No. 06-7427

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

Petitioners-Appellants,

v.

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

Respondent-Appellee,

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

RESPONDENT-APPELLEE'S REPLY IN SUPPORT OF MOTION TO DISMISS FOR LACK OF JURISDICTION

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INTRODUCTION AND SUMMARY OF ARGUMENT

On November 13, 2006, respondent-appellee Commander S.L. Wright moved to remand this case to the district court with instructions to dismiss it for lack of subject matter jurisdiction, because the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, removed federal court jurisdiction over petitioner-appellant al-Marri's habeas action so that the District of Columbia Circuit will have exclusive

jurisdiction over all pending and future actions filed by alien enemy combatants detained by the United States within the United States or at Guantanamo Bay who seek to challenge the legality of their detention. As explained in the motion, al-Marri fits within the plain terms of the MCA's jurisdictional provisions. The MCA eliminates habeas jurisdiction over "all cases, without exception" that were "pending on or after" October 17, 2006, and "which relate to any aspect of the detention, * * * of an alien detained by the United States since September 11, 2001" (MCA § 7(b)) and "who has been determined by the United States to have been properly detained as an enemy combatant" or is awaiting that determination. MCA § 7(a). Al-Marri seeks to avoid the intent of Congress that this action be dismissed by contending (Resp. 10-33) that the MCA does not apply to him or his pending habeas action and by further contending (Resp. 33-60) that, if it does, the Act violates the Suspension Clause, the Due Process Clause, and the Equal Protection Clause.

As we explain in detail below, none of al-Marri's contentions has merit. The MCA's language removing federal jurisdiction over pending cases could not be more clear, applying to "all cases, without exception," that were "pending on or after" October 17, 2006. The provision covers cases "which relate to any aspect of the detention" of "an alien detained by the United States since September 11, 2001," MCA § 7(b), who "has been determined by the United States to have been properly

detained as an enemy combatant or is awaiting such determination," MCA §7(a). That language applies to al-Marri, an alien detained by the United States since the September 11 attacks who has been determined by the United States—by both the Commander in Chief and the district court below—to be properly held as an enemy combatant and who is awaiting yet another status determination by a Combatant Status Review Tribunal (CSRT) upon the dismissal of this action.

The MCA does not leave al-Marri without legal recourse to challenge his detention. Alone among aliens covered by the Act, al-Marri has already enjoyed one full and fair opportunity to challenge his detention in a habeas proceeding in district court during which the parties engaged in multiple rounds of briefing and al-Marri had a full opportunity to present his side of the case. The district court found that al-Marri had "squandered the opportunity to be heard by purposely not participating [in the habeas proceeding] in a meaningful way." J.A. 354. But al-Marri's own decision not to participate in that proceeding in no way strengthens his claim that he is entitled to additional process now. Moreover, together with the Detainee Treatment Act (DTA), Pub. L. No. 109-148, 119 Stat. 2739 (which the MCA amends to apply to aliens such as al-Marri detained as enemy combatants inside the United States), the MCA establishes a scheme of exclusive judicial review in the District of Columbia Circuit for aliens such as al-Marri who seek to challenge the legality of their detention as

enemy combatants. Under that review scheme, al-Marri may challenge any adverse CSRT determination on the grounds that it was inconsistent with the applicable standards and procedures, "including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence" and that the standards and procedures used to make that determination did not comply with the Constitution and laws of the United States, to the extent they are applicable. DTA § 1005(e)(2)(C). The scope of judicial review that the DTA affords is more than sufficient to meet any requirements of the Suspension Clause, the Due Process Clause, and the Equal Protection Clause that apply to alien enemy combatants who claim protection under the Constitution. Indeed, the legal framework that the political branches have established for judicial review of challenges by aliens to their detention as enemy combatants adheres to the model that the Supreme Court in Hamdi v. Rumsfeld, 542 U.S. 507 (2004), indicated would be suitable for citizen combatants.

Finally, even if this Court were to conclude that applying the MCA to al-Marri would implicate Suspension Clause concerns, that targeted and narrow limitation on habeas would be a constitutional exercise of Congress's authority to suspend the writ in the wake of a rebellion or invasion. The MCA thus requires dismissal of this action.

ARGUMENT

I. THE MCA DIVESTS THIS COURT OF JURISDICTION OVER AL-MARRI'S HABEAS PETITION

Responding to Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006), Congress enacted the MCA to provide unambiguous congressional sanction for military commissions and, as relevant here, to provide for the removal of federal jurisdiction over pending habeas and other challenges filed by or on behalf of aliens detained as enemy combatants by the United States in connection with ongoing hostilities. Having bestowed upon the District of Columbia Circuit "exclusive jurisdiction" over alien detainees' challenges to their detention as enemy combatants in the DTA, see DTA § 1005(e)(2)(A), Congress in the MCA sought to ensure that that court's jurisdiction would in fact be exclusive. Congress accomplished that objective not only by making clear that the DTA covers all pending cases, see MCA § 7(b) (applying to "all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States") (emphasis added), but also by expanding the District of Columbia Circuit's exclusive jurisdiction to reach claims brought by any alien detained by the United States for whom a CSRT has been conducted—regardless of the locus of their detention. See MCA § 10 (amending DTA § 1005(e)(2)(B) by deleting the reference to "the Department of Defense at

Guantanamo Bay, Cuba," and inserting "the United States"). The Act's express terms therefore reject the notion that it applies only to habeas petitions "filed by or on behalf of aliens captured and detained outside of the United States." Resp. 31.

A. The United States Has Determined That Al-Marri Has Been Properly Detained As An Enemy Combatant

Al-Marri contends (Resp. 10-20) that the MCA does not apply to him because he has not "been determined by the United States to have been properly detained as an enemy combatant." MCA § 7(a). That is incorrect.

According to al-Marri, the decision by the President as Commander in Chief to detain him as an enemy combatant does not fall within the statute because al-Marri was in the custody of the Department of Justice, not the Department of Defense, before the President determined that he should be detained as an enemy combatant. The statute nowhere mentions, however, the type of "two-step" (Resp. 11, 12 n.4) process al-Marri contends is required. Rather, it refers to a single determination that the alien "has been properly detained as an enemy combatant." MCA § 7(a). A presidential determination satisfies that statutory trigger. Indeed, if anything, al-Marri received the benefit of a more rigorous designation process than that afforded the typical battlefield detainee that al-Marri points to in arguing that the statute envisions a "two-step" process.

Because al-Marri was detained inside the United States, he received the benefit of the multi-agency evaluation process established for United States citizens suspected of being enemy combatants. JA 214. As explained in the Declaration of Jeffrey N. Rapp, the Director of the Joint Intelligence Task Force for Combating Terrorism, the President's determination was based on the recommendations of three federal agencies—the Central Intelligence Agency, the Department of Defense, and the Department of Justice—and the White House. JA 215. Those recommendations, in turn, were based on assessments of factual information about al-Marri and legal analyses of whether, based on that information, al-Marri "is appropriately designated an enemy combatant." JA 215. Thus, the President's decision to designate al-Marri as an enemy combatant reflects a determination that it was proper to detain him as such. Indeed, the President's order designating al-Marri as an enemy combatant directed that the military take custody of him. That order necessarily includes a determination by the Executive Branch of the United States that al-Marri's continued detention as an enemy combatant was proper as well. The fact that the process established for status determinations of enemy combatants captured in the United States is different from the process established for enemy combatants captured abroad provides no basis for concluding that al-Marri's status determination falls outside the

MCA.[1] Moreover, Congress knows how to restrict the coverage of jurisdictional statutes to decisions "that an alien is properly detained as an enemy combatant" rendered by a "Combatant Status Review Tribunal," DTA § 1005(e)(2)(A), and, in stark contrast, Congress did not do so in the MCA.

In addition, the district court, after giving full and fair consideration to al-Marri's petition for a writ of habeas corpus, determined that his petition failed on the merits and should be dismissed, thereby confirming the legality of the President's determination that al-Marri should be detained as an enemy combatant. Specifically, the district court determined that the President has the authority as Commander in Chief and pursuant to the Authorization for the Use of Military Force enacted by Congress in the wake of the September 11, 2001 attacks to order al-Marri's detention as an enemy combatant; that the government has amply satisfied its burden under the Hamdi framework of providing notice to al-Marri of the basis for his detention as an enemy combatant; and that al-Marri, despite being given multiple opportunities to do so, completely failed to rebut the government's showing or to provide any evidence

[1] Of course, to the extent this Court disagrees, it should make clear that its decision turns on the unique process used for detainees seized in the United States and does not extend to aliens captured abroad who have not received a formal CSRT and may not receive one because, inter alia, the United States is detaining them in the country of capture with no immediate plans to transfer them to Guantanamo. Cf., e.g., Ruzatullah v. Rumsfeld, No. 06-CV-01707 (GK) (D.D.C.).

to support the conclusion that he is not an enemy combatant. J.A. 112-126, 340-355. For those reasons, the district court agreed with the magistrate judge's conclusion that al-Marri had "squandered his opportunity to be heard by purposely not participating [in the habeas proceeding] in a meaningful way," id. at 354, even though he was "given numerous opportunities to come forward with evidence supporting" his contention that he is not an enemy combatant, ibid. "[G]iven the imbalance between the evidence presented by the parties," the court concluded, "the Government clearly meets any burden of persuasion which could reasonably be imposed on it" at this stage of the habeas proceedings, and "a review of that evidence does not indicate that an 'erroneous' deprivation' has occurred." Id. at 355. Accordingly, under the due process framework established for citizen combatants in Hamdi, the court ruled that al-Marri's "petition should be dismissed." Ibid.

B. In Any Event, Al-Marri Is Awaiting A CSRT Determination And Thus Will Have Access To Judicial Review In Accordance With The MCA And The DTA

Even if al-Marri were correct that Congress sought to eliminate habeas jurisdiction only for those detainees who have received or will receive a CSRT determination, the MCA still applies to him because he will receive a CSRT and thus is "awaiting" the requisite determination under MCA § 7(a). Al-Marri contends first (Resp. 21) that he is not "awaiting" a CSRT determination because he was not

awaiting such a determination at the time the MCA was enacted. But if that were so, then any yet-to-be-captured alien enemy combatants would not be subject to the MCA, because their entitlement to a CSRT also depends on executive branch decisions about detention that were not made at the time the MCA was enacted. To avoid that absurd result, Section 7(a)'s language should be read to refer (as it most naturally does) to the time at which a federal court is considering whether it has jurisdiction over the alien detainee's action. If, at the time the federal court would exercise jurisdiction, the alien is "awaiting" a determination that would trigger the DTA's alternative review scheme, then the federal court has no jurisdiction. That reading is the only one that gives effect to Congress's intent to establish a system of exclusive judicial review in the District of Columbia Circuit for challenges by alien enemy combatants to their detention.

Al-Marri next contends (Resp. 21-22) that he is not awaiting a CSRT determination because there is no statute or regulation that requires that he receive one. But there is an order by the Deputy Secretary of Defense that he receive one. Al-Marri thus is on the same footing as alien enemy combatants at Guantanamo, for whom the Department of Defense (DoD)—through the Deputy Secretary of Defense—has chosen to provide CSRTs without any statute or regulation commanding it to do so. When Congress enacted the DTA, it recognized the CSRT

system established by the Executive and subjected it to both congressional oversight and judicial review. See DTA § 1005. The DTA does not, however, confer upon a detainee a statutory right to a CSRT. Rather, it establishes a regime for judicial review that is based on a practice that the Executive Branch provides a CSRT to those detainees who, after the Supreme Court's decision in Rasul v. Bush, 542 U.S. 466 (2004), would otherwise have been able to file a petition for habeas corpus.

Al-Marri suggests that Congress intended to subject only those detainees at Guantanamo to the new review scheme, because, by virtue of DoD's policy of providing them CSRTs, they are the only detainees who are "guaranteed an alternative avenue of review by an Article III court" (Resp. 22). That suggestion, however, cannot be reconciled with the MCA, which amended the DTA to expand the District of Columbia Circuit's exclusive jurisdiction to reach legal challenges to adverse CSRT determinations filed by any alien detained "by the United States" rather than only those detained "at Guantanamo Bay." See MCA § 10. While that amendment may have been designed to underscore the absence of habeas for aliens detained abroad at locations other than Guantanamo, as opposed to aliens detained in the United States, that language makes clear that the MCA was not designed to apply only to aliens "guaranteed an alternative avenue of review in Article III courts." See Brief for the United States in Ruzatullah v. Rumsfeld, No. 06-CV-01707(GK) (D.D.C.)

(filed Nov. 20, 2006) (arguing that the MCA eliminates habeas jurisdiction over aliens held in Bagram and that such aliens had no pre-existing statutory or constitutional right to habeas).

Moreover, DoD's order directing that al-Marri receive a CSRT upon dismissal of this action guarantees him that process no less than the memorandum that al-Marri cites (Resp. 21) guarantees Guantanamo detainees a CSRT. The DTA establishes a system of exclusive judicial review in the District of Columbia Circuit that depends on the Executive Branch acting in accordance with Congress's intent to provide such review to alien enemy combatants who, after Rasul, had a claim to access to the United States courts. While al-Marri suggests that the Executive Branch could frustrate Congress's review scheme and deprive him or others of any judicial review by not providing a CSRT, there is no basis at this juncture to address that speculative claim or otherwise second guess DoD's order that al-Marri receive a CSRT upon dismissal of this action. Rather, the question presented now is whether the review scheme that Congress has established, and to which al-Marri will have access, is constitutional. For the reasons set out in Part II, infra, the MCA and the DTA establish a regime of judicial review that does not amount to a suspension of the writ or a violation of due process or equal protection.

C. The MCA Applies To Pending Habeas Actions Such As Al-Marri's

Al-Marri further argues (Resp. 26) that, even if he himself falls within the MCA, his case does not because the MCA does not clearly eliminate federal court jurisdiction over pending habeas actions. Al-Marri contends (Resp. 26-27) that the reference in the effective date provision (MCA § 7(b)) to the elimination of jurisdiction over pending cases "which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States" refers back to only those "other [non-habeas] action[s] against the United States" referenced in the second part of MCA Section 7(a) (the new Section 2241(e)(2) of Title 28). That contention lacks merit.

Section 7(a) amends 28 U.S.C. 2241 in two ways. First, it eliminates federal jurisdiction over habeas actions (new Section 2241(e)(1)). Second, it eliminates federal jurisdiction over "any other action * * * relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States" (new Section 2241(e)(2)). Section 7(b) applies "[t]he amendment [to Section 2241] made by [Section 7(a)]" to pending cases. Thus, Section 7(b) plainly applies to pending habeas actions. Indeed, Congress could hardly have been more clear. Contrary to al-Marri's suggestion, Section 7(b)'s reference to cases "which relate to any aspect of the detention, transfer, treatment, trial, or

conditions of detention of an alien detained by the United States," does not cast any doubt on Section 7(b)'s express application to pending habeas actions. A habeas action "relates to * * * the detention" of the petitioner and thus is clearly encompassed within the very language that al-Marri contends excludes habeas actions. Indeed, if a habeas action did not "relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien," then Congress's reference to "other action[s] * * * relating to any aspect of the detention" in new Section 2241(e)(2) would have been superfluous.

A recent district court decision supports the government's position. In Hamdan v. Rumsfeld, No. 04-1519 (JR), 2006 WL 3625015 (D.D.C. Dec. 13, 2006), Judge Robertson held that the MCA's language calling for application of Section 7(a) to pending habeas cases is "so clear that it could sustain only one interpretation." Id. at *3 (quoting Lindh v. Murphy, 521 U.S. 320, 329 n.4 (1997)). The court pointed out that MCA Section 7(b) states that "[t]he amendment [to 28 U.S.C. 2241] made by subsection (a)"—which eliminates jurisdiction over "an application for a writ of habeas corpus" (new section 2241(e)(1)) and "any other action * * * relating to any aspect of the detention, * * * of an alien who is or was detained by the United States" (new section 2241(e)(2))—applies to "all cases, without exception, pending on or after the date of the enactment of this Act." Ibid. Because new Sections 2241(e)(1) and

2241(e)(2) "both amend the habeas statute," the court explained, "all of [MCA] § 7(a), and not just the part encompassed in new [Section 2241(e)(2)], applies" to pending cases. Ibid. The court further explained that the reference to "other" actions relating to detention in new Section 2241(e)(2) as set off from the habeas actions referenced in new Section 2241(e)(1), see MCA § 7(a) ("any other action * * * relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien") (emphasis added), "confirms the inclusion of habeas proceedings within [MCA § 7(b)'s] broader category encompassing "all cases . . . pending on or after the date of enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention." Ibid.[2] Under the plain terms of the MCA, this Court (and the district court) thus no longer have jurisdiction over Al-Marri's habeas action.

[2] Al-Marri's claim that MCA Section 7(b) tracks only the language in new Section 2241(e)(2) fails for another reason. The language in Section 7(b) sweeps more broadly, referring to "all cases, without exception" rather than to only the "other action[s]" referenced in new Section 2241(e)(2). Section 7(b)'s sweeping language also refutes al-Marri's contention (Resp. 27-28) that the provision removing jurisdiction over pending challenges to military commissions (MCA § 3(a)) uses broader language than Section 7(b). Section 3(a)'s reference to "any claim or cause of action" may be similar to Section 7(b)'s reference to "all cases, without exception," but it certainly is not broader.

D. Giving Effect To The Plain Terms Of The MCA In This Case Would Not Have The Far-Ranging Effect Hypothesized By Al-Marri

Al-Marri contends (Resp. 23) that "if Congress properly divested 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 Naval Brig." That argument is entirely baseless. Al-Marri is not "any alien." As discussed, after an inter-agency process at the highest levels, the President determined that he should be detained by the military as an enemy combatant. That determination is supported by information indicating that, inter alia, al-Marri trained at Osama bin Laden's terrorist training camp in Afghanistan for 15 to 19 months; met with Khalid Shaykh Muhammed — the mastermind of the September 11 attacks — before September 11, 2001; and al-Marri's laptop computer revealed research relating to the use of chemical weapons of mass destruction and contained files about jihad, martyrdom, and Taliban-related websites. See Rapp Decl. (JA 213-227). Al-Marri is therefore fundamentally different than the millions of aliens who lawfully reside in the United States and have no basis for being designated as an enemy combatant in connection with the ongoing conflict. Indeed, al-Marri is the only alien who has been captured in the United States and determined to be an enemy combatant in the current conflict. Congress acted well within its discretion in determining that the fact that an alien enemy combatant, such

as al-Marri, has successfully entered our borders should not entitle him to any special exemption under the MCA.

II. THE DTA PROVIDES CONSTITUTIONALLY ADEQUATE JUDICIAL REVIEW OF LEGAL CHALLENGES BY ALIEN ENEMY COMBATANTS DETAINED IN THE UNITED STATES

Al-Marri contends that the MCA if applied to him constitutes an unconstitutional suspension of the writ of habeas corpus and a violation of due process and equal protection because he is not guaranteed to receive the judicial review provided by the DTA and because the DTA's review scheme does not provide him with a meaningful opportunity to challenge the factual basis for his detention. Al-Marri's first claim lacks merit because, as discussed, he has already received a full and fair habeas proceeding in the District Court and the Department of Defense has ordered that al-Marri receive a CSRT upon dismissal of this action, and because the District of Columbia Circuit has jurisdiction to hear al-Marri's challenge to an adverse CSRT determination.[3] Al-Marri's second claim also lacks merit because, as explained

[3] Al-Marri contends further (Resp. 39) that "[e]ven if al-Marri were provided a CSRT, and prevailed, he would still remain detained based upon the President's June 23, 2003 order." If a CSRT determined that al-Marri was no longer an enemy combatant, he would be treated no differently from any other detainee who has received a favorable CSRT determination. His detention as an enemy combatant would cease, and the United States would take steps to return him to his country of citizenship or to effect another "disposition consistent with domestic and international obligations and U.S. foreign policy." July 7, 2004 Order by the Deputy Secretary of Defense Establishing Combatant Status Review Tribunal, at 4

below, the DTA's review scheme provides him with all the process to which he is entitled.

A. The Post-September 11 Legal Framework

In Hamdi v. Rumsfeld, 542 U.S. 507 (2004), the Supreme Court addressed the process "constitutionally due" to an American citizen detained as an enemy combatant in the United States who disputes his combatant status. Id. at 524 (plurality opinion). The Hamdi Court concluded that judicial proceedings would not follow standard habeas procedures under 28 U.S.C. 2241, but rather "may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict." Id. at 533.[4] The Court elaborated that "[h]earsay * * * may need to be accepted as the most reliable available evidence," and that "the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided." Ibid. The Court further observed that "[t]here remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal," pointing out that "military regulations already provide for such

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<http://www.defenselink.mil/news/July 2004/d20040707review.pdf>.

[4] The controlling opinion discussed above was adopted by a plurality of the Court, but Justice Thomas, who did not join that opinion, would have taken a more deferential approach to the Executive. See Hamdi, 542 U.S. at 589-599.

process in related instances." Id. at 538 (citing Army Regulation 190-8, § 1-6 (1997)).

Following Hamdi, the Executive Branch in the summer of 2004 established an administrative scheme, the CSRT, to permit aliens detained as enemy combatants at Guantanamo Bay to challenge their detention. The CSRT was patterned after the military regulations referred to by the Supreme Court in Hamdi (which in turn are modeled on the "competent tribunal" described in Geneva Convention Article 5), but provides even more process. See 151 Cong. Rec. S12,754 (daily ed. Nov. 14, 2005) (statement of Sen. Graham) (observing that the CSRT system "is Geneva Convention article 5 tribunals on steroids"). In proceedings before the CSRT, al-Marri will be entitled to call reasonably available witnesses, to question other witnesses, to testify or otherwise address the tribunal, and not to testify if he so chooses. Al-Marri will be additionally entitled to a decision, by a preponderance of the evidence, by commissioned officers sworn to execute their duties impartially, and to review by the Staff Judge Advocate for legal sufficiency. See Memorandum from Gordon England, Secretary of the Navy, Regarding the Implementation of CSRT Procedures for Enemy Combatants Detained at Guantanamo (July 29, 2004) <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf>. In addition, unlike an Article 5 tribunal, the CSRT provides al-Marri a personal

representative for assistance in preparing his case, access to an unclassified summary of the evidence before the hearing, the ability to introduce relevant and reasonably available documentary evidence, and to a search of government files for, and production to the Tribunal of, any exculpatory evidence.

In the DTA, Congress recognized the CSRT process as a mechanism for determining the status of enemy combatants, subjected that process to congressional oversight, and established a scheme of judicial review of that process in the District of Columbia Circuit. Section 1005(e)(2)© of the DTA authorizes the District of Columbia Circuit to review whether the determination by a CSRT that an alien is properly detained an enemy combatant "was consistent with the standards and procedures specified by the Secretary of Defense for [CSRTs]." Section 1005(e)(2)(C) further specifies that judicial review extends to determining whether the CSRT adhered to "the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence." The court of appeals also is authorized to consider whether, "to the extent the Constitution and laws of the United States are applicable," the standards and procedures adopted by the Secretary of Defense for use in the CSRTs are "consistent with the Constitution and laws of the United States."

DTA § 1005(e)(2)(C)(ii).[5]

Under the present legal framework, al-Marri may challenge his detention as an enemy combatant before a military tribunal (the CSRT) that offers more substantial process than the tribunals to which the Hamdi Court adverted as possible models for review of citizen challenges to enemy combatant status.[6] He may also challenge before the District of Columbia Circuit whether an adverse CSRT determination was reached by application of standards and procedures consistent with (1) those specified by the Secretary of Defense, "including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence," DTA § 1005(e)(2)(C)(I), and (2) "the Constitution and laws of the United States," to the extent they are applicable. DTA § 1005(e)(2)(C)(ii). Moreover, he can argue to the District of Columbia Circuit that the review provisions of the DTA and MCA must be construed to afford any constitutionally mandated quantum of review. Given the availability of this legal process and judicial review, al-Marri's claim that the MCA effects an

[5] Similarly, final decisions of a military commission are reviewable both as to their consistency with standards and procedures specified for a military commission and with the Constitution and laws of the United States to the extent they are applicable. DTA § 1005(e)(3)(D) (as amended by MCA § 9(4)).

[6] Al-Marri's contention (Resp. 42) that Hamdi is inapposite because Hamdi was captured on a foreign battlefield rather than inside the United States is without merit for reasons that will be addressed in respondent's brief on the merits (to be filed Jan. 5, 2007).

unconstitutional suspension of the writ of habeas corpus lacks merit.[7]

B. The MCA Does Not Suspend The Writ Or Violate Due Process Because The Judicial Process Available To Al-Marri Is Adequate And Effective To Test The Legality Of His Wartime Detention

The habeas remedy is neither all-encompassing nor fixed in stone. Rather, Congress has repeatedly amended and restricted the right to habeas corpus without triggering the Suspension Clause. See, e.g., Felker v. Turpin, 518 U.S. 651, 664 (1996) (concluding that significant restrictions on habeas prisoners in civilian custody in the United States did not effect a suspension of the writ). In Swain v. Pressley, 430 U.S. 372 (1977), the Supreme Court held that judicial review that "is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus." Id. at 381.

In addition, the Court has indicated that "Congress could, without raising any constitutional questions, provide an adequate substitute through the courts of appeals.

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[7]Al-Marri has submitted a letter pursuant to Federal Rule of Appellate Procedure 28(j) asserting that Judge Robertson's decision in Hamdan v. Rumsfeld, supra, supports his contention that the MCA is unconstitutional as applied to him because Judge Robertson observed that the MCA would be unconstitutional as applied to any person who is protected by the Suspension Clause. The observation of a district court in another circuit is of course not binding on this Court. In any event, that observation was dictum, and Judge Robertson gave no indication that he had considered the question whether the MCA and DTA provide aliens detained as enemy combatants an adequate and effective alternative procedure for challenging the legality of their detention.

INS v. St. Cyr, 533 U.S. 289, 314 & n.36 (2001). The Court has indicated that the fundamental factor in determining whether the writ of habeas corpus has been suspended is whether a detainee has access to judicial review of constitutional and statutory questions. See id. at 300 (noting that a substantial Suspension Clause question would be presented if the statute "entirely preclude[d] review of a pure question of law by any court"); id. at 304-305 ("[T]here is substantial evidence to support the proposition that pure questions of law like the one raised by the respondent in this case could have been answered in 1789 by a common-law judge with power to issue the writ of habeas corpus. It necessarily follows that a serious Suspension Clause issue would be presented if we were to accept the INS' submission that the 1996 statutes have withdrawn that power from federal judges and provided no adequate substitute for its exercise."); see also Swain, 430 U.S. at 382-384 (presuming that the habeas substitute was "neither ineffective nor inadequate simply because the judges of that court do not have life tenure" in light of the "settled view" that non-life-tenured judges are "fully competent to decide federal constitutional issues"). Judicial review of constitutional claims and questions of law is the touchstone of habeas corpus and any substitute guaranteeing such review is therefore adequate. See Mohamed v. Gonzales, No. 05-3357, 2006 WL 3392088, at *3 (8th Cir. 2006) ("This court may review all constitutional claims and questions of law *

* *. Congress has created a remedy as broad in scope as a habeas petition. It is an adequate and effective substitute to test the legality of a person's detention."); Alexandre v. United States Atty. Gen., 452 F.3d 1204, 1206 (11th Cir. 2006) (per curiam) ("Because Congress gave courts of appeals jurisdiction to review all legal and constitutional errors in a removal order, habeas review became unnecessary."). As described above, the DTA ensures that federal courts have jurisdiction to decide the constitutional and statutory questions bearing on Al-Marri's detention. Thus, the DTA judicial review scheme is neither inadequate nor ineffective to test the legality of al-Marri's detention.

While Al-Marri contends otherwise, he has not met his "burden of demonstrating inadequacy and ineffectiveness." Fisher v. Gibson, 262 F.3d 1135, 1145 (10th Cir. 2001), cert. denied, 535 U.S. 1030 (2002). His main claim is that he is entitled to a factual inquiry more searching than that afforded by the DTA, but the DTA permits him to challenge before the District of Columbia Circuit whether the CSRT ruling is "consistent with the standards and procedures specified by the Secretary of Defense for [CSRTs] (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence * * *)." DTA § 1005(e)(2)(C)(I). Moreover, even in the ordinary habeas context as applied to United States citizens convicted of a crime in state court, review of factual sufficiency is

highly deferential. And an alien enemy combatant historically has not had any right to de novo fact-finding by a court with respect to sensitive executive determinations made during wartime.[8] For example, the Supreme Court has held that traditional habeas review of military tribunals does not examine the guilt or innocence of the

[8] None of the cases cited by al-Marri support his claim for a searching judicial inquiry into the facts of his detention. At common law, habeas courts compared the facts alleged in the prisoner's affidavit against the facts in the custodian's return. See, e.g., Goldswain's Case, 96 Eng. Rep. 711 (C.P. 1778) (finding only that return did not refute or dispute fact critical to petitioner's contention that he was immune from impressment). Moreover, for enemy aliens detained during wartime, the courts limited their review of facts to the jurisdictional facts—i.e., citizenship— justifying the aliens' detention. See, e.g., Case of Three Spanish Sailors, 96 Eng. Rep. 775 (C.P. 1779) (after repeating affidavit's acknowledgment that prisoners were citizens of foreign sovereign, the court held that "no habeas corpus lies for an enemy alien, a prisoner of war, however ill used or deceived"); R. v. Schiever, 97 Eng. Rep. 551 (K.B. 1759) (prisoner's affidavit admitted facts justifying his continued detention); see also Lockington's Case, Brightly (N.P.) 269 (Pa. 1813) (where the petitioner was detained after he refused to obey Presidential order requiring British citizens residing in the United States during the War of 1812 to move away from certain area and the state court denied his habeas petition, holding that his detention for failure to follow a lawful Presidential order was proper; in that context, a single judge opined that an alleged enemy alien could dispute his status); United States ex rel. Schwarzkopf v. Uhl, 137 F.2d 898, 900 (2d Cir. 1943) (noting in dictum that a factual dispute between a prisoner's affidavit and the return over the prisoner's citizenship should permit the prisoner to file a traverse and, potentially, to have an evidentiary hearing to resolve the dispute). Al-Marri offers no precedent in which a habeas court undertook searching factual review of the determination of a properly constituted executive tribunal, and one of the cases he cites states the opposite. See Ex parte Gilroy, 257 F. 110 (S.D.N.Y. 1919) (conducting a hearing when the executive had not done so); id. at 112 ("If a hearing had been provided, and the executive, after a hearing in accordance with law, had decided as a fact that a person was an enemy alien, then, of course, under abundant authority, the court would not have power to oppose its own conclusion as to the fact against that of the executive.").

prisoner, nor does it examine the sufficiency of the evidence. Rather, review is limited to the question whether the military tribunal had jurisdiction over the prisoner. See Yamashita v. Styer, 327 U.S. 1, 8 (1946) ("If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions."); id. at 17 ("We do not here appraise the evidence on which petitioner was convicted" because such a question is "within the peculiar competence of the military officers composing the commission and were for it to decide"); Ex parte Quirin, 317 U.S. 1, 25 (1942) ("We are not here concerned with any question of the guilt or innocence of petitioners.").

Al-Marri contends (Resp. 44) that these precedents are inapposite because the detainees in those cases did not contest their status as combatants. But the Hamdi Court rejected that contention as a basis for distinguishing Quirin, see 542 U.S. at 523, and it went on to suggest that a process similar to that provided by the CSRTs could satisfy constitutional due process in cases in which a citizen detainee disputes his combatant status. The idea that Al-Marri—an alien—has a constitutional right to a sweeping factual inquiry on habeas simply cannot be reconciled with the Supreme

Court's treatment of the claim of a citizen combatant in Hamdi. See pp. 18-19, supra.[9] In fact, the Supreme Court has held in a closely related context that an alien enemy has no such right. In Ludecke v. Watkins, 335 U.S. 160, 164 (1948), in rejecting a challenge to the constitutional validity of the Alien Enemy Act, which authorizes the President during wartime to remove from the United States aliens who are citizens of hostile nations, the Supreme Court explained that "[t]he very nature of the President's power to order the removal of all enemy aliens rejects the notion that courts may pass judgment upon the exercise of his discretion." The Ludecke Court made clear that the Attorney General's determination (following administrative hearings), pursuant to the President's order, that an alien enemy was "dangerous" and thus subject to removal under the Alien Enemy Act, 50 U.S.C. 21 et seq., was not subject to de novo fact-finding on habeas review: "The fact that hearings are utilized by the Executive to secure an informed basis for the exercise of summary power does not argue the right

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[9] Consistent with Hamdi and Yamashita, the MCA and DTA were enacted to ensure that, while each detainee challenging an adverse CSRT determination is afforded his day in court, the substantive decision of whether to detain an alien captured during an armed conflict an enemy combatant remains a military decision. See 152 Cong. Rec. S10266 (daily ed. Sept. 27, 2006) (Sen. Graham) ("[t]he role of the courts in a time of war is to pass muster and judgment over the processes we create -- not substituting their judgment for the military"); id. at S10403 (Sen. Cornyn) ("Weighing of the evidence is a function for the military when the question is whether someone is an enemy combatant. Courts simply lack the competence -- the knowledge of the battlefield and the nature of our foreign enemies -- to judge whether particular facts show that someone is an enemy combatant").

of courts to retry such hearings, nor bespeak denial of due process to withhold such power from the courts." Id. at 171-172.

In other alien-specific habeas proceedings, the sort of intense factual scrutiny that Al-Marri requests is likewise not present. In St. Cyr, the Supreme Court explained that under traditional habeas review in alien-specific contexts, "the courts generally did not review the factual determinations made by the Executive," except to determine "whether there was some evidence to support the order." 533 U.S. at 305-306. The DTA review scheme goes beyond the "some evidence" approach; it permits the alien detainee to challenge whether the CSRT, in reaching its decision, complied with "the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence." DTA § 1005(e)(2)(C)(I). In fact, at common law, habeas courts did not even engage in any sufficiency review, given the longstanding rule that the truth of the custodian's return could not be controverted. See, e.g., Opinion on the Writ of Habeas Corpus, Wilm 77, 107, 97 Eng. Rep. 29, 43 (H.L. 1758); see also Note, Developments in the Law - Federal Habeas Corpus, 83 HARV. L. REV. 1038, 1113-1114 (1970) ("From 1789 to 1867, the period during which, with minor exceptions, federal habeas corpus extended only to federal prisoners, the federal habeas court did not hold fact hearings. The facts asserted in the return to the writ had to be accepted despite the prisoner's attempt to controvert them."). Thus, even if the

non-military habeas authority is considered, the review provided under the DTA and the MCA is consistent with it, and does not give rise to any Suspension Clause issue.

Al-Marri's Suspension Clause challenge fails not only because he has not met his burden of establishing that the judicial review that will be available to him is inadequate or ineffective to test the legality of his detention, but also because his challenge is unripe. In United States v. Hayman, 342 U.S. 205 (1952), the Supreme Court vacated the lower court's decision holding that 28 U.S.C. 2255 effected an unconstitutional suspension of the writ of habeas corpus because "[n]othing has been shown to warrant our holding at this stage of the proceeding that the Section 2255 procedure will be 'inadequate' or 'ineffective.'" Id. at 223. The Court explained that federal courts should "not pass upon the constitutionality of an act of Congress where the question is properly presented unless such adjudication is unavoidable, much less anticipate constitutional questions." Ibid. Here, al-Marri will have an opportunity to challenge his detention as an enemy combatant before a CSRT. If he prevails, he will no longer be held as such. If he is unsuccessful, he may challenge the CSRT's determination for factual sufficiency and legal validity in the District of Columbia Circuit. He is free to argue to the District of Columbia Circuit that the review provided by the MCA and DTA must be interpreted to ensure that it meets any applicable constitutional requirements. And al-Marri could seek review of the court

of appeals' decision in the Supreme Court pursuant to 28 U.S.C. 1254(1). At that juncture, a court would have a concrete record on which to review the contention that the DTA review scheme is inadequate and ineffective and the benefit of a construction of the review provisions by the court—the District of Columbia Circuit—with exclusive jurisdiction over such cases.[10]

If the Court nonetheless believes it is necessary to address al-Marri's suspension challenge now, it should conclude that he has failed to meet his burden of establishing that the legal framework for review of his combatant status established by the political branches in the wake of the Hamdi decision is inadequate and

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[10] Al-Marri complains (Br. 46-51) that the CSRT process deprives him of several rights to which the Constitution entitles him, but all of those contentions can be—and should be—raised before the District of Columbia Circuit in the DTA proceeding. The District of Columbia Circuit is the court that Congress designated to review challenges brought by individuals subject to the DTA and MCA and, under the DTA, that court of appeals has jurisdiction to determine whether the procedures and standards applied by the CSRT to reach its determination comply "with the Constitution and laws of the United States." DTA § 1005(e)(2)(C)(ii). Al-Marri also challenges the MCA's provisions relating to military commissions, but no such commission has been convened against him. Al-Marri thus lacks standing to raise such a challenge. The claim is meritless in any event, because the DTA permits him to challenge any commission's assertion of jurisdiction over him on the ground that it violates "the Constitution and laws of the United States." DTA § 1005(e)(3)(D)(ii). Moreover, contrary to al-Marri's suggestion, there is no basis for his contention that the Constitution guarantees him the right to pre-trial habeas review. His citation to Hamdan is inapposite, because the question there was whether the judiciary should review Hamdan's pre-trial challenge in the absence of congressional direction on the timing of review.

ineffective to test the legality of his wartime detention as an enemy combatant.

Although consideration of the process which al-Marri has already received is not necessary to reject al-Marri's constitutional challenge to the MCA, al-Marri's Suspension Clause challenge fails for the independent reason that has had the benefit of a habeas proceeding in which he "has received notice of the factual basis supporting his detention and has been afforded a meaningful opportunity to rebut that evidence." JA 355. Indeed, al-Marri has been "given numerous opportunities to come forward with evidence supporting" his contention that he is not an enemy combatant. JA 354. Rather than avail himself of those opportunities, however, al-Marri "refus[ed] to participate" and "fail[ed] to offer any evidence on his behalf." JA 355. Given that al-Marri "squandered his opportunity to be heard by purposely not participating [in the habeas proceeding] in a meaningful way," JA 354 (citation omitted), the CSRT process, far from being inadequate, will give al-Marri a second chance to challenge the factual basis for his detention. Having had the unique opportunity to challenge his detention under the old and new regimes, al-Marri can hardly complain that he has or will receive insufficient process.

Al-Marri contends (Resp. 17) that if the MCA divests the federal courts of jurisdiction, the district court decision itself is "null and void." But at the time the district court issued its decision denying al-Marri's petition for a writ of habeas

corpus, it had jurisdiction. Whether or not the district court's judgment is vacated on remand and thus may not have collateral estoppel or res judicata effect, cf. United States v. Munsingwear, Inc., 340 U.S. 36, 39 (1950) (addressing proper disposition of lower court judgment when case becomes moot on appeal), the relevant point for Suspension Clause purposes is that al-Marri had a full and fair opportunity to challenge his detention in federal court via a petition for a writ of habeas corpus. Al-Marri contends (Resp. 18) that he has a right to appeal the district court's decision, but the Constitution does not guarantee him a right to appeal an adverse habeas determination. Cf. Miller-El v. Cockrell (2003) ("As mandated by federal statute, a state prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition."); Pennsylvania v. Finley, 481 U.S. 551, 556-557 (1987).[11]

[11]The Supreme Court has given effect to a statute that repealed its jurisdiction to review a circuit court decision denying a habeas corpus petition. See Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1868) (dismissing appeal for "want of jurisdiction"). While al-Marri contends that Congress must "speak with unmistakable clarity of it exercises its Article III power to make exceptions to [the Supreme Court's] appellate jurisdiction," Resp. 18 (citing Ex parte Yerger, 75 U.S. 85, 106 (1868)), Congress did so in the MCA, using clear and plain language to eliminate all federal jurisdiction over habeas petitions filed by alien enemy combatants. Because al-Marri already received plenary consideration of his habeas petition by a federal court, the practical effect of the MCA as to him is merely the denial of appellate review, and that deprivation has never been held to constitute an unconstitutional suspension of the writ.

C. The MCA Provision Establishing That the Geneva Conventions Are Not Privately Enforceable In United States Courts Does Not Violate the Suspension Clause

Al-Marri further argues (Resp. 53-55) that the MCA would effect a suspension of the writ if interpreted to deny a detainee the right to argue that his detention violates the Geneva Conventions. According to Al-Marri, Congress has not clearly expressed its intent to abrogate U.S. obligations under the Geneva Conventions, which thus retain their status as domestic law. As such, al-Marri argues, the Conventions could provide him a basis on which to challenge his detention or a military commission but for the MCA, which allegedly violates the Suspension Clause because it bars a party from "invok[ing] the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States * * * is a party as a source of rights in any court of the United States." MCA § 5(a). That argument should be rejected.

To begin with, al-Marri lacks standing to raise this argument because he has not relied on the Geneva Conventions as an independent basis for relief from his detention in this habeas action, and he has not been subjected to a military commission. In any event, the argument lacks merit.

Al-Marri's argument assumes that the Geneva Conventions, in their status as domestic law, are privately enforceable. Section 5(a) of the MCA, however, reaffirms

settled law recognizing that treaties, such as the Geneva Conventions, are presumed not to create individually enforceable rights. See Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 968 (4th Cir. 1992) ("International treaties are not presumed to create rights that are privately enforceable."). A treaty "is primarily a compact between independent nations," Head Money Cases, 112 U.S. 580, 597 (1884), and absent a clear contrary intent, a treaty "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." Ibid.; see Whitney v. Robertson, 124 U.S. 190, 194-195 (1888). If a treaty is violated, this "becomes the subject of international negotiations and reclamation," not the subject of a lawsuit. Head Money Cases, 112 U.S. at 597 ("It is obvious that with all this the judicial courts have nothing to do and can give no redress.").

In Section 5(a), Congress has specifically confirmed that the Geneva Conventions are not enforceable by private parties in United States courts. That decision is consistent with the presumptive rule and with the treaty itself, whose text contemplates enforcement at the State-to-State level only. See Hamdi v. Rumsfeld, 316 F.3d 450, 468 (2003) ("[T]he language in the Geneva Convention is not 'self-executing' and does not create private rights of action in the domestic courts of the signatory countries."), vacated on other grounds, 542 U.S. 507 (2004); see also Holmes v. Laird, 459 F.2d 1211, 1213, 1222 (D.C. Cir. 1972) (holding that "the

corrective machinery specified in the [NATO Status of Forces Agreement] itself is nonjudicial"); Murphy v. Netherland, 116 F.3d 97, 100 (4th Cir. 1997) (treaties are not individually enforceable simply because of their Article VI status as "supreme Law of the Land"). Moreover, the Act gives effect to the Supreme Court's decision in Johnson v. Eisentrager recognizing that the 1929 Geneva Convention—the predecessor to the current Conventions—is not privately enforceable. See Johnson v. Eisentrager, 339 U.S. 763, 789 (1950) (holding that the 1929 Geneva Convention is not judicially enforceable by the captured party).

Nor does the fact that this is a habeas proceeding change the constitutional analysis. The habeas statute is simply a grant of jurisdiction, and does not itself create any substantive rights against detention. Accordingly, every court of appeals to consider the question has determined that treaties that do not themselves create judicially enforceable rights may not be enforced through the habeas statute, and no court has found that consequence to be in violation of the Suspension Clause. As this Court has explained, there is "no reason to conclude that 28 U.S.C. § 2241 makes * * * diplomatically-focused [treaty] rights enforceable by a private right of petition." Hamdi, 316 F.3d at 469 (citation omitted), vacated on other grounds, 542 U.S. 507 (2004). Accord Bannerman v. Snyder, 325 F.3d 722, 724 (6th Cir. 2003); accord Poindexter v. Nash, 333 F.3d 372 (2d Cir. 2003); Wesson v. United States

Penitentiary Beaumont, 302 F.3d 343 (5th Cir. 2002); Hain v. Gibson, 287 F.3d 1224 (10th Cir. 2002); United States ex rel. Perez v. Warden, 286 F.3d 1059 (8th Cir. 2002). Moreover, as discussed, the Supreme Court held that the 1929 Geneva Convention was not privately enforceable in the habeas action in Eisentrager. 339 U.S. at 789. In any event, there is no constitutional impediment to Congress limiting enforcement of a treaty to diplomatic and non-judicial processes. That is the norm for treaties. See, e.g., Holmes v. Laird, 459 F.2d 1211, 1220-22 (D.C. Cir. 1972); cf. Tag v. Rogers, 267 F.2d 664, 667 (D.C. Cir. 1959) ("it has long been established that treaties and statutes are on the same level and, accordingly, that the latest action expresses the controlling law"). In sum, Al-Marri, who has not invoked the Geneva Conventions to date in this habeas action, never had any privately enforceable rights under the Geneva Conventions, and there can be no Suspension Clause violation simply because the MCA reaffirms that fact.

D. The MCA Does Not Violate The Equal Protection Clause

Contrary to Al-Marri's arguments (Resp. 55-60), the MCA does not violate the Equal Protection Clause. The premise of his argument is that the MCA deprives him of his fundamental constitutional right of habeas corpus or access to the courts, but that premise is flawed for the same reasons that his Suspension Clause and Due Process claims fail—namely, the judicial process to which he has access is

constitutionally adequate to test the legality of his detention. The cases on which al-Marri relies, see Resp. 57 (citing Douglas v. California, 372 U.S. 353 (1963), and Griffin v. Illinois, 351 U.S. 12 (1956)), are inapposite, because they did not involve policies related to the judicial process available to aliens held as enemy combatants or embrace rationales that would legitimately apply to the context presented here.

Moreover, while al-Marri complains (Resp. 58) that the MCA impermissibly discriminates "based solely upon alienage," al-Marri is not a member of a suspect class. "The Supreme Court has reviewed with strict scrutiny only state laws affecting permanent resident aliens." LeClerc v. Webb, 419 F.3d 409, 415 (5th Cir. 2005) (emphasis added), petition for cert. filed, No. 05-1645 (Jun. 23, 2006). Present in the United States on a student visa, al-Marri is nonimmigrant alien whose "status is far more constricted than that of resident aliens." Id. at 418. As such, al-Marri has no standing to maintain an equal protection challenge to the MCA on behalf of a distinct group of lawful resident aliens. See Kowalski v. Tesmer, 543 U.S. 125, 129-130 (2004); see also In re Griffiths, 413 U.S. 717, 722 (1973) (noting that lawful resident aliens are a suspect class because "like citizens,[they] pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society"); Matthews v. Diaz, 426 U.S. 67, 78-79 (1976) ("the class of aliens is itself a heterogeneous multitude of persons with a wide-ranging variety of ties to this

country"). There is no basis for allowing al-Marri to raise claims of such lawful permanent aliens for the additional reason that he is the only alien detained in the United States as an enemy combatant and he lacks such status.

Even if al-Marri were a member of a suspect class, his equal protection challenge still would not be entitled to heightened scrutiny because courts have historically shown extraordinary deference to the federal government regarding its policies towards aliens—deference that reaches its apex when applied to decisions of Congress and the President during wartime that implicate national security and foreign policy matters.[12] As the Supreme Court explained in Eisentrager, aliens have long been subjected to different treatment than citizens when it comes to wartime decisions. See 339 U.S. at 774-776. Al-Marri concedes that the federal government has great latitude to classify according to alienage, yet he tries to limit the scope of that federal power only to the federal interest in naturalization and immigration. See Resp. 58 (citing Matthews v. Diaz, 426 U.S. 67, 79-80 (1976), and Fiallo v. Bell, 430 U.S. 787, 792 (1977)). The Supreme Court, however, has not limited Congress's authority in the manner al-Marri suggests. To the contrary, the Court sustained the laws at issue in those cases on a much broader rationale:

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[12] The Court has applied heightened scrutiny only to state policies affecting aliens. See, e.g., Graham v. Richardson, 403 U.S. 365, 379-380 (1971).

> [A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

Matthews, 426 U.S. at 81 n.17 (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 588-589 (1952)); see Fiallo, 430 U.S. at 792; Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 210 (1953). The concern motivating the Court's deference—that regulation of aliens is committed to the political branches of the federal government—is magnified in this case, where Congress is not only regulating aliens, but is doing so in order to prosecute the war against international terrorism effectively.

Under the deferential rational-basis standard applicable to federal regulation of aliens' access to the courts during wartime, the MCA easily passes constitutional muster. Given that federal power over enemy aliens "has been deemed throughout our history, essential to war-time security," Eisentrager, 339 U.S. at 774, it cannot seriously be maintained that the MCA and DTA lack a rational basis when Congress enacted them in the wake of attacks executed by aliens affiliated with a foreign-based terrorist organization and designed them to strike the appropriate balance between the national security interests of the United States and the interests of alien enemy

combatants. There is no denial of equal protection in a federal statute that distinguishes between enemy combatants who are citizens and enemy combatants who are not.

III. TO THE EXTENT THAT THE MCA SUSPENDS THE WRIT OF HABEAS CORPUS AS TO AL-MARRI, THAT SUSPENSION REFLECTS A PROPER EXERCISE OF CONGRESS'S POWER

Even if this Court were to conclude that applying the MCA to al-Marri would effect a suspension of the writ of habeas corpus, that narrow suspension as to aliens detained as enemy combatants would not be unlawful. The MCA eliminates habeas jurisdiction over aliens detained by the United States as enemy combatants in the wake of the September 11 attacks. See MCA § 7(b). Congress clearly recognized that the September 11 attacks posed a grave threat to the security of the United States, see Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, and decided in the wake of those attacks that alien enemy combatants detained by the United States may obtain judicial review of their detention only via the DTA. The September 11 attacks—the deadliest foreign attack on American Soil in the Nation's history—constituted no less of an "invasion" than the Japanese attack on Pearl Harbor. See Resp. 9 n.3 (noting that governor of Hawaii, based on authority previously conferred by Congress, suspended the writ of habeas corpus after the attack on Pearl Harbor). Indeed, far from targeting a single military base, the September 11

attacks targeted the Nation's Department of Defense, the heart of the Nation's financial center in New York City, and, it is believed, the White House or Capitol Building itself. Moreover, nothing in the Suspension Clause provides that Congress must explicitly state that it was restricting habeas corpus because of an "invasion" or "rebellion" in order for a suspension to be effective, and Congress here did expressly refer to enemy combatants in a context in which the opening of hostilities constituted an invasion by any measure.

In any event, Congress's belief that the September 11 attacks justified the MCA's amendment to the jurisdiction of the federal courts is a political question. See Baker v. Carr, 369 U.S. 186, 217 (1962). Accordingly, to the extent that the Court determines that the MCA suspended the writ as to al-Marri, that suspension, narrowly tailored to apply only to alien enemy combatants who may challenge their detention via a CSRT with the opportunity to appeal that determination to the District of Columbia Circuit, is a valid exercise of Congress's power to regulate the jurisdiction of the federal courts.

CONCLUSION

For the reasons stated above, and in respondent-appellee's motion to dismiss for lack of jurisdiction, this Court should remand the case to the district court with instructions to dismiss it for lack of subject matter jurisdiction.

Respectfully submitted,

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