

RECENT DEVELOPMENTS

ENEMY COMBATANTS AND A CHALLENGE TO THE SEPARATION OF WAR POWERS IN *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007)

Few legal issues are more controversial today than the scope of the President's authority to detain individuals as enemy combatants. Although that enormous power is described nowhere in the Constitution, it was "the practice of our own military authorities before the adoption of the Constitution."¹ The Supreme Court has validated such detention as an "important incident to the conduct of war,"² even a "fundamental incident of waging war."³ Its purpose is "to prevent captured individuals from returning to the field of battle and taking up arms once again."⁴

Ali Saleh Kahlah al-Marri, a member of al Qaeda, is currently the only person known to be detained as an enemy combatant on the American mainland.⁵ On June 11, 2007, a divided panel of the United States Court of Appeals for the Fourth Circuit held that the President lacked the power to hold al-Marri as an

1. *Ex parte Quirin*, 317 U.S. 1, 31 (1942) (noting detention of enemy combatants during the American Revolution, as well as the Mexican-American War and the Civil War).

2. *Id.* at 28.

3. *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality opinion). Although *Hamdi* was a plurality opinion, Justice Thomas in dissent, *id.* at 579 (Thomas, J., dissenting), agreed with the four-Justice plurality that Congress had authorized the President to detain enemy combatants, regardless of citizenship, until the end of hostilities. Thus, on this point, the decision will be treated as the majority view of the *Hamdi* Court.

4. *Id.* at 518.

5. See Adam Liptak, *Court Takes Second Look at Enemy Combatant Case*, N.Y. TIMES, Nov. 1, 2007, at A18. Two others, Jose Padilla and Yaser Hamdi, were also once detained as enemy combatants inside the United States. See Adam Liptak, *Judges Say U.S. Can't Hold Man as 'Combatant'*, N.Y. TIMES, June 12, 2007, at A1.

enemy combatant.⁶ The Fourth Circuit agreed to a rehearing en banc, and oral arguments were heard on October 31, 2007.⁷

In two separate holdings, the original panel sought to clarify the scope of the President's authority under the Constitution and enacted law to designate al Qaeda terrorists as enemy combatants. The court held that (i) the laws governing war are defined by international law, even when domestic statutes are to the contrary, and international law bars the detention of terrorists unless they are clearly acting on behalf of an enemy state,⁸ and (ii) Congress had already restricted the President's authority to subject al Qaeda terrorists captured inside the United States to military detention.⁹

In reaching these conclusions, the court departed from applicable Supreme Court precedent¹⁰ and a recent decision by the same circuit,¹¹ dramatically constricting the authority of Congress to authorize and the President to order the detention of terrorists who threaten grievous harm to the nation. Further, the court ignored clear language from Congress granting the President that power¹² and controlling case law recognizing it.¹³ These holdings, which largely invalidate the September 18, 2001, Authorization for Use of Military Force (AUMF),¹⁴ are contrary to the Define and Punish Clause of the Constitution,¹⁵

6. See *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007), *reh'g granted*, No. 06-7427 (4th Cir. Aug. 22, 2007).

7. *Id.*; see also Liptak, *supra* note 5. At time of this writing, the en banc decision had not yet been issued; accordingly, this Comment addresses the decision of the original three-judge panel.

8. See *Al-Marri*, 487 F.3d at 184–86 (contending that “Common Article 3 and other Geneva Convention provisions applying to non-international conflicts [such as that between al Qaeda and the United States] . . . simply do *not* recognize the ‘legal category’ of enemy combatant”).

9. See *id.* at 189.

10. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Ex parte Quirin*, 317 U.S. 1 (1942).

11. See *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005).

12. See Military Commissions Act of 2006 § 3(a)(1), 120 Stat. 2600 (codified at 10 U.S.C. § 5948a(1)(i)); Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

13. See *Padilla*, 423 F.3d at 386.

14. See Authorization for Use of Military Force § 2 (authorizing the use of force against “organizations” or “persons” such as al Qaeda and affiliates, and not only “nations,” responsible for the attacks of September 11, 2001).

15. See U.S. CONST. art. I, § 8, cl. 10 (granting Congress the power “[t]o define and punish . . . Offences against the Law of Nations”).

and depart from separation of powers principles as well as the courts' traditional deference to the political departments in construing war authorizations and related legislation.¹⁶ The consequence of the decision is to appropriate to the judiciary significant responsibility for determining with whom the nation is at war and what measures it will marshal against the enemy, thereby divesting the political branches of that power and the democratic controls and responsiveness they provide. If it became the law of the land, the panel decision would make it impossible for the United States military to detain the very terrorists who represent the greatest threat to the nation—those, like the September 11th hijackers, who operate within the United States and are unaffiliated or only nominally affiliated with a particular foreign government. The decision also has the potential to trigger major instability in war powers jurisprudence and to empower foreign states and organizations to define American law, even in the areas of domestic constitutional law and separation of powers.

A citizen of Qatar, al-Marri entered the United States legally with his wife and children on September 10, 2001.¹⁷ The morning after his arrival, al Qaeda terrorists used four hijacked commercial airliners to attack the Pentagon and the World Trade Center, killing thousands of Americans. Al-Marri was arrested by the FBI in connection with the attacks three months later, and was held in civilian custody for a year and a half before being designated an enemy combatant by the President on June 23, 2003. He was transferred to the Naval Consolidated Brig in Charleston, South Carolina shortly thereafter.¹⁸

Al-Marri then petitioned for a writ of habeas corpus in federal district court in South Carolina.¹⁹ The Government answered with a declaration by Jeffrey Rapp, Director of the Joint

16. See Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights during Wartime*, 5 THEORETICAL INQUIRIES L. 1, 44 (2004) (canvassing Supreme Court decisions and concluding that, in the context of war, “[w]here both legislature and executive endorse a particular tradeoff between liberty and security, the courts have accepted that judgment”).

17. Al-Marri *ex rel.* Berman v. Wright, 443 F. Supp. 2d 774, 776 (D.S.C. 2006).

18. *Id.*

19. *Id.* at 777.

Intelligence Task Force for Combating Terrorism,²⁰ asserting that al-Marri trained at an al Qaeda terrorist camp, was ordered by Osama bin Laden and September 11th mastermind Khalid Shaykh Muhammed to serve as a terrorist “sleeping agent,” and that he began gathering information on poisonous chemicals in anticipation of a terrorist strike.²¹

The district court explained that al-Marri could challenge his detention via the two-stage burden-shifting procedure announced in *Hamdi v. Rumsfeld*:

Hamdi provides that once the Government has offered evidence in support of its continued detention of an alleged enemy combatant, the detainee must be permitted “to present his own factual case to rebut the Government’s return [argument].” In so doing, the detainee must present “more persuasive evidence” to overcome the facts offered by the Government.²²

Applying the *Hamdi* framework to al-Marri’s case, the district court ruled that the so-called Rapp Declaration satisfied the Government’s initial burden, placing the onus on al-Marri to rebut the allegations.²³ In response, al-Marri “offered nothing more than a general denial in support of his burden.”²⁴ The district court then dismissed his habeas claim.²⁵ A Fourth Circuit panel, per Judge Diana Gribbon Motz, reversed, holding that the President lacked the authority to detain al-Marri militarily.²⁶ Judge Roger L. Gregory joined the opinion.

After determining that it could properly exercise jurisdiction over the case,²⁷ the court considered whether al-Marri had been

20. See Decl. of Jeffrey N. Rapp, Director, Joint Intelligence Task Force for Combating Terrorism, Sept. 9, 2004 [hereinafter Rapp Declaration]; see also *Al-Marri v. Wright*, 487 F.3d 160, 165–66 (4th Cir. 2007) (summarizing Rapp Declaration).

21. *Al-Marri*, 487 F.3d at 165–66.

22. *Al-Marri*, 443 F. Supp. 2d at 784 (citations omitted).

23. See *id.*

24. *Id.*

25. *Id.* at 785 (“Given Petitioner’s refusal to participate in the initial evidentiary process and his failure to offer *any* evidence on his behalf, it is beyond question that he has failed to present ‘more persuasive evidence’ to rebut Respondent’s classification and detention of him as an enemy combatant.”).

26. See *Al-Marri*, 487 F.3d at 160.

27. *Id.* at 167–68 (rejecting the Government’s argument that the Military Commissions Act of 2006 § 3(a)(1), 120 Stat. 2600 (codified at 10 U.S.C. § 948a(1)(i)), stripped the court of jurisdiction).

properly classified as an enemy combatant.²⁸ The court first summarized the Government's assertions of statutory and constitutional authority to detain al-Marri.²⁹ As statutory authority, the Government claimed that the AUMF,³⁰ as construed by the Supreme Court in *Hamdi*, allowed the President to detain al-Marri as an enemy combatant.³¹ In addition, the Government contended that Article II supplied the President with "inherent constitutional authority" to detain al-Marri.³²

In distinguishing the cases cited by the Government, the majority noted that American courts have looked to "careful distinctions made in the [international] law of war in identifying which individuals fit within the legal category of enemy combatants under our Constitution."³³ Thus, "[Yaser] Hamdi's detention was upheld because in fighting against the United States *on the battlefield* in Afghanistan with the Taliban, the de facto government of Afghanistan at the time, *Hamdi bore arms with the army of an enemy nation* and so, under the law of war, was an enemy combatant."³⁴ Similarly, the majority reasoned, the *Padilla* court "held that the AUMF authorized the President to detain as an enemy combatant an American citizen who *was armed and present in a combat zone in Afghanistan as part of Tali-*

28. *Id.* at 177.

29. *Id.*

30. The AUMF provides:

[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*.

Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (emphasis added).

31. *Al-Marri*, 487 F.3d at 177-78.

32. *Id.* at 177 (emphasis omitted).

33. *Id.* at 179 (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion); *Ex parte Quirin*, 317 U.S. 1, 30-31 & n.7 (1942); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121-22 (1866); *Padilla v. Hanft*, 423 F.3d 386, 391 (4th Cir. 2005) (quotation marks omitted)).

34. *Id.* at 179-80 (citing *Hamdi*, 542 U.S. at 518-20) (emphasis added). The effect for international law purposes of the relationship between al Qaeda and the de facto Taliban government of Afghanistan before the U.S.-led invasion of that country would likely affect the analysis of this question, but was not addressed by either the majority or the dissent and is beyond the scope of this Comment.

ban forces during the conflict there with the United States.”³⁵ *Quirin*, cited by the *Hamdi* Court as the “most apposite precedent,”³⁶ was also readily distinguishable from al-Marri’s case: the Supreme Court properly upheld the military detention of the Nazi spies and saboteurs in *Quirin*, including an American citizen, because “[c]itizens 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 [combatants] within the meaning of . . . the law of war.”³⁷

Having found that *Hamdi* and *Padilla* only validated detention of Taliban (rather than al Qaeda) affiliates, the panel suggested that al-Marri was more like Lambden Milligan, an Indiana resident detained as an enemy combatant during the Civil War.³⁸ In 1866, the Supreme Court voided Milligan’s detention and military commission conviction and announced that the “laws and usages [of war] . . . can never be applied to citizens in states which have upheld the authority of the government [that is, Union states], and where the courts are open and their process unobstructed.”³⁹

Addressing the Government’s counterarguments, the majority granted that the major precedents on executive detention over the past century and a half had departed from *Milligan*.⁴⁰ “*Hamdi*, *Quirin*, and *Padilla* distinguish *Milligan*,” wrote the court, but those cases nevertheless “recognize[d] that its core holding remain[ed] the law of the land” — which was, the panel urged, that “civilians within this country . . . may not be subjected to military control and deprived of constitutional rights.”⁴¹ Thus, the court held, the key cases on executive detention had only upheld, and international law only permitted,

35. *Id.* at 180 (quotation marks omitted) (emphasis added) (citing *Padilla*, 423 F.3d at 390–91).

36. *Hamdi*, 542 U.S. at 523 (plurality opinion).

37. *Al-Marri*, 487 F.3d at 181 (emphasis added) (quoting *Quirin*, 317 U.S. at 37–38).

38. See *Al-Marri*, 487 F.3d at 182 n.11.

39. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 121–22 (1866) (adding that “Congress could grant no such power”).

40. See *Al-Marri*, 487 F.3d at 181–82.

41. *Id.* at 182 (citing *Milligan*, 71 U.S. at 121–22). The dicta from *Milligan* cited in support of this pronouncement were overruled by *Ex parte Quirin*, 317 U.S. 1 (1942) (validating the military detention and trial of enemy combatants, including a U.S. citizen, in the District of Columbia during World War II).

the detention of an enemy combatant when the individual was at the time of capture or shortly beforehand (a) engaged in combat or armed and prepared to do combat with the United States (b) in a combat zone, and (c) in the service of a foreign government, not a terrorist organization.⁴²

Having rejected the Government's argument that the AUMF granted "the President[] authority to detain 'enemy combatants' during the current conflict with al Qaeda" because it believed "[n]o precedent recognize[d] any such authority,"⁴³ the panel considered the Government's claim that the Constitution granted the President that power.⁴⁴ Applying Justice Jackson's canonical three-part framework for assessing claims of presidential power,⁴⁵ the court first asked whether Congress had spoken to the matter of detaining enemy combatants, and found that it had.⁴⁶ "[I]n the Patriot Act," the panel wrote, employing the *expressio unius*⁴⁷ mode of statutory construction, "Congress carefully stated how it wished the Government to

42. See *id.* at 178–85. The majority contended that *Hamdi* and *Padilla* "ground their holdings on this central teaching from *Quirin*, i.e., enemy combatant status rests on an individual's affiliation during wartime with the 'military arm of the enemy government,'" *id.* at 181, and found that "Common Article 3 and other Geneva Conventions provisions applying to non-international conflicts [such as that between al Qaeda and the United States] . . . simply do *not* recognize the 'legal category' of enemy combatant" without discussing the possibility or relevance of domestic legislation addressing that category, *id.* at 184–85.

43. *Id.* at 184.

44. See *id.* at 189–90.

45. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring). In the Court's leading precedent on executive power, Justice Robert H. Jackson observed that "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." *Id.* at 635. Those fluctuations could be grouped into three categories, Justice Jackson wrote. In the first category, when the President acts with Congress' express or implied authorization, his authority is "at its maximum." *Id.* at 635. In the second category, the President "acts in absence of either a congressional grant or denial of authority, [and] can only rely upon his own independent powers." *Id.* at 637. In the third category, the President acts in the face of an express or implied congressional prohibition, and can thus only depend on his *exclusive* constitutional powers, those Congress cannot constitutionally restrict. See *id.* at 637–38.

46. *Al-Marri*, 487 F.3d at 190.

47. BLACK'S LAW DICTIONARY 620–21 (8th ed. 2004) (defining *expressio unius est exclusio alterius* as, "to express or include one thing implies the exclusion of the other, or of the alternative"). The *expressio unius* canon does "not even [enjoy] a mild presumption" without contextual support. *Id.* The Court's "context" here is the specificity of the Patriot Act provision on the one hand and the general grant of authority in the AUMF on the other.

handle aliens believed to be terrorists who were seized and held within the United States.”⁴⁸ By contrast, the AUMF was “silent on [the issue of detaining] asserted alien terrorists captured and held within the United States.”⁴⁹ By specifying a permissible procedure for the short-term detention of “terrorist aliens,” the court concluded, Congress in the Patriot Act⁵⁰ had “explicitly prohibit[ed] their indefinite detention.”⁵¹ The panel thus placed the President’s claim of independent constitutional authority to detain al-Marri in the third category of the Jackson scheme, where executive power is “at its lowest ebb.”⁵² Citing the Patriot Act provision and al-Marri’s due process rights, the majority held that the Government was free to prosecute al-Marri in a civilian court, deport him, hold him as a material witness, or detain him pursuant to the Patriot Act, but that the “military detention of al-Marri must cease.”⁵³

United States District Judge Henry E. Hudson, sitting by designation, dissented.⁵⁴ He found that the “clear congressional intent underlying the AUMF” and the statute’s plain language⁵⁵ had afforded the President “all the powers necessary,” including the power to order detention of al Qaeda terrorists like al-Marri, to combat and suppress those responsible for the September 11th attacks, and to prevent new attacks.⁵⁶

Judge Hudson contended that the panel had afforded too much importance to the locus of al-Marri’s arrest, noting that a panel of the same circuit in *Padilla* sitting only two years earlier

48. *Al-Marri*, 487 F.3d at 190.

49. *Id.*

50. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001 § 412(a), Pub. L. No. 107-56, 115 Stat. 272 (permitting the short-term “Detention of Terrorist Aliens”).

51. *Al-Marri*, 487 F.3d at 190; *see also id.* at 189 (noting that “a more specific statute will be given precedence over a more general one” (quoting *Busic v. United States*, 446 U.S. 398, 406 (1980))).

52. *Id.* at 191 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

53. *Id.* at 195.

54. *Id.* at 195–99 (Hudson, J., dissenting).

55. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (authorizing the use of “all necessary and appropriate force” against “organizations or persons” such as al Qaeda and affiliates, and not only “nations,” that the President “determines” were responsible for the attacks of September 11, 2001).

56. *Al-Marri*, 487 F.3d at 196 (Hudson, J., dissenting).

had “unanimously rejected the argument that the locus of capture was relevant to the President’s authority to detain an enemy combatant.”⁵⁷ Furthermore, the detainee in that case—Jose Padilla, a U.S. citizen whose designation as an enemy combatant was upheld—was in a position similar to al-Marri’s.⁵⁸ Padilla came to the United States “for the purpose of blowing up apartment buildings . . . in continued prosecution of al Qaeda’s war of terror against the United States” after being directed to do so by Khalid Shaykh Muhammed;⁵⁹ similarly, al-Marri “volunteered for a martyr mission on behalf of al Qaeda, received funding from a known terrorist financier, and communicated with known terrorists by phone and e-mail,”⁶⁰ including Muhammed and Osama bin Laden.⁶¹ Neither Padilla nor al-Marri had been a “soldier in a formal sense, particularly while acting on U.S. soil.”⁶² Both had been “dispatched to the United States” as “sleeper agent[s]” by Muhammed.⁶³

The dissent then suggested that the major enemy combatant precedents counseled in favor of affirming the district court’s ruling.⁶⁴ Like the petitioners in *Quirin*, al-Marri had entered American territory with the intention of committing acts of war, and the *Quirin* Court found it no bar to military detention that petitioners had not “entered into the theatre or zone of active military operations,”⁶⁵ as al-Marri had not.⁶⁶ *Milligan* was similarly unhelpful to al-Marri, the dissent argued.⁶⁷ Whereas *Milligan* “did not associate himself with a rebellious State with which the United States was at war,”⁶⁸ the Government’s unre-

57. *Id.* at 197 (citation omitted) (citing *Padilla v. Hanft*, 423 F.3d 386, 394 (4th Cir. 2005)). Padilla, a U.S. citizen, was arrested by the FBI in Chicago. *Padilla*, 423 F.3d at 388.

58. *See Al-Marri*, 487 F.3d at 197 (Hudson, J., dissenting) (citing *Padilla*, 423 F.3d at 394).

59. *Id.* at 197 (citing *Padilla*, 423 F.3d at 390).

60. *Id.* at 198 (summarizing Rapp Declaration, § 8). The opinion incorrectly cites to § 7 of the Rapp Declaration; this statement in fact characterizes § 8.

61. *Id.*

62. *Al-Marri*, 487 F.3d at 198 (Hudson, J., dissenting).

63. *Id.*

64. *See id.* at 198–99.

65. *Ex parte Quirin*, 317 U.S. 1, 38 (1942).

66. *See Al-Marri*, 487 F.3d at 197–98 (Hudson, J., dissenting).

67. *See id.* at 198–99.

68. *Id.* at 198 (citing *Quirin*, 317 U.S. at 45; *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 131 (1866)).

butted evidence showed that al-Marri had, in fact, associated with, and was an agent of, al Qaeda, the very “organization targeted by the AUMF and the enemy with which the United States is at war.”⁶⁹ The dissent concluded that al-Marri’s detention as an enemy combatant had been properly “authorized under the AUMF ‘to prevent any future acts of international terrorism against the United States.’”⁷⁰

As discussed above, the majority grounded its finding that al-Marri had not been properly designated as an enemy combatant on two broad holdings:

1. The international laws of war determine who may be detained as an enemy combatant, and that body of law does not recognize terrorists who are not state actors as combatants. Therefore, even specific authorization from Congress cannot overcome the bar to detaining terrorists as enemy combatants set out in the laws of war.
2. The AUMF does not permit the military detention of al Qaeda terrorists inside the United States, the Patriot Act explicitly forbids it, and the President lacks the constitutional power to overcome the Patriot Act’s prohibition.

In support of the first holding, the majority contended that the laws of war are defined by “treaty obligations including the Hague and Geneva Conventions and customary principles developed alongside them.”⁷¹ The panel further contended that this body of international law “provides *clear rules* for determining an individual’s status during an international armed conflict, distinguishing between ‘combatants’ (members of a nation’s military, militia, or other armed forces, and those who fight alongside them) and ‘civilians’ (all other persons).”⁷²

The application of relevant treaties and customary international law,⁷³ however, is a more complicated exercise than

69. *Al-Marri*, 487 F.3d at 198.

70. *Id.* at 199 (quoting Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001)).

71. *Id.* at 178 (majority opinion).

72. *Id.* (emphasis added).

73. Customary international law, as opposed to treaties and other formal instruments of state interaction, is the unwritten “law” of international relations that “results from a general and consistent practice of states followed by them from a sense of legal obligation.” RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

those statements suggest. Although the laws of war provide considerable guidance for the rights to which an individual is entitled once his status has been determined, they do not provide “clear rules” for reaching that determination *in the first place*. Indeed, much of the debate in international legal circles since September 11th has focused on the proper legal position of terrorists in the international system. American courts have not comprehensively addressed the question, perhaps because doing so would require them to “address the scope of [the President’s] constitutional authority” as Commander-in-Chief, an inquiry they are “understandably reluctant” to conduct, “especially during wartime, when the consequences of a constitutional error are potentially enormous.”⁷⁴ Although the *Al-Marri* panel treated it as a settled norm, the status of terrorists in international law in fact remains disputed.

The majority’s discussion on this point also neglected an additional, vitally important source of law. The authority of the United States government to detain individuals as enemy combatants derives not only from the international laws of war, but also from American domestic law. The Define and Punish Clause, which grants Congress the power “[t]o define and punish . . . Offences against the Law of Nations,”⁷⁵ allows Congress to define for domestic purposes the precise content and boundaries of customary international law.⁷⁶ For purposes of American law, therefore, Congress’ legislation concerning international law, including the laws of war, trumps non-self-executing treaties, the views of international law commentators, and other sources of customary international law. Al-

74. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2051–52 (2005) (observing that “[i]nstead [of addressing the scope of that authority], courts have attempted, whenever possible, to decide difficult questions of wartime authority on the basis of what Congress has in fact authorized” by reference to Justice Jackson’s *Youngstown* framework).

75. U.S. CONST. art. I, § 8, cl. 10. The “law of nations” is known today as international law.

76. This power was the Founders’ response to their concern that extending the vague standards of international law domestically without congressional clarification would lead to unfairness. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 614–15 (Max Farrand ed., 1911); see also J. Andrew Kent, *Congress’s Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 898–900 (2007) (noting that “[Gouverneur] Morris’s desire for prior notice and clear definition [of international law by Congress prior to domestic application] sounds in the due process and legality principle concerns that we still have today about vague criminal statutes”).

though *Hamdan v. Rumsfeld*⁷⁷ clearly supports this view, the majority cited it for the contrary proposition: that that Court's finding that the war between the United States and al Qaeda in Afghanistan was "a conflict not of an international character" barred the Government from detaining al-Marri as an enemy combatant, because "Common Article 3 and other Geneva Convention provisions applying to non-international conflicts [such as that between al Qaeda and the United States] . . . simply do not recognize the 'legal category' of enemy combatant."⁷⁸

The panel read too much into *Hamdan*'s holding that the conflict between the United States and al Qaeda was "non-international." By suggesting that international law provided the exclusive basis for determining the eligibility of a terrorist for American military detention,⁷⁹ the panel departed from the *Hamdan* Court's conclusion, which itself echoed an established principle of constitutional law, that Congress was empowered⁸⁰ un-

77. 126 S. Ct. 2749 (2006).

78. *Al-Marri*, 487 F.3d at 184–85 (citations omitted) (internal quotation marks omitted). This statement contains two major errors. First, it neglects the preeminent importance the *Hamdan* Court accorded congressional intent on the subject. *Hamdan* noted that the Geneva Conventions applied because Congress had signaled in the Uniform Code of Military Justice (UCMJ) that it *wanted* them to apply, not because they were self-executing (that is, automatically effective for purposes of U.S. law). See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780 (finding that Congress in the UCMJ had incorporated the laws of war, which include the Geneva Conventions). Second, in support of its contention that the Geneva Conventions on non-international conflicts "simply do not recognize the 'legal category' of enemy combatant," the panel cited a statement of the International Committee of the Red Cross (ICRC), Int'l Comm. of the Red Cross, Official Statement: The Relevance of IHL in the Context of Terrorism, 1, 3 (July 21, 2005), <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/terrorism-ihl-210705>, an organization that the Government rightly noted "is not a lawmaking body and does not have the power to make authoritative pronouncements of international law that would bind the United States." Petition for Rehearing and Rehearing En Banc at 14 n.5, *Al-Marri*, 487 F.3d 160 (No. 06-7427). Moreover, the Government argued persuasively that "read in context, the cited ICRC statement simply suggests that an individual fighting on behalf of a nonstate entity is not a *legitimate* combatant, not that he is somehow immune from capture or detention." *Id.*

79. See *Al-Marri*, 487 F.3d at 185 (contending that in conflicts recognized as "non-international" under the Geneva Conventions, "the 'legal category' of enemy combatant does not exist").

80. Every Justice on the *Hamdan* Court who reached the question either found that terrorists were already war criminals under the laws of war or that Congress was empowered to declare them as such. Of the eight Justices who decided *Hamdan*, four—Justices Stevens, Souter, Ginsburg, and Breyer—recognized that Congress possessed the authority under the Define and Punish Clause to "positively identifi[y]" conduct such as terrorism as a war crime and provide for the detention

der the Define and Punish Clause and the Necessary and Proper Clause⁸¹ to define violations of the laws of war, and thereby render terrorists eligible for enemy combatant designation. The majority also ignored unambiguous precedent holding that al Qaeda terrorists could be designated and detained as enemy combatants despite the “non-international character” of the conflict.⁸²

Whatever the precise legal status of terrorists in treaties and customary international law, Congress plainly exercised its constitutional authority to identify al Qaeda and affiliated terrorists as the enemy in the AUMF and the MCA for purposes of domestic law. In the AUMF, Congress clearly authorized force against al Qaeda⁸³ and “activated the President’s war powers,”⁸⁴ including the use of detention as a “fundamental incident of waging war.”⁸⁵ Congress’ choice of language in the AUMF—specifically targeting terrorist “organizations or persons”⁸⁶ connected to September 11th, rather than nation-states exclusively—reflected a legislative choice not to distinguish between al Qaeda and Taliban forces. Similarly, the MCA explicitly defines “unlawful enemy combatant” to include:

a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy com-

and trial of individuals guilty of that conduct, even when it was not clearly considered a war crime under the common law of war. *See Hamdan*, 126 S. Ct. at 2779–80 & n.33. Justices Scalia, Thomas, and Alito already considered terrorism a war crime under the common law of war, and found that Congress had granted the President the authority to detain terrorists. *Id.* at 2833–34 (Thomas, J., dissenting). Justice Kennedy did not reach the question. *Id.* at 2809 (Kennedy, J., concurring); *see also Kent*, *supra* note 76, at 863 (noting that Congress and the courts have assumed that the Define and Punish Clause empowered Congress to pass legislation “regulating the conduct of individuals not [only] when that conduct violates customary international law by itself, but [also] when the conduct could impinge on interests . . . at the least[] related to the foreign affairs of the United States”).

81. U.S. CONST. art. I, § 8, cl. 18; *see also Kent*, *supra* note 76, at 864, 866–67 (contending that Congress relies on the Define and Punish Clause and the Necessary and Proper Clause to implement for domestic purposes norms and rules derived from, but broader than, what customary international law would otherwise prescribe).

82. *See Padilla v. Hanft*, 423 F.3d 386, 389 (4th Cir. 2005); *see also infra* pp. 405–06.

83. *See Authorization for Use of Military Force*, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001); *Padilla*, 423 F.3d at 389.

84. *Hamdan*, 126 S. Ct. at 2775.

85. *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality opinion).

86. *Authorization for Use of Military Force* § 2(a).

batant (including a person who is part of the Taliban, *al Qaeda*, or associated forces)⁸⁷

In relying on the AUMF and the MCA, a President ordering the detention of *al Qaeda* forces as enemy combatants acts pursuant to the express or implied authorization of Congress, and his orders therefore merit “the strongest of presumptions and the widest latitude of judicial interpretation.”⁸⁸

The judiciary has generally deferred to the legislature and the executive’s combined interpretation of the AUMF’s “organizations or persons” language.⁸⁹ For example, courts have found that the AUMF applies to *al Qaeda* forces as well as the Taliban, recognizing the intent of the political branches to define the conflict between the United States and *al Qaeda* as a state of war.⁹⁰ The Fourth Circuit addressed the specific issue of detaining an *al Qaeda* terrorist captured and held inside the United States just two years before *Al-Marri*, holding in *Padilla* that “military 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.”⁹¹

The *Al-Marri* panel attempted to distinguish the Fourth Circuit’s *Padilla* holding, and the unavoidable inference that *al-Marri*’s detention as an *al Qaeda* terrorist is also warranted, by transforming former Chicago gang member José Padilla into a conventional belligerent. The majority states that Padilla “took up arms against United States forces in [Afghanistan] in the same way and to the same extent as did Hamdi,” and thus “un-

87. Military Commissions Act of 2006 § 3(a)(1), 120 Stat. 2601 (codified at 10 U.S.C. § 948a(1)(i)) (emphasis added).

88. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

89. Authorization for Use of Military Force § 2(a).

90. See *Hamdan*, 126 S. Ct. at 2804–05 (Kennedy, J., concurring) (discussing “our Nation’s armed conflict with the Taliban and *al Qaeda*” (emphasis added)); *id.* at 2798 (plurality opinion); see also *Hamdi*, 542 U.S. at 510 (plurality opinion) (noting that after September 11, “the President ordered United States Armed Forces to Afghanistan, with a mission to subdue *al Qaeda* and quell the Taliban regime that was known to support it” (emphasis added)); *Padilla*, 423 F.3d at 389 (finding that “*al Qaeda* . . . [is] an entity with which the United States is at war” (emphasis added)).

91. *Padilla*, 423 F.3d at 392 (emphasis added) (grounding this conclusion in the fact that Padilla “qualifie[d] as an enemy combatant under both the definition adopted by the Court in *Quirin* and the definition accepted by the controlling opinion in *Hamdi*”).

questionably qualifies as an ‘enemy combatant’ as that term was defined for the purposes of the controlling opinion in *Hamdi*.⁹² In a footnote urging a “narrow” interpretation of *Padilla*’s holding, the panel emphasized that it was *Padilla*’s support of the *Taliban* that made him an enemy combatant: “[a]lthough our opinion discussed *Padilla*’s association with al Qaeda, we held that *Padilla* was an enemy combatant because of his association with Taliban forces, i.e., Afghanistan government forces, on the battlefield in Afghanistan during the time of the conflict between the United States and Afghanistan.”⁹³ Even were the court to have set aside the unambiguous text of the AUMF and the MCA, along with clear Supreme Court and circuit precedent legitimating the use of force against al Qaeda,⁹⁴ its effort to distinguish al Qaeda from the Taliban would remain unpersuasive. The section of the *Padilla* case it cited for that formalistic proposition makes no distinction between those two groups, and explicitly justifies *Padilla*’s detention as an enemy combatant on grounds of his association with al Qaeda.⁹⁵ If the detention of al-Marri as an enemy combatant cannot be upheld because he associated with al Qaeda rather than an enemy state, and because he was captured and detained inside the United States rather than abroad, then neither can the detention of *Padilla* be justified. Nowhere, however, does the panel propose overturning that unanimous two-year-old circuit precedent.

In addition to finding that international law barred the political branches from defining terrorists as enemy combatants, the court held that a domestic statute, the Patriot Act,⁹⁶ restricted the President’s authority to detain aliens inside the United States as enemy combatants. Six years after the passage of that law, this suggestion appears to be unprecedented in the

92. *Al-Marri v. Wright*, 487 F.3d 160, 180 (4th Cir. 2007) (quoting *Padilla*, 423 F.3d at 391).

93. *Id.* at 180 n.10.

94. See *supra* note 90.

95. See *Padilla*, 423 F.3d at 391 (“[U]nder the definition of ‘enemy combatant’ employed in *Hamdi*, we can discern no difference in principle between *Hamdi* and *Padilla*. Like *Hamdi*, *Padilla* associated with forces hostile to the United States in Afghanistan. Compare [Joint Appendix] 19–23 (detailing *Padilla*’s association with al Qaeda in Afghanistan and Pakistan), with *Hamdi*, 124 S. Ct. at 2637 (describing *Hamdi*’s affiliation with the *Taliban* in Afghanistan).” (emphasis added) (citations omitted)).

96. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001 § 412(a), Pub. L. No. 107–56, 115 Stat. 272.

federal courts. If the Due Process Clause is no bar to detaining an American *citizen* as an enemy combatant,⁹⁷ it is hard to imagine that Congress intended the Patriot Act's *civil* detention provisions to restrict the President's authority to *militarily* detain *aliens* suspected of being terrorists as enemy combatants. Congress' authorization of detention in the AUMF⁹⁸ prior to the passage of the Patriot Act, its appropriation of funds for detention,⁹⁹ its subsequent authorization of detention in the MCA, and the canon of avoiding absurd results in statutory interpretation¹⁰⁰ all counsel against this reading. Because the President's power to detain enemy combatants in this war has a statutory basis¹⁰¹ in addition to a constitutional basis,¹⁰² the panel's location of the President's order in Justice Jackson's third category was incorrect. *Al-Marri* is best understood as falling within Justice Jackson's first category. Given that the executive has some constitutional authority to detain enemy combatants,¹⁰³ basic principles of constitutional avoidance¹⁰⁴ would confirm this reading of the relevant statutes, even if the court were inclined to find the President's actions and Congress' intent in conflict.

The military detention of al-Marri as an enemy combatant was authorized by the Constitution, statute, and controlling precedent, and was ordered by the President acting at the zenith of his powers.¹⁰⁵ By barring the President from detaining

97. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality opinion); *Ex parte Quirin*, 317 U.S. 1, 37–38 (1942).

98. See *Hamdi*, 542 U.S. at 519 (plurality opinion) (holding that Congress had authorized detention of Taliban forces captured in Afghanistan). As discussed above, *Padilla* extended this logic to al Qaeda forces captured in the United States.

99. See *Hamdi v. Rumsfeld (Hamdi III)*, 316 F. 3d 450, 467–68 (4th Cir. 2003) (finding it “difficult if not impossible to understand how Congress could make appropriations for the detention of persons similar to prisoners of war without also authorizing their detention in the first instance” (quotation marks omitted)), *vacated and remanded on other grounds*, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion).

100. See *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459–61 (1892).

101. See Military Commissions Act of 2006 § 3(a)(1), 120 Stat. 2601 (codified at 10 U.S.C. § 948a(1)(i)); Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001); *Hamdi*, 542 U.S. at 519 (plurality opinion).

102. See *Quirin*, 317 U.S. at 26 (noting the President's power under the Commander-in-Chief, Vesting, and Take Care Clauses to wage war and carry statutes—here, the AUMF and the MCA—into execution).

103. See *id.*

104. See *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

105. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring).

as enemy combatants al Qaeda fighters like al-Marri—who was trained by al Qaeda in the use of poisons, raced to enter the United States before September 11, 2001, stored information about poisonous chemical distributors on his computer, volunteered to be a martyr for al Qaeda, and conspired with Osama bin Laden and Khalid Shaykh Muhammed to lead a second wave of attacks inside the United States¹⁰⁶—the court made it more difficult to prevent future attacks. Equally important, it elevated international norms over the constitutional power of Congress to define the enemy for purposes of American law, a strange and probably unconstitutional result,¹⁰⁷ and one that could prove problematic as the political branches inevitably seek to refine the scope of the war on terror.

Six years into a war already longer than either World War, America's present policy of placing enemy combatants in indefinite military detention "has harmed the reputation of the United States, disrupted alliances, [and] hurt us in the war of ideas with the Islamic world."¹⁰⁸ Alternatives abound. A former top terrorism prosecutor has proposed trying all terror suspects in civilian courts,¹⁰⁹ while Hamdan's lawyer and a former Justice Department official who helped formulate the Bush Administration's detention policies have proposed creating a specialized Article III court to deal with national security matters.¹¹⁰ But whatever the wisdom of the current policy, the President retains the authority to detain enemy combatants until the end of the conflict unless Congress revokes or restricts that power, and the Fourth Circuit was wrong to substitute its judgment for that of Congress and the President.

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106. See Rapp Declaration, §§ 8, 12. Al-Marri declined to respond to these allegations or "offer any evidence on his behalf." *Al-Marri v. Wright*, 443 F. Supp. 2d 774, 785 (D.S.C. 2006).

107. See Kent, *supra* note 76, at 930–36.

108. Jack L. Goldsmith & Neal Katyal, Op-Ed., *The Terrorists' Court*, N.Y. TIMES, July 11, 2007, at A19.

109. See Kelly Anne Moore, Op-Ed., *Take Al Qaeda to Court*, N.Y. TIMES, Aug. 21, 2007, at A19.

110. See Goldsmith & Katyal, *supra* note 108.

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