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Jennifer Daskai

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A NEW SYSTEM OF PREVENTIVE DETENTION? LET'S TAKE A DEEP BREATH

*Jennifer Daskal**

Some have argued that the detention center at Guantanamo Bay cannot be closed until the U.S. passes new preventive detention laws that would allow it to detain those who cannot be tried but are considered too dangerous to release. This article rejects these claims, concluding that the existing criminal justice system can adequately deal with those who the U.S. should be seeking to detain. The article also warns of the costs of trying to set up an entirely new system of detention without charge. The article cautions that such a system will negate many of the reputational gains associated with the closure of Guantanamo, will undoubtedly be subject to multiple court challenges and delay, and will put a continuous spotlight on those subject to this alternative detention system—allowing them to glorify themselves as martyrs, rather than forcing them to bear the opprobrium of a criminal conviction.

INTRODUCTION

Just about everyone agrees that Guantanamo should be closed. Secretary of Defense Robert Gates, Secretary of State Condoleezza Rice, and even President Bush have all said that they would like to close the detention facility at Guantanamo Bay, Cuba.¹ Five former secretaries of state—including Henry Kissinger, James Baker III, and Colin Powell—have urged the next U.S. president to move quickly toward this goal.² And President-elect Barack Obama has committed to do so.³

Some have suggested that the United States cannot close Guantanamo unless it passes so-called “administrative detention” laws that allow it

* Senior Counterterrorism Counsel at Human Rights Watch.

¹ Press Release, President George W. Bush, June 4, 2006, <http://www.whitehouse.gov/news/releases/2006/06/20060614.html> [hereinafter White House Press Release]; Secretary of State Condoleezza Rice, Interview with *The Financial Times*, April 20, 2000, <http://www.state.gov/secretary/rm/2007/apr/83369.htm>; *Defense Department Budget for FY 2008: Hearing Before the Subcomm. on Defense of the H. Comm. on Appropriations*, 110th Cong., Mar. 29, 2007.

² *Shut Jail, Ex-Diplomats Say: Powell, Kissinger, Albright, Baker and Christopher also urge the Next President to Open Talks with Iran*, L.A. TIMES, Mar. 28, 2008, at A15.

³ See Steven Lee Myers, *Bush Decides to Keep Guantanamo Open*, N.Y. TIMES, Oct. 21, 2008, at A16.

to detain those who cannot be tried for any crime, yet are too dangerous to release.⁴ Proponents present this as a middle-of-the-road solution to the problem of Guantanamo. Under this approach, detainees would be provided more procedural rights than they currently receive in Guantanamo, and the United States would be able to protect itself by detaining these and other potentially dangerous men taken into custody in the future, even if there is not enough evidence to convict them of a crime. Or so the thinking goes.

But over the past 230 years, the United States has endured two world wars, a lengthy cold war, waves of domestic terrorism, and a civil war that almost broke the nation apart, without passing legislation that would allow the state to detain people for extended periods based on a prediction of future dangerousness. In fact, the few executive-branch experiments with such programs—the quickly-reversed suspension of habeas corpus during the Civil War, the Palmer Raids of 1919–1920, the internment of citizens with Japanese ancestry during World War II, and, most recently, the large-scale detention of hundreds of men at Guantanamo Bay—have in one way or another been resoundingly repudiated as mistaken experiments that are contrary to the United States' commitment to due process and the rule of law.

Before the United States adopts an entirely new system of detention—that permits the government to hold citizens and non-citizens without a trial or even charging them with a crime—based on a prediction of future threat, several key questions need careful assessment.

I. WHO SHOULD THE UNITED STATES BE DETAINING?

In 2001 and 2002, the United States answered this question broadly, without providing any clearly articulated criteria. In addition to the foot soldiers fighting to defend the Taliban's Afghanistan, the United States brought to Guantanamo those who may have once attended an al-Qaeda training camp, had some affiliation with an al-Qaeda member, or merely appeared to dislike the United States.⁵ Hundreds were held for years without charge before ultimately being released, either because the United States determined they were too insignificant to detain or because they were inno-

⁴ See, e.g., Ken Anderson & Elisa Massimino, *The Cost of Confusion: Resolving Ambiguities in Detainee Treatment*, Stanley Foundation, March 2007; John Farmer, Op-Ed, *A Terror Threat in the Courts*, N.Y. TIMES, Jan. 13, 2008, § 4, at 14; Jack Goldsmith & Neal Katyal, Op-Ed, *The Terrorists' Court*, N.Y. TIMES, July 11, 2007, at A19.

⁵ This article does not address the legality or appropriateness of so-called battlefield detentions of those picked up in Afghanistan and Iraq and held in connection with the ongoing hostilities there. Rather, it focuses on the proposals to create a preventive detention regime in the United States designed for individuals picked up around the world and brought to a setting far removed from any active hostilities.

cent people caught up in the wrong place.⁶ Others are still being held in Guantanamo—even though the United States has concluded that they should be released—because they cannot be returned to their home countries for fear of ill-treatment and the United States cannot find a third party to accept them.⁷

As Guantanamo has proven, it is not good counterterrorism policy to bring every potential terrorism supporter into a long-term detention system in the United States. Mistakes are inevitably made, and innocent people detained, fueling the very anti-American resentment that terrorist recruiters feed upon.⁸ Moreover, such a system is simply impractical. Assume, for example, that the United States continued down the road of trying to detain every possible al-Qaeda associate. The U.S. military could march through the streets of Riyadh or Islamabad, arrest and detain just about any dangerous looking male between the ages of twenty and thirty-five. After all, at least some portion of them might one day join anti-U.S. forces, or want to. But no prison is large enough to hold all of the angry young men in the world. A smart counterterrorism policy would instead focus on incapacitating tough to replace members of the al-Qaeda network—the leaders, financiers, and technological experts—and the operators who planned or carried out terrorist acts.

The United States Army's new Field Manual on Counterinsurgency Operations provides the rationale for this more pragmatic—and effective—approach. It is simply not possible to kill and capture every enemy in a battle with a non-traditional enemy like al-Qaeda, nor is it necessarily a good idea. “Dynamic insurgencies can replace losses quickly,” explains the

⁶ See Tim Golden, *Administration Officials Split over Stalled Military Tribunals*, N.Y. TIMES, Oct. 25, 2004, at A1 (statement of Lt. Col. Thomas S. Berg: “It became obvious to us as we reviewed the evidence that, in many cases, we had simply gotten the slowest guys on the battlefield. . . . We literally found guys who had been shot in the butt.”); Corine Hegland, *Empty Evidence*, NAT'L J., Feb. 4, 2006, at 28, 31 (statement of Michael Scheuer, head of the CIA's bin Laden unit from 1999 to 2004) (“We absolutely got the wrong people.”); MARK DENBEAUX & JOSHUA DENBEAUX, REPORT ON GUANTANAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA, 5, 11 (2006) (only 45% of the 517 Guantanamo detainees accused of engaging in a hostile act in government's summary of the evidence against them).

⁷ See, e.g., William Glaberson, *Release of 17 Guantanamo Detainees Sputters as Officials Debate the Risk*, N.Y. TIMES, Oct. 16, 2008, at A20 (describing the fate of 17 Chinese Uighurs who cannot be repatriated due to fear of torture, but have not been accepted by any other country to date).

⁸ See, e.g., SARAH E. MENDELSON, CLOSING GUANTANAMO: FROM BUMPER STICKER TO BLUEPRINT 5 (2008), available at http://www.csis.org/media/isis/pubs/080905_mendelson_guantanamo_web.pdf (relying on consultations with intelligence and military experts to conclude that “[s]ymbols of alienation such as Guantanamo have served as a recruitment tool for individuals and groups who seek to harm the United States, increasing—not decreasing—danger.”).

Counterinsurgency Field Manual.⁹ The only way to win, therefore, is to “cut off the sources of that recuperative power” by diminishing the enemy’s legitimacy and appeal while increasing one’s own.¹⁰ The manual cautions that the United States loses its legitimacy, and therefore its ability to win the fight against al-Qaeda, if it engages in illegitimate actions. “Unlawful detention, torture and punishment without trial” are all cited as illegitimate actions to be avoided.¹¹

The lesson from the Counterinsurgency Field Manual is clear. Rounding up every young man who hates the United States is neither possible nor effective. Rather, it fuels animosity towards the United States and becomes a talking point and recruiting tool for future terrorists. While such a policy may take a few would-be terrorists out of circulation, it aids al-Qaeda’s ability to recruit others.

Even the Bush administration seems to have recognized the need for greater selectivity in its detention decisions. The mass flood of detainees sent to Guantanamo in 2002 has now slowed to a relative trickle. Just six detainees have been sent to Guantanamo since 2007.¹² According to Department of Defense press releases, one was involved in a 2002 attack in Kenya that killed thirteen people;¹³ two planned and facilitated the movement of foreign fighters;¹⁴ a fourth planned and directed al-Qaeda operations;¹⁵ a fifth was described as “one of al-Qaeda’s highest-ranking and experienced senior operatives;”¹⁶ and the sixth reportedly served as “one of bin Ladin’s most trusted facilitators and procurement specialists.”¹⁷ The government has claimed that each of these detainees has planned, partici-

⁹ DEP’T OF THE ARMY, COUNTERINSURGENCY, ch. 1, at 23 (2006), *available at* <http://www.fas.org/irp/doddir/army/fm3-24.pdf> [hereinafter Army Field Manual].

¹⁰ *Id.*

¹¹ *Id.* at 24.

¹² *See infra* text accompanying notes 13–17.

¹³ Press Release, U.S. Dep’t of Def., Terror Suspect Transferred to Guantanamo (Mar. 26, 2007), *available at* <http://www.defenselink.mil/releases/release.aspx?releaseid=10662>.

¹⁴ Press Release, U.S. Dep’t of Def., Terror Suspect Transferred to Guantanamo (June 6, 2007), *available at* <http://www.defenselink.mil/releases/release.aspx?releaseid=10976>; Press Release, U.S. Dep’t of Defense, Terror Suspect Transferred to Guantanamo (Sept. 12, 2007), *available at* <http://www.defenselink.mil/releases/release.aspx?releaseid=11323>.

¹⁵ Press Release, U.S. Dep’t of Def., Terror Suspect Transferred to Guantanamo (June 22, 2007), *available at* <http://www.defenselink.mil/releases/release.aspx?releaseid=11041>.

¹⁶ Press Release, U.S. Dep’t of Def., Defense Department Takes Custody of a High-Value Detainee (Apr. 27, 2007), *available at* <http://www.defenselink.mil/releases/release.aspx?releaseid=10792>.

¹⁷ Press Release, U.S. Dep’t of Defense, Defense Department Takes Custody of a High-Value Detainee (March 14, 2008), *available at* <http://www.defenselink.mil/releases/release.aspx?releaseid=11758>.

pated in, or materially supported terrorist activity. Each could presumably be prosecuted for his actions.¹⁸

II. IS IT REALLY TRUE THAT THE CRIMINAL JUSTICE SYSTEM CAN'T HANDLE THESE CASES?

Proponents of preventive detention generally start from the premise that the criminal justice system cannot successfully prosecute international terrorists. But the United States has successfully prosecuted and convicted dozens of persons for terrorist activity, both before and after September, 2001. Richard Reid, the shoe-bomber arrested in Boston's Logan airport after trying to blow up a transcontinental flight;¹⁹ Zacarias Moussaoui, convicted of conspiring in the 9/11 attacks;²⁰ and Mohammed Sadiq Odeh, convicted for his role in the 1998 Embassy bombings in Tanzania and Kenya,²¹ are now all behind bars for the rest of their lives. Others are less familiar but significant nonetheless: Masoud Khan, sentenced to life in prison for training to support jihad abroad;²² Ahmed Ressay, sentenced to 22 years for smuggling and transporting explosives;²³ and Mohammed Manus Jabarah, sentenced to life for planning to blow up U.S. Embassies in Singapore and the Philippines.²⁴ The list continues. These men were all convicted by an established and reputable federal court system and are all now incarcerated in maximum security prisons. .

Some question the current system, arguing that this list is unconvincing. They say that terrorism prosecutions are too resource-intensive and messy, cannot effectively protect national security evidence, and fail to adequately prevent future terrorist acts as a result of their focus on punishment for past acts. Others warn that the adaptations needed to deal with these

¹⁸ This statement does not in any way credit the accuracy of allegations against men who have never had the chance to contest the accusations against them in a fair and open proceeding, but merely notes that according to the untested Department of Defense allegations, each has committed an act of terrorism that could be prosecuted in federal court.

¹⁹ Thanassis Cambanis, *Sentenced to Life*, BOSTON GLOBE, Jan. 31, 2003, at A1.

²⁰ Neil A. Lewis, *Moussaoui Given Live Term by Jury Over Link to 9/11*, N.Y. TIMES, May 4, 2006, at A1.

²¹ Benjamin Weiser, *The Terror Verdict: The Overview*, N.Y. TIMES, May 30, 2001, at A1.

²² See Jerry Markon, *U.S. Judge Reduces "Va Jihad" Sentences*, WASH. POST, July 7, 2005, at A3.

²³ Hal Bernton & Sara Jean Green, *Ressay Judge Decries U.S. Tactics*, SEATTLE TIMES, July 27, 2005, at A1. See also John C. Coughenour, Op-Ed, *How to Try a Terrorist*, N.Y. TIMES, Nov. 1, 2007, at A27.

²⁴ Press Release, United States Attorney Southern District of New York, *Canadian al Qaeda Member Sentenced to Life in Prison*, Jan. 18, 2008, <http://www.usdoj.gov/usao/nys/pressreleases/January08/jabarahsentencingpr.pdf>

problems will infect and undermine the due process protections in ordinary criminal prosecutions that are the mainstay of the criminal justice system.²⁵

This criticism is overblown. It is true that criminal prosecutions are resource-intensive, but so are systems of preventive detention, particularly if detainees are entitled to regular reviews of their detention, as most proposals assume.

To protect against the dissemination of classified evidence in criminal prosecutions, Congress passed the Classified Information Procedures Act (CIPA).²⁶ The CIPA gives the government wide latitude to provide the defendant and the jury substitute forms of evidence to protect against the disclosure of evidence and sources it wishes to protect. It has been used in countless terrorism cases, allowing the government to introduce evidence obtained by foreign law-enforcement and intelligence sources without compromising the integrity of those sources.²⁷ As Patrick Fitzgerald, who prosecuted the 1998 embassy bombings case, explained: “[w]hen you see how much classified information was involved in that case, and when you see that there weren’t any leaks, you get pretty darn confident that the federal courts are capable of handling these prosecutions. I don’t think people realize how well our system can work in protecting classified information.”²⁸ Even the Bush administration’s Department of Justice has extolled the CIPA’s virtues, stating that “the Classified Information Procedures Act, combined with strategic charging decisions, enable us to appropriately handle . . . intelligence in criminal cases while protecting both the classified information and defendants’ due process rights.”²⁹

To be sure, the CIPA also ensures that the defendant is not convicted based on secret evidence, and is instead presented whatever is shown to the fact finder. Notably this minimal due process requirement has also made its way into the congressionally-authorized military commissions for Guantanamo Bay detainees, which protect the defendant’s right to be present when evidence is being presented to the jury.³⁰ It is hard to see how

²⁵ See *supra* note 4.

²⁶ Classified Information Procedures Act, 18 U.S.C. app. § 8 (2000).

²⁷ See RICHARD B. ZABEL & JAMES J. BENJAMIN JR., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS 84–90 (2008) (white paper for Human Rights First), available at <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf>.

²⁸ SERRIN TURNER & STEPHEN J. SCHULHOFER, THE SECRECY PROBLEM IN TERRORISM TRIALS 25 (Brennan Center for Justice at NYU School of Law, 2005) (citing a consultation with Patrick Fitzgerald (Nov. 29, 2004)); see also Kelly Anne Moore, *Take Al-Qaeda to Court*, N.Y. TIMES, Aug. 21, 2007, at A19.

²⁹ DEP’T OF JUSTICE, COUNTERTERRORISM WHITE PAPER 4 (2006), available at <http://trac.syr.edu/tracreports/terrorism/169/include/terrorism.whitepaper.pdf>.

³⁰ See Military Commissions Act, 10 U.S.C. § 949d (making clear that the defendant has a right to be present at all parts of the trial, unless he acts in such a way to disrupt the trial or

a detention system that allows for long-term detention based on secret evidence would ever survive congressional, constitutional, or public scrutiny.³¹

It is also simply untrue that terrorism prosecutions are exclusively backward-looking, responding only to crimes that have already been committed. To the contrary, criminal prosecutions are often used to prevent future crimes from being committed. The Department of Justice cites its use of “material support,” “receiving material training,” and fraud crimes, as “allowing us to intervene at the stages of terrorist planning, before a terrorist act occurs.”³² The crime of conspiracy also allows forward-leaning prosecutions. A conspiracy is committed when two or more people plan to pursue an illegal act, and one acts in furtherance of that plan, even if no such illegal act was actually completed.³³

That is not to say that the criminal justice system is perfect. It is complicated to bring international terrorism cases to trial. Rules addressing unique aspects of international terrorism cases, such as the timing of *Miranda* warnings given to suspects detained overseas, or the process for dealing defendants who wish to proceed *pro se* (without legal representation) are still being worked out by the courts.³⁴ Crafting acceptable forms of substitute evidence to protect national security under the CIPA is often labor and time-intensive.³⁵ In some cases, prosecutors may ultimately be forced to drop certain charges, either because the evidence is tainted and inadmissible, or because even a substitute summary of classified evidence risks disclosing critical national security information that must be protected.

Even if we conclude that the criminal justice system is not fool-proof, the discussion should not end there. It is essential to consider the other side of the equation: the difficulties of creating an alternative system of preventive detention, the likelihood that it will not solve many of the problems it aims to fix, and the additional unintended costs. The remainder of this article lays out some of the key questions about a system of preventative detention that must be considered.

threaten the safety of those present and is given a prior warning, and providing a mechanism for the introduction of substitute forms of classified evidence).

³¹ The Supreme Court has described the defendant’s right to be present at trial and privy to the evidence against him as among the “safeguards to which all persons in the hands of the enemy are entitled.” *Hamdan v. Rumsfeld*, 548 U.S. 557, 633–34 (2006) (citation omitted). It seems unlikely that the government could lawfully deny detainees this minimal safeguard simply by declaring them subject to a newly created system of preventive detention.

³² DEP’T OF JUSTICE, *supra* note 30, at 3.

³³ See 18 U.S.C. § 371.

³⁴ For a discussion of these issues, see Zabel & Benjamin, *supra* note 28, at 89–90, 101–105.

³⁵ See *id.* at 87.

III. WILL A SYSTEM OF PREVENTIVE DETENTION SOLVE THE UNITED STATES' REPUTATIONAL PROBLEMS, OR WILL IT MERELY BE SEEN AS IMPORTING GUANTANAMO TO THE UNITED STATES?

Virtually every Western ally of the United States has publicly called for Guantanamo's closure; and the operation of this prison camp has earned the United States condemnation by U.N. bodies and the European Parliament.³⁶ Even those generally supportive of the Guantanamo facility agree that the detention without charge of almost 800 men in America's backyard has tarnished the reputation of the United States.³⁷

Merely importing Guantanamo to the United States will not solve the problem. The critiques of Guantanamo are not primarily related to its physical location. The major problem with Guantanamo is that people are held without trial or charge, based on evidence that may have been obtained through coercion, in a way that offends traditional American and international notions of justice. To convince a skeptical world that it has fixed the Guantanamo problem, the United States will have to show that detainees are provided fair process, including a meaningful opportunity to challenge the evidence against them. Put simply, a system of detention in which detainees continue to be held based on secret evidence that they are not permitted to see and unable to rebut is not going to allow the United States to rebuild its moral authority. Nor will a system that continues to rely on statements coerced from detainees through mistreatment and abuse.

Moreover, any system under which detainees are denied a full and fair opportunity to contest the facts supporting their detention will almost certainly lead to error. Innocent people will likely continue to be locked up, creating even greater reputational problems for the United States as the facts of their cases become known.

Colin Powell, discussing the Guantanamo Bay detainees, makes the point well:

I would simply move them to the United States and put them into our federal legal system. The concern was, "Well, then they'll have access to lawyers, then they'll have access to writs of habeas corpus." So what? Let them. Isn't that what our system's all about? And, by the way, America, unfortunately, has two million people in jail all of whom had lawyers and

³⁶ See, e.g., U.N. Committee Against Torture, *Conclusions and Recommendations of the Committee Against Torture*, ¶ 22, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006); U.N. Commission on Human Rights, *Situation of Detainees at Guantanamo Bay*, U.N. Doc. E/CN.4/2006/120 (Feb. 15, 2006); European Parliament Resolution on Guantanamo, EUR. PARL. DOC. P6_TA(2004)0050 (Oct. 28, 2004).

³⁷ See, e.g., White House Press Release, *supra* note 1 ("No question, Guantanamo sends a signal to some of our friends— provides an excuse, for example, to say the United States is not upholding the values that they're trying to encourage other countries to adhere to.").

access to writs of habeas corpus. And so we can handle bad people in our system.³⁸

IV. IF SUFFICIENT DUE PROCESS PROTECTIONS WERE INSTITUTED TO PREVENT THE SYSTEM FROM RESEMBLING GUANTANAMO, WOULD THE NEW SYSTEM END UP LOOKING A LOT LIKE THE CRIMINAL JUSTICE SYSTEM ALREADY IN PLACE?

Imagine a preventive detention system where detainees are provided lawyers, a fair chance to contest the evidence against them, and protected against the use of evidence obtained through abuse. The system would start to resemble to the criminal justice system already in place. The main differences would be that: (1) detainees could be held on suspicion of future dangerousness, rather than the more stringent standard of probable cause that they have committed a crime; (2) they would be entitled to regular reviews of the basis of their detention; and (3) hearings would presumptively be closed to the public and press, so as to prevent the dissemination of national security information.

Let's consider each of these deviations in turn. Detaining people based on a prediction of future risk is a dangerous business. The possibility of error is high, as is the possibility for abuse. How do we know that the prediction is right? What would be the criteria for assessing future risk? How would one be able to defend against such a prediction?

Proponents of such a system suggest that we can protect against error through regular reviews of the decision to detain. But such reviews carry their own costs. Not only are regular reviews resource-intensive, they allow for—and in fact encourage—a continual spotlight on the detentions, turning the detainees into possible martyrs and increasing the likelihood of public critique and condemnation. Ironically, a regular review process is also likely to result in errors in the opposite direction—with potentially dangerous people being released sooner than in a system that has the finality of the criminal justice system.

Compare this to the existing criminal justice system. Inchoate crimes like conspiracy allow the government to incapacitate potentially dangerous people before they have completed an unlawful act, but with much less risk of error or abuse. In such cases, the government must present evidence that a plan actually existed, and that the defendant took some steps to further the plan. This is something that defendants can then defend against, thereby mitigating the risk of mistake.

³⁸ *Meet the Press: Colin Powell on the War in Iraq, Decision 2008 and Much More* (NBC television broadcast June 10, 2007) (transcript), available at <http://www.msnbc.msn.com/id/19092206> [hereinafter *Meet the Press: Colin Powell*].

The criminal justice system also provides finality not possible in a system that allows for regular review of detention. True, convicted terrorists can appeal their sentence, and terrorism trials have at times been criticized for being biased or unfair. But the appeal process is finite, and the critiques are relatively muted. For the most part, those convicted of terrorism by the federal court system are sent to maximum security prisons where they fade into relative obscurity, without the risk that a regularly constituted review board will order their release.

As for the desire to hold hearings behind closed doors, federal judges already have that power, so long as they can demonstrate that any such closure is narrowly tailored to satisfy a sufficiently compelling need.³⁹ But as the Supreme Court has recognized, closed hearings should be the exception rather than the norm. Proceedings which are closed to the public are much more likely to be viewed with suspicion, undermining public confidence in the system and robbing it of one of its most important virtues—the chance for those affected by violent crime to witness the perpetrators held to account.⁴⁰ Federal courts have, and will undoubtedly continue to, designed clever ways to protect national security without going so far as closing the entire proceedings to the public, by, for example, allowing witnesses to testify using masks and pseudonyms, monitoring counsel's questioning to preempt against the inadvertent disclosure of classified evidence, and allowing the presentation of substitute forms of classified evidence under CIPA.⁴¹

V. CAN THE UNITED STATES CREATE AN ALTERNATIVE FORM OF PREVENTIVE DETENTION WITHOUT IT BEING SUBJECTED TO YEARS OF COURT CHALLENGES AND DELAYS?

In answering this question, the efforts to set up a military commission system at Guantanamo should serve as a warning sign. Established in November 2001 as a way to bring swift justice to the detainees, their track record has been abysmal.⁴² The first set of commissions was struck down by

³⁹ See *Press-Enterprise Co. v. Superior Ct. of Cal.*, 464 U.S. 501, 510 (1984).

⁴⁰ *Id.* at 508–509.

⁴¹ See *United States v. Rosen*, 520 F.Supp.2d 786, 795 (2007) (discussing a variety of mechanisms for protecting disclosure of classified evidence); COMMITTEE ON FEDERAL COURTS, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *THE INDEFINITE DETENTION OF "ENEMY COMBATANTS:" BALANCING DUE PROCESS AND NATIONAL SECURITY IN THE CONTEXT OF THE WAR ON TERROR* 143 (2004), available at http://www.abcnyc.org/pdf/1C_WL06!.pdf (describing the various ways in which classified evidence was protected from disclosure in the Embassy Bombings case).

⁴² Alberto Gonzales, *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A27 (“[military commissions] can dispense justice swiftly.”).

the Supreme Court in June 2006 as unlawful.⁴³ Although Congress quickly authorized a new set of commissions, these too have been subject to extensive public criticism, legal challenge, and delay. Even the former chief prosecutor has denounced the system as unfair.⁴⁴

Seven years since their creation, the commissions have achieved just two convictions. Australian David Hicks was convicted by plea agreement in March 2007 and is now free in Australia. In the first and only military commission trial, Salim Ahmed Hamdan, Osama bin Laden's former driver, was acquitted of conspiracy and convicted of providing material support to terrorism. He was sentenced to five and a half years, with credit given for five years' time served. The comparison with the established criminal justice system is stark: in this same time period, the federal courts have tried more than 107 jihadist terrorist cases, resulting in 145 convictions.⁴⁵

As Guantanamo has demonstrated, it is not easy to set up an entirely new system of justice, replete with new rules and new procedures, without any legal precedents on which to rely. Such a system will undoubtedly be subject to multiple court challenges, international scrutiny, and critique. The more such a system deviates from the criminal justice system—by detaining based on anything less than probable cause, relying on secret evidence that the detainee is never shown, or allowing tribunals to consider evidence obtained through coercion—the more the system will likely be subject to legal challenge and public criticism. Even if the system ultimately survives those challenges, it will still bear their scars.

VI. WILL A PREVENTIVE DETENTION SYSTEM EFFECTIVELY DELEGITIMIZE TERRORISTS IN THE WAY THAT A CRIMINAL JUSTICE SYSTEM DOES?

Terrorists, having political motivations behind their acts, like public attention. They like to be treated as special. When Khalid Sheikh Mohammed appeared before a "Combatant Status Review Tribunal" at Guantanamo Bay, he wore the status symbol of "combatant" proudly, comparing himself to George Washington saying that had Washington been captured by the British, he, too, would have been called an "enemy combatant."⁴⁶

Treating terrorists as criminals strips them of that status and allows them to fade into relative obscurity. Judge William Young, who presided over the case of Richard Reid, understood this well. At the sentencing hearing, Judge Young rejected Reid's self-proclaimed combatant status, sentenced him to life in prison, and told him: "[y]ou're no warrior. I know war-

⁴³ Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

⁴⁴ See, e.g., Morris Davis, *AWOL Military Justice*, L.A. TIMES, Dec. 10, 2007, at A15.

⁴⁵ Zabel & Benjamin, *supra* note 28, at 24–25.

⁴⁶ Transcript of Khalid Sheikh Mohammed's Combatant Status Review Tribunal Hearing, at 21–22, http://www.defenselink.mil/news/transcript_ISN10024.pdf.

riors. You are a terrorist. A species of criminal guilty of multiple attempted murders.”⁴⁷

In bypassing the existing criminal justice system and instead placing terrorists in a newly created system of administrative detention, the United States fuels the idea that they deserve special treatment and risks elevating their status. This risk is compounded by the likelihood that such detainees will be entitled to regular reviews of their detention—keeping their names and cases in the press and making them poster children for terrorist recruiters. By comparison, the criminal justice system provides closure, allowing convicted terrorists to largely disappear from the public’s eye.

Those on the front lines of the fight against al-Qaeda understand this well. To reiterate the lessons from the Army’s Counterinsurgency Manual: the key to victory against a non-traditional foe like al-Qaeda lies in cutting off the enemy’s “recuperative power” by diminishing its legitimacy while increasing one’s own. “To establish legitimacy,” the manual continues, “commanders [should] transition security activities from combat operations to law enforcement as quickly as feasible. When insurgents are seen as criminals, they lose public support.”⁴⁸

This is also a lesson that is supported by history. Between 1971 and 1975, the British army rounded up close to 2,000 individuals it believed to be associated with the Irish Republican Army (IRA) and interned them in prison camps, where they were held without charge. Violence increased, not decreased, as anti-detention anger helped fuel the conflict.

Years later, the home secretary, Reginald Maudling—who once sanctioned the internments—said the experience from 1971 to 1975 was “by almost universal consent an unmitigated disaster,” which has left an indelible mark on the history of Northern Ireland.⁴⁹ In the words of former British Intelligence officer Frank Steele who served in Northern Ireland during this period: “[Internment] barely damaged the IRA’s command structure and led to a flood of recruits, money and weapons.”⁵⁰ Even Edward Heath, the British Prime Minister in 1971 when internment was introduced, later called it a “mistake” which “gave the IRA a way to recruit from amongst people who had been interned, and . . . proved impossible to stop.”⁵¹

⁴⁷ Transcript of Criminal Sentencing, *United States v. Reid*, 214 F.Supp.2d 84 (2002 D. Mass.) (No. 02-10013), available at <http://www.cnn.com/2003/LAW/01/31/reid.transcript>.

⁴⁸ Army Field Manual, *supra* note 9, ch. 1, at 23–24.

⁴⁹ *UK MPs Vote for Anti-Terror Bill*, CNN, Nov. 20, 2001, <http://archives.cnn.com/2001/WORLD/europe/11/20/gen.britain.bill/index.html>.

⁵⁰ PETER TAYLOR, *BEHIND THE MASK: THE IRA AND SINN FEIN* 155 (1997).

⁵¹ John Gray, *A dangerous Step in a Dangerous Place: Locking up Suspected Terrorists in Ulster Caused Mayhem the Last Time it was Tried*, *GLOBE AND MAIL* (Can.), Aug. 23, 1988.

The United States should not again repeat Britain's mistakes in Northern Ireland.

VII. WHAT ARE THE RISKS OF REPLICATION—AND MISUSE—OF SUCH A SYSTEM ELSEWHERE?

The United States has long criticized other nations' use of preventive detention to detain without charge or trial.⁵² But as Guantanamo has demonstrated, the United States' capacity to pressure others to change course is significantly diminished when it is viewed as adopting the very practices it condemns. U.S. diplomats in several countries have complained of being unable to challenge round-ups and detentions without trial because of Guantanamo. When a Human Rights Watch researcher raised concern about U.S. silence over the use of detentions without charge in Malaysia, a senior State Department official replied, "[w]ith what we're doing in Guantanamo, we're on thin ice to push on this."⁵³

To make matters worse, other countries affirmatively point to the United States' wrongful practices as role models for their own. "[E]very morning I pick up a paper and some authoritarian figure, some person somewhere is using Guantanamo to hide their own misdeeds," explained Colin Powell in his discussion of why Guantanamo needed to be closed.⁵⁴ And, in fact, a long list of leaders—including Zimbabwe's Robert Mugabe, Russian President Vladimir Putin, Bashar al-Assad of Syria, and Iran's

⁵² See, e.g., Press Release, U.S. Dep't of State, Malaysia—Detention of Opposition Activists (June 5, 2001), available at <http://www.state.gov/r/pa/prs/ps/2001/3273.htm> ("The United States understands the Malaysian government has ordered that four opposition activists arrested under the Internal Security Act in April be transferred to a detention camp, where they could be held for up to two years [without charge]. . . . The United States is deeply concerned about the detentions, which seem intended to prevent the detainees, against whom there are no criminal charges, from exercising internationally recognized rights of free speech, political expression, and assembly. The detainees should either be released or charged in open court."); DEP'T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES—2006 4 (2007) (observing that "[t]he [Malaysian] constitution stipulates that no person may be incarcerated unless in accordance with the law. However, the law allows investigative detention, designed to prevent a criminal suspect from fleeing or destroying evidence while police conduct an investigation. Several laws also permit preventive detention to incarcerate an individual suspected of criminal activity or to prevent a person from committing a future crime. *Such laws severely restrict, and in some cases eliminate, access to timely legal representation and a fair public trial.*" (emphasis added)).

⁵³ HUMAN RIGHTS WATCH, IN THE NAME OF SECURITY: COUNTERTERRORISM AND HUMAN RIGHTS ABUSES UNDER MALAYSIA'S INTERNAL SECURITY ACT 1 (2004) (quoting a Senior U.S. State Department Official), available at <http://hrw.org/reports/2004/malaysia0504>.

⁵⁴ *Meet the Press: Colin Powell*, *supra* note 39.

Mahmoud Ahmadinejad—have all pointed to Guantanamo to deflect attention from human rights abuses in their own countries.⁵⁵

Malaysia's justification of its system of detention without charge or trial under its Internal Security Act (ISA) sounds eerily similar to the claims made by preventive detention supporters in the United States. "To bring these terrorists through normal court procedures would have entailed adducing proper evidence, which would have been difficult to obtain," explained Malaysia's former Prime Minister Mahathir Mohamad in 2001, a sentiment that carried over to the successor government.⁵⁶ "ISA is preventive. You could not, therefore, go to court [to charge the detainees with a crime]," explained cabinet minister Datuk Mohamed Nazri to Human Rights Watch in July 2005.⁵⁷

Clever dictatorial leaders around the world will almost certainly cite the U.S. preventive detention regime as a model for their own abusive practices. And the United States will have little standing to object.

CONCLUSION

Identifying potential weaknesses and hurdles to the use of the criminal justice system is easy. But setting up a new system of detention is hard. A system that discards basic due process protections is not a solution. In contrast, a system that maintains these basic protections ends up looking a lot like the criminal justice system, but without the public buy-in, without providing the finality of a criminal conviction, and without the centuries of rules, procedure, and precedent to draw on.

Everyone need not agree with all of the answers provided here, but everyone should be asking the hard questions: will a system of preventive detention really solve the problem the United States is trying to address? Or will it merely create bigger problems that must then be solved?

As Colin Powell explained in discussing why Guantanamo should be closed. "[W]e have shaken the belief that the world had in America's justice system by keeping a place like Guantanamo open and creating things

⁵⁵ See Interview with Vladimir Putin, President of Russia (June 4, 2007), *available at* http://www.kremlin.ru/eng/speeches/2007/06/04/2149_type82916_132716.shtml; Interview with Bashar Assad, President of Syria (Aug. 29, 2005), *available at* <http://www.spiegel.de/international/spiegel/0,1518,druck-372131,00.html>; Press Release, President of the Islamic Republic of Iran, Message of H.E. Dr. Mahmoud Ahmadinejad, President of the Islamic Republic of Iran, to the American People (Nov. 26, 2007), *available at* <http://www.un.int/iran/pressaffairs/pressreleases/2006/articles/13.htm>.

⁵⁶ SAHR MUHAMMED ALLY, HUMAN RIGHTS WATCH, DETAINED WITHOUT TRIAL: ABUSE OF INTERNAL SECURITY ACT DETAINEES IN MALAYSIA 3 (2005), *available at* <http://www.hrw.org/reports/2005/malaysia0905>.

⁵⁷ *Id.*

like the military commission. We don't need it, and it's causing us far damage than any good we get for it."⁵⁸

The creation of an entirely new system of detention without charge within the United States will similarly cause more harm than good. It's time to stop experimenting. Let's use the system that we know works.

⁵⁸ *Meet the Press: Colin Powell*, *supra* note 39.