No. 08-368

In The Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,

Petitioner,

v.

COMMANDER DANIEL SPAGONE,
U.S.N., Consolidated Naval Brig.

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

BRIEF OF THE CATO INSTITUTE, THE CONSTITUTION PROJECT, AND THE RUTHERFORD INSTITUTE, AS *AMICI CURIAE* IN SUPPORT OF REVERSAL

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QUESTION PRESENTED

Whether the Executive's use of military power inside the United States to detain, without charge or trial, a person who is lawfully in the United States violates the Constitution where Congress has not expressly authorized such detention.

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BRIEF OF THE CATO INSTITUTE, THE CONSTITUTION PROJECT, AND THE RUTHERFORD INSTITUTE, AS *AMICI CURIAE* IN SUPPORT OF REVERSAL

The Cato Institute, The Constitution Project, and The Rutherford Institute respectfully submit this brief as *amici curiae* in support of reversal.

INTERESTS OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Toward those ends, the Cato Institute publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs with the courts. Because the instant case raises vital questions about separation of powers principles, this case is of central concern to the Cato Institute.

The Constitution Project is an independent, bi-partisan think tank which creates coalitions of

[1] Pursuant to Rule 37.3(a), letters from the parties consenting to the filing of this brief are being filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

respected leaders from across the political spectrum to issue consensus recommendations for policy reforms. The Project's Liberty and Security Committee—a bipartisan, blue-ribbon group of prominent Americans—addresses the importance of preserving both national security and civil liberties. In July 2004, this committee issued a *Report on Post-9/11 Detentions* in which its signatories urged that "[a]ny detention of a citizen or non-citizen in the United States must be expressly authorized by congressional statute or by the law of war," and that "[t]he courts of the United States must be available to hear claims of detainees that they are being held or treated in violation of the law."[2] In addition, in 2005, the Project's bipartisan War Powers Committee released *Deciding to Use Force Abroad: War Powers in a System of Checks and Balances*, a report analyzing the respective powers of all three branches of government during wartime.[3]

The Rutherford Institute is an international civil liberties organization that was founded in 1982 by its President, John W. Whitehead. The Rutherford Institute specializes in providing legal representation

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[2] Liberty & Security Initiative, The Constitution Project, *Report on Post-9/11 Detentions* 20 (2004). The report and the attached list of signatories are available at http://www.constitutionproject.org/pdf/report_on_post_9_11_detentions.pdf.

[3] The report and list of signatories are available at http://www.constitutionproject.org/pdf/War_Powers_Deciding_To_Use_Force_Abroad.pdf.

without charge to individuals whose civil liberties are threatened or violated and in educating the public about constitutional and human rights issues. During its 26-year history, attorneys affiliated with The Rutherford Institute have represented numerous parties before this Court. The Institute has also filed *amicus curiae* briefs in cases dealing with important constitutional issues arising from the current efforts to combat terrorism. *See, e.g.*, *Munaf v. Geren*, 128 S. Ct. 2207 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Rasul v. Bush*, 542 U.S. 466 (2004).

SUMMARY OF ARGUMENT

The government has claimed, and the fractured *en banc* Fourth Circuit erroneously concluded, that the President has authority to use the military to detain, without charge or trial, persons who are lawfully in the United States and who have allegedly engaged in terrorism-related conduct.

There is no such authority—not in any Act of Congress nor in the Constitution. Thus, neither the government's claim nor the ruling below can be sustained.

A.

The government has pointed to the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001), as the source of congressional authorization for its use of the military for domestic detention, but that statute is silent on the issue and

speaks only in general terms about use of military force. It does not satisfy the Court's clear statement rule that requires Congress to expressly authorize the Executive's use of military detention power in lieu of civilian criminal prosecution within the domestic sphere. This Court has never inferred such an authorization from general declarations of military force by Congress.

This Court's conclusion in *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004), that the AUMF implicitly authorizes certain military detentions does not govern the instant case because the ruling in *Hamdi* applies only to the military detention of persons taken prisoner on a foreign battlefield, inside a zone of active combat. *Hamdi* does not extend to the military detention of individuals who are lawfully in the United States, far from the foreign battlefield.

It is the USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, that granted the Executive authority to detain terrorism suspects present in the United States. Congress considered the Patriot Act contemporaneously with the AUMF and enacted it a few weeks later. The Patriot Act does not authorize Executive detention in the United States *by use of the military* without charge or trial, and the government makes no such contention.

The government's reading of the AUMF to authorize the domestic military detention it seeks in this case would render superfluous Congress's enactment of the more specific domestic detention

provisions of the Patriot Act. The legislative history of the Patriot Act demonstrates that Congress intended the Patriot Act, not the AUMF, to provide the President with detention power over terror suspects who are in the United States lawfully. It also demonstrates that Congress considered—and declined to grant—the military detention power that the government now claims.

B.

Lacking express congressional authorization, the government has asserted that the Executive has the inherent authority under the Commander-in-Chief Clause in Article II of the Constitution to use the military to detain persons who are lawfully in the United States. But the Commander-in-Chief Clause grants no such authority. Under the Constitution, the use of military power is a shared responsibility between the Legislature and the Executive, and even the President's broad power to wage war overseas as Commander-in-Chief requires congressional authorization.

This constitutional diffusion of government power regarding the use of the military reflects the Framers' desire to guard against any threats to democratic government posed by standing armies controlled by a potentially tyrannical Executive. And this constitutional structure confirms the need for explicit authorization from Congress for the President

to use the military to detain without charge or trial persons who are lawfully in the United States.

C.

Allowing the Executive to use the military to detain, without charge or trial, persons who are lawfully in the United States could give rise to manipulation of the civilian criminal justice system. Such manipulation threatens the constitutionally protected liberty of every person who is lawfully in the United States, including American citizens.

ARGUMENT

THE EXECUTIVE'S USE OF MILITARY POWER TO DETAIN WITHOUT CHARGE OR TRIAL PERSONS WHO ARE LAWFULLY IN THE UNITED STATES IS NOT AUTHORIZED BY CONGRESS OR BY THE CONSTITUTION

It is well settled that, under our constitutional system of disaggregated government power, the authority of the Executive, even in wartime, must derive either from an act of Congress or from the Constitution. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). This is so because "the Constitution diffuses power * * * to secure liberty." *Id.* at 635 (Jackson, J., concurring).

Consistent with that basic tenet, this Court has repeatedly viewed with great suspicion any attempt

by the Executive to exercise its power to use the military in the domestic sphere without congressional authorization. Moreover, this Court has recognized that the preservation of individual rights requires strict enforcement of the checks-and-balances in our constitutional system, by requiring a clear statement from Congress or explicit constitutional authority derived from Article II, before the President may use military power against persons who are lawfully in the United States.

These fundamental separation-of-powers principles require that the judgment of the court of appeals be reversed. The deeply fractured Fourth Circuit *en banc* court was wrong when it concluded that "Congress has empowered the President to detain [petitioner] as an enemy combatant." Pet. App. 7a. It was wrong because the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF), on which it relied, does not expressly grant the President the authority to use the military to detain without charge or trial persons who are lawfully in the United States, far from the foreign battlefield. Lack of express congressional authorization is fatal to the government's case because the President's authority as Commander-in-Chief under Article II provides no such power.

A. Congress Has Not Authorized The Executive To Use The Military To Detain Without Charge Or Trial Persons Who Are Lawfully In The United States

1. The AUMF does not authorize such detention

The Executive has erred in its claim that the AUMF grants it the power to use the military to detain as "enemy combatants," without charge or trial, persons who are lawfully in the United States.

The AUMF was passed by Congress on September 14, 2001, as an immediate response to the September 11th terrorist attacks against the United States. The AUMF provides the President with the authority

> 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.

§ 2(a), 115 Stat. at 224.

This plain language does not support the ruling below. The AUMF is a general authorization for the use of military force. It does not explicitly authorize the President to use the military to detain without

charge or trial persons who are lawfully in the United States.

2. The court of appeals' ruling violates longstanding principles that require a clear statement from Congress when it authorizes the Executive to curtail individual rights

a. The government has argued that this Court should infer from the circumstances surrounding enactment of the AUMF congressional authorization for the domestic military detention power claimed here. *See* Br. in Op. 23. But this Court's clear statement requirement plainly precludes any such inference.

For more than 60 years, this Court has held that grants of power to the Executive that have the potential to weaken or remove enshrined constitutional protections—such as the right not to be detained by the military without due process (the right at issue here)—must be clearly stated by Congress. *See Ex parte Endo*, 323 U.S. 283, 300 (1944) ("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." (emphasis added)).

This requirement of a clear statement from Congress "facilitates a dialogue between Congress

and the Court," *Boumediene v. Bush*, 128 S. Ct. 2229, 2243 (2008), and it serves as a critical check on the overreaching that is threatened by the President's use of military power to detain persons who are lawfully in the United States. *See Kent v. Dulles*, 357 U.S. 116, 129 (1958) ("We hesitate to find in [a] broad generalized power an authority to trench so heavily on the rights of the citizen."); *Greene v. McElroy*, 360 U.S. 474, 506 (1959) (holding that clear statements are required "not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws." (citation omitted)).

This Court has not hesitated to adhere to the clear statement requirement to preclude domestic military detention of persons during times of national crisis. In *Ex parte Endo*, this Court held that a statute that ratified an executive order directing the "exclu[sion]" of persons of Japanese ancestry from the West Coast during World War II was not sufficiently explicit with regard to "detention" as to authorize the military internment of loyal, law-abiding United States citizens, or to support inferring such internment authority. *See* 323 U.S. at 300 ("In interpreting a war-time measure we must assume that [Congress's] purpose was to allow for the greatest possible accommodation between * * * liberties and the exigencies of war.").

Similarly, in *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), this Court refused to construe Congress's statutory authorization for the governor of Hawaii to declare "martial law" when there was an imminent threat of a military invasion as a grant of power for the governor to use military tribunals to resolve domestic criminal cases after the attack on Pearl Harbor. *See id.* at 316-317, 324 (refusing to assume that, by explicitly authorizing the imposition of "martial law," Congress intended to permit the governor to transgress the "boundaries between military and civilian power, in which our people always believed" and "which ha[ve] become part of our political philosophy and institutions").

Congress has acted in accordance with the clear statement requirement on other occasions when it has used clear and unmistakable language to vest the Executive with the power to detain persons who are lawfully residing in the United States, and even when such detention involves the use of civilian authority. In the Emergency Detention Act of 1950, ch. 1024, tit. II, § 100, 64 Stat. 1019 (EDA) (codified at 50 U.S.C. §§ 811-826 (1970)) (repealed 1971), for example, Congress explicitly authorized the Attorney General to "apprehend and by order detain * * * each person as to whom there is reasonable grounds to believe * * * probably will engage in, or probably will conspire with others to engage in, acts of espionage or sabotage." *Id.* § 103, 64 Stat. at 1021; *see also* the Alien Enemy Act, ch. 66, 1 Stat. 577 (1798) (codified at 50 U.S.C. § 21) (authorizing the President to

apprehend, restrain, secure, and remove resident aliens who are inside the United States if their home country is in a declared war with the United States).

Moreover, when Congress expressly authorizes detention by the Executive it typically provides explicit procedural safeguards, such as preliminary hearings and ongoing judicial review. *See*, *e.g.*, 18 U.S.C. § 3142(f) (mandating a judicial hearing—with the right to be represented by counsel, to testify, to present witnesses, and to cross-examine witnesses—within five days of a detention on a material witness warrant under 18 U.S.C. § 3144); EDA, §§ 102(b), 104(d), 109(b), 111, 64 Stat. at 1021-1029 (requiring a public presidential proclamation of an "Internal Security Emergency" to trigger the Act's detention provisions, which mandate a preliminary hearing within a reasonable time, provide an opportunity to consult counsel and to cross-examine witnesses, and permit appellate review by an executive board within 45 days, subject to further review by a court on appeal or via *habeas corpus*).

The AUMF fails to satisfy the clear statement mandate because nothing in the text comes close to authorizing the President to do what the ruling below allows; namely, to use the military to detain persons who are lawfully in the United States apart from the criminal justice system and to subject them to such ongoing detention without charge or trial. In addition, the text of the AUMF does not provide any procedural safeguards whatsoever for persons whom

the Executive chooses to detain through domestic use of the military—a silence that speaks volumes about the fact that Congress did not intend the AUMF to authorize the Executive to have the power to impose military detention without charge or trial on persons who are lawfully in the United States.

b. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), is not to the contrary. In *Hamdi*, a plurality of the Court concluded that the AUMF authorizes the military detention without charge or trial of persons who are captured on a foreign battlefield while actively taking up arms against the United States. The plurality opinion made clear that its conclusion followed *only* from "the narrow circumstances alleged" in that case. *Id.* at 509. That ruling cannot be viewed as controlling with regard to persons who, unlike Hamdi, are lawfully in the United States at the time they are arrested and have never taken up arms against the United States on a battlefield.

As the plurality opinion emphasized, Hamdi, a United States citizen, was apprehended in Afghanistan—"a *foreign* combat zone," *id.* at 523—while he was allegedly "carrying a weapon against American troops on a foreign battlefield," *id.* at 522 n.1. Because such conduct indisputably qualified Hamdi for "enemy combatant" status under established principles of international law, *id.* at 518, the plurality concluded that the AUMF implicitly conferred on the Executive the authority to detain such individuals, even United States citizens,

apprehended under like circumstances, *see id.* at 517-518. The *Hamdi* plurality's carefully limited ruling that the AUMF authorizes the Executive to use the military to detain "individuals in the narrow category" of persons who are captured while actively fighting on a foreign battlefield against United States military forces, *id.* at 517, says nothing about whether a person who is lawfully in the United States, far from a battlefield, can be detained by the military without charge or trial, rather than being arrested and prosecuted in the civilian criminal justice system.

The *Hamdi* plurality also expressly distinguished *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), in a manner that confirms that the AUMF's detention authorization should not be construed to authorize the detention at issue in this case. *Milligan* involved the apprehension, detention, and military trial of an individual who was apprehended on peaceful territory within the United States but accused of subversive conduct in support of the Confederacy during the Civil War. This Court rejected the government's contention that, as a traditional incident of war, the Executive could convene a military tribunal to try Milligan, 71 U.S. at 131, which is essentially the same claim that the government makes here with regard to military detention. The Court in *Milligan* reasoned that the use of military authority was not proper because Milligan was not apprehended while in a State that was in rebellion, and because even dangerous and

subversive behavior on the part of a person who is lawfully in the United States does not suffice to transform peaceful territory within the United States into a battlefield. *See Ex parte Milligan*, 71 U.S. at 127 (rejecting the existence of "actual war" in Indiana because it was not subjected to foreign invasion, civil war, or an overthrow of the national authority).

Moreover, the *Hamdi* plurality specifically found that the fact that Milligan "was *not* a prisoner of war, but a resident of Indiana arrested while at home there" to be "*central*" to the Court's conclusion in *Milligan* that trial by military tribunal was improper. *Hamdi*, 542 U.S. at 522 (emphasis added). The plurality emphasized that "[h]ad Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different." *Ibid.*

3. This Court has not previously construed a general congressional authorization for the use of military force, like the AUMF, to confer upon the Executive the power to use the military to detain without charge or trial persons who are lawfully in the United States

a. The ruling below represents a sea change with regard to the scope and effect of congressional authorizations for the use of military force. This Court has never held that a general authorization to

use military force by Congress permits the Executive to use the military to detain persons who are lawfully in the United States.

As far back as the War of 1812, the Court rejected attempts by the government to use such a general authorization for use of military force as a justification to seize enemy property or persons inside the United States. In *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814), the Court addressed a declaration of war by Congress that authorized the President "to use the whole land and naval force of the United States to carry [war against the United Kingdom of Great Britain and Ireland] into effect." Declaration of War against the United Kingdom, ch. 102, 2 Stat. 755 (1812). The Court held that this general declaration was *not* sufficient to authorize the government to seize as "enemy property" in the United States certain British-owned cargo scheduled to be transported to England. The Court reasoned that the Executive's power to confiscate property, like its power to seize persons, can be asserted only "in execution of some existing law." *Brown*, 12 U.S. at 122, 123. To underscore its conclusion that the Executive "did not possess the[ ] powers [to seize property or persons] by virtue of the declaration of war," the Court relied in part on the fact that Congress had separately enacted specific legislation that authorized the military detention of enemy aliens. *Id.* at 126. Enactment by Congress of such a law to authorize detention of enemy aliens would not

have been necessary if a general declaration of war was sufficient authority for detention. *See ibid.* ("War gives an equal right over persons and property: and if its declaration is not considered as prescribing a law respecting the person of an enemy found in our country, neither does it prescribe a law for his property.").[4]

This Court's refusal to view a general authorization by Congress for the use of force as specific congressional authority for the Executive's exertion of military authority over individuals in the United States has persisted through subsequent armed conflicts. The Court consistently has maintained that Congress must expressly authorize the substitution of military process for civilian judicial process with regard to persons apprehended inside the United States. In *Ex parte Milligan*, 71 U.S. at 121-122, the Court ruled that there was no congressional authorization for military trials, and this was so despite the fact that President Lincoln's use of military power had been ratified by Congress,

[4] Notably, the *Brown* Court ruled that a general declaration authorizing military force was not sufficient to permit seizure of enemy property *even though international law clearly made such property subject to confiscation*. This renders even less persuasive the government's contention here that the broad language of the AUMF authorizes the military seizure of persons who are in the United States, far from a battlefield, and therefore do not clearly qualify as "combatants" subject to detention under international law.

see Act of 1861, ch. 63, § 3, 12 Stat. 326 (1861), and Congress had suspended the writ of habeas corpus, *see* An Act Relating To Habeas Corpus, ch. 81, 12 Stat. 755 (1863).

In *Duncan*, 327 U.S. at 324, this Court did not mention, much less examine, Congress's broad authorization for the President to use force against Japan during World War II when it held that there was no congressional authorization for the imposition of a military judicial system in Hawaii after the Pearl Harbor attack. *See Duncan*, 327 U.S. at 313, 324. Moreover, in *Ex parte Endo*, 323 U.S. at 303-304, this Court rejected the contention that Congress had authorized the Executive's detention of loyal citizens of Japanese ancestry, despite the existence of a use-of-force declaration so expansive in scope that it authorized the President "to employ the entire naval and military forces of the United States and the resources of the Government" in the war against Japan and also pledged "all the resources of the country" to "bring the conflict to a successful termination." *See* Joint Resolution Declaring a State of War Against the Imperial Government of Japan, Pub. L. No. 77-328, 55 Stat. 795 (1941).

b. The reasoning of *Ex parte Quirin*, 317 U.S. 1 (1942)—on which the government has relied heavily—has been subject to pointed criticism. *See, e.g.*, *Hamdi*, 542 U.S. at 569 (Scalia, J., dissenting) (*Quirin* "was not this Court's finest hour"). It is also inapposite.

Quirin did not rely on a general authorization for the use of military force. Rather, it construed a set of statutory provisions enacted by Congress that expressly authorized the Executive to conduct military trials under certain circumstances. *See Quirin*, 317 U.S. at 26-27. Congress had also declared that the United States was at war with Germany, *see* Declaration of State of War with Germany, Pub. L. No. 77-331, 55 Stat. 796 (1941), and had expressly "pledged all of the resources of the country" to the President for use in conducting that war. *Id.* at 795. But this Court did *not* rely upon that general declaration to rule that the government was authorized to conduct military trials of the defendants, who had been apprehended in the United States. Rather, the Court held that more specific provisions of Articles 2 and 12 of the Articles of War, which were distinct from the general declaration of war, authorized the government to conduct military trials in the United States with respect to "any * * * person who by the law of war is subject to trial by military tribunal[ ]." *Quirin*, 317 U.S. at 27 (citation and internal quotation marks omitted).

Furthermore, in contrast to the use of military detention power in the domestic sphere that the Executive claims the AUMF provides, *Quirin* explicitly established that widely-accepted "law of war" principles determined who was subject to "trial by military tribunal" under the applicable statutory framework. *See id.* at 30 (noting that "Congress has incorporated by reference, as within the jurisdiction

of military commissions, all offenses which are defined as such by the law of war"); *see also Hamdi*, 542 U.S. at 518 (citing *Quirin* to conclude that, "by universal agreement and practice," the "capture, detention, and trial of unlawful combatants" is an "important incident of war" (internal quotation marks, brackets and citation omitted)). Persons who, like the *Quirin* defendants, had conceded their formal affiliation with enemy armed forces and "with the purpose of destroying war materials and utilities, [had] entered or after entry [had] remained in our territory without uniform," unquestionably committed "an offense against the law of war." *Quirin,* 317 U.S. at 46; *see also Hamdi*, 542 U.S. at 571 (Scalia, J., dissenting). Thus, the *Quirin* Court concluded that their trial by military tribunal was authorized by statute. *Quirin,* 317 U.S. at 46.

Notably, although this Court unconditionally determined that the defendants in *Quirin* qualified as "enemy belligerents" subject to trial by military tribunal under longstanding law-of-war principles, *id.* at 37, it did not address the unclear international law status of individuals who have no formal affiliation with the military arm of an enemy government. *Compare* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2113-2116 (2005) (suggesting that "enemy combatant" status under the AUMF depends largely on the scope of one's association with an enemy terrorist organization) *with* Ryan Goodman & Derek Jinks,

International Law, U.S. War Powers, and the Global War on Terrorism, 118 Harv. L. Rev. 2653, 2654-2658 (2005) (arguing that direct participation in hostilities is a necessary and important ingredient to the "enemy combatant" classification).

4. Congress's contemporaneous creation of a detailed scheme in the Patriot Act for detention of domestic terrorism suspects that does not authorize military detention without charge or trial contradicts the Executive's interpretation of the AUMF

Congress's enactment of the Patriot Act, *see* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("USA Patriot Act") Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, demonstrates that any Executive military detention authority that can be inferred from the language of the AUMF (as in *Hamdi*) was not intended to apply in the domestic sphere. Congress intended the AUMF to provide the President with authority to conduct military operations abroad in response to the September 11th attacks. In contrast, the Patriot Act was intended to address the scope of the Executive's powers with regard to combating terrorism at home.

a. The Patriot Act was enacted five weeks after the AUMF was signed into law. *See* Patriot Act, 115 Stat. at 272. Various elements of the legislation that became the Patriot Act were being considered by

members of Congress, in conjunction with the Executive branch, at the same time that the AUMF was enacted. *See Hearing on Terrorism Investigation and Prosecution Before the S. Comm. on the Judiciary*, 107th Cong. 1 (Sept. 25, 2001) [hereinafter "*Hearing on Terrorism Investigation and Prosecution*"] (statement of Sen. Leahy) (remarking that the Attorney General had started briefing and working with a bi-partisan group of congressional leaders regarding domestic anti-terrorism legislation "literally within hours of the terrible matters on September 11"). As enacted, the Patriot Act was designated as an Act to provide the Executive with "tools" to "[i]ntercept and [o]bstruct [t]errorism," § 1(a), 115 Stat. at 272.

Military detention of persons in the United States without charge or trial for the duration of international hostilities is not one of the "tools" that the Patriot Act provides. First, the Patriot Act does not authorize the Executive to use *military* authority in the domestic sphere at all.

Second, Congress placed a specific, temporal limit on the authority that the Patriot Act confers on the Attorney General to use civilian authority to "take into custody any alien" in the United States who is certified as a national security threat by the Attorney General based on "reasonable grounds to believe" that such person has engaged in or is associated with terrorist activities or "any other activity that endangers the national security of the United States." 8 U.S.C. § 1226a(a)(1), (3)(A), (3)(B).

Congress specified that the Attorney General must, within seven days of arrest, either place the alien in removal proceedings or charge the alien with a criminal offense. *Id.* § 1226a(a)(5). By contrast, the domestic military detention without charge at issue here has already lasted for more than five years.[5]

Third, even when an alien has been certified by the Attorney General to be a national security danger and has been placed in removal proceedings or ordered removed, if that alien is unlikely to be removed in the reasonably foreseeable future, the Patriot Act limits the Attorney General's detention authority to "additional periods of up to six months" and "only if the release of the alien will threaten the national security of the United States or the safety of the community or any person." 8 U.S.C. § 1226a(a)(6). The Act requires that the Attorney General review the national security threat certification every six months, and if the Attorney General determines the certification should be revoked, the alien may be released on appropriate conditions, "unless such release is otherwise prohibited by law." 8 U.S.C. § 1226a(a)(7). The Act also allows the detained alien

[5] Even for detention of persons who are under a final order of removal, immigration law designates a specified period of time within which such alien must be removed, and where removal cannot be accomplished within the specified timeframe, this Court has both refused to read immigration statutes to authorize the indefinite detention of such persons and required periodic reassessment of the reasonableness of such detention. *See Zadvydas v. Davis*, 533 U.S. 678, 682 (2001).

to request in writing every six months that the Attorney General reconsider the certification of him as a national security threat and to submit documents or other evidence in support of that request, *ibid.* In addition, the Patriot Act provides such detained aliens with access to *habeas corpus* relief and appellate review. *Id.* § 1226a(b). In enacting the Patriot Act, Congress thus granted the Executive domestic detention powers over persons suspected of terrorism who are determined to be national security threats and those powers are much more circumscribed than the power the government now claims.[6]

Well-settled canons of statutory construction preclude a general grant of authority from rendering a specific one superfluous. *See Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973) (where "Congress has passed a more specific act to cover [a particular] situation," it should govern such situations in lieu of an available general statute, which could otherwise apply); *see also St. Louis, I. M. & S. Ry. Co. v. United States*, 251 U.S. 198, 207 (1920) ("Congress must be presumed to have known of its former legislation * * * and to have passed the new laws in view of the provisions of the legislation already enacted."); *NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639*, 362 U.S. 274, 291-292 (1960) ("Courts may properly take into account the later Act when asked to extend

[6] *Amici* take no position here on the constitutional validity of the Patriot Act or the procedures that it authorizes.

the reach of the earlier Act's vague language to the limits which, read literally, the words might permit.").

Thus, the broad provisions of the AUMF cannot be read to render superfluous the Patriot Act's specific provisions demarcating the scope of the Executive's power to detain persons who pose national security threats in the United States. If Congress had intended the AUMF to be read so broadly, the detention provisions of the Patriot Act would have been unnecessary. This Court should not adopt such a construction. *See Hohn v. United States*, 524 U.S. 236, 249 (1998) ("We are reluctant to adopt a construction making another statutory provision superfluous.").

b. The legislative history of the Patriot Act confirms this conclusion. Congress considered, and *rejected*, a provision that would have granted the broad authority that the Executive claims here—*i.e.*, potentially unlimited detention without charge or trial of any person that the Attorney General "has reason to believe may further or facilitate" terrorist acts. *See Hearing on Terrorism Investigation and Prosecution*, *supra*, at 26 (statement of Sen. Arlen Specter) (expressing concerns that the legislation proposed by the Executive branch "gives broader powers than just having mandatory detention of someone thought to be a terrorist who is being held for deportation on some other lines"); *see also* John Lancaster, *Hill Puts Brakes On Expanding Police Powers*, WASHINGTON POST, Sept. 30, 2001, at A6

(noting that "the administration's anti-terrorism package has run into strong bipartisan resistance," including an unwillingness to pass legislation pursuant to which a person "suspected of involvement in terrorism—but not convicted of a crime—could be held indefinitely at the discretion of the attorney general or other Justice Department officials").

Moreover, the fact that Congress found it necessary to establish domestic detention powers in the Patriot Act strongly suggests that such power was not part of the AUMF. Senator Orrin Hatch explained that the Patriot Act bill "represent[s] the *domestic* complement to the weapons our military currently is bringing to bear on the terrorists' associates overseas" pursuant to the authority that Congress previously had granted in the AUMF. 147 Cong. Rec. S10990, S11015 (daily ed. Oct. 25, 2005) (statement of Sen. Hatch) (emphasis added). Likewise, in contrast to the government's argument here that the AUMF provides the Executive with domestic detention authority, even after the AUMF was enacted, top Justice Department officials actively sought the legal authority to detain without charge or trial alien terrorism suspects who were arrested while lawfully in the United States and who the Attorney General believed posed a national security threat. *See Hearing on Legislative Proposals Designed to Combat Terrorism Before the H. Comm. on the Judiciary*, 107th Cong., 2001 WL 1143717

(Sept. 24, 2001) (testimony of Assistant Att'y Gen. Viet Dinh).

B. Article II Of The Constitution Does Not Grant The Executive Inherent Authority To Use The Military To Detain Without Charge Or Trial Persons Who Are Lawfully In The United States

The government wrongly argued below that it can find authority in Article II of the Constitution to use the military to detain without charge or trial terrorism suspects who are lawfully in the United States.

This Court should subject that claim to careful scrutiny because, as explained above, such authority is contrary to the will of Congress with regard to the Executive's treatment of domestic terrorism suspects as established in the Patriot Act. Congress's enactment of the Patriot Act, and its failure to authorize domestic military detention by the Executive of persons who are lawfully in the United States, strongly counsels against any conclusion that the Constitution inherently permits the Executive to impose such domestic military detention. As Justice Jackson explained in his concurrence in *Youngstown*, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb" and any claim to such power "must be scrutinized with caution, for what is

at stake is the equilibrium established by our constitutional system." 343 U.S. at 634.

1. The Commander-in-Chief Clause of Article II does not provide the President with inherent authority to use the military to detain persons who are lawfully in the United States

a. The President's primary role as Commander-in-Chief is to direct the conduct of American troops engaged in armed conflicts on the battlefield. *See Ex parte Milligan*, 71 U.S. at 139 (the Commander-in-Chief power consists of "the command of the [armed] forces and the conduct of [military] campaigns").

The Constitution looks both to Congress and the President when it addresses war powers and the Nation's security forces. Many of the critical wartime decision-making functions are reserved in the Constitution for Congress. *See Quirin*, 317 U.S. at 26 (the Constitution "invests the President as Commander in Chief with the power to wage war *which Congress has declared*, and to carry into effect all *laws passed by Congress* for the conduct of war and for the government and regulation of the Armed Forces" (emphasis added)). Indeed, "out of seventeen specific paragraphs of congressional power" that are set forth in Article I of the Constitution with regard to the powers of Congress, "*eight* of them are devoted in whole or in part to specification of powers

connected with warfare." *Johnson v. Eisentrager*, 339 U.S. 763, 788 (1950) (emphasis added) (naming Congress's enumerated power to provide for the common defense, to declare war, to raise and support armies, to provide and maintain a navy, to make rules for the government and regulation of the land and naval, and to make rules concerning captures on land and water).

The government's contention that the Constitution authorizes the Executive to use the military domestically, without congressional authorization, in order to detain persons who are lawfully in the United States cannot be reconciled with the Framers' concerns. "The Commander-in-Chief Clause was understood [by the Framers] to establish the hierarchical superiority of the President in the military chain of command, thereby both ensuring civilian control over the armed forces and establishing a 'superintendence prerogative' with respect to at least some military operations," but *not* to give the Executive the power to proceed without congressional authorization in regard to matters of war. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 Harv. L. Rev. 689 (2008). The Framers were wary of standing armies "constantly on foot" and of "the danger of an undue exercise of military power" by the Executive, especially within the domestic sphere. 3 Joseph Story, *Commentaries on the Constitution of the United States* 94, 97 (Boston, Hilliar, Gray & Co.

1833); *accord Hamdi*, 542 U.S. at 568 (Scalia, J., dissenting) ("No fewer than 10 issues of the Federalist were devoted in whole or in part to allaying fears of oppression from the proposed Constitution's authorization of standing armies in peacetime.").

b. This Court has never held that, in the absence of express congressional authorization, the President has inherent authority under the Constitution to use military power inside the United States. *See Youngstown*, 343 U.S. at 632 (Douglas, J., concurring) ("[O]ur history and tradition rebel at the thought that the grant of military power [to the Commander-in-Chief] carries with it authority over civilian affairs."). Except when force is used for a limited range of defensive purposes, *see infra* Part B(1)(c), the President must seek advance authorization from Congress to initiate the use of military power inside the United States.

Indeed, as this Court reasoned in *Brown*, 12 U.S. at 126-127, the fact that Congress saw fit to enact the Alien Enemy Act, ch. 66, 1 Stat. 577 (1798), which, in the midst of an undeclared naval war with France, expressly granted the President authority to impose domestic military detention on certain lawful residents in the unusual circumstances of a declared war or invasion by a foreign nation or government, strongly suggests that the Executive has no inherent constitutional power to impose the detention that the Act was enacted to authorize. Similarly, this Court squarely rejected the Executive's imposition of

military justice over a citizen who was apprehended in a peaceful State, even though it was alleged that he had conspired with and joined a secret enemy organization "for the purpose of overthrowing the Government." *Ex parte Milligan*, 71 U.S. at 6. Despite this serious allegation of a national security threat, this Court maintained that the Executive had no inherent authority under the Constitution to try such a person in a military, rather than civilian, court. *See id.* at 121, 124.

It is of particular importance that the Executive here claims the constitutional prerogative to use military detention power *inside the United States*. This Court need not determine whether, or to what extent, the Commander-in-Chief Clause of Article II authorizes the Executive to engage in military detention without charge or trial of persons captured on foreign soil in the absence of congressional authorization. *See Hamdi*, 542 U.S. at 577 (Scalia, J., dissenting) ("Where the citizen is captured outside and held outside the United States, the constitutional requirements may be different."). Regardless of any constitutional authority that the Executive may have to act without congressional authorization with regard to military affairs in foreign territory, *see United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-316 (1936), "the Constitution's policy that Congress, not the Executive, should control utilization of the war power *as an instrument of domestic policy*," *Youngstown*, 343 U.S. at 644 (Jackson, J., concurring) (emphasis added), is well established and should not be in dispute.

c. Even the widely accepted historical power of the President to use the military to repel a sudden attack on, or invasion of, our country, *see The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863), does not encompass the power to use the military to detain persons who are lawfully in the United States and well outside the territorial and temporal scope of the attack. Such power to use the military to detain individuals who are lawfully in the United States as a means of thwarting an invasion is not at issue in the instant case, of course, because any such authority would exist only in a moment of genuine emergency, when there was no time for deliberation. *See Hamdi*, 542 U.S. at 552 (Souter, J., concurring). Such an emergency has not been alleged by the government here. Moreover, the expedience and attention with which Congress acted in regard to the September 11th attacks demonstrates that, even in a moment of true exigency, there likely would be no "want of statutory authority" that would impede Executive action in preventing further attack. *Ibid.*[7]

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[7] Whether the established power of the Executive to repel a sudden attack or an invasion is an inherent power under Article II or stems from congressional authorization is an open question. *See, e.g., The Prize Cases*, 67 U.S. at 670 (noting that if President Lincoln's power to quell the insurrection required congressional authorization, such was to be found "in almost every act passed at the extraordinary session of the Legislature of 1861, which was wholly employed in enacting laws to enable the Government to prosecute the war with vigor and efficiency"); *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 30 (1827) (opining that the President's authority to decide whether an exigency calling

(Continued on following page)

Setting aside the circumstance in which there is evidence of an imminent attack against the United States—and here none has been alleged—the power to use the military to detain without charge or trial persons who are lawfully in the United States cannot be grounded on the contention that such domestic detention authority is required to combat terrorism during a time of war. Armed international conflict always and inevitably presents unforeseen dangers to the security of the Nation. During such urgent times, when fear and uncertainty give rise to fervent calls for protection at the expense of individual liberty, it is all the more important that the breadth of Executive power be kept in check, consistent with the Nation's constitutional framework.

2. In the absence of congressional authorization, the Executive cannot subject a person who is lawfully in the United States to military detention in lieu of civilian criminal prosecution without encroaching on the powers of other branches of government

Any claim of inherent constitutional executive power to use the military to detain without charge or

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for force has arisen "necessarily results from the nature of the power" that Congress had granted the Executive in passing the Militia Act). The Court need not determine the source of any such power here.

trial persons who are lawfully in the United States would contravene separation of powers principles by encroaching on authority that the Framers reserved for other branches of government.

First, as discussed above, the use of military power is a shared responsibility between the Legislature and the Executive under our Constitution. *Cf. Youngstown*, 343 U.S. at 635 (Jackson, J., concurring) ("Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."). Like seizure of the steel mills in *Youngstown*, the circumstances under which individuals who are inside the United States may be deprived of liberty by military detention is a matter that is constitutionally relegated to the determination of Congress, not the will of the Executive through the unauthorized imposition of military force. *See Youngstown*, 343 U.S. at 587 (acknowledging that "[e]ven though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property [in this United States] in order to keep labor disputes from stopping production" because "[t]his is a job for the Nation's lawmakers, not for its military authorities"); *id.* at 644 (Jackson, J., concurring) ("That the military powers of the Commander-in-Chief were not to supersede representative government of internal affairs seems

obvious from the Constitution and from elementary American history"). Neither the Executive nor this Court is free to redistribute that power to make laws.

Second, although it is a fundamental constitutional tenet that civilian courts adjudicate government allegations against individuals in the United States that may result in a deprivation of liberty, the Executive contends here that it has the power to bypass the constitutional role of the courts as guarantors of a fair pre-deprivation process and use the military to detain without charge or trial persons whom it has apprehended in the United States. Within our constitutional framework, however, courts serve as a bulwark against the suppression of the procedural constitutional rights of individuals within the domestic sphere. Consequently, this Court has consistently maintained that the civilian judicial system—and the rights that it protects—cannot be supplanted by Executive military action without congressional authorization, so long as the courts are open and functioning. *See Duncan*, 327 U.S. at 315-316, 324; *Ex parte Milligan*, 71 U.S. at 122. This Court should reach that same conclusion here.

C. A Ruling That The Executive Has The Power To Use The Military To Detain Without Charge Or Trial Persons Who Are Lawfully In The United States Would Undermine Our Civilian Criminal Justice System And Important Rights Of Citizens

1. The military detention authority that the Executive claims in this case would permit manipulation of the civilian criminal justice system

If military detention without charge or trial of persons who are lawfully in the United States were a legal option for the Executive, the foundations of our *civilian* criminal justice system would be subject to erosion. The government would have little incentive to pursue more costly and time-consuming civilian criminal prosecutions, with the numerous attendant protections for individual constitutional rights that such proceedings provide. Military detention could become the *norm*, not the rare exception, in cases involving domestic terrorism allegations.

Recognition of military detention authority in the domestic realm also would permit government manipulation of civilian criminal proceedings. The government's handling of the allegations against Jose Padilla reflects such a likelihood because the government shuttled the terror suspect between military detention and civilian criminal prosecution at will. *See Padilla v. Hanft*, 432 F.3d 582, 583-584 (4th Cir. 2005); *see also Padilla v. Hanft*, 547 U.S. 1062, 1063 (2006) (Kennedy, J., concurring in the

denial of *certiorari*) (noting that, while Padilla had been transferred from military detention into the civilian justice system, there was "a continuing concern that his status might be altered again"). Such power would allow the Executive to wield the threat of military detention over individuals subject to domestic criminal prosecution, and also permit the collection of information for use in civilian criminal prosecutions while operating outside the confines of civilian criminal procedure rules. *See*, *e.g.*, *United States v. Abu Ali*, 528 F.3d 210, 229-34 (4th Cir. 2008) (upholding the inclusion at trial of incriminating statements made by the defendant, a United States citizen, during his 20 months of detention in Saudi Arabia, despite allegations of torture).

The incentives for such manipulation are compounded if former detainees ultimately have little legal recourse against the government officials responsible for any mistaken and unlawful detention. *See, e.g., Arar v. Ashcroft*, 532 F.3d 157, 189-190 (2d Cir. 2008) (denying a domestic detainee's *Bivens* remedy because he could not show that the government, in detaining him in order to interrogate him about his connections with terrorist groups, acted with "punitive intent" or an illegitimate purpose), *reh'g en banc granted* (2d Cir. Aug. 12, 2008) (oral argument held Dec. 9, 2008); Pet. Br. at 18-19, *Ashcroft v. Iqbal*, No. 07-1015 (U.S. Aug. 29, 2008) (arguing that a heightened qualified immunity standard should apply to foreclose all claims brought

by terrorism suspect detainees against top-tier Executive Branch officials).

2. The power claimed here by the Executive would imperil citizens and non-citizens alike

The threat to individual liberty that arises from the claimed breadth of the Executive's detention authority in this case affects more than just a small and isolated segment of the population of the United States; it extends to all persons who are lawfully in this country, including citizens.

Currently, the Non-Detention Act, 18 U.S.C. § 4001(a), prohibits the detention of citizens without congressional authorization, but this law would not shield citizens if the AUMF is construed as implicit congressional authorization for the President to use the military to detain without charge or trial persons who are lawfully in the United States. *See Hamdi*, 542 U.S. at 517. The AUMF makes no distinction between citizens and noncitizens. Nor would the American citizenship of a suspected terrorist render him any less of an "enemy combatant," or restrict his detention as such. *Id.* at 519 ("There is no bar to this Nation's holding one of its own citizens as an enemy combatant.").

Thus, not only lawfully present noncitizens but also United States citizens—both of whom the Constitution protects against the deprivation of liberty without due process, *see Zadvydas v. Davis*,

533 U.S. 678, 693 (2001); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896)—could be swept up in domestic military detention dragnets. And the severe price to be paid for mistaken allegations of terrorist ties would be borne by innocent citizens and non-citizens alike. *Cf.* Mark Larabee & Ashbel S. Green, *One Mistaken Clue Sets a Spy Saga in Motion*, THE OREGONIAN, Mar. 26, 2006, at A1 (describing the two-week long detention of a Portland-area lawyer on a material witness warrant that was issued based on the government's erroneous allegation of a connection between his fingerprint and the 2003 Madrid bombings).

The Executive here has not disclaimed the power to use the military to apprehend and detain, without charge or trial, United States citizens who are in the United States. To the contrary, the government is on record arguing that the President can do precisely that. *See* Pet. Br. at 40, 41, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027) (arguing that "nothing in the Authorization of Force suggests that Congress sought to withhold support for the President's use of force against enemy combatants who are American citizens," and that "[t]here is also no basis for reading the broad language of [the AUMF] to contain an unstated exception for enemy combatants captured within the United States"); *id.* at 44 ("[T]here is no question that the President's decision to detain Padilla[, a U.S. citizen apprehended in the United States,] as an enemy

combatant falls comfortably within the broad sweep of Congress's Authorization of Force.").

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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