No. 05-553

IN THE

Supreme Court of the United States

JOSE PADILLA,

Petitioner,

v.

C. T. HANFT, UNITED STATES NAVY COMMANDER, CONSOLIDATED NAVAL BRIG,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW AND THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF PETITIONER JOSE PADILLA

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QUESTION PRESENTED

Does the President's November 20, 2005, decision ending Jose Padilla's military detention as an enemy combatant, coupled with the Department of Justice's decision to indict Mr. Padilla on criminal charges, moot the following questions presented in Mr. Padilla's petition to this Court for a Writ of Certiorari:

1. Does the President have the power to seize American citizens in civilian settings on American soil and subject them to indefinite military detention without criminal charge or trial?

2. Did the Fourth Circuit err in concluding that Petitioner's continued detention as an "enemy combatant" was a "necessary and appropriate" use of force under the Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001)?

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INTRODUCTION

The Brennan Center for Justice at NYU School of Law ("Brennan Center") and the Association of the Bar of the City of New York ("ABCNY") respectfully submit this brief as *amici curiae* pursuant to Supreme Court Rule 37.3 in support of petitioner's application for a writ of certiorari to review the decision below.[1]

STATEMENT OF INTEREST

The Brennan Center is a community of lawyers, teachers, students and scholars that seeks to link the academy and the practicing bar in defense of the values that infused the matchless contribution of Justice William Brennan, Jr. to American constitutional law. One of the keystones of Justice Brennan's jurisprudence was deep respect for the Supreme Court's role as final arbiter of the Constitution's meaning. The Brennan Center appeared below as *amicus curiae* in the Fourth Circuit.

ABCNY is a professional association of over 22,000 attorneys. Founded in 1870, ABCNY has long been committed to studying, addressing, and promoting the rule of law and, when appropriate, law reform. Through its many standing committees, ABCNY educates the bar and public about current issues arising in connection with the "war" on terrorism, the pursuit of suspected terrorists, and the treatment of detainees. While it fully understands the importance of preventing future acts of terrorism, ABCNY believes that the Executive's behavior in this case threatens this Court's ability to ensure that the actions of the political branches comply

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[1] The parties have consented in writing to the participation of the Brennan Center and ABCNY as *amici curiae*, and their written consents have been filed with the Clerk of the Court. No party to this case authored the brief in whole or in part or made any monetary contribution to its preparation or submission.

with the Constitution and laws of the United States, even in time of national crisis.

SUMMARY OF ARGUMENT

I.

The Executive's decision to indict petitioner and return him to civilian custody on the eve of this Court's consideration of his petition for a writ of certiorari seeking review of the legality of his prolonged military detention raises a procedural issue of enormous importance. For the first time since the Civil War, this Court is confronted by a sustained effort by the Executive branch to oust the Supreme Court from its historic role as final arbiter of the meaning of the Constitution. *Amici* believe that it would significantly weaken the rule of law if the Executive branch is once again successful in blocking review by this Court of the constitutional issues raised by the Executive's imposition of prolonged military detention on petitioner. While reasonable persons can—and do—disagree over the legality of prolonged military custody of suspected terrorists, reasonable persons cannot disagree that this Court should have the final word on the constitutionality of Padilla's three-year ordeal in the military brig. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (Marshall, C.J.) ("It is emphatically the province of the judicial department to say what the law is.").

II.

This case does not test the outer limits of the combined powers of Congress and the President to invoke military responses to terrorist threats. Rather, it deals with the limits of unilateral Executive action. The Executive's decision to remove Padilla, an unarmed civilian arrested on American soil, from the civilian courts for prolonged military detention and interrogation was not expressly authorized by Congress. Accordingly, this case is governed by *Ex parte Milligan*, 71 U.S.

(4 Wall.) 2, 137 (1866), holding, at a minimum, that, absent explicit congressional authorization, the Executive may not substitute military justice for civil justice when the courts are open and unobstructed.

In this case, neither the general language of the Authorization for Use of Military Force in Afghanistan (AUMF),[2] nor any other congressional enactment, comes close to providing the "clear statement" required by the doctrine of separation of powers before a civilian arrested on American soil and suspected of terrorist activities may be removed from the custody of the Justice Department and placed in prolonged military detention, especially in light of Congress's explicit expression of contrary intention in 18 U.S.C. § 4001(a).[3]

The Brennan Center and ABCNY respectfully submit this brief as *amici curiae* in the hope of persuading the Court that certiorari should be granted to review the decision below, and that no procedural impediment exists to granting the writ.

STATEMENT OF THE CASE

In the wake of the terrorist destruction of the World Trade Center, the bombing of the Pentagon and the crash of Flight 93 on September 11, 2001, the Executive branch evolved a well-intentioned but constitutionally-flawed legal response

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[2] The AUMF provides in relevant part: "[T]he President is authorized to use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Pub. L. No. 107-40, 115 Stat. 224 (2001). The primary purpose of the AUMF was to authorize military operations in Afghanistan against the Taliban, who were allied with al Qaeda.

[3] The Non-Detention Act provides: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a).

that concentrated vast powers in the President as Commander-in-Chief. Relying upon his inherent powers as Commander-in-Chief and the general language in the AUMF, the President asserted unilateral power to designate and detain supporters of the Taliban captured in Afghanistan, as well as supporters of al Qaeda captured elsewhere in the world, in prolonged military custody as "enemy combatants."[4] The President asserted, as well, the power to try certain enemy combatants for terrorist acts before military commissions authorized to mete out severe penalties, including death.

On May 8, 2002, petitioner, an unarmed civilian with alleged ties to terrorist organizations, was arrested at O'Hare Airport in Chicago upon arrival from Pakistan pursuant to a material witness warrant issued by Chief Judge Mukasey of the Southern District of New York. *Rumsfeld v. Padilla*, 542 U.S. 426, 430-31 (2004) (*Padilla III*). Shortly after Padilla's apprehension and arrest, Attorney General Ashcroft publicly accused him of seeking to explode a "dirty bomb" in the United States in furtherance of al Qaeda's terrorist designs. *Padilla ex rel. Newman v. Bush*, 352 F.3d 695, 724 (2d Cir. 2003) (*Padilla II*). Instead of indicting Padilla, the United States moved him to New York, where he was held for one week in the maximum security wing of the Metropolitan Correctional Center as a "material witness" in connection with an ongoing grand jury investigation into terrorism.

On May 15, 2002, Padilla appeared before Chief Judge Mukasey, who appointed counsel to represent him. *Padilla II*, 352 F.3d at 700. On May 22, Padilla's court-appointed counsel moved to vacate the material witness warrant, raising serious statutory and constitutional challenges to the government's decision to detain Padilla indefinitely without bringing criminal charges against him. *Id*. By June 7, the motion had

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[4] The Executive declined, however, to find that such "enemy combatants" were protected by the Geneva Conventions.

been submitted for decision. A June 11 conference was scheduled on the motion before Chief Judge Mukasey.

On June 9, rather than face judicial review of the material witness warrant, the United States withdrew the warrant and transferred Padilla from New York to the military brig in Charleston, South Carolina, where the President proposed to detain him indefinitely, without access to family, friends or counsel, as an "enemy combatant." *Id*. When Padilla's counsel arrived at the June 11 conference with Chief Judge Mukasey, her client had already been transferred to military custody at the direction of Secretary of Defense Donald Rumsfeld. *Id*. Counsel then immediately filed a habeas corpus petition as next friend, identifying Secretary Rumsfeld as Padilla's ultimate custodian, and challenging the legality of the government's continued military detention of Padilla. *Id*.

Chief Judge Mukasey refused to dismiss Padilla's habeas petition. Although the court upheld the President's power to detain civilians as enemy combatants, it nonetheless held that Padilla had a right to a fact hearing to challenge his designation and detention. *See Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 599-600 (S.D.N.Y. 2002) (*Padilla I*). Over the government's objections, the court also found that Padilla had the right to present facts through counsel. *Id.*

Unwilling to accord Padilla even minimal procedural protections, the United States appealed to the Second Circuit, which held that the President lacked authority to detain American citizens arrested in the United States as enemy combatants in the absence of authorization by Congress. *Padilla II*, 352 F.3d at 724. The Second Circuit explicitly rejected the Executive's assertion that congressional authorization could be implied from the general language of the AUMF. *Id.* at 699.

On appeal to this Court, the United States argued that because Padilla had been moved to the Charleston military

brig two days prior to the filing of the habeas corpus petition in the Southern District of New York, the Southern District lacked statutory jurisdiction over Padilla's immediate custodian, the warden of the Charleston military prison. Chief Justice Rehnquist, writing for five members of the Court, accepted the government's argument and reversed and remanded with directions to dismiss the petition without prejudice. As a result Padilla's counsel had to begin anew in South Carolina. *Padilla III*, 542 U.S. at 451.

On July 2, 2004, four days after the Supreme Court's decision in *Padilla III*, Padilla's counsel filed a second habeas corpus petition in the District of South Carolina. In response, the government changed spots once again. For the first time, the Executive asserted that Padilla took up arms on an Afghan battlefield. *See Padilla v. Hanft*, 389 F. Supp. 2d 678, (D.S.C.), Gov't Ans. to Pet. for Writ of Habeas Corpus at 4-7 (filed Aug. 30, 2004). Further, it no longer contended that Padilla came to the United States to set off a "dirty bomb," but instead alleged that he entered the country to blow up apartment buildings. *Id.*

Padilla moved for summary judgment on stipulated facts. On February 28, 2005, the District Court ruled that the President lacked inherent military authority to detain Padilla, and that the AUMF failed to provide sufficiently explicit congressional authorization. *Padilla v. Hanft*, 389 F. Supp. 2d 678, 689, 691 (D.S.C. 2005) (*Padilla IV*). The government appealed.

On September 9, 2005, the Fourth Circuit reversed the District Court. *Padilla v. Hanft*, 423 F.3d 386, 397 (4th Cir. 2005) (*Padilla V).* Assured by the United States that Padilla was being detained as an "enemy combatant" in the Afghan conflict who just happened to be apprehended in Chicago, the Fourth Circuit held that Padilla's indefinite military detention was lawful. The Fourth Circuit relied on the plurality opinion in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), which had held

that the AUMF impliedly authorizes the military detention of enemy combatants captured on an Afghan battlefield and engaged in combat there, and on *Ex parte Quirin*, 317 U.S. 1 (1942), which upheld the military trials of alleged German saboteurs who landed in full uniform on American soil from a German submarine. *Padilla V*, 423 F.3d at 393-94, 396.

Padilla filed a petition for certiorari on October 25, 2005, imploring this Court to determine the legality of his prolonged military detention. On November 7, 2005, shortly after the petition was filed, this Court granted certiorari in *Hamdan v. Rumsfeld* to review the decision of the D.C. Circuit upholding the constitutionality of the use of military commissions to try alleged enemy combatants detained at Guantanamo Bay, Cuba. *Hamdan v. Rumsfeld*, 415 F.3d 33, 43-44 (D.C. Cir.), *cert. granted*, 126 S. Ct. 622 (2005).

Confronted with the prospect of imminent Supreme Court review in *Hamdan*, and facing the likely grant of certiorari in Padilla's case, the United States changed theories once again, this time charging Padilla in an indictment filed on November 17, 2005, and unsealed on November 22. *United States v. Hassoun et al.*, No. 04-60001-CR-Cooke (S.D. Fla.), Superceding Indictment (S.D. Fla.).[5] The indictment for the first time alleges that Padilla was a member of a terrorist conspiracy aimed at Europe, not the United States. *Id*. at 4. The indictment makes no mention of a dirty bomb in the United States, no mention of the bombing of apartment buildings, and no mention of Padilla's alleged presence on the Afghan battlefield. *Id*.

There is only one plausible explanation for the eleventh-hour indictment of Padilla on charges unrelated to any of the ever-shifting justifications offered for his prolonged military detention. The United States is seeking, once again, to frus-

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[5] *Available at* http://news.findlaw.com/hdocs/docs/padilla/uspad111705ind.pdf.

trate review in this Court of its military detention policies, this time by transferring Padilla from military back to civilian custody, just as he was moved from civilian to military custody three years ago in a successful effort to prevent judicial review in the Southern District of New York.

On November 22, 2005, pursuant to Rule 36(2) and Federal Rule of Appellate Procedure 27(e), the United States sought leave from the Fourth Circuit to transfer Padilla from the Charleston brig to civilian custody as a consequence of the indictment. On November 30, the Fourth Circuit demanded an explanation of the government's behavior, and specifically directed the government to address whether the court should vacate its prior opinion in light of Padilla's changed circumstances. On December 9, 2005, the United States revealed its true strategy by suggesting to the Fourth Circuit that this case is moot and inviting immediate vacation of the court's opinion, in an effort to prevent this Court from reviewing the opinion.

ARGUMENT

I. THE ELEVENTH-HOUR DECISION TO INDICT PETITIONER IN AN APPARENT EFFORT TO FORECLOSE REVIEW BY THIS COURT OF THE LEGALITY OF HIS PROLONGED MILITARY DETENTION DOES NOT MOOT THE "ISSUES OF IMPERATIVE PUBLIC IMPORTANCE" RAISED BY THIS APPEAL.

The United States contends that its decision to indict Padilla, resulting in a transfer from military to civilian authority, moots Padilla's pending habeas corpus petition. Even if one assumes that Article III imposes a limitation on the power to decide cases that have become moot during an appeal to this

Court,[6] the government is wrong. Padilla's indictment neither moots the case nor deprives the Court of its constitutional right and duty to determine the legality of Padilla's forty-two month military detention.

A. The Question Of The Legality Of Padilla's Military Detention Is Not Moot Because The Collateral Consequences Doctrine Recognizes The Persistence Of A Justiciable Controversy.

Despite his indictment, the controversy between Padilla and the United States concerning the legality of his prolonged military detention is very much alive. The government has refused to assure this Court that the United States will not reinstitute petitioner's military detention in the future. Rather, it has said precisely the opposite: it is "theoretically possible that the President could redesignate [Padilla] for detention as an enemy combatant." *Padilla V*, Supp. Br. for the Appellant (filed Dec. 9, 2005) ("Gov't 4th Cir. Supp. Br.") at 11.[7] Multiple collateral consequences flow from the government's assertion of a continued power to detain Padilla in prolonged military custody.

The threat of redesignation to military custody looms over Padilla's criminal proceedings. Until the legality of Padilla's military detention is resolved by this Court, negotiations over a possible plea bargain will take place under the threat of a return to indefinite military custody. The prospect of plea negotiations in the shadow of military custody is hardly fanci-

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[6] Chief Justice Rehnquist argued that no Article III impediment exists to consideration by this Court of an appeal that satisfied Article III requirements below, but has become moot on appeal. *Honig v. Doe*, 484 U.S. 305, 331-32 (1988) (Rehnquist, C.J., concurring); *see also Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 190 (2000).

[7] *Available at* http://news.findlaw.com/hdocs/docs/padilla/padhnft120905sb4th.pdf.

ful. Published reports recite precisely such a threat by the United States made in multiple plea negotiations, including in John Walker Lindh's. Eric Lichtblau, *Threats and Responses: Terror; U.S. Cites al Qaeda in Plot to Destroy Brooklyn Bridge*, N.Y. Times, June 20, 2003, at A1; Herbeck, *2 Defendants Feel Pressure for Plea Deals*, Buff. News, Apr. 6, 2003, at B1.

In *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 123-27 (1974), an analogous collateral consequence affecting future negotiations precluded mootness. In *Super Tire*, an employer challenged the legality of the payment of state welfare benefits to strikers. When the case reached this Court, the strike had ended, and the parties had re-established labor peace. This Court, nevertheless, declined to dismiss the appeal as moot, noting that the legal issue was likely to affect future labor negotiations between the parties. Similarly, the legal issues raised by this petition will dictate the tenor of future plea negotiations between the parties.

The legality of Padilla's prolonged military detention will also play a major role in deciding whether he has been denied a speedy trial under the Sixth Amendment. *United States v. MacDonald*, 456 U.S. 1, 8 (1982) ("The speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial . . ."); *c.f. Barker v. Wingo*, 407 U.S. 514, 530-32 (1972) (considering, *inter alia*, reason for delay in trial and prejudice to defendant caused by delay). Even if Padilla were successful in securing a speedy trial dismissal, it would be a hollow victory, since he would be faced with a return to indefinite military custody. Until the constitutional issues raised by this petition are finally determined by this Court, even an acquittal would confront Padilla with the prospect of a return to military detention.

Where, as here, an unresolved legal issue generates collateral consequences between the parties, the issue does not become moot merely because the challenged action has abated.

See, e.g., *Sibron v. New York*, 392 U.S. 40, 50-58 (1968) (after prisoner released, Court considered propriety of warrantless search because conviction had collateral consequence on convict's life); *Pennsylvania v. Mimms*, 434 U.S. 106, 108 n.3 (1977) (Fourth Amendment defense could be heard even after prisoner had served full sentence because conviction had collateral consequences in potential future trials of defendant). The important constitutional issues raised by this petition for certiorari are not moot, and this Court should definitively resolve them.

B. The Government's "Voluntary Cessation" Of Its Unlawful Activities Does Not Moot The Issues Of Paramount Public Importance Raised In The Petition For Certiorari.

To deter strategic behavior designed to frustrate judicial review, this Court has declined to dismiss appeals as moot when the alleged mootness flows from the voluntary cessation of unlawful activity by the party opposing review. *See, e.g.*, *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000) ("[V]oluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice."); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982).

Not surprisingly, many "voluntary cessation" cases involve efforts to prevent review of a favorable lower court ruling. For example, in *City of Erie*, a business owner secured a favorable ruling in the lower courts on the constitutionality of local efforts to regulate nude dancing. In an effort to preclude review by this Court, the business owner ceased operations and surrendered his license. This Court declined to dismiss the appeal as moot, noting that nothing prevented the business owner from re-entering the field. *City of Erie*, 529 U.S. at 287.

In *City of Mesquite*, the Court held that a city's repeal of objectionable language from an ordinance did not moot the appeal of an injunction entered by the district court, because the city was free to reenact the same provision. 455 U.S. at 289. Where a defendant voluntarily ceases an allegedly illegal act, and remains "'free to return to his own ways,'" the controversy remains a live one. *Id.* at 289 n.10 (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953)).

This case poses a classic example of voluntary cessation intended to frustrate review by this Court. On November 24, 2005, the *New York Times* reported based on information from a "former senior official" that if the government had lost in the Fourth Circuit, it would not have indicted Mr. Padilla, but would have sought Supreme Court review. Douglas Jehl & Eric Lichtblau, *Shift on Suspect is Linked to Role of Qaeda Figures*, N.Y. Times, Nov. 24, 2005, at A1. Having obtained a favorable ruling in the Fourth Circuit, the United States decided to shut down an appeal to this Court by seeking to moot Padilla's petition. In doing so, the government asks this Court to ignore the more than three years Padilla spent in military custody, much of which he endured without access to the outside world and under perpetual interrogation. So patent was the government's strategic behavior, that the Fourth Circuit demanded briefing on whether the opinion below should be vacated and withdrawn. Gov't 4th Cir. Supp. Br. at 13.

In view of the government's strategic behavior, even if the Fourth Circuit opted to vacate its decision under *United States v. Munsingwear*, 340 U.S. 36 (1950), this Court would retain jurisdiction. Under Supreme Court Rule 11, this Court may elect to review a district court's decision before a court of appeals has entered judgment when "the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. Thus, assuming the Fourth

Circuit vacates, the Court should treat the pending petition as an application for a writ of certiorari to review the decision of the District Court. *See Ex parte Quirin*, 317 U.S. 1 (1942) (granting petitions for certiorari filed by accused saboteurs before court of appeals rendered judgment); *United States v. United Mine Workers of Am.*, 330 U.S. 258, 269 (1947) (granting certiorari prior to judgment where prompt resolution of dispute was in public interest); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584 (1952) (granting certiorari before court of appeals reached merits of dispute to achieve prompt resolution of wartime controversy); *Bolling v. Sharpe*, 347 U.S. 497, 498 (1954) (granting certiorari to review district court decision dismissing challenge to segregation in public schools "because of the importance of the constitutional questions presented"); *United States v. Nixon*, 418 U.S. 683, 689-90 (1974) (granting cross-petitions for certiorari before judgment in case implicating core executive powers and the role of the federal courts); *Dames & Moore v. Regan*, 453 U.S. 654, 659-62, 667-68 (1981) (granting certiorari before judgment to address exercise of executive authority and judiciary's role in defining limits on that authority); *Mistretta v. United States*, 488 U.S. 361, 371 n.6 (1989) (granting certiorari before judgment because of importance of challenge to federal sentencing guidelines and because of conflict in lower courts regarding constitutionality of system).[8]

C. The Government's Allegedly Unlawful Activity Is "Capable Of Repetition, Yet Evasive Of Review."

Even if one ignores the ongoing effect of the government's military detention policy on Padilla's criminal case, and the

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[8] In *Mine Workers*, *Youngstown Steel*, and *Nixon*, the Court granted certiorari before judgment at the behest of a successful litigant in the District Court. *See Mine Workers*, 330 U.S. at 269; *Youngstown*, 343 U.S. at 584; *Nixon*, 418 U.S. at 689-90.

government's strategic behavior in seeking to moot this appeal, the petition would still not be moot because the behavior at issue is "capable of repetition, yet evasive of review." When, as here: (1) an issue of great constitutional magnitude is properly before the Court; but (2) the actual controversy between the parties has temporarily abated because the activity at issue has ceased; and (3) the activity is likely to be engaged in by third persons who may similarly experience difficulty in placing the issue before the courts, this Court has recognized an exception to the mootness doctrine in order to fulfill its constitutional function as guarantor of the rule of law. *See Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911); *Carroll v. Presidents & Comm'rs of Princess Anne County*, 393 U.S. 175, 179 (1968); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969); *Roe v. Wade*, 410 U.S. 113, 125 (1973).

Given the importance of the issues raised by Padilla's petition, the enormous "sunk costs" already invested in this appeal, and the likelihood that the issues presented are more than merely "capable of repetition" in the war on terror generally and in Padilla's case specifically, *amici* believe that it would be an abdication of responsibility for the Court to decline to decide whether the United States may, in the absence of explicit congressional authorization, continue to enforce its policy of indefinitely detaining civilians apprehended on American soil as "enemy combatants."

D. The Executive Cannot Strip This Court Of Authority To Review Padilla's Detention.

The Executive urges this Court to ignore the deprivation of liberty that Padilla suffered during his more than three-year captivity, and to overlook the fact that, at any time, he could be reclassified and detained as an enemy combatant. Gov't 4th Cir. Supp. Br. at 11. This Court has no role to play, argues the Executive, because it is "unlikely" that the Exec-

utive would redesignate and detain Padilla and because Padilla "would have ample opportunity to challenge any such military custody at that time." *Id.*

This Court has "reject[ed] the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts" in "enemy combatant" cases. *Hamdi*, 542 U.S. at 535. "[I]t does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated role of reviewing and resolving claims like those presented here." *Id.* at 535 (citing *Korematsu v. United States*, 323 U.S. 214, 233-34 (1944) (Murphy, J., dissenting)). Courts have a particular responsibility to exercise this authority in situations, as here, where the government seeks to evade, or even ignore, judicial oversight on the basis of national security. *See, e.g.*, *Ex parte Merryman*, 17 F. Cas. 144, 152-53 (C.C.D. Md. 1861) (Taney, C.J.); *see also Ex parte Milligan*, 71 U.S. at 121-22.

Ex parte Merryman is instructive. In that case, the military seized and detained petitioner—John Merryman—for treason and armed rebellion. 17 F. Cas. at 147. The court ordered the military to produce Merryman and to explain its unauthorized seizure and detention of him. The military professed to be acting at the Executive's direction and refused to comply. Recognizing that it lacked the power to compel compliance, the court nonetheless issued what could be described as an advisory opinion holding that Congress, not the President, held the power to suspend the writ of habeas corpus. *Id.* at 147-48. Although it might not have been able to change the outcome in Merryman's case, the Court announced its opinion for two reasons: to satisfy its constitutional role as the protector of individual rights and to articulate the constitutional principles governing Executive authority, which would enable the Executive to discharge its constitutional role, both toward Merryman and as a general matter. *Id.* at 153. The grounds to act here are even more compelling than in *Merry-*

man, because the Court's decision will directly impact Padilla even though he is no longer in military custody.

In the face of this precedent, the Executive argues that the Court should shun resolution of this dispute under *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). Gov't 4th Cir. Supp. Br. at 8-9. The Brandeis concurrence in *Ashwander* articulated a set of prudential rules for deciding issues before the Court, *not* for determining whether to exert judicial review. 297 U.S. at 346 (observing that the Court developed the avoidance rules "for its own governance" in cases "confessedly within [the Court's] jurisdiction"). The doctrine exists to avoid the announcement of constitutional principles when narrower, less drastic bases for decision exist. *Ashwander* is typically invoked in a case where there are alternative grounds for resolving a dispute, one of which does not require a constitutional decision. Here, the question is not which rule of law to employ in resolving the dispute, but whether the dispute will be resolved at all.

II. THIS COURT HAS REQUIRED A CLEAR STATEMENT OF CONGRESSIONAL AUTHORIZATION BEFORE SUBJECTING CIVILIANS TO NATIONAL EMERGENCY REGIMES THAT SUBSTANTIALLY DEPART FROM CONSTITUTIONAL PRACTICE.

In this case, the Executive seeks to substitute prolonged military detention of a suspected terrorist for the processes of criminal justice. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), a plurality of this Court ruled that the AUMF impliedly authorized military detention of armed "enemy combatants" captured on the Afghan battlefield and engaged in combat against American troops or Allied Forces. *Id.* at 517-18 (plurality opinion). The government seeks to expand the *Hamdi* plurality's narrow ruling into a broad mandate to impose prolonged military detention upon individuals, arrested by civil-

ian law enforcement in the United States under circumstances indistinguishable from a criminal arrest.

The government's position may well violate the Constitution, no matter how explicitly Congress acts. "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." *Hamdi*, 542 U.S. at 554-55 (Scalia, J., dissenting); *see also Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Never before has the Executive successfully asserted the right to detain indefinitely, without charge or process, someone taken into custody on U.S. soil in a non-combat setting based on the unilateral determination that the detainee is an enemy combatant. Given the fundamental individual liberty interests at stake, Executive action, even if based on express authorization from Congress, might well be unconstitutional. *See Zadvydas*, 533 U.S. at 695 (rejecting the government's contention that absolute deference was due to the executive and legislative branches in the immigration law context, and balancing the Executive's power to detain a removable alien against the alien's due process rights).

At a minimum, however, the uniform practice of this Court has been to demand explicit congressional authorization before displacing important constitutional guarantees by imposing military rule on civilians, even during a national emergency. *Youngstown Steel*, 343 U.S. at 653-54 (Jackson, J., concurring).

In three seminal cases, Chief Justice Marshall demanded express congressional authorization before permitting the Executive to abridge important rights in the name of wartime security. In *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 94 (1804), the literal language of the Non-Intercourse Act, forbidding "American citizens" from carrying on maritime trade with France and subjecting their vessels used in such forbidden trade to military seizure, was construed narrowly by the Chief Justice to exclude commerce

with France carried on by an American citizen residing in St. Thomas who had pledged allegiance to the King of Denmark. If, reasoned the Chief Justice, Congress wished to impose military sanctions on non-resident citizens in violation of international law, it must do so explicitly. Similarly, in *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 170 (1804), Chief Justice Marshall construed a provision of the Non-Intercourse Act authorizing military seizure of a vessel sailing *to* a French port as failing to authorize military seizure of a ship sailing *from* a French port. Finally, in *Brown v. United States*, 12 U.S. (8 Cranch) 110, 112 (1814), Chief Justice Marshall ruled that Congress's declaration of war against Great Britain, and the corresponding military force authorization, failed to provide implied authority to seize the property of enemy aliens residing in the United States during the War of 1812. If such a "disreputable" departure from the "modern law of nations" was to occur, the Constitution required explicit congressional authorization. *Id*. at 118.

In the two centuries since Chief Justice Marshall's pioneering decisions, this Court has repeatedly adhered to his wise counsel that, even in times of national emergency, constitutional values may not be displaced by military authority absent explicit congressional command that satisfies the clear statement doctrine. *See, e.g.*, *The Prize Cases*, 67 U.S. (2 Black) 635, 670-71 (1862) (noting express congressional ratification of military seizure of ships seeking to run the blockade of Confederate ports; four Justices refuse to recognize retroactive authorization); *Ex parte Milligan*, 71 U.S. at 137 (four Justices note lack of congressional authorization for military trial of alleged participant in conspiracy to oppose Union by force); *Duncan v. Kahanamoku*, 327 U.S. 304, 319 (1946) (applying clear statement doctrine to reject proffered statutory authorization for military trials of civilians); *Youngstown Steel*, 343 U.S. at 588-89 (requiring explicit authorization for military seizure of steel mills idled by strikes during Korean War); *Oestereich v. Selective Serv. Sys.*, 393 U.S. 233,

239 (1968) (construing statute as permitting pre-induction judicial review of punitive draft classification in the absence of explicit prohibition); *see also Kent v. Dulles*, 357 U.S. 116, 129 (1958) (requiring explicit authorization for denial of passports to Communist Party members on political grounds); *New York Times Co. v. United States*, 403 U.S. 713, 721 (1971) (Douglas, J., concurring) (construing Espionage Act as failing to authorize prior restraints).

When Chief Justice Marshall's "clear statement" standard is applied to this case, it is impossible to find the required, explicit authorization for the prolonged military detention of Jose Padilla.[9]

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[9] The only authority offered by the United States, *Ex parte Quirin*, 317 U.S. 1 (1942), does not support its position. *Quirin* does not stand for the broad proposition that incapacitation, standing alone, is a constitutionally permissible basis for seizing and indefinitely detaining a suspected enemy combatant. *Id.* at 23-24. In that case, in the midst of a formally declared war against Germany, the FBI initially seized the petitioners, German soldiers who had been covertly landed in this country by a German submarine intent on committing sabotage. *Id.* at 20-22. Thereafter, the President issued a proclamation establishing a military commission to try the petitioners. *Id.* at 22-23. In accordance with the proclamation, the FBI surrendered the petitioners to military custody "for trial before the Commission." *Id.* at 23. Unlike in *Quirin*, *id*. at 28, the government did not seize Padilla to prosecute him in any forum, but instead sought to detain and interrogate Padilla indefinitely. Because this asserted power to incapacitate by indefinite detention, without trial or even access to counsel, was not before this Court in *Quirin*, that decision does not support the government's position here. Indeed, if *Quirin* is deemed to authorize prolonged incommunicado military detention of unarmed civilians arrested in the United States and accused of terrorist activities, the line between criminal and military authority affirmed in *Ex parte Milligan* will simply cease to exist. Nothing in the AUMF suggests such a draconian retreat from constitutional governance. Furthermore, Quirin was a narrow decision expressly confined to its facts, and has since been roundly criticized. *See, e.g.*, *Hamdi*, 542 U.S. at 569 (Scalia, J., dissenting) ("[*Quirin*] was not this Court's finest hour.").

CONCLUSION

Amici urge that this Court issue a writ of certiorari in this case and to decide the merits of Padilla's prolonged military detention, notwithstanding the eleventh-hour decision of the United States to subject petitioner to a criminal indictment.

Respectfully submitted,

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