Definite Detention: The Scope of the President's Authority to Detain Enemy Combatants

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INTRODUCTION

After almost a decade of debate, the United States continues to struggle to define the scope of its authority to detain individuals in the fight against terrorism. Federal courts have reviewed the habeas corpus petitions of hundreds of individuals labeled "enemy combatants," and the Supreme Court has repeatedly considered the detainees' ability to challenge their detention against the President and his subordinates.[1] Yet throughout all these legal proceedings, a question central to the government's detention authority has remained unsettled and heavily disputed: whom may the government detain, without charge and without trial, as part of the military effort against terrorists? A former Army Judge Advocate General recently referred to this debate as the "final showdown" on the President's authority to detain individuals in the war on terror.[2] Considering the terrorist organizations' vast network of leaders, members, supporters, and sympathizers, the answer will affect the United States' treatment of thousands of individuals, including those currently in U.S. detention around the world. Nonetheless, the Supreme Court has explicitly left this question open for future consideration.[3]

While most agree with the general principle that the United States may detain "enemy combatants" but not mere civilians,[4] policymakers and commentators have disagreed as to the content of these terms in the context of the war on terror. The parties do agree that the President's detention authority in the war against al Qaeda, the Taliban, and supporting forces is gov-

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[1] *See, e.g.*, Boumediene v. Bush, 128 S. Ct. 2229, 2240 (2008).

[2] Geoffrey S. Corn, *The Role of the Courts in the War on Terror: The Intersection of Hyperbole, Military Necessity, and Judicial Review*, 43 NEW ENG. L. REV. 17, 22 (2008).

[3] Hamdi v. Rumsfeld, 542 U.S. 507, 522 n.1 (2004) (plurality opinion) ("The legal category of enemy combatant has not been elaborated upon in great detail. The permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them.").

[4] Throughout this Article, the label "enemy combatant" refers to those individuals that the government may attack and detain, regardless of whether they directly participate in combat. Enemy combatants contrast with civilians, whom enemy states may not target until they take up arms. *See* Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT'L L. 48, 53 (2009) ("Indeed, a fundamental principle of modern [international humanitarian law] forbids the detention of civilians solely because they are nationals or part of the general population of the enemy power.").

erned by the Authorization for Use of Military Force (AUMF),[5] passed by Congress in the wake of the 9/11 attacks. The international law of war, as adopted by the United States and to the extent Congress has not spoken to the contrary, also governs the President's detention authority.

The executive branch under both Presidents Bush and Obama has claimed the right to detain not only members of al Qaeda and the Taliban, but also those who only provide support to those organizations. Several detainees, by contrast, have argued to federal courts that the United States lacks the authority to detain anyone who has not personally taken part in armed conflict with U.S. forces; some even argue that the United States may not detain anyone who is not a member of a national military force and therefore may not detain members of terrorist groups.[6] The first federal courts to address these questions have disagreed as to the answers.[7]

This Article addresses the federal courts' initial efforts to define the scope of the President's detention authority and proposes a membership-based model to determine both whether the government may detain an individual as an enemy combatant and for how long. Under this model, the AUMF and international law permit the United States to detain—in addition to those who directly participate in battle with U.S. soldiers—any individual who is a member of al Qaeda, the Taliban, or associated forces, meaning any individual within a command hierarchy ready and able to accept orders from a superior. This detention authority does not extend to individuals providing only support or sympathy to al Qaeda or its goals. Until an individual takes up arms against the United States or formally joins the ranks of al Qaeda or its allies, he or she remains a civilian and may not be detained solely for the purpose of incapacitation.

In addition to outlining which individuals the government may detain without trial or charges, the model can also be used to determine which individuals the government should release from detention. In a traditional armed conflict, a warring state releases enemy detainees at the "cessation of active hostilities."[8] In a conflict with a terrorist organization that is unlikely to ever conclude with a formal truce or peace treaty, the traditional model is not practical. Instead, the government must look to the end of hostilities on an individual basis; just as membership determines when an individual qualifies as an enemy combatant, the end of that membership can determine his or her release. Thus, a membership-based model could determine the scope of the government's detention authority as well as the length of time it may detain an enemy combatant, providing a beginning and end to this form of preventive detention.

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[5] Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (Supp. V 2005)).

[6] *See* Gherebi v. Obama, 609 F. Supp. 2d 43, 53–54 (D.D.C. 2009).

[7] *See* Chisun Lee, Op-Ed., *Their Own Private Guantanamo*, N.Y. TIMES, July 22, 2009, at A31 (discussing the disparate standards reached by courts for the government's detention authority and urging Congress' and the President's involvement to ensure consistency).

[8] Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].

The Article begins in Part I with an explanation of the contexts in which these questions have arisen and how detainees may challenge their status in administrative tribunals and federal courts. This background section also details the basis of the nation's detention authority in the fight against al Qaeda under U.S. and international law, explaining how international law affects the actions of the United States and permits preventive detention in a conflict with a terrorist organization without explicitly endorsing it. Part II of the Article deals with the beginning of detention. It outlines a membership model for determining who is eligible for preventive detention and discusses the decisions of the first courts to address this question, some of which provide a basis for the model. Part III deals with the end of detention by extending the membership model to the determination of the appropriate time for release, comparing and contrasting a membership-based process to traditional models of civil detention used in the United States.[9]

I. Background: The Sources of the President's Authority to Detain in Wartime and the Opportunities to Challenge It

A. The AUMF and the International Law of War: The Basis of Detention Authority in the War Against al Qaeda and the Taliban

Before determining the scope of the President's detention authority in the war against al Qaeda, one must identify the sources of the President's authority to detain enemies in wartime without charges or trial. The following section outlines the sources of law that authorize these detentions at all. This section also demonstrates how detainees can seek review of their detention, providing the context in which these issues are raised and settled.

1. *The AUMF and the Targeting of al Qaeda and the Taliban*

One week after the attacks of September 11, 2001, Congress passed the AUMF, a joint resolution authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided" those attacks in order "to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."[10] This short passage subsequently became the legal basis for the President's military action in Afghanistan and his authority to detain members of al Qaeda and the Taliban.

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[9] The Article's discussion of the membership model does not address two related questions. First, it does not address the government's authority to convict enemy combatants whom the government deems "unlawful" for violations of the law of war. Second, the discussion does not address the process due to alleged enemy combatants challenging their classification. The federal judiciary, including the Supreme Court, has spent almost a decade addressing that question. *See, e.g.*, Boumediene v. Bush, 128 S. Ct. 2229, 2259–62 (2008).

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

The AUMF did not explicitly mention the authority to detain or define the extent of that authority. Nonetheless, a plurality of the Supreme Court answered in *Hamdi v. Rumsfeld* 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.'"[11] This authority to detain enemy combatants is included in the authority to use military force in order to "prevent captured individuals from returning to the field of battle and taking up arms once again."[12] The plurality held that the detention authority extended at least to those individuals fighting against the United States on behalf of the Taliban: "[t]here can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF."[13] Accordingly, the United States could at least "detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who 'engaged in an armed conflict against the United States.'"[14]

The AUMF targeted not only those fighting on behalf of the Taliban, but also those fighting on behalf of al Qaeda. As one court noted,

> [G]iven that Congress authorized the same amount of force with respect to enemy "organizations" as it did with respect to enemy nations, it stands to reason that Congress intended to confer upon the President the same authority to detain individuals fighting on behalf of enemy organizations that it conferred upon him with respect to enemy nations.[15]

The Bush Administration repeatedly argued that its authority to detain individuals arose not only from the AUMF, but also from the President's authority as Commander in Chief under Article II of the Constitution, which provides that "[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States."[16] A majority of the Supreme Court in *Hamdi* either disagreed or avoided answering the question entirely.[17] Subsequently, the Obama Administration has relied solely on the AUMF to justify its detention authority.[18]

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[11] 542 U.S. 507, 518 (2004) (quoting *Ex parte* Quirin, 317 U.S. 1, 28, 30 (1942)). Justice Thomas, finding that the detention fell "squarely within the Federal Government's war powers," agreed with the Court in this regard. *Id.* at 579 (Thomas, J., dissenting).

[12] *Id.* at 518.

[13] *Id.*

[14] *Id.* at 521.

[15] Gherebi v. Obama, 609 F. Supp. 2d 43, 55 (D.D.C. 2009); *see also* Al-Marri v. Pucciarelli, 543 F.3d 213, 260 (4th Cir. 2008) (Traxler, J., concurring).

[16] U.S. CONST. art. II, § 2, cl. 1; *see also Hamdi*, 542 U.S. at 516–17 (plurality opinion).

[17] Justice Thomas was the only Justice in *Hamdi* to agree with the Bush Administration and find that the executive's power to detain fell "squarely within the Federal Government's war powers." *Hamdi*, 542 U.S. at 579 (Thomas, J., dissenting).

[18] *See Gherebi*, 609 F. Supp. 2d at 53.

2. *International Law and Its Limitations on Detention*

Domestically, the AUMF grants the President the authority to use military force not otherwise inherent in his constitutional powers. The AUMF incorporates the principles of international law adopted by the United States to provide the limitations on his conduct.

The law of war was created among the nations to restrict the sovereign rights of nations to conduct unlimited warfare and, in part, to place limitations on the detention and treatment of captured enemy combatants.[19] The D.C. District Court and several scholars have concluded that because the AUMF authorizes the President to use "all necessary and appropriate force" against the nations, organizations, and persons responsible for the 9/11 attacks, it follows that Congress intended to grant the President the authority to use any necessary and appropriate actions permitted by the law of war.[20] The AUMF placed no other limitation on the President's authority to wage war, but Congress demonstrated no intent to displace existing limitations on the President's conduct of war.

The U.S. Court of Appeals for the D.C. Circuit reached a different conclusion in *Al-Bihani v. Obama*, noting that

> there is no indication in the AUMF . . . that Congress intended the international laws of war to act as extra-textual limiting principles for the President's war powers under the AUMF. The international laws of war as a whole have not been implemented domestically by Congress and are therefore not a source of authority for U.S. courts.[21]

But the dismissal of "international law" is a red herring in the debate over the sources of the authority for military detention. No U.S. court has reached overseas to impose foreign law on the practices of the United States. Instead, the "international law" used by courts to outline the President's detention authority is actually U.S. law. The only "international" aspect of the law is that it was initially developed among nations, including the United States. Ultimately, it was incorporated into U.S. law under constitutional principles. Congress has given no indication that it intends to displace these international principles—already incorporated into U.S. law—or their traditional treatment in U.S. courts. Moreover, such a conclusion is contrary both to the Supreme Court's numerous references to international law as defining the boundaries of the AUMF[22] and to the government's own position.[23]

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[19] *See id.* at 59; Goodman, *supra* note 4, at 50.

[20] Authorization for Use of Military Force § 2(a); *see also Gherebi*, 609 F. Supp. 2d at 70–71; Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2091 (2005); Ryan Goodman & Derek Jinks, *Replies to Congressional Authorization: International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653, 2654–56 (2005).

[21] 590 F.3d 866, 871 (D.C. Cir. 2010).

[22] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (plurality opinion) ("[W]e understand Congress' grant of authority for the use of 'necessary and appropriate force' to include

a. The Authority of International Law in the United States

Certain "international law" is binding on the President as a limitation on his authority under the AUMF, both as a matter of supremacy and as a matter of statutory interpretation. For treaties, the President is obligated to adhere to agreements entered into by the United States and ratified by the Senate. He is required by the Constitution to "take Care that the Laws be faithfully executed," and these laws include both "the Laws of the United States which shall be made in Pursuance" of the Constitution and "all Treaties, made, or which shall be made, under the Authority of the United States."[24] That Congress has only passed implementing legislation for parts of the treaty and not for others does not affect the President's obligation to enforce the entire agreement.[25] Whether a treaty is self-executing or enforced through statute answers only whether it provides a private right of action in federal courts; the President must enforce the treaty regardless as the supreme law of the land absent any superseding constitutional or statutory instruction to the contrary.[26]

Customary international law, comprising those principles not agreed to in treaty but generally recognized by states, stands on shakier ground in its supremacy to executive discretion[27] and can be superseded by treaty, statute, or even executive action.[28] To integrate customary international law into U.S. courts, the Supreme Court in 1804 developed the "Charming Betsy doctrine" in *Murray v. Schooner Charming Betsy*, which held that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[29] Customary international law, like domestic common law, guides courts' interpretation of the AUMF in the absence of any contradictory authority. The Obama Administration seemingly agrees. The Administration has stated that, whether or not the various inter-

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the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles."); *see also id.* at 548–49 (Souter, J., concurring in part and dissenting in part) (advocating a substantial role for the law of war in the interpretation of the AUMF).

[23] *See* Al-Bihani v. Obama, 590 F.3d 866, 885 (D.C. Cir. 2010) (Williams, J., concurring) (quoting the government's brief).

[24] U.S. CONST. art. II, § 3; art. VI, cl. 2.

[25] *See* Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 123–25 (2004).

[26] *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003). In *Garamendi*, the Supreme Court invalidated a California statute that conflicted with an agreement between the United States and Germany. Though the agreement did not provide a private cause of action, it did preempt the state statute. *Id.* at 406, 409, 425. *Garamendi* suggests that "international agreements . . . have the status of supreme federal law under the Supremacy Clause, regardless of whether they create a private right of action." Jinks & Sloss, *supra* note 25, at 128.

[27] *See*, *e.g.*, Bradley & Goldsmith, *supra* note 20, at 2099.

[28] *See* Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980) (citing The Paquete Habana, 175 U.S. 677, 700 (1900)); ASS'N OF THE BAR OF THE CITY OF N.Y. & CTR. FOR HUMAN RIGHTS & GLOBAL JUSTICE, TORTURE BY PROXY: INTERNATIONAL AND DOMESTIC LAW APPLICABLE TO "EXTRAORDINARY RENDITIONS" 71 (2004), *available at* http://www.chrgj.org/docs/TortureByProxy.pdf.

[29] 6 U.S. (2 Cranch) 64, 118 (1804).

national agreements bind the United States, "[p]rinciples derived from law-of-war rules governing international armed conflicts" must inform any determination of detention under the AUMF.[30]

b. International Law Relating to Wartime Detention

The rights and privileges of detention in international war are governed by the four Geneva Conventions, the body of international law controlling armed conflict.[31] The Third and Fourth Conventions contain two identical articles, known as "Common Articles." Common Article 2 specifies that the Conventions apply to "all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties."[32] Common Article 3 governs "armed conflict[s] not of an international character."[33] In other words, Common Article 2 governs armed conflicts between two states and Common Article 3 governs conflicts between a state and a non-state actor. The distinction between the two categories is meaningful because Common Article 2 incorporates the protections listed throughout the Conventions, whereas Common Article 3 only requires parties in non-international conflicts to comply with Common Article 3.[34] Specifically, Common Article 2, applicable to "international" conflicts, exhaustively regulates detention of prisoners of war, whereas Common Article 3 is silent on the subject.[35]

Both international and non-international conflicts are also governed, respectively, by Additional Protocols I and II to the Geneva Conventions.[36] Though the United States ratified the Geneva Conventions, it has not ratified

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[30] Gherebi v. Obama, 609 F.Supp. 2d 43, 62 (D.D.C. 2009) (quoting Gov't's Mem. at 1). A final argument in support of complying with international law is that it is morally just. The law of war constitutes the collective moral judgment of global powers over hundreds of years. As Justice Jackson stated in his dissent in *Korematsu*, "[t]he chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history." Korematsu v. United States, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting).

[31] Hamdan v. Rumsfeld, 548 U.S. 557, 641–42 (2006).

[32] Third Geneva Convention, *supra* note 8, art. 2.

[33] *Id.* art. 3.

[34] *See* Goodman, *supra* note 4, at 50.

[35] *Id. See also* Gabor Rona, *An Appraisal of U.S. Practice Relating to "Enemy Combatants"*, 10 Y.B. INT'L HUMANITARIAN L. 232, 241 (2007) (Geneva Conventions "silent, in deference to national law, on questions of detention"). Specifically, Common Article 3 imposes the following requirements on belligerent states: (1) persons taking no part in hostilities, members of armed forces who have laid down their arms, and those placed "hors de combat" by sickness, wounds, or detention, shall be treated humanely; (2) none of the aforementioned individuals shall be subject to violence, taken hostage, subject to degrading treatment, or sentenced or executed without judicial protection; and (3) the wounded and sick shall be collected and cared for by an impartial body, such as the International Committee of the Red Cross. *See* Third Geneva Convention, *supra* note 8, art. 3.

[36] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, adopted June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

either Additional Protocol.[37] However, the Department of State has recognized the inclusion of the core of both Additional Protocols in customary international law.[38] Though not independently binding on the President, the Protocols help inform where the limitations on detention should lie under the AUMF. Those agreements are only so helpful, however: Additional Protocol II, applicable to non-international conflicts, also fails to explicitly outline the rights of detention.

As the law stands, captured members of al Qaeda, and now the Taliban, are at least subject to the protections contained in Common Article 3 and Additional Protocol II for non-international armed conflicts. The International Criminal Tribunal for the Former Yugoslavia concluded that "an armed conflict exists whenever there is . . . protracted armed violence between governmental authorities and organized armed groups."[39] Because the fight between al Qaeda—and since late 2001, the Taliban—and the United States is not a conflict between two nation states, but a struggle between a nation and non-state actors, it qualifies as a non-international armed conflict.[40]

A threshold question, therefore, is whether the United States has any authority whatsoever to detain individuals covered only by Common Article 3, which covers conflicts between state and non-state actors, when the article makes no provisions for detention. Several detainees have argued that the government lacks this authority. They claim that the laws of war, and the Third Geneva Convention in particular, "do not simply regulate the conditions of detention in a conflict, but also *authorize* the detention itself."[41] These detainees argue that Common Article 3, which does not explicitly mention or authorize prisoners of war, does not permit detention because it is silent on the subject.[42]

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[37] S. Comm. on Foreign Relations, Geneva Conventions for the Protection of War Victims, S. Exec. Rep. No. 84-9 (1955), *reprinted in* 101 Cong. Rec. 9958, 9963.

[38] *See* Gherebi v. Obama, 609 F. Supp. 2d 43, 57 n.10 (D.D.C. 2009); Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 Am. U. J. Int'l L. & Pol'y 419, 421, 430–31 (1987).

[39] Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995), *available at* http://www.icty.org/x/cases/tadic/acdec/en/51002.htm.

[40] *See* Hamdan v. Rumsfeld, 548 U.S. 557, 628–29; Bradley & Goldsmith, *supra* note 20, at 2070 (citing Derek Jinks, *September 11 and the Laws of War*, 28 Yale J. Int'l L. 1, 39–40 (2003); Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 Harv. Int'l L.J. 1, 4–5 (2002)).

[41] *Gherebi*, 609 F. Supp. 2d at 59.

[42] A recent article agrees, arguing that members of al Qaeda are not subject to military detention unless they take part in combat because, although members of the terrorist group, they are not soldiers and are therefore civilians. *See* Scott M. Kranz, *Taking the "Combat" Out of the "Enemy Combatant" Category: Yet Another Expansion of the President's Authority to Indefinitely Detain "Enemy Combatants" Within the United States*—Al-Marri v. Pucciarelli *534 F.3d 213 (4th Cir. 2008)*, 35 Wm. Mitchell L. Rev. 5131, 5148–49 (2009). Military detention of stateless belligerents, Kranz argues, "effectively undermines the United States' 'deeply rooted and ancient opposition . . . to the extension of military control over civilians.'" *Id.* at 5149 (quoting Reid v. Covert, 354 U.S. 1, 33 (1957)).

In two recent decisions in the D.C. District Court,[43] Judge Walton and Judge Bates disagreed with the detainees, finding that international law presupposes detention in both international and non-international conflicts. Judge Walton explained:

> The Geneva Conventions restrict the conduct of the President in armed conflicts; they do not enable it. And the absence of any language in Common Article 3 and Additional Protocol II regarding prisoners of war or combatants means only that no one fighting on behalf of an enemy force in a non-international armed conflict can lay claim to the protections of such status, not that every signatory to the Geneva Conventions must treat the members of an enemy force in a civil war or transnational conflict as civilians regardless of how important the members in question might be to the command and control of the enemy force or how well organized and coordinated that force might be.[44]

The commentary to the Third Geneva Convention provided by the International Committee of the Red Cross supports Judge Walton's conclusion. The commentary explains that, prior to the international law of war, "captives were the 'chattels' of their victors who could kill them or reduce them to bondage."[45] Not until 1899 at the signing of the Hague Convention did states mutually limit their respective sovereign rights concerning the treatment of prisoners of war.[46] Belligerent parties derive the right of detention from the traditional practices of warfare; international law merely puts limits on those sovereign rights of nation states. For example, Common Article 3 requires that an enemy who has laid down his arms "be treated humanely"[47] and that he not be subject to violence or execution.[48] Additional Protocol II prohibits an "order that there shall be no survivors."[49] These provisions limit the sovereign rights of states rather than authorize them. Because Common Article 3 does not prohibit detention, it therefore permits it. The extent of that right in the fight on terrorism is the subject of the discussion below.

B. Detainees' Challenges to the President's Authority to Detain

Before addressing the scope of the President's detention rights in the fight against terrorism, it is important to understand the contexts in which

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[43] *Gherebi*, 609 F. Supp. 2d at 59; Hamlily v. Obama, 616 F. Supp. 2d 63, 73 (D.D.C. 2009).

[44] *Gherebi*, 609 F. Supp. 2d at 65.

[45] JEAN PREUX ET AL., COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 45–46 (Jean S. Pictet ed., 1960).

[46] *Id.*; *see also* Corn, *supra* note 2, at 24.

[47] Third Geneva Convention, *supra* note 8, art. 3(1).

[48] *Id.* art. 3(1)(a), (d).

[49] Additional Protocol II, *supra* note 36, art. 4.1.

the question will arise. Detainees have access to several different administrative procedures and to habeas corpus proceedings in federal courts.

Military officers are the first to determine whether detention is appropriate for any particular captive.[50] Thereafter, interrogators, analysts, behavioral scientists, and regional experts interact with the detainees and, in an ad hoc manner, recommend to the Secretary of Defense whether the individual should be transferred to the custody of another government, can be released, or should remain in the custody of the Department of Defense.[51] Three years after the government opened the military detention center at the naval base at Guantanamo Bay, and prior to the Supreme Court's 2004 decision in *Hamdi v. Rumsfeld*, the government initiated an informal review process for each individual detainee remaining at Guantanamo Bay, releasing dozens in the process.[52] These review boards assessed the threat level and intelligence value of each detainee to determine whether he should be held or released.[53] The board was charged with determining whether each detainee

> [r]emains a threat to the United States and its allies in the ongoing armed conflict against al Qaida and its affiliates and supporters or if there is any other reason that it is in the interest of the United States and its allies for the enemy combatant to remain in the control of [the Department of Defense].[54]

The standard for ongoing detention, therefore, was whether the detainee constituted a threat to the United States, regardless of his affiliation with al Qaeda or the Taliban or his place in the organizational structure of those groups.

In *Hamdi*, the Supreme Court held that a detainee held in the United States was entitled to some opportunity to challenge the factual basis underlying his detention.[55] A plurality of the Court found that a detainee "must receive notice of the factual basis for his classification and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[56] Following the *Hamdi* decision, Deputy Secretary of Defense Paul Wolfowitz ordered the creation of Combatant Status Review Tribunals (CSRTs) to determine the status of detainees held at Guantanamo Bay in

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[50] U.S. Dep't of Def., Order: Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at Guantanamo Bay Naval Base, Cuba 1 (May 11, 2004) [hereinafter 2004 ARP Order], *available at* http://www.defenselink.mil/news/May2004/d20040518gtmoreview.pdf.

[51] *Id.*

[52] *See* Bradley & Goldsmith, *supra* note 20, at 2126.

[53] *Id.*

[54] 2004 ARP Order, *supra* note 50, at 3.

[55] Hamdi v. Rumsfeld, 542 U.S. 507, 507 (2004) (plurality opinion). Though the petitioner in *Hamdi* was an American citizen, the plurality's reasoning likely extends to non-citizen detainees. Justice O'Connor relied on the Geneva Convention and stated that habeas corpus should be available to an "alleged enemy combatant." *Id.* at 539. The government indicated this understanding of the opinion by subsequently creating a combatant status review procedure available to all alleged enemy combatants.

[56] *Id.* at 533.

July 2004.[57] CSRTs are composed of three U.S. military officers and decide by a preponderance of the evidence whether a detainee was "part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners," including "any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces."[58]

Since 2006 the Department of Defense has also conducted periodic review of detention for each enemy combatant. If a CSRT deems an individual to be an enemy combatant and the United States does not intend to prosecute him in a military commission, the detainee receives an annual review from an Administrative Review Board (ARB).[59] The ARBs consist of three military officers and consider all relevant and reasonably available information to determine whether the detainee continues to pose a security threat to the United States or should be detained for "other factors," including intelligence value.[60] The ARB recommends release, transfer, or continued detention, and the Deputy Secretary of Defense makes the final decision about the detainee's status.

Despite the executive branch's efforts, the Article III courts have retained the ultimate authority to define the scope of the President's detention power. The Supreme Court ultimately held that the procedures established by Congress did not provide an adequate substitute for habeas corpus review.[61] The detainees are now entitled to judicial review of their detention in an Article III court and, as a result, federal courts finally have the opportunity to review the scope of the government's detention authority.

II. The Beginning of Detention: The Emergence of the Membership Model to Define The President's Authority to Detain Enemy Combatants

In the past year, the courts have taken up the Supreme Court's charge to determine the extent of the President's detention authority under international law. There is little disagreement that, based on the sources discussed above, the United States may detain any person who takes a "direct" part in

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[57] Memorandum from Paul Wolfowitz, Deputy Sec'y of Def., to Gordon R. England, Sec'y of the Navy 1 (July 7, 2004) [hereinafter Wolfowitz CSRT Order], *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf.

[58] *Id.* at 1.

[59] *See* Dep't of Def., Directive 2310.01E, Dep't of Def. Detainee Program § 4.8 (2006), *available at* http://www.defenselink.mil/pubs/pdfs/Detainee_Prgm_Dir_2310_9-5-06.pdf.

[60] Memorandum from Gordon R. England, Deputy Sec'y of Def., to Sec'ys of the Military Dep'ts, Chairman of the Joint Chiefs of Staff, and Under Sec'y of Def. for Policy, Encl. (3), at 4 (July 14, 2006), *available at* http://www.defenselink.mil/news/Aug2006/d20060809ARBProceduresMemo.pdf (describing the "Administrative Review Board Process Step-by-Step"); *see also* Ashley S. Deeks, *Administrative Detention in Armed Conflict*, 40 Case W. Res. J. Int'l L. 403, 430 (2009).

[61] Boumediene v. Bush, 128 S. Ct. 2229, 2240 (2008).

combat.[62] Even civilians lose the protections afforded them by the Geneva Conventions at "such time as they take a direct part in hostilities."[63] However, no consensus yet exists on whether the United States may detain members of al Qaeda or the Taliban captured outside of the battlefield or supporters and sympathizers of these organizations.[64]

Though a number of courts have addressed this question, a series of recent decisions have reached a conclusion consistent with the AUMF and, as incorporated therein, the law of war adopted by the United States: the President is authorized to detain members of enemy non-state organizations within the hierarchy of the group, whether or not they engage in battle against U.S. forces, but cannot use military detention to target individuals providing mere support to those organizations. This "membership model" permits the military to detain individuals within the hierarchical structure of al Qaeda and the Taliban who are ready and able to take orders from their superiors. While some courts and individual judges have asserted broader and narrower rules, the recent decisions of the D.C. District Court have adopted this membership model to define the President's detention authority.

A. The President's Position on the Scope of His Detention Authority

The government's position on the scope of its detention authority has changed over time and over administrations. Nonetheless, its approach remains expansive. Following the Supreme Court's decision in *Hamdi*, the Department of Defense established the CSRTs and provided them with a definition of detainable combatants. In his memo creating the CSRTs, as noted above, Deputy Secretary of Defense Wolfowitz defined "enemy combatants" as those individuals who were "part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners," including "any person who has committed a belligerent act or has directly supported hostilities in aid of enemy forces."[65] Under this standard, the government may detain individuals engaged in combat with the United States, members of al Qaeda, and, at the

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[62] *See* Bradley & Goldsmith, *supra* note 20, at 2115 n.304 (collecting sources permitting the targeting of all persons actively participating in hostilities).

[63] Additional Protocol I, *supra* note 36, art. 51(3). The plurality in *Hamdi* called the "detention of individuals [in this] limited category" to be a "fundamental and accepted . . . incident to war." Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004). *See also* Goodman & Jinks, *supra* note 20, at 2655 (defining "direct participation" as a "'direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place'" (quoting INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 1 AUGUST 1949, at 516 (Claude Pilloud et al. eds., 1987)).

[64] *See* Vijay Sekhon, *More Questions Than Answers: The Indeterminacy Surrounding Enemy Combatants Following* Hamdi v. Rumsfeld, 9 BOALT J. CRIM. L. 2, 17 (2005) ("Under Hamdi, the question remains open as to whether individuals caught outside the battlefield can be classified as 'enemy combatants.'").

[65] Wolfowitz CSRT Order, *supra* note 57, at 1.

standard's furthest reach, individuals who support the efforts of al Qaeda.[66] The government used this standard to capture and detain individuals for many years following the United States' invasion of Afghanistan. Soldiers in the field were ordered to capture both individuals who were part of hostile forces as well as those supporting the enemy.[67]

In an infamous exchange with Judge Joyce Green of the D.C. District Court, counsel for the Bush Administration elaborated on the expansiveness of its notion of support, arguing that the President has the authority to detain the following individuals until the conclusion of the war on terrorism:

> [a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities, a person who teaches English to the son of an al Qaeda member, and a journalist who knows the location of Osama Bin Laden but refuses to disclose it to protect her source.[68]

In March 2009, the recently inaugurated Obama Administration reasserted the authority to detain supporters of al Qaeda, but only those that lent *substantial* support. It argued that the President could detain "'persons who were part of, or *substantially* supported, Taliban or al-Qa[e]da 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 forces.'"[69] The government claimed that it could not identify, in the abstract, the precise nature and degree of "substantial support" and advised that the definition be developed only in application to concrete facts in individual cases.[70] Detainees continue to argue in response that only combatants may be detained, meaning only those individuals who directly participate in hostilities, whether a member of the armed group or not.[71]

B. The Fourth Circuit's Efforts to Define the Scope of Detention Authority

The Fourth Circuit's decision in *Al-Marri v. Pucciarelli* was the first authority on the scope of the President's detention authority.[72] The decision

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[66] *See* Goodman, *supra* note 4, at 61.

[67] *See* 2004 ARP ORDER, *supra* note 50, at 1.

[68] *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 475 (D.D.C. 2005) (internal quotation marks and citations omitted).

[69] Gherebi v. Obama, 609 F. Supp. 2d 43, 53 (D.D.C. 2009) (quoting Gov't's Mem. at 2).

[70] *Id.*

[71] *Id.* at 63. The government also ceased using the term "enemy combatant," presumably because the proposed definition included individuals who did not personally take part in combat.

[72] 534 F.3d 213 (4th Cir. 2008), *vacated as moot*, Al-Marri v. Spagone, 129 S. Ct. 1545 (2009).

provided little guidance, however, because it resulted in a mosaic of opinions from the fractured en banc panel.

Ali Seleh Kahlah al-Marri, a Qatari citizen, entered the United States with his wife and children on September 10, 2001, ostensibly to obtain a masters degree in Peoria, Illinois.[73] Three months later, FBI agents arrested al-Marri as a material witness to the 9/11 investigation and later charged him with the fraudulent obtainment and use of credit card numbers. The government eventually dismissed the criminal charges and designated him as an enemy combatant in the custody of the Secretary of Defense. Al-Marri's counsel filed a habeas corpus petition in the U.S. District Court for the District of South Carolina. In response, the government presented an intelligence official claiming that al-Marri was sent to the United States by al Qaeda to serve as a sleeper agent for future terrorist activities and to disrupt the country's financial system through computer hacking.[74] The court held that the government's declaration, if true, provided a sufficient notice of the basis of detention and that al-Marri had the burden to produce rebuttal evidence.[75] A panel for the Fourth Circuit reversed the court's judgment, but the government successfully moved for rehearing en banc.

The court's en banc proceeding produced a judgment, but no majority opinion. By a five-to-four vote, the court held that "if the Government's allegations about al-Marri [were] true, Congress ha[d] empowered the President to detain him as an enemy combatant."[76] With respect to the question of the scope of detention, the court issued four different opinions. Judge Motz wrote an opinion, joined by three other members of the court, concluding that, although the United States might be able to detain enemy combatants that had actually taken part in hostilities,[77] it could not militarily detain an individual who had not engaged in combat; the petitioner detainee was subject only to applicable criminal law.[78]

Judge Traxler, joined by Judge Niemeyer, wrote a concurring opinion finding that the AUMF permits the President to detain enemy combatants who associate with al Qaeda, even if the government cannot prove that the combatant also took up arms against the United States.[79] Given that prior to 9/11, the hijackers had not engaged in combat against the United States, yet were in the process of executing a mission on behalf of al Qaeda, "it strains reason to believe that Congress, in enacting the AUMF in the wake of those attacks, did not intend for it to encompass al Qaeda operatives standing in the exact position as the attackers who brought about its enactment."[80] Judge Williams agreed with Judge Traxler's approach and noted that the

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[73] *Al-Marri*, 534 F.3d at 219.
[74] *Id.* at 220.
[75] *Id.* at 221.
[76] *Id.* at 216.
[77] *Id.* at 233 n.16.
[78] *See id.* at 234.
[79] *Id.* at 259.
[80] *Id.* at 260.

AUMF specifically targeted the "organizations" responsible for 9/11, which included al Qaeda and its members.[81]

Judge Wilkinson wrote the final opinion on the matter, finding that the military may detain members of groups against which Congress has authorized the use of military force.[82] With respect to "membership," Judge Wilkinson wrote that courts should look at indicia of membership, including self-identification with the organization, participation in the group's hierarchy, or knowingly taking overt steps to aid the organization's activities.[83] He also explained that the third criterion includes those who possess hostile or military designs, but excludes those who would not engage in combat, including physicians and clerics.[84]

In sum, the opinions on the scope of detention spanned from detaining only those individuals who have engaged in conduct to detaining all members of an enemy organization, whether or not they had engaged in combat. None of the judges addressed whether the definition of enemy combatant extended as far as the government claimed—to individuals who merely provide support for enemy groups.

The court was never obligated to distill the various opinions of the Fourth Circuit in *Al-Marri* into a single standard. The Supreme Court subsequently granted a writ of certiorari,[85] but before the Court heard arguments, the Obama Administration terminated al-Marri's military detention and released him into the custody of the Attorney General for indictment and trial for the criminal offenses with which he had initially been charged.[86]

C. The D.C. District Court and a Membership Model for Detention

Following the Fourth Circuit's effort, the D.C. District Court considered the President's detention authority and eventually reached the model most consistent with domestic and international law. The court determined that the President could detain members of an enemy organization, but not those individuals providing mere support.

Judge Leon had the first opportunity to address the question for the D.C. District Court on remand in *Boumediene v. Bush*.[87] He adopted the Bush Administration's definition of enemy combatant and included those providing "support" to al Qaeda,[88] accepting an even broader definition than any of the Fourth Circuit judges had recognized in *Al-Marri*.[89] He also used

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[81] *See id.* at 286.
[82] *See id.* at 325.
[83] *Id.* at 323.
[84] *See id.* at 324, 316.
[85] Al-Marri v. Spagone, 129 S. Ct. 1545 (2009), *cert. granted*, Al-Marri v. Pucciarelli, 129 S. Ct. 680 (2008).
[86] Al-Marri v. Pucciarelli, 129 S. Ct. 680 (2008), *vacated as moot*, Al-Marri v. Spagone, 129 S. Ct. 1545 (2009).
[87] 583 F. Supp. 2d 133, 134 (D.D.C. 2008).
[88] *Id.* at 134–35.
[89] Judge Leon used the same standard in a subsequent detainee habeas proceeding. *See* Al Bahani v. Obama, 594 F. Supp. 2d 35, 38 (D.D.C. 2009).

the expansive definition of enemy combatant crafted by the Department of Defense in 2004 for use in the CSRTs: "an individual who was part of or supporting Taliban or al-Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners," including "any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces."[90] Two subsequent decisions from Judge Leon's colleagues on the D.C. District Court, however, analyzed the question in greater depth. As described below, Judges Walton and Bates reached superficially different though ultimately reconcilable conclusions that detainable enemy combatants include members of the hierarchical structure of al Qaeda and the Taliban, but not mere supporters of the groups.

1. Gherebi v. Obama

In April 2009, Judge Walton issued his decision in *Gherebi v. Obama*, concluding that the government could detain individuals in the hierarchical structure of al Qaeda and the Taliban, but not those providing only support.[91] The court rejected the petitioners' argument that the President is only authorized to detain "individuals who 'directly participate' in hostilities in non-international armed conflicts."[92] Judge Walton concluded that, consistent with the standards for conflicts between state and non-state actors in Common Article 3 and Additional Protocol II, "the President may detain anyone who is a member of the 'armed forces' of an organization that 'he determines planned, authorized, committed, or aided' the 9/11 attacks, as well as any member of the 'armed forces' of an organization harboring the members of such an organization."[93]

Adopting a definition from Additional Protocol I, the court defined "armed forces" to include "all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party."[94] As the court explained, persons who receive and execute orders from the enemy's command structure are detainable as members of the enemy's armed forces, while sympathizers, propagandists, and financiers who have no involvement with a command structure are not detainable.[95]

The court, however, did not reject outright the government's "substantial support" standard. Judge Walton noted that he "share[d] the petitioners' distaste for the government's reliance on the term 'support' at all."[96] Nevertheless, he included the term in the scope of the President's detention power,

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[90] *Boumediene*, 583 F. Supp. 2d at 134–5 (quoting 10 U.S.C. § 948a).
[91] 609 F. Supp. 2d 43 (D.D.C. 2009).
[92] *Id.* at 67.
[93] *Id.* (quoting Authorization for Use of Military Force § 2(a)).
[94] Additional Protocol II, *supra* note 36, art. 43.1.
[95] *Gherebi*, 609 F. Supp. 2d at 68–69.
[96] *Id.* at 70.

limiting its application to detainees who fit his criteria for membership in the hierarchy of enemy organizations.[97]

2. Hamlily v. Obama

A month after Judge Walton filed his opinion in *Gherebi*, Judge Bates issued his decision in *Hamlily v. Obama*.[98] The government and petitioners presented the same arguments as in *Gherebi*.[99] Judge Bates called Judge Walton's opinion in *Gherebi* "thorough and thoughtful" and concurred in much of the reasoning and conclusions.[100] But the court disagreed with *Gherebi* by "reject[ing] the concept of 'substantial support' as an independent basis for detention."[101] Specifically, Judge Bates rejected the government's request to detain those having only "some meaningful connection to [al Qaeda] by, for example, providing financing."[102] "Regardless of the reasonableness of this approach from a policy perspective," he wrote, "a detention authority that sweeps so broadly is simply beyond what the law of war will support."[103]

Despite the apparently different treatment of "substantial support," the decisions in *Gherebi* and *Hamlily* are functionally the same. They agree that only members of an enemy force may be detained, and that the level of support from a particular individual can be used to determine whether that individual falls into the hierarchical structure of an organization. Judge Walton interpreted the government's "substantial support" theory to include only those "individuals who were members of the 'armed forces' of an enemy organization at the time of their initial detention. It is not meant to encompass individuals outside the military command structure of an enemy organization . . . ."[104] Judge Bates' standard is strikingly similar: "[t]he key inquiry, then, is not necessarily whether one self-identifies as a member of the organization (although this could be relevant in some cases), but whether the individual functions or participates within or under the command structure of the organization—*i.e.* whether he receives and executes orders or directions."[105] Like Judge Walton, Judge Bates recognized that the notion of "substantial support" could "play a role under the functional test used to determine who is a 'part of' a covered organization."[106]

In sum, both Judge Walton and Judge Bates concluded that the President has the authority to detain members of al Qaeda and the Taliban or

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[97] *Id.* at 69–70.
[98] 616 F. Supp. 2d 63 (D.D.C. 2009).
[99] *See id.* at 67–68.
[100] *Id.* at 68–69.
[101] *Id.* at 69.
[102] *Id.* at 76.
[103] *Id.*
[104] *Id.*
[105] *Id.* at 75 (citing Gherebi v. Obama, 609 F. Supp. 2d 43, 68–69 (D.D.C. 2009); Bradley & Goldsmith, *supra* note 20, at 2114–15).
[106] *Id.* at 76.

associated forces.[107] The key question is whether the individual receives and executes orders within the command structure of the organization.[108] For example,

> an al-Qaeda member tasked with housing, feeding, or transporting al-Qaeda fighters could be detained as part of the enemy armed forces notwithstanding his lack of involvement in the actual fighting itself, but an al-Qaeda doctor or cleric, or the father of an al-Qaeda fighter who shelters his son out of familial loyalty, could not be detained assuming such individuals had no independent role in al-Qaeda's chain of command.[109]

Mere sympathy or association would be insufficient to render someone a member of an enemy force.[110]

3. *The D.C. Circuit Adopts a Broader, but Non-Binding, Standard*

A recent decision by the D.C. Circuit demonstrates that despite the well-reasoned opinions of the D.C. District Court, the scope of the President's detention power remains an unsettled question. In *Al-Bihani v. Obama*, the court addressed the habeas petition of a cook for the 55th Arab Brigade, an Afghan militia allied with the Taliban in the fight against the Northern Alliance.[111] Al-Bihani claimed that although he was the brigade's cook and carried a brigade-issued weapon, he never engaged in combat against the Northern Alliance or U.S. forces and was, therefore, a civilian who could not be detained by the United States.[112] The court rejected his arguments, finding that, even if al-Bihani had not engaged in combat, he was detainable as a member of the belligerent group, having accompanied the brigade on the battlefield, carried a brigade-issued weapon, and accepted orders from the brigade.[113] The court's ruling was consistent with the model discussed above and with the holdings of *Gherebi* and *Hamlily*.

However, the D.C. Circuit issued dicta that went well beyond the principles of this membership model. The court found that al-Bihani was detainable, not just as a member of the belligerent force allied with the Taliban, but also for providing support to the group.[114] The court noted that Congress had subjected supporters of al Qaeda and the Taliban to prosecution before military commissions and therefore also likely intended them to be detainable under the AUMF.[115] Nonetheless, because al-Bihani was detainable as a

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[107] The government may also detain members of co-belligerent armed forces, so long as they fulfill the same requirements of membership applied to al Qaeda. *See infra* Part II.C.4.
[108] *Hamlily*, 616 F. Supp. 2d at 75; *Gherebi*, 609 F. Supp. 2d at 69.
[109] *Hamlily*, 616 F. Supp. 2d at 75 (quoting *Gherebi*, 609 F. Supp. 2d at 69).
[110] *Id.* at 75 (citing *Gherebi*, 609 F. Supp. 2d. at 68).
[111] 590 F.3d 866 (D.C. Cir. 2010).
[112] *Id.* at 871.
[113] *Id.* at 872–73.
[114] *Id.*
[115] *See id.* at 872.

member of the brigade, the finding that he was detainable as a supporter of that group was merely dictum and not binding on future decisions. As the court recognized, "we realize the picture may be less clear in other cases where facts may indicate only support, only membership, or neither."[116]

4. The Holdings in Gherebi *and* Hamlily *Follow the AUMF and International Law*

The conclusion and definition reached by the D.C. District Court in both *Gherebi* and *Hamlily* is consistent with the international law of war, as incorporated by the AUMF. International law permits, in a non-international conflict, the detention of members of an enemy force, whether or not they personally participate in hostilities. At the same time, the same body of law does not permit the detention of mere supporters or sympathizers in a non-international conflict.

Common Article 3 endorses the detention of non-combatant members of an enemy armed force. The article provides that "[p]ersons taking no active part in the 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" must be treated "humanely . . . ."[117] By prohibiting a state from targeting civilians and soldiers unable to fight, the article implies that states can target those able to take part in combat, whether or not they do.[118] In other words, the article assumes that members of an armed force who have not laid down their arms *are* effectively taking active part in the hostilities. As a result, "[t]hose who belong to armed forces or armed groups may be attacked at any time" or detained.[119]

Though the government may detain any member of an enemy fighting force under international law, it may not target civilians who merely provide support. Unlike members of an armed force, civilians are not subject to attack or detention. Additional Protocol II provides protections for the "civilian population" in non-international armed conflicts.[120] The protocol protects civilians "against the dangers arising from military operations" and requires that "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack [and, incident to that attack, detained] . . . unless and for such time as they take a direct part in hostilities."[121]

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[116] *Id.* at 874.

[117] Third Geneva Convention, *supra* note 8, art. 3(1).

[118] As discussed earlier, the Geneva Convention does not authorize the sovereign acts of a belligerent state, but rather restricts them. *See supra* Part I.A.2.b.

[119] Int'l Comm. of the Red Cross, *supra* note 53, at 1453. *But see* Goodman & Jinks, *supra* note 20, at 2656 (concluding that membership in a group is insufficient to establish participation and that membership turns on a member's role in the group).

[120] Additional Protocol II, *supra* note 36, Part IV.

[121] *Id.* art. 13.1–.3.

Civilians providing support to an enemy organization, therefore, remain civilians and cannot be attacked or detained.[122]

Al Qaeda and the Taliban do not issue membership cards or uniforms. Nonetheless, it is possible to distinguish between members of a terrorist organization and civilians providing support to the fighting force. States can identify members of the enemy force by referring to Additional Protocol I, which draws a clear line between armed forces and civilians. Though Additional Protocol I is applicable only to international armed conflicts between states, its distinction between civilians and combatants provides a helpful analogy. Armed forces are "organized . . . under a command responsible . . . for the conduct of its subordinates . . . ."[123] All such groups "are necessarily structured and have a hierarchy."[124] Curtis Bradley and Jack Goldsmith have argued that, similarly, "terrorist organizations do have leadership and command structures, however diffuse, and persons who receive and execute orders within this command structure are analogous to combatants" in international armed conflicts.[125] Thus, persons who receive and execute orders from the enemy's "command structure" are members of the enemy's armed forces. As Judge Traxler wrote in his concurrence in *Al-Marri*, it did not matter that al-Marri neither committed nor attempted to commit any act of violence, nor entered a battlefield; when he entered the country on behalf of al Qaeda with orders and hostile purpose, he was an enemy belligerent subject to detention.[126] *Gherebi* concluded, by contrast, that "[s]ympathizers, propagandists, and financiers who have no involvement with this 'command structure,' while perhaps members of the enemy organization in an abstract sense, cannot be considered part of the enemy's 'armed forces' and therefore cannot be detained militarily unless they take a direct part in the hostilities."[127]

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[122] *But see* Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 78, Aug, 12, 1949, 6 U.S.T. 3516, 5 U.N.T.S. 287 [hereinafter Fourth Geneva Convention] (providing a narrow exception for the detention of civilians, permitting an occupying army in occupied territory to detain civilians "for imperative reasons of security"). Some commentators have argued that the United States should detain members of al Qaeda and the Taliban under this provision, which provides procedural requirements but little guidance on the scope of the detention authority. *See* Alec Walen & Ingo Venzke, *Detention in the "War on Terror": Constitutional Interpretation Informed by the Law of War*, 14 I.L.S.A. J. INT'L & COMP. L. 45, 58–59 (2007). However, the provision is inapplicable in a non-international conflict. *See* Deeks, *supra* note 60, at 406–11.

[123] Additional Protocol I, *supra* note 36, art. 43.1.

[124] INT'L COMM. OF THE RED CROSS, *supra* note 53, at 512.

[125] Bradley & Goldsmith, *supra* note 20, at 2114–15.

[126] Al-Marri v. Pucciarelli, 534 F.3d 213, 261 (4th Cir. 2008).

[127] Gherebi v. Obama, 609 F. Supp. 2d 43, 68–69 (D.D.C. 2009). *But see* Kranz, *supra* note 42, at 5146–47. Kranz argues that *Hamdi* limited the President's detention authority to the "limited category" discussed in the plurality opinion: members of al Qaeda and the Taliban who directly engage in combat. He argues that nothing in *Hamdi* suggests that the AUMF permits indefinite detention beyond the "limited category" of people covered by the "narrow circumstances" of that case. *Id.* The plurality did limit the scope of its decision to people within that category, but not the scope of the President's authority. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 516 (2004). It left open the question of detaining members who have not directly participated in combat. *See* Sekhon, *supra* note 64, at 45.

The government may detain non-combatants who are not members of al Qaeda or the Taliban, but only if they are members of another group with formal ties to al Qaeda or the Taliban. As a result, the United States has the authority under international law to target members of these associated organizations so long as they have a formal relationship with al Qaeda. In *Hamlily*, the court described a co-belligerent as a "'fully fledged belligerent fighting in association with one or more belligerent powers.'"[128] A key indication of co-belligerency is repeated violations of neutrality in the ongoing conflict.[129] "Associated forces" do not include terrorist groups who merely share a common purpose with al Qaeda, but instead includes only those with an actual relationship with the organization in the existing conflict with the United States.[130] For example, an organization that substantially participates in acts of war alongside al Qaeda, supplies war materials, provides troops or munitions, or establishes wartime communications channels may be considered a co-belligerent.[131] The United States may target members of these organizations for attack or detention in the same manner as members of al Qaeda. Once again, the question of whether an individual can be detained turns on the individual's membership in the enemy organization.

The distinction between combatants and civilians in international law, as adopted in *Gherebi* and *Hamlily*, is also reflected in the small handful of Supreme Court opinions on the subject. In *Ex parte Quirin*, the government held that German saboteurs captured inside the United States were properly detained and tried by the military.[132] The saboteurs were members of the German military, ordered to enter the United States and to destroy parts of the national infrastructure. The Court noted that "[b]y universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations,"[133] and concluded that the former, whether lawful or unlawful combatants, are subject to capture and detention by opposing military forces.[134] Though the German soldiers were captured inside the United States and outside of a battlefield, they were subject to detention and conviction, as members of an enemy force.

By contrast, the Court in *Ex parte Milligan* granted a writ of habeas corpus to a civilian who had sympathized with and intended to aid enemy forces in the Confederate states.[135] Milligan had organized a group of men in

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[128] Hamlily v. Obama, 616 F. Supp. 2d 63, 75 (D.D.C. 2009) (quoting Bradley & Goldsmith, *supra* note 20, at 2112).

[129] *See* Bradley & Goldsmith, *supra* note 20, at 2112.

[130] *Hamlily*, 616 F. Supp. 2d at 75 n.17.

[131] Bradley & Goldsmith, *supra* note 20, at 2112. One historical example of this practice is U.S. military operations in World War II against Vichy France. Congress had authorized war against Germany, Italy, Japan, Hungary, Bulgaria, and Romania, but the Vichy government had a loose alliance with Germany and was engaged in several battles with the United Kingdom. As a result, the United States and its allies targeted the military forces of Vichy France in French North Africa. *Id.* at 2111–12.

[132] *Ex parte* Quirin, 317 U.S. 1 (1942).

[133] *Id.* at 30.

[134] *Id.* at 31.

[135] *Ex parte* Milligan, 71 U.S. 2 (1866).

Indiana for the purpose of overthrowing the government of the United States, holding communications with the Confederacy, conspiring to seize munitions, and liberating prisoners of war.[136] The Court held that Milligan was not subject to military detention or trial because, despite his sympathies and efforts to aid the Southern states, he was a civilian.[137] "If in Indiana he conspired with bad men to assist the enemy," concluded the Court, "he is punishable for it in the courts of Indiana."[138] Thus, the Supreme Court, relying on the international law of war, has recognized the distinction between members of enemy forces and civilians. The former group may be detained by the military for preventive purposes while the latter must be tried for their crimes in civilian courts.

III. The End of Detention: Extending a Membership Model for the Release of Detainees

Even if some courts have reached a workable and proper standard for determining whom the United States may detain in the war on terrorism, the question remains of how to determine when that detention must cease. The AUMF contains no deadline or sunset clause determining when the President's domestic authority to detain enemy combatants ends. The plurality of the Supreme Court in *Hamdi* understood "Congress' grant of authority for the use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict . . . ."[139] International law provides a similar rule for traditional armed conflicts: a nation may detain enemy soldiers until the "cessation of hostilities."[140]

In the terrorism context, this standard produces an extreme result. The United States' fight against terrorism is likely to extend over a significant amount of time. President Bush described the potential scope of the war: "The United States of America is fighting a war against terrorists of global reach. The enemy is not a single political regime or person or religion or ideology. The enemy is terrorism—premeditated, politically motivated violence perpetrated against innocents."[141] The Bush Administration indicated soon after the 9/11 attacks that it intended to detain enemy combatants for the duration of the conflict, no matter how long that might be.[142] President Obama has reasserted the right to detain enemy combatants with no finite

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[136] *Id.* at 6.
[137] *Id.* at 131.
[138] *Id.*
[139] Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004).
[140] *See* Third Geneva Convention, *supra* note 8, art. 118.
[141] The White House, The National Security Strategy of the United States of America 5 (2002), *available at* http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/nss.pdf.
[142] *Hamdi*, 542 U.S. at 540 (Souter, J., concurring) ("The Government asserts a right to hold Hamdi under these conditions indefinitely, that is, until the government determines that the United States is no longer threatened by the terrorism exemplified in the attacks of September 11, 2001.").

date of release.[143] Then-Deputy Assistant Attorney General John Yoo asked in 2002: "Does it make sense to ever release them if you think they are going to continue to be dangerous, even though you can't convict them of a crime?"[144]

Applying the rule for traditional armed conflicts to the context of terrorism would mean that the President has the authority to detain enemy combatants until the eradication of al Qaeda and its associate organizations, or longer—until the eradication of politically motivated violence against innocents. Indefinite detention without trial or charge, given the possibility of erroneous designation, may be an excessive, and perhaps unnecessary, remedy to ensure the safety of the United States.[145] The plurality in *Hamdi* explicitly addressed the danger of indefinite detention in a war without a traditional endpoint, noting that if "the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding [of the length of detention] may unravel."[146]

The traditional rule is based upon the assumption of an identifiable end to the conflict, either by formal peace treaty, armistice agreement, or even by attrition or exhaustion.[147] Detention is intended to prevent enemy combatants from returning to the battlefield.[148] The key to a more reasonable detention policy in contemporary conflict, therefore, is to determine how the rule for traditional armed conflicts may be applied to the war on terrorism in a manner that serves this purpose. Instead of focusing on the war effort at large, or even the fight against extremism, the United States should apply the same membership standard used to determine whether to detain enemy combatants in the first place, asking whether the individual is a member of al Qaeda, the Taliban, or associated forces.

Previous scholarship has made the case for an individual assessment of a detainee's continued captivity. Curtis Bradley and Jack Goldsmith argued for such an individual assessment for release in a 2005 article.[149] They recommended that "the end of the conflict should be viewed in individual rather than group-based terms."[150] "Under this approach," they explained, "the question is not whether hostilities have ceased with al Qaeda and related terrorist organizations, but rather whether hostilities have, in essence, ceased with the individual because he no longer poses a substantial danger

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[143] Joby Warrick & Karen DeYoung, *Obama Reverses Bush Policies On Detention and Interrogation*, WASH. POST, Jan. 23, 2009, at A6.

[144] Henry Weinstein, *Prisoners May Face "Legal Black Hole"*, L.A. TIMES, Dec. 1, 2002, at A1.

[145] *See* Bradley & Goldsmith, *supra* note 20, at 2124.

[146] *Hamdi*, 542 U.S. at 521.

[147] *See* Bradley & Goldsmith, *supra* note 20, at 2124.

[148] *See id.*

[149] *Id.* at 2124–25.

[150] *Id.* at 2125.

of rejoining hostilities."[151] Professor Tung Yin outlined such an approach in another 2005 article.[152] He recommended imposing a non-criminal administrative system to retain those individuals who remain a danger to the United States and to release those who can no longer be classified as members of al Qaeda.[153] He explained that, "drawing upon the previous examples of pretrial detention, civil commitment, and others, one can build a model for detaining persons captured in military conflicts against non-state actors."[154]

These authors suggest that the detainees should be freed when they are no longer a threat to the United States and list several indicia of dangerousness. However, they do not settle on a single model for determining dangerousness that could be applied consistently to all detainees. To provide standards for these individual assessments, the membership model described above could be used to determine not only when an individual may be detained, but also when he should be released. In fact, two recent opinions from the D.C. District Court have used this standard as a way of examining the habeas petitions of detainees, demonstrating how the standard could be used in individual assessments of each detainee's continued captivity.

A. Recent Judicial Decisions Support a Membership Model for the Release of Enemy Combatants

1. Basardh v. Obama

In April 2009, Judge Huvelle issued her opinion in *Basardh v. Obama*, examining the habeas petition of a detainee held in Guantanamo Bay for the previous seven years.[155] Judge Huvelle held that the court's role was not to assess the petitioner's activities prior to his detention at Guantanamo,[156] but to determine only whether he was likely to rejoin the enemy.[157] The language of the AUMF, noted the court, spoke only to the prevention of future acts of international terrorism and did not authorize unlimited, unreviewable detention.[158] Instead, the AUMF required some nexus between the detention and its purpose.[159] The court concluded that because Basardh no longer constituted a threat to the United States, the government could no longer detain him pursuant to its authority under the AUMF.[160] Accordingly, Judge Huvelle explicitly acknowledged for the first time in a court opinion that the

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[151] *Id.*

[152] *See* Tung Yin, *Ending the War on Terrorism One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J.L. & PUB. POL'Y 149 (2005).

[153] *Id.* at 197–202.

[154] *Id.* at 201.

[155] Basardh v. Obama, 612 F. Supp. 2d 30, 31 (2009).

[156] *Id.* at 31.

[157] *Id.* at 35.

[158] *Id.* at 34.

[159] *Id.* at 34.

[160] *Id.* at 35.

AUMF required the release of former enemy combatants once they could no longer be classified as members of enemy forces.

2. Al Ginco v. Obama

A month after the decision in *Basardh*, Judge Leon issued his decision in *Al Ginco v. Obama*, providing a standard to determine whether a former member of al Qaeda severed his affiliation with the group.[161] The court held that the government failed to demonstrate by a preponderance of the evidence that petitioner Abdulrahim Abdul Razak Janko[162] was "part of" the Taliban or al Qaeda at the time he was taken into custody by U.S. forces.[163] The court's decision rested not on a case of mistaken identity or contested material facts, but on Janko's cessation of his affiliation with al Qaeda. The court held that intervening events and the duration of time rendered Janko a non-member of the organization. Though Janko's case involved his pre-detention separation from al Qaeda, the same standard could be applied to separation between a detainee and al Qaeda that occurs after capture.

Janko, a Syrian citizen, spent his teen years in the United Arab Emirates.[164] In early 2000, he traveled to Afghanistan, where he stayed for several days at a guesthouse used by Taliban and al Qaeda fighters and helped clean some weapons.[165] He spent the next eighteen days at an al Qaeda training camp.[166] In 2002, Janko returned to Afghanistan, purportedly to participate in jihad on behalf of the Taliban.[167] Instead of joining Taliban and al Qaeda fighters on the battlefield, however, Janko was imprisoned by al Qaeda and tortured into making a false confession that he was a U.S. spy.[168] He spent the next eighteen months at Sarpusa prison in Kandahar. In late 2001, al Qaeda and the Taliban abandoned the prison as United States troops took control of Kandahar.[169] In January 2002, Janko was taken into custody by U.S. forces, questioned at Kandahar Air Base for approximately one hundred days, and then transferred to Guantanamo Bay.[170]

Based on these facts, the court addressed

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[161] 626 F. Supp. 2d 123 (D.D.C. 2009).

[162] Though the case was docketed under the name *Al Ginco*, the petitioner informed the court that he preferred the spelling Janko. *See id.* at 124.

[163] The court noted that the government had adjusted its proposed standard for detention by asking the court to adopt a membership and "substantial support" standard. *Id.* at 127. The court determined that it did not need to decide the appropriate level of support necessary to render a detainee an enemy combatant because Janko's detention was based on his membership in al Qaeda, not his support of the group. *Id.* at 127–28.

[164] *Id.* at 125.

[165] *Id.* at 127.

[166] *Id.* at 127, 129.

[167] *Id.* at 127.

[168] *Id.*

[169] *Id.* at 130.

[170] *Id.* at 124. Initially, the government and the U.S. media believed Janko to be a trainee for a suicide mission based on videotapes captured at an al Qaeda safehouse. The tape featuring Janko was actually an al Qaeda torture tape. *Id.* at 128.

> an issue novel to these habeas proceedings: whether a prior relationship between a detainee and al Qaeda (or the Taliban) can be sufficiently vitiated by the passage of time, intervening events, or both, such that the detainee could no longer be considered 'part of' either organization at the time he was taken into custody.[171]

Despite the intervening events, the government argued that Janko remained a "part of" al Qaeda when he entered U.S. custody. However, the court held that Janko's relationship with al Qaeda, tenuous to begin with, had been severed by his detention and torture and no longer existed at the time of his capture by U.S. forces.[172] The court held that the government proved, at most, that al Qaeda trusted Janko enough early on to induct him into its military training program.[173] But after al Qaeda had tortured Janko for months, it was highly unlikely that the organization had any trust or confidence in him.[174]

The court stated that the determination of membership was based on the relationship between the detainee and al Qaeda. "Obviously, the more ephemeral, or undefined, the relationship, the less likely it will satisfy the 'part of' requirement. Conversely, the more explicit, in word and deed, the conduct of the detainee vis-à-vis the organization, the more likely it is that it will constitute evidence of a sufficient relationship."[175] Judge Bates had described a similar functional test in *Hamlily*.[176] Here, the court provided the following factors to determine whether the pre-existing relationship had sufficiently eroded: (1) the nature of the relationship in the first instance, (2) the nature of the intervening events or conduct, and (3) the amount of time that has passed between the time of the pre-existing relationship and the point at which the detainee is taken into custody.[177] It is entirely possible that a detainee's status would change over time.

Thus the *Al Ginco* decision confirmed that a detainee could sever his relationship with al Qaeda. Indeed, the government conceded to Judge Leon that an enemy combatant could lose his status at some future date.[178] This functional standard could be applied at any point throughout an individual's detention.

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[171] *Id.* at 128. Though the court referred to the issue as "novel," it was an unanswered question only to the extent that the alleged separation occurred prior to capture. The court did not cite Judge Huvelle's opinion in *Basardh*, which addressed the same question for a petitioner already in custody at the time he renounced his membership.

[172] *Id.* at 129.

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] Hamlily v. Obama, 616 F. Supp. 2d 63, 75 (D.D.C. 2009).

[177] *Al Ginco*, 626 F. Supp. 2d at 129.

[178] *Id.* at 128 n.6.

B. A Membership Model for Release Is Consistent With International Law

Existing international law does not explicitly require that former members of al Qaeda be released prior to the end of the hostilities. The Geneva Conventions, including Common Article 3, make no provision for changes in an enemy combatant's status. However, releasing former members of al Qaeda would be consistent with the spirit and intent of the Conventions, which recognize that a detainee may be a danger when first captured, but may become harmless at some point prior to the cessation of hostilities. In certain circumstances, the Conventions even require harmless individuals' release. For example, Article 110 of the Third Geneva Convention requires the immediate repatriation of the incurably wounded and sick.[179] These individuals no longer pose a threat to the detaining state because they are no longer able to take part in the armed conflict.

The Geneva Conventions are consistent with a membership model of detention. As discussed earlier, the Conventions permit the detention of members of an armed force, whether or not those individuals take part in armed conflict, because they are dangerous. The law presumes these individuals to be dangerous when they are ready to take up arms even if temporarily assigned to a benign duty such as cooking or cleaning. But it is consistent with international law to say that an individual is no longer a "member" of an armed force if he or she is separated from the command structure, not just physically, but in such a manner that he or she is unwilling to take orders from superiors.

Detainees who sincerely renounce their loyalty to al Qaeda and its goals no longer present a threat to the United States. Like civilians, those individuals are not ready to take up arms and are not dangerous. Accordingly, the United States no longer has the justification it once did to detain them.

C. The Purposes Behind Administrative Detention Favor a Membership Model for Release

The membership-based assessment of enemy combatants throughout their detention parallels traditional means of involuntary detention for the protection of the public good. It presumes that detainees who pose a danger to the United States may at some point cease to do so. When using traditional forms of civil detention, the government has imposed incarceration on individuals who pose a risk to society, yet it has released those individuals when the risk comes to an end.

In the words of the Supreme Court, the government has "in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to

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[179] Third Geneva Convention, *supra* note 8, art. 110.

the public health and safety."[180] As with preventive detention in wartime, these detentions are justified by interests of public safety, not deterrence and retribution, the traditional goals underlying criminal imprisonment.[181] When considering the detention of criminal defendants awaiting trial, for example, the Supreme Court has held that the defendant's liberty interest is outweighed by the "demonstrable danger to society" of allowing the defendant to go free.[182] The Supreme Court has also recognized a state's "authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill."[183] Though not often in modern times, the government has also justified quarantine for the protection of public health.[184] The Surgeon General still retains the authority to impose quarantine to prevent the spread of communicable diseases across state or national boundaries.[185] In each of these situations, the danger to society overcomes the individual's liberty interest, because, as the Supreme Court has observed, "[t]here are manifold restraints to which every person is necessarily subject for the common good."[186]

Like civil commitment, military detention is justified by the need for incapacitation of an individual in the interests of public safety. During World War II, the Ninth Circuit explained, "[t]he object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on he must be removed as completely as practicable from the front, treated humanely and in time exchanged, repatriated or otherwise released."[187] The plurality in *Hamdi* reiterated the limited purpose of preventive detention in wartime, recognizing that such detention is "solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war."[188] With the exception of war criminals, convicted and sentenced for violations of the international law of war, captured soldiers suffer only incapacitation and not the stigma and loss of rights experienced by criminal convicts.[189]

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[180] Kansas v. Hendricks, 521 U.S. 346, 357 (1997).

[181] *See id.*

[182] United States v. Salerno, 481 U.S. 739, 750 (1987).

[183] Addington v. Texas, 441 U.S. 418, 426 (1979).

[184] *See* Compagnie Francaise de Navigation a Vapeur v. State Bd. of Health, 186 U.S. 380 (1902).

[185] *See* 42 U.S.C. § 264(a) (Supp. I 2007).

[186] Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905).

[187] *In re* Territo, 156 F.2d 142, 145 (9th Cir. 1942) (footnotes omitted).

[188] Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (plurality opinion) (citing Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 84 INT'L REV. RED CROSS 571, 572 (2002) (additional citation omitted)).

[189] *See* Yin, *supra* note 152, at 172–73 ("Criminal law stigmatizes offenders as wrongdoers who deserve the imposition of punishment, whereas the law of armed conflict justifies the detention of enemy soldiers (who may indeed be viewed as honorable) for the sole purpose of incapacitating them."). In the conflict with al Qaeda, detention may serve the additional purpose of rehabilitation, a traditional goal of civil confinement, but not of the detention of enemy prisoners of war. *See id.* at 169. However, just as the petitioners in *Basardh* and *Al Ginco* were stripped of their membership in al Qaeda by intervening time and events, so too could a detainee in U.S. custody renounce his allegiance to the terrorist group and his intent to harm

Just as the justifications of civil commitment resemble those of wartime detention, the methods of wartime detainee release might be patterned after those used in the civil commitment context. In the traditional forms of civil commitment, detention is based on a specific trigger and then some limiting principle to determine the time of release.[190] For example, the trigger could be an indictment, a mental defect, or an infectious disease for pre-trial detention, commitment for mental illness, or quarantine, respectively. Meanwhile, limiting factors include the dismissal of an indictment, acquittal, the rehabilitation of a mental illness, or the cure of a disease. If a similar approach were applied to detention of enemy combatants in the fight against al Qaeda, the trigger could be seen as the existence of a non-international armed conflict with al Qaeda and the limiting factor as the detainee's membership in al Qaeda or an affiliated organization.[191] So long as a detainee remains a member, the government has good reason to keep the detainee incapacitated and off the battlefield. If he ceases to be a member, however, the United States derives no benefit from his continued incarceration, and the detainee could be released.

The primary distinction between civil commitment and military detention of terrorists is, of course, the far greater danger of freeing a terrorist who remains a threat. Releasing a committed member of al Qaeda would pose a grave risk to the United States and its allies, particularly in an era of asymmetric warfare when small numbers of technologically empowered terrorists have the capacity to kill thousands. The risk is tragically illustrated by the return of a number of former detainees to the battlefield since the beginning of the war on terror.[192] Abdallah Saleh al-Ajmi, for example, was captured in 2001 in the Bannu district of Pakistan, not far from the Afghan border, and transferred to Guantanamo Bay.[193] The government claimed Ajmi joined and fought with the Taliban, though he saw little combat. In November 2005, Ajmi was transferred from Guantanamo to Kuwaiti custody and eventually released. On March 23, 2008, Ajmi drove a pickup truck filled with explosives onto an Iraqi army base outside Mosul. The resulting blast killed thirteen Iraqi soldiers and wounded forty-two others.

Such consequences will be a colossal risk in any detention system that attempts to balance liberty with security. But proper scrutiny of the individual circumstances of each detainee according to exacting standards can lower the risk to an acceptable level. The difficulty of evaluating a detainee's risk to society is no excuse for categorical, indiscriminate, perpetual detention. As Justice Stevens has noted with regard to determining future

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the United States, like civil detainees cured of their mental incapacities, dangerous sexual proclivities, or contagious diseases.

[190] *See id.* at 188–89.

[191] *See id.* at 191–92.

[192] *See* John Mintz, *Released Detainees Rejoining the Fight*, WASH. POST, Oct. 22, 2004, at A1.

[193] *See* Rajiv Chandrasekeran, *From Captive to Suicide Bomber*, WASH. POST, Feb. 22, 2009, at A1.

dangerous behavior, "[t]he fact that such a determination is difficult . . . does not mean that it cannot be made."[194]

Conclusion

U.S. law supports the membership-based model for detention in the war on al Qaeda and the Taliban. International law, as adopted by the United States, permits the United States to detain all members of al Qaeda and the Taliban, whether or not they participate in combat, but not those individuals who merely provide support for the organizations. The same standard can be used to determine whether release is appropriate, consistent with existing models of civil confinement.

For any objections to this membership model, criminal law provides a partial response.[195] Unlike preventive military detention, criminal law can reach those who provide material support to terrorist organizations without becoming members. However, U.S. criminal statutes targeting terrorism, though expansive in reach compared to other domestic laws, are limited and will not allow the U.S. government to prosecute every person providing support to terrorism anywhere in the world. In particular, the "lone wolf" may escape both preventive detention and criminal detention. Because military and criminal detention are both based, in large part, on affiliation with others—such as membership in a terrorist organization, or material support for one, or conspiracy with the members of one—both schemes may fail to reach an individual plotting alone against United States citizens.

Nonetheless, preventive detention schemes must incorporate standards and limitations to maintain consistency and public confidence.[196] These limits ultimately preserve the detention schemes by maintaining the support of the public they are designed to protect.

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[194] Jurek v. Texas, 428 U.S. 262, 274–75 (1976).

[195] For an extensive discussion of the federal criminal law tools available to target terrorists, see Robert M. Chesney, *Terrorism, Criminal Prosecution, and the Preventive Detention Debate*, 50 S. Tex. L. Rev. 669 (2009).

[196] *See, e.g.*, Editorial, *Will Obama Violate the Spirit of the Fourth?*, Christian Sci. Monitor, July 2, 2009, at 8; Editorial, *Indefinite Detention*, Courier-Journal, Sept. 13, 2005, at 10A; Editorial, *No Blank Check; Court Rejects Bush Administration's Policy on Detainees*, Charlotte Observer, June 29, 2004, at 8A; Marie Cocco, *Guantanamo Is U.S. Diplomacy's Open Sore*, Newsday, Oct. 14, 2003, at A33.