Docket No. 06-7427

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

ALI SALEH KAHLAH AL-MARRI; MARK A. BERMAN, as next friend,

Petitioners-Appellants,

—v.—

COMMANDER S.L. WRIGHT, USN Commander, Consolidated Naval Brig.,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AT CHARLESTON

SUPPLEMENTAL BRIEF AMICI CURIAE OF HUMAN RIGHTS FIRST AND HUMAN RIGHTS WATCH IN SUPPORT OF PETITIONERS

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

Pursuant to Fed. R. App. P. 26.1 and 4th Cir. R. 26.1, *Amici Curiae* Human Rights First and Human Rights Watch advise:

1. Is the party a publicly held corporation or other publicly held entity?

No.

2. Is the party a parent, subsidiary or affiliate of, or a trade association representing, a publicly held corporation, or other publicly held entity (see Local Rule 26.1(b))?

No.

3. Is there any other publicly held corporation, or other publicly held entity, that has a financial interest in the outcome of the litigation (see Local Rule 26.1(b))?

No.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Amici curiae are experts in international human rights law and its application in domestic courts, who have previously filed a brief in support of petitioners and reversal of the decision below. *Amici* submit this supplemental brief to address the new argument in the Government's motion to dismiss in reliance on the Military Commissions Act of 2006, Pub. L. No. 109-366, § 949, 120 Stat. 2600 (2006) [hereinafter MCA].[1]

Amici respectfully urge the Court not to dismiss this case on the premise that Ali Saleh Kahlah al-Marri may eventually be subject to a Combatant Status Review Tribunal (CSRT), because a CSRT will not cure the violations of international human rights law here. While al-Marri stands before this Court, compliance with international human rights law is still possible. At best—that is, if the Government chooses to give al-Marri any post-dismissal review at all—dismissal would result in his transfer to a system in which violation of international human rights law is virtually guaranteed.

[1] Counsel for petitioners has consented to the filing of this brief, and counsel for respondent has advised that it does not oppose this filing.

ARGUMENT

I. If Construed To Apply To Al-Marri, the MCA Would Violate The International Human Rights Law Prohibition Against Arbitrary Detention.

The process that al-Marri has received thus far plainly violates the procedural safeguards that international human rights law requires. *See* Brief for Human Rights First and Human Rights Watch as Amici Curiae Supporting Petr., Al-Marri v. Wright, No. 06-7427 (4th Cir. Nov. 20, 2006) [hereinafter HRF/HRW *Amici* Br. I]. The Government's new proposal—to dismiss this case with merely the prospect of providing al-Marri with a CSRT—serves only to compound the violations by depriving al-Marri of the prompt and adequate judicial review to which he is entitled.

On November 13, 2006, the Government filed a Motion to Dismiss for Lack of Jurisdiction and Proposed Briefing Schedule. In that motion, the Government argues that the MCA divests this Court of jurisdiction over al-Marri's habeas petition because, among other things, al-Marri is "properly detained as an enemy combatant or is awaiting such determination." *See* Gov't Mot. 4 (quoting MCA § 7(a)). The Government argues that al-Marri's detention as an enemy combatant has already been determined twice to be proper, first by the President and then by the district court. In the

alternative, the Government contends that even if al-Marri's status has not yet been determined properly, al-Marri should be regarded as *awaiting* proper determination of his status because the Department of Defense—on the very day the Government filed its motion to dismiss—has ordered in a Memorandum that he be provided with a CSRT in accord with "existing procedures governing such tribunals." *See* Gov't Mot. 4-5 and Memorandum from Deputy Secretary of Defense to Director, Office For The Administrative Review of The Detention of Enemy Combatants (Nov. 13, 2006) (directing that al-Marri be provided a CSRT upon dismissal of his pending habeas litigation).

The one-paragraph Memorandum does not provide a deadline for providing a CSRT, and it does not create a legal right to a CSRT. In essence, the Government's position is that al-Marri's fate should turn on its unfettered discretion to provide him a CSRT. That the Government considers a CSRT a matter of executive grace is evident in the footnote stating that the Department of Defense's "order is not the event that eliminated this Court's jurisdiction and is not necessary to the Government's argument that jurisdiction is lacking. . . . [T]he order indicates only how the Government plans to handle al-Marri in the event the courts agree that the

MCA divested the courts of jurisdiction." Gov't Mot. n.1. In other words, the Government could not premise its motion to dismiss on the fact that al-Marri will be provided a CSRT because, in the Government's view, the Department's Memorandum does not create any binding legal obligation to provide a CSRT. Rather, according to the Government, the MCA divests this Court of jurisdiction as long as it is conceivable that al-Marri will be provided a CSRT at some undetermined time in the future. And nothing in the MCA requires the Government to provide, or gives it any incentive to provide, al-Marri with a CSRT sooner rather than later, or at all.

As an initial matter, the MCA does not apply to al-Marri because the allegations in this case do not justify designating al-Marri as a combatant under the law of war. *See* HRF/HRW *Amici* Br. I 11 (citing Petr.'s Br. 24-25). Separate and apart from that position, however, the MCA, if read as the Government urges here, would violate international law.

Were this Court to dismiss al-Marri's habeas petition, the Government could simply do nothing, and al-Marri, still "awaiting" a hearing before a CSRT, would have no means of challenging the legality of his detention or enforcing his right to a prompt hearing. That result would directly contravene ICCPR Article 9(4) and the right to be free from arbitrary

detention. *See* HRF/HRW *Amici* Br. I 13-21. Indeed, because the Government's proposal would allow it to decide if, when, and how an "enemy combatant" could challenge his status and detention, al-Marri would have no guarantee of ever obtaining any judicial review of his detention, again in violation of international human rights law. *See* HRF/HRW *Amici* Br. I 14-15.

Longstanding canons of statutory interpretation preclude that result. Instead, this Court should read the MCA in a manner compatible with the United States' obligations under international human rights law. *See The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *see also* HRF/HRW *Amici* Br. I n.11. Likewise, as a matter of United States law, the Supreme Court has already rejected the notion that the Government can place al-Marri in the kind of legal limbo it proposes. *See Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2772 (2006); *see also Padilla v. Hanft*, 432 F.3d. 582, 583 (4th Cir. 2005) (denying the Government's motion to withdraw a previous Circuit Court opinion and transfer Padilla to civilian from military custody, where he had been held for over three years, and noting that the government's motion creates, "at least an appearance that the Government

may be attempting to avoid consideration of our decision by the Supreme Court"), *cert. denied*, 126 S.Ct. 1649 (2006).

II. In Any Event, The Government's Proposed Tribunal Process Would Violate International Human Rights Law.

The Government proposes that, if held at all, the CSRT be constituted according to the procedures described in "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba" [hereinafter *Implementation*].[2] These procedures—and any CSRT constituted according to them—codify and, indeed, exacerbate the international human rights law violations that *Amici* previously identified in the Government's *ad hoc* handling and proposed further treatment of al-Marri. *See* HRF/HRW *Amici* Br. I 13-31.

The CSRT runs afoul of international human rights law in four ways. *First*, while international human rights law requires that a detainee be given equal access to the evidence supporting his detention, *see* HRF/HRW *Amici* Br. I 15-17, the Department of Defense's instructions for the proposed

[2] Deputy Secretary of Defense, Memorandum for the Secretaries of the Military Departments et al., "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba" (July 14, 2006), *available at* http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf.

CSRT require the Government to provide the detainee with far less—only an unclassified report summarizing the Government's information, and none of the classified information otherwise considered by the CSRT. Implementation Enclosure (1) at 7(H)(5).[3]

By relying on the Rapp Declaration, without more, the Government violates international human rights law provisions that guarantee al-Marri sufficient access to the evidence against him so that he can mount an adequate defense. *See* HRF/HRW *Amici* Br. I 17-19. There is no reason to believe summaries and statements available under a CSRT process would be any more informative than the Rapp Declaration, or that al-Marri would learn any more about the evidence against him in a CSRT. An analysis of nearly 102 full CSRT hearings, conducted according to the same or substantially similar procedures as those proposed for al-Marri, [4] reveals that in 96% of cases, the detainee began his defense presentation without having

[3] The Government must, however, certify that none of the withheld evidence is exculpatory. Implementation Enclosure (1) at 3.

[4] But for the inclusion of a section titled "Implementation of the Detainee Treatment Act of 2005," the procedures detailed in the memorandum of July 14, 2006 are identical to those detailed in its predecessor of July 29, 2004. *See* Secretary of the Navy, Memorandum for Distribution, "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Naval Base, Cuba" (July 29, 2004), *available at* http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf.

heard or seen any of the facts against him other than in a short unclassified summary of the classified evidence. Mark Denbeaux & Joshua Denbeaux, No-Hearing Hearings 25 (Nov. 17, 2006), *available at* http://law.shu.edu/news/final_no_hearing_hearings_report.pdf. [hereinafter *Seton Hall Rep.*]. In practice, the operative portion of these summaries were as few as three sentences long and often comprised of wholly conclusory statements without any detail, leaving the CSRTs to rely almost exclusively on the classified information. Further, in the minority of cases in which the Government also relied on unclassified evidence, it was not shown to the detainee 93% of the time. Seton Hall Rep. 22. The CSRT hearings at Guantánamo have thus far effectively been trial by secret evidence, and nothing in the Department of Defense's instructions requires more here.

Second, under the proposed CSRT process, al-Marri would not have the safeguards required by international law for presenting a meaningful defense. *See* HRF/HRW *Amici* Br. I 17, 20-21. At a CSRT hearing, al-Marri would essentially be required to take responsibility for his own defense—while, apparently, continuing to be held in a Naval Brig. The proposed CSRT would only provide him with a "Personal Representative"

(PR) to assist him. Implementation Enclosure (1) at 2. The PR is not counsel. Indeed, the PR must specifically inform the detainee at their initial meeting: "I am neither a lawyer nor your advocate, but have been given the responsibility of assisting your preparation for the hearing. None of the information you provide me shall be held in confidence and I may be obligated to divulge it at the hearing." Implementation Enclosure (3) at 3. One Guantánamo detainee described his experience to a CSRT panel this way: My PR "is talking to me like he is an interrogator. How can he be an attorney? . . . I'm afraid to say anything that you might use against me. As you know, there is no attorney here today and I don't know anything about the law." Seton Hall Rep. 16-17 (citing record for detainee ISN #1463). Further, in 78% of the Guantánamo CSRT cases for which records are available, detainees met with their PRs only once. These meetings were brief: 91% were two hours or less, 51% were an hour or less, some were less than ten minutes. Seton Hall Rep. 14. These periods all include time spent on translation and explaining the unfamiliar process. *Id.*

Further, al-Marri would be permitted to present only witnesses who are "reasonably available." Implementation Enclosure (1) at 6. Witnesses

considered not "reasonably available" include any whose appearance is precluded by "security considerations." *Id.* At the CSRT hearings held in Guantánamo Bay for which records are available, detainees have only been able to put on witnesses who happen also to be detainees at Guantánamo Bay (although even for such witnesses, the request was met only 50% of the time). Seton Hall Rep. 27, 28. Since al-Marri is being held in isolation in a Naval Brig, the application of this rule is, at best, unclear and, at worst, guarantees he will be unable to call a single witness on his behalf.

As for other evidence, detainees at Guantánamo Bay CSRT hearings have only been able to submit letters from family and friends; all other requests (even requests as simple as wishing to introduce their passports, court documents, and medical records) were denied, according to available records. Seton Hall Rep. 31-33. Even putting aside practical concerns about al-Marri's ability to collect documents and other evidence while confined

and without a lawyer or an advocate, these precedents suggest that he would be precluded from presenting any evidence at all.[5]

Further, it is virtually impossible for al-Marri to prepare an adequate defense when the charge against him—and the definition of enemy combatant is the closest he has to a charge against him—is legally vague and constantly changing. The Government has never stated any consistent definition of "unlawful enemy combatant." The MCA's definition of "unlawful enemy combatant" includes anyone that a CSRT tribunal

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[5] For example:

Detainee: Why? Because these are accusations that I can't even answer. I am not able to answer them. You tell me I am from Al Qaida, but I am not an Al Qaida. I don't have any proof to give you except to ask you to catch Bin Laden and ask him if I am a part of Al Qaida. To tell me that I thought, I'll just tell you that I did not. I don't have proof regarding this. What should be done is you should give me evidence regarding these accusations because I am not able to give you any evidence. I can tell you no, and that is it.

Tribunal President: Mustafa, we allowed you the opportunity to tell the Tribunal your side of the story so we can consider your story, plus the unclassified evidence from your family. We will consider all of the information you have given us, and this document [Exhibit R-38] in our decision.

Detainee: The evidence of proving I was living in Croatia, I do not know how I can get that to you. My wife can send papers or I can talk to the Ambassador about this. Maybe he can send papers that I was in Croatia.

Tribunal President: You have the opportunity to get that information. I do not know how or what the procedure is, but you really should take the opportunity to get that information.

Detainee: How when I am in GTMO?
Summary of Administrative Review Board Hearings, Detainee ISN #10004, *available at* http://www.dod.mil/pubs/foi/detainees/csrt/Set_53_3870-3959.pdf.

concludes is an unlawful enemy combatant. But the definition that has historically been used by CSRTs is both overbroad and vague. *See* Memorandum from Deputy Secretary of Defense to Secretary of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004), *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf (defining "enemy combatant" as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners."). Indeed, in hearings before the District Court for the District of Columbia, the Government was unable to articulate the definition. *See In re Guantanamo Detainee Cases*, 355 F.Supp.2d 443, 474-78 (D.D.C. 2005). And the definitions proffered thus far do not comport with the definition of combatant under the law of war, which is limited to members of armed forces, militias belonging to a party of the conflict, and civilians for such time that they are taking "active" or "direct" part in hostilities. *See* Third Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Article 4, 6 U.S.T. 3316, 75 U.N.T.S. 3 (1986); Protocol Additional [II] to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977,

Article 13(3), 1125 U.N.T.S. 609, 16 I.L.M. 1442; Protocol Additional [I] to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, Article 51(3), 1125 U.N.T.S. 3, 16 I.L.M. 1391.

Third, in violation of international human rights law, al-Marri would not come before a CSRT with a presumption of innocence that the Government bears the burden of disproving. *See* HRF/HRW *Amici* Br. I 17, 20. The CSRT would determine the propriety of his designation only by a preponderance of the evidence, and the Government's evidence would enjoy a "rebuttable presumption" that it is "genuine and accurate." Implementation Enclosure (1) at 6. Of course, this presumption is hardly rebuttable in practice, as al-Marri is being detained on the basis of statements of undisclosed witnesses and other classified evidence he has not been shown. In the 393 Guantánamo hearings for which records are available, for example, the Government did not present a single witness who could be made subject to cross-examination by the defense. Seton Hall Rep. 19. In reality, it would be al-Marri's impossible burden to disprove classified evidence he cannot see.

Finally, were al-Marri transferred to the jurisdiction of a CSRT and subject to the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-163 §1005(e)(2)(C), and MCA, he would have no meaningful opportunity to establish and contest the use against him of evidence obtained through the torture of others, though such evidence is likely a significant part—if not the sole basis of—the case against him. *See* HRF/HRW *Amici* Br. I 27-31. A CSRT may consider "any information it deems relevant and helpful to a resolution of the issues before it." Implementation Enclosure (1) at 6. The DTA, which applies to CSRT proceedings, *see* Implementation Enclosure (10), stipulates that CSRTs consider "(A) whether any statement derived from or relating to such detainee was obtained as a result of coercion; and (B) the probative value (if any) of any such statement." §1005(b)(1).[6]

[6] The limited appellate review over CSRT determinations available under the Detainee Treatment Act of 2005 § 1005(e)(2)(C) cannot compensate for the basic inadequacies in the CSRT's procedures. The D.C. Circuit cannot, in an appellate posture, cure CSRTs of the procedural violations that are so fundamental as to render their conclusions invalid. The D.C. Circuit Court review under the DTA is limited to whether: (i) the CSRT followed the rules and procedures laid out by the Secretary of Defense for the CSRTs; and (ii) "to the extent the Constitution and laws of the United States are applicable", whether these rules and procedures are lawful. DTA, Pub. L. No. 109-163 § 1005(e)(2)(C). The government has interpreted this statute as precluding the D.C. Circuit from engaging in any sort of factual inquiry to ascertain whether the CSRT reached the proper result and instead, allowing only a narrow review of what the government analogizes to a "final agency decision" or "administrative" record. *See* Government's Response in Opposition to Motion to Compel at 10-20, *Bismallah v. Rumsfeld*, No. 06-1197 (D.C. Cir. Aug. 2, 2006); *See also* Government's Motion for Entry of Protective Order at 13, *Bismallah v. Rumsfeld*, No. 06-1197 (D.C. Cir. Aug. 25, 2006) ("Because review under the DTA is on the record of the CSRT, counsel does not have a need to engage in factual development. . ..); Government's Reply in

While the MCA explicitly prohibits the use of statements obtained through torture in military commissions, there is no analogous prohibition for CSRTs. To the contrary, the CSRT rules indicate that tortured evidence *can* be considered so long as the presiding officer considers it to be "probative."

Support of Motion for Entry of Protective Order at 3, *Bismallah v. Rumsfeld*, No. 06-1197 (D.C. Cir. Nov. 13, 2006) ("[D]iscovery is not appropriate because this Court's review under the DTA is on the record.").

CONCLUSION

The tragic events of September 11 have not been forgotten. But it is precisely in time of conflict that the United States must maintain scrupulous adherence to the rule of law. Both the Constitution and international law protect individuals such as al-Marri from arbitrary deprivation of their liberty. When the Executive violates either source of law, whether in peace or war, it is the province and duty of the courts to reassert the rule of law.

The Government's motion to dismiss should be denied.

Respectfully submitted,

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December 12, 2006

CERTIFICATE OF COMPLIANCE

The Brief has been prepared using Times New Roman 14 point font. It contains 3,325 words.

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Paola Marusich Grgic

CERTIFICATE OF SERVICE

I, Paola Marusich Grgic, employed by Debevoise & Plimpton LLP, counsel of record for *amici curiae* herein, certify:

I am over eighteen (18) years of age. On the 12 day of December 2006, I caused to be served copies of the within Brief by overnight delivery to counsel for the other parties to this action at the following addresses:

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Pursuant to 28 U.S.C. § 1746, I certify under the penalty of perjury that the foregoing is true and correct.

Executed on 12 December 2006.

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Paola Marusich Grgic