No. ____

IN THE

Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,

Petitioner,

—v.—

COMMANDER JOHN PUCCIARELLI,
U.S.N., CONSOLIDATED NAVAL BRIG.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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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 government assertions that the detainee conspired with al Qaeda to engage in terrorist activities?

PARTIES TO THE PROCEEDING

The parties to the proceedings below are listed in the caption except for Mark A. Berman who served as Petitioner's next friend in the district court because Petitioner was previously held *incommunicado* and, therefore, was unable to file the habeas corpus petition on his own behalf. Mr. Berman is no longer a party to the proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ali Saleh Kahlah al-Marri respectfully requests that a writ of certiorari issue to review the judgment of the en banc United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals sitting en banc (App. 1a-315a) is reported at 534 F.3d 213. The panel opinion (App. 316a-401a) is reported at 487 F.3d 160. The district court opinions (App. 402a-447a) are reported at 443 F. Supp. 2d 774, and at 378 F. Supp. 2d 673. The magistrate judge's final report and recommendation (App. 448a-465a) is not reported.

JURISDICTION

The judgment of the en banc court of appeals was entered on July 15, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), is set forth at App. 490a-492a. Section 412 of Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), as codified at 8 U.S.C. § 1226a, is set forth in relevant part at App. 493a-496a.

STATEMENT OF THE CASE

This case raises the important question whether the executive can seize and subject to indefinite military detention, without criminal charge or trial, a person lawfully residing in the United States based on government assertions that he supported terrorist activities.

Petitioner's Arrest and Federal Criminal Prosecution

On December 12, 2001, FBI agents arrested Petitioner Ali Saleh Kahlah al-Marri at his home in Peoria, Illinois, where he resided with his wife and five children. Three months previously, al-Marri, a Qatari citizen, had lawfully entered the United States with his family to pursue a masters degree at Bradley University in Peoria, where he had received his bachelor's degree in 1991. The FBI transported al-Marri to New York and held him in solitary confinement in the maximum security Special Housing Unit at the Metropolitan Correctional Center in Manhattan as a material witness in the investigation of the September 11 attacks.

Two months later, in February 2002, the United States filed the first of three successive criminal indictments against al-Marri. The first, filed in the Southern District of New York, charged him with credit card fraud; the second added charges of false statements to the FBI and on a bank application, as well as identity theft. After al-Marri successfully moved to dismiss the charges for improper venue, an identical indictment was filed in

the Central District of Illinois, and al-Marri was returned to Peoria.[1]

On May 29, 2003, the district judge set a July 21, 2003 trial date. Thereafter, the government barred al-Marri's counsel from seeing him pending entry of Special Administrative Measures ("SAMs"), severely restricting al-Marri's contact with counsel. On Friday, June 20, the court scheduled a suppression hearing for July 2 in connection with one of al-Marri's pre-trial motions. That same day, defense counsel advised the AUSA prosecuting the case that the SAMs impasse had to be resolved so that counsel could meet with al-Marri to prepare for the hearing. At this point, al-Marri had already been imprisoned for eighteen months.

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

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

The President's declaration alleged that al-Marri was "closely associated" with al Qaeda and had "engaged in conduct that constituted hostile and

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[1] If convicted on all counts, al-Marri could have been imprisoned for up to 30 years under the federal sentencing guidelines based on enhancements for terrorism-related activity alleged in the indictments. *See* U.S.S.G. § 3A1.4.

war-like acts, including conduct in preparation for acts of international terrorism." App. 466a. The President claimed that al-Marri, although in maximum-security federal custody, represented "a continuing, present, and grave danger to the national security of the United States," and that military detention was "necessary to prevent him from aiding al Qaeda." App. 467a. The President also asserted that al-Marri "possesse[d] intelligence . . . that . . . would aid U.S. efforts to prevent attacks by al Qaeda." He ordered the Attorney General to surrender al-Marri to the Secretary of Defense and directed the latter "to detain him as an enemy combatant." App. 467a.

That same morning, the district court dismissed the criminal indictment with prejudice. Al-Marri was transferred to Defense Department custody and transported to the Consolidated Naval Brig in South Carolina. The military has since held al-Marri in solitary confinement without charge or trial. The government has refused to say when, if ever, al-Marri's military confinement will end, suggesting only that it will continue "for a long time." App. 67a.

For the first sixteen months of al-Marri's military confinement, he was held *incommunicado*. His attorneys, his wife and five children, and the International Committee for the Red Cross ("ICRC") all were denied access. The government ignored al-Marri's counsel's repeated requests to communicate with him. During that time, al-Marri was repeatedly interrogated in ways that bordered on, and sometimes amounted to, torture, including sleep

deprivation, painful stress positions, extreme sensory deprivation, and threats of violence or death.[2]

Only in October 2004 was al-Marri again allowed access to counsel. Al-Marri, however, remains in virtual isolation in the brig. Other than his attorneys and ICRC officials, al-Marri is not permitted to see anyone from the outside world. To date, he has been allowed only two phone calls with his family, both earlier this year, and then only after the government faced litigation challenging his conditions of confinement.[3]

The District Court Habeas Proceedings

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

On July 8, 2004, in compliance with this Court's decision in *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), al-Marri's counsel filed this habeas petition in the District of South Carolina. The government answered al-Marri's petition, appending the redacted

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

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

Declaration of Jeffrey N. Rapp, Director of the Joint Intelligence Task Force for Combating Terrorism, as sole support for al-Marri's indefinite detention. App. 468a-489a.

The Rapp Declaration contains serious allegations against al-Marri. It asserts, in substance, that al-Marri associated with high-level al Qaeda members; met with Osama bin Laden; volunteered for a "martyr mission"; and was ordered to enter the United States before September 11, 2001, to facilitate terrorist activities and explore the possibility of disrupting this country's financial system via computer hacking. App. 472a-473a. The Rapp Declaration does not, however, assert that al-Marri is a member of the armed forces or an affiliate of any nation at war with the United States. Nor does it assert that al-Marri was ever on or near a battlefield where U.S. armed forces or their allies were engaged in hostilities. Instead, it alleges criminal conduct, echoing many of the allegations in the prior federal indictments.

Al-Marri denied the government's allegations and moved for summary judgment. The district court denied the motion and referred the case to a magistrate judge for consideration of the necessary process to be afforded al-Marri in light of *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). *Al-Marri v. Hanft*, 378 F. Supp. 2d 673 (D.S.C. 2005). The magistrate judge then ruled that the Rapp Declaration gave al-Marri sufficient notice of the basis for his detention—even though at the time of the magistrate judge's decision many of the Declaration's allegations remained unknown to al-Marri because they were still redacted—and directed him to file "rebuttal

evidence." Order at 7, *Al-Marri v. Hanft*, Civ. A. No. 2:04-02257 (D.S.C. Dec. 19, 2005) (dkt. no. 41). Specifically, the magistrate judge warned that unless al-Marri came forward with "more persuasive evidence . . . the inquiry will end there." *Id.* at 6.

In response to the magistrate judge's order, al-Marri again denied the government's allegations, argued that they were insufficient to sustain the government's burden, and insisted that the executive had no legal authority to detain him as an enemy combatant. To assume the burden of disproving the Rapp Declaration's allegations in response to the court's order, al-Marri explained, would shift the burden of proof from the government to the accused, forcing al-Marri to forfeit the very constitutional guarantees his habeas petition sought to vindicate, including the presumption of innocence, the right of confrontation, the privilege against self-incrimination, the right to exculpatory evidence in the government's possession, and the right to trial by jury. Further, al-Marri explained, he was being asked to prove a negative by refuting multiple hearsay allegations without access to the government's evidence, without discovery, and without knowledge of the identity of his accusers or the opportunity to confront them.

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

The Fourth Circuit Appeal

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

On July 15, 2008, a divided en banc court issued a fragmented decision. *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008). In a brief per curiam opinion, the court held: (1) by a 5-4 vote, that Congress had empowered the President to detain al-Marri indefinitely as an enemy combatant based on the Rapp Declaration; and (2) by a different 5-4 majority, that, assuming Congress empowered the President to detain al-Marri indefinitely, al-Marri had been afforded insufficient process to challenge the government's allegations. App. 6a-7a.[4] Seven judges filed separate opinions.

Five judges believed that al-Marri could be detained as an enemy combatant under the Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224, note following 50 U.S.C. § 1541 (2000 ed., Supp. V), on the facts alleged in the Rapp Declaration. App. 6a-7a. But those judges could not agree on a legal definition of "enemy combatant" or even on whether that definition had a statutory or constitutional basis.

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[4] The Fourth Circuit unanimously affirmed its jurisdiction over al-Marri's habeas action in light of *Boumediene v. Bush*, 553 U.S. ___, 128 S. Ct. 2229 (2008).

Instead, they issued three separate opinions giving three different definitions of "enemy combatant" as a person who:

- associates with al Qaeda and comes to the United States to engage in "hostile and war-like acts," App. 90a (Traxler, J.);
- "(1) attempts or engages in belligerent acts against the United States, either domestically or in a foreign combat zone; (2) on behalf of an enemy force," App. 163a-164a (Williams, C.J., joined by Duncan, J.); or
- "(1) [is] a member of (2) an organization or nation against whom Congress has declared war or authorized the use of military force, and (3) knowingly plans or engages in conduct that harms or aims to harm persons or property for the purpose of furthering the military goals of the enemy nation or organization," App. 253a-254a (Wilkinson, J.).

Four judges disagreed. They concluded that the AUMF did not authorize al-Marri's indefinite military detention. App. 6a-7a (Motz, J., joined by Michael, King, and Gregory, JJ.). Writing for all four, Judge Motz followed *Hamdi*, *Ex parte Quirin*, 317 U.S. 1 (1942), *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), and other precedents by looking to the laws of war to determine what domestic military detention power the AUMF granted and the Constitution allowed. Judge Motz emphasized that Congress in enacting the AUMF had not expressed any intention to deviate from the laws of war. App.

55a-57a. Applying law-of-war principles, she concluded that the AUMF did not authorize al-Marri's military detention. App. 57a, 68a-69a, 74a-75a. Further, she underscored the serious constitutional problems that would arise if the AUMF were construed to permit al-Marri's indefinite military confinement. Thus, she refused to infer this detention power from the AUMF's silence and in the absence of a clear statement from Congress. App. 57a, 69a-70a. Finally, Judge Motz rejected the government's alternative argument that the President possesses inherent authority under Article II of the Constitution to detain al-Marri as an enemy combatant, App. 75a-88a—a claim no member of the en banc panel endorsed.

As to the sufficiency of the process afforded al-Marri in the district court—assuming *arguendo* legal authority to detain him as an enemy combatant—the en banc court split 5-4, with Judge Traxler casting the deciding vote to reverse and remand. App. 6a-7a. He held that the district court had erred in rigidly applying the *Hamdi* plurality's burden-shifting framework to the different circumstances of al-Marri's seizure and detention (specifically, the fact that he had been arrested in his home inside the United States), and by accepting the hearsay Rapp Declaration "as the most reliable available evidence" without inquiring whether the government could provide nonhearsay evidence. App. 123a (internal quotation marks omitted). Judge Traxler suggested, however, that the district court could consider hearsay evidence in violation of "the normal due process protections available to all within this country" if it concluded, as to any specific piece of

evidence, that these protections were "impractical, outweighed by national security interests, or otherwise unduly burdensome." App. 134a-135a.

The four judges who concluded that the President lacked legal authority to detain al-Marri as an enemy combatant (and who would have ordered his release from military custody) viewed further litigation as unnecessary but joined Judge Traxler in ordering remand to give practical effect to a majority rejection of the government's position. App. 89a (Motz, J., joined by Michael, King, and Gregory, JJ.). Writing separately, however, Judge Gregory underscored that Judge Traxler's framework would leave the district court with "no concrete guidance as to what further process is due" and "with more questions than answers" on critical evidentiary issues. App. 144a; *cf.* App. 185a (Wilkinson, J.) (agreeing that Judge Traxler's "uncertain quantum of procedures" provides the district court "with precious little direction on remand" and will leave it "mystified"). The remaining four judges voted to dismiss al-Marri's habeas petition. App. 160a-161a (Williams, C.J.); App. 181 (Wilkinson, J.); App. 293a-294a (Niemeyer, J.); App. 314a-315a (Duncan, J.).

REASONS TO GRANT THE PETITION

By a 5-4 vote, the en banc Fourth Circuit held that Congress in the AUMF vested the executive with power to seize individuals residing in this country, including American citizens and lawful aliens, and imprison them indefinitely in military custody without criminal charge or trial based solely on a determination that they planned to engage in terrorist activities. That ruling contradicts this

Court's precedents and commits four grave errors on a matter of exceptional national importance.

First, the Fourth Circuit disregarded this Court's repeated directive that authority to seize and detain individuals within the United States without charge, even if allowed under the Constitution, demands a clear statement from Congress. Instead, the Fourth Circuit construed the AUMF's silence to grant unprecedented authority for domestic military detention, rejecting centuries of legal tradition and fundamental constitutional safeguards secured through the criminal process.

Second, the Fourth Circuit ignored Congress' clear intent, manifested contemporaneous to the AUMF in the Patriot Act, that domestic terrorism suspects not be subject to prolonged or indefinite detention without charge, but be handled through the civilian criminal justice and immigration systems. It instead crafted from whole cloth a novel domestic military detention scheme abounding in constitutional problems that plainly could—and should—have been avoided.

Third, the Fourth Circuit contradicted this Court's instruction that the power to detain under the AUMF must be consistent with established law-of-war principles. Consequently, and without any legislative guidance at all, it stretched the concept of "enemy combatant" far beyond what this Court's precedents and the Constitution allow.

Finally, by upholding the military detention of a person who had been confined already for eighteen months in maximum security federal custody with no imminent prospect of release, the Fourth Circuit

ignored Congress' explicit instruction in the AUMF that only "necessary and appropriate" military force may be used.

The Fourth Circuit's decision has profound repercussions. It grants the executive discretion to displace the constitutional protections of the criminal justice system, including the right to speedy presentment, confrontation, and trial by jury, merely by alleging a connection to possible terrorist activity. The lower court has replaced settled and historic protections with confusion. It has created three definitions of "enemy combatant"—on top of the government's own various and shifting definitions of that term. The majority, moreover, could not even agree on what the district court should do on remand, returning the case for yet further proceedings without concrete guidance to the court or the parties. In authorizing a novel domestic military detention scheme with uncertain substantive parameters and *ad hoc* procedural rules, the Fourth Circuit has cast a pall over the physical liberty of all persons in the United States. Although this case involves a non-citizen, the Fourth Circuit's construction of the AUMF applies equally to American citizens, as majority and dissenting opinions below recognized, as the government has vigorously argued, and as this Court's precedents dictate. *See Hamdi*, 542 U.S. at 519 (plurality opinion); *Quirin*, 317 U.S. at 37-38; *see also Padilla v. Hanft,* 423 F.3d 386, 392 (4th Cir. 2005). Review by this Court is clearly needed now given the undeniable significance of this decision.

Review should not await further district court proceedings. Those proceedings cannot resolve the

core, threshold legal question presented by this petition: the scope of the government's domestic military detention power granted by the AUMF and permitted under the Constitution. Rather, they will generate protracted, burdensome, and potentially unnecessary litigation under an uncertain legal standard and indeterminate procedures. They will also substantially prejudice the Petitioner. Neither liberty nor democracy is served when the people, and their legislators in Congress, labor in doubt about the elementary ground rules on an issue of such paramount national importance.

I. THIS CASE RAISES A QUESTION OF EXCEPTIONAL NATIONAL IMPORTANCE NEEDING SPEEDY RESOLUTION.

All concerned agree: This case raises a legal question of extraordinary significance. This Court has twice recently recognized that indefinite military detention of domestic terrorism suspects seized inside this country implicates profoundly important constitutional interests. *Rumsfeld v. Padilla*, 542 U.S. at 450; *id.* at 465 (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ., dissenting) ("At stake . . . is nothing less than the essence of a free society."); *Padilla v. Hanft*, 547 U.S. 1062, 126 S. Ct. 1649, 1650 (2006) (Kennedy, J., joined by Roberts, C.J., and Stevens, J., concurring in the denial of certiorari) ("[Petitioner's] claims raise fundamental issues respecting the separation of powers."). The judges below, although divided on the merits, emphasized the surpassing importance of the question presented. *See, e.g.*, App. 12a-13a (Motz, J.); App. 186a-187a (Wilkinson, J.). The Solicitor

General likewise has acknowledged the "exceptional importance" of this issue. *See* Pet. for Reh'g and Reh'g En Banc, at 1, 6. He too recognizes that domestic military detention of terrorism suspects is "of extraordinary national significance." Gov't Pet. for Cert., at 11, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027).

Amplifying the significance of the Fourth Circuit's judgment is the damaging confusion that it creates. The ruling articulates three different and novel definitions of "enemy combatant" derived through varying statutory and constitutional theories. The net result clouds rather than clarifies who (if anyone) within the United States may be subject to indefinite military detention by the executive. The judgment below compounds this substantive confusion by imposing Judge Traxler's indeterminate procedural framework to test each deviation from traditional due process without any clear or predictable standard. This opens a Pandora's box of potential litigation, multiplying exponentially future uncertainty for the detainee and the government.

Only this Court possesses the authority to resolve conclusively the legal issue presented here. Continuing uncertainty about a matter of such public import serves neither liberty nor security, and warrants a grant of certiorari.

II. THE FOURTH CIRCUIT'S INTERPRETATION OF THE AUMF IMPROPERLY EXPANDS DOMESTIC MILITARY JURISDICTION BEYOND THIS COURT'S PRECEDENTS, CONTRADICTS CONGRESSIONAL INTENT, AND EXCEEDS CONSTITUTIONAL LIMITS.

The Fourth Circuit has interpreted a statute that is silent on detention to authorize the indefinite domestic military imprisonment of citizens and legal aliens far removed from any battlefield. Its judgment imperils the Constitution's most important safeguards and unsettles long-established understandings about the military's limited domestic role. The Fourth Circuit ignored the settled rule that Congress must speak clearly when it authorizes domestic detention outside the constitutional strictures of the criminal process, thwarted Congress' clearly manifested intent, and exceeded the permissible limits of military jurisdiction within the United States.

A. The Fourth Circuit's Decision Disregards this Court's Instruction that Congress Must Clearly State Its Intent To Authorize Domestic Detention without Charge or Trial.

Since the Founding, it has been the abiding norm and constitutional requirement under the Due Process Clause of the Fifth Amendment that people arrested in this country have the right to speedy criminal prosecution. *See, e.g.*, *Hamdi*, 542 U.S. at 529 (plurality opinion) ("'In our society liberty is the

norm,' and detention without trial 'is the carefully limited exception.'") (quoting *United States v. Salerno*, 481 U.S. 739, 755 (1987)). "[M]ilitary intrusion into civilian affairs," moreover, has always been staunchly resisted. *Laird v. Tatum*, 408 U.S. 1, 15 (1972); *accord Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 644 (1952) (Jackson, J., concurring) ("That military powers of the Commander-in-Chief were not to supersede representative government of *internal affairs* seems obvious from the Constitution and from elementary American history.") (emphasis added). The Framers' desire to secure the protections of the criminal process and to limit military involvement in civilian government animated this Nation's creation. *See* Declaration of Independence paras. 12, 18 (U.S. 1776) (protesting that the English crown had "affected to render the Military independent of and superior to the Civil Power" and "depriv[ed] us in many cases, of the benefits of Trial by Jury"). The strong presumption in favor of criminal process and against military detention was enshrined in the Constitution, *see, e.g.*, U.S. Const. art. I, § 9, cl. 2; *id.* amends. IV, V, and VI, and has been reiterated and confirmed in landmark statutes, *see, e.g.*, Posse Comitatus Act, 18 U.S.C. § 1385 (2000); Non-Detention Act, 18 U.S.C. § 4001(a) (2000).

Time and again, this Court has held that extending military jurisdiction over individuals seized within the United States raises grave constitutional questions, and it has demanded that Congress, at minimum, state clearly any intent to depart from the criminal process. Critically, this clear statement rule ensures that when the

government acts in this constitutionally sensitive area, "the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991); *accord Greene v. McElroy*, 360 U.S. 474, 507 (1959) (statutes should be construed to infringe fundamental liberties only to the extent they clearly and unequivocally authorize the curtailment of such liberties); *Hamdi*, 542 U.S. at 578 (Scalia, J., dissenting) ("If civil rights are to be curtailed during wartime, it must be done openly and democratically.").

Hence, in *Milligan*, all nine Justices agreed that the petitioner could not be tried by military commission because of the serious constitutional problems raised by the intrusion of military jurisdiction into the civilian sphere. The Justices diverged only on whether to reject this intrusion for want of a clear legislative statement or on constitutional grounds. The majority recognized that Milligan had allegedly committed "an *enormous crime*" in "a period of war" when he communicated with the Confederacy, conspired to "seize munitions of war," and "join[ed] and aid[ed] . . . . a secret" terrorist organization "for the purpose of overthrowing the Government and duly constituted authorities of the United States." 71 U.S. at 6-7, 130 (emphasis in original). Yet that majority held, in a ruling never since repudiated, that *the Constitution* required that Milligan be tried in a civilian court, as long as those courts were open and functioning. *Id.* at 121-22, 130. It further held that Milligan could not be detained even absent trial by military commission, noting that "[i]f in Indiana he conspired

with bad men to assist the enemy, he is punishable for it in the courts of Indiana." *Id.* at 131.

The four concurring Justices applied a clear statement rule to reach the same result on statutory grounds. They concluded that Congress had "not authorized" military jurisdiction over a resident of the United States even though it was a time of war and even though Congress had taken the extraordinary step of suspending the writ of habeas corpus. *Id.* at 136-37 (Chase, C.J., concurring). Like the majority's constitutional holding, the concurrence's statutory conclusion preserved the presumption of liberty secured by civilian criminal process against military infringement. This Court has since hailed *Milligan* as "one of the great landmarks in [its] history." *Reid v. Covert*, 354 U.S. 1, 30 (1957) (plurality opinion).

The presumption against reading legislative silence to authorize military infringement on the criminal process was affirmed in a case arising during the Second World War. *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). To preserve the historic "boundaries between military and civilian power," *id.* at 324, the Court narrowly construed a statute permitting Hawaii's governor to place that territory under martial law to prohibit military trials for civilians, even though Hawaii was "in the theater of operations" and "under fire" at the time, *id.* at 344 (Burton, J., dissenting). Absent a clear statement from Congress, the Court refused to allow military jurisdiction to usurp the role of domestic criminal prosecutions.

This Court's decision in *Hamdi* adheres to that approach. Because *Hamdi* involved an armed solider who engaged in combat in support of Taliban government forces and who was captured on a battlefield in the war in Afghanistan—circumstances in which military detention, not civilian criminal process, is the norm—the plurality did not insist on "specific language of detention" in the AUMF. 542 U.S. at 519. It emphasized, however, that its holding hinged on the fact that continued detention of soldiers captured on a battlefield was so "fundamental [an] incident of waging war" that "in permitting the use of 'necessary and appropriate force,'" Congress had "*clearly and unmistakably*" authorized detention "*in the narrow circumstances considered here*." *Id.* (emphases added); *see also id.* at 544 (Souter, J., concurring) (noting that enactments limiting liberty in wartime are subject to a "clear statement" requirement).

No precedent supports the Fourth Circuit's interpretation of the AUMF as silently, and without clear legislative guidance, sanctioning the momentous and constitutionally perilous step of supplanting the criminal process and detaining indefinitely without trial persons arrested in the United States based on suspected terrorist activity. *Cf. Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) (Congress "does not . . . hide elephants in mouseholes."). To the contrary, on the rare occasions that Congress has approved some limited form of domestic arrest and detention without criminal charge during wartime or for national security purposes, it has done so explicitly and has carefully drawn the boundaries of the

delegated power.[5] By contrast, a bare declaration of war, as Chief Justice Marshall cautioned, does not authorize the military seizure even of enemy property within the United States, let alone the detention of suspected enemy persons seized in this country. *Brown v. United States*, 12 U.S. (8 Cranch) 110, 126, 128-29 (1814); *see also Ex parte Endo*, 323 U.S. 283, 300 (1944) (rejecting the government's claim of domestic detention power not "clearly and unmistakably" granted by statute).

The need for a clear statement is especially compelling when detention without trial is indefinite. *See Zadvydas v. Davis*, 533 U.S. 678, 699-701 (2001) (refusing to construe a statute authorizing the detention of allegedly dangerous non-citizens to allow indefinite, possibly permanent, detention). By reaching three different definitions of "enemy combatant," the opinions below highlight the fact that there is no "clear" congressional license for a domestic military detention scheme hidden in the AUMF's silence. The lower court's effort to devise such a framework in this constitutionally sensitive area warrants prompt review.

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[5] *See* Alien Enemies Act of July 6, 1798, ch. 66, § 1, 1 Stat. 577 (currently codified at 50 U.S.C. § 21 (2000)); Emergency Detention Act of 1950, Pub. L. No. 81-831, tit. II, §§ 102-103, 64 Stat. 1019, 1021 (repealed 1971).

B. The Patriot Act Shows Congress Denied the President the Very Power He Now Asserts Congress Granted *Sub Silentio* in the AUMF.

While the AUMF is silent on detention, Congress was not. The very day after Congress enacted the AUMF, it began consideration of another statute that addressed separately and explicitly the domestic detention of alien terrorist suspects without ordinary civilian process. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 ("Patriot Act"). In the Patriot Act, enacted several weeks later, Congress deliberately refused to grant the very power of indefinite detention without charge that the government now claims to have obtained *sub silentio* through the AUMF. This claim of domestic military detention power therefore cannot be squared with Congress' almost contemporaneous enactment of the Patriot Act. *See Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring); *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006).

In the Patriot Act, Congress addressed the precise situation purportedly present here: an alien who enters the United States allegedly to facilitate or engage in terrorist acts. *See* Patriot Act, § 412; App. 77a-78a (Motz, J.) (describing the Patriot Act's detention provisions). The Patriot Act authorizes the Attorney General to seize suspected terrorist aliens in the United States. It mandates, however, that within seven days after seizure the Attorney General begin "removal proceedings," or "charge [such terrorist aliens] with a criminal offense." Patriot

Act § 412(a). Thus, even when it expressly authorized seizing and detaining suspected alien terrorists in the United States, Congress carefully defined the resulting detention power and explicitly prohibited prolonged detention, to say nothing of indefinite detention, absent initiation of a criminal or removal proceeding. *Cf. Youngstown*, 343 U.S. at 609 (Frankfurter, J., concurring) ("It is quite impossible . . . when Congress did specifically address itself to a problem . . . to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld.").

It defies belief that Congress, mere days after the September 11 attacks, would expend precious legislative time and energy authorizing domestic detention of alien terrorist suspects if it had already done so *sub silentio* in the AUMF. *See, e.g.*, *Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972) (subsequent bills are read in tandem with earlier legislation and are "entitled to great weight in resolving any ambiguities and doubts" in the latter) (internal quotation marks and citation omitted). To the contrary, the Patriot Act demonstrates that Congress understood that this Court's precedents require that the detention of individuals seized in the United States without criminal process—if permitted at all—must be expressly authorized and carefully delineated by the legislature. *See, e.g.*, *Zadvydas*, 533 U.S. at 699-701.[6]

[6] Were there any conflict, however, between the Patriot Act and the AUMF, settled rules of construction dictate giving precedence to the Patriot Act because of its explicit and more specific focus on the detention of terrorist aliens within the

Unlike the Patriot Act, which focused on domestic anti-terrorism efforts, the AUMF was focused on the overseas use of the military in a long-term foreign conflict that manifestly required legislative sanction. *See* AUMF, 115 Stat. 224, § 2(b) (citing War Powers Resolution). It is hardly surprising, therefore, that the AUMF does not address the domestic detention of terrorism suspects seized in this country. Congress clearly saw that question as beyond the scope of the AUMF, despite the Administration's eleventh hour effort to expand the AUMF's reach to encompass the United States.[7]

United States. *See, e.g.*, *Busic v. United States,* 446 U.S. 398, 406 (1980).

[7] As Senator Daschle has recounted, "[l]iterally minutes before the Senate cast its vote" on the AUMF, "the administration sought to add the words 'in the United States and' after 'appropriate force' in the [AUMF's] agreed-upon text" to give "the president broad authority to exercise expansive powers not just overseas—where we all understood he wanted to act—but right here in the United States, potentially against American citizens." Tom Daschle, Editorial, *Power We Didn't Grant*, Wash. Post, Dec. 23, 2005, at A21. The Senate refused "to accede to this extraordinary request for additional authority." *Id.*; *accord* 147 Cong. Rec. 17,047 (Sept. 14, 2001) (statement of Sen. Biden) ("In extending this broad authority to cover those 'planning, authorizing, committing, or aiding the attacks' it should go without saying, however, that the resolution is directed only at using force *abroad* to combat acts of international terrorism.") (emphasis added); 147 Cong. Rec. 17,111 (Sept. 14, 2001) (statement of Rep. Lantos) ("The resolution before us empowers the President to bring to bear the full force of American power *abroad* in our struggle against the scourge of international terrorism.") (emphasis added).

Further, in enacting the Patriot Act only weeks later, members of both parties fiercely objected to the

The Fourth Circuit's ruling also conflicts with another statute that reinforces the strong presumption in favor of criminal process for persons seized inside the country: the Non-Detention Act, 18 U.S.C. § 4001(a). That statute was enacted with the specific purpose of prohibiting, absent explicit direction from Congress, military detention without criminal trial of allegedly dangerous individuals seized in the United States in time of war or crisis. *Padilla v. Rumsfeld*, 352 F.3d 695, 718-20 (2d Cir. 2003) (discussing legislative history); *see also Hamdi*, 542 U.S. at 541-47 (Souter, J., concurring) (same). While the Non-Detention Act applies only to citizens, and this case involves a non-citizen, the Fourth Circuit's decision, in line with *Hamdi*, extends the AUMF domestically to citizens and non-citizens alike. Because there is no indication that Congress intended to repeal the Non-Detention Act in its core application, the Fourth Circuit's construction of the AUMF, which does precisely this, clearly deviates from Congress' aims.

In sum, the Fourth Circuit construed a statute that is silent on detention as taking the momentous step of authorizing the executive to order the military to seize and imprison indefinitely without criminal prosecution individuals arrested in this country, including American citizens, based on a determination that they are linked to possible future

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Administration's request for indefinite detention power over domestic alien terrorism suspects, and ultimately forced the Administration to accept elimination of indefinite detention from the Act. App. 60a (Motz, J.) (discussing legislative history). Such objections would make no sense if Congress had just authorized indefinite military detention in the AUMF.

terrorist activities. The Fourth Circuit reached this result despite the clear legislative instruction that domestic terrorism suspects continue to be charged promptly within the civilian justice system. Consequently, it not only defied Congress' manifest intent but had to invent from scratch a novel and uncertain scheme of indefinite domestic military detention that abounds in constitutional problems that could—and should—have been avoided. *See, e.g.*, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

C. The Fourth Circuit Expands the Concept of "Enemy Combatant" Well Beyond this Court's Precedents and Exceeds Constitutional Limits.

The Fourth Circuit also disregarded this Court's precedents that consistently interpret domestic exercises of military jurisdiction in conformity with the established laws of war. The *Hamdi*, *Milligan*, and *Quirin* Courts all applied the laws of war to provide predictable and stable constraints on the exercise of military jurisdiction within the United States. The Fourth Circuit abandoned that predictability and stability by expanding the scope of "enemy combatant" detention under the AUMF beyond this Court's decisions and established law-of-war principles. In doing so, the Fourth Circuit both reached serious constitutional questions unnecessarily and decided them incorrectly.

The Fourth Circuit majority opinions muddy the longstanding bright line rule that distinguishes

the legal categories of "combatants" (who are subject to military jurisdiction) and "civilians" (who are subject only to criminal prosecution). The category of "combatant" exists in the laws of war solely in conflicts between nations and not between a nation and an organization, even a terrorist group like al Qaeda. *See* App. 30a-32a, 43a-44a (Motz, J.); Int'l Comm. of the Red Cross, Official Statement: The Relevance of IHL in the Context of Terrorism, at 1, 3 (July 7, 2005), http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-ihl-210705.

Hewing to the laws of war, this Court's decisions consistently construe military detention power in light of this law-of-war principle, allowing military jurisdiction to be exercised only over members of an enemy nation's military, militia, or other armed forces, and those who fight alongside them on a battlefield, such as al Qaeda fighters in the war in Afghanistan. *See* App. 30a-32a, 39a-43a (Motz, J.).

Thus, in *Hamdi*, a plurality of this Court looked to the laws of war to ascertain the legality of Hamdi's military detention after he was captured while armed with a Kalashnikov assault rifle on a battlefield in the war in Afghanistan, where he had fought alongside Taliban forces. 542 U.S. at 512-13 (plurality opinion). Reading the AUMF in line with longstanding law-of-war principles, the Court held that these facts brought Hamdi squarely within the established definition of a "combatant" and therefore made him subject to military detention under the AUMF for the duration of that foreign conflict. *Id.* at 518-21. The plurality, moreover, expressly warned of the dangers of expanding military detention under

the AUMF beyond these longstanding law-of-war principles, cautioning that such expansion might cause the understanding that the AUMF authorizes military detention to "unravel." *Id.* at 521.

Similarly, the *Milligan* Court looked to "the laws and usages of war" to ascertain the permissible limits of domestic military jurisdiction. *Milligan*, 71 U.S. at 121-22. As this Court has since explained, Milligan's military trial failed to pass muster because it conflicted with traditional law-of-war principles. "Had Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different." *Hamdi*, 542 U.S. at 522 (plurality opinion).

Even in *Quirin*, upon which the government principally relies here, the Court closely followed established law-of-war principles in authorizing military jurisdiction. The *Quirin* petitioners were subject to military jurisdiction based exclusively on their affiliation with "the military arm of the enemy government." *See* 317 U.S. at 37-38; *see also id.* at 30, 36, 45. Under established law-of-war principles, this affiliation with an enemy nation placed them firmly within the legal category of combatants subject to military authority. *Id.* at 37-38; *cf.* Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.[8]

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[8] The *Quirin* petitioners thereafter became unlawful combatants—subject to military trial and punishment as well as detention—when "without uniform [they came] secretly

As Judge Motz correctly concluded, al-Marri's detention as an "enemy combatant" exceeds all precedent and breaches the constitutional line established in *Milligan*. App. 37a-38a, 48a-54a. Neither this Court's decisions nor established law-of-war principles allow the government to expand military jurisdiction to reach a person lawfully residing in the United States who is unaffiliated with the armed wing of an enemy government and who was never present, let alone participated in hostilities, on a battlefield where U.S. or allied forces were engaged in military operations. To the contrary, *Milligan* establishes that Due Process constraints on military jurisdiction render the military detention of "civilians" inside the United States without criminal process unconstitutional, even if the government alleges connections to a secret terrorist organization. *Milligan*, 71 U.S. at 121-22, 130; *supra* at 18-19.

The Fourth Circuit's decision deviates sharply from this Court's established practice of following longstanding law-of-war principles in interpreting congressional force authorizations and expands the definition of "enemy combatant" well beyond this Court's precedents. It thus gives the AUMF a reading that violates the Constitution and that the lower court would have avoided by adherence to established rules of statutory construction. Review

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through the lines for the purpose of waging war." 317 U.S. at 31; *accord* App. 49a (Motz, J.).

by this Court is essential to determine whether such an expansion should be permitted.[9]

D. Petitioner's Military Detention Was Not "Necessary" or "Appropriate."

Even if the AUMF could be read to authorize the domestic military detention of suspected terrorists seized in the United States under certain (undefined) circumstances, the Fourth Circuit's holding ignored the AUMF's explicit instruction that only "necessary and appropriate" military force be used—a limitation that additionally renders the constitutional repercussions of the holding wholly unnecessary and avoidable. Whatever other detention power it might have, the government cannot plausibly claim that military detention was "necessary and appropriate" for a person confined already for eighteen months in a maximum security federal facility and on the verge of criminal trial. Nor has it ever attempted to explain how al-Marri was a "continuing, *present*, and grave danger" at the time he was designated an enemy combatant. App. 466a (emphasis added).[10] *Cf. Hamdi*, 542 U.S. at

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[9] As explained by Judge Motz, the government's alternative argument that the President has inherent constitutional authority to detain al-Marri as an "enemy combatant"—a claim the government raised only in a footnote of its rehearing petition and that not one *en banc* judge accepted—is untenable under *Youngstown*. App. 75a-88a (Motz, J.).

[10] Instead, former Attorney General John Ashcroft, who was closely involved in the designation, has stated that the government labeled al-Marri an "enemy combatant" only once he became a "hard case" by "reject[ing] numerous offers to improve his lot by . . . providing information." John Ashcroft,

521 (plurality opinion) ("Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized [by the AUMF]."); *Rumsfeld v. Padilla*, 542 U.S. at 465 (Stevens, J., dissenting) ("[Executive detention] may not . . . be justified by the naked interest in using unlawful procedures to extract information.").

Thus, even assuming *arguendo* the AUMF provides some quantum of military detention power over suspected terrorists seized in the United States, the uncontested facts place al-Marri outside any such power. The Fourth Circuit's determination to the contrary not only exceeds the AUMF's terms but also underscores the sweeping breadth of its holding: that the executive can supplant an ongoing civilian prosecution with indefinite military detention even when a detainee is already in government custody and there is no imminent prospect of release.

III. THE COURT SHOULD HEAR THE CASE NOW.

Neither remand nor further percolation will clarify the fundamental legal question at stake here. After more than five years' litigation, the en banc Fourth Circuit has definitively rejected al-Marri's "most basic claim: that the President has no authority under the AUMF to detain [him] indefinitely." *Boumediene v. Bush*, 553 U.S. ___, 128 S. Ct. 2229, 2271 (2008). The government will doubtless argue that certiorari review should be

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delayed to allow for further proceedings. But there is no reason for any delay. The essential—and potentially dispositive—legal question presented here is whether the President can detain al-Marri without charge based on allegations of terrorist activity. Delaying resolution of that question does not serve the interest of Petitioner or of the Nation. Instead, it would permit the harmful confusion, engendered by the Circuit Court's multiple opinions, to fester and leave unresolved the legal question that all concerned agree is of paramount importance.

A. Remand Will Not Yield Further Clarification of the Central Legal Issue.

The seven opinions filed by the en banc court have ventilated as fully as possible the legal issue presented by this case. Indeed, this Court now has four separate readings of the AUMF from this case alone. The en banc court's fragmentation also proves that irremediable disagreement persists in the Fourth Circuit about the most basic aspects of the AUMF's meaning. Remand to the district court and the Fourth Circuit again cannot mitigate that confusion or resolve the central legal issue that this case presents.

Decisions from another circuit are unlikely, and in any event cannot resolve the uncertainty engendered by the Fourth Circuit's ruling. The government has no reason or incentive to alter its consistent practice of bringing alleged enemy combatants arrested inside this country to the Fourth Circuit. *See Rumsfeld v. Padilla*, 542 U.S. at 430-32; *Al-Marri v. Rumsfeld*, 360 F.3d 707, 708 (7th Cir. 2004). The only other circuit to address

domestic military seizure and detention under the AUMF rejected the government's position entirely. *See Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *rev'd on other grounds*, 542 U.S. 426 (2004); *see also Rumsfeld v. Padilla*, 542 U.S. at 464 n.8 (Stevens, J., dissenting) ("[The AUMF] does not authorize . . . the protracted, incommunicado detention of American citizens arrested in the United States."). And the ongoing Guantánamo Bay detainee litigation in the District of Columbia Circuit concerns only the permissible bounds of the "enemy combatant" category with respect to persons seized outside the United States. It will not resolve the distinct and momentous question raised by the military imprisonment of citizens and legal aliens seized within this country. The legal issue here has been fully aired. There is no reason now to delay certiorari review.

B. Delayed Review Will Perpetuate Harmful Uncertainty.

The essence of al-Marri's claim is that the executive has no authority to detain him without criminal charge even on the facts alleged and that any proceedings short of criminal trial are unauthorized and unconstitutional. Remand will not only fail to resolve conclusively this core legal claim but will perpetuate the harmful confusion engendered by the Circuit Court's decision.

Judge Traxler's indeterminate procedural framework fails to provide concrete guidance on such crucial questions as hearsay evidence, confrontation rights, and the use of classified information—a fact emphasized even by judges who reached opposite

conclusions below. Instead, Judge Traxler's opinion launches a process "tethered to mere suggestions," App. 147a (Gregory, J.), that will leave the district court "mystified," App. 185a (Wilkinson, J.), and occasion further protracted appeals no matter how the district court undertakes to solve the mystery. On the critical question of meaningful access to the government's evidence and witnesses, Judge Traxler instructs the district court to afford al-Marri normal Due Process protections *unless* the government shows it is "impractical, outweighed by national security interests, or otherwise unduly burdensome." App. 134a-135a (Traxler, J.). But his opinion wholly fails to provide any guidance as to how to make these determinations, simply suggesting that al-Marri's access even to critical evidence may be denied if the government satisfies one or another of the three vague criteria.[11]

The context of this case makes this uncertainty all the more untenable. On remand, al-Marri would be forced to present a defense at a hearing where he is denied the criminal procedural safeguards to which he is constitutionally entitled, confronting him with an irremediable Hobson's choice. To defend himself, al-Marri would have to

[11] Petitioner does not believe that Judge Traxler's procedural framework is sufficient to meet constitutional standards. Petitioner reserves the right to challenge that framework if and when the case is remanded for further proceedings. He maintains, however, that this very inquiry, and the attendant delay, is unauthorized and unconstitutional because he cannot properly be detained as an "enemy combatant" on the facts alleged regardless of the procedures that are provided to challenge that designation.

decide whether to testify without knowing for certain whether he possesses a privilege against self-incrimination in an enemy combatant hearing, or whether his decision to testify in such a hearing will waive that privilege in any future criminal prosecution. Not only might al-Marri's own statements in this proceeding be used against him, but he will have disclosed his entire defense to the government, fundamentally compromising the very rights his habeas petition has sought to vindicate. *Cf. Rafeedie v. INS*, 880 F.2d 506, 517 (D.C. Cir. 1989) (finding a significant and irreparable injury when a non-citizen "presents his defense in [a summary exclusion] proceeding, and a court later finds that [proceeding] inapplicable to him" because the government "will nevertheless know his defense in advance of any subsequent [plenary exclusion] proceeding"). These concerns are particularly compelling in light of the government's revolving-door tactics in enemy combatant detentions, which could precipitate al-Marri's return to the criminal justice system even in the midst of ongoing remand proceedings. *Cf. Padilla v. Hanft*, 126 S. Ct. at 1650 (Kennedy, J., joined by Roberts, C.J., and Stevens, J., concurring in the denial of certiorari); *Padilla v. Hanft*, 432 F.3d 582, 584-85 (4th Cir. 2005).[12]

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[12] Immediate review is further warranted by the fact that al-Marri's continued isolation at the brig, now in its sixth year, is seriously and irreversibly harming his mental health as well as jeopardizing his ability to participate meaningfully in his legal defense. *See* Declaration of Stuart Grassian, M.D., Exhibit B to Plaintiff's Motion for Interim Relief from Prolonged Isolation, *Al-Marri v. Gates*, No. 2:05-2259-HFF-RSC (dkt. no. 40).

In short, after five years of litigation on an issue of extraordinary national importance, the fragmented en banc Fourth Circuit has left matters "up in the air." App. 185a (Wilkinson, J.). This Court should not delay resolution of the central—and potentially dispositive—threshold legal question of whether the executive has the authority to detain al-Marri as an enemy combatant in the first place.

C. Immediate Review Is in the Public Interest.

This case involves constraints on government that lie at the heart of our democracy. *See Rumsfeld v. Padilla*, 542 U.S. at 465 (Stevens, J., dissenting) ("Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law."). Yet, rather than providing clarity, the lower court has sown grave confusion about who within the United States may be subjected to indefinite military detention. The result is not only profound uncertainty about whether the executive possesses this unprecedented power but arbitrariness in how it may be exercised—and why, for example, some terrorism suspects are prosecuted criminally while others are cast into potentially lifelong military detention without trial. Moreover, now that the government has secured a judgment that applies to all persons seized in the United States, including American citizens, the threat of enemy combatant designation will fall over plea-bargaining in criminal terrorism cases and distort their outcomes.

In the face of genuine threats to the Nation's safety, the security of the Republic has always rested in the sustainability of its constitutional liberties. *Boumediene*, 128 S. Ct. at 2277 ("Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers."). Only an authoritative pronouncement of this Court on whether the executive has the power to seize individuals living in this country and subject them to indefinite military detention without charge or trial can reaffirm this basic tenet of our constitutional system. Absent that pronouncement, the Fourth Circuit's ruling will "lie[ ] about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted to review the judgment below.

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