

# THE NATIONAL DEFENSE AUTHORIZATION ACT AND THE UNBOUND AUTHORITY TO DETAIN: A CALL TO CONGRESS

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## I. INTRODUCTION

On December 31, 2011, President Barack Obama signed the National Defense Authorization Act for Fiscal Year 2012 (“NDAA”).<sup>1</sup> The passage of the NDAA marked the fiftieth consecutive enactment of the National Defense Authorization Act.<sup>2</sup> The 565-page bill authorized over 600 billion dollars of military funding, increased military pay, reduced military health care costs, and included numerous other provisions that supported both the military’s personnel and strategic objectives.<sup>3</sup> The NDAA also contained provisions relating to the executive branch’s authority to place individuals in military detention.<sup>4</sup>

The detention provisions affirm the executive’s authority to place individuals in military custody without trial or formal charges. The NDAA expressly affirms the executive’s authority pursuant to the Authorization for Use of Military Force<sup>5</sup> to detain “covered persons.”<sup>6</sup> A “covered person” is defined by the NDAA as:

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1. Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2012, 2011 DAILY COMP. PRES. DOC. 978 (Dec. 31, 2011).

2. HOUSE ARMED SERVICES COMMITTEE, 112TH CONG., THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2012 HIGHLIGHT OF THE CONFERENCE REPORT 1 (2011), available at [http://armedservices.house.gov/index.cfm/files/serve?File\\_id=6bbafd38-7aae-46f9-b856-31652b920f1f](http://armedservices.house.gov/index.cfm/files/serve?File_id=6bbafd38-7aae-46f9-b856-31652b920f1f).

3. See National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2011) (codified in scattered sections of 10 U.S.C. (Supp. 2011)). See also HOUSE ARMED SERVICES COMMITTEE, *supra* note 2.

4. See National Defense Authorization Act for Fiscal Year 2012 §§ 1021–1034.

5. One week after the terrorist attacks on September 11, 2001, Congress passed the joint resolution “The Authorization for Use of Military Force” (“AUMF”). Jay M. Zitter, Annotation, *Construction and Application of Authorization for Use of Military Force*, 16 A.L.R. FED. 2D 333

A person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.<sup>7</sup>

Through the NDAA, Congress granted the executive a broad detention authority. Congress attempted to limit that authority within the NDAA, stating that it is not “intended to limit or expand the authority of the President or the scope of the Authorization for Use of Military Force,”<sup>8</sup> and that it is not intended to “affect existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States.”<sup>9</sup> However, these restrictions do not, in effect, restrict the executive’s authority to detain. The NDAA purports not to limit or expand the executive’s detention authority, yet the scope of this authority has not been completely defined.<sup>10</sup> Specifically, the meaning of the term “substantially supported” and what actions constitute “substantial support” have yet to be fully defined within the courts.<sup>11</sup> As a result, Congress has provided the executive with great discretion to decide whom to detain as substantial supporters. Accordingly, because the conflict against al Qaeda

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(2007). The AUMF authorizes the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.” AUMF, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (codified at 10 U.S.C. § 1541 note (2006)). The AUMF does not mention the authority to place enemies in military detention. However, the Supreme Court in 2004 concluded that the AUMF’s authorization to use “necessary and appropriate force” . . . include[d] the authority to detain [enemies] for the duration of the relevant conflict.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004). The Court ultimately held that the AUMF granted the President the authority to detain “enemy combatants”—that is, individuals who were “part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there.” *Id.* at 516–19 (internal quotations omitted).

6. NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2012 § 1021(a) (codified at 10 U.S.C. § 801 note (Supp. 2011)).

7. *Id.* § 1021(b)(2). The Act also includes “[a] person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks” in the definition of a “covered person.” *Id.* § 1021(b)(1). This Note will not focus on this definition of covered persons.

8. *Id.* § 1021(d).

9. *Id.* § 1021(e).

10. BENJAMIN WITTES, ROBERT M. CHESNEY & LARKIN REYNOLDS, THE EMERGING LAW OF DETENTION 2.0: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING, 36–38 (April 2012), available at <http://www.brookings.edu/research/reports/2011/05/guantanamo-wittes>.

11. *See id.*

and the Taliban lacks the characteristics of a traditional conflict that restrict the executive's detention authority,<sup>12</sup> and because the availability of habeas corpus review for detainees fails to restrain the executive's detention authority,<sup>13</sup> the executive will have virtually unchecked military detention authority. Further, the executive has an incentive to over-detain suspected terrorists,<sup>14</sup> and the courts have and will continue to afford great deference to the executive's decisions to detain.<sup>15</sup> Such unchecked authority in the area of military detention is particularly troubling—especially in the current conflict against al Qaeda and the Taliban—because it will most likely lead to erroneous, and potentially indefinite, detentions.<sup>16</sup> Thus, it is imperative that Congress revisit the scope of the executive's detention authority and place adequate restraints on who the executive may lawfully detain. Specifically, Congress should provide a more precise definition of the class of persons that the executive can detain for providing substantial support—and that definition should be consistent with the law of armed conflict and the reasons for detention.

Part II of this Note will highlight how the executive has been left with virtually unchecked authority and will explain why Congress needs to revise the executive's detention authority in this particular conflict to avoid substantial deprivations of liberty by emphasizing the untraditional nature of the conflict against al Qaeda and the Taliban and the limited utility of detainee habeas corpus proceedings in the courts. Part III will demonstrate that Congress is the government branch in the best position to place restraint on the executive's detention authority by arguing that the executive has an incentive to expand its detention authority and that the courts have supported and will likely continue to support a broad interpretation of the executive's detention authority. Part IV will suggest that Congress should restrain the executive's authority by providing a more precise definition of what constitutes “substantial support” under the NDAA. Congress can provide the most useful statutory definition of “substantial support” by remaining mindful of the law of armed conflict, the purposes behind preventative detention, and the availability of criminal prosecution for suspected terrorists.

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12. *See infra* Part II.A.

13. *See infra* Part II.B.

14. *See infra* Part III.A.

15. *See infra* Part III.B.

16. Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1088, 1099–1100 (2008).

## II. THE EXECUTIVE HAS VIRTUALLY UNCHECKED DETENTION AUTHORITY, INCREASING THE RISK THAT INDIVIDUALS WILL SUSTAIN SUBSTANTIAL DEPRIVATIONS OF LIBERTY

Congress, through the ambiguous language of NDAA, has left the executive with virtually unchecked authority to detain suspected terrorists. The executive's detention authority is virtually unchecked for two primary reasons. First, the current conflict against al Qaeda and the Taliban lacks the traditional characteristics of international armed conflict that serve to constrain the executive's detention authority. Second, the availability of habeas corpus review for detainees in Article III courts fails to check the executive's power and fails to provide adequate safeguards to protect against erroneous detention. Accordingly, the executive possesses virtually unchecked detention authority, resulting in a greater risk that individuals will sustain substantial deprivations of liberty.

### A. THE CURRENT CONFLICT LACKS THE CONSTRAINING CHARACTERISTICS OF A TRADITIONAL INTERNATIONAL ARMED CONFLICT

In a traditional international armed conflict—a conflict between two state actors—it is well established that members of the enemy forces may be detained until the end of the conflict.<sup>17</sup> However, in a traditional international armed conflict, this authority to detain is constrained.<sup>18</sup> Specifically, the executive's authority to detain in these circumstances is constrained by space, identifiable characteristics or actions of individuals, and time.<sup>19</sup> With clearly imposed restraints, there is less risk that the executive will erroneously detain individuals and less risk that detention will last indefinitely.<sup>20</sup> As a result, in the case of a traditional international armed conflict, it is usually unnecessary for Congress to constrain the executive's authority. However, the current conflict against al Qaeda, the Taliban, and associated forces is not a traditional international armed conflict—it is not a conflict with state actors.<sup>21</sup> Consequently, this conflict

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17. David Cole, *Out of the Shadows: Preventative Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 729 (2009).

18. *Id.* at 737.

19. *See id.*

20. *See* Chesney & Goldsmith, *supra* note 16, at 1088, 1099–1100.

21. Cole, *supra* note 17, at 729–30. *See also* W. Hays Parks, *Combatants*, in *THE LAW OF COUNTERTERRORISM* 1, 12–15 (Lynne K. Zusman ed., 2011) (questioning the Taliban's status as the de jure government of Afghanistan at the time of the U.S. invasion), 24–25 (describing al Qaeda as a

lacks the characteristics of a traditional international armed conflict that would ordinarily constrain the executive's authority to detain, creating an increased risk that individuals will be erroneously detained.<sup>22</sup>

In the case of a traditional international armed conflict, there is generally a clear battle zone in which the enemy forces engage in combat.<sup>23</sup> This provides the executive with a clear geographical space in which to capture detainees. Additionally, under the law of armed conflict, during combat military forces are obligated to distinguish themselves from the civilian population.<sup>24</sup> Even if individuals fail to distinguish themselves from the civilian population, they can still be detained if they are actively engaged in combat.<sup>25</sup> This provides the executive with observable attributes that may be used to determine whom to detain—those fighting and those who have distinguished themselves as part of the enemy force. Furthermore, the authority to detain ends when the conflict ends.<sup>26</sup> The end date may not be precisely predictable, but it is certain that the conflict, and ultimately military detention, will eventually end.<sup>27</sup> Because of these restrictions, in a traditional international conflict setting, there is less risk that individuals will be detained erroneously,<sup>28</sup> less risk that the detention will last indefinitely,<sup>29</sup> and consequently, less need to further constrain the executive's detention authority.

In contrast, the current conflict against al Qaeda and the Taliban is not a traditional international armed conflict and thus lacks the conflict characteristics that constrain the executive's authority to detain.<sup>30</sup> The

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“quintessential non-State actor”); Don E. Scheid, *Indefinite Detention of Mega-Terrorists in the War on Terror*, 29 CRIM. JUST. ETHICS 1, 3 (2010).

22. See Chesney & Goldsmith, *supra* note 16, at 1088, 1099–1100.

23. Laurie R. Blank, *A Square Peg in a Round Hole: Stretching Law of War Detention Too Far*, 63 RUTGERS L. REV. 1169, 1174 (2011) [hereinafter *A Square Peg*]; Laurie R. Blank, *Where is the Battlefield in the 'War on Terror'? The Need for a Workable Framework*, JURIST (Dec. 1, 2010), <http://jurist.org/forum/2010/12/where-is-the-battlefield-in-the-war-on-terror-the-need-for-a-workable-framework.php> (“[T]he battlespace in an international armed conflict [is] all areas where the forces of belligerent parties meet outside of neutral territory.”) [hereinafter *Where is the Battlefield*].

24. Parks, *supra* note 21, at 20.

25. David M. Crane & Daniel Reisner, “Jousting at Windmills” *The Laws of Armed Conflict in an Age of Terror-State Actors and Nonstate Elements*, in NEW BATTLEFIELDS OLD LAWS CRITICAL DEBATES ON ASYMMETRIC WARFARE 67, 72 (William C. Banks ed., 2011).

26. *A Square Peg*, *supra* note 23, at 1180.

27. Cole, *supra* note 17, at 737.

28. See Chesney & Goldsmith, *supra* note 16, at 1088, 1099–1100.

29. See Cole, *supra* note 17, at 737.

30. See *id.* at 729.

executive's authority to detain is not bound by any particular geographical space. The current conflict lacks a defined battle zone—terrorist attacks by al Qaeda and the Taliban can occur anywhere and at any time.<sup>31</sup> In fact, terrorist attacks by these groups have occurred both within the United States and abroad,<sup>32</sup> and United States forces have attacked these groups in Somalia, Yemen, Afghanistan, Pakistan, and Iraq.<sup>33</sup> The executive arguably has the authority to detain individuals from potentially anywhere in the world.

The executive's authority to detain is also not limited by the observable characteristics or actions of individuals. Neither the Taliban nor al Qaeda is a state actor for the purposes of international armed conflict—both are non-state actors.<sup>34</sup> Therefore, they are not bound to comply with the law of armed conflict.<sup>35</sup> Consequently, they are not obligated to distinguish themselves from the civilian population.<sup>36</sup> Moreover, terrorist attacks are not hand-to-hand battles with clearly observable fighters and non-fighters further complicating the ability of the executive to distinguish those who may be detained from those who are beyond the executive's purview.<sup>37</sup>

The executive's authority to detain in the current conflict is also not restrained by time. Under current U.S. law, individuals may be lawfully held in military detention until the end of the relevant conflict.<sup>38</sup> In the present conflict, as articulated by the House of Representatives Armed Services Committee Report, the United States is “engaged in an armed conflict with al Qaeda, the Taliban, and associated forces.”<sup>39</sup> This means that the executive's detention authority will end when the conflict with those enemies ends. This begs the question—when does a conflict against

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31. See MARY L. DUDZIAK, *WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES* 108 (2012) [hereinafter *WAR TIME*]; *A Square Peg*, *supra* note 23, at 1176–79; *Where is the Battlefield*, *supra* note 23.

32. Cole, *supra* note 17, at 729–30.

33. *Where is the Battlefield*, *supra* note 23.

34. See *supra* note 21 and accompanying text.

35. See Crane & Reisner, *supra* note 25, at 79–80.

36. In fact, “members of terrorist organizations generally try to obfuscate their identities and blend indistinguishably into civilian populations.” Matthew C. Waxman, *Administrative Detention of Terrorists: Why Detain, and Detain Whom?*, 3 J. NAT'L SECURITY L. & POL'Y 1, 5 (2009). See also Chesney & Goldsmith, *supra* note 16, at 1099–1100.

37. Waxman, *supra* note 36, at 5, 11; Chesney & Goldsmith, *supra* note 16, at 1099–1100.

38. WITTES, CHESNEY & REYNOLDS, *supra* note 10, at 42.

39. H.R. REP. NO. 112-78, at 3 (2011).

terrorist groups such as al Qaeda and the Taliban end? The United States has and is fighting these enemies in Iraq and Afghanistan, so does the conflict end when U.S. combat in Iraq and Afghanistan ends? Or does it end when al Qaeda, the Taliban, and associated forces have been completely defeated? Both of these potential end points fail to provide a clear indication of when this conflict will end, suggesting that the executive's authority to detain could be indefinite.

Unfortunately, the ending of combat in Iraq and Afghanistan fails to provide a clear indication of when the conflict against al Qaeda and the Taliban will end.<sup>40</sup> One could assume that when U.S. combat in Iraq and Afghanistan ends, the conflict with al Qaeda and the Taliban and the basis for justifying military detention would also end. However, in this conflict, there is not a connection between the end of U.S. combat in Iraq and Afghanistan and the end of the conflict with al Qaeda and the Taliban.<sup>41</sup> For example, U.S. combat ended in Iraq in December of 2011.<sup>42</sup> Despite the end of combat in Iraq, al Qaeda violence still remains prevalent within Iraq and officials believe that al Qaeda is rebuilding its training camps and regaining strength within the country.<sup>43</sup> In Afghanistan, the United States plans to end combat by 2014.<sup>44</sup> Because the combat in Afghanistan is still ongoing, one could argue that the conflict with al Qaeda and the Taliban will in fact be over in 2014. However, the U.S. plan to end combat by 2014 is based upon an "arbitrary timetable" and political pressures, not the actual strength of al Qaeda or the Taliban.<sup>45</sup> In fact, even after eleven years of U.S. combat, the Taliban still remains a "robust enemy" and there is a

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40. See Mary L. Dudziak, *The War Is Not Over Yet*, N.Y. TIMES, Feb. 16, 2012, at A31, available at <http://www.nytimes.com/2012/02/16/opinion/this-war-is-not-over-yet.html> [hereinafter *The War Is Not Over Yet*].

41. *Id.*

42. Thom Shanker, Michael S. Schmidt & Robert F. Worth, *In Baghdad, Panetta Leads Uneasy Moment of Closure to a Long Conflict*, N.Y. TIMES, Dec. 16, 2011, at A16, available at <http://www.nytimes.com/2011/12/16/world/middleeast/panetta-in-baghdad-for-iraq-military-handover-ceremony.html>.

43. Qassim Abdul-Zahara, *Al-Qaeda Making Comeback in Iraq, Officials Say*, USA TODAY (Oct. 9, 2012 6:26 PM), <http://www.usatoday.com/story/news/world/2012/10/09/al-qaeda-iraq/1623297/>.

44. Karen DeYoung, *Despite Challenges in Afghanistan, U.S. Determined to Stick to Exit Strategy*, WASH. POST, Mar. 12, 2012, <http://www.bloomberg.com/news/2012-04-16/taliban-al-qaeda-awaiting-u-s-afghanistan-exit.html>.

45. Jeffrey Goldberg, *Taliban, Al-Qaeda Awaiting U.S. Afghanistan Exit*, BLOOMBERG, Apr. 16, 2012, <http://www.bloomberg.com/news/2012-04-16/taliban-al-qaeda-awaiting-u-s-afghanistan-exit.html>.

concern that the Taliban will regain control of Afghanistan after the exit of U.S. troops.<sup>46</sup> Thus, because this conflict has been defined as a conflict with al Qaeda and the Taliban and because those enemies will not be defeated by the end of U.S. combat in Iraq and Afghanistan, the end of combat in Iraq and Afghanistan fails to provide an endpoint for the current conflict.<sup>47</sup>

If the end of combat in Iraq and Afghanistan does not indicate the end of the underlying conflict, then the complete defeat of al Qaeda and the Taliban would have to signal when this conflict will end. However, the defeat of al Qaeda and the Taliban also fails to provide a clear endpoint.<sup>48</sup> Al Qaeda and the Taliban are not state actors.<sup>49</sup> This is a conflict against an “ideology”<sup>50</sup>—a conflict against a political and religious movement.<sup>51</sup> No enemy state exists with which to negotiate a cease-fire or peace treaty.<sup>52</sup> Accordingly, there is no enemy state that can bind the members of al Qaeda and the Taliban to cease combat and end the conflict.<sup>53</sup> Thus, the seeming way to end the conflict against al Qaeda and the Taliban would be to completely defeat those terrorist groups.<sup>54</sup> However, assuming it is possible to defeat terrorist groups like al Qaeda and the Taliban, it will be difficult, if not impossible, to determine if the groups have been completely defeated.<sup>55</sup> And, even if the United States did effectively defeat these terrorist groups, that defeat would not preclude new terrorist groups from forming and engaging in combat against the United States.<sup>56</sup> Consequently, the United States could be engaged in conflict with al Qaeda, the Taliban, or associated forces for an indefinite amount of time.<sup>57</sup>

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46. Matt Spetalnick & Missy Ryan, *NATO Sets “Irreversible” But Risky Course to End Afghan War*, REUTERS (May 21, 2012, 7:59 PM), <http://www.reuters.com/article/2012/05/21/us-nato-summit-idUSBRE84J02C20120521>.

47. See *The War Is Not Over Yet*, *supra* note 40.

48. *A Square Peg*, *supra* note 23, at 1182.

49. See *supra* note 21 and accompanying text.

50. WAR TIME, *supra* note 31, at 108.

51. Scheid, *supra* note 21, at 3.

52. *Id.*

53. *Id.* at 3–4.

54. See *A Square Peg*, *supra* note 23, at 1181.

55. *Id.*

56. *Id.* at 1182.

57. *Id.*

Because this conflict lacks clear endpoints, the decision to end the conflict will rest solely in the discretion of the executive.<sup>58</sup> This unchecked authority is particularly troubling for those detained during the current conflict because the executive has a strong political incentive to continue the conflict against potentially undefeatable terrorist forces. This creates the possibility of an indefinite conflict with indefinite military detention.<sup>59</sup>

As demonstrated, the current conflict against al Qaeda and the Taliban lacks the characteristics present in a traditional international armed conflict that constrain the executive's authority to detain. Consequently, the current scope of executive authority poses a great risk that individuals will be erroneously detained and that the detention will last indefinitely.<sup>60</sup> With potentially substantial deprivations of liberty at stake, Congress must act to constrain the executive's detention authority.

B. THE LIMITED AVAILABILITY OF HABEAS CORPUS RELIEF FOR  
DETAINEES IN ARTICLE III COURTS FAILS TO RESTRAIN THE  
EXECUTIVE'S DETENTION AUTHORITY

In 2008, the Supreme Court held that Article III courts have jurisdiction over habeas corpus petitions from non-citizens detained at Guantanamo Bay in Cuba.<sup>61</sup> Justice Kennedy concluded that habeas relief was necessary for detainees to protect personal liberty and to maintain the separation of powers.<sup>62</sup> Thus, habeas relief served two very important functions: it secured the fundamental American value of liberty and created a device for the courts to constrain the broad detention authority of the executive.<sup>63</sup> Courts would be able to use habeas corpus petitions to assure that the executive's detention authority was complying with applicable laws.<sup>64</sup> However, despite Justice Kennedy's attempt to constrain the executive's broad detention authority, the ability of habeas review to constrain the executive's detention authority and to prevent erroneous detentions is questionable at best.<sup>65</sup>

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58. See WITTES, CHESNEY & REYNOLDS, *supra* note 10, at 43.

59. *A Square Peg*, *supra* note 23, at 1182.

60. Chesney & Goldsmith, *supra* note 16, at 1099–1100.

61. *Boumediene v. Bush*, 553 U.S. 723, 798 (2008).

62. Aziz Z. Huq, *What Good Is Habeas?*, 26 CONST. COMMENT. 385, 388 (2010).

63. *Id.* at 395.

64. *See id.*

65. *See id.* at 386.

Empirical studies have questioned the effectiveness of habeas litigation to release those who have been erroneously detained.<sup>66</sup> For example, during the year immediately following the Supreme Court's 2008 ruling, one would expect the number of released detainees to increase. However, there was no noticeable increase in detainee releases.<sup>67</sup> Rather, the number of detainees released remained similar to the amount released prior to habeas availability.<sup>68</sup> This suggests that habeas litigation did not contribute to the release of erroneously held detainees.<sup>69</sup> Rather, those who were released through habeas litigation would most likely have been released eventually by the executive without judicial interference.<sup>70</sup> In fact, the majority of detainee releases are executed without judicial order. During the year after the Supreme Court's decision in 2008, over 60 percent of releases were done without judicial order.<sup>71</sup> This evidence suggests that releases due to judicial orders from habeas corpus proceedings may just be substitutes for executive releases.<sup>72</sup>

Additionally, the procedures and evidentiary rules used by the courts during detainee habeas proceedings are highly deferential to the government and the executive's decision to detain. During detainee habeas proceedings, the government only has to prove that the detainee is being held lawfully by a preponderance of evidence.<sup>73</sup> This evidentiary standard is far less demanding than the "beyond a reasonable doubt" evidentiary standard employed in criminal proceedings.<sup>74</sup> The "preponderance of evidence" standard is also more attainable for the government because the government is permitted to use hearsay evidence during proceedings.<sup>75</sup> Additionally, a court may not evaluate pieces of evidence independently. Rather, a court must evaluate all of the evidence collectively and must determine whether the evidence, as a whole and in context, supports a

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66. *E.g., id.*

67. *Id.* at 405–06.

68. *Id.*

69. *See id.* at 426–27.

70. *Id.*

71. *Id.* at 408.

72. *Id.* at 426–27. Professor Huq notes that habeas litigation may have some effect on releases, but this effect is very small and does not create as strong a check on the executive's power to detain as Justice Kennedy had intended. *See id.* at 427.

73. Robert M. Chesney, *Terrorism, Criminal Prosecution, and the Preventive Detention Debate*, 50 S. TEX. L. REV. 669, 709 (2009) [*hereinafter Preventive Detention Debate*].

74. *See id.*

75. Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 41 SETON HALL L. REV. 1451, 1466 (2011).

lawful detention.<sup>76</sup> This allows the government to compile numerous pieces of questionable evidence that when looked at individually do not support a lawful detention, but when looked at as a whole support a reasonable inference that the detention is lawful.<sup>77</sup> In addition, the government must only prove that a detainee is being held lawfully at the moment of the habeas proceeding.<sup>78</sup> The government is not required to prove that the government had sufficient evidence to justify the detention at the moment of capture.<sup>79</sup> This means that the government is permitted to gather evidence after capture in order to prove that the detention is lawful.<sup>80</sup>

Furthermore, even if a detainee is able to succeed at both the trial and appellate level, the release orders issued by the trial courts do not command physical release.<sup>81</sup> Rather, most of the orders “require the government to engage in ‘all necessary and appropriate diplomatic steps to facilitate’ release.”<sup>82</sup> This suggests that, even in cases where the detainees are illegally detained, the courts are hesitant to question and restrict the executive’s authority.<sup>83</sup>

Finally, it should be noted that not all detainees are entitled to habeas corpus review in Article III courts. Detainees held at Bagram Air Force Base in Afghanistan are not permitted to challenge their detention in Article III courts.<sup>84</sup> Detainees held at Bagram are only entitled to “rudimentary hearings.”<sup>85</sup> At these hearings, three “field grade” military officers—not impartial decision makers—determine if the detention of the detainee is lawful.<sup>86</sup> Also, while at the hearings, detainees are afforded virtually no procedural protections: they have no right to adequate representation, no right to confront witnesses, and evidence used against the detainees is often classified.<sup>87</sup> Consequently, some detainees in Bagram have been “imprisoned for eight years or more without charge or trial,

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76. See WITTES, CHESNEY & REYNOLDS, *supra* note 10, at 117–18.

77. *See id.*

78. *Id.* at 40–41.

79. *Id.*

80. *See id.*

81. Huq, *supra* note 62, at 429.

82. *Id.*

83. *Id.* at 429–30.

84. See HUMAN RIGHTS FIRST, DETAINED AND DENIED IN AFGHANISTAN 4 (2011), available at <http://www.humanrightsfirst.org/2011/05/10/detained-and-denied-in-afghanistan/>.

85. *Id.*

86. *Id.* at 8–9.

87. *Id.* at 13–17.

based largely on evidence they have never seen and with no meaningful opportunity to defend themselves.”<sup>88</sup> Interestingly, the number of detainees held at Bagram increased after the Supreme Court’s ruling in 2008.<sup>89</sup> This suggests that the executive has been able to evade serious review by the courts and further exacerbates the risk of erroneous indefinite detention.<sup>90</sup>

Thus, because of the relatively low evidentiary burden imposed upon the government in habeas corpus proceedings, the discretionary nature of judicial release orders, and the lack of habeas corpus review for all detainees, Article III courts do not provide an effective check on the executive’s detention authority. Similarly, the characteristics that are present in a traditional armed conflict that serve to constrain the executive’s authority are absent in this present conflict. Consequently, it is imperative for Congress to place adequate checks on the executive’s detention authority.

### III. CONGRESS IS IN THE BEST POSITION TO CHECK THE EXECUTIVE’S DETENTION AUTHORITY

As demonstrated in Part II, without congressional boundaries the executive will have virtually unchecked detention authority. Looking forward, one might speculate that either the executive or the courts will check the executive’s detention authority that has been placed within the NDAA. However, this is not the case. The executive has little incentive to check the authority to detain. In fact, the executive has an incentive to over-detain. The courts have also been unable to constrain the executive’s authority. Legal precedent involving the executive’s detention authority demonstrates that the courts have supported a broad interpretation of the detention authority. Similarly, if a court were to utilize tools of statutory construction to interpret the NDAA in a new detainee case, the court would inevitably support a broad, deferential interpretation of the executive’s detention authority. Congress, on the other hand, could constrain the executive’s authority by passing laws and providing guidelines that will be able to ensure that the executive’s authority is constrained within appropriate boundaries.

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88. *Id.* at 4.

89. Huq, *supra* note 62, at 406–07.

90. *See id.*

#### A. THE EXECUTIVE'S INCENTIVE TO OVER-DETAIN

The executive branch has little incentive to restrain its authority to detain—the executive has an incentive to over-detain suspected terrorists.<sup>91</sup> Terrorist attacks present the executive with an unpredictable and severe threat. Faced with such a tremendous threat, the executive is likely to “err on the side of the detention.”<sup>92</sup> If an individual is erroneously detained and subsequently released, the executive’s “error is invisible.”<sup>93</sup> However, if an individual is not detained or erroneously released and proceeds to cause harm, “the error will be emblazoned across the front pages.”<sup>94</sup> It is politically more desirable for the executive to push the boundaries of the detention authority than to risk suffering the “accusatory political backlash for having failed to take sufficient action.”<sup>95</sup>

The Bush Administration’s detention policies provide a striking example of the executive’s propensity to over-detain in the face of a terrorist threat. In the first two years after the September 11 terrorist attacks, over five-thousand individuals were detained.<sup>96</sup> To this day, some of these detained individuals remain missing.<sup>97</sup>

#### B. THE JUDICIARY’S DEFERENCE TO THE EXECUTIVE’S DECISIONS TO DETAIN

The courts also fail to constrain the executive’s detention authority. A careful examination of the judiciary’s past interpretation of the executive’s authority to detain demonstrates that the court endorses a broad interpretation, and is quick to defer to the executive’s decisions. In future cases, with the detention authority now placed within the statutory text of the NDAA, courts may be called upon to use statutory interpretation tools to discern an interpretation of the executive’s detention authority. However, the use of statutory interpretation tools—such as consulting the legislative history of the NDAA and canons of statutory construction—would again lead to a highly deferential interpretation and would uphold the broad detention authority of the executive.

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91. *See* Cole, *supra* note 17, at 696.

92. *Id.*

93. *Id.*

94. *Id.*

95. Waxman, *supra* note 36, at 27.

96. Cole, *supra* note 17, at 703.

97. NATSU TAYLOR SAITO, FROM CHINESE EXCLUSION TO GUANTÁNAMO BAY 187 (2007).

### 1. The Courts' Past Decisions Have Been Deferential to the Executive's Detention Authority

A look at the District of Columbia Circuit's treatment of past habeas corpus detainee cases demonstrates that the courts support a deferential and broad interpretation of the executive's authority to detain.<sup>98</sup> The circuit has effectively expanded the scope of the executive's detention authority and has reduced the evidentiary burdens placed on the government to justify detention.

In March 2009, the Obama Administration issued a definition of the scope of the executive's detention authority.<sup>99</sup> The Obama Administration defined its detention authority as the power to detain individuals "who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces."<sup>100</sup> This is the same definition that Congress included in the NDAA.<sup>101</sup>

Shortly after the Obama Administration issued its definition, the District of Columbia Circuit began applying it to cases. In 2009, the District of Columbia District Court issued two separate opinions that placed considerable restrictions on the scope of the executive's detention authority.<sup>102</sup> In *Gherebi v. Obama*, the court held that the authority to detain would only extend to those who were members of the enemy forces.<sup>103</sup> Thus, those who provided "substantial support" could only be

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98. Robert M. Chesney, *Who May be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769, 855 (2011) [hereinafter *Who May be Held?*].

99. Resp't's Mem. Regarding the Gov't's Det. Auth. Relative to Detainees Held at Guantanamo Bay at 2, *In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d 33 (D.D.C. 2008) (No. 08-442), available at <http://www.justice.gov/opa/documents/memo-re-det-auth.pdf> [hereinafter Resp't's Mem.]; Press Release, Dep't of Justice Office of Pub. Affairs, Department of Justice Withdraws "Enemy Combatant" Definition for Guantanamo Detainees, (Mar. 13, 2009), <http://www.justice.gov/opa/pr/2009/March/09-ag-232.html>; WITTES, CHESNEY & REYNOLDS, *supra* note 10, at 26.

100. Resp't's Mem., *supra* note 99, at 2.

101. See *supra* note 7 and accompanying text.

102. *Gherebi v. Obama*, 609 F. Supp. 2d 43 (D.D.C. 2009), *abrogation recognized by Uthman v. Obama*, 637 F.3d 400, 403 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2739 (2012); *Hamlily v. Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009).

103. *Gherebi*, 609 F. Supp. 2d at 70-71. See also *Who May be Held?*, *supra* note 98, at 835; David Mortlock, *Definite Detention: The Scope of the President's Authority to Detain Enemy*

detained if they were members of the enemy forces.<sup>104</sup> The court also further restricted the executive's detention authority by holding that only those who received and executed orders from the command structure of the enemy organization would qualify as members of the enemy forces.<sup>105</sup>

Similarly, in *Hamlily v. Obama*, the court affirmed that those who were members of the enemy forces were only those who received and executed orders from the command structure.<sup>106</sup> However, in *Hamlily* the court went one step further than *Gherebi* and expressly rejected "the concept of 'substantial support' as an independent basis for detention."<sup>107</sup> Thus, after *Gherebi* and *Hamlily*, the court had effectively restricted the executive's detention authority—those who provided independent support could not be detained and only those who received and executed orders from the command structure could be detained as members of the enemy force.<sup>108</sup>

Despite the district court's restrictions on the scope of the executive's detention authority, the District of Columbia Circuit court reversed both of the restrictions in *Al-Bihani v. Obama*.<sup>109</sup> The court in *Al-Bihani* rejected the requirement that those who could be detained as members of enemy forces were only those who received and executed orders from the command structure.<sup>110</sup> The court also rejected the restriction that those who provided substantial support could only be detained if they were members of the enemy forces.<sup>111</sup> Because the detention of Al-Bihani was justified because he was part of enemy forces, the rejection of the substantial support restriction was technically dicta.<sup>112</sup> However, the use of substantial support as an independent basis for detention has been affirmed in statute

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*Combatants*, 4 HARV. L. & POL'Y REV. 375, 390 (2010); WITTES, CHESNEY & REYNOLDS, *supra* note 10, at 28; Vladeck, *supra* note 75, at 1458.

104. *Gherebi*, 609 F. Supp. 2d at 70.

105. *Id.*

106. *Hamlily*, 616 F. Supp. 2d at 75. *See also Who May be Held?*, *supra* note 98, at 837; Mortlock, *supra* note 103, at 391; WITTES, CHESNEY & REYNOLDS, *supra* note 10, at 28.

107. *Hamlily*, 616 F. Supp. 2d at 69.

108. *Who May be Held?*, *supra* note 98, at 837.

109. *See Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), *reh'g en banc denied*, 619 F.3d 1 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011).

110. *Id.* at 872–73. *See also Who May be Held?*, *supra* note 98, at 838–39; Vladeck, *supra* note 75, at 1462.

111. *Al-Bihani*, 590 F.3d at 872. *See also* WITTES, CHESNEY & REYNOLDS, *supra* note 10, at 29–31.

112. *Al-Bihani* was both part of and substantially supported enemy forces. *Al-Bihani*, 590 F.3d at 873–74.

by the NDAA and in dicta in subsequent circuit court decisions.<sup>113</sup> The circuit has not yet evaluated a habeas petition involving a detention based solely upon substantial support, so what specific actions would be sufficient to constitute substantial support still remains unclear.<sup>114</sup> However, given the circuit court's deferential interpretation of the executive's detention authority, it seems likely that the court will continue to endorse a broad interpretation of the executive's detention authority.

The way in which the District of Columbia Circuit evaluates the government's evidence in detainee habeas corpus proceedings has also failed to restrict the executive's detention authority. In *Al-Adahi v. Obama*, the District of Columbia District Court found that the petitioner traveled to Afghanistan, met with Osama bin Laden, stayed at an al Qaeda guesthouse, and trained at an al Qaeda military camp.<sup>115</sup> The district court evaluated each piece of evidence independently and concluded that no piece of evidence was sufficient on its own to prove that Al-Adahi was a part of, or substantially supported, an enemy; thus Al-Adahi was not lawfully detained.<sup>116</sup> The circuit court reversed, concluding that the district court improperly evaluated the evidence.<sup>117</sup> The circuit court held that the evidence must be considered in its entirety.<sup>118</sup> The court explained that it is irrelevant that a particular piece of evidence viewed independently is insufficient to justify a detention; rather, if the evidence viewed as a collective whole supports an inference that petitioner was more likely than not part of an enemy force or provided substantial support to enemy forces, then the detention is lawful.<sup>119</sup> Subsequent circuit court opinions have affirmed this approach.<sup>120</sup> By looking at evidence in its entirety and basing conclusions on whether all of the evidence supports an inference that the detention is lawful, the circuit court has effectively expanded the scope of

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113. WITTES, CHESNEY & REYNOLDS, *supra* note 10, at 33.

114. *See id.* at 30–31.

115. *Al-Adahi v. Obama*, No. 05-280, 2009 WL 2584685, at \*6–15 (D.D.C. Aug. 21, 2009), *rev'd*, 613 F.3d 1102 (D.C. Cir. 2010).

116. *Id.* at \*16.

117. *Al-Adahi v. Obama*, 613 F.3d 1102, 1105–06, 1111 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1001 (2011). *See also* WITTES, CHESNEY & REYNOLDS, *supra* note 10, at 115–17.

118. *Al-Adahi*, 613 F. 3d at 1105–06, 1111.

119. *Id.*

120. WITTES, CHESNEY & REYNOLDS, *supra* note 10, at 118–20. These decisions are *Salahi v. Obama*, 625 F.3d 745 (D.C. Cir. 2010), *Hatim v. Gates*, 632 F.3d 720 (D.C. Cir. 2011), and *Uthman v. Obama*, 637 F.3d 400 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2739 (2012).

the detention authority, and the “government can be expected to prevail [in detainee habeas corpus proceedings] more frequently.”<sup>121</sup>

It is also unlikely that the Supreme Court will grant certiorari to evaluate the scope of the executive’s detention authority.<sup>122</sup> In light of recent denials of certiorari, the Supreme Court seems hesitant to question the choices of the executive in the detainee context.<sup>123</sup> In any case, even if the Supreme Court does grant certiorari, it is unlikely that the Supreme Court will support a narrow interpretation of the executive’s detention authority.<sup>124</sup> Justices Roberts, Scalia, Thomas, and Alito will likely support a broad interpretation of the executive’s detention authority and Justice Kagan would likely be recused from the proceedings, due to her former role as Solicitor General.<sup>125</sup> Thus, it seems likely that the broad interpretation of the executive’s detention authority endorsed by the District of Columbia Circuit will continue to govern.

## 2. A Court’s Use of Statutory Interpretation Would Support a Highly Deferential Interpretation of the Executive’s Detention Authority

Now that the executive’s detention authority is defined by the statutory text of the NDAA, courts may employ statutory interpretation to interpret that authority. When evaluating ambiguous statutory language, courts generally endeavor to further the intent of Congress.<sup>126</sup> Courts will sometimes consult the legislative history of a statute to define an ambiguous statutory term in a way consistent with the intent of Congress.<sup>127</sup> Courts will also apply canons of statutory construction to

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121. WITTES, CHESNEY & REYNOLDS, *supra* note 10, at 112.

122. Huq, *supra* note 62, at 429.

123. *Id.* See also *Suleiman v. Obama*, 670 F.3d 1311 (D.C. Cir. 2012), *cert. denied*, No. 12-137, 2012 WL 3097225 (U.S. Oct. 1, 2012); *Latif v. Obama*, 666 F.3d 746 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2741 (2012); *Al Alwi v. Obama*, 653 F.3d 11 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2739 (2012); *Almerferdi v. Obama*, 654 F.3d 1 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2739 (2012); *Al-Madhwani v. Obama*, 642 F.3d 1071 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2739 (2012); *Abdah v. Obama*, 630 F.3d 1047 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 1904 (2012); *Awad v. Obama*, 608 F.3d 1 (D.C. Cir. 2010), *cert. denied*, 132 S. Ct. 1814 (2011).

124. *Who May be Held?*, *supra* note 98, at 855.

125. *Id.*

126. See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 221 (2d ed. 2006).

127. *Id.* at 221–22. It should be noted that some judges and justices disfavor referring to the legislative history as a way to interpret ambiguous statutory text. FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 25 (2009). This modern textualist theory—championed by Justice Scalia—is largely based on bicameralism and the Presentment Clause of Article 1, Section 7 of the Constitution. ESKRIDGE, JR., FRICKEY & GARRETT, *supra* note 126, at 236. According to this

interpret ambiguous statutory language.<sup>128</sup> In the case of the NDAA, the use of statutory interpretation tools, such as the legislative history and canons of statutory construction, would fail to constrain the executive's detention authority.

*a. Legislative History*

In the case of the NDAA and the ambiguous term "substantial support," a court's consultation of the legislative history would not provide a precise definition of substantial support and would instead support a broad interpretation of the executive's authority to detain.

*i. Committee Reports*

The NDAA was referred to and reported out of the Committee on Armed Services in both the Senate and the House.<sup>129</sup> The committee reports from both the Senate and the House do not provide guidance as to what actions constitute "substantial support." Rather, the committee reports support a broad interpretation of the executive's detention authority that affords great deference to the executive's decision to detain. As a result, these reports would not provide an interpretation that would constrain the executive's detention authority.

According to the report from the House Committee on Armed Services, the general purpose of the legislation was to authorize military funding and to support military personnel.<sup>130</sup> The general purpose of the detention provisions was to affirm the President's detention authority pursuant to the Authorization for Use of Military Force ("AUMF") and to "strengthen detention policies and procedures."<sup>131</sup> The committee expressly recognized that enemy forces, such as al Qaeda and the Taliban "still pose a grave threat to U.S. national security" and thus, the AUMF granted the

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section, in order for a bill to become law it must first pass through both chambers of Congress and then be presented and signed by the President. U.S. CONST. art. I, § 7. Therefore, according to textualists, the actual law is only what is within the statutory text, because the text itself passed through both chambers of Congress and was ultimately signed into law by the President. ESKRIDGE, JR., FRICKEY & GARRETT, *supra* note 126, at 236. For a criticism of this argument, see *id.* at 238–45 and CROSS, *supra* note 127, at 34–36. Textualists generally disfavor looking to legislative history as an interpretative tool because the views, statements, and unwritten intentions of Congress were not passed as law. ESKRIDGE, JR., FRICKEY & GARRETT, *supra* note 126, at 236. Thus, a textualist court will typically only evaluate the words of the text and their corresponding context. CROSS, *supra* note 127, at 51.

128. See ESKRIDGE, JR., FRICKEY & GARRETT, *supra* note 126, at 341.

129. H.R. REP. NO. 112-78 (2011); S. REP. NO. 112-26 (2011).

130. H.R. REP. NO. 112-78, at 1–2.

131. *Id.* at 3.

executive the authority to address the “continuing and evolving threat” posed by those enemy forces.<sup>132</sup>

Similarly, the Senate Committee Report emphasized that the purpose of the bill was to support the men and women of the armed forces by providing them with the tools and resources necessary to complete their assigned missions and by improving their ability to “counter nontraditional threats” such as terrorism.<sup>133</sup> The report provides only a brief discussion of the purpose of detainee provisions.<sup>134</sup>

Accordingly, the lack of a definition of “substantial support” and the overall emphasis on supporting the armed forces and its ability to combat terrorist forces, such as al Qaeda and the Taliban, suggest that Congress intentionally left “substantial support” undefined as a way to best support the executive and the armed forces. This intentional omission could be viewed as a way to provide the executive with the flexibility necessary to counter the unorthodox and ever-changing threat posed by terrorist organizations. Thus, a reviewing court would most likely view this intentional omission as an indication that the executive’s decision to detain an individual should be afforded great deference.

*ii. Sponsor Statements*

Statements from the bill’s sponsors in both the House and the Senate, Representative Buck McKeon and Senator Carl Levin respectively, do not provide any additional guidance as to the meaning of “substantial support.” Rather, both statements support a broad interpretation of the executive’s detention authority.

Representative Buck McKeon of California emphasized that the purpose of the detention provisions was to “strengthen policies and procedures used to detain, interrogate, and prosecute al Qaeda, the Taliban, and affiliated groups, and those who substantially support them.”<sup>135</sup> Similarly, Senator Carl Levin of Michigan emphasized that the detainee provisions were specifically constructed to provide the executive with the requisite flexibility necessary to decide whom to detain and when.<sup>136</sup>

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132. *Id.* at 209.

133. S. REP. NO. 112-26, at 2–3.

134. *See id.* at 176.

135. 157 CONG. REC. H8915, at H8923 (daily ed. Dec. 14, 2011) (statement of Rep. Buck McKeon).

136. 157 CONG. REC. S8632, at S8633 (daily ed. Dec. 15, 2011) (statement of Sen. Carl Levin).

Both of these statements support the conclusion that the statutory language was intended to provide great deference to the executive's decision to detain and support a broad interpretation of the executive's detention authority.

*iii. Drafting and Deliberation History*

The drafting and deliberation history of the NDAA also supports a broad interpretation of the executive's detention authority. Numerous amendments to the NDAA were proposed in both the House and the Senate.<sup>137</sup> Notably, in each chamber an amendment was proposed to drastically change the detention provisions of the NDAA. However, both of these amendments were ultimately voted down.

In the House, Representative Justin Amash of Michigan proposed an amendment to strike Section 1034—the section pertaining to the AUMF and the authority to detain—in its entirety.<sup>138</sup> Proponents of the amendment emphasized the broad language of the detention authority—notably that it might allow the executive to detain individuals who were merely associated with enemy forces, and even more troubling, an individual who simply provides “a meal to . . . a suicide bomber.”<sup>139</sup> Opponents of the amendment emphasized that the definition was the same interpretation used by the Obama Administration, and that it had been approved by the courts.<sup>140</sup> Opponents also argued that the codification of the interpretation would provide the military with clear guidance when determining whom they can detain.<sup>141</sup> However, as the amendment's proponents noted, this proposition was questionable at best, because the definition was vague and ultimately failed to “contain any description of harm that has occurred or that we are

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137. Forty-eight amendments were proposed in the House, and 381 amendments were proposed in the Senate. See *Bill Summary & Status 112th Congress (2011-2012) H.R.1540*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:hr1540>; (follow “Amendments” link) (last visited Nov. 15, 2012); *Bill Summary & Status 112th Congress (2011-2012) S.1867*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s1867>; (follow “Amendments” link) (last visited Nov. 15, 2012).

138. 157 CONG. REC. H3649, at H3660 (daily ed. May 25, 2011) (statement of Rep. Justin Amash). Section 1034 in the version of the bill introduced in the House had effectively the same definition of who may be detained as the final bill that was passed into law. The House version authorized the detention of those who are “part of, or are substantially supporting al-Qaeda, the Taliban or associated forces that are engaged in hostilities against the United States.” H.R. 1540, 112th Cong. § 1034 (3)–(4) (2011) (as reported by H. Comm. on Armed Services, May 17, 2011).

139. 157 CONG. REC. H3649, at H3662 (statement of Rep. Jerrold Nadler).

140. *Id.* at H3660 (statement of Rep. Buck McKeon).

141. See *id.* at H3662 (statement of Rep. Timothy Griffin).

seeking to prevent;” therefore, it would only provide minimal guidance to the executive, the military forces, and the courts.<sup>142</sup> Opponents also argued that a broad detention authorization gave the executive the flexibility necessary to combat the “evolving terrorist threat.”<sup>143</sup> Additionally, the codification of the power to detain enemy forces would send “a powerful statement” to enemy forces.<sup>144</sup> The amendment was eventually struck down by a vote of 234-187.<sup>145</sup>

In the Senate, Senator Mark Udall of Colorado proposed an amendment that would strike and replace the entire detainee section of the Senate version of the bill.<sup>146</sup> The amendment proposed to replace the language of “Subtitle D—Detainee Matters” with language that would require the Secretary of Defense to file a report within ninety days of the enactment of the amendment.<sup>147</sup> The report would contain the executive’s interpretation of its detention authority under the AUMF, including who could be lawfully detained and an analysis of the legal authority for such an interpretation.<sup>148</sup> Senator Udall proposed the amendment, in part, because of his concern regarding the definition of who could be detained.<sup>149</sup> Specifically, Senator Udall conceded that it was appropriate to detain those who were part of al Qaeda, but was concerned about situations in which the definition permitted detention in more questionable cases, such as someone who was detained “because of suspected terrorist ties.”<sup>150</sup> Senator Udall felt that it would be more appropriate for those individuals to be tried and convicted in a criminal court.<sup>151</sup>

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142. *Id.* (statement of Rep. Jerrold Nadler).

143. *Id.* at H3661 (statement of Rep. Buck McKeon) (quoting a letter from former Attorney General Michael B. Mukasey).

144. *Id.* at H3662 (statement of Rep. Buck McKeon) (quoting a letter from General Michael V. Hayden).

145. 157 CONG. REC. H3687, at H3726–27 (daily ed. May 26, 2011).

146. The version of the bill initially introduced into the Senate included the same definition of those who could be lawfully detained as the final bill that was passed into law. The first Senate bill authorized the authority to detain those who were “part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States.” S. 1867, 112th Cong. § 1031 (b)(2) (2011) (as reported by the S. Comm. on Armed Services, Nov. 15, 2011).

147. 157 CONG. REC. S7684, at S7685 (daily ed. Nov. 17, 2011) (statement of Presiding Officer).

148. *Id.*

149. *See* 157 CONG. REC. S7943, at S7945 (daily ed. Nov. 29, 2011) (statement of Sen. Mark Udall).

150. *Id.*

151. *See id.*

Similarly, Senator Jim Webb of Virginia expressed concern about the vagueness of the language in the detention provisions.<sup>152</sup> Senator Webb acknowledged that the language would be adequate for easy cases, but in times of national crises, or in hard cases, it was unclear how the language would be interpreted.<sup>153</sup> According to Senator Webb, such vagueness was unacceptable because it created the possibility of abuse and inappropriate conduct.<sup>154</sup> However, many opponents of the amendment expressed concern about its sweeping nature, because the amendment would have eliminated provisions that were important to the safety of the country.<sup>155</sup> Other senators highlighted the fact that the detention provisions still permitted the executive to use either military detention or Article III courts.<sup>156</sup> Thus, in difficult cases, the executive could choose to criminally prosecute the individual if that action was more appropriate.<sup>157</sup> Many senators also noted that it was the executive who had originally created and approved the definition of who could be detained that was present in the Senate version of the bill.<sup>158</sup> The amendment was eventually voted down by a vote of 60-38.<sup>159</sup>

Both of these amendments suggest that the vagueness of the detention provisions, including the term “substantial support,” was a major concern for members of Congress. The amendments from Senator Udall and Representative Amash show that both chambers considered providing more guidance with regards to the interpretation of who could be detained. The vagueness of the term “substantial support” was addressed, albeit indirectly, but both attempts to alter the detention provisions were ultimately rejected. This suggests that the vagueness of the term was not considered substantial enough to motivate Congress to provide more clarity. It appears that the majority of Congress felt the broad detention authority granted to the executive was necessary to adapt to the evolving

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152. *Id.* at S7950 (statement of Sen. Jim Webb).

153. *Id.*

154. *Id.*

155. *Id.* at S7954 (statements of Sens. Susan Collins & Joseph Lieberman).

156. *Id.* at S7950 (statement of Sen. Carl Levin); *Id.* at S7955 (statement of Sen. Saxby Chambliss).

157. *Id.* at S7950 (statement of Sen. Carl Levin); *Id.* at S7955 (statement of Sen. Saxby Chambliss).

158. *Id.* at S7949 (statement of Sen. Carl Levin); *Id.* at S7954 (statement of Sen. Kelly Ayotte). Compare Resp’t’s Mem. *supra* note 99, at 2 (the Obama Administration’s definition of who could be detained), with S. 1867 *supra* note 146, § 1031 (b)(2) (Senate bill definition of who could be detained).

159. *Id.* S7956–57 (statement of Presiding Officer).

and unorthodox terrorist threat. Much like the committee reports, the consideration and subsequent denial of a more restricted detention authority will most likely be viewed by a reviewing court as indication that Congress intended to afford the executive great deference in the decision to detain.

*b. Canons of Statutory Construction*

Courts may also utilize canons of statutory construction in order to resolve ambiguities in statutory text. Canons are judge-made tools used to define statutory language.<sup>160</sup> The use of canons of construction in the case of the NDAA and the term “substantial support” would also support a broad interpretation of the executive’s authority to detain, as the canons afford great deference to the executive’s decision and consequently fail to restrain the authority to detain.

There is a canon of construction that creates a “[s]uper-strong rule against congressional interference with the president’s authority over foreign affairs and national security.”<sup>161</sup> There is also a canon that presumes “the Judiciary should not interfere when the President is executing national security and foreign relations authority in a manner consistent with an express congressional authorization [of war].”<sup>162</sup> If there are ambiguities with a congressional authorization of war the ambiguities should be resolved by the President.<sup>163</sup> A reviewing court must then afford great deference to the presidential action by “presum[ing] that the President has evaluated the foreign policy consequences’ of that action ‘and determined that it serves the interests of the United States.’”<sup>164</sup> Thus, a court presiding over a habeas corpus proceeding that involved the substantial support standard would most likely grant great deference to the executive’s decision to detain and would fail to adequately scrutinize the executive’s detention authority.

Collectively, the legislative history and canons of statutory construction afford great deference to the executive’s decision to detain. Thus, a court in a detainee habeas corpus proceeding would support a broad interpretation of the executive’s detention authority and would fail to appropriately check and constrain the executive’s detention authority.

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160. CROSS, *supra* note 127, at 85.

161. WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 325 (1994).

162. *Al-Bihani v. Obama*, 619 F.3d 1, 38 (D.C. Cir. 2010) (Kavanaugh, J., concurring), *denying reh’g en banc* to 590 F.3d 866 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011).

163. *Id.*

164. *Id.* at 36 (Kavanaugh, J., concurring).

### C. CONGRESS CAN CONSTRAIN THE EXECUTIVE'S AUTHORITY

As demonstrated above, Congress is in the best position to constrain the executive's authority to detain. In addition, Congress also holds other advantages over the judiciary and executive with respect to constraining the executive's detention authority. For instance, Congress is best situated to bring the issue of constraining the executive's detention authority to the public debate.<sup>165</sup> Congressional representatives are closer to the people than both the judiciary and the executive; consequently, Congress is in the best position to bring military detention—a matter of national concern—into the public debate.<sup>166</sup> Congress will also be able to address the issues regarding military detention more quickly than the courts.<sup>167</sup> While the courts must wait for a detention case to come before them before they can change the current detention law, Congress can address the issues plaguing the detention authority immediately.<sup>168</sup> Additionally, Congress can address the detention authority in a much more flexible manner than the courts.<sup>169</sup> In the event that legislation fails to adequately constrain the executive's authority or fails to adequately define who may be detained, Congress can include a sunset provision within the legislation.<sup>170</sup> A sunset provision would allow Congress to return to the legislation and reframe it to adequately address any unresolved issues.<sup>171</sup>

### IV. CONGRESS SHOULD REVISIT THE SCOPE OF THE EXECUTIVE'S DETENTION AUTHORITY AND CONSTRUCT A STATUTE THAT RESTRICTS THE SCOPE OF THOSE WHO CAN BE DETAINED FOR PROVIDING SUBSTANTIAL SUPPORT

For the reasons stated above, it is clear that the only reliable way to provide reasonable constraints on the executive's authority to detain during the current military conflict is for Congress to pass a statute that provides a more clear definition of who the executive may detain. In order to adequately constrain the executive's detention authority, Congress should frame the statute in a way that provides a clear definition of the scope of

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165. *Who May be Held?*, *supra* note 98, at 855.

166. *See id.*

167. *Id.* at 856.

168. *Id.* at 856–57.

169. *See id.* at 856.

170. *Id.* A “sunset law” is a law that will automatically be terminated at the end of a predestinated period if it is not renewed. *See* BLACK'S LAW DICTIONARY 1574 (9th ed. 2009).

171. *Who May be Held?*, *supra* note 98, at 856.

the executive's detention authority—particularly what constitutes substantial support. When framing the statute, Congress should be mindful of the law of armed conflict, the purposes behind preventative detention, and the availability of criminal prosecution for terrorist suspects. If Congress defines who can be detained for providing substantial support in a way that is consistent with both the law of armed conflict and the purposes behind military detention, and as a complement to the availability of criminal prosecution for terrorism suspects, Congress can place appropriate boundaries around the executive's detention authority.

A. WHO CAN BE DETAINED FOR PROVIDING SUBSTANTIAL SUPPORT SHOULD BE CONSISTENT WITH THE LAW OF ARMED CONFLICT

Assuming the law of armed conflict (“LOAC”) applies in some way—whether by analogy or directly—to military detention in the current conflict against al Qaeda and the Taliban,<sup>172</sup> Congress should frame the executive's detention authority so that it is consistent with the LOAC.

The Third and Fourth Geneva Conventions contain specific provisions governing who may be detained, how they must be treated while they are detained, and when they must be released. The Third Geneva Convention provides for the detention of prisoners of war. Those who may be detained as prisoners of war generally include members of the armed forces and those who accompany the armed forces, such as

[C]ivilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the

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172. The LOAC that governs military detention in the Geneva Conventions traditionally applies to conflicts between two state actors—“an armed conflict involving on each side at least one High Contracting Party to the Geneva Conventions.” *Id.* at 793. The portions of the Geneva Conventions relevant to detention in an international armed conflict are located in the Third and Fourth Geneva Conventions. See Laura M. Olson, *Guantanamo Habeas Review: Are the D.C. District Court's Decisions Consistent with IHL Internment Standards?*, 42 CASE W. RES. J. INT'L L. 197, 200–01 (2009). The portions of the Geneva Conventions that apply to non-international conflicts—those conflicts that do not fall into the international armed conflict definition—are silent with respect to military detention. *Id.* at 201. However, Additional Protocol II, which applies to non-international armed conflict, contains provisions that indicate that if individuals are captured, the capturing force must afford them certain protections. *Id.* at 201 n.14. This suggests that the Geneva Conventions do, in fact, contemplate military detention in a non-international armed conflict. See *id.* at 201. In any case, even if the current conflict is not characterized as an international armed conflict—thus precluding the application of the Geneva Conventions relevant to military detention—it is possible to apply the Geneva Conventions to the current conflict by analogy. *Id.* at 209. This approach is consistent with the LOAC—the LOAC is not an authorizing body of law that permits detention; rather, it is a restricting body of law, recognizing that detention does occur during armed conflict and providing rules for how the detention should be conducted. See *Who May be Held?*, *supra* note 98, at 796.

welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.<sup>173</sup>

The Fourth Geneva Convention permits the detention of those who do not qualify as prisoners of war, but only if such detention is “absolutely necessary for ‘imperative reasons of security.’”<sup>174</sup> This means that individuals “must represent a real threat to the state’s security in the present or in the future.”<sup>175</sup> Commentary on the Fourth Geneva Convention concedes that it would not be possible to provide a precise definition of what a real threat to the state’s security entails.<sup>176</sup> Therefore, determining whether someone needs to be detained for “imperative reasons of security” has been left largely to government discretion.<sup>177</sup>

The International Committee of the Red Cross (“ICRC”) and International Criminal Tribunal for the Former Yugoslavia (“ICTY”) have provided insight on the issue. Both bodies agree that an individual providing direct assistance to enemy forces can be detained for national security reasons.<sup>178</sup> The ICTY suggests that an individual providing assistance to enemy groups engaging in sabotage or espionage could be justifiably detained.<sup>179</sup> The ICRC suggests that even those who only provide logistical support, and are not actual members of the group, can be lawfully detained.<sup>180</sup> However, both bodies caution that mere association with the enemy group is not sufficient to justify detention for security reasons.<sup>181</sup> An individual may not be detained because the individual “is a national of, or aligned with, an enemy party.”<sup>182</sup> There must be some “individual nexus” between the individual and the enemy force.<sup>183</sup>

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173. Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. *See also Who May be Held?*, *supra* note 98, at 793–94 (listing the requirements necessary for prisoner of war status under the Geneva Convention).

174. Olson, *supra* note 172, at 203.

175. *Id.*

176. *Id.*

177. *Id.* at 203–04.

178. *Id.* at 204–06.

179. *Id.* at 204.

180. *Id.* at 206.

181. *Id.* at 204, 206.

182. *Id.* at 204.

183. *Id.* at 205.

Additionally, detention “for the sole purpose of intelligence gathering” is not authorized for security reasons.<sup>184</sup>

Thus, if Congress were to construct a statute consistent with the LOAC, then the statute could permit the executive to detain individual members of enemy forces as well as those who provide substantial support. However, those who provide substantial support would have to be qualified—those who provide substantial support could only be detained if the threat caused by such support renders detention “absolutely necessary” for “imperative reasons of security.” Despite this qualification, the detention authority would still sweep too broadly, as the determination of whether detention was necessary for security reasons would be left within the executive’s discretion. Therefore, consistent with the purposes of detention, Congress should further restrict who can be detained to include only those who cannot be adequately prosecuted in the criminal justice system.

B. THE DEFINITION OF THOSE WHO CAN BE DETAINED FOR  
PROVIDING SUBSTANTIAL SUPPORT SHOULD BE CONSISTENT WITH  
THE PURPOSES BEHIND MILITARY DETENTION IN A POTENTIALLY  
INDEFINITE CONFLICT

The purpose of detention in a traditional international armed conflict is to prevent enemy forces from returning to the battlefield and to protect the nation from security threats.<sup>185</sup> Thus, military detention as conceived by the law of armed conflict is intended to be both preventative and protective, but it is not designed to be punitive.<sup>186</sup> Punitive detention should be left to the criminal justice system—those accused of specific criminal offenses should be tried as war criminals or tried within the domestic criminal system.<sup>187</sup> In order to assure that detention remains preventative and protective the focus of military detention can be on one of the following: information-gathering, deterrence, incapacitation disruption, or information gathering.<sup>188</sup> However, only disruption is a suitable justification for the detention of substantial supporters. Thus, in the case of the current conflict, Congress should frame the statute in such a way that the detention of substantial supporters focuses on disruption.

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184. *Id.*

185. *A Square Peg*, *supra* note 23, at 1183–84.

186. *Id.* at 1184–86.

187. *See id.* at 1189.

188. Waxman, *supra* note 36, at 14.

Information-gathering and deterrence are not suitable justifications for the detention of substantial supporters. Permitting detention for information-gathering grants the executive an overly broad detention authority, as almost any potential terrorist or substantial supporter may have valuable information.<sup>189</sup> Similarly, allowing detention for deterrence also grants the executive an overly broad detention authority as almost any detention can be justified on the basis that it would deter other terrorists from engaging in violent acts.<sup>190</sup> Additionally, it is debatable if deterrence even works in the terrorism context—the “martyrdom imagery surrounding detention might even make it seem appealing to some individuals or groups.”<sup>191</sup> If Congress utilized these rationales to create a more precise definition of the executive’s detention authority, it would fail to constrain the executive’s authority.

Incapacitation is also not a suitable justification for the detention of substantial supporters. The focus of incapacitation is on the future behavior of an individual—the underlying rationale is that the individual may commit a future terrorist act; therefore, the individual should be detained in order to prevent that future terrorist act from occurring.<sup>192</sup> However, using incapacitation as a rationale for detainment becomes more problematic when the individual is captured within the United States, as the individual possibly could be held on criminal charges.<sup>193</sup> Additionally, incapacitation does not fit well with the concept of detaining substantial supporters.<sup>194</sup> Substantial supporters do not pose a future threat themselves; rather, they provide assistance that facilitates a potential future threat.<sup>195</sup> In the case of substantial supporters, it is not the individuals themselves that are dangerous, but the acts that they support. Therefore, detaining substantial supporters would not necessarily prevent the future attack and would only serve to provide a minor hindrance to the terrorist threat.

The rationale of disruption is best suited to justify the detention of substantial supporters. The rationale of disruption is based on the notion

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189. *Id.* at 27–28.

190. *Id.* at 27.

191. *Id.*

192. *Id.* at 14–15. See also Stephanie Cooper Blum, *The Why and How of Preventative Detention in the War on Terror*, 26 T.M. COOLEY L. REV. 51, 76–77 (2009).

193. Detaining an individual on criminal charges would require the government to present relevant evidence to a magistrate within forty-eight hours. Blum, *supra* note 192, at 76–77, 79.

194. See Waxman, *supra* note 36, at 31.

195. See *id.*

that if an individual is detained it will disrupt a terrorist plot.<sup>196</sup> Detaining the individual will either foil the plot completely or suspend the occurrence of the attack for long enough to allow authorities to gain information and stop it.<sup>197</sup> The detention of a substantial supporter would more easily fit within this rationale. Detention of a substantial supporter—depending on what type of support he or she provides—could foil the entire terrorist plot or at least suspend the attack long enough to allow authorities to stop it. For example, the detention of an individual who provided the storage and transport of important explosive material could foil an entire attack plot. On the other hand, the detention of a supporter who only provided monetary support to a terrorist organization might suspend the occurrence of a terrorist attack long enough for authorities to gain enough information to stop the attack.

Thus, in order to assure that the military detention of substantial supporters remains preventative and protective, Congress should focus on disruption. To do this, Congress should focus the executive's authority to detain substantial supporters on those who provide support that is necessary for the completion of a terrorist plot or the ongoing operation of a terrorist organization or a smaller sub-group thereof.<sup>198</sup> Congress should also provide an end to the duration of the detention as well as periodic reviews throughout the detention to ascertain whether detention of the individual is still necessary to disrupt terrorist plots.<sup>199</sup> This would permit the detainment of those who contribute to the threat posed by terrorist organizations even where there may not be enough evidence to tie them to a specific plot, but, as a safeguard, would require the release of detainees who are no longer needed to disrupt terrorist plots. However, Congress must be careful to not sweep too broadly—some of the individuals who are tied to a specific plot could potentially be prosecuted in the criminal justice system. Thus, Congress should construct the statute in a way that complements the availability of criminal prosecution for terrorist suspects.

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196. *Id.* at 15. *See also* Blum, *supra* note 192, at 79.

197. Waxman, *supra* note 36, at 15. *See also* Blum, *supra* note 192, at 79.

198. *See* Waxman, *supra* note 36, at 30–32.

199. *Id.* at 35.

C. THE DEFINITION OF THOSE WHO CAN BE DETAINED FOR PROVIDING SUBSTANTIAL SUPPORT SHOULD COMPLEMENT THE AVAILABILITY OF CRIMINAL PROSECUTION FOR TERRORIST SUSPECTS

The criminal justice system can, in some circumstances, be an adequate avenue to prosecute terrorists who have completed, attempted, or supported acts of terrorism within the United States.<sup>200</sup> It is possible that some acts of substantial support will not only trigger the executive's detention authority, but will also violate criminal laws.<sup>201</sup> For example, § 2339B of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") criminalizes the act of providing "material support or resources to a foreign terrorist organization."<sup>202</sup> The AEDPA expressly defines material support as:

[A]ny property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.<sup>203</sup>

The government does not have to prove the individual knew that the support would further a terrorist activity; rather, the government must only prove that the individual "knew the identity of the true recipient of the support" and that the organization was designated as a foreign terrorist organization or knew that the organization engaged in terrorist activity.<sup>204</sup> Despite the broad language of § 2339B of the AEDPA, it is subject to two key limitations. First, in order to be criminalized, the material support must be to a designated foreign terrorist organization.<sup>205</sup> If the individual provides materials or resources to a newly formed terrorist organization or provided materials or resources to an organization before it was designated,

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200. See *Preventive Detention Debate*, *supra* note 73, at 675–92.

201. See *id.* at 680–81.

202. 18 U.S.C. § 2339B(a)(1) (2006).

203. *Id.* § 2339A(b)(1). Further "the term 'training' means instruction or teaching designed to impart a specific skill, as opposed to general knowledge," *id.* § 2339A(b)(2), and "the term 'expert advice or assistance' means advice or assistance derived from scientific, technical or other specialized knowledge," *id.* § 2339A(b)(3).

204. *Preventive Detention Debate*, *supra* note 73, at 680–81.

205. See *id.* at 682.

then the statute does not apply.<sup>206</sup> Second, between 1996 and 2004 the statute only applied to conduct within the jurisdiction of the United States.<sup>207</sup> This jurisdictional limitation has since been removed, but it will still affect prosecutorial ability when attempting to prosecute an individual for conduct that occurred between 1996 and 2004.<sup>208</sup>

Section 2339A of the AEDPA also provides an avenue for the government to prosecute those who support terrorist actions.<sup>209</sup> Specifically, § 2339A criminalizes the support of a specific list of crimes.<sup>210</sup> The support is criminalized even if it is not given to a designated foreign terrorist organization.<sup>211</sup> The crimes listed within § 2339A are generally the type of crimes one would associate with terrorist activity.<sup>212</sup> So, those who provide support to a foreign terrorist organization that is not designated as such could still be prosecuted under this portion of the statute.<sup>213</sup> However, compared to § 2339B, § 2339A places a more difficult burden of proof upon the government. Under § 2339A, the government must prove that “the defendant intended or at least knew that the support would be used by the recipient to carry out or facilitate any of [the] criminal acts” listed in the statute.<sup>214</sup>

The government may also use conspiracy liability to prosecute those who have provided substantial support to terrorist organizations.<sup>215</sup> Conspiracy liability allows the government to prosecute individuals as soon as they make an agreement to engage in an unlawful action.<sup>216</sup> In the case of substantial supporters who are not actual members of enemy forces,

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206. *See id.*

207. *Id.* at 682–83.

208. *Id.*

209. *Id.* at 689.

210. 18 U.S.C. § 2339A(a) (2006).

211. *Preventive Detention Debate*, *supra* note 73, at 689.

212. *See* 18 U.S.C. § 2339A(a). Some of the enumerated crimes are: destruction of aircraft or aircraft facilities, violence at international airports, arson with special maritime and territorial jurisdiction, use and development of biological and chemical weapons, assassination, kidnapping, and assault of government officials, possession of nuclear weapons, possession of plastic explosives, genocide, taking hostages, assassination, kidnapping, and assault of foreign officials, damage of government property, damage of communication lines or systems, destruction of energy facilities, destruction of national defense materials, premises and utilities, use of weapons of mass destruction, bombing places of public use, torture, and recruitment or use of child soldiers. *See id.*

213. *Preventive Detention Debate*, *supra* note 73, at 689.

214. *Id.*

215. *Id.* at 684.

216. *Id.*

conspiracy liability could be used to prosecute substantial supporters if they have agreed to assist with a terrorist action.<sup>217</sup>

However, under § 2339B and § 2339A of the AEDPA and conspiracy liability, as the individual's behavior becomes more attenuated from a designated terrorist organization or tangible terrorist crime or plot, it becomes more difficult to use the criminal justice system.<sup>218</sup> Those whose support cannot be linked to a designated terrorist organization cannot be charged under § 2339B.<sup>219</sup> However, they could potentially be charged under § 2339A, but such a charge would require some sort of connection to an actual terrorist crime or plot.<sup>220</sup> Thus, if the individual's support is not linked to a designated terrorist organization or to an actual terrorist crime or plot they cannot be charged under either section § 2339B or § 2339A. Similarly, those who cannot be linked to any specific terrorist plot may not be able to be charged under conspiracy liability, as conspiracy liability requires an affirmative agreement with one or more other persons to commit a crime.<sup>221</sup> Those individuals who plan to commit a terrorist act, but have made no affirmative agreement indicating this intention will fall out of the reach of conspiracy liability. Consequently, there will inevitably be individuals who pose a substantial terrorist threat but fall outside the reach of the criminal justice system.<sup>222</sup> Thus, Congress should reframe the executive's detention authority so that the executive may detain those who have substantially supported terrorist groups but fall outside of the reach of the AEDPA and conspiracy liability.<sup>223</sup>

Congress should consider the law of armed conflict, the disruption purpose behind military detention, and the availability of criminal prosecution for terrorist suspects when defining who may be detained for providing substantial support to terrorist organizations. This would allow

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217. *See id.*

218. *See id.* at 687–89.

219. *Id.* at 689.

220. *See id.* at 689–90.

221. *See id.* at 689.

222. *Id.*

223. *See* John P. McLoughlin, Gregory P. Noone, & Diana C. Noone, *Security Detention, Terrorism and the Prevention Imperative*, 40 CASE W. RES. J. INT'L L. 463, 494 (2009) (supporting restricting military detention to only those who cannot be criminally prosecuted). *But see* Chesney & Goldsmith, *supra* note 16, at 1103 (arguing why criminal prosecution is inadequate to prosecute terrorist suspects in some situations).

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Congress to place adequate restraints on the executive's detention authority.

## V. CONCLUSION

The language passed by Congress in the National Defense Authorization Act for Fiscal Year 2012 fails to adequately constrain the executive's military detention authority. This lack of constraint is especially troubling in the current conflict, because it lacks the characteristics of a traditional international armed conflict that tend to provide intrinsic limitations on the executive's authority to detain—namely, space, identifiable actions and characteristics of the enemy forces, and time. The availability of habeas corpus review for detainees in Article III courts also fails to adequately constrain the executive's authority. Without adequate checks on the executive's authority, there is a great risk that individuals will be subjected to erroneous and potentially indefinite detention. Therefore, it is imperative for Congress to revisit and restrict the executive's detention authority. Congress is in the best position to do this, because the executive has incentive to over-detain and because the courts have, and will continue to, support a broad interpretation of the executive's detention authority. Congress should construct a statute that specifically defines who may be detained for providing substantial support. Congress can adequately define those who may be detained for providing substantial support by looking at the law of armed conflict, the purposes behind military detention, and the availability of criminal prosecution of terrorist suspects. By looking to these sources, Congress can place adequate bounds around the executive's detention authority, and can help reduce the risk that individuals are subjected to erroneous and potentially indefinite military detention.