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,
Respondent.

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

BRIEF OF RETIRED MILITARY OFFICERS AND THE NATIONAL INSTITUTE OF MILITARY JUSTICE AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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INTEREST OF THE *AMICI CURIAE* [1]

Amici are retired military officers who have spent their careers commanding troops at home and over-

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of the *amici curiae* to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

seas and a nonprofit corporation organized to advance the fair administration of military justice. *Amici* have extensive experience with military jurisdiction and the laws governing military activity. Based on this experience, *amici* are uniquely positioned to address the harmful impact the Fourth Circuit's decision will have on the military. This Court has recognized the value of the military's perspective on questions relating to the military's ability to fulfill its mission to provide national security. *See Grutter v. Bollinger*, 539 U.S. 306, 331 (2003). *Amici's* interest in this case arises from their commitment to preserve the character and strength of the military and protect the relationship between military personnel and civilians.

Brigadier General David M. Brahms served in the Marine Corps from 1963 through 1988, with a tour of duty in Vietnam. During the 1970s, he served as the principal legal advisor for POW matters at Headquarters Marine Corps, and, in that capacity, he was directly involved in issues relating to the return of American POWs from Vietnam. General Brahms was the senior legal advisor for the Marine Corps from 1985 through 1988 when he retired. He is currently in private practice in California and was formerly a member of the Board of Directors of the Judge Advocates Association.

Rear Admiral Donald J. Guter was a line officer in the United States Navy from 1970 through 1974. After law school, he served in the Navy from 1977 until he retired in 2002. From June 2000 through June 2002, Admiral Guter was the Navy's Judge Advocate General. Admiral Guter was inside the Pentagon when it was attacked on September 11, 2001. Admiral Guter is now Professor of Law at

Duquesne University School of Law in Pittsburgh, Pennsylvania.

Rear Admiral John D. Hutson was commissioned in the United States Navy in 1969. After law school, he served in the Navy from 1972 until he retired in 2000. From 1994 until 1996, Admiral Hutson served as the Commanding Officer, Naval Legal Service Office, Europe and Southwest Asia. Admiral Hutson served as the Navy's Judge Advocate General from 1997 until 2000. Admiral Hutson is now Dean and President of Franklin Pierce Law Center in Concord, New Hampshire.

Major General Antonio M. Taguba served in the United States Army from 1972 through 2007. He commanded infantry divisions in the United States, Korea and Germany. General Taguba served as Chief of Staff of the United States Army Reserve Command; Deputy Commanding General (South), First U.S. Army; and Deputy Commanding General for Support, Third United States Army, based in Kuwait. General Taguba led the initial investigation of the United States military prison system in Iraq.

The National Institute of Military Justice ("NIMJ") is a District of Columbia nonprofit corporation organized in 1991. Its overall purpose is to advance the fair administration of military justice in the Armed Forces of the United States. NIMJ also participates actively in the military justice process, through such means as the filing of amicus briefs, commenting on proposed rule changes, as an alternate official nongovernmental organization observer to the military commissions at Guantanamo Bay, Cuba, its website (www.nimj.org), and its publications program. NIMJ's advisory board includes law professors, private practitioners, and

other experts in the field, none of whom are on active duty, but nearly all of whom have served as military lawyers, several as flag and general officers.

Amici file this brief to point out the importance of questions raised by this case for the relationship between military and civilian authorities in domestic law enforcement activities, and to direct the Court's attention to (1) the statutory framework for the military's domestic activity including the Posse Comitatus Act of 1878, 18 U.S.C. § 1385, and (2) the negative consequences of a deviation from this framework for the United States military and its relationship with civilians. Based on their experience, *amici* are very concerned that the military not be drawn into civilian policing functions in the United States for which it is not well trained, which will inevitably lead to problems and detract from, and undermine its support in performing, its primary function of fighting and winning the nation's wars.

PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

Since the founding of our country, civilian and military leaders have supported limitations on the use of the United States military for domestic law enforcement.[2] These limitations are an essential component of the fundamental American tradition of resisting military intrusion in civilian affairs. The indefinite detention of Petitioner, a civilian lawfully

[2] It is "one of the paramount principles for which the Revolutionary War was fought: soldiers, needed and honored in war for the valor and strength that turns back the nation's enemies, are never to be used against their civilian countrymen, no matter how expedient their utilization might seem." David E. Engdahl, *Soldiers, Riots and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 Iowa L. Rev. 1, 28 (1971).

resident in the United States, in the Consolidated Naval Brig in South Carolina, is contrary to the long-standing limitations on military involvement in domestic law enforcement and the fundamental traditions from which they arise.

Congress codified the prohibition on the use of the military to execute domestic laws in the Posse Comitatus Act of 1878 ("PCA"), explicitly making it unlawful to "use any part of the Army as a posse comitatus or otherwise to execute the laws." 18 U.S.C. § 1385. The military detention of a civilian lawfully residing in the United States is prohibited by the PCA. Exceptions to the PCA can be and have been made. Although Congress has legislated exceptions to the PCA from time to time, it has always done so expressly. When it enacted the Authorization for the Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224, upon which the government relies to justify the military detention of Petitioner, Congress created no such express exception and none can be implied. The general language of the AUMF neither overrules nor limits the specific limitations imposed by the PCA on military involvement in domestic law enforcement. There is no clear statement of congressional intent to set aside the PCA and permit the military detention of Petitioner.

This Court has repeatedly recognized this nation's fundamental tradition of resistance to military participation in civilian affairs.

> . . . The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds. . . .
>
> . . . .

> In light of this history, it seems clear that the Founders had no intention to permit the trial of civilians in military courts, where they would be denied jury trials and other constitutional protections, merely by giving Congress the power to make rules which were 'necessary and proper' for the regulation of the 'land and naval Forces.' Such a latitudinarian interpretation of these clauses would be at war with the well-established purpose of the Founders to keep the military strictly within its proper sphere, subordinate to civil authority.

Reid v. Covert, 354 U.S. 1, 23-24, 30 (1957) (plurality opinion). In *Ex parte Milligan*, this Court held that if it is possible in times of war to "substitute military force for and to the exclusion of the laws, and punish all persons, as [the executive] thinks right and proper, without fixed or certain rules . . . [then] republican government is a failure, and there is an end of liberty regulated by law." 71 U.S. 2, 125 (1866). Even when Congress authorized martial law in Hawaii during World War II, the Court held that it did not intend to "exceed the boundaries between military and civilian power" and, therefore, did not authorize the trial of civilians by the military. *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946). The Court has also held that Congress had no authority to pass a law authorizing the military trial of civilian ex-soldiers for crimes committed during service, noting that "[f]ree countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22-23 (1955).

The military itself has long held a strong preference in favor of maintaining the PCA's restrictions on its participation in domestic law enforcement. There are good reasons for this preference. First, the military's principal mission is to provide for the national defense. The character and capabilities necessary to succeed at this mission are different from those required for the domestic detention of civilians. Second, violations of the PCA could put individual military personnel at risk of criminal or civil liability. Finally, the military detention of civilians undermines the necessary combination of trust and distance between military personnel and civilians. A dramatic departure from the PCA, such as the military detention of civilians, has profound implications for the future role of the military and its relationship with civilians. History is replete with examples of the danger inherent in permitting the military to be routinely involved in domestic law enforcement.

The Fourth Circuit overlooked the PCA and did not consider the negative impact of its decision on the military. In light of the PCA's restrictions on the use of the military to execute domestic laws and the absence of an exception in the AUMF or elsewhere, *amici* respectfully suggest that the Court reject the Fourth Circuit's reading of the AUMF as giving the President authority to militarily detain Petitioner and return Petitioner to civilian custody.

ARGUMENT

I. THE POSSE COMITATUS ACT PROHIBITS THE MILITARY DETENTION OF PETITIONER, NONE OF THE EXCEPTIONS TO THE PCA ARE APPLICABLE, AND THE AUTHORIZATION FOR THE USE OF MILITARY FORCE DID NOT OVERTURN OR OTHERWISE LIMIT THE PCA

The PCA explicitly limits the use of the military for domestic law enforcement. It reflects a fundamental tradition of our country.[3] Although there are exceptions to the PCA, they do not permit the detention of Petitioner. The AUMF creates no new exception to the PCA for domestic military detention of civilians, and thus the PCA continues to apply and must be followed.

Petitioner's detention by the military is inconsistent with the PCA. Petitioner was lawfully resident in the United States when he was arrested by FBI agents at his home in Peoria, Illinois. Criminal charges were filed and Petitioner was in federal custody in New York, and then Illinois, while preparations for a criminal trial in the Central District of Illinois went forward. Eighteen months after Petitioner's arrest, the President ordered the Attorney General to surrender Petitioner to the Secretary of Defense. Petitioner was removed from civilian

[3] An analysis of the PCA by the Departments of Defense and Justice said: "The Act expresses one of the clearest traditions in Anglo-American history: that using military power to enforce the civilian law is harmful to both civilian and military interests." Hearing on H.R. 3519 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 97th Cong. 16 (1981).

custody and transferred to military custody, despite the continued availability of civilian courts and detention. Petitioner remains in military custody without charge or trial. The PCA's limitations prohibit such use of the military to detain Petitioner, displacing civilian law enforcement authorities.

A. The PCA Limits the Use of the Military for Domestic Law Enforcement

Congress passed the PCA in 1878 to restore the traditional separation between the military and civilian authorities in domestic affairs that had come undone during Reconstruction.[4] After the Civil War, troops were stationed throughout the South and were used to enforce domestic laws, tamp down disturbances, and support the new governments in the ex-Confederate states.[5] Use of the troops, however, also "became a common method of aiding revenue officers in suppressing illegal production of whiskey [and] assisting local officials in quelling labor disturbances." Clarence I. Meeks III, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 Mil. L. Rev 83, 90 (1975). Troops were also stationed at voting polls, and allegations were made that they were used to frighten people to prevent them from voting. *See* 5 Cong. Rec. 2114 (1877); 7 Cong. Rec. 3852, 4185 (1878). There were allegations that the use of the military at polls in the South contributed to an unfair victory for Rutherford B. Hayes in the 1876 presidential elec-

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[4] *See United States v. Allred*, 867 F.2d 856, 870 (5th Cir. 1989); *see also* Stephen Young, *The Posse Comitatus Act of 1878: A Documentary History* xv (2003).

[5] James P. O'Shaughnessy, *The Posse Comitatus Act: Reconstruction Politics Reconsidered*, 13 Am. Crim. L. Rev. 703 (1976).

tion.[6] Representatives in Congress criticized the use of the military as "wholly unnecessary and actually hurtful" and "dangerous to the liberties of the country." 5 Cong. Rec. 2112, 2159 (1877). Senator Benjamin Hill characterized the proper role of the military as this: "The military never executes the law. The military puts down opposition to the execution of the law when that opposition is too great for the civil arm to suppress. . . . Therefore, I say it ought to be unlawful in all cases to talk about calling upon the Army to execute the law." 7 Cong. Rec. 4247 (1878). Military commanders joined members of Congress in objecting to the assignment of domestic law enforcement duties to the military. *See* 7 Cong. Rec. 3579-3582 (1878).

The PCA is a landmark statute. Upon its passage, it was said that Congress "had secured to the people of this country the same great protection against a standing army which cost a struggle of two hundred years for the Commons of England to secure for the British people." 7 Cong. Rec. 4686 (1878). Legislative history from the original and later related statutes makes clear that, with the PCA, Congress sought to isolate the military from engaging in domestic law enforcement activities. The PCA was a response to specific objections arising during the Reconstruction era, but it continues to "embod[y] the inveterate and traditional separation between the military's mission and civil law enforcement." S. Rep. No. 97-58, at 148 (1981); *see also* 127 Cong. Rec. 2005

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[6] *See* Meeks, at 90-91. The military was dispatched to guard the local boards of canvassers in South Carolina, Florida and Louisiana, and the results in each of these states were contested. The award of their electoral votes to Hayes resulted in his victory.

(1981) (PCA codifies the "important principle prohibiting military involvement in civil law enforcement.").

The PCA is a criminal statute that provides:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus[7] or otherwise to execute the laws[8] shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. § 1385.[9]

The PCA has been supplemented by other statutes, most significantly 10 U.S.C. §§ 371-382, which authorize military assistance to civilian law enforcement under specific circumstances. Congress was explicit that this military assistance not include

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[7] The term "posse comitatus" means "power of the county," and at common law it refers to the population over the age of 15 that a sheriff could call upon to join his posse for the purposes of responding to violations of laws or civil disorders. *See United States v. Yunis*, 681 F. Supp. 891, 891 n.1 (D.D.C. 1988) (citations omitted), *aff'd*, 924 F.2d 1086 (D.C. Cir. 1991).

[8] The term "execute the laws" applies to tasks ordinarily assigned to civilian government or solely for the purpose of civilian government. Charles Doyle, *The Posse Comitatus Act and Related Matters: The Use of the Military to Execute Civilian Law* 37 (Congressional Research Service, 2000).

[9] DoD Directive 5525.5, *DoD Cooperation with Civilian Law Enforcement Officials* (Jan. 15, 1986), implements the PCA and applies its restrictions to the Navy and the Marine Corps in addition to the Army and the Air Force. As used in this brief, the "military" includes the Army, Air Force, Navy, Marines, their Reserve components, and the National Guard when in federalized status. It does not include the Coast Guard, or the National Guard when state-controlled.

"direct participation" by the military in civilian law enforcement such as "seizure, arrest, or other similar activity." 10 U.S.C. § 375. Unless otherwise authorized, arrests, apprehensions, and similar activities are "*per se* prohibited as posse comitatus violations." Dep't of the Air Force, General Counsel Guidance Document: Posse Comitatus, Off. Gen. Counsel (Sept. 2003). Military assistance is also prohibited if it will impair military preparedness. 10 U.S.C. § 376. Together, the original statute, the supplementing statutes, and the Department of Defense Directive form the core sources for PCA analysis and application.

This Court and others have recognized the PCA as a limitation on the use of military forces for civilian law enforcement. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 644-45 (1952) ("Congress has forbidden [the President] to use the army for the purpose of executing general laws except when expressly authorized by the Constitution or by Act of Congress.") (citing to the PCA). Moreover, "traditional American insistence on exclusion of the military from civilian law enforcement" influences the interpretation of the PCA by the courts. *United States v. Walden*, 490 F.2d 372, 376 (4th Cir. 1974). In those instances when the courts have held that civilian-military interaction does not violate the PCA, one or more of the following three constraints were present. *See United States v. Yunis*, 924 F.2d 1086, 1094 (D.C. Cir. 1991); *see also* Effect of the Posse Comitatus Act on Proposed Detail of Civilian Employee to the National Infrastructure Protection Center, 22 Op. Off. Legal Counsel 103 (1998). First, there was no "direct active use" of troops to execute the laws, including making arrests, seizing evidence, searching persons or buildings, interviewing witnesses,

pursuing escaped civilian prisoners, and searching for suspects. *United States v. Red Feather*, 392 F. Supp. 916, 923-25 (D.S.D. 1975); *see United States v. Yunis*, 681 F. Supp. 891, 892 (D.D.C. 1998), *aff'd*, 924 F.2d 1086 (D.C. Cir. 1991). Second, civilians were not subject to the "exercise of military power which was regulatory, proscriptive, or compulsory in nature." *United States v. McArthur*, 419 F. Supp. 186, 194-95 (D.N.D. 1975), *aff'd sub nom.*, *United States v. Casper*, 541 F.2d 1275 (8th Cir. 1976); *see also United States v. Bacon*, 851 F.2d 1312, 1313 (11th Cir. 1988). Third, the use of military personnel did not pervade the activities of civilian law enforcement. *See Hayes v. Hawes*, 921 F.2d 100, 102-03 (7th Cir. 1990); *Yunis*, 681 F. Supp. at 892.

None of those three constraints is present with respect to the military detention of Petitioner. First, military troops are directly and actively used to detain Petitioner in the U.S. Consolidated Naval Brig in South Carolina. Second, Petitioner is subject to compulsory military power as he remains in the brig indefinitely and without charge or trial. Third, military personnel have completely displaced and replaced civilian law enforcement in the detention of Petitioner, a lawful resident of the United States already in civilian custody for eighteen months and scheduled for trial in federal district court. The PCA clearly prohibits the use of the military to detain Petitioner.

B. None of the Exceptions to the PCA Permits the Military Detention of Petitioner

The PCA has been characterized as "absolute in its command and explicit in its exceptions." *Wrynn v. United States*, 200 F. Supp. 457, 465 (E.D.N.Y. 1961).

By the text of the PCA, express constitutional or statutory exceptions are the only permissible ways the military can participate in domestic law enforcement. None of the exceptions permits the military detention of a civilian, a lawful resident of the country, in the United States.

The most significant statutory exceptions to the PCA allow specific types of military assistance to civilian law enforcement, most notably in support of efforts to combat drug trafficking.[10] These exceptions permit the military to provide civilian law enforcement authorities with (i) information collected during the normal course of military operations, (ii) equipment and facilities, (iii) training and advice, (iv) under specific circumstances, operation and maintenance of the equipment and facilities made available, and (v) use of military equipment and facilities outside of the United States in certain emergency situations. 10 U.S.C. §§ 371-374.[11] None of these exceptions applies in this case.

The Department of Defense in its regulations asserts two significant constitutional exceptions to

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[10] *See* H.R. Rep. No. 97-71 (1981), *as reprinted in* 1981 U.S.C.C.A.N. 1785.

[11] Other statutory exceptions include the Insurrection Act, 10 U.S.C. §§ 331-335 (permits the military to assist civil authorities with civil disturbances under certain circumstances); 5 U.S.C. App. 3 § 8(g) (Inspector General not limited by PCA in carrying out audits and investigations); 16 U.S.C. § 23 (Secretary of the Army may detail troops to protect Yellowstone National Park at request of the Secretary of the Interior); 18 U.S.C. § 3056 (Director of the Secret Service may request assistance from the military to protect the President); and 22 U.S.C. § 461 (President may use military to stop ships that are in violation of the Neutrality Act).

the PCA. *See* DoD Directive 5525.5, *DoD Cooperation with Civilian Law Enforcement Officials*, Encl. 4 (Jan. 15, 1986). First, they assert that "emergency authority" exists to use military forces when local authorities are unable to provide protection for life or property and restore federal government function and public order, and the military may engage in "protection of Federal property and functions" when local authorities are unable to do so. *See* 32 C.F.R. § 215.4c(1); DoD Directive 3025.12, *Military Assistance for Civil Disturbances* (Feb. 4, 1994). Second, they assert that military forces may be used for the "primary purpose of furthering a military or foreign affairs function," such as investigations related to enforcement of the Uniform Code of Military Justice or protection of Department of Defense personnel. *See* DoD Directive 5525.5, Encl. 4. Neither exception applies to the seizure and detention of a lawful resident. In summary, the PCA governs, and none of its exceptions applies.

C. The AUMF Does Not Create a New Exception to the PCA

The Fourth Circuit majority held that Petitioner could be detained by the military because of the authority Congress gave to the President in the AUMF. However, the PCA and its prohibitions on the use of the military for domestic law enforcement were not taken into consideration by the Fourth Circuit.[12] The AUMF creates no new exceptions to

[12] Only two of the separate *en banc* opinions of the Fourth Circuit make even passing reference to the PCA. Judge Motz notes the now-repealed 2007 amendments to the Insurrection Act providing the President with the authority to deploy armed forces at home to protect the country in the event of terrorist attacks or incidents were "notwithstanding the Posse Comitatus

the PCA. It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). The AUMF neither explicitly creates an exception to nor implicitly repeals the PCA, and therefore the specific provisions of the PCA continue to govern the military's domestic behavior.

First, although the AUMF pertains to military action, nothing in its text refers to the PCA or makes the PCA inapplicable. Second, the Court has made clear that there is a strong presumption against implied repeals of prior federal laws. *See J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 137 (2001) ("overwhelming evidence is needed for repeal by implication"); *see also Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 381 (1996). This rule is nearly absolute; Congress acts with knowledge of its prior enactments, and this Court has repeatedly made clear that, where Congress wants to repeal its prior actions, it must "expressly contradict" its earlier act or it must be "absolutely necessary" for the act to be interpreted as a repeal "to have any meaning at

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Act" but "military control cannot subsume the constitutional rights of civilians. Rather, the Supreme Court has repeatedly catalogued our country's "deeply rooted and ancient opposition . . . to the extension of military control over civilians." *Al-Marri v. Pucciarelli*, 534 F.3d 213, 251-52 (4th Cir. 2008) (citation omitted). Judge Wilkinson cites the PCA in support of the statement that "[t]he American constitutional tradition is not consonant with the prospect of martial law in other than necessitous circumstances." *Id*. at 312. However, he disregards the importance and effect of the PCA when he goes on to state that the judiciary should not interfere with democratic efforts to ward off the dangers of war.

all." *Nat'l Ass'n of Homebuilders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2532 (2007); *see also Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 109 (1991) ("[L]egislative repeals by implication will not be recognized . . . 'absent a clearly expressed congressional intention to the contrary.'") (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)); *Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936) ("[T]he intention of the legislature to repeal must be clear and manifest."). That rule should have special force when the prior law purportedly being repealed is so fundamental to our traditions. The AUMF is absolutely silent on the issue of military involvement in domestic law enforcement, as well as the issue of detention more broadly. It neither expressly contradicts nor is irreconcilable with the PCA. Moreover, there is simply nothing in the legislative history of the AUMF to indicate Congress had any intent to repeal any portion of the PCA.

This Court has repeatedly made clear that where a law applies to a specific issue – as the PCA does to military involvement in domestic law enforcement – others laws of a more general scope will not interfere with the operation of the specific law, *generalia specialibus non derogant*. *See Morales v. TWA, Inc.*, 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general."); *see also Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) ("[A] statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum."). Applying the general language of the AUMF authorizing the use of the military would "undermine limitations" created by the more specific provision, the PCA. *See Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996). Given the founding historical

tradition behind the PCA and the explicit nature of existing exceptions, the AUMF's broad language about "necessary and appropriate force," and its silence on domestic military action do not create an exception to the specific language of the PCA. To read it to do so would be contrary to established principles of statutory construction.

Even apart from the express statutory framework of the PCA, an exception to the fundamental principles it embodies would require a clear statement, which the AUMF does not provide. When a "weighty and constant value" such as the divisions between the military and civilian spheres is at issue, "'the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'" *See Astoria Fed. Sav. & Loan*, 501 U.S. at 109 (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)). The need for a clear statement is particularly pressing when the liberties of the individual are at stake. *See Gutknecht v. United States*, 396 U.S. 295, 306-07 (1970) ("Where the liberties of the citizen are involved . . . we will construe narrowly all delegated powers that curtail or dilute them."); *Ex parte Endo*, 323 U.S. 283, 300 (1944) ("[W]e 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"). This Court has consistently required, at a minimum, a clear statement of congressional intent when the Executive wants to expand military authority such that it might depart from the fundamental division between military and civilian authorities. *See Endo*, 323 U.S. at 300 (applying clear statement requirement to prohibit domestic

military detention of Japanese-American citizen); *Duncan*, 327 U.S. at 304, 315 (applying clear statement requirement to reject claim of statutory authorization for military trials of civilians); *Youngstown Sheet & Tube Co.,* 343 U.S. at 588-89 (requiring explicit congressional authorization for military seizure of steel mills); *see also Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814) (finding the declaration of war against Great Britain and authorization of military force did not imply authority to seize property of enemy aliens in the United States and Congress would have to explicitly authorize this kind of departure from the "modern law of nations"). There is no clear statement by Congress that the Court can look to as authorizing the military detention of Petitioner.

The presumption against implied repeals, the rule that specific statutes govern more general ones, and this Court's expectation of a clear statement by Congress in cases of this type set the bar extremely high for finding that the AUMF created an exception to the PCA that would permit the military detention of Petitioner. There is nothing in the AUMF that can overcome this bar. Absent an express exception to the PCA, Petitioner should not be detained by the military.

II. DETENTION OF A LAWFUL RESIDENT IN THE UNITED STATES IS AN UNWELCOME DEPARTURE FOR THE MILITARY AND DETRIMENTAL TO THE RELATIONSHIP BETWEEN MILITARY PERSONNEL AND CIVILIANS

Amici have had responsibility for the legal affairs of the military, and based on their experience, believe it is important to prevent the military from being

drawn into civilian policing and justice functions. The quality and character of the United States military would be undermined by a more extensive involvement in domestic law enforcement. The PCA serves to permit certain types of military assistance while avoiding the risks of military involvement in domestic law enforcement, and its limitations should be observed for the good of the military and the country.

Military officials have historically expressed concerns about any involvement in domestic law enforcement. *See* 7 Cong. Rec. 3579-3582 (1878). During hearings in 1981 on proposed supplements to the PCA allowing specific types of military assistance to civilian law enforcement in support of efforts to combat drug trafficking, the General Counsel of the Department of Defense strongly resisted the diversion of military personnel to nonmilitary functions and expressed a firm opposition to the use of troops in arrests and seizures. *See* Hearing on H.R. 3519 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 97th Cong. 6, 19-20 (1981). The military became more comfortable with the supplements only after Congress made it explicit there would be no direct military involvement in domestic law enforcement. *See* William H. Taft IV, *The Role of the DoD in Civilian Law Enforcement*, Def. 83, Mar. 1983, at 6. In response to a question about the applicability of the PCA to United States Northern Command, the training of an active Army unit in the United States for on-call response to domestic emergencies and disasters, Colonel Michael Boatner said, "It absolutely governs in every instance. We are not allowed to help enforce the law. We don't do that. . . . [I]f we review the requirement that comes to us from civil authority and it has any complexion of law

enforcement whatsoever, it gets rejected and pushed back, because it's not lawful."[13] Congress has echoed the military's concerns.[14]

Congress and the public at large have expressed concerns about departures from the PCA. A recent potential departure arose in Section 1076 of the Defense Authorization Act for Fiscal Year 2007. Section 1076 modified the Insurrection Act[15] from a narrow authorization for the President to declare a form of martial law during violent insurrections, when state and local authorities resist lawful orders, to a broader grant allowing the President to use the military domestically to restore public order and enforce the laws of the United States when, as a result of a natural disaster, epidemic, or other serious public health emergency, terrorist attack or incident, or other condition, the President determines that domestic violence has occurred to such an extent to

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[13] Democracy Now! The War and Peace Report: Is Posse Comitatus Dead? US Troops on US Streets, (radio broadcast Oct. 7, 2008) (*available at* http://www.democracynow.org/2008/10/7/us_army_denies_unit_will_be).

[14] *See, e.g.*, Senator Barry Goldwater's summary of the concerns about changes to the PCA during a debate over the use of the military to support anti-drug efforts: "Mr. President, for more than 100 years, during two World Wars and many other armed conflicts when the dominance of military power was essential for the survival of our way of life, there has been no need to amend that statute, because the concept embodied in that statute is the essential American ideal that the Armed Forces are maintained to prevent foreign aggressors from imposing their system of government upon us, and not to impose upon our own people the domestic laws of this Nation. We have civilian forces, known as police, to enforce our domestic laws." 132 Cong. Rec. 26448 (1986).

[15] 10 U.S.C. §§ 331-335.

prevent public order.[16] Although this represented a potentially dramatic expansion of the President's ability to use the military under the Insurrection Act for domestic law enforcement, Senator Patrick Leahy said the change "was just slipped in the defense bill as a rider with little study. Other congressional committees with jurisdiction over these matters had no chance to comment, let alone hold hearings on, these proposals."[17] Senator Leahy warned that "[u]sing the military for law enforcement goes against some of the central tenets of our democracy."[18] The National Sheriffs' Association said the change "undermines the American tradition manifested under the original Insurrection Act of 1807 and the Posse Comitatus Act of 1878 (18 U.S.C. § 1385) which helped to enforce strict prohibitions on military involvement in domestic law enforcement."[19] The National Governors Association said "[t]he changes made in Section 1076 . . . place the safety and welfare of citizens in jeopardy and should be repealed."[20] The Fraternal Order of Police said the Insurrection Act

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[16] National Defense Authorization Act, 2007, Pub. L. No. 109-364, § 1076, 120 Stat. 2083, 2095 (2007).

[17] Remarks of Sen. Patrick Leahy, National Defense Authorization Act for Fiscal Year 2007, Conference Report, Congressional Record (Sept. 29, 2006) (*available at* http://leahy.senate.gov/press/2006-9/-92906b.html).

[18] *Id*.

[19] Letter from Sheriff Ted Kamatchus, President of the National Sheriffs' Association, to Senators Patrick Leahy and Christopher Bond (Feb. 20, 2007) (*available at* http://leahy.senate.gov/press/200702/NationalSheriffsAssociation.pdf).

[20] Letter from Governors Michael Easley and Mark Sanford to Senators Patrick Leahy and Christopher Bond (Feb. 5, 2007) (*available at* http://leahy.senate.gov/issues/InsurrectionAct/GuardGovernorsAssociation.pdf).

was "a narrow and specific exception to the proud tradition of our nation to prohibit the use of the military to enforce domestic laws" and "[s]hort of an armed and active insurrection, our military personnel should not be used to displace State and local law enforcement."[21] When Congress took notice of the extent of the change and the potential for the use of the military in domestic law enforcement, it asserted its commitment to the PCA and repealed Section 1076 in its entirety, restoring the original Insurrection Act of 1807.[22]

Separation from domestic law enforcement activities is also important to preserve the apolitical nature of the military. In discussing the circumstances that would make it possible for the military to assist with the response to an event like Hurricane Katrina, Admiral Timothy Keating said pre-existing criteria such as severity and level of damage could help remove politics from the decision, and ensure "[t]he success or failure of our effort won't depend on the political dealings between the governors and the president. . . . We'll just get a mission and we'll execute it."[23] Admiral Keating expressed wariness about a role for the military in law enforcement and also concern for how doing so fit with the civilian view of the role of the military, saying "I don't think

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[21] Letter from Chuck Canterbury, National President of the Fraternal Order of Police, to Senator Patrick Leahy (Apr. 30, 2007) (*available at* http://leahy.senate.gov/issues/InsurrectionAct/FraternalOrderofPolice.pdf).

[22] National Defense Authorization Act, 2008, Pub. L. No. 110-181, § 1068, 122 Stat. 3, 14 (2008).

[23] Eric Schmitt & Thom Shanker, *Military May Propose an Active-Duty Force for Relief Efforts*, N.Y. Times, October 11, 2005.

the American people writ large are anxious to have active-duty forces in a law enforcement role."[24]

The military, of course, is not organized for the purposes of administering justice or engaging in domestic police work, but for the purpose of fighting and winning the country's wars. *See* Center for Law and Military Operations, *Domestic Operational Law Handbook for Judge Advocates* 428 (2006); *see also United States ex rel. Toth*, 350 U.S. at 17 ("Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. . . . To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served.") *See Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (describing military life as needing "unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel"). The military is not trained to balance society's interests in punishment against the need for fairness or an individual's right to due process. These are not its core functions; they are the functions of the civilian justice system, which has successfully handled cases involving suspected terrorists. *See, e.g.*, *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999); *United States v. Lindh*, 227 F. Supp. 2d 565 (E.D. Va. 2002).

The detention of lawful United States residents is not contemplated in the military's regulations or anticipated in the training of military personnel. The differences in skills and training were noted during a Senate debate about the use of the military in anti-drug domestic law enforcement. "The Armed Forces

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[24] *Id*.

have not, and should not be, trained and equipped to be customs agents. Ground troops have not studied how to pick out the drug smuggler coming across a border hidden among a group of law-abiding American citizens. Combat personnel have not been trained to conduct searches of people and belongings in accordance with constitutional safeguards because, in a war zone, those safeguards do not exist on foreign soil." 132 Cong. Rec. 26448 (1986). Instead, military manuals describe the importance of the constitutional and historical traditions of restricting the military role in civilian law enforcement. *See* Center for Law and Military Operations, at 430; *see also* DoD Directive 5525.5.

The military's role of providing for the national defense is not consistent with the domestic law enforcement task of detaining lawful residents in the United States, and the military is therefore not adequately prepared for such a task. This lack of preparation and training may also pose a problem for individual military personnel, who might be subject to tort liability. During the debates in Congress over the adoption of statutes supplementing the PCA in 1981, a proposal to allow military personnel to search and seize was criticized on a number of grounds including that it may subject soldiers to civil tort liability. *See* 127 Cong. Rec. 15671 (1981). Military personnel, even if acting under orders, might face criminal and civil liability if their actions were an unlawful violation of the PCA.

Military detention of civilians lawfully resident in the United States risks increased conflict between the military and civilians.[25] Avoidance of military-

[25] In 1997, marines on an authorized drug-surveillance mission in Texas shot and killed a civilian teenager tending to his

civilian conflict is a longstanding national goal and an important consequence of the PCA. The "trust relationship between civilian society and the military" has been characterized as "a cornerstone of our system of government." John J. Pavlick, Jr., *The Constitutionality of the U.C.M.J. Death Penalty Provisions*, 97 Mil. L. Rev. 81, 119 (1982). An injury to the "relationship between the military and civilian communities" can make "it more difficult for service members to obtain needed local support." *United States v. Pirraglia*, 24 M.J. 671, 672 (A.C.M.R. 1987). This Court has recognized that in many ways, the military is "a specialized society separate from civilian society." *Parker v. Levy*, 417 U.S. 733, 743 (1974). And the differences "create 'particular tensions when the military and civilian realms conjoin.'" *Berry v. Bean*, 796 F.2d 713, 717 (4th Cir. 1986) (quoting *Serrano Medina v. United States*, 709 F.2d 104, 107 (1st Cir. 1983)). The effort to avoid confrontation between military personnel and civilians is illustrated by the fact the military does not have the required affirmative statutory grant from Congress to arrest civilians, although other federal bodies, such as the U.S. Forest Service, do. *See United States v. Moderacki*, 280 F. Supp. 633, 637 (D. Del. 1968). During congressional debates over proposed supplements to the PCA, there was concern that even though direct involvement was prohibited, a soldier might end up engaged in a "physical confrontation

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family's goat herd. There was considerable public outcry, prosecutors attempted to bring criminal charges against the marines involved, and the military's anti-drug operations along the Mexican border were suspended. The incident demonstrates the risks of military involvement in domestic law enforcement. *See* Sam Howe Verhovek, *Pentagon Halts Drug Patrols After a Killing at the Border*, N.Y. Times, July 31, 1997.

with civilians." *See* 127 Cong. Rec. 15669-15670 (1981). The then General Counsel of the Department of Defense said "it is the arrests and seizures . . . putting, really, into a confrontation, an immediate confrontation, the military and a violator of a civilian statute, that causes us the greatest concern." Hearing on H.R. 3519 Before the Subcomm. on Crime of the House Comm. on the Judiciary, 97th Cong. 30 (1981). Detention of a civilian is inconsistent with the military's goal of limiting confrontation with civilians. Use of the military to enforce laws against civilians could have wide-ranging future implications, including undermining civilian support for the military.

The Fourth Circuit's affirmation of the military detention of Petitioner, lawfully resident in the United States and already in the civilian justice system and in the custody of domestic law enforcement at the time of his military detention, is contrary to the PCA's limitations on the use of the military for domestic law enforcement. It is inconsistent with the character and role of the military and creates undesirable tension between military personnel and civilians. The tradition enshrined in the PCA evolved out of a desire to stop government abuses of private individuals, and a failure to protect this tradition weakens the democratic system, the military, and the relationship between the two.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Respectfully submitted,

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