NOTES

Beyond Individual Status: The Clear Statement Rule and the Scope of the AUMF Detention Authority in the United States

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> "It is not unfair to make an American citizen account for the fact that they decided to help al-Qaida to kill us all and hold them as long as it takes to find intelligence about what may be coming next. And when they say 'I want my lawyer,' you tell them 'Shut up. You don't get a lawyer. . . . You are an enemy combatant . . . .'"[1]

INTRODUCTION

The National Defense Authorization Act of 2012 (NDAA 2012)[2] contained a provision explicitly confirming that the Authorization for Use of Military Force (AUMF)[3] includes the authority to hold individuals in indefinite military detention without trial.[4] Congress was unable to agree on whether the provision should apply to U.S. citizens or persons arrested on U.S. territory.[5] The issue was the subject of intense floor debate, and an amendment that would have exempted U.S. citizens from its reach was rejected.[6] Ultimately, in an effort to avoid President Obama's threatened veto, Congress adopted language in the final bill instructing that the provision is not to be construed as "affect[ing] existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are

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1. 157 CONG. REC. S8045 (daily ed. Nov. 30, 2011) (statement of Sen. Lindsey Graham) [hereinafter Graham Statement].

2. Pub. L. No. 112-81, 125 Stat. 1298 (2011) [hereinafter NDAA 2012].

3. Pub. L. No. 107-40, 115 Stat. 224 (2001) (*reprinted in* 50 U.S.C. § 1541 note (2006)). Congress enacted the AUMF in response to the terrorist attacks of September 11, 2001. It authorizes the President:

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

Id. § 2(a).

4. NDAA 2012 § 1021, 125 Stat. at 1562. Specifically, it provides authority under the AUMF to detain "covered persons . . . pending disposition under the law of war." *Id.* Section 1021(b) defines a "covered" person as (1) "[a] person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks"; or (2) "[a] person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces." *Id.* § 1021(b). "The disposition of a [covered] person under the law of war" includes "[d]etention under the law of war without trial until the end of the hostilities authorized by the Authorization for Use of Military Force." *Id.* § 1021(c).

5. Some in Congress, like Senator Lindsey Graham, were of the view that there should be no distinction between those captured on the battlefield and those captured within the United States. *See* Graham Statement, *supra* note 1. Others, including Senator Dianne Feinstein, contended that, at the very least, the provision should not apply to U.S. citizens. *See* S. Amend. 1126, 112th Cong. (2011), *available at* http://thomas.loc.gov/cgi-bin/query/C?r112:./temp/r112mDWOID (amendment, rejected by a vote of 45–55, seeking to prohibit the long-term military detention of U.S. citizens without trial).

6. S. Amend. 1126.

captured or arrested in the United States."[7] However, the Supreme Court in *Hamdi v. Rumsfeld* had already recognized that the AUMF contained within it the authority to detain as "a fundamental incident of waging war."[8] Read in its entirety, and in light of precedent construing the AUMF, § 1021 of the NDAA 2012 therefore says nothing new.[9]

What do "existing law or authorities" say about whether the AUMF authorizes indefinite military detention without trial of individuals captured in the United States? There is a troubling level of ambiguity in all three branches of government on this question. The floor debate accompanying passage of § 1021 of the NDAA 2012 revealed sharp divisions in Congress.[10] The past two administrations have likewise taken vastly different positions.[11] President Obama

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7. NDAA 2012 § 1021(e), 125 Stat. at 1562. More recently, an amendment in the National Defense Authorization Act of 2013 would have modified the language of the Non-Detention Act, 18 U.S.C. § 4001(a) (2006), to mandate that "[a]n 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." S. Amend. 3018, 112th Cong. (2012), *available at* http://thomas.loc.gov/cgi-bin/query/C?r112:./temp/r112BVaNwN. The measure, proposed by Senator Feinstein, passed in the Senate by a vote of 67–29, *see* Josh Gerstein, *Senate Votes to Limit Military Detention*, POLITICO (Nov. 30, 2012, 12:03 AM), http://www.politico.com/blogs/under-the-radar/2012/11/senate-votes-to-limit-military-detention-150715.html, and was included in the bill that the Senate originally approved, *see* S. 3254, 112th Cong. § 1033 (2012), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-112s3254es/pdf/BILLS-112s3254es.pdf. However, the provision was dropped from the final version of the legislation. *See* Josh Gerstein, *Conference Committee Drops Ban on Indefinite Detention of Americans*, POLITICO (Dec. 18, 2012, 6:04 PM), http://www.politico.com/blogs/under-the-radar/2012/12/conference-committee-drops-ban-on-indefinite-detention-152352.html (quoting Senate Armed Service Committee Chairman Carl Levin's announcement to the press that the provision was dropped).

8. 542 U.S. 507, 519 (2004).

9. *But see* Hedges v. Obama, No. 12 Civ. 331, 2012 WL 1721124, at *2 (S.D.N.Y. May 16, 2012) (reading the "covered persons" provision in § 1021 as sweeping more broadly than the detention authority contained within the AUMF). Judge Forrest's interpretation of § 1021(b) in *Hedges* makes sense as a textual matter if read in isolation. That provision includes two subsections: whereas the first uses nearly identical language to the AUMF, focusing on persons linked to the 9/11 attacks, the second provision is not so limited, instead extending generally to any person "who was part of or substantially supported al-Qaeda, the Taliban, or associated forces." NDAA 2012 § 1021(b)(1)–(2), 125 Stat. at 1562. However, in a separate part of the same section, Congress made explicit its intent for the provision to be interpreted as coextensive with the AUMF, instructing that "[n]othing in this section is intended to limit or expand the authority of the President or the scope of the Authorization for Use of Military Force." *Id.* at § 1021(d). The precise meaning of the terms "substantially supported" and "associated forces," and their applicability to persons on U.S. territory, is unsettled. *See generally* JENNIFER K. ELSEA & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., R42143, THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FY2012: DETAINEE MATTERS 6–10 (2012) (describing how the executive branch has defined its detention authority under the AUMF and how the scope of the AUMF as applied to persons on U.S. territory remains unsettled). For criticisms of Judge Forrest's reading of § 1021 in *Hedges*, see Robert Chesney, *Issues with* Hedges v. Obama*, and a Call for Suggestions for Statutory Language Defining Associated Forces*, LAWFARE (May 17, 2012, 1:44 AM), http://www.lawfareblog.com/2012/05/issues-with-hedges-v-obama-and-a-call-for-suggestions-for-statutory-language-defining-associated-forces/; Benjamin Wittes, *Initial Thoughts on* Hedges, LAWFARE (Sept. 13, 2012, 9:04 AM), http://www.lawfareblog.com/2012/09/initial-thoughts-on-hedges/.

10. *See supra* note 5.

11. *See generally* Charlie Savage, *Obama Team Is Divided on Anti-Terror Tactics*, N.Y. TIMES, Mar. 28, 2010, http://www.nytimes.com/2010/03/29/us/politics/29force.html?pagewanted=all&_r=0

announced in his signing statement to the NDAA 2012 that his administration would "not authorize the indefinite military detention without trial of American citizens," regardless whether such detention would be permissible under the AUMF.[12] President Bush, in contrast, read the AUMF as authorizing the capture and indefinite detention without trial of anyone, anywhere, whom the President deemed to be a threat—including persons captured on U.S. territory.[13] He exercised such authority on two occasions: in the cases of Ali Saleh Kahlah al-Marri and Jose Padilla.[14] The federal courts that reviewed the resulting habeas petitions were likewise sharply divided over the issue, and the Supreme Court declined to resolve it when it was presented in *Rumsfeld v. Padilla*.[15]

This Note argues that courts should apply the clear statement principle whenever the AUMF—or the NDAA 2012—is invoked to detain individuals arrested in the United States in indefinite military detention without trial, so long as their status as an enemy combatant is in dispute. The clear statement principle serves the purpose of the constitutional avoidance canon.[16] It rests on the principle that "[i]n traditionally sensitive areas . . . the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."[17] Reading § 1021 of the NDAA 2012 and the AUMF broadly would raise serious due process and separation of powers concerns. It would amount to displacing civilian law enforcement with martial law on U.S. territory, thereby circumventing the individual rights and the restraints on government provided for in the Constitution. Supreme Court precedent in cases involving ambiguous wartime statutes raising similar concerns supports the application of a clear statement

(describing how George W. Bush claimed "virtually unlimited power" to detain those he deemed a threat and Barack Obama's criticism of this approach as "an overreach").

12. Statement by the President Barack Obama on H.R. 1540 Dec. 31, 2011, *available at* www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540. It bears emphasizing that this statement speaks only to *U.S. citizens*—not to non-citizens captured on U.S. territory.

13. *See, e.g.*, Reply Brief for Appellant at 2, Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005) (No. 05-6396) ("It would blink reality to conclude that the Congress that enacted the AUMF on September 18, 2001, wanted to authorize capture on a foreign battlefield and detention in the United States, but not capture and detention in the United States [of an enemy combatant] . . . ."). The Bush administration also maintained that even without congressional authorization, the President had inherent authority as Commander-in-Chief to detain whomever he deemed to be an enemy combatant—a position the Obama administration declined to follow. *See* Respondent's Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 1, *In re* Guantanamo Bay Detainee Litigation, 581 F. Supp. 2d 33 (D.D.C. 2009) (No. 08-0442) (grounding in the AUMF the President's authority to detain individuals held at Guantanamo Bay).

14. *See infra* section I.B.

15. *See* 542 U.S. 426, 430 (2004) (declining to decide on the merits whether the AUMF authorizes the President to militarily detain a person arrested in the United States).

16. *See, e.g.*, Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

17. United States v. Bass, 404 U.S. 336, 349 (1971).

principle in this context.[18]

Several scholars of constitutional law have advanced arguments about when and how a clear statement principle should apply to the AUMF on U.S. territory. These arguments have generally focused on the status of the individual as the triggering factor. Some have argued that the clear statement requirement is triggered where the AUMF is invoked to detain U.S. citizens on U.S. territory, but that it does not apply to noncitizens.[19] Others have argued that it applies if civilians are detained on U.S. territory, but not if the individual is deemed by the executive branch to be a "combatant."[20]

This Note argues that these arguments fail to adequately address the constitutional concerns raised by a broad construction of the AUMF detention authority as applied on U.S. territory. First, theories that make citizenship the trigger for the clear statement principle ignore that, as a matter of settled constitutional law, the rights guaranteed under the Due Process Clause apply to citizens and noncitizens alike.[21] Reading the AUMF as authorizing indefinite military detention without trial of noncitizens arrested on U.S. territory would violate the Due Process Clause of the Fifth Amendment.[22] Second, arguments that exclude those deemed to be "enemy combatants"—at least where that status is in dispute—render the clear statement principle meaningless in practical effect. It

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18. *See* Duncan v. Kahanamoku, 327 U.S. 304, 324 (1946) (applying the clear statement principle to conclude that a statute authorizing military tribunals in Hawaii during the Second World War was not intended to alter the traditional division between military and civilian power); *Ex parte* Endo, 323 U.S. 283, 300–02 (1944) (applying the clear statement rule to conclude that Congress did not intend to allow for the preventative detention of loyal Japanese-American citizens); *cf. Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 121–22 (1866) (holding that the trial by military commission of a civilian in Indiana during the Civil War was not sanctioned by the laws of war and stating in dictum that "Congress could grant no such power"). *But see Ex parte* Quirin, 317 U.S. 1, 28 (1942) (reading the Articles of War as constituting congressional authorization for the President to try Nazi saboteurs detained on U.S. territory during World War II).

19. *See, e.g.*, Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2074 (2007) (arguing that "the Court should demand a clearer, more deliberative statement than one finds in the AUMF" to authorize the detention of *citizens* seized "within the United States, outside any theater of combat").

20. *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2102–06 (2005) (arguing that a clear statement rule is appropriate in construing the AUMF when the President acts against noncombatants in the United States).

21. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("[T]he Due Process Clause applies to all persons within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.").

22. *See* U.S. CONST. amend. V ("[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . . ."); *see also Zadvydas*, 533 U.S. at 690 ("The Fifth Amendment's Due Process Clause forbids the Government to 'depriv[e]' any 'person . . . of . . . liberty . . . without due process of law.' Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects.") alterations in original); Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("We have always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty.") (quoting United States v. Salerno, 481 U.S. 739, 750 (1987)); *cf.* Kent v. Dulles, 357 U.S. 116, 125 (1958) ("The right to travel is part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment.").

would never be triggered because the executive branch is always going to claim that the individual it wishes to detain under the AUMF is an "enemy combatant" under its definition of that term. This approach thus leaves courts in the same position as they would be without the clear statement principle: they are forced to judge the legitimacy of the executive branch's exercise of military power in a particular case by interpreting ambiguous statutory language as applied to a particular set of factual circumstances. This argument also fails to give adequate attention to the more fundamental question of whether it is constitutionally legitimate to apply law-of-war principles in the United States, in the absence of battlefield conditions, in lieu of the criminal justice system.[23]

This Note argues that the concern triggering the clear statement principle is not the individual's status but rather the lack of a compelling justification for applying law-of-war principles in place of civilian law in the United States. This Note does not dispute the legal significance of individual status when an individual is detained abroad or on an active battlefield. Instead, it contends that the presence of an individual at the time of arrest in the United States, outside of any active theater of war, is of primary legal significance in determining the relative merits of applying law-of-war principles in place of an otherwise functioning criminal justice system.[24] An individual's claim to due process rights is at its strongest on U.S. territory when civilian law is functioning and the courts are open and unobstructed. In contrast, this is the context in which the applicability of law-of-war principles is most attenuated, and where there are the least legitimate reasons for eliminating the constitutional restraints on the government's exercise of power over the individual. Within the United States, the clear statement principle is triggered by the basic presumption that the Constitution restrains government action and affords rights to individuals. In other words, the clear statement principle is triggered by the default rule that the Constitution applies.

This may sound like common sense: apply a well-established canon of statutory construction to avoid reading a statute as saying that constitutional rights and restraints do not apply. However, there are high-level officials in all three branches of government who have advocated an opposite presumption—that the AUMF should not be construed as preserving constitutional restraints on government action or guarantees of individual rights in the context of counterterrorism.[25] This is a terrifying proposition because giving the President

23. The Court in *Ex parte Milligan* expressly declared that it is constitutionally illegitimate to displace civilian law, and the constitutional protections it affords, with martial law except where there are no other means to administer criminal justice. 71 U.S. (4 Wall.) at 2, 118–21, 127.

24. *Cf. id.* at 121 (holding that the laws of war can "never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed").

25. In the context of the executive branch, George W. Bush adopted an expansive construction—perhaps the most expansive of any president in U.S. history—of executive power, and this included his view that he had plenary power to detain indefinitely in military detention anyone he deemed to be an

the authority to decide selectively when his actions are subject to constitutional restraints would seem to undermine the whole purpose of having a Constitution in the first place. And the deprivation of physical liberty is the paradigmatic context in which the Supreme Court has emphasized the importance of due process rights.[26]

This Note proceeds as follows: Part I discusses pertinent case law construing the AUMF detention authority. First, it describes what the Supreme Court has said about the scope of the AUMF detention authority, and then it explores how the lower federal courts construed this authority in cases where the President invoked the AUMF to hold individuals arrested in the United States in indefinite military detention without trial.

Part II then takes a step back from the context of the AUMF to see how the Court approached ambiguous wartime statutes in the past that appeared to authorize indefinite detention or application of martial law on U.S. territory. Discussion of these precedents will show that the Court has consistently applied a clear statement principle under these circumstances, and that the frequent invocation of *Ex parte Quirin*[27] to support the contrary proposition is based upon an inappropriately broad reading of that case.

Part III provides a discussion of existing arguments regarding application of a clear statement principle in the context of the AUMF as applied on U.S. territory. This discussion will show how these arguments, by focusing on the individual's status as the trigger for the clear statement rule, have failed to address the core structural concerns warranting its application. Part IV sets forth the thesis advanced in this Note: that, as applied on U.S. territory, the clear statement principle is triggered not by the status of the individual but rather by the insufficient justification for applying military law in lieu of a fully adequate and functioning civilian legal system in the United States.

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enemy combatant, regardless of whether that person was in the United States or abroad. *See, e.g.*, Reply Brief for Appellant, *supra* note 13, at 2. As for the legislative branch, several members of Congress have made clear that they see no constitutional problem with indefinite military detention of suspected terrorists captured on U.S. territory. *See, e.g.*, Graham Statement, *supra* note 1. Several members of the judiciary have likewise supported an expansive construction of executive powers. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 679–80 (2006) (Thomas, J., dissenting) (arguing that in the context of national security and foreign relations, "the fact that Congress has provided the President with broad authorities does not imply—and the Judicial Branch should not infer—that Congress intended to deprive him of particular powers not specifically enumerated"); Hamdi v. Rumsfeld, 542 U.S. 507, 583 (2004) (Thomas, J., dissenting) (same); al-Marri v. Pucciarelli, 534 F.3d 213, 303 (4th Cir. 2008) (en banc) (Wilkinson, J., concurring in part and dissenting in part) (arguing that the AUMF should be interpreted in light of the *Youngstown* framework to allow the President broad detention authority, including over individuals arrested in the United States).

26. *See supra* note 22; *see also Zadvydas* at 690.

27. 317 U.S. 1, 28 (1942).

I. PRECEDENT ON THE SCOPE OF THE AUMF DETENTION AUTHORITY

The following Part offers a brief overview of what federal courts have said with respect to the scope of the AUMF detention authority. Section A discusses the Supreme Court's opinion in *Hamdi v. Rumsfeld*,[28] which provided the most detailed positions of the Court on the scope of the AUMF detention authority where constitutional rights are implicated. The Court in that case was not presented with the issue posted here—namely, detention under the AUMF of individuals arrested in the United States and outside of the battlefield context. Nevertheless, the various statements of the Court provide valuable insights into how the Justices would likely approach such a question.[29] Section B then follows with a discussion of two cases in which the lower federal courts addressed the question of whether the AUMF authorizes the indefinite military detention of individuals captured on U.S. territory.

A. *HAMDI V. RUMSFELD*: A U.S. CITIZEN CAPTURED ON THE BATTLEFIELD

The Supreme Court provided its most detailed discussion of the scope of detention authority under the AUMF in *Hamdi*. This case involved a U.S. citizen who was captured in Afghanistan and was alleged to have fought against the United States as part of the Taliban.[30] The government invoked authority under the AUMF to detain Hamdi indefinitely in military custody, within the United States, as an enemy combatant.[31] Hamdi's father filed a petition for a writ of habeas corpus as next of kin, alleging a due process violation.[32] The Court, in a plurality opinion, held that U.S. citizenship did not bar detention of an individual deemed to be an enemy combatant pursuant to the AUMF,[33] but

28. 542 U.S. at 519.

29. A majority of the Court in *Hamdi* indicated that some form of clear statement principle applies to the AUMF, at least where it is invoked to detain U.S. citizens. However, the Justices disagreed as to its scope and sufficiency. The plurality concluded that the AUMF "*clearly and unmistakably* authorized detention in the narrow circumstances" of the case. *Id.* at 519 (plurality opinion) (emphasis added). Justice Souter, joined by Justice Ginsburg, emphasized the need for a clear statement and concluded that, when read in light of the Non-Detention Act, the AUMF did not contain one. *Id*. at 545 (Souter, J., concurring in part and dissenting in part). Justice Scalia, joined by Justice Stevens, agreed that the AUMF did not provide a clear statement but maintained that even if it did, it would be constitutionally insufficient. *Id.* at 574–75 (Scalia, J., dissenting). *But see* Curtis A. Bradley & Jack L. Goldsmith, *Rejoinder*, *The War on Terrorism: International Law, Clear Statement Requirements, and Constitutional Design*, 118 HARV. L. REV. 2683, 2693 (2005) (arguing that "the plurality in *Hamdi* did not purport to apply a clear statement requirement, even though the case involved the detention of a U.S. citizen in the United States"). However, Bradley and Goldsmith's discussion conflates the location of capture and the location of subsequent detention. In *Hamdi*, the detainee was arrested on the battlefield in Afghanistan and subsequently held on a military base in the United States, and the Court's holding was expressly limited to those circumstances. That case did not involve the interpretation of the AUMF as applied to the use military force to arrest individuals on U.S. territory and hold them in indefinite military detention.

30. *Hamdi*, 542 U.S. at 510 (plurality opinion).

31. *Id.* at 510–11.

32. *Id.* at 511.

33. *Id.* at 519.

that the government must nonetheless afford him basic due process rights.[34] The holding was a narrow one, applicable only to "an individual who . . . was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States [in Afghanistan]."[35] In other words, the holding was limited to detention under the same circumstances that informed the development of law-of-war principles: the battlefield detention of an individual fighting on behalf of an enemy government in the context of an international armed conflict.[36] Although the AUMF did not contain the word "detention," the plurality emphasized that the detention of enemy combatants during battle—for the purpose of preventing them from returning to the battlefield and taking up arms against U.S. forces—was a "fundamental incident of waging war" and within the scope of the "necessary and appropriate force" authorized by the AUMF.[37] The plurality thus concluded that the AUMF "clearly and unmistakably authorized detention in the narrow circumstances" of the case.[38] However, it left unresolved the extent to which the same principles would apply outside of the battlefield, under circumstances different from those that informed the development of the laws of war.

Justice Souter, joined by Justice Ginsburg, dissented from this part of the plurality opinion, reasoning that the Non-Detention Act (NDA), which was enacted in response to the World War II internment of U.S. citizens of Japanese descent, provided "a powerful reason to think that . . . clear congressional authorization [is required] before any citizen can be placed in a cell."[39] Justice Souter noted that "[u]nder this principle of reading [the NDA] robustly to require a clear statement of authorization to detain, none of the Government's arguments suffices to justify Hamdi's detention."[40] Because the AUMF did not specifically use the word "detention," Justice Souter concluded that "there is no reason to think Congress might have perceived any need to augment Executive power to deal with dangerous citizens within the United States, given the well-stocked statutory arsenal of defined criminal offenses covering the gamut of actions that a citizen sympathetic to terrorists might commit."[41]

Justice Scalia, joined by Justice Stevens, dissented. For Justice Scalia, nothing short of suspending the writ of habeas corpus pursuant to Article I, Section 9

34. *Id.* at 533.

35. *Id.* at 516 (internal quotation marks omitted).

36. *See id.* at 521 ("[W]e understand Congress' grant of authority [in the AUMF] . . . to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If 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.").

37. *Id.* at 519.

38. *Id.*

39. *Id.* at 543 (Souter, J., concurring in part and dissenting in part).

40. *Id.* at 545.

41. *Id.* at 547.

of the Constitution could justify the detention of citizens without charge.[42] Otherwise, "[w]here the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime."[43] Neither party argued that the AUMF constituted suspension of the writ, and therefore Justice Scalia concluded that Hamdi's detention was unconstitutional.[44] He agreed with Justice Souter in concluding that the AUMF did not satisfy the clear statement rule.[45] However, he was of the view that such detention would be unconstitutional even with a clear statement by Congress.[46]

In sum, five Justices held that the AUMF authorized detention under the specific circumstances of the case—the four Justices of the plurality together with Justice Thomas, who wrote in dissent[47]—while four Justices concluded that it does not. Section 1021 of the NDAA of 2012, by stating that the AUMF includes the authority to detain but leaving unchanged existing law and authorities with respect to the detention of U.S. persons, says nothing more than what a majority of the Court already held in *Hamdi*. The provision did nothing to resolve the ambiguity of whether—and if so, under what circumstances—Congress intended the AUMF to authorize the executive branch to circumvent the criminal justice system and apply martial law to persons captured within the United States.

B. *PADILLA* AND *AL-MARRI*: PERSONS CAPTURED ON U.S. TERRITORY

On two occasions, the Bush administration invoked authority under the AUMF to arrest and detain persons within the United States as enemy combatants. In *Rumsfeld v. Padilla*, which was decided on the same day as *Hamdi*, the Court declined to address the constitutionality of that authority on the merits.[48] Adjudications of these cases in the lower courts—all but one of which have

42. *Id.* at 554 (Scalia, J., dissenting).

43. *Id.*

44. *Id.*

45. *Id.* at 574 ("I do not think this statute even authorizes detention of a citizen with the clarity necessary to satisfy the interpretive canon that statutes should be construed so as to avoid grave constitutional concerns; with the clarity necessary to comport with cases such as *Ex parte Endo* and *Duncan v. Kahanamoku*; or with the clarity necessary to overcome the statutory prescription [under the NDA] that no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." (alteration omitted) (citations omitted) (internal quotation marks omitted).

46. *Id.* at 575 ("The Suspension Clause of the Constitution, which carefully circumscribes the conditions under which the writ can be withheld, would be a sham if it could be evaded by congressional prescription of requirements *other than the common-law requirement of committal for criminal prosecution* that render the writ, though available, unavailing. If the Suspension Clause . . . merely guarantees the citizen that he will not be detained unless Congress by ordinary legislation says he can be detained[,] it guarantees him very little indeed.").

47. *Id.* at 579 (Thomas, J., dissenting). Justice Thomas agreed that the AUMF constituted explicit congressional approval to detain; he also contended that such "detention falls squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision." *Id.*

48. 542 U.S. 426, 430 (2004).

since been vacated—revealed deep divisions over whether the AUMF authorizes domestic military detention. The courts in those cases also differed over whether to apply the clear statement rule under these circumstances.

1. Jose Padilla

Jose Padilla is a U.S. citizen who was apprehended in May 2002 at Chicago's O'Hare International Airport by federal agents executing a material witness warrant in connection with a grand jury investigation into the 9/11 attacks.[49] Padilla initially was held in federal criminal custody, until the President issued an order designating Padilla as an "enemy combatant" to be detained in military custody.[50] The government suspected that Padilla was conspiring with al-Qaeda to "carry out terrorist attacks in the United States."[51]

Padilla filed a petition for a writ of habeas corpus in the U.S. District Court for the Southern District of New York, challenging his detention as an enemy combatant.[52] The district court found in favor of the Government, accepting the Government's claim that during a time of war, the President can detain citizens as enemy combatants, even if they were captured on U.S. territory.[53] The Second Circuit reversed, holding that the President lacked authority to detain Padilla in military custody.[54] It concluded that neither the President's Article II powers nor the AUMF authorized the detention of American citizens captured on U.S. territory.[55] Instead, it found that both Supreme Court precedent and the NDA contained "a strong presumption against domestic military detention of citizens absent explicit congressional authorization."[56] The Second Circuit accordingly granted the writ of habeas corpus and directed the government to release Padilla from military custody.[57] In a 5–4 decision, the Supreme Court reversed the Second Circuit on jurisdictional grounds, concluding that the case should have been brought in the District of South Carolina, and declined to address the Second Circuit's decision on the merits.[58]

Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented on the jurisdictional issue and indicated that he would have upheld the Second Circuit's decision on the merits: "Consistent with the judgment of the Court of Appeals, I believe that the Non-Detention Act prohibits—and the [AUMF] does not authorize—the protracted, incommunicado detention of American citizens

49. *Id.* at 430–31.
50. *Id.* at 431.
51. *Id.* at 430.
52. *Id.* at 432.
53. Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 587–88, 599 (S.D.N.Y. 2002).
54. Padilla v. Rumsfeld, 352 F.3d 695, 724 (2d Cir. 2003).
55. *Id.* at 712–18, 722–23.
56. *Padilla*, 542 U.S. at 434 (citing *Padilla*, 352 F.3d at 710–22).
57. *Padilla*, 352 F.3d at 724.
58. *Padilla*, 542 U.S. at 450–51.

arrested in the United States."[59] Given Justice Scalia's dissenting opinion in *Hamdi*, it appears that a majority of the Court, as constituted in 2004, would have found the indefinite military detention of American citizens arrested in the United States pursuant to the AUMF to be unconstitutional.[60]

On remand, the district court held that the Government lacked authority to detain Padilla in military custody absent express authority from Congress, and that the AUMF contained no such authority.[61] The Fourth Circuit reversed, finding that Padilla, despite being captured in the United States, could be detained pursuant to the AUMF because prior to entering the United States, he "associated with forces hostile to the United States in Afghanistan . . . . [a]nd . . . took up arms against United States forces in that country . . . ."[62] Pending the Supreme Court's consideration of whether to grant certiorari, the Government charged Padilla with a federal crime of conspiracy and asked the Court for leave to transfer Padilla from military custody to federal prison for civilian trial.[63] The Court granted the Government's motion[64] and subsequently denied Padilla's petition for certiorari, leaving the Fourth Circuit opinion intact.[65] After a trial, a jury convicted Padilla on several charges of conspiracy and material support.[66]

2. Ali Saleh Kahlah al-Marri

Ali Saleh Kahlah al-Marri, a Qatari student who was lawfully present in the United States, was arrested in December 2001 in Peoria, Illinois, and transported to New York City to be held as a material witness for the grand jury investigation into the 9/11 attacks.[67] He was later charged with financial fraud and false statements and transferred back to Illinois to stand trial.[68] However, before his case went to trial, the President designated him an enemy combatant, and he was transferred to military custody in South Carolina.[69]

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59. *Id.* at 464 n.8 (Stevens, J., dissenting) (citations omitted). Scholars have debated the significance of the term "incommunicado" to the dissent's conclusion. *Compare* Bradley & Goldsmith, *supra* note 20, at 2120 n.324 ("[I]f Padilla were given the hearing mandated in *Hamdi*, his detention would not be 'incommunicado' and the footnote might not apply."), *with* Fallon & Meltzer, *supra* note 19, at 2074 n.176 ("It is doubtful that the *Padilla* dissenters' conclusion depended on the incommunicado nature of detention, to which neither the AUMF nor the Non-Detention Act refers. Indeed, the court of appeals' judgment that Justice Stevens deemed 'consistent' with his own contained no such qualification.").

60. It is worth noting that Justice Stevens' dissent in *Padilla* indicated that he would have affirmed the Second Circuit opinion on *statutory* grounds—in light of the Non-Detention Act, which only applies to U.S. citizens. Justice Scalia's dissent in *Hamdi*, which Justice Stevens joined, was based on *constitutional* grounds.

61. Padilla v. Hanft, 389 F. Supp. 2d 678, 689 (D.S.C. 2005).

62. Padilla v. Hanft, 423 F.3d 386, 391 (4th Cir. 2005).

63. Hanft v. Padilla, 546 U.S. 1084 (2006).

64. *Id.*

65. Padilla v. Hanft, 547 U.S. 1062 (2006).

66. United States v. Padilla, No. 04-60001-CR, 2008 WL 6124604 (S.D. Fla. Jan. 22, 2008).

67. Al-Marri v. Wright, 487 F.3d 160, 164 (4th Cir. 2007).

68. *Id.*

69. *Id.* at 165.

The Seventh Circuit dismissed al-Marri's habeas petition for lack of jurisdiction,[70] and he filed a new petition in the Fourth Circuit.[71] The district court accepted the Government's argument that detention was authorized under the AUMF and rejected the petitioner's argument that his capture away from the battlefield precluded the government from designating him as an enemy combatant.[72] On appeal, a panel of the Fourth Circuit held, in relevant part, that al-Marri did not properly fall within the legal category of an enemy combatant as defined in *Hamdi*.[73] The court distinguished the case from that of *Padilla v. Hanft* and concluded that the President lacked the authority under the AUMF to order the military to seize and detain a person in the United States under the facts of the case.[74] In contrast to *Hamdi* and *Padilla*, which the court analogized to *Ex parte Quirin*, the court reasoned that al-Marri's case was akin to that of *Ex parte Milligan*, a Civil War case in which the Supreme Court held that a citizen of Indiana who was accused of being part of an armed group that conspired to commit hostile acts against the Union was a civilian who was not amenable to military jurisdiction.[75] Thus, the panel of the Fourth Circuit concluded that enemy-combatant status rested on affiliation with the military arm of an enemy government in an international armed conflict.[76] The government petitioned for and was granted a rehearing en banc.[77] On rehearing, a splintered and narrowly divided Fourth Circuit reversed the previous panel opinion and concluded that the AUMF constituted congressional authorization to detain al-Marri as an enemy combatant.[78]

The Supreme Court granted certiorari in December 2008.[79] However, President Barack Obama, shortly after taking office, ordered a review of the factual and legal basis for al-Marri's continued military detention, which culminated in criminal charges in federal court for conspiracy and providing material support to al-Qaeda. The Government asked the Court to dismiss al-Marri's appeal as moot and authorize his transfer from military to civilian custody pending trial.[80] The Court granted the Government's motion, vacated the Fourth Circuit's judgment, and remanded the case back to the court of appeals with instructions to dismiss the case as moot.[81] The Fourth Circuit's en banc opinion regarding the President's authority to detain terrorist suspects within the United States is therefore no longer binding precedent in that circuit.

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70. Al-Marri v. Rumsfeld, 360 F.3d 707, 709 (7th Cir. 2004).
71. Al-Marri v. Wright, 443 F. Supp. 2d 774 (D.S.C. 2006).
72. *Id.* at 778–80.
73. *Al-Marri*, 487 F.3d at 183–84.
74. *Id.*
75. *Id.* at 186–87.
76. *Id.*
77. Al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008) (en banc) (per curiam).
78. *Id.* at 216.
79. 555 U.S. 1066 (2008).
80. Al-Marri v. Spagone, 555 U.S. 1220, 1220 (2009).
81. *Id.*

In sum, the lower courts in these two cases were divided over whether the AUMF authorizes the domestic military detention of persons captured in the United States. Both cases ultimately came before the Fourth Circuit, which affirmed the government's detention authority, but it did so "without establishing a conclusive test for determining which persons arrested within the United States are subject to detention under AUMF authority."[82] In both cases, the government ultimately charged the detainees with federal crimes and moved them to federal civilian custody, thereby avoiding Supreme Court review.[83] The only opinion left standing in this slew of litigation is the Fourth Circuit's panel opinion in *Padilla v. Hanft*, which held that the AUMF authorized the President to detain a U.S. citizen on U.S. territory because he had previously taken up arms against U.S. forces on the battlefield.[84] As noted above, it appears that a majority of the Court as constituted in 2004 would have reversed the Fourth Circuit on this issue.[85]

II. PRE-AUMF PRECEDENT APPLYING THE CLEAR STATEMENT PRINCIPLE TO WARTIME STATUTES

This Note argues that courts confronted with future *Padilla* or *al-Marri* fact patterns should apply the clear statement principle to the AUMF and § 1021 of the NDAA 2012. The clear statement requirement is a well-established canon of statutory construction that the Court has applied in many contexts where a statute would otherwise raise serious constitutional concerns.[86] It rests on the principle that "[i]n traditionally sensitive areas . . . the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."[87] Here, because neither the AUMF nor the NDAA 2012 has stated with sufficient clarity that Congress intended for the laws of war to displace domestic law enforcement and courts, the presumption is that the government must hold the suspect in federal custody, not military custody, and charge the suspect with a federal crime.

Supreme Court precedent supports application of a clear statement rule in this context. Only one case, *Ex parte Quirin*, if given an expansive interpretation,

82. JENNIFER K. ELSEA, CONG. RESEARCH SERV., R42337, DETENTION OF U.S. PERSONS AS ENEMY BELLIGERENTS 7 (2012).

83. *Id.*

84. *Padilla*, 423 F.3d at 397.

85. *See supra* notes 59–60 and accompanying text.

86. *See, e.g.*, Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. . . . The courts will . . . not lightly assume that Congress intended to infringe constitutionally protected liberties . . . ."); *see also* Kent v. Dulles, 357 U.S. 116, 130 (1958) ("[W]e deal here with a constitutional right of the citizen, a right which we must assume Congress will be faithful to respect.").

87. United States v. Bass, 404 U.S. 336, 349 (1971).

can be read for the contrary proposition; yet such a reading, as explained below, is inappropriate for many reasons, including the *Quirin* Court's own statement that its holding was limited to the particular facts of that case.[88]

A. PRECEDENT SUPPORTING THE CLEAR STATEMENT REQUIREMENT ON U.S. TERRITORY: *ENDO*, *DUNCAN*, AND *MILLIGAN*

In *Ex parte Endo*, the Supreme Court applied the clear statement rule to determine whether Congress intended to authorize the executive detention of concededly loyal citizens in relocation centers during World War II.[89] The Court considered the appropriate standard for reviewing war-related actions of the political branches when those actions "touch[] the sensitive area of rights specifically guaranteed by the Constitution."[90] In such cases, the Court held that construction of wartime authority necessitates "the greatest possible accommodation of the liberties of the citizen."[91] The Court stressed that it must assume that "the Chief Executive and members of Congress, as well as the courts, are sensitive to and respectful of the liberties of the citizen."[92] It therefore concluded that courts "must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used."[93]

In *Duncan v. Kahanamoku*, the Supreme Court considered whether a statute authorizing the imposition of martial law in Hawaii in the aftermath of the attacks on Pearl Harbor was intended to authorize the trial by military tribunal of individuals charged with federal crimes who were not part of the armed forces.[94] The Court acknowledged that the statutory language and history were ambiguous on the question of whether the scope of martial law included supplanting the courts with military tribunals,[95] but decided that a broad reading of the statute in question would amount to a serious departure from our nation's legal and political traditions.[96] In applying the clear statement rule, the Court stressed:

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88. *See* 317 U.S. 1, 45–46 (1942).

89. 323 U.S. 283, 300 (1944).

90. *Id.* at 299.

91. *Id.* at 302.

92. *Id.* at 300.

93. *Id.*

94. 327 U.S. 304, 307 (1946). In framing the issue, the Court viewed the due process rights of the petitioners as paramount. *Id.* at 307–08 ("[Petitioners'] cases thus involve the rights of individuals charged with crime and not connected with the armed forces to have their guilt or innocence determined in courts to [sic] law which provide established procedural safeguards, rather than by military tribunals which fail to afford many of these safeguards. . . . [T]hese judicial safeguards are prized privileges of our system of government . . . .").

95. *Id.* at 319.

96. *See id.* at 317 ("[M]ilitary trials of civilians charged with crime, especially when not made subject to judicial review, are so obviously contrary to our political traditions and our institution of jury trials in courts of law, that the tenuous circumstance offered by the government can hardly suffice to

> Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued. . . . Military tribunals have no such standing. . . . "The established principle of every free people is, that the law shall alone govern; and to it the military must always yield."[97]

Viewing the ambiguous statute in light of the "birth, development and growth of our governmental institutions,"[98] the Court refused to construe it as authorizing the executive to displace ordinary courts with military tribunals:

> We believe that when Congress . . . authorized the establishment of "martial law" it . . . did not wish to exceed the boundaries between military and civilian power, in which our people have always believed, which responsible military and executive officers had heeded, and which had become part of our political philosophy and institutions . . . .[99]

In the Civil War context, the Supreme Court held that the President could not subject a citizen of Indiana, alleged to be a member of an armed group with links to the Confederacy, to trial by military commission.[100] Lamdin P. Milligan was alleged to be a senior commander of the "Sons of Liberty," which the Government asserted had conspired to commit acts of sabotage in the Northwestern states in order to incite rebellion.[101] The Court rejected the Government's assertion of military jurisdiction over Milligan, instead remarking that the laws of war "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed."[102] Because Milligan was not part of the armed forces of the Confederacy, he was deemed a civilian and could not be subjected to a military commission in lieu of trial.[103] The Court concluded that "[o]ne of the plainest constitutional provisions was . . . infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior."[104]

The Court set forth the parameters in which martial law could be imposed during an emergency:

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persuade us that Congress was willing to . . . permit[] such a radical departure from our steadfast beliefs.").

97. *Id.* at 322–23 (quoting Dow v. Johnson, 100 U.S. 158, 169 (1879)).

98. *Id.* at 319.

99. *Id.* at 324.

100. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 135 (1866).

101. *See id.* at 6–7.

102. *Id.* at 121.

103. *Id.* at 121–22.

104. *Id.* at 122.

> If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society . . . .[105]

However, the imposition of martial law could not outlast the duration of the necessity: "[I]f [it] is continued *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction."[106] Finally, the Court concluded that martial law could not be applied outside of the active battlefield and that it was instead "confined to the locality of actual war."[107]

B. *EX PARTE QUIRIN*: THE OUTLIER CASE

In *Ex parte Quirin*, the Supreme Court construed an ambiguous statute broadly to authorize the President to try conceded unlawful combatants captured on U.S. territory by military commission during World War II.[108] That case involved Nazi saboteurs who landed on the coast of the United States from a German submarine, armed with explosives, and who entered the United States in civilian garb with the intent to commit sabotage on key components of the American war industry.[109] After the FBI captured them, President Franklin D. Roosevelt issued a proclamation calling for enemies caught on U.S. territory with the intent to commit sabotage to be "promptly tried in accordance with the law of war."[110]

The Court did not apply a clear statement principle when construing the statute in that case. Instead, it denied petitioners' habeas petitions, concluding that Congress authorized their trial by military commission through what was then Article 15 of the Articles of War (now Article 21 of the Uniform Code of Military Justice).[111] That provision stated that "the provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions . . . of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions . . . ."[112] Writing for the Court, Chief Justice Stone interpreted this provision as authorizing the President to convene military commissions in any

105. *Id.* at 127.
106. *Id.*
107. *Id.*
108. 317 U.S. 1, 28, 45–46 (1942).
109. *Id.* at 20–21.
110. Proclamation 2561: Denying Certain Enemies Access to the Courts of the United States, 7 Fed. Reg. 5101 (July 7, 1942).
111. *Quirin*, 317 U.S. at 28, 45–46.
112. *Id.* at 27 (quoting Article 15 of the Articles of War) (internal quotation marks omitted).

case that could be subjected to military jurisdiction under the laws of war.[113] The Court was divided over the proper interpretation of the statute, and Justice Jackson drafted a concurrence disagreeing with this interpretation, which he ultimately did not to file after the majority added a passage in the opinion acknowledging the Court's division over the issue.[114]

The Court's analysis in *Quirin* also attempted to distinguish *Milligan* by focusing on the status of the accused. The Court concluded that, in contrast to the Nazi saboteurs before it, "Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war . . . ."[115] The Sons of Liberty, of which Milligan was a member, "did not qualify as a belligerent for the purposes of the law of war, even though it was alleged to be plotting hostile acts on behalf of the Confederacy and it communicated with Confederate agents."[116] In contrast, the petitioners in *Quirin* were all "conceded to be engaging in hostilities under the direction of the armed forces of an enemy State in a declared war . . . ."[117] Thus, as Professor Stephen Vladeck has observed, "*Quirin* . . . converted *Milligan*'s apparently categorical constitutional ban on military commissions in areas not under martial rule into a circumstance-specific rule that turned on the status of the offender and the nature of the charged offense."[118]

The Court's holding in *Quirin* was narrow, limited expressly to the specific facts of the case. The Court declared that it had "no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals

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113. *Id.* at 28. The Court has since expressed skepticism of this interpretation. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 593 (2006) (expressing its ambivalence toward *Quirin*'s precedential value by describing that opinion's characterization of Article of War 15 as "controversial" but finding "no occasion" to revisit the decision).

114. Justice Stone's passage acknowledged that:

> [A] majority of the full Court are not agreed on the appropriate grounds for decision. Some members of the Court are of opinion that Congress did not intend the Articles of War to govern a Presidential military commission convened for the determination of questions relating to admitted enemy invaders and that the context of the Articles makes clear that they should not be construed to apply in that class of cases. Others are of the view that—even though this trial is subject to whatever provisions of the Articles of War Congress has in terms made applicable to 'commissions'—the particular Articles in question, rightly construed, do not foreclose the procedure prescribed by the President or that shown to have been employed by the Commission in a trial of offenses against the law of war and the 81st and 82nd Articles of War, by a military commission appointed by the President.

Id. at 47–48. For a discussion of Justice Jackson's draft concurrence in *Quirin* and his views, as they would apply in the post 9/11 context, about the role of the Court in wartime, see Stephen I. Vladeck, *Justice Jackson, the Memory of Internment, and the Rule of Law After the Bush Administration*, *in* WHEN GOVERNMENTS BREAK THE LAW: THE RULE OF LAW AND THE PROSECUTION OF THE BUSH ADMINISTRATION 183, 190–91, 201–08 (Austin Sarat & Nasser Hussain eds., 2010).

115. *Quirin*, 317 U.S. at 45.

116. ELSEA, *supra* note 82, at 24–25.

117. *Id.* at 25.

118. Stephen I. Vladeck, *The Laws of War as a Constitutional Limit on Military Jurisdiction*, 4 J. NAT'L SEC. L. & POL'Y 295, 318 (2010).

to try persons according to the law of war."[119] Instead, it was satisfied that the petitioners, "upon the conceded facts, were plainly within those boundaries."[120] It thus held "only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission."[121]

The Bush administration frequently cited *Quirin* as support for the President's authority to detain indefinitely, without trial, any person he deemed to be an enemy combatant.[122] However, this is an inappropriately broad reading of the case for several reasons. First, the question of whether the accused could have been detained as enemy combatants in military custody without any sort of legal proceeding was not before the Court.[123] Indeed, the President in that case had already subjected the accused to trial by a military commission.[124] Secondly, the Court's holding was limited to the narrow category of individuals before it—individuals whose status as enemy combatants was undisputed, who were fighting on behalf of an enemy government in a declared war, and who, by shedding their uniforms, had forfeited their right to be treated as prisoners of war.[125]

There are several other reasons to read *Quirin* as limited to its facts and—to the extent the case conflicts with *Milligan*, *Endo*, and *Duncan*—to accord the latter cases greater weight.[126] Notably, *Quirin* occurred at the height of World War II, and President Roosevelt had threatened to disregard any adverse decision by the Justices, many of whom he had recently appointed to the Court.[127] At least one of the Justices hearing the case (Frankfurter) was involved in advising on the creation of the military tribunals to try the petitioners.[128] The oral argument occurred only two days after the Court granted review.[129] The briefs were submitted on the day the argument began, and the per curiam order

119. *Quirin*, 317 U.S. at 45–46.

120. *Id.* at 46.

121. *Id.*

122. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 569 (2004) (Scalia, J., dissenting) ("The Government argues that our more recent jurisprudence ratifies its indefinite imprisonment of a citizen within the territorial jurisdiction of federal courts. It places primary reliance upon *Ex parte Quirin* . . . .").

123. *Quirin*, 317 U.S. at 47.

124. *Id.* at 48.

125. *Id.* at 45–46.

126. *Quirin* has been the subject of numerous academic commentaries criticizing the Court's reasoning and the flawed process by which the case was decided. *See, e.g.*, Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59, 87 (1980) (describing the decision's problematic reasoning and process and characterizing Chief Justice Stone's purpose as "not to elucidate the law, but rather to justify as best he could a dubious decision"); David J. Danelski, *The Saboteurs' Case*, 1 J. SUP. CT. HIST., no. 1, 1996, at 61, 61–82 (detailing the rushed, after-the-fact manner in which the Court disposed of the case). For a post-9/11 commentary on why the decision is controversial, see generally Carlos M. Vázquez, *"Not a Happy Precedent": The Story of* Ex parte Quirin, *in* FEDERAL COURTS STORIES 219 (Vicki C. Jackson & Judith Resnik eds., 2010); *see also Hamdi*, 542 U.S. at 569–72 (Scalia, J., dissenting) (describing the *Quirin* decision as "not this Court's finest hour" and criticizing its treatment of *Milligan*).

127. Danelski, *supra* note 125, at 68.

128. *Id.* at 69.

129. *Id.* at 68.

allowing the military commission to proceed was issued the day after the close of the argument and without an opinion explaining the Court's reasoning.[130] Six of the eight petitioners had already been executed as the Court drafted its opinion, which it issued about three months later.[131] The Court was in essence forced to provide an after-the-fact justification of a judgment that had already been executed. A number of Justices expressed profound dissatisfaction with the way the case was handled: Justice Frankfurter referred to it as "not a happy precedent," and Chief Justice Stone, who drafted the majority opinion of the Court, described the drafting process as "a mortification of the flesh."[132]

In sum, three principles emerge from the precedent regarding the application of law-of-war principles to persons arrested on U.S. territory: (1) The Court in *Endo*, *Duncan*, and *Milligan* applied a clear statement principle to construe ambiguous wartime statutes in a manner that avoids infringing on constitutional protections. (2) *Milligan* stated that military jurisdiction could only be applied on U.S. territory in narrowly circumscribed circumstances of military exigency, where the civilian system had been overthrown and the courts were not functioning. The application of military jurisdiction under those circumstances could only extend for as long as the exigency required it and only in the locality of the war zone. (3) *Quirin* did not decide the question of indefinite military detention without trial, but it did construe the statute in question broadly to authorize the trial of the accused by military commission. However, this holding was limited to the specific facts concerning individuals before it, whose status as unlawful enemy combatants was undisputed. The Court has since expressed ambivalence with respect to *Quirin*'s precedential value, and there are compelling arguments to read the decision as limited to its facts.

III. EXISTING SCHOLARSHIP ON THE CLEAR STATEMENT RULE: THE FOCUS ON INDIVIDUAL STATUS

Many scholars have advanced arguments regarding the application of a clear statement principle to the AUMF.[133] Two specific arguments have been made

130. *Id.* at 68, 71.

131. *Id.*at 72, 79.

132. *Id.* at 72–73.

133. *See, e.g.*, Neal K. Katyal & Laurence H. Tribe, Essay, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1289 & n.111 (2002) (arguing that a clear statement rule is required for interpreting congressional authority, including under the AUMF, before allowing the President to interfere with constitutionally protected interests); Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663, 2668–69 (2005) (same); Bradley & Goldsmith, *supra* note 20, at 2103–06 (arguing that a clear statement rule is appropriate in construing the AUMF when the President acts against noncombatants in the United States); *cf.* Fallon & Meltzer, *supra* note 19, at 2074 (arguing that "the Court should demand a clearer, more deliberative statement than one finds in the AUMF" to authorize the detention of *citizens* seized "within the United States, outside any theater of combat"). Others have argued that a reverse clear statement principle should apply, in which courts defer to executive judgment absent a clear statement in the statute that Congress intended to restrict the President's war powers. Justice Thomas expresses this view in its purest form. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 679–80 (2006) (Thomas, J., dissenting); Hamdi v. Rumsfeld, 542 U.S. 507,

about the applicability of a clear statement principle in the context of U.S. territory, both of which focus on the status of the individual as the triggering factor. Professors Richard Fallon and Daniel Meltzer argue that a clear statement principle applies when U.S. citizens are detained on U.S. territory.[134] This argument is based on statutory grounds, namely the theory that the Non-Detention Act triggers the clear statement requirement.[135] This argument is perfectly sound in that respect. However, it is incomplete in that it does not address the constitutional grounds for imposing a clear statement rule: the Due Process Clause of the Fifth Amendment, which applies to all persons, including noncitizens.[136] Reading the AUMF and the NDAA 2012 together to allow for the indefinite military detention without trial of individuals arrested on U.S. territory would be inconsistent with the constitutional prohibition on depriving a person of liberty without due process of law.

Professors Curtis Bradley and Jack Goldsmith offer the most comprehensive constitutionally based argument for when and how to apply a clear statement principle. Their position is that courts should apply a clear statement requirement "when the President takes actions under the AUMF that restrict the liberty of noncombatants in the United States," but not when such actions only restrict the liberty of combatants.[137] Looking to the three World-War-II-era decisions discussed in Part II, they conclude that *Endo* and *Duncan* stand for the proposition that liberty interests trump the President's commander-in-chief authority when the President's actions are unsupported by historical practice in other wars and affect the constitutional rights of U.S. citizens who are not combatants.[138] In this context, "the canon protecting constitutional liberties prevails."[139] In contrast, the authors point to *Quirin* to show that "the Court did not demand a clear statement before concluding that the U.S. citizen enemy combatant in that case could be subject to a military commission trial in the United States even though neither the authorization to use force nor the authorization for military commissions specifically mentioned U.S. citizens."[140] In such a case, the authors contend that a clear statement requirement protecting civil liberties is not required because "the presidential action involves a traditional wartime function exercised by the President against an acknowledged enemy combatant or enemy

583 (2004) (Thomas, J., dissenting). For a discussion on clear statement principles in the context of the NDAA 2012, see Steve Vladeck, *The Problematic NDAA: On Clear Statements and Non-Battlefield Detention*, LAWFARE (Dec. 13, 2011, 12:06 PM), http://www.lawfareblog.com/2011/12/the-problematic-ndaa-on-clear-statements-and-non-battlefield-detention/.

134. Fallon & Meltzer, *supra* note 19, at 2074.

135. *Id.* The Non-Detention Act provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a) (2006).

136. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (stressing that the Due Process Clause "applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent").

137. Bradley & Goldsmith, *supra* note 20, at 2048.

138. *Id.* at 2105.

139. *Id.*

140. *Id.*

nation."[141] In this context, "the President's Article II powers are at their height, and the relevant liberty interests (and thus the need for a liberty-protecting clear statement requirement) are reduced (or nonexistent)."[142]

Despite its level of detail, Bradley and Goldsmith's clear statement principle will likely never be of much help to courts construing the AUMF. By basing their clear statement requirement on the distinction between combatants and noncombatants, they fail to resolve the key interpretive question: namely, how to construe the AUMF to avoid grave constitutional concerns where an individual's status as an enemy combatant is in dispute. Their interpretation accommodates a broad reading of *Quirin*. However, in *Quirin*, nobody disputed that the detainees were in fact unlawful enemy combatants under long-standing law-of-war principles. In contrast, a court reviewing the classification of an individual as an "enemy combatant" under the AUMF and NDAA 2012 must determine what it means to be "part of" or provide "substantial[] support[]" to al-Qaeda or an "associated force[]" or otherwise to commit a "belligerent act."[143] The question of how to construe these terms lies at the core of detainee litigation,[144] and the provisions in the NDAA 2012 failed to clarify their meaning. Bradley and Goldsmith acknowledge that the AUMF is silent on the point of "what institutions or procedures are appropriate for determining whether a person captured and detained on U.S. soil is in fact an enemy combatant."[145] However, they fail to address how this ambiguity impacts the application of their clear statement principle. Their framework is therefore of no real help to courts that must first determine whether an individual was properly deemed to be an "enemy combatant" before determining whether the clear statement rule applies to the AUMF. The clear statement rule thus fails to fulfill its core purpose of resolving statutory ambiguity in a manner that avoids serious constitutional questions.

In addition to failing to resolve the due process questions surrounding the

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141. *Id.*

142. *Id.* Bradley and Goldsmith also point to the Court's opinion in *Hamdi* to support their theory, because in that case the Court "did not purport to apply a clear statement requirement, even though the case involved the detention of a U.S. citizen in the United States." Bradley & Goldsmith, *supra* note 29, at 2693. This glosses over two important distinctions. First, as discussed in section I.A, *supra*, the opinions of the plurality, concurring, and dissenting Justices in that case are consistent with a clear statement requirement; they merely differed as to the trigger and its constitutional sufficiency. Second, this account of *Hamdi* fails to make the important distinction that the U.S. citizen in that case was arrested on the battlefield in Afghanistan, not in the United States.

143. NDAA 2012, § 1021(b)(2), 125 Stat. 1298, 1562 (2011).

144. As Katyal and Tribe observe:

> Unlike the status of the eight Nazis who abandoned their uniforms, that of al Qaeda members as "unlawful belligerents" is incapable of being ascertained apart from their ultimate guilt of planning and executing acts that . . . violate the laws of war. The result is that any determination . . . of the jurisdiction of military tribunals is necessarily bound up with the merits of the substantive charges against a particular defendant.

Katyal & Tribe, *supra* note 132, at 1286.

145. Bradley & Goldsmith, *supra* note 20, at 2121.

"enemy combatant" determination, Bradley and Goldsmith's argument does not resolve the core separation of powers concern: namely, whether, and if so under what conditions, it is constitutionally permissible for the President to apply martial law in place of the criminal justice system on U.S. territory despite the absence of any compelling need to do so. In short, their argument assumes that such an application of law-of-war principles on U.S. territory, outside of the battlefield context, would be a legitimate exercise of the President's war powers in the context of counterterrorism. This is hard to square with the *Milligan* Court's powerful statements to the contrary.[146]

IV. MOVING BEYOND INDIVIDUAL STATUS: THE CONSTITUTION APPLIES IN THE UNITED STATES

This Note argues that the clear statement principle applies to the AUMF detention authority whenever it is invoked to detain individuals arrested within the United States—at least where the enemy combatant question is in dispute. The principal trigger for application of the clear statement principle should not be an individual's status but rather the presumption that constitutional rights and restraints apply on U.S. territory. Courts therefore should dispense with the enemy combatant inquiry under these circumstances. This Note posits that such a construction is required to preserve the constitutionality of the AUMF. This constitutional default rule presumes that Congress has not delegated power to the executive branch to circumvent due process protections wholesale, and that it has not altered the traditional boundaries between military and civilian power on U.S. territory. Any departure from this baseline at least requires a clear manifestation of congressional intent. As evinced by the divisions in Congress over passage of the detention provisions in the NDAA 2012, there is no consensus as to the breadth of the detention power afforded to the executive branch under the AUMF. Courts should therefore not presume that the statute authorizes application of martial law to circumvent otherwise applicable constitutional restraints and due process rights.

By making the jurisdictional question—civilian versus military—the trigger for the clear statement principle, the judiciary would properly place the impetus on Congress to clearly define and narrowly circumscribe the conditions under which the executive may use military jurisdiction to detain individuals on U.S. territory. This is the only way to ensure that our nation's political representatives have adequately deliberated and reached a consensus with respect to delegating powers to the executive branch where such delegation would have the consequence of displacing, in a wholesale fashion, constitutional protections. For all its controversy, § 412 of the USA PATRIOT Act of 2001 provides an example of where Congress has provided for executive detention under circumstances that are arguably sufficiently detailed to satisfy a clear statement

146. *See supra* notes 101–06 and accompanying text.

requirement.[147] Absent this level of clarity, where the President purports to use the AUMF to detain militarily on U.S. territory, courts must presume that constitutional rights and restraints apply and are not displaced by martial law.

A. DUE PROCESS CONCERNS

One of the most basic rights accorded by the Constitution is the fundamental right to be free from deprivations of liberty absent due process of law. The AUMF must be read with the gravity of this fundamental right in mind. As the Court made clear in *Endo*, where fundamental due process rights are at stake, ambiguous wartime statutes are to be construed to allow for "the greatest possible accommodation of the liberties of the citizen."[148] Courts "must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used."[149] This includes statutes that would otherwise "exceed the boundaries between military and civilian power, in which our people have always believed, which responsible military and executive officers had heeded, and which had become part of our political philosophy and institutions . . . ."[150]

B. THE SUSPENSION CLAUSE

The Suspension Clause lends further constitutional support to applying a clear statement requirement to the AUMF detention authority on U.S. territory. The Suspension Clause gives Congress the emergency power to suspend the writ of habeas corpus "when in Cases of Rebellion or Invasion the public Safety may require it."[151] As Fallon and Meltzer observe, this Clause—and the limited circumstances in which it may be invoked—suggest, or even explicitly affirm, "the presumptive rule that when the civilian courts remain capable of dealing with threats posed by citizens, those courts must be permitted to function."[152] To interpret the AUMF as congressional authorization to displace the civilian system and apply military jurisdiction on U.S. territory would "render that

147. This law provides for the mandatory detention of any noncitizen within the territorial United States that the Attorney General certifies is suspected of engaging in certain acts of terrorism or "any other activity that endangers the national security of the United States." 8 U.S.C. § 1226a(a)(3) (2006). As Judge Motz noted in her original panel opinion in *al-Marri*, § 412 of the USA PATRIOT Act differs from the AUMF in that it contains strict instructions on the length of detention and the procedures the government must follow once detention commences. Al-Marri v. Wright, 487 F.3d 160, 191 (4th Cir. 2007); *see also* Vladeck, *supra* note 132 (distinguishing the USA PATRIOT Act from the AUMF for purposes of the clear statement principle).

148. *Ex parte* Endo, 323 U.S. 283, 302 (1944); *see also* Kent v. Dulles, 357 U.S. 116, 129–30 (1958) (holding that the Secretary of State could not deny citizens passports on the basis of their membership in the Communist Party absent explicit congressional authorization because the Court must construe narrowly all delegated powers that curtail constitutional rights).

149. *Endo*, 323 U.S. at 300.

150. Duncan v. Kahanamoku, 327 U.S. 304, 324 (1946).

151. U.S. CONST. art. I, § 9, cl. 2.

152. Fallon & Meltzer, *supra* note 19, at 2071.

emergency power essentially redundant."[153] The Suspension Clause also underscores that the right to be free from the arbitrary deprivation of physical liberty is one of the most central rights that the Constitution was intended to protect.

C. THE LACK OF MILITARY NECESSITY

The lack of military necessity for applying law-of-war principles on U.S. territory further supports the construction of the AUMF to avoid displacing civilian law with law of war in the domestic context. The Supreme Court long ago declared that martial law may not be applied on U.S. territory when civilian law is functioning and "the courts are open and their process unobstructed."[154] Instead, "[t]he necessity [for martial law] must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration."[155] In the absence of such necessity, "[w]hen peace prevails, and the authority of the government is undisputed, there is no difficulty of preserving the safeguards of liberty . . . ."[156]

The past ten years have shown that there is no need to stretch law-of-war principles in the AUMF to reach U.S. territory. The exigencies associated with an active battlefield, which were critical to the *Hamdi* plurality's interpretation of the AUMF,[157] are simply not present in the United States. Instead, "American law enforcement agencies . . . continue to operate within the United States. These agencies have a powerful set of legal tools, adapted to the criminal process, to deploy within the United States against . . . suspected [terrorists], and the civilian courts remain open to impose criminal punishment."[158] Indeed, for more than a decade since the 9/11 attacks, domestic law enforcement agencies have carried the responsibility for domestic counterterrorism and have successfully thwarted several terrorism plots.[159] Civilian courts have adjudicated the prosecution of suspected terrorists captured on U.S. territory under

153. *Id.* at 2077. The argument has also been made that the Treason Clause, U.S. CONST. art. III, § 3, cl. 1, lends constitutional support to finding that the framers did not intend for military jurisdiction to apply on U.S. territory. *See* Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863, 863 (2006) (arguing that "the Treason Clause prohibits the exercise of military authority over individuals who are subject to the law of treason, a category that includes not only United States citizens, but almost all persons merely present within the United States"). Justice Scalia also made this argument in his dissenting opinion in *Hamdi*. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting) ("Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime.").

154. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 121 (1866).

155. *Id.* at 127.

156. *Id.* at 123–24.

157. *See supra* section I.A.

158. Fallon & Meltzer, *supra* note 19, at 2075 (footnote omitted).

159. For a detailed summary of cases from 1998–2000 in which the U.S. government obtained intelligence or prosecuted suspected terrorists through the criminal justice system (or both), see David S. Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. NAT'L SEC. L. & POL'Y 1 app. 1, at 80–95 (2011).

federal laws.[160] The experience of the past decade shows that the civilian system is up to the task, and there is no military exigency that justifies curtailing constitutional protections and applying military authority in the domestic context.[161] Accordingly, the circumstances that the Supreme Court found to justify the use of the military authority under the AUMF to capture and indefinitely detain Hamdi, who was found armed on the active battlefield in Afghanistan, do not extend to persons captured on U.S. territory. The manner in which the government handled the *Padilla* and *al-Marri* cases further demonstrates the lack of military necessity. In both cases, the government abandoned its position that national security imperatives demanded that they continue to be held in military custody; both were transferred to federal custody and ultimately convicted of federal crimes carrying lengthy prison terms.[162]

The Supreme Court's precedent in *Quirin* neither requires, nor can it be fairly read to justify, a different conclusion. First, the issue of indefinite military detention without trial was not before the Court in that case. Second, the status of the Nazis in *Quirin* as enemy combatants was undisputed, in contrast to that of individuals who are "part of" or "substantially support" al-Qaeda or "associated forces."[163] Third, the Court in *Quirin* went "out of its way to say that the Court's holding was extremely limited," encompassing only the precise factual circumstances before it.[164] Finally, *Quirin* itself is shaky precedent, as evidenced by the Court's own subsequent statements and as elaborated in numerous scholarly commentaries on the case.[165] As Katyal and Tribe observe:

> *Quirin* plainly fits the criteria typically offered for judicial confinement or reconsideration: It was a decision rendered under extreme time pressure, with respect to which there are virtually no reliance interests at stake, and where the statute itself has constitutional dimensions suggesting that its construction should be guided by relevant developments in constitutional law.[166]

160. *See id.*

161. One argument frequently advanced in favor of applying military jurisdiction instead of civilian law enforcement is the need to "extract information from terrorist suspects and to protect intelligence sources." Fallon & Meltzer, *supra* note 19, at 2075. However, this argument is less persuasive when one considers the numerous instances in which the government has successfully used the criminal justice system over the past decade to gather intelligence, thwart terrorist plots, and prosecute suspects for various acts of terrorism under federal law. *See generally* Kris, *supra* note 158, at 14–26, app. 1 at 80–95 (citing numerous illustrative cases of how civilian law enforcement has successfully gathered intelligence, thwarted terrorist plots, and prosecuted suspects for acts of terrorism). Finally, the Supreme Court has already noted that "indefinite detention for the purpose of interrogation is not authorized [by the AUMF]." Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (plurality opinion).

162. *See supra* section I.B.

163. *See supra* note 4 and accompanying text.

164. Katyal & Tribe, *supra* note 132, at 1286.

165. *See supra* note 125.

166. Katyal & Tribe, *supra* note 132, at 1291 (footnotes omitted).

This case therefore should not be read as foreclosing the application of a clear statement principle to the AUMF as applied on U.S. territory where an individual's status as an enemy combatant is in dispute.

CONCLUSION

The AUMF is ambiguous: it does not specify whether it reaches individuals captured on U.S. territory, and Congress declined to resolve this question when it enacted § 1021 of the NDAA 2012. If a future administration invokes the AUMF as authority to capture and hold persons on U.S. territory in indefinite military detention, it will be left to the courts to determine whether this is constitutional. Courts should resolve this question by applying a clear statement requirement. This Note has argued that the trigger for this clear statement requirement is not the individual's status but rather the presumption that constitutional rights and restraints apply on U.S territory. Courts should apply this default presumption regardless of an individual's citizenship status, and it should apply even where the government claims that the individual is an "enemy combatant," at least where that determination is subject to dispute. This Note has argued that this method of statutory interpretation is constitutionally required. "[B]y extending to all 'persons' within the Constitution's reach such guarantees as . . . due process of law, the Constitution constrains how our government may conduct itself in bringing terrorists to justice."[167] If these constraints are to remain meaningful, these guarantees require, at the very least, that courts presume that constitutional guarantees prevail where congressional intent is unclear. The past ten years have shown that our criminal justice system is capable of thwarting terrorist attacks and bringing terrorists to justice while still preserving the safeguards of liberty that are fundamental to our system of justice. "[T]hese safeguards need, and should receive, the watchful care of those [e]ntrusted with the guardianship of the Constitution and laws."[168]

167. *Id.* at 1309.
168. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 124 (1866).