CONSTITUTIONAL LAW — GUANTANAMO HABEAS — D.C. CIRCUIT HOLDS THAT PETITIONER WAS PROPERLY DETAINED AS "PART OF" ENEMY FORCES. — *Hussain v. Obama*, 718 F.3d 964 (D.C. Cir. 2013), *reh'g en banc denied*, No. 11-5344, 2013 U.S. App. LEXIS 17618 (D.C. Cir. Aug. 21, 2013).

In *Boumediene v. Bush*,[1] the Supreme Court established the constitutional privilege of habeas corpus review for detainees at Guantanamo Bay.[2] Under *Boumediene*, individuals detained pursuant to Congress's 2001 Authorization for Use of Military Force[3] (AUMF) are entitled to "meaningful review" of the evidentiary basis for their detention.[4] The D.C. Circuit has delineated a two-pronged test for the authority to detain under the AUMF: The government must prove that a detainee (1) "substantially support[ed]"[5] or (2) was "part of" al Qaeda or the Taliban.[6] This test was codified in the National Defense Authorization Act for Fiscal Year 2012[7] (2012 NDAA). Recently, in *Hussain v. Obama*,[8] the D.C. Circuit applied this test in affirming the district court's denial of a detainee's habeas petition. The court held that the district court's findings of fact were not clearly erroneous and that those facts sufficiently supported the finding that the detainee was part of enemy forces when captured.[9] The D.C. Circuit's approach to this case highlights a deeply troubling element of its Guantanamo jurisprudence: an overly expansive understanding of who is considered "part of" enemy forces pursuant to the AUMF.

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[1] 553 U.S. 723 (2008).

[2] *See id.* at 732–33. The Court based its decision on its understanding of the Suspension Clause. *Id.* at 732.

[3] Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)) (authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons," *id.* § 2, 115 Stat. at 224).

[4] *Boumediene*, 553 U.S. at 783.

[5] Al-Bihani v. Obama, 590 F.3d 866, 872 (D.C. Cir. 2010) (internal quotation marks omitted).

[6] *Id.* This test, proposed by the Obama Administration, is largely similar to the criteria that the Bush Administration proposed for military tribunal determinations as to "unlawful enemy combatant" status. That earlier test, however, did not require any support given to be "substantial" in order to find that an individual was an enemy combatant. Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769, 830–31 (2011) (internal quotation marks omitted).

[7] *See* Pub. L. No. 112-81, § 1021(b)(2), 125 Stat. 1298, 1562 (2011) (codified at 10 U.S.C. § 801 note (2012)).

[8] 718 F.3d 964 (D.C. Cir. 2013), *reh'g en banc denied*, No. 11-5344, 2013 U.S. App. LEXIS 17618 (D.C. Cir. Aug. 21, 2013).

[9] *Id.* at 966.

Abdul al Qader Ahmed Hussain, a Yemeni national, traveled to Pakistan in September 1999 for the stated reasons of studying the Quran, learning about computers, and engaging in charitable work.[10] While in Pakistan, he lived in a Jama'at al-Tablighi[11] (JT) mosque in Quetta for three months, before traveling to Kabul, Afghanistan.[12] He stayed there for another three months, during which he claimed to have been performing a study of the plight of Afghan refugees.[13] Hussain then returned to Quetta, before traveling to Kabul a second time and then again returning to Pakistan.[14] He stayed at a JT mosque during both of these periods in Pakistan.[15] Hussain traveled to Afghanistan a final time in November 2000, living for ten months in a region north of Kabul on the front lines of the ongoing battle between the Taliban and the Northern Alliance.[16] During this time he lived with three Taliban guards, who gave and taught him how to use an AK-47 rifle, which he asserted was for protection from thieves and wild animals.[17] Following the September 11 attacks, Hussain returned to Pakistan.[18] He lived in Lahore in a JT mosque before moving to Faisalabad, where he was arrested by Pakistani police in March 2002.[19] He was still a teenager at the time.[20] He was subsequently transferred to U.S. custody[21] and has since been held at Guantanamo Bay.[22] In late 2005, Hussain filed a petition for a writ of habeas corpus with the District Court for the District of Columbia.[23]

The district court denied Hussain's petition.[24] Judge Walton held that the government had presented sufficiently "damning" evidence

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[10] Hussein v. Obama, 821 F. Supp. 2d 67, 69 (D.D.C. 2011). The district court spelled the petitioner's name as "Hussein," rather than "Hussain." *Id.* at 67.

[11] Although it describes itself as a peaceful and nonpolitical religious group, *see* Susan Sachs, *A Muslim Missionary Group Draws New Scrutiny in U.S.*, N.Y. TIMES, July 14, 2003, http://www.nytimes.com/2003/07/14/us/a-muslim-missionary-group-draws-new-scrutiny-in-us.html, Jama'at al-Tablighi has been designated by U.S. intelligence as a Terrorist Support Entity, *see* Almerfedi v. Obama, 654 F.3d 1, 2 (D.C. Cir. 2011). Such entities have shown a "willingness to provide financial . . . or . . . 'witting operational support' to terrorist groups." *Id.*

[12] *Hussein*, 821 F. Supp. 2d at 70.

[13] *Id.* at 71.

[14] *Id.*

[15] *Hussain*, 718 F.3d at 966.

[16] *Id.*

[17] *Hussein*, 821 F. Supp. 2d at 72.

[18] *See id.*

[19] *Hussain*, 718 F.3d at 966; *Hussein*, 821 F. Supp. 2d at 74. While the district court originally stated that Hussain was arrested in May 2002, the D.C. Circuit later clarified that the capture occurred in March. *Hussain*, 718 F.3d at 966.

[20] *Hussain*, 718 F.3d at 971 (Edwards, J., concurring).

[21] *Hussein*, 821 F. Supp. 2d at 74.

[22] *Hussain*, 718 F.3d at 966.

[23] *Id.*

[24] *Hussein*, 821 F. Supp. 2d at 80.

that Hussain was part of al Qaeda or Taliban forces.[25] He found that Hussain's repeated extended stays at a JT mosque; the fact that he received a rifle from Taliban guards near a combat zone and was trained in its use; and inconsistencies between his actions and stated intentions, considered together, provided sufficient evidence in favor of detention.[26] Judge Walton also found that not only had Hussain failed to rebut persuasively the evidence against him,[27] but that inconsistencies in his testimony also "render[ed] [it] completely incredible" and "provide[d] further justification for his detention."[28]

The D.C. Circuit affirmed.[29] Writing for the court, Judge Griffith[30] determined de novo that the facts established by the district court supported detention.[31] Relying on precedent from prior detainee cases, the court stated that detention is justified under the AUMF if the government demonstrates by a preponderance of the evidence that the petitioner was "part of" enemy forces when captured.[32] A detainee need not have been involved in the al Qaeda or Taliban "command structure," or have "personally picked up arms and engaged in active hostilities" against U.S. forces to be considered part of enemy forces.[33] Judge Griffith also noted that there was no requirement for the district court to determine expressly whether Hussain was specifically associated either with the Taliban or with al Qaeda, as both were enemy groups covered by the AUMF.[34]

The court noted that it must examine all relevant facts as part of a comprehensive whole in determining whether detention is appropriate under a preponderance standard.[35] The D.C. Circuit agreed with the district court that this evaluation strongly supported the inference that Hussain was part of enemy forces. First, applying what he referred to as the "duck test,"[36] Judge Griffith found the fact that Hussain received a weapon from Taliban guards while on the frontlines to be

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[25] *Id.* (quoting Almerfedi v. Obama, 654 F.3d 1, 6 (D.C. Cir. 2011)) (internal quotation marks omitted).

[26] *See id.* at 77–78.

[27] *Id.* at 80.

[28] *Id.* at 79.

[29] *Hussain*, 718 F.3d at 966.

[30] Judge Griffith was joined in his opinion by Judge Henderson.

[31] *See Hussain*, 718 F.3d at 966–67.

[32] *Id.* at 967. The court also stressed that it had not yet decided whether the preponderance standard is constitutionally required, just that it is constitutionally sufficient. *Id.* at 967 n.3.

[33] *Id.* at 967–68.

[34] *Id.* at 970–71.

[35] *See id.* at 968 (citing Almerfedi v. Obama, 654 F.3d 1, 4 (D.C. Cir. 2011)).

[36] *Id.* As the court described the test: "WHEREAS it looks like a duck, and WHEREAS it walks like a duck, and WHEREAS it quacks like a duck, WE THEREFORE HOLD that it is a duck." *Id.* (quoting Dole v. Williams Enters., Inc., 876 F.2d 186, 188 n.2 (D.C. Cir. 1989)) (internal quotation marks omitted).

"damning," viewing the possibility that he was a loyal member of enemy forces to be far more likely than Hussain's contention that the gun was to be used purely for self-defense.[37] Second, the court argued that Hussain's inconsistent explanations of his actions after the September 11 attacks[38] implied dishonesty and were therefore themselves persuasive evidence in favor of detention.[39] Third, Judge Griffith agreed with the district court that Hussain's extended stays at JT mosques were highly probative evidence given the group's association with terrorism.[40] Finally, the court also noted that Hussain did not provide evidence that he renounced his association with the enemy after leaving Afghanistan.[41]

Judge Edwards concurred in the judgment, stating that the court's existing precedent supported denying Hussain's petition.[42] However, he expressed serious concerns with that precedent, arguing that instead of applying the preponderance standard it stated it was using, the majority actually applied the less demanding "substantial evidence" standard.[43] He highlighted that the government provided no evidence that Hussain ever carried or used the weapon he was provided, ever engaged in violent activities, or ever joined the JT organization.[44] Finally, Judge Edwards claimed that the majority's use of Hussain's testimony against him effectively reversed the burden of proof by requiring him to provide a coherent explanation of his activities after 9/11 in order to demonstrate that he was *not* part of al Qaeda or Taliban forces when captured.[45] Judge Edwards argued that this reasoning typified the D.C. Circuit's approach to the Guantanamo habeas cases, in which it has "recited" but failed to apply the preponderance standard,[46] and he called on the President and Congress to intervene.[47]

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[37] *Id.* at 968–69.

[38] As the district court described it, Hussain claimed to desire both to return to Yemen and to study the Quran in Pakistan, yet he neither organized his return nor enrolled in the university in Faisalabad he supposedly wished to attend. *See* Hussein v. Obama, 821 F. Supp. 2d 67, 74, 79 (D.D.C. 2011).

[39] *See Hussain*, 718 F.3d at 969.

[40] *Id.* at 970.

[41] *Id.*

[42] *Id.* at 973 (Edwards, J., concurring).

[43] *Id.* Unlike the preponderance standard, which requires the court to determine that the evidence provided is "sufficiently reliable and . . . probative to *demonstrate the truth of the asserted proposition* with the requisite degree of certainty," *id.* (quoting Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust, 508 U.S. 602, 622 (1993)), the substantial evidence standard only requires the court to determine "whether a reasonable mind might accept a particular evidentiary record as adequate," *id.* at 971 (quoting Dickinson v. Zurko, 527 U.S. 150, 162 (1999)).

[44] *See id.* at 972–73.

[45] *See id.* at 973.

[46] *Id.* at 971.

[47] *See id.* at 973.

Although he questioned the majority's analysis of the evidence for Hussain's detention, Judge Edwards's focus on evidentiary standards presupposes that it is clear what the government needs to prove in the first place. In fact, this assumption is unfounded given the D.C. Circuit's unwillingness to provide more than vague limits to the scope of the government's detention authority under the AUMF: that is, what it means for a detainee to be "part of al Qaeda, the Taliban, or associated forces at the time of his capture."[48] This "part of" standard is not only overly broad as a matter of doctrine, but also threatens the right to "meaningful review" promised by *Boumediene*.[49]

Both the majority and the concurrence agreed that the government must show that Hussain was "part of" enemy forces when captured,[50] but they appeared to disagree as to what that showing should require. Judge Edwards seemed to believe that the contours of the "part of" test should be tightly limited by the language of the AUMF itself, which requires that anyone subject to its authority be determined to have "planned, authorized, committed, or aided" the 9/11 attacks.[51] Echoing that language, he stated at the outset of his opinion that "[t]he only real question in this case is whether Hussain 'aided' those who engaged in terrorist attacks."[52] In contrast, the majority, in accordance with how the circuit has previously approached the issue, framed the "part of" test more loosely, without as heavy an emphasis on the statutory text.

The D.C. Circuit has never clearly defined who is considered "part of" enemy forces under the AUMF. Instead, it has argued in favor of "a functional rather than a formal approach" to the test, which involves "focusing upon the actions of the individual in relation to the organization."[53] Rather than cabining the scope of detention authority within defined limits, it has interpreted the AUMF broadly. For example, as the majority reaffirmed in *Hussain*, the circuit does not view the AUMF as requiring the government to prove that a detainee served in the "command structure" of either al Qaeda or the Taliban,

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[48] *Id.* at 967 (majority opinion).

[49] Boumediene v. Bush, 553 U.S. 723, 783 (2008).

[50] *Hussain*, 718 F.3d at 967; *id.* at 971 (Edwards, J., concurring).

[51] Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)). Judge Edwards more directly expressed his concerns with the substantive question of the scope of detention authority under the AUMF in another concurrence, almost six months after the decision in this case. *See* Ali v. Obama, 736 F.3d 542, 552–54 (D.C. Cir. 2013) (Edwards, J., concurring) ("The troubling question in these detainee cases is whether the law of the circuit has stretched the meaning of the AUMF and the NDAA so far beyond the terms of these statutory authorizations that habeas corpus proceedings . . . are functionally useless." *Id.* at 553–54.). The fact that Judge Edwards concurred in both cases — rather than dissented — suggests that he accepts the circuit's dominant approach to this question as a matter of precedent, even if he rejects it as a normative matter.

[52] *Hussain*, 718 F.3d at 971 (Edwards, J., concurring).

[53] Bensayah v. Obama, 610 F.3d 718, 725 (D.C. Cir. 2010).

nor must the government establish that the petitioner engaged in hostilities.[54] Such approaches expanded upon earlier understandings regarding the scope and reach of the AUMF.[55]

Similarly, where the court has sought to place limits on the government's detention authority, it has set an exceedingly low bar. The circuit has conceded that the AUMF does not apply to "the errant tourist, embedded journalist, or local aid worker,"[56] or to "the purely independent conduct of a freelancer."[57] However, there appears to be no clear line between a freelancer and an individual who is "part of" the relevant organization yet outside its command structure and therefore covered by the D.C. Circuit's test. If merely traveling through vaguely defined "battleground[s]" is probative of being part of enemy forces,[58] then what it means to be a freelancer is effectively subsumed by the court's definition of who is "part of" these organizations.

The circuit's problematic construction of the "part of" test enables detention even on the basis of limited evidence. For example, the court in *Al-Bihani v. Obama*[59] stated that a *reasonable belief* that a detainee stayed at an al Qaeda guesthouse "overwhelmingly" supported his detention.[60] This fact certainly suggests that the individual in question sympathized with al Qaeda's goals or may even be associated with the organization. However, it provides only attenuated support

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[54] *Hussain*, 718 F.3d at 967–68.

[55] The circuit first definitively stated that a detainee need not have been involved in the chain of command of the relevant organization in *Awad v. Obama*, 608 F.3d 1, 11 (D.C. Cir. 2010). This position was contrary to both of the two major approaches to the scope of detention authority that previously existed in the district courts. *See* Chesney, *supra* note 6, at 837; Hamlily v. Obama, 616 F. Supp. 2d 63, 75 (D.D.C. 2009) ("The key inquiry, then, is . . . whether the individual functions or participates within or under the command structure of the organization . . . ."); Gherebi v. Obama, 609 F. Supp. 2d 43, 68–69 (D.D.C. 2009) ("Sympathizers, propagandists, and financiers who have no involvement with this 'command structure' . . . cannot be detained militarily unless they take a direct part in the hostilities."). Similarly, the rejection of a requirement of participation in hostilities expanded upon the initial treatment of the AUMF by the Supreme Court in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). *See* Jonathan Hafetz, *Calling the Government to Account: Habeas Corpus in the Aftermath of* Boumediene, 57 WAYNE L. REV. 99, 118–19 (2011). The Court there, in accordance with the brief filed by the Bush Administration, addressed only the limited question of whether the AUMF permitted the detention of individuals who have themselves taken part in armed conflict with U.S. forces. *See Hamdi*, 542 U.S. at 516 (plurality opinion).

[56] *See* Almerfedi v. Obama, 654 F.3d 1, 6 (D.C. Cir. 2011) (quoting *Hamdi*, 542 U.S. at 534 (plurality opinion)).

[57] *See Bensayah*, 610 F.3d at 725.

[58] *See, e.g.*, Esmail v. Obama, 639 F.3d 1075, 1076–77 (D.C. Cir. 2011); Uthman v. Obama, 637 F.3d 400, 404 (D.C. Cir. 2011).

[59] 590 F.3d 866 (D.C. Cir. 2010).

[60] *Id.* at 873 n.2. This statement was dictum in the case itself, but it has influenced subsequent cases. *See* BENJAMIN WITTES ET AL., THE EMERGING LAW OF DETENTION 2.0, at 33–34 (2012), *available at* http://www.brookings.edu/~/media/research/files/reports/2011/5/guantanamo%20wittes/05_guantanamo_wittes.pdf; *see also, e.g.*, Ali v. Obama, 736 F.3d 542, 545 (D.C. Cir. 2013); *Uthman*, 637 F.3d at 406.

for a finding of membership.[61] Similarly, the circuit has found other circumstances highly probative under the "part of" test, such as whether a detainee stayed at a JT mosque.[62] The problem is not that these facts do not suggest support for the goals of enemy forces — though they are likely insufficient by themselves to satisfy the "substantial support" prong of the test under the AUMF — but that they are not clearly linked with the level of affiliation inherent in the ordinary meaning of *membership*, and instead merely appear to support a finding of *association*.

The court has therefore turned the "part of" test into a catchall. By focusing more on what it does *not* require than what it *does*, the D.C. Circuit has prevented the test from seriously restricting detention authority. This approach is understandable. As Judge Edwards acknowledged, "the Guantanamo detainee cases have presented extraordinary challenges for the judiciary."[63] The court is justifiably reluctant to risk jeopardizing national security, and there are indeed serious harms that could eventuate from releasing a guilty detainee.[64] Further, while determining membership is relatively straightforward for formal military forces, it is far more difficult for more amorphously constituted groups such as al Qaeda and the Taliban.[65] Yet while these concerns may in part justify the court's preference for "look[ing] at the facts and circumstances in each case,"[66] they do not explain its failure to delineate *any* real limits in its interpretation of the test.

This overinclusiveness in the D.C. Circuit's detainee habeas jurisprudence has troubling consequences. Limits to detention authority are necessary to provide substance to *Boumediene*'s guarantee of a "meaningful opportunity" to contest one's detention.[67] As the *Boumediene* Court stressed, "[t]he Framers . . . understood the writ of habeas corpus as a vital instrument to secure . . . freedom,"[68] and "the

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[61] This understanding of the "part of" test as one of membership is reflected in the D.C. Circuit's jurisprudence, which has used the two terms interchangeably. *See, e.g.*, *Uthman*, 637 F.3d at 405; *Al-Bihani*, 590 F.3d at 873–74.

[62] *See Hussain*, 718 F.3d at 970.

[63] *Id.* at 971–72 (Edwards, J., concurring).

[64] *See* Esmail v. Obama, 639 F.3d 1075, 1077–78 (D.C. Cir. 2011) (Silberman, J., concurring).

[65] *See* Chesney, *supra* note 6, at 772.

[66] *Hussain*, 718 F.3d at 968.

[67] Boumediene v. Bush, 553 U.S. 723, 779 (2008).

[68] *Id.* at 739; *see also* Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 963 (1998) (emphasizing the "central importance" of habeas "as a protection against abuse of executive power"). For a vivid example of the dangers posed by overly loose interpretations of detention authority, see *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005) (describing how in oral arguments, counsel for the Bush Administration maintained that the AUMF would hypothetically authorize the detention of an unwitting "little old lady in Switzerland" who writes a check to a charity that is a front for al Qaeda), *vacated sub nom.* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), *rev'd*, 553 U.S. 723.

court that conducts the habeas proceeding must have the means to correct errors that occurred during [earlier] proceedings."[69] In order to fulfill this guarantee, the D.C. Circuit must provide more than merely nominal review of detainees' habeas petitions. Additionally, the circuit's interpretations of the AUMF are not limited to the litigation surrounding Guantanamo Bay; they are also likely to govern future detentions subject to habeas jurisdiction,[70] and may well be used to delimit the legitimate uses of U.S. military force outside the detention context.[71]

The D.C. Circuit's reluctance to define meaningful limits to the "part of" test has led to the adoption of an overly broad understanding of the scope of detention authority.[72] As Judge Edwards emphasized in *Hussain* in the context of the duck test, "arguably, any young, Muslim man traveling or temporarily residing in areas in which terrorists are known to operate" could be legally subjected to detention under the court's definition.[73] This concern should be addressed through congressional action. The "part of" test stems from the AUMF, an Act of Congress that Congress itself sought to clarify with the 2012 NDAA.[74] Congress could therefore modify the test by, for example, requiring evidence of participation in the enemy's command structure, which was the approach previously adopted by the district courts.[75] While it chose not to do so in the 2012 NDAA, Congress nevertheless should act to clearly delineate the bounds of the "part of" test, lest the AUMF be understood as a blank check with respect to detention authority.

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[69] *Boumediene*, 553 U.S. at 786. An example of such an error was the detention of twenty-two Uighurs who were not members of enemy forces. *See* Charlie Savage, *U.S. Frees Last of the Chinese Uighur Detainees from Guantánamo Bay*, N.Y. TIMES (Dec. 31, 2013), http://www.nytimes.com/2014/01/01/us/us-frees-last-of-uighur-detainees-from-guantanamo.html.

[70] WITTES ET AL., *supra* note 60, at 1.

[71] *See, e.g.*, Chesney, *supra* note 6, at 843 (mentioning the possibility of applying this jurisprudence to drone strikes).

[72] For a discussion of the other ways in which the AUMF has been interpreted extremely broadly, see generally Gregory D. Johnsen, *60 Words and a War Without End: The Untold Story of the Most Dangerous Sentence in U.S. History*, BUZZFEED (Jan. 16, 2014, 11:52 PM), http://www.buzzfeed.com/gregorydjohnsen/60-words-and-a-war-without-end-the-untold-story-of-the-most.

[73] *Hussain*, 718 F.3d at 972 (Edwards, J., concurring).

[74] *See* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021, 125 Stat. 1298, 1562 (2011) (codified at 10 U.S.C. § 801 note (2012)).

[75] *See supra* note 55. Even terrorist organizations such as al Qaeda possess some sort of identifiable command structure. *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2114–15 (2005) ("[T]errorist organizations do have leadership and command structures, however diffuse, and persons who receive and execute orders . . . can naturally be deemed 'members' of the organization." (footnote omitted)). For other suggestions for statutory reform, see Colby P. Horowitz, Note, *Creating a More Meaningful Detention Statute: Lessons Learned from* Hedges v. Obama, 81 FORDHAM L. REV. 2853, 2896–97 (2013). While these reforms could raise concerns regarding possible encroachment on the Executive's Article II powers, this eventuality is unlikely, at least in the short term, given that the Obama Administration has disavowed reliance on Article II for the authority to detain. *See* WITTES ET AL., *supra* note 60, at 26.