No. 03-1027

In The Supreme Court of the United States

DONALD RUMSFELD,

Petitioner,

v.

JOSE PADILLA and DONNA R. NEWMAN, as Next Friend of Jose Padilla,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF *AMICUS CURIAE* OF FRED KOREMATSU, THE BAR ASSOCIATION OF SAN FRANCISCO, THE ASIAN LAW CAUCUS, THE ASIAN AMERICAN BAR ASSOCIATION OF THE GREATER BAY AREA, ASIAN PACIFIC ISLANDER LEGAL OUTREACH, AND THE JAPANESE AMERICAN CITIZENS LEAGUE IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are Fred Korematsu, the Bar Association of San Francisco, the Asian Law Caucus, the Asian American Bar Association of the Greater Bay Area, Asian Pacific Islander Legal Outreach, and the Japanese American Citizens League.[1] *Amici* all share an interest in defending the rights and liberties of individuals. One of the most important ways to ensure that individuals will enjoy their federal constitutional rights is by maintaining the delicate balance of power between all three branches of Government, even in exigent circumstances.

Amici share an interest in making sure that the Executive does not act alone in detaining American citizens on United States soil indefinitely, without charges or access to counsel. They fear that, by allowing the Executive Branch to decide unilaterally who to detain, and for how long, our country will repeat the same mistakes of the past. The maintenance and promotion of the delicate balance of power between all three branches of government is key to the missions to which *amici* are dedicated, and to avoiding the struggles that Mr. Korematsu and others have faced.

[1] Under Rule 37.6, *amici* note the following: Both parties have consented to the filing of this brief. None of the parties to the case authored the brief. The law firms of Morrison & Foerster and Keker & Van Nest paid for all fees and costs associated with the drafting and filing of this brief.

Amici

A. Fred Korematsu

Mr. Korematsu challenged the constitutionality of Executive Order No. 34, one of a number of Executive Orders issued in early 1942 authorizing the internment of all persons of Japanese ancestry on the West Coast of the United States. He was convicted and sent to prison. His conviction was vacated 40 years later.

In 1998, when Mr. Korematsu was awarded the Presidential Medal of Freedom, he stated that "[w]e should be vigilant to make sure this will never happen again."[2] He is dedicated to ensuring that United States citizens not be detained without due process of law, and that our government not forget the slights of its past.

B. The Bar Association of San Francisco

The Bar Association of San Francisco is a nonprofit voluntary membership organization of attorneys, law students, and legal professionals in the San Francisco Bay Area. Founded in 1872, the Bar Association of San Francisco enjoys the support of over 9,900 individuals, as well as 400 sponsor firms, corporations, and law schools.

Many of the events surrounding the internment of Japanese Americans, including the prosecution of Mr. Korematsu, occurred in the San Francisco Bay Area. Because those events are bound up with the history of the

[2] President Clinton's remarks at the Presidential Medal of Freedom Ceremony for Fred Korematsu on January 18, 1998 at http://www.medaloffreedom.com/FredKorematsu.htm.

San Francisco Bay Area during the Second World War, the Bar Association of San Francisco has a particularly strong interest in ensuring that the legal misjudgments that were made in connection with the exclusion orders do not occur again.

C. The Asian Law Caucus

The Asian Law Caucus is a non-profit organization providing legal services to all sectors of our society with a specific focus directed toward addressing the needs of low-income Asian and Pacific Islanders. The Asian Law Caucus, which was founded in 1972, is the nation's oldest legal organization addressing the civil rights of Asian and Pacific Islander communities. It is dedicated to the pursuit of equality and justice for all sectors of society.

D. The Asian American Bar Association of the Greater Bay Area

The Asian American Bar Association of the Greater Bay Area was founded in 1976 as a vehicle for Asian American attorneys to speak out on issues of concern to the community. With a membership of more than 500 attorneys, it is one of the largest ethnic bar associations in the nation and has participated in many amicus briefs in its 28 year history.

E. Asian Pacific Islander Legal Outreach

Asian Pacific Islander Legal Outreach is a non-profit, community-based organization that provides legal services. Formed in 1975 to provide legal advocacy to Asian and Pacific Islander communities in San Francisco and the

Bay Area, it is dedicated to breaking down the long-standing barriers which have denied Asian and Pacific Islander people equal justice and equal access to the legal system.

F. The Japanese American Citizens League

The Japanese American Citizens League ("JACL"), founded in 1929, is the nation's oldest and largest Asian American non-profit, non-partisan organization committed to upholding the civil rights of Americans of Japanese ancestry and others. During World War II, Japanese Americans were denied their constitutional rights and were incarcerated in internment camps by the United States for no reason other than their ethnicity and without individual review. Knowing the harm caused by discrimination and the importance of protecting our constitutional guarantees, JACL continues to work actively to safeguard the civil rights of all Americans. *Amici* thus has an important and substantial interest in this case.

SUMMARY OF ARGUMENT

The history of the detention of Japanese American citizens during World War II, and the legislation that followed, demonstrate that the Executive Branch does not have the unilateral power to detain an American citizen indefinitely, without charges or access to counsel.

The internment of 120,000 American citizens of Japanese descent during World War II was one of the darkest moments in American history. The American people have recognized that the indefinite detention of

these citizens, without charges, was not justified. Indeed, to prevent such acts, Congress repealed the Emergency Detention Act of 1950.

Now, we stand at another crossroads where we face the same question – what circumstances, if any, justify the indefinite detention of an American citizen for suspicious activities, without charges or access to counsel?

In answering this question, it is important to look back at the lessons this country learned from the summary incarceration of Japanese Americans, including this Court's decision in *Ex Parte Endo*, 323 U.S. 283 (1944), and the history of the Emergency Detention Act, which was modeled after Executive Order 9066, the most notorious of the Japanese-American exclusion orders.

Although the Emergency Detention Act afforded detainees far greater procedural protections than the rights that have been granted to Respondent, Jose Padilla, many members of Congress viewed that statute as incompatible with basic due process protections. Ultimately, Congress rejected the notion that repairing the statute by amendment would be sufficient. Instead, Congress repealed it and passed the Non-Detention Act, a key basis for the Second Circuit's decision in this case.

The Non-Detention Act specifically provides that no citizen may be detained without Congress' authorization. Here, there is no such authorization. Because Congress has not authorized the indefinite detention of Mr. Padilla, without charges or access to counsel, the Second Circuit was correct to order the issuance of a writ of habeas corpus.

Our system of divided constitutional government gives us ample protection against an Executive acting based on no authority but its own edicts. From time to time in our history, however, the judiciary has been called upon to reign in the Executive during moments of national crisis. Mr. Padilla's case arises during such a time. It is imperative that this Court uphold the delicate balance of power the Constitution envisions by requiring that the Executive seek congressional authority here.

ARGUMENT

I. THE EXPERIENCE OF AMERICANS OF JAPANESE ANCESTRY DURING THE SECOND WORLD WAR HIGHLIGHTS THE NEED FOR A DELICATE BALANCE OF POWER BETWEEN ALL THREE BRANCHES OF GOVERNMENT

A. Over Fifty Years Ago, The Country Detained 120,000 American Citizens in the Name of National Security.

The intense national reaction to the September 11 attacks is, in some ways, a virtual replay of the aftermath of Pearl Harbor sixty years earlier. One day after the bombing of Pearl Harbor, on December 8, 1941, Congress declared war against Japan.[3] Two months later, on February 19, 1942, the President issued Executive Order No. 9066, which:

[3] *Hirabayashi v. United States*, 320 U.S. 81, 85 (1943).

> [A]uthorized and direct[ed] the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion.[4]

In response, General John DeWitt, the commander in charge of states along the Pacific Coast, designated much of the West Coast a "military area" on March 2, 1942.[5] On March 16, he also designated other "military areas" and proclaimed that future regulations and restrictions would apply to people remaining within those areas.[6] Congress then gave the President and military commanders the authority to impose certain restrictions within the designated "military areas." On March 21, 1942, Congress made it a crime for anyone "knowingly to disregard restrictions made applicable by a military commander to persons in a military area prescribed by him as such, all as authorized by an Executive Order of the President."[7]

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[4] *Id.* at 85-86.

[5] *Id.* at 86-87.

[6] *Id.*

[7] *Id.* at 83.

General DeWitt issued several orders imposing severe restrictions on Americans of Japanese descent. All tolled, Executive Order No. 9066, Congress' statute, and General DeWitt's orders led to the removal and detention, without individual review, of approximately 120,000 people of Japanese descent.[8]

They also caused people of Japanese ancestry untold loss and suffering. Many had to sell their homes quickly, or just leave them behind.[9] Many lost their businesses and their standing in the community.[10] Those involved in the agricultural business lost everything.[11] After the war, when they were finally allowed to leave the relocation centers, their lives had been devastated, and they were left to try to rebuild.[12]

B. The Japanese-American Detention Cases Demonstrate that the Government's Indefinite Incarceration of Mr. Padilla is Unlawful.

During World War II, this Court in a series of cases addressed the severe restrictions imposed on American citizens of Japanese ancestry. Although several of those cases addressed the permissibility of the curfews and exclusions (including General DeWitt's March 24 and May

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[8] Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* 3 (Tetsuden Kashima ed., 1982).

[9] *Id.* at 117.

[10] *Id.*

[11] *Id.* at 122-127.

[12] *Id.* at 117.

3 orders),[13] only the decision in *Ex Parte Endo* addressed the validity of General DeWitt's May 7, 1942, order that all persons of Japanese descent were to remain indefinitely in relocation centers run by the War Relocation Authority.

1. In *Ex Parte Endo*, the Court Required That Any Implied Statutory Authority Be Interpreted Narrowly.

This Court ordered the release of an American citizen of Japanese ancestry in *Ex Parte Endo*, 323 U.S. 283 (1944), in part because there was no congressional authorization for indefinite detention.[14] During World War II,

[13] In *Hirabayashi* and *Korematsu*, the Court upheld the convictions of two individuals for curfew and exclusion order violations because it concluded that Congress and the Executive had acted together in concluding that these orders were necessary. *Hirabayashi*, 320 U.S. at 101 (curfew order); *Korematsu v. United States*, 323 U.S. 214, 218 (1944) (exclusion order). Even these cases, which have been roundly discredited, cannot be used to support the position of the government, which has no authorization from Congress. *See* Bruce Ackerman, *The Emergency Constitution*, 113 Yale L.J. 1029, 1042-43 (2004) (observing that "[b]y the 1980s, it was hard to find a constitutional commentator with a good word to say for the [*Korematsu*] decision"); Natsu Taylor Saito, *Justice Held Hostage: U.S. Disregard for International Law in the World War II Internment of Japanese Peruvians – A Case Study*, 40 B.C. L. Rev. 275, 278 (1998) (noting that "it is widely accepted that the incarceration of Japanese Americans from the West Coast violated the constitutional rights of U.S. citizens and permanent residents"). As the Court in *Korematsu* noted, "[w]e cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with. . . . " 323 U.S. at 218. Here, the Executive has acted alone with no support from Congress in detaining a citizen for suspicion of committing future acts. Such unilateral actions are impermissible.

[14] *Ex Parte Endo*, 323 U.S. at 300-301, 304.

Mitsuye Endo was forced to leave her home in Sacramento, California and to remain in the Tule Lake War Relocation Center until the War Relocation Authority allowed her to leave.[15] In analyzing the permissibility of General DeWitt's order under Congress' statute and Executive Order No. 9066, this Court stressed that "the Constitution is as specific in its enumeration of many of the civil rights of the individual as it is in its enumeration of the powers of his government."[16]

The Court next set forth principles of interpretation that govern cases in times of exigency. It explained that "[w]e must assume that the Chief Executive and members of Congress, as well as the courts, are sensitive to and respectful of the liberties of the citizen."[17] More specifically, "[i]n interpreting a wartime measure we must assume that their purpose was to allow for the greatest possible accommodation between those liberties and the exigencies of war. 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."[18]

Because Congress' statute was silent on the issue of indefinite detention, the Court looked to whether it could imply such authorization. In so doing, it explained that "any such implied power must be *narrowly confined* to the

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[15] *Id.* at 288-89.

[16] *Id.* at 299.

[17] *Id.* at 300.

[18] *Id.* (emphasis added).

precise purpose of the evacuation program."[19] Because indefinite detention was not narrowly confined to protecting the war effort against espionage and sabotage, the Court ordered Ms. Endo's release.[20]

2. *Ex Parte Endo* Bars Mr. Padilla's Indefinite Detention.

As Petitioner notes in his brief, Congress authorized the President "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, 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."[21] In other words, Congress limited the President's authority to use force to two instances. Congress gave the President authority to use force against nations, organizations or persons: (1) who planned, authorized, committed or aided the September 11 terrorist attack; or (2) who harbored organizations or persons who planned, authorized, committed or aided the terrorist attack.[22]

Under the well-settled principles this Court established in *Ex Parte Endo*, the language of the joint resolution must be examined to determine whether it either expressly or implicitly supports Mr. Padilla's detention.

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[19] *Id.* at 301-302 (emphasis added).

[20] *Id.* at 302.

[21] Petitioner's Brief at 39 (citing Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, § 2(a) (2001)).

[22] *Id.*

"The government does not allege that Padilla was a member of al Qaeda."[23] Moreover, the government does not argue that Padilla was involved in the terrorist attacks that occurred on September 11. Nor does it claim that there is evidence that he harbored organizations or persons who planned, authorized, committed, or aided in those attacks. Instead, as the government concedes, Mr. Padilla is being detained because the government was concerned that he might commit *future* unlawful acts.[24] Just like the congressional statute in *Ex Parte Endo*, the joint resolution does not explicitly or implicitly support the government's detention here of persons whom the government believes *might* commit a future unlawful act.

II. THE EXPERIENCE OF AMERICANS OF JAPANESE ANCESTRY DURING THE SECOND WORLD WAR MOTIVATED CONGRESS TO ENACT THE NON-DETENTION ACT, WHICH BARS THE INDEFINITE DETENTION OF MR. PADILLA, INCLUDING BY MILITARY AUTHORITIES, WITHOUT CONSTITUTIONAL DUE PROCESS

In determining that Mr. Padilla's detention was impermissible, the Second Circuit relied in part on the Non-Detention Act, 18 U.S.C. § 4001(a), which was enacted to ensure that American citizens never again be detained indefinitely without due process. In order to understand the magnitude and scope of Congress' actions in enacting the Non-Detention Act, it is important to

[23] *Rumsfeld v. Padilla*, 352 F.3d 695, 701 (2d Cir. 2003)

[24] Petitioner's Brief at 4.

understand the Emergency Detention Act of 1950 and the historical context that led to its repeal. The decisions to repeal the Emergency Detention Act and to pass the Non-Detention Act were in large part caused by the nation's memories of the internment of Japanese-Americans during World War II.

A. The Emergency Detention of 1950 Authorized Detention in Certain Circumstances, But Afforded Greater Procedural Rights than Mr. Padilla Has Received.

Following World War II, and in the wake of the invasion of South Korea, Congress passed the Emergency Detention Act of 1950. The Act was enacted during a time of "great national hysteria and uncertainty," five years after the conclusion of World War II, while fears and "wild accusations" concerning communism were rampant.[25] In response to these fears, Congress passed the Emergency Detention Act that authorized the creation of camps modeled after those used to intern Japanese Americans several years before.[26]

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[25] H.R. Rep. No. 92-234, at 66 (1971) (statement of Rep. Chester Holifield, member of Congress during enactment and repeal and co-sponsor of bill to repeal); *see also* Emergency Detention Act, § 101, formerly 50 U.S.C. §§ 811-26 (1970) (hereinafter "EDA"); H.R. Rep. No. 92-116, at 2 (1971).

[26] *See* http://www.trumanlibrary.org/whistlestop/study_collections/japanese_internment/1950.htm. Ironically, the six potential campsites designated by the Attorney General included those that had been used before, including Tule Lake, California. H.R. Rep. No. 91-1599, at 16 (1970).

Despite the general public support for such a measure, there remained dissenters who were concerned about the protection of civil liberties. For example, when the Emergency Detention Act was offered on the Senate floor as an amendment to the Internal Security Act, Senator Karl Mundt severely criticized it as "establishing concentration camps into which people might be put without benefit of trial, but merely by executive fiat."[27]

The Emergency Detention Act authorized the Executive Branch to detain United States citizens upon suspicion of espionage or sabotage during "Internal Security Emergenc[ies]."[28] Specifically, the Emergency Detention Act permitted the President, acting through the Attorney General to detain any individual, including a United States citizen, based on a reasonable suspicion that "such person probably will engage in, or probably will conspire with others to engage in, acts of espionage or sabotage."[29] In order to invoke this authority, one of the following three events had to occur: (1) an invasion of the United States, (2) Congress' declaration of war, or (3) "[i]nsurrection within the United States in aid of a foreign enemy."[30] If any of these events occurred, the President was authorized to proclaim an "Internal Security Emergency," and such individuals could be apprehended and detained.[31]

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[27] H.R. Rep. No. 92-234, at 48 (statement of Rep. Spark Matsunaga quoting legislative history of the EDA).

[28] EDA § 102.

[29] *Id*. § 103(a).

[30] *Id*. § 102.

[31] *Id*. §102(b).

Although the Act gave the President broad authority to detain American citizens in this country, it also provided for certain procedural protections not made available to Mr. Padilla. These included the requirement that any person whom the Attorney General detained would be taken to a preliminary hearing officer "within 48 hours after apprehension," or as soon as practicable, for a finding of whether there was "probable cause for detention of such person."[32] Cause for detention could be established by demonstrating that the person *may* commit a crime. At the preliminary hearing, the detainee had the right to retain counsel.[33]

Following this administrative hearing, the detainee had the right to appeal a negative decision to a full administrative board,[34] as well as the Court of Appeals and, ultimately, to this Court.[35] In addition, the statute explicitly protected the detainee's right to challenge his detention by writ of habeas corpus.[36] It is noteworthy that, with all of its apparent faults, the Emergency Detention Act provided for greater procedural protections than the actions the Executive Branch undertook in this case, including access to counsel and notice of the charges and evidence brought forth against him.[37]

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[32] *Id.* § 104(d).

[33] *Id.* § 104(d)(2).

[34] *Id*. § 105.

[35] *Id*. § 111(f).

[36] *Id*.

[37] *Id*. § 104(d).

B. By Repealing The Emergency Detention Act and Enacting the Non-Detention Act, Congress Made Clear that the Executive Must Have Prior Congressional Approval Before Detaining an American Citizen on American Soil.

1. The Repeal of the Emergency Detention Act of 1950 and Enactment of the Non-Detention Act.

In 1970, Congress revisited the Emergency Detention Act in large part because of advocacy from various minority communities.[38] Members of the Japanese American population, whose memory of the internment camps was still fresh, continued to voice their concerns and fears about the statute.[39] Other racial minority groups, particularly the African American community, also objected to the Act, fearing that that the government would deem the civil rights movement and the resulting activities subversive.[40]

During the 91st Congress in 1970, proposed measures repealing the Emergency Detention Act and prohibiting the possibility of further detention camps were referred to the House of Representative's Committee on the Judiciary and Committee on Internal Security. In order to expedite the process and avoid redundancy, the House and Senate directed the House of Representative's Committee on

[38] H.R. Rep. No. 91-1599, at 11-12.

[39] H.R. Rep. No. 92-116, at 2. These groups included the JACL who actively participated in the congressional hearings. H.R. Rep. No. 92-234, at 95.

[40] H.R. Rep. No. 91-1599, at 11-12.

Internal Security to hold hearings on these issues. As a result, bill H.R. 19163 was introduced on September 14, 1970. Rather than repeal the act, the proposed measure merely added further procedural protections to the Emergency Detention Act.[41]

Less than a year later, the 92nd Congress revisited the issue. Again, various measures were sponsored and sent to the House of Representatives. This time, they were sent to the Committee on the Judiciary.[42]

During hearings, Committee members discussed the need to repeal the measure, and to add new restrictive language, lest the Executive Branch assume that the repeal was an authorization rather than a restriction on the ability to detain. For example, Representative Thomas Railsback explicitly raised the issue of *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952),[43] stating:

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[41] H.R. Rep. No. 92-116, at 3.

[42] *Id*.

[43] In *Youngstown*, this Court addressed the President's war powers. The Court held that the President did not have the power to seize steel mills during the Korean War because Congress had not authorized such seizures. 343 U.S. at 585. As the Court explained, the Executive Branch's powers "must stem either from an act of Congress or from the Constitution itself." *Id.*

Concurring, Justice Jackson explained that there are three ways to categorize the President's war powers. First, the President's powers are at their maximum where Congress has expressly or implicitly authorized his actions. *Id.* at 635. Second, where Congress has not either granted or prohibited the President's actions, "he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.* at 637. Finally, the President's "power is at its lowest ebb" where, as is the case here, the President acts in a way that is contrary to the express or implied will of Congress. *Id.* at 637-38.

"Maybe we should do something affirmatively, other than just repeal, to make sure that we have restricted the President's wartime powers."[44]

The resulting congressional report recommended not only the repeal of the Emergency Detention Act, but also the adoption of stringent language limiting the power of the Executive Branch to detain citizens without congressional authority. The report strongly questioned the constitutionality of the Emergency Detention Act of 1950 and the scope of the executive authority to detain in light of Fifth Amendment due process rights:

> Repeal alone might leave citizens subject to arbitrary executive action, with no clear demarcation of the limits of executive authority. . . . The Committee believes that imprisonment or other detention of citizens should be limited to situations in which a statutory authorization, an Act of Congress, exists.[45]

In addition, members of Congress expressed concern regarding whether the Emergency Detention Act violated constitutional guarantees by permitting "detentions not on the basis of an actual act committed in violation of law, but on the basis of mere suspicion – of a mere probability that, during proclaimed periods of international security emergencies, the detainee might engage in, or conspire with others to engage in acts of espionage or sabotage."[46]

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[44] H.R. Rep. 92-234, at 79.

[45] H.R. Rep. No. 92-116, at 5.

[46] 117 Cong. Rec. H31535 (daily ed. Sept. 13, 1971) (statement of Rep. Matsunaga).

The threat the Emergency Detention Act posed to established constitutional principles of criminal justice was aptly summarized by Representative Chester Holifield when he stated, "The law creates the following incredible situation: One person who actually commits sabotage or espionage will be accorded all of his fifth amendments rights – indictment, bail, a jury trial, confrontation of witnesses, compliance with rules of evidence, and full judicial review [in contrast to those who are detained under the Emergency Detention Act, who would have no such rights after being suspected of plotting such acts]."[47]

On September 25, 1971, after extensive hearings, Congress repealed the Emergency Detention Act of 1950 and enacted the Railsback amendment, commonly referred to as the Non-Detention Act,[48] which expressly limits the President's ability to detain American citizens on American soil.

2. The Non-Detention Act Bars Mr. Padilla's Indefinite Detention, Including By Military Authorities, Without Due Process.

The Non-Detention Act provides: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[49] As the Second Circuit held, because the plain language of the statute is

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[47] H.R. Rep. No. 92-234, at 68.

[48] Pub. L. No. 92-128, 62 Stat. 847 (1971).

[49] 18 U.S.C. § 4001(a) (2004).

unambiguous on its face, the judicial inquiry should end there.[50]

Not only does the plain language of the Non-Detention Act contemplate the present situation, where an American citizen is being detained on American soil, the Court has construed the language broadly. In *Howe v. Smith*, 452 U.S. 473 (1981), the Court construed the language literally as proscribing "detention *of any kind* by the United States, absent a congressional grant of authority to detain."[51]

Petitioner asserts that the legislative history indicates that the repeal of the Emergency Detention Act and the enactment of the Non-Detention Act were directed at the detention of citizens by civilian authorities. Based on this argument, he contends that the Second Circuit erred in relying on the Non-Detention Act because Mr. Padilla has been detained by non-civilian authorities. However, as Petitioner recognizes, in analyzing legislative actions, it is important to examine the backdrop of "'what Congress was attempting to accomplish in enacting'" the particular law and in light of the historical context in which it arose.[52] With that perspective, it is apparent that the distinction Petitioner attempts to draw between detention of citizens by civilian authorities versus military authorities does not survive judicial scrutiny.

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[50] *Padilla*, 352 F.3d at 718.

[51] 452 U.S. at 479 n.3 (emphasis in original).

[52] Petitioner's Brief at 45 (quoting *Reves v. Ernst & Young*, 494 U.S. 56, 63 (1990)).

First, as discussed above, the detention of Japanese Americans during World War II was initially authorized under Executive Order 9066, pursuant to the President's authority as Commander in Chief. This unbridled exercise of executive authority is exactly what Congress intended to limit by repealing the Emergency Detention Act of 1950 and enacting the Non-Detention Act, as illustrated by the statements of Representative Railsback, the drafter of the Act, during subcommittee hearings, as well as during the hearings before the full session.[53] As the Second Circuit noted, the Non-Detention Act was enacted despite stated concerns by certain members of Congress that the Railsback amendment would be construed under this Court's case law, particularly *Youngstown*, to "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."[54] The President's authority as Commander in Chief is the same authority on which the government heavily relies to justify the executive order and the resulting indefinite detention of Mr. Padilla. Thus, Petitioner's attempt to distinguish the detention cases and the Non-Detention Act as applying only to the detention of American citizens by civilian authorities is misplaced.

In fact, as indicated above and as the Second Circuit discussed, the detention cases and the adoption of the

[53] 117 Cong. Rec. H31755 (daily ed. Sept. 14, 1971) (statement by Rep. Railsback) (suggesting that the President could seize citizens only pursuant to an act of Congress or during times of martial law when the courts were not opened).

[54] 117 Cong. Rec. H31549 (daily ed. Sept. 13, 1971).

Non-Detention Act support the position that the Executive Branch's exercise of authority in this case is unwarranted. "Because the World War II detentions were authorized pursuant to the President's war making powers as well as by a congressional declaration of war and by additional congressional acts, *see Endo*, 323 U.S. at 285-90, the manifest congressional concern about these detentions also suggests that section 4001(a) limits military as well as civilian detentions."[55]

Second, the legislative history of the Non-Detention Act demonstrates that one of Congress' primary concerns was to protect civil liberties, particularly those involving each citizen's Fifth Amendment due process rights. "The legislative history suggests that the main purpose of the Act was to prevent detention without due process of law, of citizens during internal security emergencies."[56] Indeed, one of the primary criticisms of the Emergency Detention Act of 1950 and reasons for its repeal was its lack of constitutional safeguards.[57]

Significantly, the procedural safeguards that the repealed Emergency Detention Act of 1950 provided were greater than those that have been afforded to Mr. Padilla.

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[55] *Padilla*, 352 F.3d at 720; *see also* H.R. Rep. No. 92-234, at 45-46 (statement of Rep. Matsunaga, co-sponsor of H.R. 234) (emphasizing the dangers of the detention cases, including *Korematsu* and *Hirabayashi*).

[56] Jennifer K. Elsea, Congressional Research Service, *Detention of American Citizens as Enemy Combatants*, at 41 n.214 (citing H.R. Rep. No. 92-116 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1435-39).

[57] H.R. Rep. No. 92-234, at 47-48 (statement of Rep. Matsunaga) (commenting that the Emergency Detention Act "effectively overrides due process").

They included a right to judicial review, a right to habeas relief, a right to know the charges being asserted, and a right to access to counsel. Moreover, one of three specific events (*i.e.*, Congress' declaration of war, the invasion of the United States, or an insurrection in aid of a foreign enemy) had to occur prior to a Presidential declaration of an "Internal Security Emergency."[58] Despite these protections, Congress deemed the Emergency Detention Act of 1950 unconstitutional due to concerns that it did not adequately protect the citizen's rights to due process of law.[59]

In light of the legislative history of the Non-Detention Act and the fact that the Emergency Detention Act provided greater protections for American citizens than those currently being afforded Mr. Padilla, it seems incredible to suggest that the 92nd Congress intended to permit the President to authorize the indefinite detention of a United States citizen without *any* right to counsel, to have charges brought, or to a timely hearing, by merely declaring such person an "enemy combatant." There is nothing in the legislative history to indicate that Congress intended such a draconian result.

C. Recent Congressional Actions Further Illustrate that the Non-Detention Act Applies to the Present Case.

Current members of Congress have recognized that the Non-Detention Act applies to the present case and

[58] EDA § 102(b).

[59] H.R. Rep. No. 92-116, at 4.

have attempted to act in accordance with the statute's requirements. Representative Adam Schiff has proposed a bill, entitled the Detention of Enemy Combatants Act, which would authorize the President to detain an enemy combatant "who is a United States person or resident who is a member of al Qaeda or knowingly cooperated with members of al Qaeda[.]"[60] In addition the bill establishes "clear standards and procedures governing detention of a United States person or resident,"[61] including "timely access to judicial review to challenge the basis for a detention" and "access to counsel[.]"[62]

In a statement released on February 20, 2004, Representative Schiff explained the purpose of the bill:

> After our experience with the internment of Japanese-Americans during World War II, we must be vigilant to protect against the government's decision to detain any American without adequate review of the basis of its decision. While we must grant broad latitude to our armed forces when it comes to protecting national security, American citizens should not be held indefinitely upon the sole determination of one branch of government.[63]

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[60] H.R. 1029, 108th Cong. (2003).

[61] *Id.* § 4.

[62] *Id.*

[63] Press Release, Adam Schiff, *Rep. Adam Schiff Urges Congress to Act on Enemy Combatants Issue in Wake of Supreme Court Decision to Hear Padilla Case* (Feb. 20, 2004) (noting that the Supreme Court had stepped in "[i]n the wake of Congressional inaction"), *available at* http://www.house.gov/apps/list/press/ca29_schiff/022004PdillaSupCt.html.

If enacted into law, H.R. 1029 would provide the congressional authorization required under the Non-Detention Act. The bill states: "By this Act, the Congress authorizes the President to detain enemy combatants who are United States persons or residents who are members of al Qaeda, or knowingly cooperated with members of al Qaeda in the planning, authorizing, committing, aiding or abetting of one or more terrorist acts against the United States."[64]

But Congress has not passed H.R. 1029, or any other legislation authorizing the detention of "enemy combatants." Thus, the President at present lacks the congressional authorization required under the Non-Detention Act. Regardless of how strongly the President may feel that Mr. Padilla is an "enemy combatant," he alone does not have unfettered authority to detain Mr. Padilla indefinitely, whether through civilian or military authorities.

III. "A CONSTANT CAUTION":[65] OUR COUNTRY CANNOT FORGET THE LESSONS LEARNED FROM THE DETENTION OF JAPANESE AMERICAN CITIZENS AND THE PASSAGE OF THE NON-DETENTION ACT

Time sometimes reveals the unforgivable nature of our actions. Many of our country's darkest episodes have occurred when we have failed to protect civil liberties during exigent times of war or in the name of national security. These failures are well-illustrated by the internment of

[64] H.R. 1029, § 2(11)(12).

[65] *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

American citizens of Japanese descent on American soil during World War II.

At the time of the internments, the Court recognized that the Executive Branch could not act alone. It found that explicit congressional authority was necessary for such detentions.[66]

In passing the Emergency Detention Act of 1950, Congress recognized that, in order to detain its own citizens during exigent times, certain procedural protections were necessary. These constitutional protections included access to counsel, the right to timely review, and the writ of habeas corpus.

Then, in the 1970's, groups of citizens began voicing concerns that these protections were inadequate and could not justify the indefinite detention of American citizens. They expressed their fear of the possible ramifications of the Emergency Detention Act, *i.e.,* that during proclaimed periods of internal security emergencies, the government unilaterally could detain a citizen based on the "mere suspicion" that the detainee *may* engage in acts of espionage or sabotage.

Congress also recognized these concerns. Rather than amend the Emergency Detention Act to provide further procedural protections, Congress chose to repeal it. In doing so, Congress recognized that the arbitrary detention

[66] *Endo*, 323 U.S. at 300-01; *see also* Steven I. Vladeck, *The Detention Power*, 22 Yale L. & Pol'y Rev. 153, 174 (2004) ("The Court, in a decision released on the same day as *Korematsu*, ordered Endo's discharge, largely because Congress had not explicitly authorized her confinement.").

of American citizens based on a proclamation by the President and an assortment of procedural protections was insufficient to protect the civil liberties and the freedoms at stake.

These realizations continued, as we as a nation turned inward and faced the realities of our past and how we had treated our own citizens.[67] On February 19, 1976, President Gerald Ford declared that "February 19th is the anniversary of a sad day in American history" because it was "on that date in 1942 . . . that Executive Order No. 9066 was issued."[68] He further asked "the American people to affirm with me this American Promise – that we have learned from the tragedy of that long-ago experience" and "that this kind of action shall never again be repeated."[69]

In 1980, Congress established a Commission on Wartime Relocation and Internment of Civilians to review the circumstances surrounding Executive Order No. 9066, and its impact on people of Japanese ancestry.[70] Comprised of former Congressional members, Cabinet members, and members of the Supreme Court, the Commission unanimously condemned the decisions

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[67] Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 Stan. L. Rev. 755, 783 (2004) ("Congress has apologized for the Japanese detentions and paid compensation . . . . "); Frank H. Wu, *Profiling in the Wake of September 11: The Precedent of the Japanese American Internment*, 17 Crim. Just. 52, 56 (2002) (recounting the widespread regret for the internment of Japanese Americans).

[68] Proclamation No. 4417, 41 Fed. Reg. 35,7741 (Feb. 19, 1976).

[69] *Id.*

[70] Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied*.

justifying the internment of American citizens in this country.[71]

Later, a federal district court vacated the 1942 conviction of Fred Korematsu, one of the many excluded and interned Americans of Japanese ancestry, for violating General DeWitt's orders.[72] The court found that the government had failed to inform the Court of crucial evidence during the Second World War, which justified correcting Mr. Fred Korematsu's conviction under the stringent standard of coram nobis.[73] In so doing, the court noted that the *Korematsu* case "stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees."[74] It "stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability."[75]

On January 18, 1998, President Clinton presented Mr. Korematsu with the Presidential Medal of Freedom. In doing so, the President praised Mr. Korematsu's "extraordinary stand" and noted that "[i]n the long history of our country's constant search for justice, some names of

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[71] *Id.*

[72] *Korematsu*, 584 F. Supp. at 1420.

[73] *Id.* at 1419.

[74] *Id.* at 1420.

[75] *Id.*; *see also* Susan Kiyomi Serrano & Dale Minami, *Korematsu v. United States: A "Constant Caution" In a Time of Crisis*, 10 Asian L.J. 37, 45-50 (2003) (noting that the significance of the *Korematsu* decision endures, especially after the September 11, 2002 terrorist attacks).

ordinary citizens stand for millions of souls. Plessy, Brown, Parks . . . To that distinguished list, today we add the name of Fred Korematsu."[76]

CONCLUSION

Mr. Padilla has been indefinitely detained for almost two years without access to counsel or any communication with his family, based on the President's unilateral determination that Mr. Padilla is an "enemy combatant." No charges have been brought against him.

This detention is unwarranted and cannot be justified by the government's claims that we face a time of national crisis. No one can dispute the horror inflicted upon the nation on September 11. However, as illustrated by the Japanese American detention and the repeal of the Emergency Detention Act, it is imperative that we carefully balance our concerns for safety and security with the liberties afforded us in our Bill of Rights. As stated by the Court in *United States v. Robel*, 389 U.S. 258 (1967), "[i]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile."[77]

[76] President Clinton's remarks at the Presidential Medal of Freedom Ceremony for Fred Korematsu on January 18, 1998, *available at* http://www.medaloffreedom.com/FredKorematsu.htm.

[77] *Robel,* 389 U.S. at 264.

For the reasons set forth above, the judgment of the Court of Appeals for the Second Circuit should be affirmed.

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