No. 08-368

IN THE

Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,
Petitioner,

v.

COMMANDER DANIEL SPAGONE,
U.S.N., CONSOLIDATED NAVAL BRIG,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation founded in 1958 with over 13,000 subscribed 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.[1]

The NACDL first filed a brief in support of Petitioner's constitutional right to civilian criminal due process in June 2003 when opposing his transfer from civilian criminal detention to military custody by order of the President. Since then, the NACDL has opposed the Government's contention that the AUMF authorizes and the Constitution permits the deprivation of the Sixth Amendment rights of U.S. residents on the basis of the Executive's factual determination that they are "enemy combatants." The NACDL will demonstrate here that the Fourth Circuit's failure to hold the Government to its Sixth Amendment obligations was both forgetful of the

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

historical precedent giving rise to those obligations and neglectful of the disastrous consequences of setting them aside.

SUMMARY OF ARGUMENT

It has been our legal tradition for the past three centuries—since the Treason Act of 1696 up until the military detentions of Jose Padilla in 2002 and of Ali al-Marri in 2003—to subject the Government to the risks of a full adversarial criminal proceeding before assessing the guilt of a civilian who stands accused as an internal enemy of the state.

To withdraw the Sixth Amendment's guarantees based on the facts alleged here, in the context of a high security detention at the behest of the chief executive, runs counter to the original purpose of the Sixth Amendment's safeguards and to the Founders' paramount concern in securing them. The Sixth Amendment safeguards were not designed solely, or even primarily, for garden-variety crimes. Rather, the Founders well knew that these safeguards originated in the political trials of the late 17th-century when the Executive's interest in expedient, summary process was most forceful. The direct textual sources of the Sixth Amendment's safeguards in the First Congress's Treason Act, the Continental Congress's treason statutes, as well as the prototype of the Sixth Amendment's principles in the jury trial and treason clauses of Article III, reflect the Founders' understanding that providing criminal procedures precisely when the Executive and general public are most motivated to dispense with them serves as the paramount guarantee against tyranny. The Executive's unwillingness to allow a suspected internal enemy such as Mr. al-Marri to confront the

accusations against him cannot override the rule of Sixth Amendment criminal process now. It was just such unwillingness that gave rise to the safeguards in the first place.

The Fourth Circuit's failure to hold the Government to its Sixth Amendment obligations was both forgetful of this history and short-sighted. We will be doomed to revisit the abuses of our 17th-century legal forebears if we revert to their practices and rationales, forgetting the admonitions of our Founders. Justifications that have not been heard for over three hundred years resound in the judges' opinions below.

But not even expediency can justify the substitution of well-evolved arrest and detention procedures for the Government's purported unreviewable military discretion. The notion that Congress meant to deploy a rarely exercised military detention power devoid of legal protocols against its own constituents in order to better secure their safety is the less credible the more its practical effects are considered. First, the threat of military detention will compel unconstitutional guilty pleas. Second, constitutional standards for civilian arrest and initial detention will devolve into law of war standards immune from review or subject to abstention doctrines. Third, the Government will be able to avoid even curtailed habeas review of its conduct through the Hamdi settlement and Padilla transfer strategies it has already devised. The benefits of a largely unreviewable domestic military detention power are too speculative at best, and its disruptions too certain, to justify so radical a departure from

criminal due process—a bedrock principle of our system of limited government.

Both as a matter of faithfulness to our founding principles and as a matter of pragmatism, the Fourth Circuit's judgment that the AUMF may override the Sixth Amendment must be reversed.

ARGUMENT

I. THE GOVERNMENT CANNOT AVOID THE SIXTH AMENDMENT IN THIS CASE

The Government persuaded a majority of the court below that Congress has authorized the use of military force to capture and detain Mr. al-Marri and others like him without criminal trial and that this purported authorization is constitutional. But it is clear that the Constitution forbids such a reading of the AUMF. The Constitution requires full Sixth Amendment due process in this case, not merely because the Sixth amendment reserves those rights to all U.S. residents, but because Mr. al-Marri is precisely the type of prisoner whom the Sixth Amendment safeguards were originally devised to protect.

A. Sixth Amendment Safeguards Were Originally Devised for High Security Detentions

The Sixth Amendment "includes a compact statement of the rights necessary to a full defense," *Faretta v. California*, 422 U.S. 806, 818 (1975): "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of

Counsel for his defence." U.S. CONST. amend. VI. These four essential procedural safeguards "emerged" from "English and colonial jurisprudence," *Faretta*, 422 U.S. at 818, first appearing in the Treason Act of 1696, 7 & 8 William III (Eng.).[2] But this "charter of defensive liberties was not a general criminal procedural code."[3] Its "reforms were carefully restricted" to high security detainees accused of massive threats to the nation's security.[4] Significantly, although the British Act's procedural safeguards were extended to ordinary felons in the 1730s,[5] and although colonial treason statutes extended, by the 1770s, to other capital as well as

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[2] The Treason Act of 1696 provides seven safeguards: (i) that "persons accused as Offenders . . . shall have a true Copy of the whole Indictment . . . delivered to them . . . whereby to enable them . . . to plead and make their Defence"; (ii) that "every such Person so accused and indicted, arraigned or tried for any such Treason . . . shall be received and admitted to make his and their full Defence, by Counsel learned in the law, [(iii)] and to make any Proof that he or they can produce by lawful Witness or Witnesses, who shall then be upon Oath"; (iv) that "the Court before whom such Person or Persons shall be tried . . . assign to such Person and Persons such and so many Counsel . . . as the Person or Persons shall desire, [(v)] to whom such Counsel shall have free Access at all seasonable Hours; any Law or Usage to the contrary notwithstanding"; that (vi) "all Persons so accused and indicted for any such Treason as aforesaid . . . shall have copies of the panel of the Jurors who are to try them"; and (vii) that the accused "shall have the like Process of the Court where they shall be tried, to compel their Witnesses to appear for them at any such Trial or Trials, as is usually granted to compel Witnesses to appear against them." 7 & 8 Will. 3, c. 3 (1696).

[3] JOHN LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 97 (2005).

[4] *Id.* at 102.

[5] *Id.*

lesser crimes,[6] or even to all crimes in some colonies,[7] the Founders nonetheless reverted to the terms of the 1696 Act and gave priority in the text of Article III to procedural safeguards solely for prisoners held on national security grounds. *See* U.S. CONST. art. III, § 3, cl. 1.[8] The 1696 Act's seven safeguards were incorporated almost verbatim by the First Congress, which provided to treason and other capital offenders the same protections (but required an additional day for treason defendants to review the indictment and jury and witness lists).[9] In addition, the right to

[6] The Continental Congress recommended to the colonies that they pass treason legislation, drawing on the requirements of the 1696 Act. *See* HURST, THE LAW OF TREASON IN THE UNITED STATES 84 (1971); *id.* at 108-09 nn. 8-11, 114 n. 28 (citing the statutes of New Haven Colony, Connecticut, Massachusetts Bay, New Hampshire, Delaware, North Carolina, Pennsylvania, Rhode Island, South Carolina, and Virginia).

[7] *See, e.g.*, Virginia Declaration of Rights, VIII (June 12, 1776).

[8] The Committee of Detail drafted Art. III, § 3, cl. 1, the Treason Clause, in August 1787. The Treason Clause was viewed as "summing up the law pertaining to subversive activities against the Federal Government." HURST, *supra*, at 158. The broad admonitions implicit in the clause and inferable from its history are now enforced by the Fifth and Sixth Amendments and therefore still observed when charges are brought under the array of statutes now devised for prosecuting crimes of terrorism. Where the Founders saw the necessity of defining the elements of the crime and its procedural safeguards together, the Sixth Amendment now ensures that all charges will be tried with appropriate safeguards.

[9] The seven safeguards of the 1696 Act incorporated by the First Congress include: (i) a copy of the indictment; (ii) a list of the jurors (and witnesses, Congress adds); (iii) presentation of a full defense by counsel learned in the law; (iv) assignment of counsel by the judge—not to exceed two; (v) counsel's free access to the defendant at all seasonable hours; (vi) presentation of any defense or any proof defendant can produce; and (vii) compelling

remain silent was guaranteed first to national security defendants by the First Congress, 1 Stat. 112, § 30 (1790), and in the right against coerced self-incrimination in the Treason Clause's requirement of "confession in open court," before it was incorporated in the Fifth Amendment in 1791. When James Madison set out to draft the Sixth Amendment, *see Faretta*, 422 U.S. at 818, he was extending to every common criminal the protections previously associated most closely with prisoners who presented extraordinary threats to the security of the nation.

Thus, the idea that the rights set forth in the Sixth Amendment need only be provided to familiar criminals such as "car thieves and drug dealers,"[10] yet may be withheld from a high-security terrorism suspect detained on the President's orders, gets our history backwards. Mr. al-Marri is entitled to criminal due process not because the Sixth Amendment does not permit detention without trial in any instance,[11] but, rather because the Sixth

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of witnesses in like process to that granted to the prosecution. *See* Act of April 30, 1790, 1 Stat. 112, § 29.

[10] "[O]ur critics insist that these combatants should receive the benefit of the rules and procedures of our criminal justice system, those tried and true methods that we use to deal with criminals such as car thieves and drug dealers." Remarks by Alberto R. Gonzales, American Bar Assoc. Standing Committee on Law and National Security, *available at* http://www.fas.org/irp/news/2004/02/gonzales.pdf.

[11] *Cf. Al-Marri v. Pucciarelli*, 534 F.3d 213, 305 (4th Cir. 2008) (Wilkinson, J., concurring and dissenting in part) (citing diverse contexts in which preventative detention as an alternative to criminal prosecution is authorized).

Amendment cannot be read to permit exception in this instance.

B. The Reasoning In *Crawford* Applies *A Fortiori* Here

The form that the Government's evidence against Mr. al-Marri takes—a triple hearsay compilation by one government official of *ex parte* examinations of unnamed sources by other unnamed government officials[12]—is exactly the type of evidence that the Sixth Amendment's confrontation clause was originally designed to test, as *Crawford* makes clear.[13] But there is a more trenchant reason why the Sixth Amendment safeguards must apply here. The Sixth Amendment's direct textual sources, namely the First Congress's Treason Act of 1789, the colonial treason statutes, and the Treason Act of 1696, 7 & 8 Will. 3, together demonstrate that the Sixth Amendment's safeguards were originally enacted to test the substance of the kind of accusations that the Government makes here, as well.

Judge Wilkinson asserts below that "[n]othing in our constitution requires the elected branches to treat terrorism invariably as a criminal offense," and that "the judiciary has no right in the name of constitutional law to compel criminal prosecution of

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[12] The Government filed a Declaration of Jeffrey N. Rapp, Sept. 9, 2004, and a classified, secret declaration of Mr. Rapp as evidence. Pet. App. 449a.

[13] *Crawford v. Washington*, 541 U.S. 36, 50 (2004). "[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."

terrorist suspects in all instances."[14] But the reasoning in *Crawford* is to the contrary. In *Crawford*, this Court applied the forgotten historical rationale for the right of confrontation to the question of whether it could be withheld, clarifying that while the right might lawfully be unavailable for some hearsay exceptions, it could not be withdrawn in the context of an *ex parte* examination by government officials. That is because the problem of *ex parte* examinations had given rise to the confrontation safeguard; such testimony could not now work an exception to the safeguard. The rule in Crawford applies *a fortiori* here where the entire Sixth Amendment has been set aside and in the very context that its provisions were specifically devised to address: detention at the behest of the chief executive on accusations of dire threat to the nation.

C. Domestic Enemy Combatant Detentions Resemble 17th-Century State Trials and Rely on Their Rationales

"In the 16th and 17th centuries, the accused felon or traitor stood alone, with neither counsel nor the benefit of other rights—to notice, confrontation, and compulsory process—that we now associate with a genuinely fair adversary proceeding." *See Faretta*, 422 U.S. at 823. Procedural safeguards were not unknown prior to 1696, but were deliberately withheld from felony and treason defendants in order to secure the prosecution's success.[15] The prisoner

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[14] *Al-Marri*, 534 F.3d at 304.

[15] "While a right to counsel developed early in civil cases and in cases of misdemeanor, a prohibition against the assistance of counsel continued for centuries in prosecutions for felony or treason." *Faretta*, *id.* (citing 1 J. STEPHEN, A HISTORY OF THE

was "kept in close confinement till the day of his trial. He had no means of knowing what evidence had been given against him. He was not allowed as a matter of right, but only as an occasional, exceptional favour, to have either counsel or solicitors to advise him . . . ."[16] As is true today in Mr. al-Marri's case, the pre-1696 prisoner was not permitted "to see his witnesses and put their evidence in order." *Id.* The prisoner's witnesses were not permitted to be sworn, *id.* at 398, and prisoners had no copy of the indictment against them or of the panel of jurors, *id.* at 398-99. All this amounted to one overriding concern: keeping the evidence against the detainee secret. "The real grievance was keeping the prisoner in the dark as to the evidence against him." *Id.* at 399. But more tellingly, the reasons for keeping the prisoner in these conditions and limiting his ability to mount a defense were the same ones now offered by the Government and the court below for providing U.S. residents with a curtailed "post-detention status hearing" rather than a jury trial: to prevent communication with co-conspirators; to prevent willing or inadvertent relaying of messages through counsel; the urgency of obtaining a conviction, and of keeping the prisoner from escaping. In sum, overriding concern with risk and inconvenience outweighed regard for individual liberty. The same weighty concerns come to bear on Mr. al-Marri in the Fourth Circuit's judgment. As Judge Wilkinson

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CRIMINAL LAW OF ENGLAND 341 n.18 (1883)); *see also* LANGBEIN, *supra*, at 36.

[16] 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 398 (Burt Franklin ed. 1883).

explains, "serious threat to community safety" and "significant barriers to criminal prosecution" are reason enough to deny Mr. al-Marri procedural safeguards. Pet. App. 209a. In the Fourth Circuit's views, as in the 17th century, "[t]he sentiment continually displays itself that the prisoner is half, or more than half, proved to be an enemy of the King and that, in the struggle between the King and the suspected man, all advantages are to be secured to the King whose safety is far more important to the public than the life of such a questionable person as the prisoner."[17]

The crown's state trials were not just about plans to murder the monarch but about general security threats to the nation, "a miserable slaughter among the faithful Subjects . . . throughout this whole Kingdom."[18] "Catholics were accused of preparing to massacre protestants and introduce an army from abroad. . . . Hysterical fears of an impending massacre of all protestants gripped London, and anti-papist excitement quickly enveloped all sections of the population."[19] A short list of the plots and rebellions prosecuted in the period demonstrate that the times were no less fraught with terror than our own. Within ten years, the Popish Plot (1678-80) the Meal Tub Plot (1680), the Rye House Plot (1685), the Bloody Assizes (1685) and the Trial of the Seven Bishops (1688), all driven by anti-papist or anti-Whig

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[17] STEPHEN, *supra*, at 397.

[18] The Arraignment, Tryal and Condemnation of Ambrose Rookwood . . . upon the New Act of Parliament for Regulating Tryals in Cases of Treason (1696).

[19] J. R. JONES, COUNTRY & COURT: ENGLAND, 1658-1714, at 201-02 (1978).

political factionalism, led to crops of martyrs. Executions on trumped up charges finally drew attention to the unfairness of the terror defendant's position, raising sufficient alarms to cause Parliament to enact the reforms, LANGBEIN, *supra* at 78—after debating the 1696 Act for eight years.[20]

In sum, the concerns for safety and expediency articulated by the Government here are the very same that gave rise to centuries of abuses, which in turn led to the early formulations of the rights now enshrined in the Sixth Amendment. The Court should therefore firmly reject the Government's misplaced efforts to revive these concerns now as a justification for depriving U.S. residents of their rights.

II. THE GOVERNMENT'S PURPORTED AUTHORITY TO AVOID THE SIXTH AMENDMENT DISRUPTS THE CRIMINAL JUSTICE SYSTEM AND THE COURTS

Apart from its constitutional infirmities, the notion that Congress meant to authorize the displacement of criminal due process with an alternative military detention scheme for persons seized within the United States is barely credible as a practical matter. Yet its implications must be examined. Al-Marri is the sole remaining domestically detained "enemy combatant," and (with Hamdi and Padilla, both of whom have been released from military custody) one of only three U.S. citizens or residents to have been detained pursuant to the AUMF. But the uniqueness of Mr. al-Marri's predicament provides no assurance that the Government intends to use its domestic

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[20] *See* LANGBEIN, *supra*, at 86.

detention authority sparingly in future. "Enemy combatant" detentions may at some future point become more prevalent, disrupting and distorting the administration of criminal justice.

A. Discretionary Military Detention Will Force Unconstitutional Plea Bargains

The threat of military detention will corrode the adversarial system by coercing plea bargains. Under the Fourth Circuit's rule, the Executive will have two detention tracks to choose from—criminal and military—and will be free to choose the lesser burdens of the military route at its discretion. As former Attorney General Gonzales explained, "[t]here is no rigid process for making such determinations—and certainly no particular mechanism required by law."[21] The result is that the threat of prolonged imprisonment in a 9 x 6 foot cell, incommunicado—a condition of confinement that this Court has compared to "the rack, the thumbscrew, [and] the wheel," *Chambers v. Florida*, 309 U.S. 227, 237 (1940)—will hang over every terrorism prosecution, even when the designation is not made.

The purpose of the adversarial criminal process is to uncover the truth of the defendant's guilt or innocence *prior to* prolonged detention, so as to ensure that only the guilty are punished.[22] Plea

[21] Gonzales, *supra*, at 12.

[22] *Bell v. Wolfish*, 441 U.S. 520, 531 (1979) (conditions of pretrial detention violate due process when they amount to punishment); *see also Wilkins v. May*, 872 F.2d 190, 194 (7th Cir. 1989) ("if ever there were a strong case for 'substantive due process,' it would be a case in which a person who had been arrested but not charged or convicted was brutalized while in custody"); *cf.* U.S. CONST. amend. VI ("the accused shall enjoy the right to a speedy . . . trial").

bargains likewise aim for accuracy and fairness in that an "intermediate judgment" can ensure the "relative equality of results as between defendants similarly situated" and "relative congruence between the formal verdict and . . . conduct."[23] For this reason, "the full-blown negotiated plea is not merely an appeal for mercy; it is an adversary process."[24] As recently noted, a guilty plea is "highly tactical, since it usually requires balancing the prosecutor's plea bargain against the prospect of better and worse outcomes at trial."[25] This balancing and negotiation cannot occur when the Government has the leverage to effectively force a plea agreement by threatening to transfer a defendant to an isolated brig for prolonged interrogation. Likewise, for the defendant, the very possibility of transfer to indefinite military detention in severely punishing conditions, subject only to a *Hamdi* status hearing, creates a threat so disproportionate to the risks of criminal sentencing that it all but forces the defendant to plead guilty even where there is a low risk of criminal conviction, in violation of due process.[26] Most crucially, because the plea bargain is at the Executive's discretion, and there are no rules governing the unilateral decision

[23] ARNOLD ENKER, PERSPECTIVES ON PLEA BARGAINING, IN PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS, 113-14 (1967).

[24] DONALD NEWMAN, CONVICTION 216 (1966).

[25] *Gonzalez v. United States*, 128 S. Ct. 1765, 1774 (2008) (Scalia, J. concurring).

[26] Carl Takei, "Terrorizing Justice: An Argument that Plea Bargains Struck Under the Threat of 'Enemy Combatant' Detention Violate the Right to Due Process," 47 B.C. L. REV. 581 (2006).

whether to pursue trial, plea bargain, or transfer,[27] the Government is most likely to use its military option when it has the least viable evidence, a tactic that may impose torturous conditions on suspects with the strongest defense against their charges, while preserving the right of trial by jury for the most clearly guilty. In this way, even the threat of an enemy combatant designation perverts the truth-seeking objectives of the adversarial criminal trial.

There is more than theoretical support for the prediction that the Fourth Circuit's rule, providing the Government with the option of "enemy combatant" designation, will force guilty pleas in violation of due process. The Lackawanna Six[28] anticipated that they could be transferred to military custody before they were all sentenced under plea agreements in 2003.[29] Indeed, both the Vice President and Secretary Rumsfeld reportedly had pushed for military detention of the six,[30] and U.S.

[27] "[N]umerous options are considered by the various relevant agencies (the Department of Defense, CIA and DOJ), including the potential for a criminal prosecution, detention as a material witness, and detention as an enemy combatant." Gonzales, *id.*, *supra* n.10. "Options often are narrowed by the type of information available, the individual's threat potential and value as a possible intelligence source." *Id.* at 13.

[28] *See* Dina Temple-Raston, "Enemy Within? Not Quite," WASH. POST, Sep. 9, 2007, at B1 (on the six Yemeni-American men from Lackawanna, New York convicted of training at an al-Qaeda camp).

[29] Scot J. Paltrow, "U.S. Exerts Unusual Pressure on Group of Terror Suspects," WALL ST. J., Apr. 1, 2003; Eric Lichtblau, "Wide Impact From Combatant Decision is Seen," N.Y. TIMES, June 25, 2003.

[30] Michael Isikoff & Daniel Klaidman, "The Road to the Brig: After 9/11, Justice and Defense Fought over How to Deal with

Attorney Michael Battle "conceded that his office had discussed that possibility with the Defense Department."[31] As a result, "'[w]e had to worry about the defendants being whisked out of the courtroom and declared enemy combatants if the case started going well for us,' says Patrick J. Brown, attorney for one of the six. 'So we just ran up the white flag and folded.'"[32] "Defense attorneys describe[d] working blind, never knowing how far Washington would push. . . . In the end the government took the enemy combatant designation off the table and the defendants pleaded guilty." *Id.* And, as a condition of the plea, the Government agreed to "forego any right it ha[d] to detain the defendant as an enemy combatant."[33]

Al-Marri's case demonstrates the catastrophic results of pleading innocence under threat of military detention. The Government first detained al-Marri as a material witness on December 12, 2001, then filed successive charges of credit card fraud, lying to

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Suspected Terrorists," NEWSWEEK, Apr. 26, 2004, at 26, *available at* http://www.newsweek.com/id/53781/output/print.

[31] Phil Hirschkorn, "Fourth Guilty Plea in Buffalo Terror Case," CNN.com, Apr. 9, 2003, *available at* http://www.cnn.com/2003/LAW/04/08/terror.cell/.

[32] Michael Powell, "No Choice But Guilty: Lackawanna Case Highlights Legal Tilt," WASH. POST, Jul. 29, 2003, at A1.

[33] Press Release, U.S. Dep't of Justice, United States Attorney's Office Successfully Concludes Terrorism Case with Sixth Conviction of Al Qaeda Supporter (May 19, 2003), at Plea Agreement, 28; on file with Yin, "Coercion and Terrorism Prosecutions," *infra*, n.35 (quoting plea agreement and noting the terms were similar in all six).

a federal agent, bank fraud and identity theft. Br. for Pet'r at 2-4. When al-Marri pled not guilty and mounted an aggressive defense, as was his constitutional right, *id.* at 3, the Government made the decision to seek his transfer to military custody. *Id.* at 4-6. As former Attorney General Ashcroft describes the decision, Al-Marri "rejected numerous offers to improve his lot by cooperating" and "made himself a tough case."[34] The Attorney General implies that al-Marri could have spared himself designation as an enemy combatant and transfer to a U.S. naval brig where he remains to this day without contact with the outside world. But if Mr. al-Marri had anticipated the Government's tactics, as the Lackawanna Six were able to, he surely would not have chosen to defend his case. Cooperating with the prosecutor cannot be termed a choice or bargain when refusal leads to total loss—in this case, the purported loss of all the rights and protections of civilian status.[35]

B. Domestic Military Arrest and Detention Will Displace Civilian Procedures

The Government's purported authorization to use military force against U.S. civilians dispenses with the evolved rules and norms of civilian arrest and detention and substitutes a procedural blank slate. Just as there are no laws controlling the President's decision to detain, *see* Gonzales, *supra* n.10, there are

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[34] JOHN ASHCROFT, NEVER AGAIN: SECURING AMERICA AND RESTORING JUSTICE 169 (2006).

[35] *See* Tung Yin, "Coercion and Terrorism Prosecutions in the Shadow of Military Detention," 2006 B.Y.U. L. REV. 1255 (2006) (comparing implied threat of military transfer to blackmail and applying vindictive prosecution doctrine).

no guidelines governing the conduct of the capture and initial detention. And even if there were military guidelines controlling these questions, it is not likely that they would be reviewable by civilian courts. The Government assured the en banc judges at oral argument below that all claims regarding capture and detention could be raised in the *Hamdi* proceeding.[36] But the *Hamdi* plurality holds that "the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war,' *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004), and therefore not subject to civilian claims. The plurality envisions that "the errant tourist, embedded journalist, [and] local aid worker" found on the battlefield would have "a chance to prove military error" at a *Hamdi* hearing, *id.* at 534, but certainly could not challenge how violently they were detained, or for how little probable cause, or with how much collateral damage. These are military decisions. Yet once the "enemy combatant" becomes a U.S. resident, and his home or workplace becomes the constructive "battlefield," the lack of check on the mode of capture or conditions of initial confinement presents a host of practical and

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[36] *See al-Marri v. Wright*, No. 06-7427, (4th Cir. Oct. 31, 2007) unofficial transcript of oral argument at 100-102, *available at* http://brennan.3cdn.net/e75ca720b7416fd646_bym6vjh5i.pdf ("Unofficial Transcript of Oral Argument"). Asked how U.S. residents would be protected against baseless or discriminatory detentions, or how they might bring claims for abusive conditions of arrest and confinement, the Government's puzzling response was that the same curtailed *Hamdi* hearing that denies all Sixth Amendment rights and institutes a presumption in the Government's favor would provide a full opportunity to raise any other applicable constitutional or statutory claims. *See id.*

legal problems that may degrade the civilian constitutional standards:

1. Notice: Under the AUMF's purported military authorization, no rules require the military to take responsibility for the disappearance of a U.S. resident or provide notice as to why the prisoner has been detained, where he or she is being held, or who is the custodian. No rules specify how long the Department of Defense ("DOD") can conceal that information or whether the public or the prisoner's family has the right to be informed. The Government provided notice to al-Marri's attorneys ad hoc, as a matter of discretion, at the Judge's request. *See al-Marri v. Bush*, No. 03-1220, Opp. to Mot. to Dismiss, Ex. B (C.D. Ill. July 23, 2003), 14-15. But it is unclear how the military intends to initiate the detention of U.S. residents when they are not already under civilian criminal jurisdiction. Presumably, the laws of war and judicial abstention doctrines that apply to foreign policy decisions would apply to the conduct of military captures in the United States. *See*, *e.g.*, *Bancoult v. McNamara*, 445 F.3d 427 (D.C. Cir. 2006) (dismissing as nonjusticiable claims arising from the Government's forcible removal of plaintiffs from their homes); *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005) (dismissing claims of sons of Chilean general kidnapped at Secretary of State's urging); *Christopher v. Harbury*, 536 U.S. 403 (2002) (reversing judgment that widow of kidnapped dissident had claim for relief from CIA officials who falsely denied knowledge of his location).

2. Denial of Counsel: The *Hamdi* plurality held that persons detained as "enemy combatants" "unquestionably ha[ve] the right to access to counsel

in connection with their [status] proceedings." *See* 542 U.S. at 539 (plurality op.). In addition, the plurality agreed that "indefinite detention for the purpose of interrogation is not authorized [by the AUMF]." *Id.* at 521. On the same day, three other Justices (along with one member of the *Hamdi* plurality) agreed that prolonged interrogation in isolation—the very purpose that the Government had repeatedly offered as justification for the detentions—was unlawful. *See Rumsfeld v. Padilla*, 542 U.S. 426, 465 (2004) (Stevens, J. dissenting). The Government appeared to comply, ceasing the interrogation of al-Marri, which, at that point, had continued for two years.

Yet before the court below, the Government reasserted its putative authority to seize any U.S. resident and hold him for the purpose of interrogation, without access to counsel or notice to family or the public, for "some period" of time.[37] In oral argument en banc, Mr. Garre could not clarify at what point he believed a U.S. resident's right to counsel attaches or after what period of time interrogation in isolation becomes unlawful. *Id.* at 104.

Thus, despite admonitions from members of this Court that the Government's "purpose of interrogation is not authorized" by the AUMF, and that "incommunicado detention for months on end" is an "unlawful procedure[]," the Government continues to justify its alleged detention authority on the basis that it allows for incommunicado detention and a period during which the right to counsel is suspended. And rather than set any standards for

[37] *See* Unofficial Transcript of Oral Argument at 103.

the interrogation period, the Government proposes that "enemy combatant cases ought to be taken and viewed very carefully on a case-by-case basis, with the particular facts of each case." *Id.* at 97.

3. Uncertain remedy for constitutional or other violations in course of capture or initial detention: If a U.S. resident "enemy combatant" has no Sixth Amendment rights, it is not clear what other constitutional rights could be vindicated by a *Hamdi* status hearing. Although the conditions of criminal detention are frequently subject to habeas review, it is not clear whether a U.S. resident detained militarily by the President and deprived of Sixth Amendment rights would nevertheless be protected by the Eighth Amendment, or whether the Government intends to hold itself to army regulations or other law of war standards. Would the DOD or its individual officers be liable for Fourth or Fifth Amendment privacy or property violations that occur during the capture or period of detention? Or would the Government be entitled to military exceptions to its waiver of sovereign immunity and other doctrines exempting military conduct from review? *See*, *e.g.*, 28 U.S.C. § 2680(j) (excepting from the Federal Tort Claims Act "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war"). Alternatively, would law of war standards apply to the conditions of military detention? Would military standards apply to the conditions of detention, even if the habeas petitioner eventually prevails? The Government responded with assurances when asked at en banc oral argument whether "there would be no

impediment to a [§] 1983 suit,"[38] but there are significant jurisdictional impediments whenever a civilian seeks to remedy injuries arising from military conduct. The Government's contention that a presumptive "enemy combatant" forced to rebut hearsay testimony without the safeguards of the Sixth Amendment could expect to prevail at the same hearing or later on a *Bivens*, FTCA or common law claim is simply not credible.

4. The Rights of Bystanders: Finally, it is unclear whether injuries to bystanders or their property caused by a military capture would be subject to civil claims or whether they would be unreviewable under various statutes and doctrines immunizing military conduct.

In sum, under the Fourth Circuit's rule, the military has free reign to conduct the capture and temporary detention of U.S. residents as it sees fit. And if a capture or detention violates the Constitution or the laws of war, the federal courts' opportunity to review the military's conduct will be severely limited. While courts may struggle to create new rules to address these problems, this would be to reinvent the Bill of Rights, provision by provision. The number of legal issues that are left indeterminate in this scheme highlights the superiority of our well-developed civilian arrest and detention procedures.

C. Temporary Military Detentions Will Evade Review

Hamdi's provision for habeas jurisdiction and a post-detention status determination provides the only

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[38] Unofficial Transcript of Oral Argument at 112-13.

third branch check on the Government's purported military authority under the AUMF to detain U.S. residents. But, at best, the *Hamdi* hearing prevents only *indefinite* military detention without some check. The Government may use its *Hamdi* settlement and *Padilla* transfer strategies to avoid a *Hamdi* hearing.

The DOD has little incentive to reach a fact-finding proceeding, even a constitutionally curtailed one, if it can instead settle with the U.S. resident and obtain waiver of all claims. In the same way, the DOD has little incentive to hold a U.S. resident indefinitely if it can hold him only temporarily and then transfer him to civilian criminal custody when the burdens of review are imminent. We have seen both these tactics used in the only two other enemy combatant cases besides al-Marri's, and the Government may continue this pattern in future, despite the rule in *Hamdi*.

1. Hamdi Settlement

After holding Yaser Hamdi for over three years in solitary confinement on the basis of nine paragraphs of unsupported hearsay, the Declaration of Michael H. Mobbs, *Hamdi v. Rumsfeld,* No. 2:02CV439 (E.D. Va., July 24, 2002), the Government negotiated an agreement rather than submit to even curtailed review of the factual basis for Hamdi's purported combatant status.[39] The Agreement releases Hamdi from custody, recording his assertion that he "never affiliated with or joined a Taliban military unit, never was an enemy combatant, that is never was part of or supported forces hostile to the United

[39] Motion to Stay Proceedings, *Hamdi v. Rumsfeld*, No.2:02CV439 (E.D. Va. Sep. 24, 2004), Agreement.

States and, never engaged in armed conflict against the United States." *Id.* In addition, Hamdi "also maintains he was never a member of nor affiliated with al Qaeda." *Id.* But in return for his release and transport to Saudi Arabia, Hamdi agrees, *inter alia*, to forfeit his U.S. nationality, *id.* ¶ 8, and all claims against the United States or its officers for any violation of law prior to the agreement date, *id.* ¶ 13.

The *Hamdi* settlement is the presumptive enemy combatant's equivalent of a plea bargain. As in the civilian criminal context, there is no real bargaining power or ability to refuse when the alternative is the immeasurable risk of unending confinement in unremediable conditions. A U.S. resident with potential claims arising from her military detention would have to abandon them given the opportunity for release. The Government's incentive, particularly with U.S. residents mistakenly detained, will be to settle and obtain release of any claims so as to avoid creating limiting precedents. But the detained U.S. resident will not have the competing incentive to risk unlimited detention in order to litigate rights already violated.

With the threat of indefinite military detention as a bargaining tool, the Government will invariably obtain favorable settlement terms such as the forfeiture of citizenship and the release of claims relating to the detention. The Government may thus wield an extensive detention authority on the sole basis of the President's designation with no practical judicial check.

2. Padilla Transfer

Alternatively, under the Fourth Circuit's rule, the Government may detain a U.S. resident militarily,

then charge and transfer him to civilian criminal custody prior to his *Hamdi* hearing, thereby avoiding all factual challenge to his temporary "enemy combatant" status. In Padilla's case, the Government was able to avoid both a remand to District Court for a *Hamdi* hearing and imminent review by this Court by filing an indictment for conspiracy after holding Padilla for over three years.[40] During those three years, the Government had filed affidavits and held press conferences[41] "steadfastly maintaining," as Judge Luttig noted, "that it was imperative in the interests of national security" that Padilla be detained without charges.[42] Yet these *ex parte* declarations and public announcements were set aside without ever reaching the limited review of a *Hamdi* hearing, much less cross-examination. Their dire warnings presented no obstacle to Padilla's release from military custody when unfavorable review loomed. The Fourth Circuit panel was left with "impressions" that national security interests had "yield[ed] to expediency." *Id.*

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[40] Superseding Indictment of Nov. 17, 2005, *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005).

[41]Declaration of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy, at 3-4 (Aug. 27, 2002); Declaration of Jeffrey N. Rapp, Director, Joint Intelligence Task Force for Combatting Terrorism (Aug. 27, 2004); Declaration of Vice Admiral Lowell E. Jacoby (USN), Director of the Defense Intelligence Agency (Jan. 9, 2003); *see*, *e.g.*, U.S. Dep. Att'y Gen. James Comey, Justice Department News Conference Concerning Jose Padilla (June 1, 2004) (transcript available at 2004 WL 1195419).

[42] Order, *Padilla v. Hanft*, No. 05-6396 (4th Cir. Dec. 21, 2005), 12.

Thus, as long as the detentions remain temporary, terminated by either settlement or transfer, they can go completely unreviewed and can serve unlawful ends. And because the Government can avoid review through two "catch and release" strategies, the unlawful purpose and conditions that the Government has already pursued—prolonged interrogation in isolation and cruel and degrading treatment—are likely to be repeated.

Moreover, because manipulation of the detention period at the Executive's sole discretion may prevent the federal courts from ever setting constitutional standards for the initial capture or detention of U.S. residents, many other issues that are well-regulated in the criminal law, for reasons of safety as well as fairness, will be left undetermined.

D. Constructive "combatants" and "battlefields" are without clear limits

The Fourth Circuit accepted the Government's expansive construction of the term "enemy combatant" to reach Mr. al-Marri, who was arrested unarmed in his home and detained pursuant to civilian criminal proceedings. But what is the limit on who or what may be construed as a "combatant" acting on a "battlefield"? Al-Marri is a civilian according to all standard dictionary definitions, as well as established law of war understandings that mark the status distinctions articulated in *Quirin* as well as *Milligan*. But according to terms that the Government introduced in 2002, Mr. al-Marri is a constructive combatant, just as Mr. Hamdi and Mr. Padilla were both, for the duration of the litigation of their military detentions, constructive combatants, although the Government never produced evidence

that either Hamdi or Padilla was ever present in any zone of combat. Indeed, the Government has consistently manipulated traditional civilian and military distinctions, refusing to acknowledge that it cannot shift legal paradigms by shifting terminology.

If the Fourth Circuit's reasoning is correct, then there is no limit to the political branches' power to redefine other types of civilians as "enemy combatants," expanding constructive military status to reach new exigencies and conveniences. The justifications offered for reading the AUMF to authorize the military detention of terrorism suspects set no limit on Congress's authority to further militarize jurisdiction over other crimes. The proposed exclusion of a class of suspects from the criminal justice system, if constitutional at all, is without clear limit.

For example, Judge Wilkinson's justifications for carving out an exception to the general rule of Sixth Amendment process—"threat[s] to community safety" and "barriers to criminal prosecution"—could be raised about any number of other types of criminal prosecutions.[43] There is no reason why, under the Fourth Circuit's rule, Congress could not also authorize military detention of domestic terrorists, including individuals acting without an organization, so that anyone, acting alone or as part of a cell, targeting either the government or civilians, could become the subject of an Authorization for the Use of Military Force. Where will the requirement for civilian Sixth Amendment due process be redrawn?

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[43] *Al-Marri*, 534 F.3d at 309 (Wilkinson, J., concurring and dissenting in part).

Constructive combatant status and the constructive battlefield may be expanded *ad absurdum*. As counsel for the accused argued in *Quirin*, "'if you take the theory that everything that was done that might aid the enemy makes it a theater of operations, you reduce the thing to an absurdity.'" PIERCE O'DONNELL, IN TIME OF WAR 226 (2005).[44] Once "the battlefield" becomes a metaphor for a multi-agency review process and the evidence is not "buried in the rubble of war," *Hamdi*, 542 U.S. at 532 (plurality op.), but rather in the discoverable documents of civilian agency officials, then there is no longer a practical reason to maintain the conceit of "enemy combatant" status or the accompanying presumption in favor of the Government's *ex parte* testimony—nor any reason to curtail Sixth Amendment criminal process with a *Hamdi* style review. Rather than allow an exceptional time of war decision, *Quirin*, to authorize a system of routinized, administrative domestic military detentions, the Court should take the opportunity that a sustained crisis provides to retrench our Sixth Amendment principles.

CONCLUSION

The judgment below should be reversed.

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[44] In *Quirin*, the United States focused on the fact that the saboteurs stashed their uniforms, a war crime, in order justify the Government's assertion of military criminal jurisdiction. "Milligan never wore the uniform of the armed forces at war with the United States. Petitioners did. Milligan was a resident of Indiana. He did not . . . enter into a theater of operations. The Petitioners did." When asked if "[t]he mere absence of uniforms makes a difference," the Government's attorney replied, "[a]ll the difference in the world." 317 U.S. 1, 222 (1940).

Respectfully submitted,

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