No. 06-7427

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ALI SALEH KAHLAH AL-MARRI,
Petitioner-Appellant,
and
MARK A. BERMAN, as Next Friend,
Petitioner,

vs.

COMMANDER S.L. WRIGHT, USN Commander,
Consolidated Naval Brig,
Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

AMICI CURIAE BRIEF OF PROFESSORS OF EVIDENCE AND PROCEDURE ADVOCATING REVERSAL IN SUPPORT OF PETITIONERS

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STATEMENT OF *AMICI CURIAE*

This brief *amicus curiae* is submitted on behalf of professors who teach evidence, civil procedure or criminal procedure at American law schools. Since they teach, study and write about the rules of evidence and procedure, *amici* have a professional interest in the issues presented by this case. They are identified by name and position in Appendix I to this brief. Respondent and petitioner have consented to this brief's filing.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Like any other proceeding in a federal court, a habeas proceeding under 28 U.S.C. § 2241 is governed by detailed rules of procedure and evidence. Those binding rules can be created only in one of two ways: through statutory enactment, or through the delegated process established by the Rules Enabling Act, 28 U.S.C. §§ 2072-74. Under the Rules Enabling Act process, a proposed rule of evidence or procedure – or an amendment to an existing rule – takes effect only after passing through an extensive process of deliberation, drafting, debate and adoption that involves Advisory Committees, the Judicial Conference, the Supreme Court and both branches of Congress. Courts lack the power to create makeshift exceptions to those rules through case law.

Among the rules governing habeas proceedings in federal courts are the Federal Rules of Evidence, which were enacted more than thirty years ago to

promote fairness and truth in the administration of justice.[1] Pub. L. 93-595, Jan. 2, 1975, 88 Stat. 1926; Fed. R. Evid. 102. Among the most important matters considered in that enactment was the treatment of hearsay. As Justice Story aptly described it more than a century earlier, the common law antipathy to hearsay as "against the general principles of evidence" rests "upon the general consideration that it is not upon oath; that the party affected by it has no opportunity of cross-examination . . . that it is peculiarly liable to be obtained by fraudulent contrivances; and above all, that it is exceedingly infirm, unsatisfactory and intrinsically weak in its very nature and character." *Ellicott v. Pearl*, 35 U.S. 412, 436-37 (1836). Cognizant of that long antipathy, the rulemakers carefully defined when they thought hearsay would not undermine fairness or truth, and limited federal courts' ability to permit the introduction of hearsay evidence to those enumerated exceptions. As the Rule ultimately enacted by Congress unambiguously stated: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." Fed. R. Evid. 802.

Despite that clarity, the district court relied *solely* on hearsay evidence to declare petitioner an "enemy combatant" and judicially validate his indefinite

[1] Congress affirmatively enacted the Rules of Evidence, Pub. L. 93-595, Jan. 2, 1975, 88 Stat. 1926, rather than adopting them in the inactive manner set forth under the Rules Enabling Act.

military detention. The court did not even try to justify the admission of the evidence under the binding and applicable Rules of Evidence. In short, the district court's opinion flouts the prohibition on hearsay and ignores the well-defined process by which rules of evidence may be changed.

This judicial usurpation of Congress's prerogative to set rules of evidence and procedure (either directly or through the Rules Enabling Act process) rests on an unnecessarily and unconstitutionally broad reading of *dicta* in the plurality opinion of *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). There is nothing in the *Hamdi* plurality decision itself suggesting a judicial commandeering of Congress's role. To be sure, the *Hamdi* plurality indicated that the hearsay affidavit in that case, if admitted on remand, would not offend due process. *Id.* at 533-34. But that focus on the "minimum requirements of due process," *id.* at 538 says nothing about whether such material is permitted under the rules of evidence and procedure that apply, as a matter of binding law, to federal habeas cases. *See* Fed. R. Evid. 1101. Put simply, that issue was not briefed, argued or decided.

Moreover, the plurality's indication that the introduction of a hearsay affidavit would not offend due process in Hamdi's case came in a very different context. There, the hearsay evidence proffered by the government summarized battlefield reports of a capture on a foreign battlefield during an armed conflict. Battlefield capture reports are traditionally used in tribunals established under the

law of war to determine combatancy status, and the plurality's dictum is best read as concluding that, in the unique circumstances of a battlefield capture, due process does not preclude use of the same reports in a federal court also determining combatancy status. Unlike the battlefield capture of *Hamdi*, this case involves the seizure and imprisonment of a man already indicted and awaiting imminent trial. Rather than a summary of battlefield reports customarily used in law of war tribunals, the government here offered a bureaucrat's affidavit summarizing statements apparently made by domestic university employees, domestic law enforcement officials, or detainees in U.S. custody – statements that, unlike battlefield reports, historically have not been accepted in any relevant forum. *Amici* question whether such hearsay evidence could even pass due process muster. But this Court need not answer that constitutional question, because it is clear that the Rules of Evidence preclude the hearsay's admission and use.

The trial court's acceptance and use of hearsay without analysis under the Rules of Evidence trenched on Congress's ultimate rulemaking authority and on the delegated process established by the Rules Enabling Act. That fact alone should lead this Court to reject (at least in part) the report and recommendation. But while every encroachment by one branch of government on the prerogatives of another deserves rigorous judicial scrutiny, the encroachment in this case is particularly fraught, a stark reminder of why the Framers first embarked on the

creation of a government of limited and separated powers. Under the law of this Circuit, the President has the power to seize individuals in civilian settings in the United States as "enemy combatants" and detain them indefinitely without their ever being charged with a crime or given a chance to defend themselves before a jury of their peers. *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005).[2] There is of course no guarantee that this awesome power will always be used wisely. *See Padilla v. Hanft*, 432 F.3d 582, 587 (4th Cir. 2005) (noting that government's "actions have left not only the impression that Padilla may have been held for these years . . . by mistake . . . . They have left the impression that the government may even have come to the belief that the principle in reliance upon which it has detained Padilla for this time . . . can, in the end, yield to expediency with little or no cost . . . . And these impressions have been left, we fear, at what may ultimately prove to be substantial cost to the government's credibility before the courts . . . .") (Luttig, J.). The evidentiary rules that Congress directed the federal courts to apply in habeas cases serve as a protection against the unwise use of that power. As important, they ensure that any effort to exercise the power to indefinitely detain a man, seized without charge in a civilian setting in the United States, requires the participation of all three branches – Executive designation and arrest, followed by

[2] *Amici* take no position on whether the rule set forth in *Padilla* encompasses petitioner.

judicial consideration of facts, performed under the rules that Congress has deemed most likely to lead to fairness and truth.

ARGUMENT

I. *Hamdi* Did Not Create a New Exception to the Federal Rules' Prohibition on Hearsay.

The *Hamdi* plurality did not aim to commandeer Congress's constitutionally allocated rulemaking function or the delegated process of deliberative multi-party rulemaking established by the Rules Enabling Act. The plurality decision addressed only the minimum procedures required by due process, *not* the rules of evidence and procedure that Congress had mandated be applied to federal habeas cases. *See* Fed. R. Evid. 1101. Interpreting the decision otherwise would require presuming that the plurality violated a Rule of Evidence, the Rules Enabling Act, and the Supreme Court's own previous admonition that "[f]ederal courts have no more discretion to disregard [a] Rule's mandate than they do to disregard constitutional . . . provisions." *Carlisle v. United States*, 517 U.S. 416, 426 (1996) (citation omitted) (analyzing Fed. R. Crim. Pro. 29).[3]

After concluding that the Executive had the power to detain Hamdi without criminal charge as an enemy combatant, the plurality turned to "the question of

[3] *See also Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("Courts are not free to amend a rule outside the process Congress ordered . . . .") (analyzing Fed. R. Civ. Pro. 23); *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 524 (1989) (analyzing Fed. R. Evid. 609(a)(1)).

what process is *constitutionally* due to a citizen who disputes his enemy-combatant status," *Hamdi*, 542 U.S. at 524 (emphasis added), *i.e.,* what process "comport[s] with the Fifth and Fourteenth Amendments," *id.* at 524-25. The plurality's focus throughout this section (Section III) of its opinion rested squarely on the "minimum requirements of due process." *Id.* at 538; *see also id.* at 529 (describing inquiry as "determining the procedures that are necessary to ensure that a citizen is not 'deprived of life, liberty, or property, without due process of law'") (citation omitted). Answering the question it had posed, the plurality "conclude[d] that due process demands some system for a citizen detainee to refute his classification" *id.* at 537, and that "the 'process' Hamdi has received is not that to which he is entitled under the Due Process Clause." *Id.* at 538. In short, the plurality did not ask – let alone answer – whether the introduction of hearsay evidence could pass muster not simply under the "minimum" constitutional requirements, but under the more comprehensive statutory Rules of Evidence.

Reading an opinion to answer a question that was never asked is always problematic, and it would be doubly problematic here. Under the Rules Enabling Act – as under the Rules of Evidence themselves – it is clear that the Supreme Court can propose evidentiary rules or amendments through a carefully codified process, but has no power to make such rules outside that process. There is no reason to think that the plurality meant to accomplish, silently, an act

constitutionally committed to Congress and possible only through Congressional enactment or, by statutory delegation, through the process of deliberative multi-party rulemaking established by the Rules Enabling Act.

Because "out-of-court statements are subject to particular hazards," *Williamson v. U.S.*, 512 U.S. 594, 598 (1994), courts cannot admit hearsay evidence unless it falls within an established hearsay exception. *Tome v. U S.*, 513 U.S. 150, 163-65 (1995). Only Congress – or the participants in the Rules Enabling Act process exercising delegated authority – has the power to create exceptions. As Rule 802 states, "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court *pursuant to statutory authority* or by Act of Congress."[4] Fed. R. Evid. 802 (emphasis added).

The Supreme Court may prescribe rules only "pursuant to statutory authority." Fed. R. Evid. 802. Congress delegated such authority to the Supreme Court in the Rules Enabling Act, which allows the Supreme Court to propose, *inter alia*, Rules of Evidence and Rules of Civil Procedure. 28 U.S.C. §§ 2072-74. The Act allows the Judicial Conference, with the assistance of Advisory Committees, to

[4] The Federal Rules of Evidence explicitly apply to habeas proceedings. Fed. R. Evid. 1101(e). While Rule 1101(e) provides that 28 U.S.C. §§ 2241-54 ("Habeas Statutes") or the Rules Governing § 2254 Cases ("Habeas Rules") can supersede the otherwise applicable Rules of Evidence, neither provides for relaxed standards for the admission of hearsay. *See* Part II.A. (analyzing 28 U.S.C. § 2246). Federal courts thus routinely apply the Rules of Evidence to habeas actions. *E.g.*, *Fullwood v. Lee*, 290 F.3d 663, 680 (4th Cir. 2002); *Williams v. Price*, 343 F.3d 223, 230 n.3 (3d Cir. 2003).

recommend rule changes to the Supreme Court, which may then submit proposed changes to Congress. Congress has a seven-month window in which to veto or modify the proposed rule changes; if it chooses not to veto or modify the proposed changes, they take effect after seven months. 28 U.S.C. § 2074(a).

Legislative history makes clear that Congress chose to carefully guard its power. The framers of the hearsay rules explicitly rejected a case-by-case "approach to hearsay as involving *too great a measure of judicial discretion*." Fed. R. Evid. Art. VIII Advisory Comm. Note preceding Rule 801 (emphasis added).[5] As a sponsor of the Rules of Evidence explained, the law "maintains the Court's position as the *proposer* of new rules, but requires congressional approval across the board." *Proposed Rules of Evidence: Hearings before the Special Subcomm. on Reform of Federal Criminal Laws, House Comm. on the Judiciary*, 93rd Cong., 1st Sess., at 10 (1973) (Rep. Bertram Podell). Further, Congress was warned that it was necessary "to negate any inference that the Supreme Court had authority under the Rules Enabling Act to promulgate rules of evidence" without the consent of Congress. *Id.* at 156 (Richard Keatinge). Congress heeded that warning, insisting that "a judge would not be able to hold adversely to the codified rules of evidence and . . . the only way those could be changed would be through further legislation.

[5] While the Rules of Evidence permit case-by-case analysis of hearsay under Rule 807, that residual exception is quite "narrow," *U.S. v. Dunford*, 148 F.3d 385, 394 (4th Cir. 1998), and not applicable here. *See infra* Part II.B.

In the event that some rule turns out in practice to be one that reasonable people would agree ought to be changed, it would be *subject to further legislation for amendment*." 120-2 Cong. Rec. H1412 (daily ed. Jan. 30, 1974) (Rep. Smith) (emphasis added).

If anything, Congress has restricted the Supreme Court's role since 1974. In 1988, in response to "instances where "the Supreme Court had overstepped the bounds of its rule making authority," H.R. Rep. No. 99-423, pt. 1, at 5, 12 (1985), Congress amended the Rules Enabling Act. Pub. L. 100-702, Title IV, § 401(a), Nov. 19, 1988, 102 Stat. 4649. While Congress still allowed the Supreme Court to propose evidentiary rules, it preserved "the power to override a rule that has been promulgated under the Rules Enabling Act," *id.* at 6, and more than doubled the amount of time that Congress had to review rules proposed by the Supreme Court. *See* 28 U.S.C. §2074(a).

As the Supreme Court has stated unequivocally, it is "of overriding importance" that courts "be mindful that the Rule now composed sets the requirements they are bound to enforce." *Amchem Products, Inc.*, 521 U.S. at 620. The reason for that is simple: "Courts are not free to amend a rule outside the process Congress ordered . . . ." *Id.* As the Court put it in *Carlisle*, courts have no "inherent power" to "develop rules that circumvent or conflict with the Federal Rules . . . ." 517 U.S. at 427. Congress has empowered the Supreme Court to be

part of the Rules Enabling Act process, but Congress has not empowered the Court to create makeshift exceptions to rules. *See Bock Laundry*, 490 U.S. at 524 (holding that "[i]f Congress intended" not to give judges discretion, "judges must adhere to its decision" even if the Rule seems to produce irrational or unfair results).

The district court nevertheless concluded that *Hamdi* "does not recognize this distinction" between evidence that satisfies the minimum standards of due process and evidence that survives the more rigorous scrutiny of the Rules of Evidence. While that is true, it is also true that the plurality had no need to distinguish between due process and the Rules of Evidence, since only the due process question was briefed, argued or decided. In presuming that evidence passing due process muster must also pass muster under the Rules of Evidence, the district court did not merely "apply[] prior Supreme Court decision despite disagreement with it," as the court implied it was doing: it radically expanded *Hamdi*.

That expansion is improper and unsupportable. To read the *Hamdi* plurality as creating a new hearsay exception would require assuming that the Supreme Court violated not only a clearly defined Congressional rule of evidence, Fed. R. Evid. 802, and a clear process for amending that rule, 28 U.S.C. §§ 2072-74 (Rules Enabling Act), but also the Court's own previous warning, *Carlisle*, 517 U.S. at

426. Indeed, one would have to presume that the Supreme Court violated all three *without even bothering to mention them.* There is no reason to think the *Hamdi* plurality meant to create so much new law so blindly.

II. There is No Existing Hearsay Exception Applicable in This Case.

Since the *Hamdi* plurality opinion did not create – and could not have created – an exception to the Rules allowing the introduction of hearsay, this Court must assess the government's proffered hearsay in light of the Rules. The government has proffered a single piece of evidence: the Rapp Declaration. In his affidavit, Rapp, a government official, describes himself as "familiar" with the matters discussed, Rapp Declaration ¶3, but claims no personal knowledge of them. Instead of testifying to his personal knowledge, he summarizes information from "multiple intelligence sources," Bradley University employees, and FBI officials, all of which are anonymous. Rapp Declaration ¶¶ 8-15. His affidavit is thus classic hearsay, as each assertion is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c); *see also* Fed. R. Evid. 602 (A "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). Nor does the affidavit fall within any exception to the bar against hearsay created by the Rules of Evidence or other Congressional acts.

A. Congress Has Not Provided for Admission of the Hearsay in a Separate Statute.

Congress has passed several separate statutes authorizing the admission of limited categories of hearsay, both before and after the enactment of the Rules of Evidence. *See* Appendix II (cataloging federal statutes that constitute a hearsay exception). Nearly all provide for the admissibility of certain sorts of hearsay evidence in specific technical contexts. The only such separate statute relevant here is a part of the Habeas Statutes that permits evidence in a federal habeas case to "be taken orally or by deposition, or, in the discretion of the judge, by affidavit." 28 U.S.C. § 2246.

Nothing in the statute suggests that it does any more than streamline the presentation of evidence. Because an affidavit is "a statement, other than one made by the declarant while testifying at the trial or hearing," an affidavit is hearsay and Section 2246 overrides the ordinary bar against such hearsay to permit the affidavit's admission.[6] But Section 2246 does not, of course, permit an affiant to launder otherwise-inadmissible evidence through an affidavit. Thus, a party in a habeas case may not ask the court to consider a witness's religious beliefs to show that the witness is not credible, *see* Rule 610, and the fact that a party is permitted to introduce evidence by affidavit instead of live testimony does not change that.

[6] Section 2246 partly compensates for the loss of cross-examination by giving "any party . . . the right to propound written interrogatories to the affiants." *Id.*

Nor can a party seek to impeach a hostile witness's testimony by pointing to a conviction later annulled on the basis of innocence, *see* Rule 609, introduce privileged evidence objected to by the privilege-holder, *see* Rule 501, or introduce evidence that a victim of sexual misconduct engaged in other sexual behavior, *see* Rule 412. By permitting the taking of evidence in writing rather than live, Section 2246 simplifies fact-finding in habeas cases, but does not alter the substantive rules of evidence.

While Section 2246 can never be used as a Trojan Horse to smuggle violations of the Rules of Evidence into courtrooms, the smuggling of *hearsay* evidence would be particularly problematic for two additional reasons. First, Rule 602 makes plain that a "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Section 2246 multiplies the permissible forms of testimony, but does not purport to eliminate the requirement of personal knowledge. Second, Rule 805 notes that "[h]earsay included within hearsay is not excluded under the hearsay rule *if* each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." Fed. R. Evid. 805 (emphasis added). By clear implication, a multiple-hearsay statement is excluded if one of its parts does *not* conform with an exception to the hearsay rule, which is the case whenever a Section 2246 affidavit contains inadmissible hearsay.

Consistent with the limited role of Section 2246, courts have construed the statute narrowly, finding that a party may not prevail on the basis of affidavits alone. *See, e.g.*, *Herrera v. Collins*, 506 U.S. 390, 417 (1993) (finding affidavits alone to "fall[] far short" of meeting the burden required to sway the court because "the affiants' statements are obtained without the benefit of cross-examination and an opportunity to make credibility determinations"); *see also 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" because it is "particularly suspect" under *Herrera*). Indeed, the Fourth Circuit has noted the "established rule that issues of fact presented in habeas corpus proceedings may not be established by ex parte affidavits." *Jones v. Cunningham*, 313 F.2d 347, 353 n.4 (4th Cir. 1963) (citing cases); *also Campbell v. Minnesota*, 487 F.2d 1, 4 n.3 (8th Cir. 1973) (Section 2246 affidavits "cannot be used to resolve substantial disputed questions of fact."); *Owens v. Frank*, 394 F.3d 490, 498 (7th Cir. 2005) ("When the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive.").

The only other conceivably relevant legislative act is the recent passage of the Military Commissions Act of 2006, 109 Pub. L. No. 366, 120 Stat. 2600 (2006) ("MCA"), which underscores that the federal hearsay rules continue to apply in federal habeas actions. In the MCA, Congress promulgated rules of evidence for

military commissions convened by the Executive branch to prosecute certain persons for war crimes. Congress likewise could have set forth new evidentiary rules applicable to federal habeas proceedings involving persons deemed enemy combatants by the Executive branch. It did not, leaving the previously enacted federal hearsay rules undisturbed and as applicable as ever to habeas corpus actions.

B. The Rules Do Not Provide for Admission of the Hearsay.

The Rules establish several exceptions to and exemptions from the bar against hearsay. Fed. R. Evid. 801(d), 803, 804, 807. The only one not facially irrelevant Rule 807's residual exception, "a narrow exception that should not be construed broadly," *U.S. v. Dunford*, 148 F.3d 385, 394 (4th Cir. 1998). It provides: "A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence." Here, the Rapp Declaration does not have "circumstantial guarantees of trustworthiness" equivalent to those reflected in Rules 803 and 804; is not more probative than other

evidence that "the proponent can procure through reasonable efforts"; and "the general purposes" of the Rules of Evidence "and the interests of justice" are not "best served by admission of the statement into evidence." *Id.*

1. The Declaration Lacks "Equivalent Circumstantial Guarantees of Trustworthiness."

The "most important element" of Rule 807's requirements is the assurance of "equivalent circumstantial guarantees of trustworthiness." *Dunford*, 148 F.3d at 392. This Court has held that "statements admitted under . . . the residual exception . . . will be deemed sufficiently reliable only if the Government makes a 'particularized showing of trustworthiness.'" *U.S. v. Brothers Constr. Co. of Ohio*, 219 F.3d 300, 309 (4th Cir. 2000) (internal quotation and citation omitted). Such showings are rare. *See, e.g.*, *U.S. v. Clarke*, 2 F.3d 81, 84-85 (4th Cir. 1993) (finding hearsay trustworthy where prior testimony allowed cross-examination by adversary, was recorded contemporaneously, and was offered voluntarily under oath).

In *Hamdi*, the plurality implied that the statement of a military officer involved in the capture of a detainee on a battlefield might offer "circumstantial guarantees of trustworthiness" equivalent to the exceptions under Rules 803 and 804. The plurality noted that battlefield capture reports are "kept in the ordinary course of military affairs." 542 U.S. at 534. Moreover, the plurality acknowledged that Hamdi was captured in an armed conflict to which "the longstanding laws of

war" apply, including the Third Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("GPW"). Under the laws of war, a person whose status is in doubt is entitled to a "competent tribunal" to determine his status, and reports of capturing officers are essential to that determination. Art. 5, GPW, art. 5; Army Regulation 190-8 ¶1-6(e)(9) (Article 5 tribunal may "review documents and other evidence," in addition to hearing testimony, before making its determination). While the Rules of Evidence do not, of course, apply to Article 5 tribunals, the *Hamdi* plurality reasonably suggested that evidence deemed trustworthy under the laws of war would also suffice when a battlefield capture contested his enemy combatant status in a federal habeas case, instead of the ordinary Article 5 tribunal setting.

Unlike *Hamdi*'s Mobbs Declaration, the Rapp Declaration here does not possess "circumstantial guarantees of trustworthiness." It seems to rely on two types of evidence: (a) evidence obtained by regular law enforcement methods, *see id.* ¶16-21, and (b) evidence obtained outside normal law enforcement operations, likely including extreme interrogation of detainees, *see id.* ¶8 There is no justification for summarizing evidence obtained by ordinary law enforcement methods, which is regularly presented to federal courts, either openly or through the statutory mechanism for protecting classified and sensitive information. *See* Classified Information Procedures Act, 18 U.S.C. Appendix.

Evidence obtained outside regular law enforcement operations and summarized without attributing its source suffers from substantial compromises in trustworthiness. Even if the government identified the "multiple intelligence sources" compiled in the Rapp Declaration, the Court has no way of knowing how the information was obtained. Given widespread reports of abusive interrogation of detainees,[7] knowledge of the methods by which the information was obtained could cast serious doubt on whether the intelligence is "particularly worthy of belief." Thus the Supreme Court has recognized that evidence obtained through torture is too unreliable to be admitted as evidence. *See Stein v. New York*, 346 U.S. 156, 182 (1953) ("The tendency of the innocent, as well as the guilty, to risk remote results of a false confession rather than suffer immediate pain is so strong that judges long ago found it necessary to . . . treat[] any confession made concurrently with torture or threat of brutality as too untrustworthy to be received as evidence of guilt."); *Dickerson v. U.S.*, 530 U.S. 428, 432 (2000) (summarizing two centuries of Anglo-American opinions holding that torture evidence is too unreliable to be admitted); *see also CIA Human Resources Exploitation Manual* (1983) ("Use of force is a poor technique, yields unreliable results, may damage

[7] *E.g.*, Douglas Jehl & David Johnston, *White House Fought New Curbs on Interrogations, Officials Say*, N.Y. TIMES, at A1 (Jan. 13, 2005).

subsequent collection efforts, and can induce the source to say what he thinks the interrogator wants to hear.").[8]

2. The Declaration Is Not More Probative Than Other Reasonably Available Evidence.

A third party's statement is almost never "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(b); *see U.S. v. Sinclair*, 74 F.3d 753, 759 (7th Cir. 1996). This Court has thus emphasized that hearsay statements cannot supplant witness testimony even when the proposed hearsay comes from a reliable governmental actor. *See U.S. v. Welsh*, 774 F.2d 670, 671 (4th Cir. 1985) (holding written statements given to FBI by now-deceased witness properly excluded because another witness could testify to same facts contained in hearsay statements).

In *Hamdi*, the plurality emphasized Hamdi's battlefield capture, suggesting that reports about battlefield captures customarily prepared by military officers might be more probative than other evidence because a "search for evidence buried under the rubble of war" would be futile. 542 U.S. at 531-532. By contrast, the Rapp Declaration is far from the "most probative" evidence available. The

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[8] *See also* 151 Cong. Rec. S8772, S8791 (2005) (letter to Sen. McCain from former military officials) ("[T]orture and cruel treatment are ineffective methods, because they induce prisoners to say what their interrogators want to hear, even if it is not true, while bringing discredit upon the United States.").

testimony of the university employees, government officials, and detainees upon whose statements Rapp presumably relies, none of which is "buried under the rubble of war," would be "more probative" than the hearsay summary provided by Rapp.

The testimony of these witnesses – or the presentation of whatever physical evidence the government may have – could be procured through reasonable efforts. The government presumably has any physical evidence in its possession. Similarly, any witnesses are likely available to testify, either live or by affidavit under Section 2246. *See Barber v. Page*, 390 U.S. 719, 724-25 (1968) (holding witness is not "unavailable" under residual hearsay exception where government does not make "good-faith effort" to produce witness); *see also Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2792 (2006) (observing no "logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility"); *id.* at 2805 (no "exigency requiring special speed or precluding careful consideration of evidence").

3. Admission of the Declaration Does Not "Best Serve" Justice and the Rules.

Introduction of the Rapp Declaration would not "best serve" the purpose of the Rules of Evidence, which is "to secure fairness." Rule 102. It would allow one party to a dispute – the government – to introduce *all* of its evidence in the form of a bureaucrat's summary. Even if the government did its level best to provide the

information objectively, as a party to the dispute it was undoubtedly influenced by the outcome it wanted, and its hearsay summary of the statements of unnamed others almost certainly reflects that. *Amici* do not think fairness is secured by allowing one party to a dispute to present summaries of evidence from unnamed sources, preventing the other party from probing their reliability or truth.

Such a process would be problematic in any kind of case, but is doubly so here, where the government seeks judicial validation of a man's indefinite detention in military prison. To make matters worse, the indefinite detention began when al-Marri was deemed an enemy combatant on the eve of criminal trial, while a motion to suppress illegally obtained evidence was pending. If the Rapp Declaration suffices to justify al-Marri's indefinite detention, then all that stands between this Nation's residents and its military prisons is a single bureaucrat with a pen, willing to write out what he thinks other people have seen and said. The interests of justice would not be best served by that state of affairs.

III. Due Process Requires Exclusion of the Rapp Declaration.

If this Court were to conclude that *Hamdi* amended the Rules of Evidence, or that the Rapp Declaration is admissible notwithstanding those rules, then it would have to determine the whether the due process clause permits the use of hearsay against an individual seized in a civilian setting in the United States, as opposed to a foreign battlefield.[9]

The *Hamdi* plurality analyzed the process due by applying the balancing test of *Mathews v. Eldridge*, the defining principle of which is sensitivity to context. 424 U.S. 319, 334 (1976) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.") (quotation omitted). As reiterated by the *Hamdi* plurality:

> *Mathews* dictates that the process due in any given instance is determined by weighing "the private interest that will be affected by the official action" against the Government's asserted interest, "including the function involved" and the burdens the Government would face in providing greater process. The *Mathews* calculus then contemplates a judicious balancing of these concerns, through an analysis of "the risk of an erroneous deprivation" of the

[9] The *Hamdi* plurality opinion analyzed both Executive *power* to detain an enemy combatant and the minimum constitutional *process* by which courts determine whether a person designated as an enemy combatant really is one, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), a distinction that this Court has underscored, *Padilla v. Hanft*, 423 F.3d 386, 394 n.4 (4th Cir. 2005) ("Padilla's argument confuses the scope of the President's power to detain enemy combatants under the AUMF with the process for establishing that the detainee is in fact an enemy combatant."). While this Court has held that the place of capture does not affect Executive power to detain, it has not held that the place of capture does not affect the minimum constitutional process.

private interest if the process were reduced and the "probable value, if any, of additional or substitute safeguards."

542 U.S. at 529 (citations omitted). The case of an individual seized in a civilian setting in the United States and deemed an enemy combatant presents one sort of "particular situation"; the case of an individual seized on a foreign battlefield and deemed an enemy combatant presents another.[10]

The private and governmental interests involved here are roughly the same as in *Hamdi*. Al-Marri, like Hamdi, seeks to preserve the "most elemental of liberty interests – the interest in being free from physical detention," *Hamdi*, 542 U.S. at 529, and like Hamdi, the enormity of al-Marri's interest is undiminished by the government's allegations against him. *Id.* at 531. Likewise, the Government would likely assert that its security interest in detaining alleged enemy combatants in military prisons during the present "war on terror" is as great as the interests at stake in *Hamdi*.

Yet the risk of erroneous deprivation of liberty is greater here than it was in *Hamdi*. Arrest in Illinois does not strongly suggest a person's enemy combatancy, as capture on a foreign battlefield might. The *Hamdi* plurality recognized that

[10] The due process clause itself can limit the use of hearsay. Thus, in immigration hearings, where the Rules of Evidence do not apply, due process precludes the government from using an affidavit from someone not available for cross-examination unless it establishes it made reasonable efforts to secure the person's presence. *Ocasio v. Ashcroft*, 375 F.3d 105, 107 (1st Cir. 2004); *Saidane v. I.N.S.*, 129 F.3d 1063, 1065 (9th Cir. 1997); *Olabanji v. I.N.S.*, 973 F.2d 1232, 1235 (5th Cir. 1992).

people would rarely be wrongfully seized on a battlefield, and that when they were they would fall within very limited categories: "the errant tourist, embedded journalist, or local aid worker." *Id.* at 534. Accordingly, the plurality settled on a process due that would allow these individuals "the chance to prove *military* error," *id.* (emphasis added), implying that persons falling within the three narrow categories could easily demonstrate the legitimate, non-military reason why they were on a battlefield. No such assumption is warranted for people in Illinois. Their mere presence is not rare and questionable, and they do not fit into a small set of limited categories such as "errant tourist, embedded journalist, or local aid worker." *Id.*

Moreover, the value of additional procedural safeguards is much higher here than it was in *Hamdi*. The government's allegations against al-Marri rely heavily on computer and telephone records obtained by domestic law enforcement and intelligence agencies. *See* Rapp Declaration ¶¶ 16-21, 25-33. Requiring the government to come forward with these records would allow the court to consider evidence – possibly conflicting interpretations of evidence – directly, instead of mediated through the government's potentially self-serving hearsay characterizations.[11] Even more importantly, the testimony and cross-examination

[11] Where necessary and appropriate, a court can review evidence in a manner consistent with national security. *Cf.* Classified Information Procedures Act, 18 U.S.C. Appendix.

(live or by interrogatory) of fact witnesses would provide immeasurably greater procedural safeguards than are present in a summary prepared by the other side. *See Crawford v. Washington*, 541 U.S. 36, 49 (2004) ("It is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine.") (quotation omitted); *id.* at 52 (noting the particular shortcomings of statements taken by government officers during custodial interrogation).

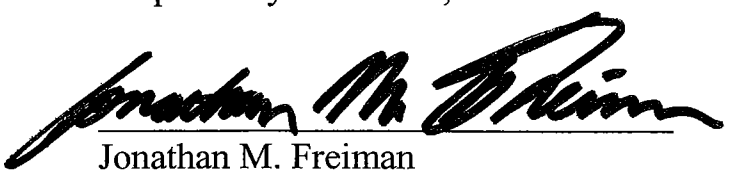
An adversary's summary provides no opportunity at all to question those whose putative observations now provide the only support for an accusation that has led to al-Marri's indefinite imprisonment. *Cf. Hamdan*, 126 S.Ct. 2749, 2797 (2006) (even in military commissions, where Rules of Evidence do not apply, accused is entitled to procedures that "afford 'all the judicial guarantees which are recognized as indispensable by civilized peoples,'" including "the right to examine, or have examined, the witnesses against him," Protocol Additional to the Geneva Conventions of 12 August 1949 art. 75(4)(g), June 8, 1977, 1125 U.N.T.S. 3 (1986); 13 I.L.M. 1391).

CONCLUSION

For the reasons set forth above, the district court's judgment should be reversed.

Respectfully submitted,

Dated: November 20, 2006



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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-7427 **Caption:** Al-Marri, et al. v. Wright

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