No. 08-368

In The Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,

Petitioner,

v.

COMMANDER JOHN PUCCIARELLI, U.S.N., Consolidated Naval Brig.

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

BRIEF OF THE CONSTITUTION PROJECT AND THE RUTHERFORD INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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OCTOBER 23, 2008

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QUESTION PRESENTED

Whether the Executive can, consistent with the Constitution, invoke military power without an express authorization by Congress, in order to detain without charge or trial a person who is lawfully residing in the United States and who has never taken up arms against this Nation on the battlefield, and whether the Authorization for Use of Military Force (AUMF), 115 Stat. 224, authorizes such action.

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BRIEF OF THE CONSTITUTION PROJECT AND THE RUTHERFORD INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

The Constitution Project and the Rutherford Institute respectfully submit this brief as *amici curiae* in support of petitioner.

INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are two public interest organizations that promote and defend constitutional rights and civil liberties, which are especially vital interests as our Nation works to confront the challenges of maintaining security in an age of global terrorism. *Amici* have authored numerous reports and have filed numerous briefs that focus on the limits of executive detention power under our divided system of government, and have gained from that work a particular insight into the significant constitutional and statutory issues in this case.

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[1] Pursuant to Rule 37.2(a), letters from the parties consenting to the filing of this brief are being filed with the Clerk of the Court, and counsel for *amici curiae* timely notified each party's counsel of *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

The Constitution Project is an independent, bipartisan think tank that creates coalitions of respected leaders from across the political spectrum to issue consensus recommendations for policy reforms. After September 11, 2001, the Constitution Project created the Liberty and Security Committee—a bipartisan, blue-ribbon group of prominent Americans—to address the importance of preserving civil liberties and to develop policy recommendations on issues such as United States detention policies. In July 2004, this committee issued a *Report on Post-9/11 Detentions* in which its signatories urged that "[a]ny detention of a citizen or non-citizen in the United States must be expressly authorized by congressional statute or by the law of war," and that "[t]he courts of the United States must be available to hear claims of detainees that they are being held or treated in violation of the law."[2]

The Rutherford Institute is an international civil liberties organization that was founded in 1982 by its President, John W. Whitehead. The Rutherford Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or violated and in educating the public about constitutional and human rights issues. During its 26-year history, attorneys affiliated with the

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

Rutherford Institute have represented numerous parties before this Court. The Institute has also filed *amicus curiae* briefs in cases dealing with important constitutional issues arising from the current efforts to combat terrorism. *See, e.g.*, *Munaf v. Geren*, 128 S. Ct. 2207 (2008); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); *Rasul v. Bush*, 542 U.S. 466 (2004).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises the significant issue of whether an individual who lawfully resides in the United States and who has never taken up arms against this Nation, can be militarily detained by the executive branch without any criminal charge, based on an assertion by executive branch officials that he supported terrorist activities.

The fractured Fourth Circuit *en banc* court arrived at no consensus about the extent of the Executive's power to have the military detain such individuals. The court of appeals held, "by a 5 to 4 vote * * *, that if the Government's allegations about [petitioner] are true, Congress has empowered the President to detain him as an enemy combatant." Pet. App. 7a. But the members of the court of appeals expressed a number of different views on the scope of the "enemy combatant" categorization.

Review by this Court is necessary because the scope of the Executive's claimed authority reaches far

beyond the scope previously recognized by this Court. The Executive in this case claims unprecedented power: the ability to exercise unchecked military authority within the domestic sphere to detain legal residents of the United States (including American citizens) who are apprehended on United States soil and who have never taken up arms against this country on a battlefield.

This claim of Executive power is breathtaking when viewed against the backdrop of our constitutional system of disaggregated government power and individual rights. Ordered liberty depends on the fundamental principle of separation of powers—*i.e.,* that the Constitution inherently, or the Legislature explicitly, must *authorize* the Executive to act. Neither the Constitution nor any Act of Congress authorizes the Executive to use the military to detain civilians in the United States without charge based on allegations of terrorism.

By upholding the President's overbroad claim of Executive power pursuant to an incorrect interpretation of the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001), the divided majority of the court of appeals below has set our Nation down a perilous path. The impact of its ruling extends far beyond the fate of this individual petitioner; indeed, the court of appeals' fractured decision condoning this unprecedented authority strikes at the foundations of our Republic.

Any determination of the constitutionality of the Executive's remarkable assertion of domestic military detention authority should come from *this* Court, not a fractured court of appeals that has repeatedly acknowledged that this Court's guidance is required. This Court should grant a writ of *certiorari* now, especially in light of the fact that the government previously went to great lengths to avoid the Court's earlier consideration of the same broad claims of executive authority that the government invokes in this case. *See, e.g., Padilla v. Hanft*, 547 U.S. 1062 (2006).

ARGUMENT

REVIEW IS NECESSARY BECAUSE THE FOURTH CIRCUIT'S RULING PERMITS THE EXECUTIVE, WITHOUT THE REQUIRED AUTHORIZATION FROM THE CONSTITUTION OR CONGRESS, TO EXERT MILITARY DETENTION POWER OVER CIVILIANS RESIDING LAWFULLY IN THE UNITED STATES

"[F]ew exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person." *Boumediene v. Bush*, 128 S. Ct. 2229, 2277 (2008). The Executive has repeatedly claimed as part of our Nation's efforts to combat terrorism that it has the power to use the military to deprive individuals of liberty without specific congressional authorization or judicial oversight. *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004);

Rasul v. Bush, 542 U.S. 466, 475 (2004). This Court has, in turn, repeatedly rebuffed that claim, and has recognized and reinforced the clear limits on the military detention power of the Executive that the Founders crafted into our Constitution as keys to the prevention of tyranny. *See, e.g., Hamdi*, 542 U.S. at 601 (the government must give a citizen-detainee notice of his enemy combatant designation and a fair opportunity to rebut that allegation before a neutral decisionmaker); *Rasul*, 542 U.S. at 474 (federal courts have jurisdiction to review habeas petitions of detainees at the Guantanamo Bay Naval Base). This Court should review the claims of Executive power at issue here, which exceed those previously asserted and again test the constitutional limits of executive detention authority.

A. The Constitution Does Not Permit The Executive, Without Express Authorization From Congress, To Impose Military Detention On Civilians Who Lawfully Reside In The United States

The President's power—even in wartime—must stem either from an act of Congress or from the Constitution itself. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952); *see also Hamdi*, 542 U.S. at 517 (concluding that the AUMF authorizes the detention of a citizen who had actively engaged in armed conflict against the United States for the duration of hostilities). No act of Congress authorizes the President to employ military power to

detain lawful residents on American soil who, like petitioner, have never taken up arms against the United States. Accordingly, the Executive can rely only on some inherent power under Article II, but there is no credible argument that the Executive is inherently vested by Article II with the power to use military authority to detain civilians.

1. Article II of the Constitution does not inherently authorize the Executive to impose domestic military detention on civilians like petitioner

It is well settled that the Constitution designates to the President the power of Commander-in-Chief of the armed forces of the United States, *see* U.S. Const., art. II, § 2, cl. 1, but that authority does not give rise to any military power to detain *civilians* lawfully residing in the United States. *See United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14 (1955) ("[A]ssertion of military authority over civilians cannot rest on the President's power as commander-in-chief, or on any theory of martial law."). As the Commander-in-Chief, the President's primary role is to direct the conduct of American troops who are engaged on the battlefield. *See Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring) (the Commander-in-Chief power consists of "the command of the [armed] forces and the conduct of [military] campaigns").

At most, the Constitution authorizes the Executive's military detention of "*enemy belligerents,*"

i.e., "those acting under the direction of the armed forces of [an] enemy [nation]," for the duration of armed hostilities. *Ex parte Quirin*, 317 U.S. 1, 37 (1942) (emphasis added). No judge on the court of appeals below adopted the view that the Executive possesses inherent authority under Article II of the Constitution to detain militarily individuals lawfully residing on United States soil who have never taken up arms against the United States.

The text and history of the Constitution compel this result. Although the Constitution confers upon the Executive the tactical control of American forces engaged in armed combat, it is Congress that authorizes the Executive to deploy military power and that "make[s] rules for the government and regulation of the land and naval forces." U.S. Const. art. I, § 8, cl. 14; *see also id.* at cls. 11-13 (Congress has the power to "declare war," to "raise and support armies," and "[t]o provide and maintain a navy"). The Founders fully recognized that the power of the executive branch to employ military control must be carefully constrained, *especially* within the domestic sphere, because to concentrate in the hands of a single branch of government the power both to decide the circumstances under which individuals should be deprived of liberty, and to carry out that mandate, is a prescription for tyranny. *See* 3 Joseph Story, *Commentaries on the Constitution of the United States* 94 (Boston, Hilliar, Gray & Co. 1833) (the power of the government to "keep large armies constantly on foot" is "most dangerous, and in its

principles despotic"); *see also* The Federalist No. 48, at 306 (James Madison) (Clinton Rossiter ed., 2003) ("The executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire.").

It is precisely because of the "danger of an undue exercise of military power" by the Executive that the Constitution ensures that such power "can never be exerted, but by the representatives of the people." 3 Story, *supra*, at 97. Even if the Commander-in-Chief power includes the authority to detain armed enemy forces captured on a battlefield in a military action that has been authorized by Congress, the Executive's military detention of *civilians* apprehended inside this country far from any armed conflict must, at a minimum, find explicit authorization in positive law, *see Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946); *cf. Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 9 (1936) ("[T]he Constitution creates no executive prerogative to dispose of the liberty of the individual[;] [p]roceedings against him must be authorized by law.").

2. The Executive's use of the military to detain civilians within the domestic sphere encroaches upon the powers of the other branches of government

a. The Executive here maintains that it has the power, as part of the President's Commander-in-Chief authority, to determine whether petitioner, or any

other lawful resident of the United States, is an "enemy combatant" subject to military detention. The Executive cannot, however, casually sweep aside the presumption that, absent an explicit congressional statement to the contrary, lawful residents of the United States who have never taken up arms against this country are subject only to civilian judicial authority and not to military control.

Under our constitutional system, the civilian judiciary serves as a bulwark against the exertion of military authority over individuals within the domestic sphere. *See Dow v. Johnson*, 100 U.S. 158, 169 (1879) ("The established principle of every free people, is that the law shall alone govern; and to it the military must always yield."). Individual liberty is protected because, when a person residing inside the United States faces charges for which he or she is subject to imprisonment by the government, there is a presumption that the individual will be prosecuted in a civilian court and will receive the procedural protections that our Constitution guarantees. *See Reid v. Covert*, 354 U.S. 1, 21 (1957) ("Under the grand design of the Constitution civilian courts are the normal repositories of power to try persons charged within crimes against the United States.").

Through our civilian justice system, courts play a critical role in checking executive power and in safeguarding individual constitutional rights. If the Executive were permitted to subject lawful residents of the United States (including citizens) to military detention without explicit congressional authorization,

this would also enable the Executive to manipulate the civilian judicial process by wielding the threat of military detention over the individuals it seeks to prosecute.[3]

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[3] The manipulation of civilian judicial processes is made possible if, due to the current uncertainty over the scope of executive branch authority, the government can select between civilian and military detention at whatever stage in the process it chooses, no matter how the case was initially classified. *Cf. Padilla v. Hanft*, 547 U.S. 1062, 1064 (2006) (Ginsburg, J., dissenting from the denial of *certiorari*) (noting that, while the government pressed criminal charges eventually, "nothing prevents the Executive from returning to the [military detention] road that it earlier constructed and defended"). If the extent of the Executive's power to detain individuals militarily remains undetermined, there is, in fact, nothing to prevent the transfer of cases between military and civilian authorities *in order to manipulate the outcome of judicial proceedings*. The exercise of the power to select between military and civilian jurisdictions has the potential to be especially egregious where, as here, the government initially treats the matter as a civilian prosecution, and switches to military detention only *after* the criminal defendant has invoked various legal rights that necessarily make criminal prosecution more difficult. *See* Pet. App. 376a n.16 (Government declared petitioner to be an enemy combatant only after he refused to enter into a cooperation agreement with the prosecution to provide information) (citing John Ashcroft, *Never Again: Securing America and Restoring Justice* 168-69 (2006)). And manipulation is possible when military detention precedes the civilian charge as well. *See* Donald Rumsfeld, Secretary of Defense, News Transcript, *Sec'y Rumsfeld Media Availability in Qatar* (June 11, 2002), *available at* http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3502 (the purpose of the initial military detention of Jose Padilla, who was subsequently tried as a civilian, was to "do everything possible to find out what [he] knows").

b. The legal distinction between civilians (*i.e.,* non-combatants) and combatants has long been recognized by this Court in conjunction with its interpretation of statutory and constitutional limitations on the exertion of domestic military power. *See Quirin*, 317 U.S. at 27-28 ("From the very beginning of its history, this Court has recognized and applied the * * * law of nations which prescribes, for the conduct of war, the status, rights, and duties of enemy nations as well as of enemy individuals."); *see also id.* at 30-31 ("By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants.").[4]

[4] Under traditional international law principles, all individuals under the control of a government in a time of war must be categorized as either "combatants" or as "civilians." *See* Int'l Comm. of the Red Cross, *Commentary, Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 51 (Jean S. Pictet ed., 1958) (explaining that "[e]very person in enemy hands must have some status under international law: he is either a prisoner of war," *i.e.*, a combatant, "and as such, covered by the Third Convention," or he is "a civilian covered by the Fourth Convention * * * [t]here is no intermediate status; nobody in enemy hands can be outside the law"). The combatant categorization includes "unlawful combatants," who are "likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful." *Quirin*, 317 U.S. at 31. Thus, the combatant-civilian categorization tracks the appropriate treatment of each detainee under the laws of war.

The instant case implicates the limits of executive military detention authority because, under the laws of war, individuals "who associate themselves with the military arm of the enemy government" qualify as "enemy belligerents" subject to capture and military detention, *id.* at 37-38, but individuals who have no such association and are otherwise citizens or lawful residents of the United States, are civilians subject to charge and trial by civilian courts as prescribed by the Constitution, *Milligan*, 71 U.S. at 121-122, 130. The Executive here, however, contends that individuals lawfully residing in the United States, who have never fought on a battlefield and have no association with the military arm of an enemy government, can be unilaterally divested of the presumption of civilian judicial control and classified by the Executive as "enemy combatants" subject to military detention. In accepting this contention, the fractured *en banc* court of appeals below considered various criteria for the Executive's new civilian-as-combatant designation. And even as it grappled with the scope of "enemy combatant" status, the divided lower court did not revisit its previous conclusion that the issue is "of such especial national importance" that it "warrant[s] final consideration" by this Court. *Padilla v. Hanft*, 432 F.3d 582, 583 (4th Cir. 2005).

This Court's review is required to reaffirm that, absent an Act of Congress, those lawful residents of the United States who have *not* taken up arms

against this Nation in battle must be treated by the Executive as civilians and charged in civilian courts with a criminal offense or released from detention. Organizations and individuals across the political spectrum are deeply concerned about the possibility that the executive branch may, through summary "enemy combatant" designation, improperly extinguish the constitutional rights of lawful residents of the United States in the course of confronting the threat of global terrorism.[5] The President lacks any such inherent authority to designate lawful residents of the United States as "enemy combatants" subject to military detention. Inferring such executive authority without a clear congressional authorization would create a grave risk that the Executive will improperly eliminate the constitutional rights of accused individuals based merely on unsubstantiated assertions of combatant status.

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[5] In March 2007, for example, the Constitution Project's Liberty and Security Committee issued a statement on *habeas corpus* that was signed by a broad bipartisan group of approximately 40 political leaders, policy experts, and legal scholars, and that reaffirmed the role of meaningful judicial review of executive action as the preeminent safeguard of individual liberty and separation of powers. *See* Liberty & Security Comm. & Coalition to Defend Checks & Balances, The Constitution Project, *Statement on Restoring* Habeas Corpus *Rights Eliminated By the Military Commissions Act* (2007), *available at* http://www.constitutionproject.org/pdf/MCA_Statement.pdf.

c. This Court has confronted on several prior occasions, during times of national crisis, the question whether the Executive, based upon some inherent authority under Article II, may subject individuals apprehended within the United States to military authority and thereby supplant civilian institutions of justice and the core procedural protections that accompany them. The Court has never allowed military control to displace the civilian courts where the accused has never been on the battlefield and the courts are open and functioning.

In *Milligan*, 71 U.S. at 6, for example, this Court considered whether the government had the power to detain and try by military commission an Indiana citizen who, in the midst of the Civil War, became a member of "a secret society * * * for the purpose of overthrowing the Government." As such, Milligan committed "enormous crime[s]," including "communicat[ing] with the enemy" and conspiring to "liberate prisoners" and "seize munitions of war." *Id.* at 6-7, 55. Nevertheless, this Court concluded that his detention and trial by military authorities, rather than by a civilian court, was unlawful. As this Court explained in *Quirin*, Milligan was a "non-belligerent" who was not a citizen of a "state[ ] in rebellion" and who had never taken up arms in support of the Confederacy against the United States. *Quirin*, 317 U.S. at 45. Thus, Milligan was not subject to military control but had to be tried under the authority (and protection) of the civilian courts.

Ex Parte Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861), a venerated *Milligan* predecessor, also stands for the axiomatic proposition that military control within the domestic sphere cannot be allowed to displace civilian authority in regard to accused individuals who would otherwise be entitled to court adjudication. *Id.* at 152; *see also ibid.* (if the civilian courts are open, the Executive is without power to "thrust aside the judicial authorities and officers to whom the constitution has confided the power and duty of interpreting and administering the laws, and substitute[ ] a military government in its place").

More recently, this Court refused to read a Hawaii state statute that permitted the Governor to impose "martial law" during World War II to authorize "the supplanting of courts." *See Duncan*, 327 U.S. at 324. This Court confirmed that the reach of the Executive's authority to use the military to detain persons within the United States should not be construed to extend to non-combatants without express congressional authorization. *See id.*; *see also Hamdi*, 542 U.S. at 569 (Scalia, J., dissenting) (rejecting "[a] view of the Constitution that gives the Executive authority to use military force rather than the force of law against citizens on American soil").

B. The Fourth Circuit Misread The AUMF To Confer Upon The Executive The Extraordinary Power To Detain Militarily Civilians Such As Petitioner

The government is mistaken in its claim, accepted by the Fourth Circuit's fractured *en banc* decision below, that the AUMF grants the President the power to exert military detention authority over civilians. This Court's plenary review is required because the court of appeals identified no coherent statutory basis (much less a clear and explicit statutory authorization) for petitioner's military detention without charge.

1. The AUMF does not confer upon the Executive the authority recognized by the judgment below

Even a cursory examination of the AUMF's text and context demonstrates that it does not authorize the President to subject to military detention individuals like petitioner, *i.e.*, those who lawfully reside in the United States, are apprehended on United States soil, and have never taken up arms against the United States on a battlefield.

The AUMF was enacted in the days following the terrorist attacks of September 11, 2001. It is a general grant to the Executive of the power "to use all necessary *and appropriate* force * * * to prevent any future acts of international terrorism against the United States." § 2(a), 115 Stat. at 224 (emphasis

added). Insofar as detention by the military is concerned, it is undisputed that the AUMF authorizes detention for the duration of armed hostilities only for the category of persons properly classified as "enemy combatants." Pet. App. 27a (noting that "the Government does *not* argue that the broad language of the AUMF authorizes the President to subject to indefinite military detention anyone he believes to have aided any 'nation[ ], organization[ ], or person[ ]' related to the September 11th attacks") (quoting § 2(a), 115 Stat. at 224).

The AUMF does not even explicitly authorize the detention of enemy combatants. The *Hamdi* plurality concluded that "detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." *Hamdi*, 542 U.S. at 518. This analysis cannot be extended to establish that a civilian who is apprehended in the United States on suspicion of activities related to terrorism but who has never been affiliated with the military arm of a foreign regime or otherwise taken up arms against the United States is an "enemy combatant" in any reasonable sense of that term.[6]

[6] This Court's holding that the AUMF provides the President with authority to use military force to detain United

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Moreover, Congress explicitly set forth the President's powers with regard to domestic terrorism suspects in the Patriot Act, which was considered nearly contemporaneously with the AUMF. *See* United and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 412, 115 Stat. 272, 350-352, ("Patriot Act"). Under the Patriot Act, the Attorney General must either institute removal proceedings for non-citizens or bring criminal charges for such suspects within seven days of arrest. *Id.* at 351. Although the Patriot Act does not speak to the threshold question of how the determination of whether an individual is a combatant or a civilian is to be made, it does address the powers of the executive branch with respect to the investigation and prosecution of individuals who, like petitioner, are apprehended inside the United States and accused of terrorist activities. *See ibid.* (Attorney General may detain, initiate removal proceedings against, or prosecute an alien when he has reasonable grounds to believe that such individual "is engaged in any * * * activity that endangers the

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States citizens "who fought against the United States in Afghanistan as part of the Taliban," *Hamdi*, 542 U.S. at 518, does not permit the conclusion that that statute allows civilians lawfully residing in the United States to be subject to military detention. The plurality opinion emphasized that its statutory interpretation rested on the conclusion that Hamdi was, in fact, an "enemy combatant," *id.* at 523, and the opinion expressly addressed only whether the AUMF gave the President "the authority to detain citizens who [so] qualify." *Id.* at 516.

national security of the United States"). Interpretation of the AUMF must take into account the nearly contemporaneously enacted Patriot Act. And the nearly simultaneous passage of these two statutes strongly suggests that Congress intended the AUMF to provide the President with the power to conduct military operations abroad in response to the September 11th attacks, whereas the Patriot Act addressed the bounds of the executive branch's powers in regard to combating terrorism at home.

2. The court of appeals' ruling violates clear-statement principles with regard to the limited circumstances in which individual rights may be curtailed by executive action

The absence of any clear statement by Congress that authorizes the domestic military detention of individuals who were not members of the armed forces of a hostile regime and did not otherwise take up arms against the United States should be the end of the matter, as the petition demonstrates. *See* Pet. 17-18. The clear statement rule "facilitates a dialogue between Congress and the Court," *Boumediene,* 128 S. Ct. at 2243, and it serves as a critical check against the very overreaching that the President's use of military power to detain civilians within the United States threatens.

A clear statement from Congress is required precisely because our constitutional system disaggregates power among the three branches of government. An *implied* grant of power to the Executive of the ability to discard individual constitutional rights and to use the military domestically provides no assurances against executive misuse of power. Clear statement principles ensure that "the legislature [too] has in fact faced, and intended to bring into issue, the critical matters involved." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (citation omitted); *see also Greene v. McElroy*, 360 U.S. 474, 507-508 (1959) (noting that "traditional forms of fair procedure [should] not be restricted by implication or without the most explicit action by the Nation's lawmakers"); *Duncan*, 327 U.S. at 324 (the authority to try civilians in military tribunals cannot be inferred because it must be assumed that Congress "did not wish to exceed the boundaries between military and civilian power, in which our people have always believed").

Review is necessary to reaffirm the fundamental separation-of-powers mandate that Congress must clearly authorize the Executive's exercise of military detention power, especially when such power is asserted domestically. The court of appeals' unfortunate willingness to identify authority where there is none jeopardizes this most basic tenet.

C. This Court, And Not A Fractured Court Of Appeals, Should Determine Whether The Executive Can Use, Consistent With The Constitution, Military Power Against Civilians On American Soil

1. The scope of the Executive's domestic military detention authority has not been, and should not be, determined definitively by the fractured courts of appeals

In *Hamdi*, a plurality of the Justices of this Court noted that the lower courts would determine "[t]he permissible bounds of the [enemy combatant] category * * * as subsequent cases are presented to them." 542 U.S. at 522 n.1. It is now apparent, however, that consistent constitutional application of the AUMF requires this Court's intervention. The widely divergent opinions of the members of the *en banc* court of appeals demonstrate that the combatant-civilian classification cannot be developed adequately by lower courts on an *ad hoc* basis, even in a single case. *See* Pet. App. 63a (Motz, J., concurring in part and dissenting in part) (noting that various members of the Fourth Circuit offer markedly divergent and "novel" enemy combatant definitions that "draw[ ] on their own beliefs as to when detention is appropriate").[7]

[7] The five members of the Fourth Circuit who concluded that the AUMF authorizes the President to detain petitioner as an enemy combatant proffered three different definitions of that term. One separate opinion concludes that an enemy combatant

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It is unlikely that the varying opinions on this issue emanating from the lower courts will be reconciled through further percolation any time soon. The government recently has channeled domestic detention cases into the Fourth Circuit, and that *en banc* court has here produced seven different opinions on the matter which fully analyze the issue from every conceivable angle. Moreover, the Second Circuit, which earlier reviewed the Executive's power to engage in domestic military detentions in the wake of the September 11th terrorist attacks, rejected the claims of executive authority that the government asserts here. *See Padilla v. Rumsfeld*, 352 F.3d 695, 712 (2d Cir. 2003).

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is a person 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., concurring). Another opinion defines enemy combatant as a person who "attempts or engages in belligerent acts against the United States, either domestically or in a foreign combat zone" and does so "on behalf of an enemy force." Pet. App. 163a-164a (Williams, C.J., joined by Duncan, J., concurring in part and dissenting in part). The third opinion states that an enemy combatant "(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., concurring in part and dissenting in part).

2. This case presents perhaps the only vehicle by which to address this significant legal issue

It appears to be the Executive's goal to avoid checks and balances with regard to United States domestic military detention policy, by seeking to avoid final judicial determination, including review by this Court of the legal question at issue in this case.

In 2005, the Fourth Circuit considered whether Jose Padilla, an American citizen who was apprehended at Chicago O'Hare Airport and jailed in New York, could be detained as an enemy combatant. *See Padilla v. Hanft*, 423 F.3d 386, 391-392 (4th Cir. 2005). Padilla allegedly accepted a mission from al Qaeda to enter the United States to carry out attacks within our borders, and the Fourth Circuit held, consistent with the government's arguments, that Padilla could be detained as an enemy combatant. *Ibid.* Two business days before the government's opposition to Padilla's petition for a writ of *certiorari* was due in this Court, the government unilaterally switched Padilla from his status as enemy combatant subject to indefinite military detention, to the status of indicted criminal defendant in the civilian courts entitled to prosecution with the full panoply of procedural rights under the jurisdiction of the criminal courts. Then-Judge Luttig observed that the transfer of Mr. Padilla into civilian custody created "an appearance that the government may be attempting to avoid consideration of our decision by

the Supreme Court." *Padilla v. Hanft*, 432 F.3d 582, 583 (4th Cir. 2005).

When the government then argued that the *Padilla certiorari* petition was moot, the Court denied review but three Justices addressed the importance of the legal issues raised and the continuing concern that these issues could quickly surface again. *See Padilla*, 547 U.S. at 1063-1064 (Kennedy, J., concurring in the denial of *certiorari*, joined by Roberts, C.J., Stevens, J.) (stating that "Padilla's claims raise fundamental issues respecting the separation of powers, including consideration of the role and function of the courts," and that Padilla has "a continuing concern that his status might be altered again"). Three other Justices concluded that the writ of *certiorari* should have been granted. *See id.* at 1062, 1064.

The Fourth Circuit's analysis below regarding the Executive's military detention authority over civilians would apply equally to a case such as *Padilla* that involves an American citizen. Thus, the Court now has an opportunity to answer the same critical question raised in *Padilla*. Nothing the Government has done in the meantime "purports to retract th[at] assertion of Executive power," *id.* at 1064 (Ginsburg, J., dissenting from denial of *certiorari*); indeed, the Executive has continued its vigorous defense of that authority. This case presents a prime vehicle for review of the question of the scope of the Executive's domestic military detention authority.

CONCLUSION

For the reasons set forth above and in the petition for a writ of *certiorari*, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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OCTOBER 23, 2008

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