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 AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

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STATEMENT OF INTEREST

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation founded in 1958 with a subscribed membership of over 13,000 members, including military defense counsel, public defenders, private practitioners and law professors, and an additional 35,000 state, local and international affiliate members. The NACDL seeks to encourage the integrity, independence and expertise of defense lawyers in criminal cases, both civilian and military, to ensure justice and due process for persons accused of crime, to promote the proper and fair administration of criminal justice (including military justice), and to preserve, protect and defend the adversary system, the right to counsel and the U.S. Constitution. The paramount concern of the NACDL in this case is to ensure that principles essential to the protection of liberty under the rule of law are not abrogated by the Government in its pursuit of the "war on terror" within the United States. These principles are threatened by the Government's efforts to avoid civilian criminal process through the arbitrary use of military detention.

STATEMENT OF THE CASE

This appeal presents constitutional questions of exceptional importance. The Government here claims the power to seize in the United States a civilian resident suspected of complicity with the al-Qaeda terrorist organization and to

imprison him indefinitely, without criminal charges or judicial process, on grounds that he is an "enemy combatant" in a global "war" of uncertain scope and duration.

None of the other "enemy combatant" cases that have been considered by this Court and the Supreme Court have addressed the issues presented here concerning the Government's exercise of military authority in the United States over a resident alien who has never been on the battlefield. While the Government claims that its conduct is authorized implicitly by the broad language of the Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF"),[1] Congress has specifically addressed the Government's power to arrest and detain aliens whom the Attorney General has "reasonable grounds to believe" to be associated with terrorist activity in the USA Patriot Act — which requires the Government to bring charges or begin deportation proceedings within seven days. 8 U.S.C. § 1226a.[2]

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[1] 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.

[2] The USA Patriot Act specifically provides for review through habeas petitions of actions taken by the Government under this authority. 8 U.S.C. § 1226a(b).

The Government's position plainly tests the limits of Executive authority. But rather than submit to the review of this Court, the Government now seeks by this motion to extend its detention power dramatically by arguing that it is completely unreviewable as to resident aliens. The Government's motion takes the remarkable position that Congress intended the Military Commissions Act of 2006 S.3930, 109th Cong. (enrolled bill), Pub. L. No. 109-366 (2006), to bar any judicial review of the domestic arrest and imprisonment of any resident alien designated an "enemy combatant" by the President, as well as any resident alien that the Government intends to submit to a Combatant Status Review Tribunal ("CSRT") operated by the Department of Defense ("DOD").

However extreme, the Government's position is consistent with its prior efforts to avoid any judicial consideration of al-Marri's incarceration. As noted by the court below (JA 113), al-Marri was first arrested at his home in Peoria, Illinois, on December 12, 2001, as a material witness in the Government's investigation of the attacks of September 11, 2001, and was incarcerated in Illinois and New York. He was charged criminally for credit card fraud, bank fraud, and lying to the FBI, first in New York and then in Illinois. After 18 months of imprisonment, four weeks before trial, and on the eve of a motion to suppress illegally seized evidence, the Government moved to dismiss these charges and transferred Mr. al-Marri from

civilian to military custody based on the President's designation of Mr. al-Marri as an "enemy combatant."

This designation was predicated on the Government's belief, as asserted in the Declaration of Mr. Jeffrey N. Rapp, that al-Marri is an al-Qaeda "sleeper agent" sent to the United States to act "as a point of contact for al-Qaeda operatives arriving in the United States" and to "explore possibilities for hacking into the main-frame computers of banks with the objective of wreaking havoc on U.S. banking records and thus damaging the country's economy." (JA 59) Al-Marri did not, however, have any competence to threaten the U.S. banking system[3] and he has never been charged criminally by the United States for conspiring to commit any acts of terrorism.

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[3] Rapp provides no basis for this claim, except that al-Marri's computer "contained a list of numerous favorite internet websites relating to computer hacking" and files containing credit card numbers that did not belong to him. (JA 63-64) In his book *Never Again*, former Attorney General John Ashcroft explained that the Government's claim was actually just "speculation" arising from its discovery that al-Marri's computer

> had computer software programs frequently used by hackers in their efforts to gather illegally personal information from unsuspecting victims' computers. This raised speculation among some officials that perhaps al-Marri planned to hack his way into the U.S. banking system to wipe out balances and otherwise wreak havoc with banking records and damage the U.S. economy.

John Ashcroft, *Never Again: Securing America and Restoring Justice*, 166 (Hachette 2006).

Nevertheless, from June 23, 2003 until now, al-Marri has been held without criminal charges in military custody at the Navy Brig in Hanahan, South Carolina. A civil complaint filed by his counsel on August 8, 2005, alleges that al-Marri is being held in solitary confinement in a barren six by nine foot cell, in which he has been subjected to multiple forms of inhumane treatment, coupled with recurring, abusive interrogations.[4] This complaint also states that from May 29, 2003 until October 14, 2004, al-Marri was denied any access to counsel. *Id*. ¶ 27. An internal Defense Department inspector general report confirms allegations of abusive treatment:

> According to a summary of the 2004 report obtained by The Washington Post, interrogators attempted to deprive one detainee, Ali Saleh Kahlah al-Marri, a Qatari citizen and former student in Peoria, Ill., of sleep and religious comfort by taking away his Koran, warm food, mattresses and pillow as part of an interrogation plan approved by the high-level Joint Forces command.[5]

The Government's decision to take al-Marri out of the criminal justice system and detain him as an "enemy combatant" appears to have been motivated by the desire to interrogate him unlawfully, under brutal conditions and without access to counsel, on the theory that he possessed information about al-Qaeda operations in the United States. The President's designation stated that "Mr. al-

[4] Complaint, *Al Marri v. Rumsfeld*, (D.S.C.), Attachment to Brief of Appellant, pp. 1-30.

[5] Carol D. Leonnig, "04 Pentagon Report Cited Detention Concerns," WASH. POST, Dec. 14, 2006, at A1.

Marri possesses intelligence, including intelligence about personnel and activities of al Qaeda, that, if communicated to the U.S., would aid U.S. efforts . . . ." (JA 54.) Former Attorney General Ashcroft asserts that al-Marri was designated an "enemy combatant," because, while he was in the criminal process, "Al-Marri rejected numerous offers to improve his lot by cooperating with the FBI investigators and providing information. He insisted on becoming a 'hard case.'" Ashcroft, *supra* n.3, 168-69.

The Government has now stated its intent to establish al-Marri's alleged status as an al-Qaeda conspirator and "enemy combatant" through a military Combatant Status Review Tribunal ("CSRT"), rather than through the courts. But the CSRT process created by the Defense Department is designed only to determine whether battlefield captives, legitimately detained under the law of war, are properly classified as "enemy combatants."[6] As discussed below, these

[6] The definition of "enemy combatant" used by the CSRTs would appear to have no application to al-Marri, who is not alleged to have ever been on a battlefield "engaged in hostilities against the United States." The DOD's procedures state that:

> An "enemy combatant" for purposes of this order shall mean an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

Memorandum for Secretaries of the Military Departments Chairman of the Joint Chiefs of Staff Under Secretary of Defense for Policy, July 14, 2006.

CSRTs, provide little more than an occasion for the military to review formally the Government's own records — the detainee is not permitted counsel or given any meaningful opportunity for adversarial inquiry into relevant facts. Assuming a CSRT were ever conducted, al-Marri could eventually achieve, by appeal to the Court of Appeals for the District of Columbia Circuit, a judgment that he should never have been subjected to the CSRT process, because it falls far short of constitutional requirements for a resident alien. But even judicial removal from the CSRT process (and from the purview of Section 7(a) of the MCA, discussed below) would likely not release him but would only return him, after further imprisonment, to the same legal position he is in now—in need of habeas relief.

Though it should be obvious to the Government that assigning al-Marri to the CSRT process would do nothing but waste time, the Government's tactics appear designed only to detain al-Marri as long as possible without any meaningful judicial review.

SUMMARY OF ARGUMENT

In the Detainee Treatment Act of 2005, Title X of Pub. L. No. 109-148, 119 Stat. 2739 (2005) ("DTA"), and the MCA, Congress created a statutory

(continued…)

"Subject: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba." ("Memorandum on CSRT Procedures of July 14, 2006).

scheme intended to deal with legal claims from battlefield captives. Under this scheme, (1) detainees are provided a formal review by the DOD through a CSRT to determine whether they have been properly classified and detained as "enemy combatants," (2) detainees are given a limited right of appeal from CSRT determinations to the Court of Appeals for the District of Columbia Circuit, and (3) the courts are barred by Section 7(a) of the MCA from considering any other actions, including habeas petitions, relating to the detention of an alien detainee "who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."

1. The Government argues, first, that this jurisdiction-stripping provision requires dismissal because al-Marri has been determined both by the President and by the lower court to be an "enemy combatant." But this provision was plainly intended to apply only to aliens subject to the CSRT determination and review process. Moreover, it is obvious from its language that this provision does not refer to the kinds of determinations by the President or the lower court on which the Government relies. The provision references a determination by the United States whether aliens already in custody "have been properly detained" as enemy combatants, not a determination, like the President's, that al-Marri should now be detained as an enemy combatant. The provision also refers to aliens "awaiting

such determination" which cannot sensibly be construed to refer to the determinations of the President or the lower court.

Legislative history makes clear that Congress intended to withdraw statutory rights to habeas for non-resident aliens, whom Congress did not believe possessed constitutional habeas rights. Moreover, the Government's construction of this jurisdiction-stripping provision is barred by canons of statutory interpretation that preclude a construction that would strip a resident alien of his constitutional rights.

2. The Government next argues that, because it has now decided to provide al-Marri with a review of his status by a CSRT, al-Marri is now "awaiting such determination" and so is subject to the jurisdiction-stripping provision. But al-Marri's petition before this court presents legal challenges which, if successful, would prevent the Government from sending al-Marri to a CSRT at all. If al-Marri's challenge to the authority of the Government to detain him is upheld, the Government is without power to send him to a CSRT. Likewise, if his challenge to any of the procedural infirmities affecting the proceedings in the court below is upheld, he could not be sent to a CSRT because CSRTs have all of these procedural problems and more. Al-Marri is not "awaiting" a CSRT determination if the Government lacks constitutional power to detain him further or use CSRT procedures to determine his status.

3. Prior cases considered by this Court have shown the potential for Government abuse of unreviewable discretion to arrest and detain "enemy combatants." In both the *Hamdi* and *Padilla* cases, the Government ultimately abandoned its position that security interests required the indefinite military detentions, but only after years of imprisonment and abusive interrogation and as a means to avoid further judicial review. These cases suggest that judicial review is needed to provide a check on misuse of Government power and that deference to the Government's positions should be limited.

ARGUMENT

1. Congress Intended To Bar Habeas Petitions Only From Aliens Subject To CSRT Determinations

a) The Government's construction is inconsistent with the structure and language of the statutes.

The MCA bars habeas review only for an alien "who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." 28 U.S.C. § 2241(e)(1). The Government's contention that this provision may be satisfied by the President's designation of al-Marri or by the decision of the court below ignores the scheme of CSRT determination and D.C. Circuit review that provides the context for this habeas provision. Congress plainly intended to create a scheme in which appellate review by the D.C. Circuit provides a limited substitute for habeas review of constitutional

issues.[7] The statutory scheme created by the DTA and the MCA provides this review only, of course, for determinations made by the DOD through its CSRT process, not for any determination made by the President, the court below, or any other agency of the United States. "Determined by the United States" and "awaiting such determination" may only be coherently understood to refer to the determinations made by the DOD through its CSRTs that are explicitly subject to appellate review under the statute.

This construction is consistent with the repeated references in the DTA to the "determination" of status made by the Defense Department and its CSRTs. §§ 1005(a)(1)(B), 1005(b)(1), 1005(e)(2)(C)(i)&(ii). It is also suggested by the definition of "unlawful enemy combatant" contained in § 3(a)(1) of the MCA, 10 U.S.C. § 948a, as:

> a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense

"Such determination" cannot, as the Government contends, be sensibly read to refer to determination by the President or the lower court in addition to the

[7]The DTA provides for review in the D.C. Court of Appeals of whether the CSRT's determination was "consistent with the standards and procedures specified by the Secretary of Defense," and whether use of these standards and procedures to make the determination "is consistent with the Constitution and laws of the United States." DTA §§ 1005(e)(2)(C)(i), (ii) (10 U.S.C.§§ 801(e)(2)(C)(i), (ii)).

CSRTs, because there is no class of aliens "awaiting such determination." As used in this sentence, "determined by the United States" and "awaiting such determination" refer expressly to the same determination process. The statute makes sense if "such determination" refers simply to the CSRT process, which the Defense Department had committed to provide to all Guantanamo detainees, some of whom are still "awaiting." But Congress could not have meant to bar habeas petitions from aliens "awaiting such determination" from the President, a court or any other U.S. agency apart from the CSRTs. Under the Government's construction, the President could presumably prevent *any* detained alien from filing a habeas petition by declaring his intent to determine whether the alien is an enemy combatant, so that the alien would then be "awaiting such determination." And while he was awaiting the lower court's consideration of his habeas petition, Mr. al-Marri would, under the Government's reading, have been "awaiting such determination" (and paradoxically barred from pursuing the action).

The language of this provision also precludes the Government's reliance on the President's designation, because it plainly refers to a determination made *after* detention as an enemy combatant, not a determination, like the President's, made to cause initial detention as an enemy combatant. The statute does not refer to aliens "determined by the United States to be enemy combatants." Rather it addresses an alien "determined by the United States *to have been properly*

detained as an enemy combatant." Thus, this language refers to a determination concerning an alien already in custody as an enemy combatant. The President's designation of al-Marri is not a determination that he "has been properly detained as an enemy combatant" but a finding that al-Marri, who had been in the custody of the civilian law enforcement authority of the Department of Justice, should now be detained by the Defense Department as an "enemy combatant." (JA 54.) The language used by Congress can only be sensibly read to refer to the CSRT review for Guantanamo detainees which determines whether they "have been properly detained" on the battlefield as enemy combatants.

b) The Government's construction is inconsistent with legislative history and canons of statutory interpretation.

In the original statement of this scheme enacted in the DTA in 2005, Congress made clear that CSRT determinations, appellate review of those determinations, and the bar to habeas suits applied *only* to aliens detained at Guantanamo Bay.[8] Consistent with Congress' expectation in the DTA, the Defense Department's Order establishing the original CSRT procedures likewise applied "only to foreign nationals held as enemy combatants in the control of the

[8] The DTA required the Secretary of Defense to submit a report setting forth procedures for the operation of CSRTs "for detainees held at Guantanamo Bay, Cuba"(§ 1005(a)(1)(A)), and barred review of habeas applications filed on their behalf (§ 1005(e)), while providing for judicial review in the Court of Appeals for the District of Columbia of the CSRT determinations of those "detained by the Department of Defense at Guantanamo Bay, Cuba" DTA § 1005(e)(2)(B)(i).

Department of Defense at the [U.S.] Guantanamo Bay Naval Base, Cuba." (Deputy Secretary of Defense Paul Wolfowitz's Memorandum for the Secretary of the Navy Establishing Combatant Status Review Tribunal, 7 July 2004, *available at* http://www.defenselink.mil/news/ Jul2004/d20040707review.pdf (last visited Dec. 19, 2006); *see also* Secretary of the Navy, "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba," 29 July 2004, *available at* http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf (last visited Dec. 19, 2006). Though a report on the procedures for status review of detainees in Afghanistan and Iraq was also required in the DTA (§ 1005(a)(1)(B)), the CSRT procedures were specifically limited to Guantanamo both in the DOD implementing memoranda and in the DTA (§ 1005(e)(2005)).

The Government's construction is only conceivable because new provisions in the MCA strike the DTA references to alien detainees in "Guantanamo Bay, Cuba" and substitute instead a reference to aliens "detained by the United States." *See* MCA §§ 7; 9(3)(A)(ii); *amending* DTA § 1005(e). Thus, where the DTA amendment to the habeas statute refers to "an alien detained by the Department of Defense at Guantanamo Bay, Cuba," 28 U.S.C. § 2241(e)(1) (2005), the MCA refers instead to "an alien detained by the United States." *Id*. § 2241(e)(1) (2006). On this basis alone, the Government argues that the MCA, while intended to

clarify the rights of Guantanamo detainees subject to military commissions, may also be read to withdraw all rights — without explanation — from U.S. resident aliens arrested on U.S. soil.

In fact, the MCA's changes accomplish something far less extraordinary and more plausible: they merely assure that the review scheme is applicable to enemy combatants who may be detained by the United States, not in Guantanamo, but in foreign lands elsewhere (*i.e.*, Afghanistan or Iraq) or in the United States. Though no CSRT procedures have so far been issued by the Defense Department for detainees outside of Guantanamo, the MCA creates a statutory structure of appellate review and habeas restriction that would permit replication of the Guantanamo process elsewhere.[9] These changes also make clear that the habeas and appellate review rights of a detainee who has been given a CSRT do not change if he is moved from Guantanamo to another location. Under the language of the original DTA, an alien who received a CSRT determination would,

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[9] Senator Sessions explained in floor debate:

> The biggest change that the MCA makes to section 2241(e) is that the new law applies globally, rather than just to Guantanamo detainees. We are legislating through this law for future generations, creating a system that will operate not only throughout this war, but for future wars in which our Nation fights.

152 Cong. Rec. S10404 (daily ed. Sept. 28, 2006) (statement of Sen. Sessions).

anomalously, no longer be subject to the DTA's habeas on review provision if he was moved from Guantanamo to another place of detention.

These changes were not intended, as the Government claims, to eliminate the habeas rights of U.S. residents. This is clear from the discussion of the habeas-restricting provision of the MCA contained in the Report of the House Judiciary Committee. H. Rep. No. 109-664 (II) (Sept. 25, 2006) at 5. The Committee explains that the MCA does not suspend the right of habeas corpus impermissibly, because it has been established since *Johnson v. Eisentrager*, 339 U.S. 763 (1950), that "constitutional protections do not apply to alien prisoners of war held outside our borders." The Report further notes that the Supreme Court affirmed in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), that "aliens receive constitutional protections when they come within the territory of the United States." H. Rep. No. 109-664, at 5. Therefore, the Committee explains, the MCA "clarifies the intent of Congress that statutory habeas corpus relief is not available to alien unlawful enemy combatants held outside of the United States." *Id.* at 5-6.

In *Rasul v. Bush*, 542 U.S. 466 (2004), the Supreme Court had held that statutory habeas relief *was* available to non-resident aliens held at Guantanamo, even if they could not claim the protections of the Fifth Amendment. The MCA "clarifies," as the Committee explains, the DTA's intent to withdraw the right to seek habeas relief under § 2241 for *any* "alien unlawful enemy combatants held

outside of the United States," whom it did not believe had constitutional rights to habeas. H. Rep. No. 109-664, at 5. But, as the District Court explained after remand from the Supreme Court in *Hamdan v. Rumsfeld*, No. 04-1519, slip op. (D.D.C. Dec. 13, 2006), Congress did not intend to suspend the writ in the MCA or to interfere with the constitutional rights of resident aliens, but only to eliminate the statutory basis for habeas by non-resident aliens lacking in constitutional rights, like Hamdan.

A construction of the MCA that does not suspend habeas rights for resident aliens who do have constitutional rights is not only consistent with the Congressional intent but dictated by the canon of constitutional avoidance: '"if the existing jurisdictional act be construed to deny the writ to a person entitled to it as a substantive right, the act would be unconstitutional. It should be construed, if possible, to avoid that result."' *Rasul*, 542 U.S. at 491 (Scalia, J., dissenting) (quoting *Eisentrager v. Forrestal*, 174 F.2d 961, 966 (D.C. Cir. 1949)). Thus, the Supreme Court has found that a construction of a statute that would preclude habeas review must be rejected "where an alternative interpretation of the statute is 'fairly possible.'" *INS v. St. Cyr*, 533 U.S. 289, 300 (2001). Moreover, it is well-settled that "Congress must articulate specific and unambiguous statutory directives to effect a repeal" of habeas jurisdiction. *Id*. at 299; *cf. Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2764 (2006) (stating that a statute will not be held to

revoke the Supreme Court's habeas jurisdiction "absent *an unmistakably clear statement* to the contrary") (emphasis added).

In sum, there is overwhelming reason to construe "determined by the United States" and "awaiting such determination" to refer to the determination made by the United States through the CSRT process, which has only been applied to non-resident detainees captured abroad. Such a construction is required by the language of Section 7, the statutory scheme created by the DTA, and well-settled canons of construction, and it is consistent with Congress' intent to provide legislative and judicial limits on the power of the Executive in dealing with alien battlefield detainees.

2. Because The Government Has No Authority To Detain Al-Marri Or Subject Him To A CSRT, He Is Not "Awaiting Determination"

To enable an argument that al-Marri is now "awaiting determination" of his status by a CSRT and thus is within the class of petitioners barred by the statutory scheme created by the DTA and the MCA, the Government has now declared its intent to assign al-Marri to the CSRT process. Motion to Dismiss at 5. This maneuver is, of course, an implicit concession that the MCA may be read to preclude habeas review only for petitioners who are within the statutory scheme and have received or are awaiting determinations under the CSRT. The Government's new directive does not, however, divest this Court of its habeas

jurisdiction, because the Government does not have constitutional authority to detain al-Marri further, to bring him to Guantanamo for a CSRT hearing, or to use the CSRT procedures to determine his status. Al-Marri is not, in fact, awaiting a CSRT determination, because he is pursuing appeal issues which, if successful, would preclude his submission to a CSRT.

Al-Marri argues, first, that the Government's use of the military to arrest and imprison him is not authorized by Congress and violates his rights under the Constitution. If Mr. Al-Marri's appeal has merit, then the Government has no authority to continue his detention at all, much less send him to Guantanamo to appear before a CSRT. In essence, the Court is being asked to defer to the President's authority to detain al-Marri without reaching the question of whether that authority was lawfully exercised.

In addition, al-Marri challenges the constitutionality of the process by which the court below reached its determination, specifically, the presumption in favor of the validity of the Government's evidence, the court's reliance on a hearsay affidavit, the denial of an opportunity to confront and cross-examine witnesses, and the denial of discovery. As discussed below, CSRTs present all of these procedural infirmities and more. Thus, a determination by this Court that any of the procedural rules applied by the district court violated al-Marri's constitutional

rights would necessarily mean that a CSRT could not be constitutionally used to determine his status.

It is apparently the Government's position that the MCA allows it to evade these challenges to its authority simply by stating its intent to submit al-Marri to a CSRT. The Government's position implies that it is now permitted to arrest resident aliens suspected of complicity with al-Qaeda and send them to Guantanamo for a military determination of their status as "enemy combatants" and that this flagrant violation of constitutional rights must proceed without judicial interference. But in enacting the DTA and the MCA, Congress plainly understood that it was dealing with procedures for battlefield captives who may be lawfully detained under the law of war. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (noting that the capture and detention of enemy combatants is a universally recognized aspect of the law of war). In the DTA and the MCA, Congress did not authorize or in any way address the power of the Government to arrest and detain U.S. residents who have never been on a battlefield.

It is abundantly clear that the CSRT process cannot be considered an adequate and effective substitute either for habeas review or for criminal courts. A CSRT, comprised of three military officers, would, as a threshold matter, have no jurisdiction or competence to consider whether al-Marri's arrest and prolonged detention was lawful. Nor does it appear likely that these issues could be raised

within the narrowly-circumscribed jurisdiction of the Court of Appeals, whose review is limited to consideration of whether the CSRT's determination was "consistent with the standards and procedures specified by the Secretary of Defense," and "whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." DTA §§ 1005(e)(2)(C)(i), (ii).

The only decision that the CSRTs are constituted to make is whether a detainee at Guantanamo is, or is not, an "enemy combatant." But, according to the Defense Department's implementing procedures,[10] these CSRTs provide only a "non-adversarial proceeding" (*id*. at 1), in which the Government relies on hearsay documentary evidence that is rebuttably presumed to be "genuine and accurate" (*id*. at 6). The detainee is not permitted the assistance of counsel (*id*. at 4) and has no meaningful ability to confront or compel the appearance of the witnesses who are the sources of the written evidence. *See* Mark Denbeaux, *et al.*, "No Hearing Hearings; CSRT: The Modern Habeas Corpus? An Analysis of the Proceedings of the Government's Combatant Status Review Tribunals at Guantanamo," *available at* http://law.shu.edu/news/final_no_hearing_hearings_report.pdf (last visited Dec. 19, 2006). Moreover, if the Government is not satisfied with the results of a tribunal, it can send the decision back for further proceedings "which means that

[10] Memorandum on CSRT Procedures of July 14, 2006, *supra* n. 6.

the detainee can be subjected to multiple Tribunals until the Government is satisfied with the ruling." *Id*. at 37. Whether or not the CSRTs provide adequate process for battlefield captives, they plainly do not provide the procedural protections required by the Constitution prior to deprivation of a resident alien's liberty.

For al-Marri, the Article III review provisions would provide means to obtain, eventually, a determination from the D.C. Court of Appeals that the plainly inadequate CSRT procedures could not be constitutionally used to deprive a resident alien of his liberty. But he would continue to be unlawfully deprived of his liberty during the time it takes to obtain the CSRT decision (assuming it is ever conducted) and to obtain the D.C. Circuit's judgment. Moreover, a judgment that the CSRT procedures are inadequate would presumably not reach the lawfulness of his original military capture or whether his detention under the President's Order could be continued. The Government could still maintain that al-Marri is an enemy combatant and that it has authority to detain him, even if the CSRT process is inadequate to establish his status. Al-Marri would then be required to return to the District Court yet again, with substantially the same petition on appeal today.

Thus, the Government's proposed assignment of al-Marri to the CSRT system essentially continues his incarceration, avoids the fundamental issues presented by this petition that preclude any CSRT review, and provides no

adequate substitute for habeas review. In these circumstances, application of the MCA's habeas restriction to dismiss this case would effect an unconstitutional suspension of habeas rights that Congress did not intend. Congress had no reason to believe that resident aliens accused of criminal conspiracy with al-Qaeda would be funneled through the CSRT scheme, which was designed for use in Guantanamo and could only be appropriate for foreign captives.

3. The Government's Inconsistent And Abusive Conduct Of Previous Enemy Combatant Detentions Demonstrates The Importance Of Judicial Review.

The Government's motion asks this Court to render an improbable construction of the MCA that would further expand its discretion to arrest and detain resident aliens without judicial interference, presumably to facilitate its efforts to prosecute the war on terror against domestic threats. But as Justice O'Connor warns, "critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat." *Hamdi*, 542 U.S. at 531. The potential for abuse of the Government's military detention authority has already been demonstrated by its conduct, not only in this case, *supra*, nn. 4, 5, but in the other two domestic enemy combatant detentions.

a) The Government Abandoned Its Justification For Hamdi's Detention When It Was Finally Subjected To Review.

In 2002, and again in 2003,[11] this Court relied on the Government's review of its own records and reports, the "Mobbs Declaration,"[12] to conclude that Yaser Hamdi's detention without charges or access to counsel was lawful and merited only "limited judicial inquiry." *Hamdi v. Rumsfeld*, 316 F.3d 450, 475 (4th Cir. 2003). The Court overruled the district court's determination that it had an obligation to test the adequacy of the unsupported, two-page Mobbs Declaration on which the Government relied to justify the detention of an individual captured on the battlefield.

After holding Hamdi over three years in solitary confinement without charges or access to counsel, and upon the Supreme Court's remand of Hamdi's case to district court for a due-process hearing, the Government negotiated a settlement with Hamdi, rather than present its justifications to the district court. Though purportedly detained as an enemy combatant pursuant to the principle that "detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war," *Hamdi,* 542 U.S. at 574 n. 5 (Scalia, J. dissenting), the settlement in fact arranged for Hamdi's transfer to Saudi Arabia, near today's

[11] *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002), *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003), *reh'g en banc denied*, *Hamdi v. Rumsfeld*, 337 F.3d 335 (4th Cir. 2003).

[12] *Hamdi*, 542 U.S. at 512, referring to Mobbs Declaration.

battlefields, albeit with his agreement not to travel to conflict areas. Motion to Stay Proceedings, No. 2:02CV439 (E.D. Va. Sept. 24, 2004), *available at* http://www.humanrightsfirst.org/us_law/inthecourts/hamdi_briefs/ Hamdi/ Agreement.pdf. Hamdi was required to waive any claims arising from his detention, Agreement, ¶ 13, while the Government agreed to advise Saudi authorities regarding Hamdi that "considerations of national security do not require his detention in light of the terms of this Agreement." *Id*. ¶ 3. If the terms of this settlement agreement were sufficient to satisfy the Government's interests of national security, there appears no justification for Hamdi's years of incommunicado incarceration.

b) The Government Repeatedly Changed Its Rationale For Military Detention Of Padilla Then Abandoned It To Avoid Supreme Court Review.

As in *Hamdi*, this Court again deferred to the Government's determination to detain Jose Padilla as an "enemy combatant," overruling the district court's determination that there was no reason why the government could not charge Padilla criminally and use criminal process to detain him. *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005).

Yet after refusing Padilla access to the criminal justice system for over three years, "steadfastly maintaining that it was imperative in the interests of national

security" that he be held militarily without charges,[13] the Government finally announced that a grand jury had indicted Mr. Padilla on charges unrelated to those that had previously been offered to justify his detention.[14]

As Judge Luttig notes, the announcement came "only two business days before the government's brief in response to Padilla's petition for certiorari was due to be filed in the Supreme Court," and "only days before the District Court . . . was to accept briefing" contesting Padilla's enemy combatant status. Order at 4. As Judge Luttig also notes, the Government failed to provide this Court with any explanation for its change of course. *Id*. at 7. Previous to this, the Government had significantly changed its allegations against Padilla, first claiming that Mr. Padilla was planning to build a "radiological dispersion device," Declaration of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy (Aug. 27, 2002), *available at* http://wiggin.com/db30/cgi-bin/pubs/Declaration%20of%20Mobbs,%20Bush.pdf, then contending that Mr. Padilla planned to cause explosions in gas-heated apartment buildings, U.S. Deputy Att'y Gen. James Comey's News Conference of June 1, 2004, *available at* 2004 WL 1195419. Later still, after the Supreme Court issued a decision in *Hamdi* that was narrowly tailored to apply to battlefield detainees, the Government added

[13] J. Luttig, Order, *Padilla v. Hanft*, No. 05-6 396 (4th Cir. Dec. 21, 2005) ("Order").

[14] Superseding Indictment of Nov. 17, 2005, *available at* http://www.wiggin.com/db30/cgi-bin/pubs/11-17-05%20Indictment.pdf.

a claim that Mr. Padilla had carried an assault rifle in Afghanistan. Declaration of Jeffrey N. Rapp, Director, Joint Intelligence Task Force for Combatting Terrorism (Aug. 27, 2004).[15]

The Government thereby succeeded in withdrawing from judicial review the distinct merits question on which the Supreme Court had granted certiorari in *Rumsfeld v. Padilla*,[16] and introduced instead the question that reached this Court: whether "the President possesses the authority to detain enemy combatants *who have taken up arms against the United States abroad* and entered into this country for the purpose of attacking American and its citizens from within." Order at 2 (emphasis added). By channeling Padilla into the battlefield facts relevant to the *Hamdi* decision, the Government avoided creating controlling precedent on a military seizure, on U.S. soil, of a civilian with no combat zone contacts. By this motion, the government is again trying to avoid a ruling on the issue that it successfully evaded in *Padilla*.

Judge Luttig has explained that the series of marked shifts in the Government's allegations against Mr. Padilla in the course of his military detention, followed by the indictment brought upon different facts than any of

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[15] Joint Appendix at 17-24, *Padilla v. Hanft*, No. 05-6396 (4th Cir.), *available at* http://www.wiggin.com/db30/cgibin/pubs/Joint%20Appendix-%20Part%201.PDF.

[16] *See* docketed "Questions Presented" in *Rumsfeld v. Padilla*, No. 03-1027, Feb. 20, 2004, available at http://www.supremecourtus.gov/qp/03-01027qp.pdf.

those previously alleged, have left "impressions" that may detract from the Government's credibility the next time it seeks review of a principle asserted on grounds of national security. (Order at 12) Specifically, the Government's conduct suggested to this Court that 1) the Government may have detained Padilla "by mistake," and 2) that the Government believed that its national security justifications for the detention could "yield to expediency"—that is, to the tactical interests of avoiding judicial scrutiny. *Id*.

c) Absence Of Judicial Oversight Has Enabled The Government To Engage In Abusive and Unlawful Practices.

The absence of meaningful judicial review of the Government's military conduct has enabled not only prolonged detentions but abusive treatment, apparently in the interest of conducting interrogations.[17] Indefinite detention for such purpose is patently unlawful. The *Hamdi* court dismissed any possibility that the AUMF authorizes it.[18] The dissenting justices in *Padilla* defined

[17] *E.g.*, Al-Marri's lawyers allege he has been denied medical treatment, hygiene, water supply, and warm clothing, and is often painfully shackled or subjected to cold temperatures, Complaint, *supra* n.4, at 13-14; Padilla's lawyers contend that he was traumatized by repeated interrogations for over three years and eight months. Deborah Sontag, "A Videotape Offers a Window Into a Terror Suspect's Isolation," N.Y. TIMES, Dec. 4, 2006 at A1.

[18] *Hamdi*, 542 U.S. at 521 ("Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized [by the AUMF].").

"incommunicado detention for months on end" as "an unlawful procedure."[19] Yet, like Hamdi and Padilla, al-Marri has been held without charges and interrogated for over three years. And for over three years, the precise questions raised in this appeal – the authority for military arrest and prolonged detention of a resident alien civilian, as well as the process that a resident alien is due – have never been reached by an appellate court.[20]

* * *

The history of the *Hamdi* and *Padilla* litigations suggests that unreviewable discretion to arrest and detain resident aliens that the Government now seeks would, in Justice O'Connor's words, "become a means for oppression and abuse" in al-Marri's case and others. Because of the highly-charged political atmosphere that attends all aspects of the "war on terror," judicial oversight to assure that the Government's factual claims are tested is especially important. While the Government receives great political benefit from announcing arrest and detention of terror suspects, it has little incentive to acknowledge mistakes. The history of

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[19] *Rumsfeld v. Padilla*, 542 U.S. 426, 465 (2004) (Stevens, J., dissenting, joined by Souter, Ginsburg and Breyer) ("Executive detention . . . may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure.")

[20] The Seventh Circuit did not reach the merits of al-Marri's detention, *al-Marri v. Rumsfeld*, 360 F.3d 707 (7th Cir. 2004), *cert. denied*, *al-Marri v. Rumsfeld*, 543 U.S. 809 (2004); *cf. Padilla v. Hanft*, 423 F.3d 386, 391 (4th Cir. 2005). Padilla's alleged battlefield conduct was critical to this Circuit's rejection of his appeal and the question of process due was not litigated.

Padilla's and Hamdi's military detentions suggest that deference to Executive Branch judgments in this context must be limited.

CONCLUSION

For the foregoing reasons, Respondent's Motion to Dismiss should be denied.

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Respectfully submitted,

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