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

JOSE PADILLA, DONNA R. NEWMAN, as Next Friend of Jose Padilla, Petitioners,	:	
v.	:	02 Civ. 4445 (MBM)
GEORGE W. BUSH, DONALD RUMSFELD, JOHN ASHCROFT, COMMANDER M.A. MARR, Respondents.	:	

RESPONDENTS' RESPONSE TO, AND MOTION TO DISMISS, THE AMENDED PETITION FOR A WRIT OF HABEAS CORPUS

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COMMANDER M.A. MARR,	:	
	:	
Respondents.	:	

RESPONDENTS' RESPONSE TO, AND MOTION TO DISMISS, THE AMENDED PETITION FOR A WRIT OF HABEAS CORPUS

Respondents George W. Bush, President of the United States, Donald Rumsfeld, Secretary of Defense, John Ashcroft, Attorney General, and Commander M.A. Marr, Commanding Officer of the Consolidated Naval Brig in Charleston, South Carolina, by and through undersigned counsel, oppose and hereby move to dismiss the amended petition for a writ of habeas corpus in this case.

The amended petition challenges the legality of the detention of Jose Padilla (a/k/a Abdullah Al Muhajir) at the Consolidated Naval Brig in Charleston, South Carolina. As explained in our Motion to Dismiss dated June 26, 2002, this Court lacks jurisdiction over the petition for two separate

reasons. First, because petitioner Newman fails to satisfy the strict, "significant relationship" test for establishing "next friend" status, she lacks standing to bring the petition on Padilla's behalf. See Whitmore v. Arkansas, 495 U.S. 149 (1990). Second, under the settled rules governing habeas actions, the only proper respondent in this case is Padilla's immediate custodian, Commander Marr. See 28 U.S.C. 2243 (providing that the writ "shall be directed to the person having custody of the person detained") (emphasis added). Commander Marr, however, lies beyond this Court's territorial jurisdiction; and even if the Court's jurisdiction extends to the reach of the New York long arm statute, Commander Marr lacks any relevant connection to the State. Accordingly, the petition should be dismissed for lack of jurisdiction, or should be transferred to the United States District Court for the District of South Carolina.

In the event that this Court declines to dismiss the amended petition for lack of jurisdiction or to transfer the case to the District of South Carolina, the Court should dismiss the amended petition on the merits for the reasons explained in this return and motion. The legality of Padilla's military detention as an enemy combatant is confirmed by historical

tradition, by the established practice of the United States in times of war, and by longstanding decisions of the Supreme Court and other courts. The rule is settled: the military has the authority to detain an enemy combatant for the duration of an armed conflict. Petitioners' claims under the Constitution and under federal statutes thus fail as a matter of law.

STATEMENT OF THE CASE

1. On September 11, 2001, the al Qaida terrorist organization launched a large-scale, coordinated attack on the United States, killing approximately 3,000 persons, and specifically targeting the Nation’s financial center and the headquarters of its Department of Defense. The President, pursuant to his constitutional authority as Commander in Chief, took immediate steps to prevent future attacks. Congress then supported the President's use of force against the "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." Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). Congress further emphasized that the forces responsible for the September 11 attack "continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States," and that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Ibid.

The President, acting pursuant to his authority as Commander in Chief and with express congressional support, dispatched the armed forces of the United States to Afghanistan

to seek out and subdue the al Qaida terrorist network and the Taliban regime that supported and protected it. Those military operations, which are ongoing, involve the United States armed forces, the armed forces of United States allies and other nations friendly to the United States, and now the forces of the new government of Afghanistan. The military operations have, among other things, destroyed the military capability of the Taliban, destroyed many al Qaida training camps, and yielded vital intelligence concerning the capabilities and intentions of al Qaida and those who assist al Qaida. Numerous members of the forces sent to Afghanistan have lost their lives, and many others have suffered injuries as part of the campaign. See generally www.army.mil/enduringfreedom. The armed forces also are engaged in activities in other locations in the course of the war against terrorists of global reach. The United States military operations are a vital part of the integrated national effort employing military, diplomatic, intelligence, financial, and economic capabilities.

During the ongoing military campaign, the al Qaida network and those who support it remain a serious threat to the security of the United States. Of particular relevance, there is a risk of future terrorist attacks on United States' citizens and

interests carried out -- as were the attacks of September 11 -- by enemy belligerents who infiltrate the United States. The detention of enemy combatants is critical to preventing additional attacks on the United States, aiding the military operations, and gathering intelligence in connection with the overall war effort. Padilla, as explained below, is being held in the custody and control of the military as an enemy combatant in the course of the continuing conflict.

2. Padilla was arrested in Chicago on May 8, 2002, on a material witness warrant related to grand jury proceedings in the Southern District of New York. Pursuant to an order of this Court, Padilla was detained at the Metropolitan Correctional Center in New York City.

On June 9, 2002, the President, in an exercise of his authority as Commander in Chief, determined that Padilla was an enemy combatant and directed his transfer to the custody and control of the United States military. President's Order (June 9, 2002) (Tab 1 to Declaration of Michael H. Mobbs (Mobbs Decl.) (Aug. 27, 2002), appended hereto as Exhibit A).[1] As the sworn

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[1] We have filed separately with the Court a classified version of the Mobbs Declaration containing additional factual detail concerning the determination that Padilla is an enemy combatant, which we respectfully request be filed under seal and received ex parte. The unclassified Mobbs Declaration appended hereto, however, is more than sufficient to establish

declaration attached hereto explains, Padilla is a close associate of al Qaida who came to the United States to advance plans to detonate explosive devices, including a "radiological dispersal device" (or "dirty bomb"), within the United States. Mobbs Decl. ¶¶ 5-10.

After his release from prison in the United States in the early 1990s, Padilla traveled to Pakistan, Egypt, Saudi Arabia, and Afghanistan. Id. ¶ 4. During his time in the Middle East and Southwest Asia, Padilla, who by then was known as Abdullah Al Muhajir, was closely associated with the al Qaida network. Id. ¶¶ 4-5. He met with senior al Qaida leaders on several occasions while in Afghanistan and Pakistan in 2001 and 2002, and, at their direction, received training from al Qaida operatives, including on the wiring of explosive devices. Id. ¶¶ 6, 9-10. Padilla discussed with senior al Qaida operatives his involvement and participation in terrorist operations targeting the United States, including a plan to detonate a "radiological dispersal device" (or "dirty bomb") within the United States as well as other operations involving the detonation of explosive devices in hotel rooms and gas stations. Id. ¶¶ 8-9. He was directed by al Qaida members to return to

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that Padilla has been properly determined an enemy combatant.

the United States to explore and advance the conduct of further attacks against the United States on al Qaida's behalf. Multiple intelligence sources separately confirmed Padilla's involvement in planning future terrorist attacks by al Qaida against United States citizens, as well as his specific objective of detonating a radiological dispersal device within the United States. Id. ¶ 3.

The President, in concluding that Padilla is an enemy combatant, determined: that Padilla is "closely associated with al Qaeda"; that he has "engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States"; that he "possesses intelligence, including intelligence about personnel and activities of al Qaeda that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda"; that he "represents a continuing, present and grave danger to the national security of the United States"; and that his detention as an enemy combatant "is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens." President's Order (June 9, 2002). After the President determined that

Padilla is an enemy combatant, the Department of Justice requested that this Court vacate the material witness warrant. The Court vacated the warrant on June 9, 2002, and Padilla was transferred to the exclusive control of the United States military and transported to the Consolidated Naval Brig in Charleston, South Carolina, for detention as an enemy combatant.

3. The initial petition for habeas relief was filed on June 11, 2002, and it was amended on June 19, 2002. The amended petition states that Padilla has been detained by the military without being "charged with any offense" (Amend. Pet. ¶ 30) and without access to counsel (id. ¶ 28). The amended petition raises three claims challenging the "[]lawfulness of [Padilla's] detention." Id. at 7 (heading).

First, the amended petition contends (id. ¶¶ 32-35) that Padilla's detention violates the Fourth, Fifth, and Sixth Amendments to the United States Constitution, on the basis that it is unlawful, inter alia, to detain "an American citizen without giving notice of the basis of his detention" (id. ¶ 33) and "without a finding of probable cause" (id. ¶ 35). Second, the amended petition claims (id. ¶¶ 36-37) that, "[t]o the extent the Presidential Order on which Mr. Padilla is held as an 'enemy combatant' disallows any challenge to the legality of

[his] detention by way of habeas corpus, the Order and its enforcement constitutes an unlawful Suspension of the Writ, in violation of Article I of the United States Constitution." Finally, the amended petition asserts (id. at ¶¶ 38-40) that, because the "Courts of the United States are open[] and no state of martial law exists," Padilla's detention by the military violates the Posse Comitatus Act, 18 U.S.C. 1385. The amended petition seeks, among other relief, an order permitting Padilla to meet with counsel, an order barring any direct or indirect interrogation of Padilla during his detention, and an order releasing Padilla from his custody as an enemy combatant. Amend. Pet. at 9.

ARGUMENT

THE AMENDED PETITION SHOULD BE DISMISSED BECAUSE PADILLA'S DETENTION AS AN ENEMY COMBATANT IS LAWFUL

The capture and detention of enemy combatants during wartime falls within the President's core constitutional powers as Commander in Chief, which, in the present conflict, are exercised with the specific support of Congress. See Hamdi v. Rumsfeld, 296 F.3d 278, 281-282 (4th Cir. 2002). The Supreme Court has "stated in no uncertain terms that the President's wartime detention decisions are to be accorded great deference from the courts," id. at 282 (citing Ex parte Quirin, 317 U.S. 1, 25 (1942)), and "there is all the more reason for deference" where, "as here[,] the President * * * act[s] with statutory authorization from Congress," id. at 281. In view of the substantial deference owed the President's determination, there is no basis to second-guess the President's conclusion that Padilla is an enemy combatant.

Rather than dispute the factual basis for that determination, the amended petition raises a number of legal challenges to the authority of the military to detain an enemy combatant during wartime, even assuming he is properly classified as such.[2] Those claims fail in the face of settled

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[2] The closest the petition comes to challenging the determination that Padilla is an enemy combatant is the claim, apparently under the Fourth Amendment, that there is no basis for detaining an American citizen in the absence of a finding of probable cause. Amend. Pet. ¶ 35. That contention, as explained below, see pp. 25-27, infra, is unavailing.

legal authority recognizing the basic power of the United States to seize and detain enemy combatants in a time of armed conflict. See Quirin, 317 U.S. at 30-31, 35; Hamdi, 296 F.3d at 283; Colepaugh v. Looney, 235 F.2d 429, 432 (10th Cir. 1956), cert. denied, 352 U.S. 1014 (1957); In re Territo, 156 F.2d 142, 145 (9th Cir. 1946); Ex parte Toscano, 208 F. 938, 940 (S.D. Cal. 1913). The established authority to detain an enemy combatant remains undiminished by the fact the individual is a United States citizen or is captured in United States territory. See Quirin, 317 U.S. at 37-38; Hamdi, 296 F.3d at 283; Territo, 156 F.2d at 144-145. Because the amended petition's challenges to the legality of Padilla's detention as an enemy combatant fail as a matter of law, the amended petition should be dismissed.

A. The President's Determination That Padilla Is An Enemy Combatant Is Proper And Is Entitled To Be Given Effect

The amended petition does not directly challenge the President's determination that Padilla is an enemy combatant. It is clear, in any event, that the President's determination is proper, and, under any appropriate standard of review, is entitled to be given effect in this proceeding.

1. As the Fourth Circuit recently explained in addressing an analogous habeas action, the petition in this case "arises in

the context of foreign relations and national security, where a court's deference to the political branches of our national government is considerable." Hamdi, 296 F.3d at 281; see generally United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-321 (1936); The Prize Cases, 67 U.S. (2 Black) 635, 670 (1862). Indeed, "[d]eference by the courts to military-related judgments * * * is deeply recurrent in Supreme Court caselaw and repeatedly has been the basis for rejections to a variety of challenges to * * * decisions in the military domain." Able v. United States, 155 F.3d 628, 633 (2d Cir. 1998).

The deference owed the political branches on matters of national security "extends to military designations of individuals as enemy combatants in times of active hostilities." Hamdi, 296 F.3d at 281. That is because the "executive is best prepared to exercise the military judgment attending the capture of alleged combatants," and because the "government has no more profound responsibility than the protection of Americans, both military and civilian, against additional unprovoked attack." Id. at 283. The determination that an individual should be detained as an enemy combatant, in fact, is one of the most fundamental of all military judgments. See Hirota v. MacArthur, 338 U.S. 197, 215 (1949) (Douglas, J., concurring) ("[T]he

capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander-in-Chief, and as spokesman for the nation in foreign affairs, had the final say.").[3] Accordingly, while courts generally owe a "healthy deference" to "executive judgments in the area of military affairs," Rostker v. Goldberg, 453 U.S. 57, 66 (1981), the specific military judgment in this case -- the decision in a time of war that an individual is an enemy combatant and should be detained to prevent his assisting the enemy and his endangering the national security -- is especially deserving of judicial deference.

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[3] Cf. Hirota, 338 U.S. at 208 (Douglas, J., concurring) (noting that handling of war criminals "is a furtherance of the hostilities directed to a dilution of enemy power," and falls "as clearly in the realm of political decisions as all other aspects of military alliances in furtherance of the common objective of victory"); Ludecke v. Watkins, 335 U.S. 160, 170 (1948) (determinations with respect to how to treat enemy aliens "when the guns are silent but the peace of Peace has not come * * * are matters of political judgment for which judges have neither technical competence nor official responsibility); Johnson v. Eisentrager, 339 U.S. 763, 789 (1950) ("Certainly it is not the function of the Judiciary to entertain private litigation -- even by a citizen -- which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region."); Quirin, 317 U.S. at 28-29 ("An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated

2. The President's determination of June 9, 2002, and the sworn declaration appended hereto readily satisfy any constitutionally appropriate standard of judicial review of the determination that Padilla is an enemy combatant. The Court owes the executive branch great deference in matters of national security and military affairs, and deference is particularly warranted in respect to the exceptionally sensitive and important determination at issue here. To the extent that the courts conclude that judicial review may be had of an executive determination during a war that an individual is an enemy combatant, such review is limited to confirming based on some evidence the existence of a factual basis supporting the determination. See Able, 155 F.3d at 634 ("In the military setting, * * * constitutionally-mandated deference to military assessments and judgments gives the judiciary far less scope to scrutinize the reasons, legitimate on their face, that the military has advanced to justify its actions.") (emphasis added). The President's determination of June 9, 2002, and the attached Mobbs Declaration more than amply demonstrate the existence of a factual basis to support the determination that Padilla is an enemy combatant.

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the law of war.").

The Mobbs Declaration explains that, after Padilla was released from prison in the United States in the early 1990s, he traveled to Afghanistan, Pakistan, Egypt, and Saudi Arabia, and was closely associated with the al Qaida network. Mobbs Decl. ¶¶ 4-5. The declaration further elaborates that Padilla met with senior al Qaida leaders on several occasions in 2001 and 2002 to discuss his involvement in terrorist operations targeting the United States, including a plan to build and detonate a "dirty bomb" within the United States. Id. ¶¶ 6-10. Padilla trained with al Qaida at the direction of senior al Qaida operatives, studying, among other things, the wiring of explosive devices. Id. ¶¶ 6-7. The Mobbs Declaration goes on to describe that Padilla returned to the United States on May 8, 2002, dedicated to carrying out acts of terrorism against United States citizens on behalf of al Qaida, and specifically to advance plans to detonate explosive devices on United States soil. Id. ¶¶ 9-10. The declaration thus confirms that there is an ample factual basis for the President's determination that Padilla is an al Qaida affiliate who engaged in hostilities against the United States and should be detained as an enemy combatant.

Indeed, when addressing habeas challenges to executive

determinations in contexts much less constitutionally sensitive than the one in this case, courts have refused to reexamine or reweigh the factual basis for the determination, instead only verifying the existence of "some evidence" supporting it. See, e.g., INS v. St. Cyr, 533 U.S. 289, 306 (2001) (deportation order: "Until the enactment of the 1952 Immigration and Nationality Act, the sole means by which an alien could test the legality of his or her deportation order was by bringing a habeas corpus action in district court. In such cases, other than the question whether there was some evidence to support the order, the courts generally did not review factual determinations made by the Executive.") (citations omitted); Eagles v. United States, 329 U.S. 304, 312 (1946) (selective service determination: "If it cannot be said that there were procedural irregularities of such a nature or magnitude as to render the hearing unfair, or that there was no evidence to support the order, the inquiry is at an end.") (citations omitted); United States v. Commissioner, 273 U.S. 103, 106 (1927) (deportation order: "Upon a collateral review in habeas corpus proceedings, it is sufficient that there was some evidence from which the conclusion of the administrative tribunal could be deduced."); Fernandez v. Phillips, 268 U.S.

311, 312 (1925) (extradition order: "[H]abeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty."). The role of a court in those contexts is limited to confirming that there is some basis for the executive judgment and does not entail undertaking a de novo review for itself.

Moyer v. Peabody, 212 U.S. 78 (1909), is instructive on this score. There, the Court considered the due process claim of a person who had been detained for months without probable cause by the governor of Colorado, who was acting in his capacity as "commander in chief of the state forces" during a local "state of insurrection." Id. at 82. In rejecting the detainee's claim, Justice Holmes, writing for a unanimous Court, explained: "So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the governor is the final judge and cannot be subjected to an action after he is out of office, on the ground that he had not reasonable ground for his belief." Id. at 85. Those principles are directly relevant here. See United States

v. Salerno, 481 U.S. 739, 748 (1987) ("[I]n times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the government believes to be dangerous.") (citing Moyer).

The reasons for limiting judicial second-guessing of the factual basis for an executive determination are at their most compelling in the circumstances of this case, which involves a challenge to the President's determination in a time of war that a particular individual is an enemy combatant who came to the United States as an al Qaida affiliate to advance the enemy's terrorist campaign against United States citizens.[4] Such determinations involve highly sensitive intelligence information and judgment calls about the credibility of foreign intelligence sources. The President's determination as Commander in Chief that an individual is an enemy combatant should, at a bare minimum, be accorded effect by the courts as long as some evidence supports that determination. That standard, as a

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[4] Even those Justices who have argued for a more expansive judicial role in evaluating military determinations after hostilities have ceased have recognized the need to avoid judicial second-guessing of executive and military judgments while hostilities are ongoing. See, e.g., Eisentrager, 339 U.S. at 796 (Black, J., dissenting) (acknowledging the "undisputable axiom" that "[a]ctive fighting forces must be free to fight while hostilities are in progress"). And decisions about the detention of unlawful enemy combatants are quintessentially military decisions inextricably linked with other decisions about how to prosecute the war. See note 3, supra.

matter of law, is more than satisfied here. A more demanding inquiry would invite the "special hazards of judicial involvement in military decision-making," and "would stand the warmaking powers of Articles I and II on their heads." Hamdi, 296 F.3d at 284.

B. The Military's Detention Of Enemy Combatants In A Time Of War, Including In The Current Conflict, Is Lawful.

The legal consequences that flow from the President's determination that Padilla is an enemy combatant are properly the subject of judicial review. Petitioners' legal claims challenging the validity of Padilla's detention, however, are without merit and are foreclosed by settled law.

1. The wartime detention of an enemy combatant raises no issue under the Fourth, Fifth, and Sixth Amendments.

The authority to detain enemy combatants in a time of war, including combatants with a claim to United States citizenship, is well established. Petitioners assert (Amend. Pet. ¶¶ 32-35) that Padilla's detention violates the Fourth, Fifth, and Sixth Amendments to the United States Constitution. Those claims share a common failing: they assume erroneously that the constitutional protections afforded individuals detained as suspects under the criminal laws apply equally to individuals detained as enemy combatants under the laws and customs of war.

a. A settled body of law recognizes that the United States military may, consistent with the Constitution, seize and detain enemy combatants or other enemy belligerents for the duration of an armed conflict. In Ex parte Quirin, 317 U.S. 1, 30-31 (1942) (emphasis added and footnotes omitted), for instance, the Supreme Court explained:

> By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.

See id. at 31 n.8 (citing authorities); Duncan v. Kahanamoku, 327 U.S. 304, 313-314 (1946); Hamdi, 296 F.3d at 283; In re Territo, 156 F.2d 142, 145 (9th Cir. 1946); Ex parte Toscano, 208 F. 938, 940 (S.D. Cal. 1913). "The object of capture is to prevent the captured individual from serving the enemy." Territo, 156 F.2d at 145. The capture and detention of enemy combatants also serves other vital military objectives, including the critical one of obtaining intelligence from captured combatants to aid in the prosecution of the war. At the same time, once individuals are taken into custody as enemy combatants, they receive protection from harm, medical care, and

humane treatment.

The United States military has captured and detained enemy combatants during the course of virtually every war in the Nation's history, including recent conflicts such as the Gulf, Vietnam, and Korean wars. There is no dispute that the United States likewise is presently engaged in an armed conflict. As the Fourth Circuit recently explained, "[t]he unconventional aspects of the present struggle do not make its stakes any less grave," and they do not diminish the military's settled authority to capture and detain an enemy combatant during the course of that conflict. Hamdi, 296 F.3d at 283.[5]

It also is firmly established that a claim or showing of

[5] The military's authority to capture and detain enemy combatants exists regardless of whether they are "lawful" or "unlawful" combatants under the laws and customs of war. Quirin, 317 U.S. at 30-31. As Quirin makes clear, both categories of enemy combatants are subject to military detention, but an "unlawful" combatant also is subject to criminal prosecution and subsequent confinement upon a conviction. See ibid.; Colepaugh, 235 F.2d at 431-432. In any event, the President has determined that al Qaida and the Taliban are unlawful combatants not entitled to treatment as prisoners of war. See United States v. Lindh, 2002 WL 1489373, at *8-*11 (E.D. Va. July 11, 2002). The President's determination that those affiliated with al Qaida and the Taliban are unlawful enemy combatants is based on the failure of those entities to qualify as legitimate belligerents under the laws of war. It is not because al Qaida and Taliban affiliates have been or necessarily will be charged with domestic criminal violations -- which would trigger the constitutional provisions

American citizenship does not affect the military's authority to detain an enemy combatant. See Quirin, 317 U.S. at 37-38; Hamdi, 296 F.3d at 283 (noting holding of Quirin "that both lawful and unlawful combatants, regardless of citizenship, 'are subject to capture and detention'"); Territo, 156 F.2d at 144-145;

Colepaugh, 235 F.2d at 432. To be sure, the fact of his American citizenship may enable an enemy combatant to proceed with a habeas action that an alien combatant could not bring, see Eisentrager, 339 U.S. 763; Rasul v. Bush, 2002 WL 1760825 (D.D.C. July 30, 2002); Coalition of Clergy v. Bush, 189 F. Supp. 2d 1036 (C.D. Cal. 2002), but his citizenship has no bearing on the settled authority to detain him as an enemy combatant.

Nor is it significant that an enemy combatant is captured within United States territory in civilian dress rather than in uniform or on a foreign battlefield. In a time of war, an enemy combatant is subject to capture and detention wherever found, whether on a battlefield or elsewhere abroad or within the United States. In Quirin, for instance, eight individuals, including one assumed to be an American citizen, arrived in the

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petitioners mistakenly invoke here.

United States during World War II on board German submarines. 317 U.S. at 21. They had been trained in a German sabotage school on the use of explosives, and their intention was to destroy United States war facilities. Ibid. When the men came ashore, they buried their uniforms and explosive supplies, and proceeded in civilian clothes to various points in the United States. Ibid. The FBI took all of them into custody, and the President subsequently ordered their trial before a military commission for violation of the laws of war. Id. at 22.

The Supreme Court sustained the constitutionality of the President's actions without regard to the combatants' citizenship, explaining that "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war." Id. at 37-38. Moreover, the fact that a citizen who associates with the enemy and enters the country bent on committing hostile acts does so in civilian dress only makes his belligerency more unlawful under the laws of war. Id. at 31 ("an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property" is a "belligerent[] * * *

generally deemed" to be an "offender[] against the law of war"). Such individuals, accordingly, are subject to detention (and prosecution) by the military as unlawful enemy combatants.

b. For those reasons, it is "established that if [Padilla] is indeed an 'enemy combatant,'" the military's "present detention of him is a lawful one." Hamdi, 296 F.3d at 283. The Fourth, Fifth, and Sixth Amendments to the Constitution, contrary to petitioners' claims, do not provide those determined to be enemy combatants with the panoply of rights associated with criminal proceedings. The petition appears to presume that the legality of Padilla's detention turns on strict adherence to the protections afforded to criminal suspects, i.e., prompt initiation and notice of criminal charges (Amend. Pet. ¶¶ 29-30, 33-34), access to counsel (id. ¶¶ 28, 34; id. at 9 (seeking as relief an order permitting Padilla to meet with counsel)), and a judicial determination of probable cause (id. ¶¶ 34-35). Those constitutional requirements, however, are inapplicable to the military's detention of an enemy combatant during wartime.

The Sixth Amendment, to begin with, applies by its terms only to "criminal prosecutions." U.S. Const. amend. VI. It therefore has no application to the wartime detention of an enemy combatant, who, like most such combatants, has not been

charged with any domestic crime. Cf. Middendorf v. Henry, 425 U.S. 25, 38 (1976) ("[A] proceeding which may result in deprivation of liberty is nonetheless not a 'criminal proceeding' within the meaning of the Sixth Amendment if there are elements about it which sufficiently distinguish it from a traditional civilian criminal trial."); Quirin, 317 U.S. at 40-46 (upholding trial of unlawful enemy combatant by military commission rather than by jury). The Self-Incrimination Clause of the Fifth Amendment similarly is a "trial right of criminal defendants," and thus also does not bear on the legality of an individual's detention as an enemy combatant. United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990) (emphasis added).

Nor does the Fifth Amendment's Due Process Clause extend the rights of a detained criminal suspect to the constitutionally distinct context of a detained enemy combatant. Any suggestion of a general due process right to the institution of charges or to counsel, for instance, could not be squared with the historical unavailability of comparable rights for detained enemy combatants. Cf. Herrera v. Collins, 506 U.S. 390, 407-408 (1993); Medina v. California, 505 U.S. 437, 445-446 (1992); Moyer v. Peabody, 212 U.S. 78, 84 (1909); see also Colepaugh, 235 F.2d at 432; Ex parte Toscano, 208 F. at 943. As

the Supreme Court stated in Quirin, 317 U.S. at 27-28, "[f]rom the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals." There is no basis in the laws and customs of war for a right among enemy combatants to the initiation of charges or access to counsel. The purpose of detention is to prevent the combatant from assisting the enemy's war effort and to gather valuable intelligence, see p.18, supra, not to exact criminal punishment.[6]

Moreover, even assuming that this Court, in the face of the settled historical tradition, could consider establishing an entirely new set of due process rights under the Fifth Amendment, but see Herrera, supra; Medina, supra, the government's critical interests in this unique context would

[6] There has never been an obligation under the laws and customs of war to charge an enemy combatant with an offense (whether under the laws of war or under domestic law). Indeed, in the usual case, the vast majority of those seized in war are never charged with an offense but are simply detained during the conflict. Nor is there any general right of access to counsel for enemy combatants under the laws and customs of war. Even the Third Geneva Convention -- which does not afford any protections to unlawful enemy combatants like the detainee in this case, see note 5, supra -- confers no right to counsel to prisoners of war for challenging their wartime detention, but provides counsel only in the event that formal charges are initiated in a trial proceeding. See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3317, 75 U.N.T.S. 135 (GPW), Article 105.

tilt the applicable balance of considerations, see, e.g., Middendorf, 425 U.S. at 42-43; id. at 45-46; id. at 49-51 (Powell, J., joined by Blackmun, J., concurring), decidedly against extending to enemy combatants an entitlement to the initiation of charges or access to counsel. That conclusion is bolstered by the jeopardy to vital national security interests that would attend any requirement of attorney access to detained enemy combatants. Compelled access to counsel would directly interfere with -- and likely thwart -- the efforts of the United States military to gather and evaluate intelligence about the enemy, its assets, its plans, and its supporters. Accordingly, there is no basis for locating in the Fifth Amendment's Due Process Clause a generalized right on the part of

detained enemy combatants to the same protections available to detained criminals suspects.[7]

Finally, there is no merit to petitioners' challenge under the Fourth Amendment. Where the governmental practice in issue was not "regarded as an unlawful search or seizure under the common law when the Amendment was framed," it can raise no Fourth Amendment concerns. Wyoming v. Houghton, 526 U.S. 295, 299 (1999); see Atwater v. City of Lago Vista, 532 U.S. 318, 326, 346 (2000); Wilson v. Arkansas, 514 U.S. 927, 931 (1995); California v. Hodari D., 499 U.S. 621, 624 (1991). That is precisely the case here. The practice of capturing and detaining enemy combatants has been followed for centuries, and is as old as war itself. See A. Rosas, The Legal Status of Prisoners of War 44-45, 59-60 (1976). That settled custom has remained fully entrenched in the laws of war since the time of the framing of the Fourth Amendment. See pp. 18-19, supra. The longstanding historical practice is dispositive in defeating petitioners' claim under the Fourth Amendment. Insofar as the Fourth Amendment might apply at all to the detention of an enemy

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[7] In addition, the Supreme Court has rejected the argument that due process entitles state prisoners to counsel in seeking habeas relief, even in capital cases. See Pennsylvania v. Finley, 481 U.S. 551 (1987); Murray v. Giarratano, 492 U.S. 1 (1989) (plurality opinion); see also United States v. Gouveia, 467 U.S. 180 (1984) (no right to counsel during period of

combatant, the settled tradition necessarily satisfies the Amendment's basic "reasonableness" requirement.

In any event, even aside from the clear historical record, petitioners' attempt to invoke the Amendment's probable cause standard (Amend. Pet. ¶ 35) is unfounded. That standard presupposes the applicability of the Amendment's warrant requirement, which by nature has no bearing in the context of the capture and detention of an enemy combatant in the field of war. See Board of Educ. Of Indep. Sch. Dist. No. 92 v. Earls, 122 S. Ct. 2559, 2564 (2002) ("The probable-cause standard * * * is peculiarly related to criminal investigations and may be unsuited to determining the reasonableness of administrative searches where the Government seeks to prevent the development of hazardous conditions.") (internal quotation marks omitted). The requirements of a warrant and probable cause do not apply when the challenged government action serves "special needs, beyond the normal need for law enforcement." Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995) (internal quotation marks omitted). The balancing of governmental and private interests in those circumstances, see id. at 652-653, would compel the conclusion that the capture and detention of an enemy combatant satisfies the Fourth Amendment without regard to

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administrative detention).

considerations of probable cause. See Haig v. Agee, 453 U.S. 280, 307 (1981) ("It is obvious and unarguable that no governmental interest is more compelling than the security of the Nation.") (internal quotation marks omitted); cf. Moyer, 212 U.S. at 83-85 (rejecting contention that detention during insurrection was unconstitutional "without probable cause").

For those reasons, petitioners' claims under the Fourth, Fifth, and Sixth Amendments fail as a matter of law.[8]

2. The President's determination that Padilla is an enemy combatant did not effect a Suspension of the Writ.

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[8] The petition errs in relying (Amend. Pet. ¶¶ 34-35) on Ex parte Milligan, 71 U.S. 2 (1866), and Toth v. Quarles, 350 U.S. 11 (1955). Milligan involved a "non-belligerent" in the Civil War who "had never been a resident of any of the states in rebellion" or "associated with the armed forces of the enemy," and the Court held that he was "not subject to the law of war." Quirin, 317 U.S. at 45. The decision subsequently was confined by the Court to "the facts before it." Ibid. Here, unlike in Milligan, Padilla is a belligerent associated with the enemy who sought to enter the United States during wartime in an effort to aid the enemy's commission of hostile acts, and who therefore is subject to the laws of war. See Quirin, 317 U.S. at 45-46. Toth v. Quarles holds that an ex-serviceman in civilian status could not be tried by court-martial for crimes allegedly committed when he was in the Air Force. 350 U.S. at 23. This case does not involve a criminal prosecution, however, and Padilla, in any event, is not a civilian outside the jurisdiction of the military but is an agent of al Qaida and an enemy combatant subject to military detention. See Quirin, 317 U.S. at 45-46.

Petitioners assert (Amend. Pet. ¶¶ 36-37) that, insofar as the President's order determining that Padilla is an enemy combatant prohibits any habeas challenge to the legality of his detention, that order unconstitutionally suspends the availability of the writ of habeas corpus. The President's order, however, does not purport to limit the availability of a habeas challenge to the legality of Padilla's detention, and makes no effort to address the subject of habeas relief. Instead, the order directs the military to take custody of Padilla as an enemy combatant and elaborates the factual conclusions supporting that determination. See President's Order (June 9, 2002). The very fact of this habeas proceeding demonstrates that there has been no "Suspension of the Writ." Amend. Pet. ¶ 37. The amended petition's various legal challenges to Padilla's detention fail on the merits, but they arise through a classic use of the writ to challenge the legal basis for his detention -- just as, for example, the habeas petitioners in Quirin employed the writ to raise similar, and similarly unavailing, legal claims.

3. The Posse Comitatus Act has no application to the detention of an enemy combatant.

Petitioners claim (Amend. Pet. ¶¶ 38-40) that Padilla's detention violates the Posse Comitatus Act, 18 U.S.C. 1385, which criminally prohibits the willful use by any individual of "any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws," "except in cases and under circumstances expressly authorized by the Constitution or Act of Congress." Id. The petition also invokes a related statute authorizing the Secretary of Defense to promulgate regulations barring military personnel from direct participation in civilian law enforcement, 10 U.S.C. 375, as well an associated directive, DoD Directive 5525.5 (1986). Petitioners' reliance on the posse comitatus provisions is in error.

As an initial matter, the Posse Comitatus Act effects a criminal prohibition against the military's engaging in the process of civil law enforcement. There is no suggestion that violation of the Act or the related provisions affords grounds for release from detention in a habeas proceeding, independent of the substantive basis for the detention. Cf. Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 511 (2d Cir. 1994) (holding that there is no private right of action to enforce the Posse Comitatus Act).

Padilla's detention by the military as an enemy combatant, in any event, does not violate the posse comitatus provisions.

Those provisions are directed by their terms to civilian law enforcement. See United States v. Chon, 210 F.3d 990, 993 (9th Cir.) ("The PCA prohibits Army and Air Force military personnel from participating in civilian law enforcement activities."), cert. denied, 531 U.S. 910 (2000); United States v. Mullin, 178 F.3d 334, 342 (5th Cir.) ("The [Posse Comitatus] Act is designed to restrict military involvement in civilian law enforcement."), cert. denied, 528 U.S. 990 (1999). Padilla's detention as an enemy combatant does not involve the military in civilian law enforcement, but instead involves a quintessentially military activity -- military detention of an enemy combatant in a time of armed conflict to ensure the national security. That detention thus implicates the laws and customs of war, not the enforcement of civilian law. Petitioners' contrary argument would disable the military from apprehending and detaining spies and saboteurs no matter how egregious their hostile acts.

The situation here likewise falls within the statutory exception for "cases and * * * circumstances expressly authorized by the Constitution or Act of Congress." 18 U.S.C. 1385; see DoD Directive 5525.5, para. E4.1.2.1 (Encl. 4) (excepting "[a]ctions that are taken for the primary purpose of furthering a military or foreign affairs function of the United States"). Padilla's detention was directed by the President in the exercise of his powers under Article II of the Constitution as Commander in Chief, and the detention also is authorized by two Acts of Congress. First, the detention of enemy combatants is encompassed within Congress's express authorization to the President "to use force against those 'nations, organizations, or persons he determines' were responsible for the September 11

terrorist attacks." Hamdi, 296 F.3d at 283 (quoting 115 Stat. 224) (emphasis added by court of appeals). Second, Congress has appropriated funding to the Department of Defense to pay for expenses incurred in connection with "the maintenance, pay, and allowances of prisoners of war, [and] other persons in the custody of the Army, Navy, or Air Force whose status is determined by the Secretary concerned to be similar to prisoners of war." 10 U.S.C. 956(5); see 10 U.S.C. 956(4) (appropriating funding for the "issue of authorized articles to prisoners and other persons in military custody"). By funding the detention of "prisoners of war" and persons "similar to prisoners of war," Congress has authorized the military detention of enemy combatants. Therefore, neither the Posse Comitatus Act nor its related provisions in any way bar the military detention of Padilla as an enemy combatant.

CONCLUSION

For the foregoing reasons, the Petition for a writ of habeas corpus should be dismissed.

Respectfully submitted,

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