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NATIONAL INSECURITY: THE NATIONAL DEFENSE AUTHORIZATION ACT, THE INDEFINITE DETENTION OF AMERICAN CITIZENS, AND A CALL FOR HEIGHTENED JUDICIAL SCRUTINY

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I. INTRODUCTION

The number of homegrown Islamist-inspired terrorist attacks is on the increase in the United States.[1] Since the attacks on the United States on September 11, 2001 there have been sixty incidents of terrorism in this country, including the intentional driving of a vehicle into a crowd of students at the University of North Carolina-Chapel Hill in 2006; the shooting at a Little Rock, Arkansas army recruitment office in 2009; the shooting at Fort Hood in 2009; and the April 15, 2013 Boston Marathon bombing[2] which killed four people and injured 264,[3] and was the fifty-ninth publicly known terror plot against the United States since 9/11.[4] Forty-nine of these plots originated in the United States and involved American citizens, or legal permanent residents

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[1] JESSICA ZUKERMAN, ET. AL., THE HERITAGE FOUNDATION, 60 TERRORIST PLOTS SINCE 9/11: CONTINUED LESSONS IN DOMESTIC COUNTERTERRORISM 1 (2013), *available at* http://thf_media.s3.amazonaws.com/2013/pdf/SR137.pdf.

[2] *Id.* at 2.

[3] Scott Malone & Richard Valdmanis, *Boston Bomber Apologizes, Admits Guilt for Deadly 2013 Attack*, REUTERS (June 24, 2015), www.reuters.com/article/2015/06/24/us-boston-bombings-trial-idUSKBN0P417520150624.

[4] ZUKERMAN, *supra* note 1, at 1.

radicalized in the United States.[5] Military facilities, mass gatherings, nightclubs and bars, and shopping malls were the primary targets.[6] In addition, according to a Congressional Committee report authored by the Homeland Security Committee, more than 250 Americans have traveled overseas since 2011 to join terrorist groups such as the Islamic State of Iraq and Syria (ISIS), and some plan on returning to the United States to commit terror attack plots.[7]

What happens if there is a series of large-scale terrorist incidents, close in time, in the United States?[8] Amidst the

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[5] *Id.* at 2.

[6] *Id.*

[7] Alicia Caldwell, Congress: U.S. Fails to stop most people trying to join ISIS, AP (Sept. 29, 2015), http://bigstory.ap.org/article/1d66f48b7d614ae187cff5a2aa517bf5/report-us-failing-stop-most-people-trying-join-isis; HOMELAND SECURITY COMMITTEE, TERROR THREAT SNAPSHOT: ISIS ATTACK PLOTS AGAINST WESTERN TARGETS (2015), *available at* https://homeland.house.gov/wp-content/uploads/2015/10/HHSC-October-Terror-Threat-Snapshot1.pdf.

[8] In such a situation when there are so many terrorist attacks in a short period of time, and a trial is held in the same city where in the events took places, there could be potential deprivation of the right to be tried by a fair and impartial jury, as guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution. U.S. CONST. amend. VI; U.S. CONST. amend. XIV. The Sixth and Fourteenth Amendments of the United States Constitution guarantee a capital defendant the right to a fair trial before a panel of impartial and indifferent jurors. *Morgan v. Illinois*, 504 U.S. 719, 728 (1992); *see also Murphy v. Florida*, 421 U.S. 794, 799 (1975) ("The constitutional standard of fairness requires that a defendant have 'a panel of impartial, indifferent' jurors.'") (quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)). This guarantee means "a jury that determin[ed] guilt on the basis of the judge's instructions and the evidence introduced at trial, as distinct from preconceptions of other extraneous sources of decision." *Oswald v. Bertrand*, 374 F.3d 475, 477 (7th Cir. 2004). Sixth and Fourteenth Amendment guarantees may be violated if a prosecutor engages in an effort to create in the courtroom an atmosphere of fear of imminent threat of serious bodily injury or death, to the jurors and the community at large in and around the city, from Terrorist outsiders. Potentially, if the jury makes its decision based on fear, Petitioner may be entitled to a new trial under the principles of Frank v. Mangum, 237 U.S. 309, 335 (1915) and Moore v. Dempsey, 261 U.S. 86, 90-91 (1923). Empirical evidence exists showing that fear about dangerous criminals roaming around on the streets is a prominent factor influencing jury decisions to impose capital sentences. Susan Bandes, *Fear Factor: The Role of Media in Covering and Shaping the Death Penalty* 1 OHIO ST. J. CRIM. L. 585, 595 (2004) ("juries are fearful that even if they impose a sentence of life without parole, the defendant will be released and perhaps cause more harm."); Peter A. Barta, *Between Death and a Hard Place: Hopkins v. Reeves and the "Stark Choice" Between Capital Conviction and Outright Acquittal*, 37 AM. CRIM. L. REV. 1429, 1467 (2000) ("Well before they are selected to serve, potential jurors are inundated with widespread media accounts of never-ending appeals and dangerous murderers paroled only to kill again."); Robert E. Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. Pa. L. Rev. 1099, 1119 (1953) ("If the jurors impose capital punishment because of the fear that the defendant may be paroled at some future time, they are, in effect, predicting

immediate shock, anger, fear, and outcry, will the President choose to coral individuals or groups under suspicion based on the National Defense Authorization Act of 2012 ("NDAA"),[9] which provides the authority to do so.[10]

These concerns about U.S. citizens being held indefinitely, without being provided any due process because the U.S. government deems them to be associated with terrorists, are real. It would not be the first time in U.S. history that the government held U.S. citizens indefinitely. The internment of 120,000 Japanese Americans pursuant to Executive Order 9066 during World War II would serve as the dubious precedent.[11] The internment is considered one of the twentieth century's most prominent mass trampling of civil liberties and it has been widely condemned as racist governmental and judicial conduct toward the Japanese and Japanese Americans.[12]

In 2011, at a Justice Department event honoring Asian Americans and Pacific Islanders, then Acting Solicitor General Neal Katyal remarked that one of his predecessors, Charles Fahy, an appointee of President Franklin D. Roosevelt, concealed from the United States Supreme Court a military report showing that Japanese Americans posed no threat during World War II—undermining the Government's justification for the internment of over 120,000 Japanese Americans in "relocation camps" during

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that when the question of his parole arises several years hence, he will be unworthy of it but will be paroled nonetheless."). This fear about criminals and the crimes they commit is facilitated by the media. *See* Bandes, *supra* note 8, at 592.

[9] P.L. 112-81, 125 Stat. 1298 (2001).

[10] *See* David A. Harris, *On the Contemporary Meaning of Korematsu: "Liberty Lies in the Hearts of Men and Women,"* 76 MO. L. REV. 1, 1 (2011) (posing the question of whether *Korematsu v. United States* –the United States Supreme Court case that upheld internment of Japanese-American citizens during World War II– will be extended to the war on terrorism after another terrorist attack in the U.S.).

[11] 7 Fed. Reg. 1407 (Feb. 19, 1942).

[12] *See, e.g.*, ERIC Y. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT xxiii (2001); NOAH FELDMAN, SCORPIONS: BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 237 (2010) ("The government of the United States could not have interned the Japanese-Americans were it not for the tradition of anti-Asian prejudice in the country in general and on the West Coast in particular. Although historically the bias was predominantly anti-Chinese, there was no hesitation in deploying stereotypes of the shifty, untrustworthy Oriental onto both first-and second-generation Americans of Japanese origin."); Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933, 1004 (2004) (concluding that "[t]he Judiciary aided and abetted the internment of Japanese Americans in disturbingly clever ways. It did so not only in terms of substance, by agreeing with a racial profiling justification based on faint evidence, but also in terms of procedure-by delaying, framing, segmenting, and not deciding what was centrally at issue").

World War II.[13] Katyal's formal statement follows longstanding denunciations by scholars and jurists about the Court's internment case rulings which paid great deference to the Government's claims of military necessity, and upheld the detention of Japanese Americans.[14] Even though the internment cases were ruled almost seventy years ago, the issue of the indefinite detention of American remains relevant today during the "war on terrorism."[15]

In *Hedges v. Obama*,[16] writers, journalists, and activists sought a permanent injunction enjoining enforcement of a provision of the NDDA. District Judge Katherine Forrest held that the NDAA provision was facially overbroad in violation of the First Amendment and impermissibly vague in violation of the Fifth Amendment.[17] However, the government appealed, and the Second Circuit ultimately held that the NDAA affirmed the President's authority under the Authorization of Use of Military Force ("AUMF")[18] reasoning that since the NDAA did not apply to citizens, lawful aliens, or individuals captured or arrested in the United States, the plaintiffs lacked standing.[19]

This essay outlines the problems posed by the NDAA and interprets the Act's language to answer the question of: whether American citizens can be indefinitely detained under the NDAA?

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[13] David G. Savage, *U.S. Official Cites Misconduct in Japanese American Internment Cases*, L.A. TIMES, (May 24, 2011), http://articles.latimes.com/2011/may/24/nation/la-na-japanese-americans-20110525; ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 122 (1997) ("A generation later, the injustice of the evacuation is clear. There was no evidence of either sabotage or even cooperation with the Japanese military by either Issei or Nisei at Pearl Harbor. Underscoring the irrationality of the evacuation was the anomaly that the Japanese residents in Hawaii were not evacuated, and the fact that German and Italian aliens, who might move more freely about, were never considered for mass evacuation.").

[14] *See generally* YAMAMOTO ET AL., *supra* note 12, at xxiii; *see also* Beverly E. Bashor, *The Liberty/Safety Paradigm: The United States' Struggle to Discourage Violations of Civil Liberties in Times of War*, 41 W. ST. U. L. REV. 617, 618 (2014) (characterizing the Japanese American internment as "one of the largest violations of civil liberties in the nation's history") (quoting Bill Ong Hing, *Lessons to Remember From Japanese Internment,* HUFFINGTON POST (Fed. 21, 2012) www.huffingtonpost.com/bill-ong-hing/lessons-to-remember-from-_b_1285303.html.).

[15] *See* ERIC K. YAMAMOTO, ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 391 (2d. ed. 2013) (hereinafter YAMAMOTO 2013) (offering the Japanese American internment as a framework for racial profiling in the wake of 9/11 and asserting that "[t]he unprecedented expansion of executive power stands as a dominant theme of the war on terror.").

[16] 890 F. Supp. 2d 424 (S.D.N.Y. 2012).

[17] *Id.* at 470-71.

[18] 50 U.S.C. § 1541 (2001).

[19] *Hedges v. Obama*, 724 F.3d 170, 173-74 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 1936 (2014).

It is divided into four sections. Part One analyzes the U.S. Supreme Court's reasoning in *Korematsu v. United States*[20] and the three other internment cases. Part Two details the origins of the NDDA. Part Three analyzes the district ruling and the Second Circuit's opinion in *Hedges*. Part Four discusses how another *Korematsu* could be avoided, and draws parallels between the internment of Japanese Americans during World War II and the war on terrorism after September 11th.

II. THE JAPANESE AMERICAN INTERNMENT

By all reasonable social measures other than their skin color, each Japanese and Japanese American internee was just like other Americans. But nevertheless, to the government and the courts, they were presumptively disloyal.[21] Internment was an egregious example of how laws may be used as an instrument of racism, and how racist laws may be defended by claims that they are not based on race.[22] Even before Pearl Harbor, Japanese immigrants and their American-born children endured great hardship in this country because they were perceived by whites as economic threats. Due to these perceived threats, Japanese immigrants were subjected to official discrimination and political protest.[23] This anti-Japanese ferment resulted in the formation of the Japanese and Korean Exclusion League.[24] Fueled by fear and hostility, "the League sought to exclude the Japanese through the use of legislation, boycotts, school segregation, and propaganda."[25]

The bombing of Pearl Harbor allowed for the creation and maintenance of concentration camps for all individuals of Japanese descent, including American citizens who held no allegiance to Japan or its culture, but were rather fully assimilated into the mainstream American culture.[26] In the eyes of

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[20] 323 U.S. 214 (1944).

[21] *See* YAMAMOTO, *supra* note 12, at 104-20 (discussing Gordon Hirabayashi's upbringing in Washington state, his participation in civic activities, and the Supreme Court's writing in *Hirabayashi v. United States* that Japanese Americans are presumptively disloyal).

[22] *Id.* at 104.

[23] COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 32 (1982).

[24] *See* Lawrence Kent Mendehall, Note, *Misters Korematsu and Steffan: The Japanese Internment and the Military's Ban on gays in the Armed Forces*, 70 N.YU. L. Rev. 196, 200 (1995).

[25] *Id.*

[26] *E.g.*, YAMAMOTO, *supra* note 12, at 104-20. Presumably, there would have been more naturalized Americans of Japanese descent if it were not for the Naturalization Act of 1906 which allowed only "free white persons" and "persons of African nativity or persons of African descent" to naturalize and become U.S. Citizens. A person was a citizen if he or she was white and not foreign. The important right to become a citizen was dependent on non-

the U.S. government, Japanese and Japanese Americans were all foreigners.[27]

A reexamination of the internment cases provide for a fuller understanding of the contemporary debate about the NDAA because the Act, as detailed in Part Two, could be construed by a court as among "the existing law or authorities" supporting an executive decision to indefinitely detain an American citizen. First, in *Hirabayashi v. United States*,[28] Gordon Hirabayashi was convicted for violating Public Proclamation No. 3, [29] which imposed a curfew on all enemy aliens and citizens of Japanese descent.[30] Hirabayashi was born and raised in Seattle, Washington, and had never been to Japan.[31] He had no personal contacts in Japan.[32] Like all Japanese Americans, Hirabayashi was subject to General DeWitt's curfew order, requiring him to be at home each night from 8:00 p.m. until 6:00 a.m.[33]

Hirabayashi was convicted of two separate counts of intentionally violating the evacuation order and the curfew order.[34] The Supreme Court avoided the difficult issues of evacuation and internment, and instead simply upheld Hirabayashi's conviction for violating the curfew.[35] Chief Justice Stone wrote the majority opinion, which reflected the established social mood and political climate of the time. He explained that at the time of the Japanese attacks on Pearl Harbor, approximately two-thirds of those of Japanese descent on the West Coast were United States citizens.[36] It was only racism and discrimination, he insisted, that "prevented their assimilation as an integral part of the white population."[37] But when weighed against national security, Stone reasoned that there was a reasonable basis for the curfew: "[w]e cannot close our eyes to the fact, demonstrated by

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foreignness and whiteness. *See Ozawa v. United States*, 260 U.S. 178, 192-93 (1922) (describing how the Naturalization Act of 1906 operated).

[27] *See* Harvey Gee, *Race, Rights, and the Asian American Experience: A Review Essay*, 13 GEO. IMMIG. L.J. 635, 641 (1999) (stating with regard to the Japanese American internment "[h]istory has shown that the legal system has played a central role in the racialization of Asian Americans as outsiders."); Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of Foreignness in the Construction of Asian American Legal Identity*, 4 ASIAN AM. L.J. 71, 76 (1997) ("The racialized identification of Japanese Americans as foreign-regardless of their citizenship-allowed for otherwise unlawful actions to be taken against United States citizens.").

[28] 320 U.S. 81 (1943).

[29] 7 Fed. Reg. 2543 (Apr. 2, 1942).

[30] *Hirabayashi*, 320 U.S. at 88.

[31] *Id.* at 84.

[32] *Id.*

[33] *Id.* at 83-84.

[34] YAMAMOTO, *supra* note 12, at 105.

[35] *Hirabayashi*, 320 U.S. at 105.

[36] *Id.* at 96.

[37] *Id.*

experience, that in time of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry."[38] Justice William Douglas, in his concurrence, noted that the curfew order, as opposed to an individualized process of investigations and hearings, was the most practical measure at the time.[39] Even Justice Frank Murphy, a well-known civil libertarian jurist, concurred with the majority opinion.[40] Though he condemned racism, he nevertheless concluded that after the Pearl Harbor attack, military necessity required a substantial restriction of the personal liberty of U.S. citizens.[41]

In *Yasui v. United States*[42] Minoru Yasui was a U.S. citizen, educated as a lawyer, employed in a Japanese consular office, and actively involved in the Japanese Americans Citizens League.[43] He and his family were ordered to leave their home and report for internment.[44] Decided the same day as *Hirabayashi*, Yasui's conviction was sustained for the same reasons.[45]

In *Korematsu v. United States*[46] the Court restricted its holding to the question of the evacuation alone, again avoiding the issue of the internment's constitutionality.[47] Justice Black wrote for five members of the Court, while Justice Frankfurter wrote a concurring opinion, and Justices Roberts, Murphy, and Jackson dissented. Fred Korematsu's lawyers wanted to characterize the internment as about race, since from the outset, Japanese Americans were excluded from the West Coast under threat of force, detained, and then immediately interned.[48] Though Korematsu argued that when Exclusion Order No. 34[49] was promulgated in May of 1942, all danger of Japanese invasion of the West Coast no longer existed, the Court was persuaded by the government's claims of military necessity and reasoned that although Exclusion Order No. 34 may have been both over-and under-inclusive, it was the practical measure at the time.[50] The Court based its decision upon General DeWitt's unsubstantiated finding that Japanese Americans posed a real danger of espionage

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[38] *Id.* at 101.

[39] *Id.* at 106-07 (Douglas, J., concurring).

[40] *Id.* at 109-14 (Murphy, J., concurring).

[41] *Id.* at 112-13.

[42] 320 U.S. 115 (1943).

[43] YAMAMOTO, *supra* note 12, at 126-27.

[44] *Id.*

[45] *Yasui*, 320 U.S. at 117.

[46] 323 U.S. 214 (1944).

[47] YAMAMOTO, *supra* note 12, at 155.

[48] *See* Harvey Gee, *Civil Liberties, National Security, and the Japanese American Internment*, 45 SANTA CLARA L. REV. 771, 783 (2005) (book review).

[49] Exclusion Order No. 34 was substantially based upon Exclusion Order 9066.

[50] *Korematsu*, 323 U.S. at 219.

on the West Coast.[51] Accordingly, the Court upheld the Exclusion Order.[52]

According to Justice Black, the constitutionality of Civilian Restrictive Order No. 1,[53] which came into effect eleven days before Korematsu's arrest, and provided the authority to detain individuals of Japanese ancestry, was never considered by the Court largely because it was not necessary to do so.[54] Justice Black closed his opinion by reiterating that Japanese and Japanese Americans were not imprisoned solely because of their race.[55]

In his powerful dissent, Justice Jackson emphasized that Korematsu was a U.S. citizen who lived in the United States his entire life, there was no evidence of disloyalty on his part, and he would not have been subject to the military order if he were German or Italian.[56] Jackson noted that courts are limited in examining the necessity of military orders, and will trust government claims of military necessity.[57] He warned that once a judicial opinion finds a military order conforms to the Constitution or that the Constitution sanctions the order, "the court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens."[58] According to Jackson, this would be like having "a loaded weapon" ready for use.[59]

In *Ex Parte Endo*[60] the Justices unanimously ruled that the U.S. government could not continue to detain a citizen who was "concededly loyal" to the United States.[61] The case arose from Mitsui Endo's habeas corpus petition filing.[62] Mitsui Endo, an American citizen of Japanese ancestry, was initially removed to the Tule Lake War Relocation Center, in California, and later transferred to the Central Utah Relocation Center.[63] Treating the case as an administrative matter, the Court found that Endo was never served with process, nor did she appear in the proceedings.[64] Endo alleged that she was a loyal and law abiding American citizen, and as such was being held unlawfully and against her will, because no formal charges were brought against her.[65]

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[51] *Id.* at 227-29 (Roberts, J., dissenting).
[52] *Id.* at 219 (Black, J., majority).
[53] 8 Fed. Reg. 982 (Jan. 21, 1943).
[54] *Korematsu*, 323 U.S. at 220-23.
[55] *Id.* at 223.
[56] *Id.* at 242-43 (Jackson, J., dissenting).
[57] *Id.* at 244.
[58] *Id.* at 246.
[59] *Id.*
[60] 323 U.S. 283 (1944).
[61] *Id.* at 297.
[62] *Id.* at 285.
[63] *Id.* at 284-85.
[64] *Id.* at 285.
[65] *Id.* at 294.

Since World War II, the internment cases have been relegated to passing reference. For instance, *Korematsu* has served as the obligatory citation for the origin of the Supreme Court's strict scrutiny standard of review.[66] Importantly, *Korematsu* only discussed the constitutionality of the exclusion order,[67] and avoided the issue of the constitutionality of the internment—"whether it is constitutional to order the mass incarceration of persons as to whom no individual showing of guilt has been made, ostensibly because of national security, though also with the use of racial classifications."[68]

Modern scholars suggest that *Korematsu* has limited application, and serves more or less as historical precedent standing for the proposition that during a time of war, or amidst claims of military necessity, the courts must protect constitutional guarantees.[69] Justice Stephen Breyer offers this explanation in his book, *Making Our Democracy Work*:[70]

> History did not bear out Justice Jackson's prediction that the decision would create a bad legal precedent, a precedent that would lie in wait "like a loaded weapon" waiting to justify a future abusive act. The decision has been so thoroughly discredited that it is hard to conceive of any future Court referring to it or favorably relying on it.[71]

But these assurances that *Korematsu* has limited application can be disputed because the case was never directly overruled. As such, the ruling arguably remains a loaded weapon for a President and the U.S. government to use. Indeed, it can be a powerful tool for the government to use in its prosecutions against terrorists.[72]

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[66] *See* Reggie Oh & Frank Wu, *The Evolution of Race in the Law: The Supreme Court Moves From Approving Internment of Japanese Americans to Disapproving Affirmative Action for African Americans*, 1 MICH. J. RACE & LAW 165, 165-66 (1996).

[67] *See* Kang, *supra* note 12, at 949-52.

[68] Frank H. Wu, *Profiling in the Wake of September 11: The Precedent of the Japanese American Internment*, 17 CRIM. JUST. 52, 55 (2002).

[69] *Id.; see also* Beverly E. Bashor, *The Liberty/Safety Paradigm: The United States' Struggle to Discourage Violations of Civil Liberties in Times of War*, 41 W. ST. U. L. REV. 617, 627 (2014) (characterizing the Japanese American internment as one of the largest violations of civil liberties in the nation's history).

[70] STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW (2010).

[71] *Id.* at 193.

[72] *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 400 (2011) ("Korematsu should be a valuable precedent for the government in its prosecutions of the war on terror, given its outsized deference to executive power."); Marilyn Hall Patel, et al., *Justice Restored: The Legacy of Korematsu II and the Future of Civil Litigation*, 16 ASIAN AM. L.J. 215, 215 (2009) (discussing the political use of Korematsu as legal precedent); Jerry Kang, *Watching the Watchers: Enemy Combatants in the Internment's Shadow*, 68 Law & Contemporary Probs. 255, 275 (2005) ("*Korematsu* acts as 'anti-

Professor David Harris argues that *Korematsu* has continuing relevance and vitality as governing law,[73] and observes, "many jurists and scholars believe that no court today would ever rely on Korematsu to sustain something as outrageous as another internment. Looked at closely, however, the law does not support this view. Korematsu remains a 'loaded weapon,' just as Justice Robert Jackson predicted in his dissent."[74] Similarly, Professor Erwin Chemerinsky asserts that the Guantanamo Bay cases repeat the mistake of *Korematsu* on a smaller scale, since detainees are held indefinitely without meaningful due process, and that *Korematsu* is a reminder of the role of race in judicial decisions.[75] But as troubling as these theories may be, the next section explains how *Korematsu* can be considered as being an "existing authority," along with other Court rulings, as defined in the NDAA.[76]

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precedent' in its application of the legal rule to the facts. The application failed not only because the Court was fed bad data, as demonstrated by the *coram nobis* cases, but also because the Court [was] influenced by . . . the racial common sense of the times."); Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decision making*, 1991 WIS. L. REV. 837, 843-44 (1991) (explaining "the courts generally have rejected the idea that Korematsu, decided during war, may be minimalized as precedent during peace . . . [Thus] Korematsu continues to exert its adverse influence."); Nathan Goetting, *A Perfect Peace Too Horrible to Contemplate: Justice Holmes and the Perpetual Conviction of Eugene Victor Debs*, 63 GUILD PRAC. 135, 136 (2006) (arguing that Korematsu has precedential value because it remains to be good law); Aya Gruber, *Raising the Red Flag, The Continued Relevance of the Japanese Internment in the Post-Hamdi World*, 54 U. Kan. L. Rev. 307, 332 n.138 (2006) (explaining because of limited judicial criticism "Korematsu is technically 'good law.'"); Wu, *supra* note 68, at 52 ("The internment of Japanese Americans during World War II is the obvious precedent for the treatment of Arab Americans and Muslim Americans in the aftermath of the September 13, 2001."). *But see* Harlan Grant Cohen, *"Undead" Wartime Cases: Stare Decisis and the Lessons of History*, 84 TUL. L. REV. 957, 960 (2010) (arguing that Korematsu has limited application as legal or live precedent); Eric L. Muller, *12/7 and 9/11: War, Liberties, and the Lessons of History*, 104 W. VA. L. REV. 571, 586 (2002) (arguing that considering "[e]ight of the nine currently sitting Justices on the Court have either written or concurred in opinions describing Korematsu as error . . . it seems safe to say that the majority opinion in Korematsu would not command a single vote today, let alone a majority.").

[73] Harris, *supra* note 10, at 8-12.

[74] *Id.* at 3.

[75] *See* Erwin Chemerinsky, *Korematsu v. United States: A Tragedy Hopefully Never to be Repeated*, 39 PEPP. L. REV. 163, 170-71 (2011); *see also* YAMAMOTO 2013, *supra* note 15, at 390 ("President [Bush] aimed to prevent these detainees from airing their claims of innocence in U.S. courts by characterizing them as the 'worst of the worst.' After years of harsh incarceration, the Administration quietly acknowledged that many of these detainees—some of whom the military and CIA tortured—were not dangerous and released them.").

[76] *See* Alfred C. Yen, *Praising With Faint Damnation: The Troubling Rehabilitation of Korematsu*, 40 B.C. L. REV. 1, 2 (1998) ("The Supreme Court

III. THE NDAA AND THE WAR AGAINST TERRORISM

A. 2001 Authorization of Use of Military Force

A week after terrorist attacks on the World Trade Center and Pentagon killed nearly three thousand people, Congress passed the 2001 AUMF,[77] authorizing the President to

> use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . or harbored such organizations or persons, in order to prevent any future acts of intentional terrorism against the United States by such nations, organizations or persons.[78]

The resolution was aimed at a new kind of enemy that did not represent a government, and one that targeted civilians.[79]

In the week following September 11th al Qaeda terrorist attacks in the United States, Congress passed the USA Patriot Act,[80] which expanded the federal government to authorize warrantless searches and seizures, interception of electronic communications, including wiretaps,[81] and the grounds upon which noncitizens could be removed from the country.[82]

Emboldened with this authority, the U.S. government implemented special registration of Arab and Muslim noncitizens, indefinitely held "enemy combatants" and engaged in the selective deportation campaigns based on the national origin.[83] Consequently, Arab and Muslim noncitizens were removed from the United States in large numbers.[84] Professor Chemerinsky

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has never overruled the case. It stands as valid precedent, an authoritative interpretation of our Constitution and the 'supreme Law of the Land.'").

[77] Pub. L. No. 107-40, 115 Stat. 224 (2001).

[78] *Id.*

[79] Sarah Lohmann & Chad Austin, *When the War Doesn't End, Detainees in Legal Limbo*, 92 DENV. U. L. REV. ONLINE 1, 7 (2014).

[80] Pub. L. No. 107-56, 115 Stat. 272 (2001).

[81] ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 115 (2007).

[82] KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS 99 (2007).

[83] *Id.* at 57; *see also* Neil Gotanda, *Reflections on Korematsu, Brown and White Innocence*, 13 TEMP. POL. & CIV. REV. L. REV. 663, 663 (2004) ("[T]here was widespread use of ethnic profiling aimed at individuals who 'look Arab' immediately after 9-11. Such profiling is based upon a presumption that someone who 'looks Arab' is potentially disloyal.").

[84] JOHNSON, *supra* note 82, at 57; *see also* Harris, *supra* note 10, at 29 ("Since most of the men incarcerated in the aftermath of the attacks were immigrants from the Middle East and South Asia, the government accomplished the round up through a systematic use of immigration law. Not a single one of the detainees faced terrorism-related criminal charges, and the

relays, "[h]undreds of individuals who have never had any meaningful factual hearing or any due process remain in Guantanamo Bay, Cuba. The Bush Administration claimed the ability to detain even American citizens without process or showing to any court individualized suspicion or probable cause."[85] While President Barack Obama's made a promise to close Guantanamo Bay when he was stumping on the campaign trail in 2008, more than half of the remaining 164 Guantanamo Bay detainees, most of whom were picked up mistakenly in the chaotic days after 9/11, are eligible for transfer to foreign countries, but remain in custody due to legal complications.[86]

B. National Defense Authorization Act of 2012

In 2012, as part of the NDAA, Congress attempted, for the first time, to codify a substantive detention standard. The 2012 NDAA, still in effect, affirms an expansive reading of the 2001 AUMF's detention authority.[87] Within the 566-page Act lies the detention clause of Section 1021 affirming the authority of the armed forces of the United States to detain a covered person pursuant to the AUMF. A covered person under this section is:

> (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 hostiles in aid of such enemy forces.[88]

The NDAA also "requires" that non-U.S. citizens be treated as enemy combatants rather than criminal suspects unless the President issues a waiver in the interests of national security. However, the NDAA does not "require" that U.S. citizens be treated in a like manner. Instead Section 1021(e) provides the following vaguely worded protections to Americans: "Nothing in this section shall be construed to affect the existing law or authorities relating to the detention of United States citizens,

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Federal Bureau of Investigation only filed criminal charges in a few cases.").

[85] Chemerinsky, *supra* note 75, at 171.

[86] *See* HUMAN RIGHTS FIRST, *Q&A: Transferring Cleared Guantanamo Detainees to Foreign Countries Under the SASC FY 2014 NDAA*, www.humanrightsfirst.org/uploads/pdfs/QA-foreign-transfer-provisions-for-guantanamo-detainees-in-SASC-NDAA.pdf (last visited Nov. 20, 2015).

[87] Oona Hathaway, et al., *The Power to Detain Detention of Terrorism Suspects After 9/11*, 38 YALE J. INT'L L. 123, 125 (2013) (asserting that "the 2012 NDAA significantly expands the possible scope of law-of-war detention.").

[88] Pub. L. No. 112-239, 126 Stat. 1632 (2012).

lawful resident aliens of the United States, or any other persons who captured or arrested in the United States."[89]

A number of Senators raised concerns that Section 1021 provided new authority to the President to detain Americans citizens indefinitely, with an emphasis on citizens captured domestically in the Congressional floor debates.[90] But there were divergent opinions. On the one hand, Senator Lindsey Graham (R-S.C.), a major NDAA supporter, argued:

> The enemy is all over the world. Here at home. And when people take up arms against the United States and [are] captured within the United States why should we not be able to use our military and intelligence community to question that person as to what they know about enemy activity. They should not be read their *Miranda* Rights. They should not be given a lawyer. They should be held humanely in military custody and interrogated about why they joined al Qaeda and what they were going to do to all of us.[91]

On the other hand, Senator Rand Paul (R-K.Y.) urged, "I'm very, very, concerned about having U.S. citizens sent to Guantanamo Bay for indefinite detention."[92] Echoing these sentiments were Democrats who compared the military policing of Americans to the Japanese American internment.[93]

While the NDAA contains a clear provision explicitly confirming that the AUMF includes the authority to hold individuals as part the indefinite military detention without trial, because of its use of ambiguous terms, certainly it leaves open questions as to who does the AUMF apply to, and how long does it last.[94] These provisions were referred to as "serious reservations" by President Obama when he signed the NDAA into law on December 31, 2011. After explaining that he signed the Act primarily because it authorized national defense funding and necessary services for service members and their families, President Obama professed that that he will not exercise the authority to detain U.S. citizens under the NDAA:

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[89] *Hedges v. Obama*, 724 F.3d at 185.

[90] *Id.* at 184.

[91] Michael McAuliff & Jennifer Bendery, *Senate Votes to Let Military Detain Americans Indefinitely, White House Threatens Veto*, HUFFINGTON POST (Nov. 29, 2011), www.huffingstonpost.com/2011/11/29senate-votes-to-left-military-detain-americans-indefintiely_n_1119473.html.

[92] *Id.*

[93] *Id.*

[94] *See* Sarah Erickson-Muschko, *Beyond Individual Status: The Clear Statement Rule and the Scope of the AUMF Detention Authority in the United States*, 101 GEO. L.J. 1399, 1401-1402 (2013) (asserting that "existing law or authorities" is both ambiguous and troubling); Colby P. Horowitz, *Creating a More Meaningful Detention Statute: Lessons Learned from Hedges v. Obama*, 81 FORDHAM L. REV. 2853, 2855 (2013) (criticizing Section 1021 of the NDAA for failing to define and limit the executive's detention authority).

> I want to clarify that my Administration will not authorize the indefinite military detention without trial of American citizens . . . 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 . . . under no circumstances will my Administration accept or adhere to a rigid across-the-board requirement for military detention.[95]

Almost immediately, public interest groups voiced their criticisms despite Obama's assurances. Anthony D. Romero, American Civil Liberties Union Executive Director, asserted, "[t]he statute is particularly dangerous because it has no temporal or geographic limitations, and can be used by this and future presidents to militarily detain people captured far from any battlefield."[96] The Japanese American Citizens League (JACL) recalling the experiences of the internment during World War II, added that the NDAA may render the Non-Detention Act of 1971, which was passed to prevent another internment of Japanese Americans in the United States, meaningless.[97]

Besides *Korematsu*, there is extant law that can be used to support or oppose the indefinite detention of U.S. citizens. *Ex parte Quirin*[98] serves as precedent for the government to argue that the United States Supreme Court has approved the indefinite detention of an American citizen on U.S. soil. In addition to *Korematsu* and *Quirin*, another source of existing law or authorities is *Zadvydas v. Davis*,[99] wherein the Court recognized that the individual challenging his detention may not be held by the Executive without due process.[100] The Court held that habeas corpus proceedings under 28 U.S.C. § 2241 "remain available as a forum for statutory and constitutional challenges to post-removal-period detention," and indefinite detention of a removable alien after a removal proceeding violates a due process right.[101] The Court concluded that the presumptive period during which an alien's detention is reasonably necessary to effectuate removal is six months, and that he must be conditionally released after that

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[95] THE WHITE HOUSE OFFICE OF THE PRESS SECRETARY, *Statement by the President on H.R. 1540*, Dec. 31, 2001, www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540.

[96] *See* American Civil Liberties Union, *President Obama Signs Indefinite Detention Bill Into Law* (Dec. 31, 2011), www.aclu.org/news/president-obama-signs-indefinite-detention-bill-law.

[97] *Id.*

[98] 317 U.S. 1 (1942) (allowing for the indefinite military detention and evacuation of an American citizens detained in the U.S.).

[99] 533 U.S. 678 (2001).

[100] *Id.* at 690.

[101] *Id.* at 688-90.

time, if he can demonstrate that there is "no significant likelihood of removal in the reasonably foreseeable future."[102]

Against this backdrop, the scope of the AUMF as applied to U.S. citizens, or to noncitizens arrested within the territorial United States, remains unclear today, and controversially so.[103] As the list of individuals and groups who are terrorists plotting against the U.S. continues to expand from the individuals and groups associated with the 9/11 attacks, Professor Stephen Vladeck argues, "[t]he case for preserving the AUMF in its current form has little to do with continuing uses of force against al Qaeda and the Taliban, and everything to do with uses of force against other groups . . . and with preserving detention authority for the current Guantanamo detainees."[104]

C. Hamdi v. Rumsfeld and Establishing the Legal Authority for the NDAA

Sixty years later after *Korematsu*, the Court affirmed the President's power to indefinitely detain members of al Qaeda and the Taliban in *Hamdi v. Rumsfeld*.[105] Yasser Esam Hamdi, an American citizen, maintained that he had been mislabeled as a Taliban fighter, and was denied due process. Hamdi was born in

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[102] *Id.* at 701. In *Clark v. Martinez*, 543 U.S. 371 (2005), the Court extended its interpretation of 8 U.S.C. §1231(a)(6) to inadmissible aliens. The Court concluded that there was no reason why the period of time reasonably necessary to effect removal would be longer for an inadmissible alien, therefore the six-month presumptive detention period prescribed in *Zadvydas* should be applicable to inadmissible aliens. *Id.* at 386.

[103] *See* Stephen I. Vladeck, *Detention After the AUMF*, 82 FORDHAM L. REV. 2189, 2193-94 (2014) (explaining AUMF's inherent ambiguities).

[104] *Id.* at 2191.

[105] 542 U.S. 507 (2004). *See also* Harris, *supra* note 10, at 28 (explaining that "Hamdi actually allows the executive to hold American citizens indefinitely, without charges or trial, as enemy combatants."). During the 2003-2004 Supreme Court term, the Court issued rulings in two other detention cases. In *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), the narrow issue was whether the habeas statute conferred a right to judicial review of the detention of aliens in a territory over which the United States exercised plenary and exclusive jurisdiction. *Id.* at 442. The Court, in order to avoid rampant forum shopping, held strictly to the "general rule that for core habeas petitions challenging present physical confinement, jurisdiction lies in only one district: the district of confinement." *Id.* at 443. In *Rasul v. Bush*, 542 U.S. 466 (2004) the Court addressed whether the six-hundred detainees at the American naval base in Guantanamo Bay, Cuba, could challenge the legality of their detention in U.S. courts on the basis that none were enemy combatants or terrorists. *Id.* at 471. Petitioners claimed: (1) no charges were filed against them; (2) they were not provided counsel; and (3) they were denied access to the court. *Id.* at 472. In a six-to-three decision, the Court held that United States courts have federal jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities. *Id.* at 485.

Louisiana in 1980.[106] As a child, he and his family moved to Saudi Arabia.[107] He resided in Afghanistan when he was seized by the Northern Alliance and turned over to the U.S. military.[108] After an initial interrogation, Hamdi was removed from Afghanistan to the U.S. Naval Base in Guantanamo Bay in January 2002.[109]

Justice O'Connor wrote the plurality opinion, joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Breyer, holding that Hamdi must be afforded due process and given judicial notice and a fair and meaningful opportunity to contest his detention.[110] The Court emphasized the importance of providing to prisoners basic constitutional due process,[111] and allowed Hamdi to contest the government's basis for his designation as an enemy combatant.[112] The Court explicitly rejected the administration's position that enemy combatants are not entitled to traditional legal rights.[113] After the Court's decision, the Justice Department agreed to release Hamdi after more than two years of detention during which time no charges were filed and lawyers were withheld.[114] Hamdi was released and returned to Saudi Arabia on the conditions that he give up his U.S. citizenship, renounce terrorism, and agree not to sue the U.S. government.[115]

The Court's discussion of the AUMF is especially noteworthy because it was the first and last time the high court addressed the substantive scope of executive detention under the statute. As an initial matter, Justice O'Connor stated "the AUMF is explicit congressional authorization for the detention of individuals" because it is an Act of Congress authorizing "the President to use 'all necessary and appropriate force' against 'nations, organizations, or persons' associated with the September 11, 2001 terrorist attacks."[116] O'Connor was not concerned that the AUMF does not contain the specific word "detention" "[b]ecause detention to prevent a combatant's return to the battlefield is a fundamental

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[106] *Hamdi*, 542 U.S. at 510.

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.* at 533.

[111] U.S. CONST. amend. XIV.

[112] *Hamdi*, 542 U.S. at 533.

[113] *Id.* at 532-33.*See also* JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA 337 (2009) (explaining that "the [Hamdi] decision struck the core of the Bush administration system for holding foreign terrorism suspects and, more generally, the president's authority in war-related matters and international obligations.").

[114] *See* Richard B. Schmitt, *U.S. Will Free Louisiana-Born "Enemy Combatant,"* L.A. TIMES, Sept. 23, 2004, at A25.

[115] Abigail Lauer, Note, *The Easy Way Out: The Yaser Hamdi Release Agreement and the United States' Treatment of the Citizen Enemy Combatant Dilemma*, 91 CORNELL L. REV. 927, 936-40 (2006).

[116] *Hamdi*, 542 U.S. at 517-18.

incident of waging war, in permitting the use of 'necessary and appropriate force,' Congress clearly . . . authorized detention in the narrow circumstances here."[117] Thus, Justice O'Connor reasoned that because United States troops are engaged in active combat in Afghanistan, detentions of citizen-detainees are part of the exercise of "necessary and appropriate force" authorized by the AUMF.[118]

In his concurrence, joined by Justice Ginsburg, Justice Souter disagreed with the plurality's acceptance of the Government's position Hamdi's detention was authorized by the AUMF.[119] Souter specifically argued that Hamdi was entitled for released under the Non-Detention Act of 1971, which states, "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[120] Apparently, the Japanese internment was prominent on Justice Souter's mind because he devoted several passages to discussing the Japanese American internment case precedents and made several key points. According to Souter, when "Congress repealed the [emergency Detention Act of 1950] and adopted §4001(a) for the purpose of avoiding another *Korematsu*, it intended to preclude reliance on vague congressional authority . . . for detention or imprisonment at the discretion of the Executive . . . ."[121] Thus, "Congress necessarily meant to require a congressional enactment that clearly authorized detention or imprisonment."[122]

A decade after *Hamdi*, the robust litigation over the detainees held at Guantanamo Bay continues in tandem with vigorous disagreements between the legislative, executive, and judicial branches concerning the law on detention.

IV. HEDGES V. OBAMA

The plaintiffs in *Hedges v. Obama* were a broad coalition of private citizens, lawyers, and legislators opposing §1021. Christopher Hedges, foreign correspondent and Pulitzer Prize winning journalist, had traveled to the Middle East, the Balkans, Africa, and Latin America, had interviewed detained al Qaeda members, and reported on groups regarded as terrorist organizations.[123] Alexa O'Brien, was the founder of U.S. of Day of Rage, wrote articles published articles on WikiLeaks's release of U.S. State Department cables and about Guantanamo Bay

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[117] *Id.* 519.
[118] *Id.* at 521.
[119] *Id.* at 541 (Souter, J., concurring).
[120] *Id.* at 541-42 (quoting 18 U.S.C. § 4001(a)).
[121] *Id.* at 543-44.
[122] *Id.* at 544.
[123] 890 F. Supp. 2d at 432.

detainees.[124] Kai Wargalla, an organizer and activist based in London, was the Deputy Director of the "Revolution Truth" an organization facilitating international speech activities though website forums.[125] Finally, the Honorable Brigitta Jonsdottir, a member of parliament in Iceland, and activist and WikiLeaks spokesperson, received a subpoena for content from her Twitter account.[126]

After hearing testimony and weighing evidence, District Court Judge Forrest issued a preliminary injunction which blocked the indefinite detention powers of the NDAA on ground of unconstitutionality.[127] The court held that plaintiffs had standing to bring their facial challenge; the NDAA provision was facially overbroad in violation of the First Amendment and impermissibly vague in violation of the Fifth Amendment.[128]

For the most part, Judge Forrest subjected the AUMF and §1021(b)(2) to heightened review because they implicated fundamental liberties.[129] In rejecting the Government's position that the AUMF and §1021(b)(2) are coextensive, and determining that that the Government failed to show why §1021 (b)(2) should not be permanently enjoined, Forrest made several distinct points to support her conclusion. First, Forrest traced the AUMF and case law discussing the President's detention authority under the AUMF to demonstrate that AUMF set forth detention authority tied directly and only to September 11, 2001.[130] She then found that the executive branch began to interpret its detention authority more broadly, but without additional Congressional authorization.[131] Forrest insisted that §1021 is not specifically tied to 9/11, unlike the AUMF.[132] Forrest noted that §1021(b)(2) "adds a new element not previously set forth in the AUMF . . . section 1021 *explicitly* incorporates disposition under the law of war."[133]

Second, "[t]he expansion of detention authority to include persons unconnected to the events of September 11, 2001, unconnected to any battlefield or to the carrying of arms, is, for the first time codified in §1021."[134] Judge Forrest observed that even though the new statute states 'reaffirmation' it appears as if broad detention authority was always authorized, "[i]t had not."[135] To the

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[124] *Id.* at 434.
[125] *Id.* at 436.
[126] *Id.* at 437.
[127] *Id.* at 470-71
[128] *Id.*
[129] *See* YAMAMOTO 2013, *supra* note 15, at 419.
[130] *Hedges*, 890 F. Supp. 2d. at 440-45.
[131] *Id.* at 444-45.
[132] *Id.* at 439.
[133] *Id.* at 441.
[134] *Id.* at 444.
[135] *Id.* at 429.

contrary, she perceived Section 1021 as an *ex post facto* legislative 'fix' "to provide the President (in 2012) with broader detention authority than was provided in the [2001] AUMF."[136]

As for the First Amendment claims, Forrest declared that the discussion of the two statutes' differences support factual findings that each plaintiff has a reasonable fear that §1021(b)(2) presents a new scope for military detentions.[137] Significantly, Judge Forrest cited Supreme Court precedent that illustrates the exception to the injury-in-fact requirement for standing when First Amendment rights, and are infringed.[138] Under this standard, the court found that the facts support each plaintiff's standing to bring a pre-enforcement, facial challenge with respect to §1021(b)(2).[139] "Each plaintiff has engaged in activities in which he or she is associating with, writing about, or speaking about or to al-Qaeda, the Taliban, or other organizations and groups, which have committed terrorists against the United States" and therefore fall under the umbrella of §1021(b)(2).[140] In her view, the "plaintiffs need not wait until they have been detained and imprisoned to bring a challenge—the penalty is too severe to have to wait."[141] Accordingly, Judge Forrest reasoned that an actual case or controversy remains because the plaintiffs were aware about the threat of indefinite military detention under §1021.[142]

The court further concluded that there was a Fifth Amendment and Due Process violation because §1021(b)(2) did not provide fair notice of conduct that was forbidden or required.[143] Plaintiffs testified that they do not understand the terms "substantially supported," "directly supported," or "associated forces."[144] Accordingly, Judge Forrest determined that the respective meanings of the terms at issue are unknown, the scope of §1021(b)(2) is therefore, impermissibly vague under the Fifth Amendment.[145]

Finally, the importance of the case did not escape the court's attention and its relationship to the Japanese American internment. Since Judge Forrest stressed the present case presented an important constitutional question and acknowledged "[c]ourts must safeguard core constitutional issues."[146] She cited to *Korematsu* and mentioned that the Supreme Court's due deference

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[136] *Id.*
[137] *Id.* at 444-45.
[138] *Id.* at 448.
[139] *Id.* at 452.
[140] *Id.* at 452-53
[141] *Id.* at 453.
[142] *Id.* at 429.
[143] *Id.* at 466-67.
[144] *Id.* at 467.
[145] *Id.* at 470-71.
[146] *Id.* at 430.

to the executive and legislative branches during World War II is now generally condemned.[147]

The plaintiffs' victory was short-lived. The Second Circuit reversed the district court and held that (1) §1021(b)(2) affirms the general AUMF authority;[148] (2) Section 1021(b)(2) is Congress' express resolution of an earlier debated question about AUMF's scopes; which does not limit or expand the detention authority;[149] and (3) the text indicates that "captured or arrested in the United States" is meant to modify only "any other persons."[150]

The Second Circuit paid particular attention to the floor debates in the Senate, specifically Senator Dianne Feinstein's unsuccessful attempts to amend §1031 to indicate that the statute's authority would not allow for the detention of U.S. citizen.[151] Eventually, Senator Feinstein was able to have her compromise amendment incorporated into the final form of §1021(e) which states: "Nothing in this section shall be constructed to affect existing or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any persons who are captures or arrested in the United States."[152]

The thrust of the opinion lies in the panel's analysis of the §1021's language and legislative history. Here, unfortunately, the court's interpretation reinforces, rather than explains, the ambiguous nature of the statute's terms.

> [I]n stating that Section 1021 is not intended to limit or expand the scope of the detention authority, under the AUMF, Section 1021(d) mostly made a statement about the original AUMF. . . it states only a limitation about how Section 1021 may be construed to affect that existing authority, whatever that existing authority may be. . . . Section 1021 (e) provides that Section 1021 just does not speak—one way of the other—to the government's authority to detain citizens, lawful resident aliens, or any other persons captured or arrested in the United States.[153]

Next, departing from Justice Souter's reasoning in his concurrence in *Hamdi*, the court determined that no clear statement by Congress was necessary for "the detention of American citizens apprehended on American soil under the Non-Detention Act" because from its vantage point, §1021(e) is clear, and confined by legislative history.[154]

The court further stressed:

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[147] *Id.* at 431.
[148] *Hedges*, 724 F.3d at 190-91.
[149] *Id.* at 191.
[150] *Id.* at 192.
[151] *Id.* at 184-85.
[152] *Id.* at 185.
[153] *Id.* at 191-92.
[154] *Id.* at 193 n.137.

> 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 . . . [t]here is nothing in Section 1021 that makes any assumptions about the government's authority to detain citizens under the AUMF. Rather, Section 1021 (e) quite specifically makes clear that the section should not be construed to affect in any way existing law or authorities relating to citizen detention, whatever those authorities may provide.[155]

On the issue of standing, the panel briefly stated that §1021 makes no assumptions about the government's authority to detain citizens under the AUMF because the language of the section states that it does not affect existing law or authorities.[156] The panel contended that the authorities allow for, but do not require detention, and as such, §1021 only affirms the President's military authority, and can be distinguished from a statute that is penal in nature.[157] Accordingly, the court concluded that speculation and expressed fears are insufficient to establish standing of enforcement.[158] Here, it appears that the panel's disagreement with the district court's treatment of §1021 as a criminal penalty, allowed the panel to essentially sidestep the First Amendment issues.

But on the contrary, the First Amendment claims warranted greater inquiry than that given by the Second Circuit. The First Amendment to the United States Constitution, expressly provides that "Congress shall make no law . . . abridging the freedom of speech."[159] Although the First Amendment is addressed to Congress, the Fourteenth Amendment has been held to protect the freedom of speech "covered by the First Amendment."[160] Few constitutional rights are so zealously protected as freedom of expression.[161] Any governmental regulation that restricts the content of speech, generally receives the highest form of judicial scrutiny.[162]

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[155] *Id.* at 193.
[156] *Id.* at 192.
[157] *Id.* at 200.
[158] *Id.* at 203-04.
[159] U.S. CONST. amend I.
[160] *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968).
[161] *See, e.g.*, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Keyishan v. Bd. of Regents*, 385 U.S. 589 (1967).
[162] Speech is not only verbal expression. The secondary effects doctrine allows courts to apply intermediate scrutiny to an ordinance that is content-based if the ordinance is targeted at suppressing the secondary effects of the speech and not the speech itself. Christopher J. Andrew, Note, *The Secondary Effects Doctrine: The Historical Development, Current Application and Potential Mischaracterization and Elusive Judicial Precedent*, 54 RUTGERS L. REV. 1175, 1175 (2002).

A finding that a statute is facially unconstitutional results in invalidation of the law itself.[163] An ordinance is facially unconstitutional if: (1) "it is unconstitutional in every conceivable application" because it is "vague or impermissibly restricts a protected activity" or (2) "it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally overbroad."[164] Next, under the Fourteenth Amendment, a law must give sufficient notice of what conduct is proscribed.[165] The Fourteenth Amendment Due Process Clause has been interpreted as requiring that a statute neither forbid nor require the doing of an act in terms so vague that people of common intelligence must necessarily guess at its meaning and differ as to its application.[166] In the First Amendment context, the prohibition of vague statutes or regulations is also based on the potential chilling effect vague statutes or regulations have on otherwise permissible speech. "If a person must guess at what speech or expressive conduct may run afoul of a regulation or statute, that person may be overly cautious in his or her words or deeds."[167] If §1021 is construed as a criminal penalty, as Judge Forrest had done, it is worth recalling that the Supreme Court had sometimes "invalidate[d] a criminal statute on its face even when it could conceivably have had some valid application."[168]

In light of the First Amendment protections, the NDAA violates the First Amendment because the statute is impermissibly vague and overbroad. More specifically, Section 1021(b)(2) offers vague and convoluted terms including: "belligerent act," "substantially supported," "coalition partners," "terrorist act," and "associated forces."[169] Congress failed to define or limit these key terms, and thus failed to shape the substantive parameters of executive detention. In practice, governmental authorities may use indefinite detention against anyone who "substantially supports" terror against the United States, since they have great leeway in defining what constitutes "substantial" and "support" as well as "terror."

Looking forward, if a circuit split becomes apparent and the record develops, perhaps the Supreme Court may grant certiorari in a future challenge to the NDDA. If that happens, there could be

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[163] *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1988).

[164] *Id.*

[165] *See Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971); *Parker v. Levy*, 417 U.S. 733, 758 (1974).

[166] *See Conally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926).

[167] *Wagner v. City of Holyoke*, 100 F. Supp. 2d 78, 84 (D. Mass. 2000).

[168] *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983).

[169] *See* Horowitz, *supra* note 94, at 2897 (stating "[t]he term 'substantial support' should be removed from any future detention statute because it is confusing and unnecessary. The government has consistently failed to provide a definition of 'substantial' in court.").

reason to think that the Court might closely scrutinize the ambiguities presented by the NDAA, just like it did last term in *Johnson v. United States*,[170] a decision having significant implications for due process rights. Justice Scalia, wrote for the majority, and held that imposing an increased sentence under the residual clause of the Armed Career Criminal Act (ACCA)[171] a recidivist statute, violated the Fifth Amendment's due process guarantee.[172]

In that prosecution, the Federal Bureau of Investigation watched Petitioner Samuel Johnson because of his connection to a white-supremacist group.[173] During this period of surveillance, Johnson disclosed his plan to commit acts of terrorism using explosives against targets in Minnesota to undercover agents.[174] Johnson pled guilty for being a felon in possession of a firearm.[175] At sentencing the government requested to enhance Johnson's sentence by arguing the ACCA, covered his conduct.[176] The ACCA provides that a federal firearms offender who has three prior convictions from "any court" for a "violent felony" such as a "burglary, arson, or extortion, involves use of explosives" must be sentenced to a mandatory minimum fifteen-year imprisonment.[177] ACCA's residuary clause states that the definition of "violent felony" includes "conduct that presents a serious potential risk of physical injury to another."[178] It is this residuary clause that violated the Due Process Clause, the Court concluded, because the clause leads to unpredictable and arbitrary determination by judges who were left to: (1) estimate the risk posed by a crime based on an "ordinary case" of a crime; and to (2) determine how much risk is necessary for a crime to be considered a violent felony.[179] To Scalia, the residual clause offers no reliable way to determine what kind of conduct that an "ordinary case" of crime involves, and hence judges must speculate about what was the "potential risk" in question.[180] Add to this, uncertainty about how much risk is necessary to consider a crime as being a violent felony.[181]

Even though *Johnson* involved a federal sentencing enhancement, the Court could apply a similar, and I would assert

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[170] 135 S. Ct. 2551 (2015).
[171] 18 U.S.C. §924(e).
[172] *Johnson*, 135 S. Ct. at 2557.
[173] Johnson was also a felon with an extensive criminal record. *Id.* at 2556.
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.* at 2555-56.
[178] 18 U.S.C. §924(e).
[179] *Johnson*, 135 S. Ct. at 2557.
[180] *Id.*
[181] *Id.*

necessary, searching inquiry about the unpredictable and arbitrary applications of the NDDA. Keeping that in mind, would the Court perceive judges as having the burden to determine if a defendant's conduct constituted a "belligerent act," or whether he "substantially supported" a terrorist organization. Will it conclude that judges must also speculate as to whether a defendant has a connection to al Qaeda, the Taliban, ISIS, or other groups and individuals who could be construed as being a "coalition partner" or "associated force?"

Putting these hypotheticals aside, the reality is that a law may not ban more conduct than is necessary to achieve its legitimate objectives.[182] To find that a statute is overbroad, "there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court . . . ."[183] The over breadth doctrine confers standing on a party who demonstrates that a statute "'create[s] an unacceptable risk of the suppression of ideas' and that [the party] has suffered an injury."[184] Over breadth standing is an exception to traditional standing and is premised upon preventing the self-censorship and chilling of expression of individuals not before the court.[185]

The NDAA is also overly broad because given the statute's wide reach, anyone person who gives to a charity or expresses opinions about terrorism in writing or in song may be prosecuted. As seen throughout the *Hedges* litigation, government attorneys were unable to define the terms, yet they insisted on maintaining the authority to do so in the future. In the end, the Second Circuit's conclusions failed to resolve the controversy. If nothing else, it created more questions.

Under the NDAA, will federal agents begin to conduct surveillance on individuals who frequent ethnic grocery stores, karate studios, rent motels with cash, who make extreme religious statements or statements about ongoing violent acts if these individuals can be construed as having substantially supported a "terrorist act" or "belligerent act"? Would the conduct of bloggers who make anti-U.S. statements or cryptic statements endorsing violence against the U.S. on their websites fall under the purview of the NDAA? Could whistleblowers, or reporters receiving information from governmental whistleblowers, be detained indefinitely? What about groups such as the Tea Party and Black Lives Matter? Can these groups' members be considered terrorists

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[182] *See Massachusetts v. Oakes*, 491 U.S. 576, 587-89 (1989).

[183] *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801 (citations omitted).

[184] *Young v, Simi Valley*, 216 F.3d 807, 815 (9th Cir. 2000) (quoting *Nunez v. City of San Diego*, 114 F.3d 935, 949 (9th Cir. 1997).

[185] *Id.*

if they engage in unlawful activity? Would these groups then be considered threats to National Security? Based on reasonable fears of being indefinitely detained under the NDAA, would Americans abstain from associating with others for fear of prosecution? Would bloggers refrain from writing anything than could be construed as assisting terrorist as defined by the NDDA? Until the NDAA's terms are better defined by Congress, Americans remain in the dark about what conduct exactly is prescribed.

Further, while the NDAA debate may seemingly be neatly divided along American citizen and non-American citizen lines, it is not. In fact, those who hold dual citizenship may be especially vulnerable if the government and the judiciary perceive them as being less American and being entitled only to a watered down due process rights.[186] On this issue, Professor Peter Shuck advises that dual citizens, who have declared themselves an enemy of the state or are nominally American citizens and have spent most of their lives aboard, may be afforded only some, but not all due process rights as guaranteed by the U.S. Constitution.[187] Schuck refers to the killing of Anwar Awlaki via a drone attack in Yemen in 2011 as an example of a dual citizen of the U.S. –and in that case Awlaki– who the U.S. government alleged plotted to kill Americans– refused to return to U.S., and evaded capture for a long time.[188] The government concluded that the intentional targeting and killing of Awlaki was lawful notwithstanding federal statues outlawing the murder of Americans overseas and that he was not entitled to due process of law.[189] Other Americans, who held dual citizenship, were inadvertently killed in drone strikes.[190] Considering that dual citizenship is becoming increasingly significant as part of globalization, trepidation about having due process guarantees for only some and important questions about who is, and who is not a real American will likely continue.

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[186] Peter H. Schuck, *Drone Strikes: Beyond Citizenship*, L.A. TIMES (Feb. 17, 2013), http://articles.latimes.com/2013/feb/17/opinions/la-oe-schuck-drones-citizenship-20130217.

[187] *Id.*

[188] *Id.*

[189] *See* Charlie Savage, *Court Releases Large Parts of Memo Approving Killing of Americans in Yemen*, N.Y. TIMES (June 23, 2013), www.nytimes.com/2014/06/24/us/justice-department-found-it-lawful-to-target-anwar-al-awlaki.html.

[190] *See* Adam Taylor, *The U.S. Keeps Killing Americans in Drone Strikes, Mostly by Accident*, WASH. POST (Apr. 23, 2015), www.washingtonpost.com/news/worldviews/wp/2015/04/23/the-u-s-keeps-killing-americans-in-drone-strikes-mostly-by-accident/ (discussing the killing of Anwar Awlaki and reporting that Kemel Darswish, an American citizen and preacher was killed in a strike in Yemen in 2002; Samir Khan, an American citizen and al-Qaeda militant, was killed at the same time as Awaki; Jude Kenan, a Florida born al-Qaeda and Pakistani Taliban recruiter was killed in Pakistan in 2011; Ahmed Farouq and Adam Gadahn, both American al-Qaeda militants, were killed in 2015).

V. LEARNING FROM HISTORY AND AVOIDING ANOTHER MANIFEST INJUSTICE

In an authoritative casebook analyzing the internment cases, a team of legal scholars persuasively argue that another *Korematsu* could be avoided by applying close judicial scrutiny when addressing national security issues during a time of war.[191] As we may have seen in *Korematsu* and *Hamdi*, the constitutional rights of American citizens should always be safeguarded during times of war, and courts should apply heightened scrutiny and more rigid analysis in cases involving the delicate balancing of executive authority and individual civil liberties during national emergencies.[192]

Placing the internment in its appropriate historical, social, and political context requires an acknowledgement of a long legacy of discrimination against Asian Americans that has existed on many fronts, including immigration,[193] business,[194] education,[195] and on social and political levels.[196] Likewise, the NDAA should also be placed in its historical and sociopolitical context. In doing so, another mass trampling of civil liberties should be avoided.

As most Americans can recall, Arab and Muslim Americans were racially and culturally profiled by the federal government after the September 11th attacks. Eric Muller compares the internment experience of Japanese aliens and citizens of Japanese ancestry after Pearl Harbor to the experiences of alien detainees or interrogated by the federal government after 9/11.[197] He

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[191] *See* YAMAMOTO 2013, *supra* note 15, at 412.

[192] *See* BREYER, *supra* note 70, at 189-93, 212-14.

[193] *See Ozawa v. United States*, 260 U.S. 178, 198-99 (1922) (upholding the denial of citizenship to Japanese*); Fong Yue Ting v. United States*, 149 U.S. 698, 730-31 (1893) (upholding the Chinese Exclusion Act); *Chae Chan Ping v. United States*, 130 U.S. 581, 609-11 (1889) (limiting ethnic Chinese from returning to United States after leaving country); *Bessho v. United States*, 178 F. 245, 248 (4th Cir. 1910) (upholding immigration act limiting privileges of naturalization of Japanese); *In re Ah Yup*, 1 F. Cas., 223, 224 (C.D. Cal. 1878) (holding that a Chinese immigrant was not a "white person" and thus was ineligible for naturalization).

[194] *See Yick Wo. v. Hopkins*, 1118 U.S. 356, 374 (1886) (invalidating racially motivated laundry ordinances).

[195] *See Lau v. Nichols*, 414 U.S. 563, 568 (1974) (holding that the school district's failure to provide English language instruction to Chinese-speaking students created unequal educational opportunities); *Gong Lum v. Rice*, 275 U.S. 78 (1927) (upholding "separate but equal doctrine" in public schools against Chinese student born in the United States).

[196] *See* Henry S. Cohn & Harvey Gee, *"No, No, No, No!" Three Sons of Connecticut Who Opposed the Chinese Exclusion Acts*, 3 CONN. PUB. INT. L.J. 1, 23 (2003) ("Resentment towards the Chinese reverberated in the laws that barred them from meaningful participation in American society.").

[197] *See* Muller, *supra* note 72, at 573.

suggests that of the approximately five hundred detainees detained by the Justice Department were held on suspicion of immigration law violations, criminal charges and unrelated to terrorism, and some held as "material witnesses" five months after 9/11.[198] To Muller, this was a much smaller group of individuals compare to twice the number of Japanese aliens placed in federal custody within three days after the attack on Pearl Harbor.[199] The Justice Department sent letters inviting more than five thousand young aliens of mostly Arab and Muslim countries, to voluntary interview under the auspices of information gathering purposes about al Qaeda and other foreign-based terrorist organizations.[200] These men arrived in the U.S. during the two years prior to 9/11, and held students, tourist, or business visas.[201] Some of men allegedly had terrorist ties.[202] Mueller asserts, "despite dire predictions that the supposedly information-gathering interviews would be mere pretext for coercive criminal interrogations . . . the program of interrogation, if it was ethnic profiling at all was ethnic profiling with a decidedly light touch."[203]

However, the intrusiveness of the government's actions were much more serious than Mueller describes them to be, on several levels. To begin, on the issue of the typical investigative interviews, Mueller may be downplaying the precarious position that these men were in. For instance, Professor Richard Leo, a leading interrogation expert, asserts that "[m]odern methods of psychological interrogation have been designed to persuade suspects that--contrary to all appearances, logic, and common sense--it is actually in their self-interest to confess."[204] Detectives often employ a ruse and call suspects to "voluntarily" come into

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[198] *See id; see also* Sharon L. Davies, *Profiling Terror*, 1 OHIO ST. J. CRIM. L. 45, 49-50 (2003) (explaining in the month following 9/11 "the number of [persons of Middle-Eastern descent] taken into federal custody mushroomed from dozens, to hundreds, to over one thousand."); YAMAMOTO 2013, *supra* note 15, at 395 (stating "Since the 9/11 attacks, the federal government has detained dozens of individuals under the pretext of using them as material witnesses. . . . Although they are only permitted to be held for the time required to testify or be deposed, the government has repeatedly held individuals as material witnesses, at times for longer than six months, without deposing them or calling them to testify.").

[199] Muller, *supra* note 72, at 573.

[200] *Id.* at 574; *See also* DAVIS, *supra* note 81, at 117; *see* YAMAMOTO 2013, *supra* note 15, at 395 (explaining "Most of the people summarily incarcerated by the Justice Department in the wake of the 9/11 attacks were non-citizen men of Arab, Middle Eastern or South Asian origin. Immediately after September 11, 2001, and again in 2004, the FBI and immigration authorities interviewed 8,000 individuals.").

[201] Muller, *supra* note 72, at 575.

[202] *Id.* at 576-77.

[203] *Id.*

[204] RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 121 (2008).

the police station for questioning.[205] Investigators will not let on they believe the suspect committed a crime or their intent to interrogate him.[206] As Professor Leo explains the procedure:

Detectives intentionally ask the suspect to come to the police station so that they can isolate the suspect from any familiar environments, friends, family, or any other source of social support that might psychologically empower the suspect to resist the interrogation process. Detectives also wish to get the suspect on police territory, in an interrogation room, in order to exercise control over the timing, pace, and strategy of interrogation.[207]

From that point forward, detectives apply targeted psychological techniques designed to create a rapport.[208] Professor Leo describes common tactics employed by detectives in routine criminal investigations, including avoiding the requirement of a *Miranda* warning by redefining the circumstances of questioning so that the suspect technically is not in custody through means of "telling the suspect that he is not under arrest and is free to leave."[209] Detectives may also avoid asking the suspect for an explicit waiver of his rights, and move directly into the interrogation.[210] Further, they can also minimize the importance of *Miranda* warnings and persuade the suspect to waive *Miranda* and consent to interrogation.[211] Similarly, interrogators can portray themselves as friends, as opposed to adversaries.[212] Finally, harsher techniques materialize in flat out accusations, attacking denial, and utilizing ploys to entice a suspect into believing that the police possess criminalizing evidence against him.[213]

Professor Christopher Slobogin voices similar concerns, relaying that U.S. interrogation manuals advocate minimization (lulling suspects into a false sense of security and offering sympathy) and maximization (exaggerating seriousness of offense and bluffing about incriminating evidence) techniques when a suspect does not initially confess to the crime.[214] All told, if the government employed similar techniques during their questioning of detainees in the wake of 9/11, such tactics are certainly more akin to a heavy hand, rather than decidedly "a light touch."

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[205] *Id.*
[206] *Id.*
[207] *Id.* at 122.
[208] *Id.*
[209] *Id.* at 124-25
[210] *Id.* at 125-26.
[211] *Id.* at 126.
[211] *Id.* at 126.
[212] *Id.* at 128.
[213] *Id.* at 134-39.
[214] *See* Christopher Slobogin, *Comparative Empiricism and Police Investigative Practices*, 37 N.C. J. INT'L L & COM. REG. 321, 338-39 (2011).

More generally, Mueller states that unlike the high concentration of Japanese Americans on the west coast, Arab and Muslim Americans reside throughout the United States and are more assimilated to American mainstream culture than Japanese Americans were during World War II.[215] But sometimes Muslims are still specially targeted because of their religious beliefs and perceived foreignness. This was apparent in the failed prosecution of suspected Guantanamo Bay spy Captain James 'Youseff' Yee, a Chinese American army officer, and Muslim convert.[216]

Captain Yee was raised a Christian in New Jersey, graduated from WestPoint in 1990, and the following year converted to Islam.[217] In August 1991 he was deployed to Saudi Arabia where he married a Syrian woman.[218] When he returned to the United States, he re-enlisted when the Pentagon asked him to serve as a chaplain for the army.[219] Captain Yee was charged with various claims, and continued to face a group of miscellaneous charges lodged against him in what appeared to many to be an effort to drum him out of the military in disgrace.[220]

> Initially, [In 2003] the U.S. government alleged that Yee, as part of an Islamic Fifth Column of extremists, breached security with two Arab language translators at Guantanamo Bay. The U.S. government detained Yee for a month before formally charging him with five offenses: sedition, aiding the enemy, spying, espionage, and failure to obey a general order. Officials reported that they found "suspicious documents" and notebooks containing information and diagrams about detainees in Yee's backpack. However, it was later determined that these documents were never labeled as classified, and the diagrams were Yee's anecdotal notes written for himself concerning counseling sessions with some of the prisoners.[221]

After spending three months in a military prison, the government quietly, and seemingly reluctantly, dropped the espionage charges due to lack of proof. Yee was allowed to return to active duty but only in the capacity of a desk clerk. However, a month after his release, authorities brought new charges of adultery and having illegally downloaded pornography [on a

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[215] *See* Muller, *supra* note 72, at 583.

[216] *See* Harvey Gee, *Asian Americans and Citizen Rights*, 8 RUTGERS RACE & L. REV. 51, 68 (2006) (book review).

[217] Mark Miller, *A Very Curious Case*, NEWSWEEK, Dec. 22, 2003, at 41.

[218] *Id.*

[219] *See* Andrew Law, *Wen Ho Lee II?*, ALTERNET (Sept. 28, 2003), www.alternet.org/story/16851/wen_ho_lee_ii.

[220] *See* Harvey Gee*, From Bakke to* Grutter *and Beyond: Asian Americans and Diversity in America*, 9 TEX. J. ON C.L. & C.R. 129, 138 (2004).

[221] *Id.* at 138-39.

government-issued computer]. Some believe that these new allegations are wrought with vindictiveness and bitterness.[222]

The Yee case is a likely example of racial profiling against Muslim Americans. Captain Yee is an American-born son of Chinese immigrants, raised in a New Jersey suburb, and just so happened to convert to Islam.[223] During its prosecution of Yee, the government portrayed him as both Chinese and Muslim, with possible ties to terrorists.[224]

Finally, Mueller described an alien detention process that may have been over-and under-inclusive, and impractical because as Professor Frank Wu explains, the racial profiling of Arab Americans and Muslim Americans relies on an incorrect belief that

> a large number or all the terrorists are Arab or Muslim. . . . Most Arab Americans are not Muslim; most Muslims in the United States are South Asian or African Americans; and the post-September 11 backlash of violence has revealed our collective carelessness in assaulting Indian Sikhs—neither Arab nor Muslim but persons who look like they might be Arab or Muslim because of skin color, accents, and dress.[225]

Similarly, Professor Sharon Davies rejects the suggestion that Arab or Middle Eastern ancestry provides an appropriate basis for suspicion of terrorism activities,[226] and cites to the examples of Timothy McVeigh, a white male who detonated a bomb outside the Alfred P. Murrah Federal Building in Oklahoma City that claimed 68 lives and injured over 500 in 1985; and Ted Kaczynski, the "Unabomber," another white male, who was responsible for bombings spanning over seventeen years.[227] Just as how racism motivated the Japanese Americans internment which based on the inaccurate claim that Japanese Americans as a group were disloyal, the targeting of Arabs and Muslims was based on false perceptions that they would be more likely to be terrorists.[228]

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[222] *Id.* at 139.

[223] *Id.*

[224] *Id.*; *see also* Gee, *supra* note 216, at 68-69.

[225] Wu, *supra* note 68, at 58; see also *See* YAMAMOTO 2013, *supra* note 15, at 392 ("Preconceived biases and newly conceived stereotypes appear to have infected public thinking and government policymaking post-9/11.").

[226] *See* Davies, *supra* note 198, at 52.

[227] *Id.* at 78-79.

[228] *See* Jerry Kang, *Thinking Through the Internment: 12/7 and 9/11*, 9 ASIAN L.J. 195, 197 (2002) (asserting an important lesson of the internment "is that wartime coupled with racism and intolerance creates particular types of mistakes."); Mark S. Kende, *Justice Clarence Thomas's Korematsu Problem*, 30 HARV. J. RACIAL & ETHNIC JUST. 293, 295 (2014) (stating "[t]he only difference between these West Coast Americans from Americans with German or Italian backgrounds, was their Asian race. The United States also had a history of

VI. CONCLUSION

Based on the NDAA's current language, the definitions can be contracted or expanded when necessary. Contrary to many assurances, the government can use the NDAA to indefinitely detain any individual or groups that it claims to be involved in, or are connected to terrorist activities against the United States. Hopefully, in time, the impact and breadth of the NDAA will become more clear, as future administrations interpret the Act, and as the social and political climate changes.[229] Even though President Obama has stated that he will not indefinitely detain American citizens, a future President might decide otherwise. Further, as shown in this Article, more and better Congressional guidance is also needed to establish guidelines on the President's authority to detain American citizens. Until that happens, the question of whom the U.S. military can hold and for how long continues to be left for courts to decide, or not decide.

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discriminating against Asians, and the military orders reflected these stereotypes given their over and under-inclusiveness.").

[229] *See* Sarah Erickson-Muschko, *Beyond Individual Status: The Clear Statement Rule and the Scope of the AUMF Detention Authority in the United States*, 101 GEO. L.J. 1399, 1421 (2013) (asserting that "existing law or authorities" is both ambiguous and troubling).