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Recommended Citation

Chris Jenks, "Civil Liberties and the Indefinite Detention of U.S. Citizens", 2 Harv. J. Law & Pub. Pol. 173 (2014)

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CIVIL LIBERTIES AND THE INDEFINITE DETENTION OF U.S. CITIZENS

CHRISTOPHER JENKS*

There are many challenges stemming from ambiguous statutory provisions of section 1021 of the 2012 National Defense Authorization Act.¹ Section 1021 expands the scope of the executive branch's detention authority under the post-September 11th Authorization for Use of Military Force and allows indefinite detention of individuals deemed to be part of or substantially supporting al Qaeda, the Taliban, and associated forces in hostilities against the United States or its coalition allies.

While that may not strike you as problematic on its face, consider that we do not know the definition of many of the operative words in section 1021. What constitutes "substantial support"? Who or what are "associated forces"? To make matters considerably worse, the "we" who do not know what section 1021 means includes the Congress that drafted the statute, the President who signed it into law while simultaneously claiming it is meaningless, and the federal courts, which are not inclined to save the other two branches of government from themselves.

With the United States now in the second decade of its fight against transnational terrorist groups, there is considerable uncertainty as to what effect section 1021 has on the scope of the executive branch's armed conflict detention authority, not on distant battlefields, but here in the United States. That is troubling for a variety of reasons, and this Article will focus on three.

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1. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021, 125 Stat. 1298, 1562 (2011).

First, it is troubling that we are not sure if section 1021 allows the President to order the indefinite detention of a U.S. citizen or lawful resident alien captured in the United States. Reviewing the legislative process which yielded section 1021 is distressing and disturbing. Our system of government relies on, or maybe assumes, the various branches will operate as checks and balances on each others. Yet with section 1021 the legislative and executive branches have abdicated their responsibility and kicked the proverbial can down the road to the judiciary. So we now face a Hobson's choice of either hoping for an activist judiciary which will mitigate the civil liberties risks the other branches of government have created, or wanting a judiciary that acts within its constitutionally mandated limitations, recognizing that section 1021 may survive challenge as a result.

Second, it is troubling because the prospect of indefinite detention and trial by military commission upsets a long-standing balance within the U.S. criminal procedure system, whereby law enforcement essentially has to choose, or prioritize, between protecting the public and prosecuting offenders. This choice is made possible by the public safety exception from *New York v. Quarles*² that modifies our understanding of the *Miranda* warning requirements.³ Since September 11th the government has made expansive use of the public safety exception, altering the balance between rights and security.⁴ The development of section 1021 and the availability of indefinite detention fundamentally alters the long-standing risk calculus under which law enforcement operated. We have, or should have, observed this change in the differing manner in which law enforcement responded to and treated a foreign citizen arrested in Detroit after attempting to bomb a transatlantic flight compared to that of a U.S. citizen alleged to have bombed the Boston Marathon.⁵ Section 1021 became law in between those two events, and it may account for

2. 467 U.S. 649 (1984).

3. *Id.* at 659–60 (citing *Miranda v. Arizona*, 384 U.S. 436 (1966)).

4. See M.K.B. Darmer, *Lessons from the Lindh Case: Public Safety and the Fifth Amendment*, 68 BROOK. L. REV. 241, 272 (2002).

5. See Geoffrey Corn & Chris Jenks, *Strange Bedfellows: How Expanding the Public Safety Exception to Miranda Benefits Counterterrorism Suspects*, 41 FORDHAM URB. L.J. 1 (2013).

why U.S. law enforcement afforded the U.S. citizen far less in civil liberties than the foreign national.

Finally, it is troubling that there is not much in the way of current discussion on section 1021 and the contemporary challenges of balancing freedom and security. Yet now is when we need to have the conversation, in the relative calm, cool light of day. If history is any guide, and it is, this debate will resurface reactively and emotionally following the next instance of someone with explosives in their underwear, their shoes, their SUV at Times Square, or after an attack like that during the Boston Marathon.⁶ We know that we often come to regret the decisions we make when emotionally compromised. It is in that moment of emotional excitement when we may finally and fully see the civil liberties risk of section 1021 in the form of the indefinite detention without trial of a U.S. citizen captured in the United States. My goal today is that by outlining where are now with section 1021, and how we reached this point, we can avoid our otherwise inevitable future, one which we will equally inevitably lament.

I. SECTION 1021

It is instructive to consider the final wording of section 1021, the drafting debate in Congress, the President's action in signing the NDAA into law, and how federal courts have construed the provisions. As enacted, section 1021 reads:

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:

6. *Id.* at 2-3 & nn.3-6.

(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).⁷

7. National Defense Authorization Act for Fiscal Year 2012, § 1021, Pub. L. No. 112-81, § 1021, 125 Stat. 1298, 1562 (2011).

Although the focus of this article is on the meaning of section 1021, it is both notable and curious that Congress drafted legislation concerning indefinite detention not as a standalone bill, but buried in a 565-page defense appropriations act.⁸ But before discussing what members of Congress claim the legislation does and does not mean, analyzing the plain language of section 1021 is in order.

As the title indicates, section 1021 affirms the authority of the U.S. military to detain certain categories of individuals (covered persons), pursuant to the Authorization for Use of Military Force (AUMF). The use of the word “affirms” is interesting. Affirm is defined as “to assert as confirmed,”⁹ which is ironic given that Congress disagrees as to the meaning of that which it claims to affirm in section 1021.

The title then links the categories of persons, the “covered persons,” with the AUMF. This is more than a little disingenuous as the definition of covered persons in section 1021 is well beyond the scope of the AUMF. Congress enacted the AUMF in the aftermath of the September 11th terror attacks. The relevant portions of the AUMF provide:

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.¹⁰

Thus, Congress authorized the President to use force, but only against those entities involved with the September 11th attacks. Although the AUMF does not specifically authorize detention, the U.S. Supreme Court held in its 2004 *Hamdi* decision that detention is “so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.”¹¹

8. *See id.*

9. *Affirm—Definition and More from the Free Merriam-Webster Dictionary*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/affirm> [<http://perma.cc/5LCM-9TLS>] (last visited Oct. 26, 2014).

10. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

11. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion).

Section 1021, while claiming that “[n]othing in this section is intended to limit or expand the authority of the President or the scope of the Authorization for Use of Military Force,”¹² does just that, at least in terms of the President’s detention authority. There are two categories of persons to whom section 1021 applies. The first is the same as from the AUMF, those “who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.”¹³ The second category of persons expands the scope of detention authority by including anyone “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.”¹⁴

This second category of covered persons is replete with uncertainty. What does it mean to be part of or substantially support al Qaeda or the Taliban? Who or what are the associated forces? What is required to engage in hostilities? Who are the coalition partners of the United States? What constitutes a belligerent act? What constitutes direct support, and is that a different level of support than substantial? Had Congress set out to draft a vague and confusing statute it could not have done better, and this is just the beginning of section 1021.

While section 1021 is unclear on who exactly is covered, what may be done to those individuals, whoever they are, is more straightforward. Section 1021 provides that the “disposition” of a covered person may include: (1) “[d]etention under the law of war without trial until the end of the hostilities authorized by the Authorization for Use of Military Force”; (2) trial by military commission; (3) transfer to an alternate court or tribunal; and (4) “transfer to the custody . . . of the person’s country of origin,” or any other foreign country or entity.¹⁵ It is the first possible disposition, indefinite law-of-war-based detention which is, or should be, the greatest source of controversy.

12. § 1021(d) (2012).

13. *Id.* § 1021(b)(1).

14. *Id.* § 1021(b)(2).

15. *Id.* § 1021(c).

When will the end of hostilities authorized by the AUMF occur? Arguably those hostilities will not end until the death or capture of all those who planned, authorized, committed or aided the September 11th attacks. But there is not, indeed could not be, any way of reaching that point or knowing if the U.S. had managed to do so. Thus while the word “indefinite” is not contained in section 1021, it is more intellectually honest to use that term instead of the fiction Congress employed, which suggests that there are known or knowable bounds to the length of permissible detention without trial.

Thus far we have discussed a detention statute in which we are unclear to whom it applies and for how long, but amazingly we are still not yet at the confusing portion. While there is a procedural briefing requirement technically at the end of section 1021, the substantive provision concludes by stating that “[N]othing 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.”¹⁶ In essence this subsection means that the current status quo regarding the legality of detaining a U.S. citizen or lawful resident alien outside the U.S. or detaining anyone in the United States remains unchanged. Yet there is no agreement as to what that status quo is. We now turn to what Congress claims section 1021 does and does not do. Normally reviewing the legislative history provides a modicum of clarity as to congressional intent. With section 1021, the legislative history only exacerbates the confusion.

II. LEGISLATIVE HISTORY

A. *House Armed Services Committee*

In May 2011, early in the legislative process for the NDAA, the House Armed Services Committee (HASC) issued a report on what ultimately became section 1021 but was at the time numbered section 1034.¹⁷ The committee noted that the terrorist threat facing the United States had evolved and that “[a]l Qaeda, the Taliban, and associated forces still pose a grave

16. *Id.* § 1021(e).

17. H.R. REP. NO. 112-78 (2011)

threat to U.S. national security.”¹⁸ The committee continues by claiming that the AUMF “necessarily includes the authority to address the continuing and evolving threat posed by these groups.”¹⁹ This is an interesting claim given that the AUMF only addressed entities responsible for the September 11th attacks. While the AUMF certainly covers al Qaeda and the Taliban, to what extent “associated forces,” some of which were not formed until *after* September 11th, are included is questionable. The committee then states that it “supports the Executive Branch’s interpretation of the AUMF, as it was described in a March 13, 2009, filing before the U.S. District Court for the District of Columbia.”²⁰

B. 2009 DOJ AUMF Filing

In that March 13, 2009 filing, the Department of Justice made several assertions concerning the AUMF, with which the HASC apparently agrees. In that filing, DOJ repeated the grant of AUMF Force authority “to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks.”²¹ But DOJ also claimed that through the AUMF: “[t]he President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces 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 hostilities, in aid of such enemy armed forces.”²²

So the Congress initially provided a limited grant of authority in the AUMF. The AUMF addresses those who planned, authorized, committed or aided the September 11th attacks. The executive branch then interpreted that grant to include other

18. *Id.* at 209.

19. *Id.*

20. *Id.* (referring to Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay, *In re Guantanamo Bay Detainee Lit.*, Misc. No. 08-442 (TFH) (D.D.C. Mar. 13, 2009) [hereinafter *Guantanamo Memo*]).

21. *Guantanamo Memo*, *supra* note 20, at 2.

22. *Id.*

individuals who engage in other activities beyond those listed in the AUMF. The executive branch's interpretation includes associated forces who support hostilities against the U.S. or unidentified coalition partners. The HASC then supported the executive branch's concept of what it claims Congress originally intended in the AUMF.

If Congress had actually intended the AUMF to mean what the executive branch claims, then no further legislation would be required. But Congress ultimately included the executive branch's version of what Congress intended in the AUMF in section 1021. This means that either the covered person language is superfluous and Congress was merely affirming its earlier grant of authority, or Congress was modifying the use of force authority through a single section of a massive defense appropriations act. The former would be needless and confusing, while the latter would be disingenuous and disconcerting.

The March 13, 2009 filing also makes other claims which, given the HASC's support, factor into what section 1021 was intended to mean. These claims include that: (1) it is "neither possible nor advisable, however, to attempt to identify, in the abstract, the precise nature and degree of 'substantial support,' or the precise characteristics of 'associated forces,' that are or would be sufficient to bring persons and organizations within the foregoing framework"; (2) the AUMF does not "limit the 'organizations' it covers to just al-Qaida or the Taliban"; (3) the AUMF is not limited to persons captured on the battlefields of Afghanistan"; and (4) the threshold for detention is lower than that for direct participation in hostilities.²³

The last point warrants explanation. Direct participation in hostilities is a law-of-war term and refers to the activity level that renders a civilian the lawful object of attack.²⁴ Normally civilians may not be made the object of attack, but when they directly participate in hostilities they may be targeted with lethal force. The DOJ filing is correct that "[L]aw-of-war principles do not limit the United States' detention authority to this

23. *Id.* at 2, 7.

24. Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT'L L. 48, 51-54 (2009) (distinguishing four groups of individuals and explaining the difference between direct and indirect participation).

limited category of individuals.”²⁵ Indeed the Fourth Geneva Convention, which covers civilians, outlines the circumstances under which civilians may be detained.²⁶ The threshold for detention is lower than the direct participation standard—it is when the civilian poses an imperative security threat.²⁷ The DOJ filing makes reference to the prisoner of war detention provisions of the Third Geneva Convention, but only to counter claims that direct participation is too high a threshold.²⁸ The filing neither acknowledges the imperative security threat standard for detention of civilians from the Geneva Conventions nor offers an alternative.

Over the course of the next six months the NDAA underwent changes as part of the legislative process. The Congressional Record from December 2011 reveals several sessions in which the Senate debated the NDAA in general and section 1021 in particular.²⁹ This legislative history sheds light—albeit not clarity—on what Congress intended in section 1021 and how agreement on the final wording was reached.

C. House and Senate Debates

The Senate Armed Services Committee developed a different version of section 1021 which included a “limitation” stating that the detention authority “does not extend to the detention of citizens or lawful resident aliens of the United States on the basis of conduct taking place within the United States except to the extent permitted by the Constitution.”³⁰

This language seems to attempt to codify the Fourth Circuit’s analysis in *Padilla*,³¹ that the Supreme Court’s *Hamdi* decision was not predicated on the capture location, but on the location of the alleged misconduct. Hamdi was captured in Afghanistan, where he was engaging in armed conflict against the

25. Guantanamo Memo, *supra* note 20, at 8.

26. ICRC, Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 258 (Jean S. Pictet gen. ed., 1958).

27. *Id.*

28. Guantanamo Memo, *supra* note 20, at 8–9.

29. *See, e.g.*, 157 CONG. REC. S8619 (daily ed. Dec. 15, 2011); 157 CONG. REC. S8079 (daily ed. Dec. 1, 2011).

30. S. 1253, 112th Cong. § 1031(d) (2011).

31. *Padilla v. Hanft*, 423 F.3d 386, 393–94 (4th Cir. 2005).

United States.³² The Fourth Circuit focused more on Hamdi having taken up arms against the United States than the location in which he was doing so. Under the Fourth Circuit's analysis, detaining Padilla in the United States was permissible because prior to returning to the United States, Padilla, similar to Hamdi, had been "armed and present in a combat zone [Afghanistan] during armed conflict between al Qaeda/Taliban forces and the armed forces of the United States."³³

But following discussions, the SASC reported a revised version of the bill which removed the limitation regarding detention of citizens and lawful resident aliens based on domestic conduct. The SASC also added a provision which stated that, "[n]othing in this section is intended to limit or expand the authority of the President or the scope of the [AUMF]."³⁴

At this point, the Obama Administration issued a statement that what would become section 1021 was unnecessary because the authority it attempted to codify already existed, and expressed concern about potential unintended consequences from legislative action in this area.³⁵

D. Final Version of Section 1021

Senator Dianne Feinstein looms large in the legislative development of section 1021. Early on in the legislative process she unsuccessfully proposed an amendment that would have provided: "The authority described in this section for the [military] to detain a person does not include the authority to detain a citizen of the United States without trial until the end of hostilities."³⁶ She later successfully proposed an amendment which became section 1021(e), the authorities portion of the bill which states that the section changes nothing. It was this amendment that allowed section 1021 to ultimately pass.³⁷

32. Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004) (plurality opinion).

33. Padilla, 423 F.3d at 390 (internal quotation marks omitted).

34. S. 1867, 112th Cong. § 1031 (2011).

35. See 157 CONG. REC. S7937, S7952 (daily ed. Nov. 29, 2011).

36. See 157 CONG. REC. S8079, S8094–125 (daily ed. Dec. 1, 2011); 157 CONG. REC. S7685 (daily ed. Nov. 17, 2011).

37. 157 CONG. REC. S8079, S8122, S8125 (daily ed. Dec. 1, 2011) (statement of Sen. Feinstein).

She provided a helpful, if depressing, description of how the Senate reached that point. According to Feinstein:

There is a difference of opinion as to whether there is [a] fundamental flaw [in what would be section 1021]. We [referring to a group of Democratic Senators] believe the current bill essentially updates and restates the authorization for use of military force that was passed on September 18, 2011. Despite my support for a general detention authority, the provision in the original bill, in our view, went too far. The bill before us would allow the government to detain U.S. citizens without charge until the end of hostilities. We have had long discussion on this.

The disagreement arises from different interpretations of what the current law is. The sponsors of the bill believe that current law authorizes the detention of U.S. citizens . . . without trial until “the end of hostilities” which, in my view, is indefinitely.

Others of us believe that current law, including the Non-Detention Act that was enacted in 1971, does not authorize such indefinite detention of U.S. citizens arrested domestically. The sponsors believe that the Supreme Court’s Hamdi case supports their position, while others of us believe that Hamdi, by the plurality opinion’s express terms, was limited to the circumstance of U.S. citizens arrested on the battlefield in Afghanistan, and does not extend to U.S. citizens arrested domestically. And our concern was that section [1021] of the bill as originally drafted could be interpreted as endorsing the broader interpretation of Hamdi and other authorities.

So our purpose [in amending 1021 with what would be the final language] is essentially to declare a truce, to provide that section [1021] does not change existing law, whichever side’s view is the correct one. So the sponsors can read Hamdi and other authorities broadly, and opponents can read it more narrowly, and this bill does not endorse either side’s interpretation, but leaves it to the courts to decide.³⁸

Feinstein’s reference to the Non-Detention Act of 1971³⁹ is important. Under that statute, “[N]o citizen shall be imprisoned or otherwise detained by the United States except pursu-

38. *Id.* at S8122 (emphasis added).

39. 18 U.S.C. § 4001(a) (2012).

ant to an Act of Congress.”⁴⁰ Feinstein apparently views that section 1021 is not itself an Act of Congress within the meaning of the Non-Detention Act.

Also of note, while Feinstein hews to the line that section 1021 “restates” the AUMF, she notes that it also “updates” the AUMF.⁴¹ Ultimately Feinstein “leaves the courts to decide” what exactly Congress intended.⁴² In that same session Senator Durbin shared that view, stating that the import of section 1021 is that “the Supreme Court will ultimately decide who can and cannot be detained indefinitely without a trial.”⁴³

Clearly there was, and presumably still is, disagreement about the current state of the executive branch’s authority to detain U.S. citizens in the United States. Where exactly the disagreement is remains unclear. Cases like *Hamdi*, *Padilla*, and *al-Marri*⁴⁴ stake out the different attitudes towards the detention of U.S. citizens or lawful resident aliens based on situs of capture versus conduct, and whether that conduct was in the past, ongoing, or believed to occur in the future.

As we have discussed, the *Hamdi* case provides the one and possibly only touchstone from which views then diverge. The Supreme Court upheld the law of war detention of Hamdi, a U.S. citizen captured in Afghanistan where he was engaging in hostilities.⁴⁵ The *Padilla* case highlights the extent to which the location of capture versus activity issue is dispositive.⁴⁶ The *al-Marri* case involved a lawful resident alien detained in the United States whom the Bush administration designated an enemy combatant and initially held without charge, trial, or access to an attorney.⁴⁷ Neither *Padilla* nor *al-Marri* reached the Supreme Court, thus leaving the argument at the different interpretations of *Hamdi* Senator Feinstein described.

40. *Id.*

41. 157 CONG. REC. S8079, S8122 (daily ed. Dec. 1, 2011) (statement of Sen. Feinstein).

42. *Id.*

43. *Id.* at S8124 (statement of Sen. Durbin).

44. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008); *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005).

45. *Hamdi*, 542 U.S. at 509.

46. *Padilla*, 423 F.3d at 393–94.

47. *Al-Marri*, 534 F.3d at 219–20.

E. *Indefinite Detention of U.S. Citizens*

At one point during the debate over section 1021, Republican Senator Lindsey Graham posited a hypothetical for the consideration of Democratic Senator Carl Levin:

So in a situation where an American citizen goes to Pakistan and gets radicalized in a madrasah, gets on a plane and flies back to Dulles Airport, gets off the plane and takes up arms against his fellow citizens . . . and starts randomly shooting people, the law we are trying to preserve is current law, which would say if the experts decide it is in the Nation's best interests, they can hold that American citizen as they were able to hold the American citizen helping the Nazis

[W]e want to preserve the ability of the intelligence community to hold that person under the law of war and find out: Is anybody else coming? Are you the only one coming? What do you know? What madrasah did you go to? How did you get over? How did you get back?

We want to preserve their ability to hold that person under the law of war for interrogation. But we also concede, if they think it is better to give them their Miranda rights, they can. That is what [section 1021] will do. Does the Senator agree with that?

Mr. LEVIN. "I do."⁴⁸

The House debate on December 14, 2011 was even more pointed, and bipartisanly so. Democratic Congresswoman Barbara Lee spoke against section 1021 and entered into the record a letter from 26 retired United States admirals and generals which expressed support for striking section 1021 altogether, or in the alternative that, "[a]t the very least, the current detention provisions merit public debate and should not be agreed to behind closed doors and tucked into legislation."⁴⁹

Republican Congressman Tom McClintock stated that section 1021:

Specifically affirms that the President has the authority to deny due process to any American the government charges with "substantially supporting al Qaeda, the Taliban or any associated forces," *whatever that means*.

48. 157 CONG. REC. S8079, S8100–01 (daily ed. Dec. 1, 2011).

49. 157 CONG. REC. H8903, H8917 (daily ed. Dec. 14, 2011).

Would “substantial support” of “associated force” mean linking a Web site to a Web site that links to an al Qaeda site? We don’t know. The question before us is: Do we really want to find out?

We’re told not to worry, the bill explicitly states that nothing in it shall alter existing law. But wait—there is no existing law that gives the President the power to ignore the Bill of Rights and detain Americans without due process. There is only an assertion by the last two Presidents that this power is inherent in an open-ended and ill-defined war on terrorism. But it is a power not granted by any act of Congress until now.

What this bill says is, what Presidents have only asserted, Congress now affirms in statute.

We’re told this merely pushes the question to the Supreme Court to decide if indefinite [detention] is compatible with any remaining vestige of our Bill of Rights. Well, that’s a good point if the court were the sole guardian of the Constitution. But it is not. If it were, there would be no reason to require every Member of Congress to swear to preserve, protect, and defend the Constitution. We are also its guardians.

And today we, who have sworn fealty to that Constitution, sit to consider a bill that affirms a power contained in no law and that has the full potential to crack the very foundation of American liberty.⁵⁰

Democratic Congressman John Conyers, the ranking member of the House Judiciary Committee, noted that the question of indefinite detention “has never gone before the House Judiciary Committee—never.”⁵¹ Conyers went on to insert a letter from Judge William Sessions, former Director of the FBI. Judge Sessions claimed that section 1021:

[W]ould for the first time codify authority for methods such as indefinite detention without charge . . . to virtually anyone picked up in antiterrorism efforts, including those arrested on U.S. soil

Some have argued that section [1021] simply reiterates current law and by doing so maintains the status quo. That is not the case. This very dangerous provision would authorized the President to subject any suspected terrorist who is

50. *Id.* (emphasis added) (remarks of Rep. McClintock).

51. *Id.* at H8925 (remarks of Rep. Conyers).

captured within the United States—including U.S. citizens and U.S. persons—to indefinite detention without charge. The provision does not limit such detention authority to people captured on the battlefield. Importantly, although subsection (e) of this provision states that the provision should not be “construed to affect existing law or authorities” relating to detention of “persons who are captured or arrested in the United States,” the reality is that current law on the scope of such executive authority is unsettled.⁵²

Judge Sessions then provided a reminder of why the domestic detention authority question remained unsettled—that the two times post September 11th when the issue arose, the executive branch “changed course so as to avoid judicial review.”⁵³ Here Judge Sessions referred to the 2005 *Padilla* case which involved a U.S. citizen, and the 2008 *al-Marri* case which involved a legal permanent U.S. resident.

Both *Padilla* and *al-Marri* were detained in the U.S. and per Judge Sessions:

the U.S. government claimed that the President had the authority to detain a suspected terrorist captured within the United States indefinitely without charge or trial. In both [cases], however, before the Supreme Court could hear the case and evaluate this claim, the Justice Department reversed course and charged the defendant with criminal offenses to be tried in civilian court. Thus, this extreme claim of executive detention authority for people captured within the United States has never been tested, and the state of the law at present is unclear. Passage of [Section 1021] would explicitly provide this authority by statute for the first time, thereby clearly, and dangerously, expanding the power for indefinite detention.⁵⁴

Congressman Conyers also asked an important and as of yet unanswered question about why an amendment to exempt American citizens from indefinite detention failed in the Senate. Conyers added that:

If we were concerned about preserving the civil liberties and constitutional protections for American citizens, why did it

52. *Id.*

53. *Id.*

54. *Id.*

fail? In addition, if existing laws prohibit this, why did we not specify this in the bill? Although supporters of this bill continue to claim that this bill would not expand detention authority inside of the U.S., that is just not the case.⁵⁵

Similar to Congressman McClintock, Conyers pointed out the uncertainty in the meaning of terms in section 1021, including “hostilities,” what constitutes direct support, and when and how hostilities will end.⁵⁶ Conyers also highlighted that section 1021 does not specifically address whether U.S. citizens or lawful resident aliens may be determined to be “covered persons” subject to detention.⁵⁷

Democratic Senator Jeff Bingaman echoed concerns regarding section 1021 that the “end of hostilities” is “a completely undefined period of time considering that we are confronting a long-term conflict with groups, such as al-Qaida, who will never sign a peace treaty ending the hostilities.”⁵⁸

Bingaman also discussed Feinstein’s amendment that section 1021:

should not be construed as affecting existing law with respect to the detention of U.S. citizens, but this language simply restates that the law is what the law is. The problem is the law is unsettled. If Congress is going to enact provisions authorizing the indefinite detention of a person without a trial, frankly, I believe the sensible approach is to be very clear about whether or not it is the intent of Congress to include American citizens within this category.⁵⁹

Interestingly, Congressman Bingaman *opposed* section 1021 because the war on terror will never end, while Senator Graham *supported* section 1021 for the same reason. Graham noted during the Senate debate that “[t]his is a war without end. There will never be a surrender ceremony signing on the USS Missouri,” referring to the end of the war with Japan.⁶⁰ Graham acknowledged that “an enemy combatant determination could be a de facto life sentence,” but claimed that the federal courts

55. *Id.* at H8927.

56. *Id.*

57. *Id.*

58. 157 CONG. REC. S8647 (daily ed. Dec. 15, 2011) (remarks of Sen. Bingaman).

59. *Id.*

60. 157 CONG. REC. S8103 (daily ed. Dec. 1, 2011) (remarks of Sen. Graham).

provide a check or balance on such detention authority.⁶¹ It is unclear how Senator Graham would respond to Judge Sessions' claim that the executive branch has been able to avoid this judicial check or balance.

F. *Section 1021 and Civil Liberties*

Democratic Senator Chris Coons referred to section 1021 and other detention authorities in the NDAA as "an assault on our civil liberties [that] do not belong on our books. They were not requested by the Pentagon, in fact they have been resisted by the President, the Secretary of Defense, the Attorney General and the directors of National Intelligence and the FBI."⁶² Coons claimed the detention provisions "take us one small, but significant, step down the road towards a state in which ordinary citizens live in fear of the military, rather than the free society that has marked this great nation since the Bill of Rights was ratified 220 years ago, in 1791."⁶³

Coons agreed that while it is "acceptable for lethal military actions to be taken against U.S. citizens abroad who have taken up arms against this Nation, I am concerned about the slow but steady creep of the military into areas that traditionally have been reserved for civilian law enforcement."⁶⁴ And as Coons astutely noted:

At the local level, it is often difficult to distinguish whether an individual in possession of bomb-making components is a hardened terrorist coordinating with al-Qaeda; is a troubled, dangerous, but [unaffiliated] teenager; or is completely innocent of any crime at all. In the rush to "repel borders" at the early stages of investigations, mistakes will be made. We need to make sure that these mistakes do not overrun the constitutional protections we all enjoy as Americans.⁶⁵

Coons then issued a poignant reminder of American history in dealing with terrorist threats. He acknowledged that:

61. *Id.*

62. 157 CONG. REC. S8653 (daily ed. Dec. 15, 2011) (remarks of Sen. Coons).

63. *Id.*

64. *Id.* at S8654.

65. *Id.*

[W]e are in conflict against terrorists. I do not doubt or dispute that. But this is not the first time that has been the case. During the beginning part of the last century, anarchists committed a string of bombings, usually targeting police officers or civilians. In 1901, an anarchist assassinated President McKinley. In the First Red Scare during the early part of the century, a plot was uncovered to bomb 36 leaders of government and industry. During the 1960s and 70s, the Weather Underground declared as its mission to overthrow the U.S. government. Members planted bombs in the Capitol, the Department of State and the Pentagon.

Each of these threats, and others, has before placed an existential fear in the minds of Americans. We have not always acted well. The Sedition Act of 1918, the internment of Japanese Americans during the Second World War, and the House Un-American Activities Committee and Hollywood blacklisting following the war are three notable examples of action, taken in the face of severe threat, which now the vast majority of Americans look back upon with deep regret.⁶⁶

Yet when it came down to voting, Senator Feinstein's amendment to add subsection (e) to section 1021 passed by a vote of 99 to 1.⁶⁷ And with section 1021 contained in the NDAA, Congress was unwilling to not approve spending authority for the Department of Defense. By December 2011, the Senate passed the NDAA by a vote of 93 to 7.⁶⁸ The House of Representatives saw much more disagreement but passed the NDAA by a vote of 283 to 136.⁶⁹

66. *Id.*

67. 157 CONG. REC. S8125 (daily ed. Dec. 1, 2011). Republican Senator Jon Kyl of Arizona cast the only no vote.

68. 157 CONG. REC. S8633 (daily ed. Dec. 15, 2011) (referencing the "93-to-7 vote just 2 weeks ago"). The following senators cast no votes on the 2012 NDAA: Tom Coburn, Republican, Oklahoma; Tom Harkin, Democrat, Iowa; Mike Lee, Republican, Utah; Jeff Merkley, Democrat, Oregon; Rand Paul, Republican, Kentucky; Bernie Sanders, Independent, Vermont; and Ron Wyden, Democrat, Oregon.

69. Lindsey O. Graham & Michael D. Tomatz, *NDAA 2012: Congress and Consensus on Enemy Detention*, 69 A.F. L. REV. 1, 3 n.5 (2013).

G. Presidential Signing Statement

President Obama signed the NDAA, with section 1021, into law on December 31, 2011.⁷⁰ He did so while issuing a signing statement drawing specific attention to section 1021:

Today I have signed into law H.R. 1540, the “National Defense Authorization Act for Fiscal Year 2012.” . . . The fact that I support this bill as a whole does not mean I agree with everything in it. In particular, I have signed this bill despite having serious reservations with certain provisions that regulate the detention, interrogation, and prosecution of suspected terrorists . . . Section 1021 affirms the executive branch’s authority to detain persons covered by the 2001 Authorization for Use of Military Force (AUMF) (Public Law 107-40; 50 U.S.C. 1541 note). This section breaks no new ground and is unnecessary . . . I want to clarify that my Administration will not authorize the indefinite military detention without trial of American citizens. Indeed, I believe that doing so would break with our most important traditions and values as a Nation. My Administration will interpret section 1021 in a manner that ensures that any detention it authorizes complies with the Constitution, the laws of war, and all other applicable law.⁷¹

President Obama’s signing statement, like all signing statements, is of little and possibly no legal significance. Signing statements are an expression of policy, issued for political reasons. President Obama could act inconsistently with his signing statement with only political or public relations consequences. One administration’s signing statement is of even less significance to a subsequent administration. What is of infinitely more significance is that the Congress enacted section 1021 and the President signed it into law.

The legislative and executive branches have spoken, however unclearly, leaving section 1021 in the hands of the judiciary. There have been a few cases which have addressed section 1021, two on the margins, one more substantively. Ultimately,

70. THE WHITE HOUSE, STATEMENT BY THE PRESIDENT ON H.R. 1540 (Dec. 31, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540> [<http://perma.cc/4A9Y-B4SA>].

71. *Id.*

section 1021 has survived initial challenge, and we still do not know its full meaning and import.

III. JUDICIAL INTERPRETATION

A. *Khairkhwa*

In December 2012 the U.S. Court of Appeals for the D.C. Circuit issued its opinion in *Khairkhwa v. Obama*.⁷² *Khairkhwa* was an Afghan national captured in Afghanistan by the United States in the fall of 2001 and subsequently transferred to the detention facility at Guantanamo Bay, Cuba.⁷³ The Court rejected *Khairkhwa's* habeas petition challenging his continued detention.⁷⁴ The significance of *Khairkhwa* is that the D.C. Circuit acknowledged that the NDAA 2012 “affirmed” the President’s authority to detain not just al Qaeda and the Taliban responsible for the September 11th attacks per the AUMF, but any person who substantially supports those groups or “associated forces that are engaged in hostilities against the United States or its coalition partners.”⁷⁵

Thus the executive branch has pulled off an impressive variant of the Emperor’s new clothes, convincing the Congress and now the judiciary not only that executive authority not otherwise apparent has always existed since the AUMF, but that Congress provided the authority. Yet as previously discussed, the AUMF is limited to those responsible for the September 11th attacks. The 2012 NDAA language is based on the language from the March 2009 DOJ filing in which the executive branch essentially told Congress either what the AUMF meant or what it should be construed to mean. Of course, were that the case, Congress would not need to be told what it had done or why. If Congress had in fact issued detention authority in the AUMF in the way envisioned by the executive branch, Congress would need not have included detention authority language in the 2012 NDAA.

72. 703 F.3d 547 (D.C. Cir. 2012).

73. *Id.* at 548–49.

74. *Id.* at 550.

75. *Id.* at 548.

B. *Ali*

A similar D.C. Circuit case in 2013, *Ali v. Obama*,⁷⁶ further solidified the expansion of the 2012 NDAA's grant of detention authority to the executive branch. Like Khairkhwa, Ali was a foreign national captured outside the U.S. and transferred to Guantanamo Bay.⁷⁷ Similarly, the court rejected Ali's challenge to his continued detention.⁷⁸ Although styled as a concurrence, Judge Edwards's opinion criticizes the majority opinion and employs section 1021 to do so.

Judge Edwards first provides the language from the AUMF and labels the 2012 NDAA as adding a provision—a far more intellectually honest approach.⁷⁹ Edwards then analyzes whether Ali's conduct as a personal associate of al Qaeda leader Abu Zubaydah fits the criteria of either the AUMF or NDAA.⁸⁰ Edwards concludes that:

Nothing in the record indicates that Ali “planned, authorized, committed, or aided the terrorist attacks” of September 11, 2001 or that he “harbored [terrorist] organizations or persons,” or that he was “part of or substantially supported al-Qaeda, the Taliban, or associated forces,” or that he “committed a belligerent act” against the United States.⁸¹

Edwards claims that “there is a clear disjunction between the law of the circuit and the statutes that the case law purports to uphold. In other words, the ‘personal associations’ test is well beyond what the AUMF and NDAA prescribe.”⁸² Edwards noted that “there is no end in sight” to the U.S. war on terror, indeed that “it is likely to continue through Ali's natural life.”⁸³ Edwards concluded that “[i]t seems bizarre, to say the least, that someone like Ali, who has never been charged with or found guilty of a criminal act and who has never ‘planned, authorized, committed, or aided [any] terrorist attacks,’ is now marked for a

76. 736 F.3d 542 (D.C. Cir. 2013).

77. *Id.* at 543.

78. *Id.* at 552.

79. *Id.* at 552–53 (Edwards, J., concurring in the judgment).

80. *Id.* at 553.

81. *Id.*

82. *Id.*

83. *Id.*

life sentence.”⁸⁴ Edwards concluded his “concurrence” by asking whether habeas corpus proceedings under the AUMF, NDAA, and D.C. Circuit case law are “functionally useless.”⁸⁵

C. *Hedges*

By far the most significant and thorough consideration of section 1021 came in the U.S. Court of Appeals for the Second Circuit decision *Hedges v. Obama*.⁸⁶ A group of journalists and activists [the plaintiffs] brought suit against President Obama and other U.S. government officials.⁸⁷ The petitioners sought to preemptively block enforcement of section 1021 on the grounds that the provision violated their First and Fifth Amendment rights under the U.S. Constitution. After the U.S. District Court agreed with petitioners and entered a permanent injunction, the U.S. government appealed.⁸⁸

The court acknowledged that “[a]t first blush, Section 1021 may seem curious, if not contradictory.”⁸⁹ Yet ultimately the court claimed that the plaintiffs “create[d] a false dilemma when they suggest that either Section 1021 expands the AUMF detention authority or it serves no purpose.”⁹⁰ The court argued that to the extent the grant of detention authority in section 1021 differs from the language in the AUMF, it is “not surprising” because, according to the court, “one obviously cannot ‘detain’ an organization, one must explain how the authority to use force against an organization translates into detention authority.”⁹¹ In so doing, the court ignores other differences between the AUMF and section 1021, which are not so easily explained away. To the AUMF types of activity, “planned, authorized, committed, or aided,” section 1021 added being part of “or substantially supporting” the undefined “associated

84. *Id.*

85. *Id.* at 553–54.

86. 724 F.3d 170 (2d Cir. 2013)

87. Editorial, *Obama’s Detention Victory*, WALL ST. J., July 22, 2013, at A16.

88. *Hedges*, 724 F.3d at 173.

89. *Id.* at 189.

90. *Id.* at 190.

91. *Id.*

forces” which are “directly supporting” hostilities not just the United States but also undefined “coalition partners.”⁹²

Substantively, the Second Circuit made quick work of the plaintiffs’ challenge. The court divided the plaintiffs into two categories, the two plaintiffs who were U.S. citizens and the two non-citizen plaintiffs.⁹³ For the U.S. citizen plaintiffs the court noted that:

While it is true that Section 1021(e) does not foreclose the possibility that previously “existing law” may permit the detention of American citizens in some circumstances—a possibility that *Hamdi* clearly envisioned in any event—Section 1021 cannot itself be challenged as unconstitutional by citizens on the grounds advanced by plaintiffs because as to them it neither adds to nor subtracts from whatever authority would have existed in its absence. For similar reasons, plaintiffs cannot show that any detention [they] may fear would be redressable by the relief they seek, an injunction of Section 1021.⁹⁴

Here the court was quite literal: “with respect to citizens, lawful resident aliens, or individuals captured or arrested in the United States, Section 1021 simply says nothing at all.”⁹⁵ The court acknowledged “that Section 1021 perhaps could have been drafted in a way that would have made this clearer and that the absence of any reference to American citizens in Section 1021(b) led the district court astray in this case.”⁹⁶

In terms of the non-U.S. citizen plaintiffs, the court claimed that:

Whereas Section 1021 says nothing about the government’s authority to detain citizens, it does have real meaning regarding the authority to detain individuals who are not citizens or lawful resident aliens and are apprehended abroad. It provides that such individuals may be detained until the end of hostilities if they were part of or substantially supported al-Qaeda, the Taliban, or associated forces. To be sure, Section 1021 in substance provides also that this authority was implicit in the original AUMF. But, as discussed

92. *Id.* at 182.

93. *Id.* at 187.

94. *Id.* at 193.

95. *Id.* at 192.

96. *Id.* at 193.

above, that the 112th Congress in passing Section 1021 expressed such a view does not mean that Section 1021 itself is a nullity. It is not immediately apparent on the face of the AUMF alone that the President had the authority to detain those who substantially supported al-Qaeda, and indeed many federal judges had concluded otherwise prior to Section 1021's passage. Hence, Section 1021(b)(2) sets forth an interpretation of the AUMF that had not previously been codified by Congress.⁹⁷

The portion of the *Hedges* opinion which is the most telling on both how unclear section 1021 is, and how we do not know what it means or how it could be applied in the future, came when the Second Circuit faced what it styled as "a somewhat peculiar situation."⁹⁸ That peculiarity resulted from the government asking the court:

to resolve standing in this case by codifying, as a matter of law, the meaningful limits it has placed on itself in its interpretation of Section 1021. We decline the government's invitation to do so. *Thus, we express no view regarding whether the laws of war inform and limit detention authority under Section 1021(b)(2) or whether such principles would foreclose the detention of individuals like [the non-citizen plaintiffs]. This issue presents important questions about the scope of the government's detention authority under the AUMF, and we are wary of allowing a preenforcement standing inquiry to become the vehicle by which a court addresses these matters unless it is necessary.* Because we conclude that standing is absent in any event, we will assume without deciding that Section 1021(b)(2) covers [the non-citizen plaintiffs] in light of their stated activities.⁹⁹

Perhaps most telling was the court's comment that "[t]he parties raise a number of important and difficult questions, but we need not reach most of them."¹⁰⁰ Thus, the court did not reach most of the important and difficult questions section 1021 presents. So section 1021 remains hiding in plain sight. We may not know section 1021's full effect unless and until there is another significant domestic terrorism incident. We can, however, already see how the viability of indefinite detention is altering

97. *Id.* at 193–94.

98. *Id.* at 199.

99. *Id.* at 199 (emphasis added).

100. *Id.* at 188.

U.S. law enforcement's approach to civil liberties in domestic counterterrorism investigations.

IV. SECTION 1021 SKEWS THE PUBLIC SAFETY EXCEPTION
TO *MIRANDA*

In the wake of post-September 11th terrorism-related incidents in the United States, questions have arisen about the efficacy and even appropriateness of utilizing a traditional criminal procedure approach.¹⁰¹ In response, federal law enforcement has been employing an increasingly expansive view of the public safety exception (PSE)¹⁰² to the *Miranda* rights warning and waiver requirement.¹⁰³ But however expansive its application, the PSE imposed, or used to anyway, a risk calculus burden on law enforcement.¹⁰⁴ Section 1021 and the possibility of indefinite detention fundamentally alters and shifts that risk to the terrorism suspect. Given that, as previously discussed, we do not know the type or quantum of activity which renders someone a terrorism suspect, section 1021 may result in a significant erosion of U.S. civil liberties. This erosion may result from the direct application of section 1021 or indirectly through the expanded use of the PSE by law enforcement buttressed by the possibility of indefinite detention.

In *New York v. Quarles*, the Supreme Court created the public safety exception to *Miranda*: When law enforcement interrogates a suspect in custody in response to an imminent threat of danger to the officer or the public, the confession will be admissible even if the officer failed to provide *Miranda* warnings and obtain a waiver.¹⁰⁵ In linking the exception to *Miranda*, Justice O'Connor

101. Corn & Jenks, *supra* note 5, at 2–3 (referring to the 2013 Boston Marathon bombing, the 2010 “Times Square,” 2009 “underwear” and 2001 “shoe” attempted bombings).

102. *New York v. Quarles*, 467 U.S. 649 (1984); see also Jonathan Hafetz, *Military Detention in the “War on Terrorism”: Normalizing the Exceptional after 9/11*, 112 COLUM. L. REV. SIDEBAR 31, 45 (2012), http://columbialawreview.org/wp-content/uploads/2012/03/31_Hafetz.pdf [<http://perma.cc/3NU5-JYR5>].

103. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

104. See Joanna Wright, *Applying Miranda’s Public Safety Exception to Dzhokhar Tsarnaev: Restricting Criminal Procedure Rights by Expanding Judicial Exceptions*, 113 COLUM. L. REV. SIDEBAR 136, 138, 140–41 (2013), http://columbialawreview.org/boston-bombers-miranda-rights_wright/ [<http://perma.cc/E5F4-QKGA>].

105. *Quarles*, 467 U.S. at 657–58.

noted that *Miranda* does not prohibit public safety questioning; *Miranda* simply restricts using the statement as evidence.¹⁰⁶

In essence, *Miranda* requires the government to employ a risk calculus—question a suspect without first advising them of the *Miranda* rights and obtaining a waiver in order to protect the public, or advise the suspect and seek a waiver to protect a future prosecution. Failing to advise a suspect questioned in a custodial setting of his or her *Miranda* rights may result in the government foregoing the opportunity to convict the suspect.¹⁰⁷

Although the expansion of the PSE lessened the need for law enforcement to make a choice, section 1021 may eliminate that choice all together. Instead of law enforcement having to decide how to prioritize protection of the public versus prosecution of alleged offenders, terrorism suspects have to make a choice: respond to questioning without *Miranda* warnings and have those statements used against you in an Article III court or do not respond and risk indefinite detention. This erosion of rights can be seen in the case of Umar Farouk Abdulmutallab, which occurred before section 1021, and the Boston Marathon bombing, which occurred after.

A. *Abdulmutallab*

On December 25, 2009, FBI agents questioned Umar Farouk Abdulmutallab at the University of Michigan Hospital.¹⁰⁸ Abdulmutallab, a Nigerian citizen, was being treated for burns resulting from his failed attempt to detonate explosives in his underwear during a transatlantic flight from Amsterdam to Detroit that same day.¹⁰⁹ When the plane landed U.S. Customs and Border Patrol agents arrested Abdulmutallab and transported him to the hospital.¹¹⁰ Thus, at the time of the FBI questioning, Ab-

106. *Id.* at 664 (O'Connor, J., concurring in the judgment in part and dissenting in part).

107. See Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV 387, 484 (1996); see also *Miranda*, 384 U.S. at 542 (White, J., dissenting) ("In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him.").

108. *United States v. Abdulmutallab*, No. 10-20005, 2011 WL 4345243, at *1 (E.D. Mich. Sept. 16, 2011).

109. *Id.*

110. *Id.*

dulmutallab was already in custody. Abdulmutallab was not advised of his *Miranda* rights until nine hours after his arrest.¹¹¹ During that time, the FBI questioned him about:

where he traveled, when he had traveled, how, and with whom; the details of the explosive device; the details regarding the bomb-maker, including where Defendant had received the bomb; his intentions in attacking Flight 253; who else might be planning an attack; whether he associated with, lived with, or attended the same mosque with others who had a similar mind-set as Defendant about jihad, martyrdom, support for al-Qaeda, and a desire to attack the United States by using a similar explosive device on a plane, and what these individuals looked like—all in an attempt to discover whether Defendant had information about others who could be on planes or about to board planes with explosive devices similar to the one Defendant used because, based upon his training, experience, and knowledge of earlier al-Qaeda attacks, this was not a solo incident and the potential for a multi-prong attack existed even if Defendant was unaware of any specific additional planned attack.¹¹²

Abdulmutallab was prosecuted in U.S. federal court where he unsuccessfully moved to suppress his statements.¹¹³ Following his conviction for, among other offenses, attempting to use a weapon of mass destruction, he was sentenced to be confined for the duration of his natural life without the possibility of parole.¹¹⁴ His case demonstrates the imprecise scope of the PSE. Is the most important criterion the spontaneity of unmirandized police questioning in the face of an imminent threat? Or is it that law enforcement's primary objective of defusing that imminent threat?

For context of the current application of the PSE, consider *Quarles* itself. In that case, New York City police apprehended a

111. *Id.*; see also Walter Pincus, *Christmas Day bomb suspect was read Miranda rights nine hours after arrest*, WASH. POST, Feb. 15, 2010, <http://www.washingtonpost.com/wpdyn/content/article/2010/02/14/AR2010021404062.html> [<http://perma.cc/QEM8-85A8>].

112. *Abdulmutallab*, 2011 WL 4345243, at *5.

113. *Id.* at *1.

114. *United States v. Abdulmutallab*, No. 10-20005, 2012 U.S. Dist. LEXIS 20057, at *3-4 (E.D. Mich. Feb. 16, 2012).

man in a grocery store suspected of sexual assault.¹¹⁵ The victim had flagged down the police and pointed out her assailant, Quarles, who proceeded to run into the store.¹¹⁶ When police arrested Quarles they noticed he was wearing a empty gun holster.¹¹⁷ With Quarles in handcuffs, the police asked about the location of the gun.¹¹⁸ The admissibility of that question and answer is the basis of the PSE.

Both the trial and appellate court ruled that the gun police seized based on Quarles's response to their post arrest questioning was inadmissible.¹¹⁹ The Supreme Court reversed the exclusion, siding with the argument of Sol Wachtler, then the Queens District Attorney, that there should be an emergency exception to *Miranda*.¹²⁰ Interestingly though, Wachtler—later a judge—has written that:

resolving immediate emergencies is about as far as we should go in delaying the *Miranda* reading or creating exceptions to it. To open non-emergency exceptions, like the one proposed by the Obama administration for terrorism suspects, would be to go down a road toward the eventual nullification of the constitutional protection against self-incrimination.

The *Miranda* rule strikes a delicate balance, enabling us to protect a fundamental constitutional right without forcing the courts to allow the legitimacy of every confession to be proven before it is allowed into evidence. To compromise the rule would be counterproductive and destructive to the kind of freedom we enjoy as Americans — a freedom that terrorists would like nothing better than to destroy.¹²¹

The FBI in *Abdulmutallab* took a calculated risk. They questioned Abdulmutallab without first advising him of his *Miranda* rights and seeking a waiver. Unlike in *Quarles*, there was nothing spontaneous about the FBI questioning. This suggests that

115. *New York v. Quarles*, 467 U.S. 649, 651–52 (1984).

116. *Id.*

117. *Id.* at 652.

118. *Id.*

119. *Id.* at 651.

120. *Id.* at 651, 655–58.

121. Sol Wachtler, Op-Ed., *You Have the Right to Remain Constitutional*, N.Y. TIMES, May 12, 2010, <http://www.nytimes.com/2010/05/13/opinion/13wachtler.html> [<http://perma.cc/9TSX-4TLM>].

perhaps the primary objective test was controlling. While courts have been receptive to expanding the PSE in terrorism cases,¹²² the FBI was still taking a risk: either the statements would fall within the public safety exception and be admissible, or they would not and could not be used in the government's case in chief. Their exclusion might not have prevented Abdulmutallab's prosecution but would have made it more challenging.

In the wake of Abdulmutallab, the FBI purportedly issued guidance to its agents encouraging a broad use of the PSE in terrorism cases.¹²³ While the FBI's course of action in the Abdulmutallab ultimately proved successful, controversy surrounded whether Abdulmutallab should have been read his rights at all.¹²⁴ Calculated risks are still risks.

At one point Attorney General Eric Holder made statements that the Obama Administration would engage Congress on developing statutory authority for such unwarned questioning of terror suspects in the future.¹²⁵ Holder went so far as to testify before the House Committee on the Judiciary that the PSE should be "clarified" to ensure it provided the necessary flexibility to permit unwarned questioning of terror suspects.¹²⁶ It is not a coincidence that within a year of the *Abdulmutallab* case and the Attorney General asking for greater flexibility that Congress enacted section 1021, which in providing for indefinite detention allows the executive branch to avoid even the calculated risk of the *Abdulmutallab* case. The reason the Attorney General has not renewed his call for statutory expansion of

122. One commentator has conducted an empirical assessment of the PSE. Joanna Wright, *Mirandizing Terrorists? An Empirical Analysis of the Public Safety Exception*, 111 COLUM. L. REV. 1296 (2011) (showing that, where the basis of the claimed exception is based on an alleged threat of an explosive device, courts have upheld the application of the PSE in 89 percent of the cases).

123 *F.B.I. Memorandum*, N.Y. TIMES, Mar. 25, 2011, <http://www.nytimes.com/2011/03/25/us/25miranda-text.html> [<http://perma.cc/X68Y-92JE>].

124. See David J. R. Frakt, *Prisoners of Congress: The Constitutional and Political Clash Over Detainees and the Closure of Guantanamo*, 74 U. PITT. L. REV. 179, 199 (2012).

125. See Anne E. Kornblut, *Obama administration looks into modifying Miranda law in the age of terrorism*, WASH. POST, May 10, 2010, <http://www.washingtonpost.com/wpdyn/content/article/2010/05/09/AR2010050902062.html> [<http://perma.cc/VP7K-6QE4>].

126. *United States Department of Justice: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 44 (2010) (testimony of Eric Holder, Att'y Gen. of the United States).

the PSE is because DOJ now has section 1021, which provides far greater “flexibility” to law enforcement.

Because the government may now indefinitely incapacitate at least certain terror suspects, the *Quarles* balance has been fundamentally altered. The possibility of indefinite detention results in the government no longer having to choose between public safety and prosecution. The Department of Justice is embracing and defending this flexibility while not acknowledging the risks to civil liberties. According to former Attorney General Michael Mukasey:

The United States has every right to capture and detain enemy combatants in this conflict, and need not simply release them to the battlefield . . . We have every right to prevent them from returning to kill our troops or those fighting with us, and to target innocent civilians. And this detention often yields valuable intelligence about the intentions, organization, operations, and tactics of our enemy. In short, detaining dangerous enemy combatants is lawful, and makes our Nation safer . . . [T]o suggest that the government must charge detainees with crimes or release them is to seriously misunderstand the principal reasons why we detain enemy combatants in the first place: it has to do with self-protection, because these are dangerous people who pose threats to our citizens and to our soldiers.¹²⁷

To understand the progression, or digression really, that the United States is undergoing in terms of civil liberties consider how the post-section 1021 Boston Marathon Bombing investigation played out.

127. Michael B. Mukasey, Att’y Gen. of the United States, Remarks Prepared for Delivery at the American Enterprise Institute for Public Policy Research (July 21, 2008), available at http://www.aei.org/files/2008/07/21/20080721_DOJ.pdf [<http://perma.cc/NV8C-EQEE>]. While General Mukasey is correct insofar as he describes the purpose of law-of-war detention, he ignores that such detention is based on armed conflict having a finite end point leading to release. Moreover it is disingenuous, to say the least, to consider all law-of-war detention the same. The U.S. Army capturing an al Qaeda or Taliban member in a remote area of Afghanistan is considerably, if not completely, different from the FBI detaining an al Qaeda or Taliban member at the Detroit airport.

B. Boston Marathon Bombing

On April 15, 2013, two bombs exploded on the course of the Boston Marathon, killing three and injuring over 200.¹²⁸ On April 18, the FBI released photos identifying two Chechen brothers, Dzhokhar and Tamerlan Tsarnaev, as suspects.¹²⁹ The following day, after several shootouts with law enforcement, Tamerlan Tsarnaev was killed and Dzhokhar was wounded and taken into custody.¹³⁰ The FBI questioned Dzhokhar, a U.S. citizen in the custody of U.S. law enforcement, for some twenty-seven hours over the course of several days.¹³¹ During this questioning Dzhokhar reportedly requested a lawyer ten times.¹³² Yet unlike in *Abdulmutallab*, where the FBI advised a foreign citizen of his *Miranda* rights, the FBI never did so for Tsarnaev, a U.S. citizen. Only when Tsarnaev was presented to a U.S. Magistrate did the Magistrate advise him of his rights and afford him to the right to consult with an attorney.¹³³

Yet the hue and cry was not that Tsarnaev had been read his rights too late, but that he had been read them at all. The criticism came not just from pundits, but from members of Congress. Senator Graham “tweeted” that “[I]f captured, I hope [the] Administration will at least consider holding the Boston suspect as enemy combatant for intelligence gathering purposes,”¹³⁴ and that “[T]he last thing we may want to do is read Bos-

128. Leti Volpp, *The Boston Bombers*, 82 FORDHAM L. REV. 2209, 2209 (2014).

129. Greg Botelho, *Timeline: The Boston Marathon bombing, manhunt and investigation*, CNN (May 2, 2013, 9:09 AM), <http://www.cnn.com/2013/05/01/justice/boston-marathon-timeline/?c=&page=0> [<http://perma.cc/VHB3-RGLK>].

130. *Id.*

131. Alana Semuels, *Boston Marathon bombing suspect's lawyers say FBI violated his rights*, L.A. TIMES, May 7, 2014, 10:38 PM, <http://www.latimes.com/nation/la-na-dzhokhar-tsarnaev-20140508-story.html> [<http://perma.cc/3NRC-VNKY>].

132. *Id.*

133. Devlin Barrett, Siobhan Gorman & Tamer El-Ghobashy, *Judge Made Call to Advise Suspect of Rights*, WALL ST. J., Apr. 25, 2013, <http://online.wsj.com/news/articles/SB10001424127887323789704578444940173125374> [<http://perma.cc/H9WR-KBVN>].

134. Debbie M. Lord, *Graham, McCain call for Obama administration to hold bombing suspect as enemy combatant*, AL.COM (Apr. 19, 2013, 10:33 PM), http://blog.al.com/wire/2013/04/lindsey_graham_calls_for_obama.html [<http://perma.cc/FLR8-GNDW>].

ton [Marathon bombing] suspect Miranda [r]ights telling him to 'remain silent.'"¹³⁵

Senator Graham also claimed that the Boston Marathon bombing was "Exhibit A of why the homeland is the battlefield."¹³⁶ Continuing to explore their use of social media, following Tsarnaev's apprehension, Senator McCain joined Senator Graham in issuing a statement on Facebook stating that:

Now that the suspect is in custody, the last thing we should want is for him to remain silent. It is absolutely vital the suspect be questioned for intelligence gathering purposes. We need to know about any possible future attacks which could take additional American lives. The least of our worries is a criminal trial which will likely be held years from now.

Under the Law of War we can hold this suspect as a potential enemy combatant not entitled to Miranda warnings or the appointment of counsel. Our goal at this critical juncture should be to gather intelligence and protect our nation from further attacks.

We remain under threat from radical Islam and we hope the Obama Administration will seriously consider the enemy combatant option.

We will stand behind the Administration if they decide to hold this suspect as an enemy combatant.¹³⁷

The Department of Justice did not decide to hold Tsarnaev as an enemy combatant and instead is prosecuting him through the normal civilian federal criminal justice process.¹³⁸ Tsarnaev's defense lawyers have filed a motion to suppress his statements.¹³⁹ Some legal scholars believe the court will grant

135. Aaron Blake, *Lindsey Graham: Boston bomber could be held as enemy combatant*, WASH. POST, Apr. 19, 2013, <http://www.washingtonpost.com/blogs/post-politics/wp/2013/04/19/lindsey-graham-boston-bomber-could-be-held-as-enemy-combatant/> [http://perma.cc/4EUR-L324].

136. See Jennifer Rubin, *Sen. Lindsey Graham: Boston bombing "is Exhibit A of why the homeland is the battlefield,"* WASH. POST, Apr. 19, 2013, <http://www.washingtonpost.com/blogs/right-turn/wp/2013/04/19/sen-lindsey-graham-boston-bombing-is-exhibit-a-of-why-the-homeland-is-the-battlefield/> [http://perma.cc/9XHV-6VK3].

137. See Lord, *supra* note 134.

138. See Semuels, *supra* note 131.

139. *Id.*

the motion,¹⁴⁰ and DOJ may well lose the ability to introduce the statements at trial. For the Assistant U.S. Attorney prosecuting the case, such a ruling is undesirable but frankly not significant. Apart from Tsarnaev's statements, there appears to be overwhelming evidence of his guilt.¹⁴¹ So if, and probably when, the court excludes the statements, the DOJ will continue with the prosecution and have learned a little more about the bounds of an expanded PSE.

But consider how emboldened the FBI was in this case and how differently it acted with Tsarnaev than with Abdulmuttalab. That a U.S. citizen would receive substantially less civil liberty protections from the U.S. government than a foreign national is surprising and telling. What changed between Abdulmuttalab and Tsarnaev that would explain the difference was section 1021.

Section 1021 was ultimately not needed in Tsarnaev's case. He and his brother appear to have been domestic terrorists.¹⁴² There do not seem to have been ties with foreign terrorist groups or follow-on plots.¹⁴³ But if the FBI and DOJ had thought they needed to detain Tsarnaev indefinitely per Senators McCain and Graham, there is in section 1021 a statute on the books that arguably authorizes such detention. At a minimum section 1021 does not prohibit such detention.

The FBI was emboldened at least in part because section 1021 has substantially shifted the burden of risk associated with counterterrorism to the terrorism suspect. Tsarnaev faced a choice of either responding to questions without *Miranda* warnings or a lawyer, or accepting the possibility of indefinite detention. Given

140. See, e.g., Erwin Chemerinsky, *Dzhokhar Tsarnaev has rights*, L.A. TIMES, Apr. 23, 2013, <http://articles.latimes.com/2013/apr/23/opinion/la-oe-chemerinsky-miranda-rights-for-tsarnaev-20130423> [<http://perma.cc/F46F-S44K>].

141. See Kevin Cullen, *Dzhokhar Tsarnaev admits to setting bombs with brother, source says*, BOSTON GLOBE, Apr. 23, 2013, <http://www.bostonglobe.com/metro/2013/04/23/source-marathon-bombing-suspect-admitted-that-and-brother-detonated-bombs-killed-police-officer/BrBQCAOsqpFU2ShoJ4YoQM/story.html> [<http://perma.cc/J22H-57LV>].

142. See Sari Horwitz & Greg Miller, *Tsarnaev brothers not yet linked to foreign terror groups, officials say*, WASH. POST, May 9, 2013, http://www.washingtonpost.com/world/national-security/tsarnaev-brothers-not-yet-linked-to-foreign-terror-groups-officials-say/2013/05/08/0d0eb3fe-b804-11e2-aa9e-a02b765ff0ea_story.html [<http://perma.cc/CTH6-DBT5>].

143. See *id.*

the amount of evidence against Tsarnaev without his statements, had he refused to cooperate, the government would likely have still prosecuted him in an Article III court. In that regard, the Tsarnaev case does not fully highlight the issues section 1021 raises. It does, however, demonstrate how law enforcement was emboldened in its approach to interrogating a U.S. citizen in the United States. The Tsarnaev case may augur how law enforcement will handle future domestic terrorisms—more aggressively, knowing that if they exceed the bounds of the PSE and there is enough admissible evidence to prosecute a terrorist suspect in federal court there is the backstop security of indefinite detention. It's like bowling with the gutter guards that make it impossible to throw a gutterball. Without the risk of a gutterball, you are free to hurl the ball down the lane as hard as you can, receiving the reward for the increased velocity without the risk from the lack of control. Such is the counterterrorism investigation world post-section 1021.

Unlike the response options available to the FBI prior to section 1021, the government does not necessarily risk the ability to prosecute successfully (due to inadmissibility of the confession)—and thereby incapacitate—a terrorist suspect if a violation of *Miranda* results in inadmissibility of the suspect's confession. Rather, the government may now both question in violation of the *Miranda* warning and waiver requirement and then incapacitate the suspect through indefinite detention. If either this current erosion of civil liberties, or the prospect of what section 1021 may ultimately yield, is disconcerting, then we should do and say something.

V. LACK OF DISCUSSION

Moving forward, there are two courses of action, or three if we consider doing nothing. While sometimes appropriate as a course of action, doing nothing is not a legitimate option in this setting. When faced with difficult questions and issues, we should not, we cannot, be the proverbial ostrich plunging its head into the sand. There are therefore two courses of action, and each involves wrestling with the conception of detention of non-state actors involved in or with al Qaeda, the Taliban, or associated forces.

When we have this discussion is simply a question of timing. We can have the discussion now—calmly, deliberately, as dispas-

sionately as can be the case, given the subject matter—or we can have the discussion during round-the-clock news coverage following the next terrorist attack, and we can have it in thirty-second sound bites. We would all agree which discussion is more likely to lead to a detention policy that better balances our sense of security and freedom, both in that moment and moving forward.

Our grandparents' generation, which detained thousands of Japanese-Americans, and our parents' generation, which overreacted to fears of communist infiltration, show the dangers of waiting. America as a country and as a people should have learned from these mistakes. These generations, however, were largely good people who as a society made regrettable decisions out of fear. We are in the midst of making decisions, or not opposing decisions made in our name, which will have equally untoward outcomes. As one member of Congress claimed, section 1021 "take[s] us one small, but significant, step down the road towards a state in which ordinary citizens live in fear of the military, rather than the free society that has marked this great nation . . ."¹⁴⁴

The components which yield this undesirable, undemocratic outcome are right in front of us: a federal statute that authorizes indefinite detention of we are not exactly sure who, nor for exactly what conduct, juxtaposed against what even members of the judiciary label a functionally useless habeas corpus regime. The components are right in front of us. They will ultimately be brought into sharp focus in the aftermath of a domestic terrorism incident in which there is not overwhelming evidence of guilt such that a traditional prosecution is possible. There the government, our government, may take the next step, one provided for by section 1021, to indefinitely detain U.S. citizens captured in the United States for conduct that allegedly occurred in the United States.

Thus far all three branches of government have acted regarding section 1021. If we the people are not satisfied and if we want to readjust how the United States is balancing security and liberty, then we need to take action. The first step in that direction is to have a public conversation, a public debate, and to have it now.

144. 157 CONG. REC. S8653 (daily ed. Dec. 15, 2011) (statement of Sen. Christopher Coons).