No. 08-368

IN THE

Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,
Petitioner,

v.

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

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

BRIEF *AMICUS CURIAE* OF AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37.3, the American Bar Association (the "ABA") respectfully submits this brief as *amicus curiae*. The ABA is the largest

[1] 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 *amicus curiae*, its members or counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief and such consents are on file with the Clerk of this Court.

voluntary professional membership organization and the leading organization of legal professionals in the United States. The ABA's membership of more than 400,000 spans all 50 states and other jurisdictions, and includes attorneys in private law firms, corporations, non-profit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors, and law students.[2]

The ABA offers a unique perspective on the issue now before the Court, which is whether an individual lawfully within the United States may be detained by the United States military and held indefinitely without charge or trial. As the national voice of the legal profession, the ABA has a special interest in and responsibility for protecting the rights guaranteed by the Constitution, safeguarding the integrity of our legal system, and fostering the growth of the rule of law, both at home and abroad. Indeed, the ABA's Constitution states, in pertinent part, "The purposes of the Association are to uphold and defend the Constitution of the United States and maintain representative government."[3] Further, over its one hundred year-plus history, the ABA has developed special competence in the area of protection of the rights of persons deprived of their liberty by arrest or detention.

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[2] Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to its filing.

[3] ABA Constitution available at www.abanet.org/polcy /constitution_and _bylaws.pdf.

Based on studies conducted by its task forces and resolutions adopted by its policy-making body, the ABA believes that the constitutionally guaranteed criminal due process rights that are available to all citizens and persons lawfully present in the United States may not be abrogated during military detention unless through constitutionally permissible means, which must include the opportunity for prompt and meaningful judicial review, effective assistance of counsel, and only if any detention thereafter is pursuant to an Act of Congress that establishes constitutionally permissible standards and procedures.

SUMMARY OF ARGUMENT

The September 11, 2001 terrorist attack on the United States has resulted in a profound struggle to balance the protection of the people with each person's individual rights. After careful study, and based on the experiences and judgment of a broad range of legal practitioners, the ABA has formulated policies that it believes strike the appropriate balance for these times. The ABA also has urged Congress and the Executive Branch to consider how any proposed legislation and policy regarding detention of "enemy combatants" may affect the response of other nations to future acts of terrorism and to the efforts of the United States in promoting the rule of law.

At the heart of the ABA policies is the conclusion that—while the present threats warrant greater security—the due process principles upon which this nation was founded must be preserved. It is the ABA's position that the constitutionally guaranteed criminal due process rights that are available to all citizens and persons lawfully present in the United States may not be abrogated during military deten-

tion unless such persons are given the opportunity for prompt meaningful judicial review. This review must include meaningful access to, and effective assistance of, counsel. Also, any resulting detention can be permissible only if pursuant to an Act of Congress that establishes constitutionally permissible standards and procedures. The ABA believes that this commitment to due process is essential to the preservation of our core principles of liberty at home and to our leadership role in promoting the rule of law globally, even in exigent circumstances.

ARGUMENT

OUR CONSTITUTIONALLY GUARANTEED CRIMINAL DUE PROCESS RIGHTS, EVEN IN GRAVE TIMES, MAY NOT BE ABROGATED EXCEPT THROUGH CONSTITUTIONALLY PERMISSIBLE MEANS.

For over two hundred years, whenever this nation has been confronted by war, our government has struggled to achieve a proper balance between the protection of the people and each person's individual rights. After the September 11, 2001 attack, Congress and the President were forced to take unprecedented steps to ensure the safety of this nation and of innocents worldwide. While recognizing the government's responsibility to work to prevent another attack on our nation, ABA asserts that this country must also be vigilant in defining those lines that cannot be crossed. As our national experience has taught us:

> [W]e must be on constant guard against excessive use of any power, military or otherwise, that results in the needless destruction of our rights and liberties.

> * * * And we must ever keep in mind that "the Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.

Duncan v. Kahanamoku, 327 U.S 304, 335 (1946) (Murphy, J. concurring) (quoting *Ex parte Milligan,* 71 U.S. 2, 120-21 (1866)).

The ABA believes that the methods employed in the cause of national security, even in grave times, must comply with constitutionally permissible statutory law and policy, and with international law to which the United States is a signatory. As this Court stated, "It would indeed be ironic if, in the name of national defense, we would sanction the subversion of . . . those liberties . . . which make[] the defense of the Nation worthwhile." *United States v. Robel*, 389 U.S. 258, 264 (1967).

Accordingly, the ABA, through its members and appointed Task Forces, has studied the Acts of Congress and the implementing orders of the Executive that have resulted from the September 11, 2001 attack. Based on the experiences and judgment of a broad range of legal practitioners, the ABA has adopted policies[4] that it believes strike the appropri-

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[4] The ABA's policymaking body is its House of Delegates, which is comprised of more than 500 delegates. Reports that recommend the adoption of specific policy positions may be submitted by ABA delegates representing states and territories, state and local bar associations, affiliated organizations, ABA sections and divisions, ABA members and the Attorney General of the United States, among others. The full House votes on the recommendations and those that are approved become ABA

ate balance between national security needs and the preservation of our fundamental freedoms, as well as the preservation of the constitutionally established balance of powers among our branches of government.

At the heart of the ABA's policies is the conclusion that the constitutionally guaranteed criminal due process rights that are available to all citizens and persons lawfully present in the United States may not be abrogated during military detention unless such persons are given the opportunity for prompt meaningful judicial review, with meaningful access to, and effective assistance of, counsel, and only if any detention thereafter is pursuant to an Act of Congress that establishes constitutionally permissible standards and procedures.

In February 2002, five months after the September 11, 2001 terrorist attack, the ABA voiced concern about the military order titled, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." This order was issued by President Bush, assertedly pursuant to his authority as President and Commander in Chief under the Constitution and laws of the United States, including the Authorization for Use of Military Force Joint Resolution, 115 Stat. 224 ("AUMF").

After careful study, the ABA adopted a policy specifically urging that the President and Congress assure that neither this military order, nor any similar military order that might be issued, would be deemed applicable to United States citizens, lawful resident aliens, and other persons lawfully present in the

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policy. *See* ABA Leadership, House of Delegates - General Information, *available at* http://www.abanet.org/leadership/delegates.html.

United States.[5] The ABA did so because the military order authorized military commissions that, in the

[5] *Revised Recommendation 8C* (adopted Feb. 2002). *Available at* http://www.abanet.org/poladv/letters/107th/militarytrib8c.pdf. The policy urged that "the President and Congress should assure that the law and regulations governing any tribunal will:

1. Not be applicable to United States citizens, lawful resident aliens, and other persons lawfully present in the United States;

2. Not be applicable to persons apprehended or to be tried in the United States, except for persons subject to the settled and traditional law of war who engage in conduct alleged to be in violation of such law of war;

* * *

4. Not permit indefinite pretrial detention of persons subject to the order;

5. Require that its procedures for trials and appeals be governed by the Uniform Code of Military Justice except Article 32 and provide the rights afforded in courts-martial thereunder, including but not limited to provision for certiorari review by the Supreme Court of the United States (in addition to the right to petition for a writ of habeas corpus), the presumption of innocence, proof beyond a reasonable doubt, and unanimous verdicts in capital cases; and

6. Require compliance with Articles 14 and 15(1) of the International Covenant on Civil and Political Rights, including, but not limited to, provisions regarding prompt notice of charges, representation by counsel of choice, adequate time and facilities to prepare the defense, confrontation and examination of witnesses, assistance of an interpreter, the privilege against self-incrimination, the prohibition of ex post facto application of law, and an independent and impartial tribunal, with the proceedings open to the public and press or, when proceedings may be validly closed to the public and press, trial observers, if available, who have appropriate security clearances.

ABA's opinion, would not satisfy constitutional minimum guarantees and would entail substantially fewer protections than those required for trials conducted in federal district court or under the Uniform Code of Military Justice.[6]

Concerned that constitutional safeguards were not being properly considered in connection with other military orders and actions taken by the Executive, the ABA formed a Task Force on Treatment of Enemy Combatants in March 2002. This Task Force was charged with examining the constitutional, statutory, and international law and policy questions raised by the detention of "enemy combatants." In February 2003, the Task Force submitted its resolutions and report to the ABA House of Delegates, after having circulated them in preliminary form to ABA members, working groups from the ABA's Criminal Justice Section and the Section of Individual Rights and Responsibilities, and the Congress and the Executive. The resolutions, which were adopted as ABA policy in February 2003, focused on the safeguards that should

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The policy also urged the "Executive and Legislative branches, in establishing and implementing procedures and selecting venues for trial by military tribunals, to give full consideration to the impact of its choices as precedents in (a) the prosecution of the U.S. citizens in other nations and (b) the use of international legal norms in shaping other nations' responses to future acts of terrorism." *Id.*

[6] *See,* Report in support of Resolution 8C. Available from the ABA. Although only the resolutions submitted to the House of Delegates may be adopted as policy of the ABA, their accompanying reports are considered by the House in determining whether to approve the resolutions as ABA policies. These reports must be approved by the sponsoring entity and must contain the reasons for the proposed resolutions. ABA Constitution and Bylaws, Article 45.2(3) and (6) (2008-2009).

be employed when the government designates and detains, as "enemy combatants," United States citizens or other persons lawfully present in the United States.[7]

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[7] Task Force on Treatment of Enemy Combatants, *Revised Recommendation* 109 (adopted Feb. 10, 2003). *Available at* http://www.abanet.org/leadership/recommendations03/109.pdf The policy, which was co-sponsored by the ABA's Criminal Justice Section, the Section of Individual Rights and Responsibilities, the Senior Lawyers Division, the Section of Litigation, the General Practice, Solo and Small Firm Section, and the Section of Administrative Law and Regulatory Practice, reads:

> **RESOLVED**, That the American Bar Association urges that U.S. citizens and residents who are detained within the United States based on their designation as "enemy combatants" be afforded the opportunity for meaningful judicial review of their status, under a standard according such deference to the designation as the reviewing court determines to be appropriate to accommodate the needs of the detainee and the requirements of national security; and
>
> **FURTHER RESOLVED**, That the American Bar Association urges U.S. citizens and residents who are detained within the United States based on their designation as "enemy combatants" not be denied access to counsel in connection with the opportunity for such review, subject to appropriate conditions as may be set by the court to accommodate the needs of the detainees and the requirements of national security; and
>
> **FURTHER RESOLVED**, That the American Bar Association urges Congress, in coordination with the Executive Branch, to establish clear standards and procedures governing the designation and treatment of the U.S. citizens, residents, or others who are detained within the United States as "enemy combatants;" and
>
> **FURTHER RESOLVED**, That the American Bar Association urges that, in setting and executing national policy regarding detention of "enemy combatants," Congress and the Executive Branch should consider how the policy

In its accompanying report,[8] the Task Force noted that the cases of Yaser Hamdi and Jose Padilla, both United States citizens, were then proceeding through the courts. The Task Force concluded that these cases raised troublesome and profound issues, especially in light of the observation by the United States Court of Appeals for the Fourth Circuit that the government had taken the position that "with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." *Hamdi v. Rumsfeld,* 296 F.3d 278, 283 (4th Cir. 2002). The Task Force noted that the Executive had maintained that its power to detain "enemy combatants" indefinitely without bringing criminal charges derived from Supreme Court precedent, in particular, *Ex parte Quirin,* 317 U.S. 1 (1942), and from the laws of war.

The Task Force noted, however, that the *Quirin* defendants were able to seek review and were represented by counsel. Further, the question for decision had been whether their detention for trial by Military Commission was "in conformity with the laws and Constitution of the United States." *Quirin,* 317 U.S. at 18. Since the *Quirin* Court had held that these enemy aliens—who were not lawfully within the United States—were entitled to judicial review, the Task Force concluded that the same entitlement could not be denied to United States citizens and other persons lawfully present in the United States, especially when held without charges.

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adopted by the United States may affect the response of other nations to further acts of terrorism.

[8] Resolution and Report 109 (adopted Feb. 2003). Available from the ABA.

Specifically as to the AUMF, the Task Force concluded that neither the AUMF nor any laws enacted in response to terrorist attacks expressly authorized detention of United States citizens as "enemy combatants." Further, 18 U.S.C. § 4001(a) raised serious questions about using the AUMF in support of such detentions.[9] The Congressional House Report accompanying the legislation that became Section 4001(a) stated that the purpose of the bill was "to restrict the imprisonment or other detention of citizens by the United States to situations in which statutory authority for their incarceration exists" and to repeal the Emergency Detention Act of 1950 ("EDA"). *See* H.R. Rep. No. 92-116, at 1435 (1971). The EDA had been enacted at the beginning of the Korean War and had authorized the establishment of domestic detention camps to hold, during internal security emergencies, individuals deemed likely to engage in espionage or sabotage. *Id.* at 1435-36. The House Report noted that "the constitutional validity of the Detention Act was subject to grave challenge because it allowed for detention merely if there was reasonable ground to believe that such person probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage." *Id.* at 1438.

The Task Force concluded that, if the AUMF is nevertheless interpreted as authorizing detentions of "enemy combatants" including United States citizens and others lawfully present in the United States, standards for detention must be established and judicial review must be required to determine, with ap-

[9] 18 U.S.C. § 4001(a) states: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."

propriate deference to the President's determination, whether the detention meets those standards.

However, the Task Force noted, appropriate deference does not mean that the courts may not review Executive determinations as to the scope of its authorization. *See Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 587 (1952) (executive order taking possession of private property was not sustained as exercise of President's military power as Commander in Chief, even though "theater of war" was an expanding concept). Courts have preserved their role in reviewing Executive detentions even in times of war. *See, e.g., Robel,* 407 U.S. at 318-19 ("The standard of judicial inquiry must also recognize that the 'concept' of 'national defense' cannot be deemed an end in itself, justifying an exercise of [executive] power designed to promote such a goal"). *See also, In re Yamashita,* 327 U.S. 1, 8 (1946) ("The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner").

Based on this analysis, the Task Force concluded that "enemy combatants" who were citizens or lawfully within the United States, and who had not been charged with a crime or a violation of the law of war, must be afforded a prompt opportunity for meaningful judicial review of the legal basis for their detention. This review, further, must include the right to effective assistance of counsel, since the right to judicial review could well be meaningless if detainees were not afforded effective assistance of counsel in challenging their detention.

The Task Force also noted that legislation was required that would establish constitutionally acceptable standards and procedures under which a court

could determine whether continued detention was permissible. This was necessary because, in the Task Force's opinion, the AUMF and, accordingly, Section 4001(a), were applicable to detentions of United States citizens and others lawfully present in the United States as "enemy combatants." *Compare, Hamdi,* 542 U.S. 507, 519 (2004) (Congress "clearly and unmistakably" authorized detention under the AUMF "in the narrow circumstances considered here" of an armed Taliban soldier captured in combat).

Certainly Congressional silence has never been sufficient to authorize military jurisdiction over civilians seized while legally within the United States. *See, e.g., Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946) (in authorizing "martial law" under Hawaiian Organic Act, Congress did not authorize supplanting of courts by military tribunals); *Milligan*, 71 U.S. at 136-37 (Chase, C.J., concurring) (where provisions of act contemplated no trial or sentence other than by civil court, trial by military commission could not be asserted). If the Executive is to be authorized to assert military jurisdiction over citizens or persons lawfully present in the United States and to dispense with their constitutionally guaranteed criminal due process rights, then Congress must say so and fixed procedures governing such jurisdiction must be in place. As stated in the ABA policy:

> "FURTHER RESOLVED, That the American Bar Association urges Congress, in coordination with the Executive Branch, to establish clear standards and procedures governing the designation and treatment of U.S. citizens, residents and others who are detained within the United States as "enemy combatants."

Finally, the Task Force concluded that, in setting and executing national policy regarding citizens and other persons lawfully present in the United States who are detained as "enemy combatants," both Congress and the Executive should consider how that policy may affect the response of other nations to future acts of terrorism. The Task Force noted that international agreements and principles recognized by the United States, which include the Universal Declaration of Human Rights[10] and the International Covenant on Civil and Political Rights,[11] support the protection of individuals from arbitrary detention and guarantee a meaningful review of a detainee's status. These and other international human rights treaties, conventions and jurisprudence are the result, in sub-

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[10] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) available at http//www.un.org /Overview/rights.html. Article 8 declares that everyone has the right to an effective remedy by the competent national tribunal for acts violating the fundamental rights granted him by the constitution of by law. Article 9 provides that no one shall be subjected to arbitrary arrest, detention or exile. For the role of the United States in the drafting and adoption of the Universal Declaration, *see* Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001).

[11] International Covenant on Civil and Political Rights, available at http//unhchr.ch/html/menu3/b/a_ccpr.htm. Article 9 provides that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." Article 14 describes standards and procedures that should be used in all courts and tribunals. Article 15(1) provides, *inter alia,* that no person shall be held guilty of a criminal offense that does not constitute a criminal offense under national or international law. Articles 14 and 15(1) are referenced in ABA Policy 8C, which is quoted in n. 5, *infra.*

stantial part, of the leadership of the United States and its efforts to promote the rule of law.

The ABA also notes that, throughout the world, constitutions and rules of criminal procedure reflect the United States' influence and leadership in promoting the rule of law. The ABA has played a role in those efforts, especially through its Rule of Law Initiative. This Initiative assists countries, including the former Soviet republics and countries in Europe, Eurasia, Asia, Africa, the Middle East and Latin America, to develop and implement legal reforms and respect for the rule of law.[12] The training programs that the ABA conducts for attorneys and judges in these countries help to ensure the growing force of the rule of law.[13]

Reaffirmation of the rights of U.S. citizens and legal residents to access to the courts encourages the adoption of the rule of law, solidifies our relations with other nations, and works to protect our country and the world from terrorism. The denial of the protection of judicial process to those declared to be "enemy combatants" undermines these important goals. As Lord Peter Goldsmith, then Attorney General of the United Kingdom, stated in a speech to the ABA House of Delegates, the threat of terrorism "does not mean that we have an unlimited license to throw away our values for the sake of expediency"; rather the rule of law requires "subjecting executive action

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[12] *See* About the ABA Rule of Law Initiative, *available at* http://www.abanet.org/rol/about.shtml.

[13] *See* Judicial Reform Programs, *available at* http://www.abanet.org/rol/programs/judicial-reform.html and Legal Profession Reform Programs, *available at* http://www.abanet.org/rol/programs/legal-profession.html (describing the ABA's international training programs for judges and attorneys).

to the scrutiny of the democratic institutions and also of the courts, for judicial scrutiny is a key part of the rule of law."[14]

CONCLUSION

The American Bar Association, as amicus curiae, respectfully requests that this Court hold that the constitutionally guaranteed criminal due process rights that are available to all citizens and persons lawfully present in the United States may not be abrogated during military detention unless such persons are given the opportunity for prompt meaningful judicial review, with meaningful access to, and effective assistance of, counsel for such review, and only if any detention thereafter is pursuant to an Act of Congress that establishes constitutionally permissible standards and procedures.

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[14] American Bar Association: Lord Peter Goldsmith, Attorney General United Kingdom Addresses House of Delegates (speech delivered Feb. 12, 2007), *available at* http://www.abavideonews.rog/ABA404/av.php#rss.