

IN THE  
**Supreme Court of the United States**

JOSE PADILLA,

*Petitioner,*

v.

COMMANDER C.T. HANFT,  
U.S.N., COMMANDER,  
CONSOLIDATED NAVAL BRIG,

*Respondent.*

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

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**BRIEF OF JANET RENO, *ET AL.*,  
AMICI CURIAE IN SUPPORT OF PETITIONER**

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December 16, 2005

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## INTEREST OF AMICI CURIAE

Amici curiae are lawyers with years of experience in government law enforcement and intelligence work. They submit this brief to assist the Court in understanding the mechanisms with which the United States has successfully monitored, searched, detained, and punished terrorists, and prevented terrorist attacks.<sup>1</sup>

## SUMMARY OF ARGUMENT

In this case, the President asserted the authority to seize an American citizen within the United States and subject him to indefinite military detention without criminal charge or trial. The sweeping power the government claims is not necessary to fulfill its duty to protect the Nation. Indeed, the government's eleventh-hour decision to transfer Mr. Padilla from military custody and indict him on charges of criminal conspiracy and providing material support to terrorists proves this point. The government's legitimate interest in preventing and disrupting acts of terrorism is addressed by a vast array of existing and recently expanded federal laws and regulations. A key difference between the substantial powers authorized by Congress and those asserted in this case is accountability.

The appellate court below wrongfully concluded that the result in this case is dictated by the Court's holding in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Pet. App. 11a-12a.

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<sup>1</sup> A list of the amici who are filing this brief is set forth in the Appendix. Counsel for a party did not author this brief in whole or in part and no person or entity, other than the amici curiae or counsel, has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a) of this Court's rules, the parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court.

In *Hamdi*, a plurality of the Court concluded that the military had the legal authority to detain an armed American citizen who was fighting U.S. forces on the battlefield of Afghanistan until a cessation of hostilities, provided that the government afforded him some opportunity to contest the factual basis for his detention. Application of *Hamdi* to Petitioner would expand the scope of presidential authority well beyond the narrow confines considered in that case. Mr. Padilla was apprehended in O'Hare Airport by civilian authorities, not on a military battlefield.<sup>2</sup> The basis for his detention was not waging war abroad, but plotting criminal acts on American soil.<sup>3</sup> If Mr. Padilla was properly considered an "enemy combatant," then the President's power to detain American citizens for indefinite periods of time knows few meaningful limits.

Mr. Padilla's case presents legal issues of great significance for our country and its citizens. In Petitioner's earlier action, which was dismissed on jurisdictional grounds, every member of the Court agreed with that assessment.<sup>4</sup> So

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<sup>2</sup> By the time the President designated him an "enemy combatant," in fact, Mr. Padilla was already in federal custody in New York pursuant to a material witness warrant. Pet. App. 9a.

<sup>3</sup> Attorney General John Ashcroft, Statement Regarding the Transfer of Abdullah Al Muhajir (Born Jose Padilla) to the Department of Defense as an Enemy Combatant (June 10, 2002) ("We have captured a known terrorist who was exploring a plan to build and explode a radiological dispersion device, or 'dirty bomb,' in the United States."), *available at* <http://www.usdoj.gov/archive/ag/speeches/2002/061002agtranscripts.htm>

<sup>4</sup> *Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004) (noting that question of President's legal authority to detain Padilla militarily "raise[s] important questions of federal law"); *id.* at 450 ("[T]he merits of this case are indisputably of 'profound importance' . . .") (quoting dissent); *id.* at 461 ("[T]his case is singular not only because it calls into question decisions made by the Secretary [of Defense] himself, but also because those decisions have created a unique and unprecedented threat to the freedom of every American citizen.") (Stevens, J., dissenting).

did the government. Brief of Petitioner at 13, *Rumsfeld v. Padilla*, 542 U.S. 426 (U.S. 2004) (No. 03-1027) (“This case raises fundamental questions about the authority of the Commander in Chief in a time of war . . .”). Respectfully, amici urge the Court to grant Mr. Padilla’s petition to ensure that he and other citizens are not detained in the future at the whim of the Executive.

## **ARGUMENT**

### **I. THE EXECUTIVE ENJOYS BROAD POWER UNDER EXISTING LAW TO PROTECT THE NATION FROM TERRORIST ATTACK.**

In more than four years since the September 11 terrorist attacks, Congress has substantially and deliberately broadened the federal government’s already significant powers to gather intelligence and to apprehend those believed to pose a threat to the United States. Collectively, it is the experience of the amici curiae that these tools provide the Executive with broad authority and flexibility to respond effectively to terrorist threats from citizens within our borders.<sup>5</sup> Whatever government “failures” arguably contributed to September 11 or other terrorist attacks, no investigation has suggested that blame lies with limits on the President’s authority to designate and detain American citizens indefinitely as “enemy combatants.”

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<sup>5</sup> See also *Hamdi*, 542 U.S. at 547-48 (Souter, J., concurring in part and dissenting in part) (“[T]here is no reason to think Congress might have perceived any need to augment Executive power to deal with dangerous citizens within the United States, given the well-stocked statutory arsenal of defined criminal offenses covering the gamut of actions that a citizen sympathetic to terrorists might commit.”); *id.* at 554 (Scalia, J., dissenting) (“Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime.”).



## A. Current Tools to Investigate Terrorists

### 1. Physical Surveillance

The primary tool for preventing terrorist attacks is the gathering of intelligence. Indeed, covert surveillance may well serve as a more effective long-term strategy against terrorism than arrests and detention.<sup>6</sup> There are few constitutional restrictions on the government's ability to conduct physical surveillance. See, e.g., *Reporters Comm. for Freedom of the Press v. AT&T Co.*, 593 F.2d 1030, 1064 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949 (1979). Normally, no warrant is required when the surveillance does not entail physical or technological intrusion into the target's home or other private area. Compare *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (holding that surveillance of home with thermal technology requires warrant), with *California v. Ciraolo*, 476 U.S. 207, 213 (1986) (upholding warrantless aerial surveillance of fenced-in backyard).

By regulation, federal agents may freely conduct “[p]hysical or photographic surveillance of any person.” Dep’t of Justice, Attorney General’s Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations § II(B)(6)(g), at 10 (May 30, 2002), <http://www.usdoj.gov/olp/generalcrimes2.pdf>. In addition, “[f]or the purpose of detecting or preventing terrorist activities, the FBI is authorized to visit any place and attend any event that is open to the public, on the same terms and conditions as members of the public generally.” *Id.* § VI(A)(2), at 22.

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<sup>6</sup> See Jim McGee, *Ex-FBI Officials Criticize Tactics on Terrorism: Detention of Suspects Not Effective, They Say*, Wash. Post, Nov. 28, 2001, at A1.

## 2. *Electronic Surveillance*

The government may intercept communications of terrorist suspects pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 *et seq.*, or the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1801 *et seq.*<sup>7</sup> The USA PATRIOT Act and the 9/11 Commission Act have further expanded these powers.<sup>8</sup> Under Title III, a federal court can issue an order authorizing surveillance of telephone calls, faxes, and e-mails upon a showing of probable cause to believe that an individual – not necessarily the target of the surveillance – has committed, or is about to commit, one of a large number of enumerated offenses, and that communications relating to that offense will be intercepted. 18 U.S.C. § 2518(3)(a), (b). The potential predicates for electronic surveillance under Title III include most terrorism-related offenses. *See id.* § 2516(1).

Even when there is insufficient evidence to begin a criminal investigation, FISA provides the government with tools to investigate “international terrorism.” 50 U.S.C. §§ 1801 *et seq.* Electronic surveillance under FISA requires

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<sup>7</sup> Overseas, the government can conduct electronic surveillance against U.S. persons, along with physical searches, subject to certain restrictions imposed by the President. Executive Order 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981).

<sup>8</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. 107-56, 115 Stat. 272 (2001); Intelligence Reform and Terrorism Prevention (9/11 Commission) Act of 2004, Pub. L. 108-458, 118 Stat. 3638 (2004). Some of these new powers are subject to sunset provisions, which has resulted in extensive congressional oversight and debate. *See* Eric Lichtblau, *Antiterrorism Law Defended as Hearings Start*, N.Y. Times, Apr. 6, 2005, at A15. We take no position on competing legislation to extend portions of the USA PATRIOT Act, or on whether the Act in its current form strikes an appropriate balance between national security and the protection of civil liberties. We note only that some of the provisions can be used effectively to combat terrorism.

the government to obtain an order from the Foreign Intelligence Surveillance Court (FISC) by showing probable cause to believe that the target is “a foreign power or agent of a foreign power” and is using facilities where the surveillance will occur. *Id.* § 1805(a)(3)(A), (B). The definition of a foreign power includes “a group engaged in international terrorism or activities in preparation therefor.” *Id.* § 1801(a)(4). An agent of a foreign power can include a U.S. citizen who “knowingly engages in . . . international terrorism, or activities that are in preparation therefor.” *Id.* § 1801(b)(2)(C).

Furthermore, the USA PATRIOT Act reduced the standard for obtaining an order authorizing electronic surveillance under FISA. An official need only certify that “a significant purpose” – rather than “*the* purpose” – of conducting the surveillance is to gather foreign intelligence information. USA PATRIOT Act, § 218, Pub. L. 107-56, 115 Stat. 272, 291 (emphasis added), *codified at* 50 U.S.C. § 1804(a)(7)(B). The law now permits a relatively free flow of information between intelligence and criminal investigators. *See In re Sealed Case*, 310 F.3d 717, 734-35 (For. Intel. Surv. Ct. Rev. 2002); *Oversight of the USA PATRIOT Act: Hearing Before the Senate Judiciary Comm.*, 109th Cong. 7 (2005) (statement of Alberto R. Gonzales, U.S. Attorney General).<sup>9</sup> As a result, surveillance under FISA has increased dramatically. Last year, the government submitted 1,758

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<sup>9</sup> Similarly, the USA PATRIOT Act relaxed the requirements of grand jury secrecy and the confidentiality of intercepted communications, to permit criminal investigators to share relevant information with intelligence agents. USA PATRIOT Act § 203(a), 115 Stat. at 278-80 (permitting disclosure of grand jury materials when matters involve foreign intelligence or counterintelligence), *codified at* Fed. R. Crim. P. 6(e)(3)(D); USA PATRIOT Act § 203(b)(1), 115 Stat. at 280 (allowing government officials to disclose contents of intercepted communications if contents include foreign intelligence or counterintelligence), *codified at* 18 U.S.C. § 2517(6).

FISA applications for electronic surveillance and physical searches, almost double the number sought in 2001, and the FISC granted every one. See Letter from William E. Moschella, Ass't Attorney General, Office of Legislative Affairs, to J. Dennis Hastert, Speaker of the U.S. House of Representatives (April 1, 2005), <http://www.fas.org/irp/agency/doj/fisa/2004rept.pdf>

Importantly, both Title III and FISA allow the government to conduct emergency surveillance for a period of time without a court order if the need is so pressing that there is no time to obtain court approval. 50 U.S.C. § 1805(f); 18 U.S.C. § 2518(7). According to FBI Director Robert S. Mueller, the government has made extensive use of these emergency provisions against terrorists. *The War Against Terrorism – Working Together to Protect America: Hearing Before the Senate Comm. on the Judiciary*, 108th Cong. 16 (2003) (statement of FBI Director Mueller).

Investigators may also record the receipt and transmission of electronic data such as telephone records, e-mail, and Internet usage through a court order authorizing pen registers and trap and trace devices. 18 U.S.C. § 3127(3)-(4). To obtain such an order, the government need only assert that the information is relevant to a criminal investigation or to protect against international terrorism. 18 U.S.C. § 3123(a); 50 U.S.C. § 1842(a), (c)(2).

### 3. *Physical Searches*

The government's authority to obtain warrants, based on probable cause, to search for and seize evidence of a crime is well established. U.S. Const. amend. IV; *Illinois v. Gates*, 462 U.S. 213, 243-46 (1983); Fed. R. Crim. P. 41(d). Probable cause is a "practical, nontechnical conception that deals with the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act." *Maryland v. Pringle*, 540 U.S. 366, 370

(2003) (internal quotations omitted). It is not “comparable to the standards of proof beyond a reasonable doubt or of proof by a preponderance of the evidence.” *Ornelas v. United States*, 517 U.S. 690, 696 (1996). Searches may be conducted incident to law enforcement actions such as a routine traffic stop. See *Illinois v. Caballes*, 543 U.S. 405, 125 S. Ct. 834, 838 (2005). The government need not show probable cause to conduct searches at the border. See *United States v. Flores-Montano*, 541 U.S. 149, 152-53 (2004).

In the case of international terrorism, the government can also obtain search warrants under FISA. The same requirements for electronic surveillance in normal and exigent circumstances, see Section I.A.2. *supra*, apply to physical searches under FISA. 50 U.S.C. §§ 1823(a)(7)(B), 1824(a)(3). To protect national security and avoid alerting the targets of FISA searches, the government may execute search warrants in secret. See 50 U.S.C. § 1824(a) (authorizing *ex parte* order approving FISA physical search); *id.* § 1822(4)(A)(i) (court may order landlord or custodian to furnish assistance “necessary to accomplish the physical search in such a manner as will protect its secrecy”). Indeed, even in the case of traditional criminal searches, the USA PATRIOT Act permits a court to delay notifying a target of the search to protect an investigation. USA PATRIOT Act § 213, 115 Stat. at 285-86, *codified at* 18 U.S.C. § 3103a(b).

#### 4. *Obtaining Records*

The government has far-reaching powers to obtain records and evidence. It may use the grand jury process to issue subpoenas and elicit information about potential terrorist threats. There is no probable cause requirement for a grand jury subpoena, on the theory that the “identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury’s labors, not at the beginning.” *Blair v. United States*,

250 U.S. 273, 282 (1919). Hence, the potential scope of a grand jury's inquiry is quite broad. *United States v. R. Enters., Inc.*, 498 U.S. 292, 301 (1991) (records subpoenaed by a grand jury must be produced unless there is "no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation").

Similar broad power exists in intelligence and international terrorism investigations. FISA permits the FBI to seek an order for "the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information . . . or to protect against international terrorism." 50 U.S.C. § 1861(a)(1). Disclosure of the order, even by the recipient, is prohibited. *Id.* § 1861(d).

In terrorism investigations the government may also obtain certain types of records without a court order by the use of so-called "national security letters." For example, the FBI has the right to obtain financial records by certifying that they are sought for "foreign counter intelligence purposes to protect against international terrorism or clandestine intelligence activities." 12 U.S.C. § 3414(a)(1)(A)-(C), (a)(5)(A).<sup>10</sup> As under FISA, a government request under this provision may not be disclosed. *Id.* § 3414(a)(3), (a)(5)(D). National security letters may also be used to obtain credit records and transactional records of wire and electronic communications. 15 U.S.C. § 1681u; 18 U.S.C. § 2709(a). *But see Doe v. Ashcroft*, 334 F. Supp. 2d 471, 526-27

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<sup>10</sup> Recent legislation greatly broadened the range of "financial institutions" from which records may be obtained by national security letter to include currency exchanges, travel agencies, pawnbrokers, casinos, and the U.S. Postal Service. See Intelligence Authorization Act for Fiscal Year 2004 § 374(a), Pub. L. 108-177, 117 Stat. 2599, 2628 (2003), *codified at* 12 U.S.C. § 3414(d).

(S.D.N.Y. 2004) (enjoining FBI officials from issuing national security letters under 18 U.S.C. § 2709).

### 5. *Interviews and Interrogation*

The government may obtain information by questioning persons who may be associated with, or have information about, terrorists. There is, of course, no restriction on the government's ability to question persons in a non-coercive setting. *See, e.g., Florida v. Royer*, 460 U.S. 491, 497-98 (1983). If there is a reasonable suspicion of criminal activity, an agent may briefly detain a person for questioning and ask for his or her identity. *Terry v. Ohio*, 392 U.S. 1, 23-24 (1968); *Hiibel v. Sixth Jud. Dist. Ct. of Nevada*, 542 U.S. 177, 187 (2005). Persons who have been taken into custody can be questioned after they have been given the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966) and in the presence of counsel, if requested.<sup>11</sup>

### **B. Current Tools to Apprehend Terrorists**

The government has a variety of authorities under which it can detain those suspected of posing a threat to the United States. Most obviously, a person can be arrested if there is probable cause to believe that he or she has committed a crime. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). There is a rebuttable presumption that those charged with federal crimes of terrorism should be detained

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<sup>11</sup> In a study of interrogation of criminal suspects, over three-quarters of the suspects waived their *Miranda* rights, and almost two-thirds provided incriminating information after being warned. Richard A. Leo, *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266, 276 tbl. 3, 280-81 tbl. 7 (1996). Many terrorists who have been arrested and provided counsel have decided to cooperate and provide valuable information to the government. *See* pp. 16-17 *infra*.

pretrial. 18 U.S.C. § 3142(e). Numerous federal statutes provide for prosecution of those who commit terrorist acts.<sup>12</sup>

In recent years, Congress has expanded the government's authority to prosecute would-be terrorists *before* they strike. It has enacted prohibitions on providing or concealing "material support or resources" when intended for use in preparing or carrying out a terrorist offense, 18 U.S.C. § 2339A; on providing "material support or resources" to a foreign terrorist organization, *id.* § 2339B;<sup>13</sup> on providing or collecting funds intending that they will be used to carry out a terrorist act, *id.* § 2339C; and on receiving "military-type training" from a terrorist organization, *id.* § 2339D. Notably, "material support" for terrorism includes not only weapons and personnel, but also training, safehouses, lodging, false documentation, communications equipment, financial services, currency, and tangible or intangible property. *Id.* § 2339A(b).<sup>14</sup>

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<sup>12</sup> See, e.g., 18 U.S.C. § 32 (destruction of aircraft or aircraft facilities); *id.* § 844 (manufacture and handling of explosive materials); *id.* § 924(c)(1)(A)(iii) (possession of firearms in furtherance of crimes of violence); *id.* § 1111 (murder committed while conducting espionage or sabotage); *id.* § 1113 (attempt to commit murder or manslaughter within special maritime or territorial jurisdiction); *id.* § 1114 (murder of federal officer or employee); *id.* § 1117 (conspiracy to murder a U.S. person, U.S. officer, or foreign official); *id.* § 2332 (attempted homicide of U.S. national outside the U.S.); *id.* § 2332a(a)(1) (use of certain weapons of mass destruction); *id.* § 2332b (acts of terrorism transcending national boundaries); *id.* § 2381 (treason); *id.* § 2384 (seditious conspiracy); 49 U.S.C. § 46502 (aircraft piracy); *id.* § 46504 (interference with flight crew members and attendants).

<sup>13</sup> As of October 2005, the Secretary of State had identified 42 groups as foreign terrorist organizations, including al Qaeda. See Dep't of State, Fact Sheet, Foreign Terrorist Organizations (Oct. 11, 2005), *available at* <http://www.state.gov/s/ct/rls/fs/37191.htm>.

<sup>14</sup> In three years following the September 11 attacks, the Justice Department charged over 50 defendants with material support offenses.

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The government has also relied on the International Emergency Economic Powers Act (IEEPA)<sup>15</sup> to promulgate far-reaching regulations to disrupt the funding of terrorist activity. Continuation of Emergency With Respect to the Taliban, 66 Fed. Reg. 35,363 (June 30, 2001). Under IEEPA regulations, “no U.S. person may deal in property or interests in property of a specially designated terrorist, including the making or receiving of any contribution of funds, goods, or services to or for the benefit of a specially designated terrorist.” 31 C.F.R. § 595.204 (2005).<sup>16</sup> Violations of the IEEPA regulations are felonies. 50 U.S.C. § 1705(b). The government can also freeze accounts or seize property belonging to terrorist organizations when these items come within the United States or within the possession of a United States citizen. 31 C.F.R. § 595.201. Since the September 11 attacks, the government has charged more than 100 persons with terrorist financing-related crimes and frozen \$136 million in assets worldwide. Dep’t of Justice, Preserving Life and Liberty: Waging War on Terror, [http://lifeandliberty.gov/subs/a\\_terr.htm](http://lifeandliberty.gov/subs/a_terr.htm).

U.S. citizens associating themselves with terrorist groups will often be subject to prosecution under other statutes as well. The seditious conspiracy statute prohibits

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*Aiding Terrorists – An Examination of the Material Support Statute: Hearings Before the Senate Judiciary Comm.*, 108th Cong. (2004) (statement of Christopher Wray, Assistant Attorney General), available at [http://judiciary.senate.gov/testimony.cfm?id=1172&wit\\_id=3391](http://judiciary.senate.gov/testimony.cfm?id=1172&wit_id=3391).

<sup>15</sup> 50 U.S.C. § 1701(a) (providing the President with broad authority “to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States if the President declares a national emergency with respect to such threat”).

<sup>16</sup> See *United States v. Lindh*, 212 F. Supp. 2d 541, 560-64 (E.D. Va. 2002) (upholding IEEPA regulations in prosecution of American who fought alongside Taliban in Afghanistan).

plotting to overthrow the United States or levying war against the nation. 18 U.S.C. § 2384. The Neutrality Act of 1794 prohibits various acts of war against entities with whom the United States is at peace. 18 U.S.C. §§ 958-962. The reach of these statutes is not limited to traditional conflicts between nations; it extends to terrorist activities.<sup>17</sup>

Finally, other statutes of more general applicability also reach inchoate terrorist activity. *See, e.g.*, 18 U.S.C. § 371 (conspiracy to violate federal law); *id.* § 1203(a) (conspiracy to take hostages); *id.* § 2332a(a)(1) (attempted use of a weapon of mass destruction). Hence, the government need not await the actual commission of violence to arrest, prosecute, and convict a would-be terrorist.

When there is insufficient evidence to charge a citizen with a crime, the material witness statute permits the detention of a person whose testimony is “material in a criminal proceeding” if “it may become impracticable to secure the presence of the person by subpoena.” 18 U.S.C. § 3144. For a grand jury witness, the required showing can be made by a good faith statement by a prosecutor or investigating agent that the witness has information material to the grand jury and is a flight risk. *United States v. Awadallah*, 349 F.3d 42, 49-64 (2d Cir. 2003), *cert. denied*, -- U.S. --, 125 S. Ct. 861 (2005).

Because of the broad scope of grand jury investigations, the government can detain a suspected terrorist as a material witness to secure his or her testimony before it has evidence sufficient to support a criminal arrest

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<sup>17</sup> *See, e.g., United States v. Rahman*, 189 F.3d 88, 123 (2d Cir. 1999), *cert. denied*, 528 U.S. 1094 (2000) (seditious conspiracy); *United States v. Khan*, 309 F. Supp. 2d 789, 824-26 (E.D. Va. 2004) (Neutrality Act, 18 U.S.C. § 2390).

or indictment.<sup>18</sup> If further investigation reveals evidence that the witness was actually part of a terrorist conspiracy or has committed perjury before the grand jury, he or she may be re-arrested as a criminal suspect, without the necessity of release. *See Awadallah*, 349 F.3d at 47, 63, 70; *In re Material Witness Warrant (Doe)*, 213 F. Supp. 2d 287, 303 (S.D.N.Y. 2002) (citing *United States v. Regan*, 103 F.3d 1072, 1079 (2d Cir. 1997)).<sup>19</sup>

### C. Current Tools to Prosecute Terrorists

Federal law recognizes the importance of balancing the constitutional rights of criminal defendants with the government's legitimate interests in protecting national security. Federal grand jury proceedings, and proceedings ancillary to the grand jury, are secret. Fed. R. Crim. P. 6(e); *see In re Newark Morning Ledger*, 260 F.3d 217, 226 (3d Cir. 2001). In many circumstances, the government is permitted to withhold the identity of informants altogether. *See, e.g., Roviato v. United States*, 353 U.S. 53, 59-61 (1957). And, as happened in this case, courts will frequently permit the government to file papers under seal if disclosure of the information in those papers could harm national security. *See, e.g., United States v. Ressam*, 221 F. Supp. 2d 1252, 1264 (W.D. Wash. 2002) (denying press requests to unseal classified documents).

The government need not fear that it will be forced to trial when national security considerations would interfere

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<sup>18</sup> *See Padilla v. Rumsfeld*, 352 F.3d 695, 699-700 (2d Cir. 2003); *Awadallah*, 349 F.3d at 47; *In re Material Witness Warrant (Doe)*, 213 F. Supp. 2d 287, 288 (S.D.N.Y. 2002).

<sup>19</sup> For example, Terry Nichols, one of the perpetrators of the Oklahoma City bombing, was initially arrested and detained as a material witness, and was not actually charged with the crime for 18 days. *In re Material Witness Warrant (Nichols)*, 77 F.3d 1277, 1278-79 (10th Cir. 1996).

with the prosecution of its case. Under the Speedy Trial Act, a court has the authority to order a continuance in several circumstances: when an essential witness resists testifying, 18 U.S.C. § 3161(h)(3)(A), (B); if evidence of the offense is being sought in a foreign country, *id.* § 3161(h)(9); or in furtherance of “the ends of justice,” *id.* § 3161(h)(8)(A).

The Classified Information Procedures Act (CIPA), 18 U.S.C. App. III, gives federal courts the power to protect classified materials during criminal prosecutions.<sup>20</sup> CIPA permits courts to authorize the government to delete classified information from materials disclosed to the defense, to substitute a summary of classified documents, or to substitute admissions regarding the relevant facts that the classified information would tend to prove. *Id.* § 4. The court may sanction the government if no adequate substitute can be found, *id.* § 6(e)(2), but charges are rarely dismissed.<sup>21</sup>

## **II. THE POWER ASSERTED BY THE PRESIDENT TO DETAIN AMERICAN CITIZENS IS UNWARRANTED.**

Through the past decade and certainly the last four years, the government has used the laws described above not only to identify, arrest, and punish persons who have

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<sup>20</sup> CIPA’s constitutionality has been upheld. *See, e.g., United States v. Yunis*, 924 F.2d 1086, 1094 (D.C. Cir. 1991); *United States v. Lee*, 90 F. Supp. 2d 1324, 1326-29 (D.N.M. 2000); *United States v. Poindexter*, 725 F. Supp. 13, 33-35 (D.D.C. 1989). *But cf. Crawford v. Washington*, 541 U.S. 36, 68-69 (2004) (holding that Confrontation Clause generally prevents use of testimonial statements by prosecution when defendant lacks opportunity to cross-examine witness).

<sup>21</sup> Comm. on Communications and Media Law, *The Press and The Public’s First Amendment Right of Access to Terrorism on Trial: A Position Paper*, 57 *The Record* 94, 162 n.263 (2002) (finding only one case in which court dismissed charges pursuant to CIPA).

committed terrorist acts,<sup>22</sup> but to disrupt and thwart terrorism before it occurs. In December 2004, the Attorney General noted that the Justice Department had brought 375 terrorism-related criminal charges and had secured 195 convictions or guilty pleas. Attorney General John Ashcroft, End of Year Address to Department of Justice (Dec. 10, 2004), *available at* <http://www.usdoj.gov/archive/ag/speeches/2004/121004endofyearaddress.htm>. A partial listing of cases illustrates the effectiveness of the investigative and enforcement tools we have described:

- Sheikh Omar Abdel Rahman and his followers were convicted of plotting a “day of terror” against New York City landmarks, including the United Nations building, the Lincoln and Holland Tunnels, and the George Washington Bridge. The government used physical surveillance, search warrants, and informants to track the activities of this group, and arrested them when they had begun building an explosive device. *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999), *cert. denied*, 528 U.S. 1094 (2000).
- Ahmed Ressam, the so-called “Millennium Bomber,” was arrested in December 1999 as he attempted to enter the United States in a rental car containing homemade explosives and timers. Ressam pled guilty and cooperated extensively with the government in its prosecution of others involved in the planned attacks. He also provided information about al Qaeda and its

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<sup>22</sup> See, e.g., *United States v. Yousef*, 327 F.3d 56 (2d Cir.), *cert. denied*, 540 U.S. 933 (2003) (affirming convictions of defendants involved in 1993 World Trade Center bombing and conspiracy to hijack airliners); *United States v. Salameh*, 152 F.3d 88 (2d Cir. 1998), *cert. denied*, 526 U.S. 1028 (1999) (affirming convictions of defendants involved in 1993 World Trade Center bombing); *Kasi v. Virginia*, 508 S.E.2d 57 (Va. 1998), *cert. denied*, 527 U.S. 1038 (1999) (affirming conviction of defendant who murdered CIA employees).

training camps in Afghanistan and identified potential terrorists.<sup>23</sup>

- Iyman Faris pled guilty to providing material support for terrorism. Faris visited an al Qaeda training camp in Afghanistan and investigated the destruction of bridges in the United States by severing their suspension cables. The government developed evidence through physical and electronic surveillance and a search of his residence. After his arrest Faris cooperated with investigators, leading to the indictment of Nuradin Abdi for plotting to blow up a shopping mall in Columbus, Ohio.<sup>24</sup>
- Ahmed Omar Abu Ali, an American citizen, was convicted of conspiracy for plotting with Al Qaeda operatives to assassinate President Bush and hijack airplanes in the United States. The government's case relied on a voluntary confession that Abu Ali made to Saudi Arabian authorities.<sup>25</sup>

As this discussion demonstrates, there is both a robust legal framework to combat terrorism and a demonstrated history of success without resort to the extraordinary power claimed here by the Executive. Indeed, the government has effectively used the authorities discussed above to deal with Mr. Padilla himself.

Mr. Padilla was initially arrested on May 8, 2002, pursuant to a material witness warrant. Pet. App. 9a. The

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<sup>23</sup> See Blaine Harden, *U.S. Contests Terrorist's Request for Reduced Sentence*, Wash. Post, Apr. 27, 2005, at A9.

<sup>24</sup> See *Somali Native Charged With Plotting to Blow Up Shopping Mall*, Associated Press, June 14, 2004; Jerry Markon, *Ohio Man Gets 20 Years for Al Qaeda Plot*, Wash. Post, Oct. 29, 2003, at A2.

<sup>25</sup> See David Stout, *Student From Virginia Is Convicted of Plotting With Al Qaeda to Assassinate Bush*, N.Y. Times, Nov. 23, 2005, at A20.

court issued the warrant based upon an affidavit from an FBI agent averring that Padilla possessed knowledge of facts relevant to a grand jury investigation of the September 11 attacks. *Padilla v. Bush*, 233 F. Supp. 2d 564, 571 (S.D.N.Y. 2002). The affidavit was sealed by the District Court and remains under seal. Mr. Padilla was in federal custody in New York, and posed no threat to the United States, when the President designated Mr. Padilla an “enemy combatant” and directed the Secretary of Defense to take possession of him. Pet. App. 9a. The facts alleged by the government at the time were more than sufficient to support serious criminal charges, including providing material support to terrorist organizations, 18 U.S.C. § 2339B; providing material support to terrorists, *id.* § 2339A; conspiracy to use a weapon of mass destruction, 18 U.S.C. § 2332a; and attempted use of a weapon of mass destruction, *id.* § 2332a(a)(1). Mr. Padilla’s history of travel outside the United States, previous criminal record, and terrorism-related activities clearly would have justified pretrial detention. 18 U.S.C. § 3142(e).

On November 17, 2005 – after more than three years of Mr. Padilla’s detention as an “enemy combatant” – the government secured a criminal indictment against Mr. Padilla. Based on alleged conduct from 1996 to 2000, the indictment charged him with conspiracy to murder, kidnap, and maim persons in a foreign country, conspiracy to provide material support to terrorists, and providing material support to terrorists. Superseding Indictment, *United States v. Hassoun*, No. 04-60001 (S.D. Fla. Nov. 17, 2005). At the press conference announcing the indictment, Attorney General Alberto Gonzales declared that the criminal case relied on FISA intercepts and several provisions of the USA PATRIOT Act. Tr. of Dep’t of Justice News Briefing on Indictment of Jose Padilla (Nov. 22, 2005) (Westlaw, Allnewsplus Library) (“[C]learly the Patriot Act was important in the investigation and prosecution of this case.”).

In short, the laws passed by Congress provided an ample basis to detain Mr. Padilla, to interrogate him, and to keep him from carrying out any violent acts against the United States or any of its citizens. It is difficult to imagine circumstances in which a terrorist would meet the standards for designation as an “enemy combatant” described by the government and not be subject to arrest as a material witness or a suspected criminal.

The difference between what the government did in this case between June 2002 and November 2005, and what existing law authorizes it to do, is one of accountability and transparency. The government could have continued to detain Mr. Padilla under existing law, but would have been required to justify the detention to a court in an adversary proceeding, based on the traditional probable cause standard. The government could have questioned Mr. Padilla, but would have had to secure the consent of his lawyer to do so. The government could have convicted and imprisoned him, but would have had to do so after a trial in District Court. By denying him these protections for over three years, the Executive Branch claimed a virtually unlimited right to arrest citizens within the United States based solely upon the President’s determination that they are “enemy combatants,” and to imprison them for an indefinite period of time without meaningful judicial review.

Amici do not question the power of the President, as Commander in Chief, to detain persons, even citizens, seized on an active field of battle. We recognize that the President has broad authority during a time of war or threat to the security of our Nation. *See, e.g., The Prize Cases*, 67 U.S. (2 Black) 635 (1862). But the exigencies of the battlefield present a vastly different circumstance than the bustle of O’Hare Airport or a federal correctional institution. There is no risk in this case that “military officers who are engaged in the serious work of waging battle would be unnecessarily and



dangerously distracted by litigation half a world away, and discovery into military operations would both intrude on the sensitive secrets of national defense and result in a futile search for evidence buried under the rubble of war.” *Hamdi*, 542 U.S. at 531-32. To conclude that Mr. Padilla was a battlefield combatant, as the appellate court did here, would vastly expand the scope of Executive authority and eviscerate the narrow lines that this Court drew in *Hamdi*.

If additional authority to detain citizens is necessary to prevent terrorist acts, that authority should come through congressional action – where the boundaries of power can be defined, the terms of detention can be set, and the procedure can be subject to judicial oversight. This Court has never written “a blank check for the President,” even in a time of war. *Hamdi*, 542 U.S. at 536. It should not do so now.

### CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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## **APPENDIX**

### **Amici Curiae in Support of Petitioner**

*JANET RENO* served as Attorney General of the United States from 1993 to 2001. After working for three years in the Dade County State Attorney's Office in Florida, she became State Attorney for Dade County in 1978. She served in that office until she became Attorney General.

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*ERIC H. HOLDER, JR.* was Deputy Attorney General of the United States from 1997 to 2001, and Acting Attorney General in 2001. For over 20 years, he was a trial attorney in the Criminal Division of the Department of Justice. In 1988, he became an Associate Judge on the Superior Court for the District of Columbia. From 1993 to 1997, he served as the United States Attorney for the District of Columbia.

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