No. 08-368

IN THE

Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,

Petitioner,

—v.—

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

Respondent.

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

REPLY TO BRIEF IN OPPOSITION

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PRELIMINARY STATEMENT

The government gives two reasons for denying certiorari. It argues that review is premature and that, in any event, the en banc court's reading of the Authorization for Use of Military Force (AUMF), 115 Stat. 224, to authorize the indefinite military detention of a person lawfully residing in the United States is so plainly correct that it does not merit review. Neither argument is persuasive.

This Court has frequently entertained review of technically interlocutory rulings where, as here, they involve a legal question of great importance whose resolution would be dispositive of the case. The dispositive legal question in this case is whether a terrorism suspect lawfully residing in the United States can be detained by the military, potentially for life, without criminal trial. A ruling by this Court that such detention is unlawful would put an immediate end to this action, avoid what may be years more of extensive district and appellate court proceedings, and still allow the government the option of pursuing a criminal prosecution. By contrast, delaying review would severely prejudice the petitioner, leave open the threat that other persons residing in the United States (including American citizens) could likewise be subject to military detention by presidential proclamation, and distort ongoing criminal matters by giving the government unjust leverage over defendants in terrorism cases.

The need for prompt review is further magnified because the authority the government is claiming is both unprecedented and unlimited. Since

the Nation's founding, persons lawfully residing in this country have correctly understood that they can be imprisoned for suspected wrongdoing only if the government charges them with a crime and tries them before a jury. The Fourth Circuit nevertheless ruled that Congress implicitly rejected more than two centuries of constitutional tradition when it enacted the AUMF. Absent any statement by Congress, and despite strong evidence to the contrary, the Fourth Circuit read into the AUMF an unexpressed and unprecedented congressional authorization for the military to seize any person in the United States that the president declares an "enemy combatant," and then to hold that person in military custody based on a government official's hearsay declaration. It determined, moreover, that Congress created this new system without defining the boundaries of permissible detention authority, the factual predicate that would warrant seizure, or the process to determine the validity of the "enemy combatant" designation. This is not how American citizens and residents have ever before had their fundamental liberties defined or defended. The ruling below disregards established canons of construction, conflicts with contemporaneously enacted provisions of the Patriot Act, and violates the Constitution.

ARGUMENT

I. THE COURT SHOULD DECIDE THE LEGAL QUESTION PRESENTED NOW.

The government argues that review should be denied in light of the remand by the Fourth Circuit to the district court. But the interlocutory status of the case is not itself a reason for denying certiorari. This Court often grants certiorari where the lower court has decided a significant issue of law, even where the appeal may technically be interlocutory. *See, e.g.*, *New York State Bd. of Elections v. Lopez Torres*, 128 S. Ct. 791, 797 (2008); *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1963-64 (2007). This is especially true where a ruling from the Court can resolve the litigation, *F. Hoffmann-La Roche Ltd. v. Empagran, S.A.,* 542 U.S. 155, 159-61 (2004), and where a decision, left unreviewed, would have immediate consequences for the petitioner, *Mazurek v. Armstrong,* 520 U.S. 968, 975-76 (1997). These factors counsel strongly in favor of certiorari review now.

There can be no dispute that the issue here is extraordinarily important to the Nation. Nor can there be any doubt that, after almost seven years of litigation, here and in the Padilla case, *e.g.*, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), the permissible bounds of the Executive's domestic detention authority remain shockingly ill-defined. The issue before the Court is not whether the government's allegations are true. It is whether the government must prove those allegations in a criminal trial, with the full safeguards of the criminal process. Further

proceedings on remand will not affect or clarify that legal question.

Delaying review, on the other hand, will be costly. As multiple Fourth Circuit judges agreed, the controlling opinion on remand provides "no concrete guidance as to what further process is due," App. 144a (Gregory, J.), and is likely to leave the district court "mystified," App. 185a (Wilkinson, J.). The government, moreover, has made clear its disagreement with those procedures. Br. 16 n.2. Thus, there will inevitably be further appeals no matter who prevails in the district court. This means that the petitioner—who is already suffering severe mental and physical harm from five-and-one-half years of isolation at the Navy brig—faces years more of litigation before this Court again has an opportunity to resolve the threshold legal issue that could dispose of the habeas proceedings altogether if addressed now. Remand may also require the petitioner to forgo vital constitutional protections in a process that may itself be totally invalid, irreversibly prejudicing his defense in any future criminal prosecution. Pet. 34-35.

The Fourth Circuit's ruling, moreover, casts a shadow over all domestic terrorism cases. By allowing the Executive to re-label a criminal defendant an "enemy combatant," the decision below distorts the normal functioning of the criminal justice system, affecting everything from charging decisions to plea negotiations. By creating a state of utter confusion over the statutory and constitutional limits of domestic detention power, it also impedes the informed consideration of counter-terrorism

policy by the political branches. Unless this Court grants certiorari, the AUMF may continue to be used to detain citizens and legal residents, and the Fourth Circuit's decision will have a corrupting influence on criminal justice outcomes. Delay here serves no legitimate purpose.

II. THE FOURTH CIRCUIT'S RULING IS INCONSISTENT WITH THIS COURT'S CASES DRAWING THE LINE BETWEEN CIVILIAN AND MILITARY AUTHORITY.

The government points to *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and *Ex parte Quirin*, 317 U.S. 1 (1942), as support for petitioner's indefinite military detention. Both decisions are distinguishable in important ways, and neither provides the support that the government claims. The relevant legal principles were established by this Court in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), and those principles cannot be reconciled with the government's assertion of military authority in this case.

First, *Hamdi* does not provide the government with the blank check it now claims. The *Hamdi* plurality repeatedly stressed that its decision was limited to a soldier captured on a battlefield in Afghanistan where he directly participated in armed combat against U.S. and allied forces on behalf of the Taliban. 542 U.S. at 512-13, 518-21; Pet. 20, 27-28. The plurality never "confirmed" that Congress had authorized the military seizure and detention of enemy combatants anywhere in the world "for the

duration of the conflict with al Qaeda." Br. 18. Indeed, the *Hamdi* plurality *refused* to accept the government's invitation to adopt this broader construction of the AUMF, App. 41a-42a (Motz, J.) (citing government briefs), and expressly warned *against* construing the AUMF to allow indefinite military detention untethered from the hostilities in Afghanistan, *Hamdi*, 542 U.S. at 521.[1]

Second, the government misreads the facts, language, and holding of *Quirin*. There, the Court explicitly rested its decision on the petitioners' affiliation with "the military arm of the *enemy government*"—an affiliation that, as Judge Motz explained, placed them squarely within the legal category of combatants under the laws of war. *Quirin*, 317 U.S. at 37-38 (emphasis added); Pet. 28. The *Hamdi* plurality cited *Quirin* for the limited proposition that soldiers who may be treated as combatants under traditional law-of-war principles—such as enemy fighters who shoot at U.S. troops on a battlefield—are not exempt from military jurisdiction simply because they are American citizens. *Hamdi*, 542 U.S. at 518-19. Neither *Quirin* nor *Hamdi* addressed whether the Executive can subject

[1] The government disingenuously suggests that the Fourth Circuit's decision might not apply to American citizens. Br. 19 n.4. That suggestion directly contradicts what the government argued to the Fourth Circuit, App 39a n.14 (Motz, J.), what multiple Fourth Circuit judges held, App. 10a (Motz, J.); App. 124a (Traxler, J.); App. 146a & n.2 (Gregory, J.); App. 186a-187a (Wilkinson, J.), what the AUMF's text provides, and what this Court's precedents dictate, *Hamdi,* 542 U.S. at 519; *Quirin*, 317 U.S. at 37-38; *see also Padilla v. Hanft,* 423 F.3d 386, 392 (4th Cir. 2005).

individuals arrested in civilian settings in the United States to indefinite and potentially lifelong military detention without charge based solely on alleged criminal conduct on behalf of a terrorist organization.[2]

Third, the government's suggestion that *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), controls the outcome here is equally mistaken. Br. 21-23. That case, like *Hamdi*, involved a prisoner seized by the military in the armed conflict *in Afghanistan*. *See Hamdan*, 548 U.S. at 566, 568; *id.* at 641-42 (Kennedy, J., concurring). The issue here, by contrast, is whether someone arrested in the *United States* on criminal charges can be denied his right to a criminal trial by re-labeling him an "enemy combatant" subject to indefinite military detention.[3]

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[2] The government's reliance on *Montoya v. United States*, 180 U.S. 261 (1901), and *Conners v. United States*, 180 U.S. 271 (1901), underscores the absence of authority for its position here. Br. 22. Those cases addressed compensation rules for the destruction of property by a band of Indians no longer under the control of a nation or tribe in amity with the United States. They do not remotely concern the question presented in this case.

[3] The government wrongly "presupposes" (Br. 22) that the Court's holding that Hamdan was entitled to the protections of Common Article 3 of the Geneva Conventions after being captured in Afghanistan necessarily means that al-Marri, who was arrested in the United States, can be treated as an "enemy combatant" as long as the government alleges a connection to al Qaeda. *Hamdan* says nothing about individuals, like petitioner, who were seized and detained in the United States, and who, as Judge Motz observed, never directly participated in hostilities against U.S. forces. App. 44a-45a n.16.

For that reason, the facts here most closely "mirror" those in *Milligan,* as Judge Motz recognized below. App. 53a. Although the President vigorously argued that Milligan presented a grave threat to the Nation's security, this Court held that Milligan had to be charged and tried in a civilian court, as long as those courts were open and functioning. In reaffirming *Milligan*, the *Hamdi* plurality made clear that the fact that Milligan was not captured while taking up arms against U.S. forces on a battlefield on behalf of enemy forces was crucial to *Milligan*'s holding. *Hamdi*, 542 U.S. at 522. The government's observation (Br. 25) that Congress did not authorize the use of military force against the Sons of Liberty is irrelevant. Congress also never authorized petitioner's indefinite military detention. Point III *infra*. And, even if it had, it would violate the Constitution because his treatment as a combatant exceeds established law-of-war principles. Pet. 18-19, 29.

III. THE FOURTH CIRCUIT'S DECISION CONTRADICTS CONGRESSIONAL INTENT AND DESTABILIZES THE SETTLED STATUTORY LANDSCAPE RESTRICTING DOMESTIC MILITARY ACTIVITY.

The government argues that Congress "expressly authorized" domestic military detention in the AUMF and that to think otherwise assumes Congress was "feckless or irrational." Br. 18, 24. The government reaches this conclusion only by ignoring the AUMF's text, Congress' clear statement in the Patriot Act, and the longstanding prohibition

against the military acting domestically. In addition, the government falsely suggests that a ruling for petitioner would deprive the executive of the power to detain suspected terrorists inside the United States. It is not some "far-fetched notion" (Br. 20) that Congress authorized the use of military force abroad and adopted separate rules for the handling of terrorism suspects at home—greatly enhancing law enforcement's powers but continuing to treat terrorism through the criminal justice and immigration systems. It is the conclusion dictated by settled principles of statutory construction and simple common sense.

The AUMF was enacted to authorize the use of military force in extended hostilities. AUMF, § 2(b), 115 Stat. 224. This military response to September 11 targeted Afghanistan, where the individuals responsible for the September 11 attacks and those who harbored them were located. *Hamdan*, 548 U.S. at 568; *Hamdi*, 542 U.S. at 510 (plurality opinion). In *Hamdi*, the Court recognized that, even as to individuals seized in Afghanistan, the AUMF is silent on detention. The Court held, however, that in authorizing the use of "necessary and appropriate force," Congress authorized the military detention of enemy soldiers captured in the armed conflict in Afghanistan because that detention is "a fundamental incident of waging war." 542 U.S. at 518-19 (plurality opinion). This conclusion rested on longstanding law-of-war principles that have historically guided force authorizations and on the common sense notion that when Congress approves sending our troops to fight a war overseas, it

necessarily empowers them to detain enemy soldiers captured on the battlefield. *Id.*

It does not follow that Congress also intended to grant the president discretion to treat the entire United States as a war zone or usurp the civilian justice system by transforming criminal defendants into combatants through the stroke of a pen. Indeed, this very notion contradicts our deepest traditions as well as the Posse Comitatus Act's explicit prohibition against using the military domestically to execute the law absent an express statement from Congress. 18 U.S.C. § 1385; *see also* Br. for Retired Military Officers as *Amici Curiae* 7-15. It also directly contradicts the Non-Detention Act, which similarly prohibits the military detention of citizens without an express statement from Congress. 18 U.S.C. § 4001(a). Nothing in the AUMF's text or legislative history suggests any intent—let alone the requisite clear statement—to override these laws and norms that have long operated within our borders.

The facts of this case underscore the breadth of the government's position and the dangerous, far-reaching implications of the Fourth Circuit's decision. Al-Marri was not captured in the course of combat operations. He was not seized by the military to prevent some imminent harm.[4] In fact, he was not even originally detained by the military. Rather, al-Marri was arrested at his home in Peoria,

[4] The President always has authority as commander-in-chief to use military force to repel sudden attacks. Congress did not need to enact the AUMF to give him that authority, and this case does not involve a challenge to that authority.

Illinois, by FBI agents, indicted on federal charges, and detained in maximum-security federal custody for eighteen months. He was then declared an "enemy combatant" by executive fiat while incarcerated in the Peoria County Jail, on the eve of a suppression hearing and less than a month before trial. Following that designation, al-Marri was held *incommunicado* for sixteen months and subjected to highly coercive interrogations. Nothing about this detention remotely involves a "necessary" or "appropriate" use of military force within the meaning of the AUMF. And the government's suggestion that this Court is powerless to interpret those statutory terms is simply wrong. *See, e.g.*, *Sterling v. Constantin*, 287 U.S. 378, 401 (1932) ("What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.").

Congress spoke after September 11 and, in speaking, it deliberately refused the Administration's request for the very power of indefinite domestic detention that the government says was granted *sub silentio* in the AUMF. Patriot Act § 412; Pet. 22-23. The scheme enacted by Congress to deal with the threat of terrorism in the United States was the Patriot Act, which expanded *civilian* law enforcement's powers under the criminal and immigration laws to prevent further attacks. There is no indication that Congress silently took the radical step of authorizing military force in the United States to achieve that objective. The government suggests that it cannot protect the Nation unless it has the authority to detain al-Marri

and other citizens and residents like him as "enemy combatants." But there is ample authority to incapacitate and detain suspected terrorists in the United States through the civilian justice system. *See, e.g.*, Br. for Former Federal Judges and Former Senior Justice Dep't Officials as *Amicus Curiae* 5-9; *Hamdi*, 542 U.S. at 547-48 (opinion of Souter, J.). And, more to the point, that is exactly the conclusion reached by Congress.

The government contends that the AUMF addresses a "separate type[ ] of detention" and a "separate group[ ] of individuals." Br. 28. But the Patriot Act explicitly addresses the *precise* situation purportedly present here—an alleged al Qaeda agent who enters the United States to facilitate or commit terrorist acts. Patriot Act § 412; App. 77a-78a (Motz, J.). And that act unambiguously requires that such individuals be placed in the civilian justice system and charged within seven days of arrest. Patriot Act § 412(a); *see also* Br. for William N. Eskridge, Jr. et al. as *Amici Curiae* 14-22. The Executive cannot do what the Legislature has forbidden simply by changing the label from "terrorist" to "combatant." *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring) ("To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between the President and Congress.").

The Executive's detention of al-Marri as an "enemy combatant" seeks to create precisely the type of indefinite detention scheme that Congress

explicitly rejected in the Patriot Act and has long barred through the Posse Comitatus and Non-Detention Acts. It is not a "necessary and appropriate" use of military force, but an abuse of the Nation's military to do what Congress has prohibited, what the Constitution forbids, and what has never before been done in American history.

CONCLUSION

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

Respectfully submitted,

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