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## MEASURING THE THREAT: A PROPOSAL FOR A NEW DETAINEE VITIATION STANDARD

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### I. INTRODUCTION

Americans have come to accept the detention of foreign terrorist suspects as a necessary by-product of the Nation's ongoing Overseas Contingency Operations ("OCO"). What most Americans do not think about, however, are the criteria necessary to determine both whom to detain and for how long. In *Boumediene v. Bush*,<sup>1</sup> the U.S. Supreme Court afforded the U.S. District Court for the District of Columbia ("D.C. District Court") the complete authority to answer these fundamental questions.<sup>2</sup> In doing so, the Court itself missed an opportunity to outline procedural rules for detention trials, and instead, permitted the D.C. District Court to establish these critically important guidelines.<sup>3</sup> However, despite this opportunity to set the procedural contours for detention cases, the D.C. District Court, and later the U.S. Court of Appeals for the District of Columbia ("D.C. Circuit Court"), have issued sometimes inconsistent rulings that paint a confusing picture of how these cases should proceed.<sup>4</sup>

One critical question of U.S. detention policy has been met with diverse judicial interpretations at the D.C. District Court: once the government establishes that a detainee's relationship with a terrorist organization existed, can that relationship ever be vitiated<sup>5</sup>? In other words, if someone satis-

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1 553 U.S. 723 (2008).

2 *Id.* at 796 ("We make no attempt to anticipate all of the . . . issues that will arise during the course of the detainees' habeas corpus proceedings."); *id.* at 798 ("The cases are remanded to the Court of Appeals with instructions that it remand the cases to the District Court for proceedings consistent with this opinion.").

3 *See generally id.* at 796 ("These and the other remaining questions are within the expertise and competence of the District Court to address in the first instance."); Baher Azmy, *Executive Detention, Boumediene, and the New Common Law of Habeas*, 95 IOWA L. REV. 445, 481 (2010) (suggesting that *Boumediene* failed to empower executive action to imprison a person because it did not establish concrete procedures as a guide for future review).

4 *See* Colin C. Pogge, *A Dissentious "Debate": Shaping Habeas Procedures Post-Boumediene*, 88 TEX. L. REV. 1073, 1097 (2010) (describing how the current state of Guantanamo jurisprudence in the D.C. District Court "breeds uncertainty and skepticism" and "personifies a court in disagreement about the way in which suspected terrorists are treated in our legal system, a disagreement in need of a resolution").

5 "Vitiate" is defined as "to make void or voidable." BLACK'S LAW DICTIONARY (9th ed. 2009).

fies the criteria for detention as an enemy combatant, does that determination serve as an indelible scarlet letter? Or can that relationship be vitiated by changed circumstances or time? This Article will argue that, following the statutory foundation of the current conflict and accepted tenets of the laws of war, such a determination does *not* serve as a scarlet letter justifying continued detention. Instead, the United States must take into account the *current* threat of the individual to justify further detention. Part II of this Article will summarize the current scope of U.S. detention power as interpreted by the D.C. District and D.C. Circuit Courts, and will synthesize recent caselaw to determine the current standard for vitiation. Next, Part III will argue that the current vitiation standard is inconsistent with governing law, and will recommend a standard that considers the current threat the detainee poses to the United States. Finally, Part III will also recommend that Congress establish this standard.

## II. BACKGROUND

### A. *Development of the Current Standard*

#### 1. *Controlling Supreme Court Opinions*

The Supreme Court has issued three opinions exploring how OCO detainees can challenge their detention.<sup>6</sup> These decisions established much of the general procedures followed today in detention proceedings, but they have also left many critical questions unanswered.

*Hamdi v. Rumsfeld*<sup>7</sup> and *Rasul v. Bush*,<sup>8</sup> both decided in 2004, were the first cases related to how detainees can challenge their detention. In *Hamdi*, the Court commented that both Congress and the Court relied on historical “law-of-war principles” when analyzing situations in which indefinite detention has been authorized.<sup>9</sup> The Court held that when the United States detains citizens as enemy combatants, the government must inform the citizen-detainee of “the factual basis for his classification” and permit the citizen detainee to challenge the government’s case before an impartial court.<sup>10</sup> In *Rasul*, the Court held that detainees confined at the Naval Station Guantanamo Bay have the right to petition the D.C. District Court to contest their detention under the habeas corpus statute.<sup>11</sup>

In *Boumediene*, the Court held that Guantanamo detainees have a constitutional right to habeas

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6 See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (announcing “that indefinite detention for the purpose of interrogation is not authorized”); *Rasul v. Bush*, 542 U.S. 466, 475 (2004) (framing the issue as “whether the habeas statute confers a right to judicial review of the legality of executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction . . .”); *Boumediene*, 553 U.S. at 771 (ruling that to deny the writ of habeas corpus, Congress must utilize the Suspension Clause).

7 542 U.S. 507 (2004).

8 542 U.S. 466 (2004).

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

10 *Id.* at 533.

11 See *Rasul*, 542 U.S. at 484 (interpreting the law as providing the Court jurisdiction to hear the habeas corpus review) (referencing 28 U.S.C. § 2241(c)(1) (“The writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody under or by color of the authority of the United States or is committed for trial before some court thereof . . . .”)).

relief, one that Congress cannot eliminate unless habeas is suspended or adequate alternative procedures are established.<sup>12</sup> The Court found that no such adequate alternative procedure existed,<sup>13</sup> and held that the D.C. District Court would hear all Guantanamo habeas detention petitions.<sup>14</sup> In doing so, the Court left the procedural and substantive standards open for lower courts to determine via the common law process.<sup>15</sup> With this holding, the Court sought to balance the competing principles of proper deference to the Executive on matters of national security<sup>16</sup> and the need for the Judiciary to settle “challenges to the authority of the Executive to imprison a person.”<sup>17</sup> However, the Court refrained from affirmatively setting any standards by which the D.C. District Court would decide habeas petitions, emphasizing that the “opinion [did] not address the content of the law that governs petitioners’ detention . . . [as the law was] yet to be determined.”<sup>18</sup> Thus, when given a prime opportunity to set the standards governing the limits of the Executive’s detention authority, the Court declined, and left open critical questions of U.S. detention policy.<sup>19</sup>

### *B. Current Scope of Detention Authority*

Before addressing the specific issue of vitiating, it is important to first establish the current scope of U.S. detention authority, both as expressed by the Obama administration and as interpreted by the D.C. District and D.C. Circuit Courts.

#### *1. Obama Administration Position and Statutory Foundation*

Soon after President Obama was elected, his administration indicated that it would seek to clarify the scope of U.S. detention power and direct Congress to establish standards for detention prosecutions.<sup>20</sup> The administration has, however, supported the *Boumediene* framework of allowing

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12 *Boumediene*, 553 U.S. at 771.

13 *Id.* at 792 (finding the DTA review process to be a facially inadequate replacement for habeas corpus).

14 *Id.* at 796 (“If, in a future case, a detainee files a habeas petition in another judicial district in which a proper respondent can be served . . . the [g]overnment can move for change of venue to the . . . United States District Court for the District of Columbia.”).

15 *See* Azmy, *supra* note 3, at 514 (commenting that the Court has left it up to the lower courts to resolve “factual disputes or mixed questions”).

16 *See Boumediene*, 553 U.S. at 796–97 (attempting to reconcile the competing purposes of the Judiciary to uphold the Executive’s judgments on national security and to protect one’s personal liberty to be free from restraints).

17 *Id.*

18 *Id.* at 798; *see* Azmy, *supra* note 3, at 514 (commenting that the Court has left it up to the lower courts to resolve “factual disputes or mixed questions”).

19 *See* Gharebi v. Obama, 609 F. Supp. 2d 43, 45 (D.D.C. 2009) (“Remarkably, despite the years that have passed since these habeas corpus petitions were filed, the state of the law regarding the scope of the President’s authority to detain the petitioners remains unsettled.”); Benjamin Wittes et al., *The Emerging Law of Detention: The Guantanamo Habeas Cases as Lawmaking*, THE BROOKINGS INST., Jan. 22, 2010 (noting that in *Boumediene*, the Court “declined to address a number of critical questions that define the contours of any non-criminal detention system”).

20 President Barack Obama, Remarks by the President on National Security at the National Archives (May 21, 2009) (“We must have clear, defensible and lawful standards for those [who we cannot prosecute even though they are a danger to the United States].”).

the D.C. District Court to develop habeas litigation standards via the common law process.<sup>21</sup> The administration's position "means that for good or ill, these rules will be written by judges through the common-law process of litigating the habeas corpus cases of the . . . detainees still held at Guantanamo."<sup>22</sup> In addition, the administration claims that it has the authority to detain not only members of al Qaeda and other terrorist groups, but also those who "substantially support" those groups.<sup>23</sup> The administration cites the Authorization for Use of Military Force ("AUMF")<sup>24</sup> as its statutory justification for this authority.<sup>25</sup>

The Obama administration's assertion of detention authority represents a more modest approach than that of the Bush administration in two ways. First, the Bush administration asserted authority to detain not only members of al Qaeda, but also its "associated forces."<sup>26</sup> This rather wide scope of asserted authority is evident in former President Bush's statement before a joint session of Congress on September 20, 2001, in which he said "[o]ur enemy is a radical network of terrorists, and every government that supports them. Our war begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated."<sup>27</sup> Second, and perhaps more importantly, the Bush administration based its authority to detain alleged terrorists not only on the AUMF, like the Obama administration, but also on the inherent authority imbued in the Executive by Article II of the U.S. Constitution.<sup>28</sup> The Obama administration has

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21 Peter Baker, *Obama to Use Current Law to Support Detentions*, N.Y. TIMES, Sept. 23, 2009.

22 Wittes, *supra* note 19, at 4.

23 See *Anam v. Obama*, 653 F. Supp. 2d 62, 63 (D.D.C. 2009) ("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 . . .").

24 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter AUMF].

25 See John R. Crook, *State Department Legal Advisor Explains U.S. Approach to International Law*, 104 AM. J. INT'L L. 271, 275 (2010) (quoting State Department Legal Advisor Harold Koh as stating that the administration's detention authority relies on "legislative authority expressly granted to the President in the 2001 AUMF"); Baker, *supra* note 21 ("Instead, the administration will continue to hold the detainees without bringing them to trial based on the power it says it has under the Congressional resolution passed after the attacks of Sept. 11, 2001, authorizing the [P]resident to use force against forces of Al Qaeda and the Taliban.").

26 See Wittes, *supra* note 19, at 16 ("The Bush administration asserted . . . [that it had] the power to detain for the duration of hostilities both members and supported of entities—including Al Qaeda, the Taliban, and 'associated forces.'").

27 President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001); see David Mortlock, *Definite Detention: The Scope of the President's Authority to Detain Enemy Combatants*, 4 HARV. L. & POL'Y REV. 375, 387 (2010) (quoting Bush administration counsel as asserting authority to detain a "little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities, a person who teaches English to the son of an al Qaeda member, and a journalist who knows the location of Osama bin Laden but refuses to disclose it to protect her source").

28 See Mortlock, *supra* note 27, at 378 (noting that "[t]he Bush administration repeatedly argued that its authority to detain arose not only from the AUMF, but also from the President's authority as Commander-in-Chief under Article II of the Constitution").

explicitly chosen not to base its claim for detention authority on such Article II powers.<sup>29</sup>

Given that the AUMF is the only statutory authority cited by the Obama administration, analysis of the statute is critical to a discussion of the government's detention power. The AUMF is concise and direct. The preamble provides the legal foundation of the statute, namely that the President has the constitutional authority to deter and prevent future acts of international terrorism against the United States.<sup>30</sup> The statute then provides:

[T]he [P]resident 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.<sup>31</sup>

When he signed the resolution into law on September 18, 2001, President Bush underscored the preventative nature of the authorization.<sup>32</sup>

Analysis of the Military Commissions Act ("MCA") is also instructive in this context, as it provides definitions of terms used in cases discussed throughout this Article.<sup>33</sup> The purpose of the MCA (both the original 2006 Act and its amendments in 2009), in general, is to "authorize trial by military commission for violations of the law of war, and for other purposes."<sup>34</sup> However, given that military commissions and the post-*Boumediene* common law process deal with similar legal questions and concepts, it is helpful to analyze whom Congress believed the administration could try in military commissions, outside of the normal civilian courts. Courts today still cite to the 2006 MCA when discussing the scope of U.S. detention authority.<sup>35</sup>

The 2006 MCA and the 2009 amendments define those who fall under the scope of the ad-

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29 See *Gherebi v. Obama*, 609 F. Supp. 2d 43, 53 n.4 (D.D.C. 2009) ("Under the Bush administration, the government had repeatedly asserted that it could detain individuals pursuant to the President's authority as Commander-in-Chief under Article II, § 2, clause 1 of the Constitution . . .").

30 AUMF at pmbl.

31 *Id.*

32 Press Release, White House Office of the Press Secretary, President Signs Authorization for Use of Military Force Bill (Sept. 18, 2001), <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/print/20010918-10.html>.

33 See generally Military Commissions Act of 2006, Pub.L. No. 109-366, 120 Stat. 2600 (2006) [hereinafter "2006 MCA"]; Military Commissions Act of 2009, Pub. L. No. 111-84, tit. XVIII, 123 Stat. 2190 (2009) [hereinafter "2009 MCA"].

34 2006 MCA pmbl.

35 See, e.g., *Al-Bihani v. Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010) (citing 2006 MCA sec. 3, § 948a(1)) ("Congress, in the 2006 MCA, provided guidance on the class of persons subject to detention under the AUMF by defining unlawful enemy combatants who can be tried by a military commission.").

ministration's military commission structure in similar ways.<sup>36</sup> The 2006 MCA defined an unlawful enemy combatant (then the general definition of a terrorist who the government was authorized to detain) as "a person who has . . . purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant . . ."<sup>37</sup> While the 2009 MCA amendments abandoned the term "unlawful enemy combatant" altogether, and instead described the type of person under MCA jurisdiction as an "unprivileged enemy belligerent,"<sup>38</sup> the definition of unprivileged enemy belligerent used language nearly identical to that of "unlawful enemy combatant." The 2009 amendments' definition covered individuals who have "engaged in hostilities against the United States or its coalition partners," who either "purposefully and materially supported hostilities against the United States or its coalition partners" or "[were] part of al Qaeda at the time of the alleged offense under this chapter."<sup>39</sup>

## 2. *Judicial Interpretation of the Obama Position*

The Obama administration explicitly envisioned that the Judiciary would determine, on a case-by-case basis, what constitutes the level and type of "substantial support" required for detention.<sup>40</sup> The courts initially accepted the administration's assertion of detention authority. In *Gherebi v. Obama*,<sup>41</sup> D.C. District Court Judge Walton agreed with the administration's claim that the AUMF provided a sufficient justification for detention,<sup>42</sup> and adopted "the basic framework advanced by the government for determining whether an individual is subject to that authority."<sup>43</sup> However, Judge Walton qualified<sup>44</sup> the substantial support standard, interpreting it to include only individuals who

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36 Compare 2006 MCA § 948a(1)(i) (defining an "unlawful enemy combatant" as "a person who has . . . purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)"), with 2009 MCA § 948a(7)(a)–(c) (conferring jurisdiction over those who have "engaged in hostilities against the United States or its coalition partners . . . [have] purposefully and materially supported hostilities against the United States or its coalition partners," or "[were] part of al Qaeda at the time of the alleged offense under this chapter").

37 2006 MCA § 948a(1)(i).

38 2009 MCA § 948a(7).

39 *Id.* § 948a(7)(a)–(c).

40 See *Gherebi v. Obama*, 609 F. Supp. 2d 43, 53 (D.D.C. 2009) (citing Memo for the Government at 1–2, *Gherebi v. Obama*, 609 F. Supp. 2d 43 (D.D.C. 2009)) ("However, the government believes that '[i]t is neither possible nor advisable . . . to attempt to identify[] in the abstract[] the precise nature and degree of 'substantial support,' or the precise characteristics of 'associated forces.' . . . Instead, it opines that 'the contours of the 'substantial support' and 'associated forces' bases of detention will need to be further developed in their application to concrete facts in individual cases.'").

41 609 F. Supp. 2d 43 (D.D.C. 2009).

42 See *id.* at 54 ("For the reasons explained at length below, the Court agrees with the government that the AUMF functions as an independent basis in domestic law for the President's asserted detention authority . . .").

43 *Id.*

44 See *Mortlock*, *supra* note 27, at 390–91 (stating that the court "did not reject outright the government's 'substantial support' standard", but simply "limit[ed] its application to detainees who fit his criteria for membership in the hierarchy of enemy organizations").

were “effectively” part of enemy terrorist armed forces.<sup>45</sup> In this regard, Judge Walton’s interpretation is similar to certain elements of the 2009 MCA: those subject to the administration’s detention power must have “engaged in hostilities against the United States or its coalition partners” and have been “part of al Qaeda at the time of the alleged offense under this chapter.”<sup>46</sup> Judge Walton’s framework has since been applied by D.C. District Court judges in *Mohammed v. Obama*<sup>47</sup> and *Al-Adabi v. Obama*.<sup>48</sup>

In *Hamliby v. Obama*,<sup>49</sup> D.C. District Court Judge Bates adopted a narrower approach. Judge Bates outright rejected the “substantial support” standard,<sup>50</sup> and instead held that the key inquiry in any habeas challenge was whether the individual was part of al Qaeda in that he or she “function[ed] or participate[d] within or under the command structure of the organization.”<sup>51</sup> In determining whether someone satisfies this test, some level of “knowledge or intent is required.”<sup>52</sup> This requirement emphasizes the “functionality” of Judge Bates’ test. An individual is not detainable by the United States if he or she is unwittingly part of a terrorist group; the individual actually has to functionally serve that group in some capacity. In elucidating this test, Judge Bates directly hearkened back to the Bush administration’s claim of authority to detain “associated forces,”<sup>53</sup> and agreed that detention of such “associated forces” was justified according to his model.<sup>54</sup> Therefore, although Judge Bates declined to set an actual bright line standard,<sup>55</sup> he offered a framework stipulating that detainees need be a co-belligerent to have been part of a terrorist group<sup>56</sup> to justify detention. The D.C. District

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45 See *Gherebi*, 609 F. Supp. 2d at 70 (“In other words, the Court interprets the government’s ‘substantial support’ standard to mean individuals who were members of the ‘armed forces’ of an enemy organization at the time of their initial detention.”).

46 2009 MCA §948a(7)(a)–(c).

47 704 F. Supp. 2d 1, 4 (D.D.C. 2009) (concluding that “Judge Walton’s opinion presented a clearer approach, and therefore [adopting] his reasoning and conclusion”).

48 No. 05-280, 2009 WL 2584685, at \*3 (D.D.C. Aug. 21, 2009) (noting that “[w]hile the Court has great regard for the scholarship and analysis contained in both decisions, the Court concludes that Judge Walton’s opinion presented a clearer approach, and therefore will adopt his reasoning and conclusion”).

49 616 F. Supp. 2d 63 (D.D.C. 2009).

50 See *id.* at 69 (holding that “detention based on substantial or direct support for the Taliban, al Qaeda or associated forces, without more, is simply not warranted by domestic law or the law of war”).

51 *Hamliby*, 616 F. Supp. 2d at 75.

52 *Id.*

53 See Wittes, *supra* note 19, at 16 (“The Bush administration asserted . . . [that it had] the power to detain for the duration of hostilities both members and supporters of entities—including [a]l Qaeda, the Taliban, and ‘associated forces’ . . .”).

54 *Hamliby*, 616 F. Supp. 2d at 70 (stating that “[t]he authority also reaches those who were members of ‘associated forces’ which the Court interprets to mean ‘co-belligerents’ . . .”).

55 *Id.* at 75 (“With respect to the criteria to be used in determining whether someone was ‘part of’ the ‘Taliban or al Qaida or associated forces,’ the Court will not attempt to set forth an exhaustive list because such determinations must be made on an individualized basis.”).

56 See *id.* (“Accordingly the government has the authority to detain members of ‘associated forces’ as long as those forces would be considered co-belligerents . . .”). The court also emphasized that “some level of knowledge or intent” to be associated with the terrorist group was required for justified detention. *Id.*



Court has since applied the *Hamli* approach in a number of cases.<sup>57</sup>

Comparing the *Hamli* and *Gherebi* tests is instructive, as the difference between the two, while appearing to be great at first, is essentially one of semantics. While Judge Walton accepted the “substantial support” standard by qualifying it to mean something that the administration may or may not agree with,<sup>58</sup> Judge Bates rejected the test while describing a standard that is not dissimilar to that used by Judge Walton.<sup>59</sup> Judge Bates even cited Judge Walton’s *Gherebi* opinion in describing what satisfied the “functionality” requirement of his test.<sup>60</sup> So, while Judge Bates rejected the substantial support standard in a literal sense,<sup>61</sup> and described this as the defining distinction between he and Judge Walton,<sup>62</sup> even Judge Bates acknowledged that “as applied in specific cases, this difference should not be great.”<sup>63</sup>

The current law controlling the scope of the administration’s detention power, however, is found in a recent D.C. Circuit Court opinion, *Al-Bibani v. Obama*.<sup>64</sup> Writing for the D.C. Circuit Court, Judge Brown departed from *Hamli* and its progeny, and accepted that substantially supporting a terrorist group *can* be sufficient grounds for detention, so long as the detainee is “part of” al Qaeda in that he “purposefully and materially support[ed] . . . hostilities against the U.S. [or c]oalition

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57 See, e.g., *Abdah v. Obama*, 708 F. Supp. 2d 9, 12 (D.D.C. 2010) (holding that, “accordingly, as Judge Bates ruled in *Hamli* . . . the U.S. may detain “those who are ‘part of the ‘Taliban or al Qaeda forces’ . . .”); *Anam v. Obama*, 696 F. Supp. 2d 1, 3-4 (D.D.C. 2010). (applying *Hamli* standard); *Awad v. Obama*, 646 F. Supp. 2d 20, 23 (D.D.C. 2009) (noting that the court has “adopted Judge Bates’ approach [in *Hamli*]”), *aff’d* 608 F.3d 1 (D.C. Cir. 2010); *Al Maitari v. United States*, 644 F. Supp. 2d 78, 85 (D.D.C. 2009) (holding that the “the Court shall adopt the reasoning set forth in Judge John D. Bates’s decision in *Hamli* . . .”).

58 See *Gherebi v. Obama*, 609 F. Supp. 2d 43, 70 (D.D.C. 2009) (interpreting the “substantial support” standard “to mean individuals who were members of the ‘armed forces’ of an enemy organization at the time of their initial detention”).

59 See *Hamli*, 616 F. Supp. 2d at 75 (“Accordingly the government has the authority to detain members of ‘associated forces’ as long as those forces would be considered co-belligerents . . .”).

60 See *id.* (citing *Gherebi*, 609 F. Supp. 2d at 69) (noting, after describing the test, that “as *Gherebi* observed, [the functionality test could be satisfied by] an individual ‘tasked with housing, feeding, or transporting al-Qaeda fighters . . . but an al-Qaeda doctor or cleric, or the father of an al-Qaeda fighter who shelters his son out of familial loyalty, [is not likely detainable] assuming such individuals had no independent role in al-Qaeda’s chain of command’ . . .”).

61 See *id.* at 76 (“Hence, the government’s reliance on ‘substantial support’ as a basis for detention independent of membership in the Taliban, al Qaeda or an associated force is rejected.”).

62 *Id.* (“This represents a difference between this Court’s approach and that of Judge Walton in *Gherebi*.”).

63 *Id.*; see *Mortlock*, *supra* note 27, at 391 (noting that “[d]espite the apparently different treatment of ‘substantial support,’ the decisions in *Gherebi* and *Hamli* are functionally the same . . . [t]hey agree that only members of an enemy force may be detained, and that the level of support from one particular individual can be used to determine whether that individual falls into the hierarchical structure of an organization”).

64 590 F.3d 866 (D.C. Cir. 2010), *reh’g denied* 619 F.3d 1 (D.C. Cir. 2010). Petitioners moved for the D.C. Circuit Court to review the case to clarify whether certain statements relating to the controlling nature of international law were binding or dicta. See Charlie Savage, *Appeals Court Backs Away From War Powers Ruling*, N.Y. TIMES, August 31, 2010, at A14, available at <http://www.nytimes.com/2010/09/01/us/politics/01legal.html>. The panel’s denial did not completely resolve the issue; while seven of the nine panel judges concurred in a joint statement expressing their belief that the statements in question were dicta, two judges separately concurred to claim that the statements were not dicta but in fact controlling law. See *id.*

partners.”<sup>65</sup> Like *Hamliily* (and to a certain extent, *Gberebi*), Judge Brown qualified the Obama administration’s substantial support standard, drawing heavily upon the 2006 MCA and its 2009 amendments.<sup>66</sup> Judge Brown justified her application of the MCA to the realm of military detentions in that “the government’s detention authority logically covers a category of persons no narrower than is covered by its military commission authority.”<sup>67</sup> The result is a standard that has been described by its critics as entirely too broad,<sup>68</sup> but despite its arguably limitless scope, *Al-Bibani*’s interpretation of the substantial support standard is now binding law in all habeas petitions heard by the D.C. District and D.C. Circuit Courts.<sup>69</sup>

### C. Vitiating—Once a Terrorist, Always a Terrorist?

Once the D.C. District Court holds that the *Al-Bibani* criteria are met and the detention is justified for a particular terrorist suspect, can that status ever be vitiated? Put another way, “is eligibility for detention indelible in the sense that having once been a member or supporter of these groups, one can always be detained?”<sup>70</sup> If the answer is “yes,” and categorical, indefinite detention is compelled by satisfaction of the *Al-Bibani* criteria, what is the legal justification for that position? If not, and vitiating is possible, what should the test be, and what is the justification for that test?

The issue of vitiating has arisen in many detention cases, and D.C. District Court judges have taken “notably different positions on it.”<sup>71</sup> After analyzing each of these positions, and comparing them to the controlling law as held by the D.C. Circuit Court, this Article will then propose a different standard.

#### 1. Initial Interpretations by the D.C. District Court

In *Basardb v. Obama*,<sup>72</sup> D.C. District Court Judge Huvelle held that vitiating is possible, and depended on the “current likelihood of [the detainee] rejoining the enemy.”<sup>73</sup> Judge Huvelle did

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65 *Al-Bibani*, 590 F.3d at 872 (“*Al-Bibani* is lawfully detained whether the definition of a detainable person is, as the district court articulated it, ‘an individual who was part of or supporting Taliban or al Qaeda forces’ . . . or the modified version offered by the government that requires that an individual ‘substantially support’ enemy forces.”).

66 *See id.* (“But for this case, it is enough to recognize that any person subject to a military commission trial [per the 2006 MCA and 2009 amendments] is also subject to detention, and that category of persons includes those who are part of forces associated with [a] Qaeda or the Taliban or those who purposefully and materially support such forces in hostilities against U.S. Coalition partners.”).

67 *Id.*

68 *See* Mortlock, *supra* note 27, at 392 (noting that while the “Court’s ruling was consistent with the [*Gberebi* and *Hamliily* models, the *Al-Bibani* Court] issued dicta that went well beyond the principles of this membership model”).

69 *See* *Al-Adahi v. Obama*, 613 F.3d 1102, 1103 (D.C. Cir. 2010) (claiming that the *Al-Bibani* standard governs who can be detained by the government under the AUMF).

70 Wittes, *supra* note 19, at 23.

71 *Id.*

72 612 F. Supp. 2d 30 (D.D.C. 2009).

73 *Id.* at 35.

not take into account what had occurred prior to Basardh's detention,<sup>74</sup> but rather focused solely on what events, if any, occurred *after* his detention that could have some impact on the continued legality of that detention.<sup>75</sup> The government had encouraged Basardh to cooperate,<sup>76</sup> and he complied,<sup>77</sup> to the extent that his fellow detainees repeatedly threatened to kill him.<sup>78</sup> Basardh also said he felt unsafe returning to his homeland and wanted instead to gain asylum in the United States, and even join the U.S. military.<sup>79</sup> Judge Huvelle held that the AUMF, on which the Obama administration exclusively relies for detention authority, does not authorize detention "beyond that which is necessary to prevent [detainees] from rejoining the battle,"<sup>80</sup> and argued that *Hamdi* supported that interpretation.<sup>81</sup> Judge Huvelle stated that "Basardh's current likelihood of rejoining the enemy is relevant to whether his continued detention is justified under the law,"<sup>82</sup> and that in this context, the court must consider "evidence relating to whether the detainee is no longer a threat."<sup>83</sup> Judge Huvelle found that evidence illustrated that Basardh was no longer a threat to the United States, and therefore, the AUMF no longer justified Basardh's detention.<sup>84</sup>

In *Awad v. Obama*<sup>85</sup> and *Anam v. Obama*,<sup>86</sup> D.C. District Court Judges Robertson and Hogan adopted a stricter approach, holding that vitiation is not possible if the detainee *ever* satisfied the cri-

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74 *Id.* at 31 (noting that "petitioner's activities prior to his detention at Guantanamo . . . are not at issue here").

75 *See id.* ("Rather, the only issue before the Court is a narrow one—what, if any, relevance does Basardh's [behavior after detention] have to a determination of the lawlessness of his continued detention?").

76 *Id.* at 32 ("In addition, throughout this period [redacted] the government has encouraged [Basardh's cooperation]. . . [and] advised the detainee that in making its determination whether [he] could be released or transferred, the [government would] 'consider . . . if [he was] working with the United States government trying to help.'").

77 *See id.* ("Basardh 'cooperated his entire stay while [at Guantanamo]."); Del Quentin Wilber, *Detainee-Informer Presents Quandary for Government*, WASH. POST, Feb. 3, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/02/AR2009020203337.html> ("In dozens of interviews over several years at [Guantanamo Bay] . . . Yasim Muhammad Basardh provided the evidence needed to continue detaining scores of alleged terrorists, military and FBI records show. . . [I]t didn't take long for Basardh to begin identifying others who trained at [the] al-Farooq [al-Qaeda training camp], stayed at Taliban or al-Qaeda guest houses, protected bin Laden, or fought at Tora Bora.").

78 *See* 612 F. Supp. 2d at 32 (noting that the detainee "was beaten by other Detainees who believe he is a spy" and "was threatened many times to be killed by other Detainees"); *see also* Wilber, *supra* note 77 ("Basardh is a well-known informer among the other detainees at the prison.").

79 Wilber, *supra* note 77 ("He wants asylum in the United States and a chance to join the U.S military.").

80 *Basardh*, 612 F. Supp. 2d at 34.

81 *Id.*

82 *Id.* at 35.

83 *Id.*

84 *See id.* ("[T]he court concludes that the government has failed to meet its burden of establishing that Basardh's continued detention is authorized under the AUMF's directive that such force be used 'in order to prevent future acts of international terrorism' . . . [t]he undisputed facts establish that Basardh's [redacted] is known to the world, and thus, any ties with the enemy have been severed, and any realistic risk that he could rejoin the enemy has been foreclosed . . . his continued detention lacks a basis in fact as well as in law.").

85 646 F. Supp. 2d 20 (D.D.C. 2009).

86 696 F. Supp. 2d 1 (D.D.C. 2010).

teria for detention and a statutorily authorized conflict is still underway.<sup>87</sup> In *Awad*, Judge Robertson found that Awad was more likely than not part of al Qaeda for some period of time, but declined to even consider whether his continued detention was in any way related to his current threat to the United States.<sup>88</sup> Despite the fact that Judge Robertson acknowledged that it was “ludicrous” to think Awad still posed a security threat to the United States, he declined to address that consideration, basing his position on *Hamdi*’s holding that the President’s detention authority existed until the end of the relevant conflict.<sup>89</sup> Judge Hogan similarly refused the possibility of vitiation in *Anam*,<sup>90</sup> even after finding that Anam did not pose a threat to the security of the United States.<sup>91</sup> Again, Judge Hogan relied on *Hamdi* in holding that the President had the authority to detain for the duration of the relevant conflict,<sup>92</sup> and given that the relevant conflict was still ongoing, “the court’s hands [were] tied.”<sup>93</sup>

While *Anam*, *Awad*, and *Basardb* all explore whether vitiation is possible based on events *after* capture, *Al Gincio v. Obama*<sup>94</sup> explores the separate question of whether detention can be vitiated if the terrorist relationship does not exist *up until* the moment of capture.<sup>95</sup> In *Al Gincio*, the detainee had visited an al Qaeda camp, but then fell out of favor with al Qaeda and was subsequently tortured and imprisoned.<sup>96</sup> U.S. forces then took Al Gincio into custody.<sup>97</sup> Judge Leon first held that vitiation, in some capacity, is absolutely available to detainees.<sup>98</sup> He offered a factor-based test to determine if vitiation is justifiable in a given case, or, in other words, “whether a pre-existing [terror-

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87 See *id.* at 4 (concluding that because the detainee had met the standards for detention, the “Court’s hands are tied”); *Awad*, 646 F. Supp. 2d at 24 (noting that the detainee can be held for the duration of conflict according to *Hamdi* and the AUMF).

88 646 F. Supp. 2d at 24, 27 (declining to consider “whether or to what extent the continued detention of Awad supports the AUMF’s self-stated purpose of ‘prevent[ing] . . . future acts of international terrorism’ . . .”).

89 *Id.*

90 See *Anam*, 696 F. Supp. 2d at 4 (“Absent from the above framework is mention of the threat the individual poses to the national security of the United States. Though recognizing its normative appeal, the Court declines to adopt in this case Judge Ellen S. Huvelle’s conclusion in [*Basardb*] . . .”).

91 *Id.* (describing, at length, how Anam does not pose a threat to the United States).

92 See *id.* at 4 (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004)) (noting that “[u]nder the AUMF, the President possesses “the authority to detain for the duration of the relevant conflict . . . based on longstanding law-of-war principles”).

93 *Id.*

94 626 F. Supp. 2d 123 (D.D.C. 2009).

95 See *id.* at 130 (noting that “the conclusion is inescapable that [Al Gincio’s] pre-existing relationship, such as it was, was sufficiently vitiated that he was no longer ‘part of’ al Qaeda (or the Taliban) at the time he was taken into custody . . .”).

96 *Id.* at 127.

97 *Id.*

98 See *id.* at 128 (“By taking a position that defies common sense, the government forces this court to address an issue novel to these habeas proceedings: whether a prior relationship between a detainee and al Qaeda (or the Taliban) can be sufficiently vitiated by the passage of time, intervening events, or both, such that the detainee could no longer be considered to be ‘part of’ either organization at the time he was taken into custody. *The answer, of course, is yes.*”) (emphasis added).

ist] relationship has eroded over time.”<sup>99</sup> Judge Leon implied that, to be a valid detention, the illicit terrorist relationship must have continued up until the moment of capture.<sup>100</sup> He held that because of the “extraordinary intervening events”<sup>101</sup> present in Al Gingo’s case, the AUMF did not support Al Gingo’s detention at the time of his capture. The D.C. District Court has since applied this approach.<sup>102</sup>

## 2. D.C. Circuit Interpretation

### a. The Current Standard

The D.C. Circuit Court has indicated, in *Al-Bihani* and *Awad*,<sup>103</sup> its preference for the harder-line approach outlined by D.C. District Court Judges Robertson and Hogan in *Awad* and *Anam*.

Synthesis of the D.C. Circuit Court opinions in *Al-Bihani* and *Awad* illustrates the current standard, which basically provides that if the *Al-Bihani* test for detention is met, and authorized hostilities are ongoing, vitiation is impossible.<sup>104</sup> The standard therefore parallels the hard line, narrow approaches espoused by Judges Robertson and Hogan, and gives little credence at all to the arguments presented by Judges Huvelle and Leon.<sup>105</sup> In *Al-Bihani*, Judge Brown, writing for the court, accepted that the government initially had authority to detain Al-Bihani, and held that absent a determination by the political branches that hostilities had ceased, Al-Bihani’s continued detention was justified

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99 *Id.* at 129 (“[T]o determine whether a pre-existing relationship sufficiently eroded over a sustained period of time, the Court must, at a minimum, look to the following factors: (1) the nature of the relationship in the first instance; (2) the nature of intervening events or conduct; and (3) the amount of time that has passed between the time of the pre-existing relationship and the point in time at which the detainee is taken into custody.”).

100 *See id.* at 130 (“[T]he conclusion is inescapable that [Al Gingo’s] pre-existing relationship, such as it was, was sufficiently vitiated that he was no longer ‘part of’ al Qaeda (or the Taliban) at the time he was taken into custody . . . the [g]overnment has [therefore] failed to establish by a preponderance of the evidence that [he] was lawfully detainable . . . under the AUMF at the time he was taken into custody.”).

101 *Id.* at 127.

102 *See Khalifh v. Obama*, No. 05-CV-1189, 2010 WL 2382925, at \*2 (D.D.C. May 28, 2010) (applying *Al Gingo* to find that a detainee “who may once have been part of al-Qaida or the Taliban can show that he was no longer part of such an entity at the time of capture by showing that he took affirmative actions to abandon his membership”).

103 608 F.3d 1 (D.C. Cir. 2010).

104 *See Al-Bihani v. Obama*, 590 F.3d 866, 872–75 (D.C. Cir. 2010) (holding that Al-Bihani’s connections “render him detainable” pursuant to the standard for detention, and that “in the absence of a determination by the political branches that hostilities in Afghanistan have ended, Al-Bihani’s continued detention is justified”); *Awad*, 608 F.3d at 11 (noting that “*Al-Bihani* makes plain that the United States’ authority to detain an enemy combatant is not dependent on whether an individual would pose a threat to the United States or its allies if released but rather upon the continuation of hostilities”).

105 *Compare Awad v. Obama*, 646 F. Supp. 2d 20, 24 (D.D.C. 2009) (noting that the detainee can be held for the duration of conflict according to *Hamdi* and the AUMF), *and Anam v. Obama*, 696 F. Supp. 2d 1, 4 (D.D.C. 2010) (concluding that because the detainee had met the standards for detention, the “courts hands are tied”), *with Basardh v. Obama*, 612 F. Supp. 2d 30, 34 (D.D.C. 2009) (noting that the AUMF only authorizes preventative detention and must take into account the threat posed by the detainee), *and Al Gingo*, 626 F. Supp. 2d at 128 (noting that a prior terrorist relationship can be sufficiently vitiated by the passage of time or intervening events, so that the detainee “could no longer be considered to be ‘part of’ [al Qaeda] at the time he was taken into custody”).

under law.<sup>106</sup> Similarly, in *Awad*, Judge Sentelle’s opinion for the court affirmed Judge Robertson’s claim that governmental authority to detain Awad was dependent on the continuation of hostilities, *not* the threat posed by the detainee.<sup>107</sup> Judge Sentelle noted that *Al-Bibani* had foreclosed the question of whether vitiation is possible if the detainee poses no current threat to the United States if released, concluding that “whether a detainee would pose a threat to U.S. interests if released is not at issue in habeas corpus proceedings in federal courts concerning aliens detained under the authority conferred by the AUMF.”<sup>108</sup>

*b. Legal Support for Current Standard*

D.C. Circuit Court Judges Brown and Sentelle, as well as D.C. District Court Judges Robertson and Hogan, rely on the interplay between the AUMF and the law of war, as interpreted by the Supreme Court in *Hamdi*, to find that the President has the authority to detain potential terrorists for the duration of the authorized conflict. Generally speaking, the reasoning follows a similar pattern: the AUMF is valid, and *Hamdi* interpreted the AUMF to authorize detention for the duration of the authorized conflict based on the laws of war.<sup>109</sup>

As mentioned earlier, *Hamdi* held that the AUMF justified the detention of possible terrorists for the duration of the conflict.<sup>110</sup> This holding is widely accepted.<sup>111</sup> At the District Court level, Judge Hogan applied *Hamdi* in *Anam* to hold that because the authorized conflict was not over, “the court’s hands are tied.”<sup>112</sup> Similarly, Judge Robertson held in *Awad* that the conflict in Afghanistan continues, and thus, the President still has detention authority.<sup>113</sup> At the Circuit Court level, Judges Brown and Sentelle cited *Hamdi* in similar fashion in *Al Bihani* and *Awad*, emphasizing that the existence of the conflict simply precluded vitiation.<sup>114</sup>

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106 590 F.3d 866, 874–75 (D.C. Cir. 2010).

107 608 F.3d at 8.

108 *Id.* at 18–19 (emphasis added).

109 *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (“If the record establishes that U.S. 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.”); *see id.* at 520 (citing 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) (explaining that “[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities”).

110 *Id.* at 521 (“If the record establishes that U.S. 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”).

111 *See* Mortlock, *supra* note 27, at 396 (noting that “the plurality of the Supreme Court in *Hamdi* understood ‘Congress’ grant of authority for the use of ‘necessary and appropriate force’ to include the authority to detain for the duration of the relevant conflict”).

112 *Anam v. Obama*, 696 F. Supp. 2d 1, 4 (D.D.C. 2010).

113 646 F. Supp. 2d 20, 24 (D.D.C. 2009) (citing *Hamdi* 542 U.S. at 520).

114 *See* *Al-Bihani v. Obama*, 590 F.3d 866, 874 (D.C. Cir. 2010) (“With the government’s detention authority established as an initial matter, we turn to the argument that Al-Bihani must now be released according to longstanding law of war principles because the conflict with the Taliban has allegedly ended.”); *Awad*, 608 F.3d at 3 (“[I]n pursuit of this campaign and in other parts of the world, still acting under the AUMF, the United States has captured and detained members of the enemy force.”).

Judge Brown also cited the laws of war in reaching her conclusion regarding vitiation in *Al-Bibani*.<sup>115</sup> This is no surprise, given that the Supreme Court in *Hamdi* expressly articulated that its holding was based on longstanding law of war principles.<sup>116</sup> The laws of war are seemingly succinct on the question of vitiation, with the Third Geneva Convention stating that “prisoners shall be released and repatriated without delay *after the cessation of active hostilities*.”<sup>117</sup> In *Al-Bibani*, Judge Brown consequently held that the Geneva Conventions only require release and repatriation of prisoners following the end of hostilities.<sup>118</sup>

### III. PROPOSAL FOR A NEW APPROACH

#### *A. Philosophical Shortcomings of the Current Standard*

On a philosophical level, it does not make sense to ignore the current threat posed by OCO detainees. Professor Tung Yin has written that “continuing to detain persons who are no longer threats to the United States is undesirable and is unlikely to persuade the rest of the world of our good intentions.”<sup>119</sup> In a global conflict in which winning hearts and minds serves such a paramount concern, the current standard does not promote that end.

More importantly, the genesis of the current standard does not reflect the legal leeway enjoyed by the D.C. District Court in the post-*Boumediene* world. When one reads Judge Hogan’s conclusion in *Anam* that his “hands are tied” on the question of vitiation,<sup>120</sup> despite the fact that the detainee in question did not pose a current threat to the United States,<sup>121</sup> it is difficult to believe that the court on which he sits had been given the opportunity to set the very standards he claims he was prohibited from modifying.<sup>122</sup> Indeed, despite what Judge Hogan said in *Anam*, academics have largely

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115 See *Al-Bibani*, 590 F.3d at 874 (citing 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).

116 See *Hamdi*, 542 U.S. 520 (2004) (citing 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) (holding that “[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities”).

117 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 (emphasis added).

118 590 F.3d at 874 (citing 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).

119 Tung Yin, *Ending the War on Terrorism One Terrorist at a Time: a Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J.L. & PUB. POL’Y 149, 150 (2005).

120 *Anam v. Obama*, 696 F. Supp. 2d 1, 4 (D.D.C. 2010).

121 *Id.*

122 See *Boumediene v. Bush*, 553 U.S. 723, 796 (2008) (“We make no attempt to anticipate all of the [procedural] issues that will arise during the course of the detainees’ habeas corpus proceedings . . . these and the other remaining questions are within the expertise and competence of the District Court to address in the first instance.”); *id.* at 798 (“The cases are remanded to the Court of Appeals with instructions that it remand the cases to the District Court for proceedings consistent with this opinion.”).

interpreted *Boumediene* as affording the D.C. District Court a *tremendous* amount of judicial power.<sup>123</sup> *Boumediene* invited the presiding judges to step outside of their normal comfort zone of judicial restraint and to function not only as judges, but also as policy-makers.<sup>124</sup> Furthermore, the Obama administration had all but validated such a role for the court,<sup>125</sup> despite considerable anticipation that it might pursue a legislative solution.<sup>126</sup>

The vast leeway afforded to the D.C. District Court, indeed the tremendous opportunity provided to it by *Boumediene* and the administration's deference on the issue, is best illustrated in *Basardh*.<sup>127</sup> There, Judge Huvelle used statutory analysis to determine the breadth of U.S. detention authority,<sup>128</sup> and then departed from her fellow District Court judges to establish a creative and fair vitiation standard to apply to Guantanamo habeas petitions.<sup>129</sup> *Basardh* shows the wide judicial and interpretive room the court had to operate, and illustrates the flaws inherent in Judge Hogan's "hands are tied" metaphor.<sup>130</sup>

Instead of taking the opportunity to offer creative legal solutions that take into account our national security responsibilities, while providing detainees with the ability to argue for vitiation,

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123 See Azmy, *supra* note 3, at 537 (describing *Boumediene* as a "largely unlimited invitation to the lower courts to create a whole new corpus of habeas law in the context of military detention"); Pogge, *supra* note 4, at 1078 (describing *Boumediene* as issuing a "mandate to design procedures for the Guantanamo detention proceedings"); *id.* at 1080 ("Boumediene elevated the district courts to sit at the head of the table. The D.C. District did not voluntarily position itself in the mist of habeas commotion. Rather, its authority over the disposition of these petitions was essentially sealed by the Supreme Court's majority in *Boumediene*, who advocated for consolidating the habeas petitions within the D.C. District . . . but although the Supreme Court made clear that the D.C. District Court would be the venue of choice, its recommendations for how to arrange the proceedings were, to say the least, wanting"); see also Judith Resnick, *Detention, The War on Terror, and the Federal Courts*, 110 COLUM. L. REV. 579, 632 (2010) (describing the "core premise" of *Boumediene* as being that "that courts play[] a critical role by standing between individuals and the Executive").

124 See Pogge, *supra* note 4, at 1096 (stating that "*Boumediene's* call for the D.C. District to take the reins of all habeas petitions constitutes a qualitatively different type of judicial intervention . . . the judges in this context are functioning not just in their normal capacity as fact finders but also as policy makers").

125 See Wittes, *supra* note 19, at 4 (noting that the administration's position "means that for good or ill, these rules will be written by judges through the common-law process of litigating the habeas corpus cases of the . . . detainees still held at Guantanamo").

126 See President Barack Obama, Remarks by the President on National Security at the National Archives (May 21, 2009) ("We must have clear, defensible, and lawful standards for those who fall into this category. We must have fair procedures so that we don't make mistakes. We must have a thorough process of periodic review so that any prolonged detention is carefully evaluated and justified. . . . and so, going forward, *my administration will work with Congress to develop an appropriate legal regime.*") (emphasis added).

127 See Pogge, *supra* note 4, at 1094 ("Contrasting Leon's steady, conservative [opinion in *Al Gincó*] with Huvelle's evolving, pro-petitioner [opinion in *Basardh*] demonstrates the amount of discretion available to district judges.").

128 See *Basardh v. Obama*, 612 F. Supp. 2d 30, 34 (D.D.C. 2009) (noting that the AUMF "requires some nexus between the force (i.e., detention) and its purpose (i.e., preventing an enemy from rejoining the enemy to commit future hostile acts) . . . the AUMF does not authorize the detention of individuals beyond that which is necessary to prevent those individuals from rejoining the battle, and it certainly cannot be read to authorize detention where its purpose can no longer be attained").

129 See *id.* at 34–35 (establishing an individualized assessment of dangerousness to determine if detention is statutorily authorized).

130 *Anam v. Obama*, 696 F. Supp. 2d 1, 4 (D.D.C. 2010).



the D.C. Circuit Court has instead chosen to foreclose the possibility of vitiation.<sup>131</sup> The court has done so despite the fact that the Obama administration is on the record as indicating that it believes vitiation is possible.<sup>132</sup> On a legal level, the D.C. Circuit Court's current approach is questionable. Indeed, the same authorities cited in support of the current standard not only undermine that standard, but arguably support a new standard altogether.

### B. *A New Approach*

The proper standard should allow for vitiation even if an ongoing authorized military conflict exists. More specifically, the standard should focus on the present threat posed to the United States by the detainee,<sup>133</sup> drawing on the reasoning of *Al Ginco* and *Basardb*: if the detainee either did not present a threat at the time of capture, or does not constitute a current threat, the detention should be vitiated.<sup>134</sup>

Both *Al Ginco* and *Basardb* are predicated on the notion that detention should reflect the current threat posed by the detainee.<sup>135</sup> In *Al Ginco*, that notion manifested in the idea that the detainee still had to maintain the terrorist relationship up until the time of capture; if he did not satisfy the criteria for detention at the time of capture, he certainly did not pose a current threat and could not be detained.<sup>136</sup> In *Basardb*, Judge Huvelle went one step further, arguing that even if the terrorist relationship existed at the time of capture, if the detainee *presently* did not pose a threat, detention

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131 See *Awad v. Obama*, 608 F.3d 1, 11 (D.C. Cir. 2010) (noting that “*Al-Bibani* makes plain that the United States’ authority to detain an enemy combatant is not dependent on whether an individual would pose a threat to the United States or its allies if released but rather upon the continuation of hostilities”).

132 See *Al Ginco v. Obama*, 626 F. Supp. 2d 123, 128 n.6 (D.D.C. 2009) (citing Classified Transcript of Oral Argument at 39, 626 F. Supp. 2d 123) (“[W]e are not saying once a Taliban, always a Taliban”) (noting that “[h]appily, the Government, to its credit, does not go so far as to contend that any prior relationship with al Qaeda or the Taliban, however distant in the past and regardless of intervening circumstances, is a sufficient basis to hold an individual under AUMF indefinitely”).

133 See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authority and the War on Terrorism*, 118 HARV. L. REV. 2048, 2125 (2005) (advocating for a framework that evaluates detainees “in individual rather than group-based terms); Yin, *supra* note 119, at 199 (recommending that continued detention should depend “on the government’s ability to demonstrate the detainee’s dangerousness”); Mortlock, *supra* note 27, at 375–76 (proposing a “membership model” to determine, on an individual basis, who falls under the government’s authority to detain).

134 See *Al Ginco*, 626 F. Supp. 2d at 130 (holding that the petitioner’s affiliation with al Qaeda “was sufficiently vitiated” at the time of capture that he was not detainable under the AUMF); *Basardb*, 612 F. Supp. 2d at 34 (stating that “the AUMF does not authorize the detention of individuals beyond that which is necessary to prevent those individuals from rejoining the battle . . .”). *Contra Awad*, 608 F.3d at 11 (noting that “*Al-Bibani* makes plain that the United States’ authority to detain an enemy combatant is not dependent on whether an individual would pose a threat to the United States or its allies if released but rather upon the continuation of hostilities”).

135 See *infra* notes 136–37.

136 See 626 F. Supp. 2d at 128 (noting the possibility that a “prior relationship between a detainee and al Qaeda (or the Taliban) can be sufficiently vitiated by the passage of time, intervening events, or both, such that the detainee could no longer be considered to be ‘part of’ either organization at the time of his capture”).

should be vitiated.<sup>137</sup> As described below, a standard synthesizing these two principles is predicated upon sound legal arguments.

### *C. Legal Foundation of New Approach*

State Department Legal Advisor Harold Koh has articulated the administration's assertion of detention authority as being founded on the AUMF, "as informed by the principles of the laws of war."<sup>138</sup> This echoes the D.C. District and D.C. Circuit Courts' treatment of the issue, as well as that of the Supreme Court in *Hamdi*. However, not only do the laws of war and the AUMF not support the current standard, they instead expressly support the type of new approach outlined above.<sup>139</sup> Put simply, both the AUMF and laws of war justify *only* preventative detention.<sup>140</sup> If the government detains an individual who does not pose a threat to the United States, the detention is not preventative and therefore not statutorily justified.

#### *1. AUMF*

The AUMF is the exclusive source of statutory authority cited by the current administration to detain potential terrorists.<sup>141</sup> While the statute's purpose certainly had a retaliatory component,<sup>142</sup> scholars generally conclude that its fundamental purpose today is to prevent future terrorist attacks.<sup>143</sup> This purpose is evident in the text<sup>144</sup> and was expressly verbalized by President Bush when he signed it into law.<sup>145</sup> Even Judge Robertson, an outspoken proponent of the current standard, acknowledges that the AUMF's "self-stated" purpose is to prevent future terrorist attacks.<sup>146</sup> The AUMF "requires some nexus between the force (i.e. detention) and its purpose (i.e. preventing indi-

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137 See *Basardb*, 612 F. Supp. 2d at 35 (holding that the AUMF compels the court to consider whether the detainee presently poses a threat to the United States).

138 Crook, *supra* note 25, at 275.

139 See *infra* Parts III.C.1–2.

140 See *id.*

141 See Baker, *supra* note 21 ("The Obama administration . . . will instead rely only [the AUMF] to continue to detain people indefinitely and without charge.").

142 See AUMF (authorizing the United States to "exercise its right to self-defense" and "use all necessary and appropriate force against those nations, organizations, or persons . . . [who] planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001").

143 See Mortlock, *supra* note 27, at 378 (citing AUMF) (noting that the AUMF's purpose is to "prevent any future acts of international terrorism against the United States" and that "this short passage subsequently became the legal basis . . . to detain members of al-Qaeda"); Resnick, *supra* note 123, at 604 (stating that the AUMF authorizes "preventative detention").

144 See AUMF (noting that the bill's purpose is to "prevent any future acts of international terrorism against the United States").

145 See Press Release, White House Office of the Press Secretary, President Signs Authorization for Use of Military Force Bill (Sept. 18, 2001), *available at* <http://georgewbushwhitehouse.archives.gov/news/releases/2001/09/print/20010918-10.html> (stating that the bill recognizes "the authority of the President under the Constitution to . . . prevent acts of terrorism against the United States").

146 *Awad v. Obama*, 646 F. Supp. 2d 20, 24 (D.D.C. 2009).

viduals from rejoining the enemy to commit future hostile acts).<sup>147</sup>

It follows that if the detainee does not pose a threat to the United States, or more specifically if he will not rejoin the terrorist group to which he previously had ties, then the AUMF does not justify his detention. This was the general pattern of reasoning applied by Judge Huvelle in *Basardh*.<sup>148</sup> Critical to her reasoning was her finding that, according to the AUMF, the likelihood of an individual rejoining the enemy was relevant to the legality of further detention.<sup>149</sup> Finding that extenuating circumstances in *Basardh*'s case made it impossible for him to rejoin al Qaeda, Judge Huvelle held that vitiation was justified.<sup>150</sup> Judge Leon in *Al Gincio* followed a similar route, finding that circumstances in between Al Gincio's terrorist ties and the time of his detention showed that he was not a threat at the time of his capture and therefore did not currently pose a threat. Thus, the AUMF did not authorize his detention.<sup>151</sup>

## 2. *Laws of War*

Given that the laws of war “inform” the AUMF's justification of U.S. detention authority,<sup>152</sup> it is important to analyze the extent to which they support the current standard. The laws of war play such a critical and prominent role in this debate because of *Hamdi*, which has been commonly understood to interpret the laws of war and the AUMF as authorizing the United States to detain prisoners “for the duration of the relevant conflict.”<sup>153</sup> Yet, this ruling was not as clear-cut as the supporters of the current vitiation standard want it to be. The Court in fact attached a critical qualifier, noting that if the practical circumstances of a particular conflict are markedly different from those conflicts upon which the laws of war were formulated, application of the laws of war may be unwarranted.<sup>154</sup>

*Hamdi*'s qualification, and Harold Koh's statement, present three key questions regarding the laws of war. First, how binding are the laws of war on our detention authority? Second, if the laws of war are controlling in any way, do the practical circumstances of the current conflict mandate

147 *Basardh v. Obama*, 612 F. Supp. 2d 30, 34 (D.D.C. 2009).

148 *See id.* at 35 (holding that the detainee must be released because “the undisputed facts establish that *Basardh*'s [redacted] is known to the world, and thus, any ties with the enemy have been severed, and any realistic risk that he could rejoin the enemy has been foreclosed”).

149 *Id.*

150 *See id.* (noting that “any realistic risk that he could rejoin the enemy has been foreclosed”).

151 *See Al Gincio*, 626 F. Supp. 2d 123, 130 (D.D.C. 2009) (asserting that “the conclusion is inescapable that his preexisting relationship, such as it was, was sufficiently vitiated that he was no longer ‘part of’ al Qaeda (or the Taliban) at the time he was taken into custody . . . [a]ccordingly, the Government has failed to establish . . . that [the detainee] was lawfully detainable as an enemy combatant under the AUMF at the time he was taken into custody [and must be released]”).

152 Crook, *supra* note 25, at 275.

153 542 U.S. 507, 521 (2004).

154 *Id.*; *see Azmy*, *supra* note 3, at 510–11 (citing *Hamdi*, 542 U.S. at 521) (noting that *Hamdi* qualified that if “‘the practical circumstances of a given conflict’ reveal themselves to be unlike those which informed the creation of the laws of war, then this prior understanding may ‘unravel’ . . .”).

their application, as stipulated by *Hamdi*:<sup>155</sup> Third, assuming that the laws of war are applicable and inform the contours of our detention authority, what do they authorize?

*a. How binding are the laws of war?*

The laws of war are not comprehensively binding on the United States in the arena of detention law, but the Obama administration acknowledges that they inform the scope of U.S. detention authority.<sup>156</sup> The limit of their control over U.S. detention authority is evident in *Al-Bibani*. While Judge Brown stated that “international laws of war are helpful to courts when identifying the general set of war powers to which the AUMF speaks,” she then noted that “their lack of controlling legal force and firm definition render their use both inapposite and inadvisable when courts seek to determine the limits of the President’s war powers.”<sup>157</sup> As mentioned in section II.B, however, Judge Brown later went on to cite the laws of war as broadly shaping the limits of presidential war powers, reasoning that the Geneva Conventions allow the President to detain terrorist suspects for the duration of the conflict.<sup>158</sup> While the laws of war then inform the extent of U.S. detention authority under the AUMF, their judicial interpretation and application indicate how their precise impact is still unsettled.<sup>159</sup>

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155 542 U.S. at 521.

156 See Bradley, *supra* note 133, at 2088–89 (noting how the laws of war can “both give content to the powers that the AUMF confers on the President and provide boundaries on the scope of Congress’s authorization”); Crook, *supra* note 25, at 275 (noting that “both in our internal discussions about specific Guantanamo detainees, and before the courts in habeas cases, we have interpreted the scope of detention authority authorized by Congress in the AUMF as informed by the laws of war”); Mortlock, *supra* note 27, at 382 (explaining that, “though not independently binding on the President, the [laws of war] help inform where the limitations on detention should lie under the AUMF”). Some scholars additionally argue that given the transnational nature of international terrorism, international law should play more of a controlling role in informing our detention authority. See Resnick, *supra* note 123, at 579 (stating that “given the transnational nature of the threats themselves . . . this arena of law would seem to invite transnational judicial exchanges . . . [n]ot only do many countries grapple with terror, many (like the United States) have responded by detaining individuals preventatively”).

157 *Al-Bihani v. Obama*, 590 F.3d 866, 871 (D.C. Cir. 2010). As mentioned above, the extent of the law of war’s controlling force is still subject to debate given the D.C. Circuit’s August 30, 2010 denial to rehear *Al-Bibani* en banc. See *supra* note 64.

158 See *Al-Bibani*, 590 F.3d at 874 (arguing that “the Geneva Conventions require release and repatriation only at the ‘cessation of active hostilities’. . .”).

159 See *supra* note 64 (describing recent D.C. Circuit panel’s denial of a rehearing of *Al-Bibani* and noting that while seven Judges joined in the denial, two concurred to disagree with the majority’s conclusion that the language in question was controlling (and not dicta)).

*b. Do the “practical circumstances” of the current conflict warrant law of war applicability?*

Assuming that the laws of war inform the extent of our detention authority under the AUMF, *Hamdi*'s qualification<sup>160</sup> opens the door to the separate argument that the practical circumstances<sup>161</sup> of the OCO preclude the comprehensive application of the laws of war. Indeed, by qualifying its holding in this manner, *Hamdi* implicitly acknowledged that the “cessation of conflict” model of detention may not be appropriate for or applicable to the current conflict.<sup>162</sup>

The OCO is certainly different from the wars on which the framers of the international laws of war relied when the laws were drafted, casting into doubt their seamless application in the current conflict.<sup>163</sup> Wars of that era were primarily traditional armed conflicts among states, and did not pit a superpower against a “diffuse, difficult to identify terrorist enemy.”<sup>164</sup> In the OCO, the “enemy intermingles with civilians” and “the battlefield lacks a precise geographic location.”<sup>165</sup> It is also difficult “to conceptualize the end of the conflict,” which “raises questions about the applicability of traditional powers to detain and try the enemy.”<sup>166</sup> Numerous critics have also pointed specifically to the problems of applying the “cessation of conflict” durational standard to the OCO.<sup>167</sup> Because of these practical circumstances, *Hamdi* arguably supports the non-application of the cessation of conflict model to the OCO.

*c. What do the laws of war authorize?*

Yet, assuming that the laws of war *do* apply to the current conflict and inform U.S. detention

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160 See 542 U.S. at 521 (noting that “if the practical circumstances of a given conflict are entirely unlike those of the conflicts that have informed the development of the law of war, then that understanding may unravel”); Azmy, *supra* note 3, at 510–11 (citing *Hamdi*, 542 U.S. at 521) (noting that *Hamdi* qualified that if “‘the practical circumstances of a given conflict’ reveal themselves to be unlike those which informed the creation of the laws of war, then this prior understanding may ‘unravel’ . . .”).

161 542 U.S. at 521.

162 See *id.* (noting that “[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel”).

163 See Yin, *supra* note 119, at 210–11 (explaining that “simply because military force might be reasonably directed against nonstate actors under domestic and international law, it does not follow that the law of armed conflict can be transferred seamlessly into the new context”).

164 Crook, *supra* note 25, at 275 (“Construing what is ‘necessary and appropriate’ under the AUMF requires some ‘translation,’ or analogizing principles from the laws of war governing traditional *international* conflicts.”); see Yin, *supra* note 119, at 153 (explaining that “the law of armed conflict, on the other hand, does not appear to have anticipated the use of force against nonstate actors”).

165 Bradley, *supra* note 133, at 2048–49.

166 See *id.*

167 See Mortlock, *supra* note 27, at 396 (explaining that, due to the indeterminate length of the OCO, “in the terrorism context, this [law of war cessation of conflict durational] standard produces an extreme result”); Yin, *supra* note 119, at 189 (stressing that “a war (or military conflict) with the objective of defeating ‘terrorism’ is, as many other have noted, of potentially never-ending duration”); *id.* at 205–06 (arguing that “when military force is applied against nonstate actors such as al Qaeda, the continuing existence of such an entity [for the purposes of cessation of conflict] is much less clear, as is the ability of such entity to negotiate an end to the conflict”).

authority therein, what do they actually authorize in the context of vitiation? In other words, under the international laws of war, how long can the United States detain potential terrorists detained during the OCO?

While the laws of war have been repeatedly cited to authorize detention for the duration of the conflict, regardless of the threat posed by the individual, their legislative intent has alternatively been interpreted to authorize only preventative detention.<sup>168</sup> The most cited portion of the laws of war in the context of detention and vitiation is Article 118 of the Third Geneva Convention, which states that prisoners “shall be released and repatriated without delay after the cessation of active hostilities.”<sup>169</sup> However, instead of intending to provide warring parties with the ability to indefinitely detain prisoners regardless of their respective threat levels, some scholars believe that “the purpose of [Article 118] is to prevent enemy combatants from returning to fight.”<sup>170</sup> By detaining prisoners of war for the entirety of a conflict, a country prevents the prisoners that it holds from returning to the fight.<sup>171</sup> Academics have interpreted *Hamdi* as confirming this characterization.<sup>172</sup>

Therefore, if the detention does not prohibit someone from returning to the field of battle, then the laws of war do not authorize detention and the detainee must be released.<sup>173</sup> If a former member of al Qaeda renounces his previous terrorist ties and decides that he no longer wants to fight against the United States, he is no longer dangerous and his detention status should be vitiated under the laws of war.<sup>174</sup> Such would be consistent with the spirit of the laws of war, which recognize the possibility that a detainee, who was once dangerous, may become harmless prior to cessation of hostilities.<sup>175</sup>

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168 See Yin, *supra* note 119, at 164 (noting that “in the case of the law of armed conflict, which is governed largely by the 1949 Geneva Convention relative to the Treatment of Prisoners of War, the harm justifying intervention includes potential of future harm; detention of enemy soldiers is based purely on preventative incapacitation grounds”); *id.* at 169 (noting that the law of war “allows detention of enemy prisoners of war solely to prevent them from engaging in further conflict against the detaining state”).

169 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.

170 Bradley, *supra* note 133, at 2123.

171 Yin, *supra* note 119, at 166; see Mortlock, *supra* note 27, at 382 (“Detention is intended to prevent enemy combatants from returning to the battlefield.”).

172 See Azmy, *supra* note 3, at 509 (noting that in defining U.S. detention authority, courts have often characterized “members of al Qaeda and the Taliban [as] tantamount to uniformed members of the ‘armed forces’ who the Government can target under the Geneva Conventions and, according to *Hamdi*, *detain to prevent return to the battlefield*”) (emphasis added).

173 See Yin, *supra* note 119, at 169 (noting that “the underlying rationale of [the Geneva Convention] is that enemy prisoners of war who no longer pose any threat to the detaining State . . . should be repatriated”).

174 See *id.* at 206.

175 See Mortlock, *supra* note 27, at 401 (“Detainees who sincerely renounce their loyalty to al Qaeda and its goals no longer present a threat to the United States . . . [a]ccordingly, the United States no longer has the justification it once did to detain them.”).

*D. Who Should Set The Standard?*

Having articulated a new standard to be applied in the context of detention violation, a critical question remains: who should set this new standard? Scholars seem divided on this issue.<sup>176</sup> Many argue that the post-*Boumediene* common law process has shown itself to be woefully unsuccessful in establishing clear, justifiable legal standards to be applied in detention cases.<sup>177</sup> Others argue that the federal court system is perfectly capable of establishing such proper guidelines.<sup>178</sup> This Article advocates the former position.

Those who contend that the federal court system should continue to set substantive and procedural standards in Guantanamo detention cases rely on three distinct arguments.<sup>179</sup> The first is straightforward: *Hamdi* and *Boumediene* establish the Supreme Court's clear preference for the federal courts to play this role.<sup>180</sup> One scholar, Judith Resnick, goes so far as to say that the Supreme Court cases provide a "constitutional mandate" for the Judiciary's continued role in the incremental, common law creation of post-*Boumediene* procedural standards.<sup>181</sup> Second, from a separation of powers standpoint, the federal courts can also, in this role, "meaningfully constrict the Executive's expansive claims of detention authority."<sup>182</sup>

Third, scholars argue that the federal courts are well equipped to handle the challenge, and point to the progress that has already been made.<sup>183</sup> On the first point, while the Guantanamo cases raise "challenging normative, political, and practical considerations,"<sup>184</sup> it is argued that such challenges are within the "expertise and competence" of the district courts.<sup>185</sup> The issues raised by Guantanamo cases are far from "exotic"<sup>186</sup> and are instead "continuous with judicial responses to the central challenges, faced daily, by governments trying to maintain peace and security and, hence, incapacitating some individuals feared likely to inflict grave harm to the social order."<sup>187</sup> In addition, many cite the

176 See Resnick, *supra* note 123, at 586 (noting that "[t]he 9/11 case law has prompted diverse assessments, with arguments that the judiciary has done too much, or too little, or left unanswered important questions about the permissible scope of executive detention and surveillance powers").

177 See *infra* notes 191-197.

178 See *infra* notes 180-189.

179 See *id.*

180 See Azmy, *supra* note 3, at 537 (describing *Boumediene* as a "decree that the courts will have a significant role in managing executive detention operations to ensure they comply with the most elementary constraints of law"); *id.* at 450 (celebrating *Boumediene*'s "historic judgment" that "defend[s] the Court's asserted role as necessary and correct").

181 Resnick, *supra* note 123, at 626; see *id.* at 625 (interpreting *Hamdi* as "a wise placeholder, firmly insistent on a role for the courts" in Guantanamo cases).

182 Azmy, *supra* note 3, at 499.

183 See *infra* notes 184-189.

184 Azmy, *supra* note 3, at 537.

185 *Id.*; see also Pogge, *supra* note 4, at 1094-95 (noting that judges are "skilled in procedural matters" and that "their experience in this area seems to make them the natural choice to be the creators of the habeas procedures").

186 Resnick, *supra* note 123, at 584; see also *id.* at 634 (noting that the "key elements that form the predicate for 9/11 detention," including "deciding who to detain, and dealing over long periods of time with people determined to be egregiously dangerous, even as they too are in need of safety or discipline while confined," are "not sui generis to 9/11 but are variations on the core problems of criminal law").

187 *Id.* at 584.

progress made so far<sup>188</sup> as “proving [that the courts are] amply equipped to resolve these cases and are competent to do so without interfering with core areas of military discretion.”<sup>189</sup>

However, the arguments for a legislatively mandated standard are more compelling than the arguments articulated above.<sup>190</sup> While the D.C. District and D.C. Circuit Courts have certainly made some degree of progress, in that they have issued rulings in a number of Guantanamo cases, those rulings have presented what some describe as a “contradictory and incoherent body of law.”<sup>191</sup> As previously explained, the results at the District Court level, especially on the question of vitiation, vary from judge to judge.<sup>192</sup> Furthermore, the D.C. Circuit Court has recently adopted a standard that arguably lacks statutory authority.<sup>193</sup> Some argue that Congress is better suited to act in the area of national security,<sup>194</sup> and it has furthermore shown the ability to expeditiously and appropriately intervene in such matters.<sup>195</sup> In sum, the circumstances illustrate “strong evidence of the need for legislative rules,”<sup>196</sup> and a congressional standard similar to that proposed by this Article would instill overarching clarity while allowing the courts to apply case-specific facts to reach individual rulings.<sup>197</sup>

#### IV. CONCLUSION

The current standard for vitiation, as held and applied by the D.C. Circuit Court in *Al-Bibani* and *Awad*, provides that vitiation is impossible if the criteria for detention have ever been met and the pertinent conflict is ongoing.<sup>198</sup> In other words, as articulated by Judge Hogan, even if the detainee

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188 See *id.* at 626 (emphasizing that the post-*Boumediene* D.C. District Court opinions “have shaped a common law of habeas corpus rights and remedies as, in dozens of rulings, district and appellate judges mined the parameters of lawful confinement for alleged enemy combatants”).

189 Azmy, *supra* note 3, at 514–15.

190 See Pogge, *supra* note 4, at 1096 (noting that “[t]hese potential benefits [of a judicially created standard], when weighed against [the alternative of a legislative standard], do not ultimately justify a judicially dominated procedure-shaping system”).

191 Jack Goldsmith and Benjamin Wittes, *No Place to Write Detention Policy*, WASH. POST, Dec. 22, 2009, at A19.

192 See Benjamin Wittes, Editorial, *Obama’s Dick Cheney Moment*, WASH. POST, Sept. 29, 2009, at A19 (noting that “the judges who have heard habeas cases have disagreed about a great many central issues”).

193 See *supra* Part III.C.

194 See Benjamin Wittes, *Obama Retreats on Creating a Better System for Detaining Suspected Terrorists*, WASH. POST, Sept. 29, 2009, *available at*,

<http://www.washingtonpost.com/wp-dyn/content/article/2009/09/28/AR2009092802492.html> (questioning whether it is “really better to hand this complex policy problem over to the whim of [unelected judges] than to ask the legislature to decide when America is going to detain alleged terrorists, under what rules and with what rights”).

195 See Wittes, *supra* note 19, at 9 (noting that in the aftermath of *Rasul v. Bush*, 542 U.S. 466 (2004), Congress “soon responded with the Detainee Treatment Act (DTA) of 2005, which at first blush appeared to eliminate [the] statutory habeas jurisdiction [articulated in *Rasul*] in favor of a potentially more limited form of judicial review committed exclusively to the D.C. Circuit Court of Appeals”).

196 *Id.* at 7.

197 See Pogge, *supra* note 4, at 1096-97 (arguing that a congressional standard would “create a more systematically balanced process” and “instill uniformity while still allowing judges flexibility in adjudicating specific petitioners’ claims”).

198 See *supra* Part II.C.