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CREATING A MORE MEANINGFUL DETENTION STATUTE: LESSONS LEARNED FROM *HEDGES V. OBAMA*

*Colby P. Horowitz**

In 2004, the Supreme Court affirmed the President's power to indefinitely detain members of Al Qaeda and the Taliban. Nearly ten years later, however, the substantive parameters of executive detention remain unclear. Post-9/11 detention law has been largely shaped by the lower federal courts on a case-by-case basis as they evaluate habeas corpus petitions from detainees held at Guantanamo Bay. In 2012, as part of the National Defense Authorization Act (NDAA), Congress attempted, for the first time, to codify a substantive detention standard in section 1021. Instead of providing clarity, however, section 1021 contained ambiguous terms and created more confusion. On January 13, 2012, a group of writers and activists led by Pulitzer Prize winning–journalist Christopher Hedges challenged this detention law in the Southern District of New York. They argued that section 1021 was vague and might allow for detention based on protected First Amendment activities. In Hedges v. Obama, *Judge Katherine Forrest held that a key portion of section 1021 was unconstitutional and permanently enjoined it. That injunction has since been stayed, and the case is currently on appeal in the Second Circuit.*

This Notes argues that congressional legislation is essential to define and limit the executive's detention authority but that section 1021 of the NDAA failed to achieve this purpose. The Note provides recommendations for how to create a more meaningful detention statute that imposes clear substantive limits on executive authority. A congressional detention statute with clearly articulated definitions and concepts will not only provide guidance to the President, it will also provide the courts with a coherent standard to use when evaluating the legality of specific detentions.

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INTRODUCTION

Challenges to executive detention normally come from detainees, and usually in the form of habeas corpus petitions.[1] But on January 13, 2012, a group of writers and activists decided to preemptively challenge the scope of indefinite executive detention.[2] They specifically sought to enjoin section 1021 of the National Defense Authorization Act for Fiscal Year 2012[3] (NDAA), claiming that this section violated their free speech, associational, and due process rights. The plaintiffs feared that, even as U.S. citizens, they might be locked away or sent to Guantanamo Bay for exercising their free speech rights or engaging in political advocacy.

In section 1021 of the NDAA, Congress codified and affirmed the executive branch's detention authority for terrorist suspects.[4] This authority had previously derived from the Authorization for Use of Military Force of 2001[5] (AUMF), which was over ten years old and made no specific mention of detention. Instead of providing clarity, however, the scope of the authority granted by section 1021 is uncertain. On September 12, 2012, Judge Katherine B. Forrest of the Southern District of New York ruled in favor of the writers and activists and permanently enjoined a key portion of section 1021, holding that it violated both the First and Fifth Amendments of the Constitution.[6]

Congressional legislation is essential to define and limit the executive's detention authority, but section 1021 of the NDAA has failed to achieve this purpose. This Note examines ambiguities and uncertainties in current detention law and recommends ways to create a more meaningful detention

1. *See* Sonia R. Farber, Comment, *Forgotten at Guantanamo: The* Boumediene *Decision and Its Implications for Refugees at the Base Under the Obama Administration*, 98 CALIF. L. REV. 989, 1006–07 (2010) (highlighting the "flood of litigation" on behalf of detainees starting in 2008); *see also infra* note 85 and accompanying text.

2. Hedges v. Obama, No. 12 Civ. 331(KBF), 2012 WL 1721124 (S.D.N.Y. May 16, 2012) (order granting preliminary injunction).

3. Pub. L. No. 112-81, 125 Stat. 1298 (2011).

4. Section 1021 of the NDAA is titled "Affirmation of Authority of the Armed Forces of the United States to Detain Covered Persons Pursuant to the Authorization for Use of Military Force." *Id.* § 1021, 125 Stat. at 1562.

5. Pub. L. No. 107-40, 115 Stat. 224 (codified at 50 U.S.C. § 1541 note (2006)).

6. *See* Hedges v. Obama, No. 12 Civ. 331(KBF), 2012 WL 3999839 (S.D.N.Y. Sept. 12, 2012). The Second Circuit has subsequently granted a stay of Judge Forrest's injunction until it decides the case on appeal. *See Court Upholds NDAA; Stay Extended on Indefinite Detention Injunction*, RT (Oct. 3, 2012, 7:43PM), http://rt.com/usa/news/appeals-ndaa-detention-public-536/.

statute. Part I focuses on the AUMF, the four major post-9/11 Supreme Court decisions regarding executive detention, and the 2012 NDAA. Part I also establishes a framework for evaluating the separation of powers between Congress and the President on national security issues using the Supreme Court's famous decision in *Youngstown Sheet & Tube Co. v. Sawyer*.[7] Part II examines how the D.C. District and Circuit Courts struggled to define important detention terms during the flood of habeas corpus litigation coming from Guantanamo Bay after 2008. These terms were eventually codified in section 1021 of the NDAA. Part III uses Judge Forrest's decision in *Hedges v. Obama* as a vehicle for exploring the issues with section 1021. Finally, Part IV recommends ways to define and clarify key terms and provisions in section 1021. The goal of this part is to create a more meaningful detention statute that provides clear congressional guidance on the scope of detention authority to both the executive and the courts.

I. THE DEVELOPMENT OF EXECUTIVE DETENTION FROM 9/11 TO THE NDAA

Indefinite executive detention is not a new tactic created in response to 9/11. The executive and the military had previously detained individuals without trial during both the Civil War[8] and World War II.[9] Although this historical precedent continues to have an important impact, post-9/11 detention is different in many ways because of the unique and unconventional nature of the current counterterrorism fight. This part traces the development of post-9/11 executive detention. It begins with the foundational statute that provides the legal authorization for the fight against Al Qaeda and the Taliban and explains how the Supreme Court interpreted this statute to include the power of indefinite detention. It then examines how, after authorizing indefinite detention, the Supreme Court struggled to develop procedural rights for detainees. Finally, this Section analyzes section 1021 of the NDAA and establishes a framework for evaluating presidential war powers using the famous Supreme Court decision in *Youngstown*.

A. The AUMF Authorizes Force in the Wake of 9/11

Seven days after the terrorist attacks on September 11, 2001, Congress passed the Authorization for Use of Military Force.[10] The AUMF "authorize[d] the use of United States Armed Forces against those

7. 343 U.S. 579 (1952).

8. President Lincoln suspended the right of habeas corpus (thus preventing prisoners from seeking judicial review). *See Ex Parte* Merryman, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9487).

9. Many Japanese Americans were detained at "Relocation Centers" without trial. *See Ex Parte* Endo, 323 U.S. 283, 284–85 (1944).

10. Pub. L. No. 107-40, 115 Stat. 224.

responsible for the recent attacks launched against the United States."[11] The key language in the AUMF is: "the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons."[12]

The Constitution grants the legislative branch the power to declare war,[13] but in response to 9/11, Congress passed the AUMF (a force authorization) instead of formally declaring war.[14] Even though it is not a formal declaration of war, the AUMF grants broad war powers to the executive.[15] The language of the AUMF is deferential, allowing the President to use force against those whom "he determines"[16] were responsible.[17] The AUMF also adopts a war model (as opposed to a criminal model) for combatting terrorism.[18]

Although the AUMF provides broad authority to the President, there are limitations, and commentators have noted that these limits are more difficult to determine in 2012 than they were immediately after 9/11.[19] The subsections below explore the limits of the AUMF. The major questions are: (1) To whom does the AUMF apply?; (2) What does "all necessary and appropriate force" include?; (3) Where does the AUMF apply and how long does it last?

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11. *Id.*

12. *Id.* § 2(a).

13. *See* U.S. CONST. art. I, § 8, cl. 11.

14. *See* Graham Cronogue, *A New AUMF: Defining Combatants in the War on Terror*, 22 DUKE J. COMP. & INT'L L. 377, 390 (2012) (explaining that "the AUMF is not a formal declaration of war").

15. *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2080 (2005) ("[T]he AUMF does not appear to impose any limitation on either the resources or the methods that the President can employ. Instead, the AUMF broadly authorizes the President to use 'all necessary and appropriate force' to prosecute the war."); Cronogue, *supra* note 14, at 388 (noting that "Congress delegated the President extremely broad powers").

16. AUMF § 2(a).

17. *See* Bradley & Goldsmith, *supra* note 15, at 2082 ("One could argue that the effect of the 'he determines' provision is to give the President broad, and possibly unreviewable, discretion . . . .").

18. *See* Beau D. Barnes, *Reauthorizing the "War on Terror": The Legal and Policy Implications of the AUMF's Coming Obsolescence*, 211 MIL. L. REV. 57, 66 (2012) (explaining that a war paradigm allows the President to use his full Article II powers, while a criminal model relies on criminal statutes and the courts). *See generally* Jonathan Hafetz, *Military Detention in the "War on Terrorism": Normalizing the Exceptional After 9/11*, 112 COLUM. L. REV. SIDEBAR 31 (2012), http://www.columbialawreview.org/wp-content/uploads/2012/03/31_Hafetz.pdf (highlighting concerns with the continued use of the war paradigm).

19. *See* Barnes, *supra* note 18, at 67 ("Although the scope of the military force authorized by the AUMF was sufficiently clear in October 2001, that is no longer the case today.").

1. Who Does the AUMF Apply To?

The AUMF authorizes the President to use force against "nations, organizations, or persons" that "planned, authorized, committed, or aided" the attacks on 9/11 or those who "harbored" them.[20] The AUMF does not specifically name any "nations, organizations, or persons," but rather describes who it applies to.[21] This lack of specificity was likely an intentional decision by Congress due to the unconventional and changing nature of the enemy.[22] Additionally, the AUMF was passed so soon after 9/11 that the exact nature of the enemy was still unknown.[23]

The AUMF requires that a target have some connection to 9/11.[24] The AUMF is widely considered to apply, at a minimum, to Al Qaeda and the Taliban.[25] Courts and commentators have argued that the AUMF authorizes force not only against these organizations themselves but against all their individual members.[26] Thus, a member of Al Qaeda who had no connection to the 9/11 attacks or who joined after 9/11 might be targeted under the AUMF based solely on his membership.[27]

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20. AUMF § 2(a).

21. *See* Bradley & Goldsmith, *supra* note 15, at 2082 ("[The AUMF] *describes* rather than *names* the enemies . . . ."); Cronogue, *supra* note 14, at 380 ("[I]t could be argued that this authorization is unnecessarily unclear, as it does not explicitly name the nations against whom force may be used.").

22. Brief for Amici Curiae Senators John McCain, Lindsey Graham & Kelly Ayotte in Support of Appellants at 1, Hedges v. Obama, Nos. 12-3176, 12-3644 (2d Cir. Nov. 13, 2012) [hereinafter Senators Amici Brief], *available at* http://www.lawfareblog.com/wp-content/uploads/2012/11/Hedges-Amicus-Brief-FINAL-2.pdf ("Because terrorists do not wear uniforms and their alliances and affiliations are never static, [the AUMF] did not declare any specific nation or organization our enemy . . . .").

23. *See* 147 CONG. REC. 17,122 (2001) (statement of Rep. Spratt) ("We do not know for sure who the enemy is, where he may be found, or who may be harboring him. Congress is giving the President the authority to act before we have answers to these basic questions because we cannot be paralyzed.").

24. *See* David Abramowitz, *The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism*, 43 HARV. INT'L L.J. 71, 73–74 (2002) (noting that Congress rejected an earlier version of the AUMF that applied to all terrorist threats in general because Congress wanted the AUMF tied to 9/11).

25. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) ("There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF."); Cronogue, *supra* note 14, at 381 ("Al-Qaeda, as an organized group responsible for the 9/11 attacks, clearly fits this definition.").

26. *See* Hamlily v. Obama, 616 F. Supp. 2d. 63, 71 (D.D.C. 2009) ("By authorizing the use of force against the 'organizations' responsible for the September 11 attacks, Congress also, necessarily, authorized the use of force (including detention) against their members."); *see also* Barnes, *supra* note 18, at 72 n.59 ("[B]ecause Al Qaeda has no headquarters or major assets, targeting it amounts to targeting its members and structure.").

27. Bradley & Goldsmith, *supra* note 15, at 2109 ("This means that Congress has authorized the President to use force against all members of al Qaeda, including members who had nothing to do with the September 11 attacks and even new members who joined al Qaeda after September 11.").

Difficult questions arise when determining if the AUMF applies to any organizations or individuals beyond Al Qaeda or the Taliban.[28] Some believe that in order to effectively fight terrorism, the AUMF must be expanded beyond these two groups.[29] This issue will be discussed more thoroughly when evaluating the meaning of the term "associated forces" in section 1021.[30]

2. All Necessary and Appropriate Force

Permitting the President to use "all necessary and appropriate force" is a broad grant of power.[31] For the purpose of this Note, the key question is whether the AUMF includes the power to detain individuals indefinitely without trial. As will be discussed further in the next part, the Supreme Court decided that "all necessary and appropriate force" includes the power of indefinite executive detention,[32] and lower courts must follow this precedent. The AUMF makes no specific mention of detention,[33] and the Supreme Court found that this power was implied in a broad grant of congressional authority.

3. Where Does It Apply and How Long Does It Last?

Since Congress omitted explicit geographical limitations in the AUMF, some argue that the President can use force anywhere, including within the United States.[34] The congressional record also contained many references to the AUMF's worldwide scope.[35] Thus, the AUMF leaves open the

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28. *See* Cronogue, *supra* note 14, at 381 ("[D]emarcating exactly where the al-Qaeda organization ends and one of its 'affiliates' or 'associated forces' begins is extremely difficult.").

29. *See* Senators Amici Brief, *supra* note 22, at 20–21 ("Such a limitation—which would exclude al-Qaeda terrorists recruited after 2001 and members of al-Qaeda 'franchises' in the Arabian Peninsula and elsewhere—would completely undermine the stated purpose of the AUMF . . . ."). *But see* Robert Bejesky, *Cognitive Foreign Policy: Linking Al-Qaeda and Iraq*, 56 HOW. L.J. 1, 8–11 (2012) (emphasizing the limited scope of permissible targets under the AUMF).

30. *See infra* Part II.C.

31. *See* Cronogue, *supra* note 14, at 386 ("[T]he AUMF's 'all necessary and appropriate force' language[,] . . . far from imposing any constraints, bolsters the President's powers significantly.").

32. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004).

33. *See* Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769, 789 (2011) ("The AUMF does not refer expressly to detention."); Diane Webber, *Preventive Detention in the Law of Armed Conflict: Throwing Away the Key?*, 6 J. NAT'L SECURITY L. & POL'Y 167, 179 (2012) ("The AUMF does not mention detention . . . .").

34. *See* Bradley & Goldsmith, *supra* note 15, at 2117 ("The text of the AUMF imposes no geographical limitation on the use of force. This distinguishes the AUMF from many prior authorizations to use force that contained geographic restrictions."). *But see* Abramowitz, *supra* note 24, at 75 (arguing that based on the AUMF's reference to the War Powers Resolution and the statements of various congressmen, the AUMF was intended to only authorize force abroad).

35. *See, e.g.*, 147 CONG. REC. 17,125 (2001) (statement of Rep. Tanner) ("We are declaring war against . . . terrorism wherever it exists on Earth.").

possibility of indefinitely detaining American citizens. Detention of American citizens was expressly approved by the Supreme Court[36] but remains highly controversial and is disfavored by the Obama Administration.[37]

In addition, it is unclear how long the AUMF lasts or if there is any event that can trigger its termination other than congressional repeal.[38] This is particularly significant for indefinite detention, because it means that individuals might "be detained for a long time" or even their entire lives without ever being tried.[39] The Supreme Court stated that the authority to detain under the AUMF lasts "for the duration of the relevant conflict," and thus members of the Taliban can only be detained while "United States troops are still involved in active combat in Afghanistan."[40] The conflict with Al Qaeda, however, is not limited to Afghanistan and is not likely to end soon,[41] and thus it is possible that members of Al Qaeda and other related terrorist organizations can be detained without trial under the AUMF for decades to come.

B. The Supreme Court Finds Detention Authority in the AUMF

Given the broad and vague language of the AUMF, it was initially unclear whether the AUMF included the power of indefinite detention. In *Hamdi v. Rumsfeld*, however, the Supreme Court definitively resolved the issue when it held that the AUMF is explicit congressional authorization for detention.[42] The case involved Yaser Esam Hamdi, an American citizen born in Louisiana who was detained for fighting with the Taliban in Afghanistan after 9/11.[43] Hamdi was originally held at Guantanamo Bay, Cuba, but he was transferred to a naval brig in South Carolina after

36. *See Hamdi*, 542 U.S. at 519 ("There is no bar to this Nation's holding one of its own citizens as an enemy combatant.").

37. *See* Statement on Signing the National Defense Authorization Act for Fiscal Year 2012, 2011 DAILY COMP. PRES. DOC. 1, 2 (Dec. 31, 2011) [hereinafter NDAA Presidential Signing Statement] ("I want to clarify that my Administration will not authorize the indefinite military detention without trial of American citizens.").

38. *See* 147 CONG. REC. 17,047 (statement of Sen. Biden) ("[The AUMF] does not limit the amount of time that the President may prosecute this action . . . ."). *But see* Barnes, *supra* note 18, at 71 (arguing that, given the connection to 9/11, "it is nearly impossible for the AUMF to last forever").

39. Bradley & Goldsmith, *supra* note 15, at 2124.

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

41. *See* Cheryl Pellerin, *Panetta Details Steps Needed To End al-Qaida Threat*, AM. FORCES PRESS SERVICE (Nov. 20, 2012), http://www.defense.gov/news/newsarticle.aspx?id=118606 (quoting Secretary of Defense Leon Panetta as stating about Al Qaeda that "the cancer has also metastasized to other parts of the global body," including Somalia and Yemen); *see also* Greg Miller & Joby Warrick, *Although Splintered, al-Qaeda Finds New Life in Unstable Areas*, WASH. POST, Feb. 8, 2013, at 1–2 (reporting that although Al Qaeda has been weakened in its traditional strongholds, it has found new life in other unstable areas of the world).

42. 542 U.S. at 517.

43. *Id.* at 510.

authorities discovered he was an American citizen.[44] The government detained Hamdi as an "enemy combatant,"[45] and Hamdi challenged his detention in court.[46]

Justice O'Connor, writing for a four-Justice plurality,[47] declared that even though the AUMF does not mention detention, "[b]ecause detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of 'necessary and appropriate force,' Congress has clearly and unmistakably authorized detention."[48] In holding that detention was fundamental to waging war, the Court evaluated a domestic statute (the AUMF) in the context of international law principles (the laws of war).[49]

Although the Court affirmed detention pursuant to the AUMF, it recognized that the power to detain must be limited.[50] First, the Court stated that detention could only be used "to prevent a combatant's return to the battlefield" and not for other purposes like interrogation.[51] Second, the Court held that "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker."[52] This due process guarantee was problematic, however, because it could vary according to the circumstances,[53] and it was left for the lower courts to

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44. *Id.*

45. For a thorough analysis of the concept of an "enemy combatant," see Allison M. Danner, *Defining Unlawful Enemy Combatants: A Centripetal Story*, 43 TEX. INT'L L.J. 1 (2007). The Obama Administration has since abandoned the term and now uses the phrase "unprivileged enemy belligerents." Webber, *supra* note 33, at 178.

46. *Hamdi*, 542 U.S. at 511.

47. Justice Thomas provided the fifth vote authorizing detention in a separate opinion in which he stated that courts lack the institutional capacity to second-guess the President's exercise of war powers. *See id.* at 579; *see also* Chesney, *supra* note 33, at 807.

48. *Hamdi*, 542 U.S. at 519.

49. *See* Chesney, *supra* note 33, at 807 ("[T]he plurality framed the issue as turning on a question of domestic law informed by reference to international law . . . ."). The inclusion of international law is controversial and is discussed further in Part III.

50. *See Hamdi*, 542 U.S. at 530 ("[A]n unchecked system of detention carries the potential to become a means for oppression and abuse . . . ."); *see also* Dawn Johnsen, *"The Essence of a Free Society": The Executive Powers Legacy of Justice Stevens and the Future of Foreign Affairs Deference*, 106 NW. U. L. REV. 467, 477 (2012) (noting that "five Justices agreed that the AUMF conferred some military detention authority, but eight Justices [all but Justice Clarence Thomas] found that the Bush Administration's policy of unilateral, unreviewable detention without counsel violated constitutional or statutory protections").

51. *Hamdi*, 542 U.S. at 519, 521.

52. *Id.* at 509; *see also* Sarah H. Cleveland, Hamdi *Meets* Youngstown*: Justice Jackson's Wartime Security Jurisprudence and the Detention of "Enemy Combatants,"* 68 ALB. L. REV. 1127, 1128 (2005) (stating that the *Hamdi* court reached the "ultimate conclusion that executive detention of a citizen could not occur absent basic procedural protections").

53. *See* Sarah A. Whalin, *National Security Versus Due Process:* Korematsu *Raises Its Ugly Head Sixty Years Later in* Hamdi *and* Padilla, 22 GA. ST. U. L. REV. 711, 726 (2006) (arguing that the *Hamdi* decision is not a victory for civil liberties because "one's due process right may vary depending on the weight of the government's interests in denying that right").

establish.[54] Additionally, the Court seemed to limit these due process rights to U.S. citizens,[55] but the overwhelming majority of those detained were foreign nationals.[56]

Thus, because these due process rights were vague and potentially limited to American citizens, *Hamdi* set the stage for future congressional legislation and legal challenges by foreign detainees. Although the Supreme Court would issue three more decisions relating to the procedural rights of detainees,[57] *Hamdi* was the last and only time since 9/11 that the Court has addressed the substantive scope of executive detention.[58]

While the *Hamdi* decision evaluated the rights of an American citizen challenging his detention, the decision in *Rasul v. Bush* (released on the same day as *Hamdi*) evaluated the rights of noncitizens detained at Guantanamo Bay.[59] The Supreme Court held that "the United States exercises 'complete jurisdiction and control' over [Guantanamo]," and thus federal district courts had "jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention."[60] Justice Stevens's majority opinion affirmed the right of detainees held at Guantanamo Bay to challenge their detention in federal court (by filing a writ of habeas corpus), regardless of their citizenship status or national origin.[61]

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54. *Hamdi*, 542 U.S. at 538–39 ("We anticipate that a District Court would proceed with the caution that we have indicated is necessary . . . . We have no reason to doubt that courts faced with these sensitive matters will pay proper heed . . . .").

55. *See* Thomas L. Hemingway, *Wartime Detention of Enemy Combatants: What If There Were a War and No One Could Be Detained Without an Attorney?*, 34 DENV. J. INT'L L. & POL'Y 63, 78 (2006) (stating that the due process rights recognized in *Hamdi* are "arguably limited to citizens or those with significant U.S. contacts.").

56. *See Hamdi*, 542 U.S. at 577 (Scalia, J., dissenting) (noting that, at the time, there were only two known American citizens who were detained as enemy combatants, Hamdi and Jose Padilla); *see also* Benjamin Wittes & Robert Chesney, *NDAA FAQ: A Guide for the Perplexed*, LAWFARE (Dec. 19, 2011, 3:31 PM), http://www.lawfareblog.com/2011/12/ndaa-faq-a-guide-for-the-perplexed/ (stating that "[t]he government has not asserted authority to detain a citizen under the AUMF" since Jose Padilla).

57. There are two additional Supreme Court decisions affecting detainees that are not discussed in this Note. *See* Al-Marri v. Spagone, 555 U.S. 1220 (2009) (holding that the government had mooted the case by transferring the detainee to the civilian court system); Rumsfeld v. Padilla, 542 U.S. 426 (2004) (holding that the detainee had chosen the wrong venue to file his habeas petition).

58. *See* Chesney, *supra* note 33, at 806 ("The sole post-9/11 instance in which the Supreme Court has addressed the substantive-scope issue to any serious extent is its 2004 decision in *Hamdi v. Rumsfeld*."). *Compare* Joseph Landau, *Muscular Procedure: Conditional Deference in the Executive Detention Cases*, 84 WASH. L. REV. 661, 664 (2009) (arguing that by enforcing procedural requirements in executive detention cases, "courts have affected the law of national security in profound ways by explicitly requiring the political branches to adhere to a judicially imposed standard of transparency and deliberation"), *with* Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013, 1092 (2008) (arguing that "the 'war on terror' litigation thus far seems to have resulted in a great deal of process, and not much justice").

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

60. *Id.* at 480, 484.

61. *Id.* at 485; *see also* Johnsen, *supra* note 50, at 469–70, 481.

C. Congress and the Supreme Court Battle over Procedural Rights

In response to the Supreme Court's decisions in *Hamdi* and *Rasul*, Congress passed the Detainee Treatment Act of 2005 (DTA).[62] In addition to declaring standards of treatment for detainees,[63] the DTA modified the detention review process. The DTA permitted limited oversight of the Combatant Status Review Tribunals (CSRTs) that operated at Guantanamo Bay[64] and provided an "annual review to determine the need to continue to detain an alien who is a detainee."[65] The DTA stripped federal courts of the ability to consider habeas corpus petitions or other actions by detainees at Guantanamo Bay, and it limited review of CSRT determinations to the D.C. Circuit.[66] The DTA did not create a substantive detention standard, but it significantly limited the procedural rights available to detainees held at Guantanamo Bay.[67]

Despite Congress's attempt to strip the federal courts of jurisdiction, the Supreme Court issued a decision affecting detainee rights less than a year later. In *Hamdan v. Rumsfeld*, the Court bypassed the jurisdiction-stripping provisions of the DTA by determining that the DTA only applied to new cases, and not cases that were pending at the time that the DTA was passed.[68] After addressing this threshold jurisdictional question, the Court went on to invalidate the military commission convened to try a Yemeni detainee[69] held at Guantanamo Bay because the commission violated both the Uniform Code of Military Justice (UCMJ) and the Geneva Conventions.[70] The Court held that the commission was invalid because it allowed for closed proceedings where "[t]he accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented."[71] The commission also had lenient evidentiary standards and denied the detainee a right to appeal his conviction to civilian judges.[72] The Court held that, in order to be valid, "the rules applied to

62. Pub. L. No. 109-148, §§ 1001–1006, 119 Stat. 2680, 2739–44 (codified at 10 U.S.C. § 801 and 42 U.S.C. § 2000dd (2006)).

63. The DTA banned "cruel, inhuman, or degrading treatment or punishment" of any detainee "under the physical control of the United States Government," and it limited interrogation techniques to those listed in the Army Field Manual. *Id.* § 1003(a); *see also id.* § 1002(a).

64. The CSRTs, created by the Department of Defense, were hearings presided over by three members of the military who determined if a detainee had been properly classified as an enemy combatant. *See* Mark Denbeaux et al., *No-Hearing Hearings: An Analysis of the Proceedings of the Combatant Status Review Tribunals at Guantanamo*, 41 SETON HALL L. REV. 1231, 1232–33 (2011) (taking a critical view of the process afforded by CSRTs).

65. DTA § 1005(a)(1)(A).

66. *Id.* § 1005(e).

67. *See* Chesney, *supra* note 33, at 791.

68. Hamdan v. Rumsfeld, 548 U.S. 557, 576 (2006).

69. The petitioner was Salim Ahmed Hamdan, a Yemeni national captured by the U.S. military in Afghanistan. The government accused him of being a bodyguard and driver for Osama bin Laden. *Id.* at 566, 570.

70. *Id.* at 567.

71. *Id.* at 614.

72. *See id.* at 587, 614.

military commissions must be the same as those applied to courts-martial" under the UCMJ,[73] and that, despite the contrary view of the Bush Administration, detainees were additionally protected by Common Article 3 of the Geneva Conventions.[74]

The *Hamdan* decision forced the Bush Administration to seek congressional approval for military commissions,[75] and Congress obliged by passing the Military Commissions Act of 2006 (2006 MCA).[76] As its name suggests, the MCA established the jurisdiction and procedures (in light of the Court's guidance in *Hamdan*) for a system of military commissions to try those who committed "violations of the law of war and other offenses."[77] This Note does not address the specific procedures used in the military commissions system.[78]

In section 7 of the MCA, Congress repeated the provisions of the DTA that denied federal courts jurisdiction to hear habeas corpus petitions brought by detainees.[79] Congress also declared that this applied to "all cases, without exception, pending on or after the date of the enactment,"[80] and thus closed the loophole used by the Court in *Hamdan* to retain jurisdiction.

In its most recent expansion of detainee rights, *Boumediene v. Bush*, the Supreme Court held that detainees at Guantanamo Bay "do have the habeas corpus privilege," and that section 7 of the MCA impermissibly interfered with this privilege.[81] The Court held that section 7 violated the Suspension Clause of the Constitution, which allows habeas corpus to be suspended only "when in Cases of Rebellion or Invasion the public Safety may require

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73. *Id.* at 620.

74. Johnsen, *supra* note 50, at 487 ("The Court instead found to the contrary that Common Article 3 applied to the conflict with al Qaeda . . . .").

75. *See id.* at 493; *see also* Neal Kumar Katyal, Hamdan v. Rumsfeld*: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 70 (2006) ("The most important doctrinal lesson of *Hamdan* is its repudiation of the claim that the President is entitled to act alone.").

76. Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

77. *Id.* § 948b(a), 120 Stat. at 2602.

78. This Note focuses on indefinite detention and does not cover military commissions in detail. It is important to understand, however, that a military commission is a type of trial that requires formal charges and an adjudication of guilt or innocence. *See generally* Victor M. Hansen & Lawrence Friedman, *The Value of the Military Commissions Act As Nonjudicial Precedent in the Context of Litigation over National Security Policymaking*, 53 S. TEX. L. REV. 1, 6–16 (2011). In contrast, a person who is held indefinitely might never receive notice of why he is being detained, let alone be brought to trial. In 2009, Congress passed a new Military Commissions Act (2009 MCA) that changed some of the procedures. *See* Military Commissions Act of 2009, Pub. L. No. 111-84, tit. 18, 123 Stat. 2190, 2574–2614 (codified at 10 U.S.C. § 948a (Supp. V 2011).

79. 2006 MCA § 7(a). ("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 . . . . [or] any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement.").

80. *Id.* § 7(b).

81. Boumediene v. Bush, 128 S. Ct. 2229, 2240–43 (2008).

it."[82] However, the Court in *Boumediene* did not definitively decide whether the right of habeas corpus applies to detainees held outside of the United States or Guantanamo Bay.[83]

The *Boumediene* decision had "an enormous practical impact"[84] and created a "flood of habeas corpus litigation arising out of Guantanamo" in the lower federal courts.[85] Although the *Boumediene* decision solidified the right of habeas corpus for detainees at Guantanamo, it provided little guidance on how these habeas petitions should be evaluated.[86] The Supreme Court instead delegated these substantive issues to the lower federal courts, specifically the District Court for the District of Columbia.[87] *Boumediene* was a purely procedural decision[88] that effectively delegated to the D.C. District Court (and the D.C. Circuit on appeal) the power to define the limits of lawful executive detention.[89] Part II of this Note examines how the D.C. courts struggled to develop the substantive scope and limits of executive detention.

D. The NDAA Codifies Detention Authority

On December 31, 2011, President Obama signed into law the National Defense Authorization Act,[90] an extensive act containing five divisions and spanning over 550 pages.[91] President Obama "signed this bill despite having serious reservations with certain provisions that regulate the

82. U.S. CONST. art. I, § 9, cl 2.

83. *See* Al Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010) (holding that detainees held at Bagram Airfield in Afghanistan were not protected by the Suspension Clause and thus could not file habeas corpus petitions).

84. Stephen I. Vladeck, *The Unreviewable Executive:* Kiyemba, Maqaleh, *and the Obama Administration*, 26 CONST. COMMENT. 603, 613 (2010) (noting that many cases were now allowed to proceed).

85. Chesney, *supra* note 33, at 769.

86. *See Boumediene*, 128 S. Ct. at 2240 ("We do not address whether the President has authority to detain these petitioners nor do we hold that the writ must issue. These and other questions regarding the legality of the detention are to be resolved in the first instance by the District Court.").

87. *See id.* at 2276 ("[T]he Government can move for change of venue to . . . the United States District Court for the District of Columbia . . . . These and the other remaining questions are within the expertise and competence of the District Court to address in the first instance.").

88. *See id.* at 2277 ("It bears repeating that our opinion does not address the content of the law that governs petitioners' detention. That is a matter yet to be determined.").

89. *See* Nathaniel H. Nesbitt, *Meeting* Boumediene's *Challenge: The Emergence of an Effective Habeas Jurisprudence and Obsolescence of New Detention Legislation*, 95 MINN. L. REV. 244, 245 (2010) ("With minimal guidance from the Supreme Court and Congress, the federal courts in the District of Columbia have functioned, in effect, as a national security court, evaluating sensitive evidence and developing their own guidelines as to what constitutes lawful detention.").

90. Pub. L. No. 112-81, 125 Stat. 1298 (2011) (to be codified in scattered sections of the U.S. Code).

91. *Id.*; *see also* NDAA Presidential Signing Statement, *supra* note 37, at 1 ("Today I have signed into law H.R. 1540, the 'National Defense Authorization Act for Fiscal Year 2012.'").

detention, interrogation, and prosecution of suspected terrorists."[92] One of the provisions that caused the President to have "serious reservations" about the NDAA was section 1021.[93]

Section 1021 is titled "Affirmation of Authority of the Armed Forces of the United States to Detain Covered Persons Pursuant to the Authorization for Use of Military Force."[94] This section "affirms that the authority of the President to use all necessary and appropriate force pursuant to the [AUMF] includes the authority for the Armed Forces of the United States to detain covered persons . . . pending disposition under the law of war."[95] Section 1021 specifies two categories of "covered persons" that can be detained: section 1021(b)(1) applies to those who "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible," and section 1021(b)(2) applies to those who were "a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces."[96]

President Obama commented that, despite new language in the NDAA that is not included in the AUMF, section 1021 "breaks no new ground and is unnecessary."[97] The President's interpretation is supported by a subsection of section 1021 titled "Construction," which states that "[n]othing in this section is intended to limit or expand the authority of the President or the scope of the [AUMF]."[98] Another subsection, titled "Authorities," further limits section 1021 by declaring that "[n]othing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States."[99]

Although other statutes (like the DTA and MCA) have dealt with executive detention, section 1021 of the NDAA is the first statute to explicitly codify the President's substantive authority to detain terrorist suspects pursuant to the AUMF.[100] As commentators have recognized, the

92. NDAA Presidential Signing Statement, *supra* note 37, at 1.

93. *Id.*

94. NDAA § 1021, 125 Stat. 1298, 1562 (2011).

95. *Id.* § 1021(a), 125 Stat. at 1562.

96. *Id.* § 1021(b)(1)–(2), 125 Stat. at 1562.

97. NDAA Presidential Signing Statement, *supra* note 37, at 1 ("The authority it describes was included in the 2001 AUMF, as recognized by the Supreme Court and confirmed through lower court decisions since then.").

98. NDAA § 1021(d), 125 Stat. at 1562.

99. *Id.* § 1021(e), 125 Stat. at 1562. This subsection of section 1021 is also referred to as Feinstein Amendment I in this Note.

100. *See* Glenn Greenwald, *Three Myths About the Detention Bill*, SALON (Dec. 16, 2011), http://www.salon.com/2011/12/16/three_myths_about_the_detention_bill/ (stating that "this is the first time this power of indefinite detention is being expressly codified by statute").

problem is that the meaning of section 1021 is far from clear.[101] There are two general views about the scope of section 1021. Some, including the Chairman of the Senate Armed Services Committee, believe that it does nothing new.[102] Others view section 1021 as a dangerous expansion of the power of executive detention beyond the scope of the AUMF.[103]

Regardless of whether section 1021 actually expands the President's substantive detention authority, both sides seem to agree on two things. First, section 1021 is significant because irrespective of its precise meaning, it is an explicit congressional affirmation of executive detention practices.[104] As will be discussed in the next section, congressional approval can significantly expand the President's war powers. Second, section 1021 leaves open the possibility of indefinite detention of American citizens.[105] As mentioned above, section 1021(e) merely states that the law remains unchanged regarding citizens, lawful resident aliens, or persons captured in the United States. It does not affirmatively state that individuals in these categories cannot be detained. The language of section 1021(e) (also known as the Feinstein Amendment I) leaves the question of whether American citizens can be indefinitely detained to the other branches.[106] The Supreme Court recognized the right to detain an American citizen in *Hamdi*[107]—a right, however, that appears to be against the policy of the Obama Administration.[108] As one Senator predicted, "[t]hese detention

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101. *See* Conference, *War, Terror, and the Federal Courts, Ten Years After 9/11*, 61 AM. U. L. REV. 1253, 1262 (2012) ("What has Congress done or not done?"); Webber, *supra* note 33, at 198 ("It is, however, unclear what all of these qualifying words actually mean.").

102. *See* 157 CONG. REC. S8633 (daily ed. Dec. 15, 2011) (statement of Sen. Carl Levin) ("Neither the Senate bill nor the conference report establishes new authority to detain American citizens—or anybody else."); *see also* Wittes & Chesney, *supra* note 56, at 2 ("Nobody who is not subject to detention today will become so when the NDAA goes into effect."); Deborah N. Pearlstein, *Detention Debates*, 110 MICH. L. REV. 1045, 1052 (2012) (book review).

103. *See generally* David Cole, *Gitmo Forever? Congress's Dangerous New Bill*, NYR BLOG (Dec. 8, 2011, 5:25 PM), http://www.nybooks.com/blogs/nyrblog/2011/dec/08/gitmo-forever-dangerous-new-bill/; Amanda Simon, *President Obama Signs Indefinite Detention into Law*, ACLU (Dec. 31, 2011, 4:20 PM), http://www.aclu.org/blog/national-security/president-obama-signs-indefinite-detention-law.

104. *See* Greenwald, *supra* note 100, at 5 ("[T]here are serious dangers and harms from having Congress . . . put its institutional, statutory weight behind powers previously claimed and seized by the President alone."); Wittes & Chesney, *supra* note 56, at 2 ("It puts Congress's stamp of approval behind [the authority the Administration claims] for the first time, and that's no small thing.").

105. *See* Wittes & Chesney, *supra* note 56, at 2–3 (explaining that an amendment to prevent the detention of U.S. citizens was rejected and that the NDAA leaves the possibility open).

106. *See* 157 CONG. REC. S8634 (daily ed. Dec. 15, 2011) (statement of Sen. Carl Levin) ("[T]he language of the Feinstein amendment . . . leaves this issue to the executive branch and the courts").

107. *See supra* note 36 and accompanying text.

108. *See* Presidential Policy Directive/PPD-14: Directive on Procedures Implementing Section 1022 of the National Defense Authorization Act for Fiscal Year 2012, 2012 DAILY COMP. PRES. DOC. 1 (Feb. 28, 2012) ("the phrase 'Covered Person' applies only to a person who is not a citizen of the United States"); *see also supra* note 37 and accompanying text.

provisions, even as they are amended, will present numerous constitutional questions that the courts will inevitably have to resolve."[109]

E. Separation of Powers Concerns During War

Youngstown Sheet & Tube Co. v. Sawyer is generally considered the "seminal case on separation of powers during wartime."[110] The Court had to decide in *Youngstown* "whether the President was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills."[111] President Truman issued this order at "the peak of the Korean War . . . in order to prevent a threatened strike by the United Steelworkers of America."[112] President Truman feared that a "strike would cripple the war effort in Korea."[113]

In the *Youngstown* decision, the majority, concurring, and dissenting opinions lay out three different theories of presidential war powers. In this Note, these three theories are called (1) the limited theory, (2) the relational theory, and (3) the expansive theory. Each of these theories will be discussed briefly below. This Note uses the relational theory, as explained by Justice Jackson's concurrence in *Youngstown*, as a framework for evaluating executive detention and section 1021 of the NDAA. The Supreme Court recently recognized that "Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action" in foreign affairs.[114]

1. The Limited Theory of Presidential War Powers

Justice Black's majority opinion in *Youngstown* expressed a limited view of presidential war powers. This view has also been called a "formalist approach."[115] Justice Black stated that "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the

109. 157 CONG. REC. S8646 (daily ed. Dec. 15, 2011) (statement of Sen. Mark Udall).

110. Avidan Y. Cover, *Supervisory Responsibility for the Office of Legal Counsel*, 25 GEO. J. LEGAL ETHICS 269, 280 (2012); *see also* Edward T. Swaine, *The Political Economy of* Youngstown, 83 S. CAL. L. REV. 263, 265 (2010) ("*Youngstown* is one of the most celebrated cases dealing with the separation of powers, and even contends for best in show."); Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1206, 1217 (2006) (stating that *Youngstown* is a "super precedent," which refers to decisions that "take on a special status in constitutional law as landmark opinions, so encrusted and deeply embedded in constitutional law that they have become practically immune to reconsideration and reversal.").

111. *Youngstown*, 343 U.S. at 582.

112. Elizabeth Bahr & Josh Blackman, Youngstown*'s Fourth Tier: Is There a Zone of Insight Beyond the Zone of Twilight?*, 40 U. MEM. L. REV. 541, 551 (2010).

113. *Id.*

114. Medellin v. Texas, 552 U.S. 491, 494 (2008).

115. *See* Bahr & Blackman, *supra* note 112, at 551, 559; William N. Eskridge, *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21, 23–24 (1998).

Constitution itself."[116] Justice Black held that the seizure of the steel mills lacked express statutory authority, and there was no "act of Congress . . . from which such a power [could] fairly be implied."[117]

Justice Black also determined that the President had exceeded his constitutional powers. He explained that the President's Commander-in-Chief power was limited to the "theater of war," which did not include domestic production facilities.[118] Additionally, the seizure did not fall under the President's power to execute the laws, because Justice Black saw it as lawmaking and not execution.[119]

2. The Relational Theory of Presidential War Powers

Justices Jackson and Frankfurter both wrote concurring opinions in *Youngstown* expressing the idea that presidential powers can change over time based on action or inaction by Congress. Justice Jackson stated, in his famous concurrence, that "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."[120] Justice Jackson established a three-category framework for evaluating presidential power in relation to Congress. In the first category, or Zone 1, the President's authority is the greatest because he is acting "pursuant to an express or implied authorization of Congress . . . ."[121] If the President's action falls within Zone 1, he "personif[ies] the federal sovereignty" and has the full power of the federal government.[122] In the second category, called Zone 2 or the "zone of twilight," the President "acts in absence of either a congressional grant or denial of authority . . . ."[123] Here, the President's power is less, but "congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility."[124] In the third category, the President's "power is at its lowest ebb" because he is pursuing "measures incompatible with the expressed or implied will of Congress . . . ."[125] In Zone 3, the President "can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[126]

116. *Youngstown*, 343 U.S. at 585.
117. *Id.* Like Justices Jackson and Frankfurter's concurrences, Justice Black's view of presidential war powers is also relational to Congress because Congress can expand the President's powers, but only by expressly enacting a statute.
118. *Id.* at 587.
119. *Id.* at 588.
120. *Id.* at 635 (Jackson, J., concurring).
121. *Id.* at 635.
122. *Id.* at 636; *see also* Dames & Moore v. Regan, 453 U.S. 654, 674 (1981) (noting that when the President acts in accordance with congressional authorization, the Presidential action can only be invalid if "the Federal Government as a whole lacked the power exercised by the President").
123. *Youngstown*, 343 U.S. at 637.
124. *Id.*
125. *Id.*
126. *Id.*

Justice Frankfurter's concurrence also declared that presidential powers were relational to Congress and could change over time.[127] "Deeply embedded traditional ways of conducting government," according to Justice Frankfurter, could provide a "gloss" on the words of the Constitution and affect their interpretation.[128] Thus, if Congress has not objected or interfered with a longstanding presidential exercise of power, that inaction could be seen as a "gloss" that expands the power of the President.[129]

Almost thirty years later in *Dames & Moore v. Regan*,[130] Justice Rehnquist referenced both the Jackson and Frankfurter concurrences in *Youngstown* in an opinion concerning whether the President could nullify "attachments and liens on Iranian assets in the United States, direct[] that these assets be transferred to Iran, and suspend[] claims against Iran that may be presented to an International Claims Tribunal."[131] While embracing the general concept of Justice Jackson's three-category framework, Justice Rehnquist noted that "executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition."[132] With respect to the President suspending claims in U.S. courts, Justice Rehnquist held that, even though there was not explicit congressional authorization, the "general tenor of Congress' legislation in this area" and "a history of congressional acquiescence" supported this exercise of presidential power.[133]

3. The Expansive Theory of Presidential War Powers

In his *Youngstown* dissent, Chief Justice Vinson, joined by two other Justices, articulated a more expansive view of presidential powers, especially during times of war and national emergency.[134] He rejected the majority's opinion because it left the President "powerless at the very moment when the need for action may be most pressing and when no one, other than he, is immediately capable of action."[135] Although the Framers of the Constitution did not want an "autocrat," they also did not want "an

127. *Id.* at 610 (Frankfurter, J., concurring) ("To be sure, the content of the three authorities of government is not to be derived from an abstract analysis. The areas are partly interacting, not wholly disjointed.").

128. *Id.*

129. *Id.* at 610–11. ("In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II.").

130. 453 U.S. 654 (1981).

131. *Id.* at 660.

132. *Id.* at 669.

133. *Id.* at 678.

134. *Youngstown*, 343 U.S. at 668 (Vinson, C.J., dissenting) ("A world not yet recovered from the devastation of World War II has been forced to face the threat of another and more terrifying global conflict.").

135. *Id.* at 680–81.

automaton impotent to exercise the powers of Government" during a national emergency.[136] In addition to providing an extensive list of past examples where the President had acted during times of emergency, the Chief Justice also stated that, "[w]ith or without explicit statutory authorization, Presidents have at such times dealt with national emergencies by acting promptly and resolutely to enforce legislative programs, at least to save those programs until Congress could act."[137] The Chief Justice pointed out that President Truman had invited Congress to act, and that twelve days had passed without any congressional action.[138]

Justice Sutherland advocated for the expansive view of presidential power almost twenty years earlier in *United States v. Curtiss-Wright Export Corp*.[139] Justice Sutherland stated that only in the realm of domestic affairs was presidential power limited to powers enumerated in the Constitution.[140] In foreign affairs, the President had "plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations" and was best equipped to deal with foreign nations.[141]

Although the expansive view of presidential war powers (sometimes called the unitary executive theory) has mostly fallen out of favor, it still has some proponents. Justice Thomas's dissent in *Hamdi v. Rumsfeld* advocates a broad view of presidential war powers and a very limited role for the courts.[142]

II. THE D.C. COURTS STRUGGLE TO DEFINE THE LIMITS OF DETENTION

This part examines how the D.C. District and Circuit courts struggled with the legal boundaries of detention while evaluating the habeas corpus petitions of detainees from 2008 to 2012. It focuses on how the D.C. courts analyzed what would become the three criteria for detention in section 1021(b)(2) of the NDAA: (1) being "part of" Al Qaeda or the Taliban; (2) "substantially support[ing]" Al Qaeda or the Taliban; and (3) being part of "associated forces" of Al Qaeda or the Taliban.[143]

The Supreme Court has not decided the merits of a detention case since *Boumediene* in 2008.[144] Additionally, in 2011 the Supreme Court denied certiorari to six different Guantanamo detainee cases appealed from the

136. *Id.* at 682.
137. *Id.* at 683.
138. *Id.* at 677.
139. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936).
140. *Id.* at 315–16 ("The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution . . . is categorically true only in respect of our internal affairs.").
141. *Id.* at 320.
142. 542 U.S. 507, 582 (Thomas, J., dissenting).
143. *See* NDAA § 1021(b)(2), 125 Stat. 1298, 1562 (2011).
144. *See* Johnsen, *supra* note 50, at 470 ("After deciding five military detention cases in five years, the Supreme Court has not since 2008 decided the merits of another case that involves the rights of Guantánamo detainees or otherwise defines the scope of the President's military detention authority.").

D.C. Circuit.[145] As a result of its continued abstention, the Supreme Court has had little impact in shaping the substantive parameters of executive detention.[146]

The substantive law of executive detention has been primarily created by the D.C. District Court and the D.C. Circuit as they evaluate habeas corpus petitions from detainees held at Guantanamo Bay.[147] As the law has evolved since 2008, the D.C. courts have often applied different or changing standards, and some believe that "the D.C. Circuit's opinions almost uniformly favor the government."[148] Additionally, some commentators have expressed concerns about "the habeas process as a lawmaking device" and fear that the standards established by the D.C. Courts are "interim steps" or "a kind of draft" until the Supreme Court eventually steps in to resolve the issues.[149]

The judges of the D.C. courts recognize that they are creating law. In their opinions, they have often commented on the lack of guidance from the Supreme Court[150] and their significant role in shaping substantive detention law with each decision.[151]

The subsections below focus on the three detention criteria listed in section 1021(b)(2) of the NDAA. Although these criteria were codified in the NDAA in late 2011, the D.C. courts struggled with their meaning in the years after the *Boumediene* decision in 2008. As one court admitted in

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145. *Id.* at 471.

146. *See* Linda Greenhouse, *A Supreme Court Scorecard*, N.Y. TIMES OPINIONATOR (July 13, 2011, 9:30 PM), http://opinionator.blogs.nytimes.com/2011/07/13/a-supreme-court-scorecard ("Missing in Action: The court's voice on Guantanamo. The justices turned down half a dozen opportunities to review how the lower federal courts in the District of Columbia are handling the habeas corpus petitions . . . ."); *see also* Benjamin Wittes, *David Remes on* Al Adahi *Cert Denial*, LAWFARE (Jan. 18, 2011, 8:22 PM), http://www.lawfareblog.com/2011/01/david-remes-on-al-adahi-cert-denial ("The Supreme Court . . . has shown no appetite for getting involved in the nitty gritty of the writing of the rules that will govern detention.").

147. *See* Benjamin Wittes, Robert M. Chesney & Larkin Reynolds, *The Emerging Law of Detention 2.0: The Guantanamo Habeas Cases As Lawmking*, BROOKINGS INST. (May 12, 2011), http://www.brookings.edu/research/reports/2011/05/guantanamo-wittes ("[T]hese rules will be written by judges through the common-law process of litigating the habeas corpus cases of the roughly 170 detainees still held at Guantanamo").

148. Nesbitt, *supra* note 89, at 246–47.

149. Wittes et al., *supra* note 147, at 3; *see also* Brief for Plaintiffs-Appellees at 52, Hedges v. Obama, Nos. 12-3176, 12-3644 (2d Cir. Dec. 10, 2012) [hereinafter Plaintiffs-Appellees Brief], *available at* http://www.lawfareblog.com/wp-content/uploads/2012/12/Hedges-Appellees-Brief.pdf (noting that habeas review is limited and requires years of detention before a detainee gets a judicial hearing).

150. *See* Al-Bihani v. Obama, 590 F.3d 866, 870 (D.C. Cir. 2010) ("The Supreme Court has provided scant guidance on these questions, consciously leaving the contours of the substantive and procedural law of detention open for lower courts to shape in a common law fashion."); Gherebi v. Obama, 609 F. Supp. 2d 43, 45 (D.D.C. 2009) ("Bereft of any definitive guidance from the Supreme Court.").

151. *See* Hamlily v. Obama, 616 F. Supp. 2d 63, 66 (D.D.C. 2009) ("[T]he Supreme Court acknowledged that the district courts would have to address this issue in a piecemeal fashion by delimiting '[t]he permissible bounds' of the government's detention authority 'as subsequent cases are presented to them.'" (alterations in original) (citations omitted)).

2010, "much of what our Constitution requires for this context remains unsettled."[152]

A. What It Means To Be "Part Of" Al Qaeda or the Taliban

There is general agreement among the courts that a person who is "part of" Al Qaeda or the Taliban can be lawfully detained without trial.[153] The more difficult question is what criteria should be used to determine who is actually a "part of" these organizations. Even as late as June of 2010 (six years after the Supreme Court authorized detention in *Hamdi*), the D.C. Circuit admitted that this was still an unresolved issue.[154]

One issue that is relatively settled is the evidentiary standard. The courts generally agree that a preponderance of the evidence standard should be used when evaluating habeas corpus petitions.[155] Courts also emphasize that circumstantial evidence should be viewed holistically and it is legal error to take an "unduly atomized approach" that looks only at individual pieces of evidence in isolation.[156]

1. The Command-Structure Test vs. the Functional Approach

The two major tests used by the D.C. courts to determine membership in Al Qaeda or the Taliban are the command-structure test and the functional approach. The command-structure test was the initial way to determine membership, but courts eventually moved to the functional approach because it was less rigid and more holistic.

a. The Emergence of the Command Structure Test

The early test used by the D.C. District Court to determine if an individual was "part of" Al Qaeda or the Taliban was the command-structure test. The court explained that, under this test, "[t]he key inquiry, then, is . . . whether the individual functions or participates within or under the command structure of the organization—*i.e.*, whether he receives and

152. *Al-Bihani*, 590 F.3d at 882.

153. *See* Bensayah v. Obama, 610 F.3d 718, 724–25 (D.C. Cir. 2010) ("[T]he AUMF authorizes the Executive to detain, at the least, any individual who is functionally part of al Qaeda."); *Hamlily*, 616 F. Supp. 2d at 73 ("Moreover, the government's claimed authority to detain those who were 'part of' those organizations is entirely consistent with the law of war principles that govern non-international armed conflicts.").

154. *See* Barhoumi v. Obama, 609 F.3d 416, 424 (D.C. Cir. 2010) ("[T]his court has yet to delineate the precise contours of the 'part of' inquiry.").

155. *See* Awad v. Obama, 608 F.3d 1, 11 (D.C. Cir. 2010) ("Lest there be any further misunderstandings, let us be absolutely clear. A preponderance of the evidence standard satisfies constitutional requirements in considering a habeas petition from a detainee held pursuant to the AUMF.").

156. Latif v. Obama, 677 F.3d 1175, 1193–94 (D.C. Cir. 2012) ("[T]he district court's [unduly atomized] treatment of the evidence in this case provides an alternative basis for remand.").

executes orders or directions."[157] The command-structure test was also used by one panel of the D.C. Circuit, although the court noted that this test was not the exclusive way to prove that an individual was "part of" Al Qaeda or the Taliban.[158]

In *Abdah v. Obama*,[159] the district court granted the habeas corpus petition of a detainee at Guantanamo Bay because the government failed to prove that he was a member of Al Qaeda under the command-structure test.[160] The court determined that the detainee was not "part of" Al Qaeda even though the court acknowledged that, among other things, the detainee had "received money for his trip to Afghanistan from an individual who supported jihad" and "was with Al Qaeda members in the vicinity of Tora Bora after the battle that occurred there."[161] Similarly, in *Mohammed v. Obama*,[162] the district court granted the detainee's habeas corpus petition because he "had not yet acquired a role within the 'military command structure' of al-Qaida and/or the Taliban . . . ."[163] Even though the detainee had been recruited at a radical mosque and had traveled to Afghanistan for the purpose of fighting against U.S. forces, the court ruled that, at the time of capture, he had not yet fully become "part of" Al Qaeda or the Taliban.[164]

b. The Transition to a Functional, Case-by-Case Approach

The D.C. courts eventually moved away from the command-structure test to a more flexible approach. In *Awad v. Obama*,[165] the D.C. Circuit rejected the command-structure test as the sole method of proving that an individual is "part of" Al Qaeda or the Taliban.[166] Because the command-structure test was created by the district courts and was not derived from the AUMF or any other authority, the courts were comfortable departing from

157. *Hamlily*, 616 F. Supp. 2d at 75; *see also* Mohammed v. Obama, 704 F. Supp. 2d 1, 31 (D.D.C. 2009) (quoting the command-structure test from *Hamlily*).

158. *See* Al-Adahi v. Obama, 613 F.3d 1102, 1109 (D.C. Cir. 2010) ("When the government shows that an individual received and executed orders from al-Qaida members . . . that evidence is sufficient (but not necessary) to prove that the individual has affiliated himself with al-Qaida.").

159. 708 F. Supp. 2d 9 (D.D.C. 2010).

160. *Id.* at 22 ("Even taken together, these facts do not convince the Court by a preponderance of the evidence that Uthman received and executed orders from Al Qaeda.").

161. *Id.*

162. 704 F. Supp. 2d 1 (D.D.C. 2009).

163. *Id.* at 31.

164. *See id.* at 32 ("In short, Petitioner may well have started down the path toward becoming a member or substantial supporter of al-Qaida and/or the Taliban, but on this record he had not yet achieved that status.").

165. 608 F.3d 1, 11 (D.C. Cir. 2010).

166. *Id.* ("But there are ways other than making a 'command structure' showing to prove that a detainee is 'part of' al Qaeda.").

precedent.[167] The command-structure test was created by the D.C. District Court without "any meaningful guidance from Congress."[168]

In the decisions that followed *Awad*, the D.C. Circuit continued to reject the command-structure test as the exclusive test for membership determinations.[169] The D.C. Circuit viewed the command-structure test as overly formalistic, and it transitioned to a case-by-case, functional evaluation of whether an individual is "part of" Al Qaeda or the Taliban.[170] The command-structure test was rejected (at least in part) because the courts realized that they had little understanding about how groups like Al Qaeda were organized.[171] The transition to a functional, case-by-case analysis has generally expanded the government's detention authority.

The D.C. Circuit acknowledged that, under the functional approach, "it is impossible to provide an exhaustive list of criteria for determining whether an individual is 'part of' al Qaeda."[172] Rather than looking at one factor in isolation, courts must consider the evidence in its totality to see if it establishes a coherent "mosaic"[173] or likely probability that an individual is "part of" Al Qaeda or the Taliban.[174] Thus, the best way to analyze the functional approach is to examine some of the factors that appear in multiple cases.

Evidence proving that a detainee fought alongside Al Qaeda or the Taliban is widely considered sufficient to show that the detainee was "part of" these organizations.[175] Additionally, evidence showing that a detainee received weapons or tactics training at a training camp is usually sufficient

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167. *Id.* at 11–12 ("Nowhere in the AUMF is there a mention of command structure . . . . Awad points us to no legal authority for the proposition that he must be a part of al Qaeda's 'command structure' to be detained.").

168. Salahi v. Obama, 625 F.3d 745, 751 (D.C. Cir. 2010).

169. *See* Uthman v. Obama, 637 F.3d 400, 402 (D.C. Cir. 2011) ("[T]his Court has rejected 'command structure' as the test for determining whether someone is part of al Qaeda.").

170. *See Salahi*, 625 F.3d at 751–52 ("These decisions make clear that the determination of whether an individual is 'part of' al-Qaida 'must be made on a case-by-case basis by using a functional rather than a formal approach and by focusing upon the actions of the individual in relation to the organization.'" (quoting Bensayah v. Obama, 610 F.3d 718, 725 (D.C. Cir. 2010))).

171. *See Bensayah*, 610 F.3d at 725 ("Although it is clear al Qaeda has, or at least at one time had, a particular organizational structure . . . the details of its structure are generally unknown . . . .").

172. *Id.*

173. For a skeptical view of the "mosaic theory," see Mohammed v. Obama, 704 F. Supp. 2d 1, 7 (D.D.C. 2009) ("[T]he mosaic theory is only as persuasive as the tiles which compose it and the glue which binds them together . . . . [I]f the individual pieces of a mosaic are inherently flawed or do not fit together, then the mosaic will split apart.").

174. The court in *Al-Adahi v. Obama* referred to the idea of conditional probability, where each additional piece of evidence makes it more likely that an individual is "part of" Al Qaeda or the Taliban. 613 F.3d 1102, 1105–06 (D.C. Cir. 2010).

175. *See generally* Al Alwi v. Obama, 653 F.3d 11, 17 (D.C. Cir. 2011) ("Al Alwi fought under the leadership of . . . a high-level al Qaeda member responsible for commanding Arab and Taliban troops in Kabul.").

to prove membership.[176] Even evidence of informal training conducted outside of a training camp may be sufficient to show that an individual was "part of" Al Qaeda or the Taliban.[177]

Given that fighting alongside or training with Al Qaeda or the Taliban generally supports membership, what if an individual is detained before he reaches this stage? The paragraphs below examine factors that are less conclusive than fighting or training, but may nonetheless still persuade the courts that the detainee is "part of" Al Qaeda or the Taliban.

Evidence that a detainee stayed at an Al Qaeda or Taliban guesthouse is often used by the government to show that the detainee was en route to a training camp or the battlefield.[178] In *Sulayman v. Obama*,[179] the detainee submitted a declaration from a political science professor (who was an expert in Yemeni history) that stated that "there is nothing inherently suspicious or sinister about . . . stay[ing] in guesthouses" in Pakistan or Afghanistan.[180] While acknowledging that some innocent guesthouses might exist, the court found it "implausible that guesthouses being operated for the benefit of Taliban fighters engaged in warfare are simultaneously providing charitable lodging to strangers in need, as the petitioner suggests."[181] Thus, staying at an Al Qaeda or Taliban affiliated guesthouse is strong evidence that an individual was "part of" these groups and was preparing to either train or fight.[182]

Courts have held that traveling on a route frequently used by other Al Qaeda or Taliban members is "probative evidence" that an individual is a part of one of these organizations.[183] Additionally, courts have determined that individuals who interact or associate with members of Al Qaeda or the

176. *See* Almerfedi v. Obama, 654 F.3d 1, 6 n.7 (D.C. Cir. 2011) ("[T]hat a petitioner trained at an al Qaeda camp . . . 'overwhelmingly' would carry the government's burden." (citation omitted)); Esmail v. Obama, 639 F.3d 1075, 1076 (D.C. Cir. 2011) ("[T]raining at . . . al Qaeda training camps is compelling evidence that the trainee was part of al Qaeda.").

177. *See* Hussein v. Obama, 821 F. Supp. 2d 67, 78 (D.D.C. 2011) ("[T]he petitioner's receipt of a Kalashnikov rifle from three Taliban guards . . . as well as the training he received from one of the Taliban guards regarding how to use the weapon, constitutes probative, if not conclusive, evidence supporting the petitioner's detention.").

178. *See* Sulayman v. Obama, 729 F. Supp. 2d 26, 46–47 (D.D.C. 2010) ("In support of its case for detention, the government . . . asserts that [redacted] served as training camp facilitation hubs [redacted][and] stations for frontline fighters . . . and that the guesthouse 'was used as a transition point [redacted] for individuals going to train at various training camps.'" (redactions in original)).

179. 729 F. Supp. 2d 26 (D.D.C 2010).

180. *Id.* at 47.

181. *Id.* at 48.

182. For cases where the guesthouse factor was considered, see Almerfedi v. Obama, 654 F.3d 1 (D.C. Cir. 2011); Al Alwi v. Obama, 653 F.3d 11 (D.C. Cir. 2011); Al-Adahi v. Obama, 613 F.3d 1102 (D.C. Cir. 2010); Barhoumi v. Obama, 609 F.3d 416 (D.C. Cir. 2010); Mohammed v. Obama, 704 F. Supp. 2d 1 (D.D.C. 2009).

183. Uthman v. Obama, 637 F.3d 400, 405 (D.C. Cir. 2011) ("[T]raveling to Afghanistan along a distinctive path used by al Qaeda members can be probative evidence that the traveler was part of al Qaeda."); *see also* Latif v. Obama, 677 F.3d 1175, 1194 (D.C. Cir. 2012) ("Nor did the district court consider that Latif's admitted route to Afghanistan from his home in Yemen corroborates the evidence that Latif trained with the Taliban.").

Taliban are likely to be members themselves.[184] In one example of membership by association, the court emphasized the petitioner's close familial ties to Osama bin Laden (including "two personal meetings" with bin Laden)[185] and, in another, the court focused on the fact that Al Qaeda had treated the petitioner "as one of their own."[186]

Courts disagree about whether suspicious travel circumstances are enough to prove membership. In *Al-Adahi v. Obama*,[187] the court determined that it was strong corroborative evidence that the petitioner's travel to Afghanistan had been organized and paid for by an Al Qaeda affiliate.[188] In *Mohammed*, however, the court found that even though a jihadi recruiter had "paid for and arranged [the petitioner's] trip to Afghanistan," this was not enough to demonstrate membership without some evidence of fighting or training.[189] Courts also disagree about the significance of lying about travel plans. In *Uthman v. Obama*,[190] the court found it highly suspicious that the petitioner had lied about the details of his travel,[191] while in *Bensayah v. Obama*,[192] the court found that the petitioner's use of false travel documents was reasonable given his fear of persecution if forced to return to his home country.[193]

2. Is It Possible To Disassociate from Al Qaeda or the Taliban?

One question that remains unclear in detention law is whether an individual can effectively disassociate from Al Qaeda or the Taliban.[194] The primary issue is whether an individual who was once a member of these groups can effectively renounce his membership or sufficiently distance himself so that he is no longer subject to detention. In *Salahi v. Obama*,[195] the detainee had sworn an oath of allegiance to Al Qaeda in 1991.[196] As the court recognized, in 1991 "al-Qaida and the United States shared a common objective: they both sought to topple Afghanistan's Communist government."[197] The detainee argued that he "severed all ties with al-Qaida" in 1992 (well before Osama bin Laden issued his first fatwa

184. *Uthman*, 637 F.3d at 405 ("[A]ssociation with other al Qaeda members is itself probative of al Qaeda membership.").
185. Al-Adahi v. Obama, 613 F.3d 1102, 1107 (D.C. Cir. 2010) ("That close association made it far more likely that Al-Adahi was or became part of the organization.").
186. Awad v. Obama, 608 F.3d 1, 3 (D.C. Cir. 2010).
187. 613 F.3d 1102 (D.C. Cir. 2010).
188. *Id.* at 1106.
189. Mohammed v. Obama, 704 F. Supp. 2d 1, 30 (D.D.C. 2009).
190. 637 F.3d 400 (D.C. Cir. 2011).
191. *Id.* at 406 ("Uthman's route to Afghanistan is even more suspicious because he lied about how he paid for the trip.").
192. 610 F.3d 718 (D.C. Cir. 2010).
193. *Id.* at 727.
194. *See* Gregory S. McNeal, *The Status Quo Bias and Counterterrorism Detention*, 101 J. CRIM. L. & CRIMINOLOGY 855, 872 (2011).
195. 625 F.3d 745 (D.C. Cir. 2010).
196. *Id.* at 751.
197. *Id.*

against U.S. forces), and thus his capture and detention in 2001 was unjustified.[198] The court did not provide a clear legal standard for evaluating claims of dissociation, and instead simply stated that a 1991 oath to Al Qaeda , without more, was unlikely to justify detention.[199] The case was then remanded to the district court for further factfinding.[200]

One year later, the D.C. District Court provided more guidance on the standard for dissociation. In *Khairkhwa v. Obama*,[201] an Afghan national and former senior Taliban official petitioned for habeas corpus because he claimed, among other things, that he had dissociated from the Taliban by the time of his capture and detention.[202] The court acknowledged that "it is not enough for the government to show simply that the petitioner was, at one time, a member of the Taliban," and "the petitioner must have been 'part of' [the Taliban] at the time of his capture."[203] The court, however, did "not credit the petitioner's contention that he had disassociated himself from the Taliban prior to his capture."[204] The court held that the petitioner made no meaningful attempt to surrender, and the fact that he "was captured at the home of a hardline Taliban military commander greatly undermines [his] contention that he had disassociated himself from the Taliban prior to his apprehension."[205] The court noted that an individual must take "affirmative actions" to demonstrate dissociation[206] but did not provide examples (other than fully surrendering)[207] of these affirmative acts. In *Khalifh v. Obama*,[208] the court noted that disassociation could be proven by affirmative actions or even a "compelling lengthy lapse in activity."[209] The amount of time that qualifies as "lengthy" is still unclear.

B. "Substantial Support" As a Basis for Detention

Section 1021(b)(2) of the NDAA states that a "covered person" (who is subject to detention) includes not only those who were "part of" Al Qaeda, the Taliban, or associated forces but also those who "substantially

198. *Id.*

199. *Id.*; *see also* Walter E. Kuhn, *The Terrorist Detention Review Reform Act: Detention Policy and Political Reality*, 35 SETON HALL LEGIS. J. 221, 246 (2012) ("*Salahi* stands for the proposition that the government must prove that a detainee was 'part of' an enemy group at the time of capture, and even if the individual was clearly 'part of' the group at an earlier point, he need not prove overt acts of disassociation.").

200. *Salahi*, 625 F.3d at 752.

201. 793 F. Supp. 2d 1 (D.D.C. 2011).

202. *Id.* at 4.

203. *Id.* at 44.

204. *Id.* at 45.

205. *Id.*

206. *Id.* at 44.

207. Surrendering, however, may not be an attractive option because it might subject an individual to indefinite detention.

208. No. 05-CV-1189, 2010 WL 2382925 (D.D.C. May 28, 2010).

209. *Id.* at *6 (referencing *Salahi* where there was a lapse in activity for about ten years); *see also* Kuhn, *supra* note 199, at 248 (noting that a detainee's ability to prove disassociation without some affirmative act is very unlikely).

supported" these groups.[210] Although most courts agree that an individual who is "part of" Al Qaeda or the Taliban can be lawfully detained,[211] courts disagree over whether providing "substantial support" to these organizations is a valid basis for detention. Thus, the "substantial support" category raises two issues that often intersect: first, is substantial support a valid basis for detention and, if so, what does it mean to provide substantial support? These questions are discussed in turn below.

1. Is Substantial Support a Valid Predicate for Detention?

In 2009, two D.C. District Court opinions conflicted over whether substantial support could serve as an independent basis for detention. In *Gherebi v. Obama*,[212] the court held that substantial support was a valid basis for detention.[213] The court limited its holding, however, to individuals who provide substantial support as members of the enemy's armed forces and, therefore, mere "[s]ympathizers, propagandists, and financiers" could not be detained.[214] The court also appeared to equate substantial support with the command structure test[215]—a test that the D.C. Circuit later rejected.[216]

In contrast, in *Hamlily v. Obama*,[217] the court rejected the concept of support as an independent basis for detention.[218] The court decided that evidence of support could be used to demonstrate that an individual was "part of" Al Qaeda or the Taliban, but support was not its own distinct detention category.[219] This view was endorsed by another D.C. District Court opinion in 2009.[220] Although this court also held that detention based on substantial support "is simply not authorized by the AUMF itself or by the law of war," the court specifically stated that "future domestic legislation" might authorize detention based solely on substantial support.[221] Thus, the NDAA may have provided this legislative

210. NDAA § 1021(b)(2), 125 Stat. 1298, 1562 (2011).
211. *See supra* Part II.A.
212. 609 F. Supp. 2d 43 (D.D.C. 2009).
213. *Id.* at 54 ("The Court therefore adopts the 'substantial support' standard employed by the government as the governing standard for detention in these cases . . . .").
214. *Id.* at 68–69.
215. *Id.* ("[Those] who have no involvement with this 'command structure,' while perhaps members of the enemy organization in an abstract sense, cannot be considered part of the enemy's 'armed forces' and therefore cannot be detained militarily unless they take a direct part in the hostilities.").
216. *See supra* note 169 and accompanying text.
217. 616 F. Supp. 2d 63 (D.D.C. 2009).
218. *Id.* at 69 ("Specifically, the Court rejects the concept of 'substantial support' as an independent basis for detention.").
219. *Id.* at 70.
220. *See* Hatim v. Obama, 677 F. Supp. 2d 1, 7 (D.D.C. 2009) ("The President does not have the authority to detain persons solely based on a determination that they substantially supported the enemy armed forces.").
221. *Hamlily*, 616 F. Supp. 2d at 76.

authorization when it specifically enumerated "substantial support" as an independent detention category.

In 2010, the D.C. Circuit partially resolved this lower court split by holding that the Military Commissions Act of 2009[222] provided congressional authority to detain those who "purposefully and materially supported hostilities."[223] Although this decision affirmed a separate detention category based on support, it did not specifically authorize detention based on "substantial support,"[224] and no D.C. court has yet evaluated the meaning of "substantial support" under the NDAA. The D.C. Circuit had the opportunity to evaluate the meaning of "substantial support" in 2011. However, because the court found that the detainee was clearly "part of" Al Qaeda or the Taliban, it never reached the substantial support issue.[225]

Additionally, lawyers in the Obama Administration appear divided over whether to use support as an independent legal justification for detention when defending against habeas petitions. The government lawyers try to avoid the issue, if possible, by first arguing that the detainee was "part of" Al Qaeda or the Taliban.[226]

2. What Does It Mean To Provide Substantial Support?

Even among courts that agree that support is a valid independent category for detention, there is little consensus about the meaning of support or what activities qualify as "substantial support."[227] The D.C. Circuit, while affirming detention based on material support, noted that it was a "standard whose outer bounds are not readily identifiable."[228] The meaning of "substantial support" is particularly unclear.[229] Absent a congressional definition of the term (which is lacking in the NDAA), courts are forced to evaluate "substantial support" on a case-by-case, ad hoc basis.[230] One judge noted that this is problematic because the term is

222. Pub. L. No. 111-84, tit. 18, 123 Stat. 2190, 2574–2614, (codified at 10 U.S.C. § 948a (Supp. V 2011)).

223. Al-Bihani v. Obama, 590 F.3d 866, 872 (D.C. Cir. 2010).

224. It is unclear whether the concept of "substantial support" is different from "material support." This will be discussed further in the next section.

225. *See* Al Alwi v. Obama, 653 F.3d 11, 16 (D.C. Cir. 2011) ("Nor need we consider whether the detainee 'substantially supported' al Qaeda or the Taliban if we are persuaded that he was 'part of' either entity.").

226. *See generally* Charlie Savage, *Obama Team Split on Tactics Against Terror*, N.Y. TIMES, Mar. 29, 2010, at A1.

227. *See* Webber, *supra* note 33, at 186 ("There is no greater clarity about the meaning of support.").

228. *Al-Bihani*, 590 F.3d at 873.

229. *See* Gherebi v. Obama, 609 F. Supp. 2d 43, 70 (D.D.C. 2009) (stating that "the government declines to provide any definition as to what the qualifier 'substantial' means").

230. *See id.* at 69 ("[T]he exact contours of the standard must and will be fleshed out on a case-by-case basis.").

"highly elastic" and could potentially cover everything from "core membership and support to vague affiliation and cheerleading."[231]

C. What Is an "Associated Force"?

The NDAA authorizes detention not only for persons who were a "part of" or "substantially supported" Al Qaeda or the Taliban, but also for those who were members of or substantially supported "associated forces" of these two organizations. Although there are some easy cases, determining whether a particular group (even an admitted terrorist organization) is an "associated force" of Al Qaeda or the Taliban can be difficult. This is especially true for Al Qaeda, a loosely organized group that has many affiliates and splinter groups.[232]

In 2009, the D.C. District Court in *Hamlily* affirmed the government's power to detain members of associated forces and defined the concept of an associated force as a "co-belligerent," or a group that has become a "fully fledged belligerent fighting in association with one or more belligerent powers."[233] The court recognized that it was applying the term "co-belligerent" by analogy, because the concept came from the law of war and was usually applied in international armed conflicts involving nation-states.[234] The court also limited the definition of an associated force to those organizations that have an "actual association in the current conflict with al Qaeda or the Taliban," and excluded groups that only "share an abstract philosophy or even a common purpose with al Qaeda."[235] The *Hamlily* decision addressed threshold legal questions for a number of different detainees, and thus no specific organizations were identified as "associated forces."[236]

Courts seem to faithfully apply the definition of "associated forces" established in *Hamlily*, limiting it those groups that actually fought alongside Al Qaeda or the Taliban. The 55th Arab Brigade[237] and the Hezb-i-Islami Gulbuddin,[238] for example, were found to be associated forces, and both organizations were actively involved in the conflict in Afghanistan.[239] *Parhat v. Gates*[240] is one of the only cases where the court

231. *Al-Bihani*, 590 F.3d at 884 (Williams, J., concurring).

232. *See* Cronogue, *supra* note 14, at 381 ("However, demarcating exactly where the al-Qaeda organization ends and one of its 'affiliates' or 'associated forces' begins is extremely difficult. For example, al-Qaeda now has many branches and affiliates in Yemen and Saudi Arabia.").

233. Hamlily v. Obama, 616 F. Supp. 2d 63, 74–75 (D.D.C. 2009) (citation omitted).

234. *Id.* at 74 n.16.

235. *Id.* at 75 n.17.

236. *Id.* at 66.

237. *See* Al-Bihani v. Obama, 590 F.3d 866, 872–73 (D.C. Cir. 2010).

238. *See* Khan v. Obama, 655 F.3d 20, 32–33 (D.C. Cir. 2011).

239. *See* Chester H.L. Hutchinson, Note, Al-Bihani v. Obama *& Congressional Testimony on Targeted Killings: Evaluating Custom As a Source of Law in the War on Terror*, 31 ST. LOUIS U. PUB. L. REV. 579, 600 (2012) (noting that the 55th Arab Brigade was "a para-military group allied with the Taliban which included al Qaeda members within its command structure"); *see also* Steve Breyman & Aneel Salman, *Reaping the Whirlwind:*

determined that an organization was not an associated force.[241] In *Parhat*, the court held that the government failed to show that the East Turkistan Islamic Movement (ETIM) had any connection to Al Qaeda or the Taliban or that the ETIM was planning "terrorist activities against U.S. interests."[242] Thus, courts have limited the definition of an "associated force" to those groups that actually engage in joint activities with Al Qaeda and the Taliban.

III. *HEDGES* CHALLENGES THE DETENTION AUTHORITY OF THE NDAA

On January 13, 2012, a group of plaintiffs brought a lawsuit in the Southern District of New York seeking injunctive relief against section 1021 of the NDAA, claiming that it violated both their First and Fifth Amendment rights.[243] Because they were challenging a detention provision, these plaintiffs were unusual, as they were not detainees but writers and political activists.[244] The plaintiffs included a Pulitzer Prize–winning journalist, a website founder, and even a member of the Icelandic Parliament.[245]

On May 16, 2012, Judge Forrest granted a preliminary injunction against section 1021[246] and then, on September 12, 2012, permanently enjoined section 1021(b)(2).[247] Judge Forrest held that this portion of the statute was "unconstitutionally overbroad" because the government failed to show "that activities protected by the First Amendment could not subject an individual to indefinite military detention under § 1021(b)(2)."[248] Judge Forrest also stated that the "due process rights guaranteed by the Fifth Amendment require that an individual understand what conduct might subject him or her to criminal or civil penalties."[249] Because the government failed to adequately define key terms like "substantially supported" and "associated

Pakistani Counterinsurgency Campaigns, 2004–2010, 34 FLETCHER F. WORLD AFF. 65 (2010) (stating that Hezb-i-Islami is an Afghan insurgent group whose members often seek sanctuary in Pakistan).

240. 532 F.3d 834 (D.C. Cir. 2008).

241. *Id.* at 848. This case was actually decided under the review authority provided in the DTA and before the Supreme Court granted the right of habeas corpus to detainees at Guantanamo Bay in *Boumdiene*.

242. *Parhat*, 532 F.3d at 848.

243. Hedges v. Obama, No. 12 Civ. 331 (KBF), 2012 WL 1721124, at *1 (S.D.N.Y. May 16, 2012).

244. *Id.* at *6.

245. *Id.* at *6, *8, *11.

246. *Id.* at *28.

247. *See* Hedges v. Obama, No. 12 Civ. 331 (KBF), 2012 WL 3999839, at *1 (S.D.N.Y. Sept. 12, 2012). Section 1021(b)(2) of the NDAA defines "covered persons" who were not directly related to the 9/11 attacks.

248. *Id.*

249. *Id.* at *2. Judge Forrest noted that the "stakes get no higher" than section 1021 because of the risk of "indefinite military detention—potential detention during a war on terrorism that is not expected to end in the foreseeable future, if ever." *Id.*

forces," the "statute's vagueness falls short of what due process requires."[250]

This part uses Judge Forrest's analysis in *Hedges* as a vehicle for examining the contours of executive detention in general and of section 1021 of the NDAA in particular. The *Hedges* case is somewhat of an outlier because it involves individuals challenging a detention statute who are not currently detained and probably do not face a realistic, imminent threat of detention. The government has appealed the ruling, and the Second Circuit may overrule Judge Forrest on a procedural issue such as standing.[251] Nonetheless, Judge Forrest raised important concerns about section 1021 and executive detention, which are addressed below.

A. Does Section 1021 Extend Detention Authority Beyond the AUMF?

As discussed in Part I, disagreement exists over whether section 1021 creates any new detention authority or simply affirms the authority of the AUMF. The text of the statute states, "Nothing in this section is intended to limit or expand the authority of the President or the scope of the [AUMF]."[252] However, the AUMF never mentions detention, and the limits of detention authority under the AUMF have been defined on a case-by-case basis after the Supreme Court's decision in *Hamdi*.[253]

The government has continued to argue on appeal that section 1021 simply affirms the AUMF and "does not confer any new detention authority."[254] But Judge Forrest found many significant differences between section 1021 and the AUMF.[255] She highlighted four major reasons why the detention authority granted in section 1021 goes beyond the AUMF: (1) it is an ex post facto fix to justify past detentions; (2) it incorporates the laws of war for the first time; (3) it is not tied to the 9/11 attacks; and (4) it is not limited to individuals captured on the battlefield. Each of these points are discussed in turn below.

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250. *Id.*

251. The Second Circuit has granted a stay of the injunction pending resolution of the appeal. *See* Hedges v. Obama, Nos. 12-3176 (L), 12-3644(Con), 2012 WL 4075626 (2d Cir. Sept. 17, 2012). The Second Circuit heard oral arguments on February 6, 2013, and a decision is expected in the coming months. *See* Michael Kelley, *Lawyer Sums Up the Enormous Stakes of the NDAA Indefinite Detention Lawsuit*, BUS. INSIDER (Feb. 7, 2013), http://www.businessinsider.com/stakes-of-indefinite-detention-lawsuit-2013-2. The Second Circuit may find that the plaintiffs lack standing, especially considering recent Supreme Court jurisprudence. *See* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1143 (2013) (holding that the plaintiffs lacked standing to challenge national security legislation because their future injuries were too speculative and were not "certainly impending").

252. NDAA § 1021(d), 125 Stat. 1298, 1562 (2011).

253. *See supra* Part II.

254. Brief for the Appellants at 15, Hedges v. Obama, Nos. 12-3176, 12-3644 (2d Cir. Nov. 6, 2012) [hereinafter Government Appellate Brief], *available at* http://www.lawfareblog.com/wp-content/uploads/2012/11/Hedges-Opening-Brief.FINAL_.FILED_.pdf.

255. *See Hedges*, 2012 WL 3999839, at *4 ("The AUMF and § 1021 have significant differences.").

First, Judge Forrest viewed section 1021 as an "ex post facto 'fix,'" or an attempt by the President and Congress to "ratify past detentions which may have occurred under an overly-broad interpretation of the AUMF."[256] She stated that, at some point, the executive branch unilaterally extended its detention authority beyond the AUMF, and section 1021 was an attempt to codify that extension.[257] In support of this view, she cited a 2009 brief to the D.C. District Court in which she claimed that the government changed its position to resemble the authority granted in section 1021(b)(2).[258]

In that brief, the government stated that it was "refining its position" and providing a "new explication of who may be detained."[259] Additionally, the description of the government's detention authority in the brief is almost identical to section 1021(b), including the categories of "substantial support" and "associated forces."[260] However, even though the government admitted it was modifying its position, it argued that this new position still derived from and was consistent with the AUMF.[261]

As discussed in Part II, most of the substantive limits of detention authority under the AUMF have been defined by the D.C. courts.[262] These courts have in many cases upheld the government's interpretation of detention authority under the AUMF,[263] while in other cases they have limited or narrowed that authority.[264] The government argues that the detention authority granted by the AUMF should not be determined by evaluating the text of the AUMF in a vacuum, but rather courts should look at how the AUMF has evolved over time through interpretation by all three branches of government.[265]

The government further contends that section 1021 "is an essentially verbatim affirmation by Congress of the Executive Branch's interpretation of the AUMF."[266] Thus, the government argues that section 1021

256. *Id.* at *4. *But see* Senators Amici Brief, *supra* note 22, at 16–17 (arguing that Judge Forrest's articulation of a hidden agenda is contrary to both the legislative history and the President's signing statement).

257. *Hedges*, 2012 WL 3999839, at *4; *see also* Plaintiffs-Appellees Brief, *supra* note 149, at 4.

258. *Hedges*, 2012 WL3999839, at *4.

259. Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 1, 11, *In re* Guantanamo Bay Detainee Litig., Misc. No. 08-442 (D.D.C. Mar. 13, 2009) [hereinafter 2009 Brief], *available at* http://www.justice.gov/opa/documents/memo-re-det-auth.pdf.

260. *See id.* at 2.

261. *See id.* at 1.

262. *See supra* note 147 and accompanying text; *see also* Barnes, *supra* note 18, at 81 ("[T]he D.C. . . . courts have been the main actors addressing the AUMF's scope.").

263. *See supra* Part II.C (explaining that the D.C. courts have affirmed the executive's authority to detain members of "associated forces").

264. *See supra* Part II.A–B (explaining that the D.C. courts have disagreed over how to determine if an individual is "part of" Al Qaeda and whether detention can be based on "support").

265. *See* Government Appellate Brief, *supra* note 254, at 5–9.

266. *Id.* at 8; *see also* Senators Amici Brief, *supra* note 22, at 2 ("That process culminated in the Obama Administration's March 2009 Memorandum setting forth the detention authority that had been exercised by the executive branch to that point and Congress's

represents congressional ratification of the current interpretation of detention authority developed by the executive and the D.C. courts.[267] But, Judge Forrest determined that section 1021 was a congressional attempt to defer to the executive and validate or fix past detentions that went beyond the scope of the AUMF.[268]

Second, Judge Forrest stated that section 1021 goes beyond the AUMF because it explicitly incorporates the law of war.[269] She stated that the government used these "vague 'law of war' principles" to support "an expansive interpretation of detention authority under the AUMF."[270] The text of the AUMF does not mention the laws of war, but the laws of war have often been used to interpret the AUMF. The Supreme Court used the laws of war to determine that the "necessary and appropriate force" language in the AUMF included the power of executive detention.[271] Additionally, scholars have argued that since the AUMF involves warfare and the use of force, the laws of war are the best way to interpret the statute.[272]

However, in *Al-Bihani v. Obama*,[273] the D.C. Circuit stated that the laws of war are "fluid" and "not a fixed code" and should not be used to "determine the limits of the President's war powers."[274] Judge Forrest cited the *Al-Bihani* case to support her position that the laws of war should not be used to interpret the AUMF.[275] The government has argued on appeal in its brief to the Second Circuit that *Al-Bihani* is not applicable because that court ruled that a detainee could not invoke the laws of war to *limit* the President's war powers, while Judge Forrest felt that invoking the laws of war are a means to *expand* the President's war powers.[276] Thus, Judge

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ratification of that authority in Section 1021 of the [NDAA]."); Stephen Consuegra, Comment, *Under the Lens of the Constitution: The NDAA's Detainee Provisions and the Fifth Amendment's Guarantee of Equal Protection*, 25 ST. THOMAS L. REV. 105, 127–28 (2012).

267. *See* Senators Amici Brief, *supra* note 22, at 32 ("The district court's wholesale rejection of the detention authority affirmed by § 1021 disregards and disrespects the opinions of all three branches of the Federal Government . . . .").

268. *See* Landau, *supra* note 58, at 696 (noting that often "the judiciary refuses to accede to a process marked by congressional abdication."). If section 1021 is a verbatim repetition of the executive's position, that could be viewed by Judge Forrest as a congressional abdication of responsibility.

269. *See* Hedges v. Obama, No. 12 Civ. 331 (KBF), 2012 WL 3999839, at *15 (S.D.N.Y. Sept. 12, 2012) ("[Section] 1021 adds a new element not previously set forth in the AUMF . . . the addition of the 'law of war' language.").

270. *Id.*

271. *See supra* note 49 and accompanying text.

272. *See* Bradley & Goldsmith, *supra* note 15, at 2091 ("[T]he AUMF should be read as authorizing the President to do what the laws of war permit.").

273. 590 F.3d 866 (D.C. Cir. 2010).

274. *Id.* at 871.

275. *See Hedges*, 2012 WL 3999839, at *17.

276. *See* Government Appellate Brief, *supra* note 254, at 27 n.4; *see also* Senators Amici Brief, *supra* note 22, at 19 ("Incorporation of the law of war would, if anything, serve to limit, not expand, the President's potential authority under the AUMF."). *See generally* Christine Waring, *The Removal of International Law from Guantanamo Detainee Litigation:*

Forrest and the D.C. Circuit seem to agree that the laws of war should not be used by the courts, although possibly for opposite reasons. Further complicating the issue, in denying a rehearing en banc, seven judges of the D.C. Circuit stated that the discussion of the laws of war in *Al-Bihani* was dicta and "not necessary to the disposition of the merits."[277]

Third, Judge Forrest stated that section 1021 goes beyond the AUMF because the AUMF was specifically tied to 9/11 and section 1021 is not.[278] The text and timing (September 18, 2001) of the AUMF suggest that it was a response to 9/11.[279] Judge Forrest held that section 1021 goes beyond the scope of the AUMF by creating a second category of "covered persons."[280] The first category of covered persons in section 1021(b)(1) is essentially a verbatim repetition of the language in the AUMF. In section 1021(b)(2) (the portion that Judge Forrest ruled unconstitutional), the statute specifically names Al Qaeda and the Taliban (not mentioned in the AUMF) and creates detention categories based on "substantial support" and "associated forces."[281]

Although Judge Forrest believes that the AUMF should be limited to 9/11, prominent scholars have argued for a more expansive interpretation of the AUMF that includes "associated forces" of Al Qaeda and those who provide support to these groups.[282] Additionally, as previously discussed, the scope and meaning of the AUMF has evolved over time through executive and judicial interpretation.[283] Although the AUMF may have been limited to the 9/11 attacks in 2001, that may no longer be true in today, where it still serves as the primary congressional authorization for the fight against Al Qaeda.[284]

Problems and Implications of Al-Bihani v. Obama, 43 GEO. J. INT'L L. 927, 930 (2012) ("*Al-Bihani* created precedent that removed international law as a limit to the President's detention authority . . . .").

277. *See* Al-Bihani v. Obama, 619 F.3d 1, 1 (D.C. Cir 2010).

278. *See Hedges*, 2012 WL 3999839 at *14 (stating that "the AUMF set forth detention authority tied directly and only to September 11, 2001").

279. *See supra* notes 10, 11 and accompanying text.

280. *See* Plaintiffs-Appellees Brief, *supra* note 149, at 5 ("[T]he district court held that § 1021(B)(2) authorizes 'for the first time,' the President to detain without reference to participation in the events of September 11, 2001 . . . .").

281. *See* NDAA § 1021(b)(2), 125 Stat. 1298, 1562 (2011).

282. *See* Bradley & Goldsmith, *supra* note 15, at 2055 ("[T]he AUMF nonetheless encompasses terrorist organizations other than those responsible for the September 11 attacks if they have a sufficiently close connection with the responsible organizations."). But some of these scholars are now advocating for Congress to create a new statute to serve as the legal foundation for America's counter-terrorism efforts. *See* JACK GOLDSMITH ET AL., A STATUTORY FRAMEWORK FOR NEXT-GENERATION TERRORIST THREATS (2013), *available at* http://media.hoover.org/sites/default/files/documents/Statutory-Framework-for-Next-Generation-Terrorist-Threats.pdf.

283. *See supra* notes 147, 148 and accompanying text.

284. *See* Karl S. Chang, *Enemy Status and Military Detention in the War Against Al-Qaeda*, 47 TEX. INT'L L.J. 1, 3 (2011) (stating that the government still uses the AUMF "as the legal authority to prosecute its military campaign against al-Qaeda."); *see also* Government Appellate Brief, *supra* note 254, at 2.

Fourth, Judge Forrest stated that section 1021 goes beyond the AUMF because detention under the AUMF is limited to the battlefield based on the Supreme Court's decision in *Hamdi*.[285] In *Hamdi*, Justice O'Connor stated that the purpose of detention was to "ensur[e] that those who have in fact fought with the enemy during a war do not return to battle against the United States."[286] Thus, one view of *Hamdi* is that it limits the detention authority of the AUMF to those who fought and were captured on the battlefield.[287]

Commentators have argued, however, that the fight against Al Qaeda and other terrorist organizations is an unconventional conflict, and thus the "battlefield lacks a precise geographic location and arguably includes the United States."[288] Additionally, former Secretary of Defense Leon Panetta stated that, "[t]his campaign against al Qaeda will largely take place outside declared combat zones."[289] The government disagrees with Judge Forrest's narrow reading of *Hamdi* and believes that, under the AUMF, Al Qaeda members can be detained wherever they are captured, regardless of whether it is on a traditional battlefield.[290]

B. Should Section 1021(b)(2) Be Voided for Vagueness?

Judge Forrest held that section 1021(b)(2) violated the Fifth Amendment because it is vague,[291] and thus fails to provide notice of what conduct may subject an individual to detention.[292] Throughout the opinion, Judge Forrest criticized not only the statute itself but also the government's litigation position because it was a moving target,[293] and it failed to provide any specific definitions of contested terms like "substantially supported"

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285. *See* Hedges v. Obama, No. 12 Civ. 331 (KBF), 2012 WL 3999839, at *15 (S.D.N.Y. Sept. 12, 2012) ("The Supreme Court made it clear that its view of the AUMF related to detention on the field of battle."); *see also* Plaintiffs-Appellees Brief, *supra* note 149, at 3.

286. Hamdi v. Rumsfeld, 542 U.S. 507, 531 (2004).

287. *See* Al-Marri v. Pucciarelli, 534 F.3d 213, 232 (4th Cir. 2008) (Motz, J., concurring) (emphasizing the "narrowness" of the holding in *Hamdi* and limiting it to those captured on the battlefield); *see also* Landau, *supra* note 58, at 692 n.150 (stating that the decision in *Hamdi* "effectively made battlefield capture a prerequisite to executive detention").

288. Bradley & Goldsmith, *supra* note 15, at 2049.

289. Larry Shaughnessy, *Panetta: America Beating al Qaeda but Hasn't Won Yet*, CNN (Nov. 20, 2012), http://security.blogs.cnn.com/2012/11/20/panetta-america-beating-al-qaeda-but-hasnt-won-yet/?iref=allsearch.

290. *See* Senators Amici Brief, *supra* note 22, at 22 ("[T]here is no requirement that a detainee be captured on any particular 'field of battle'—a particularly inappropriate limitation for an authorization of force against terrorist entities that operate worldwide.").

291. Hedges v. Obama, No. 12 Civ. 331(KBF), 2012 WL 3999839, at *2 (S.D.N.Y. Sept. 12, 2012) ("The statute's vagueness falls short of what due process requires.").

292. *Id.* at *40 ("People of common intelligence must not have to guess at the meaning of a statute that may subject them to penalties.").

293. *Id.* at *12 ("There is no guarantee that the position will not—or cannot—change again."); *see also* Brief of Amicus Curiae Bill of Rights Defense Committee in Support of Plaintiffs-Appellees and Affirmation at 9–11, Hedges v. Obama, Nos. 12-3176(L), 12-3644 (2d Cir. Dec. 17, 2012), *available at* http://www.bordc.org/resources/hedgesamicus.pdf (arguing that the government's changing litigation position is a calculated effort to avoid substantive judicial review of detention practices).

and "associated forces."[294] The government essentially conceded the vagueness of these terms,[295] and Judge Forrest stated that they had not been adequately defined by previous case law.[296]

The government argued in *Hedges*—and continues to argue on appeal—that force authorizations and military statutes, like the AUMF and section 1021, should not be subject to vagueness review by the courts.[297] This is because, as the Supreme Court has explained, "Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas."[298] Additionally, the government stated that the terms in section 1021 should not have fixed and rigid definitions, but should be evaluated on a case-by-case basis.[299] Judge Forrest rejected this argument and equated section 1021 with a criminal statute because it permits an individual to be indefinitely imprisoned.[300] The problem was further compounded, as Judge Forrest noted, by the lack of a scienter element in the statute, meaning that an individual could be detained without any "knowing conduct."[301]

Some scholars and commentators agree with Judge Forrest that the terms used in section 1021(b)(2) are impermissibly vague.[302] They believe that terms like "substantial support" and "associated forces" are ambiguous at best[303] and, at worst, allow for the possibility of abuse or manipulation.[304]

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294. *Hedges*, 2012 WL 3999839, at *2 ("[T]he Government nevertheless did not provide particular defintions.").

295. *Id.* at *41.

296. *Id.* at *43 ("The terms as used in § 1021(b)(2) have not been previously defined in case law.").

297. *See* Government Appellate Brief, *supra* note 254, at 3 ("[A] statute authorizing the use of military force in broad terms is not subject to . . . challenge for being unconstitutionally vague."); *see also* Senators Amici Brief, *supra* note 22, at 3–4 ("[A]uthorizations for exercise of the war power—as opposed to the exercise of that power in specific circumstances—have never been subject to review for vagueness because they structure the operations of the government and, unlike statutes creating criminal offenses, do not work directly on individuals or impair individuals' rights.").

298. Zemel v. Rusk, 381 U.S. 1, 17 (1965).

299. *See* 2009 Brief, *supra* note 259, at 2.

300. *See Hedges*, 2012 WL 3999839, at *41–42 ("A citizen has just as much interest—indeed, perhaps more—in understanding what conduct could subject him or her to indefinite military detention without a trial as he or she does in understanding the parameters of a traditional criminal statute that carries a statutory maximum term of imprisonment and cannot be enforced in the absence of full criminal due process rights.").

301. *Id.* at *43.

302. *See* Glenn Greenwald, *PolitiFact and the Scam of Neutral Expertise*, SALON (Dec. 5, 2011), http://www.salon.com/2011/12/05/politifact_and_the_scam_of_neutral_expertise/ (noting that people like Congressman Ron Paul and law professor Jonathan Hafetz have objected to the language used in section 1021).

303. *See* Webber, *supra* note 33, at 203 ("The definitions of 'part of' and 'substantial support' are not clear."); *see also* Cronogue, *supra* note 14, at 397 ("[T]he proposal also adds the ambiguous terms 'associated forces' and 'substantially supporting' . . . . [T]he breadth and scope of these terms seemingly depends on the Executive's determination and framing of the conflict.").

304. *See* Greenwald, *supra* note 100, at 3 (stating that the terms "substantially supports" and "associated forces" are "extremely vague terms subject to wild and obvious levels of abuse").

The government has argued, however, that congressional statutes relating to national security must be vague, and that it is the responsibility of the President as Commander-in-Chief (and not the courts) to interpret and execute them.[305] Below, the terms "substantial support" and "associated forces" are analyzed in the context of *Hedges*, the definitions provided by the government on appeal, and similar statutes.

In *Hedges*, the government failed to define "substantial support" or to provide any examples demonstrating what the term means.[306] The government also failed to provide a definition of the term when pressed by the D.C. District Court three years earlier.[307] The plaintiffs in *Hedges* argue that the addition of the term "substantial support" in section 1021(b)(2) is a clear attempt to extend detention authority beyond the AUMF and to make it easier for the government to justify questionable detentions.[308]

On appeal to the Second Circuit, the government has now provided a definition of substantial support that is shaped by the laws of war and the Geneva Conventions and includes individuals who "bear sufficiently close ties to those forces and provide them support that warrants their detention in prosecution of the conflict."[309] The government lists examples of supporting individuals who can be detained under the Geneva Conventions, but these examples seem more relevant to conventional conflicts with nation-states and less applicable to the unconventional fight against terrorism.[310]

Even with the government's new definition, there is still potential uncertainty about the type and level of support sufficient to subject an individual to detention.[311] In contrast, in the criminal statute that proscribes "providing material support to terrorists," there is a thorough definition of material support and examples of prohibited activities.[312] The examples provide clear notice of what type of conduct is illegal,[313] and the statute even further defines terms like "training" and "expert advice or

305. *See* Government Appellate Brief, *supra* note 254, at 17.

306. *Hedges*, 2012 WL 3999839, at *12 ("In particular, when the Court asked for one example of what 'substantially support' means, the Government stated, 'I'm not in a position to give one specific example.'").

307. *See supra* note 229 and accompanying text; *see also* Plaintiffs-Appellees Brief, *supra* note 149, at 9 ("[Section] 1021(b)(2) leaves the term '*substantially* supported' completely undefined (and it is defined nowhere else in *any* federal statute).").

308. *See* Plaintiffs-Appellees Brief, *supra* note 149, at 15–20.

309. Government Appellate Brief, *supra* note 254, at 27–28.

310. *See id.* at 28 (stating that individuals can be detained if they are "civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units").

311. *See* Cronogue, *supra* note 14, at 397 ("Is there a threshold level of support beyond which we call it 'substantial'?").

312. *See* 18 U.S.C. §§ 2339A–2339B (2006).

313. *See id.* § 2339A(b)(1) (examples of illegal conduct include providing "financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials").

assistance."[314] The material support statute was recently challenged for (among other things) vagueness, but the Supreme Court held that it was not vague because of the internal definitions.[315] The material support statute also has a scienter element (the support must be "knowingly" provided),[316] which the Supreme Court held "further reduces any potential for vagueness."[317] Section 1021 lacks both internal definitions and a scienter element.[318]

Judge Forrest also found that the term "associated forces" was vague, although she recognized that Congress could easily remedy the vagueness of the term by providing further clarification.[319] Without a definition, it is unclear how closely an organization must be tied to Al Qaeda or the Taliban to be considered an associated force.[320] On appeal, the government has provided a definition of an "associated force" that has two characteristics: "(1) an organized, armed group that has entered the fight alongside al-Qaeda, [that] (2) is a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners."[321] This is a narrow definition that incorporates the law of war concept of cobelligerency.[322] It excludes advocacy organizations that are not "armed groups," and it even excludes armed organizations that do not "fight alongside al Qaeda."[323] This new definition may eliminate many of the vagueness concerns expressed by Judge Forrest in *Hedges*.

C. First Amendment Issues

This Note does not address the substantive First Amendment issues that were discussed at length in *Hedges*, and instead focuses on the scope of detention authority and Fifth Amendment issues. Thus, this Note does not evaluate whether an individual could be detained under section 1021 for activities protected by the First Amendment or whether that makes the statute unconstitutional. However, it is worth mentioning that in similar

314. *See id.* § 2339A(b)(2)–(3).

315. *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2720 (2010) ("Congress also took care to add narrowing definitions to the material-support statute over time. These definitions increased the clarity of the statute's terms.").

316. 18 U.S.C. § 2239B(a)(1).

317. *Holder*, 130 S. Ct. at 2720.

318. *See* Plaintiffs-Appellees Brief, *supra* note 149, at 7, 48 (noting that section 1021(b)(2) does not require conduct to be "purposeful" and "contains no definitions of any kind").

319. Hedges v. Obama, No. 12 Civ. 331(KBF), 2012 WL 3999839, at *43 (S.D.N.Y. Sept. 12, 2012) ("'[A]ssociated forces' is an undefined, moving target, subject to change and subjective judgment. It would be very straightforward for Congress to alleviate this vagueness by tethering the term to a definition of (for instance) specific organizations.").

320. *See* Cronogue, *supra* note 14, at 403 ("Associated force could mean many things and apply to groups with varying levels of involvement."); *see also* Webber, *supra* note 33, at 203.

321. Government Appellate Brief, *supra* note 254, at 30.

322. A D.C. District Court also used the concept of cobelligerency to define associated forces in *Hamlily*. *See supra* note 233 and accompanying text.

323. Government Appellate Brief, *supra* note 254, at 30.

statutes, Congress has made more of an effort to avoid First Amendment concerns. For example, in 18 U.S.C. § 2339B, the statute that criminalizes providing material support to terrorists, there is a "Rule of Construction" that states: "Nothing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment."[324] The material support statute also excludes independent advocacy, which convinced the Supreme Court that Congress had carefully considered constitutional issues and thus deserved deference from the Court.[325] A provision excluding independent advocacy could alleviate the concerns of many journalists and activists whose activities are not "directed to, coordinated with, or controlled by foreign terrorist groups."[326] Unlike the material support statute, section 1021 does not contain a First Amendment savings clause or any exclusion of independent advocacy.[327]

D. Separation of Powers Concerns

In *Hedges*, Judge Forrest emphasized that although "courts undoubtedly owe the political branches a great deal of deference in the area of national security," courts cannot abdicate their responsibility to safeguard the Constitution.[328] The Supreme Court echoed this view in *Hamdi* when, even though it affirmed executive detention, the plurality stated that "war is not a blank check for the President when it comes to the rights of the Nation's citizens."[329] It appears that the concept of complete deference to the executive in foreign affairs has mostly fallen out of favor,[330] although it still has some advocates.[331]

Given that the courts have a role in overseeing the President's national security decisions,[332] congressional statutes like section 1021 have the

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324. 18 U.S.C. § 2339B(i) (2006). This is often referred to as a First Amendment "saving clause." *See Hedges*, 2012 WL 3999839, at *19.

325. *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2728 (2010) ("Finally, and most importantly, Congress has avoided any restriction on independent advocacy, or indeed any activities not directed to, coordinated with, or controlled by foreign terrorist groups.").

326. *Id. But see* Plaintiffs-Appellees Brief, *supra* note 149, at 33 (arguing that "the 'independent' advocacy standard gives the government virtually free reign in regulating speech").

327. *See* Plaintiffs-Appellees Brief, *supra* note 149, at 9 (noting that section 1021 lacks a "First Amendment saving clause").

328. Hedges v. Obama, No. 12 Civ. 331(KBF), 2012 WL 3999839, at *4 (S.D.N.Y. Sept. 12, 2012).

329. Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004).

330. *See* Landau, *supra* note 58, at 671 n.49 (stating that the Supreme Court has "resoundingly rejected" the unitary executive theory); *see also* Johnsen, *supra* note 50, at 495 ("Few commentators continue to defend absolute (or near-absolute) deference of the kind described in *Curtiss-Wright*").

331. *See Hamdi*, 542 U.S. at 579 (Thomas, J, dissenting).

332. For two conflicting views on the degree of deference that courts should afford the President's national security decisions, compare Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230 (2007) (arguing for more robust judicial review), *with* Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170 (2007) (arguing for a very deferential approach).

ability to either expand or restrict executive war powers. According to Justice Jackson's *Youngstown* framework, when the President acts pursuant to clear congressional authorization, he is in Zone 1, where his authority is the greatest and he has the full power of the federal government.[333] When congressional intent is unclear or unknown, the President is in Zone 2 or the "zone of twilight," and he has less authority than in Zone 1.[334]

Thus, there at least two ways to interpret section 1021 under Justice Jackson's framework. The government believes that section 1021 places the executive firmly in Zone 1. It has argued on appeal in *Hedges* that section 1021 is "an essentially verbatim affirmation by Congress of the Executive Branch's interpretation of the AUMF."[335] This is supported by the government's 2009 brief to the D.C. District Court, which is almost identical to the description of detention authority in section 1021.[336] If section 1021 places the President in Zone 1, he has clear statutory authorization and does not need to rely on his general Commander-in-Chief powers (which courts view more narrowly).[337] Additionally, in Zone 1, any ambiguities or vague terms in the statute might actually expand the President's authority.[338]

An alternative way to view section 1021 is that, although Congress appeared to affirm the President's authority, it did so with a vague and unclear statute. If it is difficult to determine what Congress actually intended, this could place the President in Zone 2.[339] Judge Forrest held that terms in section 1021, like "substantial support" and "associated forces," are vague, and thus it is unclear what authority Congress actually delegated to the President. Judge Forrest stated that there is no "loophole through which the legislative and executive branches could create immunity from judicial oversight simply by having Congress provide broad,

333. *See supra* note 121 and accompanying text.

334. *See supra* notes 123–24 and accompanying text.

335. Government Appellate Brief, *supra* note 254, at 8; *see also* Senators Amici Brief, *supra* note 22, at 2–3 ("Congress sought to endorse the specific detention authority that had been exercised by the executive and approved by the courts and thereby place it on the strongest possible constitutional footing, consistent with *Youngstown*."); Benjamin Wittes, *Raha Wala Writes His Own FAQ*, LAWFARE (Dec. 20, 2011, 10:01PM), http://www.lawfareblog.com/2011/12/raha-wala-writes-his-own-faq/ ("[B]ecause the NDAA (unlike the 2001 AUMF) authorizes the detention of members and 'substantial supporters' of not only al Qaeda but its 'associated forces,' the President's authority to indefinitely detain such individuals 'is at its maximum.'" (quoting Raha Wala)).

336. *See supra* notes 259–60 and accompanying text.

337. *See* Bradley & Goldsmith, *supra* note 15, at 2051–52 (noting that courts are more reluctant to evaluate the President's Commander-in-Chief powers, attempting, "whenever possible, to decide difficult questions of wartime authority on the basis of what Congress has in fact authorized").

338. *See* Chesney, *supra* note 33, at 792–93 (explaining that some observers view ambiguities in detention statutes as constituting "an implied delegation of authority to the executive to provide whatever further criteria may be required").

339. *See generally* Bradley & Goldsmith, *supra* note 15, at 2133 (noting that in the context of the War on Terror, "it is essential to determine what Congress has, and has not, authorized").

undefined authorization."[340] If congressional statutes are too vague or too broad when delegating power to the President, courts may determine that Congress has abdicated its role in the political process, and thus the courts are less likely to be deferential.[341]

E. Detention of U.S. Citizens

Based on the text of the statute, section 1021 does not alter the legal landscape regarding the detention of American citizens.[342] As previously mentioned, section 1021(e)[343] states that "Nothing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens."[344] Thus, Judge Forrest's claim that "§ 1021(b)(2) provides for indefinite military detention of anyone—including U.S. citizens—without trial"[345] must be based on the belief that American citizens could be indefinitely detained before section 1021 was passed. Judge Forrest's view is supported by the Supreme Court, which stated in *Hamdi* that American citizens can be held as enemy combatants.[346] However, the Obama Administration has stated that it will not detain American citizens indefinitely without trial.[347]

Thus, the current situation is that the Supreme Court has authorized the detention of American citizens, President Obama claims not to exercise that authority, and Congress has chosen not to address the issue. Senator Feinstein proposed a new amendment (Feinstein Amendment II) to the 2013 NDAA that would have forbidden the detention of American citizens or lawful permanent residents without express congressional authorization.[348] The amendment was approved by the Senate, but did not

340. Hedges v. Obama, No. 12 Civ. 331(KBF), 2012 WL 3999839, at *31 (S.D.N.Y. Sept. 12, 2012).

341. *See* Landau, *supra* note 58, at 688–89 (stating that courts will step in when they perceive insufficient coordinate branch decision making between Congress and the executive); *see also* Katyal, *supra* note 75, at 115–16 (noting that, when Congress fails to check the executive, "the judiciary is called upon to singlehandedly rein in excesses").

342. *See Recent Legislation*, 125 HARV. L. REV. 1876, 1877 (2012) ("The section, however, expressly avoids taking a position on the contentious question of whether U.S. citizens . . . may be detained.").

343. *See supra* note 106 and accompanying text.

344. The NDAA section 1021(e) also states that existing law is not affected in regards to "lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States." NDAA § 1021(e), 125 Stat. 1298, 1562 (2011). The scope of indefinite detention has important consequences for immigration law, but this topic is not addressed in this Note.

345. *Hedges*, 2012 WL 3999839, at *31.

346. *See supra* note 36 and accompanying text.

347. *See supra* note 37 and accompanying text; *see also* Consuegra, *supra* note 266, at 140 (arguing that the disparate treatment of citizens and aliens raises equal protection concerns).

348. *See* Michael Kelley, *There's a Giant Loophole in the Feinstein Amendment to the NDAA*, BUS. INSIDER (Nov. 30, 2012), http://www.businessinsider.com/feinstein-ndaa-amendment-indefinite-detention-2012-11. The article explains, however, that many congressmen feel that the AUMF provides express congressional authorization to detain American citizens, and thus Feinstein Amendment II would have no practical effect.

make it into the final version of the bill.[349] With the exclusion of the Feinstein Amendment II from the 2013 NDAA, Congress still remains silent on the issue of indefinite executive detention of American citizens.

IV. REVISING SECTION 1021 AND CREATING A NEW, MORE MEANINGFUL DETENTION STATUTE

This part recommends ways to improve section 1021, with the goal of creating a clearer, more meaningful detention statute. In section 1021, Congress simply codified verbatim the executive branch's interpretation of detention authority.[350] Congress failed to define or limit key terms like "substantial support" or "associated forces," and thus abdicated its role in shaping the substantive parameters of executive detention. This section recommends ways to improve a future detention statute and includes some proposed definitions of key detention criteria.

A vague and unclear detention statute harms the separation of powers between the three branches. As Justice Jackson's widely accepted *Youngstown* framework explains,[351] executive war powers are relational to Congress, and the judiciary decides what Congress has or has not authorized—thus all three branches have a role. Vague statutes enhance the power of the judiciary at the expense of the legislature for two reasons. First, vague statutes make congressional intent unclear and give the courts significant discretion to determine if the President is in Zone 1, 2, or 3.[352] Second, vague statutes invite close judicial scrutiny because they demonstrate to the courts that the political process has failed.[353] Thus, vague congressional authorizations that attempt to delegate broad authority to the President can be counterproductive because, instead of empowering the President, they actually empower the courts.[354]

In addition to expanding the role of the judiciary, vague statutes create uncertainty for the executive. The President cannot act quickly and decisively if the limits of his authority are unclear.[355] Finally, Congress plays an important role in detention policy, and vague statutes like section

349. *See* Robert Chesney, *Agreement Reached on the NDAA*, LAWFARE (Dec. 18, 2012, 11:35 PM), http://www.lawfareblog.com/2012/12/agreement-reached-on-the-ndaa.

350. *See supra* note 335 and accompanying text.

351. *See* Patricia L. Bellia, *Executive Power in* Youngstown*'s Shadows*, 19 CONST. COMMENT. 87, 89–90 (2002). Even while criticizing Jackson's concurrence, the author notes that it is supported by the weight of scholarship. *Id.*

352. *See* Katyal, *supra* note 75, at 99–100 ("Under *Youngstown*, whether a given case falls within a particular zone depends on statutory construction. But the Court can toggle between categories depending on its stinginess or generosity with any given statute. . . .").

353. *See supra* note 341 and accompanying text.

354. *See* Posner & Sunstein, *supra* note 332, at 1199 (arguing for more detailed congressional legislation to constrain the President instead of more judicial review). *But see* Jinks & Katyal, *supra* note 332, at 1279 (countering that judicial review will lead to more congressional action because Congress can trust the courts to check abuse by the executive).

355. *See* Cronogue, *supra* note 14, at 392.

1021 represent a congressional abdication of that role.[356] Congressional legislation is essential when creating long-term, effective antiterrorism policies that have a solid legal foundation.[357] This Note recommends substantive changes to section 1021 to make it a clearer, more meaningful congressional statement about the limits of indefinite executive detention. The major recommendations are: (1) move away from the AUMF; (2) provide specific definitions of key terms (proposed definitions are suggested); (3) exclude protected First Amendment activities; and (4) include a clear statement about the indefinite detention of American citizens.

A. Move Away from the AUMF

The AUMF is the foundational legal authorization for both the overall fight against terrorism[358] and post-9/11 executive detention.[359] However, the AUMF, which is over ten years old, makes no mention of detention,[360] and lower courts are constantly reinterpreting it on a case-by-case basis without meaningful guidance from Congress.[361] This Note does not argue that the AUMF itself should be repealed or replaced.[362] Even if the AUMF remains the background authorization for the use of force, Congress needs to pass a specific detention statute that can be understood independent of the AUMF.[363] Congress failed to do this with section 1021 when it stated that, "Nothing in this section is intended to limit or expand the authority of the President or the scope of the [AUMF]."[364] If a detention statute cannot be interpreted independent of the AUMF, the statute will create more confusion than clarity.[365] A meaningful detention statute must establish

356. *See* Jinks & Katyal, *supra* note 332, at 1276–77 (arguing that there is a "democratic deficit" in the legal War on Terror because "the President has been acting without the explicit support of the legislature"); *see also Recent Legislation*, *supra* note 342, at 1883 ("Congress not only legitimates and helps make accountable executive branch actions, but it is also the only branch capable of fashioning a comprehensive legal regime for military detention of terrorist suspects.").

357. *See* JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 122–23 (2009); *see also* JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11 183–84 (2012) (noting that Congress has effectively constrained many of the President's wartime powers after 9/11).

358. *See supra* note 284 and accompanying text.

359. *See supra* note 48 and accompanying text.

360. *See supra* note 33 and accompanying text.

361. *See supra* note 147 and accompanying text.

362. However, some commentators believe that an updated AUMF is necessary. *See* Cronogue, *supra* note 14, at 401–02; *see also supra* note 283.

363. *Ten Years After the Authorization for Use of Military Force: Current Status of Legal Authorities, Detention, and Prosecution in the War on Terror, Hearing Before the H. Armed Servs. Comm.*, 112th Cong. 3 (2011) (statement of Professor Robert Chesney) [hereinafter Chesney Testimony] (noting that "the substantive scope of the AUMF nonetheless remains incompletely defined at both the organizational and individual levels").

364. NDAA § 1021(d), 125 Stat. 1298, 1562 (2011).

365. *See* Barnes, *supra* note 18, at 82 ("[T]he AUMF's current meaning is far from clear."); *see also* Waring, *supra* note 276, at 929 ("[T]he language in the AUMF . . . . left unclear the scope of the President's power to detain individuals.").

clear, fixed legal standards for detention. Relying on the AUMF allows Congress to avoid including specific definitions and constraints on executive detention. Congressional detention legislation must impose some limits on executive power.

B. Provide Specific Definitions

The primary concern about providing more specificity in a detention statute is that it will constrain the executive from effectively thwarting terrorist threats.[366] The proposed definitions below attempt to strike a balance between the competing interests of clarity and deference to the President. Courts currently evaluate the legality of individual detentions on a case-by-case basis.[367] They do not use rigid criteria but consider the totality of the circumstances since they lack clear guidance from Congress.[368] A congressional detention statute with clear definitions and standards will both guide and constrain judicial review. A statute with specific definitions is also more likely to survive any potential constitutional challenges.[369] With specific definitions, Congress will no longer need to rely on the AUMF or vague references to the international law of war.

1. Defining Membership: The "Part of" Analysis

Most courts agree that it is lawful to detain an individual who is "part of" Al Qaeda or the Taliban.[370] Courts struggle, however, when asked to make specific membership determinations. This is because there are many different ways to be "part of" these groups, and it is difficult to provide an exhaustive list of criteria.[371] This Note's proposed definition for "part of" recognizes the flexibility necessary in membership determinations, while still prioritizing certain important criteria that should be "red flags" for the courts:

> (1) The following facts create a strong presumption that an individual is a "part of" Al Qaeda or the Taliban: participation in the command structure of the organization, fighting alongside or planning an act of violence with other members, receiving training from the organization, or staying at an affiliated guesthouse with the intent of training or fighting with the organization.
>
> (2) The facts listed above are not exhaustive, and other compelling evidence may be used to prove membership. However, if none of the facts listed above are present, it is likely that an individual is not a "part of" Al Qaeda or the Taliban.

366. *See supra* note 305 and accompanying text.
367. *See supra* note 170 and accompanying text.
368. *See supra* notes 168, 173–74 and accompanying text.
369. *See supra* note 315 and accompanying text.
370. *See supra* note 153 and accompanying text.
371. *See supra* note 172 and accompanying text.

> (3) An individual who is determined to be a "part of" Al Qaeda or the Taliban can be detained regardless of the location of capture and without any demonstrated connection to the attacks on September 11, 2001.

2. Abandoning "Substantial Support"

The term "substantial support" should be removed from any future detention statute because it is confusing and unnecessary. The government has consistently failed to provide a definition of "substantial" in court.[372] Even on appeal to the Second Circuit in *Hedges*, the government's new definition of substantial is vague and barely applicable to unconventional conflicts.[373] Thus, the term "substantial support" adds little interpretive value.

By abandoning the concept of substantial support, Congress can choose between three courses of action. First, Congress can omit any mention of support in the detention statute and eliminate support as an independent detention category. The executive already has tools to deal with those who support terrorism, including bringing criminal charges in federal court under the material support statute[374] or trial by military commission.[375] Given these other options, it may be unnecessary to indefinitely detain without trial those who only provide support to terrorist organizations.

Second, Congress can keep the concept of support in the statute, but not as an independent predicate for detention. Under this option, if an individual provides support to Al Qaeda or the Taliban, it can be used as evidence to show that he was a "part of" these organizations.[376] Third, Congress can retain support as an independent detention predicate, but it must provide a clear definition of the term and examples of what type of support can subject an individual to detention. The material support statute provides a useful baseline for the level of specificity required.[377] The statute should also include a scienter element, requiring that the support be either knowing or intentional.[378]

This Note recommends the second option. Given that an individual detained during the current conflict may be held for years or even decades,[379] it seems excessive to indefinitely detain those who only provide peripheral support. Also, as mentioned above, the President has other tools to deal with those who support terrorism. Thus, it is best to add a statement to the definition of "part of" in the previous section that includes the concept of support:

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372. *See supra* notes 229, 306 and accompanying text.
373. *See supra* notes 309–10 and accompanying text.
374. *See supra* note 312 and accompanying text.
375. *See supra* note 223 and accompanying text. The 2009 MCA authorizes trial by military commission for those who "purposefully and materially supported hostilities against the United States or its coalition partners." 10 U.S.C. § 948a(7)(B) (Supp. V 2011).
376. *See supra* note 219 and accompanying text.
377. *See supra* notes 312–15 and accompanying text.
378. *See supra* notes 316–17 and accompanying text.
379. *See supra* note 41 and accompanying text.

> (4) An individual can be detained for providing knowing support to Al Qaeda or the Taliban if the support is significant enough to demonstrate that the individual is functionally a "part of" one of these organizations.

3. Defining "Associated Forces"

Extending detention authority to individuals who are members of "associated forces" of Al Qaeda is essential for effectively combatting terrorism. Al Qaeda is loosely organized and has many splinter groups that help carry out its goals.[380] From a national security perspective, it is illogical to permit detention of Al Qaeda members but not members of Al Qaeda affiliates. The term "associated forces," however, requires further definition. As Judge Forrest recognized, the term can be easily clarified by specific guidance from Congress.[381]

On appeal to the Second Circuit in *Hedges*, the government has provided a definition of associated forces that includes armed groups that fight alongside Al Qaeda or the Taliban against the United States.[382] This definition is sufficiently clear and should alleviate any vagueness concerns, although it may be overly limiting. This definition could be interpreted to exclude groups that plan or coordinate terrorist activity with Al Qaeda away from a traditional battlefield.

Thus, in addition to this definition, it might be useful for the government to actually name specific terrorist organizations that are considered "associated forces" of Al Qaeda. The Supreme Court recognized that the number of officially designated terrorist organizations is finite.[383] The State Department maintains a list of Foreign Terrorist Organizations (FTOs) that is unclassified and available to the public.[384] The President could flag specific FTOs on this list as associated forces of Al Qaeda. This would further reduce any ambiguity and also allow the President to extend detention authority to terrorist organizations that are particularly dangerous. Obviously, the list of associated forces would not be exhaustive[385] and would change over time. But it would at least provide notice that membership in specific groups could subject an individual to indefinite detention.

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380. *See supra* note 232 and accompanying text; *see also* Chesney Testimony, *supra* note 363, at 4.

381. *See supra* note 319 and accompanying text.

382. *See supra* note 321 and accompanying text.

383. *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2728 (2010) ("There is, and always has been, a limited number of those organizations designated by the Executive Branch.").

384. *See* Bureau of Counterterrorism, *Foreign Terrorist Organizations*, U.S. DEP'T ST. (Sept. 28, 2009), http://www.state.gov/j/ct/rls/other/des/123085.htm.

385. Based on the government's definition, "associated forces" would still apply to other armed groups that fight alongside Al Qaeda, even if they are not designated as FTOs.

C. A First Amendment Savings Clause

As discussed in Part III.C, this Note does not focus on the First Amendment issues raised in *Hedges*. However, like the material support statute,[386] a future congressional detention statute could include a First Amendment savings clause in an attempt to alleviate any First Amendment concerns. The savings clause would explicitly prohibit detention based solely on protected First Amendment activities. If section 1021 had included a savings clause, it likely would have prevented the plaintiffs in *Hedges* from establishing standing. With a savings clause, the journalists and activists could not have reasonably feared that they would be detained solely for free speech activities.

Additionally, a future detention statute could include a clause that prohibits detention based solely on independent advocacy.[387] Thus, in order to be detained, an individual would need to have some intentional contact with Al Qaeda , the Taliban, or associated forces. This would probably exclude, for example, the plaintiff in *Hedges* who founded subversive websites.[388] Merely posting content on the internet without intentionally supporting terrorist organizations could not subject an individual to detention if independent advocacy was excluded.[389]

D. A Clear Statement on Detention of U.S. Citizens

This Note does not take a position on the detention of American citizens. However, Congress should take a position on the issue.[390] In section 1021, Congress stated that it was not changing existing law regarding the detention of U.S. citizens.[391] This is an abdication of Congress's role in the political process, particularly because the detention of American citizens is controversial and existing law is unclear.[392]

The rejected Feinstein Amendment II to the 2013 NDAA was a step in the right direction and an attempt to make a clear congressional statement on the issue.[393] Congress should go further than the Feinstein Amendment and clearly state whether it believes that American citizens can be indefinitely detained by the executive. Even though President Obama has

386. *See supra* note 324 and accompanying text.

387. *See supra* note 325 and accompanying text.

388. *See* Hedges v. Obama, No. 12 Civ. 331(KBF), 2012 WL 3999839, at *8 (S.D.N.Y. Sept. 12, 2012).

389. This would not address the plaintiffs' First Amendment associational concerns, because they could still be detained for associating with terrorist groups, especially if it rose to the level of membership.

390. *See generally* John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399 (2010) (noting that the Supreme Court demands a high level of congressional clarity when dealing with statutes related to core constitutional values).

391. *See supra* note 344 and accompanying text.

392. *See supra* notes 36–37 and accompanying text. A plurality of the Supreme Court in *Hamdi* declared that an American citizen could be detained as an enemy combatant, but the legal landscape in this area is still uncertain.

393. *See supra* note 348 and accompanying text.

stated that he will not indefinitely detain American citizens,[394] a future President might change this policy. Congress needs to send a clear message to the President about his authority to detain American citizens.

CONCLUSION

Congress has an important role in determining the scope of the President's war powers. This is particularly true in the area of executive indefinite detention, where there is a high risk for abuse if left unchecked. In section 1021 of the NDAA, Congress failed to define or limit the President's detention authority. Section 1021 repeats the executive's interpretation of detention authority verbatim, and it fails to clarify any important terms. A new congressional detention statute is necessary to provide clear and meaningful guidance to both the President and the courts.

394. *See supra* note 37 and accompanying text.