

No. 08-368

In the Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI, PETITIONER

v.

JOHN PUCCIARELLI, UNITED STATES NAVY
COMMANDER, CONSOLIDATED NAVAL BRIG

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the President has authority under the Constitution and the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, to order the military to detain petitioner, an alien who, like the al Qaeda agents who struck on the morning of September 11, 2001 (based on facts contained in a sworn declaration that must be taken as true at this stage), entered the United States to plan and carry out hostile or war-like acts on behalf of al Qaeda.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-315a) is reported at 534 F.3d 213. An earlier panel opinion of the court of appeals (Pet. App. 316a-401a) is reported at 487 F.3d 160. The opinion of the district court (Pet. App. 402a-426a) is reported at 443 F. Supp. 2d 774.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 2008. The petition for a writ of certiorari was filed on September 19, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is an alien detained by the Department of Defense at the Consolidated Naval Brig in Charleston, South Carolina. His detention is based on an individualized determination by the President of the United States that he is an enemy combatant. Indeed, based on a sworn affidavit that must be taken as true at this stage of the case, petitioner trained with al Qaeda forces in Afghanistan, had direct contact with the masterminds of the September 11, 2001, terrorist attacks, volunteered to undertake a martyr mission on behalf of al Qaeda, received funding from a key September 11 financier, was dispatched by al Qaeda leaders to the United States to commit or facilitate hostile acts, and, when seized in the United States, had a laptop computer with highly technical information about the use of chemicals such as cyanide as weapons of mass destruction and evidence of email communications with top al Qaeda agents. Pet. App. 468a-489a (Declaration of Jeffrey N. Rapp, Director of the Joint Intelligence Task Force for Combating Terrorism (Rapp Declaration)).¹ Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of South Carolina. The district court dismissed the petition. The court of appeals upheld the President's authority to detain an individual such as petitioner, but reversed and remanded to give

¹ For the Court's convenience, the Rapp Declaration is also reproduced in the appendix to this brief. As the case reaches the Court at this stage, the statements in the Rapp Declaration must be taken as true with respect to the presidential authority issue. Pet. App. 6a-7a. On remand, petitioner will have an opportunity (which he previously declined to avail himself of in the proceedings below, *id.* at 424a-425a) to challenge the assertions in the Rapp Declaration.

petitioner an additional opportunity to challenge the evidentiary basis for his detention. *Id.* at 1a-315a.

1. In the week following the terrorist attacks of September 11, 2001, Congress directed the President to use “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 * * * in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224. The AUMF recognized the President’s “authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States” and emphasized that it is “both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad.” AUMF pmb., 115 Stat. 224.

Soon after the AUMF was enacted, the President confirmed that the September 11 attacks “created a state of armed conflict” between the United States and al Qaeda. Military Order of Nov. 13, 2001, 3 C.F.R. 918, § 1(a). In the course of that armed conflict, the United States military has seized and detained numerous persons whom the Executive has determined are enemy combatants in the ongoing conflict.

2. Petitioner is a national of Qatar. Pet. App. 474a. The evidence shows that, between 1996 and 1998, petitioner received training at an al Qaeda terrorist training camp in Afghanistan, where he learned about the use of poisons. *Ibid.* In the summer of 2001, he was introduced to Osama Bin Laden by Khalid Shaykh Muhammed, the mastermind of the September 11 attacks, and

he “volunteered for a martyr mission or to do anything else that al Qaeda requested.” *Id.* at 473a; see *id.* at 475a.

Petitioner was directed by al Qaeda leaders to enter the United States before September 11, 2001, to serve as a “sleeper agent,” “facilitat[e] terrorist activities subsequent to September 11,” and “explore computer hacking methods to disrupt bank records and the U.S. financial system.” Pet. App. 472a, 473a, 475a. In July 2001, petitioner contacted Bradley University in Illinois, from which he had received his undergraduate degree. According to school officials, he seemed “in a rush to commence [graduate] studies in the United States” during the fall semester. *Id.* at 474a-475a. In August 2001, he traveled to the United Arab Emirates, where he met Mustafa Ahmed Al-Hawsawi, an “al Qaeda financier and September 11, 2001 moneyman,” who gave petitioner about \$3000 to buy a laptop computer and about \$10,000-\$13,000 in funding authorized by Khalid Shaykh Muhammed. *Id.* at 473a, 476a-477a. Petitioner entered the United States on September 10, 2001—one day before the September 11 attacks. *Id.* at 474a. By December 2001, he “had rarely attended classes” at the university and “was in failing status.” *Id.* at 475a.

After interviewing petitioner in December, FBI agents recovered a laptop computer from his residence. Pet. App. 477a. The laptop had “highly technical information” about cyanides and other poisonous chemicals. *Id.* at 478a-479a. It also had websites bookmarked as “favorites” that had “step-by-step instructions to make hydrogen cyanide,” “technical and medical descriptions of the effects of various cyanides,” “data on the[ir] doses and lethal effects,” and “ordering information on various cyanides.” *Id.* at 478a. The use of hydrogen cyanide,

“an exceedingly toxic substance,” was taught at terrorist training camps in Afghanistan. *Id.* at 479a.

Petitioner’s computer also included information indicating that petitioner had undertaken efforts to obtain false identification, credit-card, and banking information. Pet. App. 482a-483a, 484a-487a. There were “numerous computer programs typically utilized by computer hackers; ‘proxy’ computer software which can be utilized to hide a user’s origin or identity when connected to the internet; and bookmarked lists of favorite websites apparently devoted to computer hacking.” *Id.* at 482a. There were also “over 1,000 apparent credit card numbers * * * stored in various computer files,” bookmarked websites about “fake identification cards; buying and selling credit card numbers; and processing credit card transactions,” and a handwritten list in the computer carrying case with about 36 credit-card numbers, owners, and expiration dates. *Id.* at 485a-486a. There was also evidence that petitioner had set up bank accounts for a fraudulent business and had used the stolen credit-card numbers to make fraudulent payments to that business. *Id.* at 486a-487a.

Further investigation revealed coded communications saved as draft e-mail messages in accounts belonging to petitioner, which were addressed to an internet email account linked to Khalid Shaykh Muhammed. Pet. App. 479a-481a. Telephone records also revealed that petitioner called the United Arab Emirates repeatedly in the days following September 11, each time to a telephone number linked to Al-Hawsawi. *Id.* at 483a-484a. He had also saved on his computer several “Arabic lectures by Bin Laden and his associates on the importance of jihad and martyrdom, and the merits of the Taliban regime,” directions to terrorist training camps in Af-

ghanistan, and websites titled “Jihad arena,” “martyrs,” and “Taliban.” *Id.* at 481a-482a.

3. On June 23, 2003, the President determined that petitioner “is, and at the time he entered the United States in September 2001 was, an enemy combatant.” Pet. App. 466a. The President found, in particular, that petitioner was “closely associated with al Qaeda, an international terrorist organization with which the United States is at war”; that he “engaged in * * * hostile and war-like acts, including conduct in preparation for acts of international terrorism” against the United States; and that he “represent[ed] a continuing, present, and grave danger to the national security of the United States,” such that his military detention was “necessary to prevent him from aiding al Qaeda in its efforts to attack the United States or its armed forces, other governmental personnel, or citizens.” *Id.* at 466a-467a.

Consistent with those findings, the President directed the Secretary of Defense “to receive [petitioner] from the Department of Justice,” which had custody over petitioner because he was awaiting trial on an indictment in the Central District of Illinois, “and to detain him as an enemy combatant.” Pet. App. 467a. Immediately upon issuance of that directive, the Department of Justice moved to dismiss the indictment. *Id.* at 430a. That motion was granted, and petitioner was transferred to military control and taken to the Consolidated Naval Brig in Charleston, South Carolina, where he has since been detained. *Id.* at 431a.

4. Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of South Carolina. The government responded that petitioner was lawfully detained as an enemy combatant, and it submitted the Rapp Declaration as evidence sup-

porting the President's determination to that effect. Pet. App. 468a-489a. The district court concluded that the President had authority to detain petitioner as an enemy combatant, assuming that the government's factual allegations were true. *Id.* at 427a-447a. The court referred the case to a magistrate judge to conduct a "prudent and incremental" factfinding process consistent with the framework outlined by the plurality in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), so that petitioner would have an opportunity to contest the government's factual allegations. Pet. App. 446a-447a.

After briefing, the magistrate judge ordered that the parties follow a procedure along the lines of that prescribed by the plurality in *Hamdi*. C.A. App. 186-193; see *Hamdi*, 542 U.S. at 533-534. First, the government would provide notice of the factual basis for petitioner's classification as an enemy combatant. C.A. App. 190. Then, petitioner would need to come forward with evidence that he had been improperly classified as an enemy combatant. *Id.* at 190-191. If petitioner was able to "rebut the government's initial showing, * * * [he would] be released unless the government proceed[ed] to a full-blown adversary hearing before a neutral decisionmaker." *Id.* at 191. The magistrate judge deferred determination of the precise rules that would apply to such a hearing, noting that it would "be accompanied by greater procedural and evidentiary safeguards" than the first stage, though not necessarily "the full panoply of procedures applicable to a trial." *Ibid.*

The magistrate judge found that the Rapp Declaration satisfied the government's initial burden to provide notice to petitioner of the bases for his detention as an enemy combatant, and it ordered petitioner to submit his rebuttal. C.A. App. 192. In response, petitioner gen-

erally denied that he is an enemy combatant, but he declined to present any evidence. *Id.* at 199.

The magistrate judge recommended the dismissal of petitioner's habeas petition. Pet. App. 448a-465a. Because petitioner had "refused to participate in a meaningful way" in the *Hamdi* process, the magistrate judge found that "the Executive Branch Declarations overwhelmingly prevail," because there is "nothing specific" to contradict "even the simplest of [the Rapp Declaration's] assertions which al-Marri could easily dispute, were they not accurate." *Id.* at 459a-462a.

Petitioner filed objections with the district court. After de novo review, the district court overruled petitioner's objections, adopted the magistrate judge's report, and dismissed the petition. Pet. App. 402a-426a. In doing so, the district court emphasized that, "[d]espite being given numerous opportunities to come forward with evidence supporting [his] general denial, Petitioner has refused to do so." *Id.* at 424a. The court added that "[n]either due process nor the rule of law in general grant a party the right to participate only in the court procedures he deems best or to present his proof whenever it suits him," and reiterated that "petitioner has squandered his opportunity to be heard by purposely not participating in a meaningful way." *Id.* at 425a (citation omitted).

5. A divided panel of the court of appeals reversed. Pet. App. 316a-401a. Even accepting the allegations in the Rapp Declaration as true, the panel majority held that the President lacks the authority to detain petitioner as an enemy combatant. *Id.* at 321a-322a. It rejected the argument that petitioner's military detention was authorized by the AUMF, reasoning that this Court's decision in *Hamdi* and the court of appeals' pre-

vious decision in *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005), cert. denied, 547 U.S. 1062 (2006), “rest enemy combatant status on affiliation with the military arm of an enemy nation,” and petitioner was not alleged to have fought with the Taliban, the military arm of the former government of Afghanistan. Pet. App. 363a-364a. According to the panel majority, even accepting all the allegations in the Rapp Declaration as true, petitioner and comparably situated al Qaeda agents who enter our borders are “civilians” not subject to military detention. *Id.* at 371a-372a.

District Judge Hudson, sitting by designation, dissented. Pet. App. 393a-401a. He argued that the “broad language [of the AUMF] would certainly seem to embrace surreptitious al Qaeda agents operating within the continental United States.” *Id.* at 395a. Indeed, as Judge Hudson explained, “there is little doubt from the evidence that [petitioner] was present in the United States to aid and further the hostile and subversive activities of the organization responsible for the terrorist attacks that occurred on September 11, 2001.” *Id.* at 401a.

6. The court of appeals granted rehearing en banc, and, in a per curiam opinion, held that (1) accepting the statements in the Rapp Declaration concerning petitioner as true, the President has the authority to detain him as an enemy combatant; and (2) petitioner should be afforded an additional opportunity and further process to challenge his designation as an enemy combatant. Pet. App. 6a-7a. The court of appeals therefore reversed the judgment of the district court and remanded the case for further proceedings. *Ibid.*

a. Judge Motz, joined by Judges Michael, King, and Gregory, concurred in the judgment. Pet. App. 8a-89a.

She argued that the AUMF does not authorize the President to detain petitioner as an enemy combatant. Instead, she believed that, even assuming the government's allegations to be true, petitioner is a "civilian" who "does not fit within the 'permissible bounds of' '[t]he legal category of enemy combatant.'" *Id.* at 75a (brackets in original) (quoting *Hamdi*, 542 U.S. at 522 n.1). Nonetheless, Judge Motz joined in "ordering remand on the terms closest to those we would impose." *Id.* at 89a.

b. Judge Traxler concurred in the judgment. Pet. App. 90a-143a. In a portion of his opinion joined by Judge Niemeyer, he agreed with a majority of the court that the AUMF "grants the President the power to detain enemy combatants in the war against al Qaeda, including belligerents who enter our country for the purpose of committing hostile and war-like acts such as those carried out by the al Qaeda operatives on 9/11." *Id.* at 90a. He explained that "Congress was not merely authorizing military retaliation against a reigning foreign government known to have *supported* the enemy force that attacked us," and that "it strains reason to believe that Congress, in enacting the AUMF in the wake of [the September 11] attacks, did *not* intend for it to encompass al Qaeda operatives standing in the exact position as the attackers who brought about its enactment." *Id.* at 104a-105a. He also agreed that the allegations made by the government against petitioner, if true, would place petitioner within the category of enemy combatants included within the AUMF's reach, thus permitting the President to detain him. *Id.* at 108a-109a.

Judge Traxler further concluded that petitioner had not been afforded an adequate opportunity to challenge

the factual basis for his designation as an enemy combatant. Pet. App. 122a-141a. In his view, “the process due a detainee, including enemy combatants, will * * * vary with the facts surrounding the detention and the precise governmental burdens that would result from providing the normal procedures due under our constitution.” *Id.* at 127a. Because petitioner was “not captured bearing arms on the battlefield of Afghanistan” but was present within the United States when he was designated an enemy combatant, he “would be entitled to the normal due process protections available to all within this country, including an opportunity to confront and question witnesses against him.” *Id.* at 132a, 134a-135a. If, however, the government can demonstrate that affording such an opportunity would be “impractical, outweighed by national security interests, or otherwise unduly burdensome because of the nature of the capture and the potential burdens imposed on the government to produce non-hearsay evidence and accede to discovery requests, then alternatives should be considered and employed.” *Id.* at 135a.

c. Judge Gregory concurred in the judgment. Pet. App. 143a-160a. He joined Judge Motz’s concurring opinion. In addition, he wrote separately to elaborate his view that petitioner had not been “afforded sufficient process to challenge his designation as an enemy combatant.” *Id.* at 143a-144a. Judge Gregory stated that, in determining what process was due petitioner on remand, the district court could find “wise counsel” in the Fourth Circuit’s decision in *United States v. Moussaoui*, 382 F.3d 453 (2004), cert. denied, 544 U.S. 931 (2005), and in the Classified Information Procedures Act, 18 U.S.C. App. §§ 1-16, at 814 (2006). Pet. App. 144a.

d. Chief Judge Williams, joined by Judge Duncan, concurred in part and dissented in part. Pet. App. 160a-181a. Judge Williams agreed with the majority of judges that the President has the authority to detain petitioner under the AUMF because al Qaeda “is obviously an ‘organization’ that ‘planned, authorized, committed, or aided in’ [the] attacks” of September 11, 2001. *Id.* at 165a (quoting AUMF § 2(a), 115 Stat. 224). She also observed that al Qaeda “provided the impetus for the enactment of the AUMF,” and thus, “read in light of its purpose clause . . . and its preamble . . . , the AUMF applies even more clearly and unmistakably to [petitioner] than to Hamdi.” *Id.* at 165a-166a (quoting *Padilla*, 423 F.3d at 396).

Judge Williams dissented, however, insofar as the court reversed the district court and remanded for further proceedings. Pet. App. 171a-180a. Because petitioner failed to “participate in a meaningful way” before the magistrate and district court, Judge Williams would have held that petitioner could not challenge the factual basis for his detention on appeal. *Id.* at 174a.

e. Judge Wilkinson concurred in part and dissented in part. Pet. App. 181a-291a. He agreed with the majority of judges that Congress in the AUMF authorized the military detention of petitioner. *Id.* at 190a-204a. He found it “clear” that petitioner is “the paradigm of an enemy combatant under any reasonable interpretation of the AUMF,” *id.* at 193a, because when Congress directed the President to “use all necessary” force—including the power of military detention—“to prevent any future” attacks by those “organizations” responsible for the September 11 attacks, “it must certainly have targeted al Qaeda ‘sleeper agents’ planning similar attacks in the United States.” *Ibid.* According to Judge Wilkin-

son, “[t]o say that Congress did not have persons such as [petitioner] in mind is to say that Congress had very little in mind at all.” *Ibid.*

Judge Wilkinson dissented from the decision to reverse the district court and remand for further proceedings. Pet. App. 263a-284a. He argued that the district court had offered petitioner all of the procedures required by *Hamdi*. *Id.* at 268a-272a. And he disagreed with Judge Traxler’s view that, because petitioner was not a “battlefield detainee,” he is entitled to “more rigorous procedural safeguards” than those prescribed in *Hamdi*. *Id.* at 272a-273a.

f. Judge Niemeyer concurred in part and dissented in part. Pet. App. 292a-314a. He agreed with the majority of judges that the President has the power to detain petitioner as an enemy combatant under the AUMF, and that the President lawfully exercised that power in detaining petitioner. *Id.* at 313a-314a. He dissented, however, from the decision to vacate the district court’s dismissal order. According to Judge Niemeyer, because petitioner had already received a habeas process under 28 U.S.C. 2241, and because the district court dismissed his petition under procedures “fully consistent with traditional habeas corpus process,” *id.* at 293a, petitioner was afforded all the process he was due. *Id.* at 293a-294a.

ARGUMENT

Based on a sworn declaration that must be accepted as true in resolving the question presented, petitioner, like the al Qaeda forces that struck America on the morning of September 11, 2001, entered the United States to plan and carry out hostile or war-like acts on behalf of al Qaeda. Nevertheless, petitioner argues that

the law that Congress passed in the immediate aftermath of the September 11 attacks expressly backing the President's use of "all necessary and appropriate force" against the "nations, organizations, or persons" responsible for the September 11 attacks does not authorize his military detention. The court of appeals correctly rejected that counter-intuitive contention, and its decision does not conflict with any decision of this Court or any other court of appeals. To the contrary, the challenged portion of the decision below is entirely consistent with *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), which affirmed the President's authority to detain enemy combatants and established a framework for judicial review of detention decisions. Certiorari is therefore not warranted. That is by no means the end of this case. On remand, petitioner will have an opportunity to challenge the evidentiary basis for his detention under procedures that comport with due process.

1. Certiorari is particularly unwarranted given the interlocutory posture of this case. The court of appeals reversed the district court and remanded the case to allow petitioner another opportunity to challenge his designation as an enemy combatant. If petitioner's challenge is successful, there will be no need for this Court to consider the purely legal question of the President's authority. If it is not successful, petitioner will be able to reassert his claims at that time. This Court routinely denies petitions by parties challenging interlocutory determinations that could be reviewed at the conclusion of the proceedings. See, e.g., *VMI v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). And following that practice would

be particularly appropriate here given that petitioner urges this Court to consider potentially far-reaching constitutional questions that this Court may not need to reach at all depending on the outcome of the proceedings on remand or that could be reshaped by the proceedings on remand.

Petitioner compares his case (Pet. 14) to *Hamdi* and to *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), in which this Court granted review. In both of those cases, however, the Court reviewed a lower court's *definitive* resolutions of the merits of a habeas petition. In this case, unlike *Hamdi* and *Padilla*, the merits of petitioner's request for habeas relief have not been resolved. On the contrary, the proceedings remaining on remand will include the kind of factual review that the plurality in *Hamdi* had in mind when it spelled out the due process requirements for citizen enemy-combatant detainee cases. The plurality in *Hamdi* held that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision-maker." *Id.* at 533; see *id.* at 509. The proceedings on remand will provide petitioner with such an opportunity.

Indeed, under the Fourth Circuit's en banc decision in this case, the proceedings on remand will provide petitioner with "more rigorous procedural safeguards" than those contemplated by the *Hamdi* plurality. Pet. App. 122a (Traxler, J., concurring in part and dissenting in part); cf. *Boumediene*, 128 S. Ct. at 2269-2270. The *Hamdi* plurality held that the government could justify its detention of an enemy combatant by presenting hearsay evidence, and that "a presumption in favor of the Government's evidence" was permissible. 542 U.S. at

534. But Judge Traxler’s concurring opinion—the controlling opinion of the divided en banc court—stated that *Hamdi* did not “endorse[] a categorical acceptance of such hearsay declarations for all alleged enemy combatants regardless of the place of seizure or the other circumstances at hand.” Pet. App. 127a. Instead, Judge Traxler concluded that because petitioner was captured within the United States, he is entitled to “normal due process protections,” including confrontation rights. *Id.* at 134a-135a. Thus, the government will be allowed to present hearsay evidence only if it “can demonstrate to the satisfaction of the district court that” justifying petitioner’s detention without the use of hearsay would be “impractical, outweighed by national security interests, or otherwise unduly burdensome because of the nature of the capture and the potential burdens imposed on the government.” *Id.* at 135a.²

The “rigorous procedural safeguards,” Pet. App. 122a, directed by the decision below could obviate the need for any review of the issues raised in the petition. Since there is no immediate prospect that those issues will be relevant to other cases—petitioner is currently the only individual detained as an enemy combatant within the United States—this Court should not rush to decide them unnecessarily in this case. And to the extent that the court of appeals has not specified all of the details of the procedures to be followed on remand, see

² The government does not agree that the procedures prescribed by the court of appeals are necessary or appropriate (particularly in light of the fact that petitioner declined to avail himself of the ample procedures made available to him below under the *Hamdi* framework), but it does not seek review of the court’s decision at this time, see *Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 504, 508 n.1 (2001), and that decision therefore will govern the proceedings on remand.

id. at 135a, 140a, this Court should allow those details to be fleshed out by the courts below in the first instance.³ Although petitioner has sought a stay of the district court proceedings pending this Court’s disposition of his petition for a writ of certiorari, see Pet. Unopposed Mot. to Stay Further Proceedings, No. 02:04-2257-HFF-RSC Docket entry No. 112 (D. S.C. Sept. 30, 2008), which the government did not oppose, the government is prepared to proceed with the remand proceedings on the schedule deemed appropriate by the district court for affording petitioner the additional process mandated by the Fourth Circuit’s decision.

2. The court of appeals correctly determined that, on the facts described in the Rapp Declaration, the President has the authority to detain petitioner militarily. Indeed, its decision represents a straightforward application of the plain terms of the AUMF and the reasoning of the plurality’s decision in *Hamdi*.

The AUMF—Congress’s first-line response to the September 11 attacks—backs the President’s use of “all necessary and appropriate force against those nations, organizations, or persons he determined planned, authorized, committed, or aided the terrorist attacks” in order “to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.” AUMF § 2(a), 115 Stat. 224. Petitioner falls within the heartland of that statutory autho-

³ Petitioner asserts (Pet. 33, 34) that the procedures required by the court of appeals are “indeterminate” and “wholly fail[] to provide any guidance” as to how to balance the relevant interests. That is incorrect. But in any event, the holding of the court of appeals will be given additional concreteness as it is implemented in this case by the district court. Full litigation of the remaining issues will allow for the most complete and efficient review of the case.

rization; indeed, his circumstances are materially indistinguishable from those of Mohammed Atta and his cohorts, and holding that the AUMF did not authorize his detention is tantamount to saying that Congress did not intend for the AUMF to prevent another September 11. Nothing in the text or history of the AUMF supports that absurd result. To the contrary, all signs point to the conclusion that Congress intended to authorize detention of al Qaeda agents who, like petitioner, come to this country to commit hostile or war-like acts. And a contrary conclusion would severely undermine the military's ability to protect the nation against further al Qaeda attack at home.

Moreover, in *Hamdi*, this Court itself confirmed that Congress expressly authorized the President to seize and detain enemy combatants for the duration of the conflict with al Qaeda. *Hamdi*, 542 U.S. at 516 (plurality opinion); *id.* at 587-588 (Thomas, J., dissenting) (agreeing that Congress authorized detention). As the plurality explained, the “capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war,’” and therefore are plainly authorized by the AUMF. *Id.* at 518 (brackets in original) (quoting *Ex parte Quirin*, 317 U.S. 1, 28, 30 (1942)); accord *id.* at 587-588 (Thomas, J., dissenting); see *Johnson v. Eisentrager*, 339 U.S. 763, 786 (1950) (“This Court has characterized as ‘well-established’ the ‘power of the military to exercise jurisdiction over * * * enemy belligerents [and] prisoners of war.’”) (quoting *Duncan v. Kahanamoku*, 327 U.S. 304, 313 (1946)). That authority is especially clear where the combatant, like petitioner, is an alien. See *id.* at 774 (“Executive power over enemy aliens, undelayed and unhampered by litigation,

has been deemed, throughout our history, essential to war-time security.”)⁴

This Court recognized in *Quirin*, 317 U.S. at 1, that those “who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents.” *Id.* at 37-38. Petitioner fits comfortably within that description. The President has determined that petitioner “is closely associated with al Qaeda, an international terrorist organization with which the United States is at war.” Pet. App. 466a; see *id.* at 475a (“During his meeting with Bin Laden, [petitioner] offered to be an al Qaeda martyr or to do anything else that al Qaeda requested.”). Petitioner has “enter[ed] this country” “with its aid, guidance and direction.” *Quirin*, 317 U.S. at 37-38; see Pet. App. 475a (“Bin Laden and [Khalid Shaykh Muhammed] agreed that [petitioner] would travel to the United States.”). And he has come here “bent on hostile acts.” *Quirin*, 317 U.S. at 38; see Pet. App. 476a (“al Qaeda instructed [petitioner] to explore possibilities for hacking into the main-frame computers of banks with the objective of wreaking havoc on U.S. banking records and thus damaging the country’s economy.”); *id.* at 477a-479a (describing the laptop evidence of petitioner’s research into poisons). He is therefore properly detained as an enemy combatant.

3. a. Petitioner argues (Pet. 26-30) that the decision below impermissibly expanded the meaning of “enemy

⁴ Petitioner suggests (Pet. 11) that this case concerns the President’s authority to detain “American citizens” as enemy combatants. Because petitioner is an alien, that is incorrect. See *American Dredging Co. v. Miller*, 510 U.S. 443, 457 (1994) (“[I]t is quite impossible for our holding to be any broader” than the facts of the case.).

combatant” by applying it to someone who was never a “member[] of an enemy nation’s military * * * on a battlefield.” Pet. 27. He asserts (Pet. 20) that *Hamdi* limited the President’s authority to detain enemy combatants to “an armed soldier who engaged in combat in support of Taliban government forces and who was captured on a battlefield in the war in Afghanistan.” The *Hamdi* plurality made clear, however, that it was not limiting the category of “enemy combatants” to such individuals, but was instead describing the individual before the Court. The plurality explicitly left “[t]he permissible bounds of the category [of enemy combatant to] be defined by the lower courts as subsequent cases are presented to them.” *Hamdi*, 542 U.S. at 522 n.1.

Petitioner meets the definition of enemy combatant that this Court in *Quirin* drew from the law of war, because he “associate[d] * * * with the [enemy], and with its aid, guidance and direction enter[ed] this country bent on hostile acts.” 317 U.S. at 37-38. Indeed, as discussed, the government’s evidence shows that petitioner trained with al Qaeda forces overseas, met with top al Qaeda leaders including September 11 mastermind Khalid Shaykh Muhammed, volunteered for a martyr mission, received funding from a key September 11 financier, came to this country to commit hostile or war-like acts, and had in his possession a laptop computer containing extensive research on the use of poisons like hydrogen cyanide when he was captured. Petitioner readily fits within this Court’s definition of enemy combatant in *Quirin*, not to mention any commonsense definition of that term.

More broadly, petitioner’s argument rests on the far-fetched notion that the AUMF authorized the use of military force only against those who fight on behalf of

an enemy “nation.” Pet. 27. That argument is squarely contradicted by the text of the AUMF, not to mention the events giving rise to it. The AUMF authorizes the President to use “all necessary and appropriate force against those nations, *organizations, or persons* he determines planned, authorized, committed, or aided the terrorist attacks,” and “to prevent any future acts of international terrorism against the United States by such nations, *organizations or persons.*” AUMF § 2(a), 115 Stat. 224 (emphases added). The use of the disjunctive to separate “nations” from “organizations or persons” clearly precludes a reading of the AUMF that would limit it to forces belonging to a nation, and the “organizations or persons” responsible for the September 11 attacks undeniably include al Qaeda. There is therefore no textual basis for the astonishing suggestion that al Qaeda fighters are not covered by the AUMF.

According to petitioner (Pet. 27), “the category of ‘combatant’ exists in the laws of war solely in conflicts between nations and not between a nation and an organization.” In support of that assertion, he cites only a statement on the web site of the International Committee of the Red Cross (ICRC), but read in context, the cited statement simply suggests that an individual fighting on behalf of a non-state entity is not a *legitimate* combatant, not that he is somehow immune from capture or detention.⁵ In any event, the ICRC is not a lawmaking body and does not have the power to make authoritative pronouncements of international law that would bind the United States. Furthermore, this Court held in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), that Com-

⁵ See ICRC, *The Relevance of IHL in the Context of Terrorism* (July 21, 2005) <<http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-ihl-210705>>.

mon Article 3 of the Geneva Conventions applies to the conflict between the United States and al Qaeda and governs the treatment of those captured in that conflict. See *id.* at 629-631; see also Geneva Convention Relative to the Treatment of Prisoners of War of Aug. 12, 1949, art. 3, 6 U.S.T. 3316, 3318, 75 U.N.T.S. 135, 136. That holding presupposes that the United States may detain enemy combatants in the conflict, even though al Qaeda is not a state.

More generally, petitioner’s argument is at odds with history and the law of war. Military force has long been used against non-state actors including the Confederate Army during the Civil War, bands of Indians, international raiders like Pancho Villa and his Villistas, and the Barbary pirates. That history reflects the practical reality—embodied in Congress’s reference to “nations, organizations, or persons” in the AUMF—that states do not have a monopoly on the means to commit acts of war, and nations that have been attacked by non-state entities may use military force to defend themselves. Cf. *Montoya v. United States*, 180 U.S. 261, 265-268 (1901) (recognizing “state of war” with “band” of Indians that, at the time, was not recognized as a “nation”); *Connors v. United States*, 180 U.S. 271, 275 (1901) (same).

Similarly unsupported is petitioner’s suggestion (Pet. 27) that he is a “civilian.” The evidence that must be accepted at this stage utterly belies that contention. See p. 20, *supra*. A person who has committed to fighting on behalf of an organization that is at war with the United States, and who comes to this country to carry out hostile or war-like acts, is not, in any meaningful sense, a “civilian.” Al Qaeda is unquestionably an organization at war with the United States—as recognized by Congress, see AUMF § 2(a), 115 Stat. 224; the President,

see Pet. App. 466a; this Court, see *Hamdan*, 548 U.S. at 629-631; America's allies;⁶ and al Qaeda itself.⁷

Petitioner's claim (Pet. 30-31) that his detention is not "necessary and appropriate" under the AUMF is therefore without merit. There can be no serious doubt that Congress, in passing the AUMF, sought to authorize the use of "all necessary and appropriate force" against aliens who have come to the United States to take an active part in al Qaeda terror operations. The AUMF emphasizes that it is "necessary and appropriate * * * to protect United States citizens both *at home* and abroad" because the individuals and groups responsible for the "acts of treacherous violence" that were committed on September 11 "continue to pose an unusual and extraordinary threat to the national security * * * of the United States." AUMF pmb., 115 Stat. 224 (emphasis added). The individuals directly responsible for carrying out those attacks were aliens who entered the United States to carry out al Qaeda orders and who were inside the United States in the days before the September 11 attacks. Clearly, then, Congress intended that the AUMF reach other aliens who, on behalf of al Qaeda, have also entered the United States to carry out violent, harmful, war-like acts on United States soil against United States citizens.

⁶ See, e.g., Statement of Lord Robertson, NATO Sec'y Gen. (Oct. 2, 2001) <<http://www.nato.int/docu/speech/2001/s011002a.htm>> (describing the September 11 attack as an "armed attack" under Article 5 of the North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246).

⁷ See, e.g., World Islamic Front, *Jihad Against Jews and Crusaders* (Feb. 23, 1998) <<http://www.fas.org/irp/world/para/docs/980223-fatwa.htm>>.

Petitioner’s reading of the AUMF relies on the assumption that when Congress authorized the use of military force to respond to the September 11 attacks, it did not intend to reach individuals virtually identically situated to the September 11 hijackers, none of whom had engaged in combat operations against our forces on a foreign battlefield. Petitioner’s reading would preclude the use of military force at the precise moment when the threat of a repetition of September 11 is at its greatest: when trained al Qaeda agents have successfully crossed our borders and are preparing to carry out an act of war against our citizens on al Qaeda’s behalf. Indeed, as Judge Wilkinson observed, “[t]o say that Congress did not have persons such as [petitioner] in mind is to say that Congress had very little in mind at all.” Pet. App. 193a. Congress’s response to the attacks of September 11 was not so feckless or irrational.

b. Petitioner contends (Pet. 28-29) that the decision below conflicts with *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), but his reliance on that case is misplaced. *Milligan* held that the military lacked authority to subject to trial by military commission a citizen who was alleged to have conspired against the United States in the Civil War. The Court observed that the citizen, Milligan, was “in nowise connected with the military service” of the enemy. *Id.* at 121-122. This case is far removed from *Milligan*, because petitioner has closely associated himself with the military arm of the enemy—al Qaeda—and came to this country to commit hostile or war-like acts. In *Quirin*, moreover, the Court unanimously confined *Milligan* to its specific facts and found its holding “inapplicable” to the detention and military trial of the German saboteurs, explaining that *Milligan*, “not being a part of or associated with the armed forces of the en-

emy, was a non-belligerent, not subject to the law of war.” *Quirin*, 317 U.S. at 45.

Moreover, Congress never authorized the use of military force against the Sons of Liberty, Milligan’s organization, see *Milligan*, 71 U.S. at 6, but Congress *has* authorized the use of force against al Qaeda, petitioner’s organization, see AUMF, 115 Stat. 224. See Pet. App. 200a (Wilkinson, J., concurring in part and dissenting in part). Here, petitioner, like the *Quirin* combatants, associated himself with a declared enemy of the United States, “and with its aid, guidance and direction enter[ed] this country bent on hostile acts”; thus, he is an “enemy belligerent[] within the meaning of * * * the law of war.” 317 U.S. at 37-38.

While *Quirin* alone forecloses petitioner’s reliance on *Milligan*, petitioner’s argument is also foreclosed by *Hamdi*. The plurality in *Hamdi* expressly reaffirmed that *Quirin* is the “most apposite precedent” in the enemy-combatant context and that it “both postdates and clarifies *Milligan*.” 542 U.S. at 523; accord *id.* at 593 (Thomas, J., dissenting). Indeed, the plurality expressly rejected the dissent’s reliance on *Milligan* to the exclusion of *Quirin*. See *id.* at 523 (admonishing that “[b]rushing aside [*Quirin*] * * * is unjustified and unwise”). Because petitioner has closely associated with al Qaeda—against which Congress has authorized the use of force—*Milligan* is just as inapplicable here as it was in *Hamdi*. Indeed, if anything, *Milligan* is even less apposite here given the additional evidence in this case of petitioner’s close association with the enemy.

Petitioner also claims to find support in *Quirin* itself, noting that that case involved detainees who “were subject to military jurisdiction based exclusively on their affiliation with ‘the military arm of the enemy govern-

ment.’” Pet. 28 (quoting *Quirin*, 317 U.S. at 37-38). But *Quirin* referred to “the enemy government” because the detainees in that case fought on behalf of Nazi Germany. Nothing in the Court’s opinion suggests that *only* those who fight on behalf of a government may be detained as belligerents. Moreover, while the opinion in *Quirin* did not address the issue, it appears that only two of the saboteurs “were formally enrolled in the German army.” Michael Dobbs, *Saboteurs: The Nazi Raid on America* 204 (2004).

c. Petitioner errs in arguing (Pet. 16-21) that the decision below conflicts with this Court’s precedents holding that Congress must “clearly state” when it authorizes domestic military detention. Most of the cases petitioner cites are inapposite, because they have nothing to say about the detention of enemy combatants. At issue in *Duncan*, 327 U.S. at 304, for example, was whether the Hawaiian Organic Act, ch. 339, 31 Stat. 141, authorized the Governor of Hawaii to order that civilians charged with garden-variety civilian offenses be tried before military tribunals. *Duncan*, 327 U.S. at 309-310 (noting that petitioners were charged with “embezzling stock” and “engag[ing] in a brawl”). The Court in *Duncan* explicitly distinguished cases involving military detentions like petitioner’s: “Our question does not involve the well-established power of the military to exercise jurisdiction over * * * enemy belligerents, prisoners of war, or others charged with violating the laws of war.” *Id.* at 313-314. Nor do petitioner’s other cases remotely “involve the well-established power of the military to exercise jurisdiction over * * * enemy belligerents.” *Ibid.*; see *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (applicability of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, to state judges); *Greene v.*

McElroy, 360 U.S. 474 (1959) (government’s revocation of security clearances granted to privately-employed aeronautical engineers); *Zadvydas v. Davis*, 533 U.S. 678 (2001) (removal of inadmissible aliens); *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814) (seizure of personal property unconnected to hostilities).

The only apposite case that petitioner cites is *Hamdi* itself. But there the plurality concluded that the AUMF satisfied the requirement of 18 U.S.C. 4001(a) that the detention of a citizen be “pursuant to an Act of Congress,” even though the AUMF “does not use specific language of detention.” 542 U.S. at 517, 519; see *id.* at 587 (Thomas, J., dissenting). That result follows directly from *Quirin*, which suggested that any clear-statement rule in this sensitive area runs in the opposite direction: “[T]he detention and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief * * * are not to be set aside by the courts without the clear conviction that they are in conflict with the * * * laws of Congress.” *Quirin*, 317 U.S. at 25; see Pet. App. 20a.

d. Petitioner contends (Pet. 22-26) that the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001 (Patriot Act), Pub. L. No. 107-56, 115 Stat. 272, shows that Congress denied the President the authority to detain enemy combatants under the AUMF. Petitioner is mistaken. To begin with, petitioner’s reliance on the Patriot Act begs the question of whether his detention is authorized by the AUMF, because, as even the initial panel majority in the Fourth Circuit observed, the Patriot Act “[p]lainly * * * does not eliminate the statutory authority provided the President in the AUMF to detain individuals

who fit within the ‘legal category’ of enemy combatant.” Pet. App. 378a (citation omitted). Thus, as even that panel majority observed, “if an alien ‘qualif[ies]’ as an enemy combatant, then the AUMF authorizes his detention.” *Ibid.* (brackets in original) (citation omitted).

The Patriot Act’s detention provisions authorize the Attorney General to detain, pending removal proceedings or criminal prosecution, resident aliens suspected of terrorist activity, espionage, illegal export, or “any other activity that endangers the national security,” without regard to whether the alien is associated with al Qaeda or whether there is an armed conflict. 8 U.S.C. 1226a(a)(3)(B). The AUMF authorizes the President to order alien enemy combatants affiliated with al Qaeda to be detained in military custody during the armed conflict with al Qaeda. Petitioner’s contention that the Patriot Act’s specific detention provisions somehow override the AUMF’s general detention authority cannot be squared with the fact that the provisions relate to two separate types of detention and two separate groups of individuals. That is, they have entirely “different spheres of operation.” Pet. App. 201a (Wilkinson, J., concurring in part and dissenting in part).⁸

Petitioner’s claim that the Patriot Act mandates that alien enemy combatants like him must be subject to removal proceedings or the criminal process is without merit. While there are criminal statutes that may be used for prosecuting suspected terrorists, nothing in the Patriot Act—or any other statute—requires the President to process captured alien enemy combatants through the civilian criminal justice system simply be-

⁸ The same argument based on the Patriot Act was made to no avail in *Hamdi*. See Pet. Reply Br. at 19-20, *Hamdi*, *supra* (No. 03-6696).

cause their actions as combatants may also have violated some federal criminal law. Such laws were also available to the Executive in *Quirin*, but military detention and trial was nonetheless appropriate for the combatants in that case. Furthermore, the determination whether the exercise of military authority rather than criminal law-enforcement authority against a captured combatant is “necessary and appropriate” is a classic executive determination that—especially when it comes to alien enemy combatants like petitioner—may turn on numerous military and foreign-policy determinations.⁹

* * * * *

The court of appeals properly concluded that petitioner’s military detention is lawful given petitioner’s close association with al Qaeda and entry into this country for the purpose of committing hostile and war-like acts. Indeed, taking as true the facts described in the Rapp Declaration, the court of appeals’ conclusion should be unremarkable given the text of the AUMF, this Court’s decisions, and the law of war. What is truly remarkable is petitioner’s suggestion that the President

⁹ The fact that the availability of criminal prosecution does not preclude military detention during wartime is especially true with respect to enemy alien combatants like petitioner. Indeed, Justice Scalia, who relied in his dissenting opinion in *Hamdi* on the possibility of a treason prosecution against disloyal citizens who take up arms against the United States, explicitly limited his opinion to citizens, 542 U.S. at 554, 558-561, 577 (Scalia, J., dissenting). He acknowledged that there are important legal and historical differences between the Executive Branch’s authority over aliens and its authority over citizens during times of armed hostilities, and recognized that it “is probably an accurate description of wartime practice with respect to enemy *aliens*” that they be “detained until the cessation of hostilities and then released.” *Id.* at 558-559 (Scalia, J., dissenting) (citation omitted).

lacks the authority to detain an individual such as petitioner to protect Americans from the hostile and war-like acts he has come here to inflict. The Court should deny certiorari at this interlocutory stage and permit this case to go forward on remand. On remand, petitioner will be given a full opportunity to challenge the government's evidence. But there is no reason for the Court to short-circuit that process here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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