No. 08-368

# 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 FOR PETITIONER


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## QUESTION PRESENTED

Does the Authorization for Use of Military Force (AUMF), 115 Stat. 224, authorize—and if so does the Constitution allow—the seizure and indefinite military detention of a person lawfully residing in the United States, without criminal charge or trial, based on a determination that the detainee conspired with al Qaeda to engage in terrorist activities?

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## OPINIONS BELOW

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## JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The judgment of the en banc court of appeals was entered on July 15, 2008. The petition for a writ of certiorari was filed on September 19, 2008, and granted on December 5, 2008.

## STATUTORY PROVISIONS INVOLVED

The Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF"), is set forth at Pet. App. 490a-492a. Section 412 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 ("Patriot Act"), as codified at 8 U.S.C. § 1226a, is set forth in relevant part at Pet. App. 493a-496a.

## STATEMENT

This case raises the question whether the president may order the indefinite military imprisonment of individuals lawfully residing in the

United States without affording them the protections of the criminal justice system. In this case, Petitioner was already in high-security civilian custody for eighteen months awaiting trial on federal criminal charges when President Bush designated him an "enemy combatant." As a result of that designation, Petitioner was transferred to military custody, where he has remained for more than five-and-one-half years, and where he may be detained potentially for life without criminal charge or trial. The Fourth Circuit held in a 5-4 en banc decision that Petitioner's military detention was authorized by the AUMF. That holding contradicts our Nation's deepest traditions, disregards settled rules of statutory construction, and raises grave constitutional questions unnecessarily.[1]

**Petitioner's Arrest and Federal Criminal Prosecution**

On December 12, 2001, FBI agents arrested Petitioner, Ali Saleh Kahlah al-Marri, at his home in Peoria, Illinois, where he lived with his wife and five young children. Al-Marri was arrested at the direction of the U.S. Attorney's Office for the Southern District of New York as a material witness in the government's criminal investigation of the September 11 attacks. Three months before, al-Marri, a Qatari citizen, had lawfully entered the United States with his family to pursue a master's

[1] Since the Court granted certiorari, Daniel Spagone has replaced John Pucciarelli as Commander of the United States Naval Consolidated Brig, and is accordingly automatically substituted as Respondent pursuant to Supreme Court Rule 35.3.

degree at Bradley University in Peoria, where he had received his bachelor's degree in 1991. After his arrest, the FBI transported al-Marri to New York and held him in solitary confinement in the maximum-security Special Housing Unit at the Metropolitan Correctional Center in Manhattan.

Two months later, in February 2002, the United States filed the first of three successive criminal indictments against al-Marri. The initial indictment, filed in the Southern District of New York, charged him with credit card fraud; the second, also filed in the Southern District, added charges of false statements to the FBI, bank fraud, and identity theft. In April 2003, al-Marri, through counsel, moved to dismiss both indictments on the ground that venue was improper in the Southern District of New York. On May 12, 2003, the district judge granted the motion and dismissed the indictments. Four days later, a single indictment alleging the same counts was filed in the Central District of Illinois, and al-Marri was returned to Peoria.[2] Prior to his transfer, prosecutors warned al-Marri that his already severe conditions of confinement would worsen if his counsel continued to litigate the case aggressively.[3]

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[2] Had he been convicted on all counts, al-Marri could have been imprisoned for up to thirty years under the federal sentencing guidelines after enhancements for terrorism-related activity alleged in the indictments. *See* U.S. Sentencing Guidelines Manual § 3A1.4.

[3] *See* Certification of Mark A. Berman ¶ 12, Ex. A to Pet'r Ali Saleh Kahlah al-Marri's Br. in Opp'n to Resp't's Mot. to Dismiss or Transfer Venue, *Al-Marri v. Bush*, No. 1:03-cv-1220 (C.D. Ill. July 23, 2003).

On May 29, 2003, the district judge set a July 21, 2003 trial date. Thereafter, the government barred al-Marri's counsel from seeing him pending entry of Special Administrative Measures ("SAMs") severely restricting al-Marri's contact with counsel and the outside world. On Friday, June 20, the court scheduled an evidentiary hearing for July 2 in connection with al-Marri's pre-trial motion to suppress. That same day, defense counsel advised the Assistant United States Attorney prosecuting the case that the SAMs impasse had to be resolved so that counsel could meet with al-Marri to prepare for the hearing. At this point, al-Marri had already been held in solitary confinement in New York and Illinois for eighteen months.

**Petitioner's Designation and Detention as an "Enemy Combatant"**

The following Monday morning, June 23, 2003—just days before the scheduled suppression hearing and less than a month before the scheduled trial date—the government moved *ex parte* and *in camera* to dismiss the indictment based on a one-page redacted declaration signed by President Bush that same morning asserting a determination that al-Marri was an "enemy combatant." Pet. App. 466a-467a.

The President's declaration alleged in a conclusory fashion that al-Marri was "closely associated" with al Qaeda and had "engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism." Pet. App. 466a. The President claimed that al-Marri was "a continuing,

present, and grave danger to the national security of the United States" and that military detention was "necessary to prevent him from aiding al Qaeda," despite the fact that al-Marri had been imprisoned in solitary confinement by the government for eighteen months. Pet. App. 467a. The President also asserted that al-Marri "possesse[d] intelligence . . . that . . . would aid U.S. efforts to prevent attacks by al Qaeda." Pet. App. 467a. He ordered the Attorney General to surrender al-Marri to the Secretary of Defense and directed the latter "to detain him as an enemy combatant." Pet. App. 467a.

At the government's request, the district court dismissed the criminal indictment that same morning.[4] The military immediately took al-Marri from civilian custody and flew him to the U.S. Naval Consolidated Brig in South Carolina. Al-Marri has been detained by the military in solitary confinement at the brig without charge or trial ever since. The government has refused to say when, if ever, his military confinement will end, stating only that it

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[4] The government initially moved to dismiss the indictment without prejudice. When the district judge insisted on providing al-Marri's counsel time to respond to ensure that the dismissal was not in bad faith (which would have given al-Marri's counsel the opportunity to oppose al-Marri's impending transfer to military custody), the government changed its position. It moved to dismiss with prejudice, thereby divesting the district court of the discretion it otherwise had to deny the motion. *See* Tr. of Proceedings at 12, *United States v. Al-Marri*, No. 1:03-cr-10044 (C.D. Ill. June 23, 2003), attached as Ex. B to Pet'r Ali Saleh Kahlah al-Marri's Br. in Opp'n to Resp't's Mot. to Dismiss or Transfer Venue, *Al-Marri v. Bush*, No. 1:03-cv-1220 (C.D. Ill. July 23, 2003).

will continue "for a long time." Pet. App. 67a (Motz, J.) (quoting the Deputy Solicitor General).

For the first sixteen months of his military confinement, the government held al-Marri *incommunicado*. His attorneys (who had been allowed to meet with him until his arraignment in Peoria), his wife and five children, and the International Committee for the Red Cross ("ICRC") were all denied access. The government ignored al-Marri's counsel's many requests to communicate with him. During that time, al-Marri was repeatedly interrogated in ways that bordered on, and sometimes amounted to, torture: sleep deprivation, painful stress positions, extreme sensory deprivation, and threats of violence and death.[5] Those interrogations continued even after this Court stated that indefinite detention for purposes of interrogation is unlawful. *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality opinion).[6]

Only in October 2004 was al-Marri again allowed to meet with his attorneys. Since then, and to this day, however, al-Marri remains in near-complete isolation at the brig. Other than his attorneys and ICRC officials, al-Marri is not

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[5] *See* Certification of Andrew J. Savage ¶¶ 6-33, Ex. A to Pl.'s Mot. for Interim Relief from Prolonged Isolation and Other Unlawful Conditions of Confinement, *Al-Marri v. Gates*, No. 2:05-cv-2259 (D.S.C. Mar. 13, 2008) (dkt. no. 40).

[6] The government has admitted to destroying recordings of those interrogations while this habeas litigation was pending in federal court; the few remaining recordings reportedly confirm al-Marri's brutal treatment by interrogators. Mark Mazzetti & Scott Shane, *Pentagon Cites Tapes Showing Interrogations*, N.Y. Times, Mar. 13, 2008.

permitted to see anyone from the outside world. For more than five years he was denied all phone calls with his family; now, even after sustained litigation challenging his conditions of confinement, he is permitted only two such calls a year. Requests by al-Marri's family to visit him, including from his children, have all been refused. The government has also refused requests by Qatar for diplomatic access.[7]

**The District Court Habeas Proceedings**

On July 8, 2003, al-Marri's counsel petitioned on his behalf for a writ of habeas corpus in the Central District of Illinois. That petition was dismissed on venue grounds. *Al-Marri v. Bush*, 274 F. Supp. 2d 1003 (C.D. Ill. 2003), *aff'd sub nom. Al-Marri v. Rumsfeld*, 360 F.3d 707 (7th Cir.), *cert. denied*, 543 U.S. 809 (2004).

On July 8, 2004, in compliance with this Court's decision in *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), al-Marri's counsel filed this habeas petition in the District of South Carolina. The government answered al-Marri's petition by appending a redacted declaration from Jeffrey N. Rapp, Director of the Joint Intelligence Task Force for Combating Terrorism ("Rapp Declaration"), as sole support for al-Marri's indefinite military detention. Pet. App. 468a-489a.

The Rapp Declaration contains serious allegations against al-Marri. It asserts that al-Marri associated with high-level al Qaeda members; met

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[7] Al-Marri's separate action challenging the conditions of his confinement and seeking equitable relief is pending in district court. *Al-Marri v. Gates*, No. 2:05-cv-02259 (D.S.C.).

with Osama bin Laden; volunteered for a "martyr mission"; and was ordered to enter the United States before September 11, 2001, to facilitate terrorist activities by exploring the possibility of disrupting this country's financial system via computer hacking. Pet. App. 472a-473a.

The Rapp Declaration, however, does not assert that al-Marri was ever on or near a battlefield where U.S. armed forces or their allies were engaged in hostilities. It does not assert that al-Marri is a member of the armed forces or an affiliate of any nation at war with the United States. Nor does it assert that al-Marri posed any imminent threat. Instead, the Rapp Declaration alleges criminal conduct, echoing many of the allegations in the earlier federal indictments that were dismissed with prejudice.

Al-Marri denied the allegations in the Rapp Declaration and moved for summary judgment on the ground that the president lacked legal authority to detain him militarily or to deny him the procedural protections that the Constitution affords those accused of criminal wrongdoing. The district court denied the motion and referred the case to a magistrate judge for elaboration of a new process to be afforded al-Marri based on the plurality opinion in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). *Al-Marri v. Hanft*, 378 F. Supp. 2d 673 (D.S.C. 2005). The magistrate judge then ruled that the Rapp Declaration gave al-Marri sufficient notice of the basis for his detention—despite the fact that at the time of the magistrate judge's decision, al-Marri was not permitted to know many of the Declaration's allegations, which remained redacted. The

magistrate judge nonetheless directed al-Marri to file "rebuttal evidence." Order at 7, *Al-Marri v. Hanft*, No. 2:04-cv-2257 (D.S.C. Dec. 19, 2005) (dkt. no. 41). Unless al-Marri came forward with "more persuasive evidence," the magistrate judge warned, "the inquiry will end there." *Id.* at 6.

In response to the magistrate judge's order, al-Marri again denied Rapp's allegations, argued that they were insufficient to sustain the government's burden, and insisted that the executive had no lawful authority to detain him as an enemy combatant. To assume the burden of disproving the Rapp allegations in response to the court's order, al-Marri explained, would shift the burden of proof from the government to the accused. It would force al-Marri to forfeit the very constitutional guarantees of a criminal trial that his habeas petition sought to vindicate, including the presumption of innocence, the right of confrontation, the privilege against self-incrimination, the right to exculpatory evidence in the government's possession, the right to trial by jury, and the government's burden of proving guilt beyond a reasonable doubt. Further, al-Marri emphasized the practical impossibility of the burden that the magistrate judge would have shifted onto him: He was being asked to prove a negative by refuting multiple hearsay allegations without access to the government's evidence, without discovery, and without knowing the identity of his accusers or having an opportunity to confront them. *See* Pet'r's Resp. to Court's Order of Dec. 19. 2005, *Al-Marri v. Hanft*, No. 2:04-cv-2257 (D.S.C. Feb. 17, 2006) (dkt. no. 116); Pet. App. 138a-139a (Traxler, J.).

The magistrate judge recommended dismissal of al-Marri's habeas petition. Pet. App. 448a-465a. In August 2006, the district court adopted the magistrate judge's recommendation and dismissed the petition. *Al-Marri v. Wright*, 443 F. Supp. 2d 774 (D.S.C. 2006). Al-Marri appealed.

**Proceedings on Appeal**

On June 11, 2007, a divided panel of the Court of Appeals for the Fourth Circuit reversed the district court's judgment, holding that al-Marri's military detention must cease. *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007). On the government's motion for rehearing, the Fourth Circuit vacated the panel opinion and heard the case en banc.

On July 15, 2008, the en banc court issued a closely divided and fragmented decision. *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008). In a brief per curiam opinion, the court held: by a 5-4 margin, that Congress in the AUMF had empowered the president to detain al-Marri indefinitely as an enemy combatant based on the facts asserted in the Rapp Declaration; and by a different 5-4 majority, that, even assuming Congress empowered the president to detain al-Marri indefinitely, al-Marri had been afforded insufficient process to challenge the government's assertions. Pet. App. 6a-7a. Seven judges filed separate opinions.[8]

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[8] The AUMF provides in relevant part that:

> the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist

Five judges believed that al-Marri could be detained as an enemy combatant pursuant to the AUMF on the facts asserted in the Rapp Declaration. Pet. App. 6a-7a. But those judges could not agree on a legal definition of "enemy combatant." Nor did they concur on a method of statutory or constitutional interpretation in arriving at their divergent conclusions. Instead, these five judges generated three separate opinions crafting three different and mutually inconsistent definitions of the term "enemy combatant," none of which conformed to the government's own shifting definitions of that term. *See, e.g.*, *Hamdi*, 542 U.S. at 516 (plurality opinion) ("[T]he Government has never provided any court with the full criteria that it uses in classifying individuals as [enemy combatants]."). Specifically, these judges variously defined an "enemy combatant" as someone who:

- associates with al Qaeda and comes to the United States to engage in "hostile and war-like acts," Pet. App. 90a (Traxler, J., joined by Niemeyer, J.);
- "(1) . . . attempts or engages in belligerent acts against the United States, either domestically or in a foreign combat zone; (2) on behalf of an enemy force," Pet. App. 163a-164a (Williams, C.J., joined by Duncan, J.); or

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> attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future attacks of international terrorism against the United States by such nations, organizations or persons.

AUMF § 2(a).

- "(1) [is] a member of (2) an organization or nation against whom Congress has declared war or authorized the use of military force, and (3) knowingly plans or engages in conduct that harms or aims to harm persons or property for the purpose of furthering the military goals of the enemy nation or organization," Pet. App. 253a-254a (Wilkinson, J.).

Four judges, by contrast, rejected the notion that the president had the legal authority to detain al-Marri as an "enemy combatant." Pet. App. 6a-7a (Motz, J., joined by Michael, King, and Gregory, JJ.). Because the AUMF never mentions detention, Judge Motz, writing for all four, followed *Hamdi*, *Ex parte Quirin*, 317 U.S. 1 (1942), *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), and other precedents of this Court by looking to the laws of war to ascertain what, if any, domestic military detention power could be inferred from the AUMF in light of the Constitution's constraints. Judge Motz emphasized that Congress had enacted the AUMF without expressing any intention to deviate from the laws of war. Pet. App. 55a-57a. Applying established law-of-war principles, she concluded that the AUMF did not authorize al-Marri's military detention. Pet. App. 57a, 68a-69a, 74a-75a. Further, she underscored that serious constitutional problems would arise if the AUMF were construed to permit al-Marri's indefinite military confinement. Pet. App. 69a-70a. Judge Motz accordingly refused to infer the asserted domestic detention power from the AUMF's silence and in the absence of a clear statement from Congress. Pet. App. 57a-59a. Finally, Judge Motz

rejected the government's alternative argument that the president possessed inherent authority under Article II of the Constitution to detain al-Marri as an enemy combatant. Pet. App. 75a-88a.

As to the sufficiency of the process afforded al-Marri in the district court—assuming *arguendo* legal authority to detain him as an enemy combatant—the en banc court again split 5-4, with Judge Traxler casting the deciding vote to reverse and remand. Pet. App. 6a-7a. Judge Traxler concluded that the district court had erred by rigidly applying the *Hamdi* plurality's burden-shifting framework to the different circumstances of al-Marri's case (specifically, that al-Marri had been arrested at his home inside the United States, not seized on a battlefield in Afghanistan), and by accepting the hearsay Rapp Declaration "as the most reliable available evidence" without first determining whether the government could provide nonhearsay alternatives. Pet. App. 123a (internal quotation marks omitted). Judge Traxler suggested, however, that the district court could consider hearsay evidence in violation of "the normal due process protections available to all within this country" if it concluded, as to any specific piece of evidence, that these protections were "impractical, outweighed by national security interests, or otherwise unduly burdensome." Pet. App. 134a-135a.

The four judges who concluded that the president lacked legal authority to detain al-Marri as an enemy combatant would have ordered al-Marri's release from military custody. They viewed further litigation as unnecessary, but joined Judge Traxler in ordering remand to give practical effect to a

majority's rejection of the government's position. Pet. App. 89a (Motz, J., joined by Michael, King, and Gregory, JJ.). Writing separately, however, Judge Gregory warned that Judge Traxler's framework left the district court with "no concrete guidance as to what further process is due" and "with more questions than answers" on critical evidentiary issues. Pet. App. 144a; *see also* Pet. App. 185a (Wilkinson, J.) (agreeing that Judge Traxler's "uncertain quantum of procedures" provides the district court "with precious little direction on remand" and will leave it "mystified"). The remaining four judges voted to dismiss al-Marri's habeas petition. Pet. App. 160a-161a (Williams, C.J.); Pet. App. 181a (Wilkinson, J.); Pet. App. 293a-294a (Niemeyer, J.); Pet. App. 314a-315a (Duncan, J.).

## SUMMARY OF ARGUMENT

The Fourth Circuit held that Congress, by enacting the AUMF, had *sub silentio* vested the president with power to seize people lawfully residing in this country, including American citizens, and imprison them indefinitely without criminal charge or trial based on a determination that they planned to engage in terrorist activities. That ruling transgresses black-letter principles of statutory construction, flouts Congress's intent, and raises grave constitutional questions unnecessarily. It deviates dangerously from this Nation's most cherished constitutional principles and traditions. It must be reversed.

The Fourth Circuit made three serious errors in construing the AUMF to authorize al-Marri's

detention. *First*, the Fourth Circuit erred by not heeding the absence of a clear statement from Congress and by instead treating legislative silence as license for an unprecedented domestic military detention scheme. It thereby disregarded this Court's repeated directive that, because depriving individuals residing within the United States of their liberty without criminal charge or trial raises grave constitutional concerns, legislation will not be interpreted as authorizing such detention absent a clear statement from Congress. The Fourth Circuit also disregarded the need for a clear statement to overcome the strong presumption against reading a force authorization to displace civilian authority within the United States. Doing so, the Fourth Circuit devised from scratch a novel domestic military detention scheme abounding in constitutional problems that plainly could—and should—have been avoided.

*Second*, the Fourth Circuit ignored Congress's clear intent, manifested contemporaneously in the Patriot Act, that non-citizen domestic terrorism suspects not be detained indefinitely without charge and that domestic terrorism cases continue to be prosecuted in the civilian criminal justice and immigration systems. Thus, not only does the AUMF lack the clear statement necessary to authorize detention without criminal process, but Congress explicitly rejected this very detention power in the Patriot Act. In construing the AUMF, the Fourth Circuit also ignored the Non-Detention Act, which demands an explicit statement from Congress to detain citizens domestically without

criminal process and which was intended to prevent military encroachment on civilian prerogatives.

*Third*, the Fourth Circuit also ignored Congress's explicit limitation in the AUMF to use only "necessary and appropriate" force. Read alongside the Patriot Act, and against the constitutional backdrop of *Milligan* and its progeny, the AUMF cannot be understood to authorize military seizure and detention in the United States except possibly in the exceptional circumstances (not presented here) when the civilian courts are not open or functioning. Moreover, it is abundantly clear that military detention was neither "necessary" nor "appropriate" on the particular facts of this case—where Petitioner had been arrested by law enforcement at his home and held in solitary confinement for eighteen months pending federal criminal prosecution. Indeed, the government has never even explained, let alone demonstrated, why it was "necessary" or "appropriate" to re-label Petitioner an "enemy combatant" on the eve of trial and supplant civilian criminal process with indefinite military detention.

The Fourth Circuit, however, erred not only in its reading of the AUMF. It erred also by concluding that the Constitution would permit Petitioner's military detention if Congress had authorized it.

The Constitution limits the domestic exercise of military jurisdiction to those who fall clearly within the established definition of a combatant under precedent, custom, and longstanding law-of-war principles. Nothing alleged by the government brings al-Marri within those constitutionally

permissible bounds. Al-Marri concededly was not affiliated with the armed forces of an enemy nation and was never present on a battlefield, let alone took up arms there against the United States. The constitutional imperative of preserving the longstanding distinction between combatants and civilians, and thus the civilian sphere's independence from military intrusion, applies with even greater force here because the nature of the alleged conflict means that military detention is not simply a temporary measure to prevent a soldier's return to a battlefield, but is a potential life sentence without the constitutional protections of the criminal process.

The president, moreover, has no inherent authority to subject al-Marri to indefinite military detention. All of the Fourth Circuit judges who addressed this argument rejected it, and the government failed even to raise it in its Brief in Opposition. Because Congress, in a bill enacted contemporaneously with the AUMF's passage, refused to allow indefinite detention of suspected terrorist aliens arrested in the United States, the president's authority here is at its lowest ebb. Nothing in the Constitution's history or text, or this Court's precedents, supports the notion that Article II allows the president to declare a legal resident—or an American citizen—an enemy combatant and hold him indefinitely without charge.

## ARGUMENT

### I. THE AUMF DOES NOT AUTHORIZE PETITIONER'S INDEFINITE MILITARY DETENTION.

The Fourth Circuit's judgment sanctions a breathtaking and unprecedented expansion of executive detention power within the United States. Although this case involves a legal resident alien, the Fourth Circuit's construction of the AUMF extends equally to American citizens.[9] The domestic military detention the Fourth Circuit licensed is anathema to our tradition of individual liberty and the historic presumption against military intrusion into the domestic civilian sphere. At a bare minimum, Congress must make an explicit statement authorizing military seizure and detention at home, especially where that detention is potentially without end. The Fourth Circuit manifestly erred in inferring a power of indefinite domestic detention from Congress's approval of "necessary and appropriate" force, especially given both the serious

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[9] The text of the AUMF allows no distinction between citizens and aliens. Multiple Fourth Circuit judges so held, Pet. App. 10a (Motz, J.); Pet. App. 124a (Traxler, J.); Pet. App. 146a & n.2 (Gregory, J.); Pet. App. 186a-187a (Wilkinson, J.), as did this Court, *Hamdi,* 542 U.S. at 519 (plurality opinion); *cf. Quirin*, 317 U.S. at 37-38. The government itself also acknowledged the AUMF's equal application to citizens before the Fourth Circuit, Pet. App. 39a n.14 (Motz, J.), and twice before this Court, Br. for the Resp't in Opp'n at 21, *Padilla v. Hanft*, 547 U.S. 1062 (2006) (No. 05-533); Br. for the Pet'r at 14-15, 38-44, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027). Indeed, two citizens (Yaser Hamdi and Jose Padilla) have been detained under the AUMF in line with that position.

constitutional problems its interpretation raises and Congress's clear, contemporaneous refusal to sanction such detention in the Patriot Act.

### A. The AUMF Lacks the Clear Statement Necessary to Authorize the Military Detention of Legal Residents Seized Inside the United States.

Since the Founding, it has been the abiding norm under the Due Process Clause of the Fifth Amendment that people arrested in this country have the right to speedy criminal prosecution. *See, e.g.*, *Hamdi*, 542 U.S. at 529 (plurality opinion) ("'In our society liberty is the norm,' and detention without trial 'is the carefully limited exception.'" (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987))); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.").

Any departure from this constitutional bedrock—if permitted at all—requires an explicit statement from Congress. *See Ex parte Endo*, 323 U.S. 283, 298-300 (1944) (statutes must be construed not to infringe the fundamental constitutional right against detention without trial absent an express statement). Where individual liberty is at stake, as in other contexts, the clear statement requirement ensures that when the government is acting in a constitutionally sensitive area, "the *legislature* has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (emphasis added) (internal quotation marks and

citations omitted); *INS v. St. Cyr*, 533 U.S. 289, 299-300, 304-305 (2001) (narrowly construing a statute explicitly eliminating all judicial review over final deportation orders not to eliminate habeas corpus review); *Greene v. McElroy*, 360 U.S. 474, 507 (1959) (statutes should be construed to infringe fundamental liberties only to the extent they clearly and unequivocally authorize curtailment of such liberties); *see also* Pet. App. 23a n.6 (Motz, J.) (noting that the Supreme Court has permitted exceptions to the criminal process "only when a *legislative* body has explicitly authorized the exception" (emphasis in original) (citing cases)). This canon does not simply protect core individual liberties. It also safeguards Congress's prerogative of democratic deliberation on matters cutting to the heart of the Nation's values and traditions.

The clear statement requirement applies in time of crisis as well as in time of calm. *See, e.g.*, *Endo*, 323 U.S. at 296-297, 300-301 (rejecting the executive's claim of domestic detention power not "clearly and unmistakably" granted by statute despite the executive's claim that such power was "essential" to the war effort); *Coleman v. Tennessee*, 97 U.S. 509, 514 (1879) (absent "clear and direct language," courts must not construe congressional language as permitting military "interference" with the "regular administration of justice in the civil courts"); *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 623-625 (2006) (narrowly construing permissible deviations from the Uniform Code of Military Justice's procedural rules in finding that newly created military commissions impermissibly deviated from those rules). Silence, by contrast, does not

constitute permission, especially if executive action infringes constitutional rights. *See, e.g.*, *Brown v. United States*, 12 U.S. (8 Cranch) 110, 126, 128-129 (1814) (refusing to construe a declaration of war to authorize the military seizure of enemy property within the United States and, by necessary implication, the seizure of enemy persons); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177-178 (1804) (striking down the wartime seizure of a ship traveling *from* a French port because a congressional statute authorized only the seizure of a ship traveling *to* a French port).

Detention without trial raises especially grave concerns—and thus heightens the imperative of a clear legislative statement—when that detention is indefinite and potentially permanent, as al-Marri's necessarily is. Al-Marri's detention based on his alleged connection with al Qaeda has already exceeded 2,000 days and, as the government suggests, will likely continue "for a long time," possibly for life. Pet. App. 67a (Motz, J.) (quoting the Deputy Solicitor General); *see also Boumediene v. Bush*, 553 U.S. ___, 128 S. Ct. 2229, 2270 (2008) (cautioning that detention in a 'war on terror' "may last a generation or more"). Legal authority for prolonged, possibly lifelong detention without charge cannot be manufactured out of congressional silence. It demands the most explicit of legislative statements. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 699-701 (2001) (refusing to construe a statute explicitly authorizing some detention of allegedly dangerous aliens to authorize indefinite, possibly permanent, detention).

The Fourth Circuit, however, did not simply nullify a fundamental liberty interest without clear congressional sanction. It also disregarded a core structural predicate of the Constitution: the historic presumption against military intrusion into the domestic civilian sphere.

A crucial force behind the Constitution's conception and design was the Framers' "general mistrust of military power permanently at the Executive's disposal." *Hamdi*, 542 U.S. at 568 (Scalia, J., dissenting); *accord Laird v. Tatum*, 408 U.S. 1, 15 (1972) ("[A]ny military intrusion into civilian affairs" has always been staunchly resisted.); *Reid v. Covert*, 354 U.S. 1, 30 (1957) (plurality opinion) (A "well-established purpose of the Founders" in drafting the Constitution was "to keep the military strictly within its proper sphere, subordinate to civil authority."); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582 (1952) (refusing to sanction President Truman's claimed authority to seize the Nation's steel mills to avert a labor strike, even though the President said the seizure was necessary to avert national catastrophe). As Justice Jackson explained, "That 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." *Id.* at 644 (Jackson, J., concurring) (emphasis added).

The Framers' desire to secure the protections of the criminal process and to limit military encroachment on civilian government animated this Nation's creation. *See* The Declaration of Independence paras. 12, 18 (U.S. 1776) (protesting

that the English crown had "affected to render the Military independent of and superior to the Civil Power" and "depriv[ed] us in many cases, of the benefits of Trial by Jury"). The Framers enshrined the strong presumption in favor of criminal process and against military detention throughout the Constitution. *See, e.g.*, U.S. Const. art. I, § 9, cl. 2; *id.* art. III, § 2, cl. 3; *id.* amends. IV, V, and VI; *Milligan*, 71 U.S. at 119-120 (explaining that Article III's jury trial clause and the Fourth, Fifth, and Sixth Amendments serve as a bulwark against military infringement on individual liberty); *Duncan v. Kahanamoku*, 327 U.S. 304, 322 (1946); *see also Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (trial by jury historically provided a bulwark against tyranny and oppression). The Framers also installed additional protections against military encroachment in the Bill of Rights. *See* U.S. Const. amend. III. Congress has demonstrated the same vigilance against military intrusion into the domestic civilian sphere through its enactment of landmark statutes. *See, e.g.*, Non-Detention Act, 18 U.S.C. § 4001(a) (responding to the military detention of Japanese-Americans during World War II by prohibiting the detention of American citizens unless expressly authorized by Congress); Posse Comitatus Act, 18 U.S.C. § 1385 (prohibiting the use of the military to execute the laws in the United States unless "expressly authorized" by Congress).

Time and again, this Court has remained faithful to the Framers' understanding by holding that the extension of military jurisdiction to individuals seized within the United States—if allowed at all—raises grave constitutional questions.

It has therefore demanded that Congress, at minimum, state unequivocally any intent to supplant the civilian criminal process with military jurisdiction.

In *Milligan*, the government asserted that the president, as commander-in-chief, must have the power to deal militarily with dangerous men such as Lambdin Milligan, who had allegedly aided the enemy and plotted to take military action within the United States during the Civil War. 71 U.S. at 16-17. The government vigorously argued that while Milligan did not have the right that a belligerent has to wage war under the laws of war, he was nonetheless part of a vast, secret conspiracy, the Sons of Liberty, which involved more than 100,000 men and utilized a paramilitary structure, *id.* at 102, rendering him as proper a subject of military jurisdiction as a person who "had been taken in action with arms in his hand," *id.* at 21. The Court unanimously rejected that argument. All nine Justices agreed that Milligan could not be tried by military commission because of the serious constitutional problems raised by that intrusion of military jurisdiction into the civilian sphere. The Justices diverged only on whether to reject this intrusion for want of a clear legislative statement or on constitutional grounds.

The majority recognized that Milligan was alleged to have committed "an *enormous crime*" in "a period of war" when he communicated with the Confederacy, conspired to "seize munitions of war," and "join[ed] and aid[ed] . . . a secret" terrorist organization "for the purpose of overthrowing the Government and duly constituted authorities of the

United States." *Id.* at 6-7, 130 (emphasis in original). Yet that majority held, in a ruling never since repudiated, that *the Constitution* required that Milligan be tried in a civilian court, as long as those courts were open and functioning. *Id.* at 121-122; *see also Hamdi*, 542 U.S. at 522 (plurality opinion) (reaffirming *Milligan*); *id.* at 567-568 (Scalia, J., dissenting) (same); *Hamdan*, 548 U.S. at 591, 595 n.25 (Stevens, J., concurring) (same). The president, it explained, could not simply opt out of the criminal justice system while the civilian courts remained available solely because an alleged offender posed a grave danger, even at a time when the Nation's survival was at stake. *Milligan*, 71 U.S. at 122. The Court also held that Milligan could not be further detained by the military, even absent trial by military commission, noting that "[i]f in Indiana he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana." *Id.* at 131.[10]

The four concurring Justices reached the same result on statutory grounds. They concluded that in the absence of an explicit legislative statement sanctioning military commissions Congress had "not authorized" military jurisdiction over a resident of

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[10] While Milligan was a citizen, the Court's holding rested on the Fifth and Sixth Amendments, which apply equally to persons like al-Marri who are lawfully residing within the United States. *See, e.g.*, *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 350 (2006); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); Pet. App. 65a (Motz, J.) (noting that the government has "expressly conceded that aliens lawfully residing in the United States, like al-Marri, have the same due process rights as citizens").

the United States even though it was a time of war and even though Congress had taken the extraordinary step of suspending the writ of habeas corpus in Indiana. *Id.* at 135-136 (Chase, C.J., concurring). Like the majority's constitutional holding, the concurrence's statutory conclusion preserved the presumption of liberty secured by civilian criminal process against military infringement. This Court has since hailed *Milligan* as "one of the great landmarks in [its] history." *Reid*, 354 U.S. at 30 (plurality opinion); *see also, e.g.*, *Hamdan*, 548 U.S. at 591 (extolling *Milligan* as a "seminal case").

The Court's World War II opinion in *Quirin* adheres to this approach. In *Quirin*, all involved accepted that the petitioners were subject to military detention based on their uncontested affiliation with the armed forces of the enemy German government—a clear and irrefutable basis for military jurisdiction under longstanding and universally accepted law-of-war principles. In upholding the exercise of domestic military jurisdiction, the Court nevertheless emphasized that Congress had "explicitly provided" for the petitioners' trial by military commission under the Articles of War. *Quirin*, 317 U.S. at 28; *accord Hamdan*, 548 U.S. at 592 (*Quirin* rested on express congressional authorization); *see also infra* at 50-52 (discussing *Quirin*).

Four years later, the Court reaffirmed the presumption against reading legislative silence to authorize military displacement of the Constitution's criminal procedure protections. *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). In *Duncan*, the

government claimed that a statute authorizing Hawaii's governor to place that territory under martial law, which had been proclaimed by the governor and approved by President Roosevelt, had to be interpreted as authorizing military trials. *Id.* at 307-309, 312-313. The government further claimed that changes in war's technologies had rendered obsolete traditional limits on military jurisdiction, revoking the ordinary presumption in favor of the civilian criminal process. *Id.* at 329 (Murphy, J., concurring); Br. of the United States at 65, *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) (No. 14). The Court decisively rejected the government's argument and declined its invitation to allow the historic "boundaries between military and civilian power" to shift with changes in modern warfare even though those changes had made the Nation's entire territory more vulnerable to attack. *Duncan*, 327 U.S. at 324; *see also id.* at 330 (Murphy, J., concurring) ("The right to jury trial and the other constitutional rights of an accused individual are too fundamental to be sacrificed [even] through a reasonable fear of military assault."). The Court instead narrowly construed the statute authorizing martial law, finding that it "was not intended to authorize the supplanting of [civilian] courts by military tribunals." *Id.* at 324. The Court thus reaffirmed the continued primacy of the civilian courts as long as those courts were open and functioning, even though Hawaii was in the theater of military operations, continuously in danger of invasion, and "under fire" at the time. *Id.* at 340, 344 (Burton, J., dissenting).

The Court's more recent decision in *Hamdi* is consistent with the clear statement rule and underscores the absence of any clear statement for the detention here.

In *Hamdi*, this Court held that the AUMF provided for the military detention of an armed soldier captured on a foreign battlefield (in Afghanistan), where he had been fighting alongside enemy government forces against U.S. and allied troops during the hostilities there. *Hamdi*, 542 U.S. at 512-513, 516-517 (plurality opinion). Although the *Hamdi* plurality recognized that the AUMF did not specifically mention detention, it explained that the military detention of an armed soldier captured on a foreign battlefield was so "fundamental [an] incident of waging war" that "in permitting the use of 'necessary and appropriate force,'" Congress had "*clearly and unmistakably*" authorized detention "*in the narrow circumstances considered here*." *Id.* at 519 (emphases added). The plurality further observed that in such limited circumstances, both established law-of-war principles and the military's own rules provided a clear and predictable legal framework for determining the status of prisoners captured as an incident to the use of military force. *Id.* at 538 (referencing Article 5 of the Third Geneva Convention and U.S. Army Regulation 190-8).

*Hamdi* thus shows that Congress understood that the AUMF, like past military authorizations, would be interpreted in line with established law-of-war principles, customary practices, and the constitutional norms that have historically constrained military power domestically. *See id.* at 518-521 (plurality opinion) (AUMF must be

interpreted in light of "longstanding law-of-war principles"); *accord Hamdan*, 548 U.S. at 593-595 (expressly refusing to read the broad language of the AUMF to "expand[ ] the President's authority to convene military commissions," and instead finding that this authority was limited by traditional law-of-war principles "[a]bsent a more specific congressional authorization"); *accord Milligan*, 71 U.S. at 121-122; *Duncan*, 327 U.S. at 319-324; Cass R. Sunstein, *Clear Statement Principles and National Security:* Hamdan *and Beyond*, 2006 Sup. Ct. Rev. 1, 4, 6 (2006) (recognizing that departure by the executive "from standard adjudicative forms . . . must be authorized by an explicit and focused decision from the national legislature," especially where that departure "intrude[s] on constitutionally sensitive interests").

Unlike military detention of armed soldiers captured on a foreign battlefield in a war against an enemy government, indefinite military detention of individuals arrested at their homes in the United States and detained on the basis of suspected wrongdoing—even suspected terrorist acts—in an open-ended, generations-long struggle against a terrorist organization is not and never has been a "fundamental incident of waging war." To the contrary, al-Marri's military detention in connection with such a struggle raises the very concerns that prompted the *Hamdi* plurality to warn against inferring a detention power from the AUMF's silence beyond *Hamdi*'s narrow and traditional law-of-war circumstances. *See Hamdi*, 542 U.S. at 521 (cautioning that inferring a detention power beyond the battlefield circumstances in Afghanistan, and the

"longstanding law-of-war principles" on which that inference rests, might cause the understanding that the AUMF authorizes detention to "unravel").

The law of war fails to provide the necessary clear authorization for the detention here that it did in *Hamdi*. As this Court has observed, the law of war recognizes two types of armed conflicts: international and non-international. *Hamdan*, 548 U.S. at 630-631. International armed conflicts, by definition, exist only between nation states. *See* Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; *Hamdan*, 548 U.S. at 630-631. Non-international armed conflicts, by contrast, typically occur within the territory of a nation state and do not have a nation state on both sides. The latter term encompasses civil wars or other armed conflicts between a government and an insurgent group within its territory. *See, e.g.*, Int'l Comm. of the Red Cross, Commentary: Geneva Convention (III) Relative to the Treatment of Prisoners of War, at 28-29, 31-33 (Jean S. Pictet gen. ed., 1960); Leslie C. Green, The Contemporary Law of Armed Conflict 317 (2d ed. 2000); John Cerone, *Misplaced Reliance on the 'Law of War,'* 14 New Eng. J. Int'l & Comp. L. 57, 63-64 (2007); *see also Hamdan*, 548 U.S. at 629 (describing non-international armed conflict as a conflict "'occurring in the territory of one of the High Contracting parties [to the Geneva Conventions]'" (quoting Common Article 3 of the Geneva Conventions)).

The *Hamdan* Court assumed, *arguendo*, the existence of a non-international armed conflict against al Qaeda *in Afghanistan*. *Hamdan*, 548 U.S.

at 628-629; *id.* at 641-642 (Kennedy, J., concurring). That is a conflict in which the government admits al-Marri took no part. *See, e.g.*, Pet. for Reh'g and Reh'g En Banc at 10, *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007) (No. 06-7427); Pet. App. 67a (Motz, J.).[11] The Court did not decide in *Hamdan* whether there was a non-international armed conflict against al Qaeda *in the United States*, nor did it assume such a conflict. Likewise, the Court need not decide that question here.[12] Even if the facts were to give rise to a non-international armed conflict against al Qaeda in the United States, law-of-war principles still would provide no support for the government's position because, as Judge Motz

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[11] Although the government asserts that al-Marri attended an al Qaeda training camp in Afghanistan years before September 11, 2001, it has never asserted that he was involved in any conflict between the United States and al Qaeda in Afghanistan. Pet. App. 474a (Rapp Decl.); Pet. App. 46a n.17 (Motz, J.).

[12] Should the Court determine it must reach that issue, law-of-war principles would compel the conclusion that, as grave and horrific as the September 11 attacks were, there was no armed conflict with al Qaeda in the territory of the United States when al-Marri was detained as an "enemy combatant" in Peoria in June 2003. That is because the existence of a non-international armed conflict is typically defined by "protracted armed violence between governmental authorities and organized armed groups or between such groups within a state." *See, e.g.*, *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995); *accord Prosecutor v. Haradinaj*, Case No. IT-04-84-T, Judgment, ¶¶ 38, 49 (Apr. 3, 2008). The predicate condition for the application of the laws of war—*i.e.*, actual hostilities of sufficient organization and intensity within a given territory—is therefore not met in this case.

explained, those principles have not traditionally provided states with any independent authority to detain in such conflicts. Pet. App. 57a, 68a-69a, 74a-75a.

In international armed conflicts, the Geneva Conventions have long supplied a clearly defined and established legal framework for detention. By contrast, in non-international armed conflicts, the law of war does not separately authorize detention. Instead the law of war has long presumed that domestic law provides the applicable authority for detention in such conflicts. *See, e.g.*, Gabor Rona, *An Appraisal of U.S. Practice Relating to 'Enemy Combatants,'* 10 Y.B. of Int'l Humanitarian L. 232, 240-241 (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1326551 ("the legal basis for detention [in non-international armed conflicts] is found in domestic not international law"; the law of war "simply does not displace domestic law on questions of detention"); Marco Sassòli, *Query: Is There a Status of "Unlawful Combatant?," in* 80 International Law Studies 57, 64 (Richard B. Jaques ed., 2006) (in non-international armed conflicts, the law of war provides for guarantees of humane treatment but does not itself authorize detention). In sum, rather than authorizing (or forbidding) the detention of persons seized and held within a state's territory in a non-international armed conflict, the law of war presumes that such persons will be held pursuant to domestic criminal law or other legislation that

explicitly authorizes detention. *See, e.g.*, Sassòli, *supra*, at 64; Rona, *supra*, at 241.[13]

In the United States, the relevant domestic law—the Constitution, *Milligan* and its progeny, and framework statutes like the Non-Detention and Posse Comitatus Acts—has long instructed that the norm is detention pursuant only to criminal charge and trial. It has required that domestic detention by the military, if permitted at all, must have express authorization from Congress. Unlike in *Hamdi*, the law of war simply does not supply the requisite clear authority necessary for the military detention power the government asserts here.

Thus, in approving the use of military force against al Qaeda in the AUMF, Congress cannot be said to have silently delegated an undefined and open-ended domestic detention power, untethered to longstanding and established law-of-war principles, that displaces—literally in this case—the criminal justice process that has operated within the United States since the Nation's founding. Nor can

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[13] A primary reason that the law of war traditionally has not authorized detention in non-international armed conflicts is "respect for the principle of sovereignty of States"—a principle that has more force in internal conflicts than in conflicts between two sovereigns. *See* Int'l Comm. of the Red Cross, Commentary: Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 1332 (Claude Pilloud et al. eds., 1987); *see also, e.g.*, Frits Kalshoven & Liesbeth Zegveld, Constraints on the Waging of War: An Introduction to International Humanitarian Law 136 (2001) (explaining that "the matter of prosecution and punishment of criminal offenses" during non-international armed conflicts has traditionally been considered as "something exclusively reserved to the judicial apparatus of the state" (internal quotation marks omitted)).

Congress be said to have simply left it to the courts to create from whole cloth an unprecedented scheme of domestic military detention, applicable to citizens and legal residents alike, without legislating any guidelines or limits on the scope of the detention power or how this power was to be exercised or reviewed. *Cf. Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) (Congress "does not . . . hide elephants in mouseholes.").

To the contrary, on the rare occasions that Congress has approved some limited form of domestic arrest and detention absent criminal charge and speedy trial during wartime or for national security purposes, it has expressly provided for the exercise of that delegated detention power and carefully circumscribed its boundaries. *See* Alien Enemies Act of July 6, 1798, ch. 66, § 1, 1 Stat. 577 (codified at 50 U.S.C. § 21); Emergency Detention Act of 1950, Pub. L. No. 81-831, tit. II, §§ 102-103, 64 Stat. 1019, 1021 (repealed 1971). Congress unmistakably failed to provide either the analogous clear signal or the determinate guidelines necessary to infer domestic detention power from the AUMF.

The Fourth Circuit's profusion of divergent opinions, theories, and definitions itself reflects the absence of statutory authority for Petitioner's indefinite military detention. Five judges crafted three different and novel definitions of "enemy combatant"—beyond the various and shifting definitions supplied by the government. *See supra* at 11. The confusion below thus highlights the fact that there is no "clear" congressional license for a domestic military detention scheme hidden in the

AUMF's silence. The Fourth Circuit's effort to devise such a domestic detention scheme by *ad hoc* judicial lawmaking usurps the deliberative role constitutionally assigned to Congress under the Separation of Powers. *See, e.g.*, *Mistretta v. United States*, 488 U.S. 361, 371-372 (1989); *Youngstown*, 343 U.S. at 609 (Frankfurter, J., concurring); *see also Loving v. United States*, 517 U.S. 748, 757-758 (1996) ("[Article I] make[s] Congress the branch most capable of responsive and deliberative lawmaking."). If, as the executive has insisted throughout the course of this litigation, core constitutional rights are to be curtailed to fight terrorism at home, "it must be done openly and democratically, as the Constitution requires, rather than by silent erosion through an opinion of [a] Court." *Hamdi*, 542 U.S. at 578 (Scalia, J., dissenting).[14]

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[14] Indeed, there is vigorous and ongoing debate among jurists, lawyers, and academics as to the need for, and constitutionality of, possible legislation creating a domestic preventive detention regime to deal with suspected terrorists. This debate underscores that Congress in the AUMF did not resolve—nor has the Nation since resolved—the difficult legal and policy questions raised by such novel domestic detention power. *Compare, e.g.*, Benjamin Wittes, Law and the Long War: The Future of Justice in the Age of Terror 151-182 (2008) (arguing in favor of a preventive detention statute), *and* Jack L. Goldsmith & Neal Katyal, Op-Ed, *The Terrorists' Court*, N.Y. Times, July 11, 2007 (same), *with, e.g.*, Kelly Anne Moore, Op-Ed, *Take Al Qaeda to Court*, N.Y. Times, Aug. 21, 2007 (arguing against such a statute), *and* Deborah N. Pearlstein, *We're All Experts Now: A Security Case Against Security Detention*, 40 Case W. Res. J. Int'l L. (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1159567# (same). *See generally* Thom Shanker & David Johnston, *Legislation Could Be Path to Closing Guantánamo*, N.Y. Times,

### B. The Patriot Act and the Overarching Statutory Landscape Show that Congress Denied the President the Very Power He Has Asserted in this Case.

While the AUMF is silent on detention, Congress was not. The very day after Congress enacted the AUMF, it began consideration of another statute that addressed, separately and explicitly, the domestic detention of alien terrorist suspects without ordinary civilian process. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 ("Patriot Act").[15] The fact that Congress saw the need to address domestic seizures and detentions of alien terrorism suspects contemporaneously with its consideration of the AUMF and mere days after the September 11 attacks demonstrates that legislators themselves did not believe that they had addressed the questions the executive finds resolved in the AUMF's silence. Rather, it shows legislators believed that they still needed to resolve the question

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July 3, 2007 (describing the widespread political, legal, and academic debate).

[15] The AUMF was signed into law on September 18, 2001. On September 19, Congress began consideration of proposed legislation, originally titled the Anti-Terrorism Act of 2001, which addressed, among other things, the detention of alien terrorists seized in the United States. Pet. App. 60a n.21 (Motz, J.); S. 1510, 107th Cong. § 412(a) (2001). Those detention provisions were enacted several weeks later in the Patriot Act. *See* Christopher Bryant & Carl Tobias, *Youngstown Revisited*, 29 Hastings Const. L.Q. 373, 387-391 (2002) (discussing legislative history).

of how alien terrorism suspects would be handled domestically.

In the Patriot Act, Congress, after careful deliberation, explicitly refused to grant the very power of indefinite detention without charge that the executive claims to have obtained *sub silentio* in the AUMF. The executive's claim of indefinite military detention power cannot be squared with Congress's contemporaneous and exhaustive consideration and rejection of indefinite domestic detention without charge in the Patriot Act.

Congress focused in the Patriot Act on the precise situation purportedly present here: an alien who has entered the United States to facilitate or engage in terrorist acts. *See* Patriot Act § 412; Pet. App. 77a-78a (Motz, J.) (describing the Patriot Act's detailed detention provisions). Enacted in the immediate wake of the September 11 attacks, the Patriot Act was the centerpiece of Congress's domestic response to the attacks, and complemented the AUMF.

Among other things, the Patriot Act expressly focused on the problem of aliens entering the United States with the intent of supporting or engaging in terrorist attacks, whether in al Qaeda's name or otherwise. Specifically, section 412 of the Patriot Act authorizes the Attorney General to seize suspected terrorist aliens in the United States, even if the intelligence necessary to link them to al Qaeda is not yet confirmed, and to detain them without any process. It mandates, however, that within seven days of seizure, the Attorney General must begin "removal proceedings" or "charge [such suspected

terrorist aliens] with a criminal offense." Patriot Act § 412(a). Thus, even when Congress expressly authorized the domestic seizure and detention of suspected alien terrorists, it carefully cabined the detention power and explicitly prohibited detention without charge beyond seven days by requiring the initiation of criminal prosecution or an immigration removal proceeding. *See Youngstown*, 343 U.S. at 609 (Frankfurter, J., concurring) ("It is quite impossible . . . when Congress did specifically address itself to a problem . . . to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld."). And by preserving Justice Department control of such detentions, Congress remained faithful to the longstanding suspicion of military intrusions into the domestic civilian sphere. *See supra* Part I.A.

Congress, moreover, specifically refused to authorize *indefinite* detention without charge of terrorist aliens within the United States. Pet. App. 60a (Motz, J.) (discussing legislative history). When the Bush Administration initially requested that authority—the authority at issue here—members of both parties in Congress fiercely objected during legislative hearings on the Patriot Act, and several responded that such indefinite detention authority was unconstitutional. *See, e.g.*, *Homeland Defense: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 18, 26, 28 (2001); *Administration's Draft Anti-Terrorism Act of 2001: Hearings Before the H. Comm. on the Judiciary*, 107th Cong. 21, 40, 54 (2001). In the course of those hearings, no one—not one legislator and no member of the Administration—suggested that the AUMF had already granted the

president the power to order indefinite military detention of some terrorists within the United States, even those allegedly affiliated with the perpetrators of the September 11 attacks. Congressional opposition to indefinite detention ultimately forced the Bush Administration to accept a bipartisan agreement to eliminate any indefinite detention authority from the Patriot Act. *See* Patriot Act § 412(a); *see also* 147 Cong. Rec. S10,561 (daily ed. Oct. 11, 2001) (statement of Sen. Hatch) (relating that "Senator Kennedy, Senator Kyl, and I worked out a compromise that limits the [detention] provision"); 147 Cong. Rec. H7206 (daily ed. Oct. 23, 2001) (statement of Rep. Delahunt) (stating that negotiations had led to a "better bill" than that reflected in the initial proposal, which included authorization of indefinite detention). That the Administration and Congress felt the need during the hearings and markup to address the indefinite detention of terrorists within the United States in such detail and at such length without any reference to the AUMF underscores that no one believed that the AUMF, passed just weeks earlier, already granted the president any such authority. *See, e.g.*, *Erlenbaugh v. United States*, 409 U.S. 239, 243-244 (1972) (subsequent bills must be read in tandem with earlier legislation and are "entitled to great weight in resolving any ambiguities and doubts" in the latter (internal quotation marks and citation omitted)).[16]

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[16] Since the AUMF's enactment, senior counter-terrorism officials have affirmed that they do not believe that the executive has legal authority to detain indefinitely without charge suspected terrorists seized within the United States. *See, e.g.*, Bryan Bender, *Chertoff Wants U.S. to Review*

The legislative history of the AUMF similarly shows that Congress rejected the Bush Administration's eleventh-hour effort to expand the AUMF's reach to encompass the United States. As Senator Daschle has recounted, "[l]iterally minutes before the Senate cast its vote" on the AUMF, "the administration sought to add the words 'in the United States and' after 'appropriate force' in the [AUMF's] agreed-upon text" so as to give "the president broad authority to exercise expansive powers not just overseas—where we all understood he wanted to act—but right here in the United States, potentially against American citizens." Tom Daschle, Editorial, *Power We Didn't Grant*, Wash. Post, Dec. 23, 2005. The Senate refused "to accede to this extraordinary request for additional authority." *Id.*[17]

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*Antiterror Laws*, Boston Globe, Aug. 14, 2006 (describing recognition by Michael Chertoff, Secretary of the Department of Homeland Security, that Britain's anti-terrorism statute allowing the British government to detain suspected al Qaeda members and other terrorists for up to 28 days without charge permits it to hold suspected terrorists without charge longer than any U.S. law).

[17] Contemporaneous legislative statements confirm this understanding of the AUMF's scope. *See, e.g.*, 147 Cong. Rec. S9423 (daily ed. Sept. 14, 2001) (statement of Sen. Biden) ("In extending this broad authority to cover those 'planning, authorizing, committing, or aiding the attacks' it should go without saying, however, that the resolution is directed only at using force *abroad* to combat acts of international terrorism." (emphasis added)); 147 Cong. Rec. H5639 (daily ed. Sept. 14, 2001) (statement of Rep. Lantos) ("The resolution before us empowers the President to bring to bear the full force of American power *abroad* in our struggle against the scourge of international terrorism." (emphasis added)).

It is therefore clear from the statutory language, the context of enactment, and the legislative record that while Congress separately addressed the dangers of domestic terrorism in the Patriot Act, Congress was focused in the AUMF on the *overseas* use of the military in long-term foreign conflicts that Congress anticipated—overseas engagements that manifestly required legislative sanction. *See* AUMF § 2(b) (citing the War Powers Resolution). The AUMF was clearly drafted in anticipation of the impending conflict in Afghanistan, where the individuals responsible for the September 11 attacks and those who harbored them were known to be located. *See Hamdan*, 548 U.S. at 568; *Hamdi*, 542 U.S. at 510 (plurality opinion). Unlike the Patriot Act, the AUMF was not drafted with the detention of terrorism suspects seized in this country in mind. Nor did it grant the president discretion to treat the United States as a war zone and displace the civilian justice system by transforming criminal defendants into combatants through the stroke of a pen.

Given the long and unbroken constitutional tradition of prosecuting terrorists seized inside the United States in the criminal justice system, and the strong presumption against military action domestically, it makes perfect sense that Congress authorized the use of military force abroad in the AUMF while responding to the threat at home by substantially enlarging law enforcement's power to detain and prosecute suspected terrorists through

the Patriot Act.[18] *Cf. Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring) ("Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them."); *Nat'l Lead Co. v. United States*, 252 U.S. 140, 147 (1920) (Congress is presumed to legislate with knowledge of established executive branch practice, especially where that practice is longstanding).[19]

The Fourth Circuit, moreover, wrongly assumed that Congress silently abrogated the Non-

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[18] Beyond augmenting government authority to detain without charge for up to seven days, the Patriot Act substantially enhanced law enforcement's ability to prosecute suspected terrorists. Congress, for example, expanded the reach of federal anti-terrorism laws. *See, e.g.*, Patriot Act § 805 (amending 18 U.S.C. § 2339A) (expanding material support provisions to include providing expert advice or assistance to terrorists); *id.* § 814 (amending 18 U.S.C. § 1030(a)) (prohibiting intentional damage affecting a computer system used by or for the government); *id.* § 817 (amending 18 U.S.C. § 175) (prohibiting possession of chemical agents or toxins). Congress also increased the penalties for terrorism-related crimes. *See, e.g.*, *id.* § 811 (amending numerous provisions of 18 U.S.C.). At the same time, Congress made federal crimes of terrorism new predicate offenses for the purposes of other criminal statutes. *See id.* § 805 (amending 18 U.S.C. § 1956(c)(7)(D)) (including provision of material support to a terrorist organization as a money laundering predicate offense).

[19] Were there any conflict, however, between the Patriot Act and the AUMF, settled principles of statutory construction dictate giving precedence to the Patriot Act because of its explicit and more specific focus on the detention of terrorist aliens within the United States. *See, e.g.*, *Busic v. United States*, 446 U.S. 398, 406 (1980).

Detention Act in the AUMF. *See* 18 U.S.C. § 4001(a). Repeals by implication are strongly disfavored. *See, e.g.*, *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. __, 127 S. Ct. 2518, 2532 (2007); *Branch v. Smith*, 538 U.S. 254, 273 (2003). The Non-Detention Act was enacted with the express purpose of prohibiting military detention without criminal trial of allegedly dangerous individuals seized in the United States in time of war or crisis absent clear and explicit direction from Congress. *See Padilla v. Rumsfeld*, 352 F.3d 695, 718-720 (2d Cir. 2003) (discussing legislative history); *accord Hamdi*, 542 U.S. at 541-547 (Souter, J., concurring) (same). The Non-Detention Act, to be sure, applies only to citizens, while this case involves a non-citizen. But the Fourth Circuit's decision, as judges of that court recognized, extends the AUMF domestically to citizens and non-citizens alike. The text of the AUMF, this Court's *ratio decidendi* in *Hamdi*, and the basic force of the government's own arguments admit no distinction between citizens and non-citizens. *See supra* note 9; *cf. Clark v. Martinez*, 543 U.S. 371, 378 (2005) ("To give these same words a different meaning for each category would be to invent a statute rather than interpret one."). Thus, if the AUMF authorizes Petitioner's indefinite military detention, it also allows the indefinite military detention of American citizens arrested in the United States. But, as discussed above, the AUMF provides no such authorization.

In reaching the contrary conclusion—and finding that a statute silent on detention could authorize the executive to supplant wholesale the criminal justice system with an open-ended scheme

of indefinite military detention—the Fourth Circuit relied on its determination that the criminal justice system is ill-equipped to address domestic terrorism. *See* Pet. App. 204a-224a (Wilkinson, J.); *see also* Pet. App. 106a (Traxler, J.); Pet. App. 167a (Williams, C.J.). That conclusion is doubtful. *See, e.g.*, *Hamdi*, 542 U.S. at 547-548 (Souter, J., concurring) (describing the "well-stocked statutory arsenal" of domestic criminal laws designed to disrupt ongoing terrorist plots and incapacitate offenders); Classified Information Procedures Act, 18 U.S.C. app. 3, §§ 1-16 (providing detailed statutory framework to address the use of classified information in criminal prosecutions); *supra* note 18.[20] Time and again, the criminal justice system has demonstrated that it is

[20] Various immigration laws and regulations also address the government's power to detain suspected alien terrorists. *See, e.g.*, 8 U.S.C. § 1226(a) (authorizing discretionary detention of aliens pending outcome of removal proceedings); *id.* § 1226(c) (mandating detention of aliens charged as inadmissible or deportable based on any terrorism-related ground); *id.* § 1231(a)(6) (stating that aliens ordered removed from the country may be detained beyond the period prescribed for removal based on the Attorney General's determination that they pose a risk to the community); *id.* § 1226a(a)(6) (stating that aliens ordered removed from the country, whose removal is unlikely in the foreseeable future, may be detained for additional periods of up to six months if their release would threaten the national security or safety of the community); 8 C.F.R. § 1003.19(h)(1)(i) (prohibiting immigration judges from reexamining custody determinations concerning aliens removable on security or other related grounds); *see also* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 401, 110 Stat. 1214, 1258-1268 (codified as amended at 8 U.S.C. §§ 1531-1537) (creating an "Alien Terrorist Removal Court," which provides, *inter alia*, for the detention and removal of aliens suspected of terrorist activity).

fully capable of handling any challenges posed by domestic terrorism cases, including those involving alleged al Qaeda agents or supporters who come to the United States to commit terrorist attacks. *See generally* Richard B. Zabel & James J. Benjamin, Jr., In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts (2008), *available at* http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf.

But, in any event, this is a determination that rests in the first instance with the legislature. It is Congress's constitutionally assigned role, not the Judiciary's, to assess competing policy choices and to craft long-term responses to domestic terrorism, within constitutional constraints. Here, Congress has weighed those policy choices and decided that, at least domestically, terrorism must continue to be addressed by the civilian justice system and terrorist suspects must not be detained indefinitely without charge. If the Executive disagrees with Congress's conclusion, and insists that greater domestic detention authority is necessary, the Executive must seek and obtain explicit authorization from Congress. When the Executive did seek such authorization, in the context of the Patriot Act, it was denied. Having failed to secure this detention power from Congress, the Executive cannot now obtain it from the courts.

### C. Petitioner's Military Detention Was Not a "Necessary" or "Appropriate" Use of Force.

The Fourth Circuit also ignored Congress's explicit instruction in the AUMF to use only

"necessary and appropriate" military force. Given the strong presumption against military intrusion into domestic law enforcement and the constitutional backdrop of *Milligan* and its progeny, it is inconceivable that Congress could have considered military detention a "necessary and appropriate" use of force in the United States except where civilian courts are not open or functioning.[21]

On the particular facts of this case, moreover, the government cannot meet its burden of showing that military detention was "necessary" or "appropriate." Al-Marri was arrested at his home in Peoria by FBI agents in December 2001. He was then detained in solitary confinement for eighteen months while being prosecuted criminally by civilian authorities in federal court before President Bush ordered his military seizure on the eve of trial.

The government has never suggested that the federal courts were incapable of trying al-Marri on the charges then pressed. It has also never explained how al-Marri possibly could have presented a "continuing, *present*, and grave danger"

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[21] This limitation in the AUMF does not implicate the president's inherent power as commander-in-chief to repel sudden attacks against the United States. *See* 2 Records of the Federal Convention of 1787, at 318 (Max Farrand ed., 1937); *Prize Cases*, 67 U.S. (2 Black) 635, 668-669 (1863). That power is not at issue here. The government has never claimed that there was an imminent attack occurring on June 23, 2003, in Peoria, Illinois. In any event, once an imminent threat has been extinguished within the United States, the civilian justice system must resume its constitutional function. *Milligan*, 71 U.S. at 127 ("As necessity creates the rule, so it limits its duration.").

when he had already been incarcerated for eighteen months, with no imminent prospect of release. Pet. App. 467a (emphasis added); *cf. Padilla v. Hanft*, 432 F.3d 582, 583-584, 587 (4th Cir. 2005) (noting that the government's eleventh-hour transfer of Jose Padilla to civilian custody for criminal trial, after arguing vigorously that he was an "enemy combatant," suggested that his indefinite military detention had never, in fact, been necessary). Nor has the government articulated why the highly restrictive SAMs it sought to impose were insufficient to address any possible security concern posed by al-Marri while he was incarcerated pending trial. There was, in short, no deficiency in the criminal process, no plausible specter of imminent threat, and no necessity for removing al-Marri from the criminal justice system.[22] And if, as the government alleges, al-Marri has in fact supported or engaged in terrorist activity in the past, nothing

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[22] According to former Attorney General John Ashcroft, who was closely involved in the designation, the government labeled al-Marri an "enemy combatant" because he became a "hard case" by "reject[ing] numerous offers to improve his lot by . . . providing information." John Ashcroft, Never Again: Securing America and Restoring Justice 168-169 (2006). Following his detention as an "enemy combatant," al-Marri was held *incommunicado* for sixteen months and subjected to highly coercive interrogations. As Judge Motz observed, detention for the purpose of interrogation cannot be a "necessary" or "appropriate" use of military force. Pet. App. 54a n.19; *see Hamdi*, 542 U.S. at 521 (plurality opinion) ("Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized [by the AUMF]."); *Rumsfeld v. Padilla*, 542 U.S. at 465 (Stevens, J., dissenting) ("[Executive detention] may not . . . be justified by the naked interest in using unlawful procedures to extract information.").

stops the government now from returning him to that system to face other criminal charges.

The uncontested facts thus place al-Marri well outside the bounds of the AUMF's own terms. His designation and detention as an "enemy combatant"—derailing an on-track criminal prosecution in federal court—was not "necessary" or "appropriate." It was a misuse of military power to circumvent and subvert the civilian justice system that by law and tradition has controlled within our borders since the Nation's founding.

## II. THE CONSTITUTION PROHIBITS PETITIONER'S MILITARY DETENTION.

For the reasons explained above, the AUMF does not authorize al-Marri's military detention. But even if doubt remained as to this point, the AUMF must be construed to avoid the serious constitutional problems the government's interpretation would raise. *See, e.g.*, *St. Cyr*, 533 U.S. at 299-300 ("[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems." (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932))); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (courts must avoid serious constitutional problems unless an alternative construction is "plainly contrary to the intent of Congress"). If the Court finds that no other interpretation of the AUMF is fairly possible, then the asserted extension of the AUMF's reach to

authorize al-Marri's military detention must be invalidated.

The Constitution limits the domestic exercise of military jurisdiction inside the United States to individuals who fall within a well-defined and traditionally understood legal category of combatant under precedent and established law-of-war rules. *Compare Quirin*, 317 U.S. at 21-22, 37-38 (petitioners subject to military jurisdiction based on their uncontested affiliation with the armed forces of the enemy German government), *with Milligan*, 71 U.S. at 6-7, 130 (petitioner not subject to military jurisdiction as long as the civilian courts were open and functioning even though he had allegedly committed "an *enormous* crime" in "a period of war" by conspiring with a secret military organization to overthrow the government (emphasis in original)). That category does not include individuals such as Petitioner, who are seized and detained in the United States, far from any active hostilities, based solely on the assertion that they supported or planned to engage in terrorist activities. Such individuals remain civilians and cannot be imprisoned by the military consistent with the Constitution. They must be charged and tried in civilian court. This constitutional requirement is rooted in the Due Process Clause of the Fifth Amendment as well as the numerous safeguards of the criminal process contained in that amendment, in the Sixth Amendment, and in the jury trial guarantee of Article III.

In *Milligan*, therefore, this Court held that the petitioner could not be subjected to military jurisdiction even though President Lincoln insisted

that he presented a grave danger, supported the enemy, and plotted to commit hostile and war-like acts. 71 U.S. at 6-7, 130. Instead, the Court ruled that Milligan and his co-defendants had to be prosecuted in civilian court for their alleged crimes as long as those courts were open and functioning. *Id.* at 121-122; *supra* at 24-25; *accord United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23 (1955) ("civilians[ ] are entitled to . . . the benefit of [the] safeguards afforded those tried in the regular courts authorized by Article III of the Constitution").

*Quirin* conforms to this constitutional rule. The ruling in *Quirin* "represents the high-water mark" of military jurisdiction within the United States. *Hamdan*, 548 U.S. at 597 (Stevens, J., concurring). It also has been sharply criticized. *See, e.g.*, *Hamdi*, 542 U.S. at 569 (Scalia, J., dissenting) ("[*Quirin*] was not this Court's finest hour."). But *Quirin* must also be understood as the *Quirin* Court intended: an exceedingly narrow opinion sharply circumscribing domestic military jurisdiction while permitting its exercise in the case presented.

The *Quirin* Court held simply that in a declared war against Germany, conceded members of Germany's armed forces who invaded the United States by crossing military lines—in uniform and heavily armed—could be tried by military commission for violating the laws of war. *Quirin*, 317 U.S. at 21-22, 31 (noting that the soldiers were landed by German submarines and came ashore in German Marine Infantry uniforms carrying explosives, fuses, and incendiary devices); *see also id.* at 22 n.1 (noting that the entire Eastern Seaboard had been designated a military defense zone and

that U.S. forces had been deployed along it to interdict military landings of enemy soldiers). The Court's holding rested exclusively on the petitioners' conceded and uncontested affiliation with "the military arm of the enemy *government*," *id.* at 37-38 (emphasis added)—an affiliation that placed them squarely and unmistakably within the legal category of combatants based on clear, long-established, and uncontested law-of-war principles. *Id.* at 30-31 & n.7 (citing, *inter alia*, the Hague Convention, signed by forty-four nations, as evidence of "universal agreement and practice"); Pet. App. 35a-36a (Motz, J.) (discussing *Quirin*); *supra* at 26. The Court expressly confined its opinion to those conceded facts. *Quirin*, 317 U.S. at 45-46. It thus made clear that it did not intend to question or disturb the continued vitality of *Milligan* or the historic norm of available civilian criminal process within the United States. *Id.* The executive branch, in turn, also understood the *Quirin* opinion in the same exceptionally limited manner. Indeed, on *Quirin*'s immediate heels, the executive pursued punishment in the criminal justice system for the members of the same conspiracy as the *Quirin* petitioners who were not members of the German armed forces. *See Cramer v. United States*, 325 U.S. 1 (1945); *United States v. Haupt*, 136 F.2d 661 (7th Cir. 1943).[23]

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[23] There is also an important functional reason for distinguishing state and non-state actors: the "jurisdictional fact" of membership in another country's military force is easily verified. *See Quirin*, 317 U.S. at 47; *Hamdi*, 542 U.S. at 571-572 (Scalia, J., dissenting); *see also Ludecke v. Watkins*, 335 U.S. 160, 161-162 (1948) (stating that enemy alien status rests on affiliation with the enemy nation). By contrast, the fact of

The *Quirin* opinion, moreover, must be read in light of the extraordinary circumstances in which it was written. At the time of its preparation, the case's outcome was a *fait accompli*. Six of the eight prisoners had already been executed. *Hamdi*, 542 U.S. at 569 (Scalia, J., dissenting). The dramatic expansion of *Quirin* urged by the government and endorsed by the Fourth Circuit cannot be squared with the Constitution's scheme of basic liberties or the historic and time-honored limits on military jurisdiction within the Nation's borders.

More recently in *Hamdi*, this Court reiterated that the permissibility of the petitioner's military detention in that case rested on traditional and well-established law-of-war principles, which permit the detention of armed soldiers captured on a battlefield where they are engaged in combat alongside enemy government forces against U.S. and allied troops. 542 U.S. at 518-521 (plurality opinion). The *Hamdi* Court, moreover, both reaffirmed and clarified *Milligan*'s longstanding constitutional constraint on military jurisdiction in times and places the federal courts are open and functioning. It emphasized the sole jurisdictional triggers for the exercise of this

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affiliation with a terrorist organization is a complex and difficult factual determination—often involving questions of motive and inchoate intent—that is best and traditionally resolved in the adversarial testing process of a criminal trial. It is also, as both this case and the Padilla habeas litigation show, a fact vulnerable to dangerous threshold manipulation by the government. Pet. App. 54a n.19 (Motz, J.); *Padilla*, 432 F.3d at 584 (noting that the government abandoned its most serious allegations against Padilla, which had served as the basis for holding him as an "enemy combatant" for three-and-one-half years, when, without explanation, it charged him criminally).

awesome power within the United States: affiliation with the armed forces of an enemy government and direct participation in hostilities against U.S. forces on the battlefield. *Id.* at 522 ("Had 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.").

To the extent, however, that the permissible line between civilian and military jurisdiction is at all in question, tradition and practice inform how that line should be drawn and understood. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. __, 128 S. Ct. 2783, 2805-2807 (2008) (examining post-ratification history from the 1800s in construing the meaning of the Second Amendment); *Hamdan*, 548 U.S. at 595-596 (Stevens, J., concurring) (looking to "past practice" to determine whether military commissions were "justified under the 'Constitution and laws'"); *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring) ("The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature."). The absence of historical examples of an asserted constitutional power or practice provides strong evidence that the power or practice is neither authorized nor constitutional. *See, e.g.*, *Printz v. United States*, 521 U.S. 898, 917-918 (1997) (finding longtime congressional avoidance of the practice of commandeering state officials to execute federal law to be evidence of the unconstitutionality of a federal gun-control law directing state enforcement activities); *Raines v. Byrd*, 521 U.S. 811, 826-828

(1997) (pointing to the historical absence of suits by political officials to demonstrate plaintiff federal legislators' lack of Article III standing).

Here, the absence of historical support for the government's position is absolute. Simply put, no precedent or past practice in this Nation's entire history supports the assertion of military jurisdiction under the circumstances of this case: A legal resident who concededly is not a citizen of any nation at war with the United States or an affiliate of that enemy nation's armed forces; who was not seized on, near, or having escaped from a battlefield on which the armed forces of the United States or its allies were engaged in combat; who was never even present in the country (Afghanistan) during the hostilities in which U.S. military forces were engaged there; and who was arrested and detained at all times in places where the federal courts were open, operating, and fully capable of dispensing justice—and, indeed, were in the process of doing so in his case.

As past precedent and practice prove, the government's claimed military detention authority finds no warrant in history or constitutional tradition. Suspected terrorists seized within the United States, including alleged al Qaeda agents and supporters, have uniformly been prosecuted in the civilian justice system—not subjected to military jurisdiction—in accordance with the requirements of the Constitution. Custom and tradition thus reinforce and inform the longstanding constitutional rule. Individuals arrested in this country who are unaffiliated with the military wing of an enemy government and who do not take part in hostilities alongside enemy forces on a battlefield cannot be

subjected to military jurisdiction consistent with the Constitution as long as the civilian courts are open and operating.

## III. THE PRESIDENT HAS NO INHERENT AUTHORITY TO DETAIN PETITIONER.

Petitioner also cannot lawfully be detained as an exercise of the president's inherent authority under the Commander-in-Chief Clause of Article II. All the judges below who addressed that argument rejected it, and the government did not even mention the argument in its Brief in Opposition. Because the AUMF does not authorize Petitioner's detention, and because Congress in the Patriot Act explicitly denied the executive the power to detain indefinitely without charge suspected alien terrorists seized and held within the United States, the president's "power is at its lowest ebb" in this case. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring); Pet. App. 76a-80a (Motz, J.); *see also Hamdan*, 548 U.S. at 638-639 (Kennedy, J., concurring). Moreover, as noted, such a breathtaking and wholly unprecedented reading of the Commander-in-Chief Clause would apply not only to legal resident aliens but to American citizens as well. *See supra* note 9; Br. for the Pet'r at 14, 27, 35-38, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027). The Constitution does not permit core liberties to be extinguished so easily.

As Judge Motz explained, when President Bush ordered al-Marri's military detention, he asserted a power that "far exceeds that granted him by the Constitution." Pet. App. 83a. The government cites no authority in support of the proposition that the president, acting in

contravention of congressional legislation and absent compelling military exigency, can seize a person lawfully residing in the United States and imprison him indefinitely in a military jail. This proposition contradicts the basic constitutional framework of war powers. *See* U.S. Const. art. I, § 8, cls. 11-14. It also deviates dangerously from the Framers' understanding of the Commander-in-Chief Clause. *See, e.g.*, *Youngstown*, 343 U.S. at 643-644 (Jackson, J., concurring) ("[T]he Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and its inhabitants." (emphasis omitted)); The Federalist No. 69, at 386 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (The president's commander-in-chief power "amount[s] to nothing more than the supreme command and direction of the military and naval forces."); *see also Milligan*, 71 U.S. at 139 (Chase, C.J., concurring) (The commander-in-chief power consists of "the command of the [armed] forces and the conduct of [military] campaigns."). The government's claim is likewise irreconcilable with this Court's canonical explanation of the commander-in-chief power in *Youngstown*. 343 U.S. at 587 (rejecting the President's claim of inherent authority to seize the Nation's steel mills, despite his impassioned plea that it was vital to the war effort); *accord Hamdan*, 548 U.S. at 593 n.23.

U.S. constitutional law and practice, in short, have always recognized a sphere reserved for domestic civilian operation insulated and protected from military encroachments, especially those that infringe upon individual liberties. The facts at hand

cry out for reaffirming, not redrawing, the historic and time-honored limits on domestic military jurisdiction. To do otherwise, as Judge Motz underscored, would fundamentally alter "the constitutional foundations of our Republic." Pet. App. 88a. If the government wishes to imprison Petitioner, it must charge him and try him in our civilian courts. His military detention must cease, and the Fourth Circuit's decision should be reversed.

## CONCLUSION

For the foregoing reasons, the judgment below that the president has legal authority to detain Petitioner as an "enemy combatant" based on the facts alleged should be reversed and the case remanded with instructions that the habeas corpus petition be granted and the government be directed to release Petitioner from military custody forthwith.

Respectfully submitted,

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