No. 06-7427

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

Petitioners-Appellants,

v.

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

Respondent-Appellee.

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

PETITION FOR REHEARING AND REHEARING EN BANC

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INTRODUCTION AND STATEMENT OF PURPOSE

This case raises questions of exceptional importance concerning the authority of the President to detain alien enemy combatants in the ongoing conflict with al Qaeda. The 2-1 panel decision holds that the President lacks the authority to detain an al Qaeda fighter who entered the United States on September 10, 2001, to act as a "sleeper agent" with the intent to commit war-like acts. In the panel majority's view, a fighter associated with a non-state terrorist organization like al Qaeda is a "civilian" not subject to military detention, and cannot be an "enemy combatant." The upshot is that, under the panel decision in this case, the President lacks the authority under the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001), passed in the immediate aftermath of September 11, 2001, and the Constitution, to capture and detain individuals who are identically situated with the al Qaeda agents who waged the deadly September 11 attacks.

The panel's decision not only is grossly at odds with the plain terms and object of the AUMF, but conflicts with Hamdi v. Rumsfeld, 542 U.S. 507 (2004), and Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005). The AUMF authorizes the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the [September 11, 2001] attacks." Hamdi and Padilla hold that the AUMF authorizes the President to

detain American citizens as enemy combatants in the ongoing conflict, and Padilla holds that the AUMF authorizes the detention of (citizen) al Qaeda agents. That authority applies a fortiori to a confirmed alien enemy combatant such as al-Marri.

The panel's contrary decision radically circumscribes the President's authority to wage the ongoing military conflict against al Qaeda and impairs his ability to protect the Nation from further al Qaeda attack at home. Indeed, the decision paradoxically construes the AUMF to authorize the detention of enemy combatants except those identically situated to the al Qaeda fighters responsible for the September 11 attacks, to which the AUMF responded. The decision accordingly warrants swift reconsideration and repudiation by the en banc court.

STATEMENT

1. On September 11, 2001, al Qaeda agents waged the deadliest foreign attack on American soil in the Nation's history. In the immediate aftermath of September 11, Congress sanctioned the President's use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks." AUMF, 115 Stat. 224. Shortly thereafter, the President made it express that the September 11 attacks "created a state of armed conflict" with al Qaeda. Military Order, 66 Fed. Reg. 57,833, § 1(a) (Nov. 13, 2001). In the course of the ongoing conflict with al Qaeda, the United States military has

seized and detained numerous persons whom the Executive has determined are enemy combatants, including the appellant in this case, Ali Saleh Kahlah al-Marri.

2. Al-Marri is a citizen of Qatar who arrived in the United States on September 10, 2001. On June 23, 2003, the President, as Commander-in-Chief, made a formal determination that al-Marri "is, and at the time he entered the United States in September 2001 was, an enemy combatant." J.A. 54, 214-215. The President found, in particular, that al-Marri is "closely associated with al Qaeda"; that he "engaged in conduct that constituted hostile and war-like acts" against the United States; that he "represents a continuing, present, and grave danger to the national security of the United States"; and that his "detention is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States." J.A. 54.

The government presented factual support for that determination in the declaration of Jeffrey Rapp, Director of the Joint Intelligence Task Force for Combating Terrorism. J.A. 213-228 (reprinted in addendum). That declaration explains that between 1996 and 1998, al-Marri received training at an al Qaeda terrorist training camp in Afghanistan. In the summer of 2001, he was introduced to Osama Bin Laden by Khalid Shaykh Muhammed (KSM), the mastermind of the September 11 attacks, and he volunteered "for a martyr mission or to do anything else that al Qaeda requested." J.A. 216-218. Al-Marri was directed to enter the United

States before September 11, 2001, to serve as a "sleeper agent" and "facilitat[e] terrorist activities subsequent to September 11." In August 2001, he met with Mustafa Ahmed Al-Hawsawi, the financial and travel facilitator for the September 11 attacks, who gave him more than $10,000 in funding authorized by KSM. J.A. 216-219. On September 10, 2001, al-Marri entered the United States.

A laptop computer recovered from al-Marri's residence in December 2001 contained "highly technical information" about cyanides and other poisonous chemicals, as well as websites bookmarked as favorites that had "step-by-step instructions to make hydrogen cyanide," "technical and medical descriptions of the effects of various cyanides," "data on the[ir] doses and lethal effects," and "ordering information on various cyanides." J.A. 219-220. The computer also included information indicating that al-Marri had attempted to obtain false identification, credit-card, and banking information. J.A. 223, 224-226. Forensic examination of the computer revealed coded communications saved as draft e-mail messages which were addressed to an internet email account linked to KSM. J.A. 220-222.

3. On July 8, 2004, al-Marri filed a petition for a writ of habeas corpus. J.A. 25. Applying the Hamdi framework for evaluating the detention of citizen enemy combatants, a magistrate judge found that the Rapp Declaration satisfied the government's initial burden to provide notice to al-Marri of the bases for his

detention as an enemy combatant and ordered al-Marri to submit his rebuttal. J.A. 192. In response, al-Marri denied that he is an enemy combatant, but declined to present any evidence in support of his claim. J.A. 199. The magistrate judge recommended the dismissal of al-Marri's habeas petition, J.A. 233-249, and following de novo review the district court dismissed the petition. J.A. 340-355.

4. A divided panel of this Court reversed. Slip op. 1-77 (reprinted in addendum). The panel majority concluded that it had jurisdiction notwithstanding the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600. That Act removes habeas jurisdiction over any action "filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." MCA § 7(a), 120 Stat. 2636. The panel majority held that the MCA does not remove jurisdiction over this action, even though al-Marri had been determined by the President to be an enemy combatant, and even though he would receive a Combatant Status Review Tribunal (CSRT) hearing on his enemy combatant status upon dismissal of this action for lack of jurisdiction. Slip op. 17-27.

On the merits, the panel majority held that the President lacks the authority to detain al-Marri as an enemy combatant. The panel majority rejected the argument that al-Marri's military detention was authorized by the AUMF, reasoning that the

Hamdi and Padilla decisions "rest enemy combatant status on affiliation with the military arm of an enemy nation," and al-Marri was not alleged to have fought with the Taliban (the military arm of the former government of Afghanistan). Slip op. 47-48. According to the panel majority, even accepting all the allegations in the Rapp declaration as true, al-Marri and comparably situated al Qaeda agents who enter our borders are "civilians" not subject to military detention. Id. at 55-56.

Judge Hudson dissented. Slip op. 78-86. He explained that the "broad language [of the AUMF] would certainly seem to embrace surreptitious al Qaeda agents operating within the continental United States," and that the panel majority's conclusion that the AUMF does not cover al Qaeda is at odds with the Supreme Court's decision in Hamdi and this Court's decision in Padilla. Id. at 80-82.

ARGUMENT

This case readily satisfies the established criteria for rehearing en banc set forth in Fed. R. App. P. 35 and 4th Cir. Rule 35, because it concerns a question of exceptional importance that the panel decision resolved in a manner that directly conflicts with the precedent of this Court and the Supreme Court.

A. The Scope Of The President's Authority To Capture And Detain Al Qaeda Agents Who Enter Our Borders Is Exceptionally Important

Congress passed the AUMF in the days following the September 11 attacks to

sanction the President's use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks," and "to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." AUMF, 115 Stat. 224. As Judge Hudson explained, the panel decision in this case holds that the AUMF does not extend to al Qaeda agents who enter the United States. Slip op. 79. As a result, according to the panel decision, the President is without authority to use the military force necessary to prevent individuals identically situated with Mohamed Atta and his cohorts from planning and executing another September 11 attack.

The United States remains in a state of active conflict with al Qaeda, and top al Qaeda leaders have repeatedly stated their intention to strike America and her allies again. As Judge Hudson explained, "[a]lthough al-Marri was not personally engaged in armed conflict with U.S. forces, he is the type of stealth warrior used by al Qaeda to perpetrate terrorist acts against the United States." Slip op. 86. The panel majority assumed (as it was required to at this stage) that all the facts stated in the Rapp Declaration are true, see id. at 63, and therefore must have taken as a given that al-Marri is "an active al Qaeda operative" sent to this country from abroad to commit terrorist acts and thus "represents a continuing grave danger to the national security

of the United States." J.A. 227. Yet the panel majority held that the President lacks authority to declare such an al Qaeda agent an enemy combatant and to detain him.

The scope of the President's authority to combat al Qaeda fighters who come to America to commit terrorist acts is exceptionally important, and the panel majority's ruling that the President lacks the authority to detain such al Qaeda agents militarily poses an immediate and potentially grave threat to national security.

B. The Panel Decision Directly Conflicts With This Court's And The Supreme Court's Precedent And With The Intent Of Congress

1. In Hamdi and Padilla, the Supreme Court and this Court held that the AUMF authorizes the President to seize and detain citizen enemy combatants for the duration of the conflict with al Qaeda. Hamdi, 542 U.S. at 516 (plurality opinion); id. at 587-588 (Thomas, J., dissenting) (agreeing that Congress authorized detention); Padilla, 423 F.3d at 390-391. Those decisions rested the President's authority on the AUMF. Notwithstanding the additional statutory issue presented as to the citizens in Hamdi and Padilla (i.e., 18 U.S.C. 4001(a)), and that the AUMF responded to attacks launched by noncitizen al Qaeda affiliates, the panel majority in this case concluded that the AUMF does not authorize the military detention of an alien al Qaeda fighter. That decision directly conflicts with Hamdi and Padilla.

In Hamdi, the Supreme Court upheld the detention of a presumed United States citizen who "was 'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and who 'engaged in an armed conflict against the United States' there." Hamdi, 542 U.S. at 516 (plurality opinion) (citation omitted). The plurality in Hamdi explained that the capture and detention of enemy combatants is "a fundamental incident of waging war" and was accordingly authorized by the AUMF. Id. at 519, 521 (plurality); id. at 587 (Thomas, J., dissenting).

In Padilla, this Court upheld the detention of a United States citizen arrested on United States soil who was "closely associated with al Qaeda" and "traveled to the United States for the avowed purpose of further prosecuting that war on American soil, against American citizens and targets." Padilla, 423 F.3d at 389, 391. Although Padilla had also fought in Afghanistan, he was, like al-Marri, an al Qaeda fighter and, like al-Marri, he came to this country to wage war on behalf of al Qaeda. The authority recognized under the AUMF as to the citizen enemy combatants in Hamdi and Padilla, whether captured at home or abroad, applies a fortiori with respect to the alien enemy combatant at issue in this case.[1/]

[1/] Under Article II of the Constitution, the President also has the inherent authority to detain enemy combatants in the context of an armed conflict, and the panel erred in holding otherwise. Slip op. 63-77. Moreover, because the AUMF authorizes the military detention at issue in this case, the President was acting at the zenith of his powers. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

2. The panel's decision in this case cannot be reconciled with Hamdi and Padilla. The panel majority attempted to distinguish Hamdi on the ground that "Hamdi bore arms with the army of an enemy nation," i.e., the Taliban. Slip op. 40-41. Likewise, the panel majority reasoned that the Court in Padilla "held that Padilla was an enemy combatant because of his association with Taliban forces," regardless of his close association with al Qaeda. Id. at 42 n.10. Although it is true that al-Marri did not fight in Afghanistan with Taliban forces, nothing in the reasoning of Hamdi or Padilla, much less the text or context of the AUMF, suggests that that fact divests the President of authority to detain him as an enemy combatant.

The Hamdi plurality made clear that it was not limiting the category of "enemy combatants" to Taliban soldiers captured on the battlefield in Afghanistan, but was instead describing the individual before the Court. The plurality explicitly left "[t]he permissible bounds of the category [of enemy combatant to] be defined by the lower courts as subsequent cases are presented to them." Hamdi, 542 U.S. at 522 n.1. Moreover, in Padilla, this Court—after rejecting an effort to limit Hamdi to its facts virtually identical to the one adopted by the panel majority here—found that an individual who was "closely associated with al Qaeda" and was "seized on American soil" "unquestionably qualifie[d] as an 'enemy combatant'" because he had "t[aken] up arms on behalf of [al Qaeda]," Padilla, 423 F.3d at 389-393, and had thereafter

"crossed our borders with the avowed purpose of attacking this country and its citizens from within [like the] persons who committed the atrocities of September 11," Padilla v. Hanft, 432 F.3d 582, 586 (4th Cir. 2005).[2/]

Furthermore, by its terms, the AUMF is in no way limited to operations in Afghanistan or the Taliban. The AUMF authorizes the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks," and "to prevent any future acts of international terrorism against the United States by such nations, organizations or persons. AUMF, 115 Stat. 224 (emphases added). The use of the disjunctive to separate "nations" from "organizations or persons" clearly precludes a reading of the AUMF that would limit it to forces belonging to a nation, and the "organizations or persons" responsible for the September 11 attacks undeniably

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[2/] The panel's decision also conflicts with Ex parte Quirin, 342 U.S. 1 (1942), on which both Hamdi and Padilla relied in construing the AUMF. Although the panel majority purported to distinguish Quirin on the ground that the captured detainees were members of the armed forces of a nation-state, the effort to limit the detention authority to nation-states does not withstand scrutiny for the reasons discussed above, and most of the saboteurs in Quirin were recruited from civilian life in Germany and were not regular members of the German armed forces. See Michael Dobbs, Saboteurs: The Nazi Raid on America 204 (2004).

include al Qaeda. There is absolutely no textual basis for the panel majority's conclusion that al Qaeda fighters are not covered by the AUMF.[3/]

The panel majority's construction of the AUMF leads to the absurd conclusion that when Congress authorized the use of military force to respond to the September 11 attacks, it did not intend to reach individuals identically situated to the September 11 hijackers, none of whom had engaged in combat operations against our forces on a foreign battlefield. It would also preclude the use of military force in the precise circumstances where the threat of another of September 11 is greatest: where trained al Qaeda "sleeper agents" have successfully crossed our borders and are preparing to carry out an act of war against our citizens on al Qaeda's behalf. Congress's immediate response to the September 11 attacks was not so feckless or irrational. If one thing is certain, Congress authorized the President to prevent another September 11 by using military force against the next Mohamed Atta, or comparably situated al Qaeda agents such as al-Marri who come to America to wage war.

3. The panel decision repeatedly asserts that al-Marri is merely a "civilian," and not an "enemy combatant." See, e.g., slip op. 42, 56, 60. That characterization

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[3/] See also, e.g., 147 Cong. Rec. 17,115 (2001) (statement of Rep. Berman) ("We must do whatever it takes, including the use of military force, to track down bin Laden and destroy his organization."); id. at 17,042 (statement of Sen. Feingold) ("[T]his war will be unlike any other we have fought in the past" because "[o]ur enemy is not a state," but "a loose network of terrorists.").

is directly at odds with Padilla, which, as discussed, upheld the President's authority to treat even a citizen al Qaeda agent captured in the United States as an enemy combatant. Moreover, an agent of an entity engaged in armed conflict against the United States is not, in any relevant sense, a "civilian." Al Qaeda is unquestionably such an entity—as recognized by Congress, see AUMF, 115 Stat. 224; the President, see Military Order, 66 Fed. Reg. at 57,833; America's allies, see, e.g., Statement of NATO Secretary General Lord Robertson (Oct. 2, 2001) <http://www.nato.int/docu/speech/2001/s011002a.htm> (describing the September 11 attack as an "armed attack" under Article 5 of the North Atlantic Treaty); and al Qaeda itself, see, e.g., World Islamic Front Statement, Jihad Against Jews and Crusaders (Feb. 23, 1998) <http://www.fas.org/irp/world/para/docs/980223-fatwa.htm>.[4/]

The panel majority held that an individual can be an enemy combatant only if he fights on behalf of an "enemy nation," slip op. 47, and that "the 'legal category' of enemy combatant does not exist" in the current conflict against al Qaeda. Id. at 53. That conclusion of course conflicts with Padilla, in which this Court upheld the President's authority to detain an al Qaeda agent as an enemy combatant. The panel

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[4/] As Judge Hudson explained, the panel majority's reliance on Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866), was misplaced. Milligan did not associate himself with the enemy forces, whereas here "the unrebutted evidence shows that al-Marri associated himself with and became an agent of al Qaeda." Slip op. 84.

majority cited the Supreme Court's finding in Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006), that the conflict between the United States and al Qaeda in Afghanistan is "not of an international character" for purposes of the Article 3 of the Geneva Convention. Slip op. 52 (citing Hamdan, 126 S. Ct. at 2795).[5/] But Hamdan by no means held that the "legal status of enemy combatant" does not exist in the conflict against al Qaeda, slip op. 54, and, indeed, the Court assumed the validity of Hamdan's detention during the ongoing hostilities against al Qaeda. 126 S. Ct. at 2798; see id. at 2805 (Kennedy, J., concurring). Furthermore, the Hamdan Court stressed "that domestic statutes control[led] th[e] case." Id. at 2800 (Kennedy, J., concurring); see id. at 2786. Congress, in the AUMF, made clear that al Qaeda agents may be detained as enemy combatants; the Padilla court properly gave effect to the AUMF; and the panel had no basis to override the AUMF here.[6/]

[5/] The panel majority also cited a statement on the web site of the International Committee of the Red Cross (ICRC), see slip op. 52, but the ICRC is not a lawmaking body and does not have the power to make authoritative pronouncements of international law that would bind the United States. Moreover, read in context, the cited ICRC statement simply suggests that an individual fighting on behalf of a non-state entity is not a legitimate combatant, not that he is somehow immune from capture or detention. See ICRC, The Relevance of IHL in the Context of the War on Terrorism, <http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-ihl-210705>.

[6/] Underscoring Congress's recognition that al Qaeda forces are enemy combatants, the MCA explicitly defines "unlawful enemy combatant" to include "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant

C. The Threshold Jurisdictional Issue Also Warrants Review

The panel majority also erred, as a threshold matter, in concluding that it had jurisdiction over this action. As the government explained in its motion to dismiss the appeal, Al-Marri is covered by the plain terms of Section 7(a) of the MCA (quoted at p. 5, supra) because the President has determined that he is properly detained as an enemy combatant. J.A. 58. Moreover, even if the MCA were read to require a determination by a CSRT—a limitation not found in the MCA's text—al-Marri would still be covered as an alien "awaiting" such a determination, because the Deputy Secretary of Defense has ordered that al-Marri receive a CSRT upon dismissal of this action. The scope of the MCA is an important question in its own right, and the fact that the panel lacked jurisdiction to reach the merits and issue its decision conflicting with Hamdi, Padilla, and the AUMF only buttresses the case for rehearing.

CONCLUSION

The Court should vacate the panel decision, rehear the appeal, and remand with instructions to dismiss for lack of jurisdiction, or, in the alternative, affirm the judgment dismissing al-Marri's petition for a writ of habeas corpus.

Respectfully submitted.

(including a person who is part of the Taliban, al Qaeda, or associated forces)." MCA § 3(a)(1), 120 Stat. 2601 (codified at 10 U.S.C. 948a(1)(i)) (emphasis added).

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Dated: June 27, 2007

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