RECORD NO. 06-7427

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

ALI SALEH KAHLAH AL-MARRI AND
MARK A. BERMAN, as next friend,

Petitioners-Appellants,

v.

S.L. WRIGHT, U.S.N. COMMANDER,
Naval Consolidated Brig.,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF OF AMICI CURIAE PROFESSORS OF CONSTITUTIONAL LAW AND FEDERAL JURISDICTION ADVOCATING DENIAL OF MOTION TO DISMISS (REVERSAL)

Gerald L. Neuman
1545 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-9083

Harold Hongju Koh
127 Wall Street
New Haven, CT 06511
(203) 432-1660

Sarah H. Cleveland
1545 Massachusetts Ave.
Cambridge, MA 02138
(617) 496-8853

Amici Curiae

Margaret L. Sanner
Reed Smith LLP
Riverfront Plaza-West Tower
901 East Byrd Street, Suite 1700
Richmond, VA 23219
(804) 344-3400 Telephone
(804) 344-3410 Facsimile

Counsel for Amici Curiae

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

Cases

Statutes

Constitution

Legislative Materials

Treaties

Other Authorities

INTEREST OF AMICI

Amici are professors of constitutional law and federal jurisdiction with expertise regarding the constitutional law of habeas corpus. They submit this brief to aid the Court in interpreting § 7 of the Military Commissions Act of 2006 and to contest the Government's unconstitutional interpretation of that Act. Amici seek leave to file by a motion filed concomitantly herewith.

SUMMARY OF ARGUMENT

Petitioner al-Marri is not a battlefield detainee. He is a lawfully admitted nonimmigrant arrested in the midst of ordinary life in the interior of the United States. He has been detained by the U.S. government for over three years in South Carolina as an enemy combatant, a charge that he denies. He is not an enemy alien, but a national of Qatar, a U.S. ally in the war against terrorism. Aliens such as al-Marri unquestionably have a right to habeas review to challenge the lawfulness of their detention. Yet the Government would now have this Court read the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 ("MCA"), to abolish any such right.

On October 17, 2006, President Bush signed into law the MCA, which provides that "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." MCA § 7(a) (amending 28 U.S.C. § 2241(e)(1)). The Government now claims that by enacting the MCA, Congress abolished al-Marri's access to the writ of habeas corpus.

This Court should not so construe the MCA. The Government's construction of § 7 would constitute a permanent abrogation of the writ, in violation of the Article I, § 9 Suspension Clause. Nor is this constitutional infirmity mitigated by limiting the MCA to noncitizens. Aliens in the United States clearly have a constitutional right to habeas corpus, and this right historically has included the right of enemy aliens and prisoners of war to challenge the legality of their detention. Even during a war on terror, absent a valid suspension, the writ "has remained a critical check on the Executive, ensuring that it does not detain individuals except in accordance with law." *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (plurality opinion).

The Government's interpretation would be vastly threatening to the liberty of more than 20 million noncitizens residing in the United States, exposing them to the risk of irremediable indefinite detention on the basis of unfounded rumors, mistaken identity, the desperation of other detainees subject to coercive interrogation, and the deliberate lies of actual terrorists.

The Government's interpretation of MCA § 7 does not provide al-Marri an "adequate and effective" substitute for habeas corpus, as the Suspension Clause requires. If § 7 applies to al-Marri, the statute affords him no substitute remedy whatsoever. The limited judicial review in the D.C. Circuit preserved under § 7 and the Detainee Treatment Act of 2005, Pub. L. No. 109-148, tit. X, 119 Stat. 2680, 2739 ("DTA"), applies only to aliens who have been provided a Combatant Status Review Tribunal ("CSRT"), which al-Marri has not. A clearer violation of the Suspension Clause of the Constitution is difficult to imagine.

The Government's alternative proposal of remitting al-Marri to proceedings pursuant to the DTA does not provide an "adequate and effective" substitute for habeas corpus, for two reasons. First, the DTA allows for judicial review only of CSRT decisions. No statute or regulation makes the CSRT process available to aliens in the United States such as al-Marri, and the Government has not bound itself regarding when, or if, such process would be provided to him. Second, even if al-Marri were someday afforded the process the Government suggests, the CSRT procedures and the scope of judicial review under the DTA are constitutionally inadequate substitutes for habeas corpus.

Given the serious constitutional issues posed by the application of MCA § 7 to al-Marri (as shown in Parts I-III of this brief), this Court should either interpret

MCA § 7 as not applying to al-Marri (as argued in Part IV), or find the MCA unconstitutional as applied to him.

ARGUMENT

I. AS INTERPRETED BY THE GOVERNMENT, MCA § 7 IS AN UNCONSTITUTIONAL PERMANENT ABROGATION OF THE WRIT

"The writ of habeas corpus is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of commitment." *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201-02 (1830) (Marshall, C.J.). The "Privilege of the Writ of Habeas Corpus" was one of the few constitutional rights enshrined by the Framers in the original Constitution of 1787. The Suspension Clause of Article I, § 9, prohibits Congress from suspending the writ "unless when in Cases of Rebellion or Invasion the public Safety may require it." As Henry Hart emphasized, Congress's power to define the jurisdiction of the lower federal courts is subject to constitutional limits, including the explicit limit of the Suspension Clause. *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1393, 1397 (1953).

By narrowly defining the legislature's power to suspend the writ, the Framers meant to preserve that fundamental guarantee against both temporary

suspension and permanent evisceration. MCA § 7 flouts that constitutional obligation by permanently abridging access to the writ for aliens suspected of being enemy combatants.

A. MCA § 7 Is Not a Temporary Suspension Pursuant to Art. I, § 9, but Permanently Abrogates Habeas Corpus Jurisdiction.

Although the precise scope of MCA § 7 is subject to interpretation, it plainly does not constitute an exercise of Congress's authority under the Constitution to suspend the privilege of the writ temporarily "in cases of Rebellion or Invasion." The language of the MCA does not speak of suspension. Opponents of the legislation also repeatedly stated, without contradiction, that there was no current "Rebellion or Invasion" that could justify suspending the writ. *See, e.g.*, 152 Cong. Rec. S10368 (daily ed. Sept. 28, 2006) (Sen. Specter) ("Fact No. 3, uncontested. We do not have a rebellion or an invasion."). In the House, when Representative Lofgren made this objection, Representative Sensenbrenner replied that the statute did not suspend the Great Writ – Congress could not do so – but rather redefined the statutory writ. 152 Cong. Rec. H7548 (daily ed. Sept. 27, 2006) (Rep. Sensenbrenner).

Moreover, the MCA's prohibition of habeas corpus jurisdiction is permanent. The statute is not limited to a particular span of years or the duration of a particular emergency. Instead, it decrees a permanent alteration of the federal habeas corpus statute. The legislative history confirms that the proponents of the

MCA did not intend to enact a temporary measure. Senator Sessions proclaimed, "We are legislating through this law for future generations, creating a system that will operate not only throughout this war, but for future wars in which our Nation fights." 152 Cong. Rec. S10404 (daily ed. Sept. 28, 2006) (Sen. Sessions); *see also* 152 Cong. Rec. S10270 (daily ed. Sept. 27, 2006) (Sen. Kyl) ("all future conflicts").[1]

B. The Suspension Clause Prohibits Permanent Abrogation of the Writ.

Permanently abolishing the privilege of the writ of habeas corpus for certain persons would blatantly violate the Suspension Clause. The Supreme Court has always understood the Suspension Clause as prohibiting permanent deprivation, as well as limiting temporary withdrawal, of the writ. *See, e.g.*, *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807) (asserting that the Suspension Clause obligates

---

[1]Neither can MCA § 7 be viewed as limited to the lower federal courts, leaving unimpaired the jurisdiction of the state courts and the Supreme Court. The Act's plain language bars jurisdiction in any court in relevant cases. Congress has not invited reconsideration of the long-established doctrine denying the power of state courts to review federal detention. *See Tarble's Case*, 80 U.S. (13 Wall.) 397 (1872); *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858); William F. Duker, A Constitutional History of Habeas Corpus 149-55 (1980). Moreover, the constitutional limits on the Supreme Court's original jurisdiction – *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) – would forbid the Court to serve as a court of initial jurisdiction for habeas inquiry into executive detention in such cases. *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 100-101 (1807).

Congress to provide for the writ).[2] The Court has repeatedly viewed statutes permanently modifying the courts' habeas powers as raising potential Suspension Clause problems. *INS v. St. Cyr*, 533 U.S. 289 (2001); *Swain v. Pressley*, 430 U.S. 372, 381 (1977); cf. *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (concluding that permanent restrictions on successive petitions for post-conviction relief that were consistent with doctrinal evolution did not violate the Suspension Clause); *In re Vial*, 115 F.3d 1192, 1197 (4th Cir. 1997) (en banc) (discussing *Felker*). State supreme court decisions agree that parallel state constitutional provisions deny any power to permanently abrogate the writ.[3]

Proponents of the federal Constitution also understood the Suspension Clause as prohibiting permanent abrogation. Alexander Hamilton affirmed the Constitution's "establishment of the writ of habeas corpus" in *The Federalist No. 84*, and insisted that habeas corpus was "provided for, in the most ample manner, in the plan of the convention." *The Federalist No. 83*. Governor Edmund Randolph

---

[2]Marshall also observed that habeas corpus jurisdiction must be vested in the federal courts by statute. *Id.* at 94-95. The observation that the Clause did not vest jurisdiction without the aid of a statute, however, did not imply that Congress had power to abrogate the writ. *See INS v. St. Cyr*, 533 U.S. 289, 304 n.24 (2001).

[3]*See, e.g., Maryland House of Correction v. Fields*, 703 A.2d 167, 175 (Md. 1997); *In re Runyan*, 853 P.2d 424, 431 (Wash. 1993); *People ex rel. Sabatino v. Jennings*, 158 N.E. 613, 614 (N.Y. 1927) (Cardozo, C.J.). All state constitutions have suspension clauses, most of which were modeled on the federal version. *See* Gerald L. Neuman, *The Habeas Corpus Suspension Clause After INS v. St. Cyr*, 33 Colum. Hum. Rts. L. Rev. 555, 585-87 (2002).

assured the Virginia ratifying convention that the "privilege is secured here by the Constitution, and is only to be suspended in cases of extreme emergency."[4]

The language of the Suspension Clause itself compels the interpretation that permanent abrogations are prohibited. By limiting Congress's power to suspend habeas to cases of "Rebellion or Invasion" where "the public Safety may require it," the Clause necessarily precludes other withdrawals of access to the writ. Logically, the liberty of citizens would be even more deeply threatened by a power of permanent abrogation than by an unlimited power of temporary suspension. Reading the Suspension Clause as prohibiting permanent abridgements is also consistent with the interpretation of other constitutional provisions such as the Takings Clause.[5]

The U.S. Supreme Court recently rejected the sole contrary suggestion. *See INS v. St. Cyr*, 533 U.S. 289 (2001). Although Justice Scalia's dissent in that case briefly argued that the Suspension Clause was intended to regulate only temporary

---

[4]Virginia Convention, Debates (June 10, 1788), reprinted in 9 The Documentary History of the Ratification of the Constitution 1092, 1099 (John P. Kaminski & Gaspare J. Saladino eds. 1990). Early commentators agreed. *See* Neuman, supra, 33 Colum. Hum. Rts. L. Rev. at 582-83 & nn. (2002) (quoting James Kent, William Rawle, and Joseph Story).

[5]Although the Takings Clause of the Fifth Amendment expressly states only "nor shall private property be taken for public use without just compensation," it has traditionally been understood as prohibiting altogether takings without a public purpose, regardless of whether compensation is paid. *See Kelo v. City of New London*, 125 S. Ct. 2655, 2661 (2005).

suspensions, not total abrogations, of the writ,[6] that interpretation was rejected by the majority,[7] and Justice Scalia himself abandoned it three years later in the *Hamdi* case.[8] Justice Scalia's earlier argument is historically unsupportable. Four state ratifying conventions did include habeas corpus clauses in the lengthy bills of rights that they proposed adding to the Constitution. *Id.* at 337. But these amendments were inspired by the desire to set forth the habeas protection in plain language[9] and concern that the Constitution should not permit even temporary

---

[6]533 U.S. at 336-38 (2001) (Scalia, J., dissenting).

[7]533 U.S. at 300-01 & 304 n.24.

[8]*Hamdi v. Rumsfeld*, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting). Justice Scalia explained that "[t]he writ of habeas corpus was preserved in the Constitution," and quoted Hamilton's emphasis on the Constitution's "'establishment of the writ,'" *id.* at 558 (quoting *The Federalist No. 84*). He insisted that the Suspension Clause, "which carefully circumscribes the conditions under which the writ can be withheld, would be a sham if it could be evaded by congressional prescription . . . ," *id.* at 575.

[9]*See* Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 324 (1996) (explaining educational function of bills of rights). For example, the bill of rights proposed by Virginia included a provision stating "That every freeman restrained of his liberty is entitled to a remedy to enquire into the lawfulness thereof, and to remove the same, if unlawful, and that such remedy ought not to be denied nor delayed." Virginia Convention, Debates (June 22, 1788), reprinted in 10 The Documentary History of the Ratification of the Constitution 1550, 1552 ¶ 10 (John P. Kaminski & Gaspare J. Saladino eds. 1993). *See* William F. Duker, A Constitutional History of Habeas Corpus 134-35 (1980) (explaining this provision as denying Congress the power to suspend the writ at all); Neuman, *supra*, 33 Colum. Hum. Rts. L. Rev. at 573-80 (describing the origins of the habeas corpus provisions in the proposed bills of rights).

suspensions of the writ.[10] Surely, Antifederalists would have objected even more vigorously to the claim that the Constitution permitted the more extreme step of total abrogation of the writ.

Thus, permanent abrogation of the writ by MCA § 7 would violate the Suspension Clause.

II. LIMITING MCA § 7 TO ALIENS ALLEGED TO BE ENEMY COMBATANTS DOES NOT CURE THE CONSTITUTIONAL INFIRMITY.

Congress is not entitled to abridge al-Marri's right to the writ because he is a noncitizen or even an alleged alien enemy. The writ has always been afforded to aliens as well as citizens, in time of war as well as time of peace, including alleged and conceded enemy aliens and prisoners of war. The MCA does not define the term "enemy combatant" for purposes of § 7, and no other statutory provision does so. The case law on the somewhat analogous categories of enemy aliens and prisoners of war nevertheless demonstrates that aliens accused of being enemy combatants must have an opportunity to challenge the legality of their detention. Indeed, given the ambiguity of the concept of enemy combatant and the scope of the war on terror, there is even greater need to review the basis for such detention.

---

[10] *See, e.g.*, Essay by Montezuma, reprinted in 3 The Complete Anti-Federalist 53, 56 (Herbert J. Storing ed. 1981); Luther Martin, Genuine Information VIII, reprinted in 15 Documentary History of the Ratification of the Constitution 433, 434 (John P. Kaminski & Gaspare J. Saladino eds. 1984).

A. The Suspension Clause Protects Aliens As Well As Citizens.

The Supreme Court has not fully elaborated the judicial authority indefeasibly guaranteed by the Suspension Clause. The Court observed in *St. Cyr* that, "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" *INS v. St. Cyr,* 533 U.S. 289, 301 (2001) (quoting *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996)). The Court has left open the degree to which subsequent developments in habeas corpus doctrine may also be protected by the Suspension Clause. *Id.* at 300-301; *Swain v. Pressley*, 430 U.S. at 380 n.13. In some instances, doctrinal evolution may have made visible the implications that were inherent in the incorporation of a common law writ into a written Constitution setting forth limitations on government and protections of individual rights.

In either case, there can be no question that aliens are protected by the writ. As the Supreme Court emphasized in *St. Cyr*, 533 U.S. at 301, both at common law and throughout this Nation's history, habeas corpus has been available to aliens. *See also Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (plurality opinion) ("absent suspension, the writ of habeas corpus remains available to every individual detained within the United States").

The protection of noncitizens by the Suspension Clause is consistent with the personal scope of other fundamental constitutional guarantees. As the Supreme

Court held in *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886), the Equal Protection and Due Process Clauses of the Fourteenth Amendment are "universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality." *See also Plyler v. Doe*, 457 U.S. 202, 215 (1982); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (Fifth Amendment); *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2681-82 (2006) (Roberts, C.J.) (quoting *Wong Wing*). As set forth below, even noncitizen detainees such as enemy aliens and prisoners of war have been entitled to the writ.

B. Enemy Aliens Are Entitled to Habeas Corpus.

The concept of "enemy alien" reflects an earlier international practice permitting expulsion or detention of nationals of an enemy state during a declared war.[11] *See Brown v. United States*, 12 U.S. (8 Cranch) 110, 122-26 (1814) (Marshall, C.J.). The Alien Enemies Act of 1798, 50 U.S.C. §§ 21-24 broadly authorized the President to detain, relocate, or deport aliens who were "natives, citizens, denizens, or subjects of the hostile nation." Act of July 6, 1798, ch. 66, § 1, 1 Stat. 577 (current version codified at 50 U.S.C. §§ 21-24). The Supreme Court has held that, once activated, the executive's powers under the statute continue

[11] International law now imposes greater restrictions on the detention of enemy civilians in wartime, in accordance with the Fourth Geneva Convention, which the United States ratified in 1955. *See* Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 38, 42, 6 U.S.T. 3516, 75 U.N.T.S. 287.

until the termination of the war, which may last beyond the phase of active hostilities. *Ludecke v. Watkins*, 335 U.S. 160, 166-70 (1948).[12]

It is doubtful that the legal category of "enemy alien" applies in a "war on terrorism," which is not waged against a foreign state with a determinate class of nationals. The category does potentially apply to the armed conflicts against Iraq or Afghanistan, but not to the numerous detainees, like al-Marri, who are nationals of allied friendly states such as Qatar. But even if al-Marri were considered an enemy alien – or an individual charged with but disputing that classification – habeas corpus has been traditionally available to such individuals.

Ever since the Alien Enemies Act of 1798 was first invoked, in the War of 1812, courts have permitted detained enemy aliens to challenge on habeas corpus whether their detention complied with the statutory framework. In *Lockington's Case*, Brightly 269 (Pa. Super. Ct. 1813), the Pennsylvania Supreme Court reviewed the detention of a British subject, concluding that the Act gave the executive the option whether or not to seek judicial assistance in enforcing its

[12]The Supreme Court has upheld the scheme of the act against constitutional challenge, not on the theory that enemy aliens lack constitutional rights, but because of its lengthy historical pedigree. *See Ludecke*, 335 U.S. at 171-72; cf. *Von Moltke v. Gillies*, 332 U.S. 708 (1948) (vindicating on habeas the Sixth Amendment rights of an enemy alien prosecuted in 1943 for conspiracy to commit espionage).

policy.[13] In an unpublished judgment on circuit, Chief Justice Marshall released a conceded enemy alien on habeas because he had been detained without being given an opportunity to retain his liberty by relocating, as required by the controlling regulations.[14]

In *Ludecke v. Watkins*, 335 U.S. 160 (1948), Justice Frankfurter summarized habeas practice under the Alien Enemies Act in the First and Second World Wars – the last occasions on which it was ever applied. The Court made clear that detained individuals were entitled "to challenge the construction and validity of the statute" and whether the Act's threshold requirements were satisfied, including "the existence of the 'declared war,'" and "whether the person restrained is in fact an alien enemy fourteen years of age or older." *Id.* at 171 & n.17.[15]

---

[13]One of the state judges in *Lockington's Case*, disagreeing with the majority, argued that an undisputed enemy alien should be treated like a prisoner of war, and should not be afforded access to the writ, Brightly at 295-96 (Brackenridge, J.), but he too would have entertained the writ if the petitioner had denied his enemy status by affidavit, *id.* at 298-99. The case was decided at a time when the Supreme Court had not yet denied the authority of state courts to review federal detention.

[14]*See* Gerald L. Neuman & Charles F. Hobson, *John Marshall and the Enemy Alien: A Case Missing from the Canon*, 9 Green Bag 39 (2005).

[15]Traditionally, the exercise of discretionary power *within* the legal boundaries set by the Act, including executive judgments as to which aliens properly subject to detention under the Act were so dangerous that they should indeed be detained, has not been subject to review on habeas. *See Ludecke*, 335 U.S. at 165-66.

Thus, federal courts in the 1940s permitted German enemy aliens to challenge the government's effort to remove them to Germany without giving them an opportunity to depart voluntarily for another destination.[16] The Supreme Court itself ordered the release of a detained enemy alien on habeas corpus in *United States ex rel. Jaegeler v. Carusi*, 342 U.S. 347 (1952). There the Court found that Congress's official termination of the war against Germany ended the power of the Executive under the Alien Enemies Act. The Court rejected the government's claimed authority to execute removal orders that had been issued against dangerous enemy aliens before termination.[17]

Most importantly, individuals detained as enemy aliens have been permitted to challenge on habeas the determination of enemy alien status, either on the ground that they were citizens,[18] or on the ground that they were aliens but not natives or nationals of an enemy power.[19]

---

[16]*See, e.g.*, *United States ex rel. Hoehn v. Shaughnessy*, 175 F.2d 116 (2d Cir. 1949) (finding adequate opportunity to depart); *United States ex rel. Ludwig v. Watkins*, 164 F.2d 456 (2d Cir. 1947) (granting the writ); *United States ex rel. von Heymann v. Watkins*, 159 F.2d 650 (2d Cir. 1947) (granting the writ). The two latter cases involved German nationals who had been brought to the United States involuntarily and detained as dangerous enemy aliens.

[17]*See* Brief for Respondents, *United States ex rel. Jaegeler v. Carusi*, 342 U.S. 347 (No. 275), at 26.

[18]*E.g.*, *United States ex rel. Stabler v. Watkins*, 168 F.2d 883 (2d Cir. 1948) (permitting habeas for collateral attack on denaturalization of a detained German

Finally, enemy aliens detained for other reasons have always had access to the writ. During the War of 1812, a group of British subjects who had previously enlisted in the U.S. army sought release from military service. The federal court entertained the writ, but denied it on the merits.[20] When the federal government employed the immigration laws, rather than the Alien Enemies Act, to deport individuals who had been interned as dangerous enemy aliens, the courts permitted access to the writ.[21] And when enemy aliens were prosecuted for war-related

---

immigrant); *Ex parte Fronklin*, 253 F. 984 (N.D. Miss. 1918) (finding as fact that detainee was an unnaturalized German immigrant).

[19]*E.g.*, *United States ex rel. Zeller v. Watkins*, 167 F.2d 279 (2d Cir. 1948) (finding that petitioner born in Danzig had elected German citizenship, and then reviewing whether he should be removed to Germany or Poland); *United States ex rel. Schwarzkopf v. Uhl*, 137 F.2d 898 (2d Cir. 1943) (holding petitioner, born in Prague, not a German national); *United States ex rel. Umecker v. McCoy,* 54 F. Supp. 679 (D. Neb. 1944) (holding petitioner, born in Alsace, not a German native), appeal dismissed, 144 F.2d 354 (8th Cir. 1944).

[20]*Wilson v. Izard*, 30 F. Cas. 131 (C.C.D.N.Y. 1815) (No, 17,810). For similar cases from later wars, *see United States ex rel. Cascone v. Smith*, 48 F. Supp. 842 (D. Mass 1942); *United States ex rel. Warm v. Bell*, 248 F. 1002 (E.D.N.Y. 1918).

[21]*See, e.g.*, *United States ex rel. Bradley v. Watkins*, 163 F.2d 328 (2d Cir. 1947) (granting the writ to former internee sought as war criminal by Norway); *United States ex rel. Sommerkamp v. Zimmerman*, 178 F.2d 645 (3d Cir. 1949) (denying the writ on the merits to former internee). These cases were decided while the Alien Enemy Act was still in effect because the war had not officially terminated.

crimes in Article III courts, the usual procedural rights including habeas corpus were available to them.[22]

C. Prisoners of War are Entitled to Habeas Corpus.

Habeas corpus has also undeniably been made available to prisoners of war who dispute that classification or who challenge the military's power to try them for war crimes. A few cases have involved habeas corpus challenges to nonpunitive detention as a prisoner of war, for which authority is more frequently clear. As the Supreme Court noted in *Rasul v. Bush*, 542 U.S. 466, 481 n.11 (2004), in one Eighteenth Century case the court of King's Bench employed the writ to determine the claim of a Swedish sailor who had been forced to serve on the crew of a French privateer. The court concluded that by his own showing he was lawfully detained as a prisoner of war. *R. v. Schiever*, 2 Burr. 765, 97 Eng. Rep. 551 (K.B. 1759). In the *Case of Three Spanish Sailors*, 2 W. Bl. 1324, 96 Eng. Rep. 775 (C.P. 1779), the court entertained a motion for the writ by three captured prisoners of war who had been tricked into working on a British ship. The court held that by their own showing they were not entitled to be released, despite the injustice done to them. These precedents were decisions on the merits,

---

[22] *See Von Moltke v. Gillies*, 332 U.S. 708 (1948) (permitting an enemy alien to challenge on habeas a criminal conviction for conspiracy to commit espionage).

and they confirm the availability of the writ to aliens claiming wrongful detention as a prisoner of war.[23]

The Supreme Court itself has exercised habeas corpus jurisdiction over conceded prisoners of war (whether privileged or unprivileged combatants) challenging trial by military commission in three landmark cases.[24] In *Ex parte Quirin*, 317 U.S. 1, 24-25 (1942), arising on the mainland, the Court passed quickly to the merits and ruled against the petitioners. The case of *In re Yamashita*, 327 U.S. 1 (1946), involved an enemy soldier in the U.S. overseas territory of the Philippines. Chief Justice Stone rejected the government's

---

[23]The Government may seek to rely on a single ambiguous sentence referring to *R. v. Schiever* in a wholly irrelevant admiralty case, *Moxon v. The Fanny*, 17 F. Cas. 942, 947 (D. Pa. 1793) (No. 9,895), in support of the erroneous view that prisoners of war lack standing to apply for the writ. As an authority on British habeas law has explained, the cases actually demonstrate that where a detainee "is both in fact and in law a prisoner of war . . . . [h]is application discloses no cause for the writ to issue, and it will be dismissed on that basis. If, however, it appears that he may have been improperly detained as a prisoner of war, or if he is a prisoner of war on license and detained for some other cause, the court will investigate the propriety of the detention. Capacity to apply has nothing to do with the matter: it is purely a question of whether he can make out a case for the remedy." R.J. Sharpe, The Law of Habeas Corpus 113 (Oxford Univ. Press 1976) (footnote omitted).

[24]*Accord United States ex rel. Wessels v. McDonald*, 265 F. 754 (E.D.N.Y. 1920), appeal dismissed by stipulation, 256 U.S. 705 (1921). Wessels, a German naval officer, had come to the United States as a secret agent. *Id.* at 758. The district court upheld authority to try him by court-martial, and his appeal to the Supreme Court became moot after Congress terminated wartime powers. *See* J. Res. of Mar. 3, 1921, 41 Stat. 1359; 32 Op. Att'y Gen. 505 (1921).

objection to habeas corpus jurisdiction, holding that absent a suspension of the writ the courts had "the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus." *Id.* at 9. Justice Murphy's dissent on the merits agreed that the government's "obnoxious" jurisdictional argument had been "rejected fully and unquestionably." *Id.* at 30 (Murphy, J., dissenting). Most recently, in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), the Court ruled in favor of the habeas petitioner both on jurisdiction and on the merits. Hamdan, a detainee captured in Afghanistan and held at the Guantanamo Bay Naval Base as an "enemy combatant," challenged his prosecution before a military commission for war crimes. Hamdan did not challenge the designation as an "enemy combatant," or the government's authority to hold him in nonpunitive detention for the duration of active hostilities. *Id.* at 2798. Nonetheless, the Court emphasized "'the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty,'" *Id.* at 2772 (quoting *Quirin*, 317 U.S. at 19). The Court invalidated the proceeding as unauthorized by law.

Thus, both historical and modern practice fully support the availability of habeas corpus even to alleged enemy alien prisoners and prisoners of war to test the lawfulness of their detention where genuine issues arise.

Absent a legitimate suspension, the writ must also extend to alleged "enemy combatants." Indeed, the spectre of imprisonment by Executive fiat and the corresponding importance of habeas review are particularly heightened by the Government's expansive interpretations of the concept of "enemy combatant." *See Hamdi v. Rumsfeld*, 542 U.S. at 516, 522 n.1; *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 474-76 (D.D.C. 2005) (discussing the tenuous links to hostile organizations and persons that the Executive considered sufficient to support classification as an "enemy combatant"), *appeal docketed,* No. 05-8003 (D.C.Cir. Mar. 21, 2005).

III. MCA § 7 FAILS TO PROVIDE AL-MARRI WITH AN "ADEQUATE AND EFFECTIVE" SUBSTITUTE FOR THE CONSTITUTIONALLY MANDATED HABEAS REMEDY.

The Suspension Clause, Chief Justice Marshall wrote, places Congress under "the obligation of providing efficient means by which this great constitutional privilege should receive life and activity." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807). But Congress may also satisfy the Suspension Clause either by providing a judicial remedy whose scope is "commensurate with habeas corpus," or by preserving access to the writ in cases where the new remedy proves "inadequate or ineffective." *Swain v. Pressley*, 430 U.S. 372, 381-82 (1977). The Supreme Court accordingly has upheld the substitution of a remedy against Suspension Clause challenge only after determining either that the remedy was

clearly adequate and effective or that the option of habeas corpus had been preserved for instances where it was not. *See id.*; *United States v. Hayman*, 342 U.S. 205, 223 (1952); cf. *INS v. St. Cyr*, 533 U.S. 289, 314 (2001) (stating that preclusion of habeas might be permissible as to petitioner if it were clear that his challenge could be raised in another judicial forum).

If MCA § 7 applies to al-Marri, it provides him with no substitute process, let alone one that is adequate and effective to test the legality of his detention.

A. The DTA Does Not Afford a Remedy for al-Marri.

On the Government's reading, the MCA abolished al-Marri's access to the writ of habeas corpus while giving him no substitute remedy whatsoever: Congress denied him the only judicial review available under the Detainee Treatment Act because he had not received the predicate determination by a Combatant Status Review Tribunal. Congress also offered him no prospect of a CSRT, because no statute requires the holding of CSRTs, and Defense Department regulations established CSRTs only for detainees held at Guantanamo Bay Naval Base.[25]

---

[25]The situation of aliens detained without provision of a CSRT is only one of several apparent gaps in the statutory scheme. It may also prohibit any judicial remedy for aliens whose detention is unlawfully prolonged after the hostilities that previously justified their classification as enemy combatants have ended; for aliens who have been exonerated by a subsequent Administrative Review Board, but whom the Government will not release; and for enemy combatants who are being unlawfully transferred to a country where they will be tortured.

On November 13, 2006, the Government filed its motion to dismiss, accompanied by a Defense Department order creating the *possibility* of a future Combatant Status Review Tribunal for al-Marri. But that proffer does not change the fact that no statute or government regulation provides for a CSRT for al-Marri. There is no certainty that such a tribunal will ever convene. The Government has not represented that it is willing to provide a CSRT immediately and unconditionally, only that it may do so, at some unspecified future date. Even that vague possibility is contingent upon this Court's dismissal of his habeas action, with no guarantee that the government's case-specific order will not be retracted. Respondent-Appellee's Motion to Dismiss for Lack of Jurisdiction and Proposed Briefing Schedule at 5 n.1 (emphasis added) (stating that the "order *indicates only* how the government *plans* to handle al-Marri *in the event* the courts agree that the MCA divested the courts of jurisdiction"). The Government's proffered remedy is therefore illusory and inadequate.

B. The Substitute Combination of a CSRT and Limited Judicial Review Would Be Inadequate.

Even if a CSRT would someday be held for al-Marri, requiring al-Marri to undergo a CSRT and then to seek review of its decision in the D.C. Circuit under the DTA would be a wholly inadequate substitute for the writ of habeas corpus.

First, the CSRT procedure itself is highly questionable as a matter of due process. The CSRT procedure does not even satisfy the requirements set forth for

battlefield detainees in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Before a CSRT, al-Marri would have no right to counsel: the CSRT proceeding provides only a "personal representative" who lacks a duty of loyalty to the detainee.[26] Proponents of the MCA made clear their desire to prevent lawyers from meeting with detainees. *See* 152 Cong. Rec. S10403 (daily ed. Sept. 28, 2006) (Sen. Cornyn and Sen. Sessions). The severely limited CSRT procedures do not provide al-Marri with an adequate opportunity to make a record either for the executive determination or for its review by a court.

Even the procedures required by the *Hamdi* plurality would be constitutionally insufficient for al-Marri. Al-Marri is not a battlefield detainee – he is a lawfully admitted nonimmigrant arrested in the midst of ordinary life in the interior of the United States. The special consideration for battlefield conditions "half a world away" that informed the plurality's due process balancing in *Hamdi* has no place in the domestic arrest of civilians who have never taken up arms abroad. 542 U.S. at 531-32, 534-35.

---

[26] *See* Memorandum from Deputy Secretary of Defense Gordon England re: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba, enclosure (3) (Jul. 14, 2006), available at http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf. The personal representative is instructed to tell the detainee: "I am neither a lawyer nor your advocate, but have been given the responsibility of assisting your preparation for the hearing. None of the information you provide me shall be held in confidence and I may be obligated to divulge it at the hearing." *Id.* at 3.

Second, the scope of review in the D.C. Circuit proceeding is highly problematic. Proponents of the MCA in Congress argued that the court can examine only the facial validity of the CSRT procedures and whether the CSRT formally applied them; the court is not authorized to rule on the question ultimately at issue – whether the individual detainee was properly classified as an "enemy combatant." Senator Kyl explained, "It is not for the courts to decide if someone is an enemy combatant, regardless of the standard of review. It is simply not the role of the courts to make that decision. . . . The only thing the DTA asks the courts to do is check that the record of the CSRT hearings reflect that the military has used its own rules." 152 Cong. Rec. S10271 (daily ed. Sept. 27, 2006) (Sen. Kyl). On this reading, the D.C. Circuit cannot examine the central question that has always been raised on habeas corpus even for enemy aliens and prisoners of war – the lawfulness of the prisoner's detention.

The one-sided and insufficient factual record produced by the CSRT also cannot reliably be employed as the exclusive basis for reviewing its own adequacy. Nonetheless, the Government is likely to argue that the D.C. Circuit's review is limited to the CSRT record, and that detainees cannot exercise the traditional right of habeas corpus petitioners to supplement the record where necessary to determine the lawfulness of their confinement. This Court cannot withhold the

writ of habeas corpus on the assumption that so doubtful a procedure would guarantee a constitutionally sufficient "adequate and effective" substitute remedy.

IV. THIS COURT MUST CONSTRUE THE MCA AS NOT APPLYING TO AL-MARRI IN ORDER TO AVOID CONSTITUTIONAL INFIRMITY, OR DECLARE THE STATUTE UNCONSTITUTIONAL AS APPLIED TO HIM.

In order to avoid the serious constitutional difficulties outlined above, this Court must either construe MCA § 7 not to apply to al-Marri, or hold that provision unconstitutional as applied to him.

A. This Court Should Construe the MCA to Avoid Constitutional Infirmity.

The Supreme Court has repeatedly made clear that repeals of § 2241 jurisdiction must be "specific and unambiguous." *INS v. St. Cyr*, 533 U.S. at 299; *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 102 (1869). It also narrowly construes statutes to avoid potential Suspension Clause problems. *E.g.*, *St. Cyr*, 533 U.S. at 305; *Oestereich v. Selective Service System Local Board No. 11*, 393 U.S. 233, 238 (1968). Consistent with this approach, this Court should hold that by its own terms, MCA § 7 does not apply to al-Marri's petition. Section 7 bars habeas corpus for an alien "who has been *determined* by the United States to have been *properly* detained as an enemy combatant or who is awaiting such a determination." § 7(a) (amending 28 U.S.C. § 2241(e)(1)) (emphasis added). Al-Marri does not fall under the first provision because he has not been "determined . . . to

have been properly detained as an enemy combatant." That provision presupposes two executive determinations: an initial decision to detain and a second executive determination affirming its propriety.[27] No such second determination has been made in al-Marri's case.

Al-Marri also does not fall within the second group addressed by MCA § 7 – i.e., those "awaiting . . . a determination." The only determination that the Government contends al-Marri is "awaiting" is a CSRT. But al-Marri is not awaiting such a determination, as explained above. He has never been eligible for a CSRT during more than three years of military detention. He was not so eligible at the time the statute was adopted, and he remains ineligible – a fact that the Government has confirmed by conditioning its recent offer of a CSRT on the dismissal of his petition for habeas.

For both of these reasons, MCA § 7 does not apply to al-Marri's petition.

B. If No Reasonable Interpretation is Available to Avoid Constitutional Infirmity, this Court Must Declare § 7 Unconstitutional as Applied to al-Marri.

If no reasonable interpretation is possible that guarantees the petitioner an adequate remedy, then MCA is unconstitutional as applied to him. When a federal court is unavoidably confronted with an invalid preclusion statute, "its duty is

[27]The determination that bars habeas jurisdiction cannot be one made by the court itself on habeas. Such an interpretation of the statute does not make sense.

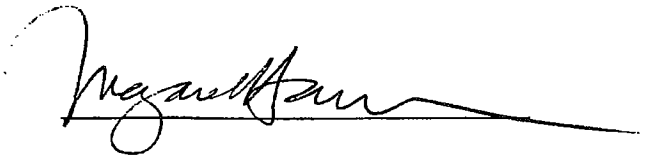
simply to declare the jurisdictional limitation invalid also, and then proceed under the general grant of jurisdiction." Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1387 (1953); *see United States v. Mendoza-Lopez*, 481 U.S. 828 (1987); *Thunder Basin Coal Co. v. Reich*, 510 U. S. 200, 219 & n.* (1994) (Scalia, J., concurring in the judgment).

In either event, the courts of this Circuit have both jurisdiction, and the constitutional obligation, to adjudicate al-Marri's habeas petition.

CONCLUSION

The Government's Motion to Dismiss for Lack of Jurisdiction should be denied.

Respectfully submitted,



Gerald L. Neuman
1545 Massachusetts Ave.
Cambridge, MA 02138
(617) 495-9083

Harold Hongju Koh
127 Wall Street
New Haven, CT 06511
(203) 432-1660

Sarah H. Cleveland
1545 Massachusetts Ave.
Cambridge, MA 02138
(617) 496-8853

Amici Curiae

Margaret L. Sanner
Reed Smith LLP
901 East Byrd Street, Suite 1700
Richmond, VA 23219
Telephone: (804) 344-3400
Fax: (804) 344-3410

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

TO BE INCLUDED IMMEDIATELY BEFORE THE CERTIFICATE OF SERVICE FOR ALL BRIEFS FILED IN THIS COURT.

1. This brief has been prepared using (SELECT AND COMPLETE ONLY ONE):

   ☒ Fourteen point, proportionally spaced, serif typeface (such as CG Times or Times New Roman, NOT sans serif typeface such as Arial). Specify software name and version, typeface name, and point size below (for example, WordPerfect 8, CG Times, 14 point):

   Word 2003, Times New Roman. 14 point

2. EXCLUSIVE of the corporate disclosure statement; table of contents; table of citations; statement with respect to oral argument; any addendum containing statutes, rules or regulations; and the certificate of service, the brief containing (SELECT AND COMPLETE ONLY ONE):

   ☒ Words (6,930); may not exceed 7,000 words pursuant to Order dated December 5, 2006.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the brief and/or copy of the word or line print-out.

12-12-06
Date

Margaret L. Sanner

CERTIFICATE OF SERVICE

I certify that on the 12th day of December, 2006, I filed with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit, via Hand Delivery, the required number of copies of this Brief of Amici Curiae, and further certify that I served via U. S. Mail, postage prepaid, the required number of this Brief to the following:

Jonathan Hafetz, Esquire
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Avenue of the Americas
12th Floor
New York, New York 10013

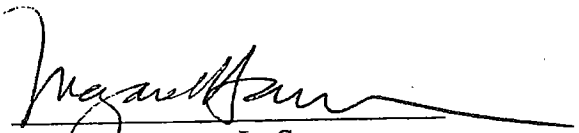
Lawrence S. Lustberg, Esquire
GIBBONS, DEL DEO, DOLAN
GRIFFINGER & VECCHIONE
A Professional Corporation
One Riverfront Plaza
Newark, New Jersey 07102

Andrew J. Savage, III, Esquire
SAVAGE & SAVAGE, P.A.
15 Prioleau Street
Post Office Box 1002
Charleston, South Carolina 29402

Kevin Frank McDonald, Esquire
OFFICE OF THE UNITED STATES ATTORNEY
Suite 500
1441 Main Street
Columbia SC 29201-2692

Gregory George Garre, Esquire
David B. Salmons, Esquire
U. S. DEPARTMENT OF JUSTICE
DEPARTMENT OF THE SOLICITOR
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Counsel for Respondent-Appellee



Margaret L. Sanner

APPENDIX 1: AMICI CURIAE*

Bruce A. Ackerman
Sterling Professor of Law and Political Science
Yale Law School

Vince A. Blasi
James Madison Distinguished Professor of Law & Roy L. and
Rosamond Woodruff Morgan Research Professor
University of Virginia and
Corliss Lamont Professor of Civil Liberties
Columbia Law School

Philip Chase Bobbitt
A. W. Walker Centennial Chair
The University of Texas School of Law

Steven G. Calabresi
George C. Dix Professor of Constitutional Law and
Co-Founder of the Federalist Society
Northwestern University

Paul D. Carrington
Professor of Law
Duke University School of Law

Gerhard Casper
Professor of Law and President Emeritus
Stanford University

Sarah H. Cleveland
Marrs McLean Professor in Law
The University of Texas School of Law and
Bemis Visiting Professor of International Law
Harvard Law School

---

*Professional affiliations provided for identification purposes only.

Walter E. Dellinger, III
Douglas Blount Maggs Professor of Law
Duke University School of Law

Earl Dudley
Professor of Law
University of Virginia School of Law

Richard Epstein
James Parker Hall Distinguished Service Professor of Law
The University of Chicago
Peter and Kirsten Bedford Senior Fellow
The Hoover Institution

Lawrence M. Friedman
Marion Rice Kirkwood Professor of Law
Stanford Law School

John C. Jeffries, Jr.
Charlottesville, Virginia

Pamela S. Karlan
Kenneth and Harle Montgomery Professor of Public Interest Law
Stanford Law School and
Sidley Austin-Robert D. McLean '70 Visiting Professor of Law
Yale Law School

Harold Hongju Koh
Dean and Gerard C. & Bernice Latrobe Smith
Professor of International Law
Yale Law School

David A. Martin
Warner-Booker Distinguished Professor of International Law &
Class of 1963 Research Professor
University of Virginia

Frank I. Michelman
Robert Walmsley University Professor
Harvard University

Martha L. Minow
Jeremiah Smith, Jr. Professor of Law
Harvard Law School

Burt Neuborne
Inez Milholland Professor of Civil Liberties
New York University School of Law

Gerald L. Neuman
J. Sinclair Armstrong Professor of International,
Foreign, and Comparative Law
Harvard Law School

Robert M. O'Neil
University Professor and Professor of Law
University of Virginia

Judith Resnik
Arthur Liman Professor of Law
Yale Law School

George A. Rutherglen
John Barbee Minor Distinguished Professor of Law &
Edward F. Howrey Research Professor
University of Virginia School of Law

James E. Ryan
Academic Associate Dean and William L. Matheson and
Robert M. Morgenthau Distinguished Professor
University of Virginia School of Law

David L. Shapiro
William Nelson Cromwell Professor of Law, Emeritus
Harvard Law School

Kathleen M. Sullivan
Stanley Morrison Professor of Law and Former Dean
Director, Constitutional Law Center
Stanford Law School

Cass R. Sunstein
Karl N. Llewellyn Distinguished Service Professor of Jurisprudence
Law School and Department of Political Science
University of Chicago

Carl Tobias
Williams Professor
School of Law
University of Richmond

Laurence H. Tribe
Carl M. Loeb University Professor
Harvard University and
Professor of Constitutional Law
Harvard Law School

William Van Alstyne
Lee Professor of Constitutional Law
Marshall-Wythe Law School
College of William & Mary