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**SECURITY DETENTION, TERRORISM AND THE PREVENTION
IMPERATIVE***

John P. McLoughlin,[†] Gregory P. Noone[‡] & Diana C. Noone[§]

[T]he Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. For example, in times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the Government believes to be dangerous. Even outside the exigencies of war, we have found that sufficiently compelling governmental interests can justify detention of dangerous persons.

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

The events of September 11 transformed the mission of the Department of Justice Indeed, the protection of our national security and the prevention of terrorist acts are our number one goal. On every level, we are now committed to a new strategy of prevention.

*—U.S. Department of Justice
Counterterrorism White Paper*

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INTRODUCTION

Since the events of September 11, 2001, the United States and many of its allies in the global campaign against terrorism have adopted a new dominant security imperative: prevention of terrorist attacks against their homelands and national interests. In succinct terms, the prevention imperative posits that the U.S. will engage all elements of national power (legal, economic, diplomatic, financial, military, intelligence, and information) to neutralize the threat posed by al Qaeda and other non-state actors. Detention of suspected terrorists has become a main facet of this prevention strategy, and several legal mechanisms have been employed in this regard in the U.S.

The primary purpose of this article is neither to assess the rectitude or efficacy of the current multi-prong approach to detention of suspect individuals, nor to assess the imperative placed on prevention as a strategy. Rather, this article will review the recent calls for a new system of preventive detention and the legal landscape of preventive detention in the U.S., and will survey several preventive detention systems used by the U.S.'s allies. The goal of the article is to outline the likely characteristics of, and fundamental questions associated with, any new security detention process the U.S. might consider adopting.

At the outset, this article is written with certain premises in mind. First, terrorism experts agree that the U.S. homeland likely will be the target of future attacks. Second, it is also likely that at some future point those attacks will be perpetrated by homegrown individuals, including U.S. citizens.¹ Third, the design of any system of preventive detention should be consistent with the U.S.'s obligations under both the U.S. Constitution and international law. Finally, it is better to discuss the controversial issue of preventive detention in a calm and deliberate manner rather than in the wake of another terrorist attack, when fear, anger, and calculations of political advantage may rule the day.

I. THE CURRENT APPROACH TO DETENTION OF TERRORIST SUSPECTS

The United States currently uses a multi-prong approach to detain suspected terrorists. As former Attorney General Alberto Gonzalez acknowledged, to many outsiders the U.S. government's decision-making process about how to deal with a particular individual "is a black box that raises the specter of arbitrary action," despite what he described as "a

¹ Timothy McVeigh's 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City has already demonstrated this reality.

thoughtful, deliberate and thorough analysis of the relevant facts and law at many levels of the Executive branch.”²

One of the legal mechanisms that the U.S. has employed to detain suspects is traditional criminal law enforcement, which the U.S. has relied on to investigate and prosecute both terrorism-specific and other crimes. This reliance on criminal law enforcement procedures principally has involved the “material support” statutes found at 18 USC §§ 2339A and 2339B. More ordinary offenses such as conspiracy, document fraud, obstruction of justice, perjury, and the like also have played a critical role.³ This criminal law enforcement element of the prevention strategy has been used with respect to both U.S. citizens and aliens, and persons apprehended both in the U.S. and in foreign nations. The U.S. has employed other tools from the law enforcement paradigm more aggressively to neutralize perceived terrorist threats. Perhaps the most notable example is the use of the power to detain persons that qualify as material witnesses for ongoing criminal investigations and prosecutions.⁴ Moreover, the U.S. and other nations have undertaken numerous measures, both in domestic and international law, to enhance the criminal law enforcement powers available to combat terrorism.

In addition to the criminal law enforcement paradigm, the U.S. has expanded and employed its framework of immigration laws as an alternate detention mechanism. As in the arena of criminal law enforcement, the years since 9/11 have witnessed enhanced government powers and in-

² Alberto R. Gonzalez, Counsel to the President, Remarks before the American Bar Association Standing Committee on Law and National Security (Feb. 24, 2004), *available at* <http://fas.org/irp/news/2004/02/gonzales.pdf>.

³ See generally U.S. Department of Justice, *Counterterrorism White Paper* (June 22, 2006), *available at* <http://trac.syr.edu/tracreports/terrorism/169/include/terrorism.whitepaper.pdf>.

⁴ The primary provision regarding material witnesses can be found at 18 U.S.C. § 3144 (2006). For example, both Jose Padilla, a U.S. citizen, and Ali Saleh Kahlah al Marri, an alien resident in the U.S., were initially detained in 2001 as material witnesses for the investigation into the 9/11 attacks. See *Al-Marri v. Wright*, 487 F.3d 160, 164 (4th Cir. 2007); Steve Fainaru & Margot Williams, *Material Witness Law Has Many in Limbo; Nearly Half Held in War on Terror Haven't Testified*, WASH. POST, Nov. 24, 2002, at A1. Both were ultimately transferred to military custody and further detained as enemy combatants. 487 F.3d at 165; Kirk Semple, *Padilla Sentenced to 17 Years in Prison*, N.Y. TIMES, Jan. 23, 2008. The U.S. government eventually transferred Padilla back to the ordinary civilian criminal justice system, where he was tried and convicted for terrorism-related crimes that were unrelated to the original basis for his detention. Peter Whoriskey & Dan Eggen, *Judge Sentences Padilla to 17 Years, Cites His Detention*, WASH. POST, Jan. 23, 2008, at A3. According to the Washington Post, between September 2001 and November 2002, at least forty-four persons were detained as material witnesses in connection with terrorism investigations. Steve Fainaru & Margot Williams, *Material Witness Law Has Many in Limbo; Nearly Half Held in War on Terror Haven't Testified*, WASH. POST, Nov. 24, 2002, at A1. Of those forty-four, twenty were never brought before a grand jury. *Id.*

creased enforcement operations with respect to foreign nationals.⁵ Although immigration laws and processes generally do not apply to citizens, immigration laws do apply to foreign nationals who legally have entered and resided in the U.S. for extended periods, not just illegal immigrants or those foreign nationals who are stopped at the border.

A third—and in some quarters more controversial—legal mechanism used to effectuate the prevention imperative is the law of armed conflict (LOAC). Framing the conflict with al Qaeda and its network of affiliates as a “global war on terror” and relying on the 2001 Authorization for the Use of Military Force (AUMF) adopted by Congress,⁶ the U.S. has cited the long-established customary and conventional power of nations to detain enemy combatants as the legal basis for holding many suspected terrorist operatives in military custody. This power, which permits a nation to hold enemy combatants for the duration of a conflict to prevent them from returning to the battle, also has been asserted by the U.S. government to detain both U.S. citizens and foreign nationals, and with respect to both persons detained in the U.S. and persons detained in foreign nations.

Despite the availability and use of these multiple legal mechanisms, a growing number of prominent U.S. legal scholars and practitioners have suggested that the U.S. should enact a new system of security detention (also termed “preventive detention” or “administrative detention”). These scholars and practitioners suggest that the challenges facing the government under the current multi-prong approach, and the questions of fundamental fairness to some detainees under that approach, necessitate such a new system. Moreover, these commentators have expressed concern that the current strategy is accomplished only by distorting these legal paradigms in ways that will ultimately spill over into government efforts to combat threats other than terrorism.

⁵ See OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS, 2, 15, 47 (2003), <http://www.usdoj.gov/oig/special/0306/full.pdf>. (stating that approximately 762 aliens were detained in the U.S. in connection with the 9/11 investigation). By far, most of those aliens were detained under immigration provisions related to illegal entry or expired visas, and the overwhelming number of those charges were found to be invalid. The vast majority of the detained aliens were never connected to terrorism, and prior to 9/11 many of them would not have been detained for those violations. *Id.*

⁶ Authorization for Use of Military Force, Pub. L. No., 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541).

A. *The Challenges of the Current Approach*

1. Shortcomings of old and new paradigms to combat terror threats

Before 9/11, the United States and many other nations viewed terrorism primarily as an issue of criminal law enforcement. Efforts to combat terrorism too often focused on *post hoc* criminal investigations that were designed to develop criminal cases for prosecution. Generally, *post hoc* criminal investigations often involve interdicting terrorist activity close to the point of attack, or, too frequently, after an attack has occurred, when evidence of offensive conduct and intent naturally is more unequivocal. This strategy largely permits shielding sensitive intelligence information—including evidence from intelligence investigations—from disclosure during judicial proceedings.

This approach might be understandable in response to a brand of terrorism that: (1) involves sporadic attacks; (2) limits civilian casualties (through advance warnings and the like) to insulate political agendas (e.g. the Marxist and nationalist terror groups of the 1970s); (3) primarily targets property interests (for example, modern eco-terrorists); (4) is secularly inspired; and (5) is almost exclusively domestic. However, this historical brand of terrorism has been joined, and to some extent eclipsed, by a fundamentally different terrorist threat, namely one perpetrated by religiously inspired radical extremist groups such as al Qaeda and its associated organizations around the world. These modern terrorist groups employ a wide web of support for recruitment, procurement, logistics, and operational planning. They present a global terrorist threat interested in carrying out repetitive attacks involving indiscriminate mass casualties and severe damage to economic and social infrastructure (including critical systems such as energy, communications, and food and water supplies). These groups have a genuine interest in the use of chemical, biological, radiological, and nuclear weapons, and a willingness, if not a desire, to die (through suicide or otherwise) to achieve their mission.

Just as the nature of the modern terrorist threat has evolved, so have the challenges of investigating and prosecuting that threat. Terrorist investigations are increasingly multi-jurisdictional. Differences in capabilities, timeframes of action, judicial systems (accusatorial versus inquisitorial, common law versus civil law, and the like), willingness to cooperate, availability of resources, and enforcement authority create serious investigative obstacles. These obstacles make it far more difficult for government agencies to obtain relevant, useful evidence while simultaneously increasing the time and cost of trying to do so. In addition, the global nature of modern

terrorism means that evidence may often be obtained under extraordinary circumstances or in extraordinary places.⁷

The forensic requirements of modern terrorism investigations are also far more complex and time consuming than in the past, particularly given the possibility of WMD hazards. The methodology of simultaneous attacks extends and complicates forensic examination and analysis, especially when the forensic sites are located in major metropolitan areas and infrastructure systems. Modern forensic investigations also require deployment of specialized teams, the number of which are limited and the functions of which are often sequential in nature, meaning that parallel efforts are difficult, if not impossible.⁸

As a result of the changed threat environment and these investigative challenges, suspected terrorist activities must be disrupted earlier in the planning and preparation cycle. Terrorism investigations now are more of-

⁷ Operation Springbourne, an investigation by the British Metropolitan Police of a terrorism plot using ricin, provides a demonstration of obstacles to terrorism investigations. Conducted between 2002 and 2005, Operation Springbourne spanned twenty-seven jurisdictions. HOME AFFAIRS COMMITTEE, TERRORISM DETENTION POWERS, 2005–06, H.C. 910-I, at 56, available at <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/910/910i.pdf>. Because U.K. law required charging decisions within a short timeframe and evidence was not able to be developed from the many jurisdictions within that timeframe, the authorities were unable to prosecute the suspects for terrorism charges. *Id.* Instead, the suspects were prosecuted for ordinary crimes such as fraud or forgery arising from some peripheral document and credit card fraud schemes. *Id.* A suspect later determined to be a prime conspirator fled the country while on bail awaiting trial on the lesser charges. *Id.*

⁸ For example, the July 2005 London bombings created the largest crime scene in the United Kingdom's history—and it took place in the heart of London's critical transport infrastructure. See *Minutes of Evidence Before the British H. of Commons Home Affairs Comm.*, Session 06 (2005) (testimony of British Metropolitan Police Commissioner Ian Blair and Assistant Commissioner Andy Hayman to the British House of Commons Home Affairs Committee) [hereinafter *Minutes of Evidence*], available at <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/462/5091305.htm>. As of September 2005, law enforcement authorities had collected over 38,000 evidentiary exhibits. See *id.* The evidence to be preserved, collected, and analyzed included thousands of hours of closed circuit television (CCTV) videos and over 1,400 fingerprints. See *id.* As the investigations expanded, over 160 sites became potential crime scenes. See *id.* According to the British Metropolitan Police, one such site involved a so-called “bomb factory” discovered in the Yorkshire area. See HOME AFFAIRS COMMITTEE, *supra* note 7, at 19. Investigators required over two weeks to secure safe access to the site, and examination required another six weeks. See *id.* Definitive forensic analysis of the explosive devices could not be completed before charging decisions were required under U.K. law, and thus a much more limited assessment of the device had to be used to interrogate the suspects prior to charge. See *id.* at 56–57. New technology also increases the time required for terrorism investigations. These investigations often involve seizure of large numbers (i.e., into the hundreds) of computer hard drives that store vast amounts of data. See *id.* at 18–19. That data must be secured, often decrypted, examined, and ultimately assessed prior to being incorporated into investigative interviews or other steps. *Id.* Many of these steps cannot be done simultaneously, and thus the time involved is necessarily increased. See *id.*

ten viewed as intelligence cases, and prosecution of terrorist crimes is only one tool available to neutralize terrorist threats. However, the realities of intelligence pose serious problems. The key limit on intelligence is its incompleteness; rarely does intelligence tell the whole story, and terrorists take proactive steps to secure and obscure information. Intelligence is sporadic, fragmentary, often inferential at best, and difficult to interpret. It requires validation, prioritization, sifting, assessment and judgment. Intelligence is also fragile. It comes from human sources who risk their lives to obtain it, and from sensitive technologies that can be countered by skilled and informed opponents. Highly dependable intelligence information may have been provided by a foreign government on the condition that the information, or the government's cooperation, is not publicly disclosed.⁹

Statutes such as the Classified Information Procedures Act (CIPA)¹⁰ provide limited relief for these concerns. To be sure, CIPA provides a valuable procedural mechanism for making determinations about the disclosure of national security information in criminal proceedings and to help "prevent[] unnecessary or inadvertent disclosures of classified information."¹¹ CIPA accomplishes this goal through: pre-trial conferences; notice requirements; judicial protective orders; *ex parte* and *in camera* submissions; court authorized deletions, summaries and stipulations; pre-trial evidentiary hearings; and interlocutory appeals. But CIPA "neither adds to nor detracts from the substantive rights of the defendant or the discovery [sic] obligations of the government."¹² Instead, it merely permits the government "to know in advance of a potential threat from a criminal prosecution to its national security . . . and advis[es] the government of the national security 'cost' of going forward."¹³ Indeed, where a court rejects protective measures pro-

⁹ See Dame Eliza Mannigham-Buller, Dir. Gen., British Security Services, Address at the Dutch General Intelligence and Security Service (AIVD) (Sept. 1, 2005), available at <http://www.mi5.gov.uk/print/Page387.html> [hereinafter Mannigham Speech].

¹⁰ 18 U.S.C. App. 3 §§ 1-16 (1980).

¹¹ U.S. ATTY. CRIM. RESOURCE MANUAL, SYNOPSIS OF CLASSIFIED INFORMATION PROCEDURES ACT, [HTTP://WWW.USDOJ.GOV/USAO/EUSA/FOIA_READING_ROOM/USAM/TITLE9/CRM02054.HTM](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02054.htm) [hereinafter U.S. ATTORNEY MANUAL].

¹² *Id.*

¹³ *Id.* The ABA has concluded that CIPA

provides procedures for notice to the government and judicial screening when the defendant wishes to reveal classified information. It is designed to limit the defense's ability to leverage its possession of classified information in plea negotiations. CIPA provides no protection for information that the prosecution might need to introduce or for information that the defense is permitted to introduce.

ABA TASK FORCE ON TERRORISM AND THE LAW, REPORT AND RECOMMENDATIONS ON MILITARY COMMISSIONS, Jan. 4, 2002, at 14, n.33. Thus, although "mechanisms exist to protect evidence of a classified nature from public exposure, these may not suffice to protect the information from the defendants and, through them, others who may use such information to the harm of the U.S. and its citizens." *Id.* at 14.

posed under CIPA, the government “ha[s] two options: (1) order the case to be dismissed; or (2) file an affidavit effectively prohibiting the use of the contested classified information. At that point, the court may impose sanctions against the government, which may include striking all or part of a witness’s testimony, resolving an issue of fact against the United States, or dismissing part or all of the indictment.”¹⁴

Perhaps the most important aspect of this new paradigm is the critical dilemma it poses to both governments and societies alike. Specifically, how does a government protect its citizens within the rule of law when intelligence that is considered reliable does not meet the high evidentiary thresholds developed by society in the context of ordinary criminal prosecutions, and still protect the sources and methods essential to acquiring that critical information? For example, authorities could correctly believe that a terrorist attack is being planned, but the authorities must release any individuals arrested in connection with the suspected threat because the plan is too embryonic and vague to obtain criminal charges and convictions, or because the intelligence underlying the authorities’ belief is too sensitive to reveal the sources, methods, or technological capabilities that gave rise to the information.¹⁵ Accordingly, it may be in the best interest of society to

¹⁴ Jim McAdams, *The Classified Information Procedures Act: An Introduction and Practical Guide for Criminal Investigators* (Nov. 13, 2007), <http://www.fletc.gov/training/programs/legal-division/downloads-articles-and-faqs/articles/the-classified-information-procedures-act.html>; *see also*, U.S. ATTORNEY MANUAL, *supra* note 11 (citing a specific example of where this issue might arise: the testimony of covert intelligence operatives). According to § 2054 of the U.S. Attorney’s Criminal Resource Manual, the success of the intelligence community

turns in significant part upon the ability of its intelligence officers covertly to obtain information from human sources. In carrying out that task, the intelligence officers must, when necessary, be able to operate anonymously, that is, without their connection to an intelligence agency of the United States being known to the persons with whom they come in contact. For that reason, an intelligence agency is authorized under Executive Order 12958 to classify the true name of an intelligence officer. During the pre-trial progression of an indicted case, as the court enters its CIPA rulings ..., it may become apparent to the prosecutor that testimony may be required from an intelligence officer or other agency representative engaged in covert activity, either because the Court has ruled under CIPA that certain evidence is relevant and admissible in the defense case, or because such testimony is necessary in the government’s rebuttal. Just as the substance of that testimony, to the extent it is classified and is being offered by the defense, must be the subject of CIPA determinations by the court, the prosecutor must also ensure that the same considerations are afforded to the true names of covert intelligence community personnel, if those true names are classified information.

Id.

¹⁵ *See* Manningham Speech, *supra* note 9. *But see Minutes of Evidence*, *supra* note 8 (testimony of British Home Secretary Charles Clarke), available at <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/462/5091302.htm> (observing that, in the weeks before the bombings, the U.K.’s Joint Terrorism Analysis Center concluded that there was no

intervene in the absence of substantial admissible evidence in order to prevent or disrupt a terrorist plot, even if the effect is to compromise a related criminal investigation and jeopardize follow-up prosecutions.

Although the U.S. has prosecuted a number of terrorism cases in the ordinary criminal courts, many of the “successful” cases have involved highly unusual circumstances.¹⁶ Others cases only have succeeded in obtaining convictions of significantly lesser charges,¹⁷ failed altogether,¹⁸ or involved novel (some would say troubling) applications of the law. Moreover, despite U.S. efforts to prosecute some terrorist suspects before military commissions as unlawful combatants under the law of armed conflict, as of

single terrorist group “with both the current intent and the capability to attack the UK,” and the threat level under which the authorities operated was reduced accordingly). Home Secretary Charles Clarke testified, “[I]ntelligence is not knowledge.” *Id.* Rather, intelligence is an effort to understand threats to a nation using a variety of techniques and sources, and then assessing the information gathered to come to a view. *See id.*

¹⁶ For example, Richard Reid, the so-called “shoe bomber,” was prosecuted for attempting to detonate an explosive device on a trans-Atlantic commercial flight in December 2001. *See* Indictment, *United States v. Reid*, 206 F.Supp.2d 132 (D. Mass 2002). The explosives were hidden in the soles of his shoes. *Id.* Had he succeeded in lighting one of the several matches he struck, Reid would have killed more than 180 innocent passengers and crew members. *Id.* Reid ultimately pled guilty to virtually all charges, likening himself a soldier at war against the U.S., and was sentenced to life imprisonment. Richard Reid’s Response To Government’s Motion To Vacate Or Modify Appointment Of Counsel For Defendant, *United States v. Reid*, 206 F.Supp.2d 132 (D. Mass 2002). Similarly, Zacarias Moussaoui also pled guilty to terrorism offenses related to the 9/11 plot. *See* Motion to Withdraw Guilty Plea, *United States v. Moussaoui*, 282 F.Supp.2d 480 (E.D. Va. 2003). Like Reid, Moussaoui used his trial to cast himself as a warrior against the U.S., and was ultimately sentenced to life imprisonment. *Id.*

¹⁷ *See, e.g.*, Dan Eggen, *Justice Dept. Statistics on Terrorism Faulted*, WASH. POST, Feb. 21, 2007, at A08 (explaining that Department of Justice Inspector General report shows that many terrorism-related cases result in charges on minor crimes or immigration violations unrelated to terrorism); Dan Eggen & Julie Tate, *U.S. Campaign Produces Few Convictions on Terrorism Charges*, WASH. POST, June 12, 2005, at A01 (reporting that out of 200 terrorism-suspect convictions reviewed, only 39 convictions were for terrorism or other national security charges; most were for more ordinary crimes such as making false statements or immigration violations). For an overview of U.S. terrorism-related prosecutions between 2001 and 2006, *see generally* U.S. Department of Justice, *supra* note 3.

¹⁸ *See, e.g.*, Adam Liptak & Leslie Eaton, *Financing Mistrial Adds to U.S. Missteps in Terror Prosecution*, N.Y. TIMES, Oct. 24, 2007, at A16 (noting a larger percentage of terrorism prosecutions brought since 9/11 have been lost compared to pre-9/11 terrorism prosecutions, in part because pre-9/11 terrorism convictions “were for completed acts of violence . . . or for conspiracies that were relatively close to fruition,” whereas post-9/11 prosecutions tend to be for less definitive activities, “reflective of a conscious change in Washington’s law enforcement strategy, to prevention from punishment”); Leslie Eaton, *U.S. Prosecution of Muslim Group Ends in Mistrial*, N.Y. TIMES, Oct. 23, 2007, at A1 (detailing lack of a single conviction in the trial of the Holy Land Foundation, one of the largest terrorist financing prosecutions in U.S. history); Eric Lichtblau, *Setback for U.S. in Terror Trial*, N.Y. TIMES, Dec. 7, 2005, at A1 (detailing failure of seventeen counts against former professor Sami al-Arian for providing support and resources for the Palestinian Islamic Jihad).

November 2008, only two such commissions have been completed. A series of challenges (many of them successful) to the legal basis and structure of the commissions are largely responsible for the failure of these efforts.¹⁹

2. Scholarly criticism of the current approach

Concern for the difficulties facing investigators and prosecutors has led a growing number of commentators to conclude that the U.S. should consider adopting a new system of preventive detention, or perhaps some form of modified criminal process, for terrorism and other national security cases. Additionally, some commentators have suggested that the current seemingly *ad hoc* approach to detention of terrorism suspects poses more risk to civil liberty than the adoption of a formal system of preventive detention would pose.

For example, Professors Jack Goldsmith (former head of the Office of Legal Counsel at the U.S. Department of Justice) and Eric Posner have argued that the U.S. should abandon trials of terrorist suspects before military commissions in favor of preventive military detention subject to more rigorous standards and enhanced oversight.²⁰ Professor Goldsmith later concluded, together with Professor Neal Katyal (counsel for the detainees in the case of *Hamdan v. Rumsfeld*²¹), that Congress should explicitly establish and sanction “a comprehensive system of preventive detention . . . that would . . . supplement the criminal process . . . [and] . . . would have greater legitimacy than our current patchwork system.”²²

Similarly, prior to his current post as U.S. Attorney General, Michael Mukasey (a former Federal district court judge who handled several of the most prominent U.S. terrorism cases) wrote that Congress should deliberate “how to fix a strained and mismatched legal system, before another cataclysm calls forth from the people demands for hastier and harsher results.”²³ Mukasey urged Congress to consider proposals to create national security courts or to develop measures akin to civil commitment to “incapa-

¹⁹ See, e.g., William Glaberson, *U.S. Seeks Execution for 6 in Sept. 11 Case*, N.Y. TIMES, Feb. 11, 2008, at A1 (discussing military tribunal's failure to begin any trials as of early 2008). The only military commissions completed as of November 2008 were the guilty plea of the Australian David Hicks and the conviction of Salim Hamdan (a.k.a. “bin Laden's driver”) for providing material support.

²⁰ See Jack Goldsmith & Eric A. Posner, Editorial, *A Better Way on Detainees*, WASH. POST, Aug. 4, 2006, at A17.

²¹ 548 U.S. 557 (2006).

²² Jack L. Goldsmith & Neal Katyal, Op-Ed, *The Terrorists' Court*, N.Y. TIMES, July 11, 2007, at A19.

²³ Michael B. Mukasey, Op-Ed, *Jose Padilla Makes Bad Law*, WALL ST. J., Aug. 22, 2007, at A15.

cite dangerous people” suspected of involvement in terrorism.²⁴ He reached this conclusion not simply as a result of the prosecutorial, financial and intelligence challenges faced by the government, but also because “if conventional legal rules are adapted to deal with a terrorist threat, whether by relaxed standards for conviction, searches, the admissibility of evidence or otherwise, those adaptations will infect and change the standards in ordinary cases with ordinary defendants in ordinary courts of law.”²⁵

Most recently, Professor John Farmer, a former Attorney General of the State of New Jersey and former senior counsel to the 9/11 Commission, reviewed the terrorism-related prosecutions of Jose Padilla and others since 9/11 for crimes such as material support and conspiracy, and determined that “[t]hey cry out for the creation of a form of preventive detention adapted to terrorism, and outside the criminal justice system.”²⁶ Professor Farmer concluded that “the continued reliance on our criminal justice system as the main domestic weapon in the struggle against terrorism fails on two counts: it threatens not only to leave our nation unprotected but also to corrupt the foundations of the criminal law itself.”²⁷ According to Farmer, “[i]n order to make the criminal justice system an effective weapon [against terrorism], we have already started extending the reach of criminal statutes to conduct that has never before been punishable as a crime,”²⁸ and

[t]he urgency involved in terrorism cases has also led courts to accept conduct by the government that might well have been disapproved in other contexts

. . . .

. . . When terrorism cases are treated as ordinary criminal prosecutions, the principles of law that they come to embody will guide law-enforcement conduct and be cited by the government not just in terrorism cases but in other criminal contexts.

Over time, we may well transform the law of conspiracy to the point where an agreement alone is a crime. This would render thoughts punishable, reward government overreaching and erode our civil liberties. All because the criminal law is being used not primarily to punish crimes but for purposes of detaining people we are worried about.²⁹

²⁴ *Id.*

²⁵ *Id.*

²⁶ John Farmer, Op-Ed., *A Terror Threat in the Courts*, N.Y. TIMES, Jan. 13, 2008, ¶ 4, at 14.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

3. Judicial responses to the current approach

Apprehension about stretching the bounds of established legal doctrines to fit difficult terrorism matters has surfaced in a number of recent cases both in the U.S. and abroad. The increasingly broad scope of the material support and conspiracy doctrines used in cases such as *Padilla*, which gave rise to Mr. Mukasey's and Mr. Farmer's commentaries, is just one example. Indeed, the federal court that handled the criminal prosecution of Jose Padilla ultimately imposed a significantly shorter term of imprisonment than that requested by U.S. prosecutors, at least in part because, in the court's view, the evidence did not link Padilla to any specific act of terrorism.³⁰

A related concern centers on the growing tendency to criminalize conduct that is ever more remote from the actual commission of a terrorist attack or conduct that is not supported by sufficient proof of terrorist intent. Earlier this year a court of appeal in the United Kingdom reversed the convictions of five young Muslim students prosecuted for "possess[ing] an article in circumstances which give rise to a reasonable suspicion that [it was possessed] for a purpose connected with the commission, preparation or instigation of an act of terrorism,"³¹ contrary to Article 57 of the U.K.'s Terrorism Act 2000.³² The articles included documents, compact discs and computer hard drives that contained extremist religious and political propaganda (described by the prosecution as al Qaeda recruiting material) and communications that allegedly revealed a plan by the men to travel to Pakistan and receive terrorist training.³³ Among the articles was a martyrdom song, a letter from one of the men saying he had left to take part in warfare, a military manual, and communications with a contact in Pakistan about how to travel without raising suspicion.³⁴ The British court ruled that, despite the potentially broad scope of the statutory language:

It was necessary for the prosecution to prove first the purpose for which each appellant held the [articles at issue] . . . and then to prove that this purpose was "connected with the commission, preparation or instigation" of the prospective acts of terrorism relied on by the prosecution

. . . .

³⁰ See Kirk Semple, *Padilla Gets 17-Year Term For Role in Conspiracy*, N.Y. TIMES, Jan. 23, 2008, at A14. ("In explaining her decision, [the judge] . . . questioned the effects of the conspiracy, saying that there was no evidence linking Mr. Padilla and two co-defendants to specific terrorism acts anywhere.")

³¹ *E.g.*, *Zafar v. Regina* [2008] EWCA (Crim) 184, [15] (Eng.).

³² *Id.* at [49].

³³ *Id.* at [1], [40], [44].

³⁴ *Id.* at [1], [8].

We have concluded that, if section 57 is to have the certainty of meaning that the law requires, it must be interpreted in a way that requires a direct connection between the object possessed and the act of terrorism. . . .

. . . .

. . . [T]he prosecution's case [suggested] that a much looser connection between the material possessed by the appellants and the terrorist act . . . would suffice to establish the appellants' guilt.³⁵

Another example of judicial pushback occurred in the June 2007 case of *al-Marri v. Wright*.³⁶ The United States Court of Appeals for the Fourth Circuit examined whether military detention of terrorist suspects designated as enemy combatants could be extended to a foreign national who legally entered and resided in the U.S. prior to his detention³⁷—a doctrine that the Supreme Court affirmed in the case of *Hamdi v. Rumsfeld* in 2004.³⁸ Al-Marri was originally arrested and charged with several crimes in the civilian criminal justice system,³⁹ but before his case went to trial, al-Marri was transferred to military custody pursuant to a Presidential Order determining that, among other things, al-Marri was an enemy combatant in possession of intelligence that would aid U.S. efforts to prevent attacks by al Qaeda.⁴⁰

³⁵ *Id.* at [24], [29], [34]; *See also Five Students Win Terror Appeal*, BBC NEWS, Feb. 13, 2008 (discussing Appellate Court decision).

³⁶ *Al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007).

³⁷ *See id.* at 164.

³⁸ *Hamdi v. Rumsfeld*, 542 U.S. 517, 519 (2004).

³⁹ *See Al-Marri*, 487 F.3d at 164. Al-Marri, a citizen of Qatar, entered the U.S. on September 10, 2001, and resided legally in the State of Illinois. *Id.* He was originally arrested by civilian authorities in the U.S. as a material witness to the 9/11 investigation and eventually indicted for several domestic crimes. *Id.* None of the charges against al-Marri were terrorism-specific crimes; instead, he was charged with more general crimes that often arise in terrorism investigations, such as “possession of unauthorized or counterfeit credit card numbers with intent to defraud . . . making false statements to the FBI [and] . . . on a banking application, and . . . using another person’s identification for the purpose of influencing the action of a federally insured financial institution.” *Id.* “Al-Marri pleaded not guilty to these charges.” *Id.*

⁴⁰ *See id.* at 164–66 (“The declaration of Jeffery N. Rapp, Director of the Joint Intelligence Task Force for Combatting Terrorism . . . asserts that al-Marri: (1) is ‘closely associated with al Qaeda, an international terrorist organization with which the United States is at war’; (2) trained at an al Qaeda terrorist training camp . . . ; (3) in the summer of 2001, was introduced to Osama Bin Laden by Khalid Shaykh Muhammed; (4) . . . volunteered for a ‘martyr mission’ on behalf of al Qaeda; (5) . . . enter[ed] the United States sometime before September 11, 2001, to serve as a ‘ sleeper agent ’ to facilitate terrorist activities and explore disrupting this country’s financial system through computer hacking; (6) . . . met with [and received funds from] terrorist financier; (7) gathered technical information about poisonous chemicals . . . (8) undertook efforts to obtain false [and stolen] identification, credit cards, and banking information . . . ; (9) communicated with known terrorists including, Khalid Shaykh Mu-

The court's answer was an emphatic "No." According to the court, even assuming all of the allegations about al-Marri's conduct were true, the government had no authority to treat al-Marri as an enemy combatant or as anything other than a civilian.⁴¹

If the government accurately describe[d] al-Marri's conduct, . . . [he could] be returned to civilian prosecutors, tried on criminal charges, and, if convicted, punished severely. But the government cannot subject al-Marri to indefinite military detention. For in the United States, the military cannot seize and imprison civilians—let alone imprison them indefinitely.⁴²

Given the level of concern of courts, legal scholars and practitioners alike, perhaps it is time to re-examine the issue of preventive detention in the U.S. in the context of terrorism.

B. The Legal Landscape of Preventive Detention in the United States

Preventive detention refers to the detention or confinement of a person believed to pose a threat to national security or to public safety and order, or a person whose presence at a public proceeding is required but cannot be guaranteed.⁴³ The purpose of the detention is avoidance of the potential danger or absence rather than the punishment of a criminal offense. Although many, if not most, people held under some form of preventive detention are in fact criminal defendants, others may not have been accused of crimes.⁴⁴

Some might suggest that preventive detention necessarily infringes fundamental principles of both U.S. Constitutional law and international

hammed and Al-Hawsawi, by phone and e-mail; and (10) saved [jihadist] information . . . on his laptop computer . . . Rapp [did not allege] that al-Marri [was] a citizen, or affiliate of the armed forces, of any nation at war with the United States . . . [or] directly participated in any hostilities against United States or allied armed forces.”)

⁴¹ See *id.* at 164. The Fourth Circuit later vacated the panel decision and reviewed al-Marri's case *en banc*. The *en banc* court held: (1) assuming the government's allegations about al-Marri's conduct were true, Congress had authorized his detention as an enemy combatant; but (2) al-Marri had not been afforded sufficient process to challenge his designation as an enemy combatant. *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (per curiam) (reversing the district court and remanding for further proceedings). The U.S. Supreme Court has recently agreed to review the *al-Marri* case during the 2008 term. See Robert Barnes, *Supreme Court to Hear Case of Accused Al-Qaeda Member*, WASH. POST, Dec. 6, 2008, at A2.

⁴² *Id.*

⁴³ See, e.g., *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (discussing rationale behind preventive detention).

⁴⁴ See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 517, 518–19 (2004).

law.⁴⁵ Others might contend that preventive detention is a widely accepted practice that is thoroughly consonant with the concept of ordered liberty.⁴⁶ The truth lies somewhere in the middle. Multiple sources of legal authority govern the standards and conditions of detention, including domestic law, international human rights law, and, in certain circumstances, the law of armed conflict (also called international humanitarian law).⁴⁷ Preventive detention by its very nature therefore has one foot in the international legal world and one in the world of domestic law.

The basic instruments of international human rights law neither explicitly permit nor prohibit preventive detention, although they do establish certain basic substantive and procedural standards relevant to the issue. Most important is the freedom from arbitrary arrest or detention, and the requirement that arrest, detention and other deprivations of liberty must be for lawful grounds and according to established legal procedures.⁴⁸ Further, anyone arrested or detained has a right to: (1) information about the grounds underlying the deprivation; (2) independent proceedings to determine the lawfulness of the detention; and (3) freedom from torture or any other form of cruel, inhuman or degrading treatment or punishment.⁴⁹ The law of armed conflict provides for many similar detainee rights.⁵⁰

⁴⁵ See, e.g., *Al-Marri*, 487 F.3d at 163–64 (stating the court’s view that al-Marri’s detention violated constitutional principles).

⁴⁶ See *id.* (discussing the Government’s perspective that it had the authority to detain al-Marri).

⁴⁷ See, e.g., Universal Declaration of Human Rights, G.A. Res. 216 (III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948); International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 972 U.N.T.S. 1950, 4 Bevans 852 [hereinafter POW Convention].

⁴⁸ See, e.g., Universal Declaration of Human Rights, *supra* note 47.

⁴⁹ See Universal Declaration of Human Rights, G.A. Res. 217A, arts. 5, 8, 9, U.N. GAOR, 3d Sess. 1st plen. mtg., U.N. Doc. A/810 (Dec. 21, 1948); ICCPR, *supra* note 47, at arts. 7, 9(1), 9(2), 9(4); Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment, G.A. Res. 43/173, principles 2, 4, 6, 11, U.N. Doc. A/RES/43/173 (Dec. 9, 1988); United Nations Convention Against Torture, G.A. Res. 39/46, arts. 2(1), 16(1), U.N. Doc. A/RES/39/46 (Dec. 10, 1984) [hereinafter CAT]. Note that, except for the prohibition on torture and cruel, inhuman or degrading treatment, each of the freedoms and rights mentioned may be subject to derogation if necessary during times of officially proclaimed public emergency. See ICCPR, *supra* note 47, at art. 4.

⁵⁰ The Geneva Conventions permit internment of prisoners of war in international armed conflicts until the cessation of hostilities. See POW Convention, *supra* note 47, arts. 4, 21, 118. The Geneva Conventions also provide for review by a “competent tribunal” of the basis for prisoner of war status “[s]hould any doubt arise.” *Id.* at art. 5. The Geneva Conventions permit the internment of certain civilians when necessary for security, and provide for reconsideration or appeal of such decisions (and further periodic review) by an appropriate judicial or administrative body. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, arts. 42, 43, 78, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [herei-

More importantly, the U.S. Supreme Court has clearly stated that “[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.”⁵¹ As a result,

government detention violates [the Due Process] Clause unless the detention is ordered in a criminal proceeding with adequate procedural protections, or in certain special and narrow non-punitive circumstances where a *special justification*, such as harm-threatening mental illness, outweighs

nafter Civilian Persons Convention]. The law of armed conflict also prohibits torture and other inhumane treatment of combatants and civilians both in international and non-international armed conflict. *See* POW Convention, *supra* note 47, arts. 3(1), 13, 17; Civilian Persons Convention, *supra*, arts. 27, 31, 32, 37. Further, whereas the provisions of both international human rights treaties and law of armed conflict treaties may be limited in their application based on the terms of the treaty (for example, many provisions of human rights treaties do not strictly apply to State activities outside the territory of the State at issue), customary international law outlines certain fundamental human rights guarantees that bind all states, in all circumstances. *See, e.g.*, Press Release, United Nations Information Service, Prohibition of Torture “Absolute” U.N. Doc. SG/SM/9373, OBV/428 (June 18, 2004) *available at* <http://www.unis.unvienna.org/unis/pressrels/2004/sgsm9373.html>. These rights generally are understood to include freedom from “prolonged arbitrary detention” and “torture or other cruel, inhuman or degrading treatment.” THE JUDGE ADVOCATE GENERAL’S SCHOOL, UNITED STATES ARMY, OPERATIONAL LAW HANDBOOK 6-1, 6-2 (2000); THE JUDGE ADVOCATE GENERAL’S DEPARTMENT, UNITED STATES AIR FORCE, AIR FORCE OPERATIONS & LAW 127–28 (2002). As a statutory matter, U.S. law explicitly forbids any cruel, inhuman or degrading treatment (including torture) of detainees in U.S. custody regardless of their geographical location, and prohibits the U.S. Department of Defense from interrogating detainees in any manner not authorized by the U.S. Army Field Manual on Military Interrogations. *See* Detainee Treatment Act of 2005, Pub. L. No. 109-148, Tit. X, 119 Stat. 2739 (2005). In September 2006, the U.S. Army replaced the Field Manual on Military Interrogations with a new Field Manual on Human Intelligence Collection Operations, which prohibits torture and other cruel, inhuman, or degrading treatment. U.S. DEPT. OF THE ARMY, HUMAN INTELLIGENCE COLLECTOR OPERATIONS, FM 2-22.3 viii (2006). It also contains a list of interrogation techniques that are specifically forbidden, including sexually humiliating acts, hooding, infliction of physical pain, “water-boarding,” and the use of military working dogs to instill fear. *Id.* at 5–21. Nevertheless, the issue of detainee treatment persists, in part because the U.S. government asserts the right of agencies other than the Department of Defense (e.g., the Central Intelligence Agency) to use unspecified enhanced interrogation techniques beyond those in the Field Manual, provided they do not constitute torture or mistreatment as defined by the U.S. government. *See, e.g.*, Pamela Hess, *House Fails to Override Torture Veto*, THE ASSOCIATED PRESS, Mar. 11, 2008; Dan Eggen, *Bush Announces Veto of Water-boarding Ban*, WASH. POST, Mar. 8, 2008, at A02; George W. Bush, President of the U.S., Text of the President’s Weekly Radio Address (Mar. 8, 2008), *available at* <http://www.whitehouse.gov/news/releases/2008/03/20080308.html>.

⁵¹ *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)).

the individual's constitutionally protected interest in avoiding physical restraint.⁵²

A statutory bias against emergency detention of citizens also has existed in the U.S. since 1971 when Congress enacted the Non-Detention Act as part of legislation that repealed the earlier Emergency Detention Act.⁵³ The Non-Detention Act plainly states that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”⁵⁴

As the Supreme Court indicated, the U.S. has recognized several exceptions to the general rule against detention of individuals absent the ordinary protections afforded a criminal defendant. The fundamental nature of the liberty interest involved compels that such exceptions be fairly limited. As such, preventive detention in the U.S. is a more recent, circumscribed power (both substantively and procedurally)⁵⁵ than many would prefer to accept, particularly in cases that do not involve post-charge, pre-trial detention of a criminal defendant.

1. Pre-trial detention

For most of the 20th Century, preventive detention was largely limited to criminal defendants awaiting trial for murder, criminal defendants who posed a flight risk, insane persons and other dangerous incompetents, and those with infectious diseases.⁵⁶ Other serious criminal defendants considered dangerous to the community may have been placed under *de facto* preventive detention through the imposition of high bail amounts, but the general practice in criminal proceedings was to set bail and provide conditional release pending trial. In the 1970s, state and local governments increasingly instituted preventive detention for criminal defendants accused of

⁵² *Zadvydas*, 533 U.S. at 690–92 (emphasis added) (internal quotations and citations omitted) (original emphasis omitted). This fundamental right to due process finds its origin in both the Fifth Amendment guarantee against deprivations of liberty without due process of law and the Fourth Amendment guarantee against unreasonable seizures. U.S. CONST. amends. V, IV.

⁵³ LOUIS FISHER, DETENTION OF U.S. CITIZENS, 1 (2005). The Emergency Detention Act, which provided procedures for emergency executive detention of individuals deemed likely to engage in espionage or sabotage, was adopted in 1950 during another period of intense national security concerns. *Id.*

⁵⁴ 18 U.S.C. § 4001(a) (1948).

⁵⁵ “[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them.” *Foucha*, 504 U.S. at 80 (internal quotation omitted).

⁵⁶ One example of preventive detention that does not fit this mold is the Japanese internment cases from World War II. Although these cases have been largely discredited, they have not been formally overruled.

dangerous or violent crimes, and in 1984 Congress passed the Federal Bail Reform Act,⁵⁷ which authorized pre-trial preventive detention for defendants accused of a much broader range of violent crimes and other demonstrably dangerous defendants.

The U.S. Supreme Court upheld the preventive detention provisions of the Act in *United States v. Salerno*,⁵⁸ in which the defendants were charged with numerous violent racketeering and organized crime offenses. Reversing the Second Circuit Court of Appeals, the Supreme Court found that the Bail Reform Act satisfied both substantive and procedural due process concerns.⁵⁹ Pre-trial detention imposed under the Act was regulatory (administrative) in nature rather than punitive; it served not to punish the defendant but to prevent danger to the community—a legitimate and compelling regulatory goal.⁶⁰ Though seemingly indefinite, detention under the act was limited to a pre-trial period, which was not excessive relative to the purpose of the detention.⁶¹ The Act also provided for a prompt judicial hearing—at which the detainee had the right to request counsel, testify, present evidence, confront witnesses, and from which he could appeal—to determine the propriety of detention.⁶² Moreover, the Act, which required holding a defendant apart from the ordinary prison population to the extent possible, reserved detention for “individuals who have been arrested for a specific category of extremely serious offenses” and whose danger had been proved by clear and convincing evidence.⁶³

In the wake of *Salerno*, the U.S. now regularly permits pre-trial preventive detention of a wide range of dangerous criminal defendants, and

⁵⁷ Federal Bail Reform Act, 18 U.S.C. §§ 3141–3150 (1984).

⁵⁸ See *United States v. Salerno*, 481 U.S. 739, 755 (1987).

⁵⁹ See *id.* at 752–55.

⁶⁰ *Id.* at 747.

⁶¹ See *id.* at 747. The Speedy Trial Act limits the length of the pre-trial detention. *Id.*

⁶² *Id.* at 739.

⁶³ *Id.* at 747–752. Of course, in the U.S. pre-trial detention differs in one critical way from the other bases for preventive detention discussed in this article, as all pre-trial defendants have at least been charged with a criminal offense on the finding of probable cause to believe that the defendant committed the crime. 18 U.S.C. § 1342(a) (2006). The U.S. is not the only system to permit extended pre-trial detention of dangerous criminal defendants; for example, in the terrorism context both France and Spain permit pre-trial detention of up to four years. See HOME OFFICE, TERRORIST INVESTIGATIONS AND THE FRENCH EXAMINING MAGISTRATES SYSTEM 7 (2007) (“In France, the period of pre-trial detention can last up to 4 years.”); HUMAN RIGHTS WATCH, COUNTER-TERRORISM MEASURES IN SPAIN: PROLONGED PRE-TRIAL DETENTION (2005), available at <http://www.hrw.org/reports/2005/spain0105/9.htm> (explaining that persons accused of serious crimes “may be held in pre-trial detention for up to 4 years”).

pre-trial preventive detention is routinely available for federal criminal defendants charged with terrorism-related offenses.⁶⁴

2. The mentally ill and recidivist sex offenders

Due Process also permits preventive detention for certain classes of persons in the U.S. other than pre-trial criminal defendants, notably those who are mentally impaired and, more recently and more controversially, recidivist sex offenders.⁶⁵ A review of the seminal case law surrounding

⁶⁴ The Bail Reform Act now includes a rebuttable presumption in favor of pre-trial detention of any person accused of a “federal crime of terrorism” (as defined in 18 U.S.C. §2332b(g)(5)(B)) for which a prison term of ten years or more is applicable. *See* 18 U.S.C. § 3142(e) (2006). The Supreme Court has also upheld pre-trial preventive detention of juvenile criminal suspects considered to present a danger to the community. *See* *Schall v. Martin*, 467 U.S. 253 (1984). An issue related to, but distinct from, pre-trial detention is pre-charge detention. In the past several years, the United Kingdom has extended the pre-charge period during which terrorist suspects may be detained in connection with criminal investigations. Recent legislation in the United Kingdom allows terrorist suspects to be detained for up to twenty-eight days before charges must be filed or the detainee released. *See* Terrorism Act, 2006, c. 11 (Eng.), § 23.

⁶⁵ The U.S. is not the only country to have enacted legislation permitting the civil detention of the mentally ill, sexual offenders and other criminals who continue to pose a danger after their criminal sentences are completed. For example, in 2003 the parliament of Queensland, Australia enacted the Dangerous Prisoners (Sexual Offenders) Act 2003, which authorizes a court to order post-sentence imprisonment of serious sexual offenders where the court has found reasonable grounds to believe the prisoner will commit a serious sexual offense if released. *See* Patrick Keyser & Sam Blay, *Double Punishment? Preventive Detention Schemes Under Australian Legislation and Their Consistency with International Law: The Fardon Communication*, 7 MELBOURNE J. OF INT’L L. (2006). In early 2008 France adopted a new law permitting the continued detention of certain dangerous criminals even after they served their full sentence. *See* *French Pass Bill on Lifelong Internment for Deranged Convicts*, DEUTSCHE PRESSE-AGENTUR, Jan. 10, 2008, available at http://www.monstersandcritics.com/news/europe/news/article_1385786.php/French_pass_bill_on_lifelong_internment_for_deranged_convicts. Inspired by a 2007 kidnapping and rape of a 5-year-old boy by a 61-year-old sexual predator, the law originated as a measure to be applied only to persons convicted of serious crimes against children. *Id.* However, the final law passed applied to anyone convicted of a broader range of serious crimes and subject to imprisonment for 15 years or more. *Id.* The law establishes a multi-disciplinary commission including medical and legal professionals to make the detention determination. *Id.* Detention is renewable each year without limit. *Id.*; *see also* Press Release, Amnesty International, France: Amnesty International’s Concerns on ‘Preventive Detention’ Bill (Feb. 8, 2008), <http://www.amnestyusa.org/document.php?lang=e&id=ENGEUR210022008> (discussing human rights concerns related to France’s preventive detention bill). Similarly, in 2004 Germany enacted legislation permitting post-sentence detention of those convicted of a crime against life, bodily integrity, personal freedom, or sexual self-determination when facts “indicate a considerable danger from the prisoner for the general public.” Andrew A. Hammel, *Preventive Detention in Comparative Perspective*, in ANNUAL OF GERMAN & EUROPEAN LAW VOLUME II & III, at 89–115 (R. Miller & P. Zumbane, eds., Berghahn Books 2006) (discussing and quoting §66b of the German Penal Code), available at http://works.bepress.com/andrew_hammel/1. Such detention can be ordered by a court “if a complete evaluation of the prisoner, his crimes, and

these doctrines, however, indicates that the circumstances justifying preventive detention are quite limited.

In *Addington v. Texas* the Supreme Court upheld the preventive detention of a mentally incapacitated person upon a showing by clear and convincing evidence that the person posed a danger to himself or to others, and where the person was entitled to a periodic release hearing.⁶⁶ Detention could continue provided the person remained mentally ill and continued to pose a danger to society.⁶⁷

*Foucha v. Louisiana*⁶⁸ highlighted the limits of the *Addington* doctrine by holding that due process prohibits the continued detention of a person who ceases to suffer from mental illness, even if he continues to pose a danger to the community. According to the Court, the continued detention of Foucha bore no "reasonable relation to the purpose for which the individual was committed,"⁶⁹ namely mental disease or illness, regardless of his dangerousness. Moreover, the statute at issue failed to provide substantive and procedural safeguards of the kind identified in *Salerno*.⁷⁰

Another area where the Supreme Court has permitted preventive detention involves violent sex offenders, particularly those convicted of crimes involving children. Starting mainly in the 1990s, many U.S. states adopted new civil commitment laws for sexual predators who continued to pose a danger after completing their criminal sentences. In *Kansas v. Hendricks*, the Court considered one such statute and found it satisfied the Constitution's due process requirement, both substantively and procedurally.⁷¹ The statute required a "special justification" beyond mere dangerousness and so applied only to "a small segment of potentially dangerous individuals," and it also provided "strict procedural safeguards."⁷² Although the statute did not require the finding of a mental illness to justify civil commitment, the Court held that the statute required some form of mental abnormality or anti-social personality disorder, thus limiting detention to individuals with "volitional impairment[s] rendering them dangerous beyond their control."⁷³ Further, it provided stringent procedural safeguards including:

. . . his development during prison confinement reveal, that with a high probability he will commit serious crimes, through which the victims will be seriously psychologically or bodily injured." *Id.* at 97.

⁶⁶ *Addington v. Texas*, 441 U.S. 418 (1979).

⁶⁷ *Id.* at 426.

⁶⁸ *Foucha v. Louisiana*, 504 U.S. 71 (1992).

⁶⁹ *Id.* at 78.

⁷⁰ *See id.* at 71–72. The Supreme Court has also permitted detention of dangerous defendants who become mentally incompetent before trial. *See Id.*

⁷¹ *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997).

⁷² *Id.* at 368.

⁷³ *Id.* at 358–59.

(1) an initial finding of probable cause to believe that person is a dangerous sexual predator; (2) an independent professional evaluation of the individual; and (3) a full trial on the merits of the question.⁷⁴ The individual possessed the right to counsel (funded if necessary) and the right to a jury.⁷⁵

3. Aliens

One area where preventive detention has received more deference from the courts is under immigration laws. Despite the lack of an explicit Constitutional power to control immigration, the U.S. Supreme Court has found that the power to exclude or deport aliens is inherent in the concept of a sovereign nation.⁷⁶ The Court has also consistently held that potentially dangerous aliens may be detained pending removal proceedings,⁷⁷ much as dangerous criminals may be held pending trial pursuant to *Salerno*.

The Court has not reached these conclusions because aliens are wholly without Constitutional rights. Although the Constitution ordinarily does not protect aliens in foreign territory,⁷⁸ it does provide some rights to aliens who have entered and developed substantial connections with U.S.

⁷⁴ *Id.* at 352–53. The statute required proof beyond a reasonable doubt at the trial. *Id.*

⁷⁵ *Id.* at 352–59; Kansas Inpatient SVP Act, Kan. Stat. Ann. §§ 59–29a01. In a subsequent case, the Court had occasion to clarify the special factor that permitted detention of sexual predators. According to the Court, the Constitution does not “permit[] commitment of the type of dangerous sexual offender considered in *Hendricks* without any lack-of-control determination. *Hendricks* underscored the constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment ‘from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings’ . . . The presence of what the ‘psychiatric profession itself classifies[] . . . as a serious mental disorder’ helped to make that distinction in *Hendricks*. And a critical distinguishing feature of [the serious mental disorder in *Hendricks*] consisted of a special and serious lack of ability to control behavior. . . . [W]e recognize that in cases where lack of control is at issue, ‘inability to control behavior’ will not be demonstrable with mathematical precision. It is enough to say that there must be proof of serious difficulty in controlling behavior. And this . . . must be sufficient to distinguish the dangerous sexual offender whose mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.” *Kansas v. Crane*, 534 U.S. 407, 412–13 (2002) (internal citations omitted).

⁷⁶ *See Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 603–06 (1889) (“[The power of the government to] exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is part of its independence.”); *Fong Yue v. United States*, 149 U.S. 698, 707 (1893) (holding that the right to deport foreign aliens already in the country “rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country”).

⁷⁷ *See, e.g., Demore v. Kim*, 538 U.S. 510, 524–26 (2003).

⁷⁸ *See, e.g., United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) (U.S. Constitution has no force “in foreign territory unless in respect of our citizens”).

territory.⁷⁹ Most provisions of the Bill of Rights, the Fourteenth Amendment, and other individual rights in the Constitution, including the Due Process Clauses, apply to “persons” rather than “citizens.”⁸⁰ Accordingly, these rights generally protect aliens present in the U.S. as well as citizens.

However, due process guarantees in immigration proceedings are not equivalent to those applicable in criminal proceedings. Immigration proceedings “are civil, not criminal, and . . . are nonpunitive in purpose and effect”⁸¹ and do not require the same procedural safeguards as criminal proceedings. The courts also have drawn distinctions between the process that is due to aliens excludable prior to admission into the U.S. and the process due to aliens subject to deportation after entry.⁸² Because the regulation of aliens is related to issues of national security and foreign relations, U.S. courts have shown deference to the judgment of Congress and the President in these matters.⁸³

⁷⁹ See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

⁸⁰ See U.S. CONST. amend V; but see U.S. CONST. amend. XIV, § 1 (defining “citizenship”). Aliens are not afforded the rights that are limited to citizens such as those in the Privileges and Immunities Clauses. Cf. *id.* (explicitly prohibiting abridging the rights of citizens only).

⁸¹ *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001).

⁸² See, e.g., *id.* at 678, 679, 719–21 (distinguishing *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), and concluding that “[t]he distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law” and “once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent”). The question of whether the Due Process Clause provides protection to aliens held outside the U.S. but on territory over which the U.S. exercises exclusive authority and control was recently before the Supreme Court. See Brief for Petitioner at i, *Boumediene v. Bush*, 128 S.Ct. 2229 (2007) (No. 06-1195). Although the Court did not explicitly hold that the protections of the Due Process Clause apply to aliens held in such circumstances, it did hold that the protections of the Suspension Clause apply, and that the limited process established by the Detainee Treatment Act to review Combatant Status Review Tribunal (CSRT) determinations was a constitutionally inadequate substitute for the habeas review to which the petitioners were entitled. See *Boumediene v. Bush*, 128 S.Ct. 2229, 2244–2262 (2008). See *infra* note 110 for a discussion of CSRTs.

⁸³ See, e.g., *Knauff v. Shaughnessy*, 338 U.S. 537 (1950) (“Whatever the procedure authorized by Congress is, it is due process as far as alien denied entry is concerned”); Restatement (Third) of the Foreign Relations Law of the United States, §§ 721 and 722 (and comments and notes thereto) (the U.S. may deport permanent resident aliens even if the person peacefully resided in the U.S. for many years if sufficient procedural safeguards are followed; such aliens can be deported even for activities that Congress could not define and punish as a crime, such as political activities otherwise protected by the first amendment). The Court also has broadly continued to affirm the broad powers of the political branches with regard to immigration controls, including upholding the more controversial ideological provisions found in the national security grounds for removal, and even in cases involving

Still, when it comes to preventive detention of removable (that is, excludable or deportable) aliens, the Supreme Court has taken a more rigorous approach in recent years in recognition of due process concerns. Under U.S. immigration law, aliens ordered removed from the U.S. are detained for up to 90-days during a statutory “removal period” after the removal order has been issued.⁸⁴ The immigration law also authorizes further detention of certain removable aliens whose removal is not accomplished during the removal period.⁸⁵ Prior to 2001, the U.S. immigration authorities maintained a practice pursuant to this statute of indefinitely detaining these categories of removable aliens if not removed during the statutory 90-day “removal period.”⁸⁶

In June 2001, the Court limited this practice in *Zadvydas v. Davis*, a case involving two resident aliens ordered removed due to convictions for aggravated crimes.⁸⁷ To avoid a constitutional due process problem, the Court read the statute to “limit[] an alien’s post-removal-period detention to a period reasonably necessary to bring about that that alien’s removal from the United States. [The statute] does not permit indefinite detention.”⁸⁸ The Court also imposed a 180-day period during which post-removal detention is presumptively valid, but after which the government generally must show evidence of a significant likelihood of removal in the foreseeable future in order to continue the detention.⁸⁹

The Court compelled these requirements even though eventual removal of the alien remained possible, good faith efforts at removal continued, and the detention underwent periodic administrative review.⁹⁰ The Court held that these considerations were outweighed by the fact that “the civil confinement at issue is not limited, but potentially permanent,”⁹¹ and

longtime lawful resident aliens. See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753 (1972); *Hirsiades v. Shaughnessy*, 342 U.S. 580 (1952).

⁸⁴ 8 U.S.C. § 1232 (2006).

⁸⁵ See 8 U.S.C. § 1231(a)(6)(2006); see also DEPARTMENT OF HOMELAND SECURITY, OFFICE OF INSPECTOR GENERAL, REPORT OIG-07-28, ICE’S COMPLIANCE WITH DETENTION LIMITS FOR ALIENS WITH A FINAL ORDER OF REMOVAL FROM THE UNITED STATES 3–4 (Feb. 2007) [hereinafter DHS OIG Report]. The provision of the statute allowing for extended post-removal period detention applies to aliens who are: (1) inadmissible; (2) removable as a result of violations of entry conditions, violations of criminal law, or reasons of national security or foreign policy; or (3) represent a threat to the community or a flight risk if released. See 8 U.S.C. § 1231(a)(6).

⁸⁶ See DHS OIG Report, *supra* note 85, at 3.

⁸⁷ *Zadvydas*, 533 U.S. 678, 690 (2001).

⁸⁸ *Id.* at 689.

⁸⁹ See *id.* at 701. In some cases, the government is not required to release an alien who was not removed after 180 days. *Id.*

⁹⁰ See *id.* at 685, 696.

⁹¹ *Id.* at 691.

“[t]he provision authorizing detention does not apply narrowly to ‘a small segment of particularly dangerous individuals,’ *say suspected terrorists*, but broadly to aliens ordered removed for many and various reasons, including tourist visa violations.”⁹² Further, “the sole procedural protections available to the alien are found in administrative proceedings, where the alien bears the burden of proving he is not dangerous, without . . . significant later judicial review. . . . [T]he Constitution may well preclude granting an administrative body the unreviewable authority to make determinations implicating fundamental rights.”⁹³ Once again considerations about whether the detention power was narrowly tailored to a specially dangerous class of persons, and subject to adequate procedural safeguards, guided the Court’s decision. Yet, despite these due process concerns, the Court indicated that the restrictions imposed would not necessarily apply in a case that involves a suspected terrorist alien or a case that raises other national security concerns.

Indeed, the *Zadvydas* Court stressed that it was not considering “terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.”⁹⁴ And when the Court extended the *Zadvydas* rule to inadmissible aliens in *Clark v. Martinez*, it took pains to point out that “sustained detention of alien terrorists is a ‘special arrangement’ authorized by a different statutory provision.”⁹⁵ Moreover, the Court held that the capacity of Congress to “secur[e] our borders” against non-removable aliens

is demonstrated by [the fact that] [l]ess than four months after the release of our opinion [in *Zadvydas*], Congress enacted a statute which expressly authorized continued detention, for a period of six months beyond the removal period (and renewable indefinitely), of any alien (1) whose removal is not reasonably foreseeable and (2) who presents a national security threat or has been involved in terrorist activities.⁹⁶

The U.S. government also adopted this approach in immigration regulations issued after the *Zadvydas* case. The regulations established three categories of aliens who may be detained beyond the presumptive 180-day

⁹² *Id.* (quoting *Kansas v. Hendricks*, 521 U.S. 346, 368 (1997) (emphasis added)).

⁹³ *Id.* at 692 (internal quotations and citations omitted). *Cf.* *Rasul v. Bush*, 452 U.S. 466 (2004) (holding that U.S. district courts can hear habeas corpus petitions from aliens captured on a battlefield and detained at a location over which the U.S. exercises plenary jurisdiction, albeit on statutory rather than constitutional grounds).

⁹⁴ *Zadvydas*, 533 U.S. at 696. The Supreme Court, interpreting the Attorney General’s authority to detain aliens, noted that “if Congress had meant to authorize long-term detention of unremovable aliens, it certainly could have spoken in clearer terms.” *Id.* at 697.

⁹⁵ *Clark v. Martinez*, 543 U.S. 371, 379, n.4 (2005).

⁹⁶ *Id.* at 386, n.8 (citing USA PATRIOT Act § 412(a), 8 U.S.C. § 1226a(a)(6)(2001)).

period even if not likely to be removed in the reasonably foreseeable future, including aliens: (1) who have highly contagious diseases; (2) whose release may cause serious adverse foreign policy consequences; and (3) who are being detained for national security or terrorism concerns.⁹⁷

4. Enemy combatants

Enemy combatants also are subject to preventive detention absent conviction in a criminal proceeding.⁹⁸ The Supreme Court has repeatedly upheld the preventive detention of enemy combatants under the customary law of armed conflict, which helps to explain the robust efforts of the U.S. government to apply this legal paradigm to the problem of international terrorism in the wake of 9/11. The application of this customary power to certain international terrorist suspects (U.S. citizens and non-citizens alike) was squarely addressed by the Supreme Court in *Hamdi v. Rumsfeld*.⁹⁹ The Court, in a plurality opinion, held that the Authorization for Use of Military Force (AUMF) provided “explicit congressional authorization for the detention” of “individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks,”¹⁰⁰ and that “the AUMF satisfied [the Non-Detention Act’s] requirement that a detention be ‘pursuant to an Act of Congress’ (assuming, without deciding, that [the Non-Detention Act] applies to military detentions).”¹⁰¹ According to the Court, “[t]he capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by universal agreement and practice, are important incidents of war. The purpose of detention is to prevent cap-

⁹⁷ 8 C.F.R. § 241.14(a)–(d) (2001); DHS OIG REPORT, *supra* note 85, at 4–5. Certification that an alien meets one or more of these criteria requires substantial factual support and approval by senior government officials. *See* 8 C.F.R. § 241.14. The statute also allows for detention of aliens determined to be “specially dangerous” beyond the 180-day presumptive period; however, during 2008 two Federal courts held that this provision of the statute was unconstitutional. *See* *Tran v. Mukasey*, 515 F.3d 478 (5th Cir. 2008); *Hernandez-Carrera v. Carlson*, 546 F. Supp. 2d 1185 (D. Kan. 2008).

⁹⁸ During times of war Congress may also authorize the detention of “alien enemies,” meaning “[s]ubjects of a foreign state at war with the United States.” *Johnson v. Eisentrager*, 339 U.S. 763, 769, n.2 (1950) (internal quotation marks omitted) (quoting *Techt v. Hughes*, 128 N.E. 185, 186 (1920)); *see also* *Ludecke v. Watkins*, 335 U.S. 160 (1948) (approving executive power to detain enemy aliens in times of war).

⁹⁹ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion).

¹⁰⁰ *Id.* at 518. Congress adopted the AUMF in September 2001. *Id.* The AUMF empowered the President to “use all necessary and appropriate force” against “nations, organizations, or persons” that he determines “planned, authorized, committed, or aided” in the September 11, 2001 terrorist attacks. *Id.* (citing Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)).

¹⁰¹ *Hamdi*, 542 U.S. at 517.

tered individuals from returning to the field of battle and taking up arms once again.”¹⁰² Moreover, “there is no bar to this Nation’s holding one of its own citizens as an enemy combatant A citizen, no less than an alien, can be ‘part of or supporting forces hostile to the United States or coalition partners’ and ‘engaged in an armed conflict against the United States’; ‘such a citizen, if released, would pose the same threat of returning to the front during the ongoing conflict.’”¹⁰³

But just as we have seen under the other categories of preventive detention, the Court limited this power in three important substantive or procedural regards. First, the Court acknowledged Hamdi’s concern for the “substantial prospect of indefinite detention” given that “the national security underpinnings of the ‘war on terror,’ although crucially important, [were] broad and malleable” and reflective of the unconventional nature of the conflict at issue.¹⁰⁴ Much like in the *Salerno* case, the Court resolved this issue by differentiating between indefinite detention and detention with an uncertain end. Hamdi’s detention could only last as long as “the record establishes that United States troops are still involved in active combat in Afghanistan.”¹⁰⁵ While this period had no fixed end date, the period’s end date could be determined with relative certainty, and thus was not an “indefinite” period in the Court’s view. Nonetheless, the Court emphasized that it affirmed the detention power “based on long-standing law of war principles” and “[i]f the practical circumstances of a given conflict [were] entirely unlike those of the conflicts that informed the development of the law of war, that understanding [would] unravel.”¹⁰⁶ Second, the Court specifically stated that “indefinite detention for the purpose of interrogation is not authorized.”¹⁰⁷ Third, the Court concluded that a citizen such as Hamdi, who disputed the enemy combatant designation underlying his detention, was entitled to notice of the factual basis for his detention and a meaningful opportunity to challenge his detention before a neutral decision maker.¹⁰⁸ While recognizing these procedural safeguards, the Court acknowledged that under some circumstances such proceedings could be tailored to the situation; evidentiary rules, burdens of proof and other aspects of such a hearing might be

¹⁰² *Id.* at 515 (internal quotation marks and citations omitted). Note that the *Hamdi* case involved a U.S. citizen captured on foreign soil. The same power of detention, however, applies to foreign nationals who satisfy the Court’s descriptive category.

¹⁰³ *Id.* at 519.

¹⁰⁴ *Id.* at 520.

¹⁰⁵ *Id.* at 521.

¹⁰⁶ *Id.* (noting that Afghanistan was similar to conflicts that contributed to the development of the law of war because “[a]ctive combat operations” continued in Afghanistan).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 533.

significantly altered from those applicable in criminal proceedings.¹⁰⁹ The Court noted, however, that Hamdi's right to an attorney in such proceedings was "unquestionabl[e]."¹¹⁰

In *Padilla v. Hanft*, the United States Court of Appeals for the Fourth Circuit closely followed the *Hamdi* decision, permitting enemy combatant detention of a U.S. citizen who took up arms against the United States in Afghanistan on behalf of the Taliban.¹¹¹ Padilla left the battlefield in Afghanistan for the alleged purpose of carrying out terrorist attacks on U.S. soil, and was initially arrested by civilian law enforcement authorities upon his arrival in the U.S.¹¹² However, as discussed above, the Fourth Circuit later initially refused to extend this power to sanction enemy combatant detention of the resident alien in the *al-Marri* case, reasoning that *Hamdi* and *Padilla* stand for the proposition that "who fits within the 'legal category' of enemy combatant . . . rest[s] . . . on affiliation with the military arm of an enemy nation."¹¹³ According to the court, al-Marri did not qualify for the enemy combatant "exception to the usual criminal process" because, unlike Hamdi and Padilla, al-Marri was not alleged to have taken up arms against the U.S. in Afghanistan on behalf of the Taliban or "to have engaged in combat with United States forces anywhere in the world."¹¹⁴ Indeed, the court explicitly rejected the government's argument that "al-Marri's seizure and indefinite military detention . . . are justified because he engaged in, and continues to pose a very real threat of carrying out, . . . acts of international

¹⁰⁹ *Id.* at 533–34.

¹¹⁰ *Id.* at 539. The U.S. government responded to the *Hamdi* decision and to the decision of the Court in *Rasul v. Bush*, 542 U.S. 466 (2004), by instituting Combatant Status Review Tribunals (CSRTs) for enemy combatants held in the war on terror. COMBATANT STATUS REVIEW TRIBUNALS, Sept. 28, 2006, <http://www.defenselink.mil/news/Jul2007/CSRT%20%Fact%Sheet.pdf>. Among other things, the CSRTs provide for the right to: (1) review the unclassified basis for the detainees detention; (2) have hearing in front of a tribunal of neutral military officers; (3) testify or introduce documentary evidence; (4) call (if reasonably available) and question witnesses before the tribunal; (5) attend all proceedings except when matters that would compromise national security are involved; (6) receive assistance of an appointed personal representative; and (7) submit the tribunal decision to automatic review by a higher authority. *See, e.g.*, Memorandum from Gordon England, U.S. Deputy Secretary of Defense, to Secretary of the Military Departments Joint Chief of Staff Under Secretary of Defense for Policy, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba (July 14, 2006), available at <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf>.

¹¹¹ *See Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005).

¹¹² *Id.*

¹¹³ *Al-Marri v. Wright*, 487 F.3d 160, 182 (4th Cir. 2007).

¹¹⁴ *Id.* at 183.

terrorism” on behalf of al Qaeda.¹¹⁵ Thus, the Fourth Circuit panel would not extend the “special justification” of enemy combatant status to a person alleged only to be an operative of a non-state international terrorist organization such as al Qaeda.¹¹⁶

In sum, preventive detention in the U.S. generally requires not just a finding of dangerousness, but a finding of dangerousness combined with: (1) adequate procedural safeguards; and (2) some “special justification” such as mental illness, incompetence, abnormality, lack of control, communicable disease, or special status as an alien or enemy.¹¹⁷ Potentially indefinite detention is particularly suspicious.

In light of these cases, the question becomes whether ties to terrorism suffice as an appropriate “special justification” and, if so, what procedural safeguards should apply?

C. *Does Terrorism Pose the “Special Danger” Required by the U.S. Supreme Court?*

In the *Zadvydas* and *Clark* cases, the Supreme Court suggested that terrorism indeed may justify an exception to the general rule against indefinite preventive detention, particularly where aliens are involved. On the other hand, the Fourth Circuit panel in the *al-Marri* case explicitly held that

¹¹⁵ *Al-Marri*, 487 F.3d at 183–84 (internal quotation and alteration omitted) (“[T]he government is mistaken in its representation that *Hamdi* and *Padilla* recognized [t]he President’s authority to detain ‘enemy combatants’ during the current conflict with al Qaeda. No precedent recognizes any such authority.”) (internal quotations omitted).

¹¹⁶ Again, the original *al-Marri* decision, which was issued by a split panel, was vacated and reheard *en banc*. *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008). Unlike the original panel, the *en banc* court held that *al-Marri* could be held as an enemy combatant, assuming the government’s allegations about his conduct were true. *Id.* at 216–17. In fact, Judge Traxler, the sole member of the court concurring in all aspects of the *en banc* judgment, vehemently disagreed with the original panel’s premise that “because al Qaeda is not technically in control of an enemy nation or its government, it cannot be considered as anything other than a criminal organization whose members are entitled to all the protections and procedures granted by our constitution. . . . [A] Qaeda is much more and much worse than a criminal organization. And while it may be an unconventional enemy force in a historical context, it is an enemy force nonetheless.” *Id.* at 160 (Traxler, J., concurring). The *al-Marri* case is subject to further proceedings on remand, *see supra* note 41, and the tension about the proper application of LOAC doctrines to a conflict as unconventional as the global campaign against international terrorism is not likely to go away soon. In fact, the U.S. Supreme Court has recently agreed to review the *al-Marri* case during the 2008 term. *See* Robert Barnes, *Justices to Decide Legality of Indefinite Detention*, WASH. POST, Dec. 6, 2008, at A2.

¹¹⁷ *See Zadvydas v. Davis*, 533 U.S. 678, 690–91 (2001) (“[W]e have upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections In cases in which preventive detention is of potentially *indefinite* duration, we have also demanded that the dangerousness rationale be accompanied by some other special circumstance, such as mental illness, that helps to create the danger.”) (internal citations and quotations omitted).

alleged involvement with international terrorism is insufficient to warrant extension of the enemy combatant exception, even to an alien, and a similar argument was raised by the petitioners in *Boumediene v. Bush*.¹¹⁸ Can terrorism qualify as a sufficient special danger justifying preventive detention?

Concerns about both security and liberty strongly suggest the answer is “Yes.” As recounted earlier, international terrorism poses significant investigative and prosecutorial challenges that the ordinary criminal justice system is not equipped to handle. And, as former U.S. Attorney Mary Jo White has indicated, the ordinary criminal justice system is not capable of deterring large numbers of committed extremists who are “willing, indeed anxious, to die in service of their cause.”¹¹⁹ Furthermore, the nature and magnitude of the injury that modern international terrorist organizations seek to inflict is categorically different from the harms that the ordinary criminal justice system was designed to remedy. It seems clear that (the Fourth Circuit’s initial *al-Marri* panel notwithstanding) individual operatives of sub-state terrorist organizations can pose the kind of special danger the Supreme Court has identified. For example, suppose that the U.S. government—using sensitive, credible, but ultimately inadmissible intelligence information—succeeded in disrupting an al Qaeda plot to simultaneously fly multiple airliners into iconic buildings in various U.S. cities, and the operatives involved were U.S. citizens and/or aliens who never fought against the U.S. forces in Afghanistan or elsewhere.

¹¹⁸ The *Boumediene* petitioners argued, among other things, that their detention as enemy combatants was illegal. They contended that aliens allegedly connected to al Qaeda, but arrested by civilian police in a friendly country and not alleged to have participated directly in armed combat against the U.S., do not satisfy the enemy combatant exception pursuant to the AUMF and *Hamdi*. Further, they argued that the CSRT process established in the wake of *Hamdi* did not provide meaningful notice of the basis of detention, an opportunity to be heard, representation by counsel, or a neutral decision maker, which they claimed are required by Fifth Amendment due process. The government strongly disagreed, arguing that petitioners were aliens detained outside the U.S. and as such were not entitled to constitutional due process guarantees, and that in any event the CSRT process provided even more due process than *Hamdi* required for U.S. citizens held as enemy combatants or than is provided under the process in place to comply with Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War. See Briefs for Petitioner and Respondent, *Boumediene v. Bush*, 128 S.Ct. 2229 (2008) (No. 06-1195). In its decision, the Court declined to address whether the President had authority to detain the petitioners. *Boumediene v. Bush*, 128 S.Ct. 2229, 2240 (2008). Moreover, the Court rendered no judgment as to whether the CSRTs satisfy due process standards. *Id.* at 2270. The Court did hold, however, that the petitioners were entitled to constitutional habeas review and to protection of the Suspension Clause, and that the limited process established by the Detainee Treatment Act to review CSRT determinations was a constitutionally inadequate substitute for such habeas review. *Id.* at 2244–2262.

¹¹⁹ Mary Jo White, *Prosecuting Terrorism in the Criminal Justice System*, XV(1) ARMS CONTROL, DISARMAMENT, AND INT’L SECURITY 3, 8 (2003).

The *al-Marri* case seems to direct that, absent criminal prosecution, those involved must be released or, if aliens, deported. Preventive detention would be impossible. This outcome seems inappropriate and unnecessary.¹²⁰ Moreover, the liberty concerns underlying *al-Marri* and other cases also favor a preventive detention system (with strong substantive and procedural safeguards built in) to handle terrorism cases that do not easily fit within the traditional categories of detention, lest the pressures on the traditional law enforcement and enemy combatant models permanently warp the principles that underlie them.

II. A "SECURITY DETENTION ACT" FOR THE U.S.?

If terrorism does represent the special danger that justifies preventive detention, then one must ask what such a security detention system for terrorist suspects would look like? The foregoing analysis of U.S. and international law, and a review of several preventive detention programs proposed or adopted by other countries,¹²¹ identifies eight fundamental issues that must be addressed in any legislation of this type.

A. *Nature of the System*

Legislation must address the nature of the system. To this point, this article has discussed exclusively actual physical detention of terrorist suspects. Israel's Administrative Detention Act employs this approach. However, several systems adopted in recent years provide control options that represent a less drastic intrusion of the liberty interest at stake. For example, both the United Kingdom and Australia have enacted legislation permitting authorities to impose "control orders" on terrorist suspects without subject-

¹²⁰ As Justice John Paul Stevens acknowledged when the *Padilla* case initially reached the Supreme Court in 2004, "[e]xecutive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction." *Rumsfeld v. Padilla*, 542 U.S. 426, 465 (2004) (Stevens, J., dissenting).

¹²¹ The preventive detention schemes reviewed for this article include the system of derogating and non-derogating control orders established by the United Kingdom's Prevention of Terrorism Act 2005, c. 2 (Eng.); the system of control orders and preventive detention orders established by Australia's Anti-Terrorism Act (No. 2), 2005, c. 144 (Austl.); Israel's Emergency Powers (Detention) Law 1979, 33 L.S.I. 89 (1978-99), reprinted in Emanuel Gross, *Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does a Democracy Have the Right to Hold Terrorists as Bargaining Chips?*, 18 ARIZ. J. INT'L & COMP. L. 721 (2001); and the system of investigative hearings and recognizance orders contemplated by Canada's Bill S-3, see LAURA BARNETT, AN ACT TO AMEND THE CRIMINAL CODE, (INVESTIGATIVE HEARING AND RECOGNIZANCE WITH CONDITIONS), LS-574E, at 3-6 (2008), available at <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=3334060&file=4>, as adopted by the Canadian Senate on March 6, 2008 and on first reading in the Canadian House of Commons.

ing them to arrest or detention.¹²² The Parliament of Canada is presently considering¹²³ a system of “recognizance” orders that are very similar.

Control order schemes allow imposition of a broad range of restrictions and prohibitions,¹²⁴ and generally provide an option that is subject to fewer procedural safeguards than actual physical detention. However, the British, Australian, and Canadian control order systems also authorize more drastic measures under certain circumstances. Under the U.K. legislation, the government may at times seek a control order that derogates from the U.K.’s arrest and detention obligations under Article 5 of the European Convention on Human Rights.¹²⁵ Similarly, the Australian and the Canadian

¹²² The United Kingdom’s Anti-terrorism, Crime and Security Act permitted the U.K. to deport aliens who were suspected international terrorists, or to detain such aliens indefinitely where deportation could not be accomplished. Anti-terrorism, Crime and Security Act, 2001, c. 24 §§ 22–23 (Eng.). If either an international legal obligation or a practical consideration (for example, human rights concerns in the receiving country, documentation issues, etc.) prevented removal pursuant to such an order, the U.K. authorities were authorized to detain the suspected terrorist indefinitely. *Id.* In December 2004, the U.K. House of Lords invalidated the alien detention provisions of the ATCSA. *A v. Secretary of State* [2004] UKHL 56. The Lords ruled that the detention provisions, in particular the indefinite detention provisions, violated the European Convention on Human Rights in that their effect on foreign nationals was a disproportionate, irrational, and discriminatory deprivation of liberty compared to the threat posed by foreign nationals. *Id.* In response to the House of Lords judgment, the British Parliament enacted the Prevention of Terrorism Act 2005 (PTA), which explicitly repealed the detention provisions of the ATCSA and instituted the current system of derogating and non-derogating control orders. Prevention of Terrorism Act 2005, c. 2 (Eng.).

¹²³ The Canadian legislation is largely identical to the system enacted by Canada’s Anti-Terrorism Act of 2001, which expired after five years and was not immediately reauthorized. *Compare* Anti-terrorism Act, 2001 S.C., c. 41 (Can.), *with* BARNETT, *supra* note 121.

¹²⁴ Examples include restrictions on movement, premises, communications, associations, activities, use or possession of articles or substances, and the wearing of electronic tracking devices. *See, e.g.*, Prevention of Terrorism Act 2005, c. 2 (Eng.).

¹²⁵ Prevention of Terrorism Act 2005, c.2, § 1 (Eng.). Article 5 of the European Convention on Human Rights stipulates that “[n]o one shall be deprived of his liberty save in the following cases,” which include: (1) detention upon criminal conviction; (2) detention for non-compliance with a lawful court order; (3) criminal pre-trial detention; (4) detention of a minor for educational supervision; (5) detention of the mentally ill, controlled substance abusers, and those with infectious diseases; and (6) detention with a view toward deportation or extradition. Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocol No. 11 art. 5(1), Nov. 1, 1998, 213 U.N.T.S. 222. A control order that impinges these rights is called a “derogating” order under the U.K. system, and must be imposed by a court. Prevention of Terrorism Act 2005, c.2, § 4 (Eng.). An order that imposes restrictions but that does not violate the person’s rights relating to physical arrest and detention is called a “non-derogating” order, and may be imposed by the Secretary of State for the Home Department. *Id.* § 2. However, it seems at least one U.K. court has held that certain orders imposed by the government, though styled as non-derogating orders, impose restrictions that in fact amount to deprivation of liberty prohibited by the arrest and detention

legislation each permit physical detention in exigent circumstances.¹²⁶ Control order systems also provide that failure to observe the conditions imposed by the order, or obstruction of those exercising the control order powers, may be grounds for arrest, detention, and potential imprisonment.¹²⁷

The dual approach of control order systems is appealing in light of the U.S. case law outlined above. The ability to impose lesser intrusions on all but the most dangerous suspects works to limit the class of potential detainees in the manner required by the Supreme Court. Moreover, less intrusive restrictions generally require less burdensome procedural guarantees.

B. *Definitional Threshold*

Any new security detention system should not broadly authorize detention for *anyone* who poses a threat to national security. Rather, preventive detention should be available only for those individuals who represent the central threat of modern terrorism and who cannot be handled without straining ordinary criminal justice processes or law of armed conflict doctrines. One of the principal concerns with the U.S.'s current multi-prong approach to the detention of terror suspects is that it has ensnared individuals and conduct that are increasingly remote from the primary terrorist actors and activities. Similarly, the Supreme Court has expressed concern with preventive detention schemes that define the pool of potential detainees too broadly.¹²⁸ If suspected involvement with international terrorism is to justify preventive detention outside one of the existing categories, the definitional threshold must be strict.

A comparison of other systems is instructive. Israel, for example, permits administrative detention of anyone when reasonable cause exists to believe that reasons of State security or public security require detention.¹²⁹ While this is an exceptionally broad threshold, it is subject to some limitations. For example, administrative detention can only occur during a state of emergency (which has existed continuously in Israel since 1948), and may be imposed only if it is the sole means available to detain the person,¹³⁰ meaning that criminal prosecution must not be a practical option.

provisions of Article 5, not merely a restriction of liberty. See *JJ and Others v. Sec'y of State for the Home Dep't*, [2006] EWHC 1623.

¹²⁶ Anti-Terrorism Bill (No. 2), 2005, § 105.4, sched. 4 (Austl.); Anti-terrorism Act, 2001 S.C., c. 41, § 4 (Can.).

¹²⁷ *E.g.*, Anti-Terrorism Bill (No. 2), 2005, § 104.27, sched. 4 (Austl.); Anti-terrorism, Crime and Security Act, 2001, c. 2 § 9 (Eng.).

¹²⁸ See, *e.g.*, *supra* text accompanying notes 51–52, 58–63, 66–74, 87–93.

¹²⁹ Israel's Emergency Powers (Detention) Law 1979, 33 L.S.I. 89 (1978–99), *reprinted in* Gross, *supra* note 121, at 725.

¹³⁰ *Id.*

The threshold for imposition of a control order in Britain depends on the nature of the order and reflects the different restrictions of liberty at stake. Derogating orders may be confirmed by the court only if: (1) it is more probable than not that the person is or has been “involved in terrorism-related activity”; (2) the obligations imposed are necessary to protect members of the public from a risk of terrorism; (3) the risk at issue is associated with a public emergency for which the government has issued a formal notice of derogation from all or part of Article 5 of the ECHR; and (4) the obligations imposed by the order are among those listed in the government’s derogation notice.¹³¹ Non-derogating control orders, however, have a lesser threshold. The Secretary of State may issue a non-derogating control order if he: (1) has reasonable grounds to suspect that the person is or has been “involved in terrorism-related activity”; and (2) considers the imposition of the order and the obligations it imposes necessary to protect the public from a risk of terrorism.¹³² But, much like Israel, where the “involvement with terrorist-related activity” that gives rise to a control order suggests the commission of a criminal offense, the Secretary of State must consult with police and prosecution officials before making or applying for the order to determine if evidence exists that could realistically be used to prosecute the subject of the order for an offense related to terrorism.¹³³ If the order is issued, the police officials must continue to investigate to determine if prosecution becomes possible during the duration of the order.¹³⁴

The Australian system seems to have the highest threshold to obtain a control order. A federal police officer may apply for a preventive detention order with respect to a person for either of two reasons: (1) if he reasonably suspects that the person “will engage in a terrorist act, possesses a thing connected with the preparation for, or engagement ... in, a terrorist

¹³¹ Prevention of Terrorism Act 2005, c.2, § 4 (Eng.).

¹³² *Id.* The terms “involvement in terrorism-related activity” and “terrorism” are defined very broadly. “Involvement in terrorism-related activity” means: (a) the commission, preparation or instigation of terrorism; (b) facilitating, encouraging, or intending to facilitate or encourage the same; or (c) giving support or assistance to those known or believed to be involved in terrorism-related activity. It does not matter if the foregoing conduct relates to a specific act of terrorism, or to terrorism in general. *See* Prevention of Terrorism Act 2005, c.2, § 1.9 (Eng.). “Terrorism” has the same meaning as in the Terrorism Act 2000, which defines the term as the use or threat of action that (a) involves serious violence against a person, involves serious damage to property, endangers a person’s life, creates a serious risk to the health or safety of the public or a section of the public, or is designed seriously to interfere with or seriously to disrupt an electronic system; (b) is designed to influence the government or to intimidate the public or a section of the public; and (c) is made for the purpose of advancing a political, religious or ideological cause. Terrorism Act, 2000, c. 11, § 1(Eng.).

¹³³ *See* Prevention of Terrorism Act 2005, c.2, § 8 (Eng.).

¹³⁴ *See id.*

act,” or has taken an action in preparation for a terrorist act; or (2) if a terrorist act has occurred within the past 28 days and detention of the person for the period imposed is reasonably necessary to preserve evidence relating to the act.¹³⁵ A future terrorist act must be imminent, meaning at the most it is expected to occur within the following 14 days.¹³⁶

C. *Duration of Detention*

Any new legislation on preventive detention must address the duration of detention. As discussed, the U.S. Supreme Court has demonstrated a decided bias against indefinite detention, particularly absent the existence of some special factor that both narrowly limits the class of people to which the detention potentially applies and confirms the heightened danger that class poses, as well as the existence of strict procedural safeguards. Thus, potentially lengthy detention periods require a stricter definitional threshold and more robust procedural safeguards.

The foreign detention schemes reviewed for this article vary broadly in potential duration. For example, preventive detention orders in Australia may not exceed 48 hours and are subject to restrictions on the imposition of multiple detention orders.¹³⁷ In contrast, detention orders under Israel's Administrative Detention Act may be imposed for up to six months and are renewable indefinitely for successive six-month periods.¹³⁸ In Britain, duration depends on the nature of the control order, again reflecting the degree of infringement of the person's liberty. Non-derogating control orders in Britain last for up to 12 months and are renewable for successive 12-month periods, while derogating control orders may be issued for six-month periods, subject to renewal by the court.¹³⁹ Further, the legislation provides that persons may be arrested and detained for up to 96 hours during the pendency of an application for a derogating control order.¹⁴⁰

D. *Appropriate Decision-maker*

Preventative detention legislation must authorize an official to impose the detention. Most foreign preventive detention systems involve an initial determination made by order of a competent and independent judicial

¹³⁵ Anti-Terrorism Bill (No. 2), 2005, § 105.4, sched. 4 (Austl.).

¹³⁶ *Id.*

¹³⁷ Anti-Terrorism Bill (No. 2), 2005, § 105.1, sched. 4 (Austl.). (“[T]he object of this [Act] is to allow a person to be taken into custody and detained *for a short period of time . . .*”) (emphasis added).

¹³⁸ Israel's Emergency Powers (Detention) Law 1979, 33 L.S.I. 89 (1978-99), *reprinted in* Gross, *supra* note 121, at 725.

¹³⁹ *See* Prevention of Terrorism Act 2005, c.2, §§ 2, 4 (Eng.).

¹⁴⁰ *See Id.* § 5.

official upon application of an executive official at a sufficiently high level to provide subsequent accountability. In urgent circumstances, however, provisions are usually made for an initial detention decision by an appropriately high-ranking executive official, with subsequent confirmation by a judicial authority.¹⁴¹

E. Nature of Process, Including Standard of Proof, Evidentiary Rules, and Detainee Rights

A security detention system also should specify any detainee rights and the procedural safeguards associated with the protection and exercise of detainee rights. As outlined earlier, notice of the basis for detention and the ability to seek independent review are basic standards.¹⁴² Other important issues include a detainee's right to counsel, standards and burdens of proof, evidentiary rules on admissibility and reliability, rules for the use and protection of classified information, rules regarding the interrogation of detainees, presence of counsel during interrogation, and the permitted uses of information obtained from such interrogation. Israel, Australia, and the U.K. each provide different procedural safeguards and assurances of a detainee's rights.

In Israel, an administrative detainee must be brought before a district court judge within 48 hours or be released.¹⁴³ While the detainee has the right to know the basis for his detention, to have access to counsel, and to be present and have counsel present at the judicial confirmation hearing, the detention court may rely on hearsay and other evidence, if such evidence is deemed reliable, even if that evidence would ordinarily be inadmissible in criminal proceedings.¹⁴⁴ The court also may order sensitive evidence with-

¹⁴¹ For example, in Israel's administrative detention may occur upon an order issued by the Minister of Defense, subject to judicial confirmation. *See* Israel's Emergency Powers (Detention) Law 1979, 33 L.S.I. 89 (1978-99), *reprinted in* Gross, *supra* note 121, at 725. In Australia, a federal police officer may apply to a senior police official for a preventive detention order lasting up to 24 hours. Anti-Terrorism Bill (No. 2), 2005, § 105.8, sched. 4 (Austl.). A judge or federal magistrate may extend a preventive detention order for up to a total of 48 hours. *Id.* § 105.12. In Britain, under normal circumstances, the Secretary of State for the Home Department may apply to a court for imposition of a non-derogating control order. Prevention of Terrorism Act 2005, c.2, § 2 (Eng.). The Secretary of State may issue a non-derogating control order in urgent circumstances, subject to subsequent confirmation by the court. *Id.* Control orders that derogate from Article 5 of the ECHR may only be issued, regardless of circumstances, by a court. *Id.* § 1(2).

¹⁴² *See, e.g., supra* text accompanying notes 48-52, 58-63, 66-74, 87-93, 104-09.

¹⁴³ Israel's Emergency Powers (Detention) Law 1979, 33 L.S.I. 89 (1978-99), *reprinted in* Gross, *supra* note 121, at 756.

¹⁴⁴ Israel's Emergency Powers (Detention) Law 1979, 33 L.S.I. 89 (1978-99), *reprinted in* Gross, *supra* note 121, at 773.

held from a detainee if disclosure would threaten national security.¹⁴⁵ Commentators suggest that the applicable evidentiary standard is generally accepted to be a “clear and convincing” standard and that more evidence is thought to be required as a practical matter the longer detention continues (a proportionality rule of sorts).¹⁴⁶

Australian detainees and their lawyers must be given a copy of the detention order and a summary of the grounds for detention.¹⁴⁷ Detainees have the right to contact lawyers, family members, and employers for limited purposes, and to contact the police Ombudsman.¹⁴⁸ However, the government may seek an order restricting the person’s ability to contact virtually any person, including particular family members and particular attorneys, and the content of a detainee’s communications may be monitored.¹⁴⁹ The Australian Act specifically requires that a person detained under the Act must be treated humanely and may not be subjected to any cruel, inhuman, or degrading treatment.¹⁵⁰ The government may not question a detainee during detention, for law enforcement or intelligence purposes,¹⁵¹

¹⁴⁵ *Id.*

¹⁴⁶ *See id.* at 773–74.

¹⁴⁷ Anti-Terrorism Bill (No. 2), 2005, § 105.32, sched. 4 (Austl.).

¹⁴⁸ *Id.* §§ 105.35–105.37.

¹⁴⁹ *Id.* §§ 105.34–38. The content of such communications with a lawyer may not, however, be admitted in any criminal proceedings. *Id.* Family members, lawyers and others may be subject to up to five years imprisonment for improperly disclosing information pertaining to a detention order. *Id.* § 105.41.

¹⁵⁰ *Id.* § 105.33.

¹⁵¹ Considering that the justification for preventive detention is the potential dangerousness of the detainee and not his intelligence value, some systems impose strict limits on intelligence interrogations of detainees. *See, e.g., id.* a § 105.42. But the issue of interrogation of detainees, particularly for intelligence purposes, is important and must be resolved. Many of the procedural and substantive rights associated with preventive detention programs may prove problematic for intelligence gathering, which is a critical element of the new prevention imperative. For example, most experienced interrogators maintain that isolation can be among the most useful interrogation techniques, and interruption of the interrogation process (for example, to meet with legal counsel) can negatively impact information gathering. *See, e.g.,* Paul Rosenzweig & James Jay Carafano, *Preventive Detention and Actionable Intelligence*, 13 LEGAL MEMORANDUM 1 (The Heritage Found., Washington, D.C.), Sept. 16, 2004, at 3, available at <http://www.heritage.org/Research/HomelandSecurity/lm13.cfm>. Professors Goldsmith and Katyal have suggested a system of delayed access to counsel to permit limited interrogation as a possible solution. Jack L. Goldsmith & Neal Katyal, Op-Ed, *The Terrorists’ Court*, N.Y. TIMES, July 11, 2007, at A19. One potential solution might involve a process modeled on that used in Spain, where terrorism suspects may be held in police custody for up to five days before a decision to commence criminal proceedings is made. Maria Alvanou, *Terrorism Legislation Issues in Spain: Terrorism Offenses and ‘Incommunicado’ Procedures*, RESEARCH INSTITUTE FOR EUROPEAN AND AMERICAN STUDIES, 2007, http://rieas.gr/index.php?option=com_content&task=view&id=405&Itemid=41. The person may be held incommunicado during that period pursuant to court authorization. *Id.* Moreover, the incommunicado period may be extended for an additional eight days if the decision

except to confirm identity and safety, and any questioning must be videotaped.

Once again, the rights and procedures applicable under Britain's control order system vary with the nature of the order. The subject of any control order must be informed of the imposition of a control order.¹⁵² For non-derogating control orders, the court may conduct an *ex parte* hearing of the government's basis for issuing the order.¹⁵³ If convinced that the government's decision is not "obviously flawed," the court must conduct a full hearing to determine the appropriateness of the order and the obligations imposed.¹⁵⁴ At the full hearing, the court must determine whether the government's decision was flawed in respect of any of the following issues: (1) the existence of reasonable grounds to suspect that the person was "involved in terrorism-related activity"; (2) that a control order was necessary to protect members of the public from the risk of terrorism; or (3) the necessity of the particular obligations imposed.¹⁵⁵ The court may order the government to revoke or modify the order as appropriate. Non-derogating control orders issued by the government in exigent circumstances must be referred to the court immediately, and the court must commence consideration of the order no more than seven days after the order took effect.¹⁵⁶ In the case of derogating control orders, upon application by the British government, the court will hold an immediate preliminary hearing (which, again, may be *ex parte*) to determine if a *prima facie* case exists for the imposition of an order.¹⁵⁷ If such a case exists, the court will impose the order subject to a subsequent full hearing.¹⁵⁸ At that hearing, the court will confirm the control order only if it is convinced that the threshold standard has been met and if it has not been met, the court may quash or modify the obligations originally imposed.¹⁵⁹

is made to commence criminal proceedings. *Id.* During an incommunicado period, a suspect's relatives may not be informed of the detention and legal services are provided by a duty solicitor, not an attorney chosen by the suspect. *Id.* A suspect held incommunicado may be questioned in the presence of the duty solicitor, who may advise the suspect on matters of procedure but may not consult privately with the suspect. *Id.* Note, however, that a forensic physician is assigned to examine the suspect during the period and ensure the suspect is not abused, and must make a report to the supervising judicial authority. *Id.* The suspect may not see a lawyer of his choosing or notify anyone of his detention until the end of the incommunicado period, which may last a total of thirteen days. *Id.*

¹⁵² See Prevention of Terrorism Act 2005, c.2, § 7 (Eng.).

¹⁵³ *Id.* § 3.

¹⁵⁴ *Id.* § 4.

¹⁵⁵ See *id.*

¹⁵⁶ *Id.* § 3.

¹⁵⁷ See *id.* § 4.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

The British system also addresses a number of evidentiary and related procedural concerns. For example, the Prevention of Terrorism Act imposes an obligation on the government to disclose all evidence relevant to the control order proceedings.¹⁶⁰ However, the Act directs the courts to establish rules allowing the government to withhold sensitive information from anyone other than the court or certain qualified lawyers designated as “special advocates,” and to exclude the controlled person and his legal counsel from proceedings when considering such evidence.¹⁶¹ In those circumstances, the special advocates shall represent the interests of the controlled person, but shall not be responsible to him or his legal counsel.¹⁶² The British Act does not, however, address the extent to which those subject to control orders may be interrogated, or any restrictions on potential uses of the information that may be obtained from interrogation.

U.S. law provides a relevant example of how these issues have been handled in a non-criminal context involving terrorism and preventive detention. In 1996, as part of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), the U.S. created a new removal process for aliens called the Alien Terrorist Removal Court (ATRC), which is comprised of five federal district court judges appointed by the Chief Justice of the Supreme Court.¹⁶³ ATRC proceedings are available to the government in any case where, on application by the Attorney General, the Court finds probable cause to believe that: (1) the alien is a terrorist; (2) the alien is present in the U.S.; and (3) ordinary removal proceedings would pose a risk to national security due to disclosure of classified information.¹⁶⁴

More specifically, the ATRC legislation allows the government to use classified information to establish grounds for removal without disclosure to the alien if a risk to national security would result. In place of the

¹⁶⁰ *Id.* § 4, sched. Control order proceedings, etc.

¹⁶¹ *Id.* §§ 4, 7. When the court opts to withhold evidence, the courts may also provide for summaries of the sensitive evidence. *Id.* § 4.

¹⁶² *Id.* § 7.

¹⁶³ 8 U.S.C. § 1532(a)(2000). Recall that removable aliens are detainable pending the removal determination and pending actual removal, particularly in cases involving terrorism. See *supra* text accompanying notes 76–83. Note also that the Alien Terrorist Removal Court provisions rarely, if ever, have been used since their adoption in 1996, primarily because the provisions’ intricate procedures are considered unworkable, but also in part because of due process concerns. Steven R. Valentine, *Flaws Undermine Use of Alien Terrorist Removal Court*, 17(12) WASH. LEGAL FOUNDATION 1, 2 (2002). One other potential example of how current U.S. law and practice address these issues is the CSRT. COMBATANT STATUS REVIEW TRIBUNALS, Sept. 28, 2006, <http://www.defenselink.mil/news/Jul2007/CSRT%20%Fact%Sheet.pdf>. However, as previously mentioned, the CSRT system continues to face significant constitutional challenge. The *Boumediene* case recently decided by the Supreme Court is just one example. *Boumediene v. Bush*, 128 S.Ct. 2229 (2008).

¹⁶⁴ 8 U.S.C. § 1533(a) (1996).

classified information, unclassified summaries approved by the court can be provided to the alien and his attorney. Where unclassified summaries are not possible, and the alien is a legal permanent resident, special pre-cleared attorneys who can review the classified material are available.¹⁶⁵ The removal hearing may continue without disclosure or summaries if the court determines that serious and irreparable harm to national security might otherwise result.

The AEDPA also spells out the rights of the aliens in ATRC proceedings, including (1) notice of the nature of charges; (2) a public hearing and the right to be present at the hearing (except when considering sensitive information); (3) a compensated right to counsel; and (4) a reasonable opportunity to call and confront witnesses and to offer evidence.¹⁶⁶ The government bears the burden of proof in ATRC proceedings under a preponderance of the evidence standard, but the ordinary rules of evidence do not apply, meaning that the government may use virtually any and all relevant evidence, including evidence alleged to have been obtained unlawfully.¹⁶⁷

F. Appeals and Periodic Review

Most preventive detention systems provide for rights of appeal and periodic automatic review of detention. For example, under the British Prevention of Terrorism Act, all persons subject to control orders have a right of appeal on matters of law.¹⁶⁸ Under the ATRC provisions in U.S. law, removable aliens may appeal the removal determination to the U.S. Court of Appeals, and in cases involving permanent legal residents the appeal is automatic.¹⁶⁹ The standard of review is the same as in criminal proceedings—*de novo* review for matters of law, and a clearly erroneous standard for factual matters.¹⁷⁰

Automatic periodic review typically involves the same standard used to impose detention in the first instance, and usually occurs no less than once each year depending on the intrusiveness of the liberty restriction. In Israel, administrative detention orders must be reviewed by the court

¹⁶⁵ Other options that might be considered in place of such special counsel are a permanent staff of skilled defense lawyers similar to the Federal Public Defender system, as proposed by Professors Goldsmith and Katyal, Jack L. Goldsmith & Neal Katyal, Op-Ed, *The Terrorists' Court*, N.Y. TIMES, July 11, 2007, at A19, or a system of pre-clearance for lawyers who are not associated with the government but who are experienced human rights practitioners.

¹⁶⁶ 8 U.S.C. § 1534 (2001).

¹⁶⁷ *Id.*

¹⁶⁸ See Prevention of Terrorism Act 2005, § 11 (Eng.).

¹⁶⁹ 8 U.S.C. § 1535 (1996).

¹⁷⁰ *Id.*

every three months.¹⁷¹ In Britain, there is no automatic periodic review during the course of the order, but the order must be affirmatively renewed at the end of each period for it to continue in effect.¹⁷² Persons subject to control orders may seek revocation or modification of the order either from the government (non-derogating orders) or the court (derogating orders).¹⁷³ Moreover, the government may revoke or relax a non-derogating control order at any time, and the court is obligated to revoke a derogating control order if the derogating restrictions are no longer required.¹⁷⁴

G. *Reporting and Oversight*

Preventive detention systems also tend to impose oversight and reporting obligations on an appropriate independent authority, such as an Inspector General.¹⁷⁵ These provisions usually require periodic evaluation of the use of the preventive detention powers, the outcome of the detention proceedings, the nature and conditions of the detention imposed, and any other material matters associated with the preventive detention program.¹⁷⁶ Reports normally must be submitted to a responsible executive agent (such as a Minister of Justice or State) and to a designated legislative committee.¹⁷⁷

For example, in Australia the Attorney General must make an annual report to the Parliament regarding the functioning of the Act, including the number of orders issued and people detained, the nature of complaints made by those detained, and the number of detention orders found invalid by a court, among other issues.¹⁷⁸ The British scheme has several periodic reporting and oversight provisions. For example, the Secretary of State must provide a report to Parliament on a quarterly basis detailing his use of the control order powers and appoint an independent reviewer to report on the operation of the Act and other related matters.¹⁷⁹

¹⁷¹ Israel's Emergency Powers (Detention) Law 1979, 33 L.S.I. 89 (1978-99), reprinted in Gross, *supra* note 121, at 775.

¹⁷² See Prevention of Terrorism Act 2005, c.2, § 4 (Eng.).

¹⁷³ See *id.* § 7.

¹⁷⁴ *Id.*

¹⁷⁵ See, e.g., *id.* § 14.

¹⁷⁶ See, e.g., Anti-Terrorism Bill (No. 2), 2005, § 105.47, sched. 4 (Austl.).

¹⁷⁷ E.g. Prevention of Terrorism Act 2005, c.2, § 14 (Eng.).

¹⁷⁸ Anti-Terrorism Bill (No. 2), 2005, § 105.47, sched. 4 (Austl.).

¹⁷⁹ Prevention of Terrorism Act 2005, c.2, § 14 (Eng.).

H. *Sunset Provisions*

Preventive detention systems may be subject to a legislative sunset provision that requires the systems to cease operation unless reauthorized.¹⁸⁰ The sunset provisions, however, vary significantly. For example, the control order provisions of the British Prevention of Terrorism Act 2005 must be reauthorized annually, subject to approval by the British Parliament.¹⁸¹ By contrast, the Australian law has a 10-year sunset clause.¹⁸²

CONCLUSION

The U.S.'s current multi-prong approach to detention of terrorist suspects has a number of strengths. Its central strength is that it takes advantage of every legal tool available and attempts to use those tools that best fit the particular situation. It is, in short, fact driven and adaptive. Moreover, the U.S. approach relies on doctrines and powers that have lengthy pedigrees in U.S. jurisprudence. The detention of material witnesses, for example, dates from Sixteenth Century England and has been permitted under U.S. law since the first Judiciary Act of 1789.¹⁸³ The prosecution of well-established lesser offenses such as obstruction of justice and document fraud proved a valuable law enforcement tool in other contexts, such as the fight against organized crime. Similarly, the right of a nation to detain aliens that pose serious threats to national security is largely uncontroversial. And invocation of the right to detain enemy combatants for the duration of hostilities under LOAC is, as the Supreme Court acknowledged in *Hamdi*, "by universal agreement and practice [an] important incident[] of war."¹⁸⁴

Nevertheless, the current approach also has many weaknesses. There is growing concern that these law enforcement, immigration and LOAC doctrines are being stressed beyond their limit.¹⁸⁵ Indeed, Attorney

¹⁸⁰ See, e.g., *id.* § 13; Anti-Terrorism Bill (No. 2), 2005, § 105.53, sched. 4 (Austl.).

¹⁸¹ Prevention of Terrorism Act 2005, c.2, § 13 (Eng.).

¹⁸² Anti-Terrorism Bill (No. 2), 2005, § 105.53, sched. 4 (Austl.).

¹⁸³ Stacey M. Studnicki, *Material Witness Detention: Justice Served or Denied?*, 40 WAYNE L. REV. 1533, 1534–36 (1994) (explaining that the concept of material witnesses began in England in the 1500s); Judiciary Act of 1789, ch. 20, sec. 33, 1 Stat. 73, 91 (1789) ("Recognizances of the witnesses for their appearance to testify . . . may [be] require[d] on pain of punishment.").

¹⁸⁴ *Hamdi v. Rumsfeld*, 542 U.S. 517, 518 (2004) (citing *Ex parte Quirin*, 317 U.S. 1, 30 (1942)).

¹⁸⁵ For instance, detention of material witnesses was conceived to compel individuals with relevant testimony to appear as witnesses; detention of material witnesses was not intended to be a proxy for preventive detention of those considered dangerous to society. See Studnicki, *supra* note 183, at 1539–37. Because these warrants were conceived for short-term detention of witnesses, there are few procedural safeguards such as meaningful judicial review or a robust ability to challenge the basis for detention. See *id.* at 1536–39.

General Mukasey and the other commentators previously cited seem to have reached just that conclusion, as did the Fourth Circuit panel in *al-Marri*.¹⁸⁶ The pressure on traditional doctrines to accommodate the challenges of modern international terrorism tends to skew those doctrines in disturbing ways. There also is genuine concern in the legal community that the current approach damages our fundamental rights, and harms our international relationships—the very partnerships the United States must strengthen to effectively defeat al Qaeda and its allies, as well as presently unknown or future terrorist organizations.

These concerns warrant a call for the U.S. Congress to explore a new system of security detention for terrorism suspects. It is not entirely clear that a system of security detention for terrorist suspects would pass constitutional muster. Whether a sufficient nexus with terrorism would qualify as a constitutionally permissible “special justification” is largely an open question, and the adequacy of any procedural safeguards will depend on the totality of the specific provisions adopted. Further, for such a system to be of value, it must avoid becoming just one more tool used in the current *ad hoc* system. Instead, it must clearly define when it applies and direct the executive and judicial branches to apply the system in cases that push the bounds of existing detention categories. This goal is not obviously achievable.¹⁸⁷

Moreover, there are countless possible variations on the preventive detention model that have not been discussed. For instance, a security detention system might concentrate preventive detention decisions, terrorism-related criminal prosecutions, and other national security matters into specialized national security courts, as several commentators have previously suggested—a concept with its own set of concerns. However, this approach might serve to free ordinary criminal courts from the challenges of handling terrorism matters, and stimulate development of a cadre of investigators, prosecutors and judges experienced in terrorism and national security matters—similar to the system used in France and Spain, where terrorism cases are handled by centralized courts. Another variation could involve the adoption of investigative hearing measures similar to those currently under contemplation in Canada, which permit a court to compel the examination of

¹⁸⁶ See *supra* text accompanying notes 24, 37–43.

¹⁸⁷ For example, the U.S. government has asserted on several occasions that the President has inherent constitutional power to detain enemy combatants even in the absence of a congressional authorization to use force such as the AUMF. *Cf., e.g., Hamdi*, 542 U.S. at 513–15 (2003) (discussing both the Government’s argument that the President’s war powers authorize detention of enemy combatants and skepticism that the Government requires a Congressional authorization to detain enemy combatants). The courts have not yet fully resolved that question.

any person reasonably believed to have information related to a terrorism matter.

Let us be clear. We do not urge the consideration of such a system because we believe that the government officials who designed or operate under the current multi-prong approach are ill-motivated or purposely distorting the legal authorities under which they operate. To the contrary, we believe the vast majority have acted in good faith and have done the best they can with, in the words of Attorney General Mukasey, “a strained and mismatched legal system.”¹⁸⁸ If structured properly, a new security detention system might relieve the pressures currently distorting the existing detention mechanisms and provide a more definite, regular, and widely accepted standard of detention in difficult terrorism cases.

¹⁸⁸ Michael B. Mukasey, Op-Ed, *Jose Padilla Makes Bad Law*, WALL ST. J., Aug. 22, 2007, at A15.