MILITARY COMMISSIONS IN AMERICA? DOMESTIC LIBERTY IMPLICATIONS OF THE MILITARY COMMISSIONS ACT OF 2006

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The Military Commissions Act of 2006 ("MCA") has potentially far-reaching negative implications for the liberties of aliens in the United States. This Article examines how the new military commissions could become a parallel scheme for the preventative incapacitation of alleged alien terrorists and terrorist supporters. The backdrop for this inquiry is the government's already robust and frequently-exercised powers with respect to immigration and criminal enforcement. But under the new MCA scheme, a broad group of aliens in the United States perceived to threaten national security could be subject to military commission jurisdiction and deprived of adequate protections against indefinite detention and unjust conviction.

This is because the MCA's definition of an "enemy combatant" is overly broad, potentially encompassing even certain aliens in the United States. From this overly broad definition of enemy combatancy, four specific concerns about the MCA are discussed: potentially indefinite detention, a broad governmental privilege regarding classified information, weakened exclusionary rules for evidence obtained through torture, and an overly broad definition of certain crimes.

These concerns are illustrated through two hypothetical domestic military commission cases. The first of these hypothetical

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cases applies the facts of Sri Lankan refugee Ahilan Nadarajah's habeas corpus case to illustrate how a refugee from a country where terrorist groups are active could be implicated in the MCA dragnet. The second of these hypothetical cases applies the facts of acquitted terrorist supporter Sami al-Arain's criminal case to illustrate how a charged criminal may be short-changed by the limited judicial discretion under the MCA. In light of the government's already robust immigration and criminal powers in national security, a domestically applicable MCA is unnecessary and dangerous. Recognizing the dangers of the new MCA, several congressional leaders have put forth legislation suggesting amendment of the MCA. Accordingly, this Article concludes that the MCA should be amended in accordance with the proposed Restoring the Constitution Act of 2007.

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INTRODUCTION

A twenty-year immigration and national security saga ended in January 2007 with the termination of deportation proceedings against Khader Hamide and Michel Shehadeh.[1] The two Palestinian-born legal permanent residents were the last of the "L.A. Eight"[2] still fighting deportation orders issued because of their alleged support of the Popular Front for the Liberation of Palestine.[3] When the government failed to come forward with potentially exculpatory evidence

[1] In its twenty-year history, the case moved up and down the Article III courts and then into immigration court. *See* Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999). Despite the case's termination, the government retains the prerogative to appeal it to the Bureau of Immigration Appeals. *Id.* at 476. On April 4, 2007, the Honorable Bruce J. Einhorn, the now-retired judge who dismissed the case, reported that the government had in fact appealed. Bruce J. Einhorn, U.S. Immigration Judge, Communities Under Seige: Immigrant Communities & Democracy Post 9/11, Panel Discussion before the University of California School of Law (Apr. 4, 2007). This could not be substantiated in media reports.

[2] The L.A. Eight included seven Palestinians—among them Hamide and Shehadeh—and a Kenyan. Ronald. L. Sobel, *Ruling Voided on Immigrant's Speech Rights Courts: Appellate Judges say Decision Guaranteeing First Amendment Protection was Premature*, L.A. TIMES, July 27, 1991, at 41. All eight were charged in 1987 with violations of the anti-Communist McCarran-Walter Act and deportability. Phyllis Bennis, *Ten Years of the Los Angeles Eight Deportation Case: Interview with David Cole*, 202 MIDDLE EAST REPORT 41 (Winter 1997).

[3] The Popular Front for the Liberation of Palestine is a Marxist, Palestinian-nationalist group with a history of engaging in terrorism. BENNY MORRIS, RIGHTEOUS VICTIMS: A HISTORY OF THE ZIONIST-ARAB CONFLICT, 1881-1999 366-67 (1999).

and other information, the immigration judge barred presentation of the case in chief against Hamide and Shehadeh.[4] Accordingly, their deportation was terminated.[5] This outcome demonstrates the importance of procedural safeguards in protecting the liberties of individuals who might unjustly be perceived to threaten national security. Indeed, Hamide and Shehadeh are suburban-dwelling family men, with jobs and U.S. citizen children.[6] But if aliens in the United States like Hamide and Shehadeh could be tried in a military proceeding authorized by the Military Commissions Act of 2006 ("MCA"),[7] important safeguards of liberty would be wholly absent.[8]

The MCA authorizes the trial by military commission of "alien unlawful enemy combatants" for crimes of war and terrorism.[9] Commissions feature broad jurisdiction, potentially indefinite deten-

[4] *Matters of Hamide & Shehadeh*, Case Nos. A 19 262 560 & A 30 660 528, Immig. Ct. *11 (slip op.) (Jan. 29, 2007).
[5] *Id.*
[6] James Ricci, *Pair Eager to Leave Their Legal Limbo*, L.A. TIMES, Feb. 9, 2007, at B1.
[7] The Military Commissions Act ("MCA") was passed September 29, 2006 and signed into law on October 17, 2006. Pub. L. No. 109-366, 120 Stat. 2600 (to be codified in scattered sections of 10, 18, 28, and 42 U.S.C.A.).
[8] Liberty is the recurrent trope in this Article because military commissions, as conceived in the MCA, threaten the fundamental constitutional right against unjust detention and conviction. *See, e.g.*, United States v. Salerno, 481 U.S. 739, 755 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.").
[9] Professor Neal Katyal testified that the MCA establishes a "framework for the war on terror" that could endure generations. *See* Neal Katyal, Professor, Georgetown University Law Center Senate Armed Services Committee (July 19, 2006).

tion, and deficient procedural safeguards. These features combine to threaten the liberty of a broad group of aliens in the United States and abroad. Criticism of the MCA typically focuses on its implications for aliens captured abroad—especially Guantanamo Bay detainees. In distinction, this Article examines the MCA as it might be applied to aliens living *domestically* who are perceived to threaten national security.[10] What liberty interests would be lost if individuals such as Hamide and Shehadeh were subject to military commission jurisdiction? In short, MCA-authorized domestic military commissions would deprive accused individuals of adequate protections against indefinite detention and unjust conviction.[11] This argument regarding the liberty costs of military commissions is developed in four substantive parts below.

[10] Several lawyers have identified the potential problem of the domestic application of the MCA. *See, e.g.*, Philip F. Schuster II, *Playing the Patriot*, 67 OR. ST. B. BULL. 62 (Nov. 2006); Aziz Huq, *Terror 2016*, (Sept. 29, 2006), http://www.tompaine.com/articles/2006/09/29/terror_2016.php.

[11] In this Article, "domestic" refers only to the territory of the fifty states and the District of Columbia. *But cf.* Rasul v. Bush, 542 U.S. 466 (2004) (grappling with the territorial status of the Guantanamo Bay Naval Base and finding a statutory right to habeas corpus review for individuals detained there).

Part I briefly establishes the "war on terrorism"[12] context in which domestic military commissions would function. In this context, preventive incapacitation of national security threats is the overarching policy imperative. Domestic military commissions support the government's policy of using a variety of detention, prosecution, and deportation powers to incapacitate perceived threats in the United States. The government's robust criminal and immigration powers are linked to this policy imperative. These powers provide a number of grounds to detain, prosecute, and deport aliens suspected of terrorism or terrorist supporters. Further context is provided by the various legislative and executive visions of how the MCA is to be applied. While a number of the MCA's proponents focus on its authorization of military commissions for those captured abroad, the plain language of the MCA (and some of its proponents) support an understanding that the MCA could be applied anywhere in the world, including the United States. Finally, domestic military commissions must be set against the constitutional protections traditionally guaranteed to

[12] President George W. Bush stated that the war on terrorism "will not end until every terrorist group of global reach has been found, stopped, and defeated." Presidential Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 38 (Sept. 24, 2001).

aliens in the United States and the American tradition of separating domestic governance from the military.

Part II summarizes the scope and structure of military commissions. It first unpacks the personal and subject matter jurisdiction of domestic military commissions. Which individuals living in the United States could be tried by military commission as "alien unlawful enemy combatants?" For what crimes of terrorism and war might such individuals be tried? This part also briefly describes the composition of military commissions and the MCA framework of judicial review. Significantly, the MCA purports to strip habeas corpus jurisdiction for individuals subject to military commission and provides for only limited federal court review of convictions.

Part III considers four liberty problems presented by domestic military commissions. First, it considers the MCA's apparent authorization of potentially indefinite detention without trial. Second, it examines the MCA provisions for classified information, which could seriously inhibit an accused individual's ability to mount a full and fair defense. Third, it discusses the MCA's elimination of the exclusionary rule for evidence obtained without a warrant or because of conduct that may amount to torture. Finally, Part III reviews the

MCA's overbroad definitions of crimes, which enable the government to subject individuals who may be undeserving of criminal sanctions into the MCA's detention and trial scheme.

The final substantive part of this Article examines the hypothetical effects of domestic military commissions on two real cases. The first of these cases, *Nadarajah v. Gonzales*,[13] emerged from the immigration context and concerned the due process limitations on the detention of a refugee suspected of terrorist affiliation.[14] The second of these cases, *United States v. Al-Arian*,[15] was a federal criminal terrorism trial which turned upon the constitutional construction of a mens rea requirement in the material support for terrorism statute.[16] Both cases were considered as defeats for the government. Thus, this final section explores how these cases would have come out had they been tried by MCA-authorized military commissions. These hypothetical outcomes demonstrate that domestic military commissions could shut the door on important constitutionally-protected proce-

[13] 443 F.3d 1069 (9th Cir. 2006).
[14] *Id.* at 1076-78.
[15] 308 F. Supp. 2d 1322 (M.D. Fla. 2004).
[16] *Id.* at 1333-41.

dural and liberty rights, including those of asylum seekers from countries with known terrorist activity.[17]

This Article is not an exhaustive study of military commissions or their potential domestic implications.[18] However, in light of the following analysis, the threat of domestic military commissions to certain aliens is clear, normatively unsettling, and ultimately unnecessary. Thus, this Article concludes that Congress should amend the MCA to specifically prohibit its domestic application.

I. COUNTER-TERRORISM AND MILITARY COMMISSIONS IN BRIEF

The MCA is principally aimed at the detention and trial of "alien unlawful enemy combatants" captured abroad.[19] However, it authorizes military commissions anywhere in the world, including the

[17] Asylum seekers who arrive in the United States from countries where government-designated terrorist groups operate are often caught in a legal bind. These asylum seekers frequently flee persecution at the hands of such groups. However, their coerced interactions with the same groups—for example, a nurse forced by armed rebels to provide them medical treatment—are interpreted to constitute "material support of terrorism" thus precluding asylum. *See* HUMAN RIGHTS FIRST, ABANDONING THE PERSECUTED: VICTIMS OF TERRORISM AND OPPRESSION BARRED FROM ASYLUM (2006), http://www.humanrightsfirst.info/pdf/06925-asy-abandon-persecuted.pdf. Asylum seekers suspected of ties to terrorists can also be placed in indefinite detention as authorized by section 412 of The Patriot Act and other immigration statutes. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act of 2001, Pub. L. No. 107-56, § 412, 115 Stat. 272 (2001).

[18] For the sake of substantive manageability, this Article necessarily simplifies certain aspects of criminal and immigration law and federal jurisdiction.

[19] 10 U.S.C.A. § 948b(a) (West Supp. 2006).

United States.[20] Though no tension runs between the extraterritorial focus and the universal scope of military commissions—the former being a subset of the latter—distinguishing these two categories situates domestic military commissions in their statutory and legislative context.

Congress passed the MCA in response to the Supreme Court's decision in *Hamdan v. Rumsfeld*,[21] which invalidated military commissions established by President Bush to try Guantanamo Bay detainees.[22] A primary congressional purpose of the MCA was to authorize the trial of "enemy combatants" at Guantanamo Bay.[23] For its part, the Bush Administration announced its intent to use MCA-authorized commissions to try terrorists who orchestrated the 9/11,

[20] *See infra* notes 25-29.
[21] 126 S. Ct. 2749 (2006).
[22] The Court all but invited the President to request authorization for military commissions from Congress. *Id.* at 2799 (Breyer, J., concurring) ("Nothing prevents the President from returning to Congress to seek the authority [for military commissions] he believes necessary.").
[23] *See* 152 CONG. REC. S10266 (daily ed. Sept. 27, 2006) (statement of Sen. Graham) (discussing Guantanamo Bay); 152 CONG. REC. S10269 (daily ed. Sept. 27, 2006) (statement of Sen. Kyl) (discussing same); 152 CONG. REC. S10269 (daily ed. Sept. 27, 2006) (statement of Sen. Cornyn) (discussing same); 152 CONG. REC. S10403 (daily ed. Sept. 28, 2006) (statement of Sen. Cornyn) (discussing same); 152 CONG. REC. H7939 (daily ed. Sept. 29, 2006) (statement of Rep. Hunter) (discussing same). Though Guantanamo appears foremost in the congressional psyche, the MCA was certainly also passed with the intent to authorize a broad scope of prosecutions. *See* 152 CONG. REC. S10243 (daily ed. Sept. 27, 2006) (statement of Sen. Frist) (discussing prosecution of terrorists caught on battlefield). *But cf.* John W. Warner et al., *Look Past the Tortured Distortions*, WALL ST. J., Oct. 2, 2006, at A10 (discussing that trial by military commission of "the people who shoot at us and those who aid and abet the trigger-men").

USS Cole, and 1998 African Embassy attacks.[24] Thus, a number of the MCA's proponents in Congress and the Bush Administration contemplate that military commissions will be used to try foreign-captured individuals.[25] While the MCA may primarily concern Guantanamo Bay detainees and other aliens captured abroad, it also concerns aliens in the United States perceived to threaten national security.

Authorization for domestic military commissions would derive from the MCA's statutory language and legislative history. First, the MCA sets no territorial limits for its own application.[26] The Manual for Military Commissions ("Manual"),[27] which implements

[24] Press Release, Office of the Press Secretary, The White House, Fact Sheet: The Military Commissions Act of 2006 (Oct. 17, 2006), http://www.whitehouse.gov/news/releases/2006/10/print/20061017.html.

[25] As of April 2007, the only Guantanamo Bay detainees charged under the new MCA scheme were David Hicks, an Australian captured in Afghanastan, Omar Khadr, a teenage Canadian citizen, and Salim Hamdan, allegedly Osama Bin Laden's former driver. *See* U.S. Dep't of Defense, Military Comm'ns, http://www.defenselink.mil/news/commissions.html (last visited Oct. 24, 2007). For Hicks' story, see Josh White, *Australian is Charged Under '06 Law*, WASH. POST, Mar. 2, 2007, at A3. Hicks pled guilty to material support of terrorism on March 26, 2007. Raymond Bonner, *Australian Detainee's Life of Wandering Ends with Plea Deal*, N.Y. TIMES, Mar. 28, 2007, at A17.

[26] The only limits to the MCA's application relate to personal and subject matter jurisdiction. *See infra* Part II.A-B.

[27] On January 18, 2007, the Department of Defense issued a manual of regulations for military commissions, as authorized by the MCA. U.S. Dep't of Defense, Manual for Military Commissions (2007) [hereinafter MMC], http://www.defenselink.mil/news/commissionsmanual.html. The Manual is split into several parts: Preamble, Rules for Military Commissions (RMC), Military

parts of the MCA, states that the MCA "applies in all places."[28] Further, several proponents of the MCA in the Senate expressed an intent that the MCA would apply universally.[29] Congressional opponents of the MCA also emphasized their concern at the MCA's domestic application.[30] A colorable claim that MCA-authorized military commissions reach the United States is thus available. As a result, the government may find in the MCA authority to indefinitely detain and try, by military commission, alien terrorism suspects captured domestically.[31] Indeed, the government has already cited the MCA in sup-

Commission Rules of Evidence (Mil. Comm. R. Evid.), and Crimes and Elements. *Id.*

[28] MMC, *supra* note 27, pt. II R. 201.

[29] MCA co-sponsor Senator John Warner spoke strongly in favor of the MCA's universality and application to aliens in the United States: "It is only directed at aliens—aliens, not U.S. citizens—bomb-makers, *wherever they are in the world*; those who provide the money to carry out the terrorism, *wherever they are*—again, only aliens and those who are preparing and using so many false documents." 152 CONG. REC. S10250 (daily ed. Sept. 27, 2006) (statement of Sen. Warner) (emphasis added). *See also* 152 CONG. REC. S10404 (daily ed. Sept. 28, 2006) (statement of Sen. Sessions) (describing how MCA would be applicable to individuals who have not received Guantanamo Bay-specific Combatant Status Review Tribunals).

[30] *See, e.g.*, 152 CONG. REC. S10260 (daily ed. Sept. 27, 2006) (statement of Sen. Bingaman) (warning that the MCA would apply even to aliens in the United States); 152 CONG. REC. H7946 (daily ed. Sept. 29, 2006) (statement of Rep. Conyers) (warning of the same).

[31] In times of crisis, the government has often sought to try by military commission "disloyal" or "threatening" individuals arrested domestically. *See generally* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2004). In *Ex parte Quirin*, the Supreme Court famously validated trial by military commission for German saboteurs who surreptitiously entered the United States. *Ex parte* Quirin, 317 U.S. 1, 35-36 (1942). Conversely, in *Ex parte Milligan*, the Supreme Court invalidated trial by military commission for disloyal individuals where the civilian courts remained open. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866) (plurality opin-

port of its indefinite detention of an alien arrested domestically and held as an "enemy combatant" on a Navy brig.[32]

Military commissions further the government's post-9/11 policy of using all available means to preventively incapacitate individuals perceived to be security threats.[33] This policy is likely to be all the more prominent if the United States suffered another homeland terrorist attack.[34] Preventive incapacitation has been used abroad—

ion). Prior to the MCA, however, Congress had never provided the Executive sweeping, elaborate authorization to convene military commissions, which were traditionally seen as a necessity of wartime prosecution, not as a permanent, alternate system of justice. *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 WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 831 (rev. 2d ed. 1920)). *See* 10 U.S.C.A. § 818 (West 2006) (authorizing regular military courts martial to try violators of the law of war).

[32] *See* Resp't-Appellee's Mot. to Dismiss for Lack of Jurisdiction at 3-4, Al-Marri v. Wright, No. 06-7427 (4th Cir. Nov. 13, 2006), *available at* http://jurist.law.pitt.edu/pdf/al-marrimotiontodismissforlackofjurisdiction.pdf.

[33] *See* John Ashcroft, Attorney General, Prepared Remarks for the U.S. Mayors Conference (Oct. 25, 2001), *available at* http://www.usdoj.gov/archive/ag/speeches/2001/agcrisisremarks10_25.htm ("Taking suspected terrorists in violation of the law off the streets and keeping them locked up is our clear strategy to prevent terrorism within our borders."); JOHN ASHCROFT, *Terrorists Among Us: The Hunt for American al Qaeda*, *in* NEVER AGAIN: SECURING AMERICA AND RESTORING JUSTICE 163-83 (2006); DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 26-46 (2003); RON SUSKIND, THE ONE PERCENT DOCTRINE 85 (Simon & Schuster Paperbacks ed. 2007). *See also* Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 431-35 (2007).

[34] The "next attack scenario" has spawned normative and prescriptive debate about the proper role of law and the Constitution in the aftermath of terrorist attacks. *See generally* BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM (2006); Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004); David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753 (2004); Martha Minow, *The Constitution as a Black Box During National Emergencies: Comment on*

through kidnappings,[35] indefinite detentions,[36] and assassinations[37]—and in the United States—through detention under the material witness statute,[38] immigration authority,[39] military authority,[40] and through prosecution under federal criminal law.[41] Assessing the MCA's impact on the liberty of affected individuals in these contexts is of great importance.[42] This Article aims to do just that by untan-

Bruce Ackerman's Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism, 75 FORDHAM L. REV. 593 (2006); Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801 (2004).

[35] *See, e.g.*, El-Masri v. United States 479 F.3d 296, 311 (4th Cir. 2007) (dismissing on the basis of state secrets doctrine a German citizen's suit seeking redress for CIA's role in his alleged kidnapping in Albania and torture in Afghanistan); Sean O'Neill, *Briton tells of his four-year 'nightmare' at Guantanamo*, TIMES (London), Apr. 2, 2007, at 21 (describing CIA-organized kidnapping of Bisher al-Rawi from the Gambia in 2002).

[36] The primary justification for indefinitely detaining "enemy combatants" at Guantanamo Bay is to prevent them from returning to the battlefield. *See In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 447 (D.D.C. 2005) ("[O]nce someone has been properly designated as [an enemy combatant], that person can be held indefinitely until the end of America's war on terrorism or until the military determines . . . that the particular detainee no longer poses a threat to the United States or its allies."). The United States has also handed suspected terrorists over to other countries for indefinite detention. *See, e.g.*, Arar v. Ashcroft, 414 F. Supp. 2d. 250, 283 (E.D.N.Y. 2006) (dismissing, on national security grounds, claims of a Canadian-Syrian dual citizen sent by U.S. officials from John F. Kennedy airport in New York to Syria where he was allegedly detained and tortured).

[37] *See, e.g.*, James Risen & David Johnston, *Threats and Responses: The Hunt for Al-Qaeda; Bush Has Widened Authority of C.I.A. to Kill Terrorists*, N.Y. TIMES, Dec. 15, 2002, at A11.

[38] 18 U.S.C.A. § 3144 (West 2006). *See* Cole, *supra* note 33, at 35-39.

[39] *See* COLE, *supra* note 33, at 26-35.

[40] The government has already cited the MCA in support of its indefinite detention of an alien arrested domestically and held as an "enemy combatant" in a Navy brig. *See Al-Marri*, *supra* note 32.

[41] *See infra* notes 42-49.

[42] Sound national security policymaking requires assessment of the costs and benefits associated with policy choices, including the implementation of legislation like the MCA. Robert M. Chesney, *Careful Thinking about Counterterrorism Policy*, 1

gling the MCA's domestic implications from its extraterritorial implications.

Domestic military commissions would run parallel to the government's robust powers to detain, prosecute, and deport threatening aliens under federal criminal and immigration laws.[43] Among the most significant of these laws are the criminal material support statutes. These criminalize the material support of terrorism[44] and the material support of any designated foreign terrorist organization ("FTO").[45] A wide range of activity is prosecuted under these statutes, including donating to the charitable branch of an FTO,[46] passing along the communications of a terrorist,[47] and attending a militant training camp abroad.[48] Beyond material support, the government

J. NAT'L SEC. L. & POL'Y 169, 181 (2005) (reviewing PHILIP B. HEYMAN, TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR (2003).

[43] *See* COLE, *supra* note 33; AZIZ HUQ, *The New Counterterrorism: Investigating Terrorism, Investigating Muslims*, *in* LIBERTY UNDER ATTACK: RECLAIMING OUR FREEDOMS IN AN AGE OF TERROR 167 (Richard C. Leone & Greg Anrig, Jr. eds., 2007) (discussing the government's national security-related criminal and immigration powers); Chesney, *supra* note 33; Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1 (2005); David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003 (2002). *See generally*, NORMAN ABRAMS, ANTI-TERRORISM AND CRIMINAL ENFORCEMENT (2d ed. 2005).

[44] 18 U.S.C.A. § 2339A (West 2006).

[45] *Id.* § 2339B (West 2006).

[46] *See* United States v. Koubriti, 336 F. Supp. 2d 676 (E.D. Mich. 2004).

[47] *See* United States v. Sattar, 314 F. Supp. 2d 279 (S.D.N.Y. 2004).

[48] Amy Waldman, *Prophetic Justice*, ATLANTIC MONTHLY, Oct. 2006, at 82-94 (discussing United States v. Hayat, 2007 WL 1454280, at *1 (E.D. Cal. 2007)).

charges a range of conspiracy[49] and lesser crimes against purported terrorists.[50] The government also uses its expansive immigration powers to detain and deport aliens perceived to threaten national security.[51] Criminal and immigration powers thus combine to authorize vigorous legal action against aliens perceived to be national security threats. Parts III and IV of this Article discuss the relationship between the government's existing criminal and immigration powers and its powers under domestic military commissions.[52]

The context of counter-terrorism and military commissions also includes the particular legal status of aliens in the United States and the domestic projection of military authority. Aliens arrested

[49] Chesney, *supra* note 33, at 452-54.
[50] Dan Eggen & Julie Tate, *U.S. Campaign Produces Few Convictions on Terrorism Charges: Statistics Count Often Lesser Crimes*, WASH. POST, June 12, 2005, at A1.
[51] *See generally* COLE, *supra* note 33. *See also* 8 U.S.C.A. § 1227(a)(4)(B) (West 2006) (authorizing the removal of alien terrorists). Some counter-terrorism immigration powers, nevertheless, have yet to be judicially tested. For example, the government is authorized to detain suspected terrorist aliens indefinitely under section 412 of The Patriot Act of 2001 and to deport them before a special alien terrorist removal court under section 401 of The Antiterrorism and Effective Death Penalty Act of 1996. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act of 2001, § 412, 115 Stat. 272 (2001) (codified at 8 U.S.C.A. 1226a(3) (West 2006)); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 401, *et seq*. (codified at 8 U.S.C.A. § 1531 (West 2006)). The constitutional status of section 412 has not been determined. *See* Clark v. Martinez, 543 U.S. 371, 387 (2005) (O'Connor, J., concurring) (discussing section 412 of The Patriot Act in dicta without opining to its constitutionality); *see also Nadarajah*, 443 F.3d at 1078-79.
[52] *See infra* Parts III, IV.

domestically have constitutional and statutory rights.[53] In contrast, courts generally hold that aliens outside the United States lack constitutional rights[54] and that statutory rights only apply where specifically provided for by Congress.[55] Thus, domestic military commissions occupy constitutional territory not cognizable in extraterritorial military commissions.[56]

Further, American law draws a sharp line against the application of military authority to either citizens or aliens in the United States.[57] While the military has exercised detention and prosecution powers domestically during declared wars,[58] courts are traditionally careful to circumscribe the domestic projection of military power.[59]

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[53] *See* Zadvydas v. Davis, 533 U.S. 678 (2001); Wong Wing v. United States, 163 U.S. 228 (1896); Fong Yue Ting v. United States, 149 U.S. 698 (1893).

[54] *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 265-66 (1990) (stating that aliens searched abroad have no Fourth Amendment rights); Johnson v. Eisentrager, 339 U.S. 763, 776 (1950) (stating that aliens captured and tried abroad have no Fifth Amendment rights). The Supreme Court has not yet determined whether an alien captured and detained abroad may invoke the Suspension Clause. *See* U.S. CONST. art. I, § 9, cl. 2 (supporting a petition for habeas corpus); Boumediene v. Bush, 476 F.3d 981, 992-94 (D.C. Cir. 2007) (holding that such an alien has no constitutional right to habeas corpus review), *cert. denied*, 127 S. Ct. 1478 (2007).

[55] *See, e.g.*, *Rasul*, 542 U.S. 466 (concerning the statutory basis of extraterritorial habeas corpus jurisdiction).

[56] See *infra* Part II.D.

[57] *See generally*, ABRAMS, *supra* note 43, at 609-31.

[58] *See, e.g.*, STONE, *supra* note 31.

[59] *See* Posse Comitatus Act, 18 U.S.C.A. § 1385 (West 2000) states:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or im-

Government activities, including the National Security Agency's wiretapping program,[60] now combine with the MCA and other legislation to blur the line between domestic policing and military authority.[61] As a factual matter, increasing the military's role in domestic national security policing may be the best way to protect civilians from terrorist attacks. However, the emergence of military authority in domestic criminal detention and prosecution raises red flags both as an affront to the civilian preference in the American tradition and as a threat to the liberty interests of non-citizens.

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prisoned not more than two years, or both.

See also Laird v. Tatum, 408 U.S. 1, 19 (1972) (Douglas, J., dissenting) ("Our tradition reflects a desire for civilian supremacy and subordination of military power. The tradition goes back to the Declaration of Independence in which it was recited that the King 'has affected to render the Military independent of and superior to the Civil power.' "); ABRAMS, *supra* note 43, at 609-10. *See also Ex parte Milligan*, 71 U.S. at 141-42 (Chase, C.J., concurring) (discussing three forms of military authority projected domestically and the occasions for each); Steve Vladek, *Five Questions about Martial Law: Part I, What* is *Martial Law?*, National Security Advisors: A National Security Law Blog (Mar. 8, 2007), *http://natseclaw.typepad.com/natseclaw/2007/03/five_questions_.html* (discussing the forms of military authority as explained in *Ex parte Milligan*).

[60] *See* ACLU v. Nat'l Sec. Agency, 438 F. Supp. 2d 754 (E.D. Mich. 2006) (striking down the NSA wiretapping program), *stayed by* 467 F.3d 590 (6th Cir. 2006).

[61] *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act § 104, 115 Stat. 272 (2001) (authorizing the Attorney General to request assistance from the Secretary of Defense for Department of Justice activities relating to criminal weapons of mass destruction provisions during an emergency situation); ABRAMS, *supra* note 43, at 611.

II. SCOPE AND STRUCTURE OF THE NEW MILITARY COMMISSIONS

This section briefly maps the scope and structure of the new military commissions in relation to the trial of domestic-captured terrorism suspects. It provides context for the subsequent discussion of liberty concerns by outlining who may be tried by military commissions, the crimes for which such individuals may be tried, the composition of military commissions, and the limited judicial review of military commissions.

A. Persons Triable by Military Commission

Any "alien unlawful enemy combatant" is subject to military commission jurisdiction under the MCA.[62] Thus, personal jurisdiction is established by an individual being an "alien" and an "unlawful enemy combatant."[63] As defined in the MCA, an alien is any non-citizen.[64] This "alien" category sweeps broadly, including the full range of non-citizens, from undocumented immigrants, to individuals

[62] 10 U.S.C.A. § 948c (West Supp. 2007); Rules for Military Commissions § 202(a), printed in The Manual for Military Commissions (Jan. 18, 2007) [hereinafter RMC], *available at* http://www.defenselink.mil/pubs/pdfs/Part%20II%20-%20RMCs%20(FINAL).pdf.

[63] RMC § 201(b)(3)(D) ("The accused must be a person subject to military commission jurisdiction[.]").

[64] 10 U.S.C.A. § 948a(3) (West Supp. 2007). This Article uses the terms "alien" and "non-citizen" interchangeably.

with student visas, to lawful permanent residents. The category "unlawful enemy combatant" is likewise broad.

An "unlawful enemy combatant" is a person (1) who "has engaged in hostilities or who has purposefully and materially supported hostilities against the United States"[65] or (2) who has ever been or ever will be determined to be an "unlawful enemy combatant" by a Combatant Status Review Tribunal ("CSRT") [66] or "another competent tribunal" established under authority of the President or Secretary of Defense.[67] Any non-citizen tied to "hostilities" or determined to be an "unlawful enemy combatant" is thus subject to trial by military commission. This formulation ratifies the existing government practice of designating certain individuals who have never set foot on a traditional battlefield to be "enemy combatants" subject to military detention and justice.[68]

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[65] *Id.* § 948a(1)(i).
[66] *Id.* § 948a(1)(ii).
[67] *Id.* § 948(a)(1)(ii); RMC § 202(b).
[68] The Bush Administration has designated as "enemy combatants" aliens captured abroad, aliens captured domestically, citizens captured abroad, and citizens captured domestically. *See Boumediene*, 476 F.3d at 985-87 (discussing whether aliens captured abroad may be designated as enemy combatants under the MCA); Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (determining whether a citizen captured abroad is entitled to constitutional protections); *Al-Marri*, 487 F.3d at 165 (discussing the *ex parte* order President Bush signed naming the defendant, who was lawfully in the United States when captured, enemy combatants); Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005) (determining whether a citizen captured domestically may be designated as an enemy combatant).

There would seem to be two potential routes to a domestically-captured alien's determination as an "unlawful enemy combatant." One route has a CSRT or other competent tribunal finding that an alien is an "unlawful enemy combatant." Procedures for this route are explicitly provided for in the MCA and the Manual for Military Commissions.[69] The other route to enemy combatant status involves a link to "hostilities." In this regard, a person is also an "unlawful enemy combatant" by "engag[ing] in hostilities" or "purposefully and materially support[ing] hostilities" against the United States and its allies.[70] However, procedures for linking an individual to "hostilities" are not spelled out in the MCA or the Manual. The domestic implications of these routes to enemy combatant status are treated in turn.

1. *The CSRT Route to Domestic Enemy Combatant Status*

In the aftermath of *Rasul v. Bush*,[71] CSRTs were instituted to determine whether each Guantanamo Bay detainee was in fact—as

[69] 10 U.S.C.A. § 948(a)(1)(ii); RMC § 202(b). The finding of enemy combatant status by a CSRT or other competent tribunal is "dispositive for purposes of jurisdiction for trial by military commission under [the MCA] . . . ." 10 U.S.C.A. § 948d(c); RMC § 202(b).
[70] 10 U.S.C.A. § 948a(1)(i).
[71] *See Rasul*, 542 U.S. 466.

each had been labeled—an "unlawful enemy combatant."[72] Guantanamo Bay remains the focus of CSRT-related issues.[73] Indeed, the Detainee Treatment Act of 2005 ("DTA") spells out CSRT procedures only for Guantanamo Bay detainees.[74] However, the government recently represented to the Fourth Circuit Court of Appeals that Ali Saleh Kahlah al-Marri, who was arrested in the United States and subsequently designated an "enemy combatant," will receive a CSRT if his habeas corpus petition is dismissed.[75] Al-Marri's prospective CSRT raises the possibility that CSRTs may be used to determine domestic-captured aliens to be "unlawful enemy combatants" for purposes of establishing military commission jurisdiction.

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[72] Nevertheless, a federal court and major human rights groups find enormous defects of procedure, fairness, and justice in CSRTs. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (describing and constitutionally interpreting CSRT procedures); Tom Malinowski, *Who's Really Locked Up in Guantanamo?*, L.A. TIMES, Mar. 16, 2006, at B11.

[73] The Court of Appeals for the District of Columbia Circuit recently dismissed the habeas corpus petitions of Guantanamo Bay detainees challenging the lawfulness of CSRTs. *Boumediene*, 476 F.3d at 1006. The case turned on the MCA's habeas-stripping provisions. *See infra* Part II.D.

[74] Detainee Treatment Act of 2005, Pub. L. 109-148, § 1001, 119 Stat. 2680, 2739 (to be codified primarily at 42 U.S.C.A §§ 2000dd to 2000dd-1). *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (describing and constitutionally interpreting CSRT procedures); Khalid v. Bush, 355 F. Supp. 2d 311 (D.D.C. 2005) (describing CSRT procedures); Robert A. Peal, *Combatant Status Review Tribunals and the Unique Nature of the War on Terror*, 58 VAND. L. REV. 1629, 1650-54 (2005). Calculus on the lawfulness of CSRT procedures might be considerably different were they to be convened domestically. *See Khalid*, 355 F. Supp. 2d at 311 (stating that Guantanamo Detainees have no constitutional rights due to the extra-territoriality of their detention).

[75] Brief for Resp't-Appellee, Al-Marri v. Wright, 2007 WL 198649 (4th Cir. 2007) (No. 06-7427).

2. *The "Hostilities" Route to Domestic Enemy Combatant Status*

An alien could also be subject to military commission jurisdiction as an "unlawful enemy combatant" if that alien is linked to "hostilities."[76] The hostilities-linked definition of "unlawful enemy combatant" is disjunctive of the CSRT-related definition discussed above.[77] This suggests that an alien linked to "hostilities" could be an "unlawful enemy combatant" independent of any CSRT proceedings. "Hostilities" thus provides independent grounds for determining enemy combatant status. Further, the Manual contemplates designating an alien as an "unlawful enemy combatant" outside of CSRT procedures.[78] An individual could then be subject to military commission jurisdiction solely based on a linkage to hostilities by the Secretary of Defense or another official.[79] This would involve the

[76] 10 U.S.C.A. § 948a(1)(i).
[77] Between the hostilities-related definition and CSRT-related definition of "unlawful enemy combatant," the MCA includes the term "or." 10 U.S.C.A. § 948a(1)(i).
[78] RMC § 202(b) ("The M.C.A. does not require that an individual receive a status determination by a C.S.R.T. or other competent tribunal before the beginning of a military commission proceeding.").
[79] The government undertook this type of designation of al-Marri, the lone remaining "enemy combatant" arrested domestically. Al-Marri v. Bush, 274 F. Supp. 2d 1003, 1004-05 (C.D. Ill. 2003). After being arrested in late 2001 in Illinois, al-Marri was indicted and re-indicted on a number of credit and bank fraud charges. *Id.* After a discovery order by the court adverse to the government, on June 23, 2003, President Bush designated al-Marri an "enemy combatant" affiliated with al Qaida and ordered that he be taken into military custody. *Id.* He has remained in a

Secretary of Defense or another executive officer designating an individual suspected of engaging in hostilities or purposefully and materially supporting hostilities as an "unlawful enemy combatant."[80] Nevertheless, such a designation could be challenged before the military commission itself.[81]

Expansive government interpretation of the concept of hostilities informs how the MCA's statutory term "hostilities" might be applied.[82] The government has consistently sought to expand the legal concept of hostilities.[83] For example, the government recently argued

Navy brig in South Carolina ever since. Al-Marri v. Wright, 443 F. Supp. 2d 774, 777 (D.S.C. 2006).

[80] The Secretary of Defense, in consultation with the Attorney General prescribes the "[p]retrial, trial, and post-trial procedures" of military commissions. MCA § 4, 120 Stat. at 2605 (codified at 10 U.S.C.A. § 949a). Determining administratively who has engaged in hostilities or purposefully and materially supported hostilities would necessarily seem to be among the pretrial procedures for which the Secretary of Defense is responsible.

[81] *See* RMC § 202(b) ("If, however, the accused has not received [a CSRT], he may challenge the personal jurisdiction of the commission through a motion to dismiss.").

[82] Similarly, the concept of "material support of hostilities" under the MCA would likely be conditioned by the government's pursuit of an expansive criminal concept of "material support of terrorism." *See generally* Robert Chesney, *Antiterrorism Prosecutions and the Demands of Prevention in Post-9/11 America*, WAKE FOREST PUBLIC LAW AND LEGAL THEORY RESEARCH PAPER SERIES, Research Paper No. 04-04, at 32-38 (Apr. 6, 2004), *available at* http://ssrn.com/abstract=527803 (surveying material support prosecutions). *See also* Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 39-47 (2005) (discussing preventative material support prosecutions). Material support prosecutions have even bled into the realm of religious thought, as where the conviction of Hamid Hayat turned on what prosecutors called his "jihadi heart and jihadi mind." *See* Waldman, *supra* note 48.

[83] An official 1997 statement by the United States to the International Committee of the Red Cross set out broadly the actions which would constitute hostilities:

that a suspected terrorist arrested in the United States who never set foot on a battlefield against American soldiers has engaged in hostilities against the United States.[84] In contrast, the law of war weds the concept of hostilities to the battlefield.[85]

For a civilian to become an "enemy combatant," that civilian must commit violence against human or physical enemy forces.[86] Terrorism does not even traditionally amount to hostilities unless there is a nexus to actual physical battlefield fighting.[87] That the bat-

"These conditions may be met by bearing arms or by aiding the enemy with arms, ammunition, supplies, money or intelligence information or even by holding unauthorized intercourse with enemy personnel." *See* 2 CUSTOMARY INT'L HUMANITARIAN LAW 113 (Jean-Marie Henckaerts & Louise Doswald-Beck, eds., 2005).

[84] Brief for the Resp't-Appellee, Al-Marri v. Wright, No. 06-7427, at 4-5; *but see Hanft*, 423 F.3d at 389 (holding that the President was authorized to detain an individual as an "enemy combatant" who carried a weapon on an Afghanistan battlefield against the United States but who was arrested in the United States).

[85] Int'l Comm. of the Red Cross & TMC Asser Inst., *Third Expert Meeting on the Notion of Direct Participation in Hostilities: Summary Report* 18-24 (2005), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2005_eng.pdf (discussing a consensus of opinions that the concept of "hostilities" is tied to, but not synonymous with, military action or operations). *See* Michael Newton, *Unlawful Belligerency After September 11: History Revisited and Law Revised*, *in* NEW WARS, NEW LAWS? APPLYING THE LAWS OF WAR IN 21ST CENTURY CONFLICTS 75-110 (David Wippman & Matthew Evangelista, eds., 2005) (defending conceptual expansion post-9/11).

[86] 1 CUSTOMARY INT'L HUMANITARIAN LAW 23 (Jean-Marie Henckaerts & Louise Doswald-Beck, eds., 2005).

[87] ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 125-26 (2003).

> [T]o amount to an international crime proper, terrorist acts must show a nexus with an *international* or *internal armed conflict* (that is, a military clash between two States or between two armed groups within one State), or they must acquire such a *magnitude* as to exhibit the hallmarks of a crime against human-

tlefield may at times extend into the United States was recognized by the Supreme Court in *Ex parte Quirin*.[88] In *Quirin*, the Court held that members of the German army who surreptitiously entered the United States in 1941, to undertake acts of sabotage, were unlawful combatants subject to trial by military commission.[89] *Quirin's* notion of an expanded battlefield would seem to unravel under less exceptional facts.[90] For example, the *Quirin* Court would likely be shocked to learn that a purely domestic action, such as conspiracy to materially support terrorism,[91] could be sufficient to establish "unlawful enemy combatant" status.[92] Nevertheless, in light of the expansion of the concept of hostilities and the MCA's statutory

> ity, or they must involve State authorities and exhibit a *transnational dimension*, that is, they do not remain confined to the territory of one State but massively spill over into and jeopardize the security of other States.

Id.

[88] 317 U.S. 1.

[89] *Id.* at 30-31.

[90] The Supreme Court in *Hamdi* stated, in dicta, that accepted notions about executive authority in a time of war might "unravel" if the circumstances of the "war on terrorism" are "entirely unlike [the circumstances] that informed the development of the law of war . . . ." *Hamdi*, 542 U.S. at 521.

[91] 10 U.S.C.A. § 950v(b)(28) (West Supp. 2007) (criminalizing conspiracy); *Id.* § 950v(b)(25)(A) (criminalizing material support of terrorism).

[92] *See Quirin*, 317 U.S. at 35. Further, the Inter-American Commission on Human Rights has determined that such actions cannot legally be categorized as hostilities. "[C]ivilians whose activities merely support the adverse party's war or military effort . . . cannot on these grounds alone be considered combatants." INTER-AMERICAN COMM'N ON HUMAN RIGHTS, THIRD REPORT ON HUMAN RIGHTS SITUATION IN COLOMBIA, (Feb. 26, 1999), *available at* http://www/cidh.oas.org/countryrep/Colom99en/table%20of%20contents.htm.

scheme of crimes, for MCA purposes, "hostilities" might include actions lacking any nexus with armed conflict or war.

Under the MCA, interpretation of statutory terms like "hostilities" is the province of the government, not the courts.[93] With unfettered administrative discretion, the government may then be able to try by military commission individuals perceived to be threats but who could only tenuously be linked to hostilities or material support of hostilities in a federal court.[94] In sum, the government may then try by military commission aliens in the United States who are either determined by a CSRT to be "unlawful enemy combatants" or are designated "unlawful enemy combatants" on the basis of engaging in hostilities or purposefully and materially supporting hostilities.

B. Crimes Triable by Military Commission

The MCA authorizes trial for a number of "violations of the law of war and other offenses triable by military commission."[95] More specifically, the MCA purports to "codify offenses that have

[93] The Secretary of Defense and Attorney General prescribe pretrial military commission procedures. MCA § 3, 10 U.S.C.A. § 949a (West Supp. 2007).
[94] *See Al-Marri*, 487 F.3d at 185. *Al-Marri*, will test the federal courts' tolerance for a definition of "hostilities" inclusive of domestic activity not amounting to war-like acts. The case is currently pending *en banc* review before the Fourth Circuit.
[95] 10 U.S.C.A. § 948b(a) (West Supp. 2007).

traditionally been triable by military commissions."[96] Indeed, the majority of crimes enumerated in the MCA are established war crimes. For example, attacking civilians,[97] torture,[98] attacking or destruction of protected property,[99] and murder of protected persons[100] are all established war crimes triable under the MCA.[101] However, other MCA-enumerated crimes are new additions to the corpus of war crimes or meaningfully expand the scope of existing war crimes.[102]

C. Composition of Military Commissions

In addition to the accused, military commission participants include a military judge;[103] trial counsel, effectively the prosecutor;[104] military defense counsel;[105] and, in non-capital cases, at least five

[96] *Id.* § 950p(a). This declaration that the MCA merely codifies existing offenses and does not create new offenses would seem to be designed to fend off challenges on constitutional ex post facto grounds. *See id.* § 950p(b) ("Because the provisions of this subchapter . . . are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter."). The Constitution prohibits ex post facto laws. U.S. CONST. art. I, § 9, cl. 3.
[97] 10 U.S.C.A. § 950v(b)(3).
[98] *Id.* § 950v(b)(11).
[99] *Id.* § 950v(b)(4), (16).
[100] *Id.* § 950v(b)(1).
[101] *See* CASSESE, *supra* note 87, at 55-57, 77-78 (discussing these and other well-established war crimes).
[102] *See infra* Part III.D.
[103] 10 U.S.C.A. § 948j (West Supp. 2007); *see also* MMC, *supra* note 27, pt. II, R. 501(a)(1).
[104] 10 U.S.C.A. § 948k(a); MMC, *supra* note 27, pt. II, R. 501(b).
[105] 10 U.S.C.A. § 948k(a); MMC, *supra* note 27, pt. II, R. 501(b).

members, effectively the jury.[106] The accused may additionally retain civilian counsel for the military commission at no expense to the government.[107] Members of a military commission vote by secret ballot.[108] Conviction in non-capital cases requires a concurrence of two-thirds or three-fourths of the members present when the vote occurs, depending upon the length of imprisonment contemplated by the charge.[109]

D. Judicial Review of Military Commissions

The MCA purports to eliminate habeas jurisdiction over all "alien enemy combatants" and provides for limited judicial review of military commissions by the Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"). For the sake of clarity, these two aspects of judicial review under the MCA and its companion statute, the DTA, are considered in turn.

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[106] 10 U.S.C.A. § 948m(a)(1); MMC, *supra* note 27, pt. II, R. 501(a)(1). If a penalty of death is sought, the commission must have at least twelve members. 10 U.S.C.A. § 949m(c)(1) (West Supp. 2007); MMC, *supra* note 27, pt. II, R. 501(a)(2).

[107] MMC, *supra* note 27, pt. II, R. 506(a).

[108] 10 U.S.C.A. § 949*l*(a) (West Supp. 2007).

[109] *Id.* § 949m(a), (b)(2). A sentence of death requires unanimity among the members. *Id.* §§ 949m(b)(C)-(D).

1. *Elimination of Habeas Review*

The writ of habeas corpus guarantees judicial review to an individual seeking to challenge the lawfulness of his executive detention.[110] Nowhere are the guarantees of habeas review stronger than in the domestic context.[111] MCA section seven nevertheless purports to eliminate habeas corpus review for any individual who has been determined to be an "alien enemy combatant" or who is "awaiting such determination."[112] This provision amends the habeas-stripping provisions of the DTA,[113] which the Supreme Court, in *Hamdan*, deter-

[110] The writ of habeas corpus is a common law device that dates back at least to the Magna Carta and is codified at 28 U.S.C.A. § 2241 (West 2000 & Supp. 2007). *See generally* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 45, 51, 106, 110 (1980).

[111] This proposition was affirmed even in the post-9/11 "war on terrorism" context. *Hamdi*, 542 U.S. at 525 ("All agree that, absent suspension, the writ of habeas corpus remains available to every individual detained within the United States.") (O'Connor, J., plurality). *See also* U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 15-16, 21, 59, 102-3, 115, 141-42 (1866) (holding that habeas corpus may be suspended during times of civil war); INS v. St. Cyr, 533 U.S. 289, 314 (2001) (holding that the Antiterrorism and Effective Death Penalty Act (AEDPA) and Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) remove district courts' habeas corpus review).

[112] 28 U.S.C.A. § 2241(e)(1) (West Supp. 2007) states:

> No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

[113] Detainee Treatment Act of 2005, Pub. L. No. 109-148; § 1005(e)(1) (2005) [hereinafter DTA], *available at* http://Thomas.loc.gov/cgi-bin/cpquery/T?&report=hr359&dbname=109&; 28 U.S.C.A. § 2241(e)(1) (West Supp. 2007).

mined not to apply retroactively.[114] This provision is also potentially very broad, given its "awaiting such determination" language. To divest federal courts of jurisdiction over a habeas corpus petition, it would seem that the government would only plead that the petitioner is awaiting determination as an "alien enemy combatant."[115]

Several domestic ramifications of the MCA's purported elimination of habeas review are being litigated in *Al-Marri v. Wright*.[116] Al-Marri is a Qatari citizen who entered the United States on a student visa on September 10, 2001. Later, he was indicted and reindicted on credit card and bank fraud, and has been detained as an "enemy combatant" and alleged al Qaida "sleeper agent" on a Navy brig in South Carolina since June 23, 2003. In August 2006, the district court denied his habeas corpus petition and found his detention as an "enemy combatant" to be lawful.[117] Al-Marri appealed to the Fourth Circuit. However, after passage of the MCA, the government

[114] *Hamdan*, 126 S. Ct. at 2764.
[115] Two bills recently introduced in the Senate seek to repeal the MCA's habeas stripping provisions. *See* Restoring the Constitution Act of 2007, S. 576, 110th Cong. (2007); Habeas Corpus Restoration Act of 2007, S. 185, 110th Cong. § 2 (2007).
[116] *See supra* notes 75 & 79 and accompanying text.
[117] *Al-Marri*, 443 F. Supp. 2d at 784 ("Affording this evidence a favorable presumption, as *Hamdi* directs, the Court finds that the Government has met its burden of providing a factual basis in support of Petitioner's classification and detention as an enemy combatant.").

moved to dismiss al-Marri's petition because MCA section seven eliminates federal court jurisdiction to review the lawfulness of his detention.[118]

The outcome of the habeas-stripping question in *Al-Marri* will thus form one part of the puzzle as to the quantum of review a domestic-arrested detainee tried by military commission would receive. If the courts find for al-Marri, then such an individual might receive full-blown habeas review, including review of the facts and law underlying his detention, but if the government prevails, then a domestic detainee would receive only the limited District of Columbia Circuit review discussed below.

[118] Specifically, the government argued that al-Marri was an alien enemy combatant within the scope of MCA section seven because he was (1) an alien and (2) was determined by both the President and the district court to be an enemy combatant, or in any case, was awaiting such determination given that the Department of Defense had ordered him to undergo a CSRT upon dismissal of his habeas petition. Resp't-Appellee's Mot. to Dismiss for Lack of Jurisdiction, at 4-5, *Al-Marri v. Wright*, No. 06-7427 (4th Cir. Nov. 13, 2006). In response, al-Marri's counsel argued that (1) al-Marri has a constitutional right to habeas review, (2) that Congress had not and could not suspend the writ of habeas corpus with respect to al-Marri, (3) that MCA section seven did not apply to a person in al-Marri's category, (4) that the MCA would violate the Suspension and Due Process Clauses if applied to al-Marri, and (5) that MCA section seven violates Equal Protection by purporting to eliminate habeas jurisdiction only for aliens. Appellant's Resp. to Appellee's Mot. to Dismiss for Lack of Jurisdiction at 3, 8, 10, 33, 55 (4th Cir. Dec. 12, 2006). The government responded with a brief that further developed its initial arguments—including its argument that the substitute review provided by the DTA is a constitutionally-acceptable substitute to habeas corpus review—and rebutted al-Marri's arguments that habeas jurisdiction remains after passage of the MCA. Resp't-Appellee's Reply in Supp. of Mot. to Dismiss for Lack of Jurisdiction, at 5-6, *Al-Marri v. Wright*, No. 06-7427 (4th Cir. Dec. 29, 2006).

2. *Limited Review by the District of Columbia Circuit*

Though the MCA purports to eliminate habeas review for "alien enemy combatants," any individual convicted by military commission has the right under the MCA and the DTA to limited judicial review from the D.C. Circuit.[119] The first stage of this review takes place within the Department of Defense, at the Court of Military Commission Review.[120] From the Court of Military Commission Review, the convicted individual may petition for review to the D.C. Circuit.[121] However, ultimate review rests with the Supreme Court.[122]

Among federal courts, the D.C. Circuit has exclusive jurisdiction to determine the validity of a final decision rendered by an MCA-authorized military commission.[123] The D.C. Circuit's scope of review is limited to two matters. First, the court may review "whether the final decision [of the military commission] was consis-

[119] *See* DTA § 1005(e)(1) (2005); 10 U.S.C.A. § 801; *see also* MMC, *supra* note 27, pt. II, R. 1110(a) (stating the right to appellate review may be waived or withdrawn).
[120] 10 U.S.C.A. § 950d(c) (West Supp. 2007); MMC, *supra* note 27, pt. II, R. 1201(a).
[121] 10 U.S.C.A. § 950d(d); MMC, *supra* note 27, pt. II, R. 1205(a).
[122] MMC, *supra* note 27, pt. II, R. 1205(b); s*ee also* 28 U.S.C.A. § 1257(a) (West Supp. 2006).
[123] DTA § 1005(e)(3)(A); 10 U.S.C.A. § 801.

tent with the standards and procedures specified for a military commission . . . ."[124] Second, the court may also review or whether the "use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States[,]" but only "to the extent the Constitution and laws of the United States are applicable . . . ."[125] This second type of review will prove most critical in any domestic military commission proceedings. However, it is not clear how the D.C. Circuit will undertake constitutional and legal review of military commission standards and procedures.

Presumably, the Constitution would apply in the military commission trial of a domestically captured individual.[126] However, the D.C. Circuit could permissibly ratchet down the scope and

[124] 10 U.S.C.A. § 801(4) (*amending* DTA § 1005(e)(3)(D)(i)).
[125] DTA § 1005(e)(3)(D)(ii); 10 U.S.C.A. § 801.
[126] Congressional supporters of the MCA cited Johnson v. Eisentrager, 339 U.S. 763, 772-73 (1950) and United States v. Verdugo-Urquidez, 494 U.S. 259, 273 (1990) when stressing that "enemy combatants" have no constitutional rights. *See, e.g.*, 152 CONG. REC. S10268 (daily ed. Sept. 27, 2006) (statement of Sen. Kyl) ("So both Eisentrager and Verdugo are still the governing law in this area. These precedents hold that aliens who are either held abroad or held here but have no other substantial connection to this country are not entitled to invoke the U.S. Constitution."). Given that these two cases expressly concern the extraterritorial application of the Constitution, one might, by negative implication infer that Congress did not intend the MCA to ratchet down the constitutional rights of aliens in the United States. Congress cannot viably legislate to diminish the substantive constitutional rights of aliens on the basis of Separation of Powers. *See* City of Boerne v. Flores, 521 U.S. 507 (1997); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). There is also an unbroken chain of cases holding that aliens legally in the United States have constitutional rights: Zadvydas v. Davis, 533 U.S. 678; Wong Wing v. United States, 163 U.S. 228; Fong Yue Ting v. United States, 149 U.S. 698.

strength of constitutional rights in light of the "national security" implications of the military commissions.[127] Further, it is unclear whether the laws of the United States—for example the Foreign Intelligence Surveillance Act ("FISA")—would be applicable to a domestically captured individual tried by military commission. The analysis below thus assumes that D.C. Circuit review will not include the full array of Fifth Amendment rights, as in the federal criminal or immigration context, nor robust Sixth Amendment rights, as in the criminal context, nor the full protections of the laws of the United States, such as FISA. Indeed, the elimination of habeas review and the apparently limited scope of D.C. Circuit review may tempt the government to use military commissions in lieu of federal criminal prosecutions or detention and deportation under immigration laws.

III. LIBERTY CONCERNS REGARDING DOMESTIC MILITARY COMMISSIONS

Several aspects the MCA demonstrate how military commissions facilitate the detention and trial of alien terrorism suspects absent fundamental guarantees of fairness and liberty.

[127] *See* Dep't of Navy v. Egan, 484 U.S. 518, 530 (1988) (noting the reluctance of courts to interfere with executive actions respecting military and national security affairs).

A. Indefinite Detention

Indefinite detention is unconstitutional in both the criminal[128] and immigration contexts.[129] However, since 9/11, the government has consistently claimed the right to subject "enemy combatants" held in the United States to indefinite detention without trial.[130] Far from providing guarantees against such indefinite detention, the MCA eliminates habeas corpus review and fails to require trial for "unlawful enemy combatants." Without habeas review or a right to a trial, individuals designated "unlawful enemy combatants" under the MCA may be subject to indefinite detention without any guarantee of being tried before a military commission.[131]

The problem of potentially indefinite detention is underscored by the circular nature of limited judicial review by the D.C. Cir-

[128] The Sixth Amendment guarantees the right to a "speedy and public trial," and thus prevents the indefinite detention of criminal defendants. U.S. CONST. amend. VI. *See also* ALFREDO GARCIA, THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE: A CRITICAL PERSPECTIVE 157-77 (Greenwood Press 1992). *But see* Curt Anderson, *Padilla Judge: Brig Time Doesn't Count*, ASSOCIATED PRESS (2007), *available at* http://abcnews.go.com/us/wirestory?id=2976718 (last visited Sept. 10, 2007) (stating that three-and-a-half years of military detention as an enemy combatant prior to civil criminal indictment did not violate Padilla's right to a speedy trial).

[129] *Zadvydas*, 533 U.S. at 689-90 (noting that indefinite detention, for purposes of removal, violates due process); *see also* Clark v. Martinez, 543 U.S. 371, 378 (2005) (reconfirming and applying *Zadvydas*).

[130] The government has consistently claimed this authority under the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). *See, e.g.*, *Hamdi*, 542 U.S. at 517; Padilla v. Hanft, 423 F.3d 386, 390-92 (4th Cir. 2005); Brief for Resp't-Appellee at 20-30, *Al-Marri*, 487 F.3d 160 (No. 06-7427).

[131] *C.f. Hamdi*, 542 U.S. at 534.

cuit.[132] As discussed above, the D.C. Circuit may review final determinations of CSRTs and military commissions.[133] However, if a particular individual receives no CSRT and is instead held as an "unlawful enemy combatant" on the basis of a link to hostilities, then the D.C. Circuit would have no opportunity to review such individual's detention. Further, if that individual were never actually tried by military commission and were instead detained pending the possibility of trial in the future—or even purely for reasons of preventative detention—there would be no final determination of a military commission that would furnish the D.C. Circuit with appellate jurisdiction. Even if the limited D.C. Circuit review of CSRTs and military commissions was broad enough to vindicate constitutional rights against indefinite detention, there is no guarantee that "alien unlawful enemy combatants" would ever receive such review. Indefinite, extra-judicial detention is thus entirely plausible in the new military commission scheme.[134] However, where the MCA scheme fails to guarantee process to challenge potentially indefinite detention, it also

[132] *See supra* Part II.D.2.
[133] DTA, Pub. L. No. 109-148, § 1005(e)(2)(A), (3)(A), 119 Stat. 2680, 2741-43.
[134] The government has identified about two dozen Guantanamo Bay detainees for potential trial. It has announced no plan to try the nearly 435 other detainees who are being held as "enemy combatants." This group thus faces the realistic possibility of indefinite detention. *See* Richard B. Schmitt & Julian E. Barnes, *Bush Signs Tough Rules on Detainees*, L.A. TIMES, Oct. 18, 2006, at 1.

fails to guarantee sufficient procedural safeguards against unjust conviction and punishment.

B. Broad Governmental Privilege Regarding Classified Information

A full and responsive criminal defense is normally predicated on access to critical information, either through discovery or the obligatory production of exculpatory evidence. However, under MCA-authorized military commissions, the government is provided a broad array of privileges related to classified information that would, if invoked, impede a full and fair defense of the accused.[135] There are several components to these privileges. Broadly speaking, classified information may be introduced to the defense if it is protectively altered. Protective alteration may include the deletion of specified items of classified information, the substitution of a summary of the classified information, or a statement of the relevant facts that the classified information would tend to prove.[136] There are no requirements that these alterations meet any particular levels of detail or ac-

[135] *See* 18 U.S.C.A. § 3500 (West 2000 & Supp. 2007).
[136] 10 U.S.C.A. § 949d(f)(2)(A) (West 2000).

curacy, though they should conform to a fairness standard reviewed by the military judge.[137]

More importantly, the government is provided broad powers to hide the sources, methods, and activities that produced the introduced evidence. In order to hide (from the defendant) the sources, methods, and activities that produced the introduced evidence, the military judge must only find that such sources, methods, and activities are classified and that the evidence is "reliable."[138] The military judge may require that the government provide an unclassified summary of the sources, methods and activities, but only to the extent that such a summary would be "practicable and consistent with national security."[139] The government may thus hide even a summary of the sources, methods and activities underlying particular evidence merely by claiming that national security would be implicated. Given that prosecutions under the MCA by their very nature concern national security, the government will likely be able to make this claim frequently.

[137] MMC, *supra* note 27, pt. III, R. 505(e)(4).
[138] 10 U.S.C.A. § 949d(f)(2)(B) (West 2007).
[139] *Id.*

Further, the accused has no right to obtain exculpatory evidence if such evidence is designated classified by an executive branch official.[140] This rule stands despite the fact that the military judge may close the commission proceedings to the public on a specific showing that such closure is necessary to protect information which could damage national security if disclosed.[141] The absence of a right to obtain classified exculpatory evidence is thus not only unjust but also seemingly unnecessary.

These provisions contrast unfavorably with constitutional guarantees in the federal criminal context. For example, the Classified Information Procedure Act provides elaborate guarantees that classified information will be protectively altered to a format fair and useful when it is provided to the defendant.[142] Further, in all domestic criminal trials, the accused has an absolute right to be provided exculpatory evidence.[143] Defendants tried by military commissions

[140] *Id.* § 949j(d)(1).
[141] *Id.* § 949d(d)(2)(A).
[142] Classified Information Procedure Act, Pub. L. No. 96-456, 94 Stat. 2025 (codified at 18 U.S.C.A. § 4 (West Supp. 2007)) (stating the substitutions for classified information to be provided to a defendant). *See also* United States v. Moussaoui, 382 F.3d 453, 482 (4th Cir. 2004) (finding the substitutions of access to classified witnesses outside the CIPA framework constitutionally adequate).
[143] Brady v. Maryland, 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due

would thus have significantly fewer protections with respect to the use of classified evidence. An alien terrorism suspect may already be removed from the United States on the basis of classified information not made available to that suspect.[144] Overlaying these immigration powers with the military commission rules discussed here, the government may now either prosecute or deport alien terrorist suspects on the basis of secrets, and can withhold full disclosure of exculpatory evidence. Other evidentiary provisions from the MCA further impede the liberty interests of domestically captured aliens who are subject to military commissions.

C. Weakened Exclusionary Rules

The exclusion of improperly obtained evidence under certain circumstances has arguably become a linchpin of the criminal justice system.[145] However, the MCA allows for the introduction of two forms of evidence that ordinarily would be excluded in federal crimi-

process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

[144] 8 U.S.C.A. § 1533 (West Supp. 2005). *See also* 8 C.F.R. § 1003.46 (2007) (allowing for submission of information to immigration court under seal where such information would, "if disclosed, harm the national security . . . or law enforcement interests of the United States").

[145] *See* Dickerson v. United States, 530 U.S. 428 (2000) (Fifth Amendment Miranda-based exclusionary rule); Lego v. Twomey, 404 U.S. 477 (1972) (Fifth Amendment involuntariness-based exclusionary rule); Mapp v. Ohio, 367 U.S. 643 (1961) (Fourth Amendment exclusionary rule).

nal trials: evidence seized without a warrant and evidence resulting from coercion that may amount to torture. Military commissions thus operate outside the scheme of illegal searches and coercion prohibited respectively by the Fourth and Fifth Amendments.

First, evidence seized without a warrant or other authorization is not excluded by military commissions.[146] Therefore the police, FBI or any other federal agency may raid an individual's house in the United States without a warrant and use evidence seized in such a raid against that individual before a military commission.[147] With no exclusionary rule to deter such behavior, the government may undertake regular raids based on little or no probable cause—perhaps even on ethnic or religious grounds or even absent any particularized suspicion at all—in order to locate evidence that could be used in a future domestic military commission.[148] The non-exclusion of evi-

[146] 10 U.S.C.A. § 949a(b)(2)(B) (West Supp. 2007).

[147] A district court recently revived a so-called "foreign intelligence" exception to the Fourth Amendment's general warrant requirement to admit into evidence the fruits of the FBI's warrantless search of an alleged Hamas official's house in Mississippi. United States v. Marzook, 435 F. Supp. 2d 778, 792-94 (N.D. Ill. 2006). The defendants in *Marzook* were acquitted, therefore the district court's "foreign intelligence" exception theory will not be tested on appeal. However, the "foreign intelligence" exception line of cases pre-dates the Foreign Intelligence Surveillance Act. 50 U.S.C.A. § 1801 (West 2003) (governing all foreign intelligence surveillance). *See* § 949a(b)(2)(B).

[148] It is worth noting that the United Kingdom's anti-terror laws have also relaxed traditional warrant requirements for certain actions. For example, the Terrorism Act of 2000 allows the arrest of a terrorism suspect without a warrant or any suspi-

dence obtained without a warrant provides for a separate, constitutionally debilitated search regime applicable to the military trial of suspected terrorist aliens in the United States.[149]

Evidence obtained by coercion that may amount to torture is likewise potentially admissible in military commissions.[150] Two distinct schemes relating to the DTA's date of enactment[151] govern how allegedly coerced statements are treated.[152] A statement obtained before the DTA's enactment in which "the degree of coercion is disputed" may be admitted if the circumstances render the statement reliable and probative, and if justice would best be served by its admission.[153] Thus, a statement obtained in this period may be admitted even if it was clearly coerced—resulting, for example, from

cion that the suspect has committed or is about to commit a particular offense. *See* Kim Lane Scheppele, *Other People's Patriot Acts: Europe's Response to September 11*, 50 LOY. L. REV. 89, 130 (2004).

[149] INS v. Lopez-Mendoza, 468 U.S. 1032, 1033 (1984) ("The exclusionary rule does not apply in a deportation proceeding . . ."). It is troubling that military commission exclusionary rules are closer to immigration than criminal standards, because, formally at least, immigration proceedings do not aim to punish.

[150] The exclusionary rule applies to statements obtained by torture. 10 U.S.C.A. § 948r(b) (West Supp. 2007). However, the MCA provides no applicable definition of torture, meaning the degree of coercion used to obtain statements is likely to be debated in every commission where detainee statements are offered into evidence. *See id.*

[151] The DTA was signed into law on December 30, 2005. It mandates torture-free interrogation procedures. DTA, Pub. L. No. 109-148, § 1003(a), 119 Stat. 2680, 2739-40.

[152] Coerced statements are excluded in criminal trials. *See, e.g.*, Brown v. Mississippi, 297 U.S. 278, 286 (1936).

[153] 10 U.S.C.A. §§ 948r(b), (c) (West Supp. 2007).

torture—so long as it is reliable, probative, and justice-serving. This pre-DTA scheme provides military judges wide latitude to admit statements that may amount to torture.

A statement obtained after the DTA's enactment in which "the degree of coercion is disputed" may be admitted if: "(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; (2) the interests of justice would best be served by admission[;]" and (3) the interrogation did not amount to "cruel, inhuman, or degrading treatment" as prohibited by the Fifth, Eighth, and Fourteenth Amendments.[154] Regarding the United States' practice, the constitutional standard for "cruel, inhuman, or degrading treatment" is the functional standard for torture.[155] An allegedly coerced statement obtained after the DTA's enactment may be admitted if it is reliable and probative, serves the interests of justice, and did not stem from torture. This scheme is certainly more protective than the pre-DTA scheme. However, the "cruel, inhuman, or degrading treatment" standard is based not on bright-line prohibi-

[154] *Id.* § 948r(d); 42 U.S.C.A. § 2000dd.
[155] *See* § 2000dd (prohibiting "cruel, inhuman, or degrading treatment,"—torture—of individuals held by the government); *see also* G.A. Res. 39/46, U.N. Doc. A/RES/39/46 (Jan. 1985) (pegging United States' understanding of torture to "cruel, inhuman, or degrading treatment").

tions against particular actions, but on a "shocks the conscience" totality of the circumstances test.[156] Like the pre-DTA scheme, the post-DTA scheme then also opens the door to the admission-coerced statements that may amount to torture.

As in criminal proceedings, the danger of admitting a statement which resulted from torture will be greater when the statement was obtained by foreign agents.[157] Recent criminal material support of terrorism trials demonstrate the extent to which federal courts are willing to admit testimony obtained in interrogations by foreign agents, even when there is credible evidence of torture.[158] Likewise, in a domestic military commission, a legal permanent resident tried for alleged material support of terrorism—perhaps for donating to the humanitarian arm of an Islamic organization that also has a militant arm—could be convicted on the basis of the statements obtained in

[156] The constitutional "cruel, inhuman, or degrading" standard does not provide for a bright-line definition of torture as it requires that the contested action "shock the conscience" in order to amount to torture. *See, e.g.*, County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998); United States v. Marzook, 435 F. Supp. 2d at 774.

[157] *See, e.g.*, *Marzook*, 435 F. Supp. 2d at 769-74; United States v. Abu Ali, 395 F. Supp. 2d 338, 380-81 (E.D. Va. 2005).

[158] *See Marzook*, 435 F. Supp. 2d at 741-73 (determining on the basis of testimony by Israeli interrogators and others that the defendant's statements while in Israeli custody were not involuntary); *Abu Ali*, 396 F. Supp. 2d at 372-81 (determining, on the basis of extensive testimony by Saudi police, custodial officials and expert witnesses, that defendant's inculpatory statements while in Saudi custody were not involuntary or the result of torture).

other countries through coercion that may amount to torture. Instead of providing meaningful categorical exclusion of the fruits of torture, the MCA leaves a significant grey area for the admission of statements obtained by abusive, dehumanizing, and perhaps unreliable methods.[159]

In sum, the MCA provides expansive exceptions to the Fourth and Fifth Amendment exclusionary doctrines. These exceptions occupy a place among several evidentiary provisions that depart significantly from guarantees entrenched in the federal criminal context.[160] They combine with overly broad crimes to threaten the liberty of individuals tried by military commission.

[159] In a significant decision, the British House of Lords held that all evidence obtained by torture—whether in the United Kingdom or in the cells of another country—is categorically excluded from criminal proceedings. A (FC) v. Secretary of State for the Home Department, [2005] UKHL 71, at ¶ 88, *available at* http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd051208/aand-1.htm.

[160] For example, hearsay evidence is admissible unless the party opposing its admission demonstrates that it is unreliable or lacking in probative value. 10 U.S.C.A. § 949a(b)(2)(E) (West Supp. 2007). For a fuller treatment of evidentiary issues in military commissions focusing on pre-MCA regulations, see Eun Young Choi, Note, *Veritas, Not Vengeance: An Examination of the Evidentiary Rules for Military Commissions in the War Against Terrorism*, 42 HARV. C.R.-C.L. L. REV. 139 (2007).

D. Overly Broad Crimes

As discussed above, the MCA categorizes a number of well-established war crimes.[161] However, the MCA also casts several new crimes in overly broad terms. Overbroad crimes raise two primary concerns. The first is the potential for selective, biased, and politically-expedient prosecution.[162] The second is that presiding military judges are prescribed only minimal judicial scrutiny in the application of the MCA. This section illustrates these concerns by examining some of the more problematic crimes created by the MCA.

"Conspiracy" is a notable new addition.[163] Criminalizing conspiracy as a war crime responds to the Supreme Court's holding in *Hamdan*, that absent congressional authorization, conspiracy could

[161] *See supra* Part II.C.

[162] *See, e.g.*, Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 38 (1975) ("Police who look charitably on a postgame victory celebration in the streets of a college town may not feel the same way about an antiwar demonstration.").

[163] 10 U.S.C.A. § 950v(b)(28) (West Supp. 2007) states:

> Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

not be tried by military commission.[164] In *Hamdan*, the Court noted that the Geneva and Hague Conventions—the major international instruments setting forth war crimes—do not mention conspiracy and that no international war crimes tribunal has criminalized conspiracy, with the exception of conspiracy to commit genocide or wage war.[165] The Court also observed that the common law of military commissions only criminalized conspiracy if the overt acts of the conspiracy were *themselves* war crimes or attempts to commit war crimes.[166]

In contrast, the MCA's definition of conspiracy does not require that the overt acts of a conspiracy constitute war crimes or attempts to commit war crimes. It requires only that the conspirator knowingly act overtly to achieve the object of the conspiracy.[167] With these eased overt act requirements, the MCA's newly minted military commission crime of "conspiracy" may prove potent if applied domestically. Further, a military judge presiding over a commission trying an individual for conspiracy—or any other crime—

[164] *Hamdan*, 126 S. Ct. at 2779, 2785.
[165] *Id.* at 2781, 2784.
[166] *Id.* at 2781.
[167] 10 U.S.C.A. § 950v(b)(28). The object of the conspiracy must, however, be a crime triable by military commission under the MCA. *Id.*

would not be bound to apply the doctrine of lenity.[168] This could further broaden the actual criminalizing effect of the MCA's already broad definition of crimes.[169]

The same concerns about overly broad criminalization and diminished judicial scrutiny also emerge with respect to the crime of providing material support for terrorism.[170] The two potential actions

[168] United States v. Bass, 404 U.S. 336, 347-48 (1971) (espousing the doctrine of lenity).

[169] "Terrorism" is broadly defined as a crime under the MCA.

> Any person subject to this chapter who intentionally kills or inflicts great bodily harm on one or more protected persons, or intentionally engages in an act that evinces a wanton disregard for human life, in a manner calculated to influence or affect the conduct of government civilian population by intimidation or coercion, or to retaliate against government conduct, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

10 U.S.C.A. § 950v(b)(24). Terrorism is a well-established international crime, but has traditionally only been considered a war crime if performed in the course of an armed conflict. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1942, art. 33, 6 U.S.T. 3516, 75 U.N.T.S. 287 (prohibiting acts of terrorism against "protected persons"). *See also* CASSESE, *supra* note 87, at 126-28. The MCA's terrorism offense requires a nexus with armed conflict. *See* MMC, *supra* note 27, pt. IV R. 6(a)(24)b(3) (providing no definition of armed conflict even though the government has frequently found "armed conflict" to extend into the United States since 9/11). *See supra* notes 82-94 and accompanying text.

[170] 10 U.S.C.A. § 950v(b)(25)(A) states:

> Any person subject to this chapter who provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism (as set forth in Paragraph (24)), or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such

under this offense roughly correspond to the two federal material support statutes. Corresponding to section 2339A, the first action is providing material support or resources with the knowledge or intent that they are to be used to prepare or carry out an act of terrorism.[171] Corresponding to section 2339B, the second action is intentionally providing material support or resources to an international terrorist organization engaged in hostilities with the United States, with knowledge that the organization has engaged or engages in terrorism.[172] Material support or resources include the same broad range of activities enumerated in section 2339A(b).[173]

Though material support is already criminalized federally, its criminalization for the purposes of military commissions is significant for two reasons. First, material support has no prior cognizance

> organization has engaged or engages in terrorism (as so set forth), shall be punished as a military commission under this chapter may direct.

[171] *Id.*

[172] *Id.*

[173] *Id.* § 950v(b)(25)(B). Material support or resources are defined as "any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials." Section 2339A(b)(1) defines "training" as the "instruction or teaching designed to impart a specific skill, as opposed to general knowledge" while section 2339A(b)(2) defines "expert advice or assistance" as "advice or assistance derived from scientific, technical or other specialized knowledge." *Id.* §§ 2339A(b)(1)-(3) (West Supp. 2007).

as a war crime, or in the common law. It was first criminalized only in the mid-1990s, when the relevant federal criminal statutes (sections 2339A and 2339B) and executive powers invoked under the International Emergency Economic Powers Act ("IEEPA") converged to knit a barrier against the financing and supporting of terrorism.[174] Material support prohibitions as defined and applied have been criticized as over inclusive.[175] These criticisms are equally applicable in the context of military commissions. There will be no precedent from the history of military law to guide the interpretation of material support, given that material support was not previously tried as a war crime. Further, the same concerns about the lack of judicial scrutiny in the conspiracy context are all present regarding material support. Not only is there no requirement that the doctrine of lenity be applied, but there is also no guarantee of full constitutional review.

[174] *See generally Oversight Hearing: Aiding Terrorists-An Examination of the Material Support Statute, S. Comm. on the* Judiciary, 108th Cong. (2004) (containing the testimonial letter of Robert M. Chesney, Professor of Law, Wake Forest University School of Law which details the history of legislation prohibiting material support of terrorism), *available at* http://judiciary.senate.gov/testimony.cfm?id=1172&wit_id=3394; Kathryn A. Ruff, *Scared to Donate: An Examination of the Effects of Designating Muslim Charities as Terrorist Organizations on the First Amendment Rights of Muslim Donors*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 447, 452-58 (2006) (discussing the history of the IEEPA's prohibitions against material support of terrorism).

[175] *See* Ruff, *supra* note 174, at 493-95; *see also* Huq, *supra* note 43; Cole, *supra* note 33. *But see* Intelligence Reform and Terrorism Prevention Act, § 2339B(c)(2) (amending material support statutes to raise the mens rea threshold for criminal culpability).

Such constitutional review has been an important part of material support doctrine and is discussed more specifically in Part IV. As a general matter, however, the over breadth of crimes as defined in the MCA is cause for concern that individuals who have done little or no harm will be swept before a military commission.

IV. MILITARY COMMISSION AS A NEW WAY TO PROSECUTE DOMESTIC TERROR SUSPECTS

The discussion now shifts to the immigration and federal criminal contexts, which military commissions augment. To illustrate how military commissions might be applied, an actual case from each context is discussed and then reconsidered in the context of military commissions. These particular cases were chosen because constitutional questions in each produced adverse results for the government. Primarily, the following analysis explores whether such cases would produce a more favorable outcome for the government if prosecuted through military commission.

A. Immigration Case Study: *Nadarajah v. Gonzales*

Ahilan Nadarajah came from Sri Lanka to the United States as an asylum-seeker.[176] He was soon recognized as a refugee by the immigration system. Nevertheless, he was detained for almost four years on suspicion of involvement with a terrorist organization, despite glaring deficiencies in the factual basis for the government's suspicions. In 2006, the Ninth Circuit determined that his ongoing detention violated the due process clause of the Constitution and ordered his release. However, if Nadarajah had been detained as an enemy combatant under the MCA, he might have faced indefinite detention and trial for material support of terrorism, absent a meaningful opportunity to challenge his detention or prove his innocence. This section tells his story and illustrates the dangers to the liberty of asylum seekers and other immigrants that a domestically-applicable MCA carries.

1. *Facts: Nadarajah's Plight*

Nadarajah is an ethnic Tamil refugee from Sri Lanka.[177] He worked as a farmer on family land in the Jaffna peninsula, in northern

[176] *See generally* Nadarajah v. Gonzales, 443 F.3d 1069 (9th Cir. 2006).
[177] *Id.* at 1072.

Sri Lanka, which the Sri Lankan army invaded during the course of a civil war in the mid-1990s.[178] The army and agents of the opposition Elam People's Democratic Party suspected Nadarajah of involvement with the Liberation Tigers of Tamil Eelam ("LTTE") rebels because he had lived in an area where the LTTE operated.[179] On three different occasions, Nadarajah was detained and tortured for a month or more because of his suspected LTTE membership.[180]

Nadarajah fled Sri Lanka in October 2001 with plans to seek asylum in Canada. After being transported to Mexico, he entered the United States in late October 2001 from Tijuana and was subsequently detained in San Diego. In November 2001, Nadarajah's removal proceedings began. As a defense to removal, Nadarajah sought asylum and other relief. The government opposed Nadarajah's asylum application, alleging that he was affiliated with the LTTE, a designated Foreign Terrorist Organization.[181] An immigration agent produced an affidavit supported by information from a confidential informant that alleged Nadarajah's LTTE affiliation.

[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Nadarajah*, 443 F.3d at 1073; *see* United States Dep't of State, Foreign Terrorist Organizations (FTOs) (Oct. 11, 2005), http://www.state.gov/s/ct/rls/fs/37191.htm.

Nevertheless, the immigration judge found Nadarajah credible and granted him asylum and withholding of removal under the Convention Against Torture.

The government then moved to reopen the proceedings to introduce evidence from a Department of Homeland Security agent ("DHS agent"). The immigration judge denied the motion, but the Bureau of Immigration Appeals granted the motion and remanded to the immigration judge.[182] In the subsequent immigration court proceedings, the DHS agent testified that Nadarajah must have been affiliated with the LTTE based on his prior residence in an area the DHS agent claimed was controlled by the LTTE. The DHS agent's testimony was founded upon public information, speaking with experts from the Canadian government, and speaking with an asset and informant of the Royal Canadian Mounted Police ("informant") familiar with the LTTE. The informant also told the DHS agent that Nadarajah ordered the murder of an individual in Canada over the phone from the detention center in San Diego.[183] The DHS agent was damagingly cross-examined by Nadarajah's counsel and Nadarajah introduced an expert witness in rebuttal, resulting in the immigra-

[182] *Nadarajah*, 443 F.3d at 1073.
[183] *Id.* at 1074.

tion judge reinstating his prior order granting Nadarajah asylum and the withholding of removal.[184]

Despite having twice been granted asylum, Nadarajah was denied release on bond and in August 2004 he filed a habeas petition. The district court denied the petition and Nadarajah appealed to the Ninth Circuit, contending that his detention violated the due process standard for indefinite detention set out in *Zadvydas v. Davis*.[185] *Zadvydas*, as discussed in Part III, held that after an immigrant has been in detention for six months, and when there is no significant likelihood of removal, due process requires his release.[186] Given that Nadarajah had already been granted asylum and withholding of removal, Nadarajah argued that there was no significant likelihood of removal and that his four-plus years of detention were thus unconstitutional.[187]

2. *Actual Outcome*

The Ninth Circuit ruled for Nadarajah holding that under the general immigration detention statutes the government did not have

[184] *Id.* at 1074-75.
[185] 533 U.S. 678.
[186] *Id.* at 701.
[187] *Nadarajah*, 443 F.3d at 1076.

the power to hold Nadarajah indefinitely.[188] Though the government consistently attempted to tie Nadarajah to the FTO-designated LTTE (just as Nadarajah's torturers had done), the accusations failed and Nadarajah was thus detained as a terrorist.[189] With no significant likelihood of removal, Nadarajah's detention ran afoul of due process and the Ninth Circuit ordered that the government release him.[190] The government did not appeal the decision to the Supreme Court. The aftermath of *Nadarajah* has proven troublesome for the government, as ACLU and Stanford Immigration Clinic lawyers recently filed a class action on behalf of immigrants illegally detained in violation of the due process standard set out in *Zadvydas*.[191]

[188] *Id.* at 1079.

[189] *See generally* Daniel Moeckli, *The Selective War on Terror: Executive Detention of Foreign Nationals and The Principle of Non-Discrimination*, 31 BROOK. J. INT'L L. 495 (2006) (explaining that Congress mandated the ongoing, potentially indefinite, detention of alien terrorists). *See* 8 U.S.C.A. § 1226a. Immigration and Nationality Act § 236A, added by section 412 of The Patriot Act, mandating the detention of suspected terrorist aliens, who must be charged with an immigration or criminal violation within seven days of arrest, and if placed in removal procedures may be detained beyond for renewable six-month periods pending deportation. *Id.*

[190] *Nadarajah*, 443 F.3d at 1080 ("The length of the detention in this case has been unreasonable. Nadarajah has established that there is no significant likelihood of removal in the reasonably foreseeable future.").

[191] *See* Am. Compl. and Pet. for Writ of Habeas Corpus, Mussa v. Gonzales, No. CV-06-2749-TJH (JTL) (C.D. Cal. Sept. 25, 2006), *available at* http://www.aclu.org/images/asset_upload_file74_27040.pdf.

3. *Military Commission Implications of* Nadarajah

There are three reasons why the government in the future might designate Nadarajah or similarly alleged terrorist-affiliated aliens as "alien unlawful enemy combatants" and try them in military commissions. First, open cross-examination procedures of hearsay testimony allowed Nadarajah to obtain asylum. Nadarajah was a suspected member of a terrorist group in the government's eyes. However, the government's critical trial evidence in this respect was exclusively hearsay, and, under cross-examination, was exposed as flimsy. Open cross-examination of a hearsay affiant is thus one reason why *Nadarajah* came out adversely to the government.

Under the military commissions system and the MCA, hearsay evidence may be submitted so long as it is reliable,[192] and though an accused has a cross examination right,[193] if the hearsay evidence is submitted by affidavit, no such cross-examination could actually occur. Further, the Secretary of Defense may craft any evidentiary and procedural rules he deems appropriate to protect intelligence sources

[192] 10 U.S.C.A. § 949a(b)(2)(E) (West Supp. 2007).
[193] *Id.* § 949a(b)(A).

and methods,[194] which were at issue in the cross examination of the DHS agent before the immigration judge and which might thus pre-empt such cross examination in a military commission.

The second reason that the government might try a Nadarajah-situated alien by military commission is to avoid the *Zadvydas*-type due process questions that compelled Nadarajah's release. If Nadarajah were tried by military commission, his detention and trial would be authorized by the MCA and not by immigration laws. Thus, even if some habeas review was available to an accused "alien unlawful enemy combatant"—as discussed above, that issue is currently being litigated—reliance on the liberty principles ratified in *Zadvydas* would be futile. Trying Nadarajah by military commission would thus evade *Zadvydas*-type questions unique to the immigration context.

Finally, trying Nadarajah by military commission would avoid running afoul of national and international prohibitions against refoulement of refugees.[195] It is illegal to return (*refouler*) refugees

[194] *Id.* § 949a(a).
[195] *See generally* Rene Bruin & Kees Wouters, *Terrorism and the Non-Derogability of Non-Refoulement*, 15 INT'L J. REFUGEE L. 5 (2003).

like Nadarajah to their countries of past persecution.[196] Prosecuting Nadarajah in the parallel legal system of the MCA would, if resulting in a conviction, evade short and medium-term questions of refoulement, because under the MCA he would not be subject to deportation, only imprisonment. While the United States would suffer no multilateral sanction if it refouled a recognized refugee like Nadarajah, such action could cause international embarrassment and spawn a civil lawsuit. Avoidance of refoulement would thus be a third reason for trying Nadarajah, or other suspected terrorist asylum seekers and refugees, by military commission.

B. Criminal Case Study: *United States v. Al-Arian*

Sami al-Arian is a Palestinian university professor who was tried in federal court for material support of terrorism and other crimes.[197] His case caught the attention of federal criminal law scholars when the district court judge found a constitutional requirement that mens rea be proven for each element of material support of terrorism. The jury deadlocked on the terrorism support charge and

[196] *See* 8 U.S.C.A. § 1231(b)(3) (West Supp. 2007) (corresponding to the Convention Relating to the Status of Refugees, Geneva, July 28, 1951, art. 33, 19 U.S.T. 6223, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954)).
[197] United States v. Al-Arian, 267 F. Supp. 2d 1258, 1260 (M.D. Fla. 2003).

acquitted al-Arian on a number of other counts. Constitutional protections had seemingly saved al-Arian from a material support conviction. But in a trial under the MCA, al-Arian and other defendants tried for material support would not obtain such protections. This section reviews al-Arian's trial and examines some implications of using the MCA to try accused terrorist-supporting aliens such as al-Arian.

1. *Facts: Al-Arian and Islamic Jihad*

Al-Arian, a Palestinian who was raised primarily in Egypt, was a professor at the University of South Florida. He was also a prominent member of the Palestinian Islamic Jihad ("PIJ"); a United States government designated terrorist organization.[198] Al-Arian and several co-defendants were indicted in Tampa, Florida on February 19, 2003 on dozens of charges including conspiring to commit and support terrorism.[199] For current purposes, the relevant charges were conspiring to provide material support to a designated FTO in viola-

[198] The PIJ has been designated a Foreign Terrorist Organization under the Anti-Terrorism and Effective Death Penalty Act and a Specially Designated Terrorist under the International Emergency Economic Powers Act. For the FTO designation, see 62 Fed. Reg. 52, 650 (Oct. 8, 1997). For the SDT designation, effected by President Clinton in response to the Beit Lid terror attacks in Israel that killed over 20 people, see Exec. Order No. 12947, 60 Fed. Reg. 5079 (Jan. 23, 1995).
[199] *Al-Arian*, 267 F. Supp. 2d at 1260.

tion of the material support statute,[200] and conspiring to make or receive funds, goods, and services on behalf of the PIJ, a Special Designated Terrorist, in violation of the IEEPA.[201] These two conspiracy charges are hereafter referred to as "terrorism support."

The government's principal evidence against al-Arian and several co-defendants were recordings of 250 telephone calls between the alleged co-conspirators.[202] These telephone calls were recorded in the course of some 21,000 hours of wiretaps obtained pursuant to the FISA.[203] Among the hundreds of overt acts detailed in the indictment were soliciting and raising funds—for example, al-Arian allegedly wrote a letter to a man in Kuwait requesting funds for the PIJ, so that they could carry out more bombings, as well as support the families of recent suicide bombers, and provide management, organizational, and logistical support for the PIJ.[204] The defendants sought to dismiss the terrorism support counts in the indictment, arguing that these counts attempt to "criminalize their First Amendment rights of

[200] 18 U.S.C.A. § 2339B(a)(1).
[201] 50 U.S.C.A. § 1705(b) (charged as conspiracy under 18 U.S.C.A. § 371); *see e.g.*, United States v. Al-Arian, 308 F. Supp. 2d 1322, 1350-51 (M.D. Fla. 2004).
[202] *Al-Arian*, 267 F. Supp. 2d at 1260.
[203] *Id.*
[204] *Al-Arian*, 308 F. Supp. 2d at 1328 n.5.

speech in support of and association with the PIJ."[205] Specifically, they argued that the terrorism support charges were unconstitutional as they did not require either a "specific intent to further the unlawful activities of the PIJ, or intent to incite and a likelihood of imminent disorder."[206]

2. *Actual Outcome*

a. Constitutional Question

Following the holdings of Cold War-era cases challenging the prosecution of pro-Communist activity, the court held that the government would have to prove beyond a reasonable doubt that al-Arian and his co-conspirators had a specific intent with respect to each element of the criminal statute.[207] For conviction under section 2339B, the government thus had to prove that al-Arian knew (a) that the PIJ was a FTO or had committed unlawful activities that caused it to be designated and (b) that what he was providing to the PIJ was "material support."[208] To prove there was knowledge of "material support" required the government to show that the defendant knew that the

[205] *Id.* at 1333.
[206] *Id.*
[207] *See id.* at 1337-40.
[208] *Id.* at 1337-38.

support would further "the illegal activities" of PIJ.[209] The court required proof of the same specific intent—for example, knowledge with respect to each particular element of the statutory crime—for conviction under the IEEPA as well.[210] This liberal reading of mens rea elements into the relevant statutes was a major setback to the government's prosecution.[211]

b. Jury Verdict and Plea

The jury found al-Arian not guilty on eight counts and deadlocked on nine others, including the terrorism support charges.[212] Rather than face retrial on those nine counts, al-Arian pled guilty to a lesser charge of aiding PIJ with immigration and legal matters in

[209] *Al-Arian*, 308 F. Supp. 2d at 1337.
[210] *Id.* at 1340.
[211] Section 2339B was subsequently amended in the Intelligence Reform and Terrorism Protection Act of 2004 according to the less comprehensive mens rea standard set out in Humanitarian Law Project v. U.S. Dep't of Just., 352 F.3d 382, 397-402 (9th Cir. 2003), *vacated by* 382 F.3d 1154 (9th Cir. 2004). Intelligence Reform and Terrorism Protection Act of 2004, § 6603(b), Pub. L. No. 108-458, 118 Stat. 3638, *amending* 18 U.S.C.A. § 2339B(a)(1) (West Supp. 2007) stating:

> To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization [as defined in the statute], that the organization has engaged or engages in terrorist activity [as defined in the Immigration and Nationality Act], or that the organization has engaged or engages in terrorism [as defined in the Foreign Relations Authorization Act].

Nevertheless, other federal judges could still find that a specific intent requirement must be read into the term "material support" and thus produce a holding similar to *al-Arian*.
[212] Jennifer Steinhauer, *19 Months More in Prison for Professor in Terror Case*, N.Y. TIMES, May 2, 2006, at A14.

mid-April 2006, while the government decided to deport him.[213] It is unclear where al-Arian will be deported. As a Palestinian, he has no state of nationality, though he was born in Kuwait and reared in Egypt before spending the past thirty years in the United States.[214] On November 16, 2006, he was sentenced to another 18 months in prison for refusing to testify in a grand jury proceeding in Alexandria, Virginia. It now appears that he may not be released (and placed into deportation proceedings) until November 2008.[215]

3. *Military Commission Implications for* al-Arian

Al-Arian would likely have been convicted in a military commission. In a military commission, the government would have the advantage of prosecuting under a broader concept of material support. The definition of "material support for terrorism" under the MCA does not contain the specific intent requirement with respect to

[213] Meg Laughlin, *Judge sentences Al-Arian to the limit*, ST. PETERSBURG TIMES, May 2, 2006, at 1A; REUTERS, *Guilty Plea on Aiding Terrorists*, N.Y. TIMES, Apr. 18, 2006, at A24.
[214] Steinhauer, *supra* note 212; Associated Press, *U.S. to Deport Palestinian it Failed to Convict*, N.Y. TIMES, Apr. 15, 2006, at A10.
[215] Meg Laughlin, *Al-Arian Gets More Prison Time*, ST. PETERSBURG TIMES, Nov. 17, 2006, at 4B.

"material support" that the *al-Arian* court imposed.[216] Further, military commission judges are not authorized to engage in constitutional review of the MCA's crimes. A commission judge trying al-Arian would thus not read an additional mens rea requirement into material support of terrorism. The military commission crime of material support would thus not be as narrow as the federal crime under which al-Arian was tried. The broadened definition of material support alone would thus make al-Arian's conviction more likely.[217]

Further, al-Arian is slated to be deported after he serves out his sentence, probably in late 2008. However, given that al-Arian apparently does not have a nationality it is unclear which if any country would accept him. After release from federal prison, he may thus find himself in a classic *Zadvydas* situation—slated for removal, but with no such removal significantly likely. The derivative due process analysis might be different than in *Zadvydas* and *Nadarajah*, given that al-Arian might be detained as an alien terrorist under the alien

[216] 10 U.S.C.A. § 950v(b)(25)(A). The MCA definition of "material support" nevertheless includes the knowledge requirement adopted by *Humanitarian Law Project* and Congress for federal criminal purposes. *See supra* note 211; MMC, *supra* note 27, pt. IV, R. 6(a)(25)b(A)(2) & (B)(3).

[217] This analysis includes speculation as to the psychological differences between a civilian jury and a military commission which might affect the decisional outcomes of each.

terrorist detention statute,[218] not the general detention statutes under which Nadarajah, for example, was detained. The Supreme Court would not likely tolerate his indefinite and potentially life-long detention. Under civilian immigration detention, there is thus a possibility that al-Arian would be ordered released under a *Zadvydas*-type due process principle. Such an outcome might prompt the government to try by military commission suspected alien criminal terrorists like al-Arian.

V. CONCLUSION: CONGRESSIONAL AMENDMENT PROHIBITING DOMESTIC APPLICATION OF THE MCA IS WARRANTED

This Article has mapped out several critical liberty implications of domestic military commissions. Though not an exhaustive study of either the MCA or its domestic implications, it nevertheless highlights the MCA's potential to further imperil the liberty of aliens in the United States.[219] In sum, the MCA authorizes the deprivation of critical liberty interests by allowing for aliens to be indefinitely detained and tried for broad crimes on the basis of secret evidence and evidence seized in warrantless raids or through conduct amounting to

[218] 8 U.S.C.A. § 1226a (West 2006).

[219] David Cole penetratingly argued that the United States historically sacrifices the liberty rights of aliens in times of crisis, often with no appreciable policy benefit. *See* COLE, *supra* note 33. *See also* STONE, *supra* note 31.

torture. In the context of the government's already overstocked reserve of counter-terrorism tools, the unjust and unnecessary liberty costs of domestic military commissions warrant Congressional amendment of the MCA. Congress should amend the MCA to explicitly prohibit its application to aliens in the United States.

The Restoring the Constitution Act, introduced to the Senate in February 2007, would amend the MCA to eliminate several of the liberty concerns raised above.[220] First, it would narrow the definition of "unlawful enemy combatant" to include only aliens directly participating in hostilities against the United States in a zone of active combat or involved with the 9/11 attacks.[221] This provision would eliminate military commission jurisdiction over aliens who may be considered national security threats but who have no link to the battlefield or 9/11, such as aliens suspected of materially supporting terrorism. Second, it would restore habeas corpus review over detentions of "unlawful enemy combatants."[222] This would provide a

[220] Restoring the Constitution Act of 2007, *supra* note 115. The Harvard Law School National Security Research Group produced a helpful memorandum summarizing the provisions of this legislation. Memorandum from Harvard Law School National Security Research Group, Reviewing the Restoring the Constitution Act of 2007 (Feb. 19, 2007), http://www.aclu.org/safefree/general/28926leg20070219.html.
[221] Restoring the Constitution Act of 2007, *supra* note 115, § 2.
[222] *Id.* § 14.

means for individuals determined to be "alien unlawful enemy combatants" to challenge their detention and determination as such. Finally, the Restoring the Constitution Act includes a number of important guarantees in military commission proceedings. For example, any statement obtained through coercion would be inadmissible, regardless of the date on which it was obtained.[223] Further, the defense counsel would have greater right to disclosure of the sources, methods and activities underlying introduced evidence.[224] Likewise, the military judge would be empowered to dismiss the case if the defense cannot fairly proceed in light of classified evidence.[225]

Passage of the Restoring the Constitution Act of 2007 or a similarly ameliorative legislative package is imperative. Through federal criminal and immigration regulations, the federal government is already well-prepared to prevent future acts of terrorism and bring terrorists to justice through civilian and administrative measures. Another layer of military authority for the detention and trial of domestically-captured terrorists is unnecessary and damaging to the liberty interests of non-citizens, especially those of now suspect Middle

[223] *Id.* § 6.
[224] *Id.* § 9.
[225] *Id.*

Eastern or South Asian background.[226] Thus, Congress should amend the MCA and explicitly prohibit military commissions for domestic-captured terrorism suspects. These individuals can already be preventatively detained or brought to justice through the immigration and federal criminal schemes.

[226] The militarization of anti-terrorism measures in the United States is communally self-damaging. Jose Padilla's criminal defense lawyers captured such a sentiment with this epigraph from Fredreich Nietzche, which was recently appended to the argument section in their brief: "Whoever fights monsters should see to it that in the process he does not become a monster. And when you look long into an abyss, the abyss also looks into you." Def.'s Mot. to Dismiss for Outrageous Government Conduct at 7, (Oct. 5, 2006), United States v. Padilla, No. 04-60001, 2006 U.S. Dist. LEXIS 84497, at *1 (S.D. Fla. Nov. 17, 2006), *available at* http://www.discourse.net/archives/docs/Padilla_Outrageous_Government_Conduct.pdf (quoting FREDREICH NIETZCHE, BEYOND GOOD AND EVIL 89 (Walter Kaufmann, trans., Vintage Books 1966) (1886)). The brief argued that the indictment against Padilla should be dismissed on account of "outrageous government conduct," including torture. *Id.* at 17-19.