



Paul John DeSena

**SUBSTANTIAL, PURPOSEFUL, OR
MATERIAL? DEFINING THE CONTOURS
OF SUPPORT FOR TERRORISM**

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Abstract: Section 1021 of the 2012 National Defense Authorization Act controversially allows individuals who provide “substantial support” to terrorist organizations to be detained “until the end of the hostilities.” The Court of Appeals for the Second Circuit is currently considering a case involving its interpretation. In this Comment, Paul John DeSena analyzes the interpretation of related terms, such as “material support,” and argues that the Second Circuit should follow the lead of a prior district court decision, *Gherebi v. Obama*, and cabin the meaning of “substantial support” to those who directly participate in or are members of terrorist organizations.

Author: Paul John DeSena, J.D., graduated from New York University School of Law in 2013, and was a Notes Editor of the *N.Y.U. Journal of Legislation and Public Policy*.

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SUBSTANTIAL, PURPOSEFUL, OR MATERIAL? DEFINING THE CONTOURS OF SUPPORT FOR TERRORISM

*Paul John DeSena**

INTRODUCTION

n December 2012, Congress passed the annual National Defense Authorization Act (NDAA).¹ This particular bill included the (now infamous) Section 1021.² Briefly, Section 1021 purports to “affirm” the President’s authority under the Authorization for Use of Military Force³ (AUMF) to detain “covered persons”.⁴ Under the Act, “covered persons” includes “[a] person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces”.⁵ No exception from these provisions is made for citizens of the United States.

This section of the act has attracted considerable controversy. Because of the uncertain nature of 1021’s meaning, especially with regard to “substantial support,” the lack of an exception for United States citizens, and the fact that the law authorizes detention “until the end of the hostilities,”⁶ the law came to be

* J.D., New York University School of Law, 2013.

¹ The NDAA is a large military appropriations bill authorizing the spending that comprises the United States military’s yearly budget. Constitutionally, all military spending authorizations expire every two years. U.S. CONST. art. I, § 8, cl. 12. Though Congress uses the bill to authorize military spending on a yearly basis, Congress is of course free to include non-spending provisions in the Act. Unlike spending authorizations, these provisions do not expire of their own accord.

² National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021 (2012).

³ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

⁴ See National Defense Authorization Act for Fiscal Year 2012 § 1021.

⁵ Such persons may be, among other things, detained without trial under the laws of war until “the end of the hostilities.” *Id.*

⁶ *Id.*

seen, at both extremes of the political spectrum, as an authorization for detention of Americans citizens for indeterminate lengths of time, without charge or trial, at the caprice of the executive.⁷ Indeed, almost immediately after its enactment in late December of 2011, commentators loosed salvo upon salvo of colorful, full-throated criticism. The Editorial Board of *The New York Times* blasted the law as “a complete political cave-in” and “misguided and unnecessary,”⁸ the American Civil Liberties Union saw danger in its potentially unlimited scope,⁹ and Kenneth Roth, executive director of Human Rights Watch, called the bill a “historic tragedy for rights.”¹⁰ Criticism was not consigned to the political left: Rush Limbaugh colorfully stated that “[t]his is the kind of stuff that exists in third world banana republics,”¹¹ and the law was vociferously attacked by the political fringe on both sides.¹² Section 1021 has spawned groups dedicated to its repeal,¹³ and has even led states to pass resolutions condemning the statute and vowing not to assist the federal government in its enforcement.¹⁴

⁷ See, e.g., *Indefinite Detention, Endless Worldwide War and the 2012 National Defense Authorization Act*, AM. CIVIL LIBERTIES UNION (Feb. 22, 2012), <http://www.aclu.org/indefinite-detention-endless-worldwide-war-and-2012-national-defense-authorization-act>; Chris Moore, *The real target of NDAA and its extreme detention provisions: the American people*, LIBERTARIAN TODAY (Dec. 17, 2011), <http://www.libertariantoday.com/2011/12/real-target-of-ndaa-and-its-extreme.html>.

⁸ Editorial, *Politics Over Principle*, N.Y. TIMES, Dec. 15, 2011, at A42, available at <http://www.nytimes.com/2011/12/16/opinion/politics-over-principle.html>; Charles C. Krulak & Joseph P. Hoar, *Guantanamo Forever?*, N.Y. TIMES (Dec. 12, 2011), <http://www.nytimes.com/2011/12/13/opinion/guantanamo-forever.html>.

⁹ Amanda Simon, *President Obama Signs Indefinite Detention Into Law*, AM. CIVIL LIBERTIES UNION (Dec. 31, 2011, 4:20 P.M.), <http://www.aclu.org/blog/national-security/president-obama-signs-indefinite-detention-law>.

¹⁰ *US: Refusal to Veto Detainee Bill A Historic Tragedy for Rights*, HUMAN RIGHTS WATCH (Dec. 15, 2011), available at <http://www.hrw.org/news/2011/12/14/us-refusal-veto-detainee-bill-historic-tragedy-rights>.

¹¹ Rush Limbaugh, *Regime Grabs Power to Detain US Citizens*, RUSHLIMBAUGH.COM (Jan. 3, 2012), http://www.rushlimbaugh.com/daily/2012/01/03/regime_grabs_power_to_detain_us_citizens.

¹² See, e.g., Ryan Gorman, *Barack Obama's War Against the American People*, POLICYMIC (Mar. 5, 2012), <http://www.policymic.com/articles/3227/ndaa-barack-obama-s-war-against-the-american-people>; Frank Morales, “*The American Military Coup of 2012: Encroachment upon Basic Freedoms, Militarized Police State in America*,” GLOBAL RESEARCH (June 14, 2012), <http://www.globalresearch.ca/the-coup-of-2012-encroachment-upon-basic-freedoms-militarized-police-state-in-america/31428> (calling Section 1021 “a war against the Constitution and civil liberties”); Carl Mirra, *The NDAA and the Militarization of America*, FOREIGN POLICY IN FOCUS (Feb. 10, 2012), http://www.fpif.org/articles/the_ndaa_and_the_militarization_of_america.

¹³ See, e.g., PEOPLE AGAINST THE NDAA, <http://www.pandaunite.org> (last visited May 2, 2013).

¹⁴ See, e.g., VA. CODE ANN. § 2.2-614.2:1 (West 2013) (“[n]otwithstanding any contrary provision of law, no agency of the Commonwealth as defined in § 8.01-385, political subdivision of the Commonwealth as defined in § 8.01-385, employee of either acting in his official capacity, or member of the Virginia National Guard or Virginia Defense Force, when such a member is serving in the Virginia National Guard or the Virginia Defense Force on official state duty, shall knowingly

To bring the issue to the forefront, a group of plaintiffs, among them noted journalist Christopher Hedges, brought suit in January 2012 against the federal government in the Southern District of New York, seeking to permanently enjoin enforcement of the statute.¹⁵ Judge Katherine Forrest, a recent Obama appointee,¹⁶ issued a preliminary injunction in May of 2012,¹⁷ and a permanent injunction in September of 2012.¹⁸ The District Court ruled for the plaintiffs, finding in part that the term “substantial support” was unconstitutionally vague.¹⁹ The United States filed, and was granted, an emergency motion to the Court of Appeals to stay the injunction pending the ruling on appeal,²⁰ and in February of 2013 the Second Circuit heard oral arguments.²¹ This case was followed closely by some commentators, most notably those writing for the *Lawfare* blog.²²

Emergency motions and other procedural moves aside, the heart of the matter in *Hedges* has yet to be addressed: what behavior, exactly, constitutes “substantial support” of terrorist activities? To date, no court has ventured to sketch the parameters of this term, though some have construed similar terminology in the Military Commissions Acts (MCA) of 2006²³ and 2009,²⁴ as well

aid an agency of the armed forces of the United States in the detention of any citizen pursuant to 50 U.S.C. § 1541 as provided by the National Defense Authorization Act for Fiscal Year 2012.”)

¹⁵ See *Hedges v. Obama (Hedges I)*, 12 CIV. 331 KBF, 2012 WL 1721124 (S.D.N.Y. May 16, 2012) *order clarified*, 12 CIV. 331 KBF, 2012 WL 2044565 (S.D.N.Y. June 6, 2012).

¹⁶ See Press Release, Office of the Press Secretary, *President Obama Nominates Six Judges to United States District Courts*, (May 4, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/05/04/president-obama-nominates-six-judges-united-states-district-courts>.

¹⁷ *Hedges I*, 2012 WL 1721124, at *2.

¹⁸ *Hedges v. Obama (Hedges II)*, 890 F.Supp.2d 424, 427 (S.D.N.Y. 2012).

¹⁹ See *Id.*

²⁰ *Hedges v. Obama (Hedges III)*, 12-3176 L, 2012 WL 4075626 (2d Cir. Sept. 17, 2012).

²¹ Adam Klasfield, *2nd Circuit Hearing on Indefinite Detention Focuses on Press Rights*, COURTHOUSE NEWS SERV. (Feb. 6, 2013, 9:33 A.M.), <http://www.courthousenews.com/2013/02/06/54640.htm>.

²² See, e.g., Wells Bennet, *More from Senate Amici on Oral Argument in Hedges*, LAWFARE (Jan 9, 2013, 2:23 P.M.), <http://www.lawfareblog.com/2013/01/more-from-senate-amici-on-oral-argument-in-hedges/> (on Senate amici appearing at oral argument in *Hedges*); Alan Rozenshtein, *Motions on Clapper’s Implications for Standing in the Hedges Second Circuit Appeal*, LAWFARE (Apr. 6, 2013, 1:35 P.M.), <http://www.lawfareblog.com/2013/04/motions-on-clappers-implications-for-standing-in-the-hedges-second-circuit-appeal/> (considering the issue of standing before the Second Circuit following the Supreme Court’s decision in *Clapper v. Amnesty International USA*, 568 U.S. ___ (2013)).

²³ Pub L. No. 109–366, 120 Stat. 2600 (2006).

²⁴ 10 U.S.C. §§ 948a–950t (Supp. V 2012); see also *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010) (analyzing the standards set out for “support” in the MCA 2006 and 2009 to determine whether plaintiff’s detention fell within the scope of the executive’s detention authority pursuant to the AUMF). The court held that Al-Bihani was lawfully detained because he “was both part of and substantially supported enemy forces,” but acknowledged that the issue would be more complex if there was “only support, only membership, or neither,” and did not “explore the outer bounds of what constitutes sufficient support or indicia of membership to meet the detention standard.” *Id.* at 873–74.

as federal criminal law.²⁵ Even Judge Forrest stopped short of defining the term, finding it unconstitutionally vague.²⁶ Underlying the vagueness of the term and the seeming judicial reticence to venture explicit guidance, it would seem, are serious questions about the nature and extent of the executive's counterterrorism strategies and judicial involvement in the realm of national security.

With Al-Qaeda leaders' power and influence seemingly on the wane,²⁷ the judiciary must allow the executive the flexibility to combat emerging threats while maintaining a strong commitment to foundational civil liberties. Though emergent groups connected with either the Taliban or Al Qaeda may be covered by the AUMF,²⁸ it remains a very real possibility that a completely new threat, not associated with either organization, could present itself to the United States in the future. On the other hand, granting our federal government undefined powers of executive detention raises serious constitutional questions.²⁹ If Section 1021 stands up to judicial scrutiny, it may be because the judiciary has stepped in and crafted a standard for this vague, yet important, term.

²⁵ It has been argued that substantial support is merely a subset of the "material support" standard used in federal criminal law, namely 18 U.S.C. §§ 2339A, 2339B (Supp V 2011). See Robert Chesney, More on "Substantial Support", "Material Support," LOAC, and the First Amendment, *LAWFARE*, (Sep. 9, 2012, 11:41 P.M.), <http://www.lawfareblog.com/2012/09/more-on-substantial-support-material-support-loac-and-the-first-amendment/> (arguing that the definition of "substantial support" is cabined by the law of armed conflict as well as by the codification of the "substantial support" standard in the NDAA, and that the fact that the standard was even codified signals an intent to eliminate *de minimis* support as actionable under the statute); see also Steve Vladeck, More Hedges: If Substantial Support < Material Support..., *LAWFARE*, (Sep. 20, 2012, 9:21 A.M.), <http://www.lawfareblog.com/2012/09/more-hedges/> (arguing that if Chesney is correct, "then the phrase 'substantial support' in... Section 1021(b)(2) of the FY2012 NDAA should be understood as a proper subset of 'material support' in those situations in which the laws of war would authorize detention," and that this interpretation is necessary to avoid serious vagueness issues).

²⁶ See *Hedges v. Obama (Hedges II)*, 890 F.Supp.2d 424, 452 (S.D.N.Y. Sept. 12, 2012).

²⁷ See Beau D. Barnes, *Reauthorizing the "War on Terror": The Legal and Policy Implications of the AUMF's Coming Obsolescence*, 211 *MIL. L. REV.* 57, 80-81 (2012) ("[i]n other words, how the law conceives of Al Qaeda's 'associated forces' ultimately determines who can be targeted and detained pursuant to the AUMF. The Obama Administration has placed increasing emphasis on the phrase, noting that '[t]he concept has become more relevant over time, as al Qaeda has, over the last 10 years, become more decentralized,' and relies more on associates to carry out its terrorist aims.).

²⁸ Pub. L. No. 107-40, 115 Stat. 224 (2001).

²⁹ See Steve Vladeck, *What Hedges Could Have Said*, *LAWFARE* (Sep. 18, 2012, 1:38 P.M.), <http://www.lawfareblog.com/2012/09/what-hedges-could-have-said/> (arguing that for U.S. persons "who *do* undertake at least some work that comes anywhere near the substantial support line, the vagueness of the definition actually *does* appear to raise a serious constitutional question—not insofar as the Constitution forbids *detention* of such individuals, but insofar as the vagueness of the government's detention authority raises the specter of chilling the constitutionally protected speech of U.S. persons *not* subject to detention.").

In this Comment, I suggest a standard for the Second Circuit to use in *Hedges* for “substantial support” as it appears in § 1021 of the NDAA. In part I, I briefly present the issues and arguments involved in *Hedges*, and reactions to the district court’s decision. In part II, I argue that a restrictive standard should be adopted for the term “substantially supported”. First, I argue that the term “substantial support” must take a different meaning than the terms “material” or “purposeful and material,” as those latter terms are used in federal law prohibiting acts supporting terrorism and the Military Commissions Act of 2006 and 2009. Second, I argue that, as it has been construed by the Supreme Court, the term “material” drags in far too much otherwise innocuous conduct to be appropriate for Section 1021. Third, I argue that the standard for the term “substantially” adopted in the D.C. District Court case *Gherebi v. Obama* is the appropriate one to use, not only because it provides a limiting principle to a potentially overbroad statute, but also because it strikes the best balance between our national security and liberty interests.³⁰

Before I begin the discussion of relevant litigation and the approach the Second Circuit should take regarding the standard for “substantial support”, I must make two points clear. The first concerns the position of this Comment as to whether the detention “until the end of the hostilities”³¹ called for by Section 1021 can properly be called “punishment.” In the decisions issuing the preliminary and permanent injunctions in *Hedges*, Judge Forrest held that Section 1021 was effectively “equivalent to a criminal statute.”³² I adopt this interpretation, and refer to the indefinite detention prescribed by Section 1021 as “punishment.” Second, the appropriateness of the punishment prescribed in Section 1021 is a topic beyond the scope of this piece. For the purposes of this comment, I take Section 1021 as I have found it.

³⁰ It cannot be ignored that the standard used to define “substantial support” in *Gherebi v. Obama* has been rejected by the D.C. Circuit. *Uthman v. Obama*, 637 F.3d 400, 403 (D.C. Cir. 2011) (noting that several cases within the D.C. Circuit have held *Gherebi*’s “‘command structure test’ ... does not reflect the full scope of the Executive’s detention authority under the AUMF....”); see Colby P. Horowitz, Note, *Creating A More Meaningful Detention Statute: Lessons Learned from Hedges v. Obama*, 81 *FORDHAM L. REV.* 2853, 2879 (2013) (explaining how *Gherebi*’s equation of substantial support with the command structure test was rejected by the D.C. Circuit.). Horowitz notes that this line of cases applies to detention authority under the AUMF and not § 1021 of the NDAA, allowing for applicability of *Gherebi* in a different statutory context. *Id.*

³¹ National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021 (2012).

³² *Hedges v. Obama (Hedges I)*, 12 CIV. 331 KBF, 2012 WL 1721124 (S.D.N.Y. May 16, 2012), *order clarified*, 12 CIV. 331 KBF, 2012 WL 2044565 (S.D.N.Y. June 6, 2012) (“[p]laintiffs are therefore at risk of detention, of losing their liberty, potentially for many years. In relevant part, then, that is the reflectical equivalent of a penal statute.”); *Hedges v. Obama (Hedges II)*, 890 F. Supp. 2d 424, 450 (S.D.N.Y. 2012) (“[a]s this Court found in its May 16 Opinion, § 1021(b)(2) is equivalent to a criminal statute—without the due process protections afforded by one.”).

I.

THE *HEDGES* LITIGATION

In *Hedges v. Obama*, plaintiffs claimed, *inter alia*, that Section 1021 of the NDAA FY 2012 has chilled their First Amendment freedoms.³³ Christopher Hedges and other named plaintiffs attested that Section 1021 had caused them to refrain from performing specific activities that they would have performed absent the law.³⁴ These behaviors included reporting on al-Qaeda operations abroad for the purposes of foreign correspondence, activism on behalf of a variety of groups, including WikiLeaks, U.S. Day of Rage, and Revolution Truth, and interviewing and writing pieces on Guantanamo detainees.³⁵ Plaintiffs argued that because the term “substantial support” was not defined in the statute, and the statute required no *mens rea* for such support, the term dragged a broad spectrum of behaviors and individuals under the statute and put the plaintiffs at risk of indefinite detention.³⁶

In response, the government argued that, though the term “substantially supported” was not explicitly defined, the law was meant merely to “reaffirm” the AUMF.³⁷ In its brief to the District Court prior to the filing of the preliminary injunction in May of 2012, the government did not explicitly exempt the *Hedges* plaintiffs from the NDAA’s reach, stating only that the “substantial support” prong of the NDAA must be determined on a “case-by-case” basis.³⁸ However, in oral arguments in August, before the court made its preliminary injunction permanent, the Government modified its approach, stating, in essence, that though the term “substantial support” was as yet undefined, it did not, at the very

³³ Complaint at 6, *Hedges v. Obama* (*Hedges I*), 12 CIV. 331 KBF, 2012 WL 1721124, (S.D.N.Y. May 16, 2012), (No. 1:12-cv-00331-KBF); *see also Hedges I*, 2012 WL 1721124, at *17.

³⁴ Complaint, *supra* note 33, at 6–12.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *See* Government’s Memorandum of Law in Opposition to Plaintiff’s Motion for a Preliminary Injunction at 1–2, *Hedges v. Obama* (*Hedges I*), 12 CIV. 331 KBF, 2012 WL 1721124, (S.D.N.Y. May 16, 2012) (No. 1:12-cv-00331-KBF).

³⁸ *Id.* at 5, n.5 (arguing that “the circumstances justifying detention of an individual for providing ‘substantial support’ to enemy forces will need to be identified case by case going forward.”) *see also, e.g.*, Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay at 3, In Re Guantanamo Bay Detainee Litigation, Misc. No. 08-442 (D.D.C. Mar. 13, 2009) (“[i]t is neither possible nor advisable, however, to attempt to identify, in the abstract, the precise nature and degree of ‘substantial support,’ . . . the particular facts and circumstances justifying detention will vary from case to case.”). This latter brief concerns the scope of the executive’s detention authority under the AUMF, not the NDAA.

least, extend to the *Hedges* plaintiffs.³⁹ This new approach was also rejected by Judge Forrest.⁴⁰

Judge Forrest's decision in *Hedges*, and its resulting permanent injunction, was not received warmly in some quarters. Benjamin Wittes, a senior fellow at the Brookings Institution, offered strident criticism, specifically on the interpretation of existing precedent and Judge Forrest's interpretation of the role that the laws of war play in detention pursuant to theories of "support".⁴¹ A mere five days after the permanent injunction was handed down, the Second Circuit granted an emergency motion to stay the order.⁴² Plaintiffs filed an emergency application to the Supreme Court to reinstate the injunction, which was rejected by Justice Ginsburg.⁴³ Negative commentary, and the treatment of the decision by the higher courts, suggest that the Second Circuit is unlikely to affirm the Judge Forrest's decision in its entirety, or even, perhaps, in part. With this in mind, however, neither the criticism of *Hedges*, nor the decision itself, has ventured to give meaning to the "substantial support" standard as it appears in the NDAA. For the Second Circuit, then, the meaning of "substantial support", and the behavior that comprises it, remains a question of first impression.⁴⁴

³⁹ Brief for Defendant-Appellant at 35, *Hedges v. Obama* (*Hedges III*), 12-3176 L, 2012 WL 4075626 (2d Cir. 2012) (No. 1:12-cv-00331-KBF) ("[i]ndeed, after the district court's unwarranted entry of a preliminary injunction, the United States expressly represented to the court that plaintiffs would not, as a matter of law, be subject to military detention for the types of conduct they allege in their complaint.").

⁴⁰ See *Hedges v. Obama* (*Hedges II*), 890 F. Supp. 2d 424, 470 (S.D.N.Y. 2012).

⁴¹ See Benjamin Wittes, *Initial Thought on Hedges*, LAWFARE, (Sep. 13, 2012, 9:04 A.M.), <http://www.lawfareblog.com/2012/09/initial-thoughts-on-hedges/>. Wittes argues that *Hedges* is "shockingly bad"; incorrectly states that the source of detention authority according to "support" is the 2009 MCA, rather than the AUMF; that Judge Forrest failed to take into account D.C. Circuit precedent, contrary to *Al-Bihani*, suggesting that the Laws of War both apply to and constrain the detention authority of the executive; that the overbroad nature of the ruling could potentially impact United States forces in Afghanistan; and finally that, given the application of the Laws of War to executive detention, the NDAA actually narrowed the scope of such detention; see also Benjamin Wittes, *Thoughts on Al Warafi*, LAWFARE, (Feb. 28, 2011, 9:30 P.M.), <http://www.lawfareblog.com/2011/02/thoughts-on-al-warafi/>.

⁴² *Hedges v. Obama* (*Hedges III*), 12-3176 L, 2012 WL 4075626 (2d Cir. 2012).

⁴³ *Hedges v. Obama*, No. 12A600 (U.S. Dec. 14, 2012) (Ginsburg, Circuit Justice), available at <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12a600.htm>.

⁴⁴ *Hedges v. Obama* (*Hedges II*), 890 F. Supp. 2d 424, 470 (S.D.N.Y. 2012) (stating that "no court has defined 'substantial support' . . . [and that] the phrase 'materially supported' as used in *Al-Bihani* does not shed light on the interpretation of 'substantial support.' [in NDAA § 1021]). It bears mention here, however, that despite his sharp criticism of the *Hedges* decision, Mr. Wittes (of Lawfare), along with Mr. Chesney, recently testified before Congress that detention of individuals captured on United States territory should be foreclosed as an option. See *Protecting U.S. Citizens' Constitutional Rights During the War on Terror: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 1 (2013) (statement of Robert Chesney & Benjamin Wittes).

II.

A RESTRICTIVE STANDARD SHOULD BE ADOPTED FOR THE
TERM “SUBSTANTIAL SUPPORT”*A. The Term “Material,” as It Has Been Construed, is Too
Broad Given the Interests at Stake*

Given that the Second Circuit will likely look to “the text of relevant statutes and controlling domestic case law”⁴⁵ in determining the meaning of “substantial support” as it appears in Section 1021 of the NDAA, it is likely that the “material” standard in federal criminal law, the “purposeful and material” standard, and relevant case law from the Supreme Court and other circuits will be used as guidance in any attempt to give meaning to “substantial support”.⁴⁶

One available option for the Second Circuit would be to read “substantial support” as equivalent to “material support.” Under United States criminal law, it is a federal crime to provide “material support” to terrorists.⁴⁷ The definition of “material” under these offenses is broad, and includes a number of activities that would be legal if they were not provided to terrorist organizations, such as financial services, lodging, and “expert advice or assistance.”⁴⁸ The MCA of 2009 also includes broad prohibitions on support for terrorist activities, stating that any “unprivileged enemy belligerent” who “purposefully and materially supported hostilities against the United States” is subject to a military trial and detention.⁴⁹

⁴⁵ *Al-Bihani v. Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010).

⁴⁶ See Chesney, *supra* note 25 (advancing the argument that “substantial support” is a subset of the “material support” standard in federal criminal law); see also 10 U.S.C. § 948a(7)(B), 948c (Supp. V 2011); *Al-Bihani*, 590 F.3d at 866 (finding that while the outer bounds of the “purposeful and material” standard for support of terrorism in the MCA of 2006 and 2009 could not be established, that defendant’s conduct fell within that standard).

⁴⁷ 18 U.S.C. § 2339A (Supp. V 2011).

⁴⁸ 18 U.S.C. § 2339A(b)(1) (Supp. V 2011) (“the term ‘material support or resources’ means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.”).

⁴⁹ 10 U.S.C. § 948a(7)(B) (Supp. V 2011) (“[t]he term ‘unprivileged enemy belligerent’ means an individual (other than a privileged belligerent) who . . . has purposefully and materially supported hostilities against the United States or its coalition partners.”); 10 U.S.C. § 948c (Supp. V 2011) (“[a]ny alien unprivileged enemy belligerent is subject to trial by military commission as set forth in this chapter.”).

In the 2010 case *Holder v. Humanitarian Law Project*, the Supreme Court considered the term “material” in some detail.⁵⁰ The plaintiffs, two United States citizens and a spate of non-profit groups, sought to provide support to two federally-recognized terrorist organizations: the Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE).⁵¹ The various plaintiffs sought to, *inter alia*, train PKK members to use international law to peacefully resolve disputes, educate LTTE members on how to bring claims for tsunami relief, and, more generally, engage in political advocacy on behalf of PKK and LTTE members.⁵² The Court held that the statute in question did not require specific intent to advance a terrorist groups' illegal activities, only that the activities fall under the scope of the meaning of “material” in the statute, and that the organization offering such support have knowledge of the named terrorist group's connection to terrorism.⁵³ That is to say, any training, expert advice, and the like for *any* reason, is illegal under the statute when proffered to a group on the federal government's list of terrorist organizations. Though the Court acknowledged that the support must be “valuable,”⁵⁴ thus removing the likelihood of *de minimis* support being charged under the statute, this ruling sweeps in a wide swath of otherwise legal conduct based not on the legality of the conduct itself, but on the identity of the target group that receives it.

In *Al Bihani v. Obama*, a *habeas* proceeding, the D.C. Circuit had occasion to consider the meaning of the term “purposeful and material.”⁵⁵ Plaintiff, a Yemeni citizen, served a paramilitary group allied with the Taliban in 2001.⁵⁶ Though plaintiff claimed that he never fired a weapon for that group, plaintiff admitted that he had 1) accompanied the group onto the battlefield, 2) carried a weapon issued by the group, 3) cooked for the group, and 4) obeyed orders by the group to retreat and surrender.⁵⁷ Though the D.C. Circuit found that though it could not identify the “outer bounds” of the term “purposeful and material”, it determined that “they clearly include traditional food operations essential to a fighting force and the carrying of arms”.⁵⁸

The term “substantial support” in Section 1021 of the NDAA must take a narrower meaning than either the “material support” standard in federal criminal law, or the “purposeful and material” standard as it appears in the 2009

⁵⁰ *Holder v. Humanitarian Law Project*, 561 U.S. ___, 130 S. Ct. 2705 (2010).

⁵¹ *Id.*

⁵² *Id.* at 2713–15.

⁵³ *Id.* at 2718, 2720–23.

⁵⁴ *Id.* at 2725.

⁵⁵ *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010).

⁵⁶ *Id.* at 869.

⁵⁷ *Id.* at 869.

⁵⁸ *Id.* at 873.

MCA, and as it has been considered by the D.C. Circuit Court of Appeals. First, from a textual standpoint, the terms are simply different. The Supreme Court has held not only that when Congress uses separate terms to describe standards for conduct, such as “substantial” and “material,” the terms are generally given different meanings,⁵⁹ but also that substantial support and material support describe conduct, on a plain reading of the text, on two different orders of magnitude. If “material” support is simply support that is “valuable,”⁶⁰ substantial support must, at the very least, be more significant, and thus describe a narrower band of conduct. In addition, the term “substantial,” in the context of the law of neutrality, means support approaching direct participation in a conflict.⁶¹ An approach reminiscent of this position has already been taken in the *Gherebi* decision, discussed in greater detail below.⁶² Furthermore, the Obama administration has stated that it intends to apply the term “substantial” in *habeas* proceedings, suggesting that it intends to limit the range of conduct that it considers to be support for terrorism.⁶³ Finally, to merely require the support to be “valuable” to a terrorist organization imports into Section 1021 a bar on a whole host of conduct considered perfectly legal today, not the least of which is conduct in which many of the *Hedges* plaintiffs have already engaged.⁶⁴ These differences in text, executive intent, and usage in other areas of law provide justification for the Second Circuit to take a narrow view of the types of behavior that may cause someone to have rendered “substantial support” for a terrorist organization for the purposes of the NDAA.

The potential consequences of enforcement of the NDAA also provide justification for the Second Circuit to take a narrow view of the “substantial support” standard. The penalties for violation of the statutes considered in *Humanitarian Law Project* versus those prescribed in Section 1021 are dramatically different. The penalty for violation of 18 U.S.C. § 2339B at issue in *Humanitarian Law Project* is up to fifteen years imprisonment in federal prison,⁶⁵ whereas the penalty for a violation of Section 1021 is military detention, without trial, *until*

⁵⁹ *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702 (2012) (“[c]ourts generally seek to respect Congress’s decision to use different terms to describe different categories of people or things.”).

⁶⁰ *Holder v. Humanitarian Law Project*, 561 U.S. ___, 130 S. Ct. 2705, 2725 (2010).

⁶¹ Karl S. Chang, *Enemy Status and Military Detention in the War Against al-Qaeda*, 47 TEX. INT’L L.J. 1, 66 (2011) (arguing, generally, for an approach to classifying detainees based in neutrality law and the concept of “enemies”); cf. Rebecca Ingber, *Untangling Belligerency from Neutrality in the Conflict with al-Qaeda*, 47 TEX. INT’L L.J. 75 (2011) (arguing that Chang’s approach offends core international law principles).

⁶² *Gherebi v. Obama*, 609 F. Supp. 2d 43 (D.D.C. 2009).

⁶³ *Id.*

⁶⁴ *Hedges v. Obama (Hedges I)*, 12 CIV. 331 KBF, 2012 WL 1721124 (S.D.N.Y. May 16, 2012) *order clarified*, 12 CIV. 331 KBF, 2012 WL 2044565 (S.D.N.Y. June 6, 2012).

⁶⁵ 18 U.S.C. § 2339A (Supp. V 2011).

the end of hostilities.⁶⁶ Given the amorphous, and seemingly perpetual, state of the War on Terror, the penalty for violation of Section 1021 is potentially much more severe than that currently prescribed under federal law.⁶⁷

Finally, the case-by-case approach used in the “purposeful and material” standard, as explained in the *Al-Bihani* decision,⁶⁸ is simply too vague to use in the context of the “substantial support” standard of the NDAA. This is not to say that it is unlikely that the plaintiff in *Al-Bihani* met the standard provided in the 2009 MCA or would fail to meet the standard under Section 1021—indeed, the plaintiff stayed at Al Qaeda guest houses and marched as a regular in units closely allied to the Taliban.⁶⁹ The case-by-case approach, however, without more, is potentially far too inconsistent for use with the “substantial support” standard, given the severity of punishment under Section 1021 and its potential applications to United States citizens. With so much at stake, we deserve better than “I know it when I see it.”⁷⁰ Something more definite is needed.

B. The More Restrictive Standard in Gherebi is More Appropriate to Adopt for Interpretation of Section 1021

Gherebi v. Obama, a consolidated litigation in which plaintiffs challenged the scope of President’s detention authority, is one of the only cases to examine the meaning of the term “substantially supported” in the context of terrorism.⁷¹ Here, the Obama Administration, in its memorandum to the court, adopted a narrower position than the executive branch did under President Bush. The Obama Administration stated that while the President’s detention authority arises solely from the AUMF, it extends only to those “who were part of, or *substantially* supported, Taliban or al-Qada [sic] forces or associated forces that are engaged in hostilities against the United States or its coalition partners.”⁷² The petitioners argued for an even higher standard, stating that their detention was

⁶⁶ National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021 (2012).

⁶⁷ § 2339A (“[w]hoever provides material support . . . shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.”); § 1021 (“[a] person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces [may be subject to] . . . [d]etention under the law of war without trial until the end of the hostilities.”).

⁶⁸ *Al-Bihani v. Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010).

⁶⁹ *Id.* at 869.

⁷⁰ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Potter, J., concurring).

⁷¹ The plaintiff after whom the action is named, Belaid Gherebi, was one of a number of individuals detained pursuant to the AUMF in the early part of the twenty-first century. *Gherebi v. Obama*, 609 F.Supp.2d 43 (D.D.C. 2009).

⁷² *Id.* at 53.

unauthorized unless the government could prove that they “actually and directly engaged in the armed conflict against the United States in Afghanistan.”⁷³

In its decision, the D.C. District Court both adopted and limited the government’s “substantial support” standard. The court found that two categories of individuals existed in non-international armed conflicts under international law: “members of armed forces” and “civilians;” further, while only members of the former could be detained, membership was not limited strictly to members of the armed forces that engaged in combat.⁷⁴ Thus, for the court, those who engaged in housing, feeding, and transporting terrorist fighters could also be detained.⁷⁵ While the court declined to expressly define the term “substantial support,” it stated that defining the term outside of the limiting principles it had set out would “give rise to . . . constitutional concerns . . . regarding the clarity and scope of Congress’s delegation of authority to the President.”⁷⁶ This approach has since been rejected, and the D.C. Circuit has mostly adopted a case-by-case approach.⁷⁷

In the context of the NDAA, however, the district court’s approach in *Gherebi* provides the most appropriate standard. First, as the *Gherebi* court pointed out, the approach it outlined is grounded in international law governing non-international armed conflicts, namely Common Article 3 of the Geneva conventions.⁷⁸ Second, allowing an overbroad interpretation of the term “substantial support” supplants existing domestic law on the subject. Congress has explicitly spoken on the question of how the federal government should deal with United States citizens who support terrorism in statutes prescribing criminal penalties for individuals who perform these acts.⁷⁹ Though some commentators have expressed concerns that these standards are too expansive even for use in domestic law,⁸⁰ these laws provide the United States with adequate protection from those

⁷³ *Id.* at 53–54.

⁷⁴ *Id.* at 65–66.

⁷⁵ *Id.* at 69.

⁷⁶ *Gherebi v. Obama*, 609 F.Supp.2d 43, 69–70 (D.D.C. 2009).

⁷⁷ *Uthman v. Obama*, 637 F.3d 400, 403, 407–08 (D.C. Cir. 2011) (“[w]e do ‘not weigh each piece of evidence in isolation, but consider all of the evidence taken as a whole.’”); *see also supra* note 30.

⁷⁸ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; *Gherebi v. Obama*, 609 F. Supp. 2d 43 (D.D.C. 2009); *see also* John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT’L L. 201, 202 (2011) (considering the influence of international law principles on detention practices).

⁷⁹ 18 U.S.C. § 2339A (Supp. V 2011).

⁸⁰ *See, e.g.*, Major Dana M. Hollywood, *Redemption Deferred: Military Commissions in the War on Terror and the Charge of Providing Material Support for Terrorism*, 36 HASTINGS INT’L & COMP. L. REV. 1, 92 (2013) (“[u]nder the Court’s deferential holding in *Holder*, it is clear that the

of its citizens who would take, attempt to take, or conspire to take action to support terrorist activities against the United States. By importing the standard articulated by the *Gherebi* court for “substantial support” into the NDAA, military detention would still be available for United States citizens who take part in a terrorist organization. For those who fall short of this conduct, namely citizens of the United States who help finance terrorism, federal law would provide adequate means of charging and punishing these individuals.

This approach also provides the most advantageous balance between the government’s national security interests and preservation of our constitutional protections. To be sure, courts have long been extremely deferential to the United States government when national security issues are involved.⁸¹ It has been said that the policies of the United States government in the wake of the terrorist attacks of 9/11 risk infringing upon fundamental protections.⁸² Limiting the term “substantial support” to, in essence, non-combat membership in a terrorist organization, preserves those protections while still allowing the United States to protect itself from terrorist activity. Under this regime, the United States can still use preventive detention against the most dangerous individuals: those who would actively offer their services to terrorist organizations. As we have seen, this does not leave the government without recourse to respond to United States citizens who would support terrorism: these individuals may still be charged under federal law. It is the process, however, that is important—by applying federal criminal law to these individuals, the government still affords them the full spate of constitutional guarantees.

Finally, if the Second Circuit would adopt this approach, it would help to quell the political arguments surrounding the law.⁸³ The fear surrounding Section 1021 stems in large part from the uncertainty of its application. Expressly limiting its scope would remove that uncertainty and help to restore citizens’ faith that, no matter who their crime involves, constitutional guarantees will remain intact. This would undercut much of the furor surrounding the law. It is not diffi-

Court will not require a specific intent *mens rea* to find a violation of the statute. This is critical as it essentially assures a conviction on the charge of providing MST in the federal courts.”)

⁸¹ See, e.g., *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1073 (9th Cir. 2010) (noting that when engaging in the “difficult balance... between fundamental principles of our liberty, including justice, transparency, accountability and national security... there are times when exceptional circumstances create an irreconcilable conflict between them. On those rare occasions, we are bound to follow the Supreme Court’s admonition that ‘even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that [state] secrets are at stake.’”) (quoting *United States v. Reynolds*, 345 U.S. 1, 11 (1953)).

⁸² See David Cole, *Where Liberty Lies: Civil Society and Individual Rights After 9/11*, 57 WAYNE L. REV. 1203, 1221 (2011) (labeling United States terrorism policies in the wake of 9/11 “legally dubious”).

⁸³ See *supra* notes 7–14.

cult to drum up opposition to a law that may or may not subject United States citizens to military detention; when that law is expressly limited to those who would seek to terrorize the United States through active participation, in combat or out, in terrorist organizations, it becomes a much easier pill to swallow.

CONCLUSION

It remains to be seen what approach the Second Circuit will take in the *Hedges* litigation. The court could, as Judge Forrest did, find the law unconstitutionally vague, though it would seem that this is unlikely, given the speed with which they stayed the permanent injunction. Alternately, it could follow the D.C. Circuit in *Al-Bihani*, the D.C. District Court in *Gherebi*, or craft its own approach based on its independent understanding of the applicable law.

Whatever approach the Court decides to take, however, it must attempt to craft guidance as to what behavior, specifically, constitutes “substantial support”. If nothing else, this could provide further guidance to courts who are forced to tackle the hard question of how best to balance the government’s need to disrupt terrorist activity with preserving access to the protections enshrined in our Constitution.

