

UNDER THE LENS OF THE CONSTITUTION: THE NDAA'S DETAINEE PROVISIONS AND THE FIFTH AMENDMENT'S GUARANTEE OF EQUAL PROTECTION

STEPHEN CONSUEGRA*

Just as the heart beats in the darkness of the body, / So I, despite this cage,
continue to beat with life. / Those who have no courage or honor / Consider
themselves free, / I am flying on the wings of thought, / And so, even in
this cage, / I know a greater freedom.

—Abdul Rahim¹

I. INTRODUCTION

There is an age-old principle “that the authority of war must be tempered by limitations that mitigate the suffering inevitably caused by war.”² In the wake of more than ten years in the armed conflict in Afghanistan, much debate exists surrounding the inception and passage of the National Defense Authorization Act For Fiscal Year 2012 (“NDAA”)³ and its detainee provisions.⁴ This article focuses specifically on the

* J.D. Candidate, St. Thomas University School of Law, 2013; B.B.A., Florida International University, 2008. There are not enough words or footnotes to express my gratitude to those who deserve recognition: thank you Professors John M. Kang, Amy D. Ronner, Stephen A. Plass, and Jessica Fonseca-Nader for all of your guidance, counsel, and insight in helping me author this piece; many thanks to the members of the *St. Thomas Law Review* for all of their hard work in making this article great; and most importantly, I thank my family and friends for all of their love, support, and encouragement—without you all, I would not be here today.

1. MAHVISH RUKHSANA KHAN, MY GUANTÁNAMO DIARY: THE DETAINEES AND THE STORIES THEY TOLD ME 252 (2008).

2. GEOFFREY S. CORN ET AL., THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE xiii (2009).

3. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2011).

4. Marty Lederman & Steve Vladeck, *The NDAA: The Good, the Bad, and the Laws of War—Part I*, OPINIO JURIS (Dec. 31, 2011, 5:19 PM), <http://opiniojuris.org/2011/12/31/the-ndaa-the-good-the-bad-and-the-laws-of-war-part-i> [hereinafter Lederman & Vladeck, *Part I*] (discussing the NDAA’s disputed detainee provisions); Benjamin Wittes & Robert Chesney, *NDAA FAQ: A Guide for the Perplexed*, LAWFARE (Dec. 19, 2011, 3:31 PM), <http://www.lawfareblog.com/2011/12/nda-faq-a-guide-for-the-perplexed/> (breaking down the NDAA’s detainee provisions in context with other constitutional principles); see Marty Lederman & Steve Vladeck, *The NDAA: The Good, the Bad, and the Laws of War—Part II*, OPINIO JURIS (Dec. 31, 2011, 5:20 PM), <http://opiniojuris.org/2011/12/31/the-ndaa-the-good-the-bad-and-the-laws-of-war-part-ii> (continuing the discussion of the NDAA’s detainee provisions, focusing

NDAA's detainee provisions and its implications regarding the equal protection guarantees under the Fifth Amendment to the United States Constitution. To better understand the breadth of the NDAA's detainee provisions, consider the following dramatis personae.⁵

It is the year 2013, and political unrest in Afghanistan and the Middle East has reached a critical tipping point. The United States is greatly accelerating its 2014 timetables for ending the armed conflict in Afghanistan, and it is drawing down its combat forces at an accelerated pace and fast-forwarding the transition of its military and government advisors into a supervisory role for the Afghan government.⁶ The political winds shifted in a tumultuous direction after American soldiers at Bagram air base burned copies of the Koran—desecrating the Muslim Holy Book sparked a snowball effect of instability and violence in the region.⁷

heavily on section 1021 of the NDAA). *See generally* Jonathan Hafetz, *The NDAA and Military Detention*, BALKINIZATION (Jan. 3, 2012, 9:49 AM), <http://balkin.blogspot.com/2012/01/ndaa-and-military-detention.html> (opining on the controversial detainee provisions within the NDAA).

5. *See* hypothetical *infra* Part I. The following hypothetical centers on a fictional protagonist in a setting influenced by news articles and current events; it is an amalgamation of both fact and fiction.

6. *See* Mark Landler & Helene Cooper, *Obama Will Speed Pullout From War in Afghanistan*, N.Y. TIMES (June 22, 2011), <http://www.nytimes.com/2011/06/23/world/asia/23prexy.html?pagewanted=all> (reporting that President Barack Obama plans to drawdown American Troops and transfer control over security matters to the Afghan government); Ahmad Nadem & Ahmad Haroon, *Afghans Urge U.S. Exit After Killings; US Says Timetable Unchanged*, REUTERS Mar. 12, 2012, <http://www.reuters.com/article/2012/03/12/us-afghanistan-civilians-idUSBRE82A02V20120312> (accounting the Afghan peoples' cry for an expedited withdrawal of American combat forces in Afghanistan). *But see* James Kirkup, *Afghanistan: Casualties Will Not Affect Plans for Pull-Out by 2014, Says David Cameron*, THE TELEGRAPH (Mar. 08, 2012), <http://www.telegraph.co.uk/news/uknews/defence/9129910/Afghanistan-casualties-will-not-affect-plans-for-pull-out-by-2014-says-David-Cameron.html> (relaying news that President Obama and Prime Minister David Cameron are committed to the 2014 timetables for pulling out of Afghanistan in light of recent Afghan civilian casualties).

7. *See* Alissa J. Rubin, *Afghan Protests Over the Burning of Korans at a U.S. Base Escalate*, N.Y. TIMES, Feb. 22, 2012, <http://www.nytimes.com/2012/02/23/world/asia/koran-burning-in-afghanistan-prompts-second-day-of-protests.html> (reporting on the increased violence and protest attributable to American soldiers burning the Koran); Kevin Sieff, *U.S. Probe of Koran Burnings Finds 5 Troops Responsible, Officials say; Afghans Demand Trial*, THE WASH. POST, Mar. 2, 2012, http://www.washingtonpost.com/world/us-probe-of-koran-burning-finds-5-soldiers-responsible-afghan-clerics-demand-public-trial/2012/03/02/gIQAwJqYmR_story.html (reporting on an investigative probe into the Koran burnings at Bagram air base by American soldiers, which led to unrest, protest, attacks, and killings in Afghanistan).

American troops faced increased opposition from the Taliban in previously liberated provincial outposts in Afghanistan; there were civilian uprisings castigating the Koran burnings; some Afghan soldiers undergoing military training retaliated against their U.S. Army instructors; and there were killings of innocent Afghan civilians at the hands of American forces.

Violence and unrest in the region touched Omaid Parsa's life in remarkable and horrifying ways. Omaid is a twenty-nine-year-old Afghan journalist; he works for the al-Jazeera news network and lives in his native Kandahar province with his wife and three children. Omaid was on assignment in Kabul to cover the recent Koran burnings at the U.S. controlled Bagram air base. The Koran burnings sparked intense violence against American service members in the region. Local news outlets reported a recent incident in which an American soldier killed sixteen Afghan civilians in Omaid's native Kandahar.⁸ Tragically, Omaid learned that his family was among the dead and mourned their loss. The United States apologized to the victims' families and the Afghan people and assured them that the U.S. military would prosecute the soldier for his crimes.⁹

The people of Afghanistan demanded that the United States Government hand over the soldier for prosecution in an Afghan tribunal.¹⁰ In the end, the Afghan central government relented to the American promise of justice. Omaid openly criticized his government's actions as placating U.S. interests while ignoring the Afghan people's call for justice. He wrote critical pieces that lambasted Hamid Karzai's government for failing to prosecute the U.S. soldier's killing of sixteen innocent Afghan civilians in an Afghan tribunal. The Afghan government's decision excited further unrest and tension in the region.

8. See Taimoor Shah & Graham Bowley, *U.S. Sergeant is Said to Kill 16 Civilians in Afghanistan*, N.Y. TIMES, Mar. 11, 2012, <http://www.nytimes.com/2012/03/12/world/asia/afghanistan-civilians-killed-american-soldier-held.html> (reporting on the aftermath of an American soldier who killed sixteen Afghan civilians in Kandahar province and then surrendered to U.S. military authorities there); Melisa Goh & Dana Farrington, *U.S. Soldier in Custody for Allegedly Shooting Afghan Villagers*, NPR (Mar. 11, 2012, 01:48 AM), <http://www.npr.org/blogs/thetwo-way/2012/03/11/148388254/u-s-service-member-detained-for-allegedly-shooting-afghans> (providing updates about the U.S. soldier who shot and killed sixteen Afghan civilians in Kandahar province as events unfolded).

9. See Shah & Bowley, *supra* note 8 (reporting on President Obama and Defense Secretary Leon Panetta's condolences and promises for investigations into the Afghan civilian killings); Goh & Farrington, *supra* note 8 (reporting on President Obama's phone-apology to Afghan President Hamid Karzai and the people of Afghanistan, which expressed deep regret and sympathy and a vow to bring those responsible for the killings to justice).

10. See Shah & Bowley, *supra* note 8 (documenting Afghan President Hamid Karzai's demand for justice for the killing of innocent Afghan civilians).

Soon after, unknown government operatives broke into Omaid's home, captured him in the night, and tortured him for writing critical news pieces against the Afghan government. Omaid's captors transferred him to U.S. controlled Bagram air base where they falsely claimed that he was part of al-Qaeda, that he substantially supported the Taliban regime and its associated forces with monetary aid, and that he gained access to terrorist training-manuals for distribution to the people in Kandahar province.¹¹ All of the accusations were lies. Omaid faced further beatings, torture, and degrading treatment by his American captors at Bagram air base. Thereafter, the U.S. military transferred Omaid to the detention center at Guantánamo Bay, Cuba.

To this day, Omaid remains incommunicado at Guantánamo Bay without knowledge of his charges, access to counsel, or a meaningful and factual inquiry into the allegations supporting his detention. He is awaiting a Combatant Status Review Tribunal to determine his disposition as an enemy combatant under the laws of war. If the tribunal declares Omaid an enemy combatant, he faces the continued threat of mandatory military detention under the NDAA's new detainee provisions—all because of his nationality as an Afghan citizen. Were it not for his foreign citizenship, Omaid would be exempt from such mandatory detention under the NDAA's detainee provisions.¹² On the face of the law, the NDAA differentiates the degree of confinement one receives on account of his or her nationality or alienage status: foreign detainees are readily subject to mandatory military detention, whereas U.S. citizens or lawful resident aliens are patently exempt.¹³ This facially discriminatory detention policy implicates the Fifth Amendment's guarantee of equal protection.¹⁴

The crux of this article discusses Congress's passage of the unequal detainee provisions under the NDAA and its equal protection issues under the Fifth Amendment to the Constitution.¹⁵ Part II begins with a discussion on the impetus for congressional passage of the Authorization for Use of Military Force ("AUMF")¹⁶ and its development under the laws of war.¹⁷ Next, Part III analyzes United States Supreme Court precedent that

11. See National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, §§ 1021–1022, 125 Stat. 1298 (2011), for a comparison of the allegations brought against Omaid Parsa in this fictional hypothetical to the language within the detainee provisions under the NDAA.

12. See discussion *infra* Part III.

13. See *infra* text accompanying notes 148–49.

14. See discussion *infra* Part V.

15. See discussion *infra* Parts IV–V.

16. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

17. See discussion *infra* Part II.

previously interpreted the scope of presidential power under the AUMF and explores its implications for purposes of understanding the NDAA's detainee provisions.¹⁸ Part IV follows with a discussion on the NDAA's detainee provisions,¹⁹ while Part V addresses the Fifth Amendment equal protection issues surrounding the detainee provisions.²⁰ Part VI concludes the discussion and proposes heightened judicial scrutiny to assess the enacted detainee provisions within the NDAA.²¹

II. THE AUMF AND THE LAWS OF WAR POST-SEPTEMBER 11, 2001

On September 11, 2001, al-Qaeda forces hijacked passenger jetliners and crashed them into strategic targets within the United States, killing over 3,000 people.²² Congress responded swiftly to the terrorist attacks and, consistent with the War Powers Resolution, enacted the AUMF on September 18, 2001,²³ which allowed the President to use military force against those who perpetrated the terrorist attacks.²⁴ Pursuant to the AUMF, the President exercised his military authority and deployed U.S. forces to Afghanistan for the purposes of combating al-Qaeda and the Taliban—those suspected of perpetrating the September 11 terrorist

18. See discussion *infra* Part III.

19. See discussion *infra* Part IV.

20. See discussion *infra* Part V.

21. See discussion *infra* Part VI.

22. *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004) (plurality opinion); *Rasul v. Bush*, 542 U.S. 466, 470 (2004).

23. See *Hamdi*, 542 U.S. at 510 (stating that Congress passed the AUMF one week after September 11, 2001); *Rasul*, 542 U.S. at 470 (indicating that Congress's enactment of the AUMF was in response to the September 11 attacks); Curtis A. Bradley & Jack L. Goldsmith, *Rejoinder: The War on Terrorism: International Law, Clear Statement Requirements, and Constitutional Design*, 118 HARV. L. REV. 2683, 2683 (2005) (suggesting the AUMF, enacted on September 18, 2001, was the central statutory enactment related to the war on terrorism).

24. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(b), 115 Stat. 224 (2001) (citing War Powers Resolution, Pub. L. No. 93-148, §§ 5(b), 8(a)(1), 87 Stat. 555 (1973)) (declaring that the AUMF is in line with War Powers Resolution and constitutes "specific statutory authorization" to introduce the U.S. Armed Forces into hostilities); see MARY L. DUDZIAK, *WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES* 104 (2012) (observing that lawmakers acted quickly in a post-September 11 environment by enacting the AUMF); Geoffrey S. Corn, *What Law Applies to the War on Terror?*, in GEOFFREY S. CORN ET AL., *THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE* 1, 6 (2009) [hereinafter Corn, *What Law Applies to the War on Terror?*] (identifying President Bush's belief that the September 11 terrorist attacks were an "armed attack" against the United States, and noting that he and Congress almost immediately invoked the War Powers Resolution to combat al-Qaeda—an international terrorist network without a sovereign nation). See generally Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2072–78 (2005), for a discussion, survey, and comparison on the historical perspectives of past congressional authorizations of military force.

attacks.²⁵ Despite not being a formal declaration of war against al-Qaeda and the Taliban, the AUMF was the functional equivalent of one.²⁶ The AUMF invoked notions of international law concepts such as armed conflicts and the laws of war.²⁷ Nevertheless, determining whether the war on terror was defined as a “war” under international law was important because a switch from peacetime to wartime triggered law of war principles and protections afforded to enemy belligerents under international human rights laws.²⁸

Under section 2(a) of the AUMF, Congress conferred powers to the President “to use all necessary and appropriate force” against any and all countries, persons, or entities that “he determines” were involved with, or aided in, the September 11 terrorist attacks.²⁹ But what defines the scope

25. Authorization for Use of Military Force pmb. (declaring that the AUMF formally and explicitly recognized the following declarations: that violent terrorist attacks were launched against the United States on September 11, 2001; that this Nation has a right to self-defense and to protect its citizens; that the attacks not only threatened our welfare, but pose a continuing threat to our national security and foreign policy interests; and that the President has the constitutional authority to thwart acts of terrorism against this Country); see DUDZIAK, *supra* note 24, at 104 (viewing the purpose of the AUMF as preventing future terrorist attacks against the United States).

26. DUDZIAK, *supra* note 24, at 104 (noticing that, while Congress did not make a formal declaration of war, the AUMF was the functional equivalent of one).

27. See Authorization for Use of Military Force pmb.; Bradley & Goldsmith, *supra* note 24, at 2056–57 (debunking two misconceptions regarding the scope of the President’s authority under the AUMF to include the following: (1) that the President’s congressionally prescribed use of force by resolution does not limit presidential war powers for want of a formal declaration of war; and (2) that categorizing skirmishes as something other than a “war” (i.e., an armed conflict) does not limit Congress’s authorization of force that the President may exercise); see also BLACK’S LAW DICTIONARY 967 (9th ed. 2009) (defining the laws of war as “[t]he rules and principles agreed on by most nations for regulating matters inherent in or incident to the conduct of a public war, such as the relations of neutrals and belligerents, blockades, captures, prizes, truces and armistices, capitulations, prisoners, and declarations of war and peace”); Corn, *What Law Applies to the War on Terror?*, *supra* note 24, at 1 n.2 (defining the law of war as “governing the conduct of belligerents engaged in armed conflict”).

28. See DUDZIAK, *supra* note 24, at 113 (noting that it is one thing to suspend laws in temporally defined moments of war and entirely another in this wartime era—where the conflict is akin to an ideology); Bradley & Goldsmith, *supra* note 24, at 2068 (“[T]he AUMF was enacted against an international law backdrop that focuses not on ‘war,’ but rather on ‘armed attacks’ and ‘armed conflicts’—concepts that are not limited to state actors.”).

The United Nations Charter recognizes the right of states to use force in self-defense in response to an “armed attack.” The Charter does not specify that the attack must come from another state, and the Security Council appears to have recognized that the September 11 attacks were armed attacks triggering the right of self-defense under the Charter. Similarly, both the North Atlantic Treaty Organization and the Organization of American States treated the attacks as “armed attacks” for purposes of their collective self-defense provisions.

Bradley & Goldsmith, *supra* note 24, at 2068–69.

29. Authorization for Use of Military Force § 2(a); see Bradley & Goldsmith, *supra* note 24, at 2082 (surveying the history and contexts with which Congress previously authorized the

of the President's authority under the AUMF concerning those persons or entities involved with the September 11 terrorist attacks?³⁰ At first, President George W. Bush proposed broad authority under the AUMF "to deter and preempt" attacks against or any threat upon the United States, regardless of the persons involved, whereas Congress chose to limit the President's authorized use of force to only include those persons or entities *connected* with the September 11 terrorist attacks.³¹ Despite congressional narrowing of the scope of covered persons under the AUMF, the span of the President's force remained broad.³² In fact, though not specifically referenced in the AUMF, the scope of the President's authorized powers included the ability to detain enemy forces incident to the war in Afghanistan.³³

Focusing on Congress's specified targets, the AUMF expressly authorizes the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001"³⁴ Still, difficulty arose after Congress authorized the use of

presidential use of military force leads to the conclusion that the AUMF confers broad—or even broader—presidential authority to conduct military operations as compared with traditional declarations of war). Under the AUMF, Congress sanctioned broad military powers to the President:

[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Authorization for Use of Military Force § 2(a).

30. See Bradley & Goldsmith, *supra* note 24, at 2077 (finding that, overall, the scope of congressional resolutions tend to restrict the President's authorized use of force to an express and/or implied enemy or purpose). Arguably, the enemies subject to force under the September 18, 2001, AUMF is broader than formal declarations of war. *Id.* at 2082. The president declares who is involved with the September 11 attacks, and who is subject to his authorized use of force. *Id.* Contrasting with formal declarations of war, the AUMF only describes, instead of names, the enemies subject to the President's authorized force; and, the AUMF clearly authorizes the President to determine which persons or entities qualify as enemy combatants. *Id.*

31. *Id.* at 2079.

32. See *id.* at 2080–81 (asserting that the President's "necessary and appropriate force" pursuant to the AUMF is a broad conferral of power paralleling the congressional powers found in the Necessary and Proper Clause under Article I, Section 8, Clause 18 of the Constitution). Even though the AUMF does not confer unchecked and unfettered power into the hands of the President, his powers are still broad enough to wage and conduct war with almost unlimited resources or employable methods. *Id.* at 2081–83.

33. See DUDZIAK, *supra* note 24, at 105 (opining that the concept of "wartime" in a post-September 11 era supported U.S. military action and treatment against detained enemy combatants).

34. Authorization for Use of Military Force § 2(a); see Bradley & Goldsmith, *supra* note 24, at 2072, 2078 (categorizing all congressional authorizations of military force that allow the

military force not against nations or internal threats, but against international terrorist organizations—blurring the traditional classifications under established law of war principles.³⁵ Before September 11, U.S. military advisors traditionally categorized armed conflicts into one of two distinct law of war categories that trigger protections under Common Articles 2 or 3 of the Geneva Conventions: Article 2 involves international combat between nations, while Article 3 involves non-international conflicts with a recognized internal military threat.³⁶ Nonetheless, what is the interest or purpose in classifying an armed conflict one particular way over another? Classifying a particular armed conflict as either international or non-international brings with it the benefit of the laws of war safeguards for prisoners of war.³⁷

Not all conflicts fit into neatly drawn classifications for purposes of construing military operations and detaining enemy belligerents in wartime.³⁸ The U.S. Department of Defense recognized the difficulty in categorizing such military operations following the Vietnam War and subsequent conflicts, and it defaulted to using law of war concepts irrespective of any official classification.³⁹ Yet, Congress's authorized targets in the armed conflict in Afghanistan were not properly cognizable

President to use such force into the following components: "(1) the authorized military resources; (2) the authorized methods of force; (3) the authorized targets; (4) the purpose of the use of force; and (5) the timing and procedural restrictions on the use of force").

35. CORN ET AL., *supra* note 2, at xiv (recognizing that after the United States declared war against a transnational terrorist organization, it was difficult to pinpoint which category these forces belonged to under the Geneva Conventions for purposes of triggering the laws of war).

36. *Id.* at xiii (observing that, prior to the September 11 attacks, the U.S. military legal profession understood there to be two triggers for the laws of war under varying articles within the 1949 Geneva Conventions: the first trigger is Common Article 2, which covers international warfare between nations for furthering respective national purposes—in other words, it was interstate armed conflict between two states to accomplish some sovereign purpose; and the second trigger is Common Article 3, which covers non-international warfare involving internal conflicts—in other words, Common Article 3 covered intra-state armed conflict where state armed forces battled against an internal threat with military capabilities).

37. See Corn, *What Law Applies to the War on Terror?*, *supra* note 24, at 3 (stating that prisoners of war are afforded the benefit of claiming law of war protections).

38. See CORN ET AL., *supra* note 2, at xiv (explaining that the operations of the United States when it invoked the power of war against non-state transnational terrorists did not fit into the two situations in which the laws of war could apply).

39. See *id.* at xiii–xiv (noting that, after the confusion after the Vietnam War, the Department of Defense's official stance was to adopt and comply with law of war concepts, regardless of the formal categorization of the conflict or military operation, for purposes of efficient operational planning for its military forces and personnel). There were numerous military operations between the Vietnam War and September 11 that would not have triggered traditional law of war concepts, but the conflicts were treated as such for operational and decision making needs in areas such as military detentions, medical treatment, and detainee interrogations. *Id.* After such conflicts, the default rule for commanding officers was to use traditional law of war principles. *Id.*

under Common Articles 2 or 3 because, under the AUMF, the U.S. military was neither against a nation with an army nor in conflict with an intra-state insurgent force, blurring the distinction under traditional law of war principles.⁴⁰

Once U.S. forces entered Afghanistan to carry out combat operations pursuant to the AUMF, top legal advisers for the military communicated the traditional law of war classifications to their commanding officers on the assumption that these default rules applied to al-Qaeda and Taliban forces in matters such as the treatment of captured enemies of war.⁴¹ Immediately thereafter, top military officials ordered commanders to stop treating detained enemy forces as though they were prisoners of war under the restrictive law of war framework and, instead, treat those detained as “unlawful enemy combatants” to preclude any claimed protections normally afforded to prisoners of war under established law of war principles.⁴² Essentially, the reason for the changed status from prisoners of war to unlawful enemy combatants was to allow the U.S. military greater ease in transferring claimed al-Qaeda operatives to the detention center at Guantánamo Bay, Cuba.⁴³

Al-Qaeda forces were without classification under Common Articles 2 and 3 of the Geneva Conventions, rendering such forces open to hostile military engagements and barring them from claiming protections under the laws of war.⁴⁴ The Bush Administration took advantage of this loophole,

40. See Corn, *What Law Applies to the War on Terror?*, *supra* note 24, at 1–2; *supra* text accompanying note 35.

[A]n “either/or” law-triggering paradigm . . . dictated when the [laws of war] . . . applied to U.S. operations: either those operations [that] involved hostilities against the armed forces of another State so as to qualify as international armed conflicts; or they involved hostilities against insurgent forces within a State on whose behalf the United States had intervened, thereby falling into the alternative category of internal armed conflict.

Corn, *What Law Applies to the War on Terror?*, *supra* note 24, at 1–2.

41. See Corn, *What Law Applies to the War on Terror?*, *supra* note 24, at 3.

42. *Id.*; see Bradley & Goldsmith, *supra* note 24, at 2070 (asserting that both the Executive and Legislative Branches construed the military operations in Afghanistan as a war; and, for purposes of law of war concepts, persons defined under the AUMF are treated as enemy combatants). In the eyes of the U.S. military, the limited rule-based application of law of war principles became apparent when American forces began detaining opposition fighters. Corn, *What Law Applies to the War on Terror?*, *supra* note 24, at 1–2. Top military brass advised commanders on the battlefield to stop treating detainees as if they were protected belligerents under the laws of war, and the officials directed commanders to treat the detainees as unlawful enemy combatants. *Id.* The new enemy combatant status would preclude these detainees from safeguards normally afforded to them under the laws of war. *Id.*

43. See Corn, *What Law Applies to the War on Terror?*, *supra* note 24, at 3–4.

44. See *id.* at 4 (“A new [U.S.] legal position began to emerge: the authority of the [laws of war] would be asserted to provide the legal basis for the execution of military operations against

justifying military action against al-Qaeda under the AUMF and exploiting suspected al-Qaeda detainees from any guarantees of treatment under the laws of war.⁴⁵ “By strictly limiting [law of war] applicability to this paradigm, the underlying purpose of the law—ensuring regulation of hostilities—was undermined.”⁴⁶ In *Hamdan v. Rumsfeld*,⁴⁷ the Supreme Court declared that Common Articles 2 and 3 operate in “contradistinction,” and the Bush Administration’s exploitation of a loophole within Common Articles 2 and 3 was incompatible with established law of war principles.⁴⁸ The Court effectively closed this interpretive loophole and afforded detainees humane treatment regardless of the operation’s characterization.⁴⁹ Further scrutiny and discussion on the treatment and rights of detainees in wartime would come to pass in subsequent Supreme Court litigation.⁵⁰

III. DETAINEE LITIGATION AND SUPREME COURT PRECEDENT REVISITED

Well into the War on Terror, the Supreme Court decided a number of important cases in a span of four years relating to the rights of men detained in wartime.⁵¹ There is an often quoted maxim by the Roman philosopher Marcus Tullius Cicero stating, “In time[s] of war, [the] law is silent” (*inter arma silent leges*).⁵² But during this wartime era, the

al-Qaeda—an entity considered to be engaged in an armed conflict with the United States; however, . . . al-Qaeda captives were afforded no such claim to [law of war] protections because the conflict they engaged in defied classification under either Common Article 2 or 3.”)

45. See *id.* at 5 (describing the Bush Administration’s use of tenets under the laws of war for claimed military action over al-Qaeda forces while, at the same time, illustrating the ambiguity of classifying al-Qaeda under the laws of war, precluding them from any claimed law of war protections). The Bush Administration believed there were two clear-cut triggering mechanisms for law of war principles under Common Article 2 or 3 of the Geneva Convention—principles that applied distinctly independent from one another—namely: (1) armed conflict between the armies of two or more States or Nations; and (2) non-international armed conflicts contained within a State or Nation. *Id.* This state of limbo allowed the United States to assert its military prowess against these authorized targets pursuant to the AUMF and the laws of war, but precluded al-Qaeda detainees from triggering any legal claim to protections afforded to prisoners of war. *Id.* at 4–5.

46. *Id.* at 9. “Accordingly, this ‘transnational armed conflict’ fell into a regulatory gap produced ironically by [law of war] provisions developed for the specific purpose of eliminating such definitional law-avoidance.” *Id.* at 10.

47. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

48. See *Hamdan*, 548 U.S. at 562; Corn, *What Law Applies to the War on Terror?*, *supra* note 24, at 12.

49. See Corn, *What Law Applies to the War on Terror?*, *supra* note 24, at 12.

50. See discussion *infra* Parts III.A–C.

51. See *id.*

52. See DUDZIAK, *supra* note 24, at 3.

Supreme Court declared that the law indeed has a voice, protecting citizens and non-citizens alike.⁵³ Despite the Government's prevailing wartime interests, the Supreme Court upheld not only the constitutional rights of citizen detainees suffering Executive confinement, but it also preserved the great writ of habeas corpus for non-citizen detainees.⁵⁴ The discussion that follows examines this precedent in light of the Government's further attempt to constrain the liberty interests of non-citizen detainees.⁵⁵

A. *HAMDI V. RUMSFELD*

In *Hamdi v. Rumsfeld*,⁵⁶ Justice Sandra Day O'Connor authored the plurality opinion that first considered whether the Government had the power during wartime to detain enemy combatants later determined to be U.S. citizens.⁵⁷ The backdrop of the case involved Yaser Esam Hamdi, a U.S. citizen who was captured, detained, and interrogated during active combat operations in Afghanistan pursuant to the AUMF.⁵⁸ The U.S. military transferred Hamdi to U.S. soil once it determined his citizenship status.⁵⁹ According to the Government, declaring Hamdi an enemy combatant justified his indefinite detention without providing notification of his charges, due process, or right of access to counsel.⁶⁰

53. See discussion *infra* Parts III.A–C.

54. See *infra* note 75 and text accompanying note 76; *infra* text accompanying notes 92, 120, 121.

55. See discussion *infra* Parts III.A–C.

56. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion).

57. *Id.* at 516.

58. *Id.* at 510; see discussion *supra* Part II. Hamdi was born a U.S. citizen in Louisiana in 1980, but later moved abroad with his parents to Saudi Arabia. *Hamdi*, 542 U.S. at 510. Around 2001, Hamdi resided in Afghanistan when the Northern Alliance, a militia opposed to the Taliban, captured and turned him over to the U.S. military. *Id.*

59. *Hamdi*, 542 U.S. at 510. Initially, the U.S. military detained and interrogated Hamdi in Afghanistan, subsequently transferred him to Guantánamo Bay, Cuba, and ultimately relocated him to a naval brig in Charleston, South Carolina upon learning of Hamdi's U.S. citizenship. *Id.*

60. *Id.* at 510–11. The Government defined an enemy combatant it seeks to detain as “an individual who, it alleges, was part of or support[ed] forces hostile to the United States or coalition partners in Afghanistan and who engaged in armed conflict against the United States there.” *Id.* at 516 (internal quotation marks omitted).

Hamdi's father filed a petition for a writ of habeas corpus on behalf of his son⁶¹ and challenged his son's indefinite detention as violating 18 U.S.C. § 4001(a)'s proscription against detaining U.S. citizens.⁶²

Nevertheless, the Government maintained that Hamdi's detention complied with 18 U.S.C. § 4001(a) because it was a proper exercise of the President's authority under the AUMF.⁶³ Though the threat of indefinite detention was present in an unconventional conflict, the Court agreed with the Government's claim and declared Hamdi's detention as lawful under the AUMF.⁶⁴

61. *Id.* at 511; see BLACK'S LAW DICTIONARY 778 (9th ed. 2009) (defining the writ of habeas corpus as a means "employed to bring a person before a court, most frequently to ensure that the person's imprisonment or detention is not illegal"). Once the lower court determined that Hamdi's father, Esam Fouad Hamdi, had standing to petition for a writ of habeas corpus as next of friend on behalf of his son, Hamdi's father challenged the basis of his son's detention. *Hamdi*, 542 U.S. at 511–12. Hamdi's detention revolved around a Special Agent's declaration (the "Mobbs Declaration"), which indicated the agent's familiarity with the facts and circumstances related to Hamdi's detention, the agent's knowledge of Department of Defense policies pertaining to the detention of al-Qaeda and Taliban forces, and the agent's close ties and involvement with military detentions of such forces. *Id.* at 512. Through preliminary and subsequent U.S. military screenings and interviews with Hamdi, the Agent claimed that Hamdi was associated with Taliban forces when Hamdi traveled to Afghanistan in the summer of 2001, that Hamdi's Taliban unit surrendered to coalition forces there, and that Hamdi was deemed an enemy combatant based on his association with the Taliban. *Id.* at 512–13. On instructions from the Fourth Circuit Court of Appeals, the District Court considered the sufficiency of the Mobbs Declaration to detain Hamdi, but the lower court criticized the Declaration as mere hearsay and ordered the Government to produce anything or anyone (i.e., essentially all documents, statements, lists of interrogators, etcetera) who made Hamdi's enemy combatant status determination. *Id.* at 513–14. The Government appealed the production order, to which the Fourth Circuit Court of Appeals concluded the following: (1) since Hamdi was captured in an active combat area, there was no basis for a factual or evidentiary hearing to dispute the Government's assertions; and (2) if deemed accurate, the Mobbs Declaration standing alone was ample authority for the President to detain Hamdi pursuant to the President's war powers. *Id.* at 514.

62. See 18 U.S.C. § 4001(a) (2006) ("No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."); *Hamdi*, 542 U.S. at 517 ("Congress passed § 4001(a) in 1971 as part of a bill to repeal the Emergency Detention Act of 1950, 50 U.S.C. § 811 *et seq.*, which provided procedures for executive detention, during times of emergency, of individuals deemed likely to engage in espionage or sabotage. Congress was particularly concerned about the possibility that the Act could be used to reprise the Japanese-American internment camps of World War II.") (citation omitted).

63. *Hamdi*, 542 U.S. at 516–17; see discussion *supra* Part II. Under section 4001(a), detaining U.S. citizens is proper so long as the Government's detention is pursuant to an Act of Congress. *Hamdi*, 542 U.S. at 517 (citing § 4001(a)). The Government argued it had complied with § 4001(a) since the AUMF was an Act of Congress, which justified Hamdi's detention. *Id.* at 517.

64. *Id.* at 517–20 (recognizing the high degree of risk in detaining individuals perpetually in an unconventional war with no clear end); see DUDZIAK, *supra* note 24, at 121 (observing Justice O'Connor's concern with the real prospect of Hamdi's perpetual detention); Bradley & Goldsmith, *supra* note 24 at 2083–84 (recognizing that the plurality in *Hamdi* did not insist that the AUMF's language be narrowly tailored to any specific incident of war; *i.e.*, that there be a

The Court recognized and declared the following:

The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by “universal agreement and practice,” are “important incident[s] of war.”

. . . .

. . . The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who “engaged in an armed conflict against the United States.” If the record establishes that the United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of “necessary and appropriate force,” and therefore are authorized by the AUMF.⁶⁵

Notwithstanding the plurality’s conclusion that the AUMF included the presidential power to detain enemy combatants for the war’s duration, it then begs the question: may Hamdi ever challenge his jailer?

After addressing the threshold issue, the plurality opinion then considered whether the Government owed any procedural due process to a citizen-detainee who challenged his or her enemy combatant status under the Constitution.⁶⁶ Hamdi argued there was insufficient procedural due process,⁶⁷ while the Government contended that any extra-afforded process

close fit between the force authorization and detaining enemy combatants). The Supreme Court agreed with the Government’s position and declared that the AUMF was a congressional act, which satisfied 18 U.S.C. § 4001(a)’s requirement that U.S. citizens be detained “pursuant to an Act of Congress,” and allowed for the detention of individuals within the Court’s narrowly fashioned category of enemy combatants. *Hamdi*, 542 U.S. at 516–17. All the while, the Government maintained throughout the litigation that it could not release Hamdi for fear he could rejoin enemy forces; this fear justified his indefinite and prolonged detention. *Id.* at 520. Even if this unconventional war could not be won within two generations, Hamdi could very well languish in prison indefinitely. *Id.*

65. *Hamdi*, 542 U.S. at 518, 521 (alteration in original) (citation omitted); see Bradley & Goldsmith, *supra* note 24, at 2053 (discussing the plurality opinion’s conclusion that the President could detain citizen and non-citizen enemy combatants through the course of active combat operations pursuant to implicit authority under the AUMF). Expanding further upon its findings, the Court established that detaining enemy combatants pursuant to the AUMF was a “fundamental and accepted incident of war” within the scope of Congress’s delegation of presidential authority to use “necessary and appropriate force” against those countries, groups, or individuals associated with the September 11 terrorist attacks. *Hamdi*, 542 U.S. at 517–18. The Court further recognized that the ability to restrain enemies from returning to combat was of no consequence despite the fact that the AUMF lacked specific statutory language pertaining to detaining the enemy since Congress clearly authorized the President to use all “necessary and appropriate force.” *Id.* at 519.

66. *Hamdi*, 542 U.S. at 524.

67. See *id.* at 524–25 (arguing that out-of-court government detentions founded solely on third-party hearsay along with the denial of a meaningful and timely hearing run counter to what is owed under the Fifth and Fourteenth Amendments). See generally *Carey v. Piphus*, 435 U.S. 247, 259 (1983) (recognizing the distinction between substantive and procedural due process: the

would be impracticable.⁶⁸ In order to resolve this question, Justice O'Connor examined the writ of habeas corpus, the Due Process Clauses of the Fifth and Fourteenth Amendments, and the *Mathews v. Eldridge* balancing test.⁶⁹ In essence, *Mathews* first weighs the effect of the Government's actions on an individual's rights against the Government's functional interests and the burdens of affording an individual with greater due process.⁷⁰ Then, *Mathews* balances these competing interests by analyzing the risk of depriving a person's rights with ill-afforded process versus any potential benefit of extra or alternate due process protections.⁷¹

In applying the test set forth in *Mathews*, the Supreme Court recognized that the Government's act of detaining Hamdi and depriving him of his physical liberty was one of the most fundamental and substantial rights that the Court has taken care not to minimize.⁷² The plurality

former is a deprivation of life, liberty, property, or some fundamental right; while the latter is a means of challenging an accidental or purposeful deprivation of rights); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) ("For more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner.") (citations omitted) (internal quotation marks omitted).

68. *Hamdi*, 542 U.S. at 525 (asserting that affording Hamdi with extra process would be both unfeasible and contrary to the Constitution). *But cf. id.* at 530 (notwithstanding the Government's vital interest in national security to detain those persons deemed an immediate threat in armed conflicts, a system of free-reign carries the risk of oppressing or abusing those detainees who do not pose such a threat).

69. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."); U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); *Hamdi*, 542 U.S. at 525 (declaring that, notwithstanding invocation of the Suspension Clause, every person detained in the United States has access to the writ of habeas corpus; and the nature of the writ of habeas corpus is vital to the Judiciary in ensuring that the Executive detains individuals according to the law); *see also Hamdi*, 542 U.S. at 528–29 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)) (explaining that the methodology under the *Mathews* test was "for balancing such serious competing interests" and for establishing necessary procedures to guard against Fifth and Fourteenth Amendment due process violations).

70. *Mathews*, 424 U.S. at 335; *see Hamdi*, 542 U.S. at 529 (considering the *Mathews* calculus, the Supreme Court found that the asserted interests on either side remained in near equipoise). There were "substantial interests" relegated to both Hamdi's private interest and the Government's asserted interest; ultimately, the scales tipped in favor of Hamdi, and the plurality afforded him the constitutional process he had not yet received. *Hamdi*, 542 U.S. at 529.

71. *See* Erwin Chemerinsky, *The Assault on the Constitution: Executive Power and the War on Terrorism*, 40 U.C. DAVIS L. REV. 1, 10–11 (2006) [hereinafter Chemerinsky, *The Assault on the Constitution*] (breaking down the balancing test in *Mathews*, which "instructs courts to weigh the importance of the interest to the individual, the ability of additional procedures to reduce the risk of an erroneous deprivation, and the government's interests").

72. *Hamdi*, 542 U.S. at 528–29; *see Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)

reaffirmed its commitment to “the fundamental nature of a citizen’s right to be free from involuntary confinement by his own government without due process of law”⁷³ On the one hand, the Court acknowledged the Government’s sensitive wartime interests and the burdens facing the Government if Hamdi was afforded with greater process.⁷⁴ On the other hand, allowing the Government’s factual averments to go unchallenged—or merely being presumed as true—would not afford Hamdi the degree of procedural due process he was owed under the Constitution.⁷⁵ Ultimately, Justice O’Connor’s principle opinion held that “a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decision-maker.”⁷⁶

B. *RASUL V. BUSH*

In *Rasul v. Bush*,⁷⁷ Justice John P. Stevens delivered the majority opinion for the Court and considered a narrow issue that determined

(recognizing that freedom from bodily restraint is the bedrock of liberty protected under the Due Process Clause); *Parham v. J.R.*, 442 U.S. 584, 600 (1979) (observing involuntary confinement as being a “substantial liberty interest”); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (finding that liberty itself remains unmistakably ill-defined, but the underpinnings of liberty clearly include freedom from bodily restraint); *see also* Chemerinsky, *The Assault on the Constitution*, *supra* note 71, at 10.

73. *Hamdi*, 542 U.S. at 531. Not even the complexities of war could tip the scales in the Government’s favor while Hamdi’s freedom from bodily restraint remained at stake. *Id.* at 530.

74. *Id.* at 531. The Court observed that the necessary realities of military operations and the laws of war clearly render detention of enemy combatants a necessary incident of the Executive’s powers under the AUMF. *Id.* What is more, the Government asserted that any extra-afforded process to Hamdi would greatly hamper the Executive’s ability to wage war, and required compliance with judicial discovery proceedings would obtrusively invade on sensitive national security interests. *Id.* at 531–32. The Supreme Court acknowledged these important Government interests and burdens when it attempted to “[s]trik[e] the proper constitutional balance” with the asserted interests involved. *Id.* at 532.

75. *Id.* at 532–33. While the Plurality gave proper regard to the Government and Hamdi’s competing interests under the *Mathews* calculus, it recognized that “the risk of . . . erroneous deprivation” towards Hamdi was unconstitutionally high given the lack of process that the Government afforded him. *Id.* (quoting *Mathews*, 424 U.S. at 335) (internal quotation marks omitted). Taking into consideration the Executive’s necessary duties in the arena of war, Government hearsay, which formed the sole basis for Hamdi’s detention, might be “the most reliable evidence” the Government relies upon in such proceedings; but at the very least, the fundamental principles of due process afford enemy-combatants, like Hamdi, an opportunity to rebut the evidence presented against him. *Id.* at 533–34.

76. *Id.* at 533; *see* Chemerinsky, *The Assault on the Constitution*, *supra* note 71, at 10–11 (recognizing that, even though the Supreme Court failed to specify the exact due process procedures the Government needed to afford Hamdi, the majority opinion ruled eight-to-one explicitly in favor of affording Hamdi a meaningful and factual hearing).

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

whether non-U.S. citizens imprisoned in Guantánamo Bay, Cuba (a de facto controlled U.S. territory)⁷⁸ could invoke federal jurisdiction to challenge their confinement at the hands of the Government.⁷⁹ The U.S. military captured foreign nationals during hostilities in Afghanistan pursuant to the AUMF⁸⁰ and held them incommunicado at the detention center in Guantánamo Bay.⁸¹

Faced with the threat of indefinite detention, the foreign nationals, through relatives acting as their next friends, or natural guardians, filed statutory habeas corpus claims (among other invocations of federal-court jurisdiction and federal claims).⁸² The petitioners challenged the detentions and asserted that none of the detainees were enemy combatants as the United States had claimed; that none had ever engaged in terrorist activities; and that neither of the detainees were ever formally charged, allowed access to counsel, nor afforded a formal hearing in a court of law or any other tribunal.⁸³ The district court construed all the causes of action as habeas claims and dismissed them all for lack of jurisdiction, believing that *Johnson v. Eisentrager*⁸⁴ precluded the detained foreign nationals from invoking habeas relief outside of U.S. territory, and the appellate court affirmed.⁸⁵

78. *Id.* at 470. A relic of the Spanish-American War, the United States entered into a lease agreement in 1903 with newly liberated Cuba, the terms of which allowed the United States to control the military installation at Guantánamo Bay. *Id.* at 471. Under the 1903 lease agreement, the United States exercised complete control over the territory. *Id.* In 1934, Cuba and the United States executed a treaty that would continue the lease (notwithstanding an amendment by the nations to modify the treaty) as long as the United States did not abandon the naval station in Guantánamo Bay. *Id.*

79. *Id.* at 470. Specifically, the Court addressed whether these foreign nationals captured during hostilities in Afghanistan, and faced with the potential of indefinite detention at the hands of the Executive, could seek federal habeas corpus relief by invoking federal court jurisdiction. *See id.* at 470, 475, 485.

80. *See* discussion *supra* Part II.

81. *Rasul*, 542 U.S. at 470–71.

82. *Id.* at 471–72. The petitioners included two Australians, Mamdouh Habib and David Hicks, and thirteen Kuwaitis, among them Fawzi Khalid Abdullah and Fahad Al Odah. *Id.* Petitioners invoked federal court jurisdiction under 28 U.S.C. §§ 1331 and 1350—federal subject matter jurisdiction and the alien tort statute provisions within title 28, respectively—to compel a hearing on various claims “under the Administrative Procedure Act, 5 U.S.C. §§ 555, 702, 706; the Alien Tort Statute, 28 U.S.C. §1350; and the general federal habeas corpus statute, §§ 2241–2243.” *Id.* at 472.

83. *Id.* at 471–72. The Australians filed their habeas petitions and sought relief from their custodial confinement; specifically, they asked for the right to consult an attorney and to be free from interrogations. *Id.* The Kuwaitis petitioned the court to hear their charges; they requested to see friends, legal counsel, and for lawful access to the courts. *Id.*

84. *Johnson v. Eisentrager*, 339 U.S. 763, 768, 771, 776 (1950).

85. *See Rasul*, 542 U.S. at 472–73. In *Eisentrager*, the Supreme Court declared “that a Federal District Court lacked authority to issue a writ of habeas corpus to 21 Germans citizens

In times of war and peace, the Supreme Court has recognized the power of the federal courts to review a petitioner's claim for habeas relief against unchallenged executive detention.⁸⁶ Just as important, the majority found that the petitioners in *Rasul* differed from the detainees in *Eisenrager*: the detainees were not citizens of a country at war with the United States; they had patently denied ever engaging in hostilities against U.S. forces; they were never charged or afforded any due process; and the detainees were imprisoned for more than two years in a de facto controlled U.S. territory.⁸⁷ The reasoning in *Eisenrager* is, nevertheless, only relevant to the *constitutional* guarantee of habeas corpus and not a *statutory* claim to the writ.⁸⁸

For purposes of seeking *statutory* habeas relief, detainees need not rely on *Eisenrager* because the case deals with the *constitutional* basis for habeas.⁸⁹ Following the decision in *Eisenrager*, the Supreme Court decided that the writ of habeas corpus acts neither on the petitioner seeking relief nor on geographical location, but instead on the person allegedly

who had been captured by U.S. forces in China, tried and convicted of war crimes by an American military commission headquartered in Nanking, and incarcerated in Landsberg prison in occupied Germany." *Id.* at 475. Relying on *Eisenrager*, the district court held that "aliens detained outside the sovereign territory of the United States [may not] invok[e] a petition for a writ of habeas corpus." *Id.* at 472–73 (alteration in original) (citation omitted). The appellate court affirmed, believing that *Eisenrager* held that "the privilege of litigation does not extend to aliens in military custody who have no presence in any territory over which the United States is sovereign." *Id.* at 473 (citations omitted). Additionally, the appellate court dismissed the remaining federal claims that did not sound in habeas. *Id.*

86. *See id.* at 474. The following cases are instances in which the Supreme Court has entertained habeas corpus petitions: *Ex parte Milligan*, where an American citizen during the Civil War planned attacks against military compounds; *Ex parte Quirin*, where wartime enemy belligerents held in the United States were charged and convicted of war crimes; and *In re Yamashita*, where enemy belligerents were held at U.S. controlled island installations. *Id.* at 474–75 (citations omitted).

87. *Id.* at 476.

88. *See id.* at 475 (declaring that *Eisenrager's* six factors only pertain to a petitioner's entitlement to habeas relief under the Constitution, and its decision made little mention as to its applicability to statutory habeas relief); *Eisenrager*, 339 U.S. at 777 (confronting the decision before the Supreme Court on the premise that prisoners are constitutionally entitled to bring suit in U.S. courts for a writ of habeas corpus). To support the premise that a military prisoner is entitled to bring habeas actions in U.S. courts, the Supreme Court in *Eisenrager* declared that such a prisoner is:

Constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.

Eisenrager, 339 U.S. at 777.

89. *See Rasul*, 542 U.S. at 478.

holding the petitioner unlawfully; thus, federal courts act within their jurisdiction when hearing statutory habeas writs so long as service of process reaches the jailor.⁹⁰ Moreover, since Congress made no distinction of citizenship for detainees to invoke the federal habeas statute, it follows that citizens and non-citizens alike have a right to invoke federal court jurisdiction under the statute for purposes of seeking federal habeas relief.⁹¹ Accordingly, Justice Stevens wrote that the foreign nationals facing executive detention at Guantánamo Bay could challenge their confinement by invoking federal court jurisdiction under the federal habeas statute.⁹²

C. *BOUMEDIENE V. BUSH*

In *Boumediene v. Bush*,⁹³ Justice Anthony M. Kennedy delivered the majority opinion and determined an issue of first impression: absent withdrawal in conformance with the Suspension Clause of the Constitution, are alien detainees in Guantánamo Bay, Cuba entitled to the constitutional privilege of habeas corpus?⁹⁴ In order to comply with the due process mandates as decided in *Hamdi v. Rumsfeld*,⁹⁵ the Defense Department created Combatant Status Review Tribunals (“CSRTs”) to determine which of the Guantánamo Bay detainees were enemy combatants.⁹⁶ Based on its interpretation of the AUMF, the Defense Department captured Lakhdar Boumediene and the other petitioners (all foreign nationals taken either from the battlefield or from faraway lands) and detained them in

90. *Id.* at 478–79 (citing *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 494–95 (1973)).

91. *Id.* at 481.

92. *See id.* at 484. Concerning the petitioners’ other invocations of federal court jurisdiction (federal question under section 1331 and section 1350 of the Alien Tort Statute found within title twenty-eight), the appellate court erroneously affirmed the dismissal of petitioners’ claims for want of jurisdiction when it relied on *Eisentrager* to hold that aliens lacked the privilege of bringing suit in the United States. *See id.* Just because the petitioners’ other actions just so happen to involve laws similar to the federal habeas corpus statute does not mean that federal courts are barred from hearing those actions. *See id.* The *Eisentrager* decision “erect[ed] no bar to the exercise of federal-court jurisdiction over the petitioners’ habeas claims.” *See id.* Additionally, neither *Eisentrager* nor any other case “categorically excludes aliens detained in military custody outside the United States from the ‘privilege of litigation’ in U.S. courts.” *See id.* (citation omitted).

93. *Boumediene v. Bush*, 553 U.S. 723 (2008).

94. *Id.* at 732. Said another way, the Supreme Court considered “whether foreign nationals, apprehended and detained in distant countries during a time of serious threats to our Nation’s security, may assert the privilege of the writ [of habeas corpus] and seek its protection.” *Id.* at 746.

95. *See* discussion *supra* Part III.A.

96. *Boumediene*, 553 U.S. at 733–34.

Guantánamo.⁹⁷ The Defense Department brought each of the petitioners before separate CSRTs and determined them all to be enemy combatants with ties to al-Qaeda or the Taliban; yet, each of the petitioners refuted the Government's allegations and applied for writs of habeas corpus, challenging their confinement.⁹⁸

While the petitioners' cases were pending, Congress sought to strip the federal courts of jurisdiction to hear habeas corpus petitions brought by those detained at Guantánamo Bay.⁹⁹ After a failed attempt, Congress enacted section 7 of the Military Commissions Act ("MCA") of 2006.¹⁰⁰

97. *Id.* at 734; see Lakhdar Boumediene, *My Guantánamo Nightmare*, N.Y. TIMES, Jan. 07, 2012, <http://www.nytimes.com/2012/01/08/opinion/sunday/my-guantanamo-nightmare.html> [hereinafter *My Guantánamo Nightmare*]. Lakhdar Boumediene lived in Algeria prior to moving with his family to Bosnia in 1997. *My Guantánamo Nightmare, supra*. In Bosnia, Boumediene worked as a director for a humanitarian aid organization and became a citizen in 1998. *Id.* On October 19, 2001, Boumediene arrived for work in the morning when an intelligence officer questioned him about news reports that Boumediene planned to blow up the U.S. embassy in Sarajevo, but he had never undertaken to plot such an atrocity. *Id.* The U.S. demanded that local authorities arrest Boumediene and five others in connection with the alleged terrorist plot. *Id.* Bosnia's highest court investigated the matter, found no evidence of any planned terrorist attack, and ordered their release. *Id.* Upon his release from custody with local authorities, U.S. agents seized Boumediene and the others, and flew them to Guantánamo Bay, Cuba on January 20, 2002. *Id.* Boumediene was held incommunicado in the detention center at Guantánamo Bay where he was beaten, interrogated, and tortured at the hands of his American captors. *Id.* In protest of his unlawful confinement, Boumediene went on a hunger strike and maintained his innocence throughout the ordeal; then, in 2008, the Supreme Court granted review of his case. *Id.*

98. *Boumediene*, 553 U.S. at 734. The petitioners' cases began around February 2002, and the lower courts dismissed the cases for lack of jurisdiction because the naval station at Guantánamo Bay was outside of U.S. territory. *Id.* The Supreme Court reversed in light of its ruling in *Rasul v. Bush*, which held that detainees had statutory access to the writ of habeas corpus under 28 U.S.C. § 2241. *Id.* Following *Rasul*, the petitioners' cases reached opposite conclusions at the district court level: in one proceeding, Judge Richard J. Leon held that the detainees had no rights to assert in their habeas corpus petitions; in a different proceeding, Judge Joyce Hens Green held that the detainees had rights under Fifth Amendment's Due Process Clause. *Id.* at 734–35.

99. *Id.* at 735. In its attempt to amend 28 U.S.C. § 2241, Congress enacted the Detainee Treatment Act (DTA) of 2005. *Id.* Section 1005(e) of the DTA stripped the federal courts of jurisdiction to hear applications for writs of habeas corpus on brought by alien detainees at Guantánamo Bay, Cuba and gave the District Court for the District of Columbia exclusive jurisdiction to hear CSRT decisions. *Id.* Following its decision in *Hamdan v. Rumsfeld*, the Supreme Court held that section 1005(e) of the DTA did not apply to matters that were already pending in the federal courts at the time of its passage. *Id.* (citing *Hamdan v. Rumsfeld*, 548 U.S. 557, 576–77 (2006)).

100. *Id.* In its response to *Hamdan*, Congress enacted section seven of the MCA, which amended 28 U.S.C. 2241 in several ways: first, it prohibited federal courts and judges from hearing applications for writs of habeas corpus brought by (or on behalf of) those detainees at Guantánamo Bay deemed enemy combatants (or those awaiting such status determinations); second, it limited the ability of federal courts and judges from entertaining actions brought against the United States concerning any matters relating to the confinement or treatment of alien detainees at Guantánamo Bay; and last, the effective date of this provision would apply to all

Initially, Congress succeeded in its pursuit, and the Court of Appeals for the District of Columbia ruled in Congress's favor: section 7 of the MCA stripped the federal courts of jurisdiction from hearing the petitioners' habeas corpus claims and the petitioners were not entitled to the constitutional writ of habeas corpus or the protections under the Suspension Clause.¹⁰¹

Reformulating the issue, the Supreme Court determined "whether [the] petitioners [we]re barred from seeking the writ or invoking the protections of the Suspension Clause either because of their status, *i.e.*, petitioners' designation by the Executive Branch as enemy combatants, or their physical location, *i.e.*, their presence at Guantanamo Bay."¹⁰² The Government claimed that non-citizen detainees designated as enemy combatants and held outside the territorial borders of the United States were not entitled to any constitutional rights, let alone the privilege of habeas corpus or the Suspension Clause's protections; whereas, the petitioners contended that their rights were cognizable under the Constitution, and Congress's abrogation of the privilege of habeas corpus violated the Suspension Clause.¹⁰³

Wading through the history of the writ of habeas corpus,¹⁰⁴ the majority honed in on the Government's position that the common law writ only ran to territories the Crown had legal sovereignty over, thereby precluding the writ's extension to Guantánamo Bay.¹⁰⁵ In other words, the Government claimed that, since the United States contracted out its full, legal claim over Guantánamo Bay, the Constitution and its terms was a nullity, at least to non-citizens.¹⁰⁶ When the Court considered the issue of territorial sovereignty, it did so narrowly: sovereignty "mean[s] a claim of right."¹⁰⁷ Though the Supreme Court accepted the Government's position that Cuba retained legal title to Guantánamo Bay, it reasoned that the United States retained plenary power and control over the territory.¹⁰⁸

cases (both future and pending) relating to Guantánamo detainees as far back as September 11, 2001. *Id.* at 735–37.

101. *Id.* at 735–36.

102. *Id.* at 739.

103. *Id.*

104. *See generally Boumediene*, 553 U.S. at 739–46 (discussing the history and tradition of the writ of habeas corpus).

105. *Id.* at 753.

106. *Id.* at 765.

107. *Id.* at 754 (citation omitted). This claim of right can be broken down into two distinct formulations: *de jure* sovereignty, (*i.e.*, sovereignty in a legal and technical sense), and *de facto* sovereignty, (*i.e.*, a high degree of objective control). *Id.* at 754–55.

108. *Id.* at 755. Ever since the Cuban Republic and the United States entered into a prolonged lease agreement in 1903, the terms of which recognized Cuba's ultimate sovereignty, the United

Contrary to the fundamental principle of separation of powers, the Supreme Court could not accept the Government's untenable premise "that *de jure* sovereignty [was] the touchstone of habeas corpus jurisdiction."¹⁰⁹ Reminding the Government, the Supreme Court stated:

The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not "absolute and unlimited" and subject "to such restrictions as are expressed in the Constitution."¹¹⁰

In the past, the Court has interpreted the Constitution to have force and application in extraterritorial jurisdictions of the United States.¹¹¹ Though the Court held in the Insular Cases¹¹² "that the Constitution ha[d] independent force in [U.S.] territories," it developed a principle "that allowed it to use its power sparingly and where it would be most needed."¹¹³ This doctrine of territorial incorporation, along with some of *Eisentrager's* factors, formed the Court's analysis in determining the reach of the Suspension Clause and the writ of habeas corpus at Guantánamo Bay.¹¹⁴ The Court looked to the following three factors in determining the reach of relevant provisions of the Constitution: (1) the status

States has exercised dominion and control over the naval station at Guantánamo Bay for over a century. *Id.* at 764–65. Simply stated, the Court had "no reason to believe an order from a federal court would be disobeyed at Guantanamo. No Cuban court has jurisdiction to hear these petitioners' claims, and no law other than the laws of the United States applies at the naval station." *Id.* at 751.

109. *Id.* at 755.

110. *Boumediene*, 553 U.S. at 765 (quoting *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885)). On this contentious point, the Court went further:

Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say "what the law is."

Id. (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

111. *Id.*; see BLACK'S LAW DICTIONARY, *supra* note 27, at 929 (defining extraterritorial jurisdiction as "[a] court's ability to exercise power beyond its territorial limits").

112. See generally *Boumediene*, 553 U.S. at 756–62 for a discussion on the history and the Supreme Court's prior interpretations of the Insular Cases, cases exploring the Constitution's reach in extraterritorial jurisdictions.

113. *Id.* at 757, 759. Through the development of the Insular Cases, the Supreme Court constructed a doctrinal framework for applying the Constitution and its provisions in U.S. controlled extraterritorial jurisdictions. *Id.* at 757. Known as territorial incorporation, the doctrine stands for the proposition that "the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories." *Id.* (citing *Dorr v. United States*, 195 U.S. 138, 143 (1904)).

114. *Id.* at 766; see *supra* note 88 and accompanying text.

determination of the detainee and the adequacy of those proceedings; (2) where the detainee was captured and later detained; and (3) roadblocks in deciding the detainee's claim to the writ.¹¹⁵

First, the CSRT proceedings against the petitioners were one-sided, "fall[ing] . . . short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review."¹¹⁶ Second, though the petitioners' detention and imprisonment occurred outside of U.S. borders, the Government keeps them in a *de facto* territory over which it exercises plenary control.¹¹⁷ Last, there were little to no roadblocks in extending the writ to the petitioners.¹¹⁸ With these factors running in the petitioners' favor, the Court recognized a truism never before considered in our Republic:

It is true that before today, the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution. But the [petitioners'] cases before . . . [the Court] lack any precise historical parallel. They involve individuals detained by executive order for the duration of a conflict that, if measured from September 11, 2001, to the present, is already among the longest wars in American History. The detainees . . . are held in a territory that, while technically not part of the United States, is under the complete and total control of our Government.¹¹⁹

Without barrier or binding precedent on point, the Supreme Court declared that the non-citizen petitioners were entitled to the constitutional privilege of the writ of habeas corpus, and that the Suspension Clause had full effect at Guantánamo Bay.¹²⁰ Accordingly, the Supreme Court found that section 7 of the MCA, Congress's jurisdiction stripping statute, was an unconstitutional suspension of the great writ.¹²¹

115. *Boumediene*, 553 U.S. at 766.

116. *Id.* at 767. Though representatives assisted the detainees during a CSRT hearing, that person was not the detainee's own personal attorney. *Id.* Detainees could bring forward "reasonably available evidence," but the detainee would have trouble rebutting the Government's evidence against him without an attorney. *Id.*

117. *Id.* at 768. This is a far cry from the detainees in *Eisentrager*. *Id.* There, the United States exercised neither total nor unlimited control over Landsberg Prison in Germany. *Id.* "In every practical sense, Guantánamo is not abroad; it is within the constant jurisdiction of the United States." *Boumediene*, 553 U.S. at 767 (citing *Rasul v. Bush*, 542 U.S. 466, 480 (2004)) (Kennedy, J., concurring in the judgment).

118. *Id.* at 769–70. Notably, the Government could not present any credible arguments that its military mission would be compromised if detainees were allowed access to the writ of habeas corpus. *Id.* at 769.

119. *Id.* at 770–71.

120. *Id.* at 771.

121. *Boumediene*, 553 U.S. at 771, 792, 795.

IV. THE NDAA AND ITS DETAINEE PROVISIONS

Following congressional passage of the NDAA, it seems that all the branches of government have spoken on detainee issues: from the Supreme Court finding implicit detention powers in *Hamdi v. Rumsfeld*;¹²² to the executive branch's continuing war efforts, and its own interpretation on the scope of its authorized force;¹²³ and ending with Congress enacting the NDAA's detainee provisions, which reaffirmed the President's detention powers under the AUMF.¹²⁴ Therein lies a constitutional problem, however, once Congress passed the NDAA's detainee provisions, which directed the President to detain certain enemies pursuant to the AUMF.¹²⁵

Congress enacted the NDAA as a general appropriations and defense-spending bill for the Defense Department¹²⁶ and declared its congressional authority for doing so under varying provisions under Article 1, Section 8 of the Constitution.¹²⁷ Congress passed wide-ranging provisions under Title X Subtitle D—Counterterrorism of the NDAA, but of particular concern are the provisions under sections 1021 and 1022, which involve matters relating to the continuing conflict in Afghanistan, detaining enemy combatants, and the AUMF.¹²⁸ The House of Representatives passed what

122. See *supra* text accompanying note 65.

123. See Resp't's Mem. Regarding the Gov't's Det. Authority Relative to Detainees Held at Guantánamo Bay at 2 In re: Guantánamo Bay Detainee Litigation (2009), No. 08-442 (TFH), available at <http://www.justice.gov/opa/documents/memo-re-det-auth.pdf> [hereinafter *Executive Memorandum*].

124. See *infra* notes 127, 132 and accompanying text.

125. Compare U.S. CONST. art. I, § 8 (authorizing Congress to provide for the defense of the nation), with *Executive Memorandum, supra* note 123 (purportedly giving the President the power of defense in the detention of individuals).

126. See 157 CONG. REC. H3388-02 (daily ed. May. 24, 2011) (Proceedings and Debates Statement of Rep. McKeon, Member, H. Armed. Serv. Comm.). Rep. McKeon lauded the NDAA's passage as protecting our Nation's interests:

The legislation will advance our national security aims, provide the proper care and logistical support for our fighting forces and help us meet the defense challenges of the 21st century. The bill authorizes \$553 billion for the Department of Defense base budget, consistent with the President's budget request and the allocation provided by the House Budget Committee. It also authorizes \$18 billion for the development of the Department of Energy's defense programs and \$118.9 billion for overseas contingency operations.

Id.

127. U.S. CONST. art. 1, § 8, cl. 1 ("The Congress shall have Power To . . . provide for the common Defence . . ."); U.S. CONST. art. 1, § 8, cl. 12 ("The Congress shall have Power . . . To raise and support Armies . . ."); U.S. CONST. art. 1, § 8, cl. 13 ("The Congress shall have Power . . . To provide and maintain a Navy"); 157 CONG. REC. H2855-02, H2856 (daily ed. Apr. 14, 2011) (Constitutional Authority Statement of Rep. McKeon) (declaring Congress's power to enact H.R. 1540 pursuant to the aforementioned constitutional provisions within Article I, Section 8 of the Constitution).

128. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, §§ 1021–

is now section 1021,¹²⁹ adopting, almost verbatim, the Obama administration's interpretation as to the scope of the President's detention authority under the AUMF.¹³⁰ Though President Barack Obama expressed strong reservations about some of the NDAA's detainee provisions in an attached signing statement, he championed the Act's defense-spending provisions for critical national interests and signed the NDAA into law on December 31, 2011.¹³¹

As enacted, section 1021 of the NDAA reaffirms the President's permissive authority under the AUMF to detain indefinitely those covered persons who were part of the September 11 terrorist attacks or those who substantially supported forces against the United States.¹³² Awaiting their disposition under the laws of war, these classified persons may be subject to detention without trial through the course of authorized engagements, trial by Military Commission, trial by courts with lawful jurisdiction, and custodial transfers to foreign countries.¹³³ It is clear though, that section

1022, 154 Stat. 852 (2011); see H.R. REP. NO. 112-78, at 209 (2011) (acknowledging in House Report 78 that under the AUMF and what is now deemed section 1021 of the NDAA, this Nation is in "an armed conflict with al Qaeda, the Taliban, and associated forces"); see *supra* text accompanying notes 22–28; see also *supra* discussion Part II. The House Report noted that the evolution of a terrorist threat, in relation to coordinated military attacks with allied forces, poses a continuing national security risk against the United States; and as a matter of course, the AUMF provides authority to address the ever-changing threats by al-Qaeda, the Taliban, or associated forces. H.R. REP. NO. 112-78, at 209.

129. 157 CONG. REC. D565, at 569 (daily ed. May 26, 2011) (vote on Amash amendment) (declaring that Representative Amash's amendment, which called for striking the reaffirmation of the AUMF in what is now section 1021 of the NDAA, failed to pass with a recorded vote of 187 ayes to 234 noes).

130. See H.R. REP. NO. 112-78, at 209 (supporting the Executive Branch's interpretation regarding its authorized powers under the AUMF as set out in a filing before the United States District Court for the District of Columbia on March 13, 2009; while affirming the Executive's interpretation remains consistent with the scope of authority provided by Congress, it also is not limiting or altering the President's existing authority under the AUMF); see also *Executive Memorandum*, *supra* note 123 ("The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces 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 hostilities, in aid of such enemy armed forces.").

131. Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2012, 2011 DAILY COMP. PRES. DOC. 978, para. 1–3 (Dec. 31, 2011) [hereinafter *Presidential Signing Statement*].

132. National Defense Authorization Act for Fiscal Year 2012, § 1021(a)–(b) (ordering § 1021(b) covered persons under the AUMF—inherently any person including U.S. citizens, lawful resident aliens, or foreigners—to be subject to permissive and potentially indefinite military detention if such persons aid or substantially support al-Qaeda).

133. *Id.* § 1021(c)(1)–(4); see *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004) (plurality

1021 does not seek to “limit or expand” the President’s authority or the AUMF’s reach, nor does it purport to change existing law or precedent relating to U.S. citizens and lawful resident aliens detained within the United States.¹³⁴ Moreover, President Obama clarified in his signing statement that his administration’s stance on section 1021 would exempt American citizens from any authorized indefinite military detention since it runs counter to our nation’s values.¹³⁵ Further, President Obama declared that his administration would ensure that any detentions arising under section 1021 would comply with “the Constitution, the laws of war, and all other applicable law.”¹³⁶

Continuing with section 1022 of the NDAA, Congress subjects foreign persons to mandatory military detention if they are captured during hostilities and are suspected of having ties with al-Qaeda; yet, Congress exempts U.S. citizens or lawful resident aliens from this mandatory military detention provision.¹³⁷ Regarding the military detention mandate over non-U.S. citizens, the President may apply and seek a waiver from Congress if it is in the interest of national security.¹³⁸ Still, the President

opinion) (acknowledging the limited duration of detentions through the course of hostilities is a fundamental incident of the laws of war); *see also* Lederman & Vladeck, *Part I, supra* note 4 (recognizing that our past and present laws allow for detaining the enemy throughout the course of military conflicts and permit military trials of such enemy forces). “Prisoners of war shall be released and repatriated without delay after the cessation of hostilities.” *Hamdi*, 542 U.S. at 520 (quoting Geneva Convention Relative to the Treatment of Prisoners of War, art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135).

134. National Defense Authorization Act for Fiscal Year 2012, § 1021(d)–(e); *see Presidential Signing Statement, supra* note 131, at para. 4, for the President’s assertion that section 1021’s affirmation of the AUMF remains unchanged with the inclusion, at his recommendation, of section 1021(d) and (e)’s limiting principles. *But see* National Defense Authorization Act for Fiscal Year 2012, § 1021(e) (refuting the implicit and contrary notion as to section 1021’s effect on existing law or precedent pertaining to U.S. citizens, lawful resident aliens, or foreign persons detained outside of the United States).

135. *Presidential Signing Statement, supra* note 131, at para. 4.

136. *Id.*

137. *See* National Defense Authorization Act for Fiscal Year 2012, § 1022(a)–(b) (asserting that section 1022 foreign-persons classified as being part of or substantially supporting al-Qaeda or its associated forces while also participating in attacks directed against the United States or its coalition partners shall be subject to mandatory military detention; while proclaiming that similarly situated persons who are U.S. citizens or lawful resident aliens are exempt from such mandatory military detention). Regardless of the covered person’s disposition or custodial status under the law of war, nothing in section 1022 of the NDAA changes anything with respect to existing U.S. agencies and criminal enforcement. *Id.* § 1022(c)(2). One cause for concern under section 1022 is Congress’s silence as to its affect, if any, on the AUMF when comparing section 1021(d), which expressly declares that nothing under section 1021 aims to “limit or expand” the President’s scope of authority under the AUMF, with section 1022 generally, which is wanting of express statutory language regarding the scope of authority for the President or the AUMF. *Id.* § 1021(d).

138. *See id.* § 1022(a)(4) (allowing the President to submit to Congress an application for

remains obligated to submit certain protocols and procedures to Congress for purposes of implementing the provisions in section 1022 of the NDAA.¹³⁹ Despite signing the NDAA into law, President Obama disagreed with some of section 1022's provisions and stated that he would construe section 1022 broadly in allowing the executive branch great flexibility in waiving any rigid detention mandate that could hinder a response to threats of terrorism.¹⁴⁰

As the legislative branch instructed, President Obama submitted his Policy Directive ("Directive") to Congress regarding the implementation of section 1022's detainee provisions on February 28, 2012.¹⁴¹ The President asserted in his Directive that the rigidity of section 1022's indefinite military detention mandate could jeopardize the executive branch's "ability to collect intelligence and to incapacitate dangerous individuals."¹⁴² Thus, citing the need for flexibility in confronting the evolving threats posed by al-Qaeda and its associated forces, President Obama's Directive specifies which procedures pertain to non-U.S. citizen detainees, when the military custody mandate in section 1022 applies, how the executive branch implements those requirements, and at what time the Executive may waive those requirements.¹⁴³

Despite any determination as to whether individuals are covered persons,¹⁴⁴ section I(D) of the Directive declares that individuals held by the Department of Defense—excluding U.S. citizens—automatically

waiving the mandatory military detention provision of foreign persons who are part of or substantially supporting al-Qaeda if national security interests are at stake).

139. *Id.* § 1022(c) (directing the President to submit to Congress certain policies and procedures for implementing section 1022 up to, and including, the following: (A) authorizing personnel charged with making status determinations of section 1022(a)(2) persons; (B) not necessarily disrupting "surveillance or intelligence gathering" of persons not in U.S. custody, notwithstanding the requirement for military custody of section 1022(a)(2) persons; (C) not requiring status determinations for section 1022(a)(2) persons until ongoing interrogations cease; (D) limiting the application of mandatory military custody when U.S. officials are granted access to persons detained by another country; and (E) providing the United States, where it could not do so otherwise and in the interests of national security, to transfer covered persons detained by another country).

140. *Presidential Signing Statement*, *supra* note 131, at para. 5–6.

141. Presidential Directive on Procedures Implementing Section 1022 of the National Defense Authorization Act for Fiscal Year 2012, 2012 DAILY COMP. PRES. DOC. 136 (Feb. 28, 2012) [hereinafter *Presidential Directive*].

142. *Id.* at para. 3.

143. *Id.* at para. 1 and 3.

144. *Id.* § I(B)–(C) (asserting that, for purposes of the Directive and section 1022 of the NDAA, a covered person is anyone who is: (1) not a U.S. citizen; (2) subject to detention under section 1021's reaffirmation of the AUMF; (3) part of al-Qaeda and acted on its behalf; and (4) involved in or planned an attack or attempted attack against the United States or its allies).

fulfills the mandatory military provisions under section 1022(a)(1) of the NDAA, and any further procedures outlined in the Directive are wholly inapplicable to these individuals.¹⁴⁵ As outlined in section VII of the Directive, even subsequent determinations that an individual is a covered person by anything less than clear and convincing evidence will not bear on the Executive's ability to detain that individual pursuant to the AUMF.¹⁴⁶ Essentially, reading sections I(D) and VII of the Directive show that detained foreign individuals suspected of being part of al-Qaeda or its associated forces are subject to mandatory military detention under section 1022 of the NDAA without further inquiry as to the individual's true status as an enemy combatant.¹⁴⁷

In turn, sections 1021 and 1022 of the NDAA make it clear that there is a congressional demarcation between two classifications of persons with the potential for varying degrees of treatment and confinement for citizen and non-citizen detainees alike.¹⁴⁸ Buttressed with President Obama's Directive, the applicability of Congress's military detention mandate are clear: if you are not a citizen of the United States then you are readily subject to the mandate and the threat of indefinite military detention.¹⁴⁹ This alienage classification has serious implications under the Constitution, as will be discussed in the following section.¹⁵⁰

V. THE FIFTH AMENDMENT'S GUARANTEE OF EQUAL PROTECTION

Together, the Fifth and Fourteenth Amendments declare that "[n]o person shall be . . . deprived of life, liberty or property, without due process of law;¹⁵¹ nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."¹⁵² By its very terms, the words expressed under the Fourteenth Amendment's Equal Protection Clause extend to

145. *Id.* § I(D). Looking at sections I(D) and (E) of the Directive respectively, if the Department of Defense captures or detains individuals, then section 1022 of the NDAA and the procedures within the Directive apply when necessary; but, if a foreign government captures or detains an individual then section 1022 and the procedures within the Directive do not apply. *Id.* § I(D)–(E).

146. *Id.* § VII para. 2 ("Any determination that there is not clear and convincing evidence that an individual is a Covered Person shall be without prejudice to the question of whether the individual may be subject to detention under the 2001 AUMF, as informed by the laws of war, and affirmed by section 1021 of the NDAA.")

147. *See supra* notes 144–45 and accompanying text.

148. *See supra* notes 132–37 and accompanying text.

149. *See supra* text accompanying notes 144–47.

150. *See* discussion *infra* Part V.

151. U.S. CONST. amend. V.

152. U.S. CONST. amend. XIV, § 1.

“persons,” connoting its equal application to all.¹⁵³ As stated in *Yick Wo v. Hopkins*¹⁵⁴:

The Fourteenth Amendment to the Constitution is not confined to the protection of citizens [Its] provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, color, or nationality; and the equal protection of the laws is a pledge of the protection of equal laws.¹⁵⁵

Though the Fifth Amendment lacks an express equal protection clause, the same principles on which the drafters of the Fourteenth Amendment built upon carry over to the Fifth Amendment’s Due Process Clause.¹⁵⁶ These principles carry over in such a way that the “equal protection obligations imposed by the Fifth and Fourteenth Amendments a[re] indistinguishable.”¹⁵⁷

153. See Neal Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365, 1367 (2007) (“The insistence on basic equality is the spirit animating the Fourteenth Amendment”). Representative John Bingham, the Fourteenth Amendment’s main author, championed equal rights for all:

“Is it not essential to the unity of the people that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States? Is it not essential . . . that all persons, whether citizens or strangers, within this land, shall have equal protection . . . ?”

Katyal, *supra* at 1372 (quoting CONG. GLOBE, 39TH CONG., 1ST SESS. 1090 (1866)).

154. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

155. *Id.* at 369 (establishing that the Fourteenth Amendment’s Equal Protection Clause applies to citizens and non-citizens alike); see *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 59 (1973) (Stewart, J., concurring) (“Unlike other provisions of the Constitution, the Equal Protection Clause confers no substantive rights and creates no substantive liberties. The function of the Equal Protection Clause, rather, is simply to measure the validity of classifications created by state laws.”); see also ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 917–18 (Aspen Publishers, 3d ed. 2009) [hereinafter CHEMERINSKY, CONSTITUTIONAL LAW] (discussing the distinction between the Privileges and Immunities Clause and the Equal Protection Clause of the Fourteenth Amendment). Compare U.S. CONST. amend. XIV, § 1 (limiting the application of the Privileges and Immunities Clause to citizens), with U.S. CONST. amend. XIV, § 1 (applying the Equal Protection Clause expressly to all persons, regardless of citizenship).

156. See *United States v. Paradise*, 480 U.S. 149, 166 n.16 (1987) (plurality opinion) (“[T]he reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth.”); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (“Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.”); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (“This Court’s approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.”); *Schneider v. Rusk*, 377 U.S. 163, 168 (1964) (“[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is ‘so unjustifiable as to be violative of due process.’”) (quoting *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)).

157. *Adarand Constructors, Inc. v. Pena, Sec’y of Transp.*, 515 U.S. 200, 217 (1995); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976) (finding that, in the context of federal alienage discrimination, “when there is no special national interest involved, the Due Process Clause has been construed as having the same significance as the Equal Protection Clause,” in

Following from this premise, “an alien is surely a ‘person’ in any ordinary sense of that term,” which entitles them to equal protection of the laws.¹⁵⁸

Though aliens surely have rights under the Constitution,¹⁵⁹ the tougher question then becomes whether those guarantees should extend to alien detainees facing Executive detention in extraterritorial jurisdictions. In *Hamdi*, the plurality opinion declared that citizen detainees held on U.S. soil are entitled to Fifth Amendment Due Process protections.¹⁶⁰ In light of the Court’s decision in *Boumediene*, which held that non-citizen detainees at Guantánamo Bay were entitled to the constitutional writ of habeas corpus, such persons should have access to the same rights as those detained on U.S. soil—anything less puts the liberty interests of citizens before those of aliens.¹⁶¹

“[W]hen the contours of personal liberty are not clear, insistence upon equality in treatment will often be a way to achieve an optimal result.”¹⁶² Such is the case in the context of the NDAA: reading sections 1021 and 1022 of the NDAA make clear that Congress created an explicit classification of individuals for purposes of varying treatment on the face of the law, impinging on the guarantees of equal protection under the Constitution.¹⁶³ Qualifying the degree of the Constitution’s reach on account of citizenship status or the location of one’s confinement, either

that “both Amendments require the same type of analysis”).

158. *Plyler v. Doe*, 457 U.S. 202, 210 (1982); *Mathew v. Diaz*, 426 U.S. 67, 77 (1976) (“The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law.”) (citations omitted); *Fong Yue Ting v. United States*, 149 U.S. 698, 754 (1893) (Field, J., dissenting) (“Arbitrary and despotic power can no more be exercised over [aliens], with reference to their persons and property, than over the persons and property of native-born citizens.”). “Aliens . . . have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.” *Plyler*, 457 U.S. at 210.

159. See *supra* notes 155–58 and accompanying text.

160. See *supra* text accompanying note 76.

161. See *supra* text accompanying note 120; see also Tamra M. Boyd, *Keeping the Constitution’s Promise: An Argument for Greater Judicial Scrutiny of Federal Alienage Classifications*, 54 STAN. L. REV. 319, 324 (2001) (arguing that the Framers of the Constitution “opposed the idea of a hierarchy in which citizens occupied a significantly superior status to aliens”).

162. See Katyal, *supra* note 153, at 1368.

163. Compare National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(b), 154 Stat. 852 (2011) (allowing the U.S. military to permissively detain anyone (e.g., U.S. citizens, lawful resident aliens, and foreign persons) associated with the September 11 attacks or those who substantially support al-Qaeda, the Taliban, or other associated forces), with National Defense Authorization Act for Fiscal Year 2012, § 1022(a)–(b) (subjecting foreign persons captured during hostilities authorized by the AUMF to mandatory military detention but expressly exempting U.S. citizens and lawful resident aliens from such mandatory military custody).

within the United States or in extraterritorial jurisdictions under *de facto* U.S. control, is a distinction without a purpose.¹⁶⁴ As Justice Robert H. Jackson famously stated:

The framers of the Constitution knew . . . that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if large numbers were affected. Courts can take no better measure that laws will be just than to require that laws be equal in operation.¹⁶⁵

If it is recognized that alien detainees like Omaid have access to greater constitutional rights then they may have the ability to challenge a federal law like the NDAA based on equal protection grounds. When challenging a federal law on the basis of equal protection, it is helpful to break down the analysis and ask three distinct questions¹⁶⁶:

- What type of classification stems from the challenged law?
- What level of judicial scrutiny should the court apply?
- Does the particular government action meet the level of scrutiny?

Incorporating Omaid's experience into this analytical framework for equal protection scrutiny will help illustrate the deficiencies within the NDAA's detainee provisions.¹⁶⁷

A. WHAT TYPE OF CLASSIFICATION STEMS FROM THE CHALLENGED LAW?

Under our hypothetical, Omaid is an Afghan citizen, readily subject to Congress's mandatory detention provisions and within the scope of President Obama's Directive.¹⁶⁸ From the onset of equal protection analysis, it is essential to establish what type of classification is at stake.¹⁶⁹

164. See Katyal, *supra* note 153, at 1390. Allowing rank discrimination to influence policy diverts attention from national security and results in misguided notions of "us" versus "them." *See id.*

165. *See id.* at 1370 (quoting *Ry. Express Agency v. New York*, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring)).

166. *See generally* CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 155, at 718–23 (contributing an analytical framework by separating equal protection analysis and scrutiny into three distinct parts).

167. *See* discussion *supra* Part IV.

168. *See* discussion *supra* Parts I, IV.

169. CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 155, at 718.

There are two ways in which to define the classification stemming from the challenged law: either the law is discriminatory on its face—that is, the law by its very terms prejudices a class of individuals; or the law is facially neutral with a discriminatory purpose and impact—that is, the discriminatory classification is not apparent on the face of the law but has an underlying discriminatory intent that results in discrimination upon the affected class.¹⁷⁰

Within the NDAA's detainee provisions, Congress drew a distinction amongst individuals and classified the degree of a person's confinement based on his or her citizenship.¹⁷¹ The status at issue affects an alienage classification: non-citizen detainees are readily subject to mandatory detention, while U.S. citizens and lawful resident aliens are patently exempt from such detention mandates.¹⁷² And Congress drew this alienage classification in explicit terms by enacting a facially discriminatory law under sections 1021 and 1022 of the NDAA.¹⁷³ After identifying the alienage classification, we move to the critical step of determining the level of judicial scrutiny.¹⁷⁴

B. WHAT LEVEL OF JUDICIAL SCRUTINY SHOULD THE COURT APPLY?

As enacted, the NDAA's detainee provisions are clear: by its very terms, there is a discriminatory classification between citizens and non-citizens for varying and unequal degrees of confinement on the face of the law.¹⁷⁵ After establishing what classification is at stake, it is necessary to consider what level of judicial scrutiny a court should apply.¹⁷⁶ Generally speaking, alienage classifications are suspect and warrant strict judicial scrutiny.¹⁷⁷ One of the motivating factors for alienage discrimination has

170. *Id.* at 718–19. Distinguishing between laws that are discriminatory on their face and laws that are facially neutral with a discriminatory purpose and effect is an important threshold issue. *Id.* The former exhibits a classification that, by its very terms, classifies a group of individuals, while the latter exhibits a classification implicit in nature that requires a showing that the Government purposely intended to discriminate against a class of persons, followed by a discriminatory impact on the affected class. *Id.*

171. See *supra* note 137 and accompanying text; *supra* text accompanying note 147.

172. See *supra* note 137 and accompanying text; *supra* text accompanying notes 148–49.

173. See *supra* note 137 and accompanying text; *supra* text accompanying notes 148–49.

174. See discussion *infra* Parts V.B.

175. See *supra* note 137 and accompanying text; *supra* text accompanying notes 148–49.

176. CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 155, at 719–20.

177. See, e.g., *In re Griffiths*, 413 U.S. 717, 721 (1973) (affirming strict judicial scrutiny for alien classifications); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (“Aliens as a class are a prime example of a ‘discrete and insular’ minority . . . for whom such heightened judicial solicitude is appropriate.”) (citation omitted); see also BLACK’S LAW DICTIONARY, *supra* note 27, at 1558 (defining strict scrutiny as “[t]he standard applied to suspect classifications . . . in

been “a bare desire to harm a politically unpopular group.”¹⁷⁸ Furthermore, “aliens as a class are a prime example of a ‘discrete and insular minority’ . . . for whom such heightened judicial solicitude is appropriate.”¹⁷⁹ At times though, principles of congruity between the Fifth and Fourteenth Amendments erode in the context of federal alienage classifications, which ushers in rational basis review.¹⁸⁰ Given the NDAA’s alienage classification and the national security interests involved in wartime, the level of scrutiny courts would impose remains unclear.¹⁸¹

Contextually, the NDAA’s detainee provisions implicate the rights of non-citizens during wartime.¹⁸² Alienage classifications that discriminate against non-citizens are “inherently suspect,” which is similar to discriminatory classifications based on national origin or race.¹⁸³ From this premise, it follows that an exacting standard of review should follow. In *Korematsu v. United States*,¹⁸⁴ the Supreme Court pronounced a rigorous standard of review for purposes of equal protection scrutiny when it considered the forced internment of Japanese-American citizens.¹⁸⁵

equal protection analysis and to fundamental rights in due-process analysis,” and stating strict scrutiny calls upon “the state [to] establish that it has a compelling interest that justifies and necessitates the law in question”).

178. *Romer v. Evans*, 517 U.S. 620, 634 (1996) (quoting *Dep’t of Agric. v. Moreno*, 43 U.S. 528, 534 (1973)); see *Fong Yue Ting v. United States*, 149 U.S. 698, 754 (1893) (Field, J., dissenting) (“[Aliens] differ only from citizens in that they cannot vote, or hold any public office.”).

179. *Graham*, 403 U.S. at 372 (citation omitted) (internal quotation marks omitted).

180. See, e.g., *Hampton v. Mow Sun Wong*, 426 U.S. 88, 103 (1976) (inferring that, in the context of congressional or presidential alienage discrimination, the Supreme Court might “presume that any interest which might rationally be served by the rule did in fact give rise to its adoption”); *Mathews v. Diaz*, 426 U.S. 67, 83 (1976) (upholding a federal law that restricted a resident alien’s eligibility claim for Medicaid benefits on the basis that the law was not “wholly irrational”); see also BLACK’S LAW DICTIONARY, *supra* note 27, at 1376 (defining rational basis test as “[t]he criterion for judicial analysis of a statute that does not implicate a fundamental right or a suspect or quasi-suspect classification under the Due Process or Equal Protection Clause”).

181. See Katyal, *supra* note 153, at 1365 (recognizing that court rooms and the general public have difficulties with questions of balancing national security interests against personal civil liberties). Professor Neal Katyal advocates for the courts to utilize equal protection scrutiny over substantive due process analysis when dealing with alien discrimination in wartime—the former only requires evenhandedness while the latter might unduly restrain Executive Branch policies in armed conflicts. *Id.* at 1366–68. “[Discrimination] is not appropriate when it determines whether someone can be put before a tribunal whose jurisdiction includes dispensing the most awesome powers of government, such as life imprisonment and the death penalty.” *Id.* at 1367.

182. See discussion *supra* Part IV.

183. See *Graham*, 403 U.S. at 372 (“[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect.”); CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 155, at 917 (“Alienage classifications refer to discrimination against non-citizens.”).

184. *Korematsu v. United States*, 323 U.S. 214 (1944).

185. *Id.*

The Supreme Court began with a premise and declared classifications based on race as subject to strict scrutiny:

[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.¹⁸⁶

The fact that alienage classifications are strikingly similar to those of race and national origin necessitate a heightened level of scrutiny to protect the fundamental interests of equality and liberty for citizens and non-citizens alike.¹⁸⁷ *Korematsu* is instructive for providing the standard of review that should guide the courts in analyzing the NDAA's unequal detainee provisions—anything lower than strict judicial scrutiny would compromise Omaid's liberty interest and right to equal treatment in the drawn-out conflict in Afghanistan.¹⁸⁸

C. DOES THE PARTICULAR GOVERNMENT ACTION MEET THE LEVEL OF SCRUTINY?

Assessing the constitutionality of the NDAA's detainee provisions under strict judicial scrutiny requires analyzing the law's means and ends; and for a court to uphold the law, it must deem the ends as compelling.¹⁸⁹

186. *Id.* at 216; see BLACK'S LAW DICTIONARY, *supra* note 27, at 1558 (indicating that strict scrutiny calls upon "the state [to] establish that it has a compelling interest that justifies and necessitates the law in question").

187. See *Fong Yue Ting v. United States*, 149 U.S. 698, 754 (1893) (Filed, J., dissenting) ("As men having our common humanity, they are protected by all the guaranties of the constitution. To hold that they are subject to any different law, or are less protected . . . than other persons . . . ignore[s] the teachings of our history, the practice of our government, and the language of our constitution."); see also *Romer v. Evans*, 517 U.S. 620, 631 (1996) (finding that classifications, "neither [of which] burden[] a fundamental right nor target[] a *suspect class*," are upheld "so long as it bears a rational relation to a legitimate end") (emphasis added).

188. See CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 155, at 719 ("[A] law is upheld if it is proven necessary to achieve a compelling government purpose."); cf. BLACK'S LAW DICTIONARY, *supra* note 27, at 1376 (specifying that, under rational basis review, "the court will uphold a law if it bears a reasonable relationship to the attainment of a legitimate government objective"). As Professor Chemerinsky details, strict judicial scrutiny is a rigorous standard of review:

The government must have a truly significant reason for discriminating, and it must show that it cannot achieve its object through any less discriminatory alternative. The government has the burden of proof under strict scrutiny and the law will be upheld only if the government persuades the court that it is necessary to achieve a compelling purpose.

CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 155, at 719.

189. CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 155, at 719; see BLACK'S LAW

Concerning the ends, it is necessary to look at the underinclusiveness of the NDAA's detention provisions to see if it applies equally to those who are similarly situated under the law.¹⁹⁰ In the context of strict scrutiny, the ends must be compelling, and the means to achieve that end must be a close fit; so much so that "the means are necessary—the least restrictive alternative—to achieve the goal."¹⁹¹

Under section 1022 of the NDAA, the unequal detainee provisions are convincingly underinclusive: only aliens are readily subject to mandatory military detention, whereas U.S. citizens and lawful resident aliens are clearly exempt from the mandate.¹⁹² Even President Obama's Directive, which animates section 1022 of the NDAA, is underinclusive.¹⁹³ These findings alone do not end the inquiry. We must look to see whether the means are necessary to achieve the Government's goals.¹⁹⁴

In the context of the AUMF and the armed conflict in Afghanistan, never before has Congress or the President qualified the ability to detain an enemy combatant because of his or her citizenship status.¹⁹⁵ For even law of war principles—tenets inextricably linked with the AUMF—reflect fundamental precepts of equality.¹⁹⁶ Even in the face of war, there is still a need to curb military discretion for both Congress and the President because the threat of force must be proportionate to the dangers at hand.¹⁹⁷

DICTIONARY, *supra* note 27, at 321 (defining compelling-state-interest test as the means "for determining the constitutional validity of a law, whereby the government's interest in the law and its purpose is balanced against an individual's constitutional right that is affected by the law; only if the government's interest is strong enough will the law be upheld").

190. CHEMERINSKY, *CONSTITUTIONAL LAW*, *supra* note 155, at 721 ("A law is underinclusive if it does not apply to individuals who are similar to those whom the law applies.").

191. *Id.* at 722.

192. *See supra* text accompanying notes 137, 148–49.

193. *See supra* text accompanying notes 144–45, 147.

194. *See supra* text accompanying notes 189–91.

195. *See* discussion *supra* Part II.

196. *See* Katyal, *supra* note 153, at 1370; discussion *supra* Part II. "The Geneva Conventions, for example, require a signatory to treat prisoners of war the same way as it treats its own soldiers." Katyal, *supra* note 153, at 1391 (citing Geneva Conventions Relative to the Treatment of Prisoners of War art. 102, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135).

197. *See* *Korematsu v. United States*, 323 U.S. 214, 219 (1944) ("[H]ardships are part of war, and war is an aggregation of hardships."). *But see* *Boumediene v. Bush*, 553 U.S. 723, 796–97 (2008) ("In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.") (citation omitted).

The armed conflict in Afghanistan has been ongoing for over ten years and now is the point in time in which Congress seeks to relegate a suspect class to unequal detention on the face of the law?¹⁹⁸

“[W]hen under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.”¹⁹⁹ The United States has in place timetables for drawing down combat troops in Afghanistan by 2014.²⁰⁰ In light of these timetables, the judiciary must reassess the degree of danger and the power to protect an individual’s liberty interests.²⁰¹ Since active combat operations are winding down, should it follow then that military discretion be less compelling?²⁰² While the “[i]nvocation of . . . equal protection . . . does not disable any governmental body from dealing with the subject at hand[,] [i]t merely means that the prohibition or regulation must have a broader impact.”²⁰³ This principle is lacking in the context of the NDAA’s detainee provisions for the military’s present interests are not as compelling as they once were when the plurality in *Hamdi* declared that enemy combatants may be held through the course of active combat operations.²⁰⁴ As stated in *Boumediene*, “The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled . . . within the framework of the law.”²⁰⁵ Decidedly so, the NDAA’s detainee provisions adversely affect Omaid’s interests for equal protection of the laws under the Fifth Amendment’s Due Process Clause, and his liberty interests must be reconciled in these most troubling of times.²⁰⁶

198. See *Korematsu*, 323 U.S. at 234 (Murphy, J., dissenting) (“[T]he military claim [of discretion] must subject itself to the judicial process of having its reasonableness determined and its conflicts with other [individual] interests reconciled.”).

199. *Id.* at 220.

200. See *supra* note 6 and accompanying text.

201. See *Boumediene*, 553 U.S. at 797–98 (“Because our Nation’s past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury.”).

202. See *supra* note 65 and accompanying text.

203. *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

204. See *supra* note 65 and accompanying text.

205. *Boumediene*, 553 U.S. at 798.

206. See *Katyal*, *supra* note 153, at 1370 (“In an era where the boundaries of national security and personal liberty are being shaped in all sorts of unforeseen ways . . . , the insistence on evenhandedness can at times be more appropriate than the attempts to freeze substantive standards into the Constitution.”).

VI. CONCLUSION

On its face, the NDAA's detainee provisions artificially draw an errant alienage classification for unequal treatment and disparate confinement.²⁰⁷ "The U.S. prison camp at Guantánamo Bay stands as a challenge to our nation. It challenges our readiness to do the right thing in times of crisis, the times when it's most important, and most difficult, to adhere to our founding principles and to follow the rule of law."²⁰⁸ Now is the time to uphold equal liberty interests for all in the face of executive detention and declare strict judicial scrutiny for citizens and non-citizens alike.²⁰⁹

Under the Constitution, there are guarantees of equal protection of the laws and safeguards for our most fundamental of rights.²¹⁰ These principles apply equally amongst us, regardless of creed, color, or country.²¹¹ As Justice Thurgood Marshall explained, "[C]onstitutional principles of equality . . . evolve over time; what once was a 'natural' and 'self-evident' ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom."²¹² Since Congress enacted the NDAA's invidious detainee provisions,²¹³ the very men and women sworn to protect our most dear and unalienable of rights threaten to erode them in due time—life and liberty among them.²¹⁴ As the Supreme Court recognized, "Security subsists . . . in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers."²¹⁵

We must recognize now—and not later—that this alienage classification is anything but natural and stifles freedom for us all.²¹⁶ For the drafters of the Declaration of Independence recognized certain "truths to be self-evident, that all men are created equal . . ."²¹⁷ This resounding principle is on the precipice of erosion. Recalling the words of Thomas Paine, "He that would make his own liberty secure[,] must guard even his

207. See *supra* note 137 and accompanying text; *supra* text accompanying notes 148–49.

208. KHAN, *supra* note 1, at xi.

209. See discussion *supra* Part V.B.

210. See *supra* text accompanying notes 151–58.

211. See *supra* text accompanying notes 151–58.

212. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 466 (1985) (Marshall, J., concurring in part and dissenting in part).

213. See discussion *supra* Part IV.

214. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

215. *Boumediene v. Bush*, 553 U.S. 723, 797 (2008).

216. See *supra* text accompanying note 163; discussion *supra* Part V.A.

217. THE DECLARATION OF INDEPENDENCE para. 2.

2012]

UNDER THE LENS OF THE CONSTITUTION

141

enemy from oppression; for if he violates this duty[,] he establishes a precedent that will reach to himself.”²¹⁸ Standing upon the shoulders of giants, I believe that the NDAA’s detainee provisions are contrary to the guarantees of equal protection and fundamental liberty interests for all persons under the United States Constitution.

218. See Katyal, *supra* note 153, at 1394 (quoting THOMAS PAINE, DISSERTATION ON FIRST PRINCIPLES OF GOVERNMENT (July 1795), in 2 THE COMPLETE WRITINGS OF THOMAS PAINE 570, 588 (Philip S. Foner ed., The Citadel Press 1945)) (internal quotation marks omitted).