In The
United States Court of Appeals
For The Fourth Circuit

ALI SALEH KAHLAH AL-MARRI;
MARK A. BERMAN, as next friend,

Petitioners - Appellants,

v.

COMMANDER S. L. WRIGHT, USN Commander,
Consolidated Naval Brig.,

Respondent - Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AT CHARLESTON

APPELLANT'S RESPONSE TO APPELLEE'S PETITION FOR REHEARING AND REHEARING *EN BANC*

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INTRODUCTION

The panel decision is narrow, carefully reasoned, and correct. The panel held that the President cannot subject persons lawfully residing in the United States to indefinite military detention without charge based solely upon allegations of domestic criminal conduct. This holding reaffirms an essential principle of our constitutional democracy: So long as the courts are open and functioning, civilians accused of criminal wrongdoing are subject to speedy public prosecution rather than indefinite military detention.

The panel decision is also in harmony with prior precedent. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005), recognize the inviolable line within the United States between civilian and military authority, as do earlier detention cases decided during prior periods of public upheaval. *See, e.g.*, *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). Al-Marri has already been detained by the United States for almost six years, the past four in a Navy brig. He is the only person in the country being held as an "enemy combatant," and en banc review is not necessary to ensure uniformity of circuit court decisions. If the Supreme Court is inclined to endorse the government's extraordinary and unprecedented position – that a lawful resident civilian accused of criminal conduct inside the United States may be imprisoned by the military indefinitely without charge – it will

undoubtedly grant certiorari, as it has done in prior cases concerning so-called "enemy combatants." But there is no need or basis for rehearing this case en banc, and the government's petition should be denied.

STATEMENT

On December 12, 2001, Ali Saleh Kahlah al-Marri, a legal resident of the United States, was arrested by civilian authorities at his home in Peoria, Illinois, as a material witness in the September 11 investigation. Slip op. 6. The next month, he was formally arrested by the government on a criminal complaint and, one week later, charged in a one-count indictment in the Southern District of New York. *Id.* A second indictment charging six additional counts followed a year later. *Id.* After those charges were dismissed on venue grounds, the government re-indicted al-Marri on the same seven counts in the Central District of Illinois. *Id.* at 6-7. On June 23, 2003, eighteen months after his arrest, weeks before his trial, and on the eve of a federal court hearing on his motion to suppress illegally seized evidence, the government dismissed the criminal charges and the President declared al-Marri an "enemy combatant." *Id.* at 7. That same day, the military assumed custody over al-Marri and incarcerated him in the Naval Consolidated Brig in South Carolina. *Id.* at 7-8.

Since that day more than four years ago, the military has imprisoned al-Marri without charge or indication when, if ever, his confinement will end. *Id.* at 8. For the first sixteen months of his military detention, the government held al-Marri *incommunicado*, forbidding him any contact with the outside world including his attorneys (with whom he had regular contact while a defendant in the civilian system) and with his wife and children (with whom he has been denied direct contact since December 2001). *Id.* The government also subjected al-Marri to complete isolation, extreme sensory deprivation, threats against him and his family, religious denigration, denial of basic necessities, and other abuse. *Id.*

The government believes that al-Marri was involved in serious unlawful conduct, but that does not alter the essential facts. Al-Marri is a lawful resident of the United States. He was arrested on U.S. soil and at all times has been detained in jurisdictions (Illinois, New York, and South Carolina) in which the civilian courts are open and operating. There is no allegation that al-Marri belongs to or is affiliated with the armed forces of any nation at war with the United States; was seized on or near a battlefield in which the armed forces of the United States or its allies were engaged in combat; was ever in Afghanistan during the armed conflict between the United States and the Taliban there; or ever directly participated in any hostilities against United States or allied armed forces anywhere in the world.

Rather, the allegation is that al-Marri is a civilian accused of criminal acts. Slip op. 9-10.

Under these circumstances, the panel – faithful to the most basic principles of limited constitutional government – held that the Executive lacked statutory or inherent authority to subject al-Marri to indefinite military detention by the simple expedient of pronouncing him an "enemy combatant." Judge Hudson dissented.

ARGUMENT

The government's Petition for Rehearing does not raise any issue that meets the criteria for rehearing en banc, Fed. R. App. P. 35; 4th Cir. R. 35, or that otherwise warrants full consideration by the Court.

A. The Panel Decision Properly Preserves the Boundary Between Civilian and Military Jurisdiction.

1. The panel decision preserves the long-recognized line between civilian and military jurisdiction in the United States, a Rubicon that must never be crossed in a constitutional democracy. By defining a sphere where the military cannot act, no matter how serious the allegation of criminal wrongdoing, this boundary protects the Constitution's most fundamental guarantees. The government has sought here an unprecedented and wholesale erasure of that line, which would allow a president, by the mere stroke of a pen, to avoid the criminal process in any case involving allegations of terrorism.

As the panel found, the line between civilian and military jurisdiction inside the United States is at the heart of *Ex parte Milligan*, the facts of which "mirror[]" those alleged here. Slip op. 58. *Milligan* too involved an individual who the government believed had committed "an *enormous crime*" during a period of war and who was a "dangerous enem[y]" to the Nation. 71 U.S. at 130 (emphasis in original).[1] Nevertheless, the Supreme Court found no support in the "laws and usages of war" for subjecting Milligan to military jurisdiction as a combatant. Instead, the Court held that he was a civilian, who could be subject only to criminal trial and punishment. *Id.* at 121-23. The Supreme Court has hailed *Milligan* as "one of the great landmarks in th[e] Court's history," *Reid v. Covert*, 354 U.S. 1, 30 (1957), and in subsequent decisions maintained the historic "boundaries between military and civilian power, in which our people have always believed." *Duncan*, 327 U.S. at 324.

The panel construed the congressional Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF"), against this background. It properly concluded that Congress's authorization to use "necessary and appropriate" military force did not contain an implied delegation to the

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[1] The government's suggestion (Pet. 13 n.4) that Milligan did not "associate himself with enemy forces" is misplaced. The Supreme Court concluded that, even if he had, Milligan was subject to criminal prosecution in a civilian court. *See Milligan*, 71 U.S. at 131 ("If in Indiana [Milligan] conspired with bad men to assist the enemy, he is punishable for it in the courts of Indiana.").

President to use the military to detain, let alone indefinitely detain, any person in the United States he suspects of conspiring to commit terrorist acts. Slip op. 59-60. While the military detention of enemy soldiers is "a fundamental incident of waging war," *Hamdi*, 542 U.S. at 519 (plurality opinion), the military detention of suspected domestic criminals "just as certainly is not." Slip op. 60. The panel thus properly refused "to infer a grant of [detention] authority that is so far afield from anything recognized by precedent or law-of-war principles, especially given the serious constitutional concerns it would raise." *Id.* at 61.

2. The government's petition ignores the statute that speaks directly to this issue. *See* USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) ("Patriot Act"). Enacted shortly after the AUMF, the Patriot Act makes clear that Congress intended suspected "terrorist aliens" living within the United States and believed to have come here to perpetrate acts of terrorism to be handled through the criminal justice system. As the panel found, "Congress could not have better described the Government's allegations against al-Marri – *and* Congress decreed that [such individuals] are *not* to be detained indefinitely but only for a limited time, and by civilian authorities, prior to deportation or criminal prosecution." Slip op. 67 (emphasis in original); 8 U.S.C. § 1226a(a) (requiring that "terrorist aliens"

be charged within seven days of arrest).[2] The Patriot Act's carefully prescribed and explicit authorization for limited detention and criminal process in civilian courts conclusively establishes that Congress did not silently empower the President to order the indefinite military detention of "terrorist aliens" living within the United States. Slip op. 62.[3]

B. The Panel Decision Does Not Conflict with Supreme Court or Circuit Precedent.

1. No appellate court in this country has ever endorsed the contrary position pressed by the government – *viz.*, that a civilian in al-Marri's position may be held by the military, without charge, for what may be the remainder of his natural life. The government protests (Pet. 8-11) that the panel's decision conflicts with *Hamdi v. Rumsfeld*. It does not. *Hamdi* involved what the government itself

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[2] The floor debate on the AUMF cited by the government (Pet. 12 n.3) focused on the use of military force overseas alone, and did not approve any domestic detention authority. By contrast, Congress specifically discussed the domestic detention of "terrorist aliens" during contemporaneous debate over the Patriot Act, and rejected the Administration's proposal to authorize the indefinite detention of suspected terrorist aliens living within the United States. *See* Christopher Bryant & Carl Tobias, *Youngstown Revisited*, 29 Hastings Const. L.Q. 373, 386-91 (2002).

[3] The panel's interpretation of the Patriot Act does not eliminate the President's authority to use "necessary and appropriate" military force against individuals in the United States who present an imminent threat of attack. *Hamdi*, 542 U.S. at 552 (Souter, J., concurring in the judgment). Rather, the Patriot Act demonstrates that the AUMF did not silently authorize the indefinite military detention of "terrorist aliens" (or "terrorist citizens") living in the United States who, like al-Marri, fall outside the definition of "enemy combatant," at a time when the courts are open and operating.

described as a "classic wartime detention" (Slip op. 48): the overseas military capture of a Taliban soldier who fought against United States and allied forces on an Afghan battlefield. *Hamdi*, 542 U.S. at 512-13, 516 (plurality opinion); *id.* at 549 (Souter, J., concurring in the judgment). The Supreme Court held that the capture and detention of such individuals constituted a "fundamental and accepted … incident of war," *id.* at 518 (plurality opinion), but emphatically limited its holding to "the detention of individuals in the *narrow category* [it] described," namely, prisoners who were "part of or supporting forces hostile to the United States or coalition partners in Afghanistan who engaged in armed conflict against the United States there," *id.* at 516-17 (internal quotation marks omitted) (emphasis added); *see also id.* at 526. *Hamdi*, in short, fell on the far side of the clear line between civilian and military jurisdictions.[4]

The government also complains (Pet. 9-11) that the panel's decision conflicts with *Padilla v. Hanft.* The government itself, however, earlier described Padilla to this Court as "*precisely like*" Hamdi. Opening Br. for the Appellant at

[4] As the panel observed, it was precisely this distinction between civilians and combatants that underlay Judge Wilkinson's statement that "[t]o compare [Hamdi's] battlefield capture to the domestic arrest in *Padilla v. Rumsfeld* is to compare apples and oranges." *Hamdi v. Rumsfeld*, 337 F.3d 335, 344 (4th Cir. 2003) (Wilkinson, J., concurring in the denial of rehearing en banc). Of course, when Judge Wilkinson made this statement the government had not yet proffered any evidence that Padilla, like Hamdi, carried a rifle alongside the Taliban against United States armed forces on an Afghan battlefield during the conflict there. *See* Slip op. 50 n.12.

29, *Padilla v. Hanft*, 423 F.3d 386 (No. 05-6396) (emphasis added). According to the government, both men were "part of or supporting forces hostile to the United States or coalition partners in Afghanistan and … engaged in armed conflict against the United States there." *Id.* at 16, 20 (internal quotation marks omitted). As in *Hamdi*, the government defended Padilla's detention to this Court as a "classic battlefield detention." Slip op. 48 (quoting government brief). This Court accepted the government's characterization, holding that Padilla could be detained by the military because he fell within the narrow category of enemy combatant "as that term was defined for purposes of the controlling opinion in *Hamdi*." *Padilla*, 423 F.3d at 391. As the Court explained, there was "no difference in principle between Hamdi and Padilla" because Padilla "took up arms against United States forces in [Afghanistan] in the same way and to the same extent as did Hamdi," and he could therefore be detained as an enemy combatant "to prevent his return to the battlefield . . . as a fundamental incident to the conduct of war." *Id.* at 391-92. Thus, *Padilla*, like *Hamdi* and the panel decision here, hewed to the established and inviolable line between civilian and military jurisdictions.[5]

[5] As the panel observed, the government also argued in *Padilla*, just as it argued in *Hamdi*, that the AUMF provided the President with even broader authority to subject to military detention, as "enemy combatants," individuals otherwise involved "in the global armed conflict against the al Qaeda terrorist network." Slip op. 49 (quoting government briefs). But neither this Court in *Padilla* nor the Supreme Court in *Hamdi* "accepted the government's invitation to fashion such a broad construction of the AUMF." *Id.* at 49-50.

2. Further, the government (Pet. 11 n.2) asserts that the panel decision conflicts with *Ex parte Quirin*, 317 U.S. 1 (1942), because, according to the government, the Supreme Court got its facts wrong in that case. But, as the panel found, the Supreme Court determined that the petitioners were all German soldiers, directed and paid by the "military arm" of the enemy government in a declared war between the United States and Germany, and based its holding on that understanding. *Quirin*, 317 U.S. at 21-22; *see also id.* at 46 (concluding "only" that petitioners, as members of the German army, "were plainly within th[e] boundaries" of military jurisdiction as combatants subject to military trial for violating the laws of war). Had the facts been otherwise, the case might well have been decided differently. On its terms, however, *Quirin* falls squarely within the traditional boundaries of military jurisdiction, and does not remotely involve lawful resident civilians accused of committing domestic crimes.[6] Indeed, civilians accused of assisting the German saboteurs in *Quirin* were charged and tried in

[6] The dissent notes (Slip op. 83-84) that the German saboteurs did not carry conventional weapons or enter a zone of active military operations. But their failure to do so bore solely on the question of whether the saboteurs' otherwise privileged belligerency was unlawful, not whether, as German soldiers, they were combatants subject to military jurisdiction and detention in the first instance, which they indisputably were. *Quirin*, 317 U.S. at 36-37.

federal court. *See Cramer v. United States*, 325 U.S. 1 (1945); *United States v. Haupt*, 136 F.2d 661 (7th Cir. 1943).[7]

3. The government (Pet. 14) further suggests that because the Supreme Court assumed the validity of the petitioner's detention in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), it necessarily endorsed al-Marri's detention as well. But, as the panel explained (Slip op. 54), the issue of Hamdan's detention was not before the Supreme Court. Moreover, *even if* the Supreme Court were ultimately to approve the detention of individuals such as Hamdan, who were captured outside the United States and who lack substantial and voluntary connections to this country, it would not bolster the government's argument here. As the government acknowledges, al-Marri's detention is governed by domestic law. And domestic law differentiates between individuals captured and detained outside the

[7] The government's petition (Pet. 8, 9, 13) also implies that the scope of the President's detention authority depends upon al-Marri's citizenship. That has never been the law. All persons living in the United States are entitled to the protections of the Constitution, and have the same right to be free from unlawful detention. *See, e.g.*, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2681-82 (2006); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896). Likewise, *Hamdi*, *Padilla*, *Quirin*, and the precedents on which they rely all make clear that citizenship is irrelevant to the lawfulness of military detention, which is precisely what the government argued vigorously, and successfully, in those cases. *See*, *e.g.*, *Hamdi*, 542 U.S. at 519 (plurality opinion) ("a citizen no less than an alien, can be an [enemy combatant]"); *Padilla*, 423 F.3d at 392; *Quirin*, 317 U.S. at 37. The panel decision thus demonstrates faithful consistency, not conflict, with Supreme Court and Circuit precedent.

United States and those lawfully residing within this country who are seized and detained here for purported domestic crimes. Slip op. at 54-55; *supra* at 4-7.[8]

C. The Panel Decision Does Not Threaten National Security.

The claim that the panel decision jeopardizes national security is an odd argument for the government to advance given that al-Marri had already been in federal custody for eighteen months and, hence, incapacitated when the President declared him an "enemy combatant." Indeed, al-Marri was being prosecuted on criminal charges without the slightest hint his prosecution and attendant civilian detention imperiled America's safety. Further, the panel went to great lengths to point out the obvious: al-Marri does not have to be released. He can be returned to civilian custody, indicted, and punished if convicted. Slip op. 77. The government has never said that al-Marri's case is not amenable to criminal process in an Article III court. Nor could it, having already subjected him to that very process.

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[8] The government (Pet. 15) also claims that the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) ("MCA"), eliminates jurisdiction over al-Marri's habeas appeal. The Court's rejection of that claim was unanimous. Slip op. 27; 78. As the panel found, Congress did not intend the MCA to apply to legal resident aliens such as al-Marri and that construing the statute to repeal jurisdiction over al-Marri's habeas action would raise serious constitutional questions. *Id.* 13-27. There is similarly no basis to revisit the Court's ruling that it had jurisdiction to decide al-Marri's appeal.

The government's argument, moreover, ignores the considered judgment of Congress that suspected "terrorist aliens" living inside the United States must be handled through the civilian justice system, not held indefinitely without charge. *See supra* at 5-7. As Congress knew when it enacted the AUMF and the Patriot Act, the President possesses ample tools to protect the Nation without casting aside the criminal justice system. Those tools include the President's "plenary authority to deploy our military against terrorist enemies overseas" (Slip op. 73); "the well-stocked statutory arsenal" of laws criminalizing a gamut of terrorist acts (*id.* at 74) (internal quotation marks and citation omitted); and the President's authority to deploy the armed forces at home to protect the country in the event of actual terrorist attacks or incidents in the United States under certain conditions (*id.*) (citing amendment to the Insurrection Act). *See also Hamdi*, 542 U.S. at 560-61 (Scalia, J., dissenting) (describing the ample grounds for criminal prosecution in the ordinary civilian courts when an individual seized in the United States is accused of crimes such as terrorism). They also include the President's inherent authority to use military force to repel an attack against the Nation or, "in a moment of genuine emergency, when the Government must act with no time for deliberation" to detain an individual "if there is reason to fear he is an imminent threat to the safety of the Nation and its people." *Id.* at 552 (Souter, J., concurring

in the judgment). But, even then, once subdued, the government must charge and try such persons, not simply lock them away in a stockade forever.[9]

There is no evidence that the government's potent law enforcement tools were or are deficient.[10] Indeed, the government has charged and convicted numerous al Qaeda (and other) terrorists arrested in this country since September 11, including Zacarias Moussaoui, a self-proclaimed member of al Qaeda and the only individual arrested in connection with the September 11 terrorist attacks. Slip op. 58-59 n.16. By contrast, only two individuals arrested in the United States have been declared "enemy combatants": al-Marri and Padilla. Both were already

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[9] The government (Pet. 9 n.1) virtually abandons its claim that the President possesses inherent authority as commander-in-chief to subject al-Marri to indefinite military detention as an "enemy combatant." As the panel found, that claim contradicts Congress's express will in the Patriot Act (Slip op. 65-68); defies all precedent (*id.* 68-71); and "far exceeds [the power] granted [the President] by the Constitution." (*id.* 71; *see also id.* 71-77). In this regard as well, there is no basis to revisit the panel's ruling.

[10] On the contrary, former Attorney General John Ashcroft explained that al-Marri was designated an "enemy combatant" because he became a "hard case" by "reject[ing] numerous offers to improve his lot by . . . providing information." Slip op. 58-59 n.16. Congress, however, plainly did not authorize the President to militarize a domestic arrest by removing that person from the constitutional protections of the criminal justice system, detaining him *incommunicado* for sixteen months (until forced to provide him access to counsel), and subjecting him to abuse and mistreatment for purposes of interrogation. *Hamdi*, 542 U.S. at 521 (plurality opinion); *see also id.* at 556 (Scalia, J., dissenting) ("It is unthinkable that the Executive could render otherwise criminal grounds for detention noncriminal merely by disclaiming an intent to prosecute, or by asserting that it was incapacitating dangerous offenders rather than punishing wrongdoing.").

detained in high security conditions at the moment they were so designated. Padilla, who was held in military custody for three-and-one-half years, is now in the midst of a criminal trial in federal district court in Miami, notwithstanding similar baseless claims by the government that prosecuting Padilla in a civilian court would harm national security. Al-Marri, meanwhile, continues to languish in a Navy brig without charge. The government's suggestion that the Nation's security depends on subjecting al-Marri to these conditions cannot be maintained.

CONCLUSION

For more than four years, the government has imprisoned a legal resident of the United States in a Navy jail without charge based upon the assertion that he was conspiring to commit domestic crimes. If the Supreme Court is inclined to endorse this unprecedented exercise of executive power on U.S. soil, it will take the case on *certiorari*, and so hold. But there is no basis or need for rehearing this case en banc.

For the foregoing reasons, the government's petition should be denied.

Respectfully submitted,

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Dated: August 15, 2007

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 15th day of August, 2007, I filed with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit, via Hand Delivery, the required number of copies of this Response to Petition for Rehearing and Rehearing *En Banc*, and further certify that I served, via UPS Transportation, the required number of said Response to the following:

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