisely for such situations of anonymous accusation of treason that the Framers designed the criminal procedure protections of the Bill of Rights. Moreover, where the battlefield power of *Hamdi* applies to only a handful of citizens, the detention power sought here would give the Executive potential military power over a vastly greater number of citizens, posing a much greater threat to the longstanding balance of our constitutional system. In short, both the risk and the consequences of governmental error and abuse would be considerably higher.

The Executive would run roughshod over the Framers' greatest fears, aggregating to itself the power to determine who among our citizens it may tear from the normal constitutional framework and subject to military jurisdiction. Our entire constitutional history rejects that claim.

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acknowledged "extreme" and "harsh" – indeed, possibly criminal - interrogation methods of suspected Al Qaeda operatives).

[41] *See, e.g.*, U.S. Army Field Manual FM 34-52 ("Use of torture and other illegal methods is a poor technique that yields unreliable results, may damage subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear."), *available at* http://www4.army.mil/ocpa/reports/ArmyIGDetaineeAbuse/FM34-52IntelInterrogation.pdf; Oral Arg. Tr., *Hamdi v. Rumsfeld*, 2004 WL 1066082 at *42 (Apr. 28, 2004) (arguing that torture may elicit "information more quickly, but you'd really wonder about the reliability of the information you are getting") (statement of then-Deputy Solicitor General Paul Clement); *see also Bran v. U.S.*, 168 U.S. 532, 546 (1897) (rejecting use of such evidence because "pain and force may compel men to confess what is not the truth of facts.")

PURL: https://www.legal-tools.org/doc/bb0285/

It goes without saying that the Executive's national security policy arguments speak to what Congress *should in the future do*: they are not reasons for this Court to skew its analysis of what Congress *has already done*. The Executive thinks it should have more than a "well-stocked statutory arsenal of defined criminal offenses covering the gamut of actions that a citizen sympathetic to terrorists might commit." *Hamdi*, 124 S.Ct. at 2657 (concurring op.); *see also* Brief for Janet Reno, *et al.*, as *Amici Curiae* at 14-29 & n.17, in *Rumsfeld v. Padilla*, 124 S.Ct. 2711; JA181-82 (district court opinion and order). If the Executive believes it needs more power to detain citizens without charge, it must first ask Congress to grant that power – just as it asked for (and received) more power to detain non-citizens without charge in the PATRIOT Act.

V. Respondent Produced No Admissible Evidence Supporting Its Allegations

Contrary to the government's assertions, Gov't Br. at 21, Padilla does not accept that the government's factual allegations must be accepted as true for purposes of summary judgment. Rather, Padilla has consistently argued that because the government's legal position is flawed, he is entitled to judgment as a matter of law "*even if* all of the facts pleaded by the Executive Branch are assumed to be true."[42] But as Padilla made clear in the district court, it is a fundamental

[42] Pet. D.Ct. Reply (Traverse) at 2-3 & n.2; Pet. Mot. for Sum. J. at 1 & 2 n.1; Pet. D.Ct. Reply Br. at 15 & n.2.

PURL: https://www.legal-tools.org/doc/bb0285/

aspect of summary judgment practice that a party "may not rest on the mere allegations" of his pleadings when responding to a motion for summary judgment, but rather "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. Proc. ("R.") 56(e); Pet. D.Ct. Reply Br. at 15 (citing same). Affidavits opposing summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." *Id.* As this Court has unambiguously held, affidavits containing only "'conclusory assertions and hearsay statements [do] not suffice' to stave off summary judgment." *U.S. v. Roane*, 378 F.3d 382, 400-01 (4th Cir. 2004) (citation omitted).

As Padilla has shown, the only affidavit submitted by the government was *not* "made on personal knowledge," *not* "admissible in evidence," and does *not* show "that the affiant is competent to testify to the matters stated therein." R.56(e); *see* Pet. D.Ct. Reply (Traverse) at 4-7; Pet. D.Ct. Reply Br. at 15. The affiant (a government official) plainly has no first-hand knowledge of his allegations regarding Padilla, and the government has provided no information to suggest that its putative facts were obtained in any manner that would permit their

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introduction into evidence.[43] The government could have tried to cure this defect in the trial court, but did not.[44]

The district court did not need to reach this alternative basis for summary judgment because it resolved the legal issue of authority in Padilla's favor – as this Court should. But were this Court to conclude that Padilla was not entitled to summary judgment *on the facts alleged by the Government*, then it would have to determine whether the government had met its burden in responding to petitioner's summary judgment motion demonstrating that there is a genuine issue of material fact for trial. The government – by providing a single, hearsay affidavit not based on personal knowledge and with no supporting indicia of reliability – has not met that burden.

CONCLUSION

The judgment should be affirmed.

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[43] *See supra* nn.40-41.

[44] It is immaterial that no discovery has been conducted. *Cf.* Gov't Opp. Cert. at 7. The government does not need discovery to obtain evidence that it claims already to control. Even if the government needed discovery to properly oppose the motion – and it is hard to imagine what evidence in Padilla's control it could seek to compel through discovery - it could have requested it under Fed. R. Civ. Proc. 56(f). While the parties contemplated no evidentiary hearing before the motion for summary judgment was resolved, it is a basic aspect of civil procedure that a party opposing summary judgment must, at a minimum, demonstrate that it has sufficient admissible evidence to create a genuine issue of fact and make an evidentiary hearing worthwhile. That is the very nature of summary judgment, and the government has not met its burden.

PURL: https://www.legal-tools.org/doc/bb0285/

Respectfully submitted,

Dated: June 6, 2005

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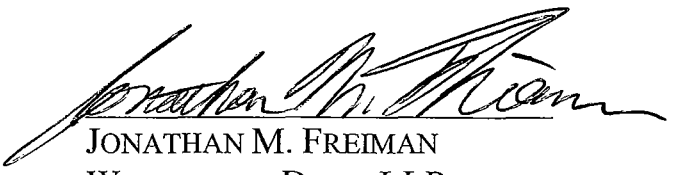

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REQUEST FOR ORAL ARGUMENT

This appeal presents a fundamental question about the Executive's power to imprison in military jails, indefinitely and without criminal charge, American citizens seized from civilian settings in the United States. Petitioner-Appellee therefore respectfully requests oral argument.

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ADDENDUM

Pursuant to FRAP 28(f) and Fourth Circuit Local Rule 28(b), Appellee Includes the Relevant Statutes, Rules and Unpublished Opinions in the Following Addendum

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*177857 18 U.S.C.A. § 4001

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART III--PRISONS AND PRISONERS
CHAPTER 301--GENERAL PROVISIONS

Current through P.L. 108-498, approved 12-23-04

§ 4001. Limitation on detention; control of prisons

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

(b)(1) The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof, and appoint all necessary officers and employees in accordance with the civil-service laws, the Classification Act, as amended and the applicable regulations.

(2) The Attorney General may establish and conduct industries, farms, and other activities and classify the inmates; and provide for their proper government, discipline, treatment, care, rehabilitation, and reformation.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 847; Sept. 25, 1971, Pub.L. 92-128, § 1(a), (b), 85 Stat. 347.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL NOTES

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Based on Title 18, U.S.C., 1934 ed., §§ 741 and 753e (Mar. 3, 1891, c. 529, §§ 1, 4, 26 Stat. 839; May 14, 1930, c. 274, § 6, 46 Stat. 326).

This section consolidates said sections 741 and 753e with such changes of language as were necessary to effect consolidation.

"The Classification Act, as amended," was inserted more clearly to express the existing procedure for appointment of officers and employees as noted in letter of the Director of Bureau of Prisons, June 19, 1944. 80th Congress House Report No. 304.

1971 Acts. House Report No. 92-116, see 1971 U.S. Code Cong. and Adm. News, p. 1435.

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Public Law 107–40
107th Congress

Joint Resolution

Sept. 18, 2001
[S.J. Res. 23]

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

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

Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and

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

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

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

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

Authorization for Use of Military Force.
50 USC 1541 note.

SECTION 1. SHORT TITLE.

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

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

President.

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

(b) WAR POWERS RESOLUTION REQUIREMENTS.—

(1) SPECIFIC STATUTORY AUTHORIZATION.—Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

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

Approved September 18, 2001.

LEGISLATIVE HISTORY—S.J. Res. 23 (H.J. Res. 64):

CONGRESSIONAL RECORD, Vol. 147 (2001):
Sept. 14, considered and passed Senate and House.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 37 (2001):
Sept. 18, Presidential statement.

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***38562 Federal Rules of Civil Procedure Rule 56**

UNITED STATES CODE ANNOTATED
FEDERAL RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS
VII. JUDGMENT

Amendments received to 02-09-05

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

***38563 (e) Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for

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the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

CREDIT(S)

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL NOTES

ADVISORY COMMITTEE NOTES

1937 Adoption

This rule is applicable to all actions, including those against the United States or an officer or agency thereof.

Summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact. It has been extensively used in England for more than 50 years and has been adopted in a number of American states. New York, for example, has made great use of it. During the first nine years after its adoption there, the records of New York county alone show 5,600 applications for summary judgments. Report of the Commission on the Administration of Justice in New York State (1934), p. 383. See also *Third Annual Report of the Judicial Council of the State of New York* (1937), p. 30.

In England it was first employed only in cases of liquidated claims, but there has been a steady enlargement of the scope of the remedy until it is now used in actions to recover land or chattels and in all other actions at law, for liquidated or unliquidated claims, except for a few designated torts and breach of promise of marriage. *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 3, r. 6; Orders 14, 14A, and 15; see also O. 32, r. 6, authorizing an application for judgment at any time upon admissions. In Michigan (3 Comp.Laws (1929) § 14260) and Illinois (Smith-Hurd Ill.Stats. c. 110, §§ 181, 259.15, 259.16), it is not limited to liquidated demands. New York (N.Y.R.C.P. (1937) Rule 113; see also Rule 107) has brought so many classes of actions under the operation of the rule that the Commission on Administration of Justice in New York State (1934) recommend that all restrictions be removed and that the remedy be available "in any action" (p. 287). For the history and nature of the summary judgment procedure and citations of state statutes, see Clark and Samenow, *The Summary Judgment* (1929), 38 Yale L.J. 423.

***38564 Note to Subdivision (d).** See Rule 16 (Pre-Trial Procedure; Formulating Issues) and the Note thereto.

Note to Subdivisions (e) and (f). These are similar to rules in Michigan. Mich.Court Rules Ann. (Searl, 1933) Rule 30.

1946 Amendment

Note to Subdivision (a). The amendment allows a claimant to move for a summary judgment at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party. This will normally operate to permit an earlier motion by the claimant than under the original rule, where the phrase "at any time after the pleading in answer thereto has been served" operates to prevent a claimant from moving for summary judgment, even in a case clearly proper for its exercise, until a formal answer has been filed. Thus in *Peoples Bank v. Federal Reserve Bank of San Francisco,* N.D.Cal.1944, 58 F.Supp. 25, the plaintiff's countermotion for a summary judgment was stricken as premature, because the defendant had not filed an answer. Since Rule 12(a) allows at least 20 days for an answer, that time plus the 10 days required in Rule 56(c) means that under original Rule 56(a) a minimum period of 30 days necessarily has to elapse in every case before the claimant can be heard on his right to a summary judgment. An extension of time by the court or the service of preliminary motions of any kind will prolong that period even further. In many cases this merely represents unnecessary delay. See *United States v. Adler's Creamery, Inc.,* C.C.A.2, 1939, 107 F.2d 987. The changes are in the interest of more expeditious litigation. The 20-day period, as provided, gives the defendant an opportunity to secure counsel and determine a course of action. But in a case where the defendant himself makes a motion for summary judgment within that time, there is no reason to restrict the plaintiff and the amended rule so provides.

Subdivision (c). The amendment of Rule 56(c), by the addition of the final sentence, resolves a doubt expressed in *Sartor v. Arkansas Natural Gas Corp.,* 1944, 64 S.Ct. 724, 321 U.S. 620, 88 L.Ed. 967. See also Commentary, Summary Judgment as to Damages, 1944, 7 Fed.Rules Serv. 974; *Madeirense Do Brasil S/A v. Stulman-Emrick Lumber Co.,* C.C.A.2d, 1945, 147 F.2d 399, certiorari denied 1945, 65 S.Ct. 1201, 325 U.S. 861, 89 L.Ed. 1982. It makes clear that although the question of recovery depends on the amount of damages, the summary judgment rule is applicable and summary judgment may be granted in a proper case. If the case is not fully adjudicated it may be dealt with as provided in subdivision (d) of Rule 56, and the right to summary recovery determined by a preliminary order, interlocutory in character, and the precise amount of recovery left for trial.

***38565 Subdivision (d).** Rule 54(a) defines "judgment" as including a decree and "any order from which an appeal lies." Subdivision (d) of Rule 56 indicates clearly, however, that a partial summary "judgment" is not a final judgment, and, therefore, that it is not appealable, unless in

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Case of Clark the spy
Philetus Swift; Geo Hosmer; W Eustis
*The Military Monitor, and American Register. Containing a Correct Record of t...*Feb 1, 1813; 1, 23; APS Online
pg. 121

ill transmit to him a statement of their accounts
c. fly, showing the amount of money, clothing, &c.
eceived and distributed, and the balance remaining
n hand: a duplicate of which they will transmit to
e War Department. They will be held responsi-
le for the good conduct of their recruits, and will
ransmit correct returns weekly to the commanding
fficer of the district, and to this office.

The commissary general of purchases will cause
be deposited, at the principal rendezvous in each
istrict, subject to the orders of the field officer, a
fficient quantity of clothing, arms, accoutrements,
mmunition, camp equipage and medicine, for the
umber of men to be recruited therein; and that
here shall at no time be a deficiency of any of these
rticles, the field officer will give due notice to the
ommisary general of the articles received, deliver-
d, and on hand, and at what time a further supply
ill be necessary.

When a recruiting officer shall send a party of
ecruits to the principal rendezvous, he will transmit
the commanding officer an exact statement of
ach man's account, as respects clothing, subsist-
nce, bounty and pay; and a like statement must
ccompany every man sent to the regiment, to be
ntered in the books of the company for which he
nlisted.

Recruits are to be free from sore legs, scurvy,
alled head, ruptures, and other infirmities. The
e is to be conformable to law, but healthy active
oys, between 14 and 18 years of age, may be en-
sted for musicians. In all cases where minors or
pprentices are enlisted, the consent in writing of
he parent, guardian or master, if any such there be,
to be obtained, and accompany the enlistment.

No objection is to be made to a recruit for want
f size, provided he is strong, active, well made and
ealthy.

As soon as convenient, and within six days at far-
hest from the time of his enlistment, every recruit
hall be brought before a magistrate, and take and
ubscribe the oath required by law, according to the
orm prescribed.

When a recruit is rejected, his clothing, if deli-
ered, and the bounty advanced to him, shall be re-
turned, for which the recruiting officer will be held
ccountable.

If any recruit, after having received the bounty,
or a part of it, shall abscond, he is to be pursued
nd punished as a deserter.

Every officer engaged in the recruiting service, will
procure the necessary transportation, forage, fuel,
straw and stationary, taking care to have his ac-
counts therefor supported by proper vouchers.

Recruiting officers, having no enlisted musicians,
are authorised to engage a drummer and fifer, at a
sum not exceeding fifteen dollars per month, and one
ration per day each.

By order of the Secretary of War.
THOMAS H. CUSHING,
Adjutant General.

ADJUTANT GENERAL'S OFFICE.
Washington City, Jan. 15, 1813.

The following officers are appointed to superintend the recruiting districts described in the preceding "Instructions:" and the captains and subalterns recruiting or residing in each district, (and not on other duty) will immediately report themselves to the superintending officer, and receive and obey his orders—viz:

DISTRICT OF MAINE.
Major Timothy Upham, Portland.

NEW-HAMPSHIRE.
Lieut. Col. John Darrington, Concord.

VERMONT.
Colonel Isaac Clark, Burlington.

MASSACHUSETTS AND RHODE-ISLAND.
Lieut. Col. John I. Tuttle, Boston.
Colonel Simeon Larned, Pittsfield.

CONNECTICUT.
Major Joseph L. Smith, Hartford.

NEW-YORK.
Colonel Alexander Macomb, New-York.
Colonel Peter P. Schuyler, Albany.
Lieut. Col. Robt. Le Roy Livingston, Canandaigua.

NEW-JERSEY.
Lieut. Col. David Brearly, Elizabeth-Town.

PENNSYLVANIA.
Colonel George Izard, Philadelphia.
Colonel Hugh Brady, Pittsburgh.

DELAWARE.
Major Robert Carr, Wilmington.

MARYLAND.
Major Timothy Dix, Baltimore.

VIRGINIA.
Major David Campbell, Leesburgh.
Colonel Thomas Parker, Winchester.

NORTH CAROLINA.
Colonel James Wellborn, Salisbury.

SOUTH CAROLINA.
Lieut. Col. Andrew Pickens, Columbia.

GEORGIA.
Colonel Patrick Jack, Bath.

TENNESSEE AND MISSOURI TERRITORIES.
Lieut. Col. George W. Sevier, Knoxville.
Colonel William P. Anderson, Nashville.

KENTUCKY.
Lieut. Col. William McMillan, Newport.

OHIO.
Colonel John Miller, Chilicothe.

ILLINOIS AND INDIANA TERRITORIES.
Major Zachariah Taylor, Vincennes, (Ind. Ter.)

LOUISIANA AND MISSISSIPPI TERRITORIES.
Major Matthew Arbuckle, Washington, (Mis. Ter.)

By order of the Secretary of War.
THOMAS H. CUSHING,
Adjutant General.

CASE OF CLARK THE SPY.

Transcript of the sentence and subsequent proceedings in the case of Elijah Clark, who was convicted as a Spy, at a General Court Martial, holden at the court-house, in the village of Buffalo, on Wednesday the 5th day of August, 1812, and continued by adjournment, from day to day, until Saturday the 8th day of August in the same year—whereof

Lt. Col. Philetus Swift, was President,
Majors George Smith,
Parmenio Adams,
Capts. Joseph M'Clure,
Samuel Jennings,
Samuel Terry,
Daniel Curtiss,
Elias Hall,
Licuts. Joel B. Clark,
Levi Moores, and
James M'Nair,
} *Were present as Assistants,*
and Major George Hosmer, was Judge Advocate.

SENTENCE.

The court having heard all the evidence and the prisoner's defence, and very maturely and thoroughly considered the same, gave the following opinion:

The charge specified, is as follows—"That the said Elijah Clark is a spy within the meaning and according to the rules and articles of war, and the laws of the United States."

1st. It appears that Elijah Clark the prisoner, was born in the state of New-Jersey, and that he continued to reside in the U. States as a citizen thereof until within about 18 months last past, when he removed to Canada, and there married, that his wife and property are yet in Canada and within the dominion and allegiance of the King of the United Kingdom of Great-Britain and Ireland. For these reasons the court are of opinion, that (altho' the said Elijah Clark is a native born citizen of the U. States, and is yet holden under that allegiance, which as such citizen he owes to the U. States) he is nevertheless liable to be tried and convicted as a spy in the United States, for his acts of a spy committed during the continuance of such temporary allegiance to the King of the United Kingdom of Great-Britain and Ireland, with whom the U. States are at war.

2d. The court are of opinion, under the testimony before them, that the prisoner did cross from the Canada shore to the U. States, and did linger about the encampments and army of the U. States for the purpose of spying out our state and condition, and of reporting the same to our enemies; and for these reasons the court are of opinion, that the said Elijah Clark is guilty of the crime whereof he stands charged; and falls under the 101 article of the act, entitled, "an act for establishing rules and articles for the government of the armies of the United States," passed the 10th day of April, 1806.

And they do adjudge and sentence the said Elijah Clark to be continued in the present place of confinement until the first Friday in September next, and that he be at the hour of two o'clock in the afternoon of that day, taken from his said place of confinement, and hung by the neck until he be dead.

PHILETUS SWIFT.
President.

GEO. HOSMER, *Judge Advocate.*

Head Quarters, Manchester,
Niagara Frontier, Aug 13.

GENERAL ORDERS.

Maj. Gen. Hall, having doubts how far the prisoner *(Elijah Clark)* within named, comes within the description of a spy, by reason that he is within the letter of the 2d section of the 101 article of the act, entitled, "an act for establishing rules and articles for the government of the armies of the United States," which excepts throughout "all persons not citizens of, or owing allegiance to the United States of America, is pleased to order, and doth hereby order a suspension of the execution of the within sentence until

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the pleasure of the President of the U. States can be known thereon.

By order of the Major General.

GEO. HOSMER, A. D. C.

OPINION OF THE PRESIDENT.

War Department, Oct. 20, 1812.

SIR,

The proceedings and sentence of the General Court Martial, which was had in the case of Elijah Clark, conformable to your orders of the 1st of August last, and which were by you transmitted to this Department, have been received and laid before the President. I have now the honor to inform you, that the said Clark being considered a citizen of the U. S. & not liable to be tried by a court martial as a spy, the President is pleased to direct, that unless he should be arraigned by the civil court for treason or a minor crime under the laws of the state of New-York, he must be discharged.

Very respectfully,
I have the honor to be,
Sir, your ob't servant,
W. EUSTIS.

Major Gen. A. Hall, Niagara.

GENERAL ORDERS,

Consequent on the Opinion of the President.

The pleasure of his Excellency the President of the United States of America, in relation to the case of *Elijah Clark*, who was tried and convicted of being a spy, under and by virtue of general orders of August last, having this day been made known to the Major General, through the Hon. Secretary at War—Therefore, in conformity to the directions of his Excellency the President, it is hereby ordered, "that the said Clark "being considered a citizen of the U. States, "and not liable to be tried by a court martial "as a spy, therefore, unless he should be ar- "raigned by the civil courts for *treason* or some "*minor crime* under the laws of New-York, he "must be discharged."

All officers and military authorities whatever, in whose custody the said Clark shall or may happen to be, for the cause aforesaid, are hereby directed to release him from the said arrest as a spy.

Lt. Col. Philetus Swift is particularly charged with the execution of this order.

By order of Major Gen. Hall.

GEO. HOSMER, A. D. C.

Bloomfield, Dec. 2, 1812.

FOR THE MILITARY MONITOR.

ON THE COUP D'ŒIL.

So many excellent authors and experienced leaders have written on the subject of the coup d'œil, that rules for its acquirement cannot be expected in this place.

Plutarch and other ancient writers, describe Philopomene as having disregarded closet meditations, and those delineations of prospect which others attended to. His method was a nice observance of the original objects they described, and thus he improved his art in his daily journeys; contemplating the plain, the mountain, the hill, the vale, the wood and the stream, as if hostile bodies actually attacked and defended the various positions they presented to his view; at one and the same time he exercised his eye and his judgment, both as assailant and defender.

No doubt his method was greatly preferable to the mere study of plans on paper, to which, perhaps, too much attention is usually given, but which, nevertheless, is absolutely necessary in the present advanced state of military science: however, it should always be closely combined with the practice of one of the first warriors of antiquity, whom the Romans called the last of the Greeks, and whose greatness has been justly celebrated by historians.

Is the coup d'œil a peculiar gift of nature? We readily admit, one man's sight is, naturally, keener than another man's; and can we doubt a partial dispensation of the coup d'œil? They are truly fortunate who thus posses it, but they are eminently meritorious who acquire it by persevering observation, in despite of nature.

I know some old officers who, when entering a room, notice (as if instinctively) its angles, and even the minute arrangement of its furniture; in a numerous assembly they nearly guess, at a glance, the number of persons, in the same way they conjecture the total of rank and file in a battalion; and in travelling, by land or water, they remark every appearance of ground. Such have told me, they do not thus regard different objects from premeditated design, but from early habit and long service. Now, if we suppose those officers do not actually possess the natural coup d'œil, we must acknowledge they have a degree of the acquired; for this constant attention must greatly improve the sight, and if the result of such continued and apt observance be useful, *(as it must be if its objects become the theatre of military manœuvre in war)* the coup d'œil is attainable.

It may often be noticed, that this class of military men procure their information in detail, and by thus strictly attending to the minutiæ of their profession, acquire a certain uniformity of action, which frequently distinguishes them from the favorites of genius; they observe a correctness in their various and progressive duties, and this commendable strictness extends even to their domestic arrangements and economy. You seldom find them deficient in the conciliating courtesy of dignified politeness; and, being actuated by fixed principles and unwearied industry, they are in many respects the most faithful and the most useful servants of their government. Individuals of this description sometimes possess the natural coup d'œil, though, in general, they have more of the acquired talent: diffident of their first essay in arms, they gain confidence by mature experience, until they attain to considerable penetration and skill in warfare; eventually, however, they do not reach that pinnacle of glory which encompasses the brow of the hero (possessing the native commanding glance we speak of) with the laurel of victory.

Paulus Emelius, after his triumph over Philip of Macedon, observed to this effect—that a degree of the same skill was requisite in arranging an entertainment, as in forming an army in battalia. Shall we place this distinguished general on the list with those who possess that required aptitude for correct system in public and in private life, but who are not the children of genius? The question may be thought insignificant, and my superiors must solve it, if they can; but with regard to genius, that partial parent of renown, she has so frequently been designated by capricious starts, that our very prejudices induce us to conclude she must still be so recognised. We would rather suppose the hair-brained king of Sweden to have been the object of her smile, than his polished cotemporary, the victor of Hochstadt.

Officers, however, in commanding stations frequently err on the other side; they point at the smart youth who shows on a parade, wears his hat with an air, and, by year's practice, drills a detachment in a few movements, as the matadore of the game; while the favorite of genius, unobserved in the crowd, and having no predilection for "nodding plumes," tight garters, and the occupation of a martinet, whiles away his time in solitude, or still worse, degrades his morals in the society of libertines—Years may be thus passed in peaceful times; when at length the trump of fame awakens his mind to energetic exertion, and he rises superior to the narrow hopes of his companions, who, jealous of his true character, attribute his brilliant fame to the chance of war.

This is not to intimate, such men are to be

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CERTIFICATION OF SERVICE

I hereby certify that on this 6th day of June 2005, an original and eight (8) copies of the Brief of Petitioner-Appellee were served on the Court by placing the same in Federal Express overnight mail, postage prepaid, to:

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I also certify that two copies of this Brief of Petitioner-Appellee were sent via Federal Express, on June 6, 2005 to the following:

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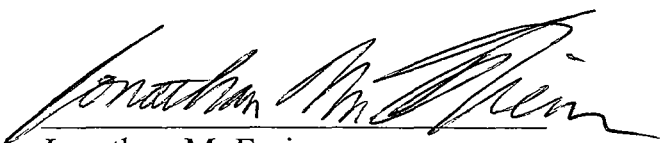

Jonathan M. Freiman

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