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The NDAA, AUMF, and Citizens Detained Away from the Theater of War: Sounding a Clarion Call for a Clear Statement Rule

Diana Cho

THE NDAA, AUMF, AND CITIZENS DETAINED AWAY FROM THE THEATER OF WAR: SOUNDING A CLARION CALL FOR A CLEAR STATEMENT RULE

Diana Cho∗

In the armed conflict resulting from the September 11 attacks, the executive authority to order the indefinite detention of citizens captured away from the theater of war is an issue of foreign and domestic significance. The relevant law of armed conflict provisions relevant to conflicts that are international or non-international in nature, however, do not fully address this issue. Congress also intentionally left the question of administrative orders of citizen detainment unresolved in a controversial provision of the 2012 version of the annually-enacted National Defense Authorization Act. While plaintiffs in Hedges v. Obama *sought to challenge the enforceability of NDAA's section 1021 on the basis that it permitted indefinite detention of citizens who are far removed from the theater of war, they were denied relief on the basis of standing and the issue continues to remain undecided. A revision of the language of section 1021, such as one suggested in this Article, might sufficiently quell the fears raised by the* Hedges *plaintiffs. Yet given that the recent versions of the NDAA have left this provision intact, this Article recommends applying a clear statement rule to section 1021 to construe that provision as not permitting the indefinite detention of citizens captured away from the theater of war.*

∗ J.D. Candidate, May 2015, Loyola Law School, Los Angeles; B.A. Sociology, University of Texas, Austin, 2011. I would like to express my deep gratitude to Professor David Glazier for his patience and invaluable guidance in this endeavor. I am forever indebted to the many law school colleagues, particularly Cameron Bell and Andrew Beshai, who sacrificed much time and energy to see this Article to fruition. Finally, I am most grateful for the steadfast support and encouragement from my older sister, who has always believed in me.

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I. INTRODUCTION

As the conflict formerly known as the "war on terror" lingers on into its thirteenth year, the issue regarding indefinite detention of American citizens captured on American soil who are alleged to be enemy combatants remains unresolved.[1] The Bush administration characterized the conflict as a worldwide war against all terrorist forces responsible for 9/11[2] and claimed broad authority under the executive's Article II war powers to validate the substandard treatment of unlawful "enemy combatants," effectively eschewing law of armed conflict (LOAC) standards.[3] While the American people and the global community stood behind the decision to use military force against those responsible for 9/11,[4] support for the "war on terror" quickly developed into strident criticism of President Bush's wartime policies.[5]

In its second decade the conflict evolved from a full-scale war effort to scattered "overseas contingency operations" as associations to the forces behind the World Trade Centers and Pentagon attacks weaken and become increasingly attenuated.[6] President Obama

1. *See infra* Part III; Diane Webber, *Preventive Detention in the Law of Armed Conflict: Throwing Away the Key?*, 6 J. NAT'L SECURITY L. & POL'Y 167 (2012).

2. Address to the Nation on the Terrorist Attacks, 2 PUB. PAPERS 1099, 1100 (Sept. 11, 2001); Memorandum from George W. Bush to the White House (Feb. 7, 2002) [hereinafter Bush Memorandum], *available at* http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf.

3. Several of President Bush's closest advisors warned that declaring the Geneva Conventions inapplicable to the conflict would reverse a century of reliance on international treaties, undermine protections of American soldiers involved in the conflict, and garner international criticism. *See* Memorandum from Colin L. Powell, Secretary of State to Counsel to President George W. Bush (Jan. 26, 2002), *available at* http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.26.pdf; Memorandum from William H. Taft, IV, Legal Advisor, to Counsel to the President (Feb. 2, 2002), *available at* http://www.nytimes.com/packages/html/politics/20040608_DOC.pdf; *see infra* Part II.A.

4. *See generally* JENNIFER L. MEROLLA & ELIZABETH J. ZECHMEISTER, DEMOCRACY AT RISK: HOW TERRORIST THREATS AFFECT THE PUBLIC 131, 140 (2009) (discussing increased public support for political authority figures that took a hardline approach on terrorism); Jack M. Beard, *America's New War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J.L. & PUB. POL'Y 559, 568–70 (2002).

5. *At Home and Abroad, Bush's 'War on Terror' Faces Mounting Criticism*, AGENCE FRANCE PRESSE, Dec. 30, 2002, http://www.commondreams.org/headlines02/1230-03.htm; *see* G. Scott Morgan et al., *The Expulsion from Disneyland: The Social Psychological Impact of 9/11*, 66 AM. PSYCHOL. 447, 450 (2011).

6. *See* Jonathan Hafetz, *Military Detention in the "War on Terrorism": Normalizing the Exceptional After 9/11*, 112 COLUM. L. REV. SIDEBAR 31, 42–46 (2012); Scott Wilson & Al Kamen, '*Global War on Terror*' *Is Given New Name*, WASH. POST, Mar. 25, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032402818.html.

quickly abandoned the heavy-handed rhetoric of his predecessor, stressing that the laws of war inform his wartime policies and that the Authorization of Use of Military Force (AUMF)[7] statutorily authorizes his war powers.[8] Indeed, in his 2014 State of the Union address, President Obama issued optimistic statements regarding the end of the current conflict against al-Qaeda and the Taliban.[9] Yet try as he might to divorce himself from President Bush's wartime agenda, President Obama has failed to make good on his promise to permanently shutter Guantánamo's doors and has actually ramped up the use of drone strikes to terminate suspected terrorist adversaries.[10]

So it comes as no surprise that Congress, ten years after 9/11, would find itself at an impasse over section 1021, a provision in the National Defense Authorization Act for Fiscal Year 2012 (NDAA)[11] that could expand or limit the president's detention

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7. Pub. L. No. 107-40, 115 Stat. 224 (codified at 50 U.S.C. § 1541 note (2006)); Letter to Congressional Leaders on the Global Deployments of United States Combat-Equipped Armed Forces, 2013 DAILY COMP. PRES. DOC. 2 (Dec. 13, 2013), *available at* http://www.gpo.gov/fdsys/pkg/DCPD-201300853/pdf/DCPD-201300853.pdf.

8. There is a notable difference between being "informed" by the laws of war, and adhering to the laws of war. This Article does not address the reasons and ramifications related to President Obama's reluctance to fully align his wartime policies with international law of war principles. *See* Remarks at the National Archives and Records Administration, 1 PUB. PAPERS 689, 694–95 (May 21, 2009); Benjamin Wittes, *Continuity and Change: Towards a Synthesis*, LAWFARE (Dec. 17, 2010, 9:53 AM), http://www.lawfareblog.com/2010/12/continuity-and-change-towards-a-synthesis/#.Uv5fEf2C5Hw.

9. Address Before a Joint Session of the Congress on the State of the Union, 2014 DAILY COMP. PRES. DOC. 7 (Jan. 28, 2014), *available at* http://www.gpo.gov/fdsys/pkg/DCPD-201400050/pdf/DCPD-201400050.pdf. Given that the "war on terror" terminology lacks legal precision, this Article will refer to the current conflict as the conflict against al-Qaeda and the Taliban.

10. *See* Exec. Order No. 13,492, 3 C.F.R. 203 (2009); Michael Price, *Guantanamo Update*, CHAMPION, Nov. 2009, at 55; David Wagner, *Obama's Failed Promise to Close Gitmo: A Timeline*, ATLANTIC WIRE (Jan. 28, 2013), http://www.theatlanticwire.com/global/2013/01/obama-closing-guantanamo-timeline/61509; Wittes, *supra* note 8.

11. Pub. L. No. 112-81, 125 Stat. 1298 (2011) [hereinafter NDAA]. The text section 1021 of the NDAA is as follows:

> Sec. 1021. AFFIRMATION OF AUTHORITY OF THE ARMED FORCES OF THE UNITED STATES TO DETAIN COVERED PERSONS PURSUANT TO THE AUTHORIZATION FOR USE OF MILITARY FORCE.
>
> (a) IN GENERAL.—Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force (Public Law 107–40; 50 U.S.C. 1541 note) includes the authority for the Armed Forces of the United States to detain covered persons (as defined in subsection (b)) pending disposition under the law of war.
>
> (b) COVERED PERSONS.—A covered person under this section is any person as follows:
>
> (1) A person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks. (2) A

authority under the AUMF.[12] The result of the senators' standoff over section 1021 of the NDAA was a compromise that essentially purported to do nothing new to executive detention authority concerning American citizens.[13] However, section 1021 incorporates language absent from the AUMF that some argue subjects citizens as well as noncitizens with trivial ties to terrorists to indefinite detention without due process, an issue raised by the group of plaintiffs in a recent Second Circuit case, *Hedges v. Obama*.[14] And while President Obama has made clear he will not be interpreting the NDAA to

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person who was 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.

(c) DISPOSITION UNDER LAW OF WAR.—The disposition of a person under the law of war as described in subsection (a) may include the following:

(1) Detention under the law of war without trial until the end of the hostilities authorized by the Authorization for Use of Military Force.

(2) Trial under chapter 47A of title 10, United States Code (as amended by the Military Commissions Act of 2009 (title XVIII of Public Law 111–84)).

(3) Transfer for trial by an alternative court or competent tribunal having lawful jurisdiction.

(4) Transfer to the custody or control of the person's country of origin, any other foreign country, or any other foreign entity.

(d) CONSTRUCTION.—Nothing in this section is intended to limit or expand the authority of the President or the scope of the Authorization for Use of Military Force.

(e) AUTHORITIES.—Nothing 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.

12. *See* 157 CONG. REC. S7,941 (daily ed. Nov. 29, 2011) (statement of Sen. Paul) ("We are talking about American citizens who could be taken from the United States and sent to a camp at Guantánamo Bay and held indefinitely."); *id*. at S7,945 (statement of Sen. Udall) ("The provisions authorize the indefinite military detention of American citizens who are suspected of involvement in terrorism—even those captured here in our own country . . . ."); *id.* at S7,950 (statement of Sen. Webb) ("I am . . . very concerned about the notion of the protection of our own citizens and our legal residents from military action inside our own country."); *id.* at S7,953 (statement of Sen. Leahy) ("As currently written, the language in this bill would authorize the military to indefinitely detain individuals—including U.S. citizens—without charge or trial. I am fundamentally opposed to indefinite detention, and certainly when the detainee is a U.S. citizen held without charge.").

13. NDAA, *supra* note 11, § 1021(e); *see* 157 CONG. REC. S8,157 (daily ed. Dec. 1, 2011) (amendment proposed by Sen. Feinstein) ("Nothing 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.").

14. 724 F.3d 170 (2d Cir. 2013).

authorize indefinite detention of citizens,[15] there is no guarantee that his presidency will outlast the current conflict.

Accordingly, given that the "war on terror" has already left an indelible mark upon the American psyche,[16] it is a worthwhile endeavor to address the unanswered question of citizen detention raised by this conflict in preparation for similar challenges that may emerge during other conflicts. Recognizing that indefinite detention of U.S. citizens is not a novel concept to the American people, but in fact has previously occurred in this nation's history as a fear-driven reaction to an unfamiliar, foreign enemy is crucial to preventing abuses of due process rights in the future.[17] The undeniably domestic nature and impact of citizen detention implicates separation of powers concerns as threats that emerge within the United States by terrorist actors warrant prompt executive action, with or without legislative support. Therefore, an informed judiciary is paramount to keeping the executive and legislative branches from perpetuating politically advantageous wartime policies that may not withstand judicial scrutiny.[18]

This Article acknowledges that the term unlawful "enemy combatant" is not a formal designation under the LOAC.[19] As such, this Article refers to enemy threats as "terrorist adversaries" or simply "combatants" and argues that while LOAC provisions governing international and non-international armed conflicts probably permit the president to indefinitely detain a properly designated terrorist adversary, an analysis of the president's foreign affairs power under *Youngstown Sheet & Tube Co. v. Sawyer*[20]

15. Statement on Signing the National Defense Authorization Act for Fiscal Year 2012, 2011 DAILY COMP. PRES. DOC. 1, 2 (Dec. 31, 2011).

16. *See* Oren Gross, *Chaos and Rules: Should Responses To Violent Crises Always Be Constitutional?*, 122 YALE L.J. 1011, 1038–41 (2003); David Sirota, *The Long-Term Legacy of 9/11*, SALON (July 26, 2011, 10:01 AM), http://www.salon.com/2011/07/26/9_11_terrorism_legacy; *see, e.g.*, Mark A. Schuster et al., *A National Survey of Stress Reactions after the September 11, 2001, Terrorist Attacks*, 345 N. ENGL. J. MED 1507 (2001) (analyzing the mental health effects of 9/11 upon American adults revealing at least 90 percent experienced some stress symptom from the attacks).

17. *See infra* Part II.C.

18. *See* Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549 (2009).

19. *See infra* Part II.A.

20. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

would support a finding that this executive detention authority does not extend to U.S. citizens captured on U.S. soil.

Therefore, this Article suggests that courts adjudicating the detention of U.S. citizens apply a clear statement rule to section 1021 of the 2012 version of the NDAA to require an express act of Congress permitting the indefinite detention of alleged citizen terrorist adversaries. Courts may then determine what due process is afforded to the alleged terrorist adversary by applying the well-known *Mathews v. Eldridge*[21] balancing test, taking into account the alleged terrorist adversary's status as an American citizen and the heightened constitutional protections that individuals gain by virtue of capture or arrest on American soil.[22] Alternatively, this Article proposes a two-fold revision of NDAA's section 1021: (1) an express prohibition of indefinite detainment of U.S. citizens captured domestically and (2) authorization to detain any other person arrested or detained in the United States only to the extent permissible under existing law and authorities.

Part II provides background information on the now-rejected "enemy combatant" terminology and discusses the scope and limits of the president's constitutional and statutory authority to detain individuals in international and non-international armed conflicts. Part III discusses cases involving citizens deemed terrorist adversaries in the current conflict and the lack of consistency in the courts regarding the executive's detention authority over citizens arrested away from the theater of war.

Part IV argues that the Non-Detention Act passed in the early 1970s in response to the Cold War that prohibited citizen detention should be construed as prohibiting both military and non-military detention of citizens without clear congressional authorization to the contrary.[23] Part IV asserts that the AUMF and NDAA do not provide the congressional authorization necessary to trump the Non-Detention Act. Therefore, under the *Youngstown* framework, the president is likely within the zone where his actions are in contravention to congressional will and even his expansive plenary

21. 424 U.S. 319 (1976).

22. Hamdi v. Rumsfeld, 542 U.S. 507, 528–33 (2004).

23. Non-Detention Act, Pub. L. 92-128, 85 Stat. 347 (1971) (codified at 18 U.S.C. § 4001(a) (2006)).

foreign affairs powers are diminished to some extent.[24] Thus, any executive decision to detain a citizen without trial would be subject to searching judicial scrutiny.

Part V proposes that when a U.S. citizen detained on U.S. soil is alleged to be a terrorist adversary but disputes that designation, courts should apply a clear statement rule to the AUMF and NDAA, which would allow courts to interpret the controversial section 1021 of the 2012 NDAA in ways that ensure due process protections are afforded to American citizens. Within these narrow circumstances, the president's war powers under the Constitution, the AUMF, the NDAA, and the LOAC are justifiably balanced and limited by judicial backstops that preserve fundamental civil liberties at home.

II. SCOPE OF THE PRESIDENT'S DETENTION AUTHORITY UNDER THE LOAC, THE CONSTITUTION, AND THE AUMF AND NDAA

Armed conflicts are generally categorized as either international or non-international in nature.[25] International armed conflicts (IACs) are those conflicts that arise between nation states whereas non-international armed conflicts (NIACs) occur in the territory of a single sovereign nation between a state and a non-state actor.[26] Thus, by definition, a NIAC typically refers to an internal civil war in which the national government may treat members of the insurgent group not as belligerents, but as criminals subject to the nation's laws and punitive treatment.[27] As a result, the combatant designation generally does not apply in NIACs but does apply in IACs to describe enemy belligerents. Nonetheless, under the separate LOAC provisions that govern IACs and NIACs, respectively, a sovereign is empowered to detain properly designated threats to the nation's security.[28]

A. The Rise and Fall of the "Enemy Combatant" Status in the Present Armed Conflict

An issue that potentially incited greater confusion and controversy than the characterization of the conflict was the Bush

24. *Youngstown*, 343 U.S. at 637.

25. David Glazier, *Playing by the Rules: Combating Al Qaeda Within the Law of War*, 51 WM. & MARY L. REV. 957, 991 (2009).

26. *Id*.

27. *Id*.

28. *See infra* Part II.B.

administration's use of a novel designation of terrorist adversaries as "enemy combatants."[29] This label eschewed the traditional dichotomous terminology of participants in an IAC as combatants or civilians.[30]

The notion of unlawful combatancy emerged in the World War II case *Ex parte Quirin*.[31] In *Quirin*, the Supreme Court held that a group of Nazi soldiers could be tried as unlawful belligerents by a military commission rather than by a jury, because they had "shed their uniforms intending to engage in acts of military sabotage."[32] The Court also denied the habeas petitions of the German saboteurs who held American citizenship, reasoning that "[c]itizenship in the United States of an enemy belligerent does not relieve [the]m from the consequences of a belligerency which is unlawful because in violation of the law of war."[33] Unlawful combatancy has historically been invoked to describe certain participants in armed conflicts such as spies who "fail[] to distinguish themselves from the civilian population during attacks" and thus cannot shroud themselves within combatant immunity nor shield themselves from administrative detention by a belligerent party without access to courts or lawyers.[34] The Bush administration relied on this idea of unlawful "enemy combatants" to label al-Qaeda and Taliban fighters as such.

Justice Department memos issued by the Bush administration justified the classification of terrorist combatants associated with al-Qaeda and the Taliban as unlawful "enemy combatants."[35] Focusing on the fact that Taliban and al-Qaeda militants do not wear uniforms with a distinguishable emblem or openly bear arms while carrying out acts of terror in contravention to the laws of war, President Bush's wartime administration determined that al-Qaeda

29. Memorandum for Daniel J. Bryant, Ass't Att'y Gen., from John Yoo, Deputy Ass't Att'y Gen. (June 27, 2002), *available at* http://fas.org/irp/agency/doj/olc/detention.pdf; Memorandum for William J. Haynes II, General Counsel, from John Yoo, Deputy Ass't Att'y Gen. (Jan. 9, 2002), *available at* http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf.

30. Glazier, *supra* note 25, at 996–1006.

31. 317 U.S. 1 (1942).

32. *Id.* at 2; Padilla v. Rumsfeld, 352 F.3d 695, 715 (2d Cir. 2003).

33. *Quirin*, 317 U.S. at 37–38.

34. Glazier, *supra* note 25, at 1011–12.

35. *See* Memorandum for Daniel J. Bryant, Ass't Att'y Gen., from John Yoo, Deputy Ass't Att'y Gen. (June 27, 2002), *available at* http://fas.org/irp/agency/doj/olc/detention.pdf; Memorandum for William J. Haynes II, General Counsel, from John Yoo, Deputy Ass't Att'y Gen. (Jan. 9, 2002), *available at* http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf.

and the Taliban do not conform to the requirements of lawful combatancy set forth in the Hague Regulations of 1907.[36] Based on this assessment, the government maintained the position that classifying detainees as "enemy combatants" sanctioned deprivation of certain international legal protections.[37] Under the mantle of inherent constitutional power as commander-in-chief and ostensibly unrestricted by the LOAC forbidding the cruel or degrading treatment of detainees, President Bush initiated a massive detention campaign to transport alleged "enemy combatants" to Guantánamo Bay to endure interrogation techniques that often bordered on torture.[38]

Indeed, the few terrorist actors who orchestrated the events of September 11 might aptly be named unlawful combatants in the "war on terror," but extending that definition to all of the forces in Afghanistan without regard for a more nuanced determination of lawful combatant status appears to have been an excessive use of wartime authority.[39] In light of the far-reaching protections in Article 75 of Additional Protocol I to the 1949 Geneva Conventions for "persons who do not benefit from more favorable treatment under the Conventions,"[40] the Bush administration's approach to treat "enemy combatants" as beyond the reach of the LOAC appears to be a failed attempt to strip detainees of rights guaranteed under the LOAC and domestic law.[41] Indeed, as discussed below, the LOAC

36. Lawful combatancy covers any person involved in a militia or volunteer corps who "(1) is commanded by a person responsible for his subordinates; (2) has a fixed distinctive emblem recognizable at a distance; (3) carries arms openly; and (4) conducts their operations in accordance with the laws and customs of war." Second Hague Peace Conference Convention Regarding the Laws of and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 3 Martens (3d) 461; Glazier, *supra* note 25, at 998–1001, 1007. *See* Memorandum from Alberto R. Gonzales, Legal Counsel, for President George W. Bush (Jan. 25, 2002), *available at* http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf.

37. Article 5 of the Fourth Geneva Convention, which applies to spies, saboteurs, and other unlawful combatants, states that "such persons shall . . . be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention." Geneva Convention Relative to the Protection of Civil Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC-IV].

38. *See* Erwin Chemerinsky, *The Assault on the Constitution: Executive Power and the War on Terrorism*, 40 U.C. DAVIS L. REV. 1, 8–12 (2006).

39. *See* Glazier, *supra* note 25, at 1013.

40. Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 75, June 8, 1977, 1125 U.N.T.S. 438 [hereinafter Protocol I].

41. *See supra* Part II.B. Certain human rights laws and international treaty provisions have been directly codified into U.S. domestic law, such as the War Crimes Act of 1996 and the

prescribes the requisite authority and conditions under which a detaining power may hold individuals in an IAC or NIAC.

B. The President Can Detain Terrorist Adversaries Under the LOAC Governing IACs and NIACs

Common Article 2 of the 1949 Geneva Conventions serves to trigger all of the provisions and protections of the conventions during any armed conflict that arises among nations, regardless if war has only been declared by one state.[42] In conflicts defined as IACs, Article 21 of the Third Geneva Convention confers authority upon a nation to detain combatants and Article 42 of the Fourth Geneva Convention grants detention authority over civilians.[43] Furthermore, Article 75 of Additional Protocol I to the 1949 Geneva Conventions (AP I) prescribes the treatment of detainees in IACs, requiring that "[a]ny person arrested, detained or interned for actions related to the armed conflict be informed promptly . . . of the reasons why these measures have been taken."[44] Article 75 of AP I also states that detainees who have not been captured for penal offences must "be released with the minimum delay possible and in any event as soon as the circumstances justifying the . . . detention . . . have ceased to exist."[45] Thus, it is evident that during an IAC, a nation state is entitled to detain a belligerent adversary for so long as the state deems the belligerent a threat to the nation's security.

Given that NIACs are typically civil wars waged within a sovereign nation, the state likely resorts to its domestic legal regime to punish or detain the insurgent group.[46] Thus, only Common Article 3 of the 1949 Geneva Conventions (CA3)[47] and Additional

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Torture Victim Protection Act of 1991. Oona Hathaway et al., *The Power to Detain: Detention of Terrorism Suspects After 9/11*, 38 YALE J. INT'L L. 123, 153–54 (2013).

42. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC-I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC-II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC-III]; GC-IV, *supra* note 37, art.3.

43. GC-III, *supra* note 42, art. 21; GC-IV, *supra* note 37, art. 42.

44. Protocol I, *supra* note 40, art 75.

45. *Id.*

46. Glazier, *supra* note 25, at 992.

47. GC-I, *supra* note 42, art. 3; GC-II, *supra* note 42, art.3; GC-III, *supra* note 42, art. 3; GC-IV, *supra* note 37, art. 3.

Protocol II to the 1949 Geneva Conventions (AP II)[48] apply when the armed conflict takes place in the territory of a single nation and is not international in nature. CA3 grants basic protections to persons who are no longer actively participating in hostilities and prohibits, among other things, "the passage of sentences . . . without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[49] Articles 4 and 5 of AP II expand on the protections promulgated by CA3 by setting forth "fundamental guarantees" similar to those described in Article 75 of AP I.[50] Article 6 of AP II also states that "[a]t the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."[51] These provisions rely on the assumption that the sovereign state retains the authority to punish *or* detain a person in a NIAC for any reason related to the conflict, not just active participation in hostilities.

Thus, under the LOAC governing both IACs and NIACs, the nation state reserves the right to detain whomever it views as a threat. Unfortunately, however, the present armed conflict has defied characterization as either an IAC or NIAC. While the Bush administration operated on the premise that the "war on terror" was international in nature such that any terrorist could be deemed a combatant and subject to preventive detention, the Supreme Court plurality opinion in *Hamdan v. Rumsfeld*[52] appeared to invoke CA3 to govern what could only be labeled a non-international conflict, demonstrating the lack of consistency regarding the classification of this armed conflict.[53]

As mentioned above, a sovereign state engaged in an IAC retains authority to capture and detain combatants and civilians

48. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 438 [hereinafter Protocol II].

49. GC-I, *supra* note 42, art. 3.

50. Protocol I, *supra* note 40, art. 75; Protocol II, *supra* note 48, arts. 4–5.

51. Protocol II, *supra* note 48, art. 6.

52. 548 U.S. 557 (2006).

53. *Id.* at 629–31 (declining to decide whether the conflict would be characterized as an IAC or a NIAC, yet determining it would be governed by Common Article 3 of the Geneva Conventions).

wherever the individual is captured. However, the United States has not expressly adopted this classification, and has instead adopted an "overseas contingency operations" approach, in which certain countries have been officially identified as enemy-occupied territory.[54] Moreover, President Obama has declared that he will interpret the AUMF in a manner "informed by law of war principles."[55]

Thus, even if the current conflict were characterized as an IAC, in a situation where a U.S. civilian has been captured domestically for alleged acts of terrorism, the U.S. would be bound by Article 42 of the Fourth Geneva Convention to ensure that the detention was "absolutely necessary" to the security of the detaining power.[56] This language warrants an inquiry under domestic law as to the propriety of the detention, triggering the additional layer of protections guaranteed by domestic law. Ultimately, classifying the current conflict as an IAC would not, by itself, resolve the question of whether indefinite administrative detention is permissible when the individual purported to be detained is a U.S. citizen who has been captured away from the theater of war.

Another justification for detaining citizens within the United States might be established by extending the theater of war to include the United States. Declaring a state of war within the coterminous States might be more consistent with a non-international characterization of the conflict. Furthermore, relying on the fact that NIACs necessarily invoke domestic law to provide the source of a sovereign's detention authority, several high-ranking government officials would argue that citizen detention is already within the scope of the president's Article II war powers.[57] On the other hand,

54. *See* Letter to the Speaker of the House of Representatives Transmitting a Supplemental Appropriations Request for Ongoing Military, Diplomatic, and Intelligence Operations, 1 PUB. PAPERS 471 (Apr. 9, 2009); Letter to Congressional Leaders on the Global Deployments of United States Combat-Equipped Armed Forces, 1 PUB. PAPERS 833 (June 15, 2009).

55. Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantánamo Bay at 1, In re Guantanamo Bay Detainee Litig., Misc. No. 08-0442 (D.D.C. Mar. 13, 2009) [hereinafter Memorandum Re Guantánamo Bay], *available at* http://www.justice.gov/opa/documents/memo-re-det-auth.pdf.

56. GC-IV, *supra* note 37, art. 42.

57. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 579 (2004) (Thomas, J., dissenting) ("The plurality utterly fails to account for the Government's compelling interests and for our own institutional inability to weigh competing concerns correctly."); 157 CONG. REC. S8,045 (daily ed. Nov. 30, 2011) (statement of Sen. Lindsey Graham) ("It is not unfair to make an American citizen account for the fact that they decided to help al-Qaida to kill us all and hold them as long

others would require significantly more than an invocation of inherent executive authority to detain citizens without allowing them access to the courts.[58]

Therefore, without a clear characterization of the conflict as a NIAC or IAC, it is uncertain which laws govern detention authority over citizens on U.S. territory. To make matters more complicated, the LOAC provisions regarding a belligerent sovereign's ability to detain its own citizens are subject to varying interpretations. Some scholars believe that executive orders of detention in NIACs are authorized to the same extent as they are in IACs.[59] Others would argue that IAC rules apply when belligerency can be attached to a party during a NIAC, but otherwise, domestic law and the protections of human rights law govern.[60] In any case, regardless of whether the conflict is classified as an IAC or NIAC, President Obama's statement evidences an intent to rely primarily on domestic law, calling for an analysis of how the domestic law framework addresses the issue of the indefinite detention of citizens on American soil.

C. The President Likely Does Not Have Constitutional or Statutory Authority to Indefinitely Detain U.S. Citizens Captured Away from the Theater of War

In light of the Obama administration's stance that it can only "analogize" law of war principles to its interpretation and

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as it takes to find intelligence about what may be coming next."); Reply Brief for Appellant at 2, Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005) (No. 05-6396) ("It would blink reality to conclude that the Congress that enacted the AUMF on September 18, 2001, wanted to authorize capture on a foreign battlefield and detention in the United States, but not capture and detention in the United States . . . .").

58. *See Hamdi*, 542 U.S. at 573–74 (Scalia, J., dissenting) ("Hamdi is entitled to a habeas decree requiring his release unless (1) criminal proceedings are promptly brought, or (2) Congress has suspended the writ of habeas corpus. . . . [The AUMF] is not remotely a congressional suspension of the writ, and no one claims that it is."); *id.* at 544–45 (Souter, J., concurring in part and dissenting in part) ("[E]ven if history spared us the cautionary example of the internments in World War II . . . there would be a compelling reason to read § 4001(a) to demand manifest authority to detain before detention is authorized."); Memorandum Re Guantánamo Bay, *supra* note 56, at 1 (basing the president's authority to detain persons at Guantánamo on the AUMF).

59. *See* Robert Chesney, *Who May be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769, 796 (2011); Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT'L L. 48, 50 (2009).

60. *See* Gabor Rona, *An Appraisal of US Practice Relating to* '*Enemy Combatants*', 10 Y.B. INT'L HUMANITARIAN L. 232, 237–41 (2009).

implementation of military operations under the AUMF,[61] it appears that the LOAC framework alone does not adequately address the issue of a sovereign's power to detain its citizens in a NIAC; thus, it is necessary to turn the focus inward to domestic law governing citizen detention during armed conflicts.

Article II of the Constitution declares that "[t]he President shall be Commander in Chief of the Army and Navy" and has power to handle the nation's foreign affairs and ensure all laws are executed faithfully.[62] The great extent of the president's foreign affairs power was described by the Supreme Court in *United States v. Curtiss-Wright Export Corp.*[63] The president has also been described as the "sole organ" in international relations, suggesting that the executive branch is vested with plenary and exclusive war powers.[64] Justice Jackson's well-known concurring opinion in *Youngstown* has influenced the analysis of executive power in times of war and has since supported the conclusion that any congressional authorization of the president's foreign affairs policies places the president in a zone of maximum power, where his acts warrant minimal judicial scrutiny.[65] Even Congress's reticence could be interpreted as acquiescence to an executive mandate.[66] Jackson called this the "zone of twilight" and reasoned that only when the Court determined the president relied upon his executive authority as commander-in-chief to accomplish purely domestic objectives could the judicial branch exert any limitations on the president's war powers.[67] Finally, Jackson described a third zone, where Congress

61. Harold Koh, Legal Advisor, U.S. Dep't of State, Remarks on the Obama Administration and International Law (Mar. 25, 2010), *available at* http://www.state.gov/s/l/releases/remarks/139119.htm (addressing the need to translate principles from the laws of war governing IACs to apply to the current conflict against a nontraditional enemy).

62. U.S. CONST. art. II, § 2.

63. 299 U.S. 304 (1936).

64. *Id.* at 319–20 ("It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . . .").

65. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).

66. In Dames & Moore v. Regan, 453 U.S. 654 (1981), the Court interpreted Congress's silence towards the president's political decision to terminate all civil claims against Iranian parties as acquiescence of the president's acts. *Id.* at 678–84.

67. *See Youngstown*, 343 U.S. at 645–46 (reasoning that the president cannot use "his exclusive function to command the instruments of national force . . . when it is turned inward, not because of rebellion but because of a lawful economic struggle between industry and labor").

had acted to expressly prohibit presidential action, and where the judicial branch is capable of higher scrutiny of executive acts, even those exercised in the name of the president's war powers.[68]

To determine whether the president's detention authority is a war power exclusive to the executive branch requires an examination of the history of citizen detention in the United States. The first notable cases addressing detention of American citizens arose out of the internment of Japanese Americans in World War II. In *Hirabayashi v. United States*,[69] the Supreme Court defined the national government's war power as one that "is not restricted to the winning of victories in the field" but "extends to every matter and activity so related to war as substantially to affect its conduct and progress . . . ."[70] The Court also recognized that this express grant of power in the Constitution meant that both the president and Congress must enjoy broad discretion to execute their war powers.[71] Noting that Congress had passed the Act of 1942[72] ratifying executive orders that established a curfew for Hirabayashi and other citizens of Japanese ancestry following the attacks on Pearl Harbor,[73] the Supreme Court found that the legislative and executive branches' actions fell squarely within the boundaries of the war power, warranting substantial deference by the judicial branch.[74]

Drawing on its reasoning in *Hirabayashi*, the Court subsequently upheld the constitutionality of the executive orders mandating the internment of Japanese citizens in *Korematsu v. United States*.[75] Justice Jackson, one of three vigorous dissenters, warned that while military orders may last only as long as the military exigency, judicial construction and approval of such orders "validated the principle . . . of transplanting American citizens."[76] Jackson understood the inherent danger in permitting a single

68. *Id.*
69. 320 U.S. 81 (1943).
70. *Id.* at 93.
71. *Id.*
72. Act of Mar. 21, 1942, Areas or Zones, Restrictions, Pub. L. No. 77-503, 56 Stat. 173 (1942).
73. Exec. Order No. 9,066, 3 C.F.R. 1092 (1938–43).
74. *Hirabayashi*, 320 U.S. at 91–92.
75. 323 U.S. 214, 223–24 (1944).
76. *Id.* at 246 (Jackson, J., dissenting).

incident to become an enduring principle of law, a doctrine that is reinforced over time and expanded to cover novel situations.[77]

Seeking to settle the issue on citizen detention, Congress enacted the Non-Detention Act nearly thirty years after *Korematsu* was decided, to prohibit executive detention of American citizens without congressional authorization.[78] Congress's intent was clear: to prevent the president from exceeding his expansive executive power and once again ordering the detention of American citizens whose disloyalty or dangerousness had not been verified.[79] The Non-Detention Act repealed the Emergency Detention Act of 1950, legislation passed during the Red Scare of the Cold War that permitted the president to declare a state of emergency and order ad hoc internment of persons who were suspected of engaging in sabotage or espionage.[80] One commentator notes that Congress, by passing and subsequently repealing legislation dealing with preventive detention of citizens on U.S. soil, indicated that the president must not have been considered to already have that authority, at least during times of peace.[81]

It is not clear whether Congress intended to include such detention authority over American citizens detained away from the theater of war when it passed the Authorization for Use of Military Force (AUMF).[82] The AUMF granted the president power to act against the "nations, organizations, or persons" connected with the terrorist attacks that occurred on 9/11.[83] A plurality of the Supreme

77. *Id.* ("The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.").

78. Non-Detention Act, *supra* note 23.

79. *See* Padilla v. Rumsfeld, 352 F.3d 695, 718–19 (2d Cir. 2003) (finding that the legislative history of the Non-Detention Act supports a reading of the Non-Detention Act as prohibiting both military and civilian detentions), *rev'd*, 542 U.S. 426 (2004); *see also* Lindsey O. Graham & Michael D. Tomatz, *NDAA 2012: Congress and Consensus on Enemy Detention*, 69 A.F. L. REV. 1, 41 (2013) (noting that though the Supreme Court vacated the Second Circuit's holding in *Padilla* for lack of jurisdiction, Justice Stevens's dissent, joined by three justices, indicated support for the Second Circuit's finding that the Non-Detention Act prohibited U.S. citizen detention without an act of Congress).

80. Emergency Detention Act of 1950, 50 U.S.C. § 811, *repealed by* Pub. L. No. 92-128, 85 Stat. 348 (1971).

81. JENNIFER K. ELSEA, CONG. RESEARCH SERV., R42337, DETENTION OF U.S. PERSONS AS ENEMY BELLIGERENTS 30 (2014), *available at* http://fas.org/sgp/crs/natsec/R42337.pdf (suggesting that the president might not have held "the constitutional power to declare such individuals to be enemy combatants subject to detention under the law of war on the basis of an authorization to use force or declaration of war, except perhaps very narrow circumstances").

82. AUMF, *supra* note 7.

83. *Id.*

Court in *Hamdi v. Rumsfeld*[84] interpreted the AUMF's broad authorization for the president to take "'all necessary and appropriate force' against 'nations, organizations, or persons' associated with the September 11, 2001, terrorist attacks" as an implicit grant of power to indefinitely detain enemy combatants regardless of citizenship status.[85]

However, Justice O'Connor, writing for the plurality, did not address whether the same principles would apply to American citizens detained in non-battlefield conditions, or if the president has explicit constitutional authority to classify an American citizen as an enemy combatant.[86] Dissenting from the plurality, Justice Souter, joined by Justice Ginsburg, argued that the unambiguous prohibition of citizen detention in the Non-Detention Act called for a clear congressional statement to authorize the internment of American citizens, wherever they are captured.[87] Noting that the AUMF does not expressly incorporate the word detention, Justice Souter argued that "there is no reason to think Congress might have perceived any need to augment Executive power to deal with dangerous citizens within the United States, given the well-stocked statutory arsenal of defined criminal offenses covering the gamut of actions that a citizen sympathetic to terrorists might commit."[88] Scholars have also weighed in on this issue regarding whether the AUMF would suffice as a clear congressional statement authorizing citizen detention by suggesting that government-mandated detention of citizens within the United States could indeed be considered a violation of the Non-Detention Act.[89] Consequently, whether the AUMF constituted such an express sanction of citizens captured on American soil is a question that has yet to be settled.[90]

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84. 542 U.S. 507 (2004).

85. *Id.* at 518–19 (quoting AUMF, *supra* note 7); Colby P. Horowitz, Note, *Creating a More Meaningful Detention Statute: Lessons Learned from* Hedges v. Obama, 81 FORDHAM L. REV. 2853, 2859–60 (2013).

86. *Hamdi*, 542 U.S. at 516–17.

87. *Id.* at 541 (Souter, J., concurring in part and dissenting in part).

88. *Id.* at 547.

89. *See* ELSEA, *supra* note 81, at 36–37; Sarah H. Cleveland, Hamdi *Meets* Youngstown*: Justice Jackson's Wartime Security Jurisprudence and the Detention of* "*Enemy Combatants*", 68 ALB. L. REV. 1127, 1139–40 (2005).

90. *See* Robert Chesney, *Congress, the Courts, and Detention of Americans under the AUMF/NDAA*, LAWFARE (Dec. 2, 2011, 12:31 PM), http://www.lawfareblog.com/2011/12/congress-the-courts-and-detention-of-americans-under-the-aumfndaa/.

The 2012 version of the NDAA provides some clarification regarding the detention policies in the current conflict. The NDAA's predominant purpose is to allocate funds to the Department of Defense for the execution of various military activities.[91] Buried in the more than three thousand provisions regulating the fiscal affairs of the military are two sections implicating civil liberties in the current conflict.[92]

In fact, sections 1021 and 1022 constitute the first codification of executive detention authority during the current conflict.[93] Section 1021 mentions "covered persons," individuals whose activities or affiliation with terrorist networks could potentially subject them to indefinite detention without access to courts or lawyers.[94] Section 1031, a provision in an earlier Senate version of the NDAA, removed a limitation on detention for citizens and lawful resident aliens,[95] inciting concerns that the NDAA could be read to authorize detention of Americans without trial or conviction of any charge.[96] Statements made during conference on section 1031 reveal that several senators fully intended the provision to maximize the president's war powers on American soil over American citizens who were deemed a danger to national security.[97]

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91. It is interesting that Congress decided to include the detention provisions at issue in the NDAA, given that the statute's main purpose is to regulate and finance military operations. This might lend itself to an interpretation of the NDAA's detention sections as a legislative afterthought, but the lengthy congressional debate over the provisions and President Obama's threatened veto of the entire bill without an amendment of the detention provisions to provide some protection for citizens indicate that Congress had intended to codify the president's detention authority. *See* NDAA, *supra* note 11, at § 1 (stating that the statute's purpose is "to authorize appropriations for fiscal year 2012 for military activities of the Department of Defense . . . ."); *see also* Recent Legislation, 125 HARV. L. REV. 1876 (2012) (discussing the tension between the legislative and executive branches over certain controversial provisions of the NDAA, including sections 1021 and 1022).

92. NDAA, *supra* note 11, at §§ 1021–22.

93. ELSEA, *supra* note 81, at 1.

94. NDAA, *supra* note 11, at § 1021(b).

95. S. 1253, 112th Cong. § 1031 (as reported by S. Comm. on Armed Services, June 22, 2011), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-112s1253rs/pdf/BILLS-112s1253rs.pdf ("[Section 1031] would authorize the [military] to detain unprivileged enemy belligerents captured in the course of hostilities authorized by the [AUMF].").

96. *See* Hedges v. Obama, 724 F.3d 170, 184 & n.83 (2d Cir. 2013).

97. *See, e.g.*, 157 CONG. REC. S7,941 (daily ed. Nov. 29, 2011) (statement of Sen. Rand Paul); *see also* 112 CONG. REC. S8,096–103 (daily ed. Dec. 1, 2011) (statement of Sen. Graham) ("It has always been the law that when an American citizen takes up arms and joins the enemy, that is not a criminal act; that is an act of war. They can be held and interrogated about what they did and what they know because that keeps us safe. If we take that off the table, with homegrown

Senator Dianne Feinstein's attempts to safeguard against such an interpretation resulted in a "compromise amendment" that ultimately became section 1021(e) of the NDAA.[98] Much of the controversy surrounding 1021(e) arises from the fact that it does not expressly exempt U.S. citizens from potential indefinite detention, unlike its sister provision, section 1022. Section 1022 states "detainable persons are not just detainable in theory, but affirmatively must be subject to military detention"[99] and was amended to exclude U.S. citizens from mandatory detention.[100] In light of such explicit exemption in section 1022, section 1021(e) could be construed as "provid[ing] clearer statutory authority to encompass citizens abroad" or citizens whose combatant status is disputed.[101] Section 1021(e) embodied the Senate's agreement to disagree on whether the Supreme Court's narrow decision in *Hamdi* could be interpreted as limiting detention without trial to U.S. citizens arrested on a foreign battlefield or sanctioning a broader authority to detain American citizens captured domestically.[102] The existence of congressional statements regarding detention of U.S. citizens strongly suggests that Congress contemplated limits on the president's constitutional power in the final version of the NDAA that constrained him from ordering military detentions of U.S. citizens found on U.S. soil independent of legislative action.[103]

Both the AUMF and the NDAA statutes relating to detention are admittedly vague. The AUMF lacks specificity and commentators have questioned whether it is still as relevant to the conflict as it was when it was passed over a decade ago.[104] Thus, the NDAA provides

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terrorism becoming the greatest threat we face, we will have done something no other Congress has done in any other war.").

98. *See Hedges*, 724 F.3d at 185; 157 CONG. REC. S7,7161, S7,745 (daily ed. Nov. 17, 2011); 157 CONG. REC. S8,094–122, S8,125 (daily ed. Dec. 1, 2011).

99. Robert Chesney, *Does the NDAA Authorize Detention of US Citizens?*, LAWFARE (Dec. 1, 2011, 10:30 AM), http://www.lawfareblog.com/2011/12/does-the-ndaa-authorize-detention-of-us-citizens/.

100. NDAA, *supra* note 11, at § 1022.

101. Robert Chesney, *Clarification: NDAA Could Still Be Read to Apply to Citizens Seized Abroad*, LAWFARE (Dec. 9, 2011, 12:34 PM), http://www.lawfareblog.com/2011/12/ clarification-ndaa-could-still-be-read-to-apply-to-citizens-if-seized-abroad/.

102. *Hedges*, 724 F.3d at 185 (quoting 157 CONG. REC. S8,122 (daily ed. Dec. 1, 2011) (statement of Sen. Feinstein)).

103. *See* ELSEA, *supra* note 81, at 37.

104. *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 (2012); David S. Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. NAT'L SECURITY L. & POL'Y 1, 64 (2011);

the most up-to-date assessment on congressional attitudes toward presidential wartime authority. It prescribes parameters on how and when the government can detain what it terms "covered persons," a neutral term for the now-defunct "enemy combatant" designation.[105] With regards to citizens, however, it is silent. Congress's reticence in this area is not insignificant; previous congressional acts in the area of citizen detention support the notion that the president's commander-in-chief detention powers are not unlimited.[106] Therefore, it would not be inaccurate to surmise that the NDAA failed to grant the authority necessary to permit the president to subject citizens suspected of terrorist activities to indefinite detention.

III. CITIZEN COMBATANT CASES: *HAMDI*, *PADILLA*, AND *HEDGES*

Given that subsection (e) of section 1021 effectively granted the president no additional authority over the fate of citizens captured on U.S. territory, it is necessary to determine what previous relevant cases have held. Unfortunately, there exists little consensus within the courts as to the limits on the president's powers over citizens detained in the current conflict. Yaser Hamdi and Jose Padilla's protracted litigation demonstrate that courts do not hold consistent views on how and when to defer to congressional and executive action when it comes to detaining Americans whose terrorist adversary status is in dispute.

A. Hamdi*: The President Is Permitted to Detain Citizens Captured on a Foreign Battlefield*

Yaser Hamdi, an American citizen who immigrated to Saudi Arabia in the early 1980s, was captured on an Afghan battlefield in 2001.[107] The government deemed him an "enemy combatant," claiming that "this status justifie[d] holding him in the United States indefinitely[,] without formal charges or proceedings."[108] A plurality

James B. Stein & Miriam R. Estrin, *Harmonizing Policy and Principle: A Hybrid Model for Counterterrorism*, 7 J. NAT'L SECURITY L. & POL'Y 161, 206 (2014) (recommending that the AUMF be reviewed to "match the current threats the United States faces against regional organizations that may have, at best, an attenuated relationship to al Qaeda").

105. NDAA, *supra* note 11, at §§ 1021–22; AUMF, *supra* note 7.

106. *See supra* Part II.C.

107. Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004).

108. *Id.* at 510–11.

of the Court, ignoring the issue of whether the government's definition of "enemy combatant" was a legitimate classification in wartime,[109] recognized that Congress, through the AUMF, had authorized the "use [of] all necessary and appropriate force" against any party associated with the attacks on 9/11.[110] The plurality concluded that the joint resolution necessarily granted the president authority to detain individuals labeled "enemy combatants" as "a fundamental and accepted . . . incident of waging war."[111]

Relying on *Quirin*, the plurality recognized that "[t]here is no bar to this Nation's holding one of its own citizens as an enemy combatant."[112] The plurality agreed that Hamdi's citizenship did not preclude him from being detained as an "enemy combatant," because the purpose of such "detention [was] to prevent a combatant's return to the battlefield[,]"[113] and it was clear that "Hamdi [had been] captured in a zone of active combat in a theater of war."[114] Justices Souter and Ginsburg disagreed with the plurality that the AUMF had authorized detention.[115] According to Justice Souter, the AUMF, which lacked any explicit mention of detention, did not provide the clear congressional authorization necessary to override the Non-Detention Act and permit the executive to detain citizens without charge or trial.[116]

Upon concluding that Hamdi's detention as an "enemy combatant" was authorized, Justice O'Connor applied the *Mathews v. Eldridge*[117] analysis, what she described as the "ordinary mechanism [used] . . . to ensure that a citizen is not 'deprived of life, liberty, or process without due process of law.'"[118] In doing so, Justice O'Connor helped to define the Court's role as a safeguard of fundamental rights. She recognized that Hamdi's private interest was a fundamental "interest in being free from physical detention by one's own government[,]"[119] and that the government's interest in

109. *See id.* at 516–17.
110. *Id.* at 518.
111. *Id.* at 519.
112. *Id.*
113. *Id.*
114. Hamdi v. Rumsfeld, 316 F.3d 450, 459 (4th Cir. 2003).
115. *Hamdi*, 542 U.S. at 540–41 (Souter, J., concurring in part and dissenting in part).
116. *See id.* at 545–52.
117. 424 U.S. 319 (1976).
118. *Hamdi*, 542 U.S. at 528–29 (majority opinion) (citing U.S. CONST. amend. 5).
119. *Id*. at 539.

preventing an enemy from returning to the battlefield without the hindrance and distraction of litigation was a "weighty and sensitive" justification for limiting judicial review over wartime detentions.[120] When weighed against the third prong of the *Mathews* test, Justice O'Connor concluded that the risk of erroneous deprivation of Hamdi's liberty was too high to justify sacrificing the "[n]ation's commitment to due process" and the indelible value of American citizenship.[121] She found that a citizen-detainee deserved notice of the facts used to classify him as an "enemy combatant" and an opportunity to appear before a neutral decision maker to challenge those factual allegations.[122] Rather than go through a separate hearing to determine whether he was an "enemy combatant," however, Hamdi agreed to renounce his U.S. citizenship and was repatriated to Saudi Arabia.[123]

The plurality in *Hamdi* interpreted the AUMF as granting authority to the executive to detain U.S. citizens indefinitely as "enemy combatants," but agreed that this authorization only applies in narrow circumstances where the citizen is captured on foreign battlefields while actively engaged in hostilities against the United States.[124] The Court, thus, did not address the separate issue of whether citizens detained on American soil can be held indefinitely as "enemy combatants."[125] It allowed this issue to remain unanswered by rejecting Hamdi's companion case, *Rumsfeld v. Padilla*,[126] for procedural reasons.

B. Padilla*: Does the President Actually Have the Authority to Detain Citizens Arrested on American Soil?*

Jose Padilla, a U.S. citizen detained on American soil for allegedly working with al-Qaeda to detonate a "dirty bomb" in the U.S.,[127] spent more than three years detained in a naval brig before

120. *Id.* at 531.
121. *Id.* at 532–33.
122. *Id.*
123. Tung Yin, *Enemies of the State: Rational Classification in the War on Terrorism*, 11 LEWIS & CLARK L. REV. 903, 910 (2007).
124. *Hamdi*, 542 U.S. at 510–21.
125. *See* Hafetz, *supra* note 6, at 37–38.
126. 542 U.S. 426 (2004).
127. Padilla v. Rumsfeld, 352 F.3d 695, 701 (2d Cir. 2003).

he was transferred into the criminal justice system.[128] Padilla's capture in the country was crucial to his case. The Second Circuit, relying on Justice Jackson's concurrence in *Youngstown*,[129] found that the president "lack[ed] inherent constitutional authority as Commander in Chief to detain American citizens on American soil outside a zone of combat."[130] Additionally, the court found that Congress's AUMF did not provide the specific congressional authorization necessary to sanction executive detention of American citizens on American soil in light of the Non-Detention Act expressly prohibiting such authority.[131]

However, the Supreme Court reversed the Second Circuit's ruling on the basis that Padilla's claim was procedurally barred for lack of jurisdiction,[132] effectively avoiding "deciding the lawfulness of a far more expansive use of enemy combatant detention authority" under the AUMF.[133] Padilla refiled his habeas petition in the proper jurisdiction, and the district court echoed the Second Circuit's reasoning that, because Padilla had been detained on American soil, his capture was not deemed a "necessary and appropriate" measure under the AUMF.[134] The court held that without explicit congressional authorization to overcome the Non-Detention Act's prohibition against detention of U.S. citizens, Padilla could not be legally detained.[135]

On appeal, the Fourth Circuit reversed the district court's ruling.[136] The court summarily rejected Padilla's argument that detention of U.S. citizens required a "clear statement" from Congress

128. Warren Richey, *U.S. Turning Over Secret Files to Lawyer for Jose Padilla: What That Could Mean*, CHRISTIAN SCI. MONITOR (Feb. 12, 2014), http://www.csmonitor.com/USA/Justice/2014/0212/US-turning-over-secret-files-to-lawyer-for-Jose-Padilla-what-that-could-mean.

129. *Padilla*, 352 F.3d at 711; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952).

130. *Padilla*, 352 F.3d at 712.

131. *Id.* at 723–24.

132. The Court reversed the Second Circuit's judgment that Padilla could assert a writ for habeas corpus in the District Court for the Southern District of New York because only the district where he was detained had jurisdiction over him. Rumsfeld v. Padilla, 542 U.S. 426, 451 (2004).

133. Hafetz, *supra* note 6, at 38 ("[The Court's] rationale eviscerated any meaningful distinction between detaining a Taliban soldier seized a battlefield in Afghanistan or an alleged al-Qaeda agent arrested in the United States.").

134. Padilla v. Hanft, 389 F. Supp. 2d 678, 686 (D.S.C. 2005).

135. *Id.* at 685–89.

136. Padilla v. Hanft, 423 F.3d 386, 389 (4th Cir. 2005).

according to another WWII internment case, *Ex parte Endo*,[137] in which the Court stated that it was limited by the clear language of a wartime statute to find implied executive powers.[138] The Fourth Circuit reasoned that the *Endo* Court held that a detention authority exists, even though the Act of 1942 made no reference to detention.[139] Finally, the circuit court held that even if a clear statement was required, the AUMF constituted a sufficiently clear statement where its purpose to prevent future terrorist acts applied unmistakably to detaining someone like Jose Padilla, who had allegedly come to the United States intending to commit terrorist acts.[140]

Three months later, the government filed criminal charges against Padilla and requested that the Fourth Circuit vacate its decision.[141] However, the circuit denied the government's motion, determining that the issue of whether the AUMF granted the president power to detain "enemy combatants" on American soil indefinitely was of "such especial national importance as to warrant final consideration by [the Supreme C]ourt, even if only by denial of further review . . . ."[142] Indeed, the Supreme Court denied certiorari, but three Justices would have granted the petition.[143] Justice Ginsburg wrote a dissent, asserting that the question whether "the President [has] authority to imprison indefinitely a United States citizen arrested on United States soil distant from a zone of combat based on an executive declaration that the citizen was . . . 'an enemy combatant'" was one "of profound importance to the Nation" that should have already been addressed.[144] The enactment of an explicit detention provision in the NDAA, however, raised a host of questions regarding the scope of the president's detention authority.

137. 323 U.S. 283 (1944).
138. *Padilla*, 423 F.3d at 395.
139. *Id.* (quoting Ex parte Mitsuye Endo, 323 U.S. 283, 301 (1944)).
140. *Id.* at 395–96.
141. Padilla v. Hanft, 432 F.3d 582, 584 (4th Cir. 2005).
142. *Id.* at 583.
143. Padilla v. Hanft, 547 U.S. 1062 (2006).
144. *Id.* at 1651 (quoting Rumsfeld v. Padilla, 542 U.S. 426, 455 (2004)).

C. The Hedges *Plaintiffs: Can the President Detain Citizens on American Soil for "Substantially Supporting" "Associated Forces"?*[145]

Seven notable writers and activists challenged NDAA's section 1021, claiming that it incorporated broader language as to the definition of an "enemy combatant."[146] The plaintiffs, Pulitzer Prize-winning journalist Christopher Hedges and other prominent U.S. citizens along with foreign political correspondents and activists whose work linked them to members of al-Qaeda, the Taliban, and information intimately connected to those terrorist networks, sought preliminary and permanent injunctive relief from section 1021 on the grounds that it violated their First and Fifth Amendment rights.[147] Several plaintiffs expressed fears that their work with organizations such as WikiLeaks and their support of certain activist associations could implicate them under section 1021's military detention clause.[148] They testified that the statutory language was disconcertingly vague as to whether their work could be construed as substantially supporting associated forces of al-Qaeda and the Taliban, and that they had significantly curtailed or altered their usual scope of activities to avoid falling within section 1021's reach.[149]

District court Judge Katherine Forrest agreed that certain terms in section 1021(b)(2)—"covered person," "substantially," and "directly"—lacked sufficient clarity such that they did not satisfy the Due Process requirement of notifying an individual of "what conduct might cause him or her to run afoul of [section] 1021."[150] Thus, holding that section 1021 was not a mere affirmation of the AUMF, Judge Forrest ultimately granted plaintiffs' claims for preliminary and permanent injunctive relief.[151] On appeal, the Second Circuit vacated Judge Forrest's permanent injunction of section 1021.[152] It held that the domestic plaintiffs did not establish standing because

145. NDAA, *supra* note 11, at § 1021.

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

147. *Id.*

148. *Id.* at *6–11.

149. *Id.*

150. *Id.* at *23.

151. *Id.* at *28; Hedges v. Obama, 890 F. Supp. 2d 424, 472 (S.D.N.Y. 2012) (granting motion for permanent injunction).

152. Hedges v. Obama, 724 F.3d 170, 173 (2d Cir. 2013).

"[s]ection 1021 says nothing at all about the President's authority to detain American citizens."[153] The court, therefore, declined to address the merits of the constitutional claims.[154] The Second Circuit went on to examine the language of the statute to determine if section 1021 actually expanded the executive detention authority.[155] Holding that section 1021(b)(2) merely clarified the AUMF's previous authority on detention of organizations,[156] the court accepted the government's position "that the statute does next to nothing at all" regarding the president's detention of U.S. citizens or individuals captured on U.S. soil.[157] The court relied on the legislative history of section 1021(e), Senator Feinstein's "compromise amendment,"[158] to determine that it was merely "a 'truce' that ensured that—as to those who are covered by section 1021(e)—courts would decide detention authority based not on section 1021(b), but on what the law previously had provided in the absence of that enactment."[159]

The Second Circuit engaged in a thorough and accurate statutory interpretation analysis of section 1021 in the *Hedges* case to determine that it was not an expansion of the president's war powers.[160] The court reached a legally justified result, but deigned to clarify that the "existing law or authorities" on the subject of citizens detained on U.S. territory is neither clear nor consistent.[161] According to the Fourth Circuit's holding in *Padilla*, Congress's joint resolution to authorize military force subsequently permits the president to detain citizens regardless of where they are captured.[162] This interpretation of the AUMF is not without its critics, since it

153. *Id.* at 174.

154. *Id.*

155. *Id.* at 189.

156. The court came to this conclusion even though the NDAA added language not present in the AUMF. *Id.* ("While Section 1021(b)(1) mimics language in the AUMF, Section 1021(b)(2) adds language absent from the AUMF.").

157. *Id.* at 173.

158. *Id.* at 192.

159. *Id.*

160. *Id.* at 182–87, 189–93.

161. NDAA, *supra* note 11, at § 1021(e); *see* Steve Vladeck, *The Problematic NDAA: On Clear Statements and Non-Battlefield Detention*, LAWFARE (Dec. 13, 2011, 12:06 PM), http://www.lawfareblog.com/2011/12/the-problematic-ndaa-on-clear-statements-and-non-battlefield-detention/.

162. Padilla v. Hanft, 423 F.3d 386, 393–94 (4th Cir. 2005).

appears to contradict Congress's intent to prohibit citizen detention on American soil via the Non-Detention Act of 1971.[163]

Despite the voluminous decisions amassed in the litigation of the citizen cases, only the *Hamdi* plurality's narrow conclusion with regards to citizens actively engaged in hostilities on foreign battlefields remains as binding precedent on all courts. The Second and Fourth Circuits have come to opposite conclusions about whether the AUMF grants the president the authority to subject citizens captured on U.S. soil to indefinite military detention.[164] Furthermore, the Supreme Court has shied away from deciding what is the president's inherent authority to detain citizens arrested on American soil.[165] The lack of settled precedent raises concerns about how courts will read the AUMF and NDAA to apply it to future citizen combatant cases that may arise in the current conflict or any other conflict that takes place outside U.S. borders.

IV. APPLYING THE *YOUNGSTOWN* FRAMEWORK AND THE CLEAR STATEMENT RULE TO EXECUTIVE DETENTION AUTHORITY

In light of the unsettled issue of citizen detention, it is disappointing that the NDAA failed to clarify the boundaries of the executive detention authority over citizens captured on American soil. Congress, faced with President Obama's threatened veto, ended the standoff over whether the indefinite detention provision in section 1021 would extend to U.S. citizens by reaching a compromise between those senators who wanted to expand detention of "covered persons" to include citizens captured on American soil and those who wanted to prohibit such detention.[166] Rather than choose one interpretation over another, Congress punted the issue over to the judicial referees of statutory interpretation.[167] The inconsistent holdings of the *Padilla* case in the Second and Fourth Circuits, however, demonstrate the difficulty that lower courts have already experienced in attempting to resolve the issue of whether the

163. Hamdi v. Rumsfeld, 542 U.S. 507, 570 (2004) (Souter, J., concurring in part and dissenting in part); Padilla v. Rumsfeld, 352 F.3d 695, 718–24 (2d Cir. 2003).

164. *See supra* Part III.B.

165. *Hamdi*, 542 U.S. at 570.

166. *See supra* Part II.C.

167. Hedges v. Obama, 724 F.3d 170, 184–85 (2d Cir. 2013) (quoting 157 CONG. REC. S8,122 (daily ed. Dec. 1, 2011) (statement of Sen. Feinstein)).

AUMF authorizes indefinite detention of American citizens detained on American soil.

By refusing to issue a clear statement against indefinite military detention of citizens, Congress could be viewed as implicitly endorsing the president's power to subject citizens to military detention regardless of whether they have been accurately designated as a terrorist adversary. Indeed, some senators have vehemently expressed the viewpoint that nothing stands in the way of terrorists carrying out future attacks on the coterminous United States, thrusting the U.S. into the theater of war.[168] In particular, Senator Lindsey Graham's statements that no U.S. citizen alleged to be a terrorist adversary could justifiably expect a right to counsel sparked intense debate on the Senate floor.[169]

Senator Graham's assertions, though volatile, subscribe to long-standing tradition and precedent that establish the president's robust authority as commander-in-chief. It is of no moment then, that even fundamental due process rights are subject to restriction in times of war.[170] However, the internment of Japanese-American citizens during WWII is a cautionary tale of how rapidly key constitutional rights can fall to the wayside when a nation is blinded by fear. The *Korematsu* decision that upheld the government's actions serves as a compelling reminder of when too much judicial deference to executive authority in times of war yields regrettable results that are not easily reversed.[171] Therefore, war powers must

168. 157 CONG. REC. S7,949 (daily ed. Nov. 29, 2011) (statement of Sen. Levin) ("Al-Qaida is at war with us. They brought that war to our shores. This is not just a foreign war. They brought that war to our shores on 9/11."); *id.* at S7,954 (statement of Sen. Lieberman) ("A nation at war that seizes those who have declared themselves to be part of enemy forces and have attempted to attack the American people, or America, should be treated as enemy combatants, as prisoners of war, according to the law of war. To me, that is a matter of principle.").

169.

> If you are an American citizen and you betray your country, you are going to be held in military custody and . . . [y]ou are not going to be given a lawyer if our national security interests dictate that you not be given a lawyer and go into the criminal justice system because we are not fighting a crime, we are fighting a war.

(statement of Sen. Graham).

170. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2032 (2007).

171. Forty years would pass before Fred Korematsu and Gordon Hirabayashi were permitted to have their cases reopened and their convictions overturned. *See* Brief for Karen Korematsu, et al. as Amici Curiae Supporting Petitioner at 1, Hedges v. Obama, 724 F.3d 170 (2013) (Nos. 12-3176, 12-3644). Nearly fifty years after defending the internment policy in *Korematsu*, the Solicitor General issued an official apology for the office's role in upholding the government-sanctioned internment of Japanese-American citizens. Neal Katyal, Acting Solicitor General of

only be exercised commensurate with the exigency and gravity of the threat. Justice Jackson declared that "the bulwark of liberty in the Constitution [i]s *process*."[172] As the interpreters of what process is due to a particular individual, the judiciary, are the watchmen of this bulwark, uniquely positioned to sound the alarm the moment a barrier has been breached.[173] Their role becomes more pronounced as this armed conflict winds down, where excesses of the executive must be properly curbed and a specter of fear does not continue to compromise the nation's most highly coveted asset: the fundamental civil liberties guaranteed by due process to citizens.[174]

So what stands in the way of a repeat of the large-scale derogation of constitutional rights that occurred immediately after the attacks on the Twin Towers and the Pentagon in 2001 and the attacks on Pearl Harbor in 1941? Indeed, one might interpret Congress's inability to come to a consensus regarding the matter of citizen detention as a presumption against military detention of citizens captured within the United States. Conversely, it could also be construed as a foothold for future executive administrations to justify the deprivation of physical liberty without due process for a disfavored group of citizens. President Obama's signing statement regarding the NDAA mollified to some extent the concerns that section 1021 would authorize indefinite military detention of U.S. citizens away from the theater of war.[175] President Obama openly admitted that he had "serious reservations" about the provisions that dealt with "detention, interrogation, and prosecution of suspected terrorists" but that he simply would not interpret the NDAA as giving him the authority to detain citizens, even if the AUMF allowed it.[176] One commentator has suggested "codifying such a view into law could be much more impactful than putting a stamp of

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the United States, *Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases*, JUSTICE.GOV (May 20, 2011), http://blogs.justice.gov/main/archives/1346.

172. *See* Cleveland, *supra* note 89, at 1135; *supra* Part II.

173. *See* Cleveland, *supra* note 89, at 1135.

174. *See id.* at 1129.

175. Statement on Signing the National Defense Authorization Act for Fiscal Year 2012, 2011 DAILY COMP. PRES. DOC. 2 (Dec. 31, 2011).

176. *Id.*

approval on the status quo" since the Supreme Court has yet to sign off on the Obama administration's stance on detention authority.[177]

That an outgoing commander-in-chief's interpretation of deliberately ambiguous statutory language serves as the only safeguard of citizens' right to be free from detention is an unsettling notion, one that has prompted several states, cities, and counties across the United States to codify laws opposing the enforcement of section 1021.[178] Moreover, the 2013 and 2014 versions of the NDAA have preserved section 1021 in its entirety, though other provisions have been amended to reflect shifting priorities in the Obama administration's wartime agenda.[179] It seems as though section 1021, despite its shortcomings, is here to stay.

Given the unsettled issue of detention authority, it is imperative to determine what, if anything, courts are empowered to do should they face another *Hedges* or *Padilla* case. Absent any compelling national emergency and the overhaul of domestic criminal law, U.S. citizens have a legitimate interest to be free from unjustified military detention without trial proceedings when it has not been established that they are terrorists. The constitutional guarantees in the Due Process clause of the Fifth Amendment, "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint,"[180] and the hard lesson learned from *Korematsu* render the issue of citizen detention one that warrants analysis under the *Youngstown* framework and the clear statement rule.

Applying the *Youngstown* continuum of presidential power to the executive's authority to detain civilians arrested on American soil gives courts an indication of the level of judicial deference to afford to executive actions. This Article asserts that with regard to citizen detention, the president has not been granted express congressional

177. Benjamin Wittes, *Raha Wala Writes His Own FAQ*, LAWFARE (Dec. 20, 2011, 10:01 PM), http://www.lawfareblog.com/2011/12/raha-wala-writes-his-own-faq/#more-4430.

178. Allie Bohm, *One Thing Maine, Virginia and Arizona Have in Common: Opposition to the NDAA*, ACLUBLOG (Apr. 27, 2012, 10:46 AM), https://www.aclu.org/blog/national-security/one-thing-maine-virginia-and-arizona-have-common-opposition-ndaa (noting that Virginia and Maine have passed legislation calling for the repeal of the NDAA's detention provisions).

179. The provision governing the closure of Guantanamo Bay was updated in the 2014 version of the NDAA, while the provision regarding indefinite military detention of citizens has yet to be reformed. Natasha Lennard, *Obama Signs NDAA 2014, Indefinite Detention Remains*, SALON (Dec. 27, 2013 04:38 AM), http://www.salon.com/2013/12/27/obama_signs_ndaa_2014_indefinite_detention_remains/.

180. Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

authorization under the AUMF or NDAA to detain citizens found away from the theater of war. Reviewing Congress's actions with a historical lens provides insight as to how the legislature regarded the power to detain U.S. citizens. During World War II, President Roosevelt issued proclamations under the Alien Enemy Act ordering the internment of "aliens" deemed likely to commit espionage or other hostile acts.[181] When the president sought to include citizens, however, the executive order referring to citizen internment "appeared to rely on the nation's war powers directly," and not the Alien Enemy Act.[182] Apparently, at that time, even "the War Department felt congressional authorization was necessary to provide authority for its enforcement."[183] Congress eventually passed legislation during the Cold War granting the president the power to detain citizens, a power it would invalidate twenty years later with the Non-Detention Act.[184]

One could deduce from this series of legislative actions that Congress contemplated that the legislature, and not the executive, had the authority to make decisions regarding citizens' liberty in the homeland. Though the *Hamdi* plurality declined to address whether the Non-Detention Act should apply to armed conflicts, Justice Souter's reasoning that the Non-Detention Act still shielded citizens from detention without an explicit act of Congress to the contrary finds support in the history of the congressional actions that sanctioned and subsequently prohibited citizen detention. And while the canon of constitutional avoidance might call for a reading of the Non-Detention Act that upholds the constitutionality of the AUMF—for example, that the Non-Detention Act only applies to civilian detention—the legislative intent of the Non-Detention Act would belie such an interpretation.[185] Both supporters and opponents of the Non-Detention Act understood it to be a prohibition on all detentions by the executive branch, including both military and non-military detentions.[186]

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181. ELSEA, *supra* note 81, at 28.

182. *Id.* at 38.

183. *Id.* at 29.

184. *Id.* at 34–37.

185. *See* Padilla v. Rumsfeld, 352 F.3d 695, 718–19 (2d Cir. 2003).

186. Hamdi v. Rumsfeld, 542 U.S. 507, 547 (2004) ("Representative Ichord, chairman of the House Internal Security Committee and an opponent of the bill, feared that the redrafted statute would 'deprive the President of his emergency powers and his most effective means of coping

Thus, this Article suggests that the president is most likely situated somewhere within the zone of twilight, where congressional authorization of executive mandated detention of citizens captured on American soil is ambiguous at best, or in the third zone of presidential power, where executive powers are at their lowest. In these zones, courts are better able to counterbalance the executive branch to provide the judicial oversight that is necessary in situations where civil liberties are at stake. Moreover, both spheres permit courts to exercise broader discretion to scrutinize the president's actions and to engage in meaningful balancing of the government and individual's interests.

However, courts might find the president to be acting with congressional authorization where Congress acted by issuing a broad authorization of force and codifying whatever detention authority, placing him firmly in the zone where his executive powers are at their maximum. The Fourth Circuit's holding in *Padilla* supports this conclusion, given its reasoning that the AUMF authorized President Bush's decision to hold Padilla incommunicado for over three years.[187] In this zone of nearly unchecked executive war power, the concern that a future president could hold citizens indefinitely without charge or trial is not unfounded. Yet if a court were to determine the AUMF and NDAA adequately constitute the act of Congress required by the Non-Detention Act to rebut the prohibition on citizen detention, it should not end its judicial inquiry there. Courts have afforded great deference to executive actions in this war—and with good reason, some national security scholars argue[188]—but others would point out that this principle of limited judicial oversight cannot be reconciled in light of the separation of powers goal of safeguarding individual rights.[189]

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with sabotage and espionage agents in war-related crises.' 117 CONG. REC., at 31,542. Representative Railsback, the bill's sponsor, spoke of the bill in absolute terms: '[I]n order to prohibit arbitrary executive action, [the bill] assures that no detention of citizens can be undertaken by the Executive without the prior consent of the Congress.' *Id.*, at 31,551.").

187. *See* Padilla v. Hanft, 423 F.3d 386, 390–92 (4th Cir. 2005).

188. *See, e.g.*, ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 16 (2007) ("The real cause of deference to government in times of emergency is institutional: both Congress and the judiciary defer to the executive during emergencies because of the executive's institutional advantages in speed, secrecy, and decisiveness.").

189. *See* David Cole, *No Reason To Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint*, 75 U. CHI. L. REV. 1329, 1335 (2008) ("Precisely because we rely so heavily on the executive to maintain our security, we should be skeptical of its ability to give

In the matter of citizen detention, it is especially incumbent upon "the judiciary [to] be a full player in the separation of powers framework,"[190] while still preserving the proper balance of powers among the three branches. The government has already recognized that American citizenship of an alleged terrorist adversary warrants some minimal form of "special treatment."[191] As it stands now, the legislature has not come to a consensus on how expansive it considers the executive detention authority over citizens. Given the indeterminate state of the law, it is up to the judiciary to take on an active role that yields constitutionally consistent results without encroaching upon the executive's unique ability to make swift decisions concerning matters of military judgment.[192] Thus, this Article suggests that courts should find that without a clear statement to the contrary, the AUMF and NDAA do not authorize the Executive to order the indefinite detention of citizens who are not terrorist adversaries or whose adversary status is in dispute.

The clear statement rule requires a "'clear statement' on the face of the statute to rebut a policy" that the Court presumes Congress intended to implement by enacting a particular statute.[193] Legal scholars note that courts might resist the application of a clear statement rule to the AUMF and the NDAA in light of the well-established presumption against interpreting statutes as interfering with or derogating the president's foreign affairs powers.[194] However, when the statute in question is susceptible to interpretations that implicate the constitutional rights of individuals, there is a compelling need to apply a clear statement rule to ensure civil liberties are not unjustifiably diminished.

Scholars arguing that the clear statement rule should be used in interpreting the AUMF have disagreed on what circumstances trigger

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sufficient weight to the liberty side of the balance."); Christina E. Wells, *Questioning Deference*, 69 MO. L. REV. 903, 929 (2004).

190. Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827, 884 (2013).

191. Hope Metcalf & Judith Resnik, *Gideon at Guantánamo: Democratic and Despotic Detention*, 122 YALE L.J. 2504, 2527 (2013).

192. Eric Holder, U.S. Attorney Gen., Speech at Northwestern University School of Law (Mar. 5, 2012), *available at* http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html.

193. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 595 n.4 (1992).

194. *See id.* at 606; Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2104 & n. 259 (2005).

its application. Some scholars reason that U.S. citizens detained on U.S. territory beyond the theater of war, regardless of their military designation, should invoke the clear statement rule,[195] while others assert that the rule should only be triggered when the president is acting against noncombatants in the United States.[196] Those that claim that a clear statement rule should be required whenever citizens are arrested in the United States cite the Non-Detention Act.[197] While the premise is reasonable, the rule, as applied, would interfere with generally accepted wartime practices. Even when appropriately engaging in scrutiny of executive military decisions, courts cannot, by their actions, supersede or substitute their judgments for the commander-in-chief's wartime decision-making authority.[198] Allowing a clear statement rule for any American citizen who concedes adversary status would be counterproductive to the war effort, and thus too broad.

On the other hand, other scholars would limit the application of a clear statement requirement on the basis of combatant status.[199] Professors Bradley and Goldsmith reason that a long history of detaining combatants and an analysis of the international laws of war provide strong support that the AUMF "need not specify all approved presidential wartime actions."[200] They argue that when "presidential action involves a traditional wartime function exercised by the president against an acknowledged enemy combatant," the president's inherent powers as commander-in-chief and interest in protecting the national security outweigh the liberty interest of the alleged terrorist adversary.[201]

Therefore, Bradley and Goldsmith assert that the clear statement rule should only be triggered when the president acts to detain American citizens who are noncombatants.[202] Their approach accounts for the fact that the United States is still actively engaged in war against enemy forces that would traditionally receive lesser

195. *See* Fallon & Meltzer, *supra* note 170, at 2074.

196. *See* Bradley & Goldsmith, *supra* note 194, at 2106.

197. *See* Fallon & Meltzer, *supra* note 170, at 2074.

198. *See* Daniel Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 1006 (1999) ("[T]he Court often contrasts the expertise of the officials under review to its own generalist and uninformed nature.").

199. *See* Bradley & Goldsmith, *supra* note 194, at 2055–56.

200. *Id.* at 2054–55.

201. *Id.* at 2105.

202. *Id.* at 2106.

protections under the LOAC than under the state's domestic criminal law. Under the LOAC, a belligerent sovereign is entitled to deem individuals terrorist adversaries and administratively detain them, so Bradley and Goldsmith's clear statement configuration affords appropriate deference to the commander-in-chief to immobilize those American citizens who pose genuine threats to national security. However, their suggestion requires ignoring the reality that the government's process of designating combatants in this armed conflict has not always resulted in detention conditions that conform to LOAC and human rights law standards.[203] Additionally, one commentator points out that basing the clear statement solely upon combatant status would result in a displacement of civilian law with martial law within the United States, where there is no compelling reason to do so absent battlefield conditions.[204]

Another approach would be to use a clear statement rule in cases where the combatant status of the citizen detainee is disputed. One concern with this approach is that courts would have to initially adjudicate the propriety of a detainee's combatant designation before determining whether a clear statement would apply. The government's heightened interest in protectionism and national security might create a perverse incentive by which the government, to avoid triggering the clear statement rule, would be motivated to make unconfirmed allegations about individual detainees in order to label them suspected terrorist adversaries.[205] This would essentially force courts to undertake statutory interpretation issues about military terms, such as "belligerent act" and "associated force," concerns found in section 1021 that were not defined in the statute,[206] and to participate in factual inquiries that might be better handled by martial law experts.

The concern that courts might face difficulties in determining whether the citizen's combatant status is genuinely in dispute, however, does not outweigh the need to first adjudicate whether

203. *See supra* Part II.A–B.

204. See Sarah Erickson-Muschko, *Beyond Individual Status: The Clear Statement Rule and the Scope of the AUMF Detention Authority in the United States*, 101 GEO. L.J. 1399, 1420–21 (2013).

205. *See generally id.* (arguing that location of capture, regardless of combatant or citizenship, should drive application of the clear statement rule to the AUMF and NDAA).

206. Hedges v. Obama, 890 F. Supp. 2d 424, 427–28 (S.D.N.Y. 2012) (expressing frustration with the government's evasiveness when asked to define the terms at issue).

indefinite detention is the most appropriate method to deal with a citizen alleged to be a combatant. Where civilian law has yet to be supplanted by martial law in the United States, constitutional rights asserted on American soil exist to their fullest extent. Additionally, the act of detaining a belligerent's own citizen within the belligerent's territory is a practice consistently used in civil wars.[207] In this scenario, the nation's own domestic law and all of its fundamental constitutional guarantees would duly kick in.

V. RECOMMENDATIONS

This Article proposes that courts should apply a clear statement rule to the AUMF and NDAA that is triggered when United States citizens, whose combatant status is in dispute, are arrested, captured, or detained on American soil.[208] This approach attempts to reconcile the existence of explicit congressional prohibition of citizen detention with the practical realities of a nation still engaged in military conflict.[209] Using the clear statement rule places a thumb on the scale towards congressional intent, a more appropriate alternative to the presidential hand that has become a near-permanent fixture on the scale. A clear statement rule also acknowledges that Congress has historically legislated in the area of citizen detention during times of peace, and thus, appropriate in this winding down period of the current armed conflict. It also permits the judiciary to maintain some oversight of executive actions.

Applying a clear statement requirement to the AUMF and NDAA would accomplish several important purposes. First, it would

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207. *See, e.g.*, Letter from Abraham Lincoln, U.S. President, to Winfield Scott, U.S. Lieutenant Gen. (Apr. 27, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 347, 347 (Roy P. Basler ed., 1953) (authorizing General Winfield Scott to suspend the writ of habeas corpus to assist in "repressing an insurrection against the laws of the United States"); *see generally* Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600 (2009) (discussing moments in history when the president suspended the writ of habeas corpus in times of national emergency).

208. Here, the trigger for a clear statement makes an explicit distinction between United States citizens and legal permanent residents detained in the United States, given that the text of the Non-Detention Act specifically and exclusively prohibits detention of American citizens absent congressional action.

209. Courts have applied civilian and military law principles in tandem to justify the indefinite detention of the few so-called combatants who were encountered at and away from the battlefield. *See supra* Part IV. Moreover, the Bush and Obama administrations, to varying degrees, couched their wartime rhetoric in traditional LOAC terms and principles. *See supra* Part II.A–B.

likely function as a preliminary stopgap measure against ongoing detention without trial or access to lawyers for citizens like Jose Padilla, whose U.S. citizenship and presence on American soil necessarily warranted more due process protections under the Fifth Amendment than were initially provided. When a court receives a next-friend habeas petition on the citizen's behalf, challenging the indefinite detention of the citizen, it need not find statutory authorization under the AUMF and NDAA for the citizen's continued detention. Instead, the court could determine that even under the *Youngstown* framework, the president's actions are not authorized by Congress, and therefore subject to judicial correction. In doing so, the court would be permitted flexibility in resolving the matter and could potentially choose to follow the lead of the district court that received Yaser Hamdi's next-friend petition and appointed Hamdi unmonitored access to legal counsel.[210]

Additionally, this Article also suggests that a clear statement rule balances the separation of powers principle of political accountability against the principle of preserving individual rights. Proponents of judicial deference to executive action assert the nature of the presidency as most amenable to the nation's constituents;[211] this rationale is just as apposite for the legislature.[212] In fact, because legislators are accountable to a different political constituency than the executive, when both political branches act in concert, this bilateral institutional endorsement of the government's actions provides more support for what Justice Jackson imagined would be a legitimate justification for courts to take a backseat when reviewing exercises of executive war power.

Moreover, because Congress generally cannot issue legislation with a high degree of specificity, "[c]ourts therefore will have a good deal of interpretive latitude to decide whether the congressional legislation is 'close enough' to be treated as effective endorsement of

210. Order at 14–15, Hamdi v. Rumsfeld, No. 2:02cv439 (E.D. Va. June 11, 2002).

211. *See, e.g.*, ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 4 (2010) (discussing the executive's unique role to govern in crises).

212. *See* Deeks, *supra* note 190, at 882–83; Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism And Executive Unilateralism: An Institutional Process Approach To Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 17 (2004); Joseph Landau, *Muscular Procedure: Conditional Deference in the Executive Detention Cases*, 84 WASH. L. REV. 661, 689 n.136 (2009).

the disputed executive action."[213] Courts are free to engage in some review, acting as a backseat driver of sorts. Thus, the due process test promulgated in *Mathews v. Eldridge*[214] constrains the executive and legislative branch from unjustifiably depriving citizen detainees of their constitutional rights. The *Mathews* analysis ensures that the court makes a case-by-case determination of whether any risk of erroneous deprivation is too high to warrant the detention of an allegedly dangerous individual.

What makes the *Mathews* analysis a vital companion to the clear statement rule is that it "is unaltered by the allegations surrounding the particular detainee or the organizations with which he is alleged to have associated."[215] Justice O'Connor determined in *Hamdi* that regardless of the veracity of the government's allegations that Hamdi was an "enemy combatant," his right to access counsel during his proceedings on remand was undeniable.[216] Thus, courts are able to focus upon the constitutionality of the procedures afforded to the individual citizen detainee without engaging in impermissible judicial review that impinges upon the executive's expansive Article II powers. Regardless of where the court deems the president is situated along the *Youngstown* continuum of power, it is entitled to evaluate the accused's due process rights in relation to whatever compelling interest the government may put forth. Thus, the *Mathews* analysis preserves the balance between all three branches of government while seeking to ensure the individual citizen's rights have not been unjustifiably derogated.

Courts would also enjoy greater latitude to construe the provisions in section 1021 as providing citizen detainees with the options presented in sections 1021(c)(3)–(4), transfer to an appropriate alternative court with jurisdiction or repatriation to the person's native country.[217] Therefore, requiring courts to utilize a clear statement rule to the AUMF and the NDAA is paramount to

213. Issacharoff & Pildes, *supra* note 212, at 38 ("[C]ongressional legislation as there is will often be cast at a high level of generality. Only rarely will Congress have focused in an exact way on the precise assertion of executive authority at issue; more typically, Congress will have legislated, if at all, in more general terms, in contexts not exactly those in which the executive currently seeks to act.").

214. 424 U.S. 319 (1976).

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

216. *Id.* at 539.

217. NDAA, *supra* note 11, § 1021(c)(1)–(4), 125 Stat. 1562 (2011).

holding the president accountable when he seeks to significantly curtail liberties of U.S. citizens who have yet to be conclusively deemed terrorist adversaries.

Finally, this Article suggests a simple revision of section 1021(e) of the NDAA to include clearer language exempting citizens captured domestically from its reach. Section 1022(b) is an example of what the revision might look like; it includes unambiguous language that expressly exempts citizens from mandatory military detention.[218] The provision is titled "Applicability to United States Citizens and Lawful Resident Aliens" and exempts citizens from mandatory military detention in subsection (1), as well as lawful resident aliens, to the extent permissible by the Constitution, in subsection (2).[219] Thus, Congress should amend section 1021(e) to expressly prohibit the application of section 1021(b)–(d) to U.S. citizens captured on U.S. soil, and to permit detention of lawful resident aliens only to the extent allowable under the Constitution. The section 1021(e) language should be revised as follows:

> (e) AUTHORITIES.—Nothing in this section shall be construed to affect existing law or authorities relating to the detention of lawful resident aliens of the United States or any other persons who are captured or arrested in the United States.
>
> (1) APPLICABILITY TO UNITED STATES CITIZENS. —Nothing in this section shall be construed to permit the detention of United States citizens captured or arrested in the United States.

This long overdue revision would quell the fears that the *Hedges* group voiced and satisfy the growing number of petitions opposing the detention statute. It would also eliminate the need for Congress to clarify the meaning of terms like "substantially supported" and "associated forces," which the *Hedges* plaintiffs claimed were impermissibly vague. This is no small matter. The task of defining these technical terms is arguably beyond the scope of the legislature's powers and is more appropriately entrusted to the executive branch, given that both the judiciary and Congress have traditionally deferred to the executive's expertise in military

218. *Id.* § 1022(b) ("The requirement to detain a person in military custody under this section does not extend to citizens of the United States.").

219. *Id.* § 1022(b)(1)–(2).

affairs.[220] Still, the fact that the 2013 and 2014 versions of the NDAA have been approved without any further revision to section 1021 makes it clear that there is little likelihood of success of amending the provision. Therefore, it is largely the responsibility of the courts to ensure the application of a clear statement rule to section 1021 of the NDAA in order to prevent the indefinite detention of American citizens on American soil without due process.

VI. CONCLUSION

In this unique issue where domestic and international law converge, courts must step up to the challenge of preserving the delicate balance between the three separate branches of government. This balance is the most compelling and enduring characteristic of the American Constitution. Justice O'Connor, writing for the *Hamdi* plurality, stated "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."[221] Therefore, permitting courts to step in when elemental civil liberties hang in the balance is not only prudent, it is necessary to sustain the balanced power dynamic of the U.S. government. Applying tools like the clear statement requirement and the *Mathews* calculus to individual cases reaffirms the judiciary's commitment to ensure the bedrock of liberty—constitutional due process—is not chipped away in the name of national security. History is a powerful reminder that a nation gripped with fear can leave indelible, almost irreversible scars upon its citizens. Thus, it is of utmost importance that courts do not flout the lessons of the past, but treat history as a guidepost to uphold the basic, fundamental rights of American citizens in the face of the novel challenges that characterize this "war on terror."

220. POSNER & VERMEULE, *supra* note 188, at 16 ("The real cause of deference to government in times of emergency is institutional: both Congress and the judiciary defer to the executive during emergencies because of the executive's institutional advantages in speed, secrecy, and decisiveness.").

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