

SAYING WHAT THE LAW SHOULD BE:  
JUDICIAL USURPATION IN  
*Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007)

*Al-Marri v. Wright*<sup>1</sup> is the most recent case in the struggle to define who qualifies as an enemy combatant in the Global War on Terror. In *Al-Marri*, the Fourth Circuit, in contrast with its previous ruling in *Padilla v. Hanft*,<sup>2</sup> found that the President's authority to designate a person detained on U.S. soil an enemy combatant was greatly limited. In so doing, the court inappropriately usurped legislative and executive powers.

Ali Saleh Kahlah al-Marri, a graduate student, was lawfully residing in Illinois when the FBI arrested him in December of 2001.<sup>3</sup> After criminal proceedings against al-Marri stalled, President Bush declared al-Marri an enemy combatant and ordered him transferred to the custody of the Secretary of Defense.<sup>4</sup> Since June 23, 2003, the military has held al-Marri as an enemy combatant at the Naval Consolidated Brig in South Carolina.<sup>5</sup>

Al-Marri's attorney petitioned for a writ of habeas corpus in federal district court in South Carolina.<sup>6</sup> The government responded to the petition with a declaration from the Joint Intelligence Task Force for Combating Terrorism that asserted, among other things, that al-Marri had trained with al Qaeda and was a "sleeping agent" for al Qaeda in America.<sup>7</sup> The district court dismissed al-Marri's habeas petition on the grounds that al-Marri had failed to rebut the accusations in the declaration.<sup>8</sup> Al-Marri appealed.<sup>9</sup>

In an opinion written by Judge Diana Gribbon Motz, the Fourth Circuit reversed the denial of the writ by the district

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1. 487 F.3d 160 (4th Cir. 2007).

2. 423 F.3d 386 (4th Cir. 2005).

3. *Al-Marri*, 487 F.3d at 164.

4. *Id.* at 165.

5. *Id.* at 164–65.

6. *Id.* at 165.

7. *Id.* at 165–66.

8. *Id.* at 166.

9. *Id.*

court.<sup>10</sup> The court first addressed the question whether it had jurisdiction over the petition. The government argued that the Military Commissions Act of 2006 (MCA)<sup>11</sup> removed from the court's jurisdiction habeas petitions from declared enemy combatants.<sup>12</sup> Section 7 of the MCA provides:

No court . . . shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien of the United States who has been determined by the United States to have been properly detained as an enemy combatant . . . .<sup>13</sup>

The court held that the MCA did not strip it of jurisdiction over al-Marri's habeas petition because there had not been a review of his status as an enemy combatant after the President's initial decision to detain him. The court understood the statute to require two steps: a determination that a person is an enemy combatant, followed by a review of the appropriateness of that classification.<sup>14</sup> The panel found that al-Marri had not received the second step of the review necessary to remove his habeas petition from the court's jurisdiction.<sup>15</sup>

Addressing the merits of the habeas appeal, the court found the government's two primary arguments unpersuasive. First, the government argued that the Authorization for Use of Military Force (AUMF)<sup>16</sup> authorized the President to hold al-Marri as an enemy combatant.<sup>17</sup> Second, the government argued that the President had inherent constitutional authority under his

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10. *Id.* at 164.

11. Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. § 948a-950w).

12. *Al-Marri*, 487 F.3d at 167.

13. 28 U.S.C. § 2241(e).

14. *See Al-Marri*, 487 F.3d at 169.

15. *See id.* at 170-71.

16. Pub. L. No. 107-40, 115 Stat. 224 (2001). The statute authorizes the President to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

*Id.*

17. *See Al-Marri*, 487 F.3d at 174.

Article II commander-in-chief authority to detain al-Marri as an enemy combatant.<sup>18</sup>

The court first rejected a literal reading of the AUMF's "all necessary and appropriate force" language, because such a reading would lead to "absurd results," including allowing the President to detain anyone who was in any way related to the attacks on September 11, 2001.<sup>19</sup> The court then argued that the AUMF must be read in light of precedents such as *Hamdi v. Rumsfeld*<sup>20</sup> and *Padilla v. Hanft*,<sup>21</sup> and by references to attempts to define the scope of the Government's authority to detain and try enemy combatants in *Ex parte Quirin*<sup>22</sup> and *Ex parte Milligan*.<sup>23</sup> In *Hamdi*, the Supreme Court upheld the classification as an enemy combatant of an individual who fought with the Taliban, the *de facto* government of Afghanistan.<sup>24</sup> In *Padilla*, the Fourth Circuit allowed the detention as an enemy combatant of an individual who was armed and present in Afghanistan in opposition to American military action, even though the government captured that individual at Chicago's O'Hare Airport.<sup>25</sup> The *Al-Marri* court reasoned that these cases could be distinguished because the detainees in *Hamdi* and *Padilla* had been working at the direction of, or in concert with, Taliban forces rather than al Qaeda, the group with which al-Marri was allegedly associated.<sup>26</sup>

The court also analyzed the Supreme Court's historical interpretations of the permissible scope of enemy combatant status. In *Quirin*, the Supreme Court upheld the designation as enemy combatants of several German nationals and one American national who, acting on behalf of Nazi Germany, secretly entered the United States to sabotage American war industries.<sup>27</sup> In

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18. *See id.* at 190.

19. *Id.* at 177–78.

20. 542 U.S. 507 (2004).

21. 423 F.3d 386 (4th Cir. 2005).

22. 317 U.S. 1 (1942).

23. 71 U.S. (4 Wall.) 2 (1866).

24. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion).

25. *See Padilla v. Hanft*, 423 F.3d 386, 389–90 (4th Cir. 2005).

26. *See Al-Marri*, 487 F.3d at 181 ("*Hamdi* and *Padilla* ground their holdings on . . . an individual's affiliation during wartime with the 'military arm of the enemy government.' . . . [I]n *Hamdi* and *Padilla*, it was the Taliban government of Afghanistan.>").

27. *See Ex parte Quirin*, 317 U.S. 1, 20–21, 30–31 (1942).

*Milligan*, the Court declined to find a southern Civil War sympathizer in Indiana to be an enemy combatant, reasoning that he was not aligned with the military arm of a foreign government.<sup>28</sup> From these cases, the *Al-Marri* court concluded that one can be an enemy combatant only if he takes up arms with the military arm of a foreign government.<sup>29</sup> The court argued that because the government had alleged only that al-Marri was part of an international terrorist organization, not the military arm of a foreign government, he did not fall into the category of enemy combatant as defined in *Quirin* and *Milligan*.<sup>30</sup>

Having rejected the government's statutory argument, the court was no more sympathetic to the government's contention that the President had the inherent constitutional authority to detain al-Marri as an enemy combatant. The court held that Congress, in section 412 of the Patriot Act,<sup>31</sup> had clearly identified the authority granted to the Attorney General to deal with suspected terrorists within the United States, and that the Patriot Act specifically forbade indefinite detention.<sup>32</sup> The court briefly considered two cases dealing with the President's inherent authority over enemy combatants, *Johnson v. Eisen-trager*<sup>33</sup> and *Ludecke v. Watkins*,<sup>34</sup> but found that they allow the President special military authority only when dealing with subjects of foreign states at war with the United States.<sup>35</sup> The court concluded that the President had no inherent constitutional authority to detain as an enemy combatant one who was lawfully present on U.S. soil and who "is not a subject of a country with which the United States is at war."<sup>36</sup> Finding that the President had no authority to detain al-Marri, the court granted the habeas petition and ordered the government to end its military detention of al-Marri.<sup>37</sup>

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28. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121–22 (1866).

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

30. See *id.* at 183.

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

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

33. 339 U.S. 763 (1950).

34. 335 U.S. 160 (1948).

35. See *Al-Marri*, 487 F.3d at 192.

36. *Id.* at 193.

37. *Id.* at 195.

U.S. District Judge Henry E. Hudson, sitting by designation, dissented. Although he agreed with the majority that the court had jurisdiction over the habeas appeal, he found the court's analysis of the President's authority to classify an individual as an enemy combatant unpersuasive.<sup>38</sup> He argued that the AUMF, in granting the President the authority to act against those "nations, organizations, or persons" responsible for the attacks on September 11, authorized the President to act against those affiliated with al Qaeda.<sup>39</sup> Judge Hudson also argued that the Fourth Circuit's reasoning in *Padilla* (that the President may declare a person who is aligned with al Qaeda, but who is captured on U.S. soil, to be an enemy combatant) should govern al-Marri's case.<sup>40</sup>

The court in *Al-Marri* was correct in its determination that the MCA did not strip it of jurisdiction. Its reliance upon a plain interpretation of the statutory language is, as the majority explained, the appropriate starting point when interpreting a statute.<sup>41</sup> The court appropriately read the MCA to require a two-step process for removing a case from the court's jurisdiction, and the government's failure to complete the second step allowed the court to retain jurisdiction over al-Marri's habeas petition.<sup>42</sup>

The manner in which the court answered the merits question, however, inappropriately usurped authorities rightfully held by Congress and the President. The court unjustifiably overturned a reasonable interpretation of the AUMF and misconstrued prior interpretations of the statute. Furthermore, the court failed to address adequately the argument that the President had inherent constitutional authority to detain enemy combatants, as the Patriot Act cannot remove authorities that the Constitution grants to the President.

The court's analysis of the AUMF ignored the express and implied intent of Congress. Specifically, the court neglected to engage in the same type of textual interpretation with respect to the AUMF as it had used in interpreting the MCA's jurisdiction-stripping provision. The baseline for the court's analysis of

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38. *Id.* at 195–96 (Hudson, J., dissenting).

39. *Id.* at 196 (quoting Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (emphasis added)).

40. *Id.* at 197–98.

41. *See id.* at 170 (majority opinion).

42. *See id.* at 169–70.

the AUMF should have been the plain language of the statute.<sup>43</sup> The statute gave the President the authority to use “all necessary and appropriate force against those nations, organizations, or persons” involved with the attacks of September 11.<sup>44</sup> A textual interpretation of this statute would have found that the inclusion of the phrase “nations, organizations, or persons” showed Congress’ intent that its grant of authority to use force not be limited to use against nation-states.<sup>45</sup> Additionally, a textual interpretation would have shown that the use of the term “all necessary and appropriate force” included a lesser component of force: detention.<sup>46</sup> Instead of making this simple finding, the court found that such an interpretation would lead to “absurd” results and therefore rejected it.<sup>47</sup> The court said what the law should be—not what the law is—and therefore stepped far outside the bounds of the role of the judiciary.<sup>48</sup>

Instead of accepting the plain language of the statute, the court interpreted the meaning of the statute in light of four cases: *Hamdi v. Rumsfeld*,<sup>49</sup> *Padilla v. Hanft*,<sup>50</sup> *Ex parte Quirin*,<sup>51</sup> and *Ex parte Milligan*.<sup>52</sup> In interpreting *Hamdi*, the court relied on the statement from the plurality that the AUMF explicitly authorizes the detention of individuals who were “part of or

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43. See *Watt v. Alaska*, 451 U.S. 259, 265 (1981); see also *Al-Marri*, 487 F.3d at 168 (“As always in interpreting an act of Congress, we begin with the plain language of the statute.”).

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

45. See *Hamdi*, 542 U.S. at 518 (plurality opinion) (“There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF.”).

46. See *id.* (“The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war.’” (citing *Ex parte Quirin*, 317 U.S. 1, 28, 30 (1942))).

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

48. Cf. *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting) (Even if a law regulating contraception was an “uncommonly silly law . . . we are not asked in this case to say whether we think this law [regulating contraception] is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do.”).

49. 542 U.S. 507 (2004).

50. 423 F.3d 386 (4th Cir. 2005).

51. 317 U.S. 1 (1942).

52. 71 U.S. (4 Wall.) 2 (1866).

supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there.”<sup>53</sup> Even though the AUMF was passed in response to attacks of September 11 and specifically referenced that date,<sup>54</sup> the Fourth Circuit interpreted the statute in a way that excepted from the AUMF’s coverage al Qaeda members (the group that planned, financed, and conducted the September 11th terrorist attacks) who were not directly associated with the Taliban.<sup>55</sup> Congress made it explicitly clear in the text of the AUMF that it intended that the grant of authority for the use of military force not be limited to one country or region but that it extend to terrorist organizations.<sup>56</sup> The Fourth Circuit used dictum from a plurality decision to ignore the plain text and congressional intent of a statute. This far exceeded the authority of the courts to “say what the law is.”<sup>57</sup>

As the dissent persuasively argued,<sup>58</sup> *Padilla v. Hanft* strongly supported the government’s position in *Al-Marri*. In *Padilla*, a different panel of the Fourth Circuit had no trouble recognizing that “al Qaeda [is] an entity with which the United States is at war.”<sup>59</sup> The court in that case concluded that it was Padilla’s association with al Qaeda, not necessarily his association with the Taliban, that made him eligible for enemy combatant status.<sup>60</sup> If the court had applied its own precedent from *Padilla*, it would have found that the President had the authority to detain al-Marri and classify him as an enemy combatant.

The court’s reliance on *Milligan* and *Quirin* was also puzzling. The AUMF was passed in 2001, but *Milligan* and *Quirin*

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53. *Hamdi*, 542 U.S. at 517 (plurality opinion) (quotation marks omitted).

54. See Pub. L. No. 107-40, 115 Stat. 224 (2001) (“Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens . . .”).

55. See *Al-Marri*, 487 F.3d at 183 (“[A]l-Marri is not alleged to have been part of a Taliban unit, not alleged to have stood alongside the Taliban or the armed forces of any other enemy nation, not alleged to have been on the battlefield during the war in Afghanistan, not alleged to have even been in Afghanistan during the armed conflict there . . .”).

56. See Pub. L. No. 107-40, 115 Stat. 224 (2001) (“Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism . . .”).

57. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

58. *Al-Marri*, 487 F.3d at 197 (Hudson, J., dissenting).

59. *Padilla v. Hanft*, 423 F.3d 386, 389 (4th Cir. 2005).

60. See *id.*

were decided 135 and 59 years, respectively, before its enactment. It is difficult to understand how the Court interpreted a statute using judicial decisions related to different claims of executive authority, and made at a time before the AUMF had ever been contemplated. *Quirin* was decided at a time when the enemy of the nation was multiple foreign governments; the enemy of the nation is now international terrorist organizations.<sup>61</sup> Furthermore, *Quirin* supports a finding contrary to that for which the court employed it, because *Quirin* held that enemy combatant status does not depend on the citizenship (or, by analogy, the status of lawful permanent resident) of the alleged enemy combatant.<sup>62</sup> *Milligan's* usefulness in interpreting the AUMF is questionable at best: the word "combatant" does not appear anywhere in the court's opinion. Even if *Milligan* were applicable, it would not support the conclusion for which the court employed it, because *Milligan* is a case about agents of "states in rebellion,"<sup>63</sup> not agents of foreign powers.

The cases the court cited did not support its argument. Moreover, the court's belief that it had the ability to determine who is an enemy combatant is a usurpation of rightful legislative power best left to the legislature. In *Al-Marri*, the court made much of the fact that al-Marri was not alleged to be associated with any government.<sup>64</sup> The court asserted that there was a fundamental difference, for the purposes of enemy combatant status, between persons associated with foreign governments and those associated with international terrorist organizations.<sup>65</sup> It is difficult to imagine an area of discretion that is more properly held by Congress and the President than the authority to decide with whom the United States is engaged in armed hostilities.

The cases cited by the majority did not support the holding that enemy combatant status is appropriate only for those associated with the military arm of a foreign government. *Quirin*

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61. See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

62. See *Quirin*, 317 U.S. at 37 ("Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war.").

63. See *Milligan*, 71 U.S. (4 Wall.) at 108 ("Milligan insists . . . he . . . had not been, since the commencement of the late Rebellion, a resident of any of the States whose citizens were arrayed against the government . . .").

64. See *Al-Marri*, 487 F.3d at 182-83.

65. *Id.* at 183.

and *Milligan* provide only minimal support for the court's broad contentions. These cases require only that an individual be acting at the behest of a foreign power, not a state. In its enemy combatant cases, the Supreme Court has never stated that courts may determine the form of that hostile foreign power—be it a non-governmental organization or a state. Quite the opposite, courts have recognized that al Qaeda is a hostile foreign power *because* the President has decided the United States is at war with it.<sup>66</sup>

The court's analysis of the government's argument that the President had inherent constitutional authority to detain enemy combatants was flawed and incomplete. To address the government's argument about inherent constitutional authority, the court argued that the Patriot Act<sup>67</sup> limited the President's powers.<sup>68</sup> This analysis has two flaws. First, statutes cannot limit constitutional authority. If the President possesses exclusive constitutional authority to detain enemy combatants, no statute by itself can restrict that authority. The court should have engaged in an analysis of the text and meaning of Article II at the time of ratification to determine whether the President possessed the inherent authority to order the military to take an enemy combatant into custody for working in collaboration with a hostile foreign power, and if that power remained in effect despite the Patriot Act.<sup>69</sup> It is possible that a statute may limit the President's power, but a statute cannot limit an authority the Constitution vests solely in the President.

The second flaw in the court's reasoning was that, even assuming that the court's discussion of the Patriot Act was appropriate, it failed to answer the government's arguments. The Patriot Act's provisions relating to detention of terrorists referred to the authority of the Attorney General (a law-enforcement of-

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66. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2794 (2006) (referring to the "United States' war with al Qaeda"); *Padilla v. Hanft*, 423 F.3d 386, 389 (4th Cir. 2005).

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

68. See *Al-Marri*, 487 F.3d at 190-91.

69. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring) (presenting a three-part analysis, part three of which recognizes that the President can retain inherent constitutional authority even in the face of a directly contradictory statute).

ficer) to hold suspected terrorists.<sup>70</sup> That is not the authority claimed by the President in *Al-Marri*; the President claimed that as Commander-in-Chief of the United States Armed Forces he had the authority to order the Secretary of Defense to hold an agent of a foreign power with which the United States is at war.<sup>71</sup> The Attorney General's authority to hold suspected terrorists and the Commander-in-Chief's authority to hold suspected agents of a foreign power are two fundamentally different authorities. That Congress legislated on the law enforcement authority given the President by the Take Care Clause<sup>72</sup> does not affect the President's authority to manage the armed forces through his role as Commander-in-Chief.<sup>73</sup> Of course, this argument does not demonstrate that the President possessed the inherent constitutional authority that he claimed. Rather, it establishes that the court failed to demonstrate that the President lacked the authorities that he claimed to possess.

*Al-Marri* was actually a narrow case that did not warrant a lengthy opinion. The scope of the conflict between the parties was relatively limited:

Both parties recognize[d] that it d[id] not violate the Due Process Clause for the President to order the military to seize and detain individuals who 'qualif[ied]' as enemy combatants for the duration of a war. They disagree[d], however, as to whether the evidence the Government . . . proffered, even assuming its accuracy, establishe[d] that al-Marri fit[] within the 'legal category' of enemy combatants.<sup>74</sup>

The court needed to decide only whether the allegations about al-Marri, if true, would mean that he was properly classified as an enemy combatant. That question did not require an exhaustive inquiry into the scope of the President's authority to detain enemy combatants; it required only a determination of whether

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70. See, e.g., Pub. L. No. 107-56, § 412, 115 Stat. 272, 351 (2001) ("The Attorney General shall take into custody . . .").

71. See *Al-Marri*, 487 F.3d at 165 ("The President determined that al-Marri's detention by the military was 'necessary to prevent him from aiding al Qaeda' and thus ordered the Attorney General to surrender al-Marri to the Secretary of Defense, and the Secretary of Defense to 'detain him as an enemy combatant.'").

72. See U.S. CONST. art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed . . .").

73. See U.S. CONST. art. II, § 2 ("The President shall be Commander in Chief of the Army and Navy of the United States . . .").

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

al-Marri was one. The government alleged that al-Marri had come to the United States at the direction and instruction of al Qaeda,<sup>75</sup> an organization with which the United States is at war.<sup>76</sup> Under the AUMF, the President had the authority to detain those affiliated with al Qaeda to prevent a future terrorist attack. The question presented to the court in *Al-Marri* was relatively straightforward, and a simple answer was readily available. The court's wide-ranging usurpation of the authorities of Congress and the President was unnecessary and unsupported.

The court's opinion in *Al-Marri* is unlikely to be the final word on the status of the President's authority to detain enemy combatants. The Fourth Circuit has granted the government's request for en banc rehearing of the case,<sup>77</sup> and the case's treatment of important issues left unresolved in *Hamdi* means the Supreme Court is likely to grant certiorari if the case were to be appealed from the forthcoming en banc decision. The *Al-Marri* opinion represents a high-water mark in the attempt of some parts of the judiciary to usurp for themselves powers rightfully held by the President and Congress. The *Al-Marri* opinion is a sobering reminder that courts may have an agenda of their own in the debate over the status of enemy combatants in the Global War on Terror.

*J.B. Tarter*

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75. *See id.* at 165–66.

76. *See Padilla v. Hanft*, 423 F.3d 386, 389 (4th Cir. 2005); Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); *see also* Press Release, White House, Fact Sheet: Combating Terrorism Worldwide (Aug. 6, 2007), available at <http://www.whitehouse.gov/news/releases/2007/08/print/20070806-1.html>.

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