[2013-2014 Supplement pp. 160-166. Replace *Hedges v. Obama* with the following decision:]

Hedges v. Obama

United States Court of Appeals, Second Circuit, July 17, 2013
2013 WL 3717774

[One of the most difficult questions raised by Section 1021 of the NDAA for Fiscal Year 2012 (*see 2013-2014 Supplement* pp. 154-155) is its relationship with the 2001 Authorization for Use of Military Force (AUMF). Does the NDAA *expand* the scope of the government's existing detention authority? Does it merely *codify* the understanding of the AUMF embraced by the Obama administration and endorsed by the D.C. Circuit in the Guantánamo litigation prior to the NDAA's passage? Or something else? And do the answers to these questions depend upon the citizenship of the detainee and/or whether he is captured within or without the territorial United States?

Because of the D.C. Circuit's Guantánamo jurisprudence (*see* NSL pp. 876-887, CTL pp. 490-501), these questions have not arisen (and likely will not arise) in litigation concerning prisoners held at Guantánamo. Instead, shortly after the NDAA was signed into law, a group of writers, journalists, and activists — whose work routinely brings them into contact with persons engaged in conduct the government regards as "material support" for terrorist organizations under 18 U.S.C. §2339B — brought suit seeking to enjoin the enforcement of §1021(b). The plaintiffs included both U.S. citizens and non-citizens.

The lead plaintiff was described by the lower court in part as follows:

> Christopher Hedges has been a foreign correspondent and journalist for more than 20 years. During that time, he has published numerous articles and books on topics such as al-Qaeda, Mohammad Atta, and the Paris bombing plot; he is a Pulitzer Prize winner. . . .
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> . . . His work has involved interviewing al-Qaeda members who were later detained. He has reported on 17 groups contained on a list of known terrorist organizations prepared by the U.S. Department of State. . . .
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> Hedges's work has involved investigating, associating with and reporting on al-Qaeda. . . .
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> Hedges has recently spoken at events in Belgium and France, and could encounter people associated with groups that are "hostile to the U.S. government." *Id.* at 174. . . .
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> Hedges testified that his oral and written speech as well as associational activities have been chilled by §1021: he does not understand what conduct is covered by §1021(b)(2), but does understand that the penalty of running afoul of it could be indefinite military detention. He anticipated having to change his associational activities at speeches he was giving as a result of §1021. Hedges testified that prior to the passage of §1021, he never feared his activities could subject him to indefinite military detention by the United States. [*Hedges v. Obama*, 890 F. Supp. 2d 424, 432-433 (S.D.N.Y. 2012).]

Plaintiffs argued that the statute authorized military detention on the basis of activities protected by the First and Fifth Amendments. The district court agreed and granted the injunction. Specifically, the court held that "[m]ilitary detention based on allegations of 'substantially supporting' or 'directly supporting' the Taliban, al-Qaeda or associated forces, is not encompassed within the AUMF." *Id*. at 472. The court then ruled that because such amorphous detention power in the NDAA might subject individuals to detention based upon constitutionally protected speech, and because of vagueness of terminology in the statute, it violated the First and Fifth Amendments. The government immediately obtained a stay pending appeal. In the decision that follows, the Second Circuit reversed — albeit not on the merits.]

LEWIS A. KAPLAN, District Judge [sitting by designation]: . . . The government contends that Section 1021 simply reaffirms authority that the government already had under the AUMF, suggesting at times that the statute does next to nothing at all. Plaintiffs take a different view. . . . They contend that Section 1021 is a dramatic expansion of the President's military detention authority, supposedly authorizing the military, for the first time, to detain American citizens on American soil. As one group of amici has noted, "[r]arely has a short statute been subject to more radically different interpretations than Section 1021." . . .

We conclude that plaintiffs lack standing to seek preenforcement review of Section 1021 and [we] vacate the permanent injunction. The American citizen plaintiffs lack standing because Section 1021 says nothing at all about the President's authority to detain American citizens. And while Section 1021 does have a real bearing on those who are neither citizens nor lawful resident aliens and who are apprehended abroad, the non-citizen plaintiffs also have failed to establish standing because they have not shown a sufficient threat that the government will detain them under Section 1021. Accordingly, we do not address the merits of plaintiffs' constitutional claims. . . .

II. Discussion . . .

B. The Proper Construction of Section 1021 . . .

The AUMF authorized 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 that occurred on September 11, 2001, or harbored such organizations or persons." Section 1021(a) "affirms" that the AUMF authority includes the detention of a "covered person[ ]," which under Section 1021(b) means (1) a "person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks" or (2) a "person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces."

At first blush, Section 1021 may seem curious, if not contradictory. While Section 1021(b)(1) mimics language in the AUMF, Section 1021(b)(2) adds language absent from the AUMF. Yet Section 1021(a) states that it only "affirms" authority included under the AUMF, and Section 1021(d) indicates that Section 1021 is not "intended to limit or expand the authority of the President or the scope of the [AUMF]."

Fortunately, this apparent contradiction — that Section 1021 merely affirms AUMF authority even while it adds language not used in the AUMF — is readily resolved. It is true that the language regarding persons who "planned, authorized, committed, or aided" the 9/11 attacks (or harbored those who did) is identical in the AUMF and Section 1021(b)(1). The AUMF, however, does not merely define persons who may be detained, as does Section 1021(b). Instead, it provides the President authority to use "force" against the "nations, organizations, or persons" responsible for 9/11. Section 1021(b)(1) (read with Section 1021(a)) affirms that the AUMF authority to use force against the persons responsible for 9/11 includes a power to detain such persons. But it does not speak to what additional detention authority, if any, is included in the President's separate AUMF authority to use force against the organizations responsible for 9/11.

This is where Section 1021(b)(2), a provision concerned with the organizations responsible for 9/11 — al-Qaeda and the Taliban — plays a role. Section 1021(b)(2) naturally is understood to affirm that the general AUMF authority to use force against these organizations includes the more

specific authority to detain those who were part of, or those who substantially supported, these organizations or associated forces. Because one obviously cannot "detain" an organization, one must explain how the authority to use force against an organization translates into detention authority. Hence, it is not surprising that Section 1021(b)(2) contains language that does not appear in the AUMF, notwithstanding Section 1021(d). Plaintiffs create a false dilemma when they suggest that either Section 1021 expands the AUMF detention authority or it serves no purpose.

Indeed, there are perfectly sensible and legitimate reasons for Congress to have affirmed the nature of AUMF authority in this way. To the extent that reasonable minds might have differed — and in fact very much did differ — over whether the administration could detain those who were part of or substantially supported al-Qaeda, the Taliban, and associated forces under the AUMF authority to use force against the "organizations" responsible for 9/11, Section 1021(b)(2) eliminates any confusion on that particular point. At the same time, Section 1021(d) ensures that Congress' clarification may not properly be read to suggest that the President did not have this authority previously — a suggestion that might have called into question prior detentions. This does not necessarily make the section a "'legislative attempt at an ex post facto "fix" . . . to try to ratify past detentions which may have occurred under an overly-broad interpretation of the AUMF,' " as plaintiffs contend. Rather, it is simply the 112th Congress' express resolution of a previously debated question about the scope of AUMF authority.

It remains to consider what effect Section 1021(e) has on this understanding. That provision states 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." Although this provision may appear superficially similar to Section 1021(d), nuances in the text and the legislative history make clear that Section 1021(e) actually is a significantly different provision.

As discussed above, in 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 — that is, it indicated that the specific power to detain those who were part of or who substantially supported the enumerated forces had been implicit in the more generally phrased AUMF. By contrast, in saying that Section 1021 shall not be construed to affect "existing law or authorities" relating to citizens, lawful resident aliens, or any other persons captured or arrested in the United States, Section 1021(e) expressly disclaims any statement about existing authority. Rather, it states only a limitation about how Section 1021 may be construed to affect that existing authority, whatever that existing authority may be. . . .

We thus conclude, consistent with the text and buttressed in part by the legislative history, that Section 1021 means this: With respect to individuals who are not citizens, are not lawful resident aliens, and are not captured or arrested within the United States, the President's AUMF authority includes the authority to detain those responsible for 9/11 as well as those who were 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 — a detention authority that Section 1021 concludes was granted by the original AUMF. But with respect to citizens, lawful resident aliens, or individuals captured or arrested in the United States, Section 1021 simply says nothing at all. . . .

C. American Citizen Plaintiffs

With this understanding of Section 1021, we may dispose of the claims of the citizen plaintiffs . . . . As discussed above, Section 1021 says nothing at all about the authority of the government to detain citizens. There simply is no threat whatsoever that they could be detained pursuant to that section.

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* [*v. Rumsfeld*, 542 U.S. 507 (2004), *see* NSL p. 831; CTL p. 445] 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 [citizens] may fear would be redressable by the relief they seek, an injunction of Section 1021. . . .

D. Non-citizen Plaintiffs

The claims of [the non-citizen plantiffs] stand differently. 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 . . . [i]t 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. Where a statute codifies an interpretation of an earlier law that is subject to reasonable dispute, the interpretive statute itself may affect the rights of persons under the earlier law.

As the standing inquiry as to these [non-citizen] plaintiffs is more involved, we discuss the . . . applicable law in detail. . . .

2. Fear-based Standing Law

We have no occasion to disturb the factual findings of the district court, which are well-supported by the record, or to question the truth of the factual testimony of the plaintiffs, which the district court found credible. Rather, we are faced only with a question of law: whether the non-citizen plaintiffs' fears of enforcement, as well as any present costs they have incurred as a result of those fears, establish their standing to bring this challenge.

. . . [T]he Supreme Court has recognized that such fears may support standing when the threat creating the fear is sufficiently imminent. The Supreme Court's jurisprudence regarding how imminent a threat must be in order to support standing, however, has been less than clear. [Here the court discusses the Supreme Court's decision in *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (20013), excerpted at *2013-2014 Supplement* p. 7, and other decisions.] . . .

3. Coverage Under Section 1021(b)(2)

. . . Plaintiffs never articulate a precise theory on which they fear detention under Section 1021(b)(2) — that is, in what sense the government may conclude that they were 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." The strongest argument would seem to be a contention that the work of [the non-citizen plaintiffs] substantially, if indirectly, supports al-Qaeda and the Taliban as the term "support" is understood colloquially. The record demonstrates a number of ways in which the government has concluded, or would have a basis to conclude, that WikiLeaks

has provided some support to al-Qaeda and the Taliban. . . . One perhaps might fear that [the non-citizen plaintiffs'] efforts on behalf of WikiLeaks could be construed as making them indirect supporters of al-Qaeda and the Taliban as well.

The government rejoins that the term "substantial support" cannot be construed so in this particular context. Rather, it contends that the term must be understood — and limited — by reference to who would be detainable in analogous circumstances under the laws of war. It points to (1) the *Hamdi* plurality's limitation of the duration of the detention authority it recognized based on the laws of war, (2) the March 2009 Memo's repeated invocation of law-of-war limiting principles[1] and the legislative history suggesting that Section 1021 was meant to codify the interpretation that the Memo set forth, (3) Section 1021(d), to the extent that *Hamdi* and the administration suggested that the laws of war inform AUMF authority, as bearing on how broadly "substantial support" may be construed, and (4) the references to "law of war" in Section 1021 itself, albeit not in Section 1021(b)(2). The government then contends that individuals like [the non-citizen plaintiffs] are civilians who are not detainable under these law-of-war principles and so cannot reasonably fear detention under Section 1021.

In these circumstances, we are faced with a somewhat peculiar situation. The government has invited us 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.

4. Threat of Enforcement

We next consider whether there is a sufficient threat of enforcement even given this assumption. . . . As noted above, however, neither this Court nor the Supreme Court has required much to establish this final step in challenges to ordinary criminal or civil punitive statutes. Rather, we have presumed that the government will enforce the law.

The question is the extent to which such a presumption is applicable here. The district court concluded that it was, reasoning that Section 1021 "is equivalent to a criminal statute" because "the possibility of being placed in indefinite military detention is the equivalent of a criminal penalty." Certainly we agree that military detention until the termination of hostilities would be severe and that the prospect of such detention can be "as inhibiting of speech as can trepidation in the face of threatened criminal prosecution." But that is a separate question from whether it is appropriate to presume that Section 1021 will be enforced as would any criminal or civil punitive statute.

On this point, there are several important differences between Section 1021 and a typical statute

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[1. The reference here is to Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-442 (TFH) (D.D.C. Mar 13, 2009), in which the government "refin[ed]" its position regarding its detention authority for persons held at Guantánamo Bay.]

imposing criminal or civil penalties. Section 1021 is not a law enforcement statute, but an affirmation of the President's military authority.[172] As discussed above, it applies only to individuals who are not citizens, are not lawful resident aliens, and are apprehended outside the United States. It thus speaks entirely to the authority of the President in the context of military force, national security, and foreign affairs, areas in which the President generally enjoys "unique responsibility"[173] and "broad discretion."[174] The Supreme Court has recognized that "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take" in the fields of national security and foreign affairs.[175] As a result, "Congress — in giving the Executive authority over matters of foreign affairs — must of necessity paint with a brush broader than that it customarily wields in domestic areas."[176]

Moreover, Section 1021 "at most *authorizes* — but does not *mandate* or *direct*" — the detention that plaintiffs fear. To be sure, the executive branch enjoys prosecutorial discretion with regard to traditional punitive statutes. Congress generally does not mandate or direct criminal prosecution or civil enforcement. But we can distinguish between Congress, on the one hand, proscribing a certain act and then leaving it to the President to enforce the law under his constitutional duty to "take Care that the Laws be faithfully executed" and Congress, on the other hand, authorizing the President to use a certain kind of military force against non-citizens abroad.

Consequently, there is a world of difference between assuming that a state executive will enforce a statute imposing civil penalties for certain campaign finance violations — or even that the executive branch will enforce a federal criminal statute barring provision of material support to terrorists — and assuming that the President will detain any non-citizen abroad that Congress authorizes him to detain under the AUMF. *Clapper* further supports this understanding, as it made clear that plaintiffs cannot establish standing on the basis of speculation about how the government may choose to utilize its authority to engage in foreign surveillance. In short, while it generally may be appropriate to presume for standing purposes that the government will enforce the law against a plaintiff covered by a traditional punitive statute, such a presumption carries less force with regard to a statute concerned entirely with the President's authority to use military force against non-citizens abroad. Thus, in the circumstances of this case, [the non-citizen plaintiffs] must show more than that the statute covers their conduct to establish preenforcement standing.

We need not quantify precisely what more is required because [the non-citizen plaintiffs] have shown nothing further here. Indeed, they have not established a basis for concluding that enforcement against them is even remotely likely. We reach this conclusion independent of the government's litigation position on appeal that plaintiffs are "in no danger whatsoever" of being detained on the basis of their stated activities.

First, even assuming that [the non-citizen plaintiffs] fall within the ambit of authority provided

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172. The *Hamdi* plurality observed that military detention "'is neither a punishment nor an act of vengeance, but merely a temporary detention which is devoid of all penal character. A prisoner of war is no convict; his imprisonment is a simple war measure.'" 542 U.S. at 518.

173. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 415 (2003) (internal quotation marks omitted).

174. Olegario v. United States, 629 F.2d 204, 233 (2d Cir. 1980).

175. Dames & Moore v. Regan, 453 U.S. 654, 678 (1981).

176. Haig v. Agee, 453 U.S. 280, 292 (1981) (emphasis and internal quotation marks omitted).

by the statute, this is certainly not a case in which "the law is aimed directly at plaintiffs."[186] They point to nothing in the record, or in the text or legislative history of Section 1021, that suggests that the statute was passed to facilitate the military detention of individuals specifically like them.

Second, while we do not hold that a specific threat of enforcement is necessary, neither [of the non-citizen plaintiffs] has adduced any evidence that the government intends or has threatened to place them in military detention.

Third, they have not put forth evidence that individuals even remotely similarly situated have been subjected to military detention. The government argues that this latter failure is particularly meaningful because, it contends, Section 1021 codified an interpretation "that the President had long articulated and exercised and that the Judiciary had repeatedly recognized."

To be sure, the government overstates its case on this point. As the history of litigation regarding the scope of AUMF detention authority shows, numerous courts criticized or rejected the government's reliance on substantial support in the March 2009 Memo. Prior to that, a divided Fourth Circuit set forth a number of different interpretations of executive detention authority, none of which resembled the government's position. While the D.C. Circuit's decision in *Al-Bihani* [*v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), *see* NSL p. 877; CTL p. 491] is supportive of the government's standard, it focused primarily on a "purposeful and material support" standard, the relationship of which to "substantial support" is not clear. Simply put, to the extent that Congress resolved a previously debated question about the scope of AUMF detention authority in passing Section 1021, it was not obvious that the answer it provided is the one that ultimately would have prevailed had Congress not passed anything at all. In light of this uncertainty, at least in principle Section 1021's codification of the "substantial support" standard could place the administration on stronger footing to detain individuals under such a theory than it might have been willing to risk previously.

Nevertheless, plaintiffs bear the burden of establishing standing. Whether Section 1021 can or will alter executive practice, particularly with regard to individuals like them, is purely a matter of speculation. The fact remains that — despite the executive at least nominally asserting the authority to detain on the basis of "support" since the 2004 CSRT enemy combatant definition,[2] and on the basis of "substantial support" since the March 2009 Memo, and despite the D.C. Circuit recognizing the lawfulness of detention at least on the basis of "purposeful and material support" since 2010 — plaintiffs have provided no basis for believing that the government will place [the non-citizen plaintiffs] in military detention for their supposed substantial support. In all the circumstances, plaintiffs have not shown a sufficient threat of enforcement to establish standing. Moreover, they cannot "manufacture standing" based on any present injuries incurred due to their expressed fears.

Nothing in this decision should be confused as deference to the political branches because the case involves national security and foreign affairs. We adhere to the principle that courts have a vigorous and meaningful role to play in assessing the propriety of military detention, as the Supreme Court has made clear in cases from *Hamdi* to *Boumediene* [*v. Bush*, 553 U.S. 723 (2008), *see* NSL p. 787; CTL p. 401]. We hold only that a court first must satisfy itself that the case comports with the "irreducible constitutional minimum" of Article III standing. This inquiry is rooted in

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186. [Virginia v. Am. Booksellers Ass'n, Inc., 484 U.S. 383 (1988),] at 392.

[2. Memorandum from Deputy Secretary of Defense Paul Wolfowitz re: *Order Establishing Combatant Status Review Tribunal* §a (July 7, 2004), *available at* http://www.defense.gov/news/Jul2004/d20040707review.pdf.]

fundamental separation-of-powers principles and must be "especially rigorous" where, as here, the merits of the dispute require the court to "decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional."[197] Section 1021 is concerned entirely with the military authority of the President with respect to non-citizens abroad — a context in which Congress provides the President broad authority to exercise with considerable discretion. Particularly after *Clapper*, plaintiffs must show more than that they fall within the ambit of this authority to establish the sufficient threat of enforcement necessary for Article III standing. They have failed to do so here. . . .

III. Conclusion

In sum, [the citizen plaintiffs] do not have Article III standing to challenge the statute because Section 1021 simply says nothing about the government's authority to detain citizens. While Section 1021 does have meaningful effect regarding the authority to detain individuals who are not citizens or lawful resident aliens and are apprehended abroad, [the non-citizen plaintiffs] have not established standing on this record. We VACATE the permanent injunction and remand for further proceedings consistent with this opinion.

NOTES AND QUESTIONS

1. *The Government's Rejected Invitation: Substantial Support and the Laws of War*. The heart of the issue in *Hedges* is the language of §1021(b)(2) that authorizes detention of individuals who "substantially support" al Qaeda or its affiliates in hostilities against the United States. What does "substantial[]" support *mean*? In enjoining the enforcement of §1021(b)(2), the district court held that the phrase was unconstitutionally vague because a reasonable person would not know what activity would actually subject them to detention.

On appeal, the government argued that one way to understand the term is by reference to the laws of war: the NDAA clearly did not authorize detention of civilians (such as the *Hedges* plaintiffs). So understood, *Hedges* would be an easy case, as the court could have held that, since the NDAA expressly incorporated the laws of war, individuals who were not belligerents under the laws of war clearly lack standing to challenge it. *See also* Marty Lederman & Steve Vladeck, *The NDAA: The Good, the Bad, and the Laws of War — Part I*, Lawfare, Dec. 31, 2011, http://www.lawfareblog.com/2011/12/the-ndaa-the-good-the-bad-and-the-laws-of-war-part-i/; Marty Lederman & Steve Vladeck, *The NDAA: The Good, the Bad, and the Laws of War — Part II*, Lawfare, Dec. 31, 2011, http://www.lawfareblog.com/2011/12/the-ndaa-the-good-the-bad-and-the-laws-of-war-part-ii/.

Why did the Second Circuit reject the government's invitation? Isn't the actual holding in *Hedges* — that, for the non-citizen plaintiffs, the threat of enforcement was insufficient to confer standing — itself open to substantial questioning? By that logic, the government could arguably control who has standing to challenge its detention authority merely by disclaiming a general desire to detain certain groups of individuals. Why do you suppose the court balked?

2. *The NDAA vs. the AUMF*. By far, the most significant passage of the Second Circuit's opinion comes where Judge Kaplan summarizes the relationship between the NDAA and the

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197. *Clapper*, 133 S. Ct. at 1147 (internal quotation marks omitted).

AUMF:

> With respect to individuals who are not citizens, are not lawful resident aliens, and are not captured or arrested within the United States, the President's AUMF authority includes the authority to detain those responsible for 9/11 as well as those who were 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 — a detention authority that Section 1021 concludes was granted by the original AUMF. But with respect to citizens, lawful resident aliens, or individuals captured or arrested in the United States, Section 1021 simply says nothing at all.

In one sense, this language merely restates the plain language of the NDAA. But is there more going on here? Why does the relationship between the AUMF and NDAA actually *matter*? Put another way, can you describe an individual who was not subject to military detention on the day before the NDAA was enacted, but who is subject to military detention now? If not, what's all the fuss about?

3. *U.S. Citizens and the Feinstein Amendment.* To explain why the citizen plaintiffs in *Hedges* lack standing, the Second Circuit held that §1021(e) — the "Feinstein Amendment" — means what it says: that, "with respect to citizens, lawful resident aliens, or individuals captured or arrested in the United States, Section 1021 simply says nothing at all." Does that mean that citizens, "lawful resident aliens" (a term nowhere defined in U.S. law), or anyone else "captured or arrested in the United States" *cannot* be subjected to military detention under the AUMF? Or does it merely codify the pre-NDAA status quo? If the latter, what *was* the pre-NDAA status quo in these cases? *See* Steve Vladeck, *The Problematic NDAA: On Clear Statements and Non-Battlefield Detention*, Lawfare, Dec. 13, 2011, http://www.lawfareblog.com/2011/12/the-problematic-ndaa-on-clear-statements-and-non-battlefield-detention/. Is it clear that the government may *not* detain someone covered by the Feinstein Amendment on the ground that they "substantially supported" al Qaeda or its affiliates in its hostilities against the United States? If not, why *didn't* the U.S. citizen plaintiffs in *Hedges* have standing? Was their challenge too narrow?

4. *Did Hedges Get Clapper'd?* In between the district court's decision in *Hedges* and the Second Circuit opinion excerpted above, the Supreme Court handed down its 5-4 decision in *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013) (*2013–2014 Supplement* p. 7), holding that plaintiffs could not challenge secret governmental surveillance programs without demonstrating that actual injury to them (through interception of their communications) was "certainly impending." Might *Hedges* have come out differently before *Clapper*? Note the very different issues complicating the standing analysis in the two cases: In *Clapper*, the problem arises from the secret nature of the government's surveillance programs, which will make it difficult for most plaintiffs to prove that they are actually injured by the challenged government conduct. In *Hedges*, by contrast, the problem arises from the lack of clarity surrounding the permissible scope of the government's detention power. In the end, does that difference make the case for standing stronger in *Hedges*? Weaker? Or is the problem in *Hedges* not *standing* so much as it is *ripeness* (*see* NSL p. 140)?