No. 08-368

IN THE

# Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,

*Petitioner*,

v.

COMMANDER DANIEL SPAGONE,
U.S.N., CONSOLIDATED NAVAL BRIG,

*Respondent.*

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

## BRIEF OF CONSTITUTIONAL LAW SCHOLARS BRUCE ACKERMAN, ERWIN CHEMERINSKY, RICHARD A. EPSTEIN, RICHARD H. FALLON, PAMELA S. KARLAN, GEOFFREY R. STONE, KATHLEEN M. SULLIVAN, AND LAURENCE H. TRIBE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

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

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## INTEREST OF *AMICI CURIAE*[1]

Constitutional law scholars Bruce Ackerman, Erwin Chemerinsky, Richard A. Epstein, Richard H. Fallon, Pamela S. Karlan, Geoffrey R. Stone, Kathleen M. Sullivan, and Laurence H. Tribe submit this brief as *amici curiae* in support of petitioner in this case. The *amici curiae* have studied and written extensively on a range of constitutional law topics, including the separation of powers and individual liberty interests at stake in this case. Specifically,

Bruce Ackerman is Sterling Professor of Law and Political Science at Yale Law School. He is the author of BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM (Yale 2006).

Erwin Chemerinsky is Dean and Distinguished Professor of Law, University of California, Irvine, School of Law. He is the author of CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (3d ed. 2006).

Richard A. Epstein is the James Parker Hall Distinguished Service Professor of Law, The University of Chicago, the Peter and Kirsten Bedford Senior Fellow, the Hoover Institution, and visiting professor of law at New York University. He has written extensively on various constitutional law topics.

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[1] The parties have consented to the filing of this brief. No counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

Richard H. Fallon is the Ralph S. Tyler, Jr. Professor of Constitutional Law, Harvard Law School. He is co-author of HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (5th ed. 2003), and *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029 (2007).

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Laurence H. Tribe is the Carl M. Loeb University Professor at Harvard University and Professor of Constitutional Law at Harvard Law School. He is the author of THE INVISIBLE CONSTITUTION (Oxford 2008).

## SUMMARY OF ARGUMENT

This case poses the question whether the President may indefinitely detain as an enemy combatant a lawful U.S. resident who was arrested in U.S. territory on suspicion of conspiring to engage in acts of terrorism.

Concerned about the excesses of executive and military power under British colonial rule, the Founding Generation established a constitution that protects individual liberty through a nearly inviolate prohibition against detention without the protection of a criminal process, the essential features of which are enumerated in the Bill of Rights. Exceptions to that presumption are rare and narrowly confined.

One such exception is the long-established power of the government, in time of war, to detain "enemy combatants" until the end of the conflict. The question here is whether that exception should extend to suspects in the present "war on terror." While arguments can be made in support of extending an old concept to modern circumstances, doing so here would expand, not simply apply, law that was developed in a different time to address a very different kind of conflict.

Whether such an extension should be attempted is a decision the Constitution gives, in the first instance, to Congress, acting in consultation with the Executive branch. While the Constitution confers upon the President war powers as Commander-in-Chief, that power is generally subject to legislative control, particularly when the war powers are exercised domestically and individual liberty is at stake. Indeed, this Court has never upheld domestic

detention of lawful U.S. residents in the absence of clear legislative authorization.

In light of the Constitution's allocation of wartime authority, this Court should require clear authorization from Congress before confronting the difficult constitutional questions that could arise from applying the enemy combatant concept to individuals like petitioner here. Requiring clarity from Congress avoids possibly unnecessary constitutional rulings in a delicate area, while also honoring the Constitution's strong presumption in favor of individual liberty and criminal process. It also vindicates Congress's prerogatives and, most importantly, encourages an inter-branch dialogue regarding the necessity, wisdom, and limits of any expansion of military detention authority over the domestic population.

In this case, the general language of the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)—which simply 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 that occurred on September 11, 2001 . . . ."—does not evidence congressional deliberation and authorization with sufficient clarity.

## ARGUMENT

### I. Treating Individuals Lawfully Within The United States As Enemy Combatants Based On Suspicions Of Involvement In Terrorism Would Constitute A Significant Expansion Of Traditional Executive Detention Powers.

1. The Founding Generation "viewed freedom from unlawful restraint as a fundamental precept of liberty." *Boumediene v. Bush*, 128 S. Ct. 2229, 2244 (2008); *see Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) ("[T]he most elemental of liberty interests [is] the interest in being free from physical detention by one's own government.") (plurality opinion). Indeed, "[e]xecutive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned . . . save by the judgment of his peers or by the law of the land." *Rasul v. Bush*, 542 U.S. 466, 474 (2004) (citation omitted).

By the time of the Founding, English law had recognized for almost six centuries that to deprive a person of liberty "without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom." 1 WILLIAM BLACKSTONE, COMMENTARIES 136; *see also* THE FEDERALIST No. 84, at 480 (Alexander Hamilton) (Clinton Rossiter ed. 1991) (decrying "the practice of arbitrary imprisonments" as "the favorite and most formidable instruments of tyranny"). Those who had survived colonial military rule were particularly aware of the threat to liberty posed by military involvement in domestic affairs, including military detention of

alleged enemies of the state. *See*, *e.g.*, *Duncan v. Kahanamoku*, 327 U.S. 304, 319-20, 323-24 (1946).

As a result, the Founders established a constitution under which "liberty is the norm, and detention without trial is the carefully limited exception." *Hamdi*, 542 U.S. at 529 (internal quotation marks omitted).[2]

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[2] Both the United States and the Fourth Circuit have recognized that this presumption applies to resident aliens as well as citizens. *See*, *e.g.*, Pet. App. 19a-21a, 98a-99a. "[L]awful residence implies protection" under our Constitution. *Johnson v. Eisentrager*, 339 U.S. 763, 776 (1950) (citation omitted). Indeed, most constitutional protections against arbitrary detention apply by their terms to resident aliens and citizens alike. *See, e.g.*, U.S. CONST. amend. V ("no *person* shall be deprived of . . . liberty . . . without due process of law") (emphasis added); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270-71 (1990) (cataloging constitutional protections enjoyed by aliens lawfully residing in the United States). And "[b]ecause the Constitution's separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments, protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles." *Boumediene v. Bush*, 128 S. Ct. 2229, 2246 (2008) (citations omitted).

Resident aliens do enjoy reduced protection, relative to citizens, in some areas. For instance, they are subject to limited executive detention related to deportation, *see Zadvydas v. Davis*, 533 U.S. 678, 689 (2001), and can be detained for the duration of a declared war if they are citizens of an enemy nation, *see Ludecke v. Watkins*, 335 U.S. 160 (1948). But the United States has not suggested that this case falls within any such exception.

In *Hamdi*, this Court considered one such carefully limited exception,[3] explaining that 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.'" *Id*. at 518 (quoting *Ex parte Quirin*, 317 U.S. 1, 28, 30 (1942)). In light of that historical understanding, the Court rejected the claim that detaining Hamdi as an enemy combatant violated the Constitution, observing that he was captured in a traditional war, fighting on behalf of the Taliban government of Afghanistan against U.S. forces that had invaded the country after the attacks of September 11, 2001. *Id*. at 521-24. For the same reason, the Court construed the general authorization in the AUMF—which plainly contemplated those military operations in Afghanistan—to encompass authority to detain traditional enemy combatants engaged in active fighting there. *Id*. at 518-19.

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[3] There are others as well. For example, convicted sex offenders, *Kansas v. Hendricks*, 521 U.S. 346 (1997), those found to be mentally ill and dangerous, *Addington v. Texas*, 441 U.S. 418 (1979), those found not guilty by reason of insanity, *Foucha v. Louisiana*, 504 U.S. 71 (1992), "recalcitrant witness[es]," *United States v. Wilson*, 421 U.S. 309 (1975), and infectious individuals, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), may be detained in limited circumstances. And in wartime, Congress may authorize executive detention of citizens of an enemy nation. *Ludecke*, 335 U.S. at 173. As the plurality noted below, this Court has "permitted such exceptions only when a *legislative* body has explicitly authorized the exception." Pet. App. 23a n.6. And, in any case, none of the exceptions is claimed as the basis for petitioner's detention in this case.

2. The Fourth Circuit, sitting en banc, held that the AUMF also empowers the President to detain suspects lawfully residing in the United States as enemy combatants in the so-called "war on terror." *See* Pet. App. 7a (per curiam). That conclusion requires an expansion of the concept of an "enemy combatant" beyond the tradition recognized in this Court's prior cases.

The traditional enemy combatant category is well-recognized and easily defined. As this Court explained in *Hamdi*, the law of war developed the concept of the enemy combatant in the context of traditional wars between nations, or between a nation and insurrectionists in a civil war. 542 U.S. at 518-519; *see, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War arts. 3, 4, Aug. 12, 1949, 6 U.S.T. 3316, 7 U.N.T.S. 135 (distinguishing between conflicts of an international character and conflicts not of that character). Accordingly, the core of the concept extends to soldiers of an enemy nation "carrying a weapon against American troops on a foreign battlefield," *Hamdi*, 542 U.S. at 522 n.1, and to spies and saboteurs working for an enemy state who unlawfully enter the United States "with the purpose of destroying war materials and utilities." *Ex parte Quirin*, 317 U.S. at 46.

At the same time, this Court has recognized an outer limit to the category as well. In *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), the Court held that a citizen of Indiana could not be treated as an enemy combatant for participating in a secret society that planned to overthrow the government during the Civil War. *See id.* at 130-31. Although Milligan participated in a conspiracy to commit acts of

violence on behalf of an enemy force during an ongoing war, he had never been a Confederate solider, did not participate in battle, and was arrested in United States, not Confederate, territory. *Id*. at 107. For these reasons, the Court concluded that Milligan should have been tried by a civilian court—not detained as an enemy combatant and tried by military court. *Id*. at 131. Likewise, although this Court has never been called upon to so hold, it seems obvious that the government lacks the authority to detain as enemy combatants members of other violent groups traditionally treated as criminals when lawfully within the United States, including individuals suspected of involvement in domestic terrorism, organized crime, drug cartels, and subversive political groups.[4]

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[4] *See, e.g.*, *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998) (Oklahoma City bombing); *Torres v. United States*, 140 F.3d 392 (2d Cir. 1998) (member of violent Puerto Rican nationalist group Fuerzas Armada de Liberacion Nacional bombed Mobil Oil Building in Manhattan as part of a campaign for Puerto Rico's independence); *United States v. Graham*, 275 F.3d 490 (6th Cir. 2001) (members of the Michigan Militia Wolverines and North American Militia organized themselves in "cells" and prepared for a "war" with the government); *United States v. Dowell*, 430 F.3d 1100 (10th Cir. 2005) (members of the Army of the American Republic set fire to the Colorado Springs office of the IRS); *United States v. Locascio*, 6 F.3d 924 (2d Cir. 1993) (criminal prosecution of Mafia boss); *Rosenberg v. United States*, 346 U.S. 273 (1953) (individuals convicted as spies for Soviet Union); *Dennis v. United States*, 341 U.S. 494 (1951) (prosecution of communists for conspiring to overthrow the U.S. government).

3. Whether modern circumstances justify applying the enemy combatant concept to individuals lawfully residing within the United States and accused of participating in terrorism is an important question. Answering that question affirmatively would require an expansion from the historical core concept.

To be sure, the conflict with terrorism shares some features of a traditional war. Like Hamdi and Quirin, al-Marri is alleged to have conspired to engage in war-like acts against our government. But that fact alone does not distinguish this case from *Milligan* or other instances in which the nation has relied on the criminal justice system to punish and deter similar violent acts against the government. *See supra* note 4. Indeed, the Constitution plainly contemplates that some of the most serious acts of violence against the government will be addressed through the criminal justice system, defining treason to include "levying War" against the United States and providing that "[n]o person shall be convicted of Treason unless on the Testimony of two witnesses to the same overt act, or on Confession in open Court." U.S. CONST. art. III, § 3.

It is also true that this conflict involves the use of military force, supporting the analogy to a traditional war to some extent. But that cannot be determinative either. Congress has authorized the

use of military resources in the "war on drugs,"[5] for example, and no one has ever suggested that the government may detain indefinitely those suspected of drug trafficking for the duration of that conflict.

At the same time, in some important respects the "war on terror" is "entirely unlike . . . the conflicts that informed the development of the law of war." *Hamdi*, 542 U.S. at 521. Among other things, the "war on terror" does not involve a conflict between sovereign states or a civil war within our borders. Each of this Court's prior decisions addressing indefinite detention during wartime has involved such conflicts. *See, e.g.*, *Ex parte Quirin*, 317 U.S. 1 (1942) (World War II), *Ex parte Endo*, 323 U.S. 283 (1944) (same), *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (individual fighting with Taliban government in Afghanistan).[6] In this case, the "war on terror" is a conflict against a "loosely connected . . . global movement of Islamic terrorism." Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2109 (2005). As a consequence, unlike traditional wars, this conflict does not involve soldiers of an enemy

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[5] *See, e.g.*, 10 U.S.C. § 374(b)(3) (authorizing the military to assist civilian law enforcement); *United States v. Del Prado-Montero*, 740 F.2d 113, 114 (1st Cir. 1984) (Navy destroyer captured foreign drug-smuggling ship at sea).

[6] Even the Alien Enemy Act, which is not claimed as a basis for al-Marri's detention but which empowers the President to detain enemy aliens during wartime, applies only when the United States is at war with a "foreign nation or government" and only to citizens or subjects of that nation or government. 50 U.S.C. § 21.

government, a circumscribed field of battle, or any discernable end point, all features of prior conflicts that have served to both delimit the scope of the enemy combatant exception and ease the burden of distinguishing true enemy combatants from common criminals.

Accordingly, the common-law courts that developed the concept of the enemy combatant as part of the law of war (which, in turn, influences the constitutional understanding of the scope of the government's detention power) simply did not have occasion to "confront[] cases with close parallels to this one." *Boumediene*, 128 S. Ct. at 2251. The Court is thus left with the question whether suspects in the "war on terror" are sufficiently similar to combatants in a traditional war (*e.g.*, Quirin and Hamdi)—and sufficiently dissimilar to individuals with a recognized right to the protections of the criminal justice system (*e.g.*, Milligan, McVeigh, and members of the Mafia)—to justify treating them under the rules developed for traditional wars.

As discussed below, there is no need for this Court to resolve that question in this case, and *amici* take no position on it. We do believe, however, that it is important to recognize that extending the enemy combatant exception to those accused of terrorism within the United States raises a myriad of complications and difficulties, as illustrated by the badly fractured decision below, which produced numerous divergent conceptions of an "enemy combatant" in the "war on terror," each subject to extensive criticism. *See*, *e.g.*, Pet. App. 63a (Motz, J., concurring in the judgment); 163a-64a (Williams, J., concurring in part and dissenting in part); 253a-54a

(Wilkinson, J., concurring in part and dissenting in part). At the same time, the risk to fundamental constitutional values is obvious: precisely because the enemy in this conflict is so diffuse and difficult to identify, having no clear indicia of membership and no defined battlefield, the universe of plausible suspects could be enormous. And because there is no historical basis for limiting treatment as an enemy combatant to noncitizens, *see Hamdi*, 542 U.S. at 519, the proposed expansion of executive detention authority places every person in the United States, citizen and alien alike, at risk of erroneous deprivation of liberty without recourse to the procedures of the criminal justice system that the Founders established precisely in order to assuage concerns about the scope of domestic military authority.

Moreover, the Court should be mindful that history has shown that expansions of government authority at the expense of individual rights are difficult to contain in times of national stress once ordinary constitutional constraints are relaxed. *See*, *e.g.*, David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 976, 990 (2002) (describing internment of Japanese citizens residing in the United States and American citizens of Japanese descent during World War II); GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 318-20 (2004) (discussing Cold War excesses arising from fear of communist agents infiltrating U.S. government).

## II. This Court Should Require Clear Congressional Authorization Before Considering Any Expansion Of The Enemy Combatant Exception.

Whether the present threat of global terrorism justifies modifying the traditional conception of an "enemy combatant" thus raises important constitutional questions that this Court may someday be required to resolve. But not today. Rather, the Court should defer a constitutional decision until Congress, in consultation with the President, has plainly considered the question itself and clearly authorized indefinite detention of individuals lawfully living in the United States and suspected of terrorism. Appling this clear statement rule not only avoids a potentially unnecessary constitutional decision, but also gives effect to the Constitution's division of wartime authority among the branches and allows the Court to fulfill its important constitutional role with the benefit of the wisdom, judgment, and experience of its coordinate branches on a question that requires the special expertise and competencies of all three departments of our government.

### A. The Constitution Permits Domestic Military Detention Without Trial Only Upon The Concurrence Of All Three Branches Of Government.

This Court has never approved the military detention of individuals lawfully residing in the United States without legislative authorization. *See, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality opinion) (allowing congressionally-

approved detention of enemy combatants); *Ex Parte Quirin*, 317 U.S. 1, 41-42 (1942) (congressionally-authorized military trial of saboteurs caught within the United States); *Ludecke v. Watkins*, 335 U.S. 160, 161-62, 173 (1948) (detention of resident aliens only pursuant to specific congressional authorization). This is a reflection of the constitutional design.

1. The Founding Generation protected liberty not only through the enumeration of specific individual rights, but also through the separation of powers. *See*, *e.g.*, *Boumediene v. Bush*, 128 S.Ct. 2244, 2246 (2008) (noting that "allocat[ing] powers among three independent branches . . . serves not only to make Government accountable but also to secure individual liberty"); *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) (explaining that the separation of powers "was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty"). Thus, among the "bedrock principles of our constitutional system" is the idea that "great power must be held in check and that the body that defines what conduct to outlaw, the body that prosecutes violators, and the body that adjudicates guilt and dispenses punishment should be three distinct entities." Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1259 (2002).

2. Multi-branch participation is as central to protecting liberty in wartime as it is in times of peace. Our Constitution "is a law for rulers and people, equally in war and in peace." *Ex parte Milligan*, 71 U.S. 2, 120 (1866). Most rights remain

in place in wartime,[7] and the fundamental structural protection against encroachment on liberty—the separation of powers—continues to govern.

The Constitution thus assigns Congress the power to "declare War," "raise and support Armies," regulate the military, and govern the capture of enemy property. U.S. CONST. art. I, § 8. And perhaps most importantly for this case, the Constitution gives Congress the authority to "define and punish . . . Offenses against the Law of Nations." *Id*. The Founders thus recognized the need to take into account general precepts of the international law of war as they continue to evolve and adapt to changing conditions. But they placed principal authority for deciding when and how to refine the definition of war crimes with Congress, not the President or the judiciary.

Accordingly, under our Constitution, many fundamental wartime decisions are made through a dialogue between Congress and the President, whose power to suggest and veto legislation ensures congressional consideration of his expert views as Commander-in-Chief. *See* U.S. CONST. art. I, § 7; WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 219 (2000) (the Constitution makes "clear that the President may do

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[7] The Constitution mentions only two rights expressly subject to abrogation during war: the Third Amendment's prohibition against the quartering of soldiers in private homes, U.S. CONST. amend. III, and the Suspension Clause's prohibition against suspending habeas rights except "in Cases of Rebellion or Invasion," U.S. CONST. art. I, § 9.

many things in carrying out a congressional directive that he may not be able to do on his own").

The legislative role is especially important when the government acts to infringe fundamental liberty interests. "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi*, 542 U.S. at 536 (plurality opinion); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645-46 (1952) (Jackson, J., concurring) (observing that although the President exercises substantial wartime authority when his war powers are "turned against the outside world," when those powers are "turned inward" the Constitution requires the involvement of Congress); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).[8] Thus, for example, the Founders explicitly provided for multi-branch participation in the punishment of wartime treason, assigning Congress the responsibility of defining the punishment, the President the duty of prosecution, and the judiciary the oversight of the trials. U.S. CONST. art. II, § 1, art. III, § 3. The Constitution further protected individual liberty by safeguarding access to the Great

[8] Likewise, although the judiciary's role in the protection of individual liberty is much reduced when the President exercises powers abroad against those with no claim to the protection of our Constitution, *see Johnson v. Eisentrager*, 339 U.S. 763, 776 (1950), the courts play a critical role when the Executive acts to detain individuals within the territorial jurisdiction of the United States, *see Boumediene*, 128 S. Ct. at 2253-62.

Writ of Habeas Corpus, even in time of war, allowing its suspension only in "Cases of Rebellion or Invasion," U.S. CONST. art. I, § 9, and only as authorized by Congress, *see*, *e.g.*, *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807) (recognizing that suspension of the writ requires congressional approval); *see also Hamdi*, 542 U.S. at 537 (plurality opinion) (same); *id*. at 562 (Scalia, J., dissenting) (same).

It should come as no surprise, then, that indefinite domestic detention of individuals without trial should require the concurrence of all three branches of government, each exercising its own special competencies. Thus, for example, in *Ex parte Endo*, 323 U.S. 283 (1944), this Court confronted the lawfulness of the internment of a loyal American citizen of Japanese descent during World War II. Although no one doubted the gravity of wartime risks faced by the nation, this Court nonetheless proceeded upon the assumption (apparently unchallenged by the President) that the detention required congressional approval. *See id*. at 298-99. And finding no such authorization in the relevant statutes, the Court held the detention unlawful and ordered Endo's release. *Id*. at 302-04. In a related context, the Court in *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), held invalid a military order replacing the civilian courts of Hawaii with military tribunals during World War II, after concluding that the action, although approved by the President, *id*. at 308, was not authorized by Congress, *id*. at 324.

### B. A Clear Statement Rule Ensures That Joint Participation Has Taken Place And Encourages Dialogue Between The Branches.

This Court should not find congressional approval of the indefinite detention of lawful U.S. residents suspected of terrorism-related offenses absent clear indication that Congress has directly considered and approved the practice.

Such a clear statement rule is consistent with this Court's prior practice in this area. In each of this nation's most recent major conflicts—World War II, the Cold War, and the war on terrorism—this Court has declined to approve substantial new incursions on individual rights in the absence of clear congressional authorization. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 601-02 (2006) (refusing to approve the trial by military commission of detainees at Guantanamo because of the lack of clear legislative authorization); *Kent v. Dulles*, 357 U.S. 116, 129 (1958) (requiring clear evidence of congressional authorization of revocation of passports of suspected communists); *Ludecke*, 355 U.S. at 163-64 (approving the detention of citizens of enemy governments during World War II under the Alien Enemy Act because the Act's "terms, purpose, and construction le[ft] no doubt" about its authorization); *Duncan*, 327 U.S. at 324 (declining to read federal statute to permit military supplanting of civilian courts in Hawaii during World War II because of lack of clear legislative authorization); *Endo*, 323 U.S. at 299-300, 302 (finding no authorization for internment of loyal Japanese-American citizens during World

War II); *see also generally* Cass Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47.[9]

This traditional requirement of a plain statement promotes four important objectives.

First, requiring Congress to speak clearly will avoid a potentially unnecessary constitutional decision in an area in which the Court should be reluctant to act unnecessarily. *See*, *e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001); *Spector Motor Servc., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944).

Second, a clear statement rule reflects the constitutional presumption in favor of preserving individual liberty. "In interpreting a war-time measure we must assume that [Congress's] purpose was to allow for the greatest possible accommodation between [individual] liberties and the exigencies of war." *Endo*, 323 U.S. at 300. Thus, this Court has "assume[d], when asked to find implied powers in a grant of legislative . . . authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used." *Id.*; *see also Coleman v. Tennessee*, 97 U.S. (7 Otto) 509, 514 (1878)

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[9] In other cases, like *Hamdi*, the Court has not required a clear statement when the government has employed a power consistent with established constitutional principles. *See Hamdi*, 542 U.S. at 521 (plurality opinion) (the AUMF authorizes detention that accords with "longstanding law-of-war principles"); *see also Hamdan*, 548 U.S. at 593 (explaining that the Court in *Quirin* found that a statute authorizing military commissions "simply preserved what power, under the Constitution and the common law of war, the President had had before 1916 to convene military commissions").

(explaining that given the "known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no such intention should be ascribed to Congress in the absence of clear and direct language to that effect"); *Duncan*, 327 U.S. at 317 (same). In the wartime context, such presumptions guard against the risk that the military might undervalue civilian liberty and that the "continual effort and alarm attendant on a state of continual danger" will lead to the erosion of civil rights. *See* THE FEDERALIST No. 8, at 61-62 (Alexander Hamilton) (Clinton Rossiter ed., 1961).[10]

Third, a clear statement rule enforces the constitutionally ordained separation of powers by insisting upon Congress's prerogative to decide whether, and how, to authorize the extraordinary measure of indefinite domestic military detention. In the criminal context, this Court narrowly construes penal statutes not only out of respect for individual liberty, but also in deference to Congress's exclusive authority to define the content of federal criminal law. *See*, *e.g.*, *United States v. Wiltberger*, 18 U.S. 76, 95 (1820) (explaining that rule of lenity—which

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[10] The presumption in favor of liberty embodied in a clear statement rule is as central for cases involving lawful resident aliens as it is for cases involving citizens. *See*, *e.g.*, *St. Cyr*, 533 U.S. at 298-99 (requiring clear statement to withdraw habeas right from aliens); *Barber v. Gonzales*, 347 U.S. 637, 642-43 (1954) (holding that "deportation statutes . . . should be strictly construed"); *see also* Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2084 (2007).

requires that criminal statutes "be construed strictly" —is founded in part "on the plain principle that the power of punishment is vested in the legislative, not in the judicial department"). The same should be true when courts construe statutes alleged to authorize deprivations of liberty outside the criminal justice system. Indeed, such vigilance is especially appropriate in times of conflict, when the perceived need for quick and decisive action may create a special risk of executive infringement on legislative authority. *Cf.* JACK GOLDSMITH, THE TERROR PRESIDENCY 126 (2007) (after terrorist attacks of September 11, 2001, the operating ethos for some in the executive branch has been to "push and push and push until some larger force makes us stop") (internal quotation marks omitted).

Fourth, a clear statement requirement can operate as an "interpretive rule [that] facilitates a dialogue between" the branches. *Boumediene*, 128 S. Ct. at 2243. By design, the legislative process is a collaborative endeavor between the legislative and executive departments, taking advantage of the strengths, and compensating for the weaknesses, of each branch. "Article I's precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberative lawmaking." *Loving v. United States*, 517 U.S. 748, 757-58 (1996). Thus, Congress is charged with legislative responsibilities precisely because it is the branch with the best claim to speak authoritatively on behalf of a large and diverse nation. And in balancing competing claims and interests—such as whether traditional criminal procedures are

ineffective to meet the modern threat—Congress can inform itself through factfinding procedures that are not available to the courts. *Cf. Bush v. Lucas*, 462 U.S. 367, 389 (1983).

At the same time, Congress may lack the depth of experience and expertise found in the executive branch, headed by a Commander-in-Chief charged with the day-to-day execution of the law and protection of the nation from the threat of global terrorism. Even without the threat of a presidential veto, U.S. CONST. art. I, § 7, the President's views on questions of national security inevitably garner deference.

Thus, requiring a clear statement ensures that tradeoffs between security and liberty are undertaken in the first instance through a "deliberative and reflective process engaging both of the political branches." *Hamdan*, 548 U.S. at 637 (Kennedy, J., concurring in part). It also helps ensure that the collaboration is, in fact, "informed," *see Boumediene*, 128 S. Ct. at 2243, by making certain that the particular sacrifices made in the name of public safety were directly considered. *See St. Cyr*, 533 U.S. at 299 n.10 ("'In traditionally sensitive areas, . . . the requirement of [a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'") (citation omitted). When authorization is found in broad and vague terms—when legislators are not required to "deliberate, argue, and take a stand," *see* GOLDSMITH, *supra*, at 207—there is an increased likelihood that the courts will unknowingly and unnecessarily

authorize broad powers Congress did not fully contemplate.

Of course, the concurrence of the legislative and executive branches cannot displace the courts' fundamental obligation to enforce the individual rights guaranteed by the Constitution. It may be that Congress and the President will be willing to sacrifice more liberty than the founding document will permit. But just as clear statement rules ensure that Congress has done its job, they assist the courts in doing theirs.

For one thing, requiring Congress to act with clarity in the first instance may diminish the practical difficulties in drawing constitutional lines in this uncharted area. Legislative lines can be drawn with a clarity that is difficult for courts to achieve and can be modified in light of experience and with changing conditions. For example, during the Civil War, after President Lincoln unilaterally suspended habeas corpus, the Congress legislatively authorized the suspension but "limited [that] authority in important respects." *See Milligan*, 71 U.S. at 133 (Chase, C.J., concurring in the judgment). So, too, in this case, were Congress to conclude that indefinite detention is appropriate in some cases involving alleged terrorists lawfully residing in the United States, it could well lay down limitations that would narrow the scope of this Court's eventual constitutional inquiry. Congress might, for example, provide statutory criteria for concluding that an individual is an enemy combatant and legislatively define the permissible duration of confinement. And Congress might also establish procedural safeguards sufficiently protective to avoid any serious procedural

due process concerns with the method for determining enemy combatant status.[11]

While such determinations would not bind this Court on the question of the statute's constitutionality, they would represent the considered judgment of two co-equal branches of government on questions to which their views are especially entitled to substantial respect. An inter-branch dialogue between the political branches and the judiciary could be especially helpful in this context, where the constitutional calculus necessarily involves a weighing of public necessity against private interests, both of values of the highest order. Without it, courts might, for example, underestimate military necessity or the special problems created by efforts to deal with an extraordinary kind of crime through ordinary criminal processes. Federal judges do not see daily threat briefings and "must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security." *Boumediene*, 128 S. Ct. at 2276–77. At the same time, courts pressed to pass on the constitutionality of measures instigated by the Executive alone may give undue deference to assertions of military authority precisely because they recognize their

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[11] In this case, there are serious questions as to the constitutional adequacy of the procedures adopted by the government for making enemy combatant determinations. *See* Pet. App. 117a-137a (Traxler, J., concurring in the judgment). While *amici* do not address the procedural due process questions in this brief, they do not wish to leave the impression that their silence indicates agreement with the United States' position on this question.

relative lack of expertise. Requiring the President to justify his requests for extraordinary authority to the people's elected representatives in Congress can guard against that risk as well.

There is no reason to believe that Congress will default in its responsibility to act with clarity. *See* Petr. Br. 36-45 (discussing enactment of the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001)). Nor is there any reason to think that if this Court denies the Executive a power Congress intended to give it, and which the President believes essential to the security of our country, that the executive branch lacks the means or the will to "return[] to Congress to seek the authority he believes necessary." *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring).

## III. The AUMF Does Not Clearly Authorize Military Detention Of Individuals Lawfully Within The United States On Suspicion of Terrorism.

In this case, the United States has identified only one statute, the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), which it believes authorizes the indefinite military detention of legal U.S. residents. But the AUMF does not authorize such detention with sufficient clarity, if at all. *See* Petr. Br. 28-48.

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 that occurred on September 11, 2001 . . . ." § 2(a), 115 Stat. at 224. Those words may

constitute sufficient congressional authorization for the Executive to detain traditional enemy combatants captured in Afghanistan. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion). But the AUMF does not even mention—let alone clearly authorize—an extension of that traditional authority to include the indefinite detention of individuals within the United States on suspicion of terrorism. *Cf. id*. at 547–548 (2004) (Souter, J., concurring) (finding AUMF did not clearly authorize detention even of citizens engaged in active combat with U.S. forces in Afghanistan); *id.* at 573–74 (Scalia, J., dissenting) (same); *see also* Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2085 (2007) (concluding that the AUMF does not "provide[] the necessary statutory authorization for the indefinite detention of aliens apprehended within the United States").[12]

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The conflict between our foundational commitment to individual liberty and preserving the nation's security in the face of new and terrible threats is one of the defining challenges of our times. Striking the proper balance will require all the wisdom and experience our country can bring to bear

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[12] Indeed, it is unlikely that Congress was able to give the question of domestic detention power significant thought—the AUMF was enacted one week after September 11, 2001, when the nation's attention was focused abroad, particularly on the prospect of war with Afghanistan.

on the problem. Denying the President the authority he seeks here will facilitate, not end, that necessary deliberative process. "Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so." *Hamdan*, 548 U.S. at 636 (Breyer, J., concurring).

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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