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Many words, no justice

Federal court divided on Ali al-Marri, mainland 'enemy combatant'

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In a speech on 21 July 2008 on detentions in the "war on terror", the United States Attorney General said that "over the past seven years, the three branches of our government have been engaged in a dialogue... over the appropriate legal process for detaining combatants." [1] It is a dialogue, if that is what it has been, that has been deaf to the demands of international human rights law. Indeed, a week before the Attorney General's speech, a decision was handed down by a US federal court that illustrates how this interaction between the legislative, executive and judicial branches has still left the USA on the wrong side of its human rights obligations in a counterterrorism struggle that it defines as a global war.

The ruling was on the case of Ali Saleh Kahlah al-Marri, a Qatari national who has been held without charge or trial in military custody in the USA since June 2003. The judgment issued by nine judges on the US Court of Appeals for the Fourth Circuit came nearly five years to the day after Ali al-Marri was due to face criminal trial in US federal court following his arrest by civilian law enforcement authorities in Illinois in December 2001. That trial never happened, because al-Marri was designated as an "enemy combatant" by presidential order, transferred to the custody of the US Department of Defense, and shut away in a military facility in Charleston, South Carolina. He has been there ever since. The transfer of Ali al-Marri appears to have been motivated by the administration's wish to interrogate him outside of the protections of the criminal justice system. For the first 16 months of his military custody, he was held entirely incommunicado and allegedly subjected to torture or other ill-treatment.

The Fourth Circuit's divided ruling offers Ali al-Marri – the only "enemy combatant" currently detained on the US mainland – little in the way of clarity about what his future holds or when, if ever, his isolating military detention might end and his right to remedy realized. His case may yet be taken by the US Supreme Court, perhaps to be ruled on in 2009, by which time the President who put al-Marri in indefinite military detention will have left office. Whether and to what extent the USA's approach to its international obligations changes under a new administration remains to be seen. Meanwhile, Amnesty International considers Ali al-Marri to be arbitrarily detained in violation of international human rights law. The organization will continue to campaign for him to be charged and brought to trial in federal court in accordance with international standards, or released.

[1] Remarks prepared for delivery by Attorney General Michael B. Mukasey at the American Enterprise Institute for Public Policy Research, Washington, DC, 21 July 2008.

There have been years of litigation in his case already. On 11 June 2007, a three-judge panel of the Fourth Circuit reversed a District Court's 2005 decision to dismiss Ali al-Marri's *habeas corpus* petition. By two votes to one, the Fourth Circuit panel ruled that al-Marri's military detention "must cease"; "For in the United States, the military cannot seize and imprison civilians — let alone imprison them indefinitely." The two judges in the majority described as "breathtaking" the government's claim that it could subject a legal resident in the USA to military custody without the benefit of any criminal process "if the President believes that such an individual has 'engaged in conduct in preparation for acts of international terrorism'". The President, the panel said "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."

As breathtaking as its claims may have been, the government appealed for them to be reheard by the full Fourth Circuit court (*en banc*). The court agreed, and oral argument was held on 31 October 2007. On 15 July 2008, by five votes to four, the *en banc* court held that "if the Government's allegations about al-Marri are true, Congress has empowered the President to detain him as an enemy combatant". This refers to the Authorization for Use of Military Force (AUMF), a resolution passed by US Congress in the immediate aftermath of the attacks of 11 September 2001 authorizing the President to "use all necessary and appropriate force" against anyone involved in the attacks "in order to prevent any future acts of international terrorism against the United States".

One of the five judges who concluded that the AUMF had authorized al-Marri's military detention sought to explain that Ali al-Marri's detention "would leave the beacon of our constitutionalism undimmed". Rejection of al-Marri's *habeas corpus* petition, wrote Judge James Harvie Wilkinson, would "not signal some pattern of surrender" on the part of Congress and the judiciary "to a rampaging executive branch". On the one hand, he said, "the courts have been more actively involved in our current struggle than in any other war in our history". On the other, Congress had been active in "delineating the appropriate scope of our response to the terrorist threat". Among the laws or resolutions passed by Congress, he pointed out, have been the Detainee Treatment Act of 2005 (DTA), and the Military Commissions Act of 2006 (MCA). Amnesty International considers that provisions of both these laws were incompatible with international law, and has welcomed the recent ruling by the US Supreme Court that the *habeas corpus* stripping Section 7 of the MCA is unconstitutional.[2]

Another of the congressional actions Judge Wilkinson listed was the AUMF, under which Ali al-Marri's internationally unlawful detention is being justified.[3] The judge emphasized in support of his position that the AUMF, "in the more than six years since its passage, has never been amended, much less rescinded." This should change, in Amnesty International's view. The AUMF, as the organization details further below, was hastily passed, is open to dangerously expansive interpretation, and has been exploited by an administration that did not consider it needed congressional approval anyway. Two years ago, the organization called for revocation of the AUMF, and it repeats this call now.

[2] USA: Time for real change as Supreme Court rules on Guantánamo detentions, 13 June 2008, http://www.amnesty.org/en/library/info/AMR51/061/2008/en.

[3] Judge Wilkinson also included in his list the broadly defined resolution passed by Congress authorizing the President to use force against Iraq.

The four judges who found that "neither the AUMF nor the President's inherent authority permits the military to detain al-Marri indefinitely as an enemy combatant" wrote that, if in the majority, they would have ordered al-Marri's release from military custody and his transfer to civilian jurisdiction for resolution of his case. They were one vote short, however, so they joined with Judge William Traxler on the second question of whether al-Marri had had an adequate opportunity to challenge his "enemy combatant" status. Judge Traxler had concluded that the AUMF had authorized the President to "detain enemy combatants in the war on terror" and that the government's allegations against Ali al-Marri, if true, "would place him within this category". However, unlike the four judges who believed that the AUMF had granted such power to the president and that Ali al-Marri had had all the process he was due, Judge Traxler found that al-Marri had not had been afforded sufficient process to challenge his designation as an "enemy combatant".

Thus, with Judge Traxler's swing vote, the Fourth Circuit returned the case, 5-4, to the District Court for "further proceedings consistent with the opinions that follow". This will be no easy task. The Fourth Circuit's judgment runs to 216 pages and incorporates seven separate opinions written or joined in various combinations by the nine judges. Judge Roger Gregory pointed out that "there is no concrete guidance as to what further process is due. Little doubt exists that this judgment will leave the district court with more questions than answers." Judge Wilkinson predicted that the District Court would be "mystified" due to the "precious little direction" provided by the Fourth Circuit.

The government accuses al-Marri of being an *al-Qa'ida* "sleeper" agent. Despite making a number of serious accusations against him, it has failed to bring him to trial in six and a half years. It seems that it is justice that is sleeping. All three branches of government should act to awaken it.

A deep judicial divide

Judge Wilkinson, whose 80-page opinion was the longest of the seven, acknowledged that "the opinions in this case are lengthy, but that reflects nothing more than the conscientious attention each member of the court has given this important case." He himself was in "no doubt" that al-Marri's detention, "a direct outgrowth and response to the massive attacks on the US homeland", is "lawful", "authorized by Congress", "consistent with Supreme Court precedent", "in accordance with the laws of war", and "should be sustained".

Judge Wilkinson's certainty was mirrored on the other side of the court, revealing a deep judicial divide.[4] The four judges who held that the AUMF had not authorized al-Marri's detention concluded that "like others accused of terrorist activity in this country, from the Oklahoma City bombers to the convicted September 11th conspirator [Zacarias Moussaoui], [al-

[4] As has been reported in the media, the four judges who found that al-Marri had had enough process (Judges Williams, Niemeyer, Wilkinson and Duncan) were appointed by Republican Presidents (George H.W. Bush, Ronald Reagan, and George W. Bush), while all four who would have ordered him back to civilian control (Judges Michael, Motz, King and Gregory) were appointed by Democrat President Bill Clinton (who also appointed Judge Traxler, the swing vote in this case). A court's conservative/liberal divide can leave an impression of ideological decision-making and heightens the need for human rights leadership in the political branches (See USA: The experiment that failed – A reflection on 30 years of executions, January 2007, http://www.amnesty.org/en/library/info/AMR51/011/2007/en).

Marri] could be tried on criminal charges and, if convicted, punished severely." But "to sanction such presidential authority to order the military to seize and indefinitely detain civilians, even if the President calls them 'enemy combatants', would have disastrous consequences for the Constitution – and the country". Judge Wilkinson accused them of "tortur[ing] the text of the AUMF", of placing too much emphasis on "quaint and outmoded notions" of what constitutes war, of being "mired in models of the past, and completely fail[ing] to accommodate the changing nature of warfare", of "trap[ping] this nation in a time warp", of "misperceiv[ing] the nature of our present danger", of "embrac[ing] a sense of rigidity and complacency" not reflected in the executive and legislature, and of risking "making the judiciary the most dangerous branch" of government. Judicial "policymaking" in this case, he suggested, "comes from those who would aggressively interfere with democratic prerogatives in the context of armed struggles", not from those who would show a "proper demonstration of judicial restraint". He accused the four of adopting a "patently undemocratic" approach.

Arguing that "Congress in the AUMF has authorized the military detention of al-Marri" and that "al-Marri has received the process he is due", Judge Wilkinson asserted that "litigation is not the only friend of liberty. Democracy is a guarantor of human life and freedom, too… [W]hen momentous questions of life and death are at stake, this nation places its deepest bets upon democracy, and the people's safety must reside and rest with those who have the people's sanction", i.e. the elected branches of government.

"Democracy" cannot *per se* guarantee respect for human rights, and in practice frequently does not. Such respect requires not only informed public and governmental debate and engagement, free of fear, prejudice or vested interests, but also principled human rights leadership and adherence to the rule of law. The AUMF was passed by 516 votes to 1 after little more than a series of patriotic statements and religious references from legislators, still absorbing the reality of the attacks three days earlier. It was not a debate that was conducted, in the words of Thomas Jefferson cited by Judge Wilkinson, "on the boisterous ocean of political passions", but was more akin, as one congressman described it when speaking in support of the resolution, to "join[ing] the choir".[5] A number of the lawmakers had referred to bringing those responsible for the attacks to "justice", but with little or no elaboration. Others variously referred to the USA as "the rock of freedom in the world", "the brightest beacon of liberty and freedom", "a nation of laws", "a nation that follows the rule of law", "the leader in freedom and democracy and human rights in the world", and "the embodiment of freedom, the beacon of hope and in a very real sense, the guardians of justice – a justice shaped and honed by our values and morals". Their words have not been matched by subsequent policies and practices in the "war on terror".

The AUMF has been part of an international law vacuum. International human rights law applies at all times, as the International Court of Justice and other international bodies have repeatedly stated.[6] During the AUMF debate, however, only one member of the US House of Representatives, out of more than 400, referred to international law, and then only in a

[5] Rep. Graham. "I too join the choir here of support for our President".
[6] See page 30 of USA: No substitute for habeas corpus: six years without judicial review in Guantánamo, November 2007 http://www.amnesty.org/en/report/info/AMR51/163/2007.

passing assurance that has subsequently remained unmet.[7] In similar vein, none of the Fourth Circuit judges made any mention of international human rights law. Yet two years earlier, the UN Working Group on Arbitrary Detention had found that al-Marri's detention was arbitrary, in violation of the USA's international human rights obligations.[8]

The USA has generally dismissed the concerns of the Working Group on Arbitrary Detention and other UN experts and treaty monitoring bodies in relation to the detention of "enemy combatants" which the US government considers are governed by (its interpretation of) international humanitarian law (IHL), the law of war. Through its global "war" framework, the USA has systematically bypassed its obligations under international human rights law in such cases. The USA has responded to the concerns of the UN Committee Against Torture and the UN Human Rights Committee, among other international bodies, with its position that "the United States is engaged in an armed conflict with al Qaida, the Taliban, and their supporters. As part of this conflict, the United States captures and detains enemy combatants, and is entitled under the law of war to hold them until the end of hostilities. The law of war, and not the [UN Convention against Torture or International Covenant on Civil and Political Rights] is the applicable legal framework governing these detentions".[9]

Prior to 11 September 2001, the USA had "dealt with [terrorist] attacks as primarily a law enforcement matter".[10] On that day, however, President Bush opened a meeting following the attacks with his principal advisers with the words "we're at war".[11] Five days later, the Director of the Central Intelligence Agency (CIA) issued a confidential memorandum to CIA staff headed "We're at war", stating that "All the rules have changed".[12] In a central policy memorandum issued in early 2002, President Bush said that the "war against terrorism ushers in a new paradigm", one that "requires new thinking in the law of war".[13] Four years later, the introductions to both the USA's National Security Strategy and its National Strategy for Combating Terrorism began with the words "America is at war".[14] This remains more than mere rhetoric, as the current CIA Director made clear shortly before the sixth anniversary of the 9/11 attacks: "We're at war, and this city (New York)… has been a battlefield in that war…I've seen public references to, quote, 'the so-called war on terrorism' or, quote, 'the Bush

[7] Rep. Clayton: "Congress will… work with the President to ensure that our actions under this resolution are necessary and appropriate, consistent with our values… and in accordance with international laws".
[8] Opinion No. 43/2006. The Working Group said al-Marri's detention is a 'Category III' violation: "When the total or partial non-observance of the international norms relating to the right to a fair trial, spelled out in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character".
[9] UN Docs: CAT/C/USA/CO/2/Add.1 (6 November 2007), para. 11, and CCPR/C/USA/CO/3/Rev.1/Add.1 (12 February 2008), page 3.
[10] Press Briefing, White House, 22 June 2004.
[11] Chapter 10 of the Final Report of the National Commission on Terrorist Attacks Upon the United States (the 9-11 Commission Report). August 2004.
[12] Memorandum: *We're at War*. George J. Tenet, Director of Central Intelligence, 16 September 2001.
[13] Humane treatment of al Qaida and Taliban detainees. President George W. Bush, 7 February 2002.
[14] National Security Strategy, 2006. National Strategy for Combating Terrorism, 2006. The Quadrennial Defense Review, February 2006 begins "The United States is a nation engaged in what will be a long war"; the National Defense Strategy, March 2005, begins with the sentence "America is a nation at war".

administration's war on terrorism', but for us it's simply war. It's a word we use commonly without ambiguity in the halls of the Pentagon and at Langley [CIA headquarters]".[15]

Specific situations in Afghanistan and Iraq, for example, qualify as armed conflicts under international law. However, the USA's theory is that it is involved in an essentially global armed conflict under international law that has existed for at least a decade and will continue for the foreseeable future. This is an unacceptably unilateral and wholesale departure from the very concept of the international law of armed conflict as it has existed to date.[16] As the International Committee of the Red Cross (ICRC), the authoritative interpreter of the Geneva Conventions, has said, "the designation 'global war on terror' does not extend the applicability of humanitarian law to all events included in this notion, but only to those which involve armed conflict."[17] The ICRC does "not believe that IHL is the overarching legal framework" applicable to the "war on terror".[18]

At the heart of the USA's global war framework is the notion of the "enemy combatant". Announcing that it was taking custody of Ali al-Marri on 23 June 2003, the Pentagon put it thus: "Enemy combatant status may be used to describe an individual who, under the laws and customs of war, has become a member of or associated himself with hostile enemy forces, thereby attaining the status of a belligerent." In the Fourth Circuit ruling five years later, Judge Gregory noted that "the Executive's process for designating an al-Qaeda operative an enemy combatant has very real legal consequences". What he did not say was that the status of "enemy combatant", at least as a status with the legal consequences ascribed to it by the USA, is unrecognized in international law.

The Fourth Circuit ruling reveals once again that the USA's global war paradigm and its notion of global "enemy combatants" is today accepted by large parts of all three branches of the US government. Judge Traxler, for example, said that "the war that al Qaeda wages here and abroad against American interests may be viewed as unconventional, but it is a war nonetheless". Judge Wilkinson said that the four judges who believed Ali al-Marri's military detention should cease were merely asserting their "unabashed preference for using the criminal justice system in all instances involving suspected terrorists similarly situated to al-Marri", and were guilty of promoting "an incredible result", namely of interpreting the AUMF "so that even the 9/11 attackers would not be considered enemy combatants under it". Judge Karen Williams condemned the notion that, "were authorities to have detained one of the hijackers on September 11, box-cutter in hand, that hijacker could have been militarily detained in the immediacy of the situation, but thereafter would have had to be turned over to civilian courts. This result would follow despite the fact that the hijacker would have been poised to commit an act of war". Amnesty International precisely considers that in that

[15] Remarks by Central Intelligence Agency Director, Gen. Michael V. Hayden at the Council on Foreign Relations, 7 September 2007.
[16] The Military Commissions Act of 2006 could be said to have effectively backdated this "war" even to before 11 September 2001 to allow the prosecution of individuals by military commission for "war crimes" committed before that date. In its charges against individuals facing trial at Guantánamo, the government's position is one in which the "war" with *al-Qa'ida* stretches back to 1996.
[17] The relevance of IHL in the context of terrorism, 21 July 2005, http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/terrorism-ihl-210705?opendocument.
[18] Developments in US policy and legislation towards detainees: the ICRC position. 19 October 2006, http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/kellenberger-interview-191006.

scenario, the alleged hijacker could and should have been brought to criminal trial in the civilian justice system.

The US government itself has not had a consistent approach in this regard. In January 2003, for example, UK citizen and alleged *al-Qa'ida* operative, Richard Reid, was tried, convicted and sentenced to life in prison in a US federal court for attempting to blow up a commercial airliner over the Atlantic. At his sentencing, Richard Reid said to the federal judge "I am at war with your country". Judge William Young said: "You are not an enemy combatant. You are a terrorist. You are not a soldier in any war. You are a terrorist. To give you that reference, to call you a soldier gives you far too much stature. Whether it is the officers of government who do it or your attorney who does it, or that happens to be your view, you are a terrorist."[19] In the al-Marri ruling, however, Judge Wilkinson suggested that a judge "insisting on criminal prosecution in nearly all instances, fails to consider that a highly publicized international terror trial may perfectly suit the interests of an organization, such as al Qaeda, that thrives on propaganda and intimidation". Yet the UN Basic Principles on the Independence of the Judiciary require that "the judiciary shall have jurisdiction over all issues of a judicial nature", and that "everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures".

Judge Wilkinson accused the four judges who would have Ali al-Marri returned to civilian jurisdiction of "not permitting the democratic branches to take into account changes in modern warfare" and of eroding the "elected branches' ability to pursue the current conflict in accordance with the laws of war". He continued: "Nuclear devices capable of inflicting enormous casualties can now fit inside a suitcase or van. Congress can and has made clear that the use of such a device by persons or groups associated with the 9/11 attacks would be more akin to an act of war than to ordinary crime." It was regrettable, he said, that some of his colleagues "regard these acts quite differently – as mere criminal offenses to be tried through the criminal justice process". While a criminal trial might be "a showcase of American values", he said, it could "also serve as a platform for suspected terrorists".

Judge Wilkinson wrote that prosecuting terrorism cases in the ordinary federal courts could have a corrosive effect on the system as a whole: "In adopting corrective measures to deal with the unique problems presented by terrorism prosecutions, courts may dilute the core protections of the criminal justice system in other cases... It is naïve to think that this sort of dilution of our procedural and substantive criminal law will have no effect on the prosecution of criminal suspects who are not terrorists. The government will seek to take advantage of 'terrorist precedents' in other cases". On the one hand, it seems that Judge Wilkinson is willing to trust and entirely endorse the government's untested accusations against Ali al-Marri, while on the other hand not generally trusting it to act in good faith in relation to criminal justice, or the courts to be able to handle complex cases involving classified intelligence sources.

Two former US federal prosecutors have noted that "it has become common, these days, for observers to point out the actual and perceived flaws in the criminal justice system and to argue that a new system should be created from scratch to handle international terrorism cases." Their recent analysis of more than 100 terrorism cases tried in federal court, however,

[19] For transcript see, http://www.cnn.com/2003/LAW/01/31/reid.transcript/.

concludes that "although the justice system is far from perfect, it has proved to be adaptable and has successfully handled a large number of important and challenging terrorism prosecutions over the past fifteen years without sacrificing national security interests or rigorous standards of fairness and due process".[20]

In 2001, for example, four men were sentenced in US federal court to life imprisonment after being convicted of involvement in the US Embassy bombings in East Africa in 1998. At that time, the Director of the FBI stated that "Through skill and perseverance, FBI personnel overcame major logistical challenges, which are inherent to crime scenes located in foreign countries, to conduct a thorough investigation that led to the verdict rendered today."[21] In another case, the administration waived its "right" to label John Walker Lindh as an "unlawful enemy combatant" as part of a plea arrangement in 2002. This US national was captured in late 2001 during the international armed conflict in Afghanistan and charged in US federal court with, among other offences, conspiring with *al-Qa'ida* to murder US citizens and providing and conspiring to provide material support and resources to foreign terrorist organizations. Eventually, under a plea agreement, the government dismissed most of the charges and Lindh pled guilty to supplying services to the Taliban and carrying explosives while supplying such services. He was sentenced to 20 years in prison. US Attorney Paul J. McNulty, who subsequently became Deputy Attorney General, said: "[T]his case proves that the criminal justice system can be an effective tool in combating terrorism".[22]

The US Justice Department was nevertheless quick to issue a celebratory statement after the Fourth Circuit's ruling on Ali al-Marri's case: "We are pleased with the court's *en banc* decision today. The decision recognizes the President's authority to capture and detain al Qaeda agents who, like the 9-11 hijackers, come to this country to commit or facilitate war-like acts against American civilians. That authority is backed by the support of Congress and is a vital tool in protecting the nation against further terrorist attacks." In his speech a week later, however, Attorney General Mukasey seemed to betray a little less confidence in the government's legal footing, when he called on Congress to "acknowledge again and explicitly that this Nation remains engaged in an armed conflict with al Qaeda, the Taliban, and associated organizations". He said that "although our right to detain enemy combatants in this armed conflict is clear…, Congress should reaffirm that for the duration of the conflict the United States may detain as enemy combatants those who have engaged in hostilities or purposefully supported al Qaeda, the Taliban, and associated organizations". Congress should not bow to such pressure.

On the second part of the Fourth Circuit's ruling – that al-Marri had not had sufficient opportunity to challenge his "enemy combatant" status, the Justice Department was more circumspect. It said that while it "believes that the district court properly concluded that Mr.

[20] Richard B. Zabel and James J. Benjamin, Jr. In pursuit of justice. Prosecuting terrorism cases in the federal courts. Human Rights First, May 2008, http://www.humanrightsfirst.org/us_law/prosecute/.
[21] Verdict rendered in the trial of four individuals associated with the 1998 bombings of the U.S. Embassies in Kenya and Tanzania. FBI press release, 29 May 2001, http://www.fbi.gov/pressrel/pressrel01/tankenbo.htm.
[22] *Lindh pleads guilty, agrees to aid inquiry*. Los Angeles Times, 16 July 2002. On 17 March 2006, Paul J. McNulty was sworn in as Deputy Attorney General of the United States after being nominated to the position by President Bush and confirmed by the Senate.

al-Marri had already received all the process he was due, the government is studying the court's decision and will respond to Mr. al-Marri's contentions on remand." If the past six years is any guide, the administration's approach in litigation will be one in which it seeks as narrow a definition of due process as possible.

Relegating fundamental human rights concerns to footnotes

Ali al-Marri was legally resident in the USA when he was arrested at his home in Peoria, Illinois, on 12 December 2001 as a "material witness" in the investigation of the attacks of 11 September 2001. He was subsequently charged with a number of offences, including credit card fraud and lying to the Federal Bureau of Investigation (FBI). His trial was due to begin in federal district court in Illinois on 21 July 2003. On Friday, 20 June 2003, the judge scheduled a hearing on various pre-trial motions, including on a motion to suppress evidence against him allegedly obtained under torture. On the next working day, Monday 23 June 2003, the government moved to dismiss the indictment based on an executive order signed by President George W. Bush that morning designating Ali al-Marri as an "enemy combatant". Al-Marri was transferred from civilian to military custody and taken to the Naval Consolidated Brig in Charleston, South Carolina. He has been there ever since.

The timing of Ali al-Marri's extraction from civilian custody falls into a pattern of the US administration apparently manipulating individual detainee cases in the "war on terror" to avoid judicial scrutiny of its actions.[23] Such manipulation would contravene international standards on the independence of the judiciary, which prohibit "any inappropriate or unwarranted interference with the judicial process".[24] Suspicion about the administration's motives in this regard was registered in the Fourth Circuit's *al-Marri* ruling on 15 July 2008 when Judge Gregory wrote:

> "Al-Marri was arrested and imprisoned for *eighteen months* in the civilian criminal justice system, and with less than one month before the commencement of his trial, the Executive authorized al-Marri's transfer to military custody. Just as we expressed our skepticism with the Government's attempt to transfer [José] Padilla from the military to the civilian criminal system *three and a half years* after his initial detention, the Executive's decision to designate al-Marri an enemy combatant on the very eve of his civilian criminal trial raises a similar concern" (emphasis in original).[25]

[23] See Section 4 of USA: No substitute for habeas corpus: six years without judicial review in Guantánamo, November 2007 http://www.amnesty.org/en/report/info/AMR51/163/2007.
[24] Principle 4, United Nations Basic Principles on the Independence of the Judiciary, endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.
[25] José Padilla was arrested at Chicago Airport in May 2002 on suspicion of plotting to detonate a radioactive "dirty" bomb against a US target. On the basis of an order signed by President Bush on 9 June 2002, he was transferred from civilian to military custody *two days* before there was to be a court hearing on his case. He was held without charge or trial in military custody for the next three and a half years. The Pentagon announced it was granting him access to a lawyer *nine days* before the Supreme Court agreed to take the appeal challenging the lawfulness of his detention, *20 months* after he had been put in incommunicado military custody. The Court ultimately did not review the case, on the grounds that it had been filed in the wrong jurisdiction. In November 2005, with the question of the lawfulness of his detention again pending before the Supreme Court, President Bush issued a memorandum to the

As part of Ali al-Marri's *habeas corpus* proceedings in District Court in 2004, the government provided a Declaration signed by Jeffrey Rapp, Director of the Joint Intelligence Task Force for Combating Terrorism (the Rapp Declaration).[26] This asserts a number of allegations against al-Marri, principally that he was a "sleeper agent sent to the United States for the purpose of engaging in and facilitating terrorist activities subsequent to September 11, 2001." The Rapp Declaration amounts to hearsay evidence. Judge Gregory, for example, wrote that when a citizen or legal resident "can be designated an enemy combatant by the military, and held incommunicado with no knowledge of the justification for his detention (other than a declaration from a government official who has no first-hand knowledge of the situation), it is not only al-Marri's rights that are at stake, but rather the rights of every man, woman, and child who breathe the fragrant scent of liberty in this great land".

Fragrant scent of liberty aside, Ali al-Marri's military detention has the stench of torture attached to it. Not only is there evidence pointing to the possibility that the decision to transfer him to the military was motivated by the administration's wish to interrogate him away from the legal protections of the criminal justice system, but also that his "enemy combatant" designation may have been at least partly based on information obtained under torture or other ill-treatment.

On the day it took custody of Ali al-Marri, the Pentagon said that "this action was taken due to recent credible information provided by other detainees in the War on Terrorism".[27] This claim does not appear in the Rapp Declaration issued more than a year later, but at the time of his transfer, US personnel were subjecting detainees in Guantánamo, Afghanistan, Iraq and in undisclosed locations outside the USA to torture and other ill-treatment. Among the allegations in the Rapp Declaration is the accusation that al-Marri was assisted in his "sleeper" mission to the USA by Khalid Sheikh Mohammed and Mustafa Ahmed al-Hawsawi. These two alleged leading members of *al-Qa'ida* were arrested in Pakistan on 1 March 2003, a few weeks before Ali al-Marri's transfer to military custody, and held in secret US detention for the next three and a half years.[28]

The CIA Director has confirmed that in 2003 Khalid Sheikh Mohammed was subjected to the form of torture known as "waterboarding", simulated drowning, in order to obtain "actionable, forward-looking intelligence". The decision to employ waterboarding was at least partly motivated by the fact that the US intelligence community had "limited knowledge about al-Qa'ida and its workings".[29] Khalid Sheikh Mohammed has alleged that he was subjected to

Secretary of Defense authorizing Padilla's transfer back to Justice Department custody to face criminal charges (not including any reference to a "dirty" bomb plot), and the government moved to have the Supreme Court dismiss the case. The Court did so over the dissent of three Justices. Three other Justices who agreed with dismissing the case acknowledged that "Padilla's claims raise fundamental issues respecting the separation of powers, including consideration of the role and function of the courts".

[26] Declaration of Mr Jeffrey N. Rapp, Director, Joint Intelligence Task Force for Combating Terrorism, 9 September 2004. Declassified on 5 April 2006.

[27] Enemy combatant taken into custody. Department of Defense news release, 23 June 2003, http://www.defenselink.mil/releases/release.aspx?releaseid=5481.

[28] They are now facing capital charges in Guantánamo, where they were transferred in September 2006.

[29] Statement to Employees by Director of the Central Intelligence Agency, General Mike Hayden on Lawful Interrogation, 13 February 2008, https://www.cia.gov/news-information/press-releases-statements/directors-statement-on-lawful-interrogation.html.

other forms of torture as well. Amnesty International does not know whether any such torture against him or other detainees led to the information on which Ali al-Marri was designated as an "enemy combatant". All details of the CIA's secret detention program are classified at the highest level of secrecy and its human rights violators continue to enjoy impunity. In any event, the Rapp Declaration alleged that Ali al-Marri possessed "information of high intelligence value, including information about personnel and activities of al Qaeda". For the first 16 months of his military custody, he was held entirely incommunicado, with no access to legal counsel, family, or the ICRC. His interrogations only ceased when he got access to a lawyer in October 2004.[30]

Since the attacks on 11 September 2001, an atrocity which raised questions about the quality of US counterterrorism intelligence and generated fears of further attacks,[31] the US administration has viewed those it brands as "enemy combatants" as potential sources of intelligence to be subjected to a "continuous" interrogation cycle.[32] In effect, the US authorities have used detainees held indefinitely outside the rule of law in order to attempt to make up for past intelligence failures through prolonged interrogation. Information gleaned from one detainee may be used to detain another, who is then himself put into indefinite detention as an "enemy combatant". This "continuous" cycle supposes that intelligence can be obtained from a detainee "years" after the interrogation process began.[33] Under this process – "especially important in the War on Terrorism" and especially in the case of those identified as "enemy combatants" – there "is a constant need to ask detainees new lines of questions as additional detainees are taken into custody and new information is obtained from them and from other intelligence-gathering methods".[34] Access to lawyers, the theory goes, disrupts the process and puts national security at risk.[35] This detention and interrogation regime has systematically and deliberately flouted international law.

Judge Wilkinson, one of the five Fourth Circuit judges who took the view that Congress had authorized al-Marri's detention through the AUMF, pursued a disturbing line in favour of incommunicado military detention and against criminal justice and human rights principles: "While torture must not be tolerated under any circumstance", he said, "this does not negate the fact that terror suspects are likely the best source of information on how to prevent future terrorist attacks... Interrogation takes time and may necessitate holding a terrorist suspect incommunicado... [E]ven if the government has no plans to interrogate a terror suspect indefinitely, the criminal justice system may impede the ability to gather critical information... because of a criminal suspect's pre-trial rights".

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[30] The government continues to refuse to recognize that Ali al-Marri has the right to legal counsel. The District Court ruled in 2005 that neither the denial of access to counsel, nor the claim of unlawful interrogations, were issues for *habeas corpus* proceedings, and the issues are currently the subject of a civil action.

[31] See, for example, the 9/11 Commission Report, *op. cit.*, "We believe the 9/11 attacks revealed four kinds of failures: in imagination, policy, capabilities, and management".

[32] Declaration of US Army Colonel Donald D. Woolfolk, 13 June 2002, filed in *Hamdi v. Rumsfeld*, http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/hamdi/hamdi61302wlflkdec.pdf.

[33] Declaration of Vice Admiral Lowell E. Jacoby (USN), Director of the Defense Intelligence Agency, 9 January 2003, http://www.pegc.us/archive/Padilla_vs_Rumsfeld/Jacoby_declaration_20030109.pdf.

[34] *Ibid*.

[35] Woolfolk and Jacoby declarations, *op. cit*.

During Ali al-Marri's 16 months incommunicado, he was allegedly subjected to torture or other cruel, inhuman or degrading treatment. Prolonged incommunicado detention violates international law, facilitates torture and other ill-treatment, and can itself amount to such treatment.[36] Ali al-Marri's civil action filed in federal court in May 2008 alleges the following in relation to his incommunicado detention between June 2003 and October 2004:

> "Mr Almarri's only regular human contact during that period was with government officials during interrogation sessions, or with guards when they delivered trays of food through a slot in his cell door, escorted him to the shower, or took him to a concrete cage for "recreation." The guards had duct tape over their name badges and did not speak to Mr Almarri except to give him orders. Mr Almarri was also subjected to brutal interrogation measures, including stress positions, prolonged exposure to extremely cold temperatures, extreme sensory deprivation, and threats of violence and death. Interrogators, for example, told Mr Almarri that they would send him to Egypt or to Saudi Arabia to be tortured and sodomized and forced to watch as his wife was raped in front of him. They also threatened to make Mr Almarri disappear so that no one would know where he was. On several occasions interrogators stuffed Mr Almarri's mouth with cloth and covered his mouth with heavy duct tape. The tape caused Mr Almarri serious pain. One time, when Mr Almarri managed to loosen the tape with his mouth, interrogators re-taped his mouth even more tightly. Mr Almarri started to choke until a panicked agent from the FBI or Defense Intelligence Agency removed the tape. In addition, for periods of up to eight days at a time, Mr Almarri was placed in a completely bare and cold cell simply for refusing to answer questions. When Mr. Almarri asked for extra clothing or a blanket, his requests were denied.
>
> In addition, Mr Almarri's observance of Islam was restricted and degraded so severely that he could not adhere to the most elemental tenets of his faith. He was denied water to purify himself and a prayer rug to kneel on when praying. Mr Almarri was also denied a *kofi* to cover his head during prayer; when he used his shirt as a substitute, he was punished by having his shirt removed. Mr Almarri was prohibited from knowing the time of day or the direction of Mecca, preventing him from properly fulfilling the Islamic requirement of praying five times a day. The only religious item that Mr Almarri was permitted was a Qur'an, and his copy of the Qur'an was sometimes taken away to facilitate interrogation and at other times was degraded and abused. Mr Almarri was also denied basic necessities, including adequate clothing, recreation, and hygiene items such as toilet paper, a toothbrush, toothpaste, and soap. Sometimes, the water to his cell was cut off for up to 20 days. If Mr Almarri needed water to drink or to wash himself, he had to ring a buzzer. Brig staff often would not respond for several hours."[37]

In a footnote to her opinion in the Fourth Circuit's ruling on 15 July 2008, one of the judges who argued that al-Marri's military detention should be ended noted his claim that the

[36] See Part 2, Point 2 of USA: Human dignity denied: Torture and accountability in the 'war on terror', October 2004, http://www.amnesty.org/en/library/info/AMR51/145/2004/en.
[37] *Almarri v. Gates*, In the US District Court for the District of South Carolina, Plaintiff's objection to the magistrate judge's report and recommendation denying plaintiff's motion for interim relief from prolonged isolation and other unlawful conditions of confinement, 6 May 2008.

government had subjected him to indefinite military custody rather than civilian trial in order to be able to interrogate him "without the strictures of criminal process". Judge Diana Gribbon Motz wrote that "we trust this is not so, for such a stratagem would contravene [the US Supreme Court's 2004] injunction [in *Hamdi v. Rumsfeld*] that 'indefinite detention for the purpose of interrogation is not authorized'." Judge Motz noted, however, that "not only has the Government offered no explanation for abandoning al-Marri's prosecution, it has even propounded an affidavit in support of al-Marri's continued military detention, stating that he 'possesses information of high intelligence value'." Moreover, "the Government's recent admission in other litigation that it has subjected al-Marri to repeated interrogations during his imprisonment in the Naval Brig would seem to substantiate al-Marri's contention".[38]

Torture and other ill-treatment of detainees by the USA in the "war on terror" has been part and parcel of the administration's policy of keeping the detainees as far from independent and impartial courts for as long as possible. Judge Motz seems to recognize this in her opinion, but relegates the issue to another footnote:

> "[R]ecent admissions by the Administration itself, in fact, indicate that military detention in recent conflicts has not achieved the proper 'balance' [with criminal prosecution], but rather has permitted the Executive to pursue a very extreme direction. In this vein, we note the admission by CIA director Michael Hayden that the CIA waterboarded al Qaeda suspects in order to extract intelligence; [39] Hayden's acknowledgement that the CIA destroyed hundreds of hours of videotapes documenting interrogation of two al Qaeda operatives;[40] President Bush's disclosure that at least fourteen al Qaeda suspects were held for years, secretly and without charges, in covert CIA 'black sites' outside the United States;[41] the public admission by Secretary of State Condoleezza Rice that the United States mishandled the case of Canadian Maher Arar, who was detained by United States officials in 2002 and deported to Syria, where Arar was allegedly held for ten months in a 3-by-6-foot cell and repeatedly beaten by Syrian interrogators, often with frayed electrical cables;[42]

[38] "It shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person". UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 21.1.

[39] See USA: CIA 'waterboarding': Admission of a crime, now there must be a criminal investigation, 6 February 2008, http://www.amnesty.org/en/library/info/AMR51/011/2008.

[40] See USA: Destruction of CIA interrogation tapes may conceal government crimes, 7 December 2007, http://www.amnesty.org/en/for-media/press-releases/usa-destruction-cia-interrogation-tapes-may-conceal-crimes-20071207. It is also alleged that the government has destroyed a number of recordings of Ali al-Marri's interrogations.

[41] See USA: Law and executive disorder: President gives green light to secret detention program, August 2007, http://www.amnesty.org/en/report/info/AMR51/135/2007: and Off the Record: US responsibility for enforced disappearances in the 'war on terror', June 2007, http://www.amnesty.org/en/report/info/AMR51/093/2007.

[42] See Amnesty International Urgent Action, USA: Possible disappearance/Forcible return, Maher Arar, 21 October 2002, http://www.amnesty.org/en/library/info/AMR51/159/2002/en; and updates http://www.amnesty.org/en/library/info/AMR51/161/2002/en; http://www.amnesty.org/en/library/info/AMR51/040/2003/en; http://www.amnesty.org/en/library/info/MDE24/029/2003/en;

> and, finally, the recently declassified March 14, 2003, memorandum of the Office of Legal Counsel, advising Pentagon officials that neither federal laws prohibiting assault, maiming, and other crimes nor the UN Convention Against Torture nor customary international law prohibiting torture would apply to military interrogation of al Qaeda detainees overseas, because the President's authority as Commander-in-Chief overrode such restrictions".[43]

Judge Wilkinson criticized Judge Motz and the three judges who joined her for advocating the criminal justice model. "In pushing for the full panoply of criminal process for all suspected terrorists arrested in this country", Judge Wilkinson said, the four judges risked giving the executive "the incentive to pursue more extraterritorial detentions and more acts of rendition [secret detainee transfers without due process]" because of the "more rudimentary" regimes available abroad. In effect, Judge Wilkinson was advocating the violation of the human rights of a few detainees at home in order to stop the administration taking such violations abroad.[44]

Ali al-Marri, Judge Wilkinson continued, is one of only two people arrested in the USA since 11 September 2001 who have been branded as "enemy combatants" (the other being José Padilla). This "is no disproportionate response", Judge Wilkinson asserted, adding that "I do not mean to whitewash wrongs we have committed in the last seven years – Abu Ghraib stained and sullied all we stand for;[45] the government's roundup and detention of Muslim immigrants in the immediate aftermath of 9/11 transgressed our commitment to due process and individualized consideration;[46] and Guantánamo Bay has proven controversial, to be sure.[47] We have stumbled on an unknown landscape, and sometimes worse". The landscape is not one that has been stumbled upon by chance, however. It has been deliberately explored and, even as it claims to inhabit the high moral ground, the US administration has taken the country down some undeniably slippery slopes.[48]

Judge Wilkinson's list of the USA's post-9/11 "wrongs" not only punctures his notion expressed a few sentences earlier of the USA's "timeless respect for human rights", but is also only partial. It fails, for example, to include issues such as the US government's authorization of torture, secret detention, rendition, enforced disappearance, and unfair trials by military commissions. Nevertheless, Judge Wilkinson goes on to suggest that "our domestic response to

http://www.amnesty.org/en/library/info/MDE24/030/2003/en;
http://www.amnesty.org/en/library/info/MDE24/036/2003/en.

[43] See USA: Where is the accountability? Health concern as charges against Mohamed al-Qahtani dismissed, 20 May 2008, http://www.amnesty.org/en/library/info/AMR51/042/2008/en.

[44] Give the administration an inch, Judge Wilkinson seems to be saying, and you stop it from taking a mile. The problem with this theory, as well as unacceptably promoting human rights violations against the few is that, as Judge Motz's footnote points out, the government has already taken the mile.

[45] See USA: An open letter to President George W. Bush on the question of torture and cruel, inhuman or degrading treatment, 7 May 2004, http://www.amnesty.org/en/library/info/AMR51/078/2004/en.

[46] See Memorandum to the US Attorney General: Amnesty International's concerns relating to the post-11 September investigations, November 2001, http://www.amnesty.org/en/library/info/AMR51/170/2001/en.

[47] See USA: Guantánamo and beyond: The continuing pursuit of unchecked executive power, May 2005, http://www.amnesty.org/en/library/info/AMR51/063/2005/en.

[48] See USA: Slippery slopes and the politics of torture, 9 November 2007, http://www.amnesty.org/en/library/info/AMR51/177/2007/en.

9/11" has been "largely measured" in comparison to past abuses such as the "Red Scare and roundup of social dissidents after World War I, or the internment of Japanese-Americans during World War II, or the surge of McCarthyism during the Cold War, or the bludgeoning of dissent during the last stages of Vietnam". Judge Wilkinson's comparison to "the lessons of history" will be of little comfort either to Ali al-Marri or those who wish to see human rights principles put at the centre of US detention policies today, for all detainees, wherever they are held.

On the other side of the Fourth Circuit divide, Judge Gregory wrote that "an independent judiciary is obliged to preserve the fundamental building blocks of our free society". Systematic human rights violations, including the international crimes of torture and enforced disappearance, have been authorized by the executive while independent judicial scrutiny has been deliberately bypassed. It is long past time for such abuses to become more than passing references and footnotes in judicial opinions.

AUMF – A resolution too far

Five of the nine judges in the Fourth Circuit's ruling of 15 July 2008 held that Congress had given the President the authority to detainees such as Ali al-Marri as "enemy combatants" when it passed the Authorization for Use of Military Force (AUMF) on 14 September 2001. This resolution authorized 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." The resolution gave the president the freedom to decide who was connected to the attacks, who might be implicated in future attacks, and what level of force could be used against them. At the same time, he was unconfined by any temporal or geographical limits.

In the al-Marri ruling on 15 July 2008, Judge Gregory described the AUMF as "the most far-reaching bestowal of power upon the Executive since the Civil War… The broad language of the AUMF, literally construed, gives the President *carte blanche* to take any action necessary to protect America against any nation, organization, or person associated with the attacks on 9/11 who intends to do future harm to America." Seven years earlier, a number of legislators had stressed that they did not believe that the AUMF would constitute a "blank check" and had voted for it.[49]

Authorization for the use of force against organizations and individuals was unprecedented in US history, "with the scope of its reach yet to be determined".[50] The scope of the AUMF has already been enormous, however, at least as interpreted by the executive. For example, the Military Order signed by President Bush on 13 November 2001, providing for trials by military

[49] Rep. Smith (New Jersey): "The resolution is not a blank check"; Rep. Watson: "the resolution is not a carte blanche"; Rep. Schakowsky: "It is not a carte blanche…"; Rep. Jackson: "I'm not willing to give President Bush carte blanche authority to fight terrorism. We need to agree to fight it together within traditional constitutional boundaries."

[50] David M. Ackermann and Richard F. Grimmett, *Declarations of war and authorizations for the use of military force: Historical background and legal implications*. Report for Congress, Congressional Research Service, updated 14 January 2003. The CRS is Congress's non-partisan public policy research arm.

commission as well as indefinite detention without charge, trial or judicial review, cited the AUMF as a supporting authority.[51] A now notorious Justice Department memorandum from August 2002 argued that if a US agent "were to harm an enemy combatant during an interrogation in a manner that might arguably [amount to torture under US law], he would be doing so in order to prevent further attacks on the United States by the al Qaeda network". The memorandum cites the AUMF as among those authorities that "recognized" the President's constitutional power to use force to defend the USA.[52] Another Justice Department memorandum of the same date, which remains classified, approved "water-boarding", simulated drowning, and other as yet officially unidentified "enhanced" interrogation techniques employed in the CIA secret detention program.[53] When President Bush re-authorized the CIA's secret detention and interrogation program in July 2007 – a program in which the international crimes of enforced disappearance and torture had already occurred – he cited the AUMF as a supporting law.[54] The AUMF was also cited by the administration in defending President Bush's authorization of a secret wiretapping program by the National Security Agency.[55] Responding to a federal judge's finding in 2006 that the warrantless wiretapping was not authorized by the AUMF and was unconstitutional, President Bush reiterated that "this country of ours is at war" and stressed his strong disagreement with the ruling which he had instructed the Justice Department immediately to appeal.[56]

Although the AUMF was adopted by near unanimity in both houses of Congress, it seems that, at least for some legislators, the executive has read into the resolution more than was intended.[57] At the debate itself, there seemed to be some confusion among legislators as to

[51] Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 13 November 2001, http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html.
[52] Memorandum for Alberto R. Gonzales, Counsel to the President. Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A., Signed by Assistant Attorney General Jay S. Bybee, Office of Legal Counsel, US Department of Justice, 1 August 2002.
[53] The Department of Justice opinion stated that the techniques did not violate the US anti-torture statute. See: http://www.aclu.org/pdfs/safefree/cia_3685_001.pdf, http://www.aclu.org/pdfs/safefree/cia_3686_001.pdf, and http://www.aclu.org/pdfs/safefree/cia_3684_001.pdf. Amnesty International has no doubt that waterboarding constitutes torture under international law. See USA: Torture in the name of 'civilization'. President Bush vetoes anti-torture legislation, 10 March 2008, http://www.amnesty.org/en/library/info/AMR51/016/2008.
[54] Executive Order: Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency, 20 July 2007, http://www.whitehouse.gov/news/releases/2007/07/20070720-4.html.
[55] See, for example, *Legal authorities supporting the activitities of the National Security Agency described by the President*, US Department of Justice, 19 January 2006 ("the AUMF places the President at the zenith of his powers in authorizing the NSA activities"), available at http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf.
[56] President Bush meets with economic advisors, 18 August 2006, http://www.whitehouse.gov/news/releases/2006/08/20060818-1.html. The ruling was *ACLU et al. v. National Security Agency et al*, Memorandum Opinion, US District Court, Eastern District of Michigan, Southern Division, 17 August 2006.
[57] See, for example, *Power we didn't grant*, by Tom Daschle, Washington Post, 23 December 2005. *Spy court judged quits in protest*. Washington Post, 21 December 2005. The vote in the House of Representatives was 420-1 for the resolution, and in the Senate was 98-0.

whether they were voting for a declaration of war or not.[58] Some felt the resolution did not go far enough, others felt it went too far.[59] Some opined that the President had all the power he needed without a resolution.[60] Others stressed the limiting effect of the resolution and the need for continuing congressional oversight.[61] Another legislator addressed President Bush rhetorically: "I will be asked by my constituents did we give you the power to declare war? Many in this Congress will argue that we are not giving you the power to declare war. Others will argue that we are giving you the power to do anything from assassinate an individual, to declare war on an entire country…" She urged him: "Mr President, do not misuse this authority. Mr President, do not abuse this awesome power". She said that she would be voting for the resolution "with great reservations" because "to be honest, I do not know what this means. The language of this resolution can be interpreted in different ways".[62] Another legislator who voted for the resolution admitted that "the literal language of this legislation can be read as broadly as executive interpreters want to read it, which gives the President awesome and undefined power."[63] Despite the apparent concerns and confusion, legislator after legislator voted for the resolution.

The law should be clear. This is not. That the AUMF is open to widely divergent interpretations is evident in the al-Marri ruling. On the one hand four of the nine judges concluded that the AUMF had not authorized the detention of Ali al-Marri:

> "We cannot agree that in a broad and general statute, Congress silently authorized a detention power that so vastly exceeds all traditional bounds… We recognize the understandable instincts of those who wish to treat domestic terrorists as 'combatants' in a 'global war on terror'. Allegations of criminal activity in association with a terrorist organization, however, do not permit the Government to transform a civilian into an enemy combatant subject to indefinite military detention, just as allegations of murder in association with others while in military service do not permit the Government to transform a civilian into a soldier subject to trial by court martial… [N]othing in the legislative history of the AUMF supports the view that Congress intended the AUMF to provide the President with the unprecedented power claimed here."

[58] E.g. Rep. Kolbe: "It is nothing less than a declaration of war"; Rep. Hoyer: "We do not make a formal declaration of war today"; Rep. Schiff: "Make no mistake; it is a broad delegation of authority to make war"; Rep. Barr: "We ought to be here this evening debating a declaration of war… This is war. The President has said it is war"; Rep. DeFazio suggested that it was an "authorization of force, a 21st century declaration of war".

[59] Rep. Smith (Texas): "this joint resolution is well intended, but it does not go far enough". Rep. Shadegg: "I am concerned that it may not go far enough…" Rep. Jackson: "…it is too broad. The literal language of this legislation can be read as broadly as executive interpreters want to read it, which gives the President awesome and undefined power." Rep. Stark: "I do not believe – even in times of extreme crisis – that the Congress should turn over our constitutional responsibilities to the President. The resolution we are debating today, I fear, begins to do just that".

[60] Rep. Lofgren: "The President likely already has the legal authority needed". Rep. Blumenauer: "I am one who believes that the American President [already] has these powers".

[61] Rep. Norton: "Congress must remain vigilant to ensure that his power is always sufficient but never unchecked". Rep. Doggett: "[W]e cannot let the executive branch become the exclusive branch. Our approval must represent not the end but the beginning of congressional involvement".

[62] Rep. Waters.

[63] Rep. Jackson.

In contrast to this, five judges concluded that the AUMF had authorized al-Marri's detention. One of them, Judge Williams, wrote that she was "not being expansive" in reaching this conclusion because "in al-Marri we are dealing with someone *squarely* within the purposes of the AUMF" (emphasis in original). For his part, Judge Wilkinson accused the four in the minority on this issue of "ignoring the AUMF's plain language and patent meaning". The AUMF, he said "expressed this nation's sorrow and outrage at what happened [on 11 September 2001]", and he was "happy indeed that the plurality did not prevail in its view that the AUMF fails to authorize the military detention at issue in this case... It should be clear that al-Marri is the paradigm of an enemy combatant under any reasonable interpretation of the AUMF."

Judge Wilkinson suggested that "it seems apparent that the criminal justice system may be ill-suited to deal with the unique problems presented by the prosecution of terrorists such as al-Marri. This, at least, was the calculus of Congress in passing the AUMF." Yet nowhere in its text does the AUMF mention either detention or turning civilians into "enemy combatants" instead of prosecuting them. Indeed, in the congressional debates, the *only* references to detention were from those legislators who believed that criminal trials should be pursued. Representative Kucinich, for example, said:

> "We are a nation of civil and moral values, and we must show the world that. These terrorist attacks were clearly a crime against humanity. What does a democracy do to punish criminals? We put them on trial. If found guilty, we imprison them. The US military action should be centered on arresting the responsible parties and the Government placing the suspects on trial. This is how we win this. This is how we should show the world that we are a humane and democratic nation. That is what gives us the moral high ground."

In similar vein, Representative McKinney said:

> "We as a nation stand for the rule of law. Perpetrators of crimes, no matter their size or scope, are afforded a trial through a judicial process... In the aftermath of this horrendous act, let us not forget that real security and real peace come through justice...[O]ur nation must respond with a commitment to justice".

And Representative Velazquez said:

> "We support this action because our cause is just... We do not seek vengeance, for Americans are not a vengeful people. Americans cherish justice, and that is what we seek here. This resolution would allow us to pursue, prosecute, and punish these criminals."

Representative McGovern spoke in favour of "those responsible for these heinous crimes" being "held accountable – in full compliance with our Constitution and our laws". He gave no indication that he was thinking that indefinite detention would play a part in such accountability. The ranking member of the House Judiciary Committee, Representative Conyers, emphasized that "These acts of hijacking, murder, and terrorism are crimes for which there are laws and punishments under Federal law." He said that those responsible should be arrested and tried "as our justice system demands". Representative Conyers also said it was important to put on the record what the resolution did not do. What it did not do, he said, was declare

war. By not doing so, "the resolution preserves our precious civil liberties". By not doing so, he said, it did not authorize the President to apprehend "alien enemies".

The administration had initially sought even broader wording for the AUMF. But in any event, it did not believe that it needed congressional approval. Signing the AUMF into law on 18 September 2001, President Bush stated that he was holding to "the longstanding position of the executive branch regarding the President's constitutional authority to use force...and regarding the constitutionality of the War Powers Resolution."[64] He said the same thing a year later when he signed the congressional resolution for use of force in Iraq.[65] According to the Office of Legal Counsel (OLC) in the US Justice Department, in a memorandum dated a week after the passage of the AUMF into law, neither the AUMF nor the War Powers Resolution could "place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. These decisions, under our Constitution, are for the President alone to make".[66] Another OLC memorandum, issued three months before Ali al-Marri was declared an "enemy combatant" by President Bush – stated that "Congress may no more regulate the President's ability to detain and interrogate enemy combatants that it may regulate his ability to direct troop movements on the battlefield".[67] The memorandum stated that the US invasion of Afghanistan was carried out not pursuant to the AUMF, but to the President's "authorities as Commander in Chief". Congress had merely "provided its support" for the use of force. The following month, a then-secret Pentagon Working Group report on "Interrogations in the Global War on Terrorism" asserted that "One of the core functions of the Commander-in-Chief is that of capturing,

[64] President signs Authorization for Use of Military Force bill. 18 September 2001. http://www.whitehouse.gov/news/releases/2001/09/20010918-10.html. In 1970, the Senate voted to terminate the Gulf of Tonkin resolution, the broadly-worded congressional resolution passed six years earlier that provided legal authority for President Lyndon Johnson's escalation of the Vietnam War. Only two legislators had dissented against that resolution, despite doubts about the basis on which the administration was seeking it. Part of the fallout from this episode was the War Powers Resolution (WPR), passed by Congress in 1973 in an attempt to rein in presidential war-making undertaken without congressional authorization. The WPR is widely viewed as having failed due to poor drafting and numerous loopholes. In any event, all US presidents since its enactment (which overrode President Nixon's veto) have taken the position that the WPR is an unconstitutional violation of their war powers. During the AUMF debate, Rep. Jackson said that in discussions the previous day "some Members noted the similarity to the open-endedness of this resolution to the Tonkin Gulf Resolution."

[65] A decade earlier, President George H.W. Bush had obtained a resolution from Congress to support military action in Iraq, but he and Secretary of Defense Dick Cheney stated that they did not believe congressional authorization was needed. President G.H.W. Bush himself subsequently remarked: "I didn't have to get permission from some old goat in the United States Congress to kick Saddam Hussein out of Kuwait". Remarks at the Texas State Republican Convention in Dallas, Texas, 20 June 1992, available at http://www.presidency.ucsb.edu/ws/index.php?pid=21125.

[66] Memorandum opinion for the Deputy Counsel to the President. The President's constitutional authority to conduct military operations against terrorist organizations and the nations that harbour or support them. John C. Yoo, Deputy Assistant Attorney General, Department of Justice, 25 September 2001, available at http://www.usdoj.gov/olc/warpowers925.htm. A version of this memorandum subsequently appeared in the Harvard Journal of Law and Public Policy (volume 25, pages 487-517).

[67] Memorandum for William J. Haynes II, General Counsel of the Department of Defense, Re: Military interrogations of alien unlawful combatants held outside the United States. John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 14 March 2003.

detaining, and interrogating members of the enemy… Any effort by Congress to regulate the interrogation of unlawful combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President… Just as statutes that order the President to conduct warfare in a certain manner or for specific goals would be unconstitutional, so too are laws that seek to prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the Untied States".[68]

In 1788, one of the framers of the US Constitution, Alexander Hamilton, wrote: "In the legislature, promptitude of decision is oftener an evil than a benefit".[69] Over two centuries later, on 14 September 2001, the single legislator who voted against the AUMF, Representative Barbara Lee, said: "Some of us must say, let us step back for a moment. Let us just pause for a minute and think through the implications of our actions today so that this does not spiral out of control".[70]

In the al-Marri ruling on 15 July 2008, Judge Traxler pointed out that "Congress has not revised or revoked the AUMF since its enactment". Judge Wilkinson suggested that "until the AUMF undergoes some change from the body that enacted it, the courts must honor its express intent".

Two years ago, Amnesty International called for revocation of the AUMF.[71] The organization repeats this call now. Congress should take the pause for thought that Representative Lee requested nearly seven years ago, and act to terminate or modify the AUMF. From now on, Congress and the executive should ensure that the USA's policies and practices fully comply with international law.

Violating the presumption of innocence

Everyone has the right to be presumed innocent, and treated as innocent, unless and until they are convicted according to law in the course of proceedings which meet internationally prescribed requirements of fairness.[72] The UN Human Rights Committee has identified this fundamental principle of fair trial as a peremptory norm of international law from which states may never deviate, even in an emergency situation.[73] The presumption of innocence attaches to an accused even before he or she is criminally charged and lasts until the charge against the defendant is proved beyond a reasonable doubt. The right to the presumption of innocence requires that judges and juries refrain from prejudging any case. It also governs the

[68] Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historial, Policy, and Operational Considerations, 4 April 2003.
[69] The Federalist Papers, No. 70.
[70] Congressional Record – House, 14 September 2001. H5642-3.
[71] USA: Justice at last or more of the same? Detentions and trials after *Hamdan v. Rumsfeld,* September 2006, http://www.amnesty.org/en/library/info/AMR51/146/2006/en.
[72] Article 11 of the Universal Declaration of Human Rights, article 14(2) of the ICCPR, article 7(1)(b) of the African Charter, article 8(2) of the American Convention, article 6(2) of the European Convention, article 75(4)(d) of Additional Protocol I, article 6(2)(d) of Additional Protocol II.
[73] Human Rights Committee, General Comment 29, States of Emergency (article 4), UN Doc: CCPR/C/21/Rev.1/Add.11, para. 11.

conduct of all other public officials. Public authorities may not make statements about the guilt or innocence of an accused before the outcome of the trial.[74]

The US government, through its treatment of Ali al-Marri, and its public commentary on his case, have violated his right to be presumed innocent. In a public "fact sheet" issued in May 2007, the White House stated:

> "In December 2001 we captured an al Qaeda operative named Ali Salih Al-Mari [sic] who was planning attacks in the US. Our intelligence community believes Ali Salih al-Mari had training in poisons at an al Qaeda camp in Afghanistan and had been sent by 9/11 mastermind Khalid Sheikh Mohammad ("KSM") to the United States before 9/11 to serve as a sleeper agent ready for follow-on attacks. Our intelligence community believes KSM brought Ali Salih to meet Osama bin Laden, to whom he pledged loyalty. Our intelligence community also believes he and KSM discussed potential attacks on water reservoirs, the New York Stock Exchange, and US military academies."[75]

In its statement following the Fourth Circuit's decision on Ali al-Marri's case on 15 July 2008, the US Justice Department said:

> "Mr al-Marri trained with al Qaeda forces in Afghanistan, had direct contact with the mastermind of the 9-11 attacks, volunteered to undertake a martyr mission on behalf of al Qaeda, received funding from a key 9-11 financier, and was dispatched by al Qaeda leaders to the United States on the eve of 9-11 to commit or facilitate war-like acts."

The government maintains, via the Rapp Declaration, that President Bush's designation of Ali al-Marri as an "enemy combatant" was based on "information derived from several Executive Branch agencies in a multi-layered Executive Branch evaluation", involving the Director of the CIA, the Secretary of Defense, and the Attorney General.[76] The initial recommendation as to whether an individual identified as a possible "enemy combatant" should be taken in Department of Defense custody is made by the Director of the CIA.[77] As noted above, it is unknown whether any of the original information on which the assessment of Ali al-Marri as an "enemy combatant" was based was obtained under torture or other ill-treatment from detainees held in Department of Defense custody or in the secret CIA detention program, the activities in which remain classified at the highest level of secrecy. At least one of the accusations – that al-Marri "received training in the use of poisons at an al-Qaeda camp" in Afghanistan between 1996 and 1998 – was derived from "highly classified" intelligence sources.[78] A substantial part of the rest of the administration's accusations against Ali al-Marri appears to be based on an analysis of phone records and of his laptop computer, which allegedly revealed evidence of internet research and files relating to chemicals and lectures by Osama bin Laden and his associates.

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[74] UN Human Rights Committee, General Comment No. 13: Article 14 (Administration of Justice), 1984, par. 7, in UN Doc. HRI/GEN/Rev.7.
[75] Fact sheet: Keeping American safe from attack, White House, 23 May 2007.
[76] Positions held at the time by George Tenet, Donald Rumsfeld and John Ashcroft respectively.
[77] Rapp Declaration, *op. cit.*
[78] *Ibid.*

As already noted, the Rapp Declaration is hearsay evidence. Judge Traxler, for example, describes it as "a hearsay declaration of a government official who has no first-hand information about the detainee". Yet Judge Traxler's four colleagues on the Fourth Circuit who considered that the AUMF had authorized Ali al-Marri's detention and that he had had all the judicial process he was due appear to have accepted the executive's version of the "facts". Judge Williams, for example, wrote that she was "accepting these allegations as true" and as a consequence she believed that "the President has the power to detain al-Marri". Judge Wilkinson indicated similar confidence in the administration's allegations:

> "Al-Marri was indisputably a member of al Qaeda, and he was indisputably planning terrorist attacks to kill American citizens and destroy American property... Al-Marri, upon his release, may well resume his efforts to launch a catastrophic attack against American interests either on US soil or abroad...
>
> Not only did he attend an al Qaeda terrorist camp in Afghanistan, but he also subsequently cultivated relationships with the most senior members of the al Qaeda organization: he met personally with Osama bin Laden and volunteered to martyr himself for the al Qaeda cause; he entered the United States as a sleeper agent under the direction of Khalid Shaykh Muhammed, the mastermind of the 9/11 attacks; and he received substantial funding for his mission from Mustafa Ahmed al-Hawsawi, the financial facilitator of the 9/11 attacks.
>
> He did not arrive here with peaceful purposes in mind. At the time he was detained, al-Marri was in the process of preparing cyanide attacks against American civilians and technological attacks on the US financial system. Therefore, it is clear that he knowingly planned to engage in conduct that aimed to harm both life and property. In addition, the direction he received from the hierarchy of al Qaeda indicated that his terrorist actions were undertaken to further the military goals of that enemy organization."

Amnesty International is disturbed that federal judges have undermined the principles of criminal justice and fair trial, including the presumption of innocence. Whether someone is guilty of "terrorism" is a matter to be decided in the crucible of a criminal trial, applying international standards. Here, the executive has effectively labeled Ali al-Marri as guilty through its use of the "enemy combatant" label and its attendant treatment and official commentary on the case. The organization points to Principle 36 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which states: "A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence". In addition, Principle 6 of the UN Basic Principles on the Independence of the Judiciary requires judges to ensure that the rights of the parties in judicial proceedings are respected.

Cruel isolation and indefinite detention

Ali al-Marri was finally granted access to a lawyer on 14 October 2004, some 16 months after his transfer to military custody. His meetings with his legal counsel were initially closely monitored – Defense Intelligence Agency personnel were present at all times, and the meetings

were recorded on audio and video – and the detainee was shackled and chained to the floor during these non-contact visits.[79]

From October 2004 to August 2005, Ali al-Marri was confined to a nine-foot by six-foot cell (three by two metres) in the Naval Consolidated Brig's Special Housing Unit (SHU), for 24 hours a day, seven days a week, for months at a time. When he was granted out-of-cell exercise time, this took place in an outdoor cage or indoors. When the exercise time was inside, he was kept in handcuffs and shackles.[80] The single window to the cell was painted with a dark paint, preventing him from seeing the outside world or perceiving the time of day.[81] He often went days without seeing daylight.[82] He had no chair, no pillow, and no blanket. He was denied a mattress for more than two years. When he was finally given a (thin) mattress, on the recommendation of a doctor, this was removed from the cell each morning at 5am and not returned until 10pm.[83] His isolation was extreme – he was denied books, newspapers, magazines, television, or radio.[84]

Since a civil action challenging his conditions of confinement was initiated in the District Court of South Carolina in August 2005, Ali al-Marri's conditions have improved. According to his lawyer, he can now move about his cell block (he is the only detainee there), and is given adequate time for recreation. He has a mattress all of the time, and is allowed to pursue his religious practices. Meetings with his lawyers are conducted without the presence of government personnel in the room.

Nevertheless, his isolation continues, and "he remains alone day after day after day". His South Carolina-based legal counsel visits him approximately once every six weeks, and his New

[79] "[C]hains or irons shall not be used as restraints". UN Standard Minimum Rules for the Treatment of Prisoners, Rule 33. The Standard Minimum Rules cited in this report come from that international instruments first Part which is "applicable to all categories of prisoners, criminal or civil, untried or convicted, including prisoners subject to 'security measures' or corrective measures ordered by the judge" (Rule 4.1).

[80] Unless otherwise stated, information in this section taken from civil action: Plaintiff's objection to the magistrate judge's report and recommendation denying plaintiff's motion for interim relief from prolonged isolation and other unlawful conditions of confinement, *Almarri v. Gates*, In the US District Court for the District of South Carolina, 6 May 2008, and the accompanying Certification of Andrew J. Savage, an attorney who has represented Ali al-Marri since July 2004.

[81] Under international standards, cell "windows shall be large enough to enable the prisoners to read or work by natural light, and shall be so constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation." UN Standard Minimum Rules for the Treatment of Prisoners, Rule 11.

[82] Under the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: "the term 'cruel, inhuman or degrading treatment or punishment' should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or his awareness of place of the passing of time" (see note to Principle 6).

[83] "Every prisoner shall… be provided with…separate and sufficient bedding". UN Standard Minimum Rules for the Treatment of Prisoners, Rule 19.

[84] "Prisoners shall be kept informed regularly of the more important items of news by the reading of newspapers, periodicals or special institutional publications, by hearing wireless transmissions, by lectures or by any similar means as authorized or controlled by the administration". UN Standard Minimum Rules for the Treatment of Prisoners, Rule 39.

York-based co-counsel sees him about every four months (the lawyers are also allowed telephone contact with him). A representative of the ICRC visits approximately once every three months.

For almost five years, Ali al-Marri spoke to no human being outside of the government except for his lawyers and ICRC representatives. On 29 April 2008, he was allowed a telephone call to his family. The call had been arranged after his lawyer learned that al-Marri's father's had died. The government has said that Ali al-Marri will only be allowed two phone calls to his family per year.

Mail is subject to months-long delays because of the government's clearance process. For example, on 6 December 2007, Ali al-Marri received a package of a few letters from his family that had been sent nearly two years earlier. They had been sent in March 2006. They were diverted to the authorities in the US Naval Base at Guantánamo Bay for clearance. This approval was not granted until 22 October 2007. Even after this it was another six weeks before the package was received by Ali al-Marri. The Pentagon has apparently refused requests to allow mail sent from his family to be reviewed anywhere other than Guantánamo.[85]

Ali al-Marri now has access to newspapers, but they are heavily redacted (censored), according to his lawyer. He is prohibited from watching news on television. His access to books is restricted. If he requests a book, his request can take more than six months to process. According to his lawyer, books are denied "arbitrarily and without explanation".

Ali al-Marri remains under 24-hour video surveillance, seven days a week, except for meetings with his lawyers or with the ICRC. One symptom of his apparent mental health deterioration is that he "periodically becomes fixated on the surveillance camera in his cell".

There is a significant body of evidence that prolonged isolation can cause serious psychological and physical harm, particularly if accompanied by other deprivations such as conditions of reduced sensory stimulation, enforced idleness and confinement to an enclosed space. Sometimes referred to as the "SHU syndrome", mental health experts who have examined prisoners in isolation, including US supermaximum security facilities, have described symptoms that include perceptual distortions and hallucinations, extreme anxiety, hostility, confusion, difficulty with concentration, hyper-sensitivity to external stimuli and sleep disturbance as well as physical symptoms.[86] A study by health experts on prisoners held in

[85] "An untried prisoner shall be given… all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution". UN Standard Minimum Rules for the Treatment of Prisoners, Rule 92. "A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations". UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 19.

[86] See, for example, Stuart Grassian, Psychological Effects of Solitary Confinement, American Journal of Psychiatry, 140:1450-1454, 1983; Terry A. Kupers, The SHU Syndrome and Community Mental Health, Community Psychiatrist, Summer 1998, Craig Haney, Mental Health Issues in Long-Term Solitary and 'Supermax' Confinement, Crime and Delinquency, vol.49, no.1, January 2003. See also USA: Cruel and inhuman: Conditions of isolation for detainees at Guantánamo Bay, April 2007, http://www.amnesty.org/en/library/info/AMR51/051/2007/en.

isolation units in the UK found inmates suffered from physical disorders resulting from their highly restricted surroundings which included impaired eyesight, weight loss, muscle wastage and memory loss and that some inmates had developed "mental illnesses which go beyond the ordinary and expected anticipatory anxiety".[87]

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), the expert body which is part of the Council of Europe, has stated, "It is generally acknowledged that all forms of solitary confinement without appropriate mental and physical stimulation are likely, in the long-term, to have damaging effects resulting in deterioration of mental faculties and other social abilities".[88] The CPT has recommended that all forms of solitary confinement should last for as short a time as possible, with compensatory measures for those held in high security units, such as enhanced exercise facilities, choice of activities and opportunities to meet fellow inmates within the units.

A psychiatrist with a great deal of experience on the effects on detainees and prisoners of solitary confinement and other harsh conditions has evaluated the information about Ali al-Marri's conditions of detention and its apparent effects on him. Dr Stuart Grassian has stated that he has "only very uncommonly encountered an individual whose confinement was as onerous as Mr Almarri's, except for individuals who had been incarcerated brutally in some third-world countries".[89] On al-Marri's state of health, he has stated:

> "He clearly is suffering quite profoundly from increasingly severe symptoms related to his prolonged incarceration in solitary. Moreover, the symptoms which he manifests are strikingly specific and detailed, and they are indeed symptoms which, while quite rare in other settings, are very specifically associated with the psychopathological effects of solitary confinement."

The symptoms being manifested by Ali al-Marri include his increasing inability to tolerate the buzzing of a fluorescent light, preoccupation with noxious odours in his cell, and "perceptual difficulties typical of solitary – for example, white spots and flickering lights". Dr Grassian expressed his concern that Ali al-Marri's "ability to tolerate this confinement is clearly eroding severely":

> "Thus, for example, it is very worrisome that Mr Almarri has recently begun manifesting paranoid thoughts, both about the Brig staff (especially regarding food preparation) and even about his attorneys. There has been increasing concern that he is becoming more irritable, distrustful, and withdrawn. And with this, his behavior has

[87] Report by three independent psychiatrists who examined prisoners in UK Special Security Units (SSUs), January 1997. An official inquiry by the UK Prison Service recommended in an unpublished report in 1996 that prisoners in SSUs should be held there for as short a period as possible and more provision should be made for mental stimulation and physical exercise and that prisoners should have access to open visits with members of their immediate family. The study's findings are described in an Amnesty International report, UK Special Security Units – Cruel, Inhuman and Degrading Treatment, March 1997, http://www.amnesty.org/en/library/info/EUR45/006/1997/en.

[88] CPT Report to the Finnish Government on the Visit to Finland, conducted between 10 and 20 May 1992, Strasbourg, France, 1 April 1993, CPT/Inf (93) 8.

[89] *Almarri v. Gates*, Declaration of Stuart Grassian, M.D., In the US District Court for the District of South Carolina, 6 March 2008.

> increasingly been deemed 'non-compliant', leading to punishment by even further environmental deprivation. This is the classic 'vicious cycle' in solitary, an enormously harmful situation".

"Without question", a US federal judge wrote in August 2004, "the isolation of a prisoner from the general population for an indefinite period of time raises Eighth Amendment issues, and due process concerns".[90] The Inter-American Court of Human Rights has held that "prolonged isolation and deprivation of communication" amounts to cruel and inhuman treatment".[91] The UN Human Rights Committee, in its General Comment on Article 10 of the ICCPR, has stated that any detainee or prisoner may not be "subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment". Treating all persons deprived of their liberty with humanity and with respect for their dignity, the Committee stated, "is a fundamental and universally applicable rule".[92] The Committee has also stated that "prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7 [of the ICCPR, i.e. torture or other cruel, inhuman or degrading treatment or punishment]".[93]

Amnesty International urges the US government to immediately improve Ali al-Marri's conditions of confinement, so that they fully comply with international standards, including the prohibition on cruel, inhuman or degrading treatment, and ensure he has access to independent medical and psychiatric care. The organization repeats: he should be promptly transferred to civilian jurisdiction, charged and brought to fair trial within a reasonable time, or released.

The right to remedy begins with a trial or release

Everyone has the right to liberty and security of person.[94] A government may only arrest, detain or imprison a person strictly in accordance with the law.[95] Arbitrary detention, the antithesis of this legal obligation, is absolutely prohibited under international human rights law. Human rights law applies at all times, even in times of emergency or war, however defined. The notion of arbitrariness of detention under human rights law, in accordance with the UN Human Rights Committee's "constant jurisprudence", is "not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of

[90] *Hamdi v. Rumsfeld*, US District Court for the Eastern District of Virginia, 27 August 2004. The Eighth Amendment of the US Constitution prohibits, among other things, "cruel and unusual punishments".
[91] Velásquez Rodríguez v. Honduras, 29 July 1988, para. 187.
[92] Human Rights Committee, General Comment 21 (humane treatment of persons deprived of their liberty).
[93] Human Rights Committee, General Comment 20, para. 6 (1992).
[94] E.g., Article 3, Universal Declaration of Human Rights; Article 9, International Covenant on Civil and Political Rights (ICCPR).
[95] Article 9, ICCPR. Principle 2, United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

predictability and due process of law".[96] As already noted, the UN Working Group on Arbitrary Detention has concluded that Ali al-Marri's detention is arbitrary, in violation of US obligations.

The prohibition of arbitrary detention has long been recognized by the international community in the Universal Declaration of Human Rights and in treaties developed since the Declaration was adopted in 1948.[97] In an address to the UN General Assembly on 25 September 2007, and repeated in a proclamation on 23 October, President Bush said the UDHR "stands as a landmark achievement in the history of human liberty",[98] and the US government continues to assert that the International Covenant on Civil and Political Rights (ICCPR), which the USA ratified in 1992, "is the most important human rights instrument adopted since the UN Charter and the Universal Declaration of Human Rights, as it sets forth a comprehensive body of human rights protections."[99] These protections include the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment (article 7), the right of any detainee to be treated with humanity and with respect for the inherent dignity of the human person (article 10), the right to a fair trial (article 14), the right to non-discriminatory application of the rights recognized in the treaty (article 2), the right to effective remedy for violations of rights in the treaty (article 2), and the right to be free from arbitrary detention (article 9). The US Supreme Court has said that the ICCPR "does bind the United States as a matter of international law".[100]

The four judges who concluded that the President did not have the authority to order Ali al-Marri's indefinite military detention and that he should be transferred back to civilian custody for resolution of his case there, did not consider it necessary to determine what process he was due on the question of challenging his "enemy combatant" status. They joined Judge Traxler's opinion because they recognized their view did not command a majority of the court and because Judge Traxler's terms for remanding the case to the District Court were "closest to those we would impose".

Amnesty International considers that Ali al-Marri's indefinite military detention violates the international prohibition on arbitrary detention, including article 9 of the ICCPR. For this reason, this report does not analyse the question of what *habeas corpus* process he is due.[101]

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[96] Communication No 1128/2002: Angola. UN Doc: CCPR/C/83/D/1128/2002.

[97] ICCPR, article 9; American Convention on Human Rights, article 7; European Convention for the Protection of Human Rights and Fundamental Freedoms, article 5; African Charter on Human and Peoples' Rights, articles 6, 7; Arab Charter on Human Rights (2004), article 14.

[98] President Bush addresses the United Nations General Assembly, UN Headquarters, New York, 25 September 2007, http://www.whitehouse.gov/news/releases/2007/09/print/20070925-4.html. United Nations Day, proclamation, http://www.whitehouse.gov/news/releases/2007/10/20071023-2.html.

[99] Opening statement to the UN Human Rights Committee by Matthew Waxman, Principal Deputy Director of the Policy Planning Staff at the Department of State, Head of the US Delegation, Geneva, Switzerland, 17 July 2006, http://www.state.gov/s/p/rem/69126.htm.

[100] *Sosa v. Alvarez-Machain*, 29 June 2004.

[101] At best, he will receive a truncated form of *habeas corpus*. The controlling precedent is likely to be the 2004 US Supreme Court ruling in *Hamdi v. Rumsfeld*, which involved Yaser Hamdi, a US national detained as an "enemy combatant" in the USA after his capture in Afghanistan in late 2001. Amnesty International reiterates that the Hamdi case is another in which the US administration demonstrated a penchant for seeking to bypass judicial scrutiny. The Pentagon only allowed Hamdi access to a lawyer in late 2003 (while maintaining that he did not have the right to one) after he had been in detention for two

His detention is unlawful. The remedy should begin with his prompt release or transfer from military custody. If the government, as it says it does, has evidence of his criminal wrongdoing, it should promptly charge him and bring him to trial within a reasonable time in the civilian criminal justice system. His trial should comply with international fair trial standards, as provided in article 14 of the ICCPR and other international instruments. The death penalty should not be an option. If the government does not intend to try him, it should immediately release him.

A fair trial is one step towards restoring respect for justice and human rights in this case. In addition, under Article 2.3 of the ICCPR, a state must ensure that any person whose rights under the treaty are violated "shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity". In an authoritative interpretation, the treaty monitoring body the UN Human Rights Committee has said:

> "Article 2, paragraph 3, of the Covenant requires a State party to the Covenant to provide remedies for any violation of the provisions of the Covenant. This clause is not mentioned in the list of non-derogable provisions in article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective." [102]

All allegations of torture and other ill-treatment must also be investigated and accountability and redress for any violations be ensured. The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by consensus by the UN General Assembly in December 2005, spell out the obligations of remedy in some detail.[103] States are obliged, among other things, to investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law (Principle 3(b)). They are also

years and, notably, only four weeks before the US Supreme Court would announce whether it would review the lawfulness of his detention. After the *Hamdi* ruling, in late August 2004, a federal judge ordered the government to explain why Yaser Hamdi was still being held in indefinite solitary confinement, as he had been held for more than two years. District Judge Robert Doumar ruled that such treatment "without question", raised issues under the constitutional ban on "cruel and unusual punishment". In a further order in early October 2004, Judge Doumar expressed concern that three months since the Supreme Court's ruling, the detainee had not been provided "with a hearing of any kind by this Court, the military, or any other tribunal." He ordered that either Yaser Hamdi be released or a hearing on the merits of his *habeas corpus* petition would be heard in his court on 12 October 2004, a hearing at which the government would have to produce Yaser Hamdi. On 11 October, the government released the detainee and transferred him to Saudi Arabia under a deal in which among other things, Hamdi renounced his US citizenship.

[102] General Comment 29, States of emergency (Article 4). UN Doc: CCPR/C/21/Rev.1/Add. 11, 31 August 2001, para. 14. Under Article 9.4 of the ICCPR, "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation".

[103] GA RES. 60/147 16 December 2005.

required to "provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice..." and to "provide effective remedies to victims, including reparation" (Principle 3(c and d)). These reparations should take the form of "restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition" (Principle 18). The Basic Principles and Guidelines must be applied and interpreted "without any discrimination of any kind or on any ground, without exception" (Principle 25).

The rule of law has been all too negotiable

In the al-Marri ruling, Judge Wilkinson wrote that "the attacks of 9/11 left this country on the horns of a dilemma: between having our hands tied with Marquess of Queensbury rules and being so indifferent to the law of war that we ourselves became a rogue and lawless nation".[104]

In a "war on terror" filled with US euphemisms for human rights violations,[105] other officials have drawn boxing analogies as the USA sought to bypass criminal justice and the courts, and subject detainees to treatment outside of international legal protections. During the AUMF debate on 14 September 2001, for example, Representative Chris Smith said: "It is time to take the gloves off". Congress has subsequently failed to ensure that the USA's conduct complies with international law. A few months later, the General Counsel of the Department of Defense allegedly authorized US national John Walker Lindh's interrogator to "take the gloves off" during Lindh's interrogation after his capture in Afghanistan in late 2001.[106] Lindh's alleged treatment included stripping, blindfolding, threats, cruel use of restraints, and denial of access to legal counsel or relatives. At a congressional hearing in September 2002, the only detail that the former chief of the CIA's Counterterrorist Center, Cofer Black, would give of the "very highly classified area" of "operational flexibility" was that "there was before 9/11 and after 9/11" and that "after 9/11 the gloves come off."[107] Since then, it has been confirmed that the CIA has run a program of secret detention and interrogation that has included commission of the international crimes of enforced disappearance and torture.

Fundamental questions about the rule of law lie at the heart of the Ali al-Marri case. At the conclusion of his long opinion, Judge Wilkinson noted expert opinion concluding that "executive unilateralism" in the "war on terror" had damaged the USA's historical commitment to the rule of law, and also noted the opinion of four of his colleagues that rejection of Ali al-Marri's *habeas corpus* petition would "have disastrous consequences for the Constitution – and the country". Judge Wilkinson disagreed, arguing that "the detention of al-Marri accords with America's legal traditions".

President George W. Bush has repeatedly stated, in the context of the "war on terror", that the USA will "always stand firm for the non-negotiable demands of human dignity", including "the rule of law". Amnesty International considers that the USA's conduct in relation to detentions

[104] The Marquess of Queensbury rules, named after the Englishman who supervised their development in 1867, still form the basis for the rules for boxing.
[105] E.g., for "stress and duress" or "enhanced" interrogation techniques, read torture or other cruel, inhuman or degrading treatment; for "ghost detainee", read enforced disappearance; for "rendition", read secret transfer without any due process.
[106] Prison interrogators' gloves came off before Abu Ghraib. New York Times, 9 June 2004.
[107] Hearing before the Senate and House Intelligence Committees, 26 September 2002.

and interrogations of those it has labelled as "enemy combatants" has nevertheless flouted the rule of law and respect for international human rights principles contained in the Universal Declaration of Human Rights and the body of treaty law and other instruments that has followed the Declaration's adoption 60 years ago.

In November 2006, Lord Bingham, one of the most senior judges in the United Kingdom, attempted to define the rule of law. Drawing on the starting point suggested by John Locke in 1690 – "wherever law ends, tyranny begins" – Lord Bingham suggested eight sub-rules to the rule of law:

- the law must be accessible and so far as possible intelligible, clear and predictable;
- questions of legal right and liability should be resolved by application of the law and not the exercise of discretion;
- the law must apply equally to all, except to the extent that objective differences justify differentiation;
- the law must protect fundamental human rights;
- civil disputes should be resolved without prohibitive cost or inordinate delay;
- public officials must use power reasonably and not exceed their powers;
- adjudicative procedures provided by the state must be fair;
- a state must comply with its international law obligations.[108]

Pursuit of unfettered executive discretion, inconsistency and discrimination, denial of fundamental human rights, and non-compliance with international law have been among the hallmarks of the USA's treatment of those, including Ali al-Marri, it has labeled as "enemy combatants". In the 15 July 2008 ruling, Fourth Circuit Judge Roger Gregory called attention to the inconsistency of the administration's approach, namely that

> "[other] al-Qaeda operatives bearing the trademarks of an enemy combatant, were charged, like al-Marri, in the civilian criminal justice system. Unlike al-Marri, however, the Executive allowed other defendants to proceed in civilian criminal trials for reasons that are unknown."[109]

The administration's decision as to which detainees should be designated "enemy combatants", Judge Gregory said, "inform my view as to what is 'fair' in this case." He was one of the four judges who concluded that Ali al-Marri's military custody should cease and civilian jurisdiction reinstated. This would seem to fit into Lord Bingham's assertion that "the historic role of the courts has of course been to check excesses of executive power".[110]

Amnesty International considers that the Fourth Circuit court as a whole has failed to issue a much needed reaffirmation of the principles of criminal justice, or to provide a check on an administration that has sought to avoid independent judicial scrutiny of its "war on terror"

[108] *The Rule of Law.* The Rt. Hon Lord Bingham of Cornhill KG, House of Lords. The sixth Sir David Williams Lecture, Cambridge University Centre for Public Law, 16 November 2006.
[109] Judge Gregory specifically referred to Jose Padilla, Zacarias Moussaoui, and Ali Abu Ali.
[110] *The Rule of Law, op.cit.*

detention policies and practices. In addition the Fourth Circuit has endorsed an over-broad resolution passed by a legislature that has appeared in the past seven years to have taken the path of least resistance – passing not only the AUMF, but also, for example, provisions in the Detainee Treatment Act and the Military Commissions Act which are incompatible with international law.

President Bush should immediately issue an order to have Ali al-Marri promptly transferred from Department of Defense detention to the custody of the Department of Justice. The Attorney General should ensure that al-Marri is either promptly charged with recognizable criminal offences for trial in federal court within a reasonable time, or released. Congress should recognize that the AUMF is over-broad and has been exploited, and even if only as an expression of this recognition, withdraw it. All legislators should make clear that from now on they will commit to a stringent oversight and lawmaking role with a view to ensuring that the USA's conduct complies with its international obligations. The US authorities must ensure that all allegations of torture and other cruel, inhuman or degrading treatment are fully investigated, and that anyone involved in such human rights violations is brought to justice. Detainees and former detainees must have genuine access to redress for abuses committed against them.

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