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### ARTICLES

#### NO VIRTUE IN PASSIVITY: THE SUPREME COURT AND ALI AL-MARRI

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##### INTRODUCTION

On June 26, 2009, the Obama administration announced a plan to issue an executive order authorizing the indefinite detention without trial of non-citizens suspected of terrorism.<sup>1</sup> This proposal followed and expanded on the President's May 21, 2009 speech, delivered at the National Archives, in which he argued that protecting national security required a non-criminal detention system for persons who cannot be successfully prosecuted but are, in the view of the Executive Branch, too dangerous to release.<sup>2</sup> The Administra-

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\* Professor of law, Western New England University School of Law; AB, Stanford University; JD, Harvard Law School. I am grateful to Thomas DeBose, J.D. Western New England University School of Law, 2010 and member of the Massachusetts Bar, for his exceptional research and editorial help and, even more, for his insights into the difficult questions raised by our nation's anti-terrorism detention policies. The argument made in this piece owes much to Mr. DeBose's clear thinking and balanced judgment. Thanks also to the Editorial Board and staff of the *Western New England Law Review* for consistently helpful comments, questions, and suggestions and for unerring technical support.

1. Dafna Linzer & Peter Finn, *White House Weighs Order on Detention*, WASH. POST, June 27, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/26/AR2009062603361.html>.

2. President Barack Obama, President of the United States, Remarks by the President on National Security at the National Archives (May 21, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-On-National-Security-5-21-09/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/); see Sheryl Gay Stolberg, *Obama Would Move Some Detainees to U.S.*, N.Y. TIMES, May 21, 2009, <http://www.nytimes.com/2009/05/22/us/politics/22obama.html>.

tion's plan appeared to be based on the same broad and controversial claims of Presidential power asserted by Mr. Obama's predecessor, George W. Bush. The President's announcement included few details. It failed to define the classes of persons subject to detention or to specify the institutions, civilian or military, executive or judicial, that would be authorized to order a detention. Nor did the proposal address the evidence needed to justify particular detentions, the rights of potential detainees to see and challenge such evidence—especially if it has been classified, or the extent to which detention proceedings would be public. Then, on July 21, a task force appointed by the President to make recommendations regarding the fates of prisoners held at the U.S. Naval base at Guantanamo Bay, Cuba issued an interim report recommending continued indefinite detention of some of these prisoners, but also the establishment of a “durable and effective” framework for holding future detainees captured in the fight against terrorists.<sup>3</sup>

The President's task force elaborated on this recommendation on January 22, 2010, when it issued its final, case-by-case, review of the status of the then approximately 240 prisoners remaining in military detention at Guantanamo.<sup>4</sup> The review concluded that these detainees should be divided into three groups. About thirty-five prisoners would be prosecuted for alleged crimes, leaving the question of whether the venue for these prosecutions should be civilian or military courts unresolved.<sup>5</sup> Another one hundred and ten prisoners would be entitled to release, some as soon as possible, and others eventually, on the ground that there was no lawful basis for the United States military to continue detaining them.<sup>6</sup> Thirty members of this second group, however, were Yemeni nationals, and the Obama Administration had barred the repatriation of any detainees to Yemen.<sup>7</sup> The Administration imposed this prohibition because of its belief that an apparent attempt by a young Nigerian

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3. Glen Greenwald, *First Steps Taken to Implement Preventive Detention, Military Commissions*, SALON.COM (July 21, 2009) <http://salon.com/opinion/greenwald/2009/07/21/detention/>.

4. DEP'T OF JUSTICE ET AL., FINAL REPORT GUANTANAMO REVIEW TASK FORCE 1, 7-8 (2009) [hereinafter FINAL REPORT], available at [http://media.washingtonpost.com/wp-srv/nation/pdf/GTMOtaskforcereport\\_052810.pdf](http://media.washingtonpost.com/wp-srv/nation/pdf/GTMOtaskforcereport_052810.pdf); see also Charlie Savage, *Detainees Will Still Be Held, But Not Tried, Official Says*, N.Y. TIMES, Jan. 22, 2010, <http://www.nytimes.com/2010/01/22/us/22gitmo.html>.

5. Peter Finn, *Justice Task Force Recommends About 50 Guantanamo Detainees Be Held Indefinitely*, WASH. POST, Jan. 22, 2010, [http://www.washingtonpost.com/wp-dyn/content/article/2010/01/21/AR2010012104936\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2010/01/21/AR2010012104936_pf.html).

6. *Id.*; Savage, *supra* note 4.

7. Finn, *supra* note 5.

man to blow up a civilian airliner landing in Detroit on Christmas Day in 2009 was the fruit of a plot that originated in Yemen.<sup>8</sup>

The third category of military prisoners held at Guantanamo, numbering about fifty, constituted of men who were, the review concluded, subject to indefinite detention “without trial under the laws of war.”<sup>9</sup> Obama administration officials acknowledged that these prisoners were entitled to use the privilege of habeas corpus to challenge their incarceration in federal court, but did not otherwise recommend specific standards or procedures to govern the adjudication of these challenges.<sup>10</sup>

On the same day that the President’s Task Force released its final report, three United States District Court judges assigned habeas corpus petitions filed on behalf of Guantanamo detainees expressed a good deal of confusion and consternation about how these petitions should proceed. One of them, Chief Judge Royce Lamberth, emphasized both the high stakes at issue in these cases and his marked frustration about the absence of any clarity about how to go about resolving them: “[We] are struggling ‘to adapt legal principles to a whole new sphere of human existence that we’ve never witnessed in history as far as I know.’”<sup>11</sup>

Chief Judge Lamberth, along with Judges Reggie Walton and Ricardo Urbina, described the problems they faced as stemming from a “battle against terrorist groups [that] doesn’t fit the classic definition of war, with clearly defined enemies who would be released when the conflict was settled.”<sup>12</sup> As captives held in a war “without end, terroris[t] detainees,” the Judges pointed out, “could be locked up for life.”<sup>13</sup> At the same time, they emphasized, “the risk in ordering a detainee to be released seems much greater than in past conflicts, because a return to the battlefield is not just a return to traditional frontlines, but to possible attacks on civilians.”<sup>14</sup> “‘How confident can I be,’” Chief Judge Lamberth lamented, striking a tone as understandable as it may be apocalyptic, “‘that if I

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8. *Id.*; Savage, *supra* note 4.

9. Finn, *supra* note 5.

10. *Id.*

11. Chisun Lee, *Judges Urge Congress to Act on Indefinite Terrorism Detentions*, ON THE HILL BLOG (Jan. 22, 2010), <http://onthehillblog.blogspot.com/2010/01/judges-urge-congress-to-act-on.html> (quoting Chief Judge Royce Lamberth).

12. *Id.*

13. *Id.*

14. *Id.*

make the wrong choice that he won't be the one that blows up the Washington Monument or the Capitol?"<sup>15</sup>

A Brookings Institution report,<sup>16</sup> also issued on January 22, evinced a good deal of sympathy for the situation facing the Guantanamo habeas corpus judges.<sup>17</sup> The Report, co-authored by Brookings Fellows Benjamin Wittes and Rabea Benhalim, and University of Texas Law Professor Robert M. Chesney, lamented the absence of any helpful sources of law defining (or limiting) the President's military detention authority or establishing procedures applicable in federal court to such detention.<sup>18</sup> As a consequence, according to these scholars, the judges' dispositions of these challenges have produced an array of incompatible approaches to these important questions.<sup>19</sup>

As the Justice Department, federal judges, and thoughtful academic commentators underscored the continuing uncertainty surrounding the legal status and rights of persons apprehended in the United States' efforts to combat terrorism, other events during the winter and spring of 2009-2010 illustrated some of the practical effects of this uncertainty. The decision of the Obama Administration to prosecute the alleged Christmas Day airplane bomber criminally rather than to remand him to military custody was severely criticized by proponents of military detention. Senators Joseph Lieberman and Susan Collins claimed that treating this suspect "as a criminal rather than [as] a UEB [Unprivileged Enemy Belligerent] almost certainly prevented the military . . . from obtaining information that would have been critical . . . to preventing future attacks."<sup>20</sup> Senator Collins added that in her view the Constitution offered no protection to the alleged bomber because he was not a U.S. citizen and had no previous connection with the

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15. *Id.* (quoting Chief Judge Royce Lamberth).

16. BENJAMIN WITTES, ROBERT CHESNEY & RABEA BENHALIM, *THE EMERGING LAW OF DETENTION: THE GUANTANAMO HABEAS CASES AS LAWMAKING* (2010), available at [http://www.brookings.edu/~media/Files/rc/papers/2010/0122\\_guantanamo\\_wittes\\_chesney/0122\\_guantanamo\\_wittes\\_chesney.pdf](http://www.brookings.edu/~media/Files/rc/papers/2010/0122_guantanamo_wittes_chesney/0122_guantanamo_wittes_chesney.pdf).

17. See Lyle Denniston, *Commentary: A GTMO Anniversary, and a New Debate*, SCOTUSBLOG (Jan. 22, 2010), <http://www.scotusblog.com/2010/01/commentary-a-gtmo-anniversary-and-a-new-debate/>.

18. *Id.*; see also WITTES ET AL., *supra* note 16, at 1-3.

19. Denniston, *supra* note 17; see also WITTES ET AL., *supra* note 16, at 35-59.

20. Kasie Hunt, *Lieberman Rips FBI on Miranda Rights*, POLITICO (Jan. 25, 2010), <http://www.politico.com/news/stories/0110/31969.html>.

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United States until his entry into the country on the airliner he was charged with attempting to destroy.<sup>21</sup>

Similar criticism was leveled against Attorney General Eric Holder's decision to prosecute Khalid Sheikh Mohammad, often described as the chief planner of the September 11, 2001 attacks on the United States, in a federal district court rather than before a military court convened outside the United States.<sup>22</sup> "Andrew McCarthy, [a] former Chief Assistant U.S. Attorney who led the prosecution of the 1993 World Trade Center attacks," maintained that the Attorney General "didn't 'understand what [the] rule of law has always been in wartime. . . . It's military commissions. It's not to wrap our enemies in our Bill of Rights.'"<sup>23</sup> The proposed prosecution of Mohammed in Manhattan was also questioned by Democratic Senators Dianne Feinstein and Charles Schumer and by New York City Mayor Michael Bloomberg.<sup>24</sup> In February of 2010, Senator Lindsey Graham introduced a bill to preclude the expenditures of federal funds for civilian prosecutions of any crimes related to the events of September 11.<sup>25</sup>

The spring of 2010 also brought reports from senior officials that the Obama Administration, despite some internal dissent, was on the verge of issuing regulations authorizing the indefinite detention without trial at Bagram Air Base in Afghanistan of at least some persons believed by the Administration to be terrorists.<sup>26</sup> And in an address to the American Society of International Law delivered on March 29, 2010, Harold Koh, legal advisor to the State Department, maintained that the President had legal authority to indefinitely detain non-state actors without trial, at either Guantanamo or Bagram, if they met the Administration's legal definition of "enemy belligerent."<sup>27</sup>

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21. Glenn Greenwald, *Susan Collins Spreads Central Myth About the Constitution*, SALON.COM (Feb. 1, 2010), [http://www.salon.com/news/opinion/glenn\\_greenwald/2010/02/01/collins](http://www.salon.com/news/opinion/glenn_greenwald/2010/02/01/collins).

22. See Jane Mayer, *The Trial: Eric Holder and the Battle over Khalid Sheikh Mohammed*, NEW YORKER, Feb. 15, 2010, [http://www.newyorker.com/reporting/2010/02/15/100215fa\\_fact\\_mayer#ixzz0f3AOFd5E](http://www.newyorker.com/reporting/2010/02/15/100215fa_fact_mayer#ixzz0f3AOFd5E).

23. *Id.* (quoting former Chief Assistant U.S. Attorney Andrew McCarthy).

24. *Id.*

25. *Id.*

26. David S. Cloud & Julian E. Barnes, *New Rules on Terror Custody Being Drafted*, L.A. TIMES, Apr. 15, 2010, <http://articles.latimes.com/2010/apr/15/nation/la-na-obama-detention16-2010apr16>.

27. Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, *The Obama Administration and International Law*, Address to Annual Meeting of the American Society of International Law, Washington, D.C. (Mar. 25, 2010), <http://www.state.gov/s/l/>

Finally, in March of 2011, the Obama Administration issued an executive order announcing the continued indefinite detention, without trial, of the 172 prisoners then still held at Guantanamo.<sup>28</sup> A month later, Attorney General Holder, by then facing a statutory ban on any transfer of prisoners from Guantanamo to the United States, even for the purpose of prosecution in civilian courts, announced that Khalid Sheik Muhammed and four other Guantanamo detainees would be prosecuted in military commissions convened at the naval base instead of the federal district court in Manhattan, as originally planned.<sup>29</sup>

It is evident that more than eight years after September 11, 2001, the day on which the attention of American political and legal institutions were riveted to the array of problems posed by terrorist violence, the scope and limits of the President's military detention power remain largely unsettled. In significant part, this uncertainty can be traced to the Supreme Court. Despite deciding five significant cases challenging Bush Administration policies concerning "enemy combatant" detainees since 2004, the Court has provided almost no guidance, as to either the President's authority to adopt a preventive detention scheme of the sort outlined by President Obama and his task force, or to the principles, if any, that might govern or constrain its implementation.<sup>30</sup> The Court's dispositions of these cases reveal very little about the Justices' views on the questions raised by the Administration's plans to introduce a permanent system of preventive detention. With respect to both the assertion of executive power such a program would entail, and the equally important specifics the President has not yet filled in, the Court has left ample room for almost any answer.

To be sure, the Court's "enemy combatant" decisions, all but one resolved at least in part against the executive branch, have limited presidential authority in some respects. And the Justices' reti-

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releases/remarks/139119.htm. Mr. Koh stated that the legal standard for determining whether a detainee was an enemy belligerent "includes, but is not limited to, whether an individual joined with or became part of al-Qaeda or Taliban forces or associated forces, which can be demonstrated by relevant evidence of formal or functional membership, which may include an oath of loyalty, training with al-Qaeda, or taking positions with enemy forces." *Id.*

28. *Executive Order: Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Use of Military Force*, WHITEHOUSE.GOV (Mar. 7, 2011), <http://www.whitehouse.gov/the-press-office/2011/03/07/executive-order-periodic-review-individuals-detained-guant-namo-bay-nava>.

29. Charlie Savage, *In a Reversal, Military Trials for 9-11 Cases*, N.Y. TIMES, Apr. 4, 2011, <http://www.nytimes.com/2011/04/05/us/05gitmo.html?>

30. See discussion *infra* notes 31-61.

cence on the issues of great moment raised by the Bush (and now Obama) Administration's claims of power to effect indefinite detention without trial is consistent with a conception of judicial modesty that is time honored, widely endorsed, and recently reinvigorated by contemporary champions of judicial minimalism.<sup>31</sup> This restrained conception of the judicial role was perhaps most effectively stated and defended almost half a century ago by Alexander Bickel.<sup>32</sup> Professor Bickel's justly famous essay extols the "passive virtues" of various judge-made strategies and techniques for avoiding resolution of constitutional questions, especially those that are both controversial and significant.<sup>33</sup> He links the legitimacy of the Supreme Court's authority to impose its view of "what the law is" on a congress or President that may strongly disagree with a deliberate commitment by the Court to keep the expressions of such authority to an absolutely necessary minimum.<sup>34</sup>

Some of the methods of limiting conflict between the courts and the elected branches are familiar tools of the craft of adjudication, such as addressing only those questions that must be resolved in order to decide the case at hand; resolving these questions on the narrowest available ground; leaving maximum space for the exercise of political judgment on issues of broad importance; and, wherever possible, relying on statutory, rather than constitutional, sources of law as the basis for decision.<sup>35</sup> The Supreme Court's use of these traditional techniques is in large part the reason the post-September 11 cases it has decided have shed so little light on the President's authority to effect non-criminal, preventive detention of persons he believes are likely to engage in terrorism. The impact of the Court's restrained approach in these cases on the civil rights of detainees, on the practical utility of constitutional limits in checking presidential power, and even on the efficacy of rule of law values

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31. *See generally* RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* (2006) (arguing that that the judicial branch has little, if any, legitimate role in checking anti-terrorism measures taken by the political branches in response to the attacks of September 11, 2001); CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999) (endorsing the Supreme Court's avoidance of broad statements of constitutional principle in favor of decisions drawn on narrow grounds and making only incremental changes in settled legal understandings).

32. *See generally* Alexander M. Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 *HARV. L. REV.* 40 (1961).

33. *Id.* at 47-51.

34. *See id.* at 77-78.

35. *See id.* at 43-47 (describing judicial techniques that are employed by the judiciary).

generally is a matter of considerable and justified controversy.<sup>36</sup> But criticism of the Court on these consequential grounds, however persuasive, is unlikely to dissuade the Justices from treading as cautiously and lightly as they can whenever they see themselves as constrained by law to invalidate measures taken by the President in the name of national security.

Professor Bickel's argument was not primarily a defense of the Supreme Court's reliance on narrow grounds for decision in cases it did resolve, though he surely did embrace that approach. Instead, Bickel's signal contribution was his justification of a series of judge-made strategies for avoiding resolution of the merits of controversial cases altogether.<sup>37</sup> Bickel maintained that these strategies enabled the Court to defer resolution, especially of momentous constitutional issues, to a time when political controversy surrounding them has abated, making a principled rather than expedient decision more likely.<sup>38</sup> His argument fostered and buttressed the Supreme Court's development of such "prudential" grounds for non-decision as the political question doctrine, the generalized grievance and third party bars to standing to sue, and the ripeness and mootness limitations on otherwise justiciable cases.<sup>39</sup> The doctrines are prudential in two senses. First, they are designed by and for judges, as self-limiting techniques, as opposed to being required either by statute or the Constitution itself.<sup>40</sup> And second, because they are judge made, they may be invoked on a largely discretionary basis, at times and in ways that focus the exercise of judicial

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36. See generally JOSEPH MARGULIES, *GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER* (2006) (arguing that Supreme Court decisions invalidating the post-September 11 detention practices of the Bush Administration have had little impact on the implementation of these practices); FREDERICK A. O. SCHWARZ, JR. AND AZIZ Z. HUO, *UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR* (2007) (same); CLIVE STAFFORD SMITH, *EIGHT O' CLOCK FERRY TO THE WINDWARD SIDE: SEEKING JUSTICE AT GUANTANAMO BAY* (2007) (pointing out the continuing and often successful efforts of military and defense department officials to thwart Guantanamo detainees' access to counsel, even after the Supreme Court's affirmation of their right to such access). *Contra* JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT ON THE WAR ON TERROR* (2006) (claiming that the President's executive and commander-in-chief powers are essentially plenary and that his exercise of these powers to prevent terrorism is not properly subject to judicial review).

37. Bickel, *supra* note 32, at 77-78.

38. *Id.* at 74-75.

39. *Id.* at 42-51.

40. *Id.* at 46 ("The political-question doctrine simply resists being domesticated in this fashion. There is something different about it, in kind, not in degree, from the general 'interpretive process'; something greatly more flexible, something of prudence, not construction and not principle." (internal citations omitted)).

power less on the immediate remedial needs of the parties and more on the Court's institutional preference for rationing its expressions of legal disagreement with the elected branches.<sup>41</sup> The Justices' deliberate fashioning of techniques aimed at undermining the obligatory character of judicial review is also justifiably controversial and arguably inconsistent with the notion of law as a constraining force on courts as well as the political branches.<sup>42</sup> But the techniques themselves, for better or worse, are also now embedded in our legal landscape.

Nevertheless, the Supreme Court's adoption of Bickel's strategy of discretionary, selective passivity has not been unprincipled. As elaborated by the Court's decisions,<sup>43</sup> the passive virtues have their own limits. And with respect to the important questions posed by the current and immediately previous Presidents' execution of their claimed power to detain terrorism suspects without trial, the Supreme Court seriously violated those limits by deciding not to resolve a case it had accepted for review in its 2008-2009 term. The case is *Al-Marri v. Spagone*, which the Court unjustifiably dismissed as moot on March 6, 2009.<sup>44</sup> By dismissing this appeal, the Court ignored its duty to determine whether the military detention of a non-citizen residing lawfully in the United States was authorized by law. And that failure has in turn contributed significantly, and unnecessarily, to the cloud of legal uncertainty which now hovers over the preventive detention measures adopted and proposed by the Obama Administration.

## I. THE AL-MARRI LITIGATION

### A. *Ali Saleh Kahlah Al-Marri: Criminal Defendant, Enemy Combatant, Criminal Defendant Redux*

Ali Saleh Kahlah Al-Marri is a citizen of Qatar.<sup>45</sup> In the 1980s and early 1990s, he studied computer science at Bradley University in Peoria, Illinois, which awarded him a bachelor's degree in 1991.<sup>46</sup>

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41. *Id.* at 50-51.

42. See Herbert Wechsler, *Toward Neutral Principles of Law*, 73 HARV. L. REV. 1, 6 (1961).

43. See discussion *infra* Part II.E.

44. *Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009).

45. *Al-Marri ex rel. Berman v. Wright*, 443 F. Supp. 2d 774, 776 (D.S.C. 2006), *vacated sub nom. Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008), *vacated sub nom. Al-Marri*, 129 S. Ct. 1545.

46. *Al-Marri*, 543 F.3d at 344; Brief for Petitioner-Appellant at 2, *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (No. 08-368).

After graduating, Al-Marri returned to Qatar where he lived until at least 1996.<sup>47</sup> According to an affidavit of a Defense Department analyst, Al-Marri traveled to Afghanistan sometime between 1996 and 1998 where he received training in use of poisons at an al-Qaeda Camp.<sup>48</sup>

Al-Marri returned to Illinois, legally, in the summer of 2000 and allegedly registered a business and opened bank accounts under a false name and Social Security number before returning to Afghanistan.<sup>49</sup> In the summer of 2001, according to the Defense Department affidavit, Al-Marri met with Khalid Sheikh Muhammed and Osama Bin Laden, who directed him to re-enter the United States before September 11, 2001 to support terrorist activities by disrupting the nation's financial system through computer hacking.<sup>50</sup> Thereafter, Al-Marri was alleged to have received funds from Mustafa Ahmed Al-Hawsawi, who is believed by American intelligence analysts to have provided financial support for the September 11 attacks.<sup>51</sup>

On September 10, 2001, Al-Marri again lawfully re-entered the United States with his wife and five children, and enrolled again at Bradley University, ostensibly in order to pursue a master's degree.<sup>52</sup> Over the next three months, he was a subject of law enforcement surveillance which included surveillance by agents of the FBI.<sup>53</sup> The FBI's investigation included at least two interviews with Al-Marri and a search of his computer, which allegedly produced evidence that he had gathered information about poisonous chemicals and retained copies of lectures by Osama Bin Laden and un-

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47. Jane Mayer, *The Hard Cases*, NEW YORKER, Feb. 23, 2009, [http://www.newyorker.com/reporting/2009/02/23/090223fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2009/02/23/090223fa_fact_mayer).

48. See Declaration of Mr. Jeffrey N. Rapp, Director, Joint Intelligence Task Force for Combating Terrorism ¶ 10, at 5, *Al-Marri v. Hanft*, 378 F. Supp. 2d 673 (D.S.C. 2005) (No. 2:04-2257-26AJ), available at [http://www.washingtonpost.com/wpsrv/nation/documents/jeffreyrapp\\_document.pdf](http://www.washingtonpost.com/wpsrv/nation/documents/jeffreyrapp_document.pdf) [hereinafter Rapp Declaration].

49. *Id.* ¶ 33-34, at 13-15.

50. *Id.* ¶¶ 12-13, at 5-6.

51. *Id.* ¶ 14, at 6.

52. *Al-Marri ex rel. Berman v. Wright*, 443 F. Supp. 2d 774, 776 (D.S.C. 2006), *rev'd sub nom. Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008), *vacated sub nom. Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009); Andy Worthington, *The Last US Enemy Combatant: The Shocking Story of Ali al-Marri* (Apr. 12, 2008), <http://www.andyworthington.co.uk/2008/12/04/the-last-us-enemy-combatant-the-shocking-story-of-ali-al-marri/>.

53. Mayer, *supra* note 47.

sent emails allegedly addressed to an account connected to Kahlid Sheikh Muhammed.<sup>54</sup>

On December 12, 2001, FBI agents arrested Al-Marri in Peoria and took him to New York City.<sup>55</sup> He was held incommunicado in federal custody at a maximum security prison on the ground that he was a material witness in the investigation into the September 11 attacks.<sup>56</sup> In February of 2002, Al-Marri was indicted in New York on federal charges of credit card fraud.<sup>57</sup> In January of 2003, he was indicted a second time for using false identification and making false statements on a bank application.<sup>58</sup> After these charges were dismissed for lack of proper venue in New York,<sup>59</sup> federal officials returned Al-Marri to Peoria where he was re-indicted for all the same crimes.<sup>60</sup> The U.S. District Court for the Central District of Illinois set a trial date of July 21, 2003.<sup>61</sup> On Friday, June 20, the district court also calendared a hearing on the parties' pre-trial motions.<sup>62</sup>

The most significant of these motions was one filed by Al-Marri's lawyers to exclude evidence against him provided by Khalid Sheikh Muhammed and Mustaffa Al-Harsawi, on the ground that it had been obtained by torture.<sup>63</sup> These men, the primary sources for the information about Al-Marri contained in the Defense Department affidavit mentioned above, are perhaps now known best as "high-level" detainees held by the CIA at so-called "black sites."<sup>64</sup> It has now been reported widely, and officially in a report of the CIA Inspector General, that one of these men, Mr. Muhammed, was subjected to waterboarding by CIA interrogators one hundred eighty three times.<sup>65</sup> On the next business day after the judge's calendaring order, Monday, June 23, President Bush issued an executive order declaring Al-Marri to be an enemy combatant closely associated with al-Qaeda, who "engaged in . . . conduct in prepara-

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54. See Rapp Declaration, *supra* note 48, ¶¶ 16-20, 25, at 7-10.

55. *Al-Marri*, 443 F. Supp. 2d at 776.

56. Worthington, *supra* note 52.

57. Rapp Declaration, *supra* note 48, ¶ 32, at 13.

58. *Id.* ¶ 34, at 14-15.

59. *Al-Marri*, 443 F. Supp. 2d at 776.

60. Rapp Declaration, *supra* note 48, ¶ 34, at 15.

61. *Al-Marri v. Pucciarelli*, 534 F.3d 213, 219 (4th Cir. 2008).

62. *Id.*

63. See Brief for Appellants at 66-70, *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2006) (No. 06-7427).

64. See *id.*

65. Jane Mayer, *The Trial*, NEW YORKER, Feb. 15, 2010, [http://www.newyorker.com/reporting/2010/02/15/100215/fa\\_fact\\_mayer](http://www.newyorker.com/reporting/2010/02/15/100215/fa_fact_mayer).

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tion for acts of international terrorism” and “represents a continuing, present, and grave danger to the national security of the United States.”<sup>66</sup> Significantly, the executive order also stated that “al-Marri possess[ed] intelligence . . . that . . . would aid U.S. efforts to prevent attacks by al-Qaeda.”<sup>67</sup> The order then directed the Attorney General to surrender Al-Marri to the custody of the Secretary of Defense in order to effect his indefinite military detention.<sup>68</sup>

On the basis of this order, the Justice Department moved to dismiss the criminal indictment against Al-Marri.<sup>69</sup> The district court granted the motion with prejudice.<sup>70</sup> Al-Marri was then transferred to the U.S. Naval Brig in Charleston, South Carolina, where he remained for more than five and one-half years.<sup>71</sup> Then, in March of 2009, as the U.S. Supreme Court prepared to review the legality of his military detention, Al-Marri was again charged with federal crimes, this time material support for terrorism and conspiracy to provide such material support, transferred from military detention back to the custody of the Justice Department, and returned to federal prison.<sup>72</sup>

#### B. *Al-Marri's Treatment While in Military Detention*

There were no judicial findings of fact as to the conditions of Al-Marri's military detention or his treatment during his five and one-half years at the Charlestown Brig. It is clear, though, that for the first sixteen months of his detention, Al-Marri was prevented from seeing or speaking with his attorneys.<sup>73</sup> Only in October of 2004, three months after the Supreme Court ruled that enemy combatants could not be completely deprived of access to counsel,<sup>74</sup>

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66. Memorandum from President George W. Bush to the Secretary of Defense and the Attorney General, FINDLAW.COM (June 23, 2003), *available at* <http://f11.findlaw.com/news.findlaw.com/hdocs/docs/almarri/almarri62303exord.pdf>.

67. *Id.*

68. *Id.*

69. *See* Justice Department's Motion to Dismiss the Complaint, *Al-Marri v. Rumsfeld*, No. 2:05-2259-HFF-RSC (D.S.C. June 14, 2006).

70. *Al-Marri ex rel. Berman v. Wright*, 443 F. Supp. 2d 774, 776 (D.S.C. 2006), *rev'd sub nom. Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008), *vacated sub nom. Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009).

71. Worthington, *supra* note 52.

72. John Schwartz, *Accused Qaeda Sleeper Agent in Court*, N.Y. TIMES, Mar. 24, 2009, <http://www.nytimes.com/2009/03/24/us/24marri.html>.

73. Worthington, *supra* note 52.

74. *Hamdi v. Rumsfeld*, 542 U.S. 507, 539 (2004) (stating that Hamdi “unquestionably has the right to access to counsel in connection with the proceedings on remand”).

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were his lawyers permitted to meet with him, in the presence of prison guards, and with Al-Marri in shackles bolted to the floor.<sup>75</sup> It is also clear, from Defense Department documents released under the Freedom of Information Act, that interrogations of detainees at the brig were conducted using the same techniques as those employed at the Guantanamo Bay Naval Base.<sup>76</sup> These included “prolonged isolation, painful stress positions, exposure to extreme temperature, sleep deprivation, extreme sensory deprivation, and threats of violence and death.”<sup>77</sup>

In addition, Al-Marri’s lawyers have claimed that for the sixteen months between the beginning of his detention at the brig and their initial meeting with him, Al-Marri:

[W]as denied any contact with the world outside, including his family, his lawyers, and the Red Cross. . . . Mr. Almarri’s only regular human contact during that period was with government officials during interrogation sessions, or with guards when they delivered trays of food through a slot in his cell door, escorted him to the shower, or took him to a concrete cage for “recreation.” The guards had duct tape over their name badges and did not speak to Mr. Almarri except to give him orders.<sup>78</sup>

Al-Marri’s lawyers also allege that Al-Marri’s interrogators told him “that they would send him to Egypt or to Saudi Arabia to be tortured and sodomized and forced to watch as his wife was raped in front of him.”<sup>79</sup> Additionally, his lawyers allege that the interrogators stuffed Al-Marri’s mouth with cloth and gagged him with duct tape, kept him cold for up to eight days at a time for refusing to answer their questions, and prevented him from praying and otherwise observing the tenets of his Islamic faith.<sup>80</sup>

After Al-Marri was permitted to see his lawyers, the conditions of his detention gradually improved.<sup>81</sup> Still, for another ten months, until August 2005, he was, again according to his lawyers,

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75. Plaintiff’s Objections to the Magistrate Judge’s Report and Recommendation Denying Plaintiff’s Motion for Interim Relief From Prolonged Isolation and Other Unlawful Conditions of Confinement at 4 n.1, *Al-Marri v. Gates*, No. C/A 2:05-2259-HFF-RSC (D.S.C. May 6, 2008), available at [http://brennan.3cdn.net/bd04de8ef937e4ec17\\_dlm6ib16o.pdf](http://brennan.3cdn.net/bd04de8ef937e4ec17_dlm6ib16o.pdf) [hereinafter Plaintiff’s Objections].

76. Worthington, *supra* note 52.

77. *Id.*; see also Plaintiff’s Objections, *supra* note 75, at 2.

78. See Plaintiff’s Objections, *supra* note 75, at 2.

79. *Id.* at 2-3.

80. *Id.* at 3.

81. *Id.* at 4 (stating that “direct interrogations of Mr. Almarri ceased after he was finally allowed access to his lawyers”).

confined to a nine-by-six foot cell, with its single window covered, and provided with no chair, blanket, mattress, pillow, or reading material for months at a time.<sup>82</sup> This confinement was unremitting—“twenty four hours a day, seven days a week.”<sup>83</sup> On one occasion, he was forcibly restrained to his metal bed, in extremely cold temperatures, for twenty days.<sup>84</sup>

From late August 2005, when his lawyers sued Defense Department officials challenging this treatment, until March of 2009 when his military detention ended, Al Marri’s confinement was far more humane.<sup>85</sup> The suit was prompted by the lawyers’ fear that Al-Marri was collapsing and that the conditions he lived under in the brig were causing a mental health emergency.<sup>86</sup> Despite the suit, and the change in his treatment that coincided with its filing, Al-Marri still was not permitted contact with his family.<sup>87</sup> He learned of the death of his father only a year after the fact.<sup>88</sup> Only in April of 2008 was Al-Marri allowed the first of two phone conversations with family members,<sup>89</sup> before President Obama ended his military detention and directed that his criminal prosecution resume.<sup>90</sup>

### C. *The Challenge to Al-Marri’s Military Detention*

Long before their emergency challenge to Al-Marri’s treatment in military detention, in fact within two weeks of President Bush’s determination that he was an enemy combatant, Al-Marri’s lawyers, on July 8, 2003, petitioned for a writ of habeas corpus seeking his release.<sup>91</sup> They filed the habeas petition in the U.S. District Court for the Central District of Illinois, the district where his criminal prosecution had been recommenced earlier that year.<sup>92</sup> The lawyers learned to their chagrin (though not to Al-Marri’s, since, held incommunicado, he knew nothing about the proceedings) that South Carolina, the location of the Charleston Navy Brig, not Illi-

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82. *Id.* at 4-5.

83. *Id.* at 5.

84. *Id.*

85. *Id.* at 6-7.

86. *Id.* at 8-9.

87. *Id.* at 7.

88. *Id.* at 7 n.5.

89. *Id.* at 7.

90. Memorandum from President Barack Obama on Transfer of Detainee to Control of the Attorney General to Secretary of Defense (Feb. 27, 2009), available at <http://www.gpoaccess.gov/presdocs/2009/DCPD2009001110.htm>.

91. *Al-Marri v. Bush*, 274 F. Supp. 2d 1003, 1004-05 (C.D. Ill. 2003), *aff’d*, 360 F.3d 707 (7th Cir. 2004), *cert. denied*, 543 U.S. 809. (2004).

92. *See id.* at 1004.

nois, was the only proper venue for their petition.<sup>93</sup> The learning process, consisting of a dismissal by the district court,<sup>94</sup> affirmance of the dismissal by the U.S. Court of Appeals for the Seventh Circuit,<sup>95</sup> and denial of certiorari by the Supreme Court,<sup>96</sup> took nearly a year.

On July 8, 2004, Al-Marri's lawyers re-filed the habeas petition, this time in the U.S. District Court for the District of South Carolina.<sup>97</sup> The petition claimed that neither the Authorization for Use of Military Force (AUMF), enacted by Congress just after the September 11, 2001 attacks, nor the Constitution granted the President the power to hold Al-Marri in military detention.<sup>98</sup> The petition emphasized that at the time he was seized, Al-Marri was a legal resident of the United States, that he was not a citizen of nor affiliated with the armed forces of any nation at war with the United States, that he was not apprehended on or near a battlefield on which American forces were engaged in combat, and that he was never in Afghanistan during the war between the United States and the Taliban which commenced in the Fall of 2001.<sup>99</sup> For these reasons, the habeas petition argued that Al-Marri could not be classified as a military combatant against the United States but must instead be treated as a civilian, subject to detention only through the processes of the criminal law.<sup>100</sup>

In response, the Justice Department produced the Defense Department affidavit referred to above and argued that Al-Marri's sojourn in Afghanistan, which ended on September 10, 2001, his close association with al-Qaeda, an organization with which the United States is at war, and his actions on al-Qaeda's behalf, regardless of their timing or location, were sufficient to warrant the President's decision to hold him indefinitely in military custody.<sup>101</sup> The district court rejected Al-Marri's argument, holding that the Supreme Court's decision in *Hamdi* authorized his military detention and

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93. *Id.* at 1009-10.

94. *Id.*

95. *Al-Marri v. Rumsfeld*, 360 F. Supp. 3d 707, 712 (7th Cir. 2004).

96. *Ali Saleh Kahlah Al-Marri v. Rumsfeld*, 543 U.S. 809, 809 (2004).

97. Petition for Writ of Habeas Corpus at 1, *Al-Marri ex rel. Berman v. Wright*, 443 F. Supp. 2d 774 (D.S.C. 2006) (No. 2:04 2257-HFF).

98. Petitioners' Reply (Traverse) to Respondent's Answer to the Petition for Writ of Habeas Corpus at 5-13, *Al-Marri ex rel. Berman*, 443 F. Supp. 2d 774 (No. 2:04-2257-HFF).

99. *See id.* at 20.

100. *Id.*

101. Respondent's Answer to the Petition for Writ of Habeas Corpus at 19, *Al-Marri ex rel. Berman*, 443 F. Supp. 2d 774 (No. 2:04-2257-HFF).

that the Defense Department affidavit provided a sufficient basis for his designation as an enemy combatant.<sup>102</sup> In August of 2006, three years after President Bush first placed him in military custody, the district court dismissed Al-Marri's habeas corpus petition.<sup>103</sup>

On appeal, a divided panel of the U.S. Court of Appeals for the Fourth Circuit reversed.<sup>104</sup> The majority opinion of Judge Diana Gibbon Motz adopted the line drawn by Al-Marri's lawyers between combatants, subject to military jurisdiction and detention, and civilians, subject to detention only attendant to prosecution for crimes in civilian courts.<sup>105</sup> Though the AUMF did authorize the President to detain enemy combatants in the military struggle triggered by the September 11 attacks, Judge Motz's opinion held that the authorization was limited to persons actually engaged in combat against the United States, and did not confer power on the President to seize a non-combatant living in the United States, even if he has committed crimes in aid "of an enemy organization."<sup>106</sup> For Judge Motz, enemy combatant status rested on a person's affiliation during wartime with the "military arm of the enemy government."<sup>107</sup> For purposes of the post-September 11 military campaign authorized by the AUMF, this meant the Taliban government of Afghanistan;<sup>108</sup> it did not mean the trans-national al-Qaeda network. Al-Marri was thus a civilian, not a combatant.<sup>109</sup> And as a civilian legally residing in the United States at the time of his arrest, he enjoyed the due process right to be imprisoned only through criminal prosecution in a civilian court.<sup>110</sup> This same distinction between combatants and civilians, Judge Motz added, also limited the President's ability to invoke his constitutional powers as Commander-in-Chief to detain legal residents of the United States.<sup>111</sup>

In dissent, Judge Henry Hudson did not entirely reject the civilian/combatant distinction.<sup>112</sup> Rather, he argued that Al-Marri's

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102. See *Al-Marri ex rel Berman*, 443 F. Supp. 2d at 784-85, *rev'd sub nom.* *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008), *vacated sub nom.* *Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009).

103. *Id.* at 785.

104. *Al-Marri v. Wright*, 487 F.3d 160, 195 (4th Cir. 2007).

105. *Id.* at 186.

106. *Id.* at 187-89.

107. *Id.* at 181 (quoting *Ex parte Quirin*, 317 U.S. 1, 37, 38 (1942)).

108. See *id.*

109. See *id.* at 187.

110. *Id.* at 193.

111. *Id.*

112. See *id.* at 196 n.1 (Hudson, J., dissenting).

alleged training with al-Qaeda and September 10 entry into the United States to engage in terrorist activities on al-Qaeda's behalf were sufficient to place him on the combatant side of the line.<sup>113</sup> In Judge Hudson's view, the power conferred on the President by the AUMF to detain enemy combatants extended beyond persons acting for the military arm of an enemy government (the Taliban) to include persons aiding the use of force by an enemy organization (al-Qaeda).<sup>114</sup>

The Fourth Circuit panel's instruction to the district court to grant Al-Marri's habeas corpus petition, issued on June 11, 2007, was vacated by the judges of the Fourth Circuit sitting en banc.<sup>115</sup> The en banc court also granted the government's motion for rehearing.<sup>116</sup> On July 15, 2008, thirteen months after the panel decision, the nine judges of the en banc court issued a remarkably fragmented ruling.<sup>117</sup> Four judges, including Judge Motz, would have affirmed the panel.<sup>118</sup> Four others essentially agreed with Judge Hudson.<sup>119</sup> The ninth, Judge David Traxler, concurred with Judge Hudson's enemy combatant analysis, thus providing a narrow majority to sustain the President's power to hold Al-Marri in military detention.<sup>120</sup> But Judge Traxler also held that the Defense Department affidavit relied on by the district court might not be sufficient, for due process purposes, to justify military detention of a person, like Al-Marri, who was arrested at his home while residing legally in the United States.<sup>121</sup> Joined by the four Judges who supported the panel decision, Judge Traxler remanded Al-Marri's petition to the district court for further evidentiary proceedings.<sup>122</sup> Significantly, Judge Traxler's controlling opinion acknowledged that the President could classify American citizens, as well as lawful resi-

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113. *Id.* at 198.

114. *See id.* at 199.

115. *Al-Marri v. Pucciarelli*, 534 F. 3d 213, 217 (4th Cir. 2008), *vacated sub nom. Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009).

116. Brief for Ali Saleh Kahlah Al-Marri as Amici Curiae Supporting Appellant Al-Marri *ex rel. Berman v. Wright*, 534 F.3d 213 (4th Cir. 2008) (No. 06-7427 2:04-cv-002257-HFF), *vacated sub nom. Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009), available at [http://www.brennancenter.org/page/-/d/download\\_file\\_50553.pdf](http://www.brennancenter.org/page/-/d/download_file_50553.pdf).

117. *Al-Marri*, 534 F. 3d at 216.

118. *Id.* at 213.

119. *Id.*

120. *Id.*

121. *Id.* at 268 ("And I cannot endorse such a view, which would allow the government to seize and militarily detain any person (including American citizens within this country) and support such military detention solely with a hearsay declaration of a government official who has no first-hand information about the detainee . . .").

122. *See id.* at 276.

dent aliens like Al-Marri, as enemy combatants subject to indefinite military detention without trial.<sup>123</sup>

On September 19, 2008, Al-Marri filed a petition for a writ of certiorari in the Supreme Court, presenting the following question for review:

Does the Authorization for the Use of Military Force (AUMF) . . . authorize—and if so does the Constitution allow—the seizure and indefinite military detention of a person lawfully residing in the United States, without criminal charge or trial, based on government assertions that the detainee conspired with al Qaeda to engage in terrorist activities?<sup>124</sup>

On December 8, 2008, the Court granted the petition.<sup>125</sup> Then, shortly following his inauguration, and just after Al-Marri's opening brief was submitted, President Obama issued an executive order directing the Justice Department to review the circumstances of his detention and the litigation challenging its legality and to report the results of this review to him.<sup>126</sup> On February 27, 2009, less than a week before the government's brief to the Supreme Court was due, the Justice Department announced Al-Marri's indictment on new charges of conspiring to provide, and of providing, material support for terrorism.<sup>127</sup> On that same day, the President ended Al-Marri's military detention, directing the Justice Department to reassume responsibility for his custody.<sup>128</sup> The Justice Department then moved to dismiss Al-Marri's certiorari petition as moot.<sup>129</sup> On March 6, the Supreme Court granted that motion, vacating the Fourth Cir-

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123. *See id.*

124. Petition for Writ of Certiorari at 2, *Al-Marri v. Pucciarelli*, 129 S. Ct. 680 (2008) (No. 08-368).

125. *Al-Marri*, 129 S. Ct. at 1245.

126. Memorandum from President Barack Obama on Review of the Detention of Ali Saleh Kahlal al-Marri to the Attorney General, the Secretary of Defense, the Secretary of State, the Secretary of Homeland Security, and the Director of National Intelligence 1, 2009 Daily Comp. Pres. Doc. No. DCPD2009000111 (Jan. 22, 2009), available at <http://www.gpoaccess.gov/presdocs/2009/DCPD200900011.pdf>.

127. Indictment at 1-2, *United States v. Al-Marri*, No. 09-CR-10030 (C.D. Ill. Feb. 26, 2009); see also Carrie Johnson & Julie Tate, *Combatant Case to Move from Tribunal to U.S. Court*, WASH. POST, Feb. 27, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/26/AR2009022601892.html>.

128. Memorandum from President Barack Obama on Transfer of Detainee to Control of the Attorney General to Secretary of Defense, 2009 Daily Comp. Pres. Doc. No. DCPD200900110, (Feb. 27, 2009), available at <http://www.gpoaccess.gov/presdocs/2009/DCPD200900110.htm>.

129. Motion to Dismiss, or in the Alternative, to Vacate the Judgment Below and Remand with Directions to Dismiss the Case as Moot at 5, *Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009) (No. 08-368), 2009 WL 526212.

cuit's en banc judgment.<sup>130</sup> Its order cited one case, the Court's 1950 decision in *United States v. Munsingwear*.<sup>131</sup>

## II. THE SUPREME COURT AND POST 9-11 MILITARY DETENTION BEFORE *AL-MARRI*

It is probably hard to exaggerate the gravity of the question presented by Al-Marri's certiorari petition.<sup>132</sup> The Fourth Circuit's en banc decision effectively sustained the President's power to seize on American soil any person living legally in the United States, citizen or alien, and to detain that person, without trial, at least for the duration of the military engagement authorized by the AUMF, on the basis of his belief that the detainee is a terrorist.<sup>133</sup> If the President does indeed have this extraordinary authority, the liberty most Americans assume to be their birthright is, as a practical matter, a trifling impediment to a President determined (perhaps understandably to many people) to do everything in his power to prevent another attack of the sort visited on the nation on September 11. Because of the danger to liberty it presents, judicial sanction of unchecked executive power to imprison citizens indefinitely without trial is also, to say the least, a profound and obvious threat to the democratic accountability of government and to the active political participation of citizens that is essential to self-rule.<sup>134</sup>

If the conception of presidential prerogatives ratified by the Fourth Circuit effects a radical distribution of power away from the people and towards a largely unchecked executive, it also raises a

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130. *Al-Marri v. Pucciarelli*, 129 S. Ct. 1545 (2009) (mem.).

131. *Id.*; see *United States v. Musingwear*, 340 U.S. 36, 39 (1950) (noting that “[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot . . . is to reverse or vacate the judgment below and remand with a direction to dismiss”).

132. See Petition for Writ of Certiorari at 2, *Al-Marri v. Pucciarelli*, 129 S. Ct. 680 (2008) (mem.) (No. 08-368).

133. See *Al-Marri v. Pucciarelli*, 534 F.3d 213, 217-18 (4th Cir. 2008). Motz states, “Our colleagues hold that the President can order the military to seize from his home and indefinitely detain anyone in this country—including an American citizen—even though he has never affiliated with an enemy nation, fought alongside any nation's armed forces, or borne arms against the United States anywhere in the world.” *Id.*

134. See FREDERICK O. SCHWARZ, JR. & AZIZ HUO, *UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR* 200-03 (2007) (outlining the dangers of unchecked executive power and the necessary participation of the public to curtail it); see also Arlen Specter, *The Need to Roll Back Presidential Power Grabs*, *NEW YORK REVIEW OF BOOKS*, May 14, 2009, <http://www.nybooks.com/articles/22656>. See generally THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* 76-90 (1992) (describing judicial unwillingness to abdicate judgment to the executive concerning individual rights).

set of more discrete but nonetheless vexing questions, including, at a minimum, the following: if the war powers granted the President by the AUMF extend beyond the battlefield against the Taliban government in Afghanistan, what are their geographical and political limits, if any? Is the theatre of war envisioned by the AUMF the entire world, including the domestic United States? Has Congress authorized the President to make war only on enemy nation-states, as Judge Motz believed, or also on groups, or even individuals, of his own choosing? If the AUMF does authorize the President to wage war on sub-national (or super-national) political groups, and thus to detain individuals affiliated with such groups, is it really true, as a majority of the judges of the Fourth Circuit believed,<sup>135</sup> that this power applies equally and in the same ways to American citizens and legal resident non-citizens alike? Are the processes due citizen and non-citizen detainees in order to determine the legality of their detentions also the same? Does the answer depend on where a detainee is taken into custody? Does it depend on where he is alleged to have engaged in combat against the United States?

The Fourth Circuit, through the various opinions, addresses all of these issues exclusively through the lens provided by the AUMF. There remains, of course, the possibility that the military detention authority of the President granted by that statute is augmented by the inherent powers he may enjoy under Article II of the Constitution. This was the position that was urged throughout the Al-Marri litigation by the Bush Administration.<sup>136</sup> Conversely, it is also possible that some powers conferred by the AUMF are themselves violations of the Bill of Rights, as Al-Marri's certiorari petition contended.<sup>137</sup> Al-Marri's sojourn in the Charleston Navy Brig leaves no doubt that an important reason for the President's decision to detain him militarily was, as the June 23, 2003 executive order implicitly acknowledged, to interrogate him about his alleged connection to al-Qaeda.<sup>138</sup> Is this a lawful purpose of military detention? Is interrogation a more (or less) justifiable goal of such

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135. *Al-Marri*, 534 F.3d at 276.

136. *See, e.g., id.* at 247.

137. *See* Petition for Writ of Certiorari at 11-12, *Al-Marri v. Pucciarelli*, 129 S. Ct. 680 (2008) (mem.) (No. 08-368).

138. *See* Memorandum from President George W. Bush to the Secretary of Defense and the Attorney General (June 23, 2003), *available at* <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/almarri/almarri62303exord.pdf>.

detention when a detainee, like Al-Marri, is not a member of or affiliated with the military forces of a nation-state?

All of these issues are embedded in the question presented by Al-Marri's petition for certiorari.<sup>139</sup> As suggested in the introduction to this paper, the Supreme Court's post-September 11 decisions about the sources, scope, and limits of the President's powers regarding alleged terrorist detainees shed remarkably little light on any of them. In one respect, this may be surprising because there were five such decisions between 2004 and 2008,<sup>140</sup> and the President's position was rejected by the Justices, at least in significant part, in four of them<sup>141</sup> and not addressed at all in the fifth.<sup>142</sup> But the Court's use of the passive virtues of narrow disposition and narrowly articulated rationales assured, perhaps inevitably, that just about any resolution of the issues raised by *Al-Marri* was plausibly consistent with its rulings. The close yet quite fundamental divide on the Fourth Circuit was a predictable result of the judges' commitment to caution.

Of course it would be inaccurate and unfair to claim that the Supreme Court's detention decisions resolved nothing. But a brief review of the five cases shows how much they left unaddressed and thus how important the Al-Marri petition was to a resolution of the central challenges to our constitutional order presented by our government's response to the events of September 11, 2001.

#### A. Hamdi

Of the Supreme Court's five significant post-September 11 decisions, *Hamdi v. Rumsfeld* offers the most insight into the Justices' possible views of the issues raised by Al-Marri's detention.<sup>143</sup> In *Hamdi*, a narrow majority of the Court sustained the President's power under the AUMF to detain an American citizen captured in

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139. See generally Petition for Writ of Certiorari at 1, *Al-Marri*, 129 S. Ct. 680 (No. 08-368).

140. *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

141. See generally *Boumediene*, 553 U.S. 723; *Hamdan*, 548 U.S. 557; *Hamdi*, 542 U.S. 507; *Rasul*, 542 U.S. 466.

142. See generally *Padilla*, 542 U.S. 426.

143. See generally *Hamdi*, 542 U.S. 507.

Afghanistan while fighting with the army of that country against U.S. Forces.<sup>144</sup>

But the Court's disposition of *Hamdi*, despite its examination of both the powers granted the President by the AUMF and the limits on those powers imposed by the due process clause, is remarkably narrow.<sup>145</sup> Justice O'Connor's opinion, for a plurality of four justices, read the AUMF to set a firm foundation under a limited and traditional account of the President's war making power, but offered no hint as to where the ceiling on that power might lie.<sup>146</sup> And with respect to the due process limitations on the exercise of AUMF authority at issue in *Hamdi*, the opinion defined only the process due a military detainee who is a citizen of the U.S., leaving unaddressed how much, if any, protection might be required for a similarly situated non-citizen.<sup>147</sup>

### 1. *Hamdi* on Presidential Power

*Hamdi*'s narrowness is a function of the unusual configuration of facts it presented. Yaser Hamdi was an American citizen, captured in Afghanistan while allegedly fighting with the military forces of that nation shortly after the American military invasion which commenced in the late autumn of 2001.<sup>148</sup> As a member of the military arm of a foreign nation engaged in combat against an invading military force on the territory of that nation, Hamdi was, when captured, indistinguishable from a prisoner of war.<sup>149</sup> His detention, in order to prevent his return to a conventional battlefield in a conventional military conflict between the United States and Afghanistan, thus lay at the apex of any war making authority conferred by the AUMF.<sup>150</sup> If an American citizen could ever be detained without trial as a war measure, that citizen was Yaser Hamdi. Thus, if the circumstances surrounding Hamdi's capture were as al-

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144. *Id.* at 517. Justice Thomas "agree[d] with the plurality that the Federal Government ha[d] power to detain" Hamdi, thus providing a majority for this assertion. *Id.* at 589 (Thomas J., dissenting).

145. *See id.*

146. *Id.* ("We do not reach the question whether Article II provides such authority" to detain individuals.)

147. *See id.* at 533-35 (outlining minimum standards for citizen-detainee proceedings).

148. *Id.* at 507, 510, 512-13.

149. *See id.* at 513.

150. *See id.* at 518 ("We conclude that detention of individuals falling into the limited category we are considering . . . is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use.").

leged by our government, it is unsurprising that Justice O'Connor's plurality opinion, joined by Chief Justice Rehnquist and Justices Kennedy and Breyer, sustained the President's power to hold him for the duration of the American war in Afghanistan.<sup>151</sup> And, if Hamdi was functionally equivalent to a prisoner of war, this power to hold him was not diminished by the different label—enemy combatant—that he was assigned. For Justice O'Connor, if the AUMF authorized the United States to wage war in Afghanistan, the authority to hold Hamdi in military detention easily followed.<sup>152</sup>

With respect to the war power of the President, Justice O'Connor's opinion for the Court in *Hamdi* was otherwise a model of caution. It was silent on whether, or for how long, the AUMF authorizes military detentions in conflicts other than the American war waged in Afghanistan against the Taliban government of that country.<sup>153</sup> And even with respect to that war, the opinion did not reach the question whether the AUMF authorizes military detention of alleged combatants who are apprehended away from a traditionally defined battlefield, i.e., outside Afghanistan.<sup>154</sup> Nor did it address whether conduct of an alleged combatant that occurred before the enactment of the AUMF is included among the acts against which the statute empowers the President to apply military force.<sup>155</sup> A bit offhandedly perhaps, because buttressed by no reference to supporting authority, Justice O'Connor did offer that “[c]ertainly, we agree that indefinite detention for the purpose of interrogation is not authorized” by the AUMF.<sup>156</sup> But as to whether this limitation attaches to all military detentions, or applies more narrowly only to Taliban fighters captured on the Afghan battlefield, or even applies just to those traditional battlefield detainees who are also American citizens, her opinion offers no secure conclusions.

No doubt the application of military force under the AUMF sustained by Yaser Hamdi's case would be equally lawful if used against a similarly situated non-citizen. In this important respect, the *Hamdi* decision did clarify the President's military detention authority in the narrow circumstances personified by Mr. Hamdi:

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151. *See id.* at 520-21.

152. *See id.* at 518-19.

153. *See id.* at 521.

154. *See id.*

155. The government alleged that Hamdi fought with the Taliban after September 11. *Id.* at 513.

156. *Id.* at 521.

that authority applies to combatants captured in Afghanistan after the enactment of the AUMF, while fighting with the military arm of the Taliban government, for the duration of the war between the United States and Afghanistan that commenced in the fall of 2001.<sup>157</sup> But beyond this endorsement of a most traditional, relatively uncontroversial conception of the power conferred by the AUMF, *Hamdi* resolves very little. And, of course, because the decision confirmed the President's authority to detain Hamdi under the AUMF alone, it quite properly also had nothing to offer regarding the scope or limits of any inherent war power the President may have under Article II of the Constitution.<sup>158</sup>

Though Yaser Hamdi's American citizenship did not exempt him from military detention, it is far from clear whether and in what respects such citizenship might limit the President's detention authority under circumstances even slightly different from those presented in his case. *Hamdi* was decided by a vote of 5-4. All four dissenters believed that Hamdi's American citizenship precluded his military detention. Justices Scalia and Stevens argued that American citizens are categorically beyond the war powers of the President and Congress.<sup>159</sup> Yaser Hamdi, they argued, could be imprisoned only pursuant to prosecution, either for federal statutory crimes or for the constitutional offense of treason.<sup>160</sup> Justices Ginsburg and Souter maintained that the federal Anti-Detention Act of 1970 barred the detention of an American citizen in the absence of a criminal conviction, unless authorized by an Act of Congress.<sup>161</sup> The AUMF, in their view, was insufficiently specific to provide the necessary authorization.<sup>162</sup> Thus, if just one of the Justices in the *Hamdi* plurality, or their successors, were to view the President's power to detain an American citizen differently in some situations not sharing all of the attributes of a traditional battlefield capture, a new majority might rely on the citizenship-based limits recognized by the *Hamdi* dissenters to qualify the President's authority in that situation.

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157. *See id.* at 517-21.

158. *See id.* at 517.

159. *See id.* at 559-62 (Scalia, J., dissenting).

160. *Id.* at 554.

161. *Id.* at 540 (Souter, J., dissenting).

162. *Id.* at 547-49.

## 2. *Hamdi* on Due Process

The likely significance of citizenship-based constraints on the President's military detention authority may be even clearer with respect to the due process limits on that authority recognized by a majority of the justices in *Hamdi*. Although *Hamdi*, because of the circumstances of his capture, fell into a category of persons that could be subjected to military detention, he was entitled under the Fifth Amendment to an appropriate hearing as to whether the facts that placed him into that category were true.<sup>163</sup> Thus, Justice O'Connor's plurality opinion for the Court, joined for this purpose by Justices Ginsburg and Souter, held that *Hamdi* was entitled to appropriate notice of the basis for the military's belief that he was an enemy combatant and to a military hearing before a neutral decision maker, at which he could be represented by counsel, to determine whether that belief was sufficiently well founded.<sup>164</sup> To be sure, the Government would enjoy many advantages at the hearing that would not apply in a criminal prosecution. Any evidence it offered would be presumed true, subject to rebuttal by *Hamdi*.<sup>165</sup> Neither hearsay nor confrontation clause limitations could be invoked to exclude any evidence from the hearing record.<sup>166</sup> And the role, if any, of Article III courts in reviewing the results of the military proceeding was left unspecified.

Despite these limitations, the Court's disposition in *Hamdi* left no doubt that the due process clause protects even battlefield detainees, at least when they are American citizens.<sup>167</sup> But on the question of whether the *Hamdi* protections extend to non-citizens, who are the overwhelming majority of Afghanistan battlefield detainees, *Hamdi* is silent, again because the case could be resolved without addressing the matter. Consequently, the Government could, did, and, *Hamdi* notwithstanding, still does maintain that non-citizens captured outside the United States do not enjoy the same due process rights as do citizens.<sup>168</sup>

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163. *Id.* at 533 (majority opinion).

164. *Id.* at 533, 539, 553.

165. *Id.* at 534. Souter disagreed, stating in his dissenting argument, "I do not mean to imply agreement that the Government could claim an evidentiary presumption casting the burden of rebuttal on *Hamdi* . . ." *Id.* at 553-54 (Souter, J., dissenting). Souter explicitly stated that he did not adopt the plurality resolution on the constitutional issues he did not reach. *Id.*

166. *Id.* at 533-34 (majority opinion).

167. *See id.* at 533.

168. *See* Ari Shapiro, *Proposal Offers Specifics on Preventive Detention*, NPR.ORG, (June 26, 2009), <http://www.npr.org/templates/story/story.php?storyId=105940019>

Because Yaser Hamdi was an American citizen, the procedures established in his case to promote the fairness and accuracy of military detention decisions quite likely represent the maximum application of due process limitations to such decisions with respect to persons captured while fighting for the Taliban government in Afghanistan.<sup>169</sup> The *Hamdi* decision, relentlessly narrow once again, says nothing about how, if at all, the due process clause applies to the military detention of persons apprehended in locations other than Afghanistan or because of conduct they are believed to have engaged in away from that traditional battlefield setting. Whether or not citizens of the United States, persons who are neither members of the military arm of a government with which the United States is at war nor captured in the territory of such a government are more likely than Afghanistan battlefield detainees, like Hamdi, to present plausible arguments that they are not combatants at all, but are instead civilians outside the lawful reach of military detention. It is thus at least conceivable that if either the AUMF or the President's Article II military power warrants the application of military force to such persons, the due process protections that accompany this application are more robust than those recognized in *Hamdi*. And if these protections are greater for non-battlefield detainees, the question of whether they extend to non-citizens captured outside the United States becomes even more salient.

In sum, though the *Hamdi* decision does recognize a limited Presidential authority to carry out military detention under the AUMF and imposes limited due process restraints on the exercise of that authority, it is, in important ways, a decision whose precedential force is restricted to its extremely unusual, particular facts. Obviously the vast majority of persons detained by the American military since September 11, 2001 have been citizens of nations other than the United States. And many have been apprehended either in locations other than Afghanistan, or because of actions they are thought to have engaged in outside Afghanistan, or both. It is probably not surprising then, that there has never been, and may never be, a hearing convened under the *Hamdi* procedures.

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(stating that U.S. citizens would not be a part of the Obama administration's detention system for terrorism detainees).

169. See *Hamdi*, 542 U.S. at 533-35 (outlining minimum standards for citizen-detainee proceedings).

## B. Padilla

*Hamdi* is the post 9-11 case that offers the most (however limited) insight into the military detention powers of the President. However, the litigation growing out of the detention of Jose Padilla was the most directly analogous to *Al-Marri*.<sup>170</sup> Like *Al-Marri*, but unlike *Hamdi*, Padilla was initially arrested in the United States.<sup>171</sup> On May 8, 2002, Padilla was held as a material witness in connection with the grand jury investigation of the September 11 attacks.<sup>172</sup> A month later, President Bush issued an executive order designating him as an enemy combatant and ordering his indefinite military detention.<sup>173</sup> As with the similar order for *Al-Marri*, the President candidly acknowledged that one of the reasons for Padilla's detention without trial was his alleged possession of "intelligence, . . . about personnel and activities of al Qaeda, that, if communicated to the U.S., would aid U.S. efforts to prevent attacks by al Qaeda on the United States or its armed forces, other governmental personnel, or citizens."<sup>174</sup> Pursuant to the executive order, Padilla, like *Al-Marri*, was transported from Justice Department custody in New York to the Navy Brig in Charleston, South Carolina where his indefinite, incommunicado detention commenced.<sup>175</sup> Padilla, like *Hamdi*, but unlike *Al-Marri*, was an American citizen.<sup>176</sup> On the other hand, again like *Hamdi* but unlike *Al-Marri*, Padilla's sojourn and alleged activities in Afghanistan extended into the period following the American military invasion of that nation under the authority of the AUMF.<sup>177</sup>

The U.S. Court of Appeals for the Second Circuit found, on the basis of reasoning similar to that of Justices Ginsburg and Souter in *Hamdi*, that the AUMF did not authorize Padilla's military detention because it did not clearly overcome the prohibition of the 1970 Non-Detention Act in the case of "an American citizen already held in a federal correctional institution and not 'arrayed against our troops' in the field of battle."<sup>178</sup> Nor, according to the Second Circuit, did the President have "inherent constitutional au-

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170. See *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

171. *Id.* at 430.

172. *Id.*

173. *Id.*

174. *Padilla v. Rumsfeld*, 352 F.3d 695, app. at 725 (2d Cir. 2003), *rev'd*, 542 U.S. 426 (2004).

175. *Rumsfeld*, 542 U.S. at 432.

176. *Id.* at 430.

177. *Padilla v. Hanft*, 423 F.3d 386, 390 (4th Cir. 2005).

178. *Padilla*, 352 F.3d at 723.

thority as Commander-in-Chief to detain American citizens on American soil outside a zone of combat.”<sup>179</sup>

The Supreme Court, by a vote of 5-4, reversed, without addressing the legality of Padilla’s military detention.<sup>180</sup> Instead, the five Justices in the majority held that the only proper venue for Padilla’s challenge to that detention had been the federal district court in South Carolina, because the Charleston Navy Brig was located in that state.<sup>181</sup> Included in this majority was Justice Scalia, whose dissent in *Hamdi* was based on his stated conviction that the President has no authority, statutory or constitutional, to hold an American citizen in military detention without trial.<sup>182</sup>

The four dissenting Justices joined an opinion by Justice Stevens which found the Southern District of New York, and thus the Second Circuit, to have been proper venues for Padilla’s suit.<sup>183</sup> On the merits, these four Justices agreed “that the Non-Detention Act, . . . prohibit[ed]—and the Authorization for the Use of Military Force Joint Resolution, . . . [did] not authorize—the protracted, incommunicado detention of American citizens arrested in the United States.”<sup>184</sup> Justice Stevens’s opinion added that

unconstrained executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber. . . .

Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure.<sup>185</sup>

Justice Breyer, who was one of the four Justices in the *Hamdi* plurality, fully joined Justice Stevens’s dissent in *Padilla*.<sup>186</sup> It may be safe to infer, therefore, that in 2004, when the two cases were decided, at least five Justices, the four *Hamdi* dissenters plus Justice

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179. *Id.* at 712.

180. *Rumsfeld*, 542 U.S. at 451. “But it is surely just as necessary in important cases as in unimportant ones that courts take care not to exceed their ‘respective jurisdictions’ established by Congress.” *Id.* at 450-51.

181. *Id.* at 446-47, 451.

182. *Hamdi v. Rumsfeld*, 542 U.S. 507, 554, 577 (2004).

183. *Rumsfeld*, 542 U.S. at 464 (Stevens, J., dissenting).

184. *Id.* at 464 n.8.

185. *Id.* at 465.

186. *Id.* at 455.

Breyer, believed Padilla's detention to be unlawful. It is even more likely that at least seven, the four members of the *Hamdi* plurality, plus the three Padilla dissenters, Justices Stevens, Ginsburg, and Souter, who were not members of that plurality, agreed with Justice O'Connor's view "that indefinite detention for the purpose of interrogation is not authorized."<sup>187</sup> And yet, in neither case were there more than four votes cast for either of these propositions. And four being one less than five, the Executive Branch remained free, after *Hamdi* and *Padilla*, plausibly to assert the power to hold American citizens, arrested on American soil, in indefinite military detention, without trial, for the purpose of interrogating them.

The proceedings on remand in *Padilla* amounted, in some ways, to a rehearsal for the Supreme Court's disposition of Al-Marri's appeal. The U.S. Court of Appeals for the Fourth Circuit, reversing a judgment of the U. S. District Court for South Carolina ordering Padilla's release, sustained the President's power to detain Padilla under the AUMF, holding that "[l]ike Hamdi, Padilla associated with forces hostile to the United States in Afghanistan . . . [a]nd . . . took up arms against United States forces in that country."<sup>188</sup> The contrast between Padilla's subsequent arrest on American soil and Hamdi's capture on a foreign battlefield was irrelevant because Padilla's detention, to prevent his return to the Afghan battlefield, was no less necessary than Hamdi's had been.

Padilla's lawyers petitioned the Supreme Court for a writ of certiorari.<sup>189</sup> Two days before the government's brief in opposition was due, and after nearly three and one-half years of holding him in military detention at the Charleston Brig, the government announced Padilla's indictment on criminal charges and moved the Fourth Circuit to authorize his transfer from military to Justice Department custody.<sup>190</sup> The Fourth Circuit denied the motion, suggesting that the government's apparently strategically motivated actions left

the impression that Padilla may have been held for these years . . . by mistake . . . [and] that the principle [of military detention without trial] . . . can, in the end, yield to expediency. . . . [T]hese impressions have been left, we fear, at what may ultimately prove to be substantial cost to the government's credibility before the

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187. *Hamdi*, 542 U.S. at 521.

188. *Padilla v. Hanft*, 423 F.3d 386, 391 (4th Cir. 2005).

189. *Hanft v. Padilla*, 546 U.S. 1084 (2006).

190. *Padilla v. Hanft*, 432 F.3d 582, 584 (4th Cir. 2005).

courts. . . . While there could be an objective that could command such a price as all of this, it is difficult to imagine what that objective would be.<sup>191</sup>

The Supreme Court quickly reversed this decision, granted the government's motion, and dismissed Padilla's petition for certiorari as moot.<sup>192</sup> Padilla was subsequently convicted of the charges against him and sentenced to prison for a term of seventeen years, a term that he is now serving.<sup>193</sup>

### C. Rasul & Boumediene

The limited resolution offered by the *Hamdi* and *Padilla* cases to the questions raised by executive detention without trial is, as suggested above, narrowed even further by the fact that the detainees in both cases were American citizens. It is possible that the Justices' opinions in these cases are largely irrelevant to the fates of hundreds, or perhaps possibly thousands, of non-citizens held without trial in American military custody at various sites, known and unknown, around the world. It is unlikely, of course, that the President could have less power to detain non-citizens than otherwise similarly situated citizens of the United States. And it is almost impossible to imagine that non-citizens falling within the President's detention power could ever enjoy more rights under the due process clause than do citizens detained under analogous circumstances. But, beyond these truisms, any insight from the Supreme Court on the scope and limits of presidential power to hold non-citizens in military detention must be drawn from those remaining post September 11 cases in which non-citizens challenged their treatment by the Bush Administration.

The plaintiffs in two of these cases, *Rasul v. Bush*,<sup>194</sup> decided along with *Hamdi and Padilla* on June 28, 2004, and *Boumediene v. Bush*,<sup>195</sup> decided four years later, were detainees held at the American Naval Base at Guantanamo Bay, Cuba. Both sets of plaintiffs claimed that they were never engaged in military combat against the United States and thus could not lawfully be held in indefinite

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191. *Id.* at 587.

192. *Padilla v. Hanft*, 547 U.S. 1649, 1650 (2007).

193. Peter Whoriskey & Dan Eggen, *Judge Sentences Padilla to 17 Years, Cites His Detention*, WASH. POST, Jan. 23, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/22/AR2008012200565.html>.

194. *Rasul v. Bush*, 542 U.S. 466 (2004).

195. *Boumediene v. Bush*, 553 U.S. 723 (2008).

military detention.<sup>196</sup> And, in both cases, the detainees further argued that their detention and treatment while in detention violated rights guaranteed to them by the Constitution.<sup>197</sup>

Because the plaintiffs in *Rasul* and *Boumediene* were apprehended outside Afghanistan, their challenges presented the question whether, and perhaps to what extent, the war powers conferred by the AUMF or Article II extended beyond that traditional theatre of war.<sup>198</sup> Because they challenged their treatment while in American military detention, their suits also tested, at least potentially, the strength of Justice O'Connor's observation in *Hamdi* that "indefinite detention for the purpose of interrogation is not authorized."<sup>199</sup> And, of course, because the *Rasul* and *Boumediene* plaintiffs were not American citizens and were held at a location outside the formal legal sovereignty of the United States, adjudication of their Fifth Amendment claims required resolution of whether and to what extent they enjoyed the protection of the limitations on government conduct that amendment enforces. Resolution of this last question would quite likely also establish the minimum due process rights available to any non-citizen detainees apprehended as combatants or held in military detention within American sovereign territory, since any argument against the application of constitutional protections could only be weaker as to detainees with these connections to the United States.

The Supreme Court's dispositions of *Rasul* and *Boumediene* did not purport to resolve, or even address, any of these issues. The reason, in both cases, was uncertainty about the question that is most basic to the exercise of federal judicial power in the American constitutional system: whether a federal court can exercise jurisdiction over the case.<sup>200</sup> In *Rasul* and *Boumediene* (as in *Hamdi* and *Padilla* as well, without controversy) the plaintiffs sought to litigate their claims by seeking a writ of habeas corpus, the venerable common law vehicle, specifically preserved in Article I, Section 9 of the Constitution, for challenging the legality of executive detention.<sup>201</sup>

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196. *Id.* at 734; *Rasul*, 542 U.S. at 471-72.

197. *Rasul*, 542 U.S. at 483 n.15; *Boumediene v. Bush*, 476 F.3d 981, 984 (D.C. Cir. 2007).

198. *See Boumediene*, 553 U.S. at 734 (acknowledging that where the petitioners were detained ranged from Afghanistan to Bosnia and Gambia); *Rasul*, 542 U.S. at 471-72 (petitioners were from Australia and Kuwait).

199. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004).

200. *See Boumediene*, 553 U.S. at 736; *Rasul*, 542 U.S. at 472 .

201. *See Boumediene*, 553 U.S. at 732; *Rasul*, 542 U.S. at 472.

In both cases, the government argued that the writ was unavailable to non-citizens detained at Guantanamo Bay.<sup>202</sup>

### 1. *Rasul* and the CSRT Process

In *Rasul*, once again by the narrowest 5-4 margin, the Court rejected the government's argument, holding that the federal statute conferring subject matter jurisdiction on the federal courts over habeas corpus petitions did apply to petitions filed by Guantanamo detainees, because the naval base, even if not technically under American sovereignty, was part of the territorial jurisdiction of the United States.<sup>203</sup> The Court's opinion resolved no other issues. Its judgment simply remanded the case for further proceedings in the U.S. District Court for the District of Columbia.<sup>204</sup>

In the aftermath of *Rasul*, the Bush Administration maintained—plausibly in light of the Court's decision—that even though the Guantanamo detainees enjoyed a *statutory* right to file habeas corpus petitions, they nonetheless held no rights, as non-citizens held at Guantanamo Bay, under the *Constitution* which a habeas court could enforce.<sup>205</sup> The merits of Guantanamo detainees' challenge to the legality of their military detention were thus still beyond the legitimate reach of the federal judicial power.<sup>206</sup> This argument met with mixed success in the lower federal courts and still remains, as the discussion of *Boumediene* will show, largely unresolved.

Despite its view that the Constitution had no application at the Guantanamo Naval Base, and thus perhaps as a matter of what it took to be executive grace, the Bush Administration quickly moved, on the heels of the Supreme Court's decisions in *Hamdi* and *Rasul*, to fashion a military hearing process of sorts to determine the legality of the detentions of persons held there. This process established military panels called Combatant Status Review Tribunals (CSRTs) and charged them with deciding whether the

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202. See *Boumediene*, 553 U.S. at 739; *Rasul*, 542 U.S. at 472-473 (arguing that aliens detained outside the sovereign territory of the U.S. cannot invoke habeas corpus).

203. *Rasul*, 542 U.S. at 471, 484.

204. *Id.* at 485.

205. *Boumediene*, 553 U.S. at 753 (characterizing the government's view of the constitutional reach of habeas corpus as limited to the areas in which the United States has sovereign control, and because the government has formally recognized Cuba as having sovereignty over Guantanamo Bay the courts would be constrained from enforcing the Constitution there).

206. *Id.* at 765.

government had a sufficient basis to subject each detainee to indefinite military imprisonment without trial.<sup>207</sup> The CSRT's rules, modeled loosely on the procedures fashioned by Justice O'Connor's *Hamdi* plurality opinion, adopted that opinion's authorization of the admission of all evidence offered by the government, notwithstanding hearsay or confrontation clause objections, and its approval of a presumption that all such evidence was true.<sup>208</sup> The CSRT system, however, did not require the government to disclose the basis for its conclusion that a detainee was a combatant against the United States, or the evidence supporting that conclusion, to the detainee, if either had been classified.<sup>209</sup> Nor was a detainee permitted to be represented by counsel at a CSRT hearing.<sup>210</sup> The definition of enemy combatant employed at CSRT hearings included any persons who have "engaged in hostilities" or who have "materially supported hostilities against the United States."<sup>211</sup> This definition, obviously far broader than the one recognized by the Supreme Court in *Hamdi*, is notable for its complete absence of either temporal or geographical limits, or constraints based on whether an alleged combatant is a member of a military force or a civilian.

Not surprisingly, the CSRT process sustained the propriety of nearly every Guantanamo Bay detention.<sup>212</sup> Nevertheless, by 2008 many Guantanamo Bay detainees had been released voluntarily by the government on the ground that they were "no longer enemy combatants," a determination which depends on the government's having satisfied itself that a detainee no longer had intelligence information useful to the United States.<sup>213</sup>

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207. *Id.* at 733-34.

208. *See id.* at 734, 784.

209. *See id.* at 783-84.

210. *Id.* at 767.

211. *See* Military Commissions Act, 10 U.S.C. § 948a (A) (1)(i) (2006).

212. *See* DEP'T OF DEF., FACT SHEET GUANTANAMO DETAINEES BY THE NUMBERS 1 (Aug. 31, 2005), <http://www.defense.gov/news/Aug2005/d20050831sheet.pdf> (noting that 558 CSRTs were conducted, but only thirty-eight of them resulted in a finding that the individual was no longer an enemy combatant).

213. *See* Thomas Bogar, *Unlawful Combatant or Innocent Civilian? A Call to Change the Current Means for Determining the Status of Prisoners in the Global War on Terror*, 21 FLA. J. INT'L. L. 29, 90 (2009).

## 2. *Boumediene* and the Constitutionalization of Habeas Corpus Rights at Guantanamo

In 2006, Congress sought to overrule the Supreme Court's decision in *Rasul* by enacting the Military Commissions Act (MCA)<sup>214</sup> The MCA included a provision amending the habeas corpus jurisdictional statute, relied on by the *Rasul* majority, to preclude the federal courts from entertaining habeas corpus petitions filed by persons detained at Guantanamo Bay, including those petitions already pending at the time of its enactment.<sup>215</sup> The plaintiffs in *Boumediene v. Bush* were Guantanamo detainees with pending habeas petitions authorized by *Rasul*.<sup>216</sup> They argued that the MCA's jurisdiction stripping measure was an unlawful attempt by Congress to suspend the writ of habeas corpus without satisfying the requirements for such a suspension specified in Article I, Section 9 of the Constitution.<sup>217</sup>

The Supreme Court, yet again by a 5-4 vote, agreed with the detainees.<sup>218</sup> As in *Rasul*, the majority rejected the government's argument that the habeas corpus right did not extend to non-citizens held at the Guantanamo Bay Naval Base.<sup>219</sup> This time, though, without a jurisdictional statute to rely on, the Court's determination was based on the conclusion that the common law writ of habeas corpus, protected from suspension by Article I, Section 9, was available to Guantanamo detainees because the Naval base was under the complete, total, and indefinite control of the United States government.<sup>220</sup> As such, the writ could not be suspended, as the MCA jurisdictional bar purported to do, without a finding by Congress that the invasion or rebellion prerequisites for such suspension were satisfied.<sup>221</sup> The *Boumediene* majority then went on to hold that the CSRT process, which had been ratified and made subject to limited appellate review in the U.S. Court of Appeals for the D.C. Circuit by Congress, was an inadequate substitute for a hearing on a habeas corpus petition conducted as an original matter

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214. See Military Commissions Act, 28 U.S.C. § 2241(e)(1).

215. See *id.* § 2241(e)(2).

216. *Boumediene v. Bush*, 553 U.S. 723, 734 (2008).

217. *Id.* at 732-33.

218. *Id.* at 733.

219. *Id.* at 771 (“We hold that Art. 1, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay.”).

220. *Id.* at 768 (“Unlike its present control [of Guantanamo Bay] the United States’ control over the prison in Germany was neither absolute nor indefinite.”).

221. *Id.* at 743, 771.

by a United States district court.<sup>222</sup> A habeas hearing, the majority ruled, must offer an opportunity to challenge the government's evidence in an Article III court and to have that court admit and consider relevant exculpatory evidence not introduced at any prior military hearing.<sup>223</sup> Because the CSRT system did neither, it was constitutionally insufficient.<sup>224</sup>

As in *Rasul*, the *Boumediene* majority opinion, written by Justice Kennedy, was narrow, deciding only that habeas corpus review was available to the Guantanamo detainees and sketching some minimal requirements of such review.<sup>225</sup> Notably, by relying solely on the common law roots of the habeas writ and the protection of the writ by the original, pre-Bill of Rights, Constitution, Justice Kennedy's opinion appeared to preserve yet again the question, left open in *Rasul*, whether the detainees also enjoyed any of the guarantees provided by the first nine amendments.<sup>226</sup> The opinion thus did not address the relationship, if any, between the habeas corpus right to Article III judicial review of the legality of their detention, established by *Boumediene* for non-citizens held outside sovereign American territory, and the apparently much more limited *Hamdi* military hearing rights available to American citizens held as enemy combatants in the United States. This apparent paradox provided an important premise for Chief Justice Roberts's *Boumediene* dissent. Roberts argued that the CSRT procedures, which he believed satisfy any constitutional process due the Guantanamo detainees, must, for that reason, also meet the minimum conditions for a habeas corpus hearing.<sup>227</sup>

Perhaps because of this latent tension with *Hamdi* and the CSRT procedures, Justice Kennedy's opinion in *Boumediene* offered little guidance to the district courts as to the standards to use in making detention decisions or on the appropriate procedures for the conduct of habeas hearings. As a consequence, the habeas

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222. *Id.* at 729.

223. *Id.* at 786.

If a detainee can present reasonably available evidence demonstrating there is no basis for his continued detention, he must have the opportunity to present this evidence to a habeas corpus court . . . . [This evidence] would be inadmissible in a DTA review proceeding. The role of an Article III court in the exercise of its habeas corpus function cannot be circumscribed in this manner.

*Id.* at 790.

224. *Id.* at 790-92.

225. *Id.* at 798.

226. *Id.*

227. *Id.* at 804 (Roberts, J. dissenting).

corpus proceedings convened by the judges of the U.S. District Court for the District of Columbia under *Boumediene* have varied greatly.<sup>228</sup> By March of 2011, these judges had completed habeas corpus proceedings for fifty-nine men held at Guantanamo.<sup>229</sup> In twenty-one of these proceedings, the evidence offered by the government was found to be sufficient to justify continued indefinite military detention.<sup>230</sup> In the other thirty-eight cases the judges ordered the release of the detainee, the first court-ordered releases since September 11, though the government continues to hold at least seventeen of these prisoners at Guantanamo pending further appeals.<sup>231</sup>

For purposes of the primary rule of law values of consistency and even-handedness, what is more striking than the government's fairly dismal record at these hearings is the variation in the definitions, procedures, and rules of evidence employed by the judges who have conducted them. The standards for determining the government's power to hold a person in indefinite military detention have ranged from a requirement of "membership in 'the armed forces of an enemy organization'"<sup>232</sup> (parallel to the definition approved in *Hamdi*, with the significant substitution of "organization" for nation) at one pole, to evidence of mere provision, at any time or place, of substantial support for "Taliban or Al Qaeda forces or associated forces that are engaged in hostilities against the United States," at the other.<sup>233</sup> Though the judges have routinely considered hearsay evidence and have been willing to protect information viewed by the government as secret from disclosure to detainees, news reports have suggested that judges have differed significantly in assessing the weight to be given materials not subjected to the

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228. Chisun Lee, *Their Own Private Guantanamo*, N.Y. TIMES, July 22 2009, <http://www.nytimes.com/2009/07/23/opinion/23lee.html> (noting that the lack of uniformity of analysis of the post-*Boumediene* detention cases).

229. *Guantanamo Timeline: Captives Sue For Release*, MIAMI HERALD (Sept. 7, 2009), <http://www.miamiherald.com/2009/09/03/1216218/guantanamo-timeline-captives-sue.html>.

230. *Id.*

231. *Id.*

232. Lee, *supra* note 228 (quoting Judge Reggie Walton's definition of "substantial support").

233. *Id.* (stating that an individual who cooked meals for the Taliban provided sufficient support to justify his detention); *see also* *Bensayah v. Obama*, 610 F.3d 718, 722 n.\* (D.C. Cir. 2010) (stating that the Government "now claims the authority to detain" these individuals).

rigorous testing that would be demanded in a criminal trial.<sup>234</sup> The absence of uniform standards has, in sum, required each judge to fashion his or her own ad hoc rules for habeas corpus hearings, with attendant costs to the perception, and perhaps the reality, of fairness and accuracy.<sup>235</sup>

#### D. Hamdan

Of the Supreme Court's five significant post-September 11 cases bearing on the President's military detention powers, *Hamdan*, decided in 2006, is the least relevant to the scope and limits of these powers.<sup>236</sup> The Court's decision in *Hamdan* did not directly address any aspect of executive authority to hold alleged combatants without trial.<sup>237</sup> Instead, the Court determined that the military commission charged with trying Hamdan was unlawful because it was inconsistent with both Congress's standards for military commissions and the requirements of international law, as adopted and enforced by Congress.<sup>238</sup>

In arriving at the second of these conclusions, Justice Stevens's opinion for the 5-4 divided Court determined that the conflict between the United States and al-Qaeda was "not of an international

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234. *Id.* (noting the lack of uniformity of analysis of the post-*Boumediene* detention cases and contrasting the burden of proof applied by judges as "far lower . . . than 'beyond a reasonable doubt'" and recognizing that "judges have . . . admitted hearsay evidence, and . . . sealed courtrooms to protect government secrecy").

235. One district judge has read *Boumediene* to require application of the Suspension Clause to habeas corpus petitions presented by foreign national detainees captured outside Afghanistan but held at the Bagram Air Base internment facility maintained by the United States in that country. *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 235 (D. D.C. 2009), *overruled by* *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010). His decision rested on findings that the United States had firm control over the facility, *id.* at 226, that aliens detained there received less process than those detained at Guantanamo Bay, *id.* at 227, that any practical obstacles to managing habeas proceedings for Bagram detainees could be overcome, *id.* at 231, and that, though imprisoned in a war zone, the detainees had not been captured on the Afghan battlefield, *id.* This decision, however, has been reversed by a panel of the D.C. Circuit, which distinguished the Bagram base from Guantanamo on the ground that it lay within a war zone. *Al Maqaleh*, 605 F.3d at 97-99.

236. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

237. *See id.* at 635 ("It bears emphasizing that . . . we do not today address[] the Government's power to detain [Hamdan] for the duration of active hostilities in order to prevent such harm.").

238. *Id.* at 567. In 2001, the Bush Administration created the system of military commissions to try persons charged by the United States with war crimes "as a tough-minded alternative to the civilian trials that the Clinton administration had used against terrorists." Charles Lane, *High Court Rejects Detainee Tribunals: 5 to 3 Ruling Curbs President's Claim of Wartime Power*, WASH. POST, June 30, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/29/AR2006062900928.html>.

character” for purposes of the application of the Geneva Conventions.<sup>239</sup> This determination may limit the President’s ability to rely on those Conventions as a source of authority to detain persons captured in that conflict as combatants. But if this is so, the power to hold persons apprehended in a non-international conflict defaults to the governing law of the detaining nation.<sup>240</sup> And it is, of course, the requirements of that law, the Constitution of the United States, and statutes enacted under its authority that drew the focus, however limited, of the Justices’ attention in *Hamdi*, *Padilla*, *Rasul*, and *Boumediene*.

#### E. Summary

The lessons to be taken from eight years of litigation, and five significant Supreme Court decisions, addressing the President’s treatment of persons captured in the armed conflicts following the attacks of September 11, 2001, are not unimportant. But because of the Supreme Court’s commitment to the passive virtues of narrow resolution on narrow grounds, these lessons are quite limited. We know, unsurprisingly, from *Hamdi* that the war-making power conferred by Congress in the AUMF authorizes the President to detain members of the Afghanistan military forces captured by the United States on the traditional battlefield, as that country became after the fall 2001 American invasion.<sup>241</sup> We know, also from *Hamdi*, that the very small number of American citizens falling within this authorization enjoy limited due process rights to challenge their designation as combatants before a military tribunal.<sup>242</sup> And, probably most significantly, we know from *Boumediene* that non-citizens held in military prison at the American Naval Base at Guantanamo Bay, Cuba, enjoy access to the writ of habeas corpus (also held, of course, by American citizens and lawful resident aliens detained in the United States) to challenge the legality of their detention, though we do not know very much about what that access entails, especially whether it includes the ability to claim pro-

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239. *Hamdan*, 548 U.S. at 629-31.

240. *Id.* at 632 (defining a “regularly constituted court” as used in Common Article 3 to mean “established and organised [sic] in accordance with the laws and procedures already in force in a country”) (citations omitted).

241. *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004); *see supra* notes 146, 148-150 and accompanying text.

242. *Hamdi*, 542 U.S. at 533; *see supra* notes 163-169 and accompanying text.

tection by some or all of the guarantees assured by the Bill of Rights.<sup>243</sup>

The many other important questions about the scope and limits of the President's military detention power remain largely unaddressed by the Court's decisions.<sup>244</sup> Perhaps the most important of these are (a) whether, and to what extent, there are geographical or temporal restraints on the lawful exercise of this power; (b) whether there is a definition that limits the categories of persons who might be subject to military detention; (c) what constitutionally mandated procedures, if any, constrain the President's power to detain persons on the basis of their alleged activities outside the traditionally defined field of battle in Afghanistan; (d) whether persons residing lawfully in the United States, including both citizens and non-citizens, are subject to military detention; and (e) whether, and in what ways, the President may lawfully interrogate persons held in military custody. On these, and perhaps other questions, both the President and the lawyers and organizations who represent detainees, can still plausibly assert just about any position.

In order to resolve the questions presented by Al-Marri's petition for certiorari, which the Court had agreed to hear, the Justices would almost certainly have been required to shed significant light on some, or maybe all, of these issues. Because Al-Marri's detention was based, in significant part, on his alleged conduct outside Afghanistan prior to September 11,<sup>245</sup> his petition necessarily ad-

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243. *Boumediene v. Bush*, 553 U.S. 723, 771 (2008); see *supra* notes 219-223 and accompanying text.

244. The first of the post-*Boumediene* habeas cases to reach the U.S. Court of Appeals for the D.C. Circuit concerned a citizen of Yemen, detained in Guantanamo after being apprehended in Afghanistan by Northern Alliance forces in late 2001 while he was serving as a cook for a paramilitary brigade engaged in combat against the United States. *Al-Bihani v. Obama*, 590 F.3d 866, 869 (D.C. Cir. 2010). Perhaps not surprisingly, in light of the similarity between the circumstances of his capture and Yaser Hamdi's, the court of appeals held both that Al-Bihani's military detention was lawful under the AUMF and that *Boumediene* did not require that Al-Bihani be afforded greater due process protections than those applicable to Hamdi's detention. *Id.* at 875-77. The opinion of the court by Judge Brown implied that Al-Bihani might not have been entitled even to the *Hamdi* procedures, noting that "the procedures to which Americans are entitled are likely greater than the procedures to which non-citizens seized abroad during the war on terror are entitled." *Id.* at 877 n.3. In a separate concurring opinion, Judge Brown also declared that the situation presented by habeas corpus petitions conducted under the authority of *Boumediene* is "particularly ripe for Congress to intervene pursuant to its policy expertise, democratic legitimacy, and oath to uphold and defend the Constitution." *Id.* at 882 (Brown, J., concurring).

245. *Al-Marri v. Wright*, 487 F.3d 160, 165-66 (4th Cir. 2007), *rev'd en banc sub nom.* *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc) (listing alleged conduct supporting the Government's detention of Al-Marri); Michael Isikoff, *A Terror*

dressed the limits imposed by time, location, and due process on the President's war power in a situation significantly different from that presented by Hamdi.<sup>246</sup> Al-Marri was also a non-citizen residing lawfully in the United States when he was apprehended, had never been a member of the armed forces of an enemy government, and was subjected to military detention, at least in significant part, in order to subject him to interrogation.<sup>247</sup> Determining the lawfulness of his detention under these circumstances would likely have required the Court also to address the standards for determining who may be subjected to military detention, the permissible goals of such detention, and the extent to which power of military detention can be applied to persons arrested on American soil.

Eight years after September 11, light from the Supreme Court on these issues would have been welcome. It goes without saying that the power of the executive branch to apply force and violence against anyone it chooses is enormous. To date, both Presidential Administrations that have held power since the events of September 11 have, perhaps understandably, sought to maximize their ability to use that power against those they perceive to be the nation's enemies. To the extent that American law imposes restraints on the President's authority to detain persons he deems to be enemy combatants without trial, it is past time for the judicial branch, which has the power and duty "to say what the law is,"<sup>248</sup> to announce what these restraints are. For this reason, unless somehow required by the Court's precedents, including those precedents standing for the passive virtues of judicial restraint, the Court's decision to dismiss the Al-Marri petition as moot was deeply unfortunate.

### III. MOOTNESS AND JUDICIAL REVIEW: THE COURT'S FAILURES IN *AL-MARRI*

#### A. *The Purposes of Judicial Review*

The American practice of judicial review serves at least two, and possibly three, distinct purposes. The first and least controversial of these is to perform the common law function of providing remedies to persons who have been, or are about to be, injured by government action that violates the Constitution. It is this essential

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*Suspect in the Dock*, NEWSWEEK, Mar. 18, 2009, <http://www.newsweek.com/2009/03/17/a-terror-suspect-in-the-dock.html>.

246. See *supra* Part II.A-C.

247. *Al-Marri*, 487 F.3d at 164-66; see *supra* Part I.A-C.

248. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

function that grounds Chief Justice Marshall's affirmation in the first part of *Marbury v. Madison*, that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."<sup>249</sup> For Marshall, it was because "court[s] of justice" were charged with carrying out this duty that they could properly examine the legality of the act of an executive branch officer, including even the head of any department of that branch.<sup>250</sup>

This justification for judicial review is reflected in the limitation of the federal judicial power by Article III of the Constitution to the resolution of cases and controversies.<sup>251</sup> And it is this limitation which in turn provides the premise for the Supreme Court's development of standing to sue doctrine, which requires that a plaintiff suffer a remediable injury at the hands of the defendant as a precondition to seeking adjudication of her or his legal claims against that defendant.<sup>252</sup> In constitutional cases, especially, this requirement adopts a posture of judicial modesty by explaining the elevation of judicial power over that of the executive or Congress as a matter of sheer necessity, as opposed to interpretive superiority. When tethered to the traditional function of providing a remedy for an unlawfully inflicted injury, a court's decision to invalidate the actions of one of these branches can be seen as a byproduct of the exercise of the core judicial function, rather than the core function itself.

The second, more controversial purpose of judicial review is to implement Marshall's justly famous claim that it is "the province and duty of the judicial department to say what the law is."<sup>253</sup> To

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249. *Id.* at 163.

250. *Id.* at 165-66.

251. U.S. CONST. art. III, § 2.

252. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

253. *Marbury*, 5 U.S. (1 Cranch) at 177. For a thorough examination of this interpretation, see William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L. J. 1; Gerald Gunther, "The Subtle Vices of the Passive Virtues"—A Comment on Principle and Expediency in Judicial Review, 64 COLUM. L. REV. 1 (1964); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 3 (1959). Contrary authorities assert that the other participants in the government have a role in interpreting the Constitution. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 248 (2004) (rejecting judicial review as the sovereign interpretation of constitutional law); see also MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999). Others advocated the control of the federal courts through either curtailing their jurisdiction, see Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to*

the extent it provides independent justification for the exercise of judicial power beyond that afforded by its necessary place in the dispensation of remedies, this claim entails an obligation by the President and Congress not just to obey the orders of courts in particular cases, but also to adhere to the principles declared by courts, especially the Supreme Court, in carrying out their own constitutional powers and responsibilities. Such an obligation does depend on the superiority of the courts over other branches in determining what the Constitution authorizes, requires, and prohibits. This is, of course, a plausible assertion, albeit one that continues to draw considerable and forceful opposition.

Controversial or not, however, the conduct of most recent Presidents has shown considerable acquiescence to the oracular, law-declaring function of Supreme Court decisions. Even the Administration of President George W. Bush, whose strategy in the terrorism cases reviewed in the previous section was to maximize the scope of unchecked executive power, treated the Supreme Court's decisions in these cases as announcing rules and principles of generally applicable law and shaped its post-litigation conduct to what it understood to be the likely requirements of that law.<sup>254</sup>

The Bush Administration's responses to the *Hamdi*, *Rasul*, and *Hamdan* cases are instructive. Despite the Supreme Court's elaboration, in *Hamdi*, of the due process rights of American citizens only, and the Court's explicit decision, in *Rasul*, not to address the question of whether the due process clause applied at all to Guantanamo detainees, the Bush Administration nevertheless immediately responded to these decisions by establishing the CSRT system at Guantanamo.<sup>255</sup>

Further, the Administration plainly saw itself as bound to apply the Court's interpretations of federal statutes in both *Rasul* and

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*Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 17 (1982), or encouraging use of judicial norms to curtail expansive judicial review, see Bickel, *supra* note 32, at 49-79 (arguing that the Court should decline to exercise jurisdiction over some cases and providing a series of factors which may be taken into account in determining whether or not to grant certiorari).

254. See *supra* Part II.A-E.

255. U.S. DEP'T OF DEF., *Combatant Status Review Tribunal Order Issued* (2004), <http://www.defense.gov/releases/release.aspx?releaseid=7530>; see also Memorandum from the Deputy Secretary of Defense on Order Establishing Combatant Statute Review Tribunal to the Secretary of the Navy 1-4 (July 7, 2004), available at <http://www.defense.gov/news/Jul2004/d20040707review.pdf>; *Guantanamo Bay Timeline*, WASH. POST, <http://projects.washingtonpost.com/guantanamo/timeline> (last visited Mar. 31, 2011) (showing that CSRTs were initiated for detainees on August 13, 2004, less than two months after the Supreme Court ruled in *Rasul*).

*Hamdan* in similar situations. After the *Rasul* majority read the habeas corpus jurisdictional statute to apply to petitions filed from Guantanamo, the Administration acquiesced in the right of Guantanamo detainees with retained counsel to be represented by such counsel for the purpose of pursuing such petitions.<sup>256</sup> Similarly, after the Court's decision in *Hamdan* that the military commission scheme established by the President was inconsistent with federal statutory requirements, the Bush Administration immediately suspended its use of these tribunals entirely, rather than simply calling off Hamdan's trial but persisting in using the tribunals to prosecute other cases. And, most tellingly, since both *Rasul* and *Hamdan* were based on the Supreme Court's reading of federal statutes, the Administration did not respond to either decision by continuing to urge or apply its own, rejected interpretations of these statutes.

Instead, the Bush Administration went to Congress to seek the prospective reversal of both decisions by statutory amendment in the Military Commissions Act of 2006.<sup>257</sup> None of this is to suggest that the Administration's responses to these cases were correct, praiseworthy or generous, much less surprising, or even worthy of much note. The point of reprising these responses is rather to show that the law-announcing—as opposed to *just* dispute resolving—function of judicial review is sufficiently embedded in American legal culture to have been largely accepted even by a President who was, perhaps, most likely to have resisted it.

The third possible purpose of judicial review is to limit the exercise of executive power.<sup>258</sup> This goal may be no more than a corollary of the previous two, without any independent justificatory force. Whatever independent weight this third function may provide, however, applies uniquely in habeas corpus cases. Limiting executive power appears to supply a premise for Justice Kennedy's opinion for the Court in *Boumediene*.<sup>259</sup> Justice Kennedy was careful to decide that the privilege of habeas corpus, protected from

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256. *Guantanamo Bay Timeline*, *supra* note 255 (On August 30, 2004, “the first civilian attorney [is able] to meet with detainees at Guantanamo.”).

257. *See id.* (On September 28, 2006, approximately three months after the Court's ruling in *Hamdan*, Congress passed the Military Commission Act.); John Cerone, *The Military Commissions Act of 2006: Examining the Relationship between the International Law of Armed Conflict and US Law*, AM. SOC'Y OF INT'L LAW (Nov. 13, 2006), [http://www.asil.org/insights061114.cfm#\\_ednref4](http://www.asil.org/insights061114.cfm#_ednref4).

258. *See* AZIZ Z. HUO, BRENNAN CENTER FOR JUSTICE, TWELVE STEPS TO RESTORE CHECKS AND BALANCES 11-13 (2008), available at [http://brennan.3cdn.net/543341179e6a856b9b\\_9um6batcl.pdf](http://brennan.3cdn.net/543341179e6a856b9b_9um6batcl.pdf).

259. *Boumediene v. Bush*, 553 U.S. 723, 744 (2008).

suspension by Article I, Section 9 of the Constitution, is in force at the Guantanamo Naval Base, without passing on whether non-citizens held there enjoy the protection of the Bill of Rights as well.<sup>260</sup> Perhaps for this reason, his opinion sought to explain the role of the great writ in restraining the conduct of the Executive Branch even on behalf of persons who may enjoy no rights under American law. Justice Kennedy's answer to this paradox was to anchor the writ in the principle of separation of powers:

The Framers' inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty. Because the Constitution's separation-of-powers structure . . . protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles. . . .

[The habeas clause] ensures that, except during periods of formal suspension, the Judiciary will have a time tested device, the writ, to maintain the "delicate balance of governance" that is itself the surest safeguard of liberty.<sup>261</sup>

This argument, to the extent it disaggregates the justification for judicial review, at least in habeas corpus cases, from the protection of other legal rights of injured plaintiffs and the authority of the courts to articulate the content of constitutional requirements generally, appears to rest on an independent need to curb the abuse of executive power.<sup>262</sup> "The Clause," Justice Kennedy concluded, "protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account."<sup>263</sup> If this duty and authority provides a third rationale for the exercise of judicial review, it has special salience with respect to the President's power to hold persons in indefinite military detention without trial.<sup>264</sup>

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260. *Id.* at 739. "First, protection for the privilege of habeas corpus was one of the few safeguards of liberty specified in a Constitution that, at the outset, had no Bill of Rights." *Id.* Kennedy further expressed that "[w]e hold that Art. I, § 9, cl. 2, of the Constitution," and *not* the Bill of Rights, "has full effect at Guantanamo Bay." *Id.* at 771.

261. *Id.* at 742-43, 745 (citations omitted).

262. *Id.* at 745-46.

263. *Id.* at 745.

264. *Id.* at 797 ("Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person.").

### B. *Mootness as a Passive Virtue*

The Supreme Court's mootness doctrine seeks to minimize the inherent challenge posed by judicial review to the prerogatives of the other branches by limiting the occasions for review to those situations where its exercise is most necessary and thus most justifiable.<sup>265</sup> The mootness doctrine serves judicial restraint by withdrawing a plaintiff's ability to continue litigating a case (nearly always one seeking some form of declaratory and or injunctive relief) if the conduct by the defendant that prompted the litigation ends before its legality is adjudicated.<sup>266</sup> A court's dismissal of a case on the ground that it has become moot is thus a corollary of a judgment, made at the outset of a case, that the plaintiff lacks standing to sue.<sup>267</sup> In order to have standing to sue for an injunction, a plaintiff must be suffering an injury at the hands of the defendant that is susceptible of judicial remediation. If that injury abates, regardless of the reason, before the litigation ends, judicial remediation is deemed no longer necessary.<sup>268</sup> As Professor Henry Monaghan put it, mootness is "standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)."<sup>269</sup>

Mootness joins a passel of similarly crafted tools of judicial restraint, such as ripeness, abstention, and the prudential applications of the standing and political question doctrines, that allow the Supreme Court substantial leeway to control the context and timing of its exercise of judicial review. In his justly renowned essay, now

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265. See Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1383-86 (1973) (defending the mootness doctrine and the exceptions to it as serving the Supreme Court's "special function" as final arbiter of the meaning of the Constitution by assuring that constitutional issues are addressed and resolved in proper context); see also Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 29-30 (1984) (defending mootness and its exceptions as focusing adjudication on the protection of rights actually in danger while avoiding unnecessary constitutional decisionmaking); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 656 (1992) (arguing that the prudential character of mootness and the mootness exceptions are an effective way of assuring that the decisions of the Supreme Court give "true and concrete meaning to public values").

266. See Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 299 (1979) (describing the doctrine of mootness).

267. See *North Carolina v. Rice*, 404 U.S. 244, 246 (1971).

268. See Monaghan, *supra* note 265, at 1383 (urging that the court should not "waste" its resources on cases in which "nothing" is at stake).

269. See *id.* at 1384.

nearly fifty years old, and in his subsequently equally famous book, *The Least Dangerous Branch*, Professor Alexander Bickel coined the enduring phrase, “the passive virtues” to categorize and celebrate these tools.<sup>270</sup> For Bickel, the exercise of judicial review was less a duty owed by the courts, either to an injured litigant or to the American polity as a whole, than a problematic but essential assertion of power.<sup>271</sup> To be seen as legitimate, Bickel argued, this power should be deployed only with abiding regard both for the legitimate exercise of political authority by the elected branches and for the limits of judicial efficacy in the face of resistance by those branches.<sup>272</sup> Judicial review, in Bickel’s view, must above all, rest on principle.<sup>273</sup> If its exercise were mandatory, principle, he feared, would yield to expedient deference to excessive claims of power by the President and Congress, especially in times of great political stress or crisis.<sup>274</sup> Only through the wise use of techniques that permitted the withholding of judgment in such times could the Supreme Court conserve its commitment to principled resolution of constitutional issues.<sup>275</sup> Without the “passive virtues” the Court would be pressured to decide the merits of some cases, especially those of significant moment, in favor of the elected branches when a proper reading of the Constitution and laws required the opposite result.<sup>276</sup>

### C. *Al-Marri and the Exceptions to Mootness*

Bickel’s warning about the limits of judicial authority in times of national crisis and political stress seems readily applicable to the period, still upon us in many ways, following the September 11, 2001 attacks. Certainly the Supreme Court’s carefully limited dispositions of the military detention cases it has resolved during this period reflect Bickel’s admonition of caution and restraint in the exercise of judicial power. But if the Court’s exceedingly narrow rulings in these cases were warranted, its use of mootness to avoid resolving Al-Marri’s appeal was not. The Court’s decisions shaping

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270. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111-98, 128 (Yale University Press, 2d ed. 1986) (discussing the judiciary’s use of “techniques of avoiding adjudication” to “limit[] each year’s business to what nine men can fruitfully deal with”).

271. *See id.* at 128-32.

272. *See id.* at 192-97.

273. *Id.* at 130-33.

274. *See id.* at 131-32.

275. *See id.* at 130-33, 187-89.

276. *See id.* at 184-85.

the mootness doctrine since the time of Bickel's essay have no doubt served the prudential purposes for which Bickel argued. But these decisions have also refused to apply the doctrine in circumstances where the purposes of judicial review required its suspension.<sup>277</sup> Nearly all of these circumstances applied to Al-Marri's challenge to his military detention by the President. The Court's refusal to decide the merits of this challenge thus claimed the passive virtues of mootness in a case where there was no virtue at all in the Court's passivity. The Court's misuse of the mootness doctrine in *Al-Marri* thus undermined the more important value which, in Bickel's view, justifies the passive virtues: the Supreme Court's commitment to principled adjudication.

Al-Marri's case, to be sure, did technically become moot on February 27, 2009, when the Obama Administration ended his nearly six years in military detention and returned him to the civilian custody of the Justice Department to face a second criminal prosecution.<sup>278</sup> Nevertheless, two of the exceptions to mootness dismissal fashioned by the Supreme Court required the Court to keep his appeal on its docket.<sup>279</sup> And a third consideration, never formally adopted by the Court as an exception to mootness, but urged persuasively by Chief Justice Rehnquist two decades ago, should also have prompted the Justices to resolve the important questions presented by Al-Marri's military detention without trial.<sup>280</sup>

### 1. Capable of Repetition Yet Evading Review

The first mootness exception excludes from dismissal those cases in which a plaintiff's initial suit seeks relief from injuries which are capable of repetition, yet evading review.<sup>281</sup> This exception is quite narrow, perhaps narrower than its label might imply, because it applies only when the plaintiff whose claim has become moot faces a reasonable expectation of being injured again by the same defendant under the same policy challenged in the initial litigation.<sup>282</sup> This limitation effectively tailors the exception's applica-

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277. See discussion *supra* notes 74-85.

278. Memorandum from Administration of Barack H. Obama on Transfer of Detainee to Control of the Attorney General to the Secretary of Defense (Feb. 27, 2009), available at <http://www.gpoaccess.gov/presdocs/2009/DCPD200900110.pdf>.

279. See discussion *infra* Part III.C.1-2.

280. See discussion *infra* Part III.C.3.

281. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 774 (1978).

282. *Id.*

tion to plaintiffs who are repeat players, that is, those who are likely to encounter the same policy or practice again and again, without ever getting an opportunity to secure a final adjudication of its legality.

Cases that are capable of repetition, yet evading review, are thus usually those which become moot because the injury inflicted on the plaintiff by the challenged policy is intrinsically of only limited duration, so that the passage of time itself inevitably abates the injury before the litigation is complete. The most common examples include candidate or contributor challenges to ballot qualification or other election rules.<sup>283</sup> In these cases, any particular election to which the challenged rules apply will be held before a suit seeking to enjoin them can be resolved on the merits. If the challenger is likely to participate in the next election, and thus subject to the rules, again his or her injury is “capable of repetition, yet evading review.”<sup>284</sup>

The repeat player requirement is as essential to the exception as the inherently transitory character of the plaintiff’s injury. For example, a challenge to a state’s one year durational residency requirement for divorce was not found incapable of “repetition, yet evading review” because of the extreme improbability that the same plaintiff would be harmed by the same state’s policy a second time.<sup>285</sup> By limiting its application only to those moot cases in which the same plaintiff faces the prospect of later identical injury by the same defendant, each one evading review, the Supreme Court has plainly crafted the “capable of repetition, yet evading review” exception to mootness<sup>286</sup> to serve the most widely accepted and least controversial justification for judicial review—the granting of adequate remedies to persons who are unlawfully injured.<sup>287</sup>

But Al-Marri’s experience shows that a plaintiff’s injuries need not be transitory to be “capable of repetition, yet evading review.” Far from it. Al-Marri’s military detention was by its terms indefinite when authorized by President Bush and had lasted nearly six years when it was lifted, in favor of pre-trial detention attendant to crimi-

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283. See *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 735-36 (2008).

284. *Id.*

285. See *Sosna v. Iowa*, 419 U.S. 393, 399-400 (1975).

286. *Id.*

287. *Id.* (noting that state officials would “continue to enforce the challenged [divorce] statute . . . yet . . . no single challenger will remain subject to its restrictions for the period necessary to see such a lawsuit to its conclusion”).

nal prosecution, by President Obama.<sup>288</sup> The harms suffered by Al-Marri are instead “capable of repetition, yet evading review” because the actions of both Presidential Administrations show that they are willing and able to move him from civilian to military detention and back at any time, for any reason.

The timing of his transfers—at apparently key moments in his first criminal prosecution and again in the litigation challenging the legality of his military detention—strongly suggest that in Al-Marri’s case the Government’s reasons were in each instance chiefly strategic. But Al-Marri’s right to invoke the “capable of repetition, yet evading review” exception to a mootness dismissal did not depend on an ascription to the executive branch of the perhaps less than salutary motivation of avoiding judicial review of its detention policies. The point is not the President’s reason for changing the terms of Al-Marri’s detention. Rather, it is his power to do so, without limitation, at times and in ways that inflict, then re-inflict, the same harm on Al-Marri, over and over.

Significantly, the Obama Administration’s successful briefs to the Supreme Court urging dismissal of Al-Marri’s appeal as moot continued to avow the power to remand him again to indefinite detention regardless of the outcome of the criminal proceedings against him.<sup>289</sup> Candidly, the brief even suggested that his future military detention might even be based on “evidence adduced during his criminal proceeding.”<sup>290</sup> And officially, at least, the Administration held to the position of its predecessor that criminal prosecution and military detention are separate, independent, and wholly parallel responses to the threat of terrorism in the aftermath of September 11.<sup>291</sup> The fact that a person is acquitted of criminal charges does not prevent his imprisonment in military custody on the basis of the same (alleged) acts that provided the basis for such charges. At the time of the indictment that brought a formal end to his military detention, Al-Marri thus faced (and may yet face) at least a reasonable expectation that he would (and will) be subjected to such detention again. The Supreme Court should have recognized that this expectation brought his injuries within the “capable

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288. See *supra* Part II.A.

289. Respondent’s Motion to Dismiss at 10-12, *Al-Marri v. Spagone*, 129 S. Ct 1545 (2009) (No. 08-368), 2009 WL 526212.

290. *Id.* at 11.

291. Peter Finn, *Administration Won’t Seek New Detention System*, Wash. Post, Sept. 24, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/23/AR2009092304427.html>.

of repetition, yet evading review” exception to mootness and, therefore, within its primary responsibility to provide remedies for such injuries if they are unlawfully inflicted.

## 2. Voluntary Cessation

Unlike the “capable of repetition, yet evading review” doctrine, the voluntary cessation exception to mootness does not arise from either injuries of limited duration or the dilemmas faced by repeat litigants. Instead, it is directed squarely at preventing the sort of strategic avoidance of adjudication that the Obama Administration appears to have pursued in the Al-Marri detention litigation. The voluntary cessation exception counsels that a suit that becomes moot because the defendant abandons its challenged policy or practice in the midst of litigation should be dismissed only if the abandonment is genuine.<sup>292</sup> The measure of genuineness is whether there is “no reasonable expectation” that that challenged policy or practice will be revived once the pressure of litigation is lifted.<sup>293</sup> For purposes of voluntary cessation, the plaintiffs need not show that they will be re-injured by such a revival. The question is instead whether the defendant is “free to return to his old ways,” absent final adjudication of the legality of these ways.<sup>294</sup>

Because the voluntary cessation exception to mootness applies independently of any continuing threat to the plaintiff, the Supreme Court has not justified its application as essential to the remedial function of adjudication that underlies the “capable of repetition, yet evading review” doctrine. Instead, the Court has explained its development of the voluntary cessation doctrine by pointing both to the second major rationale for judicial review, “the province and duty of the judicial department to say what the law is,”<sup>295</sup> and to the threat of overreaching government power that undergirded Justice Kennedy’s rationale in *Boumediene* for holding habeas corpus applicable at Guantanamo Bay.

The Court’s concerns to safeguard its authority to declare the law and to prevent official abuse are reflected in its expansive use of the voluntary cessation doctrine to permit review of the legality of policies that have been formally repealed, or even replaced by new ones. Notwithstanding such decisive evidence of official repu-

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292. *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. Jacksonville, Fla.*, 508 U.S. 656, 676 (1993) (O’Connor, J., dissenting).

293. *Id.* at 677.

294. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953).

295. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

diation of a challenged policy, the Court has remained suspicious that the changes might be mere stratagems, designed to foil judicial review, only to be dropped in favor of a return to an unlawful status quo ante as soon as the threat has passed. Even the possibility of this kind of official misconduct is enough to keep a challenge to a clearly abandoned policy alive if a defendant is formally “free to return to his old ways”:

A controversy may remain to be settled in such circumstances, e.g., a dispute over the legality of the challenged practices. . . . This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. . . . The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement.<sup>296</sup>

An opinion for the Court by Justice Thomas underscores the Court’s suspicion of amendments to challenged policies if these amendments are adopted in the midst of litigation and retain any significant resemblance to measures they replace.<sup>297</sup> For Justice Thomas, such amendments do not represent abandonment of the challenged policies, but amount instead to their re-enactment. The Court’s failure to review the original (not the new) policies would mean that “a defendant could moot a case by repealing the challenged statute and replacing it with one that differs only in some insignificant respect.”<sup>298</sup> For Justice Thomas, this was an obviously intolerable result.

This application of the voluntary cessation exception to mootness underscores the Supreme Court’s jealousy to preserve its authority to pass on the legality of the practices of other governmental actors, even when such practices are no longer extant, especially when that authority is, or might be, threatened by official abuse of the litigation process. In *Al-Marri*, however, the military detention policies at issue were neither dropped nor amended, sincerely or insincerely. Instead, the Obama Administration mooted *Al-Marri*’s suit challenging his military detention by suspending these policies as to him and to him alone. To be sure, *Al-Marri* has to date been the only non-citizen prisoner taken into military custody while residing legally in the United States, arguably rendering his transfer from military to Justice Department detention a voluntary cessation

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296. *W.T. Grant Co.*, 345 U.S. at 632 (citations omitted).

297. *Northeastern Fla. Chapter of Associated Gen. Contractors of Am.*, 508 U.S. at 662.

298. *Id.*

of a policy applicable to a class of one. The problem with this argument is that the Administration emphasized that Al-Marri's transfer did not represent an abandonment of its asserted power to detain anyone else, whether similarly situated to Al-Marri or not. In fact, the Obama Administration, as pointed out in the previous subsection, did not even forswear the authority again to return Al-Marri to military custody.<sup>299</sup> It is thus impossible to view Al-Marri's transfer as denoting genuine abandonment of anything except for the Administration's willingness to defend this claim of authority in the Supreme Court.

The Administration's briefs to the Supreme Court essentially conceded this point. They suggested nothing more than that President Obama had ordered a comprehensive review of military detention policies.<sup>300</sup> This meant only that if Al-Marri were redesignated for military detention in the future, "that redesignation would occur in a much different structure under different circumstances."<sup>301</sup> Nowhere did the Administration disclaim the power to detain anyone similarly situated to Al-Marri while the policy review directed by the President proceeded. Unless the fruits of this review, completely conjectural at the time President Obama suspended Al-Marri's military detention, were to completely forswear the authority to detain persons in his situation, it is possible, if not likely, that they would differ from the present policy only in "some insignificant respect[s]."<sup>302</sup> And with respect to the circumstantial evidence that Al-Marri's transfer amounts to little more than strategic evasion of Supreme Court review, the Administration argued only that the President's responsibility to protect the country foreclosed such a conclusion: "A rule [the voluntary cessation exception] designed to prevent manipulation of litigation should not be applied to considered action by the President of the United States involving uniquely sensitive questions of national security and military policy."<sup>303</sup>

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299. See Respondent's Motion to Dismiss at 6-9, *Al-Marri v. Spagone*, 129 S. Ct 1545 (2009) (No. 08-368), 2009 WL 526212 (arguing that al-Marri, as petitioner, is receiving the relief sought (criminal prosecution) while not addressing the question of whether detention is authorized under the AUMF and the Constitution).

300. See generally, Respondent's Motion to Dismiss at 6-9, *Al-Marri*, 139 S. Ct 1545 (No. 08-368).

301. *Id.* at 11.

302. *Northeastern Fla. Chapter of Associated Gen. Contractors of Am.*, 508 U.S. at 662.

303. *Al-Marri*, 2009 WL 526212, at \*12.

In sum, the Administration offered no answer to the argument that its mooting of Al-Marri's appeal fell squarely within the voluntary cessation exception. Instead, it urged only an abstract to appeal the passive virtues, contending that compelling prudential concerns militated against judicial interference with Presidential judgments about foreign affairs or national security. But unless the Administration meant to suggest that these concerns should always preclude such interference, the circumstances of the Al-Marri litigation far exceeded the outer limit of their application.

### 3. Chief Justice Rehnquist's Lament: Mootness After Certiorari

Chief Justice Rehnquist offered a third justification for withholding a mootness dismissal, one that also applied to Al-Marri's appeal. This third exception is for cases that become moot only after a grant of certiorari review by the Supreme Court.<sup>304</sup> Chief Justice Rehnquist began his argument for a post-certiorari exception to mootness by reviewing the mootness doctrine's firm position among the Supreme Court's prudentially fashioned set of passive virtues:

If it were indeed Article III which—by reason of its requirement of a case or controversy for the exercise of federal judicial power—underlies the mootness doctrine, the “capable of repetition, yet evading” review exception . . . would be incomprehensible. Article III extends the judicial power of the United States only to cases and controversies; it does not except from this requirement other lawsuits which are “capable of repetition, yet evading review.” If our mootness doctrine were forced upon us by the case or controversy requirement of Article III itself, we would have no more power to decide lawsuits which are “moot” but which also raise questions which are capable of repetition but evading review than we would to decide cases which are “moot” but raise no such questions. . . .

The logical conclusion to be drawn from . . . the historical development of the principle of mootness, is that while an unwillingness to decide moot cases may be connected to the case or controversy requirement of Article III, it is an attenuated connection that may be overridden when there are strong reasons to override it. The “capable of repetition, yet evading review” exception is an example. So too is our refusal to dismiss as moot those cases in which the defendant voluntarily ceases, at some

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304. *Honig v. Doe*, 484 U.S. 305 (1998).

advanced stage in the appellate proceedings, whatever activity prompted the plaintiff to seek an injunction.<sup>305</sup>

The Chief Justice then grounded his argument for an additional exception for cases becoming moot after a grant of certiorari as squarely within the law declaring function of Supreme Court review:

I believe that we should adopt an additional exception to our present mootness doctrine for those cases where the events which render the case moot have supervened since our grant of certiorari . . . in the case. . . . [Our] resources—the time spent preparing to decide the case by reading briefs, hearing oral arguments, and conferring—are squandered in every case in which it becomes apparent after the decisional process is underway that we may not reach the question presented. To me [that] . . . is a sufficient reason either to abandon the doctrine of mootness altogether in cases which this Court has decided to review, or at least to relax the doctrine. . . . I would leave the mootness doctrine . . . in full force and effect when applied to the earlier stages of a lawsuit, but I believe that once this Court has undertaken a consideration of a case, an exception to that principle is just as much warranted as where a case is “capable of repetition, yet evading review.”<sup>306</sup>

The Supreme Court has never formally adopted Chief Justice Rehnquist’s recommendation. But as a case to which both the “capable of repetition, yet evading” review and the voluntary cessation exceptions to mootness also applied, *Al-Marri*’s appeal presented the strongest possible occasion for its application.

#### CONCLUSION

In defending the passive virtues as techniques of judicial restraint, Alexander Bickel was not counseling judicial abdication. For Bickel, the passive virtues permitted the Supreme Court a measure of control over the timing of judicial review in order to maximize its effectiveness when exercised, as it properly and inevitably must be.<sup>307</sup> By deferring the resolution, especially of issues of great moment and substantial controversy, until passions may cool from the balm the passage of time sometimes affords, Bickel thought the Court would be better able to coerce the elected branches to ad-

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305. *Id.* at 330-31 (Rehnquist, J., concurring).

306. *Id.* at 331-33.

307. *See* Bickel, *supra* note 32, at 57-58.

here to the rule of law and less likely itself to succumb to an expedient rather than principled declaration of what the law requires.<sup>308</sup>

Since the September 11, 2001 attacks, the Supreme Court has decided five cases which concern directly, or indirectly, the President's power to place persons in indefinite military detention without trial and the rights of persons who may be subject to such detention.<sup>309</sup> Prompted by a commitment to judicial restraint, the Court resolved all of these cases on exceedingly narrow grounds. As a result, its decisions failed to address many of the central questions raised by the executive branch's use of military detention in aid of its efforts to combat terrorism.<sup>310</sup> The Court has said very little about the scope, geographical or temporal, of the military detention power, or about the differences, if any, raised by the application of the power to citizens, as opposed to non-citizens, of the United States.<sup>311</sup> Nor has the Court defined the kinds of activities (beyond engaging while a member of the Afghanistan government's military forces in armed conflict against American forces in that country) that can properly subject someone to indefinite military detention or the constitutionally required procedures, if any, which must attend the military detention of non-citizens.<sup>312</sup> Finally, the Court has not addressed whether the government's wish to interrogate a person can ever, even in part, provide a basis for detaining that person.

Ali Al-Marri was a non-citizen arrested while legally residing in the United States when President Bush placed him in military detention, in part in order to interrogate him about al-Qaeda.<sup>313</sup> None of Al-Marri's alleged conduct that provided the basis for the President's decision was as a member of the military forces of Afghanistan, or of any other nation. Much of the alleged conduct took place before September 11, 2001, and some of it apparently transpired in the United States. The full U.S. Court of Appeals for the Fourth Circuit nonetheless sustained the President's authority to hold Al-Marri in military detention, a decision which the Supreme Court accepted for review.<sup>314</sup>

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308. *See id.* at 77-78.

309. *See supra* Part II.

310. *See supra* Part II.

311. *See supra* Part II.

312. *See supra* Part II.

313. *See supra* Part II.

314. *See Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008), *vacated sub nom. Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009).

Disposition of Al-Marri's case would likely have required the Court to address many, perhaps even most, of the significant issues it declined to reach in the five previous post-September 11 decisions which touched on the President's military detention power. This disposition would also have been rendered in a context significantly less charged than the one the Court faced when it decided the earlier cases. The Presidency of George W. Bush, responsible for the adoption of the policies challenged by Al-Marri, had ended. His successor, Barack Obama, publicly opposed many of these policies during the last presidential campaign and had announced his intention to review at least some of them.<sup>315</sup> These developments likely signaled at least a modest, albeit perhaps short-lived, tempering of the political polarization which surrounded military detention during the Bush Administration. At the least, they pointed toward a lower risk of serious conflict between the Supreme Court and the Executive Branch in the event of a decision which limited presidential power. It is even possible that a declaration from the Court as to what the law is with respect to any aspect of the President's military detention authority would have been helpful to the policy review directed by President Obama. And there is no doubt that such a declaration would have been enormously useful to the district judges who are now sorting out the habeas corpus petitions from Guantanamo detainees in the wake of *Boumediene*.<sup>316</sup> In Bickel's terms, the time for a principled judicial resolution of the questions presented by Al-Marri's appeal had arrived.

Nevertheless, when confronted with the Obama Administration's decision to move Al-Marri from military to civilian detention in order to prosecute him, the Supreme Court dismissed his appeal as moot.<sup>317</sup> As an application of the Supreme Court's mootness doctrine, this decision was indefensible. More important, it fundamentally disserved the essential functions of judicial review in our constitutional system: to grant relief to persons who are unlawfully injured, to say what the law is, and to curb abuse of government power.

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315. See Benjamin Wittes & Colleen A. Peppard, *Designing Detention: A Model Law for Terrorist Incapacitation*, BROOKINGS INSTIT. (June 26, 2009), [http://www.brookings.edu/papers/2009/0626\\_detention\\_wittes.aspx](http://www.brookings.edu/papers/2009/0626_detention_wittes.aspx).

316. See Chisun Lee, *Dig Into the Gitmo Detainee Lawsuits*, PROPUBLICA (Aug. 12, 2010), [http://www.propublica.org/special/an-examination-of-31-gitmo-detainee-lawsuits-722#ali\\_ahmed](http://www.propublica.org/special/an-examination-of-31-gitmo-detainee-lawsuits-722#ali_ahmed) (chart tracking the lawsuits of the forty-seven Guantanamo detainees).

317. *Al-Marri*, 129 S. Ct. 1545.

To be sure, the Court did accompany its dismissal of Al-Marri's appeal with a judgment vacating the decision of the Court of Appeals.<sup>318</sup> But that judgment did not deprive that court's majority position sustaining the President's power to detain Al-Marri of its precedential value. Under the authority of that position, the President remains free plausibly to claim the power similarly to detain anyone, citizen or alien, resident of the United States or not, on the basis of any unproven conduct, anywhere in the world, that he deems to be a military threat to the United States. President Obama's proposed use of the military detention power may never extend this broadly. But his still pending proposal to institutionalize some form of military detention, and his decision to continue such detention indefinitely for many of the remaining Guantanamo detainees, underscore, however, the likelihood that the power he claims will, in Justice Jackson's dissenting words in the most infamous detention case in our history, lie "about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."<sup>319</sup>

#### EPILOGUE

On April 30, 2009, Ali Al-Marri pled guilty to one count of conspiracy to provide material support to a foreign terrorist organization.<sup>320</sup> The maximum prison sentence for this crime is fifteen years, and Al-Marri was permitted to argue that a lesser sentence should be imposed and that he should receive credit towards completion of his sentence for his time in military detention.<sup>321</sup> The Government agreed to dismiss the second count of its indictment of Al-Marri, a charge of providing material support to a terrorist organization.<sup>322</sup> Al-Marri also agreed not to oppose his deportation to either Qatar or Saudi Arabia upon completion of his prison term, while the government agreed that it would not seek again to detain

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318. *Id.*

319. *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

320. See John Schwartz, *Plea Deal Reached with Agent for Al Qaeda*, N.Y. TIMES, May 1, 2009, <http://www.nytimes.com/2009/05/01/us/01marri.html>.

321. Lyle Denniston, *Lingering Issues for Al-Marri*, SCOTUS BLOG (Apr. 30, 2009, 20:06 EST), <http://www.scotusblog.com/2009/04/lingering-issues-for-al-marri/>.

322. *Id.*

Al-Marri in military custody on the basis of conduct he engaged in before his arrest on December 12, 2001.<sup>323</sup>

In the plea agreement, Al-Marri admitted to attending al-Qaeda camps between 1998 and 2004, meeting with Khalid Sheikh Mohammed, the al-Qaeda official, in 2001, and to offering his services to the organization.<sup>324</sup> He further admitted communicating with and receiving money during the summer of 2001 from Mustafa Al-Hawshawi, the al-Qaeda member who is also thought to be a primary financier of the September 11 attacks.<sup>325</sup> Finally, Al-Marri admitted that he conducted research, apparently after his re-entry into the United States on September 10, 2001, into various cyanide substances, including their prices, toxicity levels, and commercial uses, and that an almanac recovered by the government in his apartment was bookmarked at pages showing dams, waterways, and tunnels in the United States.<sup>326</sup>

The plea agreement also indicated Al-Marri's knowledge of al-Qaeda's involvement in the September 11, 2001 attacks on the United States only as of September 21 of that year.<sup>327</sup> And though Al-Marri admitted to attempting unsuccessfully to make contact with al-Qaeda members by telephone during the autumn of 2001, the plea agreement indicates no communication between Al-Marri and al-Qaeda from September 23rd on.<sup>328</sup> In announcing the plea agreement, Attorney General Eric Holder said that it "reflects what we can achieve when we have faith in our criminal justice system and are unwavering in our commitment to the values upon which the nation was founded and under the rule of law."<sup>329</sup>

On October 29, 2009, Al-Marri was sentenced to a prison term of eight years and four months.<sup>330</sup> Federal prosecutors had urged a fifteen year sentence, but Judge Michael Mihm decided instead to take into account Al-Marri's eight years in federal custody, including the five and one-half years he spent as a military detainee in the

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323. Plea Agreement and Stipulation of Facts at 8-9, *United States v. Al-Marri*, No. 09-CR-10030 (C.D. Ill. Feb. 26, 2009), available at <http://www.scotusblog.com/wp-content/uploads/2009/05/plea-agreement-al-marri.pdf>.

324. *Id.* at 10-11.

325. *Id.* at 11-12.

326. *Id.* at 16-17.

327. *Id.* at 15.

328. *Id.* at 15-16.

329. See Schwartz, *supra* note 320.

330. Carrie Johnson, *Judge Credits Time Served in Sentencing Al-Qaeda Aide*, WASH. POST, Oct. 30, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/29/AR2009102900457.html>.

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Charleston Navy Brig.<sup>331</sup> Given the time he has already served, Al-Marri will be eligible for release in late 2014. At the sentencing hearing, Al-Marri cried when he told Judge Mihm about not hearing a word from his wife and children during his solitary confinement as a military detainee.<sup>332</sup> He also reiterated the admission in his guilty plea that he had helped al-Qaeda, adding that he was sorry for that and “no longer wished harm to the American people.”<sup>333</sup>

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331. John Schwartz, *Admitted Qaeda Agent Receives Prison Sentence*, N.Y. TIMES, Oct. 30, 2009, [www.nytimes.com/2009/10/30/us/30marri.html](http://www.nytimes.com/2009/10/30/us/30marri.html).

332. *Id.*

333. *Id.*