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Ten Questions on National Security

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RESPONSES TO THE TEN QUESTIONS

Jeffrey Kahn[†]

1. WOULD PRESIDENT OBAMA HAVE THE AUTHORITY TO HOLD A U.S. CITIZEN WITHOUT CHARGE IN A MILITARY BRIG FOR SIX MONTHS IF THAT CITIZEN—WHO LIVES IN MINNESOTA—IS SUSPECTED OF LINKS TO AL QAEDA FOLLOWING A ONE-MONTH TRIP TO SOMALIA?

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I. INTRODUCTION

No, because this citizen does not appear to be an enemy combatant. If the citizen were an enemy combatant, then the answer might still be no because the question strongly implies detention without access to a neutral decisionmaker of a citizen seized in the United States and outside of a zone of hostilities subject to the law of armed conflict.

This question is too vaguely worded (perhaps deliberately so) to know which “no” answer to give.¹ Whether the citizen is an

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1. I seek a partial remedy to this vagueness by footnoting some assumptions. In my answer, I assume that:

(1) the phrase “hold . . . without charge in a military brig” means detention by a military authority without initiating charges under any (military or civilian) justice system or otherwise permitting the citizen to “receive notice of the factual basis for his [detention], and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004);

(2) the present-tense phrase “lives in Minnesota” means that the citizen was seized in the United States shortly after returning from Somalia;

(3) the phrase “for six months” means that the citizen would not be permitted to petition a federal court for a writ of habeas corpus or other relief, since such a pe-

enemy combatant is a *very* fact-intensive inquiry. What are these suspected “links to al Qaeda”? Where and when “following a one-month trip to Somalia” is the citizen seized? How do these links relate, if at all, to this particular trip? Is the failed state of Somalia a weak ally, a redoubt for a motley collection of terrorists and pirates, al Qaeda headquarters, an active zone of combat, or some portion of all of these things? What is meant, precisely, by being held “without charge” in a military brig? What is the purpose of this detention?

Recent case law provides no helpful precedents. Since September 11, 2001, three American citizens—John Walker Lindh, Yaser Esam Hamdi, and Jose Padilla—have been detained by the U.S. military and then either transferred to civilian custody in the United States or subject to continued military detention within the United States.² Their cases, however, do not answer this question.

Lindh and Hamdi were seized in Afghanistan and initially detained there under suspicion of fighting with the Taliban against the Northern Alliance. When Lindh’s citizenship became known, he was transferred to civilian custody and brought before the U.S. District Court in Alexandria, Virginia, which convicted him for the crimes of supplying services to the Taliban and carrying an explosive while in the commission of a felony.³ When Hamdi’s citizenship became known during his confinement at Guantanamo Bay,

tition could result in the citizen’s court-ordered release in less than six months; and

(4) this U.S. citizen is not a member of the U.S. Armed Forces or the recognized armed forces of any sovereign state.

2. An American citizen, Cyrus Kar, was detained in Iraq by the U.S. Military for almost two months. *Kar v. Rumsfeld*, 580 F. Supp. 2d 80, 82 (D.D.C. 2008). Because he was not detained in the United States and “both charged and given notice of the charges,” his case is easily distinguished from ours. *Id.* at 85. Two other American citizens—Shawqi Omar and Mohammad Munaf—were detained in Iraq by the U.N. mandated Multinational Force-Iraq and then transferred to the custody of the Government of Iraq for prosecution under Iraqi criminal law. *Munaf v. Geren*, 128 S.Ct. 2207, 2214–15 (2008). The U.S. Supreme Court unanimously held that although Omar and Munaf were in the custody of the U.S. Military (and thus a U.S. court had jurisdiction to consider their petitions for writs of habeas corpus), their detention was not under the authority of the United States (and thus the release they sought as a remedy was denied). *Id.* at 2216–18.

3. Plea Agreement at 1, *United States v. John Lindh*, 227 F. Supp. 2d 565 (E.D. Va. 2002) (Crim. No. 02-37A). At the time, these offenses were found at 50 U.S.C. § 1705(b) and 18 U.S.C. § 844(h)(2). *Id.* Lindh pleaded guilty and an Article III Judge sentenced him to twenty years in the custody of the U.S. Bureau of Prisons, a component of the Department of Justice. *Id.* at 1–2; *United States v. Lindh*, 227 F. Supp. 2d 565, 572 (E.D. Va. 2002).

he was transferred to naval brigs in the United States.⁴ The Supreme Court held that Congress had authorized his detention as a person “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.”⁵ Neither man’s detention following capture in a foreign country and in a combat zone (admittedly in Lindh’s case, contestedly in Hamdi’s case) sheds light on the President’s authority to order the military detention of an American seized in Minnesota.

In the context of the current struggle with al Qaeda, only one American citizen is known to have been seized and detained without charge by the military within the United States. Jose Padilla was detained in Chicago (upon his return from Pakistan) by federal law enforcement officials executing a material witness warrant issued by the U.S. District Court for the Southern District of New York.⁶ He remained in the custody of the Justice Department for thirty-three days before the President declared him to be an enemy combatant and ordered him into military custody.⁷ Padilla was then detained in a naval brig for almost four years until the President (without changing his original designation) ordered Padilla’s transfer into the custody of the Attorney General to face criminal charges in Florida.⁸ These charges were substantially different than the reasons originally offered to justify his arrest.⁹ The Supreme Court

4. *Hamdi*, 542 U.S. at 510.

5. *Id.* at 516 (internal quotations omitted). The Court expressly declined to decide whether Article II of the Constitution granted the President this authority. *Id.* at 517. A little more than three months after this decision, the United States released Hamdi from military custody and sent him to Saudi Arabia, where he also held citizenship. News reports indicated that Hamdi’s release was conditioned on his agreement to renounce his U.S. citizenship. Joel Brinkley & Eric Lichtblau, *U.S. Releases Saudi-American It Had Captured in Afghanistan*, N.Y. TIMES, Oct. 12, 2004, at A15; see also Settlement Agreement, *Hamdi v. Rumsfeld*, Sept. 17, 2004, ¶ 8.

6. *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 568 (S.D.N.Y. 2002).

7. *Id.* at 571–72.

8. Memorandum from George W. Bush, President, to Donald Rumsfeld, U.S. Sec’y of Def., Transfer of Detainee to Control of the Attorney Gen. (Nov. 20, 2005), <http://f11.findlaw.com/news.findlaw.com/hdocs/docs/padilla/gwb112005memo.jpg>. The Supreme Court permitted this transfer. *Hanft v. Padilla*, 546 U.S. 1084, 1084 (2006).

9. Attorney General Ashcroft interrupted his visit to Moscow to announce via satellite that Padilla’s initial arrest “disrupted an unfolding terrorist plot to attack the United States by exploding a radioactive dirty bomb.” *U.S. Arrests Man Allegedly Planning Attack*, ONLINE NEWSHOUR, June 10, 2002,

declined two opportunities to decide the lawfulness of Padilla's detention.¹⁰ Thus, Padilla's case provides no judicial support for the executive authority proposed in this question. Only by accepting factual claims—that Padilla had openly carried arms against the United States on a foreign field of combat—did a lower appellate court conclude that the grounds for Padilla's detention were indistinguishable from those upheld against Hamdi (notwithstanding the different initial justifications provided by the Government for their detentions).¹¹

Thus, "no" is not an answer that comes from recent case law. My answer comes from long-established statutory and constitutional law and the body of public international law known as the law of armed conflict (a.k.a the laws of war or international humanitarian law). First, the Non-Detention Act prohibits the detention of citizens except pursuant to an Act of Congress. The Authorization for Use of Military Force does not provide a blanket exception to this prohibition.¹² The AUMF authorizes the President to use all "necessary and appropriate" force against the perpetrators of the 9/11 terrorist attacks. This grant includes the power to detain enemy combatants, a long-accepted power under the law of armed conflict. The law of armed conflict is the *lex specialis* that provides the legal context in which to understand what "necessary and appropriate" force is. The AUMF does not authorize the President to expand that *jus in bello* power by stretching the concepts of enemy combatant and armed conflict beyond their meaning in international law that binds the United States. The citizen in this question does not appear to be an enemy combatant or even a civilian directly participating in hostilities. If this is so, then the AUMF does

http://www.pbs.org/newshour/updates/dirtybomb_06-10-02.html. A superseding indictment handed down in 2006 charged Padilla and others with conspiracy to murder, kidnap, and maim persons in a foreign country, conspiracy to provide material support for terrorists, and providing material support for terrorists. See Superseding Indictment, *United States v. Hassoun*, 2007 WL 4180844 (S.D. Fla. 2007) (No. 04-60001-CR).

10. First, the Court held that Padilla had filed his habeas challenge to his confinement in the wrong court. *Rumsfeld v. Padilla*, 542 U.S. 426, 430 (2004). Then, following its refileing and against the preference expressed by the Court of Appeals for the Fourth Circuit that the Supreme Court hear the case on its merits, the Court denied Padilla's petition for a writ of certiorari. *Padilla v. Hanft*, 432 F.3d 582, 583 (4th Cir. 2005); *Padilla v. Hanft*, 547 U.S. 1062 (2006) (mem.).

11. *Padilla v. Hanft*, 423 F.3d 386, 391–92 (4th Cir. 2005); see also *infra* note 19.

12. Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (Supp. V 2005)).

not authorize his detention because the law of armed conflict does not permit it. On the contrary, the Non-Detention Act expressly forbids it.

Of course, statutory protection of individual liberty is as fragile as a legislative majority. A second, stronger source is found in the Constitution's safeguards. Some argue that these protections must bend to the extraordinary power that the President possesses in wartime as Commander in Chief. I disagree. The writ of habeas corpus, unless properly suspended, protects a citizen's access to courts to contest executive seizure at *all* times. In addition, presidents have exercised their commander in chief powers subject to the restrictions of the law of armed conflict. Those restrictions are part of our law and prohibit detention in the circumstances described above.

Some contend that these twentieth-century concepts should not encumber a President fighting a twenty-first century threat so unlike any prior conflict. Advocates of such power often rely on *Ex parte Quirin*.¹³ That World War II case is easily distinguished from our hypothetical facts. What is more, it is ironic to selectively rely on a decision buried in a bygone era of "traditional" war to defend the radical, conceptual stretching that creates a global battlefield on which only the President can distinguish innocent civilians from enemy combatants. Such a novel legal claim cannot be extracted from *Quirin*'s factual and legal context, in which the meaning of "enemy combatant" and "armed conflict" were both more clearly defined and less contested than they are here.

Answering this question in this two-step way keeps faith with past efforts to define the limits of presidential power in wartime. In the *Steel Seizure Case*, Justice Black sought authority for the President's power "either from an act of Congress or from the Constitution itself."¹⁴ Justice Jackson's famous concurrence in that case expressed the application of the President's war powers in a domestic context as a function of Congress's additive or subtractive power.¹⁵

13. 317 U.S. 1 (1942).

14. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).

15. *Id.* at 635–38 (Jackson, J., concurring). It also contained a warning:

[The President's] command power is not such an absolute as might be implied from that office in a militaristic system but is subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress. The purpose of lodging dual titles in one man was to insure that the civilian would control the military, not to enable the military to subordinate the presidential office. No

In the case presented by this hypothetical, as was the case in *Youngstown*, the President's power is "at its lowest ebb."¹⁶

II. THE NON-DETENTION ACT

Congress has forbidden the detention envisioned by this question. The Non-Detention Act states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."¹⁷ This forceful statement was not rescinded *sub silentio* by the AUMF. The AUMF might reasonably be interpreted as such a statutory exception to the Non-Detention Act in places and circumstances where the law of armed conflict would make detention a "necessary and appropriate" use of force. This was the case in *Hamdi v. Rumsfeld*, in which the Supreme Court held that the AUMF satisfied the Non-Detention Act's exception requirement, but expressly limited this holding to the narrow circumstances presented by Hamdi's capture in Afghanistan.¹⁸ The highest judicial authority to consider the effect of the Non-Detention Act in a post-9/11 *domestic* context, however, held that the Act forbids the military seizure within the United States of Jose Padilla, an American citizen suspected of links to al Qaeda follow-

penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role.

Id. at 645–46.

16. *Id.* at 637; cf. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 693–94 (2008) ("Thus, the war powers issue that is now at the forefront of the most important clashes between the political branches—and that is likely to remain there for the foreseeable future—is the one Justice Jackson famously described in *Youngstown Sheet & Tube Co. v. Sawyer* as arising when the President's authority as Commander in Chief is at its 'lowest ebb,' namely, when the chief executive acts contrary to congressional will."); Curtis A. Bradley & Jack L. Goldsmith, *Rejoinder: The War on Terrorism: International Law, Clear Statement Requirements, and Constitutional Design*, 118 HARV. L. REV. 2683, 2684–85 (2005) ("Absent textual or other evidence to the contrary, therefore, the AUMF should not be viewed as authorizing presidential actions in violation of the laws of war. As a result, such actions would be valid only if they fell within the independent constitutional authority of the President.").

17. 18 U.S.C. § 4001(a) (2006).

18. *Hamdi v. Rumsfeld*, 542 U.S. 507, 517–18 (2004). The Supreme Court rejected the Government's position that it was "undisputed" that Hamdi was seized in a combat zone (a position that the Fourth Circuit accepted), finding only that Hamdi "resided in a country in which combat operations are taking place." *Id.* at 526–27.

ing his return to the United States from Pakistan.¹⁹

The Non-Detention Act was not passed by a Congress interested merely in declaring its principles. Congressional debate was fierce because everyone knew what was at stake: revocation of an executive power that had not been lightly granted. Congress acted to strip the President of the power it had previously delegated to declare an emergency and detain citizens suspected of presenting a clear and present danger to the republic. Congress took back this power twenty-one years to the day after granting it in the Emergency Detention Act of 1950.²⁰

The Congress that passed the Emergency Detention Act feared godless communists, not religious extremists. Its purposes, however, resonate with today's national security concerns. Congress found that there existed a "world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental or otherwise), espionage, sabotage, terrorism, and any other means deemed necessary" to destroy the American way of life.²¹ Congress further held that individuals who "knowingly and willfully" participate in this conspiracy in the United States "in effect repudiate their allegiance to the United States."²²

When confronted with the argument that the detention of Hamdi and Padilla violated this statute, the United States argued that (1) the Act was never intended to limit military detention, only

19. *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003). The Fourth Circuit rejected Yaser Hamdi's argument that the Non-Detention Act protected him because it found "no indication that § 4001(a) was intended to overrule the longstanding rule that an armed and hostile American citizen captured on the battlefield during wartime may be treated like the enemy combatant that he is." *Hamdi v. Rumsfeld*, 316 F.3d 450, 468 (4th Cir. 2003). Two years later, that court held that Padilla's detention, like Hamdi's, was authorized by the AUMF. Significantly, the court did not consider the locus of capture relevant given its willingness to accept the parties' stipulation that Padilla had previously taken up arms against American forces in Afghanistan. *Padilla v. Hanft*, 423 F.3d 386, 392 (4th Cir. 2005). Since the question above does not even remotely suggest the same factual predicate in support of the detention of this Minnesotan, I do not enter the debate concerning the proper judicial role in assessing the factual record that would support such a finding.

20. Emergency Detention Act of 1950, Pub. L. No. 81-831, tit. II, 64 Stat. 987, 1019 (repealed 1971). It should be noted that the emergency detention envisioned by that act was circumscribed by numerous limitations, including a probable-cause warrant requirement, a multi-level administrative review process, and ultimate access via habeas to an Article III court.

21. *Id.* § 101(1).

22. *Id.* § 101(7).

emergency *civil* detention;²³ and (2) this straightforward reading of the plain language of the statute should be rejected because it would interfere with the President's power to defend the nation against attack.²⁴ Both responses are premised on the assumption that war and the exercise of presidential war powers are exceptional circumstances that the Act should not be interpreted to reach. Neither response is persuasive because this premise is wrong.

It is one thing to interpret the Non-Detention Act not to reach the detention of citizens captured alongside enemy combatants in a foreign country (and certainly on a foreign battlefield). In that foreign context, congressional authorization to use military force—whether in a declaration of war or the AUMF—would satisfy the Non-Detention Act. Detention (like killing) is an ordinary incident of war already regulated by an accepted and respected *lex specialis*, the law of armed conflict. But in a *domestic* context in which the factual basis for that *lex specialis* is absent, it is hard to fathom why Congress would expend so much effort to strip the President of such extraordinary power against such a potent and duplicitous enemy, but permit the President to circumvent these efforts simply by shifting from civilian to military detention. The legislative history of the Non-Detention Act supports this natural reading.²⁵ “Both the sponsor of the Act and its primary opponent repeatedly confirmed that the Act applies to detentions by the President during war and other times of national crisis.”²⁶ The odious memory of the internment camps established during World War II to detain Japanese-Americans was repeatedly referenced in legislative debates as a primary reason to support the measure. And notwithstanding dire predictions that the Act “would tie the President’s hands in times of national emergency or war,” the Act passed by a margin of more than five-to-one.²⁷ In other words, the Non-Detention Act means, and was intended to mean, exactly what it says.²⁸

23. Brief for Respondents-Appellants at 52–53, *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003) (No. 02-7338).

24. *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 596–97 (S.D.N.Y. 2002).

25. This history is briefly described by Justice Souter in his concurring opinion in *Hamdi*. *Hamdi v. Rumsfeld*, 542 U.S. 507, 542–45 (2004).

26. *Padilla v. Rumsfeld*, 352 F.3d 695, 718–19 (2d Cir. 2003).

27. *Id.* at 719. The measure passed 257 to 49. *Id.* at 720.

28. Albeit in a purely domestic context, the Supreme Court acknowledged this fact, observing that the Non-Detention Act “proscrib[es] detention of any kind by the United States absent a congressional grant of authority to detain.” *Howe v. Smith*, 452 U.S. 473, 479 n.3 (1981) (emphasis in original).

The AUMF does not supply the condition required to exempt our suspect Minnesotan from the protection of the Non-Detention Act. The Supreme Court held in the *Hamdi* case that the AUMF authorized “the detention of individuals in the narrow category” of those “who fought against the United States in Afghanistan as part of the Taliban.”²⁹ The Court held that such detention was permitted because of its purpose: to prevent captured individuals from returning to the field of battle and taking up arms once again.³⁰ In categorical terms the Court stated that “indefinite detention for the purpose of interrogation” is not authorized by the AUMF.³¹

There is no claim in our question that the citizen is an enemy combatant by virtue of his affiliation with a group against whom the AUMF effectively declares war, or that the citizen has so continuously and directly engaged in hostilities that the protections of civilian status have been lost, unless all of that is to be read into the phrase “suspected of links to al Qaeda.” And although one might speculate whether the zone of combat is now global and America’s enemies too plural and shape-shifting to categorically enumerate, such an expansive view of the AUMF was certainly not endorsed by the *Hamdi* Court. Nor (as will be discussed below) can that view be read into the law of armed conflict, which not only “can inform the scope of Congress’s authorization, [it] can also inform limitations on that authorization.”³² Although it is true that international law is sometimes made by states stretching or even breaking it, in the face of Congress’s express refusal to allow such domestic detention even in wartime, the President would be acting at the very nadir of his power in doing so. In the absence of any act expressing Congress’s intent to make an exception to the Non-Detention Act, this statute prohibits this detention.³³ Or, to put the matter more blunt-

29. *Hamdi*, 542 U.S. at 517–18. In dicta, the Supreme Court restated this position in more general terms. *Hamdi* “would need to be part of or supporting forces hostile to the United States or coalition partners and engaged in an armed conflict against the United States to justify his detention in the United States for the duration of the relevant conflict.” *Id.* at 526 (internal quotation marks omitted). This restatement, too, does not cover our case.

30. *Id.* at 518.

31. *Id.* at 521.

32. Bradley & Goldsmith, *supra* note 16, at 2684.

33. The United States argued for, and the Fourth Circuit found, an alternative source of statutory exception in appropriations Congress made for military detentions under 10 U.S.C. § 956(5). Brief for Respondents-Appellants at 54 n.17, *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003) (No. 02-7338); *Hamdi v. Rumsfeld*, 316 F.3d 450, 467–68 (2003). Stephen Vladeck’s thorough examination of

ly, as Judge Wilkinson did in his concurrence to the denial of rehearing en banc in Hamdi's case, "[t]o compare this battlefield capture [in *Hamdi*] to the domestic arrest in *Padilla v. Rumsfeld* is to compare apples and oranges."³⁴

III. EXECUTIVE POWER, INDIVIDUAL LIBERTY, AND THE LAW OF ARMED CONFLICT

The Constitution limits the power of the United States to infringe individual liberty in wartime. The Fifth Amendment guarantees that no person's liberty shall be deprived during times of peace and war alike "without due process of law." Under the Third Amendment, homes may be seized to quarter soldiers only during wartime and then only with the assent of Congress acting through law. The criminal offense of treason is carefully defined in Article III, which also details the procedure for its prosecution. The writ of habeas corpus is specially protected.³⁵ It is a hallmark of our re-

the legislative history of that statute puts to rest the notion that it could satisfy the requirement of the Non-Detention Act. Stephen I. Vladeck, *The Detention Power*, 22 YALE L. & POL'Y REV. 153, 187-90 (2004) ("[I]t is certainly ironic that the provision that was eventually used to appropriate funds for the detention of Japanese-American internees during World War II is today being cited as satisfying § 4001(a), a statute passed to explicitly repudiate the internment camps and to require unambiguous congressional authorization for the detention of all U.S. citizens.").

34. *Hamdi v. Rumsfeld*, 337 F.3d 335, 344 (4th Cir. 2003) (Wilkinson, J., concurring in the denial of rehearing en banc). Of course, when the Fourth Circuit was later asked to decide the appeal of Padilla's refiled habeas petition, it found the grounds for Padilla's detention indistinguishable from Hamdi's. *See supra* note 19.

35. U.S. CONST. art. I, § 9, cl. 2. In 1864, Lambdin Milligan (a lawyer) was detained by the military authority in Indiana, *not* as a prisoner of war, but because he was suspected of links to a group of confederate sympathizers who engaged in various acts of what might be called terrorism. Milligan was tried by a military tribunal and sentenced to death. His case is typically invoked for its pronouncement 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." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866). Care should be taken not to read this rule too broadly. The Court was primarily interested in deciding whether the military had jurisdiction to convict Milligan; it did not reach the question whether Milligan's military *detention* was unlawful because it was undisputed that Milligan's detention was permitted by the Habeas Act of 1863, which permitted military detention by suspending the writ of habeas corpus. *Id.* at 115-18. Congress passed that law in part out of concern that President Lincoln's suspension of habeas and summary military detention of suspected enemies was unconstitutional. Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755 (1863). But the Act protected the interests of civilians by requiring that lists of such detainees be provided to the federal courts in their respective districts "as soon as may be practica-

public that its citizens are not subject to arrest without charge, a protection not found in many nondemocratic regimes. War and other threats to national security place pressures on those protections that may be relieved by suspending access to the judicial check on executive detention. Such suspensions are expected to be no longer than necessary because they must be ratified by the nation's democratically elected legislature.³⁶

The United States has argued that the Commander-in-Chief Clause in Article II of the Constitution provides the power to detain enemy combatants when the nation is at war. Sometimes this authority is asserted to be an inherent executive power, independent of Congress's power to grow or shrink it. This no longer appears to be the position of the United States, which has limited its claim of executive authority to detain solely under the AUMF.³⁷

Notwithstanding this shift, the United States has consistently asserted that the law of armed conflict provides legal authority to detain enemy combatants, whether seized on the battlefield or off, in the war against al Qaeda.³⁸ The customary body of norms

ble" so that grand juries could be convened to issue criminal indictments of those detained. *Id.* § 2. If the grand jury retired without issuing an indictment, or if such lists were not provided to the courts, detainees were to be released. *Id.* For an excellent brief examination of the case with an emphasis on the inconsistency of its holding with actual practice of military commissions at the time, see Curtis A. Bradley, *The Story of Ex parte Milligan*, in *PRESIDENTIAL POWER STORIES* 93 (Schroeder & Bradley, eds. 2009).

36. Justice Scalia acknowledges that "[e]ven if suspension of the writ on the one hand, and committal for criminal charges on the other hand, have been the only *traditional* means of dealing with citizens who levied war against their own country, it is theoretically possible that the Constitution does not *require* a choice between these alternatives." *Hamdi v. Rumsfeld*, 542 U.S. 507, 564 (2004) (Scalia, J., dissenting) (emphasis in original). Justice Scalia presents historical evidence to "refute that possibility," but concedes as he must the rare instances when citizens have been subjected to military detention following their capture alongside enemy forces. *Id.*

37. See BENJAMIN WITTES, ROBERT CHESNEY & RABEA BENHALIM, *THE EMERGING LAW OF DETENTION: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING* 17 (Brookings Inst. 2010) (reporting that the term "enemy combatant" has been replaced with references "simply to persons detainable pursuant to the AUMF"); see also *Hamilly v. Obama*, 616 F. Supp. 2d 63, 66 n.1 (D.D.C. 2009) ("Although the government has previously asserted that petitioners' detentions are justified, at least in part, by the President's Article II powers as Commander in Chief, it no longer makes such an assertion.") (internal citations omitted).

38. Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 *YALE J. INT'L L.* 369, 370 n.6 (2008) (citing remarks of U.S. Department of State Legal Advisor John B. Bellinger, III); Mary Ellen O'Connell, *Combatants and the Combat Zone*, 43 *U. RICH. L. REV.* 845, 845 (2009) ("[T]he Administration asserted rights and privileges imparted

around which that law revolves is reflected in the Hague and Geneva Conventions adopted and revised over the course of twentieth-century conflicts.³⁹ It is clear that this law “places limits on the exercise of a belligerent’s power”—war is not an exercise free of legal constraint.⁴⁰ A central animating principle of that law is the principle of military necessity. As the United States teaches this principle to its soldiers, the principle of military necessity “authorizes that use of force required to accomplish the mission. Military necessity does not authorize acts otherwise prohibited by the law of war.”⁴¹

Interpreting the reach of the Commander-in-Chief Clause through the prism of that law is appropriate since treaty obligations are part of the supreme law of the land⁴² and the Supreme Court has interpreted the war powers of both political branches to operate within the context of *jus belli*.⁴³ There is no question under this

under [the law of armed conflict] with respect to combatants—namely, the right to detain without trial until the end of hostilities and the right to kill without warning.”); see also James A. Schoettler Jr., *Detention of Combatants and the Global War on Terror*, in *THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE* 69 (Geoffrey S. Corn, et al. eds., 2009) (“In [the global War on Terror], the Bush Administration used its right under the law of war to detain and punish unlawful combatants, as a method of warfare in its fight against terrorist groups like al Qaeda and the Taliban.”) [hereinafter *THE WAR ON TERROR*].

39. Of most relevance to the issues discussed in this response are the Fourth Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter *Geneva III*]; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. The Bush administration initially took the position that the law of armed conflict authorized a military response to attacks by al Qaeda, but that the Geneva Conventions did not govern United States conduct in the conflict. The Obama administration has expressed its intention to comply with the Geneva Conventions as “treaty obligations.” Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

40. DEP’T OF THE ARMY, FIELD MANUAL NO. 27-10, *THE LAW OF LAND WARFARE* para. 3(a) (1956).

41. U.S. ARMY JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., INT’L & OPERATIONAL LAW DEP’T, *OPERATIONAL LAW HANDBOOK* 12 (Maj. John Rawcliffe ed., 2007).

42. U.S. CONST. art. VI, cl. 2.

43. See, e.g., *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (Chase, J., concurring) (“If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations; but if a partial war is waged, its extent and operation depend on our municipal laws.”); *The Prize Cases*, 67 U.S. (2 Black) 635, 666 (1862) (noting that the right of prize and capture “has its origin in the ‘jus belli,’ and is goverend [sic] and adjudged under the law of nations”); see also *id.* at 687–89 (Nelson, J., dissenting) (defining war powers in terms of the law of nations); *Ex parte Quirin*, 317 U.S. 1, 27–28 (1942) (“From the

law that the United States may detain an enemy combatant or civilian directly participating in hostilities, regardless of citizenship, to prevent that individual's return to engage in further hostilities. But this law does not provide the President, as Commander in Chief, with the power to order the military detention of a citizen who is not detainable under the law of armed conflict in the first place. Nor can the President expand these terms to suit interests other than this law's intended purpose: to prevent return to the fight.⁴⁴ The commander-in-chief power is limited by the international legal obligations that the United States has freely undertaken and under which it justifies its use of military force.⁴⁵

very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals.”).

44. See O’Connell, *supra* note 38, at 862–63; see also INT’L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS (Document 30IC/07/8.4) 7–8 (Oct. 2007) (“The question that remains is whether, taken together, all the acts of terrorism carried out in various parts of the world (outside situations of armed conflict such as those in Afghanistan, Iraq or Somalia) are part of one and the same armed conflict in the legal sense. In other words, can it be said that the bombings in Glasgow, London, Madrid, Bali or Casablanca can be attributed to one and the same party to an armed conflict as understood under IHL? Can it furthermore be claimed that the level of violence involved in each of those places has reached that of an armed conflict? On both counts, it would appear not.”).

45. See *supra* note 39 and accompanying text. Professor Corn criticizes the United States for “invok[ing] the authorities of war without accepting the obligations of the law regulating war.” Geoffrey S. Corn, *What Law Applies to the War on Terror*, in THE WAR ON TERROR, *supra* note 38, at 6. This view is not universally shared. Compare *Al-Bihani v. Obama*, 590 F.3d 866, 871 (D.C. Cir. 2010) (“There is no indication in the AUMF, the Detainee Treatment Act of 2005, . . . or the MCA of 2006 or 2009, that Congress intended the international laws of war to act as extra-textual limiting principles for the President’s war powers under the AUMF. The international laws of war as a whole have not been implemented domestically by Congress and are therefore not a source of authority for U.S. courts.”) (internal citation omitted), with *al-Marri v. Wright*, 487 F.3d 160, 178 (4th Cir. 2007) (“American courts have often been reluctant to follow international law in resolving domestic disputes. In the present context, however, they, like the Government here, have relied on the law of war-treaty obligations including the Hague and Geneva Conventions and customary principles developed alongside them. The law of war provides clear rules for determining an individual’s status during an international armed conflict, distinguishing between ‘combatants’ (members of a nation’s military, militia, or other armed forces, and those who fight alongside them) and ‘civilians’ (all other persons).”). The present scope of the Government’s claimed detention authority is thus highly unsettled. WITES, CHESNEY & BENHALIM, *supra* note 37, at 17–21. For purposes of answering this hypothetical, however, it is unimportant whether the law of armed conflict would permit the detention of *members* of al Qaeda, non-member *substantial supporters*, or other inter-

What is an enemy combatant (or, for that matter, an armed conflict) in the twenty-first century? A war with al Qaeda seems to fall outside the categories that the Geneva Conventions have been understood to govern because this conflict is neither one between two sovereign states nor one occurring only in the territory of one state.⁴⁶ Some have sought guidance in the law of targeting that protects civilians “unless and for such time as they take a direct part in hostilities.”⁴⁷ To some, the distinction between uniformed, conventional armies and civilians no longer seems as workable a line to draw after 9/11. On the other hand, the emergence of a form of conflict that one might call “transnational armed conflict” (i.e., one between one or more sovereign states and one or more non-state organized groups that occurs in more than one sovereign state) does not *ipso facto* mean that the entire world is now a theater of war in which the *lex specialis* of the law of armed conflict applies.⁴⁸

Those debates need not concern us here, for “no one is a combatant in the absence of armed conflict” and “[a]rmed conflict is determined today by facts of fighting.”⁴⁹ There is no indication that our Minnesotan is an “enemy combatant” participating in an “armed conflict.” This citizen is not alleged to have committed any belligerent acts against our armed forces in Somalia or elsewhere, or to have been preparing to commit one as part of an enemy force. The citizen was not captured on any battlefield or during combat with our armed forces—he has returned (presumably via open, civilian means) from a trip to Somalia and is living in Minne-

pretations, not to mention what method of inquiry could be used to make such determinations on the basis of available evidence.

46. See Geneva III, *supra* note 39, arts. 2, 3.

47. Additional Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict art. 51(3), June 8, 1977, 1125 U.N.T.S. 3; Additional Protocol II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 13(3), June 8, 1977, 1125 U.N.T.S. 609; see also Schoettler, *supra* note 38, at 78–79; Jack Goldsmith, *Long-Term Terrorist Detention and a U.S. National Security Court*, in LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM 85–87 (Benjamin Wittes ed., 2009); O’Connell, *supra* note 38, at 853.

48. INT’L COMM. OF THE RED CROSS, *supra* note 44, at 7 (“[T]he ICRC does not share the view that a global war is being waged and it takes a case-by-case approach to the legal qualification of situations of violence that are colloquially referred to as part of the ‘war on terror.’ Simply put, where violence reaches the threshold of armed conflict, whether international or non-international, IHL is applicable. Where it does not, other bodies of law come into play.”).

49. O’Connell, *supra* note 38, at 853–54.

sota. There is no claim that this citizen's "suspected links to al Qaeda following a one-month trip to Somalia" are links to al Shabab or to other militant forces battling each other, the hapless government authority, or any American special forces who may be operating there. Providing material support to such groups is a crime, with which members of the Somali community in Minnesota have been charged.⁵⁰ But there is a world of difference in fact and in law between a criminal and an enemy combatant or a civilian who directly participates in hostilities. To blur this distinction would not only erase an important feature of the law of armed conflict, it would also render meaningless the protections provided to citizens (at least) by the Constitution itself. Not having left the battlefield, the citizen cannot *return* to the battlefield—and so the purpose of the detention is not served. Thus, absent the factual predicates for the application of this body of law, the legal justification for military detention is missing, too.

Let's rephrase the hypothetical more precisely. What if the citizen was suspected of surreptitiously traveling between the United States and Somalia with the aid of al Qaeda members there in order to commit some act of terrorism back home? *Ex parte Quirin* is sometimes cited by those who wish to expand the meaning of "enemy combatant" to include persons other than those engaged in active fighting between armed groups and to stretch "armed conflict" to global dimensions.⁵¹ The *Quirin* case does not support this expansion. *Quirin* upheld the conviction by military commission of Nazi saboteurs who landed on Long Island, buried their uniforms (which would have provided prisoner of war status—and likely would have saved their lives—if they had been captured *en route*), and set off with plans for various acts of sabotage and violence. One man, Haupt, claimed to be an American citizen, although the United States disputed his status.⁵² Tipped off to their presence, the FBI quickly arrested them all. It was "undisputed" by

50. See, e.g., James Walsh & Richard Meryhew, *Alleged Somali Recruiter Arrested, Linked to Minnesota*, STAR TRIB. (Minneapolis), Nov. 11, 2009, available at <http://www.startribune.com/local/69713097.html>.

51. The *Quirin* opinion was issued almost three months after the Court's decision was announced *per curiam* and the execution of the petitioners was allowed to proceed. As Justice Scalia noted, "[*Quirin*] was not this Court's finest hour." *Hamdi v. Rumsfeld*, 542 U.S. 507, 570 (2004) (Scalia, J., dissenting); see also LOUIS FISHER, *MILITARY TRIBUNALS AND PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM* 91–129 (2005) (suggesting on the basis of archival sources a number of bases for support for Justice Scalia's understatement).

52. *Quirin*, 317 U.S. at 20.

the parties that “[a]ll had received instructions in Germany from an officer of the German High Command to destroy war industries and war facilities in the United States, for which they or their relatives in Germany were to receive salary payments from the German Government.”⁵³ President Roosevelt ordered their trial by military commission “in the declared exercise of his powers as Commander in Chief”⁵⁴ The prisoners were transferred into military custody, were convicted of various violations of the laws of war, and were executed as spies.

The *Quirin* Court could point to the additive effect of cooperation between the executive and legislative branches in the Articles of War that provided one basis for the military commissions that were convened.⁵⁵ Perhaps this cooperation stretched the imagination (and the Court did not conclude that it was essential to its holding), but this is a joint authority that our question eschews. We are asked whether President Obama has the authority to detain those he suspects of links to al Qaeda, without any further congressional support. As I’ve argued above, the AUMF does not authorize detention by the military that would not be a proper application of the President’s *jus belli* powers. Such detention would not constitute a “necessary and appropriate” use of force. Because the Non-Detention Act is a clear statement of Congress’s rejection of such detention, even in wartime, the President’s power is at its “lowest ebb.”

The factual differences between *Quirin* and this hypothetical are also stark. The issue in *Quirin* was “whether the detention of petitioners by respondent *for trial by Military Commission . . . on charges preferred against them purporting to set out their violations of the law of war and of the Articles of War*, is in conformity to the laws and Constitution of the United States.”⁵⁶ That is a far cry from our question: whether detention *without* trial by any civilian or military court, indeed, *without* charge, would be lawful. Unlike the saboteurs in *Quirin*, who conceded their enemy status, there is no indi-

53. *Id.* at 21.

54. *Id.* at 25.

55. *Id.* at 27–29 (“It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation.”).

56. *Id.* at 18–19 (emphasis added); *see id.* at 29 (“We are concerned only with the question whether it is within the constitutional power of the national government to place petitioners upon trial before a military commission for the offenses with which they are charged.”).

cation that the Minnesotan in question would make such a concession. If the status of a detainee is uncertain, as it would be in such a case, the law of armed conflict requires that a competent tribunal determine that status.⁵⁷ But, again, this question implies that no such tribunal would be convened (for this purpose or for any other) to review the citizen's detention. Nor is there any suggestion in the question that the "suspected links" to al Qaeda would lead President Obama to conclude that this citizen's detention was made necessary by his or her belligerent acts.⁵⁸ What are we to compare to the confessions of Nazi allegiance, buried uniforms, and explosive material that stacked the deck in *Quirin*? If the writ of habeas corpus is not suspended, both the Non-Detention Act and the Constitution require that the citizen's right to petition a court for release be unobstructed.⁵⁹ Neither process is contemplated by this question.

IV. CONCLUSION

As noted at the start of this essay, this question is too vague for me. I also do not like it for another reason. Its form encourages a descriptive answer—does the President have this power or not?

57. Geneva III, *supra* note 39, art. 5.

58. Professor Goldsmith has uncovered Justice Jackson's unpublished opinion in *Quirin*, which suggests that the fact pattern of this question would have troubled the *Quirin* Court even more than they were troubled by the facts of that case. See Robert Jackson, Draft Opinion in *Ex parte Quirin* (Oct. 23, 1942), reprinted in Jack Goldsmith, *Justice Jackson's Unpublished Opinion in Ex parte Quirin*, 9 GREEN BAG 2D 232, 236–37 (2006) ("If this were a military commission invoked as a substitute for courts and juries in the administration of justice to our own inhabitants, it would to me present a quite different question, both of power and of statutory construction. . . . The seizure and trial of these prisoners is not in pursuit of the functions of internal government of this country. They are prisoners of the President by virtue of his status as the constitutional head of the military establishment and their own status as enemy forces captured while conducting a military operation within and against this country. The custody and treatment of such prisoners of war is an exclusively military responsibility. It is to be discharged, of course, in the light of any obligation undertaken by our country under treaties or conventions or under customs and usages so generally accepted as to constitute the 'laws of warfare.'").

59. See U.S. CONST. art. I, § 9, cl. 2; *Hamdi v. Rumsfeld*, 542 U.S. 507, 536–37 (2004) ("[I]t would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his Government, simply because the Executive opposes making available such a challenge. Absent suspension of the writ by Congress, a citizen detained as an enemy combatant is entitled to this process."); *Munaf v. Geren*, 128 S.Ct. 2207 (2008).

This question really deserves a normative answer. The real question is whether President Obama *should* have such an authority, a much more interesting question in the long-run. Should statutory, constitutional, and international law be changed to permit summary military detention of civilians in such circumstances?

To answer “yes” to this normative question, however, is to accept its implicit assumption of exceptionalism. The question assumes that we are living in an exceptional time that calls for exceptional departures from the ordinary legal order, departures that we would not otherwise consider.⁶⁰ In ordinary times, we expect that a U.S. citizen would enjoy constitutional protection from military seizure; but in this case, the question subtly asks, should we make an exception? In ordinary times, the constitutional protection against military seizure would be even stronger for a citizen living in Minnesota than one traveling from abroad; but in this case, should we make an exception? In ordinary times, we assume that a citizen’s associations and “links” will not be sufficient conditions to deny him constitutional protection; again, should we make an exception?

Perhaps the assumption most deeply buried in this question is the one most people would most like to be true: this Minnesotan is a loner, himself an exception, as John Walker Lindh (the “American Taliban”) was hoped to be an exception from the “norm” of foreign extremists.⁶¹ Holding this assumption seems to soften the

60. The most famous twentieth-century proponent of this view was the Nazi legal theoretician Carl Schmitt, hardly an advocate for the construction and defense of democratic, rule-of-law institutions capable of withstanding national security emergencies. CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 5 (George Schwab trans., MIT Press 1985) (1922) (“Sovereign is he who decides on the exception.”); see also Adrian Vermuele, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1098–1101 (2009) (discussing Schmitt’s “extreme” views that “law never constrains emergency power”); Lawrence Preuss, *Punishment by Analogy in National Socialist Penal Law*, 26 J. CRIM. L. & CRIMINOLOGY 847 (1936) (reporting Schmitt’s call to replace *nullum crimen sine lege* with *nullum crimen sine poena*, in the context of reforming National Socialist penal law).

61. The United States has generally chosen not to apply the laws of war to its own citizens. President Bush’s Military Order of November 13, 2001, ordering the military detention of members of al Qaeda, expressly states that U.S. citizens are not “individual[s] . . . subject to this order.” Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,834 (Nov. 13, 2001). The Military Commissions Act exempts citizens from this system, even those who have engaged in hostilities or purposefully and materially supported hostilities against the United States. Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2574 (2009)

blow exceptionalism delivers to our constitutional principles; its rarity makes departure from them seem more excusable. But it is a naïve and dangerous assumption on which to build law or policy. Narrowly defended exceptionalism always expands.⁶² Jack Goldsmith, Harvard Law professor and former assistant attorney general for the Office of Legal Counsel, has already argued that “the definition [of people subject to detention] should extend to U.S. citizens as well as to aliens.”⁶³

Fears will grow that our assumptions about a distant and foreign enemy are misplaced. Maybe they are. Pressure will mount to expand the authority to detain the enemy within.⁶⁴ We should draw strength from our constitutional principles and resist making exceptions to them. We have not fared well as a nation when we have succumbed to such fear-drenched temptations. I prefer the counsel of Justice Jackson to the theories of Carl Schmitt:

The appeal, however, that we declare the existence of inherent powers *ex necessitate* to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready

(defining the term “unprivileged enemy belligerent”) (codified at 10 U.S.C. § 948a(7)); *id.* § 1802, 123 Stat. at 2576 (limiting persons subject to commissions to any “alien unprivileged enemy belligerent”) (codified at 10 U.S.C. §§ 948b(a), 948(c)).

62. This is always the case, and a strong reason for the structural protection of liberty provided by distributing power—in peacetime as well as during war—among the branches of government. However, as Justice Jackson observed:

I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress. If not good law, there was worldly wisdom in the maxim attributed to Napoleon that “The tools belong to the man who can use them.” We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

63. Goldsmith, *supra* note 47, at 83.

64. See Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay at 2, *In re Guantanamo Bay Detainee Litig.*, No. 08-442 (TFH) (D.D.C. Mar. 19, 2009) (“This position is limited to the authority upon which the Government is relying to detain the persons now being held at Guantanamo Bay. It is not, *at this point*, meant to define the contours of authority for military operations generally, or detention in other contexts.”) (emphasis added).

pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies.⁶⁵

65. *Youngstown*, 343 U.S. at 650.