RECORD NO. 06-7427

In The

# United States Court Of Appeals

For The Fourth Circuit

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

*Petitioners – Appellants,*

v.

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

*Respondent – Appellee.*

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

## BRIEF OF *AMICI CURIAE* SPECIALISTS IN THE LAW OF WAR IN SUPPORT OF PETITIONER-APPELLANT ALI SALEH KAHLAH AL-MARRI AND REVERSAL


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## INTEREST AND IDENTITY OF *AMICI CURIAE* AND CONSENT TO FILE

Pursuant to Federal Rule of Appellate Procedure 29(a), both parties to this case, namely Ali Saleh Kahlah al-Marri and Commander S.L. Wright, have consented to the filing of this brief by *amici curiae*, Specialists in the Law of War. They file this brief to clarify when an individual may be considered a combatant under the law of war.

*Amici curiae* are specialists in the law of war.

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## INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, the Government seeks to expand military jurisdiction over individuals in the United States far beyond the boundaries set by the law of war. These boundaries have long been accepted by the armed forces of the United States and lie at the foundation of training given to military personnel. If the Government's position is accepted, individuals who would ordinarily be considered civilians under the law of war would be subject to indefinite military detention without charge or trial based on the President's determination that they are supporters of groups like al Qaeda.[1] Such a policy conflicts with the foundational distinction in the law of war – that between combatant and civilian. Because many constitutional protections in wartime are interpreted through the framework of the law of war, the Government's approach threatens both the law of war and the U.S. constitutional order.

The law of war divides those caught up in armed conflict into two categories: combatants and civilians. Much turns on this distinction. Combatants are people who are privileged to participate in hostilities. Civilians are not. Combatants may be intentionally targeted; civilians may only be targeted if – and

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[1] Indeed, all U.S. citizens would potentially be subject to such detention as well, since the Supreme Court has indicated that citizenship does not insulate an individual from military jurisdiction. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004) ("a citizen, no less than an alien" can be subject to military detention and trial).

only while – they are directly participating in hostilities. Combatants generally have the right to prisoners of war status. Civilians do not. The law of war recognizes that civilians can pose dangers to military personnel. Indeed, civilians may be tried and punished for crimes, including the crime of having unlawfully participated in combat.

Mr. Ali Saleh Kahlah al-Marri bears all the hallmarks of someone traditionally treated as a civilian who may have committed crimes subject to civilian criminal trial and punishment. His actions do not qualify him as a military combatant who would be subject to being shot on sight or detained as a prisoner of war. Mr. al-Marri is a lawful resident of the United States. He was arrested on U.S. soil and has at all times been detained here where civilian courts are open and operating. There is no allegation that he is a member of the armed forces of a nation at war with the United States. There is no allegation that he has been on a foreign battlefield where such troops are engaged in combat with the United States. There is no allegation that he directly participated in hostilities against the United States, or that he was poised to imminently engage in an armed attack.

Instead, the allegations against al-Marri – that he conspired with members of a secret organization to engage in terrorist acts at some undetermined point in the future – are almost exactly parallel to the charges against the defendant in one of the most celebrated cases in American law, *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2

(1866). The Supreme Court found that Milligan did not meet the narrow definition of a combatant under the law of war and therefore was constitutionally entitled to a criminal trial. Like Milligan, al-Marri is not a combatant under the law of war and is entitled by the Fourth, Fifth and Sixth Amendments to a criminal trial before he may be indefinitely deprived of his liberty. The Government's novel redefinition of the term combatant eviscerates the distinction between combatants and civilians and erodes the traditional constitutional boundary between military and civilian jurisdiction. The Government's position should be rejected.

## ARGUMENT

### I. AL-MARRI IS NOT A COMBATANT UNDER THE LAW OF WAR.

It is not clear what definition of "combatant" the district court used in this case to reach its conclusion that al-Marri's is an "enemy combatant."[2] The Government has employed a variety of constructions of "enemy combatant" since 2001, and the Military Commissions Act of 2006 includes a definition of unprecedentedly broad and vague scope.[3] No matter which version of enemy

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[2] Although it never directly addressed the definition of combatant, the District Court appeared to rely most heavily on the Government's assertion that al-Marri had attended an "al Qaeda terror training camp" at some point prior to his entry into the United States on September 10, 2001 in reaching its conclusion that the Authorization to Use Military Force justifies al-Marri's detention as an "enemy combatant." Memorandum Opinion and Order, August 8, 2006, at 12.

[3] *See Hamdi*, 542 U.S. at 516 (noting that "[t]here is some debate as to the proper scope of [the] term, and the Government has never provided any court with

combatant the Government elects to use in this case, this Court's understanding of the phrase should be guided by longstanding law of war principles because of three well-established interpretive canons. First, the Supreme Court has repeatedly underscored that U.S. law should be construed to be consistent with the law of nations. *See Murray v. Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"); *F. Hoffman-La Roche Ltd. v. Empagran*, 542 U.S. 155, 164 (2004) (relying on the *Charming Betsy* principle). Second, statutes should be construed to avoid difficult constitutional questions. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288 (1936). Third, statutes should be construed to infringe fundamental liberties only to the extent they clearly and unequivocally authorize the curtailment of such liberties. *Greene v. McElroy*, 360 U.S. 474, 507-08 (1959). The Supreme Court's precedents indicate that the decision to treat an individual in the United States as a combatant is a question of constitutional dimension, and they employ an understanding of the term "combatant" that is congruent with that of the law of war. In light of these precedents and the relevant interpretive canons, this Court should also employ a

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the full criteria that it uses in classifying individuals as such." *Compare, e.g., id. with* Military Commissions Act of 2006 §3(a)(1), 10 U.S.C. § 948a (1)(A) (2006) [hereinafter MCA], *and* Order Establishing Combatant Status Review Tribunal, p. 1, July 7, 2004, *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf.

definition of the term "enemy combatant" that is consistent with the law of armed conflict.

### A. The Law of War Defines the Status, Rights and Duties of Participants in Armed Conflict.

The "law of war,"[4] also known as the law of armed conflict, is the body of international law that regulates the methods, targets, and means of waging armed conflict and sets out the protections due to people caught up in war. *See* DEP'T. OF THE ARMY, *Field Manual 27-10, The Law of Land Warfare*, ¶¶ 2-3 (1956) [hereinafter *Law of Land Warfare*].[5] In cases since September 11, 2001, and indeed throughout American history, the U.S. Supreme Court has repeatedly looked to the Geneva Conventions and other international sources for relevant guidance on the content of the law of war. *See Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2786 (2006); *Hamdi*, 542 U.S. at 520 (relying on "the law of war" and citing Geneva and Hague Conventions); *Ex parte Quirin*, 317 U.S. 1, 27-28 (1942) (the Court has "recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of

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[4] The terms "law of war" and the "law of armed conflict" are used interchangeably throughout this brief.

[5] *Law of Land Warfare* "is an official publication of the United States Army." Originally published in 1956, it is still regarded as an authoritative treatment of the law of war, and although it lacks binding legal force, its provisions are "of evidentiary value insofar as they bear upon questions of custom and practice." *Law of Land Warfare* ¶ 1.

enemy nations as well as of enemy individuals"); *The Prize Cases*, 67 U.S. (2 Black) 635, 667 (1863); *Talbot v. Seaman*, 5 U.S. (1 Cranch) 1, 28 (1801).[6]

The law of war does not govern a state's initial decision to use military force. Once armed conflict has begun, however, the law of war provides a set of rules that, in their broadest form, prohibit the deliberate targeting of those not directly participating in hostilities and limit the violence and destructiveness of the tactics employed to that level necessary to achieve the war aims of the parties to the conflict. *See* Marco Sassòli & Antoine A. Bouvier, *How Does Law Protect in War?* 67-68 (Int'l Comm. of the Red Cross 1999); *Law of Land Warfare* ¶ 3.

The law of war derives from two sources: treaties and customary international law. *See Law of Land Warfare* ¶ 4. Much of the law of war is now contained in treaties. For example, the four 1949 Geneva Conventions [hereinafter the Geneva Conventions] that govern the treatment of wounded and sick soldiers (Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31), sailors (Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85), prisoners of war (Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949,

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[6] The provision of the MCA prohibiting reliance on foreign or international sources of law applies only to the application of 18 U.S.C. § 2441(d), and thus is not relevant to this case. *See* MCA § 6(a)(2).

6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]), and civilians (Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6. U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]) in international armed conflicts are treaties that 194 nations have ratified, including Afghanistan, Iraq, and the United States.[7]

Another important series of treaties, dating from 1899, has been adopted that addresses the means and methods of warfare. These are sometimes referred to collectively as the "Hague Conventions" or "Hague law." They codify the principle that military organizations must practice "discrimination" or "distinction," i.e. may lawfully attack only targets of military value.[8]

In addition to treaties, the law of war is also found in customary international law. *See Law of Land Warfare* ¶ 6. Customary international law consists of rules derived from the actual practice of nations developed gradually over time that are followed from a sense of legal obligation. *See The Paquete*

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[7] State Parties to the Following International Humanitarian Law and Other Related Treaties as of 13-Nov-2006, at 2, 3, 6 [hereinafter *Parties*], *available at* http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf (last visited November 18, 2006).

[8] *See, e.g.*, Convention (IV) Respecting the Laws and Customs of War on Land, art. 25, Oct. 18, 1907, T.S. No. 539 [hereinafter *Hague Convention*]: "The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited."

*Habana*, 175 U.S. 677, 711 (1900). Once a rule of customary international law emerges, it binds all nations, except those states that have specifically and repeatedly objected to the rule. Like the common law, customary international law is not consolidated in any single authoritative document, but instead is found in many sources, such as judicial decisions interpreting international law, statements by government officials, and scholarly books and articles on international law. *See Law of Land Warfare* ¶ 6.

The law of war that derives from treaties and the law of war that forms part of customary law overlap. Some international treaties setting out the law of war largely represent codifications of pre-existing international customary rules, and sometimes treaty rules over time take on the status of customary international law. *See* Int'l & Operational Law Dep't, The Judge Advocate General's Legal Center & School, U.S. Army ("U.S. ARMY"), *Law of War Workshop Deskbook* 26 (Brian J. Bill, ed., 2000) [herineafter *Law of War Workshop Deskbook*]; *Law of Land Warfare* ¶ 6. For example, although the United States has not ratified the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 16 I.L.M. 1391 [hereinafter Additional Protocol I] or the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts, June 8, 1977, 16 I.L.M. 1442 [hereinafter

Additional Protocol II] (which provide further rules for armed conflicts), it recognizes that most of their provisions now constitute customary international law binding on the United States. *Law of War Workshop Deskbook* 29-30; U.S. ARMY, *JA 422 Operational Law Handbook* 11 (William O'Brien, ed., 2003) [hereinafter *Operational Law Handbook*]; U.S. ARMY, *Law of War Handbook* 23-24 (2004) [hereinafter *JAG Handbook*].[9] For this reason, we refer to Additional Protocols I and II as setting out the relevant international law rules applicable in this case.

Generally speaking, the law of war is divided into an elaborate body of law regulating international armed conflicts and a somewhat less-developed body of law governing non-international armed conflicts. By their terms, the bulk of the Geneva Conventions apply only to "international armed conflicts" between two or more of the states that have ratified those conventions. *See* Geneva Conventions, Common Article 2.[10] For example, the Geneva Conventions clearly applied to the recent armed conflicts between the United States and Afghanistan and Iraq, because these nations had ratified the Conventions.[11] More limited portions of the

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[9] To the extent that this brief relies on the Additional Protocols, it relies only on those portions which the U.S. has either explicitly recognized as part of customary international law or to which the U.S. has not objected.

[10] The first few articles of the four 1949 Geneva Conventions are identically worded, and are sometimes referred to as the Common Articles, e.g., Common Article 2 or Common Article 3.

[11] *See Parties, supra,* note 7.

law of war, including Common Article 3 of the Geneva Conventions, apply in armed conflict "not of an international character." As the Supreme Court held in *Hamdan*, this phrase "bears its literal meaning," i.e., armed conflicts not between nation-states. 126 S. Ct. at 2796.

The law of war provides a comprehensive framework for the treatment of any individuals caught up in armed conflict. As the Commentary to the Fourth Geneva Convention notes:

> Every person in enemy hands 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.

*See* ICRC, *Commentary to the IV Geneva Convention* 51 (Jean S. Pictet, ed., 1958) [hereinafter *Commentary Fourth Geneva Convention*].[12]

The Law of War Handbook issued by the U.S. Army's Judge Advocate General's School summarizes this critical point. It declares that "[a]nyone not qualifying as a combatant, in the sense that they are entitled to PW [prisoner of war] status upon capture, should be regarded as a civilian." *JAG Handbook* 142.

The war on terrorism does not consist of a single, discrete, conflict. It is a multi-pronged campaign that combines international armed conflict, non-

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[12] *See also* Fourth Geneva Convention arts. 4(1) & 4(3); Additional Protocol I art. 50; *Law of Land Warfare* ¶ 73.

international armed conflict, and criminal law enforcement (including prosecutions in civilian court for conspiracy and material support of terrorism). Within those portions of the war on terrorism that qualify as an armed conflict,[13] neither the law applicable in international armed conflicts nor the law applicable in non-international armed conflicts provides authority for al-Marri's detention as an "enemy combatant."

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[13] Not all terrorist actions rise to the level of armed conflict. Indeed, terrorist actions by private groups have not customarily been viewed as creating armed conflicts. Hilaire McCoubrey & Nigel D. White, *International Law and Armed Conflict* 318 (1992). For example, as the United Kingdom stated when it ratified Additional Protocol I: "It is the understanding of the United Kingdom that the term 'armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation." Reservation by the United Kingdom to Art. 1, ¶ 4 & Art. 96, ¶ 3 of Additional Protocol 1, *available at* www.icrc.org/ihl.nsf. Key aspects of some parts of the war on terrorism diverge from traditional assumptions of the law of war. For example, the war on terrorism does not have clear geographic parameters. Furthermore, the law of armed conflict anticipates that armed conflict will, at some point, end, and regulates the return from a state of war to normal life. *See, e.g.,* Third Geneva Convention art. 118 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities."). As defined by the Government, however, the "war on terror," will not end until al Qaeda (an ill-defined and amorphous group) and its "associated forces" or supporters (also undefined), anywhere in the world are eradicated. *See, e.g.*, President Bush's Address to a Joint Session of Congress and the American People, September 20, 2001, *at* http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html (last visited November 13, 2006) ("Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.")

### B. The Law of War Should Guide This Court's Interpretation of the Term "Combatant."

As the Supreme Court described in *Hamdan*, the law of war assumes that a nation's justice system operates even during the exigencies of wartime. 126 S.Ct. at 2769. The U.S. Constitution independently protects our civilian justice system during times of crisis. At all times, the constitutional system of the United States is premised on the supremacy of civilian government, and military jurisdiction is exceptional and limited. *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."); *Reid v. Covert,* 354 U.S. 1, 30 (1957) (the Constitution makes the military "subordinate to civil authority" because of "fear and mistrust of military power").

The U.S. Supreme Court has repeatedly looked to the law of war to determine the constitutional boundaries of military jurisdiction. *See Quirin*, 317 U.S. at 27-28. The Court has allowed the exercise of military jurisdiction over individuals traditionally subject to the law of war. *See 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"). But it has held unconstitutional the substitution of military for civilian authority over individuals who fall outside the boundaries of the law of war. *See Milligan* 71 U.S. at 131

(holding that Milligan was "not engaged in legal acts of hostility" and therefore was not subject to military jurisdiction).

The Supreme Court has also looked to the law of war to inform the meaning of disputed statutory provisions related to armed conflict, such as the Authorization for Use of Military Force, *Hamdi*, 542 U.S. at 520-21, and Article 21 of the Uniform Code of Military Justice, *Hamdan*, 126 S. Ct. at 2786. Recourse to the law of war is equally appropriate in this case.

### C. The Government's broad redefinition of the term "enemy combatant" would erode the most fundamental distinction in the law of war.

The principle of distinction, which requires distinguishing between combatants and civilians, is one of the most fundamental principles of the law of war. As the official commentary to the additional protocols of the Geneva Convention observes "the principle of protection and distinction forms the basis of the entire regulation of war." ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* at 586 (Yves Sandoz et al, eds., Tony Langham et al, trans. 1987) [hereinafter *Commentary to Protocols*]; *The Handbook of Humanitarian Law in Armed Conflicts* 65 (Dieter Fleck, ed. 1995); *Quirin*, 317 U.S. at 30-31 (noting that "[b]y universal agreement and practice," the law of war draws a distinction between "the armed forces" and

civilian populations); Instructions for the Government of Armies of the United States in the Field (Lieber Code), art. 22.

The concept of combatant determines who can be the lawful target of military attack. Combatants can be intentionally shot, bombed, or otherwise targeted with lethal force. *See* Additional Protocol I art. 48; Additional Protocol II art. 52(2). Civilians, on the other hand, are protected from being the intentional targets of armed attack, as long as they do not participate directly in hostilities. *See* Additional Protocol I art. 51(2); Additional Protocol II art. 13(2). "The principle of distinction is sometimes referred to as the 'grandfather of all principles,' as it forms the foundation for much of the Geneva tradition of the law of war. The essence of the principle is that military attacks should be directed at combatants and military targets, and not civilians or civilian property." *JAG Handbook* 166.

Unless they have been disarmed or are trying to surrender, combatants may be attacked with lethal force wherever they are found.[14] The law of war does not require that a combatant first be warned of the attack and offered the chance to surrender. See Additional Protocol I art. 57(2)(c) (advance warning only required for attacks that may affect the civilian population). Thus, if al-Marri, and all other

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[14] While it is forbidden "to kill or wound an enemy who, having laid down his arms, or having no longer the means of defense, has surrendered at discretion," *Hague Convention*, art. 23(c), the law of war authorizes attacks on "individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere." *Law of Land Warfare* ¶ 31.

persons similarly alleged to have conspired with al Qaeda, truly were "combatants," the law of war would not only allow them to be held until the end of active hostilities, but would allow them to be shot upon discovery, at any point, anywhere in the world – including in their homes in Peoria, Illinois.[15]

Military officers, statesmen, judges, and scholars have long recognized that any blurring between the categories of combatant and non-combatant could lead to a severe breakdown in limits upon whom military forces may legitimately target. *See* Geoffrey Best, *War and Law Since 1945* at 254-66 (1994). In many wars, virtually every member of a society – from farmers and factory workers to government bureaucrats – may provide direct or indirect support to the nation's military. Any designation as combatants of people who provide indirect support to a party engaged in armed conflict but who do not directly participate in hostilities would threaten to legitimize the targeting of huge swaths of nations' civilian populations, as in fact occurred during World War II. *See* Kenneth Watkin, *Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy*, Occasional Paper, Harvard Program on Humanitarian Policy and Conflict Research, 8-11 (Winter 2005).

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[15] The Government might also be allowed to inflict collateral damage on bystanders. *See* Fourth Geneva Convention art. 53; Additional Protocol I art. 52.

Moreover, maintaining a clear legal separation between combatants and non-combatants reinforces a clear separation of military and civilian functions and control. "Th[e] supremacy of the civil over the military is one of our great heritages. It has made possible the attainment of a high degree of liberty regulated by law rather than by caprice. Our duty is to give effect to that heritage at all times . . . ." *Duncan v. Kahanamoku*, 327 U.S. 304, 325 (1946) (Murphy, J., concurring). Expanding the definition of "combatant" of necessity increases the scope of military authority over civil society. Nations who adopt sweepingly overbroad definitions of "combatant," such as the one proffered by the Government in this case, run the risk of thrusting upon the military the roles of judge and jailer to a degree far exceeding that required by military necessity.

Indeed, one of the most chilling aspects of the attacks of September 11, 2001 was the attackers' intentional targeting of civilians, a fundamental violation of the law of war. Some terrorist rhetoric refuses to acknowledge the distinction between civilians and combatants – labeling all U.S. and Israeli citizens, for example, the "enemy." This verbal sleight of hand, of course, renders the law of war useless, because it justifies the killing of any individual. It is precisely to protect against such abuses that the law of war defines "combatants" narrowly.

### 1. Under the Law of War, Al-Marri is Not a "Combatant."

The Geneva Conventions, and especially Additional Protocol I, prescribe with considerable detail the rights and duties of people caught up in an armed conflict.[16] Additional Protocol I states that "combatants," who are "members of the armed forces of a Party to a conflict," art. 43(2), are lawful military targets, while non-combatants are not.[17] This definition deliberately limits the class of people who lawfully may be targeted by opposing military forces. People who are actually in the armed forces of a nation-state are deemed combatants and are generally lawful targets at all times; people who are not in the armed forces are generally not combatants and are generally not lawful targets. Because the law of war provides a comprehensive scheme for people caught up in warfare, there is no intermediate status. Individuals must be classified either as combatants or civilians.[18]

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[16] Although the United States has not ratified Additional Protocol I, it has acknowledged that much of the treaty reflects customary international law. *Operational Law Handbook* 11; Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419, 420 (1987).

[17] It further defines combatants to include:

> all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a Government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce

The law of war recognizes that civilians may cause harm in armed conflict. They may be treated as lawful targets of attack and, inferentially, as combatants but only "for such time as they take a direct part in hostilities."[19] The law of war standard, therefore, for when individuals who are not ordinarily defined as combatants may be treated as combatants is when they take a "direct part" in "hostilities."

This standard contains three relevant criteria. First, it applies only to "hostilities." This term carries a narrower connotation than the phrase "armed conflict," which appears frequently elsewhere in the Geneva Conventions.[20] Thus,

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compliance with the rules of international law applicable in armed conflict.

Additional Protocol I art. 43(1). Members of disorganized militia groups who are not under a command responsible to a state Party to the conflict are not combatants under this definition. Conversely, civilians are defined as persons who do not fall into one of the categories of persons entitled to prisoner of war status pursuant to article 4 of the Third Geneva Convention and article 43 of Additional Protocol I. *See Id.*, art. 50. Additional Protocol II, art. 13.

[18] *Commentary to the Fourth Geneva Convention* 51; Fourth Geneva Convention arts. 4(1) & 4(3); Additional Protocol I art. 50; *Law of Land Warfare* ¶ 73.

[19] Additional Protocol I, art. 51(3) ("Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a *direct* part in hostilities.") (emphasis added); Additional Protocol II, art. 13 (same).

[20] *E.g.*, Third Geneva Convention, art. 2 (providing "the present Convention shall apply to all cases of declared war or of any other *armed conflict* which may arise between two or more of the High Contracting Parties) (emphasis supplied).

an individual who would not ordinarily be considered a combatant must participate in actual "hostilities" – rather than the relevant armed conflict more generally – to lose his protection as a civilian. The standard also has a clear temporal dimension. It lasts only "for such time" as the individual takes a direct part in hostilities. A civilian who takes part in hostilities regains his civilian status after his direct participation has ceased (although he may be criminally prosecuted for his illegal actions). Finally, the test sets up a demanding nexus. The individual must take a "direct" part. While this phrase is not further defined, it clearly suggests that indirect aid – no matter how valuable – does not suffice.

A civilian does not become a combatant because the opposing commander suspects he might, at some point in the future, plot to engage in violent acts.[21] If the rule were otherwise, large parts of the civilian population of a country at war would become lawful targets for attack. Shooting a gun on a battlefield constitutes taking a "direct part in hostilities." So, too, would hijacking an airplane with the intent to use it as missile. Driving a truck full of explosives or carrying a gun towards the battlefield with the imminent intent to engage in combat could also amount to taking a direct part in hostilities. By contrast, supporting the enemy

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[21] *See Commentary on the Additional Protocols* 619 (noting that there is "a clear distinction between *direct* participation in hostilities and participation in the war effort," for large portions of the civilian population may indirectly support the war effort and should not by virtue of that become targets) (emphasis added).

cause off the battlefield, conspiring with the enemy, contemplating taking part in battle in the future, and sympathizing with the enemy do not constitute taking a direct part in hostilities under the law of war, although those acts may be punishable under domestic criminal law.[22]

A civilian who participates *directly* in hostilities would be violating the law of war, and in the Government's nomenclature would be labeled an "illegal combatant."[23] "Illegal combatant" or "unlawful combatant" is not a term that appears in any treaty on the law of war. Commentators have occasionally used these phrases to describe someone who does not receive the privileges accorded to

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[22] *See* Robert K. Goldman, *International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts*, 9 AM. U. J. INT'L L. & POL'Y 49, 70-71 (1993) ("[A] civilian can be considered to participate directly in hostilities when he actually takes part in fighting, whether singly or as a member of a group. Such participation . . . would also include acting as a member of a weapons crew or providing target information for weapons systems 'intended for *immediate use against the enemy*, such as artillery spotters or members of ground observer teams.'") (citation omitted) (emphasis in source); *Commentary on the Additional Protocols* 516 ("Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity takes place."); Leslie C. Green, *The Contemporary Law of Armed Conflict* 107 (2d ed. 2000).

[23] A civilian who directly participated in hostilities could only be treated as a combatant in the sense that he would become a lawful target of attack for the duration of his direct participation; in all other senses he would remain a civilian protected by the Fourth Geneva Convention. Fourth Geneva Convention art. 4; *Law of Land Warfare* ¶ 73. The Fourth Geneva Convention would not prohibit the detention or criminal prosecution of such a person based on his unlawful participation in hostilities, provided that procedural safeguards were observed. *See* Fourth Geneva Convention arts. 42, 43, 78; Additional Protocol I art. 75(4).

combatants, the most important of which are prisoner of war status and immunity from prosecution for merely engaging in combat. The phrase "unlawful combatants" actually encompasses two sets of people: members of the regular armed forces who do not wear uniforms and do not bear arms openly (and thereby lose their privileged combatant status) and civilians who unlawfully participate directly in battle (who never had privileged combatant status to begin with).

As persons in the latter category retain their civilian status, it is arguably improper to refer to them as combatants at all under the law of war: they are more accurately described as "unprivileged belligerents." *See* George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891, 893 (2002). The *Quirin* Court's use of the phrase "illegal combatants," rather than the categories and terminology of the Geneva Conventions, reflects the fact that *Quirin* predates the 1949 Conventions. Its analysis of the law of war must therefore be read in conjunction with the subsequent, authoritative Geneva Conventions.

Members of the Taliban armed forces would properly be considered combatants in the conflict in Afghanistan. Similarly, members of groups associated with the Taliban, such as al Qaeda, who fought on the battlefield in Afghanistan and who served under a command responsible to Taliban officials could also be classified as combatants in that conflict. In addition, any other

individuals who fought on the battlefield could be treated as combatants during their actual participation in the fighting.

Because al-Marri is neither alleged to be a member of a regular armed force of a nation state nor to have participated directly in hostilities, he cannot be categorized as a combatant – lawful or unlawful. The Government does not claim that al-Marri participated directly in hostilities in Afghanistan or Iraq. Nor is there any allegation that al-Marri is a member of any "organized armed forces, groups and units which are under a command responsible to [the Taliban Government or the Government of Iraq] for the conduct or its subordinates"[24] or is a member of any other armed force.[25]

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[24] The relevant "Party" in the conflict in Afghanistan, is the Taliban Government, which at the time of the hostilities was the de facto Government of Afghanistan.

[25] To the extent that this court believes that the proper framework is the law of non-international armed conflict, that body of law does not justify the treatment of al-Marri as a combatant. Like the law applicable to international armed conflict, the rules for non-international armed conflict distinguish between combatants and civilians. Civilians may not be targets of attack "unless and for such time as they take a direct part in hostilities." Additional Protocol II, art. 13. Furthermore, the rules applicable to non-international armed conflict provide no independent authority for detaining combatants or civilians. *Cf.* Knut Dormann, *The Legal Situation of "Unlawful/Unprivileged Combatants"*, 85 INT'L. REV. RED CROSS 45, 47 (2003).

### 2. The Supreme Court's Cases Have Rested Upon a Narrow Definition of "Combatant" That is Consistent with the Law of War.

In previous decisions, the Supreme Court has hewed closely to the traditional definition of "combatant" under the law of war. Yasser Hamdi, for example, was participating directly in hostilities at the time of his capture. Northern Alliance forces were "engaged in battle" with the Taliban when Hamdi's Taliban unit surrendered. Hamdi himself was allegedly carrying a Kalashnikov assault rifle at the time of his surrender. In its decision, the Court repeatedly emphasized Hamdi's direct participation in hostilities on a foreign battlefield. See 542 U.S. at 522 n.1 ("the basis asserted for detention by the military is that Hamdi was carrying a weapon against American troops on a foreign battlefield"); *id.* at 516 (decision addresses only the "narrow question" of whether the Government had authority to detain as "enemy combatants" individuals who were " ' "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.").

In addition to participating directly in hostilities at the time of his capture, Hamdi was also specifically alleged to have been affiliated with a Taliban Government militia unit, *id.* at 513, and therefore was a part of the "organized armed forces, groups and units which are under a command responsible to Party

for the conduct of its subordinates." Additional Protocol I, art. 43(2). This was likewise the case with the defendants in *Quirin*, who wore the uniforms of the German Marine Infantry when they came ashore in the United States from German military submarines. 317 U.S. at 21. As the Supreme Court explained, they had the "status of an enemy belligerent" when they entered the United States. *Id.* at 38.

By contrast, the Supreme Court found that the prisoner in *Milligan* was not a combatant. Milligan was accused of "joining and aiding" a "secret society" for the "purpose of overthrowing the Government," "holding communication with the enemy," "conspiring to seize munitions of war stored in the arsenals", and "to liberate prisoners of war" in Indiana at a time when it "was constantly threatened to be invaded by the enemy." 71 U.S. at 6-7. Nevertheless, Milligan was entitled to a civilian criminal trial. As the Court explained:

> If in Indiana he conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana; but, when tried for the offence, he cannot plead the rights of war; for he was not engaged in legal acts of hostility against the Government, and only such persons, when captured, are prisoners of war. If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?

*Id.* at 131. As the Court emphasized in *Hamdi*, the key distinction was Milligan's lack of *direct* participation in hostilities: "Had 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.

In short, as the Court indicated in *Hamdi*, it has only upheld the detention of enemy combatants when "based on longstanding law-of-war principles." The Court has warned that "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel." *Id.* at 521. The Government's attempted extension of the term combatant in this case far beyond traditional law-of-war principles is the kind of unraveling the Court presaged.

### D. The Government's Broad Redefinition of the Term "Enemy Combatant" Would Erode Fundamental Liberties.

The Government's broad redefinition of the term "enemy combatant" would erode fundamental liberties by extending the law of war far beyond its traditional domain. The law of war allows the Government extraordinary powers to deprive individuals of life, liberty and property with relatively minimal process. These extraordinary powers are justified both by battlefield exigency and by their relatively limited temporal and geographic scope. If the Government's position in this case is accepted, it would extend those extraordinary powers without any of the traditional limits.

The Government's own statements in litigation reveal the breadth of its redefinition of the term "enemy combatant." As the U.S. District Court for the District of Columbia explained:

> This Court explored the Government's position on the matter by posing a series of hypothetical questions to counsel at the December 1, 2004 hearing on the motion to dismiss. In response to the hypotheticals, counsel for [the Government] argued that the Executive has the authority to detain the following individuals until the conclusion of the war on terrorism: "[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities," a person who teaches English to the son of an al Qaeda member, and a journalist who knows the location of Osama Bin Laden but refuses to disclose it to protect her source.

*In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005) (internal citations omitted). That court also noted that the Government claims the power of "indefinite detention of individuals who never committed a belligerent act or who never directly supported hostilities against the U.S. or its allies." *Id.* The consequences of designation as an "enemy combatant" and resulting extreme deprivation of due process rights diverge considerably from those imposed under criminal statutes under which the accused has a right to a full jury trial. *See, e.g.*, 18 U.S.C. §§ 2339-2339D. The breadth of the definition of enemy combatant is thus particularly troubling in light of the minimal process that individuals so

classified are likely to receive before being indefinitely deprived of their liberty – or even their lives. For that reason, and to avoid the profound constitutional questions that would be created by such an extension, this court should reject the Government's novel redefinition of the term enemy combatant and should instead interpret the phrase "enemy combatant" in accordance with the traditional law of war definition.

## CONCLUSION

The District Court's decision in this case did not squarely address either the definition of combatant or why al-Marri falls within this category. This omission belies the centrality of the concept of combatancy both to this case and to the law of war more generally. If this court determines that Mr. al-Marri is, indeed, a combatant then several conclusions inexorably follow. First, al-Marri and any other individuals associated with al Qaeda may lawfully, under the law of war, be killed instead of captured without a shred of legal process. Second, this court will have embraced a definition of combatancy that is considerably broader than that countenanced by the law of armed conflict. In so doing, it will not only weaken our domestic protections but will also do considerable violence to an important

body of law that protects soldiers, civilians, and all those caught up in the scourge of war.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This Brief of *Amici Curiae* has been prepared using:

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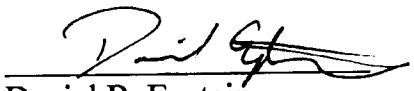
I understand that a material misrepresentation can result in this Court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the Brief and/or a copy of the word or line print-out.



Daniel B. Epstein

## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 20th day of November, 2006, I filed with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit, via courier to be filed with the Court within three (3) days, the required number of copies of this Brief of *Amici Curiae* Specialists in the Law of War in Support of Petitioner-Appellant Ali Saleh Kahlah Al-Marri and Reversal, and further certify that I served, via Federal Express, the required number of said Brief to the following:

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