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By Muneer I. Ahmad

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On December 5, 2007, the Supreme Court will for the third time in five years hear argument on the rights of detainees at Guantánamo Bay. At issue in these cases, *Boumediene v. Bush* and *Al Odah v. United States,*[1] is whether the recently enacted Military Commissions Act of 2006 ("MCA")[2] may constitutionally remove the right of the detainees to challenge the legality of their detention in habeas corpus proceedings in federal court. However, the ramifications of the Court's decision may extend well beyond the Guantánamo detainees, affecting the rights of noncitizens more broadly, including those within the territorial United States. This is because the MCA is built upon a sharp distinction between citizens and noncitizens, and allocates rights accordingly. Indeed, the focus of the MCA is not on terrorist suspects, but *noncitizen* terrorist suspects. The Court's first consideration of the Act may tell us as much about the rights of noncitizens as it does about the rights of those accused of terrorism.

When Congress passed the MCA, it ostensibly was concerned with the treatment of the approximately 350 noncitizen detainees at Guantánamo Bay, Cuba.[3] The Act emerged in response to two Supreme Court cases that struck down central features of the Bush Administration's Guantánamo policy, and sought to erect a comprehensive scheme for the detention and trial of detainees there. But on its face and according to its own logic, the MCA extends well beyond Guantánamo. The legal regime created by the MCA to regulate noncitizens detained outside the territorial United States traverses national boundaries and necessarily implicates the rights, status, and condition of noncitizens within the United States. In this way, the MCA makes clear that while geographically remote, Guantánamo is tethered to the United States, and in the legal, cultural, and political imaginations, is contiguous with it.

As a framework to govern the Guantánamo detainees, the MCA is deeply flawed, as it strips the federal courts of habeas corpus jurisdiction to review the legality of detention, and endorses a rudimentary and substandard legal process for the trial of those accused of war crimes. But in addition to its substantive defects, the MCA represents two threats to noncitizens, including those inside the territorial United States. First, by

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[1] 127 S.Ct. 3078 (Mem) (June 29, 2007) (No. 06-1195).

[2] Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. § 948-50; 18 U.S.C. § 2441; and 28 U.S.C. § 2241(c)-(e)) (2006).

[3] As of this writing, there are approximately 330 individuals detained at Guantánamo. Press Release, U.S. Dep't of Def., Detainee Transfer Announced (Sept. 29, 2007), http://www.defenselink.mil/releases/release.aspx?releaseid=11368. Approximately 445 detainees previously held have been released even though the Administration claims they were properly determined to be "enemy combatants." *Id*.

stripping habeas only for noncitizens, and by reserving the degraded proceedings of military commissions for noncitizens, the Act unnecessarily, and perhaps unconstitutionally, hardens a rights divide between citizens and noncitizens. Second, the MCA accelerates a worrying trend of criminalizing, and "national securitizing," immigration law, without the panoply of protections that ordinarily attach in criminal proceedings. The MCA goes farther than any previous national security-related law, including the USA PATRIOT Act[4], in expanding Executive power over noncitizens. In so doing, the MCA inaugurates a body of national security law that permits maximum state sanction with minimum individual rights.

Ultimately, these developments are troubling not only for the legal jeopardy they create for noncitizen terrorism suspects, but for noncitizens generally. The MCA's citizenship-based erosions of rights further undermines a felt sense of security among noncitizens, and telegraphs to them a message of legal and political vulnerability as well as social and cultural displacement. These consequences extend well outside the realm of national security, and affect low-wage immigrant workers, asylum seekers, and even lawful permanent residents.

I. Prelude to Congressional Intervention: The *Rasul* and *Hamdan* Decisions

Congress enacted the MCA in direct response to two Supreme Court decisions, *Rasul v. Bush*[5] in 2004, and *Hamdan v. Rumsfeld*[6] in 2006, both of which were major setbacks to the Bush Administration's Guantánamo policy. In *Rasul,* the Court rejected the Administration's position that the detainees could not challenge the legality of their detention in habeas corpus proceedings.[7] In *Hamdan,* the Court invalidated the Administration's hastily created military commission system.[8] But to understand the significance of these decisions, and the congressional action that followed, one must start with the fundamentals of the Administration's Guantánamo policy.

It is well understood that Guantánamo was designed by the Bush Administration as an interrogation center located in a no-rights zone, or what has often been called a legal black hole.[9] Detainees were brought there for interrogation primarily, and detention only incidentally. In order to free its hand in interrogation—both literally and figuratively—the Administration sought to place the detainees outside the law and beyond the reach of the courts. The Administration has maintained that the Guantánamo detainees are not prisoners of war, who would be entitled to a bundle of rights under the Geneva Conventions, but are instead "enemy combatants" who fall outside the purview of the Geneva Conventions, or any other body of law.[10] Indeed, prior to the *Hamdan*

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[4] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("USA PATRIOT Act"), Pub. L. No. 107-56, 115 Stat. 272 (2001).
[5] 542 U.S. 466 (2004).
[6] 126 S.Ct. 2749 (2006).
[7] Rasul, 542 U.S. 466 (2004).
[8] Hamdan, 126 S.Ct. 2749 (2006).
[9] *See generally* JOSEPH MARGULIES, GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER 11 (2006).
[10] *See* U.S. Dep't of Def., *The Legal Basis for Detaining Al Qaida and Taliban Combatants* (Nov 14, 2005), http://www.defenselink.mil/news/Jan2006/d20060215legalbasis.pdf [hereinafter *The Legal Basis*

decision, it was the consistent position of the Administration that the detainees have no rights at all under any source of law: the Constitution, U.S. statutes, the Geneva Conventions, other international treaties, or customary international law.[11] By this account, any limitation on the treatment of detainees was a matter of executive grace rather than detainee right.

The Administration argues that it has the authority to designate individuals as "enemy combatants" without any meaningful role for the courts in reviewing such determinations, and then to detain them without charge or trial for the duration of hostilities.[12] Because the Administration has also maintained that the hostilities—namely, the "war on terrorism"—are likely to last beyond our lifetime, this is tantamount to claiming authority to detain individuals indefinitely and without charge based solely on an unreviewable executive determination.

Although the Administration's broad assertion of detention authority obviates trials, it has nonetheless decided to try a small number of individuals for alleged war crimes in military commissions. Initially, military commissions began under the putative authority of the same executive order that authorized the detention of noncitizens at Guantánamo.[13]

The *Rasul* and *Hamdan* decisions invalidated key features of both the detention and trial ambitions of the Administration. In *Rasul,* the Supreme Court rejected the Administration's contention that the habeas jurisdiction of the federal courts did not reach the detainees at Guantánamo. In a decision that rested on statutory interpretation, the Court opened the way for all detainees at Guantánamo to challenge the legality of their

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for Detaining Al Qaida and Taliban Combatants]; Presidential Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter Presidential Military Order] (purporting to authorize the detention and trial by military commission of those held at Guantánamo).

[11] *See* In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 454 (D.D.C. 2005) (summarizing the government's position that the detainees "do not hold any . . . substantive rights" under the Constitution and other laws); White House Fact Sheet, *Status of Detainees at Guantanamo* (Feb 7, 2002), http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html [hereinafter *Status of Detainees at Guantanamo*] (stating U.S. policy that neither Al Qaida nor Taliban members are entitled to Prisoner of War Status under the Geneva Conventions).

[12] *See The Legal Basis for Detaining Al Qaida and Taliban Combatants*, *supra* note 10 ("There is no question that under the law of war the United States has the authority to detain persons who have engaged in unlawful belligerence for the duration of hostilities, without charges or trial."). Following the Supreme Court's decisions in *Rasul v. Bush*, 542 U.S. 466 (2004), and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Administration created a post-hoc administrative review process known as the Combatant Status Review Tribunal ("CSRT"), purportedly to determine the combatant status of Guantánamo detainees. Subsequently, Congress enacted the Detainee Treatment Act of 2005 ("DTA"), Pub. L. No. 109-148, 119 Stat. 2680, 2739-44 (codified at 10 U.S.C. § 801, 28 U.S.C. § 2241(e), and 42 U.S.C. § 2000dd) (2005), which created a limited form of review of the CSRT determinations in the U.S. Court of Appeals for the D.C. Circuit. For a thorough discussion of the infirmities of the CSRT process and the inadequacy of the review available in the D.C. Circuit, see The Guantanamo Detainees' Second Supplemental Brief Addressing the Effect of the Detainee Treatment Act of 2005 on this Court's Jurisdiction Over the Pending Appeals, *Al Odah v. United States*, 05-5064 (D.C. Cir.), 2006 WL 679965.

[13] Presidential Military Order, *supra* note 10.

detention, and correlatively, to gain access to counsel. Thus did the Supreme Court sanction piercing the veil of secrecy at Guantánamo that the Administration had worked so assiduously to create and maintain. With the arrival of counsel at Guantánamo, and the initiation of numerous proceedings in federal court, the dirty laundry of Guantánamo—the stories of the detainees, and their torture—began to be aired in earnest.

The *Hamdan* decision was no less damaging for the Administration. At issue was whether the government could try detainees for alleged war crimes in a military commission system created by the Executive. Concluding that it could not, the Court held that the executive order creating the commissions violated the Uniform Code of Military Justice (UCMJ), which governs the use of military commissions. The Court found that the UCMJ requires military commissions to comport with the laws of war, including the four Geneva Conventions, and that the structure and procedures of the commissions violated the requirements of Common Article 3 of the Geneva Conventions. The defeat for the Administration was therefore twofold: not only were its commissions invalidated, but the Administration's position that the detainees existed outside the protections of the Geneva Conventions was repudiated as well.

Despite the seeming conclusiveness of these decisions on the questions of habeas review and trial by military commission, because both were, at base, statutory decisions, they left open the possibility of congressional override. Indeed, in a concurring opinion in *Hamdan,* Justice Breyer, joined by Justices Kennedy, Souter, and Ginsburg, invited as much.[14] Soon after that ruling was handed down, Congress passed the MCA, and the President signed it.

The MCA for the first time congressionally authorizes trials by military commission of noncitizen "unlawful enemy combatants."[15] Moreover, it purports to strip from the courts habeas jurisdiction over challenges to the detention of "enemy combatants."[16] If these habeas-stripping provisions withstand legal challenge—the question before the Supreme Court in the *Boumediene* and *Al Odah* cases—the practical effect will be to sanction the indefinite detention of individuals determined to be "enemy combatants." Because the statute creates no procedural requirements for the enemy combatant determination,[17] it is at least arguable that an individual may be detained indefinitely on the basis of executive fiat uncontestable in any court. All the executive

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[14] Hamdan, 126 S. Ct. at 2799 (Breyer, J., concurring) ("Nothing prevents the President from returning to Congress to seek the authority he believes necessary).

[15] 10 U.S.C. § 948d(a).

[16] *See* MCA, § 7 (amending 28 U.S.C. § 2241). The MCA was the second time that Congress attempted to strip the courts of habeas jurisdiction over the legal claims of Guantánamo detainees. In December 2005, Congress passed the Detainee Treatment Act (DTA), which also amended the federal habeas statute, 28 U.S.C. § 2241, to exclude review of claims brought by Guantánamo detainees. Because the statute was passed after the Supreme Court had granted *certiorari* in *Hamdan*, the effect of the DTA was briefed, argued, and decided in that case. At least as applied to review of military commissions, the Supreme Court concluded that the habeas-stripping provision of the DTA did not apply retroactively. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2762–69 (2006).

[17] *See* MCA, § 3(a) (adding 10 U.S.C. § 948a(1)(ii)). At most, the MCA only requires that the individual be determined to be an "unlawful enemy combatant" by a "competent tribunal established under the authority of the President or the Secretary of Defense." *Id.*

needs to do is declare someone an enemy combatant, and his or her detention is instantly unreviewable.

Although the MCA does not require it, most, if not all, "enemy combatants" will have available a limited form of judicial review of their combatant status determination before the U.S. Court of Appeals for the D.C. Circuit, pursuant to the Detainee Treatment Act of 2005 ("DTA").[18] A central question in the *Boumediene* and *Al Odah* cases will be whether the DTA procedures are an adequate substitute for *habeas* review, though as a threshold, matter, the Court will confront the question of whether the detainees have constitutional *habeas* rights in the first instance.

II. The Hardening of The Citizen/Noncitizen Divide

The MCA does violence to a number of important values in the U.S. legal system, not the least of which are the sanctity of habeas corpus, and our fundamental commitment to fair trials before deprivation of life or liberty. Among its many deficiencies is the special jeopardy it creates for noncitizens, and the danger that this jeopardy will migrate from the detainees at Guantánamo to noncitizens within the territorial United States.

Despite the numerous examples of U.S. citizens accused of terrorist activity—John Walker Lindh,[19] Yasir Hamdi,[20] and Jose Padilla,[21] to name just three—the MCA strips substantive and procedural rights of noncitizens only. It does so explicitly, by reserving the use of the degraded proceedings of military commissions only for noncitizens,[22] and for stripping *habeas* protections only of noncitizen "unlawful enemy combatants."[23] Thus the MCA ingrains a citizenship distinction in our national security

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[18] Pub. L. No. 109-148, 119 Stat. 2680, 2739-44 (codified at 10 U.S.C. § 801, 28 U.S.C. § 2241(e), and 42 U.S.C. § 2000dd) (2005). Following the Supreme Court's decisions in *Rasul*, establishing the federal courts' habeas jurisdiction over Guantánamo, and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), suggesting what procedural protections must exist for a U.S. citizen to challenge his detention as an "enemy combatant," the Department of Defense hastily constructed a post-hoc process known as Combatant Status Review Tribunals ("CSRTs"). Under the DTA, CSRT determinations can be reviewed by the D.C. Circuit Court of Appeals, but only to evaluate whether a given determination was consistent with the CSRT rules and procedures established by the Department of Defense, and whether those rules and procedures are consistent with the laws and Constitution of the United States, to the extent they apply. It remains the Administration's position that neither the Constitution nor any U.S. laws apply to the detainees. Thus, the D.C. Circuit is unable to consider factual challenges to the detainees' detentions, as a habeas court ordinarily would be able to do. The scope of the D.C. Circuit's DTA review is currently being litigated, most notably in *Bismullah v. Gates* and *Parhat v. Gates,* Nos. 06-1197 and 06-1397, 2007 WL 2067938 (D.C. Cir. July 20, 2007).

[19] *See* U.S. v. Lindh, 227 F. Supp. 2d 565 (E.D.Va, 2002) (approving sentence of twenty years for U.S. citizen John Walker Lindh for supplying services to the Taliban government and carrying an explosive during the commission of a felony).

[20] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 512-513 (2004) (describing the detention of U.S. citizen Yasir Hamdi by the U.S. government on grounds he fought with the Taliban in Afghanistan).

[21] *See* Padilla v. Hanft, 432 F.3d 582, 584 (4th Cir. 2005) (describing the detention of U.S. citizen Jose Padilla by the U.S. government on grounds he entered the U.S. for the purpose of blowing up buildings in American cities).

[22] *See* MCA § 3(a) (amending 10 U.S.C. § 948(c)) ("Any alien unlawful enemy combatant is subject to trial by military commission under this chapter.").

[23] *See id*. at § 7(a) (amending 28 U.S.C. § 2241(e)(1)) ("No court, justice, or judge shall have jurisdiction to

law, and allocates substantive and procedural rights solely on the basis of citizenship. This is at odds with our historical practice with respect to both habeas and criminal law proceedings, and is potentially unconstitutional as well.

A. The Degraded Procedures of the Military Commissions Are Reserved for Noncitizens

Because of their martial provenance, and their deviation from standard trial procedure, military commissions were viewed with suspicion by the Framers of the Constitution.[24] However, commissions have been tolerated historically on the stated rationale that their use, as opposed to the use of regular courts, has been required by military necessity.[25] Indeed, the first use of military commissions by the United States was necessitated by jurisdictional limits on courts-martial.[26] Each subsequent use has arisen from, and been circumscribed by, the exigencies of war. The question posed in *Hamdan* was "whether the preconditions designed to ensure that a military necessity exists to justify the use of this extraordinary tribunal have been satisfied."[27]

The *Hamdan* court noted that, as reflected in the UCMJ and consistent with historical practice, any deviation from standard procedural practices of courts-martial must be "tailored to the exigency that necessitates it."[28] Specifically, Article 36 of the UCMJ established a presumption of uniformity among military commissions and courts-martial, as well as a presumption of uniformity between all military tribunals and the principles of law and rules of evidence ordinarily applicable in criminal trials in federal district courts.[29] According to the Court, military commissions could depart from either court martial or federal court practices only where such practices would be impracticable.[30] The President's failure to establish the impracticability of applying the

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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.").

[24] *See* Loving v. United States, 517 U.S. 748, 760 (1996) (noting that "the Framers harbored a deep distrust of executive military power and military tribunals").

[25] *See* Hamdan, 126 S. Ct. at 2772-73 ("The military commission, a tribunal neither mentioned in the Constitution nor created by statute, was born of military necessity." (citing W. Winthrop, *Military Law and Precedents* 831 (rev. 2d ed. 1920))).

[26] Hamdan, 126 S.Ct. at 2773.

[27] *Id.* at 2777.

[28] *Id.* at 2790.

[29] At the time that *Hamdan* was decided, Article 36 provided:

> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions, and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
>
> (b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress.

10 U.S.C. § 836 (2000). The MCA amended both paragraphs so as to except military commissions from the impracticability requirement. *See* MCA § 4(a)(3).

[30] Hamdan, 126 S.Ct. at 2791.

rules of courts-martial in the military commissions was one of the primary bases for the Court's invalidation of the commission system.[31]

The MCA jettisons this well-settled historical practice and statutory requirement that the procedural and substantive departures of military commissions from courts-martial be based on impracticability. As a statutory matter, Congress simply excepted military commissions for noncitizen "unlawful enemy combatants" from the impracticability requirements of Article 36 of the UCMJ.[32] As a substantive matter, too, it is clear that military necessity is no longer the basis for the substandard procedures of the military commissions. For if it were, then the military commissions would apply to all "unlawful enemy combatants," citizens and noncitizens alike. And yet, as under the old system, commissions under the MCA are authorized only for noncitizens.

Indeed, the deciding factor as to whether an individual in the "war on terror" will be subject to the degraded proceedings of a military commission is alienage, not the exigencies of war. The MCA creates a bifurcated system of justice, with citizenship as the dividing line. A citizen who meets the MCA's definition of an "unlawful enemy combatant" and is accused of war crimes will be tried not by commission, but instead either by court martial under Article 47 of the UCMJ,[33] or in federal district court under the War Crimes Act,[34] both fora which offer a full panoply of substantive and procedural protections. The noncitizen, and only the noncitizen, will be subject to the degraded proceedings of a military commission.

We might imagine two individuals, one a noncitizen and the other a citizen, who are in exactly the same place, at exactly the same time, and engaged in exactly the same conduct. Both individuals are captured by the United States, detained, and charged with exactly the same substantive war crime offense. Despite being identically situated in every way but citizenship, the two will get radically different trials. The citizen's trial, in either a court martial or federal court, will be governed by the ordinary rules of evidence, including hearsay rules and prohibitions on evidence obtained through coercion, while the noncitizen will endure the markedly inferior procedural and substantive protections of a military commission.

As previously mentioned, citizens—such as John Walker Lindh, Yaser Hamdi, and Jose Padilla—have been caught up in the government's anti-terrorism regime just as noncitizens have. The Lindh case is particularly instructive, as he was a young American citizen picked up in the battlefield in Afghanistan and charged with, among other things, conspiracy to murder U.S. nationals and providing material support and resources to foreign terrorist organizations.[35] Those charges were brought in federal district court,

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[31] *Id.* at 2792–93. The Court also invalidated the commissions as violative of Common Article 3 of the Geneva Conventions. *Id.* at 2793.

[32] *See* MCA § 4(a)(3) (amending 10 U.S.C. § 836).

[33] 10 U.S.C. § 847 (2000).

[34] 18 U.S.C. § 2441 (2006).

[35] *See* United States v. John Phillip Walker Lindh, Indictment (Feb. 2002, E.D.Va), http://www.usdoj.gov/ag/2ndindictment.htm. *See supra* note 19 and accompanying text.

while roughly analogous charges of murder by an unprivileged belligerent, conspiracy, and providing material support for terrorism have been brought against a young Canadian citizen, Omar Khadr, in the degraded proceedings of the military commissions.[36]

Thus, it was a political decision, and not the exigencies of war, that dictated the use of military commissions for noncitizens only. The refusal to authorize the use of military commissions for all "unlawful enemy combatants," regardless of citizenship, constitutes a tacit admission by Congress as to the inferiority and inadequacy of the commission system, and reflects a political judgment that such a degraded form of justice could not be used for American citizens, even those accused of committing war crimes while engaged in hostilities against their own country.

The MCA frankly admits the inadequacy of the military commissions in another way as well, as several provisions of the statute hermetically seal off the "jurisprudence" of the commissions from application in war crime trials in courts-martial, and vice versa.[37] This reflects a jurisprudential anxiety about the commissions, and a concern that its substandard proceedings and decisions, reserved for noncitizens, not contaminate the legitimate proceedings in courts-martial and federal court to which citizens (including U.S. servicemembers) are entitled.

The legal question of whether Congress can single out noncitizens for the substandard treatment of commissions remains unanswered. It might be argued, for example, that such a distinction based on alienage is subject to strict scrutiny under the Equal Protection Clause. And yet, whether the detainees at Guantánamo have constitutional rights at all remains unresolved. Legality aside, the political feasibility of such targeting of noncitizens was established by the passage of the MCA.

B. The MCA Attempts to Strip Habeas Corpus For Noncitizen Enemy Combatants Without Geographic Restrictions

The MCA is unambiguous in attempting to strip the federal courts of habeas jurisdiction only over noncitizens. As a legal matter, whether Congress can remove habeas jurisdiction over Guantánamo remains to be seen. Two courts have addressed the issue thus far, both ruling that the MCA does in fact remove habeas jurisdiction, and does so without running afoul of the Constitution's Suspension Clause.[38] After initially

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[36] *United States v. Khadr,* Charge Sheet (Apr. 5, 2007), *available at* http://www.defenselink.mil/news/Apr2007/Khadrreferral.pdf.

[37] *See* MCA § 3(a) (adding 10 U.S.C. § 948b(e)):

> The findings, holdings, interpretations, and other precedents of military commissions under this chapter may not be introduced or considered in any hearing, trial, or other proceeding of a court-martial convened under chapter 47 of this title. The findings, holdings, interpretations, and other precedents of military commissions under this chapter may not form the basis of any holding, decision, or other determination of a court-martial convened under that chapter.

See also, MCA § 3(a) (adding 10 U.S.C. § 948b(c) ("The judicial construction and application of [chapter 47, governing courts-martial] are not binding on military commissions established under this chapter.").

[38] *See* Hamdan v. Rumsfeld, 464 F.Supp.2d 9, 11–16 (D.D.C. 2006); Boumediene v. Bush, 476 F.3d 981, 986–94 (D.C. Cir. 2007).

denying *certiorari* in one of those cases—*Boumediene* (and its companion *Al Odah*)—the Supreme Court dramatically reversed itself, reviving the legal question. But again, as a political matter, the ability to strip noncitizens of habeas was reflected in the quick passage of the MCA.

It might be argued that the rights dividing line is not merely citizenship, but a combination of citizenship and territoriality. For example, both courts that have upheld the habeas-stripping provisions of the MCA have concluded that the detainees at Guantánamo lacked constitutional habeas rights not merely because they are noncitizens, but because they lack sufficient connection, territorial or otherwise, to the United States. In *Hamdan*, on remand from the Supreme Court, District Judge James Robertson concluded that Hamdan's connection to the United States "lacks the geographical and volitional predicates necessary to claim a constitutional right to habeas corpus."[39] Similarly, in *Boumediene v Bush*,[40] the D.C. Circuit held that the "Constitution does not confer rights on aliens without property or presence within the United States."[41]

As a textual matter, however, the MCA is explicit in applying its habeas-stripping provisions to noncitizen "unlawful enemy combatants" regardless of geography. Indeed, neither § 7, purporting to strip habeas, nor § 3(a), defining "unlawful enemy combatant," contains any geographic limitation. Thus, on the face of the statute, habeas would appear to be stripped for all noncitizen "unlawful enemy combatants," regardless of whether they are detained in or out of the territorial United States. The *Hamdan* and *Boumediene* decisions do not limit the habeas-stripping provisions to noncitizens who lack some meaningful connection to the territorial United States, but instead note that the detainees in those cases have none. Thus, even if those cases were to withstand challenge in the Supreme Court, this would not answer the question of whether habeas has been stripped even for noncitizens within the United States.

That question is not merely academic. Rather, the government has already detained at least one noncitizen within the United States as an "enemy combatant," and seeks the dismissal of his habeas action on the basis of § 7 of the MCA. Ali al-Marri, a citizen of Qatar, entered the United States lawfully on a student visa in 2001, and was subsequently arrested by the FBI at his home in Peoria, Illinois.[42] The government first held al-Marri as a material witness, then prosecuted him for various crimes in federal court. On the eve of a suppression hearing in which al-Marri planned to demonstrate that he had been tortured, the government aborted the federal prosecution and, pursuant to a presidential designation of al-Marri as an "enemy combatant," transferred him into military custody at the brig in South Carolina, where, like the detainees at Guantánamo Bay, he faces indefinite detention without charge or trial. Following the enactment of the MCA, the government moved to dismiss al-Marri's habeas action on the ground that § 7 divested the federal courts of jurisdiction.

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[39] Hamdan, 464 F.Supp.2d at 18.
[40] Boumediene, 476 F.3d at 981.
[41] *Id.* at 991.
[42] *See* Al-Marri v. Wright, 443 F.Supp.2d 774, 776 (D.D.C. 2006).

The *al-Marri* case bridges Guantánamo and the United States, and if the government's view prevails, represents the potentially borderless scope of the MCA. By the government's account, al-Marri is legally indistinguishable from a detainee at Guantánamo, in that both are noncitizens who are, by presidential fiat, "enemy combatants," and both are, by virtue of § 7 of the MCA, bereft of habeas protections. Thus, the government's position in the case suggests that while the MCA may have been enacted with Guantánamo detainees in mind, the statute is hardly confined to it. Rather, its constraints on individual liberties reach into the heartland of America—even to Peoria—and travel along the citizen-noncitizen divide.

While a federal district court initially upheld al-Marri's detention, as of this writing, the government has been rebuffed by the Fourth Circuit Court of Appeals. In *Al-Marri v Wright*, that court held that the MCA had not stripped al-Marri's statutory habeas rights, reasoning in part that "as an alien captured and detained within the United States, [al-Marri] has a right to habeas corpus protected by the Constitution's Suspension Clause."[43] In addition, the court held that al-Marri was not properly detained as an "enemy combatant." The court's decision gives dispositive weight to the fact that, although a noncitizen, al-Marri was lawfully present in the United States, and therefore was entitled to a bundle of rights that might not attach to other detainees. With regard to the MCA, the court stated:

> Congress sought to eliminate the statutory grant of habeas jurisdiction for those aliens captured and held outside the United States who could not lay claim to constitutional protections, but to preserve the rights of aliens like al-Marri, lawfully residing within the country with substantial, voluntary connections to the United States, for whom Congress recognized that the Constitution protected the writ of habeas corpus.[44]

In this regard, the *al-Marri* decision rejects the citizen-noncitizen distinction advanced by the government. However, the Fourth Circuit subsequently granted *en banc* review of the case, and so the question of whether the MCA stripped habeas for even lawfully admitted noncitizens in the territorial United States remains a live one. Moreover, even if habeas jurisdiction is upheld, the government's remaining arguments, regarding its purported authority to place noncitizens lawfully present in the United States in indefinite military detention, themselves reflect the seepage of the Guantánamo legal regime into the territorial United States.

Admittedly, *al-Marri* is currently the only case involving a noncitizen "enemy combatant" within the United States; his case may be an outlier, and if the Fourth Circuit decision stands, it may simply indicate the highwater mark of the government's "enemy combatant" regime. And yet, the *al-Marri* case suggests the Administration's ambition for the MCA. Moreover, the fact that al-Marri has remained in detention for over five years suggests once more the political feasibility of such treatment of noncitizens.

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[43] Al-Marri v. Wright, 487 F.3d 160, 167 (4th Cir. 2007).
[44] *Id*. at 171.

III. The Further Criminalization of Immigration Law

Of course, the MCA is not the first statute to distinguish between citizens and noncitizens. But with the exception of a small category of laws known as alienage laws (for example, laws prohibiting noncitizens from holding certain law enforcement jobs, or from voting), citizenship distinctions historically have been the province of immigration law. The MCA—ostensibly a national security law—encroaches dangerously and problematically on immigration law, threatening to weaken significantly legal protections for noncitizens within the territorial United States.

Long before enactment of the MCA, and even before September 11th, the civil, administrative corpus of immigration law has been used against noncitizens to achieve the punitive outcomes of criminal law. Because immigration law is civil rather than criminal, it is a far more efficient tool for policing and regulating noncitizens than is criminal law. Unlike in a criminal trial, noncitizens in immigration proceedings have no Sixth Amendment right to counsel, *Miranda* rights, presumption of innocence, or right to a jury trial.[45] Since deportation, and detention incident to deportation are considered administrative rather than punitive,[46] the government is able to constrain the liberty of noncitizens with significantly greater ease than it can citizens. The result is a convergence of immigration and criminal law, or the criminalization of immigration law, a trend that the MCA has accelerated into the national securitization of immigration law.

Prior to September 11th, this trend was most evident in the expansion of the category of "aggravated felonies" that could subject noncitizens to deportation.[47] For example, a noncitizen convicted of shoplifting was made deportable, even after completion of a criminal sentence.[48] It has become a maxim of immigration law that an "aggravated felony" need be neither aggravated nor a felony,[49] and the incoherence of this area of law has led many to conclude that, notwithstanding the doctrinal character of immigration law as civil, functionally it has been rendered criminal; the judgments meted out—namely, detention and deportation—are essentially punitive in nature.[50]

In the aftermath of September 11th, immigration law became the most favored law enforcement tool of the federal government, and was deployed in newly aggressive ways. The initial investigation of the September 11th attacks involved the round-up and

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[45] *See generally* I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1038-39 (1984).
[46] *See id.* at 1038 (stating that a "deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry").
[47] *See generally* Jennifer M. Chacón, Commentary, *Unsecured Borders: Immigration Restrictions, Crime Control, and National Security*, 39 CONN. L. REV. 1827, 1844-45 (2007) (discussing how amendments to the INA in 1996 greatly expanded the definition of "aggravated felony," significantly broadening the grounds for removability).
[48] *See, e.g.,* U.S. v. Christopher, 239 F.3d 1191 (11th Cir. 2001).
[49] *See* U.S. v. Pacheco, 225 F.3d 148, 154 (2d Cir. 2000) ("[N]othing . . . leads us to doubt our conclusion that a misdemeanor may, in some cases and consistent with legislative intent, fall within the INA's definition of 'aggravated felony.'").
[50] *See generally* M. Isabel Medina, *Demore v. Kim – A Dance of Power and Human Rights*, 18 GEO. IMMIGR. L.J. 697 (2004); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611 (2003).

detention of nearly 800 Arab, Muslim, and South Asian men by the Immigration and Naturalization Service, the closure of historically public immigration proceedings, and the deployment of a strategy to detain individuals long after they had been ordered deported.[51] (None of the individuals detained was ever charged with terrorist activity, and none are believed to have had any connection to the September 11th attacks.) Thus, national security law came to subsume immigration. Even the immigration bureaucracy was moved into the newly created Department of Homeland Security, a structural shift that communicated the view that immigration was principally a matter of national security.[52]

Congress contributed to the post-September 11th criminalization of immigration law, most notably with the passage of the USA PATRIOT Act,[53] which authorized potentially indefinite immigration detention of noncitizens certified by the Attorney General, to be engaged in terrorist activity.[54] Thus, whereas a criminal offense of providing material support for terrorism exists, for which an individual could be imprisoned, the PATRIOT Act created a parallel immigration offense which enables the government to achieve the same result of imprisonment, unencumbered by the substantive or procedural individual rights that attach in criminal proceedings.

The MCA takes the trend significantly farther by empowering the Executive to achieve criminal law goals of imprisonment (and even death) with even fewer protections than the immigration law—including the PATRIOT Act—provides. National security law does to noncitizens what even immigration law does not permit. Specifically, a key provision of the MCA, defining "unlawful enemy combatants," overlaps significantly with sections of the PATRIOT Act, but with fewer protections.

Like the various definitions of "enemy combatant" deployed by the Administration previously, the MCA's statutory definition of "unlawful enemy combatant" is exceptionally broad. One consequence of its breadth is that the statute threatens to sweep within its ambit a class of noncitizens inside the territorial United States currently targeted by the PATRIOT Act. The MCA defines "unlawful enemy combatants" to include "a person who has engaged in hostilities or who has purposefully and *materially supported* hostilities against the United States or its co-belligerents."[55] The italicized language bears strong resemblance to a provision of the Immigration and Nationality Act, added by the PATRIOT Act, regarding material support for terrorism.[56]

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[51] *See* Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion,* 92 CAL. L. REV. 1259 (2004); Leti Volpp, *The Citizen and the Terrorist,* 49 UCLA L. REV. 1575 (2002).

[52] *See* David Firestone, *Traces of Terror: The Reorganization; Divided House Approves Homeland Security Bill, with Limited Enthusiasm*, N.Y. TIMES, July 27, 2002, at A8 (reporting that the INS will be dissolved into the newly created Department of Homeland Security).

[53] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("USA PATRIOT Act"), Pub. L. No. 107-56, 115 Stat. 272 (2001).

[54] USA PATRIOT Act §412.

[55] MCA § 3(a) (adding 10 U.S.C. § 948a(1)) (emphasis added).

[56] Section 212(a)(3)(B)(i)(I) of the Immigration and Nationality Act ("INA") renders a noncitizen inadmissible for engaging in terrorist activity. 8 U.S.C. § 1182(a)(3)(B)(i)(I) (2006). The same class of individuals is also deportable. INA § 237(a)(4)(B), 8 U.S.C. § 1227(a)(4)(B). The term "engage in terrorist activity" is defined to include "an act that the actor knows, or reasonably should know, affords *material*

That provision has been invoked numerous times in recent years in removal proceedings against noncitizens who have donated money to Islamic charities, among other causes.[57]

Thus, the same noncitizens, including lawful permanent residents, who could be detained and deported on material support charges in immigration proceedings could also be detained indefinitely as "enemy combatants."[58] On first inspection, this might not seem so different from expanded immigration detention authority granted the executive under the PATRIOT Act which, as noted previously, permits potentially indefinite detention of those certified by the Attorney General, upon his reasonable belief, to be engaged in terrorist activity, including providing material support to terrorists or terrorist organizations. But the MCA's detention authority is more expansive, and more troubling, in two regards.

First, unlike the PATRIOT Act, the MCA lacks a certification requirement for "enemy combatants."[59] Rather, the MCA leaves the process for "enemy combatant" determination solely to the discretion of the executive, and in any event, permits detention even while such a determination is pending. Second, and more critically, the PATRIOT Act explicitly authorizes habeas review of the Attorney General's certification,[60] thereby bounding the exercise of executive authority statutorily and constitutionally. In contrast, the MCA explicitly strips the courts of habeas authority.[61] Thus, while the Attorney General's certification might be challenged in immigration court in the first instance and in federal habeas proceedings thereafter, the "enemy combatant" determination might never be meaningfully contested. Here, too, the *al-Marri* decision becomes critically important, for it suggests the continuing availability of habeas review for at least some noncitizens within the United States.

IV. Conclusion

When the Supreme Court takes up the *Boumediene* and *Al Odah* cases, it will be presented with the opportunity to clarify how, if at all, citizenship matters to the rights of nonterrorism suspects. But just as the MCA extends beyond Guantánamo, so does the vulnerability it creates for noncitizens extend beyond terrorist suspects. At a doctrinal level, the MCA targets noncitizen "unlawful enemy combatants." But law is more than

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support, including a safe house, transportation, communications, funds, transfer of funds, or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives or training" for the commission of a terrorist activity, to another individual or to a terrorist organization. INA § 212(a)(3)(B)(iv)(VI), 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) (emphasis added).

[57] *See* Neil MacFarquhar, *Muslim Charity Sues Treasury Dept. and Seeks Dismissal of Charges of Terrorism,* N.Y. TIMES, Dec. 12, 2006, at A24.

[58] It is not entirely clear what the differences are between "unlawful enemy combatants," as defined by the MCA, and "enemy combatants," a term used but not defined by the MCA. For the purposes of this discussion, I assume that someone determined to be an "unlawful enemy combatant" would also be considered an "enemy combatant."

[59] The INA requires certification, as well as periodic review of the certification for those being detained indefinitely. *See* INA § 236A(a)(3), (7), 8 U.S.C. § 1226a(a)(3), (7).

[60] INA § 236A(b); 8 U.S.C. § 1226a(b).

[61] MCA § 7 (amending 28 U.S.C. § 2241).

doctrine, and it casts a long shadow in our culture and our politics. The fact that such core legal protections as habeas corpus and fundamental fairness in criminal proceedings have been stripped for noncitizens, and only noncitizens, both reflects and perpetuates the political vulnerability of immigrants. Congress likely limited these provisions of the MCA to noncitizens not only because to apply them to citizens seems clearly unconstitutional, but because targeting noncitizens is politically possible in a way that depriving citizens of fundamental forms of protection against state power is not. Indeed, noncitizens are a quintessentially disenfranchised population, and their lack of electoral influence enables their targeting.

Moreover, the stripping away of habeas and criminal law protections for only noncitizens, when U.S. citizens such as John Walker Lindh, Yasir Hamdi, and Jose Padilla are also accused of terrorism, reinforces an equation of immigrants with terrorists. That association has been forged through the broader targeting of noncitizens as terrorists through immigration enforcement, as discussed previously. But once again the targeting has been imprecise, and terrorism concerns have been deployed as the basis for, among other things, a policy of mandatory detention for Haitian asylum seekers[62] and efforts to expand local enforcement of federal immigration law, a practice that largely affects low-wage immigrant workers.

By escalating from the criminalization to the national securitization of noncitizens, the MCA continues to erode the felt sense of security of immigrants in the United States. This same lack of security inhibits low-wage immigrant workers from reporting labor and employment violations, discourages immigrant survivors of domestic violence to exit their abusive relationships, and prevents immigrants from reporting suspected criminal activity to the police. In this way, the MCA contributes to a culture of immigrant vulnerability, with broad and damaging consequences.

The bitter irony of the Supreme Court's grant of *certiorari* in the *Boumediene* and *Al Odah* cases is that the Court now confronts the same fundamental issue as it did five years ago in *Rasul*—whether the detainees at Guantánamo can challenge the legality of their detention through habeas corpus. But Congress's intervention since *Rasul* has sharpened the questions of how, and why, citizenship matters to the availability of the most fundamental protections against the exercise of state power. Whether the Court addresses them or not, the MCA has thus insinuated these questions into the territorial United States, and in so doing has brought Guantánamo to our shores.

[62] In re D-J-, 23 I & N Dec. 572 (A.G. 2003) (denying Haitian asylum seeker's request for release on bond on national security grounds).