Guantánamo is Here: The Military Commissions Act and Noncitizen Vulnerability

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For more than one hundred years, immigration law has stood on the doctrinal foundation that it is civil rather than criminal, and that its sanctions are administrative rather than punitive.1 Despite this formalistic distinction, immigration increasingly has been criminalized, forcing immigration and criminal law into closer, more frequent, and often uneasy contact, and conflating the noncitizen and the criminal into a single category of undesirability. Today, in the aftermath of September 11th, immigration is newly criminalized, this time by national security law, conjoining the identities of the noncitizen and the terrorist,2 and adding transnational dimension to the noncitizen's criminal character. Whenever noncitizens are involved, questions of membership, rights, culture, and belonging3 are never far be-

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1 See Fong Yue Ting v United States, 149 US 698, 726–31 (1903) (holding that deportation is a civil rather than a criminal matter, and therefore does not constitute punishment for a crime).
2 See Leti Volpp, The Citizen and the Terrorist, 49 UCLA L Rev 1575, 1576 (2002) (arguing that September 11 "facilitated the consolidation of a new identity category that groups together persons who appear ‘Middle Eastern, Arab, or Muslim’ and that this consolidation ‘reflects a racialization wherein members of this group are identified as terrorists, and are disidentified as citizens.").
3 See generally Linda Bosniak, Citizenship Denationalized, 7 Ind J Global Legal Stud 447, 456–88 (2000) (identifying four dimensions of citizenship: citizenship as formal
hind. And so the criminalization of noncitizens, whether as "common criminals" or as terrorists, necessarily implicates multiple notions of citizenship, as applied to the other and the self, the "them" and the "us."

This Article focuses on one area of national security law—the rudimentary legal regime that governs detainees at Guantánamo Bay, Cuba, and in particular, the recently enacted Military Commissions Act of 2006. The Article draws upon my experience representing a detainee at Guantánamo over the past two and a half years. My interest is in examining how a legal framework that regulates noncitizens detained outside the territorial United States traverses national boundaries and necessarily implicates the rights, status, and condition of noncitizens within the United States. My hope is to demonstrate that while geographically remote, Guantánamo is tethered to the United States, and in the legal, cultural, and political imaginations, is contiguous with it.

I. GUANTÁNAMO, "THE WORST OF THE WORST," AND OMAR KHADR

Within months of the September 11th attacks, the Bush Administration began delivering suspected terrorists from around the world to the U.S. Naval Base at Guantánamo Bay for detention and interrogation in the newly minted "war on terror."4 The Administration has described the detainees at Guantánamo as "the worst of the worst," as hardened terrorists, as trained killers.5 The rhetoric has been incessant and extreme: these are

legal status, citizenship as rights, citizenship as political activity, and citizenship as identity or solidarity); Linda Bosniak, The Citizen and the Alien (Princeton 2006) (same).

4 I put "war on terrorism" in scare quotes because as currently conducted, U.S. antiterrorism efforts encompass not only combat in places such as Afghanistan, but the capture of individuals far from any battlefield, such as in Bosnia, Gambia, and Zambia. Similarly, the "war on terrorism" rubric has been used to justify practices as disparate as warrantless wiretapping of U.S. citizens, see James Risen and Eric Lichtblau, Bush Lets U.S. Spy on Callers Without Courts, NY Times A1 (Dec 16, 2005), and rendering of noncitizens to third countries where they have alleged torture, see Report of the Events Related to Maher Arar, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (2006), available at <http://www.ararcommission.ca/eng/AR_English.pdf> (last visited May 15, 2007). The "war on terrorism" is therefore a war in metaphor only. For similar critiques of the war terminology, see Joseph Margulies, Guantánamo and the Abuse of Presidential Power 43 (2006) (arguing that the "war on terror" justification has resulted in "an Administration that exercises substantially more power in the conduct of military operations, with fewer restraints, than ever before").

5 See Katharine Q. Seyle, Some Guantánamo Detainees Will Be Freed, Rumsfeld Says, NY Times A14 (Oct 23, 2002) (quoting Donald Rumsfeld's description of the detainees as the "worst of the worst").
the kind of people, we were told, who would chew through the hydraulic cable of a C-17 cargo plane to bring it down. The government coupled these characterizations with menacing imagery of dark, bearded men in orange jumpsuits confined by chain-link fences. These essentialized notions of the terrorist implicitly suggest that it is men like these who are detained at Guantánamo.

My client, Omar Khadr, a Canadian citizen, was a fifteen-year-old boy when he was taken into U.S. custody. When Omar was transferred to Guantánamo, at the age of sixteen, he could not yet grow a beard. His wisdom teeth had not yet come in. He had not completed puberty. Now, at age 20, Omar has spent nearly one fourth of his life at Guantánamo Bay. As a minor at Guantánamo, he was tortured. This included one occasion when he was used as a human mop, physically picked up off the ground, his body coated with solvent and used to clean up his own urine produced during the course of a prolonged interrogation. On other occasions, he was threatened with rendition to other countries where, he was told, he would be raped by older men.

It is well understood that Guantánamo was designed by the Bush Administration as a no-rights zone, or what has often been called a legal black hole. Detainees were brought there precisely in order to permit their detention and interrogation unconstrained by law, and outside the province of the courts. The Administration maintains that the Guantánamo detainees are

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8 For a fuller description of the interrogations Omar has endured, see O.K. v Bush, 377 F Supp 2d 102, 106–09 (D DC 2005).
9 See generally Margulies, Guantánamo and the Abuse of Presidential Power at 11 (cited in note 4).
10 As of this writing, there are approximately 380 individuals detained at Guantánamo. Press Release, US Department of Defense, Detainee Transfer Announced (April 26, 2007), available at <http://www.defenselink.mil/releases/release.aspx?release id=10788> (last visited May 15, 2007). Approximately 395 detainees previously held have been released, id, even though the Administration claims they were properly determined to be "enemy combatants."
not prisoners of war, who would be entitled to a bundle of rights under the Geneva Conventions, but are instead "enemy combatants" who fall outside the purview of the Geneva Conventions, or any other body of law. Indeed, it has been the consistent position of the Administration that the detainees have no rights at all under any source of law: the Constitution, U.S. statutes, the Geneva Conventions, other international treaties, or customary international law. By this account, any limitation on the treatment of detainees is a matter of executive grace rather than detainee right.

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

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13 See Fact Sheet, Status of Detainees at Guantánamo (cited in note 12) ("Even though the detainees are not entitled to POW privileges, they will be provided many POW privileges as a matter of policy.").

14 See US Department of Defense, The Legal Basis for Detaining Al Qaida and Taliban Combatants (cited in note 11) ("There is no question that under the law of war the United States has the authority to detain persons who have engaged in unlawful belligerence for the duration of hostilities, without charges or trial."). Following the Supreme Court's decisions in Rasul v Bush, 542 US 466 (2004) and Hamdi v Rumsfeld, 542 US 507 (2004), the Administration created a post-hoc administrative review process known as the Combatant Status Review Tribunal (CSRT), purportedly to determine the combatant status of Guantánamo detainees. Subsequently, Congress enacted the Detainee Treatment Act of 2005 ("DTA"), Pub L No 109-48, 119 Stat 2739 (2005), which created a limited form of review of the CSRT determinations in the U.S. Court of Appeals for the D.C. Circuit. For a thorough discussion of the infirmities of the CSRT process and the inadequacy of the review available in the D.C. Circuit, see The Guantanamo Detainees' Second Supplemental Brief Addressing the Effect of the Detainee Treatment Act of 2005 on this Court's Jurisdiction Over the Pending Appeals, Al Odah v United States, 05-5064 (DC Cir) (2006 WL 679965).

15 See Bob Woodward, CIA Told to Do 'Whatever Necessary to Kill Bin Laden; Agency and Military Collaborating at 'Unprecedented' Level; Cheney Says War Against Terror
individuals indefinitely and without charge based solely on an unreviewable executive determination.\(^{16}\)

Although the Administration's broad assertion of detention authority obviates trials, it has nonetheless decided to try a small number of individuals for alleged war crimes in military commissions. Initially done under the putative authority of an executive order,\(^{17}\) the Guantánamo military commissions progressed in fits and starts until June 2006, when the entire system was invalidated by the Supreme Court in \textit{Hamdan v Rumsfeld}.\(^{18}\) Congress subsequently passed the Military Commissions Act of 2006 ("MCA"),\(^{19}\) purporting to correct the deficiencies in the old system, and new commission proceedings began in February 2007,\(^{20}\) only to be halted less than four months later.\(^{21}\)

\(^{16}\) See Margulies, \textit{Guantánamo and the Abuse of Presidential Power} at 3 (cited in note 4).


\(^{18}\) 126 S Ct 2749 (2006).

\(^{19}\) On October 17, 2006, President Bush signed the Military Commission Act of 2006, which Congress enacted in direct response to the \textit{Hamdan} decision. Military Commission Act ("MCA"), Pub L No 109-366, 120 Stat 2600 (2006) to be codified in various sections of Title 10 USC. The Act authorizes the use of military commissions to try noncitizens designated "unlawful enemy combatants," provides an expansive definition of that term, grants the President broad powers to make such designations, and establishes a rudimentary set of standards and procedures for the commissions. The Act also redefines portions of Common Article 3 of the Geneva Conventions, immunizes government officials from certain war crimes, and perhaps most dangerous of all, attempts to strip the right of habeas corpus from all noncitizen "unlawful enemy combatants," whether in commission proceedings or not, and whether at Guantánamo or within the territorial United States.

Along with several co-counsel and students in our International Human Rights Law Clinic, I have represented Omar since July of 2004, first in a civil habeas corpus action, and then in military commission proceedings. The commission proceedings for Omar began with the filing of charges against him in November 2005, and ended with the Hamdan decision in June 2006. The charges against Omar, renewed and modified in 2007, are serious: murder in violation of the law of war; attempted murder in violation of the law of war; conspiracy; providing material support for terrorism; and spying. The central

exchange for a reduced sentence and a return to his native Australia. See Bill Glaberson, Australian to Serve Nine Months in Terrorism Case, NY Times A1 (March 31, 2007).

21 On June 4, 2007, all charges against Omar and against detainee Salim Hamdan were dismissed, without prejudice, by the military judges presiding over each case. The military judges found that the military commissions lacked jurisdiction over Omar and Hamdan because the MCA grants jurisdiction over "unlawful enemy combatants," but Omar and Hamdan had only been determined in their CSRTs to be "enemy combatants." United States v Khadr, Order on Jurisdiction ¶¶ 3–4 (June 4, 2007), available at <http://www.nimj.com/documents/Khadr%20Order%20on%20Jurisdiction.pdf> (last visited June 18, 2007); United States v Hamdan, Decision and Order—Motion to Dismiss for Lack of Jurisdiction 3 (June 4, 2007), available at <http://www.nimj.com/documents/Hamdan%20Order.pdf> (last visited June 18, 2007). The government has moved each military judge for reconsideration of his decision. See United States v Khadr, Prosecution Motion for Reconsideration (June 8, 2007), available at <http://www.scotusblog.com/movabletype/archives/Khadr%20reconsider%20motion.pdf> (last visited June 18, 2007); United States v Hamdan, Government's Motion for Reconsideration and Evidentiary Hearing (June 8, 2007), available at <http://www.scotusblog.com/movabletype/archives/Hamdan%20reconsider%20motion.pdf> (last visited June 18, 2007). The government can also appeal to a Court of Military Commission Review, though at the time of the military judges' decisions, that body had yet to be created. See Paul Koring, U.S. terror trials in doubt as Khadr case crumbles, Globe & Mail A1 (June 5, 2007).

22 I have been fortunate to be co-counsel in this case with my colleagues Rick Wilson and Kristine Huskey. In addition, two Canadian lawyers, Nathan Whitling and Dennis Edney, have represented Omar Khadr in proceedings in Canada, and three U.S. military lawyers, Lieutenant Colonel Colby Vokey, Captain John Merriam, and Lieutenant Commander William Kuebler, have served as Omar's detailed defense counsel in the military commission proceedings. In May 2007, as he faced renewed military commission proceedings, Omar decided to fire all of his American lawyers. Thus, as of this writing, I no longer represent him.

23 O.K. v Bush, 04-CV-01136 (JDB) (D DC July, 12 2005). Omar's habeas action was enabled by the groundbreaking work done by advocates to establish the right of habeas corpus of Guantánamo detainees, as the Supreme Court recognized in Rasul v Bush, 542 US 466 (2004).

24 The record of proceedings of Omar's military commission, from the issuance of the charging document in November 2005, until the commissions were invalidated by the Supreme Court in June 2006, are available at <http://www.defenselink.mil/news/commissionsarchives.html> (last visited on Apr 12, 2007).


26 See Hamdan, 126 S Ct at 2749.

27 See US Department of Defense, Charges Referred (Khadr) (cited in note 20). Prior to the Hamdan decision, Omar faced similar, but slightly different charges: murder by an
charge of murder by an unprivileged belligerent stems from the circumstances of Omar's capture by U.S. forces. According to the U.S. account, Omar was in a house in Khost, Afghanistan that was raided by U.S. forces. After a firefight that lasted several hours, including aerial bombardment, U.S. forces entered the house to find everyone dead except for Omar, who was badly wounded. At this point, the United States alleges Omar threw a grenade that killed a U.S. soldier.  

Omar is one of only ten detainees, out of approximately 400 currently at Guantánamo, who has ever been charged with a crime. Until November 2005, he, like the rest, was imprisoned for years (and potentially indefinitely) without charge as an "enemy combatant," and without a meaningful opportunity to contest his ongoing detention. The military commissions thus were a minority experience at Guantánamo, and will remain so. And yet, the commissions reveal an enormous amount about what is at stake at Guantánamo and in the United States in the present moment. They illustrate not merely the breakdown of law, but the degradation of people as a prerequisite to legal erasure.

Long before my co-counsel and I got involved in Omar's case, the Administration had fought vigorously to keep lawyers out of Guantánamo. The secrecy and inaccessibility of the place were key components of what made Guantánamo attractive to the Administration in the first place. Unconstrained by external

unprivileged belligerent; attempted murder by an unprivileged belligerent; conspiracy; and aiding the enemy. See United States v Khadr, Charge Sheet (undated) (cited in note 25).

28 See id. As noted earlier, new charges were brought against Omar following the enactment of the Military Commissions Act. See note 20 and accompanying text.


30 Despite the overall tragedy of his case, Omar is luckier than some at Guantánamo because he has actually been charged with alleged crimes, and in theory, provided an opportunity to rebut them. In contrast, the vast majority of the detainees at Guantánamo have languished for years without any charge of wrongdoing, and without any prospect of ever being released. Their detention arises from the Executive's determination that they are "enemy combatants," and that detention has been rendered indefinite by the Administration's view that "enemy combatants" can be detained for the duration of hostilities. As discussed in greater detail later in this Article, the term "enemy combatant" necessarily resides within scare quotes because its definition has shifted over time, and the legality of the Administration's "enemy combatant" determinations is deeply contested. See note 38 and accompanying text.

31 See Craig Whitlock, U.S. Faces Obstacles to Freeing Detainees, Wash Post A1 (Oct 17, 2006) (reporting statement of State Department Legal Advisor John B. Bellinger III that only 60 to 80 detainees will ever be tried by military commission).

32 The Administration clearly intended to keep the detainees beyond the reach of the courts, and considered the reach of the courts' habeas authority before locating detainees
scrutiny, the clandestine nature of Guantánamo freed the hand of the Administration, literally and physically, in the interrogation of detainees. Moreover, the detainees’ isolation from the world was not lost on them; rather, it was a principal source of detainee despair, which was in turn an essential element of the Administration’s interrogation strategy.33

The eradication of rights at Guantánamo was no small feat. Rather, it required bold, extravagant, and ultimately reckless engineering to dismantle the established framework of rights of wartime detainees, and to replace it with a new and daring architecture. In this new regime, rights, once the province of individuals, were arrogated to the state, leaving the detainees suspended by the dynamic, unpredictable, and unconstrained grace of the Administration.

There were three key shifts necessary to the destruction of the old edifice and the creation of a new, post-modern one. The first shift was to characterize post-September 11th anti-terrorism policy as a war—namely, the “war on terrorism.” This rhetorical shift ensured—as a legal matter, but equally as important, as a political matter—that the executive could act at the maximum of its powers, unfettered by the other branches of government.34 This had the effect of placing the detainees beyond the competency of Congress and the courts.

Second, once the war rhetoric took hold, the Administration needed to define this as an unprecedented, unconventional war which therefore requires different rules than those that govern traditional wars. This move has been expressed frequently in terms of “a different kind of war,” with an enemy that refuses to


33 The degree of despair at Guantánamo was captured by three detainee suicides in June 2005. See James Risen & Tim Golden, Three Prisoners Commit Suicide at Guantánamo, NY Times A1 (June 11, 2006). In addition, there have been scores of suicide attempts. Id. For a first-hand account of the despair by a former detainee, see Mourad Benchellali, Detainees in Despair, NY Times A23 (June 14, 2006).

34 Giorgio Agamben has noted the historical practice of invoking the war metaphor in order to enable expanded executive powers, writing, “[b]ecause the sovereign power of the president is essentially grounded in the emergency linked to a state of war, over the course of the twentieth century the metaphor of war becomes an integral part of the presidential political vocabulary whenever decisions considered to be of vital importance are being imposed.” Giorgio Agamben, State of Exception, 21–22 (Chicago 2005). He notes the example of Franklin D. Roosevelt, who argued that he needed “broad Executive power to wage war against the emergency [the Great Depression], as great as the power that would be given to me if we were in fact invaded by a foreign foe.” Id at 22.
comply with the laws of war, and therefore should not benefit from U.S. conformity with the traditional rules of war. It is this line of reasoning that led to then-White House Counsel Alberto Gonzales's famous pronouncement that the Geneva Conventions were "quaint" and "obsolete." Since the old rules were obsolete, it was within the ambit of the wartime powers of the executive to develop new ones, according to which the detainees had no rights; but, by the grace of the executive, they were granted certain protections.

The last shift concerns the very use of Guantánamo as the site for detention and interrogation of suspected terrorists. The Administration's central rationale for the use of Guantánamo was that because it lies outside the territorial United States, it is beyond the reach of U.S. law, and therefore beyond the purview of the U.S. courts. This last move thus attempted to place detainees beyond the jurisdiction (as opposed to the competency) of the courts.

Two features of this newly constructed regime have predominated the legal, diplomatic, and popular debates over Guantánamo. The first is the Administration's claimed authority to detain indefinitely anyone it determines to be an "enemy combatant." The second is the Administration's plan to try by military commission a select number of detainees for alleged war crimes. While both issues have been addressed by the Supreme Court in the last two years, they remain unresolved and deeply contested, and persist as central features of the government's policy at Guantánamo.

The first of these, regarding the indefinite detention of "enemy combatants," is the most expansive, and affects every detainee at Guantánamo. The definition of the term has varied over time, but at one point, in oral argument in federal habeas pro-

36 See Memorandum for William J. Haynes, II Re. Possible Habeas Jurisdiction over Aliens (cited in note 32).
37 See note 14.
38 When it established the CSRT process, see note 14, the Department of Defense defined "enemy combatant" as:

An individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.
ceedings, the government conceded that the “enemy combatant” category would include “a little old lady in Switzerland” who wrote a check to what she thought was an Afghan orphanage but that instead, unbeknownst to her, went to support the Taliban.\(^3\)

The administration also argues that the “enemy combatant” category knows no age limit, thus sweeping within its ambit 15-year-olds like Omar, but also 11- and 12-year-olds, previously detained at Guantánamo.\(^4\) By the administration’s logic, even a 5-year-old could be an “enemy combatant.”

Both the indefinite detention of “enemy combatants” and the trial by military commissions of a small number of detainees have been successfully challenged. In 2004, the Supreme Court held in *Rasul v Bush*\(^41\) that Guantánamo detainees could challenge the legality of their detention through habeas corpus actions filed in federal court, and in *Hamdan v Rumsfeld*, decided in 2006, the Court struck down the military commissions as unauthorized by Congress and in violation of Common Article 3 of the Geneva Conventions.\(^42\)

In the immediate aftermath of the *Hamdan* decision, Congress passed, and the President signed, legislation that purports to overrule both *Rasul* and *Hamdan* in one fell swoop. The Military Commissions Act of 2006 (“MCA”) for the first time congressionally authorizes trials by military commission of noncitizen “unlawful enemy combatants.”\(^43\) Moreover, it gives approval to


(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or

(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

MCA § 3 (adding 10 USC § 948a(1)).

\(^3\) See Transcript of *Rasul et al v Bush* (02-299) (Dec 1, 2004).


\(^41\) 542 US 466, 484 (2004).

\(^42\) 126 S Ct at 2759.

\(^43\) MCA § 3 (adding 10 USC § 948d(a)). Although the government has attempted to
an expansive definition of "enemy combatant," and purports to strip from the courts habeas jurisdiction over challenges to the detention of "enemy combatants." If these habeas-stripping provisions withstand legal challenge, the practical effect will be to sanction the indefinite detention of individuals determined to be "enemy combatants." Because the statute creates no procedural requirements for the enemy combatant determination, it is at least arguable that an individual may be detained indefinitely on the basis of executive fiat uncontestable in any court. All the executive needs to do is declare someone an enemy combatant, and his or her detention is instantly unreviewable. This vast executive detention authority is even broader than it might first appear, because the habeas-stripping language of the MCA applies both to someone declared an enemy combatant and to someone awaiting an enemy combatant determination.

Although the MCA does not require it, as a practical matter, most, if not all, "enemy combatants" will have available a limited, though insufficient, form of judicial review of their combatant status determination pursuant to the Detainee Treatment Act of 2005 ("DTA"). Following the Supreme Court's decisions in Rasul, establishing the federal courts' habeas jurisdiction over Guantánamo, and Hamdi v Rumsfeld, suggesting what procedural protections must exist for a U.S. citizen to challenge his

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44 MCA § 3 (adding 10 USC § 948a(1)-(2)). In fact, the MCA defines two types of enemy combatants—unlawful enemy combatants and lawful enemy combatants.

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

46 See MCA § 3 (adding 10 USC § 948a(1)(iii)). At most, the MCA only requires that the individual be determined to be an "unlawful enemy combatant" by a "competent tribunal established under the authority of the President or the Secretary of Defense." Id.

47 MCA § 7 (amending 28 USC § 2241).


49 542 US 507 (2004). Decided the same day as Rasul, Hamdi concerned the detention of a U.S. citizen, Yaser Hamdi, as an "enemy combatant." The Court upheld the government's authority to detain enemy combatants, as narrowly defined in that case, but held that when U.S. citizens are involved, due process requires that the detainee have a meaningful opportunity to challenge the legality of his detention. Id at 535–38.
detention as an “enemy combatant,” the Department of Defense hastily constructed a post-hoc process known as Combatant Status Review Tribunals (“CSRTs”). Under the DTA, CSRT determinations can be reviewed by the D.C. Circuit Court of Appeals, but only to evaluate whether a given determination was consistent with the CSRT rules and procedures established by the Department of Defense, and whether those rules and procedures are consistent with the laws and Constitution of the United States, to the extent they apply. It remains the Administration's position that neither the Constitution nor any U.S. laws apply to the detainees. Thus, the D.C. Circuit is unable to consider factual challenges to the detainees’ detentions, as a habeas court ordinarily would be able to do.

II. THE MILITARY COMMISSIONS

Arguably, the rudimentary military commissions represent the acme of legal process at Guantánamo. While the MCA makes some important improvements to the commission process—for example, permitting detainees to self-represent, and excluding statements obtained through torture—in many fundamental

50 See Deputy Secretary of Defense Order Establishing Combatant Status Review Tribunal (July 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> (last visited May 15, 2007). The CSRTs were not designed to determine a detainee's combatant status in the first instance—indeed, they could not, as they were not created until years after the first detainees arrived at Guantánamo. Rather, the Administration maintained that the detainees had been determined numerous times prior to the creation of the CSRTs to be “enemy combatants.” Thus, the CSRTs merely reviewed those determinations, and provided an opportunity for the detainee to challenge that determination. For most detainees, however, it was not a meaningful opportunity, as the tribunal could, and did, rely upon secret evidence, the detainees could not obtain witnesses or evidence, and were not permitted representation by a lawyer. The legal sufficiency of the CSRTs was contested in two cases (each a consolidation of several cases) before the federal district court in Washington. In one case, In re Guantánamo Detainee Cases, 355 F Supp 2d 443 (D DC 2005), the CSRTs were held to violate the detainee's rights to procedural due process, while in the other, Khalid v Bush, 355 F Supp 2d 311 (D DC 2005), the detainees were held to have no due process rights. Those cases were consolidated for the purposes of appeal, and were ruled on by the D.C. Circuit, which upheld the habeas-stripping provisions of the MCA that were enacted while the appeal was pending. See Boumediene v Bush, 476 F3d 981 (DC Cir 2007). Thus, the merits of the district court cases were never reviewed by the D.C. Circuit. The Supreme Court denied certiorari. See Boumediene v Bush, 127 S Ct 1478 (2007).

51 DTA § 1005(e)(2)(C).

52 See Boumediene, 476 F3d at 1005 (Rogers, dissenting) (finding that the CSRTs fall short of the factual consideration available in habeas proceedings).

53 See MCA § 3 (adding 10 USC §§ 949a(b)(1)(D), (b)(3)(A)–(B)).

54 See MCA § 3, (adding 10 USC § 948r(b)). When the military commissions system first began operating, there was no rule barring statements obtained through torture. Rather the commissions were authorized to consider any evidence that the presiding
ways, the new system will look remarkably like the old one. This suggests the utility of examining the old system's operation.

Despite the repeated invocation of the rule of law, and assurances that the commissions would be "full and fair," the commission system was devoid of rights, and what few formal rules existed shifted seemingly at will. Over the protests of defense lawyers, the commissions operated with virtually no rules of evidence, no rules of discovery, no rules of decision, and no rules of precedent. Thus, not only was positive law in short supply, so, too, was any sense as to what interpretive practices would be followed by the commissions, or what prescedential value a decision in one commission would have later on in the same trial, in another trial before the same presiding officer, or in a trial before a different presiding officer.

In preliminary hearings in Omar's case, our military co-counsel, Lieutenant Colonel Colby Vokey, sought clarity on the question of applicable jurisprudence. In the course of voir dire of the presiding officer, he attempted to learn what case law, if any—domestic or international, criminal or civil, military or civilian—would be followed, to which the presiding officer responded, "[i]f you want to know if . . . a particular case is applicable or a point of law, file a motion and I will decide it based on the briefs and the arguments and the law." Apart from the cir-

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55 See Presidential Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed Reg 57833, 57834.

56 United States v Khadr, Draft Transcript of Proceedings at 447 (April 5, 2006) (on file with The University of Chicago Legal Forum). Later in the same proceeding, the presiding officer elaborated: "I think that we will look to international law, I think that we
cularity of this argument, it contemplates counsel divining the law through a system of pinging—that is, we would issue motions like so many bursts of energy into an ocean of unknowable dimension, with the hope that they might actually hit something and signal the existence and location of applicable law. And if they just went flying by with no ping coming back, we would know to issue another motion.

Unlike an established system of law, where the parties might seek to distinguish other cases factually or legally from the one being litigated, the commission system's fundamental principles of jurisprudence were unknown. The commissions were thus a common law system at time zero, boundless in its potential, but entirely bereft of guidance as to how the law might actually evolve. The result was a lack of predictability and a corresponding manipulability, both of which undermined the system as a whole.

At base, the commissions featured the trappings of law, but none of its substance. We were told to refer to this ephemeral corpus of rules as "Commission Law," as if capitalization could magically endow an ad hoc system with the majesty of law. "Commission Law" therefore was constituted simultaneously by everything and nothing. This was consistent with the detainees' experience at Guantánamo: as a guard said to one detainee, "You are in a place where there is no law. We are the law."58

III. THE MILITARY COMMISSIONS ACT AND THE HARDENING OF THE CITIZEN/NONCITIZEN DIVIDE

The MCA does violence to a number of important values in the U.S. legal system, not the least of which are the sanctity of habeas corpus, and our fundamental commitment to fair trials before deprivation of life or liberty. Indeed, the MCA is suscepti-

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ble to attack on a number of grounds. But what I seek to empha-
size here is the special jeopardy it creates for noncitizens, and
the danger that this jeopardy will migrate from the detainees at
Guantánamo to noncitizens within the territorial United States.

Three features of the MCA threaten to erode the rights of
noncitizens in the United States. First, although the MCA begins
with a definition of "unlawful enemy combatants," it subjects
only noncitizen "unlawful enemy combatants" to the degraded
proceedings of the military commissions. Second, the habeas-
stripping provisions of the MCA similarly apply only to the
claims of noncitizens. Finally, the definition of "unlawful enemy
combatant" introduced by the MCA bears a striking similarity to
the "material support" provisions of the Immigration and Na-
tionality Act, but without the procedural protections—in particu-
lar, the right of habeas corpus—that attach in immigration pro-
ceedings. Taken together, these provisions reflect both a political
targeting of noncitizens (as opposed to terrorist suspects) and a
legal degradation of the rights of noncitizens, including those
within the territorial United States.

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

Because of their martial provenance, and their deviation
from standard trial procedure, military commissions were viewed
with suspicion by the Framers of the Constitution. However,
commissions have been tolerated historically on the stated ra-
tionale that their use, as opposed to the use of regular courts, has
been required by military necessity. Indeed, the first use of
military commissions by the United States was necessitated by
jurisdictional limits on courts-martial. Each subsequent use
has arisen from, and been circumscribed by, the exigencies of
war. The question posed in Hamdan was "whether the precondi-

59 See MCA § 3(a) (adding 10 USC § 948a(1)).
60 Id. (adding 10 USC § 948c).
61 Id at § 7 (amending 28 USC § 2241).
harbored a deep distrust of executive military power and military tribunals”).
63 See Hamdan, 126 S Ct at 2772 (“The military commission, a tribunal neither men-
tioned in the Constitution nor created by statute, was born of military necessity.”), citing
64 Hamdan, 126 S Ct at 2773.
tions designed to ensure that a military necessity exists to justify the use of this extraordinary tribunal have been satisfied."\textsuperscript{65}

The \textit{Hamdan} court noted that, as reflected in the Uniform Code of Military Justice ("UCMJ") and consistent with historical practice, any deviation from standard procedural practices of courts-martial must be "tailored to the exigency that necessitates it."\textsuperscript{66} Specifically, Article 36 of the UCMJ established a presumption of uniformity among military commissions and courts-martial, as well as a presumption of uniformity between all military tribunals and the principles of law and rules of evidence ordinarily applicable in criminal trials in federal district courts.\textsuperscript{67} According to the Court, military commissions could depart from either court-martial or federal court practices only where such practices would be impracticable.\textsuperscript{68} The President's failure to establish the impracticability of applying the rules of courts-martial in the military commissions was one of the primary bases for the Court's invalidation of the commission system.\textsuperscript{69}

The MCA jettisons this well-settled historical practice and statutory requirement that the procedural and substantive departures of military commissions from courts-martial be based on impracticability. As a statutory matter, Congress simply excepted military commissions for noncitizen "unlawful enemy combatants" from the impracticability requirements of Article 36 of the UCMJ.\textsuperscript{70} As a substantive matter, too, it is clear that military necessity is no longer the basis for the substandard procedures of the military commissions. For if it were, then the mili-

\textsuperscript{65} Id at 2777.

\textsuperscript{66} Id at 2790.

\textsuperscript{67} At the time that \textit{Hamdan} was decided, Article 36 provided:

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

(b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress.

\textsuperscript{68} \textit{Hamdan}, 126 S Ct at 2791.

\textsuperscript{69} Id at 2792–93. The Court also invalidated the commissions as violative of Common Article 3 of the Geneva Conventions. Id at 2793.

\textsuperscript{70} See MCA § 4(a)(3) (amending 10 USC § 836).
tary commissions would apply to all "unlawful enemy combatants," citizens and noncitizens alike. And yet, as under the old system, commissions under the MCA are authorized only for noncitizens.

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

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

Thus, it is not the exigencies of war that dictate the use of military commissions, but a political decision to subject only noncitizens to them. The refusal to authorize the use of military

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71 See MCA § 3(a) (adding 10 USC § 948a(1)).
74 Of course, citizens—such as John Walker Lindh, Yaser Hamdi, and Jose Padilla—have been caught up in the government's anti-terrorism regime just as noncitizens have. The Lindh case is particularly instructive, as he was picked up in the battlefield in Afghanistan and charged with, among other things, conspiracy to murder U.S. nationals and providing material support and resources to foreign terrorist organizations. See United States v John Phillip Walker Lindh, Indictment (Feb 2002 ED Va), available at <http://www.usdoj.gov/ag/2ndindictment.htm> (last visited June 18, 2007). Those charges were brought in federal district court, while roughly analogous charges of murder by an unprivileged belligerent and providing material support for terrorism were brought against Omar in the degraded proceedings of the military commissions. See note 27 and accompanying text.
commissions for all “unlawful enemy combatants,” regardless of citizenship, constitutes a tacit admission by Congress as to the inferiority and inadequacy of the commission system, and reflects a political judgment that such a degraded form of justice could not be used for American citizens, even those accused of committing war crimes while engaged in hostilities against their own country.

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

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

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75 See MCA § 3 (adding 10 USC § 948b(e)):

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

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

B. The MCA Attempts to Strip Habeas Corpus Only For Noncitizen Enemy Combatants

The MCA is unambiguous in attempting to strip the federal courts of habeas jurisdiction only over noncitizens. As a legal matter, whether Congress can remove habeas jurisdiction over Guantánamo remains to be seen. Two courts have addressed the issue thus far, both ruling that the MCA does in fact remove habeas jurisdiction, and does so without running afoul of the Suspension Clause. After initially denying certiorari on the issue in both cases, the Supreme Court reversed itself, and so the issue is poised for resolution in the 2007 Term. But as a political matter, the ability to strip noncitizens of habeas was established by the quick passage of the MCA. As with Congress’s decision to reserve military commissions solely for noncitizens, my concern here is that the allocation of rights is being made once more on the basis of citizenship and citizenship alone.

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

77 See MCA § 7 (amending 28 USC § 2241).
78 See Hamdan, 464 F Supp 2d at 11–16; Boumediene, 476 F3d at 986–94.
79 See Hamdan v Gates, 127 S Ct 1507 (2007); Boumediene v Bush, 127 S Ct 1478 (2007). In the denial of certiorari in Boumediene, Justices Stevens and Kennedy issued a statement suggesting that certiorari might be appropriate after the detainees exhausted their DTA review of the CSRT determinations if they continued to suffer some injury. 127 S Ct 1478. In addition, Justice Breyer issued a written dissent from the denial of certiorari, in which Justices Souter and Ginsburg joined in part. Id at 1479–80.
81 Hamdan, 464 F Supp 2d at 18.
82 Boumediene, 476 F3d at 981.
83 Id at 991.
As a textual matter, however, the MCA is explicit in applying its habeas-stripping provisions to noncitizen "unlawful enemy combatants" regardless of their geography. Indeed, neither § 7, purporting to strip habeas, nor § 3, defining "unlawful enemy combatant," contains any geographic limitation. Thus, on the face of the statute, habeas would appear to be stripped for all noncitizen "unlawful enemy combatants," regardless of whether they are detained in or out of the territorial United States. The Hamdan and Boumediene decisions do not limit the habeas-stripping provisions to noncitizens who lack some meaningful connection to the territorial United States, but instead note that the detainees in those cases have none. Thus, even if those cases were to withstand challenge in the Supreme Court, this would not answer the question of whether habeas has been stripped even for noncitizens within the United States.

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

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84 MCA § 7 (amending 28 USC § 2241(e)).
85 MCA § 3 (adding 10 USC § 948(a)(1)).
86 See Al-Marri v Wright, 443 F Supp 2d 774, 776 (D SC 2006).
87 Id.
88 Id.
The *al-Mari* case bridges Guantánamo and the United States, and if the government’s view prevails, represents the transnational scope of the MCA. By the government’s account, al-Marri is legally indistinguishable from a detainee at Guantánamo, in that both are noncitizens who are, by presidential fiat, “enemy combatants,” and both are, by virtue of § 7 of the MCA, bereft of habeas protections. Thus, the government’s position in the case suggests that while the MCA may have been enacted with Guantánamo detainees in mind, the statute is hardly confined to it. Rather, its constraints on individual liberties reach into the heartland of America—even to Peoria—and travel along the citizen-noncitizen divide.

While a federal district court initially upheld al-Marri’s detention, as of this writing, the government has been rebuffed by the Fourth Circuit Court of Appeals. In *Al-Marri v Wright*, that court held that the MCA had not stripped al-Marri’s statutory habeas rights, reasoning in part that “[a]s an alien captured and detained within the United States, [al-Marri] has a right to habeas corpus protected by the Constitution’s Suspension Clause.”

In addition, the court held that al-Marri was not properly detained as an “enemy combatant.” The court’s decision gives dispositive weight to the fact that, although a noncitizen, al-Marri was lawfully present in the United States, and therefore was entitled to a bundle of rights that might not attach to other detainees. With regard to the MCA, the court stated:

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

In this regard, the *al-Mari* decision rejects the citizen-noncitizen distinction advanced by the government.

Admittedly, *al-Mari* is currently the only case involving a noncitizen “enemy combatant” within the United States; his case may be an outlier, and if the Fourth Circuit decision stands, it

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91 Id at 168–71.
92 Id at 171.
may simply indicate the highwater mark of the government’s “enemy combatant” regime. And yet, the al-Marri case suggests the government’s ambition for the MCA. Moreover, the fact that al-Marri has remained in detention for over five years suggests once more the political feasibility of such treatment of noncitizens. Even if the government’s claims are permanently struck down, the years of detention under color of legal authority will have eroded the felt sense of security for many noncitizens.

C. The “Enemy Combatant” Definition and Its Overlap with “Material Support” For Terrorism

Like the iterations that preceded it, the MCA’s statutory definition of “unlawful enemy combatant” is exceptionally broad. One consequence of its breadth is that the statute threatens to sweep within its ambit a class of noncitizens inside the territorial United States currently targeted by immigration law. Specifically, the statute defines “unlawful enemy combatants” to include “a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents.”\(^9\) The italicized language bears strong resemblance to a provision of the Immigration and Nationality Act, added by the USA PATRIOT Act in the immediate aftermath of September 11th, regarding material support for terrorism.\(^9\) That provision has been invoked numerous times in recent years in removal proceedings against noncitizens who have donated money to Islamic charities, among other causes.\(^9\)

Thus, the same noncitizens, including lawful permanent residents, who could be deported on material support charges in immigration proceedings could also be detained indefinitely as “enemy combatants,” or pending a determination that they are “enemy combatants.” On first inspection, this might not seem so

\(^9\) Section 212(a)(3)(B)(i)(I) of the Immigration and Nationality Act (“INA”) renders a noncitizen inadmissible for engaging in terrorist activity. 8 USC § 1182(a)(3)(B)(i)(I) (2006). The same class of individuals is also deportable. INA § 237(a)(4)(B), 8 USC § 1227(a)(4)(B). The term “engage in terrorist activity” is defined to include “an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds, or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives or training” for the commission of a terrorist activity, to another individual or to a terrorist organization. INA § 212(a)(3)(B)(iv)(VI), 8 USC § 1182(a)(3)(B)(iv)(VI) (emphasis added).

\(^9\) See Neil MacFarquhar, Muslim Charity Sues Treasury Dept. and Seeks Dismissal of Charges of Terrorism, NY Times A24 (Dec 12, 2006).
different from expanded immigration detention authority granted the executive under the PATRIOT Act. The Act permits potentially indefinite detention of those certified by the Attorney General, upon his reasonable belief, to be engaged in terrorist activity (including providing material support to terrorists or terrorist organizations). By comparison, the MCA’s detention authority is more expansive, and more troubling, in two regards. First, unlike the PATRIOT Act, the MCA lacks a certification requirement for “unlawful enemy combatants.” Rather, the MCA leaves the process for enemy combatant determination solely to the discretion of the executive, and in any event, permits detention even while such a determination is pending. Second, and more critically, the PATRIOT Act explicitly authorizes habeas review of the Attorney General’s certification, thereby bounding the exercise of executive authority statutorily and constitutionally. In contrast, the MCA explicitly strips the courts of habeas authority. Thus, while the Attorney General’s certification might be challenged in immigration court in the first instance and in federal habeas proceedings thereafter, the enemy combatant determination might never be meaningfully contested. Here, too, the al-Marri decision becomes critically important, for it suggests the continuing availability of habeas review for at least some noncitizens within the United States.

Even if this provision of the MCA is never used against citizens—as the certification procedures of the PATRIOT Act have yet to be used—the MCA is still troubling for immigration law, as it reinforces the prevailing view that the lack of formal citizenship is a sufficient basis for the denial of procedural and substantive rights.

What is striking here is how national security law now regulates the same population of individuals as immigration law—namely, noncitizens within the territorial United States—but does so with far fewer procedural protections. After September 11th, the government began an aggressive use of immigration

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96 INA § 236A(a), 8 USC § 1226a(a).
97 Under the MCA, “unlawful enemy combatant” status is established dispositively by the CSRTs. MCA § 3 (adding 10 USC § 948d). In contrast, the INA requires certification, as well as periodic review of the certification. See INA § 236A(a)(3), (7), 8 USC § 1226a(a)(3), (7).
98 INA § 236A(b), 8 USC § 1226a(b).
99 MCA § 7 (amending 28 USC § 2241).
100 The Fourth Circuit also suggests that the Patriot Act displaces the MCA with respect to individuals to be detained within the United States. Al-Marri, 487 F3d at 190–91 (cited in note 90).
law for the purposes of detaining and interrogating suspected terrorists, openly acknowledging that such civil law enforcement enabled federal officials to operate outside the constraint of individual rights that attach under criminal law.\(^{101}\) Now, national security law emanating from Guantánamo loosens even the minimal limitations on federal immigration power, granting the executive even wider berth in the regulation of noncitizens. Thus, while the MCA appears on first inspection to concern suspected terrorists at Guantánamo Bay, it reaches into the territorial United States and finds particularly easy passage along the citizenship/noncitizenship divide. Indeed, the MCA places a great deal of weight on alienage, and recalls David Cole’s prediction soon after September 11th that our anti-terrorism policies would harden the line between citizens and noncitizens.\(^{102}\) Cases like that of Yaser Hamdi—a U.S. citizen by birth who was originally sent to Guantánamo but then transferred to the United States when his citizenship was discovered\(^{103}\)—demonstrate the strain placed on formal citizenship by our anti-terrorism policy. The MCA reflects, reinforces, and reinvests in this magic of formal citizenship, denying on that basis alone two of the most fundamental forms of protection against state power, each of which has deep roots in our common law tradition:\(^{104}\) habeas corpus, and meaningful substantive and procedural rights in the face of criminal sanction, including death.

Contrary to the argument I am making here, Amy Kaplan has suggested that the emergence and legitimation of the “enemy combatant” category has eroded distinctions between citizens and noncitizens, since the category embraces both citizens (like Hamdi and Jose Padilla) as well as noncitizens, such as Omar Khadr, and “moves both citizens and noncitizens further toward the lowest possible rung of diminished liberties.”\(^{105}\) Kaplan is undoubtedly correct that the deliberate indeterminacy of the enemy combatant category threatens all, without regard to citizenship, and yet we see a persistent differential between citizen and noncitizen treatment, and a recurrent anxiety with the suggestion that they ought to be equalized—whether at the high end or

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\(^{101}\) See Ahmad, 92 Cal L Rev at 1271–73 (cited in note 7).


\(^{103}\) See Hamdi, 542 US at 510.

\(^{104}\) See Rasul, 542 US at 473 (describing habeas corpus as “a writ antecedent to statute, . . . throwing its root deep into the genius of our common law”), citing Williams v Kaiser, 323 US 471, 484, n 2 (1945) (internal quotation marks omitted).

\(^{105}\) Amy Kaplan, Where is Guantánamo?, 57 American Quarterly 831, 853 (2005).
the low end of the ladder. This is not to say that citizenship is the only axis along which treatment varies. As Kaplan notes, the enemy combatant category tracks racial, national, and religious typologies. In this regard, the noncitizen and citizen categories are each disaggregated, and the lines of subordination criss-cross between them, even as the citizen/noncitizen divide gains new salience.

I have argued previously that post-September 11th violence, by both the state and “private” actors, has helped to construct a new racial category of the presumptively terrorist “Muslim-looking” person. Leti Volpp has suggested that this newly consolidated identity operates to exclude Arabs, Muslims, and South Asians from citizenship, thereby further destabilizing the traditional citizen/noncitizen divide. The MCA demonstrates that even as that divide is weakened by legal categorization that transcends formal citizenship, it is reconstituted in new and troubling ways.

CONCLUSION

The remoteness of Guantánamo gives a false sense of comfort, as if its ugliness can be quarantined to that liminal place. But whether doctrinally, in the form of the Military Commissions Act, or politically, in the form of an ever-expanding Executive, Guantánamo is not an island. Rather, it is, in the legal imagination, contiguous with Nogales and Eagle Pass, Detroit and JFK, the fields of California’s Central Valley and the meatpacking plants of the Midwest. In this way, no matter how remote it may seem, Guantánamo is here.

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106 Id.
107 Ahmad, 92 Cal L Rev at 1265–82 (cite in note 7).
108 Volpp, 49 UCLA L Rev at 1576 (cited in note 2).