

# Harmonizing Policy and Principle: A Hybrid Model for Counterterrorism

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## INTRODUCTION

In the ongoing and evolving response to terrorism, the United States has had to confront a threat that straddles the line between armed conflict and criminal enterprise. Like traditional warfare, the United States confronts adversaries with the avowed intention to harm the United States as a political entity and the capacity to inflict massive casualties and extensive economic and physical destruction. But unlike traditional armed conflict, the adversary represents no state, and its members wear no uniform announcing their membership in a hostile organization. In this respect, these organizations bear important similarities to criminal organizations.

Twelve years have passed since the terrorist attacks on September 11. What started out as a concentrated response against one cohesive terrorist organization, al Qaeda, with a concentrated base in Afghanistan and Pakistan, began to spread as al Qaeda-supported affiliate organizations sprang up in the Arabian Peninsula, Somalia, and the Maghreb. But as U.S. counterterrorism efforts began to defeat al Qaeda's core – killing its leader Osama bin-Laden and many in his senior leadership ranks – the more diffuse affiliate groups continued to plot attacks aimed at the American homeland. Sometimes these affiliates planned attacks in coordination with the central al Qaeda organization, as the United States discovered when it intercepted communications between the leader of al Qaeda's Yemen-based offshoot and Osama bin Laden's successor, Ayman al-Zawahri, closing nineteen embassies across the Middle East and North Africa as a precaution against.<sup>1</sup> At other times, these terrorist groups have seemingly acted alone to strike at American and Western targets in their own neighborhoods, with localized attacks against the U.S. consulate in Benghazi and the BP oil facility in Algeria. Through Internet magazines and chat rooms, al Qaeda affiliates could radicalize individuals residing in America, and give them basic training to carry out small-scale attacks from their home base in American

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1. Alan Cowell, *U.S. and Britain Withdraw Personnel from Yemen*, INT'L HERALD TRIB., Aug. 7, 2013, at 5; Lara Jakes & Adam Goldman, *Embassy closings spurred by al-Qaida threat circulating on secretive jihadi chat rooms*, ASSOCIATED PRESS, Aug. 15, 2013, available at <http://www.vancouversun.com/news/Threat+from+alQaida+leaders+that+closed+embassies+discussed/8788071/story.html>.

cities.<sup>2</sup>

To deal with these unconventional threats, policymakers have employed a variety of sometimes controversial tools: some drawn from traditional warfare, some from crime fighting, and other, novel techniques developed to address this new kind of threat. These latter include indefinite detention without prosecution, “enhanced” interrogation, rendition to third countries, military tribunals, and targeted killing that successive U.S. administrations have sought to justify under domestic and international law.

The variety of tools, and the choice between them, has been primarily driven by the varying objectives entailed in the conflict – to punish bad actors, but more importantly to prevent future acts of terrorism by incapacitating the enemy, deterring others from joining their ranks and pursuing future attacks, and gathering intelligence to disrupt terrorist plots and dismantle terrorist networks. In practice, which tools are used and when is shaped not just by the exigencies of the threat, but also by constraints imposed by the Congress and the courts, as well as the executive branch’s own evolving views on domestic and international law. These constraints are frequently driven by factors, including political calculation, that are not directly related to immediate counterterrorism objectives. The result is an operating environment in which the choice of tool is imperfectly related to the objective, and can lead to unwanted and undesirable outcomes – for example, a policy environment that leads decision-makers to favor killing rather than capturing the adversary for reasons unrelated to the safety of U.S. personnel, or that forces the detention of adversaries outside the United States rather than bringing them to the United States, which can strain U.S. foreign relations.

Even after twelve years, only recently has there been an effort to develop a written framework to guide the U.S. response. President Obama recently announced the existence of classified Presidential Policy Guidance to govern use-of-force decisions inside the executive branch.<sup>3</sup> Even now, the public details on what rules would control decisions to detain or target remain slim, and the language of existing guidance seems to leave much room for flexible and permissive interpretation.

This Article explores the tension between the policy objectives of this conflict (deterrence, incapacitation, and intelligence gathering) and the traditional legal frameworks used to justify them (the law of war and the criminal justice model). Part I examines the rationale for these policy tools and the limitations of each of the traditional frameworks for this conflict, looking at where historical cases and American principles have drawn the line between security and

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2. STAFF OF SEN. COMM. ON HOMELAND SEC. & GOV’L AFF., 110TH CONG., VIOLENT ISLAMIST EXTREMISM, THE INTERNET, AND THE HOMEGROWN TERRORIST THREAT 1, 11 (2008), *available at* <http://www.hsgac.senate.gov/imo/media/doc/IslamistReport.pdf>.

3. President Barack Obama, Remarks at the National Defense University (May 23, 2013).

liberty. Part II looks at the ways that, in this conflict, all three branches have worked at cross-purposes and deviated from what, from a policy perspective, would seem to be a more appropriate legal framework. Finally, Part III lays out the basic components of a hybrid model, in a way that allows for effective counterterrorism policy without sacrificing legality and principle.

#### I. PREVENTION AND PUNISHMENT IN THE TRADITIONAL MODELS

Debates surrounding the propriety of policy tools in counterterrorism are often quick to jump to questions of what process is due to detainees, what evidence can be used in military tribunals, or whether American citizens can be targeted overseas, without focusing on the underlying rationale for why we would detain, prosecute, or target. Proponents prioritize the national security imperative of preventing terrorist attacks, and are prepared to violate traditional principles, including the danger of imposing costs on innocent individuals (so-called “Type I” errors, or false positives) as a regrettable but necessary cost. Critics focus on whether the use of various tools does violence to broadly held values, and explicitly or implicitly accepts increased risk (so-called “Type II” errors, or false negatives) as a necessary price for safeguarding those values.

These opposing philosophical camps map fairly closely onto the difference between those who advocate an approach built on the peacetime criminal justice model and those who believe the starting point should be a wartime model. The first school recognizes that the safeguards built into the Bill of Rights and its associated jurisprudence – protecting the rights of the accused, the presumption of innocence, double jeopardy, and limitations on surveillance, all increase the risk that wrong-doers will remain at large, but that such risk is an acceptable price to pay for preserving the underlying liberty at the heart of the political system. Their willingness to accept this risk flows from two interrelated convictions: the central importance of culpability as a justification for the application of the coercive power of the state, and the need to limit the unbridled use of the state’s power against citizens, however compelling the state interest. The criminal justice model is dominated by the objective of punishing the guilty, while deterrence and incapacitation play a secondary role.

The wartime model, however, is more utilitarian. It stems from the premise that the state can legitimately use tools in self-defense that would not be permissible in peacetime – killing or detaining the adversary without a determination of individual culpability. Prevention, through incapacitation and deterrence, is the dominant objective, while punishment takes a back seat.

In practice, of course, the two models are not so starkly opposed. In the criminal justice case, police may use reasonable force in self-defense, even without a judicial determination of guilt. Suspects outside the United States may be detained and forcefully brought back to the United States without the usual

judicial process. Non-citizens are often afforded fewer rights than citizens.<sup>4</sup> Conversely, even in wartime, there are constraints on the state's use of force. For example, a state may not torture.<sup>5</sup> International law limits the state's ability to use force in going to war through the *jus ad bellum* constraints of military necessity and proportionality. During war, international humanitarian law limits states to the *jus in bello* requirements of proportionality to limit collateral damage, and distinction to separate out "innocent" civilians from combatants.<sup>6</sup>

But at its heart, the debate over each of the tools and tactics is a debate on whether counterterrorism should primarily be seen through a criminal justice or wartime lens. During the Bush Administration, proponents of the wartime lens believed that the United States was in a "global war on terror." From their post-September 11 frame of reference, "it certainly is no longer clear that the constitutional system ought to be fixed so as to make it difficult to use force. It is no longer clear that the default state for American national security is peace."<sup>7</sup> President Obama dropped the "global war on terror" frame, but still adapted the rhetoric of war. He emphasized that "[w]e are at war against al Qaeda . . . . And we will do whatever it takes to defeat them."<sup>8</sup> On the other side, critics of the war model argue that counterterrorism is more like crime fighting. For them, war is "neither a persuasive description of the situation we face nor an adequate statement of our objectives. It misleads us as to the means that we will have to use. It provides undeserved dignity to our opponents."<sup>9</sup> Instead, proponents of the criminal justice framework argue that "[w]e should recognize terrorism for what it is: a particularly dangerous and complex form of crime. And we should respond to this threat accordingly, with the tools that the well-developed

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4. Some of the disparity in treatment between citizens and aliens comes from domestic law. For example, military tribunals could be used to try citizens and non-citizens alike, but Congress has focused post-9/11 trials on non-citizens. Military Commissions Act of 2009, Pub. L. No. 111-84, §§1801-07, 123 Stat. 2190, 2574-2614 (2009) (establishing the Act "to try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission); *see also* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 977 (2002). The Alien Enemies Act of 1798 authorized the President to deport resident aliens whose countries of origin are at war with the United States. 50 U.S.C. §§21-24 (2012); *Ludecke v. Watkins*, 335 U.S. 160 (1948). *But see* *Johnson v. Eisentrager*, 339 U.S. 763, 772 (1950) (holding that enemy aliens could not seek habeas in federal court, but noting that this decision was imposed "as an incident of war, and not as an incident of alienage.").

5. *See, e.g.*, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 75 U.N.T.S. 135, 136-38; *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) ("[F]or purposes of civil liability, the torturer has become – like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind.").

6. *See, e.g.*, Steven R. Ratner, *Jus ad Bellum and Jus in Bello after September 11*, 96 AM. J. INT'L L. 905 (2002).

7. John Yoo, *War, Responsibility, and the Age of Terrorism*, 57 STAN. L. REV. 793, 816 (2004).

8. President Barack Obama, Remarks by the President on Strengthening Intelligence and Aviation Security (Jan. 7, 2010), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-strengthening-intelligence-and-aviation-security>.

9. PHILIP B. HEYMAN, *TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR* 19 (2004).

criminal justice framework provides.”<sup>10</sup>

We believe that this debate presents a false choice between the war and criminal justice models. We agree with scholars who recognize that neither framework is truly satisfactory,<sup>11</sup> and that “[a]s with so many legal dichotomies, that of ‘crime’ versus ‘war’ does not fit an emergent reality” of terrorism in the post-9/11 age.<sup>12</sup> And we have looked at how this country has responded to this same dilemma throughout its history: with the Alien and Sedition Acts of the late eighteenth century, the suspension of habeas corpus in the Civil War, and Japanese internment and the Nazi saboteur cases in World War II. In the current debate, we have seen ad hoc attempts by all three branches to pick and choose between the two models, rather than a more systematic approach that recognizes that the pure criminal justice model cannot meet the legitimate state interest in protecting the security of citizens, while the pure war model does excessive and unnecessary damage to core values. Our goal is to develop an approach that recognizes the need to prioritize incapacitation and deterrence while limiting the damage to these deeply-held principles.

Incapacitating terrorists is the most immediate way to meet counterterrorism objectives: preventing them from carrying out plots physically constrains their ability to function. But the government may also wish to deter and dissuade individuals from carrying them out in the first place. The focus on prevention can be seen throughout the executive branch characterization of its counterterrorism operations. The focus in this conflict is “to prevent attacks instead of simply prosecuting those who try to carry them out.”<sup>13</sup> Most of the United States’ counterterrorism efforts have aimed to prevent future attacks against the United States by constraining the ability of al Qaeda to plan them and by thwarting formed plots.<sup>14</sup> In some cases, the government may also wish to rehabilitate and counter-radicalize. Added to this mix is the importance of collecting intelligence to help the government understand the enemy or thwart specific plots. All of

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10. Miriam J. Aukerman, *War, Crime, or War Crimes?: Interrogating the Analogy Between War and Terror*, in ENEMY COMBATANTS, TERRORISM, AND ARMED CONFLICT LAW: A GUIDE TO THE ISSUES 162 (David K. Linnan ed., 2008).

11. BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM 44 (2006) (“So neither ‘war’ nor ‘crime’ is really adequate. War does not express the public affront to national sovereignty left in the aftermath of a successful terrorist attack. But war talk threatens all of us with arbitrary power exercised without the restraint of legal safeguards developed over centuries of painful struggle. ‘Crime’ has proved itself adequate when dealing with dangerous conspiracies, but only within a social context that presupposes the government’s effective sovereignty.”).

12. RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 72 (2006); see also Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1081 (2008) (writing that neither model can meet the “central legal challenge of modern terrorism,” which is “the legitimate and preventive incapacitation of uniformless terrorists who have the capacity to inflict mass casualties and enormous economic harms and who thus must be stopped before they act”).

13. President Barack Obama, Remarks by the President on National Security (May 21, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09>.

14. The White House, National Strategy for Counterterrorism 11 (2011), available at [http://www.whitehouse.gov/sites/default/files/counterterrorism\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf).

these must come together to achieve the main objective in this conflict, that is, “disrupting, dismantling, and eventually defeating” al Qaeda and its affiliates.<sup>15</sup>

In some cases, these goals can be mutually reinforcing. Incapacitating terrorists may deter others from joining a terrorist organization. Incapacitating them through detention may yield intelligence that leads to the incapacitation of still more terrorists. But sometimes pursuit of one goal is may undercut the pursuit of another. Incapacitating an individual through targeted killing will, of course, foreclose any future opportunity to interrogate him for intelligence. Detention without trial or harsh interrogation may provide propaganda opportunities for terrorists to recruit new members. Indeed, an important element of the critique of the expanded use of drone strikes is the belief that they cause more harm than good in achieving counterterrorism objectives, not only by radicalizing future terrorists, but also by alienating publics in countries sympathetic to the United States.<sup>16</sup>

Prevention, therefore, comes in two types: the short-term prevention of bad acts – the next terrorist attack – and the long-term prevention of terrorism. This latter type involves addressing the root causes of terror, determining why individuals participate in terrorist activities in the first place, how they become violent extremists, or what compels them to join terrorist organizations, as well as how to mobilize governments and publics to support counterterrorism efforts. There is tension between these two types of prevention. Incapacitation of terrorists through detention or targeted killing may prevent attacks in the short term, but may paradoxically work against prevention in the long term. The use of force against terrorists can backfire. As the Israeli experience suggests, it can enrage local populations, encourage new recruits to join terrorist organizations, and draw the condemnation of allies.<sup>17</sup> Both short-term and long-term prevention are vital national interests, but it is important that they do not work at cross-purposes. Tethering short-term prevention efforts to broadly accepted domestic and international principles can go a long way to square the circle.

The decisions concerning which tools to use and what trade-offs to accept are quintessential policy questions. Yet, to say that they are policy questions does not mean that the choice of which rule of law framework to apply is irrelevant, because that choice itself has important policy implications that go beyond the moral questions of whether and under what circumstances government may use

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15. *Id.* at 1.

16. See, e.g., Sudarsan Raghavan, *In Yemen, U.S. Airstrikes Breed Anger, and Sympathy for al-Qaeda*, WASH. POST, May 29, 2012, [http://articles.washingtonpost.com/2012-05-29/world/35456187\\_1\\_aqap-drone-strikes-qaeda](http://articles.washingtonpost.com/2012-05-29/world/35456187_1_aqap-drone-strikes-qaeda) (“But as in the tribal areas of Pakistan, where U.S. drone strikes have significantly weakened al-Qaeda’s capabilities, an unintended consequence of the attacks has been a marked radicalization of the local population”); PEW RES. CENT., *Pakistani Public Opinion Ever More Critical of U.S.*, June 27, 2012, at 12 (“Among [Pakistanis] who have heard a lot or a little [about drone attacks that target leaders of extremist groups], nearly all (97%) consider them a bad thing.”).

17. See, e.g., DANIEL BYMAN, *A HIGH PRICE: THE TRIUMPHS & FAILURES OF ISRAELI COUNTERTERRORISM* 5 (2011) (noting that Israel often “blunders from crisis to crisis without a long-term plan for how to solve the problem once and for all”).



force against individuals.

In this conflict, the question that should drive policy is what rule of law framework is best suited to achieve our long-term national security objectives—which includes, but is not limited to, immediate counterterrorism needs, and recognizes that an approach consistent with core values is itself a “national security” objective.

### A. *Historical Cases*

We argue that the law of war and criminal law paradigms, taken separately, are ill suited for today’s modern conflict. This is, however, not the first time that America has grappled with the choice between the criminal justice and law of war paradigms. As history shows, the decision of which model to choose is a fraught one. Suspending domestic criminal laws, for example, can unintentionally de-legitimize government efforts against what would otherwise be a legitimate target of a state’s police power. In times of emergency, domestic law allows the executive branch to respond to the exigencies of the circumstances, but it can also overreach.

The first example of Congressional-Executive overzealousness was in the Federalist Era, with the Alien and Sedition Acts of 1798. These statutes were enacted against the backdrop of the French Revolution, with inter-party disputes between the Federalists and the Democratic-Republicans in the foreground, and amidst fears that the same radicalism and revolts would spill over to the United States.<sup>18</sup> The Alien Act authorized the President to deport any alien he deemed “dangerous to the peace and safety of the United States” and denied aliens access to federal judges to petition for writs of habeas corpus.<sup>19</sup> The Sedition Act made defamation – “false, scandalous, and malicious writing” – of the President or Congress illegal.<sup>20</sup> Both Acts contained sunset clauses, with the “emergency” legislation set to expire two years after enactment.<sup>21</sup> In practice, authorities only prosecuted Republican critics of the Federalist government under the Sedition Act (all of whom were later pardoned by Thomas Jefferson), and did not enforce the Alien Act at all.<sup>22</sup> A century and a half later, the Supreme Court found that although the Sedition Act was never formally struck down in court, “the attack upon [its] validity has carried the day in the court of history.”<sup>23</sup> The disavowal of this kind of selective prosecution for acts that were considered core First Amendment rights served as a reminder that even during

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18. JOHN C. MILLER, *CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS* 141 (1951).

19. *Id.* at 52-53; Alien Act of June 25, 1798, ch. 58, §1, 1 Stat. 570 (1798).

20. Sedition Act of July 14, 1798, ch. 74, §2, 1 Stat. 596 (1798).

21. The Alien Enemy Act, enacted at the same time as the Alien and Sedition Acts, did not contain a sunset provision and remains in force today. It authorizes the President to deport aliens if the United States is at war with their home countries. Alien Enemy Act of July 14, 1798, ch. 66, §1, 1 Stat. 577 (1798) (current version at 50 U.S.C. §§21-24 (2012)).

22. Cole, *supra* note 4, at 990.

23. *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964).

times of perceived emergency, certain civil liberties have to be protected.

The Civil War not only tested the limits of the traditional criminal and rule of law paradigms, but also raised sharply the question of the respective role of the three branches in determining which rule of law framework to apply. President Lincoln had to wrestle with the appropriate rule of law framework immediately after Confederate forces attacked Fort Sumter. Lincoln maintained that Southern secessionists were rebels and traitors to the United States, and treated them as criminals. To have had Congress declare war would not only have implicitly recognized the “inter-state” nature of the conflict, but would have conferred on rebels the right to special treatment under the laws of war. At the same time, Lincoln also employed tools associated with war. With Congress away on recess, Lincoln relied on his emergency powers to call up state militias for military service, authorize money for military acts, and blockade Confederate-held ports.

The decision to blockade Southern ports blurred the lines between the international laws of war and domestic criminal law. Nations do not blockade their own ports – they close them. If the Southerners, in Lincoln’s view, had not seceded, then Southern ports could not technically be blockaded. These are legal semantics, but they carried important foreign policy consequences.<sup>24</sup> The British and French, whose economies depended on Southern cotton, sent demarches to Washington against port closure. If Lincoln merely “closed” the ports, their merchant ships would be subject to American domestic criminal law. If Lincoln issued a blockade, however, captured ships would be subject to the international laws of war and prize courts – a set of rules familiar to, indeed written by, these Western powers.<sup>25</sup> But a blockade would have the same implications as a congressional declaration of war. Applying the laws of war would give Southerners legitimacy. Indeed, the Supreme Court ruled in the *Prize Cases* that even without an express declaration of war by Congress, the Civil War qualified as an armed conflict. Lincoln had the authority to implement a blockade, to which law of war principles applied.<sup>26</sup> Yet even as the Court declared the Civil War an armed conflict, Lincoln would not confer combatant status to Confederate soldiers. He maintained a naval blockade operating under the laws of war, but treating acts of “[a]rmed or unarmed resistance by citizens of the United States against the lawful movements of their troops . . . [as] treason.”<sup>27</sup>

Meanwhile, several states had already seceded from the Union, and Virginia joined them on April 17, 1861. With Washington nearly surrounded on all sides, Lincoln’s generals would have to rely on Maryland, which was also teetering toward secession, to move troops, communications, and supplies. Without

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24. JOHN FABIAN WITT, *LINCOLN’S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* 144-147 (2013).

25. BRIAN MCGINTY, *LINCOLN AND THE COURT* 122-125 (2008).

26. *The Brig Amy Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635 (1863).

27. Abraham Lincoln, General Orders, art. 157, G.O. 100 (1863).



Maryland, Washington would be cut off from the North.<sup>28</sup> As the Confederate army seemed poised to take over Baltimore, Lincoln unilaterally authorized General Winfield Scott, Commanding General of the Union Army, to suspend the writ of habeas corpus whenever the public safety required it.<sup>29</sup> It was the first, and only, time in history that a president suspended the writ without authorization from Congress.<sup>30</sup> Supreme Court Chief Justice Taney, riding circuit in federal court in Maryland, ruled that Lincoln's suspension was illegal.<sup>31</sup> For Taney, the text of the Constitution was clear: only Congress had the authority to suspend the writ. The Chief Justice could imagine no situation under which the president "in any emergency" could take such action, especially when civilian courts remained open to hear cases.<sup>32</sup>

Lincoln ignored the court's ruling, and made his appeal directly to Congress in a special session called on the 4th of July, 1861. Lincoln defended his acts, "whether strictly legal or not," as necessary, "trusting, then as now, that Congress would readily ratify them."<sup>33</sup> Lincoln later wrote that "measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation."<sup>34</sup> In this period of emergency, it took a seemingly unconstitutional act to save the Constitution. In the end, the issue was moot. Congress ratified the suspension of the writ *ex post*.<sup>35</sup>

The twentieth century brought other "national emergencies" that have called forth responses that challenged traditional limits on government power: the Palmer Raids in 1919 and 1920, in which the Attorney General encouraged the arrest of some 4,000-10,000 individuals suspected of being radical leftists, and the internment of over 110,000 Japanese and Japanese Americans during World War II.<sup>36</sup> For advocates of Japanese internment, the lack of evidence of sabotage only underscored the dangerousness of these individuals. Then-governor of California Earl Warren said it was "quite significant that in this great state of ours we have had no fifth-column activities and no sabotage reported. It looks very much to me as though it is a studied effort not to have any until the zero

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28. DORIS KEARNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* 353 (2005); WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 22-23 (1998).

29. Letter from Abraham Lincoln to General Winfield Scott (Apr. 27, 1861), in 6 *THE COMPLETE WORKS OF ABRAHAM LINCOLN* 258 (John G. Nicolay & John Hay eds., 1894).

30. Trevor W. Morrison, Hamdi's *Habeas Puzzle: Suspension as Authorization?*, 91 *CORNELL L. REV.* 411, 428-29 (2006).

31. *Ex parte Merryman*, 17 F. Cas. 144, 151-152 (C.C.D. Md. 1861) (No. 9487).

32. *Id.* at 149; see also U.S. CONST. art. 1, §9, cl.2 ("The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.").

33. Abraham Lincoln, July 4th Message to Congress (July 4, 1861), available at <http://millercenter.org/scripps/archive/speeches/detail/3508>.

34. Abraham Lincoln, Letter to Alfred G. Hodges (Apr. 4, 1864), in *LINCOLN: SPEECHES AND WRITINGS: 1859-1865, 585-586* (Library of America, 1989).

35. Act of Mar. 3, 1863, ch. 81 §1, 12 Stat. 755.

36. Cole, *supra* note 4, at 992-993.

hour arrives.”<sup>37</sup> General DeWitt, who recommended that President Roosevelt issue Executive Order 9066, argued that the absence of sabotage was “a disturbing and confirming indication that such action will be taken.”<sup>38</sup> In addition to the absence of sabotage, the presence of “unassimilated” Japanese-Americans who lived together and congregated around harbors and other places with critical infrastructure was proffered as evidence of the impending danger.<sup>39</sup> The U.S. Government also made the argument that because Japanese Americans were discriminated against, they could possibly resent the United States and become disloyal.<sup>40</sup> The Supreme Court decided that it was “unable to conclude that it was beyond the war power of Congress and the executive to exclude those of Japanese ancestry,” even citizens whose loyalty was not questioned, because “when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.”<sup>41</sup> In hindsight, there is near universal condemnation of the internment, which utterly lacked individualized determinations with procedural safeguards.<sup>42</sup>

The use of military commissions in World War II was also an alternative tool used by the executive to skirt traditional procedures in federal court. President Roosevelt sent eight Nazi saboteurs to military commissions, including one American citizen. The legality of the commission forum was upheld by the Supreme Court in *Ex parte Quirin*, under the theory that they had clandestinely entered the United States as “unlawful belligerents,” and therefore surrendered their prisoner-of-war status.<sup>43</sup> Scholars have found the president’s actions to be “a prosecution designed to obtain the death penalty” and the judicial acquiescence as a “rush to judgment, . . . an agonizing effort to justify a fait accompli.”<sup>44</sup> The Court had issued its ruling just hours after oral arguments had ended, and issued its rationale for the decision only after six of the saboteurs had been

37. JACOBUS TENBROEK, EDWARD N. BARNHART & FLOYD W. MATSON, PREJUDICE, WAR AND THE CONSTITUTION: CAUSES AND CONSEQUENCES OF THE EVACUATION OF THE JAPANESE AMERICANS IN WORLD WAR II 83-84 (1954).

38. J.L. DeWitt, Japanese Evacuation from the West Coast, 1942: Final Report 34 (1943); see also Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945).

39. DeWitt, *supra* note 38; see also Brief for the United States, *Korematsu v. United States*, 323 U.S. 214 (1944) (No. 22), 1944 WL 42850, at \*11-15; Brief for the United States, *Hirabayashi v. United States*, 320 U.S. 81 (1943) (No. 870), 1943 WL 71885.

40. *Id.* Brief for the United States, *Hirabayashi v. United States*, 320 U.S. 81 (1943) (No. 870) at \*21.

41. *Korematsu v. United States*, 323 U.S. 214, 217-218, 220 (1944).

42. Eric L. Muller, *12/7 and 9/11: War, Liberties, and the Lessons of History*, 104 W. VA. L. REV. 571, 586 n.75 (2002) (citing cases in which Justices Breyer, Ginsburg, Kennedy, Scalia, Stevens, and Thomas wrote or joined opinions condemning *Korematsu*); see also Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1043 (2004) (writing that *Korematsu* “is bad law, very bad law, very, very bad law.”); David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2575 (2003) (*Korematsu* “has served as an object lesson in what the Court and the government ought *not* to do in future crises.”); Rostow, *supra* note 38.

43. *Ex parte Quirin*, 317 U.S. 1 (1942).

44. David J. Danelski, *The Saboteurs’ Case*, J. S. CT. HIST, July 1996, at 61.

executed. At the time of the decision, Justice Frankfurter, wary of a showdown with the other branches of government, sent a memo to his colleagues urging them that ruling in favor of the saboteurs would leave “the seeds of a bitter conflict involving the President, the courts and Congress.”<sup>45</sup> He later reflected that the case was “not a happy precedent.”<sup>46</sup> Nevertheless, the executive branch has applied the precedent to justify trying combatants in military commissions, even where the same individuals might not be able to be convicted in federal court.

That “the Constitution is not a suicide pact” is well ingrained in constitutional jurisprudence.<sup>47</sup> Yet the need for flexibility does not inherently mean unconstrained discretion. It suggests that one solution is simply to have different legal rules for emergencies. Indeed, there is a long tradition of Congress granting broad powers to the President contingent on the declaration of an emergency, although of course these are always constrained by the Constitution. In a recent example, members of Congress concerned with civil liberties used an emergency powers strategy during the debates over the original Patriot Act in the month after September 11. Recognizing they could not simply say “no” to an Administration and a public fearful about future attacks, but seeking a way to limit the impact of measures adopted at the height of anxiety, they inserted a sunset provision set to expire four years later.<sup>48</sup> Going further, Bruce Ackerman has proposed an “emergency constitution” that would empower the Executive “to take extraordinary measures” to respond to terrorism.<sup>49</sup>

The historical cases offer insight into how previous generations of Americans have dealt with conflict and emergency – and, taken together, make clear that national security “emergencies” are really a recurring feature of American history. They demonstrate the need for a more sustainable policy and legal framework to protect against the pendulum-like pattern that has characterized previous emergencies, which we believe stems from an unwillingness to embrace more clearly the need to integrate the “prevention” perspective into our constitutional jurisprudence about national security and civil liberties.

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45. LOUIS FISHER, NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW 120 (2003).

46. See Carlos M. Vázquez, ‘Not a Happy Precedent’: The Story of *Ex Parte Quirin*, in FEDERAL COURTS STORIES 219 (Vicki Jackson & Judith Resnik, eds., 2009); see also Harold Hongju Koh, *The Case against Military Commissions*, 96 AM. J. INT’L L. 337, 340 (2002).

47. For a history on the use of this phrase and its use in U.S. Supreme Court opinions, see Linda Greenhouse, *The Nation*; ‘Suicide Pact,’ N.Y. TIMES, Sept. 22, 2002, §4, p. 14.

48. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), Pub. L. No. 107-56, 115 Stat. 272, §224 (2001); see also CHARLES DOYLE, CONG. RESEARCH SERV., RL32186, “USA PATRIOT ACT SUNSET: PROVISIONS THAT EXPIRE ON DECEMBER 31, 2005” (2004), available at <http://www.fas.org/irp/crs/RL32186.pdf>. In 2011, Congress voted to extend three sunset provisions to June 1, 2015. PATRIOT Sunsets Extension Act of 2011, Pub. L. No. 112-14, §2(a), 125 Stat. 216, 216 (codified as amended in scattered sections of 50 U.S.C.).

49. Ackerman, *supra* note 42, at 1031.

*B. The Limitations of the Traditional Models*

Neither the traditional war model nor the criminal justice model, in their pure forms, provides an optimal framework for dealing with the unique challenges posed by terrorism. In a traditional war fought between the organized armed forces of nation states, it is easy to identify combatants by the military uniforms they wear. Once a soldier has donned a uniform, he is a legitimate military target – not because of his individual guilt, but because of his status as an instrument of the adversary state. No individual threat assessment is made to judge whether the use of force is appropriate, as skilled and unskilled soldiers alike may be captured until the end of hostilities or killed. No distinction is made between conscripts and volunteers, nor is there any question of culpability. By virtue of their status, combatants receive certain privileges under the laws of war, like prisoner-of-war status<sup>50</sup> and immunity from prosecution.<sup>51</sup> The laws of war permit the state to hold combatants and civilians materially supporting military organizations without charge. The Geneva Conventions even permits the detention of innocent civilians where there is a security imperative.

All of these rules stem from the underlying rationale of incapacitation – preventing the adversary from causing harm. When the threat ceases with the end of conflict, so too does the authority to deprive an individual of life or liberty solely on the basis of status. And this rationale also underlies the law of war distinction between combatants and non-combatants, and the rules prohibiting the deliberate use of force against non-combatants.

There is an intuitive appeal to applying the law of war model to terrorism, since prevention is the core objective of counterterrorism. But in practice there are severe difficulties in translating the rules derived from traditional warfare to the counterterrorism challenge. Making this status determination – drawing the line between combatant and civilian – can be difficult. Individuals participate in conflicts outside state-controlled military organizations. Combatants do not wear uniforms distinguishing themselves from civilians and self-identifying as a legitimate target.<sup>52</sup> To the contrary, terrorists depend on deception (hiding their status and intentions) as their *modus operandi*. Individuals might participate in hostilities as full-time members of a terrorist organization or as civilians

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

51. ROBERT K. GOLDMAN & BRIAN D. TITTEMORE, UNPRIVILEGED COMBATANTS AND THE HOSTILITIES IN AFGHANISTAN: THEIR STATUS AND RIGHTS UNDER INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW 2 (2002).

52. This is not the first conflict where the United States has had to contend with enemies that attempt to evade detection by shedding their uniform. *See, e.g.*, *Quirin*, 317 U.S. at 31 (“The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.”).

slipping in and out of conflict. Members of terrorist organizations play a variety of roles in support of terrorist operations, from those who carry out the attack to those who provide logistics or financing. There is no geographically well-defined battlefield.

In the war model, the cost of false positives is high. This is especially true in the case of errors in targeted killing, which are, of course, irrevocable and irreversible. The criminal justice system has special protections surrounding the death penalty, and allows killing before due process only when, at the moment of arrest, the individual presents a danger to life around him. This risk is less severe for detention, where an individual erroneously detained can be released, or as the intelligence picture changes, an individual who posed a threat at the time of detention may no longer need to be held. But in this conflict, there is no clear end.<sup>53</sup> There will be no peace treaty between two nation states to mark a temporal end to the threat, and therefore to the justification for the use of force.

Applying the war model to counterterrorism is also problematic because the goal is not only to incapacitate, but to deter. In traditional warfare, the goal is not to deter individual combatants, but the state making war. Little thought is given to deterring soldiers from joining the war effort. Soldiers are not taken as prisoners of war to dissuade others from joining the military.

Deterrence is more complicated in the counterterrorism case. First, while a state in most cases is concerned with regime survival (and therefore may be deterred by actions that threaten its survival), terrorist leaders may not be deterred by the danger of their own destruction. Second, in the counterterrorism case, individual terrorists as well as their leadership are an important element of deterrence, both because individual terrorists can pose real threats, and because a key counterterrorism goal is to deter new individuals from joining the terrorists' cause.

Indeed, applying the war model may undermine deterrence. Allowing the unconstrained full-use of authorities under the war model may backfire, ironically validating narrative appeal to potential recruits by defining the struggle as a legitimate response to hostile intent. The sheer disparity in military might between the United States government and the terrorist organizations can bring them sympathy and civilian support.<sup>54</sup> Wrongful detention, and especially collateral damage accompanying targeted killing, can rally the local population against the United States and dampen domestic support for the government's war program.<sup>55</sup> The application of the war model poses risks that actions taken pursuant to that model may be perceived as – or cross the line into – actual

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53. Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365, 1395 n. 107 (2008) (agreeing with the proposition, while acknowledging that for some, indefinite detention might “seem a fate worse than death.”).

54. See, e.g., Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT'L SECURITY J. 145, 165 (2010) (describing the “David fighting Goliath” image that this disparity can bring).

55. *Id.* at 166; see also Laura King, *Afghan Uproar Belies a Cultural Divide*, L.A. TIMES, Feb. 26, 2012, at A1.

abuse, as with the torture and executions at Abu Ghraib. The images can serve as a powerful recruitment tool for the terrorists, rather than a deterrent.

In addition, full reliance on the war model makes it more difficult for the United States to maintain allied support, both inside and outside countries with a terrorist threat, because many key partners reject the appropriateness of the war model. First, the United States is increasingly relying on the support of allies for foreign intelligence, and even capture and detention outside the central battlefields.<sup>56</sup> But several countries have made clear that they will not provide evidence or extradite suspects if the United States intends to use this assistance to prosecute suspects before military commissions.<sup>57</sup> Second, CIA rendition of terror suspects to secret prisons in Eastern Europe caused a strain in relations between the United States and its allies.<sup>58</sup> The treatment of detainees became “one of the most politically volatile issues affecting trans-Atlantic relations.”<sup>59</sup> Afghan President Hamid Karzai has been firm in his opposition to military detentions pursuant to U.S. military authority at Bagram Airfield.<sup>60</sup>

Yet pure reliance on the criminal justice model poses equally severe problems. At its core, the criminal justice model is about punishment and to a lesser degree collective deterrence, rather than prevention. The focus on establishing individual guilt, the desire to avoid false convictions of the innocent and the associated procedural protections to prevent abuses of the state’s police power all increase the risk of false negatives – allowing dangerous people to go free. The criminal law model largely rejects preventive incapacitation or targeting. The system prefers to punish individuals for past bad acts, irrespective of whether the individual may present a future risk. There is deep discomfort with the thought of incapacitating an individual prior to committing the prohibited act, regardless of the likelihood that the individual would commit a crime if left free. A law enforcement officer may arrest a suspect only with probable cause that criminal violation has taken place, based on a demonstrable evidentiary showing that is subject to third party review (for example, through the need to obtain an arrest warrant), and officers are constitutionally barred from shooting a suspect except in extreme circumstances, where they have “probable cause to believe that the suspect poses a threat of serious physical harm.”<sup>61</sup> Once

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56. See Eric Schmitt & Mark Mazzetti, *U.S. Relies More on Aid of Allies in Terror Cases*, N.Y. TIMES, May 24, 2009, at A1.

57. Eric Holder, Att’y Gen., Dep’t of Justice, Address at Northwestern University School of Law (Mar. 5, 2012) [hereinafter Holder Speech].

58. Brian Knowlton, *Issue of Secret Camps Strains U.S.-EU Relations*, INT’L HERALD TRIB., Nov. 30, 2005, at 2.

59. *Id.*

60. See Azam Ahmed & Habib Zahori, *Afghanistan Frees Detainees in Show of Sovereignty Before Karzai Visits U.S.*, N.Y. TIMES, Jan. 5, 2013, at A6; The Associated Press, *U.S., Afghans Locked in Dispute over Detainees*, TELEGRAPH HERALD, Sept. 11, 2012, at A5.

61. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985); see also *Scott v. Harris*, 550 U.S. 372 (2007) (holding that it was reasonable for a police officer in a high speed chase to run a vehicle off the road because of the substantial and immediate risk of injury to others).



arrested, the presumption is that the defendant is innocent until proven guilty. It is the state's burden to prove that the defendant is guilty beyond a reasonable doubt. The defendant is constitutionally guaranteed due process, including representation by counsel, a trial by jury, the right against self-incrimination, the right to appear before a neutral decision-maker, and the right to confront witnesses. If there is no charge available, the individual cannot be held. And if the government cannot present triable evidence or the individual has been formally acquitted of all charges, he must be let go.

Of course, there are elements of prevention in the criminal law model as well, through individual and general deterrence. By calibrating crimes and punishment according to the severity of the offense, criminal law may convince an individual not to commit more serious criminal acts. Knowing in advance about punishment for a crime will likely be enforced might deter the individual from committing the crime in the first place.<sup>62</sup>

But the deterrence approach to prevention embodied in the criminal justice model has two core weaknesses in the terrorism context. First, because of the potential scale of the harm (both in the terms of casualties and physical damage, and the political and symbolic damage from successful terrorist attacks), the failure of deterrence is much more costly in this context. Second, given the ideological motivation of the terrorists, even severe punishment may have little or no deterrent effect. Indeed, quite the opposite, the prospect of punishment may both enhance the status of the would-be terrorist as a martyr, and provide a propaganda opportunity for the terrorist organization to promote its message. In addition, the due process rights given to criminal defendants reduce the certainty that punishment will follow the crime, thus weakening the deterrent effect, and can also interfere with intelligence gathering necessary to support prevention. Finally, when domestic law enforcement requires operations overseas, the United States is limited by international norms that respect territorial boundaries of sovereign states. The United States cannot enter a country to arrest the individual, but must instead seek extradition. For all these reasons, pure reliance on the criminal justice model has severe flaws.

Of course, even the criminal justice model has been adapted in some cases to deal with other specific harms that are not well addressed by the traditional approach. The most well-known examples involve the law of criminal conspiracy and organized crime, which bear some important similarities to terrorist activities by focusing on the distinctive threat posed by the organization as well as the individual, and the availability of punishment based on intentions, rather than the commission of a criminal act. Even as domestic criminal law focuses on punishing overt individual acts, conspiracy law contemplates some notion of

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62. See JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 336 (C. K. Ogden ed., K. Paul, Trench, Trubner & Co. 1931) (1802). Jeremy Bentham theorized that if the cost of punishment would outweigh the value of the crime, the "repressive motive" would become stronger than the "seductive motive." See *id.* at 325-326.

collective guilt even long before the harmful act is committed.<sup>63</sup> The Racketeer Influenced and Corrupt Organizations Act (RICO) has been used to prosecute the Mafia, another group that, like a terrorist organization, is “well organized, predatory, secretive, and disruptive of the social order.”<sup>64</sup> The analogy has been explicitly extended to deal with terrorism through domestic criminal statutes that make it a crime to knowingly provide, or conspire to provide, material support to terrorists and terrorist organizations.<sup>65</sup>

### C. *Reluctance to Use the Preventive-Incapacitation Model*

If the main goal in this conflict is to prevent another terrorist attack, and the costs of failure so high, why has U.S. jurisprudence been reluctant to embrace the prevention and incapacitation models, other than indirectly through deterrence? At the forefront is surely the text, history, and precedent of the Constitution, along with a “civic mythology” that administrative detention and punishment absent judicially supervised due process runs contrary our core beliefs. Within the Fifth Amendment, “[f]reedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty” that the Due Process Clause is meant to protect.<sup>66</sup> In addition to constitutional protections, there are underlying assumptions about personal responsibility and free will that militate against taking action against an individual until harm is actually carried out. The guilty, and only the guilty, should be punished, and the severity of their punishment should match the severity of their moral wrongdoing.<sup>67</sup>

But the case against a prevention-centric model also has utilitarian dimension: a judgment about the relative costs of false positives and false negatives.<sup>68</sup> Even with strong indications that an individual intends harm, there is always the possibility of last minute moral conversion. Moreover, the legitimacy of the state’s coercive power is undermined when it is used against those deemed innocent. The criminal justice system implicitly weighs the balance between false positives and false negatives in ways that increase the risk of false

63. See Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1369 (2003); Robert M. Chesney, *Terrorism, Criminal Prosecution, and the Preventive Detention Debate*, 50 S. TEX. L. REV. 669, 684-690 (2009).

64. ACKERMAN, *supra* note 11, at 40. What is the difference between a terrorist organization and a domestic criminal group like the Mafia? Bruce Ackerman offers one explanation, positing that mafiosos aim to control the “underworld,” whereas terrorists aim to “destabilize a foundational relationship between ordinary citizens and the modern state: the expectation of *effective sovereignty*.” *Id.* at 42; see Gerard E. Lynch, *RICO: The Crime of Being a Criminal*, 87 COLUM. L. REV. 661 (1987).

65. 18 U.S.C. §§2339A-2339B (2006).

66. *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001); see also *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

67. IMMANUEL KANT, *THE PHILOSOPHY OF LAW* 195 (W. Hastie trans.) (1887) (arguing that “the penal law is a categorical imperative” and that “justice would cease to be justice, if it were bartered away for any consideration whatsoever.”).

68. See John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 5 (1955); see, e.g., Norval Morris, *The Future of Imprisonment: Toward a Punitive Philosophy*, 72 MICH. L. REV. 1161, 1168 (1974).

negatives. Much of the debate in criminal law over the last decades on the appropriate degree of procedural protections to provide suspects has focused on how far that balance should be tipped in favor of protecting the innocent (and curbing abuses of state power) compared with protecting society.

But as with conspiracy law, our constitutional jurisprudence has identified circumstances that justify favoring false positives over false negatives. For example, the Framers anticipated that in times of emergency, the federal government would need greater flexibility for its detention authorities. The Constitution's Suspension Clause permits suspension of the writ of habeas corpus when, in times of rebellion or invasion, Congress determines that public safety demands it.<sup>69</sup> When the writ is suspended, the executive can detain individuals without trial.<sup>70</sup> It is unclear, however, whether the Suspension Clause only precludes judicial review of habeas petitions, or whether it affirmatively grants the executive additional detention powers.<sup>71</sup>

In addition, Congress, affirmed by the courts, has carved out exceptions that allow administrative detention in a limited set of cases.<sup>72</sup> Congress and state legislatures have enacted administrative detention laws where release would cause a pressing public danger, and courts have upheld them where the defendant is given adequate procedural protections. Criminal defendants can be held preventively pending trial, for example, but only after a finding of probable cause based on factual evidence that an individual committed a crime, a finding that the defendant, if released before trial, would pose a danger to the community, and pending a speedy trial where a decision on individual innocence or guilt would be rendered.<sup>73</sup> The Bail Reform Act authorizes a federal judicial officer to detain a defendant pending trial on the basis of future dangerousness,<sup>74</sup> and the Supreme Court found that the Act did not violate the Fifth Amendment Due Process Clause or the Eighth Amendment Excessive Bail Clause where detention was a carefully delineated regulatory measure imposed to stem community danger. This, the Court said, was based on the "well-established authority of the government, in special circumstances, to restrain

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69. The Suspension Clause provides that "[t]he privilege of the writ of habeas corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, §9, cl. 2.

70. *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring) ("The historic purpose of the writ [of habeas corpus] has been to relieve detention by executive authorities without judicial trial.")

71. *See, e.g., Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 115 (1866) ("The suspension of the writ does not authorize the arrest of any one, but simply denies to one arrested the privilege of this writ in order to obtain his liberty."); Trevor Morrison, *Suspension and the Extrajudicial Constitution*, 107 COLUM. L. REV. 1533 (2007); Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 662-663 (2009).

72. FRANKLIN ZIMRING & GORDON HAWKINS, *INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME* 23 (1995) ("What is clear, however, is that the habitual criminal category for which incapacitative or preventive measures were seen as necessary was intended to be a restrictive one.")

73. *See, e.g., United States v. Salerno*, 481 U.S. 739 (1987).

74. 18 U.S.C. §3142 (2006).

individuals' liberty" prior to trial and conviction.<sup>75</sup> Where the government's interest is "sufficiently weighty," the individual's interest may "be subordinated to the greater needs of society."<sup>76</sup> One of the special factors to be considered in determining whether the individual should be held or released is the nature of the offense, and specifically whether the crime was an act of terrorism.<sup>77</sup> But because ours is a society where "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception," the individual must be given "numerous procedural safeguards."<sup>78</sup> The individual's due process interests will only be satisfied where the government can provide evidence, using a clear and convincing standard, that proves the individual presents such a danger.<sup>79</sup>

Even outside the criminal law context, the Supreme Court has permitted administrative detention in "certain special and 'narrow' nonpunitive 'circumstances'" where special justifications outweigh the individual's constitutional interest in being free from detention.<sup>80</sup> The mentally ill, for example, can be detained against their will when they are deemed to be a threat to themselves or, more germane to the terrorism context, a threat to others.<sup>81</sup>

These deviations from the traditional model of post facto punishment have one key feature in common: they include substantive and procedural provisions designed to reduce the likelihood of false positives in contexts where the traditional model's dependence on deterrence through punishment is unlikely to hold. These cases all require both a showing that the consequences of release are grave and procedural protections to prevent wrongful and excessive detention.<sup>82</sup> In some instances, administrative detention is justified only for those who have committed prior crimes, but in others, present allegations suffice, provided there is a showing of probable cause or dangerousness. And where detention is based on present allegations, there are temporal requirements and protections, such as the right to a speedy trial in the case of pre-trial detention, limiting the amount of time the accused may be detained. These cases emphasize particularistic determinations that give confidence that the harm is grave, confidence that the individual would commit the harm if left alone, and confidence that there were no other ways to prevent the harm.

The need for greater flexibility in detention regimes for limited exigencies is also evident under international law. While all fighters of an organized armed force are targetable and detainable, international law appropriately limits these authorities when non-combatants are involved. Civilians are targetable only "for

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75. Salerno, 481 U.S. at 749.

76. *Id.* at 750-751.

77. 18 U.S.C. §3142(g) (2006).

78. Salerno, 481 U.S. at 755.

79. *Id.* at 750-751.

80. Zadvydas, 533 U.S. at 690; *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997); *Foucha*, 504 U.S. at 80.

81. *See, e.g., Jones v. United States*, 463 U.S. 354 (1983).

82. *See Adam Klein & Benjamin Wittes, Preventive Detention in American Theory and Practice*, 2 HARV. NAT'L SECURITY J. 85, 186 (2011).

such time” as they “directly participate in hostilities.”<sup>83</sup> Much has been made about when an individual is a non-combatant or how wide the scope of “direct participation” can be stretched, or when, if ever, providing logistical support to armed forces, even within a battlefield, can qualify an individual as a direct participant.<sup>84</sup> The committee notes of the Geneva Conventions, for example, exclude “supply contractors [and] members of [labor] units or of services responsible for the welfare of the armed forces” or those who construct roads and airfields from the combatant category.<sup>85</sup>

But whereas the Third Geneva Convention limits the lethal targeting of non-combatants, the Fourth Geneva Conventions provide much more flexibility to detain them. Civilians who have not directly or indirectly participated in hostilities may be detained, so long as they pose a security threat. The Convention expressly allows for the detention of “protected persons” who “find themselves” in the territory of conflict, but only “if the security of the Detaining Power makes it absolutely necessary.”<sup>86</sup> These civilian detainees are entitled the periodic review of their detention at least twice yearly, with the facts construed most favorably to the detainee.<sup>87</sup>

The language from the Geneva Conventions and their attendant procedural requirements should help assuage concerns of international partners who worry about arbitrary and unlawful detention.<sup>88</sup> We recognize global partners may still interpret the detention provisions more narrowly or have concerns that barriers on detainee transfer currently in place will prevent timely release or conviction in criminal court.

Still, the Geneva Conventions evince many important principles that can be brought into a governing regime. First, they suggest an implicit preference in

83. Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT’L L. 48, 52 (2009).

84. *Id.*

85. Third Geneva Convention, *supra* note 50, art. 4(A)(4); *see also* JOINT CHIEFS OF STAFF, JOINT PUB. 4-0: DOCTRINE FOR LOGISTIC SUPPORT OF JOINT OPERATIONS at V-1-V-2 (2000), available at [http://www.fas.org/irp/doddir/dod/jp4\\_0.pdf](http://www.fas.org/irp/doddir/dod/jp4_0.pdf).

86. Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 4, 42, Aug. 12, 1949, 6 U.S.T. 3516; *see* Robert W. Gehring, *Loss of Civilian Protections under the Fourth Geneva Convention and Protocol I*, 90 MIL. L. REV. 49 (1980).

87. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 85, art. 43. This authority has not been expressly invoked in this conflict, though it was used to justify civilian detention in Iraq War. “Protected Person” Status in Occupied Iraq Under the Fourth Geneva Convention, 28 Op. O.L.C. 1-4 (2004); *see* Robert M. Chesney, *Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War, 2003-2010*, 51 VA. J. INT’L L. 549, 554 (2011) (noting that the “vast bulk of military detentions in Iraq have occurred under [a] rubric . . . that borrowed from, but was not directly authorized by, the Fourth Geneva Convention” in contrast to the Guantánamo models of criminal prosecution and combatant detention).

88. *See* International Covenant on Civil and Political Rights, art. 9(1), Mar. 23, 1976 art. 9(1), 999 U.N.T.S. 171 (“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”); Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5(1), Sept. 3, 1953, 213 U.N.T.S. 221 (“Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with procedure prescribed by law.”).

international law for detention over targeting where the individual in question is not readily classified as a combatant. In addition, the built-in review process suggests that this relative permissiveness to detain may not be coextensive with the entire conflict, as it is for known combatants. Rather, it requires updated findings that the conditions of absolute necessity continue to exist, and like the domestic law standards, individualistic determinations that this person should continue to be held.

## II. THE STRUGGLE TO DEFINE A LEGAL AND POLICY FRAMEWORK FOR U.S. COUNTERTERRORISM OPERATIONS

Since 9/11, all three branches of the federal government have been struggling to address the tensions between the traditional criminal justice model and the law of war model with respect to targeting and detention of terrorists, mostly through a series of ad hoc decisions that satisfy neither counterterrorism officials nor civil liberties advocates. Witness the series of veto threats and signing statements from the President after Congress passed bills with provisions that restrict the transfer of detainees out of the military prisons at Guantánamo and in Afghanistan. President Obama decried these provisions as interfering with his ability “to make time-sensitive determinations about the appropriate disposition of detainees” and as “substitut[ing] the Congress’s blanket political determination for careful and fact-based determinations, made by counterterrorism and law enforcement professionals” of how to deal with detainees, which “undermines our national security.”<sup>89</sup> Civil liberties groups saw the same provisions as extending “indefinite detention without charge or trial” and “illegal military commissions.”<sup>90</sup>

Although the terrorism threat to the United States predated the 9/11 attacks, the immediate aftermath of the attacks led to a series of decisions by both the Congress and the executive branch to move away from a criminal justice approach toward a law of war model. With the “early manifestations of terror,” after the first World Trade Center bombing in 1993, it was the FBI and the Justice Department that primarily handled the response, leading to the prosecution and conviction of several individuals in federal court in New York. One of the lessons of the 9/11 Commission Report was that the successful use of the legal system had the secondary effect of creating the false impression that law

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89. Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2013 (Jan. 3, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/01/03/statement-president-hr-4310>; *see also* Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2012 (Dec. 31, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540>.

90. *NDAAs Prevents Closing Guantanamo, Could Lead to Claims of a Right to Discriminate*, ACLU (Jan. 3, 2013), <http://www.aclu.org/national-security/updated-ndaa-prevents-closing-guantanamo-could-lead-claims-right-discriminate>.



enforcement was well-equipped to handle terrorism by itself.<sup>91</sup>

Although the courts came later to the game, they too have played a significant role in shaping the policy framework for the implementation of counterterrorism policy. While each of the branches has been active, judicial interventions have mostly been episodic and uncoordinated, creating a patchwork of rules and constraints. In some areas, notably in targeting potential terrorists with lethal force, the executive has been largely free to develop its own approach to the legal framework governing its actions. By contrast, in the area of detention and punishment, all three branches have engaged in an active struggle to set the terms governing policy. Because these interventions have been episodic, there is no clear underlying construct to govern the legal framework for counterterrorism.

The principal congressional action that became the predicate for the use of lethal targeting and indefinite detention of al Qaeda members was the 2001 Authorization for Use of Military Force, passed shortly after the September 11 attacks (the other key piece legislation arising from the immediate aftermath of the attacks being the PATRIOT Act). The text of the key provision, running at just sixty words, is broad in its authorization. It authorizes the President to

use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.<sup>92</sup>

While detention and targeting are not expressly mentioned, the AUMF is understood to encompass both authorities.<sup>93</sup> The authority to detain has been explicated by the executive branch, altered by Congress, and interpreted by the courts. Congress has passed additional legislation sometimes expanding and sometimes constraining the executive's ability to detain and prosecute terrorism suspects.<sup>94</sup> For example, Congress recently blocked the executive from transferring detainees from Guantánamo to the United States for trial before Article III courts. The Judiciary has established jurisdiction over habeas petitioners at

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91. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 72-73 (2004).

92. Authorization for Use of Military Force, Pub. L. No. 107-40, §2(n), 115 Stat. 224, 224 (2001).

93. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion) (holding that detention "is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use."); *Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendants' Motion to Dismiss*, *Al-Aulaqi v. Obama*, 727 F.Supp.2d 1 (D.D.C. 2010) (No. 10-cv-1469), 2010 WL 3863135, at \*4.

94. *See, e.g.*, Detainee Treatment Act of 2005, Pub. L. No. 109-48, §1003(d), 119 Stat. 2680 (2006); Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006); Military Commissions Act of 2009, Pub. L. No. 111-84, §§1801-1807, 123 Stat. 2190 (2009); National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112-81, 125 Stat. 1298 (2011).

Guantánamo Bay and addressed the reach of due process rights for detainees.<sup>95</sup>

By contrast, the courts have so far refused to rule on targeting cases, holding that they are non-justiciable, and a matter for the political branches to weigh.<sup>96</sup> For all practical purposes, targeting decisions are made entirely within the executive branch. Congress has remained silent on the executive's authority to target, even as it has been outspoken in matters of detention and prosecution.

This unevenness has changed the decision calculus and contributed to a general incoherence in counterterrorism law. The next sections explore these judgments on detention and targeting in greater detail.

### A. Detention

From the first days following the 9/11 attacks, the Bush Administration made clear it intended to treat counterterrorism in a law of war framework. In informal remarks on September 16, 2001 and later in his address to Congress on September 20, the President characterized U.S. policy as a “war on terror,” and made clear that this approach was not limited to dealing with the perpetrators of the attack. Following this logic, in the early years of the conflict, the Bush Administration argued that it could detain “enemy combatants” without charge and without access to an attorney. Detainees so classified could face trial by military tribunals, but had no right to appear before civilian courts. In legal briefings, the Administration argued that “[t]he notion that the U.S. Constitution affords due process and other rights to enemy aliens captured abroad and confined outside the sovereign territory of the United States is contrary to law and history.”<sup>97</sup> It based its legal theory not only on the congressional grant given by the AUMF, but also on the President's independent authority under Article II of the Constitution, which vests “[t]he executive Power” in the President, who also serves as Commander in Chief.<sup>98</sup> The Bush Administration argued that “respect for separation of powers and the limited institutional capabilities of courts in matters of military decisionmaking” meant that the executive branch's determination should be given “utmost deference” in court.<sup>99</sup> At its heart, the Bush approach focused on the detainees' status as members of al Qaeda, rather than individual culpability, as the predicate for detention.

In practice, the Bush Administration held detainees both at home and abroad. Some detainees, like American citizen Jose Padilla, were held in military brig

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95. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004).

96. *Al-Aulaqi*, 717 F. Supp. 2d at 46-47.

97. Response to Petitions for Writ of Habeas Corpus & Motion to Dismiss or for Judgment as a Matter of Law & Memorandum in Support at 18, *Abdah v. Bush*, No. 04-125 (D.D.C. Oct. 4, 2004), 2004 WL 5654792.

98. *Id.* at 22 (“The Executive Branch may detain individuals whom it has determined are enemy combatants. That power exists as a matter of the President's inherent authority under Article II of the Constitution.”).

99. Brief for Respondents at 25-26, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696).

inside the United States and held as “enemy combatants.”<sup>100</sup> Many others were held at a detention camp at Guantánamo Bay, Cuba, and still more at U.S. detention centers in Iraq and Afghanistan, and secret CIA-run “black site” prisons for high-level detainees.<sup>101</sup>

Within a year of the 9/11 attacks, the rules governing detention began to be tested in the courts, beginning with *Hamdi v. Rumsfeld*, a habeas petition brought on behalf of a U.S. citizen initially captured in Afghanistan and later transferred to Guantánamo. Although the Fourth Circuit largely accepted the Bush Administration’s law of war model that minimized a role for the courts in regulating detention, the Supreme Court ultimately rejected that approach, and ruled that federal courts have jurisdiction to rule on habeas petitions filed by citizens and non-citizens alike in Guantánamo.<sup>102</sup> The Court borrowed from both the criminal justice model and the traditional war model. It agreed that the executive branch had the authority to detain under the AUMF – that detention was “a fundamental incident of waging war” – but urged that this authorization would not amount to a “blank check” for the President.<sup>103</sup> A citizen was entitled to certain due process rights, such as notice on the basis for his detention and a fair opportunity to rebut the government’s evidence before a neutral decision-maker. These were “essential constitutional promises” that could not be broken.<sup>104</sup> “At the same time,” the Court cautioned, “the exigencies of the circumstances may demand” that proceedings be relaxed to “alleviate their uncommon potential to burden the Executive” during an ongoing conflict.<sup>105</sup> Were hearsay to be entered into evidence and the government’s burden of proof lessened, “the Constitution would not be offended.”<sup>106</sup> The Court has also held that non-citizens detained at Guantánamo had the right to petition for habeas in federal court,<sup>107</sup> throwing the courts open to all detainees held at the military facilities there.

Dissatisfied with the Court’s effort to bring detention at least in part under a criminal justice framework, Congress responded with jurisdiction-stripping provisions in the Detainee Treatment Act of 2005, which forced detainees to appeal

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100. The Bush Administration later filed criminal charges against Padilla in civilian court. When Padilla was initially arrested in the United States and held as an enemy combatant, the Bush Administration accused him of plotting with al Qaeda to set off a dirty bomb inside the country. Notably, the criminal charges did not reference that plot. *See, e.g.*, Eric Lichtblau, *Justices are Asked to Permit Padilla Move*, N.Y. TIMES, Dec. 29, 2005, at A16.

101. *See, e.g.*, Katharine Q. Seelye, *Rumsfeld Defends Treatment by U.S. of Cuba Detainees*, N.Y. TIMES, Jan. 23, 2002, at A1; Jane Mayer, *The Black Sites: A Reporter at Large*, THE NEW YORKER, Aug. 13, 2007, at 46.

102. Boumediene, 553 U.S. 723; Hamdi, 542 U.S. 507; Rasul, 542 U.S. 466.

103. Hamdi, 542 U.S. at 519, 536 (plurality opinion).

104. *Id.* at 533.

105. *Id.*

106. *Id.* at 534. In the words of *Mathews*, process of this sort would sufficiently address the “risk of erroneous deprivation” of a detainee’s liberty interest while eliminating certain procedures that have questionable additional value in light of the burden on the Government. *Id.* at 530.

107. Rasul, 542 U.S. at 482-483.

to Combatant Status Review Tribunals and military commissions, and purported to deny the courts jurisdiction to hear habeas cases for aliens detained at Guantánamo.<sup>108</sup> The Supreme Court responded back, holding that these commissions violated the U.S. Uniform Code of Military Justice and Geneva Conventions, especially as they allowed individuals to be convicted without knowing the evidence against them.<sup>109</sup> Congress again tried to force all detention reviews through military tribunals, including those pending at the time of the Act's enactment.<sup>110</sup> The Supreme Court again rejected Congress's attempt to thwart federal review of habeas petitions, holding in *Boumediene* that the Act's provisions amounted to an unconstitutional suspension of the writ.<sup>111</sup> Where, as at Guantánamo, the United States exercised "complete jurisdiction and control over the base," the United States maintained de facto sovereignty over the territory, and thus the Suspension Clause had "full effect."<sup>112</sup> Non-citizens held at Guantánamo could once again challenge their detention in federal courts.

When President Obama came to office, he announced his desire to replace or revise many policies that had defined the Bush years, in ways that reflected a desire to move away from a pure law of war approach to one that more explicitly incorporated criminal justice elements into detention policy. Just two days after taking office, he signed an Executive Order instructing the military to close the detention facilities at Guantánamo within one year.<sup>113</sup> The Executive Order established a task force that would review the file of each of the 241 detainees that remained there. The Administration would also close CIA black sites, make use of Article III courts in some cases for criminal trial rather than relying solely on military tribunals, issue procedural checks on military commissions, and initiate post-conviction reviews for continued detention.

The Executive Branch remains the central check on the government's power at overseas detention centers like Bagram Airfield in Afghanistan. During the Obama Administration, detention practices at Bagram were revisited, and, the Department of Defense issued guidelines covering the scope of who could be detained there and what process they were due. Detainees at Bagram are allowed to testify and present "reasonable available documentary information" before a military review board to challenge whether they meet the criteria for internment.<sup>114</sup> They are entitled to a "personal representative," a commissioned

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108. The Detainee Treatment Act of 2005 was part of the Department of Defense Appropriations Act of 2006. See Pub. L. No. 109-148, §1005, 119 Stat. 2739, 2742 (2005) (amending 28 U.S.C. §2241).

109. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 574-590 (2006).

110. See Military Commissions Act of 2006, Pub. L. No. 109-366, §7, 120 Stat. 2600, 2635-2636 (2006) (amending 28 U.S.C. §2241).

111. *Boumediene*, 553 U.S. at 733.

112. See *id.* at 771.

113. Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities, Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 27, 2009).

114. DoD, *DETAINEE REVIEW PROCEDURES AT BAGRAM THEATER INTERNMENT FACILITY 2-4* (2009), available at [http://www.aclu.org/files/pdfs/natsec/bagram20100514/03bagramcentcom\\_46-51.pdf](http://www.aclu.org/files/pdfs/natsec/bagram20100514/03bagramcentcom_46-51.pdf) [hereinafter BAGRAM MEMORANDUM].

officer authorized to access information relevant to the detainee's basis for detention. To continue internment, the detainee's status must be reviewed within sixty days of arriving at Bagram, and every six months after that.<sup>115</sup> An individual's intelligence value, in itself, is not enough to justify detention.<sup>116</sup> But even these procedures may not hold as the U.S. draws down its presence in Afghanistan.

As terrorist networks sprung up in locations far outside the central battlefield Afghanistan, the executive branch has interpreted the AUMF to reach forces "associated" with the Taliban or al Qaeda, including offshoots like al Qaeda in the Arabian Peninsula operating in Yemen and Saudi Arabia<sup>117</sup> The authorizing statute has also been interpreted to encompass the individuals that substantially support these terrorist organizations.<sup>118</sup> This support had to reach a threshold level beyond "insignificant support" and, borrowing from criminal law, the individual must have the requisite mens rea to make sure he was not an "unwitting" supporter.<sup>119</sup>

The federal courts have supported this understanding through permissive detention standards, both substantive and procedural.<sup>120</sup> To qualify as a member of al Qaeda or an associated force, an individual need only have stayed at an al Qaeda guesthouse for a number of days or travelled along a path frequented by other al Qaeda members.<sup>121</sup> Similarly, the courts have allowed the procedural requirements to favor the government, setting a burden of proof standard that lets the government detain an individual based on the preponderance of the evidence, looking at whether it was more probable than not that the individual is detainable.<sup>122</sup>

Nevertheless, Congress has stoutly resisted the Obama Administration's efforts to incorporate the criminal justice model into detention policy. Four years after President Obama pledged to close Guantánamo, the camp remains open and continues to house 160 detainees.<sup>123</sup> Over this time, Congress has been

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115. *Id.*

116. *Id.*

117. *In re Guantanamo Bay Detainee Litigation*, Respondent's Memorandum Regarding the Government's Detention Authority Relative to the Detainees Held at Guantanamo Bay, *Hamlily v. Obama*, 616 F. Supp. 2d 63 (D.D.C. Mar. 13, 2009) (No. 05-763), ECF No. 175.

118. *Id.*

119. *Id.*

120. The Supreme Court left it up to the lower courts to use their "expertise and competence" to fill in the contours of detention law, while still granting "proper deference" accorded to the political branches. *Boumediene*, 553 U.S. at 796. See generally BENJAMIN WITTES, ROBERT M. CHESNEY & LARKIN REYNOLDS, *THE EMERGING LAW OF DETENTION 2.0: THE GUANTANAMO HABEAS CASES AS LAWMAKING* (2011) (examining the federal habeas cases in detail).

121. See, e.g., *Uthman v. Obama*, 637 F.3d 400 (D.C. Cir. 2011); *Al-Bihani v. Obama*, 590 F.3d 866, 869 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011).

122. See *Al-Adahi v. Obama*, 613 F.3d 1102, 1104-05 (D.C. Cir. 2010); *Awad v. Obama*, 608 F.3d 1, 11 & 24 n.2 (D.C. Cir. 2010).

123. Charlie Savage, *Guantánamo Hunger Strike Is Largely Over*, *U.S. Says*, N.Y. TIMES, Sept. 24, 2013, at A3; see also *The Guantánamo Docket*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/detainees> (collecting documents and research relating to all Guantánamo detainees).

active in passing legislation to forbid the use of federal funds to transfer detainees from Guantánamo to the United States, to put limits on the transfer of detainees abroad, and to cut off prosecutions in Article III courts.

Closing Guantánamo had to involve transferring detainees from the military facility to locations inside the United State or resettling them in countries abroad. The prospect of relocating detainees inside the United States was unpalatable to congressmen whose states housed “supermax” prisons, who vocally launched “not-in-my-backyard” campaigns against the transfers.<sup>124</sup> The Obama Administration’s first transfer plan involved eight of the seventeen Uighur detainees at Guantánamo who were to be resettled in Northern Virginia. The Bush Administration had already determined that these Chinese Muslim detainees were not enemy combatants.<sup>125</sup> The D.C. District Court similarly found that they had not fought the United States and were not a national security threat, and ordered their production in court in October 2008.<sup>126</sup> Just before the Uighur detainees were to be flown to Virginia, a congressman faxed a letter to the White House and sent a copy to the media: the American people could not “afford to simply take [the President’s] word” that the detainees were not “not a threat if released into our communities.”<sup>127</sup>

The political backlash became codified law as Congress passed several bills with restrictions on using federal funds to transfer Guantánamo detainees.<sup>128</sup> Most recently, the 2012 National Defense Authorization Act<sup>129</sup> simultaneously authorized \$662 billion in defense funding, and prevented any funds from being used to transfer or release detainees inside the United States.<sup>130</sup> Funds may also not be used to build an alternate detention facility inside the country.<sup>131</sup> Only in December 2013 did Congress ease what had been significant limitations on the Executive’s authority to transfer detainees from Guantanamo to third countries. With the passage of the 2014 National Defense Authorization Act, the Secretary of Defense can now transfer or release a detainee to any foreign country under two scenarios— if a determination is made that the detainee is no longer a threat

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124. See Peter Finn & Anne E. Kornblut, *How the White House Lost on Guantanamo*, WASH. POST, Apr. 24, 2011, at A1. [hereinafter Finn & Kornblut].

125. See William Glaberson, *In Blow to President, Judge Orders 17 Detainees at Guantánamo Freed*, N.Y. TIMES, Oct. 8, 2008, at A18.

126. *Id.*

127. Finn & Kornblut, *supra* note 124.

128. See Supplemental Appropriations Act, Pub. L. No. 111-32, 123 Stat. 1859 (2009); Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, 123 Stat. 2142 (2010); National Defense Authorization Act Pub. L. No. 111-84, 123 Stat. 2190 (2010); Department of the Interior, Environment, and Related Agencies Appropriations Act, Pub. L. No. 111-88, 123 Stat. 2904 (2010); Consolidated Appropriations Act, Pub. L. No. 111-117, 123 Stat. 3034 (2010); Department of Defense Appropriations Act, Pub. L. No. 111-118, 123 Stat. 3409 (2010); The Ike Skelton National Defense Authorization Act for Fiscal Year 2011 Pub. L. No. 111-383, 124 Stat. 4137 (2011).

129. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, §1021, 125 Stat. 1298, 1562 (2011).

130. See *id.* §1027.

131. See *id.* §1026.



to U.S. national security or to effectuate a decision by a U.S. court or tribunal.<sup>132</sup> The Secretary of Defense must submit a report to Congress detailing the capacity and willingness of the transfer state to meet these requirements. One section of the Act even mandates detention for captured members of al Qaeda or an associated force who have participated in planning or carrying out an attack against the United States or its coalition partners.<sup>133</sup>

In effect, the transfer provisions of the NDAA will likely prevent any criminal trial in federal courts for detainees who remain at Guantánamo. To meet its goal of shutting down facilities there, the Administration would have to certify the transfer of detainees to other countries or move detainees to an alternate facility not located in the United States. Sending detainees to foreign countries has been made all the more difficult by the congressional aversion to resettling detainees within their districts. France and Saudi Arabia were all reluctant to accept detainees when the United States would not even accept low-risk transfers to the maximum-security prisons inside its own borders.<sup>134</sup> In some cases, the executive branch is reluctant to repatriate detainees where their home countries, like Yemen, are unstable and wracked by terrorism.<sup>135</sup>

The President signed the bill into law, despite “serious reservations” with the detention provisions.<sup>136</sup> After expressing disapproval of a Congress that “continue[d] to insist upon restricting the options available to [U.S.] counterterrorism professionals” and detention provisions that provided the “minimally acceptable amount of flexibility to protect national security,” the President determined that he could interpret the statute in a way that would preserve the executive’s flexibility.<sup>137</sup> Congressional limitations, however, have long frustrated President Obama’s goal of closing the facility at Guantánamo.

The only practically available option for many of the remaining Guantánamo detainees is trial for violations of the law of war before military commissions – tribunals that do not have the full support of international partners and that are less visible to the public.<sup>138</sup> The Administration’s decisions to move forward with tribunals for detainees held at Guantánamo, as in the cases of 9/11

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132. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §1035(a)(1)-(a)(2), 127 Stat. 672 (2013).

133. *See id.* §1022.

134. Carol Rosenberg, *How Congress Helped Thwart Obama’s Plan to Close Guantánamo*, MIAMI HERALD Jan. 22, 2011, at A1.

135. Peter Finn & Julie Tate, *Some Held at U.S.-Run Prison in Afghanistan Could Return Home*, WASH. POST, Jan. 23, 2012, at A11.

136. Statement by the President on H.R. 1540 (Dec. 31, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540>.

137. *Id.*

138. This is limited to aliens who have committed law of war violations. Military commissions, by statute, cannot be used to try U.S. citizens. Military Commissions Act of 2009, Pub. L. No. 111-84, §§1801-07, 123 Stat. 2190, 2571-2615 (2009). David Cole has argued that if citizens could be hauled before military tribunals, there would be a greater public interest in constraining the president’s “assertion of power.” Cole, *supra* note 4, at 977.

mastermind Khalid Sheikh Mohammed and his co-conspirators,<sup>139</sup> illustrate its reluctant acquiescence in this option.

But even the military commissions route has been further restricted recently. In 2012, the D.C. Circuit held that “material support for terrorism” was not a recognized violation of the laws of war prior to its codification in the 2006 Military Commissions Act.<sup>140</sup> By that law’s own requirements, individuals cannot be tried based on acts that were not considered violations of the laws of war at the time they were conducted. Therefore, no Guantánamo detainee held based on pre-2006 conduct can be tried for material support – and all detainees currently at Guantánamo are being held based on pre-2006 conduct. The D.C. Circuit will eventually rule on whether the crime of conspiracy is foreclosed for similar reasons, which could restrict law of war prosecutions before military commissions even further. Therefore, if faced with Guantánamo detainees whose cases rest entirely on material support (and potentially conspiracy) charges, prosecutors’ hands are tied: they could neither bring their cases before military commissions (in light of the D.C. Circuit’s ruling) nor before Article III courts (in light of Congress’s NDAA transfer-blocking provisions).

The President still retains the option of Article III prosecutions for individuals detained outside the United States but not sent to Guantánamo. For example, in 2011 American forces captured Ahmed Abdulkadir Warsame, suspected of supporting al Shabab and al Qaeda in the Arabian Peninsula, in waters between Somalia and Yemen. American forces interrogated him for months aboard a U.S. naval vessel. After exhausting the intelligence value of the interrogation, the Administration sent in a new “clean” team of interrogators who did not have access to the earlier interrogations, to try to establish a criminal case against Warsame. Following the usual criminal law due process protections (including *Miranda* warnings), prosecutors determined that they had enough evidence for prosecution in federal court.<sup>141</sup> He subsequently pled guilty to material support and conspiracy.<sup>142</sup>

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139. See Press Release, Dep’t of Def., DoD Announces Charges Referred Against 9-11 Co-Conspirators (Apr. 4, 2012); Charges have also been sworn against Guantanamo detainee Ahmed Mohammed Ahmed Haza al Darbi. Press Release, Dept. of Def., DoD Announces Charges Sworn Against Al Darbi (Aug. 29, 2012).

140. Hamdan v. United States, 696 F.3d 1238, 1250 (D.C. Cir. 2012).

141. See Press Release, United States Attorney Southern District of New York, Accused al Shabaab Leader Charged with Providing Material Support to al Shabaab and al Qaeda in the Arabian Peninsula (July 5, 2011), available at <http://www.justice.gov/usao/nys/pressreleases/July11/warsameindictment.pr.pdf>; Charlie Savage, *U.S. Tests New Approach to Terrorism Cases on Somalia Suspect*, N.Y. TIMES, July 6, 2011, at A10; see also *New York v. Quarles*, 467 U.S. 649, 655-656 (1984); John O. Brennan, Remarks at Harvard Law School: Strengthening our Security by Adhering to our Values and Laws (Sept. 16, 2011) (referencing the Supreme Court’s public safety exception to *Miranda*) [hereinafter Brennan Harvard Speech].

142. See Benjamin Weiser, *Terrorist Has Cooperated With U.S. Since Secret Guilty Plea in 2011*, *Papers Show*, N.Y. TIMES, Mar. 25, 2013, at A21.

### B. Lethal Targeting

The post-9/11 evolution of the use of lethal force against terrorism suspects, primarily through the use of drones, is well known,<sup>143</sup> not just in and around the theaters of war in Iraq and Afghanistan, but – from as early as the 2002 Bush Administration use of a drone attack in Yemen<sup>144</sup> – far beyond. The Obama Administration's expansion of the use of drones to conduct lethal operations has generated considerable controversy both in the United States and abroad. Yet in sharp contrast to rules and policy governing detention, it has largely escaped regulation by either Congress or the courts. Not since the 2001 AUMF authorized the President to use all necessary and appropriate force has Congress spoken to the President's authority to use lethal force. One court dismissed the only targeting case brought before it as non-justiciable.<sup>145</sup> As a result, the development of broad targeting policy as well as individual targeting decisions has taken place entirely inside the executive branch.

During the Bush Administration, much of the policy and legal debate on counterterrorism policy revolved around issues of detention, surveillance, and interrogation. But with the Obama Administration's expanded reliance on the use of lethal force beyond Iraq and Afghanistan, the legitimacy of this counterterrorism tool has received increased attention. The debate has been both substantive (under what circumstances may the government use lethal force) and procedural (who should decide).

The Obama Administration has recognized the need to justify the use of force in counterterrorism under both domestic and international law, as well as the importance of demonstrating that there are procedural safeguards in place for its implementation. On both substantive and procedural grounds the Administration has opted for a law of war framework. On substance, it argues that the use of lethal force against terrorists is legitimate self defense under the laws of war (in accordance with *jus ad bellum*), and that through the use of highly-accurate drone strikes, the policy respects the substantive *jus in bello* constraints of proportionality and distinction by limiting strikes to the most dangerous terrorists and sharply limiting civilian casualties. On the procedural side, while the Administration accepts that the broad authorization to use force under domestic law derives at least in part from the AUMF, it contends that specific decisions

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143. See John O. Brennan, Speech at the Woodrow Wilson International Center for Scholars: The Ethics an Efficacy of the President's Counterterrorism Strategy (Apr. 30, 2012) [hereinafter Brennan Wilson Center Speech]; Harold Hongju Koh, Address at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010) [hereinafter Koh Speech], available at <http://www.state.gov/s/l/releases/remarks/139119.htm>; Charlie Savage, *Top U.S. Security Official Says 'Rigorous Standards' Are Used for Drone Strikes*, N.Y. TIMES, May 1, 2012, at A8; Mark Mazzetti & Eric Schmitt, *U.S. Expands Its Drone War Into Somalia*, N.Y. TIMES, July 2, 2011, at A1; Mark Mazzetti, *C.I.A. Takes on Bigger and Riskier Role on the Front Lines*, N.Y. TIMES, Jan. 1, 2010, at A1; Jane Meyer, *The Predator War*, THE NEW YORKER, Oct. 26, 2009, at 36-45.

144. David Johnston & David E. Sanger, *Fatal Strike in Yemen Was Based on Rules Set Out by Bush*, N.Y. TIMES, Nov. 6, 2002, at A16.

145. Al-Aulaqi, 727 F. Supp. at 46.

on when to use force is incident to the President's commander in chief authority under Article II and is therefore committed solely to the executive branch.<sup>146</sup>

A number of features of the Administration's approach reinforce the primacy of prevention as the justification for lethal force. Eligibility for targeting is based on status (membership in al Qaeda). The majority of targets are so-called "personality" strikes against individuals with significant operational responsibility for terrorist activities, a proxy for the future danger as much as past culpability. The prevention framework is even more obvious with the so-called "signature" strikes, where there is no requirement for demonstrating any specific past culpability; targeting is done solely on the basis of a pattern of activity associated with terrorist operations. In effect, the Administration's approach substitutes patterns of behavior for the more traditional wartime status determinant, the wearing of enemy uniforms.

Likening terrorists to traditional soldiers overcomes domestic law issues, including the longstanding ban on assassinations and the narrow circumstances under which the use of force in self-defense is permitted. The assassinations ban took hold through a series of Executive Orders beginning in the Ford Administration, which emerged in the wake of CIA plots to assassinate foreign leaders.<sup>147</sup> By characterizing targeted killing as "precision" force against "high-level belligerent leaders when acting in self-defense or during an armed conflict," the Obama Administration would be unconstrained by the assassination ban or other domestic criminal law.<sup>148</sup> Citing the World War II precedent of shooting down Admiral Yamamoto, the commander of Japanese forces in the attack on Pearl Harbor, the Obama Administration has likened this conflict to a traditional war between nation states.<sup>149</sup> The criminal law paradigm would not accept targeting as a regular, and certainly not the preferred, method for incapacitation.

The only targeted killing case to reach the courts centered around Anwar al-Aulaqi, an American citizen living in Yemen, where he was involved in operational planning for the terrorist organization al Qaeda in the Arabian Peninsula. Senior government officials had, with the President's approval, placed al-Aulaqi and other terrorism suspects on a secret "kill list." Both the names on the list and the criteria used to place individuals on it (and the criteria,

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146. Brennan Wilson Center Speech, *supra* note 143 ("[T]he Constitution empowers the President to protect the nation from any imminent threat of attack"). The Administration has emphatically not argued its Article II authority in the case of detention. Koh Speech, *supra* note 143 ("First, as a matter of *domestic law*, the Obama Administration has not based its claim of authority to detain those at GITMO and Bagram on the President's Article II authority as Commander-in-Chief.")

147. See Exec. Order No. 11,905, 41 Fed. Reg. 7703 (Feb. 18, 1976); Exec. Order No. 12,306, 46 Fed. Reg. 29,693 (June 1, 1981); Exec. Order 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981) (providing that "[n]o person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.").

148. Koh Speech, *supra* note 143.

149. See Holder Speech, *supra* note 57; Jeh Charles Johnson, Gen. Couns. of the Dep't of Def., Dean's Lecture at Yale Law School: National Security Law, Lawyers, and Lawyering in the Obama Administration (Feb. 22, 2012), available at <http://www.cfr.org/defense-and-security/jeh-johnsons-speech-national-security-law-lawyers-lawyering-obama-administration/p27448>.

if any, to get removed from the list) have all been developed in secret inside the executive branch.<sup>150</sup> Al-Aulaqi's father brought suit in the D.C. District Court seeking, inter alia, an injunction prohibiting the President, the Secretary of Defense, and the Director of the Central Intelligence Agency from killing his son, along with an injunction requiring the government to disclose the standards used to place American citizens on a kill list.

The Court held that the political question doctrine prevented the judiciary from ruling on the merits of such "complex policy questions."<sup>151</sup> The government argued, and the D.C. District Court agreed, that courts could not enjoin the President, ex ante, from using lethal force against an operational leader of an AUMF-covered organization or make decisions on whether a lethal or non-lethal response would be more appropriate.<sup>152</sup> It was not appropriate for judges to "second-guess, with the benefit of hindsight," a military determination by another branch.<sup>153</sup> To do so would betray a "lack of respect due coordinate branches of government" and create "the potentiality of embarrassment of multifarious pronouncements" by the different branches.<sup>154</sup> Al-Aulaqi's status as an American citizen was not enough to overcome this political question doctrine; his "U.S. citizenship – standing alone" did not change the analysis under the doctrine.<sup>155</sup>

By regulating the executive's detention authority but declining to exercise judicial review over its targeting authority, the courts' decisions have had the impact of creating an implicit incentive for the executive to favor lethal targeting over capture,<sup>156</sup> an incentive which is reinforced by the force protection advantages of remote targeting by unmanned drones compared with capture operations. Concerned with the international law implications of these factors, Administration officials have insisted that it is the "clear and unambiguous policy of this Administration" and "unqualified preference . . . to take custody of that individual" for information and intelligence.<sup>157</sup> But the Administration has made clear that this preference is limited to situations where capturing is

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150. See Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction, *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (No. 10-cv-1469), 2010 WL 3555385; Mark Hosenball, *Secretive U.S. Panel Decides Who Will Live and Die*, IRISH TIMES, Oct. 7, 2011, at 15.

151. *Al-Aulaqi*, 727 F. Supp. 2d at 46.

152. *Id.*

153. *Id.* at 48 (quoting *El-Shifa Pharm Indus. Co. v. United States*, 607 F.3d 836, 844 (D.C. Cir 2010)).

154. *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

155. *Id.* at 49.

156. See, e.g., BENJAMIN WITTES, DETENTION AND DENIAL: THE CASE FOR CANDOR AFTER GUANTANAMO 23-26 (2010); Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES, May 29, 2012, at A1 (describing how in the nominations process for designating terrorists for kill or capture, "the capture part has become largely theoretical.").

157. Brennan Harvard Speech, *supra* note 141; see also Holder Speech, *supra* note 57 (saying that it is "preferable to capture suspected terrorists where feasible – among other reasons, so that we can gather valuable intelligence from them.").

“feasible”<sup>158</sup> or “whenever it is possible.”<sup>159</sup> The feasibility determination is based in part on “whether capture can be accomplished in the window of time available to prevent an attack and without undue risk to civilians or to U.S. personnel.”<sup>160</sup> If it is determined that capture is unfeasible, the government believes it has the authority to target non-citizens and citizens alike.<sup>161</sup>

At the same time, Administration officials have admitted that “the reality” is that U.S. captures outside the central battlefields “have been exceedingly rare.”<sup>162</sup> First, as the United States withdraws troops from Afghanistan and extends the battlefield to places where there is no sustained U.S. military presence, there is an increased emphasis on targeting. Capture becomes rare because U.S. “counter-terrorism partners” have captured or killed these individuals first or because the terrorists are finding more “remote, inhospitable terrain” to hide.<sup>163</sup> As Secretary of Defense Leon Panetta said, when going after combatants in remote locations, targeting is “the only game in town.”<sup>164</sup> Second, the Administration has placed a large emphasis on reducing the risk to American lives. Targeting, officials believe, can “dramatically reduce” this danger, “even eliminating [it] altogether.”<sup>165</sup> As one Justice Department official said, “By and large, it’s easier and lower risk to kill [a suspected terrorist] than it is to put people in and try to capture him.”<sup>166</sup> In practice, he said, the decision between a capture or kill operation reflected an economist’s choice: the policymaker weighs the costs and benefits between a kill operation that is potentially low risk and low yield, with a capture operation that is potentially high risk and high yield.<sup>167</sup> For these reasons, the Administration has become convinced that “targeted strikes are wise.”<sup>168</sup>

Using the war model also allowed the executive to retain exclusive control over the decision-making process involved in deciding to use lethal force against terrorism suspects, including those who are American citizens. Under the Fifth Amendment’s Due Process Clause, the government may not deprive a citizen of life without due process of law.<sup>169</sup> Under the Administration’s interpretation of the Fifth Amendment right, “[t]he Constitution guarantees due process,

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158. Holder Speech, *supra* note 57.

159. Brennan Harvard Speech, *supra* note 141.

160. Holder Speech, *supra* note 57.

161. *Id.*

162. Brennan Wilson Center Speech, *supra* note 143.

163. *Id.*

164. David S. Cloud, *Panetta Refers to CIA’s ‘Secret’ Drones; Defense Chief All But Confirms the Agency’s Use of Aircraft to Carry Out Strikes*, L.A. TIMES, Oct. 8, 2011, at A3.

165. Brennan Wilson Center Speech, *supra* note 143.

166. David Kris, Assistant Att’y Gen., Dep’t. of Justice, Address at the Brookings Institution: Law Enforcement as a Counterterrorism Tool (June 10, 2010).

167. *Id.*

168. Brennan Wilson Center Speech, *supra* note 143.

169. U.S. CONST. amend. V (“[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . .”).



not judicial process.”<sup>170</sup> Alluding to the precedents of *Hamdi* and *Mathews*, the Administration has used a “balancing approach” to weigh the individual interest in being erroneously deprived of life against the government interest in preventing terrorist attacks, and factoring in the cost to the government from additional process.<sup>171</sup> But unlike detention decisions in *Hamdi*, the courts have no role. The President, the Attorney General said, is not “required to get permission from a federal court” before targeting an American citizen who is a senior operational leader of al Qaeda or an associated force.<sup>172</sup> Permission on individual targeting comes from oversight mechanisms within the executive branch.<sup>173</sup>

Nor has the Administration submitted to the courts, as it has in the detention context,<sup>174</sup> a public account of the legal standards used before targeting. These are developed within the executive branch and shared with “appropriate” members of Congress.<sup>175</sup> Instead, Administration officials have made various speeches touching on matters of targeting. In the most detailed articulation of targeting standards, the Administration announced that targeting an American citizen abroad “would be lawful *at least*” in the circumstance where “[f]irst, the U.S. government has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States; second, capture is not feasible; and third, the operation would be conducted in a manner consistent with applicable law of war principles.”<sup>176</sup> This standard came with a caveat: that these requirements “may not apply in every situation,” specifically where operations “take place on traditional battlefields.”<sup>177</sup>

Indeed, use of the war model has moved the Administration away from particularistic determinations in its targeting operations on the central battlefields.<sup>178</sup> In Pakistan, for example, the Administration has allegedly relied on

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170. Holder Speech, *supra* note 57.

171. *Id.*

172. *Id.*

173. See Koh Speech, *supra* note 143 (“In my experience, the principles of distinction and proportionality that the United States applies are not just recited at meetings. They are implemented rigorously throughout the planning and execution of lethal operations to ensure that such operations are conducted in accordance with all applicable law.”).

174. See March 13 Memorandum, *supra* note 117.

175. Holder Speech, *supra* note 57.

176. *Id.* (emphasis added)

177. *Id.*

178. Some have argued that outside recognized battlefields, the United States is constrained by sovereignty concerns, such that force can only be used in self-defense or in countries unable or unwilling to deal with the threat. See, e.g., W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT’L L. 525, 528 (2006). Alternatively, countries can use force authorized by UN Security Council resolutions. See, e.g., Jonathan L. Charney, *The Use of Force Against Terrorism and International Law*, 95 AM. J. INT’L L. 835 (2001). These individuals are concerned that the executive will be able to use force all over the world. The Administration has argued that they are fighting terrorists in a limited set of countries where they have connections to al Qaeda and their associated forces. See, e.g., Brennan Harvard Speech, *supra* note 141. One distinction between Pakistan and Yemen might be that individuals on the main battlefield are put

“signature strikes” to hit terrorism suspects, even where their identities are unknown.<sup>179</sup> Instead, officials rely on intelligence pictures revealing “patterns of suspicious behavior” indicative of “signature” al Qaeda activity – gatherings at certain compounds, particular communications equipment, and the like. According to some press accounts, more militants in Pakistan were killed using signature strikes than strikes that targeted individuals found after being placed on the kill list.<sup>180</sup> The CIA is said to be seeking to expand the use of signature strikes in Yemen, where it is limited to “personality strikes” against individuals on the kill list.<sup>181</sup> As terrorists move to more remote spaces outside the central battlefield, these types of strikes could increase.

Of course, the Administration itself has recognized that there are real costs to this implied preference for targeting over detention. Lethal targeting precludes the collection of potentially valuable intelligence from the suspect. And the perception that the Administration has dramatically lowered the threshold for the use of targeted killing has created controversy at home and abroad,<sup>182</sup> undermining the perceived legitimacy of U.S. counterterrorism operations and with it the willingness of other nations to cooperate with the United States, while potentially reinforcing the terrorists’ counter-narrative. Yet as Congress continues to narrow the options for Article III prosecution, and the Administration seeks to avoid widespread use of indefinite detention without trial, the dilemma persists.

### III. A COMPREHENSIVE FRAMEWORK FOR COUNTERTERRORISM OPERATIONS: THE HYBRID MODEL

This analysis suggests that the episodic interventions of Congress and the courts into regulating executive branch conduct of counterterrorism policy has had the effect of shifting operations to the targeting of potential terrorists over detention and signature strikes over personality strikes. Courts have ruled extensively on detention, but not targeting. Congress has overregulated detention, and constrained the executive’s ability to prosecute terrorists under Article III, but taken a hands-off approach to targeting. The Executive itself has increasingly relied on targeted killing by drones in conducting counterterrorism policy, not only because of their advantages from a force protection standpoint,

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on notice, and thus assume the risk of attack. By contrast, individuals in places like Yemen may not be on notice, particularly when the standards for targeting have not been made public. Another consideration might be evidentiary. In the main battlefields, American forces have a large, on-the-ground presence, through which they can supplement surveillance imaging with human intelligence. As such, they might be better able to observe individual suspects in a sustained way, such that the right calls are more often made.

179. Greg Miller, *Broader Drone Tactics Sought*, WASH. POST, Apr. 19, 2012, at A1.

180. *Id.*

181. *Id.*

182. *See, e.g.*, Judy Dempsey, *Staying quiet amid unease over drones*, INT’L HERALD TRIB., June 12, 2012, at 2; Gardiner Harris, *Defense Chief Shrugs Off Objections to Drones*, N.Y. TIMES, June 7, 2012, at A10.

but because their accuracy and ability to limit collateral damage offer a technologically attractive way of complying with the law of war principle of distinction. And this preference has been reinforced by the absence of long-term detention options acceptable to the Administration (the congressional restrictions on bringing Guantánamo prisoners to the United States for Article III prosecution, combined with the Administration's desire to close Guantánamo and the end of options for long-term detention in the battlefield zones of Iraq and Afghanistan). The result is a fragmented approach that has prevented a coherent rule of law framework from taking hold.

Equally important, the effectiveness of the Administration's approach has been harmed by the on-going debate in the United States and abroad about whether it is consistent with our avowed commitment to the rule of law and protections for due process and individual liberty. While the Administration's more recent efforts to provide a public account of the process and underlying rationale for the use of force shed more light on the Administration's theory, it has not put to rest concerns either about the substantive principles or the constraints on the executive's exercise of discretion.

All three branches have recognized that the traditional criminal law and law of war models are inadequate to address at least some aspects of counterterrorism. Indeed, counterterrorism policy has, over time, incorporated elements of a hybrid approach, albeit in an ad hoc manner with small changes over time. Two examples documented in the literature are worth mentioning here, in intergovernmental coordination and detention policy. First, David Kris has described how the need for an all-hands-on-deck approach to counterterrorism in the immediate aftermath of 9/11 helped knock down a provision in the Foreign Intelligence Surveillance Act that separated law enforcement and intelligence gathering and limited coordination between DOJ and the FBI.<sup>183</sup> The 9/11 Commission Report concluded that the FISA wall contributed to practical difficulties in locating some of the 9/11 hijackers, and that more coordination was required between law enforcement and intelligence officers.<sup>184</sup> Kris describes how all three branches of government participated in tearing down the wall, through congressional legislation, attorney general guidelines, and the FISA court.<sup>185</sup> Second, Robert Chesney and Jack Goldsmith documented how criminal trials moderated some procedural safeguards to resemble aspects of the military detention system, and how the military added safeguards to incorporate some of the individualized requirements of the criminal justice system.<sup>186</sup> These incremental changes reflect a multi-branch approach, and show how government actors recognized that aspects from both the criminal law and law of war models were necessary for successful counterterrorism policy.

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183. David S. Kris, *Law Enforcement as Counterterrorism Tool*, 5 J. NAT'L SECURITY L. & POL'Y 1, 4 (2011); see David S. Kris, *The Rise and Fall of the FISA Wall*, 17 STAN L. & POL'Y REV. 487 (2006).

184. 9/11 COMMISSION REPORT, *supra* note 91, at 78-79, 266-272.

185. Kris, *Law Enforcement as Counterterrorism Tool*, *supra* note 183, at 5.

186. Chesney & Goldsmith, *supra* note 12, at 1081, 1100-1117.

There are many ways to effectuate a hybrid approach. Some have recommended changes to domestic law, with Congress taking the lead in passing broad framework legislation. Matthew Waxman has called on Congress to “define the subject class” of individuals who could properly be detained.<sup>187</sup> In *Law and the Long War*, Benjamin Wittes reflected broadly on the Bush Administration approach to counterterrorism, concluding that “[o]nly Congress can remove the conflict from the paralyzing war-versus-law enforcement divide and craft for terrorism new legal rules tailored to terrorism’s own peculiarities.”<sup>188</sup> For Wittes, Congress has two major virtues: a constraining function that can check against the go-it-alone presidential wartime powers model and courts’ “ambitions for a greater role in foreign and military affairs,” as well as its own “institutional virtues” that allow it to set stable rules for the long term.<sup>189</sup> Under this model, Congress would take the lead on defining hybrid rules for detention, interrogation, trial, and surveillance.

Others have suggested effectuating such an approach through changes to international law. Monica Hakimi, for example, argues that reliance on the four “regulatory domains” recognized by international law – law enforcement, emergency, armed conflict for civilians, and armed conflict for combatants – is untenable in theory and unworkable in practice as a basis for detention and targeting standards.<sup>190</sup> Rather than beginning with the domain and applying the legal analysis, she proposes three “core principles” that should undergird decision-making: a liberty-security principle, a mitigation principle, and a mistake principle.<sup>191</sup> She argues that a principles-based approach will lead to more incremental changes in the law through stronger debates and stronger accountability.<sup>192</sup>

Still others believe that a hybrid approach will occur through incremental changes to the law. Samuel Issacharoff and Richard Pildes observe that changes are afoot to the legitimation of the use of military force.<sup>193</sup> The law is not leading these changes, but following modern moral and prudential concerns. In the area of targeted killing, the moral imperative – which the law must eventually incorporate – is to individualize responsibility.<sup>194</sup> Such changes, they believe, will inevitably occur even without immediate adoption of a formal hybrid

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187. Matthew C. Waxman, *Administrative Detention of Terrorists: Why Detain, and Detain Whom?*, 3 J. NAT'L SECURITY L. & POL'Y 1, 17 (2009).

188. BENJAMIN WITTES, *LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR* 132 (2008).

189. *Id.* at 132-133.

190. Monica Hakimi, *A Function Approach to Targeting and Detention*, 110 MICH. L. REV. 1365 (2012).

191. *Id.* at 1385-1387.

192. *Id.* at 1419.

193. SAMUEL ISSACHAROFF AND RICHARD H. PILDES, *TARGETED WARFARE: INDIVIDUATING ENEMY RESPONSIBILITY*, PUBLIC LAW & LEGAL THEORY RESEARCH PAPER SERIES, WORKING PAPER No. 12-40, at 2 (2012), available at <http://www.law.northwestern.edu/colloquium/constitutionallaw/documents/Pildes-%20Targeted%20Warfare%20-%20Individuating%20Enemy%20Responsibility.pdf>.

194. *Id.* at 7.

model. Instead, they will “embed themselves in the practices of states, especially dominant states” and eventually become ingrained legal frameworks that govern the use of force.<sup>195</sup>

Our view is that a more systematic and comprehensive approach is still required, even after twelve years of conflict and just as many years of scholarly recommendations for reform. Such an approach should take into view a broad account of counterterrorism policy as a whole, without merely tinkering with individual policy tools. A more comprehensive approach would be based on characteristics that blend the unique features of the law of war and criminal justice models, and better addresses this modern conflict consistent with core constitutional values. Like the wartime model, it should focus on prevention, be proportionate, and respect the importance of force protection. Like the criminal justice model, it would require particularistic determinations, including considerations of individual culpability (at least prospectively). And consistent with our constitutional values, it would offer checks and balances on executive discretion.

At its heart, the model would recognize that incapacitation of terrorists is a necessary tool in the light of the severity of threat – not just to life and property, but to our system of government itself. That means that there must be authority for administrative detention and the use of lethal force in appropriate cases, even against those who have yet to perpetrate a terrorist act. But to justify such deviations from traditional criminal justice principles governing deprivation of life and liberty, the approach would need to incorporate particular determinations that reduce the chances of false positives, relate the severity of the means employed to the seriousness of the threat, and incorporate procedural safeguards to prevent institutional or systemic tilting of the decision process. Wherever possible, the hybrid approach should seek to approximate the criminal justice model, given the deep connections between that model and national commitment to protection of liberty and freedom from arbitrary government action. But it should also take seriously that political terrorism is itself a threat to the liberty, and the failure to take effective action against terrorists could equally harm our constitutional system.

#### *A. Detention*

The debate over detention goes to the heart of the tensions between the criminal justice and wartime models. Military detention is, at its core, about taking combatants off the battlefield – and that is a primary goal of counterterrorism. By contrast, incapacitation is, at best, an ancillary feature of our criminal justice system. The debate over detention has focused on two core elements: first, under what circumstances can a terrorist be detained in the absence of a criminal conviction, and second, what rules and procedures should govern the

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195. *Id.* at 2, 68.

detention decision. The debate has been deeply complicated by the political controversy over the use of Article III courts in terrorism cases, which conflates the debate about what kind of tribunal to select with the related – but not identical – debate over the predicate for detention. In principle, there would appear to be no barrier to the use of Article III courts for administrative detention as well as ex post punishment, as the civil confinement and criminal conspiracy models suggest.

*The primacy of Article III courts.* The arguments against civilian courts, and in favor of military tribunals, include both political and legal considerations. On the political front, some seem to believe that, given the state of “war” with terrorists, and the preference for a law-of-war approach to terrorism, it would be inappropriate to use civilian courts to detain the enemy. On the legal front, others appear to believe that the use of Article III courts provides additional constitutional protections that should not be extended to terrorists. They seem to have a general fear that in an Article III court, a terrorist would be let go based on “technicalities,” like a failure to provide *Miranda* warnings or exclusionary rules of evidence. They also suggest that some of these protections harm the ability of the government to obtain time-urgent critical intelligence from terrorism suspects (or force trade-offs by achieving the intelligence goals at the risk of jeopardizing the admissibility of evidence (and therefore the prospects of conviction) because the interrogation process “tainted” the evidence. They point to the case of Ahmed Ghailani, who was convicted on only one of over 280 charges. The perception, rightly or wrongly, was that evidence thrown out of a civilian court would survive a military commission.<sup>196</sup> They look to the lessened burden on prosecutors through relaxed hearsay standards,<sup>197</sup> the lack of *Miranda* requirements, and the need to persuade only two-thirds – rather than all – of the “jury” (here, commission members) in non-capital cases.<sup>198</sup> Some also argue that terrorists do not “deserve” the dignity of being afforded protections of the U.S. constitution. Finally, they point to the costs of security precautions and risks to the community of holding terrorism trials in Article III courts.

While some of these considerations are legitimate, in most cases they are outweighed by the substantial benefits offered by using Article III courts before placing terrorists in long-term detention. In practice, there is widespread acceptance that many of the constitutionally rooted protections available to criminal defendants should be available in the military tribunal context. This is reflected

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196. Benjamin Wiser and Charlie Savage, *At Terror Trial, Big Questions Were Avoided*, N.Y. TIMES, Nov. 19, 2010, at A1.

197. The 2009 Military Commissions Act allows hearsay where judge finds that a witness is “not available as a practical matter, taking into consideration the physical location of the witness, the unique circumstances of military and intelligence operations during hostilities, and the adverse impacts on military or intelligence operations” that would result. Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2582 (2009).

198. See, e.g., Kris, *Law Enforcement as a Counterterrorism Tool*, *supra* note 183, at 1.



by democratic consensus in statutes that have codified certain rights (including the presumption of innocence, proving guilt beyond a reasonable doubt, right to counsel, right against self-incrimination, and suppression of evidence for unfair prejudice) for defendants appearing before military commissions.<sup>199</sup>

Additionally, some of the difficulties could be overcome by carefully-crafted criminal terrorism statutes. Even under existing law, there have been a number of successful criminal prosecutions, most recently in the *Warsame* case. Cost and security considerations are not trivial, but the advantages that come from the established legitimacy of such proceedings have important collateral benefits in the broader political effort to undermine terrorists and terrorism. For this reason, there should be a strong presumption in favor of the use of Article III criminal proceedings to incapacitate, as well as punish, terrorists.

But it is also true that there are important instances when traditional criminal prosecution will be unavailable, including the nature of the evidence available, the circumstance under which the apprehension took place, or the limited period of incarceration available for the offense. Therefore there is a clear need for a procedure that would allow for the detention of demonstrably dangerous individuals outside the criminal law context.

To say that there is a need for some form of administrative detention does not necessarily imply the necessity for military tribunals. There is a powerful case to be made to seek as far as possible to use Article III courts to decide issues of detention, under explicating articulated rules established by statute. As with criminal prosecutions, the established legitimacy associated with federal courts has important collateral benefits, and the additional constitutional protections should not materially affect the disposition of the cases.

As discussed above, there are already precedents (drawn from the law of conspiracy and from the civil commitment process for the mentally ill) for using traditional courts to incapacitate even absent a traditional criminal act. While many express concerns about the long-term impact of codifying preventive detention, there is a powerful case to recognize that some individuals (often by their own admission) are too dangerous to return to the battlefield, and that a statutorily-established administrative detention scheme administered by the federal courts is preferable to the Hobson's choice of release or kill.

The preference for a statutorily established, Article III approach to administrative detention can also help resolve another important debate over appropriateness in the case of U.S. citizens. On the one hand, there are serious concerns about using military commissions against American citizens (especially outside the traditional battlefield). On the other hand, a bifurcated system that gives Americans access to Article III courts, while relegating foreign nationals to military commissions, plays into the terrorists' narrative about U.S. indifference to the rights and liberties of others. Using a common procedure and common forum for both U.S. nationals and non-nationals helps obviate this dilemma.

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199. *Id.*

*Rules governing administrative detention.* Once the initial decision to detain is made (whether by Article III court as we would prefer, or by military tribunal), there are important questions concerning both the length and place of detention. In the traditional war model for detention and incapacitation, the outer bound of the period of detention is the termination of conflict, which typically (but not always, as the Korean “conflict” demonstrated) is well demarcated. In the case of counterterrorism, it is difficult to foresee an obvious moment when the “war” will be over, and the prisoners released. There is therefore the need for a mechanism that relates the predicate for the detention (individual danger posed by the detainee) to the continued period of detention. This would clearly suggest the need for individual, periodic review of the danger associated with the release of the detainee. Although the facts that led to the initial detention decision will remain relevant to periodic review, the focus must be on *prospective* risk, with an appropriately defined burden on the government to demonstrate the on-going risk (rather than a presumption of continued need to detain), taking into account the difficulty of proving a negative. Here, mental health law provides an important model, with appropriate adjustment to account for the elevated risk to society from prematurely releasing a potential terrorist. The terms of the release may also be relevant, for example, whether the release is to third countries that retain the ability to monitor or undertake rehabilitation programs.

Post-detention review should also be accompanied by some level of habeas-like independent review. Currently, the Administration requires executive branch post-detention review at both Guantánamo and at Bagram Airfield. At Guantánamo, continued detention is justified where it is necessary “to protect against a significant threat to the security of the United States.” A detainee’s file is reviewed every six months, with a full review and hearing every three years.<sup>200</sup> The rules at Bagram are similar.<sup>201</sup> Both processes supply the detainee with counsel, the right to attend session, and a written record of the proceedings. But while habeas is available for initial determinations (though not periodic review) at Guantánamo, it is not available at all at Bagram because of theater-of-war principles. The incentive here is for the government to transport circuitously detainees not captured on “hot” battlefields to Bagram to avoid habeas review in federal courts. This runs counter to the model proposed here, which pushes for access to Article III courts, and strains credibility executive branch arguments for unreviewable detention in cases of extreme hardship on the battlefield. To obviate the concern about endless litigation and burdens on the courts, the barriers to habeas review should be reasonably high, related both to the period

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200. Exec. Order No. 13,567, 76 Fed. Reg. 13,277 (Mar. 10, 2011).

201. A review occurs every six month, and the detainee may remain if there is a determination that “continued internment is necessary to mitigate the threat the detainee poses.” BAGRAM MEMORANDUM, *supra* note 114; *see also* Letter from Mr. Phillip Carter, Deputy Assistant Sec’y of Def. for Detainee Policy, to Senator Carl Levin, Chairman of the S. Armed Services Comm. (July 14, 2010), *available at* <http://www.scotusblog.com/wp-content/uploads/2009/09/US-Bagram-brief-9-14-09.pdf>.

of time the individual has been held in administrative detention and the substantive criteria for reversing the executive's decision to continue detention (for example, with a presumption in favor of the executive's determination).

### B. Lethal Targeting

Few would dispute the right of the executive branch to use lethal force on a recognized battlefield against those who declare themselves to be an enemy of the United States. The controversy over lethal targeting has therefore focused primarily on the scope of the battlefield and the substantive criteria and processes for carrying out lethal operations, with a particular concern on the use of lethal force against U.S. citizens and the perception of a bias toward lethal force over capture. The reforms to the process of administrative detention proposed above should lessen some of the counterterrorism concerns about capture, by enhancing both the availability and legitimacy of long-term administrative detention. But in some cases, detention will be unavailable, either because of the lack cooperation of the government where the suspect is located, or the risk to U.S. and allied forces from conducting capture operations. For a government trusted with protecting the security of its citizens and (in extreme cases, the fabric of its very government), the option of "do nothing" will be unacceptable. So the question ultimately will be under what circumstances and with what procedural safeguards, should that decision be made.

As we have seen above, even in traditional war, these considerations apply under the laws of *jus in bello*. A military commander must determine whether a target is legitimate, by ascertaining that an individual belongs to the adversary's military (e.g., is wearing a uniform) or, in the case of a physical target, ascertaining that it is part of the war effort). The commander must determine whether the use of force is proportionate and discriminate, that is, avoids unnecessary civilian casualties. The Obama administration has embraced these *jus in bello* constraints and has sought to articulate publicly the criteria it applies, but the controversy continues for several reasons. Some of the concerns are substantive (who is targeted) and some procedural (how to decide). By drawing on traditional criminal justice and constitutional norms, it is possible to alleviate – if not eliminate – these concerns while preserving the authority of the executive to provide for national security. It will be important for the principles governing targeting to be transparent. Although recent speeches by Administration officials have begun to lift the veil of secrecy, the President should be prepared to articulate formally the principles for target selection as well as the legal justification.

*Substantive criteria.* *Jus in bello* considerations provide a point of departure for establishing substantive rules for targeting. The rules of proportionality and distinction are particularly important, but need to be modified by drawing on the criminal law model, to address the unique circumstances of this unconventional conflict. Under the traditional war model, every enemy soldier is a legitimate target—from private to general, from frontline troop to back office clerk. In

principle, the AUMF would seem to authorize the use of lethal force against any member of al Qaeda, regardless of the threat the individual poses.

But such a broad definition of targeting is both unsustainable and potentially counterproductive. The Administration has in part recognized this by requiring a showing of the individualized threat for so-called personality strikes, seeking to establish a reasonably high standard of necessity before using lethal operations. But this is undercut by its willingness in some cases to undertake “signature strikes,” which do not require the same individualized showing of threat. It is unclear whether recent presidential guidelines on lethal targeting would reduce signature strikes, or whether the program would persist, in at least some regions, through the cover of “vague language and loopholes” in those guidelines.<sup>202</sup> Immediately after the President announced the new guidelines, officials conceded that signature strikes against “groups of unidentified armed men presumed to be extremists” would continue in the tribal regions of Pakistan.<sup>203</sup>

While a signature strike could conceivably be justified under the laws of war as the practical equivalent of wearing a uniform (that is, as a way of honoring the principle of distinction), the dangers of Type I errors are much higher than for personality strikes, particularly where personality strikes are based on highly accurate targeting protocols that require positive, persistent identification and precise munitions.

The Administration’s approach to targeting involved in personality strikes appropriately draws on criminal justice principles that focus on individualized determinations and elements of culpability before the use of lethal force. To maintain support for this tool, it is particularly important to maintain a high standard of individualized threat – and as more of the senior leadership is eliminated, to resist any temptation to add names to the target list just to replace one that has been eliminated irrespective of the danger they may pose (we should not seek to replicate the iconic FBI “Ten Most Wanted”). Equally important, the use of signature strikes should be curtailed so that it is available only with a concrete, highly credible showing that the use of force is necessary to disrupt an on-going terrorist operation (as opposed to long-term training or unidentifiable gatherings of terrorists). And in either case, there must also be a clear showing that capture is either unavailable or would come at irreducible risk to U.S. or friendly forces.

To further the legitimacy of these criteria for lethal targeting, we believe the Congress should codify these basic principles, as a corollary to the AUMF. Although there may be questions as to whether such constraints would be constitutionally binding, an approach that has the backing of Congress would surely strengthen the legitimacy of the President’s position. We prefer the

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202. Tabassum Zakaria & Mark Hosenball, *U.S. Drone Guidelines Could Reduce ‘Signature Strikes,’* REUTERS, May 23, 2013, <http://www.reuters.com/article/2013/05/24/us-usa-obama-speech-guidelines-idUSBRE94N03520130524>.

203. Peter Baker, *In Terror Shift, Obama Took a Long Path*, N.Y. TIMES, May 27, 2013, at A1.

shared powers view espoused by Justice Jackson's concurrence in the *Steel Seizure Case*<sup>204</sup> to the sole executive powers view espoused by Justice Sutherland in the dicta of *Curtiss-Wright*.<sup>205</sup>

Congressional action would also help address the concerns over the use of lethal force against U.S. citizens. There seems little doubt that under a law of war model, the nationality of the adversary is irrelevant to the whether it is permissible to use lethal force. But it also true that under our constitutionally based criminal justice model, some protections are available to U.S. citizens that are not available to foreigners. Congressional action ratifying the use of lethal force against U.S. citizens under strict criteria (while not fully addressing Bill of Rights concerns) at least strengthens the case for the executive branch's authority.

*Procedural constraints.* The approach that we propose to the use of lethal force, with its emphasis on individualized determinations, only serves to sharpen the current debate on who should decide, and with what oversight. Who should decide which individuals present a sufficient threat to constitute to a target, and similarly, who should decide whether capture represents an undue risk? While few would question that the executive branch should make the initial decision, critics focus on the lack of independent oversight of the application of the principles to individual targeting decisions, with the executive filling every role as "prosecutor, judge, jury, and executioner."

To date, the courts have declined to intervene in *ex ante* targeting decisions, and we believe that is the wiser course. While we have recognized that the courts do have some competence in adjudging dangerousness, and have proposed that they have a role in administrative detention, the time urgency and intelligence sensitivity of lethal operations are important barriers to *ex ante* judicial review.<sup>206</sup> More broadly, interjecting the courts into these kinds of decisions about military operations would have profound consequences for the clearly constitutionally committed Commander-in-Chief authority. And if, as we suggest, the executive's authority to target is buttressed by broad congressional authorization, the case for judicial deference is especially strong.

Nonetheless, we believe that there are still ways to bridge the gap between the law of war and criminal justice models. Although courts may not be the best place for *ex ante* oversight, the executive itself could provide more independent scrutiny to the targeting decisions. Though the Administration has not publicly

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204. *Youngstown Sheet & Tube Co. v. Sawyer* (The Steel Seizure Case), 343 U.S. 579, 635-638 (1952) (Jackson, J., concurring) (proposing models for determining the lawfulness of Presidential action according to, without guidance from, or in opposition to Congressional action).

205. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (asserting the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . .").

206. Johnson, *supra* note 149 ("[C]ontrary to the view of some, targeting decisions are not appropriate for submission to a court. In my view, they are core functions of the Executive Branch, and often require real-time decisions based on an evolving intelligence picture that only the Executive Branch may timely possess.").

articulated the procedures it uses in determining whether to authorize a drone strike, newspapers have reported on a top secret “nominations” process where counterterrorism officials pore over intelligence and determine whether to place suspected terrorists on a kill list. The list is then sent to the President, where by his own rules, he decides whether to approve a name. Names are reportedly removed from the list upon a determination that the individual no longer appears to pose an imminent threat.<sup>207</sup> Building on existing practice, the executive branch should adopt – and publicly describe – a formal, executive branch process that would include the Justice Department and other non-military and intelligence officials. This group would compile a formal record on which the decision was based, along with a recommendation – including dissents – to the President. Although the President would retain the authority to overrule a negative decision, it would be based on his written determination. The model then has elements of formal fact finding that offers some of the protections embodied in the criminal justice model.

Such a formal process would also facilitate another important procedural safeguard, the use of *ex post* review of practices, both by the executive branch and Congress. The President’s Intelligence Advisory Board, a group of outside independent intelligence advisors, could serve such a role within the executive branch. The executive branch would also share the intelligence record with the relevant committees of Congress, through the House and Senate intelligence committees for Title 50 operations and the armed services committees for Title 10 operations. The President is required by law to “ensure that the congressional intelligence committees are kept fully and currently informed of the intelligence activities of the United States,”<sup>208</sup> but has the option to limit the reporting to the “Gang of Eight”—the leaders of the two parties in the Senate and House plus the chair and ranking minority members of the intelligence committees – “[i]f the President determines that it is essential to limit access to the finding to meet extraordinary circumstances.”<sup>209</sup> Because these individuals cannot share the information with other members of their committees, discuss it with legal counsel, or even take notes during meetings, this avenue is not the most effective mechanism for congressional oversight of ongoing counterterrorism operations.<sup>210</sup> To make congressional review meaningful, the default of reporting to the full intelligence committees should be respected.

These *ex post* reviews will help recalibrate policy in favor of detentions and away from targeting, and counter temptations to rely on lethal operations that are outside the review of courts. When the President announces that “America

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207. Becker & Shane, *supra* note 156.

208. 50 U.S.C. §413(a)(1).

209. 50 U.S.C. §413(c)(2).

210. See, e.g., MARSHALL CURTIS ERWIN, CONG. RESEARCH SERV., R40698, “GANG OF FOUR” CONGRESSIONAL INTELLIGENCE NOTIFICATIONS 7 (2013), available at <http://www.fas.org/sgp/crs/intel/R40698.pdf> (quoting a letter from Representative Jane Harman to President George W. Bush, January 4, 2006, regarding the National Security Agency (NSA) electronic communications surveillance program).



does not take strikes when we have the ability to capture individual terrorists; our preference is always to detain, interrogate, and prosecute,”<sup>211</sup> it will be the responsibility of these groups to evaluate this claim against the dossier of intelligence reports the executive branch used to reach individual targeting decisions. Were alternatives to targeting explored, and was there a serious consideration to pursue them? How was the decision to target ultimately justified? These determinations are difficult, but our system enables them to be made through the checks and balances of two separate political branches. These reviews can provide important assurances that the principles are not only articulated but are being respected, without interfering with the need for timely decision and while protecting confidentiality of sources and methods. Internal oversight through independent experts and external oversight through the democratically-elected houses of Congress will help ensure that targeting decisions are actually being carried out in line with the presidential guidelines, domestic and international law, and constitutional principles.

### C. *End-of-Conflict Issues*

Twelve years after the start of conflict, any overarching discussion of counterterrorism policy must move beyond the day-to-day operations and take sight of the end-of-conflict horizon. As the President has observed, “[T]his war, like all wars, must end.”<sup>212</sup>

This winding down of operations is already beginning to take place. The transfer of control over the Bagram detention facility in Afghanistan was one major, and concrete, step toward drawing down the American military presence in Afghanistan. In March 2013, the United States reached a deal with President Hamid Karzai to transfer oversight of the detention center at Bagram to Afghanistan. While the United States would maintain an advisory role over the release of prisoners, all final decisions would rest with the Afghani government.<sup>213</sup> (The other major action will be a drawdown of American troops in Afghanistan by the end of 2014, with a residual force remaining, or possibly without one.<sup>214</sup> Almost half of the 64,000 troops currently in the country will be withdrawn by February 2014.<sup>215</sup>) The transfer of Bagram will affect only a portion of the detainee population, notably those remaining under U.S. custody at Guantánamo. Under the laws of war, the authority for administrative detention ends with the “cessation of active hostilities,” at which point detainees must

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211. Barack Obama, Remarks by the President at the National Defense University (May 23, 2013).

212. *Id.*

213. Mark Mazzetti, *U.S. and Afghans Reach Deal on Bagram Prison Transfer*, N.Y. TIMES, Mar. 24, 2013, at A8.

214. Mark Mazzetti & Matthew Rosenberg, *U.S. Considers Faster Pullout in Afghanistan*, N.Y. TIMES, July 9, 2013, at A1.

215. *Id.*

be “released and repatriated.”<sup>216</sup> The end of conflict will precipitate many difficult questions about the status of detainees within U.S. custody who cannot be convicted in court, but whom the Administration determines are too dangerous to release.

These decisions will take time to iron out. Administration officials have sought to manage expectations about the timeline of releasing detainees, noting that after World War II, courts had acknowledged the President’s authority to detain German nationals even six years after hostilities had ended.<sup>217</sup> And the task of charging, releasing, or repatriating detainees will not be made any easier by the congressional restrictions on transfer authority in the NDAA.

But more can be done to ensure that the domestic authority for counterterrorism operations matches the conflict as it actually exists today. We recommend that Congress review the 2001 AUMF, update it to match the current threats the United States faces against regional organizations that may have, at best, an attenuated relationship to al Qaeda, and insert a sunset provision with a clause that mandates review of the authorization each year. Such a requirement would help guard against the inertia of a law that can persist into perpetuity if Congress is never forced to act. Mandatory review will require Congress to take a more active role in supervising the gradual drawdown of operations against the old threats periodically and methodically, while ensuring that the executive branch can continue to address new threats as they arise. Moreover, such review will help compensate for the relative degree of discretion that it grants the executive branch, by keeping it responsible to a body that has bound itself by law to regular review of its authorities.

#### CONCLUSION

This Article explored the imperfect relationship between the policy objectives – deterrence, incapacitation, and intelligence gathering – underlying the use of detention and targeted killing within the traditional legal frameworks used to justify them – the law of war and the criminal justice model. We demonstrated why a hybrid model should be developed which will allow for effective counterterrorism consistent with the underlying legal and moral principles behind the both the law of war and criminal justice model, as well as our constitutional considerations of checks and balances. In particular, the hybrid model we propose blends the particularistic determinations that lie at the heart of the American criminal justice model with the prospective and preventive orientation of the law of war model. This hybrid model recognizes that terror-

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216. Third Geneva Convention, *supra* note 50, at art. 118 (“Prisoners of War shall be released and repatriated without delay after the cessation of active hostilities.”).

217. Jeh Johnson, *The Conflict Against Al Qaeda and its Affiliates: How Will It End?*, Remarks at Oxford University (Nov. 30, 2012) (advocating that the United States and its allies should look to “conventional legal principles to supply the answer” to the detainee question and citing *Ludecke v. Watkins*, 335 U.S. 160 (1948) (Which held that the President’s authority to detain German nationals continued for over six years after the fighting with Germany had ended.).

ism is a serious threat to the fabric of society and our constitutional system, and requires use of the law of war model in some cases. But the model also protects against government overreach by seeking, wherever possible, to align itself with the best instincts of the criminal justice model, and its promotion of our core values of freedom and liberty. It respects the need for flexibility and timely action by the executive while providing meaningful checks and balances against unfettered discretion. We believe that such a comprehensive framework can help build domestic consensus and global support for a counterterrorism program that must remain effective even as specific conflicts wind down.