

# Administrative Detention of Terrorists: *Why Detain, and Detain Whom?*

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## INTRODUCTION

A debate rages in the halls of universities as well as in Congress and national security agencies about whether the United States should enact new “administrative” or “preventive” detention laws – *laws that would authorize the detention of suspected terrorists outside the normal criminal justice system.*<sup>1</sup> Advocates argue that criminal law alone is inadequate to combat transnational terrorist networks spanning continents and waging violence at a level of intensity and sophistication previously achievable only by powerful states, but that the law of war is inadequate to protect liberty.<sup>2</sup> Jack Goldsmith and Neal Katyal, for example, call on “Congress to establish a comprehensive system of preventive detention that is overseen by a national security court.”<sup>3</sup> Critics warn that new administrative detention laws will undermine liberty, and they assert that criminal law already provides the government with ample tools to arrest,

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1. On July 27, 2008, the *Washington Post* editorial page called for “a specialized national security court” that would “assess whether [the] government was justified in detaining a suspect,” *Workable Terrorism Trials*, WASH. POST, July 27, 2008, at B6, opposite an opinion piece by a federal judge arguing that such a proposal “risks a grave error in creating a parallel system of terrorism courts unmoored from the constitutional values that have served our country so well for so long.” John C. Coughenour, Op-Ed., *The Right Place to Try Terrorism Cases*, WASH. POST, July 27, 2008, at B7.

2. See, e.g., BENJAMIN WITTES, *LAW AND THE LONG WAR* 151-182 (2008); Andrew McCarthy & Alykhan Velshi, *We Need a National Security Court* (2006) (unpublished White Paper submitted to American Enterprise Institute, available at <http://wsprod1.webrecruiter.com/fdd2/images/stories/national%20security%20court.pdf>); Amos N. Guiora, *Quirin to Hamdan: Creating a Hybrid Paradigm for the Detention of Terrorists*, 19 FLA. J. INT’L L. 511 (2007); Tung Yin, *Ending the War on Terror One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J.L. & PUB. POLY. 149 (2005); Benjamin Wittes & Mark Gitenstein, *A Legal Framework for Detaining Terrorists* (Brookings Institution, Opportunity 08 Paper, 2008), available at [http://www.brookings.edu/papers/2007/~media/Files/Projects/Opportunity08/PB\\_Terrorism\\_Wittes.pdf](http://www.brookings.edu/papers/2007/~media/Files/Projects/Opportunity08/PB_Terrorism_Wittes.pdf); Jack Goldsmith, *Long-Term Detention and Our National Security Court* (Brookings Institution, Feb. 4, 2009), available at [http://www.brookings.edu/papers/2009/0209\\_detention\\_goldsmith.aspx](http://www.brookings.edu/papers/2009/0209_detention_goldsmith.aspx).

3. Jack Goldsmith & Neal Katyal, Op-Ed., *The Terrorists’ Court*, N.Y. TIMES, July 11, 2007, at A19.

charge, and prosecute suspected terrorists.<sup>4</sup> Center for Constitutional Rights President Michael Ratner writes that preventive detention “cuts the heart out of any concept of human liberty.”<sup>5</sup>

This debate has only intensified since the Supreme Court held last Term in *Boumediene v. Bush* that prisoners at Guantánamo have a constitutional right to habeas corpus review of their detention.<sup>6</sup> The Court expressly left unresolved important substantive questions such as the scope of the Executive’s power to detain,<sup>7</sup> and delegated to lower courts resolution of the procedural issues likely to arise in hundreds of resulting habeas petitions.<sup>8</sup> Administrative detention proponents argue that these openings invite Congress to enact legislation to clarify the uncertainties, recognizing that the modern-day terrorist threat necessitates new legal tools.<sup>9</sup> Critics draw the opposite lesson from *Boumediene*. A week after the decision came down, the bipartisan Constitution Project published a report condemning administrative detention proposals, arguing that *Boumediene* “illustrates [that] existing Article III courts are fully capable of adjudicating issues regarding the legality of detention. There is no need to create a specialized tribunal either for Guantanamo detainees or for anyone else who may be subject to detention under existing law.”<sup>10</sup>

This article aims to reframe the administrative detention debate, not to resolve it. In doing so, however, it aspires to advance the discussion by highlighting the critical substantive choices embedded in calls for legal

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4. See, e.g., Kenneth Roth, *After Guantánamo: The Case Against Preventive Detention*, 87 FOREIGN AFFAIRS, May/June 2008, at 2; Gabor Rona, *Legal Frameworks to Combat Terrorism: An Abundant Inventory of Existing Tools*, 5 CHI. J. INT’L. L. 499 (2004-2005); Richard B. Zabel & James J. Benjamin Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in Federal Court* (Human Rights First, White Paper, 2008), <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf>; THE CONSTITUTION PROJECT, A CRITIQUE OF “NATIONAL SECURITY COURTS” (2008), available at [http://www.constitutionproject.org/pdf/Critique\\_of\\_the\\_National\\_Security\\_Courts.pdf](http://www.constitutionproject.org/pdf/Critique_of_the_National_Security_Courts.pdf); see also Deborah Pearlstein, *We’re All Experts Now: A Security Case Against Security Detention*, 40 CASE W. RES. J. INT’L. L. 577 (2008) (arguing that even if valid under U.S. and international law, preventive detention schemes are ineffective in combating terrorism).

5. Michael Ratner, Letter to the Editor, *A New Court for Terror Suspects?*, N.Y. TIMES, July 16, 2007, at A12.

6. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

7. While mandating that Guantánamo detainees receive access to U.S. federal courts empowered to correct errors after “meaningful review of both the cause for detention and the Executive’s power to detain,” *id.* at 2269, the Court made clear that it was “not address[ing] the content of the law that governs petitioners’ detention.” *Id.* at 2277.

8. See *id.* at 2276. On July 21, 2008, Attorney General Michael B. Mukasey gave a speech calling on Congress to legislate clear rules to govern some of the procedural issues left open by *Boumediene*. See Attorney General Michael B. Mukasey, Remarks Prepared for Delivery at the American Enterprise Institute for Public Policy Research (July 21, 2008), available at <http://justice.gov/ag/speeches/2008/ag-speech-0807213.html>.

9. See, e.g., Stuart Taylor, *Bush and the Justices Behaved Badly*, NAT’L J., June 21, 2008, at 15; Benjamin Wittes, *Congress’s Guantánamo Burden*, WASH. POST, June 13, 2008, at A23.

10. A CRITIQUE OF “NATIONAL SECURITY COURTS,” *supra* note 4, at 4.

procedural reform and by pointing the way toward appropriately tailored legislative options. It argues that the current debate's focus on procedural and institutional questions of *how* to detain suspected terrorists has been allowed to overshadow the questions of *why* administratively detain, and *whom* to detain. Not only are the answers to these questions at least as important as the procedural rules in safeguarding and balancing liberty and security, but their resolution should precede analysis of the procedural issues. The soundness of any specific procedural architecture depends heavily on its purpose and on the substantive determinations it is expected to make.

To some, the answers to the *why* and *whom* questions may seem obvious – to *prevent* terrorism we should detain *terrorists*. With those basic ideas apparently settled, the administrative detention debate tends to jump quickly to the question of *how* to detain: What procedural protections should we afford suspects? What rights should they have to challenge evidence proffered against them – and with what kind of lawyer assistance? What kinds of officials should adjudicate cases?<sup>11</sup>

The answers to *why* and *whom* are more complex and consequential than they may seem at first glance. There are several different ways in which detention can help prevent terrorism, including incapacitating terrorists, disrupting specific plots, deterring potential terrorists, and gathering information through interrogation. The choice of which among these preventive objectives to emphasize will, in turn, drive the way the class of individuals subject to detention is defined, with major implications for both liberty and security. The way we answer the *why* and *whom* questions will then significantly determine the procedural architectural needs of any new administrative detention regime. This article therefore cautions against jumping too quickly in administrative detention discussions to the issue of procedural design, or the *how* questions.

Part I of this article briefly explores the Bush administration's approach to the *why* and *whom* questions, in particular its reliance on a theory of "enemy combatants," and the logic behind calls to reform it through administrative detention legislation. Part II examines various strategic objectives behind administrative detention proposals, and Parts III and IV then explain how those objectives translate into different definitions of the class subject to proposed detention laws. Part V returns to the procedural issues and shows how new administrative detention processes – or perhaps even special national security courts – would likely look very different depending on the strategic choices underlying them. Rather than coming down for or against new administrative detention law, this article identifies

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11. Cf. Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013 (2008) (detailing how most court decisions in cases challenging Bush administration counterterrorism detention policies have not directly addressed substantive rights, but instead have focused on procedural rights).

the approaches that stand the best chance of successfully protecting security and liberty, as well as questions that should guide further consideration and refinement of the policies.

#### I. ENEMY COMBATANT DETENTION AND CALLS FOR PROCEDURAL REFORM

The Bush administration's approach to detention began with the notion that the United States is at war with al Qaeda and those aligned with it.<sup>12</sup> Supporting that notion, the 2001 congressional authorization of the use of military force authorizes "all necessary and appropriate force against those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001,"<sup>13</sup> and the U.N. Security Council declared the day after 9/11 that the terrorist attacks constituted "a threat to international peace and security."<sup>14</sup> The Bush administration relied in turn on an expansive interpretation of its domestic executive war powers and the international law of war to assert that those fighting – broadly defined – on behalf of al Qaeda and its affiliates, or in some cases those supporting that fight, are enemies in an ongoing armed conflict. As such, any of these constituent agents, or "enemy combatants," may lawfully be captured and detained for the duration of hostilities, just as a state would be entitled in the course of a war with another state to capture and hold enemy soldiers until the end of the war:<sup>15</sup>

Because the United States [is] in an armed conflict with al Qaida and the Taliban, it [is] proper for the United States and its allies to detain individuals who [are] fighting in that conflict. One of the most basic precepts in the law of armed conflict is that states may detain enemy combatants until the cessation of hostilities.<sup>16</sup>

Of course, to the extent this is a war, it is not the usual kind between states. As former Attorney General Michael B. Mukasey remarked:

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12. See generally JACK L. GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007); JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* (2006).

13. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); see also Curtis Bradley & Jack Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005).

14. S.C. Res. 1368, ¶1, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

15. See Memorandum from President George W. Bush to the Vice President et al., *Humane Treatment of Al Qaeda and Taliban Detainees* (Feb. 7, 2002) (reprinted in KAREN J. GREENBERG & JOSHUA L. DRATEL, *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 134-135 (2005)); Remarks by Attorney General Mukasey, *supra* note 8.

16. John B. Bellinger, Legal Adviser, U.S. Dep't of State, Address at the London School of Economics: Legal Issues in the War on Terrorism (Oct. 31, 2006), available at <http://www.state.gov/s/l/2006/98861.htm>.

We are confronted not with a hostile foreign state whose fighters wear uniforms and abide by the laws of war themselves, but rather with a dispersed group of non-state terrorists who wear no uniforms and abide by neither laws nor the norms of civilization. And although wars traditionally have come to an end that is easy to identify, no one can predict when this one will end or even how we'll know it's over.<sup>17</sup>

While the Attorney General intended this statement to justify the government's continuing reliance on its enemy combatant detention authority,<sup>18</sup> problems with this approach are quickly apparent. Although even in conventional warfare the notion of "enemy combatants" may elude either clear definition or easy application, members of terrorist organizations generally try to obfuscate their identities and blend indistinguishably into civilian populations.<sup>19</sup> The organizations themselves lack the formalized structures of states, thereby greatly exacerbating the probability of misidentifying an innocent civilian as an enemy (a problem discussed in greater detail below). The stakes of such errors are also magnified by the likelihood that this conflict with al Qaeda or its spinoff organizations will last for decades, thus raising the specter of indefinite deprivation of innocents' liberty.<sup>20</sup>

Critiques of the Bush administration's reliance on this "enemy combatancy" theory to justify detentions have focused heavily on the inadequacy of the process by which detention decisions are made.<sup>21</sup>

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17. See Remarks by Attorney General Mukasey, *supra* note 8.

18. See *id.* ("But those differences do not make it any less important, or any less fair, for us to detain those who take up arms against us.").

19. 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 relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51(3), June 8, 1977, 1125 U.N.T.S. 3. Article 3 of the Third Geneva Convention protects "[p]ersons taking no active part in the hostilities." Third Geneva Convention, *supra*. 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 International Committee of the Red Cross, *Direct Participation in Hostilities* (Dec. 31, 2005), <http://icrc.org/web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205>.

20. See Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365 (2008).

21. See, e.g., DAVID COLE & JULES LOBEL, LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR 50-59 (2007); P. Sabin Willett, Op-Ed., *Detainees Deserve Court Trials*, WASH. POST, Nov. 14, 2005, at A21; Statement of U.S. Senator Patrick Leahy On the Detention Center at Guantánamo Bay, Cuba (June 30, 2005), available at

Whether arguing that those detained deserve full-fledged criminal trials or that detentions should be judicially reviewed or that the government failed even to provide the minimal battlefield hearings required by the Geneva Conventions,<sup>22</sup> critics have tended to focus their attacks on the *how* questions of detention. Less often discussed is the *whom* question – that is, the substantive scope of the detention class.<sup>23</sup>

The U.S. government has so far avoided demarcating the outer bounds of this class in order to maximize its freedom of action in combating major terrorist networks.<sup>24</sup> In explaining to a U.N. human rights committee its legal authority to detain suspected al Qaeda fighters, the government stated that its detention authority extended to “members of al-Qaida, the Taliban, and their affiliates and supporters, whether captured during acts of belligerency themselves or directly supporting hostilities in aid of such enemy forces.”<sup>25</sup> And at Guantánamo, the government has used the following standard to justify detention, though without further defining publicly its terms or acknowledging this as the outer boundary of its asserted detention authority:

[A]n individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against

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<http://leahy.senate.gov/press/200506/063005b.html>. 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.”).

22. See, e.g., LAWYERS COMMITTEE FOR HUMAN RIGHTS, *IMBALANCE OF POWERS: HOW CHANGES TO U.S. LAW & POLICY SINCE 9/11 ERODE HUMAN RIGHTS AND CIVIL LIBERTIES* 47-69 (2003), available at [http://www.humanrightsfirst.org/us\\_law/loss/imbalance/powers.pdf](http://www.humanrightsfirst.org/us_law/loss/imbalance/powers.pdf).

23. For some critiques of the expansive definition, see, e.g., *Al-Marri v. Pucciarelli*, 534 F.3d 213, 230 (4th Cir. 2008) (en banc) (Motz, J., concurring in the judgment) (2008) (interpreting prior Supreme Court precedent as supporting the 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, 2655-2658 (2005) (arguing that mere membership without conduct is not enough to be categorized as an “enemy combatant”); Brief for the Boumediene Petitioners, *Boumediene v. Bush*, 128 U.S. 2229 (2008) (No. 06-1195), 2007 WL 2441590, at 33-34. On March 6, 2009, the Supreme Court vacated the Fourth Circuit’s judgment in *Al-Marri* and remanded the case with instructions that it be dismissed as moot. 2009 U.S. LEXIS 1777. The Obama administration decided to try Al-Marri in federal court rather than to defend the Fourth Circuit’s approval of military detention. See Robert Barnes & Carrie Johnson, *Court Puts Off Decision on Indefinite Detention; Justices: Indictment Made Issue Moot*, WASH. POST, Mar. 7, 2009, at A5; Adam Liptak, *Justices Erase Court Ruling That Allowed a Detention*, N.Y. TIMES, Mar. 7, 2009, at A9.

24. See COLE & LOBEL, *supra* note 21, at 59-63; see also *Boumediene v. Bush*, No. 04-1166 (RJL), 2008 WL 4722127 (D.D.C. Oct. 27, 2008).

25. See Committee Against Torture, *Consideration of Reports Submitted by State Parties Under Article 19 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Annex 1 at 47, U.N. Doc. CAT/C/48/Add.3 (June 29, 2005).

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.<sup>26</sup>

In one oft-cited litigation colloquy, the government went so far as to argue that merely providing a charitable gift could qualify the so-called “little old lady in Switzerland” donor as an “enemy combatant” if the recipient turned out to be an al Qaeda front.<sup>27</sup> Even having backed off this most extreme view,<sup>28</sup> however, the Bush administration steadfastly avoided detailed public discussion of what it means to be a “member,” how it defined “al Qaida” or its affiliates and supporters, and what activities constitute belligerency or support or aid to any of these groups or activities.<sup>29</sup>

The case of *Hamdi v. Rumsfeld*<sup>30</sup> highlights the Bush administration’s apparently deliberate ambiguity on this critical definitional question. *Hamdi* involved a U.S. citizen captured in Afghanistan and held at Guantánamo who challenged the legality of his detention. While not stating clearly the substantive reach of its “enemy combatant” definition, the government argued that the Executive’s “wartime determination that an individual is an enemy combatant is a quintessentially military judgment” that no court should second-guess.<sup>31</sup> That is, the government argued until the *Hamdi* holding that the Executive should have unreviewable discretion to decide if an individual falls within the definition of “enemy combatant,” and that it should have unreviewable discretion to determine the scope of the definition itself.<sup>32</sup>

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26. Memorandum from the Deputy Secretary of Defense, Order Establishing Combatant Status Review Tribunal (July 7, 2004), <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

27. See *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005).

28. See *Al-Marri v. Pucciarelli*, *supra*, 534 F.3d at 226 (Motz, J., concurring in the judgment).

29. The breadth of the government’s definition came under attack recently by the D.C. Circuit, see *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008), and a minority of the Fourth Circuit, see *Al-Marri v. Pucciarelli*, *supra* 534 F.3d at 231-247 (Motz, J., concurring in the judgment). While this article was in press, the Obama administration submitted a memorandum in habeas corpus proceedings that offered a slightly modified definition of the class subject to detention at Guantánamo. See Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay, *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-442 (TFH) (D.D.C. March 13, 2009), at 2, available at <http://www.usdoj.gov/opa/documents/memo-re-det-auth.pdf>.

30. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

31. Brief for the Respondent at 25, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696).

32. The *Hamdi* plurality held that an individual captured on the battlefield in Afghanistan fell within the implicit detention authority of the 2001 Authorization of the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, but it explicitly left “[t]he permissible bounds of the category [of enemy combatant to] be defined by the lower courts as subsequent cases are presented to them.” *Hamdi*, 542 U.S. at 522 n.1.

This maneuver was even more starkly visible in the government's argument in *Rasul v. Bush*,<sup>33</sup> which involved the question of whether the federal habeas corpus statute extended federal court jurisdiction to claims arising at Guantánamo: "The 'enemy' status of aliens captured and detained during war is a quintessential political question on which the courts respect the actions of the political branches."<sup>34</sup> The government went on to argue that "courts have . . . no judicially-manageable standards . . . to evaluate or second-guess the conduct of the President and the military" on such matters.<sup>35</sup>

In both *Hamdi* and *Rasul* the government lost on the procedural issue. In *Hamdi* the Court held that due process requires a citizen detainee be given adequate notice of and opportunity to contest the claims against him,<sup>36</sup> and in *Rasul* it held that statutory habeas rights (i.e., an opportunity to bring before a federal judge a challenge to detention) apply to detainees at Guantánamo.<sup>37</sup> *Boumediene* then went a step further in holding that constitutional habeas rights also apply to Guantánamo detainees.<sup>38</sup> But in none of these cases did the Court address head on the government's claim that it would be impossible to fashion judicially manageable standards of "enemy combatancy," and in all of these cases the Court essentially invited Congress to do so.

Are courts really limited in their capacity to adjudicate the "enemy" status of detainees? Suppose Congress wants to regulate detention of enemy terrorists, including establishing a stronger oversight role by the courts, which is what administrative detention proposals seek to do. Taking as a point of departure the Bush administration's assertion that defining whom to detain is an issue of tremendous policy and strategic significance – but believing that it is one that Congress and courts ought to have a strong hand in regulating – how should an administrative detention regime be constituted in substantive terms?

The vast bulk of discussion of administrative detention immediately swings back to procedural architecture, based on the assumption that setting the appropriate level of procedural protection can effectively balance security and liberty.<sup>39</sup> Three particular elements of procedural design are most consistently and notably thought to be key to this balance: judicial review, adversarial process with lawyer representation, and transparency.<sup>40</sup>

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33. *Rasul v. Bush*, 542 U.S. 466 (2004).

34. Brief for the Respondents at 35, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343).

35. *Id.* at 37.

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

37. *Rasul*, 542 U.S. at 480-481.

38. *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008).

39. See *supra* notes 21-22 and accompanying text.

40. COLE & LOBEL, *supra* note 21, at 251-252; AM. BAR ASS'N STANDING COMMITTEE ON LAW AND NATIONAL SECURITY ET AL., DUE PROCESS AND TERRORISM: A POST WORKSHOP REPORT 16 (2007), available at <http://www.mccormicktribune.org/publications/dueprocess.pdf>.

And, indeed, each of them – individually and in tandem – has a vital role to play in any effective administrative detention system.

Judicial review can help safeguard liberty and enhance the credibility at home and abroad of administrative detention by ensuring neutrality of the decision maker and publicly certifying the legality of the detention in question. Most administrative detention proposals start with a strong role for courts. Some believe that a new court is needed, perhaps a National Security Court made up of specially designated judges who would build expertise in terrorism cases over time.<sup>41</sup> Others suggest expanding the Foreign Intelligence Surveillance Court’s jurisdiction to handle detention cases,<sup>42</sup> since it already has judges with expertise in handling sensitive intelligence matters and mechanisms to ensure secrecy. Still others insist that specialized terrorism courts are dangerous, and that the legitimacy of a detention system can best be ensured by giving regular, generalist judges a say in each decision.<sup>43</sup>

Adversarial process and access to attorneys can help further protect liberty and enhance the perceived legitimacy of detention systems. As with judicial review, though, proposals then tend to split over how best to organize and ensure this adversarial contest. Some argue that habeas corpus suits are the best check on administrative detention.<sup>44</sup> Others argue that administrative detention decisions should be contested at an early stage by lawyers of the detainee’s choosing.<sup>45</sup> Still others recognize an imperative need for secrecy and deep expertise in terrorism and intelligence matters, which would necessitate a specially designated “defense bar” operated by the government on detainees’ behalf.<sup>46</sup>

This issue of secrecy runs in tension with a third common element of procedural and institutional reform proposals: openness and transparency. The Bush administration’s approach had allegedly been prone to error in part because of excessive secrecy and hostility to the prying eyes of courts or Congress, let alone the press and advocacy groups. Open or at least partially open hearings or written judgments that can later be scrutinized by

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41. See Goldsmith & Katyal, *supra* note 3; McCarthy & Velshi, *supra* note 2; Guiora, *supra* note 2.

42. See PHILIP B. HEYMANN & JULIETTE N. KAYYEM, PROTECTING LIBERTY IN AN AGE OF TERROR 18, 51-52 (2005); see also STEPHANIE COOPER BLUM, THE NECESSARY EVIL OF PREVENTIVE DETENTION IN THE WAR ON TERROR: A PLAN FOR A MORE MODERATE AND SUSTAINABLE SOLUTION (2008) (recommending using the Foreign Intelligence Surveillance Court to monitor a statutory regime of preventive detention).

43. See A CRITIQUE OF “NATIONAL SECURITY COURTS,” *supra* note 4.

44. See, e.g., Alberto J. Mora & Thomas R. Pickering, Op-Ed., *Extend Legal Rights to Guantanamo*, WASH. POST, Mar. 4, 2007, at B7; Statement of Senator Patrick Leahy, Chairman, Judiciary Committee, On Amendment 2022, The Habeas Corpus Restoration Act of 2007 (Sept. 19, 2007), available at <http://leahy.senate.gov/press/200709/091907.html>.

45. See, e.g., Guiora, *supra* note 2, at 527.

46. See, e.g., Goldsmith & Katyal, *supra* note 3; Wittes & Gitenstein, *supra* note 2, at 10; McCarthy & Velshi, *supra* note 2, at 36.

the public or congressional oversight committees, critics and reformists argue, would help put pressure on the executive branch to exercise greater care in deciding which detention cases to pursue and put pressure on adjudicators to act in good faith and with more diligence.<sup>47</sup>

These three elements of procedural design reform – judicial review, adversarial process, and transparency – may help reduce the likelihood of mistakes and restore the credibility of detention decision making. That all three are deeply embedded in American law and international human rights law<sup>48</sup> makes it unsurprising that they would surface consistently in reform discussions. Rarely, though, do these discussions pause long on the prior question of what it is that these courts – however more specifically constituted – will evaluate. Judicial review of *what*? A meaningful opportunity to contest *what* with the assistance of lawyers? Transparent determinations of *what*?

Deciding the appropriate factual predicate to be proven or disproven – that is, to define the class of individuals subject to administrative detention and the substantive standards by which detentions will be judged – requires stepping back even further to consider carefully the strategic rationale for proposed new legal tools.

## II. WHY DETAIN?

The reason administrative detention is widely discussed at all is because the threat of terrorism is thought by proponents to involve a category of individuals for whom neither criminal justice nor the law of war – the two legal systems historically used to authorize and regulate most long-term detention of dangerous individuals – offers effective and just solutions.<sup>49</sup> The argument generally begins with the notion that exclusive reliance on prosecution, along with its usual panoply of defendants' rights and strict rules of evidence, cannot effectively, expeditiously, or exhaustively remove the threat of dangerous terrorists.<sup>50</sup> The reasons for

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47. See, e.g., Goldsmith & Katyal, *supra* note 3; Wittes & Gitenstein, *supra* note 2, at 10.

48. See International Covenant on Civil and Political Rights, arts. 9, 14, Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171.

49. See WITTES, *supra* note 2; Goldsmith & Katyal, *supra* note 3; Matthew Waxman, Op-Ed., *The Smart Way To Shut Gitmo Down*, WASH. POST, Oct. 28, 2007, at B4.

50. France relies on criminal law for detaining suspected terrorists, but its criminal laws are so expansive and the arrest and investigation powers of the government so potent that its criminal law system often functions much like administrative detention might. See HUMAN RIGHTS WATCH, PREEMPTING JUSTICE: COUNTERTERRORISM LAWS AND PROCEDURES IN FRANCE (2008), <http://www.hrw.org/en/reports/2008/07/01/preempting-justice>. Pre-trial detention, for example, can last up to four years. According to France's legendary counterterrorism judge, Jean-Louis Bruguiere:

Every government has an obligation to react to the threat. But the common law system is too rigid, it can't adapt because its procedural laws are more important than the criminal laws at the base, and the procedure depends on custom so it

this include: information used to identify terrorists and their plots includes extremely sensitive intelligence sources and methods, the disclosure of which during trial would undermine or even negate counterterrorism operations; the conditions under which some suspected terrorists are captured, especially in faraway combat zones or ungoverned regions, make it impossible to prove criminal cases using normal evidentiary rules;<sup>51</sup> prosecution is designed to punish past conduct, but fighting terrorism requires stopping suspects before they act; and criminal justice is deliberately tilted in favor of defendants so that few if any innocents will be punished, but the higher stakes of terrorism cannot allow the same likelihood that some guilty persons will go free.<sup>52</sup>

On the other hand, the argument continues, the law of war – under which individual enemy fighters can be captured and held for the duration of hostilities without trial – does not deal satisfactorily with modern-day terrorism threats either.<sup>53</sup> Law of war rules grew out of conflicts primarily between professional armies (acting as agents responsible to states) that could be expected to last months or maybe years but would likely end definitively. Terrorism, by contrast, involves an enemy whose fighters cannot be identified with similar precision and is unlikely to end soon or at all or with any certainty. Applying the traditional law of war detention rules therefore opens the possibility of indefinite detention without trial combined with substantial likelihood of error.<sup>54</sup>

To its proponents, administrative detention offers a way out of the stark

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doesn't change easily. The civil law system is more flexible because it functions according to laws voted by parliament and can react faster.

*Id.* at <http://www.hrw.org/en/node/62151/section/4> (quoting Jean-Louis Bruguiere). *See also* ANTOINE GARAPON, REAL INSTITUTO ELCANO, IS THERE A FRENCH ADVANTAGE IN THE FIGHT AGAINST TERRORISM? (2005), <http://www.realinstitutoelcano.org/analysis/807/Garapon807.pdf>.

51. As the Wall Street Journal editorial page put it, “[T]he truth is that in the fog of battle it is impossible to gather evidence the way a Manhattan cop can. There’s no ‘CSI: Kandahar.’” Editorial, *The Enemy Detainee Mess*, WALL ST. J., July 3, 2008, at A10.

52. *See, e.g.*, RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 64-65 (2006) (on risk calculus); Andrew McBride, Op-Ed., *We’ll Rue Having Judges on the Battlefield*, WALL ST. J., June 21, 2008, at A7 (on battlefield constraints); *Hamdan v. Rumsfeld: Establishing a Constitutional Process: Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Daniel Dell’Orto, Principal Deputy General Counsel, Department of Defense), available 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); Michael B. Mukasey, Op-Ed., *Jose Padilla Makes Bad Law*, WALL ST. J., Aug. 22, 2007, at A15 (on disclosure of sensitive intelligence information during trial); David Cole, *Closing Guantanamo*, BOSTON REV., Jan./Feb. 2009, available at <http://bostonreview.net/BR34.1/cole.php> (on problems related to secrecy and burden of proof). For counter-arguments, emphasizing that criminal law is sufficient to deal with terrorism threats, *see* Roth, *supra* note 4; Thomas B. Wilner, Op-Ed., *We Don’t Need Guantanamo Bay*, WALL ST. J., Dec. 22, 2008.

53. *See* WITTES, *supra* note 2; Goldsmith & Katyal, *supra* note 3.

54. *See* Waxman, *supra* note 20.

choice between these two systems.<sup>55</sup> Most likely any sensible alternative scheme will include some elements that resemble criminal justice and others that resemble the law of war, for the simple reason that terrorism shares some features of crime and some of war.<sup>56</sup> But this leads to the difficult questions of where one system should start and another end and how we should sort out who goes into which.<sup>57</sup> So we need to think through how to define the set of cases that fall between the two existing systems and that may demand an alternative. This requires a clear notion of the needs: what is it about terrorism that might necessitate a step so precipitous as creating a new kind of detention legal system?

There is surprisingly little discussion in the policy or academic realms of precisely how detention fits within a broader U.S. and allied strategy to combat terrorism, or perhaps more specifically al Qaeda. At least within the public domain there appears to be no comprehensive effort by the U.S. government to review lessons learned to date about the strategic appropriateness of *whom* it has detained.<sup>58</sup> The 9/11 Commission Report contained only one significant recommendation with respect to detention and that had to do with treatment standards, not with the legal powers to detain.<sup>59</sup> The White House's publicly released 2006 *National Strategy for Combating Terrorism* mentioned several times the need to capture enemy terrorists but mentioned not a single time the role or utility of the broad detention authorities asserted since September 11, 2001 – a surprising omission given the tremendous resources that have been devoted to detention operations at Guantánamo and elsewhere and the immense opposition to those operations from the courts, Congress, the public, and U.S. allies, among others.<sup>60</sup>

That said, it is virtually undisputed among those who advocate administrative detention that its purpose is preventive: a prophylactic measure against terrorist threats.<sup>61</sup> Of course, criminal justice also has a

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55. See Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 YALE J. INT'L L. 369 (2008).

56. See BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* (2006).

57. See Burt Neuborne, *Spheres of Justice: Who Decides?*, 74 GEO. WASH. L. REV. 1090 (2006).

58. The British Government, by contrast, has discussed with much greater precision how its various detention authorities fit together, and whom it has targeted with them and why. CABINET OFFICE, *COUNTERING INTERNATIONAL TERRORISM: THE UNITED KINGDOM'S STRATEGY*, 2006, Cm. 6888, at 17-20, available at <http://www.fco.gov.uk/resources/en/pdf/contest-report>.

59. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE U.S., *THE 9/11 COMMISSION REPORT 379-380* (2004), available at <http://govinfo.library.unt.edu/911/report/911Report.pdf>.

60. NATIONAL SECURITY COUNCIL, *NATIONAL STRATEGY FOR COMBATING TERRORISM* (2006), available at <http://www.whitehouse.gov/nsc/nsct/2006/nsct2006.pdf>.

61. Indeed, the term "preventive detention" is often used interchangeably with "administrative detention." See, e.g., Jonathan Rauch, *The Candidates' Four Detention*

preventive component. But criminal law is generally retrospective in focus, in that it addresses past acts.<sup>62</sup> The resulting punishment, including incarceration, serves preventive purposes insofar as it keeps a perpetrator off the street (for some period of time) and deters both him and others from future crime.

Whereas at base criminal justice addresses past harms committed by individuals,<sup>63</sup> administrative detention proposals tend to be prospective in focus. They start with the conviction that terrorist acts – especially major attacks – must be addressed before they occur. The consequences of failure to prevent terrorist attacks are too high, the argument goes, to rely on retrospective responses alone. When it comes to crime, we do not typically use the mere likelihood that someone will act – even high likelihood of violent crime – to justify detention. As Judge Posner explains:

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.<sup>64</sup>

We tolerate high levels of recidivism in parole programs, reasoning that it is more costly to keep all convicts locked up than to accept a certain level of crime. But terrorism, according to administrative detention proponents, is different. The ability of small groups to harness modern technology (including, especially in the future, weapons of mass destruction) to cause mass casualties, damage, panic, and threats to effective governance puts terrorism on a different plane.<sup>65</sup>

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*Camps*, NAT'L J., Aug. 4, 2007 (using the terms interchangeably); see also Emanuel Gross, *Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does a Democracy Have the Right To Hold Terrorists as Bargaining Chips?*, 18 ARIZ. J. INT'L & COMP. LAW 721, 752 (2001) (“Administrative detention, sometimes known as preventive detention, refers to a situation where a person is held without trial.”)

62. There are, of course, some exceptions, such as inchoate crimes or conspiracy liability.

63. See COLE & LOBEL, *supra* note 21, at 47-50.

64. POSNER, *supra* note 52, at 64-65.

65. See *id.*; ACKERMAN, *supra* note 56, at 39-57; Ashton B. Carter, John M. Deutch & Philip D. Zelikow, *Catastrophic Terrorism: Tackling the New Danger*, 77 FOREIGN AFF. 80 (1998); see also Cass R. Sunstein, *National Security, Liberty, and the D.C. Circuit*, 73 GEO. WASH. L. REV. 693, 702 (2005) (noting that in the terrorism context, “judicial errors may turn out to be disastrous rather than merely harmful”). To be sure, concern about the danger of major terrorist attack can be taken too far, as in what has been dubbed the “One Percent Doctrine” for dealing with “a low-probability, high-impact threat.” Former Vice President Dick Cheney stated: “If there’s a one percent chance that Pakistani scientists are helping al Qaeda build or develop a nuclear weapon, we have to treat it as a certainty in terms of our

This notion of prevention, however, needs to be further unpacked. There are at least four major ways in which detention contributes to terrorism prevention:

- incapacitation
- deterrence
- disruption
- information-gathering

Each of these sub-elements of prevention has implications for how administrative detention laws should be crafted and how institutions for adjudicating cases should be designed.

The most natural inclination of a government facing threats of terrorism is to *incapacitate* suspected terrorists: If someone has the will and capability to commit terrorism, keep him off the streets. The purpose of such detention is not punitive or retributive (though such desires might lurk in the background); it is protective and preemptive, to put potential threats out of action. Secretary of Defense Rumsfeld described the Guantánamo detainees in 2002, for example, as “among the most dangerous, best-trained, vicious killers on the face of the earth,”<sup>66</sup> justifying the camp as necessary to stop them from carrying out their violent objectives. This preventive purpose underlies the law of war’s detention rules, in that those rules aim to block captured soldiers from returning to an ongoing fight.<sup>67</sup> As former Attorney General Mukasey explained:

The United States has every right to capture and detain enemy combatants in this conflict, and we need not simply release them to return to the battlefield. . . . We have every right to prevent them from returning to kill our troops or those fighting with us, and to target innocent civilians.<sup>68</sup>

Beyond incapacitating existing threats, a government might wield the threat of detention to *deter* future terrorist recruits from joining the cause or participating in terrorist activities. In other words, the possibility of getting caught and held by the government may dissuade terrorists or future terrorists from joining terrorist groups or perpetrating terrorist acts.<sup>69</sup> The

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response.” RON SUSKIND, *THE ONE PERCENT DOCTRINE: DEEP INSIDE AMERICCA’S PURSUIT OF ITS ENEMIES SINCE 9/11*, at 61, 62 (2006).

66. Press Briefing, Secretary of Defense Rumsfeld (Jan. 27, 2002), *available at* <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=232>.

67. *See supra* notes 16-18 and accompanying text.

68. Remarks by Attorney General Mukasey, *supra* note 8.

69. Discussion of deterrence is usually divided into two concepts, both of which are relevant here: specific deterrence, which discourages an individual from certain conduct by instilling an understanding of negative consequences, and general deterrence, which makes an example of an individual’s punishment to discourage the broader population from deviant conduct. *See generally* Michele Cotton, *Back with a Vengeance: The Resilience of*

more credible the threat of capture and detention, and the more severe the consequences (say, the longer the threatened period of detention, or the more severe its conditions), so the theory goes, the greater the deterrent pressure.

These notions of incapacitating or deterring terrorists or future terrorists may potentially point at large groups of individuals and their dangerous activities: If we can discern who has the intent and capability – or potential to develop that intent and capability – to commit or support terrorist acts, we will try to block or dissuade them. But a narrower way to formulate a preventive purpose of administrative detention is to *disrupt* terrorist plots: A group of individuals is preparing to carry out a terrorist attack or campaign of attacks, so use the detention of certain persons to foil that plot.<sup>70</sup> Whereas incapacitation focuses heavily on the characteristics of categories of individuals, disruption focuses on their joint or individual activities. It is not so much about neutralizing very dangerous people as neutralizing their impending schemes.

Each of these preventive strategies contains some key assumptions about the government's knowledge of the terrorist threat. An incapacitation strategy assumes the state's ability to assess accurately who is likely to pose a future danger and to therefore devote resources to stemming their future dangerous activities. A prevention strategy emphasizing deterrence assumes the state's ability to manipulate sufficiently the fears of future terrorists at large. And a disruption strategy assumes the state's ability to identify plots in advance and their key individual enablers.<sup>71</sup>

A fourth preventive reason to detain is therefore to *gather information*. Thwarting terrorist plots requires getting inside the heads of network members, to understand their intentions, capabilities, and modes of operation. Detention can facilitate such intelligence collection through, most obviously, interrogation, but also through monitoring conversations among prisoners or even "turning" terrorist agents and sending them back out as government informants. Governments usually justify publicly counterterrorism detentions on incapacitation or disruption grounds, but no doubt information-gathering was at the forefront of the Bush administration's detention policies,<sup>72</sup> as demonstrated by the lengths to

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*Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1316 (2000); Mark C. Stafford & Mark Warr, *A Reconceptualization of General and Specific Deterrence*, 30 J. RESEARCH IN CRIME & DELINQUENCY 123–135 (1993).

70. See RICHARD A. POSNER, *COUNTERING TERRORISM: BLURRED FOCUS, HALTING STEPS* 205 (2007).

71. See CABINET OFFICE, *supra* note 58, at 16 ("All disruption operations depend upon the collection and exploitation of information and intelligence that helps identify terrorist networks, including their membership, intentions, and means of operation.").

72. The declaration by Defense Intelligence Agency Director Vice Admiral Lowell E. Jacoby in the litigation involving alleged dirty-bomber Jose Padilla is especially illuminating: "The United States is now engaged in a robust program of interrogating . . .

which that Administration went to defend permissive interrogation standards and CIA detention programs.<sup>73</sup> “These are dangerous men with unparalleled knowledge about terrorist networks and their plans for new attacks,” explained President Bush in September 2006, in disclosing publicly the CIA secret detention program. “The security of our nation and the lives of our citizens depend on our ability to learn what these terrorists know.”<sup>74</sup>

This last point about facilitating information-gathering shows that there are often synergies among the preventive approaches. Incapacitating individuals suspected of posing serious dangers may deter individuals from engaging in or supporting dangerous activities. Disrupting major plots and interrogating the plotters may reveal a lot about how future schemes will be hatched and who among the many dangerous individuals remaining at large are most likely to play critical roles in those schemes. Any sound counterterrorism strategy will combine all of these elements to some degree.<sup>75</sup>

But there are also tradeoffs among these elements of prevention. In part this is due to the costs of detention, some of which are discussed below.<sup>76</sup> It also results from the fact that counterterrorism detention strategy – and with it consideration of administrative detention’s utility in certain circumstances – is formulated in an environment of constrained resources.

There are also, however, tensions *among* the preventive purposes of detention and the means to achieve them. For example, the government can monitor suspects’ movements and communications, not only to foresee and forestall plots but to gain a more complete picture of the terrorist network and its activities; but the moment the government detains someone, those movements and communications may cease along with its ability to track them. Releasing a captured individual still believed to pose a danger may offer opportunities to follow him, perhaps with more to be gained through information collection than the marginal risk of his committing major violence. In other words, an aggressive incapacitation approach may

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enemy combatants in the War on Terrorism. [They] hold critical information about our enemy and its planned attacks against the United States that is vital to our national security.” Declaration of Vice Admiral Lowell E. Jacoby (USN) Director of the Defense Intelligence Agency at 6, *Padilla v. Rumsfeld*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003) (No. 02CV04445), 2002 WL 34342502.

73. See Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007; at A1; Sheryl Gay Stolberg, *Bush Says Interrogation Methods Aren’t Torture*, N.Y. TIMES, Oct. 6, 2007, at A1.

74. President George W. Bush, Speech: President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sept. 6, 2006), <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>. See also Remarks by Attorney General Mukasey, *supra* note 8. (“Detention often yields valuable intelligence about the intentions, organization, operations, and tactics of our enemy.”).

75. See PHILIP BOBBITT, TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY (2008); CABINET OFFICE, *supra* note 58.

76. See *infra* Part IV.

sometimes undermine information-gathering activities.<sup>77</sup> As the U.K. government's Intelligence and Security Committee reported in its examination of the 2005 London subway bombings, "[t]here is always a difficult balance to strike between investigating those known to be a current threat and working to discover other possible threats."<sup>78</sup>

In considering new detention laws, the critical question is therefore not simply the utility of proposed legal authorities. It is their benefits and costs compared to alternative available tools and in combination. That assessment requires knowing more precisely whom the new laws would detain, the subject of Part IV.

### III. DETAIN WHOM?

Aside from clarifying the policy requirements motivating administrative detention proposals – and therefore allowing better comparison to existing legal tools – answering the *why* question helps guide the substantive definition of the class subject to that detention. That is, the answer to *why* administratively detain heavily determines *whom* specifically to detain. Should Congress draw administrative detention laws targeting those who pose a certain level and type of dangerousness? Or who committed certain acts? Or who are members of certain designated terrorist groups? Or who has information about others who are? This Part explores how Congress might define the subject class, drawing on examples from American law and anti-terrorism laws in other democracies.

One approach to new detention laws would simply continue using the Bush administration's notion of enemy combatancy as the relevant inquiry. That is, recalling the definitions cited earlier, courts might be charged with determining whether an individual is a "member" of a certain organization, or has committed a "belligerent act," or has "supported" those who are or have.<sup>79</sup> The government's claim in *Hamdi* and *Rasul* notwithstanding, one can certainly construct judicially manageable standards for any of these inquiries.<sup>80</sup> After all, these concepts have analogues in criminal law that judges apply regularly (say, conspiracy liability in the case of membership

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77. The case of the "Lackawanna 6" provides an illustration of how this tension among priorities has played out in practice. Upon discovering a possible al Qaeda sleeper cell outside Buffalo, New York, in 2002, some elements within the United States Government favored immediate arrest while others favored surveillance. See Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 40-44 (2005).

78. Quoted in CABINET OFFICE, *supra* note 58, at 17.

79. See *supra* Part I.

80. Indeed, this is what federal courts are now charged with doing with respect to many Guantánamo detainees following *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), sitting as habeas courts reviewing the factual basis for detention. See *Boumediene v. Bush*, No. 04-1166 (RJL), 2008 WL 4722127 (D.D.C. Oct. 27, 2008).

or aiding and abetting in the case of support).<sup>81</sup>

Once free from the paradigmatic confines of the law of war, however, in designing an administrative detention regime, enemy combatancy need not be the starting point at all. After all, the traditional notion of enemy combatancy grew out of a warfare context in which participation in an enemy army could reasonably be assumed to serve as an accurate indicator of one's future threat, measured in traditional military terms. Even those who cling to a "war on terror" paradigm acknowledge that the fight against terrorism generally or al Qaeda in particular is unlike any previous war in terms of the nature of the enemy, its threat, and the way we think about success.<sup>82</sup> Moreover, it is widely believed that since 2001 the terrorist threats to the United States and its allies have become less centralized, less hierarchical, and less formalized, even further complicating direct application of legal standards developed for fighting traditional armies.<sup>83</sup> There is a range of alternative ways to define the detention class that may better fit the policy problem to be solved.

One model for defining the class might draw upon existing examples of administrative detention in U.S. law, which permit the long-term detention of certain categories of individuals judicially adjudged as "dangerous." Some state laws, for example, authorize the detention of charged or convicted sex offenders who, due to a "mental abnormality," are likely to engage in certain acts of sexual violence.<sup>84</sup> These statutory schemes might be a particularly apt analogue because, as is often supposed about religiously extremist terrorists, they were premised legislatively on a view that some sexual predators are undeterrable from future violence.<sup>85</sup> Under federal bail law, arrestees can similarly be held pending trial upon sufficient showing that no release conditions would reasonably assure community safety.<sup>86</sup>

To be sure, it remains highly debatable whether dangerousness alone as an administrative detention standard would pass constitutional muster, at least with respect to U.S. citizens or those captured inside the United

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81. See Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008).

82. See BOBBITT, *supra* note 75.

83. Although there exists a major debate among terrorism experts as to the continuing strength of al Qaeda, even those who assess al Qaeda as resurgent acknowledge that "informal local terrorist groups are certainly a critical part of the global terrorist network." Bruce Hoffmann, *The Myth of Grass-Roots Terrorism: Why Osama bin Laden Still Matters*, FOREIGN AFF., May/June 2008; see also MARC SAGEMAN, *LEADERLESS JIHAD: TERROR NETWORKS IN THE TWENTY-FIRST CENTURY* (2008) (arguing that the major terrorist threat to the United States and the West now comes from loose-knit local cells).

84. See *Kansas v. Hendricks*, 521 U.S. 346 (1997).

85. See *id.* at 351, 362-363. Another example is involuntary commitment of certain mentally ill persons believed to be dangerous. In *Addington v. Texas*, 441 U.S. 418 (1979), the Supreme Court held that to comport with Fourteenth Amendment due process in a civil proceeding brought under state law to involuntarily commit in a mental hospital an individual for an indefinite period only the clear and convincing evidence standard was required.

86. See *United States v. Salerno*, 481 U.S. 739 (1987).

States.<sup>87</sup> In *Zadvydas v. Davis*, for instance, the Court made clear that indefinite administrative detention of a removable alien would raise constitutional due process concerns,<sup>88</sup> but the Court also noted that a statutory scheme directed at suspected terrorists, in particular, might change its analysis.<sup>89</sup> As in other areas of American law, an administrative detention regime might include future dangerousness as at least one critical element. And, accordingly, the central inquiry for courts – assuming judicial review – might be to review the Executive’s dangerousness assessment.

Instead of defining the detention category around dangerousness, a statute might tie detention to membership or affiliation. Consider the Alien Enemies Act, a statute enacted in 1798 and later amended, which declares:

Whenever there is a declared war between the United States and any foreign nation or government . . . and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies.<sup>90</sup>

In *Ludecke v. Watkins*,<sup>91</sup> the Supreme Court upheld the Act’s World War II implementation, which occurred via a presidential directive calling for detention and removal of all alien enemies “who shall be deemed by the Attorney General to be dangerous to the public pea[c]e and safety of the United States.”<sup>92</sup> The statute, which remains on the books today, was clearly premised on the idea that during wartime an individual’s citizenship of an enemy state is a strong indicator of threat.

The United Kingdom’s 2005 Prevention of Terrorism Act, as another model, allows for the imposition of “control orders” (or restrictions on an individual’s movements, communications, or other freedoms) based on past or present activities. It authorizes control orders when the government “has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity,” which is further defined as:

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87. The complex constitutional issues are beyond the scope of this paper, but of course they are highly relevant and any administrative detention scheme would face intense judicial challenge. Throughout this paper I cite a number of U.S. federal and state preventive detention laws that have been upheld, though usually on very narrow grounds. For a view skeptical of the constitutionality of preventive detention laws related to terrorism, see Hamdi v. Rumsfeld, 542 U.S. 507, 554-557 (Scalia, J., dissenting).

88. *Zadvydas v. Davis*, 533 U.S. 678 (2001).

89. *See id.* at 691.

90. 50 U.S.C. §21 (2006) (originally enacted as Alien Enemies Act of 1798, ch. 66, 1 Stat. 577).

91. *Ludecke v. Watkins*, 335 U.S. 160 (1948).

92. *See id.* at 163.

- (a) the commission, preparation or instigation of acts of terrorism;
- (b) conduct which facilitates the commission, preparation or instigation of such acts, or which is intended to do so;
- (c) conduct which gives encouragement to the commission, preparation or instigation of such acts, or which is intended to do so;
- (d) conduct which gives support or assistance to individuals who are known or believed to be involved in terrorism-related activity.<sup>93</sup>

Under this model, the critical review inquiry for courts focuses not on an individualized assessment of future dangerousness or membership but on whether an individual committed certain acts. Parliament likely selected these types of acts because they were believed to serve as a good indicator of future dangerousness.<sup>94</sup>

As yet another set of models, consider two Israeli administrative detention schemes, one tied to a showing of necessity and another to showing dangerousness-plus. Under one statutory scheme, its domestic “Emergency Powers Law,” the Executive can order judicially reviewed detention based on the extremely broad standard of “reasonable cause to believe that reasons of state security or public security require that a particular person be detained.”<sup>95</sup> This does not presuppose a state of war, and it contrasts with Israel’s Unlawful Enemy Combatant statute, a law passed in 2002 following the Israeli Supreme Court’s concerns over the detention of Hezbollah fighters’ family members as bargaining chips. The new statute, recently upheld by the Israeli Supreme Court,<sup>96</sup> provides authority to detain certain individuals fighting on behalf of foreign forces with which Israel regards itself in a state of armed conflict. Pursuant to strict judicial review requirements, the statute authorizes detention of someone who “participated either directly or indirectly in hostile acts against the State of Israel or is a member of a force perpetrating hostile acts against the State of Israel” *and* whose “release will harm State security.”<sup>97</sup> In other words, detention under the latter scheme requires a showing of either certain acts *or* membership *plus* dangerousness.

The 2001 USA PATRIOT Act contains provisions authorizing the *short-term* detention of aliens on grounds similar to many of these previous

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93. Prevention of Terrorism Act, 2005, ch. 2, §§1-2 (Eng.), *available at* [http://www.opsi.gov.uk/acts/acts2005/ukpga\\_20050002\\_en\\_1](http://www.opsi.gov.uk/acts/acts2005/ukpga_20050002_en_1).

94. *See* CABINET OFFICE, *supra* note 58, at 17-18.

95. Emergency Powers (Detention) Law (EPDL), 5739-1979, S.H. 76, 33 L.S.I. 89-92 (Isr. 1979). *See generally* *Administrative Detention: The Legal Basis for Administrative Detention, Israeli Law*, [http://www.btselem.org/English/Administrative\\_Detention/Israeli\\_Law.asp](http://www.btselem.org/English/Administrative_Detention/Israeli_Law.asp).

96. *See* CrimA 6659/06 Anonymous v. State of Israel [2008] (S. Ct. Isr.), *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).

97. Incarceration of Unlawful Combatants Law, 5762-2002 (Isr.), *available at* 32 ISRAELI Y.B. HUM. RTS. 389 (2002) *and at* <http://www.justice.gov.il/NR/rdonlyres/7E86D098-0463-4F37-A38D-8AEBE770BDE6/0/IncarcerationLawedited140302.doc>.

examples. It gives the Attorney General power to detain, among others, any alien whom he has reason to believe is “likely to engage after entry in any terrorist activity,” has “incited terrorist activity,” is a “representative” or “member” of a terrorist organization, or “has received military-type training” from a terrorist organization.<sup>98</sup> The Act also authorizes the Attorney General to detain aliens who are “engaged in any other activity that endangers the national security of the United States.”<sup>99</sup>

These examples are intended to show just a partial range of possible definitions of the detention class, any of which is susceptible to judicial application. So which one makes sense: A broad “state security” class? Dangerousness? Membership? Commission of proscribed acts? Knowledge? The answer depends heavily on strategic purpose.

If, for example, the overwhelming focus of administrative detention is to incapacitate individuals likely to pursue threatening terrorist activities (and perhaps to deter others), then the authority to detain would most naturally turn on an individual’s supposed dangerousness. In that regard, a statutory scheme might resemble administrative detention laws mentioned above, aimed at supposedly very dangerous sex offenders whose prison term has expired or pre-trial arrestees. Or the scheme might rely on proxy indicators of dangerousness, as the Israeli Unlawful Enemy Combatant statute does, to further restrict and refine the dangerousness inquiry.<sup>100</sup> The Israeli Supreme Court, in upholding the statute, explained its incapacitation purpose in the following terms:

[W]e are dealing with an administrative detention whose purpose is to protect state security by removing from the cycle of hostilities anyone who is a member of a terrorist organization or who is taking part in the organization’s operations against the State of Israel, in view of the threat that he represents to the security of the state and the lives of its inhabitants.<sup>101</sup>

The incapacitation purpose of the U.K.’s 2005 Prevention of Terrorism Act control order provisions is likewise clear from its text, which states that “for the purposes [of the U.K. statute] it is immaterial whether the acts of terrorism in question are specific acts of terrorism or acts of terrorism generally.”<sup>102</sup>

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98. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, §412(a), Pub. L. No. 107-56, 115 Stat. 272, 350-352 (codified at 8 U.S.C. §1226a (2006)); 8 U.S.C. §1182(a)(3)(A)-(B) (2006).

99. 8 U.S.C. §1226a(a)(3)(B).

100. See *supra* note 98 and accompanying text.

101. *State of Israel*, at ¶15.

102. Prevention of Terrorism Act, 2005, ch. 2, §1(9) (Eng.).

If, by contrast, the emphasis of administrative detention is not to incapacitate individuals but to disrupt impending plots, then the focus of authority to detain might be cast differently – in some ways more narrowly but in some ways perhaps more broadly. A 2007 Senate bill, known as the National Security with Justice Act, for instance, sought to authorize detention on a showing that “failure to detain that [international terrorist] will result in a risk of imminent death or imminent serious bodily injury to any individual or imminent damage to or destruction of any United States facility.”<sup>103</sup> On the one hand, in theory disruption can be achieved by nabbing only key leaders and planners and those directly involved in a specific plot; even if some very dangerous but peripherally involved associates remain free, the scheme may be ruined. On the other hand, detention to disrupt might be thought to justify detaining for some period of time even individuals who are not dangerous at all (perhaps not very committed to the terrorist cause nor capable of doing much harm) but who play a role in a particular plot or might just have information about it.<sup>104</sup>

The key inquiry in the last example is different from an inquiry about incapacitation: detention to disrupt assumes a functional linkage between an individual and a plot (or set of plots), whereas incapacitation looks to an individual’s general will and capacity to do harm. A statutory regime focused on disruption would accordingly define the class around plots or a showing that “but for” detention of a particular individual, terrorist attacks are likely. There will often be some overlap of these categories, but not always. Consider, for example, a terrorist financier who funds several terrorist organizations. The government may regard him as extremely dangerous and might believe that detaining him would reduce generally the likelihood and effectiveness of future terrorist attacks (incapacitation) and would frighten others from funding terrorism (deterrence). But he is unlikely to be covered by a law requiring a showing that failure to detain him would substantially increase the risk of a specific, imminent attack. Consider then, as an example running the other direction, a terrorist organization’s courier believed to be carrying messages to its members about an impending attack: measured against a standard of dangerousness, he might fall outside an incapacitation-detention law. But his specific involvement in an imminent attack might put him squarely within a law aimed at disruption.

If the major focus of administrative detention is information-gathering, the logical definition of the detention class would change again. Administrative detention might target individuals believed to have critical information about either terrorism threats generally or, more narrowly, specific terrorism plots. In the immediate aftermath of 9/11, the U.S.

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103. National Security with Justice Act, S.1876, 110th Cong. §105(a)(1) (2007).

104. See *infra* notes 142-143 and accompanying text. As explained further below, disruption detention along these lines also points toward a short duration of detention, whereas dangerousness detention may in some cases point toward long-term detention.

government relied – amid much controversy and criticism – on the federal material witness statute, which under certain imperative circumstances allows arrest of an individual with information critical to a criminal proceeding.<sup>105</sup> An administrative detention system might similarly define detention authority in relation to an individual’s supposed knowledge.<sup>106</sup> Again, often this category of individuals will overlap with inquiries of dangerousness or involvement in specific plots, and a law might require a showing of membership in a terrorist organization or commission of a terrorist act as a threshold matter before even considering the information question. But these categories will not always overlap. Consider, for example, an al Qaeda paymaster who might not be individually very dangerous but who might have substantial information about associates who are. Taken to the extreme, a law authorizing detention based on suspected knowledge alone might be used to justify holding the spouse or roommate of a suspected terrorist – even if not complicit – in order to question that individual about the suspect’s actions, communications, and intentions.

In sum, the strategic priorities behind administrative detention proposals will guide how the substantive class should be defined. But, one might ask, if we need new tools to combat terrorism effectively, why not simply define the class broadly – as the Bush administration did – to give the Executive maximum flexibility? The Executive could then expand and contract the administrative detention class as needed to balance security and liberty. Part IV explains why not.

#### IV. RESTRICTING *WHY AND WHOM*

As noted earlier,<sup>107</sup> the Bush administration argued that broad detention authorities are needed for the entire range of reasons listed above – including incapacitation, deterrence, disruption, and information-gathering – and it therefore fought for an expansive definition of the “enemy

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105. See 18 U.S.C. §3144 (2000). For critical accounts of its use after 9/11, see HUMAN RIGHTS WATCH, WITNESS TO ABUSE: HUMAN RIGHTS ABUSES UNDER THE MATERIAL WITNESS LAW SINCE SEPTEMBER 11 (2005), <http://www.hrw.org/en/reports/2005/06/26/witness-abuse>.

106. See COLE & LOBEL, *supra* note 21, at 250. According to then-retired Judge Michael B. Mukasey:

The [material witness] 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.

Mukasey, *supra* note 52.

107. See *supra* Parts I-II.

combatants” detention class.<sup>108</sup> Even if one rejects the full breadth of the Bush administration’s argument, the notion is certainly correct that all the elements of prevention listed above feature in any overall counterterrorism strategy.<sup>109</sup>

The main reason for narrowing the class – for restricting the definition of those liable to be administratively detained – is that every expansion comes at a price. This brings us back to the need to consider carefully strategic priorities.

The policy calculus must include consideration not just of the general dangers attached to enacting any new detention regime but the marginal dangers that come from expanding the size and shape of the susceptible class. A full discussion of all of those dangers is beyond the scope of this article, but it is worth highlighting several of the most significant ones because they are relevant to the article’s broader point: that the ultimate policy merits of administrative detention will turn at least as much on the issue of defining the substantive class as on fashioning the right procedures.

Debates about administrative detention are usually cast in terms of liberty versus security.<sup>110</sup> But administrative detention – both its use as well as its mere enactment – carries risks to both liberty and security. Experiences of the U.S. and allied governments since September 2001 suggest that those costs are unlikely to be mitigated even by robust procedural protections without also constraining tightly the substantive detention criteria, and those experiences offer valuable lessons that should guide the definition of any administrative class.

Administrative detention opponents justifiably argue that creating new mechanisms for detention with diluted procedural protections (compared to the procedural features of American criminal justice) puts liberty at risk.<sup>111</sup> The most obvious liberty concern is that innocent individuals will get swept up and imprisoned – the “false positive” problem. Civil libertarians rightly worry, too, that aside from the specific risk to particular individuals, any expansion of administrative detention (I say “expansion” because, as noted earlier, administrative detention already exists in some nonterrorist contexts in American law)<sup>112</sup> risks more generally eroding checks on state power. To some the idea of administrative detention for suspected terrorists is the kind of “loaded weapon” that Justice Jackson worried about at the time of

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108. In the course of the *Padilla* litigation, for example, the Government asserted each of them. Brief of Petitioner at 28-38, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027), 2004 WL 542777.

109. See, e.g., CABINET OFFICE, *supra* note 58 (explaining the U.K. government’s use of each of them).

110. See generally ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* (2007).

111. See Roth, *supra* note 4; Ratner, *supra* note 5, Zabel & Benjamin, *supra* note 4; A CRITIQUE OF “NATIONAL SECURITY COURTS,” *supra* note 4.

112. See *supra* notes 85-87 and accompanying text.

*Korematsu*.<sup>113</sup> Furthermore, even if we are satisfied that the U.S. government can use administrative detention responsibly, there are many unsavory foreign governments that might exploit the precedent for repressive purposes. We need, therefore, to be cautious about justifying principles that could be used pretextually by less democratic regimes to crack down, for example, on dissidents they might label “terrorists” or “national security threats.”<sup>114</sup>

In safeguarding liberty against such risks, the discussion usually shifts quickly to the procedural protections afforded suspects (such as assistance of counsel and strict rules of evidence) or the burdens of proof placed on the government (such as probable cause, or beyond a reasonable doubt). But the substantive definition of the detention class is key to managing these risks as well, and without narrowing the class, even robust procedural protections will fail.

Some relatively narrow definitions – for instance, for those who commit certain acts – might generally be provable to great certainty, whereas some very broad ones – say, for those who harbor devotion to a hostile ideology – may be impossible to prove to a high certainty. A very broad definition of “conduct” or “dangerousness” justifying detention will also likely result in rounding up many suspects who would not actually have engaged in terrorist conduct. Indeed, that a broad substantive definition of the detention class can overwhelm even the most robust procedural protections is reflected in criticisms of recently expanded criminal liability for providing “material support” to terrorist organizations or engaging in terrorist conspiracies. Federal criminal statutes have been used to prosecute individuals for membership in terrorist organizations or for participating in terrorist conspiracies even when no specific terrorist plot could be shown.<sup>115</sup> Civil libertarians charge that these prosecutions have netted many individuals who were actually unlikely to engage in serious acts of terrorism.<sup>116</sup>

As to the issue of how administrative detention will be perceived and used internationally, a narrow set of definitional criteria – requiring, for example, a showing of certain specific acts or a linkage to specific plots – stands a better chance of winning legitimacy among allies and averting

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113. See Ratner, *supra* note 5. In his dissent in *Korematsu v. United States*, 323 U.S. 214, 246 (1944), Justice Jackson warned that by validating repressive actions taken under emergency, “[t]he principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”

114. See LAURA K. DONOHUE, *THE COST OF COUNTERTERRORISM: POWER, POLITICS, AND LIBERTY* 121 (2008); DEBORAH PEARLSTEIN & PRITI PATEL, *HUMAN RIGHTS FIRST, BEHIND THE WIRE: AN UPDATE TO ENDING SECRET DETENTIONS* 24-25 (2005), [http://www.humanrightsfirst.org/us\\_law/PDF/behind-the-wire-033005.pdf](http://www.humanrightsfirst.org/us_law/PDF/behind-the-wire-033005.pdf).

115. See Chesney & Goldsmith, *supra* note 81, at 1101-1106.

116. COLE & LOBEL, *supra* note 21, at 49.

overly expansive interpretations among other countries.<sup>117</sup> Although creating any new category of administrative detention risks chipping away at international norms that generally demand criminal prosecution to lock away bad actors, the more narrowly such a carve-out is defined the less prone it will be to political manipulation or to further stretching to deal with other types of public policy problems.

Besides these liberty risks, administrative detention carries costs and risks from a security standpoint. Again, the substantive criteria of detention law may help mitigate these risks.

Historically, detention practices – especially those viewed as overbroad – have sometimes proven counterproductive in combating terrorism and radicalization, and consideration of administrative detention’s strategic utility should weigh these dangers. 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, and detention helped dry up community informants.<sup>118</sup> And in Iraq and Afghanistan, though exceptional cases because combat still rages there, detention has played an important role in neutralizing threats to coalition forces but has also contributed to anti-coalition radicalization, especially when perceived as being applied overbroadly.<sup>119</sup> Overbroad detention sweeps risk further radicalizing and alienating communities from which terrorists are likely to emerge or whose assistance is vital in penetrating or discerning extremist groups.<sup>120</sup> Moreover, several influential studies of counterterrorism strategy have emphasized the need to target coercive policies (including military and law enforcement efforts) narrowly and precisely to avoid playing into al Qaeda propaganda efforts to aggregate local grievances into a common global movement.<sup>121</sup> Official U.S. military doctrine now cautions about similar risks in setting up detention systems in battling insurgencies.<sup>122</sup>

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117. See Hakimi, *supra* note 55.

118. See DAVID BONNER, EXECUTIVE MEASURES, TERRORISM AND NATIONAL SECURITY, 87-96 (2007); DONOHUE, *supra* note 114 at 36-48; Tom Parker, *Counterterrorism Policies in the United Kingdom*, in PROTECTING LIBERTY IN AN AGE OF TERROR, *supra* note 42, Appendix A, at 119, 125-128.

119. See Carlotta Gall, *U.S.-Afghan Foray Reveals Friction on Antirebel Raids*, N.Y. TIMES, July 3, 2006, at A9; Alissa J. Rubin, *U.S. Remakes Jails in Iraq, but Gains Are at Risk*, N.Y. TIMES, June 2, 2008, at A1. The new U.S. military counterinsurgency manual offers similar cautions. COUNTERINSURGENCY FIELD MANUAL NO. 3-24, at ¶¶1-132 (2006), available at <http://usacac.army.mil/cac/repository/materials/coin-fm3-24.pdf>.

120. See *infra* note 134 and accompanying text; see also Pearlstein, *supra* note 4 (arguing that even if valid under U.S. and international law, preventive detention schemes are counterproductive in combating terrorism).

121. See, e.g., Audrey Kurth Cronin, *How al-Qaida Ends: The Decline and Demise of Terrorist Groups*, INT’L SECURITY, Summer 2006 (31:1), at 7, available at <http://www.mitpressjournals.org/doi/pdf/10.1162/isec.2006.31.1.7>; David Kilcullen, *Countering Global Insurgency*, 28 J. STRATEGIC STUDIES 597 (2005).

122. See COUNTERINSURGENCY FIELD MANUAL, *supra* note 119, at ¶¶7-38, 7-40, 8-42.

Narrow definitional criteria can therefore help in mitigating an Executive's propensity to over-detain. Observers from both the right and the left worry correctly that in the face of terrorist threats the Executive is likely to push detention powers to or even past their legal outer boundaries in order to prevent catastrophe as well as head off accusatory political backlash for having failed to take sufficient action.<sup>123</sup> These are fundamentally policy problems, not legal problems, and will require sound Executive judgments no matter what the legal regime looks like. But once the role of detention is firmly situated in a broader counterterrorism strategy that seeks to balance the many competing policy priorities, a carefully drawn administrative detention statute might help restrain this propensity toward short-term overreach with long-term strategic drawbacks.

Considering these liberty and security risks in relation to the four preventive purposes outlined above,<sup>124</sup> the process of narrowing the class subject to proposed administrative detention laws should begin by excluding deterrence or information-gathering as the dominant strategic driver. Although both have important roles to play in overall counterterrorism strategy,<sup>125</sup> the costs of defining detention authority around them are likely too high to bear given the alternatives and expected benefits.

As for deterrence, virtually any very dangerous terrorist or terrorism supporter the government could target with a deterrence detention strategy would either be so committed to violent extremism as to render the marginal threat of administrative detention negligible<sup>126</sup> or would be deterred already by the threat of criminal prosecution or military attack (even discounted by a low probability of apprehension).<sup>127</sup> The publicity and martyrdom imagery surrounding detention might even make it seem appealing to some individuals or groups.

As for information-gathering, an administrative detention law premised on detaining individuals with valuable knowledge independent of an individual's nefarious activities sets a precedent too easily overused or abused at home or abroad.<sup>128</sup> Information-gathering, including through

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123. See, e.g., BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* 44-51 (2006); GOLDSMITH, *supra* note 12, at 116, 189-190. For a historical account of the British "over-detention" phenomenon during World War II, see A.W. BRIAN SIMPSON, *IN THE HIGHEST DEGREE ODIUS: DETENTION WITHOUT TRIAL IN WARTIME BRITAIN* (1992).

124. See *supra* Part II.

125. See BOAZ GANOR, *THE COUNTER-TERRORISM PUZZLE: A GUIDE FOR DECISION MAKERS* 47-100 (2005).

126. See JESSICA STERN, *THE ULTIMATE TERRORISTS* 130-131 (1999).

127. In upholding Israel's Unlawful Enemy Combatant statute, the Israeli Supreme Court noted that deterring others from committing acts is not a legitimate purpose of administrative detention. *CrimA 6659/06 Anonymous v. State of Israel* [2008] (S. Ct. Isr.) at ¶18, 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).

128. See HUMAN RIGHTS WATCH, *supra* note 105.

lawful interrogation, will no doubt be a strong motivating objective behind almost any administrative detention scheme, and an individual's knowledge about terrorist operations or planning could be a reason not to release someone otherwise validly detained (i.e., someone held on grounds independent of knowledge).<sup>129</sup> But using a person's suspected knowledge alone as the basis for detention and completely delinking detention from an individual's voluntary and purposeful actions cuts even deeper than most other administrative detention into traditional civil liberties principles and safeguards.<sup>130</sup> Even in interpreting Congress's September 2001 authorization for the use of military force to include implicitly the power to detain "enemy combatants," the Supreme Court pulled back when it came to information-gathering, noting that "[c]ertainly we agree that indefinite detention for the purpose of interrogation is not authorized."<sup>131</sup> Furthermore, a detention law that allows incarceration based on knowledge might very well deter individuals with important information from coming forward voluntarily to the government. Because local community members are often best able to discern the affiliations and intentions of terrorists or militants embedded in their communities, individual tips are critical to identifying genuine threats otherwise invisible among populations.<sup>132</sup>

Incapacitation and disruption are likely to be more effective and legitimate strategic bases for new administrative detention laws, though information-gathering is likely to be an important secondary benefit.<sup>133</sup> As noted earlier, opponents of administrative detention argue that criminal law and other non-detention tools are adequate to incapacitate or disrupt the activities of most individuals whom the government would reasonably feel compelled to target, while proponents of administrative detention insist that the risk of some terrorists slipping through that net is too high.<sup>134</sup> Much of this debate comes down to differing assessments of the marginal danger posed by that remainder. But, significantly, even opponents of new administrative schemes acknowledge that stopping an individual from carrying out a terrorist attack (as opposed to merely acquiring information or to instill fear) is a legitimate purpose of detention.<sup>135</sup> The dispute is over

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129. Opponents of administrative detention will argue that detention, outside of criminal prosecution, even based on activities or threat is still too broad and prone to abuse. See COLE & LOBEL, *supra* note 21, at 47-50.

130. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004). On the other hand, one might argue that in some extreme emergency cases liberty concerns should give way to information requirements, especially if there are no alternative means to involuntary interrogation available.

131. *Id.* at 521.

132. See DONOHUE, *supra* note 114, at 28; Renee De Nevers, *Modernizing the Geneva Conventions*, 29 WASH. Q. 99, 106 (2006). For discussions of this phenomenon in the United Kingdom, see Christopher Caldwell, *Counterterrorism in the U.K.: After Londonistan*, N.Y. TIMES, June 25, 2006, §6 (Magazine), at 42.

133. See *supra* notes 72-74 and accompanying text.

134. See *supra* notes 2-4 and accompanying text.

135. See, e.g., COLE & LOBEL, *supra* note 21, at 251-252.

what factual predicate is required and what standards and processes the state must utilize to substantiate them.<sup>136</sup>

Part V brings this discussion back to these procedural issues. This still leaves the question of how, more precisely, Congress should define the susceptible detention class in considering an administrative detention system. The ultimate merits of various definitional approaches – such as membership, past acts, future dangerousness, or some combination thereof – cannot be discerned and calculated independent of the processes and standards of proof with which they are paired. But recent experience and some judgments about the future threat of terrorism help narrow the range of sensible choices.

Part III offered some models drawn from other countries with long histories of combating terrorism and from other U.S. laws premised on incapacitation. That section further explained that an incapacitation strategy points naturally toward a future dangerousness approach to defining the class, though proxies such as past acts or membership might form part of the inquiry.<sup>137</sup> Indeed, requiring some showing of an individual's terrorist activity in addition to indications of future dangerousness has the advantage of tying detention more tightly with individual moral culpability,<sup>138</sup> though this carries the corresponding disadvantage of intruding more directly into the traditional province of criminal law. If one thinks that the number of (or threat posed by) dangerous terrorists who cannot be prosecuted through criminal trials is high, an incapacitation strategic rationale of administrative detention makes sense. But the U.S. experience at Guantánamo, for example, casts some doubt on the ability of the government to assess individual dangerousness very accurately: On the one hand the government brought many supposedly

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136. An additional worry among administrative detention critics is that building a detention system outside the criminal justice system with reduced evidentiary and procedural requirements might dramatically undercut the incentive for the government to use prosecution. This concern is valid, though the benefits of justice and finality as well as bureaucratic interests might mitigate it. An administrative detention regime might also build in a requirement that the government show that prosecution is impracticable. The British House of Lords considered this issue in *Home Department v. E* [2007] UKHL 47, at ¶¶14-16, as both the court and the British government read the control order statute as requiring a presumption that prosecution will be used when possible.

137. A great deal of scholarship has focused on the use of individual dangerousness assessments in American criminal law and other legal contexts, and the limitations of the government's ability to predict it accurately. See CHRISTOPHER SLOBOGIN, *PROVING THE UNPROVABLE: THE ROLE OF LAW, SCIENCE, AND SPECULATION IN ADJUDICATING CULPABILITY AND DANGEROUSNESS* (2006); Jeffrey Fagan & Martin Guggenheim, *Preventive Detention and the Judicial Prediction of Dangerousness for Juveniles: A Natural Experiment*, 86 J. CRIM. L. & CRIMINOLOGY 415 (1996); Norval Morris & Marc Miller, *Predictions of Dangerousness*, 6 CRIME & JUSTICE 1 (1985); Jonathan Simon, *Reversal of Fortune: The Resurgence of Individual Risk Assessment in Criminal Justice*, 2005 ANN. REV. L. & SOC. SCI. 397.

138. See COLE & LOBEL, *supra* note 21, at 47-50.

dangerous individuals to Guantánamo who were then released because they were later believed not to pose much threat after all; on the other hand, some of those released have turned out to be quite dangerous, and have reengaged in terrorist activity.<sup>139</sup> A key question for those advocating new administrative detention proposals for incapacitation is whether accurate dangerousness assessments are realistic and what would be necessary to improve them.

A disruption strategy points naturally toward including a “but for” standard of dangerousness. That is, the government would have to show that unless the individual is detained, a terrorist attack is likely, perhaps very likely.<sup>140</sup> Such an approach might effectively limit the detainable class to individuals who are either tied to specific plots or are highly central to a terrorist organization’s planning. An advantage of this approach is that it would probably be less prone to false positives or overbroad detention than a strategy based on dangerousness (depending, of course, on exactly how the standard is drawn), because the government would have to show evidence not only about the suspect but about his involvement in imminent or impending terrorist activities. A corresponding disadvantage is that such a detention system would be severely limited by intelligence – specifically, the ability to link individuals to plotting or specific plots in advance. One might also reasonably ask why, if the government is so confident it knows who is about to perpetrate a terrorist scheme, can it not arrest and prosecute the plotters? A disruption approach to administrative detention makes sense if one believes there is a significant or significantly dangerous set of individuals for whom the government is likely to have sufficient information to link them to such plotting or plots, yet is also likely to have insufficient admissible evidence to support timely use of criminal justice to stop them.<sup>141</sup>

Both of these definitional approaches – assessments of individual dangerousness and showing that an attack is likely to occur without administrative detention – look very different from the one based on enemy combatancy, certainly as the government has interpreted and used it since

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139. On releases from Guantánamo following later determinations that an individual was not an “enemy combatant,” see Press Briefing, Gordon England, Secretary of the Navy, Briefing on Combatant Status Review Tribunal (July 9, 2004), *available at* <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2777>. For a specific example of an allegedly mistaken detention at Guantánamo, see Carol D. Leonnig, *Evidence of Innocence Rejected at Guantánamo*, WASH. POST, Dec. 5, 2007, at A1. On detainees released from Guantánamo later returning to terrorism, see Press Release, U.S. Dep’t of Def., Former Guantánamo 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); Alissa J. Rubin, *Former Guantánamo Detainee Tied to Mosul Suicide Attack*, N.Y. TIMES, May 8, 2008, at A8.

140. See *supra* notes 103-104 and accompanying text.

141. See the discussion of the limits of criminal prosecutions in dealing with terrorism, *supra* notes 50-52 and accompanying text.

2001.<sup>142</sup> Indeed, once freed from the need to cast detention in terms of the law of war and traditional war powers, past experience and the logic underlying most administrative detention proposals caution against using “membership” in or “support” for a particular enemy organization or set of organizations as the key factual predicate in defining the class.

A definitional approach such as enemy combatancy, based on membership or support to a particular enemy like al Qaeda, is likely to be both too broad and too narrow. As stated earlier, the main reason modern forms of terrorism are believed by administrative detention advocates to require new detention laws is that the catastrophic harms of attacks require recalibrating the balance struck by criminal law between security and protection of innocents. A “membership” or “support” approach to administrative detention has already proven prone to overuse against individuals who, while perhaps individually dangerous, pose little or no threat of major terrorist attack.<sup>143</sup> An agency requirement – does the individual operate under the effective control of an organization? – makes more sense, and actually has more in common with traditional notions of enemy combatancy than does mere membership or support.<sup>144</sup> At the same time, if the ultimate concern is stopping major future terrorist attacks (which administrative detention proponents worry will grow more lethal), it seems odd to restrict the targeting of administrative detention powers to intended perpetrators who are affiliated with groups involved in the September 2001 attacks. This is especially true if al Qaeda and other terrorist organizations are likely to become less centralized and more dispersed,<sup>145</sup> and if massively destructive technologies are likely to become more available to them.<sup>146</sup> An alternative approach would have Congress designate on an ongoing basis which terrorist organizations pose sufficient

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142. As mentioned earlier, the Combatant Status Review Tribunals at Guantánamo define “enemy combatant” as:

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.

Order Establishing Combatant Status Review Tribunal, *supra* note 26, at ¶a.

143. And, as explained earlier, it may inadvertently play into the hands of al Qaeda propaganda efforts. See *supra* notes 118-122 and accompanying text.

144. Judge Wilkinson adopts a similar interpretation of “enemy combatant” in *Al-Marri v. Pucciarelli*, 534 F.3d 213, 244 (4th Cir. 2008) (en banc) (concurring in part and dissenting in part), when 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.” See *supra* note 23 (describing the Supreme Court’s March 6, 2009, order directing that *Al-Marri* be dismissed as moot).

145. See *supra* note 83 and accompanying text.

146. See BOBBITT, *supra* note 75, at 446-452, 478-480.

threats that their members – or, better, their agents – are subject to the administrative detention statute.<sup>147</sup>

The key point is that whether proposed administrative detention laws aim primarily at long-term incapacitation or immediate-term disruption, a more effective definitional approach would tie the target class quite directly to the specific strategic aim by including, for example, a high substantive standard of prospective or “but for” dangerousness. This could include additional proxy indicators or required congressional designations likely to improve the accuracy of adjudications and to check reflexive expansion of the target class.<sup>148</sup>

#### V. FROM *WHY* AND *WHOM* TO *HOW*

Having considered the issue of *whom* new legal powers might aim to detain, any consideration of administrative detention statutes should be grounded in a firm conception of “why detain?” because that strategic rationale will inform significantly the logic of procedural design – the *how* issues.

Near the outset we noted that there is an emerging consensus among administrative detention reform advocates around a set of minimum procedural and institutional elements found in most proposals: judicial review, adversarial process, and transparency.<sup>149</sup> After *Boumediene*, it is also fairly clear that robust judicial review and opportunity to contest the legal and factual basis for detention are also constitutionally required, at least for detainees held inside the United States and those at Guantánamo.<sup>150</sup>

Beyond identifying such minimum elements, however, it is difficult to work out the secondary details of procedural design without knowing more precisely what a new administrative detention scheme aims to achieve and

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147. David Cole offers a formula along similar lines, suggesting that Congress could authorize and regulate law-of-war preventive detention for fighters only of those terrorist groups against which Congress has expressly acknowledged a state of armed conflict. *See* Cole, *supra* note 52. Some might argue that the 2001 Authorization of the Use of Military Force did just that with respect to al Qaeda. Specifically, it authorized “all necessary and appropriate force against those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” 2001 Authorization of the Use of Military Force, Pub. L. No. 107-40, §2(a), 115 Stat. 224. Congress could pass additional resolutions to take account of new threats or repeal resolutions to take account of diminished threats.

148. Besides these definitional standards themselves, there are other ways to restrict the class of individuals susceptible to new administrative laws. Detention of an individual might require an additional showing of prior terrorism-related acts, or it might require showing that less-coercive means than detention could not alleviate the risk. The more such protections are added, however, the less useful administrative detention becomes over other legal tools like criminal prosecution.

149. *See supra* Part I.

150. *See Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

whom it is built to detain. Greater strategic clarity and a sharper idea of how the substantive detention class might be defined therefore enlighten this procedural discussion and reveal important additional questions of institutional design.

Consider first the issue of judicial review combined with adversarial process. The U.S. legal system generally exalts these features because they are believed to promote both fairness and accuracy.<sup>151</sup> Whatever the test or factual predicate used to justify detention as part of a counterterrorism strategy (dangerousness? proximity to a plot? knowledge of terrorist activities? something else?), effective administrative detention ought to involve adjudicative mechanisms likely to produce accurate and fair determinations of that particular factual predicate.

If, for example, the dominant strategic purpose is incapacitation and the critical detention test is therefore dangerousness, we should strive for hearings designed to assess and predict accurately future behavior, with adjudicators who have access to information relevant to that inquiry and processes that effectively test the quality of that specific sort of information.<sup>152</sup> True, regular federal judges make similar dangerousness determinations based on adversarial hearings all the time (take the example cited above of bail conditions while awaiting trial).<sup>153</sup> But terrorist dangerousness is different from criminal dangerousness in both kind and degree<sup>154</sup> and requires understanding not just an individual's probable

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151. See Jay Sterling Silver, *Equality of Arms and the Adversarial Process: A New Constitutional Right*, 1990 WIS. L. REV. 1007, 1008 ("our 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 some provisions in the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Title X, §1005(e), 119 Stat. 2680, 2741-2743 (2005) (codified as amended at 28 U.S.C.A. §2241(2) (West Supp. 2008)), restricting habeas corpus jurisdiction at Guantánamo. See, e.g., P. Sabin Willett, *Detainees Deserve Court Trials*, Op-Ed., WASH. POST, Nov. 14, 2005, at A21. But others observe that adversarial process may sometimes suppress truth-finding. See, e.g., Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1036 (1975) ("many 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. INTL & COMP. L. 97 (1997) (observing that the American criminal justice system often subordinates truth to other values).

152. Procedural due process cases are illustrative here. Compare, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970) (requiring evidentiary hearings in situation where veracity and credibility of claimants is key), with *Parham v. J.R.*, 442 U.S. 584 (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).

153. Cf. *Salerno v. United States*, 481 U.S. 739, 751 (1987) (noting that right to counsel and adversarial process mandated in the Bail Reform Act were "specifically designed to further the accuracy of [the] determination [of the likelihood of future dangerousness]").

154. See *supra* note 65 and accompanying text. Those who believe that terrorism should be treated as crime may disagree with this point, but other ways in which terrorist dangerousness generally differs from criminal dangerousness include its strategic purpose,

activities and the magnitude of his threat but how his activities relate to fellow terrorists' activities. If the dangerousness test includes a further inquiry into whether less liberty-restrictive means can mitigate the threat (as the British Lords have required of recent British counterterrorism laws),<sup>155</sup> courts would further need to inquire of and assess the effectiveness of an array of government tools, including monitoring and surveillance and international cooperative efforts. These latter inquiries seem better suited to a specialized court (perhaps a "national security court"), so that judges can accumulate experience and expertise in these technical and operational matters.<sup>156</sup> The same is probably true for disruption detention decisions, which would require judicial understanding of functional linkages between a suspect and terrorist organizations, as well as judicial decisionmaking under extreme time pressures. The success of France's counterterrorism efforts is sometimes credited in part to its development of a specialized, centralized terrorism court, because that country allowed its magistrates to become "the type of expert on the subject of terrorism that is difficult to create within normal judicial institutions."<sup>157</sup>

If, by contrast, the substantive standard for incapacitation detention is not future dangerousness itself but whether a suspect committed certain acts or is a member of a particular group (perhaps as proxies for dangerousness), this again starts to look very much like an inquiry that regular courts ordinarily conduct, using common analytical tools and types of evidence, though perhaps with special provisions for classified information. There is little reason why an act or membership inquiry could not be handled as effectively by regular, generalist judges as by a special court.

In similar ways the choice among strategic imperatives behind administrative detention points to different approaches to attorney assistance.<sup>158</sup> The nature of information used to prove or disprove the urgent need for detention in a disruption or information-gathering regime

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individual motivation, and long-term as well as short-term consequences.

155. *A v. Sec'y of State for the Home Dep't*, [2005] 2 A.C. 68, 102-111 (H.L.).

156. *See* Goldsmith & Katyal, *supra* note 3; Kenneth Anderson, *Law and Terror*, POLICY REV., Oct. 2006, at 1.

157. Jeremy Shapiro & Benedicte Suzan, *The French Experience of Counter-Terrorism*, SURVIVAL, Mar. 2003, at 67, 78, available at <http://www.brookings.edu/views/articles/fellows/shapiro20030301.pdf>; *see also* GARAPON, *supra* note 50, at 5-6. The Constitution Project takes issue with this view in arguing against national security courts: "unlike tax and patent law, there is simply no highly specialized expertise that would form relevant selection criteria for the judges." A CRITIQUE OF "NATIONAL SECURITY COURTS," *supra* note 4, at 3. *See also* Coughenour, *supra* note 1 (arguing that federal judges have adequate expertise to handle complex terrorism cases).

158. While assistance of counsel is generally believed to enhance truth-finding, in some circumstances the Supreme Court has found it does not contribute significantly to decision making accuracy. *See, e.g.*, *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) (rejecting due process challenge to federal statute limiting fees payable to lawyers representing veterans' benefit claimants); *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981) (holding that Constitution does not require appointment of counsel for indigent parents in every parental status termination proceeding).

(which requires knowing a great deal about terrorist organizations as a whole) might also be better understood and handled by a dedicated bar of specialist attorneys with clearance and access to highly sensitive intelligence, as some administrative detention advocates have proposed.<sup>159</sup> The need for restricting attorney choice in a comparatively transparent and less time-sensitive incapacitation regime will likely be significantly lower.

Besides judicial and representational structure, the strategic purpose of administrative detention and the corresponding definition of the substantive class will also guide other aspects of institutional design, including appropriate duration of detention and whether ongoing, periodic review is warranted. If administrative detention is focused on incapacitation and therefore defines the class by dangerousness, or on a proxy such as past acts or membership in a group, individual detentions would logically last as long as that condition exists – that is, as long as the individual poses that danger. But whereas dangerousness itself may change over time (as events pass, plots are thwarted, or as a detainee grows older or perhaps even demonstrates regret or a decision to cooperate), conditions such as membership or past actions do not.<sup>160</sup> A factual assessment like the former therefore probably merits periodic review,<sup>161</sup> while assessing static conditions such as the latter does not (though it still may warrant time limitations on detention).

In contrast to an incapacitation regime that would probably include long-term detention, a disruption-based administrative detention system could be effective with very short-term detentions; indeed, merely arresting then releasing a terrorist plot member might cause his collaborators to stand down.<sup>162</sup> And relatively short-term detentions might satisfy most information-collection requirements<sup>163</sup> but would provide little deterrent threat to would-be terrorist collaborators.

Finally, the way strategic purposes and the subject class of individuals

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159. See, e.g., Goldsmith & Katyal, *supra* note 3.

160. Israel's Unlawful Enemy Combatant Statute, discussed at *supra* note 97 and accompanying text, requires re-examination of the need for continued detention every six months. See Incarceration of Unlawful Combatants Law, 5762-2002 (Isr.), available at 32 ISRAELI Y.B. HUM. RTS. 389 (2002) and at <http://www.justice.gov.il/NR/rdonlyres/7E86 D0 98-0463-4F37-A38D-8AEBE770BDE6/0/IncarcerationLawedited140302.doc>.

161. See Goldsmith & Katyal, *supra* note 3; Wittes & Gitenstein, *supra* note 2, at 12; see also Waxman, *supra* note 20.

162. The Spanish government, for example, uses criminal investigatory detention powers – sometimes for very brief periods – in similar ways. See Victoria Burnett, *After Raids, 14 Held in Spain on Suspicion of a Terror Plot*, N.Y. TIMES, Jan. 21, 2008, at A3; see also HUMAN RIGHTS WATCH, *supra* note 50, at §VI, available at <http://www.hrw.org/en/node/62151/section/7> (detailing France's use of broad arrest powers to disrupt terrorist plotting).

163. But see Declaration of Vice Admiral Lowell E. Jacoby, *supra* note 72 (explaining that intelligence collection through interrogation may take months or years to bear fruit in some cases, especially when the suspect is trained to resist interrogation).

are defined also drives the logic of decision-making transparency. An incapacitation strategy is compatible with high levels of public scrutiny, since there will usually be little reason to hide – and indeed much to gain from disclosing openly – the underlying justification for a detention.<sup>164</sup> Some degree of transparency would be critical to a deterrence strategy as well, to the extent locking up individuals aims to dissuade others from certain specific conduct.

But the transparency of disruption-detention is more problematic, because the government may not wish to tip off other plot collaborators or cause public panic. Some European countries, for example, have laws that allow individuals otherwise legally detained to be held incommunicado for brief periods if cutting off communications (and sometimes even lawyer access) is necessary to thwart terrorist attacks.<sup>165</sup> And information-collection detention would require high levels of secrecy to avoid disclosing sensitive intelligence or tipping off the targets of possible stings.<sup>166</sup>

In any terrorist administrative detention system there will likely be a need to safeguard sensitive intelligence information from public dissemination, but in the cases of detention for disruption or information-gathering the very proceedings themselves might need to be at least temporarily shielded from disclosure.<sup>167</sup> Such administrative detention regimes might therefore have a greater need for closed or perhaps even *ex parte* hearings (perhaps analogous to hearings by the Foreign Intelligence Surveillance Court)<sup>168</sup> than would a system designed for incapacitation or deterrence.

This analysis points to an incapacitation regime and a disruption regime – the two most promising strategic approaches to administrative detention outlined above – with very different designs.<sup>169</sup> An incapacitation system could quite naturally feature generalist judges and lawyers conducting open and transparent hearings to regulate what would often be long-term

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164. On the strategic benefits of detention decision-making transparency, see Waxman, *supra* note 20.

165. See Anna Oehmichen, *Incommunicado Detention in Germany: An Example of Reactive Anti-terror Legislation and Long-term Consequences*, 9 GERMAN L. J. 855 (2008), available at [http://www.germanlawjournal.com/pdf/Vol09No07/PDF\\_Vol\\_09\\_No\\_07\\_855-888\\_Articles\\_Oehmichen.pdf](http://www.germanlawjournal.com/pdf/Vol09No07/PDF_Vol_09_No_07_855-888_Articles_Oehmichen.pdf). These laws have come under significant scrutiny and legal challenge. See *id.*

166. See Remarks by Attorney General Mukasey, *supra* note 8 (emphasizing the risks of disclosing sensitive intelligence through processes to challenge detention).

167. For a view critical of secrecy in such contexts, see STEPHEN J. SCHULHOFER, *THE ENEMY WITHIN* 12-14 (2002).

168. See 50 U.S.C.A. §1803 (West 2003 & Supp. 2008). Generally speaking, the FISC, established by the Foreign Intelligence Surveillance Act of 1978 (FISA), Pub. L. No. 95-511, 92 Stat. 1783, oversees requests for surveillance orders against suspected foreign intelligence agents and terrorists inside the United States.

169. See *supra* notes 124-132 and accompanying text (explaining that incapacitation and disruption are likely more strategically promising preventive detention approaches than deterrence or information gathering).

detention. A disruption system might require specialized courts and lawyers operating to regulate short-term detention amid some secrecy. There may therefore be a need to choose between strategic approaches in fashioning a new law, or to consider a bifurcated system to handle the two types of detention.

The broader point is that effective procedural design is not independent of strategic purpose or the substantive definition of the detention class. It is heavily driven by both.

#### CONCLUSION

This article began by explaining its purpose not to answer definitively whether new administrative detention laws are needed or to offer a detailed legislative road map, but rather to recast the terrorist detention discussion in terms of purpose and substance before turning to procedure and institutions. Most of the administrative detention debate moves too quickly to procedural design. This risks missing major pieces of the puzzle, including a clear appreciation of the specific marginal benefits and risks of various detention strategies and proposed legal reforms. An administrative detention system's legitimacy and effectiveness – measured in terms of both liberty and security – will depend at least as much on its purpose and substantive standards as on its procedures.

Those proposing new administrative detention laws have been tempted to take as the starting point existing enemy combatant detention policies and to build onto them more robust and refined procedural protections. Instead, reform proposals should consider narrower categories designed to incapacitate the most dangerous suspects or disrupt imminent plots. Working more methodically through the *why* and *whom* questions helps illuminate the dangers of vague or broadly defined detention criteria and sharpens the image of *how* more narrowly crafted administrative detention could operate.