AL-MARRI V. PUCCIARELLI: THE FOURTH CIRCUIT SOLIDIFIES THE PRESIDENT'S AUTHORITY TO DETAIN AL QAEDA AGENTS WHILE CREATING ADDITIONAL CONFUSION REGARDING THE HABEAS CORPUS PRIVILEGES OF DETAINES

I. INTRODUCTION

The practice of detaining enemy combatants and subsequently trying them before military tribunals has been a part of United States history since the country's inception.1 However, following the terrorist attacks of September 11, 2001, and the subsequent detainment of thousands of alleged terrorists, a number of questions have emerged surrounding the authority of the President of the United States to order the detention and military tribunals of suspected terrorists.2 Within the last decade, the Supreme Court of the United States has provided some guidance by upholding a congressional order entitled the Authorization for Use of Military Force3 ("AUMF"), which authorized the President to detain members of al Qaeda and the Taliban.4 Consequently, the Supreme Court has also attempted to clarify the rights of such detained persons by extending the privilege of habeas corpus to alien-detainees and establishing guidelines for the habeas proceedings of detainees.5

In the case of Al-Marri v. Pucciarelli,6 Ali Saleh Kahlah al-Marri ("al-Marri"), a legal alien residing in Illinois, petitioned the United States District Court for the District of South Carolina for a writ of habeas corpus after United States military authorities detained him.7

1. Christopher M. Evans, Terrorism on Trial: The President's Constitutional Authority to Order the Prosecution of Suspected Terrorists by Military Commission, 51 DUKE L.J. 1831, 1837-38 (2002).
4. See Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (stating that the President was authorized by Congress under the AUMF to use "... all necessary and appropriate force ..." against those responsible for the 9/11 attacks; and that such force included detainment and trial).
5. See Boumediene v. Bush, 128 S.Ct. 2229, 2262 (2008) (extending the privilege of habeas corpus to alien-detainees at Guantanamo Bay). See also Hamdi, 542 U.S. at 533 (stating that detainees must receive notice of the evidence supporting their detention as well as a fair opportunity to rebut such evidence before a neutral decisionmaker).
6. 534 F.3d 213 (4th Cir. 2008) (per curiam) (en banc).
At trial, the United States Government offered evidence in support of al-Marri's detainment; al-Marri offered no rebuttal evidence in response.\(^8\) The district court subsequently dismissed al-Marri's habeas petition due to al-Marri's refusal to file rebuttal evidence.\(^9\)

On appeal, the United States Court of Appeals for the Fourth Circuit refused to classify al-Marri as an enemy combatant because the Government did not allege that al-Marri had ever taken up arms against the United States or that al-Marri had ever been near a battlefield in Afghanistan.\(^10\) Consequently, the Fourth Circuit classified al-Marri as a civilian.\(^11\) Upon finding no authority empowering the President to detain civilians, the Fourth Circuit then reversed the district court's ruling and ordered al-Marri's release from military custody.\(^12\)

However, before al-Marri's release, the Fourth Circuit vacated its decision and considered the case en banc.\(^13\) After rehearing the case en banc, a divided Fourth Circuit offered a per curiam opinion wherein the court made two holdings: (1) if the allegations against al-Marri were true, the President had authority to detain him, and (2) al-Marri had not received sufficient process.\(^14\) The Fourth Circuit reached these two holdings in two separate 5-4 votes with seven of the court's nine Judges writing concurring and dissenting opinions.\(^15\)

This Note will first review the facts and holding of the \textit{Al-Marri} case, along with the reasoning the various Fourth Circuit Judges employed to reach the court's per curiam decision.\(^16\) This Note will then provide a summary of relevant Supreme Court and Fourth Circuit precedent that have established guidelines for: (1) the classification of enemy combatants, (2) the President's authority to detain enemy combatants, and (3) the habeas corpus and due process privileges of enemy combatants.\(^17\) Next, this Note will demonstrate that, although the Fourth Circuit correctly concluded that the AUMF authorized the President to detain al-Marri, the Fourth Circuit erred in concluding al-Marri had not received sufficient due process.\(^18\) Specifically, this Note will establish that the legal definition of an enemy combatant

\(^8\) \textit{Al-Marri I}, 487 F.3d at 166.
\(^9\) \textit{Id.}
\(^10\) \textit{Id.} at 183.
\(^11\) \textit{Id.} at 187.
\(^12\) \textit{Id.} at 195.
\(^13\) \textit{Al-Marri v. Pucciarelli (Al-Marri II)}, 534 F.3d 213, 216 (4th Cir. 2008) (per curiam) (en banc).
\(^14\) \textit{Al-Marri II}, 534 F.3d at 216.
\(^15\) \textit{See id.} at 216-352 (providing the per curiam opinion of the court as well as the seven concurring and dissenting opinions of the judges).
\(^16\) \textit{See infra} notes 23-104 and accompanying text.
\(^17\) \textit{See infra} notes 105-304 and accompanying text.
\(^18\) \textit{See infra} notes 305-517 and accompanying text.
includes al Qaeda agents operating within the United States.19 Next, this Note will demonstrate that the AUMF specifically authorized the President to detain persons, like al-Marri, who associated with al Qaeda.20 Finally, this Note will demonstrate that al-Marri received sufficient due process because al-Marri's habeas corpus proceedings adhered to guidelines established by the Supreme Court.21 Thus, this Note will conclude that the Fourth Circuit correctly held that the AUMF authorized the President to detain al-Marri as an enemy combatant, and that the Fourth Circuit erroneously held that al-Marri had not received sufficient due process.22

II. FACTS AND HOLDING

On September 10, 2001, Ali Saleh Kahlah al-Marri ("al-Marri"), a Qatari national, legally entered the United States to attend Bradley University in Peoria, Illinois.23 One day following al-Marri's arrival, terrorist agents of al Qaeda used four hijacked airliners to kill and injure thousands of United States citizens.24 One week after these attacks, the United States Congress passed the Authorization for Use of Military Force25 ("AUMF"), which authorized the President of the United States to use all force necessary and appropriate against those organizations, nations, or persons who aided in the terrorist attacks of September 11, 2001 in order to prevent similar attacks from occurring in the future.26

Two months after al-Marri entered the country, Federal Bureau of Investigation ("FBI") agents arrested him as a material witness to the September 11, 2001 attacks.27 The FBI found al-Marri in possession of fifteen or more counterfeit or unauthorized credit card numbers.28 The United States Government soon after charged al-Marri with intent to defraud, making false statements to the FBI, making false statements in bank applications, and using another person's identification to influence the actions of a federally insured financial institutions.29 The Government eventually indicted al-Marri on all

19. See infra notes 330-89 and accompanying text.
20. See infra notes 390-444 and accompanying text.
21. See infra notes 445-517 and accompanying text.
22. See infra notes 518-37 and accompanying text.
27. Al-Marri II, 534 F.3d at 254.
28. Id. at 255.
29. Id.
these charges in the United States District Court for the Central District of Illinois.\textsuperscript{30} Three days before a hearing for pretrial motions, the Government moved to dismiss the case based on an order from the President, which classified al-Marri as an enemy combatant closely associated with al Qaeda.\textsuperscript{31} The district court granted this motion and delivered al-Marri into military custody.\textsuperscript{32} The United States Military subsequently detained al-Marri in the Naval Consolidated Brig in South Carolina.\textsuperscript{33}

For four years al-Marri remained in military custody without charge or any indication of when his confinement would end.\textsuperscript{34} Military authorities did not permit al-Marri to see his family or consult with legal counsel for the first sixteen months of his confinement.\textsuperscript{35} Despite this lack of communication, al-Marri's counsel filed a petition for a writ of habeas corpus on July 8, 2004 in the United States District for the District of South Carolina.\textsuperscript{36} In this petition al-Marri claimed that his confinement was unlawful and violated his right to due process.\textsuperscript{37} In support of this claim, al-Marri argued that he was a civilian and as such, the Due Process Clause of the United States Constitution entitled him to an opportunity to challenge his alleged status as an enemy combatant.\textsuperscript{38} Al-Marri then demanded that the Government either charge him with a crime, or release him from military custody.\textsuperscript{39} Specifically, al-Marri demanded a hearing wherein the Government would be forced to present evidence supporting al-Marri's alleged enemy combatant status, and al-Marri would be granted an opportunity to refute such evidence with the assistance of legal counsel.\textsuperscript{40}

Two months later, the Government answered al-Marri's petition with evidence supporting the President's detention order.\textsuperscript{41} Jeffrey N. Rapp, Director of the Joint Intelligence Task Force for Combating Terrorism, prepared this evidence and it came to be known as the Rapp Declaration.\textsuperscript{42} The declaration asserted that al-Marri: (1) asso-

\textsuperscript{30} Id.
\textsuperscript{31} Al-Marri I, 487 F.3d at 164-65.
\textsuperscript{32} Id. at 165.
\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Id. Counsel for al-Marri originally filed a petition for a writ of habeas corpus on July 8, 2003, in the Central District of Illinois, however the petition was dismissed for lack of venue. Id.
\textsuperscript{37} Id. at 255-56.
\textsuperscript{38} Id. at 256.
\textsuperscript{39} Al-Marri II, 534 F.3d at 255 (Traxler, J., concurring).
\textsuperscript{40} Id.
\textsuperscript{41} Al-Marri I, 487 F.3d at 165.
\textsuperscript{42} Id.
associated closely with al Qaeda, (2) trained in Afghanistan at an al Qaeda Terrorist training camp sometime between 1996 and 1998, (3) met Osama bin Laden in the summer of 2001, (4) volunteered for an al Qaeda martyr mission at that time, (5) received an al Qaeda mission to enter the United States before September 11, 2001 to operate as a “sleeper agent” to facilitate terrorist acts and investigate disrupting the financial system of the United States, (6) met with and received money from terrorist financier Mustafa Ahmed Al-Hawsawi, (7) collected information on his laptop regarding poisonous chemicals, (8) made efforts to obtain false identification, banking information, and credit card numbers, including stolen credit card numbers, (9) communicated by phone and email with known terrorists, and (10) saved information about the September 11, 2001 attacks, bin Laden, and jihad on his laptop computer.\footnote{43. Id. at 165-66.}

After providing this evidence, the Government allowed al-Marri access to counsel on October 14, 2004.\footnote{44. Id. at 166.} Al-Marri subsequently denied the Government’s allegation that he was an enemy combatant, and moved for summary judgment.\footnote{45. Id.} The district court denied this motion and sent the case to a magistrate judge to determine what process should be afforded al-Marri.\footnote{46. Id.} Pursuant to the United States Supreme Court’s recent decision in \textit{Hamdi v. Rumsfeld},\footnote{47. 542 U.S. 507 (2004).} the magistrate judge ruled that the Rapp Declaration provided al-Marri with sufficient notice of the grounds for his detainment.\footnote{48. Al-Marri \textit{I}, 487 F.3d at 166.} The magistrate judge then instructed al-Marri to file rebuttal evidence.\footnote{49. Id.} Al-Marri disagreed with the magistrate judge’s ruling and refused to rebut the Government’s evidence.\footnote{50. Id.} Al-Marri claimed that the Rapp Declaration constituted mere hearsay and could not alone satisfy the Government’s burden of proof.\footnote{51. Id.}

Following al-Marri’s refusal, the district court adopted the magistrate judge’s recommendation and dismissed al-Marri’s habeas petition.\footnote{52. Al-Marri v. Wright \textit{(Al-Marri III)}, 443 F. Supp. 2d 774, 785 (D.S.C. 2006).} The district court determined that the Supreme Court’s decision in \textit{Hamdi} clearly established that hearsay evidence alone could be capable of providing detainees with sufficient notice of the evidence brought against them.\footnote{53. Al-Marri \textit{III}, 443 F. Supp. 2d at 782.} In light of this determination, the
district court then stated that the Rapp Declaration provided al-Marri with sufficient notice of the factual basis for his detention as an enemy combatant.\textsuperscript{54} Citing al-Marri's failure to offer any evidence to rebut the Rapp Declaration, the district court subsequently denied al-Marri's petition concluding that al-Marri had failed to disprove the Government's evidence.\textsuperscript{55}

On appeal, the United States Court of Appeals for the Fourth Circuit reversed the district court's decision.\textsuperscript{56} The Fourth Circuit reasoned that the Government could not classify al-Marri as an enemy combatant because the Government failed to allege that al-Marri was ever part of a Taliban unit, had ever taken up arms against the United States, or had ever been present or near a battlefield in Afghanistan.\textsuperscript{57} The Fourth Circuit noted that the AUMF contained no language authorizing the President to detain civilians.\textsuperscript{58} After determining that al-Marri was a civilian, the Fourth Circuit then determined that the President had no authority to detain him.\textsuperscript{59} Consistent with this holding, the Fourth Circuit remanded the case with instructions to order al-Marri's release to civilian authorities.\textsuperscript{60} However, before this ruling took effect, the Fourth Circuit vacated its decision and reheard the case en banc.\textsuperscript{61}

In two separate 5-4 decisions, the en banc court held that: (1) if the Rapp Declaration were true, the AUMF empowered the President to detain al-Marri as an enemy combatant, and (2) that al-Marri had not received sufficient process to challenge his enemy combatant designation.\textsuperscript{62} The Fourth Circuit then reversed the district court's decision and remanded the case.\textsuperscript{63} In making this decision, the Fourth Circuit issued a per curiam opinion wherein the Circuit Judges were so divided that seven of the nine wrote additional opinions.\textsuperscript{64}

Circuit Judge Dianna G. Motz wrote an opinion concurring in judgment in which Judges M. Blane Michael, Robert B. King, and Roger L. Gregory joined.\textsuperscript{65} In her opinion, Judge Motz classified al-Marri as a civilian and determined his detainment to be unlawful be-

\textsuperscript{54} Id.
\textsuperscript{55} Id. at 785.
\textsuperscript{56} Al-Marri I, 487 F.3d at 195.
\textsuperscript{57} Id. at 183.
\textsuperscript{58} Id. at 188.
\textsuperscript{59} Id. at 189.
\textsuperscript{60} Id. at 195.
\textsuperscript{61} Al-Marri II, 534 F.3d at 216.
\textsuperscript{62} Id.
\textsuperscript{63} Id. at 217.
\textsuperscript{64} See id. at 216-352 (providing the per curiam opinion of the court as well as the seven concurring and dissenting opinions of the judges).
\textsuperscript{65} Al-Marri II, 534 F.3d at 217, 253. (Motz, J., concurring)
cause military authorities could not detain civilians.\textsuperscript{66} To arrive at this determination, Judge Motz relied on Supreme Court precedent defining an enemy combatant as a subject of a foreign state that was at war with the United States.\textsuperscript{67} Applying this definition, Judge Motz reasoned that al-Marri must be considered a civilian, and not an enemy combatant, because al-Marri was a citizen of Qatar, a country not at war with the United States.\textsuperscript{68} Judge Motz then indicated that al-Marri’s detention was unlawful because the United States Constitution does not grant the President authority to detain civilians.\textsuperscript{69} Upon determining that al-Marri was a civilian, Judge Motz next noted that there was no need to evaluate the legal sufficiency of al-Marri’s hearing.\textsuperscript{70} However, in order to give the Fourth Circuit’s decision a practical effect, Judge Motz joined in the judgment.\textsuperscript{71} Judge Motz reasoned that a remand would at least force the Government to demonstrate that the Rapp Declaration was the best available evidence.\textsuperscript{72}

Judge William B. Traxler also wrote a concurring opinion wherein he stated that an al Qaeda “sleeper agent” such as al-Marri should be classified as an enemy combatant due to the unconventional battlefield of the war on terror.\textsuperscript{73} Regarding the due process issue, Judge Traxler noted that persons captured and detained within the United States were entitled to the due process privileges guaranteed by the Constitution.\textsuperscript{74} However, Judge Traxler recognized that such privileges should be adapted to the facts, interests, and burdens of each case.\textsuperscript{75} Concerning al-Marri’s case, Judge Traxler stated that hearsay evidence such as the Rapp Declaration may be sufficient to classify al-Marri as an enemy combatant, but only if the Government first established that the declaration was the best available evidence, or that national security interests prevented the disclosure of further evidence.\textsuperscript{76} Applying this reasoning, Judge Traxler determined al-Marri had not received sufficient process because the Government did not establish the Rapp Declaration as the best available evidence.\textsuperscript{77}

\textsuperscript{66} Id. at 250.
\textsuperscript{67} Id.
\textsuperscript{68} Id.
\textsuperscript{69} Id. at 252-53.
\textsuperscript{70} Id. at 247, 252-53.
\textsuperscript{71} Id.
\textsuperscript{72} Id.
\textsuperscript{73} Id. at 259-60 (Traxler, J., concurring).
\textsuperscript{74} Id. at 272.
\textsuperscript{75} Id.
\textsuperscript{76} Id. at 273.
\textsuperscript{77} See id. at 274, 276 (stating al-Marri had not received sufficient due process because the burden shifting scheme of enemy combatant contests requires the government to first prove the evidence it offers to be the most reliable available evidence before shifting the burden to the alleged combatant).
Judge Roger L. Gregory wrote an opinion concurring in judgment wherein he addressed the Government’s potential national security concerns. After expressing some skepticism as to the genuineness of the Government’s security interest argument, Judge Gregory stated that the criminal justice system was capable of accommodating the interests of both the Government and detainees. Judge Gregory referenced procedures set forth in the Classified Information Procedures Act (“CIPA”) to support this position. He explained that the CIPA outlined procedures that enabled classified evidence to enter the courtroom without public disclosure. Judge Gregory argued that, although the CIPA did not apply directly to proceedings such as al-Marri’s, the CIPA could be used as a guide for detainee evidentiary requests. Applying CIPA guidelines to al-Marri’s case, Judge Gregory determined that the Government could provide the additional evidence al-Marri requested without infringing on the Government’s security interests. Judge Gregory then determined that the Government should be forced to produce additional evidence to support the veracity of the Rapp Declaration.

Chief Judge Karen J. Williams concurred in part and dissented in part, stating that the AUMF authorized the President to detain al-Marri as an enemy combatant and that al-Marri was not entitled to further proceedings. First, the Chief Judge relied on the Supreme Court’s decisions in *Ex parte Quirin* and *Hamdi* to formulate a definition of enemy combatant. From *Quirin* and *Hamdi*, Chief Judge

78. See *Al-Marri II*, 534 F.3d at 282-84 (Gregory, J., concurring) (explaining the judicial system was capable of handling classified material in a sufficient manner so as to protect government security interests).

79. *Al-Marri II*, 534 F.3d at 280-82 (Gregory, J., concurring). Judge Gregory noted that the Government’s security interest argument had lost credibility in view of the Government’s prior decision to release Jose Padilla, another al Qaeda detainee, the day before Padilla’s petition for habeas corpus was to go before the United States Supreme Court. *Id.*


81. See *Al-Marri II*, 534 F.3d at 282-84 (Gregory, J., concurring) (explaining that CIPA procedures would enable an in-camera review process wherein the court could analyze the government evidence brought against detainees, while still maintaining the classified nature of such evidence).

82. *Al-Marri II*, 534 F.3d at 282 (Gregory, J., concurring).

83. *Id.* at 283.

84. See *id.* (stating that an in-camera ex parte proceeding would protect the government’s national security interests while still requiring the government to supply evidence supporting the veracity of the Rapp Declaration).

85. *Al-Marri II*, 534 F.3d at 288 (Williams, J., concurring in part, dissenting in part).

86. 317 U.S. 1 (1942).

87. See *Al-Marri II*, 534 F.3d at 285 (Williams, J., concurring) (stating that a “distillation of these precedents . . . yields a definition of an enemy combatant subject to detention).
Williams determined that an enemy combatant was an individual who, on behalf of an enemy force, engages or attempts to engage in hostile acts against the United States.\textsuperscript{88} Chief Judge Williams then easily classified al-Marri as an enemy combatant due to al-Marri's intentions of committing hostile acts on United States soil and his involvement with al Qaeda.\textsuperscript{89} With al-Marri's status determined, Chief Judge Williams then stated that al-Marri's detention was lawful because Congress had specifically authorized the President in the AUMF to take action against members of al Qaeda.\textsuperscript{90}

Concerning the due process issue, Chief Judge Williams disagreed with the majority and determined that al-Marri was not entitled to further process.\textsuperscript{91} Chief Judge Williams specifically stated that she disagreed with Judge Traxler's opinion because the Chief Judge saw no need to remand the case.\textsuperscript{92} In the Chief Judge's view, the Rapp Declaration had provided al-Marri with sufficient notice of the allegations against him.\textsuperscript{93} Chief Judge Williams then stated that the Government should not be forced to bring forth additional evidence that could possibly jeopardize national security until al-Marri at least responded to allegations in the Rapp Declaration that were within al-Marri's knowledge.\textsuperscript{94} Specifically, Chief Judge Williams cited al-Marri's refusal to respond to the Government's allegations that al-Marri was performing poorly in school and rarely attended class.\textsuperscript{95} The Chief Judge then stated that al-Marri had cut short his own process by refusing to offer rebuttal evidence, and that this refusal should not be rewarded with a remand.\textsuperscript{96}

Judges James H. Wilkinson, Paul V. Niemeyer, and Allyson K. Duncan all wrote additional opinions wherein the Judges concurred in part and dissented in part.\textsuperscript{97} All three Judges agreed that the AUMF authorized the President to classify and detain al-Marri as an enemy combatant.\textsuperscript{98} However, contrary to the majority ruling, all three

\textsuperscript{88} Al-Marri II, 534 F.3d at 285 (Williams, J., concurring)
\textsuperscript{89} Id.
\textsuperscript{90} Id. at 286.
\textsuperscript{91} Id. at 292-93.
\textsuperscript{92} Id. at 288.
\textsuperscript{93} Id. at 291.
\textsuperscript{94} Id. at 291-92. Aside from the allegations contained in the Rapp Declaration, which indicated al-Marri was an al Qaeda operative, the Rapp Declaration also contained simple allegations relating to al-Marri's school work at Bradley University. Id.
\textsuperscript{95} Id.
\textsuperscript{96} Id. at 292-93.
\textsuperscript{97} Id. at 293 (Wilkinson, J., concurring in part, dissenting in part), 341 (Niemeyer, J., concurring in part, dissenting in part), 351 (Duncan, J., concurring in part, dissenting in part).
\textsuperscript{98} Al-Marri, 534 F.3d. at 295 (Wilkinson, J., concurring), 351 (Niemeyer, J., concurring), 351 (Duncan, J., concurring).
Judges agreed that al-Marri had received sufficient process.\textsuperscript{99} Judges Wilkinson and Niemeyer based their reasoning on the Supreme Court's decisions in \textit{Boumedienne v. Bush}\textsuperscript{100} and \textit{Hamdi}, stating that al-Marri's process was consistent with the Supreme Court guidelines established in those decisions.\textsuperscript{101} Judges Niemeyer and Duncan further bolstered their arguments by indicating that the evidence brought against al-Marri was far more detailed then the evidence accepted by the Supreme Court in \textit{Hamdi}.\textsuperscript{102}

Following the Fourth Circuit's en banc decision, the Supreme Court granted certiorari; however, before the case went before the Supreme Court, the President ordered al-Marri's release from military custody.\textsuperscript{103} This order forced the Supreme Court to vacate the case as moot.\textsuperscript{104}

\section*{III. BACKGROUND}

\subsection*{A. SUPREME COURT DECISIONS DEFINING \textit{"ENEMY COMBATANT"} AND THE CONSTITUTIONAL BOUNDARIES OF DETAINMENT}

\subsubsection*{1. Ex Parte Milligan: The Supreme Court Examines the Applicability of Military Commissions to Civilians}

In \textit{Ex parte Milligan},\textsuperscript{105} the United States Supreme Court determined that a military commission could not try a United States citizen who was unassociated with an enemy faction.\textsuperscript{106} In \textit{Milligan}, a military commission tried Lambdin P. Milligan ("Milligan") on October 21, 1864, and sentenced Milligan to hang for his involvement with a secret society opposed to the United States Government.\textsuperscript{107} Milligan was a United States citizen who, at the time of his arrest, had lived in Indiana for twenty years and had never served in the United States military.\textsuperscript{108}

\begin{footnotes}
\item[99.] \textit{Al-Marri}, 534 F.3d. at 293(Wilkinson, J., dissenting), 351 (Niemeyer, J., dissenting), 351(Duncan, J., dissenting).
\item[100.] 128 S.Ct. 2229 (2008).
\item[101.] \textit{Al-Marri II}, 534 F.3d at 329 (Wilkinson, J., dissenting), 351(Niemeyer, J., dissenting).
\item[103.] \textit{Al-Marri} v. Spagone, 129 S.Ct. 1545, 1545 (2009).
\item[104.] \textit{Al-Marri}, 129 S.Ct. at 1545.
\item[105.] 71 U.S. 2 (1866).
\item[106.] \textit{See Ex parte Milligan}, 71 U.S. 2, 108, 131 (1866) (stating that Milligan, a United States citizen, was punishable for his alleged wrongdoing in the courts of Indiana and not by military commission because Milligan had not resided in, nor associated with, the confederate states).
\item[107.] \textit{Milligan}, 71 U.S. at 107.
\item[108.] \textit{Id}.
\end{footnotes}
On May 10, 1865, Milligan petitioned the Circuit Court of the United States for the District of Indiana for his release from military detention.\textsuperscript{109} The circuit court responded by certifying three questions to the Supreme Court: (1) Is Milligan entitled to a writ of habeas corpus, (2) should Milligan be released, and (3) did the military commission have jurisdiction to try Milligan?\textsuperscript{110}

In his petition, Milligan insisted that a military commission could have no jurisdiction over him due to his United States citizenship.\textsuperscript{111} The Supreme Court recognized the decision as one of grave importance explaining that a government's power to punish must be governed by law and not by wicked rulers or an excited populous.\textsuperscript{112} The Court emphasized the importance of the rule of law during times of turmoil by declaring that the United States Constitution was equally enforceable during times of war as in times of peace.\textsuperscript{113} Consequently, the Court focused on the question of whether the military commission that tried Milligan had violated any rights guaranteed by the Constitution.\textsuperscript{114}

The Supreme Court first determined that the President could not authorize a military commission to try a citizen of a state faithful to the Union, when such state's court systems were open and available.\textsuperscript{115} To support this conclusion, the Supreme Court noted that the Constitution guaranteed Milligan a trial by jury.\textsuperscript{116} The Court also noted that the Constitution vested judicial power in the Supreme Court and other inferior courts established by the United States Congress.\textsuperscript{117} The Court then noted that the military commission that tried Milligan had no such constitutional authority.\textsuperscript{118} The Court further noted that the federal courts of Indiana were open and available to try Milligan.\textsuperscript{119} Therefore, the Supreme Court concluded that the military commission that tried Milligan was unauthorized and unconstitutional.\textsuperscript{120} While the Court recognized the military's security interests in confining and trying potential conspirators, the Court stated that Congress had enacted punishments for such conspirators and the court system was capable of trying and punishing such individuals.\textsuperscript{121}

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\textsuperscript{109.} Id.
\textsuperscript{110.} Id. at 108-09.
\textsuperscript{111.} Id. at 108.
\textsuperscript{112.} Id. at 118-19.
\textsuperscript{113.} Id. at 120.
\textsuperscript{114.} Id. at 121.
\textsuperscript{115.} Id. at 121-22.
\textsuperscript{116.} Id. at 122.
\textsuperscript{117.} Id. at 121.
\textsuperscript{118.} Id. at 121-22.
\textsuperscript{119.} Id.
\textsuperscript{120.} Id.
\textsuperscript{121.} Id. at 122.
\end{flushleft}
In a final effort, the Government attempted to argue that, pursuant to the law of war, a military commission could try Milligan as a prisoner of war. The Supreme Court rejected this argument stating that Milligan could not be considered a prisoner of war because Milligan was a twenty year resident of Indiana and had not lived in, nor associated with, any of the confederate states. The Supreme Court further refuted this argument by reiterating its determination that if Milligan had in fact conspired against the Union, the federal courts of Indiana were open and available to try him.

2. Ex Parte Quirin: The Supreme Court Upholds the Executive's Use of Military Commissions While Broadening the Definition of an Enemy Combatant

In Ex parte Quirin, the United States Supreme Court upheld the President's use of a military commission to try enemy agents captured on United States soil during World War II. In Quirin, agents of the Federal Bureau of Investigation ("FBI") arrested eight German saboteurs in June of 1942 shortly after the saboteurs entered the United States. The saboteurs arrived in two separate groups, both traveling by way of German submarines. One group landed in New York, the other in Florida. All the saboteurs were men born in Germany; however, one of the saboteurs claimed United States citizenship. The German military trained the saboteurs in the use of explosives, and sent the saboteurs on a mission from the German High Command to destroy United States war industries. The German government financed this mission and paid the saboteurs a salary for their efforts. The saboteurs arrived in United States territory wearing German marine uniforms, but buried them shortly after they landed. Shortly thereafter, the FBI took all eight saboteurs into custody. Pursuant to a Presidential Order, military commissions then tried the eight men as enemy combatants.

122. Id. at 131.
123. Id.
124. Id.
125. 317 U.S. 1 (1942).
126. Ex parte Quirin, 317 U.S. 1, 21,48 (1942).
128. Id.
129. Id.
130. Id. at 20.
131. Id. at 21.
132. Id. at 21-22.
133. Id. at 21.
134. Id.
135. Id. at 21-22. Although the Supreme Court used the terms "belligerent" and "combatant" interchangeably in Quirin, for the purposes of this article only the term
The saboteurs petitioned the United States District Court for the District of Columbia for habeas corpus relief claiming that the President was without the authority to order their detainment and trials before a military tribunal, and further claiming that they were entitled to a trial by jury as guaranteed by the Fifth and Sixth Amendments of the United States Constitution. The district court denied these petitions reasoning that the President's order effectively denied the saboteurs of any privilege to access the courts of the United States. The district court did not question the President's authority to make such an order. Following this denial by the district court, the saboteurs applied directly to the United States Supreme Court, which granted certiorari.

Before the Supreme Court, the United States Government argued that the President's order effectively denied the eight saboteurs of any right to access United States Federal Courts. The Supreme Court refuted this argument by stating that nothing in the President's order barred the saboteurs from accessing a federal court to determine if the President's order applied to their circumstances.

After refuting the Government's initial argument, the Supreme Court indicated that the Constitution's Commander-in-Chief Clause empowered the President to ensure that the laws regarding the conduct of war were carried into effect. The Supreme Court then stated that the Articles of War authorized the President to create military commissions. In light of this congressional authorization, the Court then determined it unnecessary to define the extent of the President's authority to order military commissions in the absence of congressional approval. As further support for the lawfulness of

"combatant" will be used because "combatant" is the prevalent term used by the Court today. See Boumediene v. Bush, 128 S.Ct. 2229, 2240 (2008) (stating that the petitioners were designated as enemy "combatants"); Padilla v. Hanft, 126 S. Ct. 1649, 1649 (2006) (stating Jose Padilla was designated as an enemy "combatant" by the Secretary of Defense); Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004) (explaining that the Court was called on to review a United States citizens designation as an enemy "combatant").

138. See Quirin, 47 F.Supp. at 431 (omitting any discussion of the President's authority to detain or to try before military tribunals persons designated as enemy combatants).
139. Quirin, 317 U.S. at 18.
140. Id. at 24.
141. Id. at 25.
142. Id. at 26.
143. 10 U.S.C. §§ 1471-1593 (1940).
144. Quirin, 317 U.S. at 26-27.
145. Id. at 29.
military commissions, the Court cited the historic use of such commissions both before and after the adoption of the Constitution.\textsuperscript{146}

Next, the Supreme Court examined the saboteurs' classification as enemy combatants.\textsuperscript{147} The Court began by stating that there were two types of enemy combatants, lawful and unlawful.\textsuperscript{148} The Court characterized lawful combatants as persons who carried arms openly and wore distinctive emblems.\textsuperscript{149} Such persons were entitled to the rights of prisoners of war.\textsuperscript{150} Unlawful combatants were entitled to no such classification and were subject to detention and trial by military tribunals.\textsuperscript{151} The Supreme Court further defined unlawful combatants as persons who surreptitously enter the United States without uniform and with the intention to commit hostile acts.\textsuperscript{152} Consistent with these definitions, the Court classified the saboteurs as unlawful combatants because the saboteurs had entered the United States with intentions to destroy war industries.\textsuperscript{153}

The Supreme Court further specified that it was insignificant that the saboteurs did not carry conventional weapons or intend to engage United States Military Forces directly.\textsuperscript{154} The Court also found it insignificant that the saboteurs had not committed, or attempted to commit, hostile acts at the time of their capture.\textsuperscript{155} In the Court's view, the mere fact that the saboteurs had entered the United States disguised as civilians with hostile intentions was sufficient to classify them as enemy combatants.\textsuperscript{156}

Notably, the Supreme Court did not find it necessary to determine the citizenship of the petitioner who claimed to be a United States citizen.\textsuperscript{157} Instead, the Court stated that even a United States citizen who had committed acts of belligerency was subject to the conse-

\textsuperscript{146} Id. at 31.
\textsuperscript{147} See id. at 35-38 (defining two types of enemy combatants, lawful and unlawful, and applying the petitioners' actions to the requisites for each).
\textsuperscript{148} Quirin, 317 U.S. at 35.
\textsuperscript{149} Id. at 34.
\textsuperscript{150} Id. at 35.
\textsuperscript{151} Id. at 31, 35.
\textsuperscript{152} Id. at 35. The Court based this reasoning on International Law, specifically the law of war, which treated as war criminal, persons who entered an enemy country with the intention of destroying facilities. Id. at 35-36.
\textsuperscript{153} See id. at 36-37 (indicating that petitioners plainly violated the law of war by entering the United States, under the direction of an enemy of the United States, with intentions to destroy war industries).
\textsuperscript{154} Quirin, 317 U.S. at 37.
\textsuperscript{155} Id. at 38.
\textsuperscript{156} See id. at 37 (stating that "... agents of enemy armies who enter our territory, armed with explosives intended for the destruction of war industries and supplies..." are just as much enemy combatants as agents who enter for the purpose of destroying fortified military positions).
\textsuperscript{157} Id. at 37.
quences of such actions.\textsuperscript{158} The Court then distinguished the saboteur who claimed United States citizenship from the petitioner in Ex parte Milligan,\textsuperscript{159} by explaining that the petitioner in Milligan was not a combatant of any sort since he was unassociated with the military forces of the enemy.\textsuperscript{160}

B. \textbf{Post September 11, 2001 Supreme Court Decisions That Further Define the Term "Enemy Combatant" and the Process Due an Individual Detained as Such}

1. \textbf{Hamdi v. Rumsfeld: The Supreme Court Classifies al Qaeda Agents as Enemy Combatants and Establishes Due Process Requirements for Detainees}

In \textit{Hamdi v. Rumsfeld},\textsuperscript{161} the United States Supreme Court set forth two due process guidelines for individuals detained as enemy combatants.\textsuperscript{162} In \textit{Hamdi}, Yaser Esam Hamdi ("Hamdi") petitioned for a writ of habeas corpus after the United States military detained him as an enemy combatant.\textsuperscript{163} Hamdi, a United States citizen born in Louisiana, had moved to Saudi Arabia during his childhood and resided in Afghanistan in 2001.\textsuperscript{164} That same year, Northern Alliance forces captured Hamdi and later turned him over to the custody of the United States military.\textsuperscript{165} The United States Government then detained and interrogated Hamdi in Afghanistan until January of 2002 when the Government transferred Hamdi to Guantanamo Bay.\textsuperscript{166} Three months later, the Government learned of Hamdi's United States citizenship and eventually transferred him to a naval brig in Charleston, South Carolina.\textsuperscript{167} During this confinement, the Government denied Hamdi access to both his family and legal counsel.\textsuperscript{168}

In June 2002, Hamdi's father filed a petition for a writ of habeas corpus on Hamdi's behalf in the United States District Court for the Eastern District of Virginia.\textsuperscript{169} This petition contended that, as a United States citizen, Hamdi was entitled to notice of the charges

\textsuperscript{158} See Quirin, 317 U.S. at 37-38 (explaining that citizenship does not relieve a combatant from the consequences of his belligerency).
\textsuperscript{159} 71 U.S. 2 (1866).
\textsuperscript{160} Quirin, 317 U.S. at 45.
\textsuperscript{161} 542 U.S. 507 (2004).
\textsuperscript{163} Hamdi, 542 U.S. at 510-11.
\textsuperscript{164} Id. at 510.
\textsuperscript{165} Id.
\textsuperscript{166} Id.
\textsuperscript{167} Id.
\textsuperscript{168} Id. at 511.
\textsuperscript{169} Id.
against him and access to legal counsel. The district court upheld the petition stating that access to legal counsel was a principle of fundamental justice under the United States Constitution. The United States Court of Appeals for the Fourth Circuit reversed this order, stating that the district court had granted insufficient regard to the security interests of the Government. The Fourth Circuit then remanded the case instructing the district court to conduct the least intrusive inquiry possible. The Fourth Circuit additionally cautioned the district court to avoid interference with the constitutional war powers of the political branches.

On remand, the Government moved to dismiss the petition based on evidentiary support contained in a document offered by Michael Mobbs, a special advisor for the Under Secretary of Defense for Policy. The Mobbs Declaration, as the document came to be known, alleged that Hamdi had entered Afghanistan in the summer of 2001, had affiliated with and received weapons training from a Taliban military unit, and had surrendered to Northern Alliance forces whereupon he turned over a Kalashnikov assault rifle. The Government claimed that various screenings and interrogations of Hamdi had confirmed these allegations.

The district court, citing the generic and hearsay nature of the Mobbs Declaration, determined that the Declaration alone failed to justify Hamdi's detainment. The district court then ordered the Government to turn over additional materials for an in camera review. The Government subsequently attempted to appeal the district court's production order. The district court responded to this appeal by certifying the question to the Fourth Circuit.

The Fourth Circuit reversed the district court's order stating that, if true, the Mobbs Declaration sufficiently justified Hamdi's detain-

170. Id.
172. Hamdi, 542 U.S. at 512.
173. Hamdi, 296 F.3d at 284.
174. Id.
175. Hamdi, 542 U.S. at 512.
176. Id. at 512-13.
177. Id. at 513.
178. Id.
179. Id. Among the additional materials requested, the district court requested copies of Hamdi's statements relating to his activities in Afghanistan, Hamdi's reasons for going to Afghanistan, the names of all the persons who interrogated Hamdi, Northern Alliance statements regarding Hamdi's capture, the dates and locations of Hamdi's capture and detentions, and the names and titles of the United States officials who designated Hamdi as an enemy combatant and determined he should be detained in a naval brig. Id. at 513-14.
180. Id. at 514.
181. Id.
ment, and that separation-of-powers issues prevented the judicial branch from conducting a more detailed investigation.\textsuperscript{182} The Fourth Circuit reasoned that Articles I and II of the Constitution granted the political branches of the Government explicit war powers, while Article III made no mention of such inherent powers in the judicial branch.\textsuperscript{183} Therefore, the Fourth Circuit determined that the political branches, by design, were more capable of conducting war, and that the judiciary should minimize its interference.\textsuperscript{184}

Next, the Fourth Circuit determined that, consistent with the Supreme Court’s holding in \textit{Ex parte Quirin},\textsuperscript{185} the act of detaining enemy combatants was within the President’s war powers.\textsuperscript{186} Although the Fourth Circuit did recognize that the judicial branch was capable of checking the President’s exercise of such war powers, it determined that requiring proof beyond the Mobbs Declaration exceeded the scope of the judiciary’s authority.\textsuperscript{187}

Following the Fourth Circuit’s denial, Hamdi appealed to the Supreme Court of the United States, which granted certiorari.\textsuperscript{188} The Supreme Court vacated the Fourth Circuit’s decision and remanded the case, holding that United States citizens may be classified as enemy combatants and detained, but that such citizens are entitled to notice of the evidence against them and an opportunity to rebut such evidence.\textsuperscript{189} The Supreme Court stated that Authorization for Use of Military Force\textsuperscript{190} ("AUMF") clearly authorized the President to detain individuals who fought against the United States as part of the Taliban.\textsuperscript{191} The Court next stated that international law sanctioned the detainment of such individuals so long as the purpose of such detainment was necessary to prevent the enemy combatant from returning to the battlefield.\textsuperscript{192} The Court then determined that Hamdi’s detainment was lawful despite his United States citizenship because citizens who fight against their own country are just as likely to return to the battlefield as non-citizens.\textsuperscript{193}

Although the Supreme Court found Hamdi’s detainment to be lawful, the Court identified a problem concerning the potential dura-

\textsuperscript{182} \textit{Id.} at 514-15.
\textsuperscript{183} \textit{Id.} (citing Hamdi v. Rumsfeld, 316 F.3d 450, 463-66 (4th Cir. 2003)).
\textsuperscript{184} \textit{Hamdi}, 316 F.3d at 463.
\textsuperscript{185} 317 U.S. 1 (1942).
\textsuperscript{186} \textit{Hamdi}, 316 F.3d at 473.
\textsuperscript{187} \textit{Id.} at 464, 473.
\textsuperscript{188} \textit{Hamdi}, 542 U.S. at 516.
\textsuperscript{189} \textit{Id.} at 519, 533.
\textsuperscript{191} \textit{Hamdi}, 542 U.S. at 518.
\textsuperscript{192} \textit{Id.} (citing Nuremberg Military Tribunal, 41 AM. J. INT’L L. 172, 229 (1947)).
\textsuperscript{193} \textit{Hamdi}, 542 U.S. at 519.
tion of Hamdi's detainment. In past conflicts, the Court noted, an enemy combatant could only be detained for the duration of active hostilities. However, due to the indefinite nature of the war on terror, Hamdi's detention could potentially last for the remainder of his natural life. The Court reconciled this problem by distinguishing combat operations against the Taliban from the War on Terror as a whole. The Court then determined that, while active military operations against the Taliban were ongoing in Afghanistan, the detainment of Taliban combatants was appropriate.

The Supreme Court also deemed it appropriate to distinguish the case from the Ex parte Milligan case. The Court distinguished Milligan by stating that Hamdi had allegedly taken up arms against the United States, an act sufficient to classify Hamdi as an enemy combatant, whereas the petitioner in Milligan had not.

Having established that Hamdi's detainment was lawful, the Supreme Court next turned to the question of what process Hamdi was due under the Constitution. The Court recognized that both the Government and Hamdi agreed that the writ of habeas corpus was available to every person detained within the United States. The Government, however, argued that the requirements of habeas corpus had been satisfied because it was undisputed that Hamdi's apprehension occurred in a combat zone outside the United States. The Court rejected this argument, stating that Hamdi's seizure was not "undisputed" because Hamdi had not been given an opportunity to speak for himself.

The Government then argued that further investigation into Hamdi's seizure would result in a separation-of-powers issue due to the Supreme Court's potential interference with military decision-making. The Supreme Court then applied a balancing test wherein the Court weighed Hamdi's interest of being free from physical detainment against the Government's interest of detaining those individuals who posed a threat to national security. On Hamdi's side of the

194. Id. at 519-20.
195. Id. at 520.
196. Id.
197. Id. at 521-22.
198. Id.
199. 71 U.S. 2 (1866).
201. Id. at 522.
202. Id. at 524.
203. Id. at 525.
204. Id. at 526.
205. Id.
206. Id. at 527.
207. Id. at 529.
balancing test, the Court reasoned that the very purpose of due process was to protect persons from the unjustified or mistaken deprivation of life, liberty, or property. The Court also recognized that the probability of the Government erroneously detaining innocent civilians was very real, given the increased numbers of reporters and humanitarian aid workers near battlefields. For the Government’s side, the Court acknowledged the Government’s interest in detaining persons who pose a threat to national security, but reasoned that an unchecked system of detainment would lead to oppression and abuse. Consistent with this reasoning, the Court then determined that the current process granted to detainees was unacceptable due to the high probability of the erroneous detainment of innocent persons.

After determining that some form of process was due to persons detained as enemy combatants, the Supreme Court then established two guidelines for such process. First, the Government must provide detainees with notice of the allegations and evidence brought against them. Second, the Government must afford detainees a fair opportunity to rebut such allegations and evidence before a neutral decision maker. The Court then stated that detainee proceedings must be carefully tailored to avoid unnecessary burdens on the Executive Branch during ongoing military operations. Specifically, the Supreme Court indicated that hearsay was potentially acceptable as reliable evidence, so long as the accused had a fair rebuttal opportunity. In short, the proceedings would first require the Government to produce credible evidence against the accused, and then the burden would shift to the accused to refute such evidence. The Supreme Court reasoned that such a process would satisfy the requirements of due process by ensuring that wrongfully accused persons would have a fair opportunity to establish their innocence.

Applying this standard, the Supreme Court determined that the Government had not afforded Hamdi sufficient due process. The
Court reasoned that Hamdi's only opportunity to contest his enemy combatant classification was during military interrogations, which did not involve a neutral decision maker. The Court then determined that the Government had clearly not afforded Hamdi the process he was entitled to under the Due Process Clause. The Supreme Court then vacated the judgment of the Fourth Circuit, and remanded the case to the district court for further proceedings consistent with the Court's opinion.


In Boumediene v. Bush, the United States Supreme Court extended the constitutional privilege of habeas corpus to noncitizens detained at Guantanamo Bay. The Supreme Court additionally concluded that the military's procedures for reviewing the status of detainees through Combatant Status Review Tribunals ("CSRTs"), failed to meet the constitutional requirements of habeas corpus.

In Boumediene, multiple Guantanamo Bay detainees filed petitions for writs of habeas corpus. All the detainees were aliens captured abroad, whom the United States Government had classified as enemy combatants by way of CSRTs. The detainees originally requested their writs of habeas corpus from the United States District Court for the District of Columbia, however, the cases were dismissed due to lack of jurisdiction because Guantanamo Bay was located outside United States territory.

During the appellate process, the United States Congress passed the Detainee Treatment Act of 2005 ("DTA"). The DTA granted exclusive jurisdiction to the United States Court of Appeals for the District of Columbia to review CSRT decisions. Shortly after the enactment of the DTA, the Supreme Court held that the DTA was in-
applicable to cases already pending. In response, Congress passed the Military Commissions Act of 2006 ("MCA"), section 7 of which denied all federal courts jurisdiction over the habeas corpus actions of detained aliens. In addition, section 7 of the MCA indicated that the jurisdictional denial would be applicable to both pending and future cases. In light of section 7 of the MCA, the District of Columbia Circuit dismissed the detainees' petitions, concluding that no federal court had jurisdiction over the petitions. The District of Columbia Circuit further determined that the Suspension Clause of the United States Constitution did not extend its protections to the detainees. The Supreme Court granted certiorari and reversed.

The Supreme Court first addressed the effects of section 7 of the MCA on habeas actions, stating that section 7 acted as a complete jurisdictional bar to federal courts. In light of this determination, the Supreme Court then determined that, if section 7 of the MCA was valid, then the detainees' petitions must be dismissed. The Court next analyzed the constitutionality of section 7 of the MCA.

The Supreme Court first noted a potential conflict between section 7 of the MCA and the Suspension Clause. The Supreme Court explained that the Suspension Clause expressly provided that the writ of habeas corpus can only be suspended during times of rebellion or invasion when required for the protection of public safety. In light of this constitutional provision, the Court determined that the real issue was whether the Suspension Clause granted the writ of habeas corpus to aliens detained outside the United States. The Court recognized this question as one of first impression. The Court subsequently turned to the historical background of the writ for guidance.

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232. Id. at 2241-42 (citing Hamdan v. Rumsfeld, 548 U.S. 557, 576-77 (2006)).
235. Id.
236. Id.
237. Id.
238. Id. at 2242, 2277.
239. Id. at 2243-44.
240. Id. at 2242.
241. Id. at 2244.
242. Id.
243. Id. at 2246. See U.S. Const. art I, § 9, cl. 2. ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").
244. Boumediene, 128 S. Ct. at 2240.
245. Id.
246. See id. at 2244-47 (reciting the historical background of the writ of habeas corpus).
A brief look at the writs history indicated that some form of habeas corpus had been a part of English law dating back to the late thirteenth century. However, English history had shown that the writ was subject to many suspensions, most of which arose during times of national turmoil. After recounting this history, the Supreme Court noted that the Framers of the United States Constitution were keenly aware of the writ's history in England, and the tyranny that resulted from the writs suspension. The Supreme Court then emphasized the importance the Framers placed on the writ by recognizing that the habeas privilege was among the few individual rights explicitly mentioned in the Constitution, and that the Framers had taken great care to specify the limited circumstances under which the privilege may be suspending. Concluding its historical analysis, the Court added that the privilege of habeas corpus was essential to the separation-of-powers doctrine designed by the Constitution.

At trial, the Government also relied on English history, arguing that under English law the privileges of habeas corpus only ran to territories over which England maintained sovereign control. Thus, the Government put forth the argument that de jure sovereignty was the basis of habeas jurisdiction. Applying this reasoning, the Government argued that the United States Federal Courts had no jurisdiction over Guantanamo Bay, and that habeas relief was unavailable to all persons detained there because Cuba maintained sovereignty over Guantanamo Bay.

Although the Supreme Court agreed that Cuba maintained sovereign control over Guantanamo Bay, the Court determined that the Government's theory of de jure sovereignty as the basis of habeas jurisdiction was unsupported by case precedent and separation-of-powers principles. Instead of focusing on de jure sovereignty as the Government proposed, the Court established de facto sovereignty as the correct basis of habeas jurisdiction. The Court then determined that because the United States had complete jurisdiction and control over Guantanamo Bay, de facto sovereignty existed, which brought

247. See Boumediene, 128 S. Ct. at 2244 (indicating the writ of habeas corpus was in existence during the reign of King Edward I).
248. Id. at 2245.
249. Id. at 2246.
250. Id.
251. See id. at 2247 (indicating that the writ of habeas corpus was a mechanism by which the judiciary could hold the executive accountable for its actions).
252. Boumediene, 128 S. Ct. at 2282.
253. Id.
254. Id.
255. Id. at 2252-53.
256. Boumediene, 128 S. Ct. at 2253.
Guantanamo Bay under United States sovereignty for jurisdictional purposes.\textsuperscript{257}

Having determined that Guantanamo Bay fell within the jurisdiction of the United States, the Supreme Court next analyzed the Suspension Clause.\textsuperscript{258} Relying on case precedent, the Court listed three relevant factors to be considered in determining the reach of the Suspension Clause: (1) the detainee’s citizenship and status, along with the sufficiency of the process that determined such status, (2) the nature of the location where the suspects were apprehended, and (3) the practical obstacles involved in satisfying the prisoner’s entitlement to the writ.\textsuperscript{259}

Regarding the first factor, the Supreme Court determined that the Government had not afforded Guantanamo Bay detainees with adequate process to determine their status.\textsuperscript{260} Although the detainees had received CSRT hearings, the Court determined that these hearings were insufficient primarily because the Government had not granted detainees access to legal counsel, which greatly limited the detainees’ ability to obtain rebuttal evidence.\textsuperscript{261}

For the second factor, the Supreme Court reiterated its conclusion that, while Guantanamo Bay was technically outside United States sovereign territory, it was still within de facto United States sovereignty.\textsuperscript{262} The Court furthered its reasoning with a reference to the absolute and indefinite control the United States exercised over Guantanamo Bay, and stated that for practical purposes the base was within United States jurisdiction.\textsuperscript{263}

Concerning the third factor, the Supreme Court recognized both a financial burden on the Government due to the cost of habeas proceedings, as well as a tactical burden due to the resulting distraction habeas proceedings would cause United States military personnel.\textsuperscript{264} However, the Court determined that such burdens at the Guantanamo Bay installation were minimal because any judicial process would require similar expenditures of resources.\textsuperscript{265}

\textsuperscript{257} Id. See also Rasul v. Bush, 542 U.S. 466, 480-83 (2004) (stating that the United States’ complete and potentially permanent control of Guantanamo Bay compels the conclusion that federal court jurisdiction must extend there).

\textsuperscript{258} See Boumediene, 128 S. Ct. at 2253-54 (shifting the analysis from the jurisdictional issue to a discussion of the suspension clause).

\textsuperscript{259} Boumediene, 128 S. Ct. at 2259. See Johnson v. Eisentrager, 339 U.S. 763, 777 (1950) (providing a list of factors for determining the applicability of the writ of habeas corpus to military prisoners).

\textsuperscript{260} Boumediene, 128 S. Ct. at 2260.

\textsuperscript{261} Id. at 2260, 2269.

\textsuperscript{262} Id. at 2260-61.

\textsuperscript{263} Id.

\textsuperscript{264} Id. at 2261.

\textsuperscript{265} Id.
In light of the Supreme Court's analysis of these three factors, the Court held that the privileges afforded by the Suspension Clause extended to alien-detainees at Guantanamo Bay.\textsuperscript{266} The Supreme Court recognized that it had never before held that constitutional rights extend to noncitizens detained outside United States territory.\textsuperscript{267} The Court justified this anomaly, however, by stating that the exact circumstances of the case were unprecedented.\textsuperscript{268}

Consistent with this ruling, the Supreme Court determined that section 7 of the MCA was an unconstitutional suspension of the habeas privilege, and that the CSRT hearings were unacceptable substitutes for the habeas review of detainees.\textsuperscript{269} The Supreme Court then reversed the judgment of the District of Columbia Circuit and remanded the case.\textsuperscript{270} The Supreme Court indicated that the Court would not outline in detail the requirements of adequate substitute proceedings.\textsuperscript{271} Instead, the Court simply stated that detainees were entitled to a meaningful opportunity to demonstrate their innocence.\textsuperscript{272} The only further clarification the Court offered was a statement that detainee habeas proceedings were not required to rise to the level of criminal trial proceedings, but that the loose evidentiary framework of the CSRTs was unacceptable due to the CSRTs inherent risk of error.\textsuperscript{273}

C. \textit{Padilla v. Hanft}: The Fourth Circuit Determines the AUMF Authorized the President to Detain Al Qaeda Agents Captured Within the United States

In \textit{Padilla v. Hanft},\textsuperscript{274} the United States Court of Appeals for the Fourth Circuit stated that the authority afforded the President of the United States under the Authorization for Use of Military Force\textsuperscript{275} ("AUMF") extended to enemy combatants, irrespective of the location of their apprehension.\textsuperscript{276} In \textit{Padilla}, Jose Padilla ("Padilla"), a United States citizen, travelled to Afghanistan in February 2000 where he received military training from al Qaeda and served as an armed
guard at a Taliban outpost.\textsuperscript{277} After United States Military Forces began operations in Afghanistan, Padilla eluded capture by entering Pakistan where al Qaeda further trained him to commit acts of terrorism on United States soil.\textsuperscript{278}

On May 8, 2002, Padilla entered the United States via the O'Hare International Airport in Chicago on an al Qaeda mission to blow up apartment buildings.\textsuperscript{279} Upon arriving in Chicago, federal agents apprehended Padilla and arrested him for reasons associated with the September 11, 2001 attacks.\textsuperscript{280} The Government held Padilla in civilian custody until June 9, 2002, when the President designated Padilla as an enemy combatant and ordered that military authorities detain Padilla.\textsuperscript{281} Two years later Padilla filed a petition for a writ of habeas corpus in the United States District Court for the District of South Carolina.\textsuperscript{282}

The district court ruled in favor of Padilla, holding that neither the AUMF nor the United States Constitution authorized the President to detain Padilla.\textsuperscript{283} The district court reasoned that, when analyzing a statute, courts must assume that the lawmakers meant to place no greater restraints on citizens than the language of the statute clearly and unmistakably indicated.\textsuperscript{284} The court then determined that the AUMF did not contain language that clearly and unmistakably indicated a legislative intent to restrain citizens.\textsuperscript{285} The district court recognized that the Commander-in-Chief Clause of the Constitution granted certain inherent powers to the President; however, the district court reasoned that law, and not merely the President's opinion, must support those powers.\textsuperscript{286} On appeal, the Fourth Circuit reversed, holding that the AUMF had authorized the President to detain Padilla.\textsuperscript{287}

On appeal to the Fourth Circuit, Padilla challenged his detainment based on four arguments.\textsuperscript{288} First, Padilla attempted to use the
United States Supreme Court’s opinion in *Hamdi v. Rumsfeld* to demonstrate that detention was only appropriate for persons captured on a foreign battlefield. The Court disagreed with this narrow interpretation of *Hamdi*, stating that the actual reasoning in that case was that the AUMF authorized detainment when the purpose of such detention was to prevent the detainee from returning to the battlefield. The Fourth Circuit then explained that Padilla, like the petitioner in *Hamdi*, was likely to return to the battlefield if released.

Padilla next argued that his military detention was unnecessary for the prevention of future acts of terrorism because he was already subject to criminal prosecution. The Fourth Circuit struck down this argument on three bases: (1) the argument must be incorrect because the petitioner in *Hamdi* faced similar criminal prosecution and the Supreme Court upheld his detainment, (2) the subjection to criminal prosecution does not ensure detainment, and (3) criminal prosecution would not afford the President with opportunities to gather information from Padilla or restrict Padilla’s potential communication with al Qaeda.

In Padilla’s third argument, Padilla reiterated the district court’s statement that courts must assume that lawmakers meant to place no greater restraints on citizens than such lawmakers clearly and unmistakably indicated in the language of a statute. Padilla then reasoned that, because the AUMF did not contain a clear statement authorizing detainment, his detainment was unlawful. The Fourth Circuit responded to this argument by stating that, even if Padilla’s reasoning was sound, the Supreme Court clearly stated in *Hamdi* that the AUMF authorized detainment despite a lack of specific detainment language.

Lastly, Padilla claimed that, pursuant to the Supreme Court’s holding in *Ex parte Milligan*, the President could not detain a United States citizen for mere involvement with an anti-United States
The Fourth Circuit easily refuted this contention by citing the Supreme Court’s distinguishing statement in *Ex parte Quirin* that the rights outlined in *Milligan* do not apply to enemy combatants. The Fourth Circuit then stated that Padilla’s act of taking up arms against the United States was sufficient to classify him as an enemy combatant.

Finding none of Padilla’s arguments persuasive, the Fourth Circuit held that the United States Congress had effectively authorized the President under the AUMF to detained enemies of the United States. The Fourth Circuit specified that such enemies included persons like Padilla who associated with the Taliban and al Qaeda, sought to fight against United States Military Forces, and intended to attack United States citizens within the United States.

IV. ANALYSIS

In the case of *Al-Marri v. Pucciarelli*, the United States Court of Appeals for the Fourth Circuit held that the Authorization for Use of Military Force ("AUMF") authorized the President of the United States to detain Ali Saleh Kahlah al-Marri ("al-Marri"), a legal alien residing in the United States. Additionally, the Fourth Circuit held that al-Marri had not received sufficient due process to challenge his designation as an enemy combatant. The case began when al-Marri brought a petition for a writ of habeas corpus after United States military authorities apprehended and detained him. The United States District Court for the District of South Carolina denied the petition. The Fourth Circuit reversed and remanded the case, directing the district court to grant al-Marri’s habeas petition and or-

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299. *Padilla*, 423 F.3d at 396.
300. 317 U.S. 1 (1942).
301. *Padilla*, 423 F.3d at 396. See *Ex parte Quirin*, 317 U.S. 1, 45 (1942) (stating that the petitioner in *Milligan*, was entitled to a trial in federal court because the petitioner was not associated with the armed forces of the enemy, and therefore, not an enemy combatant).
303. Id.
304. Id.
305. 534 F.3d 213 (4th Cir. 2008) (per curiam) (en banc).
308. *Al-Marri II*, 534 F.3d at 216.
310. Id. at 785.
nder al-Marri’s release from military custody. However, before the Fourth Circuit’s judgment could take effect, the Fourth Circuit vacated its decision and reconsidered the case en banc.

Upon reconsidering the case en banc, the Fourth Circuit reversed and remanded the district court’s judgment directing the district court to conduct further proceedings consistent with the Fourth Circuit’s en banc opinion. In reviewing the case en banc, the Fourth Circuit addressed two main issues: (1) whether the President had the authority to detain al-Marri, and (2) whether the Government afforded al-Marri the process he was due. The divided Fourth Circuit then issued a per curiam opinion wherein the court voted separately on the two issues. Regarding the first issue, the Fourth Circuit held by a 5-4 vote that the AUMF authorized the President to detain al-Marri as an enemy combatant. Regarding the second issue the Fourth Circuit held, in a separate 5-4 vote, that al-Marri had not received sufficient due process. The Fourth Circuit then remanded the case for further proceedings consistent with the opinions written by seven of the court’s nine Judges.

This Analysis will argue that the Fourth Circuit correctly concluded that the President had the authority to detain al-Marri. This Analysis will also argue that the Fourth Circuit erroneously held that al-Marri had not received sufficient due process. This Analysis will begin by explaining that the Fourth Circuit correctly designated al-Marri as an enemy combatant, and that the AUMF subsequently authorized the President to detain al-Marri as such. This Analysis will then explain that the Fourth Circuit failed to recognize the adherence of al-Marri’s habeas corpus proceedings with guidelines established by the Supreme Court of the United States. Consequently, this Analysis will demonstrate al-Marri received a fair opportunity to prove his innocence consistent with Supreme Court precedent, thus suggesting that al-Marri received the process he was due.

312. Al-Marri II, 534 F.3d at 216.
313. Id. at 216-17.
314. Id. at 216.
315. Id. at 216-17.
316. Id. at 216.
317. Id.
318. See id. at 216-352 (providing opinions from seven of the nine justices).
319. See infra notes 324-443 and accompanying text.
320. See infra notes 444-516 and accompanying text.
321. See infra notes 330-444 and accompanying text.
322. See infra notes 453-517 and accompanying text.
323. See infra notes 325-444 and accompanying text.
A. The Executive's Power to Detain: The Fourth Circuit Correctly Determined That The AUMF Authorized the President To Detain al-Marri

A review of prior decisions from the United States Supreme Court and the United States Court of Appeals for the Fourth Circuit indicates that the Fourth Circuit properly determined that the Authorization for Use of Military Force\(^{324}\) ("AUMF") authorized the President of the United States to order the detainment of Ali Saleh Kahlah al-Marri ("al-Marri").\(^{325}\) A Supreme Court case and a Fourth Circuit case bearing similar facts to those in \emph{Al-Marri v. Pucciarelli},\(^{326}\) indicate that the Fourth Circuit correctly classified al-Marri as an enemy combatant.\(^{327}\) Furthermore, in at least two cases in the past century, the Supreme Court has upheld the President's authority to detain enemy combatants when Congress has granted such authority.\(^{328}\) Therefore, the presence of congressional authorization in \emph{Al-Marri} suggests the Fourth Circuit correctly determined that the President had the power to detain al-Marri.\(^{329}\)

1. The Fourth Circuit Correctly Determined that al-Marri's Alleged Association with al Qaeda Was Sufficient To Classify Him as an Enemy Combatant

The United States Court of Appeals for the Fourth Circuit's classification of Ali Saleh Kahlah al-Marri ("al-Marri") as an enemy combatant is consistent with the Fourth Circuit's own case precedent as well as that of the United States Supreme Court.\(^{330}\) In \emph{Ex parte Quirin},\(^{331}\) the Supreme Court of the United States broadened the definition of enemy combatant to include persons associated with an enemy

\(^{325}\) See infra notes 444-516 and accompanying text.
\(^{326}\) 534 F.3d 213 (4th Cir. 2008) (per curiam) (en banc).
\(^{327}\) Compare \emph{Ex parte Quirin}, 317 U.S. 1, 21, 35 (1942) (stating that eight German saboteurs who entered the United States on a mission to destroy American war facilities were classifiable as enemy combatants), and \emph{Padilla v. Hanft}, 423 F.3d 386, 388 (4th Cir. 2005) (stating that an al Qaeda agent who entered the United States on a mission to blow up American apartment buildings was classifiable as an enemy combatant), with \emph{Al-Marri v. Pucciarelli (Al-Marri II)}, 534 F.3d 213, 165-66 (4th Cir. 2008) (indicating that Ali Saleh Kahlah al-Marri entered the United States to serve as a "sleeper agent" for al Qaeda and to explore disrupting United States financial institutions).
\(^{328}\) See \emph{Hamdi v. Rumsfeld}, 542 U.S. 507, 517 (2004) (stating that the Authorization for Use of Military Forced empowered the President to detain enemy combatants associated with the Taliban); \emph{Quirin}, 317 U.S. at 25, 26-29 (reasoning that the Articles of War authorized the President to order the detention and military trials of person who violated the laws of war, and that petitioners had violated the laws of war and were therefore subject to detention and trial).
\(^{329}\) See infra notes 390-444 and accompanying text.
\(^{330}\) See infra notes 331-89 and accompanying text.
\(^{331}\) 317 U.S. 1 (1942).
government who enter the United States with hostile intentions.\textsuperscript{332} In \textit{Padilla v. Hanft}, \textsuperscript{333} the Fourth Circuit classified, as an enemy combatant, an al Qaeda agent who entered the United States with intentions to blow up apartment buildings.\textsuperscript{334} A comparison of \textit{Al-Marri v. Pucciarelli};\textsuperscript{335} with these two cases reveals the Fourth Circuit correctly classified al-Marri as an enemy combatant.\textsuperscript{336}

\textbf{a. A Comparison of \textit{Al-Marri} and \textit{Quirin} Indicates That the Fourth Circuit Correctly Classified al-Marri as an Enemy Combatant}

The United States Supreme Court's decision in \textit{Ex parte Quirin}\textsuperscript{337} indicates that the United States Court of Appeals for the Fourth Circuit correctly classified Ali Saleh Kahlah al-Marri ("al-Marri") as an enemy combatant.\textsuperscript{338} In \textit{Quirin}, eight German saboteurs entered the United States during World War II on missions to destroy United States war facilities.\textsuperscript{339} The Federal Bureau of Investigation ("FBI") apprehended all eight of the saboteurs shortly after they entered the United States.\textsuperscript{340} Military commissions subsequently tried the saboteurs as enemy combatants.\textsuperscript{341} The saboteurs later petitioned the federal courts for habeas corpus relief.\textsuperscript{342} These petitions eventually came before the Supreme Court.\textsuperscript{343}

The Supreme Court classified the saboteurs as enemy combatants because the saboteurs had passed surreptitiously from enemy territory into the United States for the purpose of committing hostile acts that involved the destruction of life or property.\textsuperscript{344} Notably, the Court also stated that the fact that the saboteurs did not carry conventional weapons was irrelevant.\textsuperscript{345} The Court further found irrelevant the saboteurs' contentions that they did not intend to directly attack the Armed Forces of the United States and that they had not yet committed any hostile acts at the time of their apprehension.\textsuperscript{346} The Court

\textsuperscript{332} See \textit{Ex parte Quirin} 317 U.S. 1, 35-36 (1942) (discussing the evolution of the term "enemy combatant" to include persons who "during time of war pass surreptitiously from enemy territory into our own . . . for the commission of hostile acts. . .".).
\textsuperscript{333} 423 F.3d 386 (4th Cir. 2005).
\textsuperscript{334} Padilla v. Hanft, 423 F.3d 386, 388 (4th Cir. 2005).
\textsuperscript{335} 534 F.3d 213 (4th Cir. 2008) (per curiam) (en banc).
\textsuperscript{336} See infra notes 337-89 and accompanying text.
\textsuperscript{337} 317 U.S. 1 (1942).
\textsuperscript{338} See infra notes 339-58 and accompanying text.
\textsuperscript{339} \textit{Quirin}, 317 U.S. at 21.
\textsuperscript{340} \textit{Id.} at 22-23.
\textsuperscript{341} \textit{Id.}
\textsuperscript{342} \textit{Id.} at 18.
\textsuperscript{343} \textit{Id.} at 19.
\textsuperscript{344} \textit{Id.} at 35.
\textsuperscript{345} \textit{Id.} at 37.
\textsuperscript{346} \textit{Id.} at 38.
additionally stated that the alleged United States citizenship of one of the saboteurs did not relieve him from an enemy combatant classification.\textsuperscript{347} Regarding this petitioner, the Court stated that the international laws of war classified as enemy combatants, citizens who commit hostile acts against their own country under the direction of an enemy government.\textsuperscript{348}

The Supreme Court's decision to classify the saboteurs in \textit{Quirin} as enemy combatants suggests the President correctly classified al-Marri as an enemy combatant.\textsuperscript{349} First, just as the saboteurs in \textit{Quirin} entered the United States under the direction of the German government, an enemy of the United States at the time, al-Marri entered the United States under the direction of al Qaeda, an organization clearly hostile to the United States.\textsuperscript{350} Second, similar to the petitioners in \textit{Quirin} who entered the United States on a mission to destroy war facilities, al-Marri entered the United States on a mission to disrupt the United States financial system and to facilitate future terrorist attacks.\textsuperscript{351} Additionally, like the \textit{Quirin} saboteurs, al-Marri carried no conventional weapons at the time of his arrest.\textsuperscript{352} Also similar to the saboteurs in \textit{Quirin}, al-Marri received training and financing from an enemy organization.\textsuperscript{353}

Furthermore, as compared to the saboteurs in \textit{Quirin}, al-Marri is more susceptible to an enemy combatant classification because, unlike the saboteurs in \textit{Quirin} who the FBI captured before they had committed any hostile acts, al-Marri had already committed several unlawful acts in furtherance of his al Qaeda mission at the time of his

\begin{itemize}
  \item \textsuperscript{347} \textit{Id.} at 37-38.
  \item \textsuperscript{348} \textit{Id.}
  \item \textsuperscript{349} See \textit{infra} notes 350-55 and accompanying text.
  \item \textsuperscript{350} Compare \textit{Al-Marri v. Wright (Al-Marri I)}, 487 F.3d 160, 165-66 (4th Cir. 2007) (stating that al-Marri entered the United States under the direction of al Qaeda), \textit{with Quirin}, 317 U.S. at 21 (indicating the German military sent the eight German saboteurs to the United States).
  \item \textsuperscript{351} Compare \textit{Al-Marri (Al-Marri I)}, 487 F.3d at 165-66 (stating that al-Marri entered the United States on a mission to serve as a "sleeper agent" to facilitate terrorist acts and attempt to disrupt the country's financial system), \textit{with Quirin}, 317 U.S. at 21 (describing the mission of the eight German saboteurs as the destruction of American war facilities).
  \item \textsuperscript{352} Compare \textit{Al-Marri v. Pucciarelli (Al-Marri II)}, 534 F.3d 213, 254-55(4th Cir. 2008) (Traxler, J., concurring) (stating that al-Marri was arrested for credit card fraud and the making of false statements with no mention of conventional weapons of war), \textit{with Quirin}, 317 U.S. at 37 (indicating petitioners were not alleged to have carried conventional weapons).
  \item \textsuperscript{353} Compare \textit{Al-Marri II}, 534 F.3d at 256 (Traxler, J., concurring) (noting al-Marri had been trained in the use of poisons by al Qaeda, and supplied with money by the same), \textit{with Quirin}, 317 U.S. at 21-22 (stating the eight saboteurs had received training at a German sabotage school, and were paid a salary by the German Government).
\end{itemize}
apprehension. Among other things, al-Marri had committed the following unlawful acts at the time of his apprehension: possession of multiple counterfeit credit card numbers, making false statements to the FBI, making false statements on bank applications, using another person’s identification to influence the action of a lending institution, and saving information regarding poisonous chemicals on his laptop computer.

Finally, the Quirin case indicates that al-Marri’s legal alien status should have no bearing on al-Marri’s classification as an enemy combatant. In Quirin, the Supreme Court stated that even a United States citizen who engages in hostile acts against the United States could be classified as an enemy combatant. Therefore, if the Supreme Court stated that even a United States citizen who enjoys all the rights and protections guaranteed by the United State Constitution can be classified as an enemy combatant, it follows that a mere legal alien, who enjoys far fewer rights and protections, can likewise be classified as an enemy combatant.

Thus, the factual scenario of Al-Marri not only parallels but exceeds that of Quirin because al-Marri, a mere legal alien, not only entered the United States with hostile intentions, but he also committed unlawful acts prior to his apprehension.

b. The Fourth Circuit’s Classification of al-Marri as an Enemy Combatant Is Consistent with the Fourth Circuit’s Prior Decision in Padilla

The decision of the United States Court of Appeals for the Fourth Circuit in Padilla v. Hanft supports the Fourth Circuit’s holding in Al-Marri v. Pucciarelli that the Authorization for Use of Military Force (“AUMF”) authorized the President of the United States to

354. Compare Al-Marri II, 534 F.3d at 256 (Traxler, J., concurring) (listing al-Marri’s offenses to include: possession of multiple counterfeit credit card numbers, making false statements to the FBI and on bank applications, and using another person’s identification to influence the action of a lending institution), with Quirin, 317 U.S. at 38 (indicated the petitioners had not committed any hostile act at the time of their capture).
355. Al-Marri II, 534 F.3d at 256 (Traxler, J., concurring).
356. See infra notes 357-58 and accompanying text.
357. Quirin, 317 U.S. at 37.
358. Compare Al-Marri I, 487 F.3d at 164 (stating al-Marri was a legal citizen of Qatar who lawfully entered the United States with his family to pursue a Masters Degree at Bradley University in Peoria, Illinois), with Quirin, 317 U.S. at 37 (stating that U.S. citizenship did not relieve a belligerent from the consequences of his acts of belligerency). .
359. See supra notes 337-58 and accompanying text.
360. 423 F.3d 386 (4th Cir. 2005).
361. 534 F.3d 213 (4th Cir. 2008) (per curiam) (en banc).
Bureau of Investigation ("FBI") agents apprehended Jose Padilla ("Pa-
dilla"), a United States citizen, at the Chicago O'Hare International
Airport for his alleged association with al Qaeda. Evidence brought
against Padilla stated that al Qaeda had trained Padilla while he
lived in Afghanistan, and that Padilla entered the United States via
the O'Hare Airport on an al Qaeda mission to blow up United States
apartment buildings. Among other arguments, Padilla claimed
that an enemy combatant could only be detained if captured on a for-

gain battlefield. The Fourth Circuit refuted this argument by stat-
ing that the purpose of detainment was to prevent an enemy
combatant from returning to the battlefield. The Fourth Circuit
then reasoned that Padilla was just as likely to return to fight against
the United States as a person captured in Afghanistan.

The factual similarities between the cases of *Al-Marri* and *Padilla*
indicate that the President properly classified al-Marri as an enemy
combatant. First, both al-Marri and Padilla received training from
al Qaeda while in Afghanistan. Second, both al-Marri and Padilla
entered the United States with intentions to commit hostile acts.
Third, the FBI apprehended both al-Marri and Padilla within the
United States. Finally, the United States Government transferred
both al-Marri and Padilla to military custody pursuant to Presidential
Orders.

Furthermore, the factual dissimilarities between the cases of *Al-
Marri* and *Padilla* form no rational basis for distinguishing the

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363. See infra notes 364-89 and accompanying text.
366. *Id.* at 393
367. *Id.*
368. *Id.*
369. See infra notes 370-73 and accompanying text.
(Traxler, J., concurring) (noting that al-Marri was trained in the use of poisons by al
Qaeda while in Afghanistan), with *Padilla*, 423 F.3d at 389-90 (stating that Padilla was
trained by al Qaeda in the use of explosives).
(stating that al-Marri entered the United States on a mission for al Qaeda wherein he
would serve as a "sleeper agent" to facilitate terrorist acts and attempt to disrupt the
country's financial system), with *Padilla*, 423 F.3d at 390 (indicating Padilla was sent to
the United States by al Qaeda on a mission to blow up apartment buildings).
372. Compare *Al-Marri I*, 487 F.3d at 164 (stating al-Marri was arrested at his
home in Peoria, Illinois), with *Padilla*, 423 F.3d at 388 (explaining Padilla was appre-
hended at the Chicago O'Hare Airport).
373. Compare *Al-Marri II*, 534 F.3d at 255(Traxler, J., concurring) (noting al-Marri
was transferred from federal custody to military custody based on a declaration from
the President), with *Padilla*, 423 F.3d at 390 (indicating Padilla was transferred to mili-
tary custody after the President designated him an enemy combatant).
There are two main differences between the allegations brought against al-Marri and those brought against Padilla: (1) Padilla served as an armed guard at a Taliban outpost in Afghanistan while al-Marri had not taken up arms against the United States, and (2) Padilla's al Qaeda mission specifically involved the destruction of property and potential killing of United States citizens while al-Marri's mission contained no such specificity.

Concerning the first dissimilarity, the fact that Padilla took up arms in Afghanistan while al-Marri did not fails to bear on al-Marri's classification as an enemy. Nowhere in the Padilla opinion did the Fourth Circuit indicate that Padilla's act of taking up arms in Afghanistan was a prerequisite to Padilla's classification as an enemy combatant. Instead, the Fourth Circuit emphasized Padilla's involvement with al Qaeda, Padilla's intentions to bring the war to United States soil, and the need expressed in the AUMF for the President to have the power to protect United States citizens from future terrorist attacks. Therefore, the mere fact that al-Marri did not take up arms while in Afghanistan is not enough to save al-Marri from an enemy combatant designation because al-Marri committed the more egregious acts of associating himself with al Qaeda and entering the United States with intentions to harm United States citizens.

Concerning the second dissimilarity, the lack of specificity in al-Marri's al Qaeda mission is irrelevant to the question of al-Marri's enemy combatant classification because evidence showed that al-Marri,

374. See infra notes 375-87 and accompanying text.
375. Compare Al-Marri I, 487 F.3d at 165-66 (omitting any reference of al-Marri taking up arms in Afghanistan prior to entering the United States on an al Qaeda terrorist mission), with Padilla, 423 F.3d at 389-90 (indicating that Padilla served as an armed guard at a Taliban outpost prior to entering the United States on an al Qaeda terrorist mission).
376. See infra notes 377-79 and accompanying text.
377. See Padilla, 423 F.3d at 388-97 (omitting any statement that Padilla's taking up of arms in a foreign battlefield was a requirement for Padilla's classification as an enemy combatant).
378. See Padilla, 423 F.3d at 397 (stating that the AUMF provided the President with "all powers necessary and appropriate to protect American citizens from terrorist acts by those who attacked the United States on September 11, 2001. . . .", and that such powers included the power to detain enemies such as Padilla "who associated with al Qaeda and the Taliban regime, who took up arms against this Nation in its war against these enemies, and who entered the United States for the avowed purpose of further prosecuting that war by attacking American citizens. . . .")
379. Compare Al-Marri I, 487 F.3d at 165-66 (omitting any statement that al-Marri took up arms while in Afghanistan, but stating that al-Marri associated himself with al Qaeda, volunteered to serve as an al Qaeda martyr, and entered United States to serve as a "sleeper agent"), with Padilla, 423 F.3d at 397 (emphasizing that Padilla's classification as an enemy combatant was based, not only on Padilla's taking up arms while in Afghanistan, but on Padilla's involvement with al Qaeda, as well as the need to protect American civilians from terrorist attacks).
like Padilla, manifested an intention to bring the terrorist war to United States soil. In Padilla, the Fourth Circuit cited a United States Supreme Court standard stating that the AUMF authorized the President to detain enemies who enter the United States for the avowed purpose of attacking United States citizens. In Padilla, the Fourth Circuit indicated that Padilla's intentions of entering the United States to blow up United States apartment buildings qualified Padilla as an enemy combatant.

In contrast, the evidence offered in Al-Marri merely indicated that al-Marri entered the United States with the intentions to serve as a “sleeper agent” to facilitate future terrorist activities and to explore disrupting the financial system of the United States through computer hacking. However, evidence against al-Marri also demonstrated that al-Marri had volunteered for an al Qaeda martyr mission prior to coming to the United States to serve as a “sleeper agent.”

In addition, al-Marri’s al Qaeda mission contained an open-ended provision that al-Marri would stay in the United States to facilitate future terrorist attacks. The prospect of al-Marri’s participation in future terrorist activities, coupled with al-Marri’s willingness to serve as an al Qaeda martyr, demonstrated that al-Marri harbored the same willingness to inflict harm on United States citizens as Padilla. Therefore, Al-Marri’s willingness to inflict harm on United States citizens satisfies the Supreme Court standard mention in Padilla, which in turn indicates that al-Marri’s intentions were sufficient to classify him as an enemy combatant.

In summary, due to the similarities of the factual scenarios in Al-Marri and Padilla, and in light of the irrelevance of the factual dissimilarities of the two cases, it would be inconsistent to conclude that

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380. See infra notes 381-87 and accompanying text.
381. Padilla, 423 F.3d at 397.
382. Padilla, 423 F.3d at 388, 397.
383. Al-Marri I, 487 F.3d at 165.
384. Id.
385. Id.
386. Compare Al-Marri I, 487 F.3d at 165 (stating that al-Marri entered the United States on a mission to serve as an al Qaeda “sleeper agent” to facilitate future terrorist attacks, and that al-Marri volunteered for an al Qaeda martyr mission), with Padilla 423 F.3d at 388 (indicating that Padilla entered the United States with intentions to blow up American apartment buildings).
387. Compare Al-Marri I, 487 F.3d at 165 (stating that, after having volunteered for an al Qaeda martyr mission, al-Marri entered the United States on a mission to serve as an al Qaeda “sleeper agent” to facilitate future terrorist attacks), with Padilla 423 F.3d at 397 (explaining the Supreme Court’s indication that enemies “who entered the United States for the avowed purpose of further prosecuting that war by attacking American citizens . . .” are detainable under the AUMF).
Padilla's detainment was lawful and al-Marri's was not. Thus, the Fourth Circuit correctly classified al-Marri as an enemy combatant.

2. Supreme Court Precedent Supports the Fourth Circuit's Decision That the AUMF Authorized the President to Detain al-Marri

A review of two United States Supreme Court decisions indicates that the United States Court of Appeals for the Fourth Circuit correctly determined that the Authorization for Use of Military Force ("AUMF") authorized the President of the United States to detain persons associated with al Qaeda. The first case, Ex parte Quirin, dealt with a situation wherein the President detained multiple enemy combatants pursuant to an act of the United States Congress. The second Supreme Court case of Hamdi v. Rumsfeld involved the detainment of a member of the Taliban, a group closely affiliated with al Qaeda. The Supreme Court's reasoning in these two decisions supports the Fourth Circuit's holding in Al-Marri v. Pucciarelli that the President lawfully detained Ali Saleh Kahlah al-Marri ("al-Marri").

a. The Supreme Court's Decision in Quirin Indicates the Fourth Circuit Correctly Determined That the AUMF Authorized the President to Detain al Qaeda Agents Such as al-Marri

The United States Supreme Court's determination in Ex parte Quirin that the Articles of War authorized the President of the United States to detain enemy combatants during World War II indicates that the Authorization for Use of Military Force ("AUMF") equally authorized the President to detain Ali Saleh Kahlah al-Marri ("al-Marri") as an enemy combatant. In Quirin, the Supreme Court determined that a congressional act, titled the Articles of War, author-

388. See supra notes 369-87 and accompanying text.
389. See supra notes 360-88 and accompanying text.
391. See infra notes 392-444 and accompanying text.
392. 317 U.S. 1 (1942).
393. See Ex parte Quirin, 317 U.S. 1, 21 (1942) (stating that eight German saboteurs entered the United States on a mission for the German High Command to destroy American war industries and were subsequently detained pursuant to the Articles of War).
396. 534 F.3d 213 (4th Cir. 2008) (per curiam) (en banc).
397. See infra notes 398-444 and accompanying text.
398. 317 U.S. 1 (1942).
401. See infra notes 402-18 and accompanying text.
ized the President to detain and to order the military tribunals of eight German saboteurs.\textsuperscript{402} Although the Articles of War spoke mainly to the personnel of the United States Armed Forces, and made no direct mention of enemy combatants, the Supreme Court in \textit{Quirin} interpreted the Articles of War to include enemy combatants.\textsuperscript{403}

The similarity between the Articles of War and the AUMF demonstrates that the Fourth Circuit, in \textit{Al-Marri v. Pucciarelli},\textsuperscript{404} correctly interpreted and applied the AUMF.\textsuperscript{405} In both the \textit{Quirin} case and the \textit{Al-Marri} case, the Supreme Court relied on acts of Congress, the Articles of War and the AUMF respectively, to evaluate the President's ability to detain enemy combatants.\textsuperscript{406} The Articles of War and AUMF are similar in that neither explicitly authorized detainment of enemy combatants.\textsuperscript{407} The Supreme Court, however, has interpreted both the Articles of War and the AUMF as authorizing the detention of enemy combatants.\textsuperscript{408} Therefore, the Fourth Circuit's interpretation and application of the AUMF in \textit{Al-Marri} is consistent with the Supreme Court's prior application of the Articles of War in \textit{Quirin}.\textsuperscript{409}

\textsuperscript{402} See Ex parte Quirin, 317 U.S. 1, 25, 26-29 (1942) (reasoning that the Articles of War authorized the President to order the detention and military trials of person who violated the laws of war, and that the present petitioners had violated the laws of war, and were therefore subject to detention and trial). \textit{See also} Hamdi v. Rumsfeld, 542 U.S 507, 519 (2004) (explaining that the Court in \textit{Quirin} could have detained petitioners for the duration of the hostilities).

\textsuperscript{403} \textit{See Quirin}, 317 U.S. at 26-27 (reasoning that although the Articles of War specifically provided for the trial and punishment of persons associated with United States Armed Forces, and not enemy combatants, Article 12 stated that persons who violate the law of war are not excluded from the class of persons who may be tried by military tribunals).

\textsuperscript{404} 534 F.3d 213 (4th Cir. 2008) (per curiam) (en banc).

\textsuperscript{405} \textit{See infra} notes 406-09 and accompanying text.

\textsuperscript{406} \textit{Compare} Al-Marri v. Pucciarelli (\textit{Al-Marri II}), 534 F.3d 213, 216 (4th Cir. 2008) (stating the President was empowered by Congress to detain al-Marri under the AUMF), \textit{with Quirin}, 317 U.S. at 26-27 (explaining the President was authorized by Congress through the Articles of War to detain and to appoint military tribunals for enemy combatants who violated internationally accepted laws of war).


\textsuperscript{408} \textit{Compare} Hamdi, 542 U.S. at 519 (stating that the AUMF's lack of specific detention language was irrelevant because detention of enemy combatants was a fundamental incident of war), \textit{with Quirin}, 317 U.S. at 28-29 (explaining that the Articles of War authorized the President to seize, and subject to disciplinary measures, those who violate the law of war, and that such presidential actions were important incidents in the conduct of war).

\textsuperscript{409} \textit{Compare} Al-Marri II, 534 F.3d at 216 (stating that the AUMF authorized the President to detain Al-Marri), \textit{with Quirin}, 317 U.S. at 28-29 (explaining that the Articles of War authorized the President to seize, and subject to disciplinary measures, those who violate the law of war).
Furthermore, the AUMF is more applicable to the situation in Al-Marri than were the Articles of War in Quirin. Congress specifically enacted the AUMF to target persons or organizations who aided in the September 11, 2001 attacks. In Al-Marri, the Government alleged that al-Marri was associated with al-Qaeda, a terrorist group that aided in the September 11, 2001 attacks. Al-Marri's association with al Qaeda, therefore, brings al-Marri within the realm of persons Congress intended to target. In contrast, Congress enacted the Articles of War in 1920, decades before World War II began, and the Articles of War only spoke directly to members of the United States Armed Forces. The saboteurs in Quirin, however, were not members of the United States Armed Forces, but rather members of the German military. Therefore, the AUMF is more applicable to a person such as al-Marri than the Articles of War were to the eight German saboteurs.

Thus, the Fourth Circuit's holding that the AUMF authorized the President to detain al-Marri is supported by the Supreme Court's decision in Quirin wherein the Supreme Court relied on the Articles of War to determine the President's power to detain enemy combatants. In addition, the Fourth Circuit's reliance on the AUMF in Al-Marri carries greater weight than the Supreme Court's reliance on the

410. See infra notes 411-16 and accompanying text.
411. See Pub. L. No. 107-40, 115 Stat. 224 (stating that Congress authorized the President of the United States 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, ... in order to prevent any future acts of international terrorism against the United States by such nations organizations or persons").
413. Compare Pub. L. No. 107-40, 115 Stat. 224 (granting the President congressional authorization to "use all necessary and appropriate force against all those organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 ... in order to prevent any future acts of international terrorism against the United States by such nations organizations or persons").
414. See 10 U.S.C. § 1471 (1940) (indicating that the Articles of War were enacted on June 4, 1920, to "govern the Armies of the United States").
416. Compare Pub. L. No. 107-40, 115 Stat. 224 (stating that Congress authorized the President of the United States 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 ... in order to prevent any future acts of international terrorism against the United States by such nations organizations or persons").
417. See supra notes 398-409 and accompanying text.
Articles of War in *Quirin* because the congressional intent behind the AUMF had a more direct link to the scenario in *Al-Marri* than did the congressional intent behind the Articles of War in *Quirin.*

b. The Supreme Court’s Decision in *Hamdi* Illustrates the Fourth Circuit Correctly Determined That the AUMF Authorized the President to Detain al Qaeda Operatives such as al-Marri

The United States Supreme Court’s decision in *Hamdi v. Rumsfeld* further demonstrates that the Authorization for Use of Military Force (“AUMF”) authorized the President of the United States to detain al Qaeda agents such as Ali Saleh Kahlah al-Marri (“al-Marri”). In *Hamdi*, Northern Alliance Forces captured Yaser Esam Hamdi (“Hamdi”) in Afghanistan while he was actively associated with the Taliban, a group known to affiliate with al Qaeda. After Hamdi’s capture, the United States Government interrogated and detainted Hamdi. When Hamdi eventually contested his detainment, the Supreme Court determined that the AUMF authorized the President to detain Hamdi. To arrive at this conclusion, the Supreme Court stated that the intent of Congress in drafting the AUMF was to specifically target both the Taliban and al Qaeda. The Court further stated that the AUMF’s lack of specific detainment language was of no import. The Court reasoned that detainment was a fundamental incident of waging war because detainment was necessary to prevent enemy combatants from returning to the battlefield. The Court then determined that, as a fundamental incident of waging war, detainment was a “necessary and appropriate” use of force as defined by the AUMF.

The Supreme Court’s declaration in *Hamdi* that the AUMF applied directly to members of the Taliban and al Qaeda, demonstrates that President properly detained al-Marri as an al Qaeda agent. To

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418. See supra notes 410-16 and accompanying text.
421. See infra notes 422-44 and accompanying text.
424. Id. at 517.
425. Id. at 518.
426. Id. at 519
427. Id.
428. Id. See also Authorization For Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (“That the 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 . . .”).
429. See infra notes 430-40 and accompanying text.
begin, if the allegations against Hamdi and al-Marri were true and both were associated with terrorist groups that planned and aided in the September 11, 2001 attacks, then the AUMF applies directly to both Hamdi and al-Marri.\textsuperscript{430} Next, if either Hamdi or al-Marri were associated with the Taliban or al Qaeda, then their detentions were lawful because the Supreme Court clearly stated in \textit{Hamdi} that the AUMF authorized the President to detain members of the Taliban and al Qaeda.\textsuperscript{431} Therefore, the only remaining question is whether the Government in \textit{Al-Marri v. Pucciarelli}\textsuperscript{432} presented sufficient evidence to demonstrate that al-Marri was in fact associated with al Qaeda.\textsuperscript{433}

The evidence brought against al-Marri was sufficient to classify al-Marri as an enemy combatant because the evidence against al-Marri was more detailed than the evidence presented in \textit{Hamdi}.\textsuperscript{434} In \textit{Hamdi}, the Government offered evidence in the form of a declaration prepared by Michael Mobbs, a special advisor for the Under Secretary of Defense for Policy, to demonstrate that Hamdi was associated with the Taliban and al Qaeda.\textsuperscript{435} Similarly, in \textit{Al-Marri}, the Government offered evidence against al-Marri in a declaration prepared by Jeffrey N. Rapp, Director of the Joint Intelligence Task Force for Combating Terrorism.\textsuperscript{436} Therefore, the evidence brought against both Hamdi and al-Marri came in similar form from similar sources.\textsuperscript{437}

Next, in \textit{Hamdi} the Supreme Court determined that the Mobbs Declaration presented sufficient evidence to classify Hamdi as an en-

\textsuperscript{430} Compare \textit{Al-Marri v. Pucciarelli (Al-Marri II)}, 534 F.3d 213, 254-55 (4th Cir. 2008) (Traxler, J., concurring) (indicating that the President of the United States deemed al-Marri to be closely associated with al Qaeda), and \textit{Hamdi}, 542 U.S. at 512-13 (explaining that the Mobbs Declaration stated Hamdi had affiliated with, and received weapons training from, the Taliban), with \textit{Hamdi}, 542 U.S. at 518 (interpreting the AUMF to be applicable to members of the Taliban and al Qaeda).

\textsuperscript{431} Compare \textit{Al-Marri II}, 534 F.3d at 254-55 (Traxler, J., concurring) (indicating that the President of the United States deemed al-Marri to be closely associated with al Qaeda), and \textit{Hamdi}, 542 U.S. at 512-13 (explaining that the Mobbs Declaration stated Hamdi had affiliated with, and received weapons training from, the Taliban), with \textit{Hamdi}, 542 U.S. at 518-19 (indicating that the AUMF applied to members of the Taliban and al Qaeda, and that the AUMF authorized detention “to prevent captured individuals from returning to the field of battle and taking up arms once again”).

\textsuperscript{432} 534 F.3d 213 (4th Cir. 2008) (per curiam) (en banc).

\textsuperscript{433} See supra notes 429-32 and accompanying text.

\textsuperscript{434} See infra notes 435-40 and accompanying text.

\textsuperscript{435} \textit{Hamdi}, 542 U.S. at 512.

\textsuperscript{436} \textit{Al-Marri v. Wright (Al-Marri I)}, 487 F.3d 160, 165 (4th Cir. 2007).

\textsuperscript{437} Compare \textit{Al-Marri II}, 534 F.3d at 256 (Traxler, J., concurring) (stating that the evidence supporting al-Marri’s detention was based on a declaration provided by Jeffrey N. Rapp, Director of the Joint Intelligence Task Force for Combating Terrorism), with \textit{Hamdi}, 542 U.S. at 512 (explaining that the evidence brought against Hamdi was provided by Michael Mobbs, Special Advisor to the Under Secretary of Defense for Policy).
ememy combatant associated with the Taliban. After evaluating the evidence provided in 
Hamdi, two Fourth Circuit Judges in Al-Marri stated that the evidence supporting al-Marri's detention was much more detailed than the evidence supporting Hamdi's detention. Therefore, the evidence presented against al-Marri must have been sufficient to classify al-Marri as an enemy combatant associated with al Qaeda because the evidence was far more detailed than evidence the Supreme Court deemed sufficient in Hamdi.

In summary, the Supreme Court's decision in Hamdi demonstrates that the AUMF authorizes the President to use force against members of the Taliban and al Qaeda. Additionally the Hamdi case indicates that the AUMF, despite a lack of detainment language, authorized the detainment of Taliban and al Qaeda members. Lastly, the Rapp Declaration must have been sufficient to classify al-Marri as a member of al Qaeda because the Supreme Court accepted similar, yet less detailed, evidence in Hamdi. Therefore, the Fourth Circuit correctly held that the AUMF authorized the President to detain al-Marri.

B. Habeas Corpus and the Privilege of Due Process: The Fourth Circuit Erroneously Determined Al-Marri Was Not Afforded Sufficient Due Process

The United States Court of Appeals for the Fourth Circuit incorrectly held that Ali Saleh Kahlah al-Marri ("al-Marri") had not received sufficient process because the Fourth Circuit failed to recognize the conformance of al-Marri's habeas corpus proceedings with guidelines established by the United States Supreme Court. Prior to Al-Marri v. Pucciarelli, the Supreme Court in Hamdi v. Rumsfeld

439. Al-Marri II, 534 F.3d at 348, (Niemeyer, J., dissenting), 351 (Duncan, J., dissenting).
440. Compare Hamdi, 542 U.S. at 519 (indicating that the Mobbs Declaration was sufficient to classify Hamdi as an enemy combatant associated with the Taliban), with Al-Marri II, 534 F.3d at 348, (Niemeyer, J., dissenting), 351 (Duncan, J., dissenting) (stating that the Rapp Declaration was far more detailed than the evidence brought against Hamdi).
441. See Hamdi, 542 U.S. at 518 (stating that the AUMF authorizes the president to use "necessary and appropriate force" against members of the Taliban and al Qaeda).
442. See Hamdi, 542 U.S. at 519 ("[i]t is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war. . ."").
443. See supra notes 434-40 and accompanying text.
444. See supra notes 419-43 and accompanying text.
445. See infra notes 446-517 and accompanying text.
446. 534 F.3d 213 (4th Cir. 2008) (per curiam) (en banc).
established two guidelines for the habeas proceedings of detainees.\textsuperscript{448} The presence of these guidelines in \textit{Al-Marri} indicates that al-Marri received sufficient process.\textsuperscript{449} Furthermore, in the more recent case of \textit{Boumediene v. Bush},\textsuperscript{450} the Supreme Court provided additional guidance for the habeas review process of detainees.\textsuperscript{451} The fact that al-Marri's proceedings adhered to this additional guidance is further evidence that al-Marri received the process he was due.\textsuperscript{452}

1. The Presence of the Due Process Requirements Outlined in \textit{Hamdi} Indicates the Fourth Circuit Erroneously Concluded That al-Marri Received Insufficient Process

The United States Court of Appeals for the Fourth Circuit incorrectly concluded that the process offered Ali Saleh Kahlah al-Marri ("al-Marri") did not satisfy the due process guidelines established in \textit{Hamdi v. Rumsfeld}\textsuperscript{453} by the Supreme Court of the United States.\textsuperscript{454} In \textit{Hamdi}, the Supreme Court provided two guidelines for the habeas corpus proceedings of citizen-detrainees: (1) the Government must grant detainees notice of the factual basis for their classification as enemy combatants, and (2) the Government must grant detainees a fair opportunity to rebut such evidence before a neutral decision maker.\textsuperscript{455} Although the \textit{Hamdi} opinion spoke exclusively to citizen-detrainees, and not alien-detrainees such as al-Marri, the Supreme Court's extension of the habeas corpus privilege to alien detainees in \textit{Boumediene v. Bush}\textsuperscript{456} indicates that the \textit{Hamdi} guidelines should likewise be extended to alien detainees.\textsuperscript{457} That being said, al-Marri received the process he was due because: (1) the Government granted al-Marri notice of the factual basis for his enemy combatant classification, and (2) the Government granted al-Marri a fair opportunity to rebut the evidence against him before a neutral decision maker.\textsuperscript{458}

\textsuperscript{448} See \textit{Hamdi v. Rumsfeld}, 542 U.S. 507, 533 (2004) (stating that a detainee "seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker").

\textsuperscript{449} See infra notes 453-502 and accompanying text.

\textsuperscript{450} 128 S.Ct. 2229 (2008).

\textsuperscript{451} See \textit{Boumediene v. Bush}, 128 S.Ct. 2229, 2269 (2008) (stating that detainees must be granted access to legal counsel in order to effectuate a meaningful opportunity to rebut the evidence brought against them).

\textsuperscript{452} See infra notes 503-17 and accompanying text.

\textsuperscript{453} 542 U.S. 507 (2004).

\textsuperscript{454} See infra notes 455-502 and accompanying text.


\textsuperscript{456} 128 S.Ct. 2229 (2008).

\textsuperscript{457} See infra notes 459-64 and accompanying text.

\textsuperscript{458} See infra notes 465-502 and accompanying text.
a. The Supreme Court's Holding in *Boumediene* Indicates the *Hamdi* Guidelines Apply to Alien-Detainees

The United States Supreme Court's extension of the right of habeas corpus to alien-detainees in *Boumediene v. Bush* indicates that the habeas corpus guidelines set forth in *Hamdi v. Rumsfeld* should also apply to alien-detainees. In *Boumediene*, the Supreme Court extended the privilege of habeas corpus to alien-detainees held at Guantanamo Bay. In *Hamdi*, the Supreme Court outlined the procedural safeguards associated with the habeas corpus privilege by indicating that citizen-detainees were entitled to a fair opportunity to receive notice of the factual evidence for their detainment, and an opportunity to rebut such evidence before a neutral decision maker. Therefore, if the Supreme Court in *Boumediene* has extended the privilege of habeas corpus to both citizen-detainees and alien-detainees, then it follows that the procedural safeguards of the habeas corpus privilege outlined in *Hamdi* should also extend to both categories of detainees, including legal aliens such as Ali Saleh Kahlah al-Marri.

b. Al-Marri Received Sufficient Notice of the Allegations and Evidence Brought Against Him

The United States Court of Appeals for the Fourth Circuit failed to recognize in *Al-Marri v. Pucciarelli* that the Rapp Declaration gave Ali Saleh Kahlah al-Marri ("al-Marri") sufficient notice of the allegations and evidence brought against him. The Rapp Declaration consisted of evidence prepared by Jeffrey N. Rapp, Director of the Joint Intelligence Task Force for Combating Terrorism, and consisted of intelligence gathered on al-Marri's activities in the United States. The Rapp Declaration was the sole basis of evidence

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461. See infra notes 462-64 and accompanying text.
463. See Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) (stating that the procedural safeguards suggested by the district court were insufficient and "that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker").
464. Compare Hamdi, 542 U.S. at 533 (outlining the guidelines for the habeas corpus proceeding of citizen-detainees), and Boumediene, 128 S.Ct. 2262 (extending the privilege of habeas corpus to alien-detainees at Guantanamo Bay), with Al-Marri v. Wright (Al-Marri I), 487 F.3d 160, 164 (4th Cir. 2007) (stating al-Marri was a legal alien detained within the United States by military authorities).
465. 534 F.3d 213 (4th Cir. 2008) (per curiam) (en banc).
466. See infra notes 467-91 and accompanying text.
against al-Marri. Among other things, the Rapp Declaration stated that al-Marri: (1) received training at Bin Laden's Afghanistan terrorist training camp, (2) volunteered for an al Qaeda martyr mission, (3) received an al Qaeda mission to enter the United States as a "sleeper agent" and to explore disrupting the country's financial system, (4) saved information on his laptop concerning the purchase of toxic chemicals, (5) obtained credit card information for multiple cards not his own, and (6) maintained contact with al Qaeda leaders during his residency in the United States.

In spite of this evidence, the plurality of the Fourth Circuit evaluated the Supreme Court's opinion in Hamdi v. Rumsfeld, and determined that the Government must demonstrate that the Rapp Declaration was the best available evidence before the declaration could be considered sufficient evidence to support the Government's detainment of al-Marri.

The Fourth Circuit's determination that the Government carried the burden of establishing the Rapp Declaration as the best available evidence is inconsistent with the Hamdi opinion. In Hamdi, the United States Supreme Court stated that the purpose of habeas corpus proceedings was to avoid the risk of erroneously depriving detainees of their liberty interests. However, the Court also recognized a unique governmental interest in ensuring that enemy combatants do not return to the battlefield to fight against the United States. As part of the reconciliation of these two interests, the Supreme Court held that hearsay evidence was admissible as the most reliable evidence available. The Supreme Court further stated that the evidence supplied by the Government carried with it a presumption of being the best available evidence so long as the defendant retained a fair opportunity to rebut such evidence.

Therefore, after the Government offered the Rapp Declaration as evidence, the correct procedure in Al-Marri would have been to proceed with the presumption that the Rapp Declaration was the best available evidence and continue to the next step of deciding whether

469. Id. at 782.-84.
471. See Al-Marri v. Pucciarelli (Al-Marri II), 534 F.3d 213, 253, 271 (4th Cir. 2008) (indicating that four Judges agreed with Judge William B. Traxler's decision that, before ordering al-Marri's detainment, the government must first prove that the evidence it offered was "the most reliable available evidence... ").
472. See infra notes 473-80 and accompanying text.
474. Hamdi, 542 U.S. at 531.
475. Id. at 533-34.
476. Id. at 594.
al-Marri had a fair opportunity to rebut this presumption. 477 However, the plurality of the Fourth Circuit failed to adhere to the procedural standards of the \textit{Hamdi} case, and instead ordered the Government to produce evidence that validated the quality of the Rapp Declaration. 478 By so doing, the Fourth Circuit plurality departed from the Supreme Court's guidance and placed an unnecessary burden on the Government. 479 If the Fourth Circuit had followed the Supreme Court guidance in \textit{Hamdi}, the Fourth Circuit would have respected the Government's interests while still providing al-Marri with a fair opportunity to prove his innocence. 480

Regarding the sufficiency of notice issue, it is evident that the Rapp Declaration provided al-Marri with sufficient notice of the evidence brought against him because the Supreme Court accepted similar but less detailed evidence in \textit{Hamdi} as providing sufficient notice. 481 In \textit{Hamdi}, the Government's sole supporting evidence for the detainment of Yaser Esam Hamdi ("Hamdi") was a hearsay declaration entitled the Mobbs Declaration. 482 The Mobbs Declaration stated that Hamdi: traveled to Afghanistan in August 2001, received weapons training and affiliated with a military unit of the Taliban, remained with the Taliban following the September 11, 2001 attacks, and subsequently surrendered to Northern Alliance forces. 483 The Supreme Court indicated that this evidence provided Hamdi with sufficient notice of the allegations against him, satisfying the

\begin{footnotes}
\footnote{477. Compare \textit{Hamdi}, 542 U.S. at 534 (explaining that "once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria"), \textit{with Al-Marri v. Wright (Al-Marri I)}, 487 F.3d 160, 165 (4th Cir. 2007) (stating that the Government offered the Rapp Declaration in support of al-Marri's confinement).}

\footnote{478. Compare \textit{Hamdi}, 542 U.S. at 534 (stating that evidence provided by the government carried a presumption of being the most reliable evidence available so long as a detainee retained an opportunity to rebut), \textit{with Al-Marri II}, 534 F.3d at 253 (Motz, J., concurring) (stating that al-Marri need not rebut the government's evidence against him until the government establishes such evidence as "the most reliable available evidence.".).}

\footnote{479. Compare \textit{Hamdi}, 542 U.S. at 533 ("Enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict"), \textit{with Al-Marri II}, 534 F.3d at 274, 276 (Traxler, J., concurring) (suggesting that al-Marri had not received sufficient due process because the burden shifting scheme of enemy combatant contests requires the government to first prove that the evidence it offers is the most reliable evidence available).}

\footnote{480. Compare \textit{Hamdi}, 542 U.S. at 534 (stating that evidence provided by the government carried a presumption of being the most reliable evidence available so long as a detainee retained an opportunity to rebut), \textit{with Al-Marri I}, 487 F.3d at 166 (stating that al-Marri was instructed to file rebuttal evidence but refused to do so).}

\footnote{481. See infra notes 482-90 and accompanying text.}

\footnote{482. \textit{Hamdi}, 542 U.S. at 512.}

\footnote{483. \textit{Id.} at 512-13.}
\end{footnotes}
Government's burden, so long as Hamdi retained an opportunity to rebut such evidence.\textsuperscript{484}

Similar to the Mobbs Declaration in \textit{Hamdi}, the Rapp Declaration was the only evidence offered in support of al-Marri's detainment.\textsuperscript{485} The Rapp Declaration stated in part that al-Marri: (1) received training while in Afghanistan at an al Qaeda terrorist training camp sometime between 1996 and 1998, (2) was introduced to Osama bin Laden in the summer of 2001, (3) volunteered for an al Qaeda martyr mission, (4) was provided with money and a laptop computer in the summer of 2001 by terrorist financier Mustafa Ahmed Al-Hawsawi, (5) entered the United States prior to September 11, 2001 to serve as an al Qaeda “sleeper agent” with orders to explore disrupting the financial system of the United States through computer hacking, (6) researched poisonous chemicals on his laptop, (7) obtained false identification, banking information, and stolen credit card numbers, (8) communicated with known terrorists via phone and email, and (9) saved information about the September 11, 2001 attacks and jihad on his laptop.\textsuperscript{486}

A comparison of the Mobbs Declaration with the Rapp Declaration clearly demonstrates that the Government's evidence in \textit{Hamdi} was far less detailed than the evidence provided in \textit{Al-Marri}.\textsuperscript{487} First, similar to the Mobbs Declaration in \textit{Hamdi}, the Rapp Declaration in \textit{Al-Marri} indicated that al-Marri traveled to Afghanistan where he received weapons training from al Qaeda, a terrorist organization that aided in the September 11, 2001 attacks.\textsuperscript{488} Second, differing from the Mobbs Declaration that merely stated Hamdi continued his association with the Taliban after September 11, 2001, the Rapp Declaration contained specific information regarding al-Marri's association with al Qaeda leaders, al-Marri's willingness to fulfill an al Qaeda mission, and al-Marri's actions to complete the mission he was as-

\textsuperscript{484} Id. at 538-39.

\textsuperscript{485} Compare \textit{Al-Marri I}, 487 F.3d at 165 (stating the government answered al-Marri's habeas petition by citing the Rapp Declaration), with \textit{Hamdi}, 542 U.S. at 512 (stating the Mobbs Declaration was the sole evidence provided by the government in support of Hamdi's detention).

\textsuperscript{486} \textit{Al-Marri I}, 487 F.3d at 165-66.

\textsuperscript{487} Compare \textit{Al-Marri I}, 487 F.3d at 165-66 (listing al-Marri's specific crimes, missions, and al Qaeda associates) with \textit{Hamdi}, 542 U.S. at 512-13 (stating that Hamdi received weapons training in Afghanistan, and affiliated himself with a Taliban unit both before and after the 9/11 attacks).

\textsuperscript{488} Compare \textit{Al-Marri I}, 487 F.3d at 165 (stating that somewhere between 1996 and 1998 al-Marri's received weapons training at an al Qaeda terrorist training camp in Afghanistan), with \textit{Hamdi}, 542 U.S. at 512-13 (stating that Hamdi traveled to Afghanistan in the summer of 2001 and that Hamdi received weapons training from a Taliban unit).
signed. Further, two of the Fourth Circuit Judges in *Al-Marri* specifically stated that the Rapp Declaration was far more detailed than the Mobbs Declaration.

Therefore, just as the Supreme Court in *Hamdi* determined that the Mobbs Declaration provided Hamdi with sufficient notice of the factual basis for his detainment, the Fourth Circuit should have concluded that the more detailed Rapp Declaration provided al-Marri with sufficient notice.

c. By Refusing to Offer Rebuttal Evidence al-Marri Cut Short His Fair Opportunity to Rebut the Allegations and Evidence Brought Against Him

The United States Court of Appeals for the Fourth Circuit incorrectly determined that the United States Government did not give Ali Saleh Kahlah al-Marri ("al-Marri") a fair opportunity to rebut the evidence brought against him. During the initial stages of al-Marri's proceedings, the Government granted al-Marri's request to have the Rapp Declaration substantially declassified to provide al-Marri with better notice of the evidence supporting his detainment. However, even after the declassification of the Rapp Declaration, al-Marri utterly refused to offer rebuttal evidence, claiming that the Government had not met its burden of proof.

In *Hamdi v. Rumsfeld*, the United States Supreme Court indicated that habeas proceedings for detainees should begin with a burden of proof being placed on the Government to offer the best available evidence against the detainee. After the Government did so, the

489. Compare *Al-Marri I*, 487 F.3d at 165-66 (indicating that al-Marri was personally introduced to Osama bin Laden and Mustafa Ahmed Al-Hawsawi, that al-Marri volunteered for an al Qaeda Martyr mission, that al-Marri accepted an al Qaeda mission to enter the United States to serve as a "sleeper agent" and to explore disrupting the financial system of the United States, and that al-Marri committed various fraudulent acts and saved information on his computer consistent with such mission), with *Hamdi*, 542 U.S. at 513 (stating that Hamdi continued his association with the Taliban after September 11th, and was eventually captured by Northern Alliance Forces).

490. See *Al-Marri II*, 534 F.3d at 348, (Niemeyer, J., dissenting), 351 (Duncan, J., dissenting) (Judge Niemeyer and Judge Duncan stating that the Rapp Declaration was more developed and more detailed than the Mobbs Declaration).

491. See supra notes 465-490 and accompanying text.

492. See infra notes 493-502 and accompanying text.


496. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 (2004) (stating that the government must provide a detainee seeking to challenge his status as an enemy combatant with notice of the factually credible evidence that supports the detainee's classification).
Hamdi decision suggests that the burden should then shift to the detainee to rebut such evidence. 497

Therefore, in Al-Marri v. Pucciarelli, 498 the Fourth Circuit should have determined that the Government satisfied its initial burden of proof by offering the Rapp Declaration in support of al-Marri's enemy combatant designation and detention. 499 Thus, with the Government's initial burden satisfied, the Hamdi decision suggests that the burden of proof should then shift to al-Marri to rebut the Government's evidence. 500 However, al-Marri's complete refusal to rebut the Government's evidence disrupted the burden-shifting scheme established in Hamdi, leaving the Fourth Circuit with only the evidence proffered by the Government to consider. 501 Consequently, the Fourth Circuit should have issued a judgment against al-Marri for failure to carry his burden of proof. 502

2. The Conformance of al-Marri's Habeas Corpus Proceedings with the Supreme Court's Guidance in Boumediene Provides Further Proof that al-Marri Received Sufficient Process

The fact that the habeas corpus proceedings of Ali Saleh Kahlah al-Marri ("al-Marri") in Al-Marri v. Pucciarelli 503 conformed to principles set forth by the United States Supreme Court in Boumediene v. Bush, 504 further demonstrates that al-Marri received sufficient due process. 505 In Boumediene, several Guantanamo Bay detainees petitioned the United State District Court for the District of Columbia for

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497. See Hamdi, 542 U.S. at 534 ("[O]nce the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria.").

498. 534 F.3d 213 (4th Cir. 2008) (per curiam) (en banc).

499. Compare Hamdi, 542 U.S. at 534 ("[O]nce the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence. . . ."), with Al-Marri I, 487 F.3d at 165-66 (stating that the Government offered the Rapp Declaration in support of al-Marri's enemy combatant designation).

500. See Hamdi, 542 U.S. at 534 ("[O]nce the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria.").

501. Al-Marri I, 487 F.3d at 166.

502. Compare Hamdi, 542 U.S. at 534 (indicating that once credible evidence is put forth by the government, the onus shifts to the detainee to rebut such evidence), with Al-Marri I, 487 F.3d at 166 (indicating that al-Marri refused to offer rebuttal evidence even after the Fourth Circuit determined that the Rapp Declaration provided al-Marri with sufficient notice of the basis of his detention).

503. 534 F.3d 213 (4th Cir. 2008) (per curiam) (en banc).


505. See infra notes 506-17 and accompanying text.
writs of habeas corpus. Prior to these petitions, the United States Government classified all the petitioning detainees as enemy combatants by way of Combatant Status Review Tribunals ("CSRTs"). The detainees eventually brought their habeas corpus petitions before the Supreme Court, whereupon the Supreme Court determined that the CSRTs presented a significant risk of error in the tribunal's findings of fact. Specifically the Supreme Court expressed concern that the CSRTs restrained the detainees' ability to offer rebuttal evidence by not granting detainees access to legal counsel, or a complete disclosure of the most critical allegations against them.

The Government's granting al-Marri access to legal counsel and reasonably obtainable evidence further indicates that the United States Court of Appeals for the Fourth Circuit incorrectly determined that al-Marri did not receive the process he was due. First, unlike the detainees in Boumediene to whom the Government appointed mere representatives during the CSRT process, the Government in Al-Marri granted al-Marri access to his own personnel attorney. Second, unlike the detainees in Boumediene whose ability to gather rebuttal evidence was greatly limited by their confinement, al-Marri was capable of gathering rebuttal evidence due to his access to counsel, as well as his unique knowledge of the allegations against him. Lastly, unlike the detainees in Boumediene who may not have been aware of the most critical allegations brought against them, the United States District Court for the District of South Carolina went to

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507. Boumediene, 128 S.Ct. at 2240-41. CSRTs were tribunals established by the Deputy Secretary of Defense for the United States with the purpose of evaluating the enemy combatant status of individuals detained at Guantanamo Bay. Id.
508. Id. at 2270.
509. See id. at 2269 (explaining that the government’s CSRTs contained a considerable risk of fact finding error due primarily to "the constraints upon the detainee’s ability to rebut the factual basis for the Government’s assertion that he is an enemy combatant . . . ." the denial of legal counsel for detainees being among the most prevalent constraints).
510. See infra notes 511-14 and accompanying text.
511. Compare Al-Marri v. Wright (Al-Marri I), 487 F.3d 160, 167 (4th Cir. 2007) (stating al-Marri was granted access to his lawyer on October 17, 2006, and that his lawyer filed several petitions in al-Marri’s behalf prior to such date), with Boumediene, 128 S.Ct. at 2260 (indicating that in CSRTs detainees were entitled to a “personal representative,” but that such representative was not permitted to act as the detainees’ lawyer or advocate).
512. Compare Al-Marri v. Pucciarelli (Al-Marri II), 534 F.3d 213, 291-92 (4th Cir. 2008), (Williams, J., dissenting) (indicating that the Government granted al-Marri access to legal counsel, and that al-Marri was notified by the Rapp Declaration of the allegations against him, and that many of the allegations of the Rapp Declaration were “peculiarly” within al-Marri’s knowledge), with Boumediene, 128 S.Ct. at 2260, 2269 (stating defendants did not have access to legal counsel, may not have been aware of the allegations against them, and were strictly limited in their ability to obtain rebuttal evidence by their confinement).
great lengths to provide al-Marri with the critical evidence brought against him by granting al-Marri's request to have the Rapp Declaration substantially declassified. Therefore, al-Marri's proceedings did not suffer from the restraints of the CSRTs discussed in Boumediene, but rather adhered closely to the Supreme Court's guidance set forth in the same.

In summary, the Fourth Circuit's determination that al-Marri received insufficient process is inconsistent with the Supreme Court precedent established Boumediene. Al-Marri did not suffer from the restraints of the CSRTs mentioned in Boumediene because the Government granted al-Marri access to legal counsel, access to reasonably obtainable evidence, and a substantial disclosure of the factual basis for al-Marri's enemy combatant classification. The adherence of al-Marri's proceedings to the Supreme Court's guidance in Boumediene further demonstrates that al-Marri received sufficient process and that the Fourth Circuit erred in holding otherwise.

V. CONCLUSION

In Al-Marri v. Pucciarelli, the United States Court of Appeals for the Fourth Circuit held that: (1) if the allegations against Ali Saleh Kahlah al-Marri ("al-Marri"), an alleged al Qaeda agent, were true, the President of the United States was authorized to detain al-Marri as an enemy combatant; and (2) al-Marri was not afforded sufficient

513. Compare Al-Marri II, 534 F.3d at 351 (Duncan, J., dissenting) (stating that the district court "accommodated al-Marri's only specific request—that the Rapp Declaration be substantially declassified to provide him with better notice of the factual basis for his detention"), with Boumediene, 128 S.Ct. at 2269 (indicating that in the CSRT process a detainee "may not be aware of the most critical allegations that the Government relied upon to order his detention").

514. Compare Boumediene, 128 S.Ct. at 2260, 2269 (stating that the petitioners did not have access to legal counsel, may not have been aware of the allegations against them, and were strictly limited in their ability to obtain rebuttal evidence by their confinement), with Al-Marri II, 534 F.3d at 291-92 (Williams, J., dissenting) (indicating al-Marri was granted access to legal counsel, that al-Marri was notified by the Rapp Declaration of the allegations against him, and that many of the allegations of the Rapp Declaration were "peculiarly" within al-Marri's knowledge).

515. See supra notes 510-14 and accompanying text.

516. Compare Boumediene, 128 S.Ct. at 2269 (explaining that the government's CSRTs contained a considerable risk of fact finding error due primarily to "the constraints upon the detainee's ability to rebut the factual basis for the Government's assertion that he is an enemy combatant . . . ," the denial of legal counsel for detainees being among the most prevalent constraints), with Al-Marri II, 534 F.3d at 291-92 (Williams, J., dissenting) (indicating that the Government granted al-Marri access to legal counsel, which enabled al-Marri to obtain rebuttal evidence), and id. at 351 (Duncan, J., dissenting) (stating that the district court "accommodated al-Marri's only specific request—that the Rapp Declaration be substantially declassified to provide him with better notice of the factual basis for his detention").

517. See supra notes 503-15 and accompanying text.

518. 534 F.3d 213 (4th Cir. 2008) (per curiam) (en banc).
due process despite being given notice of the evidence against him as well as an opportunity to rebut such evidence.\textsuperscript{519} Al-Marri initially petitioned the United States District Court for the District of South Carolina for a writ of habeas corpus.\textsuperscript{520} The district court dismissed al-Marri's habeas petition due to his refusal to participate in the proceedings or offer rebuttal evidence.\textsuperscript{521}

The Fourth Circuit reversed the district court's ruling stating that al-Marri was entitled to civilian status, and subsequently ordered the Government to release al-Marri from military custody.\textsuperscript{522} However, before the Government released al-Marri, the Fourth Circuit vacated its previous ruling and reheard the case en banc.\textsuperscript{523} After rehearing the case en banc, the Fourth Circuit remanded the case holding that: (1) if the allegations against al-Marri were true, the President had authority to detain al-Marri; and (2) that al-Marri had not received sufficient process.\textsuperscript{524} However, the Fourth Circuit was divided in that both holdings were decided by a 5-4 vote.\textsuperscript{525} The division of the court was further evidenced by the fact that the court issued a per curiam opinion with seven of the court's nine Judges writing additional opinions.\textsuperscript{526}

Regarding the first issue of whether the President was authorized to detain al-Marri as an enemy combatant, the plurality concluded in the affirmative, stating that the President correctly classified al-Marri as an enemy combatant due to: (1) al-Marri's involvement with al Qaeda, a terrorism organization with which the United States was at war; (2) al-Marri's intentions to commit hostile acts while in the United States; and (3) the evolving nature of modern warfare.\textsuperscript{527}

Regarding the second issue, that al-Marri had not received sufficient due process, the plurality determined that al-Marri need not re-

\textsuperscript{519} Al-Marri v. Pucciarelli \textit{(Al-Marri II)}, 534 F.3d 213, 216, 220-21 (4th Cir. 2008) (per curiam) (en banc).
\textsuperscript{520} \textit{Al-Marri II}, 534 F.3d at 220.
\textsuperscript{522} Al-Marri v. Wright \textit{(Al-Marri I)}, 487 F.3d 160, 195 (4th Cir. 2008), rev'd en banc, 534 F.3d 213 (4th Cir. 2008).
\textsuperscript{523} \textit{Al-Marri II}, 534 F.3d at 216.
\textsuperscript{524} Id.
\textsuperscript{525} Id. at 216.
\textsuperscript{526} See id. at 216-352 (providing the per curiam opinion of the court as well as the seven concurring and dissenting opinions of the judges).
\textsuperscript{527} See \textit{Al-Marri II}, 534 F.3d at 254-53 (Traxler, J., concurring) (stating the President has authority to detain, as enemy combatants, persons who enter the U.S. to commit hostile acts like those previously committed by al Qaeda); see id. at 285 (Williams, J., concurring) (stating that al-Marri was correctly classified as an enemy combatant because he entered the U.S. to commit hostile acts on behalf of al Qaeda, an enemy to the U.S.); see id. at 293 (Wilkinson, J., concurring) (stating that detention of a person lawfully within the U.S., although unprecedented, is necessary in today's world of warfare).
spond to the evidence against him until the Government demonstrated that such evidence was the most reliable evidence available.528 Consistent with this reasoning, the Fourth Circuit held that al-Marri had not received sufficient process and remanded the case for further proceedings.529

In Al-Marri, the Fourth Circuit correctly held that, if the allegations against al-Marri were true, then al-Marri's detention was lawful.530 The Fourth Circuit, however, erred in holding that al-Marri had not received sufficient due process.531 A review of prior United States Supreme Court and Fourth Circuit case law reveals that the Fourth Circuit correctly concluded that the President had the authority to detain al-Marri.532 However, the Fourth Circuit erred in its analysis of the due process issue because the Fourth Circuit failed to recognize the adherence of al-Marri's habeas corpus proceedings with the guidelines established in Hamdi v. Rumsfeld533 by the Supreme Court.534 Furthermore, the Fourth Circuit failed to recognize the consistency of al-Marri's habeas corpus proceedings with the additional guidelines provided in Boumediene v. Bush535 by the Supreme Court.536 Therefore, although the Fourth Circuit correctly upheld the President's detention of al-Marri, the Fourth Circuit incorrectly held that al-Marri had not received sufficient due process.537

The Fourth Circuit's opinion in Al-Marri will only create greater confusion for the establishment of constitutionally adequate procedures for the habeas corpus proceedings of detainees. Although the Fourth Circuit's decision further solidifies the enemy combatant status of al Qaeda members, the Fourth Circuit's decision regarding the

528. See Al-Marri II, 534 F.3d at 273-74 (Traxler, J., concurring) (stating that before al-Marri is forced to rebut the government's evidence against him, the government must prove that evidence to be the "most reliable available evidence"); see id. at 253 (Motz, J., concurring) (indicating Judges Motz, Michael, King, and Gregory agreed with Judge Traxler's determination that the government should be forced to demonstrate the evidence it provides to be the most reliable available evidence).

529. See Al-Marri II, 534 F.3d at 216 (stating the case was "remanded for further proceedings consistent with the opinions that follow"); see id. at 273-74 (Traxler, J., concurring) (stating that before al-Marri is forced to rebut the government's evidence against him, the government must prove that evidence to be the "most reliable available evidence"); see id. at 253 (Motz, J., concurring) (indicating Judges Motz, Michael, King, and Gregory agreed with Judge Traxler's determination that the government should be forced to demonstrate the evidence it provides to be the most reliable available evidence).

530. See supra notes 324-444 and accompanying text.

531. See supra notes 445-517 and accompanying text.

532. See supra notes 324-444 and accompanying text.


534. See supra notes 453-502 and accompanying text.


536. See supra notes 503-17 and accompanying text.

537. See supra notes 305-517 and accompanying text.
due process rights of detainees is inconsistent with Supreme Court guidelines and unsupported by majority reasoning. First, the Fourth Circuit’s decision suggests a departure from the guidelines established in Hamdi by proposing an initial evidentiary burden upon the Government of demonstrating that the evidence the Government offers is the best evidence available before a detainee’s burden to rebut such evidence is triggered. This strict evidentiary standard stands in stark contrast to the incremental process outlined in Hamdi, and will most likely infringe on national security concerns as well as the principal of separation-of-powers. Second, the Fourth Circuit’s decision completely fails to recognize the adherence of al-Marri’s proceedings with guidelines set forth in Boumediene. This failure leaves the Executive Branch with no further judicial direction as to the appropriate construction of detainee habeas corpus proceedings. Furthermore, the Fourth Circuit’s divided decision, as well as the court’s divided reasoning, only exacerbates the problem by giving the Executive Branch no clear indication of the reasoning behind the Fourth Circuit’s decision.

Brandon J. Pitcher – ’11