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ANYONE A POTENTIAL SUSPECT, ANYWHERE IN THE WORLD: WHY THE COUNTERNERRORISM PROVISIONS IN THE NATIONAL DEFENSE AUTHORIZATION ACT OF 2012 EVIDENCE AMERICA’S DECISION TO MAKE ITS VALUES SUBSERVIENT TO ITS SECURITY

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BY: JAMES R. DICKINSON

SEMINAR ON CONSTITUTIONAL ISSUES
PROFESSOR CHARLES DOSKOW
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The statement of authority to detain [in the National Defense Authorization Act of 2012] . . . applies to American citizens and it designates the world as the battlefield, including the homeland. . . . An American citizen can be held by our military as an enemy combatant, even if they are caught here in the United States. . . . It is not unfair to . . . hold American citizens as long as it takes to find intelligence. When they say, ‘I want my lawyer,’ you tell them, ‘Shut up! You don’t get a lawyer. You’re an enemy combatant.’\(^1\)

— Senator Lindsey Graham

**INTRODUCTION**

Attorney Joshua Colangelo-Bryan walked into a room where Jumah al-Dossari was seated. Al-Dossari, a man of small stature, welcomed Colangelo-Bryan with a big smile, thanking the attorney for coming to visit him. After exchanging pleasantries, the two men started to talk. At the outset of the discussion, Colangelo-Bryan noticed that the prisoner seemed “starved for human contact,” as al-Dossari acted like he had not spoken to anyone for quite some time.\(^2\)

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In the course of conversation, Colangelo-Bryan asked al-Dossari about his experience at Guantanamo Bay. Al-Dossari stated that he lived in solitary confinement and, during his time at the Base, had been subjected to mental and physical abuse. Although Colangelo-Bryan was naturally skeptical of the report, he could not help but feel sympathy for the detainee. When the meeting ended, Colangelo-Bryan promised to petition the courts for review of al-Dossari’s case and return with a report as soon as possible.³

After a year of little progress with the case, Colangelo-Bryan returned to Cuba as promised. Colangelo-Bryan again met with al-Dossari. The parties again conversed. After several minutes of dialogue, al-Dossari requested to use the restroom. In response, Colangelo-Bryan called in the military police and left the room. The attorney then waited outside the door of the meeting area.⁴

After waiting for several minutes, Colangelo-Bryan became anxious. Opening the door to check on the status of al-Dossari, the attorney saw a pool of blood and the detainee hanging by his neck from the top of a steel mesh cell

³ Id.
⁴ Id.
accessible from the meeting room. Colangelo-Bryan called in the military police, who took al-Dossari down and wheeled him to the infirmary. Al-Dossari survived the suicide attempt.\(^5\)

A few weeks after the incident, Colangelo-Bryan spoke with al-Dossari. Colangelo-Bryan asked the detainee why he had tried to kill himself. Al-Dossari told the attorney that he wanted to die because life in the Base was so intolerable, that he simply could not take the isolation any longer. The detainee further stated that he wanted Colangelo-Bryan to witness his death because “otherwise nobody would ever know what had happened to him.”\(^6\)

Months after the conversation with al-Dossari, Colangelo-Bryan received word that three Guantanamo detainees had committed suicide. Fortunately for Colangelo-Bryan, his client was not among the three. The attorney however did not hold an expectation that al-Dossari would not join the fate of these men at some point in the future.\(^7\)

\(^5\) Id.
\(^6\) Id.
\(^7\) Id.; Al-Dossari was held at Guantanamo for years without charges, but was finally released to Saudi Arabia in July 2007. He is currently married and employed. Al-Dossari speaks hopefully of the future and speaks conciliatorily about his detention. Jumah al-Dossari & Josh White, I’m Home, But Still Haunted By Guantanamo, The Washington Post (Aug. 17, 2008), http://www.washing
tonpost.com/wpdyn/content/article/2008/08/15/AR2008081502985.html.
Being designated an enemy combatant is arguably the worst thing that can happen to an individual. The designation subjects the person to assassination.\(^8\) It also, as seen above, allows for the detention of the individual, perhaps indefinitely. The same apparently holds true if the person is an American citizen, at least if the citizen is engaged in hostilities on foreign soil.\(^9\)

But what about American citizens whom the military believes support, or are associated with, a terror organization? What is a terror organization? What does it mean to support, or be associated with, such a group? What if American citizens, suspected of supporting terror, are captured overseas, on U.S. soil? Are these citizens subject

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\(^8\) See U.S. To Outline Legal Backing For 'Targeted Kill' Programme, THE GUARDIAN (March 5, 2012), http://www.guardian.co.uk/world/2012/mar/05/us-legal-backing-targeted-kill-programme (stating that the U.S. claims authority to target and kill persons deemed “enemy combatants”).

to indefinite detention? The answers to these questions are simply not clear.

The National Defense Authorization Act of 2012 [NDAA] specifically addresses America’s counterterrorism policy. Proponents of the law argue that the NDAA provides the executive with the tools needed to wage war against terrorists, irrespective of their national origin. Opponents of the NDAA contend that the law allows the military to indefinitely detain American citizens it believes are associated with terrorists, even if these persons are located within the United States. The language of the NDAA unfortunately does little to either resolve the debate or to remove the uncertainty surrounding the scope of the executive’s power to detain.

This uncertainty will not likely be made clear until the NDAA’s counterterrorism provisions are challenged in federal court. Until then, American citizens aware of these provisions will remain concerned. Their concern stems from a realization that if the proponents of the NDAA are correct, America will continue the questionable counterterrorism policies implemented by President Bush and later adopted by the current Administration. But if the law’s opponents are
correct, America will enter into a new phase in the “War on Terror,” in which security decidedly trumps civil liberty.

In either case, the controverted provisions of the NDAA challenge American notions of liberty. This affront is best witnessed by the decision to draft, debate, and pass legislation aimed at thwarting terrorism anywhere in the world, including on U.S. soil. These steps signal that key constitutional rights may be relegated to positions of insignificance.

The NDAA specifically threatens the fundamental right of due process. Although the NDAA may never be interpreted or applied in a manner that will violate this right, such legislation undermines expectations with regard to the right to an attorney, the right to a speedy and public hearing, the right to face one’s accusers, the right to make a defense, the right to be judged by a jury of one’s peers, etc. The NDAA therefore poses problems that can only be solved by adhering to America’s founding values, even in times of relative insecurity.

This comment will advocate for the implementation of proposals that will equip the Commander-in-Chief with the tools necessary to protect the Nation, but that will also
honor America’s most sacred traditions. Part I of the comment will describe the historical precedent to the passage of the NDAA. This section will highlight Congress’s response to terror threats, the power claimed by the executive to detain terror suspects, and the federal court decisions interpreting and defining the detention power post-9/11.

Part II will explain the counterterrorism provisions in the NDAA related to the executive’s detention power. This section will also discuss the passage of the law, including its debate on the floor of the Senate as well as the proposed amendments thereto. Part III will discuss the reaction to the passage of the NDAA from the perspective of congressmen, military experts, journalists, civil liberty organizations, the states, and of course common citizens. Part IV will make observations regarding the law and will highlight certain problems regarding the counterterrorism provisions in the NDAA. It will also propose solutions to these perceived problems. Ultimately, it will be argued that although it is yet unknown how the NDAA’s counterterrorism provisions will be interpreted and applied, the fact that Congress passed, and the President signed, a law that can reasonably be interpreted to allow for the indefinite detention of American
citizens (captured on U.S. soil) without due process of law evidences a troubling shift away from America’s most sacred values. To counteract this shift, Congress should, inter alia, take immediate action to either repeal or properly amend the counterterrorism provisions of the NDAA.

I: HISTORICAL PRECEDENT TO THE PASSAGE OF THE NDAA OF 2012

A. The Bush Administration’s Claimed Power to Detain

On September 11, 2001 [9/11], America realized not only the depravity of its enemies but also how vulnerable it was to terrorist attack. To address the threat, Congress enacted legislation to protect the homeland.¹⁰ Also, taking the offensive, it passed the Authorization for Use of Military Force [AUMF], which expressly authorized the President to use military force against “those responsible for the recent

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attacks launched against the United States."\textsuperscript{11} Pursuant to the powers granted by the AUMF, President George W. Bush ordered the invasion of Afghanistan in October 2001.\textsuperscript{12}

From the date of its enactment, the Bush Administration interpreted the AUMF broadly.\textsuperscript{13} The Administration claimed that the President, as commander-in-chief, retained plenary war powers.\textsuperscript{14} As the Nation became involved in Afghanistan, and later Iraq, questions arose with regard to the executive’s power to detain. The Administration resolved

\begin{itemize}
\item Passed just seven days after the terror attacks of 9/11, the AUMF states: The President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on Sept. 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).
\item See Tyler L. Sparrow, Note, Indefinite Detention After Boumediene: Judicial Trailblazing In Uncharted And Unfamiliar Territory, 44 Suffolk U. L. Rev. 261, 262-63 (2011).
\item See Id.; Jack Goldsmith, Detention, the AUMF, and the Bush Administration-Correcting the Record, LAWFARE (Sept. 14, 2010), http://www.lawfareblog.com/ 2010/09/detention-the-aumf-and-the-bush-administration-correcting-the-record/ (stating the Bush Administration argued that Article II of the Constitution granted the president plenary war powers in its brief to the Fourth Circuit in Padilla v. Hanft, and asserting that this was the position advocated by President Bush throughout his presidency, as it relates to the detention power).
\end{itemize}
these issues by asserting that it had power to detain war prisoners indefinitely, without due process of law.\textsuperscript{15} Its position regarding the military detention of terror suspects is best understood by referencing the case of Yassar Hamdi.

\section{Hamdi v. Rumsfeld}

Yassar Hamdi \textsuperscript{[Hamdi]} was born in Louisiana, but moved to Saudi Arabia as a child.\textsuperscript{16} He later migrated to Afghanistan and became associated with the Taliban forces.\textsuperscript{17} In the fall of 2001, Hamdi was captured by the United States military in Afghanistan.\textsuperscript{18} At that time, the United States classified Hamdi as an enemy combatant.\textsuperscript{19} The military initially

\footnotesize{\textsuperscript{15} The post-9/11 treatment of war prisoners is distinct from America’s treatment of POWs historically. In the “War on Terror,” war prisoners were labeled “enemy combatants.” Based upon this new designation, terror suspects received none of the protections afforded by the laws of war or the Geneva Conventions. Ghoshray, supra note 10, at 255-56 (highlighting the distinction between the treatment of POWs and enemy combatants and stating that the Bush Administration’s detention policy was first to captured, then to interrogate, and then, if necessary, to subject prisoners to extraordinary rendition); Williams, supra note 10, at 45-47 (stating that the Bush Administration used the newly created status of “enemy combatant” to justified extraordinary rendition).\textsuperscript{16} Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004).\textsuperscript{17} Id.\textsuperscript{18} Id.\textsuperscript{19} Id. As stated, the designation “enemy combatant” was used instead of “prisoner of war” because the Bush Administration attempted to avoid the restrictions imposed by the Geneva Conventions and the laws of war against indefinite detention and extraordinary rendition. Michael C. Dorf, What Is An Unlawful Combatant, And Why It Matters: The Status of Detain Al Qaeda And Taliban Fighters, FINDLAW (Jan. 23, 2002), http://writ.news.}
interrogated and detained him in Afghanistan, but eventually transferred Hamdi to the Guantanamo Bay Naval Base.\footnote{20}

In June 2002, Hamdi’s father filed a \textit{habeas} petition in federal court on behalf of his son.\footnote{21} The district court ruled that the father had standing to bring the claim.\footnote{22} In response, the Bush Administration argued that Hamdi was an enemy combatant and should therefore be denied access to the courts.\footnote{23} It further argued that Hamdi’s detention, like that of other enemy combatants, was necessary to maintain U.S. security.\footnote{24}

Although the lower court rejected the Administration’s arguments, the Fourth Circuit reached a different conclusion.

\begin{itemize}
\item findlaw.com/dorf/20020123.html. It should also noted that the Bush Administration strongly supported the Military Commission Act of 2006, which officially made a distinction between “lawful” and “unlawful” enemy combatants. Hamdi, along with all terror suspects, fell into the latter definition and accordingly received none of the protections afforded by the U.S. Constitution or International Law. \textit{See Military Commissions Act of 2006, Pub. L. No. 109-366}, 120 Stat. 2600 (2006).
\item Williams, \textit{supra} note 10, at 47.
\item Id.
\item Id. at 532-33.
\item Id. By detaining Hamdi without personal access to the courts, President Bush argued that he was protecting America from future attack. In its brief to the Fourth Circuit, the Bush Administration argued: “The challenged exercise of authority falls within the President’s core war powers, comes with the statutory authorization of Congress, and directly implicates vital national security interests in defending the Nation against an unprincipled, unconventional, and savage enemy.” Goldsmith, \textit{supra} note 14.
\end{itemize}
The Fourth Circuit held that Article II and the AUMF granted the executive power to detain persons like Hamdi.\textsuperscript{25} On appeal, the Supreme Court took a middle road.

In \textit{Hamdi v. Rumsfeld}, the Court held that the AUMF permitted the military to detain enemy combatants, provided that the individual was captured in a foreign theater and the detention lasted no longer than the duration of hostilities.\textsuperscript{26} Even so, the Court held that detainees were entitled to basic due process rights.\textsuperscript{27} The Court ruled that

\textsuperscript{25} \textit{Hamdi v. Rumsfeld}, 316 F.3d 450, 463-64 (4th Cir. 2003).
\textsuperscript{26} The Court unequivocally stated: “We agree with the Government’s position that Congress has in fact authorized Hamdi’s detention through the AUMF.” The Court however made it clear that the detention of Hamdi was permissible on the ground that he was engaged in acts of war against the United States in a foreign theater. The Court further emphasized that, under the Geneva Conventions and other international war treaties, military detention must end at the cessation of hostilities. The Court held therefore that detention, in the name of protecting American citizens, must not be without end. \textit{Hamdi v. Rumsfeld}, 542 U.S. 507, 517-20 (2004). On this point, Senator Feinstein stated, in the senate debate regarding the NDAA’s counterterrorism provisions, “To the extent the Hamdi case permits the government to detain a U.S. citizen until the end of hostilities, it does so only under a very limited set of circumstances; namely, citizens taking an active part in hostilities who are captured in Afghanistan and who are afforded certain due process protections, at a minimum.” Raffaela Wakeman, \textit{Senate Debate on the NDAA Conference Report}, LAWFARE (Dec. 19, 2011), http://www.lawfareblog.com/2011/12/senate-debate-on-the-ndaa-conference-report/.
\textsuperscript{27} In \textit{Rasul v. Bush}, 542 U.S. 466, 480 (2004), a case decided the same day as \textit{Hamdi}, the Court stated that basic due process rights extend to all detainees, irrespective of citizenship. According to Justice O’Connor, the detainees were entitled to receive notice.
terror suspects had the right to be apprised of the charges against them and to challenge their detention. The U.S. military released Hamdi without charge in October 2004.\(^{28}\)

2. **Rumsfeld v. Padilla**

Unlike Hamdi, Jose Padilla [Padilla] was not captured in a foreign theater; rather, Padilla was arrested in Chicago in May 2002 on suspicion that he was connected with the terror attacks of 9/11.\(^{29}\) President Bush immediately classified Padilla as an enemy combatant.\(^{30}\) The U.S. military then transported Padilla, a U.S. citizen, to a naval brig in South of the charges levied against them. They were also permitted to obtain a hearing with regard to their status as enemy combatants.\(^{28}\) See Jerry Markon, *U.S. To Free Hamdi, Send Him Home*, *The Washington Post* (Sept. 23, 2004), http://www.washingtonpost.com/wp-dyn/articles/A42198-2004Sep22.html (stating that the U.S. made a deal with Saudi Arabia to release Hamdi after three years of detention without charge). See Ghosray, supra note 10, at 265-68 (chronicling three individuals who were held for multiple years without charge but were finally released); Ulysses S. Smith, Note, ‘More Ours Than Theirs’: The Uighurs, Indefinite Detention, and the Constitution, 40 CORNELL INT’L L.J. 265, 267-70 (2007) (highlighting members of nomadic ethnic group who were captured in Pakistan and shipped to Guantanamo Bay where they were held without charge for a number of years).


\(^{30}\) Doskow, supra note 29, at 202.
Carolina where he was held in solitary confinement without charge or personal access to the courts.\textsuperscript{31}

On his behalf, Padilla’s attorney filed a \textit{habeus} petition.\textsuperscript{32} This petition led to ten separate cases discussing the constitutionality of Padilla’s detention.\textsuperscript{33} In each case, the Bush Administration argued that Padilla’s detention was lawful on the basis that “once an individual engage[s] in armed conflict as part of [an] enemy force[, he is subject to preventive detention as an enemy combatant during the pendency of the relevant conflict.”\textsuperscript{34} It further argued that affording Padilla access to an attorney, for purposes other than the filing of a \textit{habeas} petition, would prevent the United States from gathering intelligence and would therefore frustrate the war effort.\textsuperscript{35} Finally, the

\textsuperscript{31} Doskow, \textit{supra} note 29, at 202-03 (stating Padilla was initially granted an attorney but was denied personal access to the courts in June 2002 when the Bush Administration labeled Padilla an enemy combatant and moved him from New York to a naval prison in South Carolina).
\textsuperscript{32} Doskow, \textit{supra} note 29, at 202-05.
\textsuperscript{33} See Doskow, \textit{supra} note 29, at 202-22 (chronicling each of the Padilla cases in detail).
\textsuperscript{34} Goldsmith, \textit{supra} note 14 (quoting the government’s brief to the Fourth Circuit in 2005 and indicating that it represented the Bush Administration’s position regarding Padilla’s detention).
\textsuperscript{35} Richard Raimond, Comment, \textit{The Role Of Indefinite Detention In Antiterrorism Legislation}, 54 U. Kan. L. Rev. 515, 528-29 (2006) (“The government did not try to argue, however, that Padilla had no right to a habeas petition. Instead it argued that ‘affording
Administration argued that the mere fact Padilla was captured within the United States did not afford him greater protections than persons captured in foreign theaters, such as persons like Hamdi.36

The first court to hear Padilla’s petition sided with the Administration and held that the President had the power to detain enemy combatants, irrespective of their citizenship or place of capture, until the end of hostilities.37 This ruling was subject to the caveat that detainees were to be provided with an opportunity to challenge their detention in federal court.38

Padilla access to counsel would jeopardize the two core purposes of detaining enemy combatants- gathering intelligence about the enemy, and preventing the detainee from aiding in any further attack against America.’”). The Bush Administration however was willing to concede that the appointment of an attorney, for the limited purpose of filing a habeas petition, was permissible. Id. During Padilla’s three and a half years in detention, the Bush Administration gathered extensive information from him, apparently through the use of advanced interrogation techniques. See Stephanie Cooper Blum, The Why And How Of Preventive Detention In The War On Terror, 26 T.M. COOLEY L. REV. 51, 66 (2009).

36 Goldsmith, supra note 14 (stating that the Bush Administration further argued that “[l]ong-accepted principles of the laws of war confirm that Padilla’s detention is justified by his hostile acts abroad and that there is no legitimate basis for distinguishing between [Padilla] and Hamdi for purposes of the President’s authority to detain”).


38 Id. at 599-605.
On appeal, the Second Circuit held that the President lacked constitutional authority to hold enemy combatants outside of the “zone of combat.”[^39] The Second Circuit interpreted the AUMF more narrowly than did the Bush Administration, stating: “[T]here is no reason to . . . believe [the AUMF] authoriz[ed] the detention of an American citizen already held in a federal correctional institution and not ‘arrayed against our troops’ in the field of battle.”[^40] The Second Circuit therefore disallowed Padilla’s military detention.[^41] The Government appealed the Second Circuit decision to the Supreme Court.[^42]

After a series of procedural rulings, Padilla’s case was re-filed in the Fourth Circuit. The case eventually reached the Court of Appeals, which came to the opposite conclusion to that of the Second Circuit.[^43] The Fourth Circuit held that the AUMF empowered the President to detain Padilla until “the conflict with al-Qaeda” ceases.[^44] Prior to the Supreme Court hearing the case, Padilla was transferred to the

[^39]: Padilla v. Rumsfeld, 352 F.3d 695, 698 (2nd Cir. 2003).
[^40]: Id. at 723.
[^41]: Id.
[^44]: Id.
custody of the Justice Department to face trial in civilian court. In 2007, Padilla was convicted of conspiring to commit murder and of providing material support to terrorists; he was sentenced to prison for a term of seventeen years.

3. The Detainee Treatment Act of 2005 & Hamdan v. Rumsfeld

In the wake of Hamdi and Padilla, Congress passed the Detainee Treatment Act [DTA]. The DTA removed jurisdictions from the federal courts with regard to hearing habeas petitions brought by Guantanamo detainees, and vested this authority solely in the District of Columbia Circuit. President Bush praised the law as an effective means of ensuring American security. Pursuant to the AUMF and the

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47 Sparrow, supra note 13, at 269-71 (stating Congress passed the DTA in December 2005 to address issues raised with regard to the military detention of terror suspects).
DTA, the Bush Administration proceeded to establish military tribunals to try enemy combatant detainees.\textsuperscript{50}

In 2006, the Supreme Court, in \textit{Hamdan v. Rumsfeld}, invalidated the portion of the DTA removing federal jurisdiction over Guantanamo habeas petitions.\textsuperscript{51} The Court also rejected the Bush Administration’s argument that the AUMF and the DTA permitted the creation of military tribunals to try terror suspects.\textsuperscript{52} Furthermore, the Court chastised the Administration for violating the Geneva Conventions and the laws of war by subjecting Guantanamo detainees to various forms of inhumane treatment.\textsuperscript{53}

\begin{flushleft}
archives.gov/news/releases/2005/12/print/20051230-8.html (praising the DTA for providing the executive with the tools necessary to “protect the American people from further terrorist attack”).
\end{flushleft}


\textsuperscript{51} Sparrow, supra note 13, at 270-71; \textit{Hamdan}, 548 U.S. at 579-93.

\textsuperscript{52} \textit{Hamdan}, 548 at 594-95.

\textsuperscript{53} Id. at 626-35.

Responding to Hamdan, Congress passed the Military Commissions Act of 2006 [MCA]. The MCA established military tribunals for the sole purpose of processing the cases of enemy combatants. By so doing, the MCA again removed federal jurisdiction over detainee habeas claims. Additionally, the terms of the MCA disallowed appeals to the laws of war and the Geneva Conventions by detainees seeking relief thereunder. Moreover, the MCA broadly defined enemy combatants as “anyone engaged in hostilities or who has purposefully and materially supported hostilities against the United States.”

Despite the Bush Administration’s support of the MCA, the Supreme Court, in 2008, invalidated the law in Boumediene

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54 Sparrow, supra note 13, at 270-71.
58 Id.; Bill Goodman, Challenging the Military Commissions Act, JURIST (Oct. 4, 2006), http://jurist.law.pitt.edu/hotline/2006/10/challenging-military-commissions-act.php (musing whether the executive could apply the MCA to anyone associated, however loosely, not only with terrorists but with any enemy of the United States).
v. Bush.\textsuperscript{59} The Court held that the Constitution guarantees the right of \textit{habeas corpus} to citizens and other persons within the jurisdiction of the federal courts.\textsuperscript{60} As the Naval Base at Guantanamo Bay is owned and operated by the United States, the Court held that the Base is within the jurisdiction of the federal courts, and, as such, the detainees were entitled to certain fundamental rights.\textsuperscript{61}

The Court further stated that if Congress intends to suspend the right of \textit{habeas corpus} as it applies to enemy combatant, it must ensure that an adequate substitute exists through which detainees are provided with notice and an opportunity to be heard before a neutral official.\textsuperscript{62} Because the MCA did not adequately provide these basic rights, the Court invalidated the law.\textsuperscript{63} Moreover, the \textit{Boumediene} Court held that Guantanamo detainees had a constitutional right to petition the federal courts for relief. By so holding, the Court implied that the rights afforded by a system of

\begin{footnotesize}
\begin{enumerate}
\item Sparrow, supra note 13, at 273-74.
\item Boumediene, 553 U.S. at 723, 771-73.
\item Id. at 771.
\item Id. at 771-73, 793-98.
\item Id. at 787-92.
\end{enumerate}
\end{footnotesize}
military tribunals did not provide an adequate substitute to the due process rights guaranteed under the Constitution.  

_Boumediene_ highlights the Bush Administration’s attempt to test the constitutional boundaries of detaining terror suspects. Although the Supreme Court limited the Administration’s interpretation of the AUMF, it pushed ahead with plans to detain enemy combatants without preserving basic due process rights. Despite setback, the Administration, claiming authority under the AUMF, DTA, and MCA, continued to hold persons without charge, and without the ability to challenge their status, through 2008.  

**B. The Obama Administration’s Claimed Power to Detain**

On January 11, 2012, Washington D.C. was inundated with individuals protesting the tenth anniversary of the opening of the Guantanamo Bay prison.  

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64 _Id._ at 771-73, 793-98; See Sparrow, _supra_ note 13, at 273 (highlighting the Court’s unwillingness to find military tribunals an adequate procedural substitute to the federal courts).

65 The military detained a number of persons without charge until the end of the Bush presidency. See, _e.g._, Smith, _supra_ note 28, at 269-72 (highlighting the detention of Uighurs, members of Chinese nomadic tribe held in Guantanamo from 2001 to at least 2007 without charge); Sparrow, _supra_ note 13, at 273 (highlighting the six _Boumediene_ defendants who were held without charge until 2008 when five of the six defendants were released).

was the Obama Administration, which had failed to keep its promise to close the prison in early 2009. As a corollary to closing Gitmo, the Administration planned to try high profile terror suspects, such as Khalid Sheikh Mohammed, in civilian courts. Both promises however failed together.

In lieu of civilian trials, the Obama Administration unsuccessfully sought alternatives. Although President Obama did not initially adopt the position of his predecessor, he eventually retreated to a similar place. President Obama now argues that indefinite detention and the use of military tribunals are justified, citing authority under the AUMF.

67 See Id.

68 See KSM Hits Manhattan, Again, WALL STREET JOURNAL (Nov. 14, 2009), http://online.wsj.com/article/SB10001424052748703683804574533622533459520.html (highlighting President Obama’s promise to try 9/11 suspects in federal court). Although the promise to try high profile suspects, such as Khalid Sheikh Mohammed, has proven unsuccessful, civilian courts have been used successfully to try hundreds of terror suspects since 9/11 (see infra Part IV).


70 Goldsmith, supra note 14 (“It is now well known that the Obama administration has embraced almost all of the Bush administration’s counterterrorism policies without substantial modification. One such policy is military detention without trial.”).

71 See Goldsmith, supra note 14. It should be noted that although the counterterrorism provisions of the NDAA have not been
1. *In Re: Guantanamo Bay Detainee Litigation*

In response to habeas briefs filed by Guantanamo detainees, the Department of Justice set forth its justification for the continued detention of enemy combatants at Guantanamo Bay in March 2009.\(^{72}\) In a legal memorandum, the Department argued that the AUMF grants the executive power to detain the imprisoned petitioners. It also stated however that the detention of terror suspects would be guided by “the principles of the laws of war.”\(^{73}\) The Department cited the Geneva Conventions and customary international law as examples of the laws of war.\(^{74}\) The Obama Administration’s reliance upon international war treaties signaled a significant departure from the language in the MCA of 2006 and the Bush Administration’s interpretation of the AUMF.\(^{75}\)

Despite intriguing allusions to the Geneva Conventions and the laws of war, the Department went on to argue that the AUMF authorized the prolonged detention of enemy

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\(^{73}\) Id.

\(^{74}\) Id.

\(^{75}\) See infra Part I.
combatants. It stated that the detainees could be held, as a legitimate means of protecting national security, until the end of hostilities. The Department continued by providing reasons why the laws of war do not specifically apply to the Guantanamo detainees. Finally, the Department assured the court that the Administration was reviewing the issues related to prospective detention, and that it would set forth its policy in short order.

2. The Military Commissions Act of 2009

Following In Re: Guantanamo Bay Detainee Litigation, the Obama Administration decided to revive military tribunals in processing the cases of detainees. Accordingly, in October 2009, President Obama signed the Military Commissions Act of

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76 Brief of Respondent, In Re: Guantanamo Bay Detainee Litigation, No. 08-442 (D.D.C. March 13, 2009).
77 Id.
2009 [MCA of 2009]. Unlike its predecessor, the MCA of 2009 did not attempt to remove federal jurisdiction over habeas petition. It attempted rather to create a system in which detainees received limited due process rights, as required by *Hamdi* and *Boumediene*. Further, the MCA of 2009 allowed detainees to challenge their status as enemy combatants before a military tribunal.

Although certain rights were extended to Guantanamo detainees under the MCA of 2009, many fundamental due process rights were not extended. Detainees were not granted, *inter alia*, the right to a jury trial, confrontation privileges, or obviously to a speedy and public hearing. Additionally, despite rhetoric with regard to extending rights to detainees under the Geneva Conventions and the laws of war, the MCA of 2009 specifically precludes these provisions from granting to enemy combatants substantive legal rights. The MCA of 2009

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81 Id.
82 Id.
84 Id.
85 Id. (stating the standards of treatment for detainees, as set forth in the Geneva Conventions, are to be used by military personnel as guidelines and should not be understood as creating substantive rights); Joanne Mariner, *A First Look At The Military Commissions Act of 2009, Part Three*, FINDLAW (Dec. 29, 2009), http://writ.news.findlaw.com/mariner/20091229.html (decrying the
therefore differs from its 2006 version only in a very limited sense, and thus likely contains similar constitutional infirmities.\textsuperscript{86}

3. The NDAA of 2012

In the fall of 2011, the Obama Administration threatened to veto the NDAA on the ground that the bill posed significant threats to civil liberty.\textsuperscript{87} Despite this rhetoric, the White House insisted upon the inclusion of perhaps the bill’s most controversial provision.\textsuperscript{88} As such, it was not surprising that President Obama signed the NDAA in December 2011.\textsuperscript{89} After signing the law, President Obama

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\textsuperscript{86} Mariner, supra note 85.


\textsuperscript{88} See 157 CONG. REC. S8012 (Nov. 29, 2011) (quoting Senator Levin, who stated that the White House requested that section 1021 (i.e., the detention provision) be included in the NDAA); see also Jonathan Turley, The NDAA’s Historic Assault On American Liberty, THE GUARDIAN (Jan. 2, 2012), (“[T]he White House told citizens that the president would not sign the NDAA because of the [indefinite detention] provision. That spin ended after sponsor Senator Carl Levin went to the floor and discussed that it was the White House [which] insisted that there be no exception for citizens in the indefinite detention provision.”).

\textsuperscript{89} See Andrew Rosenthal, The Sound Of One President Caving, N.Y. TIMES (Dec. 15, 2011), http://loyaloppositionblogs.nytimes.com/2011/12/15/the-sound-of-one-president-caving/ (“For a while, the administration encouraged people to think that President Obama would take a stand against the unnecessary and very dangerous
promised to interpret and implement the offending provisions in a manner consistent with constitutional principles.  

Since 9/11, the executive’s stance toward the detention of enemy combatants has come full circle. Between 2002 and 2005, Americans Yassar Hamdi and Jose Padilla were detained in military custody without personal access to the courts. In Hamdi and its progeny, the Supreme Court interpreted such executive action as violating the Constitution.

To remedy these abuses, the Obama Administration attempted to reverse course. President Obama’s efforts however failed to restore either constitutional due process provision that Congress jammed into the annual National Defense Authorization Act. He threatened to veto the whole bill in order to block new rules that would mandate the military custody of most terrorist suspects, and officially sanction their indefinite detention, without due process of law. Yesterday, the president backed down, completely.”); Mark Landler, After Struggle on Detainees, Obama Signs Defense Bill, N.Y. TIMES (Dec. 31, 2011), http://www.nytimes.com/2012/01/01/us/politics/obama-signs-military-spending-bill.html; Joanne Mariner, The NDAA Explained, VERDICT (Jan. 2, 2012), http://verdict.justia.com/2012/01/02/the-ndaa-explained (arguing that President Obama, due to his signing of the NDAA, is partially responsible for the shift away from traditional constitutional safeguards and toward indefinite detention of terror suspects).  

rights or the protections afforded by the laws of war. Not only is Guantanamo Bay still open, but America now also finds itself back where it was immediately following 9/11, such that with the passage of the NDAA, American citizens are again potential subjects of indefinite military detention.  

PART II: EXPLANATION OF THE NDAA OF 2012

A. Counterterrorism Provisions in the NDAA of 2012

The NDAA is a general defense-spending bill, dealing with provisions relating to almost every aspect of America’s military for fiscal year 2012. The NDAA is diverse, such

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91 See Mariner, supra note 89 (commenting upon the Obama Administration’s willingness to accept Bush-era policies as it relates to indefinite detention, and arguing that the NDAA allows President Obama and future presidents to take terror policies to new lengths by interpreting current policy to allow for military detention of American citizens captured on U.S. soil).

92 The counterterrorism provisions which we will focus on are sections 1021 and 1022 of the NDAA. See National Defense Authorization Act For Fiscal Year of 2012, Pub. L. No. 112-81, 125 Stat. 1298, §§ 1021-22 (2011).

that it discusses military compensation, including health benefits, in proximity to provisions regarding protocols for the use of nuclear weaponry.\textsuperscript{94} In the midst of these provisions is a subdivision titled “Counterterrorism.”\textsuperscript{95} The provisions located in this subdivision have recently sparked debate.\textsuperscript{96} We will focus on sections 1021 and 1022.

With regard to section 1021, subdivision A makes explicit that the President, pursuant to the AUMF, may detain “covered persons” pending disposition pursuant to subdivision C of section 1021.\textsuperscript{97} Before we uncover who are “covered persons” and discuss the law’s disposition scheme, it should be noted that subdivision A unequivocally states that the AUMF grants the executive power to detain.\textsuperscript{98}

\begin{flushleft}
\textsuperscript{95} Id.
\textsuperscript{96} On November 29, 2011, Senator Richard Durbin stated that the counterterrorism provisions related to the detention of terror suspects sparked a heated debate over the passage of the NDAA. 157 CONG. REC. S8012 (Nov. 29, 2011). These controversial provisions inspired the writing of this paper.
To discover who are “covered persons,” we move to subdivision B of section 1021. Here we find that a covered persons includes anyone who “planned, authorized, committed, or aided” in the terror attacks of 9/11. Additionally, any person who “was a part of or substantially supported al-Qaeda, the Taliban, or associated forces,” who “has committed a belligerent act,” or who has aided enemy forces, is also subject to detention under section 1021.

100 Id. As stated infra, human rights groups have voiced concern with regard to the ambiguity of the standard of “cover persons” and its ability to be applied in a subjective, ad hoc manner. See, e.g., The National Defense Authorization Act (NDAA) Of 2012 Information For Concerned Activists, CENTER FOR CONSTITUTIONAL RIGHTS (Winter 2012), available at http://ccrjustice.org/files/NDAA_report_final.pdf (“Under the NDAA people who fit into [this] category[y] may be detained under the law of war, without trial, until the end of hostilities authorized by the AUMF.”). Some high-profile individuals are suing President Obama for signing the NDAA on the ground that the law permits the military to detain anyone who is remotely connected with persons engaged in “hostilities against the United States.” Obama Sued Over Indefinite Detention And Torture of Americans Act, RT (Jan. 17, 2012), http://rt.com/usa/news/obama-hedges-ndaa-sued-933/; see infra Parts III & IV (discussing the ambiguity of the definition of “covered persons” used in sections 1021 & 1022 and the lack of an intent element in these provisions- allowing for the potential application of these provisions to persons who unwittingly support terror organizations or ‘associated forces’).
Subdivision C of section 1021 sets forth four possible options regarding the disposition of detainees. The first provides that detention last until the “end of hostilities.” The second directs that a military tribunal, pursuant to the MCA of 2009, try detainees. The third allows for detainees to be tried in a court “having lawful jurisdiction,” which may include federal courts. The fourth option allows for the transfer of detainees to their country of origin.

The remaining subdivisions in section 1021 provide disclaimers, which appear to be aimed at assuaging fear related to the detention power under the NDAA. Subdivision D states: “Nothing in this section is intended to limit or expand the authority of the President or the scope of the [AUMF].” Subdivision E affirms that the law regarding the

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102 Id.
103 Id.
104 Id.
105 Id.
106 Id. The disclaimer has little meaning, since one of the co-sponsors of the bill, Carl Levin, recently stated: “We make clear that whatever the law is, it is unaffected by this language in our bill.” Charlie Savage, Senate Declines To Clarify Rights Of American Qaeda Suspects Arrested In U.S., N.Y. TIMES (Dec. 1, 2011), http://www.nytimes.com/2011/12/02/us/senate-declines-to-resolve-issue-of-american-qaeda-suspects-arrested-in-us.html
authority to detain United States citizens, captured or arrested in the United States, remains unchanged.  

Turning to section 1022, subdivision A mandates the detention of all “covered persons” who are captured in the course of hostilities authorized by the [AUMF]. The definition of “covered persons,” pursuant to subdivision B, is substantially similar what is listed in section 1021. 

National Defense Authorization Act For Fiscal Year of 2012, Pub. L. No. 112-81, 125 Stat. 1298, § 1021 (2011). It should be noted that despite Senator Levin’s ambivalence as to the nature of current law, certain sponsors of the bill believe that present law allows for the indefinite detention of American citizens arrested on U.S. soil. The disclaimer therefore does little to allay concerns surrounding the passage of the NDAA. [107] 157 CONG. REC. S8012 (Nov. 29, 2011)(quoting Senator Lindsey Graham, who argued that the Fourth Circuit’s Padilla decision is the law of the land, such that the executive has the power to detain American citizens, in military custody, arrested on U.S. soil). Some commentators argue that subdivision E is superfluous, in that it does not prevent the removal, from American citizens, of constitutional protections afforded under the Bill of Rights. They contend that this problem would have been solved if the Senate had adopted either the amendment or the bill proposed by Senator Diane Feinstein. Joanne Mariner, The NDAA Explained, VERDICT (Jan. 2, 2012), http://verdict.justia.com/2012/01/02/the-ndaa-explained. For an explanation of the Feinstein proposals, see immediately below. 


Id. “Covered persons” are defined more broadly in section 1021 than in section 1022, in that section 1021 also applies to those who form part of an “associated force” with Al-Qaeda. “Associated force” is not defined in the NDAA. Id. 

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Subdivision D of section 1022 makes the detention provisions discretionary as applied to United States citizens.\textsuperscript{110}

B. Legislative History of the NDAA of 2012

As stated, the NDAA went through the armed services committees of both the House and the Senate. Following a conference report combining the House and Senate versions of the bill, both chambers of Congress passed the bill. The law however was not without major controversy in the Senate.

In the Senate, Senator Rand Paul took exception with the detention provisions of the bill, alleging that they violate constitutional protections of due process.\textsuperscript{111} Senator Mark Udall echoed similar sentiments and requested that the detention provisions be considered separately from the funding portions of the bill.\textsuperscript{112} Senator Diane Feinstein also

\textsuperscript{110} See \textit{id.}; 157 CONG. REC. S8012 (Nov. 29, 2011).
\textsuperscript{111} 157 CONG. REC. S8012 (Nov. 29, 2011) (quoting Senator Rand Paul, who warns that the NDAA puts “every American at risk,” such that citizens could be subjected to indefinite detention, without due process, on the basis that they are suspected of having some connection with a terrorist organization).
\textsuperscript{112} From the floor of the Senate, Senator Udall stated: Like other challenging issues we face here in the Senate, we should identify the problem, hold hearings, gather input from those affected by our actions, and then seek to find the most prudent solution. Instead, we have language in the bill, which, while well intended--of that there is no doubt--was developed behind closed doors and is being moved rather quickly through our Congress. The Secretary of Defense is warning us we may be making mistakes that will hurt our
took exception to the bill, stating that the detention provisions posed significant threats to civil liberty.\textsuperscript{113}

Stemming from these concerns, the three senators each proposed a slightly different solution to the problems raised by the detention provisions. Senator Paul advocated for scrapping the offending sections entirely.\textsuperscript{114} Senator Udall requested that the counterterrorism provisions form a separate bill, which would be debated independently and given further consideration.\textsuperscript{115} Senator Feinstein advocated for an amendment to the bill.\textsuperscript{116} The Feinstein Amendment would have

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capacity to fight terrorism at home and abroad."
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\textsuperscript{113} \textit{Id.}
\textsuperscript{114} \textit{Id.} (quoting Senator Paul, who argues that America has a history of sacrificing fundamental rights, such as due process of law, when faced with emergency, and that the NDAA is an example of this and should therefore be abandoned).
\textsuperscript{115} \textit{Id.} (quoting Senator Udall, who advocates for reconsideration of the provisions in congressional hearings, in which military leaders would testify as to their needs in fighting the terror threat, as opposed to the purported needs of the military as represented by well-meaning members of Congress).
\textsuperscript{116} The amendment would have changed Section 1021 by adding the word “abroad” after “is captured,” which would have prevented the application of the NDAA against American citizens arrested on U.S. soil. Raffaela Wakeman, \textit{NDAA Senate Debate Part 3: “Hundreds and Hundreds Of Hours of Debate, LAWFARE} (Dec. 1, 2011), \texttt{http://www.lawfareblog.com/2011/12/ndaa-senate-debate-part-3-hundreds-and-hundreds-of-hours-of-debate/}. Senator Feinstein argued that the amendment would provide clarity to the detention provisions of Section 1021, and would require Congress to make a “clear statement” if it chose to detain American citizens in the future. Raffaela Wakeman, \textit{Senate Debate On The NDAA Conference Report, LAWFARE} (Dec. 19, 2011), \texttt{http://www.lawfareblog.com/2011/12/}
altered the language of the bill to forbid the detention of Americans arrested on U.S. soil. The Feinstein Amendment was voted down 45-55; the proposals of Senators Paul and Udall likewise failed.

C. Executive’s Implementation of the NDAA of 2012

On December 31, 2011, President Obama signed the NDAA and provided a statement which indicated his Administration’s commitment to enforce the counterterrorism provisions of the law in accordance with the Constitution. In the signing statement, President Obama declared:

senate-debate-on-the-ndaa-conference-report/. In addition to the amendment, Feinstein proposed the Due Process Guarantee Act of 2011, which stated:

An authorization to use military force, a declaration of war, or any similar authority shall not authorize the detention without charge or trial of a citizen or lawful permanent resident of the United States apprehended in the United States, unless an Act of Congress expressly authorizes such detention.


117 157 CONG. REC. S8012 (Nov. 29, 2011).
119 Statement of President Barak Obama Upon Signing H.R. 1540 (Dec. 31, 2011) (voicing “serious reservations” regarding the constitutionality of the counterterrorism provisions in the bill, especially as it relates to the prospect of indefinite detention of American citizens). For a definition of presidential signing
My Administration will not authorize the indefinite military detention without trial of American citizens. Indeed, I believe that doing so would break with our most important traditions and values as a Nation. My Administration will interpret section 1021 in a manner that ensures that any detention it authorizes complies with the Constitution, the laws of war, and all other applicable law.\footnote{Statement of President Barak Obama Upon Signing H.R. 1540, (Dec. 31, 2011).}

With regard to the mandatory detention provisions of Section 1022, President Obama asserted that these provisions were unnecessary and would not remove the discretionary power statements and an in-depth discussion of their use, see Todd Garvey, Presidential Signing Statements: Constitutional and Institutional Implications, CONGRESSIONAL RESEARCH SERVICE (Jan. 4, 2012), available at http://www.fas.org/sgp/crs/natsec/RL33667.pdf ("Presidential signing statements are official pronouncements issued by the President contemporaneously to the signing of a bill into law that, in addition to commenting on the law generally, have been used to forward the President’s interpretation of the statutory language; to assert constitutional objections to the provisions contained therein; and, concordantly, to announce that the provisions of the law will be administered in a manner that comports with the administration’s conception of the President’s constitutional prerogatives.")}; see also The National Defense Authorization Act (NDAA) of 2012 Information For Concerned Activists, CENTER FOR CONSTITUTIONAL RIGHTS (Winter 2012), available at http://ccrjustice.org/files/NDAA_report_final.pdf ("A signing statement is nothing more than a presidential press release; it is not legally binding and has no impact or influence on the courts.").
of the executive in deciding whom to detain, especially as it
related to American citizens. On this point, the President
stated: “[T]he only responsible way to combat the threat of
al-Qaeda . . . is to remain relentlessly practical, guided by
the factual and legal complexities of each case and the
relative strengths and weaknesses of each system.”

PART III: REACTION TO THE NDAA OF 2012

A. Proponents of the NDAA of 2012

Senators Carl Levin and John McCain co-sponsored the
NDAA. As rationale for the law, the senators pointed to
the emerging threat of domestic terrorism. Accordingly,
the NDAA was drafted to provide the executive with the tools

121 Id. In late February 2012, President Obama signed a directive
indicating that the mandatory detention provisions of section 1022
would be treated as though they were discretionary and that his
Administration would use military detention as one option in
combating terror. Joanne Mariner, Chipping Away At The NDAA,
VERDICT (Feb. 29, 2012), http://verdict.justia.com/2012/02/29/
chipping-away-at-the-ndaa.
122 Statement of President Barak Obama Upon Signing H.R. 1540,
(Dec. 31, 2011).
DOES Apply To American Citizens And Could Be Used To Send Them To
Guantanamo, WASHINGTON’S BLOG (Nov. 29, 2011), http://www.washingtons
-act-bill-does-apply-to-american-citizens-and-could-be-used-send-
them-to-guantanamo-indefinitely.html.
124 John McCain & Lindsey Graham Justifying The NDAA Bill, YOUTUBE,
http://www.youtube.com/watch?v=pD0GthpIgQw (last visited April 25,
2012).
necessary to thwart the perceived threat.\textsuperscript{125} At the heart of the argument supporting the NDAA is a belief that America’s fight against terror should be dealt with through military action and that terror suspects should be denied access to civilian courts regardless of their citizenship.\textsuperscript{126} Senator Lindsey Graham promised “death, detention, and prosecution” to any American citizen who seeks to assist terrorists.\textsuperscript{127}

As evidenced by their voting for the law, a host of other senators support the NDAA.\textsuperscript{128} Massachusetts Senator Scott Brown stated that he supports the NDAA because it provides the executive branch with the tools necessary to

\textsuperscript{125} Senator Lindsey Graham, an advocate of the NDAA, has consistently argued that the president should have every option available in the execution of the war on terror, including the use of the military to capture and detain American citizens (suspected of engaging in acts of terror) on U.S. soil. Senator Graham believes that the act of using the military on American soil against its own citizens does not violate the Posse Comitatus Act or Fifth Amendment Due Process, because the military would not be engaged in stopping criminal activity but in waging war. 157 Cong. Rec. S8012 (Nov. 29, 2011).

\textsuperscript{126} Id. (quoting Senator Lindsey Graham, “If you are an American citizen and you betray your country, you are going to be held in military custody and you are going to be questioned about what you know. You are not going to be given a lawyer if our national security interests dictate that you not be given a lawyer and go into the criminal justice system because we are not fighting a crime, we are fighting a war.”).

\textsuperscript{127} Id.

\textsuperscript{128} In the end, over ninety senators voted for the NDAA. Raffaela Wakeman, NDAA Passage, Final Transcript From Senate Floor, LAWFARE (Dec. 2, 2011), http://www.lawfareblog.com/2011/12/ndaa-passage-final-transcript-from-senate-floor/.
completely dismantle al-Qaeda. Brown further stated that the NDAA offers a viable alternative to the failed attempts at trying terror suspects in civilian courts. Ultimately, Brown supports the law because it sets forth guidelines for the detention of enemy combatants and further establishes procedures for the implementation of military commissions.

Many members of the House, such as Congressman Chris Gibson, also support the NDAA. Gibson supports the law on the ground that it codifies the current state of the law with regard to the executive’s power to detain. Since key provisions of the NDAA reference existing authority, Gibson argues that the law poses no threat to civil liberty.

In addition to political leaders, certain military law experts have voiced qualified support for the NDAA. These persons state that the NDAA does not on its face grant the

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130 Id.
131 Id. Of course, discussion regarding the counterterrorism provisions related to military tribunals is beyond the scope of this paper.
133 Id.
executive any new power or authority.\textsuperscript{134} These experts however are quick to point out that the counterterrorism provisions in the NDAA are extremely vague and are thus subject to a certain degree of abuse.\textsuperscript{135} Despite this, some experts take the approach that the NDAA is not earth shattering, in that the most troubling provisions apparently do not apply to American citizens.\textsuperscript{136}

Many journalists also support the NDAA. They state that the NDAA is harmless because it codifies existing law and therefore does not grant to the executive any new power.\textsuperscript{137} They further state that since federal courts strike down acts of Congress inconsistent with the Constitution, the NDAA “cannot strip Americans of their constitutional rights.”\textsuperscript{138}

These persons also argue that the NDAA is innocuous because


\textsuperscript{135} Id.


\textsuperscript{138} Id.
to implement it against American citizens would amount to political suicide.\textsuperscript{139}

Some civilians support the NDAA, pointing to the law’s by-partisan support and the Obama Administration’s promise not to detain American citizens.\textsuperscript{140} These proponents also highlight the fact that the NDAA does not, by its terms, expand the executive’s detention powers.\textsuperscript{141}

\textbf{B. Opponents of the NDAA of 2012}

Prior to passage of the NDAA, Senator Mark Udall stated that he was “extremely troubled” by the law’s counterterrorism provisions.\textsuperscript{142} On the senate floor, Udall requested additional time to consider the passage of the bill, citing a desire to carefully study its effect upon the exercise of civil liberties. Senator Diane Feinstein echoed Udall’s sentiments and, as stated, recommended that the counterterrorism provisions be amended by explicitly

\begin{flushleft}
\textsuperscript{139} Id.
\textsuperscript{140} Understanding The 2012 NDAA And Obama’s Decision To Sign It, LIBERAL IMPACT, http://www.liberalimpact.com/2012/01/02/obama-signs-2012-national-defense-authorization-act/ (last visited April 13, 2012).
\textsuperscript{141} Id.
\end{flushleft}
prohibiting its application to American citizens.143 Both Udall’s request and Feinstein’s amendment were voted down.144 Immediately following its passage, Congressman Ron Paul presented a bill that would have repealed the NDAA’s counterterrorism provisions.145 Paul was motivated to introduce the bill out of concern that the law could be used to nullify basic constitutional rights.146 Paul stated:

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“Section 1021 provides for the possibility of the US military acting as a kind of police force on US soil, apprehending terror suspects— including Americans— and whisking them off to an undisclosed location indefinitely. . . . No right to attorney, no right to trial, no day in court.”

The American Civil Liberties Union [ACLU] opposed the NDAA in its earliest stages, requesting that citizens contact their congressmen to vote against the law. Responding to its passage, the ACLU stated that the NDAA provides the president with unrestrained power with regard to the detention of terror suspects. Although the Obama Administration affirmed that it would not abuse the law’s detention power, the ACLU highlights the fact that there is nothing preventing subsequent presidents from implementing the NDAA differently. As such, the ACLU argues that unrestrained discretion poses significant future threats, especially in light of the fact that presidents post-9/11

147 Id.
150 Id.
have differed with regard to their interpretation of counterterrorism legislation.\textsuperscript{151}

Human rights organizations also oppose the NDAA.\textsuperscript{152} The primary concern of these groups is that the law vests inordinate power in the executive to detain enemy combatants, which potentially could include American citizens.\textsuperscript{153} Although certain of these groups trust the Obama Administration’s promise to apply the NDAA in a manner consistent with the Constitution, they fear that future presidents will fail to show the same restraint.\textsuperscript{154} Other human rights supporters argue that the NDAA will usher in a form of McCarthyism, in which current societal scapegoats will be “terrorists” rather than “communists.”\textsuperscript{155}

\textsuperscript{151} Id.
\textsuperscript{152} Gale Courey Toensing, Movement Grows To Revoke National Defense Authorization Act, INDIAN COUNTRY (Feb. 24, 2012), http://indiancountrytodaymedianetwork.com/2012/02/24/movement-grows-to-revoke-national-defense-authorization-act-99648 (listing hundreds of minority groups which have gathered to oppose the NDAA).
\textsuperscript{153} Id.
In addition to congressmen and civil liberty associations, many state and local governments oppose the NDAA. In fact, many state legislatures have drafted laws prohibiting state employees from enforcing the law. In February 2012, Virginia passed a law that prevented government officials or employees “from assisting an agency or the armed forces of the United State in the investigation, prosecution, or detention of a United States citizen.”

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156 See Joe Wolverton, Virginia House Passes NDAA-Nullifying Bill: Other States Join Fight, THE NEW AMERICAN (Feb. 20, 2012), http://thenewamerican.com/usnews/constitution/10916-virginia-house-passes-ndaa-nullifying-bill-other-states-join-fight (stating that a model law has been drafted which numerous other states plan to enact in refusing to enforce the NDAA).

157 Id.

158 Id.
Local governments, such as Colorado’s Fremont and El Paso counties, have passed similar measures.\textsuperscript{159}

For various reasons, several journalists are opposed to the NDAA. Among the complaints cited by these individuals is that the NDAA goes too far, such that it appears to permit the indefinite detention of American citizens.\textsuperscript{160} Adding to this, many journalists are troubled by the vagueness of the law and a fear that the NDAA could be implemented in a manner contrary to standards of due process.\textsuperscript{161} Other journalists

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\textsuperscript{159} Dr. Eowyn, \textit{State And Local Governments Fight NDAA}, \textsc{Fellowship Of The Minds} (Feb. 13, 2012), \url{http://fellowshipofminds.wordpress.com/2012/02/13/state-and-local-governments-fight-back-against-ndaa/}.
\textsuperscript{160} Coleen Rowley, \textit{Obama Should Veto Empire Over Republic}, \textsc{Huffington Post} (Dec. 3, 2012), \url{http://www.huffingtonpost.com/coleen-rowley/ndaa-military-detainment_b_1126781.html} (stating that the NDAA violates America’s commitment to due process); Ghoshray, supra note 10, at 279 (“If we were to sanctify and justify America’s War on Terror, we would have to accept the scenario that the American Government or its agents can capture anyone, anywhere in the world and can detain him as long as American security is perceived to be threatened. This is both a ludicrous and preposterous proposition which lacks both a legal and a rational basis.”).
\textsuperscript{161} See Rowley, supra note 160 (stating that the Law is hopelessly unclear and therefore subject to abuse by the executive); Andrew Rosenthal, \textit{The Sound Of One President Caving}, \textsc{N.Y. Times} (Dec. 15, 2011), \url{http://loyalopposition.blogs.nytimes.com/2011/12/15/the-sound-of-one-president-caving/} (stating that the definitions regarding who may be detained and on what grounds are vague and that enforcement of the law is left open to the unbridled discretion of the executive); see also Charlie Savage, \textit{Senate Declines To Clarify Right Of American Qaeda Suspects Arrested In U.S.}, \textsc{N.Y. Times} (Dec. 1, 2011), \url{http://www.nytimes.com/2011/12/02/us/senate-declines-to-resolve-issue-of-american-qaeda-suspects-arrested-in-us.html} (stating that the senate refuses to
argue that the language of the NDAA is “crystal clear,” but
that its provisions are “repugnant.” These persons state
that the clear language of the NDAA not only expands the
powers of the president, but also allows for the detention of
American citizens. Some individuals fear that the NDAA
could lead to the elimination of constitutional freedoms.

Countless citizens are against the NDAA. These persons
view the NDAA as patently unconstitutional, stating that it

provide clarification with regard to the interpretation and
application of the detention provisions in the NDAA, leaving
American citizens uneasy about the prospect of being detained
without due process rights; “The Senate . . . decided to leave
unanswered a momentous questions about constitutional rights in
the war against Al Qaeda: whether government officials have the
power to arrest people inside the United States and hold them in
military custody indefinitely and without a trial.”).

Glenn Greenwald, Three Myths About The Detention Bill, SALON
about_the_detention_bill/ (stating that the NDAA expands the
executive’s power by broadening the AUMF’s definition of terror
suspects, and highlighting that the law does not exempt its
application to American citizens).

Id.

On this point, journalist Erik Kain, wrote:

What’s truly at stake when we start talking about Big
Government and such is far more dangerous and preposterous
than high marginal tax rates. We’re talking about the
stripping away of our most basic freedoms. We’re talking
about a potential state that can call me a terrorist for
writing this [piece] and then lock me up and throw away the
key.

Threat To Civil Liberties Americans Face, FORBES (Dec. 5, 2011),
http://www.forbes.com/sites/erikkain/2011/12/05/the-national-
defense-authorization-act-is-the-greatest-threat-to-civil-
liberties-americans-face/.
violates numerous provisions in the Bill of Rights.\textsuperscript{165}

Certain individuals have aimed their frustrations at the President and members of Congress who voted in favor of the NDAA.\textsuperscript{166} Unlikely political allays have even joined forces in protest against the law.\textsuperscript{167}

\textbf{PART IV: PROBLEMS WITH THE NDAA OF 2012, AND APPROPRIATE SOLUTIONS THERETO}

As is clear from above debate, there is much controversy regarding the counterterrorism provisions in the NDAA. Proponents of the law argue that they serve as a necessary tool in fighting the war on terror. Opponents of the NDAA state that the provisions vest an inordinate power in the executive, opening the door to the reduction, or even eradication, of fundamental civil liberties. Although both

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sides make valid points, it is unclear at this point whether the NDAA will usher in a new era in the war on terror.

Currently, as the NDAA has neither been implemented by the executive nor has it been challenged in the courts, the counterterrorism provisions remain an enigma. What is clear however is that the counterterrorism provisions of the NDAA signal a shift in values, such that American safety is now held in paramount concern.

This shift may result in devastating consequences, in that it could open the door to the very real possibility that America citizens would lose basic constitutional rights if deemed to be “terrorists.” The history of this Nation is replete with instances in which well-meaning government leaders have gone to extremes to protect the homeland against perceived threats.\(^{168}\) Instead of learning from these examples, the NDAA signals that history is repeating.

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\(^{168}\) This point is brought to light by legal scholar Richard Raimond, who states:

There is considerably less to be proud about, and a good deal to be embarrassed about, when one reflects on the shabby treatment civil liberties have received in the United States during times of war and perceived threats to its national security. . . . For as adamanat as my country has been about civil liberties during peacetime, it has a long history of failing to preserve liberties when it perceived its national security threatened. . . . After each perceived security crisis ended, the United States has remorsefully realized
Despite this, extremism need not rule the day. America can protect itself while maintaining its most sacred values.\textsuperscript{169} To do this, different options should be considered. Eight commonsense proposals are set forth here.

First, as presidential signing statements have little or no legal effect, Congress should either repeal or amend the counterterrorism provisions of the NDAA. An appropriate amendment would be similar to that advanced by Senator Diane Feinstein, which explicitly disallowed the application of the offending provisions to American citizens.\textsuperscript{170} By taking this step, Congress would allay the legitimate fear surrounding the implementation of the NDAA.

Second, with regard to future legislation, Congress should debate and vote on counterterrorism provisions in separate bills. This step would allow for comment on the bill in committee, both from members of the public as well as

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\textsuperscript{170} See supra Parts II & III.
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military experts. This would ensure that future counterterrorism legislation, posing significant constitutional questions, is carefully considered prior to its passage.

Third, Congress should expound upon its lexicon of terror. To avoid due process infirmities, Congress should clearly define terms like: “terrorist,” “terror organization,” “al-Qaeda,” “associated force,” etc. If the executive is to enforce the AUMF or the counterterrorism provisions in the NDAA, these definitions should be clear. This is especially so if they are to be applied to American citizens.

For example, the AUMF references persons responsible for 9/11, yet it is unlikely that our current war is restricted to these individuals. In fact, the AUMF has been used to target persons who have no personal connection to 9/11 whatsoever. The terms used in the counterterrorism provisions of the NDAA and the MCA of 2009 are likewise vague and are therefore subject to the same type of abuse. By simply redefining these terms, the law would better apprise persons of what is prohibited and guide the executive in implementing the provisions.
Fourth, Congress should engraft an intent element into all counterterrorism provisions, including those within the AUMF and the NDAA. By doing this, persons would not be subjected to detention for unwittingly supporting terror organizations, which could easily happen in today’s world of online transactions. As pointed out supra, American citizens could be detained in military custody for supporting a benign-looking terror front group.

Fifth, Congress should make explicit that American citizens, not engaged in hostilities in a foreign theater but who are suspected of engaging in acts of terror, be processed in civilian courts. This action would further erect a barrier against the possibility of indefinite detention of American citizens and would ensure that the constitutional rights of these citizens are not compromised.

Sixth, for non-citizen combatants or American combatants captured in a foreign theatre engaged in hostilities against the United States, Congress should codify Boumediene and

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171 Legal scholars and congressman alike have observed the benefit of treating acts of terror as crimes, and trying the accused in civilian court. See Ghosry, supra note 10, at 257 (highlighting the benefits of using civilian courts to try terror suspects); 157 Cong. Rec. S8012 (Nov. 29, 2011) (quoting Senator Jim Webb, who stated that America has tried over 300 terror suspects in civilian court since 9/11) (emphasis added).
continue the work of ensuring that detainees receive basic due process rights. Inherent to these rights, the detainees should immediately be provided with the charges pending against them, be afforded access to counsel, and be permitted to challenge both their status as an enemy combatant and the grounds for their detention. Furthermore, to avoid the infirmities of military tribunals, the process of challenging one’s status should continue to occur in federal court.

Seventh, for detainees who choose not to challenge their status or who fail to challenge it successfully, the U.S. military should follow the laws of war, including the Geneva Conventions, to guide its treatment of detainees. Although the MCA of 2009 references the Geneva Conventions, the military is not required to comply with its provisions. Congress should make compliance with the laws of war compulsory. By treating detainees as prisoners of war (and not enemy combatants), America sends a message to the world

172 Some legal scholars believe that the process of labeling terrorists as “enemy combatants” and then withholding from them the rights due to prisoners of war had the effect of undermining America’s commitment to International Conventions. Barbara J. Falk, The Global War on Terror and the Detention Debate: The Applicability of Geneva Convention III, 3 J. Int’l L. & Int’l Rel. 31, 59 (2007) (“[This] action[...] . . . signaled a deep ambivalence toward the effectiveness and future relevance of the Geneva Conventions, which in turn was translated as both disrespect for and an outright violation of international humanitarian norms.”).
that it is committed to treating prisoners with basic dignity.\textsuperscript{173}

Eighth, Congress should either set a date ending hostilities or fix one in which persons not charged with an offense, and posing no threat to national security, will be released. Although the Supreme Court in \textit{Hamdi} stated that detainees must be released upon the cessation of conflict, it made clear that persons could not be held without end.\textsuperscript{174} By ending hostilities or by providing a specific date in which harmless detainees will be released, America avoids the problem of endless detention.\textsuperscript{175}

\textsuperscript{173} As eloquently stated by certain legal scholars, the clarity of hindsight reveals that violating the Geneva Conventions and the laws of war in an attempt to obtain “intelligence” did not strengthen America’s position in the world. Such actions worked rather to alienate our allies and it opened the door to the potential of undermining civil liberty. As such, many legal scholars advocate for the reinstatement of the Geneva Conventions norms within the context of detaining enemy combatants. Falk, supra note 172, at 59; Ghosry, supra note 10, at 258 (stating that every individual, whether an enemy combatant or a prisoner of war, is entitled to the basic protections afforded under the laws of war generally and the protocols of the Geneva Conventions specifically).

\textsuperscript{174} See \textit{Hamdi}, 542 U.S. at 507, 517-20.

\textsuperscript{175} Ghosry, supra note 10, at 259 (stating that enemy combatants face an “indeterminate state of rightlessness” under the current model, and implying that the War on Terror must have an end date for the protections afforded by the International Laws of War and the Geneva Conventions to have any meaning).
CONCLUSION

The NDAA poses significant questions regarding the state of civil liberties in the United States post-2012. The passage of the law indicates the lengths that America’s leaders will go to circumscribe liberty while claiming to protect it. Most significantly, the NDAA evidences America’s decision to make it values subservient to its security.176

To address this concern, American lawmakers should take immediate action to either repeal or amend the counterterrorism provisions of the NDAA. In the future, Congress should break out proposed counterterrorism

176 Some legal scholars have reacted viscerally to counterterrorism legislation. This comment has attempted to avoid such a reaction, although these sentiments are understood (at least in part). As an example of such a response, Saby Ghoshray writes:

[I]t is time for the American people to take the blinders off their eyes and see the current abrogation of civil liberties as the harbinger of even more ominous things to come. If fundamental freedoms are taken from even one individual in one instance, by government-sanctioned methods of selective inclusion, then the fundamental rights of every citizen are at stake. It is time for the judiciary to show more fidelity to the enduring principles of the U.S. Constitution by restraining the unbridled excesses of the Executive. It is also time for the media to uphold the profound principles of the First Amendment by dissociating itself from the pecuniary interests of capitalism. In the end, we must renew our faith in the concepts of civil rights, judicial protection, and human rights; and only then can we engage in a comprehensive and robust evaluation of detainees’ rights within the framework of law.

Ghoshray, supra note 10, at 280.
legislation to bring transparency to the process, allowing for open and honest debate regarding our approach in combating terrorism. Further, Congress should remove the ambiguity surrounding its current terror definitions by providing clearer statements with regard to its terror lexicon. Congress should also engraft an intent element into the counterterrorism provisions of the AUMF and the NDAA. It should try American citizens in civilian courts, provided they are not actively in engaged in conflict in a foreign theater. Congress should also ensure that detainees are provided basic due process rights. It should require that the U.S. military abide by the laws of war, specifically the protocols of the Geneva Conventions. Finally, Congress should end hostilities or set a date at which detainees posing no threat to national security will be released.

By implementing most or all of these proposals, Congress will upright the ship that it has capsized through the passage of the NDAA. It will have taken the appropriate steps to protect both America’s security and its values. Most importantly, it will thereby ensure that persons, specifically American citizens, are not subjected to the harm
of indefinite detention without due process of law— a harm so unbefitting our nation of liberty.