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 OF APPELLANTS

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

Record No. 06-7427

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Ali Saleh Kahlah Al-Marri (name of party/amicua) who is Appellant (appellant/appellee/amicus),

makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?
   ( ) YES (x) NO
2. Does party/amicus have any parent corporations?
   ( ) YES (x) NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?
   ( ) YES (x) NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?
   ( ) YES (x) NO
   If yes, identify entity and nature of interest:

5. Is party a trade association?
   ( ) YES (x) NO
   If yes, identify all members of the association, their parent corporations, and any publicly held companies that own 10% or more of a member's stock:

Jonathan Hafetz

August 28, 2006
(date)

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JURISDICTIONAL STATEMENT

Petitioner-Appellant Ali Saleh Kahlah al-Marri ("al-Marri") appeals from the district court's Memorandum Opinion and Order of August 8, 2006, and Judgment of August 9, 2006, dismissing his petition for writ of habeas corpus. Joint Appendix ("JA") 340, 356. The federal habeas statute, 28 U.S.C. § 2241, as well as 28 U.S.C. §§ 1331, 1651, 2201, and 2202, and Articles I and III of the Constitution, establish federal court subject matter jurisdiction over claims filed by a petitioner challenging the lawfulness of his detention by the Executive branch. *See, e.g.*, *Ex parte Quirin*, 317 U.S. 1, 24-25 (1942); *Ex parte Milligan*, 71 U.S. (4 Wall) 2, 32 (1866). Al-Marri timely filed his notice of appeal on August 18, 2006. JA 357-58. This Court has appellate jurisdiction under 28 U.S.C. §§ 1292 and 1651, and under Articles I and III of the Constitution.

STATEMENT OF THE ISSUES

1. Does the President have the authority to designate a civilian arrested inside his home in Peoria, Illinois (and not on an active battlefield) as an "enemy combatant," and to detain such individual indefinitely in a Navy Brig without charge?

2. If so, can the President's exercise of such authority be sustained under the Due Process Clause and Federal Rules of Evidence based solely upon the presentation of a multiple-hearsay declaration from a government bureaucrat, and without affording the detainee an evidentiary hearing, including the opportunity to confront and cross-examine the government's witnesses and to otherwise show that the detention rests on information gained through torture?

STATEMENT OF THE CASE

Al-Marri was arrested by the FBI at his home in Peoria, Illinois, nearly five years ago. Since then, he has been detained in solitary confinement without trial and without due process, including the past 3½ years in a Navy Brig after being declared by the President a so-called "enemy combatant."[1] If the decision below is upheld, anybody present in the United States – citizen and non-citizen alike – will be subject to indefinite military detention at the whim of the President in a "War on Terrorism" unlimited in scope, duration, and all other criteria that traditionally separate a state of war from a state of peace.

Al-Marri, a citizen of Qatar, lawfully entered the United States on September 10, 2001, with his wife and five children, to pursue a master's degree at Bradley University in Peoria, where he obtained a bachelor's degree in the early 1990s. JA 113. On December 12, 2001, al-Marri was arrested by FBI agents at his home as a material witness in the government's investigation of the September 11, 2001 terrorist attacks, and was detained in civilian jails in Peoria and then New York City. JA 113. In February 2002,

[1] The other Petitioner in the case, Mark A. Berman, one of al-Marri's attorneys, filed the habeas corpus petition as al-Marri's "next friend" because al-Marri was denied all access to the courts and to his counsel from June 23, 2003, when the President designated him an "enemy combatant," until October 14, 2004, following the Supreme Court's decision in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

al-Marri was charged in the Southern District of New York in a one-count indictment alleging his possession of unauthorized or counterfeit credit-card numbers. JA 113. Al-Marri entered a plea of not guilty. JA 113. Almost one year later, al-Marri was charged in the Southern District in a second, six-count indictment with two counts of making a false statement to the FBI; three counts of making a false statement in a bank application; and one count of using a means of identification of another person for the purpose of influencing the action of a federally insured financial institution. JA 113. Al-Marri entered pleas of not guilty to all charges and, on May 12, 2003, the district court dismissed the indictments against him on venue grounds. JA 113. Al-Marri was then returned to Peoria and re-indicted in the Central District of Illinois on the same seven counts. JA 113. Again he entered pleas of not guilty, denying the allegations against him for a third time. JA 20. The court set a July 21, 2003 trial date. JA 20.

On Friday, June 20, 2003, the court directed the parties to be prepared to proceed with a hearing on al-Marri's pre-trial motions, including his motion to suppress illegally seized evidence. JA 20. Early Monday morning, June 23, 2003, the government moved *ex parte* to dismiss the indictment based upon a redacted declaration signed by the President that morning designating al-Marri an "enemy combatant" and directing that he

be transferred from civilian to military custody. JA 20, 54. The court granted the government's motion to dismiss the criminal indictment with prejudice. JA 20. Al-Marri was then transported from the custody of the United States Marshal's Service at the Peoria Country Jail into the custody of the Department of Defense at the Navy Brig in Hanahan, South Carolina, where he remains to this day. JA 20.

On July 8, 2003, counsel filed a habeas corpus petition on al-Marri's behalf in the United States District Court for the Central District of Illinois challenging his designation and detention as an "enemy combatant." JA 114. The district court dismissed the petition on venue grounds, *Al-Marri v. Bush*, 274 F. Supp. 2d 1003 (C.D. Ill. 2003), and the court of appeals affirmed, *Al-Marri v. Rumsfeld*, 360 F.3d 707 (7th Cir. 2004). The Supreme Court denied certiorari. *Al-Marri v. Rumsfeld*, 543 U.S. 809 (2004).

On July 8, 2004, counsel filed a habeas corpus petition on al-Marri's behalf in the United States District Court for the District of South Carolina. JA 13. On September 9, 2004, the government answered the petition, relying solely upon the President's June 23, 2003 Order and hearsay assertions contained in a Declaration of Jeffrey N. Rapp, Director for the Joint Intelligence Task Force for Combating Terrorism ("Rapp Declaration"). JA 55-66 (Unclassified Rapp Declaration); JA 213-228

(Declassified Rapp Declaration).[2] Al-Marri was not permitted to read the classified Rapp Declaration. Al-Marri, however, denied that he is an enemy combatant, and maintained that he is an innocent civilian. JA 67.

Al-Marri then moved for summary judgment on the ground that the President lacked the authority to designate and detain a civilian arrested in his home in the United States as an "enemy combatant." The district court denied the motion on July 8, 2005, finding that the President had such legal authority assuming the government's allegations in the Rapp Declaration were true. JA 123. The district court also ruled that al-Marri had a constitutional right to challenge the government's factual assertions, JA 125, and referred the case to a magistrate judge for consideration of the appropriate process to be afforded to al-Marri. On August 15, 2005, the court directed the parties to brief the application of *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), to al-Marri's case and the process to which al-Marri was entitled in challenging the government's allegations. JA 154. On December 19, 2005, without the benefit of oral argument and without addressing the detailed arguments set forth in al-Marri's briefs, the magistrate judge issued a cursory eight-page order holding that the Rapp Declaration alone was a

[2] The government declassified most of the Rapp Declaration nineteen months later, after it was ordered to do so by the lower court. JA 206-08, 210-12, 396-98.

sufficient *prima facie* basis to detain al-Marri indefinitely. JA 184. The court instructed al-Marri to file "any rebuttal evidence" within sixty days, refusing to require the government to present any actual and admissible evidence to support the President's designation of al-Marri as an "enemy combatant." JA 184.

On February 17, 2006, al-Marri responded by again denying the government's allegations and maintaining that the magistrate judge had erroneously relieved the government of its constitutional and legal burden of coming forward with actual and admissible evidence establishing that al-Marri was, in fact, an "enemy combatant." JA 197-99. In a February 27, 2006 telephone conference, the magistrate judge addressed for the first time al-Marri's contention, raised in his prior submissions, that he had not been permitted to review the classified Rapp Declaration. JA 386-88. The magistrate judge directed the government to share with al-Marri the entire Declaration or withdraw the classified portions from the case. JA 396-98. On April 5, 2006, the government publicly filed a declassified version of the classified Rapp Declaration. JA 210-228. Several passages, however, remained redacted. JA 221-22. On May 4, 2006, al-Marri filed a supplemental response reiterating his objections to the December 19, 2005

order and denying the additional allegations contained in the declassified portion of the Rapp Declaration. JA 229-32.

On May 8, 2006, the magistrate judge issued a Report and Recommendation concluding that al-Marri had declined to rebut the allegations contained in the Rapp Declaration and recommending the dismissal of his habeas petition. JA 233. Al-Marri timely filed objections to the Report and Recommendation. JA 250. On August 8, 2006, the district court issued an opinion adopting the magistrate judge's Report and Recommendation and denying the habeas petition. JA 340. This appeal followed. JA 358.

STATEMENT OF THE FACTS

Al-Marri was arrested by the FBI at his home in Peoria, Illinois, almost five years ago. JA 113. When he was indicted two months later, al-Marri asserted his innocence, and vigorously contested the charges against him. JA 113. Less than a month before trial, and two days after the district court had scheduled a hearing on al-Marri's motions to suppress illegally seized evidence and to sever a count of the indictment containing terrorism-related allegations, JA 20, the President designated al-Marri an "enemy combatant" and transferred him to a Navy Brig in South Carolina. JA 20, 54.

Al-Marri was held *incommunicado* for the next sixteen months, and denied all communication with the outside world, including his attorneys, the International Committee for the Red Cross, and his wife and children, with whom he has not been permitted to speak since he was first arrested in December 2001. *See* Attachment ("Attach."), at 1-33 (*Al-Marri v. Rumsfeld*, Complaint, ¶¶ 27, 34, 38, No. 2:05-cv-02259-HFF-RSC (D.S.C. filed Aug. 8, 2005)). Al-Marri was confined alone in a nine-foot-by-six-foot cell. *Id.* ¶ 35. He was repeatedly interrogated and threatened with violence, including threats to send him to Egypt or Saudi Arabia where he would be tortured and sodomized and his wife raped in front of him. *Id.* ¶¶ 68-73. Virtually every aspect of al-Marri's environment was deliberately manipulated to create a sense of extreme sensory deprivation, disorientation, and isolation. *Id.* ¶¶ 45-47, 50-64, 88-89, 93, 96. Al-Marri was also denied basic necessities such as a toothbrush, toilet paper, and soap; adequate medical care; books, news, and magazines; exercise and recreation; and religious items essential to his observance of Islam. *Id.* ¶¶ 74-105.

The government has leveled serious allegations against al-Marri, contending that he is an al Qaeda "sleeper agent" who came to the United States to conduct post-September 11 terrorist activities. JA 216. There is no allegation, however, that al-Marri is a citizen, or member of a regular armed

force, of a nation or state at war with the United States, was seized on or near a battlefield on which the United States or its allies were engaged in combat, or directly participated in hostilities against the United States. Moreover, the allegations against al-Marri were not new when the President declared him an "enemy combatant" on June 23, 2003. The dismissed criminal indictments contained allegations similar to those contained in the Rapp Declaration, including telephone calls to alleged al Qaeda financier Mustafa al-Hawsawi; computer files discussing jihad and martyrdom and containing photographs of the September 11 attacks; and bookmarked computer websites about jihad, hazardous substances, weapons, and satellite equipment. *See* Attach. at 34, 38-43 (Criminal Complaint, ¶¶ 14-17, 20, *United States v. Al-Marri*, 03-cr-94-VM-1 (S.D.N.Y. filed January 22, 2003)); Attach. at 62 (Docket Report, *United States v. Al-Marri*, 03-cr-94-VM-1 (S.D.N.Y.)). The government has never explained why it could not try al-Marri in federal court. In the nearly five years that al-Marri has been held in solitary confinement, the government has never presented any witnesses or evidence against him, and no court has held a hearing to test the government's allegations.

SUMMARY OF ARGUMENT

The President lacks legal authority to designate and detain al-Marri as an "enemy combatant" for two principal reasons. *First*, Congress did not authorize the President to indefinitely detain civilians arrested in their homes inside the United States, and the President's assertion of such authority contradicts Congress's clear statutory requirement in the Patriot Act that suspected alien terrorists arrested in the United States must be charged within seven days of arrest. *See* 8 U.S.C. § 1226a(a)(5). *Second,* the Constitution prohibits the military imprisonment of civilians arrested in the United States and outside an active battlefield. *See, e.g.*, *Ex parte Milligan*, 71 U.S. (4 Wall) 2 (1866).

Even assuming that the President has legal authority to detain al-Marri as an "enemy combatant," such detention cannot be sustained based solely upon a multiple-hearsay declaration, and in the absence of al-Marri's being afforded a meaningful opportunity to challenge the accusations against him, including the right to confront and cross-examine witnesses in an evidentiary hearing. For these reasons, the district court's order should be reversed, and al-Marri's petition for writ of habeas corpus should be granted.

ARGUMENT

I. THE PRESIDENT LACKS THE AUTHORITY TO DETAIN AL-MARRI AS AN "ENEMY COMBATANT."

All persons in the United States, citizen and non-citizen alike, are protected by the Constitution, including the rights secured by the Fourth, Fifth, and Sixth Amendments. *See, e.g.*, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2681-82 (2006); *Plyer v. Doe*, 457 U.S. 202, 210 (1982); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896). At the core of these protections is the right to be free from detention without trial so long as the courts are open and functioning. *See Milligan*, 71 U.S. at 121, 126-27. The Constitution's guarantee of equal protection, moreover, prohibits a second-class justice system for the nearly twenty million aliens residing in this country. *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

The President has circumvented these bedrock constitutional principles by unilaterally designating al-Marri an "enemy combatant" and detaining him indefinitely without charge in a Navy Brig. The President's Order is illegal because Congress has prohibited, not authorized, al-Marri's detention and because the Constitution forbids it.

A. Congress Has Not Authorized The President To Detain Al-Marri As An "Enemy Combatant."

The district court held that al-Marri may be detained by the President under the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF"). JA 123. The AUMF provides that the "President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." 115 Stat. 224, § 2(a). The AUMF further provides that this section "is intended to constitute specific statutory authorization within the meaning of section 5(b) of War Powers Resolution." *Id.* § 2(b); *see* 50 U.S.C. § 1541 *et seq.*; *see also Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2775 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality opinion). The AUMF, however, does not grant the President sweeping power to indefinitely detain as "enemy combatants" individuals arrested in the United States, a step Congress has plainly forbidden.

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

Signed into law just five weeks after the AUMF, the USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) ("Patriot Act"), prohibits the indefinite detention without charge of suspected alien terrorists arrested in the United States. *See* Patriot Act § 412(a) (codified at 8 U.S.C. § 1226a(a) (2006)); *Hamdi*, 542 U.S. at 551 (opinion of Souter, J.) ("[The Patriot Act] carefully circumscribed Executive power over alien terrorists on home soil ...."). Specifically, the Patriot Act directs that the Attorney General "shall take into custody any alien" in the United States who he has "reasonable grounds to believe" has engaged, is engaging in, or plans to engage in terrorist activity, is associated with a terrorist organization, or "is engaged in any other activity that endangers the national security of the United States." 8 U.S.C. § 1226a(a)(1), (3). Further, the Patriot Act requires the Attorney General to charge such aliens with a criminal offense or an immigration violation within seven days of their arrest. *Id.* § 1226a(a)(5). Indeed, in requiring the Executive to charge suspected alien terrorists in the United States within seven days, Congress rejected a provision in a prior draft of the bill that would have permitted the Attorney General to detain without charge any individual he "has reason to believe may commit, further, or facilitate acts [of terrorism.]." *See* Christopher Bryant & Carl Tobias, *Youngstown*

Revisited, 29 Hastings Const. L.Q. 373, 389-91 (2002); *Terrorism Investigation and Prosecution: Hearing Before Senate Comm. on the Judiciary*, 107th Cong., 2001 WL 1132689 (Sept. 25, 2001) (statement of Sen. Arlen Specter quoting section 202 of the Administration's draft bill); *see also id.* (statement of Att'y Gen. John Ashcroft) (acknowledging the absence of legal authority to indefinitely detain without charge aliens arrested in the United States and suspected of terrorist activities).

Under settled cannons of construction, the Patriot Act's specific language regulating the detention of suspected alien terrorists arrested inside the United States trumps the AUMF's more general grant of authority permitting the President to use all "necessary and appropriate force." *See, e.g.*, *Edmond v. United States*, 520 U.S. 651, 657 (1997); *Busic v. United States*, 446 U.S. 398, 406 (1980); *United States v. Roper*, 462 F.3d 336, 340 (4th Cir. 2006). Congress, in short, considered and enacted rules governing the precise question presented here – the arrest of an alleged alien terrorist inside the United States – and, in doing so, prohibited indefinite detention without charge in civilian court. Al-Marri's detention flouts that clear congressional directive.

2. *The AUMF Lacks The Clear Statement Required To Detain Aliens Arrested On U.S. Soil.*

Even if Congress had not expressly regulated the detention of suspected alien terrorists in the Patriot Act, the AUMF does not authorize the President to militarily detain civilians arrested inside their homes inside the United States. Specifically, the AUMF lacks the clear congressional statement necessary for the Executive to arrest and detain as "enemy combatants" aliens lawfully residing in the United States.

This "clear statement" requirement dates to the Nation's first days, when Congress expressly authorized the detention of enemy aliens in the United States. *See* An Act respecting Alien Enemies, July 6, 1798, ch. 66, § 1, 1 Stat. 577 ("Alien Enemies Act") (currently codified at 50 U.S.C. §§ 21-24 (2006)). The purpose of the Alien Enemies Act was to give the Executive the power it otherwise lacked to detain and remove citizens or subjects of foreign nations at war with the United States who "were thought to present a danger, but who could not be charged with a crime." Jennifer K. Elsea, *Presidential Authority to Detain 'Enemy Combatants,'* 33 Presidential Studies Q. 568, 569 (2003). As Chief Justice Marshall explained, a clear statement by Congress is a prerequisite for the seizure of enemy aliens or property in the United States even where there is a formal declaration of war. *Brown v. United States*, 12 U.S. 110, 127 (1814) ("[A] declaration of

war does not, of itself, authorize proceedings against the persons or property of the enemy found, at the time, within the territory [of the United States]."); *see also Little v. Barreme*, 6 U.S. 170, 177-78 (1804) (invalidating wartime seizure of ship traveling *from* a French port where Congress had authorized only the seizure of ships traveling *to* a French port).

The fact that a statute like the Alien Enemies Act was needed to detain enemy aliens – which al-Marri is not – shows that the same kind of explicit authorization is needed here.[3] No such authorization, however, has been provided to detain without charge a suspected alien terrorist in the United States. Since al-Marri's detention falls outside what is clearly authorized by congressional statute, it is illegal. *See Brown*, 12 U.S. at 129; *Little*, 6 U.S. at 179.

The Emergency Detention Act, enacted during the height of the Cold War and repealed in 1971, similarly demonstrates that when Congress authorizes the Executive to detain aliens arrested in the United States, it does

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[3] Al-Marri is not an enemy alien because he is not a citizen, resident, or subject of a foreign nation during a declared war between the United States and that nation. 1 Stat. 577. To the contrary, aliens from friendly nations, like al-Marri, have not traditionally been subject to detention during wartime. *See, e.g.*, *Johnson v. Eisentrager*, 339 U.S. 763, 769 n.2, 774 n.6 (1950); 1 William Blackstone, *Commentaries* *372-73 ("alien-enemies" are subjects of an enemy nation in time of war; all other aliens are "alien-friends"). Certainly, if Congress intended to subject the millions of aliens from allied nations who live within our borders to Executive detention without charge, it would say so clearly.

so explicitly. Specifically, the Emergency Detention Act expressly authorized the Attorney General to "apprehend and ... detain" individuals in the United States who he reasonably believed "probably will engage in, or probably will conspire with others to engage in, acts of espionage or of sabotage." *See* Pub. L. No. 81-831, tit. II, §§ 102-103, 64 Stat. 1020, 1021 (1950) (repealed by Pub. L. No. 92-128, 85 Stat. 347 (1971)); *see also* Elsea, *supra*, at 588-89 (Emergency Detention Act intended to provide for detention of suspected enemy agents who fell outside the definition of "alien enemies" under the 1798 act). Like the Alien Enemies Act, the Emergency Detention Act shows that Congress must explicitly authorize the detention of aliens in the United States in order for the Executive to possess such authority.

This clear statement rule applies with particular force where the detention is indefinite. In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court, driven by the serious constitutional problem posed by the indefinite detention of aliens present in the United States because they could not be returned to another country, found that even an immigration statute expressly authorizing the detention of certain aliens with final removal orders did not authorize their *indefinite* detention, even where release might endanger the public. *Id.* at 682, 699-701 (presumptively limiting detention

period to six months). Although the Supreme Court in *Zadvydas* did not consider "terrorism or other special circumstances where special arguments might be made for forms of preventive detention," *id.* at 696, Congress did consider those very arguments only four months later when it enacted the Patriot Act. There, Congress provided the requisite clear statement necessary to authorize the continued detention of certain allegedly dangerous aliens arrested in the United States. Specifically, Congress stated that aliens charged with an immigration violation and found removable, but whose removal was not likely in the foreseeable future, could be detained for additional periods of up to six months if their release would "threaten the national security of the United States or the safety of the community or any person." 8 U.S.C. § 1226a(a)(6); *see also Clark v. Martinez*, 543 U.S. 371, 386 n.8 (2005).

In short, when Congress seeks to authorize the preventive detention of aliens arrested in the United States, it must clearly say so. Congress has done so only in the Patriot Act. Al-Marri, however, is not being detained under that Act, and Congress has not otherwise clearly authorized the President to unilaterally detain civilians – aliens or citizens – arrested in their homes inside the United States. Indeed, al-Marri's detention under the AUMF would render superfluous not only the Patriot Act's explicit

detention provision but also the numerous criminal statutes specifically designed to prevent and punish terrorist attacks on U.S. soil.[4] Accordingly, the district court erred in finding that the AUMF authorizes the President to detain al-Marri as an "enemy combatant."

3. *The Supreme Court's Decision In* Hamdi *Does Not Authorize Al-Marri's Detention As An Enemy Combatant.*

In *Hamdi v. Rumsfeld*, the Supreme Court addressed "the narrow question" of whether the President could unilaterally detain an armed Taliban soldier captured on a battlefield in Afghanistan 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." 542 U.S. at 516 (plurality opinion) (emphasis added and internal quotation marks omitted); *see also, e.g.*, *id.* at 512-13, 518, 522; *id.* at 549 (opinion of Souter, J.) ("[T]he government here repeatedly argues that Hamdi's detention amounts to nothing more than customary detention of a

[4] *See, e.g.*, 18 U.S.C. § 2384 (seditious conspiracy); *id.* § 2339A (providing "material support or resources" to be used in carrying out or preparing to carry out terrorist attacks); *id.* § 2339B (providing "material support or resources" to foreign terrorist organizations); *see also Hamdi*, 542 U.S. at 547-48 (opinion of Souter, J.) ("[T]here is no reason to think Congress might have perceived any need to augment Executive power to deal with dangerous [individuals] within the United States, given the well-stocked statutory arsenal of defined criminal offenses covering the gamut of actions that [an individual] sympathetic to terrorists might commit.") (citing counter-terrorism statutes).

captive taken on the field of battle."). The President's detention of Hamdi was permissible under the AUMF, the Court concluded, because it was consistent with "longstanding law-of-war principles" which permit the detention of enemy soldiers captured on a battlefield. *Id.* at 521 (plurality opinion); *see also id.* at 518 (capture and detention of combatants "by 'universal agreement and practice,' are 'important incident[s] of war'") (quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1942)). By contrast, arresting civilians in their homes inside the United States, far from any active battlefield, and detaining them in military custody, is not a fundamental incident of war. Therefore, al-Marri's military detention is not justified by the "longstanding law-of-war principles" that informed the Supreme Court's construction of the AUMF in *Hamdi*.

Such principles distinguish between combatants and non-combatants. *See, e.g.*, Protocol Additional I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, art. 48, June 8, 1977, 1125 U.N.T.S. 3 ("Protocol I"). Combatants who are "members of the armed forces of a Party to a conflict," are lawful military targets, *id.* art. 43(2) – non-combatants are not, *id.* arts. 48, 51. *See also id.* art. 43(1); Judgment and Opinion ¶ 47, *Prosecutor v. Galic*, Case No. IT-98-29-T (I.C.T.Y. Dec. 5, 2003), *available at*

http://www.un.org/icty/galic/trialc/judgement/index.htm ("[T]he term 'civilian' is defined negatively as anyone who is not a member of the armed forces or of an organized military group belonging to a party to the conflict."). Consequently, combatants may be killed wherever they are, unless they are disarmed or surrendering. By contrast, civilians may be treated as lawful targets of attack only "for such time as they take a direct part in hostilities." Protocol I, *supra*, art. 51(3). Such individuals, moreover, do not become combatants; they remain "unprivileged belligerents" who never enjoy the combatant's privilege to kill or wage war. If such unprivileged belligerents are arrested, they may be criminally prosecuted for having engaged in combat, or for any other war crimes they may have committed. But they are not combatants under the law of war and are not subject to detention on that basis. *Cf. Hamdi*, 542 U.S. at 518, 521 (plurality opinion). Rather, the regime within which they are subject to trial and punishment is that of civilian domestic criminal law.

Al-Marri's indefinite detention as an "enemy combatant" causes the AUMF's limited grant of detention authority to "unravel." *Id.* at 521. If al-Marri is a "combatant," as the President claims, he – and anyone else the President alleges is "associated with al Qaeda" – could lawfully be shot in broad daylight on the streets of the United States. That is not, and never has

been the law. It may be that al-Marri could be charged with a criminal offense and detained on that basis, just like the many other citizens and aliens indicted for terrorism-related activities both before[5] and after September 11.[6] But he cannot be detained as a "combatant."

Indeed, the Supreme Court's previous and limited use of the term "enemy combatant" hewed to the customary definition of a combatant under the law of war: a member of the regular armed forces of a nation or state who engages in hostilities against the United States and whose belligerency is privileged as long as he adheres to the law of war. *Ex parte Quirin*, 317 U.S. 1, 31 (1942); *accord In re Yamashita*, 327 U.S. 1, 7 (1946).[7] Here, by

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[5] *See, e.g.*, *United States v. Yousef*, 327 F.3d 56 (2d. Cir. 2003) (affirming convictions of defendants involved in 1993 World Trade Center bombing and conspiracy to bomb airliners); *United States v. Rahman*, 189 F.3d 88, 123 (2d Cir. 1999) (affirming convictions of Sheikh Omar Abdel Rahman and his followers for, *inter alia*, plotting a "day of terror" against New York City landmarks).

[6] *See, e.g.*, *United States v. Abdi*, No. 2:2004cr88 (S.D. Ohio filed June 10, 2004) (Somali national in Ohio charged with plotting to bomb shopping mall); *United States v. Faris*, No. 1:03-cr-189-LMB (E.D. Va. filed Apr. 30, 2003) (truck driver convicted of attending al Qaeda training camp and planning to cut suspension cables on Brooklyn Bridge); *United States v. Goba*, No. 1:02cr214-WMS-HKS (W.D.N.Y. filed Oct. 21, 2002) (conviction of "Lackawanna Six," a group of Buffalo residents, who traveled covertly to receive training in al Qaeda camp); *United States v. Moussaoui*, 1:2001-cr-455 (E.D. Va. filed Dec. 11, 2001) (indictment of French citizen for participation in September 11 attacks).

[7] *Quirin*'s use of this term also reflects the fact that the decision predates the 1949 Geneva Conventions, which make clear that one is either a "combatant" or "civilian" under the law of war. *See, e.g.*, *ICRC*

contrast, the President has misappropriated the term "enemy combatant" to create a category of persons outside any legal protections, something the law of war does not contemplate. *See ICRC Commentary to the IV Geneva Convention* 51 (Jean S. Pictet ed. 1958) (every prisoner "must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, [or] a civilian covered by the Fourth Convention.... There is no intermediate status; nobody in enemy hands can be outside the law."). Calling al-Marri's detention "a simple war measure," JA 35, does not make it one, nor does it allow the distortion of the law of armed conflict on which the President relies.

4. The Military Commissions Act of 2006 Does Not Authorize Al-Marri's Detention.

Congress enacted the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) ("MCA"), in response to the Supreme Court's *Hamdan* decision.[8] The MCA's title reflects its purpose: to provide the congressional authorization for military commissions to try Guantánamo Bay detainees required by the Supreme Court in *Hamdan*. *See* 126 S. Ct. at

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Commentary to the IV Geneva Convention 51 (Jean S. Pictet ed. 1958). The Court's use of the term "enemy combatant" in *Hamdi* similarly tracked long-established understandings of the law of war.

[8] The government has informed counsel that it will file a motion to dismiss al-Marri's appeal based on the MCA on November 13, 2006. Al-Marri will address the MCA's impact, if any, on jurisdictional issues in response to that motion.

2759-60; *id.* at 2799 (Kennedy, J., concurring). The MCA does not authorize the military detention of civilians arrested in their homes inside the United States.

The MCA lacks the clear statement necessary to authorize the President to detain individuals arrested inside the United States. *See supra* Argument I.A.2. The MCA's definition of "unlawful enemy combatant," 120 Stat. 2601 (adding 10 U.S.C. § 948a), expressly applies only to the new chapter establishing military commissions. It does not create any Executive detention authority, but merely limits the class of individuals subject to military commission jurisdiction under the MCA. 120 Stat. 2602 (adding 10 U.S.C. §§ 948c, 948d).

In sum, neither the AUMF nor the MCA authorizes al-Marri's detention as an "enemy combatant," and the Patriot Act squarely forbids it. Further, statutes should be construed to avoid serious constitutional questions where other interpretations are plausible. *See, e.g.*, *Clark*, 543 U.S. at 382; *Edward J. Debartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Construing the AUMF or MCA to permit al-Marri's military detention would, at a minimum, raise precisely those serious constitutional questions that this Court should avoid.

B. The Constitution Prohibits Al-Marri's Detention As An "Enemy Combatant."

All persons in the United States have the right to be charged and tried in a criminal proceeding for suspected wrongdoing. U.S. Const. amends. V & VI. To protect this fundamental right, the Constitution prohibits subjecting individuals arrested inside the United States to military detention unless they are members of a regular armed force of an enemy nation or state or participating directly in combat.

The Supreme Court affirmed the vitality and force of this principle in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). *Milligan* arose during the Civil War and involved accusations of terrorism and war-like acts against a resident of Indiana who claimed to be a civilian. Milligan was alleged to have: joined and aided a secret paramilitary group for the purpose of overthrowing the government; violated the laws of war; communicated with the enemy; and conspired to seize munitions, liberate prisoners of war, and commit other violent acts in an area under constant threat of invasion by the enemy. *Id.* at 6-7 (statement of the case); *see also id.* at 140 (Chase, C.J., concurring). Milligan was charged, convicted and sentenced to death by a military commission. *Id.* at 107.

The Supreme Court reversed Milligan's conviction, finding that the military lacked jurisdiction to try him so long as Indiana's civilian courts

were "open and their process unobstructed," *id.* at 121, and where there was no "actual and present" necessity for denying him the guarantees of the Constitution, *id.* at 126-27. Just as Milligan could not insist upon receiving the rights attaching to combatants whose belligerency is privileged, he could not suffer combatants' disabilities. *Id.* at 131 ("If [Milligan] cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?"). Instead, Milligan was afforded the protections, and subjected to the penalties, that attach to non-belligerents accused of violating the Nation's *criminal* laws. *Id.* ("If in Indiana he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana.").

The Supreme Court has described *Milligan* as "one of the great landmarks in [its] history." *Reid v. Covert*, 354 U.S. 1, 30 (1957). Relying upon *Milligan*, it has consistently resisted the imposition of military authority over civilians, and "the supplanting of courts by military tribunals." *Duncan v. Kahanamoku*, 327 U.S. 304, 316-17, 324 (1946). This constitutional tradition protects both the rights of individuals and the fundamental principle of civilian supremacy over the military in domestic affairs, which traces to the Nation's founding. *The Declaration of Independence* para. 14 (U.S. 1776); *Reid*, 354 U.S. at 29-30 (observing that

the Framers' "fear and distrust of military power" caused them to make the military "subordinate to civil authority").

Hamdi affirms and clarifies *Milligan*'s holding, explaining that Milligan was not subject to military authority because he was neither captured amid combat on a battlefield nor a member of the armed forces of the enemy subject to detention as a prisoner of war. As *Hamdi* noted, "[h]ad Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different." 542 U.S. at 522 (plurality opinion); *see also id.* at 523-24 (stressing Hamdi's capture "in a *foreign* combat zone") (emphasis in original).

The parallels between this case and *Milligan* are striking. Like Milligan, *Milligan*, 71 U.S. at 6, al-Marri was not captured while participating in hostilities; he was arrested inside his home in the middle of the United States, far from any battlefield. Like Milligan, *id.* at 131, al-Marri does not claim military status but, rather, has consistently insisted that he is an innocent civilian. Milligan, moreover, was at least charged with a crime and put on trial. Al-Marri, by contrast, has been imprisoned without charge or trial in a military jail for more than three years.

Milligan was a U.S. citizen, but citizenship was irrelevant to the Court's decision, which turned on the fundamental rights that are guaranteed to every person present in this country. *See Milligan*, 71 U.S. at 120-21 ("The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection *all classes of men*, at all times, and under all circumstances.") (emphasis added). Further, as the Supreme Court has since made clear, "a citizen, no less than an alien" can be subject to military detention and trial; the real question is whether the person falls within the proper definition of a combatant under the Constitution and the law of war. *See Hamdi*, 542 U.S. at 519 (plurality opinion); *see also Quirin*, 317 U.S. at 37 ("Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war."); *In re Territo*, 156 F.2d 142 (9th Cir. 1946) (citizen properly held as prisoner of war).

Al-Marri was designated an "enemy combatant" based on "essentially the same" process used to designate a U.S. citizen an "enemy combatant." JA 214. He has the same right to be charged and tried as all citizens arrested in the United States. If he can be detained indefinitely without charge in a Navy Brig, then so can any American citizen arrested anywhere in America.

Quirin does not support the President's radical and unprecedented attempt to expand military jurisdiction far beyond the traditional and historic limits set by the Constitution and the law of war. *Quirin* involved admitted members of the German armed forces who boarded a German submarine for the United States. It was conceded that the men wore uniforms and carried explosives which they planned to use to destroy war industries and facilities, but they buried their uniforms immediately after landing and crossed military lines in civilian dress. *Quirin*, 317 U.S. at 21. The men were apprehended and charged before a military commission with violations of the law of war and other offenses. *Id.* at 21-22. The Supreme Court held that these German saboteurs were subject to trial by military commission because their admitted conduct – burying their uniforms, concealing their weapons, and crossing military lines to attack American military installations – transformed their otherwise lawful belligerency into violations of the law of war. *See id.* at 37 ("By passing our boundaries for such purposes without uniform or other emblem signifying belligerent status, or by discarding that means of identification after entry, such enemies become unlawful belligerents subject to trial and punishment."); *id.* at 38 (finding that defendants' shedding of their German uniforms upon entry in the United States was "essential" to their offense). Such individuals were,

"upon the conceded facts," within the traditional boundaries of military jurisdiction as combatants under the law of war. *Id.* at 46 ("We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission.").

By contrast, the *Quirin* Court explained, Milligan "was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents." *Id.* at 45. Rather, he was a "non-belligerent, not subject to the law of war," but subject to criminal prosecution and punishment for his illegal acts. *Id.* Indeed, the government in *Quirin* relied upon this very point in distinguishing *Milligan*. *See* Brief for Respondent at 10, *Ex parte Quirin*, 317 U.S. 1 (1942) ("Milligan never wore the uniform of the armed forces at war with the United States. The [*Quirin*] petitioners did."); *id.* at 45 ("Milligan was a civilian; the present defendants are imprisoned combatants of an enemy nation.").

Quirin, then, stands for the narrow and unremarkable proposition that admitted members of an enemy army in a declared war who cross military lines in violation of the law of war may be charged and tried by a military commission authorized by Congress. *See Hamdi*, 542 U.S. at 518 (plurality opinion). *Quirin* reinforces *Milligan*'s core holding that military jurisdiction over individuals in the United States requires that they be combatants under

longstanding law of war principles. The *Quirin* saboteurs were admitted combatants; Milligan was not and al-Marri is not. Notably, those who aided the *Quirin* saboteurs in the United States, but who were not members of the German army, were prosecuted in the civilian courts. *Cramer v. United States*, 325 U.S. 1 (1945); *United States v. Haupt*, 136 F.2d 661 (7th Cir. 1943).

This Court's decision in *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005), is not to the contrary. As the Court held, Padilla – unlike al-Marri – fell within *Hamdi*'s narrow definition of "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 394. Thus, there was "no difference in principle between Hamdi and Padilla." *Id.* at 391. In *Padilla*, this Court distinguished *Milligan*, just as *Hamdi* did, by preserving its core constitutional holding with respect to the rights enjoyed by non-combatants who never directly participated in hostilities against the United States on a battlefield. *Id.* at 397 ("Padilla, unlike Milligan, associated with, *and* has taken up arms against the forces of the United States [on an Afghani battlefield] on behalf of, an enemy of the United States.") (emphasis added). Thus, the President was authorized to

detain Padilla under the AUMF because he was "'armed and present in a combat zone during armed conflict between al Qaeda/Taliban forces and the armed forces of the United States.'" *Id.* at 390 (quoting the government's allegations). By contrast, the government has never alleged that al-Marri was armed and present in a combat zone during armed conflict between al Qaeda/Taliban forces and the armed forces of the United States. *Id.* at 393. Thus, unlike Padilla, al-Marri is not a combatant, and cannot be detained under the AUMF or the Constitution.

In addition, Padilla – unlike al-Marri – never contested the government's factual assertions or otherwise litigated the process due in challenging his "enemy combatant" designation. This Court, therefore, never considered the serious constitutional questions raised by the President's designation as an "enemy combatant" of an individual arrested in a civilian setting in the United States and denied, *inter alia*, an evidentiary hearing, an opportunity to confront and cross-examine witnesses, and an opportunity to establish that his detention is based on evidence obtained through torture. *See infra* Argument II.[9]

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[9] Further, *Padilla*'s precedential value has been seriously eroded if not eliminated. When the government filed criminal charges against Padilla last November, it urged this Court to recall its mandate and vacate its prior decision as moot. Though Padilla elected to oppose that motion, this Court should no longer consider *Padilla* binding authority, for the reasons the

C. The President Lacks The Inherent Authority To Detain Al-Marri As An "Enemy Combatant."

The government has also argued that the President has inherent authority as Commander-in-Chief to detain al-Marri (an issue the district court did not reach). JA 123. He does not. Because Congress has prohibited al-Marri's detention without charge, the President's "power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring); *accord Hamdan*, 126 S. Ct. at 2774 n.23 ("[President] may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on [the President's] powers."). Here, the government's assertion of inherent executive authority contravenes the constitutional limits on the use of military power in domestic affairs and the requirement of congressional authorization to detain individuals arrested in the United States.

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government itself emphasized. *See* Supplemental Brief for Appellant at 13, in *Padilla v. Hanft,* No. 05-6396 (4th Cir.) (filed Dec. 9, 2005) ("Vacatur under the *Munsingwear* doctrine rests on the principle that '[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstances, ought not in fairness be forced to acquiesce in the judgment.'") (quoting *U.S. Bancorp Mtge. Co. v. Bonner Mall Partnership*, 513 U.S. 18, 25 (1994)).

The Commander-in-Chief Clause does not make the President commander-in-chief of the country. *Youngstown*, 343 U.S. at 643-44 (Jackson, J., concurring). The Supreme Court has consistently approved Alexander Hamilton's statement that the powers conferred on the President by the Commander-in-Chief Clause "amount to nothing more than the supreme command and direction of the military and naval forces." *The Federalist* No. 69, at 418 (Clinton Rossiter, ed., 1961); *see also United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14 (1955) ("[A]ssertion of military authority over civilians cannot rest on the President's power as commander-in-chief, or on any theory of martial law."). To the contrary, the Constitution's grant to Congress of many of the war powers is central to this Nation's system of government. *See, e.g.*, U.S. Const. art. I, § 8, cls. 11-16; *Milligan*, 71 U.S. at 139-40 (Chase, C.J., concurring) ("The power to make the necessary laws is in Congress; the power to execute in the President."); *Hamdan*, 126 S. Ct. at 2773-74.

The President's attempt to rely on his commander-in-chief powers to avoid the normal law-making process was squarely rejected by the Supreme Court in *Youngstown*, which invalidated President Truman's seizure of civilian steel mills for military purposes during the Korean War. *Youngstown*, 343 U.S. at 588-89; *see also Hamdan*, 126 S. Ct. at 2773-74

(reaffirming constitutional limits on President's authority to establish military tribunals). If the President does not have the inherent authority to deprive civilian owners of their steel mills during wartime, he certainly does not have inherent authority to unilaterally deprive an individual lawfully present in this country of his liberty. *See Brown*, 12 U.S. at 126 (Marshall, C.J.) ("The [1798] act concerning alien enemies, which confers on the president very great discretionary powers ... affords a strong implication that he did not possess those powers by virtue of the declaration of war."). Rather, as demonstrated above, the President possesses such authority, if at all, only by virtue of express congressional enactment. *See, e.g.*, *Ludecke v. Watkins*, 335 U.S. 160, 164-65 (1948); *cf. Hamdan*, 126 S. Ct. at 2774-75 (*Quirin* rested on "specific, overriding authorization" for presidential military commissions). In short, whatever the President's inherent authority may be to detain an enemy soldier actually captured on a foreign battlefield – an issue *Hamdi* declined to decide, 542 U.S. at 517, and which this Court need not reach – the President cannot detain an individual arrested inside the United States as an "enemy combatant" without express authorization from Congress.

II. THE PROCEDURE INVENTED BY THE MAGISTRATE JUDGE, AND APPROVED BY THE DISTRICT COURT, IS NOT DICTATED BY *HAMDI* AND OTHERWISE FAILS TO SATISFY THE MOST BASIC REQUIREMENTS OF DUE PROCESS.

Al-Marri has been detained by the United States in solitary confinement for almost five years, without a hearing, without the presentation of any evidence, and without being afforded an opportunity to confront or cross-examine the witnesses against him or to show that his detention is based on statements obtained by torture. Instead, the courts below have held that he may be imprisoned in a Navy Brig – potentially for life – based solely upon the multiple hearsay declaration of a man named Rapp. Unless this Court properly holds that the President lacks legal authority to detain al-Marri, it must conclude that al-Marri's detention, which is premised solely upon the word of a faceless government bureaucrat, violates the Due Process Clause and the Federal Rules of Evidence, and the requirements of the habeas corpus statute, 28 U.S.C. § 2241 *et seq.*, and the Suspension Clause, U.S. Const. art. I, § 9, cl.2.

A. Al-Marri's Detention Violates Due Process.

Freedom from physical detention "is the most elemental of liberty interests," and "'has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.'" *Hamdi*, 542 U.S.

at 529 (plurality opinion) (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)). Indefinite detention of individuals arrested in the United States is permitted, if ever, only under the narrowest of circumstances and only based upon "strong procedural protections," including a full-blown adversary process. *Zadvydas*, 533 U.S. at 690-91.

The Supreme Court has upheld indefinite detention based upon an individual's alleged dangerousness only in the limited context of civil commitment, where mental illness or abnormality provided an additional "special circumstance ... that helps to create the danger." *Id.* at 691; *see also Kansas v. Hendricks*, 521 U.S. 346, 358 (1997) ("mental abnormality" provides special circumstance justifying indefinite civil commitment of violent sex offenders). Even assuming *arguendo* that terrorism allegations could provide that additional "special circumstance" necessary to justify indefinite detention without charge, due process demands more rigorous procedural safeguards than those devised by the courts below.

In particular, the Supreme Court has upheld indefinite detention only where an individual has been afforded the opportunity to see and confront all of the government's evidence and to cross-examine witnesses at an evidentiary hearing. *See, e.g. Hendricks*, 521 U.S. at 352-53 (requiring full-blown trial procedures for the preventive detention of sexually violent

predators); *Foucha*, 504 U.S. at 81-82 (condemning impermissible denial of an adversary hearing to allegedly dangerous insanity acquittees); *see also United States v. Salerno*, 481 U.S. 739, 750-52 (1987) (holding that "full-blown adversary hearing" is required for pretrial detention of especially dangerous individuals); *Zadvydas*, 533 U.S. at 692 (recognizing that the indefinite detention of allegedly dangerous aliens without such procedural safeguards would raise serious constitutional problem). In addition, the Supreme Court has required the government in such cases to bear the burdens of proof and production, and to sustain its burden by at least clear and convincing evidence. *See, e.g.*, *Hendricks*, 521 U.S. at 353; *Foucha*, 504 U.S. at 81-82; *see also Salerno*, 481 U.S. at 752.

The courts below did not afford al-Marri any of those protections. Instead, the district court mistakenly adopted a presumption in favor of the government's "evidence" (*i.e.*, the hearsay Rapp Declaration) by mistakenly applying *Hamdi*'s burden-shifting framework to the non-battlefield, domestic arrest of a civilian. The courts also erred by denying al-Marri the "fair opportunity for rebuttal" that *Hamdi* envisioned, 542 U.S. at 534, and due process requires.

1. Hamdi *Does Not Envision, And The Constitution Prohibits, A Presumption In Favor Of The Government's "Evidence" In Cases Not Involving Battlefield Captures.*

The district court erred in relying on *dicta* in *Hamdi* to excuse the government from bearing its constitutionally required burden of presenting evidence to support its detention of al-Marri. *Hamdi*, which involved the battlefield capture of an armed enemy soldier in Afghanistan, is a radically different case from this one, in which al-Marri was arrested at his home in Peoria, Illinois, surrounded by millions of other civilians, and half a world away from an active field of battle.

In *Hamdi*, the Supreme Court held that the petitioner – who was captured amid combat on a battlefield in Afghanistan while carrying a weapon – was entitled to "notice of the factual basis for his classification [as an enemy combatant], and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." 542 U.S. at 533 (plurality opinion); *see also id.* at 553 (opinion of Souter, J.). A plurality of the Court further suggested in *dicta* that the "Constitution would not be offended by a presumption in favor of the government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided." *Id.* at 534. The plurality, however, addressed *only* "the narrow question" of the process due for the garden-variety capture of an

armed enemy soldier amid combat on a foreign battlefield, 542 U.S. at 516; *see also id.* at 512-13, 518, 522 n.1, and applied the traditional balancing test in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), to those unique circumstances, *id.* at 529.

In that limited context, the plurality suggested that there could be a presumption in favor of the government "once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria," which the petitioner would then have an opportunity to rebut. *Id.* at 534. This streamlined procedure was meant to approximate the procedures typically provided by a military tribunal under Article 5 of the Geneva Conventions and applicable United States army regulations in the context of a battlefield capture of an armed combatant, but which were not provided to Hamdi. *Id.* at 538.

This presumption and burden-shifting framework could not have been intended by the Supreme Court to apply to the arrest of a person in his home in Peoria, Illinois, by civilian law enforcement officers, thousands of miles from any battlefield – materially different factual circumstances that were not before the Court. *See Hamdi v. Rumsfeld*, 337 F.3d 335, 344 (4th Cir. 2003) (Wilkinson, J., concurring) (to compare the battlefield seizure with a domestic arrest "is to compare apples and oranges"). Indeed, the *Mathews*

calculus utilized by the Supreme Court in *Hamdi*, to the extent applicable at all here, mandates more substantial protections in the context of a civilian arrest inside the United States. Specifically, away from the battlefield, the private interest outweighs the burden on the government because individuals arrested in their homes in Peoria, Illinois – or in any city or town in America – are constitutionally presumed to be innocent until proven guilty beyond a reasonable doubt, rather than combatants subject to capture and summary detention.

Also, there is a much lower risk of error, that is, of misidentifying a civilian as a combatant, following a traditional battlefield capture due to the context of such captures and the typical visible signs of hostility. *Hamdi*, 542 U.S. at 513 (plurality opinion) (relating that Hamdi was captured carrying a Kalishnikov assault rifle in the company of enemy soldiers). Simply stated, there is an exceedingly limited universe of occupations that might accurately characterize an armed individual captured on an active field of combat. Conversely, there is a much greater risk of error when the President declares that an individual lawfully present inside the United States, and arrested in his home, is an "enemy combatant" based upon the conclusory assertion that he poses a "continuing, present, and grave danger to the national security." JA 54 (Order of President Bush dated June 23,

2003). Unlike a foreign war zone in which the U.S. military is engaged in active combat, the 300 million people who live within the United States cannot be simplistically divided into "errant tourist[s], embedded journalist[s], or local aid worker[s]" on the one hand, and "enemy combatants" on the other. *Hamdi*, 542 U.S. at 534 (plurality opinion) (describing the limited classes of people typically found on a battlefield). Rather, the category of non-combatants is infinitely broader so many miles away from ongoing combat, and encompasses not just the tiny group of individuals who by occupation or mistake may find themselves in a foreign war zone, but every person in the entire country, including students, protestors, immigrants, professionals, activists, civil rights lawyers, dissidents, visitors, run-of-the-mill criminals, and disfavored minorities.

Thus, when applying *Mathews* to the circumstances presented in this case, it is critically important that the risk of erroneously imprisoning a civilian as an "enemy combatant" is far greater inside the United States than in the very different context addressed by the Supreme Court in *Hamdi*. Accordingly, the Constitution requires the government to bear the burden of proving its allegations by a rigorous standard of proof when it deprives individuals of their liberty in this country. *See, e.g.*, *In re Winship*, 397 U.S. 358, 364 (1970).

Further, the burden on the government of justifying its actions is far less here than in the context of a battlefield capture of enemy soldiers. *Hamdi* considered the practical obstacles the U.S. *military* – not the Executive Branch of government – would confront in providing more rigorous procedural protections to an armed enemy soldier captured amid ongoing combat on an Afghani battlefield. 542 U.S. at 531-32 (plurality opinion) (recognizing the risk of distracting "*military* officers who are engaged in the serious work of waging battle . . . [with] litigation half a world away") (emphasis added); *id.* at 532 (expressing concern that litigation would "result in a futile search for evidence buried under the rubble of war"). Where an individual is seized by the FBI in his home inside the United States, however, and not on a foreign battlefield by military personnel engaged in ongoing combat, the Executive branch of government is constitutionally accustomed to providing rigorous procedural protections to those whom it chooses to detain.

Indeed, in this very case, the government's allegations are premised upon information gained through civilian investigation and interviews, not from military officers in an active war zone. Much, if not all, of the information relied upon by the government was developed *after* al-Marri's arrest in December 2001 for the very purpose of prosecuting him in federal

court in a proceeding in which the government would have born the burden of establishing his guilt beyond a reasonable doubt. That the President opted to circumvent such proceedings in order to deny al-Marri his constitutional rights does not detract from the fact that affording persons arrested inside the United States their fully panoply of constitutional rights is the norm.

Put another way, *Hamdi* was premised upon the understanding that, in the context of a traditional battlefield capture on a foreign battlefield, the "conceded" fact of presence in an active war zone might be constitutionally sufficient to establish a reliable presumption of belligerence that the detainee must then overcome. This case, however, arises in the dramatically different context of a traditional civilian arrest in the middle of America, in which no facts are conceded, and in which the Petitioner asserts his innocence. The only "evidence" considered by any court has been the government's disputed, unproven, and untested *allegation* that al-Marri entered the United States to engage in "hostile and war-like acts." JA 54. Neither the government, nor the courts below, have identified any conceded fact akin to "presence in an active war zone" or "direct participation in hostilities" that is sufficiently reliable to establish a presumption of belligerence in favor of the government here.

Where Congress has established an evidentiary presumption there is always at least "some rational connection between the fact proved and the ultimate fact presumed." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976). Thus, there is a "rational connection" between the capture of an individual like Hamdi in the company of enemy soldiers on a foreign battlefield and the presumption that he is an enemy combatant because, based on human experience, persons found on active battlefields are, in all probability, combatants. *See, e.g.*, Clifford S. Fishman, *Jones on Evidence, Civil and Criminal* § 4.5, at 308 (7th ed. 1992) ("Most presumptions are based at least in part on the high probability that if the basic facts exist, the presumed fact also exists."); *see also Mobile, Jackson & Kansas City R. Co. v. Turnipseed*, 219 U.S. 35, 42 (1910) (an evidentiary presumption "depends upon the generality of the experience upon which it is founded"). But there is no such fair and rational connection between the non-battlefield arrest of a civilian at his home in Peoria, Illinois and the presumption that he is an "enemy combatant" because, based on human experience, persons arrested in Peoria are, in all probability, civilians.

Furthermore, the burden of production must always fall on the party having sole or superior access to possession of critical evidence. *See United States v. Denver & Rio Grande Railroad Co.*, 191 U.S. 84, 92 (1903); 2

McCormick on Evidence § 343, at 500 (6th ed. 2006). As the Supreme Court recognized in *Hamdi*, there is a limited universe of alternative explanations for an individual's presence on an active battlefield, and those explanations are relatively easy to establish. A non-combatant knows why he was on the battlefield in the first instance, and, if given even a limited opportunity to be heard, can come forward with evidence of his non-combatant status by showing – as the Supreme Court envisioned – that he is an "errant tourist, embedded journalist, or local aid worker," and not an "enemy combatant." *Hamdi*, 542 U.S. at 534 (plurality opinion). Away from the battlefield, however, it is *the government* that knows why it has plucked one civilian from among millions of other civilians, and that person's classification by the government as an "enemy combatant" will be based upon facts that are uniquely within the government's possession and control.

Here, however, the lower courts insisted that al-Marri "prove the negative" – that is, prove, for example, that he never met with Osama bin Laden, never offered himself as a martyr to al Qaeda, and never attended an al Qaeda training camp. JA 238-38, 351. If there is any truth to the government's allegations – and al-Marri has repeatedly asserted that there is not – the government in the best position to marshal the relevant evidence,

and, consequently, the government should bear the burden of producing it. *See, e.g.*, *Denver & Rio Grande Railroad Co.*, 191 U.S. at 92 (because of difficulty of proving a negative, burden is on party in possession of the proof). Further, al-Marri can meaningfully contest such allegations only if he is provided the opportunity to challenge the veracity, credibility, and reliability of the individuals on whose statements the allegations are based. *See, e.g.*, *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (emphasizing that the right to probe witnesses is essential to "ultimate integrity of the fact-finding process") (citation omitted).

To justify its imposition of the burden of proof on al-Marri under the circumstances of this case, the district court noted that a habeas petitioner "'generally bears the burden of proof.'" JA 354 (quoting *Garlotte v. Fordice*, 515 U.S. 39, 46 (1995)). But that burden is properly assigned to a petitioner only because it does not offend due process in the context of the typical habeas proceeding. Specifically, in garden-variety post-conviction relief cases like *Garlotte*, a habeas petitioner has *already* been tried and *already* been convicted in a judicial proceeding in which he has *already* been afforded the full panoply of constitutional protections, including the requirement that the government prove its case by proof beyond a reasonable doubt and the right to confront and cross-examine the witnesses against him.

In those very different circumstances, where the challenge is not a direct attack on the Executive's factual allegations in the first instance but, rather, a collateral attack on a conviction presumed to have been constitutionally obtained for the very reason that the petitioner *already* was afforded all of the rights al-Marri has been denied, due process is not offended by placing the burden on the petitioner.

Although the President describes the "War on Terrorism" as ongoing in all places and at all times, the fact is that Peoria was not an active battlefield when al-Marri was arrested by the FBI in December 2001 or when he was declared an "enemy combatant" by the President in June 2003. There was no combat between U.S. armed forces and enemy soldiers in that midwestern city that would justify application of the burden-shifting framework described in *Hamdi*. Rather, in both Illinois and South Carolina, "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Foucha*, 504 U.S. at 83. For that reason, the procedures required by the Constitution to safeguard against unlawful detention of those arrested in this country have always been, and must necessarily remain, significantly greater than those required for enemy soldiers captured amid combat on a foreign battlefield.

2. *Due Process And A "Fair Opportunity for Rebuttal" Demand That Al-Marri Be Allowed To Confront And Cross-Examine The Government's Witnesses.*

Even if the Constitution permits an initial presumption in favor of the government, al-Marri must be given a fair opportunity to rebut the government's factual assertions and to demonstrate that he is an innocent civilian, not an "enemy combatant." That right necessarily includes the opportunity to confront and cross-examine the government's witnesses in an evidentiary hearing. Al-Marri was denied such an opportunity in the courts below.

The right to confront and cross-examine witnesses is a "bedrock procedural guarantee." *Crawford v. Washington*, 541 U.S. 36, 42 (2004). This right is "founded on natural justice," *id.* at 49 (citation omitted), and is "'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 also Coy v. Iowa*, 487 U.S. 1012, 1017 (1988) ("[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser."). And, it is "a fundamental aspect of procedural due process." *Jenkins v. McKeithen*, 395 U.S. 411, 428 (1969). *See also, e.g., Goldberg v. Kelly*, 397 U.S. 254, 269 (1970); *California v. Green*, 399 U.S. 149, 158 (1970) (observing that cross-

examination is "the greatest legal engine ever invented for the discovery of truth") (internal citation omitted).

The right of cross-examination has never been limited to criminal cases:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots . . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative and regulatory actions were under scrutiny.

Greene v. McElroy, 360 U.S. 474, 496-97 (1959) (citations and footnote omitted); *see also Willner v. Comm. on Character & Fitness*, 373 U.S. 96, 103-04 (1963); *In re Oliver*, 333 U.S. 257, 273 (1948) ("right to examine the [government's] witnesses" is "basic in our system of jurisprudence").

Accordingly, this fundamental right has been guaranteed in preventive detention schemes upheld by the Supreme Court. *See, e.g.*, *Hendricks*, 521 U.S. at 353 (preventive detention of extremely violent sexual predators);

Salerno, 481 U.S. at 742, 751 (preventive pre-trial detention of dangerous accused felons). It is even guaranteed in deportation proceedings, which threaten only removal from the country and not lifelong imprisonment. *See, e.g.*, *United States v. Jauregui*, 314 F.3d 961, 962-63 (8th Cir. 2003) (citing *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953)); *Hadjimehdigholi v. INS*, 49 F.3d 642, 649 (10th Cir. 1995). Indeed, this right is so basic to our understanding of due process that it is guaranteed even when the private interest at stake is the mere loss of government benefits. *Goldberg*, 397 U.S. at 270 (welfare termination hearings).

This case presents the "principal evil" that the right to confrontation was meant to guard against, specifically, the use of "*ex parte* examinations as evidence against the accused," *Crawford*, 541 U.S. at 50, and unchallenged reliance upon hearsay statements obtained during custodial interrogations, *id.* at 52. Even suspected enemies of the state have long had the right to confront their accusers "face to face." *Id.* at 43 (citation and internal quotation marks omitted). To allow an individual to be detained by the President indefinitely, potentially for life, based upon the statements of witnesses he has not been permitted to confront or cross-examine – statements that may well have been obtained by torture – would eviscerate

the constitutional guarantee of due process as it has existed since this Nation's founding.

For example, the government's allegations against al-Marri appear to be premised upon statements made by Khalid Shaikh Mohammed ("KSM"), a high-ranking al Qaeda official. *See* JA 217-18 (Declassified Rapp Declaration). It is widely reported, however, that KSM was tortured at a secret prison operated by the United States. *See, e.g.*, James Risen, *State of War: The Secret History of the CIA and the Bush Administration* 32 (2006) ("CIA report describes how Khalid Sheikh Mohammed was subjected to the application of several types of harsh [interrogation] techniques over a period of two weeks."); Brian Foss & Richard Esposito, *CIA's Harsh Interrogation Techniques Described*, ABC News (Nov. 18, 2005), *available at* http://abcnews.go.com/WNT/print?id=1322866 (abusive interrogation techniques used against KSM and others); Douglas Jehl, *Report Warned C.I.A. on Tactics In Interrogation*, N.Y. Times, Nov. 9, 2005, at A1 (use of water-boarding against KSM). KSM, moreover, has reportedly recanted prior statements inculpating others that were obtained through torture. *See, e.g.* Risen, *supra*, at 33.

Any information obtained from KSM or others through torture or other abusive techniques is not merely inherently unreliable but, by

definition, derives from "interrogation techniques ... so offensive to a civilized system of justice that they must be condemned under the Due Process Clause." *Miller v. Fenton*, 474 U.S. 104, 109 (1985); *see also, e.g.*, *Chavez v. Martinez*, 538 U.S. 760, 788 (2003) (Stevens, J., concurring in part and dissenting in part) (coercive interrogation tactics are "a classic example of a violation of a constitutional right implicit in the concept of ordered liberty") (internal citation omitted); *Chambers v. Florida*, 309 U.S. 227, 240-41 (1940) ("The Constitution proscribes [the] lawless means of [physical and mental torture and coercion] irrespective of the end."); *A v. Secretary of State*, [2005] UKHL 71, ¶ 51 (appeal taken from Eng.) (per Lord Bingham) (evidence obtained by torture of witnesses by foreign State cannot be admitted even when the United Kingdom was not complicit in the torture; "common law has regarded torture and its fruits with abhorrence for over 500 years" – an abhorrence "now shared by over 140 countries which have acceded to the Torture Convention," including the United States). At the very least, the accuracy of such evidence should be thoroughly evaluated by the federal courts, and discovery and cross-examination of the sources of the government's information are necessary for that purpose. *See, e.g.*, *Crawford*, 541 U.S. at 50-53; *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443, 473 (D.D.C. 2005) ("[D]ue process requires a thorough

[judicial] inquiry into the accuracy and reliability of statements alleged to have been obtained through torture."), *appeal pending* (D.C. Cir.); *see also Hamdan*, 126 S. Ct. at 2786 (invalidating the president's military commissions for, *inter alia*, allowing "testimonial hearsay and evidence obtained through coercion"). These critical safeguards, however, were entirely absent from the procedural framework devised by the courts below. Due process demands more.

B. Al-Marri's Detention Based Upon A Hearsay Affidavit Violates The Federal Rules Of Evidence.

By operation of law, the Federal Rules of Evidence apply to habeas corpus proceedings. Fed. R. Evid. 1101(e); *see, e.g.*, *Fullwood v. Lee*, 290 F.3d 663, 680 (4th Cir. 2002); *Loliscio v. Goord*, 263 F.3d 178, 186 (2d Cir. 2001). Those rules prohibit the use of hearsay unless it falls within an established exception. Fed. R. Evid. 802. The rule against hearsay "is premised on the theory that out-of-court statements are subject to particular hazards." *Williamson v. United States*, 512 U.S. 594, 598 (1994); *see also Montana v. Egelhoff*, 518 U.S. 37, 42 (1996) ("Hearsay rules ... prohibit the introduction of testimony which, though unquestionably relevant, is deemed insufficiently reliable."). The rule thus serves a critical function in ensuring the reliability of evidence:

> The declarant might be lying; he might have misperceived the events which he relates; he might have faulty memory; his words might be misunderstood or taken out of context by the listener. And the ways in which these dangers are minimized for in-court statements – the oath, the witness' awareness of the gravity of the proceedings, the jury's ability to observe the witness' demeanor, and, most importantly, the right of the opponent to cross-examine – are generally absent for things said out of court.

Williamson, 512 U.S. at 598. The present case underscores the importance of these safeguards.

This man Rapp, the government's declarant, has no personal knowledge of any asserted facts. The government refuses to identify any of the multiple sources upon whom Rapp purports to rely, but the declaration appears to be based on the hearsay statements of suspected terrorists elicited by government interrogators during secret and *incommunicado* detentions. The in-court testimony of those suspects would, of course, constitute appropriate, admissible, and, indeed, "the most reliable available evidence" within the meaning of *Hamdi*. 542 U.S. at 534 (plurality opinion). The lower courts, however, never required the government to explain, much less to demonstrate persuasively, why it cannot (and why it should not be required to) produce those individuals upon whose statements al-Marri's detention is premised. To allow the government to "launder" the alleged statements of its witnesses through the Rapp Declaration would constitute

precisely the type of abuse that the rule against hearsay, and the Due Process Clause, are designed to forestall. *See, e.g.*, *Haynes v. Washington*, 373 U.S. 503, 514 (1963) ("We cannot blind ourselves to what experience unmistakably teaches: that ... secret and incommunicado detention and interrogation ... are devices adapted and used to extort confessions from suspects.").

Hamdi does not authorize the use of hearsay evidence in habeas corpus proceedings outside the Federal Rules of Evidence, as the admissibility of hearsay evidence was not briefed, argued, or decided in that case. Rather, focusing on the unique circumstances of Hamdi's capture, the plurality merely stated that "[h]earsay ... *may* need to be accepted as the most reliable available evidence from the Government in such a proceeding" because of the nature of a battlefield capture and the potential burdens imposed by requiring the government to adduce non-hearsay evidence from military officers who may still be engaged in actual combat. 542 U.S. at 533-34 (emphasis added). Under those narrow circumstances, a hearsay affidavit may be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." Fed. R. Evid. 807. Such an affidavit may also contain the necessary "circumstantial guarantees of trustworthiness" that are

"equivalent" to hearsay statements excepted under Rules 803 and 804. *Id.*; *see also, e.g.*, *United States v. Brothers Constr. Co. of Ohio, Inc.*, 219 F.3d 300, 309 (4th Cir. 2000) ("particularized showing of trustworthiness" required to satisfy residual exception to rule against hearsay) (citation omitted). Indeed, as *Hamdi* recognized, "documentation regarding battlefield detainees already is kept in the ordinary course of military affairs." 542 U.S. at 534 (plurality opinion). It is also routinely considered by the military tribunals established under the Geneva Conventions and U.S. Army Regulations to determine the status of persons captured on a battlefield. *See, e.g.*, Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detainees, Army Regulation 190-8, ¶ 1-6e(9) (1997), *available at* http://www.au.af.mil/au/awc/awcgate/law/ar190-8.pdf (Article 5 tribunal may "review documents and other evidence," in addition to hearing testimony).

The Rapp Declaration does not satisfy any recognized exception to the rule against hearsay, including the residual exception, which is construed narrowly. *United States v. Dunford*, 148 F.3d 385, 394 (4th Cir. 1998) ("The residual hearsay exception ... is a narrow exception that should not be construed broadly. To construe it broadly would easily cause the exception to swallow the rule."). The multiple-hearsay declaration submitted by the

government in this case bears no "circumstantial guarantees of trustworthiness." Rapp is a Department of Defense functionary, not a military officer in the field, and he has no personal knowledge of any of the asserted facts. His Declaration is not a routine summary of a battlefield capture kept in "the ordinary course of military affairs." *Hamdi*, 542 U.S. at 534 (plurality opinion). Instead, it is a summary of second- and third-hand statements obtained through law enforcement investigation, interviews, and custodial interrogations, including, quite possibly, of individuals who were tortured. The Declaration is the very antithesis of trustworthiness and reliability envisioned by the residual exception, and constitutes precisely the type of rank hearsay the Federal Rules of Evidence and Due Process Clause prohibit.

While the habeas statute permits evidence taken by affidavit in the discretion of the judge, 28 U.S.C. § 2246 (2006), such affidavit must itself be based on personal knowledge to which the affiant can testify at a hearing, or satisfy some exception to the rule against hearsay. *See, e.g.*, *Herrera v. Collins*, 506 U.S. 390, 417 (1993) (finding affidavits alone "fall[] far short" of the required showing because "the affiants' statements are obtained without the benefit of cross-examination and an opportunity to make credibility determinations" which is particularly problematic when affidavits

"consist of hearsay."); *Dowthitt v. Johnson*, 230 F.3d 733, 742 (5th Cir. 2000) (refusing to consider an affidavit that "is hearsay and does not fall under any exception to the hearsay rule"). The Rapp Declaration can satisfy no such exception because it is based upon layers of inadmissible hearsay. Moreover, even when an affidavit is admitted in a habeas proceeding, the opposing party has the right to propound written interrogatories to the affiant, *id.*, a right al-Marri was denied.[10] For all of these reasons, the lower courts' reliance upon an inadmissible, multiple-hearsay affidavit to uphold al-Marri's indefinite detention was in error.

C. Al-Marri Was Improperly Denied Discovery.

To rebut the allegations in the Rapp Declaration, al-Marri sought discovery from the government, including copies of reports of any

[10] A broader reading of the *Hamdi* plurality's *dicta* is also foreclosed by the Rules Enabling Act, 28 U.S.C. § 2072 *et seq.* (2006), which authorizes the Supreme Court to promulgate rules of evidence for the federal courts. 28 U.S.C. § 2072(a). The Act, however, establishes specific procedures which must be followed by the Supreme Court before promulgating a change to the existing Federal Rules of Evidence. *Id.* § 2073. It requires, for example, formal transmission of any proposed change to Congress. *Id.* § 2074. The Court has not proposed or made any change to the Rules that would make hearsay statements in the Rapp Declaration admissible in a federal habeas proceeding, and "[c]ourts are not free to amend a rule outside the process Congress ordered." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997). The *Hamdi* plurality, then, could not have altered the existing Rules of Evidence without violating the Rules Enabling Act and, in turn, the Separation of Powers, by infringing Congress's authority to establish rules of procedure for the federal courts. *See Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 5 & n.3 (1987).

statements he made while in U.S. custody, any document relied upon by Rapp in preparing his declaration, any document describing the sources of information referenced in the Rapp Declaration and the conditions under which that information was obtained, and any exculpatory evidence possessed by the government. JA 167-68, 289. The lower courts improperly denied al-Marri's requests for discovery.

A district court should grant discovery in a habeas proceeding to enable the petitioner to "secur[e] facts where necessary to accomplish the objective of the proceedings." *Harris v. Nelson*, 394 U.S. 286, 299 (1969); *see also, e.g.*, *Banks v. Dretke*, 540 U.S. 668, 684-85 (2004) (discovery ordered by district court on habeas yielded exculpatory evidence). Discovery was not only appropriate here, it was absolutely essential for al-Marri to be afforded the "full opportunity for presentation of the relevant facts" that due process and habeas corpus require. *Harris*, 394 U.S. at 298.

The government justified the President's designation of al-Marri as an "enemy combatant" based solely upon the double and triple hearsay allegations of a single Department of Defense bureaucrat. That Declaration asserts, for example, that information obtained from "multiple intelligence sources" shows that al-Marri is an "al Qaeda 'sleeper' agent sent to the United States for the purpose of engaging in and facilitating terrorist

activities subsequent to September 11, 2001." JA 216 (Declassified Rapp Declaration). It further alleges, among other things, that "Al-Marri trained at Bin Laden's Afghanistan terrorist training camps for 15-19 months between approximately 1996 and 1998 .... [and] received training in the use of poisons [there]," JA 217; that "KSM introduced Al-Marri to Bin Laden [and] Al-Marri offered to be an al Qaeda martyr," JA 217; that "Bin Laden and KSM agreed that Al-Marri would travel to the United States to establish cover," JA 217-18.; and that "KSM considered Al-Marri an ideal sleeper agent for the United States," JA 218.

Al-Marri has denied these and the government's other allegations repeatedly. He cannot meaningfully contest them, however, without knowing, *inter alia*, who made the statements, the conditions under which the statements were made, and the evidentiary detail underlying them. At a minimum, al-Marri has the right to discovery of such "crucial exculpatory and impeaching evidence." *Banks*, 540 U.S. at 684-85 (disclosure ordered by district court of pivotal 74-page interrogation transcript of key witness); *Rice v. Clarke*, 923 F.2d 117, 118 n.3 (8th Cir. 1991) (noting district court order granting discovery of FBI records); *United States ex rel. Percoraro v. Page*, 169 F. Supp. 2d 815, 822 (N.D. Ill. 2001) (granting "exhaustive discovery," including numerous depositions).

Al-Marri's request for discovery does not involve a "futile search for evidence buried under the rubble of war," as in the case of a battlefield capture, because he was not captured on a battlefield. *Hamdi*, 542 U.S. at 532 (plurality opinion). Rather, al-Marri seeks access to evidence that the government obtained – and used – to prosecute him, evidence the government would otherwise be obligated to disclose under the Constitution and laws of the United States. *See, e.g.*, *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (mandating the disclosure of potentially exculpatory material); *United States v. Bagley*, 473 U.S. 667, 676 (1985) (mandating the disclosure of impeachment evidence); *United States v. Giglio*, 405 U.S. 150, 154 (1972) (same); Fed. R. Crim. P. 16 (mandating the disclosure of prior statements of the defendant and evidence in the government's possession, custody or control that is material to the defense).

Al-Marri has been held in solitary confinement for almost five years, and may well remain in prison for the rest of his natural life if such punishment can be upheld based upon presidential fiat, and a hearsay declaration, alone. The "fundamental requirements of fairness" dictate that al-Marri be granted discovery of the information that the government has relied upon to justify his detention, including the identity of individuals who provided statements against him, the content of those statements, and the

circumstances under which they were obtained. *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957) (government cannot withhold the identity of an informant or the contents of his communication where such information "is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause"). The lower courts' failure to afford al-Marri a non-illusory opportunity to rebut the allegations against him was unprecedented, unconstitutional, and un-American.

CONCLUSION

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

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

This appeal presents a fundamental question about the Executive's power to indefinitely detain without charge in a military jail civilians arrested in their homes inside the United States. Petitioners-Appellants therefore respectfully request oral argument.

CERTIFICATE OF COMPLIANCE

This Brief of Appellant has been prepared using:

Microsoft Word 2000;

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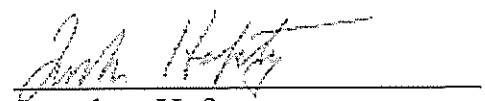
14 Point Type Space.

EXCLUSIVE of the Corporate Disclosure Statement, Table of Contents, Table of Authorities, Request for Oral Argument, the Certificate of Filing and Service, and this Certificate of Compliance, this Brief contains 13, 984 words.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the Brief and/or a copy of the word or line print-out.



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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 13th day of November, 2006, 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 Brief of Appellants and Joint Appendix, and further certify that I served, via UPS Transportation, the required number of said Brief and Appendix to the following:

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