

**THE LEGAL, MORAL, AND NATIONAL SECURITY  
CONSEQUENCES OF “PROLONGED DETENTION”**

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**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON THE CONSTITUTION  
OF THE  
COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE  
ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

—————  
JUNE 9, 2009  
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**Serial No. J-111-28**

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Printed for the use of the Committee on the Judiciary



U.S. GOVERNMENT PRINTING OFFICE

56-832 PDF

WASHINGTON : 2010

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**THE LEGAL, MORAL, AND NATIONAL SECURITY CONSEQUENCES OF "PROLONGED DETENTION"**

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**TUESDAY, JUNE 9, 2009**

U.S. SENATE,  
SUBCOMMITTEE ON THE CONSTITUTION,  
COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The Subcommittee met, pursuant to notice, at 10:04 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Russell D. Feingold, Chairman of the Subcommittee, presiding.

Present: Senators Feingold, Cardin, and Coburn.

**OPENING STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN**

Chairman FEINGOLD The hearing will come to order. Welcome to this hearing of the Constitution Subcommittee entitled "The Legal, Moral, and National Security Consequences of 'Prolonged Detention.'" I want to thank the witnesses for being here, and I especially want to thank my Ranking Member, Senator Coburn, who will be here, for his cooperation and the help of his staff in putting this hearing together on very short notice.

On May 21, President Obama gave an important national security speech at the National Archives. He devoted a major portion of that speech to the problem of the prison camp at Guantanamo Bay, Cuba. He reiterated that he intends to close that facility, and I fully support that decision. The President, in my view, was absolutely correct when he said the following:

"Rather than keeping us safer, the prison at Guantanamo has weakened American national security. It is a rallying cry for our enemies. It sets back the willingness of our allies to work with us in fighting an enemy that operates in scores of countries. By any measure, the costs of keeping it open far exceed the complications involved in closing it."

I think the President was also correct in noting the difficulties in figuring out what to do with the approximately 240 detainees still held at Guantanamo. Some of those detainees, he said, can be tried in our Federal courts for violations of Federal law. Others will be tried in reconstituted military commissions for violations of the law of war. A third category of detainees have been ordered released by the courts. And a fourth category the administration believes can be transferred safely to other countries.

(1)

Finally, though, there is a fifth category of detainees that the President said cannot be tried in Federal courts or military commissions, but the Government believes they are too dangerous to release or transfer. For this small group of detainees, the President said he is considering a new regime of what he called "prolonged detention," accompanied by procedural safeguards and the involvement and oversight of both the judicial and legislative branches of our Government.

I was and remain troubled by where the President seemed to be heading on this issue. The previous administration claimed the right to pick up anyone, even an American citizen, anywhere in the world; designate that person a so-called enemy combatant, even if he never engaged in any actual hostilities against the United States; and lock that person up possibly for the rest of his life unless he can prove, without a lawyer and without access to all, or sometimes any, of the evidence against him, that he is not an "enemy combatant."

Now, that position was anathema to the rule of law. And while the President indicated a desire to create a system that is fairer than the one the previous administration employed, any system that permits the Government to indefinitely detain individuals without charge or without a meaningful opportunity to have accusations against them adjudicated by an impartial arbiter violates basic American values and is likely unconstitutional.

I wrote to the President after his speech to express my concern, and I will put the full text of that letter in the record of this hearing, without objection. My letter noted that indefinite detention without charge or trial is a hallmark of abusive systems that we have historically criticized around the world. In addition, once a system of indefinite detention without trial is established, the temptation to use it in the future will be powerful.

Thus, if the President follows through on this suggestion of establishing a new legal regime for prolonged detention to deal with a few individuals at Guantanamo, he runs the very real risk of establishing policies and legal precedents that will not rid our country of the burden of the detention facility at Guantanamo Bay, but instead merely sets the stage for future Guantanamos, whether on our shores or elsewhere, with potentially disastrous consequences for our national security. Worse, those policies and legal precedents would be effectively enshrined as acceptable in our system of justice, having been established not by a largely discredited administration, but by a successive administration with a greatly contrasting position on legal and constitutional issues.

The fundamental difficulty with creating a new legal regime for prolonged detention is that there is a great risk, particularly because some of the detainees for whom it would be used have already been held for years without charge, that it will simply be seen as a new way for the Government to deal with cases it believes it cannot win in the courts or even before a military commission. Regardless of any additional legal safeguards, such a system will not be seen as any more legitimate than the one the Bush administration created at Guantanamo.

I do not underestimate the challenges that the President faces at Guantanamo. This is not a problem of his making, and I appreciate

how difficult the situation is. The President was right when he called dealing with the fifth category of detainees “the toughest single issue that we face.” And he recognized that creating a new system of prolonged detention “poses unique challenges.” And that is why we are here today. We have assembled a panel of distinguished witnesses to help us understand the implications of a new system of prolonged detention. Although the legality of such a system is crucial, that is not the only question. In a recent interview, Daniel Levin, who was the acting head of the Office of Legal Counsel when that office was attempting to deal with requests for legal analysis of interrogation techniques that many believe are torture, put it quite succinctly. He said, “Obviously you can only do that which is legal, but that does not mean you should automatically do something simply because it is legal.” So I think we have an opportunity today to do what we need to do, which is to look at the question from all angles.

It is my view that a great deal of what was wrong with Guantanamo stemmed from an arrogance that the previous administration sometimes demonstrated about the rule of law. It established a prison that it thought was beyond the reach of the law. And it asserted the power to put people in that prison with only the barest regard for the law. President Obama clearly wants to take a different approach. He spoke at the National Archives of “construct[ing] a legitimate legal framework for the remaining Guantanamo detainees that cannot be transferred.” This goal is admirable. But we must be very careful not to create a legal framework that is inconsistent with the very reasons we need a legal framework—to be true to our values and to regain the respect of the world for our approach to this conflict.

One final note, and then I will turn to the Ranking Member. When I wrote the President, I indicated that I would invite a representative of his administration to testify at this hearing. On reflection, I decided that to do so would be to ask the administration to publicly defend a position that it has not yet formally taken. Consideration of these very difficult questions is undoubtedly ongoing, and so I decided to hold this hearing as a way to help inform the administration’s thinking and help make sure it has full information about the consequences of its decision. I would, of course, welcome any response to the testimony and discussion we will hear today. And I look forward to an open dialog on these very difficult and important questions as the time for closing Guantanamo approaches.

With that, I am pleased to recognize Senator Coburn, and I thank him again for his help and cooperation in arranging this hearing.

**STATEMENT OF HON. TOM COBURN, A U.S. SENATOR FROM  
THE STATE OF OKLAHOMA**

Senator COBURN. Thank you, Mr. Chairman. I apologize for being late. I was working on a human rights issue associated with the Internet.

I am pleased to join you at this second hearing of the Subcommittee on the Community. I understand that this hearing was prompted by a detailed letter you sent to President Obama fol-

lowing his speech he made on national security issues at the National Archives in May. In that letter, you explained very clearly your opposition to indefinite detention, an option the President described as being "necessary to protect the American people." While I disagree with some of your conclusions, I appreciate your thoughtful approach to the issue and recognize the importance of this Subcommittee to the debate.

We have before us an impressive and diverse panel of witnesses, and I thank each of you for being here today. I would note, however, I am disappointed that the administration is not represented despite the Chairman's request. The administration's insight on this and other important national security issues, such as state secrets and media shield, are vital to ongoing congressional debate, and I am both puzzled and frustrated by their apparent unwillingness to engage Congress. In the future, I hope to see the executive branch more involved in the debates affecting its most important responsibilities.

With respect to prolonged or even indefinite detention, I would note at the outset a few observations. In 2004, the Supreme Court in *Hamdi v. Rumsfeld* affirmed the authority of the United States to detain enemy combatants until the end of hostilities. The Court recognized that by universal agreement and practice, quote-unquote, the primary purpose behind the capture and detention of enemy combatants is to prevent their return to combat. Thus, so long as the current conflict is ongoing, and given that President Obama recently directed an additional 12,000 troops to Afghanistan, it appears that it is the United States that has the authority to detain enemy combatants without trial.

Moreover, President Obama, like President Bush, has asserted the necessity of such prolonged detention. In his speech at the National Archives, President Obama acknowledged the presence of detainees at Guantanamo who cannot be prosecuted, yet who pose a clear danger to the American people. He rightfully asserted that he will not release any such detainee, adding that they must be held to keep them from carrying out an act of war.

His choice and his challenge, as he described, is to develop a legal regime appropriate to deal with these realities. The President described this category of the most dangerous detainees as the toughest single issue that he will face. My preference would be that Congress give President Obama the support and assistance he needs to create such a framework, recognizing that successive Presidents of different political parties agree prolonged detention without trial is absolutely necessary in certain circumstances. I hope today's debate about the propriety of the decision will prompt the administration to come forward with ideas so that we can all begin working on solutions for the future.

Thank you, Mr. Chairman. I look forward to hearing from our witnesses.

Chairman FEINGOLD. Thank you, Senator Coburn.

Will the witnesses rise to be sworn and raise your hands? Do you swear or affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. MALINOWSKI. I do.



Mr. RIVKIN. I do.  
Mr. LAUFMAN. I do.  
Ms. MASSIMINO. I do.  
Mr. KLINGLER. I do.  
Ms. CLEVELAND. I do.  
Chairman FEINGOLD. Thank you.

Our first witness this morning will be Tom Malinowski, the Washington Advocacy Director for Human Rights Watch, one of the premier international organizations dedicated to defending and protecting human rights. Mr. Malinowski is an expert in United States foreign policy with degrees in political science from the University of California-Berkeley and Oxford University. He has previously served as Special Assistant to President Bill Clinton, as senior director for foreign policy speechwriting at the National Security Council, and as a member of the State Department's policy planning staff.

I thank you for being here this morning, and I would ask all the witnesses to keep their remarks, if at all possible, to 5 minutes. We will put your whole statements in the record.

You may proceed, Mr. Malinowski.

**STATEMENT OF TOM MALINOWSKI, WASHINGTON ADVOCACY  
DIRECTOR, HUMAN RIGHTS WATCH, WASHINGTON, D.C.**

Mr. MALINOWSKI.. Thank you, Mr. Chairman, Senator Coburn. Good to hear, Senator Coburn, that you were occupied with an issue involving human rights and the Internet. As you know, that is an issue near and dear to our hearts as well.

Senator COBURN. Yes, I know it is.

Mr. MALINOWSKI.. Thanks for having us. It is obviously a very difficult issue. But for all the complexity of it, I want to argue today that it would be dangerous for us to continue with this experiment of indefinite detention without charge that we began in Guantanamo.

I think there is one broad point on which all of us here on this panel do agree, and that is that under the laws of war, enemy combatants who are captured in an international armed conflict can be detained without charge for the duration of that conflict, as you said, Senator Coburn. But the situation we are talking about here is different for a couple of important reasons.

First of all, in a traditional war between States, it is easy to place boundaries around this extraordinary power to detain without charge so that governments do not take it as a license to detain preventively anyone who they think poses a national security threat. In a traditional war, we know where the battlefield is. We know who the enemy combatants are. But this is a fight with no recognizable battlefield or geographical boundaries, no clear distinction between civilians and combatants. So it is very hard to keep those boundaries secure and to limit preventive detention to people who are plainly soldiers in a war. And there is this dangerous prospect of embracing a theory that would allow presidents in the future to detain a broad range of enemies solely based on a prediction of their future dangerousness.

Second, in a traditional war, preventive detention is allowed because it is the only way to keep enemy combatants from returning

to the battlefield. Lawful combatants in a traditional war have not committed a crime and cannot be prosecuted. And so detention without charge is the only conceivable way of keeping them from returning to the fight.

But for the detainees at Guantanamo, detention without charge was not the only option. The people there whom we want to continue to detain have all been accused of doing things that are crimes—committing or planning acts of terrorism, conspiring to commit them, or providing material support, et cetera. So if we are considering preventive detention for these detainees, it is not because they are lawful combatants who can only be kept off the battlefield via preventive detention. It is because some people now think that the option of prosecuting them may be harder to exercise because of the way in which these prisoners were treated in the past, because evidence was not properly kept, because some of it was tainted by the use of torture, some of it is considered too sensitive to be used in court, et cetera.

So as President Obama has said, in deciding what to do with these prisoners, we face this dilemma not because of his decision to close Guantanamo, but because of the original decision to open it. We are facing it not because of who these people are, but because of how their cases were handled in the past.

One conclusion I draw from that is that, whatever we do with the current set of detainees, the use of detention without charge in the future to detain al Qaeda suspects who are captured in the future is not necessary. We can avoid it by avoiding the mistakes that we have made in the last 8 years; by handling evidence properly, by moving as quickly as possible after capture to a criminal prosecution model.

But what about those legacy cases that we have inherited, the ones who are still sitting in Guantanamo, some of whom are obviously more difficult to prosecute than others? I do not want to minimize that difficulty, but I do not think we should throw away the possibility of using our established institutions of justice before we have even tried to do so. And I think if we are even going to consider going down that route, there are some very serious costs that we need to consider.

The first of these, obviously, is the one that you mentioned, Senator Feingold, and that is the possibility that we will create a perception that Guantanamo has not been closed, because the essence of that system was preventive detention without charge. If we move it to the United States, even with additional safeguards, there is no question that people will say that the camp has not really been dealt with, and the costs of keeping the camp open will continue to be borne.

Another obvious cost is more years of frustration and more years of delay. Any such system will inevitably be challenged. Any such system will inevitably be tied up in court for a long time. A stable set of rules may emerge, but it will take a lot of time. How much more time do we have to get this right? I do not think we have too many more chances.

I think a third cost—and this one may be counterintuitive—is that the danger of having dangerous people released may be greater if we go with an alternative system, because if I am right and

the system is challenged, if I am right and these detainees will be able to attack the system based on its legitimacy, that system will not be stable. And as we saw with the Guantanamo system in which 500 or more people were released, in part because the administration was under such pressure to get rid of these people, the chances that dangerous people will be released will be greater.

I think a fourth danger is that anytime we treat these detainees as something special, anytime we treat these detainees as the warriors they claim to be by giving them military rules, military detention, military tribunals, we are actually reinforcing their narrative. We are reinforcing their story about who they are, that they are, in fact, warriors as part of a global struggle on a global battlefield against the greatest super power in the world—a narrative that I think helps them recruit more people to their hateful cause. That is a trap that we should not fall into. The more we treat these people as not extraordinary, the more we treat them as the common criminals that they are, the more we de-legitimize them and the better we can fight them.

So I think these are mistakes that we have made in the past. I do not think we should continue to make them. I think we have alternative institutions that have proven their capacity to deal with this problem. I think at long last we should give those institutions a chance to work.

Thank you.

[The prepared statement of Mr. Malinowski appears as a submission for the record.]

Chairman FEINGOLD. Thank you very much, Mr. Malinowski.

Our next witness is David B. Rivkin, a partner in the Washington office of the law firm of Baker Hostetler, where his practice focuses on international and environmental matters. He is also Co-Chairman of the Center for Law and Counterterrorism at the Foundation for Defense of Democracies, and a graduate of Columbia Law School, with a master's in Soviet affairs from Georgetown. Mr. Rivkin has served as Associate Executive Director and Counsel to President George H.W. Bush's Council on Competitiveness, Associate General Counsel at the Department of Energy, and Deputy Director of the Department of Justice's Office of Policy Development under the Reagan administration.

Thanks for being here, Mr. Rivkin, and you may proceed.

**STATEMENT OF DAVID B. RIVKIN, JR., PARTNER, BAKER HOSTETLER LLP, AND CO-CHAIRMAN, CENTER FOR LAW AND COUNTERTERRORISM, FOUNDATION FOR DEFENSE OF DEMOCRACIES, WASHINGTON, D.C.**

Mr. RIVKIN. Chairman Feingold, Senator Coburn, I am also pleased to appear before you today and testify at this important hearing. I would say to the question about morality as distinct from law, but we act "morally" when we do our absolute utmost, within the bounds of law and proper policy, to defend the United States and the American people from terrorism. Thus, as this very long war continues to go on through its eighth year, it is vital to remember that the detainees we now have in custody at Guantanamo Bay and many other locations in Afghanistan and Iraq are not ordinary criminal suspects, such as the individuals responsible for the origi-

nal World Trade Center bombing or the Oklahoma City bombing in 1995, who indeed must be charged and brought to trial, or released, in accordance with a set of rigorous constitutional and statutory requirements guaranteeing a speedy trial.

Instead, the detainees whom we are talking about today—and, incidentally, it is important to underscore we are not just talking about a finite body of legacy detainees. To the extent this war goes on, we will continue to capture Taliban and al Qaeda operatives and operatives of affiliated organizations. It is very difficult to fight a war if you are not going to capture people, especially since under the international law of war you are obligated to provide them with the opportunity to surrender.

We are talking about unlawful combatants and unlawful belligerents, and let me, by the way, say with due respect to my good colleague Mr. Malinowski, I do not think we give them any homage by calling them “unlawful combatants” because unlawful combatants do not enjoy any honor or prestige associated with lawful combatants. They are criminals, but they are worse than criminals. They are more than criminal. They are certainly worse than muggers and rapists and bank robbers. So I do not think if you grasp the concept of unlawful combatants and call anybody that, the enemy of humanity, somebody who is a pirate or worse, gives this person any honor.

I am glad we all agree on this panel that the unlawful combatant category remains alive and well today. It is a venerable concept. Certainly, I occasionally have to deal with the question. People think that it was somehow invented in the Bush administration. Of course, it was not. It has been with us for hundreds of years. It has been upheld by numerous courts around the world, including American courts and the Supreme Court. So it is firmly grounded in international law.

Now, unlawful combatants, although they are not entitled to the privilege of legitimate prisoners of war—i.e., POWs under Geneva Conventions—can, like POWs—again, I do not think there is any serious question about it—be detained until the conclusion of hostilities. And in this regard, unlawful combatants may be punished for their unlawful belligerence because they do not have combatant unity. There is no rule of international law requiring that they be punished, and their detention for the duration of hostilities is certainly supported by the same rationale as with regard to POWs—to prevent their return to the fight.

Incidentally, again, with all due respect to Mr. Malinowski, I do not know of any rule of international law that suggests that that only applies to “international armed conflicts.” If you assume the Supreme Court is right in the *Hamdan* case in classifying our conflict with al Qaeda is not of an international nature, the whole thrust of international humanitarian law since World War II has been to grant the same privileges to participants in internal armed conflicts as the one in international. So I will be very surprised if anybody from ICRC would agree with the proposition that in a civil war, for example, which is a classical example of a conflict not of an international nature, if you capture a belligerent in a civil war that that person cannot be held for the duration of that war.

I also think—how to put it gently—that the notion that we have another viable opportunity of prosecuting people is—well, “myopic” would be to put it gently. And the reason for it has nothing to do with the legacy problems and torture. It has to do with a very simple proposition that is virtually impossible, Mr. Chairman, to obtain a corpus of evidence, forensic and otherwise, that would suffice to hold the person, bring that person successfully to trial. You are not going to run a CSI Kandahar and exposing American—in the process of trying to get that evidence, you expose American servicemen to additional danger because the longer you linger on the battlefield, particularly in the context of special force operations, the higher is that danger.

So, to me, the notion that there is this other alternative of prosecuting them is somehow—is not viable. We cannot fight this war if we are not going to have a military detention paradigm. A military detention paradigm requires that lawful and unlawful combatants captured in this conflict have to be held for the duration of it. I do not have time—in my prepared remarks, I go through some historical examples, but we have had long wars, 8 years, 5 years, 16 years in the case of Vietnam. This may be a longer war, but that does not alter the legal paradigm. The only point on which I agree with my colleagues is, yes, there is indeed a greater possibility of a mistake. I would stipulate that, because when we are talking about people fighting out of uniform trying to obscure their belonging to a particular group versus somebody wearing a uniform, you can make a mistake. But the way to deal with it is not to throw out this framework. That is why we give captured enemy combatants unprecedented, historically unprecedented degree of due process. In no war in American history have we captured enemy combatants through habeas. So we have already given people plentiful due process rights to ensure we have the right ones.

And, incidentally, the whole business about dangerousness, you do not have to be adjudged to be dangerous. The fact that we are doing that, we are looking to see what danger is created by returning people to the battlefield, is not required by international law. As a matter of international law, if you are a captured enemy combatant, you can be held for the duration of hostilities even if you never fired, Mr. Chairman, a gun in anger, even if you are a cook, even if you are payroll processor, because that is how it works. As long as you are a member of an enemy combatants organization, your particular function is irrelevant. Otherwise, during World War II, everybody, you know, who was driving trucks and sewing uniforms would have been released. That is not how it works.

So the traditional paradigm works. I do not think it is particularly controversial, and I see no other viable alternatives.

Thank you.

[The prepared statement of Mr. Rivkin appears as a submission for the record.]

Chairman FEINGOLD. Thank you, Mr. Rivkin.

Our third witness is David Laufman, a partner in the Washington office of the law firm Kelley Drye & Warren, where his practice focuses on government investigations. A graduate of Georgetown University Law Center, Mr. Laufman has had a long and distinguished career in public service, beginning as an intelligence an-

alyst at the CIA and most recently as an Assistant U.S. Attorney for the Eastern District of Virginia, where he prosecuted numerous high-profile national security cases.

In 2005, Mr. Laufman was the lead trial counsel in the United States Government's successful prosecution of Ahmed Omar Abu Ali, an American citizen convicted of providing material support and resources to al Qaeda, conspiring to assassinate the President of the United States, and conspiring to hijack and destroy aircraft, among other charges. For his work on this case, Mr. Laufman received the John Marshall Award for Outstanding Legal Achievement in Litigation, the highest honor for excellence in litigation awarded by the Department of Justice.

Mr. Laufman also represented the United States in *U.S. v. Chandia*, *U.S. v. Biheiri* and *U.S. v. Khan*—known as the “Virginia jihad” case—all significant terrorism prosecutions. I should also add that from 2001 to 2003 Mr. Laufman served as Chief of Staff to Deputy Attorney General Larry Thompson, where he helped coordinate responses to the terrorist attack of 9/11.

I thank you for being here, Mr. Laufman. You may proceed.

**STATEMENT OF DAVID H. LAUFMAN, PARTNER, KELLEY RYE & WARREN LLP, WASHINGTON, D.C.**

Mr. LAUFMAN. Thank you, Mr. Chairman, Distinguished Ranking Member Coburn. Thank you for the opportunity to testify before you today. I am coming to this issue from a slightly different approach, as a former prosecutor, as a former Department of Justice official, and those will be the experiences that inform my judgments today.

I would say to you that while it will not be appropriate or feasible to adjudicate all terrorism cases in the criminal justice system, that terrorism prosecutions should be brought in Article III courts whenever possible. First, both before and since September 11th, the courts have demonstrated their ability to handle complex terrorism cases. They have applied longstanding jurisprudence from criminal and constitutional law to resolve difficult issues, such as chain of custody for evidence seized in foreign countries by foreign law enforcement authorities, claims of coerced confessions, and the application of the Confrontation Clause to testimony given overseas by foreign government officials. Utilizing the Classified Information Procedures Act, or CIPA, the courts have guarded against the improper disclosure of sensitive intelligence information. And rather than complain about the additional administrative burdens that terrorism prosecutions sometimes impose on the courts, judges have looked upon these cases as an opportunity to shoulder their coordinate responsibility for meeting a national challenge and to demonstrate the strength and adaptability of the American criminal justice system.

Second, bringing terrorism cases in Article III courts under well-established constitutional standards and rules of procedure and evidence confers greater legitimacy on these prosecutions, both here and abroad, and the importance of that legitimacy should not be minimized.

Third, criminal proceedings also play an important role in educating the American people and the world about the nature of the

threat we face. In the *al-Marri* case, for example, it was the defendant's guilty plea in April of 2009 to conspiracy to provide material support to al Qaeda which resulted in the public admissions, nearly 6 years after his initial apprehension, that al-Marri had been recruited by Khalid Sheikh Mohammed, then the operations chief of al Qaeda, to assist with al Qaeda operations in the United States; that al-Marri had been directed to come to the United States no later than September 10, 2001, to operate as a sleeper agent; and that he had received sophisticated codes for communicating with KSM and other al Qaeda operatives while he was in the United States.

With respect to existing non-military detention options, because that is my focus here, the Government currently has only three options for detaining individuals suspected of terrorist activity in a non-military detention system. Depending on the individual's nationality, if the individual has been charged with a crime, the Government can move for pre-trial detention under the Bail Reform Act. If no charges have been brought and the individual is an alien, the Government can detain the individual administratively under an immigration removal statute. If the individual is a U.S. person, the only other recourse is detention under the material witness statute, which is problematic. That is it.

As to pre-trial detention, it is axiomatic that in order to obtain pre-trial detention under the Bail Reform Act, the Government must first charge an individual with a Federal crime. Under Department of Justice policy, however, a prosecutor may bring charges only if he or she believes that the admissible evidence—the admissible evidence—will probably be sufficient to obtain and sustain a conviction.

In a terrorism case, the need to make this early determination can be especially formidable. Terrorism investigations are often driven by threat analysis, and threat assessments often are based on intelligence information, such as communications intercepted under the Foreign Intelligence Surveillance Act, informant reporting, and information provided by foreign law enforcement and intelligence authorities.

Sometimes the Government has the luxury of building a case over a period of months to develop evidence that is admissible in a criminal prosecution. But often it does not because of the nature of the threat, the credibility of information regarding a potential attack, or the perceived imminence of an act of violence. And in those cases, the Government often needs options for detaining individuals before it may be ready to bring criminal charges in order to protect the public safety.

The rules regarding the detention of a person who has been charged with a Federal crime are favorable to the Government in terrorism cases. In support of a request for detention, the Government can submit hearsay and other information that would be inadmissible at trial because the Federal Rules of Evidence do not apply at a detention hearing. The court ordinarily must take into account several factors in determining whether to detain a defendant pending trial, and the Government ordinarily has the burden of proof. But there is a statutory rebuttable presumption in favor

of detention in a terrorism case if there is probable cause that the defendant committed a specified Federal crime of terrorism.

Although magistrate judges are not rubber stamps for the Government in detention hearings, the Government has been largely successful in obtaining pre-trial detention and terrorism cases, sometimes for many months when trial is delayed. And where judges have denied Government motions for detention, they typically have imposed restrictive and sometimes draconian conditions of release.

With respect to material witness warrants, as you know, under the material witness statute, the court may authorize an arrest warrant if the Government files a sworn affidavit establishing probable cause that the testimony of a person is material in a criminal proceeding and that it may become impracticable to secure the presence of the person by a subpoena. There is no expressed time limit in the statute for the length of detention, but the Government must submit a biweekly report to the court in which it lists every material witness held in custody for more than 10 days pending indictment, arraignment, or trial and states why the witness should not be released, with or without a deposition being taken.

After the September 11th attacks, the Government aggressively used the material witness statute to detain individuals in connection with terrorism investigations, at least several of whom were subsequently charged with crimes. But what the Committee must understand is that the material witness statute was not intended to serve as a substitute for pre-trial detention.

In the case of *United States v. Awadallah*, the defendant's name and telephone number had been found on a piece of paper in a car abandoned at Dulles Airport by September 11th hijacker Nawaf al-Hazmi. Reversing the district court, the U.S. Court of Appeals for the Second Circuit found that the defendant's detention for several weeks on a material witness statute warrant was not unreasonably prolonged, but it cautioned that it would be improper for the Government to use the material witness statute to detain persons suspected of criminal activity for which probable cause has not yet been established.

Last, immigration detention. The Government does have additional tools to detain foreign nationals in terrorism cases. Upon a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States. The Attorney General has broad discretion in exercising this authority, and detention is mandatory where the alien is reasonably believed to have engaged in activity that endangers the national security of the United States.

In the immediate aftermath of 9/11, Mr. Chairman, the Department of Justice used the alien removal statute to arrest and detain numerous foreign nationals suspected of engaging in terrorist activity. Utilizing the alien removal statute can buy the Government substantial additional time to determine whether to pursue criminal charges against an alien defendant. In *Zadvydas v. Davis*, a case decided a few months before September 11th, the Supreme Court construed the law to limit the period of detention to the time reasonably necessary to secure the alien's removal, with 6 months



presumed to be a reasonable limit. But the Court noted that the case did not involve “terrorism or other special circumstances, where special arrangements might be made for forms of preventive attention and for heightened deference to the judgments of the political branches with respect to matters of national security.”

With that, Mr. Chairman, I will in the interest of time stop. Thank you.

[The prepared statement of Mr. Laufman appears as a submission for the record.]

Chairman FEINGOLD. Thank you, Mr. Laufman. I appreciate the presentation.

Our next witness is Elisa Massimino, the CEO and Executive Director of Human Rights First, one of America’s most influential human rights advocacy organizations. A graduate of the University of Michigan Law School with a master’s degree in philosophy from Johns Hopkins University, Ms. Massimino teaches human rights advocacy at the Georgetown University Law Center here in Washington. She grew up in a military family and was instrumental in assembling a coalition of retired generals and admirals to speak out publicly against policies authorizing the torture of prisoners in U.S. custody.

Ms. Massimino, we appreciate your presence here this morning, and you may proceed.

**STATEMENT OF ELISA MASSIMINO, CHIEF EXECUTIVE OFFICER AND EXECUTIVE DIRECTOR, HUMAN RIGHTS FIRST, WASHINGTON, D.C.**

Ms. MASSIMINO. Thank you, Mr. Chairman, and thank you, Ranking Member Coburn, for convening this hearing. I really appreciate the opportunity to be here to share the views of Human Rights First on these issues and, in particular, to address how the choices on detention policy going forward will impact U.S. national security and international standing.

The use of arbitrary and unlimited detention by the previous administration has undermined America’s efforts to defeat terrorists. It has served as a powerfully effective recruiting advertisement for al Qaeda. It has strengthened the hand of al Qaeda rather than isolating and de-legitimizing them in the political struggle for hearts and minds. It has undermined critical cooperation with our allies on intelligence and detention. And it has done considerable damage to the reputation of the United States, undermining its ability to lead on counterterrorism and other key national priorities.

Now, President Obama has stated that he wants to reverse the negative impact of these policies. In his speech last month at the National Archives, he made clear that trust in our values and our institutions will enhance our national security, not undermine it. But I believe that vision could be undermined by the continued use of military commissions and detentions without trial and would deprive us of the ability to, as he said, “enlist the power of our fundamental values,” proving counterproductive and not durable. Such efforts are also unnecessary in light of the existing laws that provide an adequate basis to detain terrorism suspects and try them for crimes of terrorism before regularly constituted Federal courts.

In January of this year, Admiral Dennis Blair testified before the Senate Committee on Intelligence that, "The detention center at Guantanamo has become a damaging symbol to the world and it must be closed. It is a rallying cry for terrorist recruitment and is harmful to our national security, so closing it is important for our national security." But the damage done by Guantanamo is not because of its location. It stems from the discredited policies of unfair trials and detention without charge. If those policies are continued, even in a somewhat modified form, Guantanamo will not be closed; it will just be moved.

Proponents of preventive detention argue that those ready to do harm to the United States should be treated as warriors under the laws of war. Yet the decision to label all Guantanamo prisoners as "combatants" engaged in a "war on terror" has unwittingly ceded an important advantage to al Qaeda, supporting their claim to be warriors engaged in a global battle against the United States and its allies.

Accused 9/11 planner Khalid Sheikh Mohammed revealed in this status at his Combatant Status Review Tribunal at Guantanamo in March of 2007. He said, "For sure, I am America's enemy. The language of war in the world is killing. The language of war is victims."

Now, those whose job it is to take the fight to al Qaeda understand what a profound error it was to reinforce al Qaeda's vision of itself as a revolutionary force engaged in an epic battle with the United States. Former CIA case officer and counterterrorism expert Mark Sageman said, "Terrorist acts must be stripped of glory and reduced to common criminality. It is necessary to reframe the entire debate from imagined glory to very real horror."

Likewise, General Wesley Clark stated, along with 19 other former national security officials and counterterrorism experts, "By treating such terrorists as combatants, we accord them a mark of respect and dignify their acts, and we undercut our own efforts against them in the process. If we are to defeat terrorists across the globe, we must do everything possible to deny legitimacy to their aims and means and gain legitimacy for ourselves. The more appropriate designation for terrorists is not 'unlawful combatants,' they said, "but the one long used by the United States: 'criminal.'"

Last June, Alberto Mora, former Navy General Counsel, testified that, "Serving U.S. flag-rank officers maintain that the first and second identifiable causes of U.S. combat deaths in Iraq—as judged by their effectiveness in recruiting insurgent fighters into combat—are, respectively, the symbols of Abu Ghraib and Guantanamo."

This vision is reinforced in the updated "Army-Marine Corps Counterinsurgency Manual" that was drafted under the leadership of General Petraeus and incorporated lessons learned in a variety of counterinsurgency operations, including Iraq and Afghanistan. It stresses repeatedly that defeating nontraditional enemies like al Qaeda is primarily a political struggle and one that must focus on isolating and de-legitimizing the enemy rather than elevating it in stature and importance. As the manual states, "It is easier to separate an insurgency from its resources and let it die than to kill or capture every insurgent. Dynamic insurgencies can replace losses

quickly. Skillful counterinsurgents, which we seek to be must, thus, cut off the sources of that recuperative power.

As long as Guantanamo detainees are held in prolonged detention without charge or tried before extraordinary military commissions, the facility's legacy will continue to nurture that recuperative power of the enemy, and focus will remain on how the procedures deviate from those in criminal trials before regularly established Article III courts and not on the heinous acts of those we seek to try. Guantanamo has become a symbol to the world of expediency over fundamental fairness and of this country's willingness to set aside its core values and beliefs.

The reputational damage caused by Guantanamo has very practical ramifications for our counterterrorism operations. If U.S. detention policies continue to fall short of the standards adhered to by our closest allies, then those policies will continue to undermine our ability to cooperate in detention and intelligence operations.

In his June testimony, Alberto Mora described in detail how concerns about U.S. detainee policies damage U.S. detention operations by leading our allies to hesitate to participate in combat operations, to refuse to train on joint detainee operations, and to actually walk out on meetings regarding detention operations.

The Guantanamo detentions have shown, as three retired flag officers said in the letter to the President last month—which I ask that be included in the record.

Chairman FEINGOLD. Without objection.

Ms. MASSIMINO. It stated: The Guantanamo detentions have shown that assessments of dangerousness based not on overt acts, such as in a criminal trial but on association, are unreliable and will inevitably lead to costly mistakes. This is precisely why national security preventive detention schemes have proven a dismal failure in other countries. The potential gains from such schemes are simply not enough to warrant departure from hundreds of years of Western criminal justice traditions.

In conclusion, there has not yet been a full accounting of the strategic and operational costs of the failed Bush administration policies on prisoner treatment, but there is plenty of evidence to suggest that continuing down the road of prolonged detention without trial will undermine national security and hamper counterinsurgency efforts against al Qaeda. It will also seriously impede the Obama administration's efforts to turn the page on the past and successfully implement a new strategy to combat terrorism that brings the United States and its allies together in pursuit of a common goal. It is time for us to learn from the mistakes of the past and chart a new course, a smarter strategy, one that draws on all of the elements of national power. This is a real turning point for our country, and I urge you to seize it and ensure that we do not do to ourselves what al Qaeda could never do on its own: upend our constitutional system and values by establishing an entirely new system of detention without trial in the Federal law and on American soil.

Thank you.

[The prepared statement of Ms. Massimino appears as a submission for the record.]

Chairman FEINGOLD. Thank you, Ms. Massimino.

Our next witness is Richard Klingler, a partner in the Washington office of the law firm Sidley Austin, where his practice focuses on national security matters and complex litigation. A Rhodes scholar and a graduate of Stanford Law School, Mr. Klingler clerked for Judge Kenneth Starr on the D.C. Circuit and for the path-breaking Supreme Court Justice Sandra Day O'Connor. During the George W. Bush administration, he served as general counsel and legal adviser for the National Security Council and as senior associate counsel to the President.

I thank you for being here, Mr. Klingler, and the floor is yours.

**STATEMENT OF RICHARD KLINGLER, PARTNER, SIDLEY  
AUSTIN LLP, WASHINGTON, D.C.**

Mr. KLINGLER. Thank you, Mr. Chairman, Ranking Member Coburn, for allowing me to present my views today regarding the lawfulness, morality, and national security necessity of ongoing—or indefinite, or prolonged—detention.

Detention for this purpose means detention by our military of enemy combatants: persons whom our military has concluded have waged or threaten war against our troops, citizens, and allies. The combatants at issue are members of al Qaeda and related terrorist organizations that pose a significant threat of violence to U.S. citizens.

The main purpose of detention is to keep those who would harm U.S. citizens and troops from returning to the fight, and detention appropriately continues until that threat no longer exists. In this sense, wartime detention is always “indefinite” or “prolonged” until conflict ceases. We have fought long wars and wars against unconventional forces. The conflict against terrorist organizations is not different in kind.

The debate over indefinite detention often wrongly focuses on Guantanamo Bay. Prolonged detention is not just something proposed for the future, for a small subset of Guantanamo detainees. It is, instead, a practice that this administration is already conducting on a widespread scale, in Afghanistan and elsewhere, will continue to pursue for hundreds if not thousands of detainees for many years, and has already defended repeatedly in Federal court.

The lawfulness of ongoing detention of enemy combatants is clear and well established.

In short, such detention is a lawful incident of war, authorized whenever the exercise of war powers is proper. The Supreme Court has reached this conclusion for this specific conflict. The current administration has correctly argued that “[l]ongstanding law-of-war principles recognize that the capture and detention of enemy forces are important incidents of war,” that our enemies are not confined to fixed battlefields in Iraq and Afghanistan, and that Congress has through the AUMF authorized ongoing detention.

Challenges to the detention of enemy combatants, relying on the criminal law or otherwise, usually depend on rejecting the premise that we are truly at war on a very wide scale. That conclusion would surprise our troops in Afghanistan, Iraq, and many other places. It would particularly surprise our Commander-in-Chief. He recently confirmed that “[w]e are indeed at war with al Qaeda and its affiliates” and that because “al Qaeda terrorists and their affili-

ates are at war with the United States, those that we capture—like other prisoners of war—must be prevented from attacking us again.”

Perhaps now that this administration has endorsed ongoing detention, as has nearly every one of its predecessor once controversial counterterrorism policies, we can more readily accept the legitimacy of these practices.

The most important national security benefit of detaining enemy combatants is simple but essential: to meet our moral commitment to ensure that those detained do not directly or indirectly attack our troops or citizens, here or abroad. Continued detention also ensures that our military and intelligence forces can and will continue to seek to detain additional combatants.

Other benefits become clear in light of the alternatives. If standards for detention are increased or if detention were abandoned or restricted, at least three consequences would follow:

First, detention would be outsourced. U.S. officials would rely on foreign allies to capture, interrogate, and detain enemy combatants, and recent reporting shows that this is already occurring. Detainees are less likely to be captured, more likely to be released prematurely, and less likely to be treated well. We should worry that the administration may be failing to detain newly discovered al Qaeda members and supporters in certain circumstances, but having other nations do so instead.

Second, mistaken release of detainees would occur more frequently. Even under the current standard, many detainees released by the U.S. have gone on to become al Qaeda and Taliban leaders, a suicide bomber, and combatants against our troops. This administration's Defense Department recently detailed the significant breadth of the problem. Even so, none of the detainees released from Guantanamo has attacked citizens in the United States—yet.

Third, detention would be sidestepped. Enemy combatants may be left in the field because criminal standards of proof have not been satisfied, placing our troops and citizens at risk. This was the principal flaw in our pre-9/11 counterterrorism policy. Or the military may choose instead to use the force of arms against a combatant when capture may prove pointless or risky.

Some suggest that we can avoid these tough choices by relying exclusively on criminal proceedings. The President has largely mooted that argument by stating that “[w]e’re going to exhaust every avenue that we have to prosecute those at Guantanamo who pose a danger to our country.” Even so, he concludes that there will still be detainees who cannot be prosecuted, “who, in effect, remain at war with the United States.”

The President is clearly right, all the more so for detainees in Afghanistan. Just because we can prosecute some terrorists in Federal court does not mean that we can prosecute all those who would attack our troops and citizens. And we do not want to blur the line between the legal protections afforded to U.S. citizens and lawful permanent residents on the one hand and those suitable for foreigners abroad whom the military has concluded would do us harm.

We should resist the return to pre-9/11 practice that exclusive reliance on criminal proceedings would reflect. We do not want to

leave terrorists in the field or send them there simply because U.S. forces have not gathered evidence of past evidence of past wrongdoing, admissible in court and provable beyond a reasonable doubt. We want them off the battlefield sooner and to stay off longer. As the President says, we need tools to allow us to prevent attacks.

Thank you.

[The prepared statement of Mr. Klingler appears as a submission for the record.]

Chairman FEINGOLD. Thank you, Mr. Klingler.

Our last witness this morning is Sarah Cleveland, the Louis Henkin Professor of Human and Constitutional Rights and the Co-Director of the Human Rights Institute at Columbia Law School. A Rhodes scholar and Yale Law School graduate, Professor Cleveland clerked for Judge Louis Oberdorfer on the D.C. District Court and for the great Supreme Court Justice Harry Blackmun. She is a renowned authority on international human rights and labor rights, constitutional law, U.S. foreign relations, and the interaction between human rights and international trade. Professor Cleveland is also an experienced human rights litigator in the United States and international courts, and in 2003, she helped draft a labor code for post-Taliban Afghanistan.

We appreciate your presence today, Professor. Please proceed.

**STATEMENT OF SARAH H. CLEVELAND, LOUIS HENKIN PROFESSOR OF HUMAN AND CONSTITUTIONAL RIGHTS AND FACULTY CO-DIRECTOR, HUMAN RIGHTS INSTITUTE, COLUMBIA LAW SCHOOL, NEW YORK, NEW YORK**

Ms. CLEVELAND. Thank you, Chairman Feingold, and thank you, Ranking Member Coburn, for including me in the testimony on this pressing issue.

I am a scholar of U.S. constitutional law and international human rights law, and also co-coordinator of a Working Group on Detention Without Trial, whose draft report on comparative detention practices I would like to submit for the record today, along with my written testimony, and an excerpt of State Department country reports on preventive detention practices abroad.

I would like to start out by responding to David Rivkin's assertion that these are not ordinary criminal suspects and that the United States possesses under the laws of war a roving authority to seize and detain indefinitely persons suspected of being members of al Qaeda or its affiliates around the world.

I agree with other witnesses today who have said that persons who are seized in Afghanistan on a conventional battlefield while taking up arms against the United States may be detained for the length of that conflict. This power was acknowledged by the Supreme Court in *Hamdi*. Appropriate rules urgently need to be put in place to regulate the grounds and procedures for such detention, but it falls well within long-accepted international standards.

I part company from Mr. Rivkin and Mr. Klingler, however, in the claim that wartime detention authority allows the United States to indefinitely detain al Qaeda or Taliban affiliates seized from any non-battlefield location, wherever they may be found. It is this claimed roving detention power that has brought the U.S.

widespread international condemnation, eroded our moral authority, and brought new converts to terrorism.

The subject of this hearing is the legal, moral, and national security consequences of prolonged detention, and my remarks are organized around three premises: that prolonged detention of non-battlefield detainees is unlawful, that it is immoral, and that it has dire national security consequences for our country.

First, prolonged detention is wrong as a matter of law because it offends our most fundamental constitutional values. Protection of personal liberty against arbitrary confinement is one of the hallmarks of our legal tradition. Our Constitution narrowly circumscribes the conditions under which a person may be incarcerated through the criminal justice system. It does not recognize a roving power to detain dangerous persons. As Federal Judge Jack Coughenour has observed, there is no "bad guy" amendment to the U.S. Constitution.

The Government does have authority to detain people outside the criminal justice system under a very few narrow and historically confined exceptions, such as quarantine for public health purposes. One of those exceptions is the power to detain fighters of a foreign state in an international armed conflict. But as Tom Malinowski has testified, this exception exists for extremely specific purposes and is narrowed by well-defined parameters. Those purposes and parameters are not present when suspected al Qaeda members are seized and detained far outside the battlefield. In those circumstances, there are no objective indicia of combatency. The obligation to detain in preference to killing a fighter is not present. The choice is between detention or criminal prosecution. None of the battlefield exigencies that make preservation of evidence or criminal prosecution difficult in a wartime context are present when someone is seized in a hotel in Thailand.

But even if the detention of such persons could be contemplated under international humanitarian law, it would fall so far outside any traditional exception to our own criminal justice system as to be unconstitutional, as Justice O'Connor recognized in her plurality opinion in *Hamdi*.

Second, prolonged detention is immoral. Prolonged detention without a proven crime offends the world's most basic sense of fairness. It is the hallmark of repressive regimes that the United States historically has condemned around the globe. Our adoption of prolonged detention on Guantanamo has undermined our moral authority in promoting improved human rights conditions abroad, and it has alienated the United States as a leader in counterterrorism efforts. Our annual State Department country reports on human rights practices devote extensive scrutiny to the short- and long-term detention practices of other States. They demonstrate that none of our North American or European allies engages in the kind of detention practices that the U.S. has claimed in the recent past.

Third, prolonged detention harms our national security. It does so for four reasons. It recruits people to terrorism, as Elisa Massimino has said. It discourages cooperation in counterterrorism. It diminishes our soft power to lead on national security issues. And by condoning similar abuses, we embolden other states

to take actions contrary to global security interests around the world.

In closing, I would like to note that this Subcommittee is one of the guardians of our Constitution. For the United States to ratify the principle that our Government may hold people indefinitely based on the claim that they cannot be tried, but are too dangerous to be released, forgets our constitutional past, distorts our constitutional present, and jeopardizes our constitutional future. It forgets our past, in which some of our worst historical episodes have involved indefinite detention, such as the Japanese interment. It distorts our present because to bring Guantanamo onshore and perpetuate it would do permanent damage to our constitutional traditions and make the cure far worse than the disease. Finally, it jeopardizes our future for, as Justice Robert Jackson warned in his dissent in *Korematsu*, if we accept the principle that we may detain those who cannot be tried but are too dangerous to be released, that principle will lie around like a loaded weapon ready to be picked up and used by any future government at home or around the globe.

Thank you. I look forward to your questions.

[The prepared statement of Ms. Cleveland appears as a submission for the record.]

Chairman FEINGOLD. Thank you, Professor Cleveland, and all the witnesses for your testimony. I ask unanimous consent that the statement of the Chairman of the full Committee, Senator Leahy, be placed in the record, without objection. And we will begin with 7-minute rounds for the panel.

Ms. Massimino, I understand that Human Rights First has conducted extensive research into the 120-plus terrorism cases prosecuted in Federal court over the past 15 years, and your organization, I am told, has concluded that bringing such cases has "contributed significantly to the gathering of intelligence of terrorist plots and networks."

Can you provide some specific details about how our criminal justice system actually provides these national security benefits? And how have criminals trials helped to unravel some future terrorist plots?

Ms. MASSIMINO. Sure. Thank you. Human Rights First, when the Bush administration started to discuss the need for an alternative system, we wanted to examine the sufficiency of the current criminal justice system, the regular criminal justice system, for dealing with these cases. And so we asked two former Federal prosecutors to look at all the terrorism cases over the last 15 years that have been brought in the Federal courts. And this report, "In Pursuit of Justice," is the result of that effort.

We looked in great detail at the materials, the background materials, the filings in all of these cases, and what we found was that the United States has captured, both in the United States and overseas, some of the most dangerous terrorists the world has ever known and has prosecuted them successfully in U.S. courts and incarcerated in U.S. jails.

And what we did in the report was to look at all of the claims that have been raised about the insufficiency, alleged insufficiency of the criminal justice system in dealing with these cases, and what



we found is that the Federal courts are adaptable and flexible in dealing with the many challenges that these cases pose. And they do pose challenges, as Mr. Laufman knows probably better than any of us here.

But what we found is that the law has evolved, and so prosecutors have been able to invoke a host of specially tailored anti-terrorism laws and generally applicable criminal statutes—in fact, some that provide greater flexibility than the substantive laws that we were saddled with in the misguided military commissions that would enable us to obtain convictions, that there has been no serious problem with obtaining jurisdiction over those defendants, even when they have been apprehended by unconventional or forceful means; that, as David Laufman suggested, the existing criminal statutes and immigration laws give us an adequate basis to detain and monitor suspects in the vast majority of these cases that we know, that the Classified Information Procedures Act, that CIPA has successfully balanced the need to protect national security information, including the sources and methods of intelligence; that Miranda warnings have not posed a barrier to prosecution in these cases because they are not required on the battlefield or in non-custodial interrogations or interrogations that are conducted primarily for intelligence-gathering purposes; that the Federal Rules of Evidence, including the rules of authentication of evidence collected abroad, give the courts a flexible framework for dealing with these issues; and that the Sentencing Guidelines and other sentencing laws give us severe sentencing options for many terrorist offenses.

Also, we looked at the very real prospect of the danger posed by having terrorist suspects to the participants in these trials—the judges, the juries, the court officers—and found that the United States court system has been able to deal with those challenges successfully.

Just this morning, we saw that the Obama administration has moved a Guantanamo detainee, Ahmed Ghailani, to New York to stand trial for his role in the embassy bombings, and I think that and the *al-Marri* case, the moving of the *al-Marri* case into the Federal justice system has the potential to really demonstrate what the President talked about in terms of faith in our institutions and the ability to change the perception that we have promulgated through our past actions of al Qaeda as combatant warriors against us into a more effective tool in the broader counterterrorism struggle pursuant to the theory in the Counterinsurgency Manual.

Chairman FEINGOLD. I thank you for your answer.

Professor Cleveland, you make the very practical point in your testimony that there is no evidence that preventative detention works in the context of terrorism. You cite the fact that the U.K. renounced its prolonged detention of terrorism suspects in Northern Ireland in 1975, and a former British intelligence officer, Frank Steele, concluded, “Internment barely damaged the IRA’s command structure and led to a flood of recruits, money, and weapons.” So it seems to me we have strong evidence that prolonged detention actually can make us less safe. Can you speak about any additional evidence for this conclusion?

Ms. CLEVELAND. Yes, thank you. The Northern Ireland example is well-known and has been carefully scrutinized. There are numer-

ous studies that indicate that not only were the detentions ineffective in that they did not successfully incapacitate IRA terrorists, but instead they inflamed hostility to the U.K. regime and inspired people to join the IRA. There are a number of studies of this phenomenon, and this was a reason that the U.K. finally abandoned the detention policy in the 1970s.

In India, studies of India's detention practices also indicate that long-term detention without trial contributes to a cycle of violence and abuse, which in turn inflames unrest and provides recruitment tools for terrorist organizations.

With respect to Israel, Lisa Hajjar's book, "Courting Conflict," on the West Bank military tribunals, shows that Palestinians were mobilized to fight Israelis by the system of preventive detention and military tribunals, particularly by the "natural deaths," quote-unquote, of Palestinians in Israeli custody.

There have also been more recent studies of combatants in Iraq demonstrating that people who come from countries with abusive civil rights systems are much more likely to join the fight against the United States than those from countries that respect the rule of law.

Chairman FEINGOLD. Thank you, Professor.

Senator Coburn.

Senator COBURN. Well, thank you, each of you, for your testimony. I would like for you all to just answer this in the briefest form possible.

Are we, the United States, under any international obligation which would require us to try or release the detainees that we have?

Mr. RIVKIN. If I might start, Senator Coburn, the short answer is no. The slightly longer answer is that, with respect to my distinguished colleagues, all the caveats and all the qualifications that they spoke about—namely, combatants fighting on behalf of states, combatants being picked up on the battlefield, roving commission to capture people anywhere—are not supported by the existing body of international law.

If you are fighting on behalf of an entity which is in the state of armed conflict with the United States, which is an objective test under international law as to what an armed conflict is, if you fight on behalf of a private entity, a state entity is irrelevant, whether you were captured on a battlefield or 500 miles away from it is irrelevant in terms of our ability to be able to detain such a person. I do not have time to get into the historical examples, but does anybody seriously believe that if we launched a commando raid as we did in World War II to capture some Wehrmacht officers 500 miles away behind the front line, or perhaps in Switzerland, that they would not be detainable under the laws of armed conflict?

The problem you have is that international law provides for the widest latitude, and all the caveats and all the restrictions that are being introduced by my colleagues drive toward one purpose only, which is eviscerate and de-legitimize the international law architecture. And with respect, you cannot fight a war by using laws as a war architecture. It is not only about detention.

Let me just close by pointing out the absurdity of the proposition that you can use a Predator to launch a missile to kill somebody

in a Jeep in Yemen because you believe a person an enemy combatant. You can use deadly force, which you cannot do with a criminal suspect. That is okay. But if you happen to have a commando unit grabbing this person, that person cannot be detained as a combatant under the laws of armed conflict. That distinction is absurd.

And what we are going down the path is not just not being able to detain people like that, not being able to use deadly force, not being able to fight a war against the people who are very much fighting a war against us. That way lies defeat and disaster.

Senator COBURN. Mr. Malinowski.

Mr. MALINOWSKI.. Sure. This is not the war of Wehrmacht. This is not a conventional army of a state that has declared war against the United States with which we are engaged on a conventional battlefield. This is an entity that kills civilians. That is its reason for existence. This is an entity that blows up buildings. This is an entity that blows up children. This is an entity that killed 3,000 people in New York City on September 11th and has done similar things all around the world.

This is the kind of entity that throughout history has been treated as the lowest form of criminal life, whose members have not been accorded the honor of being treated as warriors, but have been put away in the darkest prisons that we have for such people. That is what this entity is, and that is how this entity should be treated.

And, yes, absolutely, if the members of this entity are holed away in a place where we cannot send the NYPD to put handcuffs on them because they are protected by a lot of weaponry and it is a lawless area, like Yemen or Somalia, then, of course, we can use deadly force. You can use deadly force in a lot of situations when you are trying to bring people in.

That does not, therefore, lead to the conclusion that because you can use deadly force in those situations you have to then treat them as soldiers and detain them without charge. You still do what is in the national interest in that situation, and what is in the national interest is not to treat these people as warriors. It is not just a matter of law. It is a matter of what is best for this country.

Senator COBURN. Others?

Ms. MASSIMINO. Well, if I could just add briefly, you know, the fact is that al Qaeda declared war on us several times before 9/11, and, again, there is—as we have discussed this morning, they see it very much in their interest to promote that framework onto our response to them. And I think it is quite important for us to take notice of that.

And with respect to my colleague Mr. Rivkin, you know, we seem to be under the misimpression that the only way to take the threat of al Qaeda seriously is to shoe-horn all of our response into a military framework. And while absolutely it is clear—I would be the first to say that the criminal justice system is not the solution to the terrorist problem, nor, I think, is it smart for us to ignore the advice in the Counterinsurgency Manual that General Petraeus put together, or the advice of Federal prosecutors who have successfully put away dangerous criminals through that system. I think it would be a mistake to treat those people as the warriors that Mr. Rivkin would have us think they are.

Senator COBURN. I noted that, Mr. Laufman, in your testimony about Article III courts, you had a caveat that not all of these could be tried in an Article III court. Would you expand on that?

Mr. LAUFMAN. Senator, I think there is a menu of variables that complicate the ability to try some of these cases in Article III courts, both for policy reasons and pragmatic reasons. From a policy standpoint, it is not clear to me that an individual who had committed crimes against humanity or crimes of that kind of atrocity belongs in a criminal court as opposed to some other forum with international and domestic legal standing. If individuals have been subjected to coercive interrogation, it severely complicates if not cripples the ability of prosecutors to build a case in the absence of external corroborating evidence.

There is just a host of potential issues that complicate the ability to bring all of these cases before Article III courts.

Senator COBURN. Thank you.

Mr. Klingler, how would the legal and constitutional rights of detainees currently held at Guantanamo Bay change if they were brought to the United States?

Mr. KLINGLER. Under the *Hamdan* decision, there is a broad range of treatment-related rights extended to detainees in Guantanamo, and others to the extent that they are necessarily implicated by the right to have habeas review. There is some sort of due process right that under *Boumediene* did not get defined. Chief Justice Roberts criticized the Court for providing a right under *Boumediene* without defining the scope of that.

If the detainees got brought to the United States, they would have a stronger set of arguments that they are entitled to the full range of rights that are accorded to federal court defendants. If they are criminally prosecuted, they clearly have the absolutely full range of rights that would be given to U.S. citizens, lawful permanent residents, or anyone else who is brought before the criminal justice system. Everything that is in our Constitution that would apply if you or I were prosecuted would apply to a detainee in a criminal prosecution.

So that is where the difference between the two sets of rights comes. On the one hand, if they are left in Guantanamo right now, they have some set of rights, undefined but quite limited, but clearly with some due process rights associated with habeas proceeding in the United States, under a criminal prosecution, the full range of rights.

Ms. CLEVELAND. Senator Coburn, would you mind if I—

Chairman FEINGOLD. Professor, you can briefly respond. Then we will start another round.

Ms. CLEVELAND. Thank you. I just wanted to note that the Supreme Court twice now has held that Guantanamo is essentially United States soil for the purposes of the application of U.S. statutory law and U.S. constitutional law. They did so in the *Rasul* case in 2004 and again in the *Boumediene* case last summer. And in *Boumediene*, they were quite forceful in noting that because of the complete jurisdiction and control that the United States exercises over Guantanamo, there is very little justification, under the type of functional approach to application of the Constitution that the Court employed, for concluding that constitutional protections

would be significantly different on Guantanamo than in the United States.

So I would suggest that whether or not the detainees are held in Guantanamo or in the United States, they are entitled to quite robust constitutional protections under the Supreme Court's decisions.

Mr. RIVKIN. May I—

Chairman FEINGOLD. Go ahead, Mr. Rivkin.

Mr. RIVKIN. With respect, that may be where the Supreme Court or a portion of the Supreme Court would go. That is not the holding of *Boumediene*. Therefore, in one instance you have uncertainty in litigating it. In another instance, if you bring people here, you have absolute and utter certainty that they have a full panoply of constitutional rights.

But there is one other important issue. What happens to individuals like the Uyghurs who are being ordered released by the Court, despite Judge Urbina's opinion? If you look at what this administration has continued to do in this area, they are arguing quite vigorously, but the Federal courts, despite the existence of constitutional habeas, lack the power to compel the political branches—the executive in this instance—to bring an alien from outside the United States to be released.

If you bring people here, there is no doubt in my mind that anybody who prevails in this habeas case would be released, possibly held a few months under the teaching of *Zadvydas* and immigration detention, but basically if you start bringing people here, you better be prepared, despite everything that is said at the political level, that dozens and dozens of individuals, if you look at the odds so far in the habeas process in the district court for the District of Columbia, the Government has not done very well—in my view not because they are innocent, but because the evidence is not there.

So we are going to have hundreds of terrorists walking around this country whom we cannot deport, by the way, back to their home countries because of concerns about torture. Aggregating the world's worst terrorists on American soil for years to come is not a very smart way to wage a wary.

Chairman FEINGOLD. Let me start another round relating to this. Mr. Malinowski, you noted that the Bush administration sent hundreds of former Guantanamo detainees back to their home countries, and the Pentagon believes that some of these men have engaged in terrorist activities. What do we know about these people? Do you believe that some of them would have been safely locked up in Federal prison if the United States had brought them to trial?

Mr. MALINOWSKI.. We actually know very little about most of them. I would start by suggesting that we all need to be cautious about the numbers that have been put out. You know, one in seven have gone back to the fight, one in ten. The numbers keep changing. The evidence behind those numbers is lacking, to say the least. You know, there have been guys put on that list because they gave an interview or wrote a book criticizing their treatment in Guantanamo, and that was deemed being part of the propaganda war against us.

There was a guy put on the list who went back to Russia and was picked up by the Russian authorities for allegedly committing a violent act, and the only evidence against him in trial was a confession that was tortured out of him by the Russian interior police. And we believe that is probably not something that we should be putting out as information with the U.S. seal of approval.

That said, there are some number of people, we all have to acknowledge, who have gone back, of the 500-some who were released, who did commit violent acts. And that is something everyone has every right to be concerned about. I would say two things about that group of people.

First, if they had engaged in terrorist acts or supported terrorism before they reached Guantanamo, then the best option that the Bush administration had was to prosecute them for those crimes, as it did with Moussaoui, as it did with Padilla, as it did with Richard Reid, as we have done with a lot of people who have done nothing more than spend time in a training camp or give money to the enemy, not particularly dramatic acts and yet they have been prosecuted. And had that been done, these people would be in a super max somewhere today and not creating a problem for us somewhere in Saudi Arabia or Yemen.

Second, if these people did not engage in acts of terrorism or violence before coming to Guantanamo, then it is not correct to say that they returned to the fight. It would be more correct to say that we recruited them to the fight, which brings out once again the fundamental damage that this system has caused us and our national security.

I think we need to remember, Mr. Chairman, that even as we sit here and focus on these 241 detainees in Guantanamo, what to do about them, there is a much larger problem out there. It is much larger than the number 241. It is the thousands upon thousands of young men who are virtually identical in their profiles to these men who are at large in the world, who pass through these camps in Afghanistan, who read the websites, who harbor the same views, who are potential recruits to this cause. But we win this fight by diminishing that pool, and what Guantanamo and the system have done is to increase that pool of potential terrorists. And that is why even as we struggle with the few dozen that we have to find some solution for, we have got to keep our eyes on that larger challenge.

Chairman FEINGOLD. I appreciate that point very much.

Professor Cleveland, yesterday ABC released a lengthy interview with Lakhdar Boumediene, who spent 7½ years enduring harsh treatment at Guantanamo until he was finally released by an order of a Bush-appointed Federal judge for lack of any credible evidence to justify his detention.

What lessons do we draw from Mr. Boumediene's experience? And do we know how many innocent, non-dangerous false positives, if you will, have been imprisoned in Guantanamo?

Ms. CLEVELAND. I think that Mr. Boumediene's experience underscores precisely the infirmity of the idea that we can seize people far away from the battlefield, designate them as enemy combatants, and purport to lawfully detain them under the laws of war.

Mr. Boumediene was working for the Red Crescent in Bosnia when he was arrested in October of 2001 and charged with con-

spiring to blow up the U.S. and British embassies. The Bosnian officials and a Bosnian court found that the allegations were not supported, and he was ordered released. But then the U.S. Government insisted that he be transferred to U.S. custody, and he was ultimately taken to Guantanamo and put into detention and coercive interrogation to try to extract from him information about his knowledge of al Qaeda, which he did not possess.

So he, as you said, remained there for 7½ years. The Combatant Status Review Tribunal process did not release him. He was only released after the Supreme Court ruled in the decision bearing his name that habeas jurisdiction applied to Guantanamo.

So I think the lessons to be drawn are three: First, that this underscores the high risk of false positives for seizures outside the battlefield.

Second, that prolonged detention often goes hand in hand with torture and abusive treatment. This is the experience in other countries around the world that employ preventive detention, and it was the experience in this case.

And then, third, that robust legal process protects our Government. It does not just protect people like Boumediene. If he had been arrested with the expectation that he would be criminally prosecuted initially, evidence would have been maintained; he would have been put into a regular legal process. A court would have come to the conclusion much earlier that the wrong person was being held. And the Government would have been saved the embarrassment in this case.

Chairman FEINGOLD. Mr. Laufman, you highlighted the public benefit of Federal criminal proceedings and educating the American people and the world about the nature of the terrorist threats that we all face. I would like to hear a little bit more about that. Would you provide some further details of this public benefit from your own experience?

Mr. LAUFMAN. Well, probably the most signal experience I had was in the Abu Ali case, which has some resonance with respect to concerns today about whether the United States, like Britain, will become a target of homegrown radicalism. Abu Ali was a resident of Falls Church, Virginia, not far from where we are sitting here today, born in Houston, Texas, a very bright young man, went to Maryland as an engineering student, but became enthralled by Islamic radicalism through trips to Saudi Arabia to pursue religious study, and wound up joining an al Qaeda cell at the height of al Qaeda's prominence on the Arabian peninsula, and somehow transformed from this young man with an extremely promising future into someone committed to waging acts of violence against the highest levels of the United States Government.

All that information came out through a criminal trial, but it was a criminal trial that resulted from a lot of pulling and hauling with the U.S. Government about what to do. Abu Ali, it may not be well understood, almost became an enemy combatant and hung in the balance for some period of months before the Bush administration decided upon reviewing assessments by prosecutors that a case could be mounted in criminal court. But it hung in the balance for a while.

And our ability to bring a criminal case—and this ought to be brought out in this hearing as well—depended to a large extent on the cooperation of the intelligence community. My biggest struggles as a prosecutor, Mr. Chairman, were not against al Qaeda. They were with the general counsel's office of the CIA. And they have a legitimate interest, as we all do, in protecting against the disclosure of classified information improperly. But there is sometimes an unduly reflexive response to guard against the sharing of information that could be used in a criminal case even if by any objective standard no harm would truly come to the U.S. national security interest.

Chairman FEINGOLD. Thank you, Mr. Laufman. I will do a third round here, a final round.

Mr. MALINOWSKI., as you know, any Federal criminal proceeding could conceivably end with an acquittal. How would you respond to those who would say this would be an unacceptable outcome in a terrorist case? And, of course, alluding to the comments of Mr. Rivkin, would an acquittal mean the release of an individual on American soil?

Mr. MALINOWSKI.. No, I believe if it is an alien, not talking about an American citizen here, if it is an alien that we brought here, an acquittal would not result in the release of that person on American soil because we have all kinds of other legal mechanisms to detain and deport such people if the Government feels that they pose a continuing threat.

But here is a bigger concern. Let us say we start with this proposition that we cannot afford an acquittal, and so we create a system that provides near certainty that someone who we believe is dangerous can be detained on an ongoing basis. If we have that option, that vastly easier option, my fear is that the government will always be tempted to use that option first, even for terrorist suspects against whom there is a pretty good likelihood of conviction. And so people who could be convicted, who could be put away for years and years and years, for life, then get put into this easier box, because in the short term it is more expedient.

And then that box comes under challenge. It comes under legal challenge. Detainees get to argue that they should be released based on the illegitimacy of the system, not on the basis of their innocence. It comes under political challenge. It comes under international challenge. And it is not stable, and eventually we come under great pressure, legally and politically, to release these people.

So, in the short term, it is expedient. In the long term, I think the danger of dangerous people being released is greater if we use a system that lacks stability.

Chairman FEINGOLD. Thank you.

Professor Cleveland, as you eloquently noted, the Bush administration's failed experiment at Guantanamo has made it all the more difficult for America to promote the rule of law abroad. Could you give some examples of other countries that have used the prolonged detention regime at Guantanamo as a justification for their own human rights abuses?



Ms. CLEVELAND. In Egypt, for example, the Prime Minister pointed to U.S. post-9/11 security measures as a justification for renewing the emergency in Egypt.

Perhaps the most disturbing example was in 2002, in his speech to the nation, When Muammar Qaddafi of Libya bragged to the Libyan public that he was treating terrorism suspects just like America does.

In December of 2007, when U.S. officials tried to criticize Malaysia for its preventive detention of five Hindu rights activists, the response of the Deputy Prime Minister was, "Well, you clean up Guantanamo, and until you clean up Guantanamo, we don't want to talk to you about having to justify our detention practices."

So there is an extremely corrosive impact on the rule of law in other countries, and many of these are countries where the rule of law is extremely fragile. We cannot afford to have the rule of law in countries like Egypt and Pakistan deteriorate, particularly not in response to the model that we have put out.

Chairman FEINGOLD. Thank you, Professor.

Mr. MALINOWSKI. If I could maybe add one point to that. There are dozens of examples like that, but I think we also—when we put forward these theoretical arguments, we need to ask ourselves: Would we be comfortable if other countries applied similar theoretical arguments to their own conflicts and wars on terror? There are a lot of countries around the world that claim to be engaged in their own wars on terror—Russia, for example, which, you know, sees virtually anybody who stands up to its rule in the Caucasus and Chechnya, et cetera, to be a terrorist engaged in a war against the Russian state.

Would we be comfortable if Russia started making the argument that, well, that is part of the global war, anybody who supports the Chechen cause in any way around the world is a combatant in that cause and, therefore, can be detained or killed as a combatant wherever they may be found? Not exactly a theoretical notion, as the Helsinki Commission knows quite well, given what has been happening to Russian dissidents in places like London and other places around the world.

Would we be comfortable if the Chinese were going around the world rounding up Uyghurs because they were suspected of being part of a war on terror that China is waging? These are dangerous things.

Chairman FEINGOLD. Thank you, Mr. Malinowski.

I want Mr. Rivkin to have a quick chance to respond.

Mr. RIVKIN. Mr. Chairman, I appreciate your indulgence, and I will be brief. I just want to say two things.

First of all, there is an enormous difference in causation and correlation. Just because a bunch of hypocritical politicians in Russia or China or Malaysia or Egypt claim to be inspired by our example does not make it so. I think even a casual reader of newspapers would acknowledge that there was plenty of torture and horrible misbehavior by Egyptian authorities long before Guantanamo, by Libyan authorities, by Russian authorities, and the Chinese authorities. I mean, the notion that we caused those things just does not hold true. And just because an Egyptian official claims to be inspired by it, it does not make it so.

Chairman FEINGOLD. Ms. Massimino, I will let you do a very brief response.

Ms. MASSIMINO. Very brief.

Chairman FEINGOLD. But I do want Senator Cardin to have—

Ms. MASSIMINO. Absolutely, and I just want to distinguish. I think that the view that was just put forward by Mr. Rivkin devalues what I believe is the incredible force of the United States as an example for good in the world and the ability of the United States to challenge those policies. It is not that we are saying that the Russians or the Chinese are doing this because of the U.S. example but, rather, that our doing those things deprives us of the moral authority and standing to stand up for those people who are suffering in those countries. And the world very much needs that.

Chairman FEINGOLD. Thank you.

Senator Cardin?

Senator Cardin. Well, thank you, Mr. Chairman. First, I want to thank you very much for holding this hearing. I apologize for not being here to listen to your testimonies. I can assure you that I will read them. This is an area of great interest, and as it has been pointed out, the Helsinki Commission that I chair—and Senator Feingold is a Commissioner—it is probably the No. 1 issue we hear about as we travel around Europe, around Asia. We hear more about the detainee issue than any other single issue for America.

There is no one who challenges us, a country that is under attack by terrorists, for detaining suspected terrorists. They expect us to detain and try to get information to protect our Nation. But the fatal mistake that the United States made in this effort—and has caused significant damage to America—from my point of view, I think, of our national security as well as our international reputation, was the fact that we said we could do this alone, we did not need the understanding or support of the international community in the way that we were going to detain individuals, question them, and hold them accountable.

The danger here is what I think some of you have already alluded to. How do you distinguish that from another country which is a threat, as they see it, an autocratic society that sees the free press as a threat to their way of life? So, therefore, isn't it fair game to detain individuals that are proposing a free press or free expression and not have to deal with the international community because the United States did not have to deal with the international community and took steps in order to protect its society?

So I think that is where we put our Nation at severe risk by what we did. And, obviously, the motivation is not being questioned here. We were under a severe threat. So this country developed policies on its own, did not encourage the international community's participation. Worse than that, we were very secretive about it. There was no transparency. There was no effort to include the international community.

And then we went one step further by the use of torture, which is unacceptable under any scenario, counterproductive to U.S. values and to the pragmatic way of trying to get information.

So for all those reasons, we are now in a place that we have to repair the damage that has been done. And I think this hearing is particularly important because we talk about those categories of

detainees that are very dangerous. They are very dangerous. And no one wants them released into the community where they can go back and do their damage. But we do have a rule of law that we have to figure out how we are going to deal with this.

There are no easy answers here, but we certainly are going to have a better chance to get it right if we have open hearings and discussion and debate on this subject. And that is why I wanted to particularly thank Senator Feingold for convening this hearing so that we can have a discussion about these issues and try to figure out what is the best way to carry out U.S. interests.

But I must tell you what I will be recommending is that we involve the international community in making these decisions, that it should not just be a U.S. policy. The threat of terrorism is global. There is a need for the United States to lead internationally to develop the appropriate way that individuals should be treated who are suspected terrorists, and it involves getting information to keep us safe. It involves holding terrorists accountable for their criminal actions. But it also involves respecting the rule of law. And it is not the U.S. rule of law. It is the international accepted standards that the United States has helped develop over the years.

And I think we will get back to that. I do not really have any specific questions, Mr. Chairman, because some of these questions have already been asked, and I really will read the record very carefully. But I just thank our panel for being engaged in this discussion. Sometimes it is a little painful, but it is something that we need to do, and a great democracy is prepared to take on these types of challenges.

Chairman FEINGOLD. Thank you, Senator Cardin. I appreciate your comments very much, and your presence, of course.

I want to once again thank all of our witnesses for being here today and for their testimony. This is obviously a very important issue, and I believe that the insights you have shared today will be very useful to the Senate as it considers any legislative proposal that comes before it. They will also be helpful to the administration as it weighs the costs and benefits of creating a new regime of prolonged detention.

Our discussion today poses very difficult questions for an administration that, of course, seeks to be devoted to restoring the rule of law and trust in our values and our institutions. I plan to closely monitor the issue.

The record of this hearing will remain open for one week to allow our witnesses and any interested individual or group to submit supplemental materials. In addition, members of the Subcommittee have 1 week to submit written follow-up questions for the witnesses. We will ask the witnesses to answer any such questions promptly so we can complete the record.

With that, the hearing is adjourned.

[Whereupon, at 11:41 a.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS  
COLUMBIA UNIVERSITY  
IN THE CITY OF NEW YORK  
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July 13, 2009

United States Senate  
Committee on the Judiciary  
Washington, DC 20510-6275  
[via e-mail]

Dear Senator Feingold:

Thank you again for the opportunity to testify before the Subcommittee on the Constitution regarding the legal, moral, and policy implications of prolonged detention. Enclosed are my responses to the written questions that were submitted after the hearing. Please let me know if you have any questions, or if I may be of any further assistance.

Sincerely yours,



Sarah H. Cleveland

Louis Henkin Professor of Human and Constitutional Rights

Jerome L. Greene Hall 435 West 116th Street New York, NY 10027

Senate Judiciary Committee  
Subcommittee on the Constitution  
“The Legal, Moral, and National Security Consequences of Prolonged Detention”  
Tuesday, June 9, 2009

Responses of Sarah H. Cleveland to Written Questions

Questions submitted by U.S. Senator Russell D. Feingold to Sarah Cleveland

1. In his testimony, Mr. Klingler is concerned that prosecuting suspected terrorists in the criminal justice system “risk[s] watering down defendants’ rights” and “stretch[ing] the criminal process.” He argues that “those who invoke or apply Constitutional protections in aid of foreigners who fight against us are likely in practice to erode the rights of the citizens we seek to defend.” How do you respond to that argument?

**It is important to remember that our Constitution’s procedural protections for persons facing criminal prosecution are not limited to citizens; they apply to foreigners and citizens alike. Our existing criminal justice system has repeatedly demonstrated that it is fully capable of handling prosecutions of domestic and international terrorism suspects, as the Human Rights First report, *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, demonstrates. Our existing criminal laws for combating terrorism, including the crimes of conspiracy and material support, and our existing procedures for the protection of classified information, time and again have proven adequate to the task.**

Concerns about watering down the existing criminal justice system are frequently raised in an effort to justify establishing an alternative system of detention without trial for terrorism suspects. But the creation of an extraordinary system for detaining people without criminal charge or conviction, on the grounds that they are believed to be dangerous but cannot be criminally prosecuted, would be unprecedented in our nation’s history and would do much greater damage to our constitutional fabric. Such a system would establish a dangerous precedent that could be used in the future to justify the detention of American citizens. It could also be extended beyond suspected terrorists to cover other categories of criminal suspects.

I also want to respond to Mr. Klingler’s argument that requiring criminal prosecutions of terrorism suspects in the United States will encourage the “outsourcing” of prosecution or detention of terrorism suspects to countries where they are likely to be treated worse. As

long as countries exist that have weaker procedural protections than the United States, there will always be a temptation to outsource criminal prosecutions to countries that are less protective. But the response to this problem should not be to water down our own constitutional protections—to seek the lowest common denominator—but rather for us to work to raise the legal standards in other countries, as the United States has done through its rule of law programs for many years. Our longstanding procedural protections do not exist simply to protect people potentially facing detention. They also legitimate governmental actions in the eyes of the public and protect the government by promoting accuracy in its decisions.

2. At the hearing, I asked you about the experience of other countries with prolonged detention and the practical effect it has had on their ability to combat terrorism. Please provide any additional information you have that is responsive to that question.

In addition to the information referenced in the draft white paper that I submitted with my testimony, *The Company We Keep: Comparative Law and Practice Regarding the Detention of Terrorism Suspects*, studies repeatedly have found that efforts by states to combat terrorism threats with indefinite detention and abusive treatment have been counterproductive and have recruited new supporters to terrorism. Indeed, one reason that our European allies have resisted any resort to long-term detention outside their criminal justice systems is that they have previously experimented with such policies and found them to be counterproductive.

In an empirical study of the impact of the United Kingdom's repressive legal policies on the IRA, Professor Colm Campbell and Ita Connolly concluded that the use of mass detention without trial and torture figured centrally in the mobilization of Northern Ireland to join the IRA movement.<sup>1</sup> Other studies have confirmed that the British government's tactics alienated large sections of the Catholic community and broadened support for the IRA.<sup>2</sup> The British government abandoned its internment policy in January 1998, in recognition that the policy had been counterproductive.<sup>3</sup> Announcing the decision, the Junior Northern Ireland Minister Lord Dubs told the House of Lords: "The Government have long held the view that internment does not represent an effective counter-terrorism measure . . . The power of internment has been shown to be counter-productive in terms of the tensions and divisions which it creates."<sup>4</sup>

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<sup>1</sup> See Colm Campbell & Ita Connolly, *War on Terror Symposium: A Deadly Complexity: Law, Social Movements and Political Violence*, 16 MINN. J. INT'L L. 265 (2007).

<sup>2</sup> Michael P. O'Connor & Celia M. Rumann, *Into the Fire: How to Avoid Getting Burned by the Same Mistakes made Fighting Terrorism, in Northern Ireland*, 24 CARDOZO L. REV. 1657, 1680 (2003) ("[T]he brutal internment of family members was frequently identified as critical to the decision to join outlawed paramilitary organizations."); David R. Lowry, *Internment: Detention Without Trial in Northern Ireland*, 5 HUM. RIGHTS 261, 267 (1976) ("[T]he hostility engendered by counter-terror tactics made the Catholic ghettos a safe haven for the Provisional I.R.A.")

<sup>3</sup> See Philip A. Thomas, September 11th and Good Governance, 53 N. IR. LEGAL Q. 366, 385 (2002) (quoting British MP during Parliamentary debate on 1998 bill revoking internment power: "Frankly it has not worked ...we believe that the use of internment would strengthen the terrorists.")

<sup>4</sup> *Id.*

Studies of India's use of emergency measures similarly have found that long-term detention contributed to widespread abuses and cycles of violence and provided recruitment tools for terrorist organizations.<sup>5</sup> With respect to Israel, Lisa Hajjar's book on the West Bank military tribunals demonstrates that many Palestinians were mobilized to fight Israelis by the system of preventive detention and military tribunals – particularly by “natural” deaths of Palestinians in Israeli custody.<sup>6</sup>

3. Senator Coburn asked the following question at the hearing: “Are we, the United States, under any international obligation which would require us to try or release the detainees that we have?” What is your response to that question?

**Yes. Any persons detained at Guantanamo who are not properly classified as battlefield detainees seized in a traditional armed conflict cannot lawfully be detained under the laws of war, and must be criminally prosecuted or released by the United States. Although international humanitarian law recognizes the authority of a state to detain persons who take up arms against it, it does so within the narrow confines that I outlined in my oral and written testimony. International human rights law also prohibits arbitrary detention. These human rights and humanitarian law principles are binding through treaties that the United States has ratified, including the International Covenant on Civil and Political Rights and the 1949 Geneva Conventions, as well as through customary international law.**

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<sup>5</sup> See Anil Kalhan et al., *Colonial Continuities: Human Rights, Terrorism, and Security Laws in India*, 20 COLUM. J. ASIAN L. 93, 105-106 (2006) (describing the pattern); see also Hiren Gohain, *Chronicles of Violence and Terror*, 42(12) ECON. & POL. WEEKLY 1012 (Mar. 30, 2007); Sanjay Barbora, *Rethinking India's Counter-Insurgency Campaign in the North-East*, 41(35) ECON. & POL. WEEKLY 3805 (Sept. 8, 2006).

<sup>6</sup> See Lisa Hajjar, *Courting Conflict: The Israeli Military System in the West Bank and Gaza* (2005).

## Questions of Senator Tom Coburn, M.D.

1. You, along with several other scholars, filed an amicus brief in the case of *Boumediene v. Bush*. The brief asserted: "The fact that Gitmo is occupied as a military naval base does not prevent the application of fundamental constitutional rights to aliens detained there." Do you believe that detainees at Guantanamo Bay should receive the same constitutional rights as U.S. citizens?

Neither the fact that the Guantanamo detainees are foreign nationals, nor the fact that they are detained on Guantanamo rather than in the United States, materially alters the relevant constitutional protections governing their detention. The constitutional rights of foreign nationals differ from those of U.S. citizens in certain limited respects, primarily with regard to their entry or departure from the country. For over 100 years, however, the U.S. Supreme Court has recognized that foreign nationals in the United States are protected by the due process and criminal procedural protections of the Fifth and Sixth Amendments. And although constitutional rights may apply differently outside the United States in certain circumstances, as the Supreme Court recognized in *Boumediene*, the Supreme Court has now held twice that Guantanamo is effectively U.S. territory for the purpose of applying U.S. law, in the cases of *Rasul v. Bush* and *Boumediene v. Bush*. Thus, for all relevant purposes, the nationality and location of the Guantanamo detainees should not alter the constitutional protections to which they are entitled.

2. Do you accept President Obama's determination that there are terrorist detainees who should not—and cannot—be prosecuted?

I accept the possibility that some detainees should not be prosecuted. However, I do not agree that the fact that the executive branch may believe that some detainees cannot be successfully prosecuted can be used to justify the indefinite detention of such persons. Our criminal justice system routinely confronts the problem that persons who are believed to be dangerous may not be able to be successfully prosecuted, but that is the hallmark of a system of credible justice and the rule of law. A legitimate criminal justice system is not designed to guarantee convictions for the prosecution, and our country has never before accepted the idea that the possibility that a person cannot be successfully convicted can justify their indefinite detention. Moreover, information extracted through torture or cruel, inhuman or degrading treatment cannot be used to justify indefinite detention any more than it can be used as the basis for a criminal prosecution.

That said, a number of alternatives to prosecuting the Guantanamo detainees are available to the United States. As I have testified, persons who were, in fact, battlefield belligerents in a traditional armed conflict against the United States can be detained until the end of that conflict, consistent with international humanitarian law, so long as appropriate procedural protections are in place. Persons whom the United States believes cannot be successfully prosecuted for directly perpetrating acts of terrorism may nevertheless be able to be prosecuted under other criminal laws. Some persons on Guantanamo may not have violated U.S. criminal laws but their conduct may subject them to criminal liability in other



countries that respect the rule of law, in which case they could be transferred to those states for trial.

Furthermore, it is important to note that the problems the United States is confronting in prosecuting the Guantanamo detainees are largely of the United States' own making, caused by the use of torture and abusive interrogation, and the failure to collect and preserve adequate evidence at the time of capture to support prosecutions for violations of U.S. criminal laws. These *sui generis* problems should not justify the establishment of a system of detention without criminal trial for persons who are seized in the future. Persons seized outside the battlefield by the United States in the future can and should be captured with the expectations that they will be prosecuted and that they must be treated humanely.

3. Do you take President Obama at his word, that there are some detainee terrorists who "pose a clear danger" to the American people and who "remain at war with the United States"? If so, would you agree that the United States should do everything possible to keep them from being released?

Outside of the context of a traditional armed conflict, it is precisely the role of the criminal justice process, our rules of evidence, and the adversarial system, to determine whether or not persons are, in fact, sufficiently dangerous to our society to be incarcerated or are deserving of the label of "terrorist." For centuries, the Anglo-American legal system has rejected the proposition that a determination by the executive branch that a person is dangerous is adequate to justify that person's incarceration. In contrast, countries like Libya, Syria, Iran and China have frequently relied on such justifications for indefinite detention.

4. Would you consider supporting a legal framework that allows for prolonged detention without trial?

**I do not support, and U.S. law and international law and state practice do not support, a legal framework that allows for the prolonged detention without trial of persons outside the confines of the law of armed conflict. In other words, detention must be limited to persons who were seized in the battlefield zone and who were either direct participants in the conflict or otherwise posed a serious security threat.**

5. Do you believe that the United States is engaged in an ongoing war against terrorism?

**The United States is engaged in an armed conflict against non-state groups in Afghanistan, Iraq, and other contiguous areas. The United States is not engaged in a "war on terrorism," and the law of war cannot validly be stretched to allow for the detention of persons seized in a global "war on terrorism."**

6. If the United States develops a “charge or release” policy for enemy combatants, wouldn’t that give those unlawful fighters more rights than legitimate POWs receive?

**No.** As I have previously testified, enemy belligerents in an armed conflict can be detained until the end of that conflict, regardless of whether they qualify as POWs, so long as they are properly identified and are afforded appropriate procedural guarantees. Persons cannot be detained who were seized in a battlefield zone but were not participants in an armed conflict, or who are seized outside the battlefield.

Even if the possibility exists of continuing to lawfully detain some of the Guantanamo detainees as battlefield detainees, however, there is a serious question whether it is wise policy nearly eight years later to continue to detain these persons rather than to criminally prosecute them. Given Guantanamo’s history—including the fact that detainees were never provided the hearings required under the Geneva Conventions, that many detainees were physically abused, and that others were detained based on evidence obtained abusively—the United States would be better off closing the door on this episode by ending the indefinite detention of all of the men held there.

7. Some of you referenced in your testimony more than 100 terrorism cases successfully prosecuted in federal courts since 9/11. Did any of those cases involve terrorists captured overseas on the battlefield after 9/11?

Since the September 11 terrorist attacks, the U.S. government has largely avoided bringing suspects captured overseas to justice in the federal courts. (In the past, in contrast, terrorists such as Ramzi Yousef and Mohamed Rashed Daoud al-Owhali were captured overseas, brought to the United States for trial, convicted in fair proceedings, and sentenced to long prison terms.) In January 2002, however, the U.S. did decide to bring Taliban volunteer John Walker Lindh, who was captured in Afghanistan, to the United States for trial; he pled guilty and was sentenced to 20 years of imprisonment. Also, notably, in 2007 the United States successfully prosecuted Jose Padilla, who had been held for three and a half years as an “enemy combatant” after his arrest in 2002.

8. How would you deal with the concerns raised by FBI Director Robert Mueller that terrorists moved to U.S. prisons will recruit from inside U.S. prisons, as was the case with the recent New York synagogue bombers?

The federal prison system has security measures adequate to deal with any prisoner who shows signs of being a security risk, including by attempting to recruit other prisoners to join terrorist networks. There has never been any indication that Ramzi Yousef, Zacarias Moussaoui, or other such terrorist operatives have been able to carry out recruitment efforts while incarcerated.

9. Do you believe that any detainees captured by the United States are entitled to *Miranda* rights? Please explain.

**Persons arrested in the United States are entitled to *Miranda* warnings. Persons who are captured and detained as battlefield detainees in a theater of armed conflict are not entitled to *Miranda* protections, although they can only be detained consistent with the procedures required by international humanitarian and human rights law. The extent to which *Miranda* applies to persons who are seized both outside the United States and outside of any battlefield zone is unsettled, but under the Supreme Court's decision in *Boumediene*, it is likely that *Miranda* would apply in this context, though perhaps in somewhat modified form.**

10. Do you believe there is any role for military commissions for detainees currently held by the United States?

**As a matter of both law and policy, I believe it is unwise for the United States to prosecute the current detainees before military commissions. Under U.S. and international law, military commissions exist for the purpose of prosecuting persons for violations of the laws of war, since the exigencies of the battlefield often make ordinary criminal trials impossible. While some small number the Guantanamo detainees may qualify as battlefield combatants who have violated traditional laws of war, most of them do not, and persons who did not violate the laws of war cannot be validly prosecuted before military commissions.**

**Even for persons who are properly charged with violations of the laws of war, the military commissions established by the prior administration have been irredeemably delegitimated in the eyes of the international community. The military commissions invariably will be perceived as a forum that was created to secure the convictions of detainees whom the United States thought it could not successfully convict in an ordinary criminal trial, and thus inevitably will look like rigged justice to the outside world. No amount of modifying their structure or procedures will cause convictions before the military commissions to be viewed as equally legitimate as either Article III criminal trials or ordinary court martials. At the same time, the greater the procedural protections that are afforded by the military commissions, the fewer procedural advantages they will provide the United States government over ordinary criminal trials, further undermining their utility.**

11. If the evidence needed to prosecute a Guantanamo Bay detainee has been acquired from enhanced interrogation techniques, do you believe he should be released?

**Evidence acquired through the use of torture or cruel treatment is inherently unreliable and offensive to human dignity, and cannot be the basis for either detention or prosecution. Such persons need not necessarily be released, however. They can be prosecuted for crimes that would not rely on the coerced evidence, either by the United States or another country,**

so long as the requirements of due process and international human rights law are respected.

12. Should detainees be subject to charges of conspiracy?

**Detainees may be subject to charges of conspiracy in ordinary criminal trials in the United States. As four members of the Supreme Court recognized in *Hamdan v. Rumsfeld*, however, conspiracy, without more, is not recognized as a violation of the laws of war, and thus cannot be the basis for a prosecution before a military commission. A majority of the Supreme Court did not need to reach the question in *Hamdan*, but the four-member plurality strongly signaled that a conspiracy charge before a military commission is legally infirm.**

13. If Guantanamo Bay detainees are moved to the United States, do you believe the prison system is equipped to handle them? Do you believe that these detainees could be housed in the same U.S. prison facility, or would they need to be scattered among various facilities to avoid any perceived image problems?

**If the United States decides to continue detaining some of the Guantanamo detainees, the greatest image problem that the United States will confront will derive from that very decision. The U.S. prison system, however, is more than adequately equipped to house the Guantanamo detainees. The system has successfully incarcerated convicted mass murderers and terrorists for many years.**

**Question for the Record for Sarah Cleveland**  
**from Senator Sheldon Whitehouse**

1. At the hearing, you advocated the use of the criminal justice system for the detention of individuals who are believed to be associated with terrorist organizations or that are otherwise a danger to the United States. As you know, the criminal justice system is not the only method the United States recognizes for detaining individuals, since states can quarantine individuals for public purposes or commit individuals who are dangers to themselves or others. Do such civil law approaches provide a useful analogy or starting point for the detention of enemy combatants or other individuals who are determined to harm the United States?

**As I stated in my oral and written testimony, the U.S. constitution establishes an extremely strong presumption that persons cannot be incarcerated without being convicted through the criminal justice system, with all the procedural protections that that system affords. The constitutionally-tolerated exceptions to the criminal justice system that you mention are very narrow and longstanding. They include the authority to detain battlefield detainees until the end of a traditional armed conflict, as the Supreme Court recognized in *Hamdi v. Rumsfeld*.**

**This and other exceptions to the criminal justice system, however, cannot lawfully be stretched to justify the indefinite detention without trial of persons seized outside the battlefield whom the executive branch considers dangerous, be they terrorism suspects, communists, anarchists, or otherwise.**

**Response of Richard Klingler to Post-Hearing Questions, Senate Judiciary Committee,  
Subcommittee on the Constitution, "The Legal, Moral, and National Security  
Consequences of 'Prolonged Detention'"**

**I. Enemy combatants in U.S. custody have been afforded review for determining the legality of their detention. How does this process compare to rights historically afforded alien enemy prisoners?**

The scope of judicial review and status review mandated by statute, for detainees held at Guantanamo, is unprecedented in our nation's history.

Historically, non-U.S. persons detained by our military during armed conflicts had virtually no access to U.S. courts and no particular status review mandated by federal statute. This was so even for those conflicts where the combatant status of captured enemy personnel was often unclear (as during the Vietnam War, or the conflicts in the Philippines) and even for persons held as prisoners of war during World War II but who claimed they were mistakenly detained. Certain detainees prosecuted as war criminals during and after World War II did have their sentences reviewed by federal courts.

For detainees held at Guantanamo, the scope of mandated review of detention status has been considerably more extensive. In 2005, Congress supplemented the review procedures already required by the Department of Defense, by requiring that the propriety of continued detention at Guantanamo be determined by Combatant Status Review Tribunals and Administrative Review Boards subject to certain conditions. *See* Detainee Treatment Act of 2005, § 1005(b). At the same time, Congress provided that detainees could secure federal court review of determinations by the Combatant Status Review Tribunals. *See id.* § 1005(e)(2)-(3). These procedures are separate from the extensive judicial review provided with respect to the decisions of military commissions, addressing violations of the law of war rather than detention status itself, most recently undertaken pursuant to the Military Commissions Act of 2006 (with proceedings pursuant to that Act since suspended by the current Administration).

In addition, since *Boumediene v. Bush*, 553 U.S. \_\_\_ (2008), detainees at Guantanamo have been able to secure judicial review of their detention through habeas corpus proceedings in federal district court. These have evolved into extensive, nearly trial-like proceedings that test the evidence underlying the government's detention determination. Never before had non-U.S. persons detained abroad by the military been able to secure habeas review, much less the extensive review now provided. That process of review has, in practice, displaced judicial review of the determinations of the Combatant Status Review Tribunals.

**2. Is the battlefield in the conflict against al Qaeda and associated terrorist organizations limited to Afghanistan and Iraq? If not, what would be the consequences of adopting that view?**

The battlefield is not so limited, and limiting the battlefield to Afghanistan and Iraq would dramatically curtail our nation's ability to address the threat posed by al Qaeda and related terrorist organizations.

Both the President and the Congress have defined the war against al Qaeda and related terrorist organizations in terms that extend far beyond Afghanistan. As in many other military conflicts, the "battlefield" is not defined by a geographical target, but instead by the location of the enemy we face. The President, as early as his Inaugural Address, defined the scope of the conflict by stating that "[o]ur nation is at war, against a far-reaching network of violence and hatred." He has stated that the Afghanistan component of the conflict is designed to deny al Qaeda a safe haven, and that objective applies equally to other locations that harbor al Qaeda.

Similarly, Congress's Authorization of the Use of Military Force in 2001 did not limit the U.S. military response to Afghanistan. Instead, it recognized that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States" and sought "[t]o authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States." See Pub. L. 107-40 (Sept. 18, 2001). To this end, Congress authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons . . ." *Id.*

Even if the President and Congress chose to limit the "battlefield" against al Qaeda to areas of armed combat, that battlefield would extend far beyond Afghanistan. The President's most recent report to Congress, consistent with the War Powers Act, describes the breadth of the battlefield in the war against terrorists even under this limited definition. See *Text of a Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate*, June 15, 2009 (released June 16, 2009). There, the President reported that the United States "has deployed various combat-equipped forces to a number of locations in the Central, Pacific, European, Southern and Africa Command areas of operations in support of [Afghanistan] and other overseas operations." *Id.* Press accounts detailed combat activities in and around, for example, the Horn of Africa as well as other parts of the world, often in conjunction with our allies. In addition, President Obama indicated that he will "direct additional measures, as necessary" that "include short-notice deployments of special operations and other forces for sensitive operations in various locations throughout the world." *Id.*

Limiting the battlefield to Afghanistan would prevent the U.S. from defending itself by taking action against important operatives and leaders of al Qaeda and other terrorist organizations that threaten U.S. troops and citizens. Pakistan has, of course, become an important focus of our nation's counter-terrorism activities, and the President has long asserted that counter-terrorism activities may be undertaken there. In addition, recent press reports confirm that senior al Qaeda

leaders are increasingly migrating far beyond the Afghanistan theater, to Somalia and Yemen.<sup>1</sup> Under the view of critics who would limit the legitimate range of counter-terrorism action to the "battlefield" in Afghanistan, the U.S. would be powerless to pursue these senior terrorists, or to take action in conjunction with our allies against the resurgent al Qaeda in Northern Africa and elsewhere.<sup>2</sup> Indeed, under this view, if Osama bin Laden were to return to Sudan, the U.S. could not pursue him there or take military action against the nation that provided him with safe harbor. This limited conception of the "theatre of conflict" reflects a dangerous historical amnesia: after all, al Qaeda was at war against the U.S. on a global basis, through attacks on the *U.S.S. Cole*, our East African embassies, and in New York City, long before our troops and intelligence officers invaded Afghanistan.

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<sup>1</sup> "Some in Qaeda Leave Pakistan for Somalia and Yemen," *N.Y. Times*, p. A1 (June 12, 2009).

<sup>2</sup> "Ragtag Insurgency Gains a Lifeline from Al Qaeda," *N.Y. Times*, p. A1 (July 1, 2009); "The Sahara Conundrum," *N.Y. Times*, Magazine (Feb. 13, 2009).



**3. Please discuss the security concerns you have with moving Guantanamo Bay detainees to the United States for detention and trial?**

Policymakers will have to consider at least three sets of security concerns that would arise as detainees held at Guantanamo Bay are brought to the United States for trial, detention, or release:

(i) Trial-related concerns. Providing security for the conduct of terrorism-related trials is complicated and costly in the usual case, as demonstrated in trials of the World Trade Center bombers in New York City and various trials in the Eastern District of Virginia. These costs and concerns will be even greater for trials in the U.S. of former Guantanamo detainees, especially senior al Qaeda leaders. As has been publicly discussed, the trial of a senior al Qaeda leader could present an unusual symbolic opportunity for a terrorist attack.

In addition, the choice to try a Guantanamo detainee in U.S. federal court presents national security concerns related to release of the detainee. For example, the detainee may be acquitted because the government could not present evidence in its possession of criminal wrongdoing, because admissible evidence did not meet the "beyond the reasonable doubt" threshold, or because the defendant was able to take advantage of procedural and substantive rules designed to protect U.S. citizens but unrelated to guilt or innocence. Or, the former detainee may be released after having served a relatively short sentence.

Release in these circumstances may have no bearing on whether that former detainee continues to pose a national security risk to U.S. citizens. In these circumstances, the Administration has and perhaps would seek to deport the released detainee. This course may simply free a dangerous detainee to harm U.S. interests from abroad, or may be unavailable due to asylum claims or the lack of an available country to receive the former detainee. The current Administration has also reserved the option of detaining an acquitted defendant as an enemy combatant, but whether this course is available in practice or would be exercised remains in considerable doubt.

(ii) Detention-related concerns. Very significant security concerns also may exist for detention of the former detainee in a military facility or, following or preceding trial, in a federal prison. As the current FBI Director has testified, these concerns extend to the potential for a prison-based terrorists to continue to direct terrorist activities, including fundraising, from prison, and to recruit and radicalize additional terrorists from the prison population.

This risk that detained terrorists will be able to continue to undertake terrorist activities exists even for the most highly monitored terrorist leaders. For example, the defense counsel for Omar Abdel Rahman (the "Blind Sheik") was convicted for acts related to serving as a public channel for directions from the defendant to his terrorist followers abroad (that conviction is currently on appeal, and the government is also appealing to secure a greater prison sentence).

In addition, detention in the United States increases security risks related to release of the detainee, even apart from the risks identified above in relation to release following trial or sentence. Even for those detainees who are not tried, their presence in the United States may provide them with additional rights that they might assert in habeas or other judicial proceedings,

increasing the likelihood of their being released. Of course, success in asserting these rights does not establish that the released detainee poses no national security threat to the United States.

(iii) Release-related concerns. National security concerns arise whenever a former Guantanamo detainee might be released in the United States for reasons unrelated to a completely foolproof determination that the detainee poses no risk to U.S. citizens or troops. For example, the debate surrounding the Uighur detainees' potential release in the United States arose because the initial judicial rulings in their favor were not based on the absence of any risk to U.S. security interests, but instead rested on their lack of direct ties to the particular terrorist groups whose members the court found the U.S. was authorized to hold at Guantanamo. Similarly, as noted above, the conclusion that a detainee is not guilty of a crime "beyond a reasonable doubt," has served his sentence, or has prevailed in a habeas proceeding does not establish that the released detainee poses no security risk. And even the military's own determination that particular detainees should be released abroad has often been mistaken, as a significant number of those detainees have rejoined the fight against U.S. troops and allies abroad. The risks of erroneous release in the United States, rather than abroad, obviously pose additional risks to U.S. citizens.

**4. How would you respond to the claim made by Mr. Laufman in his piece, "Terror Trials Work," that there are already sufficient mechanisms (such as CIPA) available to courts to protect against the release of sensitive information in the trials of terrorists?**

Those protections are insufficient because prosecutors must still decline to prosecute various cases or charges that involve sensitive information, and CIPA and related protections do not adequately prevent disclosure of sensitive information in the course of terrorism prosecutions that are undertaken.

While CIPA and related mechanisms to protect sensitive information may work for certain prosecutions, especially involving low-level terrorist supporters working in the United States and pursued by law enforcement officers over a lengthy period, those protections are much less effective when more sensitive information is at issue and when terrorists are apprehended by military, intelligence, or foreign officials in distant locales. The vast bulk of successful prosecutions to date fall into the former category. In contrast, the latter cases where protection of sensitive information is most difficult also are those where the need for ongoing detention – and the risk of premature or erroneous release – is greatest.

Mr. Laufman's own article and his testimony show the limits of CIPA's ability to protect sensitive information in particularly important cases. He acknowledges that "criminal prosecution of terrorists opens the door to defense efforts to seek sensitive classified information" and that "[i]t is also true that information shared confidentially with U.S. authorities by foreign law enforcement or intelligence sources can be at risk of disclosure under discovery rules." "Terror Trials Work," *Legal Times* (Nov. 5, 2007). His testimony also outlines the various barriers to bringing prosecutions against terrorists that make the criminal law process inappropriate, including "where the government's key inculpatory evidence is based on sensitive intelligence sources and methods that either should not be disclosed to the defense, or cannot be revealed in a public trial." D. Laufman, Written Testimony, at 12 (June 9, 2009).

His last observation points the essential weakness of CIPA: the act regulates only the procedures that govern the presentation of certain classified information, but does not lessen the defendant's right to have the information provided to defense counsel or to have the content of information relevant to the defense presented in court. That is, CIPA requires the government to choose between prosecuting a terrorist for particular crimes while disclosing information and, alternatively, declining to prosecute to avoid disclosing classified or other sensitive information required to make that prosecution a successful one. This is so even following the redaction and substitution measures encouraged by the Act. The statute does not allow the government to withhold information that a U.S. citizen would be entitled to have presented or made public as part of the normal constitutional Due Process, Confrontation Clause, and public trial rights afforded outside of the terrorism context – or indeed outside the context where sensitive information is at issue at all. For this reason, prosecutions will often not be successful where classified information is involved, despite CIPA's existence.

To see this dynamic in action beyond the terrorism context, review any of the principal opinions in the prosecution of Steven Rosen and Keith Weissman. See *United States v. Steven J. Rosen and Keith Weissman*, Case No. 1:05cr225 (E.D. Va., Ellis, J.). There, the government charged

the defendants with conspiring to disclose highly sensitive information. The district judge construed CIPA to provide only very limited protections of the information at issue and related sensitive information, and instead required broad disclosure to defense counsel and at trial. While these prosecutions should perhaps not have been pursued for a range of policy reasons, these rulings led the government to end the prosecution prior to trial, according to public reports.

For terrorist trials, the risk of disclosure of sensitive information is very high despite CIPA's provisions. These risks are particularly great for more senior terrorists captured abroad. For example, the trial of Omar Abdel Rahman, the "Blind Sheik" responsible for the bombing of the World Trade Center, presents one of the only examples of such a prosecution. It also led to the disclosure of quite sensitive information. As noted above, the trial process facilitated communications from the defendant to his terrorist followers. In addition, government information of high sensitivity and value to al Qaeda was publicly disclosed in the course of trial preparations. For this and related reasons, both the lead prosecutor (Andrew McCarthy) and the trial judge (Judge, and later Attorney General, Michael Mukasey) in those proceedings have since pointed to disclosure of sensitive information and related harm to national security as an important reason why prosecutions are often exceptionally poor vehicles for addressing the threats posed by terrorists. *See* A. McCarthy, *Willful Blindness* (2008); M. Mukasey, "Jose Padilla Makes Bad Law: Terror Trials Hurt the Nation Even When They Lead to Convictions," *Wall St. J.* (Aug. 22, 2007).

**5. What do other countries' domestic detention regimes show about whether the United States can continue to detain members of al Qaeda and other terrorist organizations who are captured outside this country?**

Virtually nothing. Certain critics of the current and past Administrations' policies toward alien enemy combatants, including Professor Cleveland in her June 9, 2009 testimony before the Subcommittee, point to other nations' experience with "preventive detention" regimes. Those experiences are decidedly mixed, but the essential point is that such detention regimes, directed against the domestic population of a country, have no bearing on ongoing detention of al Qaeda members captured abroad. Indeed, confusing the two types of detention poses a significant threat to the rights of U.S. citizens and persons lawfully residing in the country.

Critics such as Professor Cleveland point to the limited duration of detention of terrorist suspects permitted by principally European nations, and argue that those norms should for various reasons be adopted by the United States. Initially, it is far from clear why the United States should model its practices on the often anemic national defense commitments and policies of many European nations. We reject the benchmarks set by those countries for most of our national security policies, and should do so in this context as well. As Professor Cleveland acknowledges, countries that face serious terrorism threats and take those threats and other aspects of their national defense seriously, such as Israel and India, have chosen much more robust detention practices than have many European nations.

More importantly, the "preventive detention" regimes cited by critics seek to fulfill a far different function and operate much differently than does the U.S. military's detention of al Qaeda members captured abroad. Those European detention regimes principally address domestic terrorist suspects identified and captured within the detaining country. In this respect, those powers are crafted for citizens and residents of the detaining country, and are equivalent to the various, limited U.S. domestic detention powers identified in David Laufman's testimony: detention pursuant to material witness warrants, pre-trial detention, and, for foreign nationals, detention related to deportation or removal proceedings. Much like the European "preventive detention" powers, these U.S. detention powers are highly circumscribed and subject to judicial and other oversight.

In contrast to those domestic detention powers, detention of alien enemy combatants captured abroad is quite different. The detention is directed to non-U.S. persons, and thus is not crafted to protect the legal interests of U.S. citizens and lawful residents. It is undertaken by the military, rather than by domestic security officials. It is generally undertaken abroad, rather than within the U.S. And, most importantly, that ongoing detention is an appropriate and long-standing incident of the state of war that exists between the United States and al Qaeda and associated terrorist organizations. Ongoing detention of al Qaeda members at Guantanamo, or in Afghanistan, is not part of a domestic security arrangement, and analogies to other nations' domestic security arrangements often directed against their own citizens have little relevance to the U.S. military's practices at issue here.

The comparison is not only meritless; it is quite dangerous. The critics' analogy of U.S. military detention of alien al Qaeda members captured abroad to European domestic detention policies

suggests that the issue at hand focuses on the power to detain U.S. citizens and maintain domestic order. By doing so, they increase the risk that U.S. citizens' legal rights will be eroded and reduced to the level appropriate for alien enemy combatants held abroad. This may provide a short-term, rhetorical benefit for the critics of our counter-terrorism policies, but one that comes at the cost of ignoring important distinctions that protect U.S. citizens. Different considerations should and do apply to detention of U.S. persons, even if they support al Qaeda. Those considerations should not impede the ongoing detention of alien enemy combatants captured abroad and held at Guantanamo and in Afghanistan.

**6. Are our counter-insurgency policies inconsistent with ongoing detention of captured al Qaeda terrorists?**

Not at all. Critics of the current Administration's counter-terrorism policies, including Elisa Massimino of Human Rights First in her testimony of June 9, 2009, assert that the counter-insurgency policies developed by officials such as General Petraeus and others currently serving are in some manner inconsistent with the military's ongoing detention of enemy combatants such as members of al Qaeda and other terrorist organizations. The short rebuttal to this claim is that General Petraeus and others who have developed the most advanced counter-insurgency policies are also the very officials who are overseeing, continuing, and recommending the ongoing detention of terrorists as enemy combatants in Afghanistan and Iraq.

General Petraeus is the Commander of the U.S. Central Command. As such, he has responsibility for the military's practices in conflicts in Afghanistan and Iraq. In Afghanistan in particular, U.S. military forces are today detaining enemy combatants on an ongoing basis. As recent litigation confirms, some of those detainees were captured far from the Afghanistan battlefields. If there were any tension or inconsistency between those detention practices and General Petraeus's assessment of what is required for effective counter-insurgency, it is entirely within his power to alter those ongoing detention practices. That he has not done so confirms that the critics' argument is without merit, and that ongoing detention is entirely consistent with the most effective counter-insurgency practices.

David H. Laufman

**Responses to Questions for the Record Concerning June 9, 2009, Hearing by Subcommittee on the Constitution Entitled "The Legal, Moral, and National Security Consequences of Prolonged Detention."**

**Questions Submitted by Senator Russell D. Feingold**

1. You testified that "there are no proven examples of disclosures at trial resulting in the compromise of sensitive intelligence sources and methods." Can you explain how our courts have achieved that record?

The courts have protected against the improper disclosure of intelligence information at trial by utilizing the statutory authority conferred by the Classified Information Procedures Act ("CIPA"), 18 U.S.C. app. 3, and by fashioning protective orders to regulate what may be disclosed in open court. Prior to trial, the government has the opportunity under CIPA to make an *ex parte* submission to the court in which it describes the source and sensitivity of classified information potentially subject to disclosure, makes arguments regarding the information's relevance and the damage to national security that would result if the information were disclosed to the defense, and requests a ruling that the information is not discoverable. Typically, an official from a U.S. intelligence agency submits a classified, *ex parte* declaration to the court, and is available to answer the court's questions, regarding the sensitivity of the information.

In many instances, the court finds in a sealed proceeding or order that the information is not relevant and therefore must not be disclosed to the defense. If the court determines that the information is discoverable, CIPA affords the government the opportunity to propose a summary substitute for the specific classified information -- which the court may accept, reject, or modify -- that masks the information's most sensitive elements while substantially enabling the defendant to prepare his defense. If the court rejects the government's request for a substitution for the specific classified information at issue, or the court orders a substitution that is unacceptable to the government, the government retains the option of shutting down the case -- and thereby protecting intelligence sources and methods -- by moving to dismiss the indictment.

It should also be noted that the use of classified information at trial is highly regulated to guard against improper disclosures. At the government's request, courts often issue protective orders that regulate the conduct of the parties with respect to the treatment of classified information in open court. Courts police these orders, and defense counsel are careful to abide by them.



2. Some critics of terrorist criminal trials have claimed that our rules of discovery and due process will make foreign governments think twice before sharing critical intelligence with the United States. Based on your experience, do our federal courts successfully accommodate the intelligence concerns of foreign governments?

**My own experience in prosecuting terrorism cases represents only a small percentage of the totality of cases where the intelligence interests of foreign governments have been at issue. In my experience, however, the courts responsibly have balanced the due process rights of defendants with the government's interest in preventing the disclosure of sensitive information obtained from foreign governments. In the case of Ahmed Omar Abu Ali, for example, the district court in the Eastern District of Virginia granted the government's request for a protective order to protect the names of cooperating Saudi intelligence officers from disclosure to the defense or the public, and provided for the officials' video testimony at trial to be visible only to participants in the trial. Courts in other cases have similarly protected the identity of foreign intelligence officers testifying in U.S. criminal proceedings.**

**It is true that foreign governments often express concern to U.S. authorities about the treatment of intelligence information they might share, and that there is sometimes a reluctance to share information because of the possibility of its subsequent disclosure. In general, however, intelligence-sharing by foreign governments has increased dramatically since September 11, 2001.**

**Intelligence-information sharing by foreign governments typically is subject to well-established rules of engagement, including an agreement by U.S. authorities that the information may not be used for purposes other than intelligence, or law enforcement "lead" purposes, without the express agreement of the foreign government. Occasionally, U.S. prosecutors aware of material inculpatory information provided by a foreign government are simply told that the information may not be used in support of the government's case.**

**In some instances, foreign governments have cooperated to an unprecedented extent in U.S. criminal prosecutions. In the Abu Ali case, for example, the Saudi Government had never in its history permitted Saudi intelligence or law enforcement officers to testify in a foreign criminal proceeding. Subject to a protective order issued by the district court, several Saudi officers testified at length, and were subject to rigorous cross-examination by defense counsel. Their testimony was critical not only to proving the government's case on the merits against Abu Ali, but also to refuting Abu Ali's claims that he had been mistreated while in Saudi custody before being returned to the United States.**

3. You highlighted the scenario of a sealed pretrial hearing before a federal judge where the government prosecutor argues against the security-cleared defense counsel about whether to use certain classified information at trial. In these hearings, sometimes the government loses. How would you respond to those who question the courts' competence to evaluate the government's determination of what information must remain classified to protect the public?

**The issue in these circumstances is not the competence of the courts to assess the legitimacy of government arguments that certain information should not be disclosed. Rather, the issue is whether the government has first conducted a thorough risk assessment -- in advance of bringing criminal charges -- of whether certain intelligence information likely would have to be disclosed to the defense, and potentially aired at trial, under constitutional standards and applicable rules of evidence and criminal procedure. That assessment largely depends on the willingness of U.S. intelligence and law enforcement authorities to share with prosecutors the full range of information that is favorable to the defense in a given case. In some cases, the likelihood that sensitive information will have to be disclosed to the defense -- and the consequences of such disclosure -- may outweigh the government interest's in criminal prosecution. In such cases, the responsible course of action for the government may be to forego criminal prosecution altogether. In other cases, the government may be forced to narrow the charges brought against a particular defendant in order to contain the range of exculpatory information and thereby minimize the potential for the disclosure of sensitive intelligence.**

4. The Classified Information Procedures Act (or CIPA) can be used to prevent the disclosure of classified information that defendants might seek in discovery, but it is generally not a tool to allow the government to use secret evidence to prove its case. At the same time, of course, classified information might be the best evidence to gain a conviction. Can you discuss the tools available to prosecutors for working around this problem and the need for the cooperation of the intelligence community to obtain convictions?

**Where potential government evidence critical to a criminal prosecution is based on classified material, it is imperative for U.S. intelligence agencies, working with prosecutors, to determine whether the disclosure of that material truly would result in the compromise of sensitive U.S. or foreign intelligence information. Sometimes the manner in which the government acquired the information, and the prospects for continued intelligence collection or foreign cooperation, fairly support a determination that it would be inappropriate to utilize that information under any circumstances in a criminal proceeding. In other cases, prosecutors may obtain a protective order from the court that enables them to utilize a procedural device called the "silent witness rule" to offer classified evidence at trial -- typically documentary evidence. Under this procedure, prosecutors and cleared defense counsel may question a witness in a structured manner to elicit testimony pertinent to the admissibility of the evidence without revealing information that would compromise sensitive sources and methods.**

Cleared defense counsel is provided with a copy of the classified evidence, may question the witness within the limitations imposed by the court, and classified exhibits may be admitted into evidence and maintained by the court clerk's office under seal.

The silent witness rule has been used in both terrorism and espionage prosecutions, including the Abu Ali case. In that case the rule was employed to admit into evidence two critical communications between Abu Ali and a senior member of the al-Qaeda cell in Saudi Arabia that he had joined. The admission of this evidence played an important role in obtaining Abu Ali's conviction. The communications demonstrated Abu Ali's relationship to the cell and his use of coded communications to communicate with cell members. In addition, they helped to refute his claim that the confessions he gave to Saudi authorities after his arrest in Saudi Arabia were the product of physical coercion, as the communications occurred prior to his arrest.

5. Are there particular cases that you believe demonstrate the courts' ability to deal with the difficult procedural and evidentiary questions that arise in terrorism cases?

Several cases reflect the courts' ability to resolve the unique types of procedural and evidentiary issues that arise in terrorism cases. In my own experience, the Abu Ali case stands out. In that case, the Saudi Government declined to permit its security officers to come to the United States to testify at a critical pretrial hearing. On the government's motion under Rule 15 of the Federal Rules of Criminal Procedure, the district court agreed to procedures aimed at accommodating the Saudi government's concerns while protecting Abu Ali's rights under the Confrontation Clause of the U.S. Constitution. Specifically, the court permitted the Saudi officers to testify in Saudi Arabia under circumstances where they would be subject to personal cross-examination by the defendant's lead trial attorney, the defendant (by then in Alexandria, Virginia) and the witness could observe each other on video screens, the defendant was accompanied by one of his trial attorneys in the courtroom in Alexandria, and the defendant could communicate with his counsel at breaks in the testimony.

Abu Ali's defense hinged on his claim that detailed confessions he gave to Saudi officers while in custody in Saudi Arabia were the result of torture, and his pre-trial motion to suppress his confessions was, in many respects, the pivotal procedural juncture of the criminal prosecution. After hearing testimony from the Saudi officers and considering extensive other evidence at odds with Abu Ali's claims, the district court applied traditional standards of analysis to determine that Abu Ali's confessions were voluntary and admissible. So, too, the court applied customary standards in finding that the government had authenticated and established a chain of custody for physical evidence seized at al-Qaeda safehouses in Saudi Arabia by Saudi security officers.

**Questions Submitted by Senator Tom Coburn, M.D.**

1. Do you accept President Obama's determination that there are terrorist detainees who should not -- and cannot -- be prosecuted.

**Criminal prosecutions in Article III courts are not viable options in cases where the government's case-in-chief is based upon on defendant statements obtained through coercion, or where the government's case depends heavily on sensitive intelligence information that cannot be declassified, shared with the defense, or masked through the substitution procedures afforded under the Classified Information Procedures Act. As a policy matter, it is my belief that individuals accused of committing crimes against humanity or other war crimes are more appropriately prosecuted in U.S. military tribunals under rules comparable to those employed in established international tribunals, rather than in civilian courts.**

2. Do you take President Obama at his word, that there are some detainee terrorists who "pose a clear danger" to the American people and who "remain at war with the United States?" If so, would you agree that the United States should do everything possible to keep them from being released?

**There are detainees in custody at Guantánamo Bay and elsewhere who, if released, would pose a significant threat to the national security of the United States as well as other countries. Where appropriate and feasible, I favor prosecuting as many of these detainees as possible in civilian courts in the United States. Where criminal prosecution is not an option and other domestic or international legal authority permit, the government should utilize that authority to seek the continued detention of these individuals, at least until such time that they are judged by an appropriate arbiter to no longer present a threat, or they may be transferred to the custody of a third country where continued detention is likely.**

3. Would you consider supporting a legal framework that allows for prolonged detention without trial?

**In the military context, a legal framework already exists for the detention of enemy combatants for the duration of a conflict. In the civilian context, I do not support any modifications to existing laws governing the detention of individuals for criminal prosecution.**

4. Do you believe that the United States is engaged in an ongoing war against terrorism?

**The United States is engaged in a global conflict against organizations and individuals committed to the use of terror.**

5. If the United States develops a “charge or release” policy for enemy combatants, wouldn’t that give those unlawful fighters more rights than legitimate POWs receive?

Yes.

6. Some of you referenced in your testimony more than 100 terrorism cases successfully prosecuted in federal courts since 9/11. Did any of those cases involve terrorists captured overseas on the battlefield after 9/11?

**If the term “battlefield” refers to circumstances where an individual was captured by U.S. or other foreign military forces, one case that comes to mind is John Walker Lindh, who was criminally prosecuted and (pursuant to a plea agreement) convicted in the Eastern District of Virginia.**

7. How would you deal with the concerns raised by FBI Director Robert Mueller that terrorists moved to U.S. prisons will recruit from inside U.S. prisons, as was the case with the recent New York synagogue bombers?

**Whether transferring current detainees to civilian authority for incarceration would foster prison radicalization depends on the controls instituted for regulating the detainees. Under federal regulations (28 C.F.R. § 501.3), the Attorney General may authorize the Director of the Bureau of Prisons (“BOP”) to implement “Special Administrative Measures” (“SAMs”) upon written notification by the Attorney General, the head of a U.S. law enforcement agency, or the head of a U.S. intelligence agency, that there is a “substantial risk” that a prisoner’s communications or contacts with persons could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons. SAMs may be imposed on individuals who have been charged and are pending trial as well as on individuals who have been convicted and are serving their sentence.**

**SAMs include housing the inmate in “administrative detention” (i.e., solitary confinement) and “limiting certain privileges, including, but not limited to, correspondence, visiting, interviews with representatives of the news media, and the use of the telephone, as is reasonably necessary to protect persons against the risk of acts of violence or terrorism.” Further, in any case where “reasonable suspicion” exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism, the BOP can institute additional measures. Specifically, BOP may implement “appropriate procedures” to monitor or review communications between the inmate and attorneys or agents who traditionally would be covered by the attorney-client privilege, for the purpose of “detering future acts that could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons.**

Typical SAMs restrictions include some combination of the following:

- No visitors except attorneys and immediate family
- Restricted contact with attorneys
- No telephone calls
- Limits on contact with family
- Separation from remainder of inmate population
- Prohibitions on communications with other inmates
- Delays in mail (and monitoring of mail)
- No contact with news media
- Restricted access to television, radio, newspapers, and magazines
- Restrictions on participation in Muslim group prayer

Numerous terrorist detainees are currently under SAMs, including :

- Sheikh Omar Abdel Rahman (“the Blind Sheikh” who headed a plot to destroy New York City landmarks);
- Ramzi al-Yousef (mastermind of the first World Trade Center bombing);
- Ahmed Omar Abu Ali (an American citizen who joined an al-Qaeda cell in Saudi Arabia and plotted to commit terrorist attacks in the United States);
- Wadiah el-Hage (involved in the bombing U.S. embassies in east Africa);
- Zacarias Moussaoui (involved in the September 11 plot); and
- Richard Reid (the “shoe bomber” who tried to destroy a civilian airliner in mid-air).

I am unaware of any cases where inmates under SAMs have been found to be contributing to prison radicalization.

8. Do you believe that any detainees captured by the United States are entitled to *Miranda* rights? Please explain.

**As a general rule, individuals captured on an overseas battlefield by U.S. military forces are not entitled to *Miranda* rights. If, however, they were subsequently questioned in a custodial setting after their capture by U.S. intelligence or law enforcement officers, and the government later sought to use statements obtained in such questioning (other than volunteered statements) in a criminal prosecution against the detainee, such statements would be subject to suppression in a criminal proceeding.**

9. Do you believe there is any role for military commissions for detainees currently held by the United States?

**Yes, I believe that military commissions should be retained as an option for resolving the cases of detainees who either cannot or should not be prosecuted in civilian criminal courts.**

10. If the evidence needed to prosecute a Guantanamo Bay detainee has been acquired from enhanced interrogation techniques, do you believe he should be released?

**In a case where the government's key evidence against a detainee was based on statements obtained through coercive interrogation, criminal prosecution would not be a viable option because the statements would likely be suppressed prior to trial. However, depending on the circumstances of the individual's capture and the quality and magnitude of the government's information regarding the individual, it may still be lawful to detain the individual under the laws of war. In such a case, release (at least in the near term) would be irresponsible if there were credible, reliable evidence that the individual continued to present a significant security threat.**

11. Should detainees be subject to charges of conspiracy?

**If sufficient admissible evidence exists, detainees considered for criminal prosecution could be subject to conspiracy charges.**

12. If Guantanamo Bay detainees are moved to the United States, do you believe the prison system is equipped to handle them? Do you believe that these detainees could be housed in the same U.S. prison facility, or would they need to be scattered among various facilities to avoid any perceived image problems?

**As a general rule, the U.S. prison system is equipped to handle Guantánamo detainees transferred to civilian custody. Both before and after the attacks of September 11, 2001, a rogues' gallery of dangerous terrorists successfully have been**

detained for long periods in the United States in localities across the country. For example, Egyptian radical Sheikh Omar Abdel Rahman was held for approximately four years at the Federal Medical Center in Rochester, Minnesota, following his conviction in 1995 for plotting to bomb the Lincoln Tunnel and other New York City landmarks. Ahmed Ressay, an Algerian who had trained at an al-Qaeda camp in Afghanistan, was long incarcerated at a federal detention center near Seattle after his arrest for planning to bomb Los Angeles International Airport on New York's eve in 1999. Ramzi Yousef, who masterminded the 1993 bombing of the World Trade Center, was detained for approximately three years at the Metropolitan Detention Center in New York.

After September 11, al-Qaeda operative Richard Reid was held at a county correctional facility in Plymouth, Massachusetts, after his arrest for attempting to blow up a passenger airliner in mid-air. The municipal detention center in Alexandria, Virginia -- located only a few miles from the White House and the U.S. Capitol -- has housed both Zacarias Moussaoui, who trained to fly commercial aircraft in connection with the September 11 plot, and Ahmed Omar Abu Ali, an American citizen who joined an al-Qaeda cell in Saudi Arabia and conspired to commit various terrorist attacks in the United States, including the assassination of President George W. Bush.

None of these facilities was ever attacked while a defendant was incarcerated there on terrorism-related charges, and no such detainee has ever escaped. Moreover, most of these terrorists are now safely serving their sentences at the formidable "Supermax" facility operated by the federal Bureau of Prisons in Florence, Colorado.



Senate Judiciary Committee  
Subcommittee on the Constitution  
"The Legal, Moral, and National Security Consequences of Prolonged Detention"  
Tuesday, June 9, 2009

Questions submitted by U.S. Senator Russell D. Feingold to Tom Malinowski

***Can you elaborate on your suggestion that President Obama's proposal for a prolonged detention regime should be unnecessary for future al Qaeda suspects? How much is this perceived need for a prolonged detention regime caused by the missteps of the Bush administration in creating the system at Guantanamo?***

I believe that the perceived need for a preventive detention regime, to the extent it is based on practical rather than ideological considerations, is caused entirely by the missteps of the Bush administration. The previous administration coerced testimony from prisoners through the use of torture. It reportedly made no effort to maintain coherent and complete files on detainees. It assumed that detainees would not have to be tried, and therefore did not always make an effort to gather evidence against them after capture that could be used in a federal civilian trial, or insist that foreign law enforcement and intelligence partners cooperate in the gathering of such evidence. Indeed, I believe it consciously sought to make it harder for any future administration to return to a criminal justice model for dealing with suspected terrorists (for example, by refusing to Mirandize detainees at any stage of the investigatory process).

There is no reason for any of these mistakes to be made in the future. An administration committed to bringing terrorists to justice could ensure that evidence of criminal activity is gathered and preserved when suspected terrorists are taken into custody, interrogate such individuals using reliable, lawful methods that would hold up in a court, Mirandize suspects at the appropriate time, and use all diplomatic tools at its disposal to secure the cooperation of foreign governments in gathering evidence and interviewing witnesses overseas. If we take into account that the federal courts have strong and well established procedures for admitting classified evidence and have dealt pragmatically with evidence obtained under complex circumstances overseas, there is no reason to believe that terrorist suspects captured in the future cannot be prosecuted, so long as the government has a strong case against them.

Questions of Senator Tom Coburn, M.D.  
 Hearing: *"The Legal, Moral, and National Security Consequences of  
 'Prolonged Detention'"*  
 Subcommittee on the Constitution  
 United States Senate Committee on the Judiciary  
 June 9, 2009

***Do you accept President Obama's determination that there are terrorist detainees who should not—and cannot—be prosecuted?***

I agree that there are detainees in Guantanamo who cannot be prosecuted. In some cases, this is because there is no evidence that they ever committed a crime – the decision to detain such persons was based either on allegations of past activity that cannot be substantiated, or a prediction of future dangerousness based on their associations and beliefs. The United States should not be holding prisoners indefinitely on either basis. Such a policy would be inconsistent with America's values and the law; it would inevitably result (as it has in the past) in the mistaken imprisonment of innocent people; it would ensure that people around the world remain focused on how the United States is treating its prisoners rather than on the crimes of the terrorists; it would likely create more enemies than it takes out of circulation.

The more difficult question is whether there are detainees who cannot be prosecuted because the evidence of their crimes has been tainted by the use of torture or mishandled or lost because of the policies of the last administration. I think that it is premature to conclude that such problems would preclude the prosecution of significant terrorist suspects in U.S. federal courts. Given the successful track record of the courts in dealing with sensitive and highly complex terrorism cases, and the variety of prosecutorial tools available to the Justice Department in the fight against terrorists, we should have confidence that the system will do its job and not dismiss that system until it has been fully employed. That every alternative system of detention has failed thus far is another strong argument for giving established institutions of justice a chance.

***Do you take President Obama at his word, that there are some detainee terrorists who "pose a clear danger" to the American people and who "remain at war with the United States"? If so, would you agree that the United States should do everything possible to keep them from being released?***

I agree that there are some detainees who pose a clear danger – among them are the admitted planners of the 9/11 attacks, and others suspected of involvement in terrorist acts and of having significant roles within al Qaeda. But the reason these detainees are considered dangerous is that there is evidence that they committed acts – whether involvement in a terrorist attack or providing material support for a terrorist group – that are crimes. And if they indeed committed these acts, our criminal justice system is capable of putting them away.

Indeed, criminal prosecution is the most effective way of ensuring that dangerous people are not released, because when terrorists are convicted by a system of unquestioned legitimacy, they have no hope of winning release by challenging the legality of their imprisonment, or of winning sympathy from those concerned about justice and due process. By contrast, the system in Guantanamo has lacked legitimacy and invited constant legal and political challenge from within the United States and from US allies. That is one reason why the Bush administration released over 500 detainees, some of whom probably would be in prison today had they instead been prosecuted in the federal courts.

That said, I do not believe it is in the U.S. national interest to detain every young Muslim man who may be captured around the world who may appear, based on his associations and views, to be dangerous. If U.S. troops swept through a city like Karachi in Pakistan or Kandahar in Afghanistan or Sana'a in Yemen and arrested the first thousand young men they encountered, they would likely find dozens who appear dangerous, with profiles similar to some of those held in Guantanamo. To detain a meaningful portion of people who consider themselves at war with the United States would require building hundreds of Guantanos. This is obviously not possible. And the detention of a couple of hundred such men in Guantanamo has probably made the larger pool of potential terrorists in the world larger, not smaller.

The U.S. military understands that seeking to detain indefinitely every potentially dangerous person is neither possible nor wise. In Iraq, where U.S. forces have been fighting an insurgency that has claimed over 4,000 American lives, the U.S.-run detention system has recently been releasing an average of 560 detainees a month – the equivalent of one Guantanamo population every two weeks. All of these people were at one point deemed to pose a clear danger to Americans and to Iraqis. But the United States has recognized that to win such a struggle, you have to reduce the total number of enemies committed to fighting you. Detaining people in a manner that is seen as illegitimate and unjust makes that task harder, not easier.

***Would you consider supporting a legal framework that allows for prolonged detention without trial?***

Such a legal framework already exists with respect to combatants captured as part of an international armed conflict. The Geneva Conventions allow for the detention without trial of such people for the duration of the conflict in which they were captured. But this situation is different, for the reasons I outlined in my testimony:

First, in a traditional war between states, it is easy to place boundaries around the extraordinary power to detain without charge, so that governments do not take it as a license to detain preventively anyone who they think poses a national security threat. In a traditional war, it is clear where the battlefield is, who enemy fighters are, and how to define the conflict's endpoint. But in this fight with international terrorists, which has no geographic boundaries or clear distinction between civilians and combatants, it is hard to limit preventive detention to people who are plainly soldiers in a war.

I hope that as a Senator who has long championed limits on government, you would be wary of giving our government the extraordinary power to hold without trial anyone the president deems to be "dangerous" or a threat to national security.

Second, in a traditional war, preventive detention is allowed because it is the only way to keep enemy fighters from returning to the battlefield. If those fighters are lawful combatants, they have not committed a crime, and therefore cannot be prosecuted. But terrorists have committed a crime – there is another, more certain way of putting them behind bars.

***Do you believe that the United States is engaged in an ongoing war against terrorism?***

U.S. forces in Afghanistan are clearly engaged in a war against the Taliban. They are fighting on a defined battlefield against an organized, armed enemy. They are inflicting, and taking casualties. They are operating under wartime rules of engagement, rather than the rules that would govern a law enforcement operation.

But I do not believe it is wise to extrapolate from the war in Afghanistan to declare a global "war against terrorism."

First of all, it does not make sense to say that the United States is at war with an "ism." Wars are fought against specific enemies, not against a phenomenon.

Second, if the fight against terrorists really were a global war, on a global battlefield, then governments waging that war would have the authority not only to detain suspected terrorists without charge, but to kill them wherever they were found. The United States would be legally justified in firing missiles at suspected terrorist safe houses in Paris and London, and shooting suspected terrorists arriving at JFK airport. China and Russia would be legally justified in killing suspected Uighur and Chechen terrorists found on the streets of New York. That is what calling something a "war" means.

Third, and most important, calling this a "war" gives terrorists what they want. One thing all terrorists have in common is the desire not to be seen as ordinary criminals. Al Qaeda members want to be thought of as soldiers, as part of a great army at war with a superpower on a global battlefield. They crave the attention and, in their own minds, the glory that comes with that status, and they use it to recruit more misguided young men to join their cause. We saw this when Khalid Sheikh Mohammed was brought before a Combatant Status Review Tribunal at Guantanamo, and spoke with pride about being called an "enemy combatant," comparing himself to George Washington. We saw it when the convicted "shoe bomber," Richard Reid, demanded to be treated as a combatant during his federal trial in Boston.

Terrorists do not deserve the honor of military detention and military tribunals. They deserve to be treated like the common killers they are.

***If the United States develops a "charge or release" policy for enemy combatants, wouldn't that give those unlawful fighters more rights than legitimate POWs receive?***

Not at all. Legitimate POWs have the right not to be treated as criminals. They cannot be prosecuted for the act of taking up arms and shooting at US troops. They have to be held under conditions defined by the Geneva Conventions, accorded the respect due to their rank, and released as soon as the conflict in which they were captured was over.

A "charge or release" policy recognizes that detainees are accused of committing crimes. If they indeed engaged in or supported acts of terrorism – or even if they merely engaged in combat as unprivileged belligerents – they can be treated as common criminals, prosecuted, and imprisoned, even after the conflict in which they were captured has ended.

Also, keep in mind that no one is advocating a "charge or release" policy for combatants captured in an active zone of combat like Afghanistan – though a more clear and legitimate legal framework is needed to hold fighters captured there as well.

***Some of you referenced in your testimony more than 100 terrorism cases successfully prosecuted in federal courts since 9/11. Did any of those cases involve terrorists captured overseas on the battlefield after 9/11?***

Yes. For example, there is the case of Daniel Maldonado, who was captured in the Horn of Africa, and sentenced in 2007 to ten years in prison for having trained at a terrorist camp alongside al Qaeda members seeking to overthrow the government of Somalia.  
[http://seattletimes.nwsourc.com/html/nationworld/2003799281\\_terroridig21.html](http://seattletimes.nwsourc.com/html/nationworld/2003799281_terroridig21.html)

The Bush administration chose to prosecute Maldonado in federal court because he was a US citizen. Several other non-citizen suspects were captured alongside him and sent to Guantanamo. But if they committed the same underlying crimes, there is no reason why they could not have been prosecuted as well.

***How would you deal with the concerns raised by FBI Director Robert Mueller that terrorists moved to U.S. prisons will recruit from inside U.S. prisons, as was the case with the recent New York synagogue bombers?***

I believe that U.S. prisons are fully capable of dealing with such concerns. If this were a major problem, I imagine that Congress would have acted long ago to correct it, as federal prisons have been holding extremely dangerous convicted terrorists, including al Qaeda members, for years. Director Mueller certainly did not suggest that we stop using federal prisons to detain convicted terrorists.

Moreover, as virtually any counter-terrorism expert will attest, it is the existence of Guantanamo and the perception that the United States is detaining people in an unlawful way that has fueled terrorist recruitment around the world. This is not an abstract concern –

military commanders have said that Guantanamo was a major spur to recruitment among insurgents in Iraq, and thus a major cause of U.S. combat fatalities there.

***Do you believe that any detainees captured by the United States are entitled to Miranda rights? Please explain.***

No court has ever held that combatants captured on an overseas battlefield are entitled to Miranda warnings upon capture, or when they are being interrogated for intelligence purposes. So the notion that Miranda is an obstacle to prosecution, or that soldiers will have to read enemy fighters their rights, is a straw man in this debate. The Miranda requirement only kicks in away from the battlefield, when it is feasible to give such a warning, and when authorities begin to interview a suspect for the purpose of criminal prosecution.

***Do you believe there is any role for military commissions for detainees currently held by the United States?***

The United States has used military commissions to prosecute violations of the laws of war in the past (though not after the adoption of the Uniform Code of Military Justice following World War II). But that doesn't mean it is wise to use them today.

If military commissions are established with standards of due process that are lower than those guaranteed by federal civilian courts, all the attention at trial will be on those diminished standards. The world will continue to focus on America's treatment of suspected terrorists, rather than on the crimes they committed. The commissions will be subject to more years of legal challenges and delays. The verdicts will lack legitimacy, and may ultimately be overturned. The risk that dangerous people will be released might actually be higher.

If, on the other hand, Congress raises the due process standards in military commission trials so that they are identical or similar to trials by federal court, or military court martial, then the commissions will lose their utility. There is no reason to go to the immense trouble of establishing yet again a new and experimental system of justice if it is going to look essentially like the system we already have.

***If the evidence needed to prosecute a Guantanamo Bay detainee has been acquired from enhanced interrogation techniques, do you believe he should be released?***

No one should be detained or prosecuted solely on the basis of evidence obtained through torture. That is a basic principle of American and international law, and a core tenet of our values as a civilized society. It would also be profoundly unwise for the U.S. government to make any decisions affecting the security of American citizens solely on the basis of "evidence" obtained through a method as unreliable as torture.

But the choice in the real world is rarely between using tortured evidence and releasing a detainee. For most of the high level al Qaeda suspects in Guantanamo, there is a great deal of

evidence available to prosecutors, including non-coerced statements, the testimony of other witnesses, intercepts, travel records, financial transactions, and material evidence, such as documents and computer disks, captured with the detainees. If such evidence doesn't exist, or has been lost, then efforts can be made to obtain it, including by exerting pressure on foreign governments to turn over information and to allow witnesses to be interviewed.

***Should detainees be subject to charges of conspiracy?***

Conspiracy to commit terrorism is a crime that can be prosecuted in federal court. But it is not a violation of the laws of war. This is an additional argument for using civilian courts to prosecute, and to secure the long-term detention of, suspected terrorists.

***If Guantanamo Bay detainees are moved to the United States, do you believe the prison system is equipped to handle them? Do you believe that these detainees could be housed in the same U.S. prison facility, or would they need to be scattered among various facilities to avoid any perceived image problems?***

The federal prison system has for many years held convicted terrorists, including al Qaeda members, with no adverse consequences. If this were not the case, I assume Congress would have been seized with this issue long ago. I am not qualified to say whether one or more facilities would need to be used.

Question for the Record for Tom Malinowski  
from Senator Sheldon Whitehouse

***At the hearing, you advocated the use of the criminal justice system for the detention of individuals who are believed to be associated with terrorist organizations or that are otherwise a danger to the United States. As you know, the criminal justice system is not the only method the United States recognizes for detaining individuals, since states can quarantine individuals for public purposes or commit individuals who are dangers to themselves or others. Do such civil law approaches provide a useful analogy or starting point for the detention of enemy combatants or other individuals who are determined to harm the United States?***

I do not believe it is a useful analogy. The courts have indeed allowed civil commitment of certain categories of people, but they have been careful to limit such detention to people who are both dangerous and who suffer from a mental illness or mental abnormality that makes them unable to control their behavior. This second element is essential. In a 2002 case, *Kansas vs. Crane*, the Supreme Court ruled that Kansas could not detain someone as a sexually violent predator, no matter how dangerous he might be, without this lack-of-control showing. This showing is necessary, the Court said, to distinguish those subject to civil commitment from those who are "more properly dealt with exclusively through criminal proceedings," and to prevent "civil commitment" from becoming a "mechanism for retribution or general deterrence."

In other words, there is no precedent suggesting that a finding of dangerousness alone is enough to permit preventive detention.



## SUBMISSIONS FOR THE RECORD

United States Senate Committee on the Judiciary  
Subcommittee on the Constitution

Hearing on "The Legal, Moral and National Security Consequences of  
'Prolonged Detention'"

June 9, 2009

Statement of Sarah H. Cleveland  
Louis Henkin Professor of Human and Constitutional Rights  
Columbia Law School

Chairman Feingold, Ranking Member Coburn, and esteemed Members of this Subcommittee: Thank you for inviting me to testify at this hearing on the legal, moral and national security consequences of prolonged detention without trial, and for your leadership on this important issue facing our country.

Last week, another detainee, Mr. Muhammad Salih, committed suicide in protest of his seven-year detention without criminal charge on Guantanamo, bringing to six the total number of deaths on the base.

To the world, Guantanamo is not a place. Guantanamo stands for prolonged detention outside accepted standards of the rule of law and fundamental justice. "Closing Guantanamo" therefore requires more than simply closing a particular prison facility. It requires fundamentally redirecting U.S. policy regarding terrorism suspects. If this Administration closes Guantanamo by creating another system of prolonged detention without trial – even a system with substantially more extensive procedural protections – to the world Guantanamo will have been remade in its own image.

I am a scholar of U.S. constitutional law, international law and human rights law, and co-coordinator of the Working Group on Detention Without Trial, a group of legal and other experts who were convened to examine the legal and policy implications of the detention and trial of terrorism suspects. The Working Group is a joint project of the Human Rights Institute at Columbia Law School, the International Law and the Constitution Initiative at Fordham Law School, and the National Litigation Project at Yale Law School. We submitted written testimony regarding detention before this Committee at the rule of law hearing last fall,<sup>1</sup> and I am attaching

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<sup>1</sup> Reprinted in slightly revised form as *Scholars' Statement of Principles for the New President on U.S. Detention Policy: An Agenda for Change*, 47 COLUM. J. TRANSNAT'L L. 339 (2009) (Catherine Powell, Reporter).

a recent draft report of our Working Group regarding comparative detention practices to my testimony today.<sup>2</sup>

I am here to ask this Congress to resist any effort to authorize the United States to establish an indefinite detention system for terrorism suspects seized outside a traditional battlefield. Neither our Constitution nor international law contemplates such a power; this Congress has never authorized such a power, and the power is not recognized by our allies in North America and Europe.

I would like to emphasize up front that I am not testifying primarily regarding the power of our military to seize and detain Taliban or al Qaeda fighters in Afghanistan. The U.S. Supreme Court concluded in *Hamdi v. Rumsfeld*<sup>3</sup> that international law allows states to apprehend enemy troops in a traditional conflict and to hold them until the end of that conflict. The United States urgently needs to adopt procedural protections for such detentions consistent with our Constitution, the law of the territorial state, and international humanitarian and human rights law,<sup>4</sup> through a status of forces agreement with Afghanistan or equivalent regime. But rather than detentions in Afghanistan, it is the claim of a roving power to detain persons seized outside a traditional theater of combat that has brought the United States widespread international condemnation, eroded our moral authority, and inspired new converts to terrorism.

My testimony today makes three points: (1) that prolonged detention outside the battlefield is unwarranted as a matter of law and policy; (2) that such detention is not supported by our democratic allies and undermines both their cooperation in counterterrorism and our moral authority as a leader in human rights, and (3) that the problems on Guantanamo, as challenging as they are, do not justify the creation of a new detention regime.

#### **I. Prolonged Detention is Unwarranted as a Matter of Law and Policy**

Our Constitution does not recognize a roving power to detain dangerous persons as a substitute for criminal trial. "Liberty is the norm"<sup>5</sup> under our legal system, and the protection of personal liberty against arbitrary confinement is one of the hallmarks of our Constitution. The "charge and

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<sup>2</sup> *The Company We Keep: Comparative Law and Practice Regarding the Detention of Terrorism Suspects*. A Draft White Paper of the Working Group on Detention Without Trial (2009) (Hope Metcalf, Reporter) (Appendix A).

<sup>3</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

<sup>4</sup> E.g., Jelena Jelic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INT'L REV. RED CROSS 375 (2005).

<sup>5</sup> *U.S. v. Salerno*, 481 U.S. 739, 755 (1987).

conviction” paradigm – with its network of constraints on governmental power – is the norm. Predictions of future dangerousness, unlike proof of past criminal acts, are notoriously unreliable.<sup>6</sup> While the government has been recognized as having authority to confine persons without criminal charge in certain historically circumscribed exceptions, such as civil commitment<sup>7</sup> and quarantine for public health purposes,<sup>8</sup> these exceptions have been “carefully limited” and “sharply focused.”<sup>9</sup> Danger alone has never sufficed; nor has the government’s understandable desire to overcome the barriers imposed by the Constitution on prosecution or conviction.

The power to detain enemy belligerents until the end of an armed conflict, long recognized under international humanitarian law, is one such exception. This authority is based on the presumption that the exigencies of armed conflict require a power to detain – because privileged belligerents cannot be criminally prosecuted for waging war; because even where criminal prosecution is available, evidence is difficult to properly preserve and an obligation to prosecute would be disruptive to ongoing military operations, and because from a humanitarian perspective, incapacitating killing enemy soldiers through detention is preferable to killing them.

Such detention, however, traditionally has been constrained by four presumptions: (1) Enemy belligerents are easy to identify, thus limiting the possibility of error. In a traditional international armed conflict, enemy belligerents are generally identifiable through objective indicia: they wear the uniform or insignia of the enemy state; they carry the passport or

<sup>6</sup> Empirical studies demonstrate that “preventive” detention determinations that rely on assessment of future dangerousness generate unacceptably high levels of false positives (i.e., detention of innocent people). *See, e.g.*, Jeffrey Fagan & Martin Guggenheim, *Preventive Detention and the Judicial Prediction of Dangerousness for Juveniles: A Natural Experiment*, 86 J. CRIM. L. & CRIMINOLOGY 415, 438 (1996); Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 386 (1990) (“The high level of false positives demonstrates that the ability to predict future crimes—and especially violent crimes—is so poor that such predictions will be wrong in the vast majority of cases. Therefore, judges should not use them as an independent justification for major deprivations of liberty such as detention.”).

<sup>7</sup> *Addington v. Texas*, 441 U.S. 418 (1979).

<sup>8</sup> *O’Connor v. Donaldson*, 422 U.S. 563, 582–83 (1975) (Burger, J., concurring). Detention based on dangerousness in the immigration context is permitted only during the pendency of immigration proceedings, not as a free-standing authority to detain immigrants who are not in proceedings. *Carlson v. Landon*, 342 U.S. 524, 536 (1952). *See also* Immigration and Nationality Act (INA) § 236A, 8 U.S.C. § 1226A (2008) (added by the Patriot Act and permits detention based on certification by the Attorney General, but expressly requires that immigration or criminal charges be filed within seven days, and that habeas be available to challenge the certification.) For further discussion, see *Scholars’ Statement*, *supra* note 1, at 350-51.

<sup>9</sup> *Foucha v. Louisiana*, 504 U.S. 71, 72 (1992) (discussing *Salerno*, 481 U.S. at 755).

identification of that state; they are captured while waging war on behalf of the enemy state. (2) The conflict will be limited to a geographically defined space. (3) Detention may last only until the end of the conflict. (4) Detention may only be for the purpose of preventing return to the battlefield.

Although in a conflict with non-state forces the enemy may not be in uniform, these principles generally still apply. The detention authority recognized by the Supreme Court in *Hamdi* was based on these traditional criteria: Yaser Hamdi was allegedly detained while taking up arms against the United States during a traditional conflict in Afghanistan.

This authority to detain becomes stretched impossibly, however, when extended to persons seized outside a theater of armed conflict. The risk of error becomes exponentially greater. Persons who are seized outside the area of conflict, while not directly participating in armed conflict, but while in their homes, at work, or on the street, lack any objective indicia of combatency, making the lack of criminal process to determine their culpability all the more problematic. The military imperatives that justify tolerating detention in armed conflict also do not pertain. Outside of the theater of combat the regular criminal justice system is more readily available. Ordinary courts presumably are open and functioning at the locus of the arrest, as well as in the United States. Military exigencies do not complicate the preservation of evidence, and pursuing such a criminal prosecution does not disrupt ongoing military operations.

These considerations are further compounded if the claimed conflict is a "global" conflict against al Qaeda, the Taliban and affiliated groups -- participants are much harder to identify, the enemy is not geographically contained, and an "end" to the conflict may not occur in our lifetime. The President recognized in his May 21 speech that "we know this threat will be with us for a long time." Under these circumstances even if non-battlefield detentions could be contemplated under the international law of armed conflict, they likely would be unconstitutional.<sup>10</sup> Falling far outside any traditional exceptions to the charge-and-conviction paradigm, the circumstances of non-battlefield criminal acts simply do not provide a compelling justification for permitting the government to circumvent the traditional constraints of the criminal law.

## **II. Comparative Prolonged Detention is Not Supported by Our Democratic Allies**

Prolonged detention of non-battlefield detainees is viewed as illegitimate by the advanced democracies who are our allies and undermines their cooperation with our global counterterrorism efforts. Proponents of a new U.S. system of "preventive detention" often claim

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<sup>10</sup> Cf. *Hamdi*, 542 U.S. at 521 ("If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.").

that other countries employ similar tactics. But as detailed in the white paper that I have appended to this testimony,<sup>11</sup> no other European or North American democracy has resorted to long-term detention without charge outside of the deportation context. Our closest allies—including the United Kingdom, France, Spain, Germany, Australia, and Canada—do not resort to such detention. Preventive detention in these countries is a matter of days, not months or years. France restricts detention of terrorism suspects without charge to 6 days; Spain limits pre-charge detention to 13 days. Germany, Denmark, and Norway apply ordinary criminal procedures to suspected terrorists. Australia limits detention without charge to 14 days and bars interrogation in that period, while Canada narrowly restricts detention to the immigration context for aliens who have been ordered removed but cannot be deported. In the United Kingdom, which has the lengthiest term of preventive detention in Europe, detention without charge is limited to 28 days, and still must be conducted as part of a criminal investigation. An effort last year to extend the detention period to 42 days was vigorously opposed by members of both parties.

Although the U.K. and Canada have both held suspected terrorists for extended periods of time pending deportation, neither country detained anyone for as long as the US has already detained people at Guantanamo, and neither country is currently holding anyone in such detention. The U.K. detention scheme pending deportation, which covered a total of 17 suspects, was invalidated by the House of Lords in 2004. The Canadian scheme of detention pending deportation covered fewer than 10 people post-September 11, with most of them being held for fewer than two years.

Among advanced democracies, only Israel and India have adopted long-term detention systems for terrorism suspects. Both countries have done so based on an emergency security regime inherited from British colonial rule, and Israel has done so in the context of an ongoing threat since the country's inception. Both regimes are highly controversial, and the United States State Department consistently has criticized the practices of both countries. (See Appendix B).

Adoption of a prolonged detention regime in the face of rejection of such a system by our European and Canadian allies will undermine their willingness to cooperate with the United States in intelligence sharing and the transfer of terrorism suspects, as well as in the relocation of Guantanamo detainees. European allies participating in the conflict in Afghanistan already transfer persons who are seized directly to Afghan custody, rather than transfer them to the United States. And Germany has agreed to extradite terrorism suspects to the United States only with assurances that the suspect will not be transferred to prolonged detention on Guantanamo. Last week, our European allies took steps toward assisting the United States in closing Guantanamo by facilitating the acceptance of detainees into European countries, but they did so

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<sup>11</sup> See *The Company We Keep*, *supra* note 1. See also Stella Burch Elias, *Rethinking 'Preventive Detention' from a Comparative Perspective: Three Frameworks for Detaining Terrorist Suspects* (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1406814](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1406814).

with the expectation that the United States would conduct “a thorough review of U.S. counter-terrorism policies consistent with the rule of law and international law in the expectation that the underlying policy issues would be addressed.”<sup>12</sup> Our European allies have clearly signaled that they do not want to see business as usual. The adoption of prolonged detention for some of the Guantanamo detainees thus will not help close Guantanamo. It instead would make European states less willing to accept some of the burden in receiving detainees, leaving us still more individuals to detain.

Most important, there is no evidence that preventive detention works. As detailed in our draft white paper, comparative studies of terrorism stretching back more than twenty years have concluded that draconian measures—such as prolonged detention without trial—are not proven to reduce violence, and can actually be counterproductive. The United Kingdom, in particular, renounced the use of long-term detention of terrorism suspects in Northern Ireland in 1975 after concluding, in the words of a former British Intelligence Officer, that “[i]nternment barely damaged the IRA’s command structure and led to a flood of recruits, money and weapons” to the IRA.<sup>13</sup>

Mr. Chairman, in your May 22 letter to President Obama, you correctly observed that prolonged detention “is a hallmark of abusive systems that we have historically criticized around the globe.” Indefinite detention is indeed a hallmark of repressive regimes such as Egypt, Libya, and Syria, which presently hold hundreds of people in prolonged detention, as well as notorious past regimes such as apartheid-era South Africa, which held tens of thousands of government opponents in preventive detention as security threats during the last decades of white rule. The use of prolonged detention also commonly goes hand-in-hand with other forms of human rights abuse such as the use of torture and cruel, inhuman or degrading treatment.

Since their establishment in the 1970s, our State Department’s annual Country Reports on Human Rights Practices have consistently highlighted and critiqued the use of preventive detention in the absence of criminal charge or trial by other states around the globe. In Appendix B to this testimony, I have collected examples of the State Department’s critiques of the use of preventive detention for terrorism and other purposes in the period since September 11, 2001. In the 2008 Report, which was issued by the Obama Administration in February of this year, the State Department criticized the use of short or long term detention for terrorism-related purposes in Australia, India, Italy, Nepal, Pakistan, Singapore, and Syria. The Nepal report, for example, notes that for security purposes, “the government may detain persons in preventive detention for

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<sup>12</sup> Council of the European Union, Conclusions of the Council and of the representatives of the Governments of the Member States on the closure of the Guantanamo Bay Detention Center, June 4, 2009.

<sup>13</sup> *The Company We Keep*, *supra*, at 5 & n. 21.

up to six months without charging them with a crime,” and that a “court may order an additional six months of detention before the government must file official charges.” Singapore law “gives broad discretion to the minister for home affairs, at the direction of the president, to order detention without filing charges if it is determined that a person poses a threat to national security. The initial detention may be for up to two years and may be renewed without limitation for additional periods of up to two years at a time.” And in Syria, persons arrested for political or national security reasons “were detained incommunicado for prolonged periods without charge or trial.”

The U.S. detentions on Guantanamo for the past seven years have severely hampered the United States’ ability to credibly criticize such practices. The critical question for our country going forward is whether we will break with these past practices sufficiently to restore our credibility as an international leader in human rights. By contrast, if United States accepts the premise that we may incarcerate people without trial in order to keep us safe, we would encourage other government’s use of prolonged detention in response to security threats, both real and perceived. This could be equally true for a country like Mexico in addressing violent drug-related activities and for Russia in dealing with Chechen rebels.

We have already seen repressive governments emulate our past policies. In Egypt, President Mubarak cited U.S. post-9/11 security measures to justify renewing that country’s state of emergency. In Libya, during his 2002 address to the nation, Libyan head of state Mu’ammar Qaddafi bragged to the Libyan public that he was treating [terrorist suspects] “just like America is treating [them].” And in December 2007, when U.S. officials criticized Malaysia’s decision to arrest and detain five Hindu rights activists under that country’s administrative detention law, Malaysia’s deputy prime minister pointed immediately to the detention of terrorist suspects at Guantanamo, saying that he would not feel the need to explain his country’s detentions as long as Guantanamo detainees were still being held without trial.

In sum, should the United States take the unprecedented step of implementing indefinite detention without trial for terrorism suspects, it would have profound consequences for the rule of law globally and for U.S. foreign policy. By acting outside accepted legal standards, we would embolden other nations with far worse human rights records to adopt sweeping regimes for long-term detention. Further erosion of the rule of law in nations such as Egypt and Pakistan could further destabilize these states, with dire consequences for global security. Moreover, taking a position so far out of step with our European and North American allies would undermine our ability to gain their critical cooperation in international counterterrorism efforts.

### III. Closing Guantanamo Does Not Warrant Establishing a New Detention Regime

Guantanamo should never have happened, and the fundamental errors of law and policy that led to its creation are well known: the Administration claimed a sweeping power to detain terrorism suspects from around the globe; detainees were denied relevant protections of the Geneva conventions, including the protection of Common Article III; detainees were denied any legal process to determine the validity of their detention – including habeas corpus and the minimal determination required under Article V of the Third Geneva Convention; detainees were denied the protection of the U.S. Constitution and international human rights law; and torture and cruel, inhuman or degrading treatment were employed to justify detention and to extract information.

Guantanamo has created massive problems not of this Administration's creation. But given the fundamental violations of basic rights that have occurred on Guantanamo, we cannot "close" Guantanamo without making a sharp break with the past and renouncing prolonged detention of the Guantanamo detainees, regardless of any procedural trappings that might now be provided.

So what alternatives are available to us? The path for closing Guantanamo has been well hewn by others. We should criminally prosecute those who have violated our criminal laws. Persons whom we decide not to prosecute but who have violated the laws of other states may be transferred to those countries for trial, with meaningful assurances that due process and international human rights law will be respected. Persons found eligible for release whose home country will not take them or who cannot be returned due to a fear that they will be tortured may be transferred to a third country, if necessary with assurances protecting their security (including monitoring by multiple parties such as U.S. embassy personnel and the International Committee of the Red Cross). If necessary, others may be transferred to third countries with conditions that they will be placed under some form of monitoring, subject always to due process and human rights guarantees. And as controversial as this is for some segments of the American public, some of the detainees will need to be accepted by the U.S. The European Union, for example, has made it clear that U.S. acceptance of some responsibility for the Guantanamo detainees is a condition for its assistance.

We must continue to challenge the premise that there is a fifth category of detainees who are "too dangerous to be released, but who cannot be tried." The proposal for prolonged detention remains a solution in search of a problem. As other witnesses are attesting at this hearing, there is no evidence that our criminal justice system is not up to the task of trying terrorism suspects.

The premise of a fifth category of detainees itself is deeply problematic. On what basis is the determination that a person "cannot be tried" to be made? How is such a determination to be reviewed? On what basis do we determine that a person is "too dangerous" to be released?



Certainly, the fact that a person was tortured in detention, or that a person was detained on the basis of information extracted by torture, cannot be a proper basis for prolonged detention, given that we have renounced coerced evidence as a basis for prosecution. To conclude that a person who could not be prosecuted as a result of torture could nevertheless be detained indefinitely on that basis would illegitimate U.S. efforts in the struggle to abolish torture and to promote fair trial process around the world.

The fact that a detention may be based on hearsay similarly highlights the unreliability of the basis for detention. Our rules of evidence excluding hearsay, entitling defendants to confront the evidence against them, and requiring proof beyond a reasonable doubt, are designed to ensure accuracy and to prevent people from being incarcerated in error. On the other hand, if the option of long-term detention without trial is available, the temptation will always exist for the government to decide that difficult cases "cannot be tried," and thus to skirt the strictures of the criminal process. But a legal regime that allows a government to guarantee that persons it fears will be incarcerated is not a regime based on the rule of law.

Protection of intelligence sources and methods is a serious concern, but the criminal justice system has well-established procedures for addressing classified information. There are also other contexts in which the government wishes to convict people without revealing intelligence sources and methods, or wishes to rely on the testimony of (potentially uncooperative) foreign agents. A principle that would allow these difficulties to redirect a terrorism suspect into a prolonged detention system would not be limited to the terrorism context.

I understand that federal criminal trials of Guantanamo detainees might be fraught for any number of evidentiary reasons, might be embarrassing, might result in acquittals, and might provide the accused with legal and public relations leverage they may not enjoy in a different forum. But many of these inconveniences will arise in any judicial process, including one designed to implement prolonged detention, and most have proven not to be deal breakers in the more than 100 international terrorism cases tried in our federal courts.

Even if a category five person does exist, the overall costs to our national security of establishing a scheme of indefinite detention without trial are greater than any potential benefit, given the departure from historic American legal protections against arbitrary detention, and the fact that such detentions will likely apply to a disproportionately Islamic population and will complicate the ability of allies to cooperate in intelligence sharing and the transfer of terrorism suspects.

Finally, and perhaps most critically, our mistakes of the past must not be allowed to drive mistakes of the future. There are at least three reasons why the problems we confront today on Guantanamo should not be problems going forward:

1. *Torture will not be used.* The President has reaffirmed that the United States renounces torture and cruel treatment. To the extent that criminal prosecutions of the current detainees is complicated by the fact that they were detained based on testimony coerced from themselves or others, this should not be a problem in the future.

2. *Future evidence can be preserved.* The Guantanamo detainees were seized and transferred to Guantanamo with the erroneous expectation that they would never appear before any court, let alone be criminally prosecuted. If terrorism suspects are seized in the future with the expectation that they must be criminally tried, evidence and the chain of custody can be properly preserved.

3. *The criminal law is available.* We now have broader laws criminalizing terrorist activity outside the United States than existed prior to September 11, 2001. Given the breadth, flexibility and extraterritorial reach of our criminal laws in the context of counterterrorism, including our material support and conspiracy laws, it is hard to imagine conduct that could justify administrative detention in accordance with a properly circumscribed interpretation of our Constitution and international humanitarian or human rights law, and yet fall below the threshold for prosecution. If the evidence we have against someone is insufficient to prosecute under these standards, it is an insufficient basis for detention.

Guantanamo, in short, is a *sui generis* phenomenon that must not be allowed to dictate a model for future detention.

### **Conclusion**

My eight year old daughter campaigned energetically for President Obama and is one of the President's most enthusiastic supporters. But when I told my daughter that I had to go to Washington to testify because President Obama was proposing that the government should be able to lock people up without proving that they had done something wrong, she looked at me astonished and said, "*Obama* wants to do that?" My 85 year-old father, who lives alone in rural Alabama, has unsubscribed from the Democratic Party listserv as a result of the President's prolonged detention proposal.

Prolonged detention without trial offends the world's most basic sense of fairness. Our government acquires its legitimacy, and its moral authority as a leader in both counterterrorism efforts and human rights, by acting in accordance with law. President Obama proposes to establish prolonged detention within the rule of law. But skating at the edge of legality was the hallmark of the counterterrorism policies of the past Administration; it should not be the hallmark of this one. For the United States to ratify the principle that our government may hold people indefinitely based on the claim that they cannot be tried but are too dangerous to be released, would be, as Justice Robert Jackson warned in his dissent in *Korematsu*, to leave a loaded weapon lying around ready to be picked up by any future government, at home or around the globe.

APPENDIX A

–DRAFT–

**THE COMPANY WE KEEP:  
COMPARATIVE LAW AND PRACTICE REGARDING  
THE DETENTION OF TERRORISM SUSPECTS**

A WHITE PAPER

OF THE

WORKING GROUP ON DETENTION WITHOUT TRIAL

A Project of the Human Rights Institute, Columbia Law School;  
International Law and the Constitution Initiative, Fordham Law School; and  
the National Litigation Project, Yale Law School

JUNE 2009

## INTRODUCTION

“Indefinite imprisonment without charge or trial is anathema in any country which observes the rule of law.”

—Lord Nicholls of Birkenhead, *A v. Home Secretary*, [2004] U.K.H.L. 56.

Proponents of a new U.S. system of “preventive detention”<sup>1</sup> for terrorism suspects often rely upon assertions that other nations employ similar tactics.<sup>2</sup> But a survey of global practices reveals that no advanced democracy other than India and Israel employs a system of indefinite preventive detention without criminal charge.<sup>3</sup> Our closest allies—including the U.K., France, Spain, Germany, Australia, and Canada—do not resort to detention outside of the criminal justice or immigration contexts.<sup>4</sup> Instead, these nations have narrowly adapted existing criminal and immigration regimes to combat terrorism without sacrificing core principles.

In the United Kingdom, detention without charge is limited to 28 days as part of a criminal investigation. France restricts detention without charge of terrorism suspects to 6 days; Spain limits pre-charge detention to 13 days. Germany, Denmark, Italy, and Norway apply ordinary criminal procedures to suspected terrorists. Australia limits detention without charge to 14 days and bars interrogation in that period, while Canada narrowly restricts detention to the immigration deportation context.

<sup>1</sup> The term “preventive detention” is itself problematic. See Catherine Powell, Reporter, *Scholars’ Statement of Principles for the New President on U.S. Detention Policy: An Agenda for Change* at 1 (Dec. 1, 2008). With signatories from a number of prominent law professors, the Statement notes, “[t]he current detention policies also point to the inherent fallibility of ‘preventive’ determinations that are based on assessment of future dangerousness (as opposed to past criminal conduct). Empirical studies demonstrate that ‘preventive’ detention determinations that rely on assessment of future dangerousness generate unacceptably high levels of false positives (i.e., detention of innocent people).”

<sup>2</sup> See, e.g., Stuart Taylor Jr., *The Case for a National Security Court*, NAT’L J., Mar. 26, 2007; Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 YALE J. INT’L L. 369, 372-73 (2008) (“Thus, although all western democracies continue to rely heavily on the criminal process to prosecute and detain non-battlefield suspects, many have also acted outside that process.”).

<sup>3</sup> Stella Burch Elias, *Rethinking ‘Preventive Detention’ from a Comparative Perspective: Three Frameworks for Detaining Terrorist Suspects* at Appendix (2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1406814](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1406814).

<sup>4</sup> “Preventive detention” is a term used in various contexts. The lack of specificity has led to confusion and misleading comparisons in the recent debate about U.S. detention policy. For the purpose of this white paper, “preventive detention” shall refer to a regime whereby a terrorism suspect may be imprisoned solely on an assessment that they pose a future risk and not in connection with a criminal prosecution or immigration action. See Int’l Comm’n of Jurists, *Memorandum on International Legal Framework on Administrative Detention and Counter-Terrorism*, at 6 (Dec. 2005) (defining administrative detention), available at [http://www.icj.org/IMG/pdf/Administrative\\_detent\\_78BDB.pdf](http://www.icj.org/IMG/pdf/Administrative_detent_78BDB.pdf). This memorandum specifically does not address the application of the laws of war, which apply only in very limited instances. Although beyond the scope of this white paper, the authors note their disagreement with the assertion set forth by some proponents of preventive detention that the laws of war may be extended outside the traditionally recognized contexts of international and non-international armed conflict. See, e.g., Silvia Borelli, *Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the ‘War on Terror’*, 87 INT’L REV. RED CROSS 39, 53 (2005).

International human rights law generally proscribes preventive detention except where absolutely necessary and proportionate.<sup>5</sup> Administrative detention for security purposes may theoretically be permitted under international law, but only in the presence of a “public emergency that threatens the life of the nation,”<sup>6</sup> and where criminal prosecution or less restrictive alternatives are impossible.<sup>7</sup> In all events, indefinite detention without trial<sup>8</sup> and detention for purely intelligence-gathering purposes are highly suspect.<sup>9</sup>

Moreover, the experiences with emergency detention in India and Israel demonstrate the great danger of sidestepping the criminal process: definitions remain impossibly elastic, the pressure for intelligence-gathering yields coercive treatment, and processes are frequently shrouded in secrecy. The use of long-term preventive detention without charge most often corresponds with wide-ranging human rights violations. Most important, there is no evidence that preventive detention works. Comparative studies of terrorism stretching back more than twenty years have concluded that draconian measures—such as prolonged detention without trial—are not proven to reduce violence, and can actually be counterproductive.<sup>10</sup>

<sup>5</sup> Human Rights Comm., Communication No. 1324/2004: Australia, ¶ 7.2, U.N. Doc. CCPR/C/88/D/1324/2004 (Nov. 13, 2006) (detention could be arbitrary if “not necessary in all the circumstances of the case and proportionate to the ends sought”); Human Rights Comm., Communication No. 560/1993: Australia, ¶ 7.2, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 3, 1997) (same if “not necessary in all the circumstances of the case”); Human Rights Comm., Communication No. 305/1988: Netherlands, ¶ 5.8, U.N. Doc. CCPR/C/39/D/305/1988 (Aug. 15, 1990) (same if not “reasonable in all the circumstances”); see also Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT’L L.J. 503, 507 (2003).

<sup>6</sup> General Comment No. 29, “Derogation during a state of emergency”, in “International human rights instruments: Compilation of general comments and general recommendations adopted by human rights treaty bodies”, UN Doc. HRI/GEN/1/Rev.7 (2004), pp. 184 ff.

<sup>7</sup> Article 9(1) of the International Covenant on Civil and Political Rights (“ICCPR”) provides that “everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” UNTS, Vol. 999, p. 171, 16 December 1966, entered into force 23 March 1976. While Article 4 permits for the derogation of Article 9 in times of public emergency “which threaten[] the life of the nation and the existence of which is officially proclaimed,” derogations must still be “strictly required by the exigencies of the situation” and may not involve discrimination “solely on the grounds of race, color, sex, language, religion or sound origin.” *Id.* at Art. 4. See Alfred de Zayas, *Human Rights and Indefinite Detention*, 87 INT’L REV. RED CROSS 15, (2005); see also Human Rights Comm., Communication No. 66/1980: Uruguay, ¶ 18.1, U.N. Doc. CCPR/C/17/D/66/1980 (Oct. 12, 1982) (“[A]dministrative detention may not be objectionable in circumstances where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner . . .”) (emphasis added).

<sup>8</sup> *Bolaños v. Ecuador*, No. 238/1987, UN Doc. A/44/40, Annex X, Sec. 1, para. 8.3 (finding violation of Article 9, paragraph 3 where criminal defendant was held in pre-trial detention for over five years).

<sup>9</sup> Jelena Pejić, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INT’L REV. RED CROSS 375, 377 (2005) (“[I]nternment or administrative detention for the sole purpose of intelligence gathering, without the person involved otherwise presenting a real threat to State security, cannot be justified.”). The Israeli Supreme Court rejected Israel’s use of detainees as “bargaining chips” on the ground that detention must be based on an individualized assessment of risk. *A v. Minister of Defence*, CrimFH 7048/97, [2000] IsrSC 44(1) 721. See also Human Rights Comm., Second Periodic Report Addendum: Israel, ¶¶ 125-28, U.N. Doc. CCPR/C/ISR/2001/2 (Dec. 4, 2001); Human Rights Comm., Concluding Observations: Israel 1998, *supra*, at 106, ¶ 21; Human Rights Comm., Concluding Observations: Israel, ¶ 13, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003).

<sup>10</sup> See Arunabha Bhoomik, *Democratic Responses to Terrorism: A Comparative Study of the United States, Israel and India*, 33 DENV. J. INT’L L. & POL’Y 285, 292-95 (2005) (discussing various comparative empirical studies of counterterrorism); Yonah Alexander, *COMBATING TERRORISM: STRATEGIES OF TEN COUNTRIES 7* (2002) (study of the United States, Argentina, Peru, Colombia, Spain, the U.K., Israel, Turkey, India, and Japan); Christopher Hewitt,

Finally, the number of people who have been subjected to detention without charge for more than three years by any democratic state, including India and Israel, is extraordinarily small. Application of such policies abroad thus contrasts sharply with the United States' ongoing detention of over two hundred detainees at Guantanamo and elsewhere.

In sum, long-term preventive detention overwhelmingly has been rejected by democratic states abroad.<sup>11</sup> Our allies in Europe and North America have concluded that such detention is unwarranted, unproven and unwise, in marked contrast with the relative success of the criminal justice system in fighting terrorism. By contrast, indefinite detention without trial is a hallmark of repressive regimes such as Egypt, Libya, Syria, and apartheid-era South Africa, which held tens of thousands of government opponents in preventive detention as security threats during the last decades of white rule.<sup>12</sup>

Should the United States take the unprecedented step of implementing indefinite detention without trial for terrorism suspects, it would have profound consequences for the rule of law globally and for U.S. foreign policy. By acting outside accepted legal standards, we would embolden other nations with far worse human rights records to adopt sweeping regimes for long-term detention in response to internal or external threats, both real and perceived. Further erosion of the rule of law in nations such as Egypt and Pakistan could further destabilize these states, with dire consequences for global security. Moreover, taking an extreme position so far out of step with our European and North American allies would undermine our ability to gain their critical cooperation in international counterterrorism efforts.

#### I. EUROPE: SHORT-TERM DETENTION IN THE CRIMINAL JUSTICE SYSTEM

European nations detain terrorism suspects only in connection with ongoing criminal proceedings.<sup>13</sup> The European Convention on Human Rights flatly forbids security-based detention where it is not connected with criminal or immigration proceedings. ECHR art. 5(1)(c) (permitting detention only “for the purpose of bringing [a person] before the competent legal authority . . . when it is reasonably considered necessary to prevent his committing an offense.”). The European Court of Human Rights has held that detention is lawful only if done in

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THE EFFECTIVENESS OF ANTI-TERRORIST POLICIES 66-67 (1984) (study of Northern Ireland, Uruguay, Spain, Italy and Cyprus).

<sup>11</sup> 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 SEC. AFF.* 1, 1 (2008) (“America’s policy of preventive detention is not just different as a matter of degree – it is grossly different as a matter of kind.”).

<sup>12</sup> Jeremy Sarkin, *Preventive Detention in South Africa*, in *PREVENTIVE DETENTION AND SECURITY LAW: A COMPARATIVE SURVEY 209* (Andrew Harding & John Hatchard eds., 1993).

<sup>13</sup> See generally Elias, *supra*, at Appendix; Mar Jimeno-Bulnes, *After September 11th: The Fight Against Terrorism in National and European Law. Substantive and Procedural Rules: Some Examples*, 10 *EUR. L.J.* 235 (2004); Sionaidh Douglas-Scott, *The Rule of Law in the European Union—Putting the Security into the “Area of Freedom, Security and Justice,”* 29 *EUR. L. REV.* 219 (2004); Colin Warbrick, *The European Response to Terrorism in an Age of Human Rights*, 15 *Eur. J. Int’l L.* 989 (2004). Although the United Kingdom has adopted legislation contemplating the detention of terrorism suspects outside the criminal justice system, as addressed below, that legal regime neither has been applied in practice nor has been subjected to judicial scrutiny.

conjunction with the criminal or immigration process.<sup>14</sup> As the examples below demonstrate, some nations have brief pre-charge detention periods for terrorism suspects, but even these short-term detentions must be made in consecutive extensions, pursuant to judicial oversight and with access to counsel.<sup>15</sup>

#### A. United Kingdom

The United Kingdom is oft-cited as employing “preventive detention.”<sup>16</sup> That assertion, however, vastly exaggerates the limited scope of British detention powers. Moreover, it ignores the British experience with the Irish Republican Army that led it expressly to reject military approaches to counterterrorism. As a British government committee noted in April 2002: “Terrorists are criminals, and therefore ordinary criminal justice and security provisions should, so far as possible, continue to be the preferred way of countering terrorism.”<sup>17</sup>

##### 1. The British Experience in Northern Ireland

The lessons from its experience in Northern Ireland have caused the United Kingdom to reject long-term preventive detention. Faced with escalating violence in 1971, the United Kingdom invoked emergency powers and British troops began a campaign of raids resulting in the arrest of 342 IRA suspects on the first day and 2,375 in the first six months.<sup>18</sup> Ultimately, thousands of people—the vast majority from the Catholic community—would be interned before the abandonment of the internment program in 1975.<sup>19</sup>

By any measure, the internments and other heavy-handed tactics of the early 1970s were a terrible failure. Based on poor and outdated intelligence, the raids alienated thousands of people and resulted in relatively few solid arrests.<sup>20</sup> Meanwhile, the government’s tactics

<sup>14</sup> *Lawless v. Ireland* (No. 3), 3 Eur. Ct. H.R. (ser. A), ¶¶ 13-15, 48 (1961); *Ciulla v. Italy*, 148 Eur. Ct. H.R. (ser. A) 1, ¶38 (1989); *Guzzardi v. Italy*, 3 Eur. Ct. H.R. (ser. A) 333, ¶102 (1980). See generally Oren Gross, Fionnuala Ni Aoláin, LAW IN TIMES OF CRISIS 269 (2006) (discussing *Lawless* and limits on detention under ECHR).

<sup>15</sup> The United Kingdom has by far the lengthiest period of pre-charge detention. Parliament recently expanded the detention period to 42 days, from 28 days enacted in 2005 and 7 days, enacted in 2000. Pre-charge detention for regular suspects is limited to four days. Notably, in *Brogan v. United Kingdom*, the European Court of Human Rights held that a detention of four days and six hours without charge violated the United Kingdom’s obligations under the European Convention. *Brogan v. United Kingdom* (1988), 11 EHRR 117, para. 62.

<sup>16</sup> See, e.g., Stuart Taylor Jr., *The Case for a National Security Court*, NAT’L J. (Mar. 26, 2007).

<sup>17</sup> Privy Counselor Review Committee, Anti-Terrorism, Crime and Security Act of 2001 Review: Report, 8 quoted in L.K. Donohue, *Britain’s Counterterrorism Policy*, in HOW STATES FIGHT TERRORISM: POLICY DYNAMICS IN THE WEST 39 (Zimmerman & Wenger, eds., 2006).

<sup>18</sup> Michael Freeman, FREEDOM OR SECURITY: THE CONSEQUENCES FOR DEMOCRACIES USING EMERGENCY POWERS TO FIGHT TERROR 58 (2003); Daniel Moeckli, *The Selective “War on Terror”: Executive Detention of Foreign Nationals and the Principle of Non-Discrimination*, 31 BROOK. J. INT’L L. 495, 503 (2006).

<sup>19</sup> Michael P. O’Connor & Celia M. Rumann, *Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland*, 24 CARDOZO L. REV. 1657, 1678 (2003); Laura Donohue, COUNTER-TERRORIST LAW AND EMERGENCY POWERS IN THE UNITED KINGDOM 1922-2000 (2001).

<sup>20</sup> Freeman, *supra*, at 58. Indeed, IRA leadership claimed that only 56 of those been detained were actually IRA members. *Id.* Further, the British Army estimated that up to 70% of the long-term internees became re-involved in terrorist acts after their release. Tom Parker, Testimony before Senate Subcommittee on Homeland Security, available at 2006 WLNR 16329315 (Sept. 20, 2006).

alienated large sections of the Catholic community and broadened support for the IRA.<sup>21</sup> In the words of former British Intelligence officer Frank Steele who served in Northern Ireland during this period: "Internment barely damaged the IRA's command structure and led to a flood of recruits, money and weapons."<sup>22</sup>

Put simply, the strategy was ineffective because security forces were unable to accurately identify and detain terrorists faster than they could be replaced. The British government finally took the decision to discard the power of internment in January 1998. Announcing the decision, the Junior Northern Ireland Minister Lord Dubs told the House of Lords: "The Government have long held the view that internment does not represent an effective counter-terrorism measure . . . The power of internment has been shown to be counter-productive in terms of the tensions and divisions which it creates."<sup>23</sup> Moreover, the British experience taught that delegitimizing terrorists as ordinary criminals rather than combatants was ultimately more effective.

## 2. Current British Approaches to Counterterrorism

### a. Pre-Charge Detention

The United Kingdom currently only permits pre-charge detention for terrorism suspects for a maximum of 28 days, and then only upon judicial review and in connection with an ongoing criminal investigation.<sup>24</sup> A detainee has the right to judicial review and access to counsel within 48 hours of arrest.<sup>25</sup> Continued detention may be permitted in seven day increments, totaling no more than 28 days,<sup>26</sup> only upon a showing that "there are reasonable grounds for believing that the further detention . . . is necessary" to bolster the criminal investigation, *e.g.*, either "to obtain evidence through questioning or otherwise, preserve

<sup>21</sup> Michael P. O'Connor & Celia M. Rumann, *Into the Fire: How to Avoid Getting Burned by the Same Mistakes made Fighting Terrorism, in Northern Ireland*, 24 *CARDOZO L. REV.* 1657, 1680 (2003) ("[T]he brutal internment of family members was frequently identified as critical to the decision to join outlawed paramilitary organizations."); David R. Lowry, *Internment: Detention Without Trial in Northern Ireland*, 5 *HUM. RIGHTS* 261, 267 (1976) ("[T]he hostility engendered by counter-terror tactics made the Catholic ghettos a safe haven for the Provisional I.R.A."); Philip A. Thomas, September 11th and Good Governance, 53 *N. IR. LEGAL Q.* 366, 385 (2002) (quoting British MP during Parliamentary debate on 1998 bill revoking internment power: "Frankly it has not worked . . . we believe that the use of internment would strengthen the terrorists.").

<sup>22</sup> Frank Steele, quoted in Tom Parker, Testimony before Senate Subcommittee on Homeland Security, 2006 *WLNR* 16329315 (Sept. 20, 2006).

<sup>23</sup> *Id.*

<sup>24</sup> Terrorism Act 2000, amended by Terrorism Act 2006 Anti-Terrorism Crime and Security Act 2001, Part 4, § 21. The United Kingdom first differentiated the length of pre-charge detention for terrorist suspects from the length of pre-charge detention for 'ordinary' criminal suspects through the Terrorism Act of 2000. The maximum length of pre-charge detention for 'ordinary criminal' or 'non-terrorist' suspects is 4 days. The Act provided for an initial window of 48 hours (from the time of the suspect's arrest) during which the suspect could be detained without warrant or charge. Upon judicial authorization this pre-charge detention could then be extended, via the provision of a warrant, such that it can last a maximum of 7 days from the initial arrest. The Criminal Justice Act 2003 extended the 7-day maximum to 14 days and the Terrorism Act of 2006 further the maximum to 28 days from the initial arrest though the judicial authority can only extend the warrant by 7 days at a time.

<sup>25</sup> Terrorism Act, 2000, c. 11, § 41 (U.K.).

<sup>26</sup> Terrorism Act, 2006, c. 11, §§ 19-20 (U.K.). The original maximum was seven days, and was incrementally increased to the current maximum of 28 days.



evidence, or pending the result of examinations and analyses of already obtained evidence.”<sup>27</sup> Additionally, authorities must certify that “the investigation in connection with which the person is detained is being conducted diligently and expeditiously.”<sup>28</sup> For the first fourteen days, a designated magistrate judge reviews the detention application; between days fourteen and twenty-eight, a High Court judge conducts the review.<sup>29</sup> The detainee and defense counsel may be denied access to evidence and barred from proceedings, but only during this 28-day period.<sup>30</sup> Instead, the detainee is represented by special counsel who has been cleared to handle classified information.

The statistics on pre-charge detention suggest that extended detention is subjected to fairly rigorous judicial review and is rarely used. According to a report by the Home Office, magistrates have rejected or reduced some detention orders. Between July 26, 2006, when pre-charge detention was increased to 28 days, and October 2007, there were 204 arrests under the Terrorism Act, but only 11 suspects were detained for more than 14 days. (Eight of them were then criminally charged and three were released without charge.)<sup>31</sup>

It is notable that Parliament has rejected recent pressures to increase the detention period beyond 28 days. For example, in 2005, following the London bombings, the government pushed for a 90-day detention period. Parliament undertook a comprehensive study of the issue and concluded that the unprecedented increase was not warranted.<sup>32</sup> Efforts in 2007 and 2008 to increase the detention period to 56 days and 42 days, respectively, were similarly defeated.<sup>33</sup> Ongoing and mounting controversy also continues to shroud the British detention regime.<sup>34</sup>

But despite the swirl of controversy, it is essential to note that the debate in the United Kingdom has been over a matter of days prior to criminal charge, not years outside the criminal justice system. The notion of indefinite detention without trial has never been suggested by British authorities. As Prime Minister Gordon Brown stated during the debates regarding the 2008 extension proposal, “our first principle is that there should always be a maximum limit on

<sup>27</sup> Terrorism Act of 2000, Schedule 8, at 32(1).

<sup>28</sup> *Id.*, at ¶ 23.

<sup>29</sup> *Id.*, at ¶ 23, ¶29(3).

<sup>30</sup> *Id.*, at ¶ 34.

<sup>31</sup> Home Office, *Options for Pre-Charge Detention in Terrorist Cases*, at 6 (Jul. 25, 2007), available at <http://security.homeoffice.gov.uk/news-publications/publication-search/counter-terrorism-bill-2007/pre-charge-detention.pdf?view=Binary>; Jago Russell, *Terrorism Pre-Charge Detention Comparative Law Study*, at 17 (2007), available at <http://www.liberty-human-rights.org.uk/issues/pdfs/pre-charge-detention-comparative-law-study.pdf>, (citing Oral Evidence to Home Affairs Select Committee, October 19, 2007, Q 7 (Mr. Peter Clarke CVO OBE QPM)).

<sup>32</sup> House of Commons Home Affairs Committee, *Terrorism Detention Powers*, Fourth Report of Session 2005-06, July 3, 2006, 1.

<sup>33</sup> Cooper Blum, *supra*, at 20.

<sup>34</sup> The U.K.-based NGO Liberty reports that the British system of pre-charge detention far exceeds the detention allowed by any other European nation. Jago Russell, Liberty, *Terrorism Pre-Charge Detention Comparative Law Study* at 17 (2007), available at <http://www.liberty-human-rights.org.uk/issues/pdfs/pre-charge-detention-comparative-law-study.pdf>. Others contend that the British system is contrary to basic human rights principles and counterproductive by sacrificing British moral authority and alienating key communities. Human Rights Watch, *UK: Extended Pre-Charge Detention Violates Rights*, (Jul. 26, 2007), available at <http://hrw.org/english/docs/2007/07/26/uk16491.htm>.

pre-charge detention. It is fundamental to our civil liberties that no one should be held arbitrarily for an unspecified period.”<sup>35</sup>

#### b. Failed Immigration Detention

The United Kingdom tried—and abandoned—a “three-walled” system of preventive detention through immigration law. Under the Anti-Terrorism, Crime and Security Act of 2001, foreign terrorist suspects who could not be deported due to the risk of ill-treatment in violation of Article 3 of the ECHR could be detained, potentially indefinitely.<sup>36</sup> The Act sharply circumscribed judicial review and detainees’ access to evidence. In particular, the Act introduced the “Special Advocates” regime, whereby detainees were denied access to secret evidence. Instead, the system relied on “special advocates,” appointed by the Solicitor General to act on behalf of the detainee.<sup>37</sup> In so providing, the United Kingdom derogated from the guarantee under Article 5 of the ECHR of liberty from immigration detention except where there exists a realistic prospect of removal.<sup>38</sup> In 2004, the House of Lords held that immigration detention where deportation was impossible was not justified by security concerns alone.<sup>39</sup> The Law Lords concluded that prolonged security detention of non-citizens only was arbitrary and discriminatory, and therefore incompatible with the ECHR. In particular, the majority pointed to the fact that terrorism suspects may be citizens, and whatever mechanisms exist to curtail the threat against citizen terrorism suspects presumably must be available with respect to non-citizens.<sup>40</sup> The United Kingdom declined to adopt an equivalent detention regime for citizens, and the detention law was allowed to lapse in 2005. The short-lived ATCSA resulted in the detention of only 17 individuals.<sup>41</sup>

In February 2009, the European Court of Human Rights concurred with the Law Lords and found that the ATCSA violated the ECHR substantively and procedurally.<sup>42</sup> The court

<sup>35</sup> Gordon Brown, *42-Day Detention; A Fair Solution*, THE TIMES (Jun. 2, 2008).

<sup>36</sup> “A suspected international terrorist may be detained under a provision specified in subsection (2) despite the fact that his removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely) by (a) a point of law which wholly or partly relates to an international agreement, or (b) a practical consideration.” Anti-Terrorism Crime and Security Act of 2001, at § 23, available at [http://www.opsi.gov.uk/acts/acts2001/ukpga\\_20010024\\_en\\_4#pt4-pb1-l1g21](http://www.opsi.gov.uk/acts/acts2001/ukpga_20010024_en_4#pt4-pb1-l1g21).

<sup>37</sup> *Id.* at § 30.

<sup>38</sup> Roach, *supra*, at 2186-87.

<sup>39</sup> *A v. Home Secretary*, [2004] U.K.H.L. 56, available at <http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-l.htm>.

<sup>40</sup> As Lord Bingham explained: “the choice of an immigration measure to address a security problem had the inevitable result of failing adequately to address that problem (by allowing non-UK suspected terrorists to leave the country with impunity and leaving British suspected terrorists at large) while imposing the severe penalty of indefinite detention on persons who, even if reasonably suspected of having links with Al-Qaeda, may harbour no hostile intentions towards the United Kingdom. The conclusion that [Part 4 is], in Convention terms, disproportionate is in my opinion irresistible.” *Id.* at ¶ 43.

<sup>41</sup> Donohue, “Britain’s Counterterrorism Policy,” *supra*, at 24. A total of 17 people were held under Part IV of the 2001 Anti-Terrorism, Crime and Security Act for varying periods of time between December 2001 (when the first arrests were made under the act) and March 2005 (when the last detainees were released under control orders). BBC News, *Who Are the Terrorism Detainees?*, (Mar. 11, 2005), available at [http://news.bbc.co.uk/2/hi/uk\\_news/4101751.stm](http://news.bbc.co.uk/2/hi/uk_news/4101751.stm)

<sup>42</sup> *A and Others v. the United Kingdom*, Application no. 3455/05 (Feb. 12, 2009), [http://www.ejct.org/IMG/CASE\\_OF\\_A\\_AND\\_OTHERS\\_V\\_THE\\_UNITED\\_KINGDOM.pdf](http://www.ejct.org/IMG/CASE_OF_A_AND_OTHERS_V_THE_UNITED_KINGDOM.pdf).

found that no lawful basis for indefinite detention of non-citizens existed.<sup>43</sup> Rather, detention was permissible only where the government was pursuing immigration proceedings in good faith. The inability to deport the petitioners due to the risk of torture upon repatriation was not sufficient in and of itself to justify prolonged immigration detention.<sup>44</sup> Finally, the court criticized the special advocate system, noting that “in view of the dramatic impact of the lengthy - and what appeared at that time to be indefinite - deprivation of liberty on the applicants’ fundamental rights, Article 5 § 4 must import substantially the same fair trial guarantees as Article 6 § 1 in its criminal aspect.”<sup>45</sup> The court held that where detainees were only provided general notice, they were deprived of their right to understand the nature of the evidence and charges against them.<sup>46</sup>

### c. Control Orders

Parliament replaced the ATCSA system not with detention, but with highly controversial “control orders” restricting personal movement. The Prevention of Terrorism Act 2005 permits the application of control orders to individuals “for purposes connected with preventing or restricting involvement by that individual in terrorism-related activity.”<sup>47</sup> In reaching that conclusion regarding an individual, the Home Secretary must consult with the chief of police to determine that criminal prosecution is not possible. There are two forms of control orders: non-derogating control orders and derogating control orders. While both derogating and non-derogating control orders mandate ongoing home searches and surveillance and seriously restrict personal movements and communications, “derogating” control orders restrict individual liberty sufficiently to be incompatible with Article 5 of the ECHR. The procedural checks on derogating control orders are significantly more stringent than are those on non-derogating control orders.<sup>48</sup> Consequently, the government has attempted to treat even the most stringent of orders as non-derogating in order to avoid heightened oversight. This has sparked litigation that has ultimately led to judicial rulings from the House of Lords in two important 2007 cases involving the boundary between derogating and non-derogating control orders.<sup>49</sup> As of March 2009, thirty-

<sup>43</sup> *Id.* at 69-70.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 83 ¶ 217.

<sup>46</sup> *Id.* at 84-85.

<sup>47</sup> Prevention of Terrorism Act 2005, available at [http://www.opsi.gov.uk/acts/acts2005/ukpga\\_20050002\\_en\\_1](http://www.opsi.gov.uk/acts/acts2005/ukpga_20050002_en_1).

<sup>48</sup> For example, non-derogating orders may be imposed upon a showing that the Home Secretary has “reasonable grounds” for concluding that the subject “is or has been involved in terrorism-related activity” and “considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual.” Prevention of Terrorism Act 2005 at § 2. Judicial review of such determinations is limited to whether the Home Secretary’s determination was “obviously flawed.” *Id.* at § 3. By contrast, derogating orders require a declaration of public emergency from both Houses of Parliament and an individualized showing that “on the balance of probabilities” the controlled person has been involved in terrorist activity and “it is necessary to impose the order to protect the public from the risk of terrorism.” *Id.* at § 4.

<sup>49</sup> The precise line between derogating and non-derogating orders is not well-defined, but two recent decisions shed some light. In *Secretary of State for the Home Department v. JJ*, the Law Lords quashed a non-derogating control order, holding that an “18-hour curfew, coupled with the effective exclusion of social visitors, meant that the controlled persons were in practice in solitary confinement for this lengthy period every day for an indefinite duration, with very little opportunity for contact with the outside world, with means insufficient to permit provision of significant facilities for self-entertainment and with knowledge that their flats were liable to be entered and searched at any time.” This was supplemented by the fact that most of the controlled persons were “located in an unfamiliar area where they had no family, friends or contacts, and which was no doubt chosen for that reason.”

eight people have been subjected to non-derogating control orders, and 15 are presently under such orders.<sup>50</sup>

The Secretary of State may make a non-derogating control order if he or she has “reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity” and “considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual.”<sup>51</sup> In order to make the control order, the Secretary must apply to a regular court for permission, which will determine at a preliminary hearing whether the order is “obviously flawed” in process or substance.<sup>52</sup> In the preliminary hearing, the court may consider the matter in the absence of the individual to whom the order applies, without that individual being notified of the hearing and without the individual being allowed to make representations before the court.<sup>53</sup> However the individual must be notified of the preliminary decision, and must be given the opportunity to make representations within seven days of the court’s decision to direct the case to a full hearing.<sup>54</sup> At the full hearing, the court reviews the order to determine whether the Secretary of State’s decision was “flawed.”<sup>55</sup> Non-derogating orders may be issued for up to twelve months, and may be renewed indefinitely, subject to ongoing judicial review.

The standards of proof and evidence for the imposition of control orders are lower than in criminal proceedings. The right of the accused to be present and to counsel is greatly truncated due to the use of classified evidence.<sup>56</sup> Instead, the 2005 law permits the use of a “special advocate” to “represent the interests of a relevant party to relevant proceedings,” but also specifies that the advocate “is not to be responsible to the person whose interests he is appointed to represent.”<sup>57</sup>

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Moreover, “[t]he requirement to obtain prior Home Office clearance of any social meeting outside the flat in practice isolated the controlled persons during the non-curfew hours also. Their lives were wholly regulated by the Home Office, as a prisoner’s would be, although breaches were much more severely punishable.” The Lords held that this combination of factors amounted to a violation of Article 5. *Secretary of State for the Home Department v. JJ and others (FC)*, [2007] UKHL 45, ¶24, available at <http://www.publications.parliament.uk/pa/ld200607/djudgmt/jd071031/homejj-1.htm>. In a second case, *Secretary of State for the Home Department v. MB*, the Lords allowed a non-derogating control order that imposed a 14 hour curfew; required the controlled person to wear an electronic tag at all times; restricted him during non-curfew hours to an area of 9-square miles; required that he report to a monitoring company upon leaving his flat after a curfew period had ended and on his last return before the next curfew commenced; rendered his flat open to police search at any time; banned all visitors during curfew hours except the controlled person’s father, official or professional visitors, children aged 10 or under or persons agreed by the Home Office in advance on supplying the visitor’s name, address, date of birth and photographic identification; banned his communication with several specified individuals; permitted him to attend only one specified mosque; and confiscated all communications equipment and his passport. This combination of factors, the Lords held, did not violate Article 5. *Secretary of State for the Home Department v. MB (FC)*, [2007] UKHL 46, ¶11, available at <http://www.publications.parliament.uk/pa/ld200607/djudgmt/jd071031/home-1.htm>.

<sup>50</sup> Human Rights Watch, Letter to the UK Parliament on Control Orders (Mar. 2, 2009), available at <http://www.hrw.org/node/81153>.

<sup>51</sup> Prevention of Terrorism Act, at § 2(1).

<sup>52</sup> *Id.* at § 3(2)-(3).

<sup>53</sup> *Id.* at §3(5).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at §3(10).

<sup>56</sup> Prevention of Terrorism Act 2005 § 11.

<sup>57</sup> Prevention of Terrorism Act 2005 § 11(7).

The control order regime has provoked a wave of litigation and ongoing controversy. Human rights advocates have charged that the cumulative restrictions amount to a deprivation of liberty and a “flawed system that violates rights.”<sup>58</sup> The House of Lords held that an 18-hour curfew combined with other restrictions on movement and communications was tantamount to solitary confinement, and therefore an unlawful derogation.<sup>59</sup> Another case, involving a 16-hour curfew, is presently on appeal to the European Court of Human Rights.<sup>60</sup>

The “special advocate” system is also under serious doubt. The Law Lords determined that the use of secret evidence and a “special advocate” deprived two petitioners of a fair hearing, and ordered their cases to be reconsidered by a high court judge.<sup>61</sup> The Court of Appeal nonetheless interpreted the Law Lords’ decision to permit fully ex parte hearings, and the case is presently back before the Law Lords.<sup>62</sup> Should the House of Lords uphold the special advocate regime, it is likely that the European Court of Human Rights would reject the system as violating the Article 5(4) right to a fair hearing. As noted above, the European Court rejected a very similar system of special advocates under the now-abandoned ATCSA.

The 2005 law also facially contains a provision for preventive detention, but only if the security threat cannot be met by the criminal process or by less restrictive measures such as control orders. Because the government must consider filing criminal charges against anyone subject to pure security-based detention, extended detention is permitted in the United Kingdom only when the criminal process is deemed unavailable. It does not appear that the United Kingdom has ever detained anyone under the 2005 legislation.<sup>63</sup> Moreover, it is doubtful that such security detention would pass judicial muster under the European Convention on Human Rights.

## B. Continental Europe

### I. France

Despite decades of experience with terrorism domestically and abroad, France permits the detention of terrorism suspects only in conjunction with criminal charge and pending trial.<sup>64</sup>

<sup>58</sup> Human Rights Watch, *UK: ‘Control Orders’ for Terrorism Suspects Violate Rights*, Mar. 2, 2009, available at [hrw.org/en/news/2009/03/01/uk-control-orders-terrorism-suspects-violate-rights](http://hrw.org/en/news/2009/03/01/uk-control-orders-terrorism-suspects-violate-rights).

<sup>59</sup> See *Secretary of State for the Home Department v. JJ and others (FC)*, [2007] UKHL 45, ¶24, available at <http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd071031/homejj-1.htm>.

<sup>60</sup> Human Rights Watch, *Letter to the UK Parliament on Control Orders* (Mar. 2, 2009), <http://www.hrw.org/node/81153>.

<sup>61</sup> *Secretary of State for the Home Department v. MB and AF*, [2007] UKHL 46, available at <http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd071031/home-1.htm>.

<sup>62</sup> *Secretary of State for the Home Department v. AF; Same v AM; Same v AN; Same v AE*, [2008] EWCA Civ 1148; [2008] WLR (D) 320, Judgment of 17 October 2008.

<sup>63</sup> Lord Alex Carlile, *First Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005*, at 6-8 (2006), available at <http://security.homeoffice.gov.uk/news-publications/publication-search/prevention-terrorism-act-2005/laws-against-terror.pdf?view=Binary> (reviewing implementation of control orders after amendments).

<sup>64</sup> Jeremy Shapiro, Brookings Institution, *French Lessons: The Importance of the Judicial System in Fighting Terrorism* 2-3 (Mar. 2003), available at [http://www.brookings.edu/~media/Files/rc/articles/2003/03france\\_shapiro/shapiro20030325.pdf](http://www.brookings.edu/~media/Files/rc/articles/2003/03france_shapiro/shapiro20030325.pdf).

Although special investigating magistrates handle all terrorism investigations, independent judges oversee ongoing pretrial detention, and a panel of regular judges presides over trials at which normal criminal procedural protections apply.<sup>65</sup> The investigating judge may authorize pre-charge detentions longer than 48 hours, but no longer than 144 hours (6 days). After this point, the detainee must be criminally charged. Detainees have a right to counsel after 72 hours.<sup>66</sup>

Under French law, an independent judge oversees pretrial detention.<sup>67</sup> Pretrial detention is permitted only “if deprivation of liberty is considered the only way to preserve material evidence, to prevent either witnesses or victims being pressured or to prevent those under judicial investigation and their accomplices from agreeing on false testimony; to protect the person under judicial examination; to prevent the person from absconding; or to put an end to the offense or to prevent its recurrence.”<sup>68</sup> The initial detention period for serious terrorism-related charges is one year, renewable in 6-month increments up to four years.<sup>69</sup>

Despite its commitment to the criminal system, France has come under mounting criticism for its handling of terrorism prosecutions, particularly with respect to the combination of an extremely broad definition of “association of wrongdoers”<sup>70</sup> and the prolonged pretrial detention of suspects.<sup>71</sup> The role of the independent judge in reviewing pretrial detention is greatly hampered by the fact that the judge is wholly dependent upon the investigating magistrate and prosecutor’s case file.<sup>72</sup> Indeed, some commentators have referred to the system as “a trompe-l’oeil guarantee.”<sup>73</sup>

## 2. Germany

Germany detains terrorism suspects exclusively under regular criminal procedures, an approach employed by numerous other European nations, including Denmark, Italy, Norway, Turkey, as well as Brazil and Colombia.<sup>74</sup> Pre-charge detention may extend only up to 48 hours,

<sup>65</sup> Articles 421-1 et seq. of the Penal Code (as amended in Law 96-647 of 22 July 1996); see also Jeremy Shapiro & Benedicte Suzan, *The French Experience of Counterterrorism*, 45 *Survival* 67, 76 (2003), available at [http://www.brookings.edu/~media/Files/rc/articles/2003/spring\\_france\\_shapiro/shapiro20030301.pdf](http://www.brookings.edu/~media/Files/rc/articles/2003/spring_france_shapiro/shapiro20030301.pdf).

<sup>66</sup> Articles 421-1 et seq. of the French Penal Code (as amended in Law of 22 July 1996).

<sup>67</sup> CCP, art. 144.

<sup>68</sup> Human Rights Watch, *Preempting Justice: Counterterrorism Laws and Procedures in France*, at IV (July 1, 2008), available at [http://www.hrw.org/en/node/62151/section/5#\\_ftnref66](http://www.hrw.org/en/node/62151/section/5#_ftnref66).

<sup>69</sup> CCP, art. 145-2.

<sup>70</sup> Crim. Code art. 421-2-1 (defining “association des malfaiteurs” as “the participation in any group formed or association established with a view to the preparation, marked by one or more material actions, of any of the acts of terrorism provided for under the previous articles.”).

<sup>71</sup> Laurent Bonelli, *An 'Anonymous and Faceless' Enemy: Intelligence, Exception and Suspicion After September 11, 2001*, 58 *CULTURES AND CONFLICTS* 109-29 (2005) (noting authorities’ conviction that “it matters little if a good number of the accused are found to be innocent after spending one or two years in pre-trial detention.”).

<sup>72</sup> Human Rights Watch, *supra*, at IV.

<sup>73</sup> Human Rights Watch, *supra*, at IV (quoting Emmanuelle Perreux, president of a judges’ union called the Magistrates Syndicate).

<sup>74</sup> See Elias, *supra*, at 122. Turkey reformed its Penal Code in 2004 in order to accede to the European Union, and in the process overhauled its approach to terrorist suspect detainees. See Krista-Ann Stacey, *Revised Turkish Penal Code Comes Into Force as Part of EU Deal*, *JURIST*, 3 June 2005, available at <http://jurist.law.pitt.edu/paperchase/2005/06/revised-turkish-penalcode-comes-into.php>.

at which point the civil section of the lower court reviews the detention<sup>75</sup> and a criminal charge must be entered. Judicial review of ongoing pretrial detention occurs every six months. The lower court's decision can be appealed to the district civil court and then to the regional civil court. Review upon appeal is a substantive review of the merits of the case, and new evidence may be presented.<sup>76</sup> Access to counsel is provided at all stages of detention.

### 3. Spain

Under Spain's criminal code, detainees suspected of terrorist activity may be held in pre-charge incommunicado detention for up to 13 days. An investigating magistrate of the National High Court must review the grounds for pre-charge detention within 72 hours.<sup>77</sup> The magistrate may order an additional 48 hours of incommunicado detention in police custody. A 2003 amendment provides that a court may impose up to an additional eight days of incommunicado pre-trial detention for persons suspected of membership in an armed group or conspiracy with two or more persons.<sup>78</sup> The magistrate may extend the initial period of incommunicado detention, up to a total 13 days. If an incommunicado order is issued, a duty solicitor is appointed, not a lawyer of the detainee's choice. After the end of incommunicado period, the detainee may retain a lawyer of his choosing. After charge, as in France, the maximum pre-trial preventive detention period is four years for serious offenses.<sup>79</sup> Habeas corpus is available throughout the entire detention period.<sup>80</sup>

Spain has come under increasing criticism for its method of terrorism prosecutions. Human rights advocates point out that detainees often spend up to five days in detention without seeing a judge, and up to 13 days without access to counsel.<sup>81</sup> Moreover, during the lengthy period of pre-trial detention, "defense attorneys do not have access to critical information regarding the charges against their clients or the evidence against them, including the full grounds for remand to pre-trial detention."<sup>82</sup>

## II. OTHER COMMON LAW COUNTRIES: AUSTRALIA AND CANADA

### A. Australia: Short-Term Security Detention

Australia is unique in its use of short-term detention, limited to a maximum of 14 days, for the exclusive purpose of intercepting imminent terrorist plots.<sup>83</sup> In accordance with High

<sup>75</sup> Art. 112-130 Law of Criminal Procedure (StPO).

<sup>76</sup> Elias, *supra*, at Appendix.

<sup>77</sup> Crim. Code, of Procedure art. 520 bis (1) (Spain).

<sup>78</sup> Organic Law 15/2003 of 25 November 2003, reforming the Code of Criminal Procedure.

<sup>79</sup> Crim. Code art. 504(2) (persons accused of crimes punishable by more than 3 years imprisonment may be held in pre-trial detention for up to four years, provided that the case cannot be brought to trial within the default time period of two years).

<sup>80</sup> Elias, *supra*, at Appendix.

<sup>81</sup> Human Rights Watch, *Setting an Example? Counter-Terrorism Measures in Spain* (Jan. 2005), available at <http://www.hrw.org/en/reports/2005/01/26/setting-example>.

<sup>82</sup> *Id.*

<sup>83</sup> Aus. Crim. Code § 105 *et seq.* Under this same law, control orders may be imposed, but only for up to one year total, which may include curfew, restrictions on movement and communications, and electronic monitoring. Counsel is only entitled to see or request a copy of the order and (where confirmation of a control order is sought) a

Court precedent,<sup>84</sup> security detention is strictly limited in both duration and purpose. Detentions may last only up to 14 days<sup>85</sup> and only where (a) there are “reasonable grounds to suspect” the individual will be involved in an *imminent* terrorist attack (defined as “expected to occur at some time in the next 14 days”); or (b) detention is “reasonably necessary” to gather evidence relating to a recent terrorist attack (defined as having occurred within the last 28 days).<sup>86</sup> Initial 24-hour detention orders are issued by an administrative body, but a renewal for a 48-hour detention order requires approval by an ordinary judicial officer.<sup>87</sup> During the detention, detainees have access to counsel but quite limited opportunity to challenge their detention. Habeas review is limited to questions of law and does not permit an examination of underlying evidence.<sup>88</sup> Attorney communications are permitted but can be monitored. Nonetheless, the purpose of the detention is strictly limited: interrogations are flatly barred.<sup>89</sup>

### B. Canada: Detention Pending Deportation

Canada does not employ any specialized security-based detention regime in its criminal justice system. The country previously has employed immigration security detention sparingly for persons pending deportation, but no individuals are currently subject to such detention.

In 2001, Canada enacted the highly controversial Immigration and Refugee Protection Act (IRPA), which permitted non-citizens to be detained pending deportation as national security threats.<sup>90</sup> In 2007, the Supreme Court of Canada invalidated that security certificate system as violating fundamental fairness due to the use of secret evidence unavailable even to the

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statement of the underlying facts, though it is possible to deny counsel access to these facts if it would, amongst other things, prejudice national security and/or be protected by public interest immunity. There is no right to appeal. Only two control orders have been issued in Australia to date, for Jack Thomas and David Hicks.

<sup>84</sup> *Chu Kheng Lim v. Minister for Immigration* (1992) 176 C.L.R. 1.

<sup>85</sup> The federal statute permits initial detention for up to 48 hours without charge, but detainees may be transferred to state authorities where they may be held an additional 12 days. Terrorism (Police Powers) Act 2002 (NSW) Part 2A; Terrorism (Preventive Detention) Act 2005 (Qld); Terrorism (Preventive Detention) Act 2005 (SA); Terrorism (Preventive Detention) Act 2005 (Tas); Terrorism (Community Protection) Act 2003 (Vic) Part 2A, s 4; Terrorism (Preventive Detention) Act 2006 (WA); Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT); Terrorism (Emergency Powers) Act 2003 (NT) Part 2B. See generally, Katherine Nesbitt, *Preventive Detention of Terrorist Suspects in Australia and the United States: A Comparative Constitutional Analysis*, 17 B.U. PUB. INT. L.J. 39 (2007).

<sup>86</sup> Aus. Crim. Code § 105.8(5).

<sup>87</sup> Aus. Criminal Code § 105.14.

<sup>88</sup> Aus. Crim. Code § 105.51(1). The administrative order must state forth the most basic facts, but need not include any information that is likely to jeopardize national security—even if it is the sole basis for the detention. Aus. Crim. Code § 105.19, 105.8(6A). The detainee has no right to review the initial application or the underlying evidence. Attorney communications are permitted but can be monitored. Aus. Crim. Code §§ 105.39. Otherwise, disclosure of the detention—even after release—is strictly barred.

<sup>89</sup> Aus. Crim. Code § 105.42(1).

<sup>90</sup> Immigration and Refugee Protection Act, 2001 S.C. ch. 27, §§ 77-88 (Can.). See generally Kent Roach, *Canada's Response to Terrorism*, in *Global Anti-Terrorism Law and Policy* in GLOBAL ANTI-TERRORISM LAW AND POLICY 511 (Victor V. Ramraj et al. eds., 2005); Kent Roach, *Must We Trade Rights For Security?: The Choice Between Smart, Harsh, or Proportionate Security Strategies in Canada and Britain*, 27 CARDOZO L. REV. 2151, 2194 (2006); John Ip, *Comparative Perspectives on the Detention of Terrorist Suspects*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 773, 802-03 (2007).



detainee's counsel.<sup>91</sup> In response, Parliament revised the law to treat permanent residents and foreign nationals equally and to provide additional procedural and substantive protections.<sup>92</sup>

Detention for aliens subject to removal is permitted only if the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness issue a warrant for the person's arrest and detention upon "reasonable grounds to believe that the person is a danger to national security or to the safety of any person or is unlikely to appear at a proceeding or for removal."<sup>93</sup> A judge must now review the detention within 48 hours of arrest where the reasonableness may be challenged, and a respondent may challenge his detention at the Federal Court for further review at six-month intervals.<sup>94</sup> Detention cannot continue if the person can be deported. Moreover, although IRPA previously made detention mandatory pending deportation upon a judicial finding that the petitioner continued to be a threat to national security, the new law forbids continued detention where less restrictive alternatives are available.<sup>95</sup> There is a right of appeal to the Federal Court of Appeal, provided that the judge first "certifies that a serious question of general importance is involved and states the question."<sup>96</sup>

Most controversial among the amendments was the passage of a "special advocate" system whereby a court may appoint a special security-cleared representative to review classified information and represent the petitioner.<sup>97</sup> Although the detainee is formally represented, the special advocate may not share classified information with the detainee or his regular counsel. For that reason, among others, the measure drew sharp criticism from human rights advocates, and promises continued litigation.<sup>98</sup> As of 2007, only 27 security certificates had been issued,

<sup>91</sup> *Charkaoui v. Canada* (Citizenship and Immigration), [2007] 1 S.C.R. 350, 2007 SCC 9, ¶ 3 (Can.); see generally Maureen T. Duffy & René Provost, *Constitutional Canaries and the Elusive Quest to Legitimize Security Detentions in Canada*, 40 CASE W. RES. J. INT'L L. 531 (2009) (discussing decision at length); Craig Forcece & Lorne Waldman, *Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom, and New Zealand on the Use of "Special Advocates" in National Security Proceedings*, at 5, 10 (Aug. 2007), available at <http://aix1.uottawa.ca/~cforcece/other/sastudy.pdf> (advocating against the adoption of a special advocate system like the United Kingdom).

<sup>92</sup> C-3, An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act, 2d Sess., 39th Parl., 2007, available at [http://www2.parl.gc.ca/content/hoc/Bills/392/Government/C-3/C-3\\_2/C-3\\_2.PDF](http://www2.parl.gc.ca/content/hoc/Bills/392/Government/C-3/C-3_2/C-3_2.PDF) [hereinafter Bill C-3]; see also Parliamentary Information and Research Service, "Legislative Summary — Bill C-3: An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act," No. LS-576E (Nov. 2, 2007, rev. Dec. 31, 2007), available at <http://www.parl.gc.ca/39/2/paribus/chambus/house/bills/summaries/c3-e.pdf>.

<sup>93</sup> Bill C-3 at cls. 18.

<sup>94</sup> *Id.* at cls. 82(1)-82(3).

<sup>95</sup> *Id.* at cl. 82(5)(a).

<sup>96</sup> *Id.* at cl. 79.

<sup>97</sup> *Id.* at cl. 78, 83.

<sup>98</sup> Louis Millan, *Charkaoui Challenges Special Advocate Regime*, LAWYERS WEEKLY (May 16, 2008), <http://www.lawyersweekly.ca/index.php?section=article&articleid=681>; Craig Forcece & Lorne Waldman, *Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom, and New Zealand on the Use of "Special Advocates" in National Security Proceedings*, Aug. 2007, at 5-10, available at <http://aix1.uottawa.ca/~cforcece/other/sastudy.pdf> (arguing against the adoption of a special advocate system); Human Rights Watch, *Canada: Parliament Should Amend Bill on Special Advocates* (Nov. 17, 2008), available at <http://www.hrw.org/en/news/2007/11/18/canada-parliament-should-amend-bill-special-advocates>.

all of which were issued prior to 2003. No new certificates have been issued since that date, and currently no detainees are being held.<sup>99</sup>

### III. EMERGENCY DETENTION REGIMES: ISRAEL AND INDIA

The only two longstanding democracies to permit long-term security-based preventive detention—Israel and India—have done so based on security concerns that differ fundamentally from those confronting the United States, based on emergency security regimes inherited from British colonial rule (a regime that the United Kingdom itself has abandoned), and in a context of fundamentally different protections for basic rights. The experiences of both countries also suggest that detention without trial is unwarranted, unproven, and legally highly problematic.

#### A. Israel

The Israeli system has been pointed to in public debates as an appropriate model for U.S. reforms. Yet Israel differs fundamentally from the United States, both in its legal regime and in the security threat it faces. Terrorism in Israel has been so severe and prolonged that many have argued that the existence of the state itself has been under threat throughout its existence.<sup>100</sup> Moreover, security detention in Israel was inherited from the British Mandate, and has been available since the nation's inception.<sup>101</sup> Finally, due to the intensity and frequency of terrorist attacks, many argue that the situation in Israel more closely resembles armed conflict or insurrections, and the West Bank is under military administration. "These factors, and the geography of the Middle East itself, yield an Israeli terrorist experience which is drastically different from that of the United States."<sup>102</sup>

Three distinct detention regimes prevail in Israel. Detention without charge is available within Israel proper through domestic legislation for citizens and for non-citizens<sup>103</sup> and in the Occupied Territories through special military ordinances.<sup>104</sup> Military detention for persons captured outside of Israel has been in practice since 1945 and is the most widely-used detention authority.<sup>105</sup> Under the military occupation regime, military commanders in the West Bank can detain an individual for up to six months if they have "reasonable basis to assume" that public

<sup>99</sup> Roach, *supra*, at 2194.

<sup>100</sup> Bhoomik, *supra*, at 322.

<sup>101</sup> *Id.* at 322.

<sup>102</sup> *Id.* at 321.

<sup>103</sup> The Emergency Powers (Detention) Law 1979 (Israeli citizens); Internment of Unlawful Combatants Law 2005 (non-Israelis in Israel).

<sup>104</sup> The current source for detentions in the West Bank is Military Ordinance no. 1226(1988). Until the enactment of the Emergency Powers (Detentions) Law in 1979, the past on Art. 111 of the Defense Emergency Regulations Act (1945). Subsequently, the detention authority has been defined by various military ordinances.

<sup>105</sup> See B'Tselem, *Statistics on Administrative Detention*, available at [www.btselem.org/english/Administrative\\_Detention/Statistics.asp](http://www.btselem.org/english/Administrative_Detention/Statistics.asp); Amnesty International, *Israel/Occupied Territories: Administrative Detention Cannot Replace Proper Administration of Justice*, (Aug. 2005), <http://asiapacific.amnesty.org/library/Index/ENGMDE150forty-five2005?openandof=ENG-ISR> (describing how thousands of Palestinians were held in administrative detention between 2000 and 2005, some of them for more than three years, while during that same time period only four Israelis were placed in administrative detention for periods ranging from six weeks to six months).

security requires his or her detention.<sup>106</sup> The terms “security of the area” and “public security” are undefined, leaving military commanders great discretion. Detainees are granted review before a military judge within eight days,<sup>107</sup> but hearings are closed and typically based on secret evidence that is not shared with the detainee or his lawyer.<sup>108</sup> Moreover, detainees may be denied access to counsel for up to 34 days, but “advancing the investigation [e.g., facilitating interrogation] is not a sufficient reason to prevent the meeting . . . [T]here must be an element of necessity.”<sup>109</sup> Commanders can extend detentions for additional six-month periods,<sup>110</sup> theoretically indefinitely, though in practice detentions lasting more than two or three years are extremely rare.<sup>111</sup> Judicial review is available through appeal, potentially to the Supreme Court.

The substantive and procedural protections for detentions within Israel are somewhat more stringent. For example, in contrast to the wide-ranging “public security” rationale underlying the military occupation regime, the Unlawful Combatants Law (UCL) applies only to an individual “who took part in hostilities against the State of Israel, whether directly or indirectly, or who is a member of a force carrying out hostilities against the State of Israel.”<sup>112</sup> Initial administrative review by a military officer must occur within 96 hours;<sup>113</sup> a detention order for up to six months may be issued. Judicial review must occur within 14 days thereafter, and periodically every six months thereafter.<sup>114</sup> The detainee has a right of appeal to the Supreme Court within 30 days.<sup>115</sup> At this point, “it appears that Israel has used this law only a few times, against high-profile terrorists from abroad.”<sup>116</sup> Most recently, Israel used it to detain Hezbollah fighters during the summer of 2006.

The law nonetheless falls short of common notions of due process.<sup>117</sup> For example, the UCL provides a probative presumption that a member of a group engaged in hostilities against Israel is *a fortiori* dangerous, a concept recently narrowed by the Israeli Supreme Court.<sup>118</sup> The

<sup>106</sup> Military Ordinance no. 1226 at art. 1(a).

<sup>107</sup> *Id.* at art. 4.

<sup>108</sup> *Id.* See also *Administrative Detention: For the Good of Many?*, THE JERUSALEM POST (Oct. 16, 2008) (“It’s based on secret evidence, no witnesses, no questioning of witnesses or the detainee on the allegations or challenges from the detainee to the state. In such circumstances even judges with the best abilities can’t function as an effective check on the system.”) (quoting Lila Margalit, Association for Civil Rights in Israel).

<sup>109</sup> Blum, *supra*, at 7; see also *Marub v. IDF Commander in the West Bank*, 57 (2) P.D. 349, ¶¶ 39, 45 (Isr. H.C.J. 2003) (upholding the denial of counsel).

<sup>110</sup> *Id.* at art. 1(b).

<sup>111</sup> Interview, Lila Margalit, Association for Civil Rights in Israel (June 28, 2008); see also B’Tselem, *Administrative Detention in the Occupied Territories*, available at [http://www.btselem.org/english/Administrative\\_Detention/Occupied\\_Territories.asp](http://www.btselem.org/english/Administrative_Detention/Occupied_Territories.asp).

<sup>112</sup> UCL, at art. 2.

<sup>113</sup> *Id.* at art. 4.

<sup>114</sup> *Id.* at art. 5.

<sup>115</sup> *Id.* at art. 5(d).

<sup>116</sup> Cooper Blum, *supra*, at 11.

<sup>117</sup> Joanne Mariner, *Indefinite Detention of Terrorist Suspects*, FindLaw (Jun. 10, 2002), <http://writ.news.findlaw.com/mariner/20020610.html>; B’Tselem, *Administrative Detention in Occupied Territories*, [http://www.btselem.org/english/Administrative\\_Detention/Occupied\\_Territories.asp](http://www.btselem.org/english/Administrative_Detention/Occupied_Territories.asp) (listing procedural shortcomings including lack of notice and the use of secret evidence); Lila Margalit, ACRI, *Administrative Detention in Israel and the Occupied Territories* (April 2008), available at <http://www.acri.org.il/pdf/admindetention.pdf>.

<sup>118</sup> *Id.* at art. 7. The Supreme Court of Israel recently limited this provision to require a showing beyond mere membership; rather, the government must show some “connection or contribution to the organization [that] will be

reviewing court also may amend the evidentiary rules if it decides doing so would be beneficial to the disclosure of the truth and in the interests of justice, resulting in the use of “hearsay upon hearsay,” in the words of one practitioner.<sup>119</sup> The courts also routinely rely upon secret, *ex parte* evidence upon a finding that disclosure to the attorney or the detainee would prejudice public security.<sup>120</sup> Although the Israeli Supreme Court has expressly ruled that preventive detention may not be used as an alternative to criminal proceedings,<sup>121</sup> human rights organizations have charged that detainees are frequently held in preventive detention prior to criminal charges.<sup>122</sup>

## B. India

India shares Israel’s inheritance of emergency detention from British colonial rule. The country also has experienced intensive terrorism attacks by separatist groups since its inception,<sup>123</sup> such that “the threat of terrorism is ... seen as a threat to the very core of the Indian identity.”<sup>124</sup> India’s periodic reliance on preventive detention likewise has resulted in widespread human rights violations.<sup>125</sup>

India has had a long and complex history of administrative detention, and there are three detention regimes currently in place in India.<sup>126</sup> First, under the Armed Forces (Special Powers) Act (“AFSPA”), the military may make warrantless arrests leading to preventive detention up to two years in officially declared “disturbed areas.”<sup>127</sup> Those arrests—which occur essentially

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expressed in other ways that are sufficient to include him in the ‘cycle of hostilities’ in a broad sense.” *A.B. et al. v. State of Israel*, Crim. App. 6659/06 (June 11, 2008), available at [http://elyon1.court.gov.il/files\\_eng/06/590/066/n04/06066590.n04.htm](http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.htm).

<sup>119</sup> One reviewing court has previously held, with respect to the ADL, and held that “[n]ot every piece of hearsay evidence will carry weight with the administrative authority, such as evidence which does not contain more than unfounded rumors ... the evidence must be - bearing in mind the subject-matter, the content and the person producing it - such evidence that every reasonable man would regard it as having evidentiary value and would rely on it to some extent or another.” H.C. 442/71 *Lanski v. Minister of the Interior*, 26(2) P.D. 337, at 357.

<sup>120</sup> *Id.* at art. 5(e), (f).

<sup>121</sup> See Cr.A. 3514/97, A.D.A. 6/97 *Anonymous v. State of Israel*.

<sup>122</sup> B’Tselem, *Administrative Detention in Occupied Territories*, available at [http://www.btselem.org/english/Administrative\\_Detention/Occupied\\_Territories.asp](http://www.btselem.org/english/Administrative_Detention/Occupied_Territories.asp) (“The authorities use administrative detention as a quick and efficient alternative to criminal trial, primarily when they do not have sufficient evidence to charge the individual, or when they do not want to reveal their evidence.”).

<sup>123</sup> India grounds its preventive detention authority in a constitutional provision passed in the immediate aftermath of the assassination of Mahatma Gandhi. Chris Gagne, Note, *POTA: Lessons Learned from India’s Anti-Terror Act*, 25 B.C. THIRD WORLD L.J. 261, 266 (2005); Derek P. Jinks, *The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India*, 22 MICH. J. INT’L L. 311, 324-25 (2001).

<sup>124</sup> *Id.* at 330; see also Anil Kalhan et al., *Colonial Continuities: Human Rights, Terrorism, and Security Laws in India*, 20 COLUM. J. ASIAN L. 93, 99-100 (2006).

<sup>125</sup> India signed the ICPPR, but only upon reservation as to security detentions. The Committee expressed regret as to widespread preventive detention but Human Rights Comm., Concluding Observations: India, ¶ 24, U.N. Doc. CCPR/C/79/Add.81 (Aug. 4, 1997).

<sup>126</sup> See Kalhan, *supra*, at 265-66. The Indian Constitution grants the federal and state governments the power to enact detention laws in the interest of national or state security. See India Const., Sched. 7, List I, Entry 9 (Central Government Powers); *id.* List III, Entry 3 (Concurrent Powers). The constitution permits the denial of core procedural rights for such detentions, but requires administrative or judicial review and a fixed maximum period of detention. *Id.* art. 22(7)(a) (requiring Parliament to specify the maximum period of detention).

<sup>127</sup> Since 1958, the Armed Forces (Special Powers) Act has endowed the military with extraordinary powers—including administrative detention—in “disturbed areas.” The law was initially enacted as a one-year measure to bring security to a limited region, but its use has extended for five decades and to widespread areas of the Northeast

outside judicial review—have led to widespread reports of torture and extrajudicial killings.<sup>128</sup> Second, the National Security Act (“NSA”) permits state and federal officers to detain any individual up to twelve months “with a view to preventing him from acting in any manner prejudicial to” various state interests, including national security and public order.<sup>129</sup> Those arrests include administrative review and offer modest procedural protections, but have been employed in practice to suppress dissent and to target minority groups.<sup>130</sup> The use of prolonged detention without trial under these regimes has fostered human rights violations and enormous social unrest. The continued violations associated with the expanded military powers have prompted widespread demonstrations and calls from numerous actors—from the U.N. High Commissioner for Human Rights to local and international NGOs—for the AFSPA’s repeal.<sup>131</sup>

Third, India has recently experimented with a specific detention regime for terrorism suspects. The Prevention of Terrorism Act (POTA) effectively instituted a modified regime of detention without trial.<sup>132</sup> The statute was often used to justify the incarceration without charge

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Territories, Punjab, Jammu and Kashmir. Kalhan, *supra*, at 114. AFSPA applies to a region following a declaration that the area subject to the Act has been declared “disturbed” by the central or state government. This declaration is not subject to judicial review. Human Rights Watch, *Getting Away With Murder: 50 Years of the Armed Forces (Special Powers) Act (2008)*, <http://www.hrw.org/legacy/backgrounder/2008/india0808/>. Section 4(c) of the AFSPA permits soldiers to arrest solely on suspicion that a “cognizable offence” has already taken place or is likely to take place in the future. The AFSPA provides no specific time limit for handing arrested persons to the nearest police station, but merely advises that those arrested be transferred to police custody “with the least possible delay.” AFSPA, §5. Detention may last up to one year in most affected provinces and up to two years in Jammu and Kashmir. Assam Preventive Detention Act, 1980 (six months); Bihar Control of Crimes Act, 1981 (twelve months); Gujarat Prevention of Anti-Social Activities Act, 1985 (twelve months); Jammu and Kashmir Public Safety Act, 1978 (two years).

<sup>128</sup> See U.S. Dep’t of State, *Country Reports on Human Rights Practices: India*, at § 1(d) (2005), available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61707.htm>; see also *infra* at n.136.

<sup>129</sup> National Security Act, Act. No. 65 of 1980 (India) (“NSA”) at §§3, 13. Courts have exercised judicial review over executive determinations, but the permissible bases for detention remain ill-defined and extremely broad in application. Jinks, *supra*, at 328-29 (detailing jurisprudence); C. Raj Kumar, *Human Rights Implications of National Security Laws in India: Combating Terrorism While Preserving Civil Liberties*, 33 DENV. J. INT’L L. & POL’Y 195, 213 (2005). Procedural rights under the NSA are extremely limited. Review is conducted before an Advisory Board, an executive body whose members must be qualified to serve as a High Judge, and the Chief of the Board must presently serve as a High Judge. The Board does not conduct a hearing in a traditional sense; evidentiary rules do not apply, the procedure and final report are not public, and the Board does not make formal factual findings. Detainees do not have the right to counsel, compulsory process, or confrontation. Jinks, *supra*, at 335-38 (describing procedural protections). Thus, while India “guarantee[s] a limited regime of procedural rights” . . . [t]hese guarantees . . . arguably fall well short of established international human rights standards.” Jinks, *supra*, at 338.

<sup>130</sup> See Asian Centre for Human Rights, *Human Rights Report 2005: Manipur*, <http://www.achrweb.org/reports/india/AR05/manipur.htm> (describing how NSA detentions were used to detain protestors of AFSPA).

<sup>131</sup> See *UN Human Rights Panel Chief Wants India to Abolish AFSPA*, TIMES OF INDIA (Mar. 23, 2009), available at <http://timesofindia.indiatimes.com/India/UN-human-rights-panel-chief-wants-India-to-abolishAFSPA/articleshow/4306996.cms>; Human Rights Watch, *Getting Away with Murder*, *supra*; Amnesty Int’l, *Briefing on the Armed Forces (Special Powers) Act, 1958*, ASA 20/025/2005, at 6-7 (2005), available at [http://web.amnesty.org/library/pdf/ASA200252005ENGLISH/\\$File/ASA2002505.pdf](http://web.amnesty.org/library/pdf/ASA200252005ENGLISH/$File/ASA2002505.pdf); Asian Centre for Human Rights, *Review of the AFSPA: Need for Upholding Primacy of the Rule of Law* (Apr. 2005), available at <http://www.achrweb.org/Review/2005/54-05.htm>.

<sup>132</sup> A similar pattern can be seen in the Terrorist and Disruptive Activities (Prevention) Act, No. 31 of 1985 (TADA), enacted in 1985 in response to the assassination of Indira Gandhi. See Kalhan et al., *supra*, at 145. Originally expected to expire after two years, the legislature re-enacted TADA in 1987 for another six years. See

or trial of terrorist suspects for up to 180 days.<sup>133</sup> Moreover, the statute reversed the burden of bail so that a detainee had to show that there were reasonable grounds to believe that the accused was not guilty and unlikely to commit any other offense while on bail.<sup>134</sup> Judicial review was guaranteed, but *ex parte* evidence could be considered on a finding that disclosure could jeopardize public safety.<sup>135</sup> Facing increased criticism and evidence of widespread abuses,<sup>136</sup> legislators repealed POTA in 2004.<sup>137</sup> Following the November 2008 terrorist attacks in Mumbai, the Indian Parliament hastily enacted a modified version of POTA that, among other things, again empowers police to detain suspects for up to 180 days without charge.<sup>138</sup> This regime has not yet been subjected to judicial scrutiny.

Despite their decades-long experimentation with preventive detention, there is no evidence that India and Israel have succeeded in reducing violence. Rather, their history suggests that long-term detention without trial contributes to a cycle of violence and crackdowns resulting in widespread abuse which, in turn, flames unrest and provides recruitment tools for terrorist organizations.<sup>139</sup> And so on for decades, all without abating violence. It is a familiar

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Terrorist and Disruptive Activities (Prevention) Act, No. 28 of 1987; Manas Mohapatra, Comment, *Learning Lessons from India: The Recent History of Antiterrorist Legislation on the Subcontinent*, 95 J. CRIM. L. & CRIMINOLOGY 315, 329 (2004). TADA criminalized a number of terrorism-related offenses, but it was “predominantly used not to prosecute and punish actual terrorists,” but “as a tool that enabled pervasive use of preventive detention and a variety of abuses by the police, including extortion and torture.” *Id.* at 146-47; Mohapatra, *supra*, at 331 (“[T]he actual result of [TADA] was widespread abuse as its broad definition of terrorism was used to crack down on political dissidents ... and was used in some regions exclusively against religious and ethnic minorities.”). Between 1987 and 1995, TADA was used to “put 77,000 people in prison,” of which only 8,000 eventually were tried for terrorist activities and only two percent ultimately were convicted. See Amnesty Int’l, India: Report of the Malimath Committee on Reforms of the Criminal Justice System: Some Observations 22 (Sept. 19, 2003).

<sup>133</sup> POTA § 49(2)(a)-(b).

<sup>134</sup> POTA § 49(6)-(7). The Supreme Court upheld these provisions. *People’s Union for Civil Liberties v. Union of India*, [2004] S.C. 456; *State of Tamil Nadu v. R.R. Gopal*, [2003] SC 800.

<sup>135</sup> Kalhan et al., *supra*, at 148-52. The Supreme Court has implied the right to judicial review in preventive detention. *Shalini Soni v. Union of India* (1980) 4 SC 544.

<sup>136</sup> For example, the law was often invoked to justify large-scale sweeps and detentions targeted at religious or political minorities. See, e.g., Amnesty Int’l, Abuse of the Law in Gujarat: Muslims Detained Illegally in Ahmedabad, at 1-2 (Nov. 6, 2003), available at [http://web.amnesty.org/aidoc/aidoc\\_pdf.nsf/Index/ASA200292003ENGLISH/\\$File/ASA2002903.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/ASA200292003ENGLISH/$File/ASA2002903.pdf) (discussing illegal detention of Muslim minority groups and disregard for POTA safeguards); Human Rights Watch, In the Name of Counter-Terrorism: Human Rights Abuses Worldwide, Briefing Paper for the 59th Session of the United Nations Commission on Human Rights 15 (Mar. 25, 2003), available at <http://www.hrw.org/un/chr59/counter-terrorism/bck.pdf> (discussing detention of political figures and vulnerable groups such as children and the elderly).

<sup>137</sup> Mohapatra, *supra*, at 335. Nonetheless, administrative (and often abusive) detentions continue under pre-existing security laws National Security Act (applying to Punjab) and the Armed Forces Special Powers Act or the Armed Forces (Jammu and Kashmir) Special Powers Act.

<sup>138</sup> Rama Lakshmi, *Anti-Terror Bills Advance in India*, WASH. POST at A21 (Dec. 18, 2008); South Asia Human Rights Documentation Centre, *The Unlawful Activities (Prevention) Amendment Act, 2008: Repeating the Mistakes of the Past* (22 Jan. 2009), available at <http://www.hrdc.net/sahrdc/hrfeatures/HRF191.htm> (“The Unlawful Activities (Prevention) Amendment Act, 2008, intended to deal with terrorism, and adopted in haste following the November 2008 terrorist attacks in Mumbai, borrow provisions from the previous, unsuccessful anti-terror laws, rather than offering a new approach.”).

<sup>139</sup> See Kalhan et al., *supra*, at 105-106 (describing the pattern); see also Hiren Gohain, *Chronicles of Violence and Terror*, 42(12) ECONOMIC AND POLITICAL WEEKLY 1012 (Mar. 30, 2007); Sanjay Barbora, *Rethinking India’s Counter-Insurgency Campaign in the North-East*, 41(35) ECONOMIC AND POLITICAL WEEKLY 3805 (Sept. 8, 2006).

scenario, evoking the failed British experiments in Northern Ireland and the repressive regime of South Africa.

#### IV. CONCLUSION

A system of long-term detention without charge not only would conflict with centuries of U.S. constitutional law and practice; it would place the United States on the far margins of an emerging global consensus among rule of law states that terrorism is best combated within the recognized confines of the criminal justice system. The experience of our allies demonstrates that detention without charge is not only the wrong choice as a matter of law; it is the wrong choice as a matter of policy. Should the United States take the unprecedented step of implementing indefinite detention without trial for terrorism suspects, it would have profound consequences for the rule of law globally and for U.S. foreign policy, ultimately making us less safe and less free.

**APPENDIX B****U.S. STATE DEPARTMENT,  
COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2001-2008)**

available at <http://www.state.gov/g/drl/rls/hrrpt/>

**I. PREVENTIVE DETENTION SPECIFIC TO PERCEIVED TERRORISM OR  
NATIONAL SECURITY THREATS****Australia*****2008 Country Report***

**The law permits a judge to authorize "control orders" on individuals suspected of involvement with terrorism-related activities.** These orders may include a range of measures, such as monitoring of suspects and house arrest, and may be in effect for up to a year without the filing of criminal charges. If a control order is still warranted after one year, a new order must be sought from a court. Both the preventive detention and control order provisions expire in 2015. The law mandates a review of these provisions in 2010.

***2007 Country Report***

Police officers may seek an arrest warrant from a magistrate when a suspect cannot be located or fails to appear; however, they also may arrest a person without a warrant if there are reasonable grounds to believe the person committed an offense. Police must inform arrested persons immediately of their legal rights and the grounds for their arrest, and arrested persons must be brought before a magistrate for a bail hearing at the next sitting of the court. **However, legislation passed in 2005 permits the police to hold individuals in preventive detention for up to 24 hours without charge if a senior police official finds it is "reasonably necessary to prevent a terrorist act or preserve evidence of such an act."** Individuals may be detained for an additional 24 hours under an extension of the initial court order. Bail generally is available to persons facing criminal charges unless the person is considered to be a flight risk or is charged with an offense carrying a penalty of 12 months' imprisonment or more. Attorneys and families were granted prompt access to detainees. Government-provided attorneys are available to provide legal advice to detainees who cannot afford counsel.

**The antiterrorism law permits a judge to authorize "control orders" on individuals suspected of involvement with terrorism-related activities. These orders may include a range of measures, such as monitoring of suspects and house arrest, and may be in effect for up to a year without the filing of criminal charges. If a control order is still warranted after one year, a new order must be sought from a court.** Both the preventive detention and control order provisions of the antiterrorism legislation expire in 2015. The law mandates a



review of these provisions after five years (in 2010). On August 2, the High Court ruled that control orders were constitutional.

On July 2, the Australian Federal Police (AFP) detained Mohamed Haneef, an Indian doctor working at a Queensland hospital on a temporary visa, under the Crimes Act for alleged links to a foiled terrorist attack in Britain. Although the act states that the maximum investigation period a person can be held without charge is 24 hours (unless extended by court order), amendments enacted in 2004 introduced a concept called "dead time," in which the allowable time for questioning of a suspect can be spread across an unspecified number of days. This enabled police to detain Haneef for 12 days before he was charged on July 14 with recklessly providing support for a terrorist group and granted bail on July 16. That day the government revoked his visa on character grounds, and he was placed in immigration detention. On July 27, he was released after the Director of Public Prosecutions dropped the charges following its examination of evidence in the case. The next day Haneef returned to India. On August 21, the Federal Court of Australia granted his appeal against the cancellation of his visa. On December 21, the full bench of the Federal Court rejected the government's appeal of the August 21 decision, and the new immigration minister stated he would accept that decision. Human rights groups, the media, and the legal profession criticized the laws under which Haneef was held and police handling of the case. The Law Council, the country's highest legal body, described the "dead time" provision as introducing "indefinite detention by stealth."

### **Bangladesh**

#### ***2004 Country Report***

The Constitution prohibits arbitrary arrest and detention; however, authorities frequently violated these provisions, even in nonpreventive detention cases. The Constitution specifically allows preventive detention, with specified safeguards, and provides for the detention of individuals on suspicion of criminal activity without an order from a magistrate or a warrant. The Government arrested and detained persons arbitrarily and used national security legislation such as the Special Powers Act (SPA) of 1974 to detain citizens without filing formal charges or specific complaints.

### **China**

#### ***2005 Country Report***

Arbitrary arrest and detention remained serious problems. The law permits police and security authorities to detain persons without arresting or charging them. It also permits sentencing without trial to as many as four years in reeducation through-labor camps and other administrative detention. Because the government tightly controlled information, it was impossible to determine accurately the total number of persons subjected to new or continued arbitrary arrest or detention. According to 2003 government statistics, more than 260 thousand persons were in reeducation-through-labor camps. Foreign experts estimated that more than 310 thousand persons were serving sentences in these camps in 2003. According to published SPP reports, the country's 340 reeducation-through-labor facilities had a total capacity of about 300

thousand persons. In addition the population of special administrative detention facilities for drug offenders and prostitutes grew rapidly following a campaign to crack down on drugs and prostitution. In 2004 these facilities held more than 350 thousand offenders, nearly three times as many as in 2002. The government also confined some Falun Gong adherents, petitioners, labor activists, and others to psychiatric hospitals.

Among those specially targeted for arbitrary detention or arrested during the year were current and former China Democracy Party activists, Falun Gong practitioners, domestic and foreign journalists, unregistered religious figures, and former political prisoners and their family members. Business associates of released Uighur political prisoner Rebiya Kadeer were detained in Xinjiang from May to December. Her relatives were also harassed on several occasions after her March release abroad (see sections 2.c. and 5).

### **Colombia**

#### ***2004 Country Report***

The law prohibits incommunicado detention. Anyone held in preventive detention must be brought before a prosecutor within 36 hours to determine the legality of the detention. The prosecutor must then act upon that petition within 36 hours of its submission. Despite these legal protections, instances of arbitrary detention continued.

In August the office of the Human Rights Ombudsman, a group of NGO's, and two private individuals filed four Constitutional Court challenges to the 2001 Law on Security and National Defense on the grounds that, among other things, it would infringe on the right to due process of persons detained or investigated by the military (See Section 1.e.). The law does not specify the maximum period detainees may be held before being turned over to civilian authorities.

### **Equatorial Guinea**

#### ***2005 Country Report***

The government did provide responses on the status of 39 persons previously detained for crimes against the state. Several of the persons had been detained for months or years without judicial proceedings. They were brought before a judge during the year for brief hearings and remanded back to prison for unspecified crimes against the state, rebellion, or terrorism, to be held in "preventive detention" until trial. In at least three cases, a previous judgment of completion of sentence was overruled by the government's Fiscal (attorney general) for unexplained reasons. For 20 persons the government said there was no information, although many sources have reported their detention.

**Finland*****2004 Country Report***

Preventive detention is allowed only in exceptional circumstances, such as during a declared state of war, or for narrowly defined offenses, including treason, mutiny, and large-scale arms trafficking. There were no reports of preventive detention.

**India*****2008 Country Report***

**The National Security Act (NSA) permits police to detain persons considered security risks anywhere in the country, except Jammu and Kashmir, without charge or trial for as long as one year.** State governments must confirm the detention order, which is then reviewed by an advisory board of three high court judges within seven weeks of the arrest. Family members and lawyers are allowed to visit NSA detainees, who must be informed of the grounds of their detention within five days (10 to 15 days in exceptional circumstances).

Human rights groups expressed concerns that the NSA would allow authorities to order preventive detention after only a cursory review by an advisory board and that no court would overturn such a decision.

**Israel*****2004 Country Report***

The law permits, subject to judicial review, administrative or preventive detention (i.e., detention without charge or trial), which was used in a small percentage of security cases. In such cases, the Minister of Defense may issue a detention order for a maximum of 1 year, which can be extended every 3 months. Within 24 hours of issuance of a detention order, detainees must be brought before a district judge who can confirm, shorten, or overturn the order. If the order is confirmed, an automatic review takes place after 3 months. Detainees have the right to be represented by counsel and to appeal detention orders to the High Court of Justice; however, according to the Association for Civil Rights in Israel (ACRI) and Adalah, the Legal Center for Arab Minority Rights in Israel, the police can delay a suspect's meeting with counsel for up to 48 hours in certain extreme cases. **If the detainee is suspected of committing a "security offense," the police can delay notification of counsel for up to 10 days with the consent of a judge, which was usually granted. The court can delay the suspect's meeting with counsel for an additional 21 days. The Government may withhold evidence from defense lawyers on security grounds.**

***2001 Country Report***

The law prohibits arbitrary arrest; however, in some instances, the Government has not observed this prohibition. Defendants are considered innocent until proven guilty and have the right to writs of habeas corpus and other procedural safeguards. However, a 1979 law permits, subject to judicial review, administrative, or preventive, detention (i.e., without charge or trial), which is

used in a small percentage of security cases. In such cases, the Minister of Defense may issue a detention order for a maximum of 1 year, although such orders may be extended. Within 24 hours of issuance, detainees must appear before a district judge who may confirm, shorten, or overturn the order. If the order is confirmed, an automatic review takes place after 3 months. Detainees have the right to be represented by counsel and to appeal detention orders to the High Court of Justice; however, the security forces may delay notification of counsel with the consent of a judge. According to human rights groups and legal experts, there were cases in which a judge denied the Government's request to delay notification of counsel. At detention hearings, the security forces may withhold evidence from defense lawyers on security grounds. The Government also may seek to renew administrative detention orders. However, the security services must "show cause" for continued detention, and, in some instances, individuals were released because the standard could not be met.

#### **Italy**

##### ***2008 Country Report***

Authorities may impose preventive detention as a last resort, if there is clear and convincing evidence of a serious felony or the crime is associated with the Mafia or terrorism. Except in the most extraordinary situations, preventive detention is prohibited for pregnant women, single parents of children under age three, persons over age 70, and those who are seriously ill.

#### **Jordan**

##### ***2007 Country Report***

The law prohibits arbitrary arrest and detention; however, the government did not always observe these prohibitions. The law provides that citizens are subject to arrest, trial, and punishment for the defamation of heads of state or public officials and dissemination of "false or exaggerated information outside the country that attacks state dignity."

Some human rights groups continued to voice concern over the 2006 Prevention of Terrorism Act, complaining that its definition of terrorism might lead nonviolent critics of the government to be arrested or detained indefinitely under the provisions of the act. At year's end the government had not made use of the act.

#### **Malaysia**

##### ***2004 Country Report***

The Government stated that the implementation of preventive detention measures to combat terrorism by foreign governments underscored the country's continued need for the ISA. However, in 2003, the Minister of Legal Affairs said that the Government was reviewing the ISA and would incorporate Suhakam's recommendations into its report.

Under the Emergency Ordinance, the Internal Security Minister may issue a detention order for up to 2 years against a person if he deems it necessary to protect public order, or for the "suppression of violence, or the prevention of crimes involving violence."

### Morocco

#### *2004 Country Report*

Under the antiterrorism law, administrative detention has increased from 48 to 96 hours, with two additional 96 hour extensions allowed at the prosecutor's discretion. Some defendants were denied access to counsel or family members during this initial period, which is when the accused is interrogated, and abuse or torture is most likely to occur.

Some members of the security forces, long accustomed to indefinite access to detainees before charging them, continued to extend the time limits. In November 2003, AI reported that some of those arrested had been held incommunicado for up to 5½ months. A large increase in detainees and prisoners led to an increase in allegations of incommunicado detentions that were difficult to confirm. In 2003, the Government announced that several thousand persons had been detained for links with terrorist groups, including involvement in the May 16 suicide attacks. Human rights activists and local attorneys estimated the number of detainees to be more than 4,000.

The police were required to notify a person's next of kin of an arrest as soon as possible; however, lawyers were not always informed promptly of the date of arrest, and thus were not able to monitor compliance with the administrative detention limits.

The law provides for a limited system of bail; however, it rarely was granted. The law does not require a written release to be issued for a person to be released from detention. In some instances, defendants were released on their own recognizance. Under a separate military code, military authorities may detain members of the military without warrants or public trial.

Although accused persons generally are brought to trial within an initial period of 2 months, prosecutors may request up to five additional 2-month extensions of pretrial detention. Thus, an accused person may be kept in detention for up to 1 year prior to trial.

### Nepal

#### *2008 Country Report*

**Under the Public Security Act (PSA), security forces may detain persons who allegedly threatened domestic security and tranquility, amicable relations with other countries, or relations between citizens of different classes or religions. The government may detain persons in preventive detention for up to six months without charging them with a crime.** The detention period can be extended after submitting written notice to the Home Ministry. The security forces must notify the district court of the detention within 24 hours. The court may order an additional six months of detention before the government must file official charges.

In June authorities arrested under the PSA three Tibetan community leaders, two of whom were naturalized citizens. Three weeks later the Supreme Court ruled that the detention order failed to demonstrate an "immediate threat" to sovereignty, territorial integrity, or public order, as is constitutionally required for the use of preventive detention. The Supreme Court also found that the detention order cited the incorrect section of the PSA. This ruling resulted in the Tibetans' immediate release.

Other laws, including the Public Offenses Act, permit detention without charge. This act, and its many amendments, covers crimes such as disturbing the peace, vandalism, rioting, and fighting. Human rights monitors expressed concern that the act vests too much discretionary power in the chief district officer (CDO). Police arrested many citizens involved in public disturbances, rioting, and vandalism and detained them for short periods without charge.

#### *2005 Country Report*

Under the Public Security Act, security forces may detain persons who allegedly threatened domestic security and tranquility, amicable relations with other countries, or relations between citizens of different classes or religions. The government may detain persons in preventive detention for up to six months without charging them with a crime. The detention period could be extended after submitting written notices to the home ministry. The security forces must notify the district court of the detention within 24 hours. The court may order an additional six months of detention before the government must file official charges. The government commonly applied this act in cases involving suspected Maoists and political and civil rights activists (see section 1.b.). Human rights groups alleged that the security forces used arbitrary arrest and detention to intimidate communities considered sympathetic to the Maoists.

#### Pakistan

#### *2008 Country Report*

The district coordination officer may order preventive detention for as long as 90 days and may extend the detention for an additional 90 days with court approval. **Human rights organizations charged that a number of individuals alleged to be affiliated with terrorist organizations were held indefinitely in preventive detention.** In corruption cases, the National Accountability Bureau (NAB) may hold suspects indefinitely provided judicial concurrence is granted every 15 days.

Until the parliamentary elections in February, the government used preventive detention, mass arrests, and excessive force to quell or prevent demonstrations, political rallies, or civil unrest. There were no reports that the government elected in February engaged in these practices.

Under the FCR in the FATA, political agents have the legal authority to impose collective punishment, preventively detain individuals as long as three years, and require "bonds" to prevent undesired activity. Human rights organizations expressed concern with the concept of collective responsibility, as authorities used it to detain members of fugitives' tribes, demolish their homes, confiscate or destroy their property in the tribal areas and around the country, or lay

siege to a fugitive's village pending his surrender or punishment by his own tribe in accordance with local tradition.

#### ***2007 Country Report***

On June 15, Amnesty International expressed concern regarding a series of arbitrary arrests of opposition party workers and other political activists that had occurred over a two-week period. According to media reports, police arrested approximately 800 to 1,200 persons, primarily in Punjab, to prevent mass demonstrations protesting the suspension of the chief justice in March.

In early September police arrested hundreds of party workers from the PML-N in an effort to prevent welcome rallies for the return of exiled former prime minister Nawaz Sharif.

Following President Musharraf's declaration of an SOE on November 3, the government jailed or placed under house arrest approximately 6,000 lawyers, judges, political party activists, and civil society leaders. Most of those detained remained in prison for a few hours or up to a few days. At year's end 11 judges and three attorneys remained under house arrest. This included the former chief justice and those members of the Supreme and High Courts who refused to take an oath of allegiance to the Provisional Constitution Order, as well as attorneys Aitzaz Ahsan, president of the Pakistan Supreme Court Bar Association, Tariq Mehmood, and Ali Ahmed Khan. Authorities released attorney Munir Malik, former president of the Supreme Court Bar Association, from detention and provided him medical treatment for kidney failure following charges of mistreatment.

#### **Saudi Arabia**

##### ***2004 Country Report***

The law prohibits arbitrary arrest and detention and limits the period of arrest to 5 days without charges being filed; however, in practice, persons were held weeks or months and sometimes longer, and the law gives the Minister of Interior broad powers to detain persons indefinitely.

The authorities may detain without charge persons who publicly criticize the Government, or may charge them with attempting to destabilize the Government (see Sections 2.a. and 3). Following the demonstrations in December in this year and in October 2003 in a number of cities, authorities arrested and detained political protesters for weeks prior to charging them (see Sections 2.a. and 3).

#### **Spain**

##### ***2004 Country Report***

A judge may authorize semi-incommunicado detention for terrorism suspects, in which suspects have access only to a court-appointed lawyer.

Singapore*2008 Country Report*

Some laws--the ISA, the Criminal Law (Temporary Provisions) Act (CLA), the Misuse of Drugs Act (the drug act), and the Undesirable Publications Act (UPA)--have provisions for arrest and detention without a warrant, and under the ISA, CLA, and drug act, executive branch officials can order continued detention without judicial review. **The ISA has been employed primarily against suspected security threats. In the past these threats were Communist related; however, in recent years the ISA has been employed against suspected terrorists.** The CLA has been employed primarily against suspected organized crime and drug trafficking.

The ISA and the CLA permit preventive detention without trial for the protection of public security, safety, or the maintenance of public order. The ISA gives broad discretion to the minister for home affairs, at the direction of the president, to order detention without filing charges if it is determined that a person poses a threat to national security. The initial detention may be for up to two years and may be renewed without limitation for additional periods of up to two years at a time. Detainees have a right to be informed of the grounds for their detention and are entitled to counsel. However, they have no right to challenge the substantive basis for their detention through the courts. The ISA specifically excludes recourse to the normal judicial system for review of a detention order made under its authority. Instead, detainees may make representations to an advisory board, headed by a Supreme Court justice, which reviews each detainee's case periodically and must make a recommendation to the president within three months of the initial detention. The president may concur with the advisory board's recommendation that a detainee be released prior to the expiration of the detention order, but he is not obligated to do so.

Syria*2008 Country Report*

**The 1963 Emergency Law authorizes the government to conduct preventive arrests and overrides constitutional and penal code provisions against arbitrary arrest and detention, including the need to obtain warrants.** In cases involving political or national security offenses, arrests were often carried out in secret with cases assigned in a seemingly arbitrary manner to military, security, or criminal courts. Suspects were detained incommunicado for prolonged periods without charge or trial and denied the right to a judicial determination regarding pretrial detention. Unlike defendants in regular criminal and civil cases, security detainees did not have access to lawyers prior to or during questioning, as well as throughout the preparation and presentation of their defense. In most cases detainees were not informed of charges against them until their arraignment, which often was months after their arrest. Additionally, those suspected of political or national security offenses were arrested and prosecuted under ambiguous and broad articles of the penal code and subsequently tried in either the criminal or security courts.



**Tanzania*****2004 Country Report***

Under the Preventive Detention Act, the President may order the arrest and indefinite detention without bail of any person considered dangerous to the public order or national security. This act requires that the Government release detainees within 15 days of detention or inform them of the reason for their detention. The law allows a detainee to challenge the grounds for detention at 90-day intervals. The Preventive Detention Act was not used during the year. The Court of Appeals ruled that the Act cannot be used to deny bail to persons not considered dangerous to society; despite this ruling, however, the Government has not introduced corrective legislation. The Government has additional broad detention powers under the law, which permit regional and district commissioners to arrest and detain for 48 hours persons who may "disturb public tranquility."

**Trinidad & Tobago*****2004 Country Report***

The Minister of National Security may authorize preventive detention in order to prevent actions prejudicial to public safety, public order, or national defense, and the Minister must state the grounds for the detention. There were no reports that the authorities abused this procedure.

**United Kingdom*****2008 Country Report***

Police may detain an ordinary criminal suspect for 96 hours without charging him or her. However, detention for more than 24 hours must be authorized by a senior police official, and detention of more than 60 hours requires the approval of a magistrate. No one except terrorism suspects may be detained without charge longer than 96 hours. Authorities may hold terrorism suspects for up to 28 days before formally charging them; they are entitled to counsel during this period. A government bill to extend the period of detention without charges from 28 to 42 days in terrorist cases was a significant source of controversy during the year; the bill was withdrawn after leaders in the House of Lords indicated it would be defeated there. Existing law permits the extended detention of foreigners who are suspected of being terrorists but who cannot be deported immediately because of the risk they would be tortured or executed in their countries of destination. Such individuals may appeal their designation as terror suspects.

The law gives defendants awaiting trial the right to bail, except for those judged to be flight risks, likely to commit another offense, suspected terrorists, or in other limited circumstances. Detainees may make telephone calls and have legal representation, including government provided counsel if they are indigent.

The Terrorism Act permits a judge (or the home secretary, with a judge's permission) to impose "control orders," which include a range of restrictions, up to house arrest, on individuals suspected of involvement in terrorism related activities, regardless of nationality or perceived

terrorist cause. Control orders were first employed in January. In October the Law Lords ruled that the 18 hour curfew the home secretary had imposed on one group of individuals constituted a deprivation of liberty beyond what was permissible under the law. In two other cases, the Law Lords questioned the fairness of the hearing which two individuals received when they challenged the control orders served on them. On October 1, the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) criticized the government's detention of terrorism suspects. The law normally requires suspects to be transferred to prisons after 14 days; however in the case of terror suspects this was extended to 28 days to protect the public and permit further investigation. The CPT's objections were based on conditions at the high security detention facility at Paddington Green police station, which they regarded as inadequate for prolonged detention. Government representatives responded that detention in police facilities beyond 14 days were exceptions that they believed to be "reasonable and proportionate."

#### ***2007 Country Report***

The law permits extended detention of foreigners who are suspected of being terrorists but cannot be deported immediately because of the risk they would be tortured or executed in their countries of destination. Such individuals may appeal their designation as terror suspects.

The law permits a judge (or the home secretary, with a judge's permission) to impose "control orders" on individuals suspected of involvement in terrorism-related activities, regardless of nationality or perceived terrorist cause. The control orders include a range of restrictions up to house arrest.

#### ***2006 Country Report***

On March 30, the Terrorism Act of 2006 was enacted, allowing the police to detain terrorism suspects for up to 28 days before formally charging them. The government used this law to detain 17 suspects following the August terror plot to hijack commercial aircraft and blow them up over foreign cities.

Defendants awaiting trial have a statutory right to bail except when there is a risk that they would flee, commit another offense, or in other limited circumstances. Detainees are allowed to make telephone calls and have legal representation, including state-provided counsel if indigent.

The law permits extended detention of foreigners suspected of being terrorists, but who cannot be removed from the country immediately due to concerns that they will be subjected to torture or the death penalty in their country of origin. Such detainees have the right to appeal their certification by the government as terror suspects. The government concluded memoranda of understanding with some countries to permit the return of suspected terrorists to their countries of origin and was seeking similar agreements with others, despite NGO concerns with the human rights records of those countries (see section 1.c.).

The Prevention of Terrorism Act of 2005 permits a judge (or the home secretary with a judge's permission) to impose "control orders" on individuals suspected of involvement in terrorism-related activities, regardless of nationality or perceived terrorist cause. The control orders include

a range of restrictions up to house arrest. In April a high court judge declared that Section 3 of the act was incompatible with the right to a fair trial according to the European Convention on Human Rights.

#### ***2005 Country Report***

The law permits extended detention of foreigners suspected of being terrorists but who cannot be removed from the country immediately, due to concerns that they will be subjected to torture in their country of origin. Such detainees have the right to appeal their certification by the government as a terror suspect, and all the detainees are free to leave the country at any time. In March the government enacted the Prevention of Terrorism Bill, which permits a judge (or the home secretary with a judge's permission) to impose "control orders" on individuals suspected of involvement with terrorism-related activities regardless of nationality or perceived terrorist cause. The control orders include a range of restrictions up to house arrest.

#### ***2004 Country Report***

The law also provides law enforcement authorities with the power to detain for up to 48 hours without charge individuals suspected of having committed a terrorism-related offense. A court may extend this period for a maximum of 14 days.

Detainees are allowed to make telephone calls and have legal representation. The law limits the amount of time that a suspect can be detained without a formal charge and requires that an inspector review the detention at set intervals to ensure that it is necessary and lawful.

The Anti-Terrorism, Crime, and Security Act (ATCSA) allows for extended detention of foreigners suspected of being terrorists but who cannot be removed from the country immediately, due to concerns that they will be subjected to torture in their country of origin. Detainees have the right to appeal their certification, and all the detainees are free to leave the country at any time. On December 16, the Law Lords ruled that the ATCSA detention powers violated the European Convention on Human Rights, which has been incorporated into the law. The Government announced that the 11 individuals detained under ATCSA would remain in detention while Parliament and the Government decided how to respond to the ruling.

Defendants awaiting trial have a statutory right to bail except when there is a risk that they would flee, commit another offense, or in other limited circumstances.

#### ***2003 Country Report***

This Act also allows for extended detention of immigrants and asylum seekers suspected of being terrorists but who cannot be removed from the country immediately. Human rights groups object to provisions of these laws, arguing that they reverse the burden of proof and provide inadequate safeguards against abuse by law enforcement officials. These objections focused on the broad definition of terrorism employed in the law, the proscriptive powers of the state, and the powers of arrest, detention, and interrogation. The Special Immigration Appeals Commission ruled in 2002 that these detention powers were unlawful and violated the Government's obligation under the European Convention of Human Rights. The Government appealed the

ruling, and in 2002, the Court of Appeals ruled that the detention powers complied with the European Convention on Human Rights.

### **Yemen**

#### ***2004 Country Report***

During the year, the Government continued to detain suspects accused of links to terrorism. In November, the Government arrested Saudi-born Mohammed Hamdi al-Ahdal (AKA Abu Assam al-Maki), who has been implicated in the 2000 attack on the USS Cole. During the year, the Government arrested Hadi Dulqum, a weapons dealer, al-Qa'ida associate, and supplier of weapons for the group. In November, the President released approximately 90 security detainees not facing charges in honor of Ramadan. A parliamentary report issued in September 2002 contained an acknowledgement by the Minister of Interior that such detentions violated the Constitution; however, it asserted that they were necessary for national security. The Government sponsored an ideological dialogue led by Islamic scholars to obtain assurances from detainees to repent past extremism, denounce terrorism, commit to obeying the laws and Government, respect non-Muslims, and refrain from attacking foreign interests. More than 150 detainees have undergone the dialogue process since 2002, most of whom were released. At year's end, more than 50 persons who were accused of specific crimes or unwilling to repent remained in detention.

## **II. PREVENTIVE DETENTION FOR UNSPECIFIED PURPOSES**

### **Algeria**

#### ***2007 Country Report***

Judges rarely refused prosecutor requests for extending preventive detention. Detention can be appealed to a higher court but is rarely overturned. If the detention is overturned, the defendant can request compensation. In December 2005, the minister of justice acknowledged publicly that prosecutors sometimes abused investigative detention. Detainees generally had prompt access to a lawyer of their choice and, if indigent, were provided a lawyer by the government.

### **Angola**

#### ***2008 Country Report***

Excessively long pretrial detention continued to be a serious problem. An inadequate number of judges and poor communication among authorities contributed to it. Police often beat and then released detainees rather than prepare a formal court case. In some cases, authorities held inmates in the prison system for up to two years before their trials began. An NGO estimated that more than 50 percent of inmates were pretrial detainees, most of whom had not been formally charged. The government did not release detainees who had been held beyond the legal time

limit, claiming the 2006 release of approximately 2,000 pretrial detainees resulted in an increase in crime.

#### **Benin**

##### ***2008 Country Report***

There were credible reports that the gendarmes and the police exceeded the legal limit of 48 hours of detention in many cases, sometimes by as much as a week. Authorities often used the practice of holding a person indefinitely "at the disposition of" the public prosecutor's office before presenting the case to a magistrate. Approximately 75 percent of persons in prison were pretrial detainees. Inadequate facilities, poorly trained staff, and overcrowded dockets delayed the administration of justice.

#### **Burkina Faso**

##### ***2008 Country Report***

The law limits detention without charge for investigative purposes to a maximum of 72 hours, renewable for a single 48-hour period, although police rarely observed these restrictions. The average time of detention without charge (preventive detention) was one week; however, the law permits judges to impose an unlimited number of six-month preventive detention periods, and defendants without access to legal counsel were often detained for weeks or months before appearing before a magistrate. Government officials estimated that 23 percent of prisoners nationwide were in pretrial status. In some cases detainees were held without charge or trial for longer periods than the maximum sentence they would have received if convicted of the alleged offense. There was a pretrial release (release on bail) system; however, the extent of its use was unknown.

#### **Burundi**

##### ***2008 Country Report***

Prison conditions remained harsh and sometimes life threatening. Severe overcrowding persisted, and in August APRODH reported that 9,613 persons were held in 11 facilities built to accommodate a total of 4,050. According to government officials and human rights observers, prisoners suffered from digestive illnesses and malaria, and some died as a result of disease. APRODH reported 57 cases of torture and abuse of prisoners and detainees, as well as arbitrary and prolonged detentions, in Rumonge Prison in Bururi Province. For example, 59 percent of prisoners were "preventive detainees" held without charge.

#### **Mozambique**

##### ***2008 Country Report***

In detention facilities, overcrowding did not appear to be a serious problem. During the first half of the year, the LDH visited several police station detention facilities and noted that some

detainees continued to be held beyond the maximum police station preventive detention period of 48 hours.

***2007 Country Report***

The LDH found that more than 500 detainees in the Maputo Central Prison (Machava) had been held beyond the 90-day preventive detention period. Of the prisons visited, 399 prisoners remained in jail after the end of their sentences (including 206 at the Maputo Central Prison). The LDH described 35 facilities as "physically inadequate."

**Malaysia**

***2008 Country Report***

The constitution stipulates that no person may be incarcerated unless in accordance with the law. However, the law allows investigative detention to prevent a criminal suspect from fleeing or destroying evidence while police conduct an investigation. Four laws also permit preventive detention to incarcerate an individual suspected of criminal activity or to prevent a person from committing a future crime. Such laws severely restrict, and in some cases eliminate, access to timely legal representation and a fair public trial.

Four preventive detention laws permit the government to detain suspects without normal judicial review or filing formal charges: the ISA, the Emergency (Public Order and Prevention of Crime) Ordinance, the Dangerous Drugs (Special Preventive Measures) Act, and the Restricted Residence Act.

**Philippines**

***2008 Country Report***

A variety of national executive orders and laws provide for the welfare and protection of children. Police stations have child and youth relations officers to ensure that child suspects are treated appropriately. However, procedural safeguards were often ignored in practice. The BJMP stated that 4,213 minors were held on "preventive detention" while their trials were underway, and an additional 130 children, convicted from January to November, were serving sentences. Many child suspects were detained for extended periods without access to social workers and lawyers and were not segregated from adult criminals. NGOs believed that children held in integrated conditions with adults were highly vulnerable to sexual abuse, recruitment into gangs, forced labor, torture, and other ill treatment. There were also reports that many children detained in jails appeared to have been arrested without warrants.

**Armenia**

***2008 Country Report***

Lengthy pretrial or preventive detention remained a problem. In practice the authorities generally respected the provision of the law stipulating that pretrial detention could not extend beyond 12

months. However, the law does not set any limits for detention of defendants once the case is sent to the court, and there were cases when defendants spent three or more years in detention before a verdict was reached. Although the law requires a well-reasoned decision to justify grounds for an extension of custody, judges routinely prolonged custody on seemingly unclear grounds. Authorities reported that during the year, pretrial detainees constituted on average approximately 714 persons out of a prison population of nearly 3,969.

#### **Germany**

##### ***2008 Country Report***

Although the law does not allow courts to punish persons twice for the same crime, it allows for "subsequent preventive detention." In cases involving rape, homicide, or manslaughter, courts may order offenders to serve supplemental detention. Such preventive detention requires a court finding, based on at least one expert opinion, that the convicted person could pose a danger to the public. Such detention may last indefinitely.

#### **Bangladesh**

##### ***2008 Country Report***

Using the Special Powers Act that allows preventive detention, the government detained prominent business leaders. Most of those persons were then tried under existing anticorruption legislation. Most high-profile cases were handled under the Emergency Power Rules and therefore initially denied suspects both the right to bail and the right to appeal their cases during the course of the trial. The Supreme Court, however, restored some of its bail jurisdiction through a ruling and exercised the authority to consider bail petitions.

#### **Argentina**

##### ***2008 Country Report***

The law provides for the right to bail, except in cases involving narcotics, violent crimes, and firearms violations. Although the bail system was used, civil rights groups claimed that judges were more likely to order the holding of indicted suspects in preventive or pretrial detention than to allow suspects to remain free pending their trial.

#### **Bolivia**

##### ***2008 Country Report***

More than 70 percent of detainees awaited sentencing, but the courts provided release on bail for some detainees. Judges have the authority to order preventive detention for suspects deemed a flight risk. If a suspect is not detained, a judge may order significant restrictions on the suspect's movements.

Denial of justice through prolonged detention remained a problem. Although the law establishes that a case's investigatory phase cannot exceed a maximum of 18 months and that the trial phase cannot exceed three years, some suspects were held in preventive detention longer than the legal limits. If the investigatory process is not completed in 18 months, the detainee may request release by a judge; however, judicial corruption, a shortage of public defenders, inadequate case-tracking mechanisms, and complex criminal justice procedures kept some persons jailed for more than 18 months before trial.

#### ***2007 Country Report***

Children from 11 to 16 years of age may be detained indefinitely in children's centers for known or suspected offenses, or for their protection, on the orders of a social worker. There is no judicial review of such orders.

#### **Ecuador**

#### ***2008 Country Report***

While both the previous and the new constitution prohibit arbitrary arrest and detention, in 2006 the UN Working Group on Arbitrary Detention noted that provisions in the Criminal Procedure Code, the Penal Code, and some regulations adopted by central or provincial authorities "undermine the guarantees and protection offered." The working group cited two laws of particular concern: one imposes an obligation on judges to order detention for persons awaiting trial, i.e., "preventive detention," which in practice created a situation in which thousands of persons were detained for longer periods than the constitution allowed, often years longer, thus violating their right to be tried within a reasonable time. The second measure abolishes sentence reductions, which led to a large number of persons serving lengthy sentences for minor offenses. In 2006 the Constitutional Court ruled the preventive detention provision unconstitutional, holding that no person can remain in prison unsentenced for more than one year for penal crimes and six months for lesser crimes. The clock for inmates already incarcerated and all future incarcerated individuals started in October 2007. However, in October 2007 Congress passed an interpretative law determining that detainees who purposely delayed the judicial process were not subject to the ruling of the Constitutional Court.

#### **Haiti**

#### ***2008 Country Report***

Police frequently did not observe the legal requirement to present detainees before a judge within 48 hours, and prolonged preventive detention remained a serious problem. For example, judges sometimes failed to report for work or the police lacked vehicles to transport the accused to courthouses. Consequently, many detainees were held for extended periods in preventive detention without being informed of charges against them.



*2007 Country Report*

The law prohibits arbitrary arrest and detention, and the constitution stipulates that a person may be arrested only if apprehended during the commission of a crime, or on the basis of a warrant by a legally competent official such as a justice of the peace or magistrate. The authorities must bring the detainee before a judge within 48 hours of arrest. In practice officials frequently ignored these provisions. With so many detainees being held in preventive detention without the benefit of a hearing and in violation of the 48-hour rule, it was difficult to determine how many of them were arbitrarily arrested or detained.

**\*1365 DETENTION AS TARGETING: STANDARDS OF CERTAINTY AND DETENTION OF SUSPECTED TERRORISTS**

Matthew C. Waxman [FNa1]

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To the extent that a state can detain terrorists pursuant to the law of war, how certain must the state be in distinguishing suspected terrorists from nonterrorists? This Article shows that the law of war can and should be interpreted or supplemented to account for the exceptional aspects of an indefinite conflict against a transnational terrorist organization by analogizing detention to military targeting and extrapolating from targeting rules. A targeting approach to the detention standard-of-certainty question provides a methodology for balancing security and liberty interests that helps fill a gap in detention law and helps answer important substantive questions left open by recent Supreme Court detention cases, including *Boumediene v. Bush*. Targeting rules include a reasonable care standard for dealing with the practical and moral problems of protecting innocent civilians from injury amid clouds of doubt and misinformation, though the application of this standard in the detention context must account for differences such as a temporal dimension, available procedural mechanisms, and political and strategic context. Applying a targeting law methodology, this Article offers a law of war critique of past and current U.S. government detention policies. It recommends several ways to remedy them, including through an escalating standard of certainty as time in detention elapses, comparative consideration of accuracy-enhancing adjudication procedures, and greater decisionmaking transparency.

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**\*1366** Introduction

Consider a January 2006 incident in which the CIA allegedly tried to kill with a missile al Qaida deputy Ayman Zawahiri and other suspected al Qaida members believed to be meeting at a house in a remote Pakistani village. According to many reports, Zawahiri was not actually present, and among the eighteen or so people killed were probably some half-dozen Islamic extremists as well as perhaps a dozen civilians. [FN1] What if instead of hitting the house with a missile, the U.S. military had good reason to suspect that most, though perhaps not all, people staying in the house were al Qaida terrorists, and, even worrying that some of them might be guiltless, it sent them all to Guantanamo? Putting aside the issue of whether the missile strike itself is a legal option, somehow, curiously, the predictable civilian deaths of the missile attack seem a tragic yet natural consequence of military force while the hypothetical detention of everyone present--a more humane, less injurious application of military force--would be widely regarded as illegitimate and lawless.

As a legal matter, how accurate must the United States be in ascertaining whether those it captures and detains long-term as enemy terrorists at Guantanamo and elsewhere really are so? This Article begins to answer that question.

For the foreseeable future, the United States and its coalition partners will continue to capture and detain alleged al Qaida members and other suspected terrorists. Unfortunately, despite multiple levels of screening by U.S. forces, other government agencies, and now in some \*1367 instances courts, some of those captured and detained for long periods, and in some cases subjected to harsh interrogation, are likely to be civilians with little or no connection to terrorism, erroneously swept up and mistakenly held. To put the central question another way, what is the standard of certainty a state must exercise in sorting out suspected terrorists from nonterrorists for the purposes of detention? [FN2]

Amid all the controversy about the adequacy of procedural protections at Guantanamo and elsewhere, this substantive question has gone largely ignored. The Supreme Court's recent decision in *Boumediene v. Bush*, for example, held that detainees at Guantanamo are entitled to constitutional habeas corpus rights to challenge their classification as "enemy combatants," but it did not address the certainty with which the state must prove detainees' status. [FN3] And neither the law of war, which the U.S. government asserts is the relevant body of law for regulating such detention, nor criminal law, which many critics assert is the proper body of law to apply, provides a satisfactory answer. [FN4] At worst, there is a gap in the law; at best, the practical problem of distinguishing members of a major, global terrorist network from innocent bystanders strains either body of law.

This Article offers a way to fill that gap derived from basic law of war principles. While that body of rules does not explain how accurate a party to a conflict must be in separating suspected fighters from civilians for the purposes of detention, it says a lot about a closely analogous problem (or, one might argue, a larger version of it): the problem of identifying and striking military targets while protecting civilians and civilian property. Indeed, the challenge of differentiating enemy terrorist fighters from the surrounding civilian population is a common challenge of target identification and the ability to apply force precisely: Is the individual an enemy fighter (i.e., a combatant) and therefore subject to the application of force (i.e., capture and detention)? My central claim is that, in looking to the law of war as a possible starting point, one should focus not on detention law--the body of international law primarily concerned with the treatment conditions under which captured enemy fighters are \*1368 held (an important issue but one that I do not address in this paper)--but on targeting law.

This Article argues that detention decisions resemble targeting decisions in important ways and that an examination of targeting law is a useful analytical framework for thinking about how standards of certainty and enforcement mechanisms might develop in the detention context, including rules for adjudicating habeas claims. Even if one does not accept the premise that the law of war is the proper legal framework, the insights derived from its closer examination are useful for developing and refining a better one.

One might expect that in taking this analytical approach I will argue for expansive executive discretion. The law of war paradigm is commonly paired with operational flexibility and resistance to judicial or other review. To the contrary, this Article shows that the logic of targeting law demands robust substantive and procedural checks on detention.

In doing so, this Article explores two related questions: First, why does the law--particularly the law of war--accommodate frequent mistakes in the targeting context, while similar forms of error in the detention context, like misidentification or "collateral damage," are widely condemned as lawless? Second, to what extent do ongoing debates about the procedural protections suspected terrorists are due mask a deeper issue of what substantive standard of certainty or accuracy states should exercise in wielding their most coercive powers? [FN5]

Part I examines the two major competing paradigms for regulating detention-- criminal law and the law of war--and why neither satisfactorily regulates the accuracy of detention decisions in the context of fighting terrorist networks like al Qaeda. Part II argues that the "reasonable care" standard and methodologies of targeting law, which evolved to deal with the practical and moral problems of protecting innocent civilians from injury amid clouds of doubt and misinformation, also work well in the detention context. Part III refines a targeting approach to detention and uses it to critique the U.S. government's current terrorist detention review schemes. Once targeting law is properly applied, the appropriate standard of certainty should escalate as time in detention elapses; should consider whether alternative, more accurate adjudication mechanisms are available; and should be applied transparently. The Article concludes by returning to the law-of-war/criminal-law dichotomy and the way in which a targeting law approach brings them closer together, arguing that the insights drawn from targeting law can help institutionalize durable state tools for combating transnational terrorist networks within the rule of law.

**\*1369 I. What Is the Appropriate "Standard of Certainty" for Detaining Suspected Terrorists?**

Consider the following examples:

- From December 2004 to Spring 2005, the U.S. Department of Defense declared that thirty-eight of the nearly 600 detained enemy combatants held at Guantanamo were not enemy combatants after all; insufficient information linking them with al Qaida or Taliban forces meant that they should go free. This formal "Combatant Status Review Tribunal" process followed the Supreme Court's decision in *Hamdi v. Rumsfeld*, holding that a U.S. citizen detained in the United States as an "enemy combatant" fighting with al Qaida was entitled to a fair opportunity to rebut the government's factual assertions before a neutral decisionmaker. [FN6] The Tribunal occurred after multiple other layers of individualized reviews by the Department of Defense and other U.S. government agencies, and after several dozen detainees had already been freed from Guantanamo. [FN7]

- In December 2005, the Washington Post reported that the CIA had held incommunicado and interrogated for months a German citizen who, it turned out, was not the man it was seeking after all--it was a case of mistaken identity. [FN8] A few weeks later the Associated Press reported that the CIA Office of the Inspector General was reviewing up to ten cases of similar mistaken identity. [FN9]

- A Turkish native of Germany, Murat Kurnaz, was released from Guantanamo in August 2006 after being held over four years, allegedly despite assessments by German and American intelligence agencies doubting his supposed links to terrorist cells or enemy fighters. [FN10]

- In September 2006, the Canadian government released its investigatory report on the case of Maher Arar, a dual Canadian-Syrian national whom the United States deported to Syria based on erroneous information linking him to terrorism. Arar alleges he was subsequently tortured by Syrian authorities. [FN11]

**\*1370** In the course of carrying out its counterterrorism policy, the U.S. government has erroneously detained civilians in Afghanistan, Guantanamo, and elsewhere. That has generated intense criticism from many quarters, including courts, [FN12] the Congress, [FN13] the media, [FN14] non-governmental organizations, [FN15] and legal scholars [FN16] and commentators. [FN17] An apparently substantial rate of errors (or merely possible errors) leads to accusations that the entire system is fundamentally flawed and should be replaced with criminal justice or robust procedural protections, **\*1371** which are seen as more consistent with Western legal traditions and better able to avoid mistaken imprisonment of innocents. [FN18]

But what is a legally appropriate, substantive standard by which to judge detention decisions? The answer depends on whether one characterizes the fight against al Qaida and affiliated terrorist networks as a problem of large-scale criminality or as a problem of warfare.

If it is an issue of criminality on a grand scale, the standard-of-certainty question is relatively easy: American criminal law generally demands the highest scrutiny of detention, requiring suspects to be deemed guilty of the alleged acts beyond reasonable doubt. [FN19] This perspective proudly elevates liberty interests above security interests--"let ten guilty men run free rather than mistakenly convict one innocent man" [FN20]--and therefore may be fatally impractical for defeating international terrorist networks capable of attacks of a scale previously achievable only by organized states.

If it is an issue of warfare, or something other than pure criminal law, the applicable standard of certainty is unclear. The U.S. government has insisted that the law of war provides the authority and the appropriate framework for regulating some of its detention policies. As explained in a 2005 submission to a United Nations committee:

The United States and its coalition partners are engaged in a war against al-Qaida, the Taliban, and their affiliates and supporters. There is no question that under the law of armed conflict, the United States has the authority to detain persons who have engaged in unlawful belligerence until the cessation of hostilities. Like other wars, when they start we do not know when they will end. Still, we may detain combatants until the end of the war. [FN21]

But how careful does the state have to be in exercising this authority? The law of war has little to say about how certain a detaining power must be in determining whether an individual really is an enemy fighter, as opposed to an innocent bystander. This deficiency has contributed to **\*1372** criticism of the entire Bush Administration approach; many see the murkiness of the law of war as providing carte blanche to detain at will. [FN22]

Before exploring how this gap might be filled, let us step back and review the two main legal perspectives that are most often brought to bear on the problem.

## A. Two Paradigms: Criminal Law Versus the Law of War

Even a low number of false positives would be problematic measured against the American criminal justice system, which requires proof beyond reasonable doubt to convict and lock away suspects. [FN23] This extremely high proof standard helps ensure a low rate of erroneous convictions while also symbolizing for society the great significance of criminal conviction. [FN24] Its demanding scrutiny reflects a value judgment that it is better to accept a high rate of false negatives (i.e., letting the guilty go free) than a high rate of false positives (i.e., convicting the innocent). Writing for the Court in *Addington v. Texas*, Chief Justice Burger explained that "[i]n the administration of criminal justice, our society imposes almost the entire risk of error upon itself. This is accomplished by requiring under the Due Process Clause that the state prove the guilt of an accused beyond a reasonable doubt." [FN25]

This notion of "guilt" and the ensuing punitive purposes of criminal conviction and imprisonment are understood to justify this very high proof standard. [FN26] In some circumstances American criminal law allows restrictions of liberty, including detention, on less than proof beyond reasonable doubt. Arrests can be made on "probable cause," [FN27] for example, \*1373 and arrestees can be held pending trial on a "clear and convincing" showing that no release conditions would reasonably assure community safety. [FN28] But such liberty restrictions are generally short-term, and as a doctrinal matter they are distinguished from punitive liberty restrictions. [FN29]

In practice, even a high proof standard does not eliminate erroneous convictions. In holding that the beyond reasonable doubt standard is constitutionally required, the Supreme Court acknowledged in *In re Winship* that no conviction standard will eradicate risk of mistaken injury to innocents. [FN30] Justice Harlan explained in his concurrence that "in a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened. Instead, all the factfinder can acquire is a belief of what probably happened." [FN31] Empirical studies confirm that nonnegligible numbers of innocents still get convicted under this standard [FN32] and that jurors' interpretations of the certainty requirement vary considerably. [FN33] Nevertheless, the beyond reasonable doubt standard substantially mitigates the dangers to innocents' life and liberty.

But from the perspective of the Bush Administration and many others who see certain forms of transnational terrorism as a threat warranting military response, criminal law's beyond reasonable doubt standard is inappropriate for assessing an individual's membership in a global terrorist network. [FN34] Legal and practical reasons inform this position.

\*1374 As a legal matter, the Bush Administration has declared that al Qaida members and affiliates can be detained not as criminals but as enemy combatants, pursuant to the international law of war. As former U.S. State Department Legal Adviser William H. Taft IV explained:

[T]he law of war recognizes that it is not necessary to charge a detained person with a crime to keep him off the battlefield while hostilities continue. Preventing his further participation in the conflict will, presumably, hasten its end and could significantly reduce the risk of additional casualties to our population. Such preventive detention obviously has no place in our concept of criminal law enforcement, but it has long been accepted in the law of war and, again, seems sensibly to apply to the conflict with al Qaeda. [FN35]

\*1375 Note that Taft refers to the primarily preventive purpose of detention under the law of war, as opposed to the primarily, though not exclusively, punitive purpose of imprisonment in the criminal justice context. Intelligence gathering through questioning of those in custody constitutes another important reason for detention in warfare, and especially in fighting terrorist networks. [FN36]

Note also that this legal theory based on a state of armed conflict limits itself to transnational terrorist organizations whose activities rise to a certain level of violence. While Bush Administration rhetoric about a "Global War on Terror" is sometimes thought to be intended as justification to attack or detain any terrorist, anytime, anywhere, the legal theory attached to it is much narrower: Only al Qaida and its allies (such as the Taliban and those terrorist organizations affiliated with al Qaida) have engaged in acts sufficient to rise to the level of armed

conflict with the United States. [FN37] In that regard, the detention issue is closely tied to the issue of how broadly we should define the al Qaida network itself, an issue I touch on momentarily. [FN38]

The Supreme Court in *Hamdi v. Rumsfeld* accepted much of this reasoning, recognizing the executive branch's authority to detain enemy combatants--at least those captured in the course of operations in Afghanistan--pursuant to the congressional "Authorization for Use of Military Force" against those responsible for the September 11 attacks. [FN39] While *Hamdi* ultimately held that a U.S. citizen accused of supporting terrorist forces hostile to the United States must be given notice and a hearing before a neutral tribunal, the Court did not disagree with the executive branch that at least part of the fight against al Qaida and its allies constitutes an armed conflict such that active combatants may be detained long-term, not as a penal sanction but to ensure that they do not rejoin the conflict. [FN40]

As a practical matter, in some cases it may be impossible to link suspected terrorists bent on catastrophic violence to specific acts or planning networks beyond reasonable doubt because the intelligence information upon which those suspected links rely is unreliable, would be inadmissible at criminal trial (e.g., because it is hearsay), or could not be exposed in court without dangerously revealing intelligence sources and \*1376 methods. [FN41] Although the successful prosecutions of Zacharias Moussaoui and perpetrators of the 1993 World Trade Center bombings [FN42] show that it is sometimes possible to convict al Qaida terrorists, those cases involved individuals present in the United States and specific terrorist plots that had already materialized. By contrast, war zones like Afghanistan and western Pakistan, where many of the detainees held in Guantanamo and Afghanistan were captured, make challenging crime scenes, and military forces and intelligence agents are not generally trained or equipped to prepare or support criminal investigations, nor would we want them in many circumstances to concentrate on such tasks as forensics collection. [FN43]

#### B. A Gap in the Law in Need of Filling

In some sense, the criminality-versus-warfare dichotomy is a false choice. [FN44] The Bush Administration has employed the law of war paradigm \*1377 to authorize and regulate many of its actions, though this need not exclude the simultaneous use of criminal law to fight terrorism. Prosecutions through federal courts continue against isolated al Qaida figures, and the Administration intends to conduct war crimes prosecutions through military commissions for others. [FN45] Moreover, while some aspects of counterterrorism, like the prosecutions and extraditions of some al \*1378 Qaida suspects since September 2001, will clearly involve criminal law, others, such as combat operations against al Qaida-affiliated groups that continue in Afghanistan, will clearly involve the law of war.

The issue is what to do with the vast category of activities in the middle-- namely the detention of enemy combatants--that do not fit neatly into either framework.

In thinking about what standard of certainty should govern long-term detentions of suspected al Qaida members, it is useful to put the criminal paradigm aside for the moment. [FN46] If one thinks it should be the exclusive basis for detaining terrorism suspects long-term, the law is relatively clear and well-developed. If, however, it is inapposite to some cases or fatally ineffectual-- a debate I do not attempt to settle here--we need to evaluate alternatives. [FN47]

\*1379 This Article focuses on the law of war paradigm. For now it remains the dominant paradigm in U.S. government practice. And even when Congress and the Supreme Court have pushed back against the executive's assertions of wartime powers since 2001, they have implicitly accepted the notion that the law of war provides an appropriate regulatory framework for at least a large subset of suspected terrorist detentions. [FN48] It remains unclear how, exactly, this framework should be applied in this new kind of conflict. After *Boumediene*, for example, federal courts need to fashion substantive and procedural rules for evaluating Guantanamo habeas claims. Closer examination of the law of war's logic yields important insights that can either guide that legal evolution or serve as the basis for new legislation. Moreover, most would agree that the legal regime governing detention of suspected al Qaida terrorists should be at least as protective of innocents as the law of war.

To return, then, to my central question: If the law of war paradigm is to apply to suspected al Qaida terrorists, how careful must the state be in determining whether captured individuals are fighters in an enemy organization and can, pursuant to these traditional warfare rules, be held until the conflict with al Qaida ends? The law of war does not provide a clear answer. The general right to detain makes sense in traditional warfare; one does not want to release captured enemy fighters, only to fight them later on the battlefield. Beyond this general canon and very detailed rules contained in the Geneva Conventions regulating how captured enemy fighters must be treated while detained, however, the law of war contains little guidance on critical questions such as how cautious a detaining power must be in making individual determinations of who is and is not an enemy fighter in the first place. [FN49] The issue then becomes how the law of war might evolve or be supplemented with additional domestic \*1380 or international law to regulate the standard of certainty for detention judgments.

Let us pause for a moment on a companion question: standard of certainty of what? In other words, who should be considered an "enemy combatant" or "fighter" subject to these detention rules? [FN50] The Bush Administration has used the following definition of those eligible for detention at Guantanamo:

An "enemy combatant" . . . shall mean an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces. [FN51]

This definition is one of many that could be derived from the law of war, [FN52] and it is therefore useful for my analytic purposes, even though some have questioned the expansiveness with which the Bush \*1381 Administration has applied it. [FN53] My central question, then, fixes on the state's certainty that an individual was a member or supporter of a particular organization, or in some cases certainty that he committed a belligerent act or directly supported hostilities on that organization's behalf. But one can easily conceive of broader or narrower definitions.

Generally, the broader the definition (i.e., the more distant and indirect the relationship between an individual and a particular terrorist organization or its hostile acts), the more difficult it will be to distinguish fighters from civilians; the narrower the definition (e.g., imagine one limited to those who directly participated in a terrorist attack or those who formally acknowledge allegiance to a particular terrorist organization), the easier it will be to resolve doubt in individual cases. And in some cases, the way "enemies" is defined could radically affect the standard-of-certainty question. A very narrow definition--say, those who carry weapons--may be easy to administer and prove. Some very broad conceptions--say, those who harbor devotion to a hostile ideology--may often be impossible to prove to high levels of certainty. This analytic inextricability of the standard-of-certainty question and the substantive issue to be proven plagues not only the law of war paradigm but also the criminal law paradigm:

Winship's insistence on the reasonable-doubt standard is thought to express a preference for letting the guilty go free rather than risking conviction of the innocent. This value choice, however, cannot be implemented by a purely procedural concern with burden of proof . . . . A normative principle for protecting the "innocent" must take into account not only the certainty with which facts are established but also the selection of facts to be proved. A constitutional policy to minimize the risk of convicting the "innocent" must be grounded in a constitutional conception of what may constitute "guilt." Otherwise \*1382 "guilt" would have to be proved with certainty, but the legislature could define "guilt" as it pleased, and the grand ideal of individual liberty would be reduced to an empty promise. [FN54]

This suggests that if substantive offenses are expanded too far legislatively, even American criminal law's standard-of-certainty requirements alone may fail to protect against false positives in any meaningful way.

So certainly the concept of "enemy combatant" itself needs further refinement. But this issue need not be resolved definitively here because the arguments in the Article provide a framework for considering appropriate standards of certainty however that definitional question is ultimately answered.



No matter how one defines "enemy combatant," there are two reasons why a well-articulated standard-of-certainty rule probably has not previously evolved as a natural part of the law of war. Both reasons now pose legal challenges in the fight against transnational terrorist networks.

First, traditional warfare between professional soldiers has historically made identification relatively (though not always) easy. The Geneva Conventions and their predecessor conventions and customary legal codes grew out of a system of official armies which, by their nature, facilitated identification of foe: A person wearing the uniform of the opponent was almost undoubtedly an enemy combatant, subject to detention if captured. [FN55] Indeed, as I expand upon later, the law of war, including the Geneva Conventions and their predecessor conventions, impose requirements to wear the distinctive insignia and other indicia of one's combatant status and affiliation precisely in order to facilitate the identification process. [FN56] To be sure, even in state-versus-state warfare the enemy soldier identification problem is not eliminated. In the first Gulf War, for example, U.S. forces conducted about 1,200 hearings before military officer panels for captured Iraqi individuals thought to be pro-Saddam fighters and found about 900 of them to be displaced civilians, who were promptly released. [FN57] But these difficulties were by far the exception in traditional armed conflicts.

Al Qaida and other terrorist organizations do not generally identify their membership. They do just the opposite, operating in the shadows, blending in with local populations. Indeed, one way in which terrorists sow panic within rival societies is through doubt as to who among that \*1383 society is a threat. In these respects, terrorist networks take the identification problems long posed by guerrilla warfare to new heights. [FN58] Especially over the last half century, drafters and practitioners of the law of war have wrestled with how to treat insurgents and guerrilla fighters, who may be hard to distinguish from local civilians. Again, most of the legal development in this area has focused on treatment of those captured, aiming both to regulate the guerrilla behavior and to prevent atrocities (like the massacres by German forces of Western European townspeople in response to attacks by partisans [FN59]) that have historically been sparked by frustration in combating them. But even most guerrilla armies, at least during combat, are distinguishable from civilians by their weapons, clothing, and other identifiable features. Terrorists, by contrast, may never be distinguishable by physical features alone. [FN60]

A second reason why clear, durable law of war rules for regulating individual determinations of combatants versus noncombatants have not evolved is probably that the relatively low stakes of errors historically made it less important to resolve the issue with precision. Even in cases where combatant recognition was difficult in traditional state-versus-state warfare, the misidentification problem lacked many of the consequences of individual judgments in today's conflict with al Qaida and transnational terrorist networks. This was especially true in modern conflicts among parties that followed all of the Geneva Conventions' prisoner-of-war rules, which set high standards for the care and treatment of captured soldiers. When wars last months or years, at the end of which prisoners will be released or repatriated, erroneous detention is unfortunate but not calamitous. [FN61]

The likelihood that the conflict with al Qaida will last many, many years, however, exposes those detained as enemy combatants to indefinite or lifelong incarceration. While several hundred detainees have been released\*1384 or transferred from Guantanamo to date, several hundred remain and the U.S. government argues they can be held until the end of the war with al Qaida, [FN62] which no one expects within at least the next decade or two, if ever. The prospect of a conflict with no clear end strains the traditional rules of warfare and vastly multiplies the injury of errors. [FN63] Furthermore, it has been widely reported and in some cases acknowledged that detained suspected terrorists have been exposed to aggressive interrogation techniques that wear on them physically and psychologically. [FN64] The susceptibility of those in detention to harsh interrogation and perhaps severe abuse means that those judged to be enemy fighters might be exposed to vastly greater harms than those detained in traditional state-versus-state wars in which the Geneva Conventions' prisoner-of-war rules (including a prohibition on coercive interrogation) apply. [FN65]

It is not so surprising, then, that the pre-9/11 law of war never developed clear answers to the standard-of-certainty question. The closest the law of war comes to answering it directly is contained in a provision of the Third Geneva Convention:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of [the combatant categories established by the Geneva Conventions], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal. [FN66]

Some have argued that this provision means that when there is doubt whether a captured individual is an enemy fighter, he is entitled to a hearing before a tribunal; therefore, the argument goes, suspected al Qaida and Taliban combatants in U.S. custody at Guantanamo and elsewhere should have been entitled upon capture to such review. [FN67] But even if this interpretation is correct, it does not resolve the question this Article seeks to answer. Not only does this provision expressly presume a "belligerent act"--which is often the act that, if known to be true, answers the very problem we seek to solve-- but it merely prescribes (most generally) a procedural mechanism for adjudicating doubtful cases, without \*1385 establishing the substantive standard the procedural mechanism should apply.

If we assume the criminal law standard is inapplicable or unworkable, and the law of war does not provide clear rules and standards, how should this legal gap be filled? Put another way, what substantive standard should regulate states' determinations that an individual is a member of a given enemy terrorist organization, such that he can be stripped of his liberty for a long time?

## II. Detention as a Form of Targeting

Maybe this problem is not unique to fighting terrorists after all. Doubts about the identity of those being subjected to military force are commonplace in warfare, and the law of war has evolved over centuries to deal with them. Military forces routinely injure or destroy life and property amid uncertainty--sometimes substantial uncertainty--as to who, exactly, will sustain the blow of their military might. Specifically, targeting law regulates the attack and bombardment of supposed military personnel and objects where doubt shrouds their identity and the effects--intended and unintended--on nearby, innocent civilians. This Part traces the contours of targeting law and explains its policy and moral bases. It then argues that detention decisions can be understood analogically as targeting decisions, sharing many of the same policy and moral issues. Targeting law therefore offers one promising way to fill the standard-of-certainty gap.

### A. Operating in Clouds of Doubt: Targeting Law in Warfare

The number of Afghan civilians who have been mistakenly bombed or killed by U.S. forces since September 11, 2001 is many times higher than the number of civilians erroneously detained at Guantanamo or elsewhere in fighting al Qaida and the Taliban. [FN68] Meanwhile, several thousand civilians are believed to have been killed by coalition military operations during the first few months of fighting in Iraq in 2003, [FN69] and, by way of additional comparison, about 500 civilians are believed to have died as a result of two and a half months of airstrikes over Serbia in 1999, including a particularly tragic incident in which more than seventy fleeing \*1386 refugees were bombed and killed after being misidentified as convoying Serbian forces. [FN70]

The general, if reluctant, acceptance of these tragic injuries raises a question: Why are detention errors widely seen as lawless while other errors (like targeting errors) are often seen as unfortunate but regular byproducts of combat? After all, a decision to detain someone suspected of being an enemy combatant closely resembles a targeting exercise: It is a judgment that the individual is part of an enemy military organization and therefore subject to the application of military force, in this case physical incapacitation. Before thinking, then, about detention amid imperfect information, let us step back and review the way international law has developed to deal with targeting problems.

The modern law of military targeting rests heavily on two central principles. First, only combatants and military objectives are lawful targets; attacks aimed at civilians and "civilian objects" are prohibited. This is known as the principle of distinction. Regarded as longstanding, cardinal customary law, [FN71] this principle was expressed in the 1874 St. Petersburg

Declaration [FN72] and has since been elaborated in the First Additional Protocol to the Geneva Conventions ("Protocol I"), [FN73] which the United States, although not a party to it, has pledged to follow to the extent its terms reflect customary international law. [FN74] Second, even military objectives may not be attacked if doing so is likely to cause incidental civilian casualties or damage ("collateral damage") that would be excessive in relation to the military advantage expected from the attack. This is known as the principle of proportionality, [FN75] again widely regarded as a basic, customary legal tenet. The former principle assumes that the attacker can determine which objects are military and which are civilian. The latter principle accommodates a certain level of incidental injury to innocent civilians. While there is widespread agreement on these fundamental **\*1387** principles, specific attacks and incidents of civilian injury often trigger controversy over whether they were followed. [FN76]

In applying the principles of distinction and proportionality to planning and conducting an attack, the attacker must exercise care to verify that a target is indeed a military target and attack it so as to reduce the likelihood of incidental injury to civilians and civilian property. But the precise level of care the attacker must use in both efforts--verifying the identity of the target and reducing anticipated collateral damage--has proven difficult to define. In his classic work on the ethics of warfare, Michael Walzer confronts this issue but acknowledges that "[e]xactly how far [a party] must go" in accepting costs to itself in minimizing foreseeable harms to civilians "is hard to say":

Do civilians have a right not only not to be attacked but also not to be put at risk to such and such a degree, so that imposing a one-in-ten chance of death on them is justified, while imposing a three-in-ten chance is unjustified? In fact, the degree of risk that is permissible is going to vary with the nature of the target, the urgency of the moment, the available technology, and so on. It is best, I think, to say simply that civilians have a right that 'due care' be taken. [FN77]

But this just raises the question of what care is due.

#### B. Targeting Law's "Reasonable Care" Standard

Throughout this past century, during which much of the modern law of war was codified, international convention drafters have struggled with how to define targeting's standard of certainty. Although the text of international treaties might appear at first blush to require exceedingly high standards of care, the practice and interpretation of states is better understood as a "reasonable effort" standard, where reasonableness is judged in terms of costs to the attacker of performing more rigorous analysis or expending scarce military resources.

Protocol I to the Geneva Conventions states that in the course of attacks "constant care shall be taken to spare the civilian population, civilians **\*1388** and civilian objects." [FN78] It also requires those who plan an attack to "[d]o everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects . . . but are military objectives." [FN79] Planners must also "[t]ake all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects." [FN80]

The responsibility to "do everything feasible" and "take all feasible precautions" in carrying out these mandates, however, is generally interpreted to be not a fixed and always highly exacting duty--like, say, the beyond reasonable doubt approach of criminal law--but a balancing one: Parties are obliged to balance humanitarian concerns for civilians with military needs. That is, "[a]n attacker must exercise reasonable precautions to minimize incidental or collateral injury to the civilian population or damage to civilian objects, consistent with mission accomplishment and allowable risk to the attacking forces." [FN81]

This "reasonable care" standard, based on practicalities of particular circumstances, has been expounded in international case law, [FN82] commentaries, [FN83] and scholarly works. [FN84] It also reflects common state practice, [FN85] since one would expect a rule to rarely be followed if it were too costly or put a party's military operations in too much jeopardy. As one British **\*1389** military-legal scholar puts it: "Target verification requires reasonable care to be exercised. The precise degree of care required depends on the circumstances . . ." [FN86] Even the International Committee of the Red Cross Commentary on Protocol I acknowledges that the

"do everything feasible" requirement in targeting ultimately reduces to an obligation of "common sense and good faith." [FN87]

While it is impossible to pin down a precise formula for calculating reasonableness, factors such as time constraints, risks, technology, and resource costs emerge over time as key considerations in the legal analysis. [FN88] Those factors all bear on one's ability to prosecute the war effectively and achieve victory at acceptable expense. Targeting is then generally viewed from two sides of the same reasonableness coin: Did a belligerent exercise sufficient effort to discern the identity of targets and plan the attack in a way designed to reduce incidental injury to civilians? And was there more that the belligerent could have done to verify the identity of the target and reduce collateral damage?

Time constraints, risks, technology, and resource costs are, among other factors, often key to this analysis because the law of war recognizes that although belligerents could almost always take further precautions, they cannot be expected to disregard their own survival and ability to combat effectively in the short and long term. [FN89] The pace of events and the need to take decisive actions quickly may limit the care belligerents can exercise while still fighting successfully. Warfare is always dangerous for the belligerents, and soldiers constantly internalize certain hazards to themselves; the law of war obligates them to take dangers to civilians into account, but it does not require them to ignore their own security. Were additional intelligence or the use of more precise weapons cost-free, it would be natural to expect belligerents to do more to confirm the identity of targets and calibrate their attacks; but information and precision come with prices measured in personnel, dollars, and other scarce resources that good sense and strategic logic demand be husbanded in warfare.

A widely cited application of this reasonableness approach to targeting is the al Firdos bunker incident during the 1991 Persian Gulf War. During that conflict, American military planners identified this Baghdad complex as an Iraqi military command and control center. Unknown to coalition planners, however, Iraqi civilians were apparently inhabiting the upper levels as sleeping quarters. Coalition forces bombed the bunker, allegedly resulting in several hundred civilian casualties. [FN90] Could coalition forces have waited longer and sought additional information about the nature of these building complexes? Or used more precise weaponry and tactics for destroying what were believed to be military command nodes? Of course, but only at greater risks to themselves. This action has generally been deemed in accordance with the law of war because the attackers acted in good faith based upon information reasonably available at the time of the attack. [FN91]

In such tragic cases, debates will rage about whether military forces exercised reasonable care. And, as I explain below, the lack of determinative precision is one significant weakness that needs to be considered in importing targeting law to a detention context. [FN92]

Nonetheless, the reasonable care rule in targeting makes good sense for three reasons: (1) It pragmatically balances military necessity with humanitarian interests; (2) it helps align distribution of legal responsibility with moral culpability; and (3) it combines with companion rules to reinforce incentives for parties to comply with the law and protect civilians.

1. Military Effectiveness.--First, the law of targeting has developed to confront the problem that in the conduct of warfare, attackers invariably face situations in which imperfect information precludes discrimination between military and civilian objects with near-perfect accuracy; targeting law recognizes that in the course of attacking legitimate military targets, civilians and civilian objects will inevitably be harmed, too. Especially, though not only, in the heat of battle, and as a result of incomplete information or the "fog of war," targets will be misidentified. Civilian targets will be mistaken for military ones and destroyed. In the course of attacking legitimate military targets, civilian objects and persons will often get caught in the crossfire. Error is inevitable in war, and the law recognizes that. It seeks to regulate it, not eliminate it.

\*1391 Imposing too strict a standard might constrain military decisionmaking, which requires difficult and often quick judgments, to the point where a party could no longer achieve success. Waiting until a target's identity could be verified with near certainty (imagine a beyond reasonable doubt rule for targeting) would expose an attacking party to unacceptable risks and delays, and would mean refraining from many attacks where such verification is impractical. [FN93] The law of war obligates an attacker to internalize some of the likely injury to civilians,

but in practice no party is likely to do so to the point that it erodes its own political support to prosecute the war. [FN94]

2. Moral Culpability.--A second reason, besides the necessities of war's messiness and complexity, that the law of war has evolved around a reasonable care standard is that an attacker's ability to discriminate accurately between military and civilian objects and to limit collateral damage is a product of both parties' actions: the steps the attacker takes to verify targets and select means designed to reduce civilian suffering, and the defender's actions to segregate and demark military from civilian objects. [FN95] In that regard, both parties share moral responsibility for incidental injury to civilians, their respective shares depending on the good faith steps they take to minimize the likelihood of that injury. An attacker can reduce the chances of misidentifying a target or causing collateral damage by, for example, getting closer to it before firing or striking during the daytime, when it is easier to identify targets. But the defender, in deciding how and where to situate its military forces or arms, can also increase or decrease the likelihood of mistaken identity or collateral damage. [FN96] Storing weapons in crowded areas or disguising ammunition depots as food supplies, for example, puts crowds and food supplies at risk.

\*1392 A reasonableness approach to precautionary obligations acknowledges that mistaken identification of targets and collateral damage result from both parties' actions. Reasonableness is measured not just in terms of efforts to verify military targets and strike them with discriminate precision, but also in terms of adjustment to enemy behavior designed to keep civilians and civilian property in or out of harm's way. Facing intense criticism over the human suffering resulting from its attack on Lebanon, including widespread charges that it was violating its international legal obligations to exercise care in distinguishing combatants from civilians, [FN97] the Israeli government and its supporters stressed this division of responsibility argument in support of its 2006 counter-Hezbollah operations. They argued that Israel's conduct in bombing targets within urban Lebanese areas was reasonable in light of Hezbollah's practice of hiding and arming itself among civilians there. [FN98] Putting aside the debate over whether some of Israel's military responses targeted civilians or exacted a civilian toll disproportionate to Hezbollah's military threat, Hezbollah's decision to launch attacks from civilian neighborhoods contributed foreseeably to at least some Lebanese civilian injuries, and Israel's actions should be evaluated with that in mind. [FN99] Absolving Hezbollah of any responsibility for those injuries (for which Israel paid an immense diplomatic price) risks further incentivizing tactics that put civilians in harm's way.

3. The Adversary's Incentives.--This last point helps show a third, related reason why the reasonableness approach to targeting makes sense: It diminishes incentives for the other side to put civilians deliberately in harm's way. This notion is best understood in terms of the complementary rule that while the attacker must take reasonable steps to discriminate between military and civilian objects, the defender must take reasonable steps to make that discrimination possible. Article 58 of \*1393 Protocol I, for example, spells out the duty parties have to "[a]void locating military objectives within or near densely populated areas." [FN100] An absolute duty on an attacker to avoid civilian injury--one that ignores the steps the defender takes or does not take to improve the safety of noncombatants--would tempt the defender to place its military resources and personnel amid civilian crowds, or "human shields." Participants at the 1923 Hague Rules of Air Warfare Draft Conference wrestled unsuccessfully with a form of this dilemma: They wanted to immunize cities from aerial bombardment, but if they did so by completely prohibiting their attack they would create an incentive for states to move strategically valuable assets (such as military industries) into densely populated areas for protection, thereby inviting attacks on the very cities they sought to shelter. [FN101]

A reasonable care rule that recognizes reciprocal duties to keep civilians out of harm's way mitigates the defender's incentives to breach its own duty to protect civilians. A breach of the defender's duty to separate its military forces from civilians does not excuse the attacker from his discrimination and proportionality responsibilities, but it factors into assessment of whether the attacker's efforts are reasonable under the circumstances. [FN102]

For those hoping that the law of war would regulate actions with great clarity and predictability, the reasonable care rule is disquieting. It vests belligerents with considerable discretion in multifaceted balancing and legitimizes even large-scale injury to innocent civilians

under certain circumstances. But rather than imposing unworkable constraints, it obliges belligerents to internalize injuries to innocent civilians in ways that balance competing interests and account for the realities of warfare.

**\*1394 C. Detention As a Form of Targeting**

In sum, targeting rules have evolved to a reasonable care approach, recognizing that an attacker cannot be expected to eliminate inadvertent civilian injury while battling aggressively without reasonable reciprocal efforts by the defender to keep civilians out of harm's way. No such similar rule is generally recognized to govern detention. The law of war probably has little to say directly on point to the standard of certainty for detention because throughout much of modern military history the problem was unlikely to arise in its current form. [FN103] Taking as an investigative assumption that the criminal conviction standard is inapplicable--either because the inquiry addresses supposed status as a member of an enemy organization with which the United States is at war rather than criminal guilt or innocence, or because the magnitude of the threat requires some other kind of preventive detention regime--how careful must a state like the United States be in classifying someone as an "enemy combatant" or similar category subject to long-term **detention**?

**Targeting** law provides a useful analytical starting point for filling this gap. After all, the problem of differentiating enemy terrorist fighters from among the surrounding civilian population is really a problem of targeting: Is the individual an enemy fighter (i.e., a military target) and therefore subject to attack with force (i.e., capture and detention)? [FN104] Targeting law has evolved to deal with the problem that, in order to neutralize enemy fighting forces, military planners and operators must routinely use military force--including powerful lethal force--against individuals and targets believed to be affiliated with the enemy. Depending on the circumstances, these planners and operators may lack critical information and time to verify their targets, and may accordingly harbor significant doubt as to the identities of those they are about to attack. The law of war allows for some rate of error--sometimes a high rate of error--so long as the party acts in good faith reliance on reasonable efforts to verify military targets and contain attacks to them. In practice this means that many civilians and civilian objects are attacked by mistake, either because they are erroneously thought to be enemy forces or because they get caught in the crossfire directed at true military targets.

Erroneous detentions of innocent civilians mistaken for terrorists might then be thought of as the common tragedy in warfare of mistaking **\*1395** a civilian object for a military one. [FN105] Or in some cases erroneous detentions might be thought of as a form of collateral damage, in that they result from overbroad detention policies that sweep up bystanders alongside terrorists (though this logic has dangerous implications [FN106]). Not only does targeting law provide a useful analogical framework for thinking about detention accuracy and errors, but it might even be seen as encompassing detention decisions, such that targeting rules should govern directly.

Indeed, detention decisions arguably ought to require a lower standard of certainty than many conventional military targeting decisions, since errors in the detention context are generally less severe than in the targeting context, where the cost of error is often death. [FN107] Note that because enemy fighters are legitimate military targets, sometimes those whom the U.S. government captures and detains could, as a legal matter, perhaps be attacked and killed instead (subject, however, to other law of war rules, such as the proportionality rule and the prohibition against killing those who have surrendered). [FN108] According to the U.S. Naval Handbook, military forces "must make an honest determination as to whether a particular civilian is or is not subject to deliberate attack based on the person's behavior, location and attire, and other information **\*1396** available at the time." [FN109] So, for example, in June 2005 U.S. military forces bombed Abu Musab al Zaraqawi, the regional al Qaida leader in Iraq. [FN110] And many detainees at Guantanamo were, in fact, first shot and wounded on the battlefields of Afghanistan.

Detention errors are also generally reversible, whereas targeting errors are not; those mistakenly detained can be released, but those mistakenly bombed cannot be brought back to life. The reversibility of detention decisions again arguably points toward a lower standard of certainty for **detention** than **targeting**. [FN111]

In the fight against transnational terrorist networks, however, these claims about the low stakes and reversibility of detention errors may not hold true because the costs of erroneous detention have escalated dramatically. The likely duration of the conflict with al Qaida means that detentions could be indefinite or lifelong. [FN112] The specter of aggressive interrogation also raises considerably the stakes of errors, though it is hard to compare the harms of being erroneously exposed over time to tough interrogation tactics or even illegal abuses with other injuries that result from military force.

In any event, the same three reasons why the reasonable care rule makes sense in the targeting context could be used to justify, at least as a starting point, a similar approach for detention decisions.

1. Military Effectiveness Arguments.--First, a reasonable care standard would balance military necessity with humanitarian interests, in this case balancing the need to incapacitate suspected enemy fighters with liberty values. Just as the law of war allows an attacking party to aim attacks broadly enough to destroy or disable the enemy's forces even if it means incidentally injuring some civilians and civilian property, perhaps our military and intelligence agencies should have similar leeway to fight enemy terrorist networks effectively, including the power to sweep and detain broadly enough to ensure that no problematic number or proportion of terrorists remains free. Overbroad detentions are arguably **\*1397** militarily counterproductive, fomenting resentment among local populations. [FN113] But the same can be said for overbroad bombardment, and in the latter case militaries and their political leaderships are traditionally granted wide latitude, subject to international legal bounds, to calibrate what they see as the right balance.

The Bush Administration essentially imported the value judgment underlying targeting law in arguing in Hamdi that executive branch decisions about whom to detain are fundamentally identical to other battlefield judgments: "Capturing and detaining enemy combatants is a quintessential and necessary aspect of the use of military force, not to mention a customary and necessary means of defeating the enemy." [FN114] It continued:

A commander's wartime determination that an individual is an enemy combatant is a quintessentially military judgment . . . Especially in the course of hostilities, the military through its operations and intelligence-gathering has an unmatched vantage point from which to learn about the enemy and make judgments as to whether those seized during a conflict are friend or foe. [FN115]

While the debate in Hamdi centered on procedural mechanisms for verifying the classification of detainees as enemy fighters or innocent civilians and the institutional competence of courts to weigh in, this procedural and institutional debate masks a deeper disagreement about how much error is tolerable. Note the similarity between the government's characterization of detention decisions and how the law of war treats battlefield targeting decisions. [FN116]

In other words, one reason we might import a targeting-like reasonable care rule to the detention context is that, as with military targets, we accept some erroneous detention of civilians as an evil necessary to equip military forces with the ability to rid the battlefield of hostile fighters. That is, we might make a similar value calculus that in particular circumstances the concern with erroneously depriving some innocents of their liberty must yield to the exigencies of counterterrorism operations, just as sometimes the concern with killing civilians or destroying their property must so yield.

**\*1398** One could take this a step further and say that, as with attacking other military targets, the degree of required certainty in identification for detaining an individual should be a function of the specific threat posed by the particular, suspected terrorist. Under a proportionality analysis, military planners would be more justified in bombing a strategically significant target--say, a suspected nuclear-armed missile launcher--amid doubts about the collateral damage likely to ensue than they would be in bombing a less significant target--say, a building suspected of housing only spare parts for military transport vehicles--amid comparable doubts. Perhaps, similarly, the level of doubt the law accommodates in detaining a suspected terrorist should vary with the intensity of the threat that a particular individual is believed to pose. [FN117] We might, for example, want to allow greater doubt in detaining an al Qaida member suspected to be trained in chemical and biological weapon production than someone trained merely in the use of an AK-47. Or one could add to this case-by-case analysis the

expected value of intelligence to be gained through interrogation: A suspected mastermind planner would be expected to yield more valuable information than, say, a Taliban foot soldier, so perhaps the former should be subject to detention under a thicker cloud of doubt than the latter. [FN118]

In practice, however, such individualized analysis would usually be unworkable. With the exception of senior members of terrorist networks or terrorists armed with weapons of mass destruction, it would be difficult to assess suspected terrorists' particular threat intensity or intelligence value. [FN119] Terrorists do not lend themselves to assessable, stratified danger levels the way that some other military targets do, and the specific threat level or intelligence value of a particular individual may often become **\*1399** apparent only long after detention has begun and interrogations yield information. In the case of terrorist leaders or those with weapons of mass destruction, where the threat level can be assessed as extremely high, the information deficit that lies at the heart of the problem--Are we sure we have the right guy?--will probably be minimal anyway.

2. Moral Arguments.--Besides helping to balance liberty interests with the military necessities of fighting a war, a reasonable care approach to detention would also help align legal and moral responsibility, paralleling targeting law. As in the targeting context, the ability to discriminate accurately between military and civilian personnel will depend on both parties' actions, a phenomenon that al Qaida seeks to exploit by deliberately blurring the distinction between its fighters and civilians. "The concealed combatant certainly has an advantage over the uniformed soldier, but the advantage comes at a price that others must pay. It inevitably leads to increased casualties among the civilian population . . ." [FN120] In other words, concealment of one's combatant identity or membership in an enemy force externalizes some of the risk of being targeted to innocent civilians. A reasonable care approach akin to targeting could impose some legal responsibility for erroneous detention on those who make accurate discrimination difficult in the first place.

Although the Bush Administration's screening processes and disinclination toward judicial review have been widely criticized, nowhere does the public debate explore what share of moral responsibility al Qaida should bear for erroneous detentions. [FN121] Al Qaida's practice of intermingling fighters among civilians--indeed, throughout societies in cells--is widely cited as contributing to civilian deaths and injuries in Afghanistan and other places where U.S. and coalition military forces have launched military strikes, including bombardment. [FN122] But rarely, if ever, does anyone assign some blame to al Qaida for erroneous detentions, even though erroneous bombardment and detention of civilians thought to be terrorists are both due in part to al Qaida's refusal (for obvious reasons) to designate clearly its personnel. [FN123] This anomaly is curious because **\*1400** many of those who criticize U.S. government screening processes as unilaterally underprotective of innocents do morally condemn, for example, regimes that use civilian "human shields" to protect military sites from attacks or that refuse to differentiate their soldiers from civilians. [FN124]

If a defender who deliberately mixes civilian and military personnel and assets bears some responsibility for resulting injury to those civilian persons and property, so it seems should a defender who blurs distinctions between its armed forces and local civilians by refusing to abide by the international legal requirements to clearly identify its forces as such. Paralleling obligations of a defender to avoid commingling military objects and civilians is a longstanding legal obligation to distinguish one's soldiers from noncombatants. The obligations on a military force to distinguish its fighting force from civilians are reflected in the Geneva Conventions, which reserve prisoner of war status for "regular armed forces" or others who comply with requirements to, among other things, wear distinctive insignia and carry their weapons openly. [FN125] These requirements go directly to the duty to distinguish oneself as a combatant: Distinctive insignia like military uniforms and openly carrying weapons mark military personnel as combatants, facilitating more precise target discrimination by other belligerents.

If al Qaida and its affiliates operate without distinctive insignia or easily visible weapons--that is, if they refuse to identify themselves as combatants and instead seek to blend in with local populations--then perhaps they should share responsibility for erroneous detentions that arise from the very blurring of combatants and noncombatants that they deliberately create. A



reasonable care approach to detention decisions that recognizes greater allowable error when the adversary deliberately complicates identification helps to shift responsibility appropriately.

**\*1401** 3. Incentives Arguments.--With these reciprocal duties to protect civilians in mind, a reasonable care approach to detention could reinforce incentives to comply with the law of war and to avoid putting innocents in greater danger. Assigning all legal responsibility for erroneous detentions to the detaining state arguably increases opposing parties' incentives to blend military forces in with civilians. [FN126]

The obligation to mark one's soldiers as such requires those soldiers to assume some greater risk of attack, but it also reduces the risk to civilians. As a disincentive to breach these duties to distinguish soldiers from civilians, the law of war is often interpreted to deny prisoner of war privileges and protections to those fighters who do breach. [FN127] That is one reason the United States refused to ratify Protocol I, which would provide prisoner of war privileges to irregular forces and guerrilla fighters who, like many terrorists, often do not distinguish themselves from civilians. As this U.S. government position was explained in 1987:

Protocol I is fundamentally and irreconcilably flawed. It contains provisions that would undermine humanitarian law and endanger civilians in war . . . . [Its] provision[s] would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. [FN128]

Though it is unrealistic to suppose that a clearer and more robust legal framework, no matter what it says, would significantly modulate al Qaida members' behavior, a reasonable care approach to detention that shifted some legal responsibility for erroneous detentions to those parties who hide their military forces among local civilian populations might increase the political costs to terrorist networks (or at least those forces allied with them) that reject a duty to distinguish military personnel from **\*1402** civilians. A reasonable care approach similar to that of targeting--an approach that recognizes that the reasonableness of a state's screening practices depends in part on the actions by the other side--might also shape public opinion (both globally and locally) toward counterterrorism operations in ways that relieve states from some condemnation for erroneous detentions, and therefore reduce terrorist behavior that is likely to induce such errors.

Such incentive arguments rely critically on the assumption that the legal regime affects the cost-benefit calculus of terrorists. [FN129] This is a questionable assumption with respect to many state actors, let alone terrorist organizations, which usually seek to overturn rather than comply with legal order. But to the extent that legal rules shape public expectations, they might have marginal but important effects on political pressures facing states combating terrorist networks--pressures that are explored in the following Part.

### III. Standards of Certainty for Detentions: Refining the Targeting Approach

Having analogized detention decisions to targeting and proposed targeting law as a possible approach for regulating detentions, this Part explores more thoroughly how such a regime would work and offers a resulting critique of Bush Administration policy and its reforms to date. Three key differences between **detention** and **targeting** emerge that require refinement of this approach or yield insights for how it should be applied. First, detention has a temporal dimension that targeting lacks; detention errors play out over time--and can be reversed. Second, some practical opportunities to resolve doubt in detention contexts do not exist in targeting; in detention contexts a state may be more capable of building and using adjudication mechanisms that generate highly accurate results without severely undermining security and military effectiveness. Finally, political factors and other nonlegal incentives are arrayed differently in the detention context than they are in targeting. As a result, targeting rules may be more effectively self-enforcing than would be similar detention rules. Each of these refinements offers a critique of existing U.S. government practice and ways to improve it.

At first blush, the "reasonable care" principles of targeting law may seem to justify Bush Administration detention policies and practices up to the recent Supreme Court decision in *Boumediene v. Bush*, which held that constitutional habeas corpus rights apply to detainees held

at Guantanamo. [FN130] This justification might especially be directed at Guantanamo, where, following the Supreme Court's June 2004 decision in Hamdi, [FN131] the Defense Department established formal tribunals to \*1403 reconfirm the combatant status of each detainee (or, one might say, reverify that each is a military target). [FN132] Three-officer tribunals were required to examine each detainee's case based on all reasonably available information, including information from U.S. military and intelligence agencies as well as from the detainee's home country. [FN133] The officer panels were instructed to base their determinations on a preponderance of evidence standard--a curious instruction because, as this paper argues, the law of war is not clear on this issue. [FN134] Several dozen of the nearly 600 Guantanamo detainees at that time were freed as a result of this revalidation process. The Defense Department also established and continues to conduct annual review board proceedings, akin to parole boards, again handled by three-officer tribunals reviewing all available information, that reassess the continuing threat posed by each detainee, which could presumably include a reassessment of the detainee's status as an enemy combatant (i.e., military target). [FN135] Neither process provides detainees access to lawyers (though detainees are assigned military officer "personal representatives" to help them present their cases [FN136]). These tribunals supplemented prior screening procedures near the point of capture in Afghanistan or elsewhere in the global battle against al Qaida. In the course of these review processes, military adjudicators are required to examine all information available from military and intelligence \*1404 sources, just as military commanders planning targeting operations would do. [FN137]

Congress implicitly endorsed these Guantanamo review procedures in limiting the scope of federal court jurisdiction to review them in the 2005 Detainee Treatment Act [FN138] and the 2006 Military Commissions Act. [FN139] In *Boumediene v. Bush*, however, the Supreme Court held that constitutional habeas corpus rights apply to Guantanamo detainees and that the CSRTs combined with statutorily restricted judicial review are inadequate substitutes for those rights. [FN140] As explained further below, the Court did not articulate clearly a set of substantive and procedural protections that would pass muster. [FN141]

Outside Guantanamo, the processes by which the Defense Department reviews detention decisions regarding individuals in U.S. military control are less formal, but seem--again, at first blush--to conform to a "reasonable care" judgment similar to that found in the targeting context. In Afghanistan, for example, panels of U.S. military officials review the initial decision that a detained individual is an enemy combatant. This review is based on all available and relevant information, and the determination is reassessed annually. [FN142]

Besides these military detention programs for enemy combatants, in September 2006, President Bush also publicly disclosed the existence of a CIA-run detention and interrogation program for "high-ranking" detainees, such as al Qaida masterminds Khalid Sheik Mohammed, Abu Zubaida, and Ramzi Bin al-Shibh. [FN143] But the government has confirmed few details of the program beyond its mere existence. In particular, no information is publicly available on how CIA detainees are selected and \*1405 screened, and through what procedural mechanisms their cases are reviewed.

Putting aside the opaque CIA program, how the U.S. military conducts its combatant-verification analysis at Guantanamo and elsewhere bears strong initial resemblance to the way it would conduct verification of targets. As Deputy Secretary of Defense Gordon England explained in announcing the establishment of the Combatant Status Review Tribunal Process: "[W]e'll look at all the data dealing with their classification as an enemy combatant, . . . [a]nd the standard . . . will be reasonableness. It will be what would a reasonable person conclude." [FN144] Compare this with the U.S. Defense Department's law of war analysis of its Gulf War air campaign, which states:

An attacker operating in the fog of war may make decisions that will lead to innocent civilians' death . . . . In reviewing an incident such as the attack of the [al Firdos bunker], the law of war recognizes the difficulty of decision making amid the confusion of war. Leaders and commanders necessarily have to make decisions on the basis of their assessment of the information reasonably available to them at the time, rather than what is determined in hindsight. [FN145]

Or compare it to the reservations to Protocol I taken by many European and other U.S. allies, which stress that targeters' tough judgments must be assessed on the basis of the information reasonably available to them at the time of the strike. [FN146]

\*1406 Superficially, the close resemblance of detainee review procedures to targeting practices seems to offer strong support for how the U.S. government currently handles detentions of suspected terrorist network members. This approach arguably balances military interests, including the need to keep dangerous fighters off the global battlefield and reluctance to bog down scarce military resources in litigation, with humanitarian interests in avoiding erroneous detentions of civilians. If this were about attacking the individuals in custody from a distance rather than about detaining them, the confidence level these procedures achieved would often justify the attack.

Probing deeper, however, several important differences between targeting and detention emerge. The law should account for these differences. Exploring each key difference between targeting and detention casts doubt on whether Bush Administration practices to date would satisfy a properly constituted reasonableness standard. It also yields insights for how the law should develop and how the reasonableness approach of targeting might be improved to better balance military and humanitarian (liberty) interests in the detention context.

#### A. The Temporal Dimension of Detention

A key difference between **detention** and **targeting** relates to the instantaneity and irreversibility of most military targeting: Whereas targeting decisions are often momentary, detention decisions play out over time and can be undone. There is a temporal dimension to detention that does not exist in targeting.

1. Detention Injuries over Time.--As detentions move through time, the military benefits to the detaining power of keeping an enemy fighter off the battlefield and the injury to an erroneously detained civilian both \*1407 continue to accrue. But available information about a detained individual may change over time. Interrogation of detainees thought to be enemy fighters may yield identifying or alibi information about them or others in custody, and detaining authorities may otherwise learn new intelligence information about those in their control. In other words, the ignorance surrounding detentions may dissipate as time elapses, while injury accumulates. [FN147]

This difference from targeting might seem to distinguish the nature of the problems so fundamentally as to render the targeting analogy inapposite. But adding a time dimension to a targeting-type reasonable care analysis rescues the analogy. Detention should be thought of not as a single decision--hold or release--but as an initial decision to detain and then a perpetual series of decisions to continue to hold. At any given time, the continued detention of an individual would reflect the judgment by the detaining power that the individual was--and remains, based on information available at any given time-- an enemy fighter. As time passes, the detaining power has a continuing responsibility to reevaluate periodically an enemy combatant determination.

But assuming that the standard of certainty remains reasonable due care played out over time, what level of accuracy would a detainee reasonably be due? And how, if at all, would that expected level of certainty change over time? One approach would be to say that the standard of certainty remains constant, and as new information comes to light or the picture of a detained individual's true deeds, affiliations, and intentions becomes clearer, the detaining power should reexamine under the same standard its confidence in its combatant status determination. Under the targeting analogy, this would be akin to a series of airstrike sorties against what is believed to be a military command post. After attacking the site on one day, the attacker could try again the following day, having taken care to assess any additional information about the target it acquired in the meantime, such as new satellite images. The same substantive rule is essentially applied again and again, but as information improves the attacker might be obligated to avoid the target due to diminished confidence in its military character. In the same way, individual detentions could be subjected to periodic review to validate the underlying justification: that the individual is believed to be a member of the enemy fighting force.

In Guantanamo and Afghanistan, the U.S. military review processes do account for the temporal dimension of detention decisions to some extent, repeating periodically the combatant identification analysis. Each detainee's case is reassessed at least once per year to determine whether his detention remains justified. [FN148] During 2005, for example, about 460 \*1408 Guantanamo detainee cases were reviewed and fourteen more detainees (not counting the dozens already released) were declared eligible for release because the government no longer believed they posed a significant threat. [FN149] In other words, judgment based on what the government argues is reasonably available information is exercised not only initially but also periodically thereafter.

Such repetitious review is one way to deal with the indefinite--though almost certainly long-term--nature of the conflict with al Qaida. [FN150] The corresponding likelihood of uncertain but likely long duration of individual suspects' detention is one of the most troubling aspects for those skeptical or critical of the U.S. government's approach to counterterrorism, [FN151] and periodic review helps address those concerns. [FN152]

2. Demand an Escalating Standard of Certainty.--The experience at Guantanamo and elsewhere, however, demonstrates that the temporal dimension interplays differently with detention than with targeting. Several things happen the longer an individual remains detained. First, the humanitarian costs--to the detained individual, his family, and his community--rise. Even a short-term detention, of course, can inflict devastating physical and mental trauma; sadly, though, widespread trauma is inevitable \*1409 during wartime. Detention involves the loss of autonomy, privacy, and time, as well as the psychological strain of submission to military forces and uncertainty about one's fate. [FN153] In one of the most sharply critical federal court rulings against the U.S. government in a war on terrorism case to date, District Court Judge Joyce Hens Green remarked:

[T]he government has conceded that the war could last several generations, thereby making it possible, if not likely, that "enemy combatants" will be subject to terms of life imprisonment at Guantanamo Bay . . . . [T]he uncertainty of whether the war on terror--and thus the period of incarceration--will last a lifetime may be even worse than if the detainees had been tried, convicted, and definitively sentenced to a fixed term. [FN154]

As time elapses, not only do humanitarian costs of erroneous detention mount, but we drift farther from the type of military decisionmaking that typically warrants deference under the law of war in order to protect military effectiveness (and in cases like those at Guantanamo, we move geographically farther from the battlefield, too). At the moment of capture, military necessities dominate: Amid imperfect information, engaged forces need latitude to combat and destroy or capture those they believe are threatening them. The criminal justice standard of "beyond reasonable doubt" is sometimes described as beyond doubt that would make one hesitate. [FN155] But a soldier in the field often cannot afford to hesitate without putting himself and those around him in mortal danger.

Yet information about a detained individual should generally improve as time elapses, [FN156] and as it does we can also reasonably expect more careful review without hampering military operations. In Hamdi, \*1410 Justice O'Connor expressly rejected the government's position that burdensome procedural and independent review requirements would hamper military operations and decisionmaking once a detainee was removed from the immediate combat environment, [FN157] an observation that turns in part on temporal proximity to combat. The law of war permits military decisionmakers substantial leeway to balance competing demands--humanitarian, political, tactical--without second-guessing decisions that seem reasonable at the time because otherwise, effective military operations would grind to a halt. But in the case of long-term detention, combat operations with respect to a particular individual have halted. This suggests that at least some of the military necessities that weigh against humanitarian protection at the initial moment of capture decline over time. [FN158]

As time passes, then, the balance between humanitarian costs and military necessities that the law of war seeks to mediate tips toward the humanitarian interests. The care due in screening true terrorists from false suspects would rise accordingly. This requires a fluid analysis, adjusting the required certitude of detainees' identities as combatants or noncombatants to justify detention, just as one would adjust the required certitude to justify striking military targets, depending on the circumstances.

The legal framework governing detention of terrorist network members should account for this shifting weight by gradually increasing the level of confidence necessary to continue to hold someone. The reasonableness standard of certainty to be exercised in screening terrorists from nonterrorists should rise to account for changes in the military-necessity-versus-liberty balance. The fluid balancing logic could be taken too far; constantly tailoring new combatant determination mechanisms and standards to fit the many different circumstances of the fight against al Qaida would not be manageable. But, for example, bifurcating the system of review of enemy combatant detention decisions along the temporal dimension would at least better balance military and humanitarian interests. Initial detention decisions, including those made in a combat zone, could be conducted as they are now, using a sort of "best judgment" or "preponderance of evidence" analysis based on available intelligence and military reports. Then, after some period of time--and there will be many views as to what is an appropriate duration, so let us say for purposes\***1411** of argument six months [FN159]--a substantially stricter review would be conducted. This latter review would be designed to minimize further the likelihood of erroneous continued detentions by employing a high standard of adjudication, perhaps "clear and convincing" or even something approaching "beyond reasonable doubt."

Contrast the different approaches that responsible militaries take in verifying targets in the immediate heat of battle versus in the planning of campaigns ahead of time. As Michael Schmitt notes, "Obviously, the more time-sensitive a target, the less the opportunity to [assess] the target or plan the attack, and the fewer the attack options (systems, tactics, etc.) that will be available." [FN160] A soldier or pilot who comes under fire will fire back without elaborate and time-consuming deliberations. On the other hand, military planners plotting attacks in advance will and must conduct more rigorous analysis because they can do so without subjecting themselves to undue risks. For illustration, consider this description by the International Criminal Court prosecutor of British targeting rules and procedures, in the context of dismissing complaints of indiscriminate attacks in Iraq:

[L]ists of potential targets were identified in advance; commanders had legal advice available to them at all times and were aware of the need to comply with international humanitarian law, including the principles of proportionality; detailed computer modeling was used in assessing targets; political, legal and military oversight was established for target approval; and real-time targeting information, including collateral damage assessment, was passed back to headquarters. [FN161]

Such elaborate precautions for checking and rechecking are possible only when belligerents have the luxury of time and resources to conduct them. In the detention context, it is similarly more reasonable to expect highly exacting scrutiny of detention cases as time passes. We can expect both better information about the suspected terrorist through interrogation and investigation, and mitigation of combat or operational exigencies.

In other words, context, including the available time for accurately and precisely attacking suspected military objects, helps determine the appropriate, or "reasonable," expected level of certainty in targeting law, and it can do the same in detention law. The law and practice of military targeting demands that belligerents, when they have the luxury of time, adjust their procedures for verifying the nature of possible targets. Detention\***1412** law should incorporate the temporal dimension in this way as well.

Whatever standard of certainty applies initially, subsequent reviews of individual detentions can serve as corrective mechanisms for prior false positives. Repetitious review resembles a series of targeting decisions repeated over time. [FN162] And, as I also mentioned earlier, a key difference between detention and many forms of military targeting is that detention errors can be undone. [FN163] The availability of corrective mechanisms, however, means that the standards governing a series of decisions whether to continue to detain an individual might be thought of in combination rather than in isolation, and this creates additional opportunities for using standards of certainty to balance humanitarian and security interests. A moment ago I discussed a system in which initial detention decisions would require a preponderance of evidence substantiating enemy affiliation followed six months later by a stricter clear-and-convincing review. Suppose now that the later standard were raised to something like "beyond doubt." Then it might be reasonable to lower the initial decisionmaking standard, maybe to a "some evidence" standard, because the overall balance of humanitarian and security interests

across time could be held in place. The better corrective systems operate, the more leeway we might allow the state in its initial decisionmaking. [FN164] On the other hand, if experience indicated that later review procedures were ineffective at correcting erroneous detentions, a stricter initial review would be warranted to remedy the imbalance.

The key point is not that the temporal dimension of detention dictates a particular standard of certainty. Rather, if the logic underlying targeting rules is to be applied seriously to detention, time factors into the reasonableness inquiry in a number of ways. Most obviously, security and military burdens of more exacting review decline, while humanitarian costs accumulate and at some point may rise substantially. The law ought to require repetitious review to recalibrate this balance. An escalating standard of certainty is one way to do so, intended generally toward achieving a balance at any given moment. Or, the multiple reviews and opportunities for correction can be viewed systemically across time, intended to achieve a balance across that same timeframe.

#### \*1413 B. Alternative Adjudication Mechanisms

The first critique relates to the second: The reasonableness of adjudications labeling an individual a terrorist network member or an innocent civilian should take into account whether more accurate alternative adjudication mechanisms are available.

1. Procedural Versus Substantive Standards.--In the targeting context, the law of war leaves decisionmaking to the reasonable judgment of military operators not only because a rule of reasonableness needs to balance military effectiveness with humanitarian interests, but also because the operators themselves are generally best positioned to make targeting judgments through unilateral analysis of available data. During military combat, many targeting decisions must be made on the spot or under tight time constraints. Opportunities to communicate with the prospective target without ruining the element of surprise or putting oneself in mortal danger arise rarely. By contrast, in nonmilitary detention contexts--such as criminal prosecution or civil confinement--independent (e.g., judicial) scrutiny coupled with adversarial process is considered more likely to generate not just fairer but also more accurate results. [FN165] In thinking about the appropriate standard of certainty to be exercised, it is important to consider available and practical mechanisms for applying it. Conversely, consideration of available mechanisms and the degree of certainty they may be capable of generating should inform the analysis of viable standards of certainty.

Here the procedural and substantive aspects of the issue intertwine. Does it make sense, one might ask, to consider establishing additional procedural protections for detention decisions without first considering what standard of certainty those protections are designed to enforce? Many legal analyses of the fight against terrorism and the application of international or constitutional law have tended to focus on the procedural\*1414 dynamics rather than take on the underlying substantive standard-of-certainty question. [FN166]

2. The Need for Comparative Analysis.--The substantive standard of certainty issue, however, cannot be completely divorced analytically from the procedural issues, because the substantive reasonableness of decisionmaking depends in part on whether alternative decisionmaking schemes are available that better balance military and humanitarian (including liberty) interests. This point is similar to one made by Justice O'Connor in *Hamdi*, though there it was part of a classic procedural due process analysis. In weighing what procedural guarantees were due a citizen-detainee, she noted:

"[T]he risk of an erroneous deprivation" of a detainee's liberty interest is unacceptably high under the Government's proposed rule, while some of the "additional or substitute procedural safeguards" suggested by the District Court are unwarranted in light of their limited "probable value" and the burdens they may impose on the military in such cases. [FN167]

The Court similarly noted in *Boumediene*:

Although we hold that the [Detainee Treatment Act] is not an adequate and effective substitute for habeas corpus, it does not follow that a habeas corpus court may disregard the dangers the detention in these cases was intended to prevent . . . . Certain accommodations can be made to reduce the burden habeas \*1415 corpus proceedings will place on the military without impermissibly diluting the protections of the writ. [FN168]

In other words, the level of error we consider morally and practically acceptable depends in part on whether, consistent with other priorities, more accurate results are even possible, and this requires looking at alternative ways to adjudicate individual cases. [FN169]

Of course, to say that a scheme "better" balances competing interests presumes some value judgment of their relative importance. In the criminal law context, for example, American law protects individual liberty through strict rules of law enforcement and guaranteed rights to procedural safeguards. These mechanisms are designed not only to get at the truth of one's suspected guilt but also to minimize the likelihood of "false positives" while constraining state powers prone to abuse. [FN170] Blackstone's maxim that it is better to set free ten guilty criminals than to convict one innocent person reflects a Western legal tradition premised on the intolerability of mistaken conviction. [FN171] But the dangers of "false negatives" may be much higher in fighting al Qaida and the Taliban than in the criminal justice context, especially when U.S. forces remain actively engaged in combat and when even a small number of terrorists are capable of massive-scale attacks. The U.S. government has publicly highlighted the risks that the existing review processes create of erroneously freeing dangerous fighters who hoodwinked reviewers, noting that several dozen released Guantanamo detainees are strongly believed to have gone back to fighting the United States and its coalition partners. [FN172] Such risks are valid military considerations to weigh in setting the right kind of review. But harmonizing these review processes with the targeting law approach also requires balancing risks of erroneously freeing fighters against risks of erroneously detaining nonfighters.

**\*1416** Let us ask the question differently, then, and from a perspective initially generous to security interests: Consistent with whatever level of assurance that seems appropriate from a security standpoint that terrorists are not inadvertently released, could the state establish procedural protections-- such as a right to a hearing, represented by counsel, before a judicial magistrate--that would be expected to generate more accurate screening of true enemy fighters from erroneously held civilians? If the answer is yes, then the next question is at what cost: Is it possible to provide such procedural protections without weighing down U.S. military forces and other counterterrorism agencies with burdens that interfere with their other missions? Would such procedures endanger U.S. forces, such as by disclosing sensitive intelligence? Would the resource needs of such processes sap the military and undermine its effectiveness, or would it be practical to conduct these processes on a large scale? [FN173]

Recall that these are the types of questions demanded by targeting law, which requires that the attacker conduct a comparative analysis and choose the available means and method that minimize, consistent with certain other concerns, the likelihood of incidental injury to civilians. [FN174]

From a legal point of view, [an attacker] needs not only to assess what feasible precautions can be taken to minimize incidental loss, but also to make a comparison between different tactics or weapons so as to be able to choose the least damaging course of action compatible with military success. [FN175]

**\*1417** Or, put another way, "[t]he technology available to an attacker determines whether an action is feasible, reasonably expected, or apparent, as well as when choice is possible. In other words, belligerents bear different legal burdens of care determined by the precision assets they possess . . ." [FN176] In practice and interpretation, what we might call this "state of the art" principle, like the other requirements described above, allows the attacker to weigh costs to himself in selecting among his arsenal, to include weighing added operational burdens and perhaps, though more controversially, additional risk exposure to his own forces. But this means the reasonableness of decisionmaking must be judged in relation to whether greater certainty is possible through alternative decisionmaking mechanisms and at what cost.

As detention is to targeting, screening processes are to weapons for attacking targets. Just as a party attacking targets is obligated to choose weapons and methods likely to reduce unintended civilian injury as much as possible, so a party detaining combatants should be obligated to establish processes designed to reduce mistaken detentions as much as possible without undermining military success.

This encompasses two temporal aspects. First, with respect to individual detentions, as time and distance from the heat of battle increase, so should the rigor with which discrimination between combatants and noncombatants is conducted, because greater precision at relatively

low cost becomes reasonably possible. [FN177] This added thoroughness might entail additional procedural protections for suspected terrorists, since these accuracy-enhancing procedures become more practical as time elapses. [FN178] Second, with respect to detentions viewed collectively, as the state accrues experience and better knowledge of past errors and their causes, it is better positioned to adjust and improve procedures to reduce errors further.

In that regard, the answer to the central question of this Article--should the law incorporate a reasonable care standard, similar to the one used in targeting law, to govern detention of suspected terrorists?--may be less about the substantive standard to be applied than about what is reasonable in the context of ongoing military and intelligence operations against terrorist networks.

In contrast to initial detention decisions, it is especially in the arena of continuing, longer-term detention that U.S. government actions seem to come up short when measured against this comparative logic of the law of war. The military review processes at Guantanamo and elsewhere involve heavy efforts to compile and analyze available information to arrive **\*1418** at judgments as to an individual's status as a member of al Qaida or one of its allies. But the law of war in the targeting context judges the reasonableness of such efforts in relation to other available mechanisms, and this analysis does not appear to have taken place with rigor. The review processes at Guantanamo and elsewhere will be inadequate at least until they are compared to alternatives.

Again, the substantive and procedural aspects of this question merge. The law of targeting dictates that in exercising reasonable precautions, an attacker must choose the means and methods likely to reduce errors. [FN179] The reasonableness of the resulting errors turns in part on whether the attacker fairly accepted some costs to itself in choosing methods designed to reduce costs to innocent bystanders. In the detention context, one of those methods is to establish and use procedures for assessing an individual's identity, his affiliation with al Qaida, and his claims to the contrary. To the extent that the state could establish procedural safeguards believed likely to reduce erroneous detentions--such as providing detainees with a lawyer and an adversarial hearing [FN180]-the law of targeting would analogically demand that they be used unless the resulting costs and risks outweigh the extra humanitarian benefits.

3. The Weakness of Hamdi and Boumediene.--As noted earlier, Justice O'Connor went partway toward harnessing this analysis in Hamdi, though there it was done as part of a classic procedural due process analysis. In weighing what procedural guarantees were due a citizen-detainee, she weighed the supposed probative value of proposed procedural mechanisms against their burdens on military effectiveness. [FN181]

But Justice O'Connor's analysis failed to take the reasonableness inquiry far enough. Seen through the lens of targeting law, it is questionable whether the detention review processes that the U.S. government consequently adopted would continue to strike the right balance in the future, as circumstances evolve or as the government better understands the causes of past errors that might be alleviated through procedural improvements. Reasoning from targeting law can also help fill some of the procedural and substantive legal gaps that Boumediene leaves open.

Justice O'Connor's opinion suggested that due process (and remember that Hamdi involved a constitutional analysis, not a law of war analysis) for a U.S. citizen-detainee could be satisfied by the type of military tribunals authorized by U.S. Army regulations for determining the status of enemy detainees who assert prisoner-of-war status under the Geneva **\*1419** Convention. [FN182] These procedures are also the ones traditionally used by the military in making battlefield decisions as to whether captured individuals are combatants or civilians and to what legal status (for example, prisoner of war) each detained person is entitled. They include, among other protections: notification of a detainee's rights, a right to call witnesses who are reasonably available, and a right to address the tribunal, which is comprised of three officers and applies a preponderance of evidence standard. [FN183] The Bush Administration responded to Justice O'Connor's Hamdi opinion by adopting procedures for Guantanamo modeled closely on those battlefield tribunals. [FN184] Now that Boumediene has held that existing procedures at Guantanamo combined with limited judicial review pursuant to the Detainee Treatment Act and Military Commissions Act still fail to satisfy constitutional habeas corpus rights, [FN185] the question remains how to fill out the contours and details of proper review. [FN186] Once again,



it is beyond the scope of this Article to define exactly what the stricter review (not only the substantive standard of certainty or proof but also the procedural contours) should look like, because its terms would need to be analyzed empirically in light of their accuracy-enhancing effects and against their negative impact on military effectiveness. [FN187] But we now have an additional test for evaluating proposals. Applying targeting law, one limitation of Justice O'Connor's analysis and the government's response is the dubious comparative analysis of procedural mechanisms, specifically as applied to the context of an enemy terrorist organization. Why, for example, should we assume that military procedures designed primarily for state-versus-state warfare, as opposed to a different set of procedures, are well suited for conflict with transnational, decentralized organizations embedded within civilian populations?

A second limitation of Justice O'Connor's Hamdi analysis and the limited additional guidance of Boumediene, however, is that they represent \*1420 a single snapshot in time--an attempt to strike a universal balance of military and humanitarian interests applicable to all detainees at Guantanamo at any point in their detention. They do not, as yet, mandate enhanced procedural mechanisms as conditions allow, for example as time in detention passes and the security situation vis-à-vis al Qaida evolves. Nor, over time, do they incorporate new empirical information about what has worked effectively and what has not in making combatant determinations. Would the benefits of enhanced protection against detention of innocents outweigh the harm to military operations if the state held periodic formal hearings before a judicial magistrate? [FN188] How about with assistance of counsel? [FN189] Or instead of adversarial hearings, would such protections be enhanced more than military operations would be hampered by requiring an ex parte hearing before a judge, like the arrangement established by the Foreign Intelligence Surveillance Act for obtaining certain types of privacy-invasive warrants? [FN190] Targeting law demands that the reasonableness of judgments be assessed in terms of such available "state of the art" technological, or by analogy procedural, options for improving accuracy. In that regard U.S. government policy to date comes up short. The framework of targeting law can help guide further refinement of existing processes, whether administrative or through habeas review.

#### C. Enforcement Pressures and Incentive Structures

One might object to applying targeting law to detention on the grounds that targeting law frequently fails to meaningfully prevent human injury. First, in many eyes, even relatively responsible militaries \*1421 often do not exercise sufficient care; at the very least, targeting law's lack of determinacy may permit more than it constrains. Second, even when those responsible militaries do exercise care, many adversaries flagrantly violate their reciprocal duty to keep civilians out of harm's way; indeed, especially when militaries are most responsible do some adversaries see tremendous strategic advantage in hiding themselves among civilians. [FN191]

These problems are real. And even beyond these general difficulties with targeting law, several unique features of detention might exacerbate them were the rules applied in that context. But the experience of targeting law also offers policy lessons for mitigating these difficulties--lessons that can help shape the development of detention law. In particular, it illuminates the value of transparency in strengthening the enforcement of rules and enhancing the strategic benefits of abiding by them.

1. The Strategic and Political Context.--The law of war demands that parties launching military attacks internalize some of the expected costs to innocent civilians in their decisionmaking. [FN192] How much of those expected costs they must bear depends on the circumstances, hence the evolution of a reasonableness approach. But the law of war is only one constraint on military decisionmaking.

Some additional pressures push against civilian cost internalization, especially pressure to reduce risks to one's own troops. In an era of casualty sensitivity, military commanders and planners will be inclined to conduct military operations in ways that minimize dangers to their own troops, even if it means putting civilians in greater peril. [FN193] Waiting until a target's identity can be verified with near certainty would often expose an attacking party to unacceptable risks and delays, and would mean refraining from many attacks where such

verification is simply impractical. [FN194] The law of war as well as professional ethics in Western militaries obligate attackers to internalize some of the likely injury to civilians, but in practice no party is likely to do so to the point that it erodes its own political support to prosecute the war. [FN195]

That said, especially in the case of military operations by the United States and its allies, some strong political and military pressures often push in the same "humanizing" direction as the law of war. Domestic political pressure and international diplomatic pressure cause the American and other democratic states' militaries to exercise force carefully, \*1422 emphasizing the need to minimize injury inflicted on civilians. [FN196] Furthermore, in most armed conflicts the United States and its allies recognize winning the "hearts and minds" of local populations as a key to victory. This, too, causes military forces to internalize the costs of errors and civilian collateral damage.

Mistaken bombardment of civilians or large-scale collateral damage is also likely to be broadcast widely and immediately. Indeed, because injuries to civilians are politically costly to American and allied military operations, adversaries are likely to do everything they can to publicize mistakes. [FN197] And because errors are transparent to the public--at home and abroad--they can be measured and assessed by outside observers against the standards the law provides. All of this is not to say that American and allied forces always adequately avoid mistakes and collateral damage to satisfy critics. Often, though, they operate under tight rules of engagement designed to minimize the likelihood of incidental harm to civilians in order to satisfy internal ethical concerns and maintain support of home and coalition publics and sometimes even of communities local to a conflict. [FN198] In these ways, the reasonable care standard for targeting becomes somewhat self-enforcing. Political pressures and internal military ethics, reinforced by wide publicity of errors, inject likely harm to innocent civilians into responsible militaries' decision calculi. That may not be so, however, for detention.

Above I suggested that the fact that the stakes of erroneous detention are lower than the stakes of erroneous targeting arguably points in favor of a relatively lower standard of certainty for detention decisions. [FN199] But maybe, somewhat counterintuitively, it is precisely these lower stakes that render a targeting-like reasonable care approach unsatisfactory in the detention context. Because erroneous uses of detention power are generally (though not always) likely to have less injurious impact than erroneous targeting power, users may feel less inhibited in exercising it freely, especially since mistakes can be undone. Knowing that an erroneous detention can be corrected down the road without loss of life, military or intelligence decisionmakers may be less careful--perhaps much \*1423 less--in ordering someone detained than in ordering someone bombed. [FN200]

Equally important, whereas targeting is a public exercise, which tends to reinforce pressures in favor of a high standard of certainty, detention decisions as exercised by the U.S. government in the conflict against al Qaida and related terrorists are quite opaque to public scrutiny. [FN201] Mistaken detention decisions may never come to light at all, and to the extent that detention decisions are undone it will often be unclear whether an error even occurred. The Bush Administration has usually not acknowledged that those released from Guantanamo were "erroneously" detained, [FN202] and indeed it has said that many of them, having been assessed as not posing a threat, were actually terrorists skilled at deception. [FN203] In other words, the U.S. government has tended to be more open in acknowledging false negatives (terrorists erroneously released) than false positives (innocents erroneously detained). [FN204]

Subjecting detention decisions after some period of time to tighter scrutiny-- such as with an escalating standard of proof and additional procedural protections as time elapses [FN205]--need not impugn the judgment of military commanders in the field who exercised their best judgment at the earlier time. A later determination that a detainee is not, in fact, an enemy fighter makes the initial determination perhaps erroneous but not necessarily improper, any more than the bombing of the al Firdos bunker in Baghdad [FN206] was improper given available intelligence.

\*1424 But political pressure provides an incentive against publicly admitting "mistakes." Such instinctive defensiveness is likely especially during times of war, when political and military leaders are most concerned with erosion of public confidence in ongoing operations. [FN207] Because detention errors may remain hidden, a reasonableness approach to detention decisions lacks some of the natural enforcement we expect in the targeting context.

2. The Logic of Transparency.--The experience with targeting, however, suggests that openness and transparency of errors may, over time, actually help shape public expectations and build confidence in executive decisionmaking. The more transparent the review processes are, the more public trust the state may gain because public scrutiny of adjudications would be seen as adding external enforcement pressure to "get it right." [FN208] From a policy perspective the government might therefore want to provide more procedural protections for innocents than demanded by the law alone. [FN209]

If this is true, what about the moral and incentive arguments drawn from targeting law that providing an escalating standard of certainty along with more liberty-protective and transparent process as detention duration grows would reward terrorist tactics of deliberately blurring combatants and noncombatants by privileging them over soldiers who abide by the law and a duty to keep civilians out of harm's way? Recall that the law of war divides responsibility for misidentification of targets and collateral damage between the attacker and a defender who commingles or blurs soldiers with civilians; otherwise the law would provide incentives to thrust civilians into the line of fire. A lesson from the targeting context is that militarily weaker parties often see far more advantage in placing civilians in harm's way of military attack than in protecting them. [FN210] An analogue to terrorist practices of hiding among civilians is the widespread use, particularly by those facing technologically superior forces, of \*1425 "human shields": civilians emplaced at military sites to put attacking forces in the dilemma of leaving those sites alone or hitting them along with the civilian shields. [FN211] But under the refinements to a targeting-like approach I describe above, [FN212] terrorist fighters--those whose modus operandi makes it more difficult for the United States to differentiate them from bystanders--would be entitled to more robust procedural protection and periodic opportunity to win their release than would regular, professional soldiers captured during wartime, who can be held as prisoners of war without charge or repetitious review until hostilities cease. In other words, a captured soldier of a state can be held until the end of a war without opportunity to contest his incarceration, but a captured terrorist who owes no formal allegiance to state responsibilities would be accorded special procedural rights and hearings. This formula seems upside down: Would not providing more robust protections against erroneous detentions to terrorists turn the incentive structure of the law of war on its head and invite belligerents to hide themselves among civilians? [FN213]

Such theoretical reasoning underlying targeting law breaks down in the practical context of detaining suspected terrorist fighters, especially taking into account how detention policies and the laws that govern them will be viewed among the communities from which individuals are likely to be captured and detained. No matter what the law says about divided responsibility for errors and the levels of protection due different categories of detainees, al Qaida and similar terrorist networks are unlikely in the real world to bear great costs of erroneous detentions. Indeed, in some cases they may even thrive on them.

As an initial matter, the general tendency of militarily weaker parties to see advantage in inducing errors and collateral damage is likely to be aggravated in the context of fighting al Qaida and other terrorist networks. [FN214] Both the nature of terrorism and the nature of detention exacerbate this problem.

\*1426 Al Qaida and like-minded terrorist networks--which generally reject legal order anyway [FN215]--are likely to view substantial strategic benefits (besides merely defending themselves) to blurring terrorist-civilian distinctions for several reasons. First, terrorist organizations seek to sow panic in the United States and its allies--panic that is exacerbated when overt distinctions between friend and foe become obscured. [FN216] Perhaps more importantly, resentment against Western powers like the United States fuels these terrorist movements and the extremism that supports them--resentment that grows with perceived heavy-handed application of military force in places where al Qaida operates. [FN217] In embedding themselves in local populations, thereby inviting military attacks upon those locales, terrorist networks may actually sustain themselves.

Furthermore, the United States and other states combating terrorist organizations often rely on cooperation from local populations to help identify terrorists among them. [FN218] Because local community members are often best able to discern the affiliations and intentions of those embedded in their communities, individual tips are critical to identifying genuine threats

otherwise invisible among populations. [FN219] The more, then, that military forces and intelligence agencies alienate local communities, the more they exacerbate the informational deficits that interfere with their ability to distinguish friend from terrorist.

The political costs of detention errors or perceived errors are especially likely to fall exclusively in the laps of the United States and its allies, regardless of how the legal regime divides responsibility for them with terrorists. Historically, detention practices viewed as overbroad have proven ill-suited to winning the "hearts and minds" of local populations. The British government learned painfully that internment of suspected Northern Ireland terrorists was viewed among Northern Irish communities as a form of collective punishment that fueled violent nationalism. [FN220] \*1427 Detention perceived as overbroad can be counterproductive as a protective tool, especially against threats spawned by extremist, anti-state ideology.

The intimate physical nature of detention helps explain why detention, in particular, is likely to be viewed locally as overbroad heavy-handedness and why local communities are likely to pin blame for errors (real or perceived) solely on the detaining state, even if the terrorists' modus operandi increases the danger of such errors. In the case of bombardment, for example, from the perspective of a local population or an outside observer, it is probably easy in many cases to visualize and understand the causal link between the kinetic collateral civilian damage from imprecise bombardment and unlawful, civilian-endangering tactics like human shielding. After all, spatial and temporal distance separates a bomber and a target--a distance that already injects some expected error into targeting and puts endangered civilians closer to the terrorist fighters among them than, for example, the high-flying bombing aircraft that conducts a strike. [FN221] By contrast, because of the personal, face-to-face nature of detention it may be more natural to associate errors proximately--and exclusively--with the detaining state.

This is especially true as the duration of detention expands. Regardless of how responsibility for error is assigned between the state and enemy terrorists at the moment of capture, as time in detention elapses, observers will naturally ascribe a greater share of that responsibility to the detaining state. At the moment of capture, like the moment of bombardment, enemy fighting forces can spare civilians much risk by identifying themselves clearly as combatants or removing themselves from the vicinity of civilians. But once time elapses in detention, only the detaining state can undo errors. Terrorists' shadowy practices and the risks they \*1428 create will fade from memory while physical lockup in the hands of the state remains a stark reminder of who exclusively holds the key to the release of supposed innocents. As much as it might make sense to divide responsibility for erroneous detentions between both the detaining state and the terrorist organization whose practices make errors likely, in practice it will be difficult to achieve distribution of political costs for errors accordingly.

Ambiguous or opaque detention decisionmaking and review procedures will likely aggravate perceptions that detentions are applied overbroadly or as collective punishment. The murkier the standard of proof being applied and the less open to public scrutiny the decisionmaking, the more already distrustful communities and observers will criticize detention policies as inaccurately applied. This, again, was a lesson the British government learned in its handling of Northern Irish internment in the early 1970s, and it generated reforms emphasizing transparency in adjudicating suspected terrorists' cases to mitigate public perceptions of arbitrariness. [FN222] That now appears to be the case in Iraq and Afghanistan, where a lack of clear standards and processes open to public scrutiny for detaining suspected security threats seems to fuel distrust in detention policies. [FN223] Opaque, ambiguous detention decisionmaking contrasts starkly with American criminal proceedings, in which convictions won and rationalized against a clear and high standard of proof communicate publicly not only the guilt of the convicted but the rigor with which the state conducts its adjudicative duties.

From a policy perspective, then, more clearly articulated standards of proof combined with transparent processes may help mitigate the resentment that sustains violent extremist movements like al Qaida and other terrorist networks in the first place. While the substantive standard of certainty question and the issue of how to enforce it are analytically distinct, the political enforcement pressures and the military advantages and disadvantages that flow from them are relevant to the appropriateness \*1429 and viability of the proposed substantive standard. In the criminal justice context, open trials and the requirement of proof beyond a high threshold serve to communicate publicly the rigor of the state's efforts to distinguish offenders

from innocents. In the targeting context, identification and intelligence evaluation processes are not transparent but errors are, which strengthens internal and external pressure on military decisionmakers to exercise care. In the detention context, public confidence (domestically, internationally, and locally) in decisions about who is detained may well be enhanced through similar procedural or public scrutiny.

#### V. Conclusion

This Article shows that the law of war can and should be interpreted or supplemented to account for the exceptional aspects of an indefinite conflict against a transnational entity. A targeting-based analytical approach to the detention standard of certainty question provides a familiar methodology drawn from an analogous context for balancing similar interests. Although reasonable care and proportionality rules are easier to state than to apply with precision, they offer a way to evaluate, consistent with policy and moral principles undergirding the law of war, screening policies for detention of certain suspected terrorists.

Even if this approach ultimately seems unsatisfactory, analysis of the ways in which the law of war has operated to deal with identification problems should inform consideration of alternative legal and policy approaches. That is, whether one looks to improve the existing paradigms or to develop an entirely new one, investigation of the targeting analogy illuminates several important issues to guide the development of a more robust detention legal regime.

First, the temporal dimension distinguishes detention from many other forms of military force. As detentions move through time both the security and humanitarian interests vary. A detention regime that recalibrates its required standard of certainty, and the procedures that accompany it, as the duration of detention expands more appropriately balances security and humanitarian/liberty interests overall. Second, targeting principles require a comparative analysis of alternative means of achieving valid security objectives with minimal injury to innocents. While a law of war approach generally, and targeting specifically, is often associated with wide executive discretion, this principle provides a powerful argument that independent review, adversarial process, or enhanced protections for suspected terrorists--if they are believed to generate more accurate determinations--are quite consistent with, and may even be demanded by the logic of, the law of war paradigm. Finally, the targeting approach highlights the role of political pressures and the incentive structures that legal rules help create or sustain in what will be an ongoing dynamic between states and terrorist networks. Detention rules may encourage or discourage certain terrorist methods of operations as well **\*1430** as shape perceptions of key constituencies in the broader struggle against terrorism and the violent ideologies that support it.

This Article is a modest first step toward developing a more robust law of war approach to counterterrorism. Even operating at its best, this approach is unlikely to persuade many who see terrorism as a crime, not as warfare. Ultimately, this debate over the need for an entirely new paradigm can be settled only through fuller comparison of which framework more effectively advances national security objectives while safeguarding liberty principles and other values. But the approach presented here helps fill an important legal gap in the law of war framework and therefore allows for much richer assessment.

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[FN1]. Pamela Constable & Dafna Linzer, Confusion Shrouds Pakistan Attack, Wash. Post, Jan. 18, 2006, at A10; Thomas Omestad, Pakistani Leader Softens Criticism of U.S., U.S. News & World Rep., Feb. 14, 2006, at [www.usnews.com/usnews/news/articles/060214/14pakistan.htm](http://www.usnews.com/usnews/news/articles/060214/14pakistan.htm) (on file with the Columbia Law Review).

[FN2]. "Terrorism" is hard to define; as the saying goes, one man's terrorist is another's freedom

fighter. For the purposes of this paper, I restrict my analysis to al Qaida and terrorist networks affiliated with it, because those are the enemies against which the executive branch considers itself at war. See Memorandum from George Bush, President of the U.S., to the Vice President et al., Humane Treatment of al Qaeda and Taliban Detainees para. 1 (Feb. 7, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/020702bush.pdf> (on file with the Columbia Law Review).

[FN3]. Boumediene v. Bush, 128 S. Ct. 2229, 2277 (2008) ("It bears repeating that our opinion does not address the content of the law that governs petitioners' detention. That is a matter yet to be determined.").

[FN4]. See Robert Chesney & Jack Goldsmith, Terrorism and the Convergence of Criminal and Military Detention Models, 60 *Stan. L. Rev.* 1079, 1081 (2008) (explaining that neither traditional criminal law nor traditional law of war model adequately handles modern terrorism problems).

[FN5]. See generally Jenny S. Martinez, Process and Substance in the "War on Terror," 108 *Colum. L. Rev.* 1013, 1016 (2008) (detailing how most court decisions challenging "war on terror" policies, including detention, have focused on procedural claims rather than substantive rights).

[FN6]. Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) (plurality opinion).

[FN7]. See Gordon England, Sec'y of the Navy, Briefing on Combatant Status Review Tribunal (CSRT) (July 9, 2004), at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2777> (on file with the Columbia Law Review) [hereinafter England, Briefing].

[FN8]. See Dana Priest, Wrongful Imprisonment: Anatomy of a CIA Mistake; German Citizen Released After Months in "Rendition," *Wash. Post*, Dec. 4, 2005, at A1.

[FN9]. See Katherine Shrader, Associated Press, CIA Probes Renditions of Terror Suspects, *Hous. Chron.*, Dec. 28, 2005, at A3.

[FN10]. See Carol D. Leonnig, Evidence of Innocence Rejected at Guantanamo, *Wash. Post*, Dec. 5, 2007, at A1; Pete Yost, German Man Held 4 Years, but No Link to al-Qaida Found, *Seattle Times*, Dec. 6, 2007, at A3.

[FN11]. See Ian Austen, Canadians Fault U.S. for Its Role in Torture Case, *N.Y. Times*, Sept. 19, 2006, at A1.

[FN12]. See, e.g., In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 466 (D.D.C. 2005) ("The purpose of imposing a due process requirement is to prevent mistaken characterizations and erroneous detentions, and the government is not entitled to short circuit this inquiry by claiming ab initio that the individuals are alleged to have committed bad acts."), vacated sub nom. Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), rev'd, 128 S. Ct. 2229 (2008).

[FN13]. See, e.g., Senator Patrick Leahy, Statement on the Detention Center at Guantanamo Bay, Cuba (June 30, 2005), at <http://leahy.senate.gov/press/200506/063005b.html> (on file with the Columbia Law Review) ("[T]he Administration's unilateralism in its decisions about Guantanamo have compromised American principles and ideals and weakened our moral leadership in the world.").

[FN14]. See, e.g., Tim Golden, For Guantanamo Review Boards, Limits Abound, *N.Y. Times*, Dec. 31, 2006, at A1 (reporting that Guantanamo review boards "have often fallen short" in efforts to follow military procedures in reviewing detainees' status as "enemy combatants"); Corine Hegland, Empty Evidence, *Nat'l J.*, Feb. 4, 2006, at 28 passim (investigating shortcomings of

Guantanamo detention procedures); Tom Lasseter, *Many Detainees Had Flimsy Ties to Terror*, *Seattle Times*, June 15, 2008, at A10 (describing investigation's conclusion that U.S. imprisoned detainees on basis of "flimsy or fabricated evidence"); Stuart Taylor, Jr., *Falsehoods About Guantanamo*, *Nat'l J.*, Feb. 4, 2006, at 13, 13 (stating that high percentage of Guantanamo detainees were wrongfully seized noncombatants).

[FN15]. See, e.g., Michael Ratner, *Moving Away from the Rule of Law: Military Tribunals, Executive Detentions and the Rule of Law*, 24 *Cardozo L. Rev.* 1513, 1520 (2003) (stating, as president of Center for Constitutional Rights, that "[t]hese stories of the innocent... demonstrate the importance of a legal process for determining the status of those imprisoned on Guantanamo"); Kenneth Roth, *The Law of War in the War on Terror*, *Foreign Aff.*, Jan./Feb. 2004, at 2, 5 (2004) (expressing view as executive director of Human Rights Watch that "[e]rrors, common enough in ordinary criminal investigations, are all the more likely when a government relies on the kind of murky intelligence that drives many terrorist investigations").

[FN16]. See, e.g., David Cole & Jules Lobel, *Less Safe, Less Free* 51-53 (2007); Kent Roach & Gary Trotter, *Miscarriages of Justice in the War Against Terror*, 109 *Penn. St. L. Rev.* 967, 1032 (2005) ("[T]here is good reason to believe that some innocent people have been and are likely still detained in the current war against terrorism.... Democracies should only punish the guilty; it is terrorists who punish the innocent.").

[FN17]. See, e.g., Joanne Mariner, *Geriatric Terrorists on Guantanamo*, *FindLaw's Writ*, Nov. 4, 2002, at <http://writ.news.findlaw.com/mariner/20021104.html> (on file with the *Columbia Law Review*) ("Even though the recent releases do not prove the innocence of the remaining detainees, they do demonstrate, most compellingly, the weaknesses of the decision-making process that guides these detentions."). For a critical and widely circulated report analyzing the unclassified information regarding detainees held at Guantanamo, see Mark Denbeaux & Joshua Denbeaux, *Report on Guantanamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data*, available at <http://law.shu.edu/aaafinal.pdf> (last visited Aug. 17, 2008) (on file with the *Columbia Law Review*).

[FN18]. See, e.g., Human Rights First, *Human Rights First Analyzes DOD's Combatant Status Review Tribunals*, at [http://www.humanrightsfirst.org/us\\_law/detainees/status\\_review\\_080204.htm](http://www.humanrightsfirst.org/us_law/detainees/status_review_080204.htm) (last visited Aug. 17, 2008) (on file with the *Columbia Law Review*) ("[T]he new hearings fail to satisfy the Supreme Court's rulings, and are otherwise inadequate to meet basic requirements of national and international law.").

[FN19]. See *infra* notes 23-33 and accompanying text.

[FN20]. See William Blackstone, 4 *Commentaries* \*358 ("[I]t is better that ten guilty persons escape, than that one innocent suffer.").

[FN21]. U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Second Periodic Reports of States Parties Due in 1999, Addendum (United States of America) Annex 1*, at 47, U.N. Doc. CAT/C/48/Add.3 (May 6, 2005), available at [http://www.state.gov/g/drl/rls/45738.htm#part\\_one](http://www.state.gov/g/drl/rls/45738.htm#part_one) (on file with the *Columbia Law Review*) [hereinafter *Committee Against Torture Report*].

[FN22]. See Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 *U. Pa. L. Rev.* 675, 677-78 (2004) (arguing that U.S. claims about legality of Guantanamo detentions are based on loose readings of law of armed conflict); Christopher Greenwood, *The Law of War (International Humanitarian Law)*, in *International Law* 789, 793 (Malcolm D. Evans ed., 2003) (questioning United States's assertion that "the law of war applies to its military operations against Al-Qaeda").

[FN23]. I focus here on the American criminal justice system, but the general point is that if

terrorism is treated as a crime, the relevant standard of certainty is the criminal conviction standard for the applicable jurisdiction. See generally Thomas V. Mulrine, Reasonable Doubt: How in the World Is It Defined?, 12 *Am. U. J. Int'l L. & Pol'y* 195 (1997) (comparing standards of guilt across U.S. and international jurisdictions).

[FN24]. See Addington v. Texas, 441 U.S. 418, 423 (1979) ("The standard [of proof] serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision."); Barbara D. Underwood, The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases, 86 *Yale L.J.* 1299, 1306 (1977).

[FN25]. Addington, 441 U.S. at 423-24.

[FN26]. In noncriminal detention contexts, the American legal system sometimes permits lower burdens of proof. See *infra* note 44.

[FN27]. See Wong Sun v. United States, 371 U.S. 471, 479 (1963) (holding that information that would warrant man of reasonable caution to believe that felony had been committed is sufficient basis for arrest in absence of evidence sufficient to convict); Henry v. United States, 361 U.S. 98, 102 (1959) (holding that evidence required to establish guilt is not necessary to arrest if facts and circumstances known to arresting officer warrant belief that offense has been committed).

[FN28]. See United States v. Salerno, 481 U.S. 739, 743-44 (1987) ("The District Court... conclud[ed] that the Government had established by clear and convincing evidence that no condition or combination of conditions of release would ensure the safety of the community or any person.").

[FN29]. See id. at 747 n.4 ("We intimate no view as to the point at which detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress' regulatory goal.").

[FN30]. See In re Winship, 397 U.S. 358, 363-64 (1970).

[FN31]. Id. at 370 (Harlan, J., concurring).

[FN32]. See, e.g., Brandon L. Garrett, Judging Innocence, 108 *Colum. L. Rev.* 55, 57 (2008) (citing data showing that 208 incarcerated individuals have been exonerated based on DNA evidence since 1989).

[FN33]. See Erik Lillquist, Absolute Certainty and the Death Penalty, 42 *Am. Crim. L. Rev.* 45, 51-52 (2005) (documenting interpretations among jurors, judges, and commentators, ranging from "beyond any doubt," to "no doubt," to "moral certainty"); Lawrence M. Solan, Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt, 78 *Tex. L. Rev.* 105, 119-32 (1999) (exploring effects of highly varied reasonable doubt instructions given to jurors).

[FN34]. A number of scholars argue that counterterrorism operations could rise to the level of "armed conflict" under international law, such that the laws of war apply, but they often disagree on how those laws apply in the particular case of al Qaida. John Yoo defends the Bush Administration's approach. See John Yoo, War by Other Means 231 (2006) ("We responded with all the diplomatic and military tools we had at our disposal. I think the costs were worth the greater security these policies brought us."). W. Michael Reisman argues that some terrorist attacks might justify direct armed response, as one responds against a state launching similar attacks. See W. Michael Reisman, International Legal Responses to Terrorism, 22 *Hous. J. Int'l L.* 3, 57 (1999) (arguing that some instances of terrorism can "only be dealt with politically or militarily"). Philip Bobbitt argues that it is more appropriate to talk about ongoing "wars" against



terror than it is to talk about a single "war." See Philip Bobbitt, *Terror and Consent* 236 (2008) ("Wars against Terror will pursue three intertwined objectives: to preempt twenty-first century market state terrorism, to prevent WMD proliferation when these weapons would be used for compellence rather than deterrence, and to prevent or mitigate genocide, ethnic cleansing, and the human rights consequences of civilian catastrophes...."). Judge Richard Posner takes a functionalist approach, rejecting a formalistic distinction between "peace," where wrongdoers are treated as criminals, and "war," where wrongdoers are treated as enemies, and recognizing that terrorist organizations today pose threats that may justify warlike responses. See Richard A. Posner, *Not a Suicide Pact* 11 (2006) [hereinafter Posner, *Not a Suicide Pact*] ("I argue that the terrorist threat is sui generis--that it fits the legal category neither of 'war' nor of 'crime.'"). Adam Roberts argues that some parts of the United States and Allied response to the September 11, 2001 attacks constitute a war, or wars, though he questions how the United States has interpreted and applied the laws of war, including with regard to detention. See Adam Roberts, *The Laws of War in the War on Terror*, 32 *Isr. Y.B. on Hum. Rts.* 193, 200-01 (2002). Roy S. Schöndorf argues that conflicts with terrorist organizations like al Qaida may constitute "wars," but require a new law of war category. See Roy S. Schöndorf, *Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?*, 37 *N.Y.U. J. Int'l L. & Pol.* 1, 64-65 (2004) (assuming law of war applies but describing modifications to traditional rule of "distinction" that could make it appropriate to counterterrorist context). Curtis Bradley and Jack Goldsmith discuss the legislative aspects of the war on terrorism. See generally Curtis Bradley & Jack Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 *Harv. L. Rev.* 2047 (2005). For critiques of the paradigm viewing the conflict with al Qaida as a "war," see, e.g., Bruce Ackerman, *Before the Next Attack: Preserving Civil Liberties in the Age of Terrorism* 13-14 (2006) (arguing that describing counterterror measures as "war" is inaccurate and dangerous because it distorts nature of threat and legitimizes inappropriate responses); Mary Ellen O'Connell, *The Legal Case Against the Global War on Terror*, 36 *Case W. Res. J. Int'l L.* 349, 350 (2004) ("The claim of global war is a radical departure from mainstream legal analysis.").

[FN35]. William H. Taft IV, *War Not Crime*, in *The Torture Debate in America* 223, 225 (Karen J. Greenberg ed., 2006); see also Michael B. Mukasey, U.S. Att'y Gen., Remarks Prepared for Delivery at the American Enterprise Institute for Policy Research (July 21, 2008), at <http://justice.gov/ag/speeches/2008/ag-speech-0807213.html> (on file with the Columbia Law Review) [hereinafter Mukasey Remarks] (arguing that those who believe Guantanamo detainees should be charged with crime have forgotten "these individuals were captured in an armed conflict, not in a police raid").

[FN36]. See Mukasey Remarks, *supra* note 35.

[FN37]. See John B. Bellinger III, State Dep't Legal Advisor, *Address at the London School of Economics on Legal Issues in the War on Terrorism* (Oct. 31, 2006), at <http://www.state.gov/s/rls/76039.htm> (on file with the Columbia Law Review) (arguing that state of "armed conflict" exists with respect to al Qaida and Taliban).

[FN38]. See *infra* Part I.B.

[FN39]. 542 U.S. 507, 518-21 (2004) (plurality opinion).

[FN40]. See *id.* at 519 ("Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, ... Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.").

[FN41]. See Kenneth Anderson, *The Military Tribunal Order: What To Do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 *Harv. J.L. & Pub. Pol'y* 591, 607-09 (2002) (discussing practical difficulties of trying suspected terrorists); Lee A. Casey & David B. Rivkin, Jr., *Rethinking the Geneva Conventions*, in *The Torture Debate in America*, *supra* note 35, at

203, 211 [hereinafter Casey & Rivkin, Geneva Conventions] (noting that "battlefields make poor crime scenes" because evidence is difficult to gather and introduce in court); Michael B. Mukasey, Jose Padilla Makes Bad Law, *Wall St. J.*, Aug. 22, 2007, at A15 (describing how prosecution can serve as "rich source of intelligence" for terrorists, even if evidence can overcome hearsay bar); Richard A. Posner, The Constitution vs. Counterterrorism, *Wall St. J.*, Aug. 22, 2006, at A12 (arguing that judicial system as it currently exists cannot handle terrorist prosecutions). But see Richard B. Zabel & James J. Benjamin, Jr., Human Rights First, In Pursuit of Justice: Prosecuting Terrorism Cases in Federal Court (2008), available at <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf> (on file with the Columbia Law Review) (detailing successful federal prosecutions of suspected terrorists since 2001); Gabor Rona, Legal Frameworks to Combat Terrorism: An Abundant Inventory of Existing Tools, 5 *Chi. J. Int'l L.* 499, 501-03 (2005) (arguing that criminal law is sufficient to combat terrorism); Kenneth Roth, *After Guantánamo: The Case Against Preventive Detention*, *Foreign Aff.*, May/June 2008, at 9, 15-16 (same).

[FN42]. See Jerry Markon & Timothy Dwyer, Jurors Reject Death Penalty for Moussaoui, *Wash. Post*, May 4, 2006, at A1; Benjamin Weiser, Mastermind Gets Life for Bombing of Trade Center, *N.Y. Times*, Jan. 9, 1998, at A1.

[FN43]. See Hamdan v. Rumsfeld, Establishing a Constitutional Process: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006) (statement of Daniel Dell'Orto, Principal Deputy General Counsel, Department of Defense), at [http://judiciary.senate.gov/hearings/testimony.cfm?id=1986&wit\\_id=5506](http://judiciary.senate.gov/hearings/testimony.cfm?id=1986&wit_id=5506) (on file with the Columbia Law Review).

[FN44]. Although the criminal law and law of war are the best developed and most commonly invoked paradigms to deal with terrorism, a third notional category exists that might be labeled "civil" or "administrative." See, e.g., Benjamin Wittes, *Law and the Long War 151-82* (2008) (discussing problems of detention and trial); Monica Hakimi, International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide, 33 *Yale J. Int'l L.* 369, 389-92 (2008) (noting existence of three models of detention under international law, including "administrative" detention); Jack L. Goldsmith & Neal Katyal, *The Terrorists' Court*, *N.Y. Times*, July 11, 2007, at A19 (calling for establishment of national security court to oversee system of preventive detention); Editorial, *Workable Terrorism Trials*, *Wash. Post*, July 27, 2008, at B6 (proposing model of handling terrorism-related cases using specialized national security court). For a discussion of the variety of forms administrative or civil detention might take, see Matthew C. Waxman, *Administrative Detention: The Integration of Strategy and Legal Process* 9-26 (Brookings Inst. Series on Counterterrorism and American Statutory Law, Working Paper No. 2, July 24, 2008), available at [http://www.brookings.edu/papers/2008/0724\\_detention\\_waxman.aspx](http://www.brookings.edu/papers/2008/0724_detention_waxman.aspx) (on file with the Columbia Law Review) [hereinafter Waxman, *Administrative Detention*].

I do not treat it on par with the criminal or law of war paradigms because it might be useful only in a subset of detention cases and because the creation of a new administrative detention scheme would still raise the difficult substantive question posed in this Article. But a brief note on this approach is in order.

In some cases, American law permits even long-term detention based not (as in criminal law) on retrospective culpability nor (as in the law of war) on one's status in an enemy organization with which the state is in conflict. Rather, the detention is based on an individual's supposed future danger to himself or others. In *Kansas v. Hendricks*, for example, the Supreme Court upheld a Kansas statute allowing civil commitment of individuals who were convicted of or charged with a sexually violent offense and, due to a "mental abnormality," were likely to engage in certain acts of sexual violence. 521 U.S. 346, 357-58 (1997). This statutory scheme might be a particularly apt analogue because, as is often supposed about religiously extremist terrorists, it was premised on a view that some sexual predators cannot be deterred from future violence. See *id.* at 351, 362-63 ("Such persons are therefore unlikely to be deterred by the threat of confinement.").

The domestic and international legal bases for such an approach to terrorist detentions are unclear, and the legal constraints might depend on a number of factors, including whether such detentions took place inside or outside the United States. In *Addington*, the Supreme Court held that in a civil proceeding brought under state law, Fourteenth Amendment due process required only a clear and convincing evidence standard to involuntarily commit someone to a mental hospital indefinitely. *Addington v. Texas*, 441 U.S. 418, 433 (1979). But some states have imposed the criminal law standard of proof beyond reasonable doubt legislatively or judicially, reasoning that the deprivations of liberty, including attendant stigmatization, in civil commitment cases are comparable to those in criminal cases. See, e.g., *Conservatorship of Hofferber*, 616 P.2d 836, 848 (Cal. 1980) (stating involuntary commitment based on mental illness or dangerousness "involves loss of liberty and substantial stigma," generally necessitating proof beyond a reasonable doubt); *Superintendent of Worcester State Hosp. v. Hagberg*, 372 N.E.2d 242, 245-46 (Mass. 1978) (finding standard of proof for involuntary commitment to be beyond reasonable doubt). And in *Zadvydas v. Davis*, the Court made clear that indefinite administrative detention of a removable alien would raise constitutional due process concerns, though it noted that a statutory scheme directed at suspected terrorists might change its analysis. 533 U.S. 678, 690-91 (2001) (suggesting in dicta that preventive civil detention of suspected terrorists might not violate due process). The Court also distinguished circumstances in which an alien were held outside U.S. territory. See *id.* at 692-94.

[FN45]. See Chesney & Goldsmith, *supra* note 4, at 1103, 1118-19 (listing examples of ongoing criminal prosecutions against al Qaeda members and describing military commission structure).

[FN46]. Judge Posner poses this question but does not provide a clear answer:

Requiring proof beyond a reasonable doubt in criminal cases causes many guilty defendants to be acquitted and many other guilty persons not to be charged in the first place. We accept this as a price worth paying to protect the innocent. But ordinary crime does not imperil national security; modern terrorism does, so the government's burden of proof should be lighter, though how much lighter is a matter of judgment.

Posner, *Not a Suicide Pact*, *supra* note 34, at 64-65.

[FN47]. Nor does international human rights law answer the standard of certainty question, though many legal authorities argue that it governs detention of suspected terrorists. See, e.g., U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee: United States of America*, P18, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006) (criticizing U.S. detention practices in combating terrorism as possibly violating international human rights law); David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 *Harv. Hum. Rts. J.* 123, 136 (2006) (arguing that extraordinary rendition of terrorism suspects not formally convicted of crime violates human rights law); see also Hakimi, *supra* note 44, at 386-88 (discussing whether international human rights law permits noncriminal detention for security reasons outside traditional warfare contexts). The International Covenant on Civil and Political Rights (ICCPR), for example, prohibits "arbitrary arrest or detention" and mandates that "[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." Art. 9, Dec. 16, 1966, 999 U.N.T.S. 171. But it fails to define "arbitrary" or what level of uncertainty might fall below that standard.

To the extent one looks to human rights law on this question, the ultimate answer may still come back to interpreting the law of war. By way of analogy, in the *Nuclear Weapons Case*, the International Court of Justice considered whether nuclear attacks would violate the right to life guaranteed by the ICCPR and stated that "the protection of the International Covenant of Civil and Political Rights does not cease in times of war." *Legality of the Threat or Use of Nuclear Weapons (Nuclear Weapons Case)*, 1996 I.C.J. 226, 240 (July 8). It went on to state, however, that "[t]he test of what is an arbitrary deprivation of life... then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities." *Id.*

Within some contexts in which the United States detains suspected terrorists as enemy combatants, the International Committee of the Red Cross (ICRC) has taken the view that

neither the law of war nor human rights treaty law provides sufficiently clear or comprehensive procedural safeguards to persons detained for security reasons. Thus, the ICRC has developed a set of principles and safeguards that should govern security detention, based on law of war and human rights law treaty rules, as well as on nonbinding standards and best practice. These principles, however, do not address the substantive standard of certainty issue. See generally Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 *Int'l Rev. Red Cross* 375 (2005) (detailing ICRC principles and safeguards).

[FN48]. Both the Detainee Treatment Act, Pub. L. No. 109-148, 119 Stat. 2739 (2005) (codified at 42 U.S.C. § 2000dd (Supp. V 2005)), and the Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified at 10 U.S.C. §§ 948-950 (2006)) incorporate law of war-based standards for regulating the treatment of war on terror detainees. See *infra* notes 138-139 and accompanying text.

[FN49]. One near exception appears in the Fourth Geneva Convention, which lays out some rules for internment of those believed to pose security threats in occupied territory. For example, Article 78 allows for internment of individuals for "imperative reasons of security" and requires review of individual detentions on those grounds at least every six months. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 78, Aug. 12, 1949, 6 U.S.T. 3516, 973 U.N.T.S. 336 [hereinafter Fourth Geneva Convention]. Even if this provision, which usually protects civilians (as opposed to combatants who take part in hostilities), were applicable, it offers no guidance on the standard of certainty to be applied periodically.

[FN50]. See Waxman, *Administrative Detention*, *supra* note 44, at 5-7.

[FN51]. Memorandum from the Deputy Sec'y of Def. to the Sec'ys of the Military Dep'ts Chairman of the Joint Chiefs of Staff Under Sec'y of Def. for Policy, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba, encl. 1, at 1 (July 14, 2006), available at <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf> (on file with the Columbia Law Review). This is similar to the definition accepted by the Court in *Hamdi*. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004) (plurality opinion) (accepting definition of enemy combatant as "[o]ne who takes up arms against the United States in a foreign theater of war, regardless of his citizenship" (quoting *Hamdi v. Rumsfeld*, 316 F.3d 450, 475 (4th Cir. 2003))). The Military Commissions Act of 2006 contains a broader definition, but that definition appears to be for military commissions jurisdictional purposes, not the scope of detention authority itself. Military Commissions Act § 948a (defining "unlawful enemy combatant" as "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)").

[FN52]. The law of war contains definitions of certain classes of combatants that are entitled to particular protections, such as prisoner-of-war status upon capture, see, e.g., Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention], but it generally defines the broad category of "combatants" only in the negative. Protocol I of the Geneva Conventions says that "[c]ivilians shall enjoy the protection [from attack] unless and for such time as they take a direct part in hostilities." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51, adopted June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]. Common Article 3 of the Geneva Conventions protects "[p]ersons taking no active part in the hostilities." Third Geneva Convention, *supra*, art. 3(1). These provisions imply that combatancy derives from "direct" or "active" participation on behalf of an enemy in an armed conflict, which is itself a subject of great controversy. See ICRC, *Direct Participation in Hostilities* (Dec. 31, 2005), available at <http://icrc.org/web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205?opendocument> (on file

with the Columbia Law Review) (describing series of meetings to clarify meaning of "direct participation in hostilities").

[FN53]. See, e.g., *Al-Marri v. Pucciarelli*, No. 06-7427, slip op. at 25 (4th Cir. July 15, 2008) (en banc) (Motz, J., concurring) (interpreting Supreme Court precedent as supporting conclusion that "enemy combatant status rests on an individual's affiliation during wartime with the 'military arm of the enemy government'"); Ryan Goodman & Derek Jinks, *International Law, U.S. War Powers, and the Global War on Terrorism*, 118 *Harv. L. Rev.* 2653, 2655-58 (2005) (arguing that mere membership without evaluation of "the role the member assumed in the group" is insufficient to merit classification as "enemy combatant"). Judge Wilkinson adopts a more restrictive interpretation of "enemy combatant" than the Bush Administration's in *Al-Marri*, where he reasons that to be classified as an enemy combatant a person must

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

*Al-Marri*, slip op. at 179 (Wilkinson, J., concurring in part and dissenting in part). Interestingly, some critics also turn to the law of targeting by way of analogy to draw bounds around the category of "enemy combatants." See, e.g., Brief for the Boumediene Petitioners at 36-43, *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (No. 06-1195) (arguing that detention is authorized only for those who may properly be targets of military force).

[FN54]. John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 *Yale L.J.* 1325, 1347 (1979).

[FN55]. Cf. Taft, *supra* note 35, at 225 (noting potential need to modify law of armed conflict as applied to war on terror to ensure that those detained are actually enemy combatants).

[FN56]. See generally W. Thomas Mallison & Sally V. Mallison, *The Juridical Status of Irregular Combatants Under International Humanitarian Law of Armed Conflict*, 9 *Case W. Res. J. Int'l L.* 39, 43 (1977) (analyzing "the contemporary international law criteria applicable to irregular combatants and their ensuing status in law").

[FN57]. Dep't of Def., *Conduct of the Persian Gulf War* 578 (2002) [hereinafter *Dep't of Def., Persian Gulf War*].

[FN58]. See Posner, *Not a Suicide Pact*, *supra* note 34, at 60 ("The danger of erroneously identifying an individual as an enemy of the United States is therefore much greater than in a conventional war."); Roberts, *supra* note 34, at 202 (calling principle that attacks should not be directed against civilians "difficult to apply in counter-terrorist operations" because terrorists are often indistinguishable from civilians); Schöndorf, *supra* note 34, at 64-65 ("[T]he fact that the military action takes place in the territory of a non-involved state may justify adopting additional cautionary rules in order to avoid targeting individuals belonging to that state by mistake....").

[FN59]. See Charles S. Maier, *Targeting the City: Debates and Silences About the Aerial Bombing of WWII*, 87 *Int'l Rev. Red Cross* 429, 433 (2005) ("[S]ome German commanders resorted to civilian reprisals as well as executions of captured partisans.").

[FN60]. The Israeli Supreme Court recently made this point in upholding Israel's Internment of Unlawful Combatants Law. See *CrimA 6659/06 Anonymous v. State of Israel* [2008] 20-22 (*Isr.*), translation available at [http://elyon1.court.gov.il/files\\_eng/06/590/066/n04/06066590.n04.pdf](http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf) (on file with the Columbia Law Review) ("[U]nlawful combatants do not as a rule carry any clear and unambiguous indication that they belong to a terrorist organization.").

[FN61]. Consider that in the first Gulf War the conflict was probably over before those detainees adjudged to be civilians incidentally swept up by U.S. forces could be set free.

[FN62]. See Committee Against Torture Report, *supra* note 21, at 47.

[FN63]. See Boumediene v. Bush, 128 S. Ct. 2229, 2238 (2008) (“[G]iven that the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, [the risk of error] is a risk too significant to ignore.”).

[FN64]. See, e.g., James Risen, David Johnston & Neil A. Lewis, Harsh C.I.A. Methods Cited in Top Qaeda Interrogations, *N.Y. Times*, May 13, 2004, at A1 (describing concern over U.S. intelligence agencies’ interrogation tactics).

[FN65]. Third Geneva Convention, *supra* note 52, arts. 13, 17.

[FN66]. *Id.* art. 5(2).

[FN67]. See, e.g., W. Michael Reisman, Rasul v. Bush: A Failure to Apply International Law, 2 J. Int’l Crim. Just. 973, 976 (2004) (“[U]nder the letter and spirit of Geneva III..., the United States should have established explicit competent tribunals under Article 5(2) to determine the status of the detainees in order to ensure, in so far as possible, that innocent people were not being detained.”).

[FN68]. Cf. Carlotta Gall, U.S. and NATO Forces Kill 13 Afghans in Strikes Said To Be Mistakes, *N.Y. Times*, July 21, 2008, at A11 (reporting on accidental deaths of innocent Afghan civilians caused by U.S. and NATO missile and mortar strikes); Thom Shanker, Civilian Risks Curbing Strikes in Afghan War, *N.Y. Times*, July 23, 2008, at A1 (reporting that high civilian casualties in Afghanistan have led to tighter rules governing military air attacks).

[FN69]. See Memorandum from Luis Moreno-Ocampo, Chief Prosecutor, Int’l Criminal Court, to the International Criminal Court 6 n.12 (Feb. 9, 2006), at [http://www.icc-cpi.int/library/organs/otp/OTP\\_letter\\_to\\_senders\\_re\\_Iraq\\_9\\_February\\_2006.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf) (on file with the Columbia Law Review) [hereinafter Moreno-Ocampo Memo] (estimating “6,900 civilian casualties during the military operations from March to May 2003”).

[FN70]. See Bradley Graham, Military Turns to Software To Cut Civilian Casualties, *Wash. Post*, Feb. 21, 2003, at A18 (describing significant collateral damage caused by U.S. airstrikes and consequent efforts to improve airstrike targeting procedures).

[FN71]. See Legality of the Threat or Use of Nuclear Weapons (Nuclear Weapons Case), 1996 I.C.J. 226, 257 (July 8) (“States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets.”).

[FN72]. See Saint Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 138 *Consol. T.S.* 297, 298 (“[T]he only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy.”).

[FN73]. See Protocol I, *supra* note 52, art. 48 (“Parties to a conflict shall at all times distinguish between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”).

[FN74]. See Michael J. Matheson, The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 *Am. U. J. Int’l L. & Pol’y* 419, 420 (1987).

[FN75]. See Greenwood, *supra* note 22, at 797 (describing principle of proportionality with

respect to targeting).

[FN76]. This last point was made very well in the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (1999) [hereinafter Prosecutor's Report, NATO Bombing in Yugoslavia]:

The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied. It is relatively simple to state that there must be an acceptable relation between the legitimate destructive effect and undesirable collateral effects.... It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective.

Id. para. 48.

[FN77]. Michael Walzer, *Just and Unjust Wars* 156 (3d ed. 1977).

[FN78]. Protocol I, *supra* note 52, art. 57(1).

[FN79]. Id. art. 57(2)(a)(i).

[FN80]. Id. art. 57(2)(a)(ii).

[FN81]. Dep't of Def., *Persian Gulf War*, *supra* note 57, at 615.

[FN82]. See, e.g., *Prosecutor v. Galic*, Case No. IT-98-29-T, Judgment and Opinion, P 57 (Dec. 5, 2003), available at <http://www.un.org/icty/galic/trialc/judgement/gal-tj031205e.pdf> (on file with the Columbia Law Review) (describing Protocol I prohibitions on "indiscriminate attacks" against civilians as "well-established rule of customary law applicable in all armed conflicts").

[FN83]. See, e.g., 1 Jean-Marie Henckaerts & Louise Doswald-Beck, ICRC, *Customary International Humanitarian Law* 54 (2005) (describing "obligation to take all 'feasible' precautions," taking into account "humanitarian and military considerations," before executing military attack); ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at 681-82 (1987) [hereinafter ICRC Commentary on Protocol I] (calling for "common sense and good faith" interpretation of Protocol in order to prevent unnecessary civilian casualties"); see also Françoise Hampson, *Military Necessity*, in *Crimes of War* 251, 251 (Roy Gutman & David Reiff eds., 1999) (defining military necessity as "legal justification for attacks" on military, not civilian, targets).

[FN84]. See, e.g., Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* 126 (2004) ("[N]o absolute certainty can be guaranteed in the process of ascertaining the military character of an objective selected for attack, but there is an obligation of due diligence and acting in good faith."); Michael N. Schmitt, *Precision Attack and International Law*, 87 *Int'l Rev. Red Cross* 445, 455-56 (2005) (describing standard as "reckless disregard" or indiscriminateness in either execution or tactics).

[FN85]. See A.P.V. Rogers, *Zero-Casualty Warfare*, 82 *Int'l Rev. Red Cross* 165, 176-78, 180-81 (2000) (describing states' obligations to take all practicably possible precautions to avoid civilian injuries).

[FN86]. Id. at 181.

[FN87]. ICRC Commentary on Protocol I, *supra* note 83, at 682.

[FN88]. See, e.g., *United States v. List (The Hostage Case)*, Case No. 7 (Feb. 19, 1948), reprinted in 11 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control*

Council Law No. 10, at 1230, 1253 (1997) ("Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money."); see also Rogers, *supra* note 85, at 176 (discussing conflicting humanitarian and military interests that attackers must consider during targeting); Schmitt, *supra* note 84, at 461-62 ("As with doing everything feasible to verify a target, the requirement to resort to precision attack is not absolute.").

[FN89]. See Greenwood, *supra* note 22, at 800:

The requirement that, in choosing the weapons and methods of attack which will be used, the commander should have regard to which of those weapons and methods will be most likely to avoid or reduce incidental civilian losses is particularly important. It does not mean that the commander must always use the most discriminating weapon which his country possesses.... [H]e is entitled to take account of considerations such as the quantity of a particular weapon at his disposal, the likely future demands on his weapon stocks, the time within which a particular weapon can be brought to bear, and the degree of risk to his own forces.

[FN90]. See John Mintz, *Air War on Iraq Would Be Similar to Desert Storm: U.S. Is Planning Attack that Limits Civilian Deaths*, Wash. Post, Feb. 15, 1998, at A1 (describing al Firdos incident and efforts to avoid similar incidents).

[FN91]. See Dep't of Def., *Persian Gulf War*, *supra* note 57, at 615-17 (explaining that later reviews of attack assessed it as reasonable under the circumstances).

[FN92]. See *infra* Part III.C.

[FN93]. See Rogers, *supra* note 85, at 181 ("In the event of doubt about the nature of the target, an attack should not be carried out, with a possible exception where failure to prosecute the attack would put attacking forces in immediate danger.").

[FN94]. See W. Michael Reisman, *The Lessons of Qana*, 22 *Yale J. Int'l L.* 381, 396 (1997) [hereinafter Reisman, *Lessons of Qana*] (describing Israeli attack on U.N. compound in Lebanon and conflicting imperatives of retaliating with proportionate degree of force while retaining support of country's internal constituency).

[FN95]. See generally W. Hays Parks, *Air War and the Law of War*, 32 *A.F. L. Rev.* 1 (1990) (discussing emergence of responsibility of both parties to conflict within law governing air power).

[FN96]. The ICRC stressed the importance of these reciprocal obligations after a spate of NATO military attacks in Afghanistan resulted in civilian casualties that NATO blamed in part on Taliban forces' refusal to distinguish its fighters from innocent villagers. See News Release, ICRC, *Afghanistan: ICRC Deplores Increasing Number of Civilian Victims* (Oct. 27, 2006), at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/afghanistan-news-271006?opendocument> (on file with the Columbia Law Review) (emphasizing duty, under international humanitarian law, to take precautions to protect civilians and their property); see also Associated Press, *NATO Chief Says Taliban Used Civilians As Shields*, St. Louis Post-Dispatch, Oct. 28, 2006, at A28 (reporting NATO Secretary-General Jaap de Hoop Scheffer's allegations attributing civilian deaths resulting from NATO attacks to Taliban practices of using civilians as human shields).

[FN97]. Among those suggesting Israel violated the laws of war were the U.N. High Commissioner for Human Rights, Louise Arbour, and the International Committee of the Red Cross. See Tom Regan, *UN Warns Hizbullah, Israel of "War Crimes" Liability*, Christian Sci. Monitor, July 20, 2006, at <http://www.csmonitor.com/2006/0720/dailyUpdate.html> (on file with the Columbia Law Review) (surveying international reactions to Israeli strike).

[FN98]. See Steven Erlanger, *With Israeli Use of Force, Debate over Proportion*, N.Y. Times, July



19, 2006, at A1 (quoting Israeli Foreign Minister Tzipi Livni as justifying disproportionate casualties in Lebanon attack by saying, "Terrorists use the population and live among them.... It's difficult to target like a surgery. Unfortunately, civilians sometimes pay the price of giving shelter to terrorists."); Moshe Yaalon, *The Rules of War*, Wash. Post, Aug. 3, 2006, at A27 (defending Israeli military action and noting strategic use of civilians by Hezbollah).

[FN99]. Jan Egeland, the U.N. Humanitarian chief, called the Israeli strikes "disproportionate" and in violation of the laws of war, but also pinned some blame for collateral civilian damage on Hezbollah: "[M]y message was that Hezbollah must stop this cowardly blending... among women and children .... I heard they were proud because they lost very few fighters and that it was the civilians bearing the brunt of this." UN Official Says Hezbollah Using Civilians to Hide, Chi. Trib., July 25, 2006, at 10.

[FN100]. Protocol I, supra note 52, art. 58.

[FN101]. See Parks, supra note 95, at 27-28.

[FN102]. This was an argument Israel raised in defending its conduct of the recent war against Hezbollah:

The rules of war boil down to one central principle: the need to distinguish combatants from noncombatants. Those who condemned Israel for what happened [in the bombardment of residential areas] at Qana [Lebanon], rather than placing the blame for this unfortunate tragedy squarely on Hezbollah and its state sponsors, have rewarded those for whom this moral principle is meaningless and have condemned a state in which this principle has always guided military and political decisionmaking.

Yaalon, supra note 98. (Yaalon was formerly the chief of staff of the Israel Defense Forces.) In other words, an assessment of whether Israel's precautionary steps were adequate should consider Hezbollah tactics designed to make precise target discrimination impossible. Otherwise Hezbollah's tactics are rewarded. Michael Walzer has made similar observations:

When Palestinian militants launch rocket attacks from civilian areas, they are themselves responsible--and no one else is--for the civilian deaths caused by Israeli counterfire. But (the dialectical argument continues) Israeli soldiers are required to aim as precisely as they can at the militants, to take risks in order to do that, and to call off counterattacks that would kill large numbers of civilians.

Michael Walzer, *War Fair*, The New Republic, July 31, 2006, at 15, 16.

[FN103]. See Greenwood, supra note 22, at 797 ("The question who, or what, is a legitimate target is arguably the most important question in the law of war .... So far as people are concerned, the law is, at least, reasonably clear."); see also supra notes 55-65 and accompanying text (explaining why additional rules on this issue are necessary in nontraditional warfare).

[FN104]. See supra notes 58-60 and accompanying text (explaining difficulty of distinguishing terrorists from civilians).

[FN105]. Importantly, this approach also requires defining what is meant by "al Qaida," its affiliated terrorist network, and its military capability--an issue I introduced above, see supra notes 49-51 and accompanying text, but do not answer in this paper.

[FN106]. See infra note 117 (explaining danger of justifying mass detentions).

[FN107]. Though to some, indefinite and possibly lifelong detention might seem a fate worse than death.

[FN108]. The Israeli government's policy of "targeted killings" is a controversial application of this principle, with much of the controversy stemming, as in the case of U.S. detention policy,

from a disagreement over whether the law of war is the appropriate framework for regulating actions. As the former Israeli judge advocate and now legal scholar Amos Guiora has explained:

[T]ragic mistakes do occur and innocent women and children have died during the course of a targeted killing. In all fairness, there are two explanations for this occurrence: 1) Wanted terrorists are more than aware of their status and calculate (sometimes mistakenly so) that the [Israeli Defense Forces] will not target them when they deliberately surround themselves with women and children (one should add in clear violation of international law forbidding 'human shielding'); 2) Operational mistakes, while highly regrettable, are a reality of armed conflict. While Kofi Annan has recently been quoted as remarking that the loss of one innocent life makes any response to terrorism disproportionate, this statement is not consistent with the laws of armed conflict, which allow for collateral damage, or unintended harm, that is proportionate to the harm prevented. Moreover, a terrorist should not be granted immunity simply because he can surround himself with non-terrorists (human shielding).

Amos Guiora, *Targeted Killing As Active Self-Defense*, 36 Case W. Res. J. Int'l L. 319, 328-29 (2004). The Israeli Supreme Court considered some international legal aspects of targeted killings in H.C.J. 769/02 The Public Committee Against Torture in Israel v. Government of Israel [2005] P 21 (Isr.), translation available at [http://elyon1.court.gov.il/files\\_eng/02/690/007/A34/02007690.a34.htm](http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.htm) (on file with the Columbia Law Review).

[FN109]. Dep't of the Navy, The Commander's Handbook on the Law of Naval Operations ch. 8.2.2 (2007), available at [http://www.nwc.navy.mil/cnws/ild/documents/1-14M\\_\(Jul\\_2007\)\\_\(NWP\).pdf](http://www.nwc.navy.mil/cnws/ild/documents/1-14M_(Jul_2007)_(NWP).pdf) (on file with the Columbia Law Review).

[FN110]. A more controversial incident occurred in November 2002, when the CIA allegedly killed with a missile attack six suspected al Qaeda members traveling in their jeep in Yemen. See BBC News, CIA "Killed al-Qaeda Suspects" in Yemen, Nov. 5, 2002, at [http://news.bbc.co.uk/2/hi/middle\\_east/2402479.stm](http://news.bbc.co.uk/2/hi/middle_east/2402479.stm) (on file with the Columbia Law Review). More recently, it has been reported that U.S. forces used military gunships to target al Qaeda operatives in Somalia. See Andrew England, Somalia Air Strike "Missed al-Qaeda Targets," Fin. Times, Jan. 12, 2007, at 6.

[FN111]. A similar reversibility argument is sometimes made in the context of the death penalty, where some have argued that there should be a higher standard for conviction than "beyond reasonable doubt" in capital cases because erroneous executions can never be corrected. See, e.g., Lillquist, supra note 33, at 53-66 (discussing justifications for standard of proof in criminal cases and examining which, if any, would justify higher standard of proof in capital cases).

[FN112]. See supra note 63 and accompanying text.

[FN113]. See infra notes 220, 222-223 and accompanying text (examining historical instances of radicalization sparked by overbroad detention policy).

[FN114]. Brief for the Respondents at 20, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696).

[FN115]. *Id.* at 25.

[FN116]. In *Hamdi* the government did not articulate clearly what the executive's own internal standards were for combatant determinations. After arguing against any judicial review of such decisions, it argued in the alternative for a "some evidence" standard of review: Even if some judicial review of detentions is appropriate, it should be limited to an inquiry into whether the military could point to any empirical basis for its determination. 542 U.S. at 527 (plurality opinion).

[FN117]. I note at this point, though, a concern that conceiving of **detention as targeting** and detention of innocents along with terrorists as "collateral damage" might dangerously be used to

justify mass detentions. Although using a proportionality analysis to help justify detaining everyone in the vicinity might make sense in extreme cases of, for example, an unidentified terrorist believed to have a suitcase nuclear bomb in a crowded neighborhood, a targeting approach generally would not justify overbroad detention practices. First, proportionality is only one of a number of legal rules that should constrain detention; detentions themselves require some independent legal basis, in this case either a belief that a particular individual is an enemy combatant or some other authority. In this regard detentions differ from other military targeting in that detaining individuals not believed to be legitimate military targets is off limits, absent other legal grounds for doing so, whereas in many conventional targeting contexts it is lawful to intentionally strike known civilians along with military targets so long as proportionality is satisfied. Second, as explained in *supra* notes 78-80 and accompanying text, targeting rules require comparative analysis of more precise means of achieving an objective with lower civilian injury, which in most cases would exclude mass detention.

[FN118]. And, as mentioned earlier, the appropriate level of certainty should perhaps vary with the harshness of interrogation to which an individual might be subjected. See *supra* notes 64-66 and accompanying text.

[FN119]. Consider, for example, that the 9/11 hijackers shared a profile with probably hundreds of al Qaida members, yet were capable of inflicting thousands of casualties and billions of dollars worth of damage.

[FN120]. The Laws of War: A Comprehensive Collection of Primary Documents on International Laws Governing Armed Conflict 44 (W. Michael Reisman & Christos Antoniou eds., 1996).

[FN121]. I address this point further *infra* Part II.C.3.

[FN122]. See, e.g., Jefferson D. Reynolds, Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground, 56 A.F. L. Rev. 1, 40-42 (2005) (identifying "collateral damage incidents" caused by "concealment tactics" in Afghanistan).

[FN123]. The Israeli Government made a similar point in a case before its Supreme Court brought by Palestinian militants challenging detention practices in Operation Defensive Wall, a military operation against terrorist infrastructure in the West Bank. It argued (unsuccessfully) that the Court should be more lenient with regard to the timing of judicial review of detentions because "the terrorists had been carrying out their activities in Palestinian populations centers, without bearing any symbols that would identify them as members of combating forces and distinguish them from the civilian population, in utter violations of the laws of warfare." HCJ 3239/02 Marab v. IDF Commander in the West Bank [2002] IsrSC 57(2) 349, 372-73, translation available at [http://elyon1.court.gov.il/files\\_eng/02/390/032/A04/02032390.a04.pdf](http://elyon1.court.gov.il/files_eng/02/390/032/A04/02032390.a04.pdf) (last visited Sept. 5, 2008) (on file with the Columbia Law Review).

[FN124]. Compare James Ross, Human Rights Watch, Supreme Court to Bush: You're Not Above the Law, Salon, June 13, 2008, at [http://www.salon.com/opinion/feature/2008/06/13/gitmo\\_bush/print.html](http://www.salon.com/opinion/feature/2008/06/13/gitmo_bush/print.html) (on file with the Columbia Law Review) (criticizing Bush Administration, in piece written by Human Rights Watch's legal policy director, for "detaining hundreds of people who were later released without charge"), with Human Rights Watch, The Crisis in Kosovo (2000), available at <http://www.hrw.org/reports/2000/nato/Natbm200-01.htm> (on file with the Columbia Law Review) (concluding, in report on NATO bombardment of Serbia in 1999, that "Yugoslav military forces may share the blame for the eighty-seven civilian deaths at Korisa: there is some evidence that displaced Kosovar civilians were forcibly concentrated within a military camp there as a human shield"), and Press Release, Human Rights Watch, Civilians Must Not Be Used to Shield Homes Against Military Attacks (Nov. 22, 2006), available at [http://hrw.org/english/docs/2006/11/22/isrlpa14652\\_txt.htm](http://hrw.org/english/docs/2006/11/22/isrlpa14652_txt.htm) (on file with the Columbia Law

Review) (condemning Palestinian uses of civilian human shields).

[FN125]. See Third Geneva Convention, *supra* note 52, art. 4(A)(2). These requirements date back far beyond the Geneva Conventions and are found, for instance, in the Brussels Declaration of 1874 and the Hague Conventions of 1899 and 1907. See Mallison & Mallison, *supra* note 56, at 44-45.

[FN126]. For an excellent analysis of such incentive concerns, see generally Derek Jinks, *Protective Parity and the Law of War*, 79 *Notre Dame L. Rev.* 1493 (2004) (arguing that individualized approach, more than protective status categories, would encourage fighters to distinguish themselves from civilian population).

[FN127]. See Mallison & Mallison, *supra* note 56, at 57-58 ("The purpose of [the requirement that arms be carried openly] is to prevent irregulars, at the risk of forfeiting their privileged status as prisoners of war upon capture, from perfidiously misleading the enemy by concealing their own identity."); W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 *Chi. J. Int'l L.* 493, 510 (2003) (describing courts' tendency to adopt view that distinguishing oneself from civilian population is requirement for prisoner of war privileges); Tori Pfanner, *Military Uniforms and the Law of War*, 86 *Int'l Rev. Red Cross* 93, 119 (2004) ("Fighters, who attempt to take advantage of civilians by hiding among them in civilian dress, with their weapons out of view, lose their claim to be treated as soldiers. The law thus attempts to encourage fighters to avoid placing civilians in unconscionable jeopardy." (quoting Abraham Sofaer, 2 *Am. U. J. Int'l L. & Pol'y* 415, 466 (1987))).

[FN128]. Message to the Senate Transmitting the Protocol, 23 *Weekly Comp. Pres. Doc.* 91, 92 (Jan. 29, 1987); see also Editorial, *Denied: A Shield for Terrorists*, *N.Y. Times*, Feb. 17, 1987, at A22 (expressing support for Reagan Administration's position).

[FN129]. See *infra* notes 215-216 and accompanying text.

[FN130]. 128 *S. Ct.* 2229, 2262 (2008).

[FN131]. *Hamdi v. Rumsfeld*, 542 *U.S.* 507 (2004) (plurality opinion).

[FN132]. See News Release 651-04, Dep't of Def., *Combatant Status Review Tribunal Order Issued* (July 7, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040707-0992.html> (on file with the Columbia Law Review) (announcing formation of Combatant Status Review Tribunal).

[FN133]. See Memorandum of Paul Wolfowitz, Deputy Sec'y of Def., to the Sec'y of the Navy, *Order Establishing Combatant Status Review Tribunal 1-2* (July 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> (on file with the Columbia Law Review) [hereinafter *Wolfowitz Memorandum*].

[FN134]. See *id.* at 3 (requiring preponderance of evidence standard). As far as I can tell, there exists no public explanation for why this standard was selected, though it was probably drawn directly from Department of Defense regulations governing similar tribunals established pursuant to Article 5 of the Third Geneva Convention. See Headquarters of Dep'ts of the Army, the Navy, the Air Force, and the Marine Corps, *Army Reg. 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* § 1-6(a) (1997). Article 5 of the Third Geneva Convention provides that "[s]hould any doubt arise as to whether persons, having committed a belligerent act... [are entitled to prisoner-of-war status], such persons shall enjoy [such protections] until such time as their status has been determined by a competent tribunal." Third Geneva Convention, *supra* note 52, art. 5.

[FN135]. See Memorandum of Dep't of Def., *Designated Civilian Official Administrative Review of*

the Detention of Enemy Combatants at U.S. Naval Base Guantanamo Bay, Cuba, encl. 3, at 4 (Sept. 14, 2004), available at <http://www.defense.gov/news/Sep2004/d20040914adminreview.pdf> (on file with the Columbia Law Review) ("The ARB will make its assessment as to whether there is a reason to believe that an enemy combatant continues to pose a threat to the United States or its allies following review of all reasonably available relevant information...").

[FN136]. See Wolfowitz Memorandum, supra note 133, at 1.

[FN137]. See Committee Against Torture Report, supra note 21, at 53-54 (noting requirement that tribunal recorder and detainee's personal representative search all government files for evidence that detainee should not be designated as enemy combatant and report findings to tribunal).

[FN138]. See Pub. L. No. 109-148, § 1005(e), 119 Stat. 2739, 2741-43 (2005) (codified at 10 U.S.C. § 801 (2006)).

[FN139]. See Pub. L. No. 109-366, § 950g, 120 Stat. 2600, 2622 (2006) (codified at 10 U.S.C. § 950g).

[FN140]. See 128 S. Ct. 2229, 2262, 2270-74 (2008).

[FN141]. See infra notes 185-186 and accompanying text.

[FN142]. See Committee Against Torture Report, supra note 21, at 57 (noting right of detainees in Afghanistan to annual review procedure, with first taking place within ninety days of detention); Declaration of Colonel James W. Gray PP 11-13, *Al Maqaleh v. Gates*, No. 06-CV-01669 (JDB) (D.D.C. Mar. 3, 2007) (discussing review process for detainees in Afghanistan); Declaration of Colonel Rose M. Miller PP 10-12, *Ruzatullah v. Rumsfeld*, No. 06-CV-01707 (GK) (D.D.C. Nov. 19, 2006) (discussing detention procedures and review process for enemy combatants detained in Afghanistan).

[FN143]. See President George W. Bush, *President Discusses Creation of Military Commissions To Try Suspected Terrorists* (Sept. 6, 2006), available at <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html> (on file with the Columbia Law Review) (discussing U.S. response to September 11, 2001 attacks).

[FN144]. England, Briefing, supra note 7.

[FN145]. Dep't of Def., *Persian Gulf War*, supra note 57, at 616 (emphasis added).

[FN146]. See, e.g., United Kingdom Reservations/Declarations to the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, July 2, 2002, available at <http://www.icrc.org/IHL.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument> (on file with the Columbia Law Review) ("Military commanders and others responsible for planning, deciding upon, or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time."); Australia Reservation/Declaration to the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, June 21, 1991, available at <http://www.icrc.org/ihl.nsf/NORM/10312B4E9047086EC1256402003FB253?OpenDocument> (on file with the Columbia Law Review) ("[M]ilitary commanders and others responsible for planning, deciding upon, or executing attacks, necessarily have to reach their decisions on the basis of their assessment of the information from all sources, which is available to them at the relevant time."); Germany Reservation/Declaration to the Protocol Additional to the Geneva Conventions

of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 para. 4, Feb. 14, 1991, available at <http://www.icrc.org/ihl.nsf/NORM/3F4D8706B6B7EA40C1256402003FB3C7?OpenDocument> (on file with the Columbia Law Review) (“[T]he decision taken by the person responsible has to be judged on the basis of all information available to him at the relevant time, and not on the basis of hindsight.”); Canada Reservation/Declaration to the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Nov. 20, 1990, available at <http://www.icrc.org/ihl.nsf/NORM/172FFEC04ADC80F2C1256402003FB314?OpenDocument> (on file with the Columbia Law Review) (“[M]ilitary commanders and others responsible for planning, deciding upon or executing attacks have to reach decisions on the basis of their assessment of the information reasonably available to them at the relevant time and such decisions cannot be judged on the basis of information which has subsequently come to light.”); New Zealand Reservation/Declaration to the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 para. 2, Feb. 8, 1988, available at <http://www.icrc.org/IHL.nsf/d49c744360dad07c1256314002ee738/8fec3861203abe21c1256402003fb53b!OpenDocument> (on file with the Columbia Law Review) (“In relation to Articles 51 to 58 inclusive,... military commanders and others responsible for planning, deciding upon, or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time.”); Netherlands Reservation/Declaration to the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 para. 6, June 26, 1987, available at <http://www.icrc.org/ihl.nsf/NORM/E6EF925C67966E90C1256402003FB532?OpenDocument> (on file with the Columbia Law Review) [hereinafter Netherlands Reservation] (“[M]ilitary commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time.”).

[FN147]. In some cases doubt about a detainee may rise as time goes on, for instance if identifying information is later discredited.

[FN148]. See Rear Admiral James McGarrath, Dir., Office for the Admin. Review of the Det. of Enemy Combatants, Defense Department Special Briefing on Administrative Review Boards for Detainees at Guantanamo Bay, Cuba (July 8, 2005), available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3171> (on file with the Columbia Law Review) [hereinafter Def. Dep't Special Briefing] (“[O]ur Administrative Review Board process ensures that each detainee’s case is heard at least annually to assess whether or not the detainee continues to pose a threat to the United States... or whether there are other reasons that might warrant continued detention.”).

[FN149]. Dep’t of Def., Administrative Review Board Summary, available at <http://www.defenselink.mil/news/Jan2006/d20060130arb.pdf> (last visited Sept. 7, 2008) (on file with the Columbia Law Review).

[FN150]. This repetitious targeting-like analysis also resembles the statutory approach the Israeli government adopted for detaining certain suspected terrorists and militants as enemy combatants. Under its Incarceration of Unlawful Combatants Law of 2002, the Israeli military must petition a court to detain a member of designated enemy groups by showing “reasonable cause to believe that a person being held... is an unlawful combatant and that his release will harm State security,” and then similarly justifying his continued detention to the judge every six months. See Incarceration of Unlawful Combatants Law, 5762-2002, 32 Isr. Y.B. on Hum. Rts., 389, 389-92 (2002). The Israeli Supreme Court recently upheld this statute in *CrimA 6659/06 Anonymous v. Israel* [2007] 48 (Isr.), translation available at [http://elyon1.court.gov.il/files\\_eng/06/590/066/n04/06066590.n04.pdf](http://elyon1.court.gov.il/files_eng/06/590/066/n04/06066590.n04.pdf) (on file with the Columbia Law

Review).

[FN151]. See Boumediene v. Bush, 128 S. Ct. 2229, 2270 (2008) (“[G]iven that the consequences of error may be detention of persons for the duration of hostilities that may last a generation or more, this is a risk too significant to ignore.”); Brooks, *supra* note 22, at 725-29 (2004) (“As it stands, ... the indefinite nature of the conflict means that these detainees may remain in detention indefinitely, neither charged nor released, with no access to counsel and no international or judicial monitoring of conditions.”).

[FN152]. See Bradley & Goldsmith, *supra* note 34, at 2123-27 (proposing that individualized assessments, based on each “detainee’s past conduct, level of authority within al Qaeda, statements and actions during confinement, age and health, and psychological profile,” would ameliorate uncertain duration of detention).

[FN153]. Upon the release of twenty Pakistani detainees from Guantanamo, a Pakistani official remarked: “Their lives have been destroyed. Their families have gone through psychological trauma, since they were not terrorists; they were just low-level Taliban fighters.” Charlie Savage, *US Releases 20 Detainees, Transfers 20 More to Cuba*, Boston Globe, Nov. 25, 2003, at A1. The rate at which the humanitarian costs rise--in a sense, the marginal cost of another temporal increment of detention--arguably declines over time, since the early stages of detention may be the most jarring. But certainly the humanitarian costs of detention escalate when one moves from a short-term to an indefinite detention in a war unlikely to end anytime soon. Consider the report by British psychologists and psychiatrists regarding damage to the mental health of British prisoners detained under the United Kingdom’s 2001 antiterrorism legislation, in which they opine that “[t]he indefinite nature of detention is a major factor in their [mental] deterioration.” Ian Robbins et al., *The Psychiatric Problems of Detainees Under the 2001 Anti-Terrorism Crime and Security Act 3* (2004), available at <http://www.statewatch.org/news/2004/nov/belmarsh-mh.pdf> (on file with the Columbia Law Review).

[FN154]. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 465-66 (D.D.C. 2005), vacated sub nom. Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), rev’d, 128 S. Ct. 2229.

[FN155]. See Jon O. Newman, *Beyond “Reasonable Doubt,”* 68 N.Y.U. L. Rev. 979, 982 (1993).

[FN156]. Although time generally increases certainty by allowing for more thorough deliberation, some factors push the other way. For example, the memory of witnesses would probably degrade over time.

[FN157]. Hamdi v. Rumsfeld, 542 U.S. 507, 534 (2004) (plurality opinion) (“The parties agree that initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to continue to hold those who have been seized.”); see also Boumediene, 128 S. Ct. at 2237 (“[T]he Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction [to hear detainees’ claims].”).

[FN158]. Cf. Boumediene, 128 S. Ct. at 2247 (finding that Suspension Clause alongside writ of habeas corpus functions as safeguard of detainee rights).

[FN159]. As mentioned earlier, the Fourth Geneva Convention, in laying out rules for internment of those believed to pose security threats in occupied territory, allows for internment of individuals for “imperative reasons of security” but requires review of individual detentions on those grounds at least every six months. See Fourth Geneva Convention, *supra* note 49, art. 78.

[FN160]. Schmitt, *supra* note 84, at 451.

[FN161]. Moreno-Ocampo Memo, *supra* note 69, at 6.

[FN162]. See supra note 150 and accompanying text (describing periodic review procedures in Israel and U.S.).

[FN163]. See supra note 111. Correcting an erroneous detention by releasing the individual does not, however, by itself "undo" the harm already suffered. Some have proposed monetary compensation schemes as remedies for that harm. See, e.g., Ackerman, supra note 34, at 51-54 ("Public morality requires... a substantial money payment for each day spent in jail....").

[FN164]. Cf. Boumediene v. Bush, 128 S. Ct. 2229, 2269 (2008) ("Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing.... What matters is the sum total of procedural protections afforded to the detainee at all stages, direct and collateral.").

[FN165]. See Jay Sterling Silver, Equality of Arms and the Adversarial Process: A New Constitutional Right, 1990 Wis. L. Rev. 1007, 1008 ("[O]ur system of justice is founded on the presumption that the truth is more likely to emerge from the contest between zealous advocates."). This argument formed the basis of opposition to section 1005(e) of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (codified at 10 U.S.C. § 801 (2006)), restricting habeas corpus jurisdiction at Guantanamo. See, e.g., P. Sabin Willett, Op-Ed., Detainees Deserve Court Trials, Wash. Post, Nov. 14, 2005, at 21 ("[Courts] are slow, but they are not beholden to the defense secretary, and in the end they get it right."). But others observe that adversarial process may sometimes suppress truthfinding. See, e.g., Marvin E. Frankel, The Search for Truth: An Umpireal View, 123 U. Pa. L. Rev. 1031, 1036 (1975) ("[M]any of the rules and devices of adversary litigation as we conduct it are not geared for, but are often aptly suited to defeat, the development of the truth."); Frank J. Macciarola, Finding the Truth in an American Criminal Trial: Some Observations, 5 Cardozo J. Int'l & Comp. L. 97, 98 (1997) (observing that American criminal justice system often subordinates goal of determining truth to other values).

[FN166]. See generally Martinez, supra note 5 (detailing how most court decisions challenging "war on terror" policies, including detention, have focused on procedural claims rather than substantive rights). This is true especially in the discussion of new administrative detention proposals for handling suspected terrorists. See, e.g., Wittes, supra note 44, at 151-82 (describing difficulties of designing administrative detention scheme); Goldsmith & Katyal, supra note 44 (proposing system of preventive detention overseen by national security court composed of life-tenured federal judges). See generally Waxman, Administrative Detention, supra note 44 (arguing that almost exclusive focus in administrative detention debates on procedural issues is misguided).

In their study of legal dilemmas posed by the fight against transnational terrorist networks, for example, Philip Heymann and Juliette Kayyem conclude that suspected al Qaida detainees should be accorded formal hearings to determine whether detention is justified, but only partially address the standard-of-certainty question. They articulate different sets of procedural protections for various categories of captured terror suspects depending on whether the individual is a United States person and whether he is captured in the United States, in a zone of active combat, or outside the United States but not in a zone of active combat. Except in zones of active combat, Heymann and Kayyem urge a criminal law approach, relying on a probable cause standard for capture and a beyond reasonable doubt standard for long-term detention. But they analyze the procedural aspects of these systems, not the substantive standards. On more traditional battlefields--zones of active combat, like Afghanistan--they would ascribe the least robust procedural protections. There, they argue, a suspected terrorist is entitled to a tribunal hearing to determine if he is engaged or actively supporting those engaged in hostilities against the United States. But they do not articulate a specific standard to be applied. See Philip B. Heymann & Juliette N. Kayyem, Protecting Liberty in an Age of Terror 41-52 (2005).

[FN167]. Hamdi v. Rumsfeld, 542 U.S. 507, 532-33 (2004) (plurality opinion) (quoting Mathews



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

[FN168]. Boumediene, 128 S. Ct. at 2276.

[FN169]. Here, especially, the definitional issue identified earlier, see *supra* notes 51-54 and accompanying text, comes into play: Some notions of "enemy combatant"--or any category subject to detention--will be more susceptible to proof and certainty by the state than others. Certain objective factors that may be relevant, like possession of weapons or declared allegiance to a group, will be easier to validate and assess with confidence than others, like intentions or doctrinal beliefs.

[FN170]. See Macciarola, *supra* note 165.

[FN171]. For some, the ten-to-one ratio fails to go far enough in protecting innocents. Treatises on American criminal law have also invoked twenty-to-one and even ninety-nine-to-one ratios in explaining this principle. See Newman, *supra* note 155, at 980-81.

[FN172]. See U.S. Dep't of Def., JTF-GTMO Information on Detainees 4 (Mar. 4, 2005), available at <http://www.defenselink.mil/news/Mar2005/d20050304info.pdf> (on file with the Columbia Law Review). Recently the Defense Department released a report stating: "Our reports indicate that at least 30 former GTMO detainees have taken part in anti-coalition militant activities after leaving U.S. detention." U.S. Dep't of Def., Former Guantanamo Detainees Who Have Returned to the Fight (July 12, 2007), available at [http://www.nefafoundation.org/miscellaneous/FeaturedDocs/DOD\\_fmrGitmo.pdf](http://www.nefafoundation.org/miscellaneous/FeaturedDocs/DOD_fmrGitmo.pdf) (on file with the Columbia Law Review); see also Alissa Rubin, Former Guantanamo Detainee Tied to Attack, N.Y. Times, May 8, 2008, at A8.

[FN173]. Consider, in that regard, this observation by the Supreme Court in Johnson v. Eisentrager, in holding that German prisoners of war convicted of war crimes by a military commission could not seek federal habeas corpus review:

Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.

339 U.S. 763, 779 (1950). This view stands in stark contrast to a view of the Israeli Supreme Court described in *supra* note 150.

[FN174]. In this way, targeting law may be more protective than constitutional due process law. Cf. Boumediene v. Bush, 128 S. Ct. 2229, 2286 (2008) (Roberts, C.J., dissenting) ("The question is not how much process the CSRTs provide in comparison to other modes of adjudication. The question is whether the CSRT procedures--coupled with the judicial review specified by the DTA--provide the 'basic process' Hamdi said the Constitution affords ...." (citing Hamdi v. Rumsfeld, 542 U.S. 507, 534 (2004) (plurality opinion))).

[FN175]. Rogers, *supra* note 85, at 177; cf. Netherlands Reservation, *supra* note 146, para. 2 ("It is the understanding of the Government of the Kingdom of the Netherlands that the word 'feasible' means that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations.").

[FN176]. Schmitt, *supra* note 84, at 460.

[FN177]. See *supra* notes 156-159 and accompanying text.

[FN178]. In a similar way, Richard Posner sees habeas corpus as appropriate for detained terrorist combatants not only as a matter of traditional rights or as a check against executive abuse, but as an accuracy-enhancing mechanism. See Posner, *Not a Suicide Pact*, *supra* note 34, at 60-61.

[FN179]. See *supra* notes 82-87 and accompanying text.

[FN180]. Cf. *United States v. Salerno*, 481 U.S. 739, 751 (1987) (noting that right to counsel and adversarial process mandated in Bail Reform Act were "specifically designed to further the accuracy of [the] determination [of the likelihood of future dangerousness]").

[FN181]. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 528-35 (2004) (plurality opinion) (applying procedural due process test articulated in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

[FN182]. *Id.* at 538.

[FN183]. See Army Reg. 190-8, *supra* note 134, § 1-6.

[FN184]. Def. Dep't Special Briefing, *supra* note 148 (adopting provisions based on Army Reg. 190-8).

[FN185]. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2275-76 (2008).

[FN186]. Lower courts are now wrestling with this issue as they establish burdens and standards of proof. See *supra* note 3.

[FN187]. Instructive here is the following statement by the Office of the Prosecutor for the International Criminal Tribunal for the Former Yugoslavia:

The obligation to do everything feasible [to distinguish between military objectives and civilian persons or objects] is high but not absolute. A military commander must set up an effective intelligence gathering system to collect and evaluate information concerning potential targets. The commander must also direct his forces to use available technical means to properly identify targets during operations. Both the commander and the aircrew actually engaged in operations must have some range of discretion to determine which available resources shall be used and how they shall be used.

Prosecutor's Report, NATO Bombing in Yugoslavia, *supra* note 76, para. 29.

[FN188]. Procedural due process cases are illustrative here. Compare, for example, *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (requiring evidentiary hearings where veracity and credibility of claimants are key), with *Parham v. J.R.*, 442 U.S. 584, 607-09 (1979) (refusing to require judicial-style hearings for certain juvenile civil commitments because they were unlikely to improve practice of relying on medical expert submissions). In *Board of Curators of the University of Missouri v. Horowitz*, the Court held that a medical school need not conduct formal hearings before dismissing a student on account of inadequate clinical ability, because formal adjudication was unlikely to generate greater truth and because formality might undermine academic relations and the educative value of the review process itself. See 435 U.S. 78, 90 (1978). Similarly in the detention context, it might be argued that formal combatant adjudications undermine the effectiveness of interrogation processes, thereby hurting security interests and perhaps even eroding truth-seeking.

[FN189]. Again, the Supreme Court's due process analysis, while not directly relevant, illustrates some aspects of such an inquiry. While assistance of counsel is generally believed to enhance truth-finding, in some circumstances the Court has found it does not contribute significantly to

decisionmaking accuracy. See, e.g., Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 330 (1985) (“[I]t is less than crystal clear why lawyers must be available to identify possible errors in medical judgment.”); Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 32-33 (1981) (holding that Constitution does not require appointment of counsel for indigent parents in every parental status termination proceeding in part because “the presence of counsel for [plaintiff] could not have made a determinative difference”).

[FN190]. See 50 U.S.C. § 1803 (2006).

[FN191]. See Matthew C. Waxman, *International Law and the Politics of Urban Air Operations* 43-53 (2000) (arguing that when one party operates under tighter legal and political constraints, opposing party may exploit this asymmetry).

[FN192]. See *supra* notes 78-92 and accompanying text.

[FN193]. See Alan Vick et al., *Aerospace Operations in Urban Environments* 53-55 (2000) (discussing “high sensitivity” to “potential U.S. casualties” in U.S. military policy).

[FN194]. See Rogers, *supra* note 85, at 180.

[FN195]. See Reisman, *Lessons of Qana*, *supra* note 94, at 396 (arguing that democratic polity will insist on version of law that defers to humanitarian considerations in absence of direct threats).

[FN196]. See Theodor Meron, *The Humanization of Humanitarian Law*, 94 *Am. J. Int'l L.* 239, 276-77 (2000) (suggesting that “most advanced countries” have taken steps to minimize civilian casualties).

[FN197]. See Michael Ignatieff, *Virtual War* 52, 192 (2001) (discussing attempts by Slobodan Milosevic and Saddam Hussein to publicize damage inflicted by American attacks); Mark Fineman, *Hussein's Moves Seen as Steps in Calculated Plan*, *L.A. Times*, Jan. 17, 1993, at A1 (quoting diplomat in Baghdad as saying, “For Saddam, the whole purpose of this crisis is political--not military--to bring the siege of Iraq to the forefront of world attention”).

[FN198]. See Thomas A. Keaney & Eliot A. Cohen, *Summary Report: Gulf War Air Power Survey* 22, 69 (2002) (examining example of Iraq); Benjamin S. Lambeth, *NATO's Airwar for Kosovo* 49 (2001) (examining example of Kosovo).

[FN199]. See *supra* note 107 and accompanying text.

[FN200]. Political pressures are also likely to be diffuse in another dimension of the detention context: The individual who detains someone in the first place is unlikely to be responsible for reviewing the detention, nor may he even be aware of error.

[FN201]. Actually, both are opaque, but in different ways. In targeting, decisionmaking is usually opaque but the effects are public when attacks are actually carried out. In detention, decisionmaking is also opaque as are some of the effects (such as false positives), though more may be known about the procedures that are employed.

[FN202]. Sometimes U.S. officials have acknowledged that certain individuals should not have been brought to Guantanamo because they turned out to be only low-level fighters, but not because they were nonfighters. See Christopher Cooper, *Detention Plan: In Guantanamo, Prisoners Languish in Sea of Red Tape*, *Wall St. J.*, Jan. 26, 2005, at A1.

[FN203]. See *supra* note 172 and accompanying text.

[FN204]. Political pressures to avoid false negatives (passing up an opportunity to act against a suspected enemy fighter) are likely to operate differently in the two contexts. Whereas targeters pass up opportunities to bomb suspected military targets all the time because they lack sufficient confidence of identity, those who have captured suspected terrorists may be reluctant to release them only to find that they had let someone "slip through their fingers." That is, the political pressure to avoid false negatives may be greater in some detention contexts than some targeting contexts. The case of Osama bin Laden is an exception that may prove the rule. Political controversy has swirled around whether both the Clinton Administration and the Bush Administration failed to bomb bin Laden when intelligence agents thought they might have him in their sights. See Robert Novak, *Clinton Blew It on Bin Laden: Ex-CIA Official*, *Chi. Sun Times*, Oct. 2, 2006, at 35. But imagine the intense political firestorm that would erupt if he were captured and then erroneously released based on lack of sufficient certainty of the suspect's identity.

[FN205]. See *supra* Parts III.A.2, III.B.3.

[FN206]. See *supra* notes 90-91 and accompanying text.

[FN207]. This was the experience of the British government in World War II, when it locked away many citizens under the mistaken view that they formed a rebellious "Fifth Column." See A.W. Simpson, *In the Highest Degree Odious: Detention Without Trial in Wartime Britain 99-100* (1994).

[FN208]. See Willett, *supra* note 165.

[FN209]. The Army and Marine Corps' new Counterinsurgency Field Manual emphasizes these principles not only for legal and ethical reasons but also for military effectiveness. After noting, for example, that the "nature of [counter-insurgency] operations sometimes makes it difficult to separate potential detainees from innocent bystanders, since insurgents lack distinctive uniforms and deliberately mingle with the local populace," the Manual goes on to warn that "[t]reating a civilian like an insurgent... is a sure recipe for failure." Dep't of the Army, FM 3-24 Counterinsurgency paras. 7-38, 7-40 (2006). It continues: "Multinational and U.S. forces brought in to support [restoring order] must remember that the populace will scrutinize their actions. People will watch to see if Soldiers and Marines stay consistent with this avowed purpose. Inconsistent actions furnish insurgents with valuable issues for manipulation in propaganda." *Id.* para. 8-42.

[FN210]. See David B. Rivkin, Jr. & Lee A. Casey, "Lawfare" over Haditha, *Wall St. J.*, June 7, 2006, at A14 (explaining strategies of "irregular" forces).

[FN211]. As Secretary of Defense Rumsfeld remarked: "It is the distinction between combatants and innocent civilians that terrorism, and practices like the use of human shields, so directly assaults." Donald Rumsfeld, Sec'y of Def., Department of Defense News Briefing (Feb. 19, 2003), available at [http://www.defenselink.mil/transcripts/2003/t02192003\\_t0219sd.html](http://www.defenselink.mil/transcripts/2003/t02192003_t0219sd.html) (on file with the Columbia Law Review). On the use of human shield tactics generally, see Daniel Byman & Matthew Waxman, *The Dynamics of Coercion* 137-50 (2002).

[FN212]. See supra text accompanying notes 117-118.

[FN213]. This argument is made by, for example, Lee Casey and David Rivkin. See Casey & Rivkin, *Geneva Conventions*, supra note 41, at 211. For a general discussion of this type of argument, see Jinks, supra note 126, at 1524-26. Part of the answer to this apparent inconsistency between the provision of procedural protections and the incentive structure of the laws of war lies in the fact that those detained as enemy professional soldiers are unlikely to be held erroneously--because of their distinctive uniforms--so procedural protections are unnecessary.

[FN214]. See Schöndorf, supra note 34, at 39-40 (explaining tactics used by "non-state actors" against militarily superior opponents).

[FN215]. Eric Posner argues that terrorist organizations may make military strategic decisions rationally, and in doing so generally do not see gains from compliance with international law. See Eric A. Posner, *Terrorism and the Laws of War*, 5 *Chi. J. Int'l L.* 423, 433 (2005).

[FN216]. See Bruce Hoffman, *Inside Terrorism* 43-44 (2006) (analyzing differences between "terrorists" and other "types of criminals").

[FN217]. See Karzai Asks US to Cede Afghan Control, English.Aljazeera.net, May 22, 2005, at <http://english.aljazeera.net/archive/2005/05/2008410115912870274.html> (on file with the Columbia Law Review) ("Many Afghans have criticised US troops for what are seen as heavy-handed tactics, such as breaking into people's homes in the middle of the night.").

[FN218]. See Renee De Nevers, *Modernizing the Geneva Conventions*, 29 *Wash. Q.* 99, 106 (2006) ("[L]ocal cooperation is vital to identifying terrorists....").

[FN219]. For a discussion of this phenomenon in the United Kingdom, see Christopher Caldwell, *Counterterrorism in the U.K.: After Londonistan*, *N.Y. Times*, June 25, 2006 (Magazine), at 42.

[FN220]. See David Bonner, *Executive Measures, Terrorism and National Security* 87-96 (2007) (detailing British policies governing detention of Northern Irish terrorism suspects); Laura Donohue, *The Cost of Counterterrorism* 36-48 (2008) ("[I]nternment and its aftermath not only increased the violence but also enhanced sympathy for those opposed to the state."); Tom Parker, *Counterterrorism Policies in the United Kingdom*, in *Protecting Liberty in an Age of Terror* 119, 125-28 (Philip B. Heymann & Juliette N. Kayyem eds., 2005) ("Within Northern Ireland, internment further galvanized the nationalist community in its opposition to British rule, and violence immediately surged against the security forces.").

[FN221]. Consider a May 2006 incident in which Taliban fighters attacked coalition forces from

unaffiliated civilian homes in Afghanistan, leading to coalition bombardment of the homes and nearby structures and the deaths of more than a dozen civilians. See BBC News, *Dozens Die in Afghan Air Strike*, May 22, 2006, at [http://news.bbc.co.uk/2/hi/south\\_asia/5003478.stm](http://news.bbc.co.uk/2/hi/south_asia/5003478.stm) (on file with the Columbia Law Review). The experience of Lebanese civilians who risked Israeli air bombardment in recent anti-Hezbollah operations is mixed on this point, with many harboring intense resentment at Israel for their injuries but others blaming Hezbollah forces for hiding among civilian populations. See Hassan M. Fattah, *At Funeral, a Sunni Village Condemns Hezbollah's Presence*, N.Y. Times, Aug. 25, 2006, at A10 (describing criticism of Hezbollah); Maher Chmaytelli & Gwen Ackerman, *Israel's Attacks Deepen Lebanese Split over Disarming Hezbollah*, Bloomberg, July 20, 2006, at <http://www.bloomberg.com/apps/news?pid=20601087&sid=a3RxOepQIXgU&refer=home> (on file with the Columbia Law Review) (describing criticism of both Israel and Hezbollah); Chris Link, *Photos that Damn Hezbollah*, Herald Sun (Austl.), July 30, 2006, available at <http://www.news.com.au/heraldsun/story/0,,19955774-5007220,00.html> (on file with the Columbia Law Review) (describing criticism of Hezbollah).

[FN222]. See Lord Diplock, *Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland* paras. 28-34 (1972).

[FN223]. See Dexter Filkins, *Hundreds of Iraqi Detainees Get First Taste of Freedom*, N.Y. Times, June 8, 2006, at A6 (describing release of approximately 100 Iraqi prisoners amid criticism that they were indiscriminately "scooped up in sweeps" for detention); Carlotta Gall, *U.S.-Afghan Foray Reveals Friction on Antirebel Raids*, N.Y. Times, July 3, 2006, at A9 (describing tensions between Afghan government and American military caused by joint raid on civilian home by American and Afghan forces); Solomon Moore & Suhail Ahmad, *Iraq Frees Hundreds of Prisoners in Nod to Sunnis*, L.A. Times, June 8, 2006, at A27 (describing Iraq's release of nearly 600 Iraqi prisoners who were suspected of being insurgents despite, in many cases, never having been formally charged or tried); Joshua Partlow, *U.S. Detention of Sheik Angers Sunnis in Iraq*, Wash. Post, June 25, 2006, at A18 (describing rise in anti-American sentiment following accidental detainment of senior Sunni Muslim leader); Alissa Rubin, *U.S. Remakes Jails in Iraq, but Gains Are at Risk*, N.Y. Times, June 2, 2008, at A1 (describing widespread skepticism of American-run detention system in Iraq despite United States's recent attempts to make it more closely resemble its civilian model).

June 11, 2009

Hon. Harry Reid	Hon. Nancy Pelosi
Hon. Richard J. Durbin	Hon. Steny H. Hoyer
Hon. Carl Levin	Hon. Ike Skelton
Hon. Patrick J. Leahy	Hon. John Conyers, Jr.

*Re: The Adequacy of Our Existing Laws and Institutions to Deal with the Threat of Terrorism*

Dear Sirs and Madam:

As lawyers, we are writing to express our concern with suggestions that have been made for the creation of a new legal regime to deal with terrorist suspects. We understand that some may be advising you that our existing laws are inadequate to deal with the threat we face today from international terrorism and that a new system for detaining suspected terrorists is required to protect the nation's security. We urge you to approach that advice with caution.

We believe that our existing laws are adequate and enable the government to detain those who need to be detained to protect the nation's security. We further believe that departing from existing law and bending our bedrock principles will ultimately make us less safe by undermining our greatest asset in the struggle with international terrorism – our moral authority and international respect as a nation committed to the rule of law.

***Executive Summary — Our Existing Legal System Works.***

Our country can achieve its legitimate goals through existing laws which authorize the detention of those who should be detained in the fight against international terrorism. Longstanding law-of-war principles authorize the detention for the duration of armed hostilities of those who engage in armed conflict against the United States or its allies. They do not authorize the detention of people for terrorist activities far from the battlefield, which are not acts of war but criminal acts. Our existing federal criminal laws equip us to deal effectively with terrorist threats away from the battlefield. They authorize the prosecution, conviction and incarceration of anyone who intentionally plans, engages in or supports acts of terrorism directed against our country, our citizens or our property, or who assists groups in carrying out those activities.

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Together those laws equip us to deal effectively with the threat of terrorism we face today. They enable us to detain anyone who commanded or fought with Taliban troops in battle. They also enable us to prosecute and incarcerate anyone who received explosives training at al-Qaeda training camps or who swears allegiance and provides assistance to Osama bin Laden or otherwise makes it clear, acting on behalf of a terrorist organization, that he intends to kill Americans and takes any act to carry out that intent. Some modifications to the existing system may be warranted, but no new system is necessary. We urge you to resist calls to depart from a system that has worked effectively and that provides us with international credibility as a nation committed to the rule of law.

We firmly believe it would be a grave mistake to create a new legal regime to permit the detention of persons who could not be detained under existing law. Authorization of "preventive detention" is unnecessary and directly in conflict with the principles this country is founded upon, and would seriously undermine the President's efforts to restore our reputation in the international community.

***Law-of-War Principles Authorize the Detention for the Duration of Hostilities of Those Who Engage in Armed Conflict Against U.S. Troops.***

The law does not require everyone detained to be charged criminally. Whenever U.S. troops are engaged in armed conflicts, they must be able to seize and detain those who are fighting against them, whether members of the enemy's armed forces or civilians who directly participate in the hostilities. As the Supreme Court made clear in the *Hamdi* decision, "detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war."<sup>1</sup> No criminal charge is required. Whenever "[a]ctive combat operations" are ongoing, as they are in Afghanistan and Iraq, "[t]he United States may detain, for the duration of these hostilities, individuals legitimately determined to . . . [have] engaged in an armed conflict against the United States."<sup>2</sup>

There are limits, of course, on the authority to detain under the laws of war. First, the detention is only temporary; it "may not last longer than active hostilities,"<sup>3</sup> and individuals may be detained only "for the duration of the particular conflict in which they were captured."<sup>4</sup>

Second, detention under the laws of war is intended to prevent captured enemy forces from returning to the battlefield; it may not be used as a means for incarcerating people for suspected criminal conduct engaged in far from the battlefield. The laws of war cannot be used to circumvent the criminal justice process.



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***Terrorists Are Criminals.***

Acts of terrorism, such as the killing of innocent civilians and the intentional and wanton destruction of property, are criminal acts. Organizations committed to those activities are criminal enterprises, and anyone who intentionally assists them in carrying out their purposes is a criminal. The President may certainly employ military personnel outside areas of actual armed conflict abroad to track down and capture persons suspected of planning, engaging or assisting in those criminal terrorist acts. But the military is not authorized to incarcerate indefinitely without charge or trial a terrorist suspect captured in Bosnia or England or Canada who is not a direct participant in armed conflict. If the suspicions of terrorism against them are correct, these people are criminals and should be prosecuted as such.

It is a mistake in general to treat terrorists as anything but common criminals. Awarding them the status of combatants glorifies them and elevates them to a status they do not deserve. Anyone who intentionally plans, participates in or supports terrorist acts, such as those committed on 9/11, is a criminal and should be brought to justice through the criminal process.<sup>5</sup>

***Existing Criminal Laws Authorize the Government to Prosecute and Prevent Terrorist Activities Directed Against the United States or its Citizens.***

Those who suggest that the criminal laws are inadequate may not be familiar with the breadth of those laws. Our existing criminal statutes reach the range of people who should be detained. They cover murder, bombing, assault, theft, intentional destruction of government and private property, kidnapping and high-jacking. Congress has also enacted statutes that specifically address terrorist-related activities and authorize the government to thwart those activities in their nascent stages. See, for example:

- 18 U.S.C. § 2384: Conspiring to overthrow, make war or oppose by force the government of the United States.
- 18 U.S.C. § 2339A: Providing "material support or resources" to terrorist organizations for carrying out a number of specified offenses, including murder, kidnapping and the violation of various anti-terrorism statutes.
- 18 U.S.C. § 2339B: Knowingly providing material support for foreign terrorist organizations, but not requiring intent that the support be used in furtherance of terrorist activity.

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- 18 U.S.C. § 2339C: Engaging in conduct that “directly or indirectly” provides funds with the knowledge that the funds will be used to carry out terrorist activities.
- 18 U.S.C. § 2339D: Receiving military-type training from an organization that the Secretary of State has designated a foreign terrorist organization.
- 18 U.S.C. § 2332b: Committing acts of terrorism “transcending national boundaries.”

Those engaging in or supporting terrorist acts would also be likely to violate a number of other criminal statutes, for example, money laundering, illegal possession of fire arms or explosives, the making of false statements, and wire, mail and credit-card fraud. In addition, the authority to charge persons not only with the substantive crimes themselves but also with aiding and abetting or conspiring to commit those crimes expands considerably the government’s ability to prosecute and detain dangerous people. There is also a statutory presumption that anyone charged with terrorism-related offenses may be detained before trial. *See* 18 U.S.C. § 3142.<sup>6</sup>

***The Existing Criminal Justice System Works and Has Credibility.***

Again, those who suggest that our criminal justice system is inadequate may not be familiar with the record of convictions compiled by the Department of Justice since 9/11. In a report prepared under the prior Administration, the Department concluded that the existing criminal laws provide it with the tools necessary to prosecute terrorist suspects and stop acts of terrorism before they can be carried out.<sup>7</sup> As it reported, the Department has achieved “impressive success” and has drawn “on the full range of criminal charges available in the federal criminal code” to successfully prosecute suspected terrorists. Its “effective use” of the existing statutes “has allowed [it] to intervene at the early stages of terrorist planning before a terrorist act occurs.”<sup>8</sup> Between September 2001 and June 2006, it obtained convictions against more than 250 people in U.S. criminal courts for terrorism-related offenses. The convictions covered a range of activities, from completed acts of terrorism to the “early stages of terrorist planning” and enabled it “to disrupt terrorist activity before it occurs.”<sup>9</sup>

Recently, former federal prosecutors from the Southern District of New York also conducted a study that carefully examined nearly 125 federal terrorism prosecutions involving Islamic extremist groups. Based on a detailed review of those cases, they concluded that the existing “criminal justice system serves as an effective means of convicting and incapacitating terrorists.”<sup>10</sup> They found that major terrorism cases did raise complications, but that the criminal justice system, and the federal judges administering it, had proved remarkably capable of adapting to meet those challenges and to do justice in the individual cases.

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The former federal prosecutors also examined the possibility that the government would be unable to detain someone who it believed, based on valid intelligence information, was linked to terrorism. They concluded: "Given the breadth of the federal criminal code, the energy and resourcefulness of law enforcement agents and federal prosecutors, and the fact that terrorists, by definition, are criminals who often violate many laws, we believe that it would be the rare case indeed where the government could not muster sufficient evidence to bring a criminal charge against a person it believes is culpable. And experience bears out this conclusion . . . [T]he overall body of cases strongly suggests that existing tools provide an adequate basis for the lawful detention of suspected terrorists."<sup>11</sup>

Thus, our federal criminal justice system has repeatedly demonstrated its ability to successfully prosecute and imprison those who plan, commit, or assist in committing, terrorist acts directed against the United States and its citizens. Although some modifications or additions to existing law may be warranted – and we would support a study to examine that issue – *no new system is necessary*.

There are also clear advantages to using the existing system. First, decisions by our existing civilian courts have credibility, far more than any decisions by military commissions or national security courts or administrative panels ever could. Second, the existing system is in place, with well developed rules and procedures and an experienced judiciary, which has shown flexibility in adapting the system to meet the needs of individual cases. Any new system – even a modified commission system – would require the creation of new procedures and precedents that would inevitably cause delays. Finally, any new system is likely to be challenged in litigation, lengthening the delays. In other words, any new system is likely to be subject to the same sorts of problems and delays that have plagued the military commissions at Guantanamo and prevented them from being an effective tool for prosecuting terrorism suspects during the prior Administration.

In summary, the claims that the criminal justice system is inadequate and must be bypassed are not based on fact. The evidence shows that the system does work. The recent outcome in the *Al Marri* case is the latest confirmation of that. Believing that Mr. Al Marri could neither be interrogated nor prosecuted effectively within the criminal justice system, the prior Administration swept him out of the system and detained him for years in a naval brig as an enemy combatant. This Administration reversed that policy, and brought him back into the system, where he was indicted and recently pled guilty. We agree with the Attorney General that this experience "reflects what we can achieve when we have faith in our criminal justice system and are unwavering in our commitment to the values upon which the nation was founded and the rule of law."<sup>12</sup>

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***The Use of Evidence Obtained by Torture.***

Some have suggested that the existing criminal justice system cannot be used to convict certain known al-Qaeda criminals who are now in custody because the evidence against them was obtained through torture and therefore may not be used in our federal courts. If that is a problem, however, it exists only for the limited population of existing prisoners. We can avoid that problem in the future by banning the use of torture, a policy already adopted by the Obama Administration. No new system is required to address a problem resulting from past mistakes that have already been corrected.

Moreover, even with respect to the existing detainee population, the government should be very suspicious of the accuracy of accusations against any individual if the only evidence against the person consists of statements extracted by coercion. As the Law Lords, the highest court of final appeal in the United Kingdom, recently emphasized: "the common law has regarded torture and its fruits with abhorrence for over 500 years."<sup>13</sup> It has done so not only because torture is technically illegal but also because of the "inherent unreliability" of the evidence it produces and because torture has "degraded all those who lent themselves to the practice."<sup>14</sup> Our Supreme Court has consistently agreed.<sup>15</sup>

***The Existing System Protects Classified Information.***

Some have also suggested that prosecutions under the existing system would jeopardize our security by requiring the government to disclose classified intelligence information regarding the methods that had been used to obtain information and the sources of the information. These suggestions, however, fail to take into account the detailed rules and procedures that have been adopted and employed by the courts under the Classified Information Procedures Act (CIPA), 18 U.S.C. App. 3. That statute is designed to balance the defendant's right to be informed of the charges with the government's need to protect classified information from disclosure. CIPA provides a number of procedures for accomplishing those goals, including the use of pseudonyms, paraphrasing, summaries and the like, all employed under the close supervision of the presiding judge. Those procedures have worked. As the Department of Justice concluded in its report: "[CIPA] enable[s] us to appropriately handle this intelligence in criminal cases while protecting both the classified information and defendants' due process rights."<sup>16</sup>

Similarly, the former federal prosecutors concluded in their study: "We are not aware of a single terrorism case in which CIPA procedures have failed and a serious security breach has occurred."<sup>17</sup> Patrick Fitzgerald, the prosecutor in the Embassy Bombing case, and now U.S. Attorney for the Northern District of Illinois, reached the same conclusion: "When you see how much classified information was involved in that case, and when you see that there weren't any leaks, you get pretty darn confident that the federal courts are capable of handling these

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prosecutions. I don't think people realize how well our system can work in protecting classified information."<sup>18</sup>

***Imprisonment Based on Fear of Future Dangerousness Is Contrary to Our Values and Would Undermine Our Credibility in the International Community.***

We are concerned that the efforts to detain people who cannot be detained under existing law would establish in this country a system of preventive detention – that is, a system under which people may be detained not for actions taken in the past (fighting against our armed forces or planning or engaging in criminal terrorist acts) but purely on the basis of suspicions about what they might do in the future.

Prolonged or indefinite detention based purely on suspicion has never been consistent with our system of justice. By contrast, it has been a hallmark of non-democratic nations, and it is contrary to our most fundamental values. It is not unusual for officials charged with protecting our security to advise that those values should be temporarily disregarded to deal with the current threats facing the nation.<sup>19</sup> By and large, our leaders have resisted calls to depart from our system of laws even when confronting the most dire threats. On occasion, however, the United States has departed from those principles and engaged in forced preventive detention.<sup>20</sup> Those are not proud moments in our history. With the passage of time and of the fears that impelled them, those actions have become recognized as stains in the history of our country that we have come to regret.<sup>21</sup>

The Eminent Jurists Panel of the International Commission of Jurists recently conducted a study of actions taken by countries around the world to combat terrorism. The Panel found that a number of countries had adopted counter-terrorism laws that “reduced legal safeguards relating to arrest, detention, treatment, and trial in order to provide a supposedly more effective framework to combat terrorism.” The Panel found that such measures “have encouraged prolonged arbitrary and *incommunicado* detention and created an environment prone to abuse.”<sup>22</sup>

Significantly, the Panel also found that countries adopting such measures always provided the same rationale for doing so – that the situation they faced was unique, that the threat was entirely new and unprecedented, that existing laws were inadequate (even though existing laws were rarely examined) and that a new system was needed to safeguard the people's security.

The same rationale has consistently been advanced in support of preventive detention and consistently proved mistaken.

Most disturbingly, the Panel reported that it was the “liberal democratic societies – States that previously lauded the importance of the rule of law and human rights protections – that are now at the forefront of undermining those protections.”<sup>23</sup> In drawing this conclusion, the Panel found that these states are damaging more than themselves: “In departing from previously

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accepted norms of behavior, such governments also give succour to others that have routinely violated the human rights of their citizens.”<sup>24</sup>

The signers of this letter do not have access to all the information available to the government and, therefore, do not know whether there are, in fact, known al-Qaeda operatives among the detainees held at Guantanamo whose cases warrant convictions, but whom the government is precluded from successfully prosecuting because of existing evidentiary rules. We believe strongly, however, that it would not be worth risking lasting damage to our system of law and to our international credibility by deviating from our principles to accommodate problems in a few isolated cases.

Whatever steps may be necessary to deal with a few problem cases at Guantanamo cannot justify the creation of a preventive detention regime stretching into the future. The adoption of such a regime by the United States would seriously undermine the credibility and international support we need to effectively fight terrorism, while providing support to our enemies and encouragement to those states that routinely violate human rights. We must always bear in mind that conduct sanctioned by our government establishes a standard for all other nations.

\* \* \*

As the first nation to be deliberately founded on the principles of individual liberty and the rule of law – and as an historic beacon of those values around the world – the United States has a special obligation to adhere to those values. Unlike others, we are a nation bound together not by a common race or creed, but by our commitment to certain fundamental ideals. We believe that those ideals and, most importantly, our commitment to the rule of law, are our greatest assets in the struggle against international terrorism.

Future generations will look back and judge how we act today – whether our political leaders had the courage to stand by our values or were willing to sacrifice those values in the face of threats from the likes of Osama bin Laden. As Chief Justice Cranch cautioned more than 200 years ago: “[Our] Constitution was made for times of commotion”; it is in those “dangerous times” that we must “be peculiarly watchful” and vigilant in standing by our principles.<sup>25</sup> This same caution was expressed more recently by Justice Sandra Day O’Connor: “It is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.”<sup>26</sup>

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Very truly yours,

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Nicholas deB. Katzenbach  
Former Attorney General of  
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Timothy K. Lewis  
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Nathaniel R. Jones  
Former Judge,  
U.S. Court of Appeals for  
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Thomas B. Wilner

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<sup>1</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004).

<sup>2</sup> *Id.* at 521 (internal quotation marks omitted).

<sup>3</sup> *Id.* at 520.

<sup>4</sup> *Id.* at 518.

<sup>5</sup> As District Judge William Young said in sentencing Richard Reid, the so-called “shoe bomber”:

You are not an enemy combatant. You are a terrorist. You are not a soldier in any war. You are a terrorist. To give you that reference, to call you a soldier gives you far too much stature. . . .

[W]ar talk is way out of line in this court. You’re a big fellow. But you’re not that big. You’re no warrior. I know warriors. You are a terrorist. A species of criminal guilty of multiple attempted murders. . . . You’re no big deal.

*See Reid: ‘I am at war with your country’*, CNN.com Law Center, Jan. 31, 2003, <http://www.cnn.com/2003/LAW/01/31/reid.transcript/>.

<sup>6</sup> For example, in the Embassy bombing cases, defendant El-Hage was detained thirty-three months before his trial. *United States v. Hage*, 213 F.3d 74, 81 (2d Cir. 2000).

<sup>7</sup> U.S. Department of Justice, Counterterrorism Section, *Counterterrorism White Paper*, 22 June 2006, at 3-4, 10-11, available at <http://trac.syr.edu/tracreports/terrorism/169/include/terrorism.whitepaper.pdf>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 3, 11.

<sup>10</sup> Richard B. Zabel & James J. Benjamin, Jr., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISTS IN THE FEDERAL COURTS 2 (May 2008), available at: <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf>.

<sup>11</sup> Zabel & Benjamin at 8. *See also* U.S. Department of Justice, Counterterrorism Section, *Counterterrorism White Paper* at 10 (describing “the flexibility of the criminal justice system” and “the range of charges available to both prevent and punish terrorist acts”).

<sup>12</sup> John Schwartz, *Path to Justice, but Bumpy for Terrorists*, N.Y. TIMES, May 2, 2009, at A9.

<sup>13</sup> *A. v. Secretary of State*, [2005] UKHL 71, ¶11, ¶51 (appeal from Eng.).

<sup>14</sup> *Id.*

<sup>15</sup> It has long been recognized in the United States that statements obtained through force and the threat of force are inherently unreliable because of “[t]he tendency of the innocent, as well as the guilty, to risk



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remote results of a false confession rather than suffer immediate pain.” *Stein v. New York*, 346 U.S. 156, 182 (1953). See *Rochin v. California*, 342 U.S. 165 (1951); *Brown v. Mississippi*, 297 U.S. 278 (1936).

<sup>16</sup> U.S. Department of Justice, Counterterrorism Section, *Counterterrorism White Paper* at 4.

<sup>17</sup> Zabel & Benjamin at 9.

<sup>18</sup> S. Turner & S.J. Schulhofer, *THE SECRECY PROBLEM IN TERRORISM TRIALS* 25 (Brennan Ctr. For Justice 2005) (quoting a November 29, 2004 consultation with Patrick Fitzgerald). Judge Coughenour, who presided over the Millennium Bomber trial in 2001, noted that CIPA “played a prominent role during the trial,” and that “the act’s extensive protections [were] more than adequate.” John C. Coughenour, *The Right Place to Try Terrorism Cases*, *WASH. POST*, July 27, 2008, at B7.

<sup>19</sup> See William H. Rehnquist, *ALL THE LAWS BUT ONE* (Random House, 1998).

<sup>20</sup> See *id.*; *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>21</sup> See Civil Liberties Act of 1988, 50 U.S.C. Appx. § 1989 (which, among other things, was intended to “acknowledge the fundamental injustice of” and “apologize on behalf of the people of the United States for . . . the evacuation, relocation and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II”).

<sup>22</sup> *Assessing Damage. Urging Action. Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights*, International Commission of Jurists, at 38.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 12.

<sup>25</sup> *United States v. Bollman*, 24 F. Cas. 1189, 1192-93 (C.C.D.C. 1807) (Cranch, C.J., dissenting).

<sup>26</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004) (plurality opinion of O’Connor, J., joined by Rehnquist, C. J., and Kennedy and Breyer, JJ.).

For Immediate Release – June 9, 2009  
Contact: Zach Lowe & Katie Rowley - (202) 224-5323

**Statement of U.S. Senator Russ Feingold**  
**Hearing on “The Legal, Moral, and National Security Consequences of**  
**‘Prolonged Detention’”**  
**Senate Judiciary Committee, Subcommittee on the Constitution**

As Prepared For Delivery

“On May 21, President Obama gave an important national security speech at the National Archives. He devoted a major portion of that speech to the problem of the prison camp at Guantanamo Bay, Cuba. He reiterated that he intends to close that facility and I fully support his decision. The president was absolutely correct when he said the following:

‘Rather than keeping us safer, the prison at Guantanamo has weakened American national security. It is a rallying cry for our enemies. It sets back the willingness of our allies to work with us in fighting an enemy that operates in scores of countries. By any measure, the costs of keeping it open far exceed the complications involved in closing it.’

“The president was also correct in noting the difficulties in figuring out what to do with the approximately 240 detainees still held at Guantanamo. Some of those detainees, he said, can be tried in our federal courts for violations of federal law. Others will be tried in reconstituted military commissions for violations of the laws of war. A third category of detainees have been ordered released by the courts. A fourth category the administration believes can be transferred safely to other countries.

“Finally, there is a fifth category of detainees that the president said cannot be tried in the federal courts or military commissions, but the government believes they are too dangerous to release or transfer. For this small group of detainees, the president said he is considering a new regime of what he called ‘prolonged detention,’ accompanied by procedural safeguards and the involvement and oversight of both the judicial and legislative branches of our government.

“I was and remain troubled by where the president seemed to be heading on this issue. The previous administration claimed the right to pick up anyone, even an American citizen, anywhere in the world; designate that person a so-called ‘enemy combatant,’ even if he never engaged in any actual hostilities against the United States; and lock that person up possibly for the rest of his

life unless he can prove, without a lawyer and without access to all, or sometimes any, of the evidence against him, that he is not an 'enemy combatant.'

"That position was anathema to the rule of law. And while the president indicated a desire to create a system that is fairer than the one the previous administration employed, any system that permits the government to indefinitely detain individuals without charge or without a meaningful opportunity to have accusations against them adjudicated by an impartial arbiter violates basic American values, and is likely unconstitutional.

"I wrote to the president after his speech to express my concern, and I will put the full text of that letter in the record of this hearing. My letter noted that indefinite detention without charge or trial is a hallmark of abusive systems that we have historically criticized around the world. In addition, once a system of indefinite detention without trial is established, the temptation to use it in the future will be powerful.

"Thus, if the president follows through on this suggestion of establishing a new legal regime for prolonged detention to deal with a few individuals at Guantanamo, he runs the very real risk of establishing policies and legal precedents that will not rid our country of the burden of the detention facility at Guantanamo Bay, but instead merely sets the stage for future Guantanos, whether on our shores or elsewhere, with potentially disastrous consequences for our national security. Worse, those policies and legal precedents would be effectively enshrined as acceptable in our system of justice, having been established not by a largely discredited administration, but by a successive administration with a greatly contrasting position on legal and constitutional issues.

"The fundamental difficulty with creating a new legal regime for prolonged detention is that there is a great risk, particularly because some of the detainees for whom it would be used have already been held for years without charge, that it will simply be seen as a new way for the government to deal with cases it believes it cannot win in the courts or even before a military commission. Regardless of any additional legal safeguards, such a system will not be seen as any more legitimate than the one the Bush administration created at Guantanamo.

"I do not underestimate the challenges that the president faces at Guantanamo. This is not a problem of his making, and I appreciate how difficult the situation is. The president was right when he called dealing with the fifth category of detainees 'the toughest single issue that we face.' And he recognized that creating a new system of prolonged detention 'poses unique challenges.' That is why we are here today. We have assembled a panel of distinguished witnesses to help us understand the implications of a new system of prolonged detention. Although the legality of such a system is crucial, that is not the only question. In a recent interview, Daniel Levin, who was the acting head of the Office of Legal Counsel when that office was attempting to deal with requests for legal analysis of interrogation techniques that many believe are torture, put it quite succinctly. He said, 'Obviously you can only do that which is legal, but that does not mean you should automatically do something simply because it is legal.' So we must look at this question from all angles.

“It is my view that a great deal of what was wrong with Guantanamo stemmed from an arrogance that the previous administration had about the law. It established a prison that it thought was beyond the reach of the law. And it asserted the power to put people in that prison with only the barest regard for the law. President Obama clearly wants to take a different approach. He spoke at the National Archives of ‘construct[ing] a legitimate legal framework for the remaining Guantanamo detainees that cannot be transferred.’ This goal is admirable. But we must be very careful not to create a legal framework that is inconsistent with the very reasons we need a legal framework—to be true to our values and to regain the respect of the world for our approach to this conflict.

“One final note, and then I will turn to the ranking member. When I wrote the president, I indicated that I would invite a representative of his administration to testify at this hearing. On reflection, I decided that to do so would be to ask the administration to publicly defend a position that it has not yet taken. Consideration of these very difficult questions is undoubtedly ongoing, and so I decided to hold this hearing as a way to help inform the administration’s thinking and help make sure it has full information about the consequences of its decision. I would, of course, welcome any response to the testimony and discussion we will hear today. And I look forward to an open dialogue on these very difficult and important questions as the time for closing Guantanamo approaches.”

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**Statement of Senator Dianne Feinstein**

**Senate Judiciary Committee Hearing:  
“*The Legal, Moral, and National Security  
Consequences of Prolonged Detention*”**

*June 9, 2009*

Mr. Chairman, thank you for having this hearing. I think it is important to examine what process should be used to hold individuals captured as a result of a conflict, whether it's those at Guantanamo or those picked up in the future.

As I have stated previously, I believe that closing Guantanamo is important. But, in doing so, we must also establish safeguards to ensure that we aren't releasing those who will simply return to the battlefield.

In addition, the Obama Administration inherited detainees who have been subjected to enhanced interrogation techniques – this inevitably will inhibit the government’s ability to prosecute – even when we know that the detainee has committed crimes against the United States.

We must acknowledge that some of the people we have detained could pose a grave threat to the United States.

In these limited cases, “enemy combatants” should be detained for a prolonged period of time so long as they are provided due process and given the opportunity to have their status reviewed by a court.

It is important to strike a balance between preserving the rule of law and releasing individuals who we know are determined to harm our nation.

The Supreme Court has ruled that such detentions may be allowed if the following considerations are addressed:

1. There has been a determination that the individual presents a danger to the community.
2. There has been a showing of “some other special circumstance” to justify their indefinite detention.
3. There is proof of “dangerousness” by clear and convincing evidence and the presence of judicial safeguards.
4. The detention applies to a narrow subset of individuals, such as is the case of individuals from Guantanamo.

5. Congressional intent to grant the Executive branch the power to hold someone indefinitely is unambiguous.
  
6. The individual cannot be considered to have “entered into” or “landed in” the United States and treated legislatively as other aliens who attempted to enter the United States illegally, or as civilian or military belligerents under the Geneva Conventions and the Laws of War.

Let me be clear. I am not in favor of indefinite detention without judicial review. However, preventive and prolonged detention – under narrow and specific circumstances – and with appropriate court oversight is necessary.



I believe that we can – and we must – create a statutory framework for prolonged and preventive detention in certain situations. As members of the Judiciary Committee, it is our responsibility to be unambiguously clear that in these narrow circumstances the Executive branch has the duty to hold detainees who continue to pose a security threat but cannot be prosecuted for past crimes and to do so within the boundaries of the Constitution.

**RAW DATA: Text of Dick Cheney's National Security Speech at AEI**

Former Vice President Dick Cheney delivered a speech at the American Enterprise Institute today about the crucial issues of national security and providing a message of reassurance to Americans about the future.

FOXNews.com

Thursday, May 21, 2009

Thank you all very much, and Arthur, thank you for that introduction. It's good to be back at AEI, where we have many friends. Lynne is one of your longtime scholars, and I'm looking forward to spending more time here myself as a returning trustee. What happened was, they were looking for a new member of the board of trustees, and they asked me to head up the search committee.

I first came to AEI after serving at the Pentagon, and departed only after a very interesting job offer came along. I had no expectation of returning to public life, but my career worked out a little differently. Those eight years as vice president were quite a journey, and during a time of big events and great decisions, I don't think I missed much.

Being the first vice president who had also served as secretary of defense, naturally my duties tended toward national security. I focused on those challenges day to day, mostly free from the usual political distractions. I had the advantage of being a vice president content with the responsibilities I had, and going about my work with no higher ambition. Today, I'm an even freer man. Your kind invitation brings me here as a private citizen - a career in politics behind me, no elections to win or lose, and no favor to seek.

The responsibilities we carried belong to others now. And though I'm not here to speak for George W. Bush, I am certain that no one wishes the current administration more success in defending the country than we do. We understand the complexities of national security decisions. We understand the pressures that confront a president and his advisers. Above all, we know what is at stake. And though administrations and policies have changed, the stakes for America have not changed.

Right now there is considerable debate in this city about the measures our administration took to defend the American people. Today I want to set forth the strategic thinking behind our policies. I do so as one who was there every day of the Bush Administration - who supported the policies when they were made, and without hesitation would do so again in the same circumstances.

When President Obama makes wise decisions, as I believe he has done in some respects on Afghanistan, and in reversing his plan to release incendiary photos, he deserves our support. And when he faults or mischaracterizes the national security decisions we made in the Bush years, he deserves an answer. The point is not to look backward. Now and for years to come, a lot rides on our President's understanding of the security policies that preceded him. And whatever choices he makes concerning the defense of this country, those choices should not be based on slogans and campaign rhetoric, but on a truthful telling of history.

Our administration always faced its share of criticism, and from some quarters it was always intense. That was especially so in the later years of our term, when the dangers were as serious as ever, but the sense of general alarm after September 11th, 2001 was a fading memory. Part of our responsibility, as we saw it, was not to forget the terrible harm that had been done to America ... and not to let 9/11 become the prelude to something much bigger and far worse.

That attack itself was, of course, the most devastating strike in a series of terrorist plots carried out against Americans at home and abroad. In 1993, terrorists bombed the World Trade Center, hoping to bring down the towers with a blast from below. The attacks continued in 1995, with the bombing of U.S. facilities in Riyadh, Saudi Arabia; the killing of servicemen at Khobar Towers in 1996; the attack on our embassies in East Africa in 1998; the murder of American sailors on the USS Cole in 2000; and then the hijackings of 9/11, and all the grief and loss we suffered on that day.

Nine-eleven caused everyone to take a serious second look at threats that had been gathering for a while, and enemies whose plans were getting bolder and more sophisticated. Throughout the 90s, America had responded to these attacks, if at all, on an ad hoc basis. The first attack on the World Trade Center was treated as a law enforcement problem, with everything handled after the fact - crime scene, arrests, indictments, convictions, prison sentences, case closed.

That's how it seemed from a law enforcement perspective, at least - but for the terrorists the case was not closed. For them, it was another offensive strike in their ongoing war against the United States. And it turned their minds to even harder strikes with higher casualties. Nine-eleven made necessary a shift of policy, aimed at a clear strategic threat - what the Congress called "an unusual and extraordinary threat to the national security and foreign policy of the United States." From that moment forward, instead of merely preparing to round up the suspects and count up the victims after the next attack, we were determined to prevent attacks in the first place.

We could count on almost universal support back then, because everyone understood the environment we were in. We'd just been hit by a foreign enemy - leaving 3,000 Americans dead, more than we lost at Pearl Harbor. In Manhattan, we were staring at 16 acres of ashes. The Pentagon took a direct hit, and the Capitol or the White House were spared only by the Americans on Flight 93, who died bravely and defiantly.

Everyone expected a follow-on attack, and our job was to stop it. We didn't know what was coming next, but everything we did know in that autumn of 2001 looked bad. This was the world in which al-Qaeda was seeking nuclear technology, and A. Q. Khan was selling nuclear technology on the black market. We had the anthrax attack from an unknown source. We had the training camps of Afghanistan, and dictators like Saddam Hussein with known ties to Mideast terrorists.

These are just a few of the problems we had on our hands. And foremost on our minds was the prospect of the very worst coming to pass - a 9/11 with nuclear weapons.

For me, one of the defining experiences was the morning of 9/11 itself. As you might recall, I was in my office in that first hour, when radar caught sight of an airliner heading toward the White House at 500 miles an hour. That was Flight 77, the one that ended up hitting the Pentagon. With the plane still inbound, Secret Service agents came into my office and said we had to leave, now. A few moments later I found myself in a fortified White House command post somewhere down below.

There in the bunker came the reports and images that so many Americans remember from that day - word of the crash in Pennsylvania, the final phone calls from hijacked planes, the final horror for those who jumped to their death to escape burning alive. In the years since, I've heard occasional speculation that I'm a different man after 9/11. I wouldn't say that. But I'll freely admit that watching a coordinated, devastating attack on our country from an underground bunker at the White House can affect how you view your responsibilities.

To make certain our nation country never again faced such a day of horror, we developed a comprehensive strategy, beginning with far greater homeland security to make the United States a harder target. But since wars cannot be won on the defensive, we moved decisively against the terrorists in their hideouts and sanctuaries, and committed to using every asset to take down their networks. We decided, as well, to confront the regimes that sponsored terrorists, and to go after those who provide sanctuary, funding, and weapons to enemies of the United States. We turned special attention to regimes that had the capacity to build weapons of mass destruction, and might transfer such weapons to terrorists.

We did all of these things, and with bipartisan support put all these policies in place. It has resulted in serious blows against enemy operations ... the take-down of the A.Q. Khan network ... and the dismantling of Libya's nuclear program. It's required the commitment of many thousands of troops in two theaters of war, with high points and some low points in both Iraq and Afghanistan - and at every turn, the people of our military carried the heaviest burden. Well over seven years into the effort, one thing we know is that the enemy has spent most of this time on the defensive - and every attempt to strike inside the United States has failed.

So we're left to draw one of two conclusions - and here is the great dividing line in our current debate over national security. You can look at the facts and conclude that the comprehensive strategy has worked, and therefore needs to be continued as vigilantly as ever. Or you can look at the same set of facts and conclude that 9/11 was a one-off event - coordinated, devastating, but also unique and not sufficient to justify a sustained wartime effort. Whichever conclusion you arrive at, it will shape your entire view of the last seven years, and of the policies necessary to protect America for years to come.

The key to any strategy is accurate intelligence, and skilled professionals to get that information in time to use it. In seeking to guard this nation against the threat of catastrophic violence, our Administration gave intelligence officers the tools and lawful authority they needed to gain vital information. We didn't invent that authority. It is drawn from Article Two of the Constitution. And it was given specificity by the Congress after 9/11, in a Joint Resolution authorizing "all necessary and appropriate force" to protect the American people.

Our government prevented attacks and saved lives through the Terrorist Surveillance Program, which let us intercept calls and track contacts between al-Qaeda operatives and persons inside the United States. The program was top secret, and for good reason, until the editors of the New York Times got it and put it on the front page. After 9/11, the Times had spent months publishing the pictures and the stories of everyone killed by al-Qaeda on 9/11. Now here was that same newspaper publishing secrets in a way that could only help al-Qaeda. It impressed the Pulitzer committee, but it damn sure didn't serve the interests of our country, or the safety of our people.

In the years after 9/11, our government also understood that the safety of the country required collecting information known only to the worst of the terrorists. And in a few cases, that information could be gained only through tough interrogations.

In top secret meetings about enhanced interrogations, I made my own beliefs clear. I was and remain a strong proponent of our enhanced interrogation program. The interrogations were used on hardened terrorists after other efforts failed. They were legal, essential, justified, successful, and the right thing to do. The intelligence officers who questioned the terrorists can be proud of their work and proud of the results, because they prevented the violent death of thousands, if not hundreds of thousands, of innocent people.

Our successors in office have their own views on all of these matters.

By presidential decision, last month we saw the selective release of documents relating to enhanced interrogations. This is held up as a bold exercise in open government, honoring the public's right to know. We're informed, as well, that there was much agonizing over this decision.

Yet somehow, when the soul-searching was done and the veil was lifted on the policies of the Bush administration, the public was given less than half the truth. The released memos were carefully redacted to leave out references to what our government learned through the methods in question. Other memos, laying out specific terrorist plots that were averted, apparently were not even considered for release. For reasons the administration has yet to explain, they believe the public has a right to know the method of the questions, but not the content of the answers.

Over on the left wing of the president's party, there appears to be little curiosity in finding out what was learned from the terrorists. The kind of answers they're after would be heard before a so-called "Truth Commission." Some are even demanding that those who recommended and approved the interrogations be prosecuted, in effect treating political disagreements as a punishable offense, and political opponents as criminals. It's hard to imagine a worse precedent, filled with more possibilities for trouble and abuse, than to have an incoming administration criminalize the policy decisions of its predecessors.

Apart from doing a serious injustice to intelligence operators and lawyers who deserve far better for their devoted service, the danger here is a loss of focus on national security, and what it requires. I would advise the administration to think very carefully about the course ahead. All the zeal that has been directed at interrogations is utterly misplaced. And staying on that path will only lead our government further away from its duty to protect the American people.

One person who by all accounts objected to the release of the interrogation memos was the Director of Central Intelligence, Leon Panetta. He was joined in that view by at least four of his predecessors. I assume they felt this way because they understand the importance of protecting intelligence sources, methods, and personnel. But now that this once top-secret information is out for all to see - including the enemy - let me draw your attention to some points that are routinely overlooked.

It is a fact that only detainees of the highest intelligence value were ever subjected to enhanced interrogation. You've heard endlessly about waterboarding. It happened to three terrorists. One of them was Khalid Sheikh Muhammed - the mastermind of 9/11, who has also boasted about beheading Daniel Pearl.

We had a lot of blind spots after the attacks on our country. We didn't know about al-Qaeda's plans, but Khalid Sheikh Muhammed and a few others did know. And with many thousands of innocent lives potentially in the balance, we didn't think it made sense to let the terrorists answer questions in their own good time, if they answered them at all.

Maybe you've heard that when we captured KSM, he said he would talk as soon as he got to New York City and saw his lawyer. But like many critics of interrogations, he clearly misunderstood the business at hand. American personnel were not there to commence an elaborate legal proceeding, but to extract information from him before al-Qaeda could strike again and kill more of our people.

In public discussion of these matters, there has been a strange and sometimes willful attempt to conflate what happened at Abu Ghraib prison with the top secret program of enhanced interrogations. At Abu Ghraib, a few sadistic prison guards abused inmates in violation of American law, military regulations, and simple decency. For the harm they did, to Iraqi prisoners and to America's cause, they deserved and received Army justice. And it takes a deeply unfair cast of mind to equate the disgraces of Abu Ghraib with the lawful, skillful, and entirely honorable work of CIA personnel trained to deal with a few malevolent men.

Even before the interrogation program began, and throughout its operation, it was closely reviewed to ensure that every method used was in full compliance with the Constitution, statutes, and treaty obligations. On numerous occasions, leading members of Congress, including the current speaker of the House, were briefed on the program and on the methods.

Yet for all these exacting efforts to do a hard and necessary job and to do it right, we hear from some quarters nothing but feigned outrage based on a false narrative. In my long experience in Washington, few matters have inspired so much contrived indignation and phony moralizing as the interrogation methods applied to a few captured terrorists.

I might add that people who consistently distort the truth in this way are in no position to lecture anyone about "values." Intelligence officers of the United States were not trying to rough up some terrorists simply to avenge the dead of 9/11. We know the difference in this country between justice and vengeance. Intelligence officers were not trying to get terrorists to confess to past killings; they were trying to prevent future killings. From the beginning of the program, there was only one focused and all-important purpose. We sought, and we in fact obtained, specific information on terrorist plans.

Those are the basic facts on enhanced interrogations. And to call this a program of torture is to libel the dedicated professionals who have saved American lives, and to cast terrorists and murderers as innocent victims. What's more, to completely rule out enhanced interrogation methods in the future is unwise in the extreme. It is recklessness cloaked in righteousness, and would make the American people less safe.

The administration seems to pride itself on searching for some kind of middle ground in policies addressing terrorism. They may take comfort in hearing disagreement from opposite ends of the spectrum. If liberals are unhappy about some decisions, and conservatives are unhappy about other decisions, then it may seem to them that the President is on the path of sensible compromise. But in the fight against terrorism, there is no middle ground, and half-measures keep you half exposed. You cannot keep just some nuclear-armed terrorists out of the United States, you must keep every nuclear-armed terrorist out of the United States. Triangulation is a political strategy, not a national security strategy. When just a single clue that goes unlearned ... one lead that goes unpursued ... can bring on catastrophe - it's no time for splitting differences. There is never a good time to compromise when the lives and safety of the American people are in the balance.

Behind the overwrought reaction to enhanced interrogations is a broader misconception about the threats that still face our country. You can sense the problem in the emergence of euphemisms that strive to put an imaginary distance between the American people and the terrorist enemy. Apparently using the term "war" where terrorists are concerned is starting to feel a bit dated. So henceforth we're advised by the administration to think of the fight against terrorists as, quote, "Overseas contingency operations." In the

event of another terrorist attack on America, the Homeland Security Department assures us it will be ready for this, quote, "man-made disaster" - never mind that the whole Department was created for the purpose of protecting Americans from terrorist attack.

And when you hear that there are no more, quote, "enemy combatants," as there were back in the days of that scary war on terror, at first that sounds like progress. The only problem is that the phrase is gone, but the same assortment of killers and would-be mass murderers are still there. And finding some less judgmental or more pleasant-sounding name for terrorists doesn't change what they are - or what they would do if we let them loose.

On his second day in office, President Obama announced that he was closing the detention facility at Guantanamo. This step came with little deliberation and no plan. Now the President says some of these terrorists should be brought to American soil for trial in our court system. Others, he says, will be shipped to third countries. But so far, the United States has had little luck getting other countries to take hardened terrorists. So what happens then? Attorney General Holder and others have admitted that the United States will be compelled to accept a number of the terrorists here, in the homeland, and it has even been suggested US taxpayer dollars will be used to support them. On this one, I find myself in complete agreement with many in the President's own party. Unsure how to explain to their constituents why terrorists might soon be relocating into their states, these Democrats chose instead to strip funding for such a move out of the most recent war supplemental.

The administration has found that it's easy to receive applause in Europe for closing Guantanamo. But it's tricky to come up with an alternative that will serve the interests of justice and America's national security. Keep in mind that these are hardened terrorists picked up overseas since 9/11. The ones that were considered low-risk were released a long time ago. And among these, we learned yesterday, many were treated too leniently, because 1 in 7 cut a straight path back to their prior line of work and have conducted murderous attacks in the Middle East. I think the President will find, upon reflection, that to bring the worst of the worst terrorists inside the United States would be cause for great danger and regret in the years to come.

In the category of euphemism, the prizewinning entry would be a recent editorial in a familiar newspaper that referred to terrorists we've captured as, quote, "abducted." Here we have ruthless enemies of this country, stopped in their tracks by brave operatives in the service of America, and a major editorial page makes them sound like they were kidnap victims, picked up at random on their way to the movies.

It's one thing to adopt the euphemisms that suggest we're no longer engaged in a war. These are just words, and in the end it's the policies that matter most. You don't want to call them enemy combatants? Fine. Call them what you want - just don't bring them into the United States. Tired of calling it a war? Use any term you prefer. Just remember it is a serious step to begin unraveling some of the very policies that have kept our people safe since 9/11.

Another term out there that slipped into the discussion is the notion that American interrogation practices were a "recruitment tool" for the enemy. On this theory, by the tough questioning of killers, we have supposedly fallen short of our own values. This recruitment-tool theory has become something of a mantra lately, including from the President himself. And after a familiar fashion, it excuses the violent and blames America for the evil that others do. It's another version of that same old refrain from the Left, "We brought it on ourselves."

It is much closer to the truth that terrorists hate this country precisely because of the values we profess and seek to live by, not by some alleged failure to do so. Nor are terrorists or those who see them as victims exactly the best judges of America's moral standards, one way or the other.

Critics of our policies are given to lecturing on the theme of being consistent with American values. But no moral value held dear by the American people obliges public servants ever to sacrifice innocent lives to spare a captured terrorist from unpleasant things. And when an entire population is targeted by a terror network, nothing is more consistent with American values than to stop them.

As a practical matter, too, terrorists may lack much, but they have never lacked for grievances against the United States. Our belief in freedom of speech and religion ... our belief in equal rights for women ... our

support for Israel ... our cultural and political influence in the world - these are the true sources of resentment, all mixed in with the lies and conspiracy theories of the radical clerics. These recruitment tools were in vigorous use throughout the 1990s, and they were sufficient to motivate the 19 recruits who boarded those planes on September 11th, 2001.

The United States of America was a good country before 9/11, just as we are today. List all the things that make us a force for good in the world - for liberty, for human rights, for the rational, peaceful resolution of differences - and what you end up with is a list of the reasons why the terrorists hate America. If fine speech-making, appeals to reason, or pleas for compassion had the power to move them, the terrorists would long ago have abandoned the field. And when they see the American government caught up in arguments about interrogations, or whether foreign terrorists have constitutional rights, they don't stand back in awe of our legal system and wonder whether they had misjudged us all along. Instead the terrorists see just what they were hoping for - our unity gone, our resolve shaken, our leaders distracted. In short, they see weakness and opportunity.

What is equally certain is this: The broad-based strategy set in motion by President Bush obviously had nothing to do with causing the events of 9/11. But the serious way we dealt with terrorists from then on, and all the intelligence we gathered in that time, had everything to do with preventing another 9/11 on our watch. The enhanced interrogations of high-value detainees and the terrorist surveillance program have without question made our country safer. Every senior official who has been briefed on these classified matters knows of specific attacks that were in the planning stages and were stopped by the programs we put in place.

This might explain why President Obama has reserved unto himself the right to order the use of enhanced interrogation should he deem it appropriate. What value remains to that authority is debatable, given that the enemy now knows exactly what interrogation methods to train against, and which ones not to worry about. Yet having reserved for himself the authority to order enhanced interrogation after an emergency, you would think that President Obama would be less disdainful of what his predecessor authorized after 9/11. It's almost gone unnoticed that the president has retained the power to order the same methods in the same circumstances. When they talk about interrogations, he and his administration speak as if they have resolved some great moral dilemma in how to extract critical information from terrorists. Instead they have put the decision off, while assigning a presumption of moral superiority to any decision they make in the future.

Releasing the interrogation memos was flatly contrary to the national security interest of the United States. The harm done only begins with top secret information now in the hands of the terrorists, who have just received a lengthy insert for their training manual. Across the world, governments that have helped us capture terrorists will fear that sensitive joint operations will be compromised. And at the CIA, operatives are left to wonder if they can depend on the White House or Congress to back them up when the going gets tough. Why should any agency employee take on a difficult assignment when, even though they act lawfully and in good faith, years down the road the press and Congress will treat everything they do with suspicion, outright hostility, and second-guessing? Some members of Congress are notorious for demanding they be briefed into the most sensitive intelligence programs. They support them in private, and then head for the hills at the first sign of controversy.

As far as the interrogations are concerned, all that remains an official secret is the information we gained as a result. Some of his defenders say the unseen memos are inconclusive, which only raises the question why they won't let the American people decide that for themselves. I saw that information as vice president, and I reviewed some of it again at the National Archives last month. I've formally asked that it be declassified so the American people can see the intelligence we obtained, the things we learned, and the consequences for national security. And as you may have heard, last week that request was formally rejected. It's worth recalling that ultimate power of declassification belongs to the President himself. President Obama has used his declassification power to reveal what happened in the interrogation of terrorists. Now let him use that same power to show Americans what did not happen, thanks to the good work of our intelligence officials.

I believe this information will confirm the value of interrogations - and I am not alone. President Obama's own Director of National Intelligence, Admiral Blair, has put it this way: "High value information came from interrogations in which those methods were used and provided a deeper understanding of the al-Qaeda organization that was attacking this country." End quote. Admiral Blair put that conclusion in writing, only to see it mysteriously deleted in a later version released by the administration - the missing 26 words that tell

an inconvenient truth. But they couldn't change the words of George Tenet, the CIA Director under Presidents Clinton and Bush, who bluntly said: "I know that this program has saved lives. I know we've disrupted plots. I know this program alone is worth more than the FBI, the Central Intelligence Agency, and the National Security Agency put together have been able to tell us." End of quote.

If Americans do get the chance to learn what our country was spared, it'll do more than clarify the urgency and the rightness of enhanced interrogations in the years after 9/11. It may help us to stay focused on dangers that have not gone away. Instead of idly debating which political opponents to prosecute and punish, our attention will return to where it belongs - on the continuing threat of terrorist violence, and on stopping the men who are planning it.

For all the partisan anger that still lingers, our administration will stand up well in history - not despite our actions after 9/11, but because of them. And when I think about all that was to come during our administration and afterward - the recriminations, the second-guessing, the charges of "hubris" - my mind always goes back to that moment.

To put things in perspective, suppose that on the evening of 9/11, President Bush and I had promised that for as long as we held office - which was to be another 2,689 days - there would never be another terrorist attack inside this country. Talk about hubris - it would have seemed a rash and irresponsible thing to say. People would have doubted that we even understood the enormity of what had just happened. Everyone had a very bad feeling about all of this, and felt certain that the Twin Towers, the Pentagon, and Shanksville were only the beginning of the violence.

Of course, we made no such promise. Instead, we promised an all-out effort to protect this country. We said we would marshal all elements of our nation's power to fight this war and to win it. We said we would never forget what had happened on 9/11, even if the day came when many others did forget. We spoke of a war that would "include dramatic strikes, visible on TV, and covert operations, secret even in success." We followed through on all of this, and we stayed true to our word.

To the very end of our administration, we kept al-Qaeda terrorists busy with other problems. We focused on getting their secrets, instead of sharing ours with them. And on our watch, they never hit this country again. After the most lethal and devastating terrorist attack ever, seven and a half years without a repeat is not a record to be rebuked and scorned, much less criminalized. It is a record to be continued until the danger has passed.

Along the way there were some hard calls. No decision of national security was ever made lightly, and certainly never made in haste. As in all warfare, there have been costs - none higher than the sacrifices of those killed and wounded in our country's service. And even the most decisive victories can never take away the sorrow of losing so many of our own - all those innocent victims of 9/11, and the heroic souls who died trying to save them.

For all that we've lost in this conflict, the United States has never lost its moral bearings. And when the moral reckoning turns to the men known as high-value terrorists, I can assure you they were neither innocent nor victims. As for those who asked them questions and got answers: they did the right thing, they made our country safer, and a lot of Americans are alive today because of them.

Like so many others who serve America, they are not the kind to insist on a thank-you. But I will always be grateful to each one of them, and proud to have served with them for a time in the same cause. They, and so many others, have given honorable service to our country through all the difficulties and all the dangers. I will always admire them and wish them well. And I am confident that this nation will never take their work, their dedication, or their achievements, for granted.

Thank you very much.



4/7/2009

**FACT SHEET****Former Guantanamo Detainee Terrorism Trends**

Based on a comprehensive review of available information as of mid-March 2009, the Defense Intelligence Agency reported 14 percent as the overall rate of former Guantanamo detainees confirmed or suspected of reengaging in terrorist activities. Of the more than 530 Guantanamo detainees transferred from Department of Defense custody at Guantanamo Bay, 27 were confirmed and 47 were suspected of reengaging in terrorist activity. Between December 2008 and March 2009, nine detainees were added to the confirmed list, six of whom were previously on the suspected list.

Various former Guantanamo detainees are known to have reengaged in terrorist activity associated with the al-Qaida network, and have been arrested for reengaging in terrorist activities including facilitating the travel of terrorists into war zones, providing funds to al-Qaida, and supporting and associating with known terrorists.

The following summary, based on DIA assessments and analysis, is as comprehensive as possible given national security concerns; much of the information regarding specific former GTMO detainees' involvement in terrorist activities remains classified.

**Definitions for Confirmed and Suspected Cases**

**Definition of "Confirmed"** — A preponderance of evidence—fingerprints, DNA, conclusive photographic match, or reliable, verified, or well-corroborated intelligence reporting—identifies a specific former Guantanamo detainee as directly involved in terrorist activities. For the purposes of this definition, engagement in anti-U.S. propaganda alone does not qualify as terrorist activity.

**Definition of "Suspected"** — Significant reporting indicates an individual is involved in terrorist activities and analysis of that reporting indicates the individual's identity matches that of a specific former Guantanamo detainee. Or, unverified or single-source, but plausible, reporting indicates a specific former detainee is involved in terrorist activities. For the purposes of this definition, engagement in anti-U.S. propaganda alone does not qualify as terrorist activity.

**Review of Specific Cases Identified in May 2008**Confirmed Reengagement:

Abdullah Saleh Ali al-Ajmi — repatriated to Kuwait in 2005. In April 2008 he conducted a suicide bombing in the city of Mosul in northern Iraq. The attack resulted in the deaths of numerous Iraqi citizens.

Abu Sufyan al-Azdi al-Shihri – repatriated to Saudi Arabia in November 2007, and Mazin Salih Musaid al-Alawi al-Awfi – repatriated to Saudi Arabia in July 2007. On 24 January, a 19-minute video was released wherein al-Shihri and al-Awfi announced their leadership within the newly established al-Qaida in Arabian Peninsula.

Ibrahim Bin Shakaran and Mohammed Bin Ahmad Mizouz – repatriated to Morocco in July 2004. In September 2007, they were convicted for their post-release involvement in a terrorist network recruiting Moroccans to fight for Abu Musab al-Zarqawi's al-Qaida in Iraq (AQI). Recruits were to receive weapons and explosives training in Algeria from the Salafist Group for Preaching and Combat, which has since become al-Qaida in the Lands of the Islamic Maghreb, before going to fight in Iraq or returning to Morocco as sleeper cells. The organizers of the group reportedly intended to create an al-Qaida-affiliated network in the Maghreb similar to AQI. According to testimony presented at the trial, Bin Shakaran had already recruited other jihadists when Moroccan authorities broke up the plot in November 2005. For their roles in this plot, Bin Shakaran received a 10-year sentence and Mizouz received a two-year sentence.

Ibrahim Shair Sen – repatriated to Turkey in November 2003. In January 2008, Sen was arrested in Van, Turkey, and indicted in June 2008 as the leader of al-Qaida cells in Van. In addition, Sen also recruited and trained new members, provided illegal weapons to the group, and facilitated the movement of jihadists.

Ravil Shafeyavich Gumarov and Timur Ravilich Ishmurat – repatriated to Russia in March 2004. Russian authorities arrested them in January 2005 for involvement in a gas line bombing. A Russian court convicted both in May 2006, sentencing Gumarov to 13 years in prison and Ishmurat to 11 years.

Said Mohammed Alim Shah, also known as Abdullah Mahsud – repatriated to Afghanistan in March 2004. Alim Shah blew himself up to avoid capture by Pakistani forces in July 2007. According to a Pakistani government official, Mahsud directed a suicide attack in April 2007 that killed 31 people. After his transfer out of Guantanamo, Mahsud sought several media interviews and became well-known for his attacks in Pakistan. In October 2004, he kidnapped two Chinese engineers, and claimed responsibility for an Islamabad hotel bombing.

Mohammed Ismail – repatriated to Afghanistan in 2004, reengagement confirmed. During a press interview after his release, he described the Americans saying, "They gave me a good time in Cuba. They were very nice to me, giving me English lessons." He was recaptured four months later in May 2004, participating in an attack against U.S. forces near Kandahar. At the time of his recapture, Ismail carried a letter confirming his status as a Taliban member in good standing.

Yousef Muhammed Yaaqoub, better known as Mullah Shazada – repatriated to Afghanistan in May 2003. Shazada quickly rejoined the Taliban as a commander in southern Afghanistan. His activities reportedly included the organization and execution of a jailbreak in Kandahar, and a nearly successful capture of the border town of Spin

Boldak. Shazada was killed on 7 May 2004 fighting U.S. forces. His memorial in Quetta, Pakistan, drew many Taliban leaders wanted by U.S. forces.

Suspected Reengagement:

Ruslan Anatolovich Odijev, repatriated to Russia in March 2004. Odijev was killed in a June 2007 in battle with Russia's federal Security Service. Russian authorities stated Odijev participated in several terrorist acts including an October 2005 attack in the Caucasus region that killed and injured several police officers. Odijev was found with pistols, a grenade, and homemade explosive devices on his body.

Sabi Jahn Abdul Ghafour, also known as Maulvi Abdul Ghaffar – repatriated to Afghanistan in March 2003. After his repatriation, Ghaffar reportedly became the Taliban's regional commander in Uruzgan and Helmand provinces, carrying out attacks against U.S. and Afghan forces. On 25 September 2004, while planning an attack against Afghan police, Ghaffar and two of his men were killed in a raid by Afghan security forces.

Mohammed Nayim Farouq – repatriated to Afghanistan in July 2003. Farouq quickly renewed his association with Taliban and al-Qaida members and has since become re-involved in anti-coalition militant activity.

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**Appendix A: Partial Listing of Former GTMO Detainees Who Have Reengaged in Terrorism**

Name	Nationality	Repatriated	Activity	Status
Sabi Jahn Abdul Ghafour <i>also known as Maulvi Abdul Ghaffar</i>	Afghanistan	March 2003	Died fighting Afghan forces	Suspected
Shah Mohammed	Pakistan	May 2003	Killed fighting U.S. forces in Afghanistan	Confirmed
Yousef Muhammed Yaaqoub <i>also known as Mullah Shazada</i>	Afghanistan	May 2003	Taliban commander in Afghanistan; Organized jailbreak in Kandahar; killed on 7 May 2004 fighting U.S. forces	Confirmed
Mohammed Nayim Farouq	Afghanistan	July 2003	Association with Taliban and al-Qaida; involved in anti-coalition activity	Suspected
Ibrahim Shafir Sen	Turkey	November 2003	Leader of al-Qaida cells in Van; recruited and trained members, provided illegal weapons, and facilitation	Confirmed
Mohammed Ismail	Afghanistan	January 2004	Participated in an attack against U.S. forces; Taliban member	Confirmed
Abdullah D. Kafkas	Russia	March 2004	Suspected involvement in an attack against a traffic police checkpoint in Nalchik in October 2005	Suspected
Almasm Rabilavich Sharipov	Russia	March 2004	Association with terrorist group Hezb-e-Tahrir	Suspected
Timur Ravilich Ishmurat	Russia	March 2004	Involved in a gas line bombing	Confirmed
Ruslan Anatolievich Odijev	Russia	March 2004	Participated in several terrorist acts including an October 2005 attack in the Caucasus region that killed and injured several police officers	Suspected
Said Mohammed Alim Shah <i>also known as Abdullah Mahsud</i>	Afghanistan	March 2004	Kidnapped two Chinese engineers; Claimed responsibility for an Islamabad hotel bombing; directed a suicide attack in April 2007 killing 31 people	Confirmed
Ravil	Russia	March 2004	Involved in a gas line	Confirmed

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Shafeyavich Gumarov			bombing	
Abdullah Ghofoor	Afghanistan	March 2004	Taliban commander; planning attacks on U.S. and Afghan forces; killed in a raid by Afghan security forces	Suspected
Mohammed Bin Ahmad Mizouz	Morocco	July 2004	Recruiter for al-Qaida in Iraq	Confirmed
Ibrahim Bin Shakaran	Morocco	July 2004	Recruiter for al-Qaida in Iraq	Confirmed
Isa Khan	Pakistan	September 2004	Association with Tehrik-i-Taliban	Suspected
Muhibullah	Afghanistan	July 2005	Association with the Taliban	Suspected
Abdallah Saleh Ali al-Ajmi	Kuwait	November 2005	Conducted a suicide attack in Iraq	Confirmed
Abdullah Majid al-Naimi	Bahrain	November 2005	Arrested in October 2008; involved in terrorist facilitation; has known associations with al-Qaida	Confirmed
Saad Madhi Saad Hawash al Azmi	Kuwait	November 2005	Association with al-Qaida	Suspected
Majid Abdullah Lahiq al Joudi	Saudi Arabia	February 2007	Terrorist facilitation	Confirmed
Humud Dakhil Humud Saïd al-Jadan	Saudi Arabia	July 2007	Association with known terrorists	Suspected
Mazin Salih Musaid al-Alawi al-Awfi <i>also known as Abu al-Hareth Muhammad al-Awfi</i>	Saudi Arabia	July 2007	Leadership figure in al-Qaida in Arabian Peninsula	Confirmed
Abd al Razzaq Abdallah Ibrahim al-Sharikh	Saudi Arabia	September 2007	Arrested in September 2008 for supporting terrorism	Suspected
Abd al Hadi Abdallah Ibrahim al Sharikh	Saudi Arabia	September 2007	Arrested in September 2008 for association with terrorist members; supporting terrorism	Suspected
Zahir Shah	Afghanistan	November 2007	Participation in terrorist training	Confirmed
Abu Safyan al-Azdi al-Shihri	Saudi Arabia	November 2007	Leadership figure in al-Qaida in Arabian Peninsula	Confirmed

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Abdullah Gulam Rasoul	Afghanistan	December 2007	Taliban military commander for Afghanistan: Organized an assault on U.S. military aircraft in Afghanistan	Suspected
Haji Sahib Rohullah Wakil	Afghanistan	April 2008	Association with terrorist groups	Suspected

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# Legal Memorandum

No. 35  
January 23, 2009



Published by The Heritage Foundation

## Holding Terrorists Accountable: A Lawful Detainment Framework for the Long War

*Charles D. Stimson*

During the recent presidential campaign, then-Senator Barack Obama promised to close the Guantanamo Bay detention center and stated that some Guantanamo detainees should be prosecuted or transferred to other countries and that others should be detained "in a manner consistent with the laws of war."<sup>1</sup> President Obama already, on his second full day in office, has taken the first steps in that direction by issuing an executive order calling for the closure of Guantanamo "as soon as practicable" and the prosecution, release, transfer, or continued detention of all detainees housed there following review of their statuses.<sup>2</sup>

This action is bold, comprehensive, yet cautious. In some respects, it represents a continuation, and at most an acceleration, of many of the policies of the Bush Administration. Prior to January 20, some detainees were being prosecuted,<sup>3</sup> and others were transferred to other countries. In fact, that latter group comprises nearly two-thirds of all those who have been held at Guantanamo.<sup>4</sup>

More important is what has not yet been addressed. While the Obama executive orders allude to continued detention of some Guantanamo detainees, they address only the current detainees at Guantanamo. President Obama's bigger decision—one where he is more likely to modify previous practice—concerns *future* detainees, not the fate of those already captured and held at Guantanamo Bay.

The Obama Administration will not be ending the practice of military detention. Military detention<sup>5</sup>

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### Talking Points

- Military detention is a necessary and lawful tool with a long history of use. Closing the detention facility at Guantanamo does not answer the question of what to do with future captures. Whatever President Obama does, he is extremely unlikely to end detention altogether.
- But Obama does have the opportunity, and the obligation, to put U.S. detention policy on a firmer footing by crafting a durable legal framework for detention that meets our security needs as well as our values.
- This framework ought to follow the contours of Article 5 of the Geneva Conventions and include ample and periodic review, with counsel, of each detainee's status.
- Further, detention should be reserved only for those who cannot be safely prosecuted—a group that will always exist.

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This paper, in its entirety, can be found at:  
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Produced by the Center for Legal and Judicial Studies

Published by The Heritage Foundation  
214 Massachusetts Avenue, NE  
Washington, DC 20002-4999  
(202) 546-4400 • [heritage.org](http://heritage.org)

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of some detainees is appropriate, consistent with long historical practice, and a necessary and lawful tool in the current conflict.<sup>6</sup> True, as General David Petraeus and Secretary of Defense Robert Gates have essentially said, we cannot kill or capture our way to victory in this conflict.<sup>7</sup> Yet military detention, properly calibrated and designed to complement our broader national security and counterterrorism policy, is necessary, not only for some detainees currently detained at Guantanamo but also for future captures of high-value detainees.

Indeed, candidate Obama also pledged to continue to build U.S. capacity and international partnerships to track down, capture, or kill terrorists around the world, and this presumably entails holding additional detainees.<sup>8</sup> That promise should assure the American people that President Obama intends to protect us from those terrorists who seek to kill us. But it also begs several key questions:

- When the U.S. captures a high-value terrorist and, for whatever reason, cannot prosecute him, where will he be detained?
- Under what legal framework will he be detained?
- How will all this work given the shifting legal landscape since 9/11?

Answering those questions and crafting an acceptable legal framework that ensures the continued safety of the American people is the difficult but necessary work ahead, and it is the substance of what the Obama Administration will have to confront as it forges a new durable policy and legal framework on detainees in the war on terrorism.

### Defining the Issue

Winding down the detention operation at Guantanamo Bay in a responsible manner will be difficult, will take more than just a couple of months, and requires making difficult decisions and trade-offs.<sup>9</sup> Indeed, President-elect Obama acknowl-

1. Obama '08, "Barack Obama: The War We Need to Win," at <http://www.barackobama.com/pdf/CounterterrorismFactSheet.pdf>.
2. See, "Executive Order — Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities," January 22, 2009, at [http://www.whitehouse.gov/the\\_press\\_office/ClosureOfGuantanamoDetentionFacilities](http://www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities).
3. The Bush Administration decided early on to prosecute some Guantanamo detainees in military commissions. To date, there have been only a handful of commissions. The topic of which type of entity—military commissions, federal district court, traditional courts-martial, or a new national security court—should be used is beyond the scope of this paper.
4. To date, the United States has transferred or released over 500 detainees from Guantanamo Bay. At its peak, the detention facility had approximately 780 detainees. As of January 2009, there are approximately 248 detainees, of which approximately 55 have been approved for transfer.
5. The term "military detention" refers generally to the incapacitation of privileged belligerents (typically "prisoners of war"), unprivileged belligerents, or others caught during armed conflict. The term is sometimes used interchangeably with "preventative detention" or "administrative detention." However, the latter two terms can and do occur outside of armed conflict, such as the involuntary detention of the criminally insane, criminal suspects held pending trial, sexually violent predators confined indefinitely after serving their criminal jail terms, persons subject to immigration holds, or the like.
6. The issue of what procedural protections Guantanamo detainees should have, or should have had when captured, is a separate and distinct matter and not the subject of this paper.
7. General Petraeus said, in an interview in the January 2008 issue of *Foreign Policy*, "You can't kill or capture everybody in an insurgency." In a speech at the National Defense University on September 29, 2008, Secretary Robert Gates said that "we cannot kill or capture our way to victory."
8. Obama '08, "Barack Obama: The War We Need to Win."
9. The author was Deputy Assistant Secretary of Defense for Detainee Affairs in 2006–2007. As such, he was the primary policy adviser to the Secretary of Defense on all matters related to Department of Defense detainees, including those in Guantanamo, Iraq, and Afghanistan. He also conducted the first classified Department of Defense review of how it might be possible to close Guantanamo's military detention center in 2006. Nothing in this paper relies on or reveals any classified or other sensitive information contained within the review.



edged that ending the detention mission at Guantanamo Bay will be difficult and, more significantly, that he would consider it a failure if he did not close Guantanamo by the end of his first term.<sup>10</sup> It is a challenge because the process actually has less to do with Guantanamo Bay detainees than with the question of how we wage war in the modern era against non-state actors who are actively waging war against us.

Guantanamo Bay is just a place—a place that admittedly has harmed our country's reputation and whose benefits arguably have come to be outweighed by its costs. To be sure, the United States has gained valuable intelligence from some detainees at Guantanamo over the years and has kept those very same detainees from killing or injuring our soldiers or allies in our ongoing conflict. That intelligence has helped us to understand and fight this enemy more effectively, but its value has diminished over time. More important, that intelligence and security has strained diplomatic relations, undermined the moral authority of the United States in the eyes of some, and raised distracting domestic legal obstacles.

Simply ending the detention operations at Guantanamo addresses only one visible aspect of a broader post-9/11 detention legal framework for the incapacitation and lawful interrogation of terrorists. Closing Guantanamo or merely moving the detainees to the United States without addressing the serious underlying challenges and questions regarding detention policy in this ongoing conflict

is essentially changing the ZIP code without confronting the broader challenges.

The new Administration has the opportunity, and an obligation, to build on the strategic rationale, legal and policy underpinnings, and entire framework regarding how to hold accountable and incapacitate terrorists.<sup>11</sup>

It is important to recall that a key recommendation from the 9/11 Commission Report was for the United States to engage our allies and develop a common approach to the detention and humane treatment of captured terrorists, drawing from Common Article 3 of the Geneva Conventions.<sup>12</sup> Much work has been done with respect to this key recommendation,<sup>13</sup> some remains.

Military detention of the enemy during armed conflict is authorized and legal. According to a legal adviser for the International Committee of the Red Cross (ICRC), such detention is an "exceptional measure of control that may be ordered for security reasons in armed conflict or for the purpose of protecting State security or public order in non-conflict situations, provided the requisite criteria have been met."<sup>14</sup> According to the author, "the exceptional nature of internment lies in the fact that it allows the detaining authority to deprive liberty of persons who are not subject to criminal processes but nevertheless represent a real threat to security in the present or in the future."<sup>15</sup>

It is also just common sense. When our military enters armed conflict, however that is defined, it

10. See "Obama Pledges Entitlement Reform: President-Elect Says He'll Reshape Social Security, Medicare Programs," *The Washington Post*, January 16, 2009. The front-page article, based on a wide-ranging 70-minute interview with *Washington Post* reporters and editors, says that the President "will consider it a failure if he has not closed the U.S. military prison at Guantanamo Bay, Cuba, by the end of his first term in office."

11. See Matthew C. Waxman, "Administrative Detention: The Integration of Strategy and Legal Process," July 24, 2008, pp. 4–5. Mr. Waxman was the first Deputy Assistant Secretary of Defense for Detainee Affairs from 2004–2005.

12. National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report*, p. 380.

13. See, for example, Department of Defense Directive 2310.01E, September 2006, which incorporated verbatim the text of Common Article 3 of the Geneva Conventions and established a baseline standard of care and treatment for all Department of Defense detainees regardless of their legal status. See also FM 2-22.3, *Human Intelligence Collector Operations* manual, the so-called Army Field Manual on interrogations, also published in September 2006.

14. See Jelena Pejic, "Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence," *International Review of the Red Cross*, Vol. 87, No. 858 (June 2005), p. 376.

15. *Ibid.*, p. 380.

has the legal authority to use lethal force when necessary. It stands to reason that the military must also be able to detain the enemy in a lawful manner, all the while upholding the rule of law, protecting human rights, and adhering to applicable provisions of the Geneva Conventions.<sup>16</sup>

Military detention is not a right-wing proposition; it is a time-honored, legal, proper national security tool during armed conflict. That fact is recognized across the political spectrum. On January 6, 2009, Senator Dianne Feinstein (D-CA), along with Senators John D. Rockefeller IV (D-WV), Ron Wyden (D-OR), and Sheldon Whitehouse (D-RI), introduced Senate Bill 147, the Lawful Interrogation and Detention Act. The act, directed specifically at the detainees currently at Guantanamo Bay, Cuba, specifically authorizes military detention for some detainees who cannot be prosecuted or transferred.<sup>17</sup>

Thus, despite what some have argued over the years, the United States is not required, by its international obligations or otherwise, to "try them or set them free." This false choice is dangerous, and it comes with real consequences. It is widely known that some detainees released from detention in Iraq, Afghanistan, and Guantanamo have taken up arms against Americans and our allies and no doubt have committed further combatant activity.<sup>18</sup> This risk of further combatant activity will

always exist, and it is particularly acute in the current conflict.

Reducing that risk through lawful detention is not always a controversial proposition. For years, the United States has captured, detained, and lawfully interrogated thousands of combatants within the political boundaries of Iraq and Afghanistan, and it will continue to do so for some time in Afghanistan.<sup>19</sup> Most detainees are detained to prevent further combatant activity against the U.S. or our forces—not tried in a criminal trial.

### Beyond Guantanamo

With respect to terrorists captured in the future outside of Afghanistan, including by our allies or in a future conflict or other crisis, the detention situation is more complicated. Neither the criminal law nor the law of armed conflict provides comprehensive and complete policy prescriptions in terms of how best to keep these combatants off of the battlefield and lawfully interrogate them while upholding the rule of law, protecting human rights, and safeguarding our country.

Prior to September 11, 2001, terrorism was treated as a matter of criminal law. The limits of and flaws in that approach have been detailed in numerous articles.<sup>20</sup> It is true that our anti-terrorism statutes have improved over the years and that our track record of trying terrorism in the courts is impres-

16. Under the Geneva Conventions, prisoners of war (POWs) may not be interrogated by their captors. Rather, POWs may only be asked their name, rank, and other identifying information. See Geneva Convention Relative to the Treatment of Prisoners of War (GC III), Article 17. Unprivileged belligerents (those who do not qualify as POWs) may be interrogated, if they agree to speak to their captors, beyond the restrictions of GC3, Article 17.

17. See S. 147, Sec. 3 (5), which states, "The individual shall be held in accordance with the law of armed conflict."

18. On January 13, 2009, the Pentagon announced that 61 former detainees from Guantanamo Bay, Cuba, were confirmed to be or suspected of returning to the fight. The Pentagon's revised number—up from 37—represents 11 percent of all terrorists released from Guantanamo Bay since 2002. See U.S. Department of Defense, "DoD News Briefing with Geoff Morrell from the Pentagon," January 13, 2009, at <http://www.dodpressclink.mil/transcripts/transcript.aspx?transcriptid=4340>.

19. The United Nations Security Council resolution on Iraq that authorizes U.S. forces to detain insurgents for imperative reasons of security expired at the end of 2008. Starting January 1, 2009, pursuant to the recently signed Status of Forces Agreement between the United States of America and the Republic of Iraq, insurgents captured on January 1, 2009, going forward must be charged with a crime or set free under Iraqi law. It remains to be seen how many months (or longer) delendants will remain in custody prior to arraignment and trial.

20. See, for example, Robert M. Chesney and Jack L. Goldsmith, "Terrorism and the Convergence of Criminal and Military Detention Models," *Stanford Law Review*, Vol. 60 (2008), pp. 18-21 (discussion of difficulties with terrorism trials in federal district court such as extradition, hearsay, Fifth and Sixth Amendment issues, and classified information). See also Andrew McCarthy, *Willful Blindness: A Memoir of the Jihad* (New York: Encounter Books, 2008), pp. 310-314.

sive, but despite the system's strength and flexibility, these improvements will carry us only so far.<sup>21</sup>

A recent report by Human Rights First, *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, details over 100 terrorism cases successfully prosecuted in federal court since 9/11. The report covers many, but not all, of the important laws and legal and policy considerations regarding trying terrorism cases in federal district court. Yet it does not mention one case of a terrorist captured overseas on the battlefield after 9/11 and tried in the U.S. courts, nor does it seriously address the issue of the use of hearsay in federal trials for battlefield captures.

Most important, the Human Rights First report downplays the risks associated with the inadvertent disclosure of classified evidence, including valuable (and expensive) sources and methods of intelligence gathering. In every case involving such evidence—and this would include some cases involving terrorists captured overseas—there must be a careful, sophisticated cost-benefit analysis conducted by the highest officials in the government before deciding to disclose certain evidence in courtroom proceedings. Trying some terrorists in federal court should be an option, and it is an option the Bush Administration should have used more often,<sup>22</sup> but it should not be the exclusive weapon in our arsenal for combating al-Qaeda and other unprivileged belligerents.

To its credit, the Human Rights First report does acknowledge that some detainees may properly be held under “the law of war for the duration of

active hostilities to prevent them from returning to the field of battle, and without any effort by the government to file charges or impose punishment.”<sup>23</sup> In other words, military detention has a place in this conflict.<sup>24</sup>

For the most part, the Bush Administration and Congress, in its Authorization for the Use of Military Force, recognized the terrorist attacks of 9/11 as an act of war, and the law of armed conflict was the foundation for the legal framework surrounding detention. With respect to Guantanamo, the law-of-armed-conflict paradigm was challenged within weeks of detainees arriving in January 2002, and its limitations have become clearer during this long conflict.

Certainly, the law of armed conflict should and will provide the underpinnings for the detention framework in Afghanistan in the years to come, but it does not provide adequate answers to or procedural protections for detainees captured outside of Afghanistan and all of the issues that arise in a conflict of this nature.<sup>25</sup>

A legal regime can only set the boundaries of permissible policy; it is not a substitute for policy decisions to resolve lingering questions. In the future, when we capture a high-value al-Qaeda operative somewhere outside of Afghanistan who plots acts of terrorism or trains fellow terrorists but has not committed a domestic crime that can be prosecuted in federal district court, a court-martial, or even a new national security court, do we release him? If not, should we detain him, and under what legal framework? Where will he be detained? It is

21. See, for example, 18 U.S.C. 2339A and 2339B. See also *9/11 Commission Report*.

22. Terrorists who committed crimes against U.S. interests prior to 9/11 and then were captured after 9/11 might have been excellent candidates for prosecution in federal district court. Some were actually under indictment (some sealed) prior to 9/11. For example, Abd al-Rahim Hussein Muhammed Abdu Al-Nashiri was captured in 2002. According to his military commission's charge sheet, he was responsible for attempting to blow up the USS *The Sullivans* in 2000 and for the successful bombing of the USS *Cole* in September 2000. There are many other examples.

23. Richard B. Zabel and James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, May 2008, p. 5.

24. Even the liberal Center for American Progress has acknowledged the need for a narrow category of military detention for some Guantanamo Bay detainees. See Diane Rehm interview with Ken Gude, Associate Director, International Rights and Responsibility Program, on National Public Radio, November 26, 2008. Guests included the author, Ken Gude from the Center for American Progress, and Vincent Warren from the Center for Constitutional Rights.

25. See, generally, Benjamin Wittes, *Law and the Long War* (Penguin Press, 2008), chapters 1 and 6.

highly unlikely that the government of Afghanistan (or any other country) will allow him to be detained inside their country. Should we bring him to the United States? If so, what is his legal status, and what framework is he held under?

Further, in many of these cases, we will want to lawfully interrogate a captured operative to gain tactical or strategic intelligence. How do those lawful interrogations for intelligence reasons affect the potential for criminal prosecution? We may not be able to prosecute some of these individuals, and it may not be in our best interest as a country to try them because to do so might unreasonably risk exposing critical national security secrets.

### A Future Framework

The answer, far beyond closing Guantanamo, is to solve the broader challenge of holding accountable and incapacitating terrorists in a detention framework that is lawful, durable, and internationally acceptable. As we capture future high-value terrorists outside of Afghanistan and conclude that some may not be prosecuted in our domestic courts, we will need a sustainable legal framework to detain them.<sup>26</sup>

Creating the right framework will be challenging, but it is necessary. As a former Administration official in charge of detainee matters observed, detention carries risks to both liberty and security.<sup>27</sup> Much thought needs to be given to the characteristics of persons subject to detention.<sup>28</sup> Conceptual criteria such as (among others) dangerousness, active or direct participation, membership

in or support for an organization such as al-Qaeda, past acts, and future intentions must all be considered and weighed before drafting an appropriate definition of who may be detained.<sup>29</sup> However, we must remain ever mindful that our service members are facing the enemy on numerous battlefields every day. These questions are not, and should not be treated as, merely academic.

As for procedural protections for future captures, under the law of armed conflict, if there is a question as to a detainee's legal status (e.g., a prisoner of war, a civilian, or some other class), the detaining authority must hold a hearing, similar to an Article 5 hearing provided to prisoners of war under the Geneva Conventions, at or near the time of capture. If the "Article 5" hearing officer finds the terrorist detainable, then he may be detained. Alternatively, the hearing officer could make a finding that the captured person does not meet the proper criteria and order him released after the hearing.

If the person is deemed detainable by the hearing officer, after a defined period of lawful interrogation, the detainee should be given an Article 5-style "competent tribunal" hearing before a military judge where he should have assistance of military counsel.<sup>30</sup> If the military judge, after a full and fair hearing, decides that the detainee qualifies for further military detention, the detainee is thereafter detained pending periodic review.

There should be robust judicial appellate review, and the detainee should be afforded qualified free appellate counsel. The basis for his detention should be reviewed periodically.

26. The proposal in this section, and the procedural protections suggested, would not necessarily suffice for those detainees currently at Guantanamo Bay, Cuba.

27. See Waxman, "Administrative Detention: The Integration of Strategy and Legal Process," p. 19.

28. To some, any captured member of al-Qaeda may be lawfully detained until the end of the conflict, however long that may be. Nowhere in the Geneva Conventions is there a requirement that a particular detainee represent an imminent threat to anyone; it is required only that the detainee was a member of the opposing armed force captured during the course of military operations. Some experts fear the degradation of the fundamental ability to detain all members of the opposing force until the end of hostilities. Of course, that begs the question in this conflict: How do you know who is a member of al-Qaeda, since many al-Qaeda members are not willing to disclose their association with the terrorist organization?

29. See Waxman, "Administrative Detention: The Integration of Strategy and Legal Process," pp. 14-24. See also Chesney and Goldsmith, "Terrorism and the Convergence of Criminal and Military Detention Models," pp. 45-49.

30. For an excellent example of how to conduct a "competent tribunal," one need not look any further than the one conducted by Judge Keith Allred in the *United States v. Salim Hamdan* case in the summer of 2008.

Furthermore, military detention should be used only for those detainees who cannot be safely prosecuted.<sup>31</sup> This means, at the front end of the detention matrix, that there must be a robust system in place to determine which cases are prosecutable and which ones are not.

As a legal matter, there is support for the argument that the current Authorization for Use of Military Force (AUMF) authorizes the President to detain militarily a person captured in the United States.<sup>32</sup> However, as a policy matter, the proposed military detention framework should not apply to anyone captured in the United States, at least under current circumstances.<sup>33</sup>

Not even the Geneva Conventions or the principles underlying them answer every question. Once you give future captures an "Article 5" hearing and a "competent tribunal" determines that the detainee may be detained, then what? Does the case get transferred automatically to a federal district judge for "independent review," perhaps under a newly created national security court? And how long do you detain the individual? How often do you review the basis of his detention? According to the Geneva Conventions, a person subject to detention must have the basis for his detention reviewed periodically, but is that an appropriate standard in this case? I believe it is warranted.

Would this system even be workable if, for example, the United States captured hundreds of detainees at a time? And what impact will these robust new rules and procedures have in the next war against a state actor who will receive fewer safeguards or rights as a prisoner of war?

All of this must be done as transparently as possible.

Finally, the United States must continue to allow the International Committee of the Red Cross<sup>34</sup> to perform its valuable function vis-à-vis detainees, and we must continue to work with and engage the ICRC in a substantive, confidential diplomatic dialogue.

### Conclusion

Shuttering detention operations at Guantanamo Bay will be only a symbolic gesture—or perhaps not even that—if the Obama Administration does not also address the broader challenge of lawfully incapacitating terrorists who are intent on waging war against us. The incoming Administration has the duty to think through the strategic rationale of military detention in the broader context of its counterterrorism policies.

Some detainees may be appropriate candidates for criminal prosecution in federal district court, in terrorists' court-martials, or even in a newly created

31. These proposed procedural protections are greater than those a POW would receive under the Third Geneva Convention. However, due to the unique nature of this conflict and the difficulties involved in detaining combatants who fail to follow the law of war, these additional safeguards may be necessary to ensure that we have not mistakenly detained an innocent civilian. No set of procedural safeguards is error-free. However, the proposed procedural safeguards are an acknowledgment of a prudential trade-off: The concept of ensuring that we are not arbitrarily detaining the wrong person is more important than the idea of providing greater safeguards to those that fail to follow the law of war. A corollary question must be asked: What incentives, perverse or otherwise, does this new system create for a state or non-state actor engaged in combat to follow the laws of war? Like all policy proposals put into action, there will be a host of consequences, intended and unintended, that flow from such a change.
32. See the case of Ali Saleh Kahlah al-Marri, who is currently housed at the Navy Consolidated brig in South Carolina. In July 2008, the United States Court of Appeals for the Fourth Circuit upheld the government's right to hold al-Marri as an enemy combatant, despite the fact that he was arrested and detained in the United States in December 2001. Al-Marri appealed the Fourth Circuit's opinion, and on December 5, 2008, the United States Supreme Court agreed to hear the case.
33. Since 9/11, only a small number of suspected terrorists have been captured within the United States. Most committed domestic criminal violations and were subsequently prosecuted in federal court. Those prosecutions, with notable exceptions, proved successful. If the number increased dramatically, the Administration would be wise to revisit that policy choice. The recently signed executive orders give the President that flexibility.
34. The ICRC is mentioned specifically, by name, in the Geneva Conventions as an approved humanitarian organization. See GC III, Article 2, 9 and 10.

national security court—as long as there is not an unreasonable risk of exposure of critical national security information. Other detainees at Guantanamo Bay and those captured in the future will be appropriate candidates for military detention.

Achieving this new policy will take time. It will require the new Administration to use this “strategic pause” in military commissions, *habeas corpus* cases, and other ongoing matters to take stock of the best way forward.

We will see how Barack Obama responds to calls from some of his supporters to “try them or set them free.” Will he make the case for a thoughtful

military detention policy, or will he give in to their dangerous demand? If Obama acknowledges that al-Qaeda members and others similarly situated are not common criminals and that military detention is a lawful and necessary tool in this ongoing conflict, we will know that our new President is serious about the threats aligned against us.

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**Testimony of Richard Klingler<sup>1</sup> Before the Senate Committee on the Judiciary,  
Subcommittee on the Constitution**

**“The Legal, Moral, and National Security Consequences of ‘Prolonged Detention’”**

**June 9, 2009**

Chairman Feingold, Ranking Member Coburn, and other members of the Subcommittee, thank you for allowing me to present my views today regarding the lawfulness, morality, and national security necessity of ongoing – or indefinite, or prolonged – detention.

Detention, for this purpose, means detention by our military of enemy combatants: persons who our military has concluded have waged or threaten war against our troops, citizens, and allies. The principal combatants at issue are members and supporters of al Qaeda and related terrorist organizations that pose a significant threat of violence to U.S. citizens.

The principal purpose of detention is to keep those who would harm U.S. citizens and troops from returning to the fight – and detention appropriately continues until that threat no longer exists. In this sense, wartime detention of combatants is always “indefinite” or “prolonged” until conflict ceases. A nation at war does not know when the conflict will end or, at times, whether it will even prevail. As a nation whose history includes the Vietnam War, engagements in Central America and the Philippines, World Wars that, but for certain fortuitous, might have lasted much longer, and now the ongoing war in Afghanistan, we are familiar with prolonged engagements and wars against irregular and unconventional forces. The conflict against terrorist organizations is not different in kind.

The debate over indefinite detention often wrongly focuses on Guantanamo Bay. The current practice is considerably more widespread, and any limitations on indefinite detention would have correspondingly wide implications. The U.S. military indefinitely detains enemy combatants, including members and supporters of al Qaeda and other terrorist organizations, on a wide scale in Iraq and Afghanistan, as well as at Guantanamo, and press reports indicate that U.S. officials work closely with our allies to detain al Qaeda members in other countries.

“Prolonged” detention is thus not something proposed for the future, for just a small subset of Guantanamo detainees. It is, instead, a practice that this Administration is already conducting on a widespread scale, will continue to pursue, and has already defended repeatedly in federal court. No matter how Guantanamo detainees are handled, this Administration will continue, directly or indirectly, to detain hundreds if not thousands of enemy combatants indefinitely in many places for many years to come.

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<sup>1</sup> Richard Klingler served in the Administration of President George W. Bush in the Office of White House Counsel (2005-2007) and as General Counsel on the National Security Council staff (2006-2007). He is a partner in the law firm Sidley Austin LLP, practicing in Washington, D.C. A.B., Stanford University; M.A., Oxford University (as a Rhodes Scholar); J.D., Stanford Law School. The following views are his own.

Lawfulness and Legal Consequences. The lawfulness of ongoing detention of enemy combatants is clear and well-established.

In short, such detention of enemy forces is a lawful incident of war, authorized whenever the exercise of war powers is authorized. Addressing our current war against al Qaeda and associated forces and invoking sixty-year old precedent, the Supreme Court concluded that the capture and detention of enemy personnel “are ‘important incident[s] of war’” justified, at least, by the 2001 Authorization of Use of Military Force (“AUMF”).<sup>2</sup> It has ruled that the military may detain enemy forces even if “they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations.”<sup>3</sup> The *current* Administration has correctly argued that “[l]ongstanding law-of-war principles recognize that the capture and detention of enemy forces are important incidents of war,” that the AUMF’s “principal purpose was to eliminate the threat posed by [al Qaeda],” that capture is not limited to the formal battlefield, and that international law and principles of self-defense further justify detention of al Qaeda and co-belligerent organizations.<sup>4</sup>

A very limited range of persons can be detained under these principles, and they are determined by who we fight in the current war. At a minimum, the AUMF confirms our war status against al Qaeda and the Taliban, and the Administration has correctly construed the AUMF as extending to forces associated with al Qaeda. Thus, the current Administration has defined the following persons as subject to ongoing military detention:

The President has the authority to detain persons that the President determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban and al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy forces.<sup>5</sup>

With the exception of a single word with no material effect, this is the same standard employed by the previous Administration. As I testified before the House Armed Services Committee, Congress might usefully clarify the scope of authorized combat activities, but this is not necessary to support the general power to detain enemy combatants, even under the AUMF. Separately, a broader and additional basis for detaining enemy combatants arises from the President’s power, as Commander-in-Chief, to direct military action against our enemies, and to detain combatants as an incident of that authority.

Challenges to the detention of enemy combatants usually depend on rejecting the premise that we are truly at war with terrorist organizations, often by asserting that the matter is really

<sup>2</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality) (quoting *Ex Parte Quirin*, 317 U.S. 1, 28 (1942)).

<sup>3</sup> *Quirin*, 317 U.S. at 38.

<sup>4</sup> United States Dep’t of Justice, *Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay. In re Guantanamo Bay Detainee Litigation*, Nos. 08-442 et al., at 3, 4, 5-7, 8-10 (D.D.C. March 13, 2009) (internal citation omitted).

<sup>5</sup> *Id.* at 2.



one of criminal wrongdoing, to be addressed by the criminal law. That conclusion would surprise our troops in Afghanistan, Iraq, and elsewhere whose mission is to confront members of al Qaeda, either by killing them or capturing and detaining them.

That conclusion would surprise our Commander-in-Chief even more. One of the first lines of his Inaugural Address was that “[o]ur Nation is at war against a far-reaching network of violence and hatred.” His recent speech on detention confirmed that “[w]e are indeed at war with al Qaeda and its affiliates” and that because “al Qaeda terrorists and their affiliates are at war with the United States ... those that we capture – like other prisoners of war – must be prevented from attacking us again.”<sup>6</sup> Ongoing detention is, again, a lawful incident of this state of war.

This Administration’s understanding that war-fighting powers, including the power to detain, are appropriate should make detention less controversial, and less enmeshed in the heated debates of recent years. The extent of the current Administration’s continued use of war powers against terrorist organizations is hard to overstate. The Obama Administration has pursued nearly every aspect the prior Administration’s conduct of the war in Iraq and Afghanistan and against terrorist networks globally. As a formal matter, this Administration has embraced nearly all the components of wartime and related Executive powers asserted by its predecessor and then subject to controversy. In addition to continuing indefinite detention in Afghanistan, Iraq, and Guantanamo, and committing to do so for a subset of Guantanamo detainees even once transferred elsewhere, the Administration has, for example:

- continued, according to the Attorney General, a valuable foreign intelligence surveillance program, unsupported by warrants, that critics had characterized as “warrantless wiretapping”;
- continued to use provisions of the previously controversial PATRIOT ACT, including the most contested provisions, which the current FBI Director has defended and sought to have reauthorized;
- asserted through a Presidential Signing Statement that the Executive Branch would treat certain statutory provisions infringing on the President’s constitutional powers, as determined by the President, as “precatory” or “advisory”;
- denied *habeas corpus* rights to detainees held by the military at Bagram, Afghanistan and elsewhere beyond Guantanamo, avoiding judicial review of detention decisions previously criticized as creating a “legal black hole”;
- continued the robust use of the “state secrets doctrine” to prevent disclosure in litigation of national security information;

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<sup>6</sup> Office of the Press Secretary, The White House, *Remarks by the President on National Security*, National Archives, Washington, D.C. (May 21, 2009) (“National Archives Speech”).

- fought against disclosure of documents, under the Freedom of Information Act, where the military finds that release would harm the national security;
- declined to extend the protections of the Geneva Conventions for prisoners of war to members of al Qaeda;
- continued to act against designated financiers of terrorism, and against would-be travelers placed on “terror watch lists,” without affording the affected individuals the due process protections demanded by critics; and
- committed to continue use of military commissions, virtually unmodified beyond formal recognition of requirements previously imposed by military judges.

Now that these policies and the wartime framework underlying them have settled well within the mainstream of the American tradition, a broader recognition of the established legal basis for indefinite detention may be possible.

Some have suggested that while the military may lawfully detain prisoners of war as defined by the Geneva Conventions, it lacks such powers over members of al Qaeda and their associates. This ignores and negates the Geneva Conventions and the laws of war: terrorists who choose not to follow the legal conventions that would entitle them to POW status should not be entitled to *greater* protections than POWs. One point of those Conventions is to provide incentives for combatants to conform to the laws of war; those who target civilians or attack without indicia of their membership in an armed force should not be rewarded for that behavior. If there had been any doubt of the military’s power in this respect, the Supreme Court in *Hamdi* resolved it and added to the many prior cases establishing the power to detain.

Nor should the existence of the power to detain or the standards for detention be determined based on the Constitutional rights afforded to U.S. citizens and lawful U.S. residents. As even the current Administration has argued, foreigners beyond our shores lack the most basic Constitutional rights, including protections under the Due Process Clause. This distinction between rights afforded to U.S. persons and those accorded to foreigners abroad is well established by Supreme Court precedent and longstanding U.S. military and domestic practices.<sup>7</sup> Nothing in the Court’s *Boumediene* decision<sup>8</sup> purported to overturn these precedents or to extend even to Guantanamo detainees the full range of Constitutional rights, or any rights beyond those afforded in habeas proceedings – and the better reading of *Boumediene* (again, endorsed by the current Administration) is that the decision does not apply in even that limited respect beyond Guantanamo itself. While there are circumstances where even U.S. citizens may be detained as part of the conflict against terrorists, as the Supreme Court confirmed in *Hamdi*, the legal implications of detention, and the potential cost to long-standing rights and traditions, are far greater in that context. That power was exercised in the prior Administration in only three instances not long after the attacks of September 11, and all were subject to extensive judicial consideration. That power is not the subject of the current debates.

<sup>7</sup> See, e.g., *Verdugo-Urquidez*, 494 U.S. 259 (1990) (and cases cited).

<sup>8</sup> *Boumediene v. Bush*, No. 06-1195 (June 12, 2008).

Indeed, the greatest risks to our rights and values would arise if we fail to distinguish between the extensive Constitutional rights of U.S. citizens and the extremely limited rights of foreigners abroad who, according to our military, seek to harm our nation. Detention of U.S. citizens raises a series of difficult issues and requires heightened procedural safeguards if undertaken at all, and the standards under established law and practice for foreign combatants are not adequate for that purpose. In this respect, those who invoke or apply Constitutional protections in aid of foreigners who fight against us are likely in practice to erode the rights of the citizens we seek to defend.

National Security Consequences. Ongoing detention of enemy combatants has extremely important national security benefits, especially compared to the nation's other options – in the absence of detention -- for addressing the threat posed to U.S. interests by those combatants.

The most important national security benefit of detaining enemy combatants is simple but essential: to ensure that those detained do not directly or indirectly attack our troops or citizens, here or abroad, or the troops and citizens of our allies. The continued availability of detention also ensures that our military and intelligence forces can and will continue to seek to detain additional combatants.

Additional benefits become clear in light of the consequences of restricting or eliminating detention. These consequences arise whenever the standards for detention are increased, as when the due process rights afforded to detainees are heightened, and especially if ongoing detention were eliminated altogether:

1. Outsourcing of detention. If the U.S. cannot readily detain enemy combatants, or do so with the assurance that they will remain detained, military and intelligence officials will have tremendous incentives – and, in many respects, the responsibility – to have our allies detain and interrogate enemy forces. As The New York Times has recently reported, this is just what is increasingly taking place, even for the most senior al Qaeda leaders captured during this Administration.<sup>9</sup> According to the report, “the United States is now relying heavily on foreign intelligence services to capture, interrogate and detain all but the highest-level terrorist suspects seized outside the battlefields of Iraq and Afghanistan.”<sup>10</sup> This is hardly the best outcome. Allied forces will often be far less effective in capturing the enemy. U.S. officials cannot ensure that the combatant is not released or collect intelligence. As human rights groups have emphasized, detainees may be treated considerably worse. Failing to take direct control over the detainee, at Guantanamo or elsewhere, helps no one. This option is less good for our security, and for the detainee.

2. Mistaken release. The point of detention is to keep combatants from returning to the fight, and from harming our troops and citizens and those of our allies, and when the U.S. mistakenly releases a detainee, it causes just these results. There is increasing evidence that this risk is real and significant. The Department of Defense recently released its assessment that confirmed that 27, or 5 percent, of the hundreds of

<sup>9</sup> Schmitt & Mazzetti, “U.S. Relies More on Aid of Allies in Terror Cases,” *N.Y. Times*, May 24, 2009.

<sup>10</sup> *Id.*

detainees released from Guantanamo alone had undertaken or assisted in combat operations against U.S. troops, and that there was considerable basis to believe that an additional 47, or 9 percent, have done so.<sup>11</sup> These figures are likely to underestimate the problem: the Department has limited information regarding a number of former Guantanamo detainees, and the estimate does not address detainees released from detention in Afghanistan or Iraq, or by our allies.

These mistakes are tragic and, of course, preventable. For example:<sup>12</sup>

- Two released detainees announced that they had assumed leadership of al Qaeda's branch on the Arabian Peninsula.
- Another became a regional Taliban commander for two Afghan provinces.
- Another blew himself up in a suicide bombing in Iraq, killing civilians.
- Others have directed or participated in attacks on U.S. troops, or otherwise facilitated terrorist activities.

None of the detainees released from Guantanamo has – yet – successfully attacked citizens in the United States.

3. Initial failure to detain. An even greater risk is that we leave enemy combatants at large because we do not have the capacity or will to secure and hold them once identified. Where standards for detention are increased or detention is eliminated as an option altogether, U.S. officials may well pass up opportunities to secure those combatants, or rely on less capable allies. This result, of course, prompted a principal criticism of our nation's counter-terrorism efforts in the decade prior to the attacks of September 11, 2001. In either case, leaders and members of al Qaeda or other terrorist organizations remain at large to continue to plan and act against U.S. troops and citizens.

Similarly, as other commentators have observed, a trade-off often exists between efforts to capture and detain enemy combatants and efforts to defeat them using arms in combat. If ongoing detention is not an option, or less assured, then less justification exists for placing our troops at greater risk in capture operations instead of using greater force, even at some cost to securing intelligence. This use of armed force is clearly worse for the enemy combatant.

There are without doubt enormous, countervailing costs of mistaken detention. Military officials undertake extensive efforts to avoid the terrible hardships imposed on those detained who in fact pose no threats to U.S. interests, but erroneous detention is unavoidable in the military context as in others. In many respects, our legitimate wartime operations impose terrible costs on innocent civilians and others that far exceed the harm to detainees, and we accept those

<sup>11</sup> Dep't of Defense, *Fact Sheet: Former Guantanamo Detainee Trends* (April 7, 2009) ("DoD Fact Sheet"); Bumiller, "Later Terror Link Cited for 1 in 7 Freed Detainees," *N.Y. Times*, May 21, 2009.

<sup>12</sup> *DoD Fact Sheet*, at 1-2 (presenting examples used in this paragraph).

results because they accompany reasonable measures we undertake to defend our nation. But these hardships for certain detainees do not justify abandoning detention altogether, and the harms identified above, to combatants and U.S. troops and citizens, increase as we increase the procedural protections designed to ensure that we detain only those who threaten us.

Some suggest that we can avoid these tough choices by relying exclusively on criminal proceedings, and abandon military detentions altogether. This argument is hardly relevant today, because the President has largely mooted it by stating that “[w]e’re going to exhaust every avenue that we have to prosecute those at Guantanamo who pose a danger to our country.” He also notes that there will still be persons who cannot be prosecuted, “who, in effect, remain at war with the United States.”<sup>13</sup> And, this does not account for the many more enemy combatants in this category who are currently held beyond Guantanamo.

Even apart from the President’s commitment, criminal processes could not eliminate the need for ongoing detention:

*First*, our troops *should* seek to defeat or detain enemy forces even when we cannot prosecute them successfully in a court of law. We need not and should not return to a pre-9/11 practice. As the President has said, we need to have the “tools ... to allow us to prevent attacks, instead of simply prosecuting those who try to carry them out.”<sup>14</sup> It is unreasonable to ask our troops and intelligence personnel to gather evidence of *past* wrongdoing, admissible in court and to a level supporting a criminal conviction, before concluding that a combatant poses a threat that requires an armed response or detention. We have never applied that standard to combat or to detention of combatants in prior conflicts, and there are enormous costs and risks to our troops and citizens of leaving the enemy in the field until that standard is satisfied. And if the point is that the standard applies to detention but not armed response, that creates the unintended but quite unsatisfactory consequences outlined above.

*Second*, as others have addressed at length, the evidence that a detainee is an enemy combatant and should be detained may not support a criminal conviction or charge for many reasons. The evidence may not be admissible in court; presenting it in court, even subject to the very cumbersome and unsatisfactory CIPA procedures, risks disclosure of sensitive information or withholding it from trial; the evidence may establish combatant status by a preponderance of evidence, but not “beyond a reasonable doubt”; or the evidence may support a finding of future threat rather than all the elements of a criminal act in the past. It is a *non sequitur* to assert that some or even many terrorists can be convicted in federal court (which is true) to support the claim that all can be (which is untrue).

*Third*, combatants we charge but fail to convict, due to a technicality unrelated to guilt or because criminal activity cannot be proved beyond a reasonable doubt, may still pose grave risks to U.S. citizens and troops. The “beyond a reasonable doubt” standard is designed to be strict enough to protect the rights of U.S. citizen defendants, and the

<sup>13</sup> *National Archives Speech, supra*, at 7.

<sup>14</sup> *Id.* at 3.

military can more than reasonably conclude that combatants have sought to harm U.S. troops or citizens, and will thus do so in the future, without having proof that meets that standard. The U.S. government has already found this to be the case: for this reason, it has deported even those who have been acquitted of terrorism-related charges – although deportation provides little assurance that U.S. troops abroad will not be harmed.

*Fourth*, enemy combatants who serve short prison terms, based on the nature of the crime that can be proved in court rather than the risk to U.S. troops and citizens, may thereafter still pose significant risks of continuing the fight against us.

*Fifth*, the capacities of our criminal justice system are limited. This alternative is usually raised in addressing a subset of the Guantanamo detainees, but hardly addresses the many combatants detained abroad or the many combatants our troops and allies are likely to detain in the years ahead.

*Finally*, placing such great reliance on the criminal justice system risks undermining the rights of U.S. citizens who are appropriately tried for past wrongdoing that the criminal law prohibits. We risk watering down defendants' rights when we stretch the criminal process to ensure that criminal sentences are meted out to all those who would otherwise threaten our troops. In many cases, prosecuting combatants will be akin to forcing a square peg into a round hole, and we want to ensure that the peg retains its sharp edges, and the hole its curves.

Moral consequences. This hearing's title invites comment on the moral consequences of detention policy, and I offer the following, tentative thoughts in response. As with other wartime practices, detention of enemy combatants is morally fraught, and parties on both sides of the issue have moral claims and arguments that we dismiss at our peril. There are only hard choices and least worst alternatives. The least defensible position is to pretend that there are no trade-offs or that one course will satisfy all the components of our moral traditions – by claiming for example, as the President has, that there is no trade-off between our national security and our moral values.

Even so, the moral consequences of policy in this area can be captured in large part in the legal and national security assessments canvassed above. A detention practice that is lawful, that focuses on discrete groups of foreigners abroad who would harm our troops and citizens, and that avoids alternatives that undermine the rights of U.S. citizens has a strong moral claim. A detention practice that avoids alternatives that cause detainees to be treated less well (as when we outsource our detention practices, or subject combatants to armed force instead) also has a strong moral claim.

There is immense moral value in ensuring that enemy combatants, through continued detention, do not kill or injure our troops or citizens, or those of our allies. Perhaps our greatest moral obligation, apart from protecting the nation's citizens, is to the troops we ask to defend us, and to their families. Ongoing detention in large measure seeks to, and succeeds in, satisfying that obligation.

“The Legal, Moral, and National Security Consequences of ‘Prolonged Detention’”  
9 June 2009

SENATE JUDICIARY COMMITTEE  
SUBCOMMITTEE ON THE CONSTITUTION

**Statement of Senator Kyl**

President Obama has recognized that some unlawful enemy combatants need to be held for the duration of the conflict. In his May 21 speech at the National Archives Museum, he said: “I am not going to release individuals who endanger the American people. Al Qaeda terrorists and their affiliates are at war with the United States, and those that we capture — like other prisoners of war — must be prevented from attacking us again.”<sup>1</sup>

As Senator Coburn pointed out in his opening statement, in *Hamdi v. Rumsfeld*, the Supreme Court affirmed the authority of the United States to detain enemy combatants without trial “until the end of hostilities,”<sup>2</sup> so long as U.S. citizens detained as enemy combatants have a process to challenge that designation.<sup>3</sup> Additionally, the Supreme Court acknowledged that the international law of armed conflict recognizes by “universal agreement and practice” that the primary purpose behind the capture and detention of enemy combatants is to prevent their return to combat.<sup>4</sup> While the Supreme Court granted habeas corpus rights to these prisoners in *Boumediene v. Bush*, the practice of detention remains acceptable.<sup>5</sup>

There seems to be consensus on this point. The 2001 Authorization of Use of Military Force sanctioned the detention of enemy combatants who had committed — or might commit in the future — acts of violence against the United States. As the current administration notes, “Indeed, long-standing U.S. jurisprudence, as well as law-of-war principles, recognize that members of enemy forces can be detained even if they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations.”<sup>6</sup> Jelena Pejic, Legal Advisor at the International Committee of the Red Cross, agrees. According to Pejic, detention “is an exceptional measure of control that may be ordered for security reasons in armed conflict, or for the purpose of protecting State security or public order in non-conflict situations provided the requisite criteria have been met.”<sup>7</sup> The practice of

<sup>1</sup> Barak Obama, *Remarks by the President on National Security (at the National Archives)*, WHITE HOUSE OFFICE OF PRESS SECRETARY, May 21, 2009, [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-On-National-Security-5-21-09/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/). See also *id.* “We are not going to release anyone if it would endanger our national security, nor will we release detainees within the United States who endanger the American people.”

<sup>2</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004).

<sup>3</sup> *Id.* at 537.

<sup>4</sup> *Id.* at 507.

<sup>5</sup> *Boumediene v. Bush*, 553 U.S. \_\_\_\_ (2008).

<sup>6</sup> U.S. Dep’t of Justice, Memorandum from the Resp’ts on *In Re Guantanamo Bay Detainee Litigation*, Nos. 08-442 et al., at 5-6 (quoting *Ex Parte Quirin*, 317 U.S. 1, 38 (1942)).

<sup>7</sup> Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INT’L REV. OF THE RED CROSS 375, 376 n. 858 (2005).

detention is designed to promote national security by depriving liberty to those who are threats to that security but are not subject to the criminal process.

Since the beginning of the war against terrorists, the United States has captured and detained nearly 800 enemy combatants at Guantanamo Bay. Today, a vast majority of these prisoners have been released, leaving approximately 240 prisoners currently in Guantanamo Bay.<sup>8</sup> These prisoners constitute the most dangerous population of those captured, and the military has determined that their release would be contrary to the interests of national security. Their prolonged detention is a sensible, effective action that should be continued.

If the practice of prolonged detention ceased, the prisoners would likely either have to be released or transferred to the United States to await potential criminal action. Each of these options is problematic. The release of these detainees would be antithetical to the purpose of the detentions, and would endanger national security. Of the approximately 500 prisoners who have been released over the past seven years, the Department of Defense has confirmed that more than 10 percent have returned to the battlefield to fight the United States and its allies.<sup>9</sup> It should be noted that while the released detainees were those whom the military determined to be the least dangerous, those who remain present a heightened risk to national security, even compared to those who have been released and returned to battle. This rate of recidivism demonstrates the danger of releasing detainees and highlights the need for military detention.

Transferring the detainees to another facility in the United States also presents problems. Whether the transfers would be a prelude to criminal prosecution or merely continued detention, there is a risk that a court would grant the detainees certain constitutional protections if they were transferred to United States. Granting these rights to the detainees would hinder the military's ability to protect the United States from its most dangerous enemies. Clearly, the end of prolonged detentions would endanger the security of the United States and its citizens.

Taking a closer look at the current detainees, it is apparent why the prolonged detention program is so important. Included in the group are combatants such as Khalid Sheikh Mohammad, mastermind of the 9/11 attacks, Abd al-Rahim al Nashiri, a co-conspirator in the USS Cole bombing, and many others involved in some of the worst attacks on the United States. The group is populated by members of al-Qaeda and the Taliban, including up to 36 who are considered to be leaders of these two groups. The military has deemed these detainees to be serious threats to national security, and a quick examination of their records makes it hard to dispute this claim. For such reasons, in July 2007, the Senate voted 94 to 3 to express its opposition to the transfer of detainees from Guantanamo Bay to a location in the United States.<sup>10</sup> The combatants at Guantanamo are the worst of the worst. It certainly makes sense to keep them there.

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<sup>8</sup> Charles Stimson, *Holding Terrorists Accountable: A Lawful Detainment Framework for the Long War*, January 23, 2009, <http://www.heritage.org/research/nationalsecurity/lm35.cfm>.

<sup>9</sup> U.S. Department of Defense, *Department of Defense News Briefing with Geoff Morrell from the Pentagon*, January 13, 2009, available at, <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=4340>.

<sup>10</sup> S.Amdt. 2351 to S.Amdt. 2327 to H.R. 2669.



**Statement Senator Patrick Leahy (D-Vt.),  
Chairman, Committee On The Judiciary,  
Hearing On "The Legal, Moral, and National Security  
Consequences Of 'Prolonged Detention'"  
Subcommittee On The Constitution  
June 9, 2009**

In his May 21, 2009, speech on national security issues, President Obama spoke of the challenges faced by his administration in prosecuting individuals held at the detention facility at Guantanamo Bay, Cuba.

Some are believed to have committed crimes of terrorism against the United States and will be prosecuted in U.S. federal courts for their crimes.

There are a number of detainees for whom prosecution will be difficult because their cases are tainted by the coercive techniques used against them during the Bush-Cheney administration. Evidence obtained through coercion is inadmissible in a court of law.

The President also described cases in which individual Guantanamo detainees may still pose a threat to the United States. Such cases are uniquely challenging where the administration believes that criminal prosecution is simply not feasible. We now face the vexing problem of how to handle cases in which the government believes the individual must be detained to prevent harm. To address such cases, the President described a system of "prolonged detention," with periodic judicial review.

None of us envy the President, who now has the task of taking up these cases. He is striving to solve a problem that is not of his making. I appreciate how daunting this task is. Even so, I have some questions about the system the President outlined in his speech.

The President did not offer a great deal of specificity as to how a system of prolonged detention would operate. I need to understand the scope of the judicial review contemplated under this proposal before determining for myself whether it meets our standards of fair treatment under law. I need to trust that a system established by this administration is grounded by constitutional protections so that it cannot not be exploited by future administrations.

Today's hearing will help us to understand various proposals for preventive detention that have been debated in recent months by experts and academics. I hope that the witnesses will parse out the President's description of prolonged detention and articulate what they see as the constitutional implications of pursuing such a model.

I appreciate the President's commitment to work with the Congress to ensure that his proposal is consistent with our values and our Constitution. As Justice Kennedy said in a Supreme Court decision restoring the great writ of habeas corpus, the Constitution is not something an administration is able "to switch ... on and off at will." I believe strongly that we can ensure our safety and security, and bring terrorists to justice, in ways that are consistent with our laws and values. I am committed to working with the President to ensure we accomplish that goal.

**Testimony of David H. Laufman  
Partner, Kelley Drye & Warren LLP**

**Hearing Before the Senate Committee on the Judiciary, Subcommittee on the Constitution**

**June 9, 2009**

**Introduction**

Mr. Chairman and distinguished members of the Subcommittee, it is an honor to appear before you to testify about the issue of detention in terrorism cases and the role that Article III courts have played, and can continue to play, in adjudicating these cases.

I am currently a partner at the law firm of Kelley Drye & Warren, where I concentrate on representing individuals and corporations who are the subject of government investigations. The vast majority of my career, however, has been in public service, and a substantial portion of my time in government was in the national security arena, beginning with my tenure as a military and political analyst at the Central Intelligence Agency in the early 1980s.

The views I express today are based predominantly on my service with the Department of Justice preceding my return to private law practice in 2007. From May 2001 through February 2003, I served as Chief of Staff to the Deputy Attorney General, a position in which I assisted in coordinating the Justice Department's responses to the terrorist attacks of September 11. From March 2003 until August 2007, I then served as an Assistant U.S. Attorney in the U.S. Attorney's Office for the Eastern District of Virginia, where I prosecuted several terrorism cases, including *United States v. Abu Ali*, the "Virginia Jihad" case (*United States v. Khan*), *United States v. Chandia*, and *United States v. Biheiri*. Through my work on these cases, I obtained first-hand experience with the range of legal issues presented by bringing prosecutions of terrorism cases in Article III courts, including detention; charging options; allegations of coercive interrogations; the challenge of meeting evidentiary requirements such as authentication

and chain of custody with respect to evidence obtained overseas; working with foreign intelligence and law enforcement agencies; and the use and protection of classified information.

Based on my experience, I believe that terrorism prosecutions should be brought in Article III courts whenever possible. Our success in preventing acts of terrorism, and in holding accountable those who commit or plan such attacks, is enhanced by building and sustaining a domestic and international consensus about the legitimacy of our approach. Bringing terrorism cases in Article III courts under well established Constitutional standards and rules of procedure and evidence confers greater legitimacy on these prosecutions. In addition, criminal proceedings play an important role in educating the American people – and the world – about the nature of the threat we face. In the al-Marri case, for example, it was the defendant’s guilty plea in April 2009 to conspiracy to provide material support to al-Qacda which resulted in the public admissions, nearly six years after he was originally apprehended, that al-Marri had been recruited by Khalid Sheikh Mohammed (“KSM”), then the operations chief of al-Qaeda, to assist with al-Qaeda operations in the United States; that he had been directed to come to the United States no later than September 10, 2001, to operate as a sleeper agent; and that he had received sophisticated codes for communicating with KSM and other al-Qaeda operatives. Finally, the record demonstrates that the government has been mostly successful in using the criminal justice system to detain, convict, and obtain lengthy sentences for individuals who present a threat to U.S. national security, without compromising intelligence sources or methods or the fundamental due process rights of defendants.

**Existing Non-Military Detention Options**

In the criminal justice system, the issue of detention is inextricably intertwined with the strength of the government’s case on the merits. Under the *Principles of Federal Prosecution* set

forth in the U.S. Attorneys' Manual, which all federal prosecutors are required to follow, a prosecutor can commence or recommend Federal prosecution only if he or she "believes that the person's conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction."<sup>1</sup> That means that before the government can proceed criminally against an individual, it must determine both that it possesses admissible evidence under the Federal Rules of Evidence, and that the evidence will likely be sufficient to prove, beyond a reasonable doubt, that the individual committed the offense charged.

These requirements can be challenging to meet in an ordinary criminal case. But in a terrorism case, they can be especially formidable. Terrorism investigations are often driven by threat analysis, and threat assessments often are based on intelligence information such as communications intercepted under the Foreign Intelligence Surveillance Act and information provided by foreign law enforcement and intelligence authorities. Sometimes the government has the luxury of building a case over a period of months to develop evidence that would be admissible in a criminal prosecution. But sometimes it does not because of the nature of the threat, the credibility of information regarding a potential attack, and the perceived imminence of an attack. And in those cases, the government needs options for detaining individuals before it is ready to bring criminal charges in order to protect the public safety.

*Pretrial Detention.* The rules regarding the detention of a person who has been charged with a federal crime are favorable to the government in terrorism cases. Under the Bail Reform Act, a court can order a defendant detained pending trial if, after a hearing, the court finds probable cause that "no condition or combination of conditions will reasonably assure the appearance of the [defendant] as required and the safety of any other person and the

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<sup>1</sup> USAM § 9-27.220.

community.”<sup>2</sup> In support of a request for detention, the government can submit hearsay and other information that would be inadmissible at trial because the Federal Rules of Evidence do not apply at a detention hearing.<sup>3</sup> Accordingly, the government can present summary testimony by an agent rather than presenting testimony by a witness with first-hand knowledge.

A court must take into account several factors in determining whether to detain a defendant pending trial, including (1) the nature and circumstances of the alleged offense, including whether the offense is a federal crime of terrorism; (2) the weight of the evidence against the defendant; (3) the history and characteristics of the defendant; and (4) the nature and seriousness of danger to any person or to the community if the defendant were released.<sup>4</sup> A finding that the defendant presents a danger to a person or the community must be supported by “clear and convincing evidence,”<sup>5</sup> but there is a rebuttable presumption in favor of detention if there is probable cause that the defendant committed a “federal crime of terrorism” such as material support to terrorists;<sup>6</sup> material support to a designated terrorist organization;<sup>7</sup> financing terrorism;<sup>8</sup> the receipt of military-type training from a designated terrorist organization;<sup>9</sup> and acts of terrorism transcending national boundaries.<sup>10</sup>

More often than not in terrorism cases, courts have either ordered pre-trial detention or authorized release subject to restrictive conditions. The government successfully has obtained

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<sup>2</sup> 18 U.S.C. § 3142(c).

<sup>3</sup> *Id.* § 3142(f)(2).

<sup>4</sup> *Id.* § 3142(g).

<sup>5</sup> *Id.* § 3142(f)(2).

<sup>6</sup> *Id.* § 2339A.

<sup>7</sup> *Id.* § 2339B.

<sup>8</sup> *Id.* § 2339C.

<sup>9</sup> *Id.* § 2339D.

<sup>10</sup> *Id.* § 2332B.

pretrial detention in numerous terrorism cases, including the case of Zaccarias Moussaoui; the recent Fort Dix, New Jersey case; the case of Ahmed Omar Abu Ali, an American citizen and Falls Church, Virginia, resident who joined an al-Qaeda cell in Saudi Arabia; and the East Africa embassy bombings case (where defendant Wadih al-Hage was initially detained for 15 months on a perjury charge, then for more than two years following a superseding indictment). The courts are not rubber stamps for the government, however: the magistrate judge in the “Virginia Jihad” case denied the government’s motion for pretrial detention for a few of the defendants, and in a recent case in Ohio, the court granted the defendant’s motion for pretrial release even though the defendant was accused of having expressed interest in manufacturing improvised explosive devices from household substances, had been recorded discussing his training in weapons and tactics, had expressed concerns about maintaining security and secrecy, and had watched *pro-jihad* videos and expressed a desire to target the U.S. military.<sup>11</sup>

*Detention Without Charge.* While the standards are favorable to the government with respect to detention pending trial of an individual who *already* has been charged with a terrorism-related offense, existing legal authority to detain persons *prior* to charge is limited. Under the Constitution and the Federal Rules of Criminal Procedure, arrest warrants may be issued only upon a showing of probable cause by the government that the individual committed an offense,<sup>12</sup> and an individual who has been arrested must be presented to a Federal magistrate “without unnecessary delay” (typically within 48 hours) and advised of the charges against him. Otherwise, the government’s current authority for detention in terrorism-related cases outside of

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<sup>11</sup> *United States v. Mazloum*, 2007 WL 2778731, \*1 (N.D. Ohio 2007) (unpublished decision).

<sup>12</sup> Fed. R. Crim. P. 4(a).

the military detention model is limited to the material witness statute,<sup>13</sup> and, in the case of foreign nationals, immigration detention.

*Material Witness Warrants.* Under the material witness statute, a court may authorize an arrest warrant if the government files a sworn affidavit establishing probable cause that the testimony of a person is “material in a criminal proceeding” and that “it may become impracticable to secure the presence of the person by subpoena.” There is “no express time limit” in the statute for the length of detention,<sup>14</sup> but the Federal Rules of Criminal Procedure provide for close judicial oversight of detention under the statute. Specifically, in each judicial district the government must report biweekly to the court, list every material witness held in custody for more than 10 days pending indictment, arraignment, or trial, and “state why the witness should not be released with or without a deposition being taken....”<sup>15</sup>

After September 11, the government aggressively used the material witness statute to detain individuals in connection with terrorism investigations, several of whom were subsequently charged with crimes. José Padilla, for example, initially was arrested on a material witness warrant when he arrived in Chicago on a flight from Pakistan, in order to enforce a subpoena to secure his testimony before a grand jury. He was held for one month on the warrant before he was designated an enemy combatant and transferred to military custody. Nor has the statute’s use been limited to foreign terrorism cases: prior to September 11, Terry Nichols was arrested and detained on a material witness warrant three days after the bombings of the Federal building in Oklahoma City.

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<sup>13</sup> 18 U.S.C. § 3144.

<sup>14</sup> *United States v. Awadallah*, 349 F.3d 42, 62 (2<sup>nd</sup> Cir. 2003).

<sup>15</sup> Fed. R. Crim. P. 46(h)(2).

Although some individuals have been detained for several weeks and months on a material witness warrant, the statute was not intended to serve as a substitute for pretrial detention when the government is not yet ready to charge. In the case of *United States v. Awadallah*, the defendant's name and telephone number had been found on a piece of paper in a car abandoned at Dulles Airport by September 11 hijacker Nawaf al-Hazmi.<sup>16</sup> (The number subsequently was traced to an address in San Diego where al-Hazmi and fellow hijacker Khalid al-Mihdhar had lived.) Reversing the district court, the U.S. Court of Appeals for the Second Circuit found that the defendant's detention for several weeks on the material witness warrant was not "unreasonably prolonged,"<sup>17</sup> but it cautioned that "it would be improper for the government to use [the material witness statute to detain] persons suspected of criminal activity for which probable cause has not yet been established."<sup>18</sup>

*Immigration Detention.* The government has additional tools to detain foreign nationals in terrorism cases. Upon a warrant issued by the Attorney General, "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States."<sup>19</sup> The Attorney General has broad discretion in exercising this authority, and detention is mandatory where the alien is reasonably believed to have engaged in terrorist activity or "any other activity that endangers the national security of the United States."<sup>20</sup> In the immediate wake of the September 11 attacks, the Department of Justice utilized the removal statute to arrest and detain numerous foreign nationals suspected of engaging in terrorist activity.

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<sup>16</sup> *United States v. Awadallah*, 349 F.3d at 45.

<sup>17</sup> *Id.* at 62.

<sup>18</sup> *Id.* at 59.

<sup>19</sup> 8 U.S.C. § 1226(a).

<sup>20</sup> *Id.* §§ 1226(c)(1), 1226a(a)(3).



Utilizing the alien removal statute can buy the government substantial additional time to determine whether to pursue criminal charges against an alien defendant. In *Zadvydas v. Davis*, a case decided a few months before the September 11 attacks, the Supreme Court construed the law to limit the period of detention to the time reasonably necessary to secure the alien's removal -- with six months presumed to be a reasonable limit.<sup>21</sup> But the Court noted that the case did not involve "terrorism or other special circumstances where special arrangements might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."<sup>22</sup>

### **Terrorism Trials**

Enmeshed with the debate over detention policy is the question of whether Article III courts have proven to be an effective and sensible forum for adjudicating complex terrorism cases. Although these cases sometimes present difficult evidentiary and procedural issues -- and the government does not win every case -- the courts have demonstrated that they are fully up to the challenge of handling them.

Three arguments have been principally advanced by those who disfavor bringing terrorism cases in Article III courts: (1) that sensitive intelligence cannot be protected; (2) that existing rules of evidence and criminal procedure are inadequate; and (3) that terrorism prosecutions place an undue burden on the court system. None of these arguments withstand scrutiny.

*Protecting Intelligence Information.* It is true that the criminal prosecution of terrorists opens the door to defense efforts to obtain sensitive classified information to develop potentially exculpatory information. It is also true that information shared confidentially with the United

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<sup>21</sup> *Zadvydas v. Davis*, 533 U.S. 678, 691-97 (2001).

<sup>22</sup> *Id.* at 696.

States by foreign intelligence and law enforcement authorities can be at risk of disclosure under discovery rules. What critics of Article III prosecutions often fail to acknowledge, however, is that the Classified Information Procedures Act ("CIPA") provides a statutory mechanism for protecting sensitive intelligence information from disclosure.

CIPA provides the government with significant procedural advantages. Prior to trial, the government has the opportunity, for example, to make an *ex parte* submission to the court in which it unilaterally brings information to the court's attention for a ruling on whether the information is discoverable, explains the source and sensitivity of the information, and makes arguments as to relevance and the damage to national security that would result if the information were disclosed to the defense. In the Abu Ali case, for example, which I prosecuted, the court agreed with the government that certain categories of classified documents sought by the defense were irrelevant and precluded their use at trial by the defense.

If the court determines that the information is discoverable, the government can propose a substitute for the specific classified information -- which the court may accept, reject, or modify -- that masks the information's most sensitive elements while substantially enabling the defendant to prepare his defense. Where classified material is deemed discoverable, its pretrial disclosure may be restricted to cleared defense counsel, and the government has an opportunity in a sealed hearing to contest the defense's interest in using specific classified information at trial. The government may not win every skirmish, but courts usually fashion compromise disclosure orders that protect the government's core security interests.

Nor are trials a forum for the reckless disclosure of classified information. With the government's close attention and exhortation, courts police their pretrial orders regarding the handling of classified information and the questioning of witnesses -- and defense counsel

abides by them. Despite claims to the contrary, there are no proven examples of disclosures at trial resulting in the compromise of sensitive intelligence sources and methods.

Arguments that U.S. discovery rules and due process requirements cause foreign governments to refrain from sharing intelligence with U.S. authorities also are overstated. Since September 11, intelligence-sharing and cooperation between U.S. and foreign intelligence authorities has increased dramatically. Perhaps in no case was information-sharing and cooperation better demonstrated than in the Abu Ali prosecution, where the defendant - who originally was arrested and detained in Saudi Arabia -- claimed that his detailed confessions were the result of torture by Saudi authorities. For the first time in Saudi history, the Saudi Government permitted Saudi security officers to testify in an American criminal proceeding and face rigorous cross-examination by U.S. defense attorneys, thereby enabling prosecutors both to obtain direct testimony about the defendant's admissions and to rebut his claims of mistreatment.

Courts have also shown a willingness to accommodate the security concerns of foreign governments cooperating in U.S. terrorism prosecutions. In the Abu Ali case, U.S. District Judge Gerald Bruce Lee issued an order protecting the identities of Saudi security officers who testified and shielding their images from public view when videos of their testimony were played at trial.

*Rules of Evidence and Procedure.* Existing rules also have been adequate to resolve difficult evidentiary and procedural issues in terrorism cases. Rather than adopting new rules or relaxing the application of existing ones, the courts have simply applied traditional standards of analysis to the specific factors in a given case. In the Abu Ali case, for example, the Saudi Government declined to permit its security officers to come to the United States to testify at a pretrial hearing. On the government's motion, the court agreed to permit the Saudi officers to

testify in Saudi Arabia under circumstances where they would be subject to in-person cross-examination by the defendant's lead trial attorney, the defendant (then in Alexandria, Virginia) and the witness could observe each other on video screens, the defendant was accompanied by one of his trial attorneys in the courtroom in Alexandria, and the defendant could communicate with his counsel in Saudi Arabia during breaks in the testimony. After hearing testimony from the Saudi officers and considering related evidence, Judge Lee applied traditional standards of analysis to determine that Abu Ali's confessions were voluntary and admissible. So, too, he applied customary standards in finding that the government had authenticated and established a chain of custody for physical evidence seized at al-Qaeda safehouses in Saudi Arabia by Saudi security officers.

*Administrative Burdens.* Trying terrorism cases in federal courts does impose additional logistic and security demands on courthouse personnel and the U.S. Marshals Service. But given what is at stake, they are not unreasonable demands. With the possible exception of the Southern District of New York, no judicial district has handled a more demanding series of terrorism cases than my former district, the Eastern District of Virginia, and I am unaware of any presiding judge there who questioned the importance or appropriateness of trying those cases in federal court. Rather, they looked upon these cases as an opportunity to shoulder their coordinate responsibility for meeting a national challenge, and to demonstrate the strength and adaptability of the American criminal justice system.

### **Conclusion**

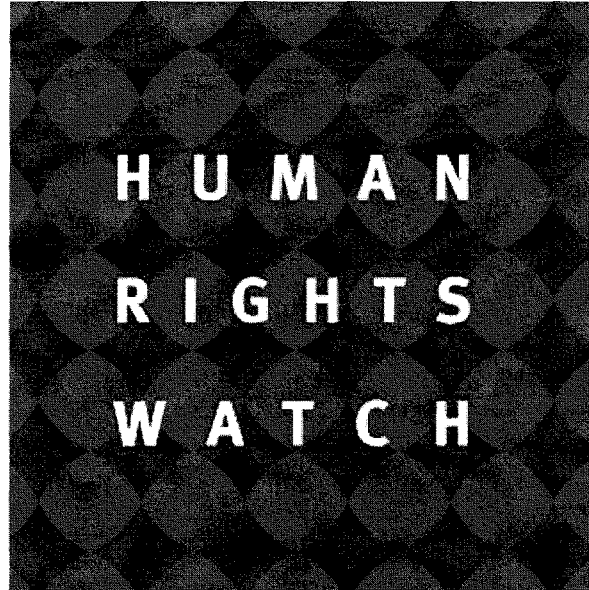
It should be recognized that certain terrorism cases either should not, or cannot, be brought in Article III courts under the criminal justice system. From a policy standpoint, these may include cases where the defendant is accused of committing crimes against humanity or war

crimes. From a pragmatic standpoint, they may include cases where evidence was gathered on the battlefield by U.S. or foreign military forces but not preserved in a way that meets the exacting standards of a criminal prosecution; where the government's key inculpatory evidence is based on sensitive intelligence sources and methods that either should not be disclosed to the defense, or cannot be revealed in a public trial; or where statements critical to the government's case were obtained through coercive means. In some of these cases, where the government has made a finding that the evidence against an accused is both probative and reliable -- and that release, repatriation, or adjudication in an appropriate third country is not an option -- it is essential that the government have recourse to an alternative legal forum such as a military tribunal, subject to judicial oversight and under rules that balance a defendant's right to a fair proceeding with the government's legitimate right to protect national security interests.

In the main, however, experience has shown that terrorism prosecutions in Article III courts work. They will not be feasible or appropriate for all of the remaining detainees at Guantanamo and other military detention sites -- or in every future counterterrorism case -- but they must remain a central part of the government's counterterrorism strategy.

The issue of non-military preventive detention must be approached with enormous care and skepticism given the inherent tension between our core Constitutional values and detaining someone without charge. Congress should recognize, though, that cases sometimes arise where the most responsible course of action may be to detain an individual before the government has sufficient admissible evidence to initiate a criminal prosecution, and that, to some extent, the government since September 11 has been using the material witness and alien removal statutes as a substitute for formal preventive detention authority. Particularly because of existing limitations on detaining U.S. persons who may present an exigent threat to homeland security,

Congress should work closely with the Obama Administration to reexamine the adequacy of existing authorities. Any legislative proposal to authorize preventive detention, however, should be narrowly structured to impose strict conditions on the government's detention authority, including time limitations, and to establish robust judicial oversight. In that regard, Congress should reject any proposal to establish a legal regime authorizing indefinite detention without charge or trial.



Testimony of Tom Malinowski, Washington  
Advocacy Director, Human Rights Watch:

Senate Judiciary Subcommittee on the  
Constitution, June 9, 2009

**"The Legal, Moral, and National Security  
Consequences of 'Prolonged Detention'"**



Mr. Chairman, thank you for calling us together today and for inviting me to testify.

Any conversation on the topic of prolonged preventive detention begins with a point on which all sides agree: Under the laws of war, enemy combatants captured in an international armed conflict can be detained without charge for the duration of that conflict.

But the situation we are talking about here is different, for two reasons.

**First**, in a traditional war between states, it is easy to place boundaries around the extraordinary power to detain without charge, so that governments do not take it as a license to detain preventively anyone who they think poses a national security threat. In a traditional war, it is clear where the battlefield is, who enemy combatants are, and how to define the conflict's endpoint. But in this campaign against international terrorists, which has no geographic boundaries or clear distinction between civilians and combatants, it is hard to limit preventive detention to people who are plainly soldiers in a war.

The US Congress has never formally established a system of detention without trial to deal broadly with national security threats. Not during the Civil War, or during World War II, or during the Cold War, even though in all these cases the survival of the nation was clearly at risk. If Congress were to establish such a system today, based on an expanded notion of wartime detention authority, in a national security crisis presidents could exploit it to detain a broad range of enemies based on a prediction of future dangerousness. Other countries engaged in their own "wars on terror" (like Russia, China, or Sri Lanka) could also mimic US arguments to justify detaining without charge anyone they accuse of terrorist links, and seizing them anywhere in the world, including on U.S. soil. This is something everyone on both sides of this debate should want to avoid.

**Second**, in a traditional war, preventive detention is allowed because it is the only way to keep enemy combatants from returning to the battlefield. They may be prosecuted only for having committed war crimes, but not for participating in



the conflict. Detention without charge is broadly accepted because it is the only conceivable form of detention.

But for the detainees at Guantanamo, detention without charge was not the only option. Those whom the Obama administration will likely want to continue detaining allegedly were involved in activity that is a crime -- committing or planning acts of terrorism, conspiring to commit acts of terrorism, or providing material support for terrorism. Consider the detainees that President Obama suggested might be candidates for preventive detention in his speech on Guantanamo two weeks ago, including: "people who have received extensive explosives training at al Qaeda training camps, commanded Taliban troops in battle." Under existing material support and terrorism laws, it should, in principle, be possible to prosecute most such people. Even Taliban fighters captured on the battlefield in Afghanistan today and found to have no connections to al Qaeda or terrorism, can be prosecuted (most appropriately by the government of Afghanistan) for violating Afghan criminal law.

So why are we are considering preventive detention for Guantanamo detainees today? It is not for the reasons we would employ it in a traditional war. It is not because these detainees are prisoners of war who can only be kept off the battlefield via preventive detention. It is because some people think that the option of prosecution, which clearly existed, may now be harder to exercise because these prisoners were kept for years in an illegitimate system, because the previous administration did not believe it needed to gather and preserve evidence in ways that would facilitate prosecution, and because some of the evidence that remains was tainted by torture or is considered too sensitive to be used in court.

Setting aside for a moment whether criminal prosecution is still possible in these cases or not, I believe that President Obama is right to say that the problems we are experiencing in deciding what to do with the detainees in Guantanamo result not from his decision to close the detention facility, but from the original decision to open it. We would not be facing a dilemma today if the Bush administration had from the start brought to justice all those Guantanamo detainees who were reasonably suspected of having criminal links to terrorism -- as it did with Zacharias Moussawi, with the "shoe bomber" Richard Reid, and, once the courts forced its hand, with Jose Padilla.

In these last few years, whenever America's established institutions of justice have been given a chance to deal with this challenge, they have passed the test. The civilian federal courts have prosecuted dozens of people accused of involvement in international terrorism. These trials have often been complicated and difficult. Some have been messy. But time and again, they have succeeded. They have disrupted conspiracies and attacks. They have put dangerous people away. They have given us finality in a way that is widely seen as fair.

It is the other system -- the experimental, improvised, repeatedly challenged system of preventive detention in Guantanamo that has failed. It is the detainees who have been sitting in that system who pose a problem today -- not because of who they are but because of how they were handled in the past.

One conclusion we can draw from this is that a permanent system of preventive detention -- used to detain without charge suspected members of al Qaeda who are captured in the future -- is not needed. The administration can avoid such a system by avoiding the mistakes of its predecessor. When it captures a suspected terrorist dangerous enough to be brought to the United States and detained for a long period of time, it can choose to conduct interrogations lawfully, to handle evidence properly, and to move with reasonable speed towards criminal prosecution. In his speech on detention policy, this is what President Obama suggested would happen in the future. When he referred to the possible need for preventive detention without trial, he was clearly speaking only about existing detainees in Guantanamo Bay.

But what about the legacy cases -- those detainees currently in Guantanamo who the administration may conclude are too dangerous to release, but who have been rendered "hard to prosecute" by the policies of the last eight years?

I don't believe that "hard to prosecute" is the same thing as "impossible to prosecute." The federal courts have developed procedures over the last few years that should give us confidence they can handle these complex cases effectively, striking a pragmatic balance between the government's interest in protecting classified information, and the need to preserve the fairness and legitimacy of criminal proceedings. An administration committed to criminal

prosecution as a priority would make the effort required to develop evidence that could be used in criminal trial. And if such evidence does not exist for a particular detainee, it is hard to imagine that holding him without trial could ever be considered legitimate.

I say this not to minimize the difficulties and dilemmas the administration faces. But it is clear that the federal courts have a good track record in dealing with these cases – and that this option has not yet been tried for those suspected terrorists who were placed in Guantanamo. Before we once again consider experimenting with a system of detention without charge, I believe that the option of using established criminal justice institutions should be exhausted. And the benefits of experimenting with such a system should be weighed against its considerable costs.

If the Committee is ever asked to consider such a proposal, let me suggest a few hard questions that I hope you will ask.

**First**, can Guantanamo detainees be moved to a new system of detention without trial in the United States without making it seem like Guantanamo was being transplanted to U.S. soil? Would such a new system repair the damage Guantanamo has done to America's reputation, or perpetuate it?

Closing Guantanamo will bring the United States plenty of short-term credit. But the price America has paid for Guantanamo is not fundamentally related to its physical location. In the eyes of the prison's American and foreign critics, the essence of Guantanamo is a system of detention without charge extended to people captured outside a conventional battlefield, combined with military tribunals that did not meet US or international standards of justice.

Theoretically, one could design a system of preventive detention that affords detainees such a high level of due process and judicial review that it would not look like Guantanamo, or even Guantanamo-lite. But if you allow protections similar to those already provided by federal courts and courts martial, why go to the trouble of creating a new system at all?

The only point of establishing a preventive detention system is to lower standards to a point where it can deal with people who cannot be prosecuted in the

criminal system. That is why almost all proposed preventive regimes assume, for example, that the person presiding could consider classified evidence never presented to the suspect. This would make it virtually impossible for defendants to challenge that evidence, and statements obtained through coercion could be concealed and relied upon.

The temptation would be great to exploit the proceedings' secrecy and reduced standards of evidence to pursue people with only tenuous connections to terrorist activity. Inevitably, errors would be made; some innocent people would be detained based on faulty intelligence or mistaken identity. Journalists and lawyers would uncover these mistakes. And once again, people around the world would focus on the injustices the United States commits, not on the crimes the terrorists commit. Except this time, the principle of detention without charge would be part of the regular practice of the U.S. government and embedded in the law of the land forever. This would not solve Guantanamo; but make the problem permanent.

A **second** question is whether one can create a new form of preventive detention without enduring more years of frustration and delay?

The military commissions system currently in place was invented by White House lawyers after 9/11, then reinvented after it was challenged by critics within and outside the Bush administration, then reinvented again after the Supreme Court's Hamdan decision. If the Obama administration follows through on its desire to keep military commissions as an option, it will have to reinvent the system yet again. And yet in all this time, the commissions have failed to bring a single important terrorist to justice.

The detention system in Guantanamo has also gone through numerous changes. Combatant Status Review Tribunals were established, and then struck down as inadequate by the courts. Habeas corpus challenges were brought before federal judges; then the Congress stripped those judges of their jurisdiction; then the Supreme Court restored it. Seven years after Guantanamo opened, a stable set of rules for determining who should be detained and with what degree of due process has still not emerged.

Some of these problems are due to the inherent flaws of the system. But many are the inevitable result of creating any new system from scratch, especially one that deviates so much from standards with which US courts are comfortable and American lawyers are familiar. America's civilian criminal justice system, on the other hand, has been around for more than 200 years. The Uniform Code of Military Justice has been around for almost 60. We've had all that time to get the kinks out of the system, to establish stable rules, to train a cadre of lawyers and judges who know those rules, and to develop special procedures for special kinds of cases, including those involving terrorism.

If we try again to create a new system from scratch, if we rely again on trial and error to work out the rules, the result will again likely be more error than trial. Eventually, stable rules may emerge, after all the legal challenges and legislative re-dos are exhausted. But how long should we be prepared to wait to get to that point? Five years? Ten years? Can the United States afford more years of controversy over how to detain suspected terrorists?

A **third** question I hope you'll ask is whether the risk of releasing truly dangerous people would be lower with a preventive detention system, or higher?

Now, that may sound like a counter-intuitive question. Surely, the whole point of a preventive system is to detain people who might otherwise be released by ordinary courts, with their higher standards of evidence and due process. But the answer is not as obvious as it may seem.

If a system of preventive detention is established, it will always be easier in the short term for the government to put suspected terrorists through such a system than to prosecute them before civilian courts. The government will have a strong incentive to use this parallel system even for those detainees who could be prosecuted in criminal courts. After all, why go to the trouble and expense of a trial, which might require declassifying evidence, and even the risk of an acquittal, when you have a more expedient option?

At the same time, because the new preventive detention system would likely face tremendous legal challenges as well as domestic and international criticism, the government will eventually feel pressure to move detainees out of it. This is precisely what happened in Guantanamo. At first, setting up the camp looked

like a good way to avoid the uncertainties of the criminal justice system; the Bush administration could put who it pleased there and control their fate for as long as it pleased. But when Guantanamo became controversial, the administration started trying to move people out of it. It sent hundreds of detainees back to their home countries, including a number of apparently very dangerous men who might well be sitting in a federal prison right now had they been brought before a criminal court at the start.

The Obama administration may face similar pressures if it continues to hold detainees without trial, and the practice proves as controversial as it has been in the past. Meanwhile, detainees will be able to fight for their release by attacking the legitimacy of the system, an opportunity they would not have in civilian court. And some of those challenges could succeed.

Any system that lacks legitimacy is likely to result in more potentially dangerous people being released sooner than a system that is unassailable, like our criminal courts. The lesson is that here, as in so many aspects in life, the short-term expedient solution is self-defeating in the long-term.

A **fourth** question is whether a preventive detention system would effectively delegitimize terrorists in the way that the criminal justice system does?

One thing all terrorists have in common is the desire not to be seen as ordinary criminals. Al Qaeda members clearly want to be thought of as soldiers, as part of a great army at war with a superpower on a global battlefield. They crave the attention and, in their own minds, the glory that comes with that status, and they use it to recruit more misguided young men to join their cause. Remember how the 9/11 mastermind Khalid Sheikh Mohammed behaved before his Combatant Status Review Tribunal at Guantanamo Bay. He wore his designation as an "enemy combatant" proudly, comparing himself to George Washington and saying that had Washington had been captured by the British, he, too, would have been called an "enemy combatant." In a sense, the Guantanamo tribunal gave Khalid Sheikh Mohammed exactly the status that he wanted.

In contrast, consider how upset the convicted "shoe bomber," Richard Reid, was when he was brought before an ordinary court in Boston back in 2003, how he

demanded to be treated as a combatant, and how the judge in that case, William Young, put him in his place by saying: "You're no warrior. I know warriors. You are a terrorist" -- as he sentenced Reid to life in prison. Isn't this a far better way to deal with such men, to let them fade into obscurity alongside the murderers and drug traffickers who populate our federal prisons?

As counterterrorism expert Mark Sageman has written: "Any policy or recognition that puts such people on a pedestal only makes them heroes in each others' eyes and encourages others to follow their example." The best system for dealing with suspected terrorists is the system that makes them feel the least special. The criminal justice system passes that test. A brand new system of preventive detention designed just for members of al Qaeda would fail it miserably. It would reinforce al Qaeda's narrative that terrorists are warriors, and fuel the notion that these men deserve special treatment and status. The risk would be compounded by the likelihood that such detainees would receive regular reviews of their detention keeping their names and cases in the press and making them poster children for advocacy and recruitment efforts alike. By comparison, the criminal justice system provides closure, allowing convicted terrorists to largely disappear from the public eye.

That leads me to a **final question**: Would a preventive detention system actually prevent terrorism?

One thing we need to keep in mind is that the 241 men currently detained in Guantanamo are not the biggest problem we face in dealing with the terrorist threat, not by a long shot. I am concerned about these 241, but I am much more concerned about the vastly larger number of young men with very similar profiles who are at large in the world and could potentially do us harm. After all, many thousands of young men committed to helping the Taliban passed through Afghanistan before 2001, staying in the same camps and guest houses and developing the same associations as those now detained in Guantanamo. Many more subscribe to the extremist ideology that gave rise to al Qaeda; they read the literature, surf the websites, watch the videos, and may be potential recruits to suicide squads or terror cells. If U.S. troops swept today through a city like Kandahar, Afghanistan, or Karachi, Pakistan, and detained and interrogated the first thousand young men they encountered, they would probably find a few dozen at least who fit the profile of scary-but-hard-to-prosecute that we are

discussing today. And we are not going to detain them all unless we want to build a thousand Guantanimos.

If you believe that incapacitating a few dozen potentially dangerous people currently in Guantanamo out of the thousands of such people at large in the world weakens al Qaeda then the answer to my question is yes – preventive detention will prevent terrorism.

But if you agree with Gen. David Petraeus that the fight against non-traditional foes like al Qaeda "depends on securing the population, which must understand that we, not our enemies, occupy the moral high ground," the answer is clearly "no." It is "no" if you believe the U.S. Army's Counterinsurgency Manual, which warns that "punishment without trial is an illegitimate action that enemies exploit to replenish their ranks." It is "no" if you look at the websites that use images of Guantanamo to recruit more fighters to the terrorists ranks. It is "no" if you believe the April 2006 National Intelligence Estimate, which argues that to defeat al Qaeda, the United States needs to "divide [terrorists] from the audiences they seek to persuade" and make "the Muslim mainstream . . . the most powerful weapon in the war on terror."

There is, unfortunately, no shortage of potential suicide bombers in the world. Guantanamo has made that problem worse, not better. We talk about not returning detainees to the fight, but what we need to remember is that Guantanamo has recruited people to the fight. It has probably created far more enemies than it has taken off the battlefield. If a new system of preventive detention is seen as another departure from America's commitment to the rule of law, the problem will be compounded.

The experience of America's allies is often cited to justify preventive detention regimes. But that experience is far from encouraging. Between 1971 and 1975, for example, the British army rounded up close to 2,000 people it believed to be associated with the Irish Republican Army (IRA) and interned them in prison camps, where they were held without charge. Violence increased as anti-detention anger helped fuel the conflict.

Years later, the home secretary, Reginald Maudling, who sanctioned the internments, said the experience "was by almost universal consent an



unmitigated disaster which has left an indelible mark on the history of Northern Ireland." In the words of former British Intelligence officer Frank Steele, who served in Northern Ireland during this period: "[Internment] barely damaged the IRA's command structure and led to a flood of recruits, money and weapons." Even Edward Heath, the British prime minister in 1971, when internment was introduced, later called it a "mistake which gave the IRA a way to recruit from amongst people who had been interned, and proved impossible to stop."

Mr. Chairman, there are no easy, expedient answers to the question of what to do with the remaining detainees in Guantanamo. But for those who are not sent home (which is likely the best answer for most), the US criminal justice system offers the best alternative.

In a sense, the United States has been running a controlled experiment for the last seven years in how best to bring suspected terrorists to justice. And the results are clear.

Those accused men who have been brought into the civilian system are, to use one of President Bush's favorite expressions, no longer a problem for the United States. If guilty, they have been convicted, put away, and largely forgotten. They are not being used for propaganda purposes by groups like al Qaeda. Their treatment has reinforced America's status as a nation of laws, not undermined it.

Meanwhile, every single person who was put through the alternative preventive detention system at Guantanamo remains an enormous problem for the United States.

The lesson is equally clear. We should stop experimenting. We should not build yet another untested structure on a foundation of failure. We should finally, at long last, bring to justice the men who killed thousands of people on September 11, and others who have committed or planned or aided the murder of Americans. And we should do it in a system that works.

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**TESTIMONY OF  
ELISA MASSIMINO**

**CHIEF EXECUTIVE OFFICER AND EXECUTIVE DIRECTOR  
HUMAN RIGHTS FIRST**

**HEARING ON**

**THE LEGAL, MORAL, AND NATIONAL SECURITY CONSEQUENCES OF  
'PROLONGED DETENTION'**

**BEFORE THE  
UNITED STATES SENATE  
COMMITTEE ON THE JUDICIARY  
SUBCOMMITTEE ON THE CONSTITUTION,**

**June 09, 2009**

### Introduction

Chairman Feingold, Ranking Member Coburn and Members of the Subcommittee, thank you for inviting me to be here today to share the views of Human Rights First on the dangers of establishing a system for prolonged preventive detention for suspected terrorists. We are grateful for the Subcommittee's persistent attention to these important matters and I appreciate the opportunity to address how the choices made by the U.S. government on detention policy going forward will impact U.S. national security and international standing.

My name is Elisa Massimino, and I am the Chief Executive Officer and Executive Director of Human Rights First. Human Rights First works in the United States and abroad to promote a secure and humane world by advancing justice, human dignity and respect for the rule of law. We support human rights activists who fight for basic freedoms and peaceful change at the local level; protect refugees in flight from persecution and repression; help build a strong international system of justice and accountability; and work to ensure that human rights laws and principles are enforced in the United States and abroad.

For nearly thirty years, Human Rights First has been a leader in the fight against arbitrary detention, torture and other cruel treatment and to restore the rule of law. We worked for the restoration of habeas corpus, served as official observers to the flawed military commissions at Guantánamo, and published a number of groundbreaking reports on U.S. detention policy. *IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS*<sup>1</sup>, examines more than 120 terrorism cases prosecuted over the past 15 years and concludes that the federal system has capably handled important and challenging terrorism cases without compromising national security or sacrificing rigorous standards of fairness and due process. *TORTURED JUSTICE: USING COERCED EVIDENCE TO PROSECUTE TERRORIST SUSPECTS*<sup>2</sup> concludes that the introduction of coerced evidence into military commission trials was jeopardizing the prospects for bringing those responsible for 9/11 to justice. *HOW TO CLOSE GUANTANAMO: A BLUEPRINT FOR THE NEXT ADMINISTRATION*<sup>3</sup>, provides a multi-phased blueprint for closing Guantánamo during the first year of the next Administration and urges the next president not to base future detention policy on needing to solve complex problems caused by the past mistakes at Guantánamo.

The use of arbitrary and unlimited detention by the Bush Administration has done considerable damage to America's efforts to defeat terrorists because it has served as a powerfully effective recruiting advertisement for al-Qaida and others. It has strengthened the hand of terrorists – rather than isolating and delegitimizing them – in the political struggle for hearts and minds. It has undermined critical cooperation with our allies on

<sup>1</sup> RICHARD B. ZABEL & JAMES J. BENJAMIN, *IN PURSUIT OF JUSTICE*, 65 (Human Rights First 2008).

<sup>2</sup> HUMAN RIGHTS FIRST, *TORTURED JUSTICE: USING COERCED EVIDENCE TO PROSECUTE TERRORIST SUSPECTS* (Human Rights First 2008).

<sup>3</sup> HUMAN RIGHTS FIRST, *HOW TO CLOSE GUANTANAMO: BLUEPRINT FOR THE NEXT ADMINISTRATION* (Human Rights First 2008).

intelligence and detention. It has done considerable damage to the reputation of the United States, undermining its ability to lead other countries and international opinion.

President Obama has stated clearly that he wants to reverse the negative impact of these policies. In his speech last month at the National Archives, the President made clear that trust in our values and our institutions will enhance, not undermine, our national security.<sup>4</sup> But other details articulated by the President would undermine the vision he outlined. Policies of revising the failed military commissions and continuing to detain Guantánamo prisoners without trial will, as described below, undermine the President's efforts to 'enlist the power of our fundamental values', proving counterproductive and nondurable. Such efforts are also unnecessary in light of existing laws that provide an adequate basis to detain terrorism suspects and to try them for crimes of terrorism before regularly constituted federal courts.

#### **I. Continued prolonged detention of terrorist suspects without trial is counterproductive.**

In January Dennis Blair told the Senate Committee on Intelligence that "the detention center at Guantánamo has become a damaging symbol to the world and that it must be closed. It is a rallying cry for terrorist recruitment and harmful to our national security, so closing it is important for our national security."<sup>5</sup> But the damage done by Guantanamo will continue if Guantanamo detention policies are not reversed and the detainees simply moved to another facility.

Proponents of preventive detention argue that those ready to do harm to the United States should be treated as warriors. Yet the decision to label all Guantánamo prisoners as "combatants" engaged in a "war on terror" ceded an important advantage to al Qaeda, supporting their claim to be "warriors" engaged in a worldwide struggle against the United States and its allies rather than the criminals that they truly are. Accused 9/11 planner Khalid Sheikh Mohammed revealed in this status at his "combatant status review tribunal" hearing at Guantánamo in March 2007: "For sure I am [America's enemy]," he said.<sup>6</sup> "[T]he language of any war in the world is killing . . . the language of war is victims."<sup>7</sup> Former CIA case officer and counterterrorism expert Marc Sageman stated, "Terrorist acts must be stripped of glory and reduced to common criminality.... It is

<sup>4</sup> President Barack Obama, Remarks by the President on National Security (May 21, 2009) *available at* [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-On-National-Security-5-21-09/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/) (last visited June 8, 2009).

<sup>5</sup> *Nomination of Admiral Dennis Blair to be Director of National Intelligence: Hearing before S. Comm. on Intelligence*, 109th Cong. 7 (Jan. 22, 2009) (statement of Admiral Dennis Blair USN (Ret.)), *available at* [http://www.dni.gov/testimonies/20090122\\_testimony.pdf](http://www.dni.gov/testimonies/20090122_testimony.pdf) (last visited June 8, 2009).

<sup>6</sup> Verbatim transcript of Combatant Status Review Tribunal Hearing for ISN 10024 at 21 *available at* [http://www.defenselink.mil/news/transcript\\_ISN10024.pdf](http://www.defenselink.mil/news/transcript_ISN10024.pdf) (last visited June 8, 2009).

<sup>7</sup> By contrast, when Federal District Judge William Young sentenced Richard Reid to life plus 110 years in federal prison in 2003, this is what he said: "You're a big fellow. But you're not that big. You're no warrior. I know warriors. You are a terrorist. A species of criminal guilty of multiple attempted murders." CNN, *Partial transcript of Sentencing of Richard Reid*, Jan. 31, 2003, <http://www.cnn.com/2003/LAW/01/31/reid.transcript/> (last visited June 8, 2009).

necessary to reframe the entire debate, from imagined glory to very real horror.” Likewise, General Wesley Clark stated and 19 other former national security officials and counterterrorism experts agreed:

By treating such terrorists as combatants ... we accord them a mark of respect and dignify their acts. And we undercut our own efforts against them in the process.... If we are to defeat terrorists across the globe, we must do everything possible to deny legitimacy to their aims and means, and gain legitimacy for ourselves.... [T]he more appropriate designation for terrorists is not “unlawful combatant” but the one long used by the United States: “criminal.”<sup>8</sup>

Those whose job it is to take the fight to al Qaeda understand what a profound error it was to reinforce al Qaeda’s vision of itself as a revolutionary force engaged in an epic battle with the United States. Last June, Alberto Mora, former Navy General Counsel Alberto Mora also testified that “Serving U.S. flag-rank officers... maintain that the first and second identifiable causes of U.S. combat deaths in Iraq – as judged by their effectiveness in recruiting insurgent fighters into combat – are, respectively the symbols of Abu Ghraib and Guantánamo.”<sup>9</sup>

The new ARMY-MARINE CORPS COUNTERINSURGENCY MANUAL,<sup>10</sup> drafted under the leadership of General Petraeus and incorporating lessons learned in a variety of counterinsurgency operations (including Iraq), stresses repeatedly that defeating non-traditional enemies like al Qaeda is primarily a *political* struggle, and one that must focus on isolating and delegitimizing the enemy rather than elevating it in stature and importance. As the Manual states: “It is easier to separate an insurgency from its resources and let it die than to kill every insurgent. . . . Dynamic insurgencies can replace

<sup>8</sup> Brief for Ali Saleh Kahliah Al-Marri as Amici Curiae Supporting Petitioner, *Al-Marri v. Spagone*, 129 S.Ct. 1054 at 21 (2009) (No. 08-368) (citing General Wesley K. Clark & Kai Rautiala, *Why Terrorists Aren’t Soldiers*, N.Y. TIMES, Aug. 8, 2007, at A19) signed by 19 former national security officials and counterterrorism experts including William Banks (Director of the Institute for National Security and Counterterrorism), Ken Bass (former Counsel for Intelligence Policy, Department of Justice), M.E. (Spike) Bowman (former Senior Counsel, Federal Bureau of Investigation), Frank J. Cilluffo (Director, Homeland Security Policy Institute, George Washington University), Albert C. Harvey (Chair, Standing Committee on Law and National Security, American Bar Association), Brian Jenkins (former Member, White House Commission on Aviation Safety), Dr. David A. Kay (former Head, Iraq Survey Group), David Low (Consultant, Oxford Analytica and National Intelligence Council), John MacGaffin (Senior Advisor, Transnational Threats Project, Center for Strategic and International Studies), Ronald Anthony Marks (Director of Washington DC Operations, Oxford Analytica), Thurgood Marshall Jr. (Partner, Bingham McCutchen LLP), Rear Admiral James E. McPherson (former Judge Advocate of the Navy), Paul Pillar (Director of Studies, Security Studies Program, Georgetown University), Nicholas Rostow (former Legal Adviser, National Security Council), Britt Snider (former General Counsel, U.S. Senate Select Committee on Intelligence), Suzanne E. Spaulding (former Assistant General Counsel, CIA), Michael Vatis (former Associate Deputy Attorney General), Dale Watson (former Executive Assistant Director for Counterintelligence and Counterterrorism, Federal Bureau of Investigation), and Jonathan Winer (former U.S. Deputy Assistant Secretary of State for International Law Enforcement).

<sup>9</sup> *Hearing on the Treatment of Detainees in U.S. Custody Before the S. Comm. on Armed Servs.*, 109th Cong. (June 17, 2008) (statement of Alberto J. Mora) available at <http://armed-services.senate.gov/statemnt/2008/June/Mora%2006-17-08.pdf> (last visited June 8, 2009).

<sup>10</sup> U.S. DEPARTMENT OF DEFENSE, FM 3-24/MCWP 3-33.5: COUNTERINSURGENCY, (2006) available at <http://www.usgcoin.org/library/doctrine/COIN-FM3-24.pdf> (last visited June 8, 2009).

losses quickly. Skillful counterinsurgents must thus cut off the sources of that recuperative power.”<sup>11</sup>

As long as Guantánamo detainees are held in prolonged detention without charge or tried before extraordinary military commissions the facility’s legacy will continue to nurture the “recuperative power” of the enemy. Focus will remain on how the procedures, even if improved, deviate from those in criminal trials before regularly established Article III courts and courts martial.

Guantánamo has become a symbol to the world of expediency over fundamental fairness and of this country’s willingness to set aside its core values and beliefs. As Secretary of Defense Robert Gates has said, “[t]here is no question in my mind that Guantánamo and some of the abuses that have taken place in Iraq have negatively impacted the reputation of the United States.”<sup>12</sup>

Reputational damage caused by the Guantánamo detention policies has practical ramifications for our counterterrorism operations. If U.S. detention policies continue to fall short of the standards adhered to by our closest allies, those policies will continue to undermine our ability to cooperate in detention and intelligence operations. In his June testimony, Mora described in detail how concerns about U.S. detainee policies in Afghanistan damages U.S. detention operations by leading our allies to hesitate to participate in combat operations, to refuse to train on joint detainee operations, and to walk out on meetings regarding detention operations.<sup>13</sup>

In addition to the operational consequences, the United States may face loosing the cooperation of the international community in closing Guantanamo if it continues with trials using coerced evidence and holding prisoners with out trial in indefinite detention. The Council for the European Union (EU) made this clear last week when it expressed support for taking-in Guantánamo detainees but only with the understanding that the underlying policy issues would be addressed in a manner consistent with international law, presumably as that law is understood not just by the United States but by EU member states.<sup>14</sup>

## **II. A new form of preventive detention without charge will lead to costly errors.**

The long standing safeguards of the U.S. criminal justice system are intended to ensure accuracy of judicial outcomes. Any detention system that deviates from these proven mechanisms reduces that accuracy, particularly if decision makers resort to racial profiling and stereotypes or are allowed to consider the use of secret, classified or coerced evidence. Errors will be made that will waste valuable resources and fuel

<sup>11</sup> *Id.* at 1-23.

<sup>12</sup> Thom Shanker, *Gates Counters Putin’s Words on U.S. Power*, N.Y. TIMES, Feb. 12, 2007 available at <http://www.nytimes.com/2007/02/12/world/europe/12gates.html> (last visited June 8, 2009).

<sup>13</sup> Mora, *supra* note 3.

<sup>14</sup> Press Release, Council Conclusion on the closure of the Guantanamo Bay Detention Centre, 2946<sup>th</sup> Justice and Home Affairs Council meeting Luxembourg (June 4, 2009) available at [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/jha/108299.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/108299.pdf) (last visited June 8, 2009).

resentment and criticism of the system. As three retired senior military officers stated in a letter to the President last month:

The Guantánamo detentions have shown that assessments of dangerousness based not on overt acts, as in a criminal trial, but on association are unreliable and will inevitably lead to costly mistakes. This is precisely why national security preventive detention schemes have proven a dismal failure in other countries. The potential gains from such schemes are simply not great enough to warrant departure from hundreds of years of western criminal justice traditions.<sup>15</sup>

Additionally, such a system inevitably would be weighted against a fair determination of a suspect's connections to terrorism. The Combatant Status Review Tribunals (CSRT), created to review "enemy combatant" determinations at Guantánamo, provide fair warning of this possibility. From 2004 to 2007, more than 570 CSRT hearings were conducted with all but 38 detainees designated as enemy combatants. Eventually, more than half of these detainees were released by the Bush Administration, and dozens of others were cleared for release, indicating a lack of credible evidence regarding dangerousness after all.

Additional procedural protections in a newly created system, including the right to an attorney and the right to judicial review would still fall far short of the accuracy safeguards provided by the criminal justice system, where guilty findings require a sufficient degree of certainty through the establishment of proof beyond a reasonable doubt. In fact, there are significant national security benefits that come from building a criminal case, as opposed to the sort of preliminary intelligence gathering upon which some Guantánamo detentions were based. As explained by former federal prosecutor Kelly Moore:

[w]orking towards obtaining sufficient evidence to establish the elements of a criminal offense forces agents to fully digest and understand the information that they gather. It is more difficult to draw faulty inferences from new information when a prosecutor is cross-examining you about every detail, demanding a correctly translated transcript, and then insisting on further corroboration. When investigators aimlessly 'gather intelligence,' no one is focusing on what the information is or what it means.<sup>16</sup>

### **III. Any scheme for prolonged detention is not a durable solution.**

Strong constitutional challenges will likely tie up any new law providing for expanded detention in extensive litigation. While the American legal system tolerates some administration detention in certain circumstances, the Supreme Court has never allowed

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<sup>15</sup> Letter from Vice Admiral Lee F. Gunn, USN (Ret.), Rear Admiral John D. Hutson, USN (Ret.), & Brigadier General James P. Cullen, USA (Ret.) to Barack Obama, President of the United States (May 14, 2009).

<sup>16</sup> See also Kelly Moore, *The Role of Federal Criminal Prosecutions in the War on Terrorism*, 11 LEWIS & CLARK L. REV. 837, 848 (2007).

preventive detention based solely upon a perceived risk of future dangerousness, nor has it permitted the use of preventive detention to bypass the criminal justice system altogether. Indeed, what would be the limits of a new system of preventive detention based on the possibility of future dangerousness; could someone be held for 15 years, or 20 years? A new preventative detention system would be highly vulnerable to constitutional attack and can not be considered a durable solution to problems presented by the Guantánamo detentions.

The Supreme Court has approved pretrial detention on a risk of future dangerousness only where probable cause of a suspect's criminal conduct has already been established.<sup>17</sup> Civil commitment of the mentally ill is also permitted, but only where the State is able to prove both mental illness and therefore dangerous beyond their control.<sup>18</sup> In *Foucha v. Louisiana*, the Court said, that a dangerous person who recovers his sanity must be released otherwise "[i]t would also be only a step away from substituting confinements for dangerousness for our present system which, 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."<sup>19</sup> Likewise, some state laws permit the civil commitment of charged or convicted sex offenders, but again the Supreme Court has held that such detention is permitted only where the risk of dangerousness accompanies "mental abnormality."<sup>20</sup>

**IV. Additional laws for preventive detention are unnecessary; existing law provides an adequate basis to detain terrorism suspects.**

Despite the claims of those in favor of a new system of preventive detention that criminal law lacks adequate tools to detain suspected terrorists before they have committed violent acts, for years the government has been able to effectively and lawfully detain many suspected terrorists under provisions of criminal, immigration and other laws. As Human Rights First outlined in *IN PURSUIT OF JUSTICE*, there are four means of detention useful in complex terrorism cases under existing law:

- Under the **Bail Reform Act**, the government may arrest and seek to detain suspected terrorists when it files criminal charges against them by promptly bring the defendant before a magistrate judge, who decides whether the defendant should be detained or released on bail. The government is entitled to a presumption that terrorism defendants should be detained.<sup>21</sup>
- **Immigration law** permits the government to arrest—and in many circumstances detain—aliens alleged to be unlawfully present in the United States, pending a decision whether they should be removed from the country.

<sup>17</sup> *United States v. Salerno*, 481 U.S. 739, 749 (1987).

<sup>18</sup> *Foucha v. Louisiana*, 504 U.S. 71, 82-83 (1992).

<sup>19</sup> *Id.*

<sup>20</sup> *Kansas v. Hendricks*, 521 U.S. 346, 346-47 (1997).

<sup>21</sup> 18 U.S.C. § 3142(e).



- When a grand jury investigation is underway, the government may apply to a federal judge for authority to arrest an individual who is deemed to be a “**material witness**” in the investigation.
- As discussed above, the **law of war**, or International Humanitarian Law (IHL), authorizes detention during international armed conflict for the duration of hostilities to prevent those who participate in hostilities or pose a serious security threat from rejoining the fight.

IN PURSUIT OF JUSTICE closely studies each of these tools and the authors conclude that they “do not believe that the need for a brand-new scheme of administrative detention has been established.”<sup>22</sup> Instead the report demonstrates that existing criminal statutes and immigration laws provide an adequate basis to detain and monitor suspects in the vast majority of known cases. In fact:

[g]iven the breadth of the federal criminal code, the energy and resourcefulness of law enforcement agents and federal prosecutors, and the fact that terrorists, by definition, are criminals who often violate many laws, we believe that it would be the rare case indeed where the government could not muster sufficient evidence to bring a criminal charge against a person it believes is culpable.<sup>23</sup>

**V. Established Article III courts are fully equipped to handle criminal trials of individuals suspected of terrorist crimes.**

Proponents of preventive detention also argue that our domestic criminal laws and courts are ill-suited for the national security issues that arise in terrorism cases. To the contrary, not only do civilian courts have a solid track record of dealing with terrorism cases – including managing classified information – bringing cases in criminal courts have contributed significantly to the gathering of intelligence of terrorist plots and networks.<sup>24</sup> In testimony before the Senate Judiciary Committee in June 2008, Judge John Coughenour, who presided over the trial of Ahmed Ressam, also remarked “[i]t is my firm conviction, informed by 27 years on the federal bench, that the United States courts, as constituted, are not only an adequate venue for trying suspected terrorists, but also a tremendous asset against terrorism.”<sup>25</sup> In our report IN PURSUIT OF JUSTICE we clearly document the capability and flexibility of our federal courts concluding that:

<sup>22</sup> Zabel *supra* note 1, at 65.

<sup>23</sup> *Id.* at 8.

<sup>24</sup> Zabel and Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, p. 118. See also, Kelly Moore, *The Role of Federal Criminal Prosecutions in the War on Terrorism*, 11 Lewis & Clark L. Rev. 837, 847 (2007).

<sup>25</sup> *Improving Detainee Policy: Handling Terrorism Detainees within the American Justice System: Hearing before the S. Comm. on the Judiciary*, 110th Cong., 3 (June 4, 2008), (testimony of Honorable John C. Coughenour).

- Prosecutors have invoked a host of specially-tailored anti-terrorism laws and longstanding, generally-applicable federal criminal statutes to obtain convictions in terrorism cases.
- Courts have consistently exercised jurisdiction over defendants brought before them, even those defendants apprehended by unconventional or forcible means.
- Existing criminal statutes and immigration laws provide an adequate basis to detain and monitor suspects in the vast majority of known cases.
- Applying the Classified Information Procedures Act (CIPA), courts have successfully balanced the need to protect national security information, including the sources and means of intelligence gathering, with defendants' fair trial rights.
- *Miranda* warnings are not required in battlefield and non-custodial interrogations or interrogations conducted purely for intelligence-gathering purposes, and *Miranda* requirements have not impeded successful criminal terrorism prosecutions.
- The Federal Rules of Evidence, including rules that govern the authentication of evidence collected abroad, provide a common-sense, flexible framework for guiding admissibility decisions.
- The Federal Sentencing Guidelines and other applicable sentencing laws prescribe severe sentences for many terrorism offenses, and experience shows that terrorism defendants have generally been sentenced to lengthy periods of incarceration.
- Courts are well able to assure the safety and security of trial participants and observers.

Critics presuppose that there have been a significant number of “dangerous” terrorist suspects whom prosecutors pursued but never charged because they lacked sufficient admissible evidence against the suspects or were reluctant to risk the disclosure of sensitive national security information in open court. But the public record contains little—if any—information about the names, number, or types of individuals who purportedly fall into this group. Without specific examples of cases where the current system has failed, it is impossible to know whether critics’ speculations are true. Nonetheless, if this group of suspects does indeed exist, the government is not always powerless to pursue them. In cases where the government cannot immediately charge or detain an individual, it may confront, disrupt, and/or monitor the individual until a criminal case is built.

### **Conclusion**

There has not yet been a full public accounting of the strategic and operational costs of the failed Bush administration policies on Guantánamo and detention. But there is plenty of evidence to suggest that continuing down the road prolonged detention without trial

will continue to undermine our security. It will also continue to impede the Obama administration's efforts to turn the page on the past and successfully implement a new strategy to combat terrorism that brings the United States and its allies together in pursuit of a common goal. We hope that the Congress will encourage the Administration to reject this path, and prevent the entrenchment of an entirely new system of detention in the federal law and on American soil.

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TESTIMONY OF

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HEARING ON

"THE LEGAL, MORAL, AND NATIONAL SECURITY CONSEQUENCES OF  
'PROLONGED DETENTION'"

BEFORE THE UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY,

SUBCOMMITTEE ON THE CONSTITUTION

JUNE 9, 2009

Chairman Feingold, and members of the Senate Judiciary Committee, Subcommittee on the Constitution, I am pleased to appear before you and to testify at a hearing on "The Legal, Moral, and National Security Consequences of 'Prolonged Detention'." I would say that we act "morally" when we do our absolute utmost, within the bounds of law, to defend the United States, and the American people, from terrorism. Thus, as the long war on terrorism continues through its eighth year, it is vital that we remember that the detainees now in U.S. custody at Guantanamo Bay and many other locations in Iraq and Afghanistan are not ordinary criminal suspects, such as the individuals responsible for the original World Trade Center bombing in 1993 or the Oklahoma City bombing in 1995, who must be charged and brought to trial, or released, in accordance with rigorous constitutional and statutory requirements guaranteeing a speedy trial. Instead, the detainees whom we discuss today are individuals captured in the context of an international armed conflict, and fall into the category of "unlawful belligerents" or "unlawful combatants." Their legal rights and liabilities must be determined with reference to that status, in accordance with the Laws of War.<sup>1</sup>

The category of unlawful combatants is firmly rooted in both international law and the Law of War.<sup>2</sup> As early as 1582, the Judge Advocate General of the Spanish Army in the Netherlands wrote with respect to those with no lawful right to engage in warfare:

The laws of war, therefore, and of captivity and of postliminy [the restoration of rights or status after release], which only apply in the case of enemies, can not apply in the case of brigands . . . . Since then those alone who are "just" enemies [*i.e.*, those enjoying the

<sup>1</sup> See generally Lee A. Casey, David B. Rivkin, Jr., Darin R. Bartram, *Detention and Treatment of Combatants in the War on Terrorism* (The Federalist Society for Law & Public Policy Studies 2002) [hereinafter *Detention and Treatment of Combatants*].

<sup>2</sup> The category of unlawful combatant has, of course, been called by other names over the years, including "unlawful belligerent," "unprivileged belligerent," and "franc-tireur."

sanction of a state under the laws of war] can invoke to their profit the law of war, those who are not reckoned as "hostes," and who therefore have no part or lot in the law of war are not qualified to bargain about matters that only inure to the benefit of "just" enemies.<sup>3</sup>

Similarly, the 18<sup>th</sup> Century international law publicist Emmerich de Vattel recognized the category of unlawful combatant, and described it thus:

When a nation or a sovereign has declared war against another sovereign by reason of a difference arising between them, their war is what among nations is called a lawful war, and in form; and as we shall more particularly shew the effects by the voluntary law of nations, are the same on both sides, independently of the justice of the cause. Nothing of all this takes place in a war void of form, and unlawful, more properly called robbery, being undertaken without right, without so much as an apparent cause. It can be productive of no lawful effect, nor give any right to the author of it. A nation attacked by such sort of enemies is not under any obligation to observe towards them the rules of wars in form. It may treat them as robbers.<sup>4</sup>

In the mid-19<sup>th</sup> Century, the Instructions for the Government of Armies of the United States in the Field, provided that "[m]en, or squads of men, who commit hostilities

<sup>3</sup> Balthazar Ayala, *Three Books on the Law of War and on the Duties Connected with War and on Military Discipline* 60 (John Pawley Bate, Trans. 1912).

<sup>4</sup> Emmerich de Vattel, *The Law of Nations* 481 (Luke White ed. Dublin 1792).

... without being part and portion of the organized hostile army, and without sharing continuously in the war, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates."<sup>5</sup>

Thus, the classification of unlawful combatant was well established by the beginning of the 20<sup>th</sup> Century, when the minimum requirements necessary for recognition as a lawful belligerent (membership in a group with a recognized command structure, uniform or other distinguishing insignia, that carried arms openly and that conducted its operation in accordance with the laws of war), were incorporated into Article I of the 1907 Annex to the Hague Convention (IV) Respecting the Laws and Customs of War on Land.<sup>6</sup> The 1914 Manual of Military Law published by the British War Office explained both the distinction, and its purpose, as follows:

The division of the enemy population into two classes, the armed forces and the peaceful population, has already been mentioned.

Both these classes have distinct privileges duties, and disabilities.

*It is one of the purposes of the laws of war to ensure that an individual must definitely choose to belong to one class or the*

<sup>5</sup> See Instructions for the Government of Armies of the United States in the Field General Orders, No. 100, April 24, 1863, reprinted in 7 John Moore, *A Digest of International Law* §174 (1906).

<sup>6</sup> Convention (No. IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, Annex art. 1, 36 Stat. 2277, T.S. No. 539 (Jan. 26, 1910) [hereinafter "Hague Convention" or "Hague Regulations"]. The conditions that must be satisfied before lawful belligerency is established are as follows:

Article 1. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:--

- (1) To be commanded by a person responsible for his subordinates;
- (2) To have a fixed distinctive emblem recognizable at a distance;
- (3) To carry arms openly; and
- (4) To conduct their operations in accordance with the laws and customs of war.

*other, and shall not be permitted to enjoy the privileges of both. In particular, that an individual shall not be allowed to kill or wound members of the army of the opposed nation and subsequently, if captured or in danger of life, to pretend to be a peaceful citizen. . . .*

Peaceful inhabitants . . . may not be killed or wounded, nor as a rule taken prisoners . . . . *If, however, they make an attempt to commit hostile acts, they are not entitled to the rights of armed forces, and are liable to execution as war criminals.*<sup>7</sup>

The classification of unlawful combatant remains fully applicable today, and was not eliminated by the various agreements entered after World War II, in particular the Geneva Conventions of 1949, as some have claimed.<sup>8</sup> In 1977, during the negotiations that resulted in Protocol I and Protocol II to the Geneva Conventions of 1949, a number of developing countries *attempted* to achieve a rule that would have been more protective of unlawful combatants, entitling them to protection "equivalent" to those of

<sup>7</sup> War Office, *Manual of Military Law* 238 (1914). Although it was fully recognized that "irregular" combatants could achieve the status of lawful belligerents, this was *only* if they complied with the basic requirements of the Hague Regulations. Anyone not complying with those requirements, constituted an unlawful belligerent who was not entitled to prisoner of war status, and would could be punished for his unlawful belligerency. A point confirmed in the current U.S. Field Manual on The Law of Land Warfare: "[p]ersons, such as guerrillas and partisans, who take up arms and commit hostile acts without having complied with the conditions prescribed by the laws of war for recognition as belligerents . . . are, when captured by the injured party, not entitled to be treated as prisoners of war and may be tried and sentenced to execution or imprisonment." See Department of the Army, *Field Manual on The Law of Land Warfare* 34 (July 1956).

Significantly, this included the regular forces of a state if they also failed to meet the minimum requirements: "[i]t is taken for granted that all members of the army as a matter of course will comply with the four conditions; should they, however, fail in this respect they are liable to lose their special privileges of armed forces. See *Manual of Military Law*, at 240.

<sup>8</sup> See *Detention and Treatment of Combatants*, *supra* note 1, at 2-7.



POWs.<sup>9</sup> The United States, however, rejected this effort to undermine the traditional laws of war, and repudiated Protocol I for this very reason. In his note transmitting Protocol II (dealing with armed conflicts within a single country) to the Senate for its advice and consent, President Reagan explained the American rejection of Protocol I as follows:

Protocol I is fundamentally and irreconcilably flawed. It contains provisions that would undermine humanitarian law and endanger civilians in war. . . . It would give special status to "wars of national liberation," an ill-defined concept expressed in vague, subjective, politicized terminology. Another provision would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations, and I therefore have decided not to submit the Protocol to the Senate in any form . . .

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<sup>9</sup> See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I), Art. 44(2) [hereinafter Protocol I]. Thus, under the language of Protocol I, the status of unlawful combatant would not have been eliminated (and such individuals could still have been punished as having violated the laws and customs of war), but groups operating in violation of the Hague Regulations would have been given more protection than hitherto required. Accordingly, the United States took a very strong position rejecting even these changes, which it feared would undermine the traditional Hague Regulations in any case.

It is unfortunate that Protocol I must be rejected. We would have preferred to ratify such a convention, which as I said contains certain sound elements. But we cannot allow other nations of the world, however numerous, to impose upon us and our allies and friends an unacceptable and thoroughly distasteful price for joining a convention drawn to advance the laws of war. In fact, we must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law.<sup>10</sup>

Thus, overall, the status of unlawful combatant is firmly grounded in international law, and the rules applicable to such individuals may be applied by the United States to members of al Qaeda and the Taliban fully in accordance with recognized and accepted international norms.<sup>11</sup>

Unlawful combatants, although they are not entitled to the status and privileges of legitimate prisoners of war ("POWs") under the Geneva Conventions,<sup>12</sup> can nevertheless, like POWs, be detained until the conclusion of hostilities. In this regard, although unlawful combatants *may* be punished for their unlawful belligerency, there is no rule of international law *requiring* that they be punished, and their detention at least until the close of hostilities would be fully supported by the same rationale that underpins the rule permitting POWs to be held -- to prevent their return to the fight.<sup>13</sup>

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<sup>10</sup> Message from the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Noninternational Armed Conflicts, Concluded at Geneva on June 10, 1977 (Jan. 29, 1987), 1977 U.S.T. LEXIS 465.

<sup>11</sup> For an analysis of the failure of either al Qaeda or the Taliban to qualify as "lawful" belligerents, see *Detention and Treatment of Combatants*, *supra* note 1, at 9-13.

<sup>12</sup> See *Detention and Treatment of Combatants*, *supra* note 1, at 7-9.

<sup>13</sup> Under the Geneva Conventions, the recognized purpose and justification of confinement during the conflict is the "legitimate concern -- to prevent military personnel from taking up arms once more against the captor State." International Committee of the Red Cross, *Commentary on the*

This, of course, may well involve a very significant length of time. Even hostilities between states may last for protracted periods. For example, taking just the wars in which the United States was involved (at least for some portion of the conflict) over the past century, the First World War lasted four years (1914-1918), the Second World War lasted six years (1939-1945), the Korean War lasted three years (1950-1953), and the Vietnam War lasted sixteen years (1959-1975), with significant U.S. involvement lasting from 1963-1973. Some U.S. POWs were held by North Vietnam for nearly a decade. Only the 1991 Gulf War was concluded in less than one year. In the case of an undeclared war, particularly one where at least some of the parties are not state actors, the precise point at which the conflict ends must be determined based on all of the facts and circumstances at the time. As Secretary of State William Seward explained in 1868:

It is certain that a condition of war can be raised without an authoritative declaration of war, and, on the other hand, the situation of peace may be restored by the long suspension of hostilities without a treaty of peace being made. History is full of such occurrences. What period of suspension of war is necessary to justify the presumption of the restoration of peace has never yet been settled, and must in every case be determined with reference to collateral facts and circumstances.

Therefore, the United States can lawfully hold captured al Qaeda and Taliban members during the conflict, even though this may involve a considerable period of

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*Geneva Conventions of 12 August 1949, Geneva Convention III Relative to the Treatment of Prisoners of War 546-47 (1960) [hereinafter ICRC Commentary on Geneva Convention III].*

detention. This is a legal and – in view of the grave threat posed by these individuals to our freedom and security – an immensely reasonable one.

February 19, 2009

## **Common Article 3 of the Geneva Conventions and U.S. Detainee Policy**

by David Rivkin, Lee A. Casey and Charles Stimson

*WebMemo #2303*

The Geneva Conventions loom large over U.S. terrorist detainee policy—even when the conventions may not strictly, as a matter of law, apply. In addition to their legal force, the conventions carry the weight of moral authority. It is no small matter, then, to question whether U.S. detention efforts fall short of the standards of Article 3—an article that is common to all four Geneva Conventions (hence its designation as "Common Article 3," or CA3). But that was the implication when President Barack Obama ordered the secretary of defense to conduct an immediate 30-day review of the conditions of detention in Guantanamo to "ensure full compliance" with CA3.

What exactly such compliance requires is open to debate.

### **CA3: Already in Force**

From the military's point of view, Common Article 3 has been in full force for over two and a half years at Guantanamo. In June 2006, the United States Supreme Court ruled in the case of *Hamdan v. Rumsfeld* that America's armed conflict with al-Qaeda was non-international in character and, as such, was governed by CA3.<sup>[1]</sup> Within a week of that ruling, Deputy Secretary of Defense Gordon England issued a department-wide memorandum requiring all Department of Defense components to comply with CA3. Shortly thereafter, all components of the Department of Defense reported that they were in full compliance; this included the Joint Task Force in charge of detention operations at Guantanamo Bay, Cuba.

On September 6, 2006, the Department of Defense issued a department-wide directive applicable to all detainees in DOD custody or effective control. That directive incorporated verbatim CA3 of the Geneva Conventions and required the entire Department of Defense, including Guantanamo, to comply with CA3.

Whether this September 2006 directive marks the end of the story depends on what the text of CA3 means. And that is not so straightforward an inquiry.

### **Defining CA3**

Common Article 3 is the third article common to each of the four Geneva Conventions. The Geneva Conventions codify much, albeit not all, of the law regulating armed conflict and the humane treatment of persons detained during armed conflict. The four conventions, as most recently revised and expanded in 1949, comprise a system of safeguards that attempt to regulate the ways wars are fought and to provide protections for individuals during wartime. The conventions themselves were a response to the horrific atrocities of World War II. The first convention covers soldiers wounded on the battlefield, the second covers sailors wounded and shipwrecked at sea, the third covers prisoners of war, and the fourth covers civilians taken by an enemy military or otherwise impacted.

What CA3 precisely requires and what it forbids is subject to debate. According to the actual language of CA 3, detainees "shall in all circumstances be treated humanely," but the term *humanely* is never defined. "[O]utrages upon personal dignity, in particular humiliating and degrading treatment," are strictly prohibited, whatever they may be. Also prohibited are "cruel treatment and torture," but again, there is no definition of these terms. CA3 is a good statement of principles, but aside from banning murder and hostage-taking, it provides no concrete guidance to anyone actually holding detainees.

Nonetheless, CA3 is a part of U.S. treaty and criminal law. Congress, in the 1999 amendments to the War Crimes Act, made it a crime to violate CA3. For certain acts, such as murder, taking hostages, and obvious acts of torture, the prohibited conduct should be clear, since Congress has defined the elements necessary to prove these crimes in statutory law.

But what exactly constitutes "outrages upon personal dignity, in particular humiliating and degrading treatment"? No universal or even national consensus as to the definition of these terms exists. There is, however, no doubt that what constitutes humiliation or degradation, as distinct from acceptable treatment, is highly context-specific and culture-dependent. For example, any custodial interrogation or incarceration entails elements of humiliation that would be unacceptable in other contexts. Likewise, some societies find placing women in a position of authority, as guards or interrogators, over detained individuals unacceptable; for other cultures that believe in basic gender equality, these practices are not even remotely humiliating. Even Jean Pictet, the world-renowned human rights attorney who helped draft the Geneva Conventions and led the International Committee of the Red Cross, noted that with respect to CA3, the drafters wanted to target those acts that "world public opinion finds particularly revolting." This is a highly uncertain guide.

Pictet also stated that the outrages upon personal dignity referenced by the treaty were of a sort "committed frequently during the Second World War." This too gives little guidance. Presumably, the prohibition would include forcing ethnic or religious minorities to wear insignia for purposes of

identification, such as the infamous yellow star imposed by the Nazi regime on the Jewish population of Germany and occupied Europe. What else it may include is very much open to debate; the Axis Powers were ingenious in the area of humiliating and degrading treatment.

### **Principles of CA3**

In interpreting this important provision, the United States would be justified in following some basic principles inferred from CA3.

First, CA3 imposes obligations on the parties to a conflict. This suggests that to violate the provision, the conduct must be both of a sort that world opinion finds "particularly revolting" and systemic, undertaken as a matter of policy rather than simply the actions of individual miscreants or criminals. Thus, although the treatment of some detainees by a few guards may have been outrageous, humiliating and degrading—and perhaps criminal—it would not violate CA3 unless it was ordered as a matter of policy or the responsible authorities failed to suppress and punish the conduct once it became known to them. All allegations of mistreatment are required to be investigated as a matter of written order.

Likewise, the use of the law of war paradigm cannot, by definition, be a violation of CA3, even if its specific application produces a less than ideal result. For example, detaining individuals believed to be enemy combatants is no violation of CA3, even if subsequent review concludes that their status classification was erroneous and they were not, in fact, enemy combatants. Under the same logic, and despite some oft-invoked but misguided criticisms of the U.S. detention policy, detaining captured enemy combatants for the duration of hostilities and not charging them with specific criminal offenses does not violate CA3.

Second, the purpose of CA3 was to compel compliance with the most basic requirements in the context of a civil war or other internal conflict, where it was acknowledged that the other provisions of the four conventions would not apply. Thus, it is a fair assumption that CA3 should not be interpreted as simply incorporating those other Geneva Convention provisions into the conflicts to which CA3 is applicable. Outrages upon personal dignity would not, therefore, include simply denying captives the rights and privileges of honorable prisoners of war under the third convention or of civilian persons under the fourth.

Third, CA3, like any other specific treaty provision, should be construed in the context of the overall treaty regime of which it is a part. In this regard, the overarching purpose of the 1949 Conventions

(and all of the other laws of war-related treaty norms) has been to ensure that the popular passions aroused by war and even the consideration of military necessity do not vitiate the fundamental requirements of humane treatment. To suggest that, for example, the wartime standards of treatment should be fundamentally superior to the peacetime standards would turn this logic upside down and is untenable. Accordingly, such incarceration-related practices as single-cell confinement and involuntary-feeding—which, subject of course to appropriate safeguards, are used in civilian penal institutions of many Western democracies—cannot, by definition, infringe CA3.

There is no doubt that the intentions reflected in CA3 are laudable, but it is a less than perfect standard for the law of war, which must provide real and precise answers to an entire range of specific questions. Indeed, CA3's language is ambiguous, capacious, and difficult to apply in some circumstances. Fortunately, U.S. detention operations in general, and post-2006 in particular, have featured conditions for detainees that—structured in ways that provide more than sufficient compliance with CA3—compare favorably with any detention facilities in the history of warfare.

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## THE WALL STREET JOURNAL

### Jose Padilla Makes Bad Law

Terror trials hurt the nation even when they lead to convictions.

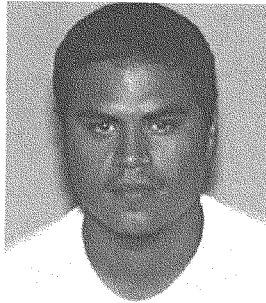
**BY MICHAEL B. MUKASEY**

*Wednesday, August 22, 2007 12:01 a.m.*

The apparently conventional ending to Jose Padilla's trial last week--conviction on charges of conspiring to commit violence abroad and providing material assistance to a terrorist organization--gives only the coldest of comfort to anyone concerned about how our legal system deals with the threat he and his co-conspirators represent. He will be sentenced--likely to a long if not a life-long term of imprisonment. He will appeal. By the time his appeals run out he will have engaged the attention of three federal district courts, three courts of appeal and on at least one occasion the Supreme Court of the United States.

It may be claimed that Padilla's odyssey is a triumph for due process and the rule of law in wartime. Instead, when it is examined closely, this case shows why current institutions and statutes are not well suited to even the limited task of supplementing what became, after Sept. 11, 2001, principally a military effort to combat Islamic terrorism.

Padilla's current journey through the legal system began on May 8, 2002, when a federal district court in New York issued, and FBI agents in Chicago executed, a warrant to arrest him when he landed at O'Hare Airport after a trip that started in Pakistan. His prior history included a murder charge in Chicago before his 18th birthday, and a firearms possession offense in Florida shortly after his release on the murder charge.



**Padilla, alias Muhajir**

Padilla then journeyed to Egypt, where, as a convert to Islam, he took the name Abdullah al Muhajir, and traveled to Saudi Arabia, Afghanistan and Pakistan. He eventually came to the attention of Abu Zubaydeh, a lieutenant of Osama bin Laden. The information underlying the warrant issued for Padilla indicated that he had returned to America to explore the possibility of locating radioactive material that could be dispersed with a conventional explosive--a device known as a dirty bomb.

However, Padilla was not detained on a criminal charge. Rather, he was arrested on a material witness warrant, issued under a statute (more than a century old) that authorizes the arrest of someone who has information likely to be of interest to a grand jury investigating a crime, but whose presence to testify cannot be assured. A federal grand jury in New York was then investigating the activities of al Qaeda.

The statute was used frequently after 9/11, when the government tried to investigate numerous leads and people to determine whether follow-on attacks were planned--but found itself without a statute that authorized investigative detention on reasonable suspicion, of the sort available to authorities in Britain and France, among other countries.

And so, the U.S. government subpoenaed and arrested on a material witness warrant those like Padilla who seemed likely to have information.

Next the government took one of several courses: it released the person whose detention appeared on a second look to have been a mistake; or obtained the information he was thought to have, and his cooperation, and released him; or placed him before a grand jury with a grant of immunity under a compulsion to testify truthfully and, if he testified falsely, charge him with perjury; or developed independent evidence of criminality sufficiently reliable and admissible to warrant charging him.

Each individual so arrested was brought immediately before a federal judge where he was assigned counsel, had a bail hearing, and was permitted to challenge the basis for his detention, just as a criminal defendant would be.

The material witness statute has its perils. Because the law does not authorize investigative detention, the government had only a limited time in which to let Padilla testify, prosecute him or let him go. As that limited time drew to a close, the government changed course. It withdrew the grand jury subpoena that had triggered his designation as a material witness, designated Padilla instead as an unlawful combatant, and transferred him to military custody.

The reason? Perhaps it was because the initial claim, that Padilla was involved in a dirty bomb plot, could not be proved with evidence admissible in an ordinary criminal trial. Perhaps it was because to try him in open court potentially would compromise sources and methods of intelligence gathering. Or perhaps it was because Padilla's apparent contact with higher-ups in al Qaeda made him more valuable as a potential intelligence source than as a defendant.

The government's quandary here was real. The evidence that brought Padilla to the government's attention may have been compelling, but inadmissible. Hearsay is the most obvious reason why that could be so; or the source may have been such that to disclose it in a criminal trial could harm the government's overall effort.

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In fact, terrorism prosecutions in this country have unintentionally provided terrorists with a rich source of intelligence. For example, in the course of prosecuting Omar Abdel Rahman (the so-called "blind sheik") and others for their role in the 1993 World Trade Center bombing and other crimes, the government was compelled--as it is in all cases that charge conspiracy--to turn over a list of unindicted co-conspirators to the defendants.

That list included the name of Osama bin Laden. As was learned later, within 10 days a copy of that list reached bin Laden in Khartoum, letting him know that his connection to that case had been discovered.

Again, during the trial of Ramzi Yousef, the mastermind of the 1993 World Trade Center bombing, an apparently innocuous bit of testimony in a public courtroom about delivery of a cell phone battery was enough to tip off terrorists still at large that one of their communication links had been compromised. That link, which in fact had been monitored by the government and had provided enormously valuable intelligence, was immediately shut down, and further information lost.

The unlawful combatant designation affixed to Padilla certainly was not unprecedented. In June 1942, German saboteurs landed from submarines off the coasts of Florida and Long

Island and were eventually apprehended. Because they were not acting as ordinary soldiers fighting in uniform and carrying arms openly, they were in violation of the laws of war and not entitled to Geneva Conventions protections.

Indeed, at the direction of President Roosevelt they were not only not held as prisoners of war but were tried before a military court in Washington, D.C., convicted, and--except for two who had cooperated--executed, notwithstanding the contention by one of them that he was an American citizen, as is Padilla, and thus entitled to constitutional protections. The Supreme Court dismissed that contention as irrelevant.

In any event, Padilla was transferred to a brig in South Carolina, and the Supreme Court eventually held that he had the right to file a habeas corpus petition. His case wound its way back up the appellate chain, and after the government secured a favorable ruling from the Fourth Circuit, it changed course again.

Now, Padilla was transferred back to the civilian justice system. Although he reportedly confessed to the dirty bomb plot while in military custody, that statement--made without benefit of legal counsel--could not be used. He was instead indicted on other charges in the Florida case that took three months to try and ended with last week's convictions.

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The history of Padilla's case helps illustrate in miniature the inadequacy of the current approach to terrorism prosecutions.

First, consider the overall record. Despite the growing threat from al Qaeda and its affiliates--beginning with the 1993 World Trade Center bombing and continuing through later plots including inter alia the conspiracy to blow up airliners over the Pacific in 1994, the attack on the American barracks at Khobar Towers in 1996, the bombing of U.S. embassies in Kenya and Tanzania in 1998, the bombing of the Cole in Aden in 2000, and the attack on Sept. 11, 2001--criminal prosecutions have yielded about three dozen convictions, and even those have strained the financial and security resources of the federal courts near to the limit.

Second, consider that such prosecutions risk disclosure to our enemies of methods and sources of intelligence that can then be neutralized. Disclosure not only puts our secrets at risk, but also discourages allies abroad from sharing information with us lest it wind up in hostile hands.

And third, consider the distortions that arise from applying to national security cases generally the rules that apply to ordinary criminal cases.

On one end of the spectrum, the rules that apply to routine criminals who pursue finite goals are skewed, and properly so, to assure that only the highest level of proof will result in a conviction. But those rules do not protect a society that must gather information about, and at least incapacitate, people who have cosmic goals that they are intent on achieving by cataclysmic means.

Khalid Sheikh Mohammed, the mastermind of the 9/11 attacks, is said to have told his American captors that he wanted a lawyer and would see them in court. If the Supreme Court rules--in a case it has agreed to hear relating to Guantanamo detainees--that foreigners in U.S. custody enjoy the protection of our Constitution regardless of the place or circumstances of their apprehension, this bold joke could become a reality.

The director of an organization purporting to protect constitutional rights has announced that his goal is to unleash a flood of lawyers on Guantanamo so as to paralyze interrogation of detainees. Perhaps it bears mention that one unintended outcome of a Supreme Court ruling exercising jurisdiction over Guantanamo detainees may be that, in the future, capture of terrorism suspects will be forgone in favor of killing them. Or they may be put in the custody of other countries like Egypt or Pakistan that are famously not squeamish in their approach to interrogation--a practice, known as rendition, followed during the Clinton administration.

At the other end of the spectrum, if conventional legal rules are adapted to deal with a terrorist threat, whether by relaxed standards for conviction, searches, the admissibility of evidence or otherwise, those adaptations will infect and change the standards in ordinary cases with ordinary defendants in ordinary courts of law.

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What is to be done? The Military Commissions Act of 2006 and the Detainee Treatment Act of 2005 appear to address principally the detainees at Guantanamo. In any event, the Supreme Court's recently announced determination to review cases involving the Guantanamo detainees may end up making commissions, which the administration delayed in convening, no longer possible.

There have been several proposals for a new adjudicatory framework, notably by Andrew C. McCarthy and Alykhan Velshi of the Center for Law & Counterterrorism, and by former Deputy Attorney General George J. Terwilliger. Messrs. McCarthy and Velshi have urged the creation of a separate national security court staffed by independent, life-tenured judges to deal with the full gamut of national security issues, from intelligence gathering to prosecution. Mr. Terwilliger's more limited proposals address principally the need to incapacitate dangerous people, by using legal standards akin to those developed to handle civil commitment of the mentally ill.

These proposals deserve careful scrutiny by the public, and particularly by the U.S. Congress. It is Congress that authorized the use of armed force after Sept. 11--and it is Congress that has the constitutional authority to establish additional inferior courts as the need may be, or even to modify the Supreme Court's appellate jurisdiction.

Perhaps the world's greatest deliberative body (the Senate) and the people's house (the House of Representatives) could, while we still have the leisure, turn their considerable talents to deliberating how to fix a strained and mismatched legal system, before another cataclysm calls forth from the people demands for hastier and harsher results.

*Mr. Mukasey was the district judge who signed the material witness warrant authorizing Jose Padilla's arrest in 2002, and who handled the case while it remained in the Southern District of New York. He was also the trial judge in United States v. Abdel Rahman et al. Retired from the bench, he is now a partner at Patterson Belknap Webb & Tyler in New York.*

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