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VI

Who May Be Held? Military Detention through the Habeas Lens

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Who lawfully may be held in military custody without criminal charge? It seems a simple question, and in some settings it is. But in the settings that matter most at the moment—counterterrorism and counterinsurgency—it is not simple at all. The very metrics of legality are disputed in those contexts, with sharp disagreement regarding which bodies of law are relevant and what if anything each actually says about the detention-scope issue.

This problem has been with us for some time. It has lurked in the background of US detention operations in Afghanistan since 2001[1] and in Iraq since 2003.[2] It is central, of course, to the controversies surrounding the use of detention at Guantanamo and in the United States itself.[3] More than one hundred thousand individuals have been detained without criminal charge across these settings,[4] giving rise to an immense amount of scholarship, advocacy and litigation along the way. Remarkably, however, the question of who lawfully may be detained remains unsettled in important respects.

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The problem exists along two distinct dimensions, only one of which do I address in this article. First, we have indeterminacy at the *group* level insofar as there is disagreement with respect to whether any authority to use military detention that the US government may currently possess extends to any entities other than al Qaeda and the Taliban, and also insofar as there is disagreement regarding which entities are sufficiently affiliated with al Qaeda or the Taliban so as to be indistinguishable from them for purposes of this inquiry.[5] Even if we had agreement regarding which groups are relevant for purposes of the detention issue, however, indeterminacy also manifests at the *individual* level insofar as we also lack agreement regarding the mix of conditions that are necessary or sufficient to justify the detention of a particular person. My aim in this article is to shed light solely on this individualized set of questions.

That we lack consensus with respect to individualized detention criteria and constraints despite nearly a decade's worth of litigation and debate to some extent reflects our preoccupation with other questions associated with military detention, above all the seven years' war over the habeas jurisdiction of federal courts in relation to the Guantanamo detainees.[6] Yet even prior to the resolution of that jurisdictional dispute in the Supreme Court's 2008 decision in *Boumediene v. Bush*,[7] courts did have several occasions to address the detention-scope issue; they just did not develop a consensus as a result. On the contrary, they splintered sharply in those cases, advancing an array of incompatible views regarding the applicable law.[8]

Matters have improved to some extent in the aftermath of *Boumediene*.[9] Many district and circuit court judges have had a chance to address who lawfully may be detained in the context of the Guantanamo habeas litigation. Their decisions reflect a consensus that the government does have authority to detain without criminal charge in at least some circumstances, and that (at least for most of the judges) these circumstances at a minimum include at least some scenarios involving persons who are "part of" al Qaeda or the Taliban (whether the consensus extends to membership in other groups is much less clear). But beyond these points disagreement reigns.

Whether a person is "part of" a group may be an administrable inquiry in the context of a regular armed force, but it does not map easily onto scenarios involving clandestine non-State actors with indistinct and unstable organizational structures. As a result, judges who agree that members of such groups may be detained do not necessarily agree as to what conduct actually counts as membership in this context. And the judges most definitely have not reached consensus with respect to whether detention lawfully may be used in the distinct situation in which a nonmember provides support to these groups. Indeed, the executive branch itself now

appears divided on the propriety of using support as a stand-alone detention predicate. Perhaps most remarkably, an apparent consensus as to the relevance of the laws of war to these questions recently came unglued, with a divided panel of the D.C. Circuit Court of Appeals declaring that the matter should turn exclusively on domestic law considerations[10] and a subsequent assertion by a majority of the active judges of that court in turn declaring that assertion to be dicta.[11]

All of which is interesting in the seminar setting, but does any of it actually matter in practice? That is not a frivolous question. By and large the merits determinations in the Guantanamo habeas cases have turned on the sufficiency of the government's evidence (or lack thereof), and not on the legal boundaries of the government's notional detention authority.[12] For better or worse, moreover, habeas jurisdiction has not (yet) been extended to overseas military detention operations involving non-citizens at locations other than Guantanamo,[13] and thus one might be tempted to conclude that any problems resulting from the judiciary's persistent inability to resolve the detention-scope question will be confined to a finite and shrinking set of cases.

In fact, the question of who lawfully may be detained matters a great deal in actual practice. As a threshold matter, the two premises mentioned above may prove to be incorrect. Much Guantanamo habeas litigation is yet to come, and it may well be that future cases will turn on this very issue. Similarly, the precise boundaries of habeas jurisdiction have not yet been fixed; though currently jurisdiction does not extend to Afghanistan, that question remains the subject of live litigation.[14] Even if those premises remain valid, however, other considerations ensure the relevance of the detention-scope question.

First, the answers judges give to this question have spillover effects beyond the immediate context of habeas.[15] They overhang any other detention operations conducted under the rubric of the same underlying detention authority, regardless of whether those operations are subject to judicial review; government and military lawyers will not simply ignore judicial pronouncements regarding the scope of that authority, and may be expected to advise commanders and policymakers accordingly. By the same token, judicial decisions regarding the notional scope of detention authority may apply by extension to questions of *targeting* with lethal force in the field pursuant to that same authority, notwithstanding that targeting decisions ordinarily are not directly subject to judicial review.[16] Future conflicts unrelated to 9/11 may also be impacted. The judges in the habeas litigation at times have included in their analyses interpretations of key terms and concepts from both international and domestic law—such as "direct participation in hostilities" and "all necessary and appropriate force"—that will be relevant in most if not all future armed conflicts.

Taking all of this together, we can see that the judges in the habeas litigation are not merely deciding whether to grant the writ in particular cases. They have become, for better or worse, the central US government institution engaged in the critical—and ultimately unavoidable—task of tailoring the laws governing military activity to suit the increasingly important scenario in which States classify clandestine non-State actors as strategic threats requiring a military response.

The paper proceeds in three parts. I begin at a high level of abstraction in Part I by drawing attention to two strands of debate that greatly complicate the task of determining whether particular detention criteria are forbidden, required or permitted by law: (i) disagreement regarding which bodies of law actually apply in a particular instance, and (ii) disagreement as to what a particular body of law has to say, if anything, when it comes to employing particular criteria in a detention standard.

Against this backdrop, Part II provides a comprehensive descriptive account of how judges since 2002 have addressed the question of individual detention criteria, emphasizing that which has been settled and that which remains in dispute. In brief, judges largely (though not entirely) agree that detention authority lawfully extends to persons who are functional members of al Qaeda, the Taliban or associated forces, but they do not agree as to what membership means in this setting or whether detention authority also extends to non-members who provide support to such groups. Part III concludes with a discussion of whether this lingering uncertainty truly matters (it does, on many levels) and, if so, what should be done about it (legislation, preferably).

I. Contested Metrics of Legality

Nearly a decade has passed since the United States began employing military detention without criminal charge in circumstances relating to al Qaeda and the Taliban. Nonetheless, the question of who lawfully may be held in that manner—if anyone—remains the subject of bitter disagreement.

Before examining how litigants and judges have attempted to resolve these disagreements in the habeas setting, it is worth pausing to describe why, at a high level of abstraction, the parties to these debates so often appear to be speaking past one another. There are two overarching problems that contribute to that state of affairs. First, there is disagreement at the threshold with respect to which bodies of law actually apply to this question. Should it be answered solely with reference to domestic law? Law of armed conflict (LOAC)? International human rights law (IHRL)? We might call this the "domain" debate. Second, with respect to each of these potentially applicable bodies of law, there is disagreement as to what if

anything it has to say regarding which detention predicates and constraints are necessary or permissible. We might call this the "content" debate.

I do not propose to settle the domain and content debates here, nor even to engage them in a comprehensive way. Rather, my goal simply is to orient the reader to their basic features. Combined with the typology of detention predicates and constraints provided in the preceding Part, this will equip the reader to fully appreciate the points of consensus and disagreement emerging from the habeas litigation discussed in Part II.

A. The Domain Debate: Disagreement Regarding Which Bodies of Law Apply

Which bodies of law are relevant with respect to the detention-scope question? The answer to this question of course may depend on the circumstances, and thus it may be most accurate to say that there are many answers to it rather than just one. But in any event, the candidate legal regimes include domestic law (statutory or constitutional), LOAC (or international humanitarian law) and IHRL.

1. Domestic Law

At one extreme, the question of who lawfully may be held might require solely a domestic law analysis. On this view, for example, one might first consider what the September 18, 2001 Authorization for Use of Military Force[17] (AUMF) has to say about the topic—or, if you prefer, what might be gleaned from the Constitution as a direct source of detention power[18]—and then take note of any other limitations that might be derived from the Constitution, other statutes, or prior US caselaw. If the government's claim of detention authority is consistent with these sources, the debate ends.

Of course, treaties are part of domestic law in the sense that the Constitution makes them supreme law of the land.[19] Thus the "domestic-only" viewpoint does not necessarily exclude consideration of LOAC and IHRL instruments. Insofar as those treaties are not self-executing or have been "unexecuted" by a subsequent statute, however, some argue that they are relevant solely in a diplomatic sense.[20] At least with respect to IHRL instruments, moreover, the US government has long maintained the position that they simply do not apply to US government conduct occurring outside of formal US territory.[21]

In any event, the notion of a purely domestic approach to determining the legal boundaries of detention authority is no mere academic invention. As we will see in Part II below, the D.C. Circuit Court of Appeals adopted precisely this view in its January 2010 decision *Al-Bihani v. Obama*. There are, however, other models.

2. The Law of Armed Conflict

The second model accepts the legal rather than just the diplomatic relevance of LOAC. On this view, LOAC might matter in either of two ways, one weak and one strong. First, on the weak view, LOAC must be considered when interpreting the AUMF (or, for that matter, when interpreting the scope of authority conferred directly by the Constitution).[22] Consistent with the *Charming Betsy* canon, for example, one would look to LOAC in order to flesh out the meaning of the AUMF's language "all necessary and appropriate force" as it relates to detention.[23] Alternatively, on the strong view, LOAC might be treated as a legally binding constraint in its own right, independent of the best reading of the underlying domestic source of authority.

It is not clear that the difference between the weak and strong models matters in the context of the scope-of-detention issue. The difference might matter where the underlying domestic source is so clear that there is no occasion for a LOAC-based interpretation, thus making the weak but not the strong model inapplicable. But that hardly seems to be the case here, given the relative lack of clarity of the domestic sources involved. Applied in this setting, in other words, both the weak and strong models would direct us to look to LOAC to define the scope of the government's detention authority.

All that said, LOAC is not automatically relevant in in all circumstances. It is, rather, applicable in circumstances of "armed conflict."[24] In order to determine LOAC's field of application, one must identify and define the scope of "armed conflict"—tasks that generate considerable disputes. Some scholars reference functional criteria involving the duration, intensity and nature of the violence at issue,[25] while others also emphasize the formal categorization of the asserted "enemy" in terms of its status as a "state, nation, belligerent, or insurgent group."[26] Even when one accepts that a state of armed conflict justifying application of LOAC exists in one particular location, moreover, there is considerable disagreement as to whether and when any resulting rules can or must be applied in relation to persons in geographically distinct locations.[27] Indeed, it is no exaggeration to say that the most fundamental divide separating the legal positions of the Bush and Obama administrations from the views of critics in the international law community has to do with the propositions that (i) the activities of al Qaeda rise to the level of armed conflict in places other than Afghanistan and (ii) in any event the existence of armed conflict in Afghanistan permits reliance on LOAC concepts against al Qaeda–related individuals in other locations.[28]

3. International Human Rights Law

The third model tracks the second, but looks to IHRL rather than LOAC. That is to say, one can advance both a weak (interpretation-based) and strong (independent-force) model of IHRL's relevance to the scope question.

Either way, the key point of departure for debate regarding the relevance of IHRL involves the question of extraterritoriality. For present purposes, the most relevant IHRL treaty is the International Covenant on Civil and Political Rights (ICCPR),[29] which, as discussed below, contains language relating to detention.[30] Article 2 of the ICCPR provides that a member State is bound to confer ICCPR protections on persons "within its territory and subject to its jurisdiction."[31] The United States has long construed this language literally, such that ICCPR rules govern within the United States but not elsewhere.[32] Many other States (including many European allies), in contrast, construe that same language to encompass any person subject to a member State's practical control regardless of geographic location, as does the UN Commission on Human Rights (now the Human Rights Council).[33] An interpretive standoff results, with great risk of outright misunderstanding insofar as either side fails to appreciate that the other simply does not share its view.

Even if one accepts the US position regarding the geographically bounded reach of the ICCPR, however, IHRL issues might still arise. Not all detentions occur outside US territory, after all. On three occasions after 9/11, for example, the United States held persons in military custody within the United States itself.[34] And in the wake of the Supreme Court's *Rasul* and *Boumediene* decisions emphasizing the unique degree of US control at Guantanamo, debate may yet arise as to its status vis-à-vis the ICCPR's jurisdictional provision. In any event, treaty law is not the only possible source of an IHRL obligation. Customary international law may contain norms comparable to those found in the ICCPR. The question then becomes whether any such norm entails a comparable geographic boundary, and this in turn may require inquiry into the existence in the overseas setting of a pattern of State practice supported by *opinio juris*. The room for debate—and hence for misunderstanding—is ample.

4. Deconfliction

The discussion grows still more complicated once one accounts for the potential of the LOAC and IHRL models to overlap and conflict with one another. This potential overlap has occasioned an immense amount of scholarship, with some characterizing the situation as encroachment by IHRL—for good or ill—on the traditional domain of LOAC.[35]

Here we confront the question of *lex specialis*. In brief, *lex specialis* is a choice-of-law concept in which the more specifically applicable body of law governs in the event of overlap.[36] Unfortunately, a variety of views exists regarding just what that concept means in practice—enough to prompt the International Law Commission to undertake an effort to clarify the question.[37] The US government, for its part, takes the view that LOAC constitutes *lex specialis* in all circumstances of armed conflict, such that it entirely occupies the field to the exclusion of IHRL considerations.[38] Some have taken a different view, treating *lex specialis* not as preempting all reference to another body of law, but rather as requiring the provisions of a competing body of law to be construed in harmony with the rules provided by the dominant body of law; IHRL, on that view, would be applicable yet would be conformed to LOAC in its particulars.[39] Some might argue for a third position, moreover, a rights-maximizing approach in which the controlling rule is whichever one that most advantages the rights of individuals, as opposed to advantaging the discretion of the State. One might also contend for a specificity-oriented approach in which the governing rule is, literally, whichever rule speaks with greater specificity to the fact pattern (whether it is more rights-protective or not).[40] Deconfliction of LOAC and IHRL, in short, requires resolution of a complex and entrenched debate.

As if this were not enough complexity, it is of course possible that the best answer to the relevant-body-of-law inquiry will vary depending on the circumstances. That is, it may be that in one location LOAC plainly is relevant and IHRL is not, while in other locations the reverse is true and in still another location it might be that the question turns partially or entirely on domestic law instead.

B. The Content Debate: Disagreement Regarding the Rules Themselves

Unfortunately, the opportunities for confusion and disagreement are not confined to the threshold determination of which body or bodies of law matter. Even if we had consensus on that question, an equally intransigent set of disagreements emerges within each domain when we turn to the question of what that body of law has to say, if anything, regarding the particular mix of detention predicates and constraints that a State can or perhaps must use.

Note that in the abstract there are several possible outcomes when one seeks to determine what rule a particular body of law supplies with respect to the detention-scope issue. First, the body of law may provide a determinate and discernible rule that is narrower than the scope of detention authority asserted by the government. Or the reverse may be true; the rule may permit at least as much detention authority as the government asserts. One can expect litigants to emphasize one or the other of these positions. But there are other possibilities. Most notably, it may be

that the body of law is simply indeterminate on the question of scope. In that case, an important question arises regarding the default state of affairs. Does the absence of a rule constitute an absence of affirmative authority for the government to exercise detention power? Or instead does it constitute an absence of constraint on the government's exercise of such powers? This too can be a point of disagreement. Finally, it may be that the most complete answer involves a blend of the aforementioned possibilities depending on the circumstances.

1. Domestic Law

Consider first how these possibilities map onto the domestic law sources relevant to the substantive-scope question. One might begin with the September 18, 2001 AUMF,[41] which introduces a series of interpretive issues.

The AUMF does not refer expressly to detention. Of course, it also says nothing express about killing or any other particular kind of military activity. What it does authorize is the use of "all necessary and appropriate force."[42] Thus there is a threshold question as to whether it should be read to confer any detention authority at all. In the case of citizens, moreover, that inquiry is complicated by the existence of a 1971 statute—the Non-Detention Act—providing that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress,"[43] as well as the Civil War–era precedent *Ex parte Milligan* in which the Supreme Court employed broad language in the course of holding that a civilian could not be subjected to a military commission trial where civilian courts were open.[44]

Assuming this obstacle is overcome, the next task is to determine against whom this authority may be directed. Here, the AUMF does a bit more of the work, as it refers to "those nations, organizations, and persons" whom the President determines were responsible for the 9/11 attacks, as well as those who harbor such entities.[45] The Bush administration exercised this authority by identifying al Qaeda as the entity responsible for the attacks and the Taliban as having harbored it, the Obama administration has continued that position,[46] and there does not appear to be any serious doubt that it was appropriate to do so. Thus it seems settled that the AUMF refers at least to al Qaeda and the Taliban.[47]

Even if we had consensus regarding precisely which entities fall within the scope of the AUMF, however, we would still have to grapple with disagreement at the *individual* level. The AUMF is entirely silent with respect to the mix of detention predicates and constraints that suffice to link a particular person to an AUMF-covered group, for purposes of detention or otherwise.

This is, in fact, typical of AUMFs (and declarations of war, for that matter).[48] Yet no one in prior conflicts thought such silence to be significant. Why does it matter

so much now? First, most prior conflicts involved nation-States as the enemy; hence the question of detention largely arose in relation to enemy soldiers who were both readily identifiable (through uniforms and through their overt presence on a conventional battlefield) and eager to actually be identified (in order to ensure prisoner-of-war (POW) treatment and qualification for the combatant's privilege to use force).[49] Second, even where prior conflicts involved a substantial amount of hostilities with guerrilla forces—as in Vietnam—the question of how the United States resolved any incipient detention issues simply did not receive anything remotely resembling the scrutiny that arises today (let alone litigation). Matters are otherwise in relation to the use of detention under the AUMF, to say the least, and thus the question of individualized detention predicates and constraints is far more significant than in the past.

No other domestic law sources suffice to prevent debate and disagreement on these points. Congress, for its part, has not returned to the question of scope, at least not directly. The first post-AUMF legislation to address detention in any significant way was the Detainee Treatment Act of 2005 (DTA),[50] which among other things addressed the jurisdiction of federal courts to hear challenges to individual detention decisions at Guantanamo.[51] The DTA did not purport to define a substantive standard as to who may be detained, however, but rather invited the D.C. Circuit Court of Appeals to consider in particular cases whether the government's assertion of detention authority was compatible with the "Constitution and laws of the United States."[52]

The Military Commissions Act of 2006 (MCA 2006) came closer.[53] It did not purport to define the category of persons subject to detention without charge under the AUMF (or otherwise). It did, however, define the personal jurisdiction of the military commission system. Specifically, it stated that commissions could try cases involving any alien constituting an "unlawful enemy combatant."[54] It defined that phrase in turn to encompass any person who is not part of a State's regular armed forces (or a militia-type group obeying the traditional conditions of lawful belligerency), and who falls into one of three categories: (i) "has engaged in hostilities . . . against the United States or its co-belligerents"; (ii) "has purposefully and materially supported hostilities against the United States or its co-belligerents"; or (iii) "is part of the Taliban, al Qaeda, or associated forces."[55]

The MCA 2006 thus introduced a series of necessary and sufficient conditions to bring a person within the jurisdiction of the new war-crime trial system—conditions that were narrowed only slightly with the subsequent passage of the Military Commissions Act of 2009 (MCA 2009).[56] The MCA 2009 replaced the verbiage "unlawful enemy combatant" with the less baggage-laden phrase "unprivileged enemy belligerent."[57] It kept the criteria relating to participation in hostilities and

material support of hostilities.[58] It also kept the "part of" test, but narrowed it to pertain only to al Qaeda—thus omitting the alternative of establishing personal jurisdiction over an individual solely on the ground that he was part of the Taliban or an associated force.[59]

The MCA 2006 and MCA 2009 arguably shed some light on the substantive-scope question, but for at least two reasons they do not suffice to end debate. First, neither statute actually purports to speak to that question.[60] Perhaps they nonetheless do so by implication, on the theory that the boundaries of personal jurisdiction in the military commission system must extend at least as far as the boundaries of the authority to detain without criminal charge. But it is not obvious that the two questions have such a relationship to one another; one might expect the scope of personal jurisdiction to be wider than baseline detention authority in some respects and narrower in others.

Second, the MCA criteria themselves are underspecified. In terms of predicates, the criteria include both past conduct considerations (including both personal involvement in hostilities and the provision of support to AUMF-covered groups) and an associational status test (the "part of" test). The "part of" test is not further calibrated, however, leaving considerable room for disagreement. This is an important omission given the diffused, evolving and informal organizational structure of non-State actors such as al Qaeda.[61] As for potential constraints, moreover, the MCA criteria are silent with respect to considerations of geography and timing.

Complicating matters, some observers may take the position that the ambiguity of these statutes constitutes an implied delegation of authority to the executive to provide whatever further criteria may be required—and perhaps also that the executive branch is entitled to deference from the judiciary in the event that its exercise of that authority should become subject to judicial review.[62] This too becomes a point of departure for debate, as would any claim that the Constitution itself (via some combination of Article II powers, presumably) confers some degree of detention authority independent of what may be conferred by the AUMF or any other statute. As to the latter argument, it suffices to note that the problems of ambiguity associated with the language of the AUMF surely arise in equal if not greater measure under the Article II authority rubric.

2. The Law of Armed Conflict

Assume for the sake of argument that LOAC is relevant in at least some post-9/11 circumstances involving detention. Unfortunately, it too is underspecified when it comes to individual detention predicates and constraints.

When it comes to the scope-of-detention issue, LOAC is most determinate in relation to international armed conflict—i.e., an armed conflict involving on each

side at least one High Contracting Party to the Geneva Conventions. In that traditional setting, the full range of Geneva Convention protections applies,[63] including a host of provisions that expressly contemplate the use of non-criminal modes of detention in military custody.

Under the Geneva Convention Relative to the Treatment of Prisoners of War (GPW), for example, we find two articles confirming that a State may hold prisoners of war in custody without charge during hostilities.[64] GPW, Article 4, moreover, provides a detailed definition as to who qualifies for POW status (and hence may be detained without much controversy). Among other things, this includes any person who

(i) is a member of the armed forces of a party;

(ii) is a member of an irregular unit that obeys the four conditions of lawful belligerency (having a command hierarchy, wearing a distinctive sign, bearing arms openly and obeying the laws of war); or

(iii) is a member of regular armed forces belonging to a government that the detaining State does not recognize.[65]

The central concept in each instance is membership. And as noted above, the concept of membership (or being "part of" a group) at least in some contexts can be a difficult concept to apply. Not so in this setting, however. The concept of membership in structured armed forces presents few definitional issues. The use of uniforms and the likelihood that a captured member of such a group willingly will concede such status in order to obtain the benefits of POW treatment further reinforce clarity.

When a person does *not* qualify for POW status in the context of an international armed conflict, it does not follow that he or she cannot be detained without criminal charge. On the contrary, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC) expressly contemplates a non-criminal regime of "security internment" for persons who are not POWs, but nonetheless pose a threat to security in relation to an armed conflict.[66] And while the security internment provisions of the GC are largely silent with respect to the individualized criteria for triggering this authority, the International Committee of the Red Cross's commentaries on the GC note that this omission was intentional on the part of the drafters, who thought it best to leave the question of scope to the discretion of the detaining State—though the commentaries themselves offer the opinion that this authority might be applied, as one example, to intern individuals

based on their membership in a dangerous organization.[67] The GC framework, in short, endorses something in the nature of a generalized future dangerousness inquiry, and does not demand particular forms of prior conduct or associational status.

If the question of detention authority arose only in the context of international armed conflict, then, the existence and scope of detention authority might generate little debate. Of course we might still have debates regarding the labels to be applied to detainees, and the resulting benefits to be given them. In the event of a spy or saboteur, for example, one might debate whether the person should be treated as a POW or a security internee, or perhaps instead placed in an interstitial category for unprivileged belligerents.[68] But there would be little doubt as to the basic capacity to detain without charge given the existence of express and sweeping treaty language.

For armed conflicts that are not international in the sense described above, however, the situation is quite different. Prior to 1949, no LOAC treaty instrument purported to apply beyond the confines of an international armed conflict. The 1949 Geneva Conventions broke new ground by including a single article—so-called "Common Article 3"—imposing a handful of baseline humanitarian protections for persons in the hands of the enemy during such conflicts. Additional Protocol II subsequently expanded upon those protections (though the United States is not party to that instrument). Neither instrument explicitly confers substantive detention authority, nor does either purport to limit or deny such authority.

The resulting opportunities for disagreement are considerable. Some construe the silence as fatal for any effort to rest the existence of detention authority on LOAC, let alone to use LOAC to define the scope of that authority.[69] On that view, both authority and definitional scope must derive from other bodies of law (domestic, IHRL or both).[70] Others, however, contend that the absence of affirmative constraint is equivalent to an authorization by omission, on the theory that LOAC on the whole is best understood to be a restraining body of law.[71] On this view, anything that can be done in an international armed conflict *a fortiori* can be done as well during non-international armed conflict—including use of the detention principles noted above.[72] Alternatively, some might take the position that some form of affirmative LOAC authority is needed, and that *customary* LOAC supplies it (again by analogy to the forms recognized by treaty in the international setting).[73]

For those drawn to either of the latter two arguments, further issues emerge. Insofar as a State seeks to bring to bear detention authority akin to the GPW-based power to detain members of the enemy armed force, for example, applying the

"membership" concept will not be a simple affair when used in connection with relatively disorganized non-State actors such as insurgencies or terrorist networks. The POW definition in GPW, Article 4 will not provide much assistance in that circumstance, predicated as it is on the assumption of an organized armed force with a command hierarchy, uniforms and the like.

Of course, a State might seek to avoid such definitional difficulties by instead analogizing to the more-sweeping detention authority associated with security internment under the GC. But the very feature that might make this attractive—the lack of any particular substantive criteria—is sure to invite objections. Such objections no doubt will be muted if the context involves sustained, large-scale, combat violence; the United States employed security internment to detain tens of thousands of individuals in Iraq over the years *following* the international armed conflict and occupation phases in 2003 and 2004, without engendering any serious objections regarding the existence and scope of its detention authority, and this pattern continues on a small scale today long after the expiration of the UN Security Council resolutions that for a time provided an ad hoc positive law blessing for this arrangement.[74] But one should expect the opposite if instead the setting involves only episodic violence of a type not as readily associated in the public's mind with combat and an enemy "force" that is non-hierarchical or otherwise indeterminate in its structure and boundaries. In that case, arguments emerge as to whether the threshold of "armed conflict" has been crossed in the first instance[75] and, even if so, whether the broad discretion associated with the GC security internment system makes sense in the context of this particular form of violence.

3. International Human Rights Law

Though IHRL refers to a diverse array of treaties and international customary law norms, for present purposes it suffices to focus attention on one treaty and one norm in particular: the prohibition of arbitrary detention contained in Article 9 of the ICCPR.[76] Article 9 provides that all persons have a "right to liberty" and thus a State shall not deprive a person of liberty "except on such grounds and in accordance with such procedure as are established by law."[77] That is to say, a State may not hold a person in custody at its own whim as opposed to doing so based on a claim that detention in that circumstance is authorized by law.

Or at least it may not do so ordinarily. The ICCPR also provides that in the event of a public proclamation of an emergency "which threatens the life of the nation," States may "take measures derogating" from certain ICCPR obligations, including the prohibition on arbitrary detention.[78] Then again, the United States has not invoked the derogation option (presumably because the US government position is

that the ICCPR does not apply extraterritorially and that LOAC in any event controls over the ICCPR by virtue of the *lex specialis* principle, as discussed above).

Assuming that Article 9 is applicable, then, the question arises whether US government claims of detention authority after 9/11 might violate that norm. The US government presumably would argue that military detention conducted under the auspices of the AUMF satisfies Article 9, on the theory that the AUMF is a "law" establishing the "grounds" for such detention. In response, one might contend that Article 9 contemplates only *criminal* law as a source of detention authority, but there is substantial reason to doubt that Article 9 requires such an approach.[79]

Assuming that *some* degree of non-criminal detention is compatible with Article 9 (or, if one prefers, with an equivalent customary norm against arbitrary detention), we then reach the question whether the government's claim of some particular mix of detention predicates and constraints in some way violates IHRL. Here, however, IHRL seems not to have anything particular to say; neither the ICCPR, nor any other IHRL treaty to which the United States is a party, nor any customary norm of IHRL purports to offer a substantive definition of non-criminal detention authority.[80]

II. Habeas Litigation and the Scope of the Detention Power

Against the backdrop of uncertainty described in Part I, federal courts have struggled for nine years to identify the mix of detention predicates and constraints permissibly defining the substantive scope of the government's military detention authority at the level of the individual. The range of resulting disagreements is remarkable.

My aim in this Part is to provide a relatively comprehensive descriptive account of these doctrinal disputes. I proceed in semi-chronological fashion, beginning with the often-overlooked habeas opinions associated with the three individuals who were held as "enemy combatants" within the United States after 9/11 and then moving on to a review of the pre- and post-*Boumediene* Guantanamo habeas opinions. The survey documents considerable and persistent points of disagreement.

A. The First Wave of Detention Criteria Caselaw: *Hamdi*, *Padilla* and *Al-Marri*

For several years following 9/11, the judiciary largely was preoccupied with questions of jurisdiction, not substantive law. Most detainees were non-citizens captured abroad and held outside the United States, after all, and as a result did not have a clearly established right to seek judicial review until the Supreme Court conclusively resolved that question in its 2008 decision in *Boumediene v. Bush*. Nonetheless, judges did have occasion to address the matter of individual detention

predicates and constraints in a handful of cases in the pre-*Boumediene* era, including a trio of cases involving detainees held in the United States (one originally captured in a combat setting abroad, and two captured in the United States itself).

1. The Scope of Detention Authority in Relation to Conventional Battlefield Captures Involving the Taliban

The sole post-9/11 instance in which the Supreme Court of the United States has addressed the substantive-scope issue to any serious extent is *Hamdi v. Rumsfeld*, in which a majority of the Court concluded that (i) associational status—in particular, serving as an arms-bearing member of a Taliban military unit—sufficed as a detention predicate at least where the detention occurred on the field in Afghanistan and while combat operations continue in that location, and (ii) being a US citizen does not exempt a person from being subject to such detention authority.

Yaser Hamdi had come into US custody in Afghanistan after being captured by Northern Alliance forces in the fall of 2001. The United States initially believed that Hamdi was a citizen of Saudi Arabia, but learned after bringing him to Guantanamo that he had been born in Louisiana and hence could claim to be a US citizen as well. As a result he was moved to a detention facility inside the United States, and he no longer faced the jurisdictional hurdles then preventing other Guantanamo detainees from obtaining habeas review.

Hamdi's case presented a relatively easy fact pattern from the viewpoint of the substantive-scope issue. He was not alleged to be an al Qaeda member or associate, and he was not captured in circumstances seemingly unrelated to conventional armed conflict. Rather, the government claimed, he was an arms-bearing fighter for the Taliban who had been captured with his unit and his weapon while fleeing the battlefield in Afghanistan. Hamdi denied that this was true, but for present purposes the important point is that the allegations cleanly presented the question whether a person meeting that description lawfully could be held without criminal charge.

The fact pattern actually posed two distinct substantive-scope questions. First, did the government have authority to detain *any* person in this situation—i.e., bearing arms for the Taliban in Afghanistan? Second, if the government did have such authority as a general proposition, would the answer change if the person happened to be a US citizen? The Supreme Court splintered in response to these questions.

A plurality of the Court in an opinion by Justice O'Connor upheld both the government's notional assertion of *some* authority to detain, as well as its claim that such authority extended at least to Hamdi's alleged circumstances—and Justice Thomas provided a fifth vote for these conclusions in a separate opinion.[81] To begin with, the

plurality framed the issue as turning on a question of domestic law informed by reference to international law—i.e., the plurality focused on the meaning of the AUMF as construed in light of the law of armed conflict.[82] As to the existence of *some* authority to detain, no treaty-based detention provision appeared directly applicable; Hamdi was not held as a prisoner of war or security internee, and the conflict in Afghanistan by 2004 no longer appeared to be an international armed conflict in any event. Nonetheless, the plurality concluded that detention was a traditional "incident" of warfare and thus, presumably, a necessary part of whatever body of customary LOAC principles might govern in this setting.[83] As for *who* precisely might be detained as a result, the plurality concluded that detention authority at least extended to persons who engaged in a particular combination of past conduct and associational status: bearing arms as part of a Taliban military unit in Afghanistan.[84] Emphasizing that the point of military detention is preventive incapacitation, moreover, the plurality expressly rejected the idea that detention might be justified on the collateral ground that a person may possess useful intelligence.

The plurality pointedly did not express any view as to the existence or scope of detention authority in other settings. It did not say whether detention authority extended beyond the Taliban to al Qaeda. It did not address the power to detain persons captured outside of Afghanistan, or persons who did not literally bear arms on a conventional battlefield. It merely observed that the "legal category of enemy combatant has not been elaborated upon in great detail," and that the "permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them."[85] The plurality did caution, however, that its "understanding is based on longstanding law-of-war principles," and 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."[86]

2. The Scope of Detention Authority in Relation to Domestic Captures Involving al Qaeda

The *Hamdi* decision left open more questions than it answered. What conduct other than bearing arms on the battlefield might count as membership in an AUMF-covered group justifying detention? Would membership continue to be sufficient if a person were to be captured outside Afghanistan, or if the linkage was to al Qaeda rather than the Taliban? Could conduct aside from membership—especially providing material support—provide an independent sufficient condition for detention in any location?

The cases of Jose Padilla and Ali Salah Kahleh al-Marri provided an early opportunity to address some of these loose ends. Unlike Guantanamo detainees, but like

Yaser Hamdi, both were in a position to seek habeas review with little in the way of jurisdictional disputes. Padilla was an American citizen captured in Chicago and eventually taken into military custody on the ground that he was an al Qaeda sleeper agent who had come back to the United States to assist or even personally participate in terrorist attacks. Al-Marri, a Qatari citizen, likewise was arrested inside the United States and then later transferred to military custody based on his alleged role as an al Qaeda sleeper agent. Neither, it initially appeared, was directly connected to the conventional battlefield in Afghanistan or to the Taliban.

The Padilla litigation moved forward quickly. Indeed, the substantive detention authority question was before Judge Michael Mukasey of the Southern District of New York by December of 2002.[87] As an initial matter, he found that the President had general authority to use military force against al Qaeda as a result of both the AUMF and Article II of the Constitution, and that the substantive scope of the resulting detention authority could be determined at least in part by reference to LOAC (at least insofar as LOAC takes the form of treaties to which the United States is a party, such as GPW).[88] LOAC, Judge Mukasey concluded, permits the detention without charge of persons who qualify as either lawful or unlawful combatants.[89] He did not elaborate the conditions necessary to show that a person fits into one or the other category; that is, he did not specify whether lawful and unlawful combatancy turns on conduct, status or both. He did, however, expressly reject the notion that Padilla should be exempt from detention simply because he was a citizen or because he was captured within the United States, and he implicitly rejected the notion that detention authority extends only to persons who actually bore arms on a conventional battlefield.[90]

Padilla appealed, and in late 2003 prevailed in a decision from a divided panel of the Second Circuit.[91] For Judges Pooler and Parker, the critical facts were Padilla's status as a citizen and his arrest within the United States—i.e., away from a conventional battlefield.[92] In that specific scenario, they concluded, the Constitution requires that any power to detain be conferred expressly by statute, not implicitly.[93] The AUMF, in this view, lacked sufficient clarity.[94]

This set the stage for Supreme Court review, or so it appeared. In the end, however, the Court avoided the issue. In an opinion issued simultaneously with the Court's *Hamdi* ruling, the Court held that the petition in Padilla's case should have been filed in South Carolina (the state in which Padilla was held at the time he filed) rather than in New York (the state in which he initially had been held).[95] Litigation thus had to begin anew at the district court level.

On remand to the District of South Carolina, Judge Floyd adopted the Second Circuit's view that detention authority did not apply to an American captured in the United States (absent a clear statement from Congress of its intention to convey

such authority), and then added an additional reason to believe Padilla in particular could not be detained.[96] The phrase "all necessary and appropriate force" in the AUMF, he argued, should be construed rather literally; any exercise of force must be "necessary" in the strict sense that no adequate *non*-military alternative is available. Padilla could not be detained militarily, on this view, because he could be (and indeed for a time had been) incapacitated instead through the civilian criminal justice system.[97]

A few months later, a Fourth Circuit panel reversed, albeit on somewhat unexpected grounds.[98] Referencing the *Hamdi* plurality opinion, Judge Luttig explained that the ultimate question is whether the AUMF, as construed in light of LOAC, confers detention authority in a particular case.[99] *Hamdi* had settled the point as to a Taliban member captured in the field in Afghanistan, whereas the Padilla litigation had seemed to present the question whether the same result obtained for an al Qaeda member captured far from conventional combat. But as restated in the Fourth Circuit's opinion, Padilla's fact pattern looked much more like that in *Hamdi* after all. Padilla, Judge Luttig emphasized, had received military training at an al Qaeda facility in Afghanistan and was present there as part of an armed al Qaeda unit serving the Taliban at the time of the US military intervention after 9/11.[100] The only notable difference between Hamdi and Padilla, in this view, was that the latter managed to evade capture until far from the battlefield.[101] This was no reason to deny the government's detention authority in the panel's view, even when the capture occurred within the United States.[102]

Once more the stage seemed set for Supreme Court review. What would have occurred next remains a mystery, however, as the government soon transferred Padilla back to civilian custody in order to prosecute him in Florida. The move precipitated criticism in some quarters, and prompted a manifestly unhappy Judge Luttig to vacate his earlier opinion on the merits. Nonetheless, Padilla's special role as the vehicle for fleshing out the substantive law of detention had come to an end. Going forward, it seemed that it would be the contemporaneous al-Marri litigation that tested the boundaries of detention authority.

Like Padilla, Ali Salah Kahleh al-Marri initially pursued habeas relief in the wrong jurisdiction, and as a result no judge addressed the merits in his case until 2005.[103] Eventually he refiled his petition in South Carolina, and like Padilla his case came before Judge Floyd. As noted above, Judge Floyd in early 2005 had construed the AUMF not to provide detention authority in Padilla's case, and since his opinion addressing the same issue in al-Marri's case came down just a few months later—before the Fourth Circuit reversed Judge Floyd's *Padilla* ruling—al-Marri no doubt expected a similar result. But it turned out otherwise. Judge Floyd drew a sharp distinction between citizens such as Padilla and non-citizens such as al-Marri,

notwithstanding the latter's lawful residence in the United States.[104] Citizenship, on this view, had been not just an important but a necessary condition of Judge Floyd's earlier, strict reading of the AUMF. For non-citizens, Judge Floyd would insist on neither express statutory language conferring detention authority nor a strict reading of "necessity" such that military detention is not available when criminal prosecution suffices as an alternative.[105] Judge Floyd's *Al-Marri* opinion thus emerged alongside that of Judge Mukasey in *Padilla* as broad endorsements of detention authority away from the conventional battlefield.

Approximately one year later, a divided panel of the Fourth Circuit yet again reversed.[106] The panel majority, written by Judge Motz, framed its analysis, at least at the outset, in terms of a domestic law consideration that would not necessarily apply to non-citizens captured outside the United States. Specifically, Judge Motz emphasized that al-Marri, though a non-citizen, was lawfully present in the United States at the time of his arrest and hence able to invoke the protections of the Fifth Amendment Due Process Clause.[107] The manner in which she elaborated the meaning of the Fifth Amendment in this context, however, had sweeping implications for the scope of the government's detention power even in other settings. The Fifth Amendment, she explained, generally precludes detention other than pursuant to criminal conviction, subject only to a fixed number of narrowly defined exceptions.[108] One such exception is the power to detain an enemy combatant during war,[109] and the boundaries of that category must be ascertained by reference to LOAC.[110] The court's analysis of the Fifth Amendment issue thus became a vehicle for staking out a position regarding LOAC's general approach to the substantive-scope issue—a position that would carry implications for any detention carried out under color of LOAC, regardless of whether the detainee had Fifth Amendment rights or access to judicial review.

What precisely did the panel conclude with respect to LOAC's treatment of the detention question? The opinion began by asserting that LOAC "provides clear rules for determining an individual's status" as either a "combatant" or a "civilian" in the context of international armed conflict. The panel asserted that civilians were categorically immune from military detention without criminal charge, failing to account for the security internment regime provided in the GC.[111] LOAC, the panel concluded, contemplated detention solely for combatants.

As to who constituted a combatant, the panel looked to GPW, Article 4, which defines eligibility for POW status.[112] That is to say, the panel equated eligibility for detention with eligibility for POW status, adding that LOAC treats as "combatants" only those who fight for the military arm of a nation-State, not just any armed group.[113] Indeed, the panel added, there simply was no such thing as "combatant"

status—and hence no LOAC-based detention authority—outside the context of international armed conflict.[114]

This was fatal to the attempt to detain al-Marri. Hamdi had been detainable in theory because of his alleged affiliation with the military arm of the Taliban, with the Taliban functioning as the de facto government of Afghanistan. Padilla's eligibility ultimately rested on the same ground (according to the Fourth Circuit at least, even if not Judge Floyd).[115] Al-Marri, in contrast, was a "mere" al Qaeda member with no alleged prior role as a de facto Taliban battlefield fighter. At most he was someone associated with the enemy in a *non*-international armed conflict in which there simply was no LOAC-based detention authority. No al Qaeda member could be detained, on this view, absent the coincidence of having been in the field in Afghanistan in a context that could be described as bearing arms for the Taliban—whether later captured in the United States or not.

But the al-Marri litigation was not over. The government successfully sought en banc review, resulting in a reversal of the panel by a narrow margin—and a profound splintering of opinion regarding the substantive bounds of the government's detention authority.[116] Four judges, in a new opinion by Judge Motz, endorsed the panel's original rationale.[117] Five other judges disagreed, albeit for different reasons.

Judge Traxler, in an opinion joined in relevant part by Judge Niemeyer, concentrated on the language of the AUMF itself, and in particular on its reference to the use of force against "organizations" as well as "nations" found to be linked to the 9/11 attacks.[118] In their view, the AUMF reflects a legislative intent to permit military force against al Qaeda, above all.[119] They did not dispute that LOAC defined limits on how such force might be employed, but rejected the panel's conclusion that LOAC permitted detention only when dealing with members of the military arm of an actual nation-State.[120]

Judge Williams, in a separate opinion joined by Judge Duncan, offered a view that was simultaneously broad and narrow. Like Judge Traxler, Judge Williams rejected the claim that the detention authority conferred by the AUMF should be read to apply only to members of the military arm of a government. But whereas Judge Traxler suggested that LOAC imposed no such limitation, Judge Williams accepted that the panel's approach "may very well be correct" as a statement of LOAC; he simply did not think that any such LOAC-based restraints survived the AUMF's explicit reference to the use of force against "organizations" as well as "nations" linked to the 9/11 attacks.[121] Interestingly, however, Judge Williams in another sense did define detention authority narrowly. Rather than refer to mere membership in or association with an enemy force as sufficient to justify detention under the AUMF, he advanced a conduct-based criterion: one must "attempt[] or

engage[] in belligerent acts against the United States" on "behalf of an enemy force" in order to be subject to detention on this model.[122] Further complicating matters, moreover, Judge Williams (somewhat inconsistently) held open the possibility that detention authority might *not* continue to exist when the United States was no longer engaged in conventional combat operations in Afghanistan.[123]

Then we have the distinctive opinion of Judge Wilkinson.[124] His analysis began relatively conventionally, exploring whether the AUMF on its own terms plausibly could be read to limit detention authority to members of government-sponsored armed forces or persons who literally fought on a conventional battlefield.[125] Neither its broad terms nor the legislative intent giving rise to it could be squared with such limits, he concluded.[126]

Next, Judge Wilkinson considered whether the broad scope of detention authority seemingly conferred by the AUMF could be reconciled with any applicable constitutional limitations given that al-Marri had been lawfully resident in the United States.[127] Citing *Hamdi*, Judge Wilkinson observed that the government constitutionally may detain persons who count as "enemy combatants."[128] The task at the heart of the constitutional inquiry, therefore, was to identify the contours of the "enemy combatant" category.[129] Toward that end, Judge Wilkinson reasoned that one must look to "traditional law of war principles."[130] LOAC was "not binding of its own force," he cautioned. But it mattered nonetheless because it "informs our understanding of the war powers in Articles I and II and of the enemy combatant category."[131]

Having clarified his motivation for doing so, Judge Wilkinson proceeded to a lengthy discussion of LOAC's treatment of the detention question.[132] In accord with Judge Motz—and likewise without reference to the security internment framework in the GC—Judge Wilkinson accepted that LOAC permitted detention without criminal charge solely for combatants, not for civilians.[133] He differed sharply from Judge Motz, however, with respect to the scope of the combatant category. Whereas Judge Motz effectively equated combatancy with eligibility for POW status, Judge Wilkinson accepted the government's contention that some individuals lose their eligibility for POW status by flouting LOAC yet nonetheless remain "combatants" subject to targeting and detention.[134] On that view, POW status is not the measure of combatancy, nor was any "single factor" a necessary or sufficient condition to establish that status.[135] The most one could say, Judge Wilkinson argued, was that the category "traditionally included 'most members of the armed forces'" as well as "those 'who associate themselves with the military arm of the enemy government,'"[136] and that key indicia included self-identification through the wearing of uniforms, involvement in the command structure of a party to the conflict or presence on the battlefield.[137]

At this point in his analysis, however, Judge Wilkinson introduced a distinguishing proposition: that LOAC is evolving in the face of asymmetric warfare and mass-casualty terrorism, bringing with it corresponding change to the concept of combatancy.[138] He expressly embraced the proposition that law and strategic context exist in dynamic relationship,[139] and argued that LOAC in particular had "consistently accommodated changes in the conduct of war and in international relations."[140] In our own era, he observed, war was becoming "less a state-based enterprise," with the diffusion of destructive technologies enabling super-empowered non-State actors to pose a strategic threat to States.[141] "Thus," he concluded, "while the principle of discrimination and the category of enemy combatant surely remain a vital part of the law of war, they most definitely must accommodate the new threats to the security of nations."[142]

All of which raised two questions. Precisely how should LOAC evolve? And through which institutional mechanisms should such evolution be effectuated or recognized?

As to the latter point, Judge Wilkinson contended that the elected branches of the government already had expressed their opinion of the matter by expressly including "organizations" in addition to States in the AUMF's text. But he also stated at the outset of the opinion that the time had come to "develop" a new, tailored legal framework to accommodate LOAC to the evolving strategic climate,[143] and he proceeded at this point in his analysis to offer his own perspective as to how best this could be done.[144] Going forward, he argued, the inquiry into combatant status ought to turn on a three-step inquiry: a combatant is a person who is

> (1) . . . a member of (2) an organization or nation against whom Congress has declared war or authorized the use of military force, and (3) [who] knowingly plans or engages in conduct that harms or aims to harm persons or property for the purpose of furthering military goals of the enemy nation or organization.[145]

The Wilkinson test, in short, combines a membership inquiry with a conduct test, thus arriving at a result not unlike that advanced by Judge Williams. As to membership, Judge Wilkinson conceded that identifying a sufficient degree of association with a non-State actor would be more difficult than, say, ascertaining citizenship.[146] Nonetheless, he argued, the concept could be measured with reference to criteria such as "self-identification with the organization through verbal or written statements; participation in the group's hierarchy or command structure; or knowingly taking overt steps to aid or participate in the organization's activities."[147] As for the additional requirement of involvement in hostile conduct, Judge Wilkinson suggested that this criterion would encompass both those who

literally engage in hostilities and those who merely engage in preliminary steps toward such acts (as with a "sleeper cell"), but that it would not also reach the members of an enemy organization otherwise (and hence would not encompass an al Qaeda doctor, for example).[148]

The net result of the Traxler, Williams and Wilkinson opinions was a five-vote majority rejecting the proposition that the AUMF conferred detention authority solely as to those who fought for the armed forces of a government or those who had fought on a conventional battlefield. The five-vote block did not agree, however, with respect to whether membership in a non-State organization such as al Qaeda must be joined with hostile individual conduct in order for detention authority to attach, and it was unclear what the four-vote block associated with the opinion of Judge Motz might think of that proposition.

The al-Marri litigation would shed no further light on these questions. The Supreme Court did grant *certiorari* in the case, but as had happened with Padilla previously, the government at that point mooted the case by transferring al-Marri to civilian custody to face criminal prosecution—prompting the Supreme Court to vacate the Fourth Circuit's judgment and remand the case to be dismissed as moot.[149] Thus ended the last of the suits challenging the government's detention authority in the exceptionally complicated—and exceptionally uncommon—context of US citizen detainees and other persons captured inside the United States.

Some things seemed to have been settled along the way, others not. The judges uniformly agreed that the AUMF conferred *some* detention authority, including at least the authority to reach Taliban fighters—even US citizens—captured on the battlefield in Afghanistan. Beyond this, however, the judges disagreed sharply. Some rejected the proposition that the authority could extend to al Qaeda–linked individuals, while others took the contrary view. Among those accepting that detention authority could extend to the context of al Qaeda–related captures, some thought membership in al Qaeda a sufficient condition for detention, while others argued that membership was necessary but not sufficient, and that some showing of knowing conduct associated with violence was also required. Among those who found membership sufficient or at least relevant to the analysis, moreover, there was relatively little discussion of just what the indicia of membership in a non-State actor like al Qaeda might be. None of the judges, finally, had occasion to address the scenario in which a person was not a member of an AUMF-covered group but had provided material support to one.

B. The Second Wave of Detention Criteria Caselaw: The Guantanamo Cases

The end of domestic-detention litigation did not mean that courts going forward would have no further opportunity to consider these debates. The same questions

of course arise in relation to the vastly more frequent scenario in which the military has detained non-citizens captured and held overseas.

1. Contesting the Substantive Scope of Detention Authority in Boumediene

Between the opening of detention operations at Guantanamo in January 2002 and the summer of 2004, the ability of non-citizens held there to obtain judicial review via habeas corpus was sharply contested. That contest ended for a brief period in June 2004, however, when the Supreme Court in *Rasul v. Bush* held that the federal habeas corpus statute conferred jurisdiction as to the claims of the Guantanamo detainees. Not long thereafter, Congress enacted the first of two statutes designed in part to overturn the statutory holding in *Rasul*, thus reviving the debate over jurisdiction that stood between the Guantanamo detainees and judicial consideration of any merits issues they might present—including arguments about the legal boundaries of detention authority.[150] Yet in the months before Congress acted, habeas litigation had moved forward in federal court in Washington, D.C., with two cases proceeding to the merits.

Ultimately, these cases would come together in the Supreme Court under the name *Boumediene v. Bush.* At the district court level, however, they remained quite distinct. One came before Judge Leon, who resolved the petition in the government's favor without addressing the substantive scope of the government's detention authority.[151] The other came before Judge Green, who took the contrary view.

In a January 2005 decision titled *In re Guantanamo Detainee Cases*, Judge Green concluded that the detainees held at Guantanamo were entitled to the protections of the Fifth Amendment notwithstanding their status as non-citizens captured and held outside the United States.[152] This of course raised constitutional questions regarding the actual process the detainees had been afforded. But it also raised a constitutional question regarding the substantive scope of detention authority asserted by the government in the following sense.[153] One group of detainees in the litigation had argued that the Fifth Amendment precludes detention "based solely on . . . membership in anti-American organizations rather than on actual activities supporting the use of violence or harm against the United States."[154] Judge Green agreed, writing that it would violate due process if the government were to hold a person "solely because of his contacts with individuals or organizations tied to terrorism and not because of any terrorist activities that the detainee aided, abetted, or undertook himself."[155] In that respect, Judge Green's opinion was akin to the view expressed by Judge Wilkinson in *Al-Marri*; for both judges, detention could not be predicated on membership alone, but must include some showing of

knowing involvement in violent activities (though not necessarily direct participation in violence).[156]

It would be some time before another judge would address the substantive scope of detention authority in the context of a Guantanamo habeas claim. By the time the decisions by Judges Leon and Green were before the D.C. Circuit Court of Appeals, Congress had enacted the Detainee Treatment Act, which purported to eliminate statutory habeas jurisdiction—thus reviving the pre-*Rasul* jurisdictional debate, albeit with a twist. Instead of eliminating all judicial review, the DTA created an exclusive mechanism pursuant to which the D.C. Circuit Court of Appeals could review individual detention decisions at Guantanamo in order to determine whether the military's screening system complied with the "Constitution and laws of the United States" and whether the military had actually complied with its own screening rules in a particular case. This model appeared to leave the D.C. Circuit in a position to consider the legal boundaries of the government's detention authority, but at the same time the DTA appeared to eliminate the habeas review system that had provided Judge Green the occasion for her ruling.

Several detainees—including many of the individuals involved in the cases before Judges Leon and Green—argued that this arrangement was unconstitutional, reasoning that the Constitution required the existence of habeas corpus jurisdiction at Guantanamo and that the D.C. Circuit review alternative was not an adequate substitute. That much is widely appreciated, as their arguments did ultimately prevail in *Boumediene*. Many are not aware, however, that these litigants simultaneously pressed the substantive question of who lawfully may be detained, and that this question was briefed and argued to the Supreme Court alongside the jurisdictional issue.

The lead petitioners in *Boumediene* did not focus their arguments on Judge Green's determination that the Due Process Clause required a conduct-based rather than a membership-based test for detainability.[157] Instead, they concentrated on LOAC-based arguments that would constrain the government's detention authority irrespective of whether a particular detainee could claim Fifth Amendment protections. Their argument began with the premise that LOAC defined the outer boundaries of whatever detention authority the United States had.[158] Next, the petitioners argued that LOAC does not recognize combatant status in relation to armed conflicts between States and non-State actors; in that setting, they contended, everyone counts as a civilian.[159]

One might have expected them to stop at this point, echoing the view of Judge Motz in the *Al-Marri* panel decision to the effect that civilians simply are not subject to military detention. But they did not do so. On the contrary, they conceded

that some civilians could indeed be detained consistent with LOAC.[160] But which ones?

The petitioners invoked the "direct participation in hostilities" (DPH) test, arguing that any civilian could be detained to the extent that he or she had engaged in DPH.[161] DPH is a LOAC principle associated with the question of who may be targeted with lethal force, reflecting the notion that whereas a "combatant" may be targeted at all times so long as not *hors de combat*, a "civilian" may never intentionally be targeted unless that person is engaged in DPH. DPH is not, in other words, a concept traditionally associated with detention authority. Nonetheless, in the context of a non-international armed conflict involving a clandestine network the members of which sought to obscure their identity, the idea of using DPH as a sorting standard had a certain appeal as a limiting principle for detention authority. From this point of view, their argument was rather in the spirit of Judge Wilkinson's effort to craft a more-tailored understanding of "combatant" for use in the same setting, except that in this case the argument was framed as a description of what LOAC *already* requires as a binding rule of international law in this context.[162]

Even assuming the Supreme Court was amenable in principle to using the DPH standard as the measure of detainability, a problem remained. Famously, the precise meaning of DPH is the subject of fierce and protracted disagreement.[163]

The petitioners would have to tread carefully in crafting their position on this point. If they pushed for too narrow a definition, they might alienate those members of the Court inclined to recognize a relatively broad amount of detention authority. If they advanced too broad a conception, on the other hand, they might confirm their own detainability. Ultimately, and perhaps surprisingly, they erred on the side of a broad definition.

As an initial matter, they conceded that immediate personal involvement in conventional battlefield-type actions counts as direct participation.[164] That much is common ground for most, if not all, participants in the larger DPH debate. They did not stop there, however. They also endorsed the view that a person can be deemed perpetually engaged in DPH—in effect, waiving the protections of civilian status—insofar as he engages in DPH on a repeated basis (a position rather like the "continuous combat function" theory of DPH advanced by the International Committee of the Red Cross, among others).[165] The petitioners added that this status would extend to leadership figures in al Qaeda, moreover, and most remarkably of all they suggested it might even extend to those actual members of al Qaeda who are subject to the group's direction and control.[166] In short, the petitioners offered a test that would leave the government with a substantial amount of detention—and targeting—authority, while excluding those who at most provide

support on a relatively independent basis to al Qaeda or the Taliban (presumably the petitioners reasoned that the government at most could prove them to be in the latter category).[167]

Notwithstanding this invitation, the Supreme Court in *Boumediene* ultimately chose to say nothing at all about the question of detention standards, neither endorsing nor rejecting Judge Green's objection to membership-based detention or the *Boumediene* petitioner's DPH-based argument.[168] All of this instead would be left for the district courts to sort out in the coming wave of habeas litigation.

2. Contesting the Substantive Scope of Detention Authority after Boumediene

Much has occurred in the Guantanamo habeas litigation during the two and a half years since the Supreme Court's decision in *Boumediene*. The federal district court in Washington, D.C. has resolved the merits in habeas cases involving forty individual Guantanamo detainees, finding for the government in nineteen instances and for the detainee in twenty-one.[169] Many of these rulings have been or may yet be appealed. Of the nineteen cases won by the government at the district court level, the D.C. Circuit has reached the merits in five, affirming in four instances and reversing and remanding for further consideration in one other.[170] Of the twenty-one cases won by the detainee at the district court level, the D.C. Circuit has reached the merits in two, reversing with instructions to deny the writ in one instance[171] and reversing and remanding for further consideration in another.[172] Many of these appellate decisions are themselves now the subjects of unresolved petitions for certiorari, and so the circumstances remain in flux.[173]

In addition to all of this, the D.C. Circuit Court of Appeals very shortly after *Boumediene* held that the government lacked authority to detain a group of seventeen Chinese Uighur detainees, because their alleged affiliation with the East Turkistan Islamic Movement did not bring them within the scope of the AUMF.[174] That ruling came under the auspices of the DTA, rather than the habeas corpus review mandated weeks earlier by *Boumediene*,[175] but the result in any event was a defeat for the government.

For the most part, these decisions have turned on evidentiary issues. That is, they turn on questions such as whether and to what extent to credit certain kinds of evidence, and above all whether the collective impact of the government's evidence suffices in a particular case to prove by a preponderance of the evidence that a detainee is who the government claims him to be.[176] But along the way, the judges have had several occasions to grapple with the substantive-scope questions left open by the combination of *Hamdi*, *Padilla, Al-Marri* and *Boumediene*. Perhaps predictably, they have disagreed on several key points.

The first section below surveys a handful of conflicting cases considering whether future dangerousness should be treated as a necessary condition for detention. For the time being at least, the answer to that question is no. The next section takes up a line of cases illustrating a strong consensus to the effect that membership counts as a sufficient condition for detention, but also revealing considerable disagreement both as to the actual meaning of membership and whether support independent of membership can serve as an alternative sufficient condition.

a. Rejecting Personal Dangerousness as a Necessary Condition. On April 15, 2009, Judge Ellen Huvelle held in *Basardh v. Obama* that the government may not continue to hold anyone in custody, regardless of whether he or she was a member or supporter of a relevant group at the time of capture, where the person is not likely to "rejoin the enemy" if released.[177] The September 18, 2001 AUMF "defines the Executive's detention authority in plain and unambiguous terms," she asserted, and "does not authorize the detention of individuals beyond that which is necessary to prevent those individuals from rejoining the battle . . . ."[178] Reasoning that Basardh had no prospect of rejoining any enemy of the United States as a result of "widespread public disclosure" of his cooperation with American interrogators, Judge Huvelle concluded that he must be released.[179]

This approach amounts to the imposition of a particular kind of "future dangerousness" condition, above and beyond whatever criteria might be required to justify detention in the first instance. It did not prove popular, however, among other judges. Two district judges explicitly rejected this aspect of *Basardh*,[180] and more significantly the D.C. Circuit eventually did the same.[181] For the time being, then, this aspect of the substantive-scope issue has been settled.

b. Contesting Membership and Support as Sufficient Conditions. The bulk of the post-*Boumediene* cases dealing with the substantive-scope question have focused on the role of membership and independent support as sufficient conditions for detention. Notwithstanding earlier claims to the contrary by Judge Green in *In re Guantanamo Detainee Cases* and Judge Wilkinson in *Al-Marri*, these opinions reflect widespread agreement among the judges that associational status alone—i.e., membership in an AUMF-covered group—can serve as a sufficient condition to justify detention. Consensus breaks down, however, when it comes to fleshing out the meaning of membership, and likewise when it comes to determining whether independent support—i.e., the provision of material support to an AUMF-covered group by a non-member—can serve as an alternative sufficient condition.

These issues arose initially before Judge Leon, presiding over the merits hearing for the *Boumediene* petitioners themselves on remand from their Supreme Court victory.[182] In October 2008, he issued an opinion characterizing both the petitioners and the government as having urged him to "draft" his own preferred legal standard regarding the boundaries of detention authority.[183] This he refused to do, arguing that his role instead was merely to determine whether the administration's position was consistent with a pair of *domestic* legal considerations: the AUMF, and any further authority the President might have under the "war powers" of Article II of the Constitution.[184] Without substantial elaboration, Judge Leon concluded that the government's two-track standard was compatible with both.[185]

There things stood when the Obama administration came into office in early 2009. On the second day of his administration, President Obama initiated a major review of detention policy by giving an interagency task force six months to assess the full range of options associated with the capture, detention, trial and disposition of persons in the context of combat and counterterrorism operations.[186] But litigation deadlines pay no respect to plans for carefully paced policy deliberations, particularly not when years of jurisdictional litigation precedes the merits. Long before the mid-2009 deadline for completion of the interagency review, the administration was obliged to make clear not only whether it intended to defend its authority to employ military detention without criminal charge at Guantanamo, but also what substantive detention standard it believed it had a right to invoke.

It did this on March 13, 2009, when the Justice Department's Civil Division filed a brief before Judge Bates in the *Hamlily* litigation. To the surprise of some, the Obama administration continued to assert authority to detain without charge, and to do so pursuant to a standard not much different from the Combatant Status Review Tribunal standard of the Bush administration. To be sure, it eschewed the baggage-laden nomenclature of "unlawful enemy combatant" in favor of an acronym-less, generic reference to those persons subject to detention pursuant to the September 18, 2001 Authorization for Use of Military Force. And it also expressly embraced the relevance of LOAC for purposes of defining the particulars of that authority. Those particulars turned out to be much the same as before, however, including preservation of the two-track approach encompassing either members or supporters of al Qaeda, the Taliban or associated groups. The only substantive difference was the qualification—or clarification—that independent support must be "substantial" in order to trigger eligibility for detention, thus eliminating any argument that *de minimis* support might suffice to support detention.

Before Judge Bates had the chance to address the merits of the revised position in *Hamlily,* Judge Walton did so in *Gherebi v. Obama*.[187] As an initial matter, Judge Walton rejected the argument that LOAC provides no detention authority at all

outside of international armed conflict, and that the AUMF should be construed accordingly.[188] LOAC, he argued, is best viewed as a restraining body of law rather than an authorizing body of law.[189] Thus, though it is true that Common Article 3 has no express language affirmatively authorizing detention, this merely showed that LOAC imposes no restraints on who lawfully may be detained in non-international armed conflict.

Any restraints instead must come from some other body of law, including the AUMF itself. In Judge Walton's view, however, the AUMF most certainly did confer at least some detention authority. "[W]henever the President can lawfully exercise military force, so, too, can he incapacitate the enemy force through detention rather than death."[190]

That position, of course, was not enough to settle the legal boundaries of AUMF-based detention authority. Judge Walton next had to confront the question of who counts as the "enemy force" when you are not contending with another State's army. Borrowing from the approach of the petitioners in *Boumediene,* the detainee in *Gherebi* urged Judge Walton to adopt DPH as the measure of detainability.[191] But he did not advocate the same conception of DPH as had the *Boumediene* petitioners. Specifically, he rejected the notion that the protections of civilian status might be waived on a sustained basis through continuous participation in hostilities, thus eliminating the need to determine whether a person was engaging in DPH at a precise point in time.[192] Furthermore, the petitioner in *Gherebi* added that it would not be enough just to show that a person had engaged in DPH; in addition, he argued, the person must also have been "part of an organized armed force" rather than some independent actor.[193]

In the end Judge Walton rejected the invitation to adopt one or another version of the DPH standard as a necessary condition for detainability—though he did not refrain from stating in dicta that the continuous-combat-function conception of DPH "while perhaps not quite broad enough, is a step toward the right answer," and that if he were to accept the DPH standard he would construe it to cover "all members of the armed forces of the enemy . . . at all times for the duration of hostilities."[194]

He did agree, however, that membership in an organized armed force is a necessary condition for detention authority—indeed, he concluded that it was a sufficient condition as well.[195] His argument in support of this conclusion turned on the notion that the combatant category did indeed exist in non-international armed conflict.[196] Again noting his view that LOAC is merely restrictive in nature, and hence that silence on a point does not deprive a State of the power to act in a particular way, Judge Walton explained that the silence of Common Article 3 with respect to the existence of a "combatant category" did not mean that no such

category could be recognized in the non-international armed conflict setting.[197] Explicitly equating targeting and detention authority, he asserted that the members of the enemy armed force can be attacked at any time in non-international armed conflict "and, incident to that attack, detained at any time."[198]

In recognizing the existence of a category of detainable combatants in the non-international conflict setting, Judge Walton's opinion in *Gherebi* was contrary to the views expressed by the Second Circuit in *Padilla* and Judge Motz in *Al-Marri*. By accepting that membership alone might establish this ground for detention, his opinion was contrary to Judge Green's in the *In re Guantanamo Detainee Cases* (though, to be fair, Judge Green's position against association status as a permissible detention predicate rested on the premise that the detainee had a Fifth Amendment Due Process right to invoke). And to the extent his opinion rejected the need to show a detainee had personally had involvement in hostile conduct, it seemed contrary as well to the views expressed by Judges Williams and Wilkinson in the Fourth Circuit's en banc opinion in *Al-Marri*. It was most akin, if anything, to Judge Mukasey's original *Padilla* opinion, and perhaps also to the concurrence of Judge Traxler in *Al-Marri*.

In any event, Judge Walton's approach at first blush appeared to be a government-friendly one, insofar as it demanded only a showing of associational status. But whether this was in fact a flexible or narrow standard really depends on how one defines "membership" and "armed force"—concepts with relatively clear meaning in a conventional armed conflict between the armies of States, perhaps, but most certainly not in the context of conflict with a clandestine non-State network with indeterminate organizational conceptions.

As to this question, Judge Walton turned explicitly to LOAC, stating that the "criteria" set forth in GPW, Article 4 and Additional Protocol I, Article 43 constitute "templates from which the court can glean certain characteristics" of an "armed force."[199] This was a challenging approach, to say the least, because if there is anything that Articles 4 and 43 emphasize as criteria for recognition as an armed force, it is adherence to LOAC—and whatever else one might say about al Qaeda and the Taliban, they neither comport their conduct with LOAC nor make any pretense of doing so. Taken literally, then, Judge Walton's reference to the criteria in these provisions would produce precious little in the way of combatant detention authority in this particular context. But Judge Walton's opinion did not highlight the LOAC-adherence language in these articles. Instead, he highlighted their implicit emphasis on the existence of a hierarchical command structure.[200] Treating formal organizational structure as the hallmark of an armed force whose members might constitute detainable (and targetable) combatants, Judge Walton then

concluded that the ultimate inquiry is whether the person in question had "some sort of 'structured' role in the 'hierarchy' of the enemy force."[201]

Judge Walton did seem sensitive to the difficulties inherent in mapping that model onto the context of decentralized networks such as al Qaeda, emphasizing that one must not be too rigid in looking for formal proof that a person occupied such a position.[202] He noted that there usually will not be membership cards or uniforms.[203] The "structured role" test, he explained, may turn instead on a particular functional inquiry: did the person "receive[] and execute[] orders" from the "command structure"?[204]

But there was a further qualification. Judge Walton explained that it is not enough that a person was part of the chain of command of the organization-as-a-whole. Rather, the person must be part of the specific chain of command associated with "the enemy force's combat apparatus."[205] To be sure, Judge Walton was trying to make the point that even a logistics officer for al Qaeda could be detained if part of al Qaeda's military chain of command.[206] And he did also explicitly recognize that a person who at one point in time was performing a non-military function may well be subject to orders to shift to a military function after all, and hence should not be treated as a non-combatant.[207] Nonetheless, this approach did necessarily embrace the notion of distinct "military" and "civilian" wings in such groups, with the personnel of the latter at least sometimes lying beyond the reach of the AUMF for *any* purpose, including not just detention authority but also the authority to target with lethal force.

In this way, Judge Walton's opinion in *Gherebi* at least partially supported the government's assertion that the AUMF conferred authority to detain the members of groups such as al Qaeda and the Taliban. As for the government's claim that the AUMF also conferred authority to detain independent supporters of such groups, however, Judge Walton was less accommodating. He did not directly reject that claim. But he did insist that any support-based detention must comply with the "structured role" test described above, which effectively folded the support inquiry into the membership standard after all.[208] Put simply, no purely independent supporter could be detained under that test (or, presumably, targeted with lethal force). A contrary reading, Judge Walton asserted, would cause the AUMF to conflict with LOAC, and he was unwilling to impute such a reading to the statute absent a clearer showing of legislative intent to accomplish such an end.[209] In this way, Judge Walton broke with the more accommodating approach of Judge Leon.

Obviously Judge Walton's approach embraces the relevance of LOAC and the premise that the United States in at last some current settings is involved in non-international armed conflict—and he offers a highly specific interpretation of what LOAC has to say about who may be detained (or targeted) as a result. Indeed,

driving home the point that his reasoning applied as much to targeting as to detention, he routinely cross-references targeting authority as turning on the exact same standards.

Just a few weeks after Judge Walton's opinion in *Gherebi*, Judge Bates issued his ruling in *Hamlily*.[210] For the most part, his analysis followed Judge Walton's. He agreed, for example, that LOAC permitted detention based on membership status even in the non-international conflict setting, notwithstanding the lack of affirmative treaty language to that effect.[211] And he agreed, too, that in this context "membership" boils down to whether the individual "receives and executes orders or directions" as part of an AUMF-covered group's command structure.[212] Unlike Judge Walton, however, he did not distinguish between the military and non-military wings of an organization, and thus did not restrict eligibility to persons subject to a military-specific chain of command.[213] *Hamlily*, in other words, appears more akin to the Mukasey opinion in *Padilla* and, perhaps, the Judge Traxler opinion in *Al-Marri*.

Whether Judges Walton and Bates differ with respect to non-members who provide substantial support to AUMF-covered groups is less clear. On one hand, Judge Bates concluded that LOAC simply does not permit military detention of such a person (though like all the other judges to address this question, he did not address the potential relevance of the security internment option that would be available in such circumstances in the event of international armed conflict).[214] On the other hand, he noted that membership in organizations such as al Qaeda may be more of a functional than a formal concept, and that conduct that one might describe as independent support could well be conceived instead as evidence of functional membership in some instances.[215] That said, even a functional member must still be shown to be part of the group's chain of command in order to be detained under the *Hamlily* model; truly independent supporters may not be detained no matter how important their aid might be to the group.[216]

Gherebi and *Hamlily* thus are best as consistent on the point that non-members may not be detained, and consistent as well on the point that membership ultimately turns on participation in a chain of command. They appear to differ, however, with respect to whether detention authority is limited to the "military" chain of command within an organization—though the magnitude of that difference very much depends on how strictly one defines "military" in this context.

Adding to the confusion, other district judges subsequently disagreed with one another regarding whether there is a genuine difference between *Gherebi* and *Hamlily*. Judge Hogan, for example, has argued that there is not a substantial difference.[217] Judge Kessler, on the other hand, states that there is, and that she prefers the *Gherebi* approach.[218] Meanwhile, Judge Urbina in *Hatim v. Obama* articulated

an understanding of the chain-of-command test that very likely differs from what either Judge Walton or Judge Bates had in mind.[219]

In *Hatim,* Judge Urbina stated that he adopts the *Hamlily* standard, including the notion that detention authority turns on whether the person in question occupied a role within a relevant group's chain of command.[220] According to *Hatim,* however, merely notional status within a chain of command was not enough; one must have actually obeyed specific orders in the past in order to be a member in this sense, and hence to be detainable.[221] Thus, according to Judge Urbina, it was not enough for the government to prove that a person knowingly attended an al Qaeda training camp and that the individual believed that in doing so he or she had effectively joined al Qaeda.[222] It may be that Judges Bates and Walton, or other judges following the *Gherebi* and *Hamlily* standards, might interpret the chain-of-command test in the same fashion. It seems equally if not more likely, however, that they would not.

In any event, the nuanced disagreement among Judges Walton, Bates and Urbina, if disagreement there truly was, became moot once the chain-of-command question came before the D.C. Circuit Court of Appeals. In a series of cases in 2010, the Circuit has expressly rejected the proposition that one must be part of any chain of command—let alone that of the military wing of an organization—in order to qualify as a member subject to military detention under the AUMF.

The Circuit first made this point in *Al-Bihani v. Obama,*[223] in January 2010. In that case, a divided panel offered a number of important observations regarding the lawful scope of detention authority. To begin with, the majority opinion by Judges Kavanaugh and Brown broke sharply with most of the prior detention cases by concluding that LOAC simply has no bearing on the question of who lawfully may be detained without criminal charge in this setting.[224] That is to say, *Al-Bihani* broke new ground in the habeas litigation by holding that *only* domestic law sources should be considered in the course of determining the legal bounds of detention authority.

Absent reference to LOAC, however, how was the broad language of the AUMF to be construed? As noted, the AUMF itself provides some guidance at the group level, but almost no guidance at all at the individual level. Other domestic law sources would be needed, therefore, in order to address what conduct or status sufficed to link a person to an AUMF-covered group for detention purposes. And according to the majority in *Al-Bihani,* the personal jurisdiction provisions found in the MCA 2006 and MCA 2009 provided the necessary guidance.[225]

Those provisions clearly stated that military commissions may entertain proceedings against non-citizens who are members of AUMF-covered groups and *also* those who are non-members but who nonetheless provide support to such groups.

Asserting that a person subject to military commission prosecution under the two MCAs *a fortiori* would be subject to detention under the AUMF, the panel majority in *Al-Bihani* concluded that independent support thus constitutes a sufficient condition for detention separate and apart from proof of membership in an AUMF-covered group.[226]

As for the meaning of membership, the panel majority rejected the view advanced by Judge Walton in *Gherebi,* Judge Bates in *Hamlily* and Judge Urbina in *Hatim* to the effect that proof of membership requires some kind of participation in a group's chain of command.[227] But if the chain-of-command test did not define membership, what criteria would? Here the opinion was less clear, except as to two remarkable points. First, *Al-Bihani* asserted that a person should be deemed a member and hence subject to detention in the event that he attended a training camp sponsored by an AUMF-covered group.[228] Second, it raised the possibility that merely having stayed at a guesthouse associated with an AUMF-covered group's recruitment process might also constitute adequate evidence of membership and detainability.[229] These statements were dicta and hence not binding on the district court, yet they certainly signaled a broad conception of membership—arguably broader than anything previously endorsed in the habeas litigation, either before *Boumediene* or since.

Subsequent decisions by the Circuit largely reinforced *Al-Bihani.* To be sure, some of *Al-Bihani*'s punch was diluted by the fact that a majority of the active judges of the Circuit declared the panel's views about the irrelevance of international law to be mere dicta, in the course of "denying" en banc review.[230] The dictafication of that aspect of the panel opinion did not necessarily undermine the support and membership aspects of the earlier decision, however, as the panel had also observed that it found "Al-Bihani's reading of international law to be unpersuasive."[231] More significantly, subsequent Circuit decisions have reinforced key aspects of the *Al-Bihani* panel opinion.

First, the unanimous opinion in *Awad v. Obama*[232]—by Chief Judge Sentelle and Judges Tatel and Garland—restated the point that one need not be part of a chain of command in order to be detainable.[233] This would be useful evidence of membership, of course, but membership also could be shown by proof that a person self-identified as part of an AUMF-covered group or was captured in circumstances amounting to fighting on behalf of such a group.[234] And in *Barhoumi v. Obama,*[235] Judges Tatel, Ginsburg and Kavanaugh joined to state once again that the chain-of-command test is not a necessary condition for detention, though it happened to be satisfied in that case and did count as a sufficient condition.[236]

Neither *Awad* nor *Barhoumi* provided the D.C. Circuit with an opportunity to revisit or refine *Al-Bihani*'s favorable treatment of independent support as a distinct

ground for detention. Many thought that the next decision—*Bensayah v. Obama*—would do so. Bensayah himself was the last of the original *Boumediene* petitioners, the only one whom Judge Leon found was subject to detention after remand from the Supreme Court. And as noted above, Judge Leon had expressly approved reliance on independent support as a ground for detention in that case. Indeed, he had found Bensayah subject to detention not for being an al Qaeda member, but instead for having provided support to al Qaeda (in the form of facilitating the travel of would-be fighters to Afghanistan). A casual observer might have assumed, therefore, that the appeal would oblige the D.C. Circuit to give further consideration to the sufficiency of independent support as a detention ground.

A more rigorous observer, on the other hand, would anticipate that the Circuit's decision would focus on the membership ground instead. Several months earlier, Charlie Savage of the *New York Times* had reported the existence of a "pronounced" disagreement among "top lawyers in the State Department and the Pentagon," as well as the Justice Department and other agencies, with respect to "how broadly to define the types of terrorism suspects who may be detained without trial as wartime prisoners."[237] According to Savage's account, the debate arose initially when the government was obliged to develop its revised detention position in *Hamlily*.[238] As noted above, the government ultimately chose to make some changes to its position, but did not abandon the claim that it had authority to detain both members and non-member supporters of AUMF-covered groups. This did not end the internal debate, however, but instead merely delayed it until such time that the administration might be faced with the choice of whether to defend a specific case on independent support grounds.[239]

The need to develop a position on appeal in the *Bensayah* litigation, Savage wrote, provided just such an occasion:

> The arguments over the case forced onto the table discussion of lingering discontent at the State Department over one aspect of the Obama position on detention. There was broad agreement that the law of armed conflict allowed the United States to detain as wartime prisoners anyone who was actually a part of Al Qaeda, as well as nonmembers who took positions alongside the enemy force and helped it. But some criticized the notion that the United States could also consider mere supporters, arrested far away, to be just as detainable without trial as enemy fighters.[240]

Assuming the accuracy of this account, then, the specific dispute involved the conjunction of the independent support ground with the use of detention authority for captures away from the conventional battlefield. Savage reported that the State Department's newly arrived Legal Adviser, Harold Koh, championed the view "that there was no support in the laws of war" for the claim of detention authority in that

circumstance, while the Defense Department's General Counsel, Jeh Johnson, disagreed.[241] Savage indicates that the question was then put to the Justice Department's Office of Legal Counsel, which eventually produced an equivocal memorandum "stating that while the Office of Legal Counsel had found no precedents justifying the detention of mere supporters of Al Qaeda who were picked up far away from enemy forces, it was not prepared to state any definitive conclusion."[242]

Nonetheless, a position was needed for the *Bensayah* appeal.[243] According to Savage's account, the solution was to "try to avoid that hard question" by "chang[ing] the subject" in *Bensayah*. Rather than defend the decision below on the ground relied upon by Judge Leon—i.e., that Bensayah could be detained because he provided support to al Qaeda—the government would instead seek affirmance on the ground that Bensayah was a functional member of al Qaeda.[244] And thus the Justice Department's Civil Division came to make a most unusual filing on the eve of oral argument in the case, explaining to the court in a brief letter that the "Government's position is that this case is best analyzed in terms of whether Bensayah was functionally 'part of' al Qaida, and that the district court's judgment can and should be affirmed solely on that ground."[245] In an indication that the internal debate had not yet been resolved, however, the letter added that

> the Government is not foreclosing its right to argue in appropriate cases that the AUMF, as informed by the laws of war, permits detaining some persons based on the substantial support they provide to enemy forces, even though such persons are not themselves "part of" those forces. The Government continues to defend the lawfulness of detaining certain individuals who provide substantial support to, but are not part of, al Qaida or the Taliban.[246]

At the time he wrote, Savage did not know how this strategy would play out with the D.C. Circuit. Nonetheless, he concluded his account with a perceptive observation regarding the larger significance of the issue: "The outcome of the yearlong debate could reverberate through national security policies, ranging from the number of people the United States ultimately detains to decisions about who may be lawfully selected for killing using drones."[247]

Some nine months later, in late June 2010, the Circuit reversed in *Bensayah v. Obama*.[248] But it is far from clear that the government's decision not to advance the independent support argument caused that outcome, nor that geographic constraints entered into the analysis. In addition to limiting its legal theory on appeal, the government also had decided not to continue to rely on certain inculpatory statements that had been made by another detainee. The latter move appeared to be the decisive one. The panel held that the remaining evidence did not suffice to prove that Bensayah had engaged in the recruiting and logistical

support activities that the government had alleged, and hence that the government had failed to show that Bensayah was a functional member of al Qaeda. By the same token, presumably, this same body of evidence would not have sufficed even if the government had advanced its original independent support theory. In any event, the litigation continues; the Circuit remanded the case not with orders to grant Bensayah's petition, but rather for Judge Leon to reconsider the merits, including any new evidence of functional membership that the government might put forward.

Thus we are left with an unusual state of affairs. After the majority of the district judges to consider the question rejected the proposition that the government lawfully may assert authority to detain independent supporters of AUMF-covered groups, the Circuit took the contrary view. In the meantime, however, the executive branch itself appears to have become internally divided on the question, and for the moment appears disinclined to take advantage of the Circuit's position on the matter—at least where the independent support occurs in a place geographically remote from a conventional battlefield.

The Circuit has not had an opportunity to weigh in on the independent support question since *Al-Bihani* and *Bensayah*. The next two circuit opinions instead touched lightly on other aspects of the substantive-scope issue. Shortly after *Bensayah*, for example, the Circuit in *Al Odah v. Obama* affirmed the detention of an individual on membership grounds.[249] The most notable aspect of the case, for present purposes, was the fact that the opinion by Chief Judge Sentelle and Judges Rogers and Garland restated *Al-Bihani*'s suggestion that training camp attendance alone might well be sufficient to make out the case for detention on membership grounds. Then, two weeks later, Judges Randolph, Henderson and Kavanaugh in *Al Adahi v. Obama* found that evidence of a detainee's attendance at a training camp and guesthouse constituted powerful evidence of functional membership, and sharply criticized a district judge for suggesting otherwise.[250]

In contrast, the Circuit has had a chance since *Bensayah* to comment—albeit only implicitly—on the question of geographic constraints at least in the context of *membership*-based detention. In *Salahi v. Obama*, in November 2010, a circuit panel dealt with a Mauritanian detainee whom the government alleged to be an al Qaeda member but who was not captured in Afghanistan nor alleged to have been involved in combat in or near Afghanistan (at least not after the early 1990s).[251] The appellate panel expressed no concerns about the theoretical assertion of detention authority in such circumstances, but instead remanded so that the district court could reweigh the evidence under a different standard. Implicit rejection of geographic constraints in the membership setting, of course, does not compel the same with respect to detention based solely on independent support.

c. That Which Is Now Clear and That Which Remains Contested. As a result of the foregoing string of D.C. Circuit decisions, an important aspect of the government's detention authority appears settled, at least at a high level of generality and at least for the moment. Specifically, the Circuit has developed a broad consensus to the effect that membership in an AUMF-covered group is a sufficient condition for detention. But other questions remain. What precisely counts as membership in a clandestine, diffused network such as al Qaeda? Does independent support provide an alternative ground for detention? Does the location of a person's capture or underlying activities matter under either the membership or support criteria?

With respect to the detailed meaning of membership, some things have been made clear while others remain uncertain—perhaps inevitably so. The cases do establish that proof of participation in a formal chain of command would be sufficient but is not necessary to demonstrate membership. They are relatively clear, moreover, that training camp participation is highly significant to prove membership, if not a sufficient condition to do so on its own, and the cases further suggest, albeit with less force, that the same may be true for guesthouse attendance in at least some contexts. Absent those elements, however, it remains unclear which forms of involvement with the affairs of an AUMF-covered group distinguish those who can be detained from those who cannot. In that circumstance, the question would seem to depend upon the gestalt impression conveyed by the totality of the circumstances, measured against unspecified—and potentially inconsistent—metrics of affiliation held by particular judges. Consider, in that regard, the way in which Judge Bates summarized the task in a recent, post-*Al-Bihani* opinion:

> "[T]here are no settled criteria" for determining who is "part of" the Taliban, al-Qaida, or an associated force. "That determination must be made on a case-by-case basis by using a functional rather than formal approach and by focusing on the actions of the individual in relation to the organization." The Court must consider the totality of the evidence to assess the individual's relationship with the organization. But being "part of" the Taliban, al-Qaida, or an associated force requires "some level of knowledge or intent."[252]

Even when the training camp or guesthouse elements are present, moreover, it is not clear that they will always suffice. Indeed, one of the first district court opinions to emerge against the backdrop of the Circuit's interventions directly challenged the relevance of guesthouse attendance, arguing that the connotations of guesthouse attendance vary depending on the house in question and that residence at the guesthouse in that particular case was not necessarily inculpatory.[253] On the other hand, another recent district court opinion gives substantial weight to the fact that a detainee attended a Taliban-controlled guesthouse, particularly

when viewed in combination with evidence that a Taliban recruiter gave the man money, a passport and a ticket for air travel, and that the man twice went near to the front lines and received a weapon from a person who likely was a Taliban member.[254]

Note that similar disagreements could yet emerge in connection with the training camp variable. Like guesthouses, training camps can vary in terms of their provenance and connotations. Some clearly were or are operated by al Qaeda or the Taliban, but not all were; fact patterns may arise that raise difficult questions of attribution and inference.[255] Of course, it may be that no further refinement of the variables defining membership is possible in this setting, and that the status quo represents the realistic maximum when it comes to defining this criterion (though it should at least be possible to clarify the geographic question).

In any event, the status quo certainly has not settled the separate question of whether detention may be predicated on a showing of independent support to an AUMF-covered group—nor whether, if such a criterion is legitimate, it must be limited to persons who were captured or acted in certain geographic locations, or for that matter whether it must be confined to only certain types of support or to support rendered with certain specific mental states.

Finally, the question of geography continues to loom large in the substantive-scope debate. Recent litigation associated with alleged plans to conduct a targeted killing of an American citizen in Yemen, on the ground that the individual was an operational leader of al Qaeda in the Arabian Peninsula, has sharpened the debate as to whether LOAC's field of application is strictly limited to geographically defined battlefields of a conventional nature or if, instead, any LOAC-related authority to use force attaches to at least some enemy-affiliated personnel wherever they may travel (or, more narrowly, to such persons when they are located in denied or ungoverned areas).[256] The question is at least as pertinent in the detention context. As noted above, at least two of the Guantanamo habeas cases thus far—*Bensayah* and *Salahi*—involved detainees with remote or no linkages to any traditional battlefield, and the judges in those instances expressed no particular concerns on that point—though they did not expressly address the issue. The earlier experience of the *Al-Marri* litigation, meanwhile, suggests there may yet be judicial disagreement on the point.

Overarching all these questions, finally, is the lingering disagreement regarding which bodies of law actually govern. The *Al-Bihani* panel opinion sought to resolve this dispute by forbidding reference to LOAC and other forms of international law. Though the Circuit majority subsequently neutered that claim by declaring it to be dicta, it did not go so far as to issue a contrary holding to the effect that any such body of law does actually apply. In any event, as Part I illustrated, determining that

a particular body of law applies does not ensure agreement as to what that body of law requires when it comes to selecting and calibrating the variables that combine to form the individualized detention standard.

III. The Significance of the Emerging Law Governing Detention Criteria

In the wake of this descriptive account, several questions arise. First, does it actually matter that the habeas process has not yet resolved the disagreements and unanswered questions noted in Part II? Second, if this does matter, is it preferable to simply be patient, leaving the matter in judicial hands, or instead should Congress intervene with legislation?

A. Do the Disagreement and Uncertainty Matter?

The persistence of disagreement and unresolved questions regarding the substantive-scope issue in the habeas litigation is problematic on many levels. First, the uncertainty and disagreement may prove significant with respect to the many as-yet-undecided Guantanamo habeas cases. True, the vast majority of the Guantanamo habeas cases to this point have turned on other issues—above all, questions of evidentiary sufficiency. Only *Basardh*, in which Judge Huvelle made an ill-fated attempt to limit detention authority to circumstances in which a person was likely to cause harm if released, clearly turned on an issue involving the scope of detention authority that the judge in question was prepared to recognize. But much more habeas litigation is to come, and hence this question may yet prove dispositive for some Guantanamo detainees. No one can say for sure precisely how many cases may yet proceed to the merits, but it seems likely that we are not yet halfway through. We cannot know at this point whether the substantive-scope question will remain marginal to the merits. If it does become central in these future cases, the continuing uncertainty surrounding the question is problematic from both the detainee and the government perspectives.

Second, the pool of habeas cases eventually may encompass more than the Guantanamo detainees. Whether this will come to pass most likely depends, however, on whether the United States resumes the practice of taking long-term custody of individuals captured outside of States in which conventional armed conflict is occurring. This issue has been tested to some extent in the context of Afghanistan. Attorneys representing a group of US military detainees in Afghanistan have been attempting for several years now to establish habeas jurisdiction over detention operations there. They met with mixed success at the district court level, with Judge Bates holding that non-Afghans may pursue habeas relief if captured outside of Afghanistan and brought there for detention by the United States,

whereas none of those actually captured in Afghanistan could do so.[257] A D.C. Circuit panel subsequently reversed on the first point only, explaining that "all of the attributes of a facility exposed to the vagaries of war are present in Bagram" and that the US detention facility in Afghanistan (then at Bagram, today in Parwan) is in "territory under neither the de facto nor de jure sovereignty of the United States and within the territory of another de jure sovereign."[258] The court did not, however, close the door to habeas jurisdiction entirely. The panel went out of its way to observe that there was no evidence in this case that the detainees had been brought into Afghanistan in order to evade judicial review, as their transfer occurred long before *Boumediene* rendered Guantanamo subject to judicial review.[259] The panel warned that if "such manipulation by the Executive" were proven in a future case, the outcome might be different.[260] In the course of remanding that case to Judge Bates for further proceedings, moreover, the Circuit noted that it might take a different view even in that very case should new evidence emerge regarding the nature of US detention operations in Afghanistan.

Given that the United States is actively engaged in a process meant to culminate in the transfer of control over its long-term detention operations in Afghanistan to the Afghan government (just as we already have transferred control of our detention operations in Iraq to the government there), and absent evidence that the United States is still in the business of capturing persons elsewhere and bringing them to Afghanistan for purposes of long-term detention, it must be said that the prospects for an extension of habeas to Afghanistan are increasingly slim notwithstanding these caveats. The more significant lesson from the Afghan habeas litigation, therefore, is that courts going forward likely would be receptive to an extension of habeas to any location should the United States in the future resume the practice of taking and maintaining military custody of individuals captured outside of a traditional battlefield context. It may be that the United States will avoid that practice in the future, substituting some combination of rendition, host-nation detention,[261] targeted killing, surveillance, prosecution or inaction in its place. But if the practice of long-term detention for non-battlefield capture re-emerges, so too will the questions surrounding habeas jurisdiction.

Even if habeas jurisdiction remains limited to Guantanamo, however, there are still other reasons to believe the uncertainty associated with the substantive-scope jurisprudence to be problematic. Most significantly, the struggle over who may be held matters not only for those detainees who already have or may one day receive the right to seek habeas review but also for any detention operations that ultimately depend upon the same underlying legal authority—i.e., the AUMF. That is to say, if judges determine in the habeas setting that the AUMF extends only to certain groups or fact patterns, commanders and policymakers must take that judgment

into account whenever acting under that same authority—whether subject to habeas review or not. In practical terms, this means that the habeas jurisprudence can and presumably will impact all AUMF-based detention operations—including specifically all detention operations in Afghanistan—even though very few detentions beyond Guantanamo are or likely ever will be subject to direct habeas review. Civilian government lawyers advising policymakers, and military judge advocates advising commanders in the field, have an obligation to take account of this caselaw in the course of devising policy and procedure regarding who may be detained prospectively and what standard should be employed when carrying out screening of detainees post-capture. In this way, the detention-scope jurisprudence arising out of Guantanamo could come to impact a far greater number of detainees. Unfortunately, policymakers and commanders at the moment lack clarity regarding the boundaries of their authority, yet have little choice but to proceed in the shadow of this uncertainty.

Making matters worse, spillover effects from the Guantanamo habeas might not be limited to detention operations. The effects may extend to AUMF-based *targeting* decisions as well. That is to say, the detention-scope debate may overhang the decision to kill under color of the AUMF as much it overhangs the decision to detain under that authority.

The point is not an immediately obvious one; the power to kill and the power to detain are by no means coextensive. But they need not be coextensive in order for the Guantanamo habeas litigation to impact the legal bounds of targeting authority elsewhere. Again, the AUMF is the transmission mechanism. Say that in the course of the habeas litigation, courts ultimately determine that the AUMF must be construed to apply only to sworn members of al Qaeda and the Taliban who have received military-style training. Assume further that a commander subsequently desires to launch a missile from a drone into the window of a car being driven in Yemen by a local man whom he believes to act as a fund-raiser for al Qaeda—but whom he also knows has not sworn an oath to al Qaeda or attended any training camps. The strike on its face would not be an exercise of force supported by the AUMF, whatever its consistency with LOAC or IHRL.

It may be that the strike could yet be justified, but the important point for present purposes is that the issue at the very least would be clouded by the narrowing construction of the AUMF produced via the habeas litigation. Thus military operations not directly subject to judicial review[262] nonetheless may be impacted indirectly by the development of detention-scope jurisprudence. And as in the detention context, the dynamic matters not so much because it exists, but rather because it is transmitting *uncertainty*.

Finally, the habeas litigation may also generate spillover effects by virtue of the fact that the judges in the course of resolving the detention-scope issue have engaged with concepts that are both contested and likely to arise in future, unrelated contexts involving military force. This is most obviously the case with respect to the episodes in which judges have grappled with the meaning of "direct participation in hostilities" in an effort to clarify the scope of the government's detention authority. The merits of referencing DPH for this purpose are considered above. For now, the important point is that when courts do make use of DPH in this way, they may be obliged to define this deeply contested concept. And once they do this, their opinion will matter at least to an extent in any subsequent context in which that LOAC concept matters—without regard to whether that subsequent context has anything to do with the AUMF. Any future armed conflict implicating the DPH question—which is to say, any future armed conflict—henceforth would take place in the shadow of that earlier opinion. Much the same might be said for frequently employed statutory language like "all necessary and appropriate force," moreover.

B. Should Congress Intervene?

Assume for the sake of argument that the emerging habeas jurisprudence does indeed involve a substantial degree of disagreement and uncertainty with respect to individualized detention criteria, and that this disagreement and uncertainty are important in relation to future cases and to other, collateral matters. It does not follow automatically that Congress should step in with legislation designed to address the situation.

One might oppose legislative intervention on the ground that the process of refining the law in this area should be left in the hands of the judiciary. Judges, after all, routinely disagree about fine points of law concerning complex subjects, and the appellate review over time will tend to smooth out such discrepancies in the traditional common law fashion. This is, in fact, the argument advanced by a pair of advocacy groups—Human Rights First and the Constitution Project—in a document titled *Habeas Works: Federal Courts' Proven Capacity to Handle Guantanamo Cases: A Report from Retired Federal Judges*.[263] The report contends that the "lower courts are steadily progressing toward a workable detention standard,"[264] and denies that judges have to "draft" a substantive standard or otherwise are engaged in a "lawmaking" process. What the judges are doing instead, the report argues, is merely "interpreting and applying" the detention standard established by Congress and the President in the AUMF as informed by the laws of war.[265] To the extent that the report acknowledges any variation among the judges, it characterizes that variation benignly as the mere "gradual exploration and shaping of the

detention standard," in traditional common law–like fashion.[266] *Habeas Works* concludes that "there is no reason to doubt the ability of the three-level federal court system to develop a substantive detention standard."[267]

That last claim no doubt is correct. As Judge Wilkinson's opinion in *Al-Marri* illustrates, judges can undertake to develop detention standards meant to conform to the peculiarities of the non-State-actor context. And so too no one doubts that the common law process in theory can smooth out the many disagreements that actually arise when judges undertake to do this, much as courts in the past used case-by-case adjudication to develop and amend substantive rules for torts, contracts and the like. But this is a straw man argument. The important question is whether it would be better for Congress to play the primary role in crafting the details of the detention standard.

There are several factors to consider in thinking about this question. First, one could select between these approaches based on the normative desirability of the substantive standard one believes is most likely to be produced in the end by each. On close inspection, however, the two options may be close to a wash along this dimension.

Those who would prefer to see greater restraints on the government's capacity to detain might at first blush be inclined to disfavor legislation on the theory that Congress most likely would adopt a broad detention standard and that the judiciary over time will settle upon a more constrained approach. Proponents of a broad standard, by the same token, might favor legislation for the same reason. The Democratic-controlled Congress in 2009 and 2010 persistently used the power of the purse to make it more difficult for the President to close Guantanamo, after all, and the Republican takeover of the House in 2010 might be expected to tilt Congress still further toward erring on the side of facilitating rather than restraining military detention. But careful consideration of the trends in the caselaw described in Part II suggests that it would be unwise to assume that the judiciary in the end will adopt narrower tests. The sequence of D.C. Circuit opinions in 2010, beginning but by no means ending with *Al-Bihani*, if anything suggests the contrary. And though many of the Circuit's decisions are now the subject of pending certiorari petitions, it would be foolish to assume that the Supreme Court will both take up the substantive-scope question and adopt more constrained positions with respect to it; Justice Kagan is recused from these cases in light of her recent role as the Solicitor General, and Chief Justice Roberts and Justices Scalia, Thomas and Alito are unlikely to be interested in such a narrowing approach.

Fear of, or desire for, a broad detention standard accordingly does not point clearly in favor of or against legislative intervention. What other factors, then, might one bring to bear in developing a well-considered position on the question?

Second, one could focus on the democratic pedigree of the resulting rule set. That is, one might favor legislative intervention because the lawmaking process would do more to contribute to a national debate and public engagement on the question, and the resulting rules would in any event bear a superior stamp of democratic legitimacy. In response, one might note that we routinely have relied on common law processes to develop and refine rules in other important settings. But it is not clear we ever have done so in a context that impacted contemporaneous military operations to this extent. Here, the question at issue is one that speaks directly to an issue of pressing national concern: just who is it that the United States purports to be at war with? A strong argument can be made that the United States has a moral obligation to engage in a forthright national debate on this subject if we are to have military detention at all; indeed, that argument has been made, and it is rather convincing.[268]

Third, one might favor or disfavor legislation on grounds of speed and finality in light of my argument that lingering uncertainty regarding the precise boundaries of detention authority is harmful. For example, one might argue that legislation will settle the substantive-scope question more quickly than the ongoing process of common law development. That process, after all, dates back at least to the initial decision by Judge Mukasey in *Padilla* in late 2002, and does not seem likely to end anytime soon. Anticipating this concern, *Habeas Works* argues that some amount of residual ambiguity—and thus some need for case-by-case clarification—invariably will remain even in the event of a legislative intervention.[269] This is true, but the reduction in ambiguity via a statute if carefully designed could reduce the total amount of work left to be accomplished through the habeas lens. Then again, an inartfully drafted statute could achieve the opposite by introducing entirely new ambiguities and undoing points of consensus already established through the existing habeas jurisprudence.

Fourth, one might take account of the fact that legislative rulemaking as a general proposition is more easily revisited than rules derived through the habeas process. Should experience demonstrate that a statutory definition of the bounds of detention authority is too broad or too narrow, that definition can be revised in the ordinary course of further legislation. Inclusion of a sunset provision in legislation, moreover, could guarantee periodic reassessment. Judicially crafted rules are not so readily altered, however. The judiciary is reactive rather than proactive. It must have a case or controversy in order to have the occasion to take up a question, and hence the opportunity to revise the substantive scope of detention authority may or may not be there even if the existing standard proves unwise. Even assuming a proper case arises, moreover, the time lag between the beginning of a case and final judgment by the last court to consider the matter

can be substantial—particularly if it is necessary for the Supreme Court to intervene in order to limit or reverse precedent.

These factors, taken together, incline me to think that legislation on the substantive-scope question would in fact be desirable, at least in the abstract. In particular, it would be desirable to have express statutory language that

- confirms that membership in an AUMF-covered group is a sufficient condition for detention;
- provides that participation on such a group's chain of command, knowing attendance at a military-style training camp operated by such a group and perhaps other factors constitute substantial but not dispositive evidence of membership;
- articulates a *mens rea* standard for membership, such as a requirement that the individual not only knew the identity of the group but intended to become an active participant in its affairs and thereby to facilitate, directly or indirectly, the unlawful ends of the group;[270]
- takes a clear position on whether the provision of support independent of membership can count as a sufficient condition to justify detention, and articulates a corresponding *mens rea* element such as intent to facilitate, directly or indirectly, the group's unlawful use of violence; and
- specifies whether there are any geographic limitations as to the availability of detention (e.g., limiting detention to persons captured outside the United States, or limiting support-based detention to persons captured in connection with combat operations).

All that said, any serious discussion of legislative intervention also must account for the fact that in no plausible scenario would Congress address only the substantive-scope question. Rather, if it reaches this question at all, Congress almost certainly would simultaneously address any number of other related matters, including the procedural and evidentiary rules associated with habeas review. Depending on what one expects Congress to produce on those issues, then, even someone who supports the idea of legislation on the substantive-scope question may conclude that legislation on the whole is undesirable.

* * *

We lack consensus regarding who lawfully may be held in military custody in the contexts that matter most to US national security today—i.e., counterterrorism and counterinsurgency. More to the point, federal judges lack consensus on this question. They have grappled with it periodically since 2002, and for the past three years have dealt with it continually in connection with the flood of habeas corpus litigation arising out of Guantanamo in the aftermath of the Supreme Court's 2008

decision in *Boumediene v. Bush*. Unfortunately, the resulting detention jurisprudence is shot through with disagreement on points large and small. As a result, the precise boundaries of the government's detention authority remain unclear despite the passage of more than nine years since the first post-9/11 detainees came into US custody.

We should not be surprised at this disagreement. The conflicting efforts of the judges reflect the fact that the very metrics of legality are deeply contested in this setting. We do not agree which bodies of law should govern in the first instance and, even if we did, we then encounter indeterminacy and plausible disagreement with respect to what each body of law actually has to say, if anything, about the detention-scope question. Making matters worse, these difficulties arise in a context in which familiar legal frameworks experience substantial evolutionary pressures, making it difficult to distinguish descriptive and normative arguments about the legal limits of the government's authority. Against this backdrop it becomes easy to see that the judges at times are speaking past one another, much as occurs in the larger public debate.

Understandable or not, though, this state of affairs is problematic. Most obviously, it renders the prospects for success in the Guantanamo habeas litigation uncertain for both the government and the detainees. More significantly, however, the failure to resolve the detention-scope question casts a shadow across an array of military activities that are not directly subject to habeas review. The mixed pronouncements overhang detention operations in Afghanistan that are not subject to habeas review, insofar as those detentions depend on the same underlying claims of authority that undergird the government's position in the Guantanamo litigation. And by the same token, the habeas caselaw may have the same spillover effect on *targeting* operations—i.e., the use of lethal force—in places as varied as Pakistan, Yemen and Somalia.

It is important to bring these disagreements, their causes and their consequences to the surface, and to push for their resolution. The Obama administration, after all, is not going to abandon the use of military detention. The Guantanamo habeas litigation will not conclude for years to come. The use of detention in Afghanistan will persist for some time. Even in Iraq—even after the supposed end of combat operations—a small population of US-controlled military detainees continues to exist, and will do so for some time. Uses of lethal force, via drone strikes and otherwise, will continue with respect to al Qaeda targets in various spots around the world for the foreseeable future. Were it all to end tomorrow, moreover, we could still expect future situations to arise in which another administration decides to employ military detention in a setting involving terrorism or insurgency, giving rise to the same set of issues.

Simply put, the problem is embedded in our evolving strategic context—particularly in the perception that non-State actors have become increasingly empowered, to the point that some can pose a strategically significant threat. Insofar as law and strategic context exist in dynamic relationship with one another, then, the question is not whether the law will adapt to these circumstances. It will, sooner or later, more or less appropriately. The question, instead, concerns which institutions we will rely upon to mediate that process.

Notes

1. *See, e.g.*, CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, I LEGAL LESSONS LEARNED FROM AFGHANISTAN TO IRAQ 53 (2004) (describing uncertainty regarding the status of the initial detainees in Afghanistan in late 2001).

2. *See* Robert Chesney, *Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War, 2003–2010*, VIRGINIA JOURNAL OF INTERNATIONAL LAW (forthcoming 2011).

3. *See infra* Part II.

4. More than 100,000 persons have been detained without charge in Iraq alone since 2003. *See* Chesney, *supra* note 2. The US detention facility in Parwan in Afghanistan holds approximately 1,000 individuals at a time, and the prior primary detention facility in Afghanistan—the Bagram Theater Internment Facility—held approximately 600–800 at a time. *See* Spencer Ackerman, *U.S. Scans Afghan Inmates for Biometric Database*, WIRED (Aug. 25, 2010), http://www.wired.com/dangerroom/2010/08/military-prison-builds-big-afghan-biometric-database/ (giving the figure for Parwan); Editorial, *Backward at Bagram*, NEW YORK TIMES, June 1, 2010, at A26 (giving the figure for Bagram). Approximately 779 individuals have been held over time at Guantanamo. *See* BENJAMIN WITTES & ZAAHIRA WYNE, THE CURRENT DETAINEE POPULATION OF GUANTANAMO: AN EMPIRICAL STUDY 1 (2008). Three more individuals—including one who for a time was held at Guantanamo—also were held in military custody inside the United States. *See infra* Part II.A.

5. *Compare* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARVARD LAW REVIEW 2047, 2113 (2005) ("Terrorist organizations that act as agents of al Qaeda, participate with al Qaeda in acts of war against the United States, systematically provide military resources to al Qaeda, or serve as fundamental communication links in the war against the United States, and perhaps those that systematically permit their buildings and safehouses to be used by al Qaeda in the war against the United States, are analogous to co-belligerents in a traditional war") and Robert Chesney, *More on the AQ/AQAP Issue, Including Thoughts on How the Co-Belligerent Concept Fits In*, LAWFARE (Nov. 4, 2010), http://www.lawfareblog.com/2010/11/more-on-the-aqaqap-issue-including-thoughts-on-how-the-co-belligerent-concept-fits-in/ (exploring the co-belligerent issue) *with* Kevin John Heller, *The ACLU/CCR Reply Brief in Al-Aulaqi (and My Reply to Wittes)*, OPINIO JURIS (Oct. 9, 2010), http://opiniojuris.org/2010/10/09/the-acluccr-reply-brief-in-al-aulaqi-and-my-reply-to-wittes/ (denying that the co-belligerent concept applies as a matter of international law in the context of non-international armed conflict).

6. The first habeas petition arising out of Guantanamo was filed within weeks of the first detainees' arrival there in January 2002. *See* Gherebi v. Bush, 374 F.3d 727, 729 (9th Cir. 2004). The Supreme Court finally settled the question as a constitutional matter in the summer of 2008,

after two rounds of legislative intervention. *See* Boumediene v. Bush, 553 U.S. 723 (2008) (holding that the Military Commissions Act of 2006 violated the Suspension Clause insofar as it forbade Guantanamo detainees from seeking habeas relief in federal court). *See also* Rasul v. Bush, 542 U.S. 466 (2004) (holding that the federal habeas statute as then written provided jurisdiction over the claims of Guantanamo detainees); Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (holding that the government failed to provide adequate process to a US citizen held in military custody on grounds of membership in the Taliban).

7. 553 U.S. 723.

8. *See infra* Part II.A.

9. *See infra* Part II.B.

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

11. *See* Al-Bihani v. Obama, 619 F.3d 1 (D.C. Cir. 2010) (Sentelle, C.J.) (opinion denying en banc review).

12. For a review of a broad range of issues in the post-2008 habeas litigation, including the centrality of evidentiary questions, see BENJAMIN WITTES, ROBERT M. CHESNEY & RABEA BENHALIM, THE EMERGING LAW OF DETENTION: THE GUANTANAMO HABEAS CASES AS LAWMAKING (2010), *available at* http://www.brookings.edu/papers/2010/0122_guantanamo_wittes_chesney.aspx.

13. *Cf.* Al Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010) (holding that habeas jurisdiction does not extend to Afghanistan, though noting caveats that preserve the possibility of a different outcome upon different factual predicates).

14. *See id*. at 98–99. *See also* Al Maqaleh v. Gates, No. 09-5265 (D.C. Cir. July 23, 2010) (order noting that detainees in an attempt to obtain rehearing made reference to evidence not in the record, and stating that denial of habeas petition is "without prejudice to [detainees'] ability to present this evidence to the district court in the first instance"), *available at* http://www.scotusblog.com/wp-content/uploads/2010/07/Bagram-order-7-23-10.pdf.

15. *See infra* Part III.A.

16. *But see* Josh Gerstein, *Treasury to Allow Anwar al-Awlaki Lawsuit*, POLITICO, Aug. 3, 2010, http://www.politico.com/news/stories/0810/40616.html (noting ACLU plans to sue to stop the lethal use of force by the US government against an American citizen in Yemen).

17. Pub. L. No. 107-40, 115 Stat. 224 (2001), codified at 50 U.S.C. § 1541 note (Supp. V 2005) [hereinafter AUMF].

18. *Cf.* Hamdi, 542 U.S. at 587 (Thomas, J.) ("Although the President very well may have inherent authority to detain those arrayed against our troops, I agree with the plurality that we need not decide that question because Congress has authorized the President to do so."). Because the current administration rests its detention-related arguments solely on the AUMF, and because it is not clear that the analysis ultimately turns on this issue in any event, for the most part in this article I refer only to the AUMF as a source of domestic detention authority.

19. *See* U.S. CONST. art. VI, cl. 2 (providing that treaties are "supreme Law of the Land").

20. *See* Carlos Manuel Vázquez, *The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide*, 101 AMERICAN JOURNAL OF INTERNATIONAL LAW 73, 88 (2007) (examining various arguments relating to self-executing treaties and legislative efforts to unexecute them in relation to the Geneva Conventions).

21. *See* U.S. Department of State, U.S. Government's 1-year Follow-up Report to the Committee's Conclusions & Recommendations 1–2 (2007), *available at* http://2001-2009.state.gov/documents/organization/100845.pdf. On the general issue of extraterritoriality, see KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW (2009).

22. *See* Ingrid Wuerth, *International Law and Constitutional Interpretation: The Commander-in-Chief Clause Reconsidered*, 106 MICHIGAN LAW REVIEW 61 (2007).

23. *See* Bradley & Goldsmith, *supra* note 5; Ingrid Wuerth, *Authorizations for the Use of Force, International Law, and the* Charming Betsy *Canon*, 46 BOSTON COLLEGE LAW REVIEW 293 (2005).

24. *See* International Law Association, *The Use of Force*: *Final Report on the Meaning of Armed Conflict in International Law* (2010), *available at* http://www.ila-hq.org/download.cfm/docid/2176DC63-D268-4133-8989A664754F9F87 [hereinafter ILA Use of Force Report].

25. *See, e.g.*, Marco Sassòli, *Terrorism and War*, 4 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 959, 965 (2006) ("As for the lower threshold of a non-international armed conflict, no clear-cut criteria exist, but relevant factors include: intensity, number of active participants, number of victims, duration and protracted character of the violence, organization and discipline of the parties, capacity to respect [international humanitarian law], collective, open and coordinated character of the hostilities, direct involvement of governmental armed forces (vs. law enforcement agencies) and *de facto* authority by the non-state actor over potential victims.").

26. Jordan Paust, *Responding Lawfully to al Qaeda*, 56 CATHOLIC UNIVERSITY LAW REVIEW 759, 760 (2007).

27. *See, e.g.*, Al-Aulaqi v. Obama, No. 10-cv-1469 (D.D.C. Oct. 8, 2010) (declaration of Professor Mary Ellen O'Connell), at 7 ("Armed conflict has a territorial aspect. It has territorial limits. It exists where (but only where) fighting by organized armed groups is intense and lasts for a significant period. . . . That the United States is engaged in armed conflict against al Qaeda in Afghanistan does not mean that the United States can rely on the law of armed conflict to engage suspected associates of al Qaeda in other countries."), *available at* http://www.aclu.org/files/assets/O_Connell_Declaration.100810.PDF.

28. *See* ILA Use of Force Report, *supra* note 24.

29. 999 U.N.T.S. 171, 6 INTERNATIONAL LEGAL MATERIALS 368 (1967) [hereinafter ICCPR].

30. *See infra* Part I.B.3.

31. ICCPR, *supra* note 29, art. 2.

32. *See* U.S. Department of State, *supra* note 21.

33. *See, e.g.,* Patrick Walsh, *Fighting for Human Rights: The Application of Human Rights Treaties to United States Military Operations*, 28 PENN STATE INTERNATIONAL LAW REVIEW 45, 60 (2009).

34. *See infra* Part II.A.

35. For a sampling of this scholarship, see Marko Milanovic, *A Norm Conflict Perspective on the Relationship Between International Humanitarian Law and Human Rights*, 14 JOURNAL OF CONFLICT AND SECURITY LAW 459 (2009); Jeremy Marsh, *Rule 99 of the Customary International Humanitarian Law Study and the Relationship between the Law of Armed Conflict and International Human Rights Law*, ARMY LAWYER, May 2009, at 18 (2009).

36. For a more thorough exposition, see Laura Olson, *Practical Challenges of Implementing the Complementarity Between International Humanitarian Law and Human Rights Law*, 40 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 437, 445–49 (2009).

37. *See, e.g.*, Martti Koskenniemi, International Law Commission, Study Group on Fragmentation, Fragmentation of International Law: Topic (a): The function and scope of the *lex specialis* rule and the question of 'self-contained regimes': An outline (2003), *available at* http://untreaty.un.org/ilc/sessions/55/fragmentation_outline.pdf (last visited Dec. 8, 2010).

38. *See, e.g.*, Jeff A. Bovarnick, *Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy*, ARMY LAWYER, June 2010, at 9 (2010).

39. *See, e.g.*, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 240 (July 8).

40. *See, e.g.*, Olson, *supra* note 36.

41. AUMF, *supra* note 17.

42. *Id.* § 2(a).

43. 18 U.S.C. § 4001(a) (2000).

44. 71 U.S. (4 Wall.) 2 (1866). *But see* Ex parte Quirin, 317 U.S. 1 (1942) (permitting military commission jurisdiction over an American citizen who was part of the German armed forces in World War II, and distinguishing *Milligan* on the ground that Milligan had not actually been part of the enemy force).

45. AUMF, *supra* note 17.

46. *See infra* Part II.B.

47. We should not overstate the level of consensus with respect to the objects of the AUMF even at this group/organizational level, however, as there is ample room for disagreement regarding the degree of institutional affiliation with al Qaeda or the Taliban that is necessary in order for other, arguably distinct entities to be deemed subject to the AUMF as well. There are numerous entities in the Afghanistan-Pakistan theater, for example, that are engaged to varying degrees in hostilities against the United States or the Afghan government yet do not constitute subsidiaries of either al Qaeda or the Taliban. The Haqqani Network provides an example, as might the Tehrik-i-Taliban Pakistan (not to be confused with the original Afghan Taliban commanded by Mullah Omar, now best referred to as the Quetta Shura Taliban). Arguments can be made that AUMF-based authority extends to such groups as cobelligerents of al Qaeda and the Taliban, but the AUMF itself does not speak to the issue. Similarly, consider the al Qaeda "affiliate" scenario represented by the Algerian extremist group once known as *Groupe Salafiste pour la Prédication et le Combat* (GSPC) or the Salafist Group for Preaching and Combat. Its activities primarily are directed toward the Algerian government, but Osama bin Laden may have provided funding or otherwise assisted when GSPC originally broke off from the *Groupe Islamique Armé* in the 1990s. Its leadership declared allegiance to bin Laden in 2003, and in 2006 it changed its name to al Qaeda in the Islamic Maghreb (AQIM) after Ayman al-Zawahiri formally announced its affiliation. For an overview, see Andrew Hansen & Lauren Vriens, *Al-Qaeda in the Islamic Maghreb (AQIM)*, CFR.ORG (July 21, 2009), http://www.cfr.org/publication/12717/alqaeda_in_the_islamic_maghreb_aqim_or_lorganisation_alqada_au_maghreb_islamique_formerly_salafist_group_for_preaching_and_combat_or_groupe_salafiste_pour_la_prdication_et_le_combat.html. When precisely, in light of all this, did AQIM become sufficiently linked to al Qaeda to be considered within the scope of the AUMF, if ever? The AUMF itself does not provide guidance.

48. *See* Bradley & Goldsmith, *supra* note 5.

49. *See* Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STANFORD LAW REVIEW 1079, 1096–99 (2008).

50. Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2680, 2739 (2005).

51. *Id.*

52. *Id.*

53. Pub. L. No. 109-366, 120 Stat. 2600 (2006).

54. *See id.* § 3 (adding 10 U.S.C. § 948c).

55. *See id.* (adding 10 U.S.C. § 948a(1) and (2)).

56. *See* Title XVIII of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. No. 111-84, 123 Stat. 2190, enacted October 28, 2009).

57. Pub. L. No. 111-84, § 1802, 123 Stat. 2574, 2576 (2009) (adding 10 U.S.C. §§ 948a(7) (defining "unprivileged enemy belligerent") & 948c (defining jurisdiction to encompass alien "unprivileged enemy belligerents")).

58. *Id.* (adding 10 U.S.C. § 948a(7)).

59. *Id.*

60. *See also* Richard H. Fallon Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARVARD LAW REVIEW 2029, 2109 (2007).

61. *See, e.g.*, CONGRESSIONAL RESEARCH SERVICE, AL QAEDA AND AFFILIATES: HISTORICAL PERSPECTIVE, GLOBAL PRESENCE, AND IMPLICATIONS FOR U.S. POLICY (2010), *available at* http://fpc.state.gov/documents/organization/137015.pdf.

62. *Cf.* Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE LAW JOURNAL 1170 (2007) (supporting deference); Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE LAW JOURNAL 1230 (2007) (criticizing Posner & Sunstein).

63. *See* Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW].

64. *See id.* arts. 21 (authorizing internment of POWs) & 118 (requiring release and repatriation of POWs upon conclusion of hostilities).

65. These categories are contained in GPW Article 4(a)(1–3). Article 4 goes on to list various other scenarios in which a person is to be accorded POW status.

66. *See* Convention Relative to the Protection of Civilian Persons in Time of War arts. 27, 42, 43 & 78, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC].

67. COMMENTARY TO GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 257–58 (Jean S. Pictet ed., Ronald Griffin & C.W. Dumbleton trans., 1958).

68. *Cf.* Ex parte Quirin, 317 U.S. 1 (1942) (categorizing saboteurs associated with the German military as unprivileged belligerents, albeit in the years prior to the 1949 Geneva Conventions). Note that many other States—but not the United States—are party to the 1977 Protocols Additional to the Geneva Conventions of 12 August 1949. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609.

69. *See, e.g.*, Gabor Rona, *A Bull in a China Shop: The War on Terror and International Law in the United States*, 39 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 135 (2008).

70. *See id.*

71. *See, e.g.*, Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AMERICAN JOURNAL OF INTERNATIONAL LAW 48 (2009).

72. *See id.*

73. This arguably is the best account of the plurality opinion in *Hamdi*, which referred to customary practice during war in a context—Afghanistan in 2004—that evolved from an international to a non-international armed conflict. *See* 542 U.S. 507.

74. *See* Chesney, *supra* note 2.

75. *See* Gabor Rona, *Legal Frameworks to Combat Terrorism: An Abundant Inventory of Existing Tools*, 5 CHICAGO JOURNAL OF INTERNATIONAL LAW 499 (2005).

76. ICCPR, *supra* note 29.

77. *Id.*, art. 9(1).

78. *See id.*, art. 4(1). Article 4(3) specifies that the derogating State is to "immediately inform the other State Parties" of the derogation, as well as the reasons for it.

79. *See, e.g.*, Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict–Criminal Divide*, 33 YALE JOURNAL OF INTERNATIONAL LAW 369, 383–89 (2008) (discussing administrative detention as an IHRL-compatible alternative to criminal prosecution in circumstances in which LOAC-based detention is not appropriate).

80. *See id.* at 392–95 (observing that "pure security-based detention is permitted under the ICCPR, so long as it is reasonably necessary to contain the security threat. The problem, again, is that the Human Rights Committee has provided almost no guidance on when security-based detention should be considered reasonably necessary"). Hakimi does note that the European Court of Human Rights has interpreted the comparable provision in the European Convention on Human Rights as forbidding non-criminal detention intended solely for security purposes. *See id*. at 392 (citing, *inter alia*, Lawless v. Ireland (No. 3), 3 Eur. Ct. H.R. (ser. A), ¶¶ 13–15, 48 (1961)).

81. 542 U.S. 507 (2004). The same plurality also concluded that Hamdi, as a citizen with Fifth Amendment procedural due process rights, should receive more process in the course of determining whether he was a Taliban fighter. *See id*. at 533–34. The government soon thereafter released Hamdi, sending him back to Saudi Arabia after he agreed in writing to relinquish his claim to US citizenship.

82. *See id.* at 519–20.

83. *See id.* at 518.

84. *Id.* at 515–16 (citing Ex parte Quirin, 317 U.S. 1, 37–38 (1942); In re Territo, 156 F.2d 142, 148 (9th Cir. 1946)); *id*. at 592 (Thomas, J.) (concurring in part and dissenting in part) (citing *Quirin*).

85. *Id*. at 522 n.1.

86. *Id*. at 521.

87. *See* Padilla ex rel. Newman v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

88. *Id.* at 587–91.

89. *Id*. at 592–93.

90. *Id*. at 593–98.

91. *See* Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003).

92. *Id*. at 714–18.

93. *Id*. at 718.

94. *Id*. at 719–24.

95. Rumsfeld v. Padilla, 542 U.S. 426 (2004). The dissent by Justice Stevens did offer the view that Padilla's detention could not be sustained on the merits if the government's justification for it rested entirely on the desire to interrogate him. *See id*. at 465 ("Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information.").

96. Padilla v. Hanft, 389 F. Supp. 2d 678, 687 (D.S.C. 2005).

97. *Id*. at 686.

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

99. *Id*. at 392.

100. *Id*. at 389–90.

101. *Id*. at 391–92.

102. *Id*. at 392, 393.

103. Al-Marri initially sought habeas review in Illinois but, like Padilla, eventually was obliged to refile in South Carolina. *See* al-Marri v. Rumsfeld, 274 F. Supp. 2d 1003 (C.D. Ill. 2003) (holding that petition had to be filed in district in which al-Marri was held at the time of filing), *aff'd*, 360 F.3d 707 (7th Cir. 2004).

104. *See* Al-Marri v. Hanft, 378 F. Supp. 2d 673, 676–77 (D.S.C. 2005).
105. *Id.* at 679–80.
106. *See* Al-Marri v. Wright, 487 F.3d 160 (4th Cir. 2007).
107. *Id.* at 174–75.
108. *Id.* at 175.
109. *Id.* at 175–76.
110. *Id.* at 178–79.
111. *Id.* at 179 n.8 (asserting that civilians under LOAC categorically are "not subject to military seizure or detention").
112. *Id.* at 178–79 (citing GPW, *supra* note 63, arts. 2, 4, 5 and GC, *supra* note 66, art. 4).
113. *Id.* at 179–82.
114. *Id.* at 184–85.
115. *Id.* at 182.
116. *See* Al-Marri v. Pucciarelli, 534 F.3d 213, 219 (4th Cir. 2008) (en banc).
117. *See id.* at 221–52.
118. *See id* at 259–60.
119. *See id* at 260–61.
120. *See id* 261–62.
121. *Id.* at 286 (noting the *Charming Betsy* canon favoring constructions of statute to comport with international law, but concluding that the AUMF is sufficiently clear so as to trump any contrary customary law rule).
122. *Id.* at 285. *But see id.* at 288 (emphasizing allegation that al-Marri was a member of al Qaeda since 1996, as opposed to emphasizing his conduct in entering the United States to conduct or support an attack).
123. *Id.* at 287 n.5.
124. *Id.* at 293.
125. *Id.*
126. *Id.* at 293–303.
127. *Id.* at 312.
128. *Id.* at 313.
129. *Id.* at 314.
130. *Id.*
131. *Id.* at 315.
132. *Id.* at 315–19.
133. *Id.* at 319.
134. *See id.* at 318–19.
135. *Id.* at 317.
136. *Id.* at 316 (quoting Bradley & Goldsmith, *supra* note 5, at 2114).
137. *Id.* at 316–17.
138. *Id.* at 319–21.
139. *Id.* at 314–19. He made this point clear at the very outset of his opinion, in fact, observing that the "advance and democratization of technology proceeds apace" and that, as a result, "we live in an age where thousands of human beings can be slaughtered by a single action and where large swaths of urban landscapes can be leveled in an instant." *Id.* at 293. The law must "show some recognition of these changing circumstances," must "reflect the actual nature of modern warfare." *Id.*
140. *Id.* at 314. *See also id.* at 319. Note that Judge Wilkinson elsewhere in the opinion quotes expressly from Philip Bobbitt's *Shield of Achilles*, a central text supporting the proposition of a

dynamic relationship between law and strategic context—not to mention the notion that non-State actors engaging in mass-casualty terrorism strongly implicate that relationship. *See id.* at 300. Judge Wilkinson plainly was aware of, and in agreement with, this line of argument.

141. *Id.* at 319.

142. *Id.*

143. *Id*. at 293.

144. *Id.* at 322–25.

145. *Id.* at 325.

146. *See id.* at 323.

147. *Id.*

148. *Id.* at 324.

149. *See* Al-Marri v. Spagone, 129 S.Ct. 1545 (2009).

150. In 2006, the Supreme Court in *Hamdan v. Rumsfeld* held that the DTA did not apply to habeas petitions that were pending at the time the DTA was enacted, at least insofar as its military commission–related provisions were concerned. 548 U.S. 557. Congress responded by enacting the Military Commissions Act of 2006, which in effect made the jurisdictional provisions of the DTA applicable to pending cases. This set the stage for the Supreme Court in *Boumediene* to hold that the MCA violated the Constitution's Suspension Clause, and that the detainees were entitled to habeas review as a constitutional matter.

151. *See* Khalid v. Bush, 355 F. Supp. 2d 311 (D.D.C. 2005) (holding that detainees had no judicially enforceable substantive rights notwithstanding *Rasul*).

152. In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 464 (D.D.C. 2005).

153. *See id.* at 474–77.

154. *Id.* at 475 (citing, *inter alia,* Scales v. United States, 367 U.S. 203, 224–25 (1961) (holding that criminal punishment of membership in a subversive organization would violate the Fifth Amendment unless the statute were construed to require proof that the defendant's membership was more than merely nominal and that the defendant specifically intended to further the organization's unlawful ends)).

155. *Id.* at 476. Redactions in the opinion make it difficult to determine more about her reasoning, but the context strongly suggests that she was particularly concerned that the government might be detaining individuals strictly for their intelligence value. *See id.* at 477.

156. Perhaps it was not surprising that Judge Green would make a point of attempting to restrain the government's capacity to detain based on associated ties. During oral argument in the case, she had posed a series of hypothetical questions to the government attorney with the apparent aim of clarifying the government's conception of the outer boundaries of the ostensible authority to detain on the basis that a person provided support to an AUMF-covered group. Specifically, she asked whether this detention criterion would be met by a "little old lady in Switzerland" who was duped into providing funds to a charity group that turned out to be an al Qaeda front. One might have expected the attorney to answer no, as this fact pattern at a minimum does not involve inculpatory *mens rea*. But it did not turn out that way. The government attorney insisted, incredibly, that all were detainable. The moment would go on to dubious immortality in Judge Green's published opinion, not to mention becoming a standard citation in the secondary literature; it would be hard to overestimate its iconic value as a symbol for those who feared that the post-9/11 assertion of detention authority had become detached from any real legal constraints.

157. *See* Brief for Petitioner, Boumediene v. Bush, No. 06-1196, 2007 WL 2441590 (Aug. 24, 2007).

158. *See id.* at 36–37.

159. *See id.* at 39.
160. *See id.* at 39–41.
161. *See id*.
162. *See id*.
163. *See* NILS MELZER, INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009). More to the point, see the collection of materials generated in the fractious process of attempting to generate consensus in the process that resulted in the ICRC's publication, posted here: http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-article-020709 (last visited Dec. 8, 2010).
164. *See* Brief for Petitioner, *supra* note 157, at 39–40.
165. *See id.* at 41.
166. *See id.* (stating that DPH would "certainly cover Osama Bin Laden—and conceivably others who have submitted themselves to the direction and control of an organization like al Qaeda").
167. *See id.* at 40–41.
168. 553 U.S. 723.
169. *See* WITTES, CHESNEY & BENHALIM, *supra* note 12, at 86–105 (summarizing decisions as to twenty-four individuals whose petitions were resolved as of January 2010). For the ten decisions denying relief between January and December 2010, see Obaydullah v. Obama (D.D.C. Oct. 19, 2010); al-Bihani v. Obama (D.D.C. Sept. 22, 2010) (involving detainee Toffiq Nasser Awad al-Bihani) (*available at* https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2005cv2386-1773); al Kandari v. United States (D.D.C. Sept. 15, 2010) (involving detainee Fayiz Mohammed Ahmed al Kandari); Khan v. Obama (D.D.C. Sept. 3, 2010) (involving detainee Shawali Khan); Sulayman v. Obama (D.D.C. July 20, 2010) (involving detainee Abd Al Rahman Abdu Abu Al Ghayth); Khalifh v. Obama (D.D.C. May 28, 2010) (involving detainee Omar Mohammed Khalifh); Abdah v. Obama (D.D.C. Apr. 18, 2010) (involving detainee Yasein Khasem Mohammed Esmail); Al Warafi v. Obama (D.D.C. Mar. 24, 2010) (involving detainee Mukhtar Yahia Naji al Warafi); Al Adahi v. Obama, 692 F. Supp. 2d 85 (D.D.C. Mar. 10, 2010) (involving detainee Suleiman Awadh Bin Agil Al-Nadhi); Al Adahi v. Obama (D.D.C. Mar. 10, 2010) (involving detainee Fahmi Salem Al-Assani). For the six individuals who prevailed on their habeas petitions between January and August 22, 2010, see Abdah v. Obama (D.D.C. July 21, 2010) (involving detainee Adnan Farhan Abd al Latif); Almerfedi v. Obama (D.D.C. July 23, 2010) (involving detainee Hussain Salem Mohammad Almerfedi); Abdah v. Obama (D.D.C. May 26, 2010) (involving detainee Mohamed Mohamed Hassan Odaini); Al Harbi v. Obama, May 13, 2010 (D.D.C. May 10, 2010) (involving detainee Ravil Mingazov); Abdah v. Obama (D.D.C. Apr. 21, 2010) (involving detainee Uthman Abdul Rahim Muhammed Uthman); Salahi v. Obama (D.D.C. Apr. 9, 2010) (involving detainee Mohammedou Ould Salahi).
170. The four affirmances are Al Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010), Awad v. Obama (D.C. Cir. June 2, 2010), Barhoumi v. Obama (D.C. Cir. June 11, 2010) and al Odah v. United States (D.C. Cir. 2010). The reversal occurred in Bensayah v. Obama, 610 F.3d 718 (D.C. Cir. 2010).
171. *See* al-Adahi v. Obama, 613 F.3d 1102 (D.C. Cir. July 13, 2010).
172. *See* Salahi v. Obama (D.C. Cir. Nov. 5, 2010).
173. For an overview, see Lyle Denniston, *Primer: The New Detainee Cases*, SCOTUSblog (Dec. 7, 2010), http://www.scotusblog.com/2010/12/primer-the-new-detainee-cases/.
174. Parhat v. Gates, 532 F.3d 834 (D.C. Cir. 2008).

175. Not long after the Uighur decision, the D.C. Circuit determined that DTA review should be discontinued in favor of the habeas proceedings mandated by *Boumediene*. *See* Bismullah v. Gates, 551 F.3d 1068 (D.C. Cir. 2009).

176. For a general overview of the issues broached in the cases, see WITTES, CHESNEY & BENHALIM, *supra* note 12, *passim.*

177. 612 F. Supp. 2d 30, 35 (D.D.C. 2009).

178. *Id.* at 34.

179. *See id.* at 35. Judge Huvelle's opinion does not actually explain the nature of what had been widely disclosed to the public. A *Washington Post* article from February 2009 describes Basardh as having cooperated extensively with US authorities, indicating that this had become known to other detainees and that Basardh was thought to be in danger from them. *See* Del Quintin Wilber, *Detainee-Informer Presents Quandary for Government*, WASHINGTON POST, Feb. 3, 2009, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/02/02/AR200902023337_pf.html.

180. *See* Awad v. Obama, 646 F. Supp. 2d 20, 24 (D.D.C. 2009) (Robertson, J.); Anam v. Obama, No. 04-1194, slip op. at 4 (D.D.C. Jan. 6, 2010) (Hogan, J.).

181. *See* Awad v. Obama, 608 F.3d 1 (D.C. Cir. 2010) (holding that "[w]hether a detainee would pose a threat to U.S. interests if released is not at issue in habeas corpus proceedings").

182. *See* Boumediene v. Bush, 583 F. Supp. 2d 133 (D.D.C. 2008). Recall that Judge Leon years earlier in *Khalid v. Bush* had declined to reach this question on the ground that the detainees lacked any substantive rights supporting such an inquiry.

183. *Id.* at 134.

184. *Id.*

185. *See id.*

186. *See* Exec. Order No. 13493, § 1, 74 Fed. Reg. 4901 (Jan. 27, 2009) (Review of Detention Policy Options).

187. *See* 609 F. Supp. 2d 43 (D.D.C. 2009).

188. *See id.* at 55–56.

189. *See id.* at 65.

190. *Id.* at 62.

191. *See id.* at 63.

192. *See id.* at 63–64.

193. *Id.* at 63.

194. *Id.* at 64 n.15.

195. *See id.* at 66–67.

196. *See id.*

197. *Id.*

198. *Id.*

199. *Id.* at 68.

200. *See id.*

201. *Id.*

202. *See id.* at 68–70.

203. *See id.* at 68.

204. *Id.*

205. *Id.*

206. *See id.*

207. *See id.* This view is consistent with *In re Territo*, a World War II case in which an Italian-American POW unsuccessfully argued that because his job in the Italian Army amounted to non-combat manual labor, he should not be held in detention. *See* 156 F.2d 142 (9th Cir. 1946).
208. 609 F. Supp. 2d at 69–70.
209. *Id.* at 69–70 & n.17.
210. Hamlily v. Obama, 616 F. Supp. 2d 63 (D.D.C. 2009).
211. *See id.* at 73.
212. *Id.* at 75.
213. *See id*.
214. *See id.* at 75–76.
215. *See id.* at 76–77.
216. *See id.* at 75–77.
217. *See* Anam v. Obama, 653 F. Supp. 2d 62 (D.D.C. 2009) (stating that *Hamlily* is "not inconsistent" with *Gherebi*, and that any apparent difference "is largely one of form rather than substance").
218. *See* Al Odah v. Obama, 648 F. Supp. 2d 1, 6–7 (D.D.C. 2009).
219. *See* 677 F. Supp. 2d 1 (D.D.C. 2009).
220. *See id.* at 5–6.
221. *See id.* at 6–7.
222. *See id. passim*.
223. 590 F.3d 866 (D.C. Cir. 2010).
224. *See id.* at 871–72.
225. *See id.* at 872–73.
226. *See id*.
227. *See id*.
228. *See id.* at 873 n.2.
229. *See id*.
230. *See* Al-Bihani v. Obama, 619 F.3d 1, 1 (D.C. Cir. 2010).
231. *See* 590 F.3d at 871.
232. 608 F.3d 1 (D.C. Cir. 2010).
233. *See id*. at 10–12.
234. *See id*.
235. 609 F.3d 416 (D.C. Cir. 2010).
236. *See id*. at 424–26.
237. Charlie Savage, *Obama Team Is Divided on Anti-Terror Tactics*, NEW YORK TIMES, Mar. 28, 2010, at A1, *available at* http://www.nytimes.com/2010/03/29/us/politics/29force.html?pagewanted=all.
238. *See id*.
239. *See id*.
240. *Id.*
241. *Id.*
242. *Id.*
243. *See id*.
244. *See id*.
245. Boumediene v. Obama, No. 08-5537 (D.C. Cir. Sept. 22, 2009) (letter from Sharon Swingle of the Justice Department's Civil Division to the Clerk of the United States Court of Appeals for the District of Columbia Circuit), at 1.
246. *Id.* at 1–2.

247. Savage, *supra* note 237.
248. 610 F.3d 718 (D.C. Cir. 2010).
249. 611 F.3d 8 (D.C. Cir. 2010).
250. 2010 WL 2756551 (D.C. Cir. July 13, 2010).
251. 625 F.3d 745.
252. Khan v. Obama (D.D.C. Sept. 3, 2010) (citations omitted).
253. *See* Almerfedi v. Obama, No. 05-1645, 2010 WL 2899060 (D.D.C. July 8, 2010).
254. *See* Sulayman v. Obama (D.D.C. July 20, 2010).
255. *Cf.* United States v. Maldonado, Superseding Criminal Complaint (prosecuting defendant for receiving military-style training from al Qaeda, though the training was provided by al Shabab in Somalia), *available at* http://www.foxnews.com/projects/pdf/Maldonado_Complaint.pdf.
256. For an introduction to this debate, see Robert Chesney, *Has Human Rights Watch Changed Its Position on Targeted Killing and the Field of Application of IHL?*, LAWFARE (Dec. 9, 2010), http://www.lawfareblog.com/2010/12/has-human-rights-watch-changed-its-position-on-targeted-killing-and-the-scope-of-application-of-ihl/. The targeted killing suit recently was dismissed by Judge Bates on standing and political question grounds in *Al-Aulaqi v. Obama* (D.D.C. Dec. 8, 2010).
257. *See* Al Maqaleh v. Gates, 604 F. Supp. 2d 205 (D.D.C. 2009), *rev'd* 605 F.3d 84 (D.C. Cir. 2010).
258. 605 F.3d at 97–98.
259. *Id.* at 98–99.
260. *Id.* at 99.
261. We may yet also see litigation involving the scope of detention authority involving US citizens allegedly held by other States under US direction or control—so-called "proxy detention." *See* Press Release, ACLU of Southern California, ACLU/SC Suit Seeks Information on U.S. 'Proxy Detention' of American Citizen in the U.A.E. (Aug. 18, 2010), *available at* https://www.aclu-sc.org/releases/view/103037.
262. The American Civil Liberties Union and the Center for Constitutional Rights recently made waves by filing a suit challenging the government's claim of authority to use lethal force against Anwar al-Aulaqi, an American citizen alleged to be a member of al Qaeda in the Arabian Peninsula. *See supra* note 5. That suit is remarkable precisely because such litigation is exceedingly rare. No earlier suit seeks to preclude the use of lethal military force against a particular individual. Prior attempts to restrain the government from exercising military force at a more general level, such as efforts to stop the use of military force in Vietnam, Cambodia and Laos, largely foundered in the face of justiciability objections. And at least for the time being, so too has the al-Aulaqi litigation. *See* Al-Aulaqi v. Obama (D.D.C. Dec. 8, 2010) (dismissing complaint on standing and political question grounds).
263. HUMAN RIGHTS FIRST, HABEAS WORKS: FEDERAL COURTS' PROVEN CAPACITY TO HANDLE GUANTANAMO CASES: A REPORT FROM RETIRED FEDERAL JUDGES 13–16 (2010) [hereinafter REPORT FROM RETIRED FEDERAL JUDGES], *available at* http://www.humanrightsfirst.org/wp-content/uploads/pdf/Habeas-Works-final-web.pdf. In the interest of full disclosure, I note that *Habeas Works* criticizes a report I coauthored with Benjamin Wittes and Rabea Benhalim in which we contend that the judges in the habeas cases have been left by Congress and the President to craft most of the substantive and procedural law governing the habeas proceedings. *See id.* at 27 (criticizing WITTES, CHESNEY & BENHALIM, *supra* note 12).
264. *Id.* at 13–16.
265. *Id.*

266. *Id.* at 16.
267. *Id.*
268. *See* BENJAMIN WITTES, DETENTION AND DENIAL (forthcoming 2011).
269. REPORT FROM RETIRED FEDERAL JUDGES, *supra* note 263, at 28.
270. *Cf.* Scales v. United States, 367 U.S. 203, 209 (1961) (permitting a criminal prosecution on membership grounds where a person is an active member of a group who intends to facilitate the group's unlawful ends).