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Preserving the Writ: the Military Commission Act's Unconstitutional Attempt to Deprive Lawful Resident Aliens of Their Habeas Corpus Rights

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Comment

PRESERVING THE WRIT: THE MILITARY COMMISSION ACT'S UNCONSTITUTIONAL ATTEMPT TO DEPRIVE LAWFUL RESIDENT ALIENS OF THEIR HABEAS CORPUS RIGHTS

On September 11, 2001, members of the al Qaeda terrorist network struck targets in the United States, killing nearly 3,000 people in the deadliest attack of its kind on United States soil.[1] Since then, the United States Government has taken several legislative and executive measures to prevent another terrorist attack.[2] Specifically, President George W. Bush and the executive branch have repeatedly employed the Authorization for Use of Military Force (the AUMF), a joint resolution passed by Congress immediately after the September 11th attacks,[3] as legal justification for detaining whomever they deem to be an "enemy combatant."[4] Ali Saleh Kahlah al-Marri was one such individual.[5]

On December 12, 2001, al-Marri, a Qatari[6] national and lawfully present alien pursuing graduate studies at Bradley University in Peo-

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1. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 4–14, 311, 363 (2004), *available at* http://www.gpoaccess.gov/911/pdf/fullreport.pdf [hereinafter 9/11 REPORT] (offering an exhaustive account of the circumstances surrounding the September 11, 2001 terrorist attacks and recommendations designed to prevent similar attacks in the future).

2. *See, e.g.*, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, 272 (codified in scattered sections of the U.S.C.); Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 note (Supp. III 2003)); Military Order of November 13, 2001, § 1(e), 3 C.F.R. 918, 918 (2002), *reprinted in* 10 U.S.C. § 801 (Supp. V 2005) (regarding the detention, treatment, and trial of certain noncitizens in the war against terrorism).

3. §§ 1–2, 115 Stat. at 224–25 (codified at 50 U.S.C. § 1541 note).

4. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 509–10, 513, 517 (2004) (plurality opinion) (concluding that the detention of an American citizen captured in Afghanistan and classified as an "enemy combatant" was congressionally authorized by the AUMF); Padilla v. Hanft, 423 F.3d 386, 388–89 (4th Cir. 2005) (holding that the President possessed the authority, pursuant to the AUMF, to militarily detain an American citizen who took up arms with the enemy in a foreign combat zone); *see also* Michelle Maslowski, Note, *Classification of Enemy Combatants and the Usurpation of Judicial Power by the Executive Branch*, 40 IND. L. REV. 177, 195 (2007) (stating that the Executive relies on the President's authority under the AUMF to classify individuals as enemy combatants).

5. Al-Marri v. Wright, 487 F.3d 160, 163, 174 (4th Cir. 2007), *reh'g en banc granted.*

6. Qatar is a friendly nation to the United States and has assisted the United States with its fight against terrorism. JEREMY M. SHARP, CONG. RESEARCH SERV., CRS REPORT FOR

ria, Illinois, was apprehended by FBI agents.[7] The agents arrested al-Marri in Peoria and alleged that he was a material witness in the Government's investigation into the September 11th (9/11) terrorist attacks.[8] Al-Marri was subsequently indicted on numerous domestic crimes, to which he pled not guilty.[9] However, on June 23, 2003, before his formal trial commenced, President Bush designated al-Marri an "enemy combatant,"[10] and he was transferred to the Naval Consolidated Brig in South Carolina, where he has remained in military custody ever since.[11]

Al-Marri's is one of several "enemy combatant" cases that has arisen from the Bush administration's post-9/11 detention policies.[12] Perhaps the most striking feature of these policies is that the Government has repeatedly attempted to strip away federal jurisdiction over detainees' habeas corpus petitions, regardless of the country of which the detainee is a citizen.[13] The Government's latest attempt, and the one currently at the forefront of the jurisdictional dispute in al-Marri's

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CONGRESS, QATAR: BACKGROUND AND U.S. RELATIONS 8–9 (2004), http://www.fas.org/man/crs/RL31718.pdf.

7. Al-Marri v. Bush, 274 F. Supp. 2d 1003, 1004 (C.D. Ill. 2003), *aff'd sub nom.* Al-Marri v. Rumsfeld, 360 F.3d 707 (7th Cir. 2004). Al-Marri was arrested based on instructions from the United States Attorney's Office for the Southern District of New York. *Id.*

8. *Id.*

9. *Id.* Specifically, on January 28, 2002, al-Marri was formally arrested based on a criminal complaint that charged him with credit card fraud, and on February 6, 2002, he was indicted and charged, in the United States District Court for the Southern District of New York, with possession of at least fifteen unauthorized or counterfeit access devices with the intent to defraud. *Id.* Almost one year later, al-Marri was charged in a second, six-count indictment, which included allegations that he had made false statements to the FBI and false statements related to a bank application. *Id.* Al-Marri again pled not guilty and the court eventually dismissed the indictments on May 12, 2003 for improper venue. *Id.* Immediately following dismissal, al-Marri was arraigned in the United States District Court for the Central District of Illinois, Peoria Division, due to a new criminal complaint. *Id.* As a result, al-Marri returned to Peoria from New York, where he was then indicted on counts identical to those with which he had been charged in New York. *Id.*

10. *Id.* Soon after the President's declaration, the court granted the U.S. Attorney's motion to dismiss al-Marri's indictment with prejudice, despite objections from al-Marri's counsel. *Id.*

11. Al-Marri v. Wright, 487 F.3d 160, 165 (4th Cir. 2007), *reh'g en banc granted.* On June 11, 2007, a panel of the United States Court of Appeals for the Fourth Circuit ruled that the military could not detain al-Marri indefinitely and, in granting him habeas relief, stated that he must either be returned to civilian prosecutors for trial on criminal charges, or freed. *Id.* at 164. However, shortly thereafter, the court scheduled a rehearing en banc for the case, to occur on October 31, 2007. United States Court of Appeals for the Fourth Circuit, Richmond, Va. (10/30/2007–11/02/2007 Session), http://pacer.ca4.uscourts.gov/calendar/internetcaloct302007ric.pdf (last visited May 5, 2008).

12. *See infra* Part I.D.

13. *See* Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635–36 (to be codified at 28 U.S.C. § 2241(e)); Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, § 1005(e)(1), 119 Stat. 2739, 2741–42 (codified at 28 U.S.C.

case,[14] is section 7 of the recently enacted Military Commissions Act of 2006 (the MCA).[15] If applied to these individuals,[16] the Act would take away the right of an alien lawfully residing in the United States, detained as an enemy combatant, to petition for habeas corpus in a federal court.[17] However, absent a valid suspension of the writ,[18] Congress cannot constitutionally remove such jurisdiction, although it may provide a detainee with an adequate remedial substitute without effectuating a suspension of the writ.[19] In the case of resident alien detainees captured and detained within the United States, like al-Marri, no adequate, alternative remedy has been provided.[20]

This Comment analyzes whether aliens lawfully residing in the United States, like al-Marri, have a constitutional right to habeas corpus and, moreover, whether the recently enacted MCA, if applied to this class of individuals, violates that right.[21] The Background includes a brief overview of the writ itself and its interpretation by the Supreme Court of the United States in landmark cases.[22] However, the Background focuses primarily on the post-9/11 decisions of the Court, particularly those involving enemy combatants and their habeas corpus rights, and the complex legislation that these cases

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§ 2241(e) (Supp. V 2005), *amended by* § 7(a), 120 Stat. at 2635–36 (to be codified at 28 U.S.C. § 2241(e))).

14. *Al-Marri*, 487 F.3d at 166.

15. § 7, 120 Stat. at 2635–36 (§ 7(a) to be codified at 28 U.S.C. § 2241(e); § 7(b) to be codified at 28 U.S.C. § 2441 note).

16. This Comment addresses whether section 7 of the MCA is unconstitutional if it is applied to al-Marri and if it restricts his constitutional right to petition for habeas corpus. Some, however, argue that the MCA does not restrict the constitutional right to habeas corpus or that principles of statutory interpretation dictate that the MCA does not apply to individuals like al-Marri and, therefore, that a court need not address the difficult constitutional questions involved because of the doctrine of constitutional avoidance. *Al-Marri*, 487 F.3d at 168, 171–72. Following this logic, the MCA would have no effect on al-Marri's constitutional right to habeas corpus. Thus, even under these analyses, jurisdiction over his habeas petition properly resides with the federal judiciary.

17. § 7(a), 120 Stat. at 2635–36 (to be codified at 28 U.S.C. § 2241(e)).

18. The United States Constitution expressly prohibits suspension except in cases of actual "Rebellion or Invasion," where "the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2.

19. *See infra* Part I.A.

20. *See* Appellants' Response to Appellee's Motion to Dismiss for Lack of Jurisdiction at 33–34, 38, Al-Marri v. Wright, 487 F.3d 160 (4th Cir. 2007), *reh'g en banc granted* (No. 06-7427) ("[A]l-Marri would, at best, be subjected to a military status hearing designated for battlefield combatants without review by an Article III court of his legal claim that, as a civilian arrested by the FBI at home in the United States, he is not subject to military jurisdiction at all.").

21. *See infra* Part II.

22. *See infra* Part I.A–C.

have produced.[23] The Analysis argues that the factual distinctions[24] of the al-Marri case warrant a constitutional analysis,[25] and illustrates why the MCA as applied to such facts is unconstitutional.[26] The discussion ends by calling on federal courts to retain jurisdiction over the habeas corpus petitions of resident aliens who are detained as enemy combatants within the United States.[27]

I. BACKGROUND

A. The Writ of Habeas Corpus

A writ of habeas corpus issued by a federal court is the traditional remedy for unlawful imprisonment.[28] For centuries, it has been "esteemed the best and only sufficient defence [sic] of personal freedom."[29] Its purpose is to provide an individual subjected to detention with a meaningful opportunity to challenge the factual basis for his detention in court.[30] Thus, the writ has historically "served as a means of reviewing the legality of detention, and it is in that context that its protections have been strongest."[31]

As a fundamental principal of personal freedom, the Framers of the United States Constitution incorporated the writ's protections into the Constitution's Suspension Clause, which states that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require

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23. *See infra* Part I.D.

24. This Comment uses the phrase "factual distinctions" to mean circumstances specific to al-Marri's case that distinguish it from Supreme Court precedent, namely, al-Marri's status as an alien lawfully residing in the United States, his lack of affiliation with an enemy's military, and his detention within the borders of the United States.

25. *See infra* Part II.A.

26. *See infra* Part II.B.1–2.

27. *See infra* Part II.B.3.

28. Chin Yow v. United States, 208 U.S. 8, 10–11, 13 (1908) (granting a petition for habeas corpus by a Chinese person who alleged that a steamship company unlawfully detained him after immigration authorities denied him entrance to the United States, despite his status as a United States resident and citizen).

29. *Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 95 (1868).

30. Hamdi v. Rumsfeld, 542 U.S. 507, 536–37 (2004) (plurality opinion); *see also* Steven R. Swanson, *Enemy Combatants and the Writ of Habeas Corpus*, 35 ARIZ. ST. L.J. 939, 945–46 (2003) (noting that the writ of habeas corpus "'is the appropriate remedy to ascertain[ ] whether any person is rightfully in confinement or not, and the cause of his confinement; and if no sufficient ground of detention appears, the party is entitled to his immediate discharge'" (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1333 (1833), *available at* http://press-pubs.uchicago.edu/founders/documents/a1_9_2s16.html)).

31. INS v. St. Cyr, 533 U.S. 289, 301 (2001).

it."[32] The Framers intentionally limited the legislature's power to suspend the writ so as to guard against temporary suspension, as well as permanent abrogation, of its core protections.[33] Until now, this limitation has been effective, as Congress has only suspended the writ in "the rarest of circumstances."[34] In the absence of such circumstances, namely rebellion or invasion, it is unconstitutional for Congress to eliminate the writ;[35] however, providing a substitute remedy that is both adequate and effective to determine the legality of an individual's detention does not result in suspension of the writ.[36]

B. The Civil War

1. Ex Parte Milligan

Discussions about whether the United States Government can legally detain, try, or sentence an individual by military tribunal usually begin with *Ex parte Milligan*.[37] Milligan, a United States citizen, was arrested during the Civil War and charged with aiding the Confederacy.[38] Milligan was immediately taken into military custody, tried by a military commission, and sentenced to execution.[39] Milligan subsequently filed a petition for habeas corpus, contending that the mili-

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32. U.S. CONST. art. I, § 9, cl. 2. A federal statute confers jurisdiction on federal courts to grant writs of habeas corpus. 28 U.S.C. § 2241(a) (2000). Specifically, the statute provides that "[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." *Id.* The Supreme Court has stated that this statute "implements the constitutional command that the writ of habeas corpus be made available." Jones v. Cunningham, 371 U.S. 236, 238 (1963).

33. Brief of Amici Curiae Professors of Constitutional Law and Federal Jurisdiction Advocating Denial of Motion to Dismiss (Reversal) at 4–5, Al-Marri v. Wright, 487 F.3d 160 (4th Cir. 2007), *reh'g en banc granted* (No. 06-7427).

34. *Hamdi*, 542 U.S. at 525.

35. U.S. CONST. art. I, § 9, cl. 2.

36. Swain v. Pressley, 430 U.S. 372, 381 (1977) (holding that the writ is not suspended when a collateral remedy that is "neither inadequate nor ineffective to test the legality of a person's detention" is provided); *see also St. Cyr*, 533 U.S. at 305 (explaining that "a serious Suspension Clause issue" would arise if legislation withdrew access to the writ of habeas corpus and offered "no adequate substitute"); Janet Cooper Alexander, *Jurisdiction-Stripping in a Time of Terror*, 95 CAL. L. REV. 1193, 1199–1200 (2007) (noting that the Suspension Clause would not "be violated by withdrawal of habeas jurisdiction so long as Congress provided an adequate statutory alternative for judicial review of detentions").

37. 71 U.S. (4 Wall.) 2 (1866).

38. *Id.* at 6. Specifically, Milligan was charged with the following: (1) conspiring against the United States government; (2) offering "'aid and comfort'" to the rebels; (3) inciting insurrection; (4) engaging in disloyal practices; and (5) violating the laws of war by aiding the rebels through a secret organization. *Id.* at 58–59.

39. *Id.* at 6–7, 107.

tary commission had no jurisdiction over him because he was a United States citizen who was not a resident of any rebel state.[40]

The Supreme Court agreed, holding that the military commission had no legal jurisdiction to try and sentence Milligan.[41] The Court reasoned with the facts to reach this conclusion, emphasizing that Milligan was neither a resident of a rebel state, nor a prisoner of war, and he had also never served in the military or navy.[42] Rather, he was a long-time resident of a nonrebellious state, Indiana, and had been arrested at his home by the United States military.[43] The Court did not deny that the crimes imputed to Milligan were of a grave nature, but found that as a citizen of Indiana, he should have been tried by the Indiana courts, if such action was warranted.[44] In essence, the *Milligan* Court concluded that when the civil courts are open and functioning, Congress cannot grant the power to subject civilians unaffiliated with military service to military trial.[45]

C. World War II

1. Ex Parte Quirin

During World War II and its aftermath, the Supreme Court decided a pair of cases concerning the rights of enemy aliens. The first case, *Ex parte Quirin*,[46] involved the trial by military commission of several agents of Nazi Germany who had secretly entered the United States with plans to commit acts of sabotage.[47] Although each of these petitioners had previously lived in the United States, all were born in Germany.[48] The civil courts were open when the petitioners were apprehended, but President Franklin D. Roosevelt appointed a military commission to try the alleged saboteurs.[49] The petitioners argued

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40. *Id.* at 108.
41. *Id.* at 107.
42. *Id.* at 107, 118, 121–22, 131.
43. *Id.* at 118, 131.
44. *Id.* at 130–31. The Court stated:

> If it was dangerous, in the distracted condition of affairs, to leave Milligan unrestrained of his liberty . . . the *law* said arrest him, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law.

Id. at 122.
45. *Id.* at 121–22.
46. 317 U.S. 1 (1942).
47. *Id.* at 21–22.
48. *Id.* at 20.
49. *Id.* at 22–24. President Roosevelt's proclamation of July 2, 1942 specifically stated that all citizens, subjects, or residents of nations at war with the United States who entered the United States during war and were charged with preparing or attempting to commit

that the President lacked the statutory and constitutional authority to try them in such a manner, but the Court disagreed.[50] The Court upheld the authority of the military commission and denied the petitioners' applications for leave to file petitions for habeas corpus because their acts constituted offenses against the laws of war, for which the Constitution authorizes trial by military commission.[51]

The Government had claimed that the petitioners could not access the courts given their status as enemy aliens and because the President's proclamation prevented them from receiving a hearing.[52] Although the Court decided that trial by the military commission was permissible, it specifically retained the right to consider and determine whether the President's proclamation applied to specific cases.[53] The Court also concluded that neither the President's proclamation, nor the fact that the case involved enemy aliens, barred the judiciary from considering the petitioners' claims that their trial by military commission was prohibited by the laws and Constitution of the United States.[54] *Ex parte Quirin*, therefore, announced the Supreme Court's penchant for retaining jurisdiction over the habeas petitions of detained combatants.

2. Johnson v. Eisentrager

Eight years after *Quirin*, the Court in *Johnson v. Eisentrager*[55] again relied heavily on the particular facts of the case to issue a decision regarding enemy aliens and their habeas corpus rights.[56] This time, the petitioners seeking habeas corpus were German nationals arrested by the United States military in China and imprisoned in Germany after World War II for violating the laws of war.[57] After conviction by a military commission, the prisoners petitioned for writs of habeas corpus in federal court on the grounds that their trial, conviction, and imprisonment violated the Fifth Amendment and other constitutional provisions.[58] The Court upheld the district court's order dismissing the petition, holding that there was no basis for federal jurisdiction

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acts of sabotage would "'be subject to the law of war and to the jurisdiction of military tribunals.'" *Id.* at 22–23.

50. *Id.* at 24–25.

51. *Id.* at 45–46, 48.

52. *Id.* at 24–25.

53. *Id.* at 25.

54. *Id.*

55. 339 U.S. 763 (1950).

56. *Id.* at 765, 768, 777–78, 790–91.

57. *Id.* at 765–66. Petitioners had been convicted of participating in, allowing, or ordering military activity against the United States after Germany's surrender. *Id.* at 766.

58. *Id.* at 765–67.

and that the military had proper authority to try and convict these prisoners.[59] More specifically, the Court found no basis for issuing the writ to enemy aliens who had not been within the territorial jurisdiction of the United States at any relevant time during their captivity or legal proceedings.[60]

However, the Court spoke at length about the legal status of aliens, and implied that if the petitioners had been resident aliens, instead of enemy aliens abroad, the Court might have invoked jurisdiction and ruled on the merits of the case.[61] Specifically, the Court stated that since 1886, constitutional guarantees like the right to due process "have extended to the person and property of resident aliens."[62] Those constitutional protections, the Court further reasoned, are typically only impaired when the United States is at war with the alien's "nation of . . . allegiance."[63] The Court recognized that the "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."[64] Nevertheless, the Court emphasized that the vulnerability of the alien's wartime status depended upon whether he was an alien of friendly or enemy allegiance.[65]

D. The Aftermath of 9/11

1. Authorization for Use of Military Force

Immediately after 9/11, Congress passed the AUMF, which authorized the President "to use all necessary and appropriate force" against "nations, organizations, or persons" associated with the September 11th attacks to prevent future acts of terrorism against the United States.[66] Since that time, the Executive has consistently claimed that the detention of enemy combatants is inherent to warfare and authorized by the AUMF's umbrella phrase "all necessary and appropriate force."[67] This form of capture and detention has resulted

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59. *Id.* at 790–91.
60. *Id.* at 768.
61. *Id.* at 770–78.
62. *Id.* at 771 (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)).
63. *Id.*
64. *Id.* at 772.
65. *Id.* at 771.
66. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 note (Supp. III 2003)).
67. Brief for the Respondent-Appellee at 22–23, Al-Marri v. Wright, 487 F.3d 160 (4th Cir. 2007), *reh'g en banc granted* (No. 06-7427); *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 516–18 (2004) (plurality opinion) (sustaining the Government's alternative argument that the AUMF authorizes the Executive's detention of designated enemy combatants, based on the above language); Padilla v. Hanft, 423 F.3d 386, 390–91 (4th Cir. 2005) (highlighting

in considerable litigation, some of which is unlikely to be resolved soon.[68]

2. November 13 Order

On November 13, 2001, President Bush, using his power as President and Commander in Chief,[69] and relying heavily on purported AUMF authorization, issued a military order (the Order) that authorized the United States to detain and try by military commission all persons "subject to this order."[70] Individuals "subject to this order" include, if it is in the interest of the United States, all noncitizens whom the President deems in writing to be either: (1) current or former members of the al Qaeda terrorist organization; (2) involved with acts of international terrorism, including involvement in the preparation of such acts; or (3) guilty of "knowingly harbor[ing]" an individual described above in (1) or (2).[71] The Order specifically prohibits individuals from seeking judicial review of the President's determination in another forum, be it a United States court or an international tribunal.[72] The Order is reminiscent of President Franklin D.

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the Government's chief reliance on the AUMF as support for the President's power to detain individuals suspected of aiding terrorists); Al-Marri v. Hanft, 378 F. Supp. 2d 673, 680 (D.S.C. 2005) (stating the critical AUMF language and then endorsing the Government's argument that Congress intended the AUMF to apply to hostile al Qaeda operatives in the United States).

68. *See In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 445–47 (D.D.C. 2005) (discussing eleven habeas cases that enemy combatant detainees filed and noting that United States authorities had relied on the AUMF to capture individuals not only in Afghanistan, but also from countries such as the Gambia, Zambia, Bosnia, and Thailand, even though "many of these individuals may never have been close to an actual battlefield and may never have raised conventional arms against the United States"), *vacated sub nom.* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted sub nom.* Al Odah v. United States, 127 S. Ct. 3067 (2007); Brief for Petitioners El-Banna et al. at 1–2, Khaled A.F. Al Odah v. United States, No. 06-1196 (U.S. Aug. 24, 2007) (explaining that the petitioners are all prisoners detained at Guantanamo Bay, captured in the aftermath of 9/11, claiming to have never engaged in terrorism, and seeking "a fair and impartial hearing before a neutral decision maker to determine whether there is a valid basis for detaining them").

69. The United States Constitution states that "[t]he President shall be Commander in Chief of the Army and Navy of the United States." U.S. CONST. art. II, § 2, cl. 1.

70. Military Order of November 13, 2001, §§ 3(a), 4(a), 3 C.F.R. 918, 919–20 (2002), *reprinted in* 10 U.S.C. § 801 (Supp. V 2005) (regarding the detention, treatment, and trial of certain noncitizens in the war against terrorism). Historically, military commissions, like those established in the November 13 Order, are utilized to efficiently execute the laws of war. *See* Christopher M. Evans, Note, *Terrorism on Trial: The President's Constitutional Authority to Order the Prosecution of Suspected Terrorists by Military Commission*, 51 DUKE L.J. 1831, 1836 (2002) (stating that President Bush's November 13 Order was "extraordinary," but not unprecedented (citing WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 330 (2d ed. 1920))).

71. Military Order of November 13, 2001, § 2(a), 3 C.F.R. at 919.

72. *Id.* § 7(b)(2), 3 C.F.R. at 921.

Roosevelt's proclamation and military order of July 2, 1942,[73] but unlike Roosevelt's order, President Bush's Order only applies to foreign citizens.[74]

3. Rasul v. Bush

In 2004, the Court ruled on the first of several cases involving persons detained as a result of the military campaign waged against al Qaeda after 9/11. In *Rasul v. Bush*,[75] the Court determined whether the federal statutory habeas corpus provision[76] bestows a right to judicial review of the legality of Executive detention upon aliens in the Guantanamo Bay Naval Base, Cuba.[77] In reversing the decision of the court of appeals,[78] the Court held that both American citizens and aliens detained at the Guantanamo Bay Naval Base are entitled to invoke habeas corpus in federal courts.[79]

4. Hamdi v. Rumsfeld

The same day that the Court decided *Rasul*, it handed down its decision in another detainee case, undoubtedly the more well-known of the two. In *Hamdi v. Rumsfeld*,[80] the Court tackled the question of whether the Executive has the authority to detain an American citizen classified as an enemy combatant.[81] Hamdi is an American citizen who was captured in Afghanistan in 2001, suspected of taking up arms against the United States.[82]

Speaking for a plurality of the Court, Justice O'Connor concluded that the AUMF authorized the detention of individuals in the

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73. *See supra* note 49 and accompanying text.

74. Curtis A. Bradley, *Agora (Continued): Military Commissions Act of 2006: The Military Commissions Act, Habeas Corpus, and the Geneva Conventions*, 101 AM. J. INT'L L. 322, 323–24 (2007).

75. 542 U.S. 466 (2004).

76. *See supra* note 32. When *Rasul* was decided, 28 U.S.C. § 2241, among other provisions, spelled out which courts and judges had the power to grant a writ of habeas corpus and defined to whom such a writ could be issued. *See* 28 U.S.C. § 2241(a)–(d) (2000). Section (e) was not added until Congress passed the DTA in late 2005. *See infra* Part I.D.6.

77. *Rasul*, 542 U.S. at 470, 475. Guantanamo Bay is a territory over which the United States does not have "'ultimate sovereignty,'" but "exercises plenary and exclusive jurisdiction." *Id.* at 470–71, 475.

78. *Id.* at 485. The district court had dismissed the petitioners' habeas actions for lack of jurisdiction and the court of appeals had affirmed. *Id.* at 472–73.

79. *Id.* at 481. The Court reasoned that because the habeas statute did not differentiate between aliens and Americans held in federal custody, Congress had not intended for the statute's "geographical coverage" to vary based on the citizenship of the detainee. *Id.*

80. 542 U.S. 507 (2004) (plurality opinion).

81. *Id.* at 516.

82. *Id.* at 510.

"narrow category" at issue here.[83] Nevertheless, the Court further concluded that a United States citizen detained in these circumstances had a right, as a matter of due process, to "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker," provided the detainee sought to dispute such a classification.[84] In fact, the Court went so far as to say that "it would turn our system of checks and balances on its head" to withhold access to the judiciary from an American citizen seeking to challenge his detention merely because the Executive preferred not to make such access available.[85]

5. Combatant Status Review Tribunals

Initially, *Rasul* and *Hamdi* appeared to be huge victories for detainees' rights, but these victories were short-lived. On July 7, 2004, barely one week after the Court decided *Rasul* and *Hamdi*, the Deputy Secretary of Defense issued an order creating Combatant Status Review Tribunals (CSRTs).[86] These substitute procedures were implemented, among other reasons, to provide Guantanamo Bay detainees with (1) notice of their ability to challenge their designation as enemy combatants; and (2) Executive review of such designations.[87] Hearings before the CSRTs allegedly meet the relaxed due process requirements that the Court set forth in *Hamdi*.[88] However, the order of the

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83. *Id.* at 517. Specifically, the Court evaluated only a category of United States citizens, like Hamdi, who were purportedly members of, or supportive of, hostile forces in Afghanistan and who had also participated in an armed conflict against the United States while there. *Id.* at 516.

84. *Id.* at 533. Although they disagreed with the plurality's conclusion that the AUMF authorized Hamdi's detention, Justices Souter and Ginsburg agreed that, given the plurality's decision, Hamdi at least deserved the opportunity to provide evidence that he was not an enemy combatant. *Id.* at 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

85. *Id.* at 536–37 (plurality opinion) ("Absent suspension of the writ by Congress, a citizen detained as an enemy combatant is entitled to this process."). Earlier in her opinion, Justice O'Connor had also explained that unless the writ of habeas corpus is suspended, it "remains available to every individual detained within the United States" and, because the writ had not been suspended, it was "undisputed that Hamdi was properly before an Article III court to challenge his detention under 28 U.S.C. § 2241." *Id.* at 525.

86. Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to the Sec'y of the Navy (July 7, 2004), *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf.

87. *Id.* at 1.

88. Senior Def. Official & Senior Justice Dep't Official, Defense Department Background Briefing on the Combatant Status Review Tribunal (July 7, 2004) (transcript available on the website of the United States Department of Defense), http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2751 (stating also that the establishment of CSRTs was in direct response to *Rasul* and *Hamdi*).

Deputy Secretary of Defense is explicit in that it applies "only to foreign nationals held as enemy combatants . . . at the Guantanamo Bay Naval Base."[89]

6. Detainee Treatment Act of 2005

On December 30, 2005, Congress enacted the Detainee Treatment Act of 2005 (the DTA), which added a subsection to the federal habeas statute, purporting to strip the judiciary of jurisdiction over all habeas petitions filed by aliens detained at Guantanamo Bay, except as otherwise provided in section 1005 of the DTA.[90] Under the DTA, rather than having a right to plenary habeas review in a federal court, Guantanamo detainees can only seek review of the rulings of CSRTs and military commissions in the United States Court of Appeals for the District of Columbia Circuit.[91] Moreover, such review is limited to consideration of whether the determination of the CSRT or military commission properly adhered to the relevant standards and procedures and "whether the use of such standards and procedures . . . is consistent with the Constitution and laws of the United States," to the extent that they apply.[92] Like the Department of Defense order establishing CSRTs, the DTA does not apply to detainees within United States borders.[93]

7. Hamdan v. Rumsfeld

In *Hamdan v. Rumsfeld*,[94] the Court concluded that the jurisdiction-stripping provisions of the DTA were inapplicable to detainee

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In *Hamdi*, Justice O'Connor alluded to the notion that enemy combatant proceedings could "be tailored to alleviate their uncommon potential to burden the Executive" during military conflict. *Hamdi*, 542 U.S. at 533 (plurality opinion). As examples of such tailoring, Justice O'Connor suggested the following: the acceptance of hearsay evidence, and a rebuttable presumption in favor of the Government's evidence. *Id.* at 533–34.

89. Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to the Sec'y of the Navy, *supra* note 86, at 1.

90. Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, § 1005(e)(1), 119 Stat. 2739, 2741–44 (codified at 28 U.S.C. § 2241(e) (Supp. V 2005), *amended by* Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635–36 (to be codified at 28 U.S.C. § 2241(e))). Specifically, Section 1005(e)(1) provides that "no court, justice, or judge shall have jurisdiction" over "an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba." *Id.*

91. *Id.* § 1005(e)(2)(A)–(B), (3)(A)–(C), 119 Stat. at 2742–43 (codified at 10 U.S.C. § 801 note (Supp. V 2005)).

92. *Id.* § 1005(e)(2)(C), (3)(D), 119 Stat. at 2742–43 (codified at 10 U.S.C. § 801 note).

93. *Id.* § 1005, 119 Stat. at 2740 (codified at 10 U.S.C. § 801 note) (titling section 1005 of the DTA "Procedures for Status Review of Detainees Outside the United States").

94. 126 S. Ct. 2749 (2006).

habeas cases pending at the time Congress enacted the legislation.[95] Hamdan is a noncitizen who was captured in Afghanistan in November 2001 and transferred to Guantanamo Bay in June 2002.[96] The President determined that the November 13 Order applied to Hamdan and, therefore, that he could be tried by military commission.[97] In a groundbreaking decision, a majority of the Court rejected the Government's argument and ultimately held that "the military commission convened to try Hamdan lack[ed] power to proceed because its structure and procedures violate[d] both the [Uniform Code of Military Justice] and the Geneva Conventions."[98]

Thus, *Hamdan* represents another example of the Court finding a way to retain jurisdiction over enemy combatant cases.[99] To reach this conclusion, Justice Stevens reasoned that Congress's omission of a provision extending the jurisdiction-stripping portion of the DTA to "pending cases" was an "integral part of the statutory scheme" that logically demonstrated an intentional move by Congress.[100] However, Justice Stevens's interpretation of the DTA's language was "far from self-evident," and is illustrative of the Court's willingness to employ less than obvious reasoning to retain jurisdiction over these important cases.[101]

8. Military Commissions Act of 2006

Not long after the Court issued its decision in *Hamdan*, Congress passed the MCA in October 2006.[102] Section 7 of the MCA addresses habeas corpus matters and replaces the previous language of 28

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95. *Id.* at 2763–64, 2769 n.15.

96. *Id.* at 2759. In fact, the Government alleged Hamdan had previously served as Osama bin Laden's "bodyguard and personal driver." *Id.* at 2761 (internal quotation marks omitted).

97. *Id.* at 2760.

98. *Id.* at 2759; *see also* Michael Greenberger, *You Ain't Seen Nothin' Yet: The Inevitable Post-*Hamdan *Conflict Between the Supreme Court and the Political Branches*, 66 MD. L. REV. 805, 805–10 (2007) (commenting generally on *Hamdan*'s significance and "the sweep of the decision").

99. *See Hamdan*, 126 S. Ct. at 2769 & n.15 (retaining jurisdiction over cases pending when Congress enacted the DTA and finding "nothing absurd about a scheme under which pending habeas actions . . . are preserved, and more routine challenges to final decisions rendered by those tribunals are carefully channeled to a particular court and through a particular lens of review").

100. *Id.* at 2769.

101. Jana Singer, Hamdan *as an Assertion of Judicial Power*, 66 MD. L. REV. 759, 761–62 (2007) (noting that the Supreme Court's decision in *Hamdan* suggests its intention for the federal judiciary to play an important role in the tripartite scheme of checks and balances).

102. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

U.S.C. § 2241(e)—the subsection that the DTA initially added[103]—with the following:

> (e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
> (2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the [DTA], no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.[104]

Unlike the DTA, the MCA's habeas restriction purports to apply to all alien enemy combatants, not just Guantanamo detainees.[105] Additionally, Congress explicitly made these habeas restrictions applicable to all alien enemy combatant habeas cases, including those pending at the time of enactment.[106]

II. ANALYSIS

America's unprecedented campaign against international terrorism—the so-called "War on Terror"—must be kept in perspective when discussing the rights of resident aliens.[107] The unconventional enemies that America currently confronts, such as al Qaeda and simi-

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103. *See* Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, § 1005(e)(1), 119 Stat. 2739, 2741–42 (codified at 28 U.S.C. § 2241(e) (Supp. V 2005), *amended by* § 7(a), 120 Stat. at 2635–36 (to be codified at 28 U.S.C. § 2241(e))).

104. § 7(a), 120 Stat. at 2635–36 (to be codified at 28 U.S.C. § 2241(e)).

105. *Id.*

106. *Id.* § 7(b), 120 Stat. at 2636 (to be codified at 28 U.S.C. § 2441 note). Specifically, section 7(b) of the MCA states that the habeas amendment shall apply to all cases, including those pending on or after its enactment, which "relate to any aspect of the detention . . . of an alien detained by the United States since September 11, 2001." *Id.* The MCA preserves, with some amendments, the DTA's scheme of limited review by the United States Court of Appeals for the District of Columbia Circuit. *Id.* §§ 7(a), 9–10, 120 Stat. at 2635–37 (§ 7(a) to be codified at 28 U.S.C. § 2241(e); §§ 9–10 to be codified at 10 U.S.C. § 801 note).

107. For example, do the factual distinctions that the Court has used to reach different outcomes in prior cases have the same meaning in the "War on Terror" as in past wars? *See supra* notes 42–44, 47–48, 56–57, 60, 77, 81–83, 96 and accompanying text (providing examples of the facts that the Court has considered in previous cases).

lar organizations, undoubtedly pose unique challenges.[108] In addition to promising no concrete end to hostilities, this campaign features no clear enemy to defeat, no specific theater of war, no physical territory to conquer, and no obvious leadership structures to eliminate.[109] However, while the current conflict may make adherence to traditional wartime doctrines inadequate,[110] basic notions concerning access to the writ of habeas corpus must endure.[111] As such, the Court should ultimately invalidate section 7 of the MCA because, as applied, it effectively suspends the writ of habeas corpus for resident aliens under circumstances not sanctioned by the Constitution.[112]

A. The Constitutional Entitlement to Habeas Corpus of Resident Alien Detainees

1. Judicial Explanation and Protection of the Right

The Suspension Clause of the United States Constitution enshrines an individual's essential right to access the writ of habeas corpus, except in certain instances of "Rebellion or Invasion."[113] That clause says nothing about a qualification of American citizenship to obtain a writ of habeas corpus[114] and, in fact, the Court has previously adopted just the opposite interpretation.[115] For instance, in *INS v. St. Cyr*, the Court explained that the Suspension Clause at least safeguards the writ of 1789, and added that both nonenemy aliens and American citizens could access the writ of habeas corpus to challenge their detention in civil and criminal cases during this time period.[116] The Court subsequently reiterated this idea in *Hamdi* when it declared the writ available to "*every* individual" detained in the United States,

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108. *See* 9/11 REPORT, *supra* note 1, at 361–64.

109. Stephen I. Vladeck, Ludecke*'s Lengthening Shadow: The Disturbing Prospect of War Without End*, 2 J. NAT'L SECURITY L. & POL'Y 53, 53 (2006) (posing the question, with regard to "[t]he 'war' on terrorism": "Just what *will* mark the conclusion of hostilities?").

110. *See* Daniel L. Swanwick, Note, *Foreign Policy and Humanitarianism in U.S. Asylum Adjudication: Revisiting the Debate in the Wake of the War on Terror*, 21 GEO. IMMIGR. L.J. 129, 136 (2006) ("While continuing to use traditional tactics against those territorial states harboring or otherwise supporting our terrorist enemies, the administration has taken innovative steps designed to more directly deal with terrorist threats, steps that more closely resemble law enforcement than warfare.").

111. *See infra* Part II.A.

112. *See infra* Part II.B.

113. U.S. CONST. art. I, § 9, cl. 2.

114. *See id.* (providing generally, without regard to citizenship, for "[t]he Privilege of the Writ of Habeas Corpus").

115. *See infra* notes 116–117 and accompanying text; *cf.* Johnson v. Eisentrager, 339 U.S. 763, 771 (1950) (noting that certain constitutional guarantees, like Fourteenth Amendment due process, have been extended to resident aliens within the United States).

116. 533 U.S. 289, 300–02 (2001).

provided the writ had not been suspended.[117] Although *Rasul* examined only the federal habeas statute, as opposed to the constitutional right to habeas, the Court's statements in that case may nevertheless also support the notion that noncitizens detained at Guantanamo possess a constitutional right to habeas review.[118] As these cases demonstrate, the reality of war does not automatically alter or suspend resident aliens' constitutional right to habeas corpus: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."[119] Thus, it is clear that resident aliens detained within the United States have a constitutional right to habeas corpus.

Particularly in a situation like al-Marri's, where a resident alien has at all relevant times been within the United States, precedent supports preserving the resident alien's right to habeas corpus. Under *Milligan*, the Government does not have the authority to subject a civilian to military jurisdiction, even in extreme cases where the writ of habeas corpus has been suspended.[120] Like Milligan, al-Marri may have committed serious crimes during a period of "war,"[121] but as a civilian resident of a state where the civil courts have remained open and functioning since his arrest, al-Marri is entitled to seek habeas relief in court and, then, if warranted, should be subjected to criminal trial and punishment, not military detention.[122]

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117. Hamdi v. Rumsfeld, 542 U.S. 507, 525 (2004) (plurality opinion) (emphasis added); Bradley, *supra* note 74, at 332 ("There appears to be little dispute that the constitutional right of habeas corpus review applies to individuals detained in the United States.").

118. Bradley, *supra* note 74, at 332–33; *see also* Rasul v. Bush, 542 U.S. 466, 481 (2004) (holding that aliens held at Guantanamo Bay Naval Base have statutory habeas corpus rights parallel to those of American citizens, given that such an application of the statute would be "consistent with the historical reach of the writ").

119. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 120–21 (1866).

120. *Id.* at 121–22, 125–26. Specifically, the Court stated that in cases of suspension, the Constitution does not say "that [individuals] shall be tried otherwise than by the course of the common law; if it had intended this result, it was easy by the use of direct words to have accomplished it." *Id.* at 125–26.

121. *Compare id.* at 122 (reciting the Government's charges that Milligan had "'conspired against the government, afforded aid and comfort to rebels, and incited the people to insurrection'" during the Civil War), *with* Al-Marri v. Wright, 487 F.3d 160, 165 (4th Cir. 2007) (restating the Government's determinations, following 9/11, that al-Marri is an "enemy combatant," has close ties to al Qaeda, and has participated in conduct that "'constituted hostile and war-like acts,'" among other allegations), *reh'g en banc granted.*

122. *See Milligan*, 71 U.S. (4 Wall.) at 121–22 (explaining that if Milligan needed to be restrained, "the *law* said arrest him, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law").

Quirin offers another reason as to why it would be improper to deprive a resident alien like al-Marri of his constitutional right to the writ of habeas corpus.[123] There, it was the Court's duty "in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty," even in the context of petitions for writs of habeas corpus by *enemy* aliens.[124] Surely then, the Court has an equal duty to preserve jurisdiction over a petition for the writ by a *friendly* resident alien like al-Marri.[125]

Moreover, the reasoning that the Court employed in *Johnson v. Eisentrager* to deny those prisoners the constitutional right to habeas corpus does not apply when the prisoner is a lawful resident alien.[126] There, the Court identified six factors to support its conclusion that the prisoners were not constitutionally entitled to habeas.[127] Specifically, each was (1) an *enemy* alien; (2) who had never been a United States resident; (3) who was captured and held in military custody outside United States territory; (4) who was tried and convicted by a military commission abroad; (5) for violations of the laws of war committed outside United States borders; and (6) who was imprisoned outside of the United States.[128] There are crucial distinctions between the prisoners in *Johnson* and an individual like al-Marri. Specifically, al-Marri (1) is not a citizen of a nation at war with the United States; (2) has been a United States resident for a portion of his life; (3) was captured in the United States; (4) has not been tried or convicted by a military commission abroad; (5) for violations of the laws of war; and (6) has not been detained outside United States borders.[129] Therefore, application of the *Johnson* factors bolsters the argument that al-Marri is constitutionally entitled to habeas.

Although some have attempted to distinguish *Milligan* because it arose in the context of a United States citizen, not an alien, the Fourth Circuit panel in *Al-Marri* rejected this argument, at least in the context of due process, given that Al-Marri is a lawfully present alien who is a citizen of a friendly nation. *Al-Marri*, 487 F.3d at 182 n.11.

123. *See Ex parte* Quirin, 317 U.S. 1, 24–25 (1942) (rejecting the petitioners' claims and upholding the authority of the military commission to try them, but nevertheless affirming that the Court retained jurisdiction over such habeas corpus cases, despite the petitioners' alien status).

124. *Id.* at 19–22.

125. *See supra* notes 6–7 and accompanying text (explaining that al-Marri is a citizen of Qatar, a nation at peace with the United States).

126. 339 U.S. 763, 777–78 (1950) (declining to extend to the prisoners the constitutional right to sue in federal court for the writ of habeas corpus because they were never in a territory over which the United States was sovereign, and their capture, trial, and punishment took place beyond the territorial jurisdiction of any United States court).

127. *Id.* at 777.

128. *Id.*

129. Al-Marri v. Wright, 487 F.3d 160, 164–66 (4th Cir. 2007), *reh'g en banc granted.*

2. Recent Legislative Complications

Although, as explained above, the Supreme Court has previously accepted and safeguarded the constitutional right to habeas of resident aliens, analysis of their wartime rights has been complicated by the legislation that has ensued from the Court's post-9/11 "enemy combatant" rulings.[130] Although debatable, the DTA seems to have stripped *Rasul* of much of its legal force.[131] Similarly, the Court's decision in *Hamdan* has been qualified by the enactment of the MCA, and it is an open question as to how the courts will interpret that piece of legislation as it pertains to detained enemy combatants.[132]

What makes al-Marri's case, and others like it, so interesting is not simply the minute factual distinctions that differentiate it from any prior enemy combatant case that the Supreme Court has confronted.[133] Rather, it is the factual distinctions combined with these recent complications, specifically the enactment of the MCA, that merit special attention.

B. The MCA and Its Constitutional Implications

In part due to the broad reach of the MCA's habeas restrictions, which purport to deprive all enemy combatant detainees of their ability to petition for habeas corpus in federal court,[134] Congress has given the Executive very broad discretion concerning the detention of alleged enemy combatants. In doing so, Congress left little room for judicial consideration of the factual distinctions that used to be of critical import when dealing with these matters.[135] This abrogation of

130. *See supra* Part I.D.

131. *Compare* Alexander, *supra* note 36, at 1197 (noting that the DTA "eliminate[d] any means of enforcing *Rasul*," in effect making it a "nullit[y]" if the Government chooses not to adhere to it), *with* Joseph R. Pope, *The Lasting Viability of* Rasul *in the Wake of the Detainee Treatment Act of 2005*, 27 N. ILL. U. L. REV. 21, 23 (2006) (declaring that the DTA did not abrogate *Rasul*'s broad holding and instead allowed it to remain as "viable precedent" for detainees held outside of Guantanamo Bay).

132. Greenberger, *supra* note 98, at 811, 834 (stating that the MCA is "a harsh rebuke of the *Hamdan* Court" and stressing that neither *Hamdan* nor the MCA offers "the final thoughts" on the enemy combatant cases).

133. Specifically, the Supreme Court has never confronted an enemy combatant petition for habeas corpus in which the alleged enemy combatant, at the time of capture, was a resident alien, peacefully residing within the United States during an undefined "War on Terror," and who was at all relevant times held by the United States military on United States soil.

134. Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635–36 (to be codified at 28 U.S.C. § 2241(e)).

135. *Compare* § 7(a), 120 Stat. at 2635–36 (to be codified at 28 U.S.C. § 2241(e)) (stating, in a blanket fashion, that "[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by" an enemy combatant de-

access to the writ, combined with the failure of Congress to provide an adequate substitute for resident aliens like al-Marri, constitutionally invalidates section 7 of the MCA if it is applied to these individuals.[136]

1. More than Temporary Suspension

If applied, section 7 of the MCA would not result in a mere temporary suspension of the writ; rather, it would completely abrogate the habeas corpus rights of certain individuals. As previously mentioned, the Suspension Clause of the United States Constitution prohibits Congress from suspending the writ of habeas corpus except for "in Cases of Rebellion or Invasion [when] the public Safety may require it."[137] Currently, the United States is not faced with any "Rebellion or Invasion" that could justify temporary constitutional suspension of the writ.[138] Moreover, there is nothing temporary about the MCA's habeas jurisdiction prohibition. The statutory language does not restrict the prohibition, or limit it to the length of a "particular emergency," but rather purports to be a permanent revision of the federal habeas statute.[139] As such, the prohibition serves as something more than a temporary suspension, in violation of the United States Constitution.[140]

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tainee), *with* Johnson v. Eisentrager, 339 U.S. 763, 777–78 (1950) (considering specifically the factual circumstances at issue when determining prisoners' habeas rights, and noting that the privilege of access to United States courts did not extend to prisoners who were not within any United States territory at any relevant time, such as the time of offense, capture, trial, or punishment).

136. *See* U.S. CONST. art. I, § 9, cl. 2 (making clear that the writ of habeas corpus cannot constitutionally be suspended except in very limited circumstances); Swain v. Pressley, 430 U.S. 372, 381 (1977) (asserting that provision of an adequate, effective collateral remedy to evaluate the legality of an individual's detention would not serve as a suspension of the writ).

137. U.S. CONST. art. I, § 9, cl. 2.

138. Bradley, *supra* note 74, at 334 ("The United States is obviously not faced with a 'rebellion' and, more than five years after the September 11 attacks, the United States is far from clearly faced with an 'invasion.'").

139. Brief of Amici Curiae Professors of Constitutional Law and Federal Jurisdiction Advocating Denial of Motion to Dismiss (Reversal) at 5, Al-Marri v. Wright, 487 F.3d 160 (4th Cir. 2007), *reh'g en banc granted* (No. 06-7427); *see also* § 7, 120 Stat. at 2635–36 (§ 7(a) to be codified at 28 U.S.C. § 2241(e); § 7(b) to be codified at 28 U.S.C. § 2441 note) (making clear that the amendment to the federal habeas statute was effective against all cases pending on or after the MCA's enactment if they concerned "the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001").

140. *See* INS v. St. Cyr, 533 U.S. 289, 304 n.24 (2001) (noting that it would be improper to imply that the Framers had drafted a clause that would "proscribe a temporary abrogation of the writ, while permitting its permanent suspension").

2. No Adequate Remedial Substitute

In its hasty attempt to remedy the problems of the DTA,[141] through enactment of the MCA, Congress has effectively abrogated the writ of habeas corpus for resident aliens like al-Marri[142] without providing an adequate remedial substitute.[143] The CSRTs established by the Executive cannot possibly represent an adequate replacement for the habeas corpus rights of resident alien enemy combatants, captured and detained within the United States, because such individuals do not fall within the definition of those with access to CSRTs.[144] Specifically, the Deputy Secretary of Defense's order establishing CSRTs states at the outset that it "applies only to foreign nationals held as enemy combatants in the control of the Department of Defense at the Guantanamo Bay Naval Base, Cuba . . . ."[145] Moreover, section 1005 of the DTA is titled "Procedures for Status Review of Detainees *Outside* the United States."[146] The Government, therefore, made clear in these two documents that the alternative system of justice that the CSRTs provide is not required for those enemy combatants detained within the United States.[147] Consequently, it is invalid to argue that the MCA habeas jurisdiction-stripping provision is constitutional because resident alien enemy combatants detained within the United States have access to a habeas substitute, in the form of a CSRT.

3. All Eyes on the Judiciary

According to the Supreme Court's understanding of our system of checks and balances, the federal judiciary must be "an indispensable player," especially when "national security policy implicates issues

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141. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2763–64 (2006) (holding that the DTA's provision stripping federal jurisdiction of the right to hear detainees' petitions for habeas corpus did not apply to cases pending when the DTA was enacted).

142. § 7, 120 Stat. at 2635–36 (§ 7(a) to be codified at 28 U.S.C. § 2241(e); § 7(b) to be codified at 28 U.S.C. § 2441 note) (repealing federal jurisdiction over the habeas cases of resident alien enemy combatants detained by the United States, including those pending on the date of the MCA's enactment).

143. Appellants' Response to Appellee's Motion to Dismiss for Lack of Jurisdiction at 33–34, Al-Marri v. Wright, 487 F.3d 160 (4th Cir. 2007), *reh'g en banc granted* (No. 06-7427) ("The MCA . . . would repeal habeas jurisdiction over al-Marri's case without guaranteeing any substitute, let alone the adequate and effective substitute that the Constitution requires.").

144. Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to the Sec'y of the Navy, *supra* note 86.

145. *Id.* at 1.

146. Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, § 1005, 119 Stat. 2739, 2740–44 (codified at 10 U.S.C. § 801 note (Supp. V 2005)) (emphasis added).

147. *See supra* Part I.D.5–6.

of individual liberty."[148] The habeas provisions of the MCA, if applied to resident alien enemy combatants detained within the United States, fail to provide these individuals with a route to challenge their indefinite detention.[149] It is imperative that federal courts retain jurisdiction over these habeas petitions, and that, in spite of the MCA, the judicial branch play its appropriate constitutional role. The fact that this is a case of first impression is irrelevant; the Court has consistently upheld the power of the federal courts to review habeas petitions in a variety of cases involving Executive detention,[150] even if doing so required the Court to interpret statutory language in a less than obvious manner.[151]

III. CONCLUSION

In 2006, Congress passed the Military Commissions Act, which purports to strip federal courts of jurisdiction over any then-pending or future habeas petitions filed by *all* alien enemy combatants detained by the United States.[152] However, this provision, if applied to the unique factual circumstances of a resident alien captured and detained within American borders, cannot stand.[153] It would eliminate the resident alien's constitutional right to habeas corpus[154] in the absence of a valid Congressional suspension and without providing an effective, adequate substitute.[155] This is unconstitutional.[156] As such, the federal judiciary must reclaim jurisdiction over enemy combatant

148. Singer, *supra* note 101, at 761; *see* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2800 (2006) (Breyer, J., concurring) (declaring that trial by military commissions concentrates power in the Executive in a manner that the "Constitution's three-part system is designed to avoid" and, as such, "raises separation-of-powers concerns of the highest order," and then proceeding to explain how the judiciary evaluates whether adequate authority exists for Executive actions).

149. *See supra* Part II.B.2.

150. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 510–11, 525 (2004) (plurality opinion) (finding it to be "undisputed" that the habeas corpus petition of an alleged enemy combatant of American citizenship was properly before an Article III court); Rasul v. Bush, 542 U.S. 466, 484 (2004) (holding that a federal district court had jurisdiction over habeas corpus petitions filed by detainees held at Guantanamo Bay); *Ex parte* Quirin, 317 U.S. 1, 24–25 (1942) (rejecting the Government's argument that the enemy alien petitioners should be denied access to federal courts).

151. *See* Singer, *supra* note 101, at 761–62 (characterizing *Hamdan*'s "holding in favor of jurisdiction [as] far from self-evident").

152. Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635–36 (§ 7(a) to be codified at 28 U.S.C. § 2241(e); § 7(b) to be codified at 28 U.S.C. § 2441 note).

153. *See supra* Part II.

154. *See supra* Part II.A.1.

155. *See supra* Part II.B.1–2.

156. *See supra* Part II.B.1–2.

habeas petitions filed by resident aliens apprehended and imprisoned inside the United States.[157] If it does, perhaps America will return to more traditional techniques of investigating, prosecuting, and punishing resident aliens who have engaged in criminal conduct. The recent policies and procedures that have displaced these methods,[158] and denied individuals their liberty in the process, must not be prolonged.

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157. *See supra* Part II.B.3.

158. *See* John T. Parry, *Terrorism and the New Criminal Process*, 15 WM. & MARY BILL RTS. J. 765, 766 (2007) (commenting generally on the "new criminal process" that has developed amidst the current "'war on terror'").