

## ARTICLES

### TRANSCENDING, BUT NOT ABANDONING, THE COMBATANT-CIVILIAN DISTINCTION: A CASE STUDY

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#### I. INTRODUCTION

The distinction between combatants and civilians is relevant to the law of war in three ways: it determines who can be prosecuted for using force, who can be subjected to long-term preventive (as opposed to punitive) detention, and who can be killed even when they do not pose an imminent threat. The traditional law of war uses the first issue as the key to understanding the second two. In doing so, it relies on a basic legal symmetry. Those who are privileged to use military force cannot be prosecuted for having done so (at least as long as they respected the legal limits on the use of military force), but they can be fought with the basic tools of fighting a war: detaining or killing the forces on the other side.<sup>1</sup> Meanwhile, those who are not privileged to use force may be prosecuted if they use it, but they may not be fought using the normal tools of warfighting.<sup>2</sup> To be detained beyond a relatively brief period of pre-trial or

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1. See INT'L COMM. OF THE RED CROSS, *The Relevance of IHL in the Context of Terrorism* (Jan. 1, 2011), <http://www.icrc.org/eng/resources/documents/misc/terrorism-ihl-210705.htm> [hereinafter ICRC IHL Paper].

2. See *id.* (stating that international humanitarian law permits the detaining state to prosecute civilians that “directly engage in hostilities”).

investigatory detention, they must be convicted of a crime.<sup>3</sup> And to be killed, they must either pose an imminent and serious threat to others or have been convicted of a capital offense and sentenced to death.<sup>4</sup>

Recent threats from al-Qaeda and affiliated terrorist groups have put pressure on that connection. Many argue for a more functional definition of a combatant, such that if a person is part of a group that uses military levels of force, then he is a combatant.<sup>5</sup> He may be an unlawful combatant in the sense that he has no privilege to use such force. But on this view all combatants, whether lawful or unlawful, can be detained until the “cessation of active hostilities”<sup>6</sup> or killed if capture is not a viable option.<sup>7</sup>

The conflict between these two models—the traditional law of war model and the functionalist model—is at the heart of the recent five-to-four decision of the Fourth Circuit in *al-Marri v. Pucciarelli*.<sup>8</sup> That case deals only with the question of detention, not that of killing, but it still turns on the conflict between these two basic models of how to think about dealing with the threat posed by global terrorist networks.

Both models, however, are inadequate. The functionalist approach is insufficiently respectful of basic civil rights, and the traditional approach is too dismissive of the problems presented by using traditional criminal law techniques when fighting enemies who use military levels of force. In what follows, I describe the two sides as developed in *al-Marri*. I then explain why each is failing to come to terms with important concerns that the other treats as central. I

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3. This is a general rule that has some limited exceptions. See *al-Marri v. Pucciarelli*, 534 F.3d 213, 223 (2008) (quoting *United States v. Salerno*, 481 U.S. 739, 749 (1987)); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (finding “that indefinite detention for the purpose of interrogation is not authorized”); *Addington v. Texas*, 441 U.S. 418, 432 (1979) (applying the exception to the civil commitment of the mentally ill).

4. The right to engage in self- and other-defense against those who pose an imminent and serious threat is standard criminal law. See MODEL PENAL CODE §§ 3.04-.05. The death penalty is a controversial but nonetheless constitutionally permitted criminal penalty. See *Gregg v. Georgia*, 428 U.S. 153, 170-87 (1976) (discussing the challenges of affording Eighth Amendment protections when balancing societal values and the presumptive validity of statutory enactments).

5. See, e.g., the majority of the judges in *al-Marri*, discussed *infra* Part II.

6. See 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 (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”).

7. HCJ 769/02 Pub. Comm. Against Torture in *Isr. v. Gov’t of Isr.*, slip op. ¶ 2 [Dec. 11, 2005] (Isr.) (Rivlin, Vice President, concurring), available at [http://elyon1.court.gov.il/files\\_eng/02/690/007/a34/02007690.a34.pdf](http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf).

8. 534 F.3d 213 (4th Cir. 2008) (en banc), *vacated and remanded sub nom. al-Marri v. Spagone*, 129 S.Ct. 1545 (2009) (vacated as moot because the appellant was no longer being held in military detention).

then argue that this impasse can be avoided if we transcend the combatant-civilian distinction.

In saying that we should transcend the combatant-civilian distinction, I do not mean to reject the distinction altogether. I argue that the traditional combatant category, at least as applied to aliens, successfully marks out people who justifiably can be subject to long term detention without trial—I believe the same is true with regard to targeted killing, but I leave that issue aside in what follows. My point is that the category of combatants should not be taken to arise in some sort of fundamentally different legal regime. Rather, the law with regard to combatants should be viewed as grounded in a deeper liberal, constitutional legal order that is committed to respecting autonomy. This is the same legal ground that supports the legal treatment acceptable for civilians. Within that deeper legal order, some, but not all, suspected members of groups like al-Qaeda can justifiably be detained for long periods of time without trial. Ultimately, the most important questions, as I have argued at length elsewhere,<sup>9</sup> are not limited to whether an individual is a combatant in the traditional sense; they also include (a) whether he can be held accountable for any future use of force against the state,<sup>10</sup> and (b) whether the detaining state has an obligation to release and police him if it cannot or chooses not to try to convict him for a past crime.<sup>11</sup>

## II. THE *AL-MARRI* OPINION

### A. *Background Facts of the Case*

Ali Saleh Kahlah al-Marri is a citizen of Qatar who legally entered the United States with his family on September 10, 2001.<sup>12</sup> His purported reason for being in the United States was to obtain a master's degree.<sup>13</sup> Three months later (December 2001), he was arrested as a material witness in the U.S. government's investigation of the 9/11 attacks.<sup>14</sup> In February 2002, he was charged with "possession of unauthorized or counterfeit credit card numbers with the intent to defraud."<sup>15</sup> And in January 2003, he was charged in a second indictment "with two counts of making a false statement to the FBI, three counts of making a false statement on a bank

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9. Alec D. Walen, *A Unified Theory of Detention, With Application to Preventive Detention for Suspected Terrorists*, 70 MD. L. REV. 871-938 (2011).

10. *See generally id.* at 922-27 (discussing the limits of a state's ability to police certain people, especially if they would be released to other states with inadequate policing abilities).

11. *See id.* at 924.

12. 534 F.3d at 219.

13. *Id.*

14. *Id.*

15. *Id.*

application, and one count of using another person's identification for the purpose of influencing the action of a federally insured financial institution."<sup>16</sup> He pleaded not guilty, and after the venue was moved to the Central District of Illinois, a trial date was set for July 2003.<sup>17</sup>

Less than a month before the trial was to begin, after having been detained already for more than eighteen months, the United States "moved *ex parte* to dismiss the indictment."<sup>18</sup> The Government's motion was based on an order by President Bush stating that he had determined that al-Marri "is an enemy combatant . . . closely associated with al Qaeda."<sup>19</sup> The order went on to assert that al-Marri had been "engaged in conduct that constituted hostile and war-like acts, including conduct in preparation for acts of international terrorism," and that he "represents a continuing, present, and grave danger to the national security of the United States."<sup>20</sup> He "was then transferred to military custody" and placed in the Naval Brig in South Carolina.<sup>21</sup>

Through counsel, al-Marri filed a petition for habeas corpus.<sup>22</sup> The Government responded with a declaration of Jeffrey N. Rapp, Director of the Joint Intelligence Task Force for Combating Terrorism.<sup>23</sup> The Rapp declaration enumerated ten ways in which al-Marri purportedly had been affiliated with al-Qaeda, including, most centrally, that he had volunteered for a "martyr mission" and had entered the United States to serve as a "sleeper agent."<sup>24</sup> The questions before the court were:

- (1) assuming the Government's allegations about al-Marri are true, whether Congress has empowered the President to detain al-Marri as an enemy combatant; and
- (2) assuming Congress has empowered the President to detain al-Marri as an enemy combatant provided the Government's allegations against him are true, whether al-Marri has been afforded sufficient process to challenge his designation as an enemy combatant.<sup>25</sup>

The court held by a vote of five-to-four that he could be held as an enemy combatant, but it also held by a differently aligned vote of five-to-four (Judge Traxler being the one judge in the majority on both questions), that he had not been afforded sufficient process to

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16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* (internal quotations marks omitted).

21. *Id.*

22. *Id.* at 220.

23. *Id.*

24. *Id.* at 220 (quoting Rapp Decl.).

25. *Id.* at 216.

challenge his designation.<sup>26</sup> The Supreme Court then took *certiorari*, but vacated the decision when the Obama administration decided to release al-Marri from military custody and prosecute him in civilian courts.<sup>27</sup> He then pleaded “guilty to conspiracy to provide material support to Al Qaeda,”<sup>28</sup> and received a fifteen-year prison sentence, with credit for the eight years of time he had already served in detention.<sup>29</sup>

Had the case not been dismissed, it would have had landmark significance as a Supreme Court case. The Court had already determined, in *Hamdi v. Rumsfeld*, that U.S. citizens can be held as enemy combatants.<sup>30</sup> But that case based its holding at least in part on the assumption (to be verified by a fair hearing) that Hamdi was captured while fighting with the Taliban in what was a traditional international armed conflict, a conflict in which the United States was and remains actively engaged.<sup>31</sup> This left the question whether a U.S. citizen or a legally resident alien, who was not captured on a traditional battlefield and had not even taken up arms against the United States on behalf of an enemy nation,<sup>32</sup> could likewise be detained as an enemy combatant. It is this question, not the question regarding process, that I focus on here.

### B. *The Traditional Law of War View of Combatants*

Judge Motz, writing for a minority of four, relying on the traditional law of war, answered the question regarding the President’s power to detain al-Marri as an enemy combatant in the negative.<sup>33</sup> The argument, in brief, went like this. First, Motz

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26. *Id.*

27. *Id.*, vacated and remanded *sub nom.* al-Marri v. Spagone, 129 S.Ct. 1545 (2009); see *Accused Enemy Combatant Moved From Military Custody*, CNN.COM (Mar. 10, 2009), [http://articles.cnn.com/2009-03-10/us/court.combatant\\_1\\_qaeda-al-marri-supreme-court?\\_s=PM:US](http://articles.cnn.com/2009-03-10/us/court.combatant_1_qaeda-al-marri-supreme-court?_s=PM:US).

28. John Schwartz, *Plea Agreement Reached With Agent for Al Qaeda*, N.Y. TIMES, May 1, 2009, at A16.

29. John Schwartz, *Admitted Qaeda Agent Receives Prison Sentence*, N.Y. TIMES, Oct. 30, 2009, at A22.

30. 542 U.S. 507, 509 (2004).

31. *Id.* at 522. It is worth noting that Justices Scalia and Stevens would not have allowed the United States to detain U.S. citizens as enemy combatants; they would require the United States to charge them with a crime or release them unless the writ of habeas corpus had been suspended. See *id.* at 554-58. As I will argue, this is the better position.

32. The Fourth Circuit had upheld the detention of Jose Padilla, another U.S. citizen, as an enemy combatant on the grounds that he, like Hamdi, took up arms against the United States in Afghanistan, fighting not only on behalf of al-Qaeda but also the de facto government of Afghanistan at the time, the Taliban. *Padilla v. Hanft*, 423 F.3d 386, 390-92 (4th Cir. 2005). Motz’s opinion clearly frames *Padilla* in this light. See al-Marri v. Pucciarelli, 534 F.3d 213, 229-30 (4th Cir. 2008).

33. 534 F.3d at 249-50.

established a baseline constitutional framework limiting long-term preventive detention: there is a general rule, reflecting the due process protection of the liberty of both citizens and lawfully admitted aliens, that “the government may not detain a person prior to a judgment of guilt in a criminal trial.”<sup>34</sup> The Supreme Court “has permitted [only] a limited number of specific exceptions” to that rule.<sup>35</sup> Those who do not fall into the limited number of exceptions may not constitutionally be deprived of their liberty for the sake of protecting the community. The relevant exception for the purposes of people like al-Marri is that “Congress may constitutionally authorize the President to order the military detention, without criminal process, of persons who ‘qualify as enemy combatants.’”<sup>36</sup> As a result, it is at least constitutionally problematic, if not outright unconstitutional, to subject people like al-Marri to military detention if they are not legally “enemy combatants.” In other words, the teaching of *Ex parte Milligan*—“that our Constitution does not permit the Government to subject *civilians* within the United States to military jurisdiction—remains good law.”<sup>37</sup>

The issue therefore turns on whether people like al-Marri can be considered enemy combatants. One might argue that Congress gave the President the authority to hold enemy combatants in relation to the War on Terror when it passed the Authorization for the Use of Military Force (“AUMF”),<sup>38</sup> and that Congress can define the concept “enemy combatant” as it likes in that statute. But Congress is not free to define concepts at will; if it were, it would be “free to make any process ‘due process of law,’ by its mere will.”<sup>39</sup> The proper legal framework for interpreting the concept comes from “the law of war—treaty obligations [binding on the United States] including the Hague and Geneva Conventions and customary principles developed alongside them.”<sup>40</sup> This framework, as interpreted by the Supreme Court, rests “enemy combatant status on [an individual’s] affiliation with the military arm of an enemy nation.”<sup>41</sup>

Moreover, as the Court held in *Hamdan v. Rumsfeld*, the conflict between the United States and al-Qaeda is a *non-international* armed conflict, governed by Common Article 3 of the Geneva

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34. *Id.* at 223 (quoting *United States v. Salerno*, 481 U.S. 739, 749 (1987)).

35. *al-Marri*, 534 F.3d at 223.

36. *Id.* (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004)).

37. *al-Marri*, 534 F.3d at 230 (citing *Ex parte Milligan*, 71 U.S. 2, 121-22, 130 (1886)).

38. See Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified as amended at 50 U.S.C. § 1541 (2006)).

39. See *al-Marri*, 534 F.3d at 226 (quoting *Murray v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276-77 (1855)).

40. *al-Marri*, 534 F.3d at 227.

41. *Id.* at 231.

Conventions.<sup>42</sup> Common Article 3 does not “recognize the ‘legal category’ of enemy combatant.”<sup>43</sup> Indeed,

As the International Committee of the Red Cross—the official codifier of the Geneva Conventions—explains, “an ‘enemy combatant’ is a person who, either lawfully or unlawfully, engages in hostilities for the opposing side in an *international* armed conflict”; in contrast, “[i]n non-international armed conflict combatant status *does not exist*.”<sup>44</sup>

And as the court points out in a note, this connection between combatant status and fighting for the opposing side in an *international* armed conflict is “not without rationale.”<sup>45</sup> “The law of war does not classify persons affiliated with terrorist organizations as enemy combatants for fear that doing so would immunize them from prosecution and punishment by civilian authorities in the capturing country.”<sup>46</sup> In other words, combatants obtain their status in virtue of fighting for an enemy nation. Doing so gives them the privilege to use military force; if they lack that privilege, then they are not properly considered, and may not be detained as, combatants.<sup>47</sup>

### C. *The Functional View of Combatants*

*Al-Marri* contained three different accounts (representing the views of five judges in total) of why he could be detained as an enemy combatant.<sup>48</sup> The five judges all accepted that the AUMF granted the President the power to treat people who used or planned to use force in association with al-Qaeda as enemy combatants.<sup>49</sup> Judge Traxler’s argument, therefore, can stand in for the rest. He admitted that the two U.S. citizens that had been held by the United States as enemy combatants, Yasir Hamdi and Jose Padilla, had both been “affiliated with the military arm of an enemy government, specifically the

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42. 548 U.S. 557, 630-32 (2006).

43. *al-Marri*, 534 F.3d at 233.

44. *Id.* (citing the ICRC IHL Paper, *supra* note 1, at 1, 3).

45. *al-Marri*, 534 F.3d at 235 n.18.

46. *Id.*

47. For further support of this view, see Knut Ipsen, *Combatants and Non-Combatants*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 65, 67 (Dieter Fleck ed., 1995) (“[O]n the basis of the ordinary meaning, a combatant is a person who fights. As an international legal term, the combatant is a person who is authorized by international law to fight in accordance with international law applicable in international armed conflict.”).

48. The authors were Judges Traxler, Williams, and Wilkinson, with Judge Duncan signing onto Williams’ opinion, and Judge Niemeyer signing onto Judge Traxler’s opinion.

49. See *al-Marri v. Pucciarelli*, 534 F.3d at 253 (Traxler, J., concurring) (joined by Niemeyer, J.); *id.* at 293 (Wilkinson, J., concurring); *id.* at 284 (Williams, J., concurring) (joined by Duncan, J.).

Taliban government of Afghanistan.”<sup>50</sup> Yet he believed that

[T]here is no doubt that individuals who are dispatched here by al Qaeda, the organization known to have carried out the 9/11 attacks upon our country, as sleeper agents and terrorist operatives charged with the task of committing additional attacks upon our homeland “are [also] individuals Congress sought to target in passing the AUMF.”<sup>51</sup>

He found this indubitable because “the AUMF authorized the President’s use of ‘all necessary and appropriate force against’ the nations *and organizations* that ‘planned, authorized, committed, or aided’ the 9/11 attacks . . .”<sup>52</sup>

The three different opinions constituting the majority differed, however, on how to understand the relationship between the AUMF and the law of war. All accepted the plurality’s premise that civilians cannot constitutionally be subject to long-term military detention as enemy combatants.<sup>53</sup> But they took different routes to the conclusion that the AUMF, in allowing the detention of members of al-Qaeda, does not violate that restriction. All were moved by the functionalist idea that members of al-Qaeda operate *like* members of traditional militaries. But some thought that fact suffices by itself; others thought more is needed: either congressional action to supplant the traditional law of war or a new definition of enemy combatants to reflect an evolving law of war.

Judge Traxler thought that the fact that al-Qaeda poses a threat more like that of a military force than a criminal organization is itself sufficient to show that the traditional law of war must be understood to allow military detention against its members. He was “unpersuaded by the claim that because al Qaeda itself is an international terrorist organization instead of a ‘nation state’ or ‘enemy government,’ the AUMF cannot apply, consistent with the laws of war and our constitutional guarantees, to such persons.”<sup>54</sup> He rejected what he took to be the premise behind that claim—namely, that al-Qaeda “cannot be considered as anything other than a criminal organization whose members are entitled to all the

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50. *Id.* at 259 (Traxler, J., concurring).

51. *Id.* (alteration in original) (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004)).

52. *al-Marri*, 534 F.3d at 259-60 (quoting the AUMF § 2(a)).

53. For example, Judge Williams says, “if al-Marri is an ‘enemy combatant’ who falls within the scope of the AUMF, he may be detained; if, however, he is not an enemy combatant, and therefore a mere civilian, the Constitution forbids such detention.” *al-Marri*, 534 F.3d at 285 (Williams, J., concurring). And Judge Wilkinson says, “The text of the AUMF clearly authorizes al-Marri’s detention. Our inquiry cannot end here, however. There are constitutional limits on what Congress can authorize the [E]xecutive to do.” *Id.* at 312 (Wilkinson, J. concurring).

54. *Id.* at 260 (Traxler, J., concurring).



protections and procedures granted by our constitution.”<sup>55</sup> Rather, he believed that “al Qaeda is much more and much worse than a criminal organization. And while it may be an unconventional enemy force in a historical context, it is an enemy force nonetheless.”<sup>56</sup>

Williams put extra weight on congressional action, within a framework that, in his view, the Supreme Court had approved. He was ready to concede that “[t]he plurality opinion may very well be correct that, under the traditional ‘law of war,’ persons not affiliated with the military of a *nation-state* may not be considered enemy combatants.”<sup>57</sup> But he thought that the traditional law of war has been supplanted by the AUMF. “As a specific and targeted congressional directive, the AUMF controls the question of who may be detained, for purposes of domestic law—at least with respect to those individuals that fall within its scope.”<sup>58</sup> This was, for him, not an unlimited power. Rather, he thought that what Congress did with the AUMF fell within the bounds set by Supreme Court precedent. Citing *Ex parte Quirin*<sup>59</sup> and *Hamdi v. Rumsfeld*,<sup>60</sup> he wrote that he believed that

[a] distillation of these precedents . . . yields a definition of an enemy combatant subject to detention pursuant to Congressional authorizations as an individual who meets two criteria: (1) he attempts or engages in belligerent acts against the United States, either domestically or in a foreign combat zone; (2) on behalf of an enemy force.<sup>61</sup>

The AUMF’s definition of an enemy combatant meets these criteria.

Finally, Judge Wilkinson thought the law of war needs to evolve to handle the new kind of threat. “By placing so much emphasis on quaint and outmoded notions of enemy states and demarcated foreign battlefields, the plurality (the opinion authored by Judge Motz) and concurrence (the opinion authored by Judge Traxler) misperceive the nature of our present danger . . . .”<sup>62</sup> In his view,

[t]he classical model is just that: a classical model. War changes. So too the law of war has not remained static. . . .

. . . .

To that end, the recent past has witnessed dramatic changes in

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55. *Id.*

56. *Id.*

57. *Id.* at 286 (Williams, J., concurring) (emphasis in original).

58. *Id.*

59. 317 U.S. 1 (1942).

60. 542 U.S. 507 (2004).

61. *al-Marri*, 534 F.3d at 285 (Williams, J., concurring).

62. *Id.* at 293 (Wilkinson, J., concurring) (grouping Judge Traxler’s concurring opinion with Judge Motz’s because Traxler believes that location of activity and capture matter for the process due to a detainee).

the manner in which wars are conducted. War is less a state-based enterprise: the greatest threats to our nation's security now include those from stateless actors intent on unleashing weapons of mass destruction against civilian populations. Thus, while the principle of discrimination and the category of enemy combatant surely remain a vital part of the law of war, they most definitely must accommodate the new threats to the security of nations. The plurality's perspective, by contrast, is mired in the models of the past, and completely fails to accommodate the changing nature of warfare.<sup>63</sup>

To meet the changing nature of warfare, he suggests a new definition of enemy combatant:

[T]he person must (1) be a member of (2) an organization or nation against whom Congress has declared war or authorized the use of military force, and (3) knowingly plans or engages in conduct that harms or aims to harm persons or property for the purpose of furthering the military goals of the enemy nation or organization.<sup>64</sup>

Crucial to all three views was cutting the tie between having the privilege to engage in combat and having combatant status. For all three, the distinct threat posed by al-Qaeda shows that its members or those who fight on its behalf must be subject to military detention—that is, long-term preventive detention without being charged with any crime.

### III. CRITIQUE OF BOTH SIDES IN THE *AL-MARRI* CASE

The problem with the functionalists is that their view threatens to strip the protections of the criminal law and its highly protective due process framework from people who any civil libertarian would think deserve to benefit from them. As Judge Gregory noted, given that the Constitution's due process protections are currently understood to apply equally to aliens legally admitted into the country and citizens,<sup>65</sup> "it is beyond peradventure that the Constitution will furnish an American citizen, detained under these circumstances, no more rights than those we provide al-Marri."<sup>66</sup> The implications of this opinion, therefore, are that a U.S. citizen suspected of being a member of al-Qaeda could be detained indefinitely, without trial, despite never having affiliated with an enemy nation and never having visited any traditional battlefield. He would have a right to a habeas hearing, but that would fall far short

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63. *Id.* at 319.

64. *Id.* at 325.

65. *See* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270-71 (1990) (listing the line of cases that stand for the proposition that aliens receive constitutional protections once they lawfully reside in U.S. territory).

66. *al-Marri*, 534 F.3d at 279 (Gregory, J., concurring). I dispute this claim below at *infra* notes 104-106 and accompanying text.

of the protections of a criminal trial.<sup>67</sup> Thus, even if the basis for suspicion were the kind of activity normally handled by the criminal justice system—such as conspiring to commit a terrorist act<sup>68</sup>—a citizen could simply be put in a military brig until the end of the War on Terror, or until the government decides it no longer considers him a threat. Despite the worries expressed by Judge Wilkinson concerning the ability to prosecute suspected terrorists,<sup>69</sup> there seems to be no need to adopt such a policy.<sup>70</sup> Indeed, adopting such a policy would strike any civil libertarian as riding roughshod over the basic right to liberty, as protected by such basic procedural guarantees as proof beyond a reasonable doubt, and the right to confront the witnesses against one.

Of the three positions constituting the majority in *al-Marri*, Judge Wilkinson provided the most well-developed view about why his position would not, in fact, make unreasonable sacrifices of liberty. He argued that on his proposed view, “there is the significant political check of congressional authorization. Specifically, absent some limited inherent authority needed during times of emergency, the executive may only detain those persons against whom Congress has authorized the use of force.”<sup>71</sup> Moreover, he would not allow someone to be detained as an enemy combatant merely upon a showing of affiliating with al-Qaeda. He stated, “the person in question must have taken steps to further the military goals of the organization. Thus, McCarthy-like accusations of mere group membership would not suffice as a basis for detention.”<sup>72</sup>

The problem with these reassurances is that Congress may, if

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67. The standards for habeas hearings for the Guantánamo detainees are still evolving, but the fundamental standard set by the court in *Hamdi* requires only that a citizen detained as an enemy combatant “receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.” 542 U.S. 507, 533 (2004). Moreover, “[h]earsay . . . may need to be accepted as the most reliable available evidence from the Government . . . [and] the Constitution would not be offended by a presumption in favor of the Government’s evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided.” *Id.* at 533-34.

68. See 18 U.S.C. § 2332b(b)(2) (2006) (listing conspiracy to commit any of the named terrorist acts as under the purview of the United States’ jurisdiction to prosecute).

69. See *al-Marri*, 534 F.3d at 307 (Wilkinson, J., concurring) (“[T]he plurality fails to realize that some of the significant difficulties associated with criminal prosecution are equally present when a suspected terrorist has never been on a foreign battlefield.”).

70. See Richard B. Zabel & James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, HUM. RIGHTS FIRST WHITE PAPER (2008), available at <http://www.law.yale.edu/documents/pdf/Alumni-Affairs/USLS-pursuit-justice.pdf>.

71. *al-Marri*, 534 F.3d at 325 (Wilkinson, J., concurring).

72. *Id.*

there are significant terrorist attacks in the future, authorize the use of military force rather broadly—indeed, the AUMF itself has arguably been stretched to allow the United States to go after groups that affiliated with al-Qaeda only fairly loosely and only long after 9/11.<sup>73</sup> And Wilkinson’s further steps test is inadequate protection for two reasons. First, it covers things like harm to property, which would allow military detention for acts as unworthy of it as certain acts of civil disobedience on behalf of groups affiliated with al-Qaeda. Second, the burden of proof and procedural protections would still be substantially lower than those found in the criminal justice system.

Nevertheless, even if the majority position in *al-Marri* provides inadequate protection to liberty, the plurality position provides inadequate protection for security. Most obviously, it would not allow the United States to use the normal tools of war—detaining or killing fighters on the other side—against an insurgency or in a civil war. Those who fight in civil wars are not privileged to engage in combat under the Geneva Convention relative to the Treatment of Prisoners of War. Common Article 3 of this Convention,<sup>74</sup> which concerns non-international armed conflict, provides them with basic protections, but it does not provide them with combatant status. True, the Protocol Additional to the Geneva Conventions of 12 August 1949 (“Protocol 1”) does provide combatant status to those fighting in civil wars and insurgent campaigns who adhere to certain basic rules regarding operating under a command structure that ensures “compliance with the rules of international law applicable in armed conflict.”<sup>75</sup> But the United States has not signed Protocol 1 precisely because it did not want to grant combatant status to people fighting in a “war of national liberation.”<sup>76</sup> Moreover, few to none of the

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73. As Matthew Waxman pointed out, “[r]ecently . . . al Qaeda has tended to rely on affiliate organizations dispersed across several continents—al Qaeda in the Arabian Peninsula, Lashkar-e-Taiba in Pakistan, al-Shabab in Somalia—to provide financial, technical and other forms of support to local ‘franchises.’” Matthew C. Waxman, *The Structure of Terrorism Threats and the Laws of War*, 20 DUKE J. COMP. & INT’L L. 429, 436 (2010). Insofar as the United States uses force against these groups, it is likely to rely on the AUMF. See, e.g., Ryan J. Vogel, *Drone Warfare and the Law of Armed Conflict*, 39 DENV. J. INT’L L. & POL’Y 101, 106 (2010) (considering a hypothetical U.S. attack on al Shabaab leaders justified by the AUMF). But it is not clear that these al-Qaeda “affiliates” count as organizations that “planned, authorized, committed, or aided” the terrorist attacks that occurred on September 11, 2001, or “harbored such organizations.” AUMF § 2(a). Al-Qaeda “affiliates” may harbor those organizations now, but they may not have even existed as of September 11, 2001.

74. See Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

75. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 43, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

76. Message to the Senate Transmitting a Protocol to the 1949 Geneva Conventions, 1 PUB. PAPERS 89 (Jan. 29, 1987).

people fighting for al-Qaeda comply with the rules of international armed conflict. Thus, under the plurality's interpretation of the traditional law of war, all members of al-Qaeda, at least when not *also* fighting for an enemy government, would be civilians who would have to be handled using the criminal law.

Naturally, the plurality would not embrace the position that the United States has to use the criminal law when dealing with suspected members of al-Qaeda detained in Afghanistan or other war zones. Whenever it discussed the precedent in *Hamdi*, it emphasized that his detention as an enemy combatant was justified in part because he was picked up "on the battlefield."<sup>77</sup> Complicating matters, it also highlighted that he was thought to be fighting with "the Taliban, the *de facto* government of Afghanistan at the time."<sup>78</sup> But this sort of linkage between al-Qaeda and the Taliban could not be used going forward. Since the establishment of the Karzai government in Afghanistan, the United States is no longer engaged in an international armed conflict with the Taliban.<sup>79</sup> Yet surely the plurality would want to embrace the position of other courts that have held that the United States can subject suspected members of al-Qaeda and the Taliban captured in Afghanistan to military detention.<sup>80</sup> Therefore, the plurality would be forced to take the position that what ultimately matters is that a detainee *either* is a combatant under the traditional law of war *or* that he was captured in, or at least came from, a traditional battlefield.<sup>81</sup>

This dichotomy creates a real problem for the plurality, however.<sup>82</sup> If they give up the high ground and acknowledge that the United States may detain people as combatants simply because they were picked up fighting in a traditional battlefield, then the question arises: how do we conceive the "battlefield"? Little to none of the fighting in modern wars occurs in a truly traditional field of battle, with opposing forces lined up against each other. At any rate, there is no such traditional battlefield in Afghanistan. Rather, what the United States encounters in Afghanistan is a country beset by

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77. See, e.g., *al-Marri v. Pucciarelli*, 534 F.3d 213, 228 (4th Cir. 2008).

78. *Id.*

79. As the Supreme Court noted in *Hamdan v. Rumsfeld*, the conflict between the United States and the Taliban was originally an international armed conflict because the Taliban, at the start of the war, "then governed Afghanistan." 548 U.S. 557, 566 (2006). Once the Taliban no longer constituted the government of Afghanistan, the conflict with it would cease to be international in nature.

80. See *Al-Maqaleh v. Gates*, 605 F.3d 84, 99 (D.C. Cir. 2010).

81. Judge Wilkinson picks up on this feature of the plurality's position, arguing against their putting so much weight on that fact that "al-Marri was not captured on a foreign battlefield." *al-Marri*, 534 F.3d at 297 (Wilkinson, J., concurring).

82. This is a problem, as well, for other civil libertarians who think that the criminal law should not displace military detentions in places like Afghanistan. See, e.g., Zabel & Benjamin, *supra* note 70.

insurgent fighters using mostly guerrilla tactics. If suspected members of the Taliban or al-Qaeda captured in that context can be detained as “enemy combatants,” then why not detain as “enemy combatants” suspected members of al-Qaeda or related groups with which the United States, according to the AUMF, is at war *wherever* they are captured? That was the position endorsed by now Justice Elena Kagan in her nomination hearings to become solicitor general.<sup>83</sup> The challenge for the *al-Marri* plurality is explaining why Kagan’s view goes too far. They do not seem to have the tools to meet this challenge.

#### IV. A PROPOSED SOLUTION

In this final part of the paper I argue that this dilemma can be avoided if we transcend the traditional legal concept of a combatant. Rather than taking it as legally basic, we should see it as grounded in a deeper liberal, constitutional legal order that is committed to respecting autonomy. This constitutional order should guide the U.S. government in all of its detention decisions, whether with citizens or aliens, whether resident or abroad. This may seem to involve me in the recent controversy regarding the extension of constitutional protections to nonresident aliens in *Boumediene v. Bush*.<sup>84</sup> I think, however, that that controversy is overblown. A proper understanding of what we may do to aliens, as I sketch it out below, does not place any unreasonable restrictions on U.S. actions.<sup>85</sup>

I want to admit up front that there are other solutions that have been considered by other courts. Most importantly, the courts in the D.C. Circuit have embraced a plausible interpretation of Common Article 3 of the Geneva Conventions, as well as of the Additional Protocols, according to which the central distinction is between civilians and “members of armed forces’ who necessarily always actively participate in hostilities; *i.e.*, would-be combatants . . . .”<sup>86</sup> This position splits the difference between the legal positions taken by the plurality and the majority in *al-Marri*, arguing that the traditional law of war provides for the military detention of civilians who are “members of armed forces.”<sup>87</sup> The problem with this view is that it still leaves unaddressed the civil libertarian’s worries that U.S. citizens, suspected of being members of al-Qaeda, could be subjected to unlimited military detention without charges. It is to make sense of that objection and also to allow for the military

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83. Charlie Savage, *Obama’s War on Terror May Resemble Bush’s in Some Areas*, N.Y. TIMES, Feb. 18, 2009, at A20.

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

85. See also Alec D. Walen, *Constitutional Rights for Nonresident Aliens*, 29 PHIL. AND PUB. POL’Y Q. 1, 2 (Summer/Fall 2009).

86. *Gherebi v. Obama*, 609 F. Supp. 2d 43, 66 (D.D.C. 2009).

87. *Id.*

detention of suspected members of al-Qaeda and the Taliban picked up in Afghanistan and other war torn or unstable regions that I offer this summary of an alternative view.<sup>88</sup>

I call the legal framework I sketch here the Autonomy Respecting (“AR”) Model of detention. It provides a principled, non-utilitarian account of why there are only a limited number of exceptions to the general rule cited by the plurality in *al-Marri*: that “the government may not detain a person prior to a judgment of guilt in a criminal trial.”<sup>89</sup> The core principle is that individuals who can be adequately policed and held criminally liable for their illegal choices, as normal autonomous actors, and who can choose whether their interactions with others will be impermissibly harmful or not, can be subjected to long-term detention *only if* they have been convicted of a crime for which (a) long-term punitive detention, and/or (b) the loss of the right not to be subject to long-term preventive detention is a fitting punishment.

One way to break this down into its component parts is as follows. Those who can be detained fall into two basic categories: those subject to punitive detention and those subject to preventive detention. Punitive detention respects autonomy because it is based on a person’s autonomous choice to commit a crime. Those subject to preventive detention can be detained in the short-term for the sake of security because even innocent people can be expected to make small sacrifices for the sake of the greater welfare. People may be subject to long-term preventive detention (“LTPD”), however, only if they fall into one of four categories: (1) they lack the normal autonomous capacity to govern their own choices; (2) they have, in virtue of one or more criminal convictions, lost their right to be treated as autonomous and accountable; (3) they have an independent duty to avoid contact with others because such contact would be impermissibly harmful (e.g., those with contagious and deadly diseases), and LTPD simply reinforces this duty; or (4) they are incapable of being adequately policed and held accountable for their choices. Importantly, traditional combatants and some suspected members of groups like al-Qaeda fall under this last category, and thus their detention can be accounted for in this AR Model. If, however, a given suspected member of a group like al-Qaeda—a suspected terrorist (“ST”)—does not fall under this last category (or any of the former three categories), then he must be released and policed like any criminal defendant who is acquitted at trial if he is

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88. See generally Walen, *supra* note 9 (defending the summary of this view); Alec Walen, *Criminalizing Statements of Terrorist Intent: How to Understand the Law Governing Terrorist Threats, and Why It Should be Used Instead of Long-Term Preventive Detention*, 101 J. CRIM. L. & CRIMINOLOGY 803 (2011).

89. 534 F.3d 213, 223 (4th Cir. 2008) (internal quotation marks and citation omitted).

not tried and convicted of a crime.

This is not the place to argue for all four categories for subjecting people to LTPD. The one that matters here is the fourth, the justification that applies to the LTPD of combatants and some STs. The basic thought is that there are two ways of being unaccountable: intrinsically and extrinsically. Those with insufficient autonomous capacity are *intrinsically* incapable of being held accountable for their actions as a normal autonomous person.<sup>90</sup> Those who cannot adequately be policed are *extrinsically* incapable of being held accountable, in anything like the normal way, for their actions. The moral relevance of both categories is the same: one who cannot adequately be held accountable can be subjected to LTPD if doing so is necessary to ensure that he does not pose a risk to others that outweighs the loss of his own liberty. Balancing of this sort is appropriate when a person cannot be held accountable for his actions because accountability is a precondition of treating someone as an autonomous actor who should be released and policed, rather than subjected to LTPD.

Combatants, as traditionally understood, may be subjected to LTPD because they are, and will remain until the relevant war is over or they are released from military service, privileged to engage in combat with the detaining power.<sup>91</sup> If a combatant is released or escapes, he has the right to take up arms again.<sup>92</sup> Therefore, the detaining power not only cannot hold him criminally responsible for his past violent actions—at least as long as those acts do not violate the laws of war—it also may not hold him criminally responsible for any *future* acts of violence that conform to the law of war. The state is not required, however, to allow itself to be attacked. Therefore, it can subject combatants to LTPD to prevent them from attacking. And it can do so without disrespecting them as autonomous people because their legal status makes them unaccountable.

Some STs can also be justifiably subject to LTPD under this same heading. On the assumption that the United States has no obligation to release and police alien STs in its own territory, the question is would they be adequately policed if released to their home country or to some other country willing to take them. The answer in some cases—for example, Yemen<sup>93</sup>—is no. It is not that they have the

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90. Some may still be held accountable, but their disability mitigates their potential culpability and makes it inappropriate to hold them fully accountable. See *Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (discussing the diminished culpability of the mentally retarded).

91. The possibility of giving parole provides an interesting complication to this picture. I discuss it at length in Walen, *supra* note 9, at 927-30.

92. See Ipsen, *supra* note 47, at 361 (explaining the end to traditional notions of capture of prisoners of war upon their escape).

93. See GUANTANAMO REVIEW TASK FORCE, FINAL REPORT 18 (2010), *available at*



legal *status* of being beyond criminal prosecution for future acts of terror. The problem is (a) that they do not have the legal status to claim that the United States release them in U.S. territory and police them there, and (b) where they do have a legal claim to be taken in, there is too large a chance that they would not be held accountable for any future acts of terror. As a result, they are effectively unaccountable and can be subject to LTPD without disrespecting them as autonomous people.<sup>94</sup>

The same would be true for alien STs picked up in Afghanistan. The situation there is so lawless and corrupt that the United States cannot trust that a detainee handed over to the Afghan government will be given a fair trial and securely detained if convicted.<sup>95</sup> Nor should either the Afghan or the U.S. government be bound to release and police a detainee that it cannot hope to convict and sentence after a fair trial. For, if a detainee is released, the policing capacity of the Afghan army, police, and judiciary, even backed by the U.S. military, cannot come close to providing the kind of security necessary to hold a detainee accountable for any future unlawful acts of violence. In essence, the situation in Afghanistan is the sort of situation that would justify suspending the writ of habeas corpus in the United States: a case of “Rebellion or Invasion [where] the public Safety may require it.”<sup>96</sup> The AR Model implies that the writ can justifiably be suspended under those sorts of conditions because people cannot reliably be held accountable for future acts of violence when such conditions obtain.

What about LTPD for U.S. citizens who are also STs? There, the argument regarding the state’s obligation to police is different. The state exists to serve its citizens, so it cannot say to a citizen, as it can to an alien, that it will not accept the responsibility of policing him. Thus, the question for a U.S. citizen is whether the conditions domestically are so insecure that habeas can be suspended. If they are not—as no one now asserts they are<sup>97</sup>—then U.S. citizen STs must be either tried for criminal acts, or released and policed to ensure that they do not commit such acts in the future. Thus, I believe the AR Model vindicates the view of Justices Scalia and

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<http://www.justice.gov/ag/guantanamo-review-final-report.pdf> (discussing the security problems in Yemen and the way they interfere with releasing Yemeni detainees from Guantánamo).

94. In this regard, it makes sense that roughly forty percent of the detainees left in Guantánamo are from Yemen. *Id.* at 14.

95. Moreover, the United States has good humanitarian reason to hold captured STs or insurgents itself, or in cooperation with NATO allies, rather than turn them over to the Afghan government, because torture and abuse seem too common in Afghan detention facilities. See Ray Rivera, *Afghan Jails Accused of Torture; NATO Limits Transfers*, N.Y. TIMES, Sept. 6, 2011, at A6.

96. U.S. CONST. art. 1, § 9, cl. 2.

97. *Hamdi v. Rumsfeld*, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting).

Stevens in *Hamdi* that when it comes to dealing with U.S. citizens suspected of waging war on the United States, “the only constitutional alternatives are to charge [them with a] crime or suspend the writ.”<sup>98</sup> This presupposes that the United States would not allow its own citizens the status of privileged combatants fighting for an enemy. But this seems a fair assumption, one that is central to the concept of loyalty, which underlies the crime of treason. And given this assumption, I would then add that these two options—charging with a crime or suspending habeas if conditions warrant—are the only two just alternatives as well.

It is important to be clear about three points related to this way of handling STs. First, it does not mean that the Court was wrong in *Quirin* to argue that U.S. citizens can be tried by military commissions.<sup>99</sup> Clearly, military commissions have their place when fighting wars, and a U.S. citizen fighting the United States could justly be tried by such a commission if the conditions for using such a commission were in place. The famous case of *Ex parte Milligan* did not suggest that U.S. citizens could not be tried by military commissions; it held only that the precondition for doing so is that they have sufficient connections to military service for the enemy forces.<sup>100</sup> The mistake was not in *Quirin*, but in the plurality decision in *Hamdi*, inferring from the premise that a U.S. citizen may be tried by military commission to the conclusion that a U.S. citizen may be detained as an enemy combatant.<sup>101</sup> The relevant considerations are not the same.

Second, there may be cases in which the United States cannot introduce into a criminal trial—whether in a civilian or a military forum—all of the relevant evidence that a U.S. citizen was involved in illegal terrorist activities. Judge Wilkinson was probably right when he wrote that “[t]he ‘fog of war’ creates confusion, and, in active combat zones such as Afghanistan and Iraq, it is often difficult to respect the evidentiary standards, such as an unbroken chain of custody, that are the hallmarks of criminal trials.”<sup>102</sup> And he was also probably correct in writing “that some of the significant difficulties associated with criminal prosecution are equally present when a suspected terrorist has never been on a foreign battlefield.”<sup>103</sup> But that simply means that it may be difficult in some cases to get a conviction of a U.S. citizen involved in international terrorism. Failing to get a conviction, however, is not a reason to panic. It does

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98. *Id.* at 564.

99. *See Ex parte Quirin*, 317 U.S. 1, 35-41 (1942).

100. 71 U.S. 2, 121-22 (1866).

101. 542 U.S. 507, 519 (2004).

102. *al-Marri v. Pucciarelli*, 534 F.3d 213, 306 (4th Cir. 2008).

103. *Id.* at 307.

not require that we then lock up the non-convict in military detention, until either al-Qaeda and other terrorist organizations no longer pose a threat to U.S. security, or the individual himself seems no longer to be a threat. The alternative is the same as with any person suspected of being a dangerous criminal who has not been convicted: release him and police him. The options for policing are surely up to the task of ensuring that non-convicted STs do not commit *future* crimes, as is demonstrated by the fact that the United States at this very moment is monitoring the activities of countless STs, waiting to find the best time—in terms of information gathering as well as prosecution—to make an arrest.

Third, the general assumption made by the court in *al-Marri*, that if a legal resident alien may be subject to military detention, then so may a U.S. citizen,<sup>104</sup> is invalid. While it is true that resident aliens benefit from almost all of the same constitutional protections as citizens, they do not benefit from *all* of the same protections. In particular, their status as aliens allows them to be deported if they have done something inconsistent with their having an ongoing right to stay in the country.<sup>105</sup> Moreover, the standard for determining whether an alien may have committed a deportable act is not proof beyond a reasonable doubt, it is “clear and convincing evidence that . . . [he] is deportable.”<sup>106</sup> That means, in essence, that the United States is not obliged to release and police an alien that it has good reason to believe is involved in terrorist activities but for whom it is either unable or unwilling to obtain a criminal conviction. It can deport him. And if there is no country that is willing to take him and police him adequately, then the United States can justifiably subject him to LTPD as an ST. One should not be glib about the processes that would be due such a person before subjecting him to LTPD. But alien STs do not have the same right to be released into the United States that citizens have, and thus they may be subject to LTPD as citizens may not.

In sum, according to the AR Model, which provides a principled account of when detention is consistent with our core liberal values, alien combatants, as that term is traditionally understood, may be subjected to military detention because they are unaccountable for any future use of force against the United States should they be released or escape. Likewise, alien STs may be subject to LTPD if the U.S. chooses not to try them and they cannot be released to a country willing to police them to ensure that they commit no future terrorist acts. U.S. citizens, however, may not be subjected to military detention. If they cannot be convicted of a crime, they must be

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104. *Id.* at 249.

105. *See generally* 8 U.S.C. § 1227 (2006).

106. 8 U.S.C. § 1229a(c)(3)(A) (2006).

released and policed. Ultimately the most important questions, as I have argued at length elsewhere, are not limited to whether an individual is a combatant or whether he poses a large threat; they also include (a) whether he can be held accountable for any future use of force against the state, and (b) whether the detaining state has an obligation to release and police him if it cannot or chooses not to try to convict him for a past crime.