



When Ketanji Brown Jackson Represented the Cato Institute

President Biden's Supreme Court nominee was counsel of record for a Cato Institute brief in a case challenging the detention of alleged enemy combatants.

JONATHAN H. ADLER

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In addition to having been an appellate judge, trial court judge, and public defender, Supreme Court nominee Ketanji Brown Jackson spent some time in private practice at Morrison & Foster. Like many lawyers, she devoted some of her time to pro bono work. One of her projects was serving as counsel of record on an amicus brief submitted in *Al-Marri v. Spagone*, a case concerning the military's authority to detain individuals who were lawfully present in the country. Of particular note, this brief was submitted on behalf of the Constitutional Project, the Rutherford Institute, and the Cato Institute.

The brief argued that the military's detention of Ali Saleh Kahlah Al-MARri was unlawful. I've reproduced the summary of the argument below the jump.

The government has claimed, and the fractured *en banc* Fourth Circuit erroneously concluded, that the President has authority to use the military to detain, without charge or trial, persons who are lawfully in the United States and who have allegedly engaged in terrorism-related conduct.

There is no such authority—not in any Act of Congress nor in the Constitution. Thus, neither the government's claim nor the ruling below can be sustained.

A.

The government has pointed to the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001), as the source of congressional authorization for its use of the military for domestic detention, but that statute is silent on the issue and speaks only in general terms about use of military force. It does not satisfy the Court's clear statement rule that requires Congress to expressly authorize the Executive's use of military detention power in lieu of civilian criminal prosecution within the domestic sphere. This Court has never inferred such an authorization from general declarations of military force by Congress.

This Court's conclusion in *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004), that the AUMF implicitly authorizes certain military detentions does not govern the instant case because the ruling in *Hamdi* applies only to the military detention of persons taken prisoner on a foreign battlefield, inside a zone of active combat. *Hamdi* does not extend to the military detention of individuals who are lawfully in the United States, far from the foreign battlefield.

It is the USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, that granted the Executive authority to detain terrorism suspects present in the United States. Congress considered the Patriot Act contemporaneously with the AUMF and enacted it a few weeks later. The Patriot Act does not authorize Executive detention in the United States by use of the military without charge or trial, and the government makes no such contention.

The government's reading of the AUMF to authorize the domestic military detention it seeks in this case would render superfluous Congress's enactment of the more specific domestic detention provisions of the Patriot Act. The legislative history of the Patriot Act demonstrates that Congress intended the Patriot Act, not the AUMF, to provide the President with detention power over terror suspects who are in the United States lawfully. It also demonstrates that Congress considered—and declined to grant—the military detention power that the government now claims.

B.

Lacking express congressional authorization, the government has asserted that the Executive has the inherent authority under the Commander-in-Chief Clause in Article II of the Constitution to use the military to detain persons who are lawfully in the United States. But the Commander-in-Chief Clause grants no such authority. Under the Constitution, the use of military power is a shared responsibility between the Legislature and the Executive, and even the President's broad power to wage war overseas as Commander-in-Chief requires congressional authorization.

This constitutional diffusion of government power regarding the use of the military reflects the Framers' desire to guard against any threats to democratic government posed by standing armies controlled by a potentially tyrannical Executive. And this constitutional structure confirms the need for explicit authorization from Congress for the President to use the military to detain without charge or trial persons who are lawfully in the United States.

C.

Allowing the Executive to use the military to detain, without charge or trial, persons who are lawfully in the United States could give rise to manipulation of the civilian criminal justice system. Such manipulation threatens the constitutionally protected liberty of every person who is lawfully in the United States, including American citizens.