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*“Liberty: Where and for Whom?”*

The fundamental rights of a Bradley University student imprisoned by the military for the last four years have won a ringing rhetorical vindication by a panel of one of the most conservative federal appeals courts in the nation. But the Court’s actual decision is far narrower, and less reassuring, than its rhetoric.

In the fall of 2001 Ali Saleh Kahlah al-Marri, was a master’s student at Bradley University in Peoria, where he previously earned a bachelor’s degree. He had entered the United States lawfully.

That December he was arrested by the FBI as a material witness in the investigation of the September 11<sup>th</sup> terrorist attacks. He was later charged with a series of crimes involving phony ID’s and credit cards and false statements to banks and to the FBI.

But before he went to trial, al-Marri was designated by President Bush as an enemy combatant. In June 2003 his criminal charges were dropped. He was transferred to military custody in the Navy brig in South Carolina, where remains today.

His prison regimen was third worldish. For 16 months he was held incommunicado from his wife, children and lawyer. He was interrogated, he says, with extreme sensory deprivation, and threatened with violence. Unlike prisoners at Guantanamo, he was not brought before a military “combatant status review panel.”

This cannot happen in America, concluded the majority of a three judge panel of the US Court of Appeals for the Fourth Circuit, perhaps the most conservative appeals court in the nation. (That is why the government chose South Carolina as the place to imprison al-Marri).

“For over two centuries of growth and struggle, peace and war,” wrote Judge Diana Gribbon Motz for the majority, “the Constitution has secured our freedom through the guarantee that, in the United States, no one will be deprived of liberty without due process of law. Yet more than four years ago military authorities seized an alien lawfully residing here. He has been held by the military ever since – without criminal charge or process. ... despite the fact that he was initially taken from his home in Peoria, Illinois by civilian authorities, and indicted for purported domestic crimes. ... [T]he Government has never alleged that he is a member of any nation’s military, has fought alongside any nation’s armed forces, or has borne arms against the United States ...”

What the government did allege was that al-Marri was a sleeper agent for Al Qaeda. He allegedly trained at an Al Qaeda camp in the 1990’s, met Osama bin Laden in the summer of 2001, came to

the US to explore disrupting our financial system through computer hacking, got funds for a laptop from Al Qaeda and was in touch with top Al Qaeda strategists by phone and email.

If so, answered the Court, then prosecute him. “Like others accused of terrorist activity in the United States, ... [such as] the Oklahoma City bombers ..., [he] can be returned to civilian prosecutors ... But the Government cannot subject al-Marri to indefinite military detention. For in the United States, the military cannot seize and imprison civilians – let alone imprison them indefinitely.”

“To sanction such presidential authority,” the Court warned sternly, “would have disastrous consequences for the Constitution – and the country. ... We refuse to recognize a claim to power that would so alter the constitutional foundations of our Republic.”

The principle proclaimed by the Court is vital. Our Constitution guarantees that “no person” – not merely “no citizen” – may be deprived of liberty without due process of law. This bedrock right extends to all persons in our country, regardless of citizenship. If al-Marri can be locked up on the say-so of intelligence information – whose unreliability is well-known – then so can you or I. Down that road lies fascism.

Yet despite the Court’s broad dicta, there are three troubling limitations on its holding. The military cannot keep al-Marri, ruled the Court, because he is a civilian rather than an enemy combatant. After his arrest in Peoria, if the Government had alleged that he was a Taliban soldier – of the government of another nation – then the military could have imprisoned him for the duration of the war between the US and Afghanistan. Only because he was supposedly with Al Qaeda instead, was al-Marri a civilian entitled to due process.

Second, the Court declined to say whether its ruling applies to prisoners at Guantanamo, even though that Naval Base is a wholly controlled territory of the US.

Third, the Court’s emphasis on the right to due process “in the United States” comes close to implying that if al-Marri had been arrested outside the US, for example at an airport en route here, the US military could imprison him at will.

Stopping the constitutional right to liberty at the water’s edge cheapens our historical commitment to freedom. Moreover, if America expects other nations to take seriously our preaching on human rights, we need to appreciate that fundamental rights do not depend on accidents of geography. Human rights are the inalienable rights of all human beings everywhere. They are not the exclusive prerogatives of Americans, or of foreign citizens only if and when they reach our soil. International law guarantees no less.

**Doug Cassel’s commentaries are generally broadcast Wednesdays during the noon hour of the Worldview program on Chicago Public Radio, 91.5 FM, and rebroadcast at 9 PM in the evening. Views expressed are personal views of the author and not necessarily those of Notre Dame Law School, the Center for Civil and Human Rights or Chicago Public Radio.**