Docket No. 06-7427

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

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

Petitioners-Appellants,

—v.—

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

Respondent-Appellee.

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

BRIEF AMICI CURIAE OF HUMAN RIGHTS FIRST AND HUMAN RIGHTS WATCH

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

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

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

No.

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

No.

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

No.

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INTEREST OF *AMICI CURIAE*

Amici are experts in international human rights law and its application in domestic courts.[1] Human Rights First (HRF) has worked since 1978 to advance the cause of justice, human dignity and respect for the rule of law. HRF works to support human rights activists and to ensure that domestic legal systems around the world incorporate international human rights protections. HRF also works to build a strong international system of justice and accountability for human rights crimes. Since September 11, 2001, HRF has been actively engaged through research, trial monitoring, and advocacy in promoting effective responses, consistent with U.S. and international law, to terrorism.

Human Rights Watch (HRW) is a non-profit organization established in 1978 that investigates and reports on violations of fundamental human rights in over 70 countries worldwide. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state and non-state actors,

[1] Both parties have consented to the filing of this *amici curiae* brief.

HRW seeks to bring public pressure upon offending governments and others to end abusive practices. HRW has filed amicus briefs before various bodies, including U.S. courts and international tribunals.

SUMMARY OF ARGUMENT

May the Executive Branch deprive a person held in military detention of the basic protections of international human rights law simply by designating him an "enemy combatant?" The answer, under both international human rights law and the domestic law that makes international human rights law binding on United States courts, must be "no." All individuals have the right to be free from arbitrary detention, and all individuals have the right not to be detained upon evidence obtained through torture. These prohibitions, long recognized by the United States, are reflected in numerous international and regional human rights instruments to which the United States is signatory, and in the municipal laws of most nations.

The government has deprived Ali Saleh Kahlah al-Marri of his liberty without regard for either of these fundamental rights. *First*, the government

has detained him for over three years without the minimal procedural safeguards necessary to ensure his meaningful challenge to his designation as an "enemy combatant." *Second*, the process advocated by the government and endorsed by the district court would allow al-Marri's fate to turn on evidence potentially obtained through the torture of other detainees, without inquiry into the provenance of the information used against him. To sanction al-Marri's detention in the face of these basic legal deficiencies would corrupt due process, conflict with the United States's international obligations, and compromise its international standing as a proponent of the rule of law.

Amici submit that this Court must adhere to the obligations imposed by international human rights law and give al-Marri the procedural safeguards that would enable him to challenge adequately the lawfulness of his detention, as well as an evidentiary hearing to determine whether the government can sustain a case against him through evidence lawfully obtained.

ARGUMENT

I. International Human Rights Law Bars Prolonged Arbitrary Detention.

In the wake of the Second World War, the United States spearheaded the development of international human rights law to ensure consistent, fair, and dignified treatment of all human beings. The resulting system of treaties, declarations, and covenants, as well as common practice among nations, is based on the simple idea that all individuals are entitled to a core body of fundamental rights.

The centerpiece of international human rights law is the 1948 Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948) (hereinafter Universal Declaration), "perhaps the most well-recognized explication of international human rights norms." *Alvarez-Machain v. United States*, 331 F.3d 604, 620-621 (9th Cir. 2003) (*en banc*), *rev'd on other grounds sub nom. Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). Human rights treaties followed it, principally the 1966 International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) (hereinafter ICCPR). The 1948 Universal Declaration and the ICCPR together constitute an authoritative

statement of the human rights obligations that nations around the world have committed to uphold.

These obligations include standards for the governmental detention of individuals accused of crimes and in particular, the basic procedural safeguards enabling detainees to challenge their confinement. These obligations are binding in al-Marri's case as a matter of both international and U.S. law.

A. Al-Marri Is Protected Against Prolonged Arbitrary Detention as a Matter of International Law.

International instruments are express and unequivocal in their prohibition of arbitrary detention. By article 1, the Universal Declaration provides that "[n]o one shall be subjected to arbitrary arrest, detention or exile." Just as the United States has long recognized that being free from arbitrary physical detention by the government is "the most elemental of liberty interests," *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004), international human rights law places this prohibition at the core of its protections: "Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United

Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights." *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3, 42 (May 24).

The ICCPR, which, with 152 states party, is one of the most widely ratified multilateral treaties in force, most clearly condemns arbitrary detention and most clearly identifies the procedural safeguards necessary to prevent it. The United States ratified the ICCPR in 1992 and is bound as a matter of international law to respect the obligations it imposes.[2]

The regional human rights instruments echo this prohibition against arbitrary detention. American Convention on Human Rights art. 7(3), Nov. 22, 1969, O.A.S.T.S. No. 36 (hereinafter American Convention) ("No one shall be subject to arbitrary arrest or imprisonment.") (signed but not ratified by the United States); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, art.

[2] *See* Office of the U.N. High Commissioner for Human Rights, *Status of the Ratifications of the Principal Human Rights Treaties* (June 9, 2004), *available at* http://www.unhchr.ch/pdf/report.pdf. The ICCPR permits limited derogation "in time of public emergency," art. 4, but the United States has not made any such derogation. *Report on the Situation of Detainees at Guantanamo Bay*, U.N. ECOSOC, 62nd Sess., para. 12, U.N. Doc. E/CN./2006/120 (Feb. 15, 2006); *cf.* Reply of U.S. Government to the List of Issues to be Taken Up in Connection with the Consideration of the Second and Third Periodic Reports of the United States of America, p. 14 (July 17, 2006), *available at* http://www.ohchr.org/english/bodies/hrc/docs/AdvanceDocs/USA-writtenreplies.pdf (informing the Human Rights Committee that "counterterrorism measures as a general matter satisfy U.S. obligations under the [ICCPR]").

5(4) (hereinafter ECHR) ("Everyone who is deprived of his liberty shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court."); African Charter on Human and Peoples' Rights, art. 6, June 27, 1981, 21 I.L.M. 58 ("[N]o one may be arbitrarily arrested or detained.").

The right is also universally recognized in domestic legal systems: over 119 national constitutions—including, of course, the U.S. Constitution, by its Fifth Amendment—guarantee the right to be free from arbitrary detention. M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 261 n.117 (1993).

B. **Al-Marri Is Protected Against Prolonged Arbitrary Detention as a Matter of United States Law.**

From the earliest days of the Republic, the Supreme Court has recognized that customary international law is part of U.S. domestic law and has enforced it accordingly:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.

The Paquete Habana, 175 U.S. 677, 700 (1900); *see also Banco Nacional de Cuba v. Sabbatino*, 376 U.S 398, 423 (1964) ("United States courts must apply international law as part of our own in appropriate circumstances."); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161 (1820); *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 161 (1795); *cf. Sosa* 542 U.S. at 729 ("For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.").

The test for determining what constitutes "a settled rule of international law" by "the general assent of civilized nations," *The Paquete Habana*, 175 U.S. at 694, is stringent. To qualify as customary international law, a norm must reflect "a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1987) (hereinafter RESTATEMENT). To determine whether a norm has reached that status, courts look to formal international agreements like treaties and declarations, *id*. cmt. i; *see also North Sea Continental Shelf* (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3, 28-29 (Feb. 20), as well as actual state practice, judicial decisions, and the expertise of jurists and legal authorities, *see generally The Paquete Habana*, 175 U.S. at 700-01; *Smith*, 18 U.S. at 160-61.

As a result of its widespread acceptance in both international instruments and the practice of nations, it is well settled that the prohibition of arbitrary detention is a norm of customary international law.[3] *Alvarez-Machain*, 331 F.3d at 620 ("[T]here exists a clear and universally recognized norm prohibiting arbitrary arrest and detention"); *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1397 (5th Cir. 1985) ("the right not to be arbitrarily detained" is one of the "human rights that have been generally accepted—and hence incorporated into the law of nations"); *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1388 (10th Cir. 1981) ("No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment"); RESTATEMENT, § 702(e) (state violates customary international law "if, as a matter of state policy, [a state] practices, encourages, or condones" prolonged arbitrary detention).[4] Hence, that norm must be given effect in the U.S. legal system.

[3] While the Senate ratified the ICCPR "on the express understanding that it was not self-executing," *Sosa*, 542 U.S. at 735, the prohibition against prolonged arbitrary detention is binding on U.S. courts as a norm of customary international law.

[4] The Restatement is an authoritative expression of the foreign affairs law of the United States. *See, e.g., C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 421 n.3 (2001); *Weinberger v. Rossi*, 456 U.S. 25, 29 n.5 (1982).

C. The Government's Designation of Al-Marri as an Enemy Combatant Does Not Strip Him of Protection Against Prolonged Arbitrary Detention.

Over three years ago, the government abruptly removed al-Marri from the domestic criminal justice system after labeling him an "enemy combatant," based on allegations that he is "closely associated with al Qaeda, an international terrorist organization with which the United States is at war," "engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism," and that he "possesses intelligence, including intelligence about personnel and activities of al Qaeda." Letter from President George W. Bush to Secretary of Defense Donald Rumsfeld and Attorney General John Ashcroft (June 23, 2003), JA 54; *see also* Unclassified Declaration of Jeffrey N. Rapp (Sep. 9, 2004), JA 213 (hereinafter Rapp Declaration). On the basis of this designation, al-Marri has been held for years without the basic procedural safeguards for challenging his detention that international human rights law and domestic law require.

Amici dispute that the law of war applies to al-Marri.[5] They dispute that his alleged acts render him subject to designation as an enemy combatant. But even if the law of war does apply, the government's obligation to honor al-Marri's basic human rights remains undiminished. *See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 131, ¶ 105 (July 9) ("the protection offered by human rights conventions does not cease in case of armed conflict"); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8), ¶ 25 ("[T]he protection of the [ICCPR] does not cease in times of war"); Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, ¶ 42, O.A.S. Doc. OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. (Oct. 22, 2002) ("the international

[5] The law of war, also known as international humanitarian law, is comprised of international treaties relating to armed conflicts—principally the Geneva Conventions—and the rules regarding such conflicts followed by nations out of a sense of legal obligation. *See* Brief of *Amici Curiae* Specialists in the Law of War at Pt. I.C.1, Ali Saleh Kahlah al-Marri v. Commander S.L. Wright, No. 06-7427 (4th Cir. Nov. 20, 2006). Nothing in the facts of al-Marri's arrest and detention suggests that he is subject to the law of war as opposed to ordinary criminal jurisdiction. If anything, his case is most like *Ex Parte Milligan*, in which the Supreme Court held that a civilian detainee accused of conspiracy to attack the United States in the midst of a war could not be tried by a military commission while the ordinary Indiana courts were open and available. 71 U.S. (4 Wall.) 2, 121-122, 140-141(1866). To hold otherwise here would allow the government to nullify all the constitutional protections of the criminal justice system on the mere incantation of the label "enemy combatant," which, in itself, is based on a misconception of the law of war. Brief of *Amici Curiae* Specialists in the Law of War at Pt. I.C.2.

human rights commitments of states apply at all times, whether in situations of peace or situations of war.").[6] As the United Nations Security Council made clear in the specific context of the "war on terrorism," states "must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law." S.C. Res. 1456, ¶ 6, U.N. Doc. S/RES/1456 (Jan. 20, 2003).

Where the law of war and international human rights law directly conflict, the law of war constitutes *lex specialis*, or specific guidance, which may trump more general obligations under international human rights law. *See, e.g.*, U.N. Hum. Rts. Comm., General Comment No. 31, *Nature of the General Obligation Imposed on States Parties to the Covenant*, CCPR/Rev. 1/Add. 13 (May 26, 2006). But even if the law of war were to apply here, it would not displace the protections of international human rights law.

[6] *See generally* Theodore Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 273–75 (2000) (both international human rights law and international humanitarian law apply even in armed conflict). U.S. courts have applied international human rights law and the law of war simultaneously in situations of armed conflict. *See, e.g.*, *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (applying both international human rights law and law of war to claims under the Alien Tort Claims Act related to the Bosnian conflict); *In re Agent Orange Product Liability Litigation*, 373 F.Supp.2d 7, 130–34 (E.D.N.Y. 2005).

Common Article 3 of the Geneva Conventions does not provide any specific guidance about the process due to a detainee like al-Marri. *See Hamdan v. Rumsfeld*, 126 S.Ct 2749, 2795-96 (2006) (applying Common Article 3 in case involving al Qaeda detainee). Hence, there is no *lex specialis* to limit or in any way relieve the government of its duty to comply with the protections of international human rights law here.

II. Al-Marri's Detention Violates the International Human Rights Law Prohibition Against Prolonged Arbitrary Detention.

Prolonged detention is "arbitrary" and thus proscribed by international law if it is either: (i) unlawful under domestic law; or (ii) "incompatible with the principles of justice or with the dignity of the human person." RESTATEMENT, § 702 cmt. h.[7] Al-Marri's detention is arbitrary on both counts.

[7] A detention can be arbitrary under international law even if it is fully consistent with domestic law. The United Nations Human Rights Committee, whose role is to monitor compliance with the ICCPR, has observed that the drafting history confirms that "'arbitrariness' is not to be equated with 'against the law,' but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law." A.W. *Mukong v. Cameroon* (Communication No. 458/1991), U.N. Doc. CCPR/C/51/D/458/1991 (U.N. Committee on Human Rights 1994). Indeed, the drafters of the Universal Declaration, who met after witnessing Nazi atrocities committed under the guise of "law," intended the treaty "to show that the United Nations disapproved of such practices" even though they may have complied with then-applicable domestic law. Statement of U.K. Delegate, 3 U.N. GAOR, Pt. I, Third Comm. 247, 248 (1948).

First, Petitioners argue, and *Amici* agree, that al-Marri's detention is unlawful under domestic law because it violates not only basic due process guarantees, but also, to the extent *Hamdi*, 542 U.S. 507, even applies to this case, the minimal process set forth there. *See* Brief for Petitioners at 20-21, 40-49, Ali Saleh Kahlah Al-Marri v. Commander S.L. Wright, No. 06-7427 (Nov. 13, 2006) (hereinafter Pet'rs Br.).

Second, al-Marri's detention is unlawful because it is contrary to the basic justice norms enumerated in the ICCPR, other human rights treaties, and international jurisprudence defining the right to be free from arbitrary detention.

A. Article 9(4) of the ICCPR Requires That Al-Marri Be Afforded Procedural Safeguards To Ensure That His Detention Is Not Arbitrary.

A detention is arbitrary under international law if it conflicts with the ICCPR's procedural safeguards, including those applicable *before* trial, so a detainee may challenge the lawfulness of detention.[8] Article 9(4) of the

[8] ICCPR Article 9 provides:

> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

ICCPR guarantees that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." ICCPR, art. 9(4).

Article 9(4) requires that proceedings be "truly adversarial" and hence fundamentally fair. *Lamy v. Belgium*, 11 Eur. Ct. H.R. 529, ¶ 29 (1989); *see also Kampanis v. Greece*, 21 Eur. Ct. H.R. 43, ¶ 58 (1996). One of the most significant safeguards of fairness is equal access by the defense to all of the evidence used to justify the detention, in order to enable the defense to challenge adequately its validity. *See generally Wloch v. Poland*, 34 Eur. Ct. H.R. 9, ¶ 12 (2000) (interpreting parallel provision of ECHR to find detention lawful only where defense has equal access to government's

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> 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
>
> 3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. . . .
>
> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

evidence presented to court); *Lamy*, 11 Eur. Ct H.R. at ¶ 29 (same).[9] What constitutes equal access to the evidence upon which the government justifies detention can take into account the requirements of national security, but in all cases must still "accord the individual a substantial measure of procedural justice." *Chahal v. United Kingdom*, 23 Eur. Ct. H.R. 413, ¶ 131 (1997) (domestic terrorism detention unlawful where full material on detainee's designation as national security threat was not made available to defense or court).

Equal access to the evidence supporting detention in turn depends on and guarantees other basic process protections: *first*, the ability to confront the government's witnesses, *see, e.g., Cantoral-Benavides v. Peru*, 2000 Inter-Am. C.H.R. (ser. C) No. 69, ¶¶ 114-15 (2000) (military proceedings violated plaintiff's pretrial ability "to prepare a proper defense, to choose a lawyer, to question witnesses"); *Barbera v. Spain*, 11 Eur. Ct. H.R. 360, ¶ 78 (1989) (prior to trial "all the evidence must in principle be produced in the presence of the accused at a public hearing with a view to adversarial argument"); *Castillo v. Peru*, 1999 Inter-Am. C.H.R. (ser. C) No. 52, ¶ 153

[9] The ECHR provides that a detainee "shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court." ECHR, art. 5(4).

(1999) (accused must be allowed to question police and military officials about accusations against him); *second*, access to any exculpatory evidence in the government's possession, *see, e.g.*, *Wloch*, 34 Eur. Ct. H.R. at ¶ 127; *third*, sufficient access to counsel to mount a meaningful defense, *see, e.g.*, *Imbrioscia v. Switzerland*, 17 Eur. Ct. H.R. 441, ¶¶ 33-34, 38 (1993); *Hilaire, Constantine and Benjamin, et al. v. Trinidad and Tobago*, 2002 Inter-Am. Ct. H.R. (ser. C) No. 94 , ¶ 152(b) (2002) (detainee entitled to "adequate legal assistance for the effective preservation of constitutional motions"); and, *finally*, a presumption of innocence that the government bears the burden of disproving, *Cantoral-Benavides*, 2000 Inter-Am. C.H.R. at ¶¶ 118-22 ; *Barbera*, 11 Eur. Ct. H.R. at ¶ 91.

B. The Process Afforded Al-Marri Violates Article 9(4) of the ICCPR.

The government has not given al-Marri these minimal safeguards of basic justice. Since June 23, 2003, al-Marri has been detained in solitary confinement in a Navy brig. He was denied access to counsel for the first seventeen months of his confinement, while repeatedly being interrogated under allegedly abusive conditions. It was not until April 5, 2006, almost three years after the government first detained him as an enemy combatant,

that al-Marri learned the most basic allegations against him, when the government declassified some of the Rapp Declaration.

As an initial matter, the circumstances of al-Marri's arrest and early detention violated the ICCPR's requirements that a detainee shall be "promptly informed of the charges against him," ICCPR, art. 9(2), and "brought promptly before a judge . . . [for] trial within a reasonable time or to release," *id*. art. 9(3), so that a court may "decide without delay on the lawfulness of the detention," *id*. art. 9(4). A two-month delay in bringing proceedings to challenge the legality of detention has been found to violate international law, illustrating the egregious violation represented by the years at issue here.[10]

The process al-Marri belatedly received also falls far short of international minimal standards. In December 2005, the district court adopted in principle *Hamdi*'s requirement that a detainee must have a "fair opportunity for rebuttal" of the government's factual assertions. *Al-Marri v.*

[10] *See, e.g., Wloch*, 34 Eur. Ct. H.R. at ¶¶ 135-36 (two-month delay violates detainee's right "to take proceedings by which the lawfulness of his detention shall be decided speedily by a court"); *Cantoral-Benavides*, 2000 Inter-Am. C.H.R. at ¶¶ 74-77 (fifteen days' detention without charge and without access to counsel violates detainee's right to personal liberty); *cf. Sosa*, 542 U.S. at 738, 737 n. 27 (citing *United States v. Iran*, 1980 I.C.J. 3, to suggest that detention of many months would violate the "principle against arbitrary detention that the civilized world accepts as binding customary international law").

Hanft, No. 2:04-2257 (Dec. 19, 2005) (Amended Order) (citing *Hamdi* 542 U.S. at 507), JA 186-187. Purporting to apply *Hamdi*, however, the magistrate judge and the district court have required merely that al-Marri be given an opportunity to present a factual case in response to the Rapp Declaration's hearsay allegations. An opportunity to present a factual case is meaningless—and unlawful under international law—unless accompanied by sufficient access to the evidence and the corresponding ability to challenge adequately the *evidentiary basis* for the government's allegations. *Wloch*, 34 Eur. Ct. H.R. at ¶¶127-9 (denial of fair proceedings where defense was not given opportunity to review underlying evidence because "opportunity of effectively challenging the statements or views which the prosecution bases on specific documents in the file, may in certain instances presuppose that the defence be given access to these documents"); *see also Lamy*, 11 Eur. Ct H.R. at ¶ 29 (violation when detainee could not access reports made by investigating judge and police and thus could not challenge "appropriately the reasons relied upon to justify a remand in custody"); *Ocalan v. Turkey*, 41 Eur. Ct. H.R. 45, ¶¶ 138-47 (2005) (violation when accused not permitted to inspect evidence against him prior to hearings or given sufficient time to inspect case file).

Al-Marri has been granted virtually no access to the evidence against him. He has not been provided with the information and sources on which the Rapp Declaration is based and how that information was obtained. Pet'rs Br. 56. He has not been informed of or provided any exculpatory evidence. *Id.* 63. He has not been able to examine witnesses against him, obtain witnesses on his own behalf, or avail himself of the presumption of innocence that is his entitlement under international law. *Id.* 50-55, 60-61. Even after he was finally granted counsel, he has not had adequate access to that counsel so as to have a meaningful opportunity to prepare his defense. *Id.* 9.

On these facts, there would be no question that the process devised by the district court is not truly adversarial and, hence, fundamentally unfair. [11]

[11] The Military Commissions Act of 2006, Pub. L. No. 109-366, § 949, 120 Stat. 2600 (2006) (hereinafter MCA), permits the Secretary of Defense, in consultation with the Attorney General, to prescribe "pretrial procedures" for detainees awaiting trial before a military commission. Even were the MCA to apply to al-Marri by virtue of his designation as an enemy combatant, which *Amici* dispute, *see* Pet'rs Br. 24-25, the provision regarding pre-trial procedures would have to be construed in a manner consistent with, and informed by, international human rights law. *See The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

Under international human rights law, al-Marri's detention is arbitrary and thus illegal.[12]

III. This Court Should Conduct a Hearing to Determine Whether the Evidence Used Against Al-Marri Was Obtained by Torture.

International law prohibits detention based on evidence obtained through torture. Because there is a reasonable basis for believing that the allegations contained in the Rapp Declaration were derived from the torture of the informants there described, this Court should order an evidentiary hearing to ascertain whether the government can sustain this detention through lawful means.

[12] In its motion of November 13, 2006, the government proposes convening a Combatant Status Review Tribunal (CSRT), constituted according to the procedures described in "Implementation of Combatant Status Review Tribunals for Enemy Combatants Detained at U.S. Naval Base Guantánamo Bay, Cuba," Memorandum from the Deputy Secretary of Defense (July 14, 2006), *available at* http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf, to determine whether al-Marri is properly detained as an enemy combatant. Respondent's Motion to Dismiss for Lack of Jurisdiction at 5, Ali Saleh Kahlah al-Marri v. Commander S.L. Wright, No. 06-7427 (Nov. 13, 2006); *id.* at Attachment 2, Memorandum for Director, Office for the Administrative Review of the Detention of Enemy Combatants. As *Amici* will argue in a supplemental filing in accord with the government's proposed schedule for addressing this new issue, the proposed CSRT is no cure for the violation of international human rights law in this case.

A. **Both International Law and the United States Constitution Prohibit Torture and the Use of Evidence Obtained Through Torture.**

The international community has unequivocally repudiated torture and the use of evidence obtained through torture, and the United States has played a central role in establishing these norms. The United States has ratified numerous international instruments prohibiting torture, joining 138 other nations in ratifying the most significant of such instruments, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter CAT) G.A. Res. 39/46, U.N. Doc. A/39/51 (Dec. 10, 1984); *see also* Universal Declaration, art. 5 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"); ICCPR, art. 7 (same); American Convention, art. 5.2 (same). The Restatement states that the prohibition against torture is a peremptory norm, or *jus cogens*, which enjoys a higher status than treaty law and ordinary customary rules, and from which there can be no derogation. RESTATEMENT, § 702 cmt. n.

The United States has long condemned other nations for torturing detainees and prisoners. The State Department's annual human rights reports, for example, have routinely criticized the use of torture against

detainees. *See, e.g.*, 2005 State Department Reports on Human Rights for Turkey[13] ("security officials mainly used torture methods that did not leave physical signs, including repeated slapping, exposure to cold, stripping and blindfolding, food and sleep deprivation, threats to detainees or family members, dripping water on the head, isolation, and mock executions"); Iran[14] ("common [torture] methods included prolonged solitary confinement with sensory deprivation, beatings, long confinement in contorted positions, . . . sleep deprivation"); Cuba[15] ("Authorities often subjected detainees and prisoners to repeated, vigorous interrogations designed to coerce them into signing incriminating statements or to force their collaboration with authorities").

The practical corollary to the prohibition against torture—that evidence obtained through torture is inadmissible in judicial proceedings—is just as firm and universal. The House of Lords recently explained that in the

[13] U.S. STATE DEPARTMENT, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, TURKEY (2005), *available at* http://www.state.gov/g/drl/rls/hrrpt/2005/61680.htm.

[14] U.S. STATE DEPARTMENT, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, IRAN (2005), *available at* http://www.state.gov/g/drl/rls/hrrpt/2005/61688.htm.

[15] U.S. STATE DEPARTMENT, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, CUBA (2005), *available at* http://www.state.gov/g/drl/rls/hrrpt/2005/61723.htm.

seventeenth century, the rejection of evidence obtained through torture was hailed as "a distinguishing feature of common law:"

> In rejecting the use of torture, whether applied to potential defendants or potential witnesses, the common law was moved by the cruelty of the practice . . ., by the inherent unreliability of confessions or evidence so procured and by the belief that it degrades all those who lent themselves to the practice.

A(FC) v. Secretary of State for the Home Department, [2005] UKHL 71, ¶ 11 (U.K.). Now that position has become the mark of civilized society everywhere, regardless of differences in political ideology, social mores, or religious tradition.

International law permits no exception to the prohibition against torture. The CAT is absolute, providing:

> No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.

CAT, art. 2(2). The prohibition against the use of evidence derived from torture is equally absolute. *See* CAT, art. 15 ("Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a

person accused of torture as evidence that the statement was made."); ICCPR, art. 7 (absolute prohibition of admissibility in judicial proceedings of statements or confessions obtained through torture).

The U.S. Supreme Court has been as emphatic as the international community in denouncing torture and evidence derived from its use. *See Brown v. Mississippi*, 297 U.S. 278, 286-87 (1935) ("The rack and torture chamber may not be substituted for the witness stand."); *Miller v. Fenton*, 474 U.S. 104, 109 (1985) (confessions procured by means "revolting to the sense of justice" like physical and psychological torture may not be used to secure conviction); *Rochin v. California*, 342 U.S. 165, 172 (1952) ("It has long ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained.").[16]

[16] The MCA § 948(c) permits admission of statements obtained before enactment of the DTA "in which the degree of coercion is disputed," if the military judge finds that "the totality of the circumstances renders the statement reliable and possessing sufficient probative value," the interests of justice would be served by admission, and the methods used to obtain the statement "do not amount to cruel, inhumane, and degrading treatment" prohibited by the DTA.). *First*, the MCA does not apply to al-Marri. Pet'rs Br. 24-25. *Second*, were the MCA interpreted to permit the admission of evidence obtained through coercion in this case, it would be unconstitutional, so that any such reading should be avoided. *See Zadvydas v. Davis*, 533 U.S. 678, 689 (2001); *cf. In re Guantanamo Detainee Cases*, 355 F.Supp. 443 (D.D.C. 2005). *Finally*, Al-Marri has not benefited even from the MCA's base-line protections: no court has determined that the evidence used against him is reliable, possesses sufficient probative value, serves the interests of justice in its admission, and was obtained without violating the DTA's minimal standards.

The United States' position has been based on three principles. *First*, as the Supreme Court explained in *Jackson v. Denno*, 378 U.S. 368, 385-86 (1964), when affirming the prohibition against involuntary confessions, courts cannot tolerate "the probable unreliability of confessions that are obtained in a manner deemed coercive." *Second*, by "afford[ing] brutality the cloak of law," the admission of such statements corrupts the judicial process and undermines its legitimacy. *Rochin*, 342 U.S. at 173-174; *see also Jackson*, 378 U.S. at 386. *Finally*, even in the midst of war, the United States must vigorously enforce the torture prohibition to ensure the reciprocal protection of U.S. citizens, including armed forces, captured overseas.[17]

[17] The U.S. Army's primary guidance for interrogations, for example, categorically prohibits acts of violence or intimidation, including mental and physical torture. *See* U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3: HUMAN INTELLIGENCE COLLECTOR OPERATIONS, ch. 5-26 (Sept. 2006). It explains: "Use of torture by US personnel would bring discredit upon the US and its armed forces while undermining domestic and international support for the war effort. It could also place US and allied personnel in enemy hands at a greater risk of abuse by their captors." *See also* U.S. DEP'T OF ARMY, FIELD MANUAL 34-52: INTELLIGENCE INTERROGATION, ch. 1-8 (Sept. 1992) (predecessor manual, applicable during the period of Al-Marri's detention) (same).

B. There Is a Reasonable Basis to Believe That At Least Some of the Evidence Used Against Al-Marri Has Been Derived by Torture.

The Rapp Declaration, the sole recitation of facts against al-Marri, states only that it "is derived from specific intelligence sources" that are "highly classified" and whose disclosure "would require significant additional security procedures, including additional clearances and storage and handling restrictions." Rapp Declaration, JA 217 n. 1. There is substantial reason to believe that the allegations of the Rapp Declaration are derived from the torture of two men interrogated at Guantánamo Bay and other detention sites: Khalid Sheikh Mohammed ("KSM") and Mustafa Ahmed Al-Hawsawi.

Both the timing and nature of the allegations in the Rapp Declaration indicate that KSM is a likely source of evidence against al-Marri. KSM is considered by the government to be a high-level member of al Qaeda and a "mastermind" of the September 11 attacks. Rapp Declaration, JA 216. According to news reports, KSM was captured in December 2003 and was

in CIA custody at a secret prison when al-Marri was designated an enemy combatant the following summer and then himself detained.[18]

The Rapp Declaration alleges that KSM personally introduced al-Marri to Osama bin Laden, describes specific communications at that initial meeting, and states that Bin Laden and KSM "agreed" that al-Marri would travel to the U.S. for al Qaeda. JA 217-18. Most notably, it relays what is alleged to be KSM's personal opinion as to why "KSM considered al-Marri an ideal sleeper agent." *Id.* 218. These facts, taken as a whole, suggest KSM as the likely source of at least some of the allegations against al-Marri. And it was reported in March 2004, just a few months before the Rapp

[18] Human Rights Watch, *Statement on Secret U.S. Detention Facilities in Europe*, http://hrw.org/english/docs/2005/11/07/usint11995.htm; Press Release, White House, President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sept. 6, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html (admitting that KSM was held and interrogated at secret CIA detention sites). Human Rights Watch reports that shortly after his capture by Pakistani police in 2003, KSM was taken by American forces to a secret location. Human Rights Watch, *The United States' "Disappeared"; The CIA's Long-Term "Ghost Detainees": A Human Rights Watch Briefing Paper* (hereinafter *The United States' "Disappeared"*) (Oct. 2004), *available at* http://www.hrw.org/backgrounder/usa/us1004/7.htm#_ftnref164; *see generally* Human Rights First, *Behind the Wire: An Update to Ending Secret Detentions* (March 2005), *available at* http://www.humanrightsfirst.org/us_law/PDF/behind-the-wire-033005.pdf. On September 6, 2006, President Bush announced that the government had moved KSM to Guantánamo Bay. The White House, *White House Fact Sheet: Bringing Terrorists To Justice* (Sept. 6, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/09/20060906-2.html.

Declaration issued, that the government had relied on KSM's interrogations to implicate other detainees.[19]

At the same time, based on interviews with current and former intelligence officials, reliable news sources have reported that the CIA tortured KSM using graduated levels of force, culminating in "water boarding," a 500-year-old practice of strapping a gagged prisoner to an inclined board with his feet raised above his head and pouring water on his face to simulate drowning and asphyxiation. *See, e.g.*, James Risen, et al., *Harsh C.I.A. Methods Cited in Top Qaeda Interrogations*, N.Y. TIMES (May 13, 2004); Human Rights Watch, *The United States' "Disappeared"*, *supra* note 18 at Annex; Human Rights Watch, *The Road to Abu Ghraib* (Oct. 2004), *available at* http://hrw.org/reports/2004/usa0604. KSM has reportedly recanted statements inculpating others that he provided while subject to torture. Pet'rs Br. 53 (citing public sources).

The Rapp Declaration also ties Amran Baqur Mohammed Hawsawi to al-Marri, alleging that he gave al-Marri logistical support to plan attacks.

[19] Press Release, White House, *supra* note 18; Elaine Shannon and Michael Weisskopf, *Khalid Sheikh Mohammed Names Names*, TIME (Mar. 24, 2004), *available at* http://www.time.com/time/nation/printout/0,8816,436061,00.html ("Other high-level al-Qaeda detainees previously disclosed some of the names, but [KSM] has volunteered new ones.").

Hawsawi is at Guantánamo Bay,[20] where abusive treatment is now well documented. Detainees there have been reportedly interrogated for 20 hours a day for weeks on end, during which they have been subjected to prolonged sleep deprivation and subjected to sustained loud noises. They report having been stripped, placed in stress positions for hours, and exposed to extreme temperatures for prolonged periods.[21] These are among the very practices the United States regularly condemns, and they qualify as torture or, at a minimum, other cruel, inhuman or degrading practices prohibited under international law. *See, e.g.*, *Situation of Detainees at Guantánamo Bay*, *supra* note 21 at ¶¶ 52, 87 (Guantánamo interrogation techniques set forth in Secretary of Defense Memoranda of 2 December 2002 and 15 January 2005 are torture).

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[20] *See* U.S. Department of Defense, *List of Detainees Who Went Through Complete CSRT Process* (May 15, 2006), *available at* http://www.dod.mil/pubs/foi/detainees/detainee_list.pdf; *See also* Rapp Declaration, JA 218-19.

[21] *See* Human Rights Watch, Guantanamo Detainee Accounts, available at http://www.hrw.org/backgrounder/usa/gitmo1004/gitmo1004.pdf; Human Rights Watch, Table of Interrogation Techniques Recommended/Approved by U.S. Officials, Aug. 2004, http://hrw.org/backgrounder/usa/0819interrogation.htm; Human Rights First, Ending Secret Detentions, June 2004, available at http://www.humanrightsfirst.org/us_law/pdf/endingsecretdetentions_web.pdf; Interrogation Log of Detainee 063, Time Online, Mar. 3, 2006, available at http://www.time.com/time/2006/log/log.pdf.; Report of the UN Working Group on Arbitrary Detention and UN Special Rapporteurs, Situation of Detainees at Guantanamo Bay, U.N. Doc. E/CN.4/2006/120 (Feb. 15, 2006).

In an analogous habeas case involving the admission of a possibly coerced confession, where "substantial facts" about how the confession was obtained were in dispute, the Supreme Court held that the appropriate remedy was to remand for a separate, preliminary evidentiary hearing to assess whether the confession was unlawfully obtained. *Jackson*, 378 U.S. at 391-394 (jury could not decide guilt and reliability of the confession simultaneously). So too here, because there is substantial reason to believe that the government is using evidence against al-Marri obtained from the torture or, at a minimum, cruel, inhuman or degrading treatment of other detainees, this Court should order an evidentiary hearing to determine whether the government can sustain a case against al-Marri through lawful means.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed.

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November 20, 2006