No. 06-7427

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

Petitioners-Appellants,

v.

COMMANDER S.L. WRIGHT, U.S.N. Commander,
Consolidated Naval Brig,

Respondent-Appellee.

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

BRIEF FOR THE RESPONDENT-APPELLEE

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JURISDICTIONAL STATEMENT

Petitioners-Appellants Ali Saleh Kahlah al-Marri and Mark A. Berman, as next friend, (hereinafter, al-Marri) invoked the jurisdiction of the district court by filing a petition for a writ of habeas corpus pursuant to 28 U.S.C. 2241. The district court, which had jurisdiction under 28 U.S.C. 1331 and 2241, entered

judgment on August 9, 2006, dismissing al-Marri's petition. Al-Marri filed a timely notice of appeal on August 18, 2006. This Court had subject matter jurisdiction pursuant to 28 U.S.C. 1291 and 2253(a). As explained in respondent's motion to dismiss for lack of jurisdiction, however, the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600 (2006), removed subject matter jurisdiction over this action.

STATEMENT OF THE ISSUES

1. Whether the President has authority under the Constitution and Congress's Authorization for Use of Military Force (AUMF) enacted in the wake of the September 11, 2001, attacks to order the military to detain al-Marri—an alien—as an enemy combatant during the ongoing hostilities.

2. Whether the incremental factfinding proceeding that the district court provided al-Marri pursuant to Hamdi v. Rumsfeld, 542 U.S. 507 (2004), satisfies any due process rights he may have in this habeas proceeding.

STATEMENT OF THE CASE

Al-Marri, a citizen of Qatar, entered the United States on September 10, 2001, and was taken into custody by federal authorities on December 12, 2001, as a material witness in the government's investigation of the September 11 attacks. He was charged in February 2002 in the Southern District of New York in a one-

count federal indictment with possession of 15 or more unauthorized or counterfeit access devices with intent to defraud, in violation of 18 U.S.C. 1029(a)(3), and was subsequently charged in a six-count federal indictment with making false statements to the Federal Bureau of Investigation (FBI), in violation of 18 U.S.C. 1001; making false statements in a bank application, in violation of 18 U.S.C. 1014; and using means of identification of another person for the purposes of influencing the action of a federally insured financial institution, in violation of 18 U.S.C. 1028(a)(7). In May 2003, al-Marri was transferred to the Central District of Illinois on his own motion, and was charged there in a new federal indictment with the same offenses. J.A. 28-30.

On June 23, 2003, the President determined that al-Marri is an enemy combatant in the ongoing conflict against al Qaeda based on, inter alia, his association with al Qaeda and conduct constituting hostile and warlike acts, and ordered the Department of Defense to take custody of al-Marri from the Department of Justice and detain him as an enemy combatant. J.A. 54. That day, on the government's motion, all federal criminal charges against al-Marri were dismissed with prejudice. Al-Marri was transferred to military control and taken to the Naval Consolidated Brig, Charleston, South Carolina, where he has since been detained. J.A. 30-31.

On July 8, 2003, al-Marri's counsel filed a petition for a writ of habeas corpus on his behalf in the United States District Court for the Central District of Illinois. The district court granted the government's motion to dismiss for improper venue. 274 F. Supp. 2d 1003. The United States Court of Appeals for the Seventh Circuit affirmed, 360 F.3d 707, and the Supreme Court denied al-Marri's petition for a writ of certiorari, 543 U.S. 809.

On July 8, 2004, al-Marri filed the present petition for a writ of habeas corpus, claiming, inter alia, that his detention without criminal charge violates the Constitution and laws of the United States. J.A. 13-27. On March 3, 2005, he moved for summary judgment on the constitutional and statutory authority claims. The district court denied the motion on July 8, 2005, finding that al-Marri's "detention is proper pursuant to the AUMF" assuming "that all the facts asserted by [the government] are true." J.A. 123, 125, reported at 378 F. Supp. 2d 673. The district court referred the case to a magistrate judge to provide al-Marri a "fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker," consistent with Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004).

On December 19, 2005, the magistrate judge issued an order establishing an incremental procedure for adjudicating al-Marri's habeas petition consistent with Hamdi. J.A. 186-193. The Government first provided notice of the facts

supporting its classification decision by affidavit. Al-Marri was then provided an opportunity to present his version of the facts, but he "decline[d]." J.A. 231. On May 8, 2006, the magistrate judge recommended that al-Marri's petition be denied because al-Marri had not presented anything that indicated that he had been erroneously classified as an enemy combatant. J.A. 233-249.

The district court, following de novo review of al-Marri's objections, adopted the recommendation of the magistrate judge and dismissed al-Marri's petition. J.A. 340-355, reported at 443 F. Supp. 2d 774. In particular, the district court adopted the magistrate judge's finding that al-Marri had "squandered his opportunity to be heard by purposely not participating in a meaningful way." J.A. 354. The district court entered judgment on August 9, 2006, J.A. 356, and al-Marri filed a timely notice of appeal on August 18, 2006, J.A. 358.

On November 14, 2006, respondents moved to dismiss this appeal for lack of jurisdiction under the MCA. That motion is the subject of separate briefing.

STATEMENT OF FACTS

I. Congress's Authorization for Use of Military Force (AUMF)

On September 11, 2001, the Nation suffered the most deadly attack on United States soil in the Nation's history. One week later, Congress enacted the AUMF, which provides legislative support for the President's use of "all necessary

and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 * * * in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Pub. L. No. 107-40, 115 Stat. 224 (2001). The AUMF recognizes the President's "authority under the Constitution to deter and prevent acts of international terrorism against the United States," and explains that, because the forces responsible for the September 11 attacks "continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States," it is "both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad." Id., Preamble.

Soon after the enactment of the AUMF, the President made it express that the September 11 attacks "created a state of armed conflict" with al Qaeda. Military Order, 66 Fed. Reg. 57,833, §1(a) (Nov. 13, 2001). In the course of that armed conflict, the United States military has seized and detained numerous persons whom the Executive has determined are enemy combatants in the ongoing conflict with al Qaeda, including al-Marri.

II. The Factual Basis for Al-Marri's Military Detention

Al-Marri is a citizen of Qatar, who arrived in the United States on September 10, 2001. After an extensive Executive Branch evaluation process,[1/] the President, as "Commander-in-Chief of the U.S. armed forces," made a formal determination on June 23, 2003, that al-Marri "is, and at the time he entered the United States in September 2001 was, an enemy combatant." J.A. 54. The President found, in particular, that al-Marri is "closely associated with al Qaeda;" that he "engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism with the aim to cause injury to or adverse effects on the United States;" that he "possesses intelligence, including intelligence about personnel and activities of al Qaeda that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda on the United States or its armed forces, other governmental personnel, or

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[1/] The Executive Branch evaluation of al-Marri's case was essentially the same as that used for suspected citizen enemy combatants. J.A. 214-215; see generally 150 Cong. Rec. S2701, S2703-S2704 (daily ed. March 11, 2004). That evaluation includes recommendations from the Director of the Cental Intelligence Agency (CIA), the Secretary of the Department of Defense (DoD), and the Attorney General based on intelligence obtained from the CIA, DoD, FBI, and the Criminal Division of the Department of Justice (DOJ), and a legal opinion analyzing whether the individual can appropriately be designated an enemy combatant from the DOJ's Office of Legal Counsel. All of the recommendations and intelligence are provided to the President for his determination of whether the individual should be detained as an enemy combatant. J.A. 215.

citizens;" that he "represents a continuing, present, and grave danger to the national security of the United States;" and that his "detention is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States." J.A. 54. The government has presented factual support for that determination in the declaration of Jeffery Rapp, Director of the Joint Intelligence Task Force for Combating Terrorism. J.A. 213-227.[2/]

The Rapp Declaration recounts some of al-Marri's acts on behalf of al Qaeda. It states that between 1996 and 1998, al-Marri received training at an al Qaeda terrorist training camp in Afghanistan, where he learned about the use of poisons. In the summer of 2001, he was introduced to Osama Bin Laden by Khalid Shaykh Muhammed (KSM), the "mastermind of [the] 9/11 attacks,"[3/] and volunteered "for a martyr mission or to do anything else that al Qaeda requested." J.A. 216-218.

[2/] The government attached classified and unclassified versions of the Rapp Declaration to its response to the petition for a writ of habeas corpus, and the district court entered a protective order to ensure the proper handling of the classified portions of the declaration. After a subsequent classification review, substantial portions of the declaration were declassified and a redacted unclassified version of the original classified Rapp Declaration was provided to al-Marri on April 5, 2006. See J.A. 213-227. All references herein are to the April 5, 2006 version of the declaration.

[3/] See Final Report of the National Commission on Terrorist Attacks Upon the United States (9/11 Commission Report), Appendix B, Table of Names.

Al-Marri was directed to enter the United States before September 11, 2001, to serve as a "sleeper agent," "facilitat[e] terrorist activities subsequent to September 11,"and "explore computer hacking methods to disrupt bank records and the U.S. financial system." He was considered an "ideal sleeper agent for the United States, because [he] had completed his undergraduate degree in the United States, had no known criminal record, and had a family with whom he could travel." If he could not enter the United States before September 11th, al-Marri was instructed to "cancel all plans and go to Pakistan." J.A. 216-218.

In July 2001, al-Marri contacted the university in Illinois where he had received his undergraduate degree and seemed, according to school officials, "in a rush to commence [graduate] studies in the United States" during the Fall semester. In August 2001, he traveled to the United Arab Emirates, where he met Mustafa Ahmed Al-Hawsawi, the "financial and travel facilitator for [the] 9/11 plot,"[4/] who gave him about $3,000 to buy a laptop computer and about $10,000-$13,000 in funding authorized by KSM. J.A. 216-219.

On September 10, 2001, al-Marri entered the United States with his family. In the aftermath of the September 11 attacks, he was interviewed by the FBI on

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[4/] See 9/11 Commission Report, Appendix B, Table of Names.

October 2, 2001, and December 11, 2001. By December, he "had rarely attended classes" at the university and "was in failing status." J.A. 217, 219.

After the December interview, FBI agents recovered a laptop computer and its recent receipt from al-Marri's residence. The laptop had "highly technical information" about cyanides and other poisonous chemical concentrations denoted "immediately dangerous to life and health" stored on it in amounts that "far exceed[ed]" the amount of information that would quell "the interests of a merely curious individual." It also had websites bookmarked as "favorites" that had "step-by-step instructions to make hydrogen cyanide," "technical and medical descriptions of the effects of various cyanides," "data on the[ir] doses and lethal effects," and "ordering information on various cyanides." The use of hydrogen cyanide, "an exceedingly toxic substance," was taught at terrorist training camps in Afghanistan. J.A. 219-220.

The computer also included information which indicated that al-Marri had undertaken efforts to obtain false identification, credit-card, and banking information. There were "numerous computer programs typically utilized by computer hackers; proxy computer software which can be utilized to hide a user's origin or identity when connected to the internet; and bookmarked lists of favorite websites apparently devoted to computer hacking." There were also "over 1,000

apparent credit card numbers * * * stored in various computer files," websites bookmarked about "fake identification cards; buying and selling credit card numbers; and processing credit card transactions," and a handwritten list in the computer carrying case with about thirty-six credit card numbers, owners, and expiration dates. There was also evidence that al-Marri had set up bank accounts for a fraudulent business and used the stolen credit card numbers to make fraudulent payments to that business. See J.A. 223, 224-226.

Forensic examination of the computer revealed coded communications saved as draft e-mail messages which were addressed to an internet email account linked to KSM. Telephone records also revealed that al-Marri called the United Arab Emirates repeatedly in the days following September 11, each time to a telephone number linked to Al-Hawsawi. He had also saved on his computer several "Arabic lectures by Bin Laden and his associates on the importance of jihad and martyrdom, and the merits of the Taliban regime," directions to terrorist training camps in Afghanistan, and websites titled "Jihad arena," "martyrs," and "Taliban." Also on the computer were photographs of the September 11 attacks, an "animated cartoon of an airplane flying at the World Trade Center," and images of "Arab prisoners of war held by authorities in Kabul." J.A. 220-224.

In sum, there was significant evidence that "al-Marri is an al Qaeda 'sleeper' agent sent to the United States for the purpose of engaging in and facilitating terrorist activities subsequent to September 11," that he had taken actions against the United States while in the country, and that he "must be detained to prevent him from aiding al Qaeda in its efforts to attack the United States, its armed forces, other governmental personnel, or citizens." J.A. 216, 227.

III. The District Court Proceedings

On July 8, 2004, al-Marri filed a petition for a writ of habeas corpus, seeking an order "directing Respondent to charge [al-Marri] with a criminal offense or to release him." J.A. 25. The government responded that al-Marri was lawfully detained as an enemy combatant under the AUMF and the Constitution and attached the Rapp Declaration as evidence supporting the President's determination in that regard. J.A. 28-66. Al-Marri filed a traverse on February 14, 2005, arguing again that the government lacked authority to detain him as an enemy combatant and seeking, in the alternative, "the right to see all the government's inculpatory evidence * * *, to obtain from the government and present exculpatory evidence, to confront and cross-examine the government's witnesses against him, and to compel the government to prove its case by clear and convincing evidence." J.A. 70, 87, 98.

Al-Marri moved for summary judgment on his claims that the government lacked statutory and constitutional authority to detain him as an enemy combatant, arguing that he could not be a "combatant" because he was arrested in the United States, having never fought in Afghanistan. J.A. 115. The district court denied the motion on July 8, 2005, finding that the scope of the AUMF reached al-Marri, assuming the government's factual allegations were true. J.A. 112-126. The district court referred the case to a magistrate judge to conduct a "prudent and incremental" factfinding process consistent with the framework outlined by the plurality in Hamdi, so that al-Marri would have an opportunity to contest the government's factual allegations. J.A. 125-126.

After briefing, the magistrate judge ordered that the parties follow an incremental procedure which essentially tracked the language of Hamdi. J.A. 186-193; see Hamdi, 542 U.S. at 533-534. First, the government would provide notice of the factual basis for al-Marri's classification as an enemy combatant. J.A. 190. Then, al-Marri would need to come forward with more persuasive evidence that he had been improperly classified as an enemy combatant. J.A. 191. If al-Marri was "unable to produce more persuasive evidence than that produced by the government, the inquiry w[ould] end" and the petition would be dismissed. J.A. 191. If, on the other hand, al-Marri was able to adequately "rebut the

government's initial showing, * * * [he would] be released unless the government [agreed to] proceed[] to a full-blown adversary hearing before a neutral decisionmaker." J.A. 191. The magistrate judge deferred determination of the precise rules which would apply to that hearing, noting that it would "be accompanied by greater procedural and evidentiary safeguards" than the first stage, though not necessarily "the full panoply of procedures applicable to a trial." J.A. 191.

The magistrate judge found that, under Hamdi, the Rapp Declaration satisfied the government's initial burden to provide notice to al-Marri of the bases for his detention as an enemy combatant and ordered al-Marri to submit his rebuttal. J.A. 192. In response, al-Marri generally denied that he is an enemy combatant, but "decline[d] at this time the Court's invitation to assume the burden of proving his own innocence" by presenting evidence in support of his claim, asserting that requiring him to rebut the government's showing would be "unconstitutional, unlawful and un-American." J.A. 199.

The magistrate judge recommended the dismissal of al-Marri's habeas petition in a report and recommendation filed May 8, 2006. J.A. 233-249. Because al-Marri had "refused to participate in any meaningful way" in the Hamdi process, the magistrate judge found that "the Executive Branch Declarations [that

al-Marri is an enemy combatant] overwhelmingly prevail," because there is "nothing specific" to contradict "even the simplest of [the Rapp Declaration's] assertions which al-Marri could easily dispute, were they not accurate." J.A. 243-244, 246. For example, the magistrate judge noted, al-Marri had failed to specifically rebut, or explain allegations such as those involving the source of his financial support, his sparse attendance and failing status at graduate school, the presence of poison research, Bin Laden materials, and false credit card numbers on his laptop, and his use of telephone numbers and email accounts connected to known al Qaeda operatives and leaders. J.A. 245-246. "At the very least," the magistrate judge concluded, "these un-rebutted facts demonstrate the lack of any effort on the part of [al-Marri] to establish the falsity of the Executive Branch Declaration, to demonstrate the possibility of an erroneous deprivation, or otherwise to meet his burden of persuasion" under Hamdi. J.A. 246.

Al-Marri filed objections with the district court, arguing that the procedure applied by the magistrate judge was deficient because it did not account for his status as a lawful United States resident, as opposed to an individual "captured during combat on a foreign battlefield." J.A. 274 (quoting Hamdi, 542 U.S. at 516). Following de novo review, the district court overruled al-Marri's objections, adopted the magistrate judge's report, and dismissed the petition. J.A. 340-355.

The district court found that the Hamdi framework applied to al-Marri's case because it applies to all challenges mounted by "alleged enemy combatants" regardless of the location of their capture. J.A. 344. The district court further found that the procedure followed by the magistrate judge necessarily protected al-Marri's due process rights as an alien because it followed the Hamdi framework, which the Court found sufficient for a challenge by a citizen combatant. Therefore, hearsay could be used to satisfy the Government's initial "burden of providing an alleged enemy combatant with notice of the factual allegations against him," and al-Marri had no right to cross-examination or discovery in making his initial response. J.A. 349. The court also adopted the finding of the magistrate judge that al-Marri had "squandered his opportunity to be heard by purposely not participating in a meaningful way." J.A. 354. This appeal followed.

SUMMARY OF ARGUMENT

The district court properly dismissed al-Marri's habeas petition on the merits.

I. The President's authority to detain "enemy combatants" during the current conflict with al Qaeda has been recognized by the Supreme Court in Hamdi v. Rumsfeld, 542 U.S. 507 (2004), and this Court in Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005). As those decisions make clear, Congress, in passing the

AUMF in the wake of the September 11 attacks provided legislative support for the President's use of all "necessary and appropriate force," including detention of enemy combatants, to "protect United States citizens both at home and abroad" from "future acts of international terrorism against the United States." 115 Stat. 224. The Supreme Court's and this Court's prior construction of the AUMF govern this case and compel the conclusion that the President is authorized to detain al-Marri as an enemy combatant. Indeed, because both Hamdi and Padilla involved citizen combatants, the authority recognized in those decisions applies, a fortiori, to alien combatants such as al-Marri.

The President properly determined that al-Marri is an enemy combatant because he engaged in, and continues to pose a very real threat of carrying out, such acts of international terrorism against United States citizens "at home." He is a Qatari citizen who allied himself with al Qaeda, received funding and training from al Qaeda, and traveled to the United States on orders from al Qaeda to serve as a sleeper agent and facilitate further terrorist attacks against the United States from within. Well-settled law recognizes that aliens who "associated with the military arm of the enemy, and with its aid, guidance, and direction entered this country bent on committing hostile acts on American soil" are enemy combatants.

See Ex parte Quirin, 317 U.S. 1, 38-38 (1942). As Quirin makes clear, enemy combatants do not earn immunity by crossing our borders to do us harm.

II. Al-Marri was provided an ample opportunity to challenge his enemy combatant classification in this habeas action that more than satisfies any due process rights he may have. The process provided by the district court is consistent with that approved in Hamdi for use in enemy combatant challenges by citizen detainees. Al-Marri, as an alien detainee, certainly does not qualify for greater protections merely because he was captured on United States soil. See Padilla, 423 F.3d at 390-391. Padilla was also captured on United States soil, but this Court recognized in Padilla that the Hamdi decision still governed. The same is true here.

Al-Marri faults the incremental procedure outlined by the plurality in Hamdi because, at its first stage, it authorizes the use of hearsay evidence and does not provide an opportunity for cross-examination or discovery. This Court, though, is bound by the holding of the Hamdi plurality that the "prudent and incremental" procedure it outlined provides sufficient due process protections even for citizen enemy combatants. The district court appropriately dismissed al-Marri's habeas corpus petition when, after the government had satisfied its burden under the Hamdi framework, al-Marri, despite being given numerous opportunities, failed to

provide any evidence to rebut the government's showing. Al-Marri not only was afforded more than enough process under the Hamdi framework to satisfy any due process rights he may assert, but the fact that he repeatedly refused to avail himself of that process makes him singularly ill-suited to be arguing for more process here.

ARGUMENT

I. THE PRESIDENT HAS AUTHORITY TO DETAIN AL-MARRI AS AN ENEMY COMBATANT DURING ONGOING HOSTILITIES

As the district court found, the President is authorized to detain aliens as enemy combatants when they, like al-Marri, trained with al Qaeda and then "entered this country to continue the battle that the September 11th hijackers began on American soil." J.A. 123. That conclusion follows directly from the Supreme Court's decisions in Quirin and Hamdi, as well as this Court's decision in Padilla. The latter decisions recognize that the President was provided specific legislative authorization to capture and detain enemy combatants in the AUMF. Moreover, that statutory authority correlates with the President's inherent constitutional authority as Commander in Chief to detain enemy combatants during an armed conflict. In directing the detention of al-Marri, the President was therefore acting with both statutory and constitutional authority, i.e., at the zenith

of his powers. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 643-644 (1952) (Jackson, J., concurring).

A. Al-Marri's Detention Is Authorized by the AUMF

1. Hamdi and Padilla compel the conclusion that al-Marri's detention is authorized by Congress and is constitutional

The Supreme Court, in Hamdi, and this Court, in Padilla, confirmed that Congress expressly authorized the President as Commander in Chief to seize and detain enemy combatants for the duration of the conflict with al Qaeda. Hamdi, 542 U.S. at 516 (plurality opinion); id. at 587-588 (Thomas, J., dissenting) (agreeing that Congress authorized detention); Padilla, 423 F.3d at 390-391. The Hamdi Court validated, as constitutional and within the authority of the AUMF, the detention of a presumed United States citizen who "was '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 (plurality opinion) (citation omitted). This Court validated, as also constitutional and within the authority of the AUMF, the detention of a United States citizen arrested on United States soil who was "closely associated with al Qaeda," fought for al Qaeda in Afghanistan, and "thereafter traveled to the United States for the avowed purpose of further prosecuting that war on American soil,

against American citizens and targets." Padilla, 423 F.3d at 389, 391. Because it is well-established that aliens like al-Marri are entitled to lesser constitutional protections than citizens like Hamdi and Padilla, and because al-Marri entered the United States with training, funding, and orders from al Qaeda "to continue the battle that the September 11th hijackers began on American soil," J.A. 123, it follows a fortiori from Hamdi and Padilla that al-Marri's detention is also constitutional and authorized by the AUMF. The detention of alien enemy combatants is a common incident of warfare—much more common than the detention of a Nation's own citizens—and especially in the context of a war launched by an attack on our own soil by alien combatants identically situated to al-Marri, there is nothing exceptional about capture and/or detention taking place in the United States.

As the plurality in Hamdi explained, the "capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'" 542 U.S. at 518 (quoting Quirin, 317 U.S. at 28); accord id. at 587-588 (Thomas, J., dissenting); see Johnson v. Eisentrager, 339 U.S. 764, 786 (1950) ("This Court has characterized as 'well-established' the 'power of the military to exercise jurisdiction over * * * enemy belligerents [and] prisoners of war'") (quoting

Duncan v. Kahanamoku, 327 U.S. 304, 313 (1946)). The authority is especially clear where the combatant is an alien. See id. at 774 ("[e]xecutive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security"); Ludecke v. Watkins, 335 U.S. 160, 173 (1948) (stating that the President is "entrusted * * * with the disposition of alien enemies during a state of war").[5/]

Military detention is not "punishment" but is instead a means to "prevent captured individuals from returning to the field of battle and taking up arms once again." Hamdi, 542 U.S. at 518 (plurality). Preventive detention is such "a fundamental incident of waging war" under "longstanding law-of-war principles" that the Hamdi plurality found it authorized by the AUMF even though "the AUMF does not use specific language of detention." Id. at 519, 521 (plurality) ("Congress' grant of authority for the use of 'necessary and appropriate force' [in

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[5/] The Ludecke and Eisentrager cases involved the Alien Enemy Act, 50 U.S.C. 21, which does not have direct application to this case. Nevertheless, the cases make clear that during wartime, aliens, whether or not resident in the United States, are "constitutionally" subject to different treatment than citizens. See Eisentrager, 339 U.S. at 775. The Eisentrager Court additionally noted that "[a]t common law alien enemies have no rights, no privileges, unless by the king's special favour, during the time of war." Id. at 774 n.6 (citation and internal quotation marks omitted); see also Hamdi, 542 U.S. at 558-559, 575 n.5 (Scalia, J., dissenting) (citing, inter alia, the Alien Enemy Act and Eisentrager to demonstrate different treatment provided alien and citizen detainees in wartime).

the AUMF] include[s] the authority to detain for the duration of the relevant conflict."); id. at 587 (Thomas, J., dissenting).

Hamdi, followed by this Court in Padilla, makes clear that the AUMF constitutionally provided the President authority to detain enemy combatants for the duration of the current conflict. Al-Marri argues that he is not an "enemy combatant" because he was arrested "inside the United States, far from any active battlefield," unlike Hamdi and Padilla who had, at some point, engaged in combat on an "active battlefield" as "members of the armed forces." Br. 20-24. But that argument ignores the nature of the September 11 attacks, which triggered the passage of the AUMF, the explicit language of Hamdi and Padilla, and the legal background against which the AUMF was enacted. Each affirms the common-sense principle that an enemy combatant may be captured and detained in the United States when he has come to the United States to attack the country from within. The enemy is not entitled to immunity simply because he has entered our territory to attack us at home; the September 11 attacks underscore the very real threat posed by alien enemy combatants within our borders.[6/]

[6/] As the district court recognized, nothing in Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006), erodes the force of Hamdi's conclusion that the AUMF authorizes the capture and detention of enemy combatants. In Hamdan, the Court held that the AUMF did not authorize the military commission at issue, but the Court took it as a given that Hamdan was subject to detention as an enemy combatant during ongoing

There can be no serious doubt that Congress, in passing the AUMF, sought to authorize the use of "all necessary and appropriate force" against aliens who have come to the United States to take an active part in al Qaeda terror operations. The AUMF emphasizes that it is "necessary and appropriate * * * to protect United States citizens both at home and abroad" because the individuals and groups responsible for the "acts of treacherous violence" that were committed on September 11 "continue to pose an unusual and extraordinary threat to the national security * * * of the United States." 115 Stat. 224 (emphasis added). The individuals directly responsible for carrying out those attacks were aliens who entered the United States to carry out al Qaeda orders and who were in their "home[s] inside the United States" in the days before the September 11 attacks. Clearly, then, Congress intended that the AUMF reach other aliens who have also entered the United States to carry out violent, harmful, war-like acts on United States soil against United States citizens on behalf of al Qaeda. Indeed, al-Marri's reading of the AUMF relies on the absurd notion that when Congress authorized the use of military force to respond to the September 11 attacks it did not intend to reach individuals identically situated to the September 11 hijackers, none of whom had engaged in combat operations against our forces on a foreign battlefield. It

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hostilities.

would also preclude the use of military force at the precise moment when the threat of a repeat of September 11 is at its greatest: when trained al Qaeda agents have successfully crossed our borders and are preparing to carry out an act of war against our citizens on al Qaeda's behalf. Congress's response to the brutal attacks of September 11 and effort to prevent their repeat was not so feckless.

Al-Marri unsuccessfully tries to limit Hamdi's authority to detain enemy combatants to "armed Taliban soldier[s] captured on a battlefield in Afghanistan who [were] 'part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in armed conflict against the United States there.'" Br. 20 (quoting Hamdi, 542 U.S. at 516). The Hamdi plurality made clear, however, that it was not limiting the category of "enemy combatants" to such individuals, but was instead describing the individual before the Court. The plurality explicitly left "[t]he permissible bounds of the category [of enemy combatant to] be defined by the lower courts as subsequent cases are presented to them." Hamdi, 542 U.S. at 522 n.1. Moreover, in Padilla, this Court, after confronting a virtually identical effort to limit Hamdi to its facts, found that an individual who was "closely associated with al Qaeda" and was "seized on American soil" "unquestionably qualifie[d] as an 'enemy combatant'" because he had "t[aken] up arms on behalf of [al Qaeda]" and had thereafter "crossed our

borders with the avowed purpose of attacking this country and its citizens from within [like the] persons who committed the atrocities of September 11." Padilla, v. Hanft, 432 F.3d 582, 586 (4th Cir. 2005); Padilla, 423 F.3d at 389, 391.

As recognized by this Court in Padilla, the legal background against which Congress passed the AUMF further confirms that its enemy combatant detention authority reaches aliens who "associated with the military arm of the enemy, and with its aid, guidance, and direction entered this country bent on committing hostile acts on American soil." 423 F.3d at 392 (citing Quirin, 317 U.S. at 37-38). In Quirin, the Supreme Court recognized that the "universal agreement and practice" among nations is that enemy combatants are "subject to capture and detention [during wartime]," 317 U.S. at 30-31, and rejected any suggestion that the detainees were "any less belligerents if, as they argue, they have not actually * * * entered the theatre or zone of active military operations," id. at 38. The "enemy belligerents" in Quirin had been trained "at a sabotage school near Berlin, Germany * * * in the use of explosives" and had then traveled to the United States with funding from the German High Command in order "to destroy war industries and war facilities in the United States." Id. at 21.[7/] The saboteurs buried their

[7/] While the Quirin opinion does not address the issue, it appears that only two of the saboteurs "were formally enrolled in the German army." Michael Dobbs, Saboteurs: The Nazi Raid on America 204 (2004).

uniforms upon arrival in the United States and "proceed[ed] in civilian dress" to New York and Chicago, where they were arrested. Ibid. Far from providing a basis for immunity, the Court cited their attempt to look like civilians as a reason in favor of according them "the status of unlawful combatants"—it was by posing as civilians that they intended to maintain their cover in the United States until they were able to "commi[t] hostile acts involving destruction of life or property." Id. at 35. Therefore, the Court concluded, it was "without significance that [they] were not alleged to have borne conventional weapons or that their proposed hostile acts did not necessarily contemplate collision with the Armed Forces of the United States." Id. at 37. The saboteurs had "passed our military and naval lines and defenses or went behind those lines, in civilian dress and with hostile purpose" and had "remained upon our territory in time of war" seeking to commit "hostile acts" against the country. Id. at 37-38. They were, therefore, "enemy belligerents." Ibid. [8/]

Similarly, this Court, applying Quirin, which was reaffirmed in Hamdi, has found that the "locus of capture" in the United States is "irrelevant" to enemy

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[8/] History shows that, notwithstanding the fact that hundreds of thousands of captured alien enemy combatants were detained in the United States during World War II, Quirin is the only reported decision in which an alien enemy combatant maintained a habeas action seeking release during wartime. And, in Quirin, the alien enemy combatant's claims were denied.

combatant status. Padilla, 423 F.3d at 393. As this Court recognized, an enemy combatant "poses the same threat of returning to the battlefield" when captured in the United States as he would if captured abroad. Ibid. Indeed, the risk of returning to the "battlefield" in the current conflict is especially pronounced given al Qaeda's persistent efforts to move the "battlefield" to United States soil, and its success in doing so on September 11, 2001. See, e.g., 9/11 Commission Report, Chapter 5, "Al Qaeda Aims at the American Homeland."

Al-Marri relies on dicta in Ex Parte Milligan, 71 U.S. (4 Wall.) 2, 120-121 (1866), that the "Constitution * * * covers with the shield of its protection all classes of men, at all times, and under all circumstances," to argue that his locus of capture in the United States requires that he be given "the same right to be charged and tried as all citizens arrested in the United States." Br. 29. His reliance is misplaced as this Court and the Supreme Court have both held that Milligan does not apply to enemy combatant challenges. Padilla, 423 F.3d at 396-397; see Hamdi, 542 U.S. at 523 (Quirin "both postdates and clarifies Milligan," providing "the most apposite precedent" for enemy combatant challenges). And al-Marri's presence at an al Qaeda training camp and entrance into the Untied States just a day before the September 11 attacks makes Milligan factually distinguishable as well as legally unhelpful. Moreover, not only is it well established that aliens are

entitled to lesser constitutional protections than those afforded citizens, see, e.g., Hamdi, 542 U.S. at 559 (Scalia, J., dissenting),[9/] but it is also clear that the citizens arrested in the United States in Padilla and Quirin did not possess a constitutional right to be charged criminally because of their status as enemy combatants.

The AUMF provides no indication that Congress intended to diverge from the "universal * * * practice" of detaining alien enemy combatants who have entered the country "bent on committing hostile acts on American soil." Padilla, 423 F.3d at 392; see Quirin, 317 U.S. at 37-38. The nature of the September 11 attacks makes any suggestion of such a deviation absurd. Therefore, even though al-Marri was arrested "inside the United States," Br. 21, his detention as an enemy combatant is still constitutional and authorized by the AUMF, because he entered

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[9/] The proposition that citizens and non-citizens may be extended different constitutional protections is well established. See, e.g., United States v. Verdugo-Urquidez, 494 U.S. 259, 273 (1990). Cf. Mathews v. Diaz, 426 U.S. 67, 79-80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."). The Court's decision in Rasul v. Bush, 542 U.S. 466 (2004), does not affect this understanding. Rasul decided only the question whether United States courts have statutory jurisdiction over petitions for writs of habeas corpus filed by aliens located outside United States territory. See 542 U.S. at 478-479; see also Khalid v. Bush, 355 F. Supp. 2d 311 (D.D.C. 2005). But see In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005).

the country with training, funding, and orders from al Qaeda to facilitate and conduct terrorist activities. See pp. 7-12, supra.[10/]

2. The AUMF does not require a "clear statement" to authorize detention of enemy combatants arrested in the United States

Al-Marri seeks to impose a rule that would require a "clear congressional statement" before the government could "arrest and detain as 'enemy combatants' aliens lawfully residing in the United States." Br. 16-20. The Supreme Court in Hamdi, however, declined to adopt such a clear-statement rule,[11/] and this Court in Padilla not only found that there is no "clear statement rule" but also that, even if there were, "the AUMF constitutes such a clear statement," Padilla, 423 F.3d at

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[10/] Al-Marri cites law-of-war principles which, he asserts, prevent "civilians" from being detained as "combatants." Br. 21-24. That argument is premised on an assumption that anyone present in the United States is a "civilian" and not an enemy combatant. That assumption, clearly, is flawed because resident aliens carried out the September 11 attacks. The argument is also clearly flawed because the Supreme Court has found that enemy combatants are no less enemy combatants when they enter the United States to do harm within our borders. See Quirin, 317 U.S. at 37-38 (cited in Hamdi, 542 U.S. at 519); and that principle is not limited to formal enrollees, see note 8, supra.

The Hamdi plurality provided for a factfinding process to protect against erroneous detentions of noncombatants. 542 U.S. at 534. The district court closely followed that process and determined that al-Marri—far from being a civilian—is properly detained as an enemy combatant.

[11/] See Petitioner's Brief, Hamdi v. Rumsfeld (U.S. No. 03-6696), 2004 WL 378715, at *47; Petitioner's Reply Brief, Hamdi v. Rumsfeld (U.S. No. 03-6696), 2004 WL 865270, at *19.

395-396, even in the case of a citizen combatant detained in the United States. A fortiori, the same clear statement would extend to the detention of alien enemy combatants.

Al-Marri again seeks to distinguish his case from Hamdi and Padilla by pointing to his arrest in the United States. Br. 16. That factual difference is inconsequential. In Quirin, where the enemy combatants were arrested in the United States, the Supreme Court not only upheld the President's authority to detain and, indeed, impose punishment on enemy combatants (both citizen and alien) who enter the country, it explained that the President's directive to detain enemy combatants during a war is "not to be set aside by the courts without the clear conviction that [it is] in conflict with the * * * laws of Congress." 317 U.S. at 25, 28. In other words, if there is a clear-statement rule when enemy combatants are involved, the rule runs in the opposite direction of that advocated by al-Marri and in favor of maximizing presidential authority.

The cases that al-Marri cites in support of a clear-statement rule, Br. 16, 17, do not require a different result because they do not involve, limit, or negate "the well-established power of the military to exercise jurisdiction over * * * enemy belligerents." Duncan, 327 U.S. at 313; see Zadvydas v. Davis, 533 U.S. 678 (2001) (involving removal of aliens who are inadmissible or likely to be a crime

risk); Brown v. United States, 12 U.S. (8 Cranch) 110 (1814) (involving seizure of personal property unconnected to hostilities); Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804) (involving statute for prosecution of owners of American vessels that did not obey trade restrictions with enemy). All of these cases pre-date Hamdi and most were used to argue unsuccessfully for a clear statement rule there. Certainly, there is no basis for requiring a clearer statement for the detention of aliens than citizens.[12/] Accordingly, even if there were a "clear statement rule," the AUMF provides the requisite clarity. See Hamdi, 542 U.S. at 516-517 (plurality); id. at 587-589 (Thomas, J., dissenting); Padilla, 423 F.3d at 396.[13/]

[12/] Similarly, al-Marri's reliance on the specific detention authorization included in the Alien Enemy Act of 1798, 50 U.S.C. 21, et seq., see Br. 17, is misplaced. That Act provides authority to detain civilian aliens, rather than combatant aliens, and so it does not speak to, or limit in any way, the authority to detain alien enemy combatants during wartime. See Ex Parte Endo, 323 U.S. 283, 300-302 (1944) (distinguishing between authority to detain enemy combatants and civilian aliens).

[13/] Contrary to al-Marri's claim that, had "Congress intended to subject the millions of aliens from allied nations who live within our borders to Executive detention without charge, it would [have said] so clearly," Br. 17 n.3, the government has never argued that the AUMF authorizes such wide-spread categorical detention. This case does not involve the potential detention of "millions of aliens;" it involves the potential detention of individuals like al-Marri who enter the United States with aid and orders from al Qaeda to exact harm on the United States and its citizens. In the more than five years since the September 11 attacks, there have been only two such individuals detained in the United States: Padilla, a citizen, whose detention as an enemy combatant this Court upheld, and al-Marri. The AUMF, not to mention the President's own constitutional authority, readily authorizes the detention of such enemy combatants.

3. The PATRIOT Act and federal criminal statutes do not limit the detention authority of the AUMF

Nor can al-Marri derive any support from the fact that the PATRIOT Act and federal criminal laws separately authorize limited detentions for reasons unrelated to whether an individual is an "enemy combatant." See Br. 14-15, 19-20. The PATRIOT Act's detention provisions authorize the Attorney General to detain, pending removal proceedings or criminal prosecution, resident aliens suspected of terrorist activity, espionage, illegal export, or "any other activity that endangers the national security," without regard to whether the alien is associated with al Qaeda or whether there is an armed conflict. 8 U.S.C. 1226a(a). The AUMF authorizes the President to order alien enemy combatants to be detained in military custody during the armed conflict with al Qaeda. Al-Marri's contention that the PATRIOT Act's specific detention provisions "trump" the AUMF's general detention authority cannot be squared with the fact that the provisions relate to two separate types of detention and two separate groups of individuals. Moreover, the same argument based on the PATRIOT Act was made to no avail in Hamdi and Padilla.[14/] It is equally meritless here.

[14/] See Petitioner's Reply Brief, Hamdi v. Rumsfeld (U.S. No. 03-6696), 2004 WL 865270, at *19-*20; Petitioner-Appellee's Brief, Padilla v. Hanft (4th Cir. No. 05-6396), 2005 WL 1410172, at *26 n.14.

Al-Marri's argument that the AUMF renders "superfluous" other ways to "prevent and punish terrorist attacks on U.S. soil" under the federal criminal laws is similarly unavailing (and was similarly raised and rejected in Hamdi). Br. 19-20, 20 n.4. While there are criminal statutes that may be used for prosecuting suspected terrorists, nothing requires the President to process captured alien enemy combatants through the civilian criminal justice system simply because their actions as combatants may have also violated some federal criminal law. Such laws were also available to the Executive in Quirin, but military detention and trial was nonetheless appropriate for the combatants in that case.

Indeed, that the availability of criminal prosecution should not preclude military detention during wartime is especially true with respect to enemy alien combatants like al-Marri. Justice Scalia, who relied in his Hamdi dissent on the possibility of a treason prosecution against disloyal citizens who take up arms against the United States, explicitly limited his opinion to citizens, 542 U.S. at 554, 558-561, 577 (Scalia, J., dissenting). He acknowledged that there are important legal and historical differences between the Executive Branch's authority over aliens and its authority over citizens during times of armed hostilities, and recognized that it is "is probably an accurate description of wartime practice with respect to enemy aliens" that they be "detained until the cessation of

hostilities and then released." Id. at 559 (Scalia, J., dissenting) (internal citation omitted). With respect to enemy alien combatants especially, then, the President is not limited to punishing terrorist acts under the federal criminal laws. He may also thwart the acts entirely through the use of the AUMF's detention authority.[15/]

B. The President, In His Capacity As Commander in Chief, Has Inherent Constitutional Authority To Order Al-Marri's Detention

Al-Marri argues that the President lacks inherent constitutional power to detain him. Br. 34-36.[16/] He is mistaken. The Constitution provides that the President is the Commander in Chief of the Army and Navy, U.S. Const. Art. II,

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[15/] Although the AUMF provides ample statutory authority for al-Marri's detention, it bears noting that the newly enacted Military Commissions Act further buttresses the President's inherent authority to detain alien enemy combatants. Without regard to whether the MCA applies to al Marri (an issue addressed in the briefing concerning the motion to dismiss), the MCA underscores at a minimum that: (1) Congress was aware of and did not object to the exercise of the military's traditional authority to detain enemy combatants during ongoing hostilities; (2) Congress not only did not object to the detention of alien enemy combatants, it provided streamlined procedures for determining their status; (3) Congress provided less protection for alien enemy combatants than citizen enemy combatants; and (4) it did so without regard to place of capture or detention. Individually and collectively, these considered judgments strengthen the Executive's authority and undermine al-Marri's objections.

[16/] In view of the fact that the AUMF authorizes the President to detain al-Marri, the Court, as in Padilla, need not reach the issue of the President's constitutional authority. In any event, as explained in the text above, such constitutional authority clearly exists.

§ 2, cl. 1, and gives the President war-making powers which include the authority to capture and detain individuals involved in hostilities against the United States. See Quirin, 317 U.S. at 25-26; Hamdi v. Rumsfeld, 296 F.3d 278, 281-282 (4th Cir. 2002) (citing The Prize Cases, 67 U.S. (2 Black) 635, 670 (1862)); see also Hamdi v. Rumsfeld, 316 F.3d 450, 463 (4th Cir. 2003) (the war powers of "the President, as Commander-in-Chief, * * * include the authority to detain those captured in armed struggle [and] likewise extend to the executive's decision to * * * detain alien enemies during the duration of hostilities") (citations and footnote omitted). Where the detained enemy is an alien, the President's inherent authority as Commander in Chief is at its peak because the alien's detention implicates sensitive matters of national security, foreign policy, and military affairs. "[A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." Mathews, 426 U.S. at 81 n.17 (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 588-589 (1952)). Therefore, as the Supreme Court has recognized, "[e]xecutive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history,

essential to war-time security." Eisentrager, 339 U.S. at 774; Ludecke, 335 U.S. at 173 (President is "entrusted * * * with the disposition of alien enemies during a state of war").

Contrary to al-Marri's argument, Br. 34-36, the President's broad authority as Commander in Chief over enemy aliens is not limited to circumstances in which the combatant is captured on a foreign battlefield. In Quirin, the Supreme Court recognized that "entry upon our territory in time of war by enemy belligerents, including those acting under the direction of the armed forces of the enemy, for the purpose of destroying property used or useful in prosecuting the war, is a hostile and war-like act," 317 U.S. at 36-37. Zadvydas is not to the contrary. There, the Supreme Court held that aliens "found to be unlawfully present in the United States" could not be detained indefinitely while the government secured their removal pursuant to the Immigration and Nationality Act, but the Court explicitly exempted suspected terrorists from its holding. 533 U.S. at 696 ("Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.").

The other cases on which al-Marri relies are also inapposite. He relies on Justice Jackson's observation in Youngstown Sheet & Tube, 343 U.S. at 643-644 (Jackson, J., concurring), that the President is not the "Commander-in-Chief of the country, its industries and its inhabitants," but as al-Marri himself seems to acknowledge, Br. 36, Justice Jackson's remark was directed to the President's authority to seize real property within the country, not his authority to detain enemy operatives who entered the country during wartime to wage the war from within. And, nothing in the decision purported to address, let alone undermine, the Court's holding in Quirin just a decade earlier.

Similarly misplaced is al-Marri's reliance on dicta in Brown, 12 U.S. at 126, that the inclusion of detention authority in the Alien Enemy Act of 1798, 50 U.S.C. 21, "affords a strong implication that [the President] did not possess those [detention] powers by [virtue] of the declaration of war." The Act concerned detention of aliens who had not engaged in hostile acts, but were considered "enemy aliens" by virtue of their foreign citizenship during a declared war. The inclusion of detention authority for such civilian aliens does not negate the well-established inherent war-making authority to detain enemy combatant aliens. See Endo, 323 U.S. at 300-302.

Accordingly, while the Court need not reach the constitutional question in this case because of the existence of statutory authority under the AUMF, the Constitution nevertheless provides an independent and entirely sufficient basis to authorize al-Marri's wartime detention.

II. THE HAMDI CLASSIFICATION FRAMEWORK APPLIES TO THIS CASE AND MORE THAN SATISFIES ANY DUE PROCESS RIGHTS AL-MARRI MIGHT HAVE

Al-Marri's challenge to the process that the district court used in adjudicating his habeas petition is just as meritless as his threshold argument that the President lacked the authority to detain him altogether. The district court simply followed the framework that the Supreme Court established for adjudicating habeas petitions filed on behalf of citizen enemy combatants. It follows, a fortiori, that the framework that the Supreme Court deemed constitutionally sufficient for citizen combatants is constitutionally adequate for alien enemy combatants as well. Moreover, al-Marri repeatedly failed to take advantage of the process he was provided under Hamdi, thereby making his claim for more process now particularly unpersuasive.

A. The Hamdi Burden-Shifting Framework Provides Ample Due Process Protections

The plurality in Hamdi established a framework for enemy-combatant cases that allows a citizen-detainee to challenge his classification as an "enemy combatant," but also recognizes the government's "interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States." 542 U.S. at 531-532 (plurality opinion) (citations omitted); see also id. at 529 (citing Mathews v. Eldridge, 424 U.S. 319 (1976)). The plurality emphasized that, with enemy combatant challenges, the "due process assessment must pay keen attention to the particular burdens faced by the Executive in the context of military action." Id. at 535. Therefore, "enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict" and still provide due process to the enemy combatant. Id. at 533. Indeed, "the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting." Id. at 535.

The plurality set forth a basic framework for enemy combatant challenges that "sufficiently address[es] the 'risk of erroneous deprivation' of a detainee's liberty interest while eliminating certain procedures that have questionable

additional value in light of the burden on the Government." Hamdi, 542 U.S. at 534. To this end, the plurality provided for the modification of procedures and evidentiary rules applicable to ordinary civil and criminal cases. For example, the plurality recognized that "[h]earsay * * * may need to be accepted as the most reliable available evidence from the Government in such a proceeding." Hamdi, 542 U.S. at 534. The plurality further stated that, in contrast to a criminal prosecution where the defendant enjoys a presumption of innocence, "the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided." Ibid.

The plurality found that any court proceedings in this sensitive area must be "both prudent and incremental." Hamdi, 542 U.S. at 539. First, the plurality explained, the government must provide "notice of the factual basis for [the detainee's] classification" as an "enemy combatant." Hamdi, 542 U.S. at 533-534. To satisfy this burden of production, the government should not be burdened further than "requiring a knowledgeable affiant to summarize" preexisting "documentation regarding battlefield detainees," id. at 534. Then, the burden of production shifts to the detainee, who must produce "more persuasive evidence" that he is not an enemy combatant. Ibid.

The requirement that the detainee provide "more persuasive evidence" reflects the burden of persuasion which remains on the petitioner at all times, consistent with the rule applied in traditional habeas actions. See Garlotte v. Fordice, 515 U.S. 39, 46 (1995) ("[T]he habeas petitioner generally bears the burden of proof."); Eagles v. United States ex rel. Samuels, 329 U.S. 304, 314 (1946) ("[Petitioner] had the burden of showing that he was unlawfully detained."); Williams v. Kaiser, 323 U.S. 471, 472, 474 (1945) (similar); Walker v. Johnson, 312 U.S. 275, 286 (1941) (similar); Johnson v. Zerbst, 304 U.S. 458, 468 (1938) (similar). Placing the burden of persuasion on the petitioner fully comports with principles of due process. See Mathews, 424 U.S. at 336 (noting that the plaintiff (not the government) "bears the continuing burden of showing" that he is eligible for benefits, notwithstanding the government's obligation of providing notice).[17/]

[17/] The magistrate judge's treatment of the ultimate burden of persuasion is the one aspect of his report and recommendation that does not properly reflect the Hamdi due process framework. The report states that "[t]he burden of proof at all times remains on the government to show by clear and convincing evidence that the petitioner is an enemy combatant." J.A. 236. Nothing in Hamdi places that heightened burden on the government, and it is inconsistent with the deference that courts owe the Executive's determinations during wartime and to the general rule that habeas petitioners bear the burden of proving their right to release. The government objected to the heightened burden conceived by the magistrate judge. J.A. 353. The district court found it unnecessary to reach the issue in this case because it found that "the Government clearly meets any burden of persuasion which could reasonably be imposed on it at

B. The Hamdi Framework Protects Due Process Rights Regardless of the Locus of Capture

In this case, the magistrate judge ordered a "prudent and incremental" process that fully complied with the Supreme Court's decision in Hamdi. Because the Hamdi framework was deemed sufficient for a challenge involving a United States citizen, the framework more than protected any due process rights that al-Marri may have as an alien resident. Al-Marri disagrees, arguing that his case requires protections in addition to those provided under Hamdi because he was captured in the United States, unlike the detainee in Hamdi, who was captured on the battlefield in Afghanistan. Br. 40. That argument is without merit.

Indeed, many of al-Marri's arguments in this regard are merely a rehash of his unavailing efforts to distinguish Hamdi and Padilla factually from this case with respect to the President's authority to detain enemy combatants. For example, he argues that the Hamdi framework applies only to cases where the detention follows a "garden-variety capture of an armed enemy soldier amid combat on a foreign battlefield," Br. 40-41. But, just as the distinction between a battlefield capture and a capture in the United States has no force in the context of

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this initial stage." Id. at 355. If the Court believes it necessary to reach the issue, it should hold that the burden of persuasion remains on the habeas petitioner at all times, consistent with the traditional rule in habeas actions.

the President's authority to detain enemy combatants under the AUMF," see supra, Section I, it also has no force in the application of the Hamdi process to challenges of that authority. And Padilla establishes that the Hamdi decision extends beyond challenges involving "battlefield" enemy combatants to challenges involving enemy combatants captured in the United States.

Al-Marri's argument that his capture in the United States requires a different "balance" of procedural rights than those determined sufficient in Hamdi is similarly flawed. Br. 41-43 (citing Hamdi, 542 U.S. at 529; Mathews, 424 U.S. at 335). The Hamdi Court found that, "[i]n the words of Mathews, process of this sort would sufficiently address the 'risk of erroneous deprivation' of a detainee's liberty interest while eliminating certain procedures that have questionable additional value in light of the burden on the Government." 542 U.S. at 534. Al-Marri's challenge of his enemy combatant classification falls within that finding regardless of the location of his arrest. Moreover, the relevant distinction between this case and Hamdi when it comes to assessing the scope of the constitutional protections, including due process, to which al-Marri may be entitled is that Hamdi was a citizen and al-Marri is not. The process that the plurality held was constitutionally adequate for the citizen in Hamdi is necessarily sufficient for the alien here.

Al-Marri contends that the Hamdi procedure cannot "sufficiently address the risk of erroneous deprivation" in his case because "there is a much greater risk of error when the President declares that an individual lawfully present inside the United States, and arrested in his home, is an 'enemy combatant'" than there is in a "traditional battlefield capture." Br. 42. This Court has previously considered the argument that "there is a higher probability of an erroneous determination that one is an enemy combatant when the seizure occurs on American soil," and has properly rejected it because "Hamdi itself provides process to guard against the erroneous detention of non-enemy combatants." Padilla, 423 F.3d at 394 n.4. That holding is equally applicable, and binding, here.

Al-Marri faults the Hamdi process for its presumption that a detainee is an enemy combatant. Br. 46. He argues that the required "rational connection between the fact proved and the ultimate fact presumed" is missing in his case because "persons arrested in Peoria are, in all probability, civilians." Ibid. (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 28 (1976)). But his argument fails to identify the relevant characteristics of the presumption. He is not merely a person residing in America; he is an alien in the United States who has been determined by the President to be an enemy combatant following an extensive Executive Branch review process. That process resulted in a finding

that is entitled to great deference. Applying the Hamdi presumption is perfectly rational in this context, regardless of the locus of the combatant's capture and detention.

Al-Marri also contends that the Hamdi framework does not adequately provide for his situation because unlike a "non-combatant [on the battlefield] who knows why he was on the battlefield in the first instance," a non-combatant in America cannot be expected to know "why [the government] has plucked [him] from among millions of other civilians." Br. 47. On that issue, he argues, "the government is in the best position to marshal the relevant evidence," and so "should bear the burden of producing it." Id. at 47-48. But at the first step of the Hamdi framework, the government provided al-Marri with detailed factual notice of the basis for his enemy combatant designation. Al-Marri, therefore, knows precisely why the government has classified him as an enemy combatant. Yet, al-Marri declined even to attempt to explain if or why the government's information was incorrect. Indeed, as the magistrate judge explained, despite being given multiple opportunities to do so, al-Marri produced "nothing specific" to contradict "even the simplest of [the Rapp Declaration's] assertions which al-Marri could easily dispute, were they not accurate." J.A. 243-244, 246. "At the very least," the magistrate judge concluded, the detailed, "un-rebutted facts" of the Rapp

Declaration "demonstrate the lack of any effort on the part of [al-Marri] to establish the falsity of the Executive Branch Declaration, to demonstrate the possibility of an erroneous deprivation, or otherwise to meet his burden of persuasion" under the Hamdi framework. Id. at 246.

Al-Marri nonetheless argues that he cannot "meaningfully contest" the government's allegations because he does not have an "opportunity to challenge the veracity, credibility, and reliability of the individuals on whose statements the allegations are based." Br. 48. The same was true of the government's declaration in Hamdi. Indeed, the Rapp Declaration submitted by respondents here is substantially more detailed that the government's declaration submitted in Hamdi. The plurality in Hamdi made clear that "a habeas court in a case such as this may accept affidavit evidence like that contained in the Mobbs Declaration, so long as it permits the alleged combatant to present his own factual case." 542 U.S. at 538. A fortiori, the Rapp Declaration is more than sufficient under Hamdi.

Al-Marri also fails to recognize that the Hamdi framework is designed to proceed incrementally, such that the opportunity to question the weight or strength of the government's evidence arises only, if at all, after the detainee comes forward with an alternate version of events that persuasively indicates that he is not an enemy combatant, i.e., that he is the equivalent of an "errant tourist,

embedded journalist, or local aid worker." Hamdi, 542 U.S. at 533. This case never reached that step in the process because al-Marri, having received notice of the basis for his detention as an enemy combatant, chose not to come forward with any alternative version of events, much less one that would support an assertion that he is not an enemy combatant. As the district court concluded, the fact that al-Marri made no attempt to satisfy his burden under the Hamdi framework provides all the more reason to dismiss his habeas petition. Al-Marri's repeated refusal to avail himself of the procedural protections under the Hamdi framework certainly provides no reason to embrace his claim that he is entitled to even more process. Moreover, habeas courts have long taken such equitable considerations into account in determining the proper disposition of habeas petitions. See, e.g., Bracy v. Gramley, 520 U.S. 899, 904 (1997) (federal courts have the "power to 'fashion appropriate modes of procedure,' including discovery, to dispose of habeas petitions 'as law and justice require'") (quoting Harris v. Nelson, 394 U.S. 286, 299-300 (1969)).

C. Al-Marri is Not Entitled to Discovery Against the Government or an Evidentiary Hearing at this Stage of the Hamdi Proceeding

Al-Marri's claim of entitlement to sweeping and unprecedented discovery and an evidentiary hearing to probe the Executive's determinations, Br. 60-64, is

fundamentally inconsistent with the Hamdi due process framework. At the first stage of the Hamdi framework, the enemy-combatant proceedings are not an opportunity for detainees to conduct discovery against the government's presumptively correct evidence. Instead, the proceeding is "limited to the alleged combatant's acts," 542 U.S. at 535, meaning that the combatant can either deny or explain the alleged acts without needing discovery. In fact, the Hamdi plurality specifically rejected the district court's discovery orders in that case, which had required the government to produce information similar to that now sought by al-Marri. See 542 U.S. at 532. Petitioner must first respond to the government's detailed and presumptively accurate factual submission with a viable alternative theory as to why he is not an enemy combatant. He cannot skip that step by merely asserting that the Hamdi framework is "un-American." See Br. 64.

This incremental framework protects the substantial separation-of-powers concerns inherent in enemy combatant litigation by limiting factual disputes to those implicated by the detainee's version of events, and by avoiding factual disputes entirely where, as here, the detainee cannot articulate and support a plausible theory under which he is not an enemy combatant. Contrary to al-Marri's suggestion, Br. 63, these protections are vital regardless of the location of a detainee's capture. Certainly, the Hamdi plurality mentioned the potential

factfinding burden to overseas military personnel when there is a battlefield capture, but it primarily stressed the separation-of-powers concerns at stake in all enemy-combatant proceedings. Hamdi, 542 U.S. at 531. The plurality explained that there are "weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States * * * and our due process analysis need not blink at those realities." Ibid.; see also Department of Navy v. Egan, 484 U.S. 518, 530 (1988) (noting the reluctance of the courts "to intrude upon the authority of the Executive in military and national security affairs").

Those "weighty" interests are at stake regardless of the locus of the combatant's capture, and are fully applicable to this case. Among the individuals from whom al-Marri seeks discovery are high-placed al Qaeda operatives detained by the United States. See, e.g., J.A. 167-168. Making such individuals available would be, at a minimum, highly disruptive of the overall operation of ongoing military efforts. The Hamdi framework underscores the need for an incremental process that does not put an enemy combatant in a position to insist on procedures that would make his detention difficult or impossible, when he has not taken initial steps to refute the government's claims or narrow the dispute.

Al-Marri's assertion that he cannot meaningfully test the allegations against him without broad-ranging discovery, Br. 62, is simply wrong. Al-Marri's burden at this stage was simply to account for his own actions. As the magistrate judge and district court noted, the government presented several factual assertions that should have been easily disputed or explained were they not accurate. J.A. 244, 354. He provides no reason to explain how discovery against the government would help him explain, for example, from whom he had received funding to come to America and to buy his computer, why he had rarely attended graduate school classes and was in failing status, and why his computer showed that he had extensively researched poisonous chemicals and tried to contact known al Qaeda operatives. He refused to provide any explanation; that considered decision—while he was represented by counsel—to not avail himself of the incremental factfinding process established by Hamdi does not somehow entitle him to a license for discovery into the extraordinarily sensitive matter of the military's decision to detain an individual in connection with an ongoing war.

D. The Constitution Does Not Require the Exclusion of Hearsay Evidence or the Cross-Examination of Witnesses at this Stage of the Hamdi Proceeding

Al-Marri does not contest that the government's detailed factual showing in the Rapp Declaration provided him with adequate notice of the grounds for his

detention as an enemy combatant. Instead, he contests the form of the government's notice, arguing that the government should be required to provide him first-hand evidence and an opportunity to cross-examine witnesses. See Br. 55-60. Once again, that argument is contradicted by Hamdi.

In Hamdi, the plurality found that a court may consider hearsay evidence when evaluating whether a detainee is an enemy combatant. 542 U.S. at 533-534. The plurality stated that, given the extraordinarily sensitive nature of these proceedings, "[h]earsay * * * may need to be accepted as the most reliable evidence from the Government in such a proceeding," ibid., and noted that allowing hearsay would lessen the burden on the government "at a time of ongoing conflict" by requiring only "a knowledgeable affiant to summarize [military] records to an independent tribunal," id. at 534. Therefore, according to the plurality, "a habeas court in a case such as this may accept affidavit evidence like that contained in the Mobb Declaration, so long as it permits the alleged combatant to present his own factual case." Id. at 538.

Remarkably, al-Marri not only disagrees with the Supreme Court holding that hearsay may be considered, Br. 55-60, but he also challenges the Supreme Court's authority for reaching that decision, id. at 60 n.10. Whatever

disagreement al-Marri may have with the Supreme Court's holding, it is not appropriate for this Court to revisit it. See, e.g., United States v. Higgs, 353 F.3d 281, 303 (4th Cir. 2003) ("Until the Supreme Court overrules [its controlling precedent], we are bound to follow its holding."). Nothing in the Federal Rules of Evidence does—or could—overrule the Supreme Court's decision in Hamdi that enemy combatant proceedings must be "tailored to alleviate their uncommon potential to burden the Executive" by allowing hearsay evidence.[18/]

Al-Marri tries to distinguish the Rapp Declaration from the hearsay declaration that the Court found credible in Hamdi, arguing that the Rapp Declaration "is the very antithesis of trustworthiness and reliability" because "Rapp is a Department of Defense functionary, not a military officer in the field."

[18/] Furthermore, even if the hearsay rule were applicable to enemy-combatant proceedings, Rule 807 provides a residual exception to the exclusion of hearsay evidence. That residual exception applies where:

> the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Fed. R. Evid. 807. In light of the significant separation-of-powers concerns identified by the Supreme Court in Hamdi, this exception would authorize the admission of the Rapp Declaration in the unusual circumstances presented by enemy combatant litigation.

Br. 59. In Hamdi, though, the government had not presented a first-hand account of the detainee's actions from a military officer. Rather, it produced the declaration of the Special Advisor to the Under Secretary of Defense for Policy at the Department of Defense, Michael Mobbs. See 542 U.S. at 512 (plurality) (describing Mobbs Declaration). Mobbs was not a uniformed officer, and he was assigned to the Pentagon, rather than to the field. The Mobbs Declaration expressed Mobbs' familiarity with the Department of Defense and military practices related to the detention of al Qaeda and Taliban members. Ibid. Mobbs explained that, based on his review of "records and reports" (not his "first-hand" observations), he was familiar with the facts surrounding Hamdi's detention. Ibid. The Hamdi plurality found that "a habeas court in a case such as this may accept affidavit evidence like that contained in the Mobbs Declaration, so long as it also permits the alleged combatant to present his own factual case to rebut the Government's return." Id. at 538. The Rapp Declaration—which is more factually specific and detailed than the two-page Mobbs Declaration—therefore falls squarely within the type of hearsay evidence that the Hamdi plurality held would be admissible in a habeas proceedings such as this. Indeed, if the Mobbs Declaration is sufficient to satisfy the government's notice burden under Hamdi in the case of a citizen, it follows a fortiori that the more detailed and specific Rapp

declaration is sufficient to satisfy the government's notice burden in the case of an alien like al-Marri.

Al-Marri also faults the hearsay evidence because it denies him the "opportunity to confront and cross-examine the government's witnesses in an evidentiary hearing." Br. 50-55. Of course, that is the nature of hearsay evidence, which is often admissible in federal courts. Moreover, al-Marri conceded below that he has no right to cross-examine the government's witnesses under the Sixth Amendment because its Confrontation Clause "applies only to criminal trials." See Petitioner's Brief In Response to Magistrate Judge's 8/15/05 Order 40. Nevertheless, he argues that he is due the same right pursuant to the Due Process Clause. He is again mistaken.

As an initial matter, it bears emphasis that the district court did not hold that alien enemy combatants such as al-Marri are never entitled to "an evidentiary hearing" or to "confront and cross-examine" the government's witnesses. It merely held that the Due Process Clause does not provide enemy combatants those rights before they have come forward with some evidence to support the conclusion that they are not an enemy combatant under the Hamdi framework. In other words, consistent with the Supreme Court's directive that enemy combatant proceedings be "both prudent and incremental," Hamdi, 542 U.S. at 539, the

district court held that the appropriate next step is for al-Marri to come forward with some evidence to support an alternative version of events that, if true, would make al-Marri not an enemy combatant. Because al-Marri failed, despite repeated opportunities, to come forward with any evidence to support such a conclusion, to otherwise rebut the government's showing, or even to suggest any alternative theory of events to support his unsupported assertion that he is not an enemy combatant, the district court held that his habeas corpus petition should be dismissed. Thus, al-Marri was not denied discovery, an evidentiary hearing, or the ability to confront and cross-examine government witnesses because he is an alien enemy combatant, but because he is an alien enemy combatant who has utterly failed to rebut the governments ample showing that he is an enemy combatant and who has, in the words of the magistrate judge, "refused to participate in any meaningful way" in the Hamdi process. J.A. 243-244.

In any event, al-Marri's argument that the Due Process Clause requires confrontation and cross-examination in all enemy combatant cases would make the textual limitations of the Sixth Amendment's Confrontation Clause wholly superfluous and render that Clause entirely redundant of the Due Process Clause. The argument is also foreclosed by the Hamdi plurality's ruling that hearsay evidence is admissible in a habeas proceeding challenging an enemy-combatant

determination. 542 U.S. at 534. The Hamdi plurality carefully considered the due process rights of citizen enemy combatants and held that direct confrontation of witnesses was not one of those rights. Al-Marri argues that confrontation rights have been applied in a variety of circumstances, Br. 51-52, but he cites no authority suggesting that such rights are held by alien enemy combatants, such as himself. He also ignores the Hamdi plurality's holding that, even in a challenge brought by a citizen, "the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting." 542 U.S. at 535.

Nevertheless, al-Marri argues that the ability to confront witnesses is needed here because, he alleges, the Rapp Declaration may possibly include unreliable information obtained through improper interrogation tactics. Br. 52-55. That allegation, however, fails to address the relevant question under the Hamdi framework, as it has been applied in this case. The framework provides for a "prudent and incremental" factfinding process, during which the determination of the weight or strength of the government's evidence is only appropriate, if ever, after the detainee has come forward with some alternative version of events that, if supported, would demonstrate that he is not an enemy combatant. This case never reached that step in the process because al-Marri, having received notice of the

basis for his detention as an enemy combatant, chose not to come forward with any alternative version of events that could support an assertion that he is not an enemy combatant. Al-Marri cannot ignore the "prudent and incremental" factfinding process required by Hamdi to insert unsubstantiated allegations of improper interrogation techniques into his case. They are not relevant and they certainly do not provide a basis for extending to him rights to cross-examination that were not extended to the citizen detainee in Hamdi.

As the district court recognized, "Hamdi provides that once the Government has offered evidence in support of its continued detention of an alleged enemy combatant, the detainee must be permitted 'to present his own factual case to rebut the Government's return.' In so doing, the detainee must present 'more persuasive evidence' to overcome the facts offered by the Government." J.A. 353 (quoting Hamdi, 542 U.S. at 534, 538). The alleged enemy combatant, of course, possesses knowledge and information about his own "factual case" as he is well aware of his own actions. The onus therefore rests with him to show that he has been mistakenly classified.

It follows that, in order to carry his burden of putting forth "more persuasive evidence," the detainee cannot rest on a bald denial of the government's evidence, as al-Marri attempted to do here. He also cannot carry his burden at this stage

simply by attempting to undermine the government's presumptively correct evidence. Al-Marri is a ready source of information concerning any theory he may have about how his activities—such as his presence at an al Qaeda training camp or the incriminating evidence found on his laptop computer—were somehow innocuous. Nonetheless, despite being granted repeated opportunities by the magistrate judge, al-Marri consistently refused to put forward any alternative theory of the events described in the Rapp Declaration or to otherwise produce any evidence supporting his bare assertion that he is not an enemy combatant. His failure left the court with "'nothing specific . . . to dispute even the simplest of assertions [by the Government] which [al-Marri] could easily' refute were they inaccurate." J.A. 354 (quoting J.A. 244). Even if this Court had leeway to depart from Hamdi and consider whether additional procedures were appropriate for enemy combatants challenging their wartime detentions, al-Marri's decision not to avail himself of the procedures afforded under Hamdi would make it inappropriate to do so in this case.

CONCLUSION

In the event that the Court concludes that it has jurisdiction, the Court should affirm the judgment of the district court dismissing al-Marri's petition for a writ of habeas corpus.

Respectfully submitted.

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Dated: January 5, 2007

STATEMENT REGARDING ORAL ARGUMENT

The Court has set this case for oral argument on February 1, 2007.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,621 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the measurement provided by WordPerfect 12 software.

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