In The
United States Court of Appeals
For The Fourth Circuit

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

Petitioners - Appellants,

v.

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

Respondent - Appellee.

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

APPELLANTS' RESPONSE TO APPELLEE'S MOTION TO DISMISS FOR LACK OF JURISDICTION

Jonathan Hafetz
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
161 Avenue of the Americas
12th Floor
New York, New York 10013
(212) 998-6289

Counsel for Appellants

Andrew J. Savage, III
SAVAGE & SAVAGE, P.A.
15 Prioleau Street
Post Office Box 1002
Charelston, South Carolina 29402
(843) 720-7470

Counsel for Appellants

Lawrence S. Lustberg
Mark A. Berman
GIBBONS, DEL DEO, DOLAN, GRIFFINGER & VECCHIONE, A Professional Corporation
One Riverfront Plaza
Newark, New Jersey 07102
(973) 596-4500

Counsel for Appellants

THE LEX GROUP ♦ **1108 East Main Street** ♦ **Suite 1400** ♦ **Richmond, VA 23219**
(804) 644-4419 ♦ **(800) 856-4419** ♦ **Fax: (804) 644-3660** ♦ **www.thelexgroup.com**

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

INTRODUCTION AND SUMMARY OF ARGUMENT

On November 13, 2006, the government moved to dismiss the appeal of Petitioner Ali Saleh Kahlah al-Marri ("al-Marri"), arguing that section 7 of the Military Commissions Act of 2006, Pub. L. No. 109-366 ("MCA") deprives the federal courts of subject matter jurisdiction over his habeas corpus petition and this appeal. Disregarding the grave constitutional issues at stake, the government contends that Congress eliminated the right of lawful resident aliens to challenge their executive detention by way of habeas corpus. As a result, the government argues, neither this Court, nor the Supreme Court, has jurisdiction to hear the fundamental questions raised on this habeas appeal:

> 1) whether the President has the authority to detain as an "enemy combatant," and without charge, a civilian arrested in his home in Peoria, Illinois; and,
>
> 2) if so, whether the President may imprison such person indefinitely in a Navy Brig based solely upon a multiple-hearsay declaration from a government bureaucrat, without a hearing and without any witnesses.

Instead, under the government's view, the President is now free "to handle" al-Marri as he sees fit. He can prolong indefinitely al-Marri's 3½-year military imprisonment without charge, and now exercises complete and unfettered control over al-Marri's ability to challenge the lawfulness of that imprisonment in an Article III court.

The government's arguments should be rejected. Like American citizens, aliens in the United States have a constitutional right to habeas corpus. Thus, absent a valid suspension of the writ, Congress could not repeal habeas jurisdiction over the petition of a lawful resident alien like al-Marri without providing an adequate and effective substitute. Yet, the MCA, in the government's view, not only eliminates jurisdiction over al-Marri's habeas petition and appeal, but fails to provide *any* substitute that guarantees al-Marri review by an Article III court of the lawfulness of his prolonged executive detention. Further, contrary to the government's suggestion, the future possibility of review by another circuit of a summary military hearing that may never occur and that fails to satisfy the most basic requirements of due process cannot provide an adequate or effective substitute for habeas corpus.

As set forth below, section 7 of the MCA plainly does not repeal jurisdiction over habeas petitions filed by or on behalf of resident aliens, like al-Marri, whose constitutional entitlement to the Great Writ and Due Process has long been recognized. If, however, this Court construes section 7 as purporting to eliminate jurisdiction over al-Marri's habeas petition, it must invalidate this provision under the Suspension, Due Process, and Equal Protection Clauses of the Constitution.

ARGUMENT

A. Al-Marri Has A Constitutional Right To Habeas Corpus.

Habeas corpus is "the highest safeguard of liberty" within our legal tradition, *Smith v. Bennett*, 365 U.S. 708, 712 (1961), and has provided a judicial remedy that "has been for centuries esteemed the best and only sufficient defense of personal freedom." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) (citation omitted). Long known as the Great Writ, habeas corpus is "a writ antecedent to statue, … throwing its root deep into the genius of our common law …." *Rasul v. Bush*, 542 U.S. 466, 473 (2004) (citation omitted).

Although thought of today as a post-conviction remedy, habeas was historically "a remedy against executive detention." *Swain v. Pressley*, 430 U.S. 372, 386 (1977) (Burger, C.J., concurring); *see also*, *e.g.*, *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial."). Indeed, it is precisely in reviewing the lawfulness of executive detention that the writ's "protections have been strongest." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001).

Our nation's Founders took great care to ensure that access to habeas corpus would never depend upon executive or legislative grace by ensuring

the Writ's protections in the Constitution's Suspension Clause. *See St. Cyr*, 533 U.S. at 304 n.24 (Suspension Clause protects against loss of right to pursue habeas claim "by either the inaction or the action of Congress") (citing *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807)); *The Federalist*, No. 84, at 511 (Alexander Hamilton) (Clinton Rossiter ed. 1961) (affirming importance of Constitution's "establishment of the writ of *habeas corpus*"). Under the Suspension Clause, "[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 it." U.S. Const. art. I, § 9, cl. 2.

The Suspension Clause protects not only citizens, but all persons arrested and detained in the United States. *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (plurality opinion) ("[A]bsent suspension, the writ of habeas corpus remains available to *every* individual detained inside the United States.") (emphasis added); *St. Cyr*, 533 U.S. at 305 (elimination of habeas review over deportation of aliens would raise "a serious Suspension Clause issue"). Thus, regardless of whether the Constitution's guarantee of habeas corpus extends to aliens captured and detained outside the United States – a question not before this Court – it certainly encompasses an individual like al-Marri, who was seized and has at all times been detained inside this country. *See Johnson v. Eisentrager*, 339 U.S. 763, 771 (1950)

("[The Supreme] Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act."); *id.* at 777-78; *Rasul*, 542 U.S. at 475-79.[1]

Indeed, as the government has previously acknowledged, the right to habeas corpus for aliens arrested and detained inside the United States has been virtually unquestioned. *See, e.g.*, Argument Transcript, *Rasul v. Bush*, 542 U.S. 466 (2004), 2004 WL 943637, at *40-*41 (Solicitor General Olson agreeing that petitioner's right to invoke federal court's habeas jurisdiction and rights under Due Process Clause "[w]ould … be entirely different" if he were detained within sovereign territory of the United States).

---

[1] Notably, in *Eisentrager*, the Supreme Court identified six factors in finding that the German soldiers did not have a *constitutional* right to habeas. Specifically, each petitioner: (i) was an enemy alien; (ii) had never been or resided in the United States; (iii) was captured outside the United States and held outside the United States by the military as a prisoner of war; (iv) was tried and convicted by a military commission sitting outside the United States; (v) for offenses against the laws of war committed outside the United States; and (vi) was then and had at all times been imprisoned outside the United States. 339 U.S. at 777. *None* of those factors applies to al-Marri. Al-Marri is not an enemy alien because he is not a citizen, resident, or subject of a nation at war with the United States, *see* Brief of Appellant at 17 n.3, and, moreover, disputes his enemy status. Al-Marri was arrested by the FBI at home inside the United States, where he was lawfully residing and where he had lawfully resided previously. Joint Appendix ("JA") 113. Al-Marri was not tried and convicted by a military commission sitting outside the United States; rather, federal criminal charges brought against him were dismissed with prejudice. JA 20. And, al-Marri has at all times been imprisoned inside the United States.

Thus, since the nation's founding, habeas "jurisdiction was regularly invoked on behalf of noncitizens." *See, e.g.*, *St. Cyr*, 533 U.S. at 305. Even alleged enemy aliens – which al-Marri is not, *see* Brief of Appellants at 17 & n.3 – had the right to challenge the legal and factual basis for their detention. *See*, *e.g.*, *Ludecke v. Watkins*, 335 U.S. 160, 171-72 & n.17 (1948) (making clear that alleged enemy alien entitled "to challenge the construction and validity of the statute" [purportedly authorizing his detention] and to judicial determination of "whether [he] is in fact an alien enemy"); *Eisentrager*, 339 U.S. at 784 (alleged resident enemy aliens entitled to "judicial hearing to determine [whether] … they are really alien enemies"); *United States ex rel. Schwarzkopf v. Uhl*, 137 F.2d 898, 900 (2d Cir. 1943) (petitioner entitled to "a hearing of testimony before the court" in challenging his detention as enemy alien); *Ex parte Gilroy*, 257 F. 110, 114-26 (S.D.N.Y. 1919) (lengthy evidentiary hearing in which petitioner contested his status as alien enemy); *Lockington's Case*, Brightly (N.P.) 269, 298-99 (Pa. 1813) (Brackenridge, J.) (right of alleged enemy alien to show "he is not an alien enemy"). At common law, as well, aliens detained during wartime invoked habeas corpus to challenge their executive detention. *See*, *e.g.*, *Rasul*, 542 U.S. at 481 ("At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of

the realm.") (citing, *e.g.*, *R. v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759) (reviewing habeas petition of alien detained as prisoner of war; denying relief on merits)); *Case of Three Spanish Sailors*, 96 Eng. Rep. 775 (C.P. 1779) (same); *see also* Brief *Amici Curiae* Professors of Constitutional Law and Federal Jurisdiction. The Suspension Clause, at a minimum, guarantees al-Marri's right to this review of the legal and factual basis for his detention by way of habeas corpus. *See St. Cyr*, 533 U.S. at 301 ("[A]t the absolute minimum, the Suspension Clause protects the writ as it existed in 1789.") (quoting *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996)).[2]

Moreover, the Supreme Court has always entertained the habeas petitions even of admitted enemy aliens in the United States in order to determine whether they are subject to military authority under the constitution and laws of this country. *See*, *e.g.*, *Yamashita v. Styer*, 327 U.S. 1, 7-8 (1946); *Ex parte Quirin*, 317 U.S. 1, 24-25 (1942). In *Quirin*, the

[2] The government may seek to rely on *Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (No. 9,895), an admiralty case with no relevance to habeas. The district court in *Moxon* held that British shipowners could not invoke U.S. admiralty jurisdiction to recover a ship taken as a prize by the French in the territorial waters of the United States. Though the court stated that English courts would not "grant a habeas corpus in the case of a prisoner of war," *id.* at 947, this statement, at most, describes the unremarkable proposition that admitted prisoners of war are not entitled to release on habeas. It has no application to individuals who, like al-Marri, dispute their enemy status. *See*, *e.g.*, R.J. Sharpe, *The Law of Habeas Corpus* 116 (2d ed. 1989) (at common law, habeas court investigated whether prisoner "is both in fact and in law a prisoner of war").

Court reviewed the petitioners' claim that they were not subject to trial by military commission, but instead had to be charged and tried in a civilian court. 317 U.S. at 24-25. Similarly, in *Yamashita*, the Court reviewed the petitioner's claim that he was not subject to trial by military commission. 327 U.S. at 9-18.

It is beyond question, therefore, that al-Marri, a civilian arrested at home in Peoria, Illinois, and imprisoned by the President for 3½ years without charge in a Navy Brig in South Carolina, has a constitutional right to test the lawfulness of his detention by way of habeas corpus. Indeed, al-Marri's challenge to the President's authority to detain him without charge and without due process lies at "the traditional core of the Great Writ." *Cf. Rumsfeld v. Padilla*, 542 U.S. 426, 441 (2004). Absent a valid suspension, this Court has not only the power, but also the obligation to decide this appeal on the merits.

B. Congress Has Not Suspended, And Could Not Validly Suspend, Habeas Corpus In Order To Eliminate Jurisdiction Over Al-Marri's Habeas Petition.

The Suspension Clause limits Congress's ability to interfere with the federal courts' essential role in protecting individual liberty, "serving as an important judicial check on the Executive's discretion in the realm of detentions." *Hamdi*, 542 U.S. at 536 (plurality opinion). The Constitution

expressly prohibits suspension except in cases of actual "Rebellion or Invasion," and, even then, only when "the public Safety" so requires. U.S. Const. art. I, § 9, cl. 2.

Cognizant of the Constitution's clear limits on its power to curtail the Great Writ, Congress has suspended habeas "[o]nly in the rarest of circumstances." *Hamdi*, 542 U.S. at 525 (plurality opinion); *see also* William F. Duker, *A Constitutional History of Habeas Corpus* 149, 178 n.190 (1980) (suspension authorized only four times in American history). Each time, Congress expressly stated that it was authorizing suspension, and each suspension was effected amid an ongoing insurrection or invasion. *See id.*[3] "At all other times, [the Writ] has remained a critical check on the Executive, ensuring that it does not detain individuals except in accordance

[3] *See also* Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755 (authorizing President Lincoln during Civil War "to suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof" for duration of "the present rebellion" and where "the public safety may require it"); Act. of Apr. 20, 1871, ch. 22, § 4, 17 Stat. 14 (authorizing President Grant amid armed rebellion in Reconstruction South "to suspend the privileges of the writ of habeas corpus" for "the continuance of such rebellion" and where "the public safety shall require it"); Act of July 1, 1902, ch. 1369, § 5, 32 Stat. 692 (authorizing President or Governor amid armed rebellion in Philippines to "suspend" the "privilege of the writ of habeas corpus" for duration of "rebellion, insurrection, or invasion" and where "during such period the necessity for such suspension shall exist"); *Duncan v. Kahanamoku*, 327 U.S. 304, 307-08 (1946) (recognizing that Hawaiian Organic Act, ch. 339, § 67, 31 Stat. 153 (1900), expressly authorized suspension of habeas corpus immediately after attack on Pearl Harbor).

with law." *Hamdi*, 542 U.S. at 525 (plurality opinion) (citing *St. Cyr*, 533 U.S. at 301).

In enacting the MCA, Congress did not clearly state that it intended to suspend the constitutional right to habeas corpus, and it did not invoke the necessary grounds for suspension. *See, e.g.*, 152 Cong. Rec. S10368 (daily ed. Sept. 28, 2006) (statement of Sen. Specter) ("Fact No. 3, uncontested. We do not have a rebellion or invasion."). Furthermore, the MCA's elimination of habeas jurisdiction contains no temporal limitation; it purports to be permanent. This Court, therefore, cannot and should not conclude that Congress sought to suspend all aliens' constitutional right to habeas corpus. *See generally St. Cyr*, 533 U.S. at 299 ("[W]hen a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result."); *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) ("In traditionally sensitive areas, … the requirement of [a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.").

C. The MCA Does Not Divest This Court Of Jurisdiction Over Al-Marri's Appeal.

Section 7 of the MCA amends 28 U.S.C. 2241 by eliminating jurisdiction over habeas corpus petitions "filed by or on behalf of an alien detained by the United States" who either:

(i) "has been determined by the United States to have been properly detained as an enemy combatant"; or

(ii) "is awaiting such determination."

MCA § 7(a). As set forth below, section 7(a) does not apply to al-Marri because he does not fall within either category, and because section 7(a) does not retroactively strip the federal courts of jurisdiction over his pending habeas case. If, however, this Court construes the MCA to apply to al-Marri, it must invalidate the statute under the Suspension, Due Process, and Equal Protection Clauses.

1. Al-Marri Has Not "Been Determined by the United States To Have Been Properly Detained As An Enemy Combatant."

While al-Marri may be "an alien detained by the United States," he has not "been determined by the United States to have been properly detained as an enemy combatant." This prong of section 7(a) describes the two-step process to which Guantanamo detainees have been subjected: (i) initial detention as an "enemy combatant"; and (ii) subsequent determination by a Combatant Status Review Tribunal ("CSRT") that such detention is proper. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 450

(D.D.C. 2005) (describing CSRT).[4] Section 7(a), however, does not apply to al-Marri because he has never been "determined by the United States to have been properly detained as an enemy combatant" within the meaning of the MCA. Rather, whether al-Marri was properly detained as an "enemy combatant" based upon the President's June 23, 2003 order is precisely the question at issue in this appeal. The government's position, therefore, would resolve by circular reasoning the very issue presented for this Court's determination.

The government, nevertheless, makes two arguments as to why this prong of section 7(a) applies to al-Marri. Both arguments, however, fail to provide the "specific and unambiguous statutory directive[]" necessary to repeal habeas jurisdiction over al-Marri's habeas petition. *St. Cyr*, 533 U.S. at 299; *accord Demore v. Kim*, 538 U.S. 510, 517 (2003). Both arguments, moreover, would raise serious constitutional questions that this Court should avoid where, as here, "an alternative interpretation of the statute is 'fairly

[4] Section 7(a) also describes the two-step process used to determine whether other aliens captured and held elsewhere outside the United States, such as at Bagram Air Base in Afghanistan, have been properly detained as enemy combatants. *See* Respondents' Response to Order to Show Cause and Motion to Dismiss for Lack of Jurisdiction, Decl. of Col. Rose M. Miller ¶ 11, *Ruzatullah v. Rumsfeld*, No. 06-CV-1707 (GK) (D.D.C.) ("By direction of the Secretary of Defense, within 90 days of a detainee being brought under DoD control, the detaining commander, or his designee, shall review the initial enemy combatant determination made in the field [to determine whether the detention is proper].").

possible.'" *St. Cyr*, 533 U.S. at 299-300 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

The government first contends (Mot. at 4) that al-Marri was "determined by the United States to have been properly detained as an enemy combatant" when the President unilaterally issued his redacted June 23, 2003 order declaring him an "enemy combatant" and directing that he be transferred from civilian to military custody. Joint Appendix ("JA") 54. But the President's order determined only that al-Marri *should be* detained as an "enemy combatant," not that he had "been properly detained as an enemy combatant" by the United States. As the President stated:

> I, GEORGE W. BUSH, as President of the United States and Commander in Chief of the U.S. armed forces, hereby DETERMINE for the United States of America that … Ali Saleh Kahlah al-Marri, who is under the control of the Department of Justice [as a criminal defendant], is, and at the time he entered the United States in September 2001 was, an enemy combatant….
>
> ….
>
> Accordingly, the Attorney General is directed to surrender Mr. al-Marri to the Secretary of Defense, and the Secretary of Defense is directed to receive Mr. al-Marri from the Department of Justice and *to detain him as an enemy combatant.*

JA 54 (emphasis added).

The President's order, therefore, did not, and could not, determine that al-Marri had been "properly detained as an enemy combatant" because al-Marri *had never before been* detained as an "enemy combatant." Rather, al-Marri had been arrested by the FBI, and was being detained as a criminal defendant by the Department of Justice in a Peoria County Jail, pending trial on credit card fraud and other charges. Whether al-Marri was "properly detained" as an "enemy combatant" is the precise question at issue here, just as it was in *Padilla*, the only other case involving the detention of an "enemy combatant" by order of the President. *See Padilla v. Hanft*, 432 F.3d 582, 586-87 (4th Cir. 2005) ("the President's authority to detain militarily persons" like Padilla and al-Marri has been "a centerpiece of the government's war on terror" and is "an issue of … surpassing importance"); *Padilla v. Hanft*, 423 F.3d 386, 389 (4th Cir. 2005) (stating that "[t]he exceedingly important question before [the Court]" is whether Padilla can be lawfully detained by the military based upon the president's order declaring him an "enemy combatant"). Plainly, section 7 instead addresses detainees at Guantanamo and other prisons outside the United States who were "determined … to have been properly detained" as enemy combatants after they had already been detained by the military.

The President's June 23, 2003 order also cannot affect this Court's jurisdiction for another, more fundamental reason. The whole purpose of habeas corpus is for an individual detained "by the United States" (by the Executive) to obtain an independent adjudication (by the Judiciary) of the lawfulness of his detention. *See Rumsfeld v. Padilla*, 542 U.S. at 441 (challenge to detention as enemy combatant lies at "the traditional core of the Great Writ"); *Hamdi*, 542 U.S. at 536 (plurality opinion); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 475 (1963) ("[T]he classical function of habeas corpus was to assure the liberty of subjects against detention by the executive or the military without any court process at all …."). Thus, under the government's view, Congress eliminated the right of a lawful resident alien, arrested in his home in the United States, to seek review by an Article III court of the lawfulness of the President's order subjecting him to indefinite military detention without charge. There could be no plainer violation of the Suspension and Due Process Clauses.

The government's second argument is equally flawed. Specifically, it contends (Mot. at 4) that al-Marri was "determined by the United States to have been properly detained as an enemy combatant" when the district court issued its decision denying his habeas corpus petition. JA 340. But a

determination by a federal district judge is not a determination "by the United States." Section 7(a)'s reference to a determination "by the United States" does not apply to al-Marri, who never received a CSRT or any other determination "by the United States" that he had been "properly detained" as an "enemy combatant" following his transfer from civilian custody to the Navy Brig on June 23, 2003. Rather, section 7(a) refers unmistakably to aliens detained at Guantanamo Bay, who have been determined by a CSRT to have been "properly detained" as enemy combatants. *See* Govt's Supp. MCA Brief in *Boumediene v. Bush* & *Al Odah v. United States*, Nos. 05-5062, 05-5063 & 05-5064, 05-5095 through 05-5116, at 6 n.1 (D.C. Cir.) (Govt's D.C. Cir. MCA Br.) ("The United States, through the CSRTs, has determined that petitioners are 'properly detained' as enemy combatants [under the MCA]."). The government's reading of the MCA, therefore, not only contradicts the statute's plain language but also fails to provide the clear statement necessary to eliminate jurisdiction over al-Marri's habeas corpus petition.

The district court's determination cannot serve as the basis for eliminating this Court's jurisdiction for several additional reasons. *First*, if Congress intended the MCA to divest the federal courts of jurisdiction over habeas petitions like this one, as the government contends (Mot. at 5), the

district court's decision, too, is null and void. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("Without jurisdiction, the court cannot proceed at all in any case. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.") (quoting *Ex parte McCardle*, 74 U.S. 506, 514 (1868)); *Elliott v. Peirsol's Lessee*, 26 U.S. 328, 340 (1828). Hence, there has been no valid determination in this case that al-Marri is "properly detained" as an enemy combatant, the pre-requisite for eliminating habeas relief.

Second, if, as the government argues, the district court's determination is sufficient under the MCA because the district court had jurisdiction to determine whether al-Marri was properly detained as an "enemy combatant" at the time it issued its decision, but no longer possesses jurisdiction by virtue of the MCA, this Court then necessarily retains jurisdiction under 28 U.S.C. 1291 to review that decision on appeal, as nothing in the MCA affected that distinct jurisdictional provision. *Cf. Bruner v. United States*, 343 U.S. 112, 115 (1952) (statute withdrawing jurisdiction of district court did not affect jurisdiction of court of claims). This Court would also retain authority under the All Writs Act to grant "all writs necessary or appropriate in aid" of that jurisdiction, including to order al-Marri's release if it

concludes that his detention as an "enemy combatant" is unlawful. *See* 28 U.S.C. 1651; *Pennsylvania Bureau Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 43 (1985) (All Writs Act confers broad authority on federal courts "to fashion extraordinary remedies when the need arises").[5]

Third, al-Marri has a right to appeal the district court's decision denying his habeas petition to this Court and to the Supreme Court. *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). The Supreme Court has long required Congress to speak with unmistakable clarity if it exercises its Article III power to make exceptions to that Court's appellate jurisdiction. *See, e.g.*, *Ex parte Yerger*, 75 U.S. 85, 106 (1868) (declining to conclude that Supreme Court's appellate jurisdiction had been repealed "without the expression of such intent, and by mere implication"). The Supreme Court, moreover, has been especially

[5] The 1789 Judiciary Act specified that "all the … courts of the United States, shall have power to issue writs of *scire facies*, *habeas corpus*, and all other writs not specifically provided for by statue." Judiciary Act of 1789, § 14, 1 Stat. 81-82. In 1948, in what is now 28 U.S.C. 1651, Congress replaced "all other writs not specifically provided for by statute" with "all writs." This suggests that while a specific statute might have limited writs under the 1789 Act, the new act eliminates those limits – permitting a court to issue even a writ of habeas corpus in an appropriate case. Indeed, Congress expanded the Act in 1948 to permit courts to issue not only "necessary" writs but instead "necessary or appropriate" ones, a change that suggests that section 1651 was intended to broaden the Act.

hesitant to construe a statute as withdrawing its jurisdiction to review decisions in habeas cases. Thus, *Ex parte Yerger* found it:

> too plain for argument that the denial to this court of appellate jurisdiction in this class of cases must greatly weaken the efficacy of the writ … and seriously hinder the establishment of that uniformity in deciding upon questions of personal rights which can only be attained through appellate jurisdiction …. We are obliged to hold, therefore, that in all cases where a Circuit Court … caused a prisoner to be brought before it, and has, after inquiring into the cause of detention, remanded him to the custody from which he was taken, this court, in the exercise of its appellate jurisdiction, may, by the writ of *habeas corpus*, aided by the writ of *certiorari*, revise the decision of the Circuit Court, and if it be found unwarranted by law, relieve the prisoner from the unlawful restraint to which he has been remanded.

Id. at 102-03. Indeed, every time the Supreme Court has upheld a congressional limitation under the Exceptions Clause, U.S. Const. art. III, § 2, it has emphasized that an alternative avenue of contemporaneous appellate review was available. *See Felker*, 518 U.S. at 661-62; *id*. at 667 (Souter, J., concurring) ("[I]f it should later turn out that statutory avenues other than certiorari for reviewing [a lower court's denial of habeas] were closed, the question whether the statute exceeded Congress's Exceptions Clause power would be open."); *Yerger*, 75 U.S. at 105-06; *McCardle*, 74 U.S. at 515. No such avenue of appellate review is guaranteed to al-Marri under the MCA.

Thus, under the government's circular reasoning, the MCA eliminated all appellate jurisdiction to review the lawfulness of the very determination – the district court's denial of al-Marri's habeas petition – that the government insists forecloses that review. As in *Yerger*, it is "too plain for argument" that Congress did not except the Supreme Court's appellate jurisdiction to review al-Marri's pending habeas action based upon the very district court determination that forecloses that review. 75 U.S. at 102; *see also Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2764 (2006) (statute will not be held to revoke Supreme Court's habeas jurisdiction "absent an unmistakably clear statement to the contrary").

2. Al-Marri Is Not "Awaiting Such Determination"

In addition to not having been determined by the United States to have been properly detained as an enemy combatant, al-Marri was not and is not "awaiting such determination" within the meaning of the MCA. Rather, al-Marri, the only remaining "enemy combatant" detained in the United States, was – and is – awaiting a determination by the federal courts, and by this Court in particular, with respect to the merits of his habeas petition challenging his detention by the President.

The government, nonetheless, asserts (Mot. at 4-5) that al-Marri is "awaiting such determination" under the MCA because, on November 13,

2006 – the date the government filed its motion to dismiss – the Defense Department ordered that al-Marri be provided with a CSRT in the event this Court dismisses his habeas petition for lack of jurisdiction. *See* Attachment 2 to Respt's Mot. Thus, when Congress enacted the MCA on October 17, 2006, the Defense Department had never convened a CSRT for al-Marri, had never ordered that a CSRT be convened for al-Marri, and had never announced any intention to convene a CSRT for al-Marri. *Cf. Defense Department Ordered to Take Custody of High-Value Detainees*, Sept. 6, 2006 (http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=9909) (announcing, before MCA's passage, that the fourteen "high-value" terrorist suspects transferred from CIA custody to Guantanamo would "undergo" CSRTs). No statute or government regulation required then, or requires now, that the Defense Department ever convene and conclude a CSRT for al-Marri, and the CSRT procedures themselves expressly apply only to aliens "detained by the Department of Defense *at the U.S. Naval Base Guantanamo Bay, Cuba*." *See* Memorandum from Deputy Secretary of Defense on Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba, at 1, July 14, 2006 ("CSRT Memorandum") (http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.

pdf) (emphasis added). Because the MCA and Detainee Treatment Act, Pub. L. No. 109-148, 119 Stat. 2680 (2005) ("DTA"), limit judicial review exclusively to aliens detained as "enemy combatants" who have received final CSRT decisions, *see* MCA § 7(a); DTA § 1005(e)(2), Congress, in the government's view, necessarily eliminated al-Marri's right to habeas corpus without guaranteeing him any other access to an Article III court to challenge the lawfulness of his executive detention. Indeed, the government's construction of the MCA leads to the absurd result whereby Congress guaranteed an alternative avenue of review by an Article III court for prisoners captured abroad and detained at Guantanamo, but eliminated habeas corpus without guaranteeing any such review for a resident alien, arrested and detained in the United States, whose constitutional rights have long been recognized.

In an eleventh-hour attempt to avoid the unconstitutional result of its own interpretation, the government (Mot. at 5 n.1) now tells the Court "how [it] plans to handle al-Marri in the event the courts agree that the MCA divested the courts of jurisdiction." But the government cannot remedy a suspension of the Writ after the fact. Further, if a CSRT were the adequate and effective substitute for habeas that the government will inevitably say it is, the government would have given al-Marri a CSRT already, instead of

telling the Court what it "plans" to do, as an act of grace, gamesmanship, or mere convenience, if the Court accepts its invitation to dismiss al-Marri's appeal. The Executive cannot defeat habeas with a promise of future review that could be revoked as easily as it was made, and that does not ensure an adequate and effective substitute for the Writ.

The government, in short, attributes to Congress an intent to eliminate a pending habeas action without providing any substitute, let alone the adequate and effective substitute for habeas that the Suspension Clause requires. *See Swain*, 430 U.S. at 381; *infra* Point D. Indeed, if Congress properly divested the federal courts of habeas jurisdiction over al-Marri's petition, any alien could be snatched off the streets of the United States at any time and imprisoned forever in a Navy Brig without charge and without access to counsel based solely upon the speculative possibility of future federal court review that is not guaranteed by law and that the Executive has the unfettered discretion to permit, delay, or deny. Congress certainly did not intend such a result, and the MCA lacks the clear statutory directive necessary to repeal habeas jurisdiction over this case. *See Demore*, 538 U.S. at 517 ("[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.") (quoting *Webster v. Doe*, 486 U.S. 592, 603 (1988)); *St. Cyr*, 533 U.S. at 300 (reading statute to

"entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions"). If, however, the Court finds that Congress did seek to repeal jurisdiction over al-Marri's habeas petition, it must strike down section 7 of the MCA as an unconstitutional suspension of the Writ.

3. The MCA Does Not Apply Retroactively To Al-Marri's Habeas Action.

The government's argument that Congress intended the MCA to reach al-Marri's habeas action also violates the longstanding rule that statutes affecting substantive rights must be presumed to apply prospectively. *See*, *e.g.*, *Lindh v. Murphy*, 521 U.S. 320, 327-28 (1997); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994). Thus, a statute that would retroactively alter a party's rights in a pending case "does not govern absent clear congressional intent favoring such a result." *Hamdan*, 126 S. Ct. at 2765 (quoting *Landgraf*, 511 U.S. at 280). Construing the MCA to apply to al-Marri would retroactively eliminate his fundamental right to habeas corpus and due process. As set forth above, there is no unequivocal statement that Congress intended such a result.

This case, therefore, is fundamentally different from *Bruner*, which merely shifted jurisdiction from one federal forum to another, rather than interfering with the vindication of previously conferred rights, as the MCA

would here. *See* 343 U.S. at 117 ("Congress has not altered the nature or validity of petitioner's rights or the Government's liability but has simply reduced the number of tribunals authorized to hear and determine such rights and liabilities."). Similarly, *Hallowell v. Commons*, 239 U.S. 506 (1916), concerned a relocation of jurisdiction, not the divestiture thereof. *See* 239 U.S. at 508 ("[T]he reference of the matter to the Secretary, unlike the changes with regard to suits upon bonds, takes away no substantive right, but simply changes the tribunal that is to hear the case."). Cases like *Bruner* and *Hallowell* thus involve "[s]tatutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action" since "[s]uch statutes affect only *where* a suit may be brought, not *whether* it may be brought at all." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951 (1997) (internal citations omitted) (emphasis in original). Such statutes "usually take[] away no substantive right but simply *change*[] the tribunal that is to hear the case." *Id.* (quoting *Landgraf*, 511 U.S. at 274); *accord Hamdan*, 126 S. Ct. at 2765.

By contrast, the MCA, in the government's view, retroactively deprived al-Marri of any right to challenge his indefinite military detention. The MCA does not even arguably shift the forum that can hear al-Marri's habeas case to the District of Columbia Circuit, as the government says the

MCA and DTA do for the Guantanamo Bay detainee cases. *See* Govt's D.C. Cir. MCA Br. at 32 (arguing that pending appeals of district court decisions in Guantanamo detainee habeas cases should be "converted into petitions for review under section 1005(e)(2) of the DTA," to the extent authorized by that statute, and decided on the merits). Rather, the government argues, the MCA stripped this Court of all jurisdiction to hear the legal and constitutional claims presented by al-Marri's habeas appeal without guaranteeing jurisdiction over those claims in any other court. There is no evidence of the clear congressional intent necessary to effect that repeal.

Further, while the government (Mot. at 3) seeks to rely on section 7(b) of the MCA, that section undercuts, not supports, its argument. Section 7(a) purports to eliminate jurisdiction over two distinct categories of cases: (1) "an application for a writ of habeas corpus" filed by or on behalf of certain aliens, 28 U.S.C. 2241(e)(1); and (2) "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 such an alien," 28 U.S.C. 2241(e)(2) (emphasis added). Even assuming section 7 applies at all to al-Marri, section 7(b), which sets out the "effective date" of section 7(a), provides only that section 7(a) applies to pending cases that are in the *second* category – *i.e.*, cases "which *relate to any aspect of the detention, transfer,*

treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001." MCA § 7(b) (emphasis added). Section 7(b) does not purport to reach the habeas applications described in section 2241(e)(1), and, indeed, makes no specific mention of habeas at all; accordingly, the MCA lacks the "unmistakably clear statement" required to affect al-Marri's habeas case, which was filed prior to its enactment. *See Hamdan*, 126 S. Ct. at 2764; *see also*, *e.g.*, *St. Cyr*, 533 U.S. at 298 (habeas jurisdiction must remain in "any cases not plainly excepted by law") (quoting *Yerger*, 75 U.S. at 102); *Twenty Per Cent. Cases*, 87 U.S. (20 Wall.) 179, 187 (1873) (statutes affecting vested rights should not be construed to apply to pending cases unless their intent is expressed "in unequivocal terms").[6]

In addition, section 7(b) contrasts with section 3(a) of the MCA, which addresses habeas petitions brought by persons convicted by military commission. Section 3(a) added 10 U.S.C. 950j, which provides that "notwithstanding any other provision of law (including section 2241 of title 28 or any other habeas corpus provision), no court, justice, or judge shall

[6] The fact that section 7(b) states that section 7(a) "shall take effect on the date of the enactment of this Act" has no bearing on whether the MCA applies retroactively. *See Landgraf*, 511 U.S. at 257 ("A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date.").

have jurisdiction to hear or consider any claim or cause of action whatsoever … pending on … the date of the enactment of the [MCA], relating to the prosecution, trial, or judgment of a military commission under this chapter ….” 10 U.S.C. 950j(b). That section explicitly states that the jurisdiction-stripping provision applies to habeas cases pending on the date of enactment. Section 7(b) lacks similar language, and binding precedent forecloses extending it by implication to pending habeas cases. *See St. Cyr*, 533 U.S. at 299 (“Implications from statutory text … are not sufficient to repeal habeas jurisdiction ….”). Indeed, “a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute.” *Hamdan*, 126 S. Ct. at 2765. This Court, accordingly, must give effect to the difference between sections 3(a) and 7 of the MCA, and find that section 7 does not eliminate jurisdiction over al-Marri’s appeal.

4. The MCA’s Extension Of The DTA’s Guantanamo Bay-Specific Repeal Of Habeas Jurisdiction Does Not Reach The Petition Of A Resident Alien Like Al-Marri.

The government (Mot. at 3) argues that the MCA extended the Guantanamo Bay-specific repeal of habeas jurisdiction in section 1005(e)(1) of the DTA to encompass “any alien enemy combatant held by the United States, regardless of the location of the detention.” MCA § 7(a). That

argument contradicts not only the language and intent of section 7 but also longstanding rules of statutory construction that forbid repeals of habeas corpus absent an unmistakably clear directive from Congress and that require courts to avoid serious constitutional problems where an alternative interpretation of a statute is fairly possible, as it is here.

The MCA's extension of the DTA's habeas repeal beyond Guantanamo was never intended to sweep so broadly to encompass a lawful resident alien, like al-Marri, who has a constitutional right to the Writ. Congress instead enacted the MCA in response to the Supreme Court's decision in *Hamdan* and against the background of an unbroken line of cases establishing that resident aliens in the United States have constitutional rights, including the right to habeas corpus and due process. *See*, *e.g.*, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2681-82 (2006) (Roberts, C.J.); *St. Cyr*, 533 U.S. at 299-300; *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270-71 (1990); *Eisentrager*, 339 U.S. at 771, 777-78; *Wong Wing v. United States*, 163 U.S. 228, 238 (1896). In *Hamdan*, the Court ruled that the DTA did not eliminate jurisdiction over pending habeas petitions filed by or on behalf of Guantanamo detainees, 126 S. Ct. at 2762-69, and that the military commissions set up by the President to try suspected terrorists lacked the

requisite congressional authorization, *id.* at 2786. The MCA amended the habeas statute in response to that decision.

The MCA also extended the DTA's repeal of habeas corpus from that of "an alien detained by the Department of Defense at Guantanamo Bay, Cuba," DTA § 1005(e)(1), to that of "an alien detained by the United States," MCA § 7(a). But the MCA did not, and could not, entirely eliminate jurisdiction over the pending habeas action of a lawful resident alien like al-Marri, who was arrested and has at all times been detained inside the United States, and whose rights under the Constitution have long been recognized. Rather, the MCA amended the federal habeas statute to limit its reach to aliens who, Members of Congress who voted for the bill believed, did not have a constitutional right to the Writ. *See* 152 Cong. Rec. H7944 (daily ed. Sept. 29, 2006) (statement of Rep. Sensenbrenner) ("The Supreme Court has never held that the Constitution's protections, including habeas corpus, extend to noncitizens held outside the United States."); 152 Cong. Rec. S10268 (daily ed. Sept. 27, 2006) (statement of Sen. Kyl) ("*Eisentrager* and *Verdugo* are still the governing law in this area. These precedents hold that aliens who are either held abroad or held here but have no other substantial connection to this country are not entitled to invoke the U.S. Constitution."); 152 Cong. Rec. S10407 (daily ed. Sept. 28, 2006)

(statement of Sen. Sessions) ("The [Supreme] Court concluded [in *Rasul*] only that the federal habeas statute confers jurisdiction on federal district courts to hear claims brought by aliens detained at Guantanamo Bay. The Court nowhere suggested that the Constitution grants such aliens a right of access to American courts.").

The MCA, accordingly, addresses habeas petitions filed by or on behalf of aliens captured and detained outside the United States, including prisoners at Guantanamo and in Afghanistan and Iraq, where military operations are ongoing. *See* 152 Cong. Rec. S10267 (daily ed. Sept. 27, 2006) (statement of Sen. Warner) ("Well, if [habeas] is actionable in Guantanamo … what about 18,000 in our custody in Iraq now?").[7] Indeed, during floor debates, Members of Congress repeatedly made clear that they sought to eliminate habeas only for non-resident aliens who could claim only a statutory, not a constitutional, right to habeas. *See, e.g.*, 152 Cong. Rec. S10367 (daily ed. Sept. 28, 2006) (statement of Sen. Graham) (MCA does not eliminate habeas for alleged enemy combatants whose right to habeas is

[7] Notably, habeas corpus petitions were filed on behalf of 25 of the approximately 500 detainees at Bagram Air Base before the MCA's passage. *See* Warren Richey, *New lawsuits challenge Congress's detainee act*, Christian Science Monitor, Oct. 6, 2006, at 1.

guaranteed by Constitution). As Representative Sensenbrenner, Chairman of the Judiciary Committee and co-manager of the bill stated:

> There are two types of habeas corpus: one is the constitutional great writ. We are not talking about that here …. The other is statutory habeas corpus, which has been redefined time and time again by the Congress. That is what we are talking about here, and we have constitutional power to redefine it.

152 Cong Rec. H7548 (statement of Rep. Sensenbrenner) (daily ed. Sept. 27, 2006); *see generally* Brief for Center for National Security Studies *et al*. as *Amici Curiae*.

Accordingly, whatever effect the MCA might have on the habeas corpus petitions filed by or on behalf of aliens captured abroad and detained at Guantanamo or elsewhere outside the United States, it does not terminate the habeas action of a lawful resident alien, like al-Marri, whose rights under the Constitution have long been established. At most, Congress removed the DTA's references to Guantanamo Bay in order to restrict the habeas rights of aliens captured abroad regardless of where the United States decides to imprison them. *See, e.g.*, 152 Cong. Rec. S10355 (daily ed. Sept. 28, 2006) (statement of Sen. Kyl) (discussing treatment of "a suspected enemy combatant captured on the battlefield"). Whether such aliens would gain constitutional rights by virtue of their involuntary presence in the United States is irrelevant here because al-Marri, who lawfully entered and resided

in this country, unquestionably has those rights. *See Verdugo-Urquidez*, 494 U.S. at 271 ("[*O*]*nce an alien lawfully enters and resides in this country* he becomes invested with the rights guaranteed by the Constitution to all people within our borders.") (quoting *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953)) (emphasis in original).

The MCA, therefore, did not – and could not – strip the federal courts of jurisdiction over the habeas petition of a resident alien like al-Marri. If, however, this Court were to hold that section 7 of the MCA was intended by Congress to apply to al-Marri, it must invalidate this provision.

D. The MCA Violates The Suspension And Due Process Clauses If Applied To Al-Marri.

The essential purpose of habeas corpus is provide an individual detained by the Executive with review by an Article III court of the lawfulness of his detention and the meaningful opportunity to be heard that Due Process requires. *Hamdi*, 542 U.S. at 536-37 (plurality opinion). Absent a valid suspension, Congress cannot eliminate the Writ unless it provides a substitute remedy that is both adequate and effective to "test the legality of a prisoner's detention." *Swain*, 430 U.S. at 381; *see also St. Cyr*, 533 U.S. at 305 (withdrawing habeas without an "adequate substitute for its exercise" would raise "a serious Suspension Clause issue"). The MCA, however, would repeal habeas jurisdiction over al-Marri's case without

guaranteeing any substitute, let alone the adequate and effective substitute that the Constitution requires. This Court, therefore, cannot dismiss this appeal based upon the contingencies and uncertainties of a process that has not happened and may never happen; that does not guarantee review by an Article III court of the lawfulness of al-Marri's detention, but instead places complete and unilateral control over any such review in the hands the detaining power (in this case, the President of the United States); and that is constitutionally deficient on its face.

1. The MCA Deprives Al-Marri Of His Right To Judicial Review Of His Legal And Constitutional Claims.

Al-Marri is a civilian and lawful resident alien who challenges the military's authority to detain him indefinitely without a criminal trial and without due process. His challenge to the President's exercise of military authority over individuals in this country lies at the historical core of habeas relief. *See, e.g.*, *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (reviewing, and granting relief on merits of, petitioner's habeas challenge to trial by military commission rather than by civilian criminal court); *Ex parte Quirin*, 317 U.S. 1 (1942) (reviewing, and denying relief on merits of, petitioners' habeas challenge to trial by military commission rather than by civilian criminal court). The MCA would eliminate al-Marri's constitutional right to raise that challenge in any federal court.

Instead, the MCA subjects al-Marri's access to an Article III court to the unilateral control and sole discretion of the Executive. Under the MCA, al-Marri no longer has any right to judicial review since such review depends entirely upon the military's decision to conduct and conclude a CSRT. *See* MCA § 7(a); DTA § 1005(e)(2)(C)(i). Al-Marri has been detained by the military for more than 3½ years, and the military has never convened a CSRT to review his detention. Indeed, no statute or government regulation requires the military to conduct or conclude a CSRT, and the CSRT procedure expressly states that it "is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees or agents, or any person." *See* CSRT Memorandum, Encl. (1), at 1.

Thus, if the MCA strips the Court of jurisdiction over this appeal, al-Marri's right to a determination by the Judiciary of the lawfulness of his detention by the President not only will be indefinitely delayed, but may never occur. The protections of the Great Writ of liberty, however, cannot hinge on Executive whim or the vagaries of an *ad hoc* military process that remains completely within the Executive's control. *Cf. Harris v. Nelson*, 394 U.S. 286, 290-91 (1969) (habeas corpus is "the fundamental instrument

for safeguarding individual freedom against arbitrary and lawless state action"); 3 William Blackstone, *Commentaries* *131 (habeas corpus is "the great and efficacious writ in all manners of illegal confinement").

The MCA, therefore, contrasts sharply with the statute upheld by the Supreme Court in *Swain*. That statute guaranteed a collateral remedy to prisoners under sentence of the Superior Court for the District of Columbia by allowing such prisoners to move in the Superior Court for release on the ground that their sentence was unlawful or unconstitutional. *See Swain*, 430 U.S. at 374. As the Court made clear, the scope of this collateral remedy was the same as that provided under 28 U.S.C. 2255, which itself was "commensurate with habeas corpus in all respects." *Id.* at 382 (citing *Hill v. United States*, 368 U.S. 424, 427 (1962)). Further, the statute in *Swain* contained a safety valve that "allow[ed] the District Court to entertain a habeas corpus application if it 'it appears that the remedy by motion is inadequate or ineffective to test the legality of (the applicant's) detention.'" *Id.* at 381.

The MCA, however, would eliminate al-Marri's habeas petition without guaranteeing any alternative access to review of his detention by an Article III court, let alone the adequate and effective substitute for habeas that the Constitution requires. The MCA also contains no safety valve,

leaving al-Marri without any opportunity to vindicate his constitutionally guaranteed habeas rights if the remedy provided by the DTA is inadequate or ineffective. By contrast, in *Swain*, it was literally impossible that the petitioners would not be entitled to exactly the same relief as they would on habeas. Thus, unlike the statute in *Swain*, the effect of the MCA would be to impermissibly suspend the Writ.

2. If The MCA Repeals Jurisdiction Over This Habeas Appeal, There Is No Certainty A Court Will Ever Review The Lawfulness Of The President's June 23, 2003 Order Declaring Al-Marri An "Enemy Combatant."

The MCA's repeal of jurisdiction over this case would be impermissible for another reason. Even if a CSRT were provided, there is no certainty a federal court would ever address the lawfulness of the President's June 23, 2003 order declaring al-Marri an "enemy combatant," which provided the basis for his indefinite military detention. The CSRT would determine only whether, "notwithstanding any prior designation," al-Marri meets the criteria set forth in CSRT procedures defining an "enemy combatant." *See* Attachment 2 to Respt's Mot. The District of Columbia Circuit's review would then be limited to whether the CSRT's determination was "consistent with the [CSRT's] standards and procedures" and "supported by a preponderance of the evidence," DTA § 1005(e)(2)(C)(i), and whether the "use of such standards and procedures … is consistent with

the Constitution and laws of the United States," *id.* § 1005(e)(2)(C)(ii). The District of Columbia Circuit, therefore, would be confined to reviewing the CSRT's findings and CSRT's use of its standards and procedures. It would not necessarily and, indeed, potentially could never review the very challenge al-Marri asserts here to the President's June 23, 2003 order ousting him from the civilian criminal justice system and the constitutional protections it provides to all individuals living in this country. *See, e.g.*, *Milligan*, 71 U.S. at 121-22, 126-27. Instead, if the MCA repeals jurisdiction over al-Marri's habeas petition, al-Marri would, at best, be subjected to a military status hearing designed 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. Foreclosing such review would transgress the Suspension Clause. *Cf. St. Cyr*, 533 U.S. at 301.

3. Even If Al-Marri Were Provided A CSRT, And Prevailed, He Would Remain Detained Based Upon The President's June 23, 2003 Order Without Review By An Article III Court.

The MCA would also repeal habeas jurisdiction without providing an adequate and effective substitute by denying al-Marri the right to release from unlawful detention, an essential element of habeas. *See generally, e.g.*, *Fay v. Noia*, 372 U.S. 391, 400 (1963), *overruled on other grounds by*

Wainwright v. Sykes, 433 U.S. 72 (1977). Even if al-Marri were provided a CSRT, and prevailed, he would still remain detained based upon the President's June 23, 2003 order declaring him an "enemy combatant." JA 54. Nowhere in its motion does the government acknowledge that al-Marri would have a right to release if a CSRT determined that he was not an "enemy combatant" or otherwise suggest that the President's June 23, 2003 order no longer binds the Executive branch. Instead, the President would remain free, as the government suggests (Mot. 5 n.1), "to handle al-Marri" however he sees fit.

4. The CSRT, And Review Of The CSRT Under The DTA, Would Deprive Al-Marri Of His Right To The Meaningful Factual Inquiry Guaranteed By The Suspension And Due Process Clauses.

This Court cannot dismiss this habeas appeal unless it first establishes that there is an adequate and effective substitute for the Writ. *See Swain*, 430 U.S. at 381. Al-Marri has not been given a CSRT and, even if he had, this Court would have no jurisdiction under the DTA to review the CSRT's decision. This Court, however, cannot consistent with the Suspension Clause, dismiss al-Marri's habeas petition based upon the future possibility of a fundamentally flawed proceeding in which al-Marri's access to review by an Article III court remains within the sole discretion and control of the Executive power that continues to detain him.

To uphold the MCA's repeal of habeas over this case, therefore, this Court must first determine that the CSRT and DTA review, which the government suggests (Mot. at 5) al-Marri, perhaps one day, "may avail himself of," guarantees an adequate and effective substitute for the Writ. As explained below, this scheme, on its face, violates both the Suspension Clause and the Due Process Clause, which the Suspension Clause protects. *See Hamdi*, 542 U.S. at 536-37 (plurality opinion); *see also id.* at 555-56 (Scalia, J., dissenting) (writ of habeas corpus, guaranteed by the Suspension Clause, is "the instrument by which due process" is secured). Specifically, it denies al-Marri the right to: (i) a meaningful inquiry into the factual basis for his detention; (ii) the assistance of counsel; (iii) see the government's evidence; (iv) confront and cross-examine witnesses; (v) be free from detention based on evidence gained by torture; (vi) discovery of the basis for the government's allegations; and (vii) a neutral decisonmaker. This Court, accordingly, should avoid these "serious constitutional problem[s]" by finding that the MCA does not apply to al-Marri. *See Zadvydas*, 533 U.S. at 690. If, however, the Court finds that section 7 of the MCA sought to repeal jurisdiction over al-Marri's petition, it must invalidate this provision.

First, in *Hamdi*, the Supreme Court held that the writ of habeas corpus, guaranteed by the Suspension Clause, secures a detainee's due

process right to notice of the factual basis for his detention and a meaningful opportunity to be heard, including a fair opportunity to rebut the government's allegations before a neutral decisionmaker. 542 U.S. at 533 (plurality opinion); *id.* at 553 (opinion of Souter, J.); *cf. Harris*, 394 U.S. at 298 ("Petitioners in habeas corpus proceedings … are entitled to careful consideration and plenary processing of their claims including full opportunity for the presentation of relevant facts."). Here, as the lower courts concluded, JA 125, 236-38, 347, and as the government has acknowledged, JA 311, al-Marri is entitled to due process in challenging his detention, and the opportunity to vindicate that right through habeas corpus.

Indeed, the factual inquiry provided by habeas was firmly established at common law in cases of executive and other non-judicial detention, where prisoners received a judicial hearing with respect to disputed facts. *See, e.g.*, *Goldswain's Case*, 96 Eng. Rep. 711, 712 (C.P. 1778) (considering evidence on habeas that sailor's impressment was unlawful); *State v. Joseph Clark*, 2 Del. Cas. 578 (Del. Ch. 1820) (releasing prisoner from military enlistment based upon hearing); Eric M. Freedman, *Habeas Corpus: Rethinking the Great Writ of Liberty* 28, 165-66 nn.55-56 (2001) (citing cases where habeas courts conducted evidentiary hearings to determine lawfulness of military custody). As noted above, even alleged enemy aliens – which al-Marri is

not – have always had a meaningful opportunity to test the factual and legal bases for their detention in habeas cases. *See supra* at 7-8.[8]

As al-Marri has explained, the process due a civilian – whether citizen or alien – arrested by the FBI in his home in the United States is necessarily greater than that due an armed soldier captured amid military combat on a foreign battlefield, as in *Hamdi*. *See* Brief of Appellant at 37-55. But, for purposes of the instant motion, the point is that all persons present in the United States have due process rights and must have the opportunity to vindicate those rights absent a valid suspension of the Writ. In place of that constitutionally mandated process, required by the Fifth Amendment and guaranteed by the Suspension Clause, the government says it plans "to handle al-Marri" by convening a military status hearing that, even if adequate for an enemy soldier captured abroad, falls far short of what the Constitution requires for a civilian arrested in Peoria.

[8] The scope of habeas, of course, was and is narrower in cases seeking collateral review of a criminal conviction. *See, e.g.*, Dallin H. Oaks, *Legal History in the High Court – Habeas Corpus*, 64 Mich. L. Rev. 451, 453 (1966). That is because the prisoner has already been convicted at a trial that provides full due process, including the opportunity to confront and cross-examine any witnesses against him, *Crawford v. Washington*, 541 U.S. 36, 49 (2004), and the requirement that the government prove its allegations beyond a reasonable doubt, *United States v. Booker*, 543 U.S. 220, 230 (2005). In cases of executive detention without trial, like this one, the habeas inquiry has always been plenary.

The CSRT makes no attempt to mask its glaring inadequacies. It is a self-described "non-adversarial proceeding to determine whether each detainee … meets the criteria to be designated as an enemy combatant." CSRT Memorandum, Encl. (1), at 1. Review of that proceeding under the DTA, moreover, does not appear to provide any judicial inquiry into disputed facts. DTA § 1005(e)(2)(C); *see also* 152 Cong. Rec. S10271 (daily ed. Sept. 27, 2006) (statement of Sen. Kyl) ("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."). Indeed, as the government maintains, the DTA limits the District of Columbia Circuit's review to the CSRT "record" and "does not authorize fact finding" by any court in "any … circumstances." *See* Response in Opposition to Motion to Compel at 14-15, *Bismullah v. Rumsfeld*, No. 06-1197 (D.C. Cir.). The District of Columbia Circuit, according to the government, decides only "whether the CSRT followed appropriate procedures and rendered a decision supported by sufficient evidence." *Id.* at 12. Thus, under the DTA, al-Marri would have no right to the meaningful hearing and opportunity to be heard that due process requires.

The *Hamdi* plurality, of course, contemplated that when the military captures a soldier amid combat on a foreign battlefield, the process due could be provided in the first instance by "an appropriately authorized and properly constituted military tribunal." 542 U.S. at 538 (plurality opinion). But *Hamdi* never suggested, and due process does not allow, the same process for a civilian, whether citizen or alien, arrested at home inside the United States. *See* Brief of Appellant at 40-49. *Hamdi* further states that "[i]n the absence of such process, ... a court that receives a petition for writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved." 542 U.S. at 538 (plurality opinion). Just like Hamdi and Padilla, al-Marri had not received any process when he filed his habeas petition. And, just like in *Hamdi* and *Padilla*, al-Marri has the right to a hearing consistent with due process, as a habeas proceeding can provide.

The government may argue that *Yamashita* and *Quirin* foreclose al-Marri's right to challenge the factual basis for his military detention. That argument would be wrong. *Yamashita* and *Quirin* involved challenges by *admitted* enemy combatants – soldiers of nations at war with the United States – to their trial and conviction by a military commission. *Yamashita*, 327 U.S. at 7-8; *Quirin*, 317 U.S. at 24-25. Moreover, even though their

enmity was undisputed, the accused Nazi saboteurs in *Quirin* received an actual trial in which 43 witnesses testified and the government presented proof "in mind-numbing detail," including physical evidence of the Germans' attempted sabotage, and the testimony of "every FBI agent who had come into contact" with the defendants, all of whom the defendants were permitted to cross-examine freely. *See* Pierce O'Donnell, *In Time of War: Hitler's Attack on America* 152-53, 153, 165-66, 189 (2005). Similarly, in *Yamashita*, the Japanese general's military commission heard testimony from 286 witnesses over the course of a five week trial that produced over "three thousands pages of testimony." 327 U.S. at 5.

Al-Marri, by contrast, is a civilian arrested at his home in the United States. He does not stand accused of a crime; instead, he remains detained indefinitely without charge, without a hearing, and without any opportunity to confront and cross-examine the witnesses against him. In such instances, due process mandates that al-Marri be provided a meaningful opportunity to challenge the factual basis for his detention and to rebut the government's allegations. *See* Brief of Appellant at 37-64. The MCA's elimination of habeas corpus would impermissibly deprive him of that right.

Second, the MCA denies al-Marri the assistance of counsel, a right essential to due process. *See, e.g., Powell v. Alabama*, 287 U.S. 45, 69 (1932) ("right to be heard" would be of "little avail if it did not comprehend the right to be heard by counsel"); *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938) (assistance of counsel "necessary to ensure fundamental human rights of life and liberty"). As the Supreme Court has made clear, al-Marri "unquestionably has the right to access to counsel" in challenging his detention as an "enemy combatant." *See Hamdi*, 542 U.S. at 539 (plurality opinion); *see also id.* at 553 (opinion of Souter, J.). Yet, the government – which unilaterally and illegally deprived al-Marri of access to counsel for 16 months after his transfer from civilian to military detention – again seeks to deprive him of that fundamental constitutional right.

The CSRT does not permit representation by counsel. Rather, the CSRT provides only a "personal representative." CSRT Memorandum, Encl. (1) at 2 & Encl. (3) at 1-3. The personal representative is neither a detainee's attorney nor his advocate. "[N]o confidential relationship exists or may be formed between the detainee and the Personal Representative." *Id.* Encl. (3) at 1. Instead, the personal representative's function is to explain the CSRT process and to assist the detainee in collecting "reasonably available information." *Id.* Encl. (3) at 1. In the overwhelming majority of

cases, personal representatives meet with detainees only once, sometimes in meetings as short as 10 minutes. *See* Mark Denbeaux et al., *No-Hearing Hearings; CSRT: The Modern Habeas Corpus?* 4 (summarizing records in 78 per cent of 393 CSRTs for which U.S. had produced records) (http://law.shu.edu/news/final_no_hearing_hearings_report.pdf) ("*No-Hearing Hearings*"). Personal representatives, moreover, freely comment on classified information outside a detainee's presence to "aid the [CSRT's] deliberations," CSRT Memorandum, Encl. (3) at 2, often advocating against detainees, *No-Hearing Hearings*, *supra*, at 6. A CSRT personal representative, in short, is no attorney and no substitute for one. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 471-72 (CSRT's denial of assistance of counsel violates due process). The DTA, moreover, limits judicial review to a CSRT record developed without the assistance of counsel, compounding the due process violation and denying the meaningful opportunity to be heard that the Constitution requires.

Third, the MCA denies al-Marri meaningful notice of the factual basis for his detention by eliminating his right to review the government's allegations. The CSRT permits the use of classified and secret evidence that a detainee cannot see or rebut. CSRT Memorandum at 7-8. In the vast majority of cases, CSRT decisions have been based upon such evidence.

See No-Hearing Hearings, *supra*, at 5. As the lower court already concluded here, the use of secret evidence to detain al-Marri would violate due process. JA 388, 396-98; *see also In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 472 (holding, in habeas cases, that CSRT's reliance on classified information that detainees cannot see violates due process); *cf. Rafeedie v. INS*, 880 F.2d 506, 516 (D.C. Cir. 1989) (individual must be able to see "undisclosed evidence" to rebut it).

Fourth, the MCA denies al-Marri the right to confront and cross-examine witnesses. As al-Marri has explained at length, this right is essential to due process. *See* Brief of Appellant at 50-55. Al-Marri would have no right to confront and cross-examine witnesses in a CSRT, which, moreover, could freely consider multiple hearsay. CSRT Memorandum, Encl. (1) at 6. Review by the District of Columbia Circuit, in turn, would be confined to the record of a proceeding which necessarily lacked this *sine qua non* of due process. Therefore, the MCA, if it repeals jurisdiction over al-Marri's habeas petition, would necessarily violate due process and cannot provide an adequate and effective substitute for the Writ.

Fifth, the MCA would allow the use of evidence obtained by torture and other mistreatment. Such evidence is not merely inherently unreliable but, by definition, derives from "interrogation techniques ... so offensive to a

civilized system of justice that they must be condemned under the Due Process Clause." *Miller v. Fenton*, 474 U.S. 104, 109 (1985); *see* Brief of Appellants at 53-55. In designating al-Marri an "enemy combatant," the President appeared to rely on information gained from individuals who have been tortured and mistreated, including Khalid Sheikh Mohammed. *See* Brief of Appellants at 53. The CSRT, however, fails to provide any meaningful "inquiry into the accuracy and reliability" of such hearsay statements to determine whether, in fact, they were obtained by torture or other abuse. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 473; *see also* Brief of *Amici Curiae* Retired Federal Jurists in Support of Petitioners' Supplemental Brief Regarding the Military Commissions Act of 2006, at 6, *Boumediene v. Bush* & *Al Odah v. United States*, Nos. 05-5062, 05-5063 & 05-064, 05-095 through 05-5116 (D.C. Cir.) (finding, based upon review of hundreds of CSRT records, that "CSRT neither examined allegations of torture *before* [an] individual was adjudicated an enemy combatant, nor did it exclude such evidence from its consideration") (emphasis in original).

Assuming a CSRT were ever convened for al-Marri, it would merely "assess, to the extent practicable, whether any statement derived from or relating to [him] was obtained as a result of coercion and the probable value, if any, of any such statement." CSRT Memorandum, Encl. (10)

(implementing DTA § 1005(b)(1)). The CSRT, therefore, would be under no obligation to assess whether a statement was gained through torture. Further, the CSRT would not only be free to rely upon statements obtained through torture, but it would assess such statements' "reliability" without any examination by al-Marri of the witnesses against him. Such reliance on unexamined hearsay statements gained from custodial interrogations flouts due process. *See, e.g.*, *Crawford v. Washington*, 541 U.S. 36, 50-53 (2004); Brief of Appellants at 51-52.

Further, the District of Columbia Circuit would have no power under the DTA to inquire into the factual basis for al-Marri's detention, but would instead be limited to the CSRT record. As a result, the government could freely launder coerced statements without any factual inquiry by an Article III court, in violation of the rights guaranteed to al-Marri by the Due Process Clause and secured by the Suspension Clause.

Sixth, the MCA would deprive al-Marri of his right to obtain discovery, including discovery related to the circumstances under which the evidence against him was obtained. Habeas courts have the power to grant discovery to enable the petitioner to "secur[e] facts where necessary to accomplish the objective of the proceedings." *Harris*, 394 U.S. at 299; Brief of Appellants at 60-64. The CSRT, however, denies any right to discovery,

including discovery of exculpatory evidence, contrary to the requirements of habeas and due process. *See* Brief of Appellants at 63. And the DTA, unlike a habeas court, would necessarily be confined to a record in which the detainee had no right to discovery and, therefore, no opportunity to obtain the facts necessary to show his detention was unlawful, including because it was based on statements obtained through torture or other abuse.

Seventh, the MCA would deny al-Marri his due process right to a determination by a neutral decisionmaker. *See Hamdi*, 542 U.S. at 533 (plurality opinion); *id.* 553 (opinion of Souter, J.). A CSRT, assuming one is ever convened, can never be a neutral decisionmaker in this case. The government asserts (Mot. at 4) that al-Marri has already been properly determined to be an "enemy combatant" by the President of the United States. JA 54. No tribunal of three subordinate military officials – who answer to the President in the military chain of command – can reject a determination by the Commander-in-Chief that al-Marri should be detained as an "enemy combatant." In addition, due process mandates a "neutral and detached judge in the first instance," not a tribunal convened after years of detention and an elaborate secret process to confirm a determination already made. *See Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 617 (1993) (quoting *Ward v. Vill. of Monroeville*, 409 U.S. 57, 61-

62 (1972)). Therefore, the only neutral decisionmaker that can satisfy al-Marri's right to due process in challenging his executive detention is a federal habeas court. *See Hamdi*, 542 U.S. at 533, 536 (plurality opinion). The MCA would impermissibly take away that right.

5. The MCA Would Deprive Al-Marri Of His Right To Challenge The Jurisdiction Of A Military Commission.

Under the MCA, a CSRT determination would do more than subject al-Marri to indefinite detention without due process; it would also expose him to trial by military commission without any opportunity to challenge the commission's jurisdiction over him. The MCA states that a CSRT finding "that a person is an unlawful enemy combatant is dispositive for the purposes of jurisdiction for trial by military commission under this chapter." MCA § 3(a)(1) (adding 10 U.S.C. 948d(c)). The military commission itself is not permitted to consider whether it lacks jurisdiction over a detainee on the ground that the basis for his unlawful enemy combatant decision was erroneous. Thus, the MCA would foreclose the jurisdictional inquiry that has been central to the habeas process for centuries – the inquiry into whether the military commission properly has jurisdiction over the prisoner. *See*, *e.g.*, *Milligan*, 71 U.S. at 118; *Yamashita*, 327 U.S. at 8 (investigating "the lawful power of the commission to try the petitioner for the offense charged"); *United States v. Grimley*, 137 U.S. 147, 150 (1890) (habeas

corpus secures right to challenge military tribunal's jurisdiction). Moreover, even if al-Marri were permitted to assert a jurisdictional challenge after a conviction by military commission, *see* DTA § 1005(e)(3); MCA § 950g(a), such *post-hoc* inquiry is not an adequate or effective substitute for a habeas petitioner's right to challenge a military tribunal's jurisdiction before trial. *See Hamdan*, 126 S. Ct. at 2772 ("Hamdan and the Government both have a compelling interest in knowing in advance whether Hamdan may be tried by a military commission that arguably is without any basis in law."). By denying that core habeas right without providing an adequate or effective substitute, the MCA would unconstitutionally suspend the Writ.

6. The MCA Would Suspend The Writ By Denying Al-Marri The Right To Invoke The Protections Of The Geneva Conventions In Any Habeas Proceeding.

The MCA would also effect a suspension of the Writ by impermissibly denying al-Marri the right to assert the protections of the Geneva Conventions in any habeas action, including as a defense to a charge by military commission to which he would be subject if found to be an "enemy combatant" by a CSRT. The MCA provides that "[n]o person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other

agent of the United States is a party as a source of rights in any court of the United States or its States or territories." MCA § 5(a). The Geneva Conventions have the status of federal law as "treaties of the United States" under Article VI of the Constitution, and thus provide a source of rights enforceable in a habeas proceeding. *See* 28 U.S.C. 2241(c)(3); *Mali v. Keeper of the Common Jail*, 120 U.S. 1, 17-18 (1887); *Saint Fort v. Ashcroft*, 329 F.3d 191, 201 (1st Cir. 2003).

Though Congress may abrogate treaties by later statute, a clear statement of congressional intent is required to effect such abrogation. *Cook v. United States*, 288 U.S. 102, 120 (1933). In enacting the MCA, Congress did not intend to abrogate the Geneva Conventions but, rather, sought to fully comply with and implement U.S. obligations under those treaties. *See* MCA § 6 ("Implementation of Treaty Obligations"). Accordingly, the Geneva Conventions retain their status as domestic law, and a habeas petitioner has the right to assert violations of those treaties as a basis for relief. By foreclosing review by an Article III court over a claim by al-Marri that his military detention or trial violates the Geneva Conventions, the MCA would unconstitutionally suspend al-Marri's right to habeas. *See St. Cyr*, 533 U.S. at 300 (statute precluding "review of a pure question of law by

any court would give rise to substantial constitutional questions"); *Saint Fort*, 329 F.3d at 201-02.

E. The MCA Violates Equal Protection.

The Constitution's guarantee of equal protection applies to all persons in the United States, regardless of citizenship. *See*, *e.g.*, *Plyer v. Doe*, 457 U.S. 202, 210 (1982) ("[A]liens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed [equal protection]."); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("The [Equal Protection Clause of the] Fourteenth Amendment to the Constitution is not confined to the protection of citizens …. [Its protections] are universal in their application, to all persons within the territorial jurisdiction …."). The "equal protection obligations imposed by the Fifth and Fourteenth Amendment [are] indistinguishable." *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995).

As a resident alien, therefore, al-Marri is guaranteed equal protection of the law. The MCA, however, threatens to create a second-class justice system in the United States, in which any of the millions of aliens lawfully residing in this country may be swept off the streets and imprisoned in a Navy Brig indefinitely without the right to judicial review guaranteed to citizens. The Constitution forbids that result.

1. The MCA Interferes With A Resident Alien's Fundamental Right Of Access To The Courts.

Any law that interferes with fundamental rights is "given the most exacting scrutiny" under equal protection. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Access to the courts is a fundamental right. *See, e.g.*, *Woodford v. Ngo*, 126 S. Ct. 2378, 2404 (2006); *Lewis v. Casey*, 518 U.S. 343, 351 (1996). Yet, the MCA, in the government's view, denies lawful resident aliens this right by eliminating habeas corpus. Instead, it permits the Executive to arrest and detain such aliens indefinitely without access to an Article III court based upon the future prospect of a summary military hearing that the Executive has the sole discretion to convene, to delay, or to deny. This cannot be.

The right of access to the courts by way of habeas corpus has long protected individual liberty against wrongful imprisonment. *See, e.g.*, *Coolidge v. New Hampshire*, 403 U.S. 443, 454 n.4 (1971) (habeas "regarded as the very essence of constitutional liberty"); *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968) (habeas is "shaped to guarantee the most fundamental of all rights"). Since the nation's founding, this right has been available to citizens and aliens alike. *See St. Cyr*, 533 U.S. at 305. Indeed, even during wartime, resident aliens had the right to challenge the lawfulness of their detention by way of habeas corpus. *See supra* at 6-8.

Here, moreover, the government argues that Congress denied all aliens in the United States this fundamental right even though both aliens and citizens alike can be detained as "enemy combatants." *Hamdi*, 542 U.S. at 519 (plurality opinion); *Padilla v. Hanft*, 423 F.3d at 392, 396-97; *cf. Quirin*, 317 U.S. at 37. Indeed, the President declared al-Marri an "enemy combatant" based upon a virtually identical order and "essentially the same" process as it did Jose Padilla. JA 54, 214; *Padilla v. Hanft*, 423 F.3d at 389.

Thus, in the government's view, Congress has authorized the indefinite military detention of "enemy combatants" arrested in the United States based upon the same criteria but denied only alien "enemy combatants" the right to test the lawfulness of that detention in an Article III court. The Supreme Court has subjected far less significant restrictions on the fundamental right of access to the courts to strict scrutiny, invaliding them on equal protection grounds. *See*, *e.g.*, *Douglas v. California*, 372 U.S. 353, 358 (1963) (law allowing unequal access to appellate counsel); *Griffin v. Illinois*, 351 U.S. 12, 15-16 (1956) (regulation denying indigent defendants free trial transcript). Certainly, the Equal Protection Clause forbids the "invidious discrimination[ ]" on the fundamental right of access to the courts that the MCA would create here. *Griffin* 351 U.S. at 17.

2. The MCA Improperly Discriminates Based Upon Alienage.

The MCA would also violate equal protection by discriminating based solely upon alienage. *See*, *e.g.*, *Graham v. Richardson*, 403 U.S. 365, 372 (1971) ("[C]lassifications based on alienage … are inherently suspect and subject to close judicial scrutiny.") (internal footnotes omitted). The Supreme Court has recognized that the federal government has greater latitude than States in drawing lines between aliens and citizens, but has only recognized such latitude when scrutinizing laws that distribute government benefits or concern "naturalization and immigration." *Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976) (addressing equal protection challenge to statute creating special qualifications for aliens' eligibility for medical benefits); *see also Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (noting "long recognized … power to expel and exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments"). By contrast, Congress's actions are subject to greater scrutiny when Congress distinguishes between citizens and aliens with respect to fundamental rights.

No rights are more fundamental than due process and habeas corpus. The right to be free from unlawful imprisonment "lies at the heart of the liberty that [the Due Process] Clause protects," *Zadvydas*, 533 U.S. at 690, extending to all persons in this country, *id.* at 693-94. Congress,

accordingly, cannot claim any broad latitude to detain aliens for punishment or other reasons unrelated to the enforcement of immigration laws, to which only aliens are subject, *Wong Wing*, 163 U.S. at 235, and which allow for an alien's detention based upon his deportability, *Demore*, 538 U.S. at 531 (Kennedy, J., concurring).

Similarly, the right to challenge one's indefinite detention by habeas corpus is not a government benefit that can divided unequally between citizens and aliens. Rather, it is an indivisible and fundamental right of constitutional dimension that belongs to all individuals in this country. *Cf. Milligan*, 71 U.S. at 120-21; *Quirin*, 317 U.S. at 37. Al-Marri's habeas petition does not claim "a share in the bounty" of public benefits that America makes available to its citizens. *Mathews*, 426 U.S. at 80. Nor does his petition assert the right to remain in the United States or otherwise infringe the President's power to deport and exclude aliens under the nation's immigration laws. To the contrary, al-Marri seeks only his freedom from unlawful government restraint, and, in that regard, asks only that this Court decide whether or not the President has unlawfully deprived him of his liberty by imprisoning him without charge, and in solitary confinement, for 3½ years in a United States Navy Brig.

For Congress to deprive al-Marri of this right because he is an alien would engender precisely the unequal treatment the Constitution forbids, selectively targeting the weak and vulnerable. *Cf. Ry Express Agency, Inc. v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring) ("[N]othing opens the door to arbitrary action so effectively as to allow … officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected."); *A. v. Sec'y of the State of the Home Dep't* [2004] UKHL 56 A.C. 68 (appeal from Eng.) (U.K.) (invalidating United Kingdom's anti-terror legislation because, *inter alia*, it discriminated against suspected terrorists who were not British citizens). If, as this Court recognized in *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir 2003), *overruled on other grounds*, 542 U.S. 507 (2004), the President cannot remove a citizen from "the Great Writ's purview" by declaring him an "enemy combatant," *id.* at 465, the President also cannot remove a resident alien from the Writ's purview, as such aliens have the same fundamental rights and are protected by the same Constitution as citizens. Such blatant discrimination not only fails to satisfy strict scrutiny but is palpably arbitrary, and violates equal protection under any standard.

CONCLUSION

For the foregoing reasons, Congress did not eliminate jurisdiction over al-Marri's habeas petition. But, if this Court finds that Congress did, it should strike down section 7 of the MCA as unconstitutional. Accordingly, the government's motion to dismiss al-Marri's appeal for lack of jurisdiction should be denied.

Respectfully submitted,

Jonathan Hafetz
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Avenue of the Americas
12th Floor
New York, New York 10013
(212) 998-6289

Lawrence S. Lustberg
Mark A. Berman
GIBBONS, DEL DEO, DOLAN
GRIFFINGER & VECCHIONE
A Professional Corporation
One Riverfront Plaza
Newark, New Jersey 07102
(973) 596-4500

Andrew J. Savage, III
SAVAGE & SAVAGE, P.A.
15 Prioleau Street
Post Office Box 1002
Charleston, South Carolina 29402
(843) 720-7470

Counsel for Appellants

Dated: December 12, 2006

CERTIFICATE OF COMPLIANCE

This Response of Appellant has been prepared using:

Microsoft Word 2000;

Times New Roman;

14 Point Type Space.

EXCLUSIVE of the Table of Contents, Table of Authorities, the Certificate of Filing and Service, and this Certificate of Compliance, this Response contains 13,989 words.

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 a copy of the word or line print-out.

Jonathan Hafetz

CERTIFICATE OF FILING AND SERVICE

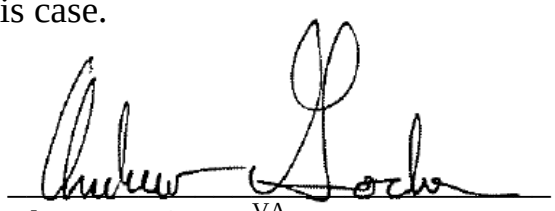
I hereby certify that on this 12th day of December, 2006, I filed with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit, via Hand Delivery, the required number of copies of this Response of Appellants, and further certify that I served, via UPS Transportation, the required number of said Response to the following:

Kevin F. McDonald
OFFICE OF THE U.S. ATTORNEY
1441 Main Street
Suite 500
Columbia, South Carolina 29201
(803) 929-3000

Gregory G. Garre
David B. Salmons
UNITED STATES
DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, NW
Washington, DC 20530
(202) 514-2206

Counsel for Appellee

The necessary filing and service were performed in accordance with the instructions given me by counsel in this case.



The LEX Group[VA]
1108 East Main Street
Suite 1400
Richmond, Virginia 23219