RECORD 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

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

The President of the United States seeks in this case the powers of a King: to detain indefinitely an individual arrested in his home inside the United States without charge, without evidence, without a hearing, and without judicial review. Thus far, the Supreme Court and this Court have limited the definition of an "enemy combatant" to individuals who directly participated in hostilities against U.S. forces in Afghanistan and who, therefore, fall within the traditional definition of a combatant under the Constitution and longstanding law-of-war principles. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005). Here, however, the President seeks to expand that limited detention authority in two dramatic and unprecedented ways: *first*, by subjecting individuals arrested in the United States to indefinite military confinement even though they never directly participated in hostilities against U.S. armed forces and are not combatants under the laws of war; and *second*, by subjecting such individuals to the same bare-bones factfinding process which applies to the battlefield capture of enemy soldiers, based upon the exigencies of combat. The President's arguments should be rejected.

ARGUMENT

I. THE PRESIDENT HAS NO LEGAL AUTHORITY TO DETAIN CIVILIANS ARRESTED IN THE UNITED STATES AS "ENEMY COMBATANTS."

The Supreme Court made clear in *Hamdi* that it was addressing only the President's authority to detain the "limited category" of individuals "who fought against the United States in Afghanistan." 542 U.S. at 518; *see also id.* at 516, 522 n.1.[1] Similarly, in *Padilla*, this Court concluded that the petitioner could be detained as an "enemy combatant" because he both "associated with forces hostile to the United States in Afghanistan" *and* "took up arms against United States forces in that country in the same way and to the same extent as did Hamdi." 423 F.3d at 391-92; *see also id.* at 391 (finding "no difference in principle between Hamdi and Padilla").[2]

Here, however, the President claims something very different: the power to detain as an "enemy combatant" a person arrested in this country who, the government admits, never directly engaged in hostilities against U.S. forces, but who is instead being held indefinitely without charge in a global "war on terror." The implications of this claim are breathtaking. If

[1] All citations to *Hamdi* are to the plurality opinion unless otherwise noted.

[2] The petitioner in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), was also captured in Afghanistan during the armed conflict there. *Id.* at 2759.

al-Marri can be designated an "enemy combatant," any person in the United States can be seized by the military and even shot on sight based upon alleged association with terrorist organizations. This unprecedented and unfettered definition of presidential power is, fortunately, prohibited by statute and by the Constitution.

A. Al-Marri's Detention As An "Enemy Combatant" Transgresses Longstanding Law-of-War Principles And The Time-Honored Constitutional Boundary Between Military And Civilian Jurisdiction.

In *Hamdi*, the Supreme Court held that the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF") must be interpreted consistently with "longstanding law-of-war principles." 542 U.S. at 521. These principles also help define the constitutional limits of military jurisdiction inside the United States. *Ex parte Quirin*, 317 U.S. 1, 27-28 (1942); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 126-27, 131 (1866).

The distinction between combatants and civilians is central to the law of war. U.S. Army, *Law of War Handbook* 166 (2004). Combatants can be intentionally shot, bombed, or otherwise targeted with lethal force wherever they are found; civilians, however, may be treated as lawful targets of attack and, inferentially, as combatants, only for such time as they take a direct part in hostilities. For this reason, the law of war narrowly defines a combatant as a member of the regular armed forces of an enemy nation or an individual

who participates directly in hostilities. Appellants' Br. 21-24 (citing authorities); Br. *Amici Curiae* Specialists in the Law of War 13-22 (same).[3] Under these longstanding law-of-war principles, al-Marri – unlike Hamdi and Padilla – is a civilian, not a combatant. Indeed, if al-Marri can be deemed a combatant, any individual in the United States can be summarily detained by the military and even shot without warning based upon alleged association with terrorist organizations. This would transgress the "longstanding law-of-war principles" that informed *Hamdi*'s understanding of the President's detention power under the AUMF, causing that understanding to "unravel." 542 U.S. at 521.

The distinction between civilians and combatants is also central to *Ex parte Milligan*, "one of the great landmarks in [the Supreme] Court's history." *Reid v. Covert*, 354 U.S. 1, 30 (1957). *Milligan* is not irrelevant to "enemy combatant" cases, as the government (Br. 28) argues. Rather, *Milligan* did not preclude Hamdi's military detention because Hamdi was captured on an Afghani battlefield where he engaged in armed combat against American forces, making him an actual combatant under longstanding law-of-war principles. 542 U.S. at 521-22 ("[*Milligan*] does

[3] The Supreme Court has consistently looked to the Geneva Conventions and other international sources to guide its understanding of the law of war. *Hamdan*, 126 S. Ct. at 2786; *Hamdi*, 542 U.S. at 520; *Quirin*, 317 U.S. at 27-28. The government conspicuously ignores these sources.

not undermine our holding about the Government's authority to seize enemy combatants, *as we define the term today*.") (emphasis added). Similarly, *Milligan* did not prohibit Padilla's military detention because Padilla had "taken up arms against the forces of the United States" on an Afghani battlefield, making him too an actual combatant. 423 F.3d at 396-97. In fact, *Hamdi* and *Padilla* reinforce *Milligan*'s application to this case, clarifying that whether a person can be detained as an "enemy combatant" turns not on his citizenship but on whether he is a combatant under the law of war and properly subject to military authority. Appellants' Br. 29.[4]

The government (Br. 22, 31) relies on *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). But in *Duncan* the Court narrowly construed a statute permitting Hawaii's governor to place that territory under martial law to prohibit military trials and preserve the historic "boundaries between military and civilian power." *Id.* at 324. That the Court rejected this assertion of military jurisdiction even though Hawaii was "in the theater of operations" and "under fire" at the time, *id.* at 344 (Burton, J., dissenting),

[4] Al-Marri's alleged presence at an al Qaeda training camp between 1996 and 1998 – which al-Marri has denied – does not bring him within *Hamdi*'s definition of an "enemy combatant" because the United States was not then engaged in an armed conflict in Afghanistan and because the government itself (Br. 5-6) characterizes the September 11, 2001 attacks as the relevant "act[s] of war." *Hamdan*, 126 S. Ct. at 2778 n.31 (plurality opinion of Stevens, J.).

makes the President's sweeping construction of the AUMF all the more extreme.

The government also improperly relies on *Ex parte Quirin*. The German saboteurs in *Quirin* were all admitted members of an organized armed force of an enemy government in a declared war between nations. Therefore, they were all combatants properly subject to military detention under the law of war. 317 U.S. at 46.[5] The government, nevertheless, seeks to expand *Quirin* beyond its narrow confines – exactly what *Quirin* cautioned against. *Id.* at 45-46 (refusing "to define with meticulous care the ultimate boundaries of [military] jurisdiction"). The German saboteurs, the government argues (Br. 26-27), were not "any the less belligerents" because they had "not actually … entered the theater or zone of active military operations," 317 U.S. at 38, and because they "were not alleged to have borne conventional weapons" or to have "necessarily contemplate[d] collision with the armed forces of the United States," *id.* at 37. But those statements had nothing to do with whether the German saboteurs were combatants properly subject to military authority in the first instance.

[5] The government's citation (Br. 26 n.7) of recent historical commentary suggesting that two of the saboteurs were actually not enrolled in the German army is beside the point, since the saboteurs all admitted their military status and the Supreme Court plainly assumed they were soldiers. *Quirin*, 317 U.S. at 21-22; *see also Padilla v. Rumsfeld*, 352 F.3d 695, 716 (2d Cir. 2003).

Rather, they bore only on the question of whether the saboteurs' belligerency was unlawful. And, what made their otherwise lawful belligerency unlawful – exposing them to military trial instead of military detention as prisoners of war – was that they had removed and buried their German army uniforms upon entering the United States. *Id.* at 37; Appellants' Br. 30-31.[6]

The government's reliance on *Padilla* is also misplaced. This Court upheld Padilla's detention under the AUMF because he fell within *Hamdi*'s limited definition of an "enemy combatant." 423 F.3d at 392; *see also Padilla v. Hanft*, 432 F.3d 582, 587 (4th Cir. 2005) (describing *Padilla*'s "limited" holding). Moreover, Padilla was not arrested inside his home as was al-Marri. Rather, Padilla was seized at an international border, *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73 (1973), a no-man's land where the full panoply of constitutional rights do not apply. *E.g.*, *Carroll v. United States*, 267 U.S. 132, 153-54 (1925) (neither probable cause nor warrant required to search person, whether citizen or alien, at the

[6] The government (Br. 27 n.8) also cites *Quirin* to suggest that al-Marri lacks the right to maintain this habeas action. But in *Quirin* the Supreme Court exercised review to determine the constitutional boundary between military and civilian jurisdiction over individuals inside the United States – the very question this case presents in the context of the detention of an "enemy combatant."

border). In Peoria, where al-Marri was seized, the Constitution applies in full force.

Furthermore, *Padilla*'s precedential value has been eroded. Once the government filed criminal charges against Padilla, it urged this Court to recall its mandate and vacate its prior decision as moot, creating "at least an appearance that the government [was] attempting to avoid consideration of [this Court's] decision by the Supreme Court." *Padilla*, 432 F.3d at 583. The criminal indictment, moreover, "made no mention of the acts upon which the government purported to base its military detention of Padilla and upon which [this Court] had concluded only several weeks before that the President possessed the authority to detain Padilla." *Id.* at 584. Administration officials publicly acknowledged that the government did not charge Padilla with those alleged acts because the evidence on which they were based had been obtained by torture and other illegal interrogation methods. Douglas Jehl & Eric Lichtblau, *Shift on Suspect Is Linked to Role of Qaeda Figures*, N.Y. Times, Nov. 24, 2005, at A1. The serious possibility that Padilla was detained as an "enemy combatant" based upon coerced evidence – unbeknownst to the Court when it issued its opinion – calls into question the Court's decision that Padilla's detention was a

"necessary and appropriate" use of force under the AUMF and the Constitution and, at a minimum, cautions against expanding its holding here.

Al-Marri's detention exceeds the permissible bounds of the AUMF for two additional reasons. *First*, the AUMF permits only temporary detention "devoid of all penal character." *Hamdi*, 542 U.S. at 518. Al-Marri, however, has been held for 3½ years in solitary confinement in a nine-foot-by-six-foot cell, denied any opportunity to see or speak with his family, and denied all social contact. Appellants' Br. 9. Indeed, for the first sixteen months at the Brig, he was held completely *incommunicado* and denied contact with his attorneys and even with the International Committee for the Red Cross ("ICRC"). *Id.* Such treatment violates longstanding law-of-war principles, *e.g.*, Third Geneva Convention, art. 126 (requiring visits by ICRC); Fourth Geneva Convention, arts. 76, 143 (same); Army Regulation 190-8, § 6-7b(2) (requiring visits by close relatives), and is undeniably punitive, *e.g.*, *Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004); *Lock v. Jenkins*, 641 F.2d 488, 492 (7th Cir. 1981).

Second, even though the AUMF does not authorize "indefinite detention for the purpose of interrogation," *Hamdi*, 542 U.S. at 521, al-Marri was repeatedly interrogated under highly coercive and abusive conditions while detained *incommunicado*. Appellants' Br. 9. Indeed, former U.S.

Attorney General John Ashcroft has bragged that the very reason al-Marri was declared an "enemy combatant" was that he insisted upon his innocence and "rejected numerous offers to improve his lot by cooperating with the FBI investigators and providing information," *i.e.*, to facilitate his interrogation. John Ashcroft, *Never Again: Securing America and Restoring Justice* 168-69 (2006). Detention for such purposes is not "a fundamental incident of waging war," and exceeds the limits of the AUMF. *Hamdi*, 542 U.S. at 519.

The government (Br. 24) asserts that Congress necessarily intended the AUMF to reach al-Marri because al-Marri was "identically situated to the September 11 hijackers." But al-Marri is not accused of any involvement in the September 11 attacks, and the one person arrested in the United States in connection with those attacks – Zacarias Moussaoui, a self-proclaimed member of al Qaeda – was charged and convicted in federal court. Nor has the government presented any evidence that al-Marri was involved in any planned future terrorist attack inside the United States.

When Congress authorized military action in Afghanistan, it did not also authorize the President to roll tanks into Peoria or to lock up Muslims in military jails without charge. The AUMF envisioned military action outside

the United States; it did not give the President *carte blanche* to use the military to wage war against civilians inside this country.

B. Aliens In The United States Have The Same Right As Citizens To Be Free From Unlawful Detention.

Without any relevant caselaw support, the government (Br. 21) suggests that al-Marri is entitled to "lesser" constitutional protection simply because he is an alien. But, as we have shown (Br. 12, 37-39), all persons living in the United States have the same right to be free from unlawful detention and the same right to a criminal trial under the Fifth and Sixth Amendments.

The government relies on *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), but the Court there expressly reaffirmed that "*once an alien lawfully enters and resides in this country* he becomes invested with the rights guaranteed by the Constitution to all people within our borders." *Id.* at 271 (citation omitted) (emphasis in original). The Court held only that the Fourth Amendment did not extend beyond America's borders to aliens *outside* the United States. *Id.* at 274-75; *id.* at 275 (Kennedy, J., concurring).

The government concedes (Br. 22 n.5) that al-Marri is not an enemy alien under the Alien Enemy Act, 50 U.S.C. 21, but ignores the import of this conclusion. The power to detain enemy aliens is a narrow one, limited

by statute to aliens who are citizens, subjects, or residents of a nation against which the United States has declared war. *Johnson v. Eisentrager*, 339 U.S. 763, 774-75 & n.6 (1950); *Ludecke v. Watkins*, 335 U.S. 160, 161-62 (1948). Such persons can be detained preventively not because they are aliens but because they are citizens of an enemy nation and, therefore, presumptively dangerous because they owe a duty of loyalty to that country.

> The alien enemy is bound by an allegiance which commits him to lose no opportunity to forward the cause of our enemy; hence the United States, assuming him to be faithful to his allegiance, regards him as part of the enemy resources. It therefore takes measures to disable him from commission of hostile acts imputed as his intention because they are a duty to his sovereign.

Eisentrager, 339 U.S. at 772-73. Justice Scalia's dissent in *Hamdi*, mistakenly relied upon by the government (Br. 29, 34-35), similarly describes this traditional, narrow, and expressly authorized power to detain aliens of enemy nations during wartime based upon their presumptive disloyalty. 542 U.S. at 558-59 & 575 n.5 (Scalia, J., dissenting) (citing *Eisentrager* and Alien Enemy Act).

The United States, however, is not at war with Qatar, and the citizens of that nation owe no duty of loyalty to an enemy by virtue of their citizenship. Non-enemy resident aliens are not, therefore, similarly situated to enemy aliens, as the government argues. On the contrary, they owe a duty

of loyalty to the United States and, in fact, are subject to criminal prosecution for treason and other offenses, like citizens. *E.g.*, *Carlisle v. United States*, 83 U.S. 147, 154-55 (1872). Alienage, in short, is as irrelevant to al-Marri's detention as an "enemy combatant" as citizenship was to Hamdi and Padilla's. *Hamdi*, 542 U.S. at 519 ("[a] citizen, no less than an alien, can be [an enemy combatant]"); *Padilla*, 423 F.3d at 395-97.[7]

C. Al-Marri's Detention Requires A Clear Congressional Statement.

Statutes authorizing executive detention have always required a clear statement by Congress. Appellants' Br. 16-20. Since the right to be free from such detention is so fundamental, this "clear statement" rule ensures that when "a particular interpretation of a statute invokes the outer limits of Congress' power," there is "a clear indication that Congress intended that result." *INS v. St. Cyr*, 533 U.S. 289, 299 (2001). The AUMF fails to provide that necessary clear statement.

Hamdi and *Padilla* did not require a clear statement because they narrowly construed the AUMF to reach only combatants who directly

[7] The government's reliance (Br. 29 n.9, 36) on *Mathews v. Diaz*, 426 U.S. 67 (1976), and *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952), is also misplaced. The government has not charged al-Marri with any violation of the immigration laws, and the government's power to remove aliens is irrelevant here. Further, the government's immigration power can never displace the constitutional right to a criminal trial guaranteed to all persons in this country. *Wong Wing v. United States*, 163 U.S. 228, 238 (1896).

participated in hostilities against U.S. forces in Afghanistan and whose detention, therefore, was a "fundamental incident of waging war." *Hamdi*, 542 U.S. at 519; *accord Padilla*, 423 F.3d at 392. Here, the government seeks a sweeping construction of the AUMF that would obliterate the traditional distinction between combatant and civilian, the constitutional line between military and civilian jurisdiction inside the United States, and the clear context underlying both *Hamdi* and *Padilla*, specifically, the fact that the petitioners in those cases had both actually waged war against the U.S. military in Afghanistan. If a clear statement is required to seize enemy aliens' persons and property during a declared war between nations, *Brown v. United States*, 12 U.S. (8 Cranch) 110, 127 (1814); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177-78 (1804), *a fortiori* a clear statement is required to preventively detain a lawful resident alien from an allied country.

The government (Br. 32 n.13) argues that no clear statement is required because it has thus far detained only two individuals arrested in the United States as "enemy combatants." *But see In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005) (describing sweeping use of "enemy combatant" definition to detain hundreds of prisoners at Guantanamo). But regardless of whether two or two thousand people in the United States have been detained by the President, the issue remains whether

Congress intended, and whether the Constitution allows, the President to arrest people at home, in the middle of the United States, and hold them without charge in a Navy Brig in a global "war on terror."

Since the Nation's founding, Congress has provided a clear statement on those rare occasions it has permitted the Executive to detain preventively individuals arrested in this country. Appellants' Br. 16-18. The AUMF lacks any such clear statement.

D. The Patriot Act Prohibits Al-Marri's Detention As An "Enemy Combatant."

If there were any question that Congress intended the AUMF to authorize the President to detain suspected alien terrorists arrested inside the United States as "enemy combatants," its enactment of the Patriot Act thirty-eight days later makes plain it did not. Section 412 of the Patriot Act provides limited detention power over aliens suspected of engaging or planning to engage in terrorist activity in the United States. Specifically, it mandates that such aliens be charged with a criminal offense or immigration violation within seven days of arrest. 8 U.S.C. 1226a(a)(5); Appellants' Br. 14-15. The President "may not disregard" these limitations properly placed by Congress on his powers. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774 n.23 (2006); *accord Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

The government (Br. 33) maintains that the Patriot Act does not limit the President's power to detain aliens in "the armed conflict with al-Qaeda" but instead addresses "separate groups" of alien terrorists. That argument contradicts the statute's plain language. Section 412 applies to any alien in the United States who, *inter alia*:

- received "military-type training" from a terrorist organization, including al-Qaeda, 8 U.S.C. 1182(a)(3)(B)(i)(VIII);
- has prepared or is planning a terrorist activity, 8 U.S.C. 1182(a)(3)(B)(iv)(II);
- has associated with a terrorist organization, including al Qaeda, and intends to engage in activities that "could endanger the welfare, safety, or security of the United States," 8 U.S.C. 1182(a)(3)(F); or
- "is engaged in any other activity that endangers the national security of the United States, 8 U.S.C. 1226a(a)(3)(B).

These provisions accurately describe the basis proffered by the President for al-Marri's current detention by the military. Joint Appendix ("JA") 213-27.

The Patriot Act also significantly expanded federal criminal prohibitions on terrorism, reinforcing that Congress intended suspected terrorists in the United States to be prosecuted through the civilian justice system. Patriot Act §§ 802, 803, 805, 808 (amending 18 U.S.C. 2331, 2339, 2339A, 2339B). All of these provisions encompass the unlawful acts attributed to al-Marri, and have been used to prosecute numerous suspected terrorists since September 11, including alleged al Qaeda operatives.

Appellants' Br. 23 n.6; Br. *Amicus Curiae* of Former Senior Department of Justice Officials 10-14.

The Patriot Act thus makes clear that Congress did not authorize the indefinite detention without charge of suspected alien terrorists arrested in the United States. In fact, Congress explicitly rejected a provision in a draft bill of the Patriot Act that would have permitted the Attorney General to detain without charge any alien he "has reason to believe may commit, further, or facilitate acts [of terrorism]." Appellants' Br. 14-15.[8] The President cannot circumvent Congress's refusal to sanction such detention by labeling a suspected terrorist an "enemy combatant."

Indeed, "[i]t is unthinkable" that the President "could render otherwise criminal grounds for detention noncriminal" by claiming he was "incapacitating dangerous offenders rather than punishing wrongdoing." *Hamdi*, 542 U.S. at 556 (Scalia, J., dissenting). Yet al-Marri was declared an "enemy combatant" precisely because he exercised his right to a criminal trial, or, as former U.S. Attorney General John Ashcroft put it, because he "insisted on becoming a 'hard case.'" Ashcroft, *supra*, at 168-69.

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[8] Secretary of Homeland Security Michael Chertoff, moreover, has acknowledged that Britain's anti-terrorism statute allowing the British government to detain suspected al Qaeda members and other terrorists for up to 28 days without charge permits it to hold suspected terrorists without charge for longer than any U.S. statute. Bryan Bender, *Chertoff Wants U.S. to Review Antiterror Laws*, Boston Globe, Aug. 14, 2006, at A1.

Neither the *Hamdi* plurality nor this Court in *Padilla* addressed the Patriot Act. Indeed, because those cases involved traditional exercises of military authority over combatants who directly engaged in hostilities against U.S. forces on a foreign battlefield, they did not present the serious constitutional questions this case does. Given the Patriot Act's clear statement prohibiting indefinite detention without charge, this Court should avoid those questions by rejecting the President's unwarranted attempt to exceed his detention authority under the AUMF in this case. *St. Cyr*, 533 U.S. at 299-300 (courts should avoid serious constitutional questions where "an alternative interpretation of the statute is fairly possible") (citation omitted). [9]

E. The President Does Not Have Inherent Authority To Detain Al-Marri As An "Enemy Combatant."

Reasserting an argument that no court has accepted, the government (Br. 35-39) maintains that the President has the inherent authority to detain indefinitely individuals arrested in the United States. As we have explained (Br. 34-36), that argument is incorrect.

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[9] The government (Br. 35 n.15) concedes that the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) ("MCA") does not authorize al-Marri's detention. Nor, for the reasons explained in our opposition to the government's motion to dismiss, does the MCA strip this Court of jurisdiction. Rather, the MCA was directed at aliens captured and detained outside the United States.

Quirin does not support the government's position because there was explicit statutory authorization for the President's action. 317 U.S. at 21, 28; *see also Hamdan*, 126 S. Ct. at 2754-55. *The Prize Cases*, 67 U.S. 635 (1862), also have no bearing here because they merely sanctioned an executive seizure of property in a combat zone, not the seizure of a person inside the United States and thousands of miles from a combat zone. And, *Zadvydas v. Davis*, 533 U.S. 678 (2001), demonstrates that Congress not only must authorize the detention of suspected alien terrorists in the United States, but must do so clearly. Appellants' Br. 18-19.

As this Court explained in *Hamdi*, the President's power to detain individuals during wartime requires congressional authorization. *Hamdi v. Rumsfeld*, 316 F.3d 450, 463 (4th Cir. 2003). Without it, the President has no such power.

II. AN INDIVDUAL ARRESTED INSIDE THE UNITED STATES CANNOT BE DETAINED INDEFINITELY AS AN "ENEMY COMBATANT" BASED SOLELY UPON A MULTIPLE-HEARSAY DECLARATION FROM A GOVERNMENT BUREAUCRAT, WITHOUT A HEARING, WITHOUT ANY ACTUAL AND ADMISSIBLE EVIDENCE, AND WITHOUT AN OPPORTUNITY TO CONFRONT AND CROSS-EXAMINE WITNESSES.

No appellate court has considered the process due an individual arrested in the United States in challenging the factual basis for his detention as an "enemy combatant." Though the government claims otherwise (Br. 43-44), that question was not before this Court in *Padilla*, and that case, moreover, was decided on stipulated facts.

The government (Br. 39-59) claims that al-Marri is entitled to no greater process than an enemy soldier captured on a foreign battlefield simply because the President says that he is a combatant. The government's position ignores *Hamdi*'s language and context, and would eliminate any meaningful distinction between an Afghani war zone and Peoria, Illinois. The government's arguments should be rejected.

A. The Lower Courts Misapplied *Hamdi* And Denied Al-Marri Due Process.

The *Hamdi* plurality addressed only the narrow question of the process due an individual captured on the battlefield where he directly participated in hostilities against U.S. forces. 542 U.S. at 531-32. The

plurality, moreover, analyzed that question by applying the balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), whose defining principle is sensitivity to context. *Mathews*, 424 U.S. at 334 ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."). All but the President and his attorneys know instinctively that to compare a battlefield capture and a domestic arrest "is to compare apples and oranges." *Hamdi v. Rumsfeld*, 337 F.3d 335, 344 (4th Cir. 2003) (Wilkinson, J. concurring). Thus, as previously explained (Br. 37-55), greater procedural safeguards are required when the government detains individuals arrested inside the United States than when it seizes enemy soldiers on active battlefields half a world away.

The government (Br. 39, 43-44) repeatedly points to Hamdi's citizenship to argue that an alien is not entitled to more process than an American citizen. But citizenship is irrelevant to the application of the *Mathews* factors. The private interest against indefinite detention, the burden on the government, and the probable value of additional safeguards are all the same whether the detainee is a citizen or an alien. *Hamdi*, 542 U.S. at 528-33 (applying *Mathews*); *see also id.* at 519 (citizen captured on battlefield "would pose the same threat of returning to the front" as alien would if released). Indeed, the government concedes (Br. 39, 43-44) that,

under its conception of the Constitution, a citizen arrested inside the United States and detained as an "enemy combatant" would receive no more process than a battlefield detainee like Hamdi. Thus, the government's focus on al-Marri's citizenship is a red herring; the President believes the same factfinding process should apply equally to citizens and aliens, whether arrested at home in Peoria or seized on a battlefield in Afghanistan.[10]

The government (Br. 45) also mischaracterizes the law governing evidentiary presumptions, arguing in circular fashion that it is fair to presume most people in the United States are "enemy combatants," not innocent civilians, because the President has unilaterally determined that al-Marri is an "enemy combatant." But presumptions derive from general experience, not from a particular case, and the rules the Court establishes here will apply to all domestic seizures, not merely to al-Marri, and to all future presidents, not just this President. On a battlefield, most individuals are combatants subject to military detention. *Hamdi*, 542 U.S. at 534. And, as the Supreme Court has explained, a summary hearing is typically

[10] The government (Br. 42 n.17) argues that the magistrate judge improperly placed the burden of proof on the government at all times to establish by clear and convincing evidence that al-Marri was an "enemy combatant." But that is not what happened. The magistrate judge's December 19, 2005 order – around which al-Marri framed his subsequent submissions – did not allocate the burden of proof at all times to the government but instead suggested that the Rapp Declaration shifted both the burdens of proof and production to al-Marri. JA 161-76.

sufficient for "the errant tourist, embedded journalist, or local aid worker … to prove military error." *Id.*; Appellants' Br. 45-47. But the opposite is true thousands of miles away from a battlefield, where people are almost invariably innocent civilians and where there is no exigency requiring such summary process. In those very different circumstances, the government necessarily bears the burden of producing the evidence it claims justifies depriving an individual of his liberty. Appellants' Br. 37-49.

Nor, in any event, does *Hamdi* allow blanket consideration of hearsay in all cases. In fact, the plurality in *Hamdi* did not even categorically approve reliance on hearsay for all battlefield captures. Rather, it merely stated that "[h]earsay … *may* need to be accepted as the *most reliable available evidence* from the Government" in proceedings involving battlefield detainees captured overseas. 542 U.S. at 533-34 (emphasis added). In this unique circumstance, where the most reliable evidence may be "buried under the rubble of war," *id.* at 532, an affidavit summarizing "documentation regarding battlefield detainees … kept in the ordinary course of military affairs" might satisfy due process, *id.* at 534. Here, however, the Rapp Declaration is plainly not "the most reliable available evidence from the Government" in support of its allegations that al-Marri attended an al Qaeda training camp, met with Khalid Shaikh Mohammed

("KSM") and Osama bin Laden, volunteered for a "martyr mission," and came to the United States to engage in terrorist activity. Instead, of course, the most reliable evidence is the statements of the witnesses themselves.

Certainly, if those statements were obtained by torture or other coercion – and the government has not denied that they were – it would undermine their reliability. James Risen, *State of War: The Secret History of the CIA and the Bush Administration* 33 (2006) (reporting that KSM has recanted prior statements inculpating others that were obtained through coercion); Appellants' Br. 53. Yet, the government has never explained why these witnesses are unavailable. Indeed, KSM is detained at Guantanamo, where he is expected to face trial. Carol Rosenberg, *Pearl's Death May Spur Trial*, The News & Observer, Oct. 14, 2006, *available at* http://www.newsobserver.com/1332/story/498302.html. His testimony is not "buried under the rubble of war." *Hamdi*, 542 U.S. at 532. The truth is that the government simply does not want to present it in a federal court, which is likely to be outraged by the methods used to obtain it, and skeptical of its reliability.

To deflect attention from its own evidentiary failures, the government berates al-Marri for "squandering his opportunity" to present evidence or "participate meaningfully" in the proceeding below. The government (Br.

46, 49) says that al-Marri "knows precisely why" he was declared an "enemy combatant" and needs only an opportunity to give his "version of events." But al-Marri has done precisely that – he has denied the government's allegations, repeatedly maintaining that he is an innocent student who lawfully arrived in this country with his family more than five years ago to obtain a Masters degree. Al-Marri has not failed to rebut the government's "evidence" because *there is no evidence*. None of the "events" the government alleges – the meetings, the phone calls, the acceptance of a "martyr mission," etc. – has ever been proven or established; they are simply conclusions cobbled together by a faceless bureaucrat with no personal knowledge of any material facts. The only meaningful way for al-Marri to disprove those allegations – and for this Court to assess their accuracy – is for al-Marri to be given the chance to confront the government's evidence and cross-examine its witnesses.

In response, the government (Br. 55, 57-58) points to *Hamdi*'s reference to "a prudent and incremental" factfinding process. 542 U.S. at 539. Once again, the government ignores *Hamdi*'s language and context. *Hamdi* was describing only the factfinding process "necessary *in this setting*" – *i.e.*, the battlefield capture of an enemy soldier in a foreign war zone. *Id.* (emphasis added). *Hamdi*, certainly, did not contemplate – let

alone sanction – using hearsay to sustain a domestic arrest, or to launder evidence obtained through torture and other coercion. *Cf. Hamdan*, 126 S. Ct. at 2786-87 (invaliding military commissions for, *inter alia*, allowing use of coerced testimony); *id.* at 2808 (Kennedy, J., concurring) (same).

The government (Br. 49-50) similarly ignores *Hamdi*'s language and context by invoking separation of powers concerns. *Hamdi* addressed the qualitatively different issue of judicial review of the decisions of "military commanders engaged in day-to-day fighting in a theater of war." *Hamdi*, 542 U.S. at 531 (citation omitted).[11] By contrast, when the President seeks to wield military force at home, the separation of powers concerns are reversed, and courts must vigilantly safeguard the constitutional boundary between civilian and military authority. *Milligan*, 71 U.S. at 120-22, 126-27; *Duncan*, 327 U.S. at 322. And, a primary way that courts preserve that boundary is not by rubber-stamping the reliability of a hearsay affidavit by a government bureaucrat, or by approving the President's "trust me" approach

[11] The government (Br. 50) also relies on *Department of Navy v. Egan*, 484 U.S. 518 (1988), but *Egan* merely involved review of an agency's decision to deny or revoke a security clearance, *id.* at 520, and, moreover, emphasized that there was no independent constitutional right to balance against the government's interest in that circumstance, *id.* at 528. By contrast, the constitutional right to be free from unlawful detention "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

to individual liberties, but by vindicating the right of an accused to confront his accusers – a right "founded on natural justice," *Crawford v. Washington*, 541 U.S. 36, 49 (2004) (citation omitted), and "'implicit in the concept of ordered liberty,'" *Pointer v. Texas*, 380 U.S. 400, 408 (1965) (Harlan, J., concurring) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). *See* Appellants' Br. 50-55.

In truth, it is the government that has refused to "participate meaningfully" by failing to subject its key witness to cross-examination and by denying al-Marri a meaningful opportunity to test its allegations that he is a terrorist. Nor should the government be permitted to invoke "equitable considerations" (Br. 48) after cutting off al-Marri's access to his lawyers for sixteen months while it interrogated him and after refusing even to show him its hearsay allegations until the lower court belatedly ordered it to do so after almost three years' of military detention. JA 206-12, 396-98. Most fundamentally, it is disturbing, indeed, that the government attacks al-Marri for insisting on a fair process and for seeking to preserve his Fifth Amendment right against self-incrimination in a proceeding that tests whether he can be detained indefinitely without charge. Insisting that one has constitutional rights is not a "squandered opportunity" – if the process is fair, the truth will prevail.

B. The Federal Rules Of Evidence Prohibit Reliance On The Rapp Declaration.

The government (Br. 52-55) is confused about the application of the Federal Rules of Evidence to this case. In stating that hearsay evidence may need to be accepted as "the most reliable available evidence from the Government," *Hamdi*, 542 U.S. at 534, the Supreme Court merely suggested that it would not necessarily offend due process for habeas courts to permit hearsay in reviewing the "limited category" of cases involving overseas battlefield captures. *Id.* at 518; *see id.* at 534-35 (assessing process due "battlefield detainees …. claimed to have taken up arms against the United States" in a foreign war zone). *Hamdi* did not address the due process problems of admitting hearsay in other contexts, or the application of the Federal Rules of Evidence, an issue that was never briefed, argued, or decided.

Al-Marri, of course, is not asking this Court to "overrule" *Hamdi*, as the government (Br. 52-53) suggests. He merely requests that this Court interpret *Hamdi* as the plurality unmistakably intended. Indeed, interpreting *Hamdi* any other way would require the Court to presume that the plurality disregarded a Rule of Evidence, the Rules Enabling Act, as well as the Supreme Court's own warning that "[f]ederal courts have no more discretion to disregard [a] Rule's mandate than they do to disregard

constitutional … provisions." *Carlisle v. United States*, 517 U.S. 416, 426 (1996); *see also* Br. *Amici Curiae* Professors of Evidence and Procedure 6. Surely, the *Hamdi* plurality did not intend that result.

The government (Br. 53 n.18) half-heartedly suggests that the Rapp Declaration might be admissible under Rule 807's residual exception. It certainly is not. A hearsay statement is excluded under that rule unless it has "circumstantial guarantees of trustworthiness" equivalent to those reflected in Rules 803 and 804; it is "more probative on the point for which it is offered than any other evidence which the proponent can secure through reasonable efforts"; and its admission serves the "general purposes of [the Federal Rules of Evidence] and the interests of justice." Fed. R. Evid. 807.

The Rapp Declaration fails all of these requirements. It is not "more probative" than the telephone records, emails, computer files, and other alleged evidence gained through the criminal law enforcement process, and does not have "equivalent circumstantial guarantees of trustworthiness." The Rapp Declaration is also not "more probative" than the statements from witnesses obtained outside the ordinary law enforcement process. *Cf. United States v. Walsh*, 774 F.2d 670, 671 (4th Cir. 1985) (hearsay statements cannot replace witness testimony even where those statements are offered by reliable government official). Moreover, there has been no

showing that those witnesses are reasonably unavailable to testify. *Hamdan*, 126 S. Ct. at 2792 (noting absence of "any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility"). But, even if they were, the Rapp Declaration would still lack the "equivalent circumstantial guarantees of trustworthiness" that Rule 807 requires, particularly where evidence may have been obtained through custodial interrogations and coercion. *Crawford*, 541 U.S. at 50-53. Finally, it would not serve the interests of justice to allow the government to circumvent the criminal justice system by detaining people for years without charge based upon unexamined – and possibly coerced – hearsay statements.

The government (Br. 53 n.18) does not even bother arguing otherwise, stating only that "separation-of-powers concerns identified … in *Hamdi*" call for admission of the entire Rapp Declaration under Rule 807. But again, the government ignores *Hamdi*'s language and context. *Hamdi* implied only that the statement of a military officer who reviewed records describing the capture of battlefield detainees might satisfy the residual exception. Because, as *Hamdi* suggested, "documentation regarding [such] detainees already is kept in the ordinary course of military affairs," 542 U.S. at 534, a summary of those records might satisfy Rule 807's requirements in a

situation where the longstanding laws of war apply and where the underlying hearings were conducted in compliance with existing U.S. army regulations and the Geneva Conventions, *id.* at 538. By contrast, the Rapp Declaration manifestly lacks any such circumstantial guarantee of trustworthiness, and its admission flouts the purpose of the Rules of Evidence and the interests of justice.

In short, *Hamdi* did not authorize wholesale admission of hearsay in "enemy combatant" cases, but only such hearsay that satisfies an exception to the Federal Rules of Evidence. The Rapp Declaration satisfies no such exception, and the lower courts erred in admitting it.

C. The Lower Courts Erred In Denying Al-Marri Discovery.

The government (Br. 49-51) also claims that *Hamdi* imposed an ironclad rule prohibiting any discovery before an alleged "enemy combatant" responds to its multiple-hearsay declaration. But *Hamdi* imposed no such rule, even for battlefield detainees. In fact, Hamdi's discovery requests were pending in the district court on remand when the government elected to release Hamdi rather than prove its case. Moreover, the concerns the *Hamdi* plurality expressed about the scope of discovery were limited to the very different context of an overseas battlefield capture by the military. 542 U.S. at 522, 532. By contrast, al-Marri's discovery

requests would not "result in a futile search for evidence buried under the rubble of war," *id.* at 532, since they seek information that has nothing to do with anything that happened on any battlefield.

In sum, the government distorts *Hamdi* beyond all recognition to eviscerate the line between a domestic arrest in Peoria and a battlefield capture in Afghanistan. *Hamdi* does not preclude discovery, just as it does not excuse the government from presenting actual and admissible evidence, dispense with the right of confrontation and cross-examination, or sanction indefinite detention based on coerced evidence.

CONCLUSION

For the foregoing reasons, the district court's judgment denying the petition for writ of habeas corpus should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This Reply Brief of Appellant has been prepared using:

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I hereby certify that on this 17th day of January, 2007, I filed with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit, via Hand Delivery, the required number of copies of this Reply Brief of Appellant, and further certify that I served, via UPS Transportation, the required number of said Brief to the following:

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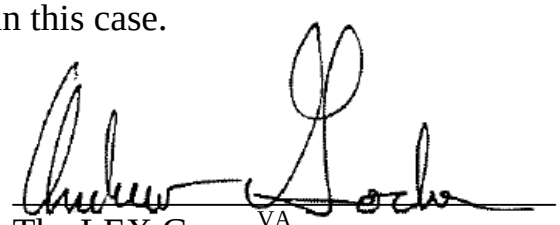

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