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Matthew Waxman Columbia Law School, mwaxma@law.columbia.edu

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

Matthew C. Waxman*

I. Introduction

A debate rages in the halls of universities as well as Congress and national security agencies about whether the United States should enact new "administrative" or "preventive" detention laws: *laws that would authorize the detention of suspected terrorists outside the normal criminal justice system.*¹ Advocates argue that criminal law alone is inadequate to combat transnational terrorist networks spanning continents and waging violence at a level of intensity and sophistication previously achievable only by powerful states, but that the law of war is inadequate to protect liberty.

^{*} Associate Professor, Columbia Law School; Adjunct Senior Fellow, Council on Foreign Relations; Member of the Hoover Institution Task Force on National Security and Law. Thanks to Ken Anderson, Bobby Chesney, David Cole, Justin Florence, Matthew Gerke, Monica Hakimi, Neal Katyal, Jack Goldsmith, Aziz Huq, Trevor Morrison, Sam Rascoff, Steve Vladeck and Ben Wittes for comments on earlier drafts.

On July 27, 2008, the *Washington Post* editorial page called for "a specialized national security court" that would "assess whether [the] government was justified in detaining a suspect," *Workable Terrorism Trials*, July 27, 2008, at B06, opposite an opinion piece by a federal judge arguing that such a proposal "risks a grave error in creating a parallel system of terrorism courts unmoored from the constitutional values that have served our country so well for so long." John C. Coughenour, *The Right Place to Try Terrorism Cases*, WASH. POST, July 27, 2008, at B07.

See, e.g., BENJAMIN WITTES, LAW AND THE LONG WAR 151-182 (2008); Andrew McCarthy & Alykhan Velshi, "We Need a National Security

Jack Goldsmith and Neal Katyal, for example, call on "Congress to establish a comprehensive system of preventive detention that is overseen by a national security court." Critics warn that new administrative detention laws will undermine the liberty protections of criminal law, which, they assert, already provides the government ample tools to arrest, charge and prosecute suspected terrorists. Center for Constitutional Rights President Michael Ratner writes that proposals like Goldsmith and Katyal's "cut[] the heart out of any concept of human liberty."

This debate has only intensified since the Supreme Court held last Term in *Boumediene v. Bush* that prisoners at Guantanamo have a constitutional right to habeas corpus review of their detention by federal

Court", Submission for AEI (2006) (available at http://www.defenddemocracy.org/usr doc/Court.doc); Amos N. Guiora, Quirin to Hamdan: *Creating a Hybrid Paradigm for the Detention of Terrorists*, Case Research Paper, Working Paper 06-19 (Oct. 2006); Tung Yin, *Ending the War on Terror One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARVARD JOURNAL OF LAW & PUBLIC POLICY 149 (2005); Benjamin Wittes & Mark Gitenstein, A Legal Framework for Detaining Terrorists, Brookings Paper (2008) (available at http://www.brookings.edu/papers/2007/~/media/Files/Projects/Opportun ity08/PB_Terrorism_Wittes.pdf.)

- Jack Goldsmith & Neal Katyal, *The Terrorists' Court*, N.Y. TIMES, July 11, 2006.
- See, e.g., Kenneth Roth, *After Guantánamo: The Case Against Preventive Detention*, 87 FOREIGN AFFAIRS, May/June 2008, at 2; Gabor Rona, *Legal Frameworks to Combat Terrorism: An Abundant Inventory of Existing Tools*, 5 CHICAGO J. INT'L L. 499 (2004-05); Richard B. Zabel & James J. Benjamin, Jr., In Pursuit of Justice: Prosecuting Terrorism Cases in Federal Court (Human Rights First, May 2008), available at http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf; The Constitution Project, "A Critique of 'National Security Courts'" June 23, 2008; see also Deborah H. Pearlstein, *We're All Experts Now: A Security Case Against Security Detention*, 40 CASE WESTERN RESERVE INTERNATIONAL LAW JOURNAL (2008) (arguing that even if valid under U.S. and international law, preventive detention schemes are counterproductive in combating terrorism).
- 5 Letter to the Editor, N.Y. TIMES, July 16, 2007.

The Court expressly left unresolved important substantive courts. questions such as the scope of the Executive's power to detain, and delegated to lower courts to work through procedural issues likely to arise in hundreds of resulting habeas petitions.⁸ Administrative detention proponents argue that these openings invite Congress to enact legislation to clarify the uncertainties, recognizing that the modern-day terrorist threat necessitates new legal tools. Critics draw just the opposite lesson from The bi-partisan Constitution Project published a report Boumediene. condemning administrative detention proposals a week after the decision came down, arguing that Boumediene "illustrates [that] existing Article III courts are fully capable of adjudicating issues regarding the legality of detention. There is no need to create a specialized tribunal either for Guantanamo detainees or for anyone else who may be subject to detention under existing law."¹⁰

This Article aims to reframe the administrative detention debate, not resolve it. In doing so, however, it advances the discussion by highlighting the critical substantive decisions embedded in calls for legal procedural reform and pointing the way toward the most sensible options to consider. It argues that the current debate's focus on procedural and institutional

No. 06–1195, slip op. (June 12, 2008).

While mandating that Guantanamo detainees receive access to U.S. federal courts empowered to correct errors after "meaningful review of both the cause for detention and the Executive's power to detain," Boumediene v. Bush, No. 06–1195, slip op. at 54 (June 12, 2008), the Court made clear that it was "not address[ing] the content of the law that governs petitioners' detention." *Id*.

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

See, e.g., Stuart Taylor, *Bush and the Justices Behaved Badly*, NATIONAL J., June 21, 2008; Benjamin Wittes, *Congress's Guantanamo Burden*, WASHINGTON POST, June 13, 2008.

The Constitution Project, "A Critique of 'National Security Courts" June 23, 2008, available at http://constitutionproject.org/article.cfm?messageID=484.

questions of *how* to detain suspected terrorists overshadows the important questions of *why* – as a matter of counter-terrorism strategy – administratively detain, and detain *whom*. Not only are the answers to these latter questions at least as important as procedural rules in safeguarding and balancing liberty and security, but they should precede analysis of the procedural issues because the soundness of any specific procedural architecture depends heavily on its purpose and the substantive determinations it is meant to adjudicate.

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

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

Part II of this Article briefly explores the Bush Administration's approach to the why and whom questions, in particular its reliance on a theory of "enemy combatants", and the logic behind calls to reform it through administrative detention legislation. Part III examines various strategic objectives behind administrative detention proposals, and Parts IV and V then explain how those objectives translate into different definitions of the class, or those subject to proposed detention laws. Part VI returns to

¹¹ Cf. Jenny S. Martinez, *Process and Substance in the "War on Terror*," 108 COLUMBIA LAW REVIEW 1013 (2008) (detailing how most court decisions in cases challenging Bush Administration counter-terrorism detention policies have not directly addressed substantive rights, but instead have focused on procedural rights).

the procedural issues and shows how new administrative detention processes, or perhaps even special national security courts, would likely look very different depending on the strategic choices underlying them. Rather than coming down for or against new administrative detention law, this Article proposes several types of schemes that stand the best chance of successfully protecting security and liberty, as well as questions that should guide further consideration and refinement of them.

II. ENEMY COMBATANT DETENTION AND CALLS FOR PROCEDURAL REFORM

The Bush Administration's approach to detention began with the notion that the United States is at war with al Qaida and those aligned with it. 22 Supporting that notion, the 2001 congressional Authorization of the Use of Military Force authorizes "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001,"13 and the UN Security Council declared the day after 9/11 that the terrorist attacks constituted "a threat to international peace and security."14 The Administration has relied in turn on an expansive interpretation of its domestic executive war powers and the international law of war to assert that those fighting – broadly defined – on behalf of al Qaida and its affiliates, or in some cases those supporting that fight, are enemies in an ongoing armed conflict. As such, any of these constituent agents, or "enemy combatants," may lawfully be captured and detained for the duration of hostilities, just as a state would be entitled in the course of a war with another state to capture and hold enemy soldiers until the end of the war: 15 "Because the United States [is] in an armed conflict with al Qaida and the Taliban, it [is] proper for the United States and its allies to

See generally Jack L. Goldsmith, The Terror Presidency (2007); John Yoo, War by Other Means (2006).

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

¹⁴ UN Security Council Res. 1368 (Sept. 12, 2001), para. 1.

See Memorandum from the President to the Vice President, et al, Feb. 7, 2002; Address by Attorney General Mukasey, *supra*.

detain individuals who [are] fighting in that conflict. One of the most basic precepts in the law of armed conflict is that states may detain enemy combatants until the cessation of hostilities."¹⁶

Of course, to the extent this is a war, it is not a regular one between states. As Attorney General Michael B. Mukasey recently remarked:

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

While the Attorney General intended this statement to justify the government's continuing reliance on its enemy combatant detention authority, ¹⁸ problems with this approach are quickly apparent. Although even in conventional warfare the notion of "enemy combatants" may elude either clear definition or easy application, members of terrorist organizations generally try to obfuscate their identities and blend indistinguishably into civilian populations. ¹⁹ The organizations themselves

Address by State Department Legal Adviser John B. Bellinger, "Legal Issues in the War on Terrorism," Oct. 31, 2006, available at: http://www.state.gov/s/1/2006/98861.htm

¹⁷ See Attorney General's Remarks, *supra*.

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

The law of war contains definitions of certain classes of combatants that are entitled to particular protections, such as prisoner-of-war status upon capture, see, e.g. GCIII, Art. 4, but it generally defines the broad category of "combatants" only in the negative. Protocol I of the Geneva Conventions says that "[c]ivilians shall enjoy the protection [from attack] unless and for such time as they take a direct part in hostilities." Art 51(3). Common Article 3 of the Geneva Conventions protects "[p]ersons taking no active part in the hostilities." These provisions imply that combatancy derives from "direct" or "active" participation on behalf of an enemy in an armed conflict, which is itself a subject of great controversy. See International Committee of the Red Cross, Direct Participation in Hostilities, Dec. 31, 2005 Report (available at http://icrc.org/web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-

lack the formalized structures of states, thereby greatly exacerbating the probability of misidentifying an innocent civilian as an enemy (a problem discussed in greater detail below). The stakes of such errors are also magnified by the likelihood that this conflict with al Qaida or its spinoff organizations will last for decades, raising the specter of indefinite deprivation of innocents' liberty.

Critiques of the Bush Administration's reliance on this "enemy combatancy" theory to justify detentions have focused heavily on the inadequacy of the process by which detention decisions are made.²¹ Whether arguing that those detained deserve full-fledged criminal trials or that detentions should be judicially reviewed or that the government failed even to provide the minimal battlefield hearings required by the Geneva Conventions, critics have tended to focus their attacks on the "how" questions of detention. Less often discussed is the "whom" question, that is, the substantive scope of the detention class.²³

311205?opendocument).

- See Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUMBIA L. REV. 1365 (2008).
- See, e.g., Cole & Lobel, *supra*, at 50-59; P. Sabin Willett, Detainees Deserve Court Trials, Wash. Post, Nov. 14, 2005, at 21; Statement Of Senator Patrick Leahy On The Detention Center At Guantanamo Bay, Cuba, June 30, 2005 (available at http://leahy.senate.gov/press/200506/063005b.html). Cf. Boumediene v. Bush, Slip opinion at 53-54 ("Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing.... What matters is the sum total of procedural protections afforded to the detainee at all stages, direct and collateral.").
- See, e.g., Human Rights First, Imbalance of Powers: How Changes to U.S. Law & Policy Since 9/11 Erode Human Rights and Civil Liberties 7-69 (2003).
- For some critiques of the expansive definition, see, e.g., Al-Marri v. Pucciarelli, No. 06-7427, slip op. at 25 (4th Cir. *en banc*, July 15, 2008) (Motz, J., concurring in the judgment) (interpreting prior Supreme Court precedent as supporting the conclusion that "enemy combatant status rests on an individual's affiliation during wartime with the 'miltiary arm of the enemy government.'"); Ryan Goodman & Derek Jinks,

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

An individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes n person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.²⁶

In one oft-cited litigation colloquy, the government went so far as to argue that merely providing a charitable gift could qualify the so-called "little old lady in Switzerland" donor as an "enemy combatant" if the recipient turned out to be an al Qaeda front. Even having backed off this most extreme view, 28 however, the government has steadfastly avoided detailed public discussion of what it means to be a "member", how it defines "al Qaida" or its affiliates and supporters, and what activities constitute belligerency or

International Law, U.S. War Powers, and the Global War on Terrorism, 118 HARV. L. REV. 2653, 2655-58 (2005) (arguing that mere membership without conduct is not enough to be categorized as an "enemy combatant"); Petitioner's Brief in Boumediene v. Bush.

- See Cole & Lobel, *supra*, at 59-63. See also Memorandum Order, Boumediene v. Bush, D.D.C. Civil Case no. 04-1166 (RJL), Oct. 27, 2008.
- See Annex 1 to the Second Periodic Report of the United States of America to the Committee Against Torture, May 6, 2005, para. 47.
- DoD Order Establishing Combatant Status Review Tribunal (July 7, 2004), at E-1 § B.
- See *In Re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C 2005).
- Al-Marri v. Pucciarelli, No. 06-7427, slip op. at 19-20 (4th Cir. *en banc*, July 15, 2008) (Motz, J., concurring in the judgment).

support or aid to any of these groups or activities.²⁹

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

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

The breadth of the Government's definition came under attack recently by the D.C. Circuit, see Parhat v. Gates, No. 06-1397, slip op. (June 20, 2008), and a minority of the Fourth Circuit, see Al-Marri v. Pucciarelli, No. 06-7427, slip op. at 179 (4th Cir. *en banc*, July 15, 2008) (Motz, J., concurring in the judgment).

⁵⁴² U.S. 507 (2004).

Brief for the Respondent, Hamdi v. Rumsfeld, at 25.

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

³³ 542 U.S. 466 (2004).

Brief for the Respondent, Rasul v. Bush, at 35.

such matters.³

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

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

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

³⁶ 542 U.S. 507 (2004).

³⁵ Id. at 37.

³⁷ 542 U.S. 466 (2004).

³⁸ No. 06–1195, slip op. (June 12, 2008).

³⁹ See *supra* notes _ and accompanying text.

DAVID COLE & JULES LOBEL, LESS FREE, LESS SAFE 251-52 (2007); ABA Standing Committee on Law and National Security, Due Process and Terrorism, Nov. 2007, at 16.

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

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

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

Goldsmith & Katyal, *supra*; McCarthy & Velshi, *supra*; Guiora, *supra*

PHILIP B. HEYMANN & JULIETTE N. KAYYEM, PROTECTING LIBERTY IN AN AGE OF TERROR 18, 51-52 (2005).

⁴³ See The Constitution Project, *supra*.

See, e.g., Alberto J. Mora and Thomas R. Pickering, *Extend Legal Rights to Guantanamo*, WASHINGTON POST, March 4, 2007, at B07; Statement of Sen. Leahy on Amendment 2022, The Habeas Corpus Restoration Act Of 2007, Sept. 19, 2007 (available at http://leahy.senate.gov/press/200709/091907.html).

Guiora, *supra*, at 15.

government on detainees' behalf. 46

This issue of secrecy runs in tension with a third common element of procedural and institutional reform proposals: openness and transparency. The Bush Administration's approach to date has allegedly been prone to error in part because of excessive secrecy and hostility to the prying eyes of courts or Congress, let alone the press and advocacy groups. Open or at least partially-open hearings or written judgments that can later be scrutinized by the public or congressional oversight committees, critics and reformists argue, would help put pressure on the Executive branch to exercise greater care in deciding which detention cases to pursue and put pressure on adjudicators to act in good faith and with more diligence.

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

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

III. WHY DETAIN?

The reason administrative detention is widely discussed at all is because the threat of terrorism is thought by proponents to involve a category of individuals for whom neither criminal justice nor the laws of war – the two legal systems historically used to authorize and regulate most

Goldsmith & Katyal, *supra*; Wittes & Gitenstein, *supra*, at 10; McCarthy & Velshi, *supra*, at 36.

Goldsmith & Katyal, *supra*; Wittes & Gitenstein, *supra*, at 10.

⁴⁸ See International Covenant on Civil and Political Rights, arts. 9, 14.

long-term detention of dangerous individuals – offer effective and just solutions.⁴⁹ The argument generally begins with the notion that exclusive reliance on prosecution, along with its usual panoply of defendant rights and strict rules of evidence, cannot effectively, expeditiously, or exhaustively remove the threat of dangerous terrorists.⁵⁰ The reasons for this include: information used to identify terrorists and their plots include extremely sensitive intelligence sources and methods, the disclosure of which during trial would undermine or even negate counter-terrorism operations; the conditions under which some suspected terrorists are captured, especially in far-away combat zones or ungoverned regions, make it impossible to prove criminal cases using normal evidentiary rules;⁵¹ prosecution is designed to punish past conduct, but fighting terrorism requires stopping suspects before they act; and criminal justice is deliberately tilted in favor of defendants so that few if any innocents will be punished, but the higher stakes of terrorism cannot allow the same

Every government has an obligation to react to the threat. But the common law system is too rigid, it can't adapt because its procedural laws are more important than the criminal laws at the base, and the procedure depends on custom so it doesn't change easily. The civil law system is more flexible because it functions according to laws voted by parliament and can react faster.

Quoted in *id.*, at 13. See also Antoine Garapon, *Is There a French Advantage in the Fight Against Terrorism?*, Real Institute Elcano (2005), available at

www.realinstitutoelcano.org/analisis/807/Garapon807.pdf

See WITTES, supra; Goldsmith & Katyal, supra; Matthew Waxman, The Smart Way to Shut Gitmo Down, WASH. POST, Oct. 28, 2007.

France relies on criminal law for detaining suspected terrorists, but its criminal laws are so expansive and the arrest and investigation powers of the government so potent that its criminal law system often functions much like administrative detention might. See Human Rights Watch, Preempting Justice: Counterterrorism Laws and Procedures in France (July 2008). Pre-trial detention, for example, can last up to four years. According to France's legendary counterterrorism judge, Jean-Louis Bruguiere:

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

likelihood that some guilty will go free. 52

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

To its proponents, administration offers a way out of, and option between, the stark choice among these two systems.⁵⁵ Most likely any sensible alternative scheme will include some elements that resemble criminal justice and others that resemble the law of war, for the simple reason that terrorism shares some features of crime and some of war.⁵⁶ But this leads to the difficult questions of where one system should start and another end, and how we should sort out who goes into which.⁵⁷ So we

See, e.g., RICHARD A. POSNER, NOT A SUICIDE PACT 64-65 (2006) (on risk calculus); Andrew McBride, We'll Rue Having Judges on the Battlefield, WALL ST. JOURNAL., June 21, 2008, at A7 (on battlefield constraints); Statement by Daniel Dell'Orto, Hearing of the Senate Judiciary Committee, Hamdan v. Rumsfeld: Establishing a Constitutional Process, July 11, 2006 (same); Michael B. Mukasey, Jose Padilla Makes Bad Law, WALL ST. JOURNAL, Aug. 22, 2007, at A15 (on disclosure of sensitive intelligence information during trial). For counter-arguments, emphasizing that criminal law is sufficient to deal with terrorism threats, see Roth, supra.

⁵³ See WITTES, *supra*; Goldsmith & Katyal, *supra*.

See Waxman, *Detention as Targeting*, *supra*.

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

See Bruce Ackerman, Before the Next Attack (2006).

See Burt Neuborne, Spheres of Justice: Who Decides?, 74 GEO. WASH.

need to think through how to define the set of cases that fall between the two existing systems and that may demand an alternative. This requires a clear notion of the needs: what is it about terrorism that might necessitate a step so precipitous as creating a new detention legal system?

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

That said, it is virtually undisputed among those who advocate administrative detention that its purpose is preventive: a prophylactic measure against terrorist threats. Of course, criminal justice also has a preventive component. But criminal law is generally retrospective in focus, in that it addresses past acts. The resulting punishment, including

L. REV. 190 (2006).

The British Government, by contrast, has discussed with much greater precision how its various detention authorities fit together, and whom it has targeted with them and why. HM Government, Countering International Terrorism: The United Kingdom's Strategy (July 2006), at 17-20.

NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT, 379-80 (2004).

The report is available at http://www.whitehouse.gov/nsc/nsct/2006.

Indeed, the term "preventive detention" is often used interchangeably with "administrative detention".

There are, of course, some exceptions, such as the case of inchoate crimes.

incarceration, serves preventive purposes insofar as it keeps a perpetrator off the street (for some period of time) and deters both him and others from future crime. But at base criminal justice addresses past harms committed by individuals.⁶³

Administrative detention proposals, by contrast, tend to be prospective in focus. They start with a notion that terrorist acts – especially major attacks – must be addressed before they occur at all. The consequences of failure to prevent terrorist attacks are too high, the argument goes, to rely on retrospective responses alone. When it comes to crime, we do not typically use the mere likelihood that someone will act – even high likelihood, and even violent crime – to justify detention. As Judge Posner explains:

Requiring proof beyond a reasonable doubt in criminal cases causes many guilty defendants to be acquitted and many other guilty persons not to be charged in the first place. We accept this as a price worth paying to protect the innocent. But ordinary crime does not imperil national security; modern terrorism does, so the government's burden of proof should be lighter, though how much lighter is a matter of judgment.⁶⁴

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

⁶³ See COLE & LOBEL, at 47-50.

⁶⁴ RICHARD A. POSNER, NOT A SUICIDE PACT 64-65 (2006).

See Posner, *supra*, at 64-65; Ackerman, *supra*, at 39-57; Ashton B. Carter, John Deutch & Philip Zelikow, *Catastrophic Terrorism: Tackling the New Danger*, 77 Foreign Affairs, November/December 1998 at 80; see also Cass R. Sunstein, *National Security, Liberty, and the D.C. Circuit*, 73 George Washington Law Rev. 693, 702 (2005) (noting that in the terrorism context, "judicial errors may turn out to be disastrous rather than merely harmful"). To be sure, concern about the danger of major terrorist attack can be taken too far, as in what has been dubbed the "One Percent Doctrine," after Vice President Dick Cheney stated that "[w]ith a low-probability, high-impact event like this ... if there's a one percent chance that Pakistani scientists are helping al

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

- incapacitation
- deterrence
- disruption
- information-gathering

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

The most natural inclination of a government facing threats of terrorism is to *incapacitate* suspected terrorists: if someone has the will and capability to commit terrorism, keep him off the streets. The purpose of such detention is not punitive or retributive (though such desires might lurk in the background), but protective and preemptive: to put potential threats out of action. Secretary of Defense Rumsfeld described the Guatanamo detainees in 2002, for example, as "among the most dangerous, best-trained, vicious killers on the face of the earth," justifying the camp as necessary to stop them from carrying out their violent objectives. This preventive purpose underlies the law of war's detention rules, in that those rules aim to block captured soldiers from returning to an ongoing fight.⁶⁷ As Attorney General Mukasey recently explained: "The United States has every right to capture and detain enemy combatants in this conflict, and we need not simply release them to return to the battlefield... We have every right to prevent them from returning to kill our troops or those fighting with us, and to target innocent civilians."68

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

Qaeda build or develop a nuclear weapon, we have to treat it as a certainty in terms of our response." RON SUSKIND, THE ONE PERCENT DOCTRINE 61-62 (2006).

Secretary of Defense Rumsfeld, News Briefing, 27 January 2002.

⁶⁷ See *supra*; *infra*.

⁶⁸ Attorney General's Remarks, *supra*.

future terrorists from joining the cause or perpetrating bad acts. ⁶⁹ The more credible the threat of capture and detention, and the more severe the consequences (say, the longer the threatened period of detention, or the more severe its conditions), so the theory goes, the greater the deterrent pressure.

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

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

Discussion of deterrence is usually divided into two concepts, both of which are relevant here: specific deterrence, which discourages an individual from certain conduct by instilling an understanding of negative consequences, and general deterrence, which makes an example of an individual's punishment to discourage the broader population from deviant conduct. See generally Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 Am. CRIM. L. REV. 1313, 1316 (2000); Mark C. Stafford & Mark Warr, *A Reconceptualization of General and Specific Deterrence*, 30 JOURNAL OF RESEARCH IN CRIME AND DELINQUENCY 123–135 (1993).

⁷⁰ See RICHARD A. POSNER, COUNTERING TERRORISM 205 (2007).

individual enablers.⁷¹

A fourth preventive reason to detain is therefore to gather information. Thwarting terrorist plots requires getting inside the heads of network members, to understand their intentions, capabilities and modes of operation. Detention can facilitate such intelligence collection through, most obviously, interrogation, but also through monitoring conversations among prisoners or even "turning" terrorist agents and sending them back out as government informants. Governments usually justify publicly counter-terrorism detentions on incapacitation or disruption grounds, but no doubt information-gathering has been at the forefront of Bush Administration's detention policies, 72 as demonstrated by the lengths to which it has gone to defend permissive interrogation standards and CIA "These are dangerous men with unparalleled detention programs. knowledge about terrorist networks and their plans for new attacks," explained President Bush in September 2006, in disclosing publicly the CIA secret detention program. "The security of our nation and the lives of our citizens depend on our ability to learn what these terrorists know."74

See HM Government, Countering International Terrorism: The United Kingdom's Strategy (July 2006), at 16 ("All disruption operations depend upon the collection and exploitation of information and intelligence that helps identify terrorist networks, including their membership, intentions, and means of operation").

The declaration by Defense Intelligence Agency Director Vice Admiral Lowell E. Jacoby in the litigation involving alleged dirty-bomber Jose Padilla is especially illuminating: "The United States is now engaged in a robust program of interrogating ... enemy combatants in the War on Terrorism. [They] hold critical information about our enemy and its planned attacks against the United States that is vital to our national security." Declaration submitted Jan. 9, 2003 in Padilla v. Bush, D.D.C., No. 01 Civ. 4445, at 6.

Scott Shane, David Johnston & James Risen, Secret U.S. Endorsement of Severe Interrogations, NEW YORK TIMES, Oct. 4, 2007; Sheryl Gay Stolberg, Bush Says Interrogation Methods Aren't Torture, WASHINGTON POST, Oct. 6, 2007.

Speech of President George W. Bush, Sept. 6, 2006, available at: http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html. See also Attorney General's Remarks, *supra* ("detention often yields valuable intelligence about the intentions, organization, operations, and

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

But there are also tradeoffs among these elements of prevention. In part this is due to the costs of detention, some of which are discussed below. The last results from the fact that counter-terrorism detention strategy – and with it consideration of administrative detention's utility in certain circumstances – is formulated in an environment of constrained resources.

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

tactics of our enemy").

⁷⁵ See See Philip Bobbitt, Terror and Consent (2008); HM Government, Countering International Terrorism: The United Kingdom's Strategy (July 2006).

⁷⁶ See *infra*, Part V.

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

examination of the 2005 London subway bombings, "[t]here is always a difficult balance to strike between investigating those known to be a current threat and working to discover other possible threats."⁷⁸

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

IV. DETAIN WHOM?

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

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

Quoted in HM Government Strategy, *supra*, at 17.

⁷⁹ See *supra*, Part II.

Indeed, this is what federal courts are now charged with doing with respect to many Guantanamo detainees following *Boumediene*, *supra*, sitting as habeas courts reviewing the factual basis for detention. See Memorandum Order, Boumediene v. Bush, D.D.C. Civil Case no. 04-1166 (RJL), Oct. 27, 2008.

in the case of support) that judges apply regularly.⁸¹

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

One model for defining the class might draw upon existing examples of administrative detention in U.S. law, which permit the long-term detention of certain categories of individuals judicially adjudged as "dangerous." Some state laws, for example, authorize the detention of charged or convicted sex offenders who, due to a "mental abnormality," are likely to engage in certain acts of sexual violence. These statutory schemes might be a particularly apt analogue because, as is often supposed

See Robert Chesney and Jack Goldmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STANFORD LAW REVIEW 1079 (2008).

⁸² See Philip Bobbitt, Terror and Consent (2008).

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

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

about religiously-extremist terrorists, they were premised legislatively on a view that some sexual predators are undeterrable from future violence. Under federal bail law, arrestees can similarly be held pending trial upon sufficient showing that no release conditions would reasonably assure community safety.

To be sure, it remains highly debatable whether dangerousness alone as an administrative detention standard would pass constitutional muster, at least with respect to U.S. citizens or those captured inside the United States. In *Zadvydas v. Davis*, for instance, the Court made clear that indefinite administrative detention of a removable alien would raise constitutional due process concerns, but it also noted that a statutory scheme directed at suspected terrorists, in particular, might change its analysis. So as in other areas of American law, an administrative detention regime might include future dangerousness at least as one critical element. And, accordingly, the central inquiry for courts – assuming judicial review – might be to review the Executive's dangerousness assessment.

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

See *id.* at 351, 362-63. Another example is involuntary commitment of certain mentally ill persons believed to be dangerous. In *Addington v. Texas*, the Supreme Court held that to comport with Fourteenth Amendment due process in a civil proceeding brought under state law to involuntarily commit in a mental hospital an individual for an indefinite period, at a minimum only the clear and convincing evidence standard was required. *See* 441 U.S. 418 (1979).

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

The complex constitutional issues are beyond the scope of this paper, but of course they are highly relevant and any administrative detention scheme would face intense judicial challenge. Throughout this paper I cite a number of U.S. federal and state preventive detention laws that have been upheld, though usually on very narrow grounds. For views skeptical of the constitutionality of preventive detention laws related to terrorism, see Justice Scalia's dissent in *Hamdi*, 542 U.S. at 554-557.

see 533 U.S. 678 (2001).

⁸⁹ See *id.*, at 691.

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

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

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

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

Under this model, the critical review inquiry for courts focuses not on an individualized assessment of future dangerousness or membership but on whether an individual committed a certain acts. Parliament likely selected

^{90 1} Stat. 577 R.S. § 4067, as amended, 40 Stat. 531, 50 U.S.C. § 21.

⁹¹ 335 U.S. 160 (1948).

⁹² See *id*.

Ch. 2, Sec. 1, Para. 9. The UK statute is available at http://www.opsi.gov.uk/acts/acts2005/ukpga_20050002_en_1

these types of acts because they were believed to serve as a good indicator of future dangerousness.⁹⁴

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

The 2001 PATRIOT Act contains provisions authorizing the *short-term* detention of aliens on grounds similar to many of these previous examples. It gives the Attorney General power to detain, among others, any alien whom he has reason to believe is "likely to engage after entry in any terrorist activity," has "incited terrorist activity," is a "representative" or "member" of a terrorist organization, or "has received military-type training" from a terrorist organization. The Act also authorizes the Attorney General to detain aliens who are "engaged in any other activity that endangers the national security of the United States."

See HM Government, Countering International Terrorism: The United Kingdom's Strategy (July 2006), at 17-18.

⁹⁵ Emergency Powers Law (Detention), 1979.

See Anoymous v. State of Israel, Cr. App. 6659/06 (S. Ct. Israel, June 11, 2008).

Incarceration of Unlawful Combatants Law, 5762-2002.

⁹⁸ USA PATRIOT Act § 412(a), 8 U.S.C.A. § 1182(a)(3)(A)-(B).

⁹⁹ *Id*.

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

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

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

That incapacitation purpose of the United Kingdom's 2005 Prevention of Terrorism Act control order provisions is likewise clear from its text, which states that "for the purposes [of the UK statute] it is immaterial whether the acts of terrorism in question are specific acts of terrorism or acts of terrorism generally."

If, by contrast, the emphasis of administrative detention is not to incapacitate individuals but to disrupt impending plots, then the focus of authority to detain might be cast differently, in some ways more narrowly but in some ways perhaps more broadly. A 2007 Senate bill, known as the National Security with Justice Act, for instance sought to authorize detention on a showing that "failure to detain that [international terrorist]

¹⁰⁰ See *supra* notes _ and accompanying text.

Anoymous v. State of Israel, Cr. App. 6659/06 (S. Ct. Israel, June 11, 2008), at para. 15.

¹⁰² Ch. 2, Sec. 2, Para. 1.

will result in a risk of imminent death or imminent serious bodily injury to any individual or imminent damage to or destruction of any United States facility." On the one hand, in theory disruption can achieved by nabbing only key leaders and planners and those directly involved in a specific plot; even if some very dangerous but peripherally-involved associates remain free, the scheme may be ruined. On the other hand, detention to disrupt might be thought to justify detaining for some period of time even individuals who are not dangerous at all (perhaps not very committed to the terrorist cause nor capable of doing much harm) but who play a role in a particular plot, or might just have information about it.¹⁰⁴

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

If the major focus of administrative detention is informationgathering, the natural definition of the detention class would look different still. Administrative detention might target individuals believed to have critical information about either terrorism threats generally or, more

National Security with Justice Act, S.1876, introduced July 25, 2007 (available at: http://thomas.loc.gov/cgi-bin/bdquery/z?d110:s.01876:)

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

narrowly, specific terrorism plots. In the immediate aftermath of 9/11, the U.S. government relied – amid much controversy and criticism – on the federal material witness statute, which under certain imperative circumstances allows arrest of an individual with information critical to a criminal proceeding. 105 An administrative detention might similarly define detention authority in relation to an individual's supposed knowledge. 106 Again, often this category of individuals will overlap with inquiries of dangerousness or involvement in specific plots, and a law might require a showing of membership in a terrorist organization or commission of a terrorist act as a threshold matter before even considering the information But these categories will not always overlap. Consider, for example, an al Qaida paymaster who might not be individually very dangerous, but who might have substantial information about associates Taken to the extreme a law authorizing detention based on suspected knowledge alone might be used to justify holding the spouse or roommate of a suspected terrorist – even if not complicit – in order to question them about the suspect's actions, communications and intentions.

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

The [material witness] statute was used frequently after 9/11, when the government tried to investigate numerous leads and people to determine whether follow-on attacks were planned-but found itself without a statute that authorized investigative detention on reasonable suspicion, of the sort available to authorities in Britain and France, among other countries. And so, the U.S. government subpoenaed and arrested on a material witness warrant those like Padilla who seemed likely to have information.

Jose Padilla Makes Bad Law, supra.

See 18 U.S.C. § 3144. For critical accounts of its use after 9/11, see Human Rights Watch, Witness to Abuse: Human Rights Abuses Under the Material Witness Law Since September 11 (June 2005).

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

V. RESTRICTING WHY AND WHOM

As noted earlier, ¹⁰⁷ the Bush Administration has argued that broad detention authorities are needed for the entire range of reasons listed above – including incapacitation, deterrence, disruption, and information-gathering – and it has therefore fought for an expansive definition of the class, or "enemy combatants." Even if one rejects the full breadth of the Bush Administration's argument, the notion is certainly correct that all elements of prevention listed above feature in any sensible counter-terrorism strategy. ¹⁰⁹

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

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

Debates about administrative detention are usually cast in terms of liberty versus security. But administrative detention – both its use as well as its mere enactment – carries risks to both liberty and security. Experiences of the U.S. and allied governments since September 2001 suggests that those costs are unlikely to be mitigated even by robust

See *infra*, Parts II-III.

In the course of the *Padilla* litigation, for example, the Government asserted each of them. See Brief for Petitioner, Rumsfeld v. Padilla, at 28-38.

See, e.g., HM Government, Countering International Terrorism: The United Kingdom's Strategy (July 2006) (explaining the UK Government's use of each of them).

See generally Eric A. Posner & Adrian Vermeule, Terror in the Balance: Security, Liberty, and the Courts (2007).

procedural protections without also constraining tightly the substantive detention criteria, and those experiences offer valuable lessons that should guide definition of any administrative class going forward.

Administrative detention opponents justifiably argue that creating new mechanisms for detention with diluted procedural protections (compared to the procedural features of American criminal justice) puts liberty at risk. The most obvious liberty concern is that innocent individuals will get swept up and imprisoned – the "false positive" problem. Civil libertarians rightly worry, too, that beside the specific risk to particular individuals any expansion of administrative detention (I say "expansion" because, as noted earlier, administrative detention already exists in some non-terrorist contexts in American law)¹¹² risks more generally eroding checks on State power. To some the idea of administrative detention for suspected terrorists is the kind of "loaded weapon" that Justice Jackson worried about at the time of Korematsu. 113 Furthermore, even if we are satisfied that the U.S. government can use administrative detention responsibly, there are many unsavory foreign regimes that might exploit the precedent for repressive purposes. We need, therefore, to be cautious about justifying principles that could be used pretextually by less-democratic regimes to crack down, for example, on dissidents it might label "terrorists" or "national security threats." 114

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

See Roth, *infra*; Ratner, *infra*, Human Rights First, *infra*; The Constitution Project, *infra*.

See *infra* notes __ and accompanying text.

See Ratner, *supra*. In his dissent in *Korematsu v. U.S.*, 323 U.S. 214 (1944), Justice Jackson warned that by validating repressive actions taken under emergency, "The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."

See DONAHUE, *supra* note _, at 121; Human Rights First, Behind the Wire 24-25 (2005).

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

As to the issue of how administrative detention will be perceived and used internationally, a narrow set of definitional criteria – requiring, for example, a showing of certain specific acts or a linkage to specific plots – stands a better chance of winning legitimacy among allies and averting over-expansive interpretation among other countries. Although creating any new category of administrative detention risks chipping away at international norms generally demanding criminal prosecution to lock away bad actors, the more narrowly such a carve-out is defined the less prone it will be to political manipulation or to further stretching to deal with other types of public policy problems.

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

Historically, detention practices – especially those viewed as overbroad – have proven counterproductive in combating terrorism and radicalization, and consideration of administrative detention's strategic utility should weigh these dangers. The British government learned painfully that internment of suspected Northern Ireland terrorists was

See Robert Chesney and Jack Goldmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STANFORD LAW REVIEW 1079 (2008).

COLE & LOBEL, *supra*, at 49.

¹¹⁷ See Hakimi, *supra*.

viewed among Northern Irish communities as a form of collective punishment that fueled violent nationalism, and detention helped dry up And in Iraq and Afghanistan, though exceptional community informants. because combat still rages there, detention has played an important role in neutralizing threats to coalition forces but has also contributed to anticoalition radicalization, especially when perceived overbroadly. Such overbroad detention sweeps risk further radicalizing and alienating communities from which terrorists are likely to emerge or whose assistance is vital in penetrating or discerning extremist groups. 120 Moreover, several important studies of counter-terrorism strategy have emphasized the need to target coercive policies (including military and law enforcement efforts) narrowly and precisely to avoid playing into al Qaida propaganda efforts to aggregate local grievances into a common global movement. Official U.S. military doctrine now cautions about similar risks in setting up detention systems in battling insurgencies. 122

See David Bonner, Executive Measures, Terrorism and National Security, 87-96; Laura K. Donohue, The Cost of Counterterrorism 36-48 (2008); Tom Parker, *Counterterrorism Policies in the United Kingdom*, in Philip B. Heymann & Juliette N. Kayyem, Protecting Liberty in an Age of Terror 119, 125-28 (2005).

See Carlotta Gall, *U.S.-Afghan Foray Reveals Friction on Antirebel Raids*, NEW YORK TIMES, July 3, 2006; Alissa Rubin, *U.S. Remakes Jails in Iraq, but Gains Are at Risk*, NEW YORK TIMES, June 2, 2008. The new U.S. military counterinsurgency manual offers similar cautions.

See *infra* notes _ and accompanying text; see also Deborah H. Pearlstein, *We're All Experts Now: A Security Case Against Security Detention*, 40 CASE WESTERN RESERVE INTERNATIONAL LAW JOURNAL (2008) (arguing that even if valid under U.S. and international law, preventive detention schemes are counterproductive in combating terrorism).

See, e.g., Audrey Kurth Cronin, *How al-Qaida Ends*, 31 INTERNATIONAL SECURITY 7 (2006); David Kilcullen, *Countering Global Insurgency*, 28 JOURNAL OF STRATEGIC STUDIES 597 (2005).

¹²² See Department of the Army, FM 3-24 Counterinsurgency (2007), at paras. 7-38, 7-40, 8-42.

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

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

As for deterrence, virtually any very dangerous terrorist or terrorism-supporter the government could target with a deterrence detention strategy would either be so committed to violent extremism as to render the marginal threat of administrative detention negligible or would be deterred already by the threat of criminal prosecution or military attack (even discounted by a low probability). The publicity and martyrdom

See, e.g., BRUCE ACKERMAN, BEFORE THE NEXT ATTACK 44-51 (2006); JACK L. GOLDSMITH, THE TERROR PRESIDENCY 116, 189-90 (2007). For a historical account of the British "over-detention" phenomenon during World War II, see A.W. BRIAN SIMPSON, IN THE HIGHEST DEGREE ODIOUS (1992).

¹²⁴ See *infra*, Part III.

¹²⁵ See Boaz Ganor, The Counter-Terrorism Puzzle 47-100 (2005).

¹²⁶ See Jessica Stern The Ultimate Terrorism 130-31 (1999)

In upholding Israel's Unlawful Enemy Combatant statute, the Israeli Supreme Court noted that deterring others from committing acts is not a legitimate purpose of administrative detention. Anoymous v. State of Israel, Cr. App. 6659/06 (S. Ct. Israel, June 11, 2008), at para. 18.

imagery surrounding detention might even make it seem appealing to some individuals or groups. 128

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

See *infra* notes _ and accompanying text.

See Human Rights Watch, Witness to Abuse: Human Rights Abuses Under the Material Witness Law Since September 11 (June 2005).

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

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

See DONOHUE, *supra* note _, at 28; Renee De Nevers, *Modernizing the Geneva Conventions*, 29 WASH. Q. 99, 106 (2006). For discussions of this phenomenon in the United Kingdom, see Christopher Caldwell,

Incapacitation and disruption are likely to be more effective and legitimate strategic bases for new administrative detention laws, though information-gathering is likely to be an important secondary benefit. ¹³³ As noted earlier, opponents of administrative detention argue that criminal law and other non-detention tools are adequate to incapacitate or disrupt the activities of most individuals whom the government would reasonably feel compelled to target, while proponents of administrative detention insist that the risk is too high of some terrorists slipping through that net. 134 Much of this debate comes down to differing assessments of the marginal danger But, importantly, even opponents of new posed by that remainder. administrative schemes acknowledge that stopping an individual from carrying out a terrorist attack (as opposed to merely acquiring information or to instill fear) is a legitimate purpose of detention. ¹³⁵ The dispute is over what factual predicate is required and by what standards and processes the state must substantiate them. 136

The next Part brings this discussion finally back around to the procedural issues, but narrowing the strategic focus of proposed new detention rules to incapacitation or disruption still leaves the question of how, more precisely, Congress should define the susceptible detention class. The ultimate merits of various definitional approaches – such as membership, past acts, future dangerousness, or some combination thereof – cannot be discerned and calculated independent of the processes and standards of proof with which they are paired. But recent experience and some judgments about the future threat of terrorism help narrow the range

Counterterrorism in the U.K.: After Londonistan, N.Y. TIMES, June 25, 2006, sec. 6, at 42.

¹³³ See *supra* notes _ and accompanying text.

See *supra* notes _ and accompanying text.

¹³⁵ See, e.g., COLE & LOBEL, *supra*, at 251-52.

An additional worry among administrative detention critics is that building a detention system outside the criminal justice system with reduced evidentiary and procedural requirements might dramatically undercut the incentive for the government to use prosecution. This concern is valid, though the benefits of justice and finality as well as bureaucratic interests might mitigate it. An administrative detention regime might also build in a requirement that the government show that prosecution is impracticable.

of sensible choices.

The previous Part offered some models drawn from other countries with long histories of combating terrorism and from other U.S. laws premised on incapacitation. It further explained that an incapacitation strategy points naturally toward a future dangerousness approach to defining the class, though proxies such as past acts might form part of the inquiry. 137 Indeed, requiring some showing of an individual's terrorist activity in addition to indications of future dangerousness has the advantage of tying detention more tightly with individual moral culpability, 138 though this carries the disadvantage of intruding more directly into the traditional province of criminal law. If one thinks that the number of (or danger posed by) dangerous terrorists who cannot be prosecuted through criminal trials is high, an incapacitation strategic rationale of administrative detention may make sense. But the U.S. experience at Guantanamo, for example, casts some doubt on the ability of the government to assess individual dangerousness very accurately: on the one hand it brought many supposedly-dangerous individuals to Guantanamo who were then released because they were later believed not to pose much threat after all; on the other hand, some of those released have turned out to be quite dangerous, and have re-engaged in terrorist activity. 139 A key question for those

A great deal of scholarship has focused on the use of individual dangerousness assessments in American criminal law, and the limitations of the government's ability to predict it accurately. See Jeffrey Fagan & Martin Guggenheim, Preventive Detention and the Judicial Prediction of Dangerousness for Juveniles: A Natural Experiment, 86 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 415 (1996); Norval Morris & Marc Miller, Predictions of Dangerousness, 6 CRIME & JUSTICE 1 (1985); Jonathan Simon, Reversal of Fortune: The Resurgence of Individual Risk Assessment in Criminal Justice, 2005 ANNUAL REVIEW LAW & SOCIAL SCIENCE 397

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

On releases from Guantanamo following later determinations that an individual was not an "enemy combatant," see Secretary of the Navy England Briefing on Combatant Status Review Tribunal, July 9, 2004, available at

http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=277
7. For a specific example of an allegedly mistaken detention at Guantanamo, see Carol D. Leonnig, *Evidence of Innocence Rejected at Guantanamo*, WASHINGTON POST, Dec. 5, 207, at A01. On detainees

advocating new administrative detention proposals for incapacitation is whether accurate dangerousness assessments are realistic, and what would be necessary to improve them.

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

Both of these definitional approaches – assessments of individual dangerousness or showing that an attack is likely to occur without administrative detention – look very different from the one based on enemy combatancy, certainly as the government has interpreted and used it since 2001. Indeed, once freed from the need to cast detention in terms of the

released from Guantanamo later returning to terrorism, see Former Guantanamo Detainees Who Have Returned to the Fight, U.S. Department of Defense, July 12, 2007, available at http://www.defenslink.mil/news/d20070712formergtmo.pdf; Alissa Rubin, *Former Guantanamo Detainee Tied to Attack*, N.Y. TIMES, May 8, 2008.

¹⁴⁰ See *supra* notes _ and accompanying text.

See the discussion of the limits of criminal prosecutions in dealing with terrorism, *supra* notes _ and accompanying text.

As mentioned earlier, the Combatant Status Review Tribunals at Guantanamo define "enemy combatant" as:

law of war and traditional war powers, past experience and the logic underlying most administrative detention proposals caution against using "membership" in or "support" for a particular enemy organization or set of organizations as the key factual predicate in defining the class.

A definitional approach, like enemy combatancy, based on membership or support to a particular enemy like al Qaida is simultaneously too broad and too narrow. As stated earlier, the main reason modern forms of terrorism are believed by administrative detention advocates to require new detention laws is because the catastrophic harms of attacks require recalibrating the balance struck by criminal law between security and protection of innocents. A "membership" or "support" approach to administrative detention has already proven prone to over-use against individuals who, while perhaps individually dangerous, pose little or low threat of major terrorist attack. 143 An agency requirement – does the individual operate under the effective control of an organization? – makes more sense, and actually has more in common with traditional notions of traditional enemy combatancy than does mere membership or support. 144 At the same time, if the ultimate concern is stopping major terrorist attacks it seems odd to restrict the targeting of administrative detention powers to intended perpetrators who are affiliated with groups involved in the September 2001 attacks. This is especially true if al Qaida and other

An individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes n person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

DoD Order Establishing Combatant Status Review Tribunal (July 7, 2002), at E-1 § B.

And, as explained earlier, it may inadvertently play into the hands of al Qaida propaganda efforts. See *supra* notes _ and accompanying text.

Judge Wilkinson adopts a similar interpretation of "enemy combatant" in Al-Marri v. Pucciarelli, No. 06-7427, slip op. at 179 (4th Cir. *en banc*, July 15, 2008) (concurring in part and dissenting in part), when he reasons that to be classified as an enemy combatant a person must "(1) be a member of (2) an organization or nation against whom Congress has declared war or authorized the use of military force, and (3) knowingly plans or engages in conduct that harms or aims to harm persons or property for the purpose of furthering the military goals of the enemy nation or organization."

terrorist organizations are likely to become less centralized, more organizationally dispersed. An alternative approach would have Congress designate on an ongoing basis which terrorist organizations pose sufficient threat that their members – or, better, its agents – are subject to the administrative detention statute, or might allow for exceptions where a terrorist attack is believed to be imminent. ¹⁴⁶

The key point is that whether proposed administrative detention laws aim primarily at long-term incapacitation or immediate-term disruption, a more effective definitional approach would tie the class quite directly to the specific strategic aim by including a high substantive standard of prospective or "but for" dangerousness, including additional proxy indicators likely to improve the accuracy of adjudications. ¹⁴⁷

VI. From Why and Whom to How

Having worked through the issue of *whom* new legal powers might aim to detain, a final reason to ground any consideration of administrative detention statutes in a firm conception of "why detain?" is because that strategic rationale will inform significantly the logic of procedural design, or the *how* issues. Near the outset I noted an emerging consensus among administrative detention reform advocates around a set of minimum

See *supra*.

Some might argue that the 2001 Authorization of the Use of Military Force, *supra*, did just that, with respect to al Qaida. Specifically, it authorized "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." Congress could pass additional resolutions to take account of new threats or repeal resolutions to take account of diminished threats.

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

procedural and institutional elements consistent to most proposals: judicial review, adversarial process, and transparency. After *Boumediene*, it is also fairly clear that robust judicial review and opportunity to contest the legal and factual basis for detention are also constitutionally required at least for detainees held inside the United States or at Guantanamo. Beyond identifying such minimum elements, however, it is difficult to work out the secondary details of procedural design without knowing more precisely what a new administrative detention scheme aims to achieve and whom it is built to detain. Greater strategic clarity and a clearer idea of how the substantive detention class might be defined therefore enlighten this procedural discussion and reveal important additional questions of institutional design.

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

See *supra*, Part II.

See Boumediene v. Bush, *supra*.

¹⁵⁰ See Jay Sterling Silver, Equality of Arms and the Adversarial Process: A New Constitutional Right, WISCONSIN L. REV. 1007, 1008 (1990) ("our system of justice is founded on the presumption that the truth is more likely to emerge from the contest between zealous advocates"). This argument formed the basis of opposition to some provisions in the 2005 Detainee Treatment Act, Pub. L. No. 109-148, 119 Stat. 2739, restricting habeas corpus jurisdiction at Guantanamo. See, e.g., P. Sabin Willett, Detainees Deserve Court Trials, WASH. POST, Nov. 14, 2005, at 21. But others observe that adversarial process may sometimes suppress truth-finding. See, e.g., Frankel, The Search for Truth: An Umpireal View, 123 U. PA. L. REV. 1031, 1036 (1975) ("many of the rules and devices of adversary litigation as we conduct it are not geared for, but are often aptly suited to defeat, the development of the truth"); Frank J. Macciarola, Finding the Truth in an American Criminal Trial: Some Observations, 5 CARDOZO J. INTL & COMP. L. 97 (1997) (observing that the American criminal justice system often subordinates truth to other values).

fair determinations of that factual predicate.

If, for example, the dominant strategic purpose is incapacitation and the critical detention test is therefore dangerousness, we should strive for hearings designed to assess and predict accurately future behavior, with adjudicators who have access to information relevant to that inquiry and processes that effectively test the quality of that information.¹⁵¹ True, regular federal judges make similar dangerousness determinations based on adversarial hearings all the time (take the example cited above of bail conditions while awaiting trial). 152 But terrorist dangerousness is different from criminal dangerous in kind and degree¹⁵³ and requires understanding not just an individual's probable activities and the magnitude of their threat but how they relate to activities fellow terrorists' activities. dangerousness test includes a further inquiry of whether less libertyrestrictive means can mitigate the threat (as the British Law Lords have held to apply in the case of recent British counter-terrorism laws), courts would further need to inquire of and assess the effectiveness of an array of government tools, including monitoring and surveillance and international cooperative efforts. These latter inquiries seem particularly well-suited to a specialized court (perhaps a "national security court"), so that judges can accumulate experience and expertise in these technical and operational

Procedural due process cases are illustrative here. Compare, for example, Goldberg v. Kelly, 397 U.S. 254 (1970) (requiring evidentiary hearings in situation where veracity and credibility of claimants is key), with Parham v. J.R., 442 U.S. 584 (1979) (refusing to require judicial-style hearings for certain juvenile civil commitments because they were unlikely to improve practice of relying on medical expert submissions).

¹⁵² Cf. Salerno v. United States, 481 U.S. 739, 751 (1987) (noting that right to counsel and adversarial process mandated in the Bail Reform Act were "specifically designed to further the accuracy of [the] determination [of the likelihood of future dangerousness]").

See supra notes _ and accompanying text. Those who believe that terrorism should be treated as crime may disagree with this point, but other ways in which terrorist dangerousness generally differs from criminal dangerousness include its strategic purpose, individual motivation, and long-term as well as short-term consequences.

House of Lords, A(FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent), [2004] UKHL 56, paras. 30-43.

matters. Success of France's counterterrorism efforts is sometimes credited in part to its development of a specialized, centralized terrorism court, because it allowed its magistrates to become "the type of expert on the subject of terrorism that is difficult to create within normal judicial institutions." ¹⁵⁶

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

The strategic purpose of administrative detention and the corresponding definition of the substantive class will also guide other aspects of institutional design, including how long individual detentions ought to last and whether ongoing, periodic review is warranted. If administrative detention is focused on incapacitation, and therefore defines the class by dangerousness, or a proxy such as past acts or membership in a group, individual detentions would logically last as long as that condition exists – i.e. as long as the individual poses that danger. But whereas dangerousness itself may change over time (as events pass, plots are thwarted, or as a detainee grows older or perhaps even demonstrates regret and cooperate), conditions such as membership or past actions do not. 157

See Goldsmith & Katyal, *supra*; Kenneth Anderson, *Law and Terror*, POLICY REVIEW, Oct. 2006, at 1.

Jeremy Shapiro & Benedicte Suzan, *The French Experience of Counter-Terrorism*, 45 SURVIVAL 67-78 (2003); see also Antoine Garapon, Is There a French Advantage in the Fight Against Terrorism, Real Institute Elcano (2005), at 5-6, available at www.realinstitutoelcano.org/analisis/807/Garapon807.pdf. The Constitution Project appears to take issue with this view, in arguing against national security courts that "unlike tax and patent law, there is simply no highly specialized expertise that would form relevant selection criteria for the judges." Constitution Project, *supra*, at 3. *See also* Coughenour, *supra* (arguing that federal judges have adequate expertise to handle complex terrorism cases).

Israel's Unlawful Enemy Combatant Statute, discussed at *supra* notes _ and accompanying text, requires re-examination of the need for

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An inquiry like the former therefore probably merits periodic review, while assessing static conditions like the latter do not (though they still may warrant time limitations on detention).

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

Finally, the way strategic purposes and the subject class of individuals are defined also drives the logic of decision-making transparency, with implications for other aspects of procedural and institutional design such as attorney access and assistance. An incapacitation strategy is compatible with high levels of public scrutiny, since there will usually be little reason to hide – and indeed much to gain from disclosing openly – the underlying justification. Some degree of transparency would be critical to a deterrence strategy as well, to the extent locking individuals away aims to dissuade others from certain specific conduct.

But the transparency of disruption-detention is trickier, since the government may not wish to tip off other plot collaborators or cause public

continued detention every six months. See Incarceration of Unlawful Combatants Law, 5762-2002.

- See Goldsmith & Katyal, *supra*; Wittes & Gitenstein, *supra*; see also Waxman, *Detention as Targeting*, *supra*.
- The Spanish government, for example, uses criminal investigatory detention powers sometimes for very brief periods in similar ways. See Victoria Burnett, *After Raids*, *14 Held in Spain on Suspicion of a Terror Plot*, N.Y. TIMES, Jan 21, 2008, at A3. See also Human Rights Watch, Preempting Justice, *supra* at 24-27 (detailing France's use broad arrest powers to disrupt terrorist plotting).
- But see Jacoby Declaration, *supra* (explaining that intelligence collection through interrogation may take months or years to bear fruit in some cases, especially when the suspect is trained to resist interrogation).
- On the strategic benefits of detention decision-making transparency, see Waxman (forthcoming), *supra*.

panic. Some European countries, for example, have laws that allow individuals otherwise legally detained to be held incommunicado for brief periods if cutting off communications (and sometimes even lawyer access) is necessary to thwart terrorist attacks. And information-collection detention would require high levels of secrecy to avoid disclosing sensitive intelligence or tipping off the targets of possible stings. 163

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

In similar ways the choice among strategic imperatives behind administrative detention points toward different approaches to attorney assistance.¹⁶⁶ The nature of information used to prove or disprove the

See Anna Oehmichen, Incommunicado Detention in Germany: An Example of Reactive Anti-terror Legislation and Long-term Consequences, 9 GERMAN LAW JOURNAL 855 (2008). These laws have come under significant scrutiny and legal challenge. See id.

¹⁶³ See Attorney General's Remarks, *supra* (emphasizing the risks of disclosing sensitive intelligence through processes to challenge detention).

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

See 50 U.S.C. § 1803. Established by the Foreign Intelligence Surveillance Act of 1978 (FISA), generally speaking the FISC oversees requests for surveillance warrants against suspected foreign intelligence agents and terrorists inside the United States.

While assistance of counsel is generally believed to enhance truth-finding, in some circumstances the Supreme Court has found it does not contribute significantly to decisionmaking accuracy. See, e.g., Walters v. National Assoc. of Radiation Survivors, 473 U.S. 305 (1985) (rejecting due process challenge to federal statute limiting fees payable to lawyers representing veterans' benefit claimants); Lassiter v.

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

Taken together this analysis interestingly points in favor of a very different design for an incapacitation regime than a disruption regime, the two most promising strategic approaches to administrative detention outlined above. An incapacitation system could quite naturally feature generalist judges and lawyers conducting open and transparent hearings to regulate what would often be long-term detention. A disruption system might require specialized courts and lawyers operating to regulate short-term detention amid some secrecy. There may therefore be a need to choose between strategic approaches in fashioning a new law. Alternatively, Congress could consider a bifurcated system to handle the two types of detention.

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

Department of Social Services, 542 U.S. 18 (1981) (holding that Constitution does not require appointment of counsel for indigent parents in every parental status termination proceeding).

See, e.g., Goldsmith & Katyal, *supra*.

VII. CONCLUSION

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

Those proposing new administrative detention laws have been tempted to take as the starting point existing enemy combatant detention policies and to build onto them more robust and refined procedural protections. This Article shows that temptation is misguided. It recommends that reform proposals abandon an "enemy combatant" model in favor of more restrictive categories, based on either incapacitating the most dangerous suspects or disrupting imminent plots. Working more methodically through the *why* and *whom* questions helps illuminate the dangers of vague or broadly-defined detention criteria and sharpens the image of *how* more narrowly-crafted administrative detention could operate.