No. 10-98

IN THE

Supreme Court of the United States

JOHN ASHCROFT,

Petitioner,

v.

ABDULLAH AL-KIDD,

Respondent.

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

BRIEF FOR THE CONSTITUTION PROJECT AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

The Constitution Project (Project) is an independent, bipartisan organization that promotes

[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amicus* certifies that no party, or counsel for a party, authored or paid for this brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amicus*, its members, or its counsel made a monetary contribution to the brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the Clerk.

and defends constitutional safeguards. The Project brings together legal and policy experts from across the political spectrum to promote consensus solutions to pressing constitutional issues. After September 11, 2001, the Project created its Liberty and Security Committee, a blue-ribbon commission of prominent Americans, to address the importance of preserving civil liberties as we work to protect our Nation from international terrorism. In all its work, the committee emphasizes the need for all three branches of government to play a role in preserving constitutional rights. And the Project has regularly appeared before this Court in cases raising important questions of separation of powers. *See*, *e.g.*, *Boumediene* v. *Bush*, 553 U.S. 723 (2008); *Munaf* v. *Geren*, 553 U.S. 674 (2008).

The Project's Liberty and Security Committee has issued a series of reports addressing the issues currently before this Court. In July 2004, the committee issued a *Report on Post-9/11 Detentions*, in which its signatories urged that "[a]ny detention of a citizen or non-citizen in the United States must be expressly authorized by congressional statute or by the law of war."[2] In 2008, the committee issued *A Critique of National Security Courts*, analyzing the Government's use of preventive detention. The report recommended that all prosecutions for terrorism be handled by Article III courts and explained that preventive detention is only constitutionally permissible in very narrow

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[2] Liberty & Security Committee, The Constitution Project, *Report on Post-9/11 Detentions* 20 (2004). The report and the attached signatories are available at http://www.constitutionproject.org/pdf/report_on_post_9_11_detentions.pdf.

circumstances.[3] Also in 2008, the committee published a report on the Government's use of immigration policy as a counterterrorism tool, including the limited detention of aliens authorized in Section 412 of the USA Patriot Act. The report's signatories recommended that this section's limited detention authority be repealed.[4]

The Project files this brief in support of Respondent to address the important question of the scope of the Executive's detention authority.

SUMMARY OF ARGUMENT

Executive authority is not unlimited. "[It] must stem either from an act of Congress or from the Constitution itself." *Medellin* v. *Texas*, 552 U.S. 491, 524 (2008) (internal quotations omitted). Yet the Executive action at issue in this case—the preventive detention of U.S. citizens and other persons lawfully within the United States—has never been approved by Congress. Just the opposite. Congress *denied* the Attorney General precisely the preventive detention power that he sought over aliens, and the Executive has never purported to ask for it with regard to American citizens.

In the immediate aftermath of the September 11, 2001 terrorist attacks, the Justice Department requested from Congress the authority to

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[3] Liberty & Security Committee, The Constitution Project, *A Critique of National Security Courts* (2008), *available at* http://www.constitutionproject.org/pdf/144.pdf.

[4] Liberty & Security Committee, The Constitution Project, *The Use and Abuse of Immigration Authority as a Counterterrorism Tool: Constitutional and Policy Considerations* 8, 12 (2008), *available at* http://www.constitutionproject.org/pdf/48.pdf.

preventively detain aliens suspected of involvement with terrorism. *See* Dep't of Justice Antiterrorism Bill 2d Draft, § 202 (Sept. 19, 2001). Over the course of a month's deliberations, including committee hearings and floor debate, Congress considered the Department's unbounded request—and rejected it. Instead, Congress crafted an alternative detention policy that authorized the Executive to detain certain aliens suspected of terrorism only briefly, for seven days. *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, 351 (2001) ("USA Patriot Act" or "Patriot Act"). To continue the detention longer, Congress required the Attorney General to charge the non-citizen with a crime or initiate deportation. *See id.* If the Attorney General did neither, the alien had to be released. *See id.* Further, Congress subjected the Attorney General's detention decision to judicial review, required the Attorney General to provide updates on any alien detained longer than a week, and barred the Attorney General from delegating the decision to detain to any subordinate other than the Deputy Attorney General. *See id.* In short, Congress completely redrafted the detention provisions the Executive proposed, and in so doing, expressed its will on detention policy. *See Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 639 (1952) (Jackson, J., concurring) (when Congress "has not left * * * an open field," but has crafted its own policy on a given matter, it cannot be said to have acquiesced in the Executive's action).

But the power that Congress denied expressly is the very same power that the Executive now claims indirectly through the material witness statute.

That is not how the separation of powers works. Under Justice Jackson's famous *Youngstown* framework, the fact that Congress carefully considered—and rejected—proposals that would have granted the Executive the authority it now claims means that the exercise of this authority can be justified only by the Executive's inherent "constitutional powers *minus* any constitutional powers of Congress over the matter." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) (emphasis added). That is a thin reed on which to rest the capacious powers the Department of Justice has exercised here. This Court has never held that the Executive has inherent Article II power to detain individuals as part of the war on terrorism. The cases this Court has heard that implicated the Executive's authority to detain individuals suspected of terrorism all involved authority granted by Congress. *See*, *e.g.*, *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004); *Boumediene* v. *Bush*, 553 U.S. 723 (2008). The Executive's attempt to circumvent the clearly expressed will of Congress—that open-ended preventive detention is not permissible—threatens the equilibrium of the constitutional order. *See Youngstown*, 343 U.S. at 638 (Jackson, J., concurring) (category three Executive claims "must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.").

ARGUMENT

THE EXECUTIVE'S USE OF THE MATERIAL WITNESS STATUTE TO PREVENTIVELY DETAIN U.S. CITIZENS AND OTHER PERSONS LAWFULLY WITHIN THE UNITED STATES RAISES SERIOUS SEPARATION-OF-POWERS CONCERNS.

To evaluate exercises of Executive power, this Court has long referred to the tripartite framework elaborated by Justice Jackson in *Youngstown Sheet & Tube Company*. *See*, *e.g.*, *Medellin*, 552 U.S. at 524 (citing *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring)) ("Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action * * * ."). According to that framework, "when the [Executive] acts pursuant to an express or implied authorization of Congress, his authority is at its maximum." *Youngstown*, 343 U.S. at 635. "When the [Executive] acts in absence of either a congressional grant or denial of authority," however, only Article II's "independent powers" will justify the action, leading to a "zone of twilight in which [the Executive] and Congress may have concurrent authority, or in which its distribution is uncertain." *Id*. at 637. Finally, "[w]hen the [Executive] takes measures incompatible with the expressed or implied will of Congress, [its] power is at its lowest ebb," and valid only if Congress is itself not permitted to "ac[t] upon the subject." *Id*. at 637-638.

This case falls in category three. The Justice Department has adopted a policy of preventive detention directly at odds with the detention authority Congress authorized. The Executive's

policy thus threatens to upset the separation of powers and should not be permitted to stand.

A. Congress Has Refused To Authorize Open-Ended Detention Of U.S. Citizens Or Other Persons Lawfully Within The United States.

1. No act of Congress permits the policy of preventive detention that the Department of Justice implemented in the aftermath of September 11, 2001. As Respondent al-Kidd explains in his brief, the material witness statute was never intended to authorize this sort of detention, and the Executive's use of the statute for that purpose violates its plain terms. *See* Respondent's Br. 24-31. Moreover, neither the Authorization for Use of Military Force, 115 Stat. 224 (2001) (AUMF), nor the Detainee Treatment Act of 2005, 119 Stat. 2680 (2005) (DTA), permits the preventive detention of non-combatants lawfully within the United States. Indeed, neither statute so much as mentions civilian detention.

But the most fundamental problem with the Department's policy is not that Congress has never authorized the power that the Executive claims. Rather, it is that Congress expressly rejected legislation that would have given the Executive just that power. To be sure, Congress did bestow upon the Executive some authority to detain non-citizens suspected of involvement with terrorism. That authority is contained in Section 412 of the USA Patriot Act. *See* 115 Stat. 272, 351 (2001). But the detention authority Congress drafted in Section 412 is fundamentally different from the policy pursued by the Executive in this case. Indeed, the Patriot Act's text and drafting history reveal that Congress affirmatively *rejected* the Executive's detention

policy, fashioning its own more modest policy as a substitute.

2. Because that drafting history is so extensive—and so instructive on just what Congress did, and did not, authorize—it merits careful scrutiny. There is nothing surprising about that approach. This Court has recently examined drafting history to resolve various separation-of-powers questions. *See Medellin*, 552 U.S. at 504-516 (investigating drafting history of Optional Protocol to Vienna Convention on Consular Relations to determine whether Congress meant Protocol to be self-executing); *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 593-595 (2006) (examining drafting history of AUMF and DTA to determine whether Congress intended to amend Uniform Code of Military Justice). And the Court has often looked to an instrument's drafting history to discern Congress's views in a given area, whether the question is the meaning of a particular treaty, *see*, *e.g.*, *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 226 (1996) (interpreting treaty provisions), or a complex statutory scheme, *see*, *e.g.*, *Burgess* v. *United States*, 553 U.S. 124, 133-135 (2008) (looking to drafting history of Controlled Substances Act to discern meaning of "felony drug offense"); *Bank One Chicago, N.A.* v. *Midwest Bank & Trust Co.*, 516 U.S. 264 (1996) (interpreting Expedited Funds Availability Act); *see also Harbison* v. *Bell*, 129 S. Ct. 1481, 1489-90 (2009) (interpreting AEDPA).

Here, the Patriot Act's drafting history is particularly relevant. Between the time the Justice Department first proposed new antiterrorism measures in mid-September 2001 until the time Congress adopted the Patriot Act little more than a month later, Congress considered and rejected

precisely the policy of preventive detention the Executive has pursued. Indeed, with the Patriot Act, Congress crafted a wholly alternative and much more limited detention authority for use in combating terrorism. Justice Jackson instructed in *Youngstown* that when Congress "has not left * * * an open field," but has crafted its own policy on a given matter, it cannot be said to have acquiesced in the Executive's action. 343 U.S. at 639 (Jackson, J., concurring); *see also Medellin*, 552 U.S. at 528-529. Just so here.

3.a. In the fall of 2001, the Justice Department proposed a series of antiterrorism measures in response to the September 11 attacks. The Justice Department called its proposal "The Anti-Terrorism Act of 2001." Dep't of Justice Antiterrorism Bill 2d Draft, § 202 (Sept. 19, 2001). Several of its sections proposed a greatly expanded power of Executive detention.

In particular, Section 202 of the proposed Act would have authorized indefinite preventive detention, without charge, of aliens suspected of some connection to terrorist activities or groups. That section would have provided:

> (e) Detention of Terrorist Aliens. –
>
> (1) Custody. – The Attorney General shall take into custody any alien who is certified under paragraph (3).
>
> (2) Release. – The Attorney General shall maintain custody of any such alien until such alien is removed from the United States. Such custody shall be maintained irrespective of any relief from removal the alien may be eligible for or granted until the

> Attorney General deems such alien is no longer an alien who may be certified pursuant to paragraph (3).
>
> (3) Certification. – The Attorney General may certify an alien to be an alien he has reason to believe may commit, further, or facilitate acts [of terrorism] described in section 237(a)(4)(A)(i), (A)(iii), or (B), or engage in any other activity that endangers the national security of the United States.

Dep't of Justice Antiterrorism Bill 2d Draft, § 202 (Sept. 19, 2001).

Section 203 of the proposed Act sought to prohibit judicial or administrative review of any detention apart from habeas corpus, and to limit habeas review to the U.S. District Court for the District of Columbia. *Id*. § 203. Section 204 meanwhile would have applied the detention authority spelled out in the two previous sections "to all aliens, regardless of whether any such aliens entered the United States before or after the date of enactment," and regardless of whether "any relevant activity by any such aliens occurred before or after such date." *Id*. § 204.

b. Almost immediately, members of Congress from both parties voiced opposition to the detention proposals. At a Senate Judiciary Committee hearing on the antiterrorism measures, Senator Edward Kennedy noted that "many of us * * * have serious concerns about the administration's proposal to give the Government broad powers to detain a person indefinitely on the mere suspicion that the person may engage in terrorist activity without any realistic review of the decision." *Homeland Defense: Hearing Before the S. Committee on the Judiciary*, 107 Cong.

18 (2001). At the same hearing, Senator Arlen Specter similarly objected to "th[e] very generalized standard" for detention proposed by the Department, which in his view lacked "any evidentiary base or probable cause." *Id.* at 26. Senator Russ Feingold, too, objected to the detention provisions at the hearing, saying that "indefinite mandatory detention * * * raise[s] serious due process concerns." *Id.* at 28 (statement of Sen. Feingold).

In the House, members of the Judiciary Committee voiced similar, bipartisan opposition. Congressmen Bob Barr, Bobby Scott, Chris Cannon, Darrell Issa, and Jeff Flake—four Republicans and a Democrat—issued a joint report on the Department's antiterrorism proposals in which they called the detention provisions "fundamentally flawed" and "unacceptable." *See* Letter to Chairman Sensenbrenner & Ranking Member Conyers (Sept. 19, 2001) (cited in *Hearing Before the Committee on the Judiciary, House of Representatives* at 50 (Sept 24, 2001) (statement of Rep. Barr)). Sections 201, 202, 203, and 204 of the Justice Department's proposal, they wrote, "permit the immediate detention of non-citizens based on a vague 'reason to believe' that the person is a 'threat to national security.' " *Id.* "In many cases," the report warned, "this detention could be indefinite." *Id.* Worse, it was not clear "what, if anything, would be subject to judicial review, and limiting judicial review to courts in the District of Columbia would effectively deny review to aliens in distant states." *Id.* They recommended the House Judiciary Committee scrap the detention provisions and start over.

4. In the weeks following, the Senate and House Judiciary Committees took precisely this course,

substantially redrafting the Department's proposals. When the overhauled antiterrorism bill eventually came to the floor for debate, it included detention provisions quite different from what the Department initially proposed.

The Senate bill was introduced on October 4, 2001. Senator Patrick Leahy, one of the bill's chief sponsors and Chairman of the Judiciary Committee, described the major changes the bill made to the Justice Department's detention proposals. First and foremost, the Senate bill refused to authorize open-ended detention. Instead, Senator Leahy explained, "the Justice Department must now charge an alien with an immigration or criminal violation *within seven days of taking custody*." 107 Cong. Rec. S10547, 10558 (daily ed. Oct. 11, 2001) (emphasis added). Second, "if an alien is found not to be removable, he must be released from custody." *Id.* And third, the Attorney General would not be permitted to delegate his detention authority to just any subordinate: Senator Leahy emphasized that "the Attorney General can only delegate the power to certify an alien to the Deputy Attorney General" or to the Immigration and Naturalization Service Commissioner, thereby "ensuring greater accountability and preventing the certification decision from being made by low-level officials." *Id.* Even with these changes, Senator Leahy continued to voice concern over the uses to which the detention power might be put, but reported that the new detention provision—rechristened Section 412 in the Senate bill—was much "improved." *Id.*

One of the bill's other chief sponsors, Senator Orrin Hatch, echoed his co-sponsor's assessment, emphasizing the broad new restrictions that the

Committee had added to the Department's proposal. Senator Hatch too stressed that "the alien must be charged with an immigration or criminal violation *within seven days*." *Id*. at 10561 (emphasis added). If the Attorney General did not bring charges within that time frame, the redrafted Section 412 required the Attorney General to "relinquish custody." *Id*. at 10603. In addition, Senator Hatch pointed out, "the [Attorney General's] certification itself is subject to judicial review." *Id*. at 10561.

The House version of the detention authority was even more circumscribed. At the House Judiciary Committee's markup session on October 3, 2001, members adopted a series of restrictions over and above those in the Senate bill. Congresswoman Sheila Jackson-Lee proposed revising the section covering habeas review of detention decisions to permit review in any federal district court. *See* H.R. Rep. No. 107-236, pt. 1, at 402-403 (2001). Congressman Jerrold Nadler and Congresswoman Jackson-Lee together proposed language that would compel the Attorney General to release within 90 days aliens detained as terrorists who had not been deported or who were unlikely to be deported in the "reasonably foreseeable future." *Id*. at 43-44. And Congressman Barr proposed to restrict the Attorney General's power to delegate the initial decision to detain even further; his amendment permitted delegation only to the Deputy Attorney General. *See id*. at 43. The Committee adopted all these amendments.

Thus the bill reported out of Committee and brought to the House floor on October 5, 2001, looked very different—in very fundamental ways— from the Justice Department's proposal. As the House

Committee Report explained, the bill permitted detention of an alien only if the Attorney General had "reasonable grounds to believe" the alien was engaged in terrorist activity or otherwise "endanger[ed] the national security of the United States"—not based on mere suspicion, as the original Justice Department draft proposed. *Id*. at 18. The bill required any detained alien to be charged within seven days, or released. *See id.* It restricted the certification decision to the Attorney General or the Deputy Attorney General alone. *See id*. It also permitted judicial review "of the merits of the [Attorney General's] determination" in any federal district court. *Id.* at 65. And it directed the Attorney General to release any alien found to be removable but not actually removed within 90 days, unless the Attorney General "demonstrate[d]" that the alien presented an ongoing threat to national security, a certification he was then required to renew every six months. *Id.* at 18.

5. In Conference, House and Senate negotiators reconciled the two detention provisions by adopting the House's more restricted version. The result was a final bill that, in the words of the Conference Report, "*completely revises the Administration's proposal* to better balance the law enforcement needs of the Attorney General with the protection of aliens' civil liberties." 107 Cong. Rec. H7159, 7198 (daily ed. Oct. 23, 2001) (emphasis added). That was no exaggeration. To demonstrate just how pronounced the changes were, the Report catalogued seven fundamental revisions to the Justice Department's original proposal. Among the most crucial were: curtailing the Attorney General's discretion to detain non-citizens, limiting the number of days an alien

could be held without charge, providing for the alien's release, and ensuring meaningful judicial review. *Id.* at 7198-99. The Report, in short, confirmed that Congress had refused to grant the Executive a broad license to engage in preventive detention without charge.

Multiple members of Congress pointed to these revisions when casting their final votes on the bill. Congressman James Sensenbrenner, chairman of the House Judiciary Committee, praised the new detention measures in part by noting that they denied the Attorney General the power to indefinitely detain non-citizens without charge. *See id.* at 7196. Congressman Conyers claimed the bill "corrected the immigration provision [as proposed by the Justice Department] that allows indefinite detention without evidence." *Id.* Congresswoman Zoe Lofgren emphasized that the Attorney General "may detain persons," but only upon "reasonable grounds" and only for limited amounts of time, all subject to court review. *Id.* at 7203. And Congressman Bill Delahunt noted that while the Justice Department's initial proposal "contain[ed] a number of profoundly disturbing features, including provisions that would have authorized the indefinite detention of nonresident aliens," the revised bill denied the Attorney General such open-ended authority. *Id.* at 7205.

Members of the Senate sang the same refrain. They emphasized that one of the principal reasons that the law deserved to be passed was that Congress had deprived the Executive of the radical power it had sought. Senator Leahy, for example, declared "that we have twice improved [the detention provision] from the original proposal offered by the

Administration," first by denying the Attorney General the power of unlimited detention, and second by subjecting all detention decisions to full habeas review. 107 Cong. Rec. S10990, at 11004 (daily ed. Oct. 25, 2001). Senator Feingold noted that while "the administration's original proposal would have granted the Attorney General extraordinary powers to detain immigrants indefinitely," the revised law denied the Executive this authority. *Id.* at 11022. Senator Jon Kyle called the detention authorized by the Patriot Act merely "temporary," based on a "bipartisan understanding" that "the Attorney General must charge an alien with a deportable violation or * * * release the alien." *Id.* at 11050. Finally, Senator Kennedy and Senator Sam Brownback introduced a joint report cautioning that even the "seven-day window to initiate proceedings is limited" and "should be used judiciously, with charges filed as promptly as possible." *Id.* at 11047. The bill was enacted on October 26, 2001.

6. This drafting history speaks with unmistakable clarity: Congress squarely rebuffed the Executive's request for unlimited detention power—over aliens *or* U.S. citizens. After all, while Section 412 and its drafting history make clear that the Executive may not detain non-citizens for more than seven days without charge, the Executive never so much as asked for such broad detention authority over American citizens. And neither the Justice Department's initial counterterrorism proposals, nor the AUMF, nor the DTA ever hinted at—let alone

expressly claimed—an authority to detain citizens for an extended period without charge.[5]

But Congress did not stop at merely rejecting the Executive's proposals. It responded to the Justice Department's request and the demands of national security by crafting an alternative and significantly more circumscribed detention authority. That authority, spelled out in Section 412 of the Patriot Act, was what Congress intended the Executive to use to combat the emergent terrorist threat—not a centuries-old statute drafted with no reference to present circumstances and for an entirely different purpose. Congress, in the words of Justice Jackson's *Youngstown* concurrence, "[did] not le[ave] * * * an open field," but clearly expressed its will regarding counterterrorism detention. 343 U.S. at 639 (Jackson, J., concurring).

B. The Executive's Use Of The Material Witness Statute To Implement Open-Ended Detention Is An Attempt To Circumvent The Will Of Congress.

Rather than use the tailored detention authority Congress crafted, the Executive has "cho[sen] a different and inconsistent way of its own." *Youngstown*, 343 U.S. at 639 (Jackson, J., concurring). To the best of *amicus curiae*'s knowledge, in the years since Congress approved Section 412, the Executive has never invoked it—not

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[5] Whether Congress could grant the Executive such power consistent with the Constitution is an open question. *See Zadvydas* v. *Davis*, 533 U.S. 678, 679-680 (2001) ("Once an alien enters the country * * * the Due Process Clause applies * * * ."); *see also Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953). But that question is not before this Court and need not be answered here.

once. *See* Liberty & Security Committee, The Constitution Project, *The Use and Abuse of Immigration Authority as a Counterterrorism Tool: Constitutional Policy and Considerations* 6-8 (2008). Instead, the Executive has chosen a more expedient approach: to resort to the material witness statute to do what Congress refused to permit.

It is important to understand just how muscular an assertion of Executive power this truly is. The authority that Congress specifically granted the Executive in Section 412 requires the Government to file charges against, or begin deportation proceedings for, any alien detained under the statute *within seven days* of the detention—otherwise the Government must set the detainee free. *See* 115 Stat. 272, 351. The Government, though, has chosen not to heed those carefully crafted provisions and to resort instead to the material witness statute (as it has construed it). The Executive's interpretation of the material witness statute has allowed the Government to detain individuals for days and months on end without charge. *See also* 18 U.S.C. § 3144 (material witness statute).

But the problems run deeper still. Section 412 requires the Attorney General or Deputy Attorney General to certify that any individual detained has some connection to terrorist activities. *See* 115 Stat. 272, 351. Not so under the Government's interpretation of the material witness statute. Instead, *any* federal law enforcement officer may initiate detention simply by swearing out a perfunctory affidavit. *See* 18 U.S.C. § 3144. Section 412 does not authorize the detention of American citizens, *see id.*; the material witness statute—as read by the Government—effectively does, without

charge and without probable cause. The detention policy the Executive has adopted is, in short, not the one Congress authorized.

This Court has warned that when the Executive acts against the will of Congress, "[the] assertion of authority * * * [falls] within Justice Jackson's third category, not the first or even the second." *Medellin*, 552 U.S. at 527. This is dangerous territory. Executive claims "so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring). Indeed, "[c]ourts can sustain [Executive action] in such a case only by disabling the Congress from acting upon the subject." *Id.* at 637-638.

This Court has *never* held that the Executive enjoys an independent—and immutable—power to detain civilians that is beyond Congress's reach. The Executive detention power at issue in *Hamdi*, 542 U.S. 507, and *Boumediene*, 553 U.S. 723, flowed from congressional statutes. As the Court put it in another context, "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States* v. *Salerno*, 481 U.S. 739, 755 (1987). The Executive does not have the power to detain civilians absent congressional authorization coupled with the most extraordinary of circumstances. "[O]ur history and tradition rebel at the thought that the grant of military power [in Article II] carries with it authority over civilian affairs." *Youngstown*, 343 U.S. at 632 (Douglas, J., concurring).

The Executive's policy of preventive detention directly contravenes the will of Congress and thus disturbs our constitutional equilibrium. This Court

has rejected such Executive intrusions in the past. In *Medellin*, the Court's investigation of the drafting history of the Optional Protocol to the Vienna Convention on Consular Relations convinced it that the Executive's actions to "enforce" a non-self-executing treaty in fact contravened the will of Congress. *See* 552 U.S. at 504-516. In *Hamdan*, the drafting history of the AUMF and DTA led the Court to conclude that Congress had not repealed or amended the Uniform Code of Military Justice governing military tribunals; the alternative procedures for these tribunals devised by the President violated the Code and could not stand. *See* 548 U.S. at 593-595. And of course in *Youngstown*, Justice Jackson explained that President Truman's seizure of the steel mills violated at least "three statutory policies" enacted by Congress, pressing the President's action into category three, where it could not be justified. *See* 343 U.S. at 639 (Jackson, J., concurring). This case is like those. The Executive has acted against the will of Congress, without viable claim to independent authority.

CONCLUSION

For the foregoing reasons, the Court should hold that the Executive may not use the material witness statute to preventively detain U.S. citizens and others lawfully within the United States.

Respectfully submitted,

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