

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

ALI SALEH KAHLAH AL-MARRI,)	
and MARK A. BERMAN, as next)	
friend,)	Appeal from the United
)	States District Court for the
<i>Petitioners-Appellants,</i>)	District of South Carolina,
)	Charleston Division
v.)	
)	
COMMANDER S.L. WRIGHT,)	No. 06-7427
USN Commander, Consolidated)	2:04-cv-002257-HFF
Naval Brig,)	
)	
<i>Respondent-Appellee.</i>)	

BRIEF OF AMICI CURIAE

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IN SUPPORT OF PETITIONERS-APPELLANTS

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INTEREST OF AMICI¹

Amici are retired generals and admirals who have spent their careers commanding troops at home and overseas and protecting the nation from attack. Amici have extensive experience dealing with issues relating to military courts and the law of war. Amici's interest in this case arises from their commitment to ensure the greatest possible safety for service men and women stationed abroad, to promote the proper and fair administration of military justice, and to preserve, protect and defend the U.S. Constitution.

General Merrill A. McPeak served in the United States Air Force from 1957 to 1994. From 1990 to 1994, he was Chief of Staff for the Air Force and the senior officer responsible for a combined active-duty, National Guard, Reserve, and civilian workforce of more than 850,000 people serving at 1,300 locations in the United States and abroad.

Rear Admiral Donald J. Guter was a line officer in the United States Navy from 1970 through 1974. After law school, he served in the Navy from 1977 until he retired in 2002. From June 2000 through June 2002, Admiral Guter was the Navy's Judge Advocate General. Admiral Guter is now Dean of Duquesne Uni-

¹ The parties to this appeal have consented to the filing of this brief.

versity School of Law in Pittsburgh, Pennsylvania. Admiral Guter was inside the Pentagon when it was attacked on September 11, 2001.

Brigadier General David M. Brahms served in the United States Marine Corps from 1963 through 1988, with a tour of duty in Vietnam. He served as principal legal advisor for POW matters at Marine Corps Headquarters in the 1970s and was directly involved in issues relating to the return of American POWs from Vietnam. From 1985 through 1988, he was the senior legal adviser for the Marine Corps. General Brahms is a member of the Board of Directors of the Judge Advocates Association.

STATEMENT OF FACTS

1. Petitioner Ali Saleh Kahlah al-Marri, a citizen of Qatar, lawfully entered the United States with his family in September 2001 and, until December 2001, lived with them in Peoria, Illinois. In December 2001, FBI agents arrested al-Marri at home as a material witness in the government's investigation of the September 11, 2001, terrorist attacks. In due course, the government indicted al-Marri in the United States District Court for the Central District of Illinois on several counts involving alleged false statements and financial fraud. Al-Marri pleaded not guilty to all charges.

In June 2003, on the eve of a hearing on al-Marri's pre-trial motion to suppress, the government moved to dismiss the indictment based on a redacted declaration by the President designating al-Marri an "enemy combatant" and directing that al-Marri be transferred from civilian to military custody. The district court granted the government's motion. Al-Marri was then transported from the custody of the United States Marshals in Peoria to the custody of the Department of Defense at the Navy brig in Hanahan, South Carolina.

2. In July 2004, al-Marri's counsel, acting as his next friend, filed a habeas petition in the United States District Court for South Carolina challenging his mili-

tary detention.² Through counsel, al-Marri denied that he is an “enemy combatant,” protested that he is an innocent civilian, and sought summary judgment on the ground that the President lacked authority to place a civilian in military detention. The government opposed the motion on the basis of the President’s declaration and a declaration of Jeffrey N. Rapp, a government official. The government eventually released a redacted declassified version of the Rapp declaration, when ordered to do so by the magistrate judge, the material allegations of which were based entirely on hearsay.

In July 2005, the district court denied al-Marri’s summary judgment motion, ruling that the President had authority to designate al-Marri an “enemy combatant” if the hearsay allegations in the Rapp declaration were true. The district court then assigned the matter to a magistrate, who ruled that the hearsay allegations in the Rapp declaration were sufficient to keep al-Marri in military detention and that the government was not obligated to produce actual and admissible evidence. On the magistrate’s recommendation, the district court dismissed the petition. Al-Marri thereupon appealed.

3. On October 17, 2006, while this appeal was pending, the President signed into law the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120

² A previous habeas petition filed by al-Marri in the United States District Court for the Central District of Illinois was dismissed on venue grounds.

Stat. 2600. Among other things, the MCA amended Section 2241 of title 8, United States Code, by replacing the existing subsection (e) with a new subsection (e), paragraph (1) of which purports to strip the federal courts of “jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.” On November 13, 2006, the government, citing the new § 2241(e)(1), moved to dismiss al-Marri’s appeal for lack of subject matter jurisdiction.

SUMMARY OF ARGUMENT

The issue on the government’s motion to dismiss is not whether the United States may hold al-Marri in military custody based on the President’s designation of him as an “enemy combatant” and the hearsay allegations of a government official. The issue is whether the Court should read the MCA as having stripped it of habeas jurisdiction even to *consider* that question.

The Detainee Treatment Act (DTA), Pub. L. No. 109-148, 119 Stat. 2680 (2005), does not provide an adequate substitute for that jurisdiction in al-Marri’s case – not only because the scope of DTA review is far more limited than habeas review (a fatal flaw by itself) but also because al-Marri does not, and indeed may never, satisfy the conditions even for *seeking* DTA review. At best, al-Marri is merely “awaiting” a determination of a Combatant Status Review Tribunal that he

is properly detained as an enemy combatant. DTA § 1005(e)(2). His access to DTA review is entirely at the discretion of the military.

Because an adequate substitute for habeas is not available to al-Marri, the Court, if possible, should read the MCA not to strip it of jurisdiction to consider on habeas whether al-Marri's military detention is justified as a matter of fact and law. As discussed below, a contrary reading would threaten the supremacy of civilian over military authority, thereby undermining our democratic institutions, and heighten the risk that American soldiers and civilians captured abroad will suffer the same lawless treatment as al-Marri.

ARGUMENT

I. HABEAS IS REQUIRED TO POLICE THE LINE BETWEEN CIVILIAN AND MILITARY AUTHORITY.

The Constitution places the military under civilian authority and by so doing protects our democracy against encroachment by the military. Accordingly, habeas not only provides a means of challenging arbitrary detention by the Executive generally; it also enables Article III courts to restrain the Political Branches from placing civilians in the United States under military authority except as specifically authorized by the Suspension Clause. Ironically, as this case exemplifies, the President, in the name of fighting terrorism, has used his civilian authority as commander-in-chief in effect to place civilians under military control. The Court should avoid reading the MCA to strip Article III courts of the power to restrain

the President from thus displacing civilian authority and should reach the merits of al-Marri's appeal.

The Constitution specifies that “[t]he President shall be Commander in Chief of the Army and Navy, and of the militia of the several States, when called into the actual Service of the United States.” Const. art. II, § 2, cl. 1. As the constitutional text makes plain, the President “is not Commander in Chief of the country, only of the military.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 552 (2004) (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 643-44 (1952) (concurring opinion)). Moreover, the President's commander-in-chief authority is not a “blank check” in wartime. *See Hamdi*, 542 U.S. at 536 (plurality opinion). Whatever may be the reach of the President's authority over the military in battles fought on foreign soil, it threatens the supremacy of civilian over military authority – and the democratic institutions that such supremacy protects – when a President, absent invasion or rebellion, wields at home the military power that he may wield abroad. As Justice Jackson stated:

[N]o doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.

Youngstown, 343 U.S. at 642 (footnote omitted) (Jackson, J., concurring); *see also* *Raymond v. Thomas*, 91 U.S. 712, 716 (1875).

“The very purpose of Article II’s creation of a civilian Commander in Chief in the President of the United States was to generate ‘structural insulation from military influence.’ We do not live under a military junta.” *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2822 n.8 (2006) (Scalia, J., joined by Thomas & Alito, JJ., dissenting) (citing *The Federalist* Nos. 28 & 69). As this Court has noted, there is “a traditional and strong resistance of Americans to any military intrusion into civilian affairs. That tradition has deep roots in our history and found early expression, for example, . . . in the constitutional provisions for civilian control of the military.” *United States v. Walden*, 490 F.2d 372, 375 (4th Cir. 1974). *See also* *Garmon v. Warner*, 358 F. Supp. 206, 209 (W.D.N.C. 1973) (“Civilian control over the military – a necessity for the survival of human liberty – is rooted in the Constitution.”). As a plurality of the Supreme Court similarly stated in *Reid v. Covert*:

The tradition of keeping the military subordinate to civilian authority may not be so strong in the minds of this generation as it was in the minds of those who wrote the Constitution. . . . The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds. Their fears were rooted in history. They knew that ancient republics had been overthrown by their military leaders. They were familiar with the history of Seventeenth Century England, where Charles I tried to govern through the army and without Parliament. . . . It was against this general background that two of the greatest English jurists, Lord Chief Justice Hale and Sir William Blackstone – men who exerted considerable influence on the Founders – expressed sharp hostility to any ex-

pansion of the jurisdiction of military courts. For instance, Blackstone went so far as to assert: “For martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as Sir Matthew Hale observes, in truth and reality no law, but something indulged rather than allowed as a law. The necessity of order and discipline in an army is the only thing which can give it countenance.” . . . In light of this history, it seems clear that the Founders had no intention to permit the trial of civilians in military courts, where they would be denied jury trials and other constitutional protections, merely by giving Congress the power to make rules which were “necessary and proper” for the regulation of the “land and naval Forces.” Such a latitudinarian interpretation of these clauses would be at war with the well-established purpose of the Founders to keep the military strictly within its proper sphere, subordinate to civil authority.

354 U.S. 1, 23-26, 30 (1957) (plurality opinion).

A core function of habeas is to protect the supremacy of civilian authority over military authority that undergirds our constitutional system. By enabling a civilian to challenge in an Article III court his detention by military authorities, habeas helps ensure, in Justice Scalia’s words, that “[w]e do not live under a military junta.” *See, e.g., Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14 (1955). “The point of civilian control is to make security subordinate to the larger purposes of a nation, rather than the other way around.” Richard H. Kohn, “An Essay on Civilian Control,” *American Diplomacy* 2 (Feb. 1997).

In the name of fighting terrorism, the President in this case has turned his commander-in-chief authority on its head, seeking to use that authority to make the military supreme over the civilian and to write the federal courts out of the equa-

tion. *Cf. Padilla v. Hanft*, 432 F.3d 582, 585 (4th Cir. 2005), *application granted*, 126 S. Ct. 978 (2006). Fighting terrorism is a high national priority, but the Constitution does not authorize the President to seize a civilian on American soil, throw him in a military brig, and keep him there until it pleases the President to release him. That is the teaching of *Milligan*. No lesson could be clearer.³

In other countries without our traditions and constitutional guarantees of an independent judiciary, a statute such as the MCA would be unnecessary because the Executive could simply assume control of the judicial system and command that justice be dispensed on the Executive's terms. In our system, Article III cannot be so corrupted. That is why the President has attempted to create a parallel system within the military that he can use to detain individuals without judicial re-

³ The Posse Comitatus Act, 18 U.S.C. § 1385, reflects the principle that civilian authority is supreme over military authority. "The purpose of the Act is to uphold the American tradition of restricting military intrusions into civilian affairs, except where Congress has recognized a special need for military assistance in law enforcement." *United States v. Johnson*, 410 F.3d 137, 146-47 (4th Cir. 2005) (citation omitted). This Court's interpretation of "the scope and importance of the letter and the spirit of the Act as a standard governing primary behavior is influenced by the traditional American insistence on exclusion of by the military from civilian law enforcement, which some have suggested is lodged in the Constitution." *United States v. Walden*, 490 F.2d 372, 376 (4th Cir. 1974) (capitalization and punctuation modified). Indeed, the Act is a "cornerstone statute [that] reflects an underlying presumption against blurring military and civilian life unless Congress clearly authorizes otherwise or the Constitution so demands." Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L.J. 1259, 1296 n.136 (2002).

view and that he can command to dispense “justice” on his terms. The system created by the President for handling civilians, like al-Marri, who have been designated “enemy combatants,” is a system in which “justice” means what the President says it means, and the President is accountable to no one.

The transfer of al-Marri from civilian to military custody illustrates this point. The President, facing a proceeding in civilian court that might draw undue and perhaps embarrassing attention to the Executive’s actions, and perhaps show those actions to be groundless, simply pulls the plug on the proceeding and remits the prisoner to military custody, where the President may hold the prisoner indefinitely and without process, free from judicial accountability. Such a regime is a lawless regime, a legal “black hole” from which the prisoner may never emerge, and is contrary to the principle of civilian supremacy enshrined in the Constitution.

II. HABEAS RELIEF IS REQUIRED TO MINIMIZE THE RISK THAT AMERICAN SOLDIERS WILL BE HELD WITHOUT PROCESS.

Giving effect to the MCA’s purported elimination of habeas relief for individuals such as al-Marri would heighten the risk that American soldiers – and civilians – captured or arrested abroad would be subject to similar treatment and leave the United States without moral or legal authority to object. Maintaining not only the rule of law but also the appearance of the rule of law is essential to protect our own troops and fulfill our obligations under the Constitution and laws of the

United States. The President's treatment of al-Marri maintains neither the rule of law nor its appearance.

The United States' commitment to the Geneva Conventions illustrates the importance of commanding the high ground. The United States became a party to the Conventions to protect the safety and welfare of its own citizens. As Secretary of State Dulles said during Senate consideration of the Conventions, America's "participation [in the Conventions] is needed to . . . enable us to invoke them for the protection of our nationals." *Geneva Conventions for the Protection of War Victims: Hearing Before the Senate Comm. on Foreign Relations*, 84th Cong., 1st Sess. 3-4 (1955). Senator Mansfield similarly urged that "it is to the interest of the United States that the principles of these conventions be accepted universally by all nations," because "[t]he conventions point the way to other governments."

101 Cong. Rec. 9960 (1955). Senator Alexander Smith voiced the same view:

I cannot emphasize too strongly that the one nation which stands to benefit the most from these four conventions is the United States To the extent that we can obtain a world-wide acceptance of the high standards in the conventions, to that extent will we have assured our own people of greater protection and more civilized treatment.

Id. at 9962.

A similar principle is at stake in this case. Unless the United States affords the meaningful legal process to individuals such as al-Marri guaranteed by habeas corpus, American soldiers and civilians around the world will be at heightened risk

of arbitrary imprisonment by other countries, and the United States will be ill-positioned to object. Indeed, other governments have cited the United States' treatment of "enemy combatants" to rationalize the indefinite detention of individuals within their borders. The more the United States comes to resemble its enemies, the more its enemies will come to resemble us. Such a race to the bottom is inevitable when we cause the world "to doubt the moral basis of our fight against terrorism." Letter from General Colin L. Powell (ret.) to Senator John McCain (Sept. 13, 2006), *available at* <http://news.findlaw.com/hdocs/docs/terrorism/powellmccain91406ltr.html>.⁴

⁴ Amici's concerns are also relevant to the Executive's expansive view of its grant of authority under the Authorization of Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF). Relying on *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), this Court found that Jose Padilla's detention was lawful because Padilla, "[l]ike Hamdi, associated with forces hostile to the United States in Afghanistan" and "took up arms against United States forces in that country in the same way and to the same extent as did Hamdi." *Padilla v. Hanft*, 423 F.3d 386, 391-92 (4th Cir. 2005). Therefore, the Court reasoned, even though Padilla was arrested in the United States, the "locus of capture [was] irrelevant" and the laws of war authorized his detention because it was "no less necessary than was Hamdi's in order to prevent his return to the battlefield" while hostilities in Afghanistan endured. *Id.* at 392. Here, Appellant has not taken up arms against the United States and was never present on any battlefield. His military detention, therefore, is not the "simple war measure" the government claims it is but, rather, an unwarranted intrusion on the civilian justice system.

CONCLUSION

For the reasons stated, the Court should conclude that it has jurisdiction over this case.

DATED: December 19, 2006

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH
RULE 28.1.(e) or 32(a)**

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32 (a)(7)(B) because this brief contains 3,231 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(b) because it has been prepared in a 14-point proportionally spaced typeface (Times New Roman) using Word.

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David H. Remes

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December, 2006, I filed with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit, via UPS, the required number of copies of the Brief of Amicus Curiae of Retired Military Officers, and further certify that I served, via UPS, the required number of the brief to the following:

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