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An Assault on Liberty: The 2012 National Defense Authorization Act and the Indefinite Military Detention of US Citizens without Charge or Trial

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Abstract

In the wake of 9/11 the U.S. Government has passed a host of counter-terrorism laws that provide the Executive Branch and the President of the United States frightening levels of authority. The Authorization for Use of Military Force Against Terrorists of 2001 (AUMF) and the National Defense Authorization Act for Fiscal Year 2012 (NDAA) include provisions or have been interpreted to allow the President to indefinitely detain terrorism suspects in military custody without charge or trial. This includes the potential application of these laws to American citizens. This thesis will analyze these statutes and relevant jurisprudence on the subject of indefinite detainment for both Americans and non-Americans. Ultimately, the analysis will show that the President of the United States does not have the constitutional authority to indefinitely detain US citizens in military custody who are taken into custody in the domestic United States. Thus, the detention provisions of the 2012 National Defense Authorization Act are unconstitutional and should either be repealed by Congress or struck down by the Supreme Court.

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Table of Contents

Abstract 2
Acknowledgements 3
Introduction 5
Breaking Down The National Defense Authorization Act 7
Section 1021: 7
Section 1022 11
Article II, the Separation of Powers Doctrine, and the Writ of Habeas Corpus 14
Analysis of Relevant Supreme Court Case Law and Indefinite Detainment of Citizens 16
Conclusion 30
Appendix A – The Authorization for Use of Military Force Against Terrorists of 2001 (Public Law 107-40) 33
Appendix B – The National Defense Authorization Act for Fiscal Year 2012 (Public Law 112-81) 35
Section 1021 of the National Defense Authorization Act for Fiscal Year 2012 35
Section 1022 of the National Defense Authorization Act for Fiscal Year 2012 36
References 38

Introduction

The attacks of September 11th, 2001 started a security frenzy in the United States causing the restructuring of various intelligence agencies, and the creation of the cabinet level, Department of Homeland Security.[1] However, the government's restructuring of the bureaucracy was not the only action it took in the name of preventing further acts of terrorism. Congress has passed a number of powerful statutes that were intended to empower the Executive Branch to prevent future acts of terrorism, arrest those involved in terrorist activity, and attack those persons or groups who threaten the United States, including United States citizens.

Some of the statutes that Congress passed were given extensive media coverage, such as the Patriot Act. The Patriot Act, and surveillance programs that have similar or farther reaching surveillance powers than the Patriot Act authorizes, have received a great deal of public debate because of their controversial nature. Recently, the leaks of National Security Agency (NSA) contractor Edward Snowden have once again brought surveillance laws and the Executive Branch front and center in media coverage and public discourse.[2] But, there are some laws that have flown under the radar and received very little media coverage, if at all. These laws are far more dangerous than intrusive governmental surveillance programs.

The laws this paper will address specifically are Public Law 107-40, The Authorization for Use of Military Force (AUMF), and Public Law 112-81, The National Defense Authorization Act for Fiscal Year 2012 (NDAA). These laws, especially when read together, have the potential

[1] Martin, Gus. Understanding terrorism. 4th ed. London: SAGE, 2013: 473-474

[2] The Economist Newspaper. "The Snowden effect." The Economist. http://www.economist.com/blogs/democracyinamerica/2013/08/american-surveillance (accessed May 6, 2014).

to not only violate the rights of US citizens, but to also erode the constitutional tradition the US has embraced since its creation by the founding fathers – a three branch government set up to ensure that no one branch holds too much power or becomes tyrannical.[3] Of the three branches, the founders were extremely cautious when setting up the Executive Branch, with the potential for abuse and of tyranny that come out of unchecked executive authority.

As will be discussed later in this paper, when read together these laws can be construed to authorize indefinite military detention of those who are merely suspected of having ties to terror organizations, regardless of their citizenship status. The reality of the situation is that these laws together form what can be referred to as a quasi state of martial law in the United States, where the military enforces laws and detains suspects, without charge or trial under the direction of the President of the United States.

In 2012, New York Times Pulitzer Prize winning reporter Chris Hedges brought suit on behalf of journalists and citizens of the US against the indefinite detention provisions contained within section 1021 and 1022 of the National Defense Authorization Act. The central issues of the Hedges case focus around a denial of 5th amendment due process rights and 1st amendment rights by sections 1021 and 1022.[4] A U.S. District Court initially passed an injunction against the President's use of the NDAA's detention provisions; however, upon the Government's appeal, the Court of Appeals overturned the lower court's decision on the grounds that Hedges and his compatriots could not prove that any harm had been perpetrated on any of the stakeholders in the

[3] Renzo, Anthony. "A Call to Protect Civilian Justice: Beware the Creep of Military Tribunals." American Constitution Society for Law and Policy. https://www.acslaw.org/files/Renzo%20Issue%20Brief_Final.pdf (accessed April 2, 2014).

[4] *Hedges v. Obama*, 890 F.Supp.2d 424 (2012)

suit.[5] Essentially, the Appeals court dodged the decision by attacking the petitioners' standing instead of ruling on their challenge to the NDAA.

This paper will analyze the constitutionality of indefinite military detainment without charge or trial of terror suspects captured on U.S. soil and who are U.S. citizens. The contention being that the National Defense Authorization Act's section 1021 and 1022 military detention provisions are unconstitutional because the President lacks the relevant constitutional authority from Article II. Furthermore, the President's indefinite detainment of U.S. citizens would constitute a violation of the separation of powers doctrine by implying an Executive suspension of the Writ of Habeas Corpus and the declaration of martial law, removing citizens from the civilian criminal justice system and with it, all of its essential protections from governmental abuse.

Breaking Down The National Defense Authorization Act

Section 1021:

The National Defense Authorization Act (NDAA) for Fiscal Year 2012 was passed by Congress in December 2011[6]. The National Defense Authorization Acts are normally mundane acts passed each year by Congress to fund the Department of Defense. The NDAAs also provide a way for Congress to direct new regulations or policies regarding the US military or Department of Defense. For example, over the past few years the NDAA's have prohibited the closure of the

[5] *Hedges v. Obama (2012)*
[6] The National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81

detention center at Guantanamo Bay by the Executive Branch.[7] [8] However, beginning in December 2011, the NDAA '12 included several provisions relating to the military detention of terrorist suspects.[9] As we will examine in this section, several provisions of the NDAA '12, when combined with the Authorization for Use of Military Force (AUMF), can be read to allow the military detainment of U.S. citizens captured on U.S. soil without charge and without a public trial – in direct violation of their constitutionally protected due process rights.

The 2012 NDAA's Title X, Subtitle D is dedicated to counter-terrorism policies of the Department of Defense. Within Subtitle D are sections 1021 and 1022 which explicitly authorizes detainment, by the US military, of terrorism suspects.

Section 1021 of the NDAA '12 is titled "Affirmation of authority of the Armed Forces of the United States to detain covered persons pursuant to the Authorization for Use of Military Force".[10] This reinforces the Executive Branch's statements and briefs in numerous Supreme Court cases where it argued that it ultimately had the authority under the AUMF to detain terror suspects.[11] The Bush Administration argued in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), that if the AUMF authorized deadly force, then less serious forms of force, including detention authority, must logically follow. Subsection A of sec. 1021, in general terms, affirms the ability of the President to use the armed forces to detain "covered persons…pending the disposition under the law of war".[12] The act defines "covered persons" as follows:

> *(b) COVERED PERSONS. – A covered person under this section is any person as follows:*

[7] The National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239
[8] NDAA FY 2012
[9] The National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, Title X, Subtitle D, §1021, §1022
[10] Pub. L. No. 112-81, Title X, Subtitle D, §1021
[11] *See Hamdi v. Rumsfeld (2004), Hamdan v. Rumsfeld (2006), Boumediene v. Bush (2008)*
[12] Pub. L. No. 112-81, Title X, Subtitle D, §1021

(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.

(2) A person who was 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.

Subsection b(1) is a fairly straight forward provision, but it is b(2) that embodies the vague, ambiguous policies that litter the statute. Subsection b(2) does not elaborate on what the phrase "substantially supported" entails, nor does it define what constitutes a "belligerent act". Does a disgruntled US citizen who fires shots at a government building qualify as a "belligerent act"? If the President labeled that US citizen as a "covered person", he could use the NDAA to have the military detain him in a military detention center without charge or trial, where if he was arrested and processed in the civilian criminal justice system, he would have to be charged and tried before a judge and jury.

Moving down to Subsection C, Disposition Under the Law of War, Subsection C(1) defines disposition under the law of war as "detention under the law of war without trial until the end of the hostilities authorized by the Authorization for Use of Military Force".[13] This clause will be discussed later in the paper, but the main issue with C(1) is that being detained until the end of hostilities implies that there will eventually be an end. The "War on Terror" has been ongoing since the passing of the AUMF in 2001. It is now 2014, that is 13 years of hostilities, and there currently is no end in sight as we continue to engage al-Qaeda across the Middle East and Africa. The current battle to dismantle al-Qaeda could last another decade or more.[14] Even

[13] The National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, Title X, Subtitle D, §1021
[14] Greenwald, Glenn. "Washington gets explicit: its 'war on terror' is permanent." theguardian.com. http://www.theguardian.com/commentisfree/2013/may/17/endless-war-on-terror-obama (accessed April 6, 2014).

worse, the "war on terror" could continue indefinitely, and as a result, so would a US citizen's military detention if they were held under C(1) of the NDAA.

The last few provisions of section 1021, however, solidify the government's ability to actively partake in military detention pursuant to subsection C(1). Subsections D and E are as follows:

> *(d) CONSTRUCTION. – Nothing 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*
>
> *(e) AUTHORITIES. – Nothing in this section shall be construed to affect 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 captured or arrested in the United States*

Subsection D and E appear to be provisions added by Congress to try and limit the scope of the NDAA. Perhaps to aid the law in standing up to the rising level of scrutiny the US Supreme Court has been applying to indefinite detention cases since the passage of the AUMF.[15] Subsection D is attempting to limit the powers the NDAA gives the President by stating that the NDAA is not intended to limit or expand the authority the President already has under the AUMF. However, this is problematic in and of itself. The Executive Branch, under both former President Bush and President Obama have asserted that they have the authority under the AUMF to detain terror suspects in military custody regardless of their citizenship status, as was the case in *Boumediene v. Bush*.[16] Thus, the language stating that "nothing in this section is intended to

[15] *See Hamdi v. Rumsfeld,* 542 U.S. 507 (2004) and *Boumediene v. Bush,* 553 U.S. 723 (2008)
[16] *Boumediene v. Bush*, 553 U.S. 723 (2008)

limit or expand" the authority of the president or the AUMF fails to protect the rights of US citizens as the Executive is arguing it already posses the necessary detention authority.

Section 1022

Section 1022 of the NDAA serves to further define the procedure for detaining terror suspects. The title of Section 1022 is "Military Custody for Foreign Al-Qaeda Terrorists".[17] At face value it would appear that this section could be intended to be applied only to foreign terror suspects; however, as later examination will show, Congress fails to explicitly ban the President from applying the section to U.S. citizens. As the later analysis of *Hamdi v. Rumsfeld* will demonstrate, that the AUMF, from which the NDAA is derived, was used in that case to detain an American citizen. Subsection A, paragraph 1 states that "In General…the Armed Forces of the United States shall hold a person described in paragraph 2 [covered persons]... in military custody pending disposition under the law of war", which creates a statutory requirement for the President to detain these suspects in military custody.[18]

Subsection A, paragraph 1's reference to the "covered persons" provision is more problematic given paragraph 1's requirement for military detainment. Paragraph 2 states:

> (2) COVERED PERSONS. – The requirement in paragraph (1) shall apply to any person whose detention is authorized under section 1021 who is determined-
>
> (A) to be a member of, or part of, al-Qaeda or an associated force that acts in coordination with or pursuant to the direction of al-Qaeda; and

[17] The National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, Title X, Subtitle D, §1022
[18] Pub. L. No. 112-81, Title X, Subtitle D, §1022, a(1)

(B) to have participated in the course of planning or carrying out an attack or attempted attack against the United States or its coalition partners"

These provisions are relatively vague, and it is not beyond the realm of possibility that a U.S. citizen can be falsely believed by the government to either be a member of al-Qaeda or having either carried out a terror incident, or is in the stage of planning one, or conspiring to plan one. If it was any other crime, the citizen would be entitled to the normal civilian justice system process where they are formally indicted on charges by the Executive Branch (whether that be a local, state or the federal one) before a grand jury and the courts of the Judiciary who are empowered to ensure that the Executive Branch has enough evidence to proceed.[19]

In this case, the NDAA is allowing the Executive to simply label the suspect an enemy combatant or construe the evidence so that it fits into the "Covered Persons" provisions of paragraph (2) and then can detain the individual indefinitely. It is important to note that the resulting detainment comes absent of being formally charged, let alone allowing a grand jury or a judge to determine whether or not the Government has enough evidence to both continue their detainment of the suspect, and to proceed forward with a trial. Of course those individuals who are being held indefinitely have no guarantee of a trial either, in addition to not being charged.

Subsection B, paragraph (1) specifically refers to section 1022's applicability to citizens of the United States. Paragraph (1) states that "The requirement to detain a person in military custody under this section does not extend to citizens of the United States".[20] This provision would appear to exempt U.S. citizens from the application of the NDAA's detention authorities, but that would only be a superficial reading of this paragraph. It simply states that the

[19] Weaver, Russell L.. Constitutional law: cases, materials & problems. 2nd ed. New York: Aspen Publishers, 2011.
[20] The National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, Title X, Subtitle D, §1022, b(1)

requirement to detain "does not extend" to American citizens.[21] This does not explicitly ban the detention of U.S. citizens under this section, it merely is not extending the requirement to do so that originates from subsection A, paragraph 1 of this section. Section 1022 already incorporates a level of Presidential discretion as Congress has provided the President with the ability to waive the requirement to detain "covered persons" for national security interests.[22]

If there is any doubt as to whether or not the President believes he has this authority, look no further than President Obama's signing statement. He stated "I want to clarify that my Administration will not authorize the indefinite military detention without trial of American citizens". He explained further that "I believe that doing so would break with our most important traditions as a Nation".[23] From these statements it can be inferred that President Obama does believe that the NDAA gives him the authority to detain U.S citizens, but he is simply not going to employ the detention provisions in that way. While President Obama thankfully believes that indefinite detainment of American citizens is against our constitutional traditions that does not mean that the next president, or a president years down the road won't interpret the law in the same light. Suppose two presidents from now another terror attack on the scale of 9/11, or worse, happened. That president, given the political climate, might seek to imprison those he thought were involved, including American citizens without charge or trial.

Being that Congress has already given the President a certain level of discretion when applying this section's detention provisions, it stands to reason that a President can interpret this section as a whole as not explicitly banning the military detention of citizen terror suspects,

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[21] Pub. L. No. 112-81, Title X, Subtitle D, §1022, b(1)
[22] The National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, Title X, Subtitle D, §1022, b(4)
[23] Eviatar, Daphne. "Promises, Promises: President Obama's NDAA Signing Statement." The Huffington Post. http://www.huffingtonpost.com/daphne-eviatar/promises-promises-preside_b_1182067.html (accessed April 6, 2014).

effectively removing them from civilian courts and moving solely into the jurisdiction of the Executive Branch, through the auspices of the military.

Article II, the Separation of Powers Doctrine, and the Writ of Habeas Corpus

The founders set up the Government of the United States to ensure that no single branch could ever gain too much power.[24] The founders achieved this by explicitly vesting different branches with different authorities. In cases surrounding the AUMF, the Executive Branch has argued that under Article II, the President's commander-in-chief powers allows him to detain those he labels as enemy combatants or belligerents, including US citizens.[25] However, as the evidence will show, giving the President the ability to detain US citizens under the NDAA's provisions (and by extension, the AUMF's as well) constitutes a violation of the separation of powers doctrine, and is done with the absence of any direct, vested powers given to the President under Article II of the Constitution.

The separation of powers dilemma arises from two major issues that the President's detention authority under the AUMF and NDAA present when examining that authority against the powers vested to the Executive, Legislative, and Judicial branches. Both of these issues come from powers that in Article I of the Constitution were explicitly vested to the Congress. Congress was given the authority to suspend habeas corpus and to declare martial law. Having the military act as law enforcement and using military courts and review tribunals as Habeas substitutes both

[24] Milkis, Sidney M., and Michael Nelson. The American presidency: origins and development, 1776-2011. 6th ed. Washington, DC: CQ Press, 2012: 15-35
[25] *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004)

violate the constitution. The President would be unable to employ the military, an organ of the Executive Branch, in this way without explicit authorization from Congress in the form of suspension of Habeas and/or a declaration of martial law.

Focusing on the issue of Habeas Corpus, the NDAA would allow the President to detain U.S. citizens in indefinite military detention and they would primarily be examined by a military detainee review tribunal that, in theory, would impartially examine the government's evidence for holding the terror suspect.[26] However, several issues arise from this expectation. First, the review tribunal that would be effectively replacing a standard Habeas review in front of judge would be a military one, so it would be an extension of the Executive Branch. Thus, the Executive Branch would be both bringing allegations against the accused and would then be expected to impartially judge its own evidence to determine if the accused should continue to be held in military custody. This constitutes a grave breach of power under the separation of powers doctrine as the Executive Branch has essentially become the judge, jury, and depending on the case, the executioner.

The Constitution and the earliest laws passed by the first Congresses ensured that an adversarial, separated system of justice was to be employed.[27] The Judiciary would provide the impartial judges that would conduct Habeas reviews, while the Executive Branch, through the auspices of the police and the prosecutors, would bring evidence and charges against the accused. Here, the Executive is not even formerly charging the accused, it is simply bringing evidence to bear against the individual for purposes of indefinite detainment, and then is passing judgment on its own evidence to affirm the detainment process.[28] The Executive is being trusted

[26] *Boumediene v. Bush,* 553 U.S. 723 (2008)
[27] Weaver, Russell L.. Constitutional law: cases, materials & problems. 2nd ed. New York: Aspen Publishers, 2011.
[28] *Boumediene v. Bush (2008)*

to carry out the duties that even the founders did not entrust to any single branch of the U.S. Government.

Analysis of Relevant Supreme Court Case Law and Indefinite Detainment of Citizens

While there have been no Supreme Court cases that have explicitly involved the National Defense Authorization Act of 2012, the Authorization for Use of Military Force and its implied detention authority has been challenged numerous times before the Court. Controlling cases in this area include *Hamdan v. Rumsfeld (2006), Hamdi v. Rumsfeld (2004), Boumediene v. Bush (2008), Rasul v. Bush (2004), Ex Parte Milligan (1866),* and *Ex Parte Quirin (1943)*. *Hamdan, Hamdi, Rasul,* and *Boumediene* are cases that arose out of challenges to the detention powers asserted by the Executive Branch pursuant to the AUMF. These cases when taken together are considered landmark cases when it comes to detainee rights and the "War on Terror". It is important to note at the outset of this analysis that none of these cases barred the Executive from detaining suspects in indefinite detention. My argument will be more abstract, as the only one of these cases, *Hamdi*, involved an actual US citizen. And even *Hamdi*, involved a US citizen who was not on US soil at the time of his capture. When read together these cases tell a tale of a Court that is slowly reigning in the imperial nature of the post-9/11 Executive Branch. The other two cases, *Milligan* and *Quirin*, deal with military detention and Habeas Corpus during the Civil War and the Second World War, respectively.

We will examine *Milligan* and *Quirin* first as they are used as controlling case authorities for the present day set of detainee rights cases. *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), is a case that arose out of the Civil War in the state of Indiana. Milligan and others were accused by

the Union Army of planning to steal Union weapons, and assault prisoner of war camps to liberate Confederate soldiers. Milligan and his compatriots were tried in a military tribunal and sentenced to be hanged.[29] They were able to appeal this decision after the war ended as their execution date was not set until May of 1865.

The Court ruled that the suspension by the government of Habeas Corpus during the Civil War was lawful, but citizens could not be tried under military tribunal in states that upheld the authority of the constitution and where civilian courts were open and operating (as they were in Indiana).[30] [31] What this ruling essentially boils down to is the Executive Branch cannot subject an American citizen to a military tribunal where the civilian courts are open. This presents a major obstacle to the NDAA and the AUMF. If a terror suspect happened to be an American citizen and was captured in the United States, would he still be subjected to the NDAA's indefinite detention provisions?

If you interpret the NDAA based on the detainment language in Section 1022, and the general affirmation in Section 1021 of the AUMF's detention authorities, it would appear that the President does in fact have the ability to indefinitely detain American citizens who are captured on American soil. Under *Milligan*, such an action would clearly contradict the courts ruling as the NDAA and AUMF take a US citizen out of the civilian criminal justice system and place them in military custody – all while the civilian courts are in fact open and operating. Furthermore, the court upheld the ability for the military to detain these individuals pending the disposition of the laws of war but there is an important circumstantial caveat to take into

[29] *Ex Parte Milligan,* 71 U.S. (4 Wall.) 2 (1866)
[30] *Ex Parte Milligan (1866)*
[31] Renzo, Anthony. "A Call to Protect Civilian Justice: Beware the Creep of Military Tribunals." American Constitution Society for Law and Policy. https://www.acslaw.org/files/Renzo%20Issue%20Brief_Final.pdf (accessed April 2, 2014).

consideration.[32] At the time of *Milligan*, Congress had officially suspended Habeas corpus and declared martial law in certain areas of the country. This would boost the Executive Branch's authorities, especially its detention powers.[33] The court was careful to note, however, that when Habeas Corpus is suspended the executive Branch cannot use that opportunity to try citizens in military courts, nor should it be executing them.[34]

The other controlling case authority we will examine is *Ex Parte Quirin,* 317 U.S. 1 (1942). Quirin throws a wrench in the precedents set by *Milligan*. Quirin is a case were Haupt, a US citizen who primarily grew up in Germany became a member of the Nazi party. He was joined by several Nazi agents and landed on the coast of Long Island, NY in a U-Boat with a mission to sabotage American war industries. Haupt and his co-conspirators were caught by the FBI and were transferred to military custody as enemy combatants. The men were tried by military commission and sentenced to death[35]. The Supreme Court issued a quick decision allowing the execution to continue and then later released the full reasoning for their decision.[36]

The key issues in *Quirin* were over whether or not the Government had violated Haupt and the other co-conspirators' Habeas rights, and if their detention and the military commission to try them were constitutionally sound. The Court ruled in favor of the Government stating that President Roosevelt was within his authority to both detain and try the men under military law.[37] While this verdict might indicate that the current AUMF and NDAA detention authorities are

[32] *Ex Parte Milligan*, 71 U.S. (4 Wall.) 1 (1866)
[33] Renzo, Anthony. "A Call to Protect Civilian Justice: Beware the Creep of Military Tribunals." American Constitution Society for Law and Policy. https://www.acslaw.org/files/Renzo%20Issue%20Brief_Final.pdf (accessed April 2, 2014).
[34] *Ex Parte Milligan (1866)*
[35] *Ex Parte Quirin,* 317 U.S. 1 (1942)
[36] Renzo, 2008
[37] *Ex Parte Quirin (1942)*

constitutional, there are key differences between the nature of the AUMF/NDAA detainment authorities and the facts that surrounded *Quirin*.

The Government argued that it had the constitutional authority in a time of war to detain, try, and ultimately execute the conspirators on the grounds that they were unlawful combatants that violate the laws of war, and were thus not entitled to standard civilian trials. The Court in its decision stated that:

> "Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals." (317 U.S. 1)

The court drew the distinction that the Government was arguing between lawful and unlawful combatants. The court found that the Germans, including Haupt, qualified as unlawful enemy combatants, and they were thus subject to military detention and punishment, and were not entitled to the rights of prisoners of war. They stated that the Germans fell "plainly within the ultimate boundaries of the jurisdiction of military tribunals, and were held in good faith for trial by military commission, charged with being enemies who, with the purpose of destroying war

materials and utilities, entered or after entry remained in our territory without uniform".[38] The court further went on to say that such action constitutes "an offense against the law of war" and that the constitution authorizes these individuals to be tried by military commission.[39] However, the applicability of this ruling to a NDAA type case, should one make it to the Supreme Court, is questionable.

A major difference between a future NDAA case and *Quirin* is that the circumstances surrounding *Quirin* involve a declared war in which the general strategy on all sides was "total war", with the entire country was mobilized behind the war effort. The current "War on Terror" bears almost no similarities to the Second World War context of *Quirin.* Another difference is the classification of the individual or individuals as combatants. To the extent that Quirin was not simply a case decided during the war hysteria of the time, the court's decision was based on the initial classification of Haupt and his co-conspirators as unlawful enemy combatants, making them akin to spies in a time of war.

The Government attorney, Attorney General Biddle, argued that the Government had the ability to punish the accused in military commissions because of the text of the 1789 Alien Enemies Act that among other provisions, authorized the treatment of those individuals who were associated with a foreign government who the United States had a declared war with were to be treated as enemy aliens.[40] Biddle's central argument throughout *Quirin* was that the Germans were acting under the authority of the German Government and had entered U.S. territory illegally in secret, ditching their military uniforms for civilian clothes as spies or

[38] *Ex Parte Quirin,* 317 U.S. 1 (1942)
[39] *Ex Parte Quirin (1942)*
[40] Renzo, Anthony. "A Call to Protect Civilian Justice: Beware the Creep of Military Tribunals." American Constitution Society for Law and Policy. https://www.acslaw.org/files/Renzo%20Issue%20Brief_Final.pdf (accessed April 2, 2014).

saboteurs. This, he argued and with which the court later agreed with, was an offense against the law of war and qualified them to be detained and tried by the military.

Quirin presents a contradiction to the ruling of *Milligan* discussed earlier. *Milligan* held that citizens should not be tried under military jurisdiction if the civilian courts were open and operating. During the time of *Quirin* the civilian courts were indeed open and operating, as was referenced by the counsel for the Germans.[41] The court drew a distinction between *Milligan* and *Quirin* by reasoning that Milligan, while he was accused of conspiring to aid the Confederacy, was not actually a member of the Confederate Army nor was he acting on behalf of the Confederate Army.[42] This differs from *Quirin* where accused were either a part of the German Armed Forces or were acting on their behalf. Additionally, in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), Justice Scalia noted that to the extent that *Quirin* remains good law, a major difference between *Milligan* and *Quirin* is that in *Quirin* none of the accused ever contested their status of being in the German Armed Forces.[43] In *Milligan*, he did dispute his status and Justice Scalia reasons that this is the key differentiator since by not contesting their associations with the German Armed Forces the Germans were essentially admitting to being agents of a hostile, foreign government.[44]

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) is perhaps the most significant case in this analysis. Yaser Hamdi was an Arab-American citizen who was caught on the battlefields of Afghanistan by Northern Alliance and US forces in a Taliban unit. He was detained as an enemy combatant and sent to military custody in the United States. He was ordered by President Bush to

[41] Renzo, Anthony. "A Call to Protect Civilian Justice: Beware the Creep of Military Tribunals." American Constitution Society for Law and Policy. https://www.acslaw.org/files/Renzo%20Issue%20Brief_Final.pdf (accessed April 2, 2014): 6-8
[42] Renzo, 2013: 7
[43] *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004). See Justice Scalia's opinion in Section V of the dissent
[44] *Hamdi v. Rumsfeld (2004),* See Justice Scalia's Dissent

be held in indefinite military detention, pursuant to the Authorization for Use of Military Force. Yaser Hamdi was subsequently denied access to counsel or the Federal Courts.[45] His father filed a Habeas petition in the US District Court for Eastern Virginia that brought the case into the Federal Court system. The Supreme Court eventually ruled that those who were detained were required to have due process protections afforded to them, including having a right to counsel and to the Federal Courts. *Rasul v. Bush*, 542 U.S. 466 (2004), which was decided on the same day as *Hamdi*, affirmed the Federal Court's jurisdiction over military detention centers like Guantanamo Bay and extended Habeas rights to those facilities.[46] While both of these rulings would appear to expressly allow the detainment of a US citizen, there are quite a few issues that the opinions of the court raised.

One major issue with *Hamdi* was that there was no "majority" opinion, it was instead a plurality decision. This weakens the precedential value of the case as it was not a clear, firmly grounded opinion. The plurality, written by Justice O'Conner, makes an interesting note on the precedential value of the case by stating that:

> "For the purposes of this case, the enemy combatant that it is seeking to detain is an individual who, it alleges, 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 there. We therefore answer only the narrow question before us, whether the detention of citizens falling within that definition is authorized" (542 U.S. 507, Pg. 8)

The Court was careful to note that *Hamdi*'s decision should be interpreted narrowly based on the specific facts of the case. Hamdi was a US citizen who was caught on an active battlefield during

[45] *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004)
[46] *Rasul v. Bush,* 542 U.S. 466 (2004)

a time of open conflict between the United States, its allies, and the Taliban. The Court, in essence, has limited the AUMF's detention authority on US citizens to those who are captured in an active combat zone by US forces or their allies. Being that the NDAA is essentially a beefed up version of the AUMF, it would logically follow that the NDAA's authority in this area should also be limited to the narrow facts surrounding Hamdi. However, the NDAA makes no mention or differentiation between the laws applicability to US citizens arrested abroad or those arrested in the domestic United States. This leaves open the possibility that a future President could interpret the statute as Congress conferring upon him the authority to detain even domestically arrested American citizens in military custody.

As the previous cases illustrate, the President has some authority to detain individuals and set up military tribunals. However, most of the cases the Executive has won in the Supreme Court did not directly involve US citizens. For example, in *Rasul v. Bush* and *Hamdan v. Rumsfeld* the court asserted that it had jurisdiction over Habeas petitions coming from Guantanamo Bay Detention Center and overseas US operated prisons even though they were not technically on US soil.[47] They also extended certain procedural safeguards to foreign inmates at those prisons. While those two cases did not directly address the issue of whether or not the Executive could detain these individuals indefinitely, it appears that by only addressing the Habeas issues arising for their detainment, that the court was allowing the indefinite detention of foreign nationals. The applicability of such a precedent to Americans remains murky, as the previous analysis of *Hamdi* demonstrates.

[47] Renzo, Anthony. "A Call to Protect Civilian Justice: Beware the Creep of Military Tribunals." American Constitution Society for Law and Policy. https://www.acslaw.org/files/Renzo%20Issue%20Brief_Final.pdf (accessed April 2, 2014).

The President, even during a time of war, does not have unilateral authority to establish military trials unless they are used as war-courts or are used as part of a military government in an occupied territory.[48] The only other way for military courts to be established outside of this limited Presidential authority is for Congress to explicitly authorize them.[49] While the focus of our analysis is on indefinite detention, the establishment of military commissions necessarily infers detention authority, as you would have to detain individuals prior to conducting, if at all, a military commission. But, per the current interpretation of the AUMF, and the NDAA's detention language, in order for a person to be transferred to military custody the President must label them an enemy combatant. However, the definition of enemy combatant is vague and from time to time has been obscured.

The term enemy combatant obviously covers any individual who is physically engaged in battle against U.S. Armed Forces. For those individuals that fall outside of the battlefield, the *Quirin* Court stated that the legal category of "enemy combatant" is limited to the members of the enemy's armed forces.[50] Given the circumstances of *Quirin* this implies that the reason for which Haupt, a US citizen, was allowed to be detained, tried, and ultimately executed by the military was because he was acting on behalf of the German Armed Forces when he landed on Long Island to commit acts of sabotage and espionage.[51] [52] In *Hamdi,* while Hamdi was an American citizen, the circumstances of his capture closely resemble those of Haupt and his co-conspirators. Hamdi was captured fighting in a Taliban unit on the battlefield, so he fits both

[48] Renzo, Anthony. "A Call to Protect Civilian Justice: Beware the Creep of Military Tribunals." American Constitution Society for Law and Policy. https://www.acslaw.org/files/Renzo%20Issue%20Brief_Final.pdf (accessed April 2, 2014): 7-8
[49] Renzo, 2013: 8
[50] Renzo, 2013: 11
[51] Renzo, 2013: 11
[52] *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004)

Quirin definitions of enemy combatant – he was captured on an active battlefield and was acing on behalf of an enemy of the United States.

Again, while both *Quirin* and *Hamdi* would both be authoritative cases in a Supreme Court challenge to the NDAA, both American citizens in those cases were members of, or acting on behalf of, hostile armed forces engaged in combat with the United States. Another case, *Boumediene v. Bush,* 533 U.S. 723 (2008), dealt specifically with the procedures that the Executive had to take to improve the combatant status review tribunals, which were the fact finding bodies set up by the military in an attempt to comply with the court's recommendations following the *Hamdi* ruling. The combatant status tribunals were meant to afford some measure of Habeas protections to Guantanamo detainees, and those held at other US military detention centers.

Justice Kennedy's majority opinion in *Boumediene* asserted that the government had to do more to protect the Habeas rights of detainees. In his opinion Kennedy states:

> "An adequate substitute [for Habeas] must offer the prisoner a meaningful opportunity to demonstrate he is held pursuant to an erroneous application or interpretation of relevant law, and the decision making body must have some ability to correct errors, assess sufficiency of the government's evidence, and to consider relevant exculpatory evidence" (533 U.S. 723 (2008))

The Court was willing to allow the Executive to conduct the review tribunals themselves, independently of the Judiciary as long as the Executive provided what it deemed were the essential components of the Writ. However, *Boumediene* is yet another case that involves foreign

nationals and not American citizens, so there remains a question over whether or not the Court's decision would have been different had the individual being detained was a citizen.[53]

Other language stemming from *Boumediene* also seems to obscure an authoritative stance by the court on detainee rights and military detainment under the AUMF. Justice Kennedy later stated in the opinion of the court that "…[the] political branches cannot turn on and off the parts of the constitution that suits them", making reference to the Executive Branch's argument that the President was authorized to replace or restrict certain Habeas rights and that these actions were un-reviewable by the court because the court was not properly suited for dealing with military affairs.[54] Justice Scouter in his concurrence noted the exceptionally long periods of detention some of the Guantanamo detainees had endured to this stage without adequate methods to challenge their detention. Justice Scouter specifically recalled that some were detained for over six years.[55] The opinion of the court also stated that "the Habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain".[56] This calls into question another major pillar of separation of powers, and is where the court's decision could fall apart if a future NDAA challenge arises that involves a U.S. citizen being held by the military.

If the Executive took the Court's *Boumediene* decision and implemented the Court's prescribed procedural safeguards that are meant to provide a substitute to the Writ of Habeas Corpus, the accused would still have to trust that the Executive Branch can self regulate and self check itself. This flies contrary to the essence of separation of powers. How can we be certain

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[53] *Boumediene v. Bush,* 553 U.S. 723 (2008)
[54] *Boumediene v. Bush (2008)*
[55] Richey, Warren. "Supreme Court deals blow to Guantánamo prisoners challenging their detention." The Christian Science Monitor. http://www.csmonitor.com/USA/Justice/2012/0611/Supreme-Court-deals-blow-to-Guantanamo-prisoners-challenging-their-detention (accessed April 6, 2014).
[56] Richey, 2012

that justice is being served if there is no true independent, impartial third party who will pass judgment on the government's evidence for indefinite detainment. Given the recent revelations about covert government torture programs, advanced and invasive surveillance programs, and the President's decision to order a drone strike on an American-citizen cleric on Yemen without a trial, or even consulting the judiciary or the Congress should lend credence to the fears that a newly empowered Executive armed with the NDAA's broad detention authority could run amuck over the constitutional protections that Americans have enjoyed up until the September 11th attacks.[57] [58]

Looking at the previously mentioned cases in totality, a history begins to form where the Executive Branch has dramatically expanded its authority immediately after the September 11th attacks and then has had its detention authorities restricted more and more with each subsequent case from *Hamdi (2004)* and *Rasul (2004)* to *Hamdan (2006)* and *Boumediene (2008)*. While *Hamdi* is the only one of these cases that involved a U.S. citizen, he was captured on the battlefields of Afghanistan, armed, and in a Taliban unit. In other words, he fit the primary definition of an Enemy Combatant, and was subject to military detention until the end of hostilities, as long as the Executive changed its detention procedures to allow for Habeas reviews to apply to detainees. *Rasul*, *Hamdan*, and *Boumediene* all served to further extend Habeas rights to the non-citizen detainees involved in those cases. Speaking to *Boumediene* specifically, the Court harshly rebutted the Executive's assertion that the Court had no jurisdiction over Status Tribunals and their procedures because of both the President's war powers and Congress'

[57] Eviatar, Daphne. "Promises, Promises: President Obama's NDAA Signing Statement." The Huffington Post. http://www.huffingtonpost.com/daphne-eviatar/promises-promises-preside_b_1182067.html (accessed April 6, 2014).

[58] The Washington Post. "Muslim cleric Aulaqi is 1st U.S. citizen on list of those CIA is allowed to kill." Washington Post. http://www.washingtonpost.com/wp-dyn/content/article/2010/04/06/AR2010040604121.html (accessed April 12, 2014).

Detainee Treatment Act that attempted to empower the military to set up the Combatant Status Review Tribunals mentioned earlier.

Given the Court's tightening grip on the Executive's use of the military for indefinite detainment and military commissions for certain terror suspects, it seems highly likely that any case arising from the NDAA's sections 1021 and 1022 detention powers would be ruled unconstitutional to be applied to US citizens. Because the NDAA does not specifically mention whether it is meant to be applied overseas or domestically (or both), it can be interpreted as applying to terror suspects on US soil, including citizens. If the President was to take a citizen out of the civilian justice system and place them either in indefinite military detainment or try them before a military commission it would expressly violate the *Milligan* Court's "open-courts" doctrine, where if the civilian courts are open and operating, it is unconstitutional to try citizens in military commissions, or hold them in military custody.

It is important to remember that not holding these suspects in military custody does not mean that the government loses its much needed ability to fight terrorism, it simply requires the government to carry out that essential duty under the framework of the civilian criminal justice system. After all, it was specifically created to correct the wrongs our Founders experienced at the hands of the English King, and it would be decidedly un-American to allow our President to use the military as a domestic law enforcement tool, and this could lead to the violation of citizens' rights and the potential for political repression, as was the case at the time of King George and George Washington. This analysis of course assumes that the U.S. citizen in question is not a confirmed member of a hostile nation's Armed Forces. For example, if the citizen had left and joined the Taliban, and then returned to the United States where he was eventually captured, then he would fit the *Quirin* court's enemy combatant category that covers

those who are members of an enemy's military but who are not captured on a field of battle. Additionally, if the Executive did try to detain a non-enemy military affiliated American citizen on U.S. soil, and declares that citizen an enemy combatant, would in essence be asserting that the entirety of the United States is a battlefield in the War on Terror. Such a distinction would be absolutely unprecedented, and surely would fail to pass constitutional muster, let alone a review of fact.

Touching again on the Combatant Status Review Tribunals that the Executive has set up at military detention centers of those individuals labeled "enemy combatants", the Executive's self-regulating authority would surely violate the separation of powers doctrine if directly challenged in front of the Court. While *Boumediene* could be viewed as a bit of a step backward for the Court in the sense that it broke the Court's streak of cases that continued to chip away at the President's military detention powers, it did not involve U.S. citizen terrorism detainees. Given the Court's difficulty in coming to a clear consensus on allowing the Executive to detain U.S. citizens indefinitely, as evidenced by the weakened authority of the plurality opinion in *Hamdi*, it stands to reason that the court would strike down the President's ability to detain U.S. citizens pursuant to the NDAA's vague detention provisions. Remember, these case authorities we have examined involved the older AUMF, from which the NDAA is derived, and the Court has had some significant reservations on the detention powers the Executive Branch has interpreted the AUMF as having provided it.[59]

It is a logical expectation to see the Court progress down a path of totally preventing the Executive from detaining those citizens who have no confirmed connection to an enemy government as enemy combatants without charge or trial in indefinite detainment. Given the

[59] *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004)

controlling *Milligan* "open-court" doctrine, the controversial, potential separation of powers violating Review Tribunals, and the lack of previous, directly analogous cases involving American citizens who have not had their enemy government affiliations proven, the National Defense Authorization Act should be ruled by the court, unconstitutional.

Conclusion

After much analysis, it should now be clear that the President and the Executive Branch do not have the relevant authorities under existing law or the Constitution to detain U.S. citizens in indefinite military detention, at will. Article II of the Constitution does provide the President with significant war powers, and during a time of war, the Court has been willing to defer to the Executive Branch on matters of war and national security, as was stated by the Court in *Youngstown* and *Curtiss-Wright.*[60] [61] However, the Court states in *Hamdi* that "we necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances", rejecting the Executive's contention that the courts have no role in military detention or military commission procedures.[62]

The *Hamdi* court also stated that "we have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the nation's citizens".[63] The National Defense Authorization Act's detention statutes are murky at best when referring to U.S. citizens. The President should not have the discretion under the NDAA to determine if he will

[60] *Youngstown Sheet and Tube Co. v. Sawyer,* 343 U.S. 579 (1952)
[61] *United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304 (1936)
[62] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)
[63] Renzo, Anthony. "A Call to Protect Civilian Justice: Beware the Creep of Military Tribunals." American Constitution Society for Law and Policy. https://www.acslaw.org/files/Renzo%20Issue%20Brief_Final.pdf (accessed April 2, 2014).

use it to detain U.S. citizens, as this constitutes a violation of separation of powers as the President would be, in essence, suspending Habeas corpus and declaring martial law at the same time, when Article I of the Constitution specifically vests those powers to Congress. To date, Congress has not suspended the Writ of Habeas Corpus, nor have they declared martial law, which makes the NDAA's potential to allow the President to use the military domestically, illegal.

Based on the *Milligan* precedent, any attempt by the President to use the military to carry out domestic law enforcement and remove American citizens from the civilian criminal justice system, and all of the protections and rights that come with it, would be unconstitutional as long as the civilian courts were open and operating. Again, this is assuming that the American citizen is not a member of the enemy's armed forces, per the precedent set under *Ex Parte Quirin*. Given the difficulty of establishing connections between terrorists and terror groups, there remains a high possibility that the government could get bad evidence or make the wrong conclusions from the limited amount of evidence they may possess. It is critical that the Court in the future assures that the American citizens are processed through the civilian justice system, which requires Grand Jury indictments (i.e., criminal charges), exceptional Habeas protections, and a jury trial.[64]

Allowing an American citizen to be sent to a military prison where the military, who are subordinate to the President, their Commander-in-chief, are trusted to self-regulate and self-correct errors in evidence or combatant status is an unprecedented step in the wrong direction for the country. In these turbulent and dangerous times, it is important to remember Justice O'Connor's foreboding assertion in the *Hamdi* plurality: "It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is

[64] Weaver, Russell L.. Constitutional law: cases, materials & problems. 2nd ed. New York: Aspen Publishers, 2011.

in those times that we must preserve our commitment at home to the principles for which we fight for abroad".[65] Is America going to allow the fear of terrorism to compromise the values we have been fighting to uphold since the days of the Revolution?

[65] *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004): 25

Appendix A – The Authorization for Use of Military Force Against Terrorists of 2001 (Public Law 107-40)

Public Law 107–40
107th Congress
Joint Resolution

To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.
Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and
Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and
Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and
Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and
Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it
Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.
This joint resolution may be cited as the ‘‘Authorization for Use of Military Force’’.

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.
(a) IN GENERAL.—That 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 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.
(b) WAR POWERS RESOLUTION REQUIREMENTS.—
(1) SPECIFIC STATUTORY AUTHORIZATION.—Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.
(2) APPLICABILITY OF OTHER REQUIREMENTS.—Nothing in this resolution supercedes any requirement of the War Powers

Resolution.
Approved September 18, 2001.

(Source: US Government Printing Office, Public Law 107-40)

http://www.gpo.gov/fdsys/pkg/PLAW-107publ40/pdf/PLAW-107publ40.pdf

Appendix B – The National Defense Authorization Act for Fiscal Year 2012 (Public Law 112-81)

Section 1021 of the National Defense Authorization Act for Fiscal Year 2012

Subtitle D—Counterterrorism

SEC. 1021. AFFIRMATION OF AUTHORITY OF THE ARMED FORCES OF THE UNITED STATES TO DETAIN COVERED PERSONS PURSUANT TO THE AUTHORIZATION FOR USE OF MILITARY FORCE.

(a) IN GENERAL.—Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force (Public Law 107–40; 50 U.S.C. 1541 note) includes the authority for the Armed Forces of the United States to detain covered persons (as defined in subsection (b)) pending disposition under the law of war.

(b) COVERED PERSONS.—A covered person under this section is any person as follows:

(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.

(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.

(c) DISPOSITION UNDER LAW OF WAR.—The disposition of a person under the law of war as described in subsection (a) may include the following:

(1) Detention under the law of war without trial until the end of the hostilities authorized by the Authorization for Use of Military Force.

(2) Trial under chapter 47A of title 10, United States Code (as amended by the Military Commissions Act of 2009 (title XVIII of Public Law 111–84)).

(3) Transfer for trial by an alternative court or competent tribunal having lawful jurisdiction.

(4) Transfer to the custody or control of the person's country of origin, any other foreign country, or any other foreign entity.

(d) CONSTRUCTION.—Nothing 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.

(e) AUTHORITIES.—Nothing in this section shall be construed to affect 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 captured or arrested in the United States.

(f) REQUIREMENT FOR BRIEFINGS OF CONGRESS.—The Secretary of Defense shall regularly brief Congress regarding the application of the authority described in this section, including the organizations, entities, and individuals considered to be ‘‘covered persons’’ for purposes of subsection (b)(2).

(Source: U.S. Government Printing Office, Public Law 112-81, Subtitle D, Section 1021)

http://www.gpo.gov/fdsys/pkg/PLAW-112publ81/pdf/PLAW-112publ81.pdf

Section 1022 of the National Defense Authorization Act for Fiscal Year 2012

SEC. 1022. MILITARY CUSTODY FOR FOREIGN AL-QAEDA TERRORISTS.

(a) CUSTODY PENDING DISPOSITION UNDER LAW OF WAR.—
(b)
(1) IN GENERAL.—Except as provided in paragraph (4), the Armed Forces of the United States shall hold a person described in paragraph (2) who is captured in the course of hostilities authorized by the Authorization for Use of Military Force (Public Law 107–40) in military custody pending disposition under the law of war.

(2) COVERED PERSONS.—The requirement in paragraph (1) shall apply to any person whose detention is authorized under section 1021 who is determined—
(A) to be a member of, or part of, al-Qaeda or an associated force that acts in coordination with or pursuant to the direction of al-Qaeda; and
(B) to have participated in the course of planning or carrying out an attack or attempted attack against the United States or its coalition partners.

(3) DISPOSITION UNDER LAW OF WAR.—For purposes of this subsection, the disposition of a person under the law of war

has the meaning given in section 1021(c), except that no transfer otherwise described in paragraph (4) of that section shall be made unless consistent with the requirements of section 1028.

(4) WAIVER FOR NATIONAL SECURITY.—The President may waive the requirement of paragraph (1) if the President submits to Congress a certification in writing that such a waiver is in the national security interests of the United States.

(b) APPLICABILITY TO UNITED STATES CITIZENS AND LAWFUL RESIDENT ALIENS.—

(1) UNITED STATES CITIZENS.—The requirement to detain a person in military custody under this section does not extend to citizens of the United States.
(2) LAWFUL RESIDENT ALIENS.—The requirement to detain a person in military custody under this section does not extend to a lawful resident alien of the United States on the basis of conduct taking place within the United States, except to the extent permitted by the Constitution of the United States.

(c) IMPLEMENTATION PROCEDURES.—
(d)
(1) IN GENERAL.—Not later than 60 days after the date of the enactment of this Act, the President shall issue, and submit to Congress, procedures for implementing this section.

(2) ELEMENTS.—The procedures for implementing this section shall include, but not be limited to, procedures as follows:

(A) Procedures designating the persons authorized to make determinations under subsection (a)(2) and the process by which such determinations are to be made.

(B) Procedures providing that the requirement for military custody under subsection (a)(1) does not require the interruption of ongoing surveillance or intelligence gathering with regard to persons not already in the custody or control of the United States.

(C) Procedures providing that a determination under subsection (a)(2) is not required to be implemented until after the conclusion of an interrogation which is ongoing at the time the determination is made and does not require the interruption of any such ongoing interrogation.

(D) Procedures providing that the requirement for military custody under subsection (a)(1) does not apply when intelligence, law enforcement, or other Government officials of the United States are granted access to an individual who remains in the custody of a third country.

(E) Procedures providing that a certification of national security interests under subsection (a)(4) may be granted for the purpose of transferring a covered person from a third country if such a transfer is in the interest of the United States and could not otherwise be accomplished.

(d) AUTHORITIES.—Nothing in this section shall be construed to affect the existing criminal enforcement and national security authorities of the Federal Bureau of Investigation or any other domestic law enforcement agency with regard to a covered person, regardless whether such covered person is held in military custody.

(e) EFFECTIVE DATE.—This section shall take effect on the date that is 60 days after the date of the enactment of this Act, and shall apply with respect to persons described in subsection (a)(2) who are taken into the custody or brought under

(Source: U.S. Government Printing Office: Public Law 112-81, Subtitle D, Section 1022)

http://www.gpo.gov/fdsys/pkg/PLAW-112publ81/pdf/PLAW-112publ81.pdf