U.S. Department of Justice

Office of Legal Counsel

Washington, D.C. 20530

August 16, 2012

Hina Shamsi
Director, National Security Project
American Civil Liberties Union
125 Broad Street, 18th Floor
New York, NY 10004

Dear Ms. Shamsi:

This letter responds to your Freedom of Information Act ("FOIA") request to the Department of Justice ("Department") dated April 23, 2009. Your request was referred to the Department's National Security Division ("NSD") and the Office of Legal Counsel ("OLC"). In the course of searching for records pursuant to the Stipulated Order entered on January 28, 2010, in *ACLU v. Department of Defense*, 09-8071 (S.D.N.Y.), NSD referred four documents to OLC for direct response to you.

We are releasing two of these documents to you, one in full and one with redactions pursuant to FOIA Exemption Five, 5 U.S.C. § 552(b)(5), to the extent the material is protected by the deliberative process and attorney-client privileges, and pursuant to FOIA Exemption Six or Seven, § 552(b)(6), (7)(C), to the extent that disclosure of the material would constitute an unwarranted invasion of personal privacy. These documents are enclosed. We are withholding the other two documents pursuant to FOIA Exemption Five because they are protected by the deliberative process and attorney-client privileges and the attorney work product doctrine.

Although your request is the subject of ongoing litigation, and administrative appeals are not ordinarily acted upon in such situations, I am required by statute and regulation to inform you of your right to file an administrative appeal. You must submit any administrative appeal within 60 days of the date of this letter by mail to the Office of Information Policy, United States Department of Justice, 1425 New York Avenue, Suite 11050, Washington, D.C. 20530, or by e-mail at DOJ.OIP.AdministrativeAppeal@usdoj.gov. Both the letter and the envelope, or the e-mail, should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

D. L. Koffsky

Daniel L. Koffsky
Deputy Assistant Attorney General

Enclosures

Out of the Shadows: Preventive Detention, Suspected Terrorists, and War

By David Cole[1]

Unlike some other nations, the United States does not have a statute authorizing preventive detention of suspected terrorists without charge.[2] Some

1. Professor, Georgetown University Law Center. I would like to thank Ahilan Arulanantham, Robert Chesney, Sarah Cleveland, Anthony Dworkin, James Forman, Conor Gearty, Richard Goldstone, John Ip, Shane Kadidal, Jules Lobel, Joanne Mariner, Hope Metcalf, Eric Posner, Michael Ratner, Sir Adam Roberts, Gabor Rona, Matt Waxman, Pete Wales, and Peter Weiss for their comments on drafts of this article. I am especially indebted to my research assistant, Chris Segal, for his prodigious work on this article. The errors are all mine. . Part of the article was published in a condensed version in the Boston Review. David Cole, *Closing* GuantanamaGuantanamo, BOSTON REVIEW., Jan.-Feb. 2009, *available at* http://bostonreview.net/BR34.1/cole.php (last visited Feb. 11, 2009);.

2. For reviews of other nations' preventive detention regimes, see, for example, LAW LIBRARY OF CONGRESS, DIRECTORATE OF LEGAL RESEARCH, LL FILE NO. 2005-01606, PREVENTIVE DETENTION: AUSTRALIA, FRANCE, GERMANY, INDIA, ISRAEL, AND THE UNITED KINGDOM (2005); PREVENTIVE DETENTION AND SECURITY LAW (Andrew Harding & John Hatcherd eds., 1993); John Ip, *Comparative Perspectives on the Detention of Terrorist Suspects*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 773 (2007) (comparing United States, United Kingdom,

may consider that irresponsible, as it is not difficult to imagine circumstances in which the government might want to detain a suspected al Qaeda operative, but not be prepared to file charges in open court as required for a criminal prosecution. The government may have learned of the individual from a confidential or foreign government source that it cannot publicly disclose or from an investigation that may be still underway. It may lack sufficient evidence to convict beyond a reasonable doubt, but have substantial grounds to believe that the individual was actively engaged in armed conflict for al Qaeda. The disclosures necessary for a public trial might seriously compromise the ongoing military struggle against the Taliban and al Qaeda. U.S. law has no formal statutory mechanism by which the government could detain such a person. Some have suggested that this is a potentially profound defect in our national security armature.[3]

Canada, and New Zealand).

3. *See, e.g.*, Stephanie Cooper Blum, *Preventive Detention in the War on Terror: A Comparison of How the United States, Britain, and Israel Detain and Incapacitate Terrorist Suspects*, 4 HOMELAND SECURITY AFF., Oct. 2008, at 13 (stating that the U.S. "attest[s it] need[s] preventive detention when evidence is classified or inadmissible—or when [it does] not want to compromise methods and sources"), http://www.hsaj.org/?fullarticle=4.3.1 (last visited Feb. 11, 2009); *cf.* BEN WITTES, LAW AND THE LONG WAR 151-82 (2008) (arguing that Congress should authorize preventive detention of al Qaeda terrorists); Jack L. Goldsmith & Neal Katyal, *The Terrorists' Court*, N.Y. TIMES, July 11, 2007 at A19, *available at* http://www.nytimes.com/2007/07/11/opinion/11katyal.html; Stuart Taylor Jr., *Al Qaeda Detainees: Don't Prosecute, Don't Release*, ATLANTIC, Apr. 30, 2002, *available at* http://www.theatlantic.com/politics/nj/taylor2002-04-30.htm; Stuart Taylor Jr., *Opening*

Others hail the absence of such a preventive detention law as a testament to the United States' commitment to individual liberty.[4] The fact that the United States has survived for more than two centuries without employing a freestanding preventive detention law for dangerous persons counsels strongly against adopting one now. Preventive detention laws in other countries have often been abused to round up persons who pose little or no real danger.[5] The history of the United States with respect to preventive detention, even without an explicit statutory basis, underscores the dangers. The United States has conducted three significant preventive roundups on domestic soil: the Palmer

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Argument: Terrorism Suspects and the Law, NAT'L J., May 12, 2007, *available at* http://www.nationaljournal.com/njmagazine/nj_20070512_4.php; Michael Chertoff, Secretary, Dep't of Homeland Security, Remarks at Westminster College, The Battle for Our Future (Oct. 17, 2007) (discussing the difficulty of dealing with suspected terrorists under current laws), *available at* http://www.dhs.gov/xnews/speeches/sp_1193063865526.shtm; Michael Chertoff, Secretary, Dep't of Homeland Security, Remarks on Protecting the Homeland: Meeting Challenges and Looking Forward, George Washington University (Dec. 14, 2006) (discussing the need to detain immigrants), *available at* http://www.dhs.gov/xnews/speeches/sp_1166137816540.shtm.

4. *See, e.g.*, Kenneth Roth, *After Guantánamo*, HUFFINGTON POST, May 5, 2008 (arguing that preventive detention would be a "massive loophole to our basic due process rights . . . worse than the Guantánamo problem"), *available at* http://hrw.org/english/docs/2008/05/05/usint18752_txt.htm.

5. *See, e.g., Nepal: Terror Law Likely to Boost 'Disappearances'*, HUM. RTS. NEWS, Oct. 26, 2004, http://hrw.org/english/docs/2004/10/26/nepal9562.htm (last visited Feb. 11, 2009); *see also* Ip, *supra* note 2, at 773 (discussing preventive detention regimes and reactions to them in the United States, United Kingdom, Canada, and New Zealand).

Raids of 1919-20, the internment of Japanese Americans and Japanese nationals during World War II, and the arrests and detention of several thousand Arab and Muslim foreign nationals within the United States in the aftermath of the terrorist attacks of September 11, 2001.[6] In each period, not one person detained was identified as posing the threat that was said to justify the sweeps in the first place.[7] These experiences support those who oppose calls for preventive detention today.

Yet the debate about whether the United States should enact a preventive detention statute is in an important sense misleading. Those who warn that we are dangerously unprepared to protect ourselves because of the absence of a preventive detention statute overstate the case; many existing laws and authorities can be and have been invoked in an emergency to effectuate preventive detention. At the same time, those who object to any preventive detention statute as a matter of principle often fail to confront the same fact—that even in the absence of a freestanding statute for preventive detention of suspected terrorists, there are numerous laws on the books that can be and have been employed for those purposes. After 9/11, for example, without ever invoking a USA PATRIOT Act provision authorizing preventive detention of foreign nationals suspected off terrorist ties,[8] the executive branch implemented

6. For an account of these detentions, see DAVID COLE, ENEMY ALIENS 22-46, 88-128 (2003).

7. *See id.* at 25-26.

8. Uniting and Strengthening America by Providing Appropriate Tools Required to

far-reaching preventive detention by employing pre-existing immigration law, the material witness statute, pretextual prosecution, and an asserted power to detain "enemy combatants."[9]

Preventive detention is in fact an established part of U.S. law. Federal and state statutes authorize preventive detention of those facing trial on criminal or immigration charges, and of those whose mental disabilities warrant civil commitment. All juvenile detention is, at least in theory, preventive rather than punitive. As Paul Robinson has shown, criminal sentencing often includes substantial preventive considerations, such as when a court gives different sentences to two persons convicted of the same offense because it predicts one will be more dangerous in the future.[10] In reality, then, preventive detention is already an integral feature of the American legal landscape.

The proper question, therefore, is not whether the United States should authorize preventive detention—it is already authorized—but how and under what circumstances it should be authorized. In particular, is there a case for preventive detention of persons suspected of terrorism beyond the preventive detention authorities that already exist? Are existing preventive detention authorities appropriately drawn to distinguish between those who truly need to be detained preventively, and those who do not? Should different rules apply in

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Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 § 312, 8 U.S.C. § 1226a(a) (2006).

[9] See David Cole, *Enemy Aliens*, supra note 6.

10. *See* Paul H. Robinson, Commentary, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429 (2001).

light of the potentially catastrophic harms posed by twenty-first century terrorists? Should special rules apply to al Qaeda, a terrorist organization that has declared war on the United States and attacked us here and abroad, against whom Congress has authorized a military response, and with whom the United States is in an ongoing military conflict in Afghanistan? If preventive detention is permissible under some circumstances, what are the appropriate substantive and procedural safeguards that should accompany it? These are some of the most difficult and controversial legal questions of the day.

"Just say no" is not a realistic response. Unlike torture, which is universally condemned without exceptions as a matter of international law, the question of preventive detention is not susceptible to absolute answers. The prevalence of preventive detention authorities in other countries, as well as in the United States, demonstrates this fact. Moreover, if those concerned about human rights and the rule of law insist that there is no place for detention of combatants in an armed conflict with foes such as al Qaeda or the Taliban, their arguments may have the perverse effect of leading the state to seek to act outside the law, without the safeguards that accompany wartime detention.

At the same time, there are three important reasons to be skeptical of preventive detention regimes. First, preventive detention rests on a prediction about future behavior, and no one can predict the future. Decision makers all too often fall back on stereotypes and prejudices as proxies for dangerousness. Humility about our predictive abilities should counsel against preventive detention. Preventing harm is a legitimate social goal, but there are many ways

to do so short of detention, such as securing borders, enhancing intelligence gathering, safeguarding nuclear stockpiles, and developing smarter foreign policy. Locking up human beings is one of the most extreme preventive measures a state can undertake; it should be reserved for situations where it is truly necessary.

Second, the risk of unnecessarily detaining innocent people is high, because the incentives cause decision makers to err on the side of detention. When a judge releases an individual who in fact poses a real danger of future harm and the individual goes on to commit that harm, the error will be emblazoned across the front pages. When, by contrast, a judge detains an individual who would not have committed any wrong had he been released, that error is invisible—and, indeed, unknowable. How can one prove what someone would not have done had he been free? Thus, preventive detention regimes will more likely than not lead judges to err on the side of custody over liberty.

Third, preventive detention is inconsistent with basic notions of human autonomy and free will. We generally presume that individuals have a choice to conform their conduct to the law. Thus, we do not criminalize thought or intentions, but only actions. Respect for autonomy requires us to presume, absent some very strong showing, that individuals will conform their activities to the law. To lock up a human being on the prediction that he will undertake dangerous and illegal action if left free is, in an important sense, to deny his

autonomy.[11]

Thus, any consideration of preventive detention should begin with a strong presumption that society should deal with dangerous people through criminal prosecution and punishment, not preventive detention. We prohibit certain actions (including conspiracy to engage in such actions), give notice that those who violate the prohibitions will be punished, and then hold responsible those who can be shown, in a fair adversarial proceeding, to have engaged in such activity. Given the dangers of preventive detention, we should depart from this model only where the criminal process cannot adequately address a particularly serious danger.

While it is not always explicitly rationalized in such terms, constitutional doctrine governing preventive detention is best understood as reflecting a strong presumption that the criminal process is the preferred means for addressing socially dangerous behavior. As the Supreme Court has said, "'in our society, liberty is the norm,' and detention without trial 'is the carefully limited exception.'"[12] The exceptions largely arise where criminal prosecution is not a viable option for addressing a serious threat to public safety. Thus, civil commitment of mentally disabled persons is justified when they pose a danger to the community but lack the requisite intent to be held culpable in a criminal prosecution. Similarly, because the adjudication of criminal liability and

11. I am indebted to Alec Whalen for this insight.

12. Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) (citing United States v. Salerno, 481 U.S. 739 (1987)).

immigration status cannot be performed instantaneously, federal law authorizes detention without bail of persons facing criminal trial or deportation where they pose a danger to the community or a risk of flight. Quarantines of persons with infectious disease similarly fit this model; we cannot make it a crime to have a disease, and therefore quarantines protect the community from a danger that the criminal justice system cannot adequately address.

Preventive detention of prisoners of war in an international armed conflict can be understood in much the same way. The criminal justice system cannot address the problem of enemy soldiers for at least three reasons. First, under the laws of war, the enemy's soldiers are "privileged" to fight, which means that nations may not criminalize fighting for the other side absent the commission of specified "war crimes." Second, enemy soldiers cannot be expected to conform their actions to the capturing nation's laws by avoiding combat if they are released; they are generally compelled to fight by their own country's laws. Finally, problems of proof regarding battlefield captures and the need to incapacitate the enemy while preserving military secrets mean that the criminal justice system may prove inadequate even where criminal prosecution is a legal possibility. In *Hamdi v. Rumsfeld*, the Supreme Court held that detention of persons captured on the battlefield fighting for the Taliban could be held as "enemy combatants" because that authority was a fundamental incident of warfare,[13] but controversy has reigned ever since regarding the appropriate

[13] 542 U.S. 507, 517-19 (2004).

scope of that authority.[14]

Any consideration of preventive detention reform should seek to limit preventive detention to situations that cannot be adequately addressed through the criminal justice system. The post-9/11 roundups of thousands of persons with no proven ties to terrorism[15] reveal the need for reform aimed at restricting the use of sub rosa or de facto preventive detention powers. At the same time, the longstanding dispute over the scope of "enemy combatant" detention authority implicitly provided by the Authorization to Use Military Force against al Qaeda suggests that a statute expressly addressing that issue is necessary. This Article argues that any preventive detention regime must be predicated on a showing that criminal prosecution cannot adequately address a serious problem of dangerousness. That showing can be made with respect to enemy fighters in an ongoing armed conflict, as long as that category is narrowly defined. Such a showing cannot be made more broadly for "suspected terrorists," because terrorism has been and can be addressed through criminal prosecution. Thus, preventive detention of combatants during wartime may be warranted; preventive detention of "suspected terrorists" is not.

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[14] *See, e.g.*, Al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008) (addressing whether enemy combatant authority extended to foreign national lawfully residing in the United States who was allegedly associated with al Qaeda and had come to the United States to commit terrorist acts), vacated as moot by ___ S. Ct. ___ (Mar. 6, 2009).

15. *See* COLE, *supra* note 6, at 25-26; *see also* DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM, at xx-xxii (2005).

Part I will briefly describe the existing statutory authorities that the government has used—and in many instances misused—to effectuate preventive detention after 9/11. The laws in question include immigration law, the material witness statute, broad criminal statutes penalizing material support of terrorist groups, and the Authorization to Use Military Force against al Qaeda, which the Supreme Court has interpreted to authorize detention of at least some "enemy combatants."[16] The government has used each of these measures to achieve preventive detention in the absence of a law expressly authorizing detention of suspected terrorists or al Qaeda fighters. In many instances, the government has exploited these laws for purposes they were not designed to serve.

Part II will address the constitutional principles that should govern preventive detention. Preventive detention implicates fundamental rights under the Fourth and Fifth Amendments and the Suspension Clause. I will argue that together, these provisions reflect a constitutional obligation to address dangerous conduct through criminal prosecution, conviction, and incarceration. Accordingly, the Supreme Court has struck down preventive detention laws that are triggered by proof of dangerousness alone.[17] At the same time, in most settings where the Court has permitted preventive detention, criminal prosecution and incarceration cannot adequately address a particular danger to the community. As a constitutional matter, then, preventive detention should be

[16] *Hamdi*, 542 U.S. at 517-19.

17. *See, e.g.*, Foucha v. Louisiana, 504 U.S. 71, 84-88 (1992).

tolerated only in those rare circumstances where dangerous behavior cannot be addressed through the criminal justice system.

Part III applies the above principle by proposing a set of specific reforms designed to forestall the kinds of preventive detention abuses that followed 9/11. If preventive detention is to be reserved for situations where it is truly needed, existing laws must be tightened. As it currently stands, federal law permits preventive detention of persons who have not been shown to pose a serious future danger. The reforms would include conforming standards for detention under immigration law to detention standards under criminal law; restricting the time that individuals may be detained as material witnesses to ensure that this authority is used solely to obtain testimony; narrowing the sweeping criminal laws that penalize material support to terrorist groups and that have become a proxy for preventive detention; and reshaping the largely ad hoc and poorly defined authority to detain "enemy combatants." I contend that to be constitutional, any preventive detention regime must closely conform to the traditional model of military detention of prisoners of war—and not be predicated on the much broader and more malleable concept of "suspected terrorists." Terrorism should remain a matter of criminal prosecution, and preventive detention should be authorized only where we are engaged in an ongoing armed conflict. But when we are so engaged, there is no reason why we ought not have recourse to the preventive military detention that has historically been recognized as appropriate during wartime.

I also explore the alleged need for a short-term preventive detention

authority for suspected terrorists that is not tied to the authority to detain "enemy combatants." In my view, there has been no showing that such a law is needed, as the criminal process already authorizes short-term preventive detention of those as to whom the government has probable cause of terrorist activity.

I conclude with some questions about whether a de facto or de jure preventive detention regime is ultimately preferable. This is, in fact, the real choice we must make when it comes to preventive detention. Advocates on both sides of the issue fail to acknowledge that the government already has such authority, and has shown its ability and willingness to use it. The question is whether the United States should maintain a system that pretends to bar preventive detention, but in reality allows it as a de facto matter, or whether it should acknowledge candidly that preventive detention has a limited but appropriate place in liberal democracies, and then carefully circumscribe the authority to ensure that it is no broader than necessary. In my view, the latter approach is more likely both to provide society with the protection it needs and to reduce the number of people unnecessarily detained.

I.

EXISTING STATUTORY AUTHORITY FOR PREVENTIVE DETENTION

A. Types of De Facto Preventive Detention

The debate over whether the United States should adopt a preventive detention law often proceeds as if preventive detention is not already a part of

the fabric of American law. In fact, existing federal and state laws already authorize preventive detention of persons accused of criminal or immigration violations and awaiting trial or removal; persons with information relevant to a grand jury investigation or criminal trial who are unlikely to appear to testify if served with a subpoena; convicted sex offenders who have completed their criminal sentences but pose a continuing risk of recidivism; persons with a mental abnormality who pose a risk to themselves or others; nationals of a country with which we are in a declared war; and "enemy combatants" fighting for the enemy in a military conflict.

The most common form of preventive detention is of persons formally accused of violating criminal or immigration law. Under the Bail Reform Act, a judge may deny bail and keep a criminal defendant detained if he poses either a risk of flight or a danger to others.[18] The detention is preventive because it is imposed not to punish the individual, who remains innocent until proven guilty, but to ensure his presence at trial or to protect the community from danger in the meantime. Similarly, when an individual has been charged with an immigration violation, she may be preventively detained pending resolution of the proceedings if there is a risk that she will flee or pose a danger to others in the interim.[19]

There are three important constraints on these forms of preventive detention. First, they apply only to persons charged with violation of criminal

18. Bail Reform Act of 1984, 18 U.S.C. § 3142(d)(2) (2006).

19. *See* 8 C.F.R. § 236 (2008).

or immigration law. Second, the detention is temporally limited—it ends once the criminal trial concludes, or once a foreign national is either removed or determined to be not subject to removal.[20] Third, these forms of preventive detention generally require an individualized hearing in which the government bears the burden of demonstrating that the individual poses a danger that warrants his detention.[21]

The material witness statute authorizes another form of preventive detention.[22] If the government establishes reason to believe that an individual has testimony relevant to a grand jury proceeding or a criminal trial, but would likely flee if served with a subpoena, a federal court may authorize detention of the individual as a "material witness" in order to ensure his presence at the grand jury or criminal trial.[23] The detention is imposed not on the basis of any past or ongoing violation of law, but to prevent the individual from a future evasion of his societal obligation to testify. Detention under this statute is limited in time to that necessary to obtain the individual's testimony, and requires individualized proof that the individual is indeed likely to flee if served

20. *See* Zadvydas v. Davis, 533 U.S. 678 (2001) (holding that foreign nationals ordered deported who cannot in fact be removed must be released from custody).

21. *See* United States v. Salerno, 481 U.S. 739 (1987) (upholding preventive detention pending criminal trial where government shows by "clear and convincing evidence" that defendant poses a danger to the community if released).

22. *See* 18 U.S.C. § 3144 (2006).

23. *Id.*

with a subpoena.[24]

Some states also authorize preventive detention of individuals who have been convicted of sex offenses and have fully served their sentences but have a mental disability and pose a risk of repeat offending.[25] This is a form of civil commitment, which the Supreme Court has upheld for persons who have a mental disability that renders them unable to conform their conduct to the law and dangerous to themselves or others.[26] Individualized showings of danger are required, as are fair and regular procedures for judicial review.[27]

Two forms of preventive detention are authorized only during wartime. The laws of war have long authorized detention of those fighting for the enemy in a military conflict. Pointing to this authority, the Supreme Court in *Hamdi v. Rumsfeld* held that a Congressional authorization to use military force authorized, as an incident to military force, detention of even U.S. citizens captured on the battlefield fighting for the enemy.[28] Under the laws of war, this authority extends only to persons actually fighting for the enemy, and therefore

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24. *Id.*

25. *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346 (1997); Varner v. Monohan, 460 F.3d 861 (7th Cir. 2006); *see also* David J. Gottlieb, Essay, *Preventive Detention of Sex Offenders*, 50 KAN. L. REV. 1031 (2002); Meagan Kelly, Note, *Lock Them Up—And Throw Away the Key: The Preventive Detention of Sex Offenders in the United States and Germany*, 39 GEO. J. INT'L L. 551 (2008).

26. *See, e.g.*, Kansas v. Crane, 534 U.S. 407 (2002).

27. *Id.* at 357.

28. 542 U.S. 507, 517 (2004).

also requires an individualized determination that the individual in question falls into that category.[29] The tribunals that make those determinations are generally comprised of military officials.[30]

In addition, the Enemy Alien Act, enacted in 1798 as part of the Alien and Sedition Acts and still part of the U.S. Code today, authorizes the detention of anyone who is a national of a country with which we are engaged in a declared war.[31] Under this statute, there need be no determination that an individual is fighting for the enemy, is likely to engage in sabotage or espionage, or is hostile to the United States.[32] The law presumes that any national of a country with which we are at war poses a potential danger and does not require any individualized determination beyond ensuring that the individual in question is in fact a national of the enemy country.

Since shortly after 9/11, federal law has also contained a preventive detention statute that has never been employed, and therefore never judicially tested. Section 412 of the USA PATRIOT Act authorizes the Attorney General to detain foreign nationals he certifies as terrorist suspects without a hearing and without a showing that they pose a danger or a flight risk.[33] They can be held for seven days without any charges, and after being charged, can

29. Geneva Convention Relative to the Treatment of Prisoners of War art. 5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention].

30. *See, e.g.*, LOUIS FISHER, MILITARY TRIBUNALS AND PRESIDENTIAL POWER (2005).

31. 50 U.S.C. § 21 (2000).

32. *Id.*

33. 8 U.S.C. § 1226a(a) (2006).

apparently be held indefinitely in some circumstances, even if they prevail in their removal proceedings by obtaining "relief from removal."[34] The Attorney General need only certify that he has "reasonable grounds to believe" that the individual is "described in" various anti-terrorism provisions of the Immigration and Nationality Act, which are in turn extremely expansive.[35] The statute does provide for immediate federal court review via habeas corpus review of the detention,[36] and perhaps for that reason, the government has yet to invoke this authority.

As a practical matter, the Constitution's Suspension Clause also implies a de facto preventive detention authority in very limited circumstances. It guarantees the right of detained persons to seek judicial review of the legality of their detention, but also provides that in "times of Rebellion or Invasion," where public safety requires it, Congress may suspend the writ of habeas corpus.[37] While this provision does not authorize preventive detention as such, it acknowledges Congress's power to suspend habeas corpus, which would as a practical matter remove the recourse that a detainee would otherwise have to

34. *Id.*

35. *Id.* The INA's anti-terrorism provisions include persons who are mere members of designated "terrorist organizations," persons who have supported only the lawful activities of such organizations, and persons who have used, or threatened to use, any weapon with intent to endanger person or property, regardless of whether the activity has any connection to terrorism as it is generally understood. *See* 8 U.S.C. § 1182(a)(3)(B)(i)(V), (iii)(V)(b) (2006).

36. 8 U.S.C. § 1226a(a) (2006).

37. U.S. CONST. art. I, § 9, cl. 2.

the courts to challenge his detention. Because suspension has so rarely been invoked, this Article will not address the powers of Congress or the executive under the Suspension Clause, but will instead consider what sorts of preventive detention regimes might be permissible or advisable in the absence of the extraordinary act of suspending the writ.

Still, the Suspension Clause is significant in at least two ways. On the one hand, it underscores that preventive detention is not necessarily anathema to our constitutional democracy, at least where limited to extraordinary emergencies. On the other hand, the presence of suspension as a kind of safety valve undermines arguments in favor of a freestanding preventive detention statute for ordinary times, because the Constitution already provides for preventive detention in true emergency situations.

Finally, while it does not formally fit within the technical definition of preventive detention, the expansion of criminal laws is another way in which governments may implement a kind of de facto preventive detention. Preventive detention is ordinarily defined as distinct from punitive criminal incarceration, but if the criminal law is written broadly enough, it may become a tool for de facto preventive detention. For example, the federal government after 9/11 aggressively prosecuted individuals under material support statutes that, at least as the Bush administration interpreted them, permit the prosecution of persons who have never engaged in terrorism, aided or abetted terrorism, conspired to engage in terrorism, or provided any support to

terrorism.[38] Under this interpretation, the prosecution need only prove that an individual provided something of value to a group that the government has designated as terrorist, even if there is no connection shown between the support provided and terrorism, and no intent to further terrorist activity.[39] These laws amount to little more than guilt by association, as they effectively punish the individual not for his own terrorist acts, nor for any terrorist acts that he has supported, but for his support of a group that has been labeled "terrorist." Here, the state punishes and incarcerates the defendant not so much because he did anything harmful in the past, but because it fears that he, or the group he supports, may do harm in the future.

38. *See, e.g.*, David Cole, *Terror Financing, Guilt by Association and the Paradigm of Prevention in the 'War on Terror'*, *in* COUNTERTERRORISM: DEMOCRACY'S CHALLENGE (Andrea Bianchi & Alexis Keller eds., 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1262792; Michael E. Deutsch & Erica Thompson, *Secrets and Lies: The Persecution of Muhammad Salah (Part I)*, 37 J. PALESTINE STUD. 38, 41 (2008).

39. *See* Robert M. Chesney, *Federal Prosecution of Terrorism-Related Offenses: Conviction and Sentencing Data in Light of the "Soft-Sentence" and "Data-Reliability" Critiques*, 11 LEWIS & CLARK L. REV. 851, 855 (2007) (observing that "the statute does not require any showing of personal dangerousness on the part of the defendant; in the paradigmatic case, the defendant provides money, equipment, or services to other individuals"); *see also* 18 U.S.C. § 2339a(b)(1) (2006) (broadly defining material support to mean "any property, tangible or intangible, or service").

B. Abuses of Preventive Detention Authorities

The Bush administration used many of the above authorities to effectuate widespread preventive detention, at home and abroad, after 9/11. But it also abused these authorities by detaining persons as to whom it appears to have had little or no basis for concern. For example, it has admitted to using immigration laws to preventively detain more than 5,000 foreign nationals, nearly all of whom were Arab or Muslim, in the first two years after 9/11.[40] Especially in the first several months, the government often detained individuals without evidence that they posed any danger and without charging them with any immigration violations.[41] Where it lacked evidence to justify detention, it sought to delay bond hearings that might have led to release orders.[42] It kept foreign nationals in detention even after immigration judges ordered them released.[43] And it kept foreign nationals in custody on immigration pretexts even after their immigration cases were fully resolved and there was no longer

40. *See* COLE, *supra* note 6, at 25-26.

41. *See* U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (2003), *available at* http://www.fas.org/irp/agency/doj/oig/detainees.pdf [hereinafter OIG REPORT].

42. *See id.* at 78-80.

43. *See* Turkmen v. Ashcroft, No. 02-CV-2307 (JG), 2006 U.S. Dist. LEXIS 39170 (E.D.N.Y. June 14, 2006) (describing extended INS detention of Arab and Muslim foreign nationals to whom judges had granted "voluntary departure"). .

any need to detain them to ensure their removal.[44] Not one of the more than 5,000 detained foreign nationals has been convicted of a terrorist offense.[45]

In addition, the Bush administration employed the material witness law to detain suspects for investigation on less than probable cause.[46] In many instances, it never called its material witness detainees to testify[47]—the only legitimate reason for a material witness detention in the first place. The government presumably found the material witness law attractive because it permits detention on a showing that an individual merely may have information relevant to a criminal investigation,[48] a much lower threshold than probable cause that the individual has engaged in wrongdoing.

The Bush administration also aggressively prosecuted individuals under material support laws. In one case, it argued that running a website that featured links to other websites that in turn contained jihadist rhetoric constituted material support for terrorism.[49] In another, it argued that members

44. *See* OIG Report, *supra* at 78-80.

45. *See* David Cole & Jules Lobel, *Are We Safer?*, L.A. TIMES, Nov. 18, 2007, at M4, *available at* http://articles.latimes.com/2007/nov/18/opinion/op-cole18; *see also* COLE, *supra* note 6, at 25-26; *see also* DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM, at xx-xxii (2005).

46. HUMAN RIGHTS WATCH, WITNESS TO ABUSE 1 (2005), *available at* http://hrw.org/reports/2005/us0605/.

47. *Id.* at 2.

48. *See* 18 U.S.C. § 3144 (2006).

49. *See* United States v. Al-Hussayen, No. CR03-048-C-EJL, 2004 U.S. Dist. LEXIS 29793 (D. Idaho Apr. 7, 2004).

of a Muslim charity had violated the material support statute not by providing aid to a designated terrorist group, but by providing humanitarian assistance to local "zakat committees" in the West Bank and Gaza that it should have known were connected to a designated terrorist group, even though the United States itself had never designated any of the "zakat committees" as terrorist.[50] In still another case, the Bush administration argued that providing humanitarian aid to Hamas, before there was any law on the books designating Hamas as terrorist or criminalizing support to it, was a crime under RICO.[51] In none of these cases did prosecutors offer any evidence that the defendants had in fact provided aid to terrorist or violent acts. Most of the convictions on "terrorism" charges since 9/11 have been under the material support statute, which requires no proof that support was intended to further terrorist activity.[52] In some cases, there may have been reason to believe that the defendants intended to support terrorist activity, but the statute itself has been interpreted to require no such proof, and therefore juries need find no such evidence to convict.[53]

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50. *See* Gretel C. Kovach, *Five Convicted in Terror Financing Trial*, N.Y. TIMES, Nov. 24, 2008, at A16, *available at* http://www.nytimes.com/2008/11/25/us/25charity.html?hp. A previous trial had concluded in acquittal of one man and hung jury on all other counts. *See* David Cole, *Anti-Terrorism on Trial*, WASH. POST, Oct. 24, 2007, at A19, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/10/23/AR2007102301805.html.

51. *See* United States v. Marzook, 383 F. Supp. 2d 1056 (N.D. Ill. 2005).

52. 18 U.S.C. § 2339B (2006); *see* DAVID COLE & JULES LOBEL, LESS SAFE, LESS FREE 109-16 (2007).

53. *See, e.g.*, Humanitarian Law Project v. Mukasey, 509 F.3d 1122 (9th Cir. 2007),

Finally, the Bush administration cited Congress's authorization to use military force and its own executive power as authority to detain those it declared "enemy combatants"—citizens or foreign nationals— whether captured at home or abroad.[54] It initially held them incommunicado and denied them any hearings whatsoever,[55] and it subjected them to cruel and inhuman coercive interrogation, and in some instances, torture.[56] While the Bush administration initially described all those it held at Guantanamo as the "worst

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amended by 552 F.3d 916 (9th Cir. 2009) (rejecting argument that material support statute violates due process because it fails to require proof of specific intent to further a group's illegal activities).

54. *See, e.g.*, Al-Marri v. Pucciarelli, 534 F.3d 213, 221 (4th Cir. 2008) (citing the government's argument that either the Authorization for Use of Military Force or the President's inherent constitutional powers permit detention), vacated as moot by ___ S. Ct. ___ (Mar. 6, 2009)

55. *See Forsaken at Guantanamo*, N.Y. TIMES, Mar. 12, 2003, *available at* http://query.nytimes.com/gst/fullpage.html?res=9C02E1DF153EF931A25750C0A9659C8B63&scp=1.

56. *See* PHILIPPE SANDS, TORTURE TEAM (2008) (recounting coercive interrogation policy implemented at Guantanamo); Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantanamo*, N.Y. TIMES, Nov. 30, 2004, at A1, *available at* http://query.nytimes.com/gst/fullpage.html?res=9C03E1DE113EF933A05752C1A9629C8B63; Bob Woodward, *Detainee Tortured, Says U.S. Official*, WASH. POST, Jan. 14, 2009, at A1 (reporting that Susan Crawford, top administration official in charge of Guantanamo war crimes prosecutions, concluded that a Guantanamo detainee, Mohammed al-Qahtani had been tortured), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html?hpid=topnews.

of the worst,"[57] it subsequently released more than 500 of them, suggesting that they might not have been so dangerous after all.[58] Of the more than 500 released, the Pentagon claimed in January 2009 that 61 had returned to terrorism, a figure disputed by others as unfounded.[59]

As this overview demonstrates, existing law gives the government substantial options for detaining those whom it suspects of terrorist activity. At the same time, it also shows that existing authorities are susceptible to abuse and already afford the government too much unchecked power to detain. Within the United States alone, thousands of people were detained who posed

57. Ken Ballen & Peter Bergen, *The Worst of the Worst?*, FOREIGN POL'Y, Oct. 2008, *available at* http://www.foreignpolicy.com/story/cms.php?story_id=4535 (quoting Donald Rumsfeld).

58. *See* OFFICE OF ASSISTANT SEC'Y OF DEF., U.S. DEP'T OF DEF., NEWS RELEASE NO. 1017-08, DETAINEE TRANSFER ANNOUNCED (2008) (reporting that 525 detainees had been transferred or released), *available at* http://www.defenselink.mil/releases/release.aspx?releaseid=12449; David Bowker & David Kaye, *Guantanamo by the Numbers*, N.Y. TIMES, Nov. 10, 2007, at A15 *available at* http://www.nytimes.com/2007/11/10/opinion/10kayeintro.html.

59. *See* MARK DENBEAUX ET AL., RELEASED GUANTÁNAMO DETAINEES AND THE DEPARTMENT OF DEFENSE: PROPAGANDA BY THE NUMBERS? (2009) at 2, 9-15, *available at* http://law.shu.edu/center_policyresearch/reports/propaganda_numbers_11509.pdf (showing vast inconsistencies in numbers Pentagon has reported as having returned to battle upon release from custody); David Morgan, *Pentagon: 61 Ex-Guantanamo Inmates Return to Terrorism*, REUTERS, Jan. 13, 2009, *available at* http://www.reuters.com/article/topNews/idUSTRE50C5JX20090113?feedType=RSS&feedName=topNews&rpc=22&sp=true.

no demonstrable threat. Accordingly, if reform is necessary, it should start by seeking to correct for the abuses evident in the wake of 9/11. While concerns about the need for preventive detention often rest on hypothetical scenarios, the case for reform of existing laws is supported by actual experience.

II.

PREVENTIVE DETENTION AND THE CONSTITUTION

The Constitution itself neither expressly forbids nor expressly authorizes preventive detention. The Supreme Court's constitutional jurisprudence reflects a healthy skepticism on the subject, tempered by the realist acknowledgment that the criminal justice system cannot adequately address all of the dangers that individuals may pose to society, and that therefore preventive detention, narrowly confined, is sometimes appropriate.

The constitutionality of preventive detention is a critically important subject, as the power to detain human beings is one of the most awesome authorities a sovereign exercises. If that power is unchecked, it would matter little what other rights were guaranteed on paper. If people have the right to speak freely, for example, but the government has the power to lock them up without legal justification, fair procedure, or access to court, the right to speak freely cannot for all practical purposes be guaranteed. In this sense, due process and habeas corpus are the *sina qua non* not only of all other rights, but of the very idea of limited government. As Senator Daniel Patrick Moynihan said, "[i]f I had to choose between living in a country with habeas corpus but without

free elections, or a country with free elections but without habeas corpus, I would choose habeas corpus every time."[60]

In recognition of the importance of checking the government's detention power, the Constitution restricts that power through the Due Process Clause, the Suspension Clause, and the Fourth Amendment. As the Supreme Court has noted, "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects."[61] The writ of habeas corpus, a preexisting common law right to challenge the legality of detention in court, was given constitutional status by the Suspension Clause, which guarantees recourse to the writ except in the most extreme circumstances—when Congress determines in the face of a rebellion or invasion that the public safety necessitates suspension.[62] The Fourth Amendment also restricts official detention, for it

60. 145 CONG. REC. 924 (1999) (statement of Sen. Moynihan).

61. Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

62. INS v. St. Cyr, 533 U.S. 289, 301 (2001) ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." (footnote omitted)); *see also* Brown v. Allen, 344 U.S. 443, 533 (1953) (Jackson, J., concurring) ("The historic purpose of the writ [of habeas corpus] has been to relieve detention by executive authorities without judicial trial." (footnote omitted)). The roots of the right not to be detained unlawfully extend back beyond the Constitution. William Blackstone characterized as an absolute right "the personal liberty of individuals . . . without imprisonment or restraint, unless by due course of law." WILLIAM BLACKSTONE, 1 COMMENTARIES *134 (footnote omitted). He also stated that "to refuse or to delay to bail any person bailable is an offence against the liberty of the subject . . . by the common

requires that all seizures (including arrests) be reasonable, and generally provides that an arrest is not reasonable unless based on probable cause.

A. Due Process

Most of the Supreme Court's decisions concerning preventive detention have addressed the issue from the standpoint of due process. In a 2001 decision surveying the landscape and articulating the constitutional preference for criminal prosecution of socially dangerous behavior, the Supreme Court stated that "government detention violates th[e Due Process] Clause" unless it is imposed as punishment in a criminal proceeding conforming to the rigorous procedures constitutionally required for such proceedings, or "in certain special and 'narrow' non-punitive 'circumstances.'"[63] Non-punitive, or preventive, detention has been upheld only where an individual (1) is either in criminal or immigration proceedings and has been shown to be a danger to the community or flight risk;[64] (2) is dangerous because of a "harm-threatening mental illness"

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law, as well as by the statute and the *habeas corpus* act." 4 WILLIAM BLACKSTONE, COMMENTARIES *297 (citations and footnote omitted). In England and in the colonies prior to 1789, the writ of habeas corpus was available to non-enemy aliens seeking to challenge their detention. *St. Cyr*, 533 U.S. at 301-02.

63. *Zadvydas*, 533 U.S. at 690.

64. *Id.*; *see, e.g.*, United States v. Salerno, 481 U.S. 739, 755 (1987) (finding the Bail Reform Act constitutional because it authorizes pretrial detention based on danger to the community and acknowledging bail's traditional use against flight); Carlson v. Landon, 342 U.S. 524, 541 (1952) (holding executive could detain violent immigrants pending the outcome of deportation proceedings).

that impairs his ability to control his dangerousness;[65] or (3) is an "enemy alien" or "enemy combatant" in wartime.[66]

Three general principles are common to all of the preventive detention regimes that the Court has upheld. First, the purpose and character of the detention must not be punitive; punishment requires a criminal trial. This principle of "non-punitiveness" assumes that where the government seeks to address dangerous conduct by individuals, the punitive criminal justice system is the first and presumptive line of defense. Only where punishment through the criminal justice system cannot address the problem is preventive detention warranted.

Second, the detention must be temporally limited. Indefinite detention is an especially drastic measure, and accordingly most preventive detention regimes that have been upheld have an articulable endpoint—for example, a trial, deportation, treatment of a mental disability, or termination of a military conflict. The endpoint need not be a specific date, but there must be a conceptual terminating point to the detention. When individuals are detained pending criminal trial or deportation proceedings, the conclusion of the legal process marks a clear end to their preventive detention. In a criminal trial, the defendant will either be acquitted and set free, or convicted and then

65. *Zadvydas*, 533 U.S. at 690; *see, e.g.*, Kansas v. Crane, 534 U.S. 407, 411 (2002); Kansas v. Hendricks, 521 U.S. 346, 358 (1997).

66. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004); Ludecke v. Watkins, 335 U.S. 160 (1948).

imprisoned for punitive rather than preventive ends. Similarly, a deportation proceeding will result either in a determination that the individual is not deportable, in which case she will be freed, or in an order of removal, which must be executed in a reasonable period of time or the individual must be released. In civil commitment settings, if the mental illness that is a predicate for the commitment is successfully treated, or if the individual no longer poses a danger, he must be released. Finally, prisoners of war must be released when the necessity created by the military conflict comes to a close, either because the war ends or because as individuals they no longer pose a threat to return to battle.

Third, with narrow and questionable exceptions, the justification for detention must be particularized to the individual, and generally requires probable cause of some past wrongdoing as well as proof of some future danger or risk warranting prevention. Just as the state cannot impose criminal sanctions on individuals absent a determination of individual culpability,[67] it cannot lock

67. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 920 (1982) (civil liability for group membership requires a showing of an individual intent to further illegal aims of the group); United States v. Robel, 389 U.S. 258, 264-65 (1967) (finding unconstitutional a statute because it: "quite literally establishes guilt by association alone, without any need to establish that an individual's association poses the threat feared by the Government in proscribing it"); Scales v. United States, 367 U.S. 203, 224-25 (1961) (due process requires showing of individual culpability for criminal sanction).

up a person absent a demonstrated need to lock up that specific person.[68]

The Bail Reform Act illustrates these principles. In *United States v. Salerno*, the Supreme Court upheld the Act's authorization of preventive pretrial detention for dangerous criminal defendants against a due process challenge.[69] The Court emphasized that the statute authorized detention only for preventive purposes, only for a limited period of (pretrial) time, and only upon a showing both of individualized probable cause for arrest, and of clear and convincing evidence that no release conditions "'will reasonably assure . . . the safety of any other person and the community.'"[70] Denial of bail to dangerous arrestees pending trial did not constitute punishment, the Court reasoned, because it served a legitimate non-punitive interest in protecting the community and was not excessive in light of that interest.[71] If the government's interests could be addressed through criminal prosecution, then detention without trial would be excessive. Because it necessarily takes time to bring a case to trial, criminal conviction and punishment cannot address the danger that a defendant will flee or commit further harm pending trial.

The Court held that the Bail Reform Act's imposition of preventive detention satisfied substantive due process because: (1) it was limited in time to

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

69. *Id.* at 741.

70. *Id.* at 741; *accord id.* at 750-52.

71. *Id.* at 747. A detention may be deemed impermissibly punitive not only if it has a punitive motive, but also if, even if properly motivated, it is excessive in character. *Id.*

the period pending trial; (2) it served a "legitimate and compelling" interest; (3) it applied only to "a specific category of extremely serious offenses;" and (4) it required both a showing of probable cause for arrest and clear and convincing evidence, established in a "full-blown adversary hearing," that "no conditions of release can reasonably assure the safety of the community or any person."[72] These elements were critical to the Court's determination because they established that the law narrowly furthered a genuine need that could not be served through the presumptive route of criminal conviction and incarceration.

The Court also held that the Bail Reform Act's "extensive safeguards" satisfied procedural due process.[73] The safeguards included the rights to counsel, to testify, to proffer evidence, and to cross-examine witnesses.[74] In addition, the government was obliged to prove the need for detention by clear and convincing evidence.[75] Finally, the statute required that an independent judge, guided by "statutorily enumerated factors," issue a written decision subject to "immediate appellate review."[76]

If detention were imposed without an individualized showing of necessity, it would be excessive in light of its legitimate purposes, and would violate

72. *Id.* at 749-50

73. *Id.* at 752.

74. United States v. Salerno, 481 U.S. 739, 751-52 (1987).

75. *Id.* at 752.

76. *Id.* at 751-52.

substantive due process. And without safeguards affording the individual a meaningful opportunity to defend himself, civil detention would violate procedural due process. Thus, *Salerno*'s reasoning implies that preventive detention in the pretrial detention context may be imposed only if the criminal prosecution model cannot adequately address the state's compelling interests in protecting the community or precluding flight of a criminal defendant, it lasts only for a limited period of time, and it includes a fair, individualized determination that detention is necessary.[77]

Civil commitment, like detention pending trial, also addresses a scenario in which criminal prosecution often cannot adequately address danger to the community. Persons who lack the requisite mental capability to determine right from wrong or to control their own actions generally cannot be held criminally liable. Yet they may nonetheless pose a serious danger to the community. The Court has accordingly upheld civil commitment where an individual is found, after a fair adversarial proceeding, to be a danger to himself or others and to have a mental illness or abnormality that makes it "'*difficult*, if not impossible, for the [dangerous] person to control his dangerous behavior.'"[78] The latter

77. Analogous reasoning supports preventive detention of foreign nationals charged with deportation pending the outcome of their proceedings, provided they pose a risk of flight or a danger to the community. *See* David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1029 (2002); *see, e.g.*, Zadvydas v. Davis, 533 U.S. 678, 690-91 (2001).

78. Kansas v. Crane, 534 U.S. 407, 411 (2002) (quoting Kansas v. Hendricks, 521 U.S. 346, 358 (1997))

showing is particularly essential "lest 'civil commitment' become a 'mechanism for retribution or general deterrence'—functions properly those of criminal law, not civil commitment."[79]

Commitment for dangerousness alone is not constitutionally permitted. In *Foucha v. Louisiana*, the Court invalidated a Louisiana statute that authorized civil commitment on a finding of dangerousness without any finding of mental illness, stressing that our present system, "with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law."[80] The civil commitment cases thus underscore that criminal prosecution is, as a constitutional matter, the presumptive route for addressing socially dangerous behavior, and that preventive detention is permissible only where for some reason the criminal process cannot adequately address dangerousness.

The maxim that civil commitment may not be imposed for purposes of retribution or general deterrence also supports the requirement that detention be

79. *Id.* at 412 (quoting *Hendricks*, 521 U.S. at 372-73 (Kennedy, J., concurring)). To the same effect, the *Crane* Court stated that this requirement was designed "to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." *Id.* at 413. Similarly, in *Hendricks*, the Court explained that the requirement of a harm-threatening mental illness "serve[s] to limit involuntary civil commitment to those who suffer from a volitional impairment rendering them dangerous beyond their control." *Hendricks*, 521 U.S. at 358.

80. 504 U.S. 71, 83 (1992).

predicated on an individualized showing of need. One might otherwise contend that detention of a whole category of persons will have a general deterrent effect, eliminating the need to show that each individual's detention is in fact necessary for reasons specific to that individual.[81] With those purposes off limits, the only legitimate purposes for detention are by definition subject to individualized proof, such as protection of the community from dangerous persons and avoiding flight from pending criminal or immigration proceedings.

Civil commitment is in some sense broader than pretrial preventive detention, as it does not formally require probable cause that an individual has engaged in criminal conduct. But that may be only a formality; as a practical matter, it is highly unlikely that the government could establish that someone posed a sufficient danger to warrant civil commitment without proving some past harmful conduct that, but for the individual's mental illness, would amount to probable cause of criminal behavior. Accordingly, the prediction about future harm that underlies civil commitment will often require proof of past harmful conduct.

Preventive detention is also permitted in wartime. Here, too, the criminal model does not adequately address the state's legitimate concerns. In a

81. The Bush administration made just that argument to justify detention of asylum seekers arriving from Haiti, contending not that any particular individual had to be detained to guard against the risk of flight or danger to the community, but that the detention of all Haitian asylum seekers would deter Haitians from coming to the United States to seek asylum. D-J-, Resp't, 23 I. & N. Dec. 572, 577 (Att'y Gen 2003) (interim decision).

traditional armed conflict, the laws of war forbid the state from prosecuting enemy soldiers for fighting—conduct that, outside a war setting, would violate laws against murder, assault, and the like.[82] In addition, a nation cannot presume, consistent with respect for individual autonomy, that an enemy soldier will desist from fighting against it, because the soldier is under no obligation to do so, and on the contrary, is generally required by his own country's laws to fight. Finally, problems of proof are significant, both because military forces cannot be expected to gather evidence carefully on the field of battle and because the military will frequently have legitimate needs to maintain secrecy about what it knows about the opposing forces. Accordingly, preventive detention during wartime without criminal charges or a criminal trial has long been recognized as legitimate.

Most recently, in *Hamdi v. Rumsfeld*, the Supreme Court upheld the detention of a U.S. citizen allegedly captured on the battlefield carrying arms and fighting for the Taliban during the military conflict in Afghanistan.[83] The administration argued that it could hold Hamdi indefinitely as an "enemy combatant" without affording him any hearing, on the basis of a hearsay

82. FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (LIEBER CODE), U.S. WAR DEP'T GENERAL ORDERS NO. 100, § 3, art. 57 (1863) ("So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses."), *available at* http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument.

83. 542 U.S. 507, 510-13 (2004).

affidavit from a mid-level military official.[84] At most, it maintained, habeas corpus review should ask only whether the government's affidavit constituted "some evidence" to support the detention,[85] an extremely deferential standard that precluded any inquiry into whether the affidavit's assertions were in fact true, and that would not involve any evidentiary hearing.

The Supreme Court recognized that detention under the narrow circumstances presented was statutorily authorized, but insisted on much more robust procedural guarantees than the Bush administration has provided. It ruled that detention for the purpose of preventing a fighter from returning to the battle during a military conflict was supported by a long tradition under the laws of war, and was therefore authorized as a "fundamental incident" to Congress's Authorization to Use Military Force.[86] But it held that the government had failed to afford Hamdi adequate procedural protections.[87] Due process required the government to afford Hamdi notice of the factual basis for his detention and a meaningful opportunity to contest the government's allegations before an independent adjudicator.[88] Thus, even in wartime, an individualized showing of need, established in a fundamentally fair proceeding,

84. *Id.*

85. *Id.* at 527-28.

86. *See id.* at 519.

87. *Id.* at 529-37.

88. *Id.* at 533.

is required if preventive detention is to satisfy due process.[89]

B. Fourth Amendment

While preventive detention has most often been analyzed through the lens of due process, the Fourth Amendment also imposes limits on the practice. Its requirement that all seizures be "reasonable" has long been interpreted to mean that arrests (seizures of the person) generally require a showing of probable cause that the arrestee committed a criminal offense.[90] Since preventive detention requires an initial arrest, probable cause of some past or ongoing illegal activity under criminal or immigration law is generally required for preventive detention.

There are exceptions to this requirement, which would presumably be justified under the Fourth Amendment by finding that a given seizure is minimally intrusive and serves special needs above and beyond ordinary law enforcement.[91] The material witness law authorizes preventive detention

89. *See id.* at 523.

90. U.S. CONST. amend. IV; *see, e.g.*, Carroll v. United States, 267 U.S. 132 (1925).

[91] The Court has upheld searches and seizures without probable cause or a warrant where the search or seizure scheme serves special needs above and beyond ordinary law enforcement, and the scheme is otherwise reasonable. *See, e.g.*, Michigan v. Sitz, 496 U.S. 444 (1990) (upholding sobriety checkpoint on highway where it served special need of highway safety, was applied across the board,

without any showing of probable cause of past or current criminal activity, and instead requires proof that an individual has testimony material to a criminal proceeding and "that it may become impracticable to secure the presence of the person by subpoena."[92] Civil commitment does not formally require probable cause of a past crime, although as a practical matter it may require something very close. And military detention of combatants does not require proof of criminal activity, but does require that the individual be a combatant for enemy forces. The Supreme Court has not addressed the validity of these measures under the Fourth Amendment, but presumably they would be deemed "reasonable" for reasons similar to those outlined under the Due Process Clause above. Generally, however, probable cause of some criminal activity is required for preventive detention of those suspected of criminal activity regardless of whether the crime is terrorism.

As a procedural matter, the Fourth Amendment requires either a judicially approved warrant in advance of arrest, or, where warrantless arrests are permissible,[93] that the arrestee be brought before a judge promptly, presumptively within forty-eight hours, for a probable cause hearing.[94] The

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and involved only a minimally intrusive brief stop).

92. 18 U.S.C. § 3144 (2006).

93. The Court permits warrantless arrests where there is probable cause and an arrest takes place in public, or where there are exigent circumstances. *See, e.g.*, United States v. Watson, 423 U.S. 411, 417 (1976).

94. County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).

government may be able to show that a delay of more than forty-eight hours is necessary, but the burden rests with the government.[95]

There is no reason why these Fourth Amendment protections against "unreasonable seizures" ought not to apply to all arrests in the United States, including arrests of foreign nationals, and including arrests for preventive purposes.[96] An arrest for immigration or preventive purposes is just as much a "seizure" as an arrest for criminal law enforcement purposes. Thus, any preventive detention regime would presumably require some showing of individualized suspicion, and prompt access to a court for a determination as to whether the government can justify the preventive detention.

C. Suspension Clause

The Suspension Clause guarantees the availability of the most important practical safeguard against arbitrary detention: judicial review.[97] The

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95. *Id.* at 57.

96. Any substantial restriction on an individual's freedom of movement is a seizure, and requires reasonable suspicion, if it amounts to only a brief investigative stop, *Terry v. Ohio*, 392 U.S. 1, 27 (1968), or probable cause if it amounts to a custodial arrest. United States v. Place, 462 U.S. 696, 709-10 (1983) (seizure of luggage for ninety minutes was not a brief stop, and required probable cause); Florida v. Royer, 460 U.S. 491, 499 (1983) (stop of airline passenger rose to level of custodial arrest, and therefore required probable cause).

97. *See, e.g.*, Boumediene v. Bush, 128 S. Ct. 2229 (2008). Justice Kennedy, writing for the Court, observed that: "Where a person is detained by executive order, rather than . . . after being tried and convicted in a court, the need for collateral review is most pressing. A criminal conviction in the usual course occurs after a judicial hearing before a tribunal disinterested in the

Suspension Clause strictly limits the situations in which habeas corpus may be suspended, and guarantees that absent suspension, a detained individual should have prompt and effective recourse to a court to challenge the legality of his detention. In *Boumediene v. Bush*, the Supreme Court held that this constitutional guarantee applied even to foreign nationals detained on the battlefield and held at Guantanamo Bay Naval Base, outside the United States's borders.[98] *Boumediene* establishes that the Suspension Clause identifies a constitutionally based source of jurisdiction, subject to restriction only through a formal suspension of the writ. Thus, where the Suspension Clause applies (a question governed in the extraterritorial setting by a practical consideration of multiple factors), any preventive detention regime must include prompt and effective access to a court to test the legality of the detention, absent a formal suspension of the writ.

In sum, the Constitution does not forbid preventive detention, but does require that any preventive detention scheme meet four basic requirements: (1) it must have a legitimate, non-punitive, purpose that cannot be served through the presumptive approach of criminal prosecution; (2) it must be accompanied by fair procedures to establish that the individual in fact poses a threat sufficient to warrant preventive detention; (3) it must provide for prompt and

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outcome and committed to procedures designed to ensure its own independence. These dynamics are not inherent in executive detention orders or executive review procedures. In this context the need for habeas corpus is more urgent." *Id.* at 2269.

98. *Id.*

meaningful judicial review, absent suspension of the writ; and (4) it must be subject to a definable (if not necessarily definite) endpoint.

D. Exceptions to the Rule

Constitutional jurisprudence on preventive detention includes some exceptions to the rules set forth above, but these exceptions are of questionable validity, and in any event are confined to very particular circumstances.

In *Korematsu v. United States*, for example, the Court infamously upheld President Franklin Delano Roosevelt's World War II "Japanese exclusion order," requiring the displacement and ultimate internment of all Japanese Americans and Japanese nationals residing on the West Coast.[99] The Court's decision focused on equal protection rather than due process, and concluded that the need to forestall espionage and sabotage, coupled with the asserted inability to identify specific threats on an individualized basis gave rise to a compelling state interest that justified excluding all persons of Japanese descent from the West Coast.[100] The majority did not expressly address a due process challenge, but its reasoning would presumably also support the constitutionality, as a matter of due process, of detentions without individualized showings of dangerousness.[101]

Korematsu, however, has been thoroughly discredited. The Court has

99. 323 U.S. 214, 219 (1944).

100. *See id.* at 223-24.

101. *See id.* at 218-19.

never cited it with approval, and every sitting Justice who has mentioned it has condemned it.[102] Congress ultimately issued a formal apology and paid reparations to the Japanese internees,[103] and the federal courts invalidated the convictions of Korematsu and others for defying the exclusion orders.[104] *Korematsu* has little if any precedential value. To the contrary, its widespread rejection over time reinforces the principle that individuals should be treated as individuals, on their own facts and circumstances, even when national security is at stake.

In World War II, the Court also reviewed a challenge to the detention pending removal of a German national under the Alien Enemy Act, which authorizes the President to detain, deport, or otherwise restrict the liberty of any person over fourteen years of age who is a citizen of the country with which the United States is at war and has not naturalized as a United States citizen.[105] In *Ludecke v. Watkins*, a five-member majority upheld the removal, but offered

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102. *See* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 993 n.165 (2002) (citing various cases); *see, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 535 (2004) (O'Connor, J.) (citing the *Korematsu* dissent); *Id.* at 608 (Thomas, J., dissenting).

103. *See* Civil Liberties Act of 1988, Pub L. No. 100-383, 102 Stat. 903 (acknowledging "fundamental injustice" of internment and ordering restitution for all persons ordered to leave their homes).

104. *See, e.g.*, Korematsu v. United States, 584 F. Supp. 1406, 1417 (N.D. Cal. 1984); Hirabayashi v. United States, 828 F.2d 591, 603-04 (9th Cir. 1987).

105. *See, e.g.*, Ludecke v. Watkins, 335 U.S. 160 (1948); 50 U.S.C. § 21 (2000).

little reasoning to support its conclusion [106] Instead, it rested almost entirely on custom, asserting simply that the Alien Enemy Act was "almost as old as the Constitution, and it would savor of doctrinaire audacity now to find the statute offensive to some emanation of the Bill of Rights."[107] This is hardly persuasive. The law invalidated in *Marbury v. Madison* was also enacted contemporaneously with the Constitution, and that did not protect it from invalidation.[108] Similarly, laws criminalizing homosexual sex have a long legacy, yet the Court has held that they violate due process today.[109]

In *Ludecke*, moreover, the President had asserted only the power to deport those alien enemies who he specifically determined to pose a danger, and had afforded Ludecke a hearing on his specific circumstances.[110] The Supreme Court has more recently characterized *Ludecke* as holding that "in times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the Government believes to be dangerous,"[111] a

106. 335 U.S. 160, 173 (1948).

107. *Id.* at 171 (footnote omitted).

108. 5 U.S. (1 Cranch) 137 (1803). It is true, of course, that when the court decided *Ludecke*, the Enemy Aliens Act had been on the books for a much longer time than the statute invalidated in *Marbury* had been when that case was decided. However, but because this Act is triggered only by declared wars or invasion, it was only sporadically in force, and the Supreme Court had not previously reviewed or applied it. *See* 50 U.S.C. § 21.

109. *See* Lawrence v. Texas, 539 U.S. 558, 578-79 (2003).

110. *Ludecke*, 335 U.S. at 163-64.

111. United States v. Salerno, 481 U.S. 739, 748 (1987).

description that is consistent with a requirement of individualized findings. The Alien Enemy Act itself does not require the President to make an individualized finding of danger or suspicion,[112] but as the law had been implemented in Ludecke's situation such a finding was indeed required. [113] Moreover, the continuing validity of the Alien Enemy Act has not been tested since *Ludecke*, because the Act applies only in declared wars,[114] and the United States has not declared war since World War II.

As with *Korematsu*, there is reason to doubt that *Ludecke* remains good law. The *Ludecke* Court employed highly deferential reasoning strikingly similar to that used in *Korematsu*, and strikingly different from that employed in *Boumediene*. *Ludecke* precedes the development of the Court's modern due process jurisprudence regarding preventive detention, which required an individualized showing of need for detention, even in wartime.[115] And the Court has warned that the power over the particular category of "enemy aliens" should not be extended beyond its unique setting.[116]

The only non-wartime Supreme Court decision to uphold preventive detention without an individualized showing of need concerned a statute

112. *See* 50 U.S.C. § 21.

113. *See Ludecke, 335 U.S. at 163.*

114. *See* 50 U.S.C. § 21.

115. *See, e.g.*, Hamdi v. Rumsfeld, 524 U.S. 507, 533 (2004) (requiring that American citizen detained as "enemy combatant" be afforded notice and a meaningful opportunity to respond before a neutral decision maker).

116. Johnson v. Eisentrager, 339 U.S. 763, 772 (1950).

subjecting certain "criminal aliens" to mandatory immigration detention pending removal.[117] As in *Ludecke*, the Court in *Demore v. Kim* split five-to-four. The majority relied on statistical evidence that "criminal aliens"—those who had been convicted of crimes that rendered them presumptively deportable—were more likely than other foreign nationals to commit additional crimes or flee if released on bond.[118] And the Court stressed that would be unacceptable if applied to citizens may be permissible in the immigration setting.[119]

However, Justice Kennedy, who cast the necessary fifth vote, emphasized in a separate concurrence that under the immigration statute, foreign nationals were entitled to an individualized hearing if they claimed not to fall within the category subject to mandatory detention.[120] He further noted that if deportation were unreasonably delayed, an individualized showing of dangerousness or flight risk would be constitutionally required.[121]

The Court's reasoning in *Kim* is flawed, as it proffers no good reason for discarding the requirement of individualized need before subjecting a human being to preventive detention. Its explicit invocation of a double standard, allowing the deprivation of liberty of foreign nationals without the due process

117. Demore v. Kim, 538 U.S. 510, 531 (2003).

118. *Id.* at 521.

119. *Id.*

120. Id. at 532 (Kennedy, J., concurring).

121. *Id.* at 531-32 (Kennedy, J., concurring).

to which citizens would be entitled, is especially troubling, as it posited no legitimate rationale for differential treatment in this context.[122]

At most, then, the Court has upheld preventive detention without requiring a fair individualized determination that the detainee poses a threat or risk of flight that could not be addressed through the criminal process on only three occasions. Two of those decisions arose in World War II, and may not withstand the test of history. The third is limited to temporary preventive detention of a class of foreign nationals who are almost certainly removable and have been shown as a class to pose a greater than average risk of flight—and even there the crucial fifth vote stressed the importance of at least some kind of individualized determination. With the exception of these three decisions, the Court has upheld preventive detention only where criminal prosecution is inadequate to address a serious danger to the community, the need for preventive detention in an individual case has been established in a fair, adversarial hearing subject to judicial review, and the detention has a definable endpoint.

122. Great Britain's Law Lords, by contrast, ruled a post-9/11 law invalid precisely because it imposed indefinite preventive detention without charges on foreign nationals suspected of terrorist ties and not British citizens. It found no difference in the threats British and foreign nationals posed, and no difference in their respective interests in being free of confinement. The Lords declared the statute incompatible with the European Convention of Human Rights, as incorporated in British law by the Human Rights Act of 1998, because the statute discriminated uulawfully between British citizens and foreign uationals.. A v. Sec'y of State for the Home Dep't, [2004] UKHL 56, ¶73 (U.K.).

Still, the precedents described above leave many unanswered questions. Is it ever permissible to detain an individual on grounds of future danger without any charge or adjudication of past dangerous conduct or wrongdoing? What burden of proof is required for preventive detention, and does the burden vary depending on the length of the detention? When does the Constitution mandate that a detainee be afforded access to a lawyer? How should the individual's right to a fair hearing be reconciled with the government's interest in maintaining the confidentiality of information relevant to detention?

In short, the Court's precedent provides some limited guidance on the constitutionality of a terrorist preventive detention law. On the one hand, the Court has not ruled out preventive detention altogether. On the other, it has viewed preventive detention skeptically, and upheld it only in limited settings, principally where the criminal justice system is incapable of addressing the government's legitimate concerns about an individual's danger or flight risk, and where fair procedures are in place. The Court has made clear that preventive detention is not permissible for punitive purposes or for general deterrence. And it has recognized the legitimacy of preventive detention only where an individual is awaiting resolution of formal charges that he has violated criminal or immigration law, where an individual suffers from a mental disability that renders him dangerous to himself or others, or where the laws and customs of war have long recognized the power to detain as an incident of engagement in an ongoing military conflict.

III.

REFORM OF EXISTING LAW

The history of preventive detention, both before and after 9/11, suggests that there is more reason to restrict than to expand existing preventive detention laws. The United States has survived for more than two hundred years without a preventive detention law directed at terrorists or other serious criminals. Proponents of expanded preventive detention powers have not pointed to a single al Qaeda member or other terrorist who had to be let free because of the lack of adequate existing detention authority. At the same time, thousands of persons having nothing to do with terrorism were subject to preventive detention in the wake of 9/11. Accordingly, the first step in any reform of the preventive detention laws must be to curtail the abuses. This would require, at a minimum, reforms of immigration law, the material witness law, the material support statutes, and the enemy combatant detention authority. I will discuss each in turn. In each instance, the proper reform is not elimination of preventive detention authority, but a narrowing of the law to ensure that it is employed only where truly necessary. Finally, I will address whether there is a need for a new short-term preventive detention statute directed at persons suspected of involvement in imminent terrorist attacks.

A. Immigration Law

The vast majority of persons detained in anti-terrorism measures in the wake of 9/11 were foreign nationals detained pursuant to immigration law.[123]

123. COLE, *supra* note 6, at 6-35.

Under that law, if a foreign national is placed into immigration proceedings for having allegedly violated the terms of her visa, she may be denied bond and held pending resolution of the removal proceeding if she poses a risk of flight or a danger to the community.[124] This form of preventive detention is analogous to that imposed on persons awaiting a criminal trial, and is not objectionable in itself. However, this authority was widely abused after 9/11, resulting in the detention of many persons without any objective justification for their detention.[125]

Immigration law should be amended to ensure that preventive detention is available on the same terms—and with the same safeguards—as in the criminal bail context. The immigrant facing a deportation hearing and the criminal defendant have identical interests in not being arbitrarily deprived of their liberty. Similarly, the government has identical interests in detaining the immigrant and the criminal defendant if they pose a risk of flight or a danger to the community. We treat foreign nationals and citizens awaiting criminal trial identically; why should it matter that a foreign national is being detained pending an immigration proceeding rather than a criminal trial? There is no justification for a double standard here. Accordingly, a statute modeled on the Bail Reform Act should be enacted to govern preventive immigration detention.

In addition to adopting Bail Reform Act procedures and standards, several

124. 8 U.S.C. § 1226; 8 C.F.R. § 236.1.

125. *See* COLE, *supra* note 6, at 26-35..

other reforms would be necessary to achieve parity between the treatment of foreign nationals in immigration proceedings and defendants in criminal proceedings. First, foreign nationals arrested for alleged immigration violations should be charged and brought before a judge for a probable cause hearing within forty-eight hours of their arrest. Under current immigration rules and regulations, foreign nationals can be arrested without charges, and the regulations merely require that they be charged within a "reasonable period of time" in emergencies.[126] That language, introduced by Attorney General Ashcroft in the first weeks after 9/11, ultimately led to hundreds of foreign nationals being arrested and held for days, weeks, and sometimes even months without being charged with any immigration violation.[127] A criminal arrest is "unreasonable" absent probable cause,[128] found by a judge either before or within forty-eight hours after arrest. An immigration arrest ought to require the same showing and procedure.

Second, if the government is unable to meet its burden of demonstrating

126. 8 C.F.R. § 287.3(d) (2008).

127. AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: AMNESTY INTERNATIONAL'S CONCERNS REGARDING POST SEPTEMBER 11 DETENTIONS IN THE USA 10-11 (2002), *available at* http://www.amnesty.org/en/library/info/AMR51/044/2002; HUMAN RIGHTS WATCH, PRESUMPTION OF GUILT: HUMAN RIGHTS ABUSES OF POST-SEPTEMBER 11 DETAINEES 50 (2002), *available at* http://www.hrw.org/legacy/reports/2002/us911/.

128. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103, 114 (1975) (requiring prompt judicial hearing of probable cause, presumptively within 48 hours, where individuals are arrested without warrant).

that an individual poses a danger to the community or risk of flight, release on bond or the individual's own recognizance should be ordered. The Justice Department's Inspector General found that in the wake of the 9/11 attacks, immigration authorities frequently delayed bond hearings solely because they had no objective evidence that would justify denying bond, and they did not want to risk a hearing that would expose that fact and lead to the individual's release.[129] The Bush administration's official policy was to hold individuals in detention until they were "cleared" of any connection to terrorism, and government officials exploited immigration law to obtain that result.[130]

Third, indigent foreign nationals detained during removal proceedings should be entitled to government-provided counsel at least with respect to the issue of their detention. Existing immigration law does not entitle indigent foreign nationals to receive legal representation at the government's expense in immigration hearings, despite the gravity of such hearings for individuals' lives, and the difficulty of navigating the complex immigration system. The kind of justice foreign nationals receive often depends on whether they have legal assistance, and on the quality of that assistance.[131] Irrespective of whether

129. *See* OIG REPORT, *supra* note 41, at 76-80.

130. *See* OIG REPORT, *supra* note 41, at 77; COLE, *supra* note 6, at 26-35; CONSTITUTION PROJECT, THE USE AND ABUSE OF IMMIGRATION AUTHORITY AS A COUNTERTERRORISM TOOL (2008) at 6, available at www.constitutionproject.org/pdf/Immigration_Authority_As_A_Counterterrorism_Tool.pdf.

131. *See* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 349 (2007) (finding, in 247 immigration asylum hearings from 2000 until

the United States should provide indigent foreign nationals legal assistance for removal hearings in general, the government should certainly provide legal assistance when it seeks to detain. Foreign nationals often languish in detention for long periods while their cases are pending.[132] While detention may be necessary for some, appointment of counsel would help to ensure that we detain only those who truly need to be detained. Over time, such a reform might even save the government money, by saving on the cost of unnecessary detentions.

Fourth, the government should rescind its regulation providing an automatic stay of release orders where immigration authorities appeal a grant of release on bond.[133] Under this regulation, which Attorney General Ashcroft promulgated in the wake of 9/11, the government need not show that it has any chance of success on appeal in order to keep a foreign national detained, even after an immigrationo judge has found no basis for detention.[134] The mere filing of the appeal automatically stays the foreign national's release for the duration of the appeal. Appeals can easily take several months to resolve. There is no legitimate rationale for giving the government a stay without requiring it to

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2004, asylum seekers who received legal assistance were more likely to be granted asylum than those who lacked assistance).

132. *See* ACLU, IMMIGRANT'S RIGHTS: DETENTION, CONDITIONS OF CONFINEMENT IN IMMIGRATION DETENTION FACILITIES (2007), *available at* http://www.aclu.org/immigrants/detention/30261pub20070627.html.

133. *See* 8 C.F.R. §1003.19(i)(2) (2008).

134. *Id.*

show that it is likely to succeed on appeal, the showing traditionally required for stays and injunctions pending appeal.[135] For these reasons, many courts have declared the automatic stay provision unconstitutional.[136]

Finally, immigration law should be clarified to make explicit that immigration detention must end once removal can be effectuated. After 9/11, the government often kept foreign nationals in detention long after they could have been released.[137] In some instances, individuals admitted that they had overstayed their visas and agreed to leave, and immigration judges granted "voluntary departure" orders, which provide that the alien is free to leave.[138] At that point, the only action remaining was for the foreign national to leave the country. Yet under the Bush administration's "hold until cleared" policy, the government would not allow the detainee to leave the country until it was satisfied that he was not connected to terrorism even where there were no obstacles to his immediate departure.[139] Such detention should be unlawful, for the only legitimate purpose of an immigration detention is to aid removal. Once a person has agreed to leave and can leave, there is no legitimate *immigration*

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135. FED. R. CIV. P. 62.

136. *See* Ashley v. Ridge, 288 F. Supp. 2d 662, 669 (D.N.J. 2003); Uritsky v. Ridge, 286 F. Supp. 2d 842, 846-47 (E.D. Mich. 2003); Bezmen v. Ashcroft, 245 F. Supp. 2d 446, 451 (D. Conn. 2003); Almonte-Vargas v. Elwood, No. 02-CV-2666, 2002 U.S. Dist. LEXIS 12387 (E.D. Pa. June 28, 2002).

137 OIG REPORT, *supra* note 41, at 37-38.

138 See, e.g., Cole, supra note 6 at 33-34 (discussing Turkmen).

139. *Id.*

reason to keep him detained any further.[140]

These reforms would place preventive detention in the context of pending immigration proceedings on the same footing as preventive detention pending a criminal trial. By ensuring that the government must promptly demonstrate that detention without bond is actually necessary, such reforms would reduce the likelihood that immigration detention is employed unnecessarily, to detain persons who pose no threat. Preventive detention unquestionably has a place in immigration enforcement, but under current law it can too easily be imposed without an objective basis—as the aftermath of 9/11 illustrated.

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140. *Zadvydas v.* Davis, 533 U.S. 678 (2001), held that once removal was no longer reasonably foreseeable, immigration detention could not be maintained, for the only legitimate purpose of immigration detention is to aid removal. In *Turkmen v. Ashcroft*, No. 02-CV-2307 (JG), 2006 U.S. Dist. LEXIS 39170 (E.D.N.Y. June 14, 2006), a district court interpreted the Supreme Court's decision in *Zadvydas* as having established a presumptively reasonable six month detention period for foreign nationals under final deportation orders. *Turkmen*, 2006 U.S. Dist. LEXIS 39170, at *118. That decision gets *Zadvydas* backwards. The Court in *Zadvydas* confronted the question of whether there were limits on the government's ability to detain a demonstrably dangerous individual where it faced obstacles to his removal. It read the statute to give federal authorities six months to attempt to resolve any such obstacles, and then required release thereafter if removal was not reasonably foreseeable. Thus, in *Zadvydas* the six-month statutory period was treated as a constraint on the detention of dangerous foreign nationals who could not be removed. In *Turkmen,* the district court transformed that *limitation* into a presumptive *authorization* of six months of detention even where removal could be effectuated immediately. The *Turkmen* decision is pending on appeal before the Court of Appeals for the Second Circuit. (Disclosure: I am co-counsel for plaintiffs in *Turkmen v. Ashcroft*).

B. Material Witness Law

The material witness law[141] is designed for a legitimate purpose: to ensure that individuals do not evade their civic obligation to provide testimony in a criminal investigation or trial by fleeing the jurisdiction. However, because it permits detention without probable cause of criminal activity, it is a tempting tool for law enforcement authorities who suspect a given individual but lack sufficient evidence to establish probable cause. The law was not designed, however, as a catch-all provision to allow detention of suspicious individuals. If it were, it would likely be unconstitutional because it would provide an end-run around the probable cause requirement.

To forestall abusive invocation of the material witness law, it should be amended to impose a presumptive time limit on detention. It might provide, for example, that a material witness must be brought to testify before a grand jury within forty-eight hours of his arrest unless the government can show good cause for delaying the testimony. In no event should the government be permitted to hold an individual more than a week for grand jury testimony. There is no reason not to have the detained individual testify promptly, especially given the constitutional interest in minimizing non-punitive restrictions on individual liberty.

When witnesses are held to testify at trial, delay issues are more difficult. Fitting an individual's testimony into a criminal trial will often require more flexibility as trials are frequently delayed or deferred by forces beyond the

141. 18 U.S.C. § 3144 (2006).

prosecution's control. But the material witness law provides for testimony to be taken by videotape deposition.[142] When delays of more than two or three weeks are likely, courts should require that the witness's testimony be taken by videotape deposition. Without such time limits, the material witness statute poses too great a temptation to the prosecutor who seeks to detain suspicious persons for investigation without probable cause of wrongdoing.

C. Material Support Laws

We generally conceive of preventive detention as incarceration imposed without a criminal conviction. But that conception may be overly formalistic. Another way to effectuate preventive detention as a de facto matter is to expand criminal liability. In Philip K. Dick's short story, "Minority Report," psychics predict who will commit crime in the future, and the legislature enacts a "pre-crime" law that allows the government to arrest and prosecute people before they commit their crimes.[143] The United States has not gone quite so far, but its "material support" laws allow for the prosecution and conviction of individuals based more on what the government fears might happen in the future than on the wrongfulness of their past conduct.

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142 *See* 18 U.S.C. § 3144 ("No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice").

143. PHILLIP K. DICK, *The Minority Report*, *in* 4 THE COLLECTED STORIES OF PHILIP K. DICK: THE DAYS OF PERKY PAT 71 (1987).

The most important of these statutes is 18 U.S.C. § 2339B, enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996.[144] Although hardly enforced before 9/11, it has since become a principal tool in the Justice Department's "terrorism" prosecutions.[145] The reason is simple: it allows the government to obtain a "terrorist" conviction without establishing that an individual engaged in any terrorism, conspired to engage in terrorism, aided or abetted terrorism, or even intended to further terrorism. The government need only show that an individual provided "material support," which includes virtually any service or thing of value, to a group that has been labeled a "foreign terrorist organization."[146] Under this law, a humanitarian donation of blankets to a hospital or of coloring books to a day-care center are crimes if the

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144 The International Emergency Economic Powers Act, 50 U.S.C. § 1701, has also provided the basis for penalizing "material support," as it has been invoked by the Clinton and Bush administrations to designate certain individuals and groups as "terrorist" without even applying the statutory criteria Congress set forth in 18 U.S.C. § 2339B and 8 U.S.C. § 1189, and to criminalize all transactions with such persons or groups. *See, e.g.*, Al Haramain Islamic Found. v. U.S. Dept. of Treasury, 585 F.Supp.2d 1233 (D. Ore. 2008).

145. COLE & LOBEL, *supra* note 52, at 49; *see also* U.S. DEP'T OF JUSTICE, COUNTERTERRORISM WHITE PAPER (2006) at 10-14, *available at* http://trac.syr.edu/tracreports/terrorism/169/include/terrorism.whitepaper.pdf (listing the Justice Department's major terrorism prosecutions, most of which are under the "material support" statute).

146 18 U.S.C. § 2339B.

recipient has been designated a terrorist. The Justice Department has taken the position that the law criminalizes training or assistance in human rights advocacy, even if it is established that the intent and effect of the assistance is to reduce violence by encouraging peaceful ways of resolving disputes.[147] The U.S. Court of Appeals for the Ninth Circuit has held as unconstitutionally vague the law's prohibitions on the provision of "training," "services," and "expert advice and assistance," but has otherwise upheld the law against constitutional challenge.[148]

As the United States government reads it, the material support law is for all practical purposes indistinguishable from a law imposing guilt for mere membership in a proscribed group. The courts have, for the most part, rejected claims that the law imposes guilt by association, however, maintaining that the law permits individuals to join proscribed groups and to advocate their views, and merely forbids them from providing the groups with "material support."[149] But this distinction reduces the right of association to a mere formality, because virtually any associational penalty can be recast as a prohibition on material

147. *See* Humanitarian Law Project v. Mukasey, 509 F.3d 1122, 1134 (9th Cir. 2007), as amended by 552 F.3d 916 (9th Cir. 2009); Humanitarian Law Project v. Reno, 205 F.3d 1130, 929-30 (9th Cir. 2000).

148 *Id.*

149. *See, e.g.*, Humanitarian Law Project v. Reno, 204 F.3d 1130, 1133 (9th Cir. 2000) (finding that "[t]he statute does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group"); United States v. Warsame, 537 F. Supp. 2d 1005, 1015 (D. Minn. 2008).

support. The right to join an organization is meaningless if the state can bar any payments of dues or donations, and even the volunteering of one's time.

The material support laws serve much the same function as the "guilt by association" laws of the McCarthy era and the laws criminalizing speech critical of the war did during World War I.[150] In each instance, it is not the defendant's proscribed conduct—whether material support, membership, or speech—that poses a threat to the state. The concern is rather that if people are allowed to speak, associate, and support organizations freely, those organizations might be strengthened, and might take dangerous action in the future. In this sense, the statutes are preventive in purpose. And because they are drafted so broadly, they can be employed to incarcerate individuals preventively, without proving that they have undertaken any actual harmful conduct. The problem, however, is that while some people tried and convicted for "material support" pose a real threat to the nation's security, the laws' overbreadth means that many who do not pose such a threat may nonetheless fall within their proscriptions. In this sense, they are inaccurate proxies for actual dangerousness, and, as preventive measures, are vastly overinclusive.

In order to limit the extent to which the material support laws serve a de facto preventive detention function, they should be amended to incorporate an express requirement of intent to further a proscribed group's illegal ends. That is the line the Supreme Court eventually drew, as a constitutional matter, with

150. *See* Cole, *supra* note 38, at 234.

respect to laws penalizing association with the Communist Party.[151] The intent requirement ensured that if one associated with the Party only to advance its legitimate ends (such as civil rights advocacy and union organizing), one could not be prosecuted. If, by contrast, one joined the Party with intent to further its illegal ends of violent overthrow of the state, one could be convicted. That line, the Court insisted, was necessary to distinguish those morally culpable from those merely exercising their rights to associate with a group having both legal and illegal ends.[152] The same principle ought to apply to the material support statute.

This does not mean that those supporting terrorists will be able to avoid prosecution by writing "bake sale" in the subject lines of their checks to a terrorist entity. Proof of intent to further illegal ends is required under conspiracy laws, and prosecutors obtain convictions under such laws on a regular basis. The requisite intent may be proved by circumstantial evidence, including what was said about the donation, the donees' track record, the donor's due diligence, the character of the group, and the nature of the aid.

Such an intent requirement would focus the "material support" laws on their legitimate purpose of proscribing support to terrorist activity, conform the statutes to First and Fifth Amendment principles, and reduce the likelihood that this otherwise overbroad law will be abused for sub rosa preventive detention

151. *See, e.g.*, United States v. Robel, 389 U.S. 258 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1966); Scales v. United States, 367 U.S. 203 (1961).

152 Scales v. United States, 367 U.S. at 209-210.

purposes. The broader the criminal statute, the more tempting it will be as a tool to target individuals for de facto preventive detention.

D. Military Detention of Enemy Combatants

Since Congress authorized the use of military force against the perpetrators of 9/11 and those who harbor them, and President Bush launched an attack on Afghanistan in 2001, the United States military has detained hundreds thousands of "enemy combatants."[153] Some were captured on the battlefield; others were found as far from Afghanistan as Bosnia, Africa, and Chicago's O'Hare Airport.[154] Many are being held in Afghanistan at Bagram Air Force Base;[155] approximately 775 have been held at Guantanamo Bay, Cuba, where many remain.[156] An undisclosed number have been detained in

153. President George W. Bush, Speech on Terrorism at the White House (Sep. 6, 2006), *available at* http://www.nytimes.com/2006/09/06/washington/06bush_transcript.html. The military has detained approximately 775 persons at Guantanamo Bay Naval Base, of which about 250 remained as of March 2009. In addition, as of March 2009, about 600 persons were detained as "enemy combatants" at Bagram Air Force Base in Afghanistan. Helene Cooper & Sheryl Gay Stolberg, *Obama Ponder Outreach To Elements of the Taliban*, N.Y. TIMES, Mar. 8, 2009, at A1 (reporting that there are approximately 600 prisoners held at Bagram). An undisclosed number of others were detained in CIA secret prisons, or "black sites," but President Obama closed those facilities on his second day in office. **Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009)**

154. *Al Qaeda Arrests Worldwide*, FOXNEWS.COM, Nov. 22, 2002, http://www.foxnews.com/story/0,2933,64199,00.html (last visited Feb. 11, 2009).

155. Tim Golden, *Defying U.S. Plan, Prison Expands in Afghanistan*, N.Y. TIMES, Jan. 7, 2008, at A1.

156. *Id.*

secret CIA prisons (which were closed by President Obama in one of his first actions as President).[157] Some of the detainees are said to have been members of the Taliban or al Qaeda military forces carrying weapons on the battlefield, but others are accused merely of being "associated" in an unspecified way with one of those groups.[158] Many have been detained for more than seven years.[159]

The Bush administration initially took the extreme position that it could hold anyone it labeled an "enemy combatant" indefinitely, without charges or a hearing, and without the protections of the Geneva Conventions.[160] The administration argued, in effect, that no law limited its authority to hold anyone it so labeled, and that no court had the power to question that extraordinary assertion of power. That position led, not surprisingly, to charges that Guantanamo was a "legal black hole."[161] Soon, accounts of abusive

157. Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 27, 2009), *available at* http://www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities; Craig Whitlock, *U.S. Faces Scrutiny Over Secret Prisons*, WASH. POST, Nov. 4, 2005, at A20.

158. MARK DENBEAUX ET AL., REPORT ON GUANTANAMO DETAINEES: A PROFILE OF 57 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA (2006) 9, *available at* http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf.

159. *See, e.g.*, Nicholas D. Kristof, *A Prison of Shame, and It's Ours*, N.Y. TIMES, May 4, 2008, at WK13.

160. Douglas Jehl, *The Conflict in Iraq: Prisoners; U.S. Action Bars Right of Some Captured in Iraq*, N.Y. TIMES, Oct. 26, 2004, at A1; Press Release, White House Office of the Press Sec'y, Announcement of President Bush's Determination re Legal Status of Taliban and al Qaeda Detainees (Feb. 7, 2002), *available at* http://www.state.gov/s/l/38727.htm.

161. Lord Steyn, Lord of Appeal in Ordinary, 27th F.A. Mann Lecture, Guantanamo Bay:

interrogation tactics began to leak out—meticulously recorded by the Army itself in interrogation logbooks, and by the FBI in emails and memos objecting t th e abuses its agents observed there.[162] Guantanamo became a focal point of international condemnation of the United States' approach to the "war on terror." One of President Obama's first actions as President was to order that Guantanamo be closed within a year.[163]

Closing Guantanamo, however, will not resolve the difficult question of what to do with the men still detained there. President Bush's ad hoc approach to the problem, assertedly predicated on Congress' Authorization to Use Military Force and his powers as commander-in-chief, was a legal and political disaster. The Bush administration took a maximalist position from the start. It insisted that it need not provide any hearings to ensure that detainees were in fact enemy combatants; that the detainees were not protected by the Geneva Conventions, and therefore could be subjected to harsh coercive interrogations; and that the detainees had no recourse to judicial protection. The Supreme

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The Legal Black Hole (Nov. 25 2003); William Glaberson, *U.S. Asks Court to Limit Lawyers at Guantanamo*, N.Y. TIMES, Apr. 26, 2007, at A1, *available at* http://www.nytimes.com/2007/04/26/washington/26gitmo.html.

162. PHILIPPE SANDS, TORTURE TEAM, (2008) (discussing development and implementation of order authorizing coercive interrogation tactics at Guantanamo); Eric Lichtblau & Scott Shane, *Report Details Dissent on Guantanamo Tactics*, N.Y. TIMES, May 21, 2008, at A21.

163. *See* Exec. Order No. 13,492, *supra* note 157.

Court rejected each of these arguments, as did most of world opinion.[164]

But closing Guantanamo will restore legitimacy only if the Obama administration adopts a policy that rejects the illegitimate aspects of the Bush administration approach, but at the same time maintains the security of the United States.

Human rights groups have responded to the abuses at Guantanamo by arguing that the government must either "try or release" the detainees.[165] It should try those who are charged with crimes in fair trials, preferably in civilian criminal courts, and release the rest. At the opposite end of the spectrum from the human rights groups, Professors Neal Katyal and Jack Goldsmith have proposed that Congress enact a statute creating a national security court empowered to detain "suspected terrorists" indefinitely.[166] Such a scheme,

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164. In *Rasul v. Bush*, 542 U.S. 466 (2004), and *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), the Court held that detainees at Guantánamo were entitled to habeas corpus review of the legality of their detentions. In *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Court held that Common Article 3 of the Geneva Conventions applied to the conflict with al Qaeda, and in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Court held that a U.S. citizen detained as an enemy combatant was constitutionally entitled to a fair hearing on whether he was an enemy combatant.

165. *See, e.g.*, Jameel Jaffer & Ben Wizner, *Don't Replace the Old Guantánamo With a New One*, SALON.COM, Dec. 9, 2008, http://www.salon.com/opinion/feature/2008/12/09/guantanamo/print.html (last visited Feb. 11, 2009); Michael Ratner & Jules Lobel, *Don't Repackage Gitmo!*, NATION, Nov. 25, 2008 (President and Vice-President of Center for Constitutional Rights advocating "try or release" approach), *available at* http://www.thenation.com/doc/20081215/ratner_lobel?rel=hp_currently.

166. Goldsmith & Katyal, *supra* note 3.

applicable to foreign nationals and citizens alike, and without any link to a military conflict, would create a permanent authority to bypass criminal prosecution for anyone found to be a "suspected terrorist."

In my view, both of these proposals are misguided. The "try or release" position disregards the legitimate, if limited, role of preventive detention in an ongoing military conflict, and would inappropriately tie the United States' hands. Detaining enemy soldiers has long been a recognized incident of war;[167] it was not the concept of detaining the enemy that made Guantanamo an international embarrassment, but the way the Bush administration asserted that power—refusing to provide hearings to determine whether the detainees were actually combatants, subjecting them to inhumane interrogation tactics, asserting the right to detain them as long as the "war on terror" continued, and claiming that no law restricted its actions there. As long as the United States is engaged in an active military conflict in Afghanistan, detention, properly implemented according to the laws of war, should be an option for those fighting against us. Indeed, it would be irresponsible to release persons we had strong reason to believe were fighters for al Qaeda or the Taliban and would return to the battle upon release. Closing Guantanamo and restoring the rule of law therefore need not mean the release of all those detained there, or even the release of all those who cannot be tried criminally. However, if the United States seeks to continue to hold some Guantanamo detainees in preventive detention without criminal trial, it must do so in a way that is legitimate,

[167] Hamdi v. Rumsfeld, 542 U.S. at 518.

carefully constrained by law, and meticulously fair.

The proposal to authorize detention of "suspected terrorists" is even more problematic. Such a statute, not tied to the traditions and limitations of military detention during armed conflict, would be unconstitutional. It fails the threshold test of establishing the inadequacy of criminal prosecution. Terrorism, after all, is a crime. It has historically been addressed through criminal prosecution, and there is no reason to believe that terrorist crimes cannot continue to be so addressed. Two former federal prosecutors recently reviewed over one hundred criminal prosecutions of terrorist crimes, and concluded that the criminal justice system is fully capable of handling such cases.[168] Absent a showing that terrorism cannot be prosecuted criminally, there is no constitutional justification for bypassing the criminal process anytime a crime can be labeled "terrorist."

Moreover, once we start carving out categories of criminal offenders who can be detained indefinitely without being charged with or convicted of any criminal conduct, it may be difficult to resist extension of such measures to other crimes, as there is no categorical difference between terrorism and any number of other serious crimes. If "suspected terrorists" warrant preventive detention, why not suspected murderers, rapists, or drug kingpins?

Even if the preventive detention category were restricted to "terrorists," that term has often been very expansively defined. Federal law treats as

168. *See generally* RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS (2008).

"terrorist" even nonviolent conduct, such as the provision of humanitarian support to a designated group,[169] and also treats as terrorist virtually *any* use or threat to use a weapon against person or property,[170] regardless of whether it targets civilians or is intended to terrorize a population. The breadth of the definition of "terrorism" will in turn contribute to the slippery slope problem. If preventive detention were authorized for persons suspected of making humanitarian donations to the "wrong" groups, shouldn't it be authorized for persons suspected of violent crimes? Even without such extensions, the sweep of the federal definition of "terrorism" would permit the imposition of preventive detention on persons who could certainly be addressed through the criminal justice system.

Limiting preventive detention to combatants in an ongoing armed conflict, by contrast, would by definition created only an extraordinary authority restricted to wartime, and therefore would be less likely to invite a slippery slope. Military detention of persons engaged in an ongoing armed conflict—regardless of whether the conflict or the individuals have anything to do with "terrorism"—has long been a "fundamental incident" of warfare.[171] Thus, if

169. 18 U.S.C. § 2339B (2006) (criminalizing as a terrorist crime the provision of material support to designated "terrorist organizations").

170. 8 U.S.C. §§ 1182, 1189 (2006) (defining terrorist activity for immigration purposes and for purposes of designating "terrorist organizations").

171. *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004); *see generally* Geremy C. Kamens, *International Legal Limits on the Government's Power to Detain "Enemy Combatants", in* ENEMY COMBATANTS, TERRORISM, AND ARMED CONFLICT LAW 107, 107-120 (David K. Linnan

long-term detention of some of the individuals held at Guantanamo and Bagram Air Force Base is authorized, it is because at the time of detention they were engaged in armed conflict against the United States, and continue to pose an ongoing threat that they will return to hostilities—not because they are "suspected terrorists." Terrorism, in other words, should have nothing to do with the justification for preventive detention. Instead, detention should be predicated on, and restricted by, the customs and laws of war. Where terrorists are engaged in armed conflict, they may be detained on the same terms as others so engaged—but they should be detained because they are engaged in armed conflict, not because they are terrorists. Where terrorists are not engaged in an ongoing armed conflict, the threats they pose can and should be addressed through the criminal justice system, and there is no precedent for subjecting them to preventive detention

Looking to the laws of war, the Supreme Court has ruled that as long as fair procedures are provided, the Constitution does not prohibit the United States from holding even U.S. citizens as "combatants" if they are captured on the battlefield and fighting for the enemy.[172] Because of the unusual nature of the conflict against al Qaeda, however, neither the laws of war nor the Constitution provide precise guidance on who may be detained, for how long, and pursuant to what procedures.

No one disputes that a nation fighting a traditional armed conflict with

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ed., 2008).

172. *Hamdi*, 542 U.S. at 519.

another nation may capture and detain enemy soldiers for as long as the conflict lasts. The conflict with al Qaeda, however, is not a traditional armed conflict. Al Qaeda is not a state, has not signed the Geneva Conventions, is difficult to identify, and targets civilians. At the same time, we are engaged in an ongoing armed conflict with al Qaeda and the Taliban, centered in Afghanistan. Unlike the ill-conceived "war on terror," the conflict with al Qaeda and the Taliban is not a metaphor or a slogan. Al Qaeda declared war on the United States,[173] and has attacked it both at home and abroad. The Taliban refused to turn Osama bin Laden over, and permitted al Qaeda to operate within its borders. The attacks of 9/11 were recognized by both NATO and the United Nations Security Council as being of a level that warranted a military response in self-defense,[174] and approximately 120 nations signed on to the United States' invasion of Afghanistan after the Taliban refused to turn over Osama bin Laden, al Qaeda's leader.[175] As of March 2009, the fighting continued, with no immediate end in

173. *Excerpts from 2001 Memo About Al Qaeda Given To Rice*, N.Y. TIMES, Feb. 12, 2005, at A10 (stating that "in 1998, Osama bin Laden publicly declared war on the United States"), *available at* http://query.nytimes.com/gst/fullpage.html?res=9902E5D9143AF931A25751C0A9639C8B63.

174. S.C. Res. 1386, pmbl., U.N. Doc. S/RES/1386 (Dec. 20, 2001); S.C. Res. 1373, pmbl., U.N. Doc. S/RES/1373 (Sep. 28, 2001); *see generally* Steven R. Ratner, Note, Jus ad Bellum and Jus in Bello *After September 11*, 96 AM. J. INT'L L. 905, 909-10 (2002), Statement by the North Atlantic Council, Press Release (2001) 124 (Sept. 12, 2001) reprinted in 40 ILM 1267, 1267 (2001) *available at* http://www.nato.int/docu/pr/2001/p01-124e.

175. PRESIDENT GEORGE W. BUSH, THE COAL. INFO. CTRS., THE WHITE HOUSE, THE GLOBAL WAR ON TERRORISM: THE FIRST 100 DAYS 7-9 (2001) (listing U.S. diplomatic

sight.[176]

If the United States could hold Italians fighting against it during World War II in military detention, should different rules apply to Talban and al Qaeda members fighting against it in Afghanistan? One argument for differential treatment would draw a distinction based on the relative availability of criminal sanctions in a traditional international armed conflict and the conflict with al Qaeda, a non-state actor. As argued above, preventive detention is generally permissible only where criminal prosecution is inadequate to address a particular danger. In a traditional war between states, military detention is often the only option available for incapacitating the enemy short of killing them. Under the laws of war, soldiers are entitled or privileged to fight, meaning that they may not be tried criminally for doing so.[177] Thus, the criminal law literally cannot address the very substantial danger posed by armed soldiers under orders to kill in an international armed conflict, and preventive detention is permissible.

By contrast, al Qaeda has no legally recognized right to wage war against the United States. Its actions can be—and for the most part have been—

successes).

176. *See* Helene Cooper & Shreyl Gay Stolberg, *Obama Ponders Outreach To Elements of the Taliban*, N.Y. TIMES, Mar. 8, 2009, at A1 (reporting that President Obama admitted that the United States was not winning the war in Afghanistan).

177. *See* Geneva Convention, supra note 29; *see also* Protocol Additional I to the Geneva Conventions of 12 Augnst 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 43.2, June 8, 1977, 1125 U.N.T.S. 23.

criminalized by the United States, at least where they are directed at doing harm to U.S. persons or property. There is therefore no formal legal impediment to addressing the threat al Qaeda poses through criminal law. And the United States has successfully prosecuted many persons associated with al Qaeda in its criminal justice system.[178] Thus, one might argue that because the criminal process is available to incapacitate al Qaeda fighters, the alternative of preventively detaining them should not be permitted.

But this is too formalistic. As Judge J. Harvie Wilkinson has pointed out, there are many reasons for not proceeding against one's enemy in an armed conflict exclusively through the criminal process, even where, as in a non-international armed conflict, there is no law-of-war impediment to doing so.[179] These include the difficulty of collecting and preserving evidence in war settings, the increased need for secrecy in a military conflict, the diversion of scarce resources from the battlefield to the courtroom, the possibility that enemies might use the criminal process as a platform or to pass information to their compatriots, and heightened security concerns for the participants presented by trying a military foe in a public courtroom.[180]

Moreover, it is not clear why the fact that al Qaeda is engaged in warfare

178. ZABEL & BENJAMIN, *supra* note 168, at ___.

179. Al-Marri v. Pucciarelli, 534 F.3d 213, 303-12 (4th Cir. 2008) (Wilkinson, J., concurring in part and dissenting in part) (cataloguing problems with employing the criminal justice system to try terrorists during wartime), vacated by ___ S. Ct. ___ (Mar. 6, 2009).

180. *Id.*

that is itself a crime should *restrict* the United States' options in defending itself. The United States has the right, under the laws of war, to try al Qaeda fighters for war crimes, and it also has the right to try them for ordinary crimes. But should it be *required* to try them in either forum, particularly while the conflict is ongoing? War crimes trials typically occur at the conclusion of a war, because a nation at war has a strong interest in devoting its resources to the conflict itself, and in not revealing what it knows about the enemy. The fact that some detainees in a traditional international armed conflict may be triable for war crimes (e.g., those who target civilians or fail to wear distinctive uniforms) does not mean that they must either be tried or released. Rather, they may be held as combatants for the duration of the conflict, and tried (or not) at the state's discretion. The theoretical availability of a criminal prosecution option should not eliminate the option of preventive detention while an armed conflict is ongoing.

The state may also legitimately prefer preventive detention to prosecution during wartime because of differences in the burden of proof. In criminal cases, including for war crimes, the government must prove guilt beyond a reasonable doubt.[181] Suppose that the government has "clear and convincing evidence" that an individual was captured while actively engaged in armed conflict for al Qaeda or the Taliban, and good reason to believe he would return to the battle if released. Now suppose that the government is nonetheless unable to convince

181. *See, e.g.*, Military Commissions Act, [cite section imposing beyond a reasonable doubt standard for conviction]; *In re* T.J.W., 294 A.2d 174 (D.C. 1972) (paren needed).

a jury—civilian or military—that the individual is guilty beyond a reasonable doubt of a specific crime. Must he be released? An Italian soldier who prevailed in a war crimes trial during World War II would not be entitled to release on acquittal, but only upon the cessation of hostilities. Why should an unprivileged belligerent fighting for an entity that has no right to fight receive better treatment than an Italian soldier fighting for Italy during World War II? For these reasons, it seems likely that detaining al Qaeda or Taliban members actively engaged in armed conflict with the United States is at least consistent with, and not proscribed by, the laws and customs of war. Moreover, the Supreme Court has ruled that detention of at least some "enemy combatants" during armed conflicts is consistent with the Constitution, provided that the procedures for determining a detainee's status are sufficiently robust to satisfy due process.[182]

182. I do not read the Geneva Conventions to affirmatively authorize the detention of combatants in an armed conflict. After all, the Conventions apply even to illegal wars, and surely if the war itself is illegal, the Conventions are not intended to authorize detentions pursuant to that war. Rather, the Conventions contemplate that such detentions will take place, and seek to impose negative limits on detention and guarantees of decent treatment for the detainees. This is especially clear with respect to non-international armed conflicts governed by Common Article 3, which is utterly silent on who may be detained and under what circumstances, and merely seeks to establish minimal standards of humane treatment for those who are detained.

The Supreme Court reasoned in *Hamdan v. Rumsfeld*, 548 U.S. 557, 629-30 (2006), that the conflict with al Qaeda is "not of an international character"—that is, it is not a conflict between nations. Accordingly, it concluded, Common Article 3 applies to the conflict. Common Article 3, however, principally governs the treatment of detainees once they have been detained, and does

The Court's decision in *Hamdi*, however, hardly resolved the issue. Disputes continue to rage over both the proper substantive scope of "enemy combatant" detention, and over the procedures that alleged combatants are due. The disputes are exacerbated by the fact that the only Congressional statement on the issue is the Authorization to Use Military Force, which does not even mention detention, but simply authorizes the use of all "necessary and appropriate" military force. If preventive detention of "enemy combatants" is to continue, it should be defined—and carefully circumscribed—by legislation. The power to hold a human being indefinitely is too grave to leave to executive experimentation. Such a statute would have to address both the proper substantive scope of the detention power, and the procedural guarantees available to those subjected to it.

1. Substantive Constraints: Who May Be Detained and For How Long?

If military detention is to be legitimately deployed, it should be used only against those who are combatants in an armed conflict, and it may last only as long as the particular armed conflict that justifies it in the first place. The first questions with respect to al Qaeda and Taliban detainees, then, are who may be detained, and for how long?

As we have seen, the Supreme Court in *Hamdi* held that as an incident to

not purport to authorize detention, or even to address the threshold questions of who may be detained, for how long, or what type of process is required. Its focus on the treatment of detainees appears to assume that that there will be detainees during non-international armed conflicts, and notably does not attempt to prohibit such detentions, but ouly to regulate them.

war, the executive could detain persons captured on the battlefield in Afghanistan fighting on behalf of the Taliban against the United States.[183] If one concedes that *some* individuals may be subject to detention in connection with the Afghanistan conflict, then *Hamdi* identified the core case for detention—an individual captured on the battlefield, carrying a weapon, and fighting for the opposition forces. But what about people captured far from the battlefield? What about members of al Qaeda or the Taliban who have never fought against the United States? What about those who sympathize with al Qaeda, and may even be inspired by the group to engage in terrorism, but have not themselves joined al Qaeda? What about someone who provides financial support to al Qaeda or the Taliban, but is not a member of either? What about someone who has provided medical attention to a Taliban fighter?

The Bush administration took an extraordinarily expansive view of who could be detained as an "enemy combatant." It defined the category as containing not only members of al Qaeda or the Taliban, but also those who have merely "support[ed]" al Qaeda or Taliban forces, and those who are members or supporters of other groups "associated" with al Qaeda or the Taliban "engaged in hostilities against the United States or its coalition partners."[184] This goes too far. If one analogizes to World War II, for example,

183. Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004).

184. *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 450 (D.D.C. 2005) (quoting definition of "enemy combatant" contained in Deputy Secretary of Defense Paul Wolfowitz's July 7, 2004 order creating Combatant Status Review Tribunal).

such a standard would allow the United States to detain as "enemy combatants" not only those enlisted in the German armed forces, but also anyone who paid taxes in Germany or treated a German soldier in a hospital.

Others have argued that only those captured on the battlefield or foreign soil should be subject to military detention, at least as long as the ordinary courts are open and available at home. For example, several members of the U.S. Court of Appeals for the Fourth Circuit recently took a position almost entirely at odds with the Bush administration's view. In an opinion authored by Judge Motz, four judges concluded that only those captured on a foreign battlefield or part of a foreign nation's military could be detained as "enemy combatants."[185] The judges maintained that they were only interpreting the AUMF, but their reasoning suggested that it might be unconstitutional to extend military detention any further. But as a constitutional principle, this seems too restrictive. If an enemy fighter is captured outside the field of battle but the capturing nation has reason to believe that he is in fact an enemy fighter and, if let free, would resume hostilities against it, why should it be compelled to release him? Moreover, as in the conflict with al Qaeda, where the enemy affirmatively seeks to attack soft targets and kill civilians, restricting military detention to those found on traditional battlefields would significantly hamstring U.S. defenses.

Two courts—the U.S. Court of Appeals for the Fourth Circuit and the

185. *See* Al-Marri v. Pucciarelli, 534 F.3d 213, 217-53 (4th Cir. 2008) (Motz, J., concurring).

Israeli Supreme Court—recently addressed the question of who may be detained as "enemy combatants" in armed conflicts with terrorist organizations. Both did so as a matter of domestic law, but with explicit reference to the international law of war (which informs statutory interpretation in both Israel and the United States). Both courts also took into account the need to adapt the law of war to the changed circumstances presented by military conflicts with non-state terrorist organizations. Their decisions provide helpful guidance in determining who is an "enemy combatant" in a military conflict with a terrorist organization.

The Fourth Circuit, in *Al-Marri*, considered whether a Qatar citizen lawfully residing in the United States could be detained as an enemy combatant.[186] Al-Marri was transferred from civilian to military custody shortly before he was to go on trial for criminal charges related to identity fraud and lying to FBI agents.[187] The United States alleged that al-Marri trained in an al Qaeda training camp, worked closely with and took orders from the al Qaeda leadership, and came to the United States as an al Qaeda agent for the purpose of engaging in and facilitating terrorist activities here.[188] In a splintered opinion, the en banc court of appeals held that if the allegations against al-Marri were true, he could be detained as an "enemy combatant," but that he had not been afforded due process in determining whether the allegations were

186. *Id.* at 219.

187. *Id.*

188. *Id.* at 220.

true.[189] The Supreme Court granted al-Marri's petition for certiorari, but the Obama administration then decided to indict him in a civilian criminal court, thereby avoiding a Supreme Court adjudication of the scope of its detention power.[190]

In the court of appeals, Judge Wilkinson's concurring opinion provided perhaps the most illuminating discussion of who may be detained as an enemy combatant. While the other judges limited their decisions to the particular facts presented in the case, Judge Wilkinson attempted to set forth principled criteria, guided by the laws of war and the Constitution, to define the scope of who may be detained. Articulating a three-part test, he would require the government to establish that an individual is (1) a member of (2) an organization against whom Congress has authorized the use of military force (3) who "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."[191] The first two criteria, Wilkinson explained, concern whether the individual is an "enemy," a term that in his view encompasses only those who are members of an entity against whom Congress has authorized the use of military force.[192] Congress did not authorize the use of military force against all terrorists, nor could it, but only against those who perpetrated 9/11 and those who harbored them. Accordingly, a terrorist who does not belong to al Qaeda

189. *Al-Marri*, 534 F.3d at 216.

190 Al-Marri v. Pucciarelli, S. Ct. ___ (2009).

191. *Id.* at 325 (Wilkinson, J., concurring in part and dissenting in part).

192. *Id.* at 323 (Wilkinson, J., concurring in part and dissenting in part).

or the Taliban is not an enemy in this military conflict.

Judge Wilkinson's third criterion addresses whether the individual is a "combatant" and serves to distinguish "mere members" from those actually engaged in hostilities on behalf of the enemy.[193] In a conflict with Germany, for example, the laws of war distinguish between combatants and civilians. Judge Wilkinson's third criterion does much the same thing. It distinguishes between those who merely associate with an enemy and those who are actually part of the enemy's fighting forces. Only the latter may be preventively detained.

The Israeli Supreme Court has also addressed who may be detained in an armed conflict with a terrorist organization—in this case, Hezbollah.[194] The Israeli legislature, unlike the United States Congress, has addressed the question of detention of "enemy combatants" expressly. The Israeli Supreme Court upheld Israel's Internment of Unlawful Combatants Law, which authorizes detention of individuals who "took part in hostilities against the State of Israel, whether directly or indirectly," or who are "member[s] of a force carrying out hostilities against the State of Israel."[195] The Court interpreted the law in light of both Israel's Basic Law and the international laws of war to authorize detention where there has been an individualized determination that a person meets one of the above categories.

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193. *Id.* at 324.

194. *See* CrimA 6659/06 A v. State of Israel, [2008], *available at* http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf.

195. *Id.* at 9 (quoting Section 2 of Internment of Unlawful Combatants Law).

The Court noted that in a traditional international armed conflict, "unlawful combatants" are not treated as "combatants," a term limited to those privileged to fight and covered by the Third Geneva Convention, but are instead treated as a subset of "civilians," protected by the Fourth Geneva Convention.[196] However, it also noted that the Convention permits detention of civilians where detention is "absolutely necessary" to the security of the state, and is subject to judicial or administrative review.[197] The Court stressed that to meet the requisite showing of necessity, an individualized determination must be made, and construed the Israeli law to require a showing by "clear and convincing evidence" that the individual either (1) took a non-negligible part in hostilities against Israel, or (2) was a member of an organization engaged in such hostilities and "made a contribution to the cycle of hostilities in its broad sense."[198]

Moreover, because the justification for detention is preventive, periodic review is required to ensure that detention lasts no longer than absolutely necessary.[199] In addition, the Court ruled that as the length of detention increases, the strength of the evidence that the individual poses a threat must also increase.[200] Thus, a detention that is marginally justified at the outset may

196. *Id.* at 15.

197. *Id.*.

198. *Id.* at 20.

199. CrimA 6659/06 A v. State of Israel, [2008] 44, *available at* http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf.

200. *Id.* at 43-44.

no longer be justified three months later if the government does not offer additional evidence that the individual poses a threat. This increased evidentiary requirement is predicated on the notion that as detention is extended, the burden on individual liberty increases, and therefore a proportionally stronger showing is required to warrant further detention.[201] The critical point is that the detention cannot last longer than is necessary, and in no event longer than the hostilities that triggered it in the first place.

The Israeli Supreme Court's approach to enemy combatant detention is broader than Judge Wilkinson's in two respects. First, it authorizes detention of individuals who engage in hostilities regardless of any evidence of membership, while Judge Wilkinson would require proof of membership as an absolute prerequisite for detention. Second, the Israeli Supreme Court authorizes detention based on membership without proof of actual involvement in terrorist activity, whereas Judge Wilkinson would require, in addition to membership, proof that an individual knowingly planned or engaged in harmful conduct "for the purpose of furthering the military goals of an enemy nation or organization."[202] In my view, Judge Wilkinson's narrower approach is more consistent with the laws of war principles. Absent a requirement of membership in (or at least active engagement in the conflict on behalf of) the enemy group,

201. This is likely to affect marginal cases, because where the evidence of a threat is very strong at the outset, it is unlikely to be weakened by the passage of time, and as long as the showing was strong to begin with, it will ordinarily suffice to justify an extended detention.

202. Al-Marri v. Pucciarelli, 534 F.3d 213, 324 (4th Cir. 2008) (Wilkinson, J., concurring in part and dissenting in part).

it will be difficult to distinguish "enemy combatants" from ordinary terrorists. And where terrorist organizations have multiple purposes, one cannot automatically assume that all members are in fact "combatants."

Still, the two approaches share certain core features as well. First, neither predicates detention on the basis of terrorism per se. Rather, both treat detention as necessarily tied to active involvement in a military conflict. Thus, Judge Wilkinson would require a showing that an individual is a member of an organization against which Congress has authorized the use of military force, and the Israeli Supreme Court requires proof of involvement in, or membership in an organization involved in, hostilities against Israel. As such, compared to a preventive detention regime targeted at "suspected terrorists," these approaches are less likely to justify expansive preventive detention authority predicated on other criminal conduct.

This is a critically important limiting principle. The concept of terrorism is far more expansive than the concept of involvement in a military conflict. Some parts of U.S. law define "terrorism" as any unlawful use of a weapon with intent to endanger a person or property, except when done purely for monetary gain.[203] More traditional definitions of terrorism refer to the use of violence targeted at civilians for a political cause.[204] And as noted above, Congress has expanded "terrorist" crimes to include the provision of

203. 8 U.S.C. § 1182(a)(3)(B)(iii)(V) (2006).

204. 18 U.S.C. § 2331 (2006).

humanitarian support to any group labeled terrorist.[205] As these examples illustrate, predicating preventive detention on "terrorism" is not likely to ensure that preventive detention is used only sparingly, and only when absolutely necessary.

The requirement of involvement in armed conflict, by contrast, provides a significant check on the use of preventive detention. It can only be employed in wartime, and only for the duration of the conflict. Over the course of its history, the United States has been subjected to many terrorist attacks, at home and abroad, but Congress has authorized the use of military force in response only once. As heinous as they may be, most acts of terrorism simply do not rise to the level of "war," as that term is widely understood, or justify a military response.

In addition, even protracted armed conflicts eventually come to an end. The conflict with al Qaeda and the Taliban in Afghanistan has lasted eight years, but it is not likely to last forever. By contrast, the phenomenon of "terrorism" will always be with us. Thus, a detention authority linked to military conflict has a definable end point, even if one cannot predict precisely when the end will come. By contrast, a preventive detention statute for "terrorists" would be a permanent feature of the law, applicable in ordinary as well as extraordinary times, and without any definable end point.

Second, both Judge Wilkinson's and the Israeli Supreme Court's approaches to preventive detention are substantially narrower than the Bush

[205] 18 U.S.C. § 2339B (2004).

administration's. Neither would permit detention of mere supporters of an enemy organization, much less detention of members or supporters of associated groups. And neither Judge Wilkinson nor the Israeli Supreme Court would permit detention based on membership alone. They both require some evidence of involvement in hostilities. This may seem odd, because under traditional laws of war, any member of the German armed forces during World War II could have been detained, without any need to show that he had planned or engaged in harmful conduct, or contributed to the cycle of hostilities. Why do both the Israeli Supreme Court and Judge Wilkinson require more than membership?

The answer lies in the difference between membership in a terrorist organization and being enlisted in an army. A terrorist organization is a political organization, not a military force. It may well have a military wing, but many "terrorist organizations" are multipurpose groups, and include members who never engage in violence. Hezbollah, for example, is a political organization with representation in the Lebanese national legislature.[206] Mere membership in such an organization should not be a ground for military detention, and under the Israeli law, it is not. Just as military detention would not be permissible simply because an individual was part of the German civil service, military detention should not be permitted simply because an individual is a member of a terrorist organization. A scheme of military

206. Thanassis Cambanis, *Lebanese Presidential Selection Delayed by Deadlock*, N.Y. TIMES, Sept. 26, 2007, at A8.

detention predicated on the need to incapacitate the enemy's combatants requires proof of more than mere membership in a "terrorist organization."

At the same time, membership in a terrorist organization will often be more difficult to prove than membership in a fighting army. Terrorist organizations tend to operate clandestinely and members often disguise themselves among the general population. Thus, membership—a prerequisite for detention under Judge Wilkinson's definition—may be too high an evidentiary burden in some instances. Where the state can demonstrate that an individual directly participated in hostilities against the state and *on behalf of the enemy*, military detention may be justified even if the state cannot prove actual membership in the organization with which it is at war. In a traditional conflict, mercenaries and irregular forces may be detained, even if they are not members of the armed forces of the enemy or nationals of the enemy state. So, too, an individual who is directly engaged in hostilities against the United States on behalf of al Qaeda or the Taliban ought to be subject to military detention, even without proof that he is a formal member of either. As the Israeli Supreme Court emphasized, the focus of the inquiry, and the trigger for detention, should be the threat the individual poses to the state as part of an ongoing armed conflict.

Finally, neither the Israeli Supreme Court nor Judge Wilkinson would restrict military detention to battlefield captures, although four members of the

Fourth Circuit would have imposed such a limitation.[207] I do not believe such a limitation makes sense. Even in a traditional war, the state should be able to detain those engaged in hostilities against it who pose a risk of returning to the struggle, no matter where they are found. The Supreme Court in *Ex parte Quirin* upheld the detention and military trial of several members of the German armed forces, including an American citizen, who had been captured in various United States cities, far from any battlefield.[208] Detention should turn on whether an individual is a combatant and poses a risk of return to the battle, not where he happened to be captured. Moreover, in an asymmetric conflict with a terrorist group, the enemy will virtually always prefer attacking far from any battlefield, for the same tactical reasons that it generally takes up terrorism in the first place—it cannot possibly prevail on a traditional battlefield.[209] Therefore, limiting preventive detention to those captured on the battlefield fails to take account of the nature of terrorist warfare, and would leave the state excessively hamstrung in its ability to defend itself.

In short, military preventive detention should be permissible in the ongoing military conflict with al Qaeda and the Taliban, but should be limited to (1) persons involved in actual hostilities with the United States on the part of al Qaeda or the Taliban; or (2) members of al Qaeda or the Taliban who can be

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[207] Al-Marri, 534 F.3d at 217-53 (Motz, J.).

208. 317 U.S. 1 (1942).

209. To be clear, I do not mean this *explanation* of why terrorists choose terrorist tactics as a *justification* of those tactics in any way. In my view, terrorist tactics are unjustifiable, period.

shown, by their activities or their position in the organization, to have played a direct role in furthering its military ends such as through training, planning, directing, or engaging in hostile military activities. Such persons may be detained only as long as the conflict continues and they still pose a threat of returning to hostilities. And as detention is extended, the burden on the government to prove that threat should be increased.

2. Procedural Constraints: What Process is Due?

In addition to defining who may be detained and for how long, a constitutional preventive detention statute must provide adequate procedural safeguards to ensure that the individuals detained in fact fit the category of enemy combatants. The Supreme Court in *Hamdi* held that at least with respect to a U.S. citizen, due process required notice of the factual basis for the detention, a meaningful opportunity to rebut that showing, and a neutral decision maker.[210] This ruling provides an important starting point for analysis of what procedures should be applied generally, but it leaves many questions unanswered. Do the same due process rights apply to foreign nationals as U.S. citizens? What is the burden of proof? Are detainees entitled to lawyers? And how should confidential information be treated?

As a threshold matter, foreign nationals should be afforded no less protection than U.S. citizens.[211] The nature of due process permits a court to

210. Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004).

211. The threshold constitutional question of the extent to which constitutional protections

take into consideration the state's security needs because the nature of the process that is due is determined by balancing the individual's interest in liberty against the government's interests in security.[212] The interests at stake with respect to foreign detainees, however, are the same as those presented by the U.S. citizen's detention in *Hamdi*. The detainee has a strong interest in being free from detention, and the government has a strong interest in ensuring that enemy combatants do not return to hostilities. Neither of these considerations is affected by citizenship status, and thus the basic analysis ought to be the same for citizens and foreign nationals. While the government is likely to have increased security concerns in some locales—such as when it detains an individual near a battlefield or other hostile territory—these considerations can be factored into the calculus, but should have the same implications for foreign nationals and citizens.

The process set forth in *Hamdi* ought not be treated as sufficient as a matter of law in all cases. Judge Traxler, the decisive vote in the Fourth

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extend to foreign nationals beyond U.S. borders is beyond the scope of this Article. For a discussion of that topic, see generally GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION (1996); David Cole, *Rights Over Borders: Transnational Constitutionalism and Guantanamo Bay*, 2007-2008 CATO SUP. CT. REV. 47. However, whether or not due process is deemed to apply abroad, the competing interests in liberty and security are simply not affected by citizenship status, so that Congress should as a matter of fairness require the same procedures for foreign nationals and U.S. citizens.

212. *Hamdi*, 542 U.S. at 529 (applying due process balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

Circuit's en banc decision in *Al-Marri,* suggested more process should be required in some circumstances.[213] The *Hamdi* Court, for example, ruled that the government may be able to establish its case through hearsay affidavits,[214] and the government in *Al-Marri* did just that, relying exclusively on an affidavit written by a military officer with no first-hand knowledge of the facts he asserted.[215] The Bush administration subsequently maintained that under *Hamdi* that showing was sufficient as a matter of law. But Judge Traxler and four other members of the court disagreed, noting that the Court in *Hamdi* actually said something more nuanced.[216] The *Hamdi* Court acknowledged the government's arguments about the difficulties of presenting first-hand witnesses in connection with battlefield captures, and stated that under those circumstances hearsay "may need to be accepted as the most reliable available evidence."[217]

But hearsay many not always be "the most reliable available evidence," and it should not be accepted where more reliable evidence could be made available. Al-Marri, for example, was not captured on a battlefield; he was arrested in the United States through the ordinary criminal process.[218] Given

213. Al-Marri v. Pucciarelli, 534 F.3d 213, 253 (4th Cir. 2008) (Traxler, J., concurring).

214. *Hamdi*, 542 U.S. at 533-34.

215. *Al-Marri*, 534 F.3d at 256.

216. *Id.* at 265.

217. *Hamdi*, 542 U.S. at 533-34.

218. *Al-Marri*, 534 F.3d at 219.

these circumstances, Judge Traxler concluded that the government had not shown that hearsay was the "most reliable available evidence."[219] If more reliable evidence was available and could be used without undermining legitimate security concerns, due process would require the government to produce it. In other words, Judge Traxler reasoned, the rule of *Hamdi* is not that hearsay is always sufficient, but only that it is sufficient where the government establishes that it is the "most reliable available evidence" in light of the government's legitimate security needs.[220]

This makes sense. Where there is no need to rely on hearsay, it should not be permitted, as it directly undermines the individual's opportunity to cross-examine his accusers. But Judge Traxler may not have gone far enough. The due process balancing test looks not just at the government's security needs, but also at the individual's interest in liberty, and more broadly, at the need for fair and accurate decision making.[221] In addition to asking whether the government has identified security interests that necessitate reliance on hearsay (or classified evidence, discussed below), the court should also ask whether the government's reliance on the hearsay negates the individual's meaningful opportunity to respond. Since a meaningful opportunity to respond is a necessary component of due process, hearsay should not be permitted where it defeats that opportunity.

219. *Id.* at 268 (Traxler, J., concurring) (quoting *Hamdi*, 542 U.S. at 534).

220. *Id.* at 268-70.

221. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

A similar evidentiary principle applies to judicial review of combatant status determinations. Thus, the Court of Appeals for the D.C. Circuit ruled that the government had failed to justify the detention of a Guantanamo detainee where it presented only allegations and accusations based on hearsay, and did not present sufficient information for the court to assess the credibility of the government's sources or their basis for knowing what they alleged.[222] Absent that information, the court reasoned, it could not provide meaningful review.[223]

A similar principle ought to apply in assessing the process that is due to a detainee directly. Just as a failure to provide the court with sufficient evidence to assess the reliability of accusations negates the court's ability to engage in meaningful independent review, so too may the failure to provide the detainee with sufficient information deprive him of a meaningful opportunity to respond. Thus, hearsay should be admitted only where it is "the most reliable available evidence" *and* its use does not defeat the detainee's meaningful opportunity to defend himself.

What burden of proof should apply to determinations of combatant status? Israel requires "clear and convincing evidence" that an individual is an unlawful combatant to justify his detention, and as discussed above, the evidentiary threshold required increases as the length of detention increases. The same standard should apply in the context of the conflict with al Qaeda. The "clear and convincing evidence" standard, used for deportation

222. Parhat v. Gates, 532 F.3d 834, 846-47 (D.C. Cir. 2008).

223. *Id.*

proceedings and pretrial detention hearings under the Bail Reform Act,[224] is less onerous than the "beyond a reasonable doubt" standard required for criminal prosecutions. This lower standard reflecets the idea that where we seek to detain preventively, not punish, a lower degree of certainty should be demanded. But at the same time, this standard is substantially higher than a "preponderance of the evidence" standard, the standard that courts reviewing habeas corpus claims by Guantanamo detainees have been using. Surely the government should be required to meet as high a standard where it proposes to detain an individual indefinitely as it is required to meet in order to deny bail pending trial or to deport a foreign national, actions that impinge less substantially on liberty interests.

Because of the high stakes of detention hearings and the complexity of the legal issues involved, due process should also demand that detainees be provided lawyers. Advocates dispute whether the Supreme Court decided this issue in *Hamdi*.[225] From the perspective of the due process balancing test, there is every reason to require that detainees be permitted the assistance of counsel.

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224. 18 U.S.C. §3142(f) (2006) (requiring clear and convincing evidence to deny bail); Woodby v. INS, 385 U.S. 276 (1966) (requiring clear, unequivocal, and convincing evidence to support deportation).

225. The issue remains unsettled. *See* Al-Marri v. Pucciarelli, 534 F.3d 213, 272-73 (4th Cir. 2008) (Traxler, J., concurring) (citing the *Hamdi* and *Boumediene* decisions as leaving evidentiary standards and right to counsel issues to the discretion of trial courts within the framework of "the general rule . . . that al-Marri would be entitled to the normal due process protections . . . .").

In many instances, the detainees will speak little or no English, and in virtually every circumstance, detainees will have had little or no experience with the American legal system. Most detainees at Guantanamo already have counsel representing them in habeas corpus proceedings, so allowing those lawyers to participate in combatant status hearings would come at little cost to the government. The government's legitimate security concerns can be addressed by imposing reasonable protective orders on the lawyers restricting their dissemination of confidential information. And given the enormous stakes for the individual—the possibility of indefinite detention—it is essential that the process be as fair as possible.

One of the most difficult issues is how to reconcile the individual's right to notice and an opportunity to respond with the state's interest in maintaining secrecy during an ongoing military conflict. While the military may often have a legitimate interest in preserving the confidentiality of information relevant to a military detention proceeding, its ability to do so should be limited by the same principles that govern reliance on hearsay. When determining whether confidential information may be employed, two questions should be asked: (1) has the government exhausted all options that might protect both its interest and the interest of the detainee?; and (2) does the use of confidential information under the circumstances preserve the detainee's meaningful opportunity to defend himself? Unless both questions can be answered in the affirmative, the government should not be permitted to use confidential information.

To ensure that these elements have been satisfied, courts must be able to

review all classified evidence behind closed doors. In addition, detainees should be provided with sufficiently detailed information about the classified evidence to permit them to respond in a meaningful way to the factual allegations against them, much as is required under the Classified Information Procedures Act. [226] In addition, the government should be required to appoint lawyers with security clearance who have full access to all of the evidence, and are assigned to challenge the classified evidence on the detainee's behalf. In addition, when periodic detention reviews are conducted, they should include reviews of whether previously confidential information can now be disclosed, as the need for confidentiality will often wane over time.

Limiting the use of hearsay and confidential evidence, requiring disclosure of sufficiently specific allegations to permit the detainee to respond meaningfully, applying the "clear and convincing evidence" standard, and allowing detainees access to counsel would mark a significant improvement over the process previously provided to detainees. Before *Hamdi*, the Bush administration insisted that the Guantanamo detainees were entitled to no

226. 18 U.S.C. app. §§ 1-16 (2006). The European Court of Human Rights recently ruled that in order to provide a person subject to a "control order" with a fair hearing, he must be provided with sufficiently detailed allegations to allow him to instruct his attorney on how to make a meaningful response. *A and Others v. United Kingdom*, App. No. 3455/05, Eur. Ct. H.R. (Feb. 19 2009), *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=3455/05&sessionid=20814440&skin=hudoc-en. A similar standard should govern here.

process whatsoever.[227] After *Hamdi*, it hastily created "Combatant Status Review Tribunals," or CSRTs, to assess whether the detainee was properly detained as an enemy combatant.[228]

The CSRT hearings have been widely criticized, including by the Supreme Court in *Boumediene*.[229] Detainees were not allowed the assistance of a lawyer, even where lawyers already represented them in habeas corpus proceedings at no expense to the government.[230] The tribunals heard no live testimony, but merely reviewed documents containing hearsay, and therefore the detainees had no ability to confront witnesses.[231] In addition, much of the evidence reviewed was treated as confidential and not shown to the detainee, making a meaningful rebuttal literally impossible.[232] And the hearing officers

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227 Brief for United States Brief for United States in Rasul v. Bush.

228. Adam Liptak, *Tribunal System, Newly Righted, Stumbles Again*, N.Y. TIMES, June 5, 2007, at A21.

229. Boumediene v. Bush, 128 S. Ct. 2229, 2269-70 (2008).

230. Linda Greenhouse, *Legal Battle Resuming on Guantánamo Detainees*, N.Y. TIMES, Sep. 2, 2007, *available at* http://www.nytimes.com/2007/09/02/washington/02scotus.html.

231 Mark Denbeaux & Joshua W. Denbeaux, No-Hearing Hearings: CSRT: The Modern Habeas Corpus? (Seton Hall Pub. Law Research Paper No. 951245, 2006) (describing shortcomings of CSRT procedures), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=951245.

232. *In re* Guantanamo Detainee Cases, 355 F.Supp. 2d 443, 469-70 (D.D.C. 2005) (quoting an exchange in which a detainee is unable to respond to secret evidence used against him), *vacated on other grounds*, Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), *rev'd*, 128

were military subordinates of commanders who had already determined—without a hearing—that the detainees were enemy combatants, thus calling into question the tribunals' impartiality.[233]

Some argue that the CSRT hearings were at least as fair as those generally provided pursuant to Article V of the Geneva Conventions, which requires that a hearing be provided where there is doubt about a detainee's status.[234] But Article V hearings generally take place at or near the field of battle, and as such, are necessarily informal. [235] Moreover, Article V's hearings requirement was written with a more formal war in mind, where doubt about the status of a detainee is likely to be the exception, not the rule. In traditional wars, the vast majority of soldiers wear uniforms and are not likely to contest that they are members of the opposing armed forces, as their status as enemy soldiers gives them prisoner-of-war protections.

The Guantanamo hearings, in contrast, took place years after the detainee's capture and thousands of miles away from the field of battle. This fact made it more difficult for the detainees to muster evidence in their defense—how do you call a witness from a village in Afghanistan when you are being held in Guantanamo? At the same time, it made it possible for the government to provide more attributes of a fair hearing without interfering with

S. Ct. 2229 (2008).

233. *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d at 469-70.

234. Brief of United States at 10, *Boumediene*, 128 S. Ct. 2229 (No. 06-1195).

235. *Id.*

ongoing battlefield operations. Moreover, in the conflict with al Qaeda, where the enemy does not wear uniforms or otherwise identify itself, detentions shrouded in doubt are the rule rather than the exception. These difficulties do not mean that military detention should be categorically rejected. But in these circumstances, with much greater doubt about who the detainees are, fewer impediments to conducting more formal and fair hearings, and lengthy detention at stake, greater procedural protections should be required.

Congress has thus far left the regulation of enemy combatant detentions to executive innovation. The Military Commissions Act of 2006 prescribes procedures for military trials for war crimes, but is silent with respect to the process for assessing the propriety off detention *simpliciter*. Given what is at stake, both for the detainees, who may spend years in detention, and for the United States, whose reputation has been severely damaged worldwide by its failure to accord the detainees a fair process, a statute setting forth carefully crafted and fair substantive standards and procedures for enemy combatant detentions should be required.

Some may argue that establishing such a preventive detention authority may open the door to military responses to organized crime, drug gangs, and terrorists generally, accompanied by preventive detention regimes. Such a slippery slope would be a much more pressing concern were Congress to adopt a preventive detention regime targeted at "suspected terrorists," because other sorts of criminals could be said to pose as great a threat to the community as those who labeled "terrorists." However, the authority proposed here is

necessarily tied to war, and therefore would be justified only where the United States is at war—not metaphorically, but actually.

The world generally conceded that the events of 9/11 constituted an armed attack giving rise to the right to respond militarily in self-defense. Congress enacted an authorization to use military force in response, something it has never before done in response to a terrorist offense or any other crime. While the "global war on terror" invoked by the Bush administration was a rhetorical slogan, not a legal state of affairs, there is little doubt that Afghanistan is the site of an armed conflict that continues to this day. The same has never been true with respect to drugs, organized crime, or indeed, most acts of terrorism. The situations in which war will be a legitimate response to action by a non-state actor are likely to be exceptional. In addition, the narrow definition of "enemy combatant" advocated here, limited to persons engaged in armed conflict against the United States on behalf of a specified enemy in a specific armed conflict, avoids the problems that the Bush administration's capacious definition created.

In sum, what is proposed here—as part of a general reform package directed at the issue of preventive detention—is not a statute authorizing preventive detention of "suspected terrorists," an idea that is both ill-advised on policy grounds and unconstitutional. Rather, I propose a preventive detention model predicated on the longstanding tradition of detaining enemy fighters during an armed conflict—an extraordinary power limited to the extraordinary setting of a specific ongoing war. The nature of the conflict with al Qaeda

makes the application of the military detention model more complicated, to be sure, but I do not believe that it renders it wholly inapplicable. The critical point is that the authority to detain should rest squarely on an individual's participation in armed conflict, a fact that can be established objectively, and not on vague notions of future danger and "suspected terrorism." Moreover, because the proposed preventive detention authority would be tied to war, it would be triggered only when we are in fact at war, and will not be generally applicable to conduct that the community considers dangerous, whether it be organized crime, drugs, weapons sales, or terrorism.

E. Short-Term Preventive Detention

Some have argued that the United States should adopt a short-term preventive detention law for terror suspects to address the hypothetical case in which government officials have credible and reliable evidence that an individual poses a serious and imminent danger to the community, but cannot immediately make that evidence public. Such cases are likely to be extremely rare, and there are sound reasons to question whether the United States needs to introduce a new preventive detention regime for an eventuality that is likely to arise infrequently. The more important point, however, is that were such a situation to arise, it could be adequately addressed under existing legal authority for preventive detention pending a criminal trial.

As long as the government has probable cause that an individual has committed a crime, he can be arrested. The probable cause showing, whether

made *ex parte* in advance to a magistrate to obtain an arrest warrant, or in the post-arrest probable cause hearing required where an arrest is made without a warrant,[236] may be based on hearsay that preserves the confidentiality of the source of the incriminating information.[237] The Bail Reform Act then authorizes preventive detention pending trial, and while the government must generally demonstrate that the defendant poses a danger to the community or a risk of flight, it is again permitted to oppose bail on the basis of hearsay that can protect the confidentiality of the source.[238] Moreover, the Bail Reform Act creates a rebuttable presumption in favor of pretrial detention where a defendant faces terrorism charges, and thus effectively places the burden on the defendant to establish that he is not a danger to the community or a flight risk.[239] The Speedy Trial Act requires a prompt criminal trial, but defendants routinely waive it to allow adequate time to prepare their defense.[240]

Hence, existing law is sufficient to address the situation in which the

236. *Gerstein v. Pugh*, 420 U.S. 103 (1975) held that where police make an arrest without a warrant, they must bring the arrestee before a court for a prompt probable cause hearing. In *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), the Supreme Court interpreted *Gerstein*'s "promptness" requirement to mandate a hearing within forty-eight hours of arrest unless the government can establish an emergency or extraordinary circumstance justifying a delay.

237. *Gerstein*, 430 U.S. at 124 n.25.

238. 18 U.S.C. § 3142(f) (2006).

239. 18 U.S.C. § 3142(e); *see generally* ZABEL & BENJAMIN, *supra* note 168, at 65-75 (arguing that existing federal law permits preventive detention of defendants pending criminal trial without disclosing confidential information).

240. *See* 18 U.S.C. § 3161 (2006).

government has confidential information establishing probable cause that an individual is engaged in imminent terrorist conduct. Moreover, if the individual is a foreign national as to whom the government has evidence of terrorist activity, the government may also be able to effectuate short-term preventive detention pending immigration proceedings. Of course, once the time comes for a criminal trial (or a removal hearing), the government may have to reveal its sources if it seeks to use confidential evidence affirmatively against the defendant. But if it has been able to develop other incriminating evidence that can be disclosed, it has the option of not using information whose source it would prefer not to reveal.

Accordingly, the only situations that cannot be addressed adequately by the criminal justice system are those where (1) the government lacks probable cause of any criminal or immigration violation; or (2) the government cannot develop sufficient nonconfidential evidence to hold the defendant criminally liable or to establish a deportable offense. In those cases, it is not clear that there is a justifiable case for preventive detention. Given conspiracy laws, it is difficult to imagine cases where the government has reliable evidence that an individual is going to commit an imminent terrorist act, but lacks probable cause of any criminal activity. If it lacks even probable cause, society should take the risk associated with continued surveillance, rather than permitting preventive detention. Similarly, unless we are to authorize long-term preventive detention, if the government cannot ultimately come forward with admissible evidence that the individual has committed a crime, he should be freed. The

government could, of course, continue to keep a close eye on the individual, and even if no criminal trial is held, its arrest and detention may well disrupt any ongoing terrorist plot.

Because we must start with a presumption that the criminal justice system is how we deal with dangerous persons—whether terrorists, murderers, rapists, spies, or traitors—we ought not authorize preventive detention absent a strong showing that criminal prosecution is inadequate to address a compelling need to protect the community from danger. Absent such a showing, there is no reason to expand the existing short-term preventive detention authority, which is generally limited to individuals facing criminal or immigration proceedings and posing a demonstrable threat to the community or risk of flight.

CONCLUSION

The above reforms would have at least two significant benefits. First, they would bring preventive detention out of the shadows of existing law, and subject it to a more open and accountable process.[241] Second, they would

241. Alan Dershowitz has made similar "accountability" arguments in favor of a system for judicial warrants for torture. *See generally* ALAN M. DERSHOWITZ, WHY TERRORISM WORKS (2002). He argues that it would be better to subject torture to a formal approval process via independent judges than to tolerate its practice as an informal, underground matter. In my view, Dershowitz's torture warrant proposal is fundamentally misguided, because it only makes sense to set up a warrant process if you can imagine some situations in which a judge should authorize torture in advance. The prohibition on torture is absolute for a reason, however, and should remain

simultaneously empower the government to employ preventive detention where it was truly necessary while limiting its ability to sweep up large numbers of people on little or no evidence of dangerousness. If all of the above reforms had been in place on 9/11—so that the government had available to it a tightly regulated preventive detention authority but was not able to exploit existing authorities for *sub rosa* preventive detention without sufficient safeguards—it seems likely that fewer people would have been unnecessarily detained. Detainees would have been limited to persons as to whom there was some legitimate basis for concern, and the length of detention would have been more strictly controlled. Most of those actually detained under immigration authorities, for example, would not have been subject to preventive detention unless the government had objective evidence that they posed a terrorist threat. And many of those unnecessarily and wrongly held at Guantanamo for years might not have been detained at all. The proposed reforms would reduce the number of unnecessary detentions while ensuring that detention remains available where truly necessary. And by bringing preventive detention above board and adopting rules that apply equally to citizens and foreign nationals, the reform effort would force us to confront when preventive detention is truly justified, rather than tolerating it as an informal practice as long as it does not

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so. By contrast, there is no absolute prohibition on preventive detention. On the contrary, it is probably an accepted part of every developed system of law, to one extent or another Where, as here, an absolute prohibition neither makes sense nor is found anywhere in the legal world, arguments for making the practice more accountable hold more sway.

apply to the majority.

There remain, however, good reasons to be skeptical about preventive detention. First, if a preventive detention law were enacted without reform of existing laws, it would not mitigate but would probably exacerbate the abuses after 9/11. The Bush administration did successfully obtain passage of one new preventive detention law in the wake of 9/11: Section 412 of the PATRIOT Act. But perhaps because the law included such safeguards as immediate access to federal court and a strict seven-day time limit on detention without charges (adopted over the administration's objections), the government never used it. It found that it could lock up literally thousands of foreign nationals by abusing existing immigration laws, obstructing detainees' access to court, and keeping them locked up even after judges had ordered their release. If the immigration and material witness laws remain unchanged, government officials may continue to exploit them in future crises, rather than invoke a new preventive detention authority that might require a stronger showing of need for detention. Thus, under no circumstances should Congress enact a preventive detention statute unless simultaneous reforms of existing laws are included as an integral part of the package.

Second, even a narrow preventive detention law might have the undesirable effect of "normalizing" preventive detention. The number of instances that would truly necessitate a freestanding preventive detention law seems small. During World War II, for example, FBI Director J. Edgar Hoover argued that preventive detention of Japanese Americans was unnecessary

because the FBI had the capability to place suspected saboteurs under surveillance and charge them with a crime if it determined that they were truly dangerous.[242] Creating a new legal regime for such an exceptional circumstance may make the very idea of preventive detention more routine and acceptable. One of the checks on preventive detention in American legal culture today is that it is still viewed as exceptional. Congress should therefore narrowly tailor any reform to underscore the exceptional character of preventive detention. Even so, the creation of such an authority inherently carries the risk of subsequent "mission creep." In my view, requiring a showing that the criminal justice system is inadequate, and tying freestanding preventive detention to an ongoing military conflict would reduce that risk. But as with the risk of terrorism itself, the risk of "mission creep" cannot be entirely eliminated.

Third, as suggested in the introduction, any preventive detention regime inevitably presents substantial risks: we cannot predict the future; skewed incentives favor detention over release; and preventive detention contradicts a fundamental tenet of autonomy central to liberal democracy—that people should be judged by their actions, not their thoughts, desires, or associations. One might reasonably conclude that these risks are so great that one should not go down this path in the first place. But in that case, one would have to show why all the preventive detention regimes that the United States already

242. *See* 117 CONG. REC. H31551-52 (daily ed. Sept. 13, 1971) (remarks of Rep. Railsback), *cited in* Padilla v. Rumsfeld, 352 F.3d 695, 719-20 (2d Cir. 2003), *rev'd*, 124 S. Ct. 2711 (2004).

tolerates—and that most liberal democracies have as well—are not equally illegitimate. I have sought to show that the unifying principle underlying legitimate preventive detention is that it is permissible only upon a strong showing that the criminal justice system cannot address a serious danger to the community.

Concerns about preventive detention are considerable, and I do not mean to minimize them. Reasonable people could conclude that we ought to oppose preventive detention wherever it appears. But my own sense is that the camel's nose is already under the tent. Opportunities for de facto and sub rosa preventive detention already exist in current law, and the aftermath of 9/11 provides a blueprint for how the government can exploit them again.

If we are to learn lessons from our mistakes, then, we would do well to confront the issue of preventive detention directly. That would require amending existing laws to preclude their abuse for unjustified preventive detention purposes. But it might also include crafting a carefully circumscribed preventive detention authority outside the criminal justice system for those engaged in an ongoing military conflict. Such a regime would be justified along roughly the same lines that preventive detention of prisoners of war in a traditional conflict is justified. Because there are salient differences between traditional state-to-state conflicts and military conflicts with nonstate actors, however, the rules need to be more circumscribed in the latter context. In a conflict with a nonstate actor, there is no per se bar on criminalizing the enemy's engagement in the conflict. At the same time, there is likely to be

greater doubt about the identity of the enemy, a much longer and more nebulous conflict, and an ability on the part of detained individuals to choose to abandon the fight.

These differences require some modification of existing rules, but do not, in my view, eliminate entirely an appropriate role for military preventive detention. Moreover, if we insist that the rule of law knows no place for detention of those actively fighting against the state in a military conflict, we may unwittingly encourage the state to take matters into its own hands, outside any legal limits—much as the Bush administration did.

What is most critical is that any preventive detention regime be justified as *military* detention, a concept with fairly well-established parameters, and not as detention of "suspected terrorists," a new and potentially capacious category that poses substantial risks of unjustified expansion. These are difficult judgments. But in the end, if we were to succeed in bringing preventive detention out of the shadows, we might advance our liberty, our security, and our democracy.

From: Lederman, Marty
Sent: Wednesday, March 25, 2009 4:31 PM
To: b(6) [redacted]
Cc: Wiegmann, Brad; Martins, Mark (GTMO Task Force); Barron, David
Subject: RE: Preventive Detention Subgroup: Discussion Paper
Attachments: Cole09_March09draft[1].doc

Here is another draft paper, not yet published, that has a great deal of interesting discussion about these topics. I've received permission from the author to share it with you. <<Cole09_March09draft[1].doc>>

From: Wiegmann, Brad
Sent: Wednesday, March 25, 2009 10:11 AM
To: 'Martins, Mark S COL MIL USA OTJAG'; Martins, Mark (GTMO Task Force); b(6) [redacted] b(6),(7)(C) [redacted] 'Deeks, Ashley S'; 'Ingber, Rebecca M'; 'Blum, Stephanie <TSA OCC>'; Clark, Brad, CIV, OSD-POLICY; Ardinger, Jo Ellen

Subject: Preventive Detention Subgroup: Discussion Paper

Here is a paper that it would be useful if possible for you to review before today's subgroup meeting at 1:00. It is a work in progress but we think it is useful to frame our initial discussion. Thanks.

<< File: MSM Edits--Preventive Detention Memo.doc >>

From: Barron, David
Sent: Friday, April 03, 2009 6:11 PM
To: Monaco, Lisa (ODAG); Katyal, Neal; Letter, Douglas (CIV); Wiegmann, Brad
Cc: Jeffress, Amy (OAG); Kris, David (NSD); Lederman, Marty; Hertz, Michael (CIV); Anderson, David J. (CIV); Guerra, Joseph R.; Kagan, Elena; Loeb, Robert (CIV); Kopp, Robert (CIV); Renan, Daphna ODAG)
Subject: RE:

Perhaps brad could organize a call with jeh and the relevant folk from doj for early Monday?

From: Lederman, Marty
Sent: Saturday, April 04, 2009 7:28 PM
To: Martins, Mark (GTMO Task Force); Wiegmann, Brad
Subject: RE: Law Of War Subgroup Meeting

b(6)

Mark, Brad: Wasn't someone in the larger group -- [redacted] -- responsible for detainees at Bagram? If so, that person should be part of this discrete project, thanks

From: Wiegmann, Brad
Sent: Monday, April 13, 2009 9:11 AM
To: Barron, David
Subject: RE: Procedures

yes

-----Original Message-----
From: Barron, David
Sent: Monday, April 13, 2009 9:03 AM
To: Wiegmann, Brad
Subject: Re: Procedures

Excellent - that is at 3?

----- Original Message -----
From: Wiegmann, Brad
To: Barron, David
Sent: Mon Apr 13 07:04:52 2009
Subject: Re: Procedures

Yes Elena and Neal are coming to our subgroup today.

----- Original Message -----
From: Barron, David
To: Wiegmann, Brad
Sent: Sun Apr 12 16:39:07 2009
Subject: Procedures

b(5)

Hi brad - not sure if elena or anyone else from the sg's office has gotten in touch with you about the bagram procedures issues. [redacted] Let me know how I can be helpful with that