No. 06-7427

United States Court of Appeals

for the

Fourth Circuit

ALI SALEH KAHLAH AL-MARRI,

Petitioner-Appellant,

– and –

MARK A. BERMAN, as Next Friend,

Petitioner,

– v –

COMMANDER S.L. WRIGHT, USN Commander, Consolidated Naval Brig,

Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

BRIEF OF AMICI CURIAE U.S. CRIMINAL SCHOLARS AND HISTORIANS ADVOCATING REVERSAL IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

This case addresses whether non-citizens living in the United States accused of crimes against the state may be held pursuant to military authority instead of receiving traditional civilian criminal due process. *Amici curiae* are professors of law and legal history, with a special interest in the history and application of criminal law.[1] The professional interest of *amici curiae* is in assuring that the Court is fully and accurately informed as to the proper limits of military jurisdiction with respect to allegations of criminal acts against the state. The district court's unprecedented decision suggests that non-citizens living in the United States could be subject to military, not civilian, jurisdiction for acts otherwise encompassed by federal criminal statutes. That proposition is simply contrary to centuries of English and American precedent that has treated citizens and virtually all non-citizens equally with respect to alleged crimes against the state. *Amici curiae* have no personal, financial, or other professional interest, and take no position respecting any other issue raised in the case below.

[1] Names and affiliations of *Amici* are included in the Appendix to this brief. All parties consented to the filing of this brief.

SUMMARY OF ARGUMENT

The government has argued, and the district court agreed, that non-citizens within the United States may constitutionally be subjected to military rather than civilian jurisdiction when accused of treasonous acts. Def.'s Mem. Opp'n Summ. J. [Docket #28], at 8-9; *Al-Marri v. Hanft*, 378 F. Supp. 2d 673, 676-79 (D.S.C. 2005). Historically, however, non-citizens within English territory were liable to prosecution for treason, not to military justice, subject only to narrow exceptions not applicable in this case. The Supreme Court has long recognized that this history is relevant because the founding generation expressly incorporated common-law understandings into the Treason Clause. U.S. Const. art III, §3. The government is therefore mistaken. Its exercise of military jurisdiction over Ali Saleh Kalah al-Marri is inconsistent with this common-law tradition and violative of the principles codified in the Treason Clause.

Early modern English law – incorporated by the Framers into the Treason Clause of the U.S. Constitution – held that most categories of non-citizens, especially those present in the King's realm, were subject to the law of treason and to trial in a civilian court. These early jurists reasoned that anyone who received the King's protection owed a reciprocal duty of allegiance. Allegiance was a flexible and expansive concept, and was most typically incurred by simple physical presence within the realm. The narrow exceptions were hostile invaders and

subjects of an enemy sovereign. As a result, virtually all cases involving alleged crimes against the King by non-natural subjects within the realm were brought under civilian, not military, law.

This longstanding tradition of treating most persons accused of crimes against the King —native or alien— as subject to civilian law traveled across the Atlantic. The founding generation adopted the language of the English treason statute, 25 Edward III, into the Treason Clause, U.S. Const. art. III, §3, and early U.S. commentators and courts relied on the English history of treason law in order to interpret the meaning and scope of the Treason Clause. Though the Founders increased the procedural protections for those charged with treason, they did not alter the English distinction between military and civilian jurisdiction in such cases. American jurisprudence confirms an unbroken practice of subjecting aliens owing temporary allegiance to the United States to criminal treason charges for violations of their duty of allegiance, rather than subjecting them to military justice. *See* Carlton F. W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. Pa. L. Rev. 863, 878 (2006) (noting the "fundamental distinction, rooted in allegiance, between those persons subject to civilian authority and those persons subject to military authority with respect to crimes against the state").

This history is also wholly consistent with the American constitutional tradition of subjugating military authority to civilian rule of law—especially with respect to individual rights—so that only open combatants may be subject to military jurisdiction. *See Reid v. Covert*, 354 U.S. 1, 33 (1957) (plurality opinion)); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Ex parte Merryman*, 17 F. Cas. 144, 144-45 (C.C. Md. 1861) (No. 9,487); *see also* Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 Geo. Wash. L. Rev. 649, 734-36 (2002). And that bright line between who may be subjected to civilian versus military authority does not vacillate on the basis of alienage alone. *See Johnson v. Eisentrager*, 339 U.S. 763, 771-72 (1950) (noting that "[t]he disabilities this country lays upon the alien who becomes also an enemy are imposed temporarily as an incident of war and *not as an incident of alienage,*" due to an enemy alien's presumed allegiance to a hostile sovereign) (emphasis added).

Viewed through the lens of early English and American history and subsequent constitutional developments, it is evident that the district court was incorrect to hold that Mr. al-Marri was properly subject to military jurisdiction. The district court recognized that Mr. al-Marri, a Qatari national captured far from any battlefield, is not subject to any conflicting duty to an enemy sovereign and cannot be presumed to be an enemy alien pursuant to the terms of the Enemy Alien

Act of 1798. *Al-Marri v. Hanft*, 378 F. Supp. 2d 673, 679 (D.S.C. 2005). Nonetheless, the court concluded that fact was "simply a result of the nature of the war on terrorism" and went on to hold that Mr. al-Marri's Qatari citizenship rendered him particularly susceptible to U.S. military, not civilian, authority. *Id.*

Common law history, however, teaches that the government may hold Mr. al-Marri under military jurisdiction only if he owes no duty of allegiance to the United States. Where, as here, the accused is not the citizen of an enemy state and had been living openly and legally in the United States with his family at the time of his detention, there should be a presumption that he owed a duty of allegiance for the duration of that stay absent evidence that he was a hostile invader.

In light of these undisputed facts and the long tradition of subjecting most aliens to civil—not military—jurisdiction, *amici* respectfully suggest that this Court release Appellant from military custody, or, alternatively, remand this case to the district court for additional fact-finding as to whether Appellant owed a duty of temporary allegiance. If he did owe such a duty, he should be released from military custody, and to the extent the government believes that Appellant acted against the welfare of the United States, it should proceed with criminal charges within the civilian justice system.[2]

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[2] *Amici* do not suggest that the only option available to the government is a treason charge. To the contrary, in addition to treason, there already exists an advanced statutory framework available to prosecutors pursuing terrorism investigations.

ARGUMENT

I. The Treason Clause Must Be Understood in Light of Its English Heritage.

The Treason Clause of the U.S. Constitution was modeled on the fourteenth century English statute on treason, 25 Edward III.[3] Though the Framers increased the evidentiary requirements for treason, they modeled the elements of the offense on the English statute.[4] *United States v. Burr*, 25 F. Cas. 55, 159 (No. 14,693) (Marshall, Circuit Justice, C.C.D. Va. 1807) (noting the statute's English roots and instructing that "[i]t is, therefore, reasonable to suppose, unless it be incompatible with other expressions of the constitution, that the term 'levying war' is used in that instrument in the same sense in which it was understood in England, and in

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See, e.g., 18 U.S.C. §§ 2331 et seq. (defining and criminalizing terrorism); 18 U.S.C. § 2339 (harboring or concealing terrorists); 18 U.S.C. § 2339A (providing material support to terrorists); 18 U.S.C. § 2339B (providing material support or resources to designated foreign terrorist organizations), 18 U.S.C. § 2339C (prohibitions against the financing of terrorism). In the context of early English and American law—when there existed no such statutory regime dealing with terrorism—treason is best viewed as a proxy for the civilian criminal justice system. Where there is a duty of temporary allegigance, an individual is subject to domestic, not military, law.

[3] Treason Act, 1351, 25 Edw. III, stat. 5, c. 2 (using the phrases "levying war" and "adhering to their enemies, giving them aid and comfort").

[4] The Treason Clause states, "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." U.S. Const., art. III, § 3, cl. 1. The requirement of "testimony of two witnesses to the same overt act" was an American innovation not present in the English law of treason.

this country, to have been used in the statute of the 25th of Edw. III. from which it was borrowed.").

Federal courts have consistently relied on English jurisprudence to illuminate the U.S. Constitution's Treason Clause. Chief Justice Marshall explained the English roots of American treason law in the trial of Aaron Burr: "[T]he principles set down by such writers as Coke, Hale, Foster, and Blackstone, are not lightly to be rejected. . . . [T]he definitions and dicta of those authors, if not contradicted by adjudications, and if compatible with the words of the statute, are entitled to respect." *Id.* at 160; *see also In re Charge to Grand Jury-Treason*, 30 F. Cas. 1047, 1048 (C.C.E.D. Pa. 1851) (No. 18,276) (noting that the definition of treason "is borrowed from the ancient law of England, and its terms must be understood of course in the sense which they bore in that law, and which obtained here when the constitution was adopted") (internal citations omitted).

More recently, the Supreme Court addressed the history and interpretation of the Treason Clause in *Cramer v. United States*, which overturned the treason conviction of an associate of the *Quirin* saboteurs. *Cramer v. United States*, 325 U.S. 1 (1945). The Court paid homage to 25 Edward III, saying it was a "monumental piece of legislation several times referred to in the deliberations of the [Constitutional] Convention," *id.* at 16-17, and that it "cut a bench-mark by which the English-speaking world tested the level of its thought on the subject until

our own abrupt departure from it in 1789." *Id.* at 17-18. The departure to which the Court refers is the increased standard of proof discussed above. The Court did not suggest that the Framers intended any change in the meaning of the elements that were borrowed from 25 Edward III, namely "levying war" and "giving [the enemy] aid and comfort." To the contrary, those borrowed provisions could only be interpreted in light of English history:

> We, of course, can make no independent judgment as to the inward meanings of the terms used in a six-century-old statute . . . . We can read this statute only as our forebears read it – through the eyes of succeeding generations of English judges, to whom it has been the core of all decision, and of common-law commentators, to whom it has been the text.

Id. at 18; *see also Chandler v. United States*, 171 F.2d 921, 929 (1st Cir. 1948) (noting that "in drafting the provision with reference to treason, the framers of the Constitution had much in mind the old English Treason Act of 25 Edw. III" and relying on English precedents to conclude that treason was not territorially limited).

Reference to the English interpretation of the law of treason at the time of the framing of the U.S. Constitution is therefore appropriate because the U.S. Framers borrowed the definition of treason from a particular and ancient English statute. The Framers themselves referred to 25 Edward III at the Constitutional Convention, and federal courts since the ratification of the Constitution have consistently looked to the understanding of treason that accompanied 25 Edward

III in England. Employing the technique adopted by the federal courts and the Supreme Court, Section II analyzes the English conception of the applicability of treason to aliens present within the King's realm.

II. Under English Law, Persons Present Within the King's Realm Were Punished for Treason for Violations of the Duty of Allegiance They Owed to the King in Return for His Protection.

A. The Concept of Allegiance Determined Who Was Triable Under Treason Instead of Military Law for Acts Against the Crown.

The principle that allegiance imposes duties on individuals who are not natural-born subjects of the English Crown has been established since at least the early seventeenth century,[5] when the concept was acknowledged in the landmark *Calvin's Case.* 7 Coke Rep. 1a, 77 Eng. Rep. 377 (1608). Plaintiff Robert Calvin was born in Scotland before its unification with England in 1603 under James I of England (who was concurrently James VI of Scotland). 7 Coke Rep. at 1a-2a, 77 Eng. Rep. at 377-78. The defendants in the case sought to bar Calvin from bringing an action to recover his land, of which, according to plaintiff, they had dissiezed him unjustly. 7 Coke Rep. at 2a, 77 Eng. Rep. at 378.

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[5] As early as the fourteenth century, English law recognized that aliens could establish reciprocal bonds of duty and allegiance as a result of obtaining letters patent granting them the right to be as "'free and entire' as any of the natural born liege-men." Keechang Kim, *Aliens in Medieval Law: The Origins of Modern Citizenship* 52-59 (2001) (citing translation from Letters Patent Issued to John Swart in 1397, *in* Alice Beardwood, *Mercantile Antecedents of the English Naturalization Laws*, 16 Medievalia et Humanistica 75 (1964))).

In arriving at its holding, the Court in *Calvin's Case* developed the concept of allegiance (*ligeance*) to determine whether Calvin was an alien – that is, whether Calvin was born out of allegiance (*ligeance*) to the King. 7 Coke Rep. at 16b, 77 Eng. Rep. at 396. *Calvin's Case* identified the duty a natural-born subject owes to the Crown (*ligentia naturalis*) as one form of allegiance. Importantly for this case, the court went on to recognize the local allegiance of the "alien that is in amity [who] cometh into England, because as long as he is within England, he is within the King's protection [and] therefore so long as he is here, he oweth unto the King a local obedience or ligeance . . . ." 7 Coke Rep. at 5b, 77 Eng. Rep. at 383.[6]

Subsequent case law, as well as the major seventeenth- and eighteenth-century expositors of English law including Lord Coke,[7] William Hawkins,[8] Matthew Hale,[9] Michael Foster,[10] and William Blackstone, reaffirmed and refined

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[6] The court also recognized two other forms of allegiance, the allegiance of individuals who have acquired letters patent conferring denizenship (*ligeantia acquisita*) and the legal allegiance of individuals who have sworn an oath to the King in court. 7 Coke Rep. at 5b, 77 Eng. Rep. at 383.

[7] 1 *The Third Part of the Institutes of the Laws of England* 4-5 (1671) [hereinafter "Coke, *Institutes*"] (citing *Calvin's Case* (1608), 7 Coke Rep. 1a, 77 Eng. Rep. 377, 383 (K.B.)).

[8] 1 *A Treatise on the Please of the Crown* 8 (1716) ("[I]t seems clear, that the subjects of a foreign prince coming into England and living under the protection of our king, may, in respect of that *local ligeance* which they owe to him, be guilty of high treason.")

[9] *The History of the Pleas of the Crown* 59 (1736) [hereinafter "Hale, *Pleas*"] ("[I]f an alien, the subject of a foreign prince in amity with the king live here, and enjoy

this concept of local allegiance.[11] They construed the concept as a form of virtual or implied allegiance, which was similar to the allegiance due from natural-born subjects, because it did not arise as a result of express declaration. Instead, as Hale wrote, local allegiance "obligeth all, that are resident within the king's dominions, and partake of the benefit of the king's protection, *although strangers born.*" Hale, *History* at 62 (emphasis added). By the time Blackstone wrote, it was well-established that "[l]ocal allegiance is such as is due from an alien, or stranger born, for so long time as he continues within the king's dominion and protection." William Blackstone, 1 *Commentaries* at *370.

The logic supporting the concept of local allegiance was that such allegiance was due to the King in return for the King's protection: "[A]s long as [an alien entering on friendly terms] is within England, he is within the King's protection; therefore so long as he is here, he oweth unto the King a local obedience or ligeance, for . . . the one . . . draweth the other." *Calvin's Case*, 7 Coke Rep. at 5b, 77 Eng. Rep. at 383. Foster, writing in the middle of the eighteenth century,

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the benefit of the king's protection, and commit a treason, he shall be judged and executed, as a traitor; for he owes a local allegiance.")

[10] *A Report of Some Proceedings on the Commission of Oyer and Terminer and Goal Delivery for the Trial of Rebels in the Year 1746 in the County of Surry, and of Other Crown Cases, to Which Are Added Discourses upon a Few Branches of the Crown Law* 183 (1762) [hereinafter, "Foster, *Report*"] ("The duty of allegiance, whether natural of local, is founded in the relation the person standeth into the Crown, and in the privileges he deriveth from that relation.").

[11] 1 *Commentaries* at *358–59, *370.

viewed the concomitant relationship between the King's duty of protection and the subject's duty of allegiance as clearly and plainly established: "[p]rotection and allegiance are reciprocal obligations." Foster, *Report* at 183; *see also* Blackstone, 4 *Commentaries* at *83 (observing that the basis of an alien's local allegiance was "an implied contract with the prince, that so long as the one affords protection, so long the other will demean himself faithfully.").

B. Nearly All Non-Natural Subjects Present in the King's Realm Owed Local Allegiance and Were Subject to the Law of Treason.

Under the flexible and expansive concept of local allegiance, virtually all non-natural subjects on English territory could be brought under the jurisdiction of English domestic law. Matthew Hale, *Prerogatives of the King* (Selden Society, D.E.C. Yale ed., 1976) (manuscript substantially completed circa 1660) [hereinafter, "Hale, *Prerogatives*"] ("[T]hose that come under the notion of a soldier or an auxiliary or an enemy are persons to whom martial law extends, *otherwise not.*") (emphasis added). "Friendly aliens" within the realm—i.e., the subjects of "sovereigns in amity," 1 Coke, *Institutes* at 4-5—were presumed to owe a duty of local allegiance for the duration of their sojourn. Even "alien enemies"—i.e., the subjects of an enemy sovereign—could also fall under the doctrine, provided that they had secured the King's permission to be present within the

realm.[12] Those subject to a duty of allegiance and tried for treason, including aliens, received common law procedural protections. *See* Case LVIII, (1220-1623) Jenk 216, 145 E.R. 147 (Exch. Ch.) ("If an alien, whose King is in amity with our King, joins with rebels: he shall he put to death as a traitor, by commissioners of oyer aid terminer, or the judges of the King's Bench.").

Regarding the first category, an alien subject of a friendly sovereign physically present in England owed a local allegiance to the Crown unless he "first openly remov[ed] himself from the king's protection." Hale, *History* at 92; *see also Rex & Regina v. Tucker*, (1694) 1 Ld. Raymond 2, 91 Eng. Rep. 898 (P.C.) ("[A]n alien friend, who abides in the kingdom, owes allegiance to the King, and

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[12] In some circumstances, even people outside of the realm could nonetheless be subject to a duty of local allegiance as a result of the alien's possession of an instrument – such as a passport – that entitled the alien to the King's military, diplomatic, and legal protection. An assembly of the judges of England gathered together in 1707 at the Queen's command and laid down the following expansive rule concerning the scope and duration of the duty of local allegiance: "If an alien, seeking the protection of the Crown, and having a family and effects here, should, during a war with his native country, go thither, and there adhere to the King's enemies for purposes of hostility, he might be dealt with as a traitor." Foster, *Report* at 185; *see also Joyce v. Director of Public Prosecutions* (1946) A.C. 347, 347 (12-13) (holding that a long-term resident of the United Kingdom could be tried for treason, even though the defendant had left the country and accepted an official position with a declared enemy of England, because defendant's possession of a British passport endowed him with the ability to invoke the Crown's protection). *Cf.* 1 Coke, *Institutes* at 4-5 ("[A]ll aliens that are within the realme of England, and whose soveraignes are in amity with the king of England, are within the protection of the king, and doe owe a locall obedience to the king ... and if they commit high treason against the king, they shall be punished as traytors, but otherwise it is of an enemy.").

therefore he may commit treason . . . ."). The only exception to this general presumption was someone who entered the country for the sole and immediate purpose of taking action against the sovereign. Hale, *History* at 59 ("[I]f an alien enemy come into this kingdom hostilely to invade it, if he be taken, he shall be dealt with as an enemy, but not as a traitor, because he violates no trust nor allegiance.").

Perhaps the best—and most frequently cited—example of a hostile invader is the case of Perkin Warbeck.[13] Warbeck was a native of Flanders—a neutral sovereign not at war with England—who claimed to be the Duke of York and was captured after leading several unsuccessful armed incursions into England for the purpose of seizing the throne from Henry VII. *See* Sir John Baker, 6 *The Oxford History of the Laws of England, 1483–1558*, at 59, 216-17 (2003). English jurists held that Warbeck was an alien coming to invade the country who was taken in war, and therefore could not be indicted for treason under common law. Instead, he was properly tried under martial law. *See Calvin's Case*, 7 Coke Report 6 b, 77 ER at 384 (1569) (citing *Perkin Warbeck's Case* (1499) (from Edward Griffin's and James Hobart's reports, as noted in Reports from the Lost Notebooks of Sir

[13] *R. v. Schiever*, (1759) 97 Eng. Rep. 551 (K.B.) is another example. In that case, the court adjudicated the habeas petition of a subject of Sweden, a neutral power, who had been captured aboard a French privateer during the Seven Years' War while fighting against the English. *Id.* at 551. The court reviewed the evidence presented by the petitioner before determining that he was a prisoner of war and, therefore, lawfully detained. *Id.* at 552.

James Dyer, 109 *Selden Society* 106 (Sir John Baker ed., 1993) (from notebook IV, originally composed during Hillary Term 1571)); *see also* Hawkins, *A Treatise on the Please of the Crown* 8, 9 (1716) (discussing Warbeck case); Hale, *Prerogatives* ("[M]artial [law] reacheth only to those that are a part of the army [and] ... to those that are enemies, as in the case of Perkin Warbeck.").

Even subjects of hostile powers could be granted rights and duties under English domestic law if the King had granted them express permission to enter or to remain within the realm.[14] Hale, for example, distinguished subjects of hostile foreign sovereigns who entered England after the commencement of hostilities as liable to be "dealt with as an enemy, *viz*, taken, and ransomed," from aliens of the same hostile nation who entered with the King's permission and resided "under the king's protection as . . . subject[s]" and who therefore "may be indicted of high treason *contra ligeantiae suae debitum*." Hale, *History* at 59, 94. Similarly, James

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[14] Indeed, subjects of enemy powers who found themselves on English territory at the beginning of hostilities were accorded significant concomitant rights and duties under English law as early as the Magna Carta, which directed the King at the outbreak of hostilities to attach merchants who were subjects of the hostile sovereign "without harm to their body or goods, till it be known, how the English merchants are used in the hostile country." Hale, *History* at 60. If it turned out that the enemy sovereign did not harm the English merchants within its territory, then the enemy aliens within English territory "shall likewise be used [in England]; so that in this case such merchants, tho alien enemies, have the benefit of the king's protection, and so owe a local alligeance, which if they violate, they may be dealt with as traitors, not as enemies." *Id.* These rights and duties were later codified. *Id.* at 94 (citing The Staple, Merchant Strangers, Money Act, 1353, 27 Edw. III, c. 17).

Ashley wrote that a subject of a foreign hostile sovereign who is permitted safe conduct by the King must be treated under English law as a "freeman because he has the protection of the king and thus . . . must have the privilege of the laws of the realm." *Serjeant Francis Ashley's Reading on Magna Carta*, cap. 29, Mich. 14 James I in the Middle Temple, British Library, Harleian Manuscript 4841, ff. 6-7 (1616) (trans. Paul Halliday). Thus, two subjects of Portugal were tried for treason after conspiring with the Queen Elizabeth's doctor to poison her even though England was at war with Portugal; despite their "enemy alien" status, the men were subject to allegiance because they had been living at the Queen's court and under her protection. *Calvin's Case,* 7 Coke Report 6 b, 77 Eng. Rep. at 384 (citing *Case of Emanuel Longe Tynceo [sic], Stephen Ferrera de Gama, and Roger Lopez*, The National Archives KB29/231, m. 83v (1594)).

Under longstanding English precedent, therefore, birthright alone is not determinative of whether an individual is subject to the duties and protections of domestic English law. Except in rare circumstances, aliens present within the realm are subject to a duty of local allegiance and therefore reciprocally subject to domestic English law – such as the law of treason – rather than the laws of war for acts against the King. In the case of Mr. al-Marri, who is the subject of a "friendly" sovereign and resided legally for several months within the U.S, English legal history suggests that civilian, not military, law should apply.

III. The Treason Clause Applies to All Those Who Owe Allegiance to the United States, Including Non-Citizens Present in the United States.

The government cites Justice Scalia's dissenting opinion in *Hamdi v. Rumsfeld*, 542 US 507, 558-59 (2004) (Scalia, J., dissenting) to justify differential treatment of citizens and non-citizens accused of crimes against the state. Justice Scalia grounded his argument that citizens could not be detained as enemy combatants in early English and American treason law, pointing to the many instances in which "[c]itizens aiding the enemy have been treated as traitors subject to the criminal process." *Id.* at 559.[15] Justice Scalia acknowledged that the Founders "inherited" their understanding of the bounds of treason law from English jurisprudence, but wrongly conflated the term "subject" with "citizen." *Id.* That misapprehension, relied upon by the government in this case and apparently accepted by the district court, distorts both English and American common law,

[15] As evidence that citizens were entitled to special protections unavailable to non-citizens, Justice Scalia in his dissent in *Hamdi*, 542 U.S. at 559, pointed to instances in which citizens were tried for treason when aliens were subjected to military authority for the same conspiracy. These cases, however, are not instructive, for they all involved citizens and subjects of enemy states who were caught invading the United States; thus, the alien defendants in those cases were in the same position as the invader Warbeck, and the question of temporary or local allegiance was simply not at issue. *See Hamdi*, 452 U.S. at 560-61 (Scalia, J., dissenting) (citing Ex *parte Quirin*, 317 U.S. 1, 20-22 (1942) (upholding military execution of German soldiers who arrived on U.S. soil via submarine armed and in uniform); *United States ex rel. Wessels v. McDonald*, 265 F. 754, 757-58 (E.D.N.Y. 1920) (upholding military detention of Fricke's co-conspirator, German naval officer who had entered United States on forged Swiss passport and under assumed name)); *United States v. Fricke*, 259 F. 673 (S.D.N.Y. 1919) (indictment of U.S. citizen for treason for providing aid and comfort to German spy).

which has consistently held that citizens and non-citizens alike are subject to the law of treason.

American jurisprudence has recognized the concept of "local allegiance" since the formation of the Treason Clause itself. In 1790, James Wilson—Constitutional Convention delegate and United States Supreme Court justice who had served as defense counsel in several prominent Revolutionary-era treason trials—wrote: "[W]ho may commit treason against the United States? To this the answer is – those who owe obedience to their authority." James Wilson, *Of Crimes Immediately Against the Community, in Lectures on Law* 416 (1790). Wilson explicitly referenced the English treason statute, 25 Edward III, and acknowledged that he had substituted "obedience" for the traditional word "allegiance."[16] *Id.* Wilson's simple formulation overrode the relatively convoluted tests in English law relating to who owed local allegiance and provided a clearer method for assessing who could be subject to treason.

Since Wilson propagated his understanding of the Treason Clause he helped draft, U.S. courts have repeatedly held that an alien in foreign territory owes a duty

[16] For further evidence that the United States imported the concept of temporary allegiance and susceptibility to treason from England, *see* Larson, *supra*, 154 U. Pa. L. Rev. at 878-90; Bradley Chapin, *The American Law of Treason* 71 (1964); James Willard Hurst, *The Law of Treason in the United States* 245–46 (1971) (citing *Gillars v. United States*, 182 F.2d 962, 980 (D.C. Cir. 1950)); Robert D. Powers, Jr., Comment, *Treason By Domiciled Aliens*, 17 Mil. L. Rev. 123, 132 (1962).

of local allegiance to the territorial sovereign.[17] In the treason context, courts have held that violations of an alien's duty of temporary allegiance can give rise to a treason charge. *See United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 97 (1820) (Marshall, C.J.) ("Treason is a breach of allegiance, and can be committed by him only who owes allegiance *either perpetual or temporary*.") (emphasis added).

The leading case applying the Treason Clause to non-citizens is *Carlisle v. United States*, 83 U.S. 147 (1873). In *Carlisle*, British citizens who were residents of the United States during the Civil War sued for the return of cotton that had

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[17] In evaluating cases where a citizen of one state finds himself in another state, courts have held that mere presence entails a duty of temporary allegiance. Given the strength of individual states vis-à-vis the federal government at the time these cases were decided, an analogy to the modern day duty of temporary allegiance by an alien to the United States as a whole is not inapt. *See The Pizarro*, 15 U.S. 227, 246 (1817) ("Indeed, in the language of the law of nations . . . a person domiciled in a country, and enjoying the protection of its sovereign, is deemed a subject of that country. He owes allegiance to the country, while he resides in it; temporary, indeed, if he had not, by birth or naturalization, contracted a permanent allegiance; but so fixed that, as to all other nations, he follows the character of that country, *in war as well as in peace*.") (emphasis added); *Puckett v. Pope*, 3 Ala. 552, 555 (1842) ("A citizen of one State, who comes within the territory of another, contracts a temporary allegiance to it, and may be subjected to the process of its Courts, and bound personally by a judgment there rendered."); *Dunham v. Lamphere*, 69 Mass. 268, 275 (1855)("[T]hose inhabitants of other states, who come within the territorial limits of this state, and thereby owe a temporary allegiance, and become amenable to its laws, have no just reason to complain, if, when within those limits, and enjoying benefits in common with our own citizens, they are bound to conform to a salutary law, necessary for the common good."); *Bissell v. Briggs*, 9 Mass. 462, 470 (1813) ("Now, an inhabitant of one state may, without changing his domicile, go into another; he may there contract a debt or commit a tort; and while there he owes a temporary allegiance to that state, is bound by its laws, and is amenable to its courts.").

been seized by the Union Army. They argued that they had committed treason by aiding the Confederacy, and were thus subject to a presidential pardon issued for all those guilty of treasonous acts during the Civil War. The Court held, "[b]y thus furnishing materials for the prosecution of the war whilst they were domiciled in the country, knowing the uses to which the materials were to be applied, the claimants became participators in the treason of the Confederates." *Id.* at 150. The Supreme Court found in favor of the British citizens, holding that they were entitled to sue for return of their cotton.

The Supreme Court reached its holding for the British citizens by differentiating between the types of allegiance due from citizens and non-citizens present in the United States. The Court stated:

> By allegiance is meant the obligation of fidelity and obedience which the individual owes to the government under which he lives, or to his sovereign in return for the protection he receives. It may be an absolute and permanent obligation, or it may be a qualified and temporary one. The citizen or subject owes an absolute and permanent allegiance to his government or sovereign, or at least until, by some open and distinct act, he renounces it and becomes a citizen or subject of another government or another sovereign. The alien, whilst domiciled in the country, owes a local and temporary allegiance, which continues during the period of his residence.

Id. at 154. However, the Court clarified that violation of *either* type of allegiance would constitute treason. In reference to the British citizens at issue in the case, the Court held, "[t]hey were, as domiciled aliens in the country prior to the rebellion, under the obligation of fidelity and obedience to . . . the United States.

They subsequently took their lot with the insurgents, and would be subject . . . to punishment under the laws [of treason] they violated but for the [Presidential pardon]." *Id.* at 155.

The *Carlisle* Court extensively quoted from an 1851 report by then-Secretary of State Daniel Webster to the President discussing temporary allegiance and treason with reference to non-citizens in the United States. Webster wrote,

> Every foreigner born residing in a country owes to that country allegiance and obedience to its laws so long as he remains in it, as a duty upon him by the mere fact of his residence, and that temporary protection which he enjoys, and is as much bound to obey its laws as native subjects or citizens. This is the universal understanding in all civilized states, and nowhere a more established doctrine than in this country.

83 U.S. at 155 (quoting Webster and approvingly referencing Hale and Foster for the same proposition). Webster was equally explicit that non-citizens who violate the duty of allegiance are subject to charges of treason: "[A]n alien or a stranger born, for so long a time as he continues within the dominions of a foreign government, *owes obedience to the laws of that government, and may be punished for treuson* [sic] *or other crimes as a nativeborn subject might be.*" *Id.* at 155 (quoting Webster's report) (emphasis added). Webster's report demonstrates that it has historically been the policy not just of the courts, but also of the Executive Branch, to recognize violations of a non-citizen's duty of allegiance as treason.

Other federal courts, both during and prior to the Civil War, similarly recognized that non-citizens were subject to treason for violations of their duty of allegiance. In Grand Jury instructions on "Treason," the District Court of Massachusetts, interpreting St. 1790, c. 9, § 1 – the early federal treason statute – differentiated between the types of allegiance due from citizens and non-citizens present in the United States. The Court instructed:

> Allegiance is of two kinds: that due from citizens, and that due from aliens resident within the United States. Every sojourner who enjoys our protection, is bound to good faith toward our government, and although an alien, he may be guilty of treason by cooperating either with rebels or foreign enemies.

Charge to Grand Jury-Treason, 30 F. Cas. 1039, 1040 (D. Mass. 1861) (No. 18,273); *see also In re Charge to Grand Jury-Treason*, 30 F. Cas. 1047, 1049 (C.C.E.D. Pa. 1851) (No. 18,276) ("[T]reason against the United States may be committed by any one resident or sojourning within its territory and under the protection of its laws, whether he be a citizen or alien.") (citing Hale, *The History of the Pleas of the Crown* 59, 60, 62 (1736) and Hawkins, 1 *A Treatise on the Please of the Crown* c. 2, § 5 (1716)).

The English common law conception that non-citizens owe temporary allegiance to the territorial sovereign and are subject to treason charges for violations of that allegiance has been adopted by U.S. courts and the executive branch throughout history. This conception of treason is preserved in the current

treason statute, which states, "Whoever, *owing allegiance to the United States*, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason." 18 U.S.C. § 2381 (2000).[18] Contrary to Justice Scalia's suggestion, discussed above, "*whoever, owing allegiance*" is not synonymous with "citizen," either explicitly or implicitly, given the long history of English and U.S. application of treason law to citizens and non-citizens alike.

This unbroken heritage does not support the extension of military jurisdiction over a non-citizen residing in the United States. As a Qatari national who had entered the United States legally and lived here openly with his family for several months, al-Marri should be presumed to have been subject to a duty of local allegiance, and absent evidence that he was a hostile invader, should be released from military custody. To the extent the government believes that al-Marri committed illegal acts against the United States, he should be charged criminally and afforded the rights due any person present in the United States, citizen and non-citizen alike.

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[18] Indeed, reference to "owing allegiance" has been a common formulation in defining the distinction between those subject to military jurisdiction and civilians. *See, e.g.,* Act of Apr. 10, 1806, ch. 20, art. 101, § 2, 2 Stat. 359, 371 (stating that "all persons *not citizens of, or owing allegiance to,* the United States of American, who shall be found lurking as spies, in or about the fortifications for encampments of the armies of the United States" could be sentenced to death by court-martial) (emphasis added).

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reverse the district court decision and either grant Appellant's petition to be released from military custody or remand this case for further fact-finding as to whether he is properly subject to military jurisdiction.

Respectfully submitted,

November 20, 2006

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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