THE SECOND ANNUAL SOLF-WARREN LECTURE IN INTERNATIONAL AND OPERATIONAL LAW[†]

[†] This lecture is an edited transcript of a lecture delivered on 1 April 2009 by Professor Ryan Goodman to members of the staff and faculty, distinguished guests, and officers attending the 57th Graduate Course at The Judge Advocate General's Legal Center and School, Charlottesville, Virginia. Portions of the lecture were drawn from Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 American Journal of International Law 48 (2009), and appreciation is extended to the American Journal of International Law for permission to reprint previously published material.

The Waldemar A. Solf Chair of International Law was established at The Judge Advocate General's School, U.S. Army (TJAGSA) on 8 October 1982 in honor of Colonel (COL) Waldemar A. Solf. In August 2007, the Chair was renamed and established as the Waldemar A. Solf and Marc L. Warren Chair in International and Operational Law.

Colonel Waldemar Solf (1913–1987) was commissioned in the Field Artillery in 1941. He became a member of the Judge Advocate General's Corps in 1946. He served in increasingly important positions until his retirement twenty-two years later.

Colonel Solf's career highlights include assignments as the Senior Military Judge in Korea and at installations in the United States; Staff Judge Advocate (SJA) of both the Eighth U.S. Army/U.S. Forces Korea/United Nations Command and the U.S. Strategic Command; Chief Judicial Officer, U.S. Army Judiciary; and Chief, Military Justice Division, Office of The Judge Advocate General (OTJAG).

After two years lecturing with American University, COL Solf rejoined the Corps in 1970 as a civilian employee. Over the next ten years, he served as Chief of the International Law Team in the International Affairs Division, OTJAG, and later as chief of that division. During this period, he served as a U.S. delegate to the International Committee of the Red Cross (ICRC) Conference of Government Experts on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. He also served as Chairman of the U.S. delegation to the ICRC Meeting of Experts on Signaling and Identification Systems for Medical Transports by Land and Sea.

He was a representative of the United States to all four of the diplomatic conferences that prepared the 1977 Protocols Additional to the 1949 Geneva Conventions. After his successful efforts in completing the Protocol negotiations, he returned to Washington and was appointed the Special Assistant to The Judge Advocate General for Law of War Matters. Having been instrumental in promoting law of war programs throughout the Department of Defense, COL Solf again retired in August 1979.

In addition to teaching at American University, COL Solf wrote numerous scholarly articles. He also served as a director of several international law societies, and was active in the International Law Section of the American Bar Association and the Federal Bar Association.

Colonel (Ret.) Marc Warren served in the U.S. Army Judge Advocate General's Corps as the Special Assistant to The Judge Advocate General and as the Staff Judge Advocate (senior attorney) for Combined Joint Task Force 7/Multi-National Forces in Iraq, V Corps in Iraq and Germany, and the 101st Airborne Division (Air Assault). He was the Legal Advisor for the world-wide activities of the Joint Special Operations Command, Regimental Judge Advocate for the 11th Armored Cavalry Regiment, and served in numerous other assignments as a Judge Advocate in the United States, Germany, Grenada, Bosnia, Kuwait, and Iraq. His awards and decorations include the Distinguished Service Medal, Defense Superior Service Medal, the Legion of Merit, and

PROFESSOR RYAN GOODMAN*

Thank you very much for that introduction. I want to begin by saying how special an honor and pleasure it is for me to be here with you and engage you on this topic and discussion. I've thought very specifically about the ways in which it's an honor and pleasure for me. First, I regard you as an exceptional audience. I'm deeply respectful and grateful for your service to the country, and I'm also keenly aware that you have been thinking about these topics and will be thinking about these topics a lot, probably much more than me and especially collectively by magnitudes more than me. So I'm very much looking forward to our conversation after the presentation. It's also an honor and a privilege for me to be here given that this distinguished lecture series is in the name of Colonels Solf and Warren, and it's also humbling given the extraordinary individuals who have been invited to speak on prior occasions of this

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the Bronze Star Medal. He has earned the master parachutist, pathfinder, and air assault badges.

Colonel Warren was appointed as the FAA's Deputy Chief Counsel for Operations in November 2007. He assists the Chief Counsel in overseeing all aspects of the FAA's legal activities with special focus on nationwide enforcement, airports and environmental, personnel and labor law, and Regional and Center Counsel office activities.

Colonel Warren received the B.A. and J.D. degrees, with honors, from the University of Florida; an LL.M. degree from the Judge Advocate General's School; and a Master of Strategic Studies degree from the U.S. Army War College. He is a member of the Florida Bar.

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Professor Goodman's publications have appeared in the American Journal of International Law, the Duke Law Journal, the Harvard Law Review, the Stanford Law Review, and the Yale Law Journal. His publications also include the following books: *International Human Rights in Context* (Oxford University Press, 3d ed., 2007) (with Henry Steiner & Philip Alston); *Socializing States: Promoting Human Rights through International Law* (Oxford University Press, forthcoming) (with Derek Jinks); *International Humanitarian Law* (Oxford University Press, forthcoming) (with Derek Jinks & Michael Schmitt); and *Understanding Social Action, Promoting Human Rights* (Oxford University Press, forthcoming) (with Derek Jinks & Andrew K. Woods).

Professor Goodman is a member of the Board of Editors of the *American Journal of International Law*. His research interests include public international law, international human rights law, and international relations.

distinguished lecture series. I also want to express my gratitude for the hospitality that's been shown to me by the faculty, staff, and students when I had to postpone this lecture due to an unforeseen family illness. When I received the re-invitation to come, at a later occasion, there was a paranoid part of me that thought it might be a joke given that we had scheduled this for April Fool's Day. So it's a relief to actually see that the auditorium has people in it besides myself.

The discussion that I want to engage in with you today is the question of the detention of civilians in the armed conflict with al Qaeda, or more particularly, the question concerning *which* civilians can be detained in the armed conflict with al Qaeda. It's obviously an extraordinarily timely topic, more timely than I had even imagined when the date for this event was scheduled. What's taken place, just to make sure that we're all on the same page, is that the Supreme Court has expressed its interest in deciding the matter, if it remains controverted, by having granted cert in the *Al-Marri*[1] case. The Court subsequently dismissed the case as moot, but the Justices are presumably keeping a watchful eye on the developments that take place. Also since January there have been congressional bills introduced that would redefine the application of detention authority with respect to enemy combatants whether or not that term is used, and the administration is now engaged in a multiagency review of the question. Just a couple of weeks ago, the Department of Justice submitted a memo in the *In re* Guantanamo Detention Litigation staking out its preliminary position on this topic. I will talk to you about my paper on which this presentation is based,[2] and I will also incorporate these more recent events.

I have organized the presentation in three parts. The first part outlines the long-standing law of armed conflict framework. In other words, I want to examine the regime that constitutes the legal background against which post-9/11 policies, practices, and representations were made by the Government, by civil society actors, and others. The second part of the presentation describes and identifies misunderstandings or misconceptions of that legal framework that have occurred over the last eight years, on the part of the Executive Branch, members of Congress, some federal judges, and litigators. So in some ways no group escapes that kind of a challenge or critique. The third

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[1] Al-Marri v. Pucciarelli, 534 F.3d 213 *passim* (4th Cir. 2008) (en banc).
[2] Ryan Goodman, *The Detention of Civilians in Armed Conflict* 103 AM. J. INT'L L. 48 (2009).

part of the lecture describes the consequences or implications of those misunderstandings.

First, let's look at the structure of the existing framework that long predated 9/11. Before I turn to the table, I should say a few words about the material field of application with respect to noninternational armed conflicts. I accept and take as granted that we are currently in an armed conflict with al Qaeda which is governed at least by Common Article 3;[3] all three branches of the U.S. Government have agreed to that proposition, and we can open it up to discussion if you'd like to, but I'm taking it as an accepted premise for the purpose of this initial presentation.

I should also note that I naturally understand that status-based categories, like prisoners of war, do not apply in noninternational armed conflicts, and therefore I'll generally refer to classes of actions and classes of individuals, such as civilians or direct participation in armed conflict, which have referents in conventional sources like Common Article 3[4] and Additional Protocol II[5] to the Geneva Conventions, but, as you can tell from the table, I will refer to part of the legal regime that applies to international armed conflict as well. And I want to give you three reasons why I think it's relevant that we consider the legal regime applicable in international armed conflict before, then transposing it or applying it to the noninternational armed conflict with al Qaeda. This is especially important because the Department of Justice memo that was submitted in recent litigation in fact states that such an analytic move is a predicate for the position of the administration.

Three reasons justify that application. The first is a reactive reason; simply put, many commentators and practitioners have applied the law of international armed conflict to the conflict with al Qaeda by analogy. It's a prevalent practice that's used, for example, in debates about whether or not we can hold fighters until the cessation of hostilities and with or without access to an attorney. The analog or the referent in those discussions is often international armed conflict. And if that's a prevalent mode of discourse or argument, then we at least need to

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[3] Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III].
[4] *Id.*
[5] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

understand better the referent, which is the law of international armed conflict, to evaluate those kinds of claims.

A second reason is an affirmative one. On my view, it's valid to use the law of international armed conflict as an analogy. In fact, if we have to think of an analogy, it's the closest fit or closest approximation—especially the Fourth Geneva Convention[6]—for questions of who may be detained and what types of activities on the part of civilians are subject to detention. That is, the rules contained in the Civilians Convention, are the closest analog that we have and therefore the best reference point for trying to approximate what the law of armed conflict should look like or will look like when it applies in a noninternational scenario like the conflict with al Qaeda.

The third reason is the strongest, and it's an affirmative argument not just by way of analogy. The argument here is that the law in international armed conflict establishes an outer boundary of permissive action. The idea is fairly simple, which is that the law of armed conflict uniformly involves more exacting, more restrictive obligations on parties in international armed conflict than in noninternational armed conflict. We could even state this point as a maxim: if states have authority to engage in particular practices in an international armed conflict, they *a fortiori* possess the authority to undertake the same practices in noninternational armed conflict, or simply put, whatever is permitted in international armed conflict is permitted in noninternational armed conflict. Therefore, if the law of armed conflict permits a state to detain civilians in international armed conflict, the law of armed conflict surely permits states to detain civilians in a noninternational armed conflict. The same logic does not apply to prohibitions or proscriptive rules: it does not follow that if the law of armed conflict forbids states from engaging in a practice in international armed conflict that the law would also forbid states from engaging in that practice in noninternational armed conflict. Nevertheless, I think we'll see in our discussion that the permissive rules are sufficient to answer many of our questions, and the remaining open questions concerning what else is forbidden will be answered by other ordinary sources of international legal authority that have addressed the question whether a party can preventively detain civilians who pose no security threat. So those remaining questions, in the end, will be fairly easy to answer.

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[6] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

The table that I've created tries to make sense of the existing legal framework.

Actions Permitted by the Law of Armed Conflict

		COERCIVE MEASURES		
		I. Targeting	**II. Military Trial**	**III. Detention**
SUBJECTS	A. Members of regular armed forces and irregular forces that meet Geneva Convention III or Additional Protocol I criteria	**(1) YES**	**(2) YES**	**(3) YES**
	B. **DPH**: Direct participants in hostilities ("unlawful combatants")	**(4) YES**	**(5) YES**	**(6) YES**
	C. **IPH**: Indirect participants in hostilities (security threats)	**(7) NO**	**(8) NO?**	**(9) YES**
	D. **NPH**: Nonparticipants in hostilities ("innocent civilians")	**(10) NO**	**(11) NO?**	**(12) NO**

The substantive rules reflected in the table are meant to reflect the structure of the law of armed conflict with respect to the detention of civilians, in particular, as well as interactions or relationships with other elements of the law of armed conflict regime. In that respect it's useful

to distinguish three types of coercive measures. The table thus distinguishes targeting, military trial, and detention across four different groups of individuals. Group A includes members of regular armed forces and irregular forces that meet either Geneva Convention III[7] or Additional Protocol I[8] criteria, with the obvious caveat that the U.S. Government has not ratified Protocol I[9] and considers many of its provisions, especially these, not reflective of customary international law. But with that caveat, we can still usefully proceed because the U.S. Government would just place some of those individuals in Group "B"; and as you can tell from the rows for Groups "B" and "A," it actually makes no difference. The Group "B" category includes direct participants in hostilities, otherwise referred to as unlawful combatants with scare quotes, or unprivileged belligerents. These are civilians who directly participate in hostilities without the lawful prerogative to do so. Group "C" is what I'm calling indirect participants in hostilities, otherwise known as imperative security threats, that is, individuals who would be classified under the Fourth Convention as a threat to the state and may be detained as such.[10] And I'll say a lot more, not just a little more, but a lot more about who might fit within that category. The final group of actors is nonparticipants in hostilities, what some authorities refer to as "innocent civilians;" that caption is generally a lay term which nevertheless captures the idea that these individuals have no meaningful relationship to or contribution to the war effort or to hostilities.

The big point of the table is to demonstrate the relationships between the cells, not necessarily the content of the cells. I understand, however, that I can't escape delving into the content, especially because some of the content is controversial. So let me say just a few words about what is contained in direct participation, and cell number four is the flagship in terms of what most of the debate has been about in the last several years with respect to the International Committee of the Red Cross's (ICRC) study on direct participation. That ongoing study focuses primarily on direct participants for the purpose of targeting, not for the other reasons. That said, let me provide a preliminary definition of what we might mean by "direct participation." It is generally defined to have a geographic

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[7] Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III].
[8] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, 37–38 [hereinafter AP I].
[9] *Id.*
[10] GC IV, *supra* note 6, arts. 5, 27, 41–43 & 78.

and temporal proximity to the damage inflicted on the enemy. To take from the ICRC's Commentaries on the Additional Protocols, "direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity takes place," and it entails, "a sufficient causal relationship between the act of participation and its immediate consequences." There are persistent definitional squabbles about the category. Many of those definitional squabbles, however, demonstrate how well-settled a core part of the category actually is. It's always a curiosity to me that the example usually given to show the lines of debate on the definition involves a civilian who drives a truck full of ammunition to the front lines, and the question posed is whether that individual is a direct participant. To me, that demonstrates how much we must know because that scenario is so close to direct participation. The fact that scenario would be controversial demonstrates in a sense how much is noncontroversial. Indeed, important elements are fairly well-settled. Just look to the POW Convention, Article 4(A)(4):[11] persons accompanying the armed forces are clearly not direct participants. They, in fact, don't have the right to participate directly in hostilities; so we do know that a category of actors engaged in logistical support to armed forces, even in the zone of active military operations, fall below the threshold. Persons accompanying armed forces, such as, "supply contractors [and] members of labor units or of services responsible for the welfare of the armed forces," are noncombatants by the strict terms of the treaties. Nils Meltzer has recently written—and this will be important when we evaluate the Department of Justice's memo—in the case of noninternational armed conflicts with irregularly constituted armed groups that "religious leaders . . . financial contributors, informants, collaborators and other service providers without fighting functions [who] may support or belong to an opposition movement or an insurgency as a whole can hardly be regarded as members of its 'armed forces' in the functional sense underlying [the law of armed conflict]." That's fairly controversial in a way. I don't want to represent that statement as though it is black letter law, but it gives you a sense of where some of that debate has transpired without a necessary connection to the armed conflict with al Qaeda.

With regard to targeting, the table demonstrates, for example, the fundamental principle of distinction. The major difference under Column I for targeting is between Groups A and B and Groups C and D,

[11] GC III, *supra* note 7.

so the dividing line between B and C constitutes the distinction between those who directly participate or not. If a civilian directly participates, they lose their immunity from direct attack. In contrast, for detention there's a very different line that is drawn, which will be the most important line for our discussion. The line that's drawn for detention, so Column III, is between C and D. In other words, A, B, and C are all subject to lawful detention, direct participants and indirect participants alike. As a result, I have a burden to carry out by saying a little more about what actors or actions fall under Category D as opposed to Category C for the purpose of detention.

So, who are nonparticipants versus indirect participants in hostilities? A fundamental principle of the law of armed conflict is that it forbids the detention of individuals solely because they are nationals or part of the general population of the enemy power. Their political sympathy or political affiliation is not sufficient to indicate indirect participation in hostilities. Instead, a specific determination must be made that each civilian who is detained poses a threat to the security of the state. So we find in Category C, the security threats to the state, otherwise located in Articles 5, 27, 41 through 43, and 78 of the Civilians Convention.[12] The ICRC Commentary and an excellent article in the *Military Law Review* by Colonel Robert Gehring clearly demonstrate that the category of security detainees is broader than the category of direct participants in hostilities.[13] And also the Third Convention is fairly clear about it. That is, the POW Convention, not just the Civilians Convention, specifically contemplates the detention of individuals who are not direct participants in hostilities. Persons, sometimes referred to as civilians, who accompany the armed forces, may be detained without a finding that the individuals have directly participated in hostilities. The definition of indirect participants in hostilities does not imply a direct causal relationship or geographical proximity between the individual's activity and the damage inflicted on the enemy, which is in contrast to direct participation in hostilities. Indeed, the activity need not occur on a battlefield. For example, the ICRC's Commentary states, "Subversive activity carried on inside the territory of a party to the conflict or actions which are of direct assistance to an enemy power"[14] count as indirect

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[12] GC IV, *supra* note 6.

[13] Captain Robert W. Gehring, *Legal Rules Affecting Military Use of the Seabed*, 54 MIL. L. REV. 168 (1971).

[14] ICRC, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, art. 42, at 258 (Jean S. Pictet gen. ed., 1958).

participation, or as a security threat. Michael Bothe and his colleagues, in a well-regarded treatise on noninternational armed conflict, refer to a category of "civilians who support the armed forces (or armed groups) by supplying labour, transporting supplies, serving as messengers or disseminating propaganda," who are not direct participants according to the treatise, "but they remain amenable to domestic legislation against giving aid and comfort to domestic enemies."[15] Hence many of those functions that are currently carried out, for example, on behalf of the U.S. Government by private military contractors would constitute indirect participation, not direct participation, subject to detention though not subject to lethal force or direct attack.

One important note: I've just defined the category but I haven't defined it specifically within the context of detention. It's important to note that in detention not only do we need to define what individuals or activities fall within that category, but there's a separate element that we might address in our discussion following my remarks, which is that the detention must be absolutely necessary for the security of the state. Thus, there's an independent test that might come into play, depending on what particular issue or coercive measure is under consideration.

A second note, before moving on, is that states are given very wide latitude in defining a threat to their security. The ICRC Commentaries make such an acknowledgement explicit. At the same time, however, Richard Baxter, in a leading article, demonstrated that abuse of such discretion constitutes a war crime,[16] and Additional Protocol I, for example, shows that abuse of such discretion constitutes a grave breach, which places important boundaries on decisions made in the detention context.

The last point to make is that I think everything I've said so far is relatively noncontroversial. It's fairly well-settled and understood. In fact, I'm worried that I'm boring you! What's not well-settled are cells number 8 and 11. So, I should say a few words about them, even though they're not the main focus of my remarks. It's important to understand the entirety of the regime including the legality of military trials. I'm not

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[15] MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, at 672 (1982).

[16] Richard R. Baxter, *The Duty of Obedience to the Belligerent Occupant*, 1950 BRIT. Y.B. INT'L L. 235.

fully certain whether a party to a conflict can conduct a military trial for a civilian who is not a direct participant in hostilities. If we referred to Categories A and B as "combatants," whether lawful combatants or unlawful combatants, and Category C and D, as "civilians" who are not directly participating in hostilities, there's an open question whether the law of armed conflict forbids military trials of those civilians. Many have referred to the Civil War case by the Supreme Court in *Ex parte Milligan* as standing for the proposition, at least read through contemporary eyes, that the law of war precludes military trials for civilians.[17] Gary Solis submitted a declaration in the *Boumediene*[18] case that also contends that a party cannot hold military trials for civilians.[19] It is unclear what the textual source for that proposition might be. The Geneva Conventions are arguably silent on the matter as to whether a military trial can be held for civilians and, in fact, the Fourth Convention in Article 66 does permit some military trials for civilians in an occupied setting.[20] That said, there are now a plethora of sources in the international human rights realm that reach the conclusion that military trials are permitted only when civilian courts are closed or unavailable in circumstances such as occupation or martial law, such that resorting to the military system is essentially "unavoidable."

Against that background legal regime, let's now consider the category mistakes that have violated the existing framework. I want to discuss three different types of category mistakes. As you'll see from the slide presentation, I'll elaborate the content of each of these: first, actor conflation; second, actor disaggregation; and, third, power conflation.[21]

As a caveat, I do agree that it's perfectly reasonable and appropriate to advocate for changes in the law, to adopt a normative position, and to suggest that the framework shouldn't be applicable to the present conflict, but that's a very different kind of an argument than the arguments that I'm going to present on the screen. The arguments I'm going to present are made by commentators and practitioners who are not involved in such normative projects; instead, they are purportedly working with the fixed foundation of existing rules, that is, referring to the existing rules but conflating or disaggregating domains of actors and

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[17] 71 U.S. (4 Wall.) 2 (1866).
[18] Gary D. Solis, Declaration, Boumediene v. Bush, 583 F.Supp.2d 133 (D.D.C. 2008) (Civ. No. 04-1166 (RJL)), *available at* 2008 WL 5260271.
[19] *Id.* para. 6.f.
[20] GC IV, *supra* note 6, art. 66.
[21] *See* Appendix A.

coercive powers without sufficient explanation or recognition of the novelty of that venture.

The first type of category mistake is actor conflation. This category mistake has been made primarily by proponents of current U.S. detention policy. As the previous slide showed, a fundamental category mistake involves grouping different actors under a heading that correctly applies only to some of them. For example, only Groups A and B in the table included combatants. The U.S. Government, however, has officially taken the position that the definition of combatants also includes members of Group C, indirect participants in hostilities. So the position I'm maintaining is a fairly clear one. Lawful combatants and direct participants in hostilities can be called combatants. But individuals who provide logistical support and the like, civilians who accompany the armed forces, are not combatants; they're civilians who are security threats. Now this might be immaterial or semantic at one level because all of those individuals can be detained. At the end of my talk, however, when I discuss the implications, I will explain the significant consequences from reorganizing the categories, especially without admitting or recognizing that one is engaging in such an innovative venture.

The following slide presents, in chronological order, various representations of the law on the part of the U.S. Government and U.S. federal judges.[22] The Department of Defense, in a Fact Sheet issued in February 2004, employed a definition of enemy combatants that is perfectly consistent with the existing standard for direct participation in hostilities. The idea here, as you can see from the slide,[23] is that the individual must be part of or supporting forces hostile to the United States, and that individual must also be engaged in an armed conflict against the United States. That is, individuals themselves must be personally engaged in the armed conflict. It is insufficient, according to that definition, if an individual only supports others who are engaged in the armed conflict, as an indirect participant might do. In short, the Government has to make a finding that is equivalent to or consistent with

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[22] *See* Appendix B.

[23] U.S. Dep't of Def., Fact Sheet: Guantanamo Detainees 5 (Feb. 13, 2004), *available at* www.defenselink.mil/news/Feb2004/d20040220det.pdf ("At the time of capture and based on available information, combatant and field commanders determine whether a captured individual was part of or supporting forces hostile to the United States or coalition partners, and engaged in an armed conflict against the United States. Such persons are enemy combatants.").

the direct participation standard. The U.S. Government, in its brief submitted to the Supreme Court in *Hamdi*,[24] referred to that Fact Sheet, and then the Supreme Court, in a plurality opinion, adopted essentially the same definition with a citation to the Government's brief.[25] In the plurality's construction, a great deal might turn on the word "who." Indeed, within weeks after *Hamdi*, the Combatant Status Review Tribunals order was issued, and the word "who" changed to "that," and under that system, the definition of a combatant is "an individual who was part of or supporting Taliban or al Qaeda forces or associated forces *that* are engaged in hostilities."[26] As a consequence, the Government need not make a finding that the individual directly engaged in fighting; the Government needs to prove only that the individual supported Taliban or al Qaeda forces and those forces directly participated or engaged in hostilities. As the next section of the slide shows, Congress essentially ratified, or endorsed, that position since the Military Commissions Act (MCA)[27] adopts a very similar definitional structure. The MCA also refers to an individual "who has purposefully and materially supported hostilities," which could encompass indirect participants in hostilities.

Finally, let me end with an example of one of the most notorious interpretations of what such standards might encompass. I assume that many of you are familiar with it. In the *In re* Guantanamo Litigation before District Court Judge Joyce Green, the Government attorney answered a hypothetical question in which Judge Green asked whether the CSRT definition of an enemy combatant could apply to "a little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities." The attorney for the Government responded that the unknowing, little old lady in Switzerland would count. Now, I do not want to pin my argument on that extreme claim, but it does show you, at least in some nontrivial sense, how a slippery slope might work.

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[24] Brief for Respondents, at 3, Hamdi v. Rumsfeld, 542 U.S. 507 (4th Cir. 2004) (No. 03-6696).

[25] Hamdi v. Rumsfeld, 542 U.S. 507, 516 (2004) (quoting Brief for the Respondents at 3, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696), *available at* 2004 WL 724020 ("an individual who . . . was 'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan *and who* 'engaged in an armed conflict against the United States' there.") (emphasis added) (internal quotation marks omitted).

[26] Deputy Secretary of Defense Paul Wolfowitz, Memorandum to the Secretary of the Navy 1 (July 7, 2004) (emphasis added), *available at* www.defenselink.mil/news/Jul 2004/d20040707review.pdf.

[27] Pub. L. No. 109-366, 120 Stat. 2600 (2006).

Roman numeral five on the slide contains a quotation from the DoJ's memo issued in March 2009.[28] The memo does not define enemy combatant, which makes this a very different proposition. Everything else up to this point in my presentation involved a definition of enemy combatant, which potentially included slippage in conflating indirect participants with direct participants. Here, the Government is not taking a position with respect to the definition of enemy combatants, but the new position is largely reflective of the Combatant Status Review Tribunal's definition.[29] Apparently many, if not all, of the very same individuals can be detained, and, under the framework that I articulated earlier, that result is permitted by the law of armed conflict because a state can detain direct participants and indirect participants. The question of nomenclature is eliminated; but, as you can see on the slide, a significant distinction involves the terms "substantially supported." That's different from the unqualified term "supported" under the Combatant Status Review Tribunal. It is also interesting to compare the Military Commissions Act, because the MCA contains "purposefully and materially supported." Thus the delta between those two standards—the DoJ memo and the MCA—might be very small.

Let me make a couple preliminary remarks about the new definition. In my view, if we are to work within the existing international legal framework, it might be better to maintain an explicit reference to enemy combatants and then add an express reference to civilians who indirectly participate in hostilities. The DoJ position makes a valuable advance, but it also raises concerns. First, it's underspecified. We don't know what it means to be a member in an armed group, and that's why I used the Nils Meltzer quote from before. According to his study, "religious leaders . . . financial contributors, informants, collaborators and other service providers without fighting function [who] may support or belong to an opposition movement or an insurgency as a whole can hardly be regarded as members of its 'armed forces.'" So it's an open question what membership in the armed forces entails. Much of what one cares most about might turn on that very question.

The next concern with the DoJ memo is the question of mere membership. Is mere membership in a group sufficient? A very insightful analysis can be found in a recent decision by Israel's High

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[28] *See* Appendix B.

[29] Respondents Memorandum, In re Guantanamo Litigation (D.D.C. Mar. 13, 2009) (Misc. No. 08-442), *available at* http://www.usdoj.gov/opa/documents/memo-re-det-auth.pdf.

Court. The Israeli Court, dealing with a very similar statute and a similar set of concerns, concluded that mere membership in the armed forces or terrorist organization is not enough.[30] That proposition, however, is not necessarily endorsed by the reasoning in the DoJ memo.

The last concern about the DoJ memo involves the work being done by the terms "substantially support." There's one statement in the memo which seems to suggest that the new definition might not escape all the concerns that we would otherwise have about the Combatant Status Review Tribunal definition and the Military Commissions Act definition. The concern is triggered if "substantially supports" performs a function of assimilation, whereby an individual who engages in substantial support is considered a member of the fighting forces. That equation could spell trouble because it would mean the same conflation of Category C, indirect participants in hostilities, with Category B. The troubling sentence in the memo is "Under a functional analysis, individuals who provide substantial support to al-Qaeda forces in other parts of the world may properly be deemed part of al-Qaeda itself."[31]

Turning to another pattern that has occurred over the past several years, I also want to discuss actor disaggregation. The concern here is a second type of category mistake, which involves the failure to properly recognize that certain distinct categories of individuals are all lawfully subject to the same coercive measure. For example, it's improper to suggest that a state can legally target Group A, lawful combatants, but not legally target Group B, direct participants. Similarly, litigators who have represented the interests of detainees in Guantanamo and elsewhere criticized the Government for an expansive definition of combatant that includes civilians who do not meet the direct participation standard; however, those opponents do not acknowledge that the law of armed conflict permits the very same individuals to be detained, regardless of the nomenclature or the name that one assigns the individuals. Some opponents have even taken a stronger position, contending that only combatants can be detained and that Category C cannot be detained, which, in my view, flies in the face of the existing framework. Let's now consider *Al-Marri*, the case in which the Supreme Court granted certiorari but then subsequently vacated because the individual was transferred to the civilian system for criminal prosecution. On the slide

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[30] A. v. State of Israel, Cr. App. 6659/06 (S. Ct. Israel, June 11, 2008), *available at* http://e1yon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf.
[31] *Id*.

is an excerpt from the opinion which is otherwise termed "the plurality opinion" in the Court of Appeals decision. Three other judges joined this opinion. Ultimately, their view on this legal issue did not affect the holding. Yet it is technically a plurality opinion with respect to the traditional law of war understanding of who may be detained. The other judges on the panel didn't agree on that issue. Four judges took the position that under the long-standing law of armed conflict, civilians cannot be detained. The quote on the slide gives you one example of it: Judge Motz states that "'civilian' is a term of art in the law of war, not signifying an innocent person, but rather someone in a certain legal category who is not subject to military seizure or detention. So, too, a 'combatant' is by no means always a wrongdoer, but rather a member of a different 'legal category' who is subject to military seizure and detention. . . . Nations in international conflicts can summarily remove the adversary's 'combatants,' i.e., the 'enemy combatants,' from the battlefield and detain them for the duration of such conflicts, but no such provision is made for 'civilians.'" The opinion never refers to the articles of the Fourth Convention that I've discussed. The opinion never refers to Article 4(A)(4) of the POW Convention in this regard either.[32]

One of the concerns you might think about is why did the judges reach that opinion? On the screen are various quotes from legal briefs filed by litigators on behalf of detainees. Not all the briefs are like this, however. I've picked only the briefs that make the category mistake of representing to the judges that civilians cannot be detained in an armed conflict if they're not direct participants. So the bolded language (on the slide) gives you a sense of these portrayals of the law. The appellant in *Al-Marri* said, by contrast, "[A]rresting civilians in their homes inside the United States, far from any active battlefield, and detaining them in military custody is not a fundamental incident of war." The petition for cert in *Al-Marri* said, "Hewing to the laws of war, this Court's decisions consistently construe military detention power in light of this law-of-war principle, allowing military jurisdiction to be exercised only over members of an enemy nation's military, militia, or other armed forces, and those who fight alongside them on a battlefield, such as Al Qaeda fighters in the war of Afghanistan." Petitioners in *Boumediene* said, "*Hamdi* emphasizes that military detention is justified only 'to prevent a combatant's return to the battlefield.' Civilians who do not directly participate were never on the 'battlefield' in the first place, and therefore there is no justification for treating them as 'combatants who might

[32] GC III, *supra* note 7.

return.' Of course civilians may be punished for activity short of direct participation in hostilities, even though they cannot be targeted with military force or subjected to military detention." And then the last one, as well, is, as you can tell from the slide, very similar.

The last category mistake I want to discuss is power conflation. Here both proponents and opponents have made the mistake of conflating the power to detain with the power to prosecute. It's important to note before mentioning instances of this conflation—and you can see a couple of them on the next slide—that under the existing framework of the law of armed conflict, detention is generally considered a less restrictive means than military trial. So, military trial is the greater power, and detention is the lesser power. Interestingly, the same principle indeed applies in international human rights law as well. The Covenant on Civil and Political Rights is very similar to the Geneva Conventions whereby there are several procedural requirements that apply to trials that are considerably more stringent than the procedures that apply to detention. The logic underlying this system is that a trial is thought to be a much more severe measure, and detention is considered a less severe, less restrictive measure.

Proponents of U.S. detention policy have tied the power to conduct military trials with the power to detain. Consider the decision in *Hamdi*. The plurality opinion references the *Milligan* Civil War case in stating that if combatants could be tried by a military court, then they could also be detained;[33] and that might be a fair, logical argument—if a state possesses the greater power, the state certainly has the lesser power—but it demonstrates that the reverse doesn't work. In his dissent, Justice Scalia interestingly seems to recognize that there's a problem in transposing the rules for military trial into detention, yet he still makes that very transposition. As you can see in the slide, he states that "*Milligan* is not exactly this case, of course, since the petitioner was threatened with death, not merely imprisonment. But the reasoning and conclusion of *Milligan* logically cover the present case. The Government justifies imprisonment of Hamdi on principles of the law of war and admits that, absent the war, it would have no such authority. But if the law of war cannot be applied to citizens where courts are open, then Hamdi's imprisonment without criminal trial is no less unlawful than Milligan's trial by military tribunal."[34] Judge Motz made the same

[33] *Hamdi*, 542 U.S. at 522.
[34] *Id.* at 567–68 (Scalia, J., dissenting).

error in *Al-Marri*, claiming that if a state cannot try a civilian before a military court, then a state cannot militarily detain the individual.[35] That reasoning doesn't work, because it would mean that the lesser power includes the greater power, in a certain sense. It is also important to note that even if this reasoning were sustainable, it would only deny military detention. It wouldn't deny detention by civilian authorities.

As a final part of my presentation, let me discuss the impact of these misclassifications or miscategorizations. The first impact is a general consequence of ambiguity in the legal regime. And here, I want to momentarily wear my other hat. The other hat that I sometimes wear is that of an interdisciplinary scholar. I study, as an empirical matter, what drives state behavior, what motivates actors to comply or violate international law. It's fair to say that there are two schools of thought: one is normative and emphasizes how actors follow a logic of normative appropriateness, and the other is instrumental and emphasizes how rational actors following a logic of consequences. Both schools of thought would be deeply troubled by the introduction of ambiguity into international law. The argument for the normative model of behavior is that, according to widely accepted theories, clarity in the law is essential to its legitimacy, and if legitimacy erodes, then compliance with law erodes. The rational actor model, which is based more on systems of incentives, also requires clarity in the law. In that case, the introduction of ambiguity undermines the clarity of the law that is required for individuals to know whether or not their actions are cooperative or uncooperative, compliant or noncompliant. And, as the slide suggests, the introduction of significant ambiguity also raises a fundamental question of fairness. Should we apply unclear standards to operators, when those standards could result in criminal penalties or social sanctions, or damage to a person's reputation? This question of fundamental fairness applies to arguments on all sides—some of the arguments that have been made by proponents, some of the arguments that have been made by opponents.

Let me next turn attention to the consequences of some of the opponents' positions, that is, opponents of U.S. detention policies since 9/11. As the slide suggests, one consequence is that these arguments misdirect legal and policy efforts. A false impression has been created that a solid legal edifice underpins the claim that civilians cannot be detained in armed conflict where, in fact, that legal edifice doesn't exist.

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[35] Al-Marri v. Pucciarelli, 534 F.3d 213, 230–31, 237 n.19 (4th Cir. 2008) (en banc).

Accordingly, insufficient attention has been paid to alternative legal and policy grounds for developing principled constraints on detentions. More viable approaches may be found through the political process and policy changes, not litigation; or directly in constitutional law, not directly in the law of armed conflict.

Let me elaborate briefly. First, the law of armed conflict permits the detention of individuals who are indirect participants in hostilities. Whether, as a policy matter, it's wise to go as far as the law allows is a separate and important question. And that's where a policy debate should take place. Should U.S. policy extend to the outer boundary of what international law permits? Will that strategy win more hearts and minds? Will it damage our public and social institutions? Second, if one pursues a legal claim against current detention practices, consider underexploited U.S. domestic law options. For example, the U.S. Constitution arguably distinguishes between the exercise of military control over civilians versus combatants. And, in that case, the definition of civilians versus combatants could be found in the law of armed conflict. But the fundamental question concerns constitutional and domestic law. Thus a very strong argument could be made that if Congress truly wants to detain civilians who are indirect participants in hostilities, it has to say so plainly on the face of the statute; and Congress has not done that so far. But that would be a domestic legal question. And I'm no expert in that arena.

The second consequence of opponents' positions concerns coercive powers over enemy private contractors. A logical consequence of their arguments is that private military contractors whose activities constitute only indirect participation in hostilities would not be detainable. Yet such a result seems inconsistent with the opponents' own views and values. Many of those opponents understandably are concerned about the potential security threats that military contractors pose on the battlefield, but their argument undermines the basis for the detention of such actors. It would also be vexing to military commanders, U.S. military commanders included, who might face the need to detain enemy private contractors during hostilities.

The third consequence is an erosion of prohibitions on the use of child soldiers. These same opponents of detention are generally sympathetic to efforts to strengthen the regime that prohibits children from directly participating hostilities. But, by narrowly defining what it

means to directly participate in hostilities, their argument creates a loophole in the child soldiers regime.

A fourth consequence is a potential expansion of the class of actions that are subject to lethal force. There are two dynamics here. One is a self-fulfilling effect. In legal briefs that have been filed before federal courts, some have adopted a two-pronged argument: namely, if the court were to accept that civilians who are indirect participants in hostilities could be detained, the court must also accept that those individuals would be lawful targets. That argument is based on either a claim that the powers to engage in such coercive measures, detention and targeting, are coextensive with one another, or a claim that the law on detention is derivative of the law on targeting. In other words, the only people who may be detained are those who can be targeted. Both of those claims are incorrect. But if the opponents' argument loses on the first prong—that is, if a court concludes that indirect participants can be detained—then the self-fulfilling consequence would be that those same individuals could be targeted. The other dynamic for the expansion of the class of actions subject to lethal force is one which involves pressures placed on operators and members of the U.S. administration to define much more broadly what it means to be a direct participant in hostilities—especially if the detention of indirect participants is foreclosed as an option.

The fifth and last consequence implicates the preservation of discrete rules pertaining to trials. The thought here is fairly straightforward, but it's more speculative. The point is that one shouldn't conflate military trials with detention. If one does, it creates a perverse incentive for decision makers who are responsible for defining fair-trial rights. Whatever rules those individuals design for fair-trial rights, such as defining who may be subject to the jurisdiction of a military court, could spill into detention policies if you conflate the two categories or powers. A better system would be one in which those actors make their decisions exclusively on the basis of procedural rights, balanced against security interests in the trial domain, without having to project what that spillover effect would be in the detention domain. Such a separation also works against opportunism. For example, some individuals who will design or review military trials might strategically define jurisdictional limits or fair-trial rights to effectuate a second-order effect in the detention sphere, and that would also be a mistake. We'd rather want to keep these domains separate and free from such extrinsic considerations.

Finally, let's consider consequences of the proponents' positions. First, their positions might unduly expand the class of actions subject to lethal force. I understand this is a controversial position I'm taking, because some would respond that the pressure placed on expanding the use of lethal force is actually appropriate and beneficial. In my view, however, there's trouble with the ways in which the definition of enemy combatants might be used in the targeting domain. For example, as a thought experiment, take the Military Commissions Act's definition of enemy combatants and think about whether or not those individuals could be lawfully subject to targeting. If you use the definition of enemy combatants under the Military Commissions Act, it might mean that individuals such as faculty and students at U.S. military academies would constitute lawful targets of attack and private military contractors would lose their immunity because the definition conflates the category of indirect participants with combatants and direct participants. In short, it introduces unnecessary if not dangerous confusion into the law of targeting.

Second, some of the proponents' positions undermine counterterrorism efforts. The flip side of the definition of combatancy is the definition of terrorism. It has taken decades for the U.S. Government to obtain international agreement on a definition of terrorism. But the definition of combatancy that has been used in the conflict with al Qaeda introduces ambiguity into the very definition of terrorism that is included in counterterrorism laws, international treaties, and the like. Indeed, the definition of combatants crops, or restricts, the definition of terrorism to a narrower scope of activities. Several international and domestic laws define terrorism to mean violence committed against two groups: "noncombatants" and civilians who do not actively or directly participate in hostilities. Hence, the narrower the definitional boundaries of those two groups is drawn, the wider the range of activities that would not count as terrorism. As an example, let's reverse engineer the definition of terrorism on the basis of the broad definition of combatants adopted by the U.S. Government: it would mean that attacks on the following individuals would not constitute an act of terrorism, that is, attacks on propagandists, financiers, and civilians who provide logistical support to armed forces. Those individuals would no longer technically be covered by the prohibition on terrorism.

A third consequence of the proponents' positions involves a threat to the U.S. legal position on the status of private military contractors. I think this one is very obvious to you all. As you know, the roles

performed by private military contractors are officially deemed not to constitute direct participation in hostility; but those same roles when performed in relationship to al Qaeda are defined as combatancy or direct participation.

A fourth consequence involves a threat to U.S. treaty commitments concerning child soldiers. In the conflict with al Qaeda, a very broad definition of direct participation is being used. In contrast, the U.S. formal position adopted when ratifying the Protocol on Child Soldiers included a very narrow definition of direct participation to make consistent our Government's recruitment, training, and deployment practices. The U.S. Government officially submitted that the phrase "direct participation in hostilities" means "immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct causal relationship between the activity engaged in and the harm done to the enemy; and does not mean indirect participation in hostilities, such as gathering and transmitting military information, transporting weapons, munitions, or other supplies, or forward deployment." Note that most all of those actions would count as direct participation or satisfy the Military Commissions Act and the Combatant Status Review Tribunal's definition of enemy combatants and very well might satisfy the definition of membership in an armed group under the DoJ's recent memorandum.

Finally, the proponents' positions undermine the fair treatment of differently situated individuals subject to confinement and trial. This point is admittedly speculative. There might be deep normative as well as narrowly pragmatic reasons to differentiate the treatment of civilians who indirectly participate from those who directly participate. We do so, for example, in targeting. And of course, the targeting regime need not have been designed that way. The regime architects could have thought that those individuals are all similarly responsible and should all be subject to lethal force. The question for our purposes is whether those individuals should be treated differently in confinement—and currently they're not—and it's an open question whether the U.S. Government is planning to treat them differently if we do reengage in military trials. But if all those individuals are treated the same way for conditions of confinement, that might be a problem. It's potentially a very serious problem for military trials; that is, if a state cannot lawfully subject a civilian who is an indirect participant in hostilities to a military trial, but the state can lawfully subject a civilian who is a direct participant, those individuals need to be treated differently. Under the system that existed

before the military commissions were suspended, those individuals were all treated the same. Let me elaborate a bit on what transpired. The very widely respected U.N. Special Rappoteur on Counterterrorism and Human Rights criticized the U.S. military commissions for that feature—the very feature of including civilians in the military commissions without admitting to it and without the lawful authority to do so.[36] The U.S. Government's reply was, "The United States may not under our law try any civilian before a military commission. Rather, jurisdiction is limited to unlawful enemy combatants. As a result, we question whether speculation about an individual being misclassified warranted inclusion in the [U.N.] report."[37] But that begs the question of what is meant by an enemy combatant. If an enemy combatant is a civilian who indirectly participates in hostilities, then we're back to the same question. So my parting thought for this set of concerns is that only time will tell whether the DoJ's memorandum pursues the same line or is really a different framework with respect to the classification of one or two groups of actors in these contexts.

In conclusion, one way to end my opening remarks is just to say that some of the best legal minds, including in this audience, are now trying to figure out the answer to these various questions. These are really difficult problems. The Judiciary, the Executive Branch, Congress, and legal advocates now have an opportunity to decide how to align U.S. discourse and policy with the long-standing international legal framework. My hope is that we'll ultimately design rules that consider the integrity of the law of armed conflict regime not only in the current conflict but for prospective ones as well. If we do not, we will jeopardize both humanitarian and security interests now and in the future.

Thank you very much for this opportunity.

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[36] U.N. Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, ¶ 30, U.N. Doc. A/HRC/6/17/Add.3 (Nov. 22, 2007) (*prepared by* Martin Scheinin).

[37] U.S. Diplomatic Mission to the U.N. in Geneva, United States Comments on the Report on the Mission to the United States of America of the Special Rapporteur on the Protection and Promotion of Human Rights and Fundamental Freedoms While Countering Terrorism, ¶ 30 (*prepared by* Martin Scheinin), *available at* http://geneva.usmission.gov/Press2007/Scheinin-Response-HRC.pdf.

Appendix A

Category Mistakes

Type 1: Actor conflation

Grouping different actors under a heading that correctly applies only to some of them

Example: defining "combatants" to include civilians who do not directly participate in hostilities

Type 2: Actor disaggregation

Failure to recognize when distinct categories of individuals are all lawfully subject to the same coercive measure

Example: contending that parties may target regular armed forces but not civilians who directly participate in hostilities

***Type 3*: Power conflation**

Grouping distinct coercive powers under a heading that correctly applies only to some of them

Example: assuming that a prohibition on military trials (the greater power) means that the prohibition applies to military detention (the lesser power) as well

Appendix B

Definitions of "Enemy Combatants" and Detainable Individuals

I. U.S. Department of Defense, Fact Sheet (February 2004)

"At the time of capture and based on available information, combatant and field commanders determine whether a captured individual was part of or supporting forces hostile to the United States or coalition partners, **and engaged** in an armed conflict against the United States. Such persons are enemy combatants."

II. Hamdi v. Rumsfeld, 542 U.S. 507 (March 2004) (plurality opinion)

"an individual who . . . was 'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan **and who** '**engaged** in an armed conflict against the United States' there."

III: Combatant Status Review Tribunals (July 2004)

"an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces **that are engaged** in hostilities against the United States or its coalition partners."

IV: Military Commissions Act (Dec. 2006)

"'unlawful enemy combatant' means . . . a person who has engaged in hostilities **or who has purposefully and materially supported** hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)."

V. U.S. Department of Justice (March 2009)

"The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or **substantially supported**, Taliban or al-Qaida forces or associated forces **that are** engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces."