UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Ali Saleh Kahlah Al-Marri, and Mark A. Berman as next friend,	)	
Petitioners,	)	**C/A No. 02:04-2257-26AJ**
v.	)	
Commander C.T. Hanft, U.S.N. Commander, Consolidated Naval Brig,	)	
Respondent.	)	

PETITIONERS' BRIEF

IN RESPONSE TO THE COURT'S AUGUST 15, 2005 ORDER

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PRELIMINARY STATEMENT

Since the President designated him an "enemy combatant" over two years ago, Petitioner Ali Saleh Kahlah al-Marri has been held in solitary confinement in a Navy brig without charge and without a hearing. Indeed, he has not even been afforded the process provided to those individuals captured by the military outside the United States and charged before military commissions or detained at Guantánamo Bay, Cuba. In determining what process Mr. al-Marri is now due, and how the Supreme Court's decision in *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633 (2004), bears on that question, a few basic points are worth repeating.

On June 23, 2003, when President Bush signed the order declaring him an "enemy combatant," Mr. al-Marri was awaiting trial on criminal charges in a federal district court. As a criminal defendant, Mr. al-Marri was entitled to the same fundamental protections against unlawful imprisonment that this Country has always afforded individuals accused of wrongdoing, no matter how serious the offense or how dangerous the offender, during times of war and during times of peace. These protections have been afforded to suspected terrorists, both before and after September 11, 2001, including, for example, to Zacarias Moussaoui, the alleged "twentieth hijacker." Yet, on June 23, 2003, the President sought to strip Mr. al-Marri of these protections by executive fiat, that is, by declaring him an "enemy combatant."

This Court, assuming the truth of the government's factual allegations, has previously upheld the President's legal authority to detain Mr. al-Marri. *Al-Marri v. Hanft*, 378 F. Supp. 2d 673 (D.S.C. 2005). It now must determine what process Mr. al-Marri is due to challenge the veracity of those allegations. The government, for its part, continues to assert a degree of executive power and immunity from meaningful judicial review that defies all precedent. It

argues that the burden is on Mr. al-Marri to refute a triple hearsay declaration by a Department of Defense functionary, which includes allegations that Mr. al-Marri has not been permitted to see, and which is based on statements that may have been obtained through torture, cruel and inhuman treatment, or other circumstances that call the veracity of the information into question. Even if the President has the legal authority to hold individuals arrested in the United States as "enemy combatants," however, it would mock due process to allow the government to thus deny Mr. al-Marri a meaningful opportunity to challenge the factual basis for his indefinite detention.

PROCEDURAL BACKGROUND

On December 12, 2001, Mr. al-Marri was arrested by FBI agents at his home in Peoria, Illinois, at the direction of the United States Attorney's Office for the Southern District of New York as a material witness in the investigation of the September 11, 2001, terrorist attacks, and detained in a civilian jail in New York City. *Al-Marri v. Hanft*, 378 F. Supp. 2d at 674. In February 2002, Mr. al-Marri was charged by the federal government in a one-count indictment, returned in the Southern District of New York, alleging possession of unauthorized or counterfeit credit-card numbers. *Id.* Almost one year later, he was charged in a second, six-count indictment with two counts of making a false statement to the FBI; three counts of making a false statement in a bank application; and one count of using a means of identification of another person for the purpose of influencing the action of a federally insured financial institution. *Id.* The United States District Court for the Southern District of New York granted Mr. al-Marri's motion to dismiss the indictment on venue grounds in May 2003; Mr. al-Marri was then promptly re-indicted in the Central District of Illinois on the same seven counts. *Id.*

On June 23, 2003, shortly before trial and, in particular, while Mr. al-Marri's motion to suppress illegally seized evidence was pending, the President declared Mr. al-Marri an "enemy

combatant" and transferred him to the Navy brig in South Carolina. There, he was held incommunicado for approximately 17 months and repeatedly interrogated under coercive conditions; there he remains confined today, still subject to severe restrictions. On July 8, 2003, Counsel filed a Petition for Writ of Habeas Corpus on Mr. al-Marri's behalf in the United States District Court for the Central District of Illinois to challenge his detention. The district court dismissed the petition on venue grounds, *Al-Marri v. Bush*, 274 F. Supp. 2d 1003 (C.D. Ill. 2003), and the court of appeals affirmed, *Al-Marri v. Rumsfeld*, 360 F.3d 707 (7th Cir. 2004). On October 4, 2004, the Supreme Court denied certiorari. *Al-Marri v. Rumsfeld*, __ U.S. __, 125 S. Ct. 34 (2004).

On July 8, 2004, Counsel filed a Petition for Writ of Habeas Corpus on Mr. al-Marri's behalf in this Court, again challenging his detention as an "enemy combatant." On or around September 9, 2004, the government filed an Answer to the Petition, which relied upon the unclassified and classified declarations of Jeffrey N. Rapp, Director for the Joint Intelligence Task Force for Combating Terrorism.[1] The Rapp Declarations remain the sole factual basis provided by the government to support the President's classification of Mr. al-Marri as an "enemy combatant." On October 14, 2004, Counsel was granted access to Mr. al-Marri for the first time since he was declared an "enemy combatant" seventeen months before. On February 11, 2005, Mr. al-Marri submitted a Reply (or Traverse) again denying that he is an "enemy combatant" and re-asserting that he is an innocent civilian. Mr. al-Marri argued that the President had no authority to detain him as an "enemy combatant" as a matter of law and, alternatively, that he was entitled to a hearing consistent with the requirements of due process.

[1] Mr. Rapp's unclassified declaration will be referred to as the "unclassified Rapp Declaration"; his classified declaration will be referred to as the "classified Rapp Declaration"; and the two declarations will be referred to jointly as the "Rapp Declarations."

On March 2, 2005, following this Court's decision in the *Padilla* case, Mr. al-Marri moved for summary judgment on the ground that the President lacked legal authority to detain him as an "enemy combatant." On July 8, 2005, this Court denied that motion, holding that the President could detain Mr. al-Marri pursuant to the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001) ("AUMF"), *assuming* that all the facts asserted by the government were true. *Al-Marri v. Hanft*, 378 F. Supp. 2d at 680. Specifically, the Court determined that the AUMF authorized Mr. al-Marri's detention based upon the allegation that he is an al Qaeda operative who entered the United States to commit hostile and war-like acts. *Id.* at 680. The Court also held, however, that its decision "does not close the door of this Court to Petitioner," and that Mr. al-Marri has a constitutional right to challenge the government's factual assertions. *Id.* at 681-82.

On August 15, 2005, the Honorable Robert S. Carr, United States Magistrate Judge, held a status conference to discuss further proceedings in this case in which Mr. al-Marri could challenge the government's factual allegations. At the conclusion of the conference, Judge Carr requested that the parties brief the following issues: (1) Is the presumption in favor of the government's evidence discussed by the Supreme Court in *Hamdi v. Rumsfeld* applicable here?; and (2) If this presumption is applicable, what opportunity must Mr. al-Marri be given to rebut it?

Mr. al-Marri respectfully requests that the Court accept this brief in response to the questions it posed at the status conference and as Mr. al-Marri's formal request for leave to seek discovery. For the reasons set forth below, any presumption in favor of the government's evidence that might apply under circumstances like the *Hamdi* case does not apply to Mr. al-Marri, and, even if such an initial presumption does apply, notwithstanding the very significant

differences between this case and *Hamdi*, Mr. al-Marri must still be given a fair opportunity to rebut the government's claims in an evidentiary hearing before this Court. This fair opportunity must include, at a minimum, meaningful notice of the government's factual allegations, including the allegations in the classified Rapp Declaration; the opportunity to obtain discovery of the sources of information on which those allegations are based and of any exculpatory information; the exclusion of hearsay statements that do not satisfy the requirements of the Federal Rules of Evidence or due process; the opportunity to confront the government's evidence and any adverse witnesses at a hearing; and the opportunity to compel the production of favorable witnesses.

ARGUMENT

I. THERE IS NO PRESUMPTION IN FAVOR OF THE GOVERNMENT'S ALLEGATIONS.

In *Hamdi*, a plurality of the Supreme Court held that the petitioner was entitled to "notice of the factual basis for his classification [as an "enemy combatant"], and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." 124 S. Ct. at 2648. The plurality further suggested in *dicta* that, in a case like Hamdi's, the "Constitution would not be offended by a presumption in favor of the government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided." *Id.* at 2649. In such a case, "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." *Id.* The *Hamdi* plurality thus did not hold that there is necessarily a presumption in favor of the government's evidence that a petitioner is an "enemy combatant" but, rather, only that there *could* be such a presumption in appropriate circumstances and where the government has come forward with credible evidence. No such presumption is appropriate in this case, for three reasons.

First, the government has failed to produce "credible evidence" that Mr. al-Marri is an "enemy combatant," as *Hamdi* requires, 124 S. Ct. at 2649. Instead, it relies upon an inadmissible triple hearsay declaration from a Department of Defense functionary with no personal knowledge of any of the asserted facts. *Second*, the presumption discussed in *Hamdi* was rooted in the narrow circumstances of that case -- an armed enemy soldier "captured in a *foreign* combat zone," 124 S. Ct. at 2543 (emphasis in original); *see also id.* at 2639 (defining "enemy combatant"); *id.* at 2637 (describing Hamdi's capture). *Hamdi* does not support such a presumption under the very different circumstances presented here -- the domestic arrest by

civilian law enforcement agents and subsequent criminal prosecution of an individual who is not alleged to have engaged in armed combat against the United States on a foreign battlefield or elsewhere. *Third*, the Constitution requires that the government bear the burden of proof throughout this proceeding and that it establish its claim that Mr. al-Marri is an "enemy combatant" by at least clear and convincing evidence.

A. The Government Has Not Produced Credible Evidence That Petitioner Is An Enemy Combatant.

There can be no presumption in favor of the government because it has failed to produce "*credible evidence* that [Mr. al-Marri] meets the enemy-combatant criteria." *Hamdi*, 124 S. Ct. at 2649 (emphasis added). The Rapp Declarations cannot give rise to such a presumption. Specifically, the triple hearsay declarations of a Department of Defense functionary, who has no personal knowledge of any asserted facts, do not constitute evidence, let alone credible evidence, because they do not satisfy the requirements of the Federal Rules of Evidence or due process.

By operation of law, the Federal Rules of Evidence apply to habeas corpus proceedings. Fed. R. Evid. 1101(e); *see, e.g.*, *Loliscio v. Goord*, 263 F.3d 178, 186 (2d Cir. 2001); *Plaster v. United States*, 720 F.2d 340, 349 (4th Cir. 1983) (citing government's argument); *Smith v. Brewer*, 444 F. Supp. 482, 486 (S.D. Iowa), *aff'd* 577 F.2d 466 (8th Cir. 1978). Under the Federal Rules of Evidence, hearsay is inadmissible unless it falls within an established exception. Fed. R. Evid. 802 ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress."); *see also United States v. Bumpass*, 60 F.3d 1099, 1101 (4th Cir. 1995) ("Federal Rule of Evidence 802 provides that hearsay is not admissible into evidence except as provided by law...."). The rule against hearsay "is premised on the theory that out-of-court statements are subject to particular hazards." *Williamson v. United States*, 512 U.S. 594, 598 (1994); *see also Montana v.*

Egelhoff, 518 U.S. 37, 42 (1996) ("Hearsay rules ... prohibit the introduction of testimony which, though unquestionably relevant, is deemed insufficiently reliable."). The rule against hearsay thus serves a critical function in ensuring the reliability of evidence:

> The declarant might be lying; he might have misperceived the events which he relates; he might have faulty memory; his words might be misunderstood or taken out of context by the listener. And the ways in which these dangers are minimized for in-court statements -- the oath, the witness' awareness of the gravity of the proceedings, the jury's ability to observe the witness' demeanor, and, most importantly, the right of the opponent to cross-examine -- are generally absent for things said out of court.

Williamson, 512 U.S. at 598. This case underscores the importance of these safeguards.

Mr. Rapp has no personal knowledge of any asserted facts and his declaration consists of not one, but two levels of hearsay. The unclassified Rapp Declaration appears to rely on the hearsay statements of unidentified government officials, while the classified Rapp Declaration appears to rely additionally on the hearsay statements of two high-level al Qaeda suspects, provided to government interrogators under unknown circumstances while they were in U.S. custody at an undisclosed location. The in-court testimony of those individuals would clearly constitute appropriate, admissible, and, indeed, "the most reliable available evidence" within the meaning of *Hamdi*, 124 S. Ct. at 2649; yet, the government has failed even to explain, much less to demonstrate persuasively, why it cannot (and why it should not be required to) produce those individuals in a hearing before this Court as required by the Federal Rules of Evidence. Further, the statements of the two al Qaeda suspects may, according to press and other published reports, be the product of multiple interrogations under coercive conditions and possibly even torture, including a technique known as water-boarding, in which a subject is made to believe he might be drowned. *See, e.g.*, Douglas Jehl & David Johnston, "White House Fought New Curbs on Interrogations, Officials Say," N.Y. Times, at A1 (Jan. 13, 2005); Amnesty Int'l, *United States of*

America: Human dignity denied; Torture and accountability in the 'war on terror' 114 (Oct. 27, 2004), *at* <http://www.web.amnesty.org/library/pdf/AMR511452004ENGLISH/$File/AMR5114504.pdf>. If so, those statements are obviously unreliable and, if relied upon in this proceeding, would engender precisely the type of abuses that the rule against hearsay was intended to forestall.

Hamdi certainly does not authorize the broad use of hearsay evidence in habeas corpus proceedings. Rather, focusing on the context of Hamdi's capture, the plurality in *Hamdi* merely stated that "[h]earsay ... *may* need to be accepted as the most reliable available evidence from the Government in such a proceeding" because of the nature of a battlefield capture and the potential burdens imposed by requiring the government to adduce non-hearsay evidence from military officers who may still be engaged in actual combat. 124 S. Ct. at 2649 (emphasis added). All the plurality intended, then, was to provide a gloss on the existing residual exception to the established rule against hearsay under the Federal Rules of Evidence in cases like *Hamdi*, *i.e.*, that a sworn affidavit from a military officer in the field, presumably with relevant first-hand knowledge, produced in a habeas proceeding challenging a battlefield capture might be admissible if it was "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." Fed. R. Evid. 807(B). Of course, that affidavit must also have "equivalent circumstantial guarantees of trustworthiness" to the hearsay exceptions contained in Rules 803 and 804, and must serve "the general purposes of [the Federal Rules of Evidence] and the interests of justice" to satisfy the residual exception. Fed. R. Evid. 807.

A broader reading of the *Hamdi* plurality's dicta is foreclosed by the Rules Enabling Act, 28 U.S.C. § 2072 *et seq*. In this Act, Congress authorized the Supreme Court to promulgate rules

of evidence for the federal courts. 28 U.S.C. § 2072(a) (authorizing "[t]he Supreme Court ... to prescribe ... rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof)"). The Act establishes specific procedures which must be followed by the Supreme Court before promulgating a change to the existing rules of evidence. 28 U.S.C. § 2073 (prescribing procedures for proposed changes to rules of evidence by the Judicial Conference). It requires, for example, formal transmission of any proposed change to Congress. 28 U.S.C. § 2074. The Court, however, has not proposed or made any change to the Federal Rules of Evidence that would make any hearsay statement in the Rapp Declarations admissible in a federal habeas proceeding. The *Hamdi* plurality, then, could not have altered the existing rules of evidence without violating the Rules Enabling Act and, in turn, the Separation of Powers, by infringing on Congress's authority to establish rules of procedures for the federal courts. *See Burlington Northern R. Co. v. Woods*, 480 U.S. 1, 5 & n.3 (1987). In short, the *Hamdi* plurality could not have intended to alter the established rules against hearsay, something it was constitutionally incapable of doing.

Further, the Rapp Declarations do not satisfy any recognized exception to the rules against hearsay, including the residual exception. In a battlefield capture like *Hamdi*, the government might need to rely on a hearsay affidavit from a military officer in the field who is too occupied with ongoing combat operations to testify in a judicial proceeding in federal court. This quite obviously was the concern that informed the plurality's discussion of the use of a presumption, and reliance on hearsay evidence, in *Hamdi*. Under those limited circumstances, a hearsay affidavit may be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." Fed. R. Evid. 807(B). Also, such an affidavit may contain "circumstantial guarantees of trustworthiness" that are

"equivalent" to hearsay statements excepted under Rules 803 and 804. For example, an affidavit from a military official who observed a petitioner fighting against American troops on a battlefield might fall under the exception for present sense impression. Fed. R. Evid. 803(1) (defining present sense impression as "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter"). The same is not true for the triple hearsay declaration submitted by the government in this case. Mr. Rapp is a Department of Defense functionary, not a military officer in the field, and he has no personal knowledge of any of the asserted facts. While the habeas statute permits evidence has to be taken by affidavit in the discretion of the judge, 28 U.S.C. § 2246, that affidavit must itself be based on personal knowledge to which the affiant can testify at a hearing, or otherwise satisfy some exception to the rule against hearsay. Moreover, even when an affidavit is admitted in a habeas proceeding, the opposing party has the right to propound written interrogatories to the affiant. *Id.*

Moreover, statements from individuals who have been in government custody for over two years at undisclosed locations, and who have been repeatedly interrogated, and may have been subjected to torture and/or other highly coercive measures, lack "equivalent circumstantial guarantees of trustworthiness" and flout "the general purposes" of the Federal Rules of Evidence and due process. *See, e.g., Haynes v. Washington*, 373 U.S. 503, 514 (1963) ("We cannot blind ourselves to what experience unmistakably teaches: that ... secret and incommunicado detention and interrogation ... are devices adapted and used to extort confessions from suspects."). Thus, in this case, "the most reliable available" evidence, *Hamdi*, 124 S. Ct. at 2649, is the testimony of the witnesses and civilian government officials with personal knowledge of the asserted facts. Unless the government first satisfies a recognized exception to the hearsay rules, it must produce

the individuals upon whose statements Mr. Rapp relies, and those individuals must testify before this Court in accordance with the Federal Rules of Evidence.

Further, the Court must find that the government's evidence is credible before there can be a presumption in favor of that evidence. *Hamdi*, 124 S. Ct. at 2649. Credibility, of course, is precisely the type of fact-bound determination that requires an evidentiary hearing so that the adjudicator can observe witnesses and make appropriate findings based on their demeanor or conduct. *See, e.g., Gomez v. United States*, 490 U.S. 858, 874 n.27 (1989); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *see also United States v. White*, 366 F.3d 291, 302 (4th Cir. 2004) ("where the ultimate resolution rests on a credibility determination ... an evidentiary hearing is especially warranted") (internal citation omitted). Here, the need for such a hearing is particularly salient in that the government's allegations appear to come from law enforcement officials, government interrogators, and two high-level al Qaeda suspects held under the very dubious circumstances described above. *Hamdi*, in contrast, involved a routine assessment of Hamdi's status following a battlefield capture. *See, e.g., Mathews*, 424 U.S. at 343-44 (evidentiary hearing less important where determination rests on information obtained through "routine, standard, and unbiased" reports rather than credibility of witnesses). Thus, only after the government has produced admissible evidence at a hearing, and that evidence has been found credible by the Court, can there be an initial presumption in favor of the government. No such credible evidence has yet been produced by the government here, and the presumption described in *Hamdi* therefore cannot apply in this case.

B. The Presumption Described in *Hamdi* Was Limited To The Very Different Circumstances Of That Case, And Greater Procedural Safeguards Are Required Here.

The presumption described in *Hamdi* does not apply here for another reason. That presumption flowed from the Court's analysis of the process that was due Hamdi based upon the

particular circumstances of his capture by the U.S. military on a foreign battlefield. The circumstances of Mr. al-Marri's seizure by civilian law enforcement agents at his home inside the United States are starkly different and, consequently, Mr. al-Marri is constitutionally entitled to more robust protections than was Hamdi. While the Due Process Clause may have allowed a presumption in favor of the government's evidence in *Hamdi*, it prohibits such a presumption here.

In *Hamdi*, the plurality applied the procedural due process balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine the minimum process a petitioner in Hamdi's situation must be given before he may be deprived of his liberty. Under *Mathews*, "the process due in any given instance is determined by weighing 'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process." *Hamdi*, 124 S. Ct. at 2646 (quoting *Mathews*, 424 U.S. at 335). *Mathews*, then, requires that a court balance these concerns "through an analysis of 'the risk of an erroneous deprivation' of the private interest if the process were reduced and the 'probable value, if any, of additional or substitute safeguards.'" *Id.*

The plurality's application of *Mathews* in *Hamdi* was narrowly tailored to "the realities of combat" on a foreign battlefield, 124 S. Ct. at 2647, including the burdens on the military and the risk of erroneous deprivations of liberty in that context. In light of these *specific* concerns, the plurality stated:

> [T]he exigencies of the circumstances may demand that, aside from these core elements [of due process], enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise,

> the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal was provided. Thus, 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. A burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant. In the words of *Mathews*, process of this sort would sufficiently address the 'risk of erroneous deprivation' of a detainee's liberty interest while eliminating certain procedures that have questionable additional value in light of the burden on the Government.

Id. at 2649 (internal citation and footnote omitted). The very different circumstances of this case and the constitutional protections they implicate, compel more robust safeguards against the unlawful deprivation of liberty. Even if the Constitution permits a presumption in favor of the government's evidence in a case like *Hamdi*, it forbids any such presumption here.

1. **The Private Interest Is Greater Than In *Hamdi*.**

Freedom from physical detention "is the most elemental of liberty interests," *Hamdi*, 124 S. Ct. at 2646; *see also Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."), and "commitment for *any* purpose constitutes a significant deprivation of liberty that requires due process protection," *Jones v. United States*, 463 U.S. 354, 361 (1983) (emphasis added and citation omitted). Thus, when the government deprives an individual of liberty, "[m]eticulous care must be exercised" to ensure that "the essential standards of fairness" are met. *Bridges v. Wixon*, 326 U.S. 135, 154 (1945). The weight on this side of the *Mathews* scale is not offset by the circumstances of war or the accusation of highly dangerous, even treasonous behavior. *Hamdi*, 124 S. Ct. at 2646; *see also Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120-21 (1866) ("The Constitution of the United States is a law for rulers and

people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."). As the Supreme Court explained in *Hamdi*, an "unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat." 124 S. Ct. at 2647.

The danger of unchecked executive detention is magnified substantially when the government seeks to detain a civilian lawfully residing in the United States rather than an armed soldier captured on a foreign battlefield thousands of miles away. In this country, "liberty is the norm, and detention prior to or without trial is the carefully limited exception." *Foucha*, 504 U.S. at 83 (internal quotation marks and citation omitted). The Constitution prohibits the government from preventively detaining people without trial because it believes they pose a danger -- even a grave danger -- to the public, except in narrowly defined circumstances. *See Kansas v. Hendricks*, 521 U.S. 346 (1997) (civil commitment of sex offenders); *United States v. Salerno*, 481 U.S. 739, 750 (1987) ("full-blown adversary hearing" and other procedural safeguards required to preventively detain dangerous criminal defendants before trial); *Addington v. Texas*, 441 U.S. 418 (1979) (civil commitment of mentally ill); *see also Hamdi*, 124 S. Ct. at 2662 (Scalia, J., dissenting) (forms of non-criminal detention have always been very "limited" and "well-recognized"). In each of those exceptional circumstances, the government's authority to detain individuals based on their alleged dangerousness has been contingent on the existence of robust procedural safeguards. *See, e.g., Hendricks*, 521 U.S. at 352-53 (trial-type proceeding and other significant safeguards afforded to violent sex offenders before they may be civilly committed); *see also Zadvydas v. Davis*, 533 U.S. 678, 690-91 (2001) (Supreme Court has "upheld preventive detention based on dangerousness only when limited to specially dangerous individuals *and* subject to strong procedural protections") (emphasis added).

On a foreign battlefield, capture and detention are the norm, not the carefully limited exception. *Hamdi*, 124 S. Ct. at 2640. Battlefields are, by definition, occupied by armed soldiers whose principal purpose -- indeed, whose duty -- is to shoot and kill their enemy. Capture is to be expected, and the detention of captured soldiers is merely "'a simple war measure'" to prevent their return to the battlefield. *Id.* (quoting William Winthrop, *Military Law and Precedents* 788 (rev. 2d ed. 1920)); *see also In re Territo*, 156 F.2d 142, 145 (9th Cir 1946).

In contrast, the villages, hamlets, towns, and metropolises of America are not active combat zones, and the tens of millions of people who reside in them -- including the millions of Muslims and persons of Arab descent -- are not, and cannot be presumed to be, enemy combatants. That is, individuals lawfully residing in this country have a greater private interest in remaining free from military detention than those engaged in armed combat against American troops overseas on foreign battlefields.

The private interest is also greater here than in *Hamdi* because of the much broader definition of "enemy combatant" used in this case. In *Hamdi*, the Court limited that definition to a person who was "part of or supporting forces hostile to the United States or coalition partners in Afghanistan *and* who engaged in an armed conflict against the United States there." 124 S. Ct. at 2639 (internal quotation marks omitted and emphasis added). Mr. al-Marri did not engage, and is not alleged to have engaged, in armed combat against the United States or its coalition forces in Afghanistan and, therefore, does not fall within the Court's definition of "enemy combatant" in *Hamdi*. Because Mr. al-Marri never waged war on a battlefield, his detention, unlike Hamdi's, is not "a fundamental incident of waging war." *Id.* at 2641. *Accord Padilla v. Hanft*, __ F.3d __, 2005 WL 2175946, at *4-*5 (4th Cir. Sept. 9, 2005) (upholding President's authority to detain individual who allegedly took up arms against United States or its coalition

partners in Afghanistan "in the same way and to the same extent as did Hamdi" to prevent his return to the battlefield there). This Court, therefore, significantly expanded the narrow definition of an "enemy combatant" upheld in *Hamdi* when it ruled that the President may detain Mr. al-Marri based on the allegation that he was an "alien al Qaeda operative[ ] who enter[ed] this country to commit hostile and war-like acts," even though he never engaged in combat in Afghanistan or anywhere else. *Al-Marri*, 378 F. Supp. 2d at 680 (citing government's brief) (internal quotation marks omitted).

Moreover, the term "hostile and war-like acts" is not defined anywhere and, unlike in the battlefield context, could potentially include a wide range of arguably innocent conduct. *See* Order of President George W. Bush Declaring Ali al-Marri an Enemy Combatant, Exhibit A to Respondent's Answer to the Petition for Writ of Habeas Corpus ("Bush Order") ("hostile and war-like acts" would include "conduct in preparation for acts of international terrorism that had the aim to cause injury to or adverse effects on the United States"). Thus, the broader and more elastic definition of "enemy combatant" applied by the Court here mandates stronger procedural protections than in *Hamdi* and prohibits a presumption in favor of the government's evidence in this case.

Furthermore, the private interest is greater here than in *Hamdi* because the detention is indefinite and not governed by any limiting principle. By contrast, the length of Hamdi's detention (which has already concluded) was circumscribed by traditional and "longstanding law-of-war principles." 124 S. Ct. at 2641. Specifically, Hamdi was allegedly a member of the Taliban military force and, consequently, could be detained only as long as "[a]ctive combat operations against the Taliban fighters ... are ongoing in Afghanistan." *Id.* at 2641-42. At the time *Hamdi* was decided, 13,500 U.S. troops remained in Afghanistan, including several

thousand new arrivals. *Id.* at 2642 (citing Department of Defense statistics). The duration of Hamdi's detention, therefore, was limited by the continued presence and activity of U.S. soldiers in Afghanistan -- a factor which could be measured objectively and independently of the President's unilateral assertions about any threat Hamdi himself posed. *Id.* at 2641-42. Here, in contrast, the government alleges that Mr. al-Marri is closely associated with al Qaeda, an international criminal terrorist organization. *See* Bush Order ¶ 2. Unlike the conflict with the Taliban in Afghanistan, there are no objective, independent, or customary criteria to limit the length of the "war on terrorism." In fact, the government has stressed that "the end of the war [with al Qaeda] is a very difficult thing to perceive" and that alleged al Qaeda members may be detained far longer than those individuals, like Hamdi, who were captured on the battlefield with the Taliban. Transcript of Oral Argument, *Hamdi v. Rumsfeld*, No. 03-6696 (Sup. Ct.), 2004 WL 1066082, at *40 (Apr. 28, 2004) (Statement of then-Deputy Solicitor General Paul D. Clement). Thus, unlike any other alleged "enemy combatant" in American history, Mr. al-Marri may well be detained *forever*, without ever being charged with a crime or afforded a fair trial.

In short, to compare the battlefield seizure in *Hamdi* and the domestic arrest here "is to compare apples and oranges." *Hamdi v. Rumsfeld*, 337 F.3d 335, 344 (4th Cir. 2003) (Wilkinson, J., concurring). The possible presumption in favor of the government's evidence in *Hamdi* reflected the private interest at stake there. But the private interest of a civilian arrested in his own home inside the United States, and detained indefinitely under the government's sweeping definition of the term "enemy combatant," is significantly weightier than the interest of a traditional "combatant," i.e., an armed soldier captured on a foreign field of battle. Accordingly, Mr. al-Marri's private interest weighs strongly in favor of additional procedural safeguards and against a presumption in favor of the government's evidence.

2. The Risk Of An Erroneous Deprivation Of Liberty And The Probable Value Of Additional Safeguards Are Greater Here Than In *Hamdi*.

This case also poses a far greater risk of an erroneous deprivation of liberty than did *Hamdi* and, thus, requires additional procedural safeguards. In *Hamdi*, the government emphasized that Hamdi's detention "amounts to nothing more than customary detention of a captive taken on the field of battle." 124 S. Ct. at 2657 (Souter, J., concurring). Specifically, it contended that Hamdi was an "enemy combatant" because he was "part of or supporting forces hostile to the United States or coalition partners in Afghanistan and ... engaged in an armed conflict against the United States there." 124 S. Ct. at 2639 (plurality op.) (internal quotation marks omitted). Hamdi fell within that narrow category because he was fighting with a Taliban military unit against United States forces in Afghanistan and was captured there with an AK-47 in his hands when his unit surrendered to Northern Alliance forces. *Id.* at 2637.

In general, procedures already exist to prevent an erroneous deprivation of liberty in cases of garden-variety battlefield captures like Hamdi's. Typically, the determination of whether an individual captured in a war zone is an "enemy combatant" (as defined in *Hamdi*) is made promptly by a duly constituted military tribunal, not a federal court exercising habeas jurisdiction. *Hamdi*, 124 S. Ct. at 2651 (noting process provided under Army Regulation 190-8 and Geneva Conventions); *see also, e.g.*, Department of Defense, Report on the Conduct of the Persian Gulf War, Final Report to Congress (Apr. 1992) (on-the-spot determinations of status by U.S. military pursuant to Article 5 of Geneva Conventions made in every conflict since World War II). The necessary "documentation" regarding such captures "is already kept in the ordinary course of military affairs," thus further reducing the risk of error. *Hamdi*, 124 S. Ct. 2649 (citing government's brief). Indeed, it was because the standard military hearing had not been conducted to determine Hamdi's status at the time of capture, *see* Enemy Prisoners of War,

Retained Personnel, Civilian Internees, and Other Detainees, Army Regulation 190-8, § 1-6 (1997), that a habeas court had to ensure that the basic requirements of due process were met in the first instance. *Hamdi*, 124 S. Ct. at 2651; *see also id.* at 2649.

Thus, the streamlined procedural scheme that the *Hamdi* plurality described, including a possible presumption in favor of the government's evidence, reflects the relatively minimal risk of erroneous deprivations of liberty under the particular circumstances of battlefield captures, in general, and of the *Hamdi* case, in particular. The plurality believed that this scheme would enable "the errant tourist, embedded journalist, or local aid worker . . . to prove *military error*." 124 S. Ct. 2649 (emphasis added). The class of persons who could mistakenly be seized by American soldiers or their allies in a combat zone is limited, and it would be relatively easy for such a person to prove, for example, that he was a newspaper reporter or a relief worker and not an "enemy combatant" as defined in *Hamdi*.

In contrast, there is a constitutionally significant greater possibility that the government would erroneously deprive an individual in the United States of his liberty based upon the belief that he committed or intended to commit wrongdoing. In such circumstances, that is, in the circumstances presented in this case, the potential class of individuals who could be unlawfully detained by the government is enormous, if not limitless, and the burden of proof has always remained on the government because that burden represents the most valuable and effective safeguard available to reduce the risk of error. *In re Winship*, 397 U.S. 358, 364, 374-75 (1970) (Harlan, J., concurring). Here, that risk is greatly magnified because of the broad definition of "enemy combatant" and the lack of any other safeguards afforded to those alleged to be "enemy combatants." In these circumstances, a presumption in favor of the government's evidence

would greatly increase the risk of an erroneous deprivation of liberty; conversely, imposing the burden of production and proof on the government would significantly reduce that risk.

3. The Potential Burdens On The Government Described in *Hamdi* Are Not Present Here And Cannot Justify A Presumption In Its Favor.

As the plurality repeatedly emphasized, *Hamdi* involved the detention of an armed enemy soldier "captured in a *foreign* combat zone." 124 S. Ct. at 2543 (emphasis in original); *id.* at 2637 (Hamdi's capture as armed soldier on battlefield with Taliban unit engaged in fighting U.S. troops). Indeed, the government stressed in that case that Hamdi's detention "amounts to nothing more than customary detention of a captive taken on the field of battle." *Id.* at 2657 (Souter, J., concurring). Accordingly, in balancing the interests at stake, the plurality focused on the potential burdens imposed on the government and, in particular, on the military, when an enemy soldier seized in an active war zone on the other side of the world files a habeas petition in federal district court. Specifically, the plurality was concerned that "military officers who are engaged in the serious work of waging battle would be unnecessarily and dangerously distracted by litigation half a world away" and that such litigation would "result in a futile search for evidence buried under the rubble of war." *Id.* at 2648. Indeed, these were the concerns raised by the government in its brief, which specifically described the potential burdens posed by a habeas petitioner's challenge to *battlefield captures by the military in overseas war-zones*. *See* Brief for the Respondents at 46-49, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696), *cited in Hamdi*, 124 S. Ct. at 2649.

Unlike *Hamdi*, however, this case does not involve an on-the-spot determination by military field officers or "a futile search for evidence buried under the rubble of war." *Hamdi*, 124 S. Ct. at 2647-49. Instead, it began as a civilian law enforcement operation when Mr. al-

Marri was arrested by the FBI in his home in Peoria, Illinois, and then indicted on criminal charges. It remained a civilian law enforcement operation for over 16 months, as the government developed and prepared the evidence that it intended to present at Mr. al-Marri's criminal trial. During that time, the government filed not one but three indictments against Mr. al-Marri; the last was filed but a month before he was declared an "enemy combatant." *Every single allegation* in the unclassified Rapp Declaration was taken directly from those criminal indictments. The only additional factual allegations are contained in the classified Rapp Declaration, which Mr. al-Marri has never seen and which his Counsel has not been permitted to share with him. Moreover, Mr. al-Marri's classification as an "enemy combatant" was based on "assessments" by top-level government officials located in Washington, D.C., thousands of miles from any combat zone. Unclassified Rapp Decl. ¶ 6. In fact, the initial assessment that Mr. al-Marri might be an "enemy combatant" was not made by the military but, rather, by the CIA, while the President's subsequent classification of Mr. al-Marri as an "enemy combatant" relied on "factual information ... supplied by the FBI" and a "fact memorandum" from the Criminal Division of the Department of Justice. *Id.* No military officer is identified at all, much less one who is presently engaged in the "serious work of waging battle [and who] would be unnecessarily and dangerously distracted by litigation half a world away." *Hamdi, supra.*

The government cannot point here to any burden that supported a presumption in favor of the government's evidence in *Hamdi*. Specifically, there is no risk in this case of distracting military officers engaged in combat on an overseas battlefield with litigation in a domestic court or with "a futile search for evidence buried under the rubble of war." *Hamdi*, 124 S. Ct at 2648. To the contrary, much, if not all, of the information relied upon by the government was developed *after* Mr. al-Marri's arrest in December 2001, for the very purpose of federal court

litigation. Moreover, the Rapp Declarations contain precisely the kind of inculpatory assertions that the government is accustomed to proving in adversarial proceedings in order to sustain its burden when it seeks to deprive an individual, arrested in this country, of his liberty. The *Hamdi* plurality suggested that there could be a presumption in favor of the government's evidence because it was concerned with the burden of requiring military officers in the field to testify about the commonplace capture of an armed soldier in a foreign war zone. This case does not remotely involve that burden. And, to the extent the government might rely on concerns about the public disclosure of sensitive information that could endanger national security, such concerns can be properly addressed through, for example, sealing orders, which would vindicate the government's interest in avoiding disclosure, without infringing Mr. al-Marri's right to due process of law. Accordingly, *Hamdi* does not support a presumption in favor of the government's evidence in this case.

C. The Government Must Bear the Burden of Proving Its Claim That Petitioner Is An "Enemy Combatant" By At Least Clear And Convincing Evidence.

The Constitution not only forbids a presumption in favor of the government's evidence in this case, but it also requires that the government bear the burden of proof throughout the proceeding and establish its claim that Mr. al-Marri is an "enemy combatant" by at least clear and convincing evidence. It is a fundamental axiom of our legal system that when the government seeks to deprive an individual in the United States of his liberty, it must bear the burden of proof. *See, e.g.*, *Winship*, 397 U.S. at 364 ("Due process commands that no man shall lose his liberty unless the Government has borne the burden of ... convincing the factfinder of his guilt.") (internal quotation marks and citation omitted). This "notion -- basic in our law and rightly one of the boasts of a free society -- is a requirement and a safeguard of due process of

law in the historic, procedural content of 'due process.'" *Leland v. Oregon*, 343 U.S. 790, 803 (1952) (Frankfurter, J., dissenting). Placing the burden of proof on the government also reflects the general principle that the burden of proof lies on the party in the better position of marshalling the relevant facts. *See, e.g.*, *Selma, R. & D. R Co. v. United States*, 139 U.S. 560, 567-68 (1891). When the government seeks to deprive a person of his liberty based on its belief that he has committed wrongdoing or poses a danger to the public, it is necessarily in a better position to provide the relevant facts to a court and, accordingly, it bears the burden of proof for that reason as well.

Thus, in criminal cases, the government bears the burden of proof, regardless of how minor or severe the alleged infraction or potential sanction. Similarly, the government bears the burden of proof in non-criminal cases when it seeks to deprive an individual of his liberty. *See, e.g.*, *Hendricks*, 521 U.S. at 352-53 (commitment of violent sex offenders); *Addington*, 441 U.S. at 432-33 (commitment of mentally ill); *Woodby v. INS*, 385 U.S. 276, 285-86 (1966) (deportation proceedings); *Schneiderman v. United States*, 320 U.S. 118, 135 (1943) (denaturalization proceedings); *Gonzales v. Landon*, 350 U.S. 920, 921 (1955) (expatriation proceedings); *see also Addington*, 441 U.S. at 424 (noting use of clear and convincing evidence standard in other civil cases "involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant"). None of these cases permits an initial presumption in favor of the government's evidence; indeed, such a presumption would, by definition, turn the burden of proof on its head.

Further, when the government deprives an individual in this country of his liberty, it must meet its burden of proof by a high standard. That is because in a "free society" like the United States, "every individual going about his ordinary affairs [must] have confidence" that the

government will not imprison him unlawfully. *Winship*, 397 U.S. at 364. The underlying principle -- that all individuals in this country are presumed innocent -- is "axiomatic and elementary," *Coffin v. United States*, 156 U.S. 432, 453 (1895), and is central to the American system of justice, 9 John Henry Wigmore, *Evidence in Trials at Common Law* § 2511, at 530 (1981 ed.). The standard of proof thus demonstrates "a profound judgment about the way in which law should be enforced and justice administered." *Winship*, 397 U.S. at 361-62 (internal citation and quotation marks omitted).

In our system of justice, then, the standard of proof provides the "prime instrument" for reducing the risk of imprisonments resting on factual errors. *Id.* at 363. Here, a factual error "exposes [Mr. al-Marri] to a complete loss of his personal liberty through a state-imposed confinement away from his home, family, and friends." *Id.* at 374 (Harlan, J., concurring). Therefore, the Constitution compels the government to carry its burden by a correspondingly high standard of proof to ensure that its factual conclusions are correct. *Id.* at 374-75. That standard does not turn on whether the proceeding is labeled "criminal" or "civil" in nature because words cannot obscure the real interests at stake or "'the value society places on individual liberty.'" *Addington*, 441 U.S. at 425 (quoting *Tippett v. Maryland*, 436 F.2d 1153, 1166 (4th Cir. 1971) (Sobeloff, J., concurring in part and dissenting in part)); *see also Winship*, 397 U.S. at 366.

When the government seeks to deprive an individual of his liberty, it must meet its burden of proof by at least clear and convincing evidence. *See, e.g., Hendricks*, 521 U.S. at 353 (commitment of dangerous convicted sex offenders); *Foucha*, 504 U.S. at 81, 86 (continued commitment of criminal defendant found not guilty by reason of insanity based on alleged future dangerousness); *Salerno*, 481 U.S. at 750 (pre-trial detention based on dangerousness);

Addington, 441 U.S. at 432-33 (commitment based on mental illness and dangerousness); *see also Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 282 (1990) (clear and convincing evidence standard required "when the individual interests at stake ... are both particularly important and more substantial than mere loss of money") (citation omitted). The clear and convincing evidence standard is mandated even where the liberty interest is less than indefinite imprisonment, as in deportation proceedings. *See, e.g., Woodby*, 385 U.S. at 285 ("[A] deportation proceeding is not a criminal prosecution .... [b]ut it does not syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a negligence case.").

Whether the government calls Mr. al-Marri an "enemy combatant" or a criminal defendant, that label does not change reality. *In re Gault*, 387 U.S. 1, 50 (1967) ("It is incarceration against one's will, whether it is called 'criminal' or 'civil.'). Mr. al-Marri is held without charge by the Executive Branch, away from his family, home, and friends, possibly for the rest of his life. This is as grievous a loss of liberty as can be imagined, short of execution. Moreover, his confinement as an "enemy combatant" is profoundly stigmatizing. *Winship*, 397 U.S. at 363-64; *see also Board of Regents v. Roth*, 408 U.S. 564, 573 (1972) (important interests when "'a person's good name, reputation, honor, or integrity is at stake'") (citation omitted). The President of the United States has called Mr. al-Marri a "sleeper" agent of al Qaeda and publicly accused him of plotting to commit acts of terrorism against innocent civilians.

In fact, here there are even stronger reasons to require the government to prove its assertions by clear and convincing evidence than in other forms of non-criminal confinement. Unlike other forms of indefinite detention, there is no non-punitive or rehabilitative purpose for Mr. al-Marri's continued confinement. *Addington*, 441 U.S. at 428 & n. 4 (identifying non-

punitive and rehabilitative purpose behind commitment of mentally ill); *see also Hendricks*, 521 U.S. at 366 (detention of sex offenders coupled with treatment where possible). To the contrary, Mr. al-Marri is being detained based *solely* upon his alleged dangerousness. Also, unlike other forms of non-criminal confinement, there are no "layers of professional review" or other "continuous opportunities for an erroneous commitment to be corrected." *Addington*, 441 U.S. 429-30. Furthermore, the inquiry here does not turn on the meaning of facts that are to be interpreted by experts, as in civil commitment cases, *id.* at 429, but, rather, on the disputed allegation that Mr. al-Marri is an al Qaeda operative who sought to commit acts of terrorism against the United States -- exactly the type of fact-bound determination that the government must prove beyond a reasonable doubt in criminal cases, including terrorism cases, and that it had the burden of proving when it prosecuted Mr. al-Marri criminally. *See, e.g.*, *United States v. Yousef*, 327 F.3d 56 (2d. Cir. 2003) (affirming convictions of defendants involved in 1993 World Trade Center bombing and conspiracy to bomb airliners); *United States v. Rahman*, 189 F.3d 88, 123 (2d Cir. 1999) (affirming conviction of Sheikh Omar Abdel Rahman and his followers for, *inter alia*, plotting a "day of terror" against New York City landmarks). Furthermore, while the government claims that Mr. al-Marri's detention is non-punitive, his conditions of confinement belie that assertion. Mr. al-Marri was held incommunicado for 17 months at the brig, where he remains in solitary confinement and subject to other conditions of confinement that are more severe than those to which even the most dangerous convicted criminals are subjected.[2]

[2] Mr. al-Marri's prolonged incommunicado detention and solitary confinement, repeated interrogation, and other mistreatment further undermine the government's claim that his detention is "a simple war measure" intended solely to prevent his return to the battlefield. *See* Complaint in *Al-Marri v. Rumsfeld*, Civ. No. 2:05-2259 (D.S.C.) (HHF) (RSC), *filed* August 8, 2005; *cf. Hamdi*, 124 S. Ct. at 2658-59 (Souter, J., concurring) (Hamdi's incommunicado detention and government's failure to apply applicable military regulations undermines its contention that it is acting in accordance with laws of war). These conditions flout the military's own regulations which it ordinarily applies to combatants captured during wartime, as well as the international treaties which the United States has long followed. These conditions suggest that the government's intent is not simply to detain Mr. al-Marri, but also to punish him.

In sum, the law is quite clear that when an individual has at stake an interest of such "transcending value" as potentially lifelong confinement, the burden of proof must remain on the government throughout, and it must satisfy that burden by a high standard of proof. *Winship*, 397 U.S. at 364. Here, the minimum constitutionally acceptable standard of proof is clear and convincing evidence.

II. PETITIONER IS ENTITLED TO NOTICE OF THE FACTUAL BASIS FOR HIS CLASSIFICATION AND A FAIR OPPORTUNITY TO REBUT THE ALLEGATIONS AGAINST HIM.

Regardless of whether there is an initial presumption in favor of the government's evidence, Mr. al-Marri is entitled to "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Hamdi*, 124 S. Ct. at 2648. "It is equally fundamental that th[is] right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *Id.* at 2649 (quoting *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972)). Here, notice and a fair opportunity to rebut the government's factual assertions require that Mr. al-Marri be provided with: information regarding the factual allegations underlying his designation as an "enemy combatant," including the allegations in the classified Rapp Declaration; the opportunity to obtain discovery, including the information and sources on which Mr. Rapp's hearsay statements are based and how that information was obtained, as well as any exculpatory information; the opportunity to confront any adverse witnesses at an evidentiary hearing; and the opportunity to compel the production of witnesses in his favor.

A. The Government Must Provide Sufficient Notice Of The Factual Basis For Petitioner's Classification As An "Enemy Combatant."

Presently, the sole actual basis for Mr. al-Marri's classification as an "enemy combatant" is contained in the Rapp Declarations, triple hearsay declarations from a Department of Defense bureaucrat with no personal knowledge of any material facts. Like the hearsay declaration in *Hamdi*, the Rapp Declaration "leads to more questions than it answers." *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527, 533 (E.D. Va. 2002). The Declarations, for example, never allege that Mr. al-Marri engaged in any act of terrorism or "hostile and war-like act" against the United States. Nor does it provide the underlying basis for Mr. al-Marri's classification -- *i.e.*, the sources of all

of the information, the conditions under which that information was obtained, the standard used to designate Mr. al-Marri an "enemy combatant," and whether exculpatory information exists. The disclosure of the sources and conditions under which the government has obtained its information may, for example, reveal that it was obtained through torture, cruel and inhuman treatment, or other circumstances which might call the veracity of some or all of the allegations into question.

Equally important, Mr. al-Marri has not even been permitted to see the classified Rapp Declaration and Counsel is prohibited from discussing its contents with him. Thus, Mr. al-Marri has not been permitted to see the very allegations that purportedly support his detention as an "enemy combatant." The government's reliance on secret evidence that Mr. al-Marri cannot see or confront critically undermines the fairness of this proceeding and "creates a one-sided process by which the protections of our adversarial system are rendered impotent." *Kiareldeen v. Reno*, 71 F. Supp. 2d 402, 413 (D.N.J. 1999). The "evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." *Greene v. McElroy*, 360 U.S. 474, 496 (1959); *see also Rafeedie v. INS*, 880 F.2d 506, 516 (D.C. Cir. 1989) (individual must be able to see "undisclosed evidence" to rebut it). The notion that an individual could be imprisoned for the rest of his life based on information that he has not been permitted to see and confront is abhorrent to the most basic principles of fairness and due process. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring); *see also Mathews*, 424 U.S. at 345-46 ("*full access* to access to information relied upon by the [government]" ensures that an affected individual has a meaningful opportunity to challenge its accuracy and reliability and reduces risk of an erroneous deprivation) (emphasis added); *United States v. Hayman*, 342 U.S. 205, 220 (1952) (district court

erred in proceeding under 28 U.S.C. § 2255 "when it made findings on controverted issues of fact relating to respondent's own knowledge without notice to respondent and without his being present").

The government's failure to provide Mr. al-Marri with notice of the allegations in the classified Rapp Declaration, as well as the additional information on which those allegations are based, violates due process. The petition should be granted forthwith for that reason alone. Regardless, the Court should order such disclosure so that Mr. al-Marri's hearing might comport with the Constitution and laws of the United States.

B. Petitioner Must Have The Opportunity To Obtain Discovery From The Government.

In order for Mr. al-Marri's opportunity for rebuttal to be a fair one, he must be afforded the opportunity to obtain discovery regarding the government's factual allegations and its decision to classify him as an "enemy combatant." In *Harris v. Nelson*, 394 U.S. 286 (1969), the Supreme Court upheld the power of federal courts to allow discovery by habeas petitioners pursuant to the All Writs Act, 28 U.S.C. § 1651, and further declared it to be "the inescapable obligation of the courts" to grant leave to obtain discovery in appropriate circumstances. 394 U.S. at 299. The Court emphasized that "[t]he very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Id.* at 291; *see also Townsend v. Sain*, 372 U.S. 293, 312 (1963) ("[T]he power of inquiry on federal habeas corpus is plenary."), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992). Therefore, trial courts must "fashion appropriate modes of procedure, by analogy to existing rules or otherwise in conformity with judicial usage," to allow a habeas petitioner to "secur[e] facts where necessary to accomplish the

objective of the proceedings." *Harris*, 394 U.S. at 299; *see also Hamdi v. Rumsfeld et al.*, Civ. No. 2:02cv439, at 1 (E.D. Va., Oct. 11, 2004) (government ordered to produce copies of all documents on which it intended to rely in case-in-chief against Hamdi before hearing took place).

Further, the habeas statute itself provides "at least a skeletal outline of the procedures to be afforded a petitioner in habeas corpus review." *Hamdi*, 124 S. Ct. at 2644. Specifically, the statute authorizes the taking of depositions. 28 U.S.C. § 2246; *see also Harris*, 394 U.S. at 299. It also mandates that if affidavits are admitted, the opposing party "*shall* have the right to propound written interrogatories to the affiants" and to submit answering affidavits. 28 U.S.C. § 2246 (emphasis added); *Valdez v. Cockrell*, 274 F.3d 941, 958 (5th Cir. 2001) ("The introduction of affidavits into evidence is subject to the right of the opponent to cross-examine the affiants by written interrogatories.'") (internal quotation marks and citation omitted). Thus, if the Court concludes that the Rapp Declarations are admissible, Mr. al-Marri must, at a minimum, have the opportunity to propound written interrogatories to Mr. Rapp and to the individuals on whom he relied, "to elicit facts necessary to help the court to 'dispose of the matter as law and justice require,'" *Harris*, 394 U.S. at 290 (quoting 28 U.S.C. § 2243), as well as to submit answering affidavits, 28 U.S.C. § 2246.

Here, discovery is essential to "secur[e] facts" necessary for Mr. al-Marri to meaningfully challenge the basis for his detention. *Harris*, 394 U.S. at 299. Specifically, discovery is required so that Mr. al-Marri has adequate notice of the government's factual assertions that he is an "enemy combatant" and an opportunity to review and confront those assertions before this Court. The government must also be required to provide Mr. al-Marri with any information favorable to his defenses, *Brady v. Maryland*, 373 U.S. 83, 87 (1963), including information that could enable

him to impeach the government's witnesses, *United States v. Bagley*, 473 U.S. 667, 676 (1985); *United States v. Giglio*, 405 U.S. 150, 154 (1972). Denying Mr. al-Marri discovery of this information would flout both the fundamental guarantees of due process and the historic protections of the Great Writ as a bulwark against unlawful executive confinement. *Cf. INS v. St. Cyr*, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest.").

As discussed above, this case is very different -- and is far more complex -- than that of an individual captured in a zone of active hostilities, like Hamdi, who could come forward with evidence of his status -- *i.e.*, that he was, in fact, an aid worker or journalist and not an enemy soldier engaged in active hostilities against American troops. *Hamdi*, 124 S. Ct. at 2649. Mr. al-Marri has already asserted that he was a student lawfully residing with his family in Peoria, Illinois, when he was arrested at his home by the FBI almost four years ago. But the government is demanding that Mr. al-Marri do much more, specifically, that he disprove his presumptively correct classification under the government's loose and sweeping definition of an "enemy combatant." Without obtaining discovery, it is simply impossible for Mr. al-Marri to "prove the negative," much less to understand, challenge, and prepare to respond to the government's assertions.

Discovery is necessary on other issues as well. This Court previously held that the President may detain Mr. al-Marri as an "enemy combatant" under the AUMF based on the facts alleged by the government. *Al-Marri v. Hanft*, 378 F. Supp. 2d at 680. However, the plurality in *Hamdi* specifically pointed to the need for factual development not only on whether a given petitioner falls within the definition of an "enemy combatant" but also on the scope of the

AUMF itself. As Justice O'Connor explained, "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war," then the "understanding" of Congress's grant of authority for the use of all necessary and appropriate force "may unravel." 124 S. Ct. at 2641. Mr. al-Marri intends to show that this "understanding" has, in fact, unraveled. Specifically, he will demonstrate that he was designated an "enemy combatant" because the government failed to induce him to plead guilty before his criminal trial and because information on which that classification was based had been obtained through means that were not only suspect but also potentially unlawful. 18 U.S.C. § 2340A(a) (providing for criminal prosecution of any individual who "commits or attempts to commit torture" outside United States). Mr. al-Marri is therefore entitled to discovery of information surrounding his classification as an "enemy combatant," including the assessments of the CIA, Department of Defense, and Attorney General that preceded his designation as an "enemy combatant" as well as the assessment of the President prior to his declaring him an "enemy combatant." Certainly, Congress did not authorize a deliberate end-run around the laws it had enacted, including the anti-terrorism laws, when it authorized the use of "necessary and appropriate force." Accordingly, Mr. al-Marri is entitled to discovery to elicit the facts necessary to demonstrate why his indefinite detention is not, in fact, authorized by the AUMF.

Thus, in lieu of a more formal motion, and as is implicit in the Court's August 15, 2005 Order, Mr. al-Marri requests that the Court require the government to provide copies of, among other items: (1) any statements or reports of statements made by Mr. al-Marri while in the custody of the United States; (2) any documents the government intends to rely upon at the hearing; (3) any document relied upon by Mr. Rapp in preparing his classified and unclassified declarations; (4) all documents relied upon by the CIA, Department of Defense, Department of

Justice, and President Bush in assessing whether Mr. al-Marri was an "enemy combatant"; (5) all documents describing the sources of information referenced in Mr. Rapp's declaration and the conditions under which that information was obtained, including any documents describing the questioning, interrogation, and/or interviews of sources by U.S. government officials or any other individuals; (6) all documents identifying the standard used to designate Mr. al-Marri an "enemy combatant"; (7) any exculpatory evidence that exists. Furthermore, to the extent that this discovery shows that witnesses in Guantánamo Bay, Cuba, or elsewhere may have relevant information regarding the issues presently before the Court, Mr. al-Marri asks that the Court permit Mr. al-Marri to seek additional deposition or other testimony and documents, and to supplement the record in advance of a hearing.

C. This Court Should Issue An Order Compelling The Government To Preserve The Information Petitioner Seeks to Discover.

This Court should also issue an order compelling the government to preserve the information Mr. al-Marri seeks to discover. This Court is empowered to enter such a preservation order when circumstances warrant it. *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 138 & n.8 (2004); *United States v. Phillip Morris USA, Inc.*, 327 F. Supp. 2d 21, 23 (D.D.C. 2004). Circumstances warrant the entry of a preservation order when there is substantial concern that evidence may be damaged or destroyed, and the burden on the party required to preserve the evidence is not great. *Capricorn Power Co., Inc. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429, 433-34 (W.D. Pa. 2004).

Here, Mr. al-Marri is legitimately and substantially concerned that the government will not maintain the evidence it may possess about the torture, mistreatment, and abuse of individuals who are in its custody and who provided information on which Mr. al-Marri's

detention is based. The loss of this evidence could irreparably harm Mr. al-Marri by depriving him of proof that his confinement is unlawful. Therefore, this Court should enter an order requiring the government to preserve all information about the torture, mistreatment, or other abuse of individuals presently or formerly in its custody or control who have provided information about Mr. al-Marri.

D. Petitioner Has The Right To Confront And Cross-Examine Witnesses In An Evidentiary Hearing Before This Court.

Mr. al-Marri must be able to review and confront all the government's evidence and to cross-examine any adverse witnesses in a hearing before this Court, in order to have a fair opportunity to rebut the accusation that he is an "enemy combatant." The Supreme Court has "frequently emphasized that the right to confront and cross-examine witnesses is a fundamental aspect of procedural due process." *Jenkins v. McKeithen*, 395 U.S. 411, 428 (1969); *see also California v. Green*, 399 U.S. 149, 158 (1970) (cross-examination is "the greatest legal engine ever invented for the discovery of truth") (internal citation omitted); *Goldberg*, 397 U.S. at 269 ("where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses"). The notion that an individual arrested inside the United States could be imprisoned by the military for the rest of his life without charge and without any opportunity to confront and cross-examine the individuals on whose statements his detention rests offends the most basic principles on which this Nation was founded.

The right of confrontation is "'implicit in the concept of ordered liberty.'" *Pointer v. Texas*, 380 U.S. 400, 408 (1965) (Harlan, J., concurring) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). As Justice Scalia stated, "[i]t is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross

examine." *Crawford v. Washington*, 541 U.S. 36, 49 (2004) (citation omitted). The use of "*ex parte* examinations as evidence against the accused" was the "principal evil" that the right to confrontation was meant to prevent. *Id.* at 50. Even suspected enemies of the state have always had the right to confront the government's witnesses "face to face." *Id.* at 43 (citation and internal quotation marks omitted). And the paradigmatic example of *ex parte* statements which must be subject to cross examination are precisely those relied upon by the government here -- statements taken by law enforcement officers and other government officials during the course of custodial interrogations. *Id.* at 52.

Further, the right to confront and cross-examine witnesses has never been limited to criminal cases:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots.... This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, ... but also in all types of cases where administrative and regulatory actions were under scrutiny.

Greene, 360 U.S. at 496-97 (citations and footnote omitted); *see also In re Oliver*, 333 U.S. 257, 273 (1948) (right to notice of the charge and opportunity to be heard in one's defense "are basic in our system of jurisprudence" and include one's "right to examine the witnesses against him"). Indeed, this fundamental right has been guaranteed in every preventive detention scheme the Supreme Court has ever upheld. *See, e.g., Hendricks*, 521 U.S. at 353 (preventive detention of extremely violent sexual predators); *Salerno*, 481 U.S. at 742, 751 (preventive pre-trial detention

of dangerous accused felons). It is also guaranteed in deportation proceedings, which merely threaten removal from the country and not lifelong imprisonment. *See, e.g., United States v. Jauregui*, 314 F.3d 961, 962-63 (8th Cir. 2003) (citing *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953)); *Hadjimehdigholi v. INS*, 49 F.3d 642, 649 (10th Cir. 1995); *United States v. Gasca-Kraft*, 522 F.2d 149, 152 (9th Cir. 1975). Indeed, this right is so basic to our understanding of due process that it cannot be dispensed with even when the private interest is the mere loss of government benefits. *Goldberg*, 397 U.S. at 270 (right to confront and cross-examine witnesses in welfare termination hearing). It is also fundamental under the Uniform Code of Military Justice ("UCMJ"). *See United States v. Davis*, 19 U.S.C.M.A. 217, 224 (M.C.A. 1970); *United States v. Sippel*, 4 U.S.C.M.A. 50, 56 (M.C.A. 1954) ("[I]f a party seeks to establish a fact by a substitute method [other than by direct testimony], the party against whom the testimony is offered must have been afforded an opportunity to confront the witness whose testimony is sought to be admitted."); *see also United States v. Anderson*, 51 M.J. 145, 149 (C.A.A.F. 1999) ("'There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goals.'") (quoting *Pointer*, 380 U.S. at 405). The President cannot eliminate this fundamental right simply by labeling an individual arrested in this country an "enemy combatant."

The right of confrontation could not be more important here. Mr. al-Marri's classification as an "enemy combatant" is apparently based on statements made by individuals who reportedly have been repeatedly interrogated while in government custody over the course of two years, and subjected to coercive techniques. Those interrogations, moreover, occurred

during a period in which the Executive Branch had adopted an exceedingly narrow definition of torture which it has since repudiated. *See* U.S. Dep't of Justice, Office of Legal Counsel, "Memorandum for James B. Comey, Deputy Attorney General," Dec. 30, 2004, at 2, 8 *at* <http://news.findlaw.com/hdocs/docs/terrorism/dojtorture123004mem.pdf> (repudiating definition in place since 2002 limiting torture to techniques resulting in "pain equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death"). Any evidence obtained by the government as the result of torture or other abusive interrogation tactics cannot support Mr. al-Marri's detention as an "enemy combatant." *Chavez v. Martinez*, 538 U.S. 760, 788 (2003) (Stevens, J., concurring part and dissenting in part) (coercive interrogation tactics are "a classical example of a violation of a constitutional right implicit in the concept of ordered liberty") (internal citation omitted). Such information is not merely unreliable but, as the Supreme Court has consistently held, derives from "interrogation techniques ... so offensive to a civilized system of justice that they must be condemned under the Due Process Clause." *Miller v. Fenton*, 474 U.S. 104, 109 (1985); *see also Brown v. Mississippi*, 297 U.S. 278, 286 (1936) (coercive interrogation techniques are "revolting to the sense of justice"); *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443, 473 (D.D.C. 2005) ("[D]ue process requires a thorough [judicial] inquiry into the accuracy and reliability of statements alleged to have been obtained through torture."), *appeal pending* (D.C. Cir. 2005). At very least, the reliability of such evidence must be thoroughly evaluated; cross-examination is necessary for that purpose.

E. Petitioner Has The Right To Present And Compel The Production Of Witnesses In His Favor.

Like the right to confront adverse witnesses, the right to compel the production of favorable witnesses is "fundamental and essential" to due process. *Washington v. Texas*, 388

U.S. 14, 17-18 (1967). This right is vital to an individual's "right to present a defense" -- *i.e.*, to present his version of the facts as well as the government's so that a neutral arbiter may decide where the truth lies. *Id.* at 19; *see also id.* at 24 (Harlan, J., concurring) (Due Process Clause's protection against arbitrary deprivations of liberty mandates the opportunity to compel witnesses in one's favor").

Like the right to confront government witnesses, the right to compel favorable witnesses is required here not because it is guaranteed under the Sixth Amendment (which applies only to criminal trials) but because it is mandated under the Due Process Clause. It embodies the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," *Powell v. Alabama*, 287 U.S. 45, 67 (1932) (citation omitted), and applies in any proceeding where the government seeks to deprive an individual of his liberty. *See, e.g., Hendricks*, 521 U.S. at 353 (preventive detention of extremely violent sexual predators); *Salerno*, 481 U.S. at 742 (preventive pretrial detention of allegedly dangerous criminals); *see also Jauregui*, 314 F.3d at 963 (deportation proceedings) (citing *Kwong Hai Chew*, 344 U.S. at 596). Moreover, this Court plainly has the power to compel the production of witnesses by statute. *See* 28 U.S.C. § 2241(c)(5); *United States v. Moussaoui*, 382 F.3d 453, 464-66 (4th Cir. 2004). To deprive Mr. al-Marri of his liberty indefinitely without affording him this elemental safeguard would "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." *Malinski v. New York*, 324 U.S. 401, 416-47 (1945).

CONCLUSION

For the foregoing reasons, the presumption in favor of the government's evidence described by a plurality of the Supreme Court in *Hamdi v. Rumsfeld* does not apply to this case because the government has failed to put forth credible evidence that Mr. al-Marri is an "enemy combatant" and, in any event, because the circumstances of this case are very different from those in *Hamdi* and require greater procedural safeguards. Further, Mr. al-Marri is entitled to a fair and meaningful opportunity to rebut the government's factual assertions, including: full notice of the allegations in the Rapp Declarations; the opportunity to obtain discovery of the sources of information on which the government's assertions are based and any exculpatory information; the exclusion of hearsay statements that fail to satisfy the requirements of the Federal Rules of Evidence or due process; the opportunity to confront the evidence and witnesses against him at an evidentiary hearing; and the opportunity to compel the production of witnesses in his favor.

Respectfully submitted,

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Dated: Charleston, South Carolina
October 14, 2005