



AL-MARRI V. PUCCIARELLI
FOURTH CIRCUIT INCORRECTLY
INTERPRETS “ENEMY COMBATANT”

by

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On July 15, 2008, the U.S. Court of Appeals for the Fourth Circuit reversed and remanded the Central District of Illinois’ judgment dismissing Ali Saleh Al-Marri’s habeas corpus petition on the grounds that the district court deprived al-Marri of his due process. The Fourth Circuit instructed the district court to determine if the government could not have presented additional evidence to establish al-Marri was an enemy combatant without unjustifiably burdening itself.

Al-Marri filed a petition for a writ of habeas corpus in the district court challenging his military detention as an enemy combatant. Initially, a divided panel of the Fourth Circuit reversed the judgment of the district court and ordered that al-Marri’s detention cease. *Al-Marri v. Wright*, 487 F.3d 16 (4th Cir. 2007). The Fourth Circuit later vacated that judgment and considered the case *en banc*. The *en banc* court held that 1) if the Government’s allegations about al-Marri are true, Congress has legally empowered the President to detain al-Marri as an enemy combatant, and 2) assuming the present facts, al-Marri was not afforded sufficient process to challenge his designation as an enemy combatant. *Al-Marri v. Pucciarelli*, No. 06-7427, __F.3d __, 2008 WL 2736787 at *31 (4th Cir. July 15, 2008).

The Background of al-Marri v. Pucciarelli. The facts leading up to the Fourth Circuit decision are undisputed by either party. Al-Marri is a dual citizen of Qatar and Saudi Arabia who legally entered the United States with his wife and children on September 10, 2001 to attend graduate school in Peoria, Illinois. The next day, terrorists hijacked four commercial aircraft and used them to inflict grievous injury on and murder thousands of innocent Americans. On December 12, 2001, the FBI arrested al-Marri at his home as a material witness in the Government’s investigation of the September 11th attacks. At this point al-Marri was imprisoned in civilian jails in Peoria and then New York City.

In February 2002, the Government charged al-Marri with possession of unauthorized or counterfeit credit card numbers with intent to defraud in the Southern District of New York. A year later, al-Marri was also charged with two counts of making a false statement to the FBI, three counts of making a false statement on a bank application and one count of using another person’s identification for the purpose of influencing the action of a federally insured financial institution. In May 2003, a federal district court in New York dismissed the charges against al-Marri for lack of venue. Prior to a scheduled hearing to address pre-trial motions, the Government moved *ex parte* to dismiss the indictment based on an order signed by the President.

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In the order, President George W. Bush stated that he “DETERMINE[D] for the United States of America that” al-Marri: (1) is an enemy combatant; (2) is closely associated with al Qaeda; (3) “engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism; (4) “possesses intelligence . . . that . . . would aid the U.S. efforts to prevent attacks by al Qaeda”; and (5) “represents a continuing, present, and grave danger to the national security of the United States.” The order directed the Attorney General to surrender al-Marri to the Secretary of Defense and further directed the Secretary of Defense to “detain him as an enemy combatant.” Since then, al-Marri has been held in the Naval Consolidated Brig in South Carolina. On July 8, 2004, al-Marri’s counsel filed the present habeas petition on al-Marri’s behalf in the District of South Carolina. The district court remanded the case to a magistrate judge for consideration of the appropriate process to be afforded al-Marri in light of *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (Applied the *Matthews v. Eldridge* test to balance the interests of the government and the detainees’ right to process).

On September 9, 2004, the Government responded to al-Marri’s petition with *The Declaration of Mr. Jeffrey N. Rapp Director, Joint Intelligence Task Force for Combating Terrorism (Declassified 2004)*. The Rapp Declaration asserts that al-Marri: (1) is “closely associated with al Qaeda . . .”; 2) maintained communications with known terrorists including Khalid Sheikh Mohammed; (3) trained at an al Qaeda terrorist training camp in Afghanistan sometime between 1996 and 1998; (4) in the summer of 2001, was introduced to Osama Bin Laden by Khalid Shaykh Muhammed; (5) volunteered for a “martyr mission” on behalf of al Qaeda; (6) was ordered to enter the United States sometime before September 11, 2001 to serve as a “sleeper agent” to facilitate terrorist activities and disrupt the American financial system through computer hacking; (7) was provided money by terrorist financier Mustafa Ahmed al-Hawsawi; (8) collected technical information concerning the use of chemicals as weapons of mass destruction; (9) possessed stolen credit card information and undertook efforts to obtain false information, credit cards, and banking information; and (10) saved information about jihad, the September 11th attacks, and Bin Laden on his laptop computer.

The magistrate judge afforded Al-Marri an opportunity to file rebuttal evidence and he refused. Consequently, the magistrate recommended dismissal of al-Marri’s habeas petition because al-Marri failed to rebut any of the accusations of the Rapp Declaration.

The Fourth Circuit’s Opinion in Al-Marri v. Pucciarelli. The Fourth Circuit’s *en banc per curiam* opinion does not discuss the rationale of the court’s decision. In Judge Motz’s plurality opinion she aligns herself with the *per curiam* opinion but explains she would prefer to have the case remanded to the district court. Further, she would instruct the district court to issue a writ of habeas corpus directing the Secretary of Defense to release al-Marri from military custody back into the custody of the Attorney General for deportation or charge al-Marri with a crime within a reasonable period set by the district court.

Judge Motz begins her analysis by noting that the right to due process under the Fifth Amendment extends to all lawfully admitted aliens living within the United States. *See Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *see also United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990). The opinion continues by noting that: [F]reedom from imprisonment-lies at the heart of liberty that [the Due Process] Clause protects.” *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001). Motz’s opinion conceded that in the past the Court has permitted exceptions to the aforementioned rule. She notes that although some process is always required in order to detain an individual special situations detention based on process less that that attendant to a criminal conviction does not violate the Fifth Amendment. *See, e.g., Kansas v. Hendricks*, 521 U.S. 346 (1997) (civil commitment of mentally ill sex offenders); *United States v. Salerno*, 481 U.S. 739 (pretrial detention of dangerous adults); *Addington v. Texas*, 441 U.S. 418 (1979) (civil commitment of mentally ill); *Hamdi*, 542 U.S. at 516, 522 (Congress may constitutionally authorize the President to order military detention, without criminal process, of persons who can be legally classified as enemy combatants).

After conceding it is possible for the President to detain al-Marri if he has congressional authorization, Judge Motz determines that the Authorization for Use of Military Force (AUMF), the congressional authority the President asserted in detaining al-Marri, does not authorize al-Marri’s military detention. Judge Motz did not find al-Marri’s detention analogous to the detention’s authorized in *Hamdi* or *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005). Judge Motz distinguishes al-Marri’s case from *Hamdi* and *Padilla* by noting that both *Padilla* and *Hamdi* were captured supporting hostile forces in Afghanistan, making it clear *Hamdi* was an enemy combatant.

Judge Motz attempts to frame her interpretation of Hamdi and Padilla with *Ex Parte Quirin*, 317 U.S. 1 (1942). In *Quirin*, petitioners claiming American citizenship were found to have been directed, outfitted, and paid by the German military in World War II to bring explosives into the United States to destroy American war industries had been properly classified as enemy combatants. The Court held they were properly classified as enemy combatants 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.” 317 U.S. at 37-38.

Judge Motz asserts that in all three aforementioned cases enemy combatant status depends on affiliation with the military arm of the enemy government. Judge Motz continues by finding that in *Quirin* the enemy government was the German Reich; in *Hamdi and Padilla*, it was the Taliban government of Afghanistan. She concludes by holding that because al-Marri was not involved in the conflict between the U.S. and al Qaeda in Afghanistan, but only of associating with al Qaeda, a terrorist group lacking sovereignty, he cannot be affiliated with the military arm of a government, which precludes him from being an enemy combatant. Judge Motz defends her assertion by noting that the law of war does not classify persons affiliated with terrorist organizations as enemy combatants for fear that doing so would immunize them from prosecution and punishment by civilian authorities in the capturing country. The judge also cites to *Ex Parte Milligan*, 71 U.S. 6 (1866) (A presidential order and the “laws and usages of war are not sufficient to subject an American citizen to indefinite military detention”).

Judge Motz concludes her opinion by applying the test to assess claims of presidential power found in *Youngstown Sheet & Tube Co v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). Applying the *Youngstown* test, Judge Motz determined that the President could not have the power to subject individuals to indefinite military detention because Congress expressly forbids it in the Patriot Act. *See*, Patriot Act §412(a).

Judge Traxler also concurred with the *per curiam* opinion, holding that the President could make a finding that al-Marri is an enemy combatant under the AUMF highlighting the fact that al-Qaeda allied themselves with an enemy nation. However, Judge Traxler held that the process, afforded al-Marri by the district court did not meet the minimum requirements of due process guaranteed by the Fifth Amendment. Judge Traxler determined that in order for al-Marri to be afforded sufficient process the district court must balance the interests of both the government and al-Marri using the *Eldridge* test applied in *Hamdi*. He continues by explaining that *Hamdi* did not provide a due process standard to follow but only a test to apply to the current situation. Judge Traxler held that the Rapp memorandum is sufficient for the district court to determine that al-Marri is an enemy combatant if the government can make a showing that to provide any more evidence would be unduly burdensome. If the court determines that the government would not be unduly burdened, the government must provide more information and again attempt to make a showing that they would be unduly burdened under the *Eldridge* test.

Judge Gregory concurs with the *per curiam* opinion and presents a process the district court can use to ensure that al-Marri is provided proper process. Judge Gregory suggests an *in camera*, *ex parte* review of all evidence in the possession of U.S. agencies. The district court would then decide which evidence is appropriate for al-Marri to review. Judge Gregory further suggests that the Classified Information Procedures Act combined with legal precedent would serve as an effective guide to assist the district court in determining the evidence that should be release to al-Marri.

Chief Judge Williams concurred with the plurality opinion that the President has the authority to detain an enemy combatant but dissented from the plurality opinion concerning whether al-Marri was afforded sufficient process. The Chief Judge bases her argument on the grounds that: (1) al-Marri refused to participate in his own evidentiary hearings, precluding him from later challenging the validity of the evidence submitted by the government or the process afforded; (2) additionally, the presumption afforded the government in the initial hearings was contingent on al-Marri not presenting rebuttal evidence. If al-Marri were to present rebuttal evidence (which he refused to do), *Hamdi* would require that al-Marri received a more adversarial proceeding; (3) finally, in a typical habeas case the detainee has the burden to demonstrate that his detention is unjustified. The Chief Justice found no reason to hold that the district court denied al-Marri process because al-Marri had to

meet an evidentiary burden typical in normal habeas cases.

Chief Judge Williams continues by questioning the plurality's assertion that al-Qaeda al-Marri is not an enemy combatant under the AUMF. The Chief Judge notes that the AUMF grants the President power to use force against "organizations" that he determines "planned, authorized, committed, or aided in" the September 11 attacks. The Chief Judge asserts that *Hamdi v. Rumsfeld* has already classified al-Qaeda as an organization that falls within the AUMF. "There can be no doubt that 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, are individuals Congress sought to target in passing the AUMF." *Hamdi*, 542 U.S. at 518. The Chief Judge concludes the aforementioned argument by noting that based on the al-Marri and the plurality's argument, if the American authorities captured Osama Bin after September 18, 2001 but before actual military operations in Afghanistan took place he would not be subject to military custody.

Judge Wilkinson and Niemeyer both wrote separate opinions concurring in part and dissenting in part.

In conclusion, the *per curiam* opinion reaffirms that the President has been legally empowered by Congress to detain enemy combatants. While the court found that the district court did not provide al-Marri sufficient process, *Hamdi* still controls as the guide for determining the process that courts are to provide in detainee hearings.

The plurality opinion did however, ignore the plain language of the AUMF and the precedent set forth in *Quirin* by finding al-Marri could not be an enemy combatant based on his associations with al Qaeda. There is very little that can be done to distinguish al-Marri, who was equipped, trained, and directed by al Qaeda (an organization operating with the support and consent of Afghanistan, an enemy nation) to conduct chemical warfare operations in the United States, from the German operatives in *Quirin* who were equipped, trained, and directed to conduct operations to dismantle the American industrial complex during WWII. There are only two significant differences in these cases. The first is that two of the German operatives were *American citizens* at the time of their proceeding. The second is that secret military tribunals carried out the proceedings. For over half a century the Supreme Court has recognized the President's authority to detain individuals, even American citizens, on the grounds of being an enemy combatant. The lack of substantial jurisprudence on the matter is a testament to the Executive's restraint in exercising this authority since WWII. Further, it is unreasonable for the plurality to determine that the district court did not afford a non-citizen who refused to participate in his own proceeding his right to due process by entitling the government, who complied with al-Marri's sole declassification request, to an initial presumption they would already be entitled to in a typical habeas hearing.

Based on the Rapp Declaration the government will more likely than not disclose additional information possessed by law enforcement agencies. If the government does so and al-Marri again refuses to rebut the evidence presented against him, then there should not be any grounds to challenge the district court once again denying al-Marri's habeas petition.