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TAKING THE "COMBAT" OUT OF THE "ENEMY COMBATANT" CATEGORY: YET ANOTHER EXPANSION OF THE PRESIDENT'S AUTHORITY TO INDEFINITELY DETAIN "ENEMY COMBATANTS" WITHIN THE UNITED STATES—*AL-MARRI V. PUCCIARELLI*, 534 F.3D 213 (4TH CIR. 2008)

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> "In these uncertain times, we must tread carefully when balancing our need for national security with our rights as individuals. This case is fraught with danger . . . ."[1]

I. INTRODUCTION

An inherent tension exists between our country's national security and the fundamental freedoms of U.S. citizens. Specifically, this tension is the difficulty, if not impossibility, of reconciling the need to fight and prevent terrorism with the need to uphold the basic values of a free society.[2] One can easily comprehend such tension when considering one of the most controversial national security issues of the twenty-first century: the scope of the President's authority to detain individuals as enemy combatants.[3] The U.S. Court of Appeals for the Fourth Circuit addressed this issue in *al-Marri v. Pucciarelli*.[4] In *al-Marri*, a 5-4 majority held that the President is congressionally authorized to order the indefinite military detention of *civilians* who are captured in the United States.[5]

On September 10, 2001, Ali Saleh Kahlah al-Marri, a Qatari national and a legal resident of the United States, lawfully entered the United States with his wife and children.[6] The following day, al

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1. Al-Marri v. Pucciarelli, 534 F.3d 213, 276 (4th Cir. 2008) (Traxler, J., concurring), *vacated sub nom.* al-Marri v. Spagone, No. 08-368, 2009 WL 564940 (U.S. Mar. 6, 2009) (mem.).

2. *See Ten Questions on National Security*, 34 WM. MITCHELL L. REV. 5007, 5076 (2008).

3. Gregory H. Shill, *Enemy Combatants and a Challenge to the Separation of War Powers in* al-Marri v. Wright, *487 F.3d 160 (4th Cir. 2007)*, 31 HARV. J.L. & PUB. POL'Y 393, 393 (2008). Once the Government detains an individual whom it properly labeled as an "enemy combatant" in the war on terror, the Government contends that he is not entitled to prisoner-of-war (POW) status or the protections of the Constitution. Deva Solomon, Note, *Can Government Indefinitely Detain Individuals Accused of Being Enemy Combatants?*, 34 WM. MITCHELL L. REV. 5155, 5157–58 (2008). While the scope of the enemy-combatant category is controversial today, the practice of militarily detaining enemy combatants actually predates the Constitution. *See Ex parte* Quirin, 317 U.S. 1, 31 (1942) ("Such was the practice of our own military authorities before the adoption of the Constitution, and during the Mexican and Civil Wars.").

4. 534 F.3d at 216–17.

5. *Id.* at 216.

6. *See* Petition for Writ of Habeas Corpus ¶ 19, al-Marri *ex rel.* Berman v.

Qaeda perpetrated horrific terrorist attacks on American soil. As part of the Government's investigation of the 9/11 attacks, the FBI arrested al-Marri nearly three months later as a material witness.[7] Thereafter, the Government imprisoned al-Marri and eventually charged him with several federal criminal offenses.[8]

In June 2003, less than a month before al-Marri's criminal trial, President George W. Bush signed an order in which he stated that al-Marri "is, and at the time he entered the United States in September 2001 was, an enemy combatant."[9] In light of this declaration, the Government successfully moved to dismiss the pending criminal indictment, transferred al-Marri to military custody, and transported him to the Naval Consolidated Brig in Charleston, South Carolina.[10] Al-Marri has remained in military custody ever since.[11]

Today, al-Marri is the only person on the American mainland known to be held as an enemy combatant.[12] On July 15, 2008, the Fourth Circuit[13] sitting en banc set forth a fractured decision that addressed two related issues.[14] First, assuming the truth of the Government's allegations against al-Marri, did "Congress . . . empower[] the President to detain al-Marri as an enemy

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Wright, 443 F. Supp. 2d 774 (D.S.C. 2006) (No. 2:04-2257-HFF). Al-Marri returned to the United States to pursue a master's degree in Peoria, Illinois, where he obtained a bachelor's degree in 1991. *Id.*

7. *Al-Marri*, 534 F.3d at 219 (Motz, J., concurring).

8. Petition for Writ of Habeas Corpus, *supra* note 6, ¶¶ 20, 22–23. The Government charged al-Marri with possession of counterfeit credit card numbers with the intent to defraud, making false statements, and using false identification to influence the action of a federally insured financial institution. *Id.* ¶¶ 22–23.

9. Official Designation of President George W. Bush (filed June 23, 2003), *available at* http://news.findlaw.com/nytimes/docs/almarri/usalmarri62303ecord.html. More fully, the President stated that al-Marri is an enemy combatant; that he is closely associated with al Qaeda; that he engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism; and that he represents a "continuing, present, and grave danger to the national security of the United States." *Id.*

10. *Al-Marri*, 534 F.3d at 255 (Traxler, J., concurring).

11. *Id.*

12. Adam Liptak, *Court Ruling Favors Bush in Powers On Detainees*, N.Y. TIMES, July 16, 2008, at A12. All other individuals whom President Bush has labeled as "enemy combatants" are detained at Guantanamo Bay. *Id.*

13. The "closely divided and complex decision" is somewhat surprising given the Fourth Circuit's reputation as the "nation's most conservative federal appeals court." *Id.*

14. After the court's brief per curiam opinion, the additional 210 pages contain seven opinions. The decision involved nine judges, seven opinions, and two 5-4 majorities.

combatant" [15] Second, if the answer to the first issue is yes, has al-Marri "been afforded sufficient process to challenge his designation as an enemy combatant" [16]

To ensure sufficient depth in analysis, this note focuses primarily on the first part of the two-part ruling—that is, the issue of whether the President has the authority to detain al-Marri as an enemy combatant.

This note first provides an overview of the Supreme Court's decision in *Hamdi v. Rumsfeld*,[17] which provided the legal framework for the Fourth Circuit's decision in *al-Marri*.[18] Next, it sets forth a comparison of the facts in *Hamdi* and *al-Marri*.[19] It then examines the Fourth Circuit's decision of *al-Marri*.[20] Lastly, this note lays out an analysis of that decision,[21] concludes that the Fourth Circuit's ruling is an unprecedented extension of the President's authority to detain and improperly exceeds the legal detention framework set forth in *Hamdi*,[22] and closes with a discussion of the future of the *al-Marri* case.

II. *HAMDI V. RUMSFELD*

While most of the Fourth Circuit judges in *al-Marri* admitted that *Hamdi* does not compel the conclusion that the President has the authority to detain al-Marri,[23] the enemy combatant framework in *Hamdi* is of utmost importance in any case involving the President's authority to detain. Accordingly, it is essential to briefly examine the facts of the *Hamdi* case and thoroughly examine the legal framework set forth by the *Hamdi* Court.[24]

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15. *Al-Marri*, 534 F.3d at 216.

16. *Id.* As to the due process issue, the second 5-4 majority held that al-Marri was not afforded constitutionally sufficient process in the district court proceeding. *Id.* at 262 (Traxler, J., concurring) ("[D]ue process demands more procedural safeguards than those provided to al-Marri in the habeas proceedings below.").

17. 542 U.S. 507 (2004).

18. *See infra* Part II.

19. *See infra* Part III.

20. *See infra* Part IV.

21. *See infra* Part V.

22. *See infra* Part VI.

23. Al-Marri v. Pucciarelli, 534 F.3d 213, 259 (4th Cir. 2008) (Traxler, J., concurring), *vacated sub nom.* al-Marri v. Spagone, No. 08-368, 2009 WL 564940 (U.S. Mar. 6, 2009) (mem.).

24. A reader who already knows the factual and legal background of *Hamdi* can jump to Part III, which presents a factual comparison of *Hamdi* and *al-Marri*.

A. *Facts of* Hamdi

Yaser Esam Hamdi is a citizen of the United States who was born in Louisiana in 1980 and raised in Saudi Arabia.[25] Hamdi resided in Afghanistan by 2001.[26] During that year, members of the Northern Alliance apprehended Hamdi, Kalashnikov rifle in hand.[27] Hamdi was then turned over to the U.S. military and eventually transferred to Guantanamo Bay.[28] In April 2002, after three months of detainment in Guantanamo Bay, authorities discovered Hamdi's American citizenship.[29] Consequently, U.S. authorities transferred him to a naval brig in Norfolk, Virginia and then to a naval brig in Charleston, South Carolina.[30]

B. *Procedural History of* Hamdi

In June 2002, Hamdi's father filed a habeas corpus petition on Hamdi's behalf.[31] In response, the Government filed a motion to dismiss the petition,[32] attaching a declaration by Michael Mobbs (Mobbs Declaration), a Department of Defense official "familiar with the facts and circumstances related to the capture of... Hamdi," based on his review of "relevant records."[33] This Declaration asserted that Hamdi was affiliated with a Taliban military unit and received weapons training, and that such facts supported his classification as an enemy combatant.[34]

After considering the sufficiency of the Mobbs Declaration, the district court concluded that it fell "far short" of supporting Hamdi's detention.[35] Further, the district court ordered the

25. Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004) (plurality opinion).

26. *Id.*

27. Joel Brinkley, *From Afghanistan to Saudi Arabia, via Guantanamo,* N.Y. TIMES, Oct. 16, 2004, at A4; *Hamdi*, 542 U.S. at 510.

28. *Hamdi*, 542 U.S. at 510.

29. *Id.*

30. *Id.*

31. *Id.* at 511. Hamdi's father alleged that his son went to Afghanistan to do "relief work" and requested that he be released from his "unlawful custody." *Id.*

32. Respondents' Response to, and Motion to Dismiss, the Petition for Writ of Habeas Corpus, Hamdi v. Rumsfeld, 243 F. Supp. 2d 527 (E.D. Va. 2002) (No. 2:02-CV-439).

33. Declaration of Michael H. Mobbs, Hamdi v. Rumsfeld, 243 F. Supp. 2d 527 (E.D. Va. 2002) (No. 2:02-CV-439), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/sleeper/tools/mobbshamdi.html. The Mobbs Declaration was the only evidence the Government provided to the court in support of Hamdi's detention. *Hamdi*, 542 U.S. at 512.

34. Declaration of Michael H. Mobbs, *supra* note 33.

35. Hamdi v. Rumsfeld, 243 F. Supp. 2d 527, 533 (2002).

Government to turn over numerous materials so that the court could perform a "meaningful judicial review" of Hamdi's detention.[36] Upon the Government's appeal, however, the Fourth Circuit reversed the lower court's production order and dismissed the habeas corpus petition.[37]

Granting certiorari, the Supreme Court ultimately reversed the decision of the Fourth Circuit and remanded the case to the district court.[38] The Supreme Court first analyzed the threshold issue of whether the President has the authority to detain citizens who qualify as enemy combatants.[39]

C. *The Supreme Court's Decision in* Hamdi

In addressing the first issue, the *Hamdi* plurality noted that the proper scope of the term enemy combatant is much disputed.[40] The plurality explained that "[t]he permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them."[41] Rather than determine the exact scope of the enemy-combatant category, Justice O'Connor, writing for the plurality, confined the holding to certain "narrow circumstances."[42]

According to the Government, Hamdi was detained because he carried a weapon against American troops in a foreign country—that is, that he was an enemy engaged in combat, an "enemy combatant" in its simplest form.[43] In light of this alleged

36. *Id.* at 532, 536.

37. Hamdi v. Rumsfeld, 316 F.3d 450, 459 (2003).

38. Hamdi v. Rumsfeld, 542 U.S. 507, 516 (2004).

39. *Id.* In the months following 9/11, President Bush regularly designated individuals as enemy combatants for purposes of ordering their military detention. *See In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 474 (D.D.C. 2005), *vacated by* Boumediene v. Bush, 128 S. Ct. 2229 (2008). For instance, all of the individuals detained at Guantanamo Bay are categorized under the Bush administration's definition of enemy combatant. *Id.* Notwithstanding the prevalent use of the term "enemy combatant," the Government did not formally define the term until a July 7, 2004, order creating the Combatant Status Review Tribunals. *Id.* Yet, when *Hamdi* was decided, the "Government [had not] provided any court with the full criteria that it use[d] in classifying individuals as such." *Hamdi*, 542 U.S. at 516.

40. *Hamdi*, 542 U.S. at 516.

41. *Id.* at 522 n.1.

42. *Id.* at 509 ("We hold that . . . Congress authorized the detention of combatants in the narrow circumstances alleged in [this case]."); *see also* Padilla v. Hanft, 423 F.3d 386, 393 (4th Cir. 2005) (holding that capture on a foreign battlefield is not one of the "narrow circumstances" to which the plurality in *Hamdi* confined its opinion).

43. *Hamdi*, 542 U.S. at 522 n.1.

basis, the *Hamdi* plurality stated that it would determine whether the detention of citizens who were part of or supporting forces hostile to the United States in Afghanistan and who engaged in an armed conflict against the United States is permissible.[44]

The plurality first discussed whether the President has the *statutory* authority to detain an individual such as Hamdi.[45] The Government contended that the Authorization for Use of Military Force (AUMF),[46] passed in the wake of the 9/11 terrorist attacks, supplies such authority.[47] The AUMF provides in pertinent part:

> [T]he 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.[48]

The plurality concluded that the AUMF is "explicit congressional authorization for the detention of individuals in the narrow category we describe."[49] The "narrow category" to which Justice O'Connor referred is the category of "individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks."[50]

While the Court recognized that the AUMF does not use specific language of detention, five justices glossed over this fact. According to these five justices, the absence of language regarding detention was of no consequence because the detention of Hamdi

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44. *Id.* at 516.

45. The Court addressed this issue in light of 18 U.S.C. § 4001(a). *See Hamdi*, 542 U.S. at 517. The statute provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a) (2004).

46. Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (Supp. V 2005)). Soon after the enactment of the AUMF, President Bush ordered U.S. Armed Forces to Afghanistan, with the goal of holding back al Qaeda and suppressing the Taliban government. *Hamdi*, 542 U.S. at 510.

47. Brief for Respondents at 20–21, *Hamdi*, 542 U.S. 507 (No. 03-6696).

48. Authorization for the Use of Military Force, § 2(a).

49. *Hamdi*, 542 U.S. at 517.

50. *Id.* at 518.

and any individual who falls in the "limited category" discussed above, is "so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use."[51] To be sure, the particular type of detention "so fundamental and accepted an incident to war"[52] is the "detention to prevent a combatant's return to the battlefield."[53]

Next, the plurality addressed the issue of whether Hamdi's citizenship precluded his military detention. In doing so, the plurality looked to *Ex parte Quirin*[54] as "the most apposite precedent that we have on the question of whether citizens may be detained in such circumstances."[55] Under *Quirin*, "[U.S.] citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction, enter this country bent on hostile acts, are enemy belligerents."[56] The plurality found no reason to draw a line between citizens and noncitizens for purposes of military detention.[57]

For these reasons, the Court concluded "that the AUMF is explicit congressional authorization for the detention of individuals in the narrow category we describe."[58]

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51. *Id.* (quoting Authorization for Use of Military Force, § 2(a)).

52. *Id.*

53. *Id.* at 519. In support of its choice to overlook the AUMF's lack of specific language of detention, the Court noted that the "purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again." *Id.* at 518 (citing Naqvi, *Doubtful Prisoner-of-War Status*, 84 INT'L REV. RED CROSS 571, 572 (2002)).

54. 317 U.S. 1 (1942). *Quirin* dealt with the military trial of Haupt who was charged with being an "enemy belligerent." *Id.* at 38. Haupt, a U.S. citizen, entered this country with orders from the Nazis to destroy domestic war facilities but was captured before he could execute those orders. *Id.* at 21.

55. *Hamdi*, 542 U.S. at 523.

56. *Id.* at 519 (quoting *Quirin*, 317 U.S. at 37–38). According to Justice O'Connor, *Quirin* does not preclude the detention of an individual solely on the basis of that individual's citizenship. *Id.* (citing *Quirin*, 317 U.S. at 20).

57. *See id.* The Court explained that a "citizen, no less than an alien, can be 'part of or supporting forces hostile to the United States or coalition partners' and 'engaged in an armed conflict against the United States.'" *Id.* (quoting Brief for Respondents at 3, *Hamdi*, 542 U.S. 507 (No. 03-6696)). Also, whether a citizen or an alien, a detainee will nonetheless pose the danger of returning to the battlefield if released. *Id.*

58. *Id.* at 517. In June 2004, the Supreme Court ruled that Hamdi was entitled to procedural due process. *Id.* at 538. Interestingly, the Government responded by simply releasing Hamdi in October 2004. Brinkley, *supra* note 27. At present, Hamdi resides in Saudi Arabia. *Id.*

III. FACTUAL COMPARISON OF *HAMDI* AND *AL-MARRI*

To determine whether the *al-Marri* decision improperly ventured beyond the framework set forth by the Supreme Court in *Hamdi*, it is necessary to draw a factual comparison between the two cases.

Al-Marri is a citizen of Qatar and a legal resident of the United States.[59] Hamdi is a citizen of the United States.[60]

The circumstances surrounding the arrest of al-Marri differ significantly from those surrounding the seizure of Hamdi. Al-Marri was arrested at his home in Peoria, Illinois.[61] FBI agents arrested al-Marri as a material witness in the investigation of the 9/11 terrorist attacks.[62] Hamdi, in contrast, was seized in Afghanistan by members of the Northern Alliance.[63] At that time, he was found with a Kalashnikov assault rifle on a battlefield, where he had allegedly fought alongside the Taliban forces.[64]

Al-Marri was initially charged with several federal criminal offenses.[65] In contrast, Hamdi was never criminally charged.[66]

Upon being transferred to military custody, al-Marri was brought directly to the Naval Consolidated Brig in South Carolina.[67] Hamdi's path to the contiguous United States involved a few more stops. After the Northern Alliance turned Hamdi over to the U.S. military, the United States initially detained and interrogated Hamdi in Afghanistan and eventually brought him to Guantanamo Bay.[68] Once it discovered his American citizenship, the United States transferred Hamdi to a Virginia naval brig.[69]

In response to al-Marri's petition for habeas corpus, the Government cited the Rapp Declaration.[70] That Declaration includes allegations, inter alia, that al-Marri held close ties to al

59. Al-Marri v. Pucciarelli, 534 F.3d 213, 219 (4th Cir. 2008) (Motz, J., concurring), *vacated sub nom.* al-Marri v. Spagone, No. 08-368, 2009 WL 564940 (U.S. Mar. 6, 2009) (mem.).

60. *Hamdi*, 542 U.S. at 510.

61. *Al-Marri*, 534 F.3d at 219.

62. *Id.* at 254 (Traxler, J., concurring).

63. *Hamdi*, 542 U.S. at 510.

64. *Id.* at 513.

65. *Al-Marri*, 534 F.3d at 219 (Motz, J., concurring).

66. *Hamdi*, 542 U.S. at 510.

67. *Al-Marri*, 534 F.3d at 219.

68. *Hamdi*, 542 U.S. at 510.

69. *Id.*

70. Respondent's Answer to the Petition for Writ of Habeas Corpus, al-Marri *ex rel.* Berman v. Wright, 443 F. Supp. 2d 774 (D.S.C. 2006) (No. 2:04-2257-HFF).

Qaeda; that he received al Qaeda terrorist training for two years; that he volunteered for a martyr mission; and that he entered the United States to serve as a sleeper agent and to disrupt the United States' financial system through computer hacking.[71]

The Rapp Declaration does *not* include allegations that al-Marri was affiliated with the armed forces of an enemy of the United States; does *not* state that al-Marri was seized on or around, or escaped from, a battlefield on which United States soldiers fought; does *not* proclaim that al-Marri was in Afghanistan at a time when the United States and the Taliban engaged in armed conflict; and does *not* assert that al-Marri "directly participated in any hostilities against the United States."[72]

In response to Hamdi's petition for habeas corpus, the Government cited to the Mobbs Declaration.[73] Unlike the Rapp Declaration in *al-Marri*, the Mobbs Declaration includes allegations that Hamdi "affiliated with a Taliban military unit and received weapons training . . . [and that he] engaged in battle with the Taliban."[74] Further, the Mobbs Declaration states, "because al Qaeda and the Taliban were and are hostile forces engaged in armed conflict with the United States, individuals associated with [those groups] were, and continue to be, enemy combatants."[75]

The key differences between these two "enemy combatants" are summarized in the table below.

Table 1. Fact Comparison: *Hamdi* vs. *al-Marri*

	Hamdi	***al-Marri***
Citizenship	United States	Qatar, legal U.S. resident
Place of Arrest/Seizure	Desert battlefield in Afghanistan	Residence in Illinois
Circumstances Surrounding Arrest/Seizure	Engaged in armed combat against the United States	Material witness in 9/11 investigation

71. *See* Declaration of Jeffrey N. Rapp, al-Marri *ex rel.* Berman v. Wright, 443 F. Supp. 2d 774 (D.S.C. 2006) (No. 2:04-2257-HFF), *available at* http://www.washingtonpost.com/wpsrv/nation/documents/jeffreyrapp_document.pdf.

72. *Al-Marri*, 534 F.3d at 220.

73. *See supra* notes 33–34 and accompanying text.

74. Declaration of Michael H. Mobbs, *supra* note 33.

75. *Id.*

Criminal Charges Before Military Detention	None filed	Criminal charges included credit-card fraud and lying to federal agents
Association with Hostile Forces	Allegedly fought alongside the Taliban	None alleged

This factual comparison between *al-Marri* and *Hamdi* incorporates the facts relevant to each court's decision. Admittedly, noteworthy similarities exist between the cases. However, it is important to understand that the key differences highlight Hamdi's active combatant status and al-Marri's lack thereof. It is now appropriate to turn to the Fourth Circuit's decision of *al-Marri* to determine whether it deviates from the framework set forth by the Supreme Court in *Hamdi*.

IV. *AL-MARRI V. PUCCIARELLI*

A. *Procedural History of* al-Marri

In July 2003, after an initial petition was dismissed for improper venue,[76] al-Marri's legal counsel filed a petition for a writ of habeas corpus in the U.S. District Court for the District of South Carolina.[77] The district court judge, Henry Franklin Floyd, ultimately held that the AUMF authorized the President to militarily detain a legal alien who had legally entered the United States and was later declared an enemy combatant.[78]

76. In *al-Marri v. Bush*, 274 F. Supp. 2d 1003 (C.D. Ill. 2003), the U.S. District Court for the Central District of Illinois dismissed al-Marri's petition on the basis of improper venue. *Id.* at 1010. The Court of Appeals for the Seventh Circuit eventually affirmed this ruling. Al-Marri v. Rumsfeld, 360 F.3d 707, 712 (7th Cir. 2004).

77. Petition for Writ of Habeas Corpus, al-Marri *ex rel.* Berman v. Wright, 443 F. Supp. 2d 774 (D.S.C. 2006) (No. 2:04-2257-HFF). As it was undisputed that al-Marri was unavailable to sign for himself, al-Marri's counsel filed a petition on his behalf, making five claims: (1) unlawful detention, (2) right to counsel, (3) right to be charged, (4) denial of due process, and (5) unlawful interrogation. *Id.* Moreover, "[e]ight former Justice Department officials (including . . . Janet Reno), [twenty-nine] legal scholars . . . and three retired military leaders filed friend-of-the-court briefs on behalf of al-Marri." *Sent from Peoria to the Brig, Terror Suspect in Limbo*, USA TODAY, June 13, 2007, at 10A [hereinafter *Sent from Peoria*].

78. Al-Marri *ex rel.* Berman v. Wright, 443 F. Supp. 2d 774, 785 (D.S.C. 2006), *rev'd* al-Marri *ex rel.* Berman v. Wright, 487 F.3d 160, 163 (4th Cir. 2007), *rev'd en banc sub nom.*, al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008), *vacated sub nom.*

Al-Marri eventually appealed to the Fourth Circuit.[79] Two circuit judges, Judge Motz and Judge Gregory, and a U.S. district court judge, Judge Hudson, joined as a panel to review two lower-court decisions.[80] After examining *Hamdi* and *Padilla v. Hanft*,[81] the panel majority held that an individual's enemy combatant status rests on his affiliation during wartime with the military arm of an enemy government.[82] According to the panel majority, the Government failed to demonstrate that al-Marri had any wartime affiliation with the military arm of an enemy government, and therefore al-Marri fell outside the enemy-combatant category.[83] The panel majority thus concluded that the AUMF does not supply a basis for al-Marri's seizure and indefinite military detention.[84]

B. The Fourth Circuit's En Banc Decision

On rehearing, the Fourth Circuit considered the case en banc and reversed the panel decision.[85] Among the seven opinions of

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al-Marri v. Spagone, No. 08-368, 2009 WL 564940 (U.S. Mar. 6, 2009) (mem.). In reaching this conclusion, Judge Floyd adopted a magistrate judge's report and recommendations. *Id.*

79. Al-Marri v. Wright, 487 F.3d 160, 166 (4th Cir. 2007), *rev'd* al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008), *vacated sub nom.* al-Marri v. Spagone, No. 08-368, 2009 WL 564940 (U.S. Mar. 6, 2009) (mem.).

80. *Id.* at 163. U.S. District Court Judge Hudson, sitting by designation, ultimately dissented. *Id.* Circuit Judge Diana Motz filed an opinion in which Judge Gregory joined. *Id.*

81. 423 F.3d 386 (4th Cir. 2005). Jose Padilla, like Hamdi, was an American citizen who associated with forces hostile to the United States in Afghanistan and took up arms against U.S. forces in that country. *Id.* at 388. Unlike Hamdi, Padilla "was arrested by civilian law enforcement authorities upon his arrival at O'Hare International Airport in Chicago." *Id.* In *Padilla*, the Fourth Circuit held that the President possesses the authority to militarily detain a U.S. citizen who is closely associated with al Qaeda; took up arms on behalf of that enemy and against the United States in a foreign combat zone of that war; and thereafter traveled to the United States for the "avowed purpose of further prosecuting that war on American soil, against American citizens and targets." *Id.* at 389. After Padilla sought certiorari in the U.S. Supreme Court, the Government obtained an indictment charging him with various federal crimes. Padilla v. Hanft, 547 U.S. 1062, 1062 (2006) (mem.). At that time, President Bush ordered that Padilla be released from military custody and transferred to the control of the Attorney General to face criminal charges. *Id.* In light of the federal charges and presidential order, the Supreme Court denied Padilla's petition for a writ of certiorari. *Id.*

82. *Al-Marri*, 487 F.3d at 182.

83. *Id.* at 183.

84. *Id.*

85. Al-Marri v. Pucciarelli, 534 F.3d 213, 216 (4th Cir. 2008), *vacated sub nom.* al-Marri v. Spagone, No. 08-368, 2009 WL 564940 (U.S. Mar. 6, 2009) (mem.).

the en banc decision, Judge Traxler's concurring opinion is commonly acknowledged as controlling justification for the decision.[86]

Judge Traxler began with the general principle that the Government may not detain a person before a trial determination of guilt.[87] However, if properly designated an enemy combatant pursuant to the President's legal authority, such persons may be detained without charge or criminal proceedings "for the duration of the relevant hostilities."[88]

Judge Traxler then addressed *Hamdi*.[89] He recognized that the *Hamdi* Court discussed the authority to detain individuals falling into a particular "limited category" that included "individuals who [took up arms and] fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for [the 9/11] attacks."[90]

Judge Traxler emphasized that the *Hamdi* Court was not required to decide the exact issue present in *al-Marri*—namely, whether an individual's mere alleged affiliation with al Qaeda, and not an association with the military arm of an enemy government, would support the individual's detention as an enemy combatant.[91] As a result, Traxler agreed with his colleagues that *Hamdi* does not compel the conclusion that the President is congressionally authorized to detain al-Marri as an enemy combatant.[92]

Nonetheless, Judge Traxler concluded that the AUMF authorizes the President to detain as an enemy combatant any individual who associates with al Qaeda "even though the government cannot establish that the combatant also took up arms on behalf of that enemy and against our country in a foreign

86. As to the authority to detain and the due process issues, Chief Judge Williams and Judges Wilkinson, Duncan, and Niemeyer sided with the Government. *Id.* at 216–17. Further, as to both issues, Judges Michael, Motz, Gregory, and King sided with al-Marri. *Id.* As such, Judge Traxler's vote was necessary to form a majority on each issue. *Id.* In addition, Judge Traxler did not join any opinion written by other judges. *See generally id.*

87. *Id.* at 257 (Traxler, J., concurring) (quoting United States v. Salerno, 481 U.S. 739, 755 (1987)).

88. *Id.* (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 519–21 (2004)). Other exceptions to the general principle include: the civil commitment of mentally ill sex offenders, the pretrial detention of dangerous adults and dangerous juveniles, and the civil commitment of mentally ill. *Id.* at 223 (Motz, J., concurring).

89. *Id.* at 257 (Traxler, J., concurring).

90. *Id.* (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004)).

91. *Id.* at 259.

92. *Id.*

combat zone of that war."[93] In reaching this conclusion, Judge Traxler stressed two main points.

First, according to Judge Traxler, Congress passed the AUMF to target individuals who are dispatched to the United States by al Qaeda to act "as sleeper agents and terrorist operatives charged with the task of committing additional attacks upon our homeland."[94]

Secondly, relying on *Quirin*, Judge Traxler stated that it does not matter that al-Marri neither committed nor attempted to commit any act of depredation, nor entered a battlefield zone, because an individual is an enemy belligerent subject to detention as soon as he enters the United States "with hostile purpose."[95] According to Judge Traxler, al-Marri entered the United States with hostile intentions because he is an alleged al Qaeda operative who associated with the enemy "and with its aid, guidance and direction, entered this country bent on hostile acts."[96]

In sum, because "the AUMF plainly authorizes the President to use all necessary and appropriate force against al Qaeda," Judge Traxler maintained that this authority necessarily includes the detention of individuals like al-Marri.[97] Therefore, Judge Traxler concluded that the President possesses authority to detain al-Marri as an enemy combatant.

V. ANALYSIS OF *AL-MARRI* DECISION

A. The Fourth Circuit Improperly Expanded the President's Authority to Detain

In light of precedent set forth in *Hamdi*, the Fourth Circuit in *al-Marri* erred in two respects. First, al-Marri does not fit within the

93. *Id.* at 258 (quoting Padilla v. Hanft, 423 F.3d 386, 389 (4th Cir. 2005)) (internal quotation marks omitted).

94. *Id.* at 259. Judge Traxler also noted that "it was the 9/11 attacks which triggered the passage of the AUMF." *Id.* at 260. Furthermore, he stated that there is nothing in the AUMF's language that suggests that Congress intended to limit the President's authority to detain enemy combatants to acts occurring in foreign territories. *Id.* Judge Traxler found it difficult to believe that "Congress, in enacting the AUMF in the wake of those attacks, did *not* intend for it to encompass al Qaeda operatives standing in the exact position as the attackers who brought about its enactment." *Id.*

95. *Id.* at 261 (quoting *Ex parte* Quirin, 317 U.S. 1, 38 (1942)).

96. *Id.* (quoting *Quirin*, 317 U.S. at 37-38) (internal quotation marks omitted).

97. *Id.*

"limited category" discussed in *Hamdi* that was so essential to its holding. Second, al-Marri's detention is not a fundamental and accepted incident to war to be considered an exercise of the "necessary and appropriate force" stated in the AUMF.[98]

1. Al-Marri Does Not Fit Within the "Limited Category" Set Forth in Hamdi.

The Fourth Circuit first erred by discounting the consequences of the fact that al-Marri does not fit within the "limited category" set forth in *Hamdi.* The *Hamdi* plurality held that the AUMF is "explicit congressional authorization for the detention of individuals in the [limited] category we describe."[99] Once again, the "limited category" consists of individuals who are: (1) "part of or supporting forces hostile to the United States or coalition partners in Afghanistan," and (2) "engaged in an armed conflict against the United States."[100]

In light of the factual comparison above, al-Marri does not fit within this "limited category." When arrested, Hamdi was bearing arms on behalf of the enemy in a foreign combat zone,[101] but al-Marri's arrest involved no such conduct.[102] Rather, al-Marri was arrested in the United States by the FBI as part of a 9/11 investigation.[103] As one Fourth Circuit judge put it, to compare Hamdi's capture with al-Marri's arrest is "to compare apples and oranges."[104] Plainly, al-Marri: (1) was not an individual who was "part of or supporting forces hostile to the United States or

98. Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004).

99. *Id.* at 517.

100. *Id.* at 516 (internal quotation marks omitted).

101. *Id.* at 510.

102. *Al-Marri*, 534 F.3d at 254–55. Another salient factual difference between *Hamdi* and *al-Marri* is Hamdi's alleged affiliation with the Taliban government and al-Marri's lack thereof. *Id.* at 220 (Motz, J., concurring); *Hamdi*, 542 U.S. at 512–13. The Government alleged that al-Marri was merely affiliated with al Qaeda. *Al-Marri*, 534 F.3d at 220. As to this difference, the Fourth Circuit correctly ruled that al-Marri's alleged affiliation with al Qaeda was insufficient to support the enemy combatant status. *Id.* at 259–60. The particular choice of language in the AUMF—specifically targeting terrorist "organizations or persons" connected to 9/11 rather than exclusively foreign governments—reflected a legislative choice not to distinguish between al Qaeda and Taliban forces. Shill, *supra* note 3, at 405; *see also* Padilla v. Hanft, 423 F.3d 386, 392 (4th Cir. 2005) ("[M]ilitary detention as an enemy combatant by the President is unquestionably authorized by the AUMF as a fundamental incident to the President's prosecution of the war against *al Qaeda* in Afghanistan.") (emphasis added).

103. *Al-Marri*, 534 F.3d at 254 (Motz, J., concurring).

104. *Id.* at 232 n.15.

coalition partners in Afghanistan,"[105] and (2) was not an individual "who engaged in an armed conflict against the United States there."[106] Therefore, al-Marri does not fit within the "limited category" discussed in *Hamdi*.

After reaching the conclusion that al-Marri falls outside of the "limited category," the next issue is whether such a distinction is relevant. Unlike several other distinctions, such as citizenship,[107] enemy affiliation,[108] and "locus of capture,"[109] there is a clear basis in *Hamdi*'s reasoning for the "limited category" distinction. In fact, the Fourth Circuit admitted in *Padilla* that the qualities of being "part of or supporting forces hostile to the United States" and of "engag[ing] in an armed conflict against the United States" were two of the "narrow circumstances" to which the *Hamdi* plurality confined its opinion.[110] Accordingly, the fact that al-Marri does not fit within the "limited category" is relevant to the *al-Marri* case in light of the *Hamdi* Court's reasoning.

Contrary to Judge Wilkinson's dissenting argument,[111] the *Hamdi* Court's "limited category" distinction reflects the Court's unwillingness to extend the enemy–combatant category to individuals other than those engaged in armed conflict on a battlefield. Nothing in *Hamdi* suggests that the AUMF permits indefinite military detention beyond the "limited category" of

105. *Hamdi*, 542 U.S. at 516.

106. *Id.*

107. After examining precedent in *Quirin*, the *Hamdi* plurality stated that nothing suggests a detainee's *citizenship* should preclude his detention for the duration of the relevant hostilities. *Id.* at 519 (quoting *Quirin*, 317 U.S. at 20). For an in-depth analysis of the significance of citizenship in enemy combatant cases, see Jerome A. Barron, *Citizenship Matters: The Enemy Combatant Cases*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 33 (2005).

108. *See supra* note 103 and accompanying text.

109. In *Padilla*, the Fourth Circuit addressed and rejected the "locus of capture" distinction. Padilla v. Hanft, 423 F.3d 386, 393 (4th Cir. 2005). The court asked whether the *Hamdi* Court's reasoning admitted "a distinction between an enemy combatant captured abroad and detained in the United States, such as Hamdi, and an enemy combatant who escaped capture abroad but was ultimately captured domestically and detained in the United States, such as Padilla." *Id.* The Fourth Circuit ultimately concluded that the "locus of capture" distinction is not relevant because "capture on a foreign battlefield" was not one of the "narrow circumstances" to which the plurality in *Hamdi* confined its opinion. *Id.*

110. *See id.* (quoting *Hamdi*, 542 U.S. at 516).

111. Al-Marri v. Pucciarelli, 534 F.3d 213, 314 (4th Cir. 2008) (Wilkinson, J., concurring in part, dissenting in part) ("The plurality has consistently overread *Hamdi*, to the effect that *only* those engaged in armed conflict on a foreign battlefield fall into the enemy-combatant category."), *vacated sub nom.* al-Marri v. Spagone, No. 08-368, 2009 WL 564940 (U.S. Mar. 6, 2009) (mem.).

people covered by the "narrow circumstances" of that case.[112]

In sum, the "limited category" designation reflects the narrow circumstances to which the *Hamdi* plurality deliberately confined its opinion. The *Hamdi* plurality cautiously limited its opinion, but not in a manner that leaves room for an argument that the President is authorized to declare a normal citizen, who has not "engaged in an armed conflict against the United States," as an enemy combatant.[113] Plainly, the Fourth Circuit erred in holding that the President is authorized to detain al-Marri because al-Marri does not fit within the "limited category" set forth in *Hamdi.*

2. Al-Marri's Detention Is Not a Fundamental Incident to War and Not an Exercise of the "Necessary and Appropriate Force" Under the AUMF.

Even assuming arguendo that the above "limited category" argument is a product of overreading *Hamdi* and that the "limited category" distinction is irrelevant, al-Marri's military detention is improper as it is not pursuant to an act of Congress.[114] More specifically, the AUMF is not explicit congressional authorization for the detention of individuals like al-Marri, because such detention is not an exercise of "necessary and appropriate force."[115]

To reach this conclusion, it is again critical to examine the Supreme Court's reasoning in *Hamdi.* When addressing whether Hamdi's detention was an exercise of such "necessary and appropriate force," the *Hamdi* Court identified the *purpose* for which Hamdi was detained—namely, "to prevent a combatant's return to the battlefield."[116] According to the Court, "[b]ecause detention to prevent a combatant's return to the battlefield is a *fundamental incident of waging war,* in permitting the use of 'necessary and appropriate force,' Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here."[117] Accordingly, the Supreme Court in *Hamdi* found that the AUMF authorizes the President to engage in the

112. *See id.* at 232–33 (Motz, J., concurring).

113. Hamdi v. Rumsfeld, 542 U.S. 507, 517 (2004).

114. *See* 18 U.S.C. § 4001(a) (2004) ("No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.").

115. *Hamdi,* 542 U.S. at 519; *see* Authorization for the Use of Military Force, § 2(a), 115 Stat. 224.

116. *Hamdi,* 542 U.S. at 519.

117. *Id.* (emphasis added).

"fundamental incident[s] of waging war."[118]

Indeed, it follows that Congress has authorized al-Marri's detention if the purpose thereof is a "fundamental incident of waging war." Accordingly, two steps must be taken: (1) identifying the purpose of al-Marri's detention, and (2) determining whether such purpose is a "fundamental incident of waging war."

First, it is clear that the purpose of Hamdi's detention—preventing a combatant's return to the battlefield—does not apply to al-Marri.[119] Rather, the most likely purpose of al-Marri's detention can be identified by examining the language of President Bush's initial order declaring al-Marri an "enemy combatant" as well as the language of the Rapp Declaration. In his Order, President Bush alleged that al-Marri's military detention was "necessary to prevent him from aiding al Qaeda."[120] According to the Rapp Declaration, al-Marri would have aided al Qaeda by serving as a "sleeper agent" to facilitate terrorist activities and by disrupting this country's financial system through computer hacking.[121] Considering the allegations in the President's Order and the Rapp Declaration, the purpose of al-Marri's detention was to prevent him from aiding al Qaeda by serving as a "sleeper agent" to facilitate terrorist activities and by disrupting the U.S. financial system.

Second, to determine whether such purpose is a "fundamental incident of waging war," one must examine the nature of the present war and al-Marri's role therein. The present war may be unconventional.[122] Nonetheless, it is a war between the United States and al Qaeda.[123] Further, al-Marri may be a serious criminal

118. Al-Marri v. Pucciarelli, 534 F.3d 213, 313 (4th Cir. 2008) (Wilkinson, J., concurring in part, dissenting in part) (quoting *Hamdi*, 542 U.S. at 519), *vacated sub nom.* al-Marri v. Spagone, No. 08-368, 2009 WL 564940 (U.S. Mar. 6, 2009) (mem.).

119. The Government did not allege that al-Marri was seized on, near, or escaped from a battlefield on which the armed forces of the United States or its allies were engaged in combat. *See id.* at 220 (Motz, J., concurring). Therefore, no one could reasonably argue that the purpose of al-Marri's detention was "to prevent [his] return to the battlefield." *See Hamdi*, 542 U.S. at 519.

120. Official Designation of President George W. Bush, *supra* note 9.

121. *Al-Marri*, 534 F.3d at 220.

122. *Id.* at 260 (Traxler, J., concurring) (citing Hamdi v. Rumsfeld, 296 F.3d 278, 283 (4th Cir. 2002)).

123. *Id.* at 260–61 (citing Padilla v. Hanft, 423 F.3d 386, 389 (4th Cir. 2005)). In addition, Judge Traxler stated that members of al Qaeda "fight us with conventional weapons in Afghanistan and Iraq, but they have also infiltrated our borders and those of our allies, bent on committing, at a minimum, sabotage and

and a member of a terrorist organization. Yet, al-Marri is appreciably different from a soldier at war in one enormous respect: he is a civilian.[124]

The Fourth Circuit's decision effectively undermines the United States' "deeply rooted and ancient opposition . . . to the extension of military control over civilians."[125] It is one thing to argue that the civilian criminal justice system can effectively handle terrorism cases.[126] It is quite another to argue that the military detention model can properly handle civilian cases.[127] Tellingly, the latter argument is rarely asserted and the civilian-combatant distinction ought to be upheld. Accordingly, detention to prevent a civilian from facilitating terrorist activities and disrupting our financial system is *not* a "fundamental incidence of waging war."

In sum, although the military detention of enemy combatants like Hamdi is certainly "a fundamental incident of waging war" as understood in the AUMF, the military detention of civilians like al-Marri certainly is not.[128] Accordingly, in the absence of explicit congressional authorization for the detention of individuals like al-Marri, the Fourth Circuit impermissibly expanded precedent set forth in *Hamdi*.[129]

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other war-like acts targeting both military and civilian installations and citizens." *Id.* at 261.

124. *See id.* at 247 (Motz, J., concurring) ("[A]l-Marri is still a civilian: he does not fit within the 'permissible bounds of' '[t]he legal category of enemy combatant.'") (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 522 n.1 (2004)).

125. Reid v. Covert, 354 U.S. 1, 33 (1957); *see* Laird v. Tatum, 408 U.S. 1, 15 (1972) (recognizing a traditional American resistance to any military intrusion into *civilian* affairs).

126. *See Ten Questions on National Security*, *supra* note 2, at 5062–73.

127. It is this author's opinion that to hold that the military detention of a civilian is a "fundamental incident of waging war" is tantamount to robbing the traditional civilian criminal justice system of its ability to effectively prosecute civilians like al-Marri.

128. *Al-Marri*, 534 F.3d at 238–39 (Motz, J., concurring) (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004)) (internal citation omitted). In addition, it is important to recall that the *Hamdi* plurality announced *Ex parte Quirin* as "the most apposite precedent that we have on the question of whether citizens may be detained in such circumstances." *Hamdi*, 542 U.S. at 523. However, "[n]either *Quirin* nor any other precedent even suggests . . . that individuals with constitutional rights, unaffiliated with the military arm of any enemy government, can be subjected to military jurisdiction and deprived of those rights solely on the basis of their conduct on behalf of a terrorist organization." *Al-Marri*, 534 F.3d at 235 (Motz, J., concurring).

129. For an argument reaching a contrary conclusion with respect to the Fourth Circuit's panel decision, see Shill, *supra* note 3, at 405.

B. Raising and Dismissing Potential Counterarguments

Those who disagree with the above analyses are likely to present two main counterarguments. First, one could argue that a broad construction of the AUMF authorizes the President to militarily detain a person like al-Marri. Second, one could argue that the *Hamdi* court expressly permitted the district court and Fourth Circuit in *al-Marri* to adopt an expansive definition of the "enemy combatant" category. This note will address and dismiss each counterargument.

1. A Broad Construction of the AUMF Authorizes the President to Indefinitely Detain al-Marri.

One could argue, as Judge Traxler did, that the AUMF can be read broadly as "plainly authoriz[ing] the President to use all necessary and appropriate force against al Qaeda."[130] According to Judge Traxler, this construction of the AUMF "necessarily includes the detention of al Qaeda operatives who associate with . . . al Qaeda . . . and with its aid, guidance and direction enter this country bent on hostile acts."[131]

This counterargument fails for two reasons. First, by giving full force to the AUMF's plain language and by underreading the *Hamdi* Court's construction of the AUMF, Judge Traxler's broad construction will produce "absurd results."[132] It is a well-founded and common concern that, taken to its extreme, the AUMF's reference to organizations or persons who "aided in" the 9/11 attacks could endanger U.S. citizens.[133] Furthermore, because the initial designation of an enemy combatant is based merely on the President's say-so, such a rule is susceptible to grave abuse. Accordingly, a rule permitting the indefinite military detention of citizens who bear no resemblance to fighters on a battlefield treads

130. *Al-Marri*, 534 F.3d at 261 (Traxler, J., concurring).

131. *Id.* (quoting *Ex parte* Quirin, 317 U.S. 1, 37–38 (1942)) (internal quotation marks omitted).

132. *Id.* at 226 n.9 (Motz, J., concurring).

133. *See id.* at 286 n.4 (Williams, C.J., concurring in part, dissenting in part) ("I understand al-Marri's concern that, taken to its extreme, the AUMF's reference to organizations or persons who 'aided in' the September 11 attacks might produce absurd results."). In addition to endangering citizens, the Fourth Circuit's decision could also endanger U.S. military troops. Many commentators, including former Department of Justice officials, legal scholars, and retired military leaders argue that giving al-Marri legal rights helps protect U.S. troops from arbitrary imprisonment while abroad. *See Sent from Peoria*, *supra* note 77.

too closely to the detention of ordinary Americans and therefore should not be used.

Second, this counterargument overlooks the well-recognized canon of constitutional avoidance. A statute such as the AUMF should be construed to avoid "serious constitutional problems."[134] Judge Traxler's broad construction of the AUMF fails to avoid "serious constitutional problems," such as violation of the Due Process Clause.[135] The Due Process Clause protects both American citizens and lawfully admitted aliens,[136] who, like al-Marri, have established substantial connections in the United States.[137]

Overall, the Fourth Circuit erred by employing an overly broad construction of the AUMF, one which raises serious constitutional problems and will produce absurd results in the future.[138]

134. *Al-Marri*, 534 F.3d at 313 (Wilkinson, J., concurring in part, dissenting in part); *see also* Clark v. Martinez, 543 U.S. 371, 380–81 (2005); Jones v. United States, 526 U.S. 227, 239 (1999).

135. The Due Process Clause of the Constitution guarantees that no "person" shall "be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

136. *See* Boumediene v. Bush, 128 S. Ct. 2229, 2246 (2008) (noting that the Fifth and Fourteenth Amendments protect both citizens and foreign nationals); Plyler v. Doe, 457 U.S. 202, 212 (1982) (stating that the Fourteenth Amendment applies "to all persons within the territorial jurisdiction") (emphasis omitted). While the Fourth Circuit's decision may be more easily digested because al-Marri is a legal U.S. resident and not a U.S. citizen, the Court's reasoning makes no such distinction and therefore appears to be equally applicable to U.S. citizens. *See* Editorial, *Detaining Mr. Marri*, N.Y. TIMES, July 20, 2008, at WK10.

137. *Al-Marri*, 534 F.3d at 222 (Motz, J., concurring). The Fourth Circuit noted that the Due Process Clause affords this guarantee to "persons," not merely citizens. *Id.* (citing Wong Wing v. United States, 163 U.S. 228, 238 (1896)); *see* United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990). Moreover, al-Marri established substantial connections in the United States by residing in Illinois for several months with his family and attending the university there. *Id.*

138. The Government's arguments in al-Marri are also noteworthy; they reflect the obvious difficulties with interpreting the AUMF to give effect to its broad language. The Government wisely limited its argument in support of al-Marri's designation as an enemy combatant by not requiring the Fourth Circuit to "deal with the absurd results, [or] reach the constitutional concerns, raised by an interpretation of the AUMF that would authorize the President to detain indefinitely-without criminal charge or process-anyone he believes to have aided any 'nation[], organization[], or person[]' related to the September 11th terrorists." *Al-Marri*, 534 F.3d at 226 (Motz, J., concurring) (citing Authorization for the Use of Military Force, § 2(a), 115 Stat. 224).

2. The Hamdi *Court Permitted the District Court and Fourth Circuit in* al-Marri *to Adopt an Expansive Definition of the "Enemy Combatant" Category.*

Notwithstanding the conclusion that a broad construction of the AUMF cannot justify the Fourth Circuit's decision without serious constitutional problems, could an expansive definition of the "enemy combatant" category suffice? The next counterargument involves the assertion that the district court and Fourth Circuit in *al-Marri* were simply accepting the *Hamdi* Court's invitation when it stated "[t]he permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them."[139]

While, at first blush, this argument appears to have merit, the *Hamdi* Court's invitation is not without limits. Specifically, the law of war[140] remains of "primary importance" in determining the permissible bounds of the enemy-combatant category.[141] In fact, American courts have consistently looked to the law-of-war principles when determining which individuals fit within the enemy-combatant category.[142] It follows, naturally, that lower courts are not free to go beyond such law-of-war principles when defining the "permissible bounds of the [enemy combatant]

139. Hamdi v. Rumsfeld, 542 U.S. 507, 522 n.1 (2004). Judge Wilkinson raised this exact argument in his opinion. *Al-Marri*, 534 F.3d at 314 (Wilkinson, J., concurring in part, dissenting in part). He stated that, because the *al-Marri* case raises fundamental questions about the President's power to militarily detain suspected terrorists lawfully residing in this country, there is an "obligation to examine the precise contours of the enemy-combatant category and to develop a framework for determining who under our Constitution may be lawfully detained." *Id.*

140. In general, the law of war "encompasses all international law for the conduct of hostilities *binding* on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law." U.S. Dep't of Def., Directive 2311.01E, D.O.D. Law of War Program, ¶ 3.1 (May 9, 2006), *available at* http://www.fas.org/irp/doddir/dod/d2311_01e.pdf.

141. *Al-Marri*, 534 F.3d at 314 (Wilkinson, J., concurring in part, dissenting in part).

142. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) ("[W]e understand Congress' grant of authority for the use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles."); *Ex parte* Quirin, 317 U.S. 1, 27–28 (1942) ("From the very beginning of its history this Court has recognized and applied the law of war."); Padilla v. Hanft, 423 F.3d 386, 391 (4th Cir. 2005).

category," as the *Hamdi* Court invited.[143]

The lower courts in *al-Marri*—both the district court and the en banc Fourth Circuit—yielded to the Government's wishes and adopted an unprecedented definition of the enemy-combatant category.[144] In the controlling opinion, Judge Traxler stated that, "in [his] view, limiting the President's authority to militarily detain soldiers or saboteurs as enemy combatants to those who are part of a formal military arm of a foreign nation or enemy government is not compelled by the laws of war."[145] However, Judge Traxler's analysis began and ended with that conclusory statement—he provided no authority or explanation for the assertion.

Unlike Judge Traxler, other Fourth Circuit judges addressed the pertinent law-of-war principles.[146] One salient law-of-war

143. *Al-Marri*, 534 F.3d at 242 (Motz, J., concurring). In addition to exceeding traditional law-of-war principles, the lower courts' definition of "enemy combatant" contradicts the definition of the term "combatant" found in U.S. military handbooks. For example, as noted in the text, "[a]nyone engaging in hostilities in an armed conflict on behalf of a party to the conflict is a 'combatant.'" JORDAN J. PAUST, BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE "WAR" ON TERROR 52 (2007) (quoting U.S. ARMY JUDGE ADVOCATE GENERAL'S SCHOOL, OPERATIONAL LAW HANDBOOK 12 (2002)). Further, "combatants . . . include all members of the regularly organized armed forced of a party to the conflict." *Id.* (quoting THE U.S. NAVY, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK OF NAVAL OPERATIONS 296 § 5-3 (Naval War College, Int'l L. Studies vol. 73, 1999)).

144. The Fourth Circuit's definition of an "enemy combatant" is alarmingly similar to the definition used in Paul Wolfowitz's July 7, 2004, order creating the Combatant Status Review Tribunal, a military tribunal to review the status of each detainee at Guantanamo Bay. Paul Wolfowitz, Deputy Sec'y of Def., Memorandum for the Secretary of the Navy: Order Establishing Combatant Status Review Tribunal (July 7, 2004), *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf. The Order defines "enemy combatant" as an "individual who was part of or supporting Taliban or al Qaeda 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." *Id.* The definition of "enemy combatant" contained in the July 7, 2004, Order, however, is "significantly broader than the definition considered in *Hamdi*." *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 475 (D.D.C. 2005), *vacated by* Boumediene v. Bush, 128 S. Ct. 2229 (2008).

145. *Al-Marri*, 534 F.3d at 261 (Traxler, J., concurring).

146. *Id.* at 242 (Motz, J., concurring) ("But nothing in any of the *Hamdi* opinions suggests that lower courts, absent express congressional authorization, are free to venture beyond traditional law-of-war principles to fashion these "permissible bounds."); *Id.* at 286 (Wilkinson, C.J., concurring in part, dissenting in part) ("[Judge Motz's] opinion may very well be correct that, under the traditional 'law of war,' persons not affiliated with the military of a nation-state may not be considered enemy combatants.").

principle involves the key distinction between a "civilian" and a "combatant," when properly understood as terms of art under the Geneva Conventions.[147] The term "civilian" denotes someone in a certain legal category who is *not* subject to *military* detention, whereas the term "combatant" denotes a member of a different legal category who *is* subject to *military* seizure and detention.[148] Therefore, by adopting a definition of the enemy *combatant* category that includes *civilians* who bear absolutely no resemblance to fighters on a battlefield, the civilian-combatant distinction collapses into itself. By adopting such a definition, the lower courts ventured beyond this long-standing law-of-war principle.[149] In conclusion, to expand the enemy-combatant category to include individuals who bear no resemblance to armed fighters on a battlefield is unprecedented and undoubtedly against the law of war.

C. *The Future of* al-Marri

While the dispositive issue ultimately resounded in insufficiency of process, the fractured en banc decision with respect to the authority to detain issue is in dire need of correction. Plainly, the Fourth Circuit's convoluted set of opinions is too confusing to give proper guidance to other courts, the executive branch, or the people.[150]

Initially, on September 19, 2008, al-Marri filed a petition for a writ of certiorari.[151] Al-Marri's petition raised this single question:

147. *Id.* at 227 n.11 (Motz, J., concurring) (citing Geneva Convention Relative to the Treatment of Prisoners of War arts. 2, 4, 5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 4, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287).

148. *Id.*

149. *See* PAUST, *supra* note 143, at 56 ("[T]he Bush administration's classification of members of al Qaeda as 'enemy combatants' deflates the meaning of combatant.").

150. *Detaining Mr. Marri*, *supra* note 136.

151. Given the two separate majorities of the Fourth Circuit's decision, either party was in a position to seek Supreme Court review. Shortly after the Fourth Circuit's en banc decision, however, the Government released a statement indicating that it would not seek the Supreme Court's review of the due process holding. Press Release, Brian Roehrkasse, Dir. of Pub. Affairs, Dep't of Justice, Today's Decision by the U.S. Court of Appeals for the Fourth Circuit in *al-Marri v. Pucciarelli* (July 15, 2008), http://www.scotusblog.com/wp/wp-content/uploads/2008/07/doj-statement-july-15.doc. In that statement, the Director of Public Affairs stated, "We are pleased with the court's en banc decision today. The decision recognizes the President's authority to capture and detain al

> Does the Authorization for Use of Military Force . . . authorize—and if so does the Constitution allow—the seizure and indefinite military detention of a person lawfully residing in the United States, without criminal charge or trial, based on government assertions that the detainee conspired with al Qaeda to engage in terrorist activities?[152]

On December 5, 2008, the Supreme Court granted al-Marri's Petition for Writ of Certiorari.[153]

However, as anticipated by some commentators,[154] *al-Marri* did not run its course. On January 22, 2009, at the dawn of his presidency, President Barack Obama issued a memorandum that mandated a review of al-Marri's detention.[155] Over a month later, President Obama issued a second memorandum directing the Secretary of Defense to transfer al-Marri to the control of Attorney General Eric Holder upon the Attorney General's request.[156] On March 6, 2009, the Supreme Court granted the request by vacating the Fourth Circuit's ruling and effectively withdrawing the controversial victory of the Bush administration.[157]

Presently, al-Marri is back in the criminal justice system facing terrorism charges, and according to the Supreme Court, al-Marri's case is now moot.[158] The one-paragraph Supreme Court ruling

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Qaeda agents who, like the 9-11 hijackers, come to this country to commit or facilitate war-like acts against American civilians." *Id.*

152. Petition for Writ of Certiorari, al-Marri v. Pucciarelli, No. 08-368 (U.S. Sept. 19, 2008).

153. Al-Marri v. Pucciarelli, 129 S. Ct. 680 (2008) (mem.).

154. *See, e.g.*, Adam Liptak, *Early Test of Obama View on Power Over Detainees*, N.Y. TIMES, Jan. 2, 2009, at A1; Susan Page, *For Obama, Tough Decisions from the Start*, U.S.A. TODAY, Jan. 20, 2009, at A1.

155. Memorandum for the Attorney General on Review of Detention of Ali Saleh Kahlah al-Marri (Jan. 22, 2009), http://www.whitehouse.gov/the_press_office/Review_of_the_Detention_of_Ali_Saleh_Kahlah.

156. Memorandum for the Secretary of Defense on Transfer of Detainee to Control of the Attorney General (Feb. 27, 2009), http://www.whitehouse.gov/the_press_office/Transfer-of-Detainee-to-Control-of-the-Attorney-General/.

157. Al-Marri v. Spagone, No. 08-368, 2009 WL 564940, at *1 (U.S. Mar. 6, 2009) (mem.). Some civil rights groups have expressed satisfaction with the Supreme Court's decision. *See, e.g.*, Adam Liptak, *Justices Erase Court Ruling That Allowed a Detention*, N.Y. TIMES, Mar. 7, 2009, at A9.

158. *Al-Marri*, 2009 WL 564940, at *1 (citing United States v. Munsingwear, Inc., 340 U.S. 36 (1950)). If the Supreme Court had heard *al-Marri*, the *al-Marri* case would have taken the Supreme Court Justices well beyond the four

does not discuss the possibility that al-Marri will be redesignated and redetained as an enemy combatant.[159] However, such a possibility still exists even though the Obama administration announced that it will no longer use the term "enemy combatant" for certain detainees.[160] President Obama's administration claims roughly the same authority asserted by the Bush administration to indefinitely detain detainees, and offered "essentially the same definition of 'enemy combatant' without using the term."[161]

While *al-Marri* did not result in a Supreme Court opinion, the Fourth Circuit's analysis is still relevant. *Al-Marri* is one of only three cases discussing the treatment of U.S. citizens as enemy combatants.[162] In addition, *al-Marri* continues to be important as the most recent example of a court attempting to discern the scope of the enemy-combatant category. In any event, the fractured Fourth Circuit decision in *al-Marri* will assist the Nation's highest Court in clarifying the issue of the President's authority to detain enemy combatants.

VI. CONCLUSION

As Judge Traxler noted, the *al-Marri* case is fraught with danger. The potential for the executive to abuse its power in the wake of this decision is overwhelming. Therefore, the controversial issues in the case must be considered with unusual care. By holding that the AUMF authorizes the President to detain al-Marri as an enemy combatant, the Fourth Circuit erred by overstepping the framework set forth by the Supreme Court in *Hamdi*. Holding that the President may detain individuals who did not take up arms on behalf of an enemy of the United States, the enemy-combatant category would be to expand it to unprecedented size. If the

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major rulings arising out of the "war on terrorism," confronting issues of domestic power of the U.S. military and of the President as Commander in Chief. Posting of Lyle Denniston to SCOTUSBlog, http://www.scotusblog.com/wp/presidents-domestic-detention-power-tested/ (Sept. 19, 2008, 13:30 EST).

159. *Al-Marri*, 2009 WL 564940, at *1. Unlike the *Padilla* case where the Court denied Padilla's petition for certiorari on mootness grounds and three Justices provided a "brief explanatory statement" about the possibility of recurrence, 547 U.S. 1062, 1062 (2006) (mem.) (Kennedy, J., concurring), the Supreme Court's mootness ruling in *al-Marri* provided no such guidance.

160. David G. Savage, *They Are 'Enemy Combatants' No More*, L.A. TIMES, Mar. 14, 2009, at 16.

161. *Id.*

162. As discussed above, al-Marri, as a legal resident of the United States, may join Hamdi and Padilla as a U.S. citizen for constitutional purposes in this case.

President has the power to order the indefinite military detention of legal residents of the United States who, like al-Marri, did *not* take up arms on behalf of an enemy of the United States, and whose detention is *not* a fundamental incident of waging war, it is exceedingly difficult to imagine circumstances in which the President would be unable to exercise such plenary power. Plainly, the fundamental rights of all Americans are at risk. Overall, the potential effect of the Fourth Circuit's divided opinion is far-reaching and its logic must be rejected given the court's expansive and unprecedented definition of the enemy-combatant category.

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