Military Commissions in America? Domestic Liberty Implications of the Military Commissions Act of 2006

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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 for the Popular Front for the Liberation of Palestine.³ When the government failed to come forward with potentially exculpatory evidence and other information, the immigration judge barred presentation of the case in chief against Hamide and Shehadeh.⁴ Their deportation was accordingly terminated.⁵ This outcome

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 Committee, 525 U.S. 471 (1999).
² The L.A. Eight included seven Palestinians – among them Hamide and Shehadeh – and a Kenyan. All eight were charged in 1987 with violations of the anti-Communist McCarran-Walter Act and deportability. Interview with David Cole, Ten Years of the Los Angeles Eight Deportation Case, 202 MIDDLE EAST REPORT 41 (1996).
demonstrates the importance of procedural safeguards in protecting the liberties of individuals who might unjustly be perceived to threaten national security. 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), important safeguards of liberty would be wholly absent.

The MCA authorizes the trial by military commission of “alien unlawful enemy combatants” for crimes of war and terrorism. Commissions feature broad jurisdiction, potentially indefinite detention 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 concerns the MCA as it might be applied to aliens living domestically who are perceived to threaten national security. What liberty interests

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\[6\] The MCA, 10 U.S.C. §§ 948a, et seq., Pub. L. No. 109-366, was passed on September 29, 2006 and signed into law on October 17, 2006.

\[7\] 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 (1987) (“In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”).

\[8\] Professor Neal Katyal testified that the MCA establishes a “framework for the war on terror” that could endure generations. Testimony of Professor Neal Katyal, Senate Armed Services Committee (July 19, 2006).

\[9\] 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 (2006); Aziz Huq,
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. This argument about the liberty costs of military commissions is developed in four substantive parts below.

The first part briefly establishes the “war on terrorism” context in which domestic military commissions would function. Preventive incapacitation of national security threats is the overarching policy imperative in this context. 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. Linked to this policy imperative are the government’s robust criminal and immigration powers. These powers provide a number of grounds to detain, prosecute and deport aliens suspected of being terrorists or terrorist supporters. Further context is provided by the various legislative and executive visions of how


10 In this article, “domestic” describes only the territory of the fifty states and the District of Columbia. _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).

11 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.” George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), _available at_ http://www.whitehouse.gov/news/releases/20010920-8.html.
the MCA is to be applied. While a number of the MCA’s proponents focus on the its authorization of military commissions for those captured abroad, the plain language of the MCA and other of its proponents support an understanding that the MCA could be applied anywhere in the world, including in the United States. Finally, domestic military commissions must be set against the constitutional protections traditionally guaranteed aliens in the United States and the American tradition of separating domestic governance from the military.

The second part 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.

The third part 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 as a result of conduct that may amount to torture. Finally, this part reviews the MCA’s overbroad definitions of crimes, which enable the government to pull individuals who may be undeserving of criminal sanction into the MCA’s detention and trial scheme.
The final substantive part of this article then examines the hypothetical effects of domestic military commissions on two real cases. The first of these cases, *Nadarajah v. Gonzales*, emerged from the immigration context and concerned the due process limitations on the detention of a refugee suspected of terrorist affiliation.12 The second of these cases, *United States v. Al-Arian*, was a federal criminal terrorism trial. It turned upon the constitutional construction of a *mens rea* requirement in the material support for terrorism statute.13 Both cases were seen as defeats for the government. This final section thus seeks to understand 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 procedural and liberty rights, including those of asylum seekers from countries with known terrorist activity.14

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12 443 F.3d 1069, 1072 (9th Cir. 2006).


14 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 be “material support of terrorism” and a bar to asylum. *See* Human Rights First, *Abandoning the Persecuted: Victims of Terrorism and Oppression Barred from Asylum* 2 (2006), available at 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* 8 U.S.C. §1226a; *infra* Part IV.A.
This piece is not an exhaustive study of either military commissions or their potential
domestic effect.\textsuperscript{15} Other angles could be taken to these issues. However, in light of the
following analysis, the threat of domestic military commissions to certain aliens is clear,
normatively unsettling, and ultimately unnecessary. For these reasons, this piece concludes that
Congress should amend the MCA to specifically prohibit its domestic application.

\section{Counter-terrorism and Military Commissions in Brief}

The MCA is principally aimed at the detention and trial of “alien unlawful enemy
combatants” captured abroad.\textsuperscript{16} However, it authorizes military commissions anywhere in the
world, including the United States.\textsuperscript{17} 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 \textit{Hamdan v. Rumsfeld}.\textsuperscript{18} That case invalidated military commissions established by President Bush to try
Guantanamo Bay detainees.\textsuperscript{19} A primary congressional purpose of the MCA was thus to

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\item[\textsuperscript{15}] For the sake of substantive manageability it necessarily simplifies certain aspects of criminal
and immigration law and federal jurisdiction.

\item[\textsuperscript{16}] \textit{See infra} notes 20-21.

\item[\textsuperscript{17}] \textit{See infra} notes 23-27.

\item[\textsuperscript{18}] \textit{Hamdan v. Rumsfeld}, 126 S. Ct. 2749 (2006).

\item[\textsuperscript{19}] The Court all but invited the President to request authorization for military commissions from
Congress. \textit{Id.}, 126 S. Ct. at 2799 (“Nothing prevents the President from returning to Congress to
seek the authority [for military commissions] he believes necessary.”).

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authorize the trial of “enemy combatants” at Guantanamo Bay. For its part, the Bush Administration announced its intent to use MCA-authorized commissions to try terrorists who orchestrated the 9/11, USS Cole and 1998 African embassy attacks. A number of the MCA’s proponents in Congress and the Bush Administration thus contemplate that military commissions will be used to try foreign-captured individuals. While the MCA may primarily concern

20 See 152 Cong. Rec. S10266, S10268 (September 27, 2006) (MCA sponsor Senator Lindsey Graham discussing Guantanamo Bay); 152 Cong. Rec. S10269 (September 27, 2006) (Senator Jon Kyl discussing same); 152 Cong. Rec. S10269 (September 27, 2006) (Senator John Cornyn discussing same); 152 Cong. Rec. S10403 (September 28, 2006) (Cornyn discussing same); 152 Cong. Rec. H7939 (September 29, 2006) (MCA sponsor Representative Duncan 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. S10263 (September 27, 2006) (Senator Bill Frist discussing prosecution of terrorists caught on battlefield). Cf. John W. Warner, et al., Look Past the Tortured Distortions, THE WALL STREET JOURNAL A10 (October 2, 2006) (discussing that trial by military commission of “the people who shoot at us and those who aid and abet the trigger-men”).


22 As of April 2007, only Guantanamo Bay detainee David Hicks, an Australian captured in Afghanistan, had been charged under the new MCA scheme. Josh White, Australian is Charged Under ’06 Law, WASH. POST A3 (March 2, 2007). He pled guilty to material support of terrorism on March 26, 2007. Raymond Bonner, Australian Detainee’s Life of Wandering Ends with Plea, N.Y. Times A17 (March 28, 2007).
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. The Manual for Military Commissions (Manual), which implements parts of the MCA, states that the MCA “applies in all places.” Further, several proponents of the MCA in the Senate expressed an intent that the MCA would apply universally. Congressional

23 The only limits to the MCA’s application relate to personal and subject matter jurisdiction. See infra Part II.A & B.


25 Mil. Comm. R. 201(a)(2) (“The M.C.A. applies in all places.”).

26 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 money to carry out terrorism, wherever they are – again, only aliens and those who are preparing and using so many false documents.” 152 Cong. Rec. S10250 (September 27, 2006) (emphasis added). See also 152 Cong. Rec. S10404 (Senator Jeff Sessions describing how MCA would be applicable to
opponents of the MCA also emphasized their concern at the MCA’s domestic application. 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. Indeed, the individuals who have not received Guantanamo Bay-specific Combatant Status Review Tribunals).

27 See, e.g., 152 Cong. Rec. S10260 (September, 27 2006) (Senator Jeff Bingaman warning that the MCA would apply even to aliens in the United States); 152 Cong. Rec. H7946 (September 29, 2006) (Representative Jon Conyers warning of the same).

28 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 (2005). Among the more famous of these cases to make their way to the Supreme Court were Ex Parte Quirin, 317 U.S. 1 (1942), which validated trial by military commission of German saboteurs who surreptitiously entered the United States, and Ex parte Milligan, 71 U.S. 2 (1866) (plurality op.), which invalidated trial by military commission of disloyal individuals while the civilian courts remained open. 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 (citing William Winthrop, Military Law and Precedents 831 (rev. 2d ed. 1920)) (“The military commission, a tribunal neither mentioned in the Constitution nor created by statute, was born of military necessity.”). Cf. 10 U.S.C. § 818 (statute authorizing regular military courts martial to try violators of the law of war).
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.⁹⁹

Military commissions further the government’s post-9/11 policy of using all available means to preventively incapacitate individuals perceived to be security threats.³⁰ This policy is likely to be all the more prominent if the United States suffered another homeland terrorist attack.³¹ Preventive incapacitation has been used abroad – through kidnappings,³² indefinite

²⁹ Al-Marri v. Wright, Respondent-Appellee’s Motion to Dismiss for Lack of Jurisdiction, No. 06-7427 (Nov. 13, 2006) (4th Cir.).


³¹ 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 especially BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM (2006); idem, The Emergency Constitution, 113 YALE L. J. 1029 (2004); Martha Minnow, The Constitution as a Black Box During National Emergencies: Comment on Bruce Ackerman’s
detentions, and assassinations – and in the United States – through detention under the material witness statute, immigration authority, and military authority, and through


33 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) (“It is the government’s position that once 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 on a case by case basis 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, 416 F. Supp. 2d. 250 (E.D.N.Y. 2006) (dismissing on national security grounds claims of Canadian-Syrian dual citizen sent by U.S. officials from John F. Kennedy airport in New York to Syria where he was detained and allegedly tortured).

34 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 A11 (December 15, 2002).
prosecution under federal criminal law.38 Assessing the MCA’s impact on the liberty of affected individuals in these contexts is of great importance.39 This paper aims to do just that by disentangling 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.40


36 See COLE, supra note 30, at 26-35.

37 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. Al-Marri v. Wright, Respondent-Appellee’s Motion to Dismiss for Lack of Jurisdiction, No. 06-7427 (Nov. 13, 2006) (4th Cir.).

38 See infra notes 40-47.


40 On the government’s national security-related criminal and immigration powers, see Aziz Huq, Policing Terror, Policing Islam: Federal Criminal Law Enforcement, Counter-Terrorism and America’s Muslim Minority Communities, in RICHARD C. LEONE & GREG ANDRIG, JR., LIBERTY UNDER ATTACK: RECLAIMING OUR FREEDOMS IN AN AGE OF TERROR (forthcoming 2007); Chesney, Beyond Conspiracy? supra note 30; idem., The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention, 42 HARVARD J. ON LEGIS. 1 (2005); COLE, ENEMY
Among the most significant of these laws are the criminal material support statutes. These criminalize the material support of terrorism and the material support of any designated foreign terrorist organization (FTO). A wide range of activity is prosecuted under these statutes, including donating to the charitable branch of an FTO, passing along the communications of a terrorist, and attending a militant training camp abroad. Beyond material support, the government charges a range of conspiracy and lesser crimes against purported terrorists. The government also uses its expansive immigration powers to detain and deport aliens perceived to threaten national security. Criminal and immigration powers thus combine to authorize


41 18 U.S.C. § 2339A.

42 18 U.S.C. § 2339B.


46 Chesney, supra note 30, at *28.

47 Dan Eggen & Julie Tate, U.S. Campaign Produces Few Convictions on Terrorism Charges; Statistics often Lesser Crimes, WASH. POST A1 (June 12, 2005).

48 See generally, Cole, Enemy Aliens, supra note 30. See also 8 U.S.C. § 1227(a)(4)(B) (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
vigorous legal action against aliens perceived to be national security threats. The relationship between the government’s existing criminal and immigration powers and its powers under domestic military commissions are discussed in more depth below.49

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 domestically have constitutional and statutory rights.50 In contrast, courts generally hold that aliens outside the United States lack constitutional rights51 and possess

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49 See infra Parts III & IV.


51 Johnson v. Eisentrager, 339 U.S. 763 (1950) (aliens captured and tried abroad have no Fifth Amendment rights); United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (aliens searched abroad have no Fourth Amendment rights). The Supreme Court has not yet determined whether an alien captured and detained abroad may invoke the Suspension Clause, U.S. CONST., art. I, § 8, cl. 3, in support of a petition for habeas corpus. See Boumediene v. Bush, Slip. Op. No. 05-
statutory rights only where specifically provided for by Congress. Domestic military commissions thus occupy constitutional territory not cognizable in extraterritorial military commissions.

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

5062 (February 20, 2007) (D.C. Cir.) (holding that such an alien has no constitutional right to habeas corpus review), cert. denied – S. Ct. –, 2007 WL 957363 (April 2, 2007).

52 For example, see the discussion in Rasul, supra note 10, concerning the statutory basis of extraterritorial habeas corpus jurisdiction.

53 See infra Part II.D.

54 See generally, ABRAMS, supra note 40, at 609-631.

55 See, e.g., STONE, supra note 28.

56 See 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.’”); Posse Comitatus Act, 18 U.S.C. § 1385 (“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 imprisoned not more than two years, or both.”). These materials were cited in ABRAMS, supra note 40, at 609-10. See also Ex parte Milligan, 71 U.S. at 141-42 (Chase, C.J., concurring) (discussing three forms of
National Security Agency’s wiretapping program, now combine with the MCA and other legislation to blur the line between domestic policing and military authority. 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. But 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.

II. SCOPE AND STRUCTURE OF THE NEW MILITARY COMMISSIONS

This section briefly maps the scope and structure of the new military commissions, as relevant 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


58 See USA PATRIOT Act § 104 (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) (cited in ABRAMS, supra note 40, at 611).
Any “alien unlawful enemy combatant” is subject to military commission jurisdiction under the MCA.\textsuperscript{59} Personal jurisdiction is thus established by an individual being an “alien” and also an “unlawful enemy combatant.”\textsuperscript{60} As defined in the MCA, an alien is any non-citizen.\textsuperscript{61} This “alien” category sweeps broadly, including the full range of non-citizens, from undocumented immigrants, to individuals with student visas, to lawful permanent residents. The category “unlawful enemy combatant” is likewise broad.

An “unlawful enemy combatant” is either (1) anyone who “has engaged in hostilities or who has purposefully and materially supported hostilities against the United States,”\textsuperscript{62} or (2) a person who has ever been or ever will be determined to be an “unlawful enemy combatant” by a Combatant Status Review Tribunal (CSRT)\textsuperscript{63} or “another competent tribunal” established under authority of the President or Secretary of Defense.\textsuperscript{64} 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

\textsuperscript{59} MCA § 3, 10 U.S.C. § 948c; Mil. Comm. R. 202(a).

\textsuperscript{60} Mil. Comm. R. 201(b)(3)(D) (“The accused must be a person subject to military commission jurisdiction.”).

\textsuperscript{61} MCA § 3, 10 U.S.C. § 948a(3). The terms “alien” and “non-citizen” are used interchangeably in this piece.

\textsuperscript{62} MCA § 3, 10 U.S.C. § 948a(1)(i).

\textsuperscript{63} MCA § 3, 10 U.S.C. § 948a(1)(ii).

\textsuperscript{64} \textit{Id.}; Mil. Comm. R. 202(b).
have never set foot on a traditional battlefield to be “enemy combatants” subject to military
detention and justice.65

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.66 The other route
to enemy combatant status involves a link to “hostilities.” 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.67 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

65 The Bush Administration has designated as “enemy combatants” aliens captured abroad
domestically (currently before the Fourth Circuit Court of Appeals in al-Marri v. Wright, No. 06-
7427), citizens captured abroad (litigated in Hamdi v. Rumsfeld, 542 U.S. 507 (2004)), and
citizens captured domestically (litigated in Padilla v. Rumseld, 423 F. 3d 386 (4th Cir. 2005)).
66 MCA § 3, 10 U.S.C. § 948a(1)(ii), MCM Rule 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].” MCA § 3, 10 U.S.C. § 948d(c); Mil. Comm. R. 202(b).
67 MCA § 3, 10 U.S.C. § 948a(1)(i).
In the aftermath of *Rasul v. Bush*, CSRTs were instituted to determine whether each Guantanamo Bay detainee was in fact – as each had been labeled – an “unlawful enemy combatant.” Guantanamo Bay remains the focus of CSRT-related issues. Indeed, the Detainee Treatment Act of 2005 (DTA) spells out CSRT procedures only for Guantanamo Bay detainees. 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

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68 *See supra*, note 10.


designated an “enemy combatant,” will receive a CSRT if his habeas corpus petition is dismissed.\textsuperscript{72} 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.

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.”\textsuperscript{73} The hostilities-linked definition of “unlawful enemy combatant” is disjunctive of the CSRT-related definition discussed above.\textsuperscript{74} This suggests if 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.\textsuperscript{75} An individual could then be subject to military commission jurisdiction solely on the basis of a linkage to hostilities by the Secretary of

\textsuperscript{72} Al-Marri v. Wright, Respondent-Appellee’s Motion to Dismiss for Lack of Jurisdiction, No. 06-7427 (Nov. 13, 2006) (4th Cir.).

\textsuperscript{73} MCA § 3, 10 U.S.C. § 948a(1)(i).

\textsuperscript{74} Between the hostilities-related definition and CSRT-related definition of “unlawful enemy combatant,” the MCA includes the term “or.” MCA § 3, 10 U.S.C. § 948a(1)(i).

\textsuperscript{75} Discussion, MCM Rule 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.”).
Defense or another official. This would involve the Secretary of Defense or another executive officer designating as an “unlawful enemy combatant” an individual suspected of engaging in hostilities or purposefully and materially supporting hostilities. Such a designation could nevertheless be challenged before the military commission itself.

Expansive government interpretation of the concept of hostilities informs how the MCA’s statutory term “hostilities” might be applied. The government has consistently sought


77 The Secretary of Defense, in consultation with the Attorney General prescribes the “pretrial, trial, and post-trial procedures” of military commissions. MCA § 3, 10 U.S.C. § 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.

78 Discussion, Mil. Comm. R. 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.”).

79 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
to expand the legal concept of hostilities. For example, the government recently argued 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. In contrast, the law of war weds the concept of hostilities to the battlefield.

80 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: “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.” *Quoted in Jean-Marie Henkaerts & Louise Doswald-Beck, 2 Customary International Humanitarian Law* 113 (2004).

81 Respondents’ Motion to Dismiss for Lack of Subject Matter Jurisdiction, *Al-Marri v. Wright*, 06-7427, at 4-5 (November 13, 2005). *Contrast Padilla v. Rumsfeld*, 423 F. 3d 386 (4th Cir. 2005) (President authorized to detain as an “enemy combatant” individual who carried weapon on Afghanistan battlefield against U.S. but who was arrested in the U.S.).
For a civilian to become an “enemy combatant,” that civilian must commit violence against human or physical enemy forces.83 Terrorism does not even traditionally amount to hostilities unless there is a nexus to actual physical battlefield fighting.84 That the battlefield may at times extend into the United States was recognized by the Supreme Court in *Ex parte*

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83 *HENKAERTS & DOSWALD-BECK, supra note 80, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 23.*

84 *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 humanity, or they must involve State authorities and exhibit a *trans-national 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.”)*
Quirin.\textsuperscript{85} 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.\textsuperscript{86} Quirin’s notion of an expanded battlefield would seem to unravel under less exceptional facts.\textsuperscript{87} For example, the Quirin court would likely be shocked to learn that a purely domestic action such as conspiracy to materially support terrorism\textsuperscript{88} could be sufficient to establish “unlawful enemy combatant” status.\textsuperscript{89} Nevertheless, in light of the expansion of the concept of hostilities and the MCA’s statutory scheme of crimes, for MCA purposes, “hostilities” might include actions lacking any nexus with armed conflict or war.

\begin{footnotesize}
\begin{enumerate}
\item[85] 317 U.S. 1 (1942).
\item[86] 317 U.S. at 30-31.
\item[87] The Supreme Court in Hamdi v. Rumsfeld, 542 U.S. 507 (2004), 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[].” Id. at 521.
\item[88] MCA § 3, 10 U.S.C. § 950v(b)(28) (criminalizing conspiracy); MCA § 3, 10 U.S.C. § 950v(b)(25)(A) (criminalizing material support of terrorism).
\item[89] Further, the Inter-American Commission on Human Rights has determined that such actions cannot legally be categorized as hostilities: “Civilians whose activities merely support the adverse party’s war or military effort or otherwise only indirectly participate in hostilities cannot on these grounds alone be considered combatants.” Inter-American Commission on Human Rights, Third report on human rights in Colombia, Doc. OEA/Ser.L/V/II.102 Doc. 9 rev. 1 § 56 (February 26, 1999).
\end{enumerate}
\end{footnotesize}
Under the MCA, interpretation of statutory terms like “hostilities” is the province of the government, not the courts. 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. 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.” More specifically, the MCA purports to “codify offenses that have historically been triable by military commissions.” Indeed, the majority of

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91 Al-Marri v. Wright, supra note 76, will test the federal courts’ tolerance for a definition of “hostilities” inclusive of domestic activity not amounting to war-like acts. The Court of Appeals for the Fourth Circuit heard oral arguments in al-Marri in early February 2007.

92 MCA § 3, 10 U.S.C. § 948b(a).

93 MCA § 3, 10 U.S.C. § 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., 10 U.S.C. § 950p(b) (“Because the provisions of this subchapter … are declarative of existing law, they do not preclude trial for crimes that
crimes enumerated in the MCA are established war crimes. For example, attacking civilians,\textsuperscript{94} torture,\textsuperscript{95} attacking or destruction of protected property,\textsuperscript{96} and murder of protected persons\textsuperscript{97} are all established war crimes triable under the MCA.\textsuperscript{98} But other MCA-enumerated crimes are new additions to the corpus of war crimes or meaningfully expand the scope of existing war crimes.\textsuperscript{99}

C. Composition of Military Commissions

In addition to the accused, military commission participants include a military judge;\textsuperscript{100} trial counsel, effectively the prosecutor;\textsuperscript{101} military defense counsel;\textsuperscript{102} and in non-capital cases at least five members, effectively the jury.\textsuperscript{103} The accused may additionally retain civilian

\textsuperscript{94} MCA § 3, 10 U.S.C. § 950v(b)(3).

\textsuperscript{95} MCA § 3, 10 U.S.C. § 950v(b)(11).

\textsuperscript{96} MCA § 3, 10 U.S.C. § 950v(b)(4), (16).

\textsuperscript{97} MCA § 3, 10 U.S.C. § 950v(b)(1).

\textsuperscript{98} For a discussion of these and other well-established war crimes see CASSESE, supra note 84, at 55-7, 77-8.

\textsuperscript{99} See infra Part III.D.

\textsuperscript{100} MCA § 3, 10 U.S.C. § 948j; MCM Rule 501(a)(1).

\textsuperscript{101} MCA § 3, 10 U.S.C. § 948k; MCM Rule 501(b).

\textsuperscript{102} MCA § 3, 10 U.S.C. § 948k; MCM Rule 501(b).

\textsuperscript{103} MCA § 3, 10 U.S.C. § 948m; MCM Rule 501(a)(1). If a penalty of death is sought, the commission must have at least twelve members. MCA § 3, 10 U.S.C. § 949m(c); Mil. Comm. R. 501(a)(2).
counsel for the military commission, at no expense to the government.\textsuperscript{104} Members of a military commission vote by secret ballot.\textsuperscript{105} 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.\textsuperscript{106}

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. For the sake of clarity, these two aspects of judicial review under the MCA and its companion statute the Detainee Treatment Act are considered in turn.

1. Elimination of Habeas Review

The writ of habeas corpus generally guarantees judicial review to an individual seeking to challenge the lawfulness of his executive detention.\textsuperscript{107} Nowhere are the guarantees of habeas review stronger than in the domestic context.\textsuperscript{108} MCA Section 7 nevertheless purports to

\textsuperscript{104} Mil. Comm. R. 506(a).

\textsuperscript{105} MCA § 3, 10 U.S.C. § 949l(a).

\textsuperscript{106} MCA § 3, 10 U.S.C. § 949m(a), § 949m(b)(2). A sentence of death requires unanimity among the members. MCA § 3, 10 U.S.C. § 949m(b)(D).

\textsuperscript{107} The writ of habeas corpus – a common law device that dates back at least to the Magna Carta – is codified at 28 U.S.C. 2241. \textit{See generally} William F. Duker, \textit{A Constitutional History of Habeas Corpus} (1980).

\textsuperscript{108} This proposition was affirmed even in the post-9/11 “war on terrorism” context in \textit{Hamdi}, 542 U.S. 507, 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 op.). \textit{See also}
eliminate habeas corpus review for any individual who has been determined to be an “alien enemy combatant” or who is “awaiting such determination.”109 This provision amends the habeas-stripping provisions of the DTA,110 which the Supreme Court in Hamdan determined not to apply retroactively.111 This provision is also potentially very broad given its “awaiting such determination” language. To divest federal courts of jurisdiction over a habeas corpus petition, the government would seemingly need to only plead that the petitioner is awaiting determination as an “alien enemy combatant.”112

Several domestic ramifications of the MCA’s purported elimination of habeas review are being litigated in al-Marri v. Wright.113 Al-Marri is a Qatari citizen who entered the United States on a student visa on September 10, 2001, was later indicted and reindicted on credit card

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109 MCA § 7(a), amending 28 U.S.C. 2241(e) (“No court, justice or judge shall have jurisdiction to 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 be lawfully detained as an enemy combatant or is awaiting such determination.”).

110 DTA § 1005(e), amending 28 U.S.C. 2241(e).

111 Hamdan, 126 S. Ct. at 2764.

112 Two bills recently introduced in the Senate seek to repeal the MCA’s habeas stripping provisions. See Restoring the Constitution Act of 2007, 110 S. 576 § 14 (Feb 13, 2007); Habeas Corpus Restoration Act of 2007, 110 S. 185 § 2 (January 4, 2007).

113 See supra notes 72 & 76 and accompanying text.
and bank fraud, and has been detained as an “enemy combatant” and alleged al-Qa‘ida “sleeper agent” in a Naval 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.\(^{114}\) Al-Marri appealed to the Fourth Circuit. However, after passage of the MCA, the government moved to dismiss al-Marri’s petition on the grounds that MCA Section 7 eliminates federal court jurisdiction to review the lawfulness of his detention.\(^{115}\)


\(^{115}\) Specifically, the government argued that al-Marri was an alien enemy combatant within the scope of MCA Section 7 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. Al-Marri v. Wright, Respondent-Appellee’s Motion to Dismiss for Lack of Jurisdiction, No. 06-7427 (Nov. 13, 2006) (4th Cir.). 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 7 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 7 violates Equal Protection by purporting to eliminate habeas jurisdiction only for aliens. Al-Marri v. Wright, Petitioner-Appellant’s Response to Respondent-Appellee’s Motion to Dismiss for Lack of Jurisdiction, 06-7427 (Dec. 12, 2006) (4th Cir.). 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. Al-Marri v. Wright,
The outcome of the habeas-stripping question in al-Marri will thus form one part of the puzzle as to how much judicial 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 the detention. But if the government prevails, then a domestic detainee would receive only the limited D.C. Circuit review discussed below.

2. **Limited Review by the D.C. 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 Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”). The first stage of review takes place within the Department of Defense, at the Court of Military Commission Review. From the Court of Military Commission Review, the convicted individual may petition for review to the D.C. Circuit. Ultimate review rests with the Supreme Court.

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116 MCA § 9; DTA § 1005(e)(3). *See also* Mil. Comm. R. 1110 (right to appellate review may be waived).


118 Mil. Comm. R. 1205(a).

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.\textsuperscript{120} The D.C. Circuit’s scope of review is limited to two matters. It may review “whether the final decision [of the military commission] was consistent with the standards and procedures specified for a military commission.”\textsuperscript{121} It may also review 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.”\textsuperscript{122} This second type of review will prove most critical in any domestic military commissions. But 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 domestic-captured individual.\textsuperscript{123} But the D.C. Circuit could of course ratchet down the scope and strength

\textsuperscript{120} MCA § 9(1); DTA § 1005(e)(3)(A).
\textsuperscript{121} MCA § 9(4); DTA § 1005(e)(3)(D)(i).
\textsuperscript{122} DTA § 1005(e)(3)(D)(ii).
\textsuperscript{123} Congressional supporters of the MCA cited in floor debate Johnson v. Eisentrager, 339 U.S. 763 (1950) and United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) when stressing that “enemy combatants” have no constitutional rights. See, e.g., Cong. Rec. S10268 (September 27, 2006) (Senator 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
of constitutional rights in light of the “national security” implications of the military commissions. It is further 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 the 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.

A. Indefinite Detention

Constitutional rights of aliens in the U.S. Congress cannot viably legislate to diminish the substantive constitutional rights of aliens on the basis of Separation-of-Powers, see Marbury v. Madison, 5 U.S. 137 (1803); City of Boerne v. Flores, 521 U.S. 507 (1997), and an unbroken chain of cases holding that aliens legally in the United States have constitutional rights, see Fong Yue Ting v. United States 149 U.S. 698 (1893), Wong Wing v. United States, 163 U.S. 228 (1896), Zadvydas v. Davis, 533 U.S. 678 (2001).

Indefinite detention is unconstitutional in both the criminal and immigration contexts. 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. 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.


The problem of potentially indefinite detention is underscored by the circular nature of limited judicial review by the D.C. Circuit.\textsuperscript{128} As discussed above, the D.C. Circuit may review final determinations of CSRTs and military commissions.\textsuperscript{129} 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 D.C. Circuit 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.\textsuperscript{130} But where the MCA scheme fails to guarantee process to challenge potentially indefinite detention, it also fails to guarantee sufficient procedural safeguards against unjust conviction and punishment.

\textsuperscript{128} See supra Part II.D.2.

\textsuperscript{129} DTA § 1005(e)(2) & (3).

\textsuperscript{130} Though Guantanamo Bay detainees receive CSRTs, many face indefinite detention without trial by military commission. The government has identified about two dozen Guantanamo Bay detainees for potential trial. It has announced no plans to try the nearly 435 other detainees who are being held as “enemy combatants.” This group thus faces the realistic possibility of indefinite detention. Richard B. Schmitt & Julian E. Barnes, \textit{Bush Signs Tough Rules on Detainees}, L.A. TIMES A1, October 18, 2006.
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. 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.\footnote{MCA § 3, 10 U.S.C. § 949d(f)(2)(A).} There are no requirements that these alterations meet particular levels of detail or accuracy, though they should conform to a fairness standard reviewed by the military judge.\footnote{Mil. Comm. R. Evid. 505(e)(4).}

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.”\footnote{MCA § 3, 10 U.S.C. § 949(f)(2)(B).} 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.”\footnote{MCA § 3, 10 U.S.C. § 949d(f)(2)(B).} 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.

Further, the accused has no right to obtain exculpatory evidence if such evidence is
designated to be classified by an executive branch official. 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.

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

(substitutions for classified information to be provided to a defendant). See also United States v.
Moussaoui, 382 F.3d 453 (4th Cir. 2004), cert. denied 125 S. Ct. 1670 (2005) (finding adequate
substitutions to access to classified witnesses outside the CIPA framework).
made available to that suspect. 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 domestic-captured aliens who are subject to military commissions.

C. Weakened Exclusionary Rules

The exclusion of improperly obtained evidence is a linchpin of the criminal justice system. But the MCA allows for the introduction of two forms of evidence that ordinarily would be excluded in federal criminal 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 to be excluded in military commissions. This means that the police, FBI or any other federal agency could raid an individual’s house in the U.S. without a warrant and use evidence seized in such raid against

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139 8 U.S.C. § 1533. See also 8 C.F.R. § 1003.46 (allowing for submission of information to immigration court under seal where such information would if disclosed harm the “national security” or “law enforcement interests”).


141 MCA § 3, 10 U.S.C. § 949a(b)(2)(B).
that individual before a military commission. With no exclusionary rule to deter such behavior, the government may undertake regular raids on the least of suspicion—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. The non-exclusion of evidence 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.

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142 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, 792-794 (N.D. Ill. 2006). As the defendants in that case were acquitted, 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. § 1801, et seq., which governs all foreign intelligence surveillance. 143 It is worth noting that United Kingdom 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 suspicion that the suspect has committed or is about to commit a particular offense. See Kim Lane Schepele, Other People’s PATRIOT Acts: Europe’s Response to September 11, 50 LOY. L. REV. 89, 130 (2004).

Evidence obtained by coercion that may amount to torture is also not excluded in military commissions.\footnote{145} Two distinct schemes relating to the DTA’s date of enactment\footnote{146} determine how allegedly coerced statements are treated.\footnote{147} A statement obtained before the DTA’s enactment in which “the degree of coercion is debated” may be admitted if the circumstances render the statement reliable and probative and if justice would best be served by its admission.\footnote{148} Thus a statement obtained in this period may be admitted even if it was clearly coerced, i.e. the result of 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 debated” may be admitted if the circumstances render the statement reliable and probative, justice would best be served by its admission, and the interrogation did not amount to “cruel, inhuman, or degrading treatment” as prohibited by the Fifth, Eighth, and Fourteenth

\footnote{145} The exclusionary rule applies to statements obtained by torture. MCA § 3, 10 U.S.C. § 948r(b). 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.

\footnote{146} The DTA was signed into law on December 30, 2005. It mandates torture-free interrogation procedures. DTA § 1003.

\footnote{147} Coerced statements are excluded in criminal trials. \textit{See, e.g.}, \textit{Brown v. Mississippi}, 297 U.S. 278, 286 (1936).

\footnote{148} MCA § 3, 10 U.S.C. § 948r(b), (c).
Amendments. As regards United States practice, the constitutional standard for “cruel, inhuman, or degrading treatment” is the functional standard for torture. In other words, 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 prohibitions against particular actions, but on a “shocks the conscience” totality of the circumstances test. 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 all the greater when the statement was obtained by foreign agents. Recent

149 MCA § 3, 10 U.S.C. § 948r(d); DTA § 1003(d).

150 See DTA § 1003(d) (prohibiting “cruel, inhuman, or degrading treatment,” i.e. torture, of individuals in the custody of the government); United States Reservations, Declaration and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984 (pegging United States’ understanding of torture to “cruel, inhuman, or degrading treatment”).

151 The constitutional “cruel, inhuman, or degrading” standard doesn’t provide for a bright-line definition of torture as it requires that 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 708, 774 (N.D. Ill. 2006).

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.\textsuperscript{153} 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 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.\textsuperscript{154}

In sum, the MCA provides expansive exceptions to the Fourth and Fifth Amendment exclusionary doctrines. These exceptions occupy a place among several evidentiary provisions

\textsuperscript{153} See Abu Ali, 396 F. Supp. 2d at 372-81 (court determined on the basis of extensive testimony by Saudi police and custodial officials and expert witnesses that defendant’s inculpatory statements while in Saudi custody were not involuntary or the result of torture); Marzook, 435 F. Supp at 741-73 (court determined on the basis of testimony by Israeli interrogators and others that defendant’s statements while in Israeli custody were not involuntary).

\textsuperscript{154} 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.
that significantly depart from guarantees entrenched in the federal criminal context.\footnote{For example, hearsay evidence is admissible unless the party opposing its admission demonstrates that it is unreliable or lacking in probative value. MCA § 3, 10 U.S.C. § 949a(b)(2)(E).} They combine with overly broad crimes to threaten the liberty of individuals tried by military commission.

D. Overly Broad Crimes

As discussed above, the MCA includes a number of well-established war crimes.\footnote{See supra Part II.C.} But 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.\footnote{See, e.g., Kenneth Karst, \textit{Equality as a Central Principle in the First Amendment}, 43 CHI. L. REV. 20, 38 (1975-76) ("Police who look charitably on a postgame victory celebration in the streets of a college town may not feel the same way about anti-war demonstrations.").} 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. Criminalizing conspiracy as a war crime responds to the Supreme Court’s holding in Hamdan that absent congressional authorization, conspiracy could not be tried by military commission. 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 either commit genocide or wage war. 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.

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

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158 MCA § 3, 10 U.S.C. § 950v(b)(28) (“Any person subject to this chapter who conspires to commit one or more of the 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.”).

159 126 S. Ct. at 2779, 2785.

160 126 S. Ct. at 2781, 2784.

161 126 S. Ct. at 2781.
conspirator knowingly act overtly to achieve the object of the conspiracy.162 With 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 – would not be bound to apply the doctrine of lenity.163 This could further broaden the actual criminalizing effect of the MCA’s already broad definition of crimes.164

162 MCA § 3, 10 U.S.C. § 950v(b)(28). The object of the conspiracy must, however, be a crime triable by military commission under the MCA.


164 “Terrorism” too is a broadly defined as a crime under the MCA. It is defined as follows:

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.

MCA § 3, 10 U.S.C. § 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 Art. 33(1), Fourth Geneva Convention of 1949 (prohibiting acts of terrorism against “protected persons”). See also Cassese, supra note 84, at 126-28. The MCA’s terrorism offense requires a nexus with armed conflict, see Mil. Comm. Crimes & Elements 6(a)(24)b(3),
The same concerns about overly broad criminalization and diminished judicial scrutiny also emerge with respect to the crime of providing material support for terrorism.\textsuperscript{165} The two potential actions under this offense roughly correspond to the two federal material support statutes. Corresponding to 18 U.S.C. § 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.\textsuperscript{166} Corresponding to 18 U.S.C. § 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.\textsuperscript{167} Material support or resources include the same broad range of activities enumerated in 18 U.S.C. § 2339A(b).\textsuperscript{168}

\textsuperscript{165} MCA § 3, 10 U.S.C. § 950v(b)(25)(A) (“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 [the MCA]), or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism (as so set forth), shall be punished as a military commission under this chapter may direct.”).

\textsuperscript{166} MCA § 3, 10 U.S.C. § 950v(b)(25)(A).

\textsuperscript{167} MCA § 3, 10 U.S.C. § 950v(b)(25)(A).

\textsuperscript{168} MCA § 3, 10 U.S.C. § 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,
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 as a war crime, or in the common law. It was first criminalized only in the mid-1990s, when the relevant federal criminal statutes (18 U.S.C. §§ 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.\textsuperscript{169} Material support prohibitions as defined and applied have been criticized as over inclusive.\textsuperscript{170} These criticisms 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.” 18 U.S.C. 2339A(b)(1). In this definition, “training” means “instruction or teaching designed to impart a specific skill, as opposed to general knowledge,” 18 U.S.C. 2339A(b)(2), while “expert advice or training” means “advice or assistance derived from scientific, technical or other specialized knowledge,” 18 U.S.C. 2339A(b)(3).

\textsuperscript{169} See Testimony of Robert M. Chesney, United States Senate Committee on the Judiciary (May 5, 2004) (detailing the history legislation prohibiting material support of terrorism); Kathryn A. Ruff, \textit{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, 452-458 (2006) (discussing history of the IEEPA’s prohibitions against material support of terrorism).

\textsuperscript{170} See Ruff, \textit{supra} note 169, at 493-95; Huq, \textit{supra} note 40, Cole, \textit{supra} note 30. \textit{But see} Intelligence Reform and Terrorism Prevention Act of 2004 § 6603(c) (amending material support statutes so as to raise the \textit{mens rea} threshold for criminal culpability).
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 lack of judicial scrutiny that inhere regarding conspiracy also inhere 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. Such constitutional review has been an important part of material support doctrine and is discussed more specifically in Part IV, below. 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. THE 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, a real 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, then, the analysis below seeks to understand whether such cases would likely produce a more favorable outcome for the government if prosecuted through military commission.

A. Immigration Case Study: Nadarajah v. Gonzales

1. Facts: Nadarajah’s Plight

Ahilan Nadarajah (Nadarajah) is an ethnic Tamil refugee from Sri Lanka. Nadarajah worked as a farmer on family land in the Jaffna peninsula, in the north of Sri Lanka, which the Sri Lankan army invaded during the course of a civil war in the mid-1990s. The army and agents of the opposition Elam People’s Democratic Party suspected Nadarajah of involvement
with the Liberation Tigers of Tamil Eelam (LTTE) rebel group because he had lived in an area where the LTTE operated. On three different occasions Nadarajah was detained and tortured for a month or more on account of his suspected LTTE membership.\textsuperscript{171}

Nadarajah fled Sri Lanka in October 2001 with plans to claim 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 claimed asylum and other relief. The government opposed Nadarajah’s asylum application, alleging that Nadarajah was affiliated with the LTTE, a designated Foreign Terrorist Organization.\textsuperscript{172} An immigration agent produced an affidavit supported by information from a confidential informant that alleged Nadarajah’s LTTE affiliation. The immigration judge nevertheless 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.\textsuperscript{173} In the subsequent immigration court proceedings, the DHS agent testified that Nadarajah must have been affiliated with the LTTE based on Nadarajah’s 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

\textsuperscript{171} 443 F.3d 1069, 1072 (9th Cir. 2006).

\textsuperscript{172} See Foreign Terrorist Organizations Fact Sheet, \textit{available at} http://www.state.gov/s/ct/rls/fs/37191.htm.

\textsuperscript{173} 443 F.3d at 1073.
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 a hit on an individual in Canada by phone from the detention center in San Diego. The DHS agent was damagingly cross examined by Nadarajah’s counsel, Nadarajah introduced an expert witness in rebuttal, and the immigration judge reinstated his prior order granting Nadarajah asylum and withholding of removal.

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. Zadvydas 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. 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.

2. Actual Outcome

The Ninth Circuit ruled for Nadarajah. It held that under the general immigration detention statutes the government did not have the power to hold Nadarajah indefinitely.

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174 443 F.3d at 1074.
175 443 F.3d at 1074-75.
177 533 U.S. at 701.
178 443 F.3d at 1076.
179 443 F.3d at 1079.
Though the government consistently attempted to tie Nadarajah to the FTO-designated LTTE (just as Nadarajah’s torturers had done), those accusations did not stick and Nadarajah was thus not detained as a terrorist.\textsuperscript{180} With no significant likelihood of removal, Nadarajah’s detention ran afoul of due process and the Ninth Circuit ordered that the government release him.\textsuperscript{181} 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 \textit{Zadvydas}.\textsuperscript{182}

3. \textbf{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

\textsuperscript{180} In specific response to \textit{Zadvydas}, Congress mandated the ongoing, potentially indefinite, detention of alien terrorists. \textit{See} 8 U.S.C. 1226a (Immigration and Nationality Act §236A, added by Section 412 of the USA 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).

\textsuperscript{181} 443 F.3d at 1080.

\textsuperscript{182} See the class action complaint in \textit{Mussa, et al. v. Gonzales}, No. CV-06-2749-TJH (JTL) (September 25, 2006), \textit{available at}

government’s eyes. However, the government’s critical trial evidence in this respect was exclusively hearsay, and was exposed as flimsy under cross examination. Open cross examination of a hearsay affiant is thus one reason why Nadarajah came out adversely to the government.

Under the military commissions system, hearsay evidence may be submitted so long as it is reliable,183 and though an accused has a right to cross examination,184 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 and methods,185 which were at issue in the cross examination of the DHS agent before the immigration judge and which might thus preempt 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 obligated 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.

184 MCA § 3, 10 U.S.C. § 949a(b)(A).
185 MCA § 3, 10 U.S.C. § 949a(a).
Finally, trying Nadarajah by military commission would avoid running afoul of national and international prohibitions against refoulement of refugees.\textsuperscript{186} It is illegal to return (\textit{refouler}) refugees like Nadarajah to their countries of past persecution.\textsuperscript{187} Prosecuting Nadarajah in the parallel legal system of the MCA would, if he were convicted, 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.

\textbf{B. Criminal Case Study: \textit{United States v. Al-Arian}}

\textbf{1. Facts: Al-Arian and Islamic Jihad}

Sami al-Arian (al-Arian), a Palestinian who was raised primarily in Egypt, was a professor at the University of South Florida. But he was also a prominent member of the Palestinian Islamic Jihad (PIJ), a U.S. government designated terrorist organization.\textsuperscript{188} Al-Arian and several co-defendants were indicted in Tampa, Florida on February 19, 2003 on dozens of


\textsuperscript{187} \textit{See Art. 33, 1951 Convention Relating to the Status of Refugees.}

\textsuperscript{188} The PIJ has been designated as both 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 (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 Presidential Order No. 12947 (1996).
charges, including conspiring to commit and support terrorism.\textsuperscript{189} For current purposes, the relevant charges were conspiring to provide material support to a designated FTO in violation of the material support statute,\textsuperscript{190} and conspiring to make or receive funds, goods, and services on behalf of the PIJ, a Special Designated Terrorist, in violation of the IEEPA.\textsuperscript{191} 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.\textsuperscript{192} These telephone calls were recorded in the course of some 21,000 hours of wiretaps obtained pursuant to the FISA.\textsuperscript{193} 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 to carry out more bombings and support the families of recent suicide bombers – and providing management, organizational, and logistical support for the PIJ.\textsuperscript{194} The defendants sought to dismiss the terrorism support counts in the indictment, arguing that these counts attempt to criminalize First Amendment rights of speech in support of and association with the PIJ.\textsuperscript{195} Specifically, they argued that the terrorism support charges were unconstitutional as they did not

\begin{itemize}
  \item \textsuperscript{189} 267 F. Supp. 2d 1258, 1260 (M.D. Fla. 2003).
  \item \textsuperscript{190} 18 U.S.C. § 2339B.
  \item \textsuperscript{192} 267 F. Supp. 2d at 1260.
  \item \textsuperscript{193} 267 F. Supp. 2d at 1260.
  \item \textsuperscript{194} 308 F. Supp. 2d at 1328 & n. 5.
  \item \textsuperscript{195} 308 F. Supp. 2d at 1333.
\end{itemize}
require either a specific intent to further the unlawful activities of the PIJ, or intent to incite and a likelihood of imminent violence.196

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.197 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.”198 Proving knowledge of “material support” required the government to show that the defendant knew that the support would further “the illegal activities” of PIJ.199 The court required proof of the same specific intent – i.e. knowledge with respect to each particular element of the statutory crime – for conviction under the IEEPA as well.200 This liberal reading of mens rea elements into the relevant statutes was a major setback to the government’s prosecution.201

196 308 F. Supp. 2d at 1333.
197 For the court’s full discussion, see 308 F. Supp. 2d at 1337-39.
199 308 F. Supp. 2d at 1339.
200 308 F. Supp. 2d at 1340.
201 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.
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.\textsuperscript{202} 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 mid-April 2006, while the government decided to deport him.\textsuperscript{203} 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 30 years in the United States.\textsuperscript{204} On November 16, 2006, he was sentenced to another 18 months in prison for refusing to testify in a grand jury proceeding in \textit{Humanitarian Law Project v. U.S. Dep’t of Just.}, 352 F.3d 382 (9th Cir. 2003), \textit{vacated by} 382 F.3d 1154. \textit{See} Intelligence Reform and Terrorism Protection Act of 2004, § 6603(b), \textit{amending} 18 U.S.C. 2339B (“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 engaged is terrorist activity [as defined in the Immigration and Nationality Act], or that the organization 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 holding similar to \textit{al-Arian}.\textsuperscript{202} Jennifer Steinhauer, \textit{19 Months More in Prison for Professor in Terror Case}, N.Y. TIMES A1 (May 2, 2006).\textsuperscript{203} Meg Laughlin, \textit{Judge Sentences Al-Arian to the limit}, ST. PETERSBURG TIMES A1 (May 2, 2006); Reuters, \textit{Guilty Plea on Aiding Terrorists} A24, N.Y. TIMES (April 18, 2006).\textsuperscript{204} Steinhauer, \textit{supra} note 202; AP, \textit{U.S. to Deport Palestinian it Failed to Convict}, N.Y. TIMES (April 15, 2006).
Alexandria, Virginia. It now appears that he may not be released (and placed into deportation proceedings) until November 2008.205

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 “material support” that the Al-Arian court imposed.206 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.207

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, Al-Arian thus may find

205 Meg Laughlin, Al-Arian gets more prison time, ST. PETERSBURG TIMES 4B (Nov 17, 2006).


207 This analysis does include speculation as to the psychological differences between a civilian jury and a military commission which might affect the decisional outcomes of each.
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 terrorist detention statute,\(^{208}\) not the general detention statutes under which Nadarajah, for example, was detained. But 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 could prompt the government to try by military commission suspected alien criminal terrorists like Al-Arian.

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

This piece has mapped out several critical liberty implications of domestic military commissions. Though not an exhaustive study of either the MCA or the its domestic implications, the foregoing nevertheless highlights the MCA’s potential to further imperil the liberty of aliens in the United States.\(^{209}\) 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 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

\(^{208}\) 8 U.S.C. 1226a.

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.210 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.211 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.”212 This would provide a 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.213 Further, the defense counsel would have greater right to disclosure of the sources, methods and...


211 Restoring the Constitution Act of 2007 § 2.

212 Id. § 14.

213 Id. § 6.
activities underlying introduced evidence. Likewise, the military judge would be empowered to dismiss the case if the defense cannot fairly proceed in light of classified evidence.

Passage of 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 domestic-captured terrorists is unnecessary and damaging to the liberty interests of non-citizens, especially those of now suspect Middle Eastern or South Asian background. Congress should thus 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.

214 Id. § 9.

215 Id.

216 I would also suggest that 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 Nietzsche, which was recently appended to the argument section in their brief: “He who fights against monsters should see to it that he does not become a monster in the process. And when you look long into an abyss, the abyss also looks into you.”

United States v. Padilla, No. 04-60001 at 9 (Oct. 4, 2006) (S.D. Fla.) (quoting FREDREICH NIETZCHE, BEYOND GOOD AND EVIL 89 (Walter Kaufmann, trans.) (1966 [1886]). The brief argued that the indictment against Padilla should be dismissed on account of “outrageous government conduct,” including torture.