THE POWER TO DETAIN: DETENTION OF TERRORISM SUSPECTS AFTER 9/11

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Since the attacks of September 11, 2001, the United States has used detention of suspected terrorists as a key element of its counterterrorism operations. Yet the sources of the U.S. government's authority to detain suspected terrorists—and limitations on that authority—remain ill defined. This Article fills this gap by clarifying the reach and limits of existing sources of U.S. government detention authority. It offers a comprehensive overview of the sources of government authority to detain terrorism suspects in law of war detention—including statutory and constitutional authority. It shows, moreover, that this authority is limited not only by its own terms but also by the law of armed conflict and human rights law. The Article then examines criminal law detention as an alternative to law of war detention for terrorism suspects. It challenges the recent trend toward favoring law of war detention for terrorism suspects, arguing that criminal law detention and prosecution of terrorism suspects can produce better predictability, fairness, legitimacy, and flexibility than law of war detention. In most cases, therefore, suspected terrorists can—and should—be charged and prosecuted within the federal criminal justice system. Doing so is not only more consistent with U.S. legal principles and commitments, but it is also the most promising way forward in the fight against terrorism.

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I. INTRODUCTION

U.S. counterterrorism operations today are being carried out on an unprecedented scale. Since the attacks of September 11, 2001, a key element of these counterterrorism operations has been detention of suspected terrorists. The United States is holding 171 terrorism suspects at Guantanamo Bay, Cuba, and three thousand in Afrghanistan.[2] The docket of the Court of Appears for the District of Columbia continues to be filled with cases filed by detainees challenging detentions that in some cases are entering a second decade. Meanwhile, Congress and the President have repeatedly sparred over issues ranging from the scope of Military Commissions set up to try law of war detainees, the transfer detainees held abroad to prisons within the United States, the propriety of prosecuting terrorism suspects in U.S. federal courts, and unlimited detention of terrorism suspects without trial.[3] Yet the sources of the U.S. government's authority to detain suspected terrorists—and limitations on that authority—remain ill defined.

This Article aims to fill this gap by clarifying the reach and limits of existing sources of U.S. government detention authority, with a particular focus on the government's authority to detain participants in the ongoing conflict with al-Qaeda and associated forces. The inquiry begins with the key statutory authority for detention for counterterrorism purposes: the Authorization for Use of Military Force of 2001 (2001 AUMF). The 2001 AUMF authorizes 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."[4] Although detention power is not specifically mentioned in the AUMF, courts have repeatedly held that the statute authorizes the detention of members of al-Qaeda and the Taliban for the duration of hostilities as a fundamental incident of waging war. Outside of these parameters, however, the scope of detention authority under the 2001 AUMF has been less clear.

The recently signed National Defense Authorization Act (NDAA) of 2012[5] codifies the expansive interpretation of detention authority under the 2001 AUMF advanced by the Obama Administration since 2009.[6] It provides that, pursuant to the

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[2] These figures are accurate as of March 2012. Mark Hosenball , *Recidivism Rises Among Released Guantanamo Detainees*, REUTERS (March 5, 2012); Ernesto Londoño & Peter Finn, U.S. agrees to transfer control of detainees in Afghanistan, Washington Post (March 9, 2012).

[3] To take one recent example, Democratic senators recently proposed a bill to prohibit the indefinite detention of any suspected terrorist apprehended in the United States, whether or not the suspect was a U.S. citizen. This measure is aimed at limiting the recent National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. (2011), which authorized indefinite detention of terrorism suspects. Jennifer Rizzo Lawmakers announce bill prohibiting indefinite detention in U.S., CNN Online (March 8, 2010).

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

[5] National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. (2011). The included terrorism detention provisions were among the most controversial aspects of the defense budget discussion.

[6] The government has maintained that authority under the AUMF extends to "associated forces," as well as those directly involved in planning, authorizing, committing, or aiding the attacks. Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 2, *In re* Guantanamo Bay Detainee Litigation, 624 F. Supp. 2d 27 (D.D.C. Mar. 13, 2009) (Nos. 05-0763, 05-1646, 05-2378) [herinafter Memorandum Regarding the Government's Detention Authority].

2001 AUMF, the President has authority to detain "covered persons," including those who "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks" and those who "were a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners."[7] Although the NDAA disclaims any intention to either limit or expand the scope of the 2001 AUMF,[8] it reaches beyond the text of the original authorization to provide legislative support for law of war detention of members of associated forces that, although not directly involved in the September 11 attacks, may pose similar threats to the United States currently or in the future. By affirming an expansive reading of detention authority under the 2001 AUMF, and in its further provisions relating to military custody for Al-Qaeda terrorism suspects,[9] the NDAA demonstrates and supports a growing trend toward the use of law of war detention, rather than criminal detention and prosecution, as the preferred approach in the terrorism context.

This Article first examines the reach and limits of existing statutory and constitutional authority for detention arising from counterterrorism operations. Part II begins by discussing the scope of the government's detention authority under the 2001 AUMF. It then explores the extent and limitations of alternative sources of law of war detention authority, that is, sources of authority to detain in the course of military operations.[10] It examines the powers to detain terrorism suspects granted to the President in the Authorization for Use of Military Force Against Iraq Resolution of 2002 (2002 AUMF) and the Military Commissions Act of 2009 (MCA), as well as the President's independent power to detain under Article II of the Constitution. It concludes that, while each of these legal authorities offers limited additional detention authority, none of them offers a basis for authority that could be used to broadly justify terrorism detentions not authorized under the 2001 AUMF.

Part III examines the affirmative limitations on law of war detention imposed by international law. Under *jus ad bellum*, the use of military force, including detention, is only authorized where the host state has consented to, the Security Council has authorized, or self-defense has necessitated the use of military force. Under *jus in bello*, privileged combatants may be held only until the end of hostilities. Unprivileged enemy combatants may be tried for crimes committed in the course of their belligerency and detained punitively past the end of hostilities, but if they are not charged with a crime or tried, they also must be released at the end of hostilities. Finally, international human rights law imposes additional limitations on the use of law of war detention authority. The United States has ratified a series of human rights treaties that create obligations that bear on the legality of initial and continued detention.

Part IV discusses criminal detention as a frequently preferable alternative to law of war detention in the terrorism context. The recently-enacted NDAA demonstrates and

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[7] National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. §1021(b) (2011). For further discussion of "associated forces," *see infra* page 10.

[8] National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. §1021(d) (2011) ("Nothing in this section is intened to limit or expand the authority of the President or the scope of the Authorization for Use of Military Force,"). In his signing statement, President Obama also asserted that Section 1021 "breaks no new ground and is unnecessary."

[9] National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. §1022 (2011).

[10] This Article uses "law of war detention" interchangeably with "military detention."

supports a growing trend toward the use of law of war detention for terrorism suspects. This Article challenges this policy trend and highlights criminal detention as a frequently preferable alternative to law of war detention in the terrorism context. This Part shows that while law of war detention is appropriate in some contexts, it has many drawbacks, including lack of certainty about conviction and sentence duration, heightened risk of error, poor incentives for cooperation by defendants and allies, and inflexibility. By contrast, the use of criminal detention and prosecution has a number of advantages that produce greater predictability, fairness and legitimacy, and flexibility. Even so, the government has consistently pointed to certain situations in which it believes detention and prosecution within the criminal justice system will not be possible. In these cases,[11] alternative authority to detain may exist under the authorities described in Part II.

Part V concludes that where criminal antiterrorism statutes provide authority to prosecute and detain, this authority should be treated as the first resort—including in situations that have previously relied on military commissions and law of war detention. There are challenges inherent in increased use of the criminal system in the terrorism context, but these challenges can be overcome in most cases. Indeed, some of the challenges posed by criminal law can be seen as advantages of criminal prosecution and detention as opposed to law of war detention. Thus, in most cases, suspected terrorists can—and *should*—be charged and prosecuted within the federal criminal justice system.

II. LAW OF WAR DETENTION AUTHORITY AND LIMITATIONS

Under U.S. law, the President must trace his authority to detain individuals in the context of military operations to one of two sources of legal authority—a specific statute granting him that authority or his independent constitutional authority as Commander-in-Chief of the armed forces of the United States. Both sources of authority are narrowly circumscribed. Moreover, international law, including the law of armed conflict and human rights law, provides independent restrictions on the scope and nature of military detention authority.

The President's statutory authority to detain individuals in the course of military operations is provided in three separate statutes. First, the 2001 AUMF provides congressionally authorized detention authority in the context of hostilities that have a nexus to the terrorist attacks on the United States. Second, the 2002 AUMF provides detention authority in the context of the conflict in Iraq. Third, the Military Commissions Act of 2009 provides independent statutory authority to detain those over whom it grants jurisdiction to prosecute. All of these sources of authority, however, have well defined limits that grant the President constrained authority to detain those it suspects of engaging in terrorist activities.

[11] The government recently opined on the question of detention authority after acquittal in a brief in the trial by military commission of Abd Al Rahim Hussayn Muhammed Al Nashiri. Government Response to Defense Motion for Appropriate Relief To Determine if the Trial of This Case Is One from Which the Defendant May Be Meaningfully Acquitted, United States v. Al Nashiri (Oct. 27, 2011), at 6, *available at* http://www.lawfareblog.com/wp-content/uploads/2011/11/Govt-Response-to-Al-Nashiri-Motion.pdf ("Should the accused be acquitted following a trial by military commission, the government could, as a legal matter, continue to detain the accused during hostilities pursuant to the AUMF if it establishes by a preponderance of the evidence that the accused was part of or substantially supported al Qaeda, the Taliban, or associated forces.").

The President also possesses independent constitutional authority to detain individuals in the course of military operations. This authority derives from the President's power as Commander-in-Chief and his responsibility to protect the nation in times of emergency. This authority is also highly constrained. There is consensus that the President has independent Article II authority to conduct *defensive* military operations in very limited settings. When he acts on his own constitutional authority, however, any use of force must be closely tied to and justified by permitted limited purposes. Therefore, once again, the detention authority of the President is limited.

This Part considers each source of authority for law of war detention of terrorism suspects. Prior scholarship has examined these sources of authority individually, but so far none has addressed them as a whole. Here we offer a comprehensive overview of the President's current law of war detention authority. Examining all of the statutory and constitutional sources of detention authority together makes clear that the detention power is far from unlimited. Indeed, even the most significant grant of authority—that found in the 2001 Authorization for Use of Military Force—is carefully circumscribed. Understanding the true reach of and limits on the power to detain is an essential first step toward deciding the best course forward for addressing the threat of terrorism.

A. Statutory Authority

1. The 2001 Authorization for Use of Military Force

A week after terrorist attacks on the World Trade Center and Pentagon killed more than three thousand people, Congress passed an Authorization of Military Force (2001 AUMF) authorizing the President to respond to the attacks. The statute authorized the President:

> [T]o 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.[12]

Although the statute does not explicitly refer to detention, all three branches of government have since affirmed that the statute authorizes detention. In *Hamdi v. Rumsfeld*, a plurality of the Supreme Court held that the statute incorporated detention authority for the duration of the war against al-Qaeda,[13] because the "capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war."[14] The plurality arrived at its conclusion that detention authority was inherent in the statutory authorization to use military force by examining international law, including the

[12] Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).
[13] For more on the duration-based limitations on law of war detention authority, see *infra* Subsection I.C.2.b.
[14] Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (plurality opinion) (quoting *Ex parte* Quirin, 317 U.S. 1, 28, 30 (1942)).

customary concept of belligerent rights.[15] Belligerent rights grant sovereigns affirmative capabilities in wartime, including capture, detention,[16] and the seizure of neutral ships.[17] The plurality thus used longstanding international legal principles to give content to non-specific statutory language by inferring an authority generally associated with hostilities.[18] Under international law, detention authority is predicated on the importance of preventing a combatant's return to the battlefield. In light of this longstanding principle, a plurality of the Court concluded that the authority to detain until the end of hostilities was "an exercise of the 'necessary and appropriate force' Congress has authorized the President to use."[19]

The Supreme Court's holding afirmed the consistent position of the U.S. government—one that has held across administrations. In 2009, for example, the Obama Administration filed a memorandum with the U.S. Court of Appeals for the D.C. Circuit discussing its authority to detain those held at the U.S. military base in Guantanamo Bay. It argued that it possessed detention authority by virtue of the 2001 AUMF.[20] In 2012, Congress itself reaffirmed this understanding of the authority granted in the 2001 AUMF. In the National Defense Authorization Act (2012 NDAA), Congress stated that "the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force . . . includes the authority for the Armed Forces of the United States to detain covered persons."[21]

It is well established that the 2001 AUMF authorizes detention, but the scope of that authority is much less clear. In this section, we therefore examine the specific scope of detention authority under the 2001 AUMF. The power to detain under the AUMF rests on several factors in the statute. First, detention authority under the language of the 2001

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[15] *Hamdi*, 542 U.S. at 518 (plurality opinion); *see also* Cross v. Harrison, 57 U.S. (16 How.) 164, 190 (1853) (finding a belligerent right to form a civil government over a conquered territory); Bas v. Tingy, 4 U.S. (4 Dall.) 37, 40 (1800) (holding that in war fought "under a general authority, . . . all the rights . . . of war attach . . . .").

[16] *Hamdi*, 542 U.S. at 519, 521 (plurality opinion).

[17] *See, e.g.*, *Bas*, 4 U.S. (4 Dall.) at 43-44.

[18] If the 2001 AUMF can be read expansively as authorizing the President to "do what the laws of war permit," Curt A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terror*, 119 HARV. L. REV. 2047, 2092 (2005), other aspects of belligerent rights including, for example, the right to detain members of enemy forces who have not yet engaged in combat, might also be inferred under the same logic employed in *Hamdi.* The Obama Administration suggested this possibility in its *In re Guantanamo Litigation* memorandum. Memorandum Regarding the Government's Detention Authority, *supra* note 6, at 5-6 (citing *Quirin*, 317 U.S. at 38; Khalid v. Bush, 355 F. Supp. 2d 311, 320 (D.D.C. 2005), *rev'd on other grounds sub nom.*, Boumediene v. Bush, 128 S. Ct. 2229 (2008)); Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 art. 3, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention] (contemplating detention of members of state armed forces and militias without making a distinction as to whether they have engaged in combat).

[19] *Hamdi*, 542 U.S. at 518 (plurality opinion).

[20] Memorandum Regarding the Government's Detention Authority, *supra* note 6, at 1 ("The detention authority conferred by the AUMF is necessarily informed by the principles of the laws of war." (citing *Hamdi*, 542 U.S. at 521)).

[21] National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. §1021(a) (2011) ("Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force (Public Law 107-40; 50 U.S.C. 1541 note) includes the authority for the Armed Forces of the United States to detain covered persons (as defined in subsection (b)) pending disposition under the law of war.").

AUMF requires a sufficient link between a targeted nation, organization, or person and the September 11 attacks. Second, the geographic scope of the AUMF is not expressly restricted, therefore the AUMF apparently authorizes the use of force wherever those sufficiently linked to September 11 attacks may be found. Finally, the statutory authority to hold a detainee under the 2001 AUMF may derive either from the individual's own role in planning, authorizing, committing, or aiding the September 11 attacks, or from his or her association with an organization that performed such a role.

a. September 11 Nexus Requirement

The central textual restriction on the scope of detention authority under the 2001 AUMF is the September 11 nexus requirement. Under the terms of the statute, the President is authorized to use military 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."[22] Given that the September 11 attacks occurred over a decade ago, the need to establish a link to those attacks apparently provides some substantive limits on an otherwise broad grant of military authority.[23] This is especially true in the context of counterterrorism efforts involving groups with potentially fluid organizational structures and membership. The statute does grant the President authority to determine which nations, organizations, or persons satisfy the criteria.[24] Nonetheless, this does not give the President authority to interpret the scope of the statute to reach individuals or groups outside the scope of the authority granted.

The nexus to September 11 in the statute is necessary to the President's authority to act under the statute. A holding by a district court interpreting the statute to require a nexus *either* to the September 11 attacks *or* to a terrorist threat was subsequently overturned, although on other grounds.[25] Moreover, an earlier version of the authorization, proposed by the White House, that granted broad authority "to deter and pre-empt any future acts of terrorism or aggression against the United States,"[26] was

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

[23] Former legal adviser John Bellinger III called in November 2010 for new detention authority on the grounds that the 2001 AUMF "provides insufficient authority for our military and intelligence personnel to conduct counterterrorism operations today and inadequate protections for those targeted or detained, including U.S. citizens." John B. Bellinger III, *A Counterterrorism Law in Need of Updating*, WASH. POST (Nov. 26, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/11/25/AR2010112503116.html.

[24] Authorization for Use of Military Force § 2(a).

[25] In *Khalid v. Bush*, the D.C. District Court concluded that Congress "in effect, gave the President the power to capture and detain those who the military determined were *either* responsible for the September 11 attacks *or* posed a threat of future terrorist attacks." Khalid v. Bush, 355 F. Supp. 2d 311, 319 (D.D.C. 2005) (emphasis added), *decision vacated sub nom*. Boumediene v. Bush, 476 F.3d 981 (D.C. Cir 2007), *order vacated*, 511 U.S. 1160 (2007). According to the statute, the 2001 AUMF was created "in order to prevent any future acts of terrorism against the United States by such nations, organizations, or persons." Authorization for Use of Military Force § 2(a).

[26] David Abramowitz, *The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism*, 43 HARV. INT'L L.J. 71, 73 (2002) (quoting Draft Joint Resolution Authorizing the Use of Force (on file with the Harvard International Law Journal)).

dismissed as an "overreach."[27] It would be perverse, therefore, to read the narrower language adopted by Congress to encompass the broader authority that it specifically declined to enact. The statutory detention authority under the 2001 AUMF thus reaches only so far as a sufficient link can be established between the September 11 attacks and the organization or individual concerned.

The counterterrorism provisions of the recently enacted NDAA provide additional Congressional guidance about the meaning of the nexus requirement. The text of the Act asserts that it neither limits nor expands the scope of the 2001 AUMF,[28] but it serves to codify the Administration's interpretation of its detention authority under the statute. In particular, the NDAA sheds light on the question of timing. The plain language of the statute, which describes the connection to the September 11 attacks in the past tense suggests that if an individual or group did not plan, authorize, commit, or aid the terrorist attacks that occurred on September 11, 2001, or harbor such organizations or persons, but has subsequently affiliated itself with organizations—such as al-Qaeda or the Afghan Taliban—that did so, it does not meet the nexus requirement. Yet the Administration has argued that it possesses 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."[29] According to this reading, a person may be detained if he has at some time in the past supported Taliban or al-Qaeda forces or associated forces *that are currently engaged* in hostilities against the United States. The NDAA describes two classes of "covered persons."[30] The first, "a person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2011, or harbored those responsible for those attacks,"[31] echoes the language in the 2001 requiring a nexus to the September 11 attacks. The second, "a person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces,"[32] affirms the Administration's position, and seems to substantially weaken, although not eliminate, the September 11 nexus requirement.[33]

b. Geographic Reach

The 2001 AUMF does not include an explicit geographical restriction.[34] The lack of such restrictive language in the statute, coupled with language in the preamble invoking the rights of the United States "to self-defense and to protect United States

[27] *Id.* at 74.
[28] National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. §1021(d) (2011).
[29] Memorandum Regarding the Government's Detention Authority, *supra* note 6, at 2.
[30] National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. §1021(b) (2011).
[31] *Id.*
[32] *Id.*
[33] See discussion of associated forces, infra.
[34] This is in contrast with, for example, the subsequent Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498, which specifically limits authority to operations in Iraq.

citizens both at home and abroad," implies that the AUMF authorizes the use of force—as a matter of domestic law—wherever those sufficiently linked to September 11 attacks may be found.[35]

The Fourth Circuit supported this geographically open reading of the AUMF in *Padilla v. Hanft.*[36] The court rejected the argument that the 2001 AUMF did not authorize detention of a terrorist suspect seized on American soil, noting that the language in *Hamdi* articulating the authority to detain as a fundamental incident of war makes no distinction between the lawfulness of capturing and detaining a terrorist suspect abroad as opposed to in the United States.[37] The *Padilla* court reasoned that if detention authority is predicated on the necessity of preventing a combatant from returning to the battlefield,[38] then the location of capture should not be determinative.[39] The District Court for the District of South Carolina reached the same conclusion in a separate case, reasoning that because the AUMF was enacted in direct response to the September 11 attacks, Congress must have intended its scope to reach alien al-Qaeda operatives who had already entered the country and were plotting terrorist attacks.[40] The District Court for the District of Columbia similarly concluded that "the AUMF does not place geographic parameters on the President's authority to wage this war against terrorists," explaining that any interpretation that limited search, capture, and detention to the battlefields of Afghanistan would contradict Congress's clear intention to the contrary and unduly hinder the President's ability to protect the country from future terrorist acts and to gather vital intelligence.[41]

Although the locus of capture does not place an absolute geographic limitation on the authority to detain under the 2001 AUMF, geography still may be relevant to the scope of the statutory authorization. Specifically, geography may be a significant indicator of both whether a given organization falls within the substantive scope of the 2001 AUMF and whether a specific individual has sufficient ties to a relevant organization to be subject to detention authority.[42]

International law also places affirmative limits on the geographic scope of the President's lawful detention authority. Even if the Authorization for Use of Military Force grants authority as a matter of U.S. domestic law to engage in military action—including detention of combatants—that authority is subject to independent international legal limits. Article 2(4) of the United Nations Charter states that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with

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[35] Authorization for Use of Military Force pmbl.
[36] Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005), *cert. denied*, 547 U.S. 1062 (2006).
[37] *Id*. at 393-94.
[38] *Id*. at 391.
[39] *Id*. at 393-94.
[40] Al-Marri v. Hanft, 378 F. Supp. 2d 673, 680 (D.S.C. 2005).
[41] Khalid v. Bush, 355 F.Supp.2d 311, 320 (D.D.C. 2005), *decision vacated sub nom*. Boumediene v. Bush, 476 F.3d 981 (D.C. Cir 2007), *order vacated*, 511 U.S. 1160 (2007); *see also* Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769, 845 (2011) (discussing the implicit rejection of geographic constraints on detention authority by the D.C. Circuit in *Salahi v. Obama*).
[42] *Id*. at 847 (raising the question of whether a provision of support criterion for membership in a designated organization, if legitimate, must be limited to persons captured or acting in certain geographic locations or to certain types of support or to support rendered with certain specific mental states).

the Purposes of the United Nations."[43] Moreover, state sovereignty places limits on the authority of the United States to engage in acts short of armed attack—including seizing and detaining individuals—on the territory of another country.[44] The only exceptions are where the governing state authority has granted its consent, the Security Council has authorized action, or unilateral state action is justified as a matter of self defense.[45]

c. Included Organizations and Associated Forces

The authority to hold a detainee under the 2001 AUMF may derive either from the individual's own role in planning, authorizing, committing, or aiding the September 11 attacks, or from his or her association with an organization that performed such a role. The question of which organizations trigger AUMF detention authority for their members has been a matter of controversy, but it has been suggested by the U.S. government and some academics that co-belligerency theory can provide some guidance. Support for this approach is now found in the NDAA, which includes in its definition of "covered persons," "a person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any such person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces."[46]

The language of the 2001 AUMF explicitly refers to organizations that the president determines directly "planned, authorized, committed, or aided" the September 11 attacks "or harbored such organizations," thereby clearly encompassing members of al-Qaeda and the Taliban.[47] However, it is the government's position, now affirmed by Congress, that the statute also provides for co-belligerency detention authority, for "persons who were part of . . . associated forces that are engaged in hostilities against the United States or its coalition partners."[48] The D.C. District Court has also agreed that the "President also has the authority to detain persons who were part of 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 in aid of such enemy armed forces."[49]

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[43] U.N. Charter art. 2, para. 4.

[44] *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 ¶ 195 (June 27); Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, ¶ 64 (Nov. 6) ; Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, ¶ 146 (Dec. 19).

[45] U.N. Charter ch. VII & art. 51.

[46] National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. §1021(b) (2011).

[47] Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001); Memorandum Regarding the Government's Detention Authority, *supra* note 6, at 6 ("[I]t is enough that an individual was part of al-Qaida or Taliban forces, the principal organizations that fall within the AUMF's authorization of force.").

[48] Memorandum Regarding the Government's Detention Authority, *supra* note 6, 2; *see also* Anam v. Obama, 653 F. Supp. 2d 62, 64 (D.D.C. 2009); Hamlily v. Obama, 616 F. Supp. 2d 63, 70 (D.D.C. 2009) ("Because the AUMF permits the president 'to use all necessary and appropriate force' against 'organizations' involved in the September 11 attacks, it naturally follows that force is also authorized against the members of [associated] organizations.").

[49] Anam, 653 F. Supp. 2d at 64. The opinion goes on to note that "this precise framework has been adopted by multiple Merits Judges, and is not inconsistent with Judge Walton's opinion in *Gherebi v. Obama*, as applied." *Id.* (internal citation omitted).

The extension of authority to "associated forces" is ambiguous. The change in tense between "persons who *were* part of . . . associated forces that *are* engaged in hostilities" suggests, at least grammatically, that membership is measured by some past date—either before or at the time of the September 11 attacks—while hostilities are occurring in the present. Furthermore, these statements do not specify which bodies might constitute an "associated force[]" beyond those engaged in active hostilities with the United States or coalition partners.

In *Hamlily v. Obama*, an opinion that continues to spark debate, the D.C. District Court interpreted the term "associated forces" to mean "co-belligerents," "as that term is understood under the law of war."[50] The concept of co-belligerency remains "undertheorized,"[51] but captures the notion of actively waging war in concert with another belligerent. The *Hamlily* court used the concept of neutrality to inform its analysis of co-belligerency, although the concepts actually refer to different bodies of international law.[52] Under the *Hamlily* analysis, a group "attains co-belligerent status by violating the law of neutrality—*i.e.*, the duty of non-participation and impartiality."[53] Violations of neutrality include recruiting agents, conveying weapons, or facilitating communications for a belligerent party.[54] The court did not make clear what level of neutrality violation it required for a group to be considered a co-belligerent.[55] However, it did clarify that associated forces "do not include terrorist organizations who merely share

[50] *Hamlily*, 616 F. Supp. 2d at 70, 74. The regularly cited example of the United States's past practice in targeting co-belligerents against whom it did not originally declare war is Vichy France. Having declared war against Germany, Italy, Japan, Hungary, Bulgaria, and Romania, the United States targeted French forces in North Africa after the Vichy government formed an alliance with Germany and fought against the United Kingdom. David Mortlock, *Definite Detention: The Scope of the President's Authority to Detain Enemy Combatants*, 4 HARV. L. & POL'Y REV. 375, 395 n.131 (2010).

[51] Rebecca Ingber, *Untangling Belligerency from Neutrality in the Conflict with al-Qaeda*, 47 TEX. INT'L L.J. (forthcoming 2011) (manuscript at 15), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1939598#%23.

[52] *Id.* at 12 ("[W]hen neutral states take actions that are seen as . . . violating neutrality . . . [s]uch violations do not necessarily bring neutrality to an end . . . or necessitate that the violator has become the 'enemy' of either belligerent.").

[53] *Hamlily*, 616 F. Supp. 2d at 75. Note that the traditional notion of co-belligerency is not automatically implicated by individual violations of neutrality. As a leading treatise on the international law of the nineteenth century—when neutrality and co-belligerency law were developed—explains, "[m]ere violation of neutrality must not be confused with the ending of neutrality. . . . [T]he condition of neutrality continues to exist between a neutral and a belligerent in spite of a violation of neutrality." 2 OPPENHEIM, INTERNATIONAL LAW § 358 (Lauterpacht ed., 7th ed. 1952). In fact, "[t]he law of neutrality itself did not traditionally articulate when a state or individual gave up its neutral status and became a belligerent." Ingber, *supra* note 51, at 13.

[54] Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land arts. 2-5, 9, U.S.T.S. 540, 2 A.J.I.L. Supp. 117 (Jan. 26, 1910).

[55] Neutrality is at least ended by "acts of force performed for the purpose of attacking a belligerent. They are acts of war, and they create a condition of war between such neutral and the belligerent concerned." OPPENHEIM, *supra* note 53, at § 320. Others have argued that "[a] state that significantly and systematically violates its neutral duties—through participation in the conflict or flagrant violations of impartiality—may be treated as a co-belligerent." Tess Bridgeman, Note, *The Law of Neutrality and the Conflict with Al Qaeda*, 86 N.Y.U. L. REV. 1186, 1200 (2010). In addition, "[p]rior U.S. practice is consistent with the conclusion that a country becomes a co-belligerent when it permits U.S. armed forces to use its territory for purposes of conducting military operations." Office of Legal Counsel, Memorandum Opinion for the Counsel to the President,"Protected Person" Status in Occupied Iraq Under the Fourth Geneva Convention 8 (Mar. 18, 2004), *available at* http://www.justice.gov/olc/2004/gc4mar18.pdf.

an abstract philosophy or even a common purpose with al Qaeda—there must be an actual association in the current conflict with al Qaeda or the Taliban."[56] To qualify as a co-belligerent, the group must be a "fully fledged belligerent fighting in association with one or more belligerent powers."[57]

The application of traditional law of war principles such as co-belligerency and neutrality to the evaluation of the 2001 AUMF's scope is consistent with the Administration's general position that "[p]rinciples derived from law-of-war rules governing international armed conflicts . . . must inform the interpretation of the detention authority"[58] and with its more specific position that "the United States has authority to detain individuals who, in analogous circumstances in a traditional armed conflict between the armed forces of opposing governments, would be detainable under principles of co-belligerency."[59] However, certain aspects of neutrality law, for instance requirements relating to states' use of their territory, do not translate perfectly into the context of the United States' conflict with decentralized terrorist groups. Several scholars have, indeed, been highly critical of applying the theory of co-belligerency from international law to interpret statutory authority.[60] Although the NDAA codifies the Administration's inclusion of associated forces within the scope of detention authority under the 2001 AUMF, the imperfect application of neutrality law to non-state actors may present difficulties with the use of traditional concepts of co-belligerency and neutrality to identify the specific organizations that fall within the reach of this authority.

d. Level of Individual Affiliation

Closely linked to the identification of organizations falling within the scope of the 2001 AUMF is the identification of individuals sufficiently affiliated with such organizations to be subject to detention under the statute. The government's position, now affirmed by Congress in the NDAA, is that the United States may lawfully detain persons who were either "part of" or provided "substantial support" to al-Qaeda, the Taliban, or associated forces,[61] but there is some ambiguity regarding which specific activities constitute sufficient evidence of membership or support. As a threshold matter, the Supreme Court determined that detention authority under the 2001 AUMF does extend to United States citizens. In *Hamdi v. Rumsfeld,* the plurality found that a citizen, no less than an alien, could be part of or supporting a force hostile to the United States or coalition partners and engaged in armed conflict against the United States, and therefore he could also be held as an enemy combatant.[62]

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[56] *Hamlily*, 616 F. Supp. 2d at 74.
[57] *Id.* at 75 (quoting Bradley & Goldsmith, *supra* note 18, at 2112) (internal quotation marks omitted).
[58] Memorandum Regarding the Government's Detention Authority, *supra* note 6, at 1. The Administration applies this framework to detention power, arguing that "[t]he president also has the authority under the AUMF to detain in this armed conflict those persons whose relationship to al-Qaida or the Taliban would, in appropriately analogous circumstances in a traditional international armed conflict, render them detainable." *Id*.
[59] *Id.* at 7.
[60] *See, e.g.*, Ingber, *supra* note 51.
[61] Memorandum Regarding the Government's Detention Authority, *supra* note 6, at 3 (internal quotation marks omitted). National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. §1021(b) (2011).
[62] Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004) (plurality opinion).

The definition of individual membership is not explicitly addressed in the 2001 AUMF and is complicated by the informal and sometimes unstable organizational structures of the groups involved.[63] The individuals most clearly within the scope of detention authority are those who personally take a direct role in combat against U.S. forces as part of a qualifying organization, such as al-Qaeda or the Taliban.[64] The D.C. District Court also has upheld the President's authority to detain an individual who directly functions or participates within the military command structure of a designated organization, even without evidence of his or her direct participation in combat.[65]

While active combat and military leadership are *sufficient* to establish authority to detain, they are not *necessary* to demonstrate that an individual is "part of" an enemy force or included organization within the meaning of the AUMF.[66] Substantial gray area exists between individuals who operate within al-Qaeda and the Taliban's formal military command structures and a "freelancer" who is clearly beyond the scope of the authorization.[67] The evaluation of membership is made on a case-by-case basis through judicial assessment of the "totality of the circumstances."[68] The government has endorsed this case-by-case approach to evaluating individual membership for the purposes of detention.[69]

Significant factors examined by courts evaluating whether an individual's connection to a designated organization constitutes membership may include attendance at military training facilities associated with targeted groups, overnight use of affiliated guesthouses, self-identification with an organization through verbal or written statements, participation in a group's hierarchy or command structure (both military and non-military), and participation in an organization's activities (both military and non-

[63] *See* Chesney, *supra* note 41, at 794 (contrasting the concept of membership in targeted organizations with the clearer concept of membership in structured armed forces, where identification is facilitated both by uniforms and the likelihood that a captured member will admit his status in order to obtain the benefit of POW status).

[64] Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (plurality opinion) (indicating that detention authority extends at least to persons bearing arms as part of a Taliban military unit in Afghanistan).

[65] Al Odah v. United States, 648 F. Supp. 2d 1 (D.D.C. 2009) (identifying the "key inquiry" as "whether the individual functions or participates within or under the command structure of the organization" (quoting Hamlily v. Obama, 616 F.Supp. 2d 63, 75 (2009)) (internal quotation marks omitted)).

[66] *See* Bensayah v. Obama, 610 F.3d 718, 725 (D.C. Cir. 2010) (stating that operating within al-Qaeda's formal command structure is sufficient but not necessary to show that the individual is part of the organization); Kandari v. United States, 744 F. Supp. 2d 11, 22 (D.D.C. 2010) ("[P]roof that an individual actually fought for or on behalf of al-Qaeda or the Taliban, while sufficient, is not required to demonstrate that an individual is 'part of' such enemy forces.").

[67] Salahi v. Obama, 625 F.3d 745 (D.C. Cir. 2010) (noting that "'the purely independent conduct of a freelancer is not enough' to establish that an individual is 'part of' al-Qaeda" and therefore subject to detention under the AUMF (quoting Bensayah, 610 F.3d at 725)); *see also* Chesney, *supra* note 41, at 828 (arguing that the D.C. Circuit cases since *Boumediene* indicate a "strong consensus that membership counts as a sufficient condition for detention, but reveal considerable disagreement as to both the actual meaning of membership and whether support independent of membership can serve as an alternative sufficient condition").

[68] Chesney, *supra* note 41, at 845-46 (citing Khan v. Obama, 741 F. Supp. 2d 1, 5 (D.D.C. 2010)).

[69] Memorandum Regarding the Government's Detention Authority, *supra* note 6, at 7 ("In each case, given the nature of the irregular forces, and the practice of their participants or members to try to conceal their affiliations, judgments about the detainability of a particular individual will necessarily turn on the totality of the circumstances.").

military).[70] Although courts look to these common indicators, they diverge with respect to which factor or constellation of factors constitutes adequate proof of membership.[71]

The related question of whether the government may detain an individual on the basis of his or her support of a designated enemy organization—even when the individual is not a member of the organization—has been a source of controversy..[72] The Administration has consistently asserted the authority to detain individuals on the grounds of "substantial" support,[73] and at least one court has agreed with this position.[74] However, other court decisions and commentary have taken the position that statutory authority to detain individuals who are "part of" an organization involved in the September 11 terrorist attacks does not extend to individuals who simply supported enemy forces, even if such support is "substantial" or "direct."[75] Congress has now provided its answer to this question. The NDAA interprets detention authority under the 2001 AUMF to include persons who were either "part of or substantially supported" covered organizations, including those who have "directly supported [hostilities against the United States or its coalition partners] in aid of such enemy forces."[76] This language

[70] *See*, *e.g.*, Padilla v. Hanft, 423 F.3d 386, 389-90 (4th Cir. 2005), *cert. denied*, 547 U.S. 1062 (2006); al-Bihani v. Obama, 590 F. 3d 866, 872-73 (D.C. Cir. 2010); al-Marri v. Pucciarelli, 534 F.3d 213, 323 (4th Cir. 2008) (en banc) (Wilkinson, J., concurring in part and dissenting in part), *cert granted*, 129 S. Ct. 680, *vacated sub nom.* al-Marri v. Spagone, 129 S. Ct. 1545 (2009).

[71] *Compare* Gherebi v. Obama, 609 F. Supp. 2d 43, 69 (D.D.C. 2009) (implying that membership in the military chain of command of a covered organization is a necessary condition), *with* al Odah v. United States, 611 F.3d 8, 16-17 (D.C. Cir. 2010) (implying that membership is a sufficient condition and may be proven by training camp attendance); *see also* Chesney, *supra* note 41, at 866 (summarizing the findings of various courts reaching the scope of detention authority with regard to the relevance of past conduct, associational status, citizenship, location of capture, and future dangerousness, among other factors).

[72] Chesney, *supra* note 41, at 828.

[73] The Bush Administration defined enemy combatants as individuals who were "part of or supporting Taliban or al-Qaeda forces, or associated forces," including "any person who has committed a belligerent act or has directly supported hostilities in aid of enemy forces." Mortlock, *supra* note 50, at 386. The Obama Administration has confined its articulation of the scope of its detention authority to those who provided "substantial" support. Memorandum Regarding the Government's Detention Authority, *supra* note 6, at 7 ("Under a functional analysis, individuals who provide substantial support to al-Qaida forces in other parts of the world may properly be deemed part of al-Qaida itself."). The government's memorandum recognized uncertainty regarding the degree of support that would justify detention. *Id*. at 2 ("[T]he particular facts and circumstances justifying detention will vary from case to case . . . . [T]he contours of the 'substantial support' and 'associated forces' bases of detention will need to be further developed in their application to concrete facts in individual cases.")

[74] Gherebi v. Obama, 609 F. Supp. 2d 43 (D.D.C. 2009) (finding that the AUMF authorizes the President to detain both persons who are part of enemy organizations and those who provide substantial support to such organizations); *see also* al-Bihani v. Obama, 590 F.3d 866, 872-73 (D.C. Cir. 2010) (finding, in dicta, that the defendant could be detained, not only as a member of a belligerent force allied with the Taliban, but also for providing support to the group). *But see* Hamlily v. Obama, 616 F. Supp. 2d 63 (D.D.C. 2009).

[75] Al Odah v. United States, 648 F. Supp. 2d 1, 7 (D.D.C. 2009) (finding that, while evidence of support may be probative of whether an individual is part of an enemy organization, it does not by itself provide grounds for detention); *Hamlily*, 616 F. Supp. 2d at 69 (rejecting both the concepts of "substantial support" and "directly support[ing] hostilities" as an independent basis for detention, but allowing that "the concept may play a role under the functional test used to determine who is a 'part of' a covered organization."); *see also* Mortlock, *supra* note 50, at 386 (presenting a "membership model" for determining which individuals are "part of" an organization within the scope of the AUMF).

[76] National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. §1021(b) (2011).

extends beyond the inclusion of individuals who substantially supported al-Qaeda and the Taliban[77] to include those who have supported unspecified associated forces.

Although courts have disagreed on the substantive requirements to meet membership or support criteria under the 2001 AUMF they agree that the government bears the evidentiary burden of proving sufficient affiliation with an organization or affiliated group, and that a "preponderance of the evidence" standard is appropriate.[78] Hearsay evidence has been treated as admissible for the purposes of determining detainability. The *Hamdi* plurality, for instance, found that "the exigencies of the circumstances may demand" the tailoring of enemy-combatant proceedings, aside from the core elements, "to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict," and specifically stated that hearsay may need to be accepted as the most reliable available evidence.[79] When addressing hearsay statements, judges generally require corroboration, although courts have diverged as to the strength of the corroboration required.[80] There is disagreement between judges regarding further evidentiary issues, including whether the government is entitled to presumptions in favor of accuracy or authenticity of evidence, the use of evidence allegedly resulting from coercion or torture, and the appropriateness of the government's use of a "mosaic theory" of evidence.[81]

This sub-section has described the scope of the 2001 AUMF and the controversy surrounding it. It has also discussed the recent NDAA, which codifies the Administration's expansive interpretation of detention authority under the statute. In the context of U.S. counterterrorism efforts spread broadly across the globe more than a

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[77] *Compare* Gherebi v. Obama, 609 F. Supp. 2d 43 (D.D.C. 2009) (accepting the provision of the Administration's formulation of its detention powers which included those providing "substantial support" to enemy organizations), *with* Hamlily v. Obama, 616 F. Supp. 2d 63 (D.D.C. 2009) (rejecting "substantial support" as a basis for detention).

[78] In *al-Bihani*, in an opinion since called into some doubt, Al-Bihani v. Obama, 619 F.3d 1, 1 (D.C. Cir. 2010) (Sentelle, C.J., Ginsburg, Henderson, Rogers, Tatel, Garland, and Griffith, JJ., concurring in the denial of rehearing en banc), the D.C. Circuit panel upheld this approach as constitutional. Al-Bihani, 590 F.3d at 878. The court analogized to the "burden-shifting" scheme approved in *Hamdi*, "in which the government need only present 'credible evidence that the habeas petitioner meets the enemy-combatant criteria' before 'the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria,'" reasoning that that description "mirrors a preponderance standard." *Id.* (citing Hamdi v. Rumsfeld, 542 U.S. 507, 533-34). Although the court accepted a preponderance of the evidence standard as constitutional, it emphasized that its "opinion does not endeavor to identify what standard would represent the minimum required by the Constitution," opening up the possibility that a lower standard of proof might suffice. *Id.* In *Hamdi*, Justice O'Connor also suggested that it may be appropriate to adopt a presumption in favor of the government's evidence, "so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided." *Hamdi*, 542 U.S. at 534 (plurality opinion); *see also Awad v. Obama*, 608 F.3d 1,10 (D.C. Cir. 2010) (relying on *al-Bihani* to hold that the district court did not err in holding the government to a preponderance of the evidence standard). *See generally* BENJAMIN WITTES, ROBERT CHESNEY & LARKIN REYNOLDS, BROOKINGS INST., THE EMERGING LAW OF DETENTION: THE GUANTANAMO HABEAS CASES AS LAWMAKING 13 (2010), *available at* http://www.brookings.edu/papers/2011/05_guantanamo_wittes.aspx.

[79] *Hamdi*, 542 U.S. at 533-34 (plurality opinion).

[80] Benjamin Wittes, Robert Chesney & Larkin Reynolds, *The Emerging Law of Detention 2.0: The Guantanamo Habeas Cases as Lawmaking* (unpublished paper 2011), at 35-50 (describing variations in reliability analysis with respect to hearsay evidence).

[81] For a detailed discussion of the evidentiary issues and the varying approaches of district court judges toward both substantive law issues and rules of evidence, see *id.*

decade after September 11, however, alternative sources of detention authority that might supplement the 2001 AUMF should still be explored. The next two subsections consider two additional sources of statutory authority: the 2002 Authorization for Use of Military Force and the Military Commissions Act of 2009.

2. The 2002 Authorization for Use of Military Force Against Iraq

Much of the policy debate regarding detention has surrounded the forty-five square miles of Guantanamo Bay and the nearly 800 detainees that have been housed there. Meanwhile little attention has been paid to the nearly 100,000 individuals the United States has detained in Iraq.[82] Here we provide an overview of the domestic legal authority under which these individuals were detained.

The detentions in Iraq have been justified as a matter of domestic law under the legal authority granted in a joint resolution authorizing the use of force against Iraq, the Authorization for Use of Military Force Against Iraq Resolution of 2002 (2002 AUMF).[83] The resolution authorized the President to use the Armed Forces "as he determines to be necessary and appropriate" in order to "(1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council Resolutions regarding Iraq."[84] It does not explicitly mention any authority to detain individuals, but the language it shares with the 2001 AUMF suggests that detention authority is derivative of the "necessary and appropriate" clause.[85] Unlike the 2001 AUMF, however, it is geographically limited in its effect—applying as it does only to the "threat posed by Iraq" and Security Council Resolutions "regarding Iraq."

The continuing validity of the 2002 AUMF as a source of detention authority is a subcomponent of a larger question—does the 2002 AUMF still provide legitimacy for *any* U.S. military operations in Iraq? The purpose-oriented clauses of the resolution suggest that the document should cease to be a source of legal authority once these conditions have been met. The extent to which the first condition, defending the U.S. "against the continuing threat posed by Iraq," is satisfied turns on the nature of the threat contemplated by Congress. Some have argued that this threat should be limited to the existence of Weapons of Mass Destruction (WMD), while others have articulated a

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[82] *See* Caroline Alexander, *Last U.S.-Run Prison Handed over to Iraqis Ahead of Withdrawal*, WASH. POST, July 15, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/07/15/AR2010071502545.html (stating that about 100,000 detainees have been held at Camp Cropper alone).

[83] The military intervention and detentions were justified under international law by a series of United Nations Mandates and, when the final Mandate expired, under the bilateral agreements between the United States and the Iraqi governments. *See* Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 463-76 (2011) (describing the UN Mandates and the bilateral agreements that superseded them).

[84] Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § 3, 116 Stat. 1498, 1501 (2002).

[85] One possible explanation for the lack of explicit language referencing detention authority is that "detention operations did not figure prominently in pre-invasion planning because the assumptions driving that planning did not include a sustained U.S. ground presence, let alone an extended occupation and counterinsurgency campaign." Robert M. Chesney, *Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War, 2003-2010*, 51 VA. J. INT'L L. 549, 563 (2011).

broader construction of this threat to encompass the post-invasion insurgency.[86] The second prong of the 2002 AUMF is less controversial, as the final U.N. Security Council Resolution expired at the end of 2009.[87] Successive administrations have justified their continuing presence in Iraq based on a combination of bilateral agreements with the Iraqi government, the 2001 AUMF, the 2002 AUMF, and congressional support in the form of appropriations.[88] With the potential exception of the 2002 AUMF, all of these justifications provide questionable domestic authority to continue active military operations—and by extension detention—in Iraq without renewed congressional authorization.[89]

In practice, strategic considerations have made the issue of detention authority largely moot as the U.S. military has transferred nearly all detention responsibilities to its Iraqi counterparts. In fact, the vast majority of the individuals formerly detained by the United States in Iraq have either been released or prosecuted within the Iraqi judicial system, with the exception of "about 200 dangerous, yet difficult to charge, individuals."[90] Under one of the bilateral agreements governing the ongoing relationship between the United States and Iraq, U.S. forces only have limited powers to detain pursuant to "an Iraqi decision issued in accordance with Iraqi law," and "persons must be handed over to competent Iraqi authorities within 24 hours from the time of their detention or arrest."[91] While the agreement provides limited detention authority within Iraq, it does not purport to grant domestic legal authority for these detentions. Thus, the

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[86] *Compare* Ackerman & Hathaway, *supra* note 83, *with* Robert M. Chesney, *Ackerman and Hathaway on the Iraq AUMF: How Strictly Should AUMFs Be Construed?*, LAWFARE (Nov. 1, 2010, 8:18 PM), http://www.lawfareblog.com/2010/11/ackerman-and-hathaway-on-the-iraq-aumf-how-strictly-should-aumfs-be-construed/; *see also* Bradley & Goldsmith, *supra* note 18, at 2102 (noting that the Supreme Court has construed broadly congressional authorizations to the President on the basis of delegation considerations).

[87] *See* Ackerman & Hathaway, *supra* note 74, at 469.

[88] *Id.* at 471-72 (citing *Declaration and Principles: Future U.S. Commitments to Iraq: Joint Hearing Before the Subcomm. on the Middle E. and S. Asia and the Subcomm. on Int'l Orgs., Human Rights, and Oversight of the H. Comm. on Foreign Affairs*, 110th Cong. 6 (2008) (written response of David M. Satterfield, Senior Adviser, Coordinator for Iraq, U.S. Dep't of State, to Rep. Gary L. Ackerman, Chairman, Subcomm. on the Middle E. and S. Asia)). Ambassador Satterfield cited three separate legal rationales for the continuation of the Iraq war without additional congressional authorization: (1) The 2002 AUMF, (2) the 2001 AUMF, and (3) the fact that "Congress has repeatedly provided funding for the Iraq war, both in regular appropriations cycles and in supplemental appropriations."

[89] While proponents of strong presidential power argue that appropriations suffice to demonstrate congressional authorization, they seem to be outside the constitutional consensus. *See, e.g.*, John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167 (1996). The Supreme Court has held that appropriations bills can only substitute for enactments in very limited circumstances. The Court acknowledged that appropriations are "Acts of Congress," but explained that they "have the limited and specific purpose of providing funds for authorized programs." Tenn. Valley Auth. v. Hill, 437 U.S. 153, 190 (1978) (internal quotation marks omitted); *see also* Ackerman & Hathaway, *supra* note 86, at 472.

[90] Chesney, *supra* note 85, at 599.

[91] *See* Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, U.S.-Iraq, art. 22, paras. 1-2, Nov. 17, 2008, *available at* http://graphics8.nytimes.com/packages/pdf/world/20081119_SOFA_FINAL_AGREED_TEXT .pdf; *see also* Brian J. Bill, *Detention Operations in Iraq: A View from the Ground*, *in* 86 INTERNATIONAL LAW STUDIES, THE WAR IN IRAQ: A LEGAL ANALYSIS 411, 416-17 (Raul A. Pedrozo ed., 2010) (describing the thinking behind the policy transition to an Iraqi law enforcement model).

government continues to rely upon the 2002 AUMF for its limited continuing detention authority.

3. Pendant Authority to Detain under the Military Commission Act of 2009

While the 2002 AUMF covers only detainees linked to the U.S. participation in the conflict in Iraq, some have suggested that the Military Commission Act of 2009 (MCA), the statute that governs the process for trying and punishing unprivileged combatants, may provide detention authority of a broader scope.[92] The MCA does provide some additional detention authority, but that additional authority is limited to those individuals actually prosecuted under the statute.

Responding to the Supreme Court's holding in *Hamdan v. Rumsfeld*,[93] Congress passed the MCA to establish a jurisdictional and procedural foundation for the use of military commissions. The MCA stated that military commissions may proceed against aliens who are members of groups covered by the 2001 AUMF as well as those who are not members but nonetheless provide support to such groups.[94] Importantly, the MCA is silent on the issue of detention authority, and the legislative history explicitly notes that the statute was not intended to define the scope of the President's authority to detain.[95]

The D.C. Circuit panel's opinion in *al-Bihani v. Obama* (which was, as already noted, cast into doubt in subsequent proceedings[96]) nonetheless suggested that the scope of the MCA includes detention authority.[97] Speaking for the panel, Judge Janice Rogers Brown concluded that anyone subject to a military commission under the MCA is *a fortiori* subject to indefinite detention without trial as well. According to the panel's logic, anyone who has "purposefully and materially supported hostilities against the United States or its coalition partners" could be detained.[98] The opinion applied a lower bar for indefinite detention than under the AUMF by allowing the government to detain under the MCA those who provide independent support to an AUMF-covered organization, even without proof of membership in that organization, and even if there is

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[92] Similar to the Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2190, the Detainee Treatment Act of 2005, Pub. L. 101-148, 119 Stat. 2739, arguably could be read as a (post-hoc) legislative ratification of the executive's policy of detention up to that point. However, the DTA contains no authorization for detention in itself, and neither the Obama Administration nor any of the habeas rulings in post-September 11 terrorism cases have relied upon the DTA for advancing detention authority arguments.

[93] 548 U.S. 557 (2006).

[94] Military Commissions Act of 2006, sec. 3, §§ 948a(1), 948c, Pub. L. No. 109-366, 120 Stat. 2600, 2601-02; Military Commissions Act of 2009, sec. 1802, §§ 948a(7), 948b(a), 948c (codified as amended at 10 U.S.C. §§ 948a et seq.).

[95] *See* S. REP. NO. 111-288, at 862-3 (2009) (Conf. Rep.) (noting that the MCA's definition of "unprivileged enemy belligerents" is included only for the purpose of establishing persons subject to trial by military commission in accordance with section 948c, of title 10, United States Code, and is not intended to address the scope of the authority of the United States to detain individuals in accordance with the laws of war or for any other purpose) [hereinafter Conference Report].

[96] *See* al-Bihani v. Obama, 619 F.3d 1, 1 (D.C. Cir. 2010) (Sentelle, C.J., Ginsburg, Henderson, Rogers, Tatel, Garland, and Griffith, JJ., concurring in the denial of rehearing en banc) ("We decline to en banc this case to determine the role of international law-of-war principles in interpreting the AUMF because, as the various opinions issued in the case indicate, the panel's discussion of that question is not necessary to the disposition of the merits.").

[97] Al-Bihani v. Obama, 590 F.3d 866, 872 (D.C. Cir 2010).

[98] Wittes, Chesney & Reynolds, *supra* note 80, at 23.

no intention to prosecute under the MCA.[99] By doing so, *al-Bihani* suggested a substantial expansion of detention authority.

The *al-Bihani* panel erred in deriving expansive stand-alone detention authority from the MCA's purely jurisdictional and procedural provisions.[100] It is uncontroversial that individuals subject to trial by a military commission will also be detained—at least for the period of the trial. But the *al-Bihani* panel opinion suggests that the authority to prosecute always and *necessarily* implies the authority to detain[101]—and that this authority to detain can be unhinged from the authority to prosecute, thereby allowing the government to detain individuals without any intention of prosecuting them. Under this formulation, Congress's vestment of prosecutorial authority was enough to supply the President with stand-alone detention authority. Yet this expansive reading of the MCA is not only inconsistent with specific statutory language to the contrary—in which, as already noted, Congress expressly stated that it did not intend to address the scope of authority to detain.[102] It is also inconsistent with basic principles of detention authority pursuant to prosecution authority. To detain someone suspected of murder, for example, the government must intend to prosecute that person for murder. Similarly, in order to detain an individual pursuant to the MCA, the government must charge and eventually prosecute that individual pursuant to the MCA.[103]

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[99] *Id*. at 26.

[100] *Al-Bihani*, 590 F.3d at 872 ("The provisions of the 2006 and 2009 MCAs are illuminating in this case because the government's detention authority logically covers a category of persons no narrower than is covered by its military commission authority. Detention authority in fact sweeps wider . . . .").

[101] This first step of the argument is itself incorrect. The government has the authority to prosecute a criminal law violation but does not possess the authority to detain in cases where the available penalties for the criminal law violation do not include detention. For example, certain non-federal statutes criminalize activities such as jaywalking, speeding, or wildlife violations as misdemeanors and limit the punishment to a fine. *See, e.g.*, COLO. REV. STAT. § 42-4-1701 (indicating that Class A and Class B traffic offenses have a maximum penalty of $100). On a federal level, certain statutes establish maximum fines for certain acts and exclude the power to detain. *See, e.g.*, 33 U.S.C. § 502(a) (2006) ("If the persons, corporation, or association owning or controlling any railroad or other bridge shall, after receiving notice [that their railroad or bridge is obstructing navigation waters], as hereinbefore required, from the Secretary of Transportation and within the time prescribed by him willfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of the Army in the premises, such persons, corporation, or association shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine not exceeding $5,000 . . . ."). Other statutes criminalize activity perpetrated by corporations but do not allow for detention authority. *See, e.g.*, TEX. PENAL CODE § 12.51(b) ("If a corporation or association is adjudged guilty of an offense that provides a penalty including imprisonment, or that provides no specific penalty, a court may sentence the corporation or association to pay a fine in an amount fixed by the court, not to exceed: (1) $20,000 if the offense is a felony of any category; (2) $10,000 if the offense is a Class A or Class B misdemeanor; (3) $2,000 if the offense is a Class C misdemeanor; or (4) $50,000 if, as a result of an offense classified as a felony or Class A misdemeanor, an individual suffers serious bodily injury or death."). While all of these statutes suggest that detention authority does not automatically flow from prosecutorial authority, the nature of the underlying crimes in these provisions, such as crossing a street when the traffic light is green, obviously differ significantly from the crimes outlined in the MCA. The point here is simply that these examples illustrate that the power to prosecute for a violation of criminal law does not always entail a power to detain.

[102] *See* Conference Report, *supra* note 95.

[103] Many of the current detainees at Guantanamo Bay would likely not be subject to prosecution under the MCA because they have not committed any crimes. *See, e.g.*, *Obama and Guantanamo*, WALL ST. J., Jan. 22, 2009, http://online.wsj.com/article/SB123258578172604569.html

Thus, while the MCA may provide detention authority for some individuals who are not covered by the 2001 AUMF—for example, because they are not members or supporters of al-Qaeda or the Taliban—the first important limitation on this authority is that the government must charge and prosecute those individuals within a reasonable timeframe. Article 14(3)(c) of the ICCPR requires that trial take place "without undue delay". The Human Rights Committee has noted that this applies "not only to the time by which a trial should commence, but also the time by which it should end and judgment be rendered; all stages must take place 'without undue delay'".[104] Lengthy pre-trial detention constitutes a violation of 14(3)(c)[105] and, although the Committee has not specified a particular timeframe, it has found delays of 22 months,[106] two years,[107] and 29 months[108] to violate the right to trial without undue delay. When read in light of this fundamental guarantee, the MCA does not provide the authority to detain individuals indefinitely under the pretext of intent to prosecute, but only where they are prosecuted "without undue delay."

Jurisdiction under the MCA is also disputed for certain subject matters. For example, the constitutionality of material support prosecutions is controversial and is currently being contested in the D.C. Circuit.[109] Moreover, human rights organizations have generally been critical of the MCA on due process and independence grounds,[110] and the Committee has expressed concern about the trial of civilians by military courts and has indicated that such trials "should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14."[111]

("[M]any of the Guantanamo prisoners haven't committed crimes per se but are dedicated American enemies and too dangerous to let go. Other cases involve evidence that is insufficient for trial but still sufficient to determine that release is an unacceptable security risk.'').

[104] General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 135 (2003), ¶10.

[105] *See* Sextus v. Trinidad & Tobago, ¶¶ 7.2, 7.3, U.N. Doc. CCPR/C/72/D/818/1998 (July 16, 2001).

[106] *See id.*, ¶7.2.

[107] *See* C. Smart v. Trinidad & Tobago, ¶ 10.2, U.N. Doc. GAOR, A/53/40 (vol. II) (July 29, 1998).

[108] *See* J. Leslie v. Jamaica, ¶ 9.3, U.N. Doc. GAOR, A/53/40 (vol. II) (July 31, 1998).

[109] *See* Steve Vladeck, Government brief in *Hamdan*: The Looming Article III Problem, *available at* http://www.lawfareblog.com/2012/01/government-brief-in-hamdan-the-looming-article-iii-problem/. *See also* Brief of Amicus Curiae National Institute of Military Justice, Human Rights Watch, Professor Stephen I. Vladeck, and Professor David S. Weissbrodt, U.S. v. Al Bahlul, No. 09-001, (C.M.C.R. October 15, 2009) (arguing that material support does not constitute a violation of the law of nations and is therefore outside the subject-matter jurisdiction of the military commissions); Stephen Vladeck, *The Laws of War as a Constitutional Limit on Military Jurisdiction*, 4 J. Nat'l. Sec. L. & P. 295 (2010).

[110] *See, e.g.,* Human Rights Watch, *New Legislation on Military Commissions Doesn't Fix Fundamental Flaws*, October 8, 2009, *available at* http://www.hrw.org/news/2009/10/08/us-new-legislation-military-commissions-doesn-t-fix-fundamental-flaws; Human Rights Watch, *Submission to Universal Periodic Review of the United States*, March 2010, *available at* http://www.hrw.org/sites/default/files/related_material/HRWUSA_UPR2010.pdf; Amnesty International, Military Commissions, *available at* http://www.amnestyusa.org/our-work/issues/security-and-human-rights/fair-trials?id=1041195#.

[111] Gen. Comm. 13, *supra note* XX, ¶4 ("The Committee notes the existence, in many countries, of military or special courts which try civilans. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it

In sum, the MCA may provide detention authority for prosecutions of unlawful enemy belligerents who do not fall under the 2001 AUMF, where such belligerents are to be imminently prosecuted under that statute for violations of the law of nations. However, the nature and extent of that authority remains controversial.

This Section has argued that the three existing sources of statutory authority for detention provide highly circumscribed authority to detain persons suspected of engaging in terrorist activities. The next Section turns to a separate—and, as we shall argue, highly limited—source of presidential authority to detain: the President's role as Commander-in-Chief under the U.S. Constitution.

B. Constitutional Authority: The President's Article II Power to Detain

After the September 11 attacks, the Bush Administration argued that it had expansive detention authority under Article II of the Constitution because detention of the enemy is among the core functions of the President as Commander-in-Chief.[112] This position has been widely criticized,[113] and the Obama Administration has refrained from making similar arguments. Instead, it has relied solely on the 2001 AUMF to justify military detention of individuals apprehended in the course of counterterrorism operations.[114] Courts have declined to reach the issue of whether the President has independent Article II detention authority in the war on terror and have generally analyzed the scope of that detention authority under the 2001 AUMF.[115] This section addresses two questions: (1) does the President have independent Article II authority to detain; and (2) if yes, what is the scope of that authority? To the extent that detention authority is incident to the authority to engage in military operations, the President may have independent detention authority, but only in the very circumscribed settings where he has independent military authority.

1. Source of Article II Detention Authority

The President's law of war detention authority is ancillary to the President's authority as Commander-in-Chief to conduct military operations. It follows that the scope of the President's Article II detention authority cannot exceed the scope of his power to engage in military operations. The President's independent detention authority is thus limited to the scope of the President's independent Article II authority to initiate or to engage in military operations.

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lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14.")

[112] Brief of Respondents-Appellants at 13-14, Hamdi v. Rumsfeld, 378 F.3d 426 (4th Cir. 2004) (No. 02-6895).

[113] *See, e.g.*, David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008); Neil Kinkopf, *The Statutory Commander in Chief*, 81 IND. L.J. 1169 (2006); *see also* Memorandum Regarding the Government's Detention Authority, *supra* note 6, (relying on the 2001 AUMF and not on Article II for detention authority).

[114] *See* Memorandum Regarding the Government's Detention Authority, *supra* 6; *see also* Wittes, Chesney & Reynolds, *supra* note 80, at 22-23.

[115] *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Boumediene v. Bush, 553 U.S. 723 (2008).

The President's detention authority outside the immigration context is grounded in the President's powers as Commander-in-Chief.[116] The plurality opinion in *Hamdi* stated that "[t]he capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war'"[117] and that "detention . . . is a fundamental incident of waging war."[118] As a result, the plurality concluded that the 2001 AUMF authorization for the use of "necessary and appropriate force" unmistakably includes the authority to detain.[119] This reasoning was echoed in subsequent cases.[120] In a brief to the Fourth Circuit, the government had also argued that "the President's core functions as Commander-in-Chief in wartime [include] detention,"[121] and Justice Thomas treated detention authority as part of the President's war powers in his dissent in *Hamdi*.[122] While there is disagreement about the scope of the President's Article II detention authority, therefore, there is nonetheless broad consensus that the authority arises from the President's Commander-in-Chief powers.[123] Hence, the scope of the President's authority to engage in law of war detention in the absence of statutory authorization is limited to the scope of his independent authority to use military force.

The Court's reasoning in *Hamdi* and elsewhere[124] suggests two further restrictions on the President's Article II detention authority. First, the detention must be a fundamental or necessary incident to the specific type of military operation under consideration. This follows directly from the reasoning in *Hamdi* and subsequent cases—that detention is included in "necessary and appropriate force" because it is a fundamental incident of the use of such force. In order for ancillary detention authority to exist, therefore, it must be a fundamental incident to the specific type of military operation the President has independent authority to engage in. Second, the capture and detention must have as its object the disabling of enemy combatants and the prevention of

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[116] *See, e.g.*, Johnson v. Eisentrager, 339 U.S. 763 (1950); *Ex parte* Quirin, 317 U.S. 1 (1942); *Ex parte* Milligan, 71 U.S. 2 (1866).

[117] 542 U.S. 507, 518 (2004) (citing *Ex parte* Quirin, 317 U.S. 1, 28, 30 (1942)); *see also supra* Subsection I.A.1.

[118] *Hamdi*, 542 U.S. at 519.

[119] *Id.*

[120] *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 733 (2008); Padilla v. Hanft, 423 F.3d 386, 391 (4th Cir. 2005); Gherebi v. Obama, 609 F. Supp. 2d 43, 62 (D.D.C. 2009) ("[D]etention *is* an exercise of the state's 'right to use force.'"); Hamlily v. Obama, 616 F. Supp. 2d 63, 71 n.13 (D.D.C. 2009); al-Marri v. Hanft, 378 F. Supp. 2d 673, 680 (D.S.C. 2005).

[121] Brief for Respondents-Appellants at 13, Hamdi v. Rumsfeld, 378 F.3d 426 (4th Cir. 2004) (No. 02-6895).

[122] *Hamdi*, 542 U.S. at 587-88 (2004) (Thomas, J., dissenting).

[123] It bears mentioning in this context that, in the wake of September 11, the Department of Justice proposed a bill that would have authorized "indefinite preventive detention, without charge, of aliens suspected of some connection to terrorist activities or groups," and Congress pointedly rejected those provisions. Brief for the Constitution Project as Amicus Curiae in Support of Respondent at 9-16, Ashcroft v. al-Kidd, 131 S. Ct. 2074 (2011) (No. 10-98) (citing Dep't of Justice Antiterrorism Bill 2d Draft, § 202 (Sept. 19, 2001)); *Homeland Defense: Hearing Before the S. Comm. on the Judiciary*, 107 Cong. 18 (2001) (statement of Sen. Kennedy). The proposal (and rejection) of this bill indicates that neither the executive nor Congress viewed the President as having independent Article II authority to indefinitely detain persons with ties to terrorism within the United States and outside the circumscribed context of an authorized war or military operation.

[124] *See* Johnson v. Eisentrager, 339 U.S. 763 (1950); *Ex parte* Quirin, 317 U.S. 1 (1942); *In re* Territo, 156 F.2d 142 (9th Cir. 1946).

their return to the battlefield.[125] *Hamdi*, *Eisentrager*, and similar cases make clear that the key purpose of detention in the course of war is to disable the enemy.[126] That is, wartime detention has a defensive purpose. To determine whether detention authority exists, therefore, one must ask whether the military operation is of such a nature that detention could serve the disabling defensive function envisioned in these cases.[127] Where the President has independent Article II authority to engage in military operations and these two additional conditions are met, independent Article II detention authority likely also exists.

2. Scope of Article II Detention Authority

Given the dependence of executive detention authority on the scope of the President's Article II authority as Commander-in-Chief, the more expansive a view one takes of the President's independent military powers, the more expansive a view of detention authority may follow. Broadly speaking, there are three views about the President's substantive powers under Article II and their implications for the scope of detention authority.[128]

At one extreme is the view that the "Constitution vests the President with *exclusive* authority to act as Commander-in-Chief and as the Nation's sole organ in foreign affairs."[129] In this view, the different powers allocated by the Constitution among

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[125] In the contemporary counterterrorism context, this may be a question about future dangerousness.

[126] *See Hamdi*, 542 U.S. at 519 ("Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of 'necessary and appropriate force,' Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here."); *Eisentrager*, 339 U.S. at 772-73 ("The alien enemy is bound by an allegiance which commits him to lose no opportunity to forward the cause of our enemy; hence the United States, assuming him to be faithful to his allegiance, regards him as part of the enemy resources. It therefore takes measures to disable him from the commission of hostile acts imputed as his intention because they are a duty to his sovereign."); *In re Territo*, 156 F.2d at 145 ("The object of capture is to prevent the captured individual from serving the enemy.").

[127] Two cautionary notes should be made. First, *Hamdi*, *Quirin*, and *Eisentrager* were all decided in the setting of a *statutorily authorized* war or military operation; thus, the arguments presented here are arguments by analogy only. Based on the reasoning these courts use in referencing or discussing detention authority, some more general conclusions may be drawn, but they are not by any means obvious or settled law. Moreover, the analysis presented here brackets questions about the authorized duration of detention and instead focuses solely on the initial authority to seize or capture in the course of military operations. Additional restrictions that limit the President's detention authority include all applicable law of war limitations, such as the well-settled rule that privileged combatants must be released at the end of hostilities and unprivileged combatants must be tried and convicted or released at the end of hostilities. However, in a setting where there is no anticipated end to the hostilities in sight and where detention for the duration of hostilities begins to approach indefinite detention, this traditional approach "may unravel" and different or additional limitations and procedural protections may apply. *Hamdi*, 542 U.S. at 521. For a more detailed discussion of the problem of duration, see *infra* Subsection I.C.2.b.

[128] This summary follows the basic framework laid out in David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008).

[129] Brief for Respondents-Appellants at *5, Hamdi v. Rumsfeld, 378 F.3d 426 (4th Cir. 2004) (No. 02-6895); *see* Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (Thomas, J., dissenting); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936); *The Prize Cases*, 67 U.S. (2 Black) 653, 670 (1862); John C. Yoo, Office of Legal Counsel, The President's Constitutional Authority to Conduct Military Operations

the branches are "separate and distinct powers," meaning that there is no overlap in the substance of these powers and "Congress may not make rules and regulations that burden the President's ability to act as commander in chief."[130] In John Yoo's words, "[t]he power of the President is at its zenith under the Constitution when the President is directing military operations of the armed forces, because the power of Commander-in-Chief is assigned solely to the President."[131] As Justice Thomas put it in his dissenting opinion in *Hamdi*, authority over matters relating to national security, including detention, is vested exclusively in the President "principally because the structural advantages of a unitary Executive are essential in these domains."[132] On his view, "the President has *constitutional* authority to protect the national security and … this authority carries with it broad discretion"[133] and a "need to be free from interference."[134] This approach would give the President very expansive military authority, including detention authority, and would regard this authority as unencumbered by congressional limitations.

At the other end of the spectrum is the view that the Commander-in-Chief clause confers no substantive powers, and that this designation is a purely hierarchical one.[135] On this view, the President lacks independent detention authority under Article II, and his authority to detain is entirely statutory. This interpretation finds some support in the historical use of the term "commander in chief"[136] but, as David Barron and Martin Lederman note, ultimately cannot be reconciled with "a long line of Supreme Court precedent recognizing a range of distinct substantive powers that the Commander-in-Chief may exercise in the absence of legislative authorization."[137]

The intermediate view, grounded in Justice Jackson's concurrence in *Youngstown*,[138] views the President's Commander-in-Chief powers as components of a shared war power. On this view, presidential authority does not preclude regulation by Congress. Instead, "[t]he Constitution . . . means for the President and Congress each to wield aspects of the war power, which means that the powers should be understood in a way that accommodates the exercise of each and recognizes that they overlap and interrelate."[139] This approach yields a more flexible model that sees some of the President's powers as "core" powers that are "preclusive" of congressional regulation and others as more "peripheral" and therefore "non-preclusive" of such regulation.[140] This

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Against Terrorists and Nations Supporting Them (Sept. 25, 2001), *available at* http://www.justice.gov/olc/warpowers925.htm [hereinafter Yoo, OLC Memo]. .

[130] Neil Kinkopf, *The Statutory Commander in Chief*, 81 IND. L.J. 1169, 1170 (2006).

[131] Yoo, OLC Memo, *supra* note 129.

[132] *Hamdi*, 542 U.S. at 580 (Thomas, J., dissenting).

[133] *Id.* at 581.

[134] *Id.* at 582.

[135] JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 5 (1993); Barron & Lederman, *supra* note 116, at 730; Ingrid Brunk Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 MICH. L. REV. 61, 83 (2007). *See generally* Barron & Lederman, *supra* note 116, at 772-800.

[136] Wuerth, *supra* note 135, at 67, 83.

[137] Barron & Lederman, *supra* note 116, at 729-30.

[138] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.").

[139] Kinkopf, *supra* note 130, at 1170.

[140] *See generally* Barron & Lederman, *supra* note 116, at 1056-59.

model envisions a distribution of power where the President's actions can be circumscribed by Congress even where he acts in his capacity as Commander-in-Chief.[141] Thus, even though the President's detention authority is part of his authority as Commander-in-Chief, it does not exist independent of Congress's concurrent power to declare war[142] and to regulate aspects of the conduct of war. [143] Numerous cases support this view, holding that the President's powers as Commander-in-Chief may be limited by Congress,[144] and the War Powers Resolution places concurrent constraints on the President's exercise of his Commander-in-Chief authority:

> The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.[145]

While there are different views about how far the War Powers Resolution limits the President's powers in practice[146] and about how to sort preclusive core powers from

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[141] See generally the discussion of marque and reprisal authority and other relevant powers vested in Congress and their implications for the scope of the President's authority as Commander-in-Chief, in Wuerth, *supra* note 135, at 91-95.

[142] U.S. CONST. art. I, § 8, cl. 11; *see Dellums v. Bush*, 752 F. Supp. 1141, 1144 (D.D.C. 1990) ("To the extent that this unambiguous direction requires construction or explanation, it is provided by the framers' comments that they felt it to be unwise to entrust the momentous power to involve the nation in a war to the President alone; Jefferson explained that he desired 'an effectual check to the Dog of war'; James Wilson similarly expressed the expectation that this system would guard against hostilities being initiated by a single man. Even Abraham Lincoln, while a Congressman, said more than half a century later that '*no one man* should hold the power of bringing' war upon us.").

[143] For the view that the war powers are overlapping shared powers, see *Massachusetts v. Laird*, 451 F.2d 26, 31-2 (1st Cir. 1971) ("[T]he war power of the country is an amalgam of powers, some distinct and others less sharply limited. In certain respects, the executive and the Congress may act independently. The Congress may without executive cooperation declare war, thus triggering treaty obligations and domestic emergency powers. The executive may without Congressional participation repel attack, perhaps catapulting the country into a major conflict. But beyond these independent powers, each of which has its own rationale, the Constitutional scheme envisages the joint participation of the Congress and the executive in determining the scale and duration of hostilities.").

[144] *See, e.g.*, Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804) (standing for the proposition that Congress may prescribe statutory limitations on the President's executive authority as Commander-in-Chief); Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801) (deciding a question of executive authority to capture neutral vessel by analyzing *statutory* not *inherent* authority); Bas v. Tingy, 4 U.S. (4 Dall.) 37, 45 (1800) (Paterson, J.) ("As far as congress tolerated and authorized the war on our part, so far may we proceed in hostile operations."); *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 662 (1952) (Clark, J., concurring in the judgment) ("[*W*]*here Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis*; but . . . *in the absence of such action by Congress*, the President's independent power to act depends upon the gravity of the situation confronting the nation." (emphasis added)).

[145] War Powers Resolution, Pub. L. No. 93-148, § 2(c), 87 Stat. 555, 555 (1973) (codified at 50 U.S.C. §§1541-1548).

[146] It is unclear how far the War Powers Resolution extends in limiting the President's authority, since courts have tended either to find the question of whether the executive's actions were authorized by statute

non-preclusive shared powers,[147] there does appear to be a broad consensus that the President has independent Article II authority to conduct *defensive* military operations in very circumscribed settings[148]—paradigmatically, where he acts to repel an attack on the United States;[149] to defend U.S. citizens abroad[150]; and to defend U.S. embassies,

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non-justiciable for reasons of standing or ripeness or under the political question doctrine, or to find that the President had statutory authorization because Congress approved financing of the war effort or because it retrospectively ratified the war effort. However, the mere practice of deciding by looking to statutory authorization (even where a finding that there was one seems strained) reinforces the view that Congress may limit the President's exercise of his Commander-in-Chief powers if it so chooses. *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654 (1981); The Amy Warwick, 67 U.S. 635 (1862); El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836 (D.C. Cir. 2010); Doe v. Bush, 323 F.3d 133 (1st Cir. 2003); Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000); Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973); Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973); Mass. v. Laird, 451 F.2d 26 (1st Cir. 1971); Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971); Rappenecker v. United States, 509 F.Supp. 1024 (N.D. Cal. 1980); Berk v. Laird, 317 F. Supp. 715 (E.D.N.Y. 1970).

[147] *See generally* Barron & Lederman, *supra* note 116, at 753-61 (discussing possible distinctions to define the scope of the President's preclusive Commander-in-Chief powers but finding none satisfactory).

[148] Presidents have also asserted the authority to engage unilaterally in humanitarian intervention without congressional authorization where the operations are of limited "nature, scope, and duration" and where the President determines it is in the national interest to do so. *E.g.* Authority to Use Military Force in Libya, 35 Op. O.L.C. 1, 6-9 (2011); *see also* Authority to Use United States Military Forces in Somalia, 16 Op. O.L.C. 6, 11 (1992) ("Nor is the president's power strictly limited to the protection of American citizens in Somalia. Past military interventions that extended to the protection of foreign nationals provide precedent for action to protect endangered Somalians and other non-United States citizens."). To the extent such authority exists, the President may also have ancillary detention authority in the context of resulting hostilities.

[149] *See* The Prize Cases (The Brig Amy Warwick), 67 U.S. (2 Black) 635, 668 (1863) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be '*unilateral*.'"); Massachusetts v. Laird, 400 U.S. 886, 893 n.1 (1970); Massachusetts v. Laird, 451 F.2d 26, 31-32 (1st Cir. 1971**)**; *see also* El-Shifa Pharm. Indus. Co. v. U.S., 378 F.3d 1346, 1367 (Fed. Cir. 2004) (holding that courts cannot question the President's determination that the plant's destruction was a necessary and appropriate response to the imminent threat of terrorist attacks against U.S. personnel and facilities). Scholars also have widely accepted the President's power to repel an attack on the United States. *See, e.g.*, Pirozzi, *The War Power and a Career-Minded Congress: Making the Case for Legislative Reform, Congressional Term Limits, and Renewed Respect for the Intent of the Framers*, 27 SW. U. L. Rev. 185, 194-198 (1997); *See* MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 87 (1990).

[150] This was recognized as early as 1860 in *Durand v. Hollins*, which reasoned that U.S. citizens abroad are entitled to protection, and that threats of violence against U.S. citizens abroad cannot be anticipated and frequently require prompt action. 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860). Consequently, the court concluded that the duty to protect the lives and property of citizens abroad must rest with the President. *Id.* Numerous presidents have since invoked this authority, for example during the Iran hostage crisis, *see* Presidential Powers Relating to the Situation in Iran, 4A Op. O.L.C. 115, 120 (1979), in order to send troops to Somalia, s*ee* Authority to Use Military Forces in Somalia, 16 Op. O.L.C. 6, 8 (1992) ("[T]he president's role under our Constitution as Commander in Chief and Chief Executive vests him with the constitutional authority to order United States troops abroad to further national interests such as protecting the lives of Americans overseas. Accordingly, where, as here, United States government personnel and private citizens are participating in a lawful relief effort in a foreign nation, we conclude that the president may commit United States troops to protect those involved in the relief effort."); *see also* Pirozzi, *supra* note 149, at 200-202 (stating that the President has the authority to initiate military actions to protect U.S. citizens abroad), and, perhaps less persuasively, in assessing the legality of deploying troops in Haiti, *see* Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173, 176 n.3 (1994); Deployment of

consulates, and military bases abroad.[151] However, "when the President acts on his own constitutional authority, the force employed must be strictly tied to and justified by the circumstances initially permitting the use of force."[152] Any detention authority the President may have under his defensive war powers is similarly limited.

In sum, detention authority under Article II derives from the President's authority as Commander-in-Chief. Thus, its scope can be no greater than the scope of the President's independent war powers. Independent Article II detention authority thus exists in only very circumscribed defensive settings in which the President has unilateral authority to initiate and conduct military operations.

* * *

As the war with those who planned and carried out the attacks on the United States on September 11, 2001 draws to a close,[153] the 2001 AUMF is becoming more tenuous as a central source of detention authority for the U.S. government. Meanwhile, the 2002 AUMF only provides limited detention authority within Iraq—authority that is also drawing to a close with the conclusion of U.S. military combat in that country. Detention authority under the MCA is limited to alien enemy combatants prosecuted for law of war violations in military commissions under the MCA. Finally, the President's independent constitutional detention authority exists only in very limited circumstances, because Article II detention authority rests on the President's independent authority to use military force.

United States Armed Forces to Haiti (2004), *available at* http://www.justice.gov/olc/2004/legalityofdeployment.pdf. Given the purpose of this authority, however, it is very limited in nature. *See* GLENNON, *supra* note 149, at 86 ("[T]he president does have the power to use the armed forces, in the face of congressional silence, in emergency situations involving the imminent threat of grievous harm to American citizens and nationals."). Moreover, at least one scholar suggests that the use of force for this purpose must be proportional; that this authority is limited to situations where diplomatic remedies have been exhausted; and that it does not exist in situations where "people . . . voluntarily enter ultrahazardous areas" and therefore have "no reasonable expectation of rescue by the United States armed forces." *See id.* at 86-87.

[151] *See* GLENNON, *supra* note 149, at 87. While there do not appear to have been any legal analyses specifically of the President's *detention* authority when acting to defend U.S. embassies or consulates abroad, such authority would similarly exist as ancillary to military engagement authority, and would similarly be limited by its relatedness to the type of operation required to defend U.S. positions abroad. Notably, courts have not been inclined to review the President's determination that a particular action was necessary for the defense of U.S. personnel and facilities abroad. *See* El-Shifa Pharmaceutical Industries Co. v. U.S., 378 F.3d 1346, 1362-65 (Fed. Cir. 2004) (holding that courts cannot question the President's determination that the plant's destruction was a necessary and appropriate response to the imminent threat of terrorist attacks against U.S. personnel and facilities). Where the President undertakes actions solely to defend holdings abroad, it is likely that these operations would be very limited in scope and duration. As a result, it is highly unlikely that detention authority exists in these contexts, except for the very limited purpose of disabling combatants and preventing them from returning to the battlefield while the military operation is ongoing.

[152] *See* GLENNON, *supra* note 149, at 87; *see also* Dellums, 752 F. Supp. at 1144.

[153] John O. Brennan, "Strengthening our Security by Adhering to our Values and Laws," Speech Delivered at Harvard Law School, September 16, 2011 ("Simply put, [newly proposed detention legislation] is not an approach we should pursue. Not when we have al-Qa'ida *on the ropes*. Our counterterrorism professionals—regardless of the administration in power—need the flexibility to make well-informed decisions about where to prosecute terrorist suspects.") (emphasis added).

As we shall see in the following Part, these are not the only limits on the government's law of war detention authority. International law—both the law of war and human rights law—provides an independent set of limitations on the government's authority to detain suspected terrorists.

III. INTERNATIONAL LAW LIMITATIONS ON LAW OF WAR DETENTION

The laws of war provide general limitations on detention authority regardless of whether the domestic source of authority is statutory or constitutional. The government expliclity acknowledged the relevance of international law to its detention authority under the 2001 AUMF when it stated in a brief before the Court of Appeals for the District of Columbia that "[p]rinciples derived from law-of-war rules governing international armed conflicts . . . must inform the interpretation of the detention authority."[154] The government's position is consistent with the *Hamdi* plurality's use of international law to interpret congressional grants of war-making authority as well as with longstanding historical practice.[155] Indeed, the Supreme Court has frequently used customary international law as an interpretive tool for construing statutes to avoid conflict with "the law of nations" where possible.[156]

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[154] Memorandum Regarding the Government's Detention Authority, *supra* note 6, at 1. The Administration applies this framework to detention power, arguing that "[t]he president also has the authority under the AUMF to detain in this armed conflict those persons whose relationship to al-Qaida or the Taliban would, in appropriately analogous circumstances in a traditional international armed conflict, render them detainable." *Id*.

[155] Early Supreme Court cases held that customary norms automatically applied in armed conflict absent congressional abrogation. *E.g.*, The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) ("Till . . . an act be passed, the Court is bound by the law of nations which is a part of the law of the land."); Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28 (1801) ("[C]ongress may authorize general hostilities, in which case the general laws of war apply to our situation . . . ."); *see* Brief for Non-Governmental Organizations and Scholars as Amici Curiae in Support of Rehearing or Rehearing En Banc at 10-11, al-Bihani v. Obama, 619 F.3d 1 (D.C. Cir. 2010) (No. 09-5051) ("In conflict after conflict, the Supreme Court has relied upon the laws of war as default rules governing the conduct of hostilities, applicable absent explicit statutory language to the contrary.").

[156] Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . ."). The use of this canon of interpretation has continued until the present, both implicitly and explicitly. *See, e.g.*, *Hamdi*, 542 U.S. at 548-49 (Souter, J., concurring in part and dissenting in part) (relying on the government position that the "usages of war" inform the 2001 AUMF's interpretation); Lauritzen v. Larsen, 345 U.S. 571, 577 (1953) (using "prevalent doctrines of international law" to interpret the Jones Act of 1920); McCulloch v. Sociedad Nacional de Marinerosde Honduras, 372 U.S. 10, 21 (1963) (relying on a "well-established rule of international law" to construe the jurisdictional provisions of the National Labor Relations Act). In the course of giving content to the statute, the laws of war may place limitations on its grant of authority. Suggestions to the contrary by the D.C. Circuit in al-Bihani v. Obama, in which a panel denied the premise that the war powers granted by the 2001 AUMF were limited by the international laws of war, Al-Bihani v. Obama, 590 F.3d 866, 871 (D.C. Cir. 2010), were later identified as dicta, Al-Bihani v. Obama, 619 F.3d 1, 1 (D.C. Cir. 2010) (Sentelle, C.J., Ginsburg, Henderson, Rogers, Tatel, Garland, and Griffith, JJ., concurring in the denial of rehearing en banc) ("We decline to en banc this case to determine the role of international law-of-war principles in interpreting the AUMF because, as the various opinions issued in the case indicate, the panel's discussion of that question is not necessary to the disposition of the merits.").

Law of war limitations on detention derive from *jus ad bellum* restrictions on initial capture and *jus in bello* due process and humane treatment requirements.[157] Human rights law also provides both independent and overlapping limits on law of war detention authority. This Part considers each of these bodies of law in turn.

A. Jus ad Bellum

One source of international law limitations on law of war detention authority is *jus ad bellum* principles governing the commencement of hostilities. Given that the 2001 AUMF, the 2002 AUMF, the MCA, and Article II are all sources of law of war detention authority, the same *ad bellum* principles governing the lawfulness of strikes or military operations would, in principle, govern the lawfulness of detention in the context of those strikes or operations. This is particularly germane to the question of *whom* the President may detain under either statutory or constitutional law of war authority.[158]

In brief, *jus ad bellum* privides that use of military force (including detention) is only authorized where the host state has consented to, the Security Council has authorized, or self-defense has necessitated that use of military force.[159] Although some scholars have dismissed the relevance of *jus ad bellum* to detention of suspected terrorists,[160] the language of the 2001 AUMF explicitly references fundamental *ad bellum* concepts. It asserts the "right[] to self-defense," and, in light of the September 11, 2001 "acts of treacherous violence," characterizes the hostilities it authorizes as "necessary and appropriate"—close echoes of the *ad bellum* notions of necessity and proportionality.[161] These references appear to signal Congress' intention to abide by the basic tenets of *jus ad bellum*, as codified in the U.N. Charter and interpreted by the International Court of Justice (ICJ).[162] It would be peculiar for Congress to explicitly situate its statute within these norms if it intended to authorize their violation.[163] While some scholars note that "for purposes of the U.S. legal system, Congress has the authority to override international law,"[164] the language of the 2001 AUMF seems to signal the opposite intention. Similar reasoning applies to the 2002 AUMF[165] and to the MCA.[166]

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[157] For a discussion of the international law regarding indefinite detention, see Chris Jenks & Eric Talbot Jensen, *Indefinite Detention Under the Laws of War*, 22 STAN. L. & POL'Y REV. 41, 43 (2011).

[158] For a discussion of whom the President may detain in the 2001 AUMF context, *see supra* Subsection I.A.1.d.

[159] *See* U.N. Charter, arts. 2(4), 43(1), 48(1), 49, 51.

[160] Bradley & Goldsmith, *supra* note 18, at 2089-90.

[161] Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

[162] *See, e.g.*, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

[163] Furthermore, the *Charming Betsy* canon, discussed *supra* Subsection I.A.1, dictates that statutes be interpreted to comply with international law absent explicit indications to the contrary.

[164] Bradley & Goldsmith, *supra* note 18, at 2089 n. 180.

[165] For example, the 2002 AUMF uses the same "necessary and appropriate" language used in the 2001 AUMF. In addition, the scope of detention authority under the 2002 AUMF is geographically limited to Iraq and temporally limited to the duration of hostilities in Iraq and/or the temporal scope of the 2002 AUMF; any detention authority that comes with it is also similarly limited. *See* Military Commissions Act of 2009, Pub. L. No. 111-184, 123 Stat. 2190.

[166] For example, the MCA of 2009 uses terms that clearly reference the laws of war, such as privileged and unprivileged enemy belligerents, and therefore it is reasonable to infer that it should be understood to incorporate the laws of war.

Ad bellum compliance may therefore be understood to be incorporated into the detention authority granted by Congress to the President. Yet this raises a series of questions about the scope of the statutory authority. For example, relying on *ad bellum* self-defense for domestic authorization raises the difficult question of how to assess imminence with respect to terrorist groups. Moreover, it places the "authority to detain persons . . . engaged in hostilities against . . . coalition partners"[167] squarely within the requirements for collective self-defense, which the ICJ has construed to include declaration, U.N. reporting, and a formal request for aid.[168] These limitations should be carefully considered in determining whom the President has the authority to detain, whether by statute or under Article II authority.

Jus ad bellum also places independent limitations on U.S. government actions as a matter of international law. The President may be authorized as a matter of domestic law to detain certain individuals, but if that detention violates *ad bellum* principles it is prohibited as a matter of international law. Where that international law has—like the U.N. Charter—been ratified by the United States, it is incorporated into U.S. law by virtue of the Supremacy Clause of the Constitution.[169]

B. Jus in Bello

Jus in bello norms also apply to law of war detention. The only international law restriction expressly identified by the plurality in *Hamdi* is on the duration of detention; yet the opinion repeatedly relies on "longstanding law of war principles."[170] This aligns with previous cases discussing detention under the laws of war: they assume that *in bello* norms apply and meaningfully limit detention authority.[171] Thus, law of war *in bello* norms that are now considered customary international law limit the President's detention authority,[172] both in the AUMF context and more generally, unless Congress specifically overrides them (and even then they continue to apply as a matter of international law, even though they no long apply as a matter of domestic law and can no longer be enforced in U.S. courts).

Under the laws of war, privileged combatants may be held only until the end of hostilities and unprivileged enemy combatants may be tried for crimes committed in the course of their belligerency.[173] If convicted of a crime, unprivileged enemy combatants may be detained punitively past the end of hostilities, but, if they are not charged with a

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[167] Memorandum Regarding the Government's Detention Authority, *supra* note 6, at 2.
[168] *Nicaragua*, 1986 I.C.J. 14, ¶¶ 195, 199-200.
[169] U.S. CONST. art. VI, cl. 2. . This does not guarantee, however, that it creates an obligation that could be enforced in the courts. . *See* Medellín v. Texas, 552 U.S. 491, 506 (2008).
[170] Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (plurality opinion).
[171] *See* Johnson v. Eisentrager, 339 U.S. 763, 789 (1950); *Ex parte* Quirin, 317 U.S. 1, 30-31 (1942).
[172] Bradley & Goldsmith, *supra* note note 18, at 2092 n. 198.
[173] *See* Third Geneva Convention, *supra* note 18, arts. 118 & 119; *see also* Adam Klein & Benjamin Wittes, *Preventative Detention in American Theory and Practice*, 2 HARV. NAT'L SEC. J. 85, 91-92 (2011). A privileged combatant is a member of armed forces directly engaged in hostilities who qualifies for prisoner-of-war status upon capture. An unprivileged combatant is someone who engages in direct hostilities but who does not qualify for prisoner-of-war status because he is not a member of a regular armed force or because he is a mercenary or has otherwise violated the laws of war.

crime or tried, they also must be released at the end of hostilities.[174] While this seems straightforward, a host of complications makes it difficult to determine how these limitations apply in the counterterrorism context.

First, and perhaps most difficult, there is the difficulty of how to treat civilians directly participating in hostilities. An essential principle of humanitarian law is the principle of distinction between combatants and civilians. Yet in the context of transnational non-international armed conflict, the line between combatant and civilian is blurred, with persons who would ordinarily be considered civilians directly participating in hostilities. The question of when such persons may be targeted and detained has been the subject of ongoing controversy and debate.[175] Here, it must suffice to note that the capacity of the United States to detain such persons—particularly at times when they are not actively participating in an attack—is far from clear.

Second, the end of hostilities normally marks a bright line between lawful and unlawful law of war detention; but the indefinite duration of the "war on terror" makes the line significantly less clear. In light of the ambiguity surrounding a conflict of potentially indefinite duration, due process protections become especially crucial, as detention is also likely to be indefinite. Yet the question of which due process protections apply is itself significantly complicated by lingering ambiguities regarding whether detainees in the counterterrorism context are combatants, civilians, neither, or both.[176]

A third layer of complication is added by the fact that the conflict with al-Qaeda, and the "war on terror" more generally, is considered a non-international armed conflict, and therefore Common Article 3 of the Geneva Conventions[177] may be the only applicable portion of the Conventions. In addition to Common Article 3, the International Committee of the Red Cross (ICRC) regards the provisions of Additional Protocol I Article 75 (Article 75) as customary international law and therefore applicable in non-international armed conflict.[178] The Obama Administration has taken the position that it intends to treat Article 75 as legally binding in international armed conflicts, but has been studiously silent regarding the applicability of Article 75 in non-international armed conflicts such as the war against al-Qaeda.[179] Nonetheless, the Administration has

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[174] *See Quirin*, 317 U.S. at 30-31; *Eisentrager*, 339 U.S. at 789-90; *Hamdi*, 542 U.S. at 518-19 (plurality opinion); *see also* Klein & Wittes, *supra* note 173, at 91-92.

[175] *See, e.g.*, ICRC, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009); Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 INT'L L. & POL. 697 (2010); Ramin Mahnad, Targeting Versus Deprivation of Liberty Under the International Law of Armed Conflict, ASIL Insights (Nov. 1, 2011), *available at* http://www.asil.org/insights111101.cfm.

[176] While laws governing the *conditions* of detention are not directly relevant in a discussion of the sources and scope of detention authority, these restrictions take on a heightened significance where, as here, both duration and due process are contested issues. In this context, at least Common Article 3 of the Geneva Conventions, which mandates humane treatment in all circumstances, non-discrimination, and the right to trial in a "regularly constituted court," is applicable law. *E.g.*, Third Geneva Convention, *supra* note 18, art. 3.

[177] *See infra* Subsection I.C.2.a.

[178] *See The Relevance of IHL in the Context of Terrorism: 01-01-2011 FAQ*, ICRC (Jan. 1, 2011), http://www.icrc.org/eng/resources/documents/misc/terrorism-ihl-210705.htm.

[179] *See* Julian Barnes, *Geneva Protections for al-Qaeda Suspects? Read the Fine Print*, WASH. POST, Mar. 14, 2011, http://blogs.wsj.com/washwire/2011/03/14/geneva-protections-for-al-qaeda-suspects-read-the-fine-print/?mod=google_news_blog.

indicated that its practices are consistent with Article 75.[180] This report therefore discusses law of war limitations including those provided by Article 75.

1. Relevant Provisions: Common Article 3 and Article 75

Common Article 3 of the Geneva Conventions uncontroversially applies to non-international armed conflicts and provides protection for persons "taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause."[181] It provides, in particular, that such persons should be treated humanely and without discrimination on the basis of race, religion, sex, birth, wealth or any other similar criteria.[182] It prohibits "violence to life and person" including torture and "outrages upon personal dignity, in particular, humiliating and degrading treatment." It also provides that sentences may not be passed without judgment "by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[183]

Article 75 of the First Additional Protocol to the Geneva Conventions elaborates on these requirements, providing that any persons "who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances" and "without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria."[184] Article 75 further elaborates on the Common Article 3 prohibition on violence to life and person, by specifying that "violence to the life, health, or physical or mental well-being of persons" is prohibited, including torture, humiliating or degrading treatment, or the threat of such violence or treatment.[185] In addition, Article 75 provides that detainees must be informed of the reasons for their detention and must be released as soon as the circumstances justifying their detention cease to exist.[186] Article 75 also provides for stringent due process protection, including trial by a regularly constituted court, provision of information about the specifics of the charge and the means to defend against it, and the presumption of innocence.[187]

Of particular importance in the detention context are the stringent limitations on the conditions of detention, including the universal requirement of humane treatment, the right to be released as soon as the reasons for detention cease to exist, and due process protections including the right to be informed of the reasons for detention and the right to a fair trial in accordance with applicable international and domestic laws.

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[180] *Id.*
[181] Third Geneva Convention, *supra* note 18, art. 3.
[182] *Id.*
[183] *Id.*
[184] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 75, *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].
[185] *Id.*
[186] *Id.*
[187] *Id.*

2. Duration of Detention

The *Hamdi* plurality opinion concluded that under "longstanding law-of-war principles," detention of "individuals legitimately determined to be Taliban combatants" is authorized for the duration of the conflict.[188] The plurality also noted that indefinite detention is not authorized under the laws of war, and that if the duration of the conflict begins to approach indefiniteness, then law of war detention authority "may unravel."[189] As noted at the beginning of this subsection, in conventional armed conflict, combatants may be held until the end of hostilities, but then must be released, unless they are tried for crimes committed in the course of their belligerency. If convicted, they may be detained punitively past the end of hostilities, but if they are not charged with a crime and tried, they must also be released at the end of hostilities.[190] In a setting where most individuals are unprivileged enemy combatants, the clear implication is that detainees must be tried in order to be held past the end of hostilities.

However, it is less clear how to define the end of hostilities in this context. If the war at issue really is "the war on terror" broadly defined, individuals detained in the course of this war, typically under the authority of the 2001 AUMF, may be legally subject to indefinite detention for the duration of U.S. counterterrorism operations.[191] The AUMF lacks any language that would preclude this conclusion; the President has therefore asserted the right to hold detainees indefinitely.[192]

One approach to resolving this problem is to individualize the concept of "the end of hostilities" to apply to "hostilities" between the United States and an individual detainee, rather than between the United States and al-Qaeda and all of its affiliates. Accordingly, one D.C. District Court judge concluded that because there is a required nexus between detention and the government's purpose to prevent future terrorism, when an individual defendant no longer constituted a threat to the United States, the government was no longer authorized to detain him pursuant to the 2001 AUMF.[193] However, other courts have declined to adopt this approach.[194] Further, given the difficulty of establishing that an individual detainee no longer poses a threat to the United States or its allies, this solution may do little in practice to resolve the problem of indefinite detention.

That the 2001 AUMF, and potentially other sources of law of war detention authority identified in this report, may effectively authorize indefinite detention[195] is significant. A conflict definition so broad in scope that it admits of no meaningful

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[188] Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (plurality opinion).
[189] *Id.*
[190] *See Hamdi*, 542 U.S. at 518-19 (plurality opinion); Johnson v. Eisentrager, 339 U.S. 763, 789-90 (1950); *Ex parte* Quirin, 317 U.S. 1, 30-1 (1942); *see also* Klein & Wittes, *supra* note 173, at 91-92.
[191] Third Geneva Convention, *supra* note 18, art. 118.
[192] Hamdi v. Rumsfeld, 542 U.S. 507, 540 (2004) (Souter, J., concurring).
[193] Basardh v. Obama, 612 F. Supp. 2d 30, 35 (2009); *see also* Bradley & Goldsmith, *supra* note note 18, at 2125.
[194] *See* Anam v. Obama, 696 F. Supp. 2d 1, 4 (D.D.C. 2010); Awad v. Obama, 646 F. Supp. 2d 20, 24 (D.D.C. 2009), *aff'd*, 608 F.3d 1 (D.C. Cir. 2010), *cert denied*, 131 S. Ct. 1814 (2011).
[195] In fact, the task force established by Executive Order 13493, Review of Detention Policy Options, recommended in its report that about fifty Guantanamo detainees be held indefinitely without trial under the laws of war. *See* Chris Jenks & Eric Talbot Jensen, *Indefinite Detention Under the Laws of War*, 22 STAN. L. & POL'Y REV. 41, 43 (2011).

temporal limitation may raise questions about the legality of detention during the "conflict," at least in its latter stages, and at least as a matter of international law. While a full discussion of this problem is beyond the scope of the present report, the specter of indefinite detention at least highlights the importance of taking special care that detainees are afforded all the due process protections to which they are entitled.

3. Due Process

In a series of decisions leading up to and including *Boumediene v. Bush*, the Supreme Court held that individuals detained under the 2001 AUMF are entitled to due process protections. Given the reasoning, these protections presumably also extend to all law of war detainees. The Court held that U.S. citizens and foreign law of war detainees alike have a right to challenge the lawfulness of their detention and their designation as enemy combatants in U.S. federal courts.[196] The Court further held that the Combatant Status Review Tribunals afforded insufficient process to substitute for the traditional protection of habeas review.[197] While it has yet to consider the applicability of these protections to individuals detained outside of Guantanamo Bay (for example, those held at the military base in Baghram[198]), the Court in *Boumediene* articulated a fairly robust understanding of the process due for law of war detainees under domestic law.

The Court's habeas jurisprudence parallels protections that the ICRC has argued apply as a matter of international law to individuals detained in the course of an ongoing armed conflict.[199] In particular, the ICRC position is that detainees have a right to challenge the lawfulness of their detention, and that this review must be conducted by an independent impartial body.[200] The ICRC has stressed the particular importance of the availability of such challenges in court where they "serve[], *inter alia*, to protect non-derogable rights, such as the right to life or freedom from torture and other cruel, inhuman, or degrading treatment or punishment."[201] The Supreme Court appears to have put in place a rule that, at least theoretically, meets this standard. However, its holdings have been weakened considerably by the D.C. Circuit,[202] and in practice not a single detainee ultimately has been successful in securing his release through a federal court order.[203]

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[196] Rasul v. Bush, 542 U.S. 446 (2005); Hamdi v. Rumsfeld, 542 U.S. 507.
[197] Boumediene v. Bush, 553 U.S. 723 (2008).
[198] *See* al-Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010).
[199] Jelena Pejic, *Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence*, 87 INT'L. REV. RED CROSS 858 (2005). For a more detailed treatment of all the rules that apply, see also CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 178, ch. 5.
[200] Pejic, *supra* note 184, at 385-89; *see also* Article 75, *supra* at II.C.2.a; CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 178, Rules 99 & 100.
[201] Pejic, *supra* note 199, at 387.
[202] *See, e.g.*, al-Bihani v. Bush 590 F.3d 866 (D.C. Cir. 2010); Kiyemba v. Obama, 555 F.3d 1022 (D.C. Cir. 2009).
[203] Lyle Dennison, *"Guantanamo Day" at the Cour*t, SCOTUSBLOG, April 1, 2011, http://www.scotusblog.com/2011/04/guantanamo-day-at-the-court/.

The ICRC further takes the position that periodic review of internment should be available at least every six months.[204] While this is not a well established rule in non-international armed conflicts, the indefinite nature of the current hostilities militates in favor of affording law of war detainees especially strong due process protections—particularly in cases where the Administration has no intention to prosecute.[205] Periodic review would facilitate the identification of the point at which detainees cease to pose a threat. This parallels the reasoning put forward by the D.C. District Court in *Basardh v. Obama*,[206] although other courts have declined to follow its lead.[207]

Whether periodic review is required or not, at a minimum, pursuant to Article 75, detainees have a right to be informed of the reasons for their detention, to challenge the lawfulness of their detention, and and to receive a fair trial in a regularly constituted court.

4. Conditions of Detention

The laws of war provide stringent restrictions on the conditions in which law of war detainees may be held, whether they are lawful or unlawful belligerents. Both Common Article 3 of the Geneva Conventions and Article 75 consider humane treatment to be a fundamental guarantee.[208] Both prohibit torture and humiliating or degrading treatment.[209] Both prohibit discrimination on any grounds and in particular on the basis of religion.[210] Common Article 3 prohibits violence to life and person, and Article 75 elaborates on that requirement by specifying that this prohibition includes violence to the physical or mental well-being of persons.[211] These limitations on the conditions of detention apply at all times and protect any persons who are in the power of a party to the conflict and who do not enjoy more favorable treatment as a privileged combatant.[212]

C. Human Rights Law

In addition to limitations provided by the laws of war, human rights law may also provide supplemental limits on law of war detention authority. The United States has ratified the International Covenant on Civil and Political Rights (ICCPR), the

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[204] This argument is by analogy to the requirements that apply in international armed conflict (*see* Fourth Geneva Convention, arts. 43 and 78). "The purpose of the periodical review is to ascertain whether the detainee continues to pose a real threat to the security of the detaining power and to order release if that is not the case.All the safeguards that apply to the initial review must apply to the periodical review(s) as well, which, among other things, means that the review has to be effective and must be conducted by an independent and impartial body." Pejic, *supra* note 199, at 388.

[205] Again by analogy to international armed conflict, and based on the principle that personal liberty is the rule and that criminal justice systems are adequately equipped to deal with "persons suspected of representing a danger to State security," the position paper argues that internment should be an exceptional measure and is not an adequate substitute for criminal prosecution. *Id.* at 380.

[206] 612 F. Supp. 2d 30, 35 (2009).

[207] *See supra* n. 23.

[208] *See* CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 178, Rule 87.

[209] *See id.*

[210] *See id.*

[211] *See id.*

[212] *See id.*

International Convention on the Elimination of All Forms of Racial Discrimination (CERD), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (CAT). Of particular relevance to detention authority are: the ICCPR prohibitions on arbitrary deprivation of life[213] and liberty;[214] the CERD prohibition on discrimination on the basis of race or national or ethnic origin;[215] the ICCPR prohibition on discrimination of any kind, including on the basis of religion;[216] the ICCPR requirement that detainees be able to challenge the lawfulness of their detention in a court of law and to be released if such detention is found to be unlawful;[217] the CAT and ICCPR prohibitions on torture and inhuman or degrading treatment;[218] and the due process guarantees of the ICCPR.[219] In interpreting the prohibition of inhuman or degrading treatment, the U.N. Special Rapporteur on Torture considers indefinite solitary confinement to be impermissible, and solitary confinement in general to be permissible only in exceptional circumstances (such as the protection of gay or lesbian inmates) and only for a very short period of time.[220] These and other human rights limitations bear on the legality of initial and continued detention and should be carefully considered in this context.

While there is some disagreement about the extraterritorial reach of human rights law and its applicability where the laws of war are operative,[221] international and foreign courts have increasingly held that human rights obligations exist wherever a state exercises effective control.[222] Moreover, both the U.N. Human Rights Committee and the ICRC have taken the position that human rights law and the laws of war are

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[213] International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

[214] *Id.* art. 9.

[215] International Convention on the Elimination of All Forms of Racial Discrimination art. 2, Mar. 7, 1966, 660 U.N.T.S. 195, 216 [hereinafter CERD]; *see also* CERD Gen. Rec. No. 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system, *Report of the Committee on the Elimination of Racial Discrimination*, U.N. Doc A/60/18 at 460; CERD Gen. Rec. No. 30, Discrimination Against Non-Citizens, ¶ 19 (ensuring security of non-citizens, in particular with regard to arbitrary detention), *available at* http://www.unhchr.ch/tbs/doc.nsf/0/e3980a673769e229c1256f8d0057cd3d? Opendocument.

[216] ICCPR, *supra* note 213, art. 2.

[217] *Id.* art. 9.

[218] United Nations Convention Against Torture art. 2, 4, 1465 U.N.T.S. 85 (1984); ICCPR, *supra* note 199, art. 7, 10.

[219] ICCPR, *supra* note 199, art. 14.

[220] *Solitary confinement should be banned in most cases, UN expert says*, UN News Center, October 18, 2011, *available at* http://www.un.org/apps/news/story.asp?NewsID=40097&Cr=torture&Cr1=.

[221] *See generally* Hathaway et. al., *The Relationship Between International Humanitarian Law and Human Rights Law in Armed Conflict*, 96 MINN. L. REV. (forthcoming 2012) [hereinafter Hathaway et al., *IHL and HRL*].

[222] *See* Sarah Cleveland, *Embedded International Law and the Constitution Abroad*, 111 COLUM. L. REV. 225, 229 (2010); Hathaway et. al., *IHL and HRL*, *supra* note 221, at 11. It is important to note here, however, that the United States government has not yet expressed support for an effective-control standard, making it an outlier among peer governments and international tribunals. *See, e.g.*, Oona Hathaway et al., *Human Rights Abroad : When Do Human Rights Treaty Obligations Apply Extrarritorially?*, 43 ARIZ. ST. L.J. 389 (2011) [hereinafter Hathaway et al, *Human Rights Abroad*].

complementary because they share the same underlying purpose of protecting human life and dignity.[223]

In the context of detention, there are few conflicts between the laws of war and human rights law. The clearest area in which the two bodies of law diverge is duration of the detention: human right law permits detention only until a timely trial and then only for the duration of a lawful sentence. Humanitarian law, by contrast, contemplates detention for the duration on the conflict. For the most part, however, the norms provided in each context reinforce and confirm the norms provided in the other. Human rights law provides that persons deprived of their liberty must be treated humanely and with respect for their dignity in all circumstances, and the Human Rights Committee considers this a non-derogable norm.[224] The laws of war through Common Article 3 and Article 75 also require humane treatment and respect in all circumstances and prohibit treatment that is humiliating or degrading. Both bodies of law require that persons not be detained arbitrarily or without cause or beyond the point where a reason justifying detention ceases to exist; both provide due process protections and a right to a fair trial; and both place stringent limitations on the conditions of detention. Hence human rights law provides limitations on government behavior in the detention context that largely—though not entirely—overlap with those provided by the law of war.

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The statutory and constitutional sources of authority for law of war detention are limited in scope and may contract further with growing distance from September 11, 2001. At the same time, international law places independent limits on law of war detention authority. There is as yet no settled law regarding the duration of the detention of individuals captured and detained under the 2001 AUMF, but it is well-settled in international humanitarian law that detainees who cannot or will not be prosecuted must be released when the circumstances justifying their detention cease to exist, or upon cessation of hostilities. The laws of war do also provide clear guidance with respect to the due process protections detainees are owed and the conditions in which they may be held. Moreover, human rights law also applies, and provides additional guidance. Thus, there are important limits on law of war detention authority, even where there is clear statutory or constitutional authority to detain under domestic law.

It is therefore time to consider a new model for counterterrorism detention. The next Part describes just such a model: the criminal law. Criminal law detention provides a legitimate and effective source of authority that could—and should—be much more widely used as an alternative to law of war detention of suspected terrorists.

IV. DETENTION OF TERRORISM SUSPECTS UNDER CRIMINAL LAW

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[223] *See* Jakob Kellenberger, President, Int'l Comm. of the Red Cross [hereinafter ICRC], Address at the 27th Annual Round Table on Current Problems of International Humanitarian Law, (Sept. 6, 2003), *available at* http://www.icrc.org/web/eng/siteeng0.nsf/html/5rfgaz; U.N. Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 11. For a general discussion of the relationship between international humanitarian law and human rights law, *see* Hathaway et. al., *IHL and HRL*, *supra* note 221.

[224] Human Rights Comm., *General Comment 29: States of Emergency (Article 4)*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001).

The United States is still actively engaged in hostilities with global terrorist elements, but there are indications that "we're within reach of strategically defeating al-Qaeda."[225] This development, combined with the growing distance from the national trauma of September 11, has reinvigorated the debate surrounding the detention and prosecution of suspected terrorists both outside of and within the United States. While the current Congress has expanded military detention and prosecution,[226] prosecution in federal court offers several key advantages over law of war detention, including predictability, fairness and legitimacy, greater cooperation by defendants and international partners, and flexibility.[227] These advantages have led a diverse set of actors—from current Department of Defense and counterterrorism officials,[228] to former Bush Administration officials,[229] to the *Washington Post* editorial board[230]—to support the prosecution and detention of individuals through the federal courts.

In some cases, prosecution in federal court is the only available option for prosecuting an accused terrorist. Federal antiterrorism statutes are extensive and provide statutory authority to prosecute individuals who are part of or supporting terrorist groups without direct ties to forces associated with al Qaeda (and therefore outside the scope of the 2001 AUMF), such as Hamas, Hezbollah, the FARC,[231] and independently operating

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[225] Craig Whitlock, *Panetta: U.S. 'within reach' of Defeating Al-Qaeda*, WASH. POST, July 9, 2011, http://www.washingtonpost.com/world/panetta-us-within-reach-of-defeating-al-qaeda/2011/07/09/gIQAvPpG5H_story.html.

[226] National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 112 Cong., Dec. 31, 2011; *see also* H.R. 1540, May 26, 2011 (original House version); S. 1253, June 22, 2011 (original Senate version).

[227] For an in-depth analysis of these advantages from a former Department of Justice National Security Division lawyer, *see* David S. Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. NAT'L SECURITY L. & POL'Y 1, 50-70 (2011).

[228] *See, e.g.*, Jeh Charles Johnson, "National Security Law, Lawyers and Lawyering in the Obama Administration," Speech at Yale Law School, Feb. 22, 2012 ("As a former prosecutor, I know firsthand the strength, security and effectiveness of our federal court system . . . Given the reforms since 9/11, the federal court system is even more effective. And, as a result of lengthy and mandatory minimum prison sentences authorized by Congress and the Federal Sentencing Guidelines, those convicted of terrorism-related offenses often face decades, if not life, in prison.").

[229] *See, e.g.*, Jim Comey & Jack Goldsmith, *Holder's Decision on Mohammed Trial Defended*, WASH. POST, Nov. 20, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/11/19/AR2009111903470.html ("By contrast [to military commissions], there is no question about the legitimacy of U.S. federal courts to incapacitate terrorists. Many of Holder's critics appear to have forgotten that the Bush Administration used civilian courts to put away dozens of terrorists, including 'shoe bomber' Richard Reid; al-Qaeda agent Jose Padilla; 'American Taliban' John Walker Lindh; the Lackawanna Six; and Zacarias Moussaoui, who was prosecuted for the same conspiracy for which Mohammed is likely to be charged. Many of these terrorists are locked in a supermax prison in Colorado, never to be seen again.").

[230] Editorial, *Justice for the 'Underwear Bomber,'* WASH. POST, Oct. 13, 2011, http://www.washingtonpost.com/opinions/justice-for-the-underwear-bomber/2011/10/12/gIQAO6dUiL_story.html ("Federal courts have long been a tried-and-true venue in which to prosecute accused terrorists. . . . The courts' rules are clear, procedures are fair and their legitimacy is unparalleled. . . . Efforts to strip the executive branch of this powerful tool or to force all terrorism suspects to be held in military custody are . . . myopic . . . .").

[231] *See, e.g.*, Hamlily v. Obama, 616 F. Supp.2d 63, 75, n. 17 (D.D.C. 2009) (holding that under the AUMF, the government cannot detain individuals associated with "terrorist organizations who merely share an abstract philosophy or even a common purpose with al-Qaeda - there must be an actual association in the current conflict with al-Qaeda or the Taliban").

terrorists who are inspired by, but are not part of or associated with, al-Qaeda.[232] These statutes also reach persons or citizens who, because they are apprehended in the United States, cannot be tried under the MCA. The following sections discuss the contours and limitations of such criminal prosecution and detention in the terrorism context.

Even where detention under both the law of war and criminal law are available, we conclude that the criminal law system should be the venue of choice for the detention and prosecution of suspected terrorists. This conclusion is in tension with recent congressional action, as expressed in the 2012 NDAA and discussion surrounding that legislation. We thus aim to offer a corrective to the recent trend toward favoring law of war detention over criminal law prosecution and detention. In doing so, we recognize, of course, that certain factors may counsel in favor of military detention and prosecution under the statutory or constitutional authority outlined above. Yet we conclude that this this set of cases is quite small and that in the vast majority of cases, criminal law detention and prosecution is the most effective and legitimate way to address the terrorist threat.

We begin by discussing the specific advantages of criminal law detention and prosecution—including predictability, fairness and legitimacy, and strategic advantages. Next we respond to critics of criminal law detention and prosecution, considering the three chief concerns that have been raised regarding criminal prosecution of terrorism suspects in federal court. Finally, we conclude by acknowledging the limits of criminal law detention and prosecution.

A. The Advantages of Criminal Law Detention and Prosecution

The least contested bases for detention authority in any context are post-conviction criminal detention and pre-verdict detention for those who pose a risk of flight. It is often assumed that such criminal detention is ill-suited to terrorists. However, with very little fanfare, federal district court dockets have been flush with terrorism cases over the past decade. Strikingly, during the first two years of Barack Obama's presidency, the annual number of terrorism prosecutions doubled, while the conviction rate for the nearly 500 cases has stayed constant at around 90 percent.[233] One reason for this increase in prosecutions is the recognition by both the Bush and Obama Administrations that trying suspected terrorists in criminal courts has certain strategic and moral advantages in the fight against terrorism.

1. Predictability

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[232] *See, e.g.*, Bensayah v. Obama, 610 F.3d 718, 725 (D.C. Cir. 2010) ("[I]t is impossible to provide an exhaustive list of criteria for determining whether an individual is 'part of' al-Qaeda . . . but the purely independent conduct of a freelancer is not enough.") (internal quotations and citations omitted).

[233] *See* Ctr. on Law and Sec., N.Y. Univ. Law Sch., Terrorist Trial Report Card: September 11, 2001-September 11, 2011 (2011) [hereinafter Terrorist Trial Report Card] (calculating that approximately 87% of terrorism prosecutions between September 11, 2001 and September 11, 2011 resulted in convictions, either after trial or after a guilty plea); RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN FEDERAL COURTS 29 (2008), *available at* http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf (calculating that about 91% of charges filed in terrorism prosecutions resulted in a conviction on some charge, whether after trial or after a guilty plea).

Post-conviction detention of terrorists after prosecution in federal court provides a level of predictability that is absent in the military commission system. Federal courts have years of experience trying and convicting dangerous criminals, including international terrorists, and the rules are well established and understood. The current military commission system, on the other hand, is an untested adjudicatory regime with no established jurisprudence to guide the parties and judges.[234] As discussed above, conviction rates in terrorism trials have been close to 90% since 2001, despite a huge increase in the absolute number of such prosecutions. The military commissions, by contrast, have convicted three people since 2001, and three more have pled guilty.[235] Several defendants had their charges dropped,[236] and others have been charged but not tried.[237] Their procedures have been challenged at every stage, and it is unclear what their final form will ultimately look like. The commissions' track record is short, and in light of their mixed results thus far, their future performance is uncertain.

Furthermore, those who have been convicted by the commissions have received extremely short sentences.[238] By contrast, favorable sentencing guidelines in federal terrorism trials allow the government to incapacitate dangerous individuals for long periods of time, if not for the life of the defendant.[239] While it is difficult to estimate the counterfactual results were the defendants in each case to have been tried in the other system, it is clear that the military commission system is highly unproven and unpredictable compared to the federal courts.[240]

2. Fairness and Legitimacy

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[234] *See* Kris, *supra* note 227, at 50. ("This invites, if it does not guarantee, challenges to virtually every aspect of the commission proceedings - the legality of the system, the jurisdiction of the court, the lawfulness of certain offenses, the rules on the use of evidence derived from coerced statements, discovery obligations, and the nature of protective orders (among others).").

[235] *Id.* at 52-53.

[236] *See* Jane Sutton, *U.S. Drops Charges Against 5 Guantanamo Captives*, REUTERS.COM, Oct. 21, 2008, http://www.reuters.com/article/2008/10/21/us-guantanamo-hearings-idUSTRE49K65120081021?sp=true; James Vicini, *US Drops Case to Detain Young Guantanamo Prisoner*, REUTERS.COM, July 24, 2009, http://www.reuters.com/article/2009/07/24/idUSN24486114.

[237] *See, e.g.*, News Release, DOD Announces Charges Referred Against Detainee Al Nashiri, U.S. Dep't of Defense, No. 827-11, Sept. 28, 2011, *available at* http://www.defense.gov/releases/release.aspx?releaseid=14821.

[238] David Hicks was sentenced to nine months in prison. Michael Melia, *Australian Gitmo Detainee Gets 9 Months*, WASH. POST, Mar. 31, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/03/31/AR2007033100279.html. Osama Bin Laden's driver and guard, Salim Hamdan, was sentenced to 66 months but given credit for 61 months of time served, and made to sign a "pledge not to commit violent acts." Reuters, Yemen Releases Former Bin Laden Driver from Jail, N.Y. TIMES, Jan. 11, 2009, *available at* http://www.nytimes.com/2009/01/12/world/middleeast/12yemen.html?ref=world. *See also* Kris, *supra* note 224, at 53 n.147.

[239] *See* Kris, *supra* note 227, at 63.

[240] *See id.* at 64 ("Sentencing in the commissions is much harder to predict at this stage."). In addition, the Department of Justice was reoriented with respect to counterterrorism prosecution in 2006 with the creation of the National Security Division, which interfaces with the intelligence community while coordinating appeals and providing resources to trial prosecutors. PATRIOT Improvement and Reauthorization Act, Pub. L. No. 109-177, §506, 120 Stat. 192 (2006), codified in various sections of Titles 18 and 50 of the U.S. Code; Kris, *supra* note 224, at 8. Increased coordination and experience with terrorism cases and the evidentiary issues they entail will ensure even greater predictability over time.

Federal courts are also fairer and more legitimate fora than military commissions. The procedural protections they offer are the source of their legitimacy, and they reduce the risk of error.[241] At every turn, the military commissions' deviations from established criminal procedure has been challenged—sometimes successfully.[242] Even where commission procedures are constitutional, they are not widely accepted, and are a novel judicial framework.[243] Federal criminal procedure, on the other hand, is as legitimate a criminal process as we have.

Both acceptance and accuracy are important to the fight against terrorism. As several successful habeas corpus petitions have demonstrated, insufficient procedural protections create a real danger of erroneous imprisonment for extended periods.[244] Meanwhile, local populations are more likely to cooperate in policing when they believe they have been treated fairly.[245] The understanding that a more legitimate detention regime will be a more effective one is echoed in statements from within the Department of Defense and the White House.[246]

3. Strategic Advantages

Furthermore, our allies in the fight against terrorism also recognize and respond to the difference in legitimacy and fairness between civilian and military courts. Increased international cooperation is another advantage of criminal prosecution. Many of our key allies have been unwilling to cooperate in cases involving law of war detention or prosecution but have cooperated in criminal law prosecution. In fact, many of our extradition treaties, including those with allies such as India and Germany, forbid extradition when the defendant will not be tried in a criminal court.[247] This issue has played out in practice several times. An al-Shabaab operative was recently extradited from the Netherlands only after assurances from the United States that he would be

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[241] For a summary of the differences between federal criminal procedure and military commission procedure, see JENNIFER K. ELSEA, CONG. RESEARCH SERV., COMPARISON OF RIGHTS IN MILITARY COMMISSION TRIALS AND TRIALS IN FEDERAL CRIMINAL COURT (2010).

[242] *See* Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Boumedienne v. Bush, 553 U.S. 723 (2008).

[243] Kris, *supra* note 224, at 50 ("[T]he current commissions are essentially a new creation, and they do not have the body of established procedures and years of precedent and experience to guide the parties and judges.").

[244] *See, e.g.*, Boumedienne v. Bush, 579 F.Supp.2d 191 (2008) (granting habease relief and ordering release of Lakhdar Boumediene, Mohamed Nechla, Hadj Boudella, Mustafa Ait Idir, and Saber Lahmar);*see also* Lakhdar Boumedienne, *My Guantanamo Nightmare*, N.Y. TIMES, Jan. 7, 2012, *available at* http://www.nytimes.com/2012/01/08/opinion/sunday/my-guantanamo-nightmare.html.

[245] *See* Tom R. Tyler, Stephen Schulhofer & Aziz Haq, *Legitimacy and Deterrence Effects in Counter-Terrorism Policing: A Study of Muslim Americans*, Chicago Public Law and Legal Theory Working Paper No. 296, *available at* http://www.law.uchicago.edu/files/file/296-ah-legitimacy.pdf.

[246] Brennan, *supra* note 153 (discussing "the perceived legitimacy—and therefore the effectiveness" of Guantanamo policy); Johnson, *supra* note 228 (arguing against detention policies that "make military detention more controversial, not less.").

[247] Kris, *supra* note 224, at 67 (citing Extradition Treaty Between the Government of the United States of America and the Government of the Republic of India, U.S.-India, June 25, 1997, T.I.A.S. 12873; Treaty Between the United States of America and the Federal Republic of Germany Concerning Extradition, U.S.-Ger., art. 3, June 20, 1978, T.I.A.S. No. 9785).

prosecuted in criminal court.[248] Two similar cases arose in 2007,[249] and several more are pending.[250] The use of military commissions may similarly hinder other kinds of international prosecutorial cooperation, such as testimony- and evidence-sharing.

Finally, the criminal justice system is simply a more agile and versatile prosecution forum. Federal jurisdiction offers an extensive variety of antiterrorism statutes that can be marshaled to prosecute terrorist activity committed outside the United States, and subsequently to detain those who are convicted.[251] This greater variety of offenses—military commissions can only punish a narrow set of traditional offenses against the laws of war[252]—offers prosecutors important flexibility. For instance, it might be very difficult to prove al Qaeda membership in an MCA prosecution or a law-of-war habeas proceeding; but if the defendant has received training at a terrorist camp or participated in a specific terrorist act, federal prosecutors may convict under various statutes tailored to more specific criminal behavior.[253] The federal criminal system also allows for more flexible interactions between prosecutors and defendants. Proffer and plea agreements are powerful incentives for defendants to cooperate, and often lead to valuable intelligence-gathering. The legitimacy and consistency of the federal courts, discussed above, also push defendants to cooperate, which in turn produces more intelligence over the course of prosecution.[254]

B. Answering Critics of Criminal Law Detention and Prosecution

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[248] *See* Robert M. Chesney, *United States v. Mahamud Said Omar: An Important New Al-Shabaab Case in Federal Court*, LAWFARE (Aug. 15, 2011, 3:38 PM), http://www.lawfareblog.com/2011/08/united-states-v-mahamud-said-omar-an-important-new-al-shabaab-case-in-federal-court/.

[249] Kris, *supra* note 224, at 68 n.190

[250] *Id.* at 68, n.191.

[251] Federal prosecutors have relied upon numerous substantive statutes to bring terrorism-related suits for acts committed abroad including: 18 U.S.C. § 2339A (material support to terrorists); 18 U.S.C. § 956 (conspiracy to kill, kidnap, maim, or injure persons or damage property in a foreign country); and 18 U.S.C. § 2332b (acts of terrorism transcending national boundaries). In cases in which authorities seek extraterritorial jurisdiction, they must first establish that Congress intended for the statute at issue to be applied outside U.S. territory, either on the basis of explicit authorization, or based on "the nature of the law itself." Brian L. Porto, *Extraterritorial Criminal Jurisdiction in Federal Courts*, 1 A.L.R. Fed. 2d 415 (2005); Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 167 (2007). In order to fulfill the requirements of international law, the exercise of extraterritorial jurisdiction must also be consistent with one or more of five essential principles of international law: (1) the subjective or objective territorial principle; (2) the nationality principle; (3) the protective principle; (4) the passive personality principle; and (5) the universality principle. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 402, 404 (1987). This international law requirement is often satisfied in the terrorism context either by the protective principle (jurisdiction based on national security concerns) or by the passive personality principle (jurisdiction based on the victim being American). A further due process limitation on the extraterritorial reach of criminal statutes is that some nexus must exist between the defendants and the United States, so that the application of the statute abroad "would not be arbitrary or fundamentally unfair." *See* United States v. Davis, 905 F.2d 245, 248-49 (9th Cir. 1990). Where a suspect poses a threat to the United States, including U.S. citizens or missions abroad, this nexus requirement would clearly be satisfied.

[252] *See supra*, Section I.A.3.

[253] *See, e.g.*, 18 U.S.C. §2339D (receiving military training from a terrorist organization); 18 U.S.C. §956(a)(1) (conspiring to kill to kill persons in a foreign country); 18 U.S.C. §229(a) (assisting the development of a chemical weapon). *See also* Kris, *supra* note 224, at 59.

[254] Kris, *supra* note 224, at 22-24.

Those opposed to widespread prosecution and detention of suspected terrorists under criminal law generally base their analysis on certain constraints of the criminal law system: (1) lack of preventative detention tools, (2) *Miranda* limitations, and (3) evidentiary concerns. This section addresses those limitations and argues that, while some pose genuine obstacles to widespread criminal law detention and prosecution of terrorism suspects, none is insurmountable. Rather, the federal criminal system is well equipped to confront the complex array of issues that prosecution and detention of terrorist suspects presents.

1. Preventative Detention Concerns and Solutions

The inability to preventatively detain individuals without cause creates a significant challenge to the use of federal criminal trials as the principal means of incapacitating terrorists. The prohibition on detention without charge is fundamental in American constitutional discourse—a given that presents a serious obstacle for the government in cases where dangerous individuals cannot be fully incapacitated through prosecution. However, while outright indefinite preventative detention is, and should be, outside of the government's set of counterterrorism tools, there is still ample room for the government to detain a wide array of individuals suspected of terrorism offenses.[255] In addition to the numerous extraterritorial statutes available to prosecutors discussed above, the three mechanisms highlighted in the following sections are also available for the incapacitation of dangerous individuals.

a. Incapacitation through Material Support Prosecution

Prosecutors often face situations where an individual has yet to commit a terrorism offense but incapacitation of that individual is nonetheless a national security imperative.[256] One solution is strategic use of the material support statutes.[257] As these statutes do not require an actual act of terrorism, they can be used, and have been used, to prosecute and detain those suspected of planning or contributing to terrorist acts, even if a prosecution for terrorism per se would not be likely to succeed.[258] Material support

[255] *See*, *e.g.*, United States v. Salerno, 481 U.S. 739, 748 (1987) ("[T]he Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. For example, in times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the government believes to be dangerous. Even outside the exigencies of war, we have found that sufficiently compelling governmental interests can justify detention of dangerous persons." (internal citations omitted)).

[256] Prosecutors often charge individuals with inchoate crimes in these situations (e.g., attempt and conspiracy) but there are certain situations where prosecutors possess insufficient evidence to sustain an indictment or conviction on these grounds. *See* Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 28 (2005) ("The sleeper scenario, however, often will not be amenable to [the strategy of charging individuals with inchoate crimes]; the essence of the sleeper dilemma is that the suspect cannot be linked to plans to commit a particular harmful act.").

[257] Strategic use of the material support statute to incapacitate individuals supporting terrorist activities should be distinguished from overbroad use of the material support statute to prosecute individuals or organizations providing humanitarian aid through designated organizations.

[258] ZABEL & BENJAMIN, *supra* note 233, at 6.

prosecutions already have been brought against individuals who enrolled at terrorist training camps, who acted as messengers for terrorist leaders, who attempted to act as doctors to terrorist groups, and who raised money to support terrorist organizations.[259]

b. Incapacitation through Non-Terrorism Crimes

Another criminal law detention tool worth mentioning is the use of non-terrorism statutes to incapacitate terrorism suspects. In a method broadly applied in other areas of the law, prosecutors can arrest the suspect on an alternative, readily provable charge that does not, on its face, require any allegation that the defendant is linked to terrorism.[260] This "preventative charging" also allows law enforcement to arrest suspects at an early stage without risking disclosure of sensitive information.[261] Statutes that have been invoked for this purpose include those criminalizing identity theft, wire fraud, and making misrepresentations to federal investigators.[262] For example, the 9/11 Commission noted in its report that as many as fifteen of the nineteen September 11 hijackers were vulnerable to criminal charges based on their fraudulent travel documents.[263]

c. Incapacitation through Administrative Detention

The diverse statutes and regimes authorizing detention for individuals not convicted of a crime include detention for aliens, sex offenders, the mentally ill, alcoholics, those with communicable diseases, those awaiting trial, material witnesses, and others.[264] These detentions are generally not indefinite in temporal scope and can be controversial. They have limited applicability with reference to suspected terrorists, but

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[259] *Id.*

[260] This strategy is sometimes referred to as the"Al Capone approach," named for the famous mobster who was prosecuted on tax evasion charges, rather on the more obvious racketeering crimes associated with him. *See* Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 584 (2005); Harry Litman, *Pretextual Prosecution*, 92 GEO. L.J. 1135, 1135 (2004).

[261] *See* Chesney, *supra* note 256, at 30-34.

[262] In fact, the Department of Justice has an explicit strategy of employing alternative statutes for terrorism suspects:

> [T]he Department's counterterrorism efforts have broadened since September 11 to include pursuit of offenses terrorists often commit, such as identity theft and immigration violations. These statutes include 18 U.S.C. § 1546 (fraudulently obtaining travel documents), 18 U.S.C. § 1425 (immigration violations), and 18 U.S.C. § 1001 (making misrepresentations to federal investigators). Prosecution of terrorism-related targets on these types of charges is often an effective method—and sometimes the only available method—of deterring and disrupting potential terrorist planning and support activities without compromising national security information.

U.S. DEP'T OF JUSTICE, COUNTERTERRORISM WHITE PAPER 29 (2006).

[263] *See* THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 384 (2004).

[264] For a detailed analysis of the different preventative detention regimes, see David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 700 (2009) (noting existing statutory authorities for preventive detention, including pretrial detention and immigration detention); *see also* Adam Klein & Benjamin Wittes, *Preventative Detention in American Theory and Practice*, 2 HARV. NAT'L SEC. J. 85 (2011) (analyzing the pervasive use of non-criminal preventative detention in different areas).

in certain circumstances may be a relevant tool, for instance, to incapacitate aliens suspected of terrorism within the United States, who may be detained for immigration violations. Like material support and non-terrorism crime prosecutions, administrative detention can fill some of the gap provided by the unavailability of general preventative detention within the criminal system.

2. Miranda Concerns and Solutions

A second criticism that is often raised in discussions of criminal law detention for suspected terrorists is the feasibility of providing *Miranda* warnings prior to arrest.[265] This criticism of the criminal law model has particular resonance if the suspected terrorist is captured abroad or is not a United States citizen.[266] Critics also claim that applying *Miranda* warnings can be an obstacle to gathering intelligence.[267]

While these considerations are legitimate in the abstract, the issuance of *Miranda* rights has yet to be a real impediment to intelligence collection in the terrorism context. John Brennan recently confronted and rejected these concerns rather unequivocally:

> Claims that *Miranda* warnings undermine intelligence collection ignore decades of experience to the contrary. Yes, some terrorism suspects have refused to provide information in the criminal justice system, but so have many individuals held in military custody, from Afghanistan to Guantánamo, where Miranda warnings were not given. What is undeniable is that many individuals in the criminal justice system have provided a great deal of information and intelligence—even after being given their *Miranda* warnings. The real danger is *failing* to give a Miranda warning in those circumstances where it's appropriate, which could well determine whether a terrorist is convicted and spends the rest of his life behind bars, or is set free.[268]

In fact, it is unclear whether the reading of *Miranda* rights has any meaningful effect on the gathering of intelligence or the prosecution of terrorists. According to one study, approximately 83 percent of suspects who were advised of their *Miranda* rights waived those rights.[269] This empirical finding supports the conclusion reached by FBI Director

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[265] *See, e.g.*, Shawn Boyne, *The Future of Liberal Democracies in a Time of Terror: A Comparison of the Impact on Civil Liberties in the Federal Republic of Germany and the United States*, 11 TULSA J. COMP. & INT'L L. 111, 143 (2003); Brian Haagensen II, Comment, *Federal Courts Versus Military Commissions: The Comedy of No Comity*, 32 OHIO N.U.L. REV. 395 (2006).

[266] *See* Press Release, Chairman Lamar Smith, House of Representatives Committee on the Judiciary, Bill Requires Consultation Before Giving Terrorists Miranda Rights (March 17, 2011), *available at* http://judiciary.house.gov/news/03172011MirandaRights.html ("The president's policy of treating terrorists like common criminals has failed. Giving terrorists the same rights as American citizens ignores the seriousness of the threat from al-Qaeda and other foreign terrorist groups.These are acts of war, not isolated incidents of crime. Foreign terrorists should be treated like enemy combatants and interrogated by intelligence experts to obtain crucial information about future attacks. Anything less risks the safety and security of the American people.").

[267] *Id.*

[268] Brennan, *supra* note 153.

[269] *See* Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 861-71 (1996).

Robert Mueller in October 2010: "I do believe that if you look at the number of recent cases we've had, Miranda has not stood in the way of getting extensive intelligence."[270]

Beyond the dubious operational value in withholding *Miranda* rights, the extent to which these warnings in the terrorism context must mirror those issued in the criminal context is still unsettled. The Supreme Court has recognized public safety exceptions to *Miranda* rights[271] and lower circuits have applied this exception within the terrorism context.[272] Interestingly, statements elicited by foreign law enforcement officials are generally admissible in U.S. courts, regardless of whether a *Miranda* warning was given, as long as the statements were voluntarily made.[273] However, in *United States v. Bin Laden*, Judge Sand of the Southern District of New York held that *Miranda* does generally apply when U.S. law enforcement questions a detainee outside the United States.[274] This does not mean that the government cannot detain and interrogate an individual held abroad, but only that law enforcement must read the detainee his *Miranda* rights in order to use any statements elicited in a criminal court.[275] For the foregoing reasons, the issuance of *Miranda* rights is not likely to be a substantial hindrance in the detention and prosecution of suspected terrorists.

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[270] *See* Chris Strohm, *FBI Says Miranda Readings Don't Hurt Bureau, Congress Daily*, THE BIPARTISAN POLICY CENTER (Oct. 6, 2010), available at http://www.bipartisanpolicy.org/news/articles/2010/10/fbi-says-miranda-readings-dont-hurt-bureau.

[271] New York v. Quarles, 467 U.S. 649, 655-656 (1984) (finding defendant's pre-*Miranda* custodial statement to police officers admissible when asked about the location of a gun in a supermarket because of the imminent threat to public safety posed by the weapon).

[272] United States v. Khalil, 214 F.3d 111, 121-122 (2d Cir. 2000) (invoking *Quarles* to permit the government to introduce incriminating statements made prior to the administration of *Miranda* warnings in a case involving an impending terrorist attack on the New York City subway system); *see also* ZABEL & BENJAMIN, *supra* note 233, at 10 ("As an initial matter, few individuals have been placed on trial following a battlefield capture; the vast majority of confessions in terrorism cases have resulted from traditional interrogation by law enforcement officers rather than soldiers . . . . [W]e believe in a battlefield situation, the courts would likely find that *Miranda* does not apply."); Kris, *supra* note 227, at 77 ("Where the exigency in question is the danger of bombs on commercial aircraft or other coordinated mass-casualty attacks—as opposed to a loose gun in a supermarket—the public-safety exception should permit broader questioning, as necessary, to protect against the threat."). . The courts will undoubatedly address this issue in the course of the trial of Ahmed Warsame, the Somali terror suspect held for two months aboard a Navy ship before being Mirandized and indicted in the Southern District of New York. Ken Dilanian, *Somali Terror Suspect Secretly Held on Navy Ship for Two Months*, L.A. TIMES, July 5, 2011, http://articles.latimes.com/2011/jul/05/nation/la-naw-somali-detainee-20110706.

[273] *See* United States. v. Yousef, 327 F.3d 56, 145-46 (2d Cir. 2003); *see also* United States. v. Abu Ali, 395 F. Supp. 2d 338, 373-74 (E.D. Va. 2005) (holding that inculpatory statements made by an American citizen to Saudi Arabian officials without *Miranda* warnings were admissible because they were not the product of a "joint venture" relationship between U.S. and Saudi officials, nor were they produced by means that "shock the judicial conscience").

[274] 132 F. Supp. 2d 168, 187-88 (S.D.N.Y. 2001).

[275] For a review of *Miranda*'s application to suspected terrorists, see William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2186-90 (2002). Some have suggested an even more expansive *Miranda* public safety exception. *See* Jeffrey S. Becker, *A Legal War on Terrorism: Extending New York v. Quarles and the Departure from Enemy Combatant Designations*, 53 DEPAUL L. REV. 831, 864-69 (2003); *see also* M.K.B. Darmer, *Beyond Bin Laden and Lindh: Confessions Law In An Age of Terrorism*, 12 CORNELL J.L. & PUB. POL'Y 319 (2003).

3. Evidentiary Concerns and Solutions

Opponents of federal criminal law prosecution and detention of suspected terrorists often point to two evidentiary concerns: (1) the inability to utilize sensitive national security information for fear of exposure, and (2) adherence to the Federal Rules of Evidence, which makes it impossible for the government to present probative evidence in terrorism cases.[276] While these concerns are reasonable, they do not present an insuperable challenge to criminal prosecution and detention of terrorist suspects.

a. Release of Sensitive National Security Information

The exposure of probative evidence in a given trial often may imperil ongoing investigations or sources. Critics point to this danger as a reason not to prosecute individuals within the criminal system. However, Congress, understanding the nature of this tension even before the emergence of the contemporary terrorism threat, passed the Classified Information Procedures Act (CIPA) with the explicit intention of allowing sensitive national security information to be used in a federal criminal trial, without being publicly released.[277] Under CIPA's detailed procedural framework, classified evidence need not be disclosed to the defense during discovery unless the court finds, based on an in camera review, that it is relevant under traditional evidentiary standards, and even relevant evidence can be withheld through a non-disclosure order (for which the government may face some sanction). All of the relevant proceedings, meanwhile, are conducted without the defendant being present and in secure facilities to ensure maximum protection for classified information. And classified evidence that is released can use substitutions to minimize security risks. [278]

CIPA has been used in many terrorism cases where the government seeks to rely on evidence that is probative of the defendant's guilt but which implicates sensitive national security interests. In particular, it has been used to protect information concerning intelligence sources, means of intelligence gathering, and even the state of our intelligence on other subjects or intelligence priorities.[279] A report by former federal prosecutors who surveyed CIPA invocations in criminal court concluded, "courts have proved, again and again, that they are up to the task of balancing the defendant's right to a fair trial, the government's desire to offer relevant evidence, and the imperative of

[276] *See generally* Andrew C. McCarthy & Alykhan Velshi, *Oursourcing American Law: We Need a National Security Court, American Enterprise Institute* (July 16, 2007) (unpublished manuscript), *available at* http://www.aei.org/paper/100038.

[277] 18 U.S.C. app. 3 §§ 1-16 (2006); *see also* ZABEL & BENJAMIN, *supra* note 233, at 85 ("Thus, while CIPA has provided a flexible, practical mechanism for problems posed by classified evidence, Congress did not intend the statute to ossify the courts' ability to deal with these issues. Rather, Congress' express intent in enacting CIPA was that federal district judges, and thus the criminal justice system, 'must be relied on to fashion creative and fair solutions to these problems,' i.e., the problems raised by the use of classified information in trials." (quoting United States v. Rosen, 2007 WL 3243919, at *7 (E.D. Va. Nov. 1, 2007))).

[278] For a more in-depth discussion of CIPA procedures, see *id*. at 82-91. *See also* LARRY M. EIG, CONG. RESEARCH SERV., CLASSIFIED INFORMATION PROCEDURES ACT (CIPA): AN OVERVIEW (1989).

[279] *See, e.g*., Aref v. United States, 452 F.3d 202, 204 (2d Cir. 2006) (discussing trial court's issuance of a protective order in criminal terrorism trial pursuant to CIPA).

protecting national security."[280] From a civil libertarian perspective, CIPA also protects defendants' rights, by allowing a defendant the opportunity to gain access to the government's classified evidence where the judge deems it necessary. As described by one author, CIPA gives "the defendant a sword in his battle to avoid a conviction and . . . the Government a shield to protect its national security interests."[281] In general, then, CIPA adequately protects national security interests while affording defendants substantial rights.

While CIPA has become a fixture in criminal law terrorism prosecutions, courts have also had to balance security concerns and due process in assessing the government's duty to disclose "evidence favorable to the accused" under the Supreme Court's decision in *Brady v. Maryland*.[282] This has been particularly challenging when some of the government's evidence is confidential or when the government's witnesses are either being detained by the government or are involved in ongoing counterterrorism efforts.[283] The court in *United States v. Moussaoui* dealt with precisely these challenges as defense counsel sought *Brady* material in the form of access to certain detained al-Qaeda figures.[284] The Fourth Circuit rejected the lower court's proposed solution—a closed video deposition of the witnesses—arguing that while Moussaoui was entitled to the witnesses' exculpatory information, summaries of interviews or interrogations of these witnesses would satisfy the government's Brady obligation.[285] While this was not squarely a CIPA issue, the court used the CIPA balancing scheme to craft a suitable alternative to the depositions.[286] The government was required to produce summaries that were as unedited and true to the original statements of the witnesses as possible without compromising national security.[287] Summary evidence would be a sufficient substitution for deposition testimony so long as "the crafting of the substitutions [is] an interactive

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[280] ZABEL & BENJAMIN, *supra* note 233, at 8; *see also* ASS'N OF THE BAR OF THE CITY OF N.Y., THE INDEFINITE DETENTION OF "ENEMY COMBATANTS": BALANCING DUE PROCESS AND NATIONAL SECURITY IN THE CONTEXT OF THE WAR ON TERROR 143 (2004) (There is "no indication that [CIPA], reasonably interpreted by federal judges, is inadequate to the task of protecting national security interests while affording defendants a fair trial."). *But see* Afsheen John Radsan, *Remodeling the Classified Information Protection Act*, 32 CARDOZO L. REV. 437, 441-2 (2010) ("[Zabel and Benjamin's] study examined only minor cases of material support to terrorism. The Bush administration, in part to avoid problems under CIPA, turned away from the federal courts and dealt with high-level cases through alternative means. Second, in a significant error, the two authors failed to interview intelligence officers to learn the true costs of public trials to sources and methods. Accordingly, their study does not address what is necessary to surmount the obstacles that compelled the Bush administration to move away from civilian courts after 9/11. For the two former prosecutors, CIPA is a wand to wave at all problems of mixing classified information with public trials.").

[281] Timothy Shea, Note, *CIPA Under Siege: The Use and Abuse of Classified Information in Criminal Trials*, 27 AM. CRIM. L. REV. 657, 662 (1990).

[282] 373 U.S. 83, 87 (1963). In Giglio v. United States, the Supreme Court held that the government's *Brady* obligation extends to evidence that may be used to impeach government witnesses. *See* 405 U.S. 150, 154 (1972) ("when the 'reliability of a given witness may well be determinative of guilt or innocence,' non-disclosure of evidence affecting credibility falls within" the Brady doctrine.).

[283] ZABEL & BENJAMIN, *supra* note 233, at 93.

[284] United States v. Moussaoui, 382 F.3d 453 (4th Cir. 2004).

[285] *Id*. at 456-57.

[286] *Id*. at 471.

[287] *Id*. at 480.

process among the parties and the district court" and the substitutions are crafted so that they "use the exact language … to the greatest extent possible."[288]

The compromises reached under both CIPA and *Brady* to protect classified information are complicated to some extent if a defendant chooses to proceed pro se. In *Faretta v. California*, the Supreme Court recognized a constitutional right to self-representation in criminal cases.[289] However, in a subsequent case, *McKaskle v. Wiggins*, the Court acknowledged that this right in not absolute.[290] The *McKasle* Court held that court appointment of standby counsel, who can assist the defendant with courtroom procedures and mechanics, is fully consistent with a defendant's right to self-representation. During terrorism related trials, just as in international criminal trials,[291] standby counsel can play a crucial role in acting as a buffer between the government and the defendant to protect confidential information.[292] This issue arose in *United States v. Moussaoui* when the defendant sought to represent himself pro se. The lower court allowed Moussaoui to represent himself with standby counsel in order to, among other things, review classified national security documents. When Moussaoui challenged his exclusion from reviewing the classified information, the court ruled that "Moussaoui's Fifth and Sixth Amendment rights are adequately protected by standby counsel's review of the classified discovery and their participation in any proceedings held pursuant to [CIPA]…even though the defendant will be excluded from these proceedings."[293] The use of standby counsel for CIPA purposes demonstrates judicial ingenuity and flexibility in balancing security and due process concerns. While the pro se scenario certainly poses a challenge to prosecuting these cases in federal court, the *Moussaoui* case makes clear that this challenge is not insurmountable.[294]

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[288] *Id*.

[289] 422 U.S. 806 (1975)

[290] 465 U.S. 168 (1984)

[291] There have also been a number of pro se litigants in international prosecutions. In these cases, some judges have attempted to accommodate the scope of the right to self-representation while others have disallowed defendants from proceeding pro se when doing so would not serve the interests of justice. In a number of cases, judges have allowed litgants to proceed pro se, but have required standby counsel to assist the defendant. *See* GIDEON BOAS, THE MILOSEVIC TRIAL: LESSONS FOR THE CONDUCT OF COMPLEX INTERNATIONAL CRIMINAL PROCEEDINGS 205-17 (2007).

[292] *Id.* at 183. ("Faretta rights are also not infringed when standby counsel assists the pro se defendant in overcoming routine procedural or evidentiary obstacles to the completion of some specific task … Nor are they infringed when counsel merely helps to ensure the defendant's compliance with basic rules of courtroom protocol and procedure."). See also ZABEL & BENJAMIN, *supra* note 233, at 89. ("[W]e anticipate that courts would recognize that a criminal defendant cannot plausibly claim an entitlement to see classified information by the simple expedient of firing his lawyer and that, in this area, standby counsel can be relied upon to protect the defendant's interests.").

[293] United States v. Moussaoui, No. CR. 01-455-A, 2002 WL 1987964 (E.D. Va. Aug. 23, 2002) (denying Moussaoui's motion to gain access to classified information).

[294] For further discussion on balancing the defendant's right to self-representation with protecting the government's interest in protecting confidential information, see Joshua L. Dratel, *Ethical Issues in Defending A Terrorism Case: How Secrecy and Security Impair the Defense of A Terrorism Case*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 81, 100 (2003).

b. Admissibility of Evidence

The second evidentiary concern raised in opposition to criminal prosecution and detention of suspected terrorists is that the Federal Rules of Evidence make it difficult or impossible for the government to present probative evidence in terrorism cases. This concern can be further broken down into three separate issues: (1) authentication requirements; (2) testimony from witnesses around the world, including some who may be active in the military; and (3) the hearsay rule.[295]

Regarding the first concern, the Federal Rules of Evidence provide a relatively low burden for proving the authenticity of evidence, requiring only that "sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification."[296] The admission of evidence is a decision of the trial judge[297] and judges in the past have exercised this discretion flexibly in international terrorism cases.[298] In practice, the authentication rules have not appeared to impose a significant barrier to the prosecution of terrorism cases.[299]

The second concern involves the unavailability of witnesses, particularly for the trial of individuals seized abroad. According to federal prosecutors who have surveyed past terrorism prosecutions, "[a]lleged problems with unavailable witnesses are not supported based on our review of the cases that have been brought."[300] Moreover, courts have been flexible in this regard—allowing depositions and other forms of testimony in the terrorism context, despite Confrontation Clause concerns raised by some parties.[301]

Finally, there has been opposition to federal criminal trials due to the inflexibility of hearsay rules. This may be a more serious concern than those just discussed, but it generally is not insuperable. Hearsay rules are necessary to protect the right of defendants to receive a fair trial. That said, federal evidence rules contain numerous exceptions that provide judges with necessary flexibility to admit out-of-court statements in criminal cases.[302] Moreover, in the past, courts have shown considerable flexibility regarding hearsay rules in the terrorism context.[303] This flexibility should not be perceived as a

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[295] ZABEL & BENJAMIN, *supra* note 233, at 107. For an in-depth discussion of how these issues are confronted in the terrorism criminal law trials, see *id.* at 107-110.

[296] United States v. Ruggiero, 928 F.2d 1289, 1303 (2d Cir. 1991) (quoting J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 901(a), at 901-17 (1990)).

[297] *See* FED. R. EVID. 104(a) (admissibility of evidence is a decision for the court).

[298] *See, e.g.*, United States v. al-Moayad, 545 F.3d 139, 162 (2d Cir. 2008) (The prosecution relied on a "Mujahidin Form" to demonstrate the defendant's predisposition to support terrorist activities and to rebut the impression created by the defense that there were no documents or other evidence establishing al-Moayad's involvement in supporting terrorism early on in the alleged conspiracy).

[299] ZABEL & BENJAMIN, *supra* note 233, at 107.

[300] *Id.* at 108.

[301] *See, e.g.*, United States v. Ressam, Order, No. 99-cr-00666 (W.D. Wash. Sept. 01, 2000) (Dkt. No. 119) (granting the government's motion, over the defendant's Confrontation Clause objection, to allow depositions of Canadian witnesses who were outside the court's subpoena power and who were unable or unwilling to testify at trial in the United States).

[302] *See, e.g.*, FED. R. EVID. 801; FED. R. EVID. 804(b)(3).

[303] *See, e.g.*, United States v. Abu Ali, 395 F. Supp. 2d 338, 373 (concluding that inculpatory statements made to Saudi Arabian interrogators while defendant was detained were voluntary and admissible); United States v. Salameh, 152 F.3d 88, 112 (2d Cir. 1998) (upholding the trial court's admission into evidence of materials seized from defendant that considered the desirability of attacking enemies of Islam and how to produce and use explosives); *see also* ZABEL & BENJAMIN, *supra* note 233, at 107 ("[Hearsay] issues have

wholesale rejection of federal hearsay jurisprudence, but courts do seem to strike a necessary balance between defendants' rights and national security concerns in making hearsay determinations.[304]

In sum, none of the common objections to criminal prosecution and detention of suspected terrorists presents an insuperable barrier. There are more preventative detention options through the criminal system than many realize, and *Miranda* and evidentiary-based concerns about use of the criminal system in terrorism cases have often been overstated. Although it may not be possible to apply criminal jurisdiction to detain suspected terrorists in every case, the criminal system remains an underappreciated alternative to law of war detention that ought to be maximally exploited in the future.

C. Limits of Criminal Law Detention and Prosecution

This Part has argued that criminal law detention and prosecution has numerous advantages over law of war detention, and should therefore be the preferred means for dealing with suspected terrorists in a large majority of cases—and the default option in case of doubt.[305] We recognize, however, that, as a practical matter, the Bush Administration, the Obama Administration, and the Congress have consistently indicated that there are certain suspected terrorists who cannot be effectively prosecuted and detained under criminal law in civilian courts. This Section therefore proposes two preconditions that should be met for it to be permissible for a detainee to be kept out of the criminal system, and made subject to law of war detention and prosecution.

First, the defendant must be a legitimate detainee under the law of war. This status has two components: (1) the defendant must fall within the scope of those who may be detained under domestic law, i.e., under the NDAA, he must be among those who "planned, authorized, committed, or aided" the September 11 attacks, or have harbored such persons, or he must be a member of an "associated force";[306] and (2) the defendant must be subject to law of war detention under international law, i.e., he must be a direct participant in hostilities, subject as a result to detention for as long as the length of hostilities, though we assume detainees should be able to be prosecuted sooner in virtually all, if not all, cases. The argument for using law of war detention and prosecution may be strengthened for defendants to be tried for specific violations of the law of war.[307]

Second, the defendant must pose a continuing, substantial threat. Simply being a legitimate law of war detainee is insufficient to justify avoidance of the criminal law system. But posing a serious, ongoing threat, in the considered opinion of the Executive

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traditionally been addressed in a common-sense manner, and our research indicates that to date they have not presented a significant obstacle to the government's terrorism prosecutions.").

[304] *Id.* at 10 ("The Federal Rules of Evidence . . . generally provide a common-sense, flexible framework to guide the decision whether evidence is admissible in court. We are not aware of any terrorism case in which an important piece of evidence has been excluded on authentication or other grounds.").

[305] There is already a recognized presumption in favor of Article III courts. *See* DETENTION POLICY TASK FORCE, PRELIMINARY REPORT, Tab A (2009) ("[W]here feasible, referred cases will be prosecuted in an Article III court, in keeping with the traditional principles of federal prosecution.")

[306] *See supra* note 6 and accompanying text.

[307] *See, e.g.*, Alexandra Roth, Forum Selection in the Age of Terrorism: Towards Accountability, Transparency, and Limited Military Jurisdiction 22 (Feb. 2012) (unpublished manuscript) (on file with author).

branch, can provide additional justification for using law of war detention, particularly when prosecutors are not prepared to prosecute a dangerous defendant, and thus the defendant may need to be detained beyond the pre-prosecution detention period that would be legitimate in the criminal system. This precondition nevertheless follows logically from the requirement that law of war detention is legitimate only during the length of hostilities, i.e., when combatants would pose a real threat.[308] It might also be appropriate, in order to apply this precondition, to set out clearer procedures for periodic review of whether individual law of war detainees pose a continuing threat.

The preconditions just presented are not intended to justify use of the law of war system, rather than the criminal law system, on their own. Rather, recognizing as a practical matter that there are limits to the criminal system, despite its many advantages, the preconditions set out minimum standards for use of law of war detention and prosecution. The preconditions are meant to begin, not end, a conversation about the factors that might indicate one of the few situations in which law of war prosecution and detention may be a necessary supplement to the criminal system. Given that the government has not yet set out such factors clearly,[309] it is imperative that the government—and commentators—clarify them further.

V. CONCLUSION

As the United States enters the second decade following the attacks of September 11, 2001, it is time to re-examine the legal basis for ongoing counterterrorism efforts. The Obama Administration has eschewed references to the "war on terror" trumpeted by its predecessor—and rightly so. The number of al-Qaeda members active in Afghanistan, where the September 11 attacks were planned and orchestrated, now number in the few hundreds at most. At the same time, threatening terrorist groups across a broad geographic scope—some loosely affiliated with al-Qaeda and some not—have proliferated. The United States Department of State currently lists forty-nine separate foreign terrorist organizations.[310]

In this context, treating counterterrorism efforts—and justifying counterterrorism detention—primarily through the lens of war is no longer practical or effective. Nor does existing law provide sufficient legal authority for detaining a wide range of terrorist suspects. As this Article has shown, statutory authority for detention under the 2001 AUMF, 2002 AUMF, and MCA, and the President's independent constitutional authority under Article II, are narrowly circumscribed and subject to significant limitations.

It is time, then, for a new approach to counterterrorism detention—one that places criminal law detention at the center of counterterrorism efforts. Already the criminal law system has proven to be highly effective at detaining and prosecuting terrorists, and it has

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[308] Ultimately, as the D.C. Circuit has held, "the United States's authority to detain an enemy combatant is not dependent on whether an individual would pose a threat to the United States or its allies if released but rather upon the continuation of hostilities." *Awad v. Obama*, 608 F.3d 1,11 (D.C. Cir. 2010).

[309] The closest the government has come is in articulating three very vague forum selection factors for Guantanamo detainees: strength of interest, efficiency, and "other prosecution considerations." *Id.* Despite these theoretical factors, prosecutors do not need to indicate any justification for a given forum selection decision. *See* Roth, *supra* note 307, at 25-28.

[310] U.S. Department of State, Office of the Coordiantor for Coutnerterrorism, Foreign Terrorist Organizations (September 15, 2011), *available at* http://www.state.gov/s/ct/rls/other/des/123085.htm.

provided a level of predictability, legitimacy, and flexibility that is missing in prosecution and detention practice carried out within the frame of war. The well established procedural protections within the criminal justice system promise to reduce the risk of error and thus ensure that the results are regarded as more legitimate than those in the more hidden and less protective military commission process. A fairer and more flexible detention regime will make a more effective contribution to counterterrorism operations.

There will likely remain some cases in which law of war detention is the best available alternative for detaining terrorism suspects. Yet instead of treating law of war detention as the centerpiece of the United States' counterterrorism detention program, the government should treat criminal law detention as its first resort, and should consider law of war detention only for those cases in which the detention is unambiguously authorized under both domestic law and international law, and the detainee poses a continuing, substantial threat.

Moving toward a regime of detaining and prosecuting terrorism suspects primarily through the criminal law would reveal terrorists for what they really are—criminals guilty of violating the law rather than soldiers in a war. It would also allow the United States to live up to the "the better angels of our nature" by providing even those we suspect of plotting against us the benefit of the principled commitments that make the United States different from those who have attacked it—among them a commitment to fairness, due process, and equality before the law. That may, in the end, prove to be the most important weapon of all.