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© Reuters/POOL New -A Guantanamo guard stands inside doorway at Camp 6 detention facility at Guantanamo Bay U.S. Naval Base.

Designing Detention **A Model Law for Terrorist Incapacitation**

Benjamin Wittes
Colleen A. Peppard

Over the past several years, the non-criminal detention of Al Qaeda and Taliban captives at Guantánamo Bay, Cuba has sharply divided the American polity. However, a consensus is beginning to emerge in the public and political spheres on the non-criminal detention of terrorist suspects. In the following paper we attempt to imagine an administrative detention law at the granular level of actual legislative language, offering a model law for terrorist incapacitation. The model law attempts to address all of the major questions that a statutory approach to detentions will have to answer, including questions of who falls within the detainable class, what evidentiary and procedural rules should govern detentions, what role the courts should play in reviewing them, and how the system should handle classified information.

The model law is an attempt to move terrorist detentions away from a strict law-of-war model and towards one better tailored to America's long-term struggle against global terrorism. At its core, the model law is designed to provide the executive branch with a targeted and highly regulated detention authority supplemental to the authority provided by the laws of war. This new authority is aimed principally at those suspected terrorists captured outside of zones of active military operations. While it is aimed primarily at future captures, we offer it with the hope that it may also provide a useful and fair mechanism for the disposition of some non-trivial number of current cases, including those of some of the Guantánamo detainees.

The model law allows the executive branch a fairly liberal initial, 14-day detention authority, one useful in the short term for the disruption of terrorist plots, that grows significantly more rigorous if the government decides to seek a longer-term incapacitation. When the president seeks longer-term detention, he petitions a federal district court for a detention order and thereby invokes a detailed set of procedures. If the district court approves the president's petition, the court issues an order authorizing detention for up to six months. This process may be repeated every six months until the president or the court determines that the detainee no longer meets the criteria established in the model law, or until the president transfers the individual for trial, release, or to foreign custody

Introduction

A consensus is beginning to emerge in the public and political spheres concerning the non-criminal detention of terrorist suspects. Over the past several years, non-criminal detention of Al Qaeda and Taliban captives at Guantánamo Bay, Cuba has sharply divided the American polity. Since the change in administration, however, it has become increasingly clear that the United States – even under a Democratic administration and with substantial Democratic majorities in both houses of Congress – is not going to abandon long-term detention of terror suspects and revert to a pure law enforcement model for incapacitating them, and it is not going

to deal with the population of Guantánamo on the basis of freeing everyone whom it cannot prosecute. While the developing consensus still has many dissenters, the real question now is not whether America will have some detention system, but what sort of detention system, designed by whom, and using what rules.

In his recent speech at the National Archives on national security strategy and law, President Obama placed himself solidly within this emerging body of thought. He recognized that protecting our national security may require a non-criminal detention system for terrorists who cannot be tried but are too dangerous to release. And he made clear that this system needs to be fair and rigorous, supervised by the federal courts and created by an act of Congress. The president called for a system that has “clear, defensible, and lawful standards,” “fair procedures so that we don’t make mistakes,” and “a thorough process of periodic review, so that any prolonged detention is carefully evaluated and justified.”¹

This paper, and the model legislative text we have attached as an appendix, is an effort to imagine such a regime at the granular level of actual legislative language. Much commentary and speculation has focused on the form that this new regime should take, rather than on the details of the many questions a detention regime will need to address. In the wake of the Supreme Court’s decision in *Boumediene v. Bush*,² it is inevitable that federal judges will ultimately oversee any such detention system. Aside from this one general feature, however, the framework for the new system remains wide open in any number of respects.

The necessity of a preventative detention apparatus is the result of the unique nature of America’s conflict with transnational terrorist organizations and the limits of existing laws, both international and domestic, in responding to current threats. Defense Secretary Robert Gates recently testified that, after Guantánamo closes, there will remain a residual group of 50 to 100 Guantánamo detainees who cannot be tried yet are too dangerous to release.³ Yet the structural issues that generate this group actually implicate a larger population than those currently held at Guantánamo. Any new detention regime will need to address not only Guantánamo detainees but also similar detainees held elsewhere and other terrorists captured in the future outside of zones of active military operations.

The debate over what to do both with these residual Guantánamo detainees and with future captives in global counterterrorism operations has largely focused on which legal regime should serve as the reference guide. Commentators from across the spectrum have debated the merits of the law-of-war versus the criminal-law paradigms. But except in the broadest terms, this debate does little to advance the discussion on how exactly we should detain suspected terrorists – or, indeed, how we should define the category of suspected terrorists we mean to detain.

Meanwhile, advocates of a non-criminal detention scheme have tended to focus on the possibility of creating a national security court. Proponents argue that a national security court could bridge the divide between the law-of-war and criminal-justice paradigms, using elements of both to create a new system responsive to modern security threats. A national security court would be staffed



Benjamin Wittes is a senior fellow in Governance Studies at the Brookings Institution.

Colleen A. Peppard served as a Judiciary Fellow for Senator Joseph I. Lieberman and a graduate of New York University School of Law.

by federal judges, buttressing the legitimacy of any detention regime. It could address issues such as the protection of classified information and the consideration of evidence which federal courts would normally exclude from criminal proceedings. Suggested national security court models have ranged from a stand-alone institution comparable to the Foreign Intelligence Surveillance Court to simply giving exclusive jurisdiction over detention cases to the federal district court in the District of Columbia. National security court advocates have suggested their use to oversee wartime detentions, to conduct trials for suspected terrorists, or both.

Yet national security court critics have argued that such proposals are significantly underdeveloped in both form and function. As one opponent writes, these proposals are “dangerously myopic proxies for larger debates that must be resolved *first*.”⁴ And the critics have a point. Many proposals for national security courts offer an institutional solution (creating a new court) for what is really a substantive set of problems: We, as a society, have not yet decided on the rules that will govern terrorist detentions. We have not yet decided the substantive standards, procedural elements, or rights of the accused within the processes in question. These issues are far more important than what building the adjudication will take place in or what to call the institution that will do the adjudication.

Given that there will be a residual group of Guantánamo detainees and that the president intends, as he put it, to “work with Congress to develop an appropriate legal regime” to govern their detentions, now is the time to answer these important questions. Jack Goldsmith, in a paper earlier this year, identified several key questions any detention legislation will have to address:⁵

- Who falls within the definition of the detainable class?
- What are the evidentiary and procedural rules?
- How much of the proceedings should take place in public?
- How often should detention decisions be reviewed?
- What rules should govern access to classified information?
- Should the court be a stand-alone institution?
- Should the court make first-order detention decisions or review detention decisions made by the military?

In this paper, we do not intend to argue for a preventative detention regime but, rather, to design one – to pose one set of answers to these questions with sufficient precision to produce actual legislative language. For those unconvinced of the necessity of such a law, there is a voluminous literature – including several works by one of the present authors.⁶ Our aim here is to elaborate on this previous work, on the work of other writers and scholars, and on subsequent legal developments in both U.S. courts and international jurisprudence in an effort to address Goldsmith’s questions head on. That is, we aim to begin the process of translating the emerging consensus that some detention apparatus is necessary

into actionable legislation, to bring the debate down from a high-altitude argument over first principles to a more practically useful discussion of what a coherent approach to non-criminal terrorism detentions ought to look like. The attached model detention law is a further effort to translate the choices we put forward into actual legislative language, which we offer as a kind of discussion draft as Congress begins to contemplate President Obama's request.

In addressing the design elements of a detention law, rather than arguing for one, we necessarily take as given several assumptions that many readers may still regard as premature. First, we assume that the laws of war do not offer an adequate legal framework for the detention of terrorist suspects. The detention system they envision relies on numerous premises which do not hold true for conflicts with global terrorist organizations – for example, that it is fairly simple to distinguish those who are participating in hostilities from those who are not, that the nationality of the participants should determine their rights, and that conflicts will end in an identifiable manner. Conflicts with terrorist organizations buck these premises, and therefore render the framework provided by the Geneva Conventions incomplete, and arguably ill-suited, for a long-term conflict with Al Qaeda.

Second, we assume that reliance solely on domestic criminal law to incapacitate transnational terrorists is untenable. The rules of procedure and evidence for criminal trials create too high a bar to detain terrorists arrested in the far corners of the earth under circumstances less than favorable for the collection of evidence. People against whom evidence may not come close to proving criminal culpability may still pose an unacceptable danger as a result of frankly-acknowledged allegiance to enemy organizations, evidence that would be inadmissible in criminal proceedings, or evidence that cumulatively falls short of proof beyond a reasonable doubt of criminal conduct. Efforts to shoehorn terrorism cases into the criminal justice system may also have serious negative repercussions for the conduct of domestic criminal trials more generally.⁷ We assume, in short, that the appropriate detention regime for counterterrorism purposes will draw on both the criminal-law and law-of-war traditions but is ultimately very much its own animal.

We proceed in five parts. In the first section, we lay out a general overview of the model detention statute we envision, how it would work mechanically and what the legal process under its terms would look like. In the second section, we discuss the model law's definition of the class of people subject to detention. We next turn to the details of the procedures the model law would employ to adjudicate terrorist detentions. In the penultimate section, we discuss briefly the various accountability mechanisms we have sought to build into the model law. Finally, we conclude with a set of observations concerning how the model law would help insulate traditional wartime detentions from probing post-*Boumediene* judicial review and preserve a zone of executive discretion for such detentions.

Structural Overview

At its core, the model law is designed to provide the executive branch with *a detention authority supplemental to the authority provided by the laws of war*. This authority is aimed principally at those suspected terrorists captured outside of zones of active military operations, such as Iraq or Afghanistan. We take as a given that individuals captured within zones of military operations may continue to be held pursuant to the Geneva Conventions and the customary laws of war. That said, the model law contains no impediment to the executive branch's use of it with respect to battlefield detainees if it so chooses. By design, in fact, we make no attempt whatsoever to define the legal parameters of law-of-war detentions or to police the line between the authority created by the model law and the authority residing within the laws of war. Faced with a captive whom the military might plausibly argue is subject to detention under the laws of war, the executive branch would have a choice as to which legal regime to invoke. If it wished to proceed under the laws of war, and thereby risk further extensions of federal habeas jurisdiction into military affairs, it would be free to do so under this proposal. On the other hand, this detention authority is designed to offer an alternative, one under which the executive branch would accept up-front review by the courts, using more rigorous procedures, in exchange for the safe harbor of detentions *supported both by clear and detailed congressional authorization and pre-approval by a federal judge based on factual findings*.

In short, we rely on the incentive structure facing the executive branch today to police the boundaries between detentions under this system and detentions under the laws of war. Our hope is that the continuing litigation risk the government faces in habeas cases for non-battlefield detainees held under the laws of war will create a significant incentive for the government to use this detention system. This would provide significant benefits to the detainees, who would get timelier, more probing, and more frequent federal court review. It would also benefit the government, which could better insulate law-of-war detentions from federal court review by removing the detention cases most likely to make adverse law – those involving suspects captured far from overt hostilities – to a federal court environment that proceeds on more certain, better-defined grounds and with the judiciary implicated in detentions from the outset.

This latter point is critical and informs an important structural judgment in the model law. Current habeas review of detentions proceeds, loosely speaking, on an administrative law model. The executive branch uses internal procedures to decide whether detainees are properly held. The detainee then challenges his detention, and habeas litigation – often years later – reviews the designation. The judges who hear these habeas cases had no involvement in the initial detention decision, which was often made with only a limited sense of how robustly it would later stand up in federal court. Thus, when the courts finally confront detentions, the records tend to be weak, the elapsed time long, and the judiciary has no investment in their integrity. This structure differs significantly from other preventive detention

judgments supervised by American courts—for the seriously mentally ill, for sex offenders, and in pretrial detentions, for example. Under those regimes, the judicial approval *authorizes* the detention at the front end, rather than reviewing its propriety at the back end.

We aim to bring terrorist detentions into line with this more sensible approach. As a consequence, the model law places judicial review at the outset of a long-term detention and forces the government to go through it again and again on a regular basis as long as the detention persists. This would serve several purposes. It would, first, clarify for the executive that it is speaking to a federal court from the very opening of a covered detention case. Second, it would implicate the judiciary in that decision from the beginning. The appellate courts would not be asked to defer to executive discretion in approving a detention but to a considered set of factual findings by a federal district court judge. The result should be both more professional evidentiary collection and presentation on the part of the government and less of a tendency on the part of the judiciary to move the goal posts.

It is unclear at this stage how much application the model law would have for the residual Guantánamo population. Not having access to classified material—or even unclassified habeas returns, which remain under seal—we do not know whether the procedures we describe here would help resolve a substantial number of the Guantánamo cases or not. That said, it is easy to imagine the model law’s invocation with respect to a bloc of detainees at the naval base—specifically, those who cannot be released, cannot plausibly face criminal trial, and for whom the prospect of further habeas litigation has the potential to render adverse precedential decisions. Our goal in the model law is to offer a fair set of procedures aimed primarily at future captures with the hope that it may also provide a useful and fair mechanism for the disposition of some non-trivial number of current cases.

Another important premise in the design of this law is Matthew Waxman’s caution that any administrative detention law should be carefully crafted in light of the purpose of such detention.⁸ While one major motivating factor behind the Bush administration’s detention regime may have been intelligence gathering, the Supreme Court has held that long-term detention for the purpose of interrogation is not authorized by the Authorization for the Use of Military Force (AUMF).⁹ The purpose we propose for detention is, first, the incapacitation of terrorists and, second, the disruption of terrorist plots. Intelligence-gathering may be a significant collateral benefit of detention in any number of cases, but it is just that: a collateral benefit, not the strategic object that underlies the design elements of the regime.

The model law relies on one other basic threshold decision: It excludes from its coverage U.S. citizens and lawful immigrants. Some commentators have argued for including U.S. citizens in any detention regime on grounds both that American citizens are no less likely than foreigners to be involved in terrorism and that their inclusion would serve to discipline the policy process to ensure that the resulting system is fair.¹⁰ While these concerns are weighty, we believe the proper structure

for the preventive detention of citizens and resident aliens may differ in significant respects from the appropriate rules for non-U.S. persons. This latter group constitutes the overwhelming bulk of the policy problem the executive branch has faced to date. We therefore confine the current model law to this population with the recognition that Congress may wish to enact parallel legislation covering citizens to the extent the criminal law and the laws of war do not offer an appropriately tailored detention authority for American nationals.

The model law's structure reflects these fundamental judgments. It allows the executive branch a fairly liberal initial detention authority, one useful in the short term for the disruption of terrorist plots, that grows significantly more rigorous if the government decides to seek a longer-term incapacitation.

Once the president identifies a non-U.S. person whom he reasonably believes poses an imperative threat to security, a term whose definition we discuss at length below, he may detain that person for up to 14 days before seeking judicial authorization for further detention [See Section 3(a)]. This initial period of detention will both allow the executive branch to disrupt terrorist activity and to gather evidence and consult with U.S. and foreign intelligence services for purposes of justifying longer-term detention. In the 14-day period, the president is entitled to hold the individual without publicly disclosing his apprehension. While controversial, this grace period is designed to allow for the apprehension of associates or other actions that might be frustrated should news of the capture leak out to confederates.

If the president seeks to continue to detain the individual beyond the initial 14-day period, he must petition the federal District Court for the District of Columbia to issue a detention order under the authority the model law grants it [See Section 3(d)]. If the district court approves the president's petition, the court issues an order authorizing the president to detain the individual for up to six months [See Section 4(e)]. This process may be repeated every six months until the president or the court determines that the individual no longer meets the criteria established in the law, or until the president transfers the individual for trial, release, or to foreign custody.¹¹

Defining the Detainable Class

As noted above, the purpose of any administrative detention regime should inform its structure; in particular, it should inform the manner in which Congress defines the class of people subject to detention in the first place. The model law aims both to permit the long-term incapacitation of terrorists and the disruption of ongoing terrorist plots. Consequently, we have sought a definition of the detainable class that permits the government to accomplish both of these objectives without permitting the detention of people who are merely politically unpopular, ideologically sympathetic to the enemy, or even active in violent activity outside the scope of America's war on terrorism.

Some of the contention between those who advocate a law-of-war paradigm and those who advocate a criminal-law model involves the divergence between the substantive grounds for detention that each entails. Generally speaking, military detention is rooted in associational status with a particular enemy entity, while criminal detention is based on individual conduct. In World War II, for example, a German soldier could be detained merely because he was a member of the German armed forces. Detention required no proof of what that soldier did, merely how he was associated with the opposing force. As described above, the conflict with Al Qaeda and other terrorist organizations differs in fundamental respects from prior conflicts. Therefore, creating a workable definition of the detainable class requires some degree of rethinking of the associational status and conduct-based detention models.¹²

Reflecting this tension, the definition of “the enemy” has gone through numerous iterations over the past several years both within the executive branch and in the courts. The Bush administration’s definition of the enemy, which it adopted for the Combatant Status Review Tribunals (CSRTs), permitted the detention of any individual who was “part of or supporting Taliban or Al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.”¹³ This definition generated a lot of controversy, partly because the terms “part of,” “supporting,” “associated forces,” and “coalition partners” all remained wholly undefined and therefore potentially sweeping in scope. President Obama has only slightly altered the previous administration’s definition, modifying “supported” with the word “substantially” and specifically including those who can be tied to the September 11 attacks. Thus, under the Obama definition,

The president has the authority to detain persons that the president determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The president also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.¹⁴

In practice, the Obama administration’s definition will not significantly limit the detainable class in any identifiable manner. Since the term “support” never had clear meaning, “substantial support” sheds little light on the limits of the executive branch’s detention authority. Judge Reggie Walton has written that “[r]eplacing a standard that authorizes the detention of individuals who ‘support’ an enemy organization with a standard that permits the detention of individuals who ‘substantially support’ that enemy doubtless strikes the casual reader as a

distinction of purely metaphysical difference, particularly when the government declines to provide any definition as to what the qualifier ‘substantial’ means.”¹⁵

Complicating matters is the fact that the various judges who are adjudicating the habeas cases have adopted competing definitions of the detainable class. Some judges have accepted the administration’s definition, while others have narrowed it based on their own interpretations of whom the administration can lawfully subject to detention under the laws of war. Recently, for example, Judge John Bates held that the laws of war do not allow for the detention of those who substantially supported enemy forces, nor do they allow for the detention of those who directly supported hostilities. The judge’s opinion rejected the president’s argument that any variant of “support” constitutes a valid basis for detention under the laws of war. Judge Bates, rather, limited the permissible grounds for detention to those who were part of or members of opposing forces, and those who directly *participated* in hostilities.¹⁶

One judge has scrapped the executive branch’s definition altogether and attempted to craft new criteria delineating the scope of the authority to detain under the laws of war. In a thoughtful discussion, Judge J. Harvie Wilkinson analyzed how the term “enemy combatant” comports with the laws of war. Judge Wilkinson concluded that the laws of war allow for the detention of an individual who is (1) a member of (2) an organization or nation against whom Congress has declared war or authorized the use of military force, and (3) knowingly plans or engages in conduct that harms or aims to harm persons or property for the purpose of furthering the military goals of the enemy nation or organization.¹⁷ Judge Wilkinson wrote that the first two prongs, membership and congressional authorization for the use of force, identify the “enemy,” while the third prong is a conduct-based test for determining who qualifies as a “combatant.”

Commentators have suggested other approaches to defining the enemy, adopting both status- and conduct-based triggers for detention. In a recent article, for example, Jack Goldsmith argued that detention could be based on an individual’s membership in the command structure of an organization covered by the Authorization for the Use of Force or on an individual’s direct participation in hostilities.¹⁸

The United States is not the only nation struggling with this issue. In a recent opinion, the Israeli Supreme Court upheld a law which allows for the incarceration of “unlawful combatants,” who in the Israeli context are captured members of Hezbollah. The Israeli Incarceration of Unlawful Combatants Law authorizes the detention of an individual who “participated either directly or indirectly in hostile acts against the State of Israel or is a member of a force perpetrating hostile acts against the State of Israel.” The law allows for the detention of individuals who fulfill the above criteria only when their release would harm state security.¹⁹

Although Judge Wilkinson’s opinion and the Israeli law’s definition diverge in some legally significant respects,²⁰ there are certain common themes which are important for our analysis. As David Cole has noted, both the Israeli Supreme

Court and Judge Wilkinson's opinion only allow for detention within the context of an armed conflict between a hostile group and the detaining state, which is an important limiting factor in any administrative detention law. Further, neither definition allows for the detention of "supporters" of enemy forces or hostilities.²¹ Both definitions wrestle with associational status versus conduct as the basis for detention, with the Israeli court allowing for the detention of someone who fulfills *either* of the tests for associational status or conduct, but Judge Wilkinson's opinion requiring *both* the requisite status and requisite conduct to trigger detention.

One can glean several lessons from the progression of definitions which both the executive and judicial branches have put forth. For present purposes, two are particularly important. First, the nature of the conflict against Al Qaeda makes problematic any purely associational definition of the detainable class, especially when the terms of such association are not clearly defined. Membership is often informal and unacknowledged in terrorist groups, and concepts such as support and association have a way of metastasizing the detainable class until it includes—at least formally—people too far outside of the command structure to warrant detention. The courts are compensating for this problem by requiring both a relatively close association between the individual and the organization and by analyzing the individual's conduct in relation to hostilities as a part of the threshold for detention.

Second, the courts' interpretation of the permissible scope for the detention of belligerents under the laws of war has had a significant limiting effect on the executive's authority. Labeling terrorists as combatants was intended to give the executive branch broad discretion to detain enemies for the duration of hostilities, but as the courts continue to hear these cases, that label is paradoxically *narrowing* the range of permissible detentions and perhaps even preventing the incapacitation of people who pose an imperative threat to the security of the United States. This is because the courts are only analyzing one aspect of the detention authority under the laws of war: the authority to detain combatants. Yet the laws of war also allow for detention of other categories of individuals, including civilians who pose a security threat. And while some terrorism detainees, when one examines their activities, look a great deal like traditional combatants, others look more plausibly like civilians who are operating on behalf of the enemy in a fashion that imperils security. Our point here is not that America should treat all terrorism detainees as civilian internees, just that the insistence of both administrations on viewing them through the lens of combatancy is needlessly confining. The laws of war themselves are not the only plausible basis for detention, and the detention regime best suited to terrorism need not be defined by their terms.

Some commentators have recognized the limits of a purely military detention authority and have proposed new definitions, informed by the laws of war, but not confined by their terms. One of the present authors proposed, for example, that the definition of the detainable class should include those who are members or

associates of opposing forces and are dangerous for that reason.²² The definition we propose in the model law draws on the lessons learned in the developing jurisprudence of detention and on the thoughtful proposals made by various commentators. We acknowledge that any workable definition should draw on both status-based criteria – the relationship an individual has with an enemy force – and conduct-based criteria – the actions that the individual has committed. However, we also recognize that reliance on the laws of war, or even on terms derived from those laws, to identify “combatants,” at once limits the detention authority available to the executive branch and paradoxically gives it *too much* authority to detain small fry people who may meet the associational definition of “combatant” yet who pose no real danger. Finally, any definition should rely on terms which both provide the courts with workable guidelines as to the individuals targeted for detention, and give the courts some measure of flexibility to allow for a judicial assessment of who poses a true threat to our security.

We consequently propose a three-prong test, which aims at both providing greater clarity for the judiciary and at moving away from a strict law-of-war detention model. The model law authorizes the detention of an individual who is (1) an agent of a foreign power, if (2) that power is one against which Congress has authorized the use of force, and if (3) the actions of the covered individual in his capacity as an agent of the foreign power pose a danger both to any person and to the interests of the United States [See Section 4(b)].

We propose “agency” as the requisite associational status for reasons of clarity and in recognition that people who pose grave dangers to American interests, troops, and civilians have a wide range of associational relationships with the enemy. Some are plausibly combatants, others far less so. Some are “members” of Al Qaeda; others are not, at least not in any formal definable sense. Some have taken direct part in hostilities; others have spent their time in safe houses far from the battlefield arranging transport of recruits; some have traded in weapons or trained recruits in terrorist tactics. What they all have in common – except perhaps the lone wolf terrorist or isolated terrorist cell merely inspired by the enemy but working entirely on its own – is that they are all *working on behalf of the enemy*, that is, acting as its agents. Conveniently, American national security law has an excellent, well-developed, and flexible tool – albeit in a different context – to describe such people.

The Foreign Intelligence Surveillance Act (FISA) relies on the concept of an “agent of a foreign power” as a trigger for electronic and physical surveillance of suspected spies and terrorists. By employing FISA’s definition as a threshold criterion for detention, we mean to tap into the rich interpretive history under that statute that explores the nature and quality of interactions between individuals and organizations that trigger lawful government interventions. The FISA definition covers individuals who knowingly engage in clandestine intelligence activities or engage in international terrorism or activities in preparation therefore. In addition, the definition includes those who knowingly aid or abet or conspire to

engage in terrorism or clandestine intelligence activities.²³

Not all agents of foreign powers, of course, are subject to detention under the model law. The quality of the foreign power in question matters greatly. We are not aiming to authorize the detention of a spy for Russia or even a Hamas terrorist suspect – both of whom are plausible surveillance targets under FISA. Rather, the *only* foreign agents subject to detention under the model law are those operating on behalf of those nations, organizations or persons against which Congress has authorized the use of military force. The AUMF is essential not chiefly because it implicates the executive’s war powers, though presidential war powers surely bolster the constitutional validity of the model law’s detention regime. More importantly, the second prong of our three-part test serves to distinguish those entities which are merely dangerous or foreign from those which pose such a significant threat that the legislative branch of America’s government has determined they require a response that goes beyond the coercive powers of the criminal law.

Exactly which groups fall within the category covered by the AUMF is, of course, another disputed area. The model law, therefore, creates a reporting requirement, under which the executive branch would have to update Congress every six months on the organizations it considers covered by the AUMF [See Section 6]. This list is not meant to be exhaustive, as rapid evolution is a trademark of enemy terrorist organizations, and new groups are constantly cropping up that the military needs to evaluate as potential co-belligerents with Al Qaeda or the Taliban. However, the provision will require the executive branch to engage in regular evaluations of those groups it considers to be covered by the congressional authorization and to list them publicly. This requirement roughly approximates the designation of foreign terrorist groups for purposes of the criminal ban on providing material support to foreign terrorist organizations. As the identification of foreign threats is an essentially executive function, the model law directs the courts to give deference to the determinations reached by the executive branch [See Section 4(c)]. Both to protect against utterly capricious designations and to give the executive branch latitude to argue that groups it has not yet listed are covered by the AUMF, we have not required that the courts consider the list conclusive.

The model law’s detainable class has an additional limiting factor. The final criterion requires that the individual’s conduct on behalf of the terrorist organization must pose a danger *both to any person, and to the interests of the United States*. The inclusion of a dangerousness test is important because it allows judges to make a reasoned appraisal of the threat the individual poses and because it grants judges the discretion to decide when an individual’s dangerousness no longer tips in favor of continued detention. The specific character of the dangerousness prong is also significant. It is not enough for an agent of Al Qaeda to pose a danger by, say, engaging in domestic violence. *The danger must flow, rather, from his conduct as an agent of a foreign power*. Moreover, it is not enough for the subject’s activities to pose a danger to another person. *It must also threaten the*

interests of the United States. We included this language to exclude from the coverage of the model law people like the Guantánamo Uighurs. They might plausibly be labeled agents of a foreign power that is allied in some loose sense with the Taliban and engaged in activities that pose a danger to Chinese civilians and interests, but they cannot reasonably be said to be engaged in activities that threaten *American* interests. The idea is to focus only on people whose activities are both menacing and in some meaningful sense a part of the conflict in which America is engaged.

We anticipate any number of objections to this definition of the detainable class. Two warrant preemptive responses. The first is that it is either too narrow – that is, unduly constricting of the president’s detention powers – or that it is too broad and thereby permits too much detention. To those concerned that its coverage is scanty, remember that this authority would supplement, not replace, whatever power to detain the enemy the president has under the laws of war. Nothing compels the president to invoke this detention regime. While our hope is that it would provide a detention power sufficiently flexible that the safe harbor it offers would make it attractive for that category of detentions that pose the greatest challenges under the Geneva Conventions, the president would remain free to take his chances under current law if he felt the need to detain someone who fell outside of this class. In other words, unless invoked by the president in the first place, it does not constrict the president’s detention powers at all.

To those concerned that its coverage is too broad, by contrast, we turn the challenge around. We have struggled to imagine the person who genuinely meets all three of these criteria yet whose detention would be unreasonable, inappropriate, or unconstitutional under current Supreme Court doctrine. We have failed. That said, we stand ready to amend the definition should such a hypothetical case come to light. As it stands, the definition represents our best effort to define the detainable class with sufficient precision as to exclude from its coverage those people American counter-terrorism policy ought either to leave alone or to deal with by means short of detention.

The second objection, we expect, will be that the concept of “dangerousness” is too diffuse and lacks clear definition. This point has merit. Assessing a person’s dangerousness is inherently a speculative inquiry. That said, it is a speculative inquiry in which courts engage frequently in the context of pre-trial detention,²⁴ immigration detention,²⁵ and the civil commitment of the mentally ill.²⁶ Experience with these detention regimes has not shown dangerousness to present an unworkable inquiry for judges. To the contrary, these judgments happen every day without stirring particular controversy, suggesting that the concept offers a flexible intellectual device for balancing risks to individuals with larger risks to society.

Procedural Outline

The range of possible procedural approaches to non-criminal detention spans a

great deal of territory. At one end of the spectrum is a process that approximates a criminal trial in its procedural rigor and substantive burden of proof – the difference being only that the criminal process assesses proof of the elements of an offense, whereas this parallel process would assess proof of the identified criteria for detention. At the other end of the spectrum, by contrast, Congress could take the position that it wishes to afford detainees the bare minimum of process the Constitution will tolerate, thereby facilitating the maximum amount of detention conceivably permissible under American law. Working up from the constitutional minimum, rather than down from full-fledged criminal trial, makes sense; after all, there is little reason to have a separate detention regime if it simply mimics the requirements of the one America already has. The trouble is that pinning down the minimum constitutional requirements for a detention system is not easy – and the target is not fixed but ever-shifting.

The courts are still in the early stages of writing the procedural rules for the Guantánamo habeas corpus cases, with the lower courts struggling with any number of basic questions regarding how to proceed with the review of the detainees' cases. The Supreme Court has provided only the broad-strokes outline for how habeas courts should proceed, writing in *Boumediene* a few of the minimal procedural components required, but defining none with particular precision. The majority opinion made clear that the review must give the detainee a “meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law.” And this “meaningful opportunity,” the court held, includes giving the detainee the ability to supplement the record with his own evidence, and whatever material exculpatory evidence is reasonably available to the government. If review under any detention statute does not meet these baseline procedural standards, the statute will likely either not survive constitutional scrutiny or will be of marginal relevance, since the real detention determinations will continue to be made by the habeas courts. We therefore take the rather skeletal *Boumediene* instructions as the starting point for our consideration of the procedural rights due the accused in this process.

Our second guidepost for the development of rules of procedure and evidence is the work done by the federal district court in Washington as it has tried to implement the *Boumediene* decision. While common law adjudication is, in our judgment, a suboptimal means of making detention policy, the lower courts have worked conscientiously to create processes that at once give detainees a reasonable opportunity to contest the bases for their detentions and protect the reasonable security needs of the government. This still-nascent body of cases represents the most concentrated effort to think through the problems of actually adjudicating detention cases and provides a rich body of thought for policy-makers to consider.

Our choices in this area also reflect once again Matthew Waxman's caution that the rules in any detention regime should flow from the purpose of the detention law. As discussed above, the model law seeks both to facilitate the disruption of terrorist plots and to offer the government a mechanism for the longer-term

incapacitation of terrorists. Its rules consequently envision two distinct stages, with different procedures tailored to those different purposes. This division also responds to the risk to the liberty of the detainee subject to the model law. As that risk is enormously greater when the government envisions a long-term detention than when the government merely seeks to hold him briefly, the bifurcated process offers a more rigorous review system when the authorized detention time frame is greater.

The first stage is designed to allow the president to disrupt terrorist plots which may be anywhere between the initial planning stages and actually unfolding. It is also designed to permit the administration to take custody of people captured abroad by allied foreign intelligence or law enforcement agencies when the prospect of either a criminal case against them, or continued detention under some other authority, is uncertain. The model law, therefore, gives the president a broad short-term detention authority, free from judicial oversight and with a low standard of proof. During this initial stage, the president must only “reasonably believe” that the detainee meets the criteria established in the three-pronged test described above [See Section 3(a)]. This initial stage of detention offers the government a grace period during which to decide whether and how to proceed with a longer-term incapacitation. The president can proceed by petitioning the district court for further detention, as described below, by referring the detainee for trial by military commission or in an Article III court, by transferring the detainee to another country, or by releasing him [See Section 3(d)(1)].

(It is, of course, possible that the government could end up stuck with certain detainees after this 14-day period – having decided, as with the Guantánamo Uighurs, that it does not need to hold them yet found itself unable to persuade any other country to take them. This, however, is not a problem the law can solve. It is, rather, a diplomatic problem and a caution about the pitfalls of *any* detention regime – including one based on the laws of war or even the criminal law.)

The initial phase of detention has only two significant safeguards. The first and more important is that its duration is short. Unlike traditional military detention, which can persist until the termination of hostilities, detention under this provision is limited to a single 14-day period from the time the executive branch invokes the statute. As a practical matter, this brief time frame may induce a certain caution on the government’s part in moving people from military detention into the new system; indeed, it might even incentivize the holding of people in military detention rather than under the new law until the government is certain that invoking the new law won’t necessitate a quick release. In the long run, to avoid this problem, Congress may wish to consider barring invocation of the model law if the government does not do so promptly on assuming custody of a detainee. For the time being, in an effort to encourage the use of the model law in Guantánamo cases, we have not included such a restriction.

Second, the model law requires that the government furnish the detainee with

information as to the reasons for his arrest, the time limits to which his detention is subject, the ability of the government to petition a court for a longer-term detention order, and the rules and procedures governing his detention and his right to contest that detention. The law requires that all information be provided to the detainee in a language he understands [See Section 3(b)].

Should the president determine that the detainee poses a longer-term threat to the security of the United States, he is entitled to seek judicial authorization for continued detention past the 14 days in the initial phase [See Section 4(a)(1)]. This second stage triggers a much more rigorous set of procedural and evidentiary rules. The model law authorizes continued detention during the pendency of any such petition, so the government will not risk having to free a detainee when the initial detention lapses if the new litigation is not complete [See Section 3(d)(2)]. The result, in at least some cases, will be that the act of requesting a longer-term detention order will itself convey the authority to detain for at least a brief interval while the courts consider the matter.

When the president decides to seek authorization for longer-term detention under the second stage of the model law, the Attorney General submits a petition to the U.S. District Court for the District of Columbia. The petition includes a written declaration detailing the evidence on which the government is relying in order to demonstrate that the detainee meets the three-pronged standard described above [See Section 4(d)(1)]. The government bears the burden of proving its case by a preponderance of the evidence [See Section 4(a)(2)]. This is the evidentiary standard the habeas courts have deemed appropriate for purposes of reviewing law-of-war detentions, given which it seems appropriate as well for purposes of the model law. Unlike law-of-war detentions, detention orders under the model law cannot exceed six months, so the consequences to the detainee's liberty of an adverse judgment, though far from trivial, are significantly less severe than in the current habeas litigation. What's more, as long as the government has the option of litigating cases under the laws of war on a preponderance of the evidence standard, it is implausible to imagine that it would invoke a law authorizing shorter detentions based on a more rigorous showing. As long as the government retains the option of holding people under the laws of war, in other words, Congress probably cannot require more under any other detention and still expect that detention regime to see regular use.

Once the government petitions the court, the model law requires that the detainee receive immediate access to counsel. It directs the Attorney General to maintain a list of lawyers with security clearances adequate for the detention litigations,²⁷ and it authorizes the court to appoint an attorney from that list to represent the detainee. If the detainee wants to retain private counsel, he is entitled to do so, though if the private counsel does not have the appropriate security clearances, he will have to either gain such clearances – which can extend the pendency of the petition and thereby extend the detainee's incarceration – or the court will appoint a security-cleared counsel to handle matters involving classified

information [See Section 4(d)(6)]. The goal is to ensure both that every detainee is ably represented by competent counsel and that this counsel is capable in a compressed litigation time frame of receiving and responding to the government's rather considerable discovery obligations.

The discovery obligations under the model law closely resemble those it already faces in the habeas courts. The practice in the initial habeas cases was for the government to present a factual return to the court and to the detainee's counsel, detailing the facts supporting the government's contention that the detainee was an enemy combatant. If the factual return contained classified information, the court would receive an unredacted version, and the counsel for the detainee would receive a version with some portion of the classified information removed. The litigation over discovery has focused on two main issues: First, counsel for the detainees wanted access to unredacted factual returns, and second, they wanted the disclosure of all reasonably available evidence in the government's possession regarding a given detainee.²⁸ They argued that the habeas courts should adopt the same standard which the courts used in the litigation under the Detainee Treatment Act, in which the D.C. Circuit Court of Appeals required the government to turn over "reasonably available information in the possession of the U.S. government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant," regardless of whether that information was included in the factual return or not.²⁹

Judge Thomas Hogan agreed, holding that upon request, the government must disclose "(1) any documents and objects in the government's possession that the government relies on to justify detention; (2) all statements, in whatever form, made or adopted by the petitioner that the government relies on to justify detention; and (3) information about the circumstances in which such statements of the petitioner were made or adopted." Further, Judge Hogan required the government to turn over "all reasonably available evidence in its possession that tends materially to undermine the information presented to support the government's justification for detaining the petitioner."³⁰

The model law mirrors these requirements, providing for the discovery of (1) any document or object referenced in the petition or written declaration submitted by the government; (2) any evidence in the government's possession that tends materially to undermine information in the petition or written declaration; (3) any statement, whether oral, written, or recorded, made or adopted by the covered individual that is in the government's possession and both related and material to the information in the petition or written declaration submitted by the government; and (4) any other evidence in the government's possession that is both related and material to the information in the petition or written declaration submitted by the government [See Section 4(d)(2)(A)].

If any discoverable information is classified – as we assume in almost all cases that at least some would be – the model law contains procedures for the handling of classified material. Few procedural issues have generated as much controversy

as the protection of classified information in detainee cases. And while the habeas courts have by no means settled the issue, they have adopted a sensible set of processes. The habeas courts have examined three intertwined issues with regard to the disclosure of classified information: first, whether the information is material to the government's case; second, the impact of the information on the detainee's meaningful opportunity to rebut the government's case; and third, the availability of an adequate substitute for the classified material.³¹ The courts have acknowledged that even if evidence is material, it does not necessarily require disclosure so long as a summary or admission is provided which protects the detainee's "meaningful opportunity to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law."³² Congress has already authorized the use of such summaries in at least two acts, the Classified Information Procedures Act (CIPA), and for the Alien Terrorist Removal Court (ATRC) provisions of the Antiterrorism and Effective Death Penalty Act.³³

Underlying the model law's approach to classified information is the fact that security-cleared defense attorneys will, one way or another, always be representing those subject to detention. With that in mind, we have proposed rules designed to maximally protect classified information, specifically the sources and methods which the government uses to obtain such information, while still ensuring that each detainee has the ability to rebut the government's case and granting the public and the press as much access to proceedings and judgments as possible.

The model law starts with the baseline presumption that classified information is protected and privileged from disclosure to the detainee. If there is classified information which is the subject of disclosure, the government will submit to the court a summary of that information or a set of admissions of the facts the information would tend to prove. The court, in consultation with the attorney for the detainee, shall only accept the summary or statement if it is sufficient to allow the detainee to make a defense; this standard is drawn from the ATRC procedures.³⁴ In addition, however, the model law generally requires the government to make any classified information withheld from the detainee available to properly-cleared defense counsel and permits such counsel to participate in proceedings relative to the summaries. If, as has sometimes happened in habeas cases with respect to sources and methods intelligence, the government declines to disclose such information to the attorney for the detainee, it is obliged instead to provide him with a summary or set of admissions. This substitute must be adequate to permit him substantially the same ability to make a defense as would disclosure of the specific information. This standard is imported from CIPA.³⁵ In other words, the model law tolerates the notion that the detainee might have a summary less rigorous than the one granted a criminal defendant under CIPA but insists that his counsel not be left worse off than if the discoverable information were turned over. The model law provides for interlocutory appeal of discovery issues involving classified information [See

Section 4(d)(2)(B)].

To facilitate speedy resolution of cases with minimal interruption of military operations, the model law seeks to encourage the use of written declarations and statements, rather than live witness testimony. Recognizing, however, that courts will often need to hear from witnesses directly to assess credibility and conflicts between testimonies, it directs the District Court to allow in-person testimony if it finds that such presentations will not substantially harm military or intelligence operations and will provide material benefit to the proceedings. If witnesses are located abroad, or otherwise unable to appear in person, the model law authorizes the court to make use of available technological means, such as video teleconferencing [See Section 4(d)(3)].

The final major procedural and evidentiary question is what evidence to admit and exclude, particularly evidence taken in violation of standards of treatment guaranteed to the detainee under domestic and international law. Americans have argued over the issue of evidence derived from torture, ill treatment, or harsh interrogation methods primarily with respect to the military commission system. Congress can, however, not avoid it in the detention arena either. The Military Commissions Act obliges commissions to exclude evidence derived from torture. However, evidence taken in situations involving coercion short of torture may be considered if a military judge finds the evidence reliable and that the interests of justice would be served by its admission.³⁶ The language we propose makes no such exception. On the assumption that detainees in United States custody should be afforded a minimal standard of humane treatment as defined by the Detainee Treatment Act and Common Article 3 of the Geneva Conventions, the model law prohibits the consideration of evidence taken in violation of either [See Section 4(d)(5)(A)].

With the exception of this restriction, however, the model law otherwise permits the consideration of a wide range of evidence and intelligence data. Generally speaking, the model law permits the introduction of hearsay and other material the rules of evidence in criminal and civil cases would normally exclude as long as it would be probative to a reasonable person. However, the law does require that if hearsay is admitted against a detainee, the detainee must be permitted to offer evidence challenging the reliability of the information [See Section 4(d)(5)(B)]. The idea here is that evidence in detention cases often takes the form not of classic courtroom evidence but the looser category of intelligence information. It is often probabilistic in nature, cumulative in impact, and not conducive to presentation in the form of live testimony by first-hand witnesses. To exclude all such material is unrealistic and an inappropriate imposition of criminal-law norms on detentions the government pursues for different purposes and under different authorities. At the same time, there have to be some standards. It would put the courts in an untenable position to ask them to affirm detentions based on evidence collected in violation of the baseline laws governing civilized treatment of detainees. The goal here is to give the government wide latitude to

establish a detainee’s amenability to detention, but not infinite latitude. Further, we should not to place the courts in the position of authorizing a detention based on information when the revelation of that information’s provenance would bring discredit on the courts themselves.

If, after proceedings conducted under these rules, the District Court finds that the detainee meets the detention criteria, the model law instructs it to issue an order authorizing detention for up to six months. Should the executive branch want to continue detention beyond that time frame, the process begins anew – with the burden of proof once again falling on the government to establish the criteria for detention [See Section 4(e)].

Accountability Measures

Nobody knows with a high degree of confidence how any new detention law is likely to work in practice. We are all, to some degree, guessing. It could get mired in new litigation. It could yield detentions in which the public and the courts still lack confidence. By contrast, the procedures could end up being sufficiently rigorous that the government finds the whole apparatus too onerous actually to invoke. Because of the degree of uncertainty, and to maximize public confidence in what will inevitably be a nascent detention system, it is essential that any new detention authority have mechanisms of accountability built into it. The absence of such accountability mechanisms was devastating for the public reputation of the CSRT system, whose work product the public had no real-time vehicle to assess. In the model law, by contrast, a variety of provisions aim to facilitate, even compel, ongoing review of the functioning of the regime and to permit relative transparency in the executive branch’s detention practices.

The model law emphasizes that proceedings should be conducted in public to the greatest extent possible [See Section 4(d)(4)]. This requirement is specifically intended to make sure that non-classified material about a detainee’s conduct – and his own statements about his affiliations and behavior – are available to the general public. The government’s failure to date to treat detainees in the public arena as individuals, people whose cases differed enormously from one another’s, has fostered a damaging impression that the detainees are all alike. The Bush administration termed them the “worst of the worst”³⁷ while the *New York Times* editorial page described “hundreds of innocent men . . . jailed . . . without charges or rudimentary rights.”³⁸ These broad, unsupportable generalizations were possible only because the press and the public more broadly lacked the ability to assess for itself the integrity of government allegations about detainees. To prevent a recurrence of this problem under the new detention regime, the model law requires that the district court publish an opinion identifying the factual and legal basis for a detention order, to the extent it can do so consistent with the need to protect classified material [See Section 4(e)]. At a minimum, this should create a public document in every case certifying that a federal judge, having examined all

of the relevant evidence, signed off on the government's conduct.

As noted above, the model law also requires the executive branch to report to Congress at least every six months on the groups the United States considers to be covered by the Authorization for the Use of Military Force. This exercise is designed in large measure to clarify for the courts the parameters of the second prong of the definition of the detainable class. It also, however, serves an important transparency function, identifying regularly for the public whom exactly the United States considers itself to be at war with.

In addition, the law requires the government to notify the International Committee of the Red Cross (ICRC) when it takes detainees into custody under this law and to provide the ICRC access to them [See Section 3(e)]. This does not represent a change in current policy. The military, after all, provides access to the ICRC to Guantánamo detainees. The purpose of the current provision is to make sure detentions under the new detention regime are conducted openly and in a fashion that brings credit upon the United States before international organizations.

The model law has one additional accountability mechanism: The detention authority sunsets three years after enactment [See Section 8]. This is a deliberate effort to force Congress to examine which aspects of the system are working well, which aspects need improvement, and indeed, to examine whether the system itself ought to continue in existence. As Jack Goldsmith has argued, sunset provisions had a salutary effect on both the independent counsel law, which Congress permitted to lapse, and the USA PATRIOT Act, portions of which the legislature amended in a reauthorization debate.³⁹ It seems a particularly apt instrument here, in a setting in which the stakes are high both for liberty and for security and the variables are many. Importantly, however, the detention authority does not lapse entirely when the law sunsets. It continues in force as to those detainees already in the system, either in the initial phase of detention or locked up under a court order. What lapses, rather, is only the authority to enter *new* detainees into the system – much as the lapsing of the independent counsel law did not effect existing investigations, only the authority to initiate new ones. The idea is that the government should not fear that the lapsing of the statute will require the release of detainees for whom it may have made no contingency plans.

Conclusion

Congress and the Obama administration face a stark problem today over detention: Nobody knows the eventual contours of the judicial review the courts have asserted over detentions carried out by American forces beyond the sovereign territory of the United States. Nobody knows the specific procedural and substantive rules the courts will ultimately employ. Nobody knows the standards to which they will ultimately hold the government. And perhaps most ominously, nobody knows how far beyond Guantánamo judicial review will ultimately follow

the military.


The administration should not count on reasonable answers to these questions emerging from the current spree of habeas litigation. Its litigating position is eroding quickly; the solicitude judges are likely to show for detainees who have already spent many years locked up will tend to push policy toward more probing review; and the similarity of Guantánamo detainees to those held elsewhere will tend to push the courts to expand further the scope of habeas jurisdiction. The longer the government waits to seek a reasonable legislative regime in which the courts can repose confidence, the worse the deal is likely to get.

We anticipate that our proposal will face significant opposition from those who argue that detention decisions should remain under the purview of the military. And broadly speaking, it should. In zones of military operations, the military should retain broad discretion to develop detention policies consistent with the laws of war and it should not have to worry about defending detention judgments before American courts. Ironically, however, *it is only by subjecting to significant legal and judicial processes some detentions America currently treats under the laws of war that the administration and Congress can, in the long run, hope to protect battlefield detentions from further judicialization.* The Supreme Court has held that a subset of current – and presumably future – terrorism detainees have a constitutional right to habeas corpus review. If Congress and the administration continue treating such detainees under the laws of war, it will be very difficult to justify the grossly differential standards under which some detainees will receive no judicial process while others situated virtually identically will receive extensive process. The courts in the long run are likely to resolve this disparity with serial extensions of habeas rights. We have already seen this trend begin. The federal district court in Washington extended habeas rights to certain detainees held in Bagram, Afghanistan.⁴⁰ If the administration and Congress want to arrest this trend before it flowers fully in binding precedents, it will have to draw a line somewhere and distinguish the law-of-war detentions it wishes to insulate from the judiciary from the detentions it is willing to litigate over.

There is no clean way to do this as a matter of law. Geography offers only an imprecise guide, there being no clear definition of where the battlefield begins and ends. The crime-versus-war debate similarly avails the policy-maker little; most terrorists plausibly fit in either box, after all, while others comfortably fit in neither.

Our proposal is designed to alleviate the problem by offering a form of detention tailored for the hard cases the conflict with Al Qaeda and the Taliban has yielded. Our hope is that government invocation of the model law in these cases will leave for the military system only those detentions least likely to provoke substantial judicial intervention.

This strategy depends on the executive branch to opt into an elaborate judicial review mechanism in order to insulate a separate category of cases – and, therefore, also depends on the wisdom of the executive in choosing which detainees belong in which boxes. America already relies on executive judgment in



this regard to a considerable extent. Since September 11, 2001, the executive has used immigration detention, law-of-war detention, and criminal detention frequently in terrorism cases – despite the fact that none of these authorities was crafted to describe the sort of people America now seeks to detain. The model law is an effort to add to the American legal toolbox a detention authority specifically designed for the purpose to which we have deployed these other powers as surrogates. By doing so, we hope to remove some of the burden from each and to permit each to serve the role for which it evolved.

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Governance Studies

The Brookings Institution
1775 Massachusetts Ave., NW
Washington, DC 20036
Tel: 202.797.6090
Fax: 202.797.6144
www.brookings.edu/governance.aspx

About the Authors

Benjamin Wittes is a senior fellow in Governance Studies at the Brookings Institution. He is the author of *Law and the Long War: The Future of Justice in the Age of Terror* (Penguin Press, 2008) and a member of the Hoover Institution's Task Force on National Security and Law. His previous books include *Starr: A Reassessment* (Yale University Press, 2002) and *Confirmation Wars: Preserving Independent Courts in Angry Times* (Rowman & Littlefield, 2006). Between 1997 and 2006, he served as an editorial writer for *The Washington Post* specializing in legal affairs. Before joining the editorial page staff of *The Washington Post*, Wittes covered the Justice Department and federal regulatory agencies as a reporter and news editor at *Legal Times*. His writing has also appeared in a wide range of journals and magazines, including the *Atlantic*, *Slate*, *The New Republic*, *The Wilson Quarterly*, *The Weekly Standard*, *Policy Review*, and *First Things*.

Colleen A. Peppard served as a Judiciary Fellow for Senator Joseph I. Lieberman. She has previously worked for both the Protection and Legal divisions of the International Committee of the Red Cross and is a graduate of New York University School of Law.

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¹ Remarks by the President on National Security, National Archives, Washington, D.C. May 21, 2009. Available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/.

² *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). Available at <http://www.supremecourt.us/opinions/07pdf/06-1195.pdf>.

³ Testimony of Secretary of Defense Robert M. Gates before the Senate Committee on Appropriations, April 30, 2009. See, Sue Fleming, “Gates Grilled Over Fate of Guantanamo Inmates,” *Reuters*, April 30, 2009.

⁴ Stephen I. Vladeck, “The Case Against National Security Courts” (December 12, 2008). *Willamette Law Review*, Vol. 45, 2009; American University, WCL Research Paper No. 2008-82. Available at SSRN: <http://ssrn.com/abstract=1315337>; See also, The Constitution Project, “A Critique of ‘National Security Courts,’” (June 23, 2008). Available at http://www.constitutionproject.org/pdf/Critique_of_the_National_Security_Courts.pdf.

⁵ Jack L. Goldsmith, “Long-Term Terrorist Detention and Our National Security Court,” (February 4, 2009). Available at http://www.brookings.edu/~media/Files/rc/papers/2009/0209_detention_goldsmith/0209_detention_goldsmith.pdf.

⁶ See Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror* (New York: Penguin, 2008). See also “Improving Detainee Policy: Handling Terrorism Detainees within the American Justice System,” Testimony before the Senate Committee on the Judiciary, June 4, 2008, available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_senate_hearings&docid=f:43658.wais; “A Legal Framework for Detaining Terrorists: Enact a Law to End the Clash over Rights,” with Mark Gitenstein, Brookings Institution Opportunity ’08 Paper, November 15, 2007, available at http://www.brookings.edu/papers/2007/1115_terrorism_wittes_opp08.aspx#; “Terrorism, The Military, and the Courts,” Policy Review, June & July 2007, available at <http://www.hoover.org/publications/policyreview/7831532.html>; and “Judicial Baby-Splitting and the Failure of the Political Branches,” *Terrorism, the Laws of War, and the Constitution*, ed. Peter Berkowitz (Hoover Institution Press, 2005).

⁷ See, e.g., Charles D. Weisselberg, “Terror in the Courts: Beginning to Assess the Impact of Terrorism-Related Prosecutions on Domestic Criminal Law and Procedure in the USA.” *Crime, Law and Social Change*, Vol. 50, Nos. 1-2, pp. 25-46, 2008; UC Berkeley Public Law Research Paper No. 1167482. Available at SSRN: <http://ssrn.com/abstract=1167482>.

⁸ Matthew C. Waxman, “Administrative Detention of Terrorists: *Why* Detain, and Detain *Whom*?” *Journal of National Security Law & Policy*, Vol. 3, pp. 1-37 (2009). Available at http://www.mcgeorge.edu/Documents/publications/jnslp/Waxman_V13_3-19-09.pdf.

⁹ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

¹⁰ Goldsmith, *supra* note 5, at 8-9.

¹¹ The time frames for both stages of the law are derived from several sources. The Israeli *Incarceration of Unlawful Combatants Law* uses both the 14-day and 6-month time periods. The 14-day period is also how long detainees in Iraq are permitted to be held in Division Holding Areas before their transfer to Theater Internment Facilities. See, United Nations Assistance Mission for Iraq, December 2007 Report. Available at <http://www.ohchr.org/Documents/Press/UNAMIJuly-December2007EN.pdf>. The 6-month time frame is also commonly used in state laws which allow for the confinement of sexual predators or the mentally ill.

¹² Robert Chesney and Jack Landman Goldsmith III, “Terrorism and the Convergence of Criminal and Military Detention Models.” *Stanford Law Review*, Vol. 60, 2008; Wake Forest Univ. Legal Studies Paper No. 1055501. Available at SSRN: <http://ssrn.com/abstract=1055501>.

¹³ Deputy Secretary of Defense, *Memorandum for Secretaries of the Military Departments, 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>.

¹⁴ Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, *In Re: Guantanamo Bay Detainee Litigation*, Civ. A. No. 08-442 (D.D.C. March 13, 2009). Available at <http://www.usdoj.gov/opa/documents/memo-re-det-auth.pdf>.

¹⁵ Memorandum Opinion, *Gherebi v. Obama*, Civ. A. No. 04-1164 (D.D.C. April 22, 2009). Available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2008cv2019-87.

¹⁶ Memorandum Opinion, *Hamlily v. Obama*, Civ. A. No. 05-763 (D.D.C. May 19, 2009). Available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2008cv1236-116.

¹⁷ *Al Marri v. Pucciarelli*, No. 06-7427 (4th Cir. Ct. of Appeals. July 15, 2008). Available at <http://pacer.ca4.uscourts.gov/opinion.pdf/067427A.P.pdf>.

¹⁸ Goldsmith, *supra* note 5, at 9-11.

¹⁹ *Incarceration of Unlawful Combatants Law*, 5762-2002 (Isr.). Available at http://ejp.icj.org/IMG/Unlawful_Combatants_2002.pdf.

²⁰ Curtis A. Bradley, "The United States, Israel, and Unlawful Combatants" (May 21, 2009). Available at SSRN: <http://ssrn.com/abstract=1408135>.

²¹ David Cole, "Closing Guantanamo: The Problem of Preventive Detention." *Boston Review*, Jan/Feb 2009. Available at <http://bostonreview.net/BR34.1/cole.php>.

²² Wittes, *supra* note 6, pg 163.

²³ Foreign Intelligence Surveillance Act, 50 U.S.C. 1801.

²⁴ *See, e.g.*, American Bar Association, *ABA Standards for Criminal Justice: Pretrial Release*, 3rd ed. (2007). ABA 10-5.10 - "If, on conclusion of a pretrial detention hearing, the court determines by clear and convincing evidence that no condition or combination of conditions will reasonably ensure the appearance of the person as required, and the safety of any other person and the community pursuant to the criteria established within these Standards, the judicial officer should state the reasons for pretrial detention on the record at the conclusion of the hearing or in written findings of fact within [three days]. The order should be based solely upon evidence provided for the pretrial detention hearing. The court's statement on the record or in written findings of fact should include the reasons for concluding that the safety of the community or of any person, the integrity of the judicial process, and the presence of the defendant cannot be reasonably ensured by setting any conditions of release or by accelerating the date of trial." Available at <http://www.abanet.org/crimjust/standards/pretrialrelease.pdf>

²⁵ *See, e.g.*, Immigration and Nationality Act § 212 (d)(5)(A), which allows for the parole of inadmissible aliens for humanitarian or public benefit reasons. This section allows for parole after an assessment of the individual's security risk and risk of absconding immigration proceedings.

²⁶ *See, e.g.*, *Kansas v. Hendricks* 521 U.S. 346 (1997), upholding the constitutionality of a Kansas law which allowed for the civil commitment of violent sexual predators.

²⁷ The creation of a "national security bar" has been proposed by numerous commentators, in one form or another. *See, e.g.*, Robert S. Litt and Wells C. Bennett, "Better Rules for Terrorism Trials," (May 8, 2009), at 3. Available at

http://www.brookings.edu/~media/Files/rc/papers/2009/0508_terrorism_litt_bennett/0508_terrorism_litt_bennett.pdf;

See also, Jack L. Goldsmith, "Long Term Detention and Our National Security Court," (February 4, 2009), at 13.

²⁸ *Al Odah v. United States*, No. 05-5117 (D.C. Cir. March 6, 2009). Available at <http://pacer.cadc.uscourts.gov/docs/common/opinions/200903/05-5117-1168849.pdf>.

²⁹ *Bismullah v. Gates*, No. 06-1197 (D.C. Cir. July 20, 2007), quoting the Deputy Secretary of Defense, *Memorandum for Secretaries of the Military Departments, 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> . See also *Bismullah v. Gates*, No. 06-1197, (D.C. Cir., October 3, 2007).

³⁰ Order, *In Re: Guantanamo Bay Detainee Litigation*, No. 08-442 (D.D.C. Nov. 6, 2008), amended by Order (D.D.C. Dec. 16, 2008). Available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2002cv0828-420.

³¹ *Al Odah v. United States*, No. 05-5117 (D.C. Cir. March 6, 2009).

³² *Al Odah v. United States*, No. 05-5117 (D.C. Cir. March 6, 2009), quoting *Boumediene v. Bush*.

³³ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996).

³⁴ Immigration and Nationality Act (8 U.S.C. 1534).

³⁵ Classified Information Procedures Act (18 U.S.C. App. 3).

³⁶ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006).

³⁷ This is a claim that the former vice-president is still making. See, for example, Remarks by Richard B. Cheney, American Enterprise Institute (May 21, 2009). Available at <http://www.aei.org/speech/100050>.

³⁸ Editorial, *The Real Agenda*, *The New York Times*, July 16, 2006. Available at <http://www.nytimes.com/2006/07/16/opinion/16sun1.html>.

³⁹ Goldsmith, *supra* note 5, at 15-16.

⁴⁰ *Maqaleh v. Gates* No. 06-1669 (D.D.C. April 2, 2009). Available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2006cv1697-31.

Appendix

Model Administrative Detention Statute

SEC. 1. FINDINGS.

Congress finds that—

(a) the Geneva Conventions, other binding treaties regulating the conduct of hostilities, and the customary laws of war offer an appropriate legal framework for the detention and internment of combatants and civilians in zones of active military operations in international armed conflicts. Congress does not seek to subject detentions within this framework to the oversight of U.S. courts to the extent they are not already subject to such oversight;

(b) zones of active military operations do not necessarily correspond to national boundaries;

(c) outside of zones of active military operations, the President claims the authority to detain persons who were part of, or substantially supported, Taliban or Al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities in aid of such enemy armed forces;

(d) some U.S. courts have adopted a narrower view of the President's authority to detain enemy forces, leaving the President's detention authority outside of active military operations undefined and vulnerable to challenge;

(e) this lack of definition presents dangers both as to Taliban and Al Qaeda forces and as to associated forces, including foreign terrorist forces that are co-belligerents of the Taliban or Al Qaeda;

(f) there exist no agreed-upon substantive or procedural standards in U.S. courts to govern the detention of individuals arrested outside of zones of active military operations;

(g) in some instances, the Executive Branch may prefer to subject even combatants in zones of active military operations to more rigorous judicial review than the laws of war require at the outset of a detention out of concern to avoid lengthy habeas

corpus litigation leading ultimately both to adverse judgments in specific cases and adverse developments in the law;

(h) a set of rigorous, fair, and flexible judicial procedures to govern the detention of non-U.S. persons who pose an imperative threat to security are necessary to promote regularity and legal certainty in American detention policy, as well as to ensure that detainees receive timely and predictable access to judicial review based on known procedures and substantive standards.

SEC. 2. DEFINITIONS.

In this Act—

(a) the terms “agent of a foreign power”, “foreign power”, and “United States person” have the meanings given such terms in section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801);

(b) the term “covered individual” means an individual who is not a United States person;

(c) the term “District Court” means the United States District Court for the District of Columbia; and

(d) the term “Geneva Conventions” means—

(1) the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, done at Geneva August 12, 1949 (6 UST 3217);

(2) the Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, done at Geneva August 12, 1949 (6 UST 3217);

(3) the Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949 (6 UST 3316); and

(4) the Convention Relative to the Protection of Civilian Persons in Time of War, done at Geneva August 12, 1949 (6 UST 3516).

SEC. 3. INITIAL DETENTION OF NON-UNITED STATES PERSONS.

(a) IN GENERAL.—The Government may detain, for not more than 14

days, a covered individual who the President reasonably believes meets the requirements under section 4(b).

(b) ARREST NOTICE.—The Government shall promptly present to any covered individual detained under subsection (a)—

- (1) a notice of arrest that includes the reasons for which the covered individual is being detained;
- (2) a notice that detention under subsection (a) shall be for not more than 14 days;
- (3) a notice that the Government may apply for a detention order under section 4; and
- (4) an explanation of the laws and procedures governing such an application and detention order, including the right of the detainee to counsel in connection with such proceedings.

(c) All information provided a covered individual under subsection (b) shall be provided to the covered individual in a language understood by the covered individual.

(d) END OF INITIAL DETENTION.—

(1) IN GENERAL.—Not later than 14 days after the date on which the Government detains a covered individual under subsection (a), the Government shall initiate proceedings under section 4, initiate proceedings under another legal authority, release the covered individual, or lawfully transfer the covered individual to a foreign government.

(2) PROCEEDINGS PENDING.—The Government may continue to detain a covered individual under this Act while any proceeding under section 4 is pending before the District Court and during the pendency of an appeal by the Government of a decision in a proceeding under section 4.

(e) INTERNATIONAL COMMITTEE OF THE RED CROSS.—The Government shall notify the International Committee of the Red Cross regarding a covered individual detained by the government under this Act as soon as practicable and not later than 14 days after an initial detention under this Act. The Government shall grant access to the International Committee of the Red Cross to a

covered individual relating to whom notification is provided under this subsection.

SEC. 4. DETENTION PROCEEDINGS.

(a) IN GENERAL.—

(1) DETERMINATION.—Upon petition by the Government, the District Court shall determine whether a covered individual meets the requirements under subsection (b) of this section for detention as an imperative threat to security.

(2) STANDARD OF PROOF.—In a proceeding under this section, the burden of proof shall be on the Government to demonstrate by a preponderance of the evidence that a covered individual detained under section 3 meets the requirements under subsection (b) of this section.

(b) CRITERIA.—A covered individual shall constitute an imperative threat to security, detainable under this Act, if—

(1) the covered individual is an agent of a foreign power;

(2) that foreign power is one against which the use of military force was authorized under the Authorization for Use of Military Force (Public Law 107-40; 115 Stat. 224; 50 U.S.C. 1541 note); and

(3) the actions of the covered individual in his capacity as an agent of the foreign power described in paragraphs (1) and (2) pose a danger both to any person and to the interests of the United States.

(c) DEFERENCE TO EXECUTIVE.—In determining whether a foreign power is a foreign power against which the use of military force was authorized under the Authorization for Use of Military Force (Public Law 107-40; 115 Stat. 224; 50 U.S.C. 1541 note), the District Court shall give deference to the identification of an organization by the Director of National Intelligence in a report submitted under section 6 of this Act.

(d) HEARING PROCEDURES.—

(1) IN GENERAL.—In any proceeding under this section, the Attorney General shall submit a written declaration supporting the contention that the covered individual meets the requirements under subsection (b) for detention as an

imperative threat to security.

(2) DISCOVERY.—

(A) SCOPE OF DISCOVERY.—Subject to subparagraph (B), a covered individual may request from the Government as discovery relating to a proceeding under this section, and if requested by the covered individual the Government shall provide—

(i) any document or object referenced in the petition or written declaration submitted by the Government under this section;

(ii) any evidence in the Government's possession that tends materially to undermine information in the petition or written declaration submitted by the Government under this section;

(iii) any statement, whether oral, written, or recorded, made or adopted by the covered individual that is in the Government's possession and both related and material to the information in the petition or written declaration submitted by the Government under this section; and

(iv) any other evidence in the Government's possession that is both related and material to the information in the petition or written declaration submitted by the Government under this section.

(B) PROTECTION OF NATIONAL SECURITY INFORMATION.—

(i) GENERALLY.—Classified information shall be protected and is privileged from disclosure to the covered individual in proceedings under this section. The rule under this subparagraph applies to all stages of any proceeding under this section.

(ii) SUBSTITUTE.—If any information described in subparagraph (A) is classified, the attorney for the Government shall submit such information to the District Court and shall prepare for the court's approval an unclassified summary of the specific classified evidence or a statement

admitting relevant facts that the specific classified information would tend to prove. The District Court shall approve the summary or statement if the District Court finds that it is sufficient to enable the detainee to prepare a defense. The Government shall deliver to the detainee a copy of the unclassified summary or statement approved under this subparagraph.

(iii) DISAPPROVAL.—In general, if an unclassified summary or statement is not approved by the District Court under subparagraph (ii), the Government shall expeditiously correct the deficiencies identified by the court and submit a revised unclassified summary. If the revised unclassified summary is not approved by the District Court, the proceeding shall be terminated.

(iv) CLASSIFIED INFORMATION AVAILABLE TO COUNSEL FOR DETAINEE.—Classified information withheld from a detainee shall be available to properly cleared counsel for the covered individual, if any, and the District Court shall afford such properly cleared counsel the opportunity to object to the adequacy of any substitute under subparagraph (ii). If the Government declines to make such information available to properly cleared counsel for the covered individual, the proceeding shall be terminated unless the Government substitutes a statement admitting relevant facts that the specific classified information would tend to prove and the District Court certifies that such statement is sufficient to provide the properly cleared counsel with substantially the same ability to make a defense as would disclosure of the specific classified information.

(v) INTERLOCUTORY APPEAL.—The Government may take an interlocutory appeal from a decision of the District Court relating to the disclosure of classified information subject to the same expedited procedures that would apply to such an appeal under section 7 of the Classified Information Procedures Act (18 U.S.C. 14 App.).

(3) WITNESS PRODUCTION.—

(A) IN GENERAL.—To the maximum extent possible, proceedings under this section shall be decided on the basis of written pleadings and written declarations.

(B) BASIS FOR IN-PERSON TESTIMONY.—The District Court shall grant a motion for oral testimony relating to an evidentiary hearing under this section when the District Court finds that military and intelligence operations would not be substantially harmed by the production of the witness and that oral testimony would provide a material benefit to the resolution by the District Court of the disputed matter. The District Court shall allow witnesses stationed overseas or otherwise unavailable to appear in court to participate from remote locations through available technological means.

(4) PUBLIC PROCEEDINGS.—To the maximum extent practicable, proceedings under this section shall be conducted in a fashion open to the public. The District Court shall have authority to close proceedings to ensure the security of classified information.

(5) CERTAIN EVIDENCE.—

(A) IN GENERAL.—In determining whether a covered individual meets the requirements under subsection (b) for detention as an imperative threat to security, the District Court may not consider any evidence obtained by a means that violates—

(i) the Detainee Treatment Act of 2005 (title X of Public Law 109-148; 119 Stat. 2739; 10 U.S.C. 801 note); or

(ii) Common Article 3 of the Geneva Conventions. Conduct that violates Common Article 3 includes, but is not limited to, the following techniques, each of which is prohibited by Army Field Manual 2-22.3: forcing a person to be naked, perform sexual acts, or pose in a sexual manner; applying beatings, electric shocks, burns, or other forms of physical pain to the person; waterboarding the person; threatening the person with dogs; inducing hypothermia or heat injury; conducting a mock

execution; and depriving the person of necessary food, water, or medical care.

(B) OTHER EVIDENCE.—The rules concerning the admissibility of evidence in civil or criminal trials shall not apply to the presentation and consideration of information at any evidentiary hearing under this section. To the maximum extent allowable under the Constitution, the District Court may consider any reliable and probative evidence, including hearsay from military, intelligence, and law enforcement sources that the District Court determines would be probative to a reasonable person. If any hearsay evidence is admitted, the covered individual shall be entitled to offer evidence impeaching the credibility of the declarant.

(6) ATTORNEYS.—

(A) IN GENERAL.—The District Court shall appoint an attorney to represent a covered individual in proceedings under this section, unless the covered individual has retained an attorney for such purposes.

(B) REQUIREMENTS FOR ATTORNEYS.—An attorney may represent a covered individual in a proceeding under this section if the attorney—

(i) except as provided in subparagraph (E), has been determined to be eligible for access to classified information that is classified at the level Secret or higher, as required; and

(ii) has signed a written agreement to comply with all applicable regulations or instructions for attorneys in proceedings under this section before the District Court, including any rules of court for conduct during the proceedings.

(C) CLASSIFIED INFORMATION.—Any attorney for a covered individual shall protect any classified information received during the course of representation of the covered individual in accordance with all applicable law governing the protection of classified information.

(D) SECURITY CLEARANCE LIST.—The Attorney General shall establish a list of attorneys with appropriate security

clearances who may represent covered individuals in proceedings under this section.

(E) PRIVATE ATTORNEYS.—If an attorney retained by a covered individual for purposes of a proceeding under this section does not have the appropriate security clearances, the Government may grant the attorney an appropriate clearance at its discretion, or the District Court shall assign an attorney on the list established under subparagraph (D) as co-counsel to represent the covered individual in all proceeding under this Act which require access to classified information on the part of counsel for the covered individual.

(7) VIDEO HEARINGS.—The District Court shall not require the presence of a covered individual detained outside the United States for the purpose of any proceeding under this section. However, the District Court shall permit a covered individual to participate in all proceedings under this section to the extent consistent with the procedures for the protection of classified information and national security under this section. If the covered individual is detained outside the United States, the court shall allow him to participate from the location at which he is detained through available technological means.

(8) LANGUAGES.—Any information relating to the District Court proceedings under this section, including translation of any proceedings in which a covered individual participates, shall be provided to the covered individual in a language understood by the covered individual.

(e) DETENTION.—If the District Court determines that a covered individual meets the requirements under subsection (b) for detention as an imperative threat to security, the District Court shall issue an order authorizing the Government to detain the covered individual for not more than 6 months. To the maximum extent practicable and consistent with the protection of classified information, the District Court shall explain in an opinion available to the public the factual and legal basis for the detention order. An order under this subsection may be renewed for additional periods of not more than 6 months if the District Court determines, after a hearing conducted in accordance with this section, that the covered individual continues to meet the requirements under subsection (b) for detention as an imperative threat to security.

(f) JURISDICTION AND VENUE.—The District Court shall have exclusive jurisdiction over any petition under this Act. An action relating to a petition under this Act may only be brought in the District Court.

SEC. 5. DETENTION.

(a) IN GENERAL.—Any covered individual detained under this Act shall be held in accordance with the conditions of confinement guaranteed by Common Article 3 of the Geneva Conventions.

(b) LOCATION.—Any covered individual detained under this Act shall be held in a location accessible to the International Committee of the Red Cross.

SEC. 6. REPORTING.

Not later than 6 months after the date of enactment of this Act, and no less frequently than every 6 months thereafter, the Director of National Intelligence, in consultation with the Director of the Central Intelligence Agency, the Secretary of Defense, the Secretary of Homeland Security, the Secretary of the Treasury, and the Secretary of State, shall submit to Congress a report identifying the organizations which the Executive Branch considers to be forces covered by the Authorization for Use of Military Force (Public Law 107-40; 115 Stat. 224; 50 U.S.C. 1541 note) as "those nations, organizations, or persons" who "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons" or as co-belligerents of such forces.

SEC. 7. RULES OF CONSTRUCTION.

Nothing in this Act may be construed to—

(1) preclude or impinge on the authority of the Government to detain or intern individuals subject to detention under the laws of war in a theater of active military operation or under another legal authority;

(2) confer any right upon an individual lawfully detained in a theater of active military operation; or

(3) require or permit continued detention of an individual after the Government determines the individual is not an imperative

threat to security.

SEC. 8. SUNSET.

The authority under this Act to detain a covered person not already detained under section 3 or section 4 shall terminate 3 years after the date of enactment of this Act. Authority to renew detention orders already in place or to proceed with applications already filed under section 4 shall not terminate.