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# Who May Be Held? Military Detention Through the Habeas Lens

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# WHO MAY BE HELD? MILITARY DETENTION THROUGH THE HABEAS LENS

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**Abstract:** We lack consensus regarding who lawfully may be held in military custody in the contexts that matter most to U.S. 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, leaving the precise boundaries of the government's detention authority unclear. The aim of this Article is to flesh out and contextualize these disagreements, and to locate them in relation to larger trends and debates.

## Introduction

Who lawfully may be held in military custody without criminal charge? It seems a simple question, and in some settings it is.[1] 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 these contexts, with sharp disagreement regarding which bodies of law are relevant and what, if anything, each actually says about the scope of the government's authority to detain (the "detention-scope issue").[2]

This problem has been with us for some time. It has lurked in the background of U.S. detention operations in Afghanistan since 2001[3]

 I am grateful to the organizers and participants at the Naval War College's annual law of war conference for their comments and criticisms, to the Office of the General Counsel of the Department of Defense for the opportunity to present this work in progress, and to Daniel Jackson for outstanding research assistance.

[1] *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War art. 4(A), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW].

[2] *See infra* notes 350–586 and accompanying text.

[3] *See, e.g.*, 1 Ctr. for Law & Military Operations, U.S. Army, Legal Lessons Learned from Afghanistan and Iraq 53 (2004) (describing uncertainty regarding the status of the initial detainees in Afghanistan in late 2001).

and in Iraq since 2003.[4] And it is central, of course, to the controversies surrounding the use of detention at Guantanamo and within the United States itself.[5] More than one hundred thousand individuals have been detained without criminal charge across these settings,[6] giving rise to an immense amount of scholarship, advocacy, and litigation along the way.[7] Remarkably, however, the question of who lawfully may be detained remains unsettled in important respects.

This problem exists along two distinct dimensions, only one of which is addressed in this Article. First, we have indeterminacy at the group level: there is disagreement as to whether any military detention authority currently possessed by the U.S. government extends to entities other than al Qaeda and the Taliban, and 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.[8] Second, even if we had agreement regarding which groups

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[4] *See* Robert Chesney, *Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War, 2003–2010*, 51 Va. J. Int'l L. 549, 557–58 (2011).

[5] *See infra* notes 64–212 and accompanying text.

[6] More than one hundred thousand persons have been detained without charge in Iraq alone since 2003. *See* Chesney, *supra* note 4, at 553. The U.S. detention facility in Parwan, Afghanistan holds approximately one thousand individuals at a time, and the prior primary detention facility in Afghanistan—the Bagram Theater Internment Facility—held approximately six hundred to eight hundred at a time. *See* Editorial, *Backward at Bagram*, N.Y. Times, May 31, 2010, at A26 (giving the figure for Bagram); Spencer Ackerman, *U.S. Scans Afghan Inmates for Biometric Database*, Wired: Danger Room (Aug. 25, 2010, 12:37 PM), http://www.wired.com/dangerroom/2010/08/military-prison-builds-big-afghan-biometric-database/ (giving the figure for Parwan). Between 2002 and 2008, approximately 779 individuals were held at Guantanamo. *See* Benjamin Wittes & Zaahira Wyne, Brookings, The Current Detainee Population of Guantánamo: An Empirical Study 1 (2008). Three more individuals—including one who was held at Guantanamo for a time—also were held in military custody inside the United States. *See infra* notes 215–349 (discussing these cases).

[7] *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 732–33 (2008); Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004); Rasul v. Bush, 542 U.S. 466, 484 (2004), *superseded by statute*, Detainee Treatment Act of 2005 §§ 1001, 1003–1004, Pub. L. No. 109-148, 119 Stat. 2680, 2739 (codified at 42 U.S.C. § 2000dd (2006)), *as recognized in Boumediene*, 553 U.S. 723; Benjamin Wittes, Detention and Denial: The Case for Candor After Guantánamo 5–7 (2010).

[8] *Compare* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 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, 12:23 AM), 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 Jon Heller, *The ACLU/CCR Reply Brief in* Al-Aulaqi *(and My Reply to Wittes)*, Opinio Juris (Oct. 9, 2010, 9:10

are relevant for purposes of the detention issue, however, indeterminacy also manifests at the individual level: we lack agreement as to the mix of conditions that are necessary or sufficient to justify the detention of a particular person.[9] This Article aims to shed light on the set of questions that arises at this second, individual level.

That we lack consensus with respect to individualized detention criteria and constraints, despite nearly a decade's worth of litigation and debate,[10] reflects our preoccupation with other questions associated with military detention—above all the seven years' war regarding federal courts' habeas jurisdiction over the Guantanamo detainees.[11] Yet even prior to the resolution of that jurisdictional dispute in the U.S. Supreme Court's 2008 decision in *Boumediene v. Bush*,[12] courts had several occasions to address the detention-scope issue; they just did not develop a consensus as a result.[13] On the contrary, the courts splintered sharply in those cases, advancing an array of incompatible views regarding the applicable law.[14]

Matters have improved somewhat in the aftermath of *Boumediene*.[15] Many district and circuit court judges, in the context of the Guan-

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PM), 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).

[9] *See infra* notes 213–586 and accompanying text.

[10] For particularly useful treatments of the issue, see Baher Azmy, *Executive Detention,* Boumediene*, and the New Common Law of Habeas*, 95 Iowa L. Rev. 445, 504–14 (2010); Bradley & Goldsmith, *supra* note 8, at 2107–33; Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 Am. J. Int'l L. 48, 51–60 (2009); Ryan Goodman & Derek Jinks, *International Law, U.S. War Powers, and the Global War on Terrorism*, 118 Harv. L. Rev. 2653, 2654–58 (2005); Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 Yale J. Int'l L. 369, 370–75 (2008); Ganesh Sitaraman, *Counterinsurgency, the War on Terror, and the Laws of War*, 95 Va. L. Rev. 1745, 1821 (2009); Matthew C. Waxman, *Administrative Detention of Terrorists:* Why *Detain, and Detain* Whom*?*, 3 J. Nat'l Sec. L. & Pol'y 1, 17–23 (2009).

[11] 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*, 553 U.S. at 732–33; *see also Hamdi*, 542 U.S. at 509 (holding that the government failed to provide adequate process to a U.S. citizen held in military custody on grounds of membership in the Taliban); *Rasul*, 542 U.S. at 484 (holding that the federal habeas statute as then written provided jurisdiction over the claims of Guantanamo detainees).

[12] 553 U.S. at 732–33. In *Boumediene*, the Court held 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 id.*; *infra* notes 352–396 and accompanying text.

[13] *See infra* notes 215–349 and accompanying text.

[14] *See infra* notes 215–349 and accompanying text.

[15] *See infra* notes 397–586 and accompanying text.

tanamo habeas litigation, have had the opportunity to address who lawfully may be detained.[16] Their decisions reflect a consensus that the government does have authority to detain without criminal charge in at least some circumstances.[17] And most hold that these circumstances 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 less clear).[18] But beyond these points, disagreement reigns.[19]

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.[20] Furthermore, these judges most definitely have not reached consensus as to whether detention lawfully may be used in the distinct situation in which a non-member provides support to these groups;[21] in fact, the executive branch itself now appears divided on the propriety of using support as a stand-alone detention predicate.[22] Perhaps most remarkably, an apparent consensus regarding the relevance of the laws of war to these questions recently came unglued in January 2010 in *al-Bihani v. Obama*, with a divided panel of the U.S. Court of Appeals for the D.C. Circuit declaring that the matter should turn exclusively on domestic law considerations,[23] and a subsequent assertion by a majority of the active judges of that court in turn declaring that assertion to be dicta.[24]

Although these issues are interesting in the seminar setting, one might fairly question whether they actually matter in practice. 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 deten-

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[16] *See infra* notes 412–586 and accompanying text.
[17] *See infra* notes 412–417 and accompanying text.
[18] *See infra* notes 418–586 and accompanying text.
[19] *See infra* notes 412–586 and accompanying text.
[20] *See infra* notes 418–586 and accompanying text.
[21] *See infra* notes 418–586 and accompanying text.
[22] *See infra* notes 532–547 and accompanying text; *see also* Charlie Savage, *Obama Team Split on Tactics Against Terror*, N.Y. Times, Mar. 29, 2010, at A1.
[23] *See infra* notes 507–520 and accompanying text.
[24] *See infra* note 522 and accompanying text.

tion authority.[25] For better or worse, moreover, habeas jurisdiction has not (yet) been extended to overseas military detention operations involving noncitizens at locations other than Guantanamo.[26] Thus, it may be tempting 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 actual practice, however, the question of who lawfully may be detained matters a great deal. 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 current litigation.[27] Even if the above-mentioned premises remain valid, other considerations ensure the relevance of the detention-scope question.[28]

First, the answers judges give to this question have spillover effects beyond the immediate context of habeas.[29] 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.[30] By the same token, judicial decisions regarding the notional scope of detention authority may be applied 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

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[25] For a review of a broad range of issues in the post-2008 habeas litigation, including the centrality of evidentiary questions, see generally Benjamin Wittes, Robert Chesney & Rabea Benhalim, Brookings, The Emerging Law of Detention: The Guantánamo Habeas Cases as Lawmaking (2010).

[26] *Cf.* al Maqaleh v. Gates, 605 F.3d 84, 98–99 (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).

[27] *See al Maqaleh*, 605 F.3d at 98–99; *see also* al Maqaleh v. Gates, No. 09-5265, slip op. at 1 (D.C. Cir. July 23, 2010) (order denying appellees' petition for panel rehearing), *available at* http://www.scotusblog.com/wp-content/uploads/2010/07/Bagram-order-7-23-10.pdf (noting that detainees, in an attempt to obtain a rehearing, made reference to evidence not in the record, and stating that the denial of habeas petition is "without prejudice to [detainees'] ability to present this evidence to the district court in the first instance").

[28] *See infra* notes 588–613 and accompanying text.

[29] *See infra* notes 588–613 and accompanying text.

[30] *See infra* notes 588–606 and accompanying text.

judicial review.[31] Future conflicts unrelated to 9/11 may also be impacted because many of the habeas decisions have included interpretations of key terms and concepts from both international and domestic law—such as "direct participation in hostilities" ("DPH") and "all necessary and appropriate force"—that will be relevant in most if not all future armed conflicts.[32] The judges involved in the habeas litigation have thus become, for better or worse, the central U.S. 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.

In addition, the detention-scope question will remain relevant well into the future because the habeas litigation story—as it relates to this question—functions as a case study in the dynamic relationship between law and strategic context.[33] More specifically, habeas litigation exemplifies two significant trends in the legal regulation of hostilities, one that is somewhat familiar and one that is somewhat novel.[34] The first and somewhat-familiar trend involves the increasing significance of national courts in developing the international laws of war (at a time when the prospects for revisions to foundational treaties, such as the Geneva Conventions, are exceedingly slim, and when the role of international courts remains constrained).[35] The second and more novel trend involves the emergence of domestic law as a rival to the international laws of war in the context of extraterritorial conflict (at a time when most scholarly attention focuses instead on the rivalry between the laws of war and international human rights law).[36] From this point of view, the habeas litigation may herald increasing fragmentation of the law relating to hostilities—and, for good or ill, more occasions for national courts to grapple with the consequences.

This Article proceeds in four parts. It begins at a high level of abstraction in Part I, surveying the various elements that could be used to define the scope of detention authority at the individual level.[37] This

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[31] *See infra* notes 607–610 and accompanying text. *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 that the ACLU plans to sue to stop the lethal use of force by the U.S. government against an American citizen in Yemen).

[32] *See infra* notes 611–613 and accompanying text.

[33] *See infra* notes 635–656 and accompanying text.

[34] *See infra* notes 657–672 and accompanying text.

[35] *See infra* notes 657–665 and accompanying text.

[36] *See infra* notes 666–672 and accompanying text.

[37] *See infra* notes 42–63 and accompanying text.

Part aims to convey a rich sense of the possibilities before exploring the positions advanced by the U.S. government since 9/11, the counter-arguments advanced by various detainees, and the reactions of federal judges to these competing positions. Part II then provides additional context by drawing attention to two strands of debate that complicate the task of determining whether particular detention criteria are forbidden, required, or permitted by law: (1) disagreement regarding which bodies of law actually apply in a particular instance, and (2) disagreement as to what a particular body of law has to say about employing particular criteria in a detention standard.[38]

Against this backdrop, Part III describes how judges, since 2002, have addressed the question of individual detention criteria, emphasizing that which has been settled and that which remains in dispute.[39] In brief, judges largely agree that detention authority lawfully extends to persons who are functional members of al Qaeda, the Taliban, or associated forces; they do not agree, however, as to what membership means in this setting or whether detention authority also extends to non-members who provide support to such groups.[40] Part IV explains that these lingering disagreements are problematic not simply because they create an uncertain atmosphere for the Guantanamo habeas litigation, but also because uncertainty in this context may spill over into other critical areas, such as detention operations in Afghanistan and decisions about the use of lethal force in the field; Part IV therefore calls on Congress to address this confusion by crafting a detailed detention standard.[41]

## I. Disaggregating the Potential Elements of an Individual Detention Standard

Substantive detention standards, much like criminal laws or civil tort rules, cannot truly be understood at a high level of generality. To appreciate their real reach, one must disaggregate them into their constituent variables and identify, as precisely as possible, the calibration of each of these variables. Bearing this in mind, and to set the stage for the discussions that follow, the goal of this Part is to establish a vocabulary and frame of reference suitable for: (1) gauging the extent to

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[38] *See infra* notes 64–212 and accompanying text.

[39] *See infra* notes 213–586 and accompanying text.

[40] *See infra* notes 587–672 and accompanying text.

[41] *See infra* notes 587–676 and accompanying text. The Article's specific proposals for Congress are set out *infra* notes 633–644 and accompanying text.

which various bodies of law already address this topic (the subject of Part II);[42] (2) parsing and comparing the positions advanced by the government, detainees, and judges in the ongoing post-9/11 habeas litigation (the subject of Part III);[43] and (3) commenting on alternatives (addressed in Part IV).[44]

Although there is no comprehensive list of elements that might be included in a substantive, individualized detention standard, Section A identifies and explores a handful of variables that seem particularly relevant.[45] Section B describes the manner in which each variable might be calibrated so as to expand or contract the resulting authority.[46] Such selection and calibration decisions provide the true measure of a detention standard.[47]

### A. *Detention Predicates*

Three variables seem most likely to be used or proposed as the affirmative basis for seeking to detain an individual. At a high level of generality, they can be referred to as: (1) personal conduct, (2) associational status, and (3) collateral utility.

An individual's "personal conduct" is one of the more obvious predicates for a detention standard. That is, one might premise detainability, in whole or part, on whether an individual has personally committed a particular act. The nature of the requisite act, in turn, might be defined strictly or loosely depending on the scope of detention authority sought.

In the context of military detention, for example, personal conduct could be defined very narrowly, so as to encompass only personal and direct participation in violent actions.[48] More permissively, this variable could be defined to include the act of knowingly assisting others with a specific act of violence. Further, it could be calibrated to reach the knowing provision of assistance to others in furtherance of nonspecific violence that might one day occur—or to reach any support, even

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[42] *See infra* notes 64–212 and accompanying text.

[43] *See infra* notes 213–586 and accompanying text.

[44] *See infra* notes 587–672 and accompanying text.

[45] *See infra* notes 48–57 and accompanying text.

[46] *See infra* notes 58–63 and accompanying text.

[47] None of this is to suggest that any particular combination of variables and calibrations is *lawful*. Lawfulness is a conceptually distinct inquiry. That is to say, there is a difference between determining what detention authority has been asserted in a particular instance and determining whether that asserted scope of authority falls within whatever legal boundaries may be applicable.

[48] *See, e.g.*, Bradley & Goldsmith, *supra* note 8, at 2115–16.

where a nexus with violence is entirely lacking. Most permissively, the variable could be dropped from the detention standard altogether; in that case, there would be no need to show any particular conduct on the individual's part.

A second possible variable is associational status: the extent of a person's affiliation with an organization.[49] Like support, degree of affiliation can vary. A person may be a leader or member of an organization, for example, or may associate in other ways with it.[50]

From the point of view of the state, the great virtue of using associational status as a basis for detention is that it enables the state to act even in the absence of proof that a person has committed or is planning to commit a particular act.[51] Associational status, in this sense, is a prevention-oriented criterion. Thus, in the context of international armed conflict, the Third Geneva Convention makes clear that states need not wait until an enemy soldier commits or attempts a belligerent act, but instead can detain (or target) that person based simply on his membership in the enemy's armed forces.[52] But for much the same reason, associational status can be a problematic criterion. Using it as a detention predicate can smack of guilt-by-association and may seem to be in tension with the principle that guilt should be personal rather than imputed from the actions of others. Accordingly, particular care must be taken when calibrating associational status as a detention variable.

Furthermore, for many organizations, a binary, formalistic conception of associational status (the idea that one is either a member of that organization or is not) maps poorly onto ground truth. Consider, for example, the difficulties that arise when a "membership" concept is applied to youth gangs in the United States, as occurs often in the context of state criminal law.[53] As Babe Howell has observed, "social scientists and sociologists have long focused on . . . the difficulty of defining both 'gangs' and 'membership' in [a] gang," identifying a substantial gap between the membership concept typically employed by law en-

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[49] *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 516 (2004); Padilla v. Hanft, 423 F.3d 386, 391–92, 397 (4th Cir. 2005).

[50] One might object that "associational status" is not meaningfully distinct from "personal conduct," but rather is a catchall term for certain patterns of conduct involving interactions with other persons. No doubt there is some truth to that, but it remains useful to treat associational status as a distinct variable given the significant role it turns out to play in the detention debate. *See infra* notes 51–57 and accompanying text.

[51] *Cf.* GPW, *supra* note 1, art. 4(A).

[52] *Id.*

[53] *See* K. Babe Howell, *Fear Itself: The Impact of Allegations of Gang-Affiliation on Pre-Trial Detention*, 23 ST. THOMAS L. REV. (forthcoming 2011) (manuscript at 1).

forcement "and the decidedly more complex and nuanced relationship between youth in neighborhoods dominated by street gangs evidenced in the social science literature."[54] Drawing on the work of Lewis Yablonsky, Howell suggests that the typically sweeping definition of "membership" must be disaggregated to account for distinctions among core and fringe members; active and inactive members; and actual members and "[g]roupies . . . who do not ordinarily participate in criminal gang activity but hang out with gangsters and dress and talk like them,"[55] mere co-located residents of gang-infested neighborhoods who "find it necessary to their survival to identify with the gang,"[56] and even "former gangsters" who have aged out or otherwise left behind the active gang life.[57] It also may be necessary to distinguish those who consider themselves independent of an organization but nonetheless actively and perhaps repeatedly cooperate with its members—either out of a sense of shared mission or for other self-interested reasons.

Bearing all this in mind, what is the range of options when it comes to calibrating an associational status variable in the detention setting? There are several possibilities, ranging from agency to fleeting forms of affiliation. To keep the category narrow, we could require that an individual be subject to the command-and-control of an organization—an agent of the organization, in effect. Further narrowing the category, we might require that the person be an agent not of the organization as a whole, but specifically of its militarized "wing." Going even further, we might require that this agency relationship be more than merely notional but instead has actually been borne out in practice. Alternatively, we could broaden the variable by relaxing one or more of these elements. We might relax or even outright relinquish the requirement of past obedience to a group's commands. We might abandon the distinction between a group's militarized wing and the overall group. We might relax the requirement of agency, accepting instead other forms of association—perhaps formal membership would suffice, if that concept can meaningfully be applied—or even more fleeting types of connection. Apart from all this, we might tweak the calibration of the variable by treating various formal indicia as necessary or sufficient conditions. Examples might include an oath of alle-

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[54] *Id.* (manuscript at 2–3).

[55] *Id.* (manuscript at 27–28).

[56] *Id.* (manuscript at 28) (quoting Lewis Yablonsky, Gangs in Court 10 (2d ed. 2008)).

[57] *Id.*

giance, inclusion on a payroll, or inclusion in a group-sponsored training program or housing complex.

Not every potentially relevant variable links the detainee in a personal way to violence or danger. Consider a final possibility: that a state might wish to detain persons for collateral reasons. Two examples of this approach come to mind. First, a detention standard might permit detention of a person simply as a means of pressuring a third party to take or refrain from some action—a decidedly problematic detention predicate smacking of hostage-taking. Second, a detention standard might permit detention of a person simply because he or she is thought to possess useful intelligence, even if only by happenstance (as in the case of a neighbor who happens to see what insurgents are doing nearby).

### B. *Constraint Criteria*

A fully realized substantive detention standard may consist of much more than some combination of the aforementioned detention predicates.[58] It may also incorporate any number of constraint conditions. The possibilities are endless, but several are particularly likely to be relevant, including: (1) citizenship, (2) geography, (3) timing, (4) the existence of less-restrictive alternatives, and (5) future dangerousness.[59]

First, detention authority could be constrained with reference to a person's citizenship. A state might attempt to exclude its own citizens from its detention authority, for example, or seek to define its detention authority affirmatively with reference to citizenship in some other state(s).

Second, detention authority could be constrained with reference to the geography of capture. At its most demanding, this constraint could be calibrated to require that an individual be physically located on a conventional battlefield at, or at least shortly before, the time of capture. Or the variable could be relaxed so as to require merely that the individual be located within the geographic boundaries of a state in which violence is occurring at some particular level of intensity and repetition (rising to the level of "armed conflict," for example). Most permissively, the question of location could be omitted altogether.

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[58] *See supra* notes 48–57 and accompanying text.

[59] *See infra* notes 61–63 and accompanying text. Bearing in mind the "child soldier" issue and the presence of several teenage detainees in Afghanistan and then later in Guantanamo, one might add an age constraint to this list. *Cf.* Charlie Savage, *Deal Averts Trial in Disputed Guantánamo Case*, N.Y. Times, Oct. 26, 2010, at A12.

A third consideration involves timing. Mary Dudziak has observed that we tend not to notice the role of temporal conceptions when we examine law relating to war, and that even when we do note the relevance of temporal frames, we tend not to think carefully about them.[60] These insights are applicable to the detention debate. Just as one can be relatively strict or generous in terms of physical proximity to violent activity, so too can one be relatively strict or generous in terms of how much time may pass before past satisfaction of a detention predicate ceases to count. If participation in violence is the predicate, one could require that the person be captured in the act, the immediate aftermath of the act, or within a few days; for maximum flexibility, there could be no limitation period at all. One could similarly use a temporal lens to refine the calibration of a geographic constraint variable: one could require that the geographic criterion be satisfied at the moment of capture, immediately beforehand, or within the past year, and so forth.

Fourth, detention authority could be constrained by adopting a least restrictive alternative test. For example, the state could be precluded from using detention except in circumstances where the courts are not open or where prosecution is possible but unlikely to succeed. The impact of such a constraint would turn both on the substantive condition imposed and on the degree of confidence the state must possess with respect to whether that condition has been satisfied. Consider, as an illustration, the difficulty of operationalizing a standard that requires that criminal prosecution be unlikely to succeed.

Finally, detention authority could be constrained by requiring a showing of the detainee's "future dangerousness." The notion of future dangerousness as a detention constraint is closely related to the use of past personal conduct and associational status as affirmative predicates for detention. One's past acts and associations, after all, may matter from the detention perspective precisely because they signal that a person may be harmful in the future if not detained. Nevertheless, past acts and associations do not exhaust the future dangerousness concept. One may not have engaged in any past violent acts or have any particular sort of associational status and yet may still be potentially dangerous in light of other indicators (e.g., statements indicating intent to carry out a harmful act in the future, or past attendance at a military-style training camp). Conversely, one might have been involved in violence

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[60] *See* Mary L. Dudziak, *Unlimited War and Social Change: Unpacking the Cold War's Impact* 2–4 (Univ. of S. Cal. Law Sch., Legal Studies Paper No. 10-15, 2010), *available at* http://ssrn.com/abstract=1676460.

or have associated with a relevant organization, but not personally appear to pose a threat.

In any event, a future dangerousness variable can be calibrated in much the same way as a past conduct or associational status variable. At the strict end of the spectrum, future dangerousness might refer to the likelihood of an individual committing (or assisting) a particular violent act. More flexibly, it could refer to the likelihood of an individual committing (or assisting) violence as a general matter, without linkage to a particular act. More broadly still, it could refer to the likelihood of an individual being involved in activity that supports some particular group, without linkage to violence. As with all possible detention predicates, moreover, the bite of a future dangerousness variable would depend at least as much on the degree of certainty required for its satisfaction as on the particular substantive calibration decision.

The foregoing discussion provides a typology of potentially relevant detention predicates and constraints, as well as a sense of how each might be calibrated in a more-or-less expansive direction.[61] The list is not exhaustive, but, as we will see in Part III, it does go far toward encompassing the range of positions that have been advanced in post-9/11 debates regarding the scope of detention authority asserted by the U.S. government.[62] Importantly, the typology also helps us understand the extent to which existing bodies of law actually speak to the individualized detention question—the subject of the next Part.[63]

## II. 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.[64] 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—

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[61] *See supra* notes 42–60 and accompanying text.

[62] *See infra* notes 213–586 and accompanying text.

[63] *See infra* notes 64–212 and accompanying text.

[64] *See* Gherebi v. Bush, 374 F.3d 727, 728 (9th Cir. 2004).

such as domestic law, the law of armed conflict ("LOAC"), and international human rights law ("IHRL")—actually apply to this question. This might be called the "domain" debate and is explored in Section A.[65] 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. This might be called the "content" debate and is explored in Section B.[66] Finally, Section C examines an additional factor that complicates the detention-scope debate: the prospect of legal change.[67]

The aim is not to settle the domain and content debates, but rather simply to orient the reader to their basic features. Combined with the typology of detention predicates and constraints provided in the preceding Part,[68] this orientation will equip the reader to appreciate fully the points of consensus and disagreement emerging from the habeas litigation, which are discussed in Part III.[69]

### 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. This Section first examines three of the candidate legal regimes: (1) domestic law (statutory or constitutional), (2) LOAC or international humanitarian law, and (3) IHRL.[70] It then considers how the need to resolve overlaps and conflicts between LOAC and IHRL further complicates the domain debate.[71]

#### 1. Domestic Law

At one extreme, the question of who lawfully may be held might require solely a domestic law analysis. Under this view, for example, one might first consider what the September 18, 2001 Authorization for Use of Military Force (AUMF)[72] has to say about the topic—or what might be gleaned from the U.S. Constitution as a direct source of detention

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[65] *See infra* notes 70–103 and accompanying text.
[66] *See infra* notes 103–168 and accompanying text.
[67] *See infra* notes 169–212 and accompanying text.
[68] *See supra* notes 48–63 and accompanying text.
[69] *See infra* notes 213–586 and accompanying text.
[70] *See infra* notes 79–96 and accompanying text.
[71] *See infra* notes 97–102 and accompanying text.
[72] Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)).

power[73]—and then note any other limitations that might be derived from the Constitution, other statutes, or prior U.S. case law. If the government's claim of detention authority is consistent with these sources, the debate ends.

Of course, treaties are part of domestic law as the Constitution makes them supreme law of the land.[74] Thus, the "domestic-only" viewpoint does not necessarily exclude consideration of LOAC and IHRL instruments. If 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.[75] At least with respect to IHRL instruments, moreover, the U.S. government has long maintained that they simply do not apply to U.S. government conduct occurring outside of formal U.S. territory.[76]

In any event, the notion of a purely domestic approach to determining the legal boundaries of detention authority is no mere academic invention. As Part III discusses, the U.S. Court of Appeals for the D.C. Circuit adopted precisely this view in its January 2010 decision *al-Bihani v. Obama*.[77] 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

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[73] *Cf.* Hamdi v. Rumsfeld, 542 U.S. 507, 587 (2004) (Thomas, J., dissenting) ("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, for the most part this Article refers only to the AUMF as a source of domestic detention authority. *See* Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 1, Hamlily v. Obama, 616 F. Supp. 2d 63 (D.D.C. 2009) (No. 05-0763) [hereinafter Hamlily Memorandum].

[74] *See* U.S. Const. art. VI, cl. 2 (providing that treaties are the "supreme Law of the Land").

[75] *See* Carlos Manuel Vázquez, *The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide*, 101 Am. J. Int'l L. 73, 88 (2007) (examining various arguments relating to self-executing treaties and legislative efforts to "unexecute" these treaties in relation to the Geneva Conventions).

[76] *See* U.S. Dep't 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 generally Kal Raustiala, Does the Constitution Follow the Flag? The Evolution of Territoriality in American Law (2009).

[77] U.S. Dep't of State, *supra* note 76, at 1–2; *see infra* notes 507–520 and accompanying text (discussing a D.C. Circuit panel's rejection of international law in *al-Bihani*).

of two ways, one weak and one strong. First, according to 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).[78] Consistent with the *Charming Betsy* canon, for example, one would look to LOAC to flesh out the meaning of the AUMF's "all necessary and appropriate force" language, as it relates to detention.[79] Second, according to 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 detention-scope issue. The difference might matter where the underlying domestic source is so clear that there is no occasion for an LOAC-based interpretation, thus making the weak, but not the strong, model inapplicable. But that is hardly the case here, given the relative lack of clarity of the domestic sources involved.[80] In this setting, rather, both the weak and strong models would direct us to look to LOAC to define the scope of the government's detention authority.

Nonetheless, LOAC is not automatically relevant in all circumstances; it is, however, applicable in circumstances of "armed conflict."[81] To determine LOAC's field of application, one must identify and define the scope of "armed conflict"—tasks that generate considerable disputes.[82] Some scholars reference functional criteria involving the duration, intensity, and nature of the violence at issue,[83] while oth-

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[78] *See* Ingrid Brunk Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 Mich. L. Rev. 61, 74–75, 81 (2007).

[79] *See* Bradley & Goldsmith, *supra* note 8, at 2088–2100; Ingrid Brunk Wuerth, *Authorizations for Use of Force, International Law, and the* Charming Betsy *Canon*, 46 B.C. L. Rev. 293, 295–99 (2005) (under the *Charming Betsy* canon, "the courts construe acts of Congress to avoid violations of international law whenever possible").

[80] *See infra* notes 103–131 and accompanying text (discussing the applicable domestic law and noting its lack of clarity).

[81] *See* Int'l Law Ass'n, The Hague Conference: Use of Force; Final Report on the Meaning of Armed Conflict in International Law 1 (2010) [hereinafter ILA Use of Force Report], *available at* http://www.ila-hq.org/download.cfm/docid/2176DC63-D268-4133-8989A664754F9F87.

[82] *See infra* notes 83–86 and accompanying text.

[83] *See, e.g.*, Marco Sassòli, *Terrorism and War*, 4 J. Int'l Crim. Just. 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 IHL, collective, open and coordinated character of the hostilities, direct involvement of gov-

ers also emphasize the formal categorization of the asserted "enemy" in terms of its status as a "state, nation, belligerent, or insurgent group."[84] Furthermore, even when one accepts that a state of armed conflict justifying application of LOAC exists in a particular location, 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.[85] Indeed, 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 (1) the activities of al Qaeda rise to the level of armed conflict in places other than Afghanistan, and (2) the existence of armed conflict in Afghanistan, in any event, permits reliance on LOAC concepts against al Qaeda-related individuals in other locations.[86]

3. International Human Rights Law

The third model tracks the second, but looks to IHRL rather than LOAC. That is, 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.[87] For present purposes, the most relevant IHRL treaty is the International Covenant on Civil and Political Rights (ICCPR),[88] which, as discussed below,

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> ernmental armed forces (vs. law enforcement agencies) and *de facto* authority by the non-state actor over potential victims.

*Id.*

[84] Jordan J. Paust, *Responding Lawfully to al Qaeda*, 56 CATH. U. L. REV. 759, 760 (2007).

[85] *See, e.g.*, Declaration of Prof. Mary Ellen O'Connell at 7, al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-1469), *available at* http://www.aclu.org/files/assets/O_Connell_Declaration.100810.PDF.

> 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.

*Id.*

[86] *See* ILA USE OF FORCE REPORT, *supra* note 81, at 25.

[87] *See infra* notes 88–92 and accompanying text.

[88] International Covenant on Civil and Political Rights art. 9, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR].

contains language relating to detention.[89] 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."[90] The United States has long construed this language literally, such that ICCPR rules govern within the United States but not elsewhere.[91] In contrast, many other states (including many European allies) and the U.N. Commission on Human Rights (now the Human Rights Council) construe that same language to encompass any person subject to a member state's practical control, regardless of geographic location.[92] An interpretive stand-off 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 U.S. position regarding the geographically bounded reach of the ICCPR, however, IHRL issues might still arise. After all, not all detentions occur outside U.S. territory.[93] On three occasions after 9/11, for example, the United States held persons in military custody within the United States itself.[94] And in the wake of the U.S. Supreme Court's decisions in *Rasul v. Bush* in 2004[95] and *Boumediene v. Bush* in 2008,[96] both of which emphasize the unique degree of U.S. control at Guantanamo, debate may yet arise as to Guantanamo's 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. 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.

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[89] *See infra* notes 162–168 and accompanying text.

[90] ICCPR, *supra* note 88, art. 2.

[91] *See* U.S. Dep't of State, *supra* note 76, at 1.

[92] *See, e.g.*, Patrick Walsh, *Fighting for Human Rights: The Application of Human Rights Treaties to United States' Military Operations*, 28 Penn. St. Int'l L. Rev. 45, 60 (2009).

[93] *See infra* notes 215–349 and accompanying text.

[94] *See, e.g.*, *Hamdi*, 542 U.S. at 509–10; Rumsfeld v. Padilla, 542 U.S. 426, 430 (2004); al-Marri v. Wright (*al-Marri I*), 487 F.3d 160, 163 (4th Cir. 2007), *rev'd en banc sub nom.* al-Marri v. Pucciarelli (*al-Marri II*), 534 F.3d 213 (4th Cir. 2008) (en banc), *vacated sub nom.* al-Marri v. Spagone, 129 S. Ct. 1545 (2009) (mem.); *see also* notes 215–349 and accompanying text.

[95] 542 U.S. 466, 480 (2004), *superseded by statute*, Detainee Treatment Act of 2005 §§ 1001, 1003–1004, Pub. L. No. 109-148, 119 Stat. 2680, 2739 (codified at 42 U.S.C. § 2000dd (2006)), *as recognized in* Boumediene v. Bush, 553 U.S. 723 (2008).

[96] 553 U.S. at 755.

4. Deconfliction

The discussion grows still more complicated once one accounts for the potential of the LOAC and IHRL models to overlap and conflict. 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.[97]

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.[98] Unfortunately, a variety of views exist regarding just what that concept means in practice—enough to prompt the International Law Commission to undertake an effort to clarify the question.[99] The U.S. 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.[100] 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.[101] One might argue for a third position, a rights-maximizing approach in which the controlling rule is whichever one most advantages individuals' rights, rather than state discretion. Alternatively, one might advocate 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).[102]

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[97] For a sampling of this scholarship, see J. 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 Law., May 2009, at 18, 22; Marko Milanović, *A Norm Conflict Perspective on the Relationship Between International Humanitarian Law and Human Rights Law*, 14 J. Conflict & Sec. L. 459, 459 (2009).

[98] For a more thorough exposition, see Laura M. Olson, *Practical Challenges of Implementing the Complementarity Between International Humanitarian and Human Rights Law—Demonstrated by the Procedural Regulation of Internment in Non-International Armed Conflict*, 40 Case W. Res. J. Int'l L. 437, 445–49 (2009).

[99] *See, e.g.*, Martti Koskenniemi, Int'l Law Comm'n, Study Grp. 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 1 (2003), *available at* http://untreaty.un.org/ilc/sessions/55/fragmentation_outline.pdf.

[100] *See, e.g.*, Jeff A. Bovarnick, *Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy*, Army Law., June 2010, at 9, 37.

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

[102] *See, e.g.*, Olson, *supra* note 98, 446–49.

Deconfliction of LOAC and IHRL, in short, requires resolution of a complex and entrenched debate.

As if this were not enough complexity, it is 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 is plainly relevant and IHRL is not, but in other locations the reverse is true or the question turns 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 currently has to say regarding the particular mix of detention predicates and constraints that a state can, or must, use.

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. Second, 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, and third, 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 does it instead constitute an absence of constraint on the government's exercise of such powers? This too can be a point of disagreement. Fourth, and 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, which introduces a series of interpretive issues.[103]

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."[104] 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,"[105] as well as the Civil War-era precedent *Ex parte Milligan*, in which the Supreme Court, in 1866, employed broad language in the course of holding that a civilian could not be subjected to a military commission trial if civilian courts were available.[106]

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, or persons" that the President determines were responsible for the 9/11 attacks, as well as those who harbor such entities.[107] The Bush administration exercised this authority by identifying al Qaeda as the entity responsible for the attacks and the Taliban as having harbored them;[108] the Obama administration has continued that position,[109] and there does not appear to be any serious doubt that it was appropriate to do so.[110] Thus it seems settled that the AUMF refers at least to al Qaeda and the Taliban.[111]

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[103] *See* Authorization for the Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)).

[104] *Id.* § 2(a).

[105] Act of Sept. 25, 1971, Pub. L. No. 92-128, 85 Stat. 347, 347 (codified at 18 U.S.C. § 4001(a) (2006)).

[106] 71 U.S. (4 Wall.) 2, 121, 127 (1866). *But see Ex parte* Quirin, 317 U.S. 1, 45–46 (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).

[107] AUMF § 2(a).

[108] *See Hamdi*, 542 U.S. at 510.

[109] *See* Hamlily Memorandum, *supra* note 73, at 1.

[110] *See also infra* notes 350–586 and accompanying text.

[111] The level of consensus with respect to the objects of the AUMF, even at this group/organizational level, should not be overstated. There is ample room for disagreement regarding the degree of institutional affiliation with al Qaeda or the Taliban that is necessary for other, arguably distinct, entities to be deemed subject to the AUMF as well. There are numerous entities in the Af-Pak theater, for example, that are engaged to varying degrees in hostilities against the United States or the Afghan government, yet do not

Even if we had consensus regarding precisely which entities fall within the scope of the detention power authorized by 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.[112]

This is, in fact, typical of AUMFs (and declarations of war, for that matter).[113] Yet no one in prior conflicts thought such silence to be significant.[114] Why does it matter so much now? First, most prior conflicts involved nation-states as the enemy, and 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 be identified (in order to ensure prisoner-of-war ("POW") treatment and qualification for the combatant's privilege to use force).[115] 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

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constitute subsidiaries of either al Qaeda or the Taliban. *See* Jeffrey Dressler, *Haqqani Network Influence in Kurram and Its Implications for Afghanistan*, CTC SENTINAL (Combatting Terrorism Ctr., U.S. Military Acad., West Point, N.Y.), Mar. 2011, at 11, 11–12, *available at* http://www.ctc.usma.edu/sentinel/CTCSentinel-Vol4Iss3.pdf; Rasool Dawar, *Pakistan Taliban Claim CIA Turncoat in Afghanistan*, HUFFPOST WORLD (Jan. 1, 2010), http://www.huffingtonpost.com/2010/01/01/pakistan-taliban-claim-ci_n_409201.html. 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). *See* Dressler, *supra*, at 13. Arguments can be made that AUMF-based authority extends to such groups as co-belligerents 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 the *Groupe Salafiste pour la prédication et le combat* ("GSPC," or the Salafist Group for Preaching and Combat). Its activities are primarily directed toward the Algerian government, but Osama bin Laden may have provided funding or otherwise assisted when the GSPC originally broke off from the *Groupe islamique armé* in the 1990s. *See* Andrew Hansen & Lauren Vriens, *Backgrounder: Al-Qaeda in the Islamic Maghreb (AQIM)*, COUNCIL ON FOREIGN REL., http://www.cfr.org/north-africa/al-qaeda-islamic-maghreb-aqim/p12717 (last updated July 21, 2009). The GSPC 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. *Id.* For an overview, see Hansen & Vriens, *supra*. 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.

[112] *See* Bradley & Goldsmith, *supra* note 8, at 2082–83.

[113] *See id.* at 2072–83.

[114] *See id.*

[115] *See* Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1099–100 (2008).

the scrutiny that arises today (let alone litigation).[116] Matters are otherwise in relation to the use of detention under the AUMF, and thus the question of individualized detention predicates and constraints is far more significant than in the past.

No other domestic law source suffices to prevent debate and disagreement on these points. Congress, for its part, has not returned to the detention-scope question, at least not directly. The first post-AUMF legislation to address detention in any significant way was the Detainee Treatment Act of 2005 (DTA),[117] which, among other things, addressed federal courts' jurisdiction over challenges to individual detention decisions at Guantanamo.[118] The DTA did not purport to define a substantive standard as to who may be detained, however. Instead, it invited the D.C. Circuit to consider in particular cases whether the government's assertion of detention authority was compatible with the "Constitution and laws of the United States."[119]

The Military Commissions Act of 2006 ("MCA 2006") came closer.[120] 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.[121] Specifically, it stated that commissions could try cases involving any alien constituting an "unlawful enemy combatant."[122] It defined that phrase 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: (1) "has engaged in hostilities . . . against the United States or its co-belligerents"; (2) "has purposefully and materially supported hostilities against the United States or its co-belligerents"; or (3) "is part of the Taliban, al Qaeda, or associated forces."[123]

The MCA 2006 thus introduced a series of necessary and sufficient conditions to bring a person within the jurisdiction of the new war crimes trial system—conditions that were narrowed only slightly with the subsequent passage of the Military Commissions Act of 2009 ("MCA

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[116] *See id.* at 1091.

[117] Detainee Treatment Act of 2005 §§ 1001, 1003–1004, Pub. L. No. 109-148, 119 Stat. 2680, 2739 (codified at 42 U.S.C. § 2000dd (2006)).

[118] *Id.* § 1005.

[119] *Id.*

[120] Military Commissions Act of 2006, Pub. L. No. 109-366, § 3, 120 Stat. 2600, 2600–31.

[121] *See id.*

[122] *Id.* (adding 10 U.S.C. § 948c).

[123] *Id.* (adding 10 U.S.C. § 948a(1) and (2)).

2009").[124] The MCA 2009 replaced the verbiage "unlawful enemy combatant" with the less baggage-laden phrase "unprivileged enemy belligerent."[125] It kept the criteria relating to participation in hostilities and material support of hostilities.[126] 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 of being part of the Taliban or an associated force.[127]

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.[128] 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).[129] 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.[130] 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 re-

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[124] *See* Military Commissions Act of 2009 Pub. L. No. 111-84, tit. XVIII, 123 Stat. 2190, 2574.

[125] *Id.* § 1802 (adding 10 U.S.C. §§ 948a(7) (defining "unprivileged enemy belligerent"), 948c (defining jurisdiction to encompass alien "unprivileged enemy belligerents")).

[126] *Id.* (adding 10 U.S.C. § 948a(7)).

[127] *Id.*

[128] *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev. 2029, 2109 (2007).

[129] *See* Military Commissions Act of 2009 § 1802; Military Commissions Act of 2006, Pub. L. No. 109-366, § 3, 120 Stat. 2600, 2601–03.

[130] *See, e.g.*, John Rollins, Cong. Research Serv., R410780, Al Qaeda and Affiliates: Historical Perspective, Global Presence, and Implications for U.S. Policy summary (2010), *available at* http://fpc.state.gov/documents/organization/137015.pdf.

quired—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.[131] 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.[132] In that traditional setting, the full range of Geneva Convention protections apply, including a host of provisions that expressly contemplate the use of non-criminal modes of detention in military custody.[133]

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.[134] GPW Article 4, moreover, provides a detailed definition as to who qualifies for POW status (and hence may be detained without much controversy).[135] Among other things, this includes any person who:

1. is a member of the armed forces of a Party;
2. is a member of an irregular unit that obeys the four conditions of lawful belligerency (having a command hierarchy,

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[131] *See, e.g.*, Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1232–33 (2007); Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170, 1218 (2007).

[132] *See, e.g.*, GPW, *supra* note 1, art. 2.

[133] *See id.*

[134] *Id.* art. 21 (authorizing internment of POWs); *id.* art. 118 (requiring release and repatriation of POWs upon conclusion of hostilities).

[135] *Id.* art. 4.

wearing a distinctive sign, bearing arms openly, and obeying the laws of war); or

3. is a member of regular armed forces belonging to a government that the detaining state does not recognize.[136]

The central concept in each category is membership.[137] 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.[138] Not so in this setting, however. The concept of membership in structured armed forces presents few definitional issues.[139] The use of uniforms and the likelihood that a captured member of such a group will willingly concede such status to obtain the benefits of POW treatment further reinforce clarity.[140]

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.[141] And although the GC's security internment provisions 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.[142] The GC's drafters thought it best to leave the question of scope to the discretion of the detaining state—though the commentaries suggest that this authority might be applied, as one example, to intern individuals based on their membership in a dangerous organization.[143] The GC framework, in short, endorses something in the nature of a generalized fu-

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[136] *See id.* art. 4(a)(1)–(3) (listing these categories). Article 4 goes on to list various other scenarios in which a person is to be accorded POW status. *See id.* art. 4.

[137] *See id.*

[138] *See supra* notes 53–57 and accompanying text (discussing Babe Howell's scholarship on gangs).

[139] *See* GPW, *supra* note 1, art. 4.

[140] *See* Chesney & Goldsmith, *supra* note 115, at 1099–1100.

[141] *See* Geneva 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].

[142] *See* Oscar M. Uhler et al., Int'l Comm. of the Red Cross, Commentary IV: Geneva Convention Relative to the Protection of Civilian Persons in Time of War 256–58 (Jean S. Pictet ed., Ronald Griffin & C.W. Dumbleton trans., 1958).

[143] *Id.* at 257–58.

ture dangerousness inquiry, and does not demand particular forms of prior conduct or associational status.[144]

If the question of detention authority arose only in the context of international armed conflict, the existence and scope of detention authority might generate little debate. Of course we might still debate 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, a security internee, or an unprivileged belligerent.[145] But there would be little doubt as to the basic capacity to detain without charge, given the existence of express and sweeping treaty language.[146]

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.[147] Additional Protocol II ("APII") subsequently expanded upon those protections (though the United States is not party to that instrument).[148] Neither instrument explicitly confers substantive detention authority, nor does either purport to limit or deny such authority.[149]

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.[150] On that view, both authority and definitional scope must derive from other bodies of law (domestic, IHRL, or

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[144] *See* GC, *supra* note 141, arts. 27, 42, 43, 78.

[145] *Cf. Quirin*, 317 U.S. at 36–38 (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 (Protocol I), *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter API]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *adopted* June 8, 1977, 1125 U.N.T.S. 609 [hereinafter APII].

[146] *See* GC, *supra* note 141, arts. 27, 42, 43, 78; GPW, *supra* note 1, arts. 4, 21, 118.

[147] GC, *supra* note 141, art. 3; GPW, *supra* note 1, art. 3.

[148] APII, *supra* note 145.

[149] *See id.*; GC, *supra* note 141, art. 3; GPW, *supra* note 1, art. 3.

[150] *See, e.g.*, Gabor Rona, *A Bull in a China Shop: The War on Terror and International Law in the United States*, 39 CAL. W. INT'L L.J. 135, 148–54 (2008).

both).[151] 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.[152] 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.[153] 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).[154]

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,[155] 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.[156]

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.[157] But the very feature that might make this attractive—the lack of any particular substantive criteria—is sure to invite objections.[158] Such objections no doubt will be muted if the context involves sustained, large-scale, combat violence. For example, 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.[159] This pattern continues on a small

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[151] *See id.*

[152] *See, e.g.*, Goodman, *supra* note 10, at 49, 63–65.

[153] *See id.*

[154] *See Hamdi*, 542 U.S. at 521–22. 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 id.*

[155] *See* GPW, *supra* note 1, arts. 21, 118.

[156] *Id.* art. 4.

[157] GC, *supra* note 141, arts. 27, 42, 45, 78.

[158] *See* Gabor Rona, *Legal Frameworks to Combat Terrorism: An Abundant Inventory of Existing Tools*, 5 CHI. J. INT'L L. 499, 502–03 (2005).

[159] *See* Chesney, *supra* note 4, at 574–77.

scale today, long after the expiration of the U.N. Security Council Resolutions that for a time provided an ad hoc positive law blessing for this arrangement.[160] But one should expect the opposite if the setting instead involves only episodic violence less associated with public conceptions of combat, and only an enemy "force" that is non-hierarchical or otherwise indeterminate in its structure and boundaries. In that case, arguments could emerge as to whether the threshold of "armed conflict" has been crossed 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.[161]

3. International Human Rights Law

Though IHRL refers to a diverse array of treaties and international customary law norms,[162] for present purposes it suffices to focus attention on a single treaty and norm: the prohibition of arbitrary detention contained in Article 9 of the ICCPR.[163] 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."[164] That is to say, a state may not hold a person in custody on its own whim as opposed to doing so based on a claim that detention in that circumstance is authorized by law.

Or at least a state 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.[165] Then again, the United States has not invoked the derogation option (presumably because the U.S. 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).[166]

Assuming that Article 9 is applicable, then, the question becomes whether U.S. government claims of detention authority after 9/11

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[160] *See id.* at 577.

[161] Rona, *supra* note 158, at 501–03.

[162] *See generally* Hurst Hannum et al., International Human Rights: Problems of Law, Policy, and Practice (4th ed. 2006).

[163] ICCPR, *supra* note 88, art. 9.

[164] *Id.* art. 9(1).

[165] *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. *Id.* art. 4(3).

[166] *See supra* notes 98–101 and accompanying text.

might violate that norm. The U.S. 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.[167]

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 must consider whether the government's claim of some particular mix of detention predicates and constraints violates IHRL. Here, however, IHRL seems not to have anything particular to say: no substantive definition of non-criminal detention authority is offered by the ICCPR, any other IHRL treaty to which the United States is a party, or any customary norm of IHRL.[168]

### C. *Strategic Change, Convergence, and Balloon-Squeezing*

Thus far we have examined two clusters of issues: one involving disagreement as to the applicable bodies of law,[169] and the other involving disagreement as to the content of whatever law may be applicable.[170] These are not the only issues that cloud the question of who lawfully may be detained, however. The prospect of legal change further complicates the effort to identify the legal boundaries of detention authority.

Law is never entirely static. A given legal framework may change over time for any number of reasons and through any number of processes (though some processes raise more legitimacy concerns than others). In light of the pervasive ambiguity described above, we may be especially likely to see pressure for change in this setting; the indeterminacy of the law relating to who may be held invites arguments for

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[167] *See, e.g.*, Hakimi, *supra* note 10, at 383–89 (discussing administrative detention as an IHRL-compatible alternative to criminal prosecution in circumstances in which LOAC-based detention is not appropriate).

[168] *See id.* at 392–95 ("[P]ure 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)).

[169] *See supra* notes 72–102 and accompanying text.

[170] *See supra* notes 103–168 and accompanying text.

change that might reduce uncertainty.[171] The ambiguity also makes it easier to cast reform-oriented arguments in descriptive terms—i.e., to portray normative arguments as if they are mere interpretations of already-existing law—and thereby to avoid legitimacy concerns for whichever institution is considering the argument.

None of which is to say that arguments for change are unwarranted in the context of post-9/11 events. On the contrary, changing practical circumstances exert considerable pressure on the aforementioned legal frameworks.[172] But it is important to understand the nature of that pressure and how it relates to the ambiguities discussed above— especially for the judges who now are obliged to determine who lawfully may be held.[173]

### 1. Strategic Change

As Philip Bobbitt has argued, the constitutional order of a state exists in dynamic relationship with that state's strategic circumstances.[174] On this view, changing strategic circumstances—or more specifically, changing perceptions thereof—may place pressure on the constitutional structure to evolve in some particular direction.[175] At the same time, however, the nature of the prevailing legal order—not to mention the extent to which the state actually adheres to it—can itself influence the strategic context.[176] One might extend this observation beyond constitutional structure, applying it to any legal framework associated with the state's management of security affairs.

Michael Schmitt recently did just that in the course of examining LOAC principles governing the use of lethal force.[177] Schmitt noted the increasing prominence of armed conflicts involving non-state actors that eschew compliance with LOAC, and the tendency of such groups to en-

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[171] *See supra* notes 70–168 and accompanying text.

[172] *See* Michael N. Schmitt, *The Vanishing Law of War: Reflections on Law and War in the 21st Century*, Harv. Int'l Rev., Spring 2009, at 60, 65–68; *infra* notes 174–187 and accompanying text; *see also al-Marri II*, 534 F.3d at 300, 314–21 (Wilkinson, J., concurring in part and dissenting in part) (quoting from Philip Bobbitt's *Shield of Achilles* and embracing Bobbit's concept of a dynamic relationship between law and strategic context); *infra* notes 326–338 (discussing this aspect of Judge Wilkinson's *al-Marri* opinion).

[173] *See infra* notes 188–212 and accompanying text.

[174] For extended treatments of this proposition, see generally Philip Bobbitt, The Shield of Achilles: War, Peace, and the Course of History (2002) [hereinafter Bobbitt, The Shield of Achilles]; Philip Bobbitt, Terror and Consent: The Wars for the Twenty-First Century (2008).

[175] *See* Bobbitt, The Shield of Achilles, *supra* note 174, at xxii.

[176] *See id.*

[177] Schmitt, *supra* note 172, at 60, 65–68.

danger civilians, both by attacking them purposefully and by attempting to blend in amongst them.[178] This "asymmetric warfare" trend, he asserted, posed a profound challenge to the standard LOAC framework in which force may be used against combatants at all times prior to capture, but never against civilians—unless they are directly participating in hostilities at the time.[179] Schmitt notes that these pressures in recent years have found expression in the context of policies and laws relating to targeting and rules of engagement.[180] For example, as a matter of policy judgment in pursuit of a particular vision of counterinsurgency strategy, the U.S. military imposed strict rules of engagement on itself in Afghanistan—stricter than required by LOAC, insofar as the U.S. military is concerned.[181] Schmitt notes, however, that critics who want the U.S. military to further restrain its targeting practices at times pitch their arguments in legal as well as policy terms, and he suggests that the law relating to targeting may yet adapt accordingly.[182]

The asymmetric warfare trend emphasized by Schmitt—involving the increasing strategic significance of non-state actors who eschew the principle of distinction in their targeting practices and in their efforts to conceal themselves—does not merely exert pressure on the law relating to targeting.[183] It also applies pressure to the various legal frameworks, discussed above, relating to detention.[184] On one hand, non-state actors who defy easy identification place tremendous pressure on any legal model that presupposes that enemies are readily identified via uniforms, citizenship, or their own admission.[185] Opportunities for false positives necessarily are much higher in this context, undermining a key assumption of process-weak screening systems (like those associated with LOAC in international armed conflict).[186] And, as noted above, the informal, decentralized nature of such groups similarly undermines the utility of membership as a substantive detention crite-

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[178] *See id.*

[179] *See id.* at 66–67.

[180] *See id.* at 67–68.

[181] *See id.* at 67. It is unclear, however, whether the United States will continue to adhere to these relatively strict rules of engagement in Afghanistan, after the replacement of General Stanley A. McChrystal with General David Petraeus. *See* Helene Cooper & David E. Sanger, *Obama Says Afghan Policy Won't Change After Dismissal*, N.Y. Times, June 24, 2010, at A1.

[182] *See* Schmitt, *supra* note 172, at 68.

[183] *See id.* at 65–68.

[184] *See supra* notes 70–168 and accompanying text (exploring legal frameworks for detention).

[185] *Cf.* GPW, *supra* note 1, art. 4.

[186] *See* Chesney & Goldsmith, *supra* note 115, at 1099–1100; *see infra* notes 209–210 and accompanying text (defining "false positive" in this context).

rion.[187] On the other hand, the increasing strategic significance of at least some such actors pressures the state to incapacitate them.

### 2. Convergence

The combination of these pressures generates a "convergence" phenomenon in which the familiar models of military detention and criminal prosecution gravitate toward one another en route to development of a more tailored, hybrid model.[188] This hybrid model is characterized by intermediate levels of process (with neither the rigor of a criminal prosecution nor the discretion of the traditional military model) and fine-tuned substantive detention criteria, reaching beyond the concept of formal membership.[189]

The convergence trend found powerful expression over the past seven years in Iraq.[190] The initial U.S. military intervention in 2003 inaugurated an international armed conflict in which the baseline detention frameworks associated with LOAC—detention of POWs under the GPW and security internment of civilians under the GC—plainly were applicable, and this continued into the summer of 2004 during the occupation phase.[191] Beginning in 2004, however, Iraq resumed its sovereignty, rendering the legal foundation for non-criminal detention far less clear.[192] But with the insurgency mounting and the institutional capacities of the nascent Iraqi state still weak to nonexistent (especially Iraq's security-related institutions), the strategic context nonetheless favored continuation of military detention in some form.[193] The solution was to continue security internment—indeed, to expand its scale dramatically, with more than twenty-six thousand internees in custody at one point[194]—by mere analogy to the GC system, based on an exchange of diplomatic notes between America and Iraq that then were incorporated by reference in a series of U.N. Security Council resolutions.[195] Eventually, increasing attention to the strategic imperatives of

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[187] *See supra* notes 53–57 and accompanying text (discussing Babe Howell's scholarship on gangs).

[188] Chesney & Goldsmith, *supra* note 115, at 1100–01.

[189] *Id.*

[190] *See* Chesney, *supra* note 4, at 633–34; *see also* M. Cherif Bassiouni, *Legal Status of US Forces in Iraq from 2003–2008*, 11 Chi. J. Int'l L. 1, 26–27 (2010).

[191] *See* Chesney, *supra* note 4, at 558–59, 563.

[192] *See id.* at 574–97.

[193] *See id.*

[194] *Id.* at 597 (citing Brian J. Bill, *Detention Operations in Iraq: A View from the Ground*, *in* 86 The War in Iraq: A Legal Analysis 411 (Raul A. "Pete" Pedrozo ed., 2010)).

[195] *Id.* at 558–59.

counterinsurgency turned attention to the problem of false positives associated with this model; as a result, the security internment system was modified to afford greater procedural protections.[196] At the same time, efforts to stand up the Iraqi criminal justice system as an alternative mode of detention for security threats accelerated.[197]

These trends developed further in 2009, after the last U.N. Security Council Resolution expired.[198] At that point, the United States formally agreed with Iraq to terminate its security internment system in favor of sole reliance on the Iraqi criminal justice system, at least in most instances.[199] The agreement did contain a little-noticed provision, however, permitting some degree of detention-without-charge to continue.[200] It seems that the United States has made use of this option to hold onto a small population of security internees, and it appears it will continue to do so for as long as it retains a military presence in Iraq because these individuals are ostensibly both too difficult to prosecute and too dangerous to release.[201]

Meanwhile, the convergence trend is now showing signs of emergence in Afghanistan as well, as illustrated by both significantly enhanced procedural safeguards in the detention screening process and substantial efforts to establish the host-nation prosecution option.[202] All of which is entirely to be expected given that the strategic environment in Afghanistan (like that in Iraq) involves non-state actors who are difficult to identify and yet pose such a threat that the pressure to afford a non-criminal detention option is significant.[203]

Convergence can also be seen in relation to the Guantanamo detainees. It emerged as early as the summer of 2004 with the military's adoption of the Combatant Status Review Tribunal and Administrative

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[196] *Id.* at 597–99; *see infra* notes 209–210 and accompanying text (defining "false positive" in this context).

[197] *See* Chesney, *supra* note 4, at 588–89.

[198] *See* S.C. Res. 1790, U.N. Doc. S/RES/1790 (Dec. 18, 2007); Chesney, *supra* note 4, at 599.

[199] *See* Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, U.S.-Iraq, art. 22, Nov. 17, 2008, Temp. State Dep't No. 09-6 [hereinafter U.S.-Iraq Status of Forces Agreement]; Chesney, *supra* note 4, at 600.

[200] *See* U.S.-Iraq Status of Forces Agreement, *supra* note 199, art. 22(4); Chesney, *supra* note 4, at 600.

[201] *See* Chesney, *supra* note 4, at 625–26.

[202] Bovarnick, *supra* note 100, at 9–11, 19–22.

[203] *Cf. id.* at 15–16.

Review Board systems,[204] and the Supreme Court's decision to extend habeas jurisdiction to Guantanamo in *Rasul*.[205] We see it as well in the 2005 enactment of the DTA, which pushed back against the *Rasul* holding, yet called for at least some degree of judicial review of detention decisions.[206] And we certainly see it in the Supreme Court's 2008 holding in *Boumediene*, which established that the DTA review system was inadequate to supplant habeas review, in part because detainees must have the chance to put fresh evidence before a court.[207] Federal judges ever since have been grappling with a host of procedural questions, including disclosure and discovery obligations, the burden of proof, the rules governing protection of classified information, and the rules governing the admissibility of hearsay and potentially coerced statements.[208] The resulting screening system is still a work in progress, but already is a further manifestation—if not the apotheosis—of the convergence trend insofar as questions of process are concerned.

### 3. Balloon Squeezing: Resort to Alternative Mechanisms for Neutralizing the Enemy

The question at hand today is whether the convergence trend will also find expression in the substantive grounds for detention. As we will see in the next Part, that is a central issue with which the judges in the habeas cases have been wrestling.[209] Before we move on to survey what they have had to say, however, a final observation is in order concerning the dynamic relationships implicated by the non-state actor scenario.

The convergence thesis describes one manner in which law might respond to the cross-cutting pressures associated with the asymmetric warfare phenomenon—i.e., the pressure to reduce false positives (targeting, capture, or detention of the wrong individual) while also ensuring an adequate capacity to neutralize the non-state actors in question. One must bear in mind, however, that detention itself is not the only system of government action that can satisfy that latter interest. Other options exist, including the use of lethal force; the use of rendition to place individuals in detention at the hands of some *other* state; the use

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[204] Chesney & Goldsmith, *supra* note 115, at 1110–12.

[205] 542 U.S. at 484.

[206] Detainee Treatment Act of 2005 §§ 1001, 1003–1004, Pub. L. No. 109-148, 119 Stat. 2680, 2739 (codified at 42 U.S.C. § 2000dd (2006)); *see* Chesney & Goldsmith, *supra* note 115, at 1115.

[207] 553 U.S. at 732–33.

[208] *See* Wittes, Chesney & Benhalim, *supra* note 25, at 10.

[209] *See infra* notes 213–586 and accompanying text.

of persuasion to induce some other state to take custody of an individual through its own means; and perhaps also the use of various forms of surveillance to establish a sort of constructive, loose control over a person (though for persons located outside the United States it is unlikely that surveillance could be much more than episodic, and thus any resulting element of "control" may be quite weak).[210]

From the point of view of the individual involved, all but the last of these options are likely to be far worse experiences than U.S.-administered detention. In addition, all but the last are also likely to be far less useful for purposes of intelligence-gathering from the point of view of the U.S. government.[211] Nonetheless, these alternatives may grow attractive to the government in circumstances where the detention alternative becomes unduly restricted, yet the pressure for intervention remains. The situation is rather like squeezing a balloon: the result is not to shrink the balloon, but instead to displace the pressure from one side to another, causing the balloon to distend along the unconstrained side. So too here: when one of these coercive powers becomes constrained in new, more restrictive ways, the displaced pressure to incapacitate may simply find expression through one of the alternative mechanisms. On this view it is no surprise that lethal drone strikes have increased dramatically over the past two years, that the Obama administration has refused to foreswear rendition, that in Iraq we have largely (though not entirely) outsourced our detention operations to the Iraqis, and that we now are progressing along the same path in Afghanistan.[212]

Decisions regarding the calibration of a detention system—the management of the convergence process, if you will—thus take place in the shadow of this balloon-squeezing phenomenon. A thorough policy review would take this into account, as should any formal lawmaking process. For the moment, however, our formal law-making process is not directed at the detention-scope question. Instead, clarification and development with respect to the substantive grounds for detention takes place through the lens of habeas corpus litigation.

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[210] *See generally* WITTES, *supra* note 7.

[211] U.S.-administered detention in general is a superior option from the point of view of intelligence-gathering in that use of lethal force eliminates the option of asking questions of the target and use of rendition limits U.S. control over the questioning of the target (as the custodial state may or may not fully cooperate with U.S. requests).

[212] *See* WITTES, *supra* note 7, at 5–7.

## III. Habeas Litigation and the Scope of the Detention Power

Against the backdrop of uncertainty described in Part II, 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.

This Part aims to provide a relatively comprehensive descriptive account of these doctrinal disputes. It proceeds in semi-chronological fashion. Section A considers the often-overlooked habeas opinions associated with the three individuals who were held as "enemy combatants" within the United States after 9/11.[213] Section B then reviews the pre-*Boumediene* Guantanamo habeas opinions; examines how post-*Boumediene* Guantanamo habeas opinions treated the variables of personal dangerousness, membership, and support; and documents the many points of disagreement that persist.[214]

### A. *The First Wave of Detention Criteria Case Law:* Hamdi, Padilla, *and* al-Marri

For several years following 9/11, the judiciary largely was preoccupied with questions of jurisdiction, not substantive law.[215] Most detainees were noncitizens 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 2008, when the U.S. Supreme Court conclusively resolved that question in its decision in *Boumediene v. Bush*.[216] 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—discussed below—involving detainees held in the United States (one originally captured in a combat setting abroad, and two captured in the United States itself).[217]

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[213] *See infra* notes 215–349 and accompanying text.

[214] *See infra* notes 350–586 and accompanying text.

[215] *See* Azmy, *supra* note 10, at 504–14; Bradley & Goldsmith, *supra* note 8, at 2107–33; Goodman, *supra* note 10, at 51–60; Goodman & Jinks, *supra* note 10, at 2654–58; Hakimi, *supra* note 10, at 370–75; Sitaraman, *supra* note 10, at 1821; Waxman, *supra* note 10, at 17–23.

[216] 553 U.S. 723, 732–33 (2008).

[217] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004); Rumsfeld v. Padilla, 542 U.S. 426, 430 (2004); al-Marri v. Wright (*al-Marri I*), 487 F.3d 160, 163 (4th Cir. 2007), *rev'd en banc sub nom.* al-Marri v. Pucciarelli (*al-Marri II*), 534 F.3d 213 (4th Cir. 2008) (en banc), *vacated sub nom.* al-Marri v. Spagone, 129 S. Ct. 1545 (2009) (mem.).

### 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 has addressed the substantive-scope issue to any serious extent is its 2004 decision *Hamdi v. Rumsfeld*.[218] In *Hamdi*, a majority of the Court concluded that (1) 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 (2) being a U.S. citizen does not exempt a person from being subject to such detention authority.[219]

Yaser Hamdi came into U.S. custody in Afghanistan after being captured by Northern Alliance forces in the fall of 2001.[220] The United States initially believed that Hamdi was a citizen of Saudi Arabia but learned, after bringing him to Guantanamo, that he was born in Louisiana and hence could claim U.S. citizenship.[221] As a result, he was moved to a detention facility inside the United States and no longer faced the jurisdictional hurdles then preventing other Guantanamo detainees from obtaining habeas review.[222]

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.[223] 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.[224] Hamdi denied that this was true, but for present purposes the important point is that the allegations cleanly presented the question of whether a person meeting that description lawfully could be held without criminal charge.[225]

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 proposi-

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[218] *See* 542 U.S. at 516–17.
[219] *See id.*
[220] *Id. at* 510.
[221] *Id.*
[222] *See id.* at 510, 512.
[223] *See id.* at 512–13.
[224] *Hamdi*, 542 U.S. at 512–13.
[225] *See id.* at 516.

tion, would the answer change if the person happened to be a U.S. citizen? The Supreme Court splintered in response to these questions.[226]

A plurality of the Court, in an opinion by Justice O'Connor, upheld both the government's notional assertion of *some* authority to detain and its claim that such authority extended at least to Hamdi's alleged circumstances.[227] Justice Thomas provided a fifth vote for these conclusions in a separate opinion.[228] To begin with, the plurality framed the issue as turning on a question of domestic law informed by reference to international law: they focused on the meaning of the September 18, 2001 Authorization for Use of Military Force (AUMF) as construed in light of the law of armed conflict.[229] 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, by 2004, the conflict in Afghanistan no longer appeared to be an international armed conflict in any event.[230] Nonetheless, the plurality concluded that detention was a traditional "incident" of warfare and thus, presumably, a necessary part of whatever body of customary law of armed conflict ("LOAC") principles might govern in this setting.[231] 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.[232]

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[226] *See id.* at 509 (plurality opinion) (holding that the government had authority to detain Hamdi under the AUMF); *id.* at 541 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (contending that the AUMF did not give the government authority to detain Hamdi); *id.* at 554 (Scalia, J., dissenting) (arguing that Hamdi could only be detained if Congress had suspended habeas corpus or if the government tried and convicted him in criminal court); *id.* at 579 (Thomas, J., dissenting) (concluding that the government had authority to detain Hamdi).

[227] *See id.* at 521 (plurality opinion); *infra* Appendix, Table 1. 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 Hamdi*, 542 U.S. 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 U.S. citizenship. *See* Eric Lichtblau, *U.S., Bowing to Court Ruling, Will Free 'Enemy Combatant,'* N.Y. Times, Sept. 23, 2004, at A1.

[228] *See Hamdi*, 542 U.S. at 587–88 (Thomas, J., dissenting) (agreeing with the plurality that the government had authority to detain Hamdi, but arguing that Hamdi's habeas petition should not be granted).

[229] *See id.* at 519–20 (plurality opinion).

[230] *Id.*

[231] *See id.* at 518.

[232] *Id.* at 518–19, 524 (citing *Ex parte* Quirin, 317 U.S. 1, 37–38 (1942); *In re* Territo, 156 F.2d 142, 148 (9th Cir. 1946)); *id.* at 592–93 (Thomas, J., dissenting) (citing *Quirin*, 317 U.S. at 45).

Furthermore, emphasizing that the point of military detention is preventive incapacitation, the plurality expressly rejected the idea that detention might be justified on the collateral ground that a person may possess useful intelligence.[233]

The plurality pointedly did not express any view, however, 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 "[t]he legal category of enemy combatant has not been elaborated upon in great detail," and that "[t]he permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them."[234] 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."[235]

### 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 Saleh Kahlah al-Marri provided an early opportunity to address some of these loose ends.[236] Unlike Guantanamo detainees, but like Yaser Hamdi, both were in a position to seek habeas review without much jurisdictional dispute.[237] 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

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[233] *Id.* at 518 (plurality opinion).
[234] *Hamdi*, 542 U.S. at 522 n.1.
[235] *Id.* at 521.
[236] *See Padilla*, 542 U.S. at 430; *al-Marri I*, 487 F.3d at 163.
[237] *Padilla*, 542 U.S. at 430; *al-Marri I*, 487 F.3d at 163.

participate in terrorist attacks.[238] Al-Marri, a Qatari citizen, likewise was arrested inside the United States and later transferred to military custody based on his alleged role as an al Qaeda sleeper agent.[239] Neither, it initially appeared, was directly connected to the conventional battlefield in Afghanistan or to the Taliban.[240]

a. *Padilla*

The *Padilla* litigation moved forward quickly. Indeed, *Padilla ex. rel. Newman v. Bush* put the substantive detention authority question before Judge Mukasey of the U.S. District Court for the Southern District of New York by December 2002.[241] As an initial matter, he found (1) 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 (2) that the substantive scope of the resulting detention authority could be determined at least in part by reference to LOAC (at least in the form of treaties to which the United States is a party, such as the Geneva Convention Relative to the Treatment of Prisoners of War (GPW)).[242] LOAC, Judge Mukasey concluded, permits the detention without charge of persons who qualify either as lawful or unlawful combatants.[243] He did not elaborate on 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.[244] 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.[245] In addition, he implicitly rejected the notion that detention authority extends only to persons who actually bore arms on a conventional battlefield.[246]

Padilla appealed and, in late 2003, prevailed in *Padilla v. Rumsfeld*—a decision of a divided panel of the U.S. Court of Appeals for the

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[238] *Padilla*, 542 U.S. at 430–31.

[239] *Al-Marri I*, 487 F.3d at 164.

[240] *See Padilla*, 542 U.S. at 430–31; *al-Marri I*, 487 F.3d at 165.

[241] *See* (*Padilla I*), 233 F. Supp. 2d 564, 588 (S.D.N.Y. 2002), *aff'd in part, rev'd in part sub nom.* Padilla v. Rumsfeld (*Padilla II*), 352 F.3d 695 (2d Cir. 2003), *rev'd and remanded*, 542 U.S. 426 (2004); *infra* Appendix, Table 2.

[242] *Padilla I*, 233 F. Supp. 2d at 587–91.

[243] *Id.* at 592–93.

[244] *See id.*

[245] *Id.* at 588.

[246] *See id.* at 593–98.

Second Circuit.[247] For Judges Rosemary S. Pooler and Barrington D. 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.[248] In that specific scenario, they concluded, the Constitution requires that any power to detain be conferred expressly by statute, not implicitly.[249] The AUMF, on this view, lacked sufficient clarity.[250]

This set the stage for Supreme Court review, or so it appeared. In the end, however, the Court avoided the issue.[251] In 2004, in an opinion issued simultaneously with its *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).[252] Litigation thus had to begin anew at the district court level.[253]

On remand to the U.S. District Court for the District of South Carolina, under the name *Padilla v. Hanft*, Judge Henry F. 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), but also added an additional reason to believe Padilla, in particular, could not be detained.[254] The phrase "all necessary and appropriate force" in the AUMF, he concluded, should be construed rather literally: any exercise of force must be "necessary" in the strict sense that no adequate nonmilitary alternative is available.[255] 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.[256]

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[247] *See Padilla II*, 352 F.3d at 698, *rev'd and remanded*, 542 U.S. 426 (2004); *infra* Appendix, Table 3.

[248] *Padilla II*, 352 F.3d at 714–18.

[249] *Id.* at 717–18, 722–23.

[250] *Id.* at 719–24.

[251] *Padilla*, 542 U.S. at 446.

[252] *Id.* 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 (Stevens, J., dissenting) ("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.").

[253] *See id.*

[254] 389 F. Supp. 2d 678, 687–89 (D.S.C. 2005), *rev'd*, 423 F.3d 386 (4th Cir. 2005); *see infra* Appendix, Table 4.

[255] *Padilla*, 389 F. Supp. 2d at 688–89.

[256] *Id.* at 686.

A few months later, a panel of the U.S. Court of Appeals for the Fourth Circuit reversed, albeit on somewhat unexpected grounds.[257] Referencing the *Hamdi* plurality opinion, Judge J. Michael Luttig explained that the ultimate question is whether the AUMF, as construed in light of LOAC, confers detention authority in a particular case.[258] *Hamdi* had settled the point as to a Taliban member captured in the field in Afghanistan,[259] whereas the *Padilla* litigation seemed to present the question of whether the same result pertained to an al Qaeda member captured far from conventional combat.[260] But, as restated in the Fourth Circuit's opinion, the fact pattern in *Padilla* looked much more like that in *Hamdi*.[261] 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 U.S. military intervention after 9/11.[262] The only notable difference between Hamdi and Padilla, on this view, was that the latter managed to evade capture until far from the battlefield.[263] In the panel's view, this was no reason to deny the government's detention authority, even when the capture occurred within the United States.[264]

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.[265] The move precipitated criticism in some quarters, and a manifestly unhappy Judge Luttig denied a government motion to vacate the earlier decision.[266] 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.[267]

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[257] *See Padilla*, 423 F.3d at 392; *infra* Appendix, Table 5.

[258] *Padilla*, 423 F.3d at 392.

[259] *See Hamdi*, 542 U.S. at 516–17.

[260] *Padilla*, 423 F.3d at 392.

[261] *See id.*

[262] *Id.* at 389–90.

[263] *Id.* at 391–92.

[264] *Id.* at 392, 393.

[265] *See* Chesney & Goldsmith, *supra* note 115, at 1104.

[266] *See* Padilla v. Hanft, 432 F.3d 582, 587 (4th Cir. 2005); *see also* Editorial, *The Padilla Conviction*, N.Y. Times, Aug. 17, 2007, http://www.nytimes.com/2007/08/17/opinion/17fri1.html.

[267] *See infra* notes 268–343 and accompanying text.

b. *Al-Marri*

Like Padilla, Ali Saleh Kahlah al-Marri initially pursued habeas relief in the wrong jurisdiction, and as a result no judge addressed the merits of his case until 2005.[268] Eventually he refiled his petition in the U.S. District Court for the District of South Carolina, and, like Padilla, his case came before Judge Floyd.[269] As noted above, in Padilla's case, Judge Floyd in early 2005 had construed the AUMF not to provide detention authority.[270] As he was deciding the same issue in al-Marri's case just a few months later—and before the Fourth Circuit reversed his *Padilla* ruling—al-Marri no doubt expected a similar result.[271] But it turned out otherwise: in *al-Marri v. Hanft* in July 2005, Judge Floyd drew a sharp distinction between citizens, such as Padilla, and noncitizens, such as al-Marri—notwithstanding the latter's lawful residence in the United States.[272] Citizenship, on this view, had been not just an important but a *necessary* condition of Judge Floyd's earlier, strict reading of the AUMF.[273] For noncitizens, he insisted on neither express statutory language conferring detention authority nor a strict reading of "necessity," such that military detention is not permissible when criminal prosecution suffices as an alternative.[274] Judge Floyd's *al-Marri* opinion thus emerged alongside Judge Mukasey's *Padilla* opinion as a broad endorsement of detention authority away from the conventional battlefield.[275]

Approximately one year later, in *al-Marri v. Wright*, a divided panel of the Fourth Circuit yet again reversed.[276] The panel majority, written by Judge Diana Gribbon Motz, framed its analysis, at least at the outset, in terms of a domestic law consideration that would not necessarily ap-

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[268] *See* al-Marri v. Hanft, 378 F. Supp. 2d 673, 673 (D.S.C. 2005), *rev'd sub nom.* al-Marri v. Wright (*al-Marri I*), 487 F.3d 160 (4th Cir. 2007), *rev'd en banc sub nom.* al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008) (en banc), *vacated sub nom.* al-Marri v. Spagone, 129 S. Ct. 1545 (2009) (mem.). Al-Marri initially sought habeas review in Illinois but, like Padilla, eventually was obliged to refile in South Carolina. *See* al-Marri v. Bush, 274 F. Supp. 2d 1003, 1009 (C.D. Ill. 2003) (holding that the petition had to be filed in the district in which al-Marri was held at the time of filing), *aff'd sub nom.* al-Marri v. Rumsfeld, 360 F.3d 707 (7th Cir. 2004).

[269] *See al-Marri*, 378 F. Supp. 2d at 673; *infra* Appendix, Table 6.

[270] *Padilla*, 389 F. Supp. 2d at 686.

[271] *See Padilla*, 423 F.3d at 389.

[272] *See* 378 F. Supp. 2d at 676–77.

[273] *See id.*

[274] *Id.* at 679–80.

[275] *See id.*; *Padilla I*, 233 F. Supp. 2d at 588.

[276] *See* 487 F.3d at 195; *infra* Appendix, Table 7.

ply to noncitizens captured outside the United States.[277] Specifically, Judge Motz emphasized that al-Marri, though a noncitizen, was lawfully present in the United States at the time of his arrest and hence was able to invoke the protections of the Fifth Amendment Due Process Clause.[278] The manner in which she elaborated on the requirements of the Fifth Amendment in this context, however, had sweeping implications for the scope of the government's detention power even in other settings.[279] The Fifth Amendment, she explained, generally precludes detention other than pursuant to criminal conviction, subject only to a fixed number of narrowly defined exceptions.[280] One such exception is the power to detain an enemy combatant during war,[281] and the boundaries of that category must be ascertained by reference to LOAC.[282] Her 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.[283]

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.[284] 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 Geneva Convention Relative to the Protection of Civilian Persons in Time of War ("GC").[285] LOAC, the panel concluded, contemplated detention solely for combatants.[286]

As to who constituted a combatant, the panel looked to GPW Article 4, which defines eligibility for POW status.[287] The panel equated eligibility for detention with eligibility for POW status, adding that

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[277] *See al-Marri I*, 487 F.3d at 174–76.

[278] *Id.* at 174–75.

[279] *See id.*

[280] *Id.* at 175.

[281] *Id.* at 175–76.

[282] *Id.* at 178–79.

[283] *See al-Marri I*, 487 F.3d at 178–79.

[284] *Id.* at 178.

[285] *See id.* at 178 n.8 (asserting that civilians under LOAC categorically are "not subject to military seizure or detention").

[286] *See id.* at 178–79.

[287] *Id.* (citing GPW, *supra* note 1, Articles 2, 4, and 5 and GC, *supra* note 141, Article 4).

LOAC treats as "combatants" only those who fight for the military arm of a nation-state, not just any armed group.[288] 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.[289]

This was fatal to the attempt to detain al-Marri.[290] 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.[291] Padilla's eligibility ultimately rested on the same ground (according to the Fourth Circuit at least, even if not Judge Floyd).[292] Al-Marri, in contrast, was a "mere" al Qaeda member with no alleged prior role as a de facto Taliban battlefield fighter.[293] 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.[294] No al Qaeda member could be detained 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.[295]

But the *al-Marri* litigation was not over.[296] In *al-Marri v. Pucciarelli*, 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.[297] Four judges, in a new opinion by Judge Motz, endorsed the panel's original rationale.[298] Five other judges disagreed, albeit for different reasons.[299]

Judge William Byrd Traxler, in an opinion joined in relevant part by Judge Paul V. Niemeyer, concentrated on the language of the AUMF

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[288] *Id.* at 179–82.

[289] *Al-Marri I*, 487 F.3d at 184–85.

[290] *See id.*

[291] *Id.* at 179.

[292] *See id.* at 182; *Padilla*, 389 F. Supp. at 687–89 (holding that Padilla could not be detained).

[293] *Al-Marri I*, 487 F.3d at 183, 186.

[294] *Id.* at 183.

[295] *See id.*

[296] *See al-Marri II*, 534 F.3d at 216.

[297] *See id.* at 218–19 (Motz, J., concurring) (plurality opinion); *infra* Appendix, Table 8.

[298] *See al-Marri II*, 534 F.3d at 221–53; *infra* Appendix, Table 8.

[299] *See al-Marri II*, 534 F.3d at 216 (per curium); *see also id.* at 253 (Traxler, J., concurring in the judgment); *id* at 284 (Williams, C.J., concurring in part and dissenting in part), 293 (Wilkinson, J., concurring in part and dissenting in part); *id.* at 341–42 (Niemeyer, J., concurring in the judgment in part and dissenting in part); *id.* at 351 (Duncan, J., concurring in part and dissenting in part); *infra* Appendix, Table 8.

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.[300] In their view, the AUMF reflected a legislative intent to permit military force against al Qaeda, above all.[301] They did not dispute that LOAC defined limits on how such force might be employed, but they rejected the panel's conclusion that LOAC permitted detention only when dealing with members of the military arm of an actual nation state.[302]

Chief Judge Karen J. Williams, in a separate opinion joined by Judge Allyson K. Duncan, offered a view that was simultaneously broad and narrow.[303] Like Judge Traxler, Chief 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.[304] But whereas Judge Traxler suggested that LOAC imposed no such limitation, Chief Judge Williams accepted that the panel's approach "may very well be correct" as a statement of LOAC.[305] She 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.[306] Interestingly, however, Chief Judge Williams in another sense defined detention authority narrowly.[307] Rather than refer to mere membership in or association with an enemy force as sufficient to justify detention under the AUMF, she 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.[308] Further complicating matters, moreover, she (somewhat inconsistently) held open the possibility that detention authority might *not* continue to exist were the United

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[300] *See al-Marri II*, 534 F.3d at 259–60 (Traxler, J., concurring in the judgment); *infra* Appendix, Table 8.

[301] *See al-Marri II*, 534 F.3d at 260–61 (Traxler, J., concurring in the judgment).

[302] *See id.* at 261–62.

[303] *See id.* at 285–87 (Williams, C.J., concurring in part and dissenting in part); *infra* Appendix, Table 8.

[304] *See al-Marri II*, 534 F.3d at 285–86 (Williams, C.J., concurring).

[305] *Id.* at 286.

[306] *Id.* (noting the *Charming Betsy* canon favoring constructions of statutes to comport with international law but concluding that the AUMF is sufficiently clear so as to trump any contrary customary law rule).

[307] *See id.* at 285.

[308] *Id. But cf. id.* at 288 (emphasizing the 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).

States no longer engaged in conventional combat operations in Afghanistan.[309]

Then we have the distinctive opinion of Judge J. Harvey Wilkinson.[310] His analysis began relatively conventionally, exploring whether the AUMF on its own terms could plausibly be read to limit detention authority to members of government-sponsored armed forces or persons who literally fought on a conventional battlefield.[311] Neither its broad terms nor the legislative intent giving rise to it could be squared with such limits, he concluded.[312]

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 residing in the United States.[313] Citing *Hamdi*, Judge Wilkinson observed that the government may constitutionally detain persons who count as "enemy combatants."[314] The task at the heart of the constitutional inquiry, therefore, was to identify the contours of the "enemy combatant" category.[315] Toward that end, Judge Wilkinson reasoned that one must look to "traditional law of war principles."[316] LOAC was "not binding of its own force," he cautioned, but mattered nonetheless because it "informs our understanding of the war powers in Articles I and II and of the enemy combatant category."[317]

Having clarified his motivation for doing so, Judge Wilkinson proceeded to a lengthy discussion of LOAC's treatment of the detention question.[318] 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.[319] He differed sharply from Judge Motz, however, with respect to the scope of the combatant category.[320] Whereas Judge Motz effectively equated combatancy with eligibility for

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[309] *See id.* at 287 n.5.

[310] *Al-Marri II*, 534 F.3d at 293 (Wilkinson, J., concurring in part and dissenting in part); *infra* Appendix, Table 8.

[311] *Id.*

[312] *Id.* at 293–303.

[313] *Id.* at 312.

[314] *Id.* at 313 (Wilkinson, J., concurring in part and dissenting in part).

[315] *Id.* at 314.

[316] *Al-Marri II*, 534 F.3d at 314.

[317] *Id.* at 315.

[318] *Id.* at 315–19.

[319] *Id.* at 319.

[320] *Compare id.* at 318–19 (Wilkinson, J., concurring in part and dissenting in part), *with al-Marri I*, 487 F.3d at 179–82.

POW status,[321] 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.[322] On that view, POW status is not the measure of combatancy, nor is any "single factor" a necessary or sufficient condition to establish that status.[323] The most one could say, Judge Wilkinson reasoned, 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,'"[324] 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.[325]

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.[326] He expressly embraced the proposition that law and strategic context exist in dynamic relationship,[327] and suggested that LOAC in particular had "consistently accommodated changes in the conduct of war and in international relations."[328] In our own era, he observed, war was becoming "less a state-based enterprise" due to the diffusion of destructive technologies enabling super-empowered non-state actors to pose a strategic threat to states.[329] "Thus," he concluded, "while the principle of dis-

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[321] *See al-Marri I*, 487 F.3d at 179–82.

[322] *See al-Marri II*, 534 F.3d at 318–19 (Wilkinson, J., concurring in part and dissenting in part).

[323] *Id.* at 317.

[324] *Id.* at 316 (quoting Bradley & Goldsmith, *supra* note 8, at 2114).

[325] *Id.* at 316–17.

[326] *Id.* at 319–21.

[327] *Id.* at 314–19. Judge Wilkinson made this point clear at the very outset of his opinion, 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" and must "reflect the actual nature of modern warfare." *Id.*

[328] *Al-Marri II*, 534 F.3d at 314 (Wilkinson, J., concurring in part and dissenting in part); *see also id.* at 319. Note that Judge Wilkinson elsewhere in the opinion quotes expressly from Philip Bobbitt's *Shield of Achilles*, *supra* note 174, a central text supporting the notion of a dynamic relationship between law and strategic context—as well as 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. *See id.*

[329] *Id.* at 319.

crimination 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."[330]

Judge Wilkinson's view 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.[331] But he also stated at the outset of his opinion that the time had come to "develop" a new, tailored legal framework to accommodate LOAC to the evolving strategic climate,[332] and he proceeded to offer his own thoughts as to how this could best be done.[333] Going forward, he concluded, 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.[334]

The Wilkinson test, in short, combines a membership inquiry with a conduct test, thus arriving at a result not unlike that advanced by Chief Judge Williams.[335] As to membership, Judge Wilkinson conceded that identifying a sufficient degree of association with a non-state actor would be more difficult than ascertaining citizenship.[336] Nonetheless, he found that 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."[337] As for the additional requirement of in-

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[330] *Id.*

[331] *Id.* at 324.

[332] *Id.* at 293.

[333] *Id.* at 322–25.

[334] *Al-Marri II*, 534 F.3d at 325 (Wilkinson, J., concurring in part and dissenting in part).

[335] *Compare id.* at 285 (Williams, C.J., concurring in part and dissenting in part), *with id.* at 325 (Wilkinson, J., concurring in part and dissenting in part).

[336] *See id.* at 323 (Wilkinson, J., concurring in part and dissenting in part).

[337] *Id.*

volvement 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 terrorist cell"), but not other members of an enemy organization (such as an al Qaeda doctor).[338]

The net result of the Traxler, Williams, and Wilkinson opinions was a five-vote majority rejecting the proposition that the AUMF conferred authority to detain solely those individuals who fought for the armed forces of a government or who fought on a conventional battlefield.[339] The five-vote block did not agree, however, on whether membership in a non-state organization such as al Qaeda must be joined with hostile individual conduct 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.[340]

The *al-Marri* litigation would shed no further light on these questions.[341] 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.[342] This prompted the Supreme Court to vacate the Fourth Circuit's judgment and remand the case to be dismissed as moot.[343] Thus ended the last of the suits challenging the government's detention authority in the exceptionally complicated—and exceptionally uncommon—context of U.S. citizen detainees and other persons captured inside the United States.

### c. *Substantive Standards for Detention Remain Unresolved*

Although some things seem to have been settled along the way, others have not. The judges uniformly agreed that the AUMF conferred *some* detention authority, including at least the authority to reach Taliban fighters—even U.S. citizens—captured on the battlefield in Af-

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[338] *Id.* at 324.

[339] *See id.* at 260–62 (Traxler, J., concurring in the judgment); *id.* at 285–86 (Williams, C.J., concurring in part and dissenting in part); *id.* at 293–303 (Wilkinson, J., concurring in part and dissenting in part); *infra* Appendix, Table 8.

[340] *Compare al-Marri II*, 534 F.3d at 259–62 (Traxler, J., concurring in the judgment) (not considering past conduct), *with id.* at 285 (Williams, C.J., concurring in part and dissenting in part) (imposing past conduct tests), *and id.* at 325 (Wilkinson, J., concurring in part and dissenting in part) (same). *See infra* Appendix, Table 8.

[341] *See al-Marri*, 129 S. Ct. at 1545.

[342] *See id.*

[343] *See id.*

ghanistan.[344] Beyond this, however, the judges disagreed sharply: some rejected the proposition that detention authority could extend to al Qaeda-linked captures,[345] but others accepted that it could.[346] Among those in the latter category, some thought membership in al Qaeda a sufficient condition for detention,[347] while others concluded that membership was necessary but not sufficient, and that some showing of knowing conduct associated with violence was also required.[348] 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.[349] 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 Case Law: 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.[350] The same questions of course arise in relation to the vastly more frequent scenario in which the military has detained noncitizens captured and held overseas.[351]

#### 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 noncitizens held there to obtain judicial review via habeas corpus was sharply contested.[352] 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 Guan-

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[344] *See, e.g.*, *Hamdi*, 542 U.S. at 516–17; *Padilla*, 423 F.3d at 391–92; *al-Marri*, 378 F. Supp. 2d at 676–77.

[345] *See al-Marri II*, 534 F.3d at 260–61 (Traxler, J., concurring in the judgment).

[346] *See al-Marri I*, 487 F.3d at 183.

[347] *See al-Marri II*, 534 F.3d at 259 (Traxler, J., concurring in the judgment).

[348] *See id.* at 285 (Williams, C.J., concurring in part and dissenting in part); *id.* at 325 (Wilkinson, J., concurring in part and dissenting in part).

[349] *See id.* at 259 (Traxler, J., concurring in the judgment).

[350] *See infra* notes 352–586 and accompanying text.

[351] *See infra* notes 352–586 and accompanying text.

[352] *See* Rasul v. Bush, 542 U.S. 466, 471–73 (2004), *superseded by statute*, Detainee Treatment Act of 2005 §§ 1001, 1003–1004, Pub. L. No. 109-148, 119 Stat. 2680, 2739 (codified at 42 U.S.C. § 2000dd (2006)), *as recognized in* Boumediene v. Bush, 553 U.S. 723 (2008).

tanamo detainees.[353] Not long thereafter, however, 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.[354] 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.[355]

Ultimately, these cases would come together in the Supreme Court under the name *Boumediene v. Bush*.[356] When they were first heard by the U.S. District Court for the District of Columbia, however, they remained quite distinct.[357] On January 15, 2005, D.C. District Court Judge Richard J. Leon, in *Khalid v. Bush*, resolved the petition in the government's favor without addressing the substantive scope of the government's detention authority.[358] Just two weeks later, on January 31, 2005, D.C. District Court Judge Joyce Green took the contrary view in *In re Guantanamo Detainee Cases*.[359]

In *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 noncitizens captured and held outside the United States.[360] This, of course, raised constitutional questions regarding the actual process the detainees had been

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[353] *Id.* at 484.

[354] *See* Detainee Treatment Act, div. A, tit. X; Military Commissions Act of 2006, Pub. L. No. 109-366, § 3, 120 Stat. 2600, 2600–31. In 2006, the U.S. 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, 575–80 (2006), *superseded by statute*, Military Commissions Act of 2006, § 3. Congress responded by enacting the Military Commissions Act of 2006, which in effect made the jurisdictional provisions of the DTA applicable to pending cases. § 3. This set the stage for the Supreme Court in *Boumediene* to hold that the MCA violated the U.S. Constitution's Suspension Clause, and that the detainees were entitled to habeas review as a constitutional matter. *See* 553 U.S. at 732–33.

[355] *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 445 (D.D.C. 2005), *decision vacated sub nom.* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), *order vacated*, 511 U.S. 1160 (2007); Khalid v. Bush, 355 F. Supp. 2d 311, 314 (D.D.C. 2005), *decision vacated sub nom.* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), *order vacated*, 511 U.S. 1160 (2007).

[356] 553 U.S. at 734–35.

[357] *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 445; *Khalid*, 355 F. Supp. 2d at 314.

[358] *See* 355 F. Supp. 2d at 321 (holding that detainees had no judicially enforceable substantive rights notwithstanding *Rasul*).

[359] *See* 355 F. Supp. 2d at 464.

[360] *See id.*; *infra* Appendix, Table 9.

afforded.[361] But it also raised a constitutional question regarding the substantive scope of detention authority asserted by the government.[362] The issue arose because 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."[363] 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."[364] 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).[365]

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[361] *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 464.

[362] *See id.* at 474–77.

[363] *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)).

[364] *Id.* at 476. Redactions in the opinion make it difficult to determine more about Judge Green's 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.

[365] *See al-Marri II*, 534 F.3d at 325 (Wilkinson, J., concurring in part and dissenting in part); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 476. 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. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 475. 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. *Id.* 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. *See id.* The moment would go on to dubious immortality in Judge Green's published opinion. *See id.* It has also become a standard citation in the secondary literature. *See, e.g.*, Azmy, *supra* note 10, at 505; Bradley & Goldsmith, *supra* note 8, at 2113; Waxman, *supra* note 10, at 7. 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.

By the time the decisions by Judges Green and Leon were before the U.S. Court of Appeals for the D.C. Circuit,[366] Congress had enacted the Detainee Treatment Act of 2005 (DTA), which purported to eliminate statutory habeas jurisdiction—thus reviving the pre-*Rasul* jurisdictional debate, albeit with a twist.[367] Instead of eliminating all judicial review, the DTA created an exclusive mechanism pursuant to which the D.C. Circuit could review individual detention decisions at Guantanamo.[368] In each case, its task was 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.[369] 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.[370]

Several detainees—including many of the individuals involved in the cases before Judges Green and Leon—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.[371] That much is widely appreciated, as their arguments did ultimately prevail in *Boumediene*.[372] 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.[373]

The lead petitioners in *Boumediene* did not focus their arguments on Judge Green's determination that the Due Process Clause requires a conduct-based rather than a membership-based test for detainability.[374] Instead, they concentrated on LOAC-based arguments that would constrain the government's detention authority irrespective of whether a

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[366] *See Boumediene*, 476 F.3d at 994 (vacating *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 and *Khalid*, 355 F. Supp. 2d 311).

[367] *See* Detainee Treatment Act of 2005 §§ 1001, 1003–1004, Pub. L. No. 109-148, 119 Stat. 2680, 2739 (codified at 42 U.S.C. § 2000dd (2006)).

[368] *Id.* § 1005.

[369] *Id.* § 1005(e).

[370] *See id.*

[371] *See* Brief for the *Boumediene* Petitioners at 18, 26–33, *Boumediene*, 553 U.S. 723 (No. 06-1195).

[372] *See* 553 U.S. at 732–33.

[373] *See* Brief for the *Boumediene* Petitioners, *supra* note 371, at 36–44.

[374] *See id.*

particular detainee could claim Fifth Amendment protections.[375] Their argument began with the premise that LOAC defined the outer boundaries of whatever detention authority the United States had.[376] Next, they 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.[377]

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.[378] But they did not do so.[379] On the contrary, they conceded that some civilians could indeed be detained consistent with LOAC.[380] 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.[381] As noted in Part I, DPH is a LOAC principle associated with the question of who may be targeted with lethal force.[382] It reflects the notion that, whereas a "combatant" may be targeted at all times (so long as not *hors de combat*), a "civilian" may never be intentionally targeted unless he or she is engaged in DPH.[383] 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 whose members sought to obscure their identity, the idea of using DPH as a sorting standard appeals 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.[384]

Even assuming the Supreme Court was amenable in principle to using the DPH standard as the measure of detainability, a problem re-

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[375] *Id.*

[376] *See id.* at 36–38.

[377] *See id.* at 39.

[378] *See al-Marri I*, 487 F.3d at 178–79.

[379] *See* Brief for the *Boumediene* Petitioners, *supra* note 371, at 39–41.

[380] *See id.*

[381] *Id.*

[382] *See supra* notes 50–51 and accompanying text; *see also* Nils Melzer, Int'l Comm. of the Red Cross, Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law 41–68 (2009).

[383] *See* Melzer, *supra* note 382, at 61–62.

[384] *See* Brief for the *Boumediene* Petitioners, *supra* note 371, at 39–41; *see also al-Marri II*, 534 F.3d at 314–19 (Wilkinson, J., concurring in part and dissenting in part).

mained.[385] Famously, the precise meaning of DPH is the subject of fierce and protracted disagreement.[386]

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.[387]

As an initial matter, they conceded that immediate personal involvement in conventional battlefield-type actions counts as direct participation.[388] That much is common ground for most if not all participants in the larger DPH debate.[389] They did not stop there, however.[390] 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 they engage 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).[391] The petitioners added, moreover, that this status would extend to leadership figures in al Qaeda; 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.[392] 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

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[385] *See* MELZER, *supra* note 382, at 12–13.

[386] *See id.*; *see also ICRC Clarification Process on the Notion of Direct Participation in Hostilities Under International Humanitarian Law (Proceedings)*, INT'L COMM. OF THE RED CROSS, http://www.icrc.org/web/eng/siteeng0.nsf/html/direct-participation-article-020709 (last updated Oct. 22, 2010) (providing a collection of materials generated in the fractious process of attempting to generate consensus that resulted in the ICRC's publication).

[387] *See* Brief for the *Boumediene* Petitioners, *supra* note 371, at 39–41.

[388] *See id.* at 39–40.

[389] *See id.* at 39 (noting that the United States "recently explained that it 'understands the phrase "direct participation in hostilities" to mean immediate and actual action on the battlefield'").

[390] *See id.* at 41.

[391] *See id.*; *see also* MELZER, *supra* note 382, at 16.

[392] *See* Brief for the *Boumediene* Petitioners, *supra* note 371, at 41 (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").

Taliban.[393] Presumably, the petitioners reasoned that the government could at most prove them to be in the latter category.[394]

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.[395] All of this instead would be left for the district courts to sort out in the coming wave of habeas litigation.[396]

### 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*: between June 2008 and December 2010, the U.S. District Court for the District of Columbia 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.[397] Many of

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[393] *See id.* at 39–41.

[394] *See id.* at 40–41.

[395] *See Boumediene*, 553 U.S. at 732–33.

[396] *See infra* notes 397–586 and accompanying text.

[397] *See* WITTES, CHESNEY & BENHALIM, *supra* note 25, at 86–105 (summarizing decisions as to twenty-four individuals whose petitions were resolved as of January 2010). The ten decisions denying relief between January and December, 2010 are as follows. Obaydullah v. Obama, 744 F. Supp. 2d 344, 351–52 (D.D.C. 2010); al-Bihani v. Obama, No. 05-2386, slip op. at 18 (D.D.C. Sept. 22, 2010) (involving detainee Toffiq Nasser Awad al-Bihani); al Kandari v. United States, 744 F. Supp. 2d 11, 48 (D.D.C. 2010) (involving detainee Fayiz Mohammed Ahmed al Kandari); Khan v. Obama, 741 F. Supp. 2d 1, 18 (D.D.C. 2010) (involving detainee Shawali Khan); Sulayman v. Obama, 729 F. Supp. 2d 26, 53 (D.D.C. 2010) (involving detainee Abd al Rahman Abdu Abu al Ghayth Sulayman); Khalifh v. Obama, No. 05-CV-1189, 2010 WL 2382925, at *6 (D.D.C. May 28, 2010) (involving detainee Omar Mohammed Khalifh), *appeal dismissed*, No. 10-5241, 2011 WL 321713 (D.C. Cir. Jan. 28, 2011); Abdah v. Obama, 709 F. Supp. 2d 25, 48 (D.D.C. 2010) (involving detainee Yasein Khasem Mohammad Esmail); Naji al Warafi v. Obama, 704 F. Supp. 2d 32, 45 (D.D.C. 2010) (involving detainee Mukhtar Yahia Naji al Warafi); al-Adahi v. Obama, 698 F. Supp. 2d 48, 66 (D.D.C. 2010) (involving detainee Fahmi Salem al-Assani); al-Adahi v. Obama, 692 F. Supp. 2d 85, 102 (D.D.C. 2010) (involving detainee Suleiman Awadh Bin Agil al-Nahdi). The six cases where individuals prevailed on their habeas petitions between January and August 22, 2010 are as follows. Abdah v. Obama, No. 04-1254, 2010 WL 3270761, at *10 (D.D.C. Aug. 16, 2010) (involving detainee Adnan Farhan Abd al Latif); Almerfedi v. Obama, 725 F. Supp. 2d 18, 31 (D.D.C. 2010) (involving detainee Hussain Salem Mohammad Almerfedi); Abdah v. Obama, 717 F. Supp. 2d 21, 36 (D.D.C. 2010) (involving detainee Mohamed Mohamed Hassan Odaini); al Harbi v. Obama, No. 05-2479 (HHK), 2010 WL 2398883, at *16 (D.D.C. May 13, 2010) (involving detainee Ravil Mingazov); Abdah v. Obama, 708 F. Supp. 2d 9, 23 (D.D.C. 2010) (involving detainee Uthman Abdul Rahim

these rulings have been or may yet be appealed.[398] By December 2010, the D.C. Circuit reached the merits in five of the nineteen cases won by the government at the district court level; the Circuit affirmed in four instances and reversed and remanded for further consideration in one other.[399] Of the twenty-one cases won by the detainee at the district court level, the D.C. Circuit reached the merits in two by the end of 2010, reversing with instructions to deny the writ in one instance[400] and vacating and remanding for further consideration in another.[401] Many of these appellate decisions themselves have been the subjects of petitions for certiorari to the U.S. Supreme Court, and so the circumstances remain in flux.[402]

In addition to all of this, in 2008, very shortly after *Boumediene* was decided, the D.C. Circuit held in *Parhart v. Gates* 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 September 18, 2001 AUMF.[403] That ruling came under the auspices of the DTA, rather than the habeas corpus review mandated weeks earlier by *Boumediene*,[404] but the result, in any event, was a defeat for the government.[405]

For the most part, these decisions have turned on evidentiary issues.[406] 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

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Mohammed Uthman); Salahi v. Obama, 710 F. Supp. 2d 1, 16 (D.D.C. 2010) (involving detainee Mohammedou Ould Salahi), *vacated and remanded*, 625 F.3d 745 (D.C. Cir. 2010).

[398] *See* Lyle Denniston, *Primer: The New Detainee Cases*, SCOTUSblog (Dec. 7, 2010, 7:47 PM), http://www.scotusblog.com/2010/12/primer-the-new-detainee-cases/.

[399] The four affirmances are as follows. Al-Bihani v. Obama, 590 F.3d 866, 869 (D.C. Cir. 2010), *rehearing en banc denied*, 619 F.3d 1 (D.C. Cir. 2010), *cert. denied*, No. 10-7814, 2011 WL 1225807 (U.S. Apr. 4, 2011); Awad v. Obama, 608 F.3d 1, 3 (D.C. Cir. 2010), *cert. denied*, No. 10-736, 2011 WL 1225732 (U.S. Apr. 4, 2011); Barhoumi v. Obama, 609 F.3d 416, 418 (D.C. Cir. 2010); al Odah v. United States, 611 F.3d 8, 9 (D.C. Cir. 2010), *cert. denied*, No. 10-439, 2011 WL 1225724 (Apr. 4, 2011). The reversal occurred in *Bensayah v. Obama*. 610 F.3d 718, 720 (D.C. Cir. 2010).

[400] *See* al-Adahi v. Obama, 613 F.3d 1102, 1103 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1001 (2011).

[401] *See* Salahi v. Obama, 625 F.3d 745, 747 (D.C. Cir. 2010).

[402] For an overview, see generally Denniston, *supra* note 398.

[403] 532 F.3d 834, 854 (D.C. Cir. 2008).

[404] 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, 1070 (D.C. Cir. 2009).

[405] *See Parhart*, 532 F.3d at 854.

[406] Wittes, Chesney & Benhalim, *supra* note 25, at 1–2.

to prove by a preponderance of the evidence that a detainee is whom the government claims him to be.[407] 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*.[408] Perhaps predictably, they have disagreed on several key points.[409]

This subsection first surveys a handful of conflicting cases, which consider 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.[410] It then takes up a line of cases that illustrate a strong consensus that membership counts as a sufficient condition for detention, but reveal considerable disagreement as to both the actual meaning of membership and whether support independent of membership can serve as an alternative sufficient condition.[411]

a. *Rejecting Personal Dangerousness as a Necessary Condition*

On April 15, 2009, the U.S. District Court for the District of Columbia Judge Ellen Segal Huvelle held in *Basardh v. Obama* that the government may not continue to hold a person in custody, regardless of whether he or she was a member or supporter of a relevant group at the time of capture, where that person is not likely to "rejoin the enemy" if released.[412] The September 18, 2001 AUMF "defines the Executive's detention authority in plain and unambiguous terms," she concluded, and "does not authorize the detention of individuals beyond that which is necessary to prevent those individuals from rejoining the battle."[413] Reasoning that the petitioner, Yasin Muhammed 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 held that he must be released.[414]

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[407] For a general overview of the issues broached in the cases, *see id. passim.*

[408] *See infra* notes 412–586 and accompanying text.

[409] *See infra* notes 412–586 and accompanying text.

[410] *See infra* notes 412–417 and accompanying text.

[411] *See infra* notes 418–586 and accompanying text.

[412] 612 F. Supp. 2d 30, 35 (D.D.C. 2009) Several subsequent cases declined to follow this aspect of the decision. Awad v. Obama, 646 F. Supp. 2d 20, 24 (D.D.C. 2009) (Robertson, J.), *aff'd*, 608 F.3d 1 (D.C. Cir. 2010), *cert. denied*, No. 10-736, 2011 WL 1225732 (U.S. Apr. 4, 2011); Anam v. Obama, 696 F. Supp. 2d 1, 4 (D.D.C. 2010) (Hogan, J.); *see infra* Appendix, Table 10.

[413] *Basardh*, 612 F. Supp. 2d at 34.

[414] *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 U.S. authorities, indicating that this had become known to other detainees and that Basardh was thought to be in danger from

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.[415] It did not prove popular, however, among other judges: two district judges explicitly rejected this aspect of *Basardh*;[416] and, more significantly, the D.C. Circuit eventually did the same.[417] For the time being, therefore, 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.[418] Notwithstanding earlier claims to the contrary by Judge Green in *In re Guantanamo Detainee Cases*[419] and Judge Wilkinson in *al-Marri*,[420] 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.[421] Consensus breaks down, however, when it comes to fleshing out the meaning of membership,[422] 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.[423]

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them. *See* Del Quentin Wilber, *Detainee-Informer Presents Quandary for Government*, WASH. POST, Feb. 3, 2009, at A1.

[415] *See Basardh*, 612 F. Supp. 2d at 34–35.

[416] *See Anam*, 696 F. Supp. 2d at 4; *Awad*, 646 F. Supp. 2d at 24; *infra* Appendix, Table 10.

[417] *See Awad*, 608 F.3d at 11 ("Whether a detainee would pose a threat to U.S. interests if released is not at issue in habeas corpus proceedings."); *infra* Appendix, Table 10.

[418] *See, e.g.*, *Salahi*, 625 F.3d at 748, 753; Gherebi v. Obama, 609 F. Supp. 2d 43, 66–67 (D.D.C. 2009); Boumediene v. Bush, 583 F. Supp. 2d 133, 135 (D.D.C. 2008).

[419] *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 476.

[420] *Al-Marri II*, 534 F.3d at 325 (Wilkinson, J., concurring in part and dissenting in part).

[421] *See, e.g.*, *Salahi*, 625 F.3d at 748, 753; *Gherebi*, 609 F. Supp. 2d at 66–67; *Boumediene*, 583 F. Supp. 2d at 135.

[422] *See, e.g.*, *al-Bihani*, 590 F.3d at 873 & n.2 (concluding that membership does not require participation in a chain of command and might be proven by attending a training camp or staying at a guesthouse); Hatim v. Obama, 677 F. Supp. 2d 1, 12–13 (D.D.C. 2009) (holding that membership in the chain of command of an AUMF-covered group must be illustrated by actual obedience to orders in a particular instance), *vacated sub nom.* Hatim v. Gates, No. 10-5048, 2011 WL 553273 (D.C. Cir. Feb. 15, 2011); Hamlily v. Obama, 616 F. Supp. 2d 63, 75 (D.D.C. 2009) (noting that support may be proof of membership).

[423] *Compare al-Bihani*, 590 F.3d at 873 (deciding that independent support is a sufficient condition), *and Boumediene*, 583 F. Supp. 2d at 135 (same), *with Hatim*, 677 F. Supp. 2d at 12–13 (concluding that independent support is not a sufficient condition), *and Hamlily*, 616 F. Supp. 2d at 75 (same).

These issues arose initially before D.C. District Court Judge Leon, presiding over the merits hearing for the *Boumediene* petitioners on remand from their Supreme Court victory.[424] 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.[425] This he refused to do, reasoning that his role instead was merely to determine whether the administration's position was consistent with a pair of domestic legal considerations: (1) the AUMF, and (2) any further authority the President might have under the "war powers" of Article II of the Constitution.[426] Without substantial elaboration, Judge Leon concluded that the government's two-track standard was compatible with both.[427]

There things stood when the Obama administration came into office in early 2009. On the second day of his presidency, 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.[428] But litigation deadlines do not respect 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 had to decide not only whether it would defend its authority to employ military detention without criminal charge at Guantanamo, but also what it considered the correct substantive detention standard to be.[429]

It did this on March 13, 2009, when the Justice Department's Civil Division filed a brief in *Hamlily v. Obama* before Judge John D. Bates of the U.S. District Court for the District of Columbia.[430] To the surprise of some, the Obama administration asserted its authority to detain without charge pursuant to a substantive detention standard not much

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[424] *See Boumediene*, 583 F. Supp. 2d at 134–35; *infra* Appendix, Table 11. 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. 355 F. Supp. 2d at 321.

[425] *Boumediene*, 583 F. Supp. 2d at 134.

[426] *Id.*

[427] *See id.* at 135 ("An 'enemy combatant' is an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.").

[428] *See* Exec. Order No. 13,493, 3 C.F.R. 203 (2009).

[429] *See* Hamlily Memorandum, *supra* note 73, at 1.

[430] 616 F. Supp. 2d at 67; Hamlily Memorandum, *supra* note 73, at 1.

different from the Combatant Status Review Tribunal (CSRT) standard of the Bush administration.[431] 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 AUMF.[432] And it also expressly embraced the relevance of LOAC for purposes of defining the particulars of that authority.[433] 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.[434] 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.[435]

Before Judge Bates had the chance to address the merits of the revised position in *Hamlily*,[436] D.C. District Court Judge Reggie B. Walton did so in *Gherebi v. Obama* in April 2009.[437] As an initial matter, Judge Walton rejected the argument that LOAC provides no detention authority outside of international armed conflict, and that the AUMF should be construed accordingly.[438] LOAC, he reasoned, is best viewed as a restraining body of law rather than an authorizing body of law.[439] Thus, though it is true that Common Article 3 of the Geneva Conventions has no express language affirmatively authorizing detention, he understood this to mean merely that LOAC imposes no restraints on those who lawfully may be detained in non-international armed conflict.[440]

Any restraints instead must come from some other body of law, including the AUMF itself.[441] In Judge Walton's view, however, the AUMF most certainly did confer at least some detention authority.[442] "[W]henever the President can lawfully exercise military force, so, too,

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[431] Hamlily Memorandum, *supra* note 73, at 1.
[432] *Id.*
[433] *Id.*
[434] *See id.* at 1–2.
[435] *See id.* at 2, 7.
[436] 616 F. Supp. 2d at 67.
[437] *See* 609 F. Supp. 2d at 53; *infra* Appendix, Table 12.
[438] *See Gherebi*, 609 F. Supp. 2d at 55–56.
[439] *See id.* at 65.
[440] *See id.* at 65–67.
[441] *See id.* at 62.
[442] *See id.*

can he incapacitate the enemy force through detention rather than death."[443]

That position of course was not enough to settle the legal boundaries of AUMF-based detention authority.[444] Judge Walton next had to confront the question of who counts as the "enemy force" when the United States is not contending with another state's army.[445] The detainee in *Gherebi*, borrowing from the approach of the petitioners in *Boumediene*, urged Judge Walton to adopt DPH as the measure of detainability[446] but did not advocate the same conception of DPH as had the *Boumediene* petitioners.[447] Specifically, the petitioner in *Gherebi* 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.[448] Furthermore, he 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.[449]

Judge Walton ultimately rejected the invitation to adopt one version or the other of the DPH standard as a necessary condition for detainability.[450] He did not refrain from stating in dicta, however, that the continuous-combat function conception of DPH "while perhaps not quite broad enough, is a step towards 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 their membership."[451]

But he did agree that membership in an organized armed force is a necessary condition for detention authority—in fact, he concluded that it was a sufficient condition as well.[452] His reasoning in support of this conclusion turned on the notion that the combatant category did indeed exist in non-international armed conflict.[453] Again noting his

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[443] *Id.*

[444] *See Gherebi*, 609 F. Supp. 2d at 63.

[445] *See id.*

[446] *See id.*

[447] *See* Brief for the *Boumediene* Petitioners, *supra* note 371, at 39–41; *see also supra* notes 361–381 and accompanying text (discussing the *Boumediene* petitioners' argument).

[448] *See Gherebi*, 609 F. Supp. 2d at 63–64.

[449] *Id.* at 63.

[450] *See id.* at 64 n.15.

[451] *Id.*

[452] *See id.* at 66–67.

[453] *See id.*

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.[454] 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.'"[455]

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*[456] and Judge Motz's panel decision for the Fourth Circuit in *al-Marri*.[457] By accepting that membership alone might establish this ground for detention, his opinion was contrary to D.C. District Court Judge Green's decision in *In re Guantanamo Detainee Cases*.[458] And to the extent his opinion rejected the need to show a detainee had been personally involved in hostile conduct, it seemed contrary as well to the views expressed by Chief Judge Williams and Judge Wilkinson in the Fourth Circuit's en banc opinion in *al-Marri*.[459] It was most akin, if anything, to Judge Mukasey's original *Padilla* opinion for the Southern District of New York,[460] and perhaps also to the concurrence of Judge Traxler in the Fourth Circuit's en banc opinion in *al-Marri*.[461]

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.[462] But whether this was in fact a flexible or narrow standard really depends on how one defines "membership" and "armed

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[454] *Gherebi*, 609 F. Supp. 2d at 58, 63.

[455] *Id.* at 66.

[456] *Compare id.* at 66–67, *with Padilla II*, 352 F.3d at 713–14. For discussion of the *Padilla* case, see *supra* notes 247–250 and accompanying text.

[457] *Compare Gherebi*, 609 F. Supp. 2d at 66–67, *with al-Marri I*, 487 F.3d at 184–85. For discussion of the *al-Marri* case, see *supra* notes 276–296 and accompanying text.

[458] *Compare Gherebi*, 609 F. Supp. 2d at 66–67, *with In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 475. 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. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 475; *supra* notes 360–365 and accompanying text (discussing *In re Guantanamo Detainee Cases*).

[459] *Compare Gherebi*, 609 F. Supp. 2d at 66–67, *with al-Marri II*, 534 F.3d at 285 (Williams, C.J., concurring in part and dissenting in part), *and id.* at 325 (Wilkinson, J., concurring in part and dissenting in part).

[460] *See Padilla I*, 233 F. Supp. 2d at 592–98.

[461] *See al-Marri II*, 534 F.3d at 259–62 (Traxler, J., concurring in the judgment).

[462] *See Gherebi*, 609 F. Supp. 2d at 66–67.

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.[463]

As to this question, Judge Walton turned explicitly to LOAC, stating that the "criteria" set forth in GPW Article 4 and Additional Protocol I ("API") Article 43 constitute "templates from which the Court can glean certain characteristics" of an "armed force."[464] This was a challenging approach 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.[465] 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.[466] 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."[467]

Judge Walton was seemingly sensitive to the difficulties inherent in mapping that model onto 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.[468] He noted that there usually will not be membership cards or uniforms.[469] 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"?[470]

But there was a further qualification.[471] Judge Walton explained that it is not enough for a person to have been part of the chain of

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[463] *See* Chesney & Goldsmith, *supra* note 115, at 1099–1100.
[464] *Gherebi*, 609 F. Supp. 2d at 68.
[465] *See id.*
[466] *See id.*
[467] *Id.*
[468] *See id.* at 68–70.
[469] *See id.* at 68.
[470] *Gherebi*, 609 F. Supp. 2d at 68.
[471] *See id.* at 69.

command of the organization as a whole.[472] Rather, the person must have been part of the specific chain of command associated with "the enemy force's combat apparatus."[473] To be sure, Judge Walton tried to make the point that even a logistics officer for al Qaeda could be detained if he were part of al Qaeda's military chain of command.[474] And he also explicitly recognized 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, and hence should not be treated as a non-combatant.[475] 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.[476]

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.[477] 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.[478] He did not directly reject that claim, but he did insist that any support-based detention comply with the "structured role" test described above, which effectively folded the support inquiry into the membership standard.[479] Put simply, no purely independent supporter could be detained under that test (or, presumably, targeted with lethal force).[480] 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.[481] In this way, Judge

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[472] *Id.*

[473] *Id.*

[474] *See id.*

[475] *See id.* This view is consistent with the U.S. Court of Appeals for the Ninth Circuit's 1946 decision in *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, 146 (9th Cir. 1946).

[476] *Gherebi*, 609 F. Supp. 2d at 69.

[477] *See id.* at 53, 68–69.

[478] *See id.* at 53, 69–70.

[479] *Id.* at 69–70.

[480] *See id.*

[481] *Id.* at 69–70 & n.17.

Walton broke with the more accommodating approach of Judge Leon.[482]

Obviously Judge Walton's approach embraced the relevance of LOAC and the premise that the United States, in at least some current settings, is involved in non-international armed conflict—and he offered a highly specific interpretation of what LOAC has to say about who may be detained (or targeted) as a result.[483] Indeed, driving home the point that his reasoning applied as much to targeting as to detention, he routinely cross-referenced targeting authority as turning on the exact same standards.[484]

Just a few weeks after Judge Walton's opinion in *Gherebi*, Judge Bates issued his ruling in *Hamlily*.[485] For the most part, his analysis followed Judge Walton's.[486] 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.[487] 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.[488] 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.[489] *Hamlily*, in other words, is more akin to Judge Mukasey's opinion for the Southern District of New York in *Padilla*[490] and, perhaps, Judge Traxler's concurrence in the Fourth Circuit's en banc opinion in *al-Marri*.[491]

Whether Judges Walton and Bates differ with respect to non-members who provide substantial support to AUMF-covered groups is less clear.[492] On one hand, Judge Bates concluded that LOAC simply does not permit military detention of such persons (though, like all the

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[482] *Compare Gherebi*, 609 F. Supp. 2d at 69–70 & n.17, *with Boumediene*, 583 F. Supp. 2d at 134–35.

[483] *See Gherebi*, 609 F. Supp. 2d at 67–69.

[484] *See id.*

[485] 616 F. Supp. 2d at 77–78; *see infra* Appendix, Table 13.

[486] *See Hamlily*, 616 F. Supp. 2d at 68.

[487] *See id.* at 73.

[488] *Id.* at 75.

[489] *Compare id.*, *with Gherebi*, 609 F. Supp. 2d at 69–70.

[490] *See Hamlily*, 616 F. Supp. 2d at 75; *Padilla I*, 233 F. Supp. 2d at 592–98; *see also supra* notes 241–246 and accompanying text (discussing *Padilla*).

[491] *See al-Marri II*, 534 F.3d at 259–62 (Traxler, J., concurring in the judgment); *Hamlily*, 616 F. Supp. 2d at 75; *see also supra* notes 205–207 and accompanying text (discussing Judge Traxler's concurring opinion in *al-Marri*).

[492] *See Hamlily*, 616 F. Supp. 2d at 75–77; *Gherebi*, 609 F. Supp. 2d at 69–70.

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).[493] 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.[494] That said, even a functional member must still be shown to be part of the group's chain of command to be detained under the *Hamlily* model; truly independent supporters may not be detained no matter how important their aid is to the group.[495]

*Gherebi* and *Hamlily* thus are consistent on two points: that nonmembers may not be detained and that membership ultimately turns on participation in a chain of command.[496] They appear to differ, however, on 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.[497]

Adding to the confusion, other U.S. district court judges have subsequently disagreed over whether there is a genuine difference between *Gherebi* and *Hamlily*.[498] In *Anam v. Obama* in September 2009, for example, D.C. District Court Judge Thomas F. Hogan found that there is not a substantial difference.[499] D.C. District Court Judge Gladys Kessler, on the other hand, stated in *al Odah v. United States* in August 2009 that there *is* a difference, and that she prefers the *Gherebi* approach.[500] Additionally, D.C. District Court Judge Ricardo M. Urbina in *Hatim v. Obama* in December 2009 articulated an understanding of the chain-of-command test that very likely differs from what either Judge Walton or Judge Bates had in mind.[501]

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[493] *See Hamlily*, 616 F. Supp. 2d at 75–76.

[494] *See id.* at 76–77.

[495] *See id.* at 75–77.

[496] *See id.*; *Gherebi*, 609 F. Supp. 2d at 69–70; *infra* Appendix, Tables 12–13.

[497] *Compare Hamlily*, 616 F. Supp. 2d at 75, *with Gherebi*, 609 F. Supp. 2d at 69–70. *See infra* Appendix, Tables 12–13.

[498] *See, e.g.*, *Hatim*, 677 F. Supp. 2d at 5–6; Anam v. Obama, 653 F. Supp. 2d 62, 64 (D.D.C. 2009); al Odah v. United States, 648 F. Supp. 2d 1, 6–7 (D.D.C. 2009), *aff'd sub nom.* al Odah v. United States, 611 F.3d 8 (D.C. Cir. 2010), *cert. denied*, No. 10-439, 2011 WL 1225724 (Apr. 4, 2011).

[499] *See* 653 F. Supp. 2d at 64 (stating that *Hamlily* is "not inconsistent" with *Gherebi*, and that any apparent difference "is largely one of form rather than substance").

[500] *See* 648 F. Supp. 2d at 6–7.

[501] *See* 677 F. Supp. 2d at 5–6.

In *Hatim*, Judge Urbina explicitly adopted 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.[502] 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 to be a member in this sense, and hence to be detainable.[503] 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 by doing so he had effectively joined al Qaeda.[504] It may be that Judges Walton and Bates, or other judges following the *Gherebi* and *Hamlily* standards, will interpret the chain-of-command test in the same fashion. It seems equally if not more likely, however, that they will not.

In any event, the nuanced disagreement among Judges Urbina, Walton, and Bates, if disagreement there truly was, became moot once the chain-of-command question came before the D.C. Circuit.[505] In a series of cases in 2010, the D.C. Circuit expressly rejected the proposition that one must be part of any chain of command—let alone that of the military wing of an organization—to qualify as a member subject to military detention under the AUMF.[506]

The D.C. Circuit first made this point in *al-Bihani v. Obama*, in January 2010.[507] In that case, a divided panel offered a number of important observations regarding the lawful scope of detention authority.[508] To begin with, the majority opinion by Judges Janice Rogers Brown and Brett M. Kavanaugh 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.[509] That is to say, the *al-Bihani* court 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.[510]

Absent reference to LOAC, however, how was the broad language of the AUMF to be construed? As noted in Part II, the AUMF itself pro-

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[502] *See id.*; *infra* Appendix, Table 14.
[503] *See Hatim*, 677 F. Supp. 2d at 6–7.
[504] *See id. passim.*
[505] *See infra* notes 507–586 and accompanying text.
[506] *See infra* notes 507–586 and accompanying text.
[507] 590 F.3d at 872–73; *see infra* Appendix, Table 15.
[508] *See al-Bihani*, 590 F.3d at 872–73.
[509] *See id.* at 871–72.
[510] *See id.*

vides some guidance at the group level but almost no guidance at the individual level.[511] Other domestic law sources would be needed, therefore, to address what conduct or status sufficed to link a person to an AUMF-covered group for detention purposes.[512] And according to the majority in *al-Bihani*, the personal jurisdiction provisions found in the Military Commissions Act of 2006 and Military Commissions Act of 2009 provided the necessary guidance.[513]

Those provisions clearly stated that military commissions may entertain proceedings against noncitizens who are members of AUMF-covered groups and *also* those who are non-members but who nonetheless provide support to such groups.[514] 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.[515]

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.[516] But if the chain-of-command test could not define membership, what criteria would? Here the opinion was less clear, except as to two remarkable points.[517] First, *al-Bihani* asserted that a person should be deemed a member and hence subject to detention if he attended a training camp sponsored by an AUMF-covered group.[518] Second, *al-Bihani* raised the possibility that merely staying at a guesthouse associated with an AUMF-covered group's recruitment process could also constitute adequate evidence of membership and detainability.[519] These statements were dicta and hence not binding on the district court, yet they certainly signaled a broad conception of membership—

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[511] *See supra* notes 103–116 (discussing the AUMF's role in the "content debate").

[512] *See al-Bihani*, 590 F.3d at 872–73.

[513] *See id.*

[514] *See id.*

[515] *See id.*

[516] *See id.*; *see also Hatim*, 677 F. Supp. 2d at 5–6; *Hamlily*, 616 F. Supp. 2d at 69–70; *Gherebi*, 609 F. Supp. 2d at 75–77.

[517] *Al-Bihani*, 590 F.3d at 873 n.2.

[518] *See id.* at 873 n.2.

[519] *See id.*

arguably broader than anything previously endorsed in the habeas litigation, either before *Boumediene* or since.[520]

Subsequent decisions by the D.C. Circuit largely reinforced *al-Bihani*.[521] To be sure, some of *al-Bihani*'s punch was diluted by the fact that a majority of the active judges of the D.C. Circuit, in the course of "denying" en banc review, declared the panel's views about the irrelevance of international law to be mere dicta.[522] The "dicta-fication" of that aspect of the panel opinion did not necessarily undermine its support and membership aspects, however, as the panel had also observed that it found "al-Bihani's reading of international law to be unpersuasive."[523] More significantly, subsequent D.C. Circuit decisions have reinforced key aspects of the *al-Bihani* panel opinion.[524]

First, the unanimous opinion in *Awad v. Obama*—issued on June 2, 2010 by Chief Judge David B. Sentelle and Judges Merrick B. Garland and Laurence H. Silberman of the D.C. Circuit—restated the point that one need not be part of a chain of command to be detainable.[525] This would be useful evidence of membership, of course, but membership could also 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.[526] On June 11, 2010, in *Barhoumi v. Obama*, Judge Kavanaugh and Judges Douglas H. Ginsburg and David S. Tatel joined to state once again that the chain-of-command test is not a necessary condition for detention—though, in that case, it happened to be satisfied and counted as a sufficient condition.[527]

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*, decided by the D.C. Circuit on June 28, 2010—would do so.[528] Bensayah himself was the last of the original *Boumediene* petitioners, the only one whom Judge Leon found

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[520] *Compare al-Bihani*, 590 F.3d at 873–74, *with al-Marri I*, 487 F.3d at 178–82 (adopting a significantly narrower conception of membership), *and Hamlily*, 616 F. Supp. at 75 (same).

[521] *See, e.g.*, *Bensayah*, 610 F.3d at 720; *Barhoumi*, 609 F.3d at 424–26; *Awad*, 608 F.3d at 10–12.

[522] *See* al-Bihani v. Obama, 619 F.3d 1, 1 (D.C. Cir. 2010), *cert. denied*, No. 10-7814, 2011 WL 1225807 (U.S. Apr. 4, 2011).

[523] *See al-Bihani*, 590 F.3d at 871.

[524] *See, e.g.*, *Bensayah*, 610 F.3d at 720; *Barhoumi*, 609 F.3d at 424–26; *Awad*, 608 F.3d at 10–12.

[525] *See* 608 F.3d at 10–12; *infra* Appendix, Table 16.

[526] *See Awad*, 608 F.3d at 10–12.

[527] *See* 609 F.3d at 424–26; *infra* Appendix, Table 16.

[528] *See* 610 F.3d at 720.

subject to detention after remand from the Supreme Court.[529] And as noted above, Judge Leon had expressly approved reliance on independent support as a ground for detention in that case.[530] 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.[531] 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, however, would anticipate that the D.C. Circuit's decision would focus on the membership ground instead.[532] 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 trials as wartime prisoners."[533] According to Savage's account, the debate arose initially when the government was obliged to develop its revised detention position in *Hamlily*.[534] 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.[535] This did not end the internal debate but instead merely delayed it until the administration was faced with the choice of whether to defend a specific case on independent support grounds.[536]

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

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[529] Boumediene v. Bush, 579 F. Supp. 2d 191, 198 (D.D.C. 2008), *rev'd and remanded sub nom.* Bensayah v. Obama, 610 F.3d 718 (D.C. Cir. 2010).

[530] *Boumediene*, 583 F. Supp. 2d at 135; *see supra* notes 424–427 and accompanying text.

[531] *Boumediene*, 579 F. Supp. 2d at 198.

[532] Savage, *supra* note 22.

[533] *Id.*

[534] *See id.*

[535] Hamlily Memorandum, *supra* note 73, at 1–2; *see supra* notes 430–435 (discussing the Obama administration's position).

[536] Savage, *supra* note 22.

> 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.[537]

Assuming the accuracy of this account, the specific dispute involved the conjunction of the independent-support ground with the use of detention authority for captures away from the conventional battlefield.[538] Savage reported that the State Department's newly arrived Legal Advisor, 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.[539] Savage indicated 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."[540]

Nonetheless, a position was needed for the *Bensayah* appeal.[541] According to Savage's account, the solution was to "try to avoid that hard question" by "chang[ing] the subject" in *Bensayah*.[542] 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[543]—the government would instead seek affirmance on the ground that Bensayah was a functional member of al Qaeda.[544] 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 "[t]he 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 af-

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[537] *Id.*
[538] *See id.*
[539] *Id.*
[540] *Id.*
[541] *See id.*
[542] Savage, *supra* note 22.
[543] *Boumediene*, 583 F. Supp. 2d at 135; *see supra* notes 424–427 and accompanying text.
[544] Savage, *supra* note 22.

firmed solely on that ground."[545] 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.[546]

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."[547]

Some nine months later, in late June 2010, the D.C. Circuit reversed the district court's holding and allowed detention in *Bensayah*.[548] But it is far from clear that the government's decision not to advance the independent support argument caused that outcome, or that geographic constraints entered into the analysis. In addition to limiting its legal theory on appeal, the government had decided not to continue to rely on certain inculpatory statements that had been made by another detainee.[549] The latter move appeared to be the decisive one.[550] 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.[551] 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.[552] In any event, the litigation continues: the court re-

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[545] Letter from Sharon Swingle et al., Civil Div., U.S. Dept. of Justice at 1, *Bensayah*, 610 F.3d 718 (No. 08-5537).

[546] *Id.* at 1–2.

[547] Savage, *supra* note 22.

[548] 610 F.3d at 727.

[549] *See id.* at 720, 722.

[550] *See id.*

[551] *See id.* at 722, 727.

[552] *See id.*

manded 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.[553]

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,[554] the D.C. Circuit took the contrary view.[555] 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 court's position on the matter—at least where the independent support occurs in a place geographically remote from a conventional battlefield.[556]

The D.C. Circuit has not had an opportunity to weigh in on the independent support question since *al-Bihani* and *Bensayah*.[557] The court's next two opinions instead touched lightly on other aspects of the substantive scope issue.[558] Shortly after *Bensayah*, for example, in June 2010 in *al Odah v. United States*, the D.C. Circuit affirmed the detention of an individual on membership grounds.[559] The most notable aspect of the case, for present purposes, was the fact that the opinion by Chief Judge Sentelle and Judges Judith W. 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.[560] Then, two weeks later, in *al-Adahi v. Obama* in July 2010, Judges Karen LeCraft Henderson, Kavanaugh, and A. Raymond Randolph 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.[561]

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[553] *Id.* at 727.

[554] *See, e.g.*, *Hatim*, 677 F. Supp. 2d at 12–13; *Hamlily*, 616 F. Supp. 2d at 75.

[555] *See Bensayah*, 610 F.3d at 727.

[556] *See* Letter from Sharon Swingle et al., *supra* note 545, at 1–2; Savage, *supra* note 22.

[557] *See Bensayah*, 610 F.3d at 727; *al-Bihani*, 590 F.3d at 872–73.

[558] *See al-Adahi*, 613 F.3d at 1105; *al Odah*, 611 F.3d at 17.

[559] 611 F.3d at 17; *see infra* Appendix, Table 17.

[560] *See al Odah*, 611 F.3d at 13, 17.

[561] 613 F.3d at 1105 (criticizing the district court for appearing to "think that if a particular fact does not itself prove the ultimate proposition (*e.g.*, whether the detainee was part of al-Qaida), the fact may be tossed aside and the next fact may be evaluated as if the first did not exist"); *see infra* Appendix, Table 17.

In contrast, the D.C. 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.[562] In *Salahi v. Obama*, in November 2010, a D.C. 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).[563] 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 re-weigh the evidence under a different standard.[564] Implicit rejection of geographic constraints in the membership setting, of course, does not compel the conclusion that geographic constraints also must be rejected with respect to 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 D.C. Circuit has developed a consensus that membership in an AUMF-covered group is a sufficient condition for detention.[565] 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 the person's underlying activities matter under either the membership or support criteria?

With respect to the detailed meaning of membership, some things have been made clear. The cases clearly establish that proof of participation in a formal chain of command is sufficient, but not necessary, to demonstrate membership.[566] They are relatively clear, moreover, that training camp participation is highly significant to prove membership, if not a sufficient condition.[567] The cases further suggest, albeit with less force, that the same may be true for guesthouse attendance in at

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[562] *See Salahi*, 625 F.3d at 748, 753.

[563] *See id.* at 748; *infra* Appendix, Table 17.

[564] *See Salahi*, 625 F.3d at 753.

[565] *See, e.g.*, *id.* at 748, 753.

[566] *See, e.g.*, *Barhoumi*, 609 F.3d at 424–26; *Awad*, 608 F.3d at 10–12; *al-Bihani*, 590 F.3d at 872–73.

[567] *See, e.g.*, *al-Adahi*, 613 F.3d at 1105; *al Odah*, 611 F.3d at 13, 17; *al-Bihani*, 590 F.3d at 873 n.2.

least some contexts.[568] 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 seems 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.[569] Consider, for example, the way in which Judge Bates, writing for the D.C. District Court, summarized the task in September 2010, in the post-*al-Bihani* case *Khan v. Obama*:

> "[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."[570]

Even when the training camp or guesthouse elements are present, moreover, it is not clear that they will always suffice.[571] Indeed, *Almerfedi v. Obama*—which, in July 2010, was one of the first D.C. District Court opinions to emerge against the backdrop of the D.C. Circuit's interventions—directly challenged the relevance of guesthouse attendance; it reasoned that (1) the connotations of guesthouse attendance vary depending on the house in question, and (2) residence at the guesthouse, in that particular case, was not necessarily inculpatory.[572] On the other hand, *Sulayman v. Obama*, also decided by the D.C. District Court in July 2010, gave 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 the front lines and received a weapon from a person who likely was a Taliban member.[573]

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[568] *See, e.g.*, *al-Bihani*, 590 F.3d at 873 n.2.

[569] *See, e.g.*, *Khan*, 741 F. Supp. 2d at 5.

[570] *Id.* (internal citations omitted).

[571] *See, e.g.*, *Sulayman*, 729 F. Supp. 2d at 44–45, 53; *Almerfedi*, 725 F. Supp. 2d at 23 & n.2.

[572] *See* 725 F. Supp. 2d at 23 & n.2.

[573] *See* 729 F. Supp. 2d at 44–45, 53.

Note that similar disagreements could yet emerge in connection with the training camp variable.[574] 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.[575] 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).[576]

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. It also has not settled the question of whether, if such a criterion is legitimate, it must be limited to persons who were captured or who acted in certain geographic locations—or whether it must be confined only to 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.[577] 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.[578] It raises the issue of whether, 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).[579] The question is at least as pertinent in the detention context.[580]

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[574] *See al-Bihani*, 590 F.3d at 873 n.2.

[575] *Cf.* Superseding Criminal Complaint at 3–4, United States v. Maldonado, No. 4:07-MJ-00125 (S.D. Tex. Feb. 13, 2007) (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; *see also* Andrea Elliott, *The Jihadist Next Door*, N.Y. Times, Jan. 31, 2010, § 6 (Magazine), at 34–35.

[576] *See Salahi*, 625 F.3d at 748, 753.

[577] For an introduction to this debate, see Robert Chesney, *Has Human Rights Watch Changed Its Position on Targeted Killing and the Scope of Application of IHL?*, Lawfare (Dec. 9, 2010, 12:26 PM), http://www.lawfareblog.com/2010/12/has-human-rights-watch-changed-its-position-on-targeted-killing-and-the-scope-of-application-of-ihl/. Judge Bates, of the D.C. District Court, dismissed the targeted killing suit, *al-Aulaqi v. Obama*, on standing and political question grounds in December 2010. 727 F. Supp. 2d 1, 9 (D.D.C. 2010).

[578] *See al-Aulaqi*, 727 F. Supp. 2d at 9–10.

[579] *See* Chesney, *supra* note 577.

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.[581] The earlier experience of the *al-Marri* litigation, meanwhile, suggests there may yet be judicial disagreement on the point.[582]

Overarching all these questions, finally, is lingering disagreement regarding which bodies of law actually govern.[583] The *al-Bihani* panel opinion sought to resolve this dispute by forbidding reference to LOAC and other forms of international law.[584] Though the D.C. Circuit majority subsequently neutered that claim by declaring it dicta, the majority did not go so far as to issue a contrary holding to the effect that any such body of law does actually apply.[585] In any event, as Part II 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.[586]

## IV. 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 III?[587] Second, if this does matter, is it preferable simply to be patient, leaving the matter in judicial hands, or instead should Congress intervene with legislation? Finally, are there larger lessons to be drawn from the past decade's experience with the substantive law of military detention? This Part addresses each of these questions in turn.

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[580] *See Salahi*, 625 F.3d at 748, 753; *Bensayah*, 610 F.3d at 720; *al-Marri I*, 487 F.3d at 182–83.

[581] *See Salahi*, 625 F.3d at 748, 753; *Bensayah*, 610 F.3d at 720.

[582] *See* 487 F.3d at 182–83.

[583] *See al-Bihani*, 590 F.3d at 871; *supra* notes 70–212 and accompanying text.

[584] *See al-Bihani*, 590 F.3d at 871.

[585] *See al-Bihani*, 619 F.3d at 1.

[586] *See supra* notes 64–212 and accompanying text.

[587] *See infra* notes 588–613 and accompanying text.

### A. *Does 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.[588] Only *Basardh v. Obama*, in which D.C. District Court 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.[589] But much more habeas litigation is to come, and hence this question may yet prove dispositive for some Guantanamo detainees. No one can say 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 both from 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.[590] Attorneys representing a group of U.S. military detainees in Afghanistan have been attempting for several years now to establish habeas jurisdiction over detention operations there.[591] In *al Maqaleh v. Gates* in 2009, they met with mixed success in the D.C. District Court when Judge Bates held 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.[592] A panel of the U.S. Court of Appeals for the D.C. Circuit subsequently reversed on the first point only, explaining that "all of the attributes of a

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[588] *See* WITTES, CHESNEY & BENHALIM, *supra* note 25, at 1–2.

[589] *See* 612 F. Supp. 2d 30, 34 (D.D.C. 2009).

[590] *See* al Maqaleh v. Gates, 604 F. Supp. 2d 205, 207, 209–10 (D.D.C. 2009), *rev'd* 605 F.3d 84 (D.C. Cir. 2010).

[591] *See id.*

[592] *See id.* at 235.

facility exposed to the vagaries of war are present in Bagram."[593] The U.S. detention facility in Afghanistan (then at Bagram, today in Parwan), the panel further noted, 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."[594] The panel did not, however, close the door to habeas jurisdiction entirely.[595] It 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 had occurred long before *Boumediene v. Bush* rendered Guantanamo subject to judicial review.[596] The panel warned that if "such manipulation by the Executive" were proven in a future case, the outcome might be different.[597] In the course of remanding that case to Judge Bates for further proceedings, the D.C. Circuit noted that it might take a different view, even in that very case, should new evidence emerge regarding the nature of U.S. detention operations in Afghanistan.[598]

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 the United States already has transferred control of its detention operations in Iraq to the government there),[599] 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, 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 likely will 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.[600] It may be that the United States will avoid that practice in the future, substituting some combination of rendition, host-nation detention,[601] targeted killing,

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[593] Al Maqaleh v. Gates, 605 F.3d 84, 97 (D.C. Cir. 2010).

[594] *Id.* at 97–98.

[595] *See id.* at 98–99.

[596] *Id.*

[597] *Id.* at 99.

[598] *See id.*

[599] Chesney, *supra* note 4, at 599–601.

[600] *See al Maqaleh*, 605 F.3d at 98–99.

[601] We may yet also see litigation involving the scope of detention authority over U.S. citizens allegedly held by other states under U.S. direction or control—so called "proxy detention." *See ACLU/SC Suit Seeks Information on U.S. 'Proxy Detention' of American Citizen in the U.A.E.*, Am. Civ. Liberties Union of S. Cal. (Aug. 18, 2010), https://www.aclu-sc.org/releases/view/103037.

surveillance, prosecution, or inaction in its place.[602] But if the practice of long-term detention for non-battlefield capture reemerges, so too will the questions surrounding habeas jurisdiction.

Even if habeas jurisdiction remains limited to Guantanamo, however, there are other reasons to believe the uncertainty associated with the substantive-scope jurisprudence is 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 September 18, 2001 Authorization for Use of Military Force (AUMF).[603] 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 all detention operations in Afghanistan—even though very few detentions beyond Guantanamo are or likely ever will be subject to direct habeas review.[604] Civilian government lawyers advising policymakers, and military judge advocates advising commanders in the field, have an obligation to take account of this case law 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.[605] 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.[606]

Making matters worse, spillover effects from the Guantanamo habeas cases 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

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[602] *See* WITTES, *supra* note 7, at 5–7.

[603] *See* Authorization for the Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)).

[604] *See al Maqaleh*, 605 F.3d at 98–99.

[605] *See, e.g.*, CTR. FOR LAW & MILITARY OPERATIONS, *supra* note 3, at 30, 40–58 (stressing that judge advocates needed to be prepared to advise the military on the law governing detention operations in Iraq and Afghanistan).

[606] *See supra* notes 565–586 and accompanying text.

color of the AUMF as much as it overhangs the decision to detain under that authority.

The point is not immediately obvious; the power to kill and the power to detain are by no means coextensive. But they need not be coextensive for the Guantanamo habeas litigation to impact the legal bounds of targeting authority elsewhere. Again, the AUMF is the transmission mechanism.[607] Suppose, 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.[608] 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 fundraiser 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 the law of armed conflict ("LOAC") or international human rights law ("IHRL").[609]

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[610] nonetheless may be impacted indirectly by the development of detention-scope jurisprudence. 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 deten-

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[607] AUMF, 50 U.S.C. § 1541.

[608] *Cf.* Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004) (interpreting the scope of the government's detention authority).

[609] *Cf.* al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 9–10 (D.D.C. 2010).

[610] 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 id.* That suit, *al Aulaqi v. Obama*, 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 floundered in the face of justiciability objections. *See, e.g.*, Holtzman v. Schlesinger, 484 F.2d 1307, 1308–09 (2d Cir. 1973); DaCosta v. Laird, 471 F.2d 1146, 1147 (2d Cir. 1973); DaCosta v. Laird, 448 F.2d 1368, 1369 (2d Cir. 1971). And at least for the time being, so too has the *al-Aulaqi* litigation. *See* 727 F. Supp. 2d at 54 (dismissing the complaint on standing and political question grounds).

tion-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" ("DPH"), in an effort to clarify the scope of the government's detention authority.[611] The merits of referencing DPH for this purpose are considered above.[612] For now, the important point is that when courts make use of DPH in this way, they may be obliged to define this deeply contested concept. And once they offer such a definition, their opinion will matter to some 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."[613]

### 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 is 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.[614] Judges, after all, routinely disagree about fine points of law concerning complex subjects, and 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 Guan-*

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[611] *See, e.g.*, Gherebi v. Obama, 609 F. Supp. 2d 43, 64 n.15 (D.D.C. 2009).

[612] *See supra* notes 47–50 and accompanying text.

[613] Authorization for the Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)).

[614] *See, e.g.*, Azmy, *supra* note 10, at 502–10 (expressing confidence in the capacity and propriety of relying upon federal courts to identify and apply the substantive rules governing the scope of the government's detention authority).

*tánamo Cases; A Report from Former Federal Judges.*[615] The report contends that the "lower courts are steadily progressing toward a workable detention standard,"[616] and denies that judges have to "draft" a substantive standard or otherwise are engaged in a "lawmaking" process.[617] What the judges are doing instead, the report argues, is merely "interpreting and applying," informed by the laws of war, the detention standard established by Congress and the President in the AUMF.[618] 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.[619] *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."[620]

That last claim no doubt is correct. As Judge Wilkinson's concurrence in the Fourth Circuit's 2008 decision in *al-Marri v. Pucciarelli* illustrates, judges can undertake to develop detention standards meant to conform to the peculiarities of the non-state actor context.[621] Similarly, 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.[622] 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

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[615] Human Rights First & The Constitution Project, Habeas Works: Federal Courts' Proven Capacity to Handle Guantánamo Cases; A Report from Former Federal Judges 13–16 (2010). In the interest of full disclosure, *Habeas Works* criticizes a report that the author of this Article co-authored 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 25).

[616] *Id.* at 13.

[617] *Id.* at 14.

[618] *Id.* at 7.

[619] *Id.* at 16.

[620] *Id.*

[621] al-Marri v. Pucciarelli (*al-Marri II*), 534 F.3d 213, 325 (4th Cir. 2008) (en banc) (Wilkinson, J., concurring in part and dissenting in part) (setting out a three-step inquiry), *vacated sub nom.* al-Marri v. Spagone, 129 S. Ct. 1545 (2009) (mem.).

[622] *See* Azmy, *supra* note 10, at 502–10.

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.[623] 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,[624] 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.[625] But careful consideration of the trends in the case law described in Part III suggests that it would be unwise to assume that the judiciary in the end will adopt narrower tests.[626] The sequence of D.C. Circuit opinions in 2010, beginning but by no means ending with *al-Bihani v. Obama*, if anything suggests the contrary.[627] And it would be unwise to assume that the Supreme Court will both take up the substantive-scope question and adopt more constrained positions with respect to it: Chief Justice Roberts and Justices Scalia, Thomas, and Alito are unlikely to be interested in such a narrowing approach, while Justice Kagan is likely to be recused from these cases in light of her recent role as the Solicitor General and might well join that block of four in any event.[628] Thus, fear of, or desire for, a broad detention standard accordingly does not point clearly in favor or against legislative intervention.

A second factor one might bring to bear in developing a well-considered position on the question is the democratic pedigree of the resulting rule set. That is, one might favor legislative intervention be-

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[623] *See* Charlie Savage, *New Measure to Hinder Closing of Guantánamo*, N.Y. Times, Jan. 8, 2011, at A11; Detainee Treatment Act of 2005 §§ 1001, 1003–1004, Pub. L. No. 109-148, 119 Stat. 2680, 2739 (codified at 42 U.S.C. § 2000dd (2006)).

[624] *See* Savage, *supra* note 623.

[625] *See* Charlie Savage, *Vote Hurt Obama's Push to Empty Cuba Prison*, N.Y. Times, Dec. 23, 2010, at A24.

[626] *See supra* notes 213–586 and accompanying text.

[627] Al-Bihani v. Obama, 590 F.3d 866, 872–73 (D.C. Cir.), *rehearing en banc denied*, 619 F.3d 1 (D.C. Cir. 2010), *cert. denied*, No. 10-7814, 2011 WL 1225807 (U.S. Apr. 4, 2011); *see also supra* notes 506–564 and accompanying text (discussing this sequence).

[628] *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 818–19 (2008) (Roberts, C.J., dissenting) (finding that the DTA provided Guantanamo detainees with sufficient process); *id.* at 826–27 (Scalia, J., dissenting) ("The writ of habeas corpus does not, and never has, run in favor of aliens abroad.").

cause 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.[629] In response, one might note that we routinely have relied on common-law processes to develop and refine rules in other important settings.[630] 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.[631]

Third, one might favor or disfavor legislation on grounds of speed and finality, in light of this Article's 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 for the U.S. District Court for the Southern District of New York in *Padilla ex. rel. Newman v. Bush* in late 2001,[632] 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.[633] 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

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[629] *See generally* Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (2d ed. 1962).

[630] *See* Azmy, *supra* note 10, at 502–10.

[631] *See* Wittes, *supra* note 7, at 111–15 (advancing this argument).

[632] Padilla *ex rel.* Newman v. Bush (*Padilla I*), 233 F. Supp. 2d 564, 587–91 (S.D.N.Y. 2002), *aff'd in part, rev'd in part sub nom.* Padilla v. Rumsfeld (*Padilla II*), 352 F.3d 695 (2d Cir. 2003), *rev'd and remanded*, 542 U.S. 426 (2004).

[633] Human Rights First & The Constitution Project, *supra* note 615, at 28.

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 U.S. Supreme Court to intervene in order to limit or reverse precedent.

These factors, taken together, strongly suggest 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 in 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;[634]
- 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

[634] *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).

- 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.

### C. *The Larger Lessons of the Detention-Scope Narrative*

Separate and apart from the debate over the details of the government's detention authority, the descriptive account in Part III also functions as a case study in three larger phenomena. First, it illustrates the dynamic relationship between law and strategic context.[635] Second, it draws our attention to the increasingly significant role that national courts—including lower courts—can play in developing the law relating to the use of military force.[636] Third, and related to the second point, the narrative highlights the increasing significance of domestic substantive law, and the prospect that such law may displace both LOAC and IHRL—normally thought to be in competition solely with one another in this arena—as the central body of law relevant to such issues.[637]

#### 1. On the Dynamic Relationship Between Law and Strategic Context

Part II described the theoretical claim that at least some legal frameworks exist in dynamic relationship with the prevailing strategic climate, such that the law both influences that climate and adapts in response to changes in that climate.[638] It further described the convergence theory, which makes the related, but more specific, claim that certain features of asymmetric warfare and other strategically significant

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[635] *See infra* notes 638–656 and accompanying text.
[636] *See infra* notes 657–665 and accompanying text.
[637] *See infra* notes 666–672 and accompanying text.
[638] *See supra* notes 174–187 and accompanying text.

violence committed by non-state, clandestine organizations (such as al Qaeda) placed tremendous pressure on status quo legal frameworks to change.[639] In particular, these features pressure existing frameworks to converge toward one another en route to formation of a hybrid, tailored legal framework more suited to this setting.[640] And finally, Part II noted that the convergence phenomenon operates in the shadow of a balloon-squeezing effect.[641] That is, policymakers will substitute alternative and relatively unconstrained policy options for incapacitating perceived threats—including drone strikes, rendition, and proxy detention—in the event that the convergence process oversteers to the point that U.S.-controlled detention ceases to be a plausible option.[642]

The narrative in Part III provides support for the existence of the dynamic-relationship theory as well as the convergence theory, illustrating the critical role that the judiciary can play in mediating these processes.[643] At the same time, considering the narrative in light of the theory of a balloon-squeezing effect is a cause for alarm.

The story of the judicial struggle to ascertain the legal boundaries of detention authority conforms nicely to the dynamic-relationship theory. This is clear, for example, when we look at Judge Wilkinson's opinion in *al-Marri v. Pucciarelli*.[644] As noted above, there is every reason to believe Judge Wilkinson was quite conscious of the dynamic-relationship theory at the time he wrote, and at the very least we can say he consciously strove to develop a doctrinal framework for detention operations that conformed to the particular features of clandestine entities such as al Qaeda.[645] Most other opinions recounted in the narrative were far less self aware on their face, yet taking the lot of them together one cannot help but see the overall set in terms of an ad hoc, collective process of coming to grips with the disruptive impact of asymmetric warfare and other forms of non-state actor violence.[646] The multiple opinions of the D.C. district and circuit courts dealing with the significance

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[639] *See supra* notes 188–208 and accompanying text.

[640] *See* Chesney & Goldsmith, *supra* note 115, at 1100–01.

[641] *See supra* notes 209–212 and accompanying text.

[642] *See supra* notes 209–212 and accompanying text.

[643] *See supra* notes 213–586 and accompanying text.

[644] *See* 534 F.3d at 314–19 (Wilkinson, J., concurring in part and dissenting in part).

[645] *See id.*; *see also supra* notes 326–330 and accompanying text.

[646] *See* Khan v. Obama, 741 F. Supp. 2d 1, 5 (D.D.C. 2010); *supra* notes 569–571 and accompanying text.

of training and guesthouse attendance, for example, smack strongly of tailoring a new framework to these unorthodox circumstances.[647]

That does not mean that all the judges were pulling in the same direction, of course. Some judges were resolute, for example, in insisting that detainees be categorized as "civilians" who could be neither targeted nor detained absent direct participation in hostilities—something that could be viewed as an effort to insist upon adherence to the formal categorical distinctions and associated rule sets applicable to more traditional conflict scenarios.[648] None of those opinions, however, survived.[649] One comes away with the impression that whatever ultimately may come from the habeas litigation, it will not be an endorsement of an approach that simply involves rote application of a more traditional legal framework.

Which leads to the relationship of all this to convergence. The essence of the convergence phenomenon is that strategic context pressures the legal system to adjust, to eschew existing frameworks in favor of something more carefully tailored to the circumstances.[650] Though the process remains in progress for now, we can at least see that it is driving towards the development of a set of detention criteria more carefully tailored to the problem posed by clandestine, networked entities such as al Qaeda.[651] In the end, it is difficult to imagine that the government will end up with quite as much detention authority as it would like, let alone the full breadth it might claim were the courts mindlessly to map conventional armed conflict detention criteria onto this scenario.[652] At the same time, it is quite plain too that the process will not outright reject the claim of non-criminal detention authority, and further that the government in the end will at least have a substantial amount of authority to detain persons based on associational status alone.[653]

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[647] *See, e.g.*, al-Adahi v. Obama, 613 F.3d 1102, 1105 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1001 (2011); al Odah v. United States, 611 F.3d 8, 13, 17 (D.C. Cir. 2010), *cert. denied*, No. 10-439, 2011 WL 1225724 (Apr. 4, 2011); *al-Bihani*, 590 F.3d at 873 n.2; Sulayman v. Obama, 729 F. Supp. 2d 26, 44–45, 53 (D.D.C. 2010); Almerfedi v. Obama, 725 F. Supp. 2d 18, 23 & n.2 (D.D.C. 2010).

[648] *See* Hamlily v. Obama, 615 F. Supp. 2d 63, 75–77 (D.D.C. 2009); *Gherebi*, 609 F. Supp. 2d at 69–70.

[649] *See* Barhoumi v. Obama, 609 F.3d 416, 424–26; Awad v. Obama, 608 F.3d 1, 10–12 (D.C. Cir. 2010), *cert. denied*, No. 10-736, 2011 WL 1225732 (U.S. Apr. 4, 2011); *al-Bihani*, 590 F.3d at 872–73.

[650] *See* Chesney & Goldsmith, *supra* note 115, at 1100–01.

[651] *See al-Bihani*, 590 F.3d at 872–73; *supra* notes 514–516 and accompanying text.

[652] *Cf.* Bensayah v. Obama, 610 F.3d 718, 727 (D.C. Cir. 2010).

[653] *Cf.* GPW, *supra* note 1, art. 4.

Finally, a cautionary observation regarding the aforementioned balloon-squeezing effect: as noted above, the habeas jurisprudence quite possibly will have spillover effects for AUMF-based detention operations in Afghanistan—effects that most likely would find expression in the form of additional constraints on detention authority.[654] This implicates the balloon-squeezing dynamic in that the military, as a result of such spillover effects, may be incentivized to opt for lethal force over capture when both options lawfully are available—though, if the spillover effect extends to targeting, this may not be an option either. Alternatively, the spillover effects may serve further to incentivize resort to still another alternative method of incapacitation: Afghan custody, whether on a proxy basis or as a genuinely independent detention system. Certainly there already is great interest in shifting to just such an approach.[655] Whether this is in detainees' interest is a difficult question.[656]

2. On the Increasing Significance of Domestic Courts for LOAC

The habeas litigation also offers lessons having to do more specifically with the legal regulation of military activity and the state's pursuit of its national security interests. First, it illustrates an important variation of an otherwise well-recognized trend having to do with the development of LOAC: the role of judicial institutions as mechanisms, not just to enforce LOAC, but to contribute in substantial ways to LOAC's ongoing development.[657] In this sense, courts have to some extent supplanted, or at least have emerged as an institutional rival to, treaty making. This is particularly important with respect to issues such as detention authority, where differences in interests and views among potential treaty partners is sufficiently broad so as to suggest that further treaty making is relatively unlikely in the near or mid terms. In that setting, the existence of an alternative mechanism for law development—a safety valve of sorts—matters a great deal.

The variation on this trend illustrated by the habeas litigation is the utility of *domestic* courts—including lower domestic courts—toward this end. In the recent past the International Criminal Tribunal for Yu-

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[654] *See supra* note 212 and accompanying text.

[655] *See* WITTES, *supra* note 7, at 5–7.

[656] *See id.*

[657] *See al-Marri II*, 534 F.3d at 315–19 (Wilkinson, J., concurring in part and dissenting in part); *Gherebi*, 609 F. Supp. 2d at 55–66.

goslavia played an important role in developing LOAC,[658] and the International Criminal Court may yet do the same in the future. The ICTY will not serve that role going forward, however, and it remains to be seen how much of this role the ICC actually will play. In the meantime, domestic courts at times can take up the task, and in this instance they have done just that.[659]

To be sure, the habeas litigation has not always treated LOAC as relevant.[660] Indeed, for a brief period the original *al-Bihani* opinion appeared to hold quite to the contrary.[661] But that aspect of *al-Bihani* is no longer with us,[662] and in any event the decisions prior to that point had frequently prioritized LOAC in their analyses.[663] Judge Walton's *Gherebi* opinion provides a prime example, as do the various opinions by the Fourth Circuit in *al-Marri* (above all that of Judge Wilkinson, which expressly embraced the task of developing and adapting the law to changing circumstances).[664] In these cases and others, the judiciary for better or worse has engaged with some of the most significant and deeply contested concepts in LOAC, including meta-questions regarding LOAC's field of application and more focused questions regarding such controversies as the precise meaning of DPH.[665] The habeas litigation in this respect is a reminder that we must look as much to the domestic courtroom as to the halls of diplomacy or the chambers of international tribunals in order to stay current with LOAC's development.

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[658] *See, e.g.*, Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 111–127 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

[659] *Cf.* David Weissbrodt & Nathaniel H. Nesbitt, *The Role of the United States Supreme Court in Interpreting and Developing Humanitarian Law* 4 (Univ. of Mich. Law Sch. Legal Studies Research Paper Series, Paper No. 10-31, 2010), *available at* http://ssrn.com/abstract=1615224.

[660] *See al-Bihani*, 590 F.3d at 871–72.

[661] *Id.*

[662] Al-Bihani v. Obama, 619 F.3d 1, 1 (D.C. Cir. 2010), *cert. denied*, No. 10-7814, 2011 WL 1225807 (U.S. Apr. 4, 2011).

[663] *See, e.g.*, *al-Marri II*, 534 F.3d at 315–19 (Wilkinson, J., concurring in part and dissenting in part); *Gherebi*, 609 F. Supp. 2d at 55–66.

[664] *See al-Marri II*, 534 F.3d at 315–19 (Wilkinson, J., concurring in part and dissenting in part); *Gherebi*, 609 F. Supp. 2d at 55–66.

[665] *See, e.g.*, *al-Marri II*, 534 F.3d at 315–19 (Wilkinson, J., concurring in part and dissenting in part); *Gherebi*, 609 F. Supp. 2d at 55–66.

### 3. On the Increasing Significance of Domestic Law Governing Military Activity

The other trend illustrated by the habeas litigation is related. It involves the increasing significance of domestic law itself—not just domestic judicial institutions—as a component of the legal architecture of the use of military force in the transnational setting.[666] Indeed, a careful observer of the habeas litigation could fairly conclude that domestic law matters as much or more as LOAC (and certainly more than IHRL, was has played virtually no role at all in the litigation).

On this view, the Guantanamo detention cases tell us something important about the bodies of law most relevant to the regulation of military operations, at least insofar as the United States is concerned. This not an unfamiliar question; scholars have grappled extensively with the question of priority among competing bodies of law in this setting.[667] In most instances, however, the competition is between contending bodies of international law: LOAC on one hand, and IHRL on the other.[668] At one level, the Guantanamo cases can be seen as taking the side of LOAC in this dispute. The decisions never speak of IHRL, let alone accord it any significance, while at least some of the judges—along with the Obama administration—are at pains to assert the relevance of LOAC to the analysis.[669] But as noted above, domestic law has come to play the dominant substantive role notwithstanding these references to LOAC—indeed, notwithstanding the relative lack of domestic materials on point.[670] Domestic law has not so much been the vehicle through which LOAC has displaced IHRL as it has been a third force supplanting analysis under both bodies of international law.[671] This trend resonates with larger trends in American law involving resistance to international and comparative law as rules of decision in American courts;[672] moreover, and hence, we should not be entirely surprised to see it now or going forward.

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[666] *See* Milanović, *supra* note 97, at 461, 467–68.

[667] *See id.*

[668] *See generally, e.g.*, Alexander Orakhelashvili, *The Interaction Between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?*, 19 Eur. J. Int'l L. 161 (2008).

[669] *See Gherebi*, 616 F. Supp. 2d at 55–56, 65–67.

[670] *See supra* notes 72–77 and accompanying text.

[671] *Cf. Gherebi*, 616 F. Supp. 2d at 62, 68 (looking to LOAC principles to for guidance in interpreting the AUMF).

[672] *See* G. Brinton Lucas, *Structural Exceptionalism and Comparative Constitutional Law*, 96 Va. L. Rev. 1965, 1965–66 (2010).

## Conclusion

We lack consensus regarding who lawfully may be held in military custody in the contexts that matter most to U.S. 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 U.S. 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 case law 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 U.S.-controlled military detainees continues to exist, and will 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.

## Appendix

| **Table 1: Hamdi v. Rumsfeld, 542 U.S. 507 (2004)** | |
|---|---|
| Past Conduct | n/a |
| Associational Status | Yes – Taliban member who bore arms on the battlefield. |
| Collateral Utility | Not permitted. |
| Citizenship | Not relevant. |
| Passage of Time | n/a |
| Location of Capture | Unclear. At the least, capture on a conventional battlefield. |
| Criminal Prosecution Alternative | n/a |
| Future Dangerousness | n/a |

| **Table 2: Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002)** | |
|---|---|
| Past Conduct | Unclear. |
| Associational Status | Unclear. |
| Collateral Utility | n/a |
| Citizenship | Not relevant. |
| Passage of Time | n/a |
| Location of Capture | No geographic limits. |
| Criminal Prosecution Alternative | n/a |
| Future Dangerousness | n/a |

| **Table 3: Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003)** | |
|---|---|
| Past Conduct | n/a |
| Associational Status | n/a |
| Collateral Utility | n/a |
| Citizenship | U.S. citizenship, at least when combined with capture in the United States, requires a clear statement of detention authority from Congress. |
| Passage of Time | n/a |
| Location of Capture | Capture in the United States, at least when combined with U.S. citizenship, requires a clear statement of detention authority from Congress. |
| Criminal Prosecution Alternative | n/a |
| Future Dangerousness | n/a |

| **Table 4: Padilla v. Hanft, 389 F. Supp. 2d 678 (D.S.C. 2005)** | |
|---|---|
| Past Conduct | Unclear. |
| Associational Status | Unclear. |
| Collateral Utility | n/a |
| Citizenship | U.S. citizenship, at least when combined with capture in the United States, requires a clear statement of detention authority from Congress. |
| Passage of Time | n/a |
| Location of Capture | Capture in the United States, at least when combined with U.S. citizenship, requires a clear statement of detention authority from Congress. |
| Criminal Prosecution Alternative | Detention is not "necessary" if prosecution is available. |
| Future Dangerousness | n/a |

| **Table 5: Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005)** | |
|---|---|
| Past Conduct | n/a |
| Associational Status | Yes – at least where the person was a member of an armed unit serving the Taliban. |
| Collateral Utility | n/a |
| Citizenship | Not relevant. |
| Passage of Time | n/a |
| Location of Capture | Not relevant, even if captured in the United States. |
| Criminal Prosecution Alternative | n/a |
| Future Dangerousness | n/a |

| **Table 6: Al-Marri v. Hanft, 378 F. Supp. 2d 673 (D.S.C. 2005)** | |
|---|---|
| Past Conduct | n/a |
| Associational Status | Yes – al Qaeda membership suffices irrespective of whether the person had been on the battlefield. |
| Collateral Utility | Not permitted. |
| Citizenship | Noncitizens—even those lawfully present in the United States—are not protected to the same extent as citizens. |
| Passage of Time | n/a |
| Location of Capture | Irrelevant, at least when dealing with noncitizens. |
| Criminal Prosecution Alternative | Irrelevant, at least when dealing with noncitizens. |
| Future Dangerousness | n/a |

| **Table 7: Al-Marri v. Wright, 487 F.3d. 160 (4th Cir. 2007) (panel)** | |
|---|---|
| Past Conduct | Participation in planning for a terrorist attack does not suffice. |
| Associational Status | Mere membership in al Qaeda does not suffice. Membership in the armed forces of a nation-state is necessary. |
| Collateral Utility | Not permitted. |
| Citizenship | Not relevant. |

| **Table 8: Al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008) (en banc)** | | | | |
|---|---|---|---|---|
| Opinion | Motz, J. (plurality) | Traxler, J. | Williams, C.J. | Wilkinson, J. |
| Past Conduct | Participation in planning for a terrorist attack does not suffice. | n/a | Must engage or attempt to engage in a belligerent act (including plotting terrorist attacks in the U.S.). | Must engage directly in hostilities or in preliminary steps. |
| Associational Status | Mere membership in al Qaeda does not suffice. Membership in a nation-state's armed forces is necessary. | Membership in al Qaeda can suffice; not necessary to show connection to a nation-state's military. | n/a | Must be a member of an AUMF-covered organization or nation. |
| Collateral Utility | Not permitted. | n/a | n/a | n/a |
| Citizenship | Not relevant. | n/a | n/a | n/a |
| Passage of Time | n/a | n/a | n/a | n/a |
| Location of Capture | n/a | Capture in the United States not an obstacle. | Capture in the United States not an obstacle, but end of hostilities in Afghanistan might terminate authority. | Capture in the United States not an obstacle. |
| Criminal Prosecution Alt. | n/a | Not relevant. | Not relevant. | Not relevant. |
| Future Dangerousness | n/a | n/a | n/a | n/a |

| **Table 9: *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005)** | |
|---|---|
| Past Conduct | Must have participated in some way in violent activities. |
| Associational Status | Fifth Amendment forbids use of membership alone as a criterion. |

| **Table 10: Decisions Concerning Future Dangerousness** | | | | |
|---|---|---|---|---|
| Case | Basardh v. Obama, 612 F. Supp. 2d 30 (D.D.C. 2009) | Awad v. Obama, 646 F. Supp. 2d 20 (D.D.C. 2009) | Anam v. Obama, 696 F.Supp. 2d 1 (D.D.C. 2010) | Awad v. Obama, 608 F.3d 1 (D.C. Cir. 2010) |
| Future Dangerousness | Detention not permitted if detainee would not "rejoin the battle" if released. | Expressly rejecting a future dangerousness test. | Expressly rejecting a future dangerousness test. | Expressly rejecting a future dangerousness test. |

| **Table 11: Boumediene v. Bush, 583 F. Supp. 2d 133 (D.D.C. 2008) (Leon, J.)** | |
|---|---|
| Past Conduct | Independent support is a sufficient condition. |
| Associational Status | Membership is a sufficient condition. |

| **Table 12: Gherebi v. Obama, 609 F. Supp. 2d 43 (D.D.C. 2009) (Walton, J.)** | |
|---|---|
| Past Conduct | Rejects independent support as a sufficient condition. |
| Associational Status | Membership in the military chain of command of an AUMF-covered group is a necessary condition. |

| **Table 13: Hamlily v. Obama, 616 F. Supp. 2d 63 (D.D.C. 2009) (Bates, J.)** | |
|---|---|
| Past Conduct | Rejects independent support as a sufficient condition, but notes support may be proof of functional membership. |
| Associational Status | Membership in the chain of command of an AUMF-covered group is a necessary condition. |

| **Table 14: Hatim v. Obama, 677 F. Supp. 2d 1 (D.D.C. 2009) (Urbina, J.)** | |
|---|---|
| Past Conduct | Rejects independent support as a sufficient condition. |
| Associational Status | Membership in the chain of command of an AUMF-covered group, illustrated by actual obedience to orders in particular instance, is a necessary condition. |

| **Table 15: Al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010) (panel)** | |
|---|---|
| Past Conduct | Independent support is a sufficient condition. |
| Associational Status | Membership is a sufficient condition, does not require participation in a chain of command, and might be proven by attending a training camp or staying at a guesthouse. |

| **Table 16: Awad and Barhoumi** | | |
|---|---|---|
| Case | Awad v. Obama, 608 F.3d 1 (D.C. Cir. 2010) (panel) | Barhoumi, 609 F.3d 416 (D.C. Cir. 2010) (panel) |
| Associational Status | Membership is a sufficient condition, does not require participation in a chain of command. | Membership is a sufficient condition, and participation in a chain of command is a sufficient but not necessary condition to prove membership |

| **Table 17: al Odah, al-Adahi, and Salahi** | | | |
|---|---|---|---|
| Case | al Odah v. United States, 611 F.3d 8 (D.C. Cir. 2010) (panel) | Al-Adahi v. Obama, 613 F.3d 1102 (D.C. Cir. 2010) (panel) | Salahi v. Obama, 625 F.3d 745 (D.C. Cir. 2010) (panel) |
| Associational Status | Membership is a sufficient condition, and training camp attendance might suffice to prove it. | Membership is a sufficient condition, and both training camp attendance and staying at a guesthouse might suffice to prove it. | Membership is a sufficient condition. |
| Location of Capture | n/a | n/a | Location of capture or conduct not relevant. |