

No. 08-368

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IN THE  
*Supreme Court of the United States*

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ALI SALEH KAHLAH AL-MARRI  
*Petitioner,*

v.

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

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

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BRIEF OF WILLIAM N. ESKRIDGE, JR.,  
DANIEL A. FARBER, AND ERIC LANE  
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici* are law professors and scholars at Yale Law School, Boalt Hall Law School and Hofstra Law School, respectively. They teach and write in the areas of legislation and statutory interpretation. Based on their application of accepted canons of statutory interpretation, *amici* respectfully submit that neither the Authorization for Use of Military Force Joint Resolution, Pub. L. No. 107-40, 115 Stat. 224 (2001), nor the USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) (partially codified at 8 U.S.C. § 1226a), authorizes the indefinite detention of Petitioner and similarly situated persons seized in the United States as enemy combatants.

## SUMMARY OF ARGUMENT

Al-Marri's petition marks the third time that this Court has been presented with this question of exceptional importance: Has Congress authorized the President to seize persons lawfully present within this country and to hold them indefinitely without trial as "enemy combatants"? At stake in the answer to that question are nothing less than "freedom's first principles," *Boumediene v. Bush*, 128 S. Ct. 2229, 2277 (2008), as "[t]he very core of liberty

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<sup>1</sup> The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. No counsel for a party 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 curiae* or their counsel made a monetary contribution to its preparation or submission.

secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive,” *Hamdi v. Rumsfeld*, 542 U.S. 507, 554-55 (2004) (Scalia, J., dissenting).

In *Hamdi*, a plurality of this Court held that the Authorization for Use of Military Force Joint Resolution, Pub. L. No. 107-40, 115 Stat. 224 (the “AUMF”) authorized the President to detain as enemy combatants persons who were “part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there.” *Hamdi*, 542 U.S. at 516 (quotation marks omitted). The plurality explicitly restricted its decision to persons falling within that “limited category” of battlefield captives, *id.* at 518, but indicated that the lower courts would further elaborate “[t]he permissible bounds of the category” of “enemy combatant” on a case-by-case basis, *id.* at 522 n.1.

Over four years later, the lower courts are divided with respect to whether the AUMF authorizes the President to detain as enemy combatants persons, such as Jose Padilla and Ali Saleh Kahlal al-Marri, who were seized within the United States. The Second Circuit has held that Padilla’s detention was unauthorized while the Fourth Circuit has reached the opposite conclusion. *Compare Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *vacated on other grounds*, 542 U.S. 426 (2004), *with Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005). Now, in the decision below, the en banc Fourth Circuit has

expanded that Circuit split and issued a series of fractured opinions demonstrating the deep and intractable divisions among the judges of that court.

The result is that al-Marri continues to be detained as an enemy combatant even though no legal theory authorizing his detention has garnered the majority support of any court. The fractured decision below is all the more problematic because it has produced an outcome that is in considerable tension with the views previously expressed by five Justices concerning the detention of U.S. citizens. *See Padilla v. Rumsfeld*, 542 U.S. 426, 464 n.8 (2004) (Stevens, J., dissenting, joined by Souter, Ginsburg, and Breyer, J.J.) (concluding that the AUMF does not authorize the President to detain citizens seized within the United States as “enemy combatants”); *Hamdi*, 542 U.S. at 574 (Scalia, J., dissenting, joined by Stevens, J.) (same).<sup>2</sup>

The question presented by al-Marri’s petition raises difficult issues of statutory interpretation, which this Court should resolve now. The lower courts have divided, not only over the ultimate answer, but even with respect to the tools of construction they should use. At least two fundamental questions urgently require this Court’s guidance.

First, the Court should clarify whether the clear-statement rule of *Ex parte Mitsuye Endo*, 323 U.S. 283 (1944), applies when determining whether the

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<sup>2</sup> Unlike Hamdi and Padilla, al-Marri is not a citizen of the United States, but that distinction should not alter the relevant constitutional or statutory analysis. *See infra* at 5-6.



AUMF authorizes the seizure and detention in the United States of persons who never were soldiers on a battlefield. Although the AUMF contains no clear statement authorizing detention, this Court's decision in *Hamdi* held that the AUMF authorized the traditional wartime detention of persons, citizens or otherwise, captured on a foreign battlefield. But this Court has long required Congress to speak with greater clarity when authorizing the President to use military power in the realm of domestic affairs. Ignoring the distinction between persons captured abroad and persons seized on American soil, the Fourth Circuit has concluded that the AUMF's implicit authorization for detaining battlefield captives, identified by the *Hamdi* plurality, also authorizes the detention of Padilla (who was seized in the United States but had previously fought on a battlefield) and al-Marri (who has never set foot on a battlefield). *See Padilla*, 423 F.3d at 396; Pet. App. 165a (opinion of Williams, C.J.). This Court should grant certiorari to correct the Fourth Circuit's error and reaffirm that only a clear statement can authorize the indefinite military detention of persons seized within the United States.

Second, this Court should provide guidance on how the AUMF should be reconciled with the USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (partially codified at 8 U.S.C. § 1226a). In passing section 412 of the Patriot Act, Congress narrowly defined the President's power to detain aliens within the United States as suspected terrorists. The Fourth Circuit's expansive interpretation of the AUMF ignores those limits set by Congress,

implausibly concluding that just days earlier Congress authorized the President to detain suspected terrorists indefinitely without deportation, trial, or congressional oversight. This Court should grant certiorari and reaffirm that in the event of any conflict between the two statutes, the specific provisions of the Patriot Act, passed later in time, take precedence over any broad and amorphous detention power that could be inferred from the AUMF.

## ARGUMENT

### **I. The Fourth Circuit's Decision Conflicts With the Holding of the Second Circuit and With the Expressed Views of Five Justices of This Court.**

The decision below upholding the detention of al-Marri widens a conflict between the lower courts that the Fourth Circuit created three years ago when it upheld the detention of Jose Padilla. In direct conflict with a previous decision of the Second Circuit, and with the expressed views of a majority of Justices on this Court, the Fourth Circuit held that the AUMF authorized the President to detain Padilla as an enemy combatant. *See Padilla*, 423 F.3d at 396. The en banc Fourth Circuit has now expanded that conflict by holding that the AUMF authorizes the President to similarly detain al-Marri even though al-Marri never set foot in a foreign combat zone.

Unlike Hamdi and Padilla, al-Marri is not a citizen of the United States, but that distinction should not alter the relevant constitutional or statutory analysis. This Court has long held that

resident aliens are protected by the Fifth and Sixth Amendments and the Suspension Clause. *See Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (“[E]ven aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law.”); *Hamdi*, 542 U.S. at 525 (plurality) (“All agree that, absent suspension, the writ of habeas corpus remains available to every individual detained within the United States.”); *see also* Pet App. 39a n.14 (opinion of Motz, J.). This Court has also made clear that the definition of “enemy combatant” inferred from the AUMF applies equally to both citizens and non-citizens. *See Hamdi*, 542 U.S. at 519. The judges on the Fourth Circuit thus acknowledged that the court’s holding likely would apply with equal force to citizens and non-citizens alike. *See* Pet. App. 10a (opinion of Motz, J.); *id.* at 141a (opinion of Traxler, J.); *id.* at 146a n.2 (opinion of Gregory, J.); *id.* at 180a (opinion of Williams, C.J.); *id.* at 235a-236a (opinion of Wilkinson, J.). *But see id.* at 268a n.10 (declining to “resolve the issue for the purposes of this case”).

No other court has concluded that the AUMF authorizes the President to hold citizens and resident aliens, captured on U.S. soil, indefinitely as “enemy combatants.” In the only other decision to address the issue, the Second Circuit distinguished between the President’s authority to detain persons captured on the battlefield and the purported authority to detain persons “seized within the United States, away from a zone of combat, as enemy

combatants.” *Padilla*, 352 F.3d at 721. In doing so, the Second Circuit emphasized that, unlike the detention of Hamdi, Padilla’s detention did not implicate “the Executive’s inherent wartime power, generally, to detain enemy combatants on the battlefield. Rather, we are called on to decide whether the Constitution gives the President the power to detain an American citizen seized in this country until the war with al Qaeda ends.” *Id.* at 713.<sup>3</sup>

Although this Court vacated the Second Circuit’s decision based on improper venue, *see Padilla*, 542 U.S. at 451-52 (Kennedy, J., concurring), four Justices explicitly agreed with the Second Circuit that the AUMF does not authorize “the protracted, incommunicado detention of American citizens arrested in the United States.” *Id.* at 464 n.8 (Stevens, J., joined by Souter, Ginsburg, and Breyer, J.J., dissenting). That same day, in *Hamdi v. Rumsfeld*, Justice Scalia agreed that the AUMF does not speak with the clarity required to justify reading it as authorizing the detention of citizens. *Hamdi*, 542 U.S. at 574 (Scalia, J., dissenting, joined by Stevens, J.) (stating that dissent’s views would also apply to Jose Padilla).

Notwithstanding the considered views of the Second Circuit and the majority of Justices of this Court, a panel of the Fourth Circuit subsequently

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<sup>3</sup> *Accord Hamdi v. Rumsfeld*, 337 F.3d 335, 344 (4th Cir. 2003) (Wilkinson, J., concurring in denial of rehearing en banc) (“To compare this battlefield capture of [Hamdi] to the domestic arrest in *Padilla v. Rumsfeld* is to compare apples and oranges.”), *vacated by*, 542 U.S. 507 (2004).

upheld Padilla's detention and stated that the "locus of capture" is "irrelevant" so long as the purported enemy combatant has at some point waged war against the United States on a foreign battlefield. *Padilla*, 423 F.3d at 393.<sup>4</sup> In authorizing the ongoing detention of al-Marri, the en banc Fourth Circuit has gone even further, widening the split that had already been created by the *Padilla* panel. A majority of judges, sitting en banc, have held that the President may detain al-Marri, even though (unlike Yasser Hamdi) he was seized in the United States and even though (unlike Jose Padilla) the government concedes that he never took part in any hostilities in an active theater of war. *See* Pet. App. 103a-109a (opinion of Traxler, J., joined by Neimeyer, J.); *id.* at 163a-168a (opinion of Williams, C.J., joined by Duncan, J.); *id.* at 192a-204a (Wilkinson, J.).

While a bare majority of the judges of the en banc court concluded that al-Marri's detention was authorized by the AUMF, the court was unable to produce an opinion garnering majority support. *See* Pet. App. 187a-88a (opinion of Wilkinson, J.) (disagreeing with the opinions of Chief Judge Williams and Judge Niemeyer). The court thus authorized the indefinite detention of citizens and resident aliens without a majority opinion agreeing on the legal basis for detention, and in the face of the apparent views of a majority of Justices of this Court

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<sup>4</sup> *But cf. Boumediene*, 128 S. Ct. at 2259 (identifying "the sites where apprehension and then detention took place" as a relevant factor in determining whether the Suspension Clause applies).

that such detention is unlawful. This state of uncertainty should not be allowed to persist.

Without clearer guidance from this Court, the lower court judges will remain intractably divided. The festering confusion concerning “fundamental issues respecting the separation of powers,” *Padilla v. Hanft*, 547 U.S. 1062, 1064 (2006) (Kennedy J., concurring in denial of certiorari), leaves the lower courts and the political branches uncertain of the legal standards governing their roles and responsibilities. As Judge Wilkinson observed in his opinion below, “The military detention of American citizens or aliens lawfully within this country is a huge step. It is a mistake to take this step without asking where the journey leads.” Pet. App. 186a-187a (Wilkinson, J.). “This is not an area where *ad hoc* adjudication provides either guidance or limits, and it leaves the most basic values of our legal system—liberty and security—in limbo.” *Id.* at 187a. This Court should grant certiorari now to finally resolve the question.

**II. The Court Should Grant Certiorari to Resolve Whether, Under *Ex parte Endo*, a Clear Statement is Necessary to Authorize the Detention of Citizens Seized Within the United States.**

This Court should clarify whether the AUMF contains a sufficiently clear statement to authorize military detentions of citizens seized in the United States under this Court’s decision in *Ex parte Mitsuye Endo*, 323 U.S. 283 (1944).

*Endo* instructs that “when asked to find implied powers” in “a war-time measure,” a reviewing court must assume 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.* at 300; *see Hamdi*, 542 U.S. at 544 (Souter, J., concurring in judgment) (explaining that *Endo* created “an interpretive regime that subjected enactments limiting liberty in wartime to the requirement of a clear statement”).<sup>5</sup>

In accordance with *Endo*, courts must “attribute to Congress a purpose to guard jealously against the dilution of the liberties of the citizen that would result if the jurisdiction of military tribunals were enlarged at the expense of civil courts.” *Lee v. Madigan*, 358 U.S. 228, 235 (1959); *accord Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946) (narrowly

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<sup>5</sup> *Endo*’s requirement of a clear statement authorizing detention was reaffirmed by Congress in the Non-Detention Act, 18 U.S.C. § 4001(a). Although al-Marri is not a citizen and therefore not covered by *Endo* or the Non-Detention Act, the judges on the court below recognized that their holding would apply with full force to citizens and non-citizens alike. Because of the “obligation to maintain the consistent meaning of words in statutory text,” *United States v. Santos*, 128 S. Ct. 2020, 2030 (2008) (plurality opinion), the Court should therefore interpret the AUMF in a manner that avoids unnecessary conflict with the Non-Detention Act in similar cases involving citizens. This Court has often “give[n] a statute’s ambiguous language a limiting construction called for by one of the statute’s applications, even though other of the statute’s applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern.” *Id.* (quoting *Clark v. Martinez*, 543 U.S. 371, 380 (2005)).

construing congressional authorization of “martial law” in Hawaii and refusing to attribute to Congress an intent to “authorize the supplanting of courts by military tribunals”).

*Endo’s* requirement of a “clear” and “unmistakable” statement is not simply a method of divining legislative intent. Rather, it “impute[s] to Congress an attitude that [i]s more consonant with our traditions of civil liberties.” *Lee*, 358 U.S. at 235. As with the clear-statement rules employed by this Court in the area of federalism, *Endo* ensures that “[i]n traditionally sensitive areas . . . 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) (quotation marks omitted); see also William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593 (1992).

It is not entirely clear whether the *Hamdi* plurality applied *Endo’s* clear-statement rule when it concluded that the AUMF authorized the detention of Hamdi as an enemy combatant. On the one hand, the plurality appeared to discard *Endo’s* requirements by stating, in finding an implicit authorization to detain battlefield captives, that “it is of no moment that the AUMF does not use specific language of detention.” *Hamdi*, 542 U.S. at 519 (plurality). But, at the same time, the plurality opinion appeared to incorporate *Endo’s* standard when it concluded that “Congress has clearly and



unmistakably authorized detention in the narrow circumstances considered here.” *Id.*

Either way, the *Hamdi* plurality opinion provides scant support for ignoring the *Endo* canon in a case involving detention of a person seized in this country, especially one who is not even alleged to have ever taken up arms against the United States on a battlefield. Again and again, the plurality emphasized the narrowness of its position that the AUMF authorizes detention of enemy combatants, focusing on the fact that Hamdi had been captured (1) on a battlefield and (2) in a foreign war zone. *Id.* at 517-18. The plurality distinguished *Ex parte Milligan*, 71 U.S. 2 (1866) on the former ground. *Hamdi*, 542 U.S. at 521-22. And it was willing to analogize the case to *Ex parte Quirin*, 317 U.S. 1 (1942), which involved detention of German soldiers, because the circumstances of Hamdi’s seizure on a foreign battlefield satisfied the plurality that he had associated himself with the military arm of an enemy government and thus that Congress would have intended the AUMF to authorize his detention. *Hamdi*, 542 U.S. at 522-24.

The Fourth Circuit nevertheless chose to go much further, concluding that the AUMF is sufficiently clear to authorize the detention of Padilla and al-Marri, notwithstanding *Endo’s* clear-statement requirement. According to the Fourth Circuit, “Nothing in the AUMF permits us to conclude that the Joint Resolution clearly and unmistakably authorized Hamdi’s detention but not Padilla’s.” *Padilla*, 423 F.3d at 396; *accord* Pet. App. 165a

(opinion of Williams, C.J.) (applying *Padilla's* holding to al-Marri).

That was error. Congress must speak with greater clarity when it intends to authorize domestic detentions than when it authorizes the detention of enemy soldiers captured abroad. This Court has been willing to accommodate a “latitude of interpretation” to uphold executive action “when turned against the outside world for the security of our society” but has refused “such indulgence” when executive action “is turned inward.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645 (1952) (Jackson, J., concurring).

Congress must speak with greater clarity when authorizing the detention of persons seized within the United States because such detentions raise constitutional concerns that are more attenuated when the military detains persons as part of a military action abroad. *See Boumediene*, 128 S. Ct. at 2260-61 (discussing historic application of the Suspension Clause to permanent territories but not to territories the United States “did not intend to govern indefinitely”). This Court has accordingly been willing to infer military jurisdiction over foreign territories while refusing to infer any corresponding military jurisdiction over domestic territory. *See Lee*, 358 U.S. at 233-34 (narrowly construing military jurisdiction over crimes committed by soldier in the United States); *Duncan*, 327 U.S. at 314 (narrowly construing Congress’s authorization of “martial law” in Hawaii because territory had already been permanently annexed as part of the United States and was not part of a “temporary

military government over occupied enemy territory or territory regained from an enemy” (footnote omitted)).

The Fourth Circuit’s interpretation of the AUMF as authorizing domestic detentions is particularly problematic as applied to al-Marri who, unlike Padilla, is not even alleged to have ever fought against this country on a battlefield. It is one thing to read the AUMF as implicitly authorizing the kinds of detentions of enemy soldiers abroad that are normally a part of warfare. It is quite another to assume that Congress intended to authorize the domestic seizure and detention of a person who is not a part of any military service and never fought on any battlefield.

The Fourth Circuit mistakenly concluded that the AUMF’s implicit authorization for the President to detain battlefield captives necessarily authorizes the military detention of citizens and resident aliens arrested in the United States. This Court should grant certiorari to reaffirm that such detention of persons arrested inside the United States can be authorized only by the “clear” and “unmistakeable” language *Endo* requires.

**III. The Court Should Grant Certiorari to Resolve Whether the PATRIOT Act or the AUMF is the More “Specific” Statute Governing Domestic Detention.**

When it passed the Patriot Act (thirty-eight days after passing the AUMF) Congress gave the President explicit, narrowly defined authority to detain aliens within the United States held on

suspicion of terrorism. A subheading of the statute expressly identifies its provisions as a “[l]imitation on indefinite detention.” *See* Pub. L. No. 107-56, § 412(a)(6), 115 Stat. at 351.

The Patriot Act provides that within seven days of seizing an alien within the United States, the Attorney General “shall place the alien. . . in removal proceedings,” “shall charge the alien with a criminal offense,” or “shall release the alien.” *Id.* § 412(a)(5), 115 Stat. at 351. In extraordinary circumstances, when removal is impossible, and the Attorney General certifies that release would present national security concerns, the alien may be detained for additional periods of up to six months—subject to procedural safeguards and strict congressional oversight. *Id.* § 412(a)(6), 115 Stat. at 351. “The alien may request each 6 months in writing that the Attorney General reconsider the certification and may submit documents or other evidence in support of that request.” *Id.* § 412(a)(7), 115 Stat. at 351. Every six months, the Attorney General must submit detailed reports to the House and Senate Judiciary committees, disclosing the number of aliens certified; the grounds for those certifications; the nationalities of the aliens; the length of the detention for each certified alien; the number of certified aliens who were removed; the number of certified aliens who were granted relief from removal; the number of certified aliens who the Attorney General has determined are no longer aliens who may be certified; and the number of certified aliens released from detention. *Id.* § 412(c), 115 Stat. at 352.

These provisions of the Patriot Act unambiguously constrain the President's authority to hold in preventive detention suspected terrorists arrested within the United States. Those specific limitations preclude an interpretation of the general language of the AUMF, passed just weeks earlier, as authorizing detentions transgressing the careful limits set in the Patriot Act. In most circumstances, "a precisely drawn, detailed statute" such as the Patriot Act "pre-empts more general remedies" and should be "regarded as exclusive." *Hinck v. United States*, 127 S. Ct. 2011, 2015 (2007) (citations omitted); *United States v. Estate of Romani*, 523 U.S. 517, 530 (1998) (applying principle that "a specific policy embodied in a later federal statute should control our construction" of an earlier statute).

That conclusion is reinforced by the legislative history of the Patriot Act, which makes clear that Congress considered and rejected the President's request for authorization to detain suspected terrorists indefinitely without charge. The initial legislation proposed by the administration, named the Anti-Terrorism Act of 2001, would have allowed the Attorney General to indefinitely detain aliens suspected of terrorism with no limitations or restrictions. During committee hearings in Congress, this provision drew bi-partisan criticism,<sup>6</sup>

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<sup>6</sup> See *Administration's Draft Anti-Terrorism Act of 2001: Hearings Before the H. Comm. on the Judiciary*, 107th Cong. 21 (2001) (statement of Rep. Conyers) (identifying proposal for indefinite detention as one of a "number of provisions in your measure that give us constitutional trouble"); *id.* at 34

which caused the administration to agree to a more restricted provision limiting detention to seven days and requiring congressional oversight.

Congress's repudiation of the administration's proposal was recounted throughout the debate by the bill's supporters. Representative Conyers submitted a "point-by-point" analysis of the legislation, stating that the final bill "completely revises the Administration's proposal to better balance the law enforcement needs of the Attorney General with the protection of aliens' civil liberties." 147 Cong. Rec. 20,441 (2001) (statement of Rep. Conyers); *see also id.* at 20,439 (statement of Rep. Sensenbrenner) (noting that the "compromise legislation" requires the Attorney General "to revisit every 6 months the detention of an alien who has been certified as an alien terrorist").

Speaking in support of the legislation, Senator Hatch stated that the negotiators have "made painstaking efforts to achieve this workable compromise" in order to address "questions about earlier provisions, particularly the detention

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(statement of Rep. Berman) (criticizing provision for giving Attorney General "an ability to detain in perpetuity people in detention without limit, without requirement of deportation, without requirement of prosecution"); *id.* at 54 (statement of Rep. Lofgren) ("[T]he indefinite detention is a real issue, because there is no time line during which the deportation proceedings must be undertaken."); *Homeland Defense: Hearings before the S. Comm. on the Judiciary*, 107th Cong. 23 (2001) (statement of Sen. Specter) (criticizing proposal for giving "the authority to detain on that very generalized standard without any evidentiary base or probable cause").

provision for suspected alien terrorists.” 147 Cong. Rec. 19,507 (2001) (statement of Sen. Hatch).

In response to the concern that the INS might detain a suspected terrorist indefinitely, the Senator Kennedy, Senator Kyl, and I worked out a compromise that limits the provision. It provides that the alien must be charged with an immigration or criminal violation within seven days after the commencement of detention or be released. In addition, contrary to what has been alleged, the certification itself is subject to judicial review. The Attorney General’s power to detain a suspected terrorist under this bill is, then, not unfettered.

*Id.* Senator Kyl similarly stated that the provision for “temporary detention” was a “compromise” that “represents a bipartisan understanding.” *Id.* at 19,538 (statement of Sen. Kyl).

Under the compromise that Members have reached, the Attorney General must charge an alien with a deportable violation or he must release the alien. The underlying certification, and all collateral matters, can be reviewed by the U.S. District Court of the District of Columbia, and the Attorney General is required to report to Congress every six months on the use of this detention provision.

*Id.* Congress’s unambiguous rejection of the administration’s request for authority to indefinitely detain persons seized within the United States fatally undermines the Fourth Circuit’s conclusion

that such detention was somehow authorized *sub silentio* by the AUMF only 38 days earlier.

The Fourth Circuit’s conclusion that the AUMF authorized al-Marri’s detention creates an irreconcilable tension with the Patriot Act’s careful limitations.<sup>7</sup> Under settled principles of statutory interpretation a specific statute takes precedence over a general one. Thus, for example, in the war-powers context, a “framework statute” such as the Foreign Intelligence Surveillance Act, the War Powers Act, or the Patriot Act is not usually repealed by implication when Congress authorizes use of force in a new military conflict. *See* Daniel J. Freeman, Note, *The Canons of War*, 117 Yale L.J. 280, 304 (2007) (surveying cases and concluding that “in nine of twelve cases the courts found that a specific framework statute trumps a more recent AUMF”).

The general rule that a framework statute should take precedence over an AUMF applies with even greater force in this case because the Patriot Act was

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<sup>7</sup> As recognized by Judge Motz, “[t]he explicit authorization for limited detention and criminal process in civilian courts in the Patriot Act provides still another reason why we cannot assume that in the AUMF Congress silently empowered the President to order the indefinite military detention of civilian ‘terrorist aliens’ as enemy combatants without any criminal process.” Pet. App. 60a-61a (opinion of Motz, J.); *accord Hamdi*, 542 S. at 551 (Souter, J., concurring in judgment) (“It is very difficult to believe that the same Congress that carefully circumscribed Executive power over alien terrorists on home soil would not have meant to require the Government to justify clearly its detention of an American citizen held on home soil incommunicado.”).



enacted one month *after* Congress passed the AUMF. The Court need not, therefore, choose between the interpretive principle that the specific governs the general, *see Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 524-25 (1989); *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961), and the principle that the last statute in time governs, *see Romani*, 523 U.S. at 532-33. Both canons of interpretation point to the conclusion that, notwithstanding the general provisions of the AUMF, the detention of persons arrested on American soil must be executed in accordance with the Patriot Act's more specific and more recent provisions.<sup>8</sup>

In struggling to avoid this conclusion, the judges on the Fourth Circuit turned these principles on their heads. According to Judge Wilkinson, the AUMF, not the Patriot Act, is the more specific statute because “the AUMF represents a specific response to the 9/11 attacks, authorizing military

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<sup>8</sup> The Court has often expressed reluctance to read a general statutory provision broadly enough to encompass authority that Congress elsewhere specifically rejected. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 579-80 (2006) (“Congress’ rejection of the very language that would have achieved the result the Government urges here weighs heavily against the Government’s interpretation.”); *Doe v. Chao*, 540 U.S. 614, 622 (2004) (argument for broad reading of statute undermined by “drafting history showing that Congress cut out the very language in the bill that would have authorized” the relief sought). Another canon, of course, provides that findings of implied repeal of earlier, unambiguous laws are disfavored. *Morton v. Mancari*, 417 U.S. 535, 549-50 (1974). But that canon is inapplicable here, where the Patriot Act itself provides compelling evidence of the limits of what that same Congress intended to authorize in the earlier AUMF.

force against those responsible for the attacks,” while the Patriot Act’s standards for executive detention are “designed to prevent terrorism generally, regardless of whether the suspect was associated with 9/11.” Pet. App. 201a (Wilkinson, J.). Judge Wilkinson therefore concluded that the AUMF is the only relevant statute that “specifically addresses military detention in response to the 9/11 attacks.” *Id.* Chief Judge Williams took a similarly flawed approach, concluding that the Patriot Act regulates the President’s authority to detain under the Take Care Clause of the Constitution and the AUMF provides separate authority to detain pursuant to the Commander-in-Chief Clause.

The approaches advocated by Judge Wilkinson and Chief Judge Williams effectively impose a reverse clear-statement rule in favor of displacing otherwise applicable domestic laws with military powers. Under their reasoning, grants of authority implicit in the AUMF would presumably supplant any and all domestic laws unless those laws specifically referenced the 9/11 attacks or the Constitution’s Commander-in-Chief Clause. Such an approach, which would uphold broad President powers in the face of Congress’s explicit disapproval, cannot be reconciled with *Youngstown* or our Constitution’s Separation of Powers.

It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, 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. 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 President and Congress.

*Youngstown*, 343 U.S. at 609 (Frankfurter, J., concurring). The Court should grant certiorari to bring the Fourth Circuit's decision in line with these basic principles.

### CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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