No. 06-7427

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ALI SALEH KAHLAH AL-MARRI, and MARK A. BERMAN, as next friend, Petitioners-Appellants, v. COMMANDER S.L. WRIGHT, USN Commander, Consolidated Naval Brig, Respondent-Appellee.	)	Appeal from the United States District Court for the District of South Carolina, Charleston Division Civil Action No. 2:04-2257-HFF Hon. Henry F. Floyd, *Judge*, Presiding

BRIEF AMICUS CURIAE OF FORMER SENIOR JUSTICE DEPARTMENT OFFICIALS IN SUPPORT OF PETITIONERS-APPELLANTS AND SUPPORTING REVERSAL

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IDENTITY OF AMICI CURIAE[1]

Amici curiae are former senior officials in the United States Department of Justice. They are:

W. Thomas Dillard was United States Attorney for the Eastern District of Tennessee in 1981 and the Northern District of Florida from 1983 to 1986. He currently is a partner at Ritchie, Dillard & Davies, P.C. in Knoxville.

Saul Green was United States Attorney for the Eastern District of Michigan from 1994 to 2001. He is currently senior counsel at Miller, Canfield, Paddock and Stone, P.L.C. in Detroit.

Philip A. Lacovara was Deputy Solicitor General of the United States in charge of criminal and internal security cases before the Supreme Court from 1972 to 1973, and Counsel to the Special Prosecutor, Watergate Special Prosecution Force from 1973 to 1974. He is now senior counsel at Mayer, Brown, Rowe & Maw LLP in New York City.

Scott R. Lassar was United States Attorney for the Northern District of Illinois from 1997 to 2001. He is currently a partner at Sidley Austin LLP in Chicago.

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[1] Some of the amici and their law firms are currently representing individuals being held by the government as alleged enemy combatants at the U.S. Naval Base at Guantanamo Bay, Cuba.

David L. Lillehaug was the United States Attorney for the District of Minnesota from 1994 to 1998. He is currently an officer and shareholder at Fredrikson & Byron, P.A. in Minneapolis.

Janet Reno served as Attorney General of the United States from 1993 to 2001. She was the State Attorney of the Eleventh Judicial District of Florida from 1978 to 1993.

Thomas P. Sullivan was United States Attorney for the Northern District of Illinois from 1977 to 1981. He is currently a partner at Jenner & Block LLP in Chicago.

Anton R. Valukas was United States Attorney for the Northern District of Illinois from 1985 to 1989. He is now a partner at Jenner & Block LLP in Chicago.

INTEREST OF AMICI CURIAE

Amici curiae are interested in this case because of their years of dedicated service to the United States and their commitment to criminal prosecutions conducted consistent with the Constitution and the rule of law. In particular, amici are concerned about the government's decision in this case to designate petitioner al-Marri as an "enemy combatant" rather than continuing to prosecute him on criminal charges. (The President declared al-Marri to be an enemy combatant more than a year after he had been arrested in Illinois and was first indicted on

federal criminal charges; the enemy combatant designation occurred shortly before al-Marri's criminal trial was scheduled to begin.) In many cases in recent years, the criminal justice system has been used to effectively prosecute people accused of committing or planning to commit acts of terrorism within the United States. Based on their many years of experience, amici are knowledgeable about the tools prosecutors possess and the effectiveness of those tools in prosecuting crimes in order to protect American citizens.

SOURCE OF AUTHORITY TO FILE

All parties to this appeal have consented to the filing of this amicus brief.

FACTUAL BACKGROUND

This is an unusual case. The government arrested al-Marri in Illinois five years ago, in late 2001, and he has been in government custody within the United States ever since. The government brought criminal charges against al-Marri in early 2002. After proceeding in the criminal justice system for more than a year—a period in which the government obtained three indictments against al-Marri on a variety of charges—the government abruptly changed course just before trial: it designated al-Marri as an enemy combatant in June 2003 and dismissed the criminal indictment against him with prejudice. Since then, al-Marri has been held without charge and without any indication of when his detention will end.

The FBI arrested al-Marri, a Qatari national, in Peoria, Illinois on December 12, 2001 as a material witness in the government's investigation of the September 11 attacks. JA 341. Al-Marri was formally arrested on January 28, 2002 and transferred to the Southern District of New York, where he was charged on February 6, 2002 in a one-count indictment for possessing unauthorized counterfeit access devices with intent to defraud. *Id*. In January 2003, the government obtained a second indictment against al-Marri; in six counts, al-Marri was charged with making false statements to the FBI, making a false statement in a bank application, and using stolen identification for the purpose of influencing a federally insured financial institution. *Id*. See also *United States v. Al-Marri*, No. 03-cr-94-VM-1, Criminal Complaint (S.D.N.Y. Jan. 22, 2003) (Petitioners' Attachment ("Attach.") 34-46). In that criminal complaint, the government alleged, among other things, that (1) al-Marri had made several attempts to call a telephone number in the United Arab Emirates associated with Mustafa Ahmed al-Hawaswi, the alleged al Qaeda financier of the September 11, 2001 terrorist attacks; (2) al-Marri's computer contained jihad and martyrdom files, including lectures by Osama bin Laden and his associates; (3) his computer also had photographs of the September 11 attacks; (4) al-Marri had bookmarked websites about jihad, hazardous substances, weapons, and satellite equipment; and (5) al-Marri had more than 1,000 stolen credit card numbers; he had also bookmarked

websites concerning fake identification and the purchase and sale of credit card numbers. Attach. 38-43, ¶¶ 14-17, 20.

Al-Marri moved to dismiss the New York federal indictment because of improper venue—all of the alleged acts occurred in Illinois—and the court granted the motion on May 12, 2003. JA 341. The next day, al-Marri was arraigned on a new criminal complaint in the Central District of Illinois, transferred back to Peoria, and then re-indicted on the same counts that had been charged in New York. *Id*. The Illinois court scheduled the case for trial beginning on July 21, 2003. *Id*. On June 18, al-Marri moved to suppress evidence allegedly obtained in violation of the Fourth Amendment. Petition For A Writ Of Habeas Corpus, *Al-Marri v. Bush*, Civ. No. 03-1220 (C.D. Ill. July 7, 2003), ¶ 34 (available at http://news.lp.findlaw.com/hdocs/docs/almarri/almarribush70703pet.pdf). On June 20, a Friday, Judge Mihm set the motion for an evidentiary hearing on July 2. JA 20 ¶ 27. The following Monday, June 23, the government presented the court with an order signed by President Bush designating al-Marri as an enemy combatant and dismissed the indictment with prejudice. JA 20 ¶ 28; JA 341. Al-Marri was immediately transferred to the Naval Brig at Charleston, South Carolina, where he remains today. JA 20 ¶ 29; JA 341-42.

The purported factual basis for al-Marri's enemy combatant designation was explained in a declaration of Jeffrey Rapp, which was attached to the government's

answer to the petition in this case. The Rapp declaration contains many of the same allegations contained in the January 2003 criminal complaint filed against al-Marri, including assertions that (1) calling cards belonging to al-Marri were used in attempts to telephone al-Hawaswi, the purported al Qaeda financier; (2) al-Marri's computer contained jihad and martyrdom lectures by Osama bin Laden and his cohorts; (3) his computer had photographs of the September 11 attacks; (4) al-Marri had bookmarked websites about jihad, hazardous substances, weapons, and satellite equipment; and (5) al-Marri had lists of over 1,000 stolen credit card numbers, and he had bookmarked websites concerning fake identification and the purchase and sale of credit card numbers. Rapp Declaration, JA 217-25, ¶¶ 17, 25-28, 31-32.

ARGUMENT

THE CRIMINAL JUSTICE SYSTEM IS WELL EQUIPPED TO PROSECUTE PEOPLE ACCUSED OF PLANNING OR COMMITTING TERRORIST ACTS.

A. The Handling Of This Case By The Executive Branch Has Given Rise To The Appearance Of Manipulation Of The Judicial Process.

The facts just summarized present a troubling picture. For nearly a year-and-a-half, the government handled al-Marri's case within the criminal justice system before deciding, virtually on the eve of trial, to abandon the criminal prosecution and attempt to place al-Marri beyond the reach of the law. The implications of the government's about-face are considerable: the government is

essentially asserting the right to hold putative enemy combatants arrested in the United States indefinitely whenever it decides not to prosecute those people criminally—perhaps because it would be too difficult to obtain a conviction, perhaps because a motion to suppress evidence would raise embarrassing facts about the government's conduct, or perhaps for other reasons.

So far as we are aware, al-Marri—who has already been held by the government for five years—is the only person arrested in the United States who is presently subject to this new type of executive detention. As this Court is well aware, Jose Padilla was initially designated an enemy combatant, but he was later transferred into the criminal justice system. See *Padilla v. Hanft*, 423 F.3d 386, 397 (4th Cir. 2005) (granting government authority for military detention); *Padilla v. Hanft*, 432 F.3d 582 (4th Cir. 2005) (discussing the interplay between criminal prosecution and enemy combatant designation); *Hanft v. Padilla*, 126 S. Ct. 978 (2006) (granting the government's request to transfer Padilla back to the jurisdiction of the federal courts). See also *Padilla v. Hanft*, 126 S. Ct. 1649 (2006) (Kennedy, J., concurring in the denial of certiorari and describing the case's procedural history). Padilla is now under federal indictment for several terrorism-related offenses and is awaiting trial in Miami. Terry Aguayo, *Padilla Pleads Not Guilty; Bail is Denied,* N.Y. TIMES, Jan. 13, 2006, at A14.

If al-Marri's challenge to his indefinite detention is rejected, we are gravely concerned that indefinite imprisonment of individuals within the United States will become increasingly common—that the government will choose to avoid criminal prosecutions and the rights associated with them, such as the defendant's right to counsel and the government's obligation to prove guilt beyond a reasonable doubt.

B. The Military Commission Act Does Not Justify Indefinite Executive Detention.

The indefinite detention of al-Marri in a military brig is not rendered permissible by the recently enacted Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) ("MCA"). This will be explained at much greater length in other briefs being filed in this case, but two points about the statute are of particular importance in our view.

First, the MCA establishes military commissions for cases properly subject to military trial. The government has never suggested that al-Marri will be tried by a military commission.

Second, the MCA purports to strip the courts of jurisdiction over habeas corpus cases filed by alleged alien enemy combatants. But the Constitution forbids subjecting civilians—which al-Marri unquestionably was when he was arrested in Peoria—to military jurisdiction without the availability of habeas corpus, when they have not been arrested on a battlefield and the civilian courts are "open and their process unobstructed." *Ex parte Milligan*, 71 U.S. 2, 121 (1866). See also *id*.

at 127 ("Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction"); *Reid v. Covert*, 354 U.S. 1, 33 (1957) (Supreme Court precedent has "recognized and manifested the deeply rooted and ancient opposition in this country to the extension of military control over civilians") (plurality opinion); *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946) (the declaration of "martial law" in Hawaii during World War II did not "authorize the supplanting of courts by military tribunals"). The federal courts, of course, have not been shut down; the Central District of Illinois, in fact, was on the verge of adjudicating al-Marri's guilt or innocence when the Executive Branch decided to take him out of the criminal justice system and whisk him off to a brig in South Carolina.

C. A Wide Variety Of Federal Criminal Statutes Have Been Used To Prosecute Alleged Terrorists In Recent Years.

It is not as if indefinite executive detention is the only means of preventing alleged terrorist activity. To the contrary, Congress has enacted a wide variety of statutes that may be used for prosecuting suspected terrorists. The ample statutory resources at the government's disposal include a number of statutes specifically aimed at terrorist activity:

- 18 U.S.C. § 2384 makes it a crime to, "in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof";

- 18 U.S.C. § 2339A criminalizes the provision of "material support or resources" to terrorist organizations; it also prohibits "conceal[ing] or disguis[ing] the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out," terrorism-related activities prohibited by federal law;

- 18 U.S.C. § 2332B criminalizes "acts of terrorism transcending national boundaries" and prohibits acts of violence against government officials or property; it also prohibits "threats, attempts, and conspiracies" to commit any of the acts of violence enumerated in the statute; and

- 18 U.S.C. § 2339C prohibits conduct that "by any means, directly or indirectly, unlawfully and willfully provides or collects funds with the intention that such funds be used, or with the knowledge that such funds are to be used, in full or in part, in order to carry out" terrorist activities.

In addition, many other federal criminal statutes, although not designed specifically for anti-terrorism efforts, can easily be used to prosecute suspected terrorists. In this case, for example, before al-Marri was designated as an enemy combatant, he was charged with making false statements to the FBI (18 U.S.C. § 1001) and making false statements to a federally insured financial institution (18 U.S.C. § 1014).

Federal criminal statutes have often been employed successfully in recent years to prosecute suspected terrorists:

1. In a series of related cases, 17 individuals were convicted of planning and executing the 1993 bombing of the World Trade Center, conspiring to bomb U.S.

commercial airliners in Southeast Asia, and engaging in a seditious conspiracy "to wage a war of urban terrorism against the United States and forcibly to oppose its authority." *United States v. Rahman*, 189 F.3d 88, 104 (2d Cir. 1999); see also *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003); *United States v. Salameh*, 152 F.3d 88 (2d Cir. 1998) (all affirming convictions). Among the charges for which the *Rahman* defendants were convicted were seditious conspiracy, attempted bombing, a variety of firearms charges, and several counts of murder, attempted murder, and conspiracy to commit murder (including the attempted murder of Egyptian President Hosni Mubarak and the murder of Rabbi Meir Kahane). 189 F.3d at 104.

2. Iyman Faris was charged with, and ultimately pleaded guilty to, conspiring with other members of al Qaeda to blow up the Brooklyn Bridge. *United States v. Faris*, 162 Fed. Appx. 199 (4th Cir. 2005) (affirming Faris's conviction and 20-year sentence).

3. Seven young Muslims dubbed the "Portland Seven" were apprehended in 2002 and charged with various counts of conspiracy; one fled the country for Afghanistan, where he was killed in battle, while the other six pled guilty and received prison sentences. Mitch Frank, *Terror Goes on Trial*, TIME MAGAZINE, Mar. 7, 2005, at 34; Jack Epstein & Johnny Miller, *The Record in Court of U.S.*

Charges Brought Against Terrorism Suspects by the Justice Department, S.F. CHRONICLE, Sept. 17, 2004, at A3.

4. Six men from New York state who came to be known as "The Lackawanna Six" were charged with providing material assistance to a terrorist organization after they traveled to Afghanistan to train and meet with Osama bin Laden; all six entered guilty pleas and were sentenced to prison terms. John J. Goldman, *First "Lackawanna Six" Sentencing,* L.A. TIMES, Dec. 4, 2003, at A20.

5. On December 22, 2001, Richard Reid was arrested for trying to blow up an airplane with explosives embedded in his shoes; he later pleaded guilty to various terrorism-related offenses, and was sentenced to life in prison. See *United States v. Reid,* 369 F. 3d 619, 619-20 (1st Cir. 2004).

6. United States citizen John Walker Lindh was apprehended in Afghanistan and ultimately pleaded guilty to charges that included assisting Al-Qaeda and carrying explosive devices. He received a 20-year sentence. See *United States v. Lindh,* 227 F. Supp. 2d 565 (E.D. Va. 2002).

7. Over this past summer, the government indicted seven suspected terrorists, including the group's leader, Narseal Batiste, who were arrested in Florida for allegedly plotting to blow up the Sears Tower. *United States v. Batiste*, No. 06-20373 (S.D. Fla. June 22, 2006), Indictment. They have been charged with violating 18 U.S.C. § 2339B (providing material support to terrorists); § 2339A

(providing material support or resources to designated foreign terrorist organizations); § 844(n) (conspiracy to import, manufacture, distribute and store explosive materials); and § 2384 (treason, sedition, and subversive activities). *Id*.

8. Ahmed Omar Abu Ali was arrested in Saudi Arabia and transferred to the United States, where he was prosecuted for joining al Qaeda and participating in plans to commit terrorist acts within the United States. *United States v. Abu Ali*, 395 F. Supp. 2d 338, 341 (E.D. Va. 2005). He was sentenced to 30 years' imprisonment after being convicted of nine counts, including providing material support and resources to a designated foreign terrorist organization, receiving funds and services from al Qaeda, conspiracy to assassinate the President, and conspiracy to destroy an aircraft. *United States v. Abu Ali*, 2006 U.S. Dist. Lexis 29461, at *2 n.1, *20 (E.D. Va. Apr. 17, 2006).

9. Ali al-Timimi, an Islamic scholar and alleged member of the Virginia Jihad network, who encouraged young men to travel to foreign training camps and join the Taliban in fighting the United States, was sentenced to life in prison after a jury convicted him of conspiracy, attempting to aid the Taliban, soliciting treason, soliciting others to wage war against the United States, and aiding and abetting the

use of firearms and explosives. Eric Lichtblau, *Scholar Is Given Life Sentence in 'Virginia Jihad' Case*, N.Y. TIMES, July 14, 2005, at A21.[2]

Foreign governments, too, have aggressively prosecuted alleged terrorists. Earlier this year, the United Kingdom charged 11 people with plotting to conduct suicide bombings of U.S. and U.K. airplanes over the Atlantic. Alan Cowell, *Britain Charges 3 More Suspects With Plotting to Bomb Airplanes*, N.Y. TIMES, Aug. 30, 2006, at A3. In another recent case, an al Qaeda operative pleaded guilty in a British court to conspiring to commit murder through massive explosions in Britain and the United States; he has been sentenced to a minimum of 40 years in prison. Alan Cowell, *British Court Hears of Qaeda Plans for 'Black Day'*, N.Y. TIMES, Nov. 7, 2006, at A6; Alan Cowell, *British Muslim Sentenced for Plotting Terror Attacks*, N.Y. TIMES, Nov. 8, 2006, at A13. And an Italian court just sentenced the mastermind behind the March 2004 Madrid bombings and another defendant to prison terms for planned terrorist activity in Italy. Elisabetta Povoledo, *Admitted Planner of Madrid Bombings Gets 10-Year Sentence for Terrorism in Italy*, N.Y. TIMES, Nov. 7, 2006, at A6.

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[2] The case of Zaccarias Moussaoui presents another example of the successful use of existing criminal justice mechanisms. Moussaoui, a self-proclaimed member of al Qaeda, was apprehended in August 2001 while enrolled in flight school in Minneapolis. He ultimately pleaded guilty to conspiracy charges, and a jury sentenced him to life in prison. Jerry Markon and Timothy Dwyer, *Jurors Reject Death Penalty for Moussaoui,* WASH. POST, May 4, 2006, at A1.

The cases discussed above demonstrate that the existing criminal justice system is more than up to the task of prosecuting and bringing to justice those who plan or attempt terrorist acts within the United States—without sacrificing any of the rights and protections that have been the hallmarks of the American legal system for more than 200 years. The federal government is eminently capable of both protecting our nation's security and safeguarding our proud traditions of civil liberties. We would do well to remember Benjamin Franklin's admonition that "[t]hose who would give up essential liberty to purchase a little temporary safety, deserve neither liberty nor safety." Benjamin Franklin, AN HISTORICAL REVIEW OF THE CONSTITUTION AND GOVERNMENT OF PENNSYLVANIA, title page (1759) (Arno Press reprint 1972).

November 20, 2006

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH
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This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 3,349 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a 14-point proportionally spaced typeface (Times New Roman) using Word.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November, 2006, I filed with Clerk's Office of the United States Court of Appeals for the Fourth Circuit, via UPS, the required number of copies of the Brief of Amicus Curiae of Former Senior Justice Department Officials, and further certify that I served, via UPS, the required number of the brief to the following:

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