No. 10-98

IN THE
Supreme Court of the United States

JOHN D. ASHCROFT,
Petitioner,
v.

ABDULLAH AL-KIDD,
Respondent.

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

Brief of The Center for Justice and Accountability as Amicus Curiae in Support of Respondent

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BRIEF OF THE CENTER FOR JUSTICE AND ACCOUNTABILITY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTERESTS OF THE *AMICUS CURIAE*

The Center for Justice and Accountability (CJA) is an international human rights organization dedicated to the protection and promotion of human rights through law.[1] CJA is a non-profit legal advocacy center that works to deter severe human rights abuses through litigation, education, and outreach.

CJA represents survivors and their families in both domestic and foreign tribunals. Many of these cases include a claim of arbitrary detention, giving CJA considerable experience litigating claims of detention not authorized by governing law, as well as experience with the detention statutes of foreign states.

That experience brings us to the conclusion that Section 3144 cannot be found to allow for the preventative or investigative detention of U.S. citizens suspected of engaging in criminal activity.

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[1] Pursuant to Supreme Court Rule 37.6, CJA states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than CJA and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the clerk.

SUMMARY OF ARGUMENT

There is a sharp distinction between the purpose of Section 3144, which authorizes the detention of witnesses to compel their testimony, and the purpose to which petitioner allegedly put that statute: to detain and investigate suspects whom the government lacked probable cause to charge with a crime. That distinction is made evident by the laws of foreign nations, as well as those of this country.

A number of foreign nations, including ones that share our values and legal traditions, have grappled with national security concerns similar to those in the United States, and have enacted laws that permit their citizens to be detained while authorities conduct an investigation against them. Some of those countries also have laws similar to Section 3144. Notably, foreign legislative schemes that permit preventative or investigative detention are distinct from those authorizing the detention of witnesses. They typically include procedural safeguards, and reflect a conscious and calibrated decision by lawmakers to provide explicit investigative detention authority to law enforcement.

In enacting Section 3144, Congress has authorized the detention of witnesses. Congress has also authorized the preventative detention of non-citizens on an exceedingly limited basis. But Congress has not authorized the preventative detention of U.S. citizens.

ARGUMENT

Respondent Abdullah al-Kidd is a U.S. citizen who was arrested in March 2003 under 18 U.S.C. §

3144. That statute authorizes the detention of a witness to a crime to compel his testimony under certain narrow circumstances when his testimony might otherwise be unavailable. The statute provides that a person may be detained if his testimony "is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena." 18 U.S.C. § 3144.

Petitioner allegedly instituted a policy of detaining individuals, including U.S. citizens like respondent, under Section 3144 without the requisite Congressional authorization or evidentiary showing. Specifically, petitioner allegedly ordered the U.S. Department of Justice to employ Section 3144 as a pretext to hold suspects against whom probable cause for an arrest was lacking, while an investigation could be undertaken against them. Respondent contends that Section 3144 was not intended to confer such authority on petitioner.

I. Foreign Nations Use Separate Laws to Detain Suspects and Witnesses.

Several foreign countries, including those that share our common law heritage, have enacted statutes authorizing detention for preventative or intelligence-gathering purposes in instances involving terrorism or other threats to their national security.[2] Some of these countries also authorize the

[2] This Court has previously considered foreign legal practice in interpreting U.S. Constitutional rights in analogous situations. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 578 (2005) ("It does not lessen our fidelity to the Constitution or our

(Continued …)

detention of material witnesses. But these laws are separate. And in countries with preventative or investigative detention provisions, there was a conscious decision by foreign legislatures to grant law enforcement such extraordinary authority, which

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pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom."); *Washington v. Glucksberg*, 521 U.S. 702, 710-11 & n.8, 718 n.16 (1997) (Rehnquist, C.J.) (discussing centuries of "the Anglo-American common-law tradition" regarding punishment for assisting suicide and noting the practices of foreign states); *see also* The Federalist No. 63, at 382 (Alexander Hamilton or James Madison) (Clinton Rossiter ed., 1961) ("[A]ttention to the judgment of other nations is important to every government . . . [;] in doubtful cases, particularly where the national councils may be warped by some strong passion or momentary interest, the presumed or known opinion of the impartial world may be the best guide that can be followed."). That is particularly true in the criminal law context, including the Fourth Amendment. *See, e.g.*, *Roper*, 543 U.S. at 576-78 (acknowledging foreign legal regimes' rejection of death penalty punishments for crimes committed by juveniles); *Graham v. Florida*, 130 S. Ct. 2011, 2033-34 (2010) (assessing foreign practices with respect to juveniles convicted of non-homicide crimes); *Miranda v. Arizona*, 384 U.S. 436, 488-89 (1966) (assessing experiences of foreign states in requiring warnings to suspects during custodial interrogations); *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949) (noting that protection from "arbitrary intrusion by the police" is "at the core of the Fourth Amendment" and that allowing such intrusion would be "inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples"), *overruled on other grounds by Mapp v. Ohio*, 367 U.S. 643, 645-46 (1961).

typically is accompanied by extensive procedural safeguards.

A. Several Foreign Countries Have Separate Schemes for Witness Detention and Preventative and/or Investigative Detention.

Several foreign countries, including ones that share our common law heritage, have legal regimes that provide separately for witness detention and detention for preventative and/or investigative purposes, maintaining the clear distinction between detention schemes that petitioner allegedly blurred.

1. The United Kingdom

The United Kingdom, like the U.S., permits the detention of witnesses. It has a separate legal process for detaining terrorism suspects, however. That distinction is strictly maintained.

A summons may be issued for a material witness if a magistrate or clerk is satisfied that the person is both likely to give material evidence and will not attend voluntarily. Magistrates' Courts Act, 1980, c. 43, § 97. Applications for a summons under Section 97 have been denied, however, when the court has found the summons was not for "the simple and proper purpose of obtaining evidence, but for a different and ulterior purpose." *R v. Marylebone Magistrates ex parte Gatting and Emburey*, (1990) 154 JP 549 (quoting *R v. Baines and Anor*, (1909) 1 KB 258). In *Marylebone*, for instance, the court rejected a request for a summons to a witness the party claimed was material. The court noted its "suspicion in this case that the process of this court

is being abused," since the anticipated testimony of the witness would be hostile—not helpful—to the party requesting the summons. *Marylebone*, 154 JP 549.

In contrast to detention of witnesses under Section 97, terrorism-related detentions are authorized under a separate law, the Terrorism Act 2000, c. 11. Under that law, a constable may arrest without a warrant a person reasonably suspected of having been "concerned in the commission, preparation or instigation of acts of terrorism" or of committing enumerated terrorism offenses. *Id.* §§ 40, 41.[3] The U.K. thus has authorized the constable to detain individuals suspected of terrorism where the suspicion is reasonably based, while providing

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[3] The Terrorism Act is imbued with significant procedural protections. First, as soon as possible after arrest—and at 12-hour intervals for the first 48 hours, *id.* § 41 & sched. 8 ¶21—the detention must be reviewed by a police officer not directly involved in the investigation; the detention may be continued only if the reviewing officer finds that, *inter alia*, the detention is necessary to obtain or preserve relevant evidence, or to make a decision about the deportation or charging of the suspect. *Id.* sched. 8 ¶¶ 23-24. After 48 hours, the detention must be supported by a judicial finding that (1) the detention is necessary, *inter alia*, to obtain or preserve relevant evidence; and (2) the investigation is being conducted diligently and expeditiously. *Id.* sched. 8 ¶ 32. Such pre-trial detention is renewable for supplemental periods of seven days, up to a maximum of 28 days. *Id.* sched. 8 ¶ 36. Since 2006, the Act has permitted continued detention to question the suspect, as well as to complete "examination or analysis of any relevant evidence." *Id.* sched. 8 ¶ 32. In any case, after 28 days, the suspect must be charged or released. *Id.* sched. 8 ¶ 36.

separate authority for witness detention, so long as such detention is not effected for an "ulterior purpose."

2. Canada

Like the United Kingdom, Canada's legislative scheme separately authorizes detention of witnesses and detention for purposes related to terrorism. Akin to Section 3144, Canada permits the detention of a witness "bound by recognizance to give evidence in any proceedings." Criminal Code, R.S.C., c. C-46, § 704(1) (1985); *see also id.* § 706 ("Where a person is brought before a court . . . under a warrant issued pursuant to subsection 698(2) or section 704 or 705, the court . . . may order that the person . . . be detained in custody").

In the wake of September 11, 2001, Canada authorized two other types of detention: "Investigative Hearings" and "Recognizance with Conditions," the authority for which sunset in 2007.[4] Anti-Terrorism Act, S.C., c. 41 (2001); *see also* Criminal Code, c. C-46, §§ 83.28-83.3. Investigative Hearings allowed investigators to seek an order requiring a witness believed to have information concerning a terrorism offense to appear before a judge to answer questions. Criminal Code, R.S.C., c. C-46, § 83.28(5). Witnesses to a terrorism offense in an Investigative Hearing could be arrested and detained in custody for several reasons, including the

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[4] *See* Criminal Code, R.S.C., c. C-46, § 83.32 (1985). The government tabled a 2010 bill for their reenactment. *See* Bill C-17.

risk of flight. *Id.* § 83.29(1).[5] The law also expressly permitted preventative detention. *Id.* § 83.3. A person could be arrested when an officer reasonably believed that terrorist activity would be carried out or reasonably suspected that the imposition of a recognizance with conditions or the arrest of a person was necessary to prevent terrorist activity.[6]

In a notable decision, the Supreme Court of Canada made clear that the procedures under these anti-terrorism laws may not be used to circumvent normal criminal protections. *See Re: Application under s. 83.28 of the Criminal Code*, [2004] 2 S.C.R. 248 ¶ 72 ("There is no reason to believe that the predominant purpose of the judicial investigative hearing before us is to obtain information or evidence for the prosecution of the appellant."). *Application under S. 83.*28 arose out of prosecutions associated with the bombing of an airplane. The state sought an application to compel a witness to participate in a "judicial investigative hearing" under Canada's Anti-

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[5] Witnesses to the Investigative Hearings were not allowed the privilege against self-incrimination, but were given use and derivative use immunity for their testimony as a check against using Investigative Hearings to secure incriminating evidence against the witness. *Id.* § 83.28(10).

[6] After arrest—and after obtaining the consent of the relevant Attorney General—the detainee had to be brought before a provincial court judge within 24 hours (or "as soon as possible" if the judge is not available) for review of the detention and for determining whether recognizance with conditions (such as having no contact with certain other persons) is appropriate. *Id.* § 83.3(6).

Terrorism Law. The Court explicitly recognized the particular need for caution when addressing the scope and application of such laws:

> It was suggested in submissions that the purpose of the Act should be regarded broadly as the protection of "national security." However, we believe that this characterization has the potential to go too far and would have implications that far outstrip legislative intent. The discussions surrounding the legislation, and the legislative language itself clearly demonstrate that the Act purports to provide means by which terrorism may be prosecuted and prevented. . . . [C]ourts must not fall prey to the rhetorical urgency of a perceived emergency or an altered security paradigm. While the threat posed by terrorism is certainly more tangible in the aftermath of global events such as those perpetrated in the United States, and since then elsewhere . . . , we must not lose sight of the particular aims of the legislation. Notably, the Canadian government opted to enact specific criminal law and procedure legislation and did not make use of exceptional powers, for example under the *Emergencies Act*, R.S.C. 1985, c. 22 (4th Supp.), or invoke the notwithstanding clause at s. 33 of the *Charter*.

Id. ¶ 39; *see also Re Vancouver Sun*, [2004] 2 S.C.R. 324 (companion case concluding that investigative hearings presumptively were to be held in open court). The Court then upheld the request for the application regarding the witness, noting the good faith of the prosecution in seeking the application for investigative purposes related to the witness, as opposed to any "oblique motive or otherwise improper purpose." *Application under s. 83.28 of the Criminal Code* [2004] 2 S.C.R. 248 at 97. The Court also remarked that where "the Crown can be shown to have acted vexatiously or in bad faith, recourse may be sought through the courts." *Id.* at 95. Accordingly, like the U.K., Canada maintained distinct procedures for material witness detention and investigative or preventative detention, and sought to ensure that its legal processes are not employed with ulterior motives.

3. South Africa

South Africa, a former British colony, also has enacted separate laws for witness detention and terrorism-related preventative and investigative detentions. Its Criminal Procedure Act 51 of 1977 sets out the terms under which the state may detain "ordinary" (*i.e.*, non-security related) witnesses, much in the manner of Section 3144. *See id.* § 185.[7]

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[7] To effectuate a witness detention, the attorney general must submit an affidavit to a court for review and decision. *See id.* §§ (1)-(2). The detainee can generally be held inaccessible until the underlying criminal proceedings are concluded, but

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South Africa's Internal Security Act 74 of 1982 (ISA), on the other hand, provides for both preventative and investigative detention of witnesses and suspects who raise national security concerns. *See id.* § 28 (regarding "[d]etention of certain persons in order to prevent commission of certain offences or endangering of security of State or of maintenance of law and order"); § 29 (regarding "[d]etention of certain persons for interrogation"); *see also Minister of Law and Order v. Hurley* 1986 (3) SA 568 (A). The ISA also dictates specific showings and procedures for each.[8] Thus, comparable to the U.K. and Canada, South Africa has enacted separate legal structures for material witness detentions and preventative or investigative detentions.

4. Australia

Australia, which also shares a legal heritage with the U.K., enforces a strict boundary between detention for the purpose of gathering evidence and preventative detention of terrorism suspects. For witnesses, a "questioning and detention warrant" is

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the Act also provides for regular visitation by a local magistrate. *See id.* § (4)-(6).

[8] For § 28 preventative detention, the government must provide the detainee with a statement setting forth the reasons of detention, to which the detainee may respond with the assistance of counsel. *See id.* §§ (3)(b), (8)-(9). For § 29 investigative detention, regular reports justifying continued detention must be made to the Minister of Law and Order and a showing made to a review board, whom the detainee may petition for release. *See id.* §§ (2)-(4). The detainee must also be visited regularly by a magistrate and a doctor. *See id.* § (9).

available for persons of intelligence value for up to 168 hours (seven days). *See* Australian Security Intelligence Organisation Act 1979 (Cth), pt III; div 3; ss 34F-H, 34R-S (Austl.).[9]

In contrast, terrorism suspects can be detained preventatively under a different type of warrant for twice as long. *See* Anti-Terrorism Act (No. 2) 2005 (Cth) sch 4 (Austl.); Criminal Code Act 1995 (Cth) ch 2, pt 5.3, div 105 (Austl.); Terrorism (Police Powers) Act 115 of 2002 (NSW). Significantly, Australia's Criminal Code prohibits the questioning of a suspect detained preventatively under the Anti-Terrorism Act. *See* Criminal Code Act 1995 (Cth) ch 2, pt 5.3, s 105.42 (Austl.). Australia thus criminalizes what petitioner is alleged to have done here: use of one kind of detention to accomplish the purpose of another.

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[9] Under this procedure, the officer "must make arrangements for the person to be immediately brought before a prescribed authority for questioning." *Id.* § 34H. A person may not be detained for "a continuous period of more than 168 hours." *Id.* § 34S. After 168 hours have passed, an officer may obtain additional questioning and detention warrants only if the issuing authority finds that (i) a new warrant is justified by information additional to or materially different from that known to the Director-General when the Director-General sought the Minister's consent to request the issuance of the last of the earlier warrants; and (ii) the person is not being detained under this Division in connection with one of the earlier warrants. *Id.* § 34G.

5. Germany

Germany also has enacted separate laws for witness detention and preventative detention. Under Section 70 of the German Criminal Procedure Code, akin to Section 3144, witnesses can be placed in "coercive detention" until the termination of the legal proceedings to compel their testimony. *Strafprozeßordnung* [StPO] [Code of Criminal Procedure], Apr. 7, 1987, *Bundesgesetzblatt* [BGB_L] 312-2, § 70 (Ger.), *available at* http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.htm. Sections 413-416 of the Criminal Procedure Code set forth a separate scheme of preventative detention, applicable where the prosecutor "does not conduct criminal proceedings because of the perpetrator's lack of criminal responsibility or his unfitness to stand trial." *Id.* § 413.[10]

The German federal states have also enacted laws permitting the detention of suspects for public safety reasons, whether or not formal criminal investigations are pending. *See, e.g.*, *Wortlaut des Hessischen Gesetzes über die öffentliche Sicherheit und Ordnung* [HSOG] [Hessian Public Security and Order Law], Dec. 22, 2004, as amended Jan. 15, 2005 [GVB_L]. § 32(1) (Ger. (Hes.)).

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[10] The preventative detention procedure is similar to the criminal procedure, except the Public prosecutor must make a written application (rather than an indictment). *Id.* § 414. An expert then prepares an opinion and the court conducts an examination. *Id.* §§ 414-15. If the accused criminal responsibility becomes apparent through these proceedings, they may transition to criminal proceedings. *Id.* § 416.

B. Other Foreign Countries Have Authorized Preventative and Investigative Detention With Extensive Procedural Safeguards.

Still other countries, which do not appear to have laws similar to Section 3144, have enacted laws permitting detention for preventative and investigative purposes. These detention schemes show the due consideration their legislatures have given the confinement of citizens and the extensive procedural safeguards they have imposed before a witness may be lawfully detained.

1. Israel

Since anti-terrorism is a fundamental component of its security efforts, Israel has carefully constructed detention laws. Israel authorizes preventative detention of suspected terrorists as part of a scheme of "administrative detention," distinct from criminal detention. Section 2(a) of the Emergency Powers (Detention) Law, 5739-1979 (EPDL) allows law enforcement officials to detain administratively both citizens and non-citizens when the Minister of Defense has "reasonable cause to believe that reasons of state security or public security" require it.

Broad though that authority may be, it is not unlimited, and a detention order may be vacated if it is found to have been made in "bad faith" or based on "irrelevant considerations."[11] For example, Israel's

[11] Generally within 48 hours of arrest, detainees must appear before a judge, who views all the evidence (including

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Supreme Court has concluded that the EPDL does not allow Israel to detain as "bargaining chips" individuals who do not themselves pose a terrorism risk but are held as a negotiating tool for the release of Israeli soldiers. *See* CrimA 7048/97 *Anonymous Persons v. Minister of Defense,* 54(1) P.D. 721 (2000). In response to that ruling, the Knesset enacted the Incarceration of Unlawful Combatants Law, 5762-2002 (IUCL), under which the state may detain "member[s] of a force perpetrating hostile acts against the state of Israel." IUCL, §§ 2, 3(a).

2. India

In a similar vein, India authorizes the central government to detain preventatively persons without trial in matters related to foreign affairs, defense, or security. India Const., art. 22(5). India also provides for preventative detention outside the emergency context by explicitly empowering Parliament to enact preventative detention laws for reasons connected with "the security of the State," "maintenance of

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classified evidence) before deciding what to disclose to the detainee and/or the detainee's counsel. The district court reviewing a detention order must vacate the order if the court does not find "objective reasons of state security or public security" requiring the detention, or if the detention was "made in bad faith or from irrelevant considerations." EPDL § 4(c). The detainee can appeal the district court's decision directly to Israel's Supreme Court. To uphold the order the court must find that (1) the danger to the state was "so grave as to leave no choice but to hold the suspect in administrative detention," or that (2) the detainee "would almost certainly pose a danger to public or state security." *See Agbariyya v. State of Israel*, 42(1) P.D. 840, 844-45 (Heb.).

Public order," or "maintenance of supplies and services essential to the community." National Security Act N.65 of 1980 (NSA), § 3(2); *see also* India Const., art. 22(3)-(7).

Laws enacted pursuant to these constitutional authorities, permitting preventative detention, have been upheld by Indian courts. *See A.K. Gopalan v. State of Madras*, A.I.R. (1950) S.C. 27. For instance, the NSA allows the central government or any state government to order the detention of an individual for up to twelve months (*id.* § 13) to prevent him or her from acting in a manner "prejudicial to the [defense] of India, the relations of India with foreign powers, or the security of India." *Id.* § 3(1)-(2). Once again, though, such authority is cabined by procedural protections, ending detentions, like respondent's, where the justification for detention is "non-existent."[12]

3. Singapore and Malaysia

Similarly to India, the constitutions of both Singapore and Malaysia authorize preventative detention. Federal Const. of Malaysia, Art. 149(1); Singapore Const., Art. 149(1). Both countries have

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[12] *See, e.g.*, *Smt. Devi v. State of Manipur and Ors*, (2010) 9 S.C.C. 618 ¶¶ 22-23 (finding that if the grounds for justifying the detention are "non-existent or misconceived or irrelevant," the detention violates the detainee's right to be fully informed of the grounds for his detention and to make a representation against his detention at the earliest opportunity); *see also id.* ¶¶ 20, 23 ("[T]here must be a reasonable basis for the detention order, and there must be material to support the same.").

enacted identical internal security acts governing the terms of preventative detention.[13] Both laws give the Minister the power to detain a person on the precondition that the Minister or President is "satisfied" that it is necessary to do so, "with a view to preventing [the person] from acting in any manner prejudicial to the security of [the State]." Malaysia Internal Security Act 1960, § 8(1) (2006); Singapore Internal Security Act, § 8(1).

* * *

As these legal regimes show, many foreign countries have, after due consideration, enacted preventative and investigative detention schemes, accompanied by explicit procedural safeguards. Some also have enacted material witness laws in the vein of Section 3144, but have not allowed law enforcement to use these statutes for investigating suspects. Rather, these countries have expressly granted law enforcement officials the authority that petitioner did not have under the clear language of Section 3144: to detain individuals for preventative or investigative purposes relating to terrorism.

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[13] Preventative detention law in Singapore owes its origins to the preventative detention law of Malaysia, which became Singapore law when Singapore joined the Federation of Malaya in 1963. Singapore left the Federation in 1965, but substantially the same preventative detention laws continue in force in both countries.

II. al-Kidd's Detention was Outside the Authority that Congress Granted Petitioner.

The actions of these foreign countries, permitting the detention of individuals for national security reasons, stands in sharp contrast to the decisions made by the U.S. Congress. As a matter of U.S. law, any federal detention of U.S. citizens must be authorized by an act of Congress, and the Executive Branch must make an appropriate showing of cause; and any state detention scheme must also be based on such a showing. Non-Detention Act, 18 U.S.C. § 4001(a); *see, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 537 (2004) (plurality opinion) (because "due process demands some system for a citizen-detainee to refute his classification [of enemy combatant], the proposed 'some evidence' standard is inadequate"); *United States v. Salerno*, 481 U.S. 739, 751-52 (1987) (upholding pretrial detention based on "clear and convincing" showing of future dangerousness); *Addington v. Texas*, 441 U.S. 418, 431-32 (1979) (upholding civil commitment of mentally ill on showing of danger to the public); *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) ("[T]he Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest."); *Ex parte Endo*, 323 U.S. 283, 297, 303 (1944) (limiting the War Relocation Authority's power to detain a "concededly loyal" citizens because the "authority to detain a citizen. . . is exhausted . . . when his loyalty is conceded.").

A. Congress Authorized Limited Preventative Detention of Aliens in the Aftermath of September 11, 2001.

Congress has expressly authorized the limited preventative detention of aliens under federal immigration laws. After September 11, 2001, Congress enacted legislation authorizing the Attorney General to detain an alien for up to seven days "until the alien is removed from the United States" if the Attorney General has "reasonable grounds to believe" that an alien is engaged in terrorist activity or any other activity endangering national security. USA Patriot Act, Pub. L. No. 107-56, § 412(a), 115 Stat. 272, 350-51 (enacted Oct. 26, 2001) (codified at 8 U.S.C. §§ 1226a(a), (a)(5) (2000 ed., Supp. II)).

Congress could have attempted, consistent with the U.S. Constitution—and reflective of the approaches taken by other countries—to enact a similar statute authorizing detention of U.S. citizens. It did not do so.

B. Congress Did Not Authorize the Preventative Detention of U.S. Citizens in the Aftermath of September 11, 2001.

In fact, Congress has expressly repealed a legislative scheme similar to those enacted in other countries, which authorized the preventative and investigative detention of U.S. citizens for certain national security reasons. Sixty years ago, at the onset of the Cold War, Congress enacted the Emergency Detention Act of 1950. The law authorized detention of a citizen when "there is reasonable ground to believe that such person

probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage" when there is an "internal security emergency." Emergency Detention Act of 1950, 50 U.S.C. §§ 812-813 (1970 ed.). The Emergency Detention Act was repealed in 1971 when Congress passed the Non-Detention Act, which prohibits detention of United States citizens unless authorized by an act of Congress. *See* Pub. L. No. 92-128, 85 Stat. 347, 347-48 (Sept. 25, 1971); 18 U.S.C. § 4001(c); Non-Detention Act, 18 U.S.C. § 4001(a); *see also Howe v. Smith*, 452 U.S. 473, 479 n.3 (1981) (noting that Section 4001(a) prohibits "detention *of any kind* by the United States, absent a congressional grant of authority to detain") (emphasis in original). At no time after September 11, 2001, has Congress enacted a law similar to the Emergency Detention Act, which permitted U.S. citizens to be detained in the civilian justice system while a criminal investigation against them was conducted.

The failure to enact such legislation stands in notable contrast to Congressional action in the context of military affairs. On September 18, 2001, the President signed the Authorization for Use of Military Force (AUMF), which generally permitted the President to "use all necessary and appropriate force" against "nations, organizations, or persons" that he determines "planned, authorized, committed, or aided" in the September 11, 2001 attacks. 115 Stat. 224. A plurality of this Court found that the AUMF authorized detention of a U.S. citizen who was captured in a foreign combat zone and designated as an enemy combatant because under these "narrow circumstances," a citizen may be

detained "to prevent a combatant's return to the battlefield." *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality opinion) (O'Connor, J.).[14] More importantly, as a plurality of the Court concluded, the AUMF would only authorize the detention of a U.S. citizen who is properly designated as an enemy combatant. *See id.*

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Congress thus has recently enacted laws that permit the detention of aliens, and in the past had enacted laws permitting the detention of U.S. citizens for national security, terrorism, and other considerations. That Congress did not enact such legislation in the wake of September 11, 2001, permitting citizen-suspects to be detained by the Department of Justice while a criminal investigation

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[14] Two bills were proposed that would have authorized detention of U.S. citizens designated as "unprivileged enemy belligerents," but neither was enacted. *See* Enemy Belligerent Interrogation, Detention, and Prosecution Act of 2010, S. 3081, 111th Cong. (Mar. 4, 2010) (introduced by Sen. McCain, among others) ("An individual, including a citizen of the United States, determined to be an unprivileged enemy belligerent . . . may be detained without criminal charges and without trial for the duration of hostilities against the United States . . . ."); *see also* Terrorist Detention Review Reform Act, S. 3707, 111th Cong. (Aug. 4, 2010) (introduced by Sen. Graham) ("Congress reaffirms that the President is authorized to detain unprivileged enemy belligerents in connection with the continuing armed conflict with the Taliban, al Qaeda, and associated forces, regardless of the place of capture, until the termination of hostilities.").

is conducted against them, cannot be deemed accidental.

Congress's chosen approach also stands in marked contrast to the considered determinations made by other countries facing similar national security and terrorism concerns. These countries expressly have provided law enforcement with the very authority petitioner unilaterally sought to exercise here: preventative detention schemes to investigate national security threats. Congress's failure to provide petitioner with such authority strongly supports respondent's contention that the policy petitioner employed extended beyond the permissible scope of Section 3144.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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