

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

ALI SALEH KAHLAH AL-MARRI,

Petitioner-Appellant,

and

MARK A. BERMAN, as next friend,

Petitioner,

v.

COMMANDER S.L. WRIGHT,

USN Commander, Consolidated Naval Brig.,

Respondent-Appellee.

No. 06-7427

**RESPONDENT-APPELLEE’S MOTION TO DISMISS FOR LACK
OF JURISDICTION AND PROPOSED BRIEFING SCHEDULE**

Pursuant to Federal Rule of Appellate Procedure and Local Rule 27(f), respondent-appellee Commander S.L. Wright respectfully moves this Court to remand this case to the district court with instructions to dismiss it for lack of subject matter jurisdiction. Respondent-appellee has conferred with counsel for petitioner-appellant, and they agree with the briefing schedule proposed below.

As explained below, the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366 (see Attachment 1), which took effect on October 17, 2006, removes federal court jurisdiction over pending and future habeas corpus actions and any other actions filed by or on behalf of detained aliens determined by the United States to be enemy combatants, such as petitioner-appellant al-Marri, except as provided in Section 1005(e)(2) and (e)(3) of the Detainee Treatment Act (DTA).

In plain terms, the MCA removes this Court's jurisdiction (as well as the district court's) over al-Marri's habeas action. Accordingly, the Court should dismiss this appeal for lack of jurisdiction and remand the case to the district court with instructions to dismiss the petition for lack of jurisdiction.

Background

Exercising, inter alia, its "plenary authority to regulate federal court jurisdiction," In re B-727 Aircraft Serial No. 21010, 272 F.3d 264, 269 (5th Cir. 2001), Congress enacted the DTA -- the predecessor to the MCA -- on December 30, 2005, to remove federal court jurisdiction over applications for a writ of habeas corpus and any other actions filed by alien enemy combatants held in military custody at Guantanamo Bay. In lieu of habeas jurisdiction for the detainees held at Guantanamo, the DTA established a scheme of judicial review under which the District of Columbia Circuit would exercise exclusive jurisdiction over challenges by the Guantanamo detainees to a final decision by a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant, DTA § 1005(e)(2)(A), or to a final decision of a military commission, DTA § 1005(e)(3)(A). The DTA provided that the removal of habeas jurisdiction "shall take effect on the date of the enactment of this Act." DTA § 1005(h)(1).

In Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006), the Supreme Court held that the DTA did not divest the federal courts of jurisdiction over habeas actions, such as Hamdan's, which were pending when the DTA was enacted and which challenged the legitimacy of the military commissions established by the President. The Court went on to hold that the military commission that was convened to try Hamdan for a violation of the law of war was not authorized by Congress.

In response to Hamdan, Congress enacted the MCA both to provide the statutory authorization for military commissions the Court found lacking in Hamdan and to amend the DTA

to make clear that the provision eliminating habeas jurisdiction applies to all pending habeas actions and, as most relevant here, to extend the DTA's elimination of habeas jurisdiction to any action (other than the exclusive review provided in the D.C. Circuit) filed on behalf of any alien enemy combatant held by the United States, regardless of the location of the detention.

Thus, Section 7(a) of the MCA amends the habeas corpus statute, 28 U.S.C. 2241, to provide that:

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

MCA § 7(a). Section 7(a) further provides that, except as authorized in the DTA:

[N]o court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

MCA § 7(a). In addition, the MCA expressly provides that the jurisdiction-altering amendments to Section 2241:

shall take effect on the date of the enactment of this Act [October 17, 2006], and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

MCA § 7(b).

Argument

The MCA divests this Court and the district court of jurisdiction over al-Marri's habeas petition. In pertinent part, the jurisdiction-removing provisions apply to "all cases, without exception" that were "pending on or after" October 17, 2006, and "which relate to any aspect of the

detention, * * * of an alien detained by the United States since September 11, 2001.” MCA § 7(b) (emphasis added). Al-Marri’s petition for a writ of habeas corpus meets these three conditions. First, the petition was filed on July 8, 2004, see Al-Marri v. Wright, 443 F. Supp. 2d 774, 777 (D. S.C. 2006), and was still pending on October 17, 2006. Second, the petition challenges the legality of al-Marri’s detention as an enemy combatant. Ibid.

Third, al-Marri is an “alien detained by the United States” within the meaning of the MCA, because he has “been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.” MCA § 7(a). In fact, al-Marri has been determined to have been properly detained as an enemy combatant twice. On June 23, 2003, the President of the United States determined that, based on all the information available to him at that time from all sources, al-Marri “is, and at the time he entered the United States in September 2001 was, an enemy combatant.” And on August 6, 2006, the district court in this case -- having determined that (1) the President had authority as commander in chief and pursuant to the Authorization for Use of Military Force enacted by Congress following the September 11 attacks to order al-Marri’s detention as an enemy combatant; (2) that the government had satisfied its burden of proof and produced ample evidence that al-Marri is in fact an enemy combatant; and (3) that al-Marri has failed to produce any evidence to rebut the government’s showing -- held that al-Marri’s habeas petition lacked merit, thus recognizing that he has been properly detained as an enemy combatant. See 443 F. Supp. 2d at 785.

Moreover, even if, contrary to fact, al-Marri had not been determined by the United States to have been properly detained as an enemy combatant, the MCA would still apply to al-Marri’s petition because al-Marri is also “awaiting” such a determination within the meaning of the MCA. The Department of Defense has ordered, upon dismissal of this habeas action for lack of jurisdiction,

that al-Marri be provided with a Combatant Status Review Tribunal (CSRT), in accordance with the existing procedures governing such tribunals. See Attachment 2 (Order by the Deputy Secretary of Defense).¹ If the CSRT's finding is adverse to al-Marri, he may avail himself of the DTA's exclusive review scheme by filing a claim in the District of Columbia Circuit.²

Accordingly, under Section 7 of the MCA, this Court (as well as the district court) lacks jurisdiction over this habeas action.

Proposed Briefing Schedule

The parties in this action have discussed how best to address the jurisdictional issues presented by the new legislation, and jointly propose the following briefing schedule:

- Petitioner-appellant's memorandum of law in response to the motion to dismiss served and filed on or before January 5, 2007;
- Respondent-Appellee's reply memorandum in support of the motion to dismiss, if any, served and filed on or before January 17, 2007.

This proposed schedule for briefing the jurisdictional issues presented by the MCA mirrors the briefing schedule on the merits of the appeal set forth in this Court's September 19, 2006, scheduling

¹ Although the order makes clear that al-Marri is alternatively covered by the jurisdictional provision both as an alien determined to be properly held as an enemy combatant and as an alien awaiting such a determination, the order is not the event that eliminated this Court's jurisdiction and is not necessary to the government's argument that jurisdiction is lacking. This Court lost jurisdiction over this action on the effective date of the MCA; the order indicates only how the government plans to handle al-Marri in the event the courts agree that the MCA divested the courts of jurisdiction.

² Under the DTA, al-Marri may challenge whether the CSRT's determination was "consistent with the standards and procedures specified by the Secretary of Defense for [CSRTs]," including "the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence." DTA § 1005(e)(2)(C)(i). Also, "to the extent the Constitution and laws of the United States are applicable," al-Marri may challenge "whether the use of such standards and procedures to make the [combatant] determination is consistent with the Constitution and laws of the United States." DTA § 1005(e)(2)(C)(ii).

order. It would therefore allow the jurisdictional question to be fully briefed in advance of the oral argument in this case, which the Court has tentatively calendered for the week of January 31 - February 3, 2007.

Conclusion

For the reasons stated above, this Court should dismiss this appeal and remand the case to the district court with instructions to dismiss al-Marri's habeas petition for lack of jurisdiction.

Respectfully submitted,

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November 13, 2006

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Respondent-Appellee's Motion to Dismiss for Lack of Jurisdiction and Proposed Briefing Schedule was served, this 13th day of November, 2006, by electronic mail and overnight delivery to:

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