

United States Court of Appeals, Fourth Circuit

Ali Saleh Kahlah AL-MARRI, Petitioner-Appellant,
And Mark A. Berman, as next friend, Petitioner,

v.

Commander S.L. WRIGHT, USN Commander, Consolidated Naval Brig., Respondent-Appellee.

Argued: Feb. 1, 2007.

Decided: June 11, 2007.

Reversed and remanded by published opinion. Judge MOTZ wrote the opinion, in which Judge GREGORY joined. Judge HUDSON wrote a dissenting opinion.

DIANA GRIBBON MOTZ, Circuit Judge.

For over two centuries of growth and struggle, peace and war, the Constitution has secured our freedom through the guarantee that, in the United States, no one will be deprived of liberty without due process of law. Yet more than four years ago military authorities seized an alien lawfully residing here. He has been held by the military ever since-without criminal charge or process. He has been so held despite the fact that he was initially taken from his home in Peoria, Illinois by civilian authorities, and indicted for purported domestic crimes. He has been so held although the Government has never alleged that he is a member of any nation's military, has fought alongside any nation's armed forces, or has borne arms against the United States anywhere in the world. And he has been so held, without acknowledgment of the protection afforded by the Constitution, solely because the Executive believes that his military detention is proper.

While criminal proceedings were underway against Ali Saleh Kahlah al-Marri, the President ordered the military to seize and detain him indefinitely as an enemy combatant. Since that order, issued in June of 2003, al-Marri has been imprisoned without charge in a military jail in South Carolina. Al-Marri petitions for a writ of habeas corpus to secure his release from military imprisonment. The Government defends this detention, asserting that al-Marri associated with al Qaeda and “prepar[ed] for acts of international terrorism.” It maintains that the President has both statutory and inherent constitutional authority to subject al-Marri to indefinite military detention and, in any event, that a new statute-enacted years after al-Marri's seizure-strips federal courts of jurisdiction even to consider this habeas petition.

We hold that the new statute does not apply to al-Marri, and so we retain jurisdiction to consider his petition. Furthermore, we conclude that we must grant al-Marri habeas relief. Even assuming the truth of the Government's allegations, the President lacks power to order the military to seize and indefinitely detain al-Marri. If the Government accurately describes al-Marri's conduct, he has committed grave crimes. But we have found no authority for holding that the evidence offered by the Government affords a basis for treating al-Marri as an enemy combatant, or as anything other than a civilian.

This does not mean that al-Marri must be set free. Like others accused of terrorist activity in this country, from the Oklahoma City bombers to the surviving conspirator of the September 11th attacks, al-Marri can be returned to civilian prosecutors, tried on criminal charges, and, if convicted, punished severely. But the Government cannot subject al-Marri to indefinite military detention. For in the United States, the military cannot seize and imprison civilians-let alone imprison them indefinitely.

* * *

III.

Al-Marri premises his habeas claim on the Fifth Amendment's guarantee that no person living in this country can be deprived of liberty without due process of law. He maintains that even if he has committed the acts the Government alleges, he is not a combatant but a civilian protected by our Constitution, and thus is not subject to military detention. Al-Marri acknowledges that the Government can deport him or charge him with a crime, and if he is convicted in a civilian court, imprison him. But he insists that neither the Constitution nor any law permits the Government, on the basis of the evidence it has proffered to date-even assuming all of that evidence is true-to treat him as an enemy combatant and subject him to indefinite military detention, without criminal charge or process.

The Government contends that the district court properly denied habeas relief to al-Marri because the Constitution allows detention of enemy combatants by the military without criminal process, and according to the Government it has proffered evidence that al-Marri is a combatant. The Government argues that the Authorization for Use of Military Force (AUMF), Pub.L. No. 107-40, 115 Stat. 224 (2001), as construed by precedent and considered in conjunction with the "legal background against which [it] was enacted," empowers the President on the basis of that proffered evidence to order al-Marri's indefinite military detention as an enemy combatant. Alternatively, the Government contends that even if the AUMF does not authorize the President to order al-Marri's military detention, the President has "inherent constitutional power" to do so.

A.

* * *

We need not here deal with the absurd results, nor reach the constitutional concerns, raised by an interpretation of the AUMF that authorizes the President to detain indefinitely-without criminal charge or process-anyone he believes to have aided any "nation[], organization[], or person[]" related to the September 11th terrorists. For the Government wisely limits its argument. It relies only on the scope of the AUMF as construed by precedent and considered in light of "the legal background against which [it] was enacted." Specifically, the Government contends that "[t]he Supreme Court's and this Court's prior construction of the AUMF govern this case and compel the conclusion that the President is authorized to detain al-Marri as an enemy combatant."

* * *

Quirin, *Hamdi*, and *Padilla* all emphasize that *Milligan's* teaching-that our Constitution does not permit the Government to subject *civilians* within the United States to military jurisdiction-remains good law.

* * *

In sum, the holdings of *Hamdi* and *Padilla* share two characteristics: (1) they look to law-of-war principles to determine who fits within the “legal category” of enemy combatant; and (2) following the law of war, they rest enemy combatant status on affiliation with the military arm of an enemy nation.

* * *

Thus, the Government is mistaken in its representation that *Hamdi* and *Padilla* “recognized” “[t]he President's authority to detain ‘enemy combatants’ during the current conflict with al Qaeda.” No precedent recognizes any such authority. *Hamdi* and *Padilla* evidence no sympathy for the view that the AUMF permits indefinite military detention beyond the “limited category” of people covered by the “narrow circumstances” of those cases. Therefore the Government's primary argument-that *Hamdi* and *Padilla* “compel the conclusion” that the AUMF authorizes the President “to detain al-Marri as an enemy combatant”-fails.

* * *

The core assumption underlying the Government's position, notwithstanding *Hamdi*, *Padilla*, *Quirin*, *Milligan*, and *Hamdan*, seems to be that persons lawfully within this country, entitled to the protections of our Constitution, lose their civilian status and become “enemy combatants” if they have allegedly engaged in criminal conduct on behalf of an organization seeking to harm the United States. Of course, a person who commits a crime should be punished, but when a civilian protected by the Due Process Clause commits a crime he is subject to charge, trial, and punishment in a civilian court, *not* to seizure and confinement by military authorities.

* * *

C.

Accordingly, we turn to the Government's final contention. The Government summarily argues that even if the AUMF does not authorize al-Marri's seizure and indefinite detention as an enemy combatant, the President has “inherent constitutional authority” to order the military to seize and detain al-Marri. The Government maintains that the President's “war-making powers” granted him by Article II “include the authority to capture and detain individuals involved in hostilities against the United States.” In other words, according to the Government, the President has “inherent” authority to subject persons legally residing in this country and protected by our Constitution to military arrest and detention, without the benefit of any criminal process, if the President believes these individuals have “engaged in conduct in preparation for acts of international terrorism.” *See* Rapp Declaration. This is a breathtaking claim, for the Government

nowhere represents that this “inherent” power to order indefinite military detention extends only to aliens or only to those who “qualify” within the “legal category” of enemy combatants.

To assess claims of presidential power, the Supreme Court has long recognized, as Justice Kennedy stated most recently, that courts look to the “framework” set forth by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*. Justice Jackson explained that “Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.” “When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum,” but “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.” Hence, to evaluate the President’s constitutional claim we must first look to the “expressed or implied will of Congress” as to detention of aliens captured within the United States alleged to be engaged in terrorist activity.

1.

* * *

Therefore, the Patriot Act establishes a specific method for the Government to detain aliens affiliated with terrorist organizations, who the Government believes have come to the United States to endanger our national security, conduct espionage and sabotage, use force and violence to overthrow the government, engage in terrorist activity, or even who are believed likely to engage in any terrorist activity. Congress could not have better described the Government’s allegations against al-Marri and Congress decreed that individuals so described are *not* to be detained indefinitely but only for a limited time, and by civilian authorities, prior to deportation or criminal prosecution.

In sum, Congress has carefully prescribed the process by which it wishes to permit detention of “terrorist aliens” within the United States, and has expressly prohibited the indefinite detention the President seeks here. The Government’s argument that the President may indefinitely detain al-Marri is thus contrary to Congress’s expressed will. “When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.” . . .

2.

. . . . The Government nowhere suggests that the President’s inherent constitutional power to detain does not extend to American citizens. Yet it grounds its argument that the President has constitutional power to detain al-Marri on his alien status. The Government apparently maintains that alien status eliminates the due process protection applicable to al-Marri, and for this reason permits the President to exercise special “peak” authority over him. The Government can so contend only by both ignoring the undisputed and relying on the inapposite.

It is undisputed that al-Marri had been legally admitted to the United States, attending an American university from which he had earlier received an undergraduate degree, and legally

residing here (with his family) for several months before the Government arrested him at his home in Peoria. The Government's refusal to acknowledge these undisputed facts dooms its contention that al-Marri's status as an alien somehow provides the President with special "peak" authority to deprive al-Marri of constitutional rights. For, as we have noted within, the Supreme Court has repeatedly and expressly held that aliens like al-Marri, i.e. those lawfully admitted into the United States who have "developed substantial connections with this country," are entitled to the Constitution's due process protections. No case suggests that the President, by fiat, can eliminate the due process rights of such an alien.

* * *

In sum, al-Marri is not a subject of a country with which the United States is at war, and he did not illegally enter the United States nor is he alleged to have committed any other immigration violation. Rather, after lawfully entering the United States, al-Marri "developed substantial connections with this country" . . . and so his status as an alien neither eliminates due process rights, nor provides the President with extraordinary powers to subject al-Marri to seizure and indefinite detention by the military. The President's constitutional powers do not allow him to order the military to seize and detain indefinitely al-Marri without criminal process any more than they permit the President to order the military to seize and detain, without criminal process, other terrorists within the United States, like the Unabomber or the perpetrators of the Oklahoma City bombing.

3.

In light of al-Marri's due process rights under our Constitution and Congress's express prohibition in the Patriot Act on the indefinite detention of those civilians arrested as "terrorist aliens" within this country, we can only conclude that in the case at hand, the President claims power that far exceeds that granted him by the Constitution. . . .

We do not question the President's war-time authority over enemy combatants; but absent suspension of the writ of habeas corpus or declaration of martial law, the Constitution simply does not provide the President the power to exercise military authority over civilians within the United States. The President cannot eliminate constitutional protections with the stroke of a pen by proclaiming a civilian, even a criminal civilian, an enemy combatant subject to indefinite military detention. Put simply, the Constitution does not allow the President to order the military to seize civilians residing within the United States and detain them indefinitely without criminal process, and this is so even if he calls them "enemy combatants."

* * *

The President has cautioned us that "[t]he war on terror we fight today is a generational struggle that will continue long after you and I have turned our duties over to others." Unlike detention for the duration of a traditional armed conflict between nations, detention for the length of a "war on terror" has no bounds. Justice O'Connor observed in *Hamdi* that "[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," the understanding that combatants can be detained "for the

duration of the relevant conflict” “may unravel.” If the indefinite military detention of an actual combatant in this new type of conflict might cause the thread of our understandings to “unravel,” the indefinite military detention of a civilian like al-Marri would shred those understandings apart.

* * *

For the foregoing reasons, we reverse the judgment of the district court dismissing al-Marri's petition for a writ of habeas corpus. We remand the case to that court with instructions to issue a writ of habeas corpus directing the Secretary of Defense to release al-Marri from military custody within a reasonable period of time to be set by the district court. The Government can transfer al-Marri to civilian authorities to face criminal charges, initiate deportation proceedings against him, hold him as a material witness in connection with grand jury proceedings, or detain him for a limited time pursuant to the Patriot Act. But military detention of al-Marri must cease.

REVERSED AND REMANDED.

HUDSON, District Judge, dissenting:

* * *

While I commend the majority on a thoroughly researched and impressively written opinion, I must conclude that their analysis flows from a faulty predicate. In my view, the appellant was properly designated as an enemy combatant by the President of the United States pursuant to the war powers vested in him by Articles I and II of the United States Constitution and by Congress under the Authorization to Use Military Force (AUMF). I am also of the opinion that al-Marri has received all due process entitlements prescribed by existing United States Supreme Court precedent. I would therefore vote to affirm the district court's dismissal of al-Marri's Petition for Writ of Habeas Corpus.

* * *

Central to the majority's analysis is the locus of his arrest. Unlike the petitioners in *Hamdi v. Rumsfeld*, and *Hamdan v. Rumsfeld*, al-Marri is a lawful resident alien who was not taken into custody in a battle zone. He was arrested in Peoria, Illinois, where he was residing on a student visa. Despite powerful evidence of his connection to al Qaeda, the majority believe the President is without power to declare him an enemy combatant. They believe he must be indicted and tried for crimes against the United States. Although definitive precedent is admittedly sparse, in my opinion, this position is unsupported by the weight of persuasive authority.

In *Padilla v. Hanft*, 423 F.3d 386 (4th Cir.2005), a panel of this Court unanimously rejected the argument that the locus of capture was relevant to the President's authority to detain an enemy combatant.

* * *

The only significant fact that distinguishes the justification for Padilla's detention from that of al-Marri is that Padilla at some previous point in time had been armed and present in a combat zone. There was no indication, however, that Padilla was ever a soldier in a formal sense, particularly while acting on U.S. soil.

* * *

The Quirin Court further provided that “[i]t is without significance that petitioners were not alleged to have borne conventional weapons or that their proposed hostile acts did not necessarily contemplate collision with the Armed Forces of the United States.” “Nor are petitioners any the less belligerents if, as they argue, they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations.”

Ex parte Milligan, 4 Wall. 2, 71 U.S. 2, 18 L.Ed. 281 (1866), does not undermine the district court's decision. Milligan did not associate himself with a rebellious State with which the United States was at war.

* * *

I believe the district court correctly concluded that the President had the authority to detain al-Marri as an enemy combatant or belligerent. Although al-Marri was not personally engaged in armed conflict with U.S. forces, he is the type of stealth warrior used by al Qaeda to perpetrate terrorist acts against the United States. Al-Marri's detention is authorized under the AUMF “to prevent any future acts of international terrorism against the United States.” AUMF § 2(a). Furthermore, setting aside the amorphous distinction between an “enemy combatant” and an “enemy belligerent,” there is little doubt from the evidence that al-Marri was present in the United States to aid and further the hostile and subversive activities of the organization responsible for the terrorist attacks that occurred on September 11, 2001.

I therefore vote to affirm the district court.