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ORAL ARGUMENTS  
4th CIRCUIT COURT OF APPEALS

for Margaret Rocco

CD 1-2

AUDIO

AL SALEH KAHLAH AL-MARRI v. COMMANDER S.L.  
WRIGHT, 10/31/07

ORAL ARGUMENTS, 4th CIRCUIT COURT OF  
APPEALS

[SOUND OF GAVEL]

**COURT CLERK:**

The Honorable, the Judges of the United  
States Court of Appeals for the Fourth  
Circuit. Oh yea, oh yea, oh yea, all persons  
having any manner, form of business before  
the Honorable United States Court of Appeals  
for the Fourth Circuit are admonished to draw

now and give their attention, for the Court is now sitting. God [ ? ] to the United States and this Honorable Court.

**JUDGE:**

Thank you, and welcome to the Fourth Circuit Court of Appeals. We are convened *en banc* to review the August 2006 District Court judgment in al-Marri vs. Wright. Mr. Hafetz?

[PAUSE]

**JONATHAN HAFETZ:**

Good morning, Your Honor. May it please the Court, Jonathan Hafetz for Ali al-Marri.

Whatever the line between civilian and military jurisdiction might be in other cases, the Executive has crossed it here. As a person lawfully residing in this country Mr. al-Marri cannot be detained as an enemy combatant for three reasons, any one of which requires relief be granted.

He is not a member of the armed forces of an

enemy nation, there is no battlefield connection, and there was nothing necessary or appropriate about locking him in a Navy brig after he had already been detained by civilian authorities for over 17 months on criminal charges, and less than a month before his trial was scheduled to begin.

To conclude otherwise would sanction a power the President has never had and can never – and was never meant to have, the power to militarize the arrest of any person living in this country on his say-so and deny them the right to test the allegations against them at trial.

[BOTH AT ONCE]

**JUDGE:**

If we assume that –

**JONATHAN HAFETZ:**

Congress –

**JUDGE:**

– we have jurisdiction over this appeal,

under your approach, which the panel majority opinion adopted, even if the President knew that the 9/11 hijackers were about to board the planes, he couldn't have militarily detained any of them before they got on the planes without violating the laws of war. Would that be correct?

**JONATHAN HAFETZ:**

Your Honor our position is this: the President has authority as Commander-in-Chief to repel sudden attacks. What the President does not have is the authority to in - to detain and to detain indefinitely an individual in this country. Your Honor -

**JUDGE:**

What would be your answer to my question?

**JONATHAN HAFETZ:**

That the President could've used force to prevent the attacks, if necessary, as could law enforcement, but no, Your Honor, the President could not militarily detain those individuals once they were in custody. Once

they were in custody the civilian criminal process had to take over.

**JUDGE:**

But, if they weren't in custody, they wouldn't have been picked up.

**JONATHAN HAFETZ:**

To be clear, Your Honor, again, the President can use necessary force. And if – to prevent an imminent attack that meant grabbing people to prevent it, the President would have authority to do that. But at that point, once the individuals were taken, the criminal process must take over.

**JUDGE:**

Does the President need the authority from the AUMF to stop these planes? Couldn't the President have shot down the planes?

**JONATHAN HAFETZ:**

That is, that is absolutely –

**JUDGE:**

There's no question about that. Both in his Commander-in-Chief and his, the chief –

police – and his police powers he could do that, right?

**JONATHAN HAFETZ:**

That is exactly correct. The President would not need, and I would hope the Government wouldn't argue, that the President would need the authority from Congress to shoot down a plane that was headed towards the World Trade Center. The – again, the question is –

**JUDGE:**

Or to take – militarily take control of those people.

**JONATHAN HAFETZ:**

That's correct, Your Honor.

[OVERTALK]

**JUDGE:**

Are you challenging the –

**JUDGE:**

So, the hijackers, the hijackers who were, let's say, hypothetically apprehended on September 10<sup>th</sup> would have to be charged in due time and undergo a full criminal trial.

**JONATHAN HAFETZ:**

Yes, Your Honor, that's what -

[OVERTALK]

**JUDGE:**

Well, that's not true either because the Patriot Act, or at least if it happens events forward, we have the Patriot Act they can be detained under, isn't that correct?

[OVERTALK]

**JONATHAN HAFETZ:**

Yes, they would have to be charged within seven days.

**JUDGE:**

But, as far as the - as far as the AUMF is concerned it's your view that the September 10 hijacker who was apprehended on September 10 could not be subject to detention under the AUMF, but would have to undergo a full criminal trial.

**JONATHAN HAFETZ:**

Well, Your Honor, the Government has other tools that they cannot be subject to military

detention.

**JUDGE:**

Yes, but I'm talking about -- let's put those other tools aside, we're talking about something Congress has passed. Could the hijackers be detained under the authority of the AUMF?

**JONATHAN HAFETZ:**

No, Your -- no, Your Honor, they could not. And Congress made abundantly clear when it enacted the Patriot Act, which was considered at the same time--

[OVERTALK]

**JUDGE:**

I don't understand how -- I don't understand how an authorization for the use of military force, which relates specifically to the September 11<sup>th</sup> attacks and this country's response to the September 11<sup>th</sup> attacks, can be held not to apply to those who attacked us on September 11<sup>th</sup>.



In other words, the AUMF is passed with the –  
with the purpose of responding to the  
September 11<sup>th</sup> attacks, and you hold it not to  
apply to the September 10<sup>th</sup> or September 11<sup>th</sup>  
attackers. How, how can that be true to  
congressional intent?

**JONATHAN HAFETZ:**

Your Honor, the AUMF plainly authorized the  
President to use military force against the  
perpetrators of the 9/11 attacks and those  
that harbored them and it was enacted  
specifically with the idea of sending  
military troops abroad. The Supreme Court,  
Your Honor, has considered the AUMF now  
twice–

**JUDGE:**

But, but the AUMF uses the word "at home".

**JONATHAN HAFETZ:**

Well, Your Honor, so does the Patriot Act and  
the point is that it is an authorization to  
use military force abroad.

[OVERTALK]

**JUDGE:**

Why do you stipulate the authorization? Are you challenging the authorization at all, in other words, the legality of Congress' authority to issue the authorization?

**JONATHAN HAFETZ:**

Your Honor, no. Our, our challenge to the authorization is -

[OVERTALK]

**JUDGE:**

So the question is whether the authorization applies, not whether it's authorized, right?

**JONATHAN HAFETZ:**

Your Honor, our argument is that the authorization does not apply to this situation, and that if it did apply it would violate the Constitution, your Honor, it would violate *Ex parte Milligan*.

**JUDGE:**

Well, that's my, that's, that's my point, is the authorization is an exercise of

sovereignty by both Congress and the President, and it's directed against international terrorism directed at the United States. And it authorizes the use of force against anyone, anywhere, right?

**JONATHAN HAFETZ:**

Well, the AUMF doesn't say that, Your Honor.

[OVERTALK]

**JUDGE:**

It does.

**JONATHAN HAFETZ:**

It says the use of all necessary – it says all use of necessary force. But, again, the key point –

[OVERTALK]

**JUDGE:**

It says against anyone anywhere and the – the catch to distinguish this from a civilian type of process and the Patriot Act is the fact that it has to be linked to 9/11, it has to be linked to international terrorism, and it has to be linked to a threat against the

United States.

And, it seems to me that your argument has to be the authorization doesn't apply because I cannot think that Congress and the President didn't have authority to protect the sovereignty of the United States in those circumstances.

**JONATHAN HAFETZ:**

The argument is that the AUMF does not apply to authorize the indefinite detention of an individual in this country.

[OVERTALK]

**JUDGE:**

Well, it's not -- let's stick with that argument as to whether the use of necessary and proper force authorizes indefinite detention because that could be the issue. But, it seems to me, the Supreme Court may have put that to rest.

**JONATHAN HAFETZ:**

Your Honor, the Supreme Court has twice

considered the AUMF, and both times the Supreme Court has made it perfectly clear that the AUMF is not a blank check. It is constrained by -

[OVERTALK]

**JUDGE:**

Is the problem - is the problem that the AUMF does not use the word "detention," in your view? Is it the fact that that one word is absent -

[OVERTALK]

**JONATHAN HAFETZ:**

Well, Your Honor, that's one -

**JUDGE:**

- from the AUMF?

**JUDGE:**

Well, that isn't - can't be your problem because the Supreme Court in *Hamdi* said that detention was considered part of the use of force when you were detaining somebody who had been a combatant in an enemy battlefield against the United States.

Your position, I think, has to be that the authorization for use of force doesn't, among other things, authorize the use of military force against civilians in the United States of America. It nowhere says in the United States, for example, does it?

**JONATHAN HAFETZ:**

No, that's correct, Your Honor. And, in fact, when the Congress looked at the Patriot Act which was considered at the same time as the AUMF, with the same purpose, the Attorney General -

[OVERTALK]

- asked the Congress -

**JUDGE:**

But the, the language, the language of the AUMF is not confined geographically. The language of the AUMF isn't confined to a battlefield, is it? It's not confined to abroad.

It was - it was passed in response to an attack on the American homeland and it contains no words of geographic limitation.

There are, there are limiting concepts in the AUMF, namely that there has to be a link to al Qaeda. That's a limiting concept - or those who planned the September 11<sup>th</sup> attacks. But the limiting concepts in the AUMF are those that require links to terrorists groups.

The limiting concepts in the AUMF are not geographical limits. There's no way you can read that authorization and say it's geographically limited, as opposed to limited by requiring specific links to those who planned the September 11<sup>th</sup> attacks. Isn't that critical?

**JONATHAN HAFETZ:**

Your Honor the AUMF must be read that way because that's what - because the Supreme

Court said the AUMF gets constrained by the laws of one, it's constrained by the Constitution. And it is plain, Your Honor, from the context of the AUMF and the Patriot Act, enacted, again, simultaneously, that Congress did not silently authorize the indefinite military detention of individuals in the United States.

[OVERTALK]

**JUDGE:**

Except you're overlooking the fact that the Patriot Act defines its application to terrorist aliens, which is a category under our immigration laws AS somebody who's here as an alien is not a citizen.

And terrorism is a broad category of violations that includes this, but also includes all our criminal laws relating to terrorism, whereas the authorization is focused at anyone, anywhere who's linked to 9/11 and international terrorism directed



against the United States.

And it seems to me that al-Marri's facts bring him under the authorization almost by concession.

**JONATHAN HAFETZ:**

Your Honor, no. There is a -- there is a absolute silence; there's a deafening silence in the AUMF about its application to the United States and the --

[OVERTALK]

**JUDGE:**

How do you explain *Padilla*?

**JONATHAN HAFETZ:**

Your Honor, *Padilla* may only be justified if it was read as the panel opinion read it, as an individual who took up arms as part of Taliban forces in Afghanistan --

[OVERTALK]

**JUDGE:**

It's fairly clear about its applicability to a detention on United States soil, isn't it?

I mean, doesn't it fairly directly refute  
your argument with respect to locus?

**JONATHAN HAFETZ:**

Your Honor -

[OVERTALK]

**JUDGE:**

Isn't - now, I mean, isn't it your rationale  
have to be that that person was escaping from  
the battlefield and hadn't been able - the  
United States troops hadn't been able to  
capture the person on the battlefield and,  
therefore, had to capture him in the United  
States, and the AUMF would permit that. It  
wouldn't permit the capture of somebody  
that's never been on a battlefield and  
certainly was not escaping from a  
battlefield.

[OVERTALK]

**JONATHAN HAFETZ:**

That - exactly, Your Honor, the AUMF can only  
be read in the way that Your Honor says. If  
the AUMF is read more broadly and if the

*Padilla* decision is read more broadly than that, Your Honor, we submit the *Padilla* decision was wrongly decided and should be rejected. Moreover, it's abundant -

**JUDGE:**

It does not find en banc court -

**JONATHAN HAFETZ:**

Not only does it not find this en banc court, Your Honor, but subsequent developments in *Padilla* have robbed that decision of any, of any judicial significance or applicability.

And this Court should be loathe to read *Padilla* more broadly than the panel decision read it, in light of those subsequent developments and in light of what was quite clear from the second opinion in *Padilla*, where the Government, in fact, doesn't even really believe that *Padilla* could've been detained, and the Government apparently intentionally mooted *Padilla* before the Supreme Court could decide it.

[BOTH AT ONCE]

**JUDGE:**

If, in fact, this is a threat -

[OVERTALK]

**JUDGE:**

Did the Congress consider adding in the United States to the AUMF and reject it?

**JONATHAN HAFETZ:**

Your Honor, there is - there is nothing specific in the Congressional record. There are statements that Senator Daschle made that it was rejected, but again, Your Honor, it is-

Putting that aside, there is absolute silence in the AUMF. And to read the AUMF more broadly, Your Honor, to read the AUMF to authorize indefinite military detention of suspected terrorists in the United States would directly contradict the Supreme Court's holding in Milligan

[OVERTALK]

**JUDGE:**

[ ? ]to think of. You have 25 or 30 terrorists who sneak into the country and are assisting those same people who flew the jets, and if we know that those 25 or 30 were part of the planning and operation, we couldn't pick them up under this authorization, even though they were the direct planners and ex - persons executing the attack against the United States? That's remarkable.

I mean, Congress was exercising its full sovereignty to protect this country against this attack of foreign terrorism.

[OVERTALK]

**JUDGE:**

If they were directly -

**JUDGE:**

And if they were here in the United States, if they were here in the United States, it

seems to me the authorization would authorize the President to pick them up in the United States, don't you believe?

**JONATHAN HAFETZ:**

No, Your Honor, unless it was to prevent it, as the President would have the authority without the, you know, independent of the AUMF as Commander-in-Chief to repel sudden attacks.

[OVERTALK]

**JUDGE:**

No, I want to know if AUMF — I don't want to duck the issue. The AUMF was an authority by Congress and the President to follow up on the 9/11 attack and pick up anybody who may have been responsible, wherever. And it's not limited to outside the United States.

And it's a remarkable thing to argue that if we had all these people walking around in New York and planning flights for the next day, and the next day, and it was all clearly

linked, that we couldn't pick them up under  
the military power of [ ? ] -

[BOTH AT ONCE]

**JONATHAN HAFETZ:**

Your Honor, the Supreme Court -

**JUDGE:**

I didn't realize that was your argument. I  
thought that you recognized that if there was  
direct involvement that you had a somewhat  
different situation.

**JONATHAN HAFETZ:**

Well, Your Honor, I -

**JUDGE:**

Is that your argument?

**JONATHAN HAFETZ:**

The AUMF does not authorize the military  
detention of individuals in the United  
States.

[OVERTALK]

**JUDGE:**

Well, they put [ ? ] and put him in a  
civilian court, right? He was supposed to

have been involved.

**JONATHAN HAFETZ:**

That's right, your Honor, as with every other individual who – Richard Reid, now Jose *Padilla* and dozens and dozens of others –

**JUDGE:**

[ ? ] was the 20<sup>th</sup> hijacker.

**JONATHAN HAFETZ:**

That's right and he –

[OVERTALK]

**JUDGE:**

He said he was the 20<sup>th</sup> hijacker, and he was tried in a court in this circuit.

**JONATHAN HAFETZ:**

That's exactly right, and he was convicted and sentenced –

**JUDGE:**

And he was a civilian.

**JONATHAN HAFETZ:**

– to life in prison, Your Honor. That's, that's the system. The President has ample tools under domestic law enforcement to



prosecute terrorism, and certainly it does  
not apply to -

[OVERTALK]

**JUDGE:**

Let me, let me just - may I just step back  
for a second and, and - because I think one  
of the things that we're concerned with, and  
that you're properly concerned with, is that  
the AUMF may have authorized some sweeping  
detention program that's going to just get  
out of control and that we are going to have  
people swept off the streets of Omaha and put  
in brigs without -

[OVERTALK]

**JUDGE:**

Or Peoria.

**JUDGE:**

- anyone knowing. And the question I have for  
you is this: does that really - is that  
really borne out by experience, because the  
AUMF has been in force for six years, and

we're talking about two individuals, *Padilla* and al-Marri, who were detained pursuant to its authority.

And both of those seem to me to have undisputable ties to al Qaeda. Al-Marri didn't even try to controvert the declaration that said he had trained in Afghanistan and had been in contact with al Qaeda leaders and had come over here to be part of a sleeper cell.

So, we're talking about a - we're not talking about a dragnet, we're not talking about a sweep, we're not talking about an indiscriminate round-up. We're talking about two people in six years with undisputed ties to al Qaeda.

And the - what I don't understand is whether we have - why does that kind of carefully targeted response by the Government generate

all this apprehension, all this anxiety and, if I may say, all this hoopla? Haven't we really lost our sense of perspective, because we are simply not talking about the kind of mass round-ups that occurred in previous periods of this country's history, after World War I with respect to German-Americans, during World War II with respect to Japanese-Americans.

The present enemy combatant steps have been remarkably limited and, seems to me, have detained people within the core of the congressional expression. I'm not sure that they've been pushing the edges on this.

So why, in light of the fact that we're talking about two people with undisputed al Qaeda ties is there all this apprehension that this program is going to burgeon way out of control and we're going to have the Executive rounding up A, B and C tomorrow?

**JONATHAN HAFETZ:**

Your Honor, because the principle the Executive puts forth crosses a line that must never be crossed. Remember the facts in this case, Your Honor, Mr. al-Marri is not a member of the enemy armed forces. There is no allegation of any participation on a battlefield or any direct participation in hostility.

And whatever Your Honor might conclude about the scope of the AUMF, there is nothing within the language of the AUMF that was necessary and appropriate about declaring him an enemy combatant when he had already been detained, when he was detained, Your Honor, had been detained for 17 months on criminal charges which, if convicted, Your Honor, given the allegations, he could have gone to jail for 25 years, Your Honor.

[OVERTALK]

**JUDGE:**

Well, what do we do with the simple answer to that question that the calculus for determining constitutionality is not whether we have a good king or a bad king or whether or not that king has improper power. It's not about whether he stays his hand in generosity. That's not our constitutional question.

And here, I think, your argument is basically that they're right in terms of AUMF doesn't have geographical boundaries, it doesn't have citizenship boundaries, either. But, if it's going to be applied without those boundaries and definitions of a battlefield and it applies to civilians, without a suspension clause being enacted, then it's unconstitutional, isn't it?

**JONATHAN HAFETZ:**

That is exactly right, Your Honor, and that

is exactly the decision in *Ex parte Milligan*, Your Honor. And if the President would be granted this power, whether it's 1 or 1,000, Your Honor, as the Court said in *Milligan*, republican Government is at a failure and it's the end of liberty regulated by law as we know it.

Your Honor, it doesn't matter whether there's 1 or 1,000, the point is that they've crossed the line.

[OVERTALK]

**JUDGE:**

What do you do with the fact that he trained in Afghanistan? What do we — what do we do with the fact, at least, that it seems uncontroverted, that he trained in Afghanistan, he trained in an enemy camp, he trained in an enemy camp preparing for an attack upon the United States.

[BOTH AT ONCE]

**JONATHAN HAFETZ:**

Well, Your Honor -

**JUDGE:**

It's not - this is not an individual who simply grew up in one of our communities or cities. This is somebody who trained - in Afghanistan.

[OVERTALK]

**JONATHAN HAFETZ:**

Your Honor, even taking, taking the allegations as true, which, we understand, we're asking this court to do in this posture, the allegation that Mr. al-Marri trained in Afghanistan was before there was, under the Government's own view, there was any armed conflict, Your Honor. And Mr. al-Marri as a resident of this country has the same constitutional rights.

As the Supreme Court has said, he stands on equal footing to a citizen with respect to the right to a criminal trial under the Fifth

and Sixth Amendment and the right to *habeas corpus*.

[OVERTALK]

**JUDGE:**

Okay --

**JUDGE:**

What, what implications does -- does our decision today have with regard to American citizens?

**JONATHAN HAFETZ:**

Your Honor, if this court were to approve Mr. al-Marri's detention, it would be approving the detention of American citizens in the same situation, arrested in the United States based on allegations of terrorism.

The Supreme Court has said in the *Hamdi* decision, in the *Quirin* decision, that the issue of citizenship is not the dispositive factor; it is whether someone is an enemy



combatant.

So, if Mr. al-Marri, who is not a member of the enemy – of the armed forces of an enemy nation, who has no connection to any battlefield or any allegation of direct participation in hostilities, can be declared an enemy combatant, Your Honor, you are sanctioning the detention of American citizens as well.

**JUDGE:**

Mr. Hafetz, I see your time is getting short and I wanted to explore the question of whether the Military Commissions Act has taken away – give – taken away jurisdiction from us to even hear this case.

And it seems to me there's a serious question there because the act applies to not only cases where there has been a determination,

but also to cases that are pending *habeas* – petitions that are pending. And this one was pending on October 17 when – last year, when the act was passed.

And at that point, the act seems to suggest that this should go to the Combatant Tribunal and then be appealed to the D.C. Circuit. That's where Congress seems to have placed it. Why isn't that act applicable to this case?

**JONATHAN HAFETZ:**

Because, Your Honor, as the panel decision makes abundantly clear, and as we've argued, the act does not apply to lawful resident aliens such as al-Marri. Your Honor, the – the act clearly applies only to individuals who are detained at Guantanamo Bay or elsewhere outside the United States.

**JUDGE:**

Of course, that was amended out of there, right? It applies now to be anybody in the United States.

**JONATHAN HAFETZ:**

No, Your Honor. The – what the – the review procedures are available to individuals in the United States. But the – the, the jurisdiction repeal that the section seven plainly, if you read the language, does not apply to someone in al-Marri's situation.

To elaborate, it doesn't apply under the first prong because the first prong requires an initial, initial detention and a subsequent Executive branch determination that the detention was proper. That plainly doesn't apply to Mr. al-Marri.

**JUDGE:**

Just take me through this. I'm looking at 2241E which takes the jurisdiction away. And it basically says no judge, justice or court has the jurisdiction to hear a *habeas* case who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

And, of course, as we know, right after the passage of this act in October, in November the Defense Department did indicate the order that this man be subjected to the tribunal upon dismissal of this case.

**JONATHAN HAFETZ:**

Well, that's not quite what the Government said. They said that they - they said that they - that was how they intended to handle Mr. al-Marri.

[OVERTALK]

But, Your Honor, the point is what – the point is what Congress intended.

[OVERTALK]

**JUDGE:**

There's an order issued by the Secretary of Defense committing this man to the tribunal upon termination of this case.

[OVERTALK]

**JONATHAN HAFETZ:**

Your Honor, the Executive has had more than four years to give Mr. al-Marri a CSRT.

[OVERTALK]

**JUDGE:**

This was done in November, sir, of last year, which was a few days after the act was passed

**JONATHAN HAFETZ:**

No, it was a month after the act and it was – and the day – and it was on the day the Government filed its motion to dismiss. Your Honor, the Government's had four years to

give Mr. al-Marri a CSRT. At the time -

[OVERTALK]

**JUDGE:**

That [ ? ] was made applicable to pending cases in October. The question is, Congress said as of October 17 it applies to any case pending as of that date.

**JONATHAN HAFETZ:**

It - it applies to any case pending, Your Honor, that the act applies to. It applies to pending cases that are covered by the act. And this case is not covered by the act, Your Honor. And if it were, it would be a suspension of the writ.

You have to remember what Congress, Your Honor, was - when, when Congress enacted the AUMF -

[BOTH AT ONCE]

**JUDGE:**

What? I'm sorry?

**JONATHAN HAFETZ:**

I'm sorry, I'm sorry – the Military Commissions Act, there was no law policy requiring Mr. al-Marri receive a CSRT or any indication Congress believed he would be eligible one.

Your Honor would have to take the – reach the absurd conclusion that the MCA, which is intended to apply to people without constitutional right or the Congress believed had no constitutional rights, eliminated silently, without any judicial review, any right to judicial review –

[OVERTALK]

**JUDGE:**

Hold it, hold it –

**JONATHAN HAFETZ:**

– the, the rights of someone *habeas* –

**JUDGE:**

You're stating a lot of things all at once.  
What happened is Congress passed a law  
saying, we're taking *habeas* review from the  
federal courts and putting it into this  
system of a combatant tribunal, which is  
reviewable in the D.C. circuit.

And they did that to not only cases in which  
a person has been determined to be a foreign  
enemy combatant, but in which that  
determination is pending.

**JONATHAN HAFETZ:**

Yes.

**JUDGE:**

Then shortly afterwards they issued – the  
Defense Department issued an order placing  
this man in line for that determination



before the tribunal. That was what, November  
17<sup>th</sup>.

[OVERTALK]

**JONATHAN HAFETZ:**

Your Honor, but --

**JUDGE:**

And the question is now why isn't that  
determination pending --

**JONATHAN HAFETZ:**

Be --

**JUDGE:**

-- as, as stated in this act?

**JONATHAN HAFETZ:**

Because, Your Honor, Mr. al-Marri was not --  
is not awaiting such determination within the  
meaning of the act. Congress made abundantly  
clear that it was only intending to repeal  
*habeas* for those who BEL -- individuals who it  
believed had only a statutory right to  
*habeas*, individuals at Guantanamo and others

held outside the United States. It made it  
explicitly clear in the history—

[OVERTALK]

**JUDGE:**

Where does it say that? I'm reading — I'm  
reading the stripping statute 2241E. I don't  
see any of what you're arguing there.

**JONATHAN HAFETZ:**

No, Your Honor, that is in the — that is in  
the legislative history. But the statute,  
Your Honor — if you read the statute, the  
only way the statute makes sense, Your Honor,  
is if that it was intended to apply to  
individuals who Congress believed did not  
have Constitutional rights.

Otherwise, Your Honor, you would have to  
reach the conclusion that Congress  
inadvertently repealed *habeas* jurisdiction  
without any — without any substitute for an

individual [ ? ]

**JUDGE:**

The substitute was the tribunal -

**JONATHAN HAFETZ:**

But, Your Honor, there was - that's -

**JUDGE:**

[ ? ] to the D.C. circuit.

**JONATHAN HAFETZ:**

But there was, at the time, Congress enacted-

**JUDGE:**

There was no requirement that that substitute be given.

**JONATHAN HAFETZ:**

There was no requirement, and there was no indication that Congress believed Mr. al-Marri would be eligibly - eligible for one. In fact, the evidence is to the contrary.

[OVERTALK]

**JUDGE:**

Now, look -

**JONATHAN HAFETZ:**

In more than four years he was never given a CSRT.

**JUDGE:**

What you're saying doesn't make much sense, because if he has not been determined to be an enemy combatant, or if it's not pending, then he has rights under *habeas*. But if it has been determined, or if such determination is pending, which is this case, then he is — has to go through the tribunal and up to the D.C. Circuit.

And I don't see why there's a compulsion, it seems to me — either they are going to declare him an enemy combatant — they don't have to declare him an enemy combatant, but if they do then the way to review that is through the tribunal and the D.C. Circuit.

**JONATHAN HAFETZ:**

Your Honor —

**JUDGE:**

That's what Congress created.

**JONATHAN HAFETZ:**

No, for the reasons I've explained and explained the panel opinion, it's plain Congress did not intend to repeal jurisdiction over this action. Moreover, Your Honor, the decisions of the U.S. Supreme Court —

[OVERTALK]

**JUDGE:**

Okay, stay — stay with that, stay with that. Let's just stay with one thing at a time, because the dialogue isn't [LAUGHS] carrying it on if we can't get some kind of resolution as to where there's a difference or an agreement.

The statute has to have language otherwise, if you say it doesn't apply, and I'd like you to point out in the statute where it doesn't apply to this circumstance and this case where the Secretary of Defense has determined that this man will be declared an enemy combatant or not by the tribunal.

**JONATHAN HAFETZ:**

On the second prong, the awaiting such determination prong, which is, I believe, what Your Honor is referring to, because you cannot read that language to apply to Mr. al-Marri because at the time Congress enacted the MCA, it was - he was not awaiting a determination under the act; there was no law, policy or regulation that require he be given one, and there was nothing to indicate Congress believed he would be eligible one.

Again, it would – your construction would produce the absurd result that Congress guaranteed a right to *habeas* for Guantanamo detainees, individuals Congress believed had no constitutional rights, correctly or not, without providing any administrative procedure or form of judicial review for an alien in this country who has undisputed and uncontested constitutional rights.

Moreover, Your Honor, the decision – every single decision of the United States Supreme Court addressing the suspension clause says that there must be an explicitly clear statement and intent to repeal *habeas*. We certainly don't have that here. In fact, the intent of Congress was plainly *not* to reach this case.

**JUDGE:**

You don't think it's very clear when they

say, "No court, justice or judge shall have jurisdiction to hear or consider an application for a writ of *habeas corpus*."

**JONATHAN HAFETZ:**

Your Honor, but that – you're, only reading part of the statute, with respect –

[OVERTALK]

"of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."

That carefully crafted language was intended to apply to Guantanamo detainees and others outside the United States, but not to Mr. al-Marri.

**JUDGE:**

Can I ask you a technical question? Do you challenge the constitutionality of the transfer of custody from civilian to military



in and of itself? In other words, let's suppose it had been for one day, do you challenge the constitutionality of that transfer?

**JONATHAN HAFETZ:**

Yes we do, Your Honor, that our argument, the, the third argument I outlined at the beginning is that even if Your Honor assumes there was some, there's some military detention power to authorize - to, to allow for detention of suspected alien terrorists in the United States, in - as applied to these facts, Your Honor, it is outside the scope of the AUMF and it violates the Constitution because there was no exigency, there was nothing that was necessary and appropriate, in the words of the AUMF, to authorize Mr. al-Marri's transfer after sev - when he was in custody for 17 months and was-

[OVERTALK]

**JUDGE:**

All right, what - what provision of the  
Constitution does that violate?

**JONATHAN HAFETZ:**

Your Honor, it violates the Fifth Amendment,  
it violates the right to due process.

[OVERTALK]

**JUDGE:**

And what, particularly?

**JONATHAN HAFETZ:**

Your Honor, the right - the Fifth Amendment  
and, which incl - and the Sixth Amendment,  
which include a - the right to a criminal  
trial, Your Honor.

And I would take Your Honor back to the  
decisions of the Supreme Court in *Milligan*  
and in *Duncan*, Your Honor, where - and, and  
to quote Justice Murphy in *Duncan*, Your

Honor, "to authorize military detention and to deny criminal rights there must be some overpowering necessity," Your Honor, "that makes recognition of those rights incompatible with the safety -

[OVERTALK]

**JUDGE:**

Is there a due process right with regard to that transfer?

**JONATHAN HAFETZ:**

I, I didn't hear the -

**JUDGE:**

Is there a due process right with regard to that transfer from civilian custody to military custody?

**JONATHAN HAFETZ:**

Absolutely, Your Honor, it is a fundamental due process right because in civilian custody an individual who's detained on allegations of wrongdoing has a right to challenge their

detention and test the allegations of  
criminal trial.

To strip someone of those rights by yanking  
them from civilian jurisdiction without any  
explanation, and after 17 months of custody,  
on the eve of a criminal trial, Your Honor,  
would violate the most essential principles  
of the due process clause.

**JUDGE:**

Suppose the Government were to determine that  
he was – he was charged on credit card fraud,  
as I understand it, and al-Marri was  
initially – suppose the Government were to  
determine that putting on its case with  
respect to credit card fraud would, would  
involve the divulgence of all kinds of  
classified information, does that make a  
difference?

**JONATHAN HAFETZ:**

No, Your Honor, it doesn't make a difference.  
There's the -

[OVERTALK]

**JUDGE:**

But hasn't Congress enacted a statute to deal  
with that?

**JONATHAN HAFETZ:**

Exactly, the Congress has enacted the  
Classified Information Procedures Act to  
specifically deal with that. And Your Honor  
shouldn't assume, should not get ahead of  
Congress in assuming that Congress silently  
repealed the fundamental protection of the  
Constitution without any kind of clear  
statement, particularly in light of the  
contrary evidence in the Patriot Act.

And moreover, Your Honor, the, the charges on  
which Mr. al-Marri was prosecuted, the credit

card fraud charges, Your Honor, there was -  
the - those charges were in the courts for 17  
months. There was no indication that there  
was any danger to national security. And if  
al-Marri had - Mr. al-Marri had been  
convicted -

[OVERTALK]

**JUDGE:**

Were there any -

**JONATHAN HAFETZ:**

- on those charges, he could've been -

[OVERTALK]

- put in jail for 25 years if the Government  
had-

[OVERTALK]

**JUDGE:**

You seem to assume that because some other  
statute is available that the AUMF can be set  
to one side. I mean, I don't - the, the, the  
multiple authorizations of, of authority here

- I was curious about your view that you think that - or at least you've suggested it, that, that citizen combatants and alien combatants belong in the same category and that what we decided with respect to - what we might decide with respect to an alien combatant would necessarily apply to citizen combatants.

I mean, there're - there are differences in the law as respects immigration. The Supreme Court's made clear that the same rules need not apply to citizens and to aliens.

And one could say, perhaps that the amount - that the number of procedures or the amplitude of procedures would differ between citizens and aliens. Citizens can probably invoke a greater array of constitutional rights.

The point is I'm not at all convinced that a case involving an alien combatant would apply across the board to citizen combatants.

**JONATHAN HAFETZ:**

Well -

**JUDGE:**

I think that might - that those kinds of questions would seem to me to have to await another day.

**JONATHAN HAFETZ:**

Well, I don't think so, Your Honor, because we're talking - if we're talking about alien - aliens who are lawfully residing in the United States, because they have the exact same constitutional rights to criminal trial, the exact same rights under the Fifth and Sixth - the Fourth, Fifth and Sixth Amendments as do citizens, Your Honor.



I would call Your Honor's attention to Chief Justice Robert's decision in *Sanchez-Llamas* where he made clear, affirming more than a century of unquestioned Supreme Court precedence, saying that aliens in the United States -

[OVERTALK]

**JUDGE:**

And yet the Supreme Court -

[OVERTALK]

**JONATHAN HAFETZ:**

- had the same constitutional rights as the  
[ ? ] -

[OVERTALK]

**JUDGE:**

And yet, the Supreme Court in *Hamdi* seemed to attach special significance to the fact that  
- that Hamdi was a citizen.

**JONATHAN HAFETZ:**

Because he was captured on a battlefield in

Afghanistan, Your Honor. I - we certainly recognize that the Constitution, if it applies at all to non-citizens captured in Afghanistan, is as - is very different than when the non-citizen is arrested in the United States. Non-citizens - our argument is limited only to non-citizens who are lawfully residing in the United States.

**JUDGE:**

Well, Mr. Hafetz, would you agree with Judge Wilkinson that there are situations in which lawfully resident aliens have different constitutional rights than citizens? What your position, I guess, is that the Fifth Amendment rights are no different and you have said that the Supreme Court has consistently said no different. And Chief Justice Roberts says, "A foreign national, like anyone else in our country, enjoys, under our system, the protections of the due

process law." He said that less than a year ago.

**JONATHAN HAFETZ:**

E - exactly.

**JUDGE:**

So we don't even have to rely on those 1800's cases - and cites one of those old cases.

**JONATHAN HAFETZ:**

Right, that's ex - that's exactly right, Your Honor, that certainly Congress has power over immigration to non-citizens to deport them - there are certain - those are certain rights, but when the, the right to the, the criminal trial, under the Fifth Amendment, is the same for a non-citizen and a citizen.

**JUDGE:**

Thank you.

**JONATHAN HAFETZ:**

Thank you.

**[END CD 1]**

**CONTINUATION OF ORAL ARGUMENT**

CD 2

**CHIEF JUDGE WILLIAMS:**

Mr. Garre?

**GREGORY GARRE:**

Thank you, Chief Judge Williams. And may it please the Court, just one week after the 9/11 attacks Congress passed an authorization for use of military force that expressly backed the President's use of all necessary and appropriate force against the nations, organizations or persons responsible for the 9/11 attacks, in order to protect the country from further attack at home or abroad.

The *habeas* petitioner in this case is almost identically situated with the al Qaeda forces that stuck on the morning of 9/11, betraying –

[OVERTALK]

**JUDGE:**

Can I ask you about that initial statement

when you talked about - and it's certainly correct that the AUMF was enacted less than a - or a week after the attack; because the Government had cited legislative history in its petition for rehearing, I went and looked and tried to do some looking at legislative history myself.

And the day after, or the day before the President signed the AUMF, the Attorney General called on the Congress to pass the legislation which became Patriot Act.

The very next day, the 19<sup>th</sup> of September, the Patriot Act goes to Congress, and there is extensive - we are on the same page here, do you agree?

**GREGORY GARRE:**

Sure.

**JUDGE:**

And there is extensive legislative history about whether illegal detention, I mean,

indefinite detention, will be part of the Patriot Act. And the Administration had suggested it needed indefinite detention as part of the Patriot Act, and ultimately when not just Senators Kennedy and Senators Biden but Senator Specter, Senator Hatch and Senator Kyl and others said that that was not consistent with the Constitution, the Administration dropped that.

And now I'm wondering if illegal detention has — I mean, indefinite detention had been authorized by the AUMF, why was there this extensive discussion about the illegality or the legality of indefinite detention in the Patriot Act?

**GREGORY GARRE:**

Well first, Your Honor, let me say that we agree with what you said in your panel decision, that if this Court agrees that Mr. al-Marri is an enemy combatant and is covered by the authorization for military force, then

the Patriot Act is of no moment.

**JUDGE:**

Right.

**GREGORY GARRE:**

The President has the authority to put him in  
the military box —

[OVERTALK]

**JUDGE:**

Right, right, and I'm looking just at the  
Patriot Act to inform —

**GREGORY GARRE:**

Right.

**JUDGE:**

— what your take on the AUMF is here.

[OVERTALK]

**GREGORY GARRE:**

And with respect to the Patriot Act, that  
provides important authority to the Attorney  
General and the Government to deal with  
civilian detentions. There are a number of  
tools that the President has at his, at its —  
his disposal to deal with terrorists and to

deal with acts of terrorism.

[OVERTALK]

Certainly -

**JUDGE:**

Which is in my question: Why was there so much debate and why did the Administration want the power to indefinitely detain these terrorist aliens in the United States in the Patriot Act, if it already had the power to do this [ ? ] that?

[OVERTALK]

**GREGORY GARRE:**

I think we're dealing with a much broader class of individuals who are potentially -

[OVERTALK]

**JUDGE:**

Well, there's no discussion about that. There's no discussion from anybody. We already have the power to go against al Qaeda here.

[OVERTALK]



**GREGORY GARRE:**

Well - and, and we're talking -

**JUDGE:**

Because I looked - have you found that?

**GREGORY GARRE:**

Your Honor, we're talking about legislative -

[OVERTALK]

**JUDGE:**

Have you found that, Sir?

**GREGORY GARRE:**

I'm sorry, found what?

**JUDGE:**

Have you found any discussion about well,  
we've already got the power to detain al  
Qaeda operatives indefinitely in the United  
States?

[OVERTALK]

**GREGORY GARRE:**

We're talking about acts passed in the same  
general time period.

**JUDGE:**

Right.

**GREGORY GARRE:**

Where I think the Administration made clear its support for the authorization for use of military force and has repeatedly made clear its view that that authorization authorizes the military detention of al Qaeda fighters who come to this country or who fight abroad against America and American interests. I don't, I don't think that that can be disputed. The Patriot Act is an -

[OVERTALK]

**JUDGE:**

The Administration may have thought that, but both Senator Daschle and Senator Specter have said that the words "in the United States" were suggested by the Administration in the AUMF, and the Senate and Congress would not go along with those words.

**GREGORY GARRE:**

Your Honor, the words that I look to in the AUMF are the words that say it was intended to protect against attacks, quote, "at home

and abroad."

[OVERTALK]

**JUDGE:**

Of the Supreme Court [?]

**GREGORY GARRE:**

I also look to the Supreme Court's decision in *Hamdi*, which, which, of course, interpreted the AUMF to authorize the fundamental incidents of war, including the detention of enemy combatants.

Now, we can debate as to whether or not Mr. al-Marri falls into the category of enemy combatants.

**JUDGE:**

Let me just clear this up.

**JUDGE:**

But [ ? ]

**JUDGE:**

It -- just one more question. You would, you recognize -- we're on the same page, that if -- that the AUMF doesn't authorize military

detention of someone who's not an enemy combatant.

**GREGORY GARRE:**

I would say - I mean, I think there was a lot of debate about who is an enemy combatant or who is not an enemy combatant -

[OVERTALK]

**JUDGE:**

Well, I understand that.

**GREGORY GARRE:**

- or who is not an enemy combatant.

[OVERTALK]

I think it of - it's - the Supreme Court has said -

[OVERTALK]

**JUDGE:**

And you'd say - we could argue about that. But you're not - the Government's not maintaining that the AUMF authorizes detention of non-enemy combatants, is it?

**GREGORY GARRE:**

That's true, Your Honor. And if I could

explain though, the Supreme Court said that it authorizes the fundamental incidents of warfare and it looked at the Law of War.

And certainly, the Congress has a say in what the Law of War is. And the Congress has made clear in the Military Commissions Act that al Qaeda fighters qualify as enemy combatants.

**JUDGE:**

Of course, the Military Commissions Act was enacted, what, two years after al-Marri was detailed - was militarily detained. So it can't be used as a definition about whether he is an enemy combatant.

**GREGORY GARRE:**

Well, I would disagree, Your Honor. We're here today talking about whether or not Mr. al-Marri is lawfully detained, and we now have the benefit -

[OVERTALK]

**JUDGE:**

So - to determine the definition of "enemy

combatant" under the AUMF, you look to the MCA?

**GREGORY GARRE:**

I think, I think that that is a further indication. We know that Congress views al Qaeda fighters as enemy combatant, and the judgment of Congress is at least relevant as to what the Law of War is.

**JUDGE:**

So do you look to the War - Law of War?

**GREGORY GARRE:**

I, I would, Your Honor -

[OVERTALK]

**JUDGE:**

And *Quirin* and *Padilla* and *Milligan* all - and *Hamdi* - all look to the Law of War. Do you look to the Law of War?

**GREGORY GARRE:**

Yes, and what I would look to first, if I were on the Court, is pages 37 and 38 of the *Quirin* decision where the Supreme Court said that individuals who associate with enemy

forces and with the aid, direction and guidance of the enemy, come to this country bent on committing hostile acts are enemy belligerents within the meaning of the Law of War. That's what the Supreme Court's saying.

*Quirin* – several decades before Mr. al-Marri came to this country – it's the definition that this Court adopted in the *Padilla* case, and it's a definition that should control this case.

**JUDGE:**

Mr. Garre, let me – ask because I'm, I'm interested in the evaluative process that the Executive uses to determine who is an enemy combatant. You – you're asking for a good deal of, of deference to that determination. And I notice that you say, well, that's an evaluative process as a combined, as a combined input of the CIA and the Department of Defense, and the FBI and, presumably, OLC.

I think one of the concerns, of course, is that the – you know, these agencies work in a multilayered process and they work – they're not – there's not a lot of transparency, perhaps necessarily, but it's a closed process, and it's an *Ex parte* process to say the least.

But I want to know how the Executive goes about determining whether someone is an enemy combatant and what would justify in this determination the kind of, the extent of the deference that you're asking from the courts.

**GREGORY GARRE:**

Yes, Your Honor. First of all, with respect to deference, the President, particularly where he's acting with authority backed by the Congress, is entitled to great deference from the exercise of his authority under Article Two.

**JUDGE:**

But I want to know about the specifics of



this process that the Executive uses to determine this designation, because you can't just say there's an Article 2 Commander in Chief power, and that can't be the end of it.

So just tell me, walk me through the steps that someone is - because that has a lot to do, I think, with the question of whether this is careful and whether this is carefully targeted or whether we're dealing with something that threatens to leap proper bounds.

**GREGORY GARRE:**

It is extremely carefully run. Our Mr. al-Marri is an alien, but he benefited from the process that the Executive uses to determine whether a citizen is an enemy combatant. You're talking about individualized assessments and determinations in the Department of Defense, the Attorney General, the CIA, the FBI, collecting all information available to the Government, much of which is

classified because of the context in which these determinations are made - making assessments and then where those different agencies agree, as they did in this case, they presented those assessments to the President and the President himself made a determination if -

[OVERTALK]

**JUDGE:**

Are those assessments made independently or is it some inner agency working group?

**GREGORY GARRE:**

I think it's both, Your Honor. They're made initially independently and then those assessments are shared before the matter is presented to the President. The President here made that determination. He spelled out - and this is reprinted at page 54 of the Joint Appendix - why he determined that Mr. al-Marri is an enemy combatant.

And, of course, Mr. al-Marri benefited from

the process that the Supreme Court established in the *Hamdi* case for citizen enemy combatants to test that enemy combatant determination in a courtroom, in a full-fledged *habeas* proceeding that District Court Judge Carr [?] - Floyd carried out in the proceedings blow.

Mr. al-Marri had every opportunity to present his side of the story.

**JUDGE:**

No, I understand that. But I'm - again, I think the question that people have, and it's a legitimate question, is we want to make certain that this is not a process and a - that the process of determination and the definition are not going to simply metastasize and spin out of control.

The authorization for the use of military force, for example - and I want to know how carefully you interpret this - is phrased in

the past tense. The verbs are in the past tense. They talk about against those nations he "determined planned, authorized, committed or aided" a terrorist attack.

By phrasing those verbs in the past tense, does somebody who began an affiliation with al Qaeda after the September 11<sup>th</sup> attacks - does that individual fall within the Executive's understanding of what an enemy combatant is, somebody who joined al Qaeda in the summer of 2003, 'cause you might think this is hypothetical but it's really not, because we're, we're dealing with what the parameters of the exercise of Executive power are.

Now, what about that person that -

[OVERTALK]

**GREGORY GARRE:**

Your Honor, I think -

**JUDGE:**

- joined in 2003, given the fact that those verbs refer to past tense?

**GREGORY GARRE:**

Somebody like Mr. al-Marri, who closely associates with al Qaeda overseas after - even after 9/11, comes to this nation with the aid, direction and guidance of al Qaeda, could qualify as an enemy combatant. And the Congress's authorization of use of military force against al Qaeda and its associates -

[OVERTALK]

- would have -

**JUDGE:**

But even though, even though the AUMF refers to those who planned or directed the September 11<sup>th</sup> attacks - how could the person that - who is a second or third generation al Qaeda leader be involved in the, in the planning? I'm just trying to fi - flesh this out.

**GREGORY GARRE:**

Because the AUMF authorizes the President to

go after, for example, the organizations that he determines were responsible for the 9/11 attacks. The President has determined, as has the Congress, that the al Qaeda terrorist organization is responsible for those attacks.

And just as in the case of a conventional war, where a military force that we're fighting against could have soldiers coming up at any point in the process, this nation is at war with al Qaeda, as the President and the Congress have made clear, and individuals who go to fight with al Qaeda, whether abroad or in this country, the authorization -

[OVERTALK]

**JUDGE:**

All right now, we can talk about al Qaeda, but that's it - it - al Qaeda is a diffuse group. I mean, there's a core which apparently has been transplanted from Afghanistan to Waziristan or remote regions

of Pakistan. But there are different terrorist groups that are more or less loosely affiliated with it and financially or whatever. Are persons affiliated with groups, which may not be formally under the umbrella of al Qaeda —

[OVERTALK]

— are, are those determined to be enemy combatants?

**GREGORY GARRE:**

I think that would present a much more difficult case, Your Honor. The Executive would have to come in and explain why its belief — it believes that that organization is responsible for the 9/11 attacks or is supporting the al Qaeda organization that was responsible for the 9/11 attacks.

[OVERTALK]

**JUDGE:**

What about the complaint or the people that are involved in Bomadi? Isn't the Government maintaining that those people are enemy

combatants?

**GREGORY GARRE:**

Sure, and those individuals -

[OVERTALK]

**JUDGE:**

First of all, I have had no - have - were in exactly the situation that Judge Wilkinson is hypothesizing.

**GREGORY GARRE:**

Well, I'm, I'm not sure which indi - particular individuals Your Honor is referring to, but the individuals in those cases had been determined to be enemy combatants, using the definition that Congress has authorized and that the CSRT regulations use, which refer to members who are, who are part of or supporting al Qaeda forces. And s -

**JUDGE:**

So, but you're incorporating that definition, which is broader than the definition that Judge Wilkinson read you from the AUM - or



the language of the AUMF is all past tense.

**GREGORY GARRE:**

Well, Your Honor -

[OVERTALK]

**JUDGE:**

So I think that shows another reason why the  
MCA definition just doesn't work -

[OVERTALK]

-- on [ ? ]

**GREGORY GARRE:**

We - to be clear, Your Honor, our, our  
position is that this Court doesn't need to  
look any further than the definition in the  
*Quirin* case that this court used and the  
*Padilla* case.

[OVERTALK]

**JUDGE:**

[ ? ] the Laws of War.

**GREGORY GARRE:**

That -

[OVERTALK]

**JUDGE:**

How oft - in terms of the - excuse me, Judge Michael, go ahead.

**JUDGE MICHAEL:**

I was going to ask how long can you keep this man in custody? And, you know, that's, I think, you know, *Hamdi*, I think, puts the AUMF into the Laws of War. And in a traditional war, there's usually an end.

And even in *Hamdi* and *Padilla*, I think the reference was to the conflict in Afghanistan, and there could be a discernible end to that, but what about this man?

[OVERTALK]

**GREGORY GARRE:**

Well, the R -

**JUDGE MICHAEL:**

How long can you keep him in custody, forever? I mean, because the way the war on terrorism has been described, it's been described as a very long struggle.

So are you saying you can keep him in custody indefinitely and never let him out?

**GREGORY GARRE:**

Your Honor, the rule under the Law of War is that captured combatants may be held during the course of ongoing hostilities. The Supreme Court recognized that in the *Hamdi* case. And you're quite right -

OVERTALK]

**JUDGE:**

So [ ? ] is ongoing hostility here. There they defined the hostility; it was the war in Afghanistan. But what's your war here?

**GREGORY GARRE:**

It was the war against al Qaeda and the Taliban and Afghanistan. Here, I think, the relevant conflict is the conflict against al Qaeda. An important part of that conflict is ongoing.

[OVERTALK]

**JUDGE:**

Worldwide, anywhere?

**GREGORY GARRE:**

Well, I think in a p - I think potentially it could be, Your Honor, but I think an important part of that conflict is the conflict that is still ongoing in Afghanistan against al Qaeda.

[OVERTALK]

**JUDGE:**

But it doesn't sound like you're limiting yourself to that. I mean, how long can you keep this man - are you saying you're limiting custody here, just like *Hamdi*, to the conflict in Afghanistan?

**GREGORY GARRE:**

I don't - no, Your Honor, we're not. I think the Court could say -

**JUDGE:**

You're not saying that.

**GREGORY GARRE:**

That is not our position Your Honor. I think-

**JUDGE:**

So what is your position?

**GREGORY GARRE:**

Our, our - our position is that under the rule - under the Law of War, the rule applied in that context, individuals can be held during the course of ongoing hostilities. Hostilities, we know at this point, are active and ongoing against al Qaeda.

At some point in the future, the political branches which are charged with making these determinations -

**JUDGE:**

And the political branches are now projecting that that's going to go on for generations perhaps.

**GREGORY GARRE:**

It, it could go on for a long time.

[OVERTALK]

**JUDGE MICHAEL:**

So you're going to keep this man in, in military customer for a lifetime, it looks

like.

[OVERTALK]

**GREGORY GARRE:**

It could go on for a long time, Your Honor.  
What is -

**JUDGE MICHAEL:**

It looks like a lifetime. Am I right?

**GREGORY GARRE:**

Well, we don't know that, Your Honor. We  
certainly don't know that today.

[OVERTALK] [SEVERAL AT ONCE]

[OFF-MIKE COMMENTS]

**JUDGE:**

The alternative is to, to detain people who  
are openly hostile to the United States  
through a terrorist organization and then to  
say through some artificial determination -  
we're going to release them back so they can  
come and continue the war against us.

**GREGORY GARRE:**

That's true. I mean, whatever doubts the  
Court has -

[OVERTALK]

**JUDGE:**

Now, [ ? ] see, that's the least -

[SEVERAL AT ONCE]

MAN:

[ ? ] see, [ ? ] release him, probably.

**JUDGE:**

Right.

**GREGORY GARRE:**

There goes -

[OFF-MIKE COMMENTS/SEVERAL AT ONCE]

**JUDGE:**

[ ? ] properties, well like you did Mousali  
[?]

**JUDGE:**

Padilla - you changed his status from enemy  
combatant and then you indicted him and tried  
him and convicted him.

**GREGORY GARRE:**

Well -

**JUDGE:**

There's nothing that would prevent you, if

the *en banc* court would conclude that - go your way for putting Mr. al-Marri into the criminal process. This is -

**GREGORY GARRE:**

There is not, Your Honor. But I, I think it's-

**JUDGE:**

And you might well do that. And if we followed precedent, you did precisely that in *Padilla*.

**GREGORY GARRE:**

Your Honor, is this - as you yourself wrote in the panel decision in this case, if this Court agrees that Mr. al-Marri is an enemy combatant and should be treated as such in the Law of Wars, then there's nothing that binds the President or the Executive to deal with him through the criminal justice system. There are enormous advantages of the -

[OVERTALK]

**JUDGE:**

We're trying to prevent you from doing that,



and that's exactly what you did with *Padilla*.

**GREGORY GARRE:**

There is not, and there's nothing that prevents us from dealing with him through the military process, as the Executive has in past conflicts.

**JUDGE:**

Yes, but he's -]

[OVERTALK]

**JUDGE:**

But for present purposes, al Qaeda is not a degraded force. I mean, it has regrouped, from everything we can possibly understand, and in the Waziristan area of Pakistan, it's reassembling itself. So I don't think in terms of present purposes that anyone in this room would contend that the struggle with al Qaeda has somehow lapsed and along with it the authority of the AUMF.

**GREGORY GARRE:**

I think that's absolutely true, Your Honor.  
But my -

[OVERTALK]

**JUDGE:**

And Congress has shown no indication to  
modify this or to repeal it -

[OVERTALK]

or to narrow it.

**GREGORY GARRE:**

That's correct, Your Honor. The one thing  
that we know -

[OVERTALK] -

**JUDGE:**

But I think it's proper to ask the question  
about how long the man might be held in  
custody because, you know, we don't have a  
traditional Law of War situation, or a  
traditional war, like World War II, that had  
an end. And so -

**GREGORY GARRE:**

And, Your Honor -

**JUDGE:**

- we're into uncharted territory.

**GREGORY GARRE:**

Your Honor, we -

**JUDGE:**

So I think it's proper to ask the question, isn't it, about how long he might be held in custody?

**GREGORY GARRE:**

Absolutely, Your Honor. I think that that's one of the difficult legal questions that the courts have to confront in this situation.

**JUDGE:**

Your answer is the rest of his life.

[OVERTALK]

**JUDGE:**

No, that's not the answer. The answer is it's up to Congress to repeal the AUMF, isn't it? If Congress believes that the state of hostilities and that - that led and precipitated the events of September 11th have diminished in gravity, politically that -the AUMF -

We talk about the importance of the Executive

and Congress working in tandem. And the Executive is acting pursuant to an authority of Congress. And if the perceived threat lapses or diminishes, then it's up – isn't that a political question? And can't Congress, at that point, narrow or repeal altogether the authorization that it granted the President on – after 9/11?

**GREGORY GARRE:**

Certainly it could, Your Honor. And then one other point I wanted to make, Judge Michael –

[OVERTALK]

**JUDGE YOUNG:**

But isn't al-Marri's argument that that is precisely what Congress did in the Patriot Act? So perhaps in forming – in framing your response, you could elaborate on what you view as the interrelationship between that broader, more general grant of authority and the more limited delegation of authority that followed fairly closely on its heels.

**GREGORY GARRE:**

Right, Judge Young. I don't think anyone is contending that the Patriot Act repealed the authorization for use of military force. We --

[OVERTALK]

**JUDGE:**

No, but there is more limited language with respect to detention in [ ? ].

**GREGORY GARRE:**

That's true. And the Patriot Act deals with civilian detention. It is addressed to a different problem than military detentions that the authorization for the use of military force cover.

And again, looking at the panel decision, the initial panel decision in this case, even that decision recognized that if this court agrees that Mr. al-Marri, someone who trained with al Qaeda, met with top al Qaeda leaders, volunteered for a martyr mission, received funding from 9/11 financier al-Hasawi and came to this country to commit hostile

warlike acts, if someone like that meets the definition of an enemy combatant under the Law of War, then the authorization of military force, of course, authorizes the President to use military force in the form of the detention of this individual.

**JUDGE:**

Does the power to detain that you assert here apply equally to American citizens?

**GREGORY GARRE:**

Your Honor, we have assumed for purposes of this case that Mr. al-Marri has the same rights as a citizen enemy combatant, like the combatants in *Hamdi* and *Padilla*.

[OVERTALK]

**JUDGE:**

So [ ? ]

**GREGORY GARRE:**

Potentially I would say this, though - Mr. al-Marri is an alien, and the Supreme Court -

[OVERTALK]

**JUDGE TRAXLER:**

You've [   ?   ] answered my question. Let me ask you the next one.

**JUDGE:**

I didn't hear the answer. Would you answer Judge Traxler's question?

**GREGORY GARRE:**

The final point I was going to make is -

[OVERTALK]

**JUDGE:**

No, he answered Judge Traxler's question. Does it apply to American citizens?

**GREGORY GARRE:**

We have assumed, as the Supreme Court -

[OVERTALK]

The answer is yes.

**JUDGE:**

The answer is yes.

**GREGORY GARRE:**

The answer is yes. *Hamdi* holds that and *Padilla* holds that, and we've assumed that Mr. al-Marri, an alien, is entitled to the

same protections, and he received those protections.

I would say, and I wanted to follow up on this point, Judge Traxler, is that there would be nothing preventing this court from assuming that this case is limited to an alien and not reaching the difficult question—

[OVERTALK]

**JUDGE:**

Well, we have a Supreme Court precedence that says [LAUGHS] — the reason the Government has to say that the resident aliens have the same rights as citizens is because the Supreme Court said it, repeatedly.

**GREGORY GARRE:**

Well, the Supreme Court has also, for example, in the Eisentrager case, made clear that there are distinctions between aliens and citizens when it comes —

[OVERTALK]



**JUDGE:**

Right. But I -- and I -- and we acknowledge that. I mean, I think everybody acknowledges that.

But as far as the Fifth Amendment due process rights, a resident, a person, legally resident alien in the United States has the same rights as citizens. Isn't that correct? I mean, that --

**GREGORY GARRE:**

That is true, Your Honor.

**JUDGE:**

Justice Roberts said it.

**GREGORY GARRE:**

I think -- that is true, Your Honor. But the Supreme Court in the *Hamdi* case also said, in its first footnote, that enemy combatant cases ought to be taken and viewed very carefully on a case-by-case basis, with the particular facts of each case.

And we certainly think that this Court should keep very closely in mind the particular facts of this -

[OVERTALK]

**JUDGE:**

I was interested in your dialog with Judge Traxler. I want to hear that play out, because the questions that he was asking were-

**JUDGE TRAXLER:**

Yes, I have - the next question is do you believe that the power to confine carries with it or includes implicitly the power to seize?

**GREGORY GARRE:**

Yes. Under the authorization for use of military force, we think that it authorizes the military to capture and detain enemy combatants for some -

**JUDGE TRAXLER:**

So that in, in the situations we dealt with before, I think, even *Quirin*, the person was

in civilian custody first and then  
transferred to military custody -.

**GREGORY GARRE:**

Right.

**JUDGE TRAXLER:**

But I want to make sure I understand where  
we're going and what the Government asserts  
is the right of the military, if they  
believe, if they design - believe someone is  
an enemy combatant, to go - the military to  
go and seize that person.

**GREGORY GARRE:**

That's true, Your Honor. That happened in  
*Quirin*, that happened in *Padilla*, where  
individuals -

[OVERTALK]

**JUDGE TRAXLER:**

[ ? ] but they were seized, I believe, by  
civilian authorities -

**GREGORY GARRE:**

In both cases -

**JUDGE TRAXLER:**

– and turned over to military.

**GREGORY GARRE:**

– by the FBI.

[OVERTALK]

**JUDGE TRAXLER:**

But what you assert is the power of the military to seize a person in the United States, including an American citizen, on suspicion of being an enemy combatant by the Executive.

**GREGORY GARRE:**

Yes, Your Honor. We think the authorization for use of military force would authorize the military to capture and detain an enemy combatant.

[OVERTALK]

**JUDGE:**

All right, what check and balance is there on the assertion and exercise of that power?

**GREGORY GARRE:**

The procedural framework that the Supreme

Court established in the *Hamdi* case for citizen enemy combatants, and under that framework, the Government has to come in and explain why it believes that individual is an enemy combatant.

The Government did that in this case in the Declaration at pages 213 to 228 -

[OVERTALK]

**JUDGE:**

There's no check or balance on the seizure.

**GREGORY GARRE:**

Well -

**JUDGE:**

There's an after the fact.

**GREGORY GARRE:**

There is a hearing before a *habeas* court where -

[OVERTALK]

**JUDGE:**

There's no - no court in between the individual, no impartial person in between

the individual and the Executive.

**GREGORY GARRE:**

Well, Your Honor, there -- but there wasn't in the *Padilla* and the *Quirin* situation, where individuals are initially apprehended by the FBI. And it's not unusual for -

**JUDGE:**

They were charged civilian process, weren't they?

**GREGORY GARRE:**

And eventually they were turned over to the military. For example, to take the *Quirin* saboteurs, initially they were apprehended by the FBI, and then they were turned over to military authorities.

**JUDGE:**

But what you want is the power for the military to take 'em, take 'em back to the military based and perhaps hold them incommunicado.

**GREGORY GARRE:**

Well, we don't need that in this case.

**JUDGE:**

But you did that here when you transferred him to military custody. You have the power, if he's in military custody, to hold that person incommunicado.

**GREGORY GARRE:**

That's for some - at least for some period. The Supreme Court in the *Hamdi* case said that at some -

**JUDGE:**

A good 16 months in this case, wasn't it?

**GREGORY GARRE:**

It was, Your Honor. At some point that individual would have a right to counsel, and the Supreme Court hasn't defined exact -

**JUDGE:**

But you do that to citizens, as well.

**GREGORY GARRE:**

That's what the *Hamdi* court held, Your Honor. The *Hamdi* recognized -

[OVERTALK]

**JUDGE:**

When does the right to counsel attach?

**GREGORY GARRE:**

Your Honor, it attaches at -

[OFF-MIKE COMMENTS]

- some period after the initial detention.

And the Su - the courts haven't had to flush out that - the particular line at which that right attaches. I think -

The assumption, I think, is that there is some period for the military to interrogate that person and to, and to assess the situation, to take into account the military threat posed by that person. But -

[OVERTALK]

**JUDGE:**

Where are these rules located that will govern how long the military can hold them, what they can do to 'em, what, what forms of communication or the outside world or relatives or friends, or the, the person



detain themselves?

**GREGORY GARRE:**

Well, Your Honor, I think the Law of War, the Supreme Court decisions and the decisions of this Court are developing and have developed a framework for citizen enemy combatants and alien enemy combatants to challenge their enemy combatant determinations.

[OVERTALK]

**JUDGE:**

What, what notice is required if the military goes and takes somebody off the street? Nobody knows they've detained him; they take him and hold him incommunicado, what, what notice is required to the public or to the family about his detention?

**GREGORY GARRE:**

Your Honor, I think that there - particularly an individual captured, an individual captured in the United States, like Mr. al-Marri - and, again, this is, of course, a hypothetical situation, given that he was- [-

**JUDGE:**

Well sir, is it - is it a hypothetical situation, because there is, in fact, one Supreme Court case that does deal with military capture of a citizen - one, *Ex parte Milligan*. Right?

**GREGORY GARRE:**

Yes, Your Honor. Thank you for bringing that up.

**JUDGE:**

And that - and in that case, the Supreme Court held, no, you cannot have military detention of this civilian, even though this civilian planned the overthrow of the Government, with a group, to plan the overthrow of the Government, stealing guns, releasing prisoners of another nation and was a member of a secret terrorist organization willing to do great crimes in the United States, a secret terrorist organization sounding a lot like al Qaeda.

**GREGORY GARRE:**

Your Honor -

**JUDGE:**

And this was when our country was much smaller. That secret terrorist organization had more than 100,000 members in three states, three states of the union.

**GREGORY GARRE:**

Your Honor -

**JUDGE:**

Three states of the country. Do we, do you - does the Government posit that we have 100,000 al Qaeda members in the United States at this moment?

[OVERTALK]

**GREGORY GARRE:**

No, Your Honor. Certainly we don't have evidence of that. But, but what I would say about -

**JUDGE:**

So that, that the Son of Liberty, that secret terrorist organization, which Mr. Milligan

wasn't just related to or closely connected to, as Mr. al-Marri is, but had joined and was a member, and it was a paramilitary organization; he held a rank in it. Military comes and -

[OVERTALK]

**GREGORY GARRE:**

Your Honor, with, with respect -

**JUDGE:**

The United States military comes and takes jurisdiction over him. The Supreme Court says no, you can't do that.

**GREGORY GARRE:**

And with respect, Your Honor, we think that the Milligan case is completely different. What the Supreme Court said -

**JUDGE:**

Let me just ask you before you tell me how it's different. Do you - you do concede that Milligan is a good law.

**GREGORY GARRE:**

Of course, Your Honor.

**JUDGE:**

Okay.

**GREGORY GARRE:**

On page 121 of the Supreme Court's decision in that case, the Supreme Court said that Mr. Milligan, a citizen, was, quote, "in no wise connected with the military service of the enemy." On page -

[OVERTALK]

**JUDGE:**

That's right. And that has to be the confederate truth, because we know from the rest of the opinion that he was a member of the Sons of Liberty, which is the secret terrorist organization.

[BOTH AT OCNE]

**GREGORY GARRE:**

And on - and on page 45 of the *Quirin* case, the Supreme Court made clear that Mr. Milligan was not part of or associated with enemy forces.

**JUDGE:**

Right, and -

**GREGORY GARRE:**

Now, Mr. al-Marri -

**JUDGE:**

And *Quirin*, the Supreme Court said, okay, we'll distinguish Milligan because had Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a battlefield, the holding might well have been different, making the precise distinction between assisting nation's troop [?] and being part of a terrorist organization.

**GREGORY GARRE:**

We would disagree, Your Honor. What the Court focused on - and this is on page 45 of the decision, Your Honor - he was not part of or associated with enemy forces. Mr. al-Marri is. He trained with al Qaeda in Afghanistan. He met with top al Qaeda leaders. He received funding from al Qaeda financiers.

**JUDGE:**

All before we were at war in Afghanistan.

**GREGORY GARRE:**

The --

**JUDGE:**

--according to the Government.

**GREGORY GARRE:**

And then he came to this country to commit hostile and war-like acts.

**JUDGE:**

Mr. Garre, let me ask you a, a question, and it follows up a little bit on what Judge Traxler was asking about some of the procedures.

The difficulty here is the magistrate judge found that the R.A.P. declaration and affidavit was never controverted and that Mr. al-Marri refused to participate meaningfully, despite multiple opportunities to do so in challenging anything.

**JUDGE:**

It's called the Fifth Amendment, isn't it?

[FEMALE JUDGE LAUGHS]

But the - the - there would be no impediment, would there, to - of someone who is seized as an enemy combatant, challenging the basis of their seizure in a *Hamdi*-type hearing?

In other words, if somebody was picked up without any probable cause or was, was simply whisked by the military off the, the street, there could be - if it was a baseless detention, there would be the opportunity, as I understand it, to, to challenge that in a *Hamdi*-like hearing. I don't know how ample it would be.

And there would be no impediment, as I understand it, to a Section 1983 suit raising a violation of Fourth Amendment rights.

In other words, are there channels to



challenge baseless seizures and baseless detentions? And I would suppose that the *Hamdi*-type hearing would be one forum like that, and a subsequent civil suit for baseless detention would be another. Am I correct in that assumption?

**GREGORY GARRE:**

Absolutely, Your Honor. The *Hamdi* framework is the framework that the Supreme Court held that the Fifth Amendment of our Constitution guarantees the citizens declared as enemy combatants. Mr. al-Marri had the benefit of that framework.

As the magistrate judge explained on pages 244 to 246, he not only didn't respond to that, he didn't explain why he had extensive evidence of research into poisonous chemicals like hydrogen cyanide on his computer, why he had coded email communications with Khalid Sheikh Mohammed, why he repeatedly tried to call 9/11 financier al-Hasawi in the days

after 9/11 - the unusual circumstances of rushing to come to this country.

[OVERTALK]

**JUDGE:**

But there were no roadblocks put in his way to challenging any of those, were there? He could have, he could have challenged any and everything about the Government's actions.

[OVERTALK]

**GREGORY GARRE:**

Absol -

**JUDGE:**

He could have challenged the - transfer from the Department - DOJ custody to DOD custody. He could have challenged the manner in which he was seized. All of that's on the table, as I understand it.

**GREGORY GARRE:**

Absolutely, what the -

**JUDGE:**

How can a person who's held incommunicado challenge these things?

**GREGORY GARRE:**

Well -

[LAUGHTER IN COURTROOM]

Your Honor, here he would challenge them in the *habeas court* proceeding that he was afforded. He knows -

**JUDGE:**

Sixteen months after he's - well, more than sixteen months, years after [ ? ]

[OVERTALK]

**GREGORY GARRE:**

Well, I don't think we're arguing about when the *habeas* proceeding occurred. I thought the argument was about whether or not the Government has shown that he has been lawfully detained, that he is lawfully detained today. And the And the Government, as the District Court and magistrate judge found, clearly met its burden under the *Hamdi* framework.

Mr. al-Marri, as the District Court and

magistrate judge found, squandered his opportunity to present his side of the case. The District Court said neither the due process nor the rule of law in general permits a party to participate only in those procedures that he deems best. And we would agree with that.

And if I could make one other point, and I've wanted to get back to a question that Judge Duncan asked earlier about the locus of detention, the fact that Mr. al-Marri was not captured on the battlefield and, indeed, was not on the battlefield at any time.

The Supreme Court, in the *Quirin* case, dealt with that same exact argument, and here's what the Court said on page 38 of its decision. "Nor are petitioners any less the belligerents if, as they argue, they have not actually committed to attempted to commit any act of depredation or entered the theater or

zone of active military operations."

The fact that Mr. al-Marri was not captured on a battlefield, was not captured before he was able to commit the terrorist attacks that he came to this country to carry out, in no way impedes the Executive's authority to detain him consistent with the acts of Congress, consistent with the Law of War, consistent with the precedents of the Supreme Court and this Court.

If there -

[OVERTALK]

**JUDGE:**

Do you believe that the exercise of power under the AUMF must be consistent with the provisions of the Constitution?

**GREGORY GARRE:**

Yes, Your Honor. And those provisions were interpreted in the *Hamdi* case to establish the procedural framework under the Fifth

Amendment, again, for a citizen enemy combatant. Mr. al-Marri, an alien, had the full benefit of those protections.

He decided not to participate in that proceeding, and he should not get the benefit of, on the one hand, deciding not to participate and, on the other hand, claiming that he's entitled to more process than a citizen would be entitled under our Constitution.

**JUDGE:**

Just briefly, just in a moment, address the jurisdictional issue that I had raised with your colleague.

**GREGORY GARRE:**

Yes, Your Honor. Last fall, in the Military Commissions Act, Congress explicitly removed *habeas* jurisdiction and established a different procedure, including judicial review, for all aliens who have been determined by the United States to have been

properly detained as enemy combatants or awaiting such a determination.

In our view, Mr. al-Marri meets the description of the category over which the Congress removed *habeas* jurisdiction, which would mean that Mr. al-Marri would be afforded a CSRT as the Deputy Secretary of Defense has ordered, if this court dismisses his case for lack of jurisdiction, and then would have an opportunity to raise all of his legal and Constitutional arguments through the judicial review procedure that Congress established in the MCA.

Now, we recognize that Mr. al-Marri's situation is probably different than the large category of cases that Congress had in mind when it enacted the statute. We did feel an obligation to bring this jurisdictional issue to the attention of the court, and we do think that, properly read, Mr. al-Marri

would fit into the category of cases where Congress specified this alternative means. But if this Court disagrees, we would urge the court to make clear that its ruling is limited to the facts of this case.

If there are no further questions, we would ask this court to affirm the District Court decision, dismissing Mr. al-Marri's petition for *habeas corpus*. Thank you very much.

**JUDGE:**

Thank you. Mr. Hafetz.

**JONATHAN HAFETZ:**

Your Honor, I want to address first the *habeas* proceeding, Your Honor, and what was described as Mr. al-Marri's, by the Government, quote, "squandering his opportunity."

Mr. al-Marri has no obligation to submit to the wrong process. As we've discussed, he is an individual in this country. He has



unquestioned constitutional rights, including a right against self-incrimination, a right to be presumed innocent and a right to have the Government prove its case beyond reasonable doubt at trial.

It is astounding, Your Honor, that the Government would criticize Mr. al-Marri for exercising those rights in the very proceeding that designed to test whether or not he can be held by the military.

Moreover, Your Honor, it is more astounding, given that if Mr. al-Marri were – could substantially prejudice himself in that proceeding that the Government could turn around tomorrow and indict him, just as it has indicted Jose Padilla, and subject him to criminal penalties.

Your Honor, this is not a game. This is a man's life. And Mr. al-Marri has the right to

know what the rules are in the proceeding and to have it determined whether or not he could be held by the military before he's forced into - in a *habeas* proceeding that contains none of the essential safeguards under the Constitution.

Your Honor, I want to turn briefly to the *Quirin* case. The *Quirin* case was limited. The court repeated at least a half a dozen times in that opinion that *Quirin* - the *Quirin* saboteurs could be detained because they were under the military arm of the German Government.

They, as such, and as the Government argued at page 10 of, I believe, of their brief in that case, they had belligerent status under the Laws of War and as - and could be treated as combatants.

[OFF-MIKE COMMENT/OVERTALK]

Your Honor, the treatment of combatants -

**JUDGE:**

Do you think we could legitimately analogize al Qaeda with a foreign enemy in *Quirin*? I mean, we're in a new era where the traditional forms of war probably will not be seen again.

But we do have a serious threat from international terrorism in the form of al Qaeda and other organizations. And can we lawfully, under the Constitution, deal with that threat using our military power, as opposed to being left to treat that response in our civilian courts?

**JONATHAN HAFETZ:**

Two responses, Your Honor. First, the answer is under the Constitution, no, and that's *Ex parte Milligan*.

But Your Honor, even if the Court were to disagree with that, that, what Your Honor is

describing would require an absolute clear statement from Congress. There would need to be a concrete statute laying out exactly what the parameters are. And it's for Congress - it would be for Congress, not the Court to decide, and then the Court to evaluate it under due process.

But Congress has not done so, as we've explained. And under *Ex parte Milligan*, Your Honor -

**JUDGE:**

Well, this is the problem is that you say Congress has not done so. And there's this - this same argument was made in *Hamdi*, that they hadn't used the word "detention," so Congress has got to go back to the drawing board.

And so, we require Congress to get ever-more specific, and we pick apart the, the language of the AUMF. But there comes a point where

the Court just keeps constructing hurdles in the path of Congress and asking Congress to do something, which it has already done.

**JONATHAN HAFETZ:**

Well, Your Honor, we submit Congress -

**JUDGE:**

I mean, there's a question here of simply moving the goalpost.

**JONATHAN HAFETZ:**

Your Honor, we believe, under any circumstances, the indefinite four-plus years and potentially lifelong military detention of someone arrested in this country would be unconstitutional.

But again, as we've argued, Congress has not done so. Congress authorized the use of force and could - and *Hamdi* could be detained, Your Honor, because he fell squarely within -

**JUDGE:**

Is there anything, is there anything -

– the Laws of War.

[OVERTALK]

**JUDGE:**

Is there anything – is there anything about the detention that, that Mr. al-Marri is precluded from contesting, if he wishes to do so in the, in the hearing below?

**JONATHAN HAFETZ:**

Well, Your Honor, the – while we understand that the Court must, for purposes of our argument, take the allegations as true –

**JUDGE:**

Let me just –

**JONATHAN HEIFETZ:**

It does bear noting that the declaration relies – is larded with hearsay, and it's precisely the type of hearsay that the Constitution prohibits. It is hearsay for – includes hearsay from individuals who have been interrogated in Government custody. It

is precisely the principal evil that, as Justice Scalia said, that the Constitution clause is meant to prevent.

[BOTH SPEAK AT ONCE]

**JUDGE:**

Well, you criticize – you, you – you, you criticize the Government for not providing rights that this gentleman has never sought to invoke.

**JONATHAN HAFETZ:**

Well, Your Honor, he's invoked them. He's invoked his right to a trial from the get-go and argued his detention was illegal.

He was held for 17 months incommunicado. And, Your Honor, the only individuals he's able to talk to now are his lawyers, with security clearance. In more than four-plus years he hasn't been able to speak to his family, including his wife and five children.

And while the Government holds out a

possibility of -

[OVERTALK]

**JUDGE:**

So [ ? ] this procedure, he'd have to give up his Fifth Amendment right.

**JONATHAN HAFETZ:**

That's exactly right, Your Honor.

[OVERTALK]

That's exactly right.

**JUDGE:**

Let us return to the question I had, which I didn't really finish. And I'm - I'm curious to know your position on this, that al Qaeda, if we assume al Qaeda is an ideologically-driven organization, but not a nation that was responsible for attacking the United States on 9/11 and killing more people that were killed at Pearl Harbor, your suggestion is that we cannot treat al Qaeda as a surrogate for a nation under our general war powers, military power?



**JONATHAN HAFETZ:**

Your Honor, the President has in his power to use military force against al Qaeda. What we believe the Constitution prohibits, Your Honor, is that the President can indefinitely detain an individual without charge based on allegations of terrorism.

[OVERTALK]

**JUDGE:**

Well, answer my question. My question is we have some traditional rules of war that have been articulated in our various cases. And one of the criteria is that we be at war with a nation, a sovereignty. Well, al Qaeda is not a nation in the traditional sense. It doesn't have sovereignty over a particular territory. It's an organization driven by an ideology, I suppose, against the West.

And this organization, we have determined, is responsible for attacking our country and causing a lot of harm.

And my question is can we legitimately, under the Constitution, treat an organization of that type as a foreign nation, for purposes of exercising the war powers of the United States. I'm talking about Congress and the President.

**JONATHAN HAFETZ:**

Again, Your Honor, our position is no, it would violate the Constitution to be able to detain individuals in this country based on -

[TWO AT ONCE]

However, Your Honor, again, Congress - this Court doesn't and should not even reach that-

[OVERTALK]

- weighty constitutional question because - because Congress hasn't authorized it.

**JUDGE:**

We have to capture all these people who are not part of a foreign nation and bring them into civilian courts and punish them, as opposed to just exercising the military power

and incapacitating them so they can't attack us anymore.

**JONATHAN HAFETZ:**

Your Honor, if they're lawfully within this country, yes. We're arguing that it is not direct -

[OVERTALK]

**JUDGE:**

But what if they're - what if they're not lawfully in this country?

**JONATHAN HAFETZ:**

Well, Your Honor, the Supreme Court, to quote the Supreme Court in the Curtis-Wright decision, the Constitution does not have force outside the United States, except with application to its citizens. Our argument is limited to the individuals within the United States.

And, Your Honor, I submit that the power the Government is asking for is exactly the power that this country rebelled against, that the

President or the leader would have the  
authority to render the military severely to

-

[OVERTALK] -

**JUDGE:**

Well, the war power, the power committed to  
the President is to defend our country from  
just such attacks.

**JONATHAN HAFETZ:**

Your Honor, it -

**JUDGE:**

Now, just because the attack wasn't done by a  
country within organized boundaries, it was  
done by an organization, militarily armed,  
designed and planned, well organized, large  
in number and could cause severe, and did  
cause severe harm, to our country.

Now, we rose up and responded with military  
force, not civilian force. We didn't say the  
minute we catch you we're going to bring you  
into our courts and try you. We said we can

bomb 'em, repel them, detain them, kill them, anything to protect the sovereignty of the United States. And we treated them that, and And your suggestion is that our treating al Qaeda in that fashion violates the constitutional war power.

[OVERTALK]

**JONATHAN HAFETZ:**

Your Honor, actually, I don't think that's an accurate description of what happened. The military used force in Afghanistan, and there was certainly a war there, and those captured in that war, like *Hamdi*, could be detained as enemy combatants.

But actually I'm not aware of any case where the military has been used to capture anyone in the United States. I'm only aware of the numerous -

**JUDGE:**

*Milligan.*

**JONATHAN HAFETZ:**

*Milligan*. Right, *Milligan*.

**JUDGE:**

[ ? ] used to capture –

[OVERTALK]

**JONATHAN HAFETZ:**

That's right. That's right. I meant,  
Since 9/11, *Milligan* –

[OVERTALK]

**JUDGE:**

*Milligan* was not a foreign – was not the  
enemy and he was not foreign. Here we have –

**JONATHAN HAFETZ:**

He was –

**JUDGE:**

– somebody outside of the United States, an  
international terrorist organization that has  
been – determined itself to cause us and to  
continue to cause us harm and to bring us to  
our knees, if they can.

**JONATHAN HAFETZ:**

Well, Your Honor, Judge Motz –

[OVERTALK]

**JUDGE:**

And to suggest that the war power can't be used there is a fairly aggressive argument, isn't it?

**JONATHAN HAFETZ:**

Your Honor, Judge Motz described the danger Milligan posed, a grave danger. And this case, I submit, is really *Milligan* in modern dress. And the Supreme Court said *Milligan* must be treated within the criminal process.

I just want to briefly address the comment before about the limits or the absence of limits to the Government's power. There are no limits, as was made plain, about really who the Government could hold and how long they could hold them.

And the Supreme Court, Justice O'Connor in the *Hamdi* decision, was very cautious in explaining what the detention power was on

the AUMF and emphasized that the detention power was there -

[OVERTALK]

**JUDGE:**

How can you see there are no limits, when a hearing has been provided to test those limits?

**JONATHAN HAFETZ:**

Well, Your Honor, that was a hearing that was designed for the battlefield. Justice O'Connor said that reason *Hamdi* could be detained -

[OVERTALK]

**JUDGE:**

I don't know that it was a hearing that was designed for the battlefield. The court in *Hamdi* simply decided the case on the facts before it. But you say -

[OVERTALK]

**JONATHAN HEFETZ:**

Well, no [ ? ]



**JUDGE:**

But you say there are no, you say there are no limits to what Government can do and no limits to what the Government -

[OVERTALK]

**JONATHAN HEFETZ:**

I - Your Honor, I have a principle -

[BOTH AT ONCE]

**JUDGE:**

Excuse me a second.

**JONATHAN HEFETZ:**

Sorry.

**JUDGE:**

- that there are no limits to whom the Government can seize, there are no limits to what the Government can do?

But, and yet, there's a hearing pursuant to 2241 in which Mr. al-Marri is represented by counsel, and the hearing exists for the very purpose of testing those limits.

Now, exactly what -- now how many procedures should be afforded and everything is something we haven't gotten into because there wasn't any joining of that issue and invocation of those procedures below.

**JONATHAN HEFETZ:**

Well --

**JUDGE:**

But to say there are no limits when there's a hearing provided expressly by the Supreme Court and under the laws of this country, 2241, by virtue of the power of *habeas corpus*, to test those limits --

**JONATHAN HAFETZ:**

Your Honor, there's a --

**JUDGE:**

-- I can't understand how you arrive at what is your basic position, which is to, you know, inculcate an atmosphere of fear about there being no limits.

**JONATHAN HAFETZ:**

There's no limit to who the Government can

put into the category of enemy combatant and take out of this criminal justice system.

But to go back to Justice O'Connor, in the *Hamdi* decision, the rationale - it wasn't just the facts, it was the rationale. And the reason Hamdi could be detained was to prevent his return to the battlefield and prevent him from taking up arms again.

There's no allegation Mr. al-Marri was on a battlefield or near a battlefield. There's no allegation he ever took up arms. Your Honor, and Justice O'Connor cautioned about precisely this situation, this type of situation, this type of extension of military power, and said it would cause the understanding of the AUMF to unravel.

And, Your Honor, I submit that what we have here is a total unraveling of the AUMF and of the authority to seize individuals in the

United States - to seize individuals in the  
United States. If there are no further  
questions -

**JUDGE:**

Thank you. We'll come down and speak to  
counsel, and then we will take a break and  
reconstitute for our other cases.

[SOUND OF GAVEL] [SOUND CUT]

**[END CD 2]**

**[END OF TRANSCRIPT]**