

**Administrative Detention:  
The Integration of Strategy and Legal Process**

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### **Editor's Note**

This paper is the second in a paper series on reforms to the statutory architecture of American counterterrorism policy, to be published jointly by the Brookings Institution, the Georgetown University Law Center, and the Hoover Institution. The series is intended to suggest changes to areas of American statutory law pertinent to the War on Terrorism. Because of its obvious importance to an ongoing public policy debate over the future of detention policy in the wake of *Boumediene v. Bush*, we are releasing Mr. Waxman's paper as a working document that may undergo changes as the debate evolves over the coming months.

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## Introduction

The Supreme Court's recent decision in *Boumediene v. Bush*,<sup>1</sup> holding that prisoners at Guantanamo have a constitutional right to *habeas corpus* review of their detention by federal courts, has injected new fuel into the debate about whether Congress should enact administrative detention legislation. To its advocates, administrative detention—or detention by the Executive branch without criminal prosecution in the courts—is a potentially important counter-terrorism tool.<sup>2</sup> New legislation, they argue, would more effectively and legitimately regulate detention practices of suspected terrorists that to date the Bush Administration has conducted under an expansive notion of unilateral war powers.<sup>3</sup> But critics warn that administrative detention is a dangerous tool as well, not just because it threatens liberty and entails expanded powers of the State, but also because its overuse or injudicious use may be counter-productive in combating violent extremism. Rather than institutionalizing and regulating it through legislation, opponents and skeptics of administrative detention generally argue that, especially outside combat zones, detention of suspected terrorists should be handled through criminal prosecution, with its tight rules limiting state powers and safeguarding individual suspects' liberties.<sup>4</sup> According to a recent statement by the Constitution Project, administrative detention proposals “neglect basic and fundamental principles of American constitutional law, and they assume incorrectly that the traditional processes have proven ineffective.”<sup>5</sup>

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<sup>1</sup> No. 06–1195, slip op. (June 12, 2008).

<sup>2</sup> See, e.g., BENJAMIN WITTES, LAW AND THE LONG WAR 151-182 (2008); Jack Goldsmith & Neal Katyal, *The Terrorists' Court*, NEW YORK TIMES, July 11, 2006; Andrew McCarthy & Alykhan Velshi, “We Need a National Security Court”, Submission for AEI (2006) (available at [http://www.defenddemocracy.org/usr doc/Court.doc](http://www.defenddemocracy.org/usr/doc/Court.doc)); Amos N. Guiora, Quirin to Hamdan: *Creating a Hybrid Paradigm for the Detention of Terrorists*, Case Research Paper, Working Paper 06-19 (Oct. 2006); Tung Yin, *Ending the War on Terror One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARVARD JOURNAL OF LAW & PUBLIC POLICY 149 (2005); Benjamin Wittes & Mark Gitenstein, A Legal Framework for Detaining Terrorists, Brookings Paper (2008) (available at [http://www.brookings.edu/papers/2007/~media/Files/Projects/Opportunity08/PB\\_Terrorism\\_Wittes.pdf](http://www.brookings.edu/papers/2007/~/media/Files/Projects/Opportunity08/PB_Terrorism_Wittes.pdf)).

<sup>3</sup> Most of those proposals begin with the assumptions that criminal prosecution of suspected terrorists is the preferred option when possible and consistent with national security imperatives and that capture and detention of enemy military forces on traditional battlefields should be excluded from any new administrative detention regime, because the law of war deals with those cases satisfactorily. In other words, there are categories of very threatening individuals for whom existing detention frameworks serve well, and any new system should not significantly disrupt that effectiveness. See, e.g., Goldsmith & Katyal, *supra*; Wittes, *supra*; McCarthy & Velshi, *supra* at 6.

<sup>4</sup> See, e.g., Kenneth Roth, *After Guantánamo: The Case Against Preventive Detention*, 87 FOREIGN AFFAIRS, May/June 2008, at 2; Gabor Rona, *Legal Frameworks to Combat Terrorism: An Abundant Inventory of Existing Tools*, 5 CHICAGO J. INT'L L. 499 (2004-05); Richard B. Zabel & James J. Benjamin, Jr., In Pursuit of Justice: Prosecuting Terrorism Cases in Federal Court (Human Rights First, May 2008). See also Deborah H. Pearlstein, *We're All Experts Now: A Security Case Against Security Detention*, 40 CASE WESTERN RESERVE INTERNATIONAL LAW JOURNAL (2008) (arguing that even if valid under U.S. and international law, preventive detention schemes are counterproductive in combating terrorism).

<sup>5</sup> The Constitution Project, “A Critique of ‘National Security Courts’” June 23, 2008.

My purpose in these pages is not to convince the reader that a new administrative detention regime is necessary, nor do I mean to offer a specific legislative roadmap towards one. I have argued elsewhere for “a durable, long-term framework for handling detainees—one that lets [the United States government] hold the most dangerous individuals [it captures] and collect intelligence from them (including through lawful interrogation), but also (unlike Guantanamo Bay) has rules and procedures that are politically, legally and diplomatically sustainable.”<sup>6</sup> Other papers in this series argue for various approaches to preventive detention. In this paper, rather, I aim to examine what seem at first like simple questions underlying the discussion of administrative detention and the possible need for new laws: in combating terrorism, why administratively detain, and detain whom?

The answers to these questions seem obvious at first. We should detain individuals to *prevent* terrorism and, to that end, we should detain *terrorists*. And with those basic ideas apparently settled, the administrative detention debate tends to jump quickly to the question of how to detain: What procedural protections should we afford suspects? What rights should we grant them to challenge evidence proffered against them? What kinds of officials will adjudicate cases?<sup>7</sup> Those advocating new administrative detention laws generally call for robust judicial review of what have largely been executive-only detention decisions since the early days of the Bush Administration’s Global War on Terror—perhaps by a new “national security court” charged with overseeing a process that includes adversarial process and meaningful assistance of lawyers. And at that point, the discussion moves just as quickly to questions of institutional design, and such procedural details as evidentiary rules, the type of judges who will hear these cases, detainee access to counsel, and counsel’s own access to classified information. Administration detention critics, too, focus heavily on the procedural dynamics of administrative detention proposals: how would detention decision-making and, for that matter, the standards and rules governing those decisions, deviate from normal criminal justice rules?

The Supreme Court similarly focused almost exclusively on procedural mechanisms in its *Boumediene* ruling. While mandating that Guantanamo detainees receive access to U.S. federal courts empowered to correct errors after “meaningful review of both the cause for detention and the Executive’s power to detain,” the Court made clear that it was “not address[ing] the content of the law that governs petitioners’ detention.”<sup>8</sup>

The questions everyone seems keen to skip over, however, are not nearly as obvious as their omission suggests. In this paper, I therefore take a step back from the issues surrounding how to make and review detention decisions and engage the antecedent questions of why detain and, therefore, whom to detain. In doing so, I mean to advance two overarching arguments that should guide the discussion of whether the United States needs administrative detention laws and, if so, of what type. First, any discussion of administrative detention should begin with a

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<sup>6</sup> Matthew Waxman, *The Smart Way to Shut Gitmo Down*, WASHINGTON POST, Oct. 28, 2007.

<sup>7</sup> See Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 COLUMBIA LAW REVIEW 1013 (2008) (detailing how most court decisions in cases challenging Bush Administration counter-terrorism detention policies have not directly addressed substantive rights, but instead have focused on procedural rights).

<sup>8</sup> *Boumediene v. Bush*, slip op. at 54.

clear understanding of the strategic rationale for administrative detention and a sense of how detention fits within a broader counter-terrorism and national security strategy. Our answers to the “why detain?” question will drive our answers to the “whom to detain?” question, and those answers together will significantly affect the matrix of costs and benefits of legal innovation. Second, the way we answer the “why” and “whom” questions will, in turn, significantly determine the procedural architecture of any new administrative detention regime. This paper therefore cautions against jumping too quickly in administrative detention discussions to the issue of procedural design, or the “how” questions.

To whatever extent Congress decides that the United States needs a new administrative detention apparatus, this analysis points in favor of narrowing significantly the strategic flexibility and expansive operational latitude the Bush Administration has asserted through its legal interpretations. It recommends that architects of proposed administrative detention schemes focus on the strategic objectives of either immediate-term disruption of terrorist plots or long-term incapacitation of suspected terrorists (and, as this analysis shows, it may not be as easy as it seems to design a system that does both effectively). Further, it advises against broad substantive criteria like “enemy combatancy” or “membership” in favor of a more narrow and specific inquiry of an individual’s supposed dangerousness, perhaps supplemented with additional substantive requirement. With those strategic aims and substantive detention criteria in mind, this paper comes back to the procedural debate and concludes with a discussion of effective, corresponding procedural design.

### **The Bush Administration Approach and Calls for Reform**

The Bush Administration’s approach to detention began with the notion that the United States is at war with Al Qaeda and those aligned with it. The administration has relied in turn on an expansive interpretation of its domestic executive war powers and the international law of war to assert that those fighting—broadly-defined—on behalf of Al Qaeda and its affiliates, or in some cases those supporting that fight, are enemies in an ongoing armed conflict. As such, the United States may lawfully capture any of these constituent enemies, or “combatants,” and detain them for the duration of hostilities, just as a state would be entitled in the course of a war with another state to capture and hold enemy soldiers until the end of the war.<sup>9</sup>

Of course, this is not a war between states, and—despite any analogical appeal such an understanding of war may have—some problems with this approach are quickly apparent. Although even in conventional warfare the notion of “enemy combatants” may defy either clear definition or easy application, members of terrorist organizations generally try to obfuscate their identities and blend indistinguishably into civilian populations. The organizations themselves lack the formalized structures of states, thereby greatly exacerbating the likelihood of misidentifying an innocent civilian as an enemy (a problem discussed in greater detail below). The stakes of such errors are also magnified by the likelihood that this conflict with Al Qaeda or its spinoff organizations will last for decades, raising the specter of indefinite deprivation of

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<sup>9</sup> See Address by State Department Legal Adviser John B. Bellinger, “Legal Issues in the War on Terrorism,” Oct. 31, 2006 (available at: <http://www.state.gov/s/1/2006/98861.htm>).

innocents' liberty.<sup>10</sup>

Critiques of the Bush Administration's reliance on this "enemy combatancy" theory to justify detentions have focused heavily on the inadequacy of the process by which detention decisions are made. Whether arguing that those detained deserve full-fledged criminal trials or that detentions should be judicially reviewed or that the government failed even to provide the minimal battlefield hearings required by the Geneva Conventions, critics have tended to focus their attacks on the "how" questions of detention.<sup>11</sup> Less often discussed is the "whom" question, that is, the substantive scope of the detention class.<sup>12</sup>

The U.S. government has so far avoided demarcating the outer bounds of this class in order to maximize its freedom of action in combating major terrorist networks. In explaining to a UN human rights committee its legal authority to detain suspected Al Qaeda fighters, it stated that its detention authority extended to "members of al-Qaida, the Taliban, and their affiliates and supporters, whether captured during acts of belligerency themselves or directly supporting hostilities in aid of such enemy forces."<sup>13</sup> In one (often-cited) litigation colloquy, the government went so far as to argue that merely providing a charitable gift could qualify the so-called "little old lady in Switzerland" donor as an "enemy combatant" if the recipient turned out to be an al Qaeda front.<sup>14</sup> Even having backed off a bit from this extreme view,<sup>15</sup> the government has steadfastly avoided detailed public discussion of what it means to be a "member", how it defines "Al Qaeda" or its affiliates and supporters, and what activities constitute belligerency or support or aid to any of these groups or activities.

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<sup>10</sup> See Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 109 COLUMBIA L. REV. (forthcoming 2008)

<sup>11</sup> See, e.g., HUMAN RIGHTS FIRST, *IMBALANCE OF POWERS: HOW CHANGES TO U.S. LAW & POLICY SINCE 9/11 ERODE HUMAN RIGHTS AND CIVIL LIBERTIES* 7-69 (2003).

<sup>12</sup> As an example of one of the few, thorough judicial treatments of this issue, see *Al-Marri v. Pucciarelli*, No. 06-7427, slip op. at 25 (4th Cir. *en banc*, July 15, 2008) (Motz, J., concurring in the judgment) (interpreting prior Supreme Court precedent as supporting the conclusion that "enemy combatant status rests on an individual's affiliation during wartime with the 'military arm of the enemy government.'")

<sup>13</sup> See Annex 1 to the Second Periodic Report of the United States of America to the Committee Against Torture, May 6, 2005, para. 47. The Combatant Status Review Tribunals at Guantanamo similarly define "enemy combatant" as:

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

DoD Order Establishing Combatant Status Review Tribunal (July 7, 2004), at E-1 § B.

<sup>14</sup> See *In Re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C 2005).

<sup>15</sup> See *Al-Marri v. Pucciarelli*, No. 06-7427, slip op. at 19-20 (4th Cir. *en banc*, July 15, 2008) (Motz, J., concurring in the judgment). The breadth of the Government's definition came under attack recently by the D.C. Circuit, see *Parhat v. Gates*, No. 06-1397, slip op. (June 20, 2008), and a minority of the Fourth Circuit, see *Al-Marri v. Pucciarelli*, No. 06-7427, slip op. at 179 (4th Cir. *en banc*, July 15, 2008) (Motz, J., concurring in the judgment).

The case of *Hamdi v. Rumsfeld*<sup>16</sup> highlights how the Bush Administration has steadfastly maintained ambiguity on this critical definitional question. *Hamdi* involved a U.S. citizen captured in Afghanistan and held at Guantanamo, challenging the legality of his detention. While not stating clearly the substantive reach of its “enemy combatant” definition, the government argued that the Executive’s “wartime determination that an individual is an enemy combatant is a quintessentially military judgment” that no court should second-guess.<sup>17</sup> That is, it argued until *Hamdi* (1) that the Executive should have unreviewable discretion to decide if an individual falls within the definition of enemy combatant, and (2) that it should have unreviewable discretion to determine the scope of the definition itself.<sup>18</sup>

This double-move was even more starkly visible in the government’s argumentation in *Rasul v. Bush*, which involved the question of whether the federal habeas corpus statute extended federal court jurisdiction to claims arising at Guantanamo: “The ‘enemy’ status of aliens captured and detained during war is a quintessential political question on which the courts respect the actions of the political branches.”<sup>19</sup> The government went on to argue in that case that “courts have ... no judicially-manageable standards ... to evaluate or second-guess the conduct of the President or the military” on such matters.<sup>20</sup>

So suppose the Congress wants to regulate the detention of suspected enemy terrorists using new administrative detention laws that include establishing a stronger oversight role for courts. Taking as a point of departure the Bush Administration’s assertion that defining whom to detain is an issue of tremendous policy and strategic significance—but believing that it is one that Congress and the courts ought to regulate—how should the legislature constitute an administrative detention regime in substantive terms?

The vast bulk of discussion of administrative detention jumps quickly back to procedural architecture, based on the assumption that setting the appropriate level of procedural protection can better balance security and liberty than the current approaches do. Several major elements of procedural design are most consistently and notably thought to be key to this balance: judicial review, adversarial process with lawyer representation, and transparency.<sup>21</sup> And, indeed, each of them—individually and in tandem—has a vital role to play in any effective administrative detention system.

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<sup>16</sup> 542 U.S. 507 (2004).

<sup>17</sup> Brief for the Respondent, *Hamdi v. Rumsfeld*, at 25.

<sup>18</sup> The *Hamdi* plurality held that an individual captured on the battlefield in Afghanistan fell within the implicit detention authority of the 2001 Authorization of the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, but it explicitly left “[t]he permissible bounds of the category [of enemy combatant to] be defined by the lower courts as subsequent cases are presented to them.” 542 U.S. at 522 n. 1.

<sup>19</sup> Brief for the Respondent, *Rasul v. Bush*, at 35.

<sup>20</sup> *Id.* at 37.

<sup>21</sup> DAVID COLE & JULES LOBEL, *LESS FREE, LESS SAFE* 251-52 (2007); ABA Standing Committee on Law and National Security, *Due Process and Terrorism*, Nov. 2007, at 16.

Judicial review can help safeguard liberty and enhance the credibility at home and abroad of administrative detention by ensuring neutrality of the decision-maker and publicly certifying the legality of the detention in question. Most calls for reform of existing detention laws start with a strong role for courts. Some commentators believe that a special court is needed, perhaps a “National Security Court” made up of designated judges who would build expertise in terrorism cases over time.<sup>22</sup> Others suggest that the Foreign Intelligence Surveillance Court already has judges with expertise in handling sensitive intelligence matters and mechanisms to assure secrecy, so its jurisdiction ought to be expanded to handle detention cases.<sup>23</sup> Still others insist that specialized terrorism courts are dangerous; the legitimacy of a detention system can best be assured by giving regular, generalist judges a say in each decision.

Adversarial process and access to attorneys can help further protect liberty and enhance the perceived legitimacy of detention systems. As with judicial review, though, proposals then tend to split over how best to organize and ensure this adversarial contest. Some argue that habeas corpus suits are the best check on administrative detention.<sup>24</sup> Others argue that administrative detention decisions should be contested at an early stage by lawyers of the detainee’s choosing.<sup>25</sup> Still others recognize an imperative need for secrecy and deep expertise in terrorism and intelligence matters, necessitating a specially designated “defense bar” operated by the government on detainees’ behalf.<sup>26</sup>

This issue of secrecy runs in tension with a third common element of procedural and institutional reform proposals: openness and transparency. The Bush Administration’s approach to date has allegedly been prone to error in part because of excessive secrecy and hostility to the prying eyes of courts or Congress, as well as to the press and advocacy groups. Open or at least partially-open hearings or written judgments that can later be scrutinized by the public or congressional oversight committees, critics and reformists argue, would help put pressure on the Executive branch to exercise greater care in deciding which detention cases to pursue and put pressure on adjudicators to act in good faith and with more diligence.<sup>27</sup>

These three elements of procedural design reform—judicial review, adversarial process, and transparency—may help reduce the likelihood of mistakes and restore the credibility of detention decision-making. Rarely, though, do these discussions pause long on the antecedent question of

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<sup>22</sup> Goldsmith & Katyal, *supra*; McCarthy & Velshi, *supra*; Guiora, *supra*

<sup>23</sup> PHILIP B. HEYMANN & JULIETTE N. KAYYEM, PROTECTING LIBERTY IN AN AGE OF TERROR 18, 51-52 (2005).

<sup>24</sup> See, e.g., Alberto J. Mora and Thomas R. Pickering, *Extend Legal Rights to Guantanamo*, WASHINGTON POST, March 4, 2007, at B07; Statement of Sen. Leahy on Amendment 2022, The Habeas Corpus Restoration Act Of 2007, Sept. 19, 2007 (available at <http://leahy.senate.gov/press/200709/091907.html>).

<sup>25</sup> Guiora, *supra*, at 15.

<sup>26</sup> Goldsmith & Katyal, *supra*; Wittes & Gitenstein, *supra*, at 10; McCarthy & Velshi, *supra*, at 36.

<sup>27</sup> Goldsmith & Katyal, *supra*; Wittes & Gitenstein, *supra*, at 10.

what it is that these courts—however more specifically constituted—will evaluate. Judicial review of *what*? A meaningful opportunity to contest *what* with the assistance of lawyers? Transparent determinations of *what*?

To answer these questions—that is, to define the class of individuals subject to administrative detention and the substantive standards by which detentions will be judged—it is necessary to step back even further to consider carefully the strategic rationale for new proposed legal tools. Discussion of the class should begin with a clear understanding of detention’s strategic purpose: What exactly is non-criminal detention for? The answer to that basic question will help determine the necessity and wisdom of administrative detention, and if one concludes that it is necessary, help define who should fall within the scope of an appropriately drawn regime. Only then can we devise the precise procedural contours and weight the overall merits of legal innovation.

### Why Administratively Detain?

The reason administrative detention is widely discussed at all is that proponents believe terrorism to involve a category of individuals for whom neither criminal justice nor the laws of war—the two legal systems that generally authorize and regulate the long-term detention of dangerous threats—offer effective and just solutions. The argument generally begins with the notion that exclusive reliance on prosecution, along with its usual panoply of defendant rights and strict rules of evidence, cannot effectively, expeditiously, or exhaustively remove the threat of dangerous terrorists. The reasons for this include: information used to identify terrorists and their plots may include extremely sensitive intelligence sources and methods, the disclosure of which during trial would undermine or even negate counter-terrorism operations; the conditions under which some suspected terrorists are captured (especially in far-away lawless or combat zones) make it impossible to prove criminal cases using normal evidentiary rules; prosecution is designed to punish past conduct, but fighting terrorism requires stopping suspects before they act; and criminal justice is deliberately tilted in favor of defendants so that few if any innocents will be punished, but the higher stakes of terrorism cannot allow the same likelihood that some guilty will go free.<sup>28</sup>

These concerns about relying on the criminal justice system to detain suspected terrorists are subject to much debate. Anti-terrorism statutes have been expanded in recent years, making prosecution a more powerful tool.<sup>29</sup> The organization Human Rights First recently published a study of federal prosecutions of terrorism cases since 9/11 and concluded that Article III courts are generally well-equipped to handle many of the challenges just listed.<sup>30</sup> Administrative

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<sup>28</sup> See, e.g., RICHARD A. POSNER, NOT A SUICIDE PACT 64-65 (2006) (on risk calculus); Andrew McBride, *We’ll Rue Having Judges on the Battlefield*, WALL ST. JOURNAL., June 21, 2008, at A7 (on battlefield constraints); Michael B. Mukasey, *Jose Padilla Makes Bad Law*, WALL ST. JOURNAL, Aug. 22, 2007, at A15 (on disclosure of sensitive intelligence information during trial).

<sup>29</sup> See Robert Chesney and Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STANFORD LAW REVIEW 1079 (2008).

<sup>30</sup> See Zabel & Benjamin, *supra*. The Constitution Project’s report condemning administrative detention proposals echoed those findings, and concludes that “the United States government should only be permitted to detain an

detention proponents, however, remain unpersuaded: while acknowledging that prosecution is one important tool among many, they worry that it is not sufficient to deal with the full range of suspected terrorist cases.<sup>31</sup>

Viewing, on the one hand, criminal law as inappropriate or inadequate, administrative detention proponents then usually argue, on the other hand, that the law of war—under which individual enemy fighters can be captured and held for the duration of hostilities without trial—does not work satisfactorily either. These rules grew out of conflicts primarily between professional armies (acting as agents responsible to a state) that could be expected to last months or maybe years but would likely end definitively. Terrorism, by contrast, involves an enemy whose fighters cannot be identified with similar precision and is unlikely to end soon or at all or with certainty. Applying the traditional law of war detention rules therefore opens the possibility of indefinite detention without trial combined with a substantial likelihood of error.<sup>32</sup>

The idea behind administrative detention is to free the State from the stark choice between these two systems: rather than trying to jam the square peg of terrorist threats into the round holes of criminal justice or the law of war, we might design a system better tailored to the special problems of terrorism. Most likely any sensible alternative scheme will include some elements that resemble criminal justice and others that resemble the law of war, for the simple reason that terrorism shares some features of crime and some features of warfare. Consequently, we need to think through how to define the set of cases that fall between the two existing systems and that may demand an alternative. This requires first a clear notion of the needs: what is it about terrorism that might necessitate a step so precipitous as creating a new detention regime?

This may sound like an obvious point, but there is remarkably little discussion in the policy or academic realms of precisely how detention fits within a broader strategy to combat terrorism, or perhaps more specifically, to combat Al Qaeda. At least within the public domain there appears to be no comprehensive effort by the U.S. government to review lessons learned to date about whom it has chosen to detain or not detain. The 9/11 Commission Report contained only one significant recommendation with respect to detention, and that had to do with treatment standards, not the power to detain.<sup>33</sup> The White House's publicly-released *National Strategy for Combating Terrorism* mentions several times the need to capture enemy terrorists but mentions

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individual suspected of a terrorism offense if it can make a probable cause showing to a judge and it intends to prosecute that individual, or if appropriate, as part of immigration removal proceedings.” The Constitution Project, *supra*, at 6.

<sup>31</sup> See Wittes, *supra*. Judge Wilkinson goes through the various obstacles to prosecuting many terrorism cases in his opinion in *Al-Marri*. See *Al-Marri v. Pucciarelli*, No. 06-7427, slip op. at 143-156 (4th Cir. *en banc*, July 15, 2008) (concurring in part and dissenting in part). One limitation of the Human Rights First report is that by using as its data set those cases actually prosecuted by the Justice Department, it may have excluded many of the most difficult cases, since prosecutors presumably only brought forward cases they were confident they would win.

<sup>32</sup> See Waxman, *Detention as Targeting*, *supra*.

<sup>33</sup> NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT, 379-80 (2004).

not a single time the role or utility of the broad detention authorities it has asserted since September 11, 2001—a striking omission given the vast resources that have been devoted to detention operations at Guantanamo and elsewhere and the immense opposition to those operations it has weathered.<sup>34</sup>

That said, it is virtually undisputed among those who advocate administrative detention that its purpose is preventive—a prophylactic measure against terrorist threats. Indeed, the term “preventive detention” is often used interchangeably with “administrative detention.” Whereas criminal justice also has a preventive component, it is usually retrospective in focus, in that it addresses past acts. The resulting punishment, including incarceration, serves preventive purposes insofar as it keeps a perpetrator off the street (for some period of time) and deters both him and others from future crime. But at base criminal justice generally addresses past harms.

Administrative detention proposals, by contrast, tend to be prospective in focus. They start with a notion that terrorist acts—especially major attacks—must be addressed before they occur at all. The consequences of failure to prevent terrorist attacks are too high, the argument goes, to rely on retrospective responses alone. When it comes to crime, we do not typically use the mere likelihood that someone will act—even a high likelihood of even a violent crime—to justify detention. The entire criminal justice system, including the burden of proof beyond reasonable doubt, is tilted in favor of defendants: let ten (or a hundred) guilty go free rather than convict one innocent. And we tolerate high levels of recidivism in parole programs, reasoning that it is more costly to keep all convicts locked up than to accept a certain level of crime. But terrorism, according to administrative detention proponents, is different. The ability of small groups harnessing modern technology (including, especially in the future, weapons of mass destruction) to cause mass casualties, damage, panic and threats to effective governance puts terrorism on a different plane.<sup>35</sup>

This notion of prevention, however, needs to be further unpacked, because it contains several sub-elements. Each of them has its own implications for how to cast administrative detention laws and how to design institutions for adjudicating terrorism cases. Detention may serve the cause of prevention in a number of ways, including (1) by incapacitating suspects, (2) by deterring potential terrorists from joining up with violent extremists or undertaking violent acts, (3) by disrupting specific, ongoing plots, and (4) by enabling the government to gather information about enemy organizations.

The most natural inclination of a government facing threats of terrorism is to *incapacitate* suspected terrorists. Someone has the will and capability to commit terrorism, so keep him off the streets. The purpose of such detention is not punitive or retributive (though such desires might operate in the background), but protective—to put threats out of action. As Attorney General Michael B. Mukasey recently remarked along these lines, “[t]he United States has every right to capture and detain enemy combatants in this conflict, and need not simply release them

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<sup>34</sup> The report is available at <http://www.whitehouse.gov/nsc/nsct/2006>.

<sup>35</sup> See POSNER, *supra*, at 64-65; Ashton B. Carter, John Deutch & Philip Zelikow, *Catastrophic Terrorism: Tackling the New Danger*, 77 FOREIGN AFFAIRS, November/December 1998 at 80.

to return to the battlefield—as indeed some have after their release from Guantanamo. We have every right to prevent them from returning to kill our troops or those fighting with us, and to target innocent civilians.”<sup>36</sup> A prevention strategy emphasizing incapacitation assumes the State’s ability to assess accurately who likely poses a future danger, and to therefore devote resources to stemming their future dangerous activities.

Beyond incapacitating existing threats, the threat of detention might *deter* future terrorist recruits from joining the cause or participating in terrorist activities. In other words, the possibility of getting caught and held by the government may dissuade terrorists or future terrorists from joining the cause or perpetrating bad acts. The more credible the threat of capture and detention, and the more severe the consequences (say, the longer the threatened period of detention), so the theory goes, the greater the deterrent pressure.<sup>37</sup> Whereas an incapacitation strategy begins with the assumption of identifying accurately individual threats, a prevention strategy emphasizing deterrence assumes the State’s ability to manipulate sufficiently the fears of future terrorists at large.

These notions of incapacitating or deterring terrorists or future terrorists may potentially point at large groups of individuals and their dangerous activities. If we can discern who has the intent and capability to commit or support terrorist acts—or the potential to develop that intent and capability—we will try to block or dissuade them. But a narrower way to formulate the preventive purpose of administrative detention might be to *disrupt* terrorist plots. A group of individuals is preparing to hijack a plane or detonate a dirty bomb, so use the detention of certain key persons to foil that plot. Whereas incapacitation focuses heavily on the characteristics of particular individuals, disruption focuses on their joint or individual activities. It is not so much about neutralizing very dangerous people as such but about going after their imminent schemes. The critical assumption here is the State’s ability to identify plots in advance and their key individual enablers.

All three of these preventive approaches assume substantial and accurate knowledge about terrorist network members and supporters, which raises a fourth preventive reason to detain: to *gather information*. Preventing and disrupting terrorist plots requires getting inside the heads of network members, to understand their intentions, capabilities and modes of operation. Detention can facilitate such intelligence collection through, most obviously, custodial interrogation, but also perhaps through monitoring conversations among prisoners or even “turning” terrorist agents and releasing them as government informants. Governments usually justify publicly counter-terrorism detentions on incapacitation or disruption grounds, but no doubt information-gathering has been at the forefront of Bush Administration thinking on the issue, as demonstrated<sup>38</sup> by the lengths to which it has gone to defend permissive interrogation standards and programs.

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<sup>36</sup> Remarks delivered at American Enterprise Institute, July 21, 2008.

<sup>37</sup> Discussion of deterrence is usually divided into two concepts, both of which are relevant here: specific deterrence, which discourages an individual from certain conduct by instilling an understanding of negative consequences, and general deterrence, which makes an example of an individual’s punishment to discourage the broader population from deviant conduct.

<sup>38</sup> Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, NEW YORK

During the early phases of the government's enemy combatant litigation against alleged Al Qaeda dirty-bomber Jose Padilla, the Defense Intelligence Agency director attested:

[T]he War on Terrorism cannot be won without timely, reliable, abundant intelligence. That intelligence cannot be obtained without robust interrogation efforts. Impairment of the interrogation tool—especially with respect to enemy combatants associated with al Qaeda—would undermine our Nation's intelligence gathering efforts, thus jeopardizing the national security of the United States.<sup>39</sup>

As this last point about facilitating information-gathering shows, the preventive purposes of detention often work in tandem. Incapacitating individuals suspected of posing serious dangers may deter individuals from engaging in or supporting dangerous activities. Disrupting major plots and interrogating the plotters may tell us a lot about how future schemes will hatch and who among the many dangerous individuals remaining at large are most likely to play critical roles in those schemes. Any sound counter-terrorism strategy will combine all of these elements to some degree.

But there are also tensions and tradeoffs among these elements of prevention, in part because detention is but one among an array of tools the government will use in implementing its counterterrorism strategy. For example, the government can monitor suspects' movements and communications, not only to foresee and forestall plots but to gain a more complete picture of the terrorist network and its activities; the moment the government detains someone, however, those movements and communications may cease along with its ability to track them. Releasing a captured individual still believed to pose a danger may offer opportunities to follow him, perhaps with more to be gained through information collection than lost by assuming the marginal risk of his committing major violence. In other words, an aggressive incapacitation approach may sometimes undermine information-gathering activities.<sup>40</sup> Aside from other policy costs to detention, some of which are discussed below, the government formulates counter-terrorism detention strategy—and with it consideration of administrative detention's utility in certain circumstances—in an environment of constrained resources. This means that we must prioritize among these preventive functions, and sometimes sacrifice one in the service of another.

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TIMES, Oct. 4, 2007; Sheryl Gay Stolberg, *Bush Says Interrogation Methods Aren't Torture*, WASHINGTON POST, Oct. 6, 2007.

<sup>39</sup> Declaration of DIA Director Vice Admiral Lowell E. Jacoby at 6, *Padilla v. Bush*, No. 02 Civ. 4445 (S.D.N.Y. Jan. 9, 2003). In 2006, President Bush similarly declared, in disclosing publicly the CIA detention and interrogation program: "These are dangerous men with unparalleled knowledge about terrorist networks and their plans for new attacks. . . . The security of our nation and the lives of our citizens depend on our ability to learn what these terrorists know." Speech of President George W. Bush, Sept. 6, 2006, available at: <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>.

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

A final reason that consideration of administrative detention must begin with a clear understanding of its strategic purposes is that the ultimate policy question will not simply be whether administrative detention will effectively serve preventive functions but how it does so and in comparison with the alternatives. Even if not foolproof or able to cast as wide or dense a detention net, criminal law is able to serve each of the preventive functions just mentioned to at least some significant degree, and the government has an array of other tools at its disposal including surveillance and non-custodial questioning as well. The critical question is by what margin, if any, administrative detention might improve the effectiveness of an integrated counter-terrorism strategy, and at what cost.

### **Whom to Administratively Detain?**

Greater clarity on the “why detain” question will not merely help clarify the strategic advantages motivating proposed administrative detention programs; it will also help guide the substantive definition of the class subject to that detention—that is, it will help answer the “whom” question. In other words, it is difficult to define legislatively the factual predicate of detention decisions without knowing precisely the main strategic rationale.

If we were to continue using the Bush Administration’s notion of enemy combatancy as the relevant inquiry, courts might be charged with reviewing whether an individual is a “member” of a certain organization, or committed a “belligerent act,” or “supported” those who are or have. The government’s claim in *Hamdi* and *Rasul* notwithstanding, one can certainly construct judicially manageable standards for any of these inquiries. After all, any of these concepts have analogues in criminal law (say, conspiracy liability in the case of membership or aiding and abetting in the case of support, or perhaps even the concept of agency of a foreign power under the Foreign Intelligence Surveillance Act) that judges apply regularly.<sup>41</sup>

More to the point, though, in designing an administrative detention regime, enemy combatancy need not, and probably should not, be the starting point at all, and there are a range of other possible ways to define the class of individuals subject to detention. After all, the traditional notion of enemy combatancy grew out of a warfare context in which participation in an enemy army could reasonably be assumed to serve as an accurate indicator of one’s future threat, measured in traditional military terms. But even those who cling to a “war on terror” paradigm acknowledge that the fight against terrorism generally or Al Qaeda in particular is unlike any previous war, in terms of the nature of the enemy, its threat, and the way we think about success. Moreover it is widely believed that since 2001 the terrorist threats to the United States and its allies have become less centralized, less hierarchical, and less formalized, even further complicating direct application of legal standards developed for traditional armies.<sup>42</sup>

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<sup>41</sup> See the forthcoming paper by Robert Chesney in this series.

<sup>42</sup> Although there exists a major debate among terrorism experts as to the continuing strength of Al Qaeda, even those who assess Al Qaeda as resurgent acknowledge that “informal local terrorist groups are certainly a critical part of the global terrorist network.” Bruce Hoffmann, *The Myth of Grass-Roots Terrorism: Why Osama bin Laden Still Matters*, FOREIGN AFFAIRS, May/June 2008; see also MARC SAGEMAN, LEADERLESS JIHAD: TERROR NETWORKS IN THE TWENTY-FIRST CENTURY (2008) (arguing that the major terrorist threat to the United States

One model for defining the class might be based on what are, in essence, already existing examples of administrative detention in U.S. law, which permit the long-term detention of certain categories of individuals judicially adjudged as “dangerous.” Some state laws, for example, authorize the detention of charged or convicted sex offenders who, due to a “mental abnormality,” are likely to engage in certain acts of sexual violence.<sup>43</sup> These statutory schemes might be a particularly apt analogue because, as is often supposed about religiously-extremist terrorists, they were premised legislatively on a view that some sexual predators are undeterrable from future violence.<sup>44</sup> Under federal bail law, authorities can hold suspects pending trial upon sufficient showing that no release conditions would reasonably assure community safety.<sup>45</sup> To be sure, it remains highly debatable whether dangerousness alone as an administrative detention standard would pass constitutional muster, at least with respect to U.S. citizens.<sup>46</sup> But in the terrorism context, as in other areas of American law, an administrative detention regime might include future dangerousness at least as one critical element. And, accordingly, a central inquiry for courts might be to review the Executive’s dangerousness assessment.

The United Kingdom’s 2005 Prevention of Terrorism Act, as another model, allows for the imposition of “control orders” (or restrictions on an individual’s movements, communications or other freedoms) when the government “has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity,” which is further defined as “(a) the commission, preparation or instigation of acts of terrorism; (b) conduct which facilitates the commission, preparation or instigation of such acts, or which is intended to do so; (c) conduct which gives encouragement to the commission, preparation or instigation of such acts, or which is intended to do so; (d) conduct which gives support or assistance to individuals who are known or believed to be involved in terrorism-related activity.”<sup>47</sup> Under this model, the critical inquiry for courts focuses not on an individualized assessment of future dangerousness but on whether an individual committed a certain type of act. Parliament presumably selected these types of acts because it believed them to serve as good indicators of future dangerousness. But the narrow

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and the West now comes from loose-knit local cells).

<sup>43</sup> See *Kansas v. Hendricks*, 521 U.S. 346 (1997).

<sup>44</sup> See *id.* at 351, 362-63.

<sup>45</sup> See *United States v. Salerno*, 481 U.S. 739 (1987).

<sup>46</sup> The complex constitutional issues are beyond the scope of this paper, but of course they are highly relevant and any administrative detention scheme would face intense judicial challenge. Throughout this paper I cite a number of U.S. federal and state preventive detention laws that have been upheld, though usually on very narrow grounds. In *Zadvydas v. Davis* the Court made clear that indefinite administrative detention of a removable alien would raise constitutional due process concerns, see 533 U.S. 678 (2001), though it noted that a statutory scheme directed at suspected terrorists might change its analysis, see *id.*, at 691. For views skeptical of the constitutionality of preventive detention laws related to terrorism, see Justice Scalia’s dissent in *Hamdi*, 542 U.S. at 554-557.

<sup>47</sup> Ch. 2, Sec. 1, Para. 9. The UK statute is available at [http://www.opsi.gov.uk/acts/acts2005/ukpga\\_20050002\\_en\\_1](http://www.opsi.gov.uk/acts/acts2005/ukpga_20050002_en_1)

focus on acts tends to tidy the judicial inquiry considerably. Determining whether a suspect committed alleged deeds, after all, is something that courts do all the time.

As yet another set of models, consider several Israeli administrative detention schemes. Under one statutory scheme, Israel's domestic "Emergency Powers Law," the Executive can order judicially reviewed detention based on the extremely broad standard of "reasonable cause to believe that reasons of state security or public security require that a particular person be detained."<sup>48</sup> This statute does not presuppose a state of war, and it contrasts with Israel's 2002 Unlawful Enemy Combatant statute. The statute, recently upheld by the Israeli Supreme Court, provides the authority to detain an individual fighting on behalf of foreign forces with which Israel regards itself in a state of armed conflict, pursuant to strict judicial review requirements, if that individual "participated either directly or indirectly in hostile acts against the State of Israel or is a member of a force perpetrating hostile acts against the State of Israel" *and* whose "release will harm State security."<sup>49</sup> In other words, detention under the latter scheme requires a showing of either certain acts *or* membership *plus* dangerousness.

These examples illustrate just part of the spectrum of possible definitions of the detention class; any of them is susceptible to judicial application.<sup>50</sup> So which one makes sense? A broad "state security" class? Dangerousness? Membership? Commission of proscribed acts? Knowledge? The answer depends heavily on strategic purpose.

If, for example, the overwhelming focus of administrative detention is to incapacitate and deter individuals likely to pursue threatening terrorist activities, then the authority to detain would most naturally turn on an individual's supposed dangerousness. In that regard, a statutory scheme might resemble administrative detention laws mentioned a moment ago, aimed at supposedly dangerous sex offenders whose prison term has expired or pre-trial arrestees. Secondary questions then arise. What type of dangerousness: Likelihood of one day participating in a major terrorist attack? Likelihood of attacking U.S. forces or citizens? Likelihood of supporting those who carry out terrorist attacks? And what level of dangerousness: Substantial likelihood? More likely dangerous than not?

Rather than making purported dangerousness itself the test, a statute might rely on proxy indicators of future threat, such as membership in a particular terrorist organization or commission of particular acts, supposing that such membership and activities are good predictors of an individual's likely behavior if allowed to roam free. With regard to membership, consider

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<sup>48</sup> Emergency Powers Law (Detention), 1979 (Israel).

<sup>49</sup> Incarceration of Unlawful Combatants Law, 5762-2002. See *Anonymous v. State of Israel*, Cr. App. 6659/06 (S. Ct. Israel, June 11, 2008). The law passed in 2002 following the Israeli Supreme Court's concerns over the detention of Hezbollah fighters' family members as bargaining chips

<sup>50</sup> The 2001 PATRIOT Act contains provisions authorizing the *short-term* detention of aliens on grounds similar to those discussed in the previous examples. It authorizes the Attorney General to detain, among others, any alien whom he has reason to believe is "likely to engage after entry in any terrorist activity," has "incited terrorist activity," is a "representative" or "member" of a terrorist organization, or "has received military-type training" from a terrorist organization. USA PATRIOT Act § 412(a), 8 U.S.C.A. § 1182(a)(3)(A)-(B). The Act, which has never seen use, also authorizes the Attorney General to detain aliens who are "engaged in any other activity that endangers the national security of the United States."

the Alien Enemy Act, a statute enacted in 1798 and later amended. It authorizes that during a declared war and upon presidential proclamation, “all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies.”<sup>51</sup> The statute, which remains on the books today, was clearly premised on the idea that during wartime an individual’s citizenship of an enemy state is a strong indicator of dangerousness.<sup>52</sup>

With regard to past acts as a proxy for dangerousness, recall that the United Kingdom’s 2005 Prevention of Terrorism Act, for example, allows for the imposition of control orders when the government “has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity,” which it then further enumerates. Note that “for the purposes [of the UK statute] it is immaterial whether the acts of terrorism in question are specific acts of terrorism or acts of terrorism generally.”<sup>53</sup>

If, by contrast, the emphasis of administrative detention is not to incapacitate individuals but to disrupt impending plots, then the focus of authority to detain might be cast differently, in some ways more narrowly but in some ways perhaps more broadly. A law might authorize detention on a showing that “failure to detain that [international terrorist] will result in a risk of imminent death or imminent serious bodily injury to any individual or imminent damage to or destruction of any United States facility” (this language is drawn from a 2007 Senate bill).<sup>54</sup> On the one hand, in theory, authorities can disrupt plots by nabbing only key leaders and planners and those directly involved in the specific plots; even if some very dangerous but peripherally-involved associates remain free, the scheme may be ruined. On the other hand, detention to disrupt might justify detaining for some period of time even individuals who are not very dangerous at all (perhaps not very committed to the terrorist cause or trained to do much harm) but who play a minor role in a particular plot, or might just have information about it.<sup>55</sup> As explained further below, disruption detention along these lines also points toward a short duration of detention, whereas dangerousness detention may in some cases point toward long-term detention.

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<sup>51</sup> In *Ludecke v. Watkins*, 335 U.S. 160 (1948), the Supreme Court upheld the Act’s World War II implementation through a presidential directive calling for detention and removal of all alien enemies “who shall be deemed by the Attorney General to be dangerous to the public pea[c]e and safety of the United States.”

<sup>52</sup> Similarly, as mentioned a moment ago, Israel’s Unlawful Enemy Combatant statute requires a showing of both membership in an enemy organization as well as individual dangerousness. In upholding the statute, the Israeli Supreme Court explained its incapacitation logic: “[W]e are dealing with an administrative detention whose purpose is to ... remov[e] from the cycle of hostilities anyone who is a member of a terrorist organization ... in view of the threat that he represents to the security of the state and the lives of its inhabitants.” *Anonymous v. State of Israel*, Cr. App. 6659/06 (S. Ct. Israel, June 11, 2008), at para. 15.

<sup>53</sup> Ch. 2, Sec. 2, Para. 1.

<sup>54</sup> National Security with Justice Act, S.1876, introduced July 25, 2007 (available at: <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:s.01876>.)

<sup>55</sup> Human Rights Watch has criticized France’s use of broad criminal liability for supporting terrorism and heavy investigatory powers to disrupt terrorist plotting by casting very wide arrest nets. See Human Rights Watch, *Preempting Justice: Counterterrorism Laws and Procedures in France* (July 2008), at 22-27.

Note that the key inquiry in the last example looks different than it does for incapacitation: detention to disrupt assumes a functional linkage between an individual and a plot (or set of plots), whereas incapacitation might look to an individual's general will and capacity to do harm. A statutory regime focused on disruption might accordingly define the class around plots or a showing that "but for" detention of a particular individual, terrorist attacks are likely. There will no doubt be overlap of these categories, but not complete overlap. Take, for example, a terrorist financier who provides money to a range of terrorist organizations. Authorities may regard him as extremely dangerous and believe his detention might reduce generally the likelihood and effectiveness of future terrorist attacks and frighten others from funding terrorism (incapacitation and deterrence). But he is unlikely to fall within the terms of a law requiring a showing that failure to detain him will substantially increase the risk of a specific, imminent attack. For an example running in the other direction, consider an Al Qaeda courier believed to be carrying messages to other members about an impending attack; measured for future dangerousness on an individual basis (depending on how high the bar is set and what factors are used in determinations), authorities might regard him as not very threatening at all. But his specific, not-itself-violent involvement in an imminent attack might put him squarely within a law aimed at disruption.

If the major focus of administrative detention is information-gathering, the natural definition of the detention class would look different still. Administrative detention might target individuals believed to have critical information about either terrorism threats generally or, more narrowly, specific terrorism plots. Again, often this category of individuals will overlap with inquiries of dangerousness or involvement in specific plots, and a law might require a showing of membership in a terrorist organization or commission of a terrorist act as a threshold matter before even considering the information question. But these categories will not always overlap. Consider, for example, an Al Qaeda paymaster who might not be individually very dangerous, but who might have substantial information about associates who are. Taken to the extreme, a law authorizing detention based on suspected knowledge alone might be used to justify holding the spouse or roommate of a suspected terrorist—even if not complicit—in order to question them about the suspect's actions, communications and intentions. Some argue that the federal government used (or abused) its material witness powers in similar ways after 9/11, taking individuals into custody solely to question them about any possible knowledge of terrorist activity.<sup>56</sup>

In sum, the strategic focus of administrative detention proposals will bear heavily on how the law should define the substantive class.

### **Narrowing the Class**

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<sup>56</sup> An example of a similar law is the Material Witness statute, 18 U.S.C. § 3144, which under certain imperative circumstances allows arrest of an individual with information critical to a criminal proceeding. For critical accounts of its use after 9/11, see COLE & LOBEL, *supra*, at 250; Human Rights Watch, *Witness to Abuse: Human Rights Abuses Under the Material Witness Law Since September 11* (June 2005).

If the United States needs new tools to effectively combat new forms of terrorism, why not simply define the class broadly—as the Bush Administration has done—to give the Executive maximum latitude to design appropriate responses? As noted earlier, the Bush Administration has argued that administrative detention is needed for the entire range of reasons listed above, and has therefore argued for an expansive definition of the class.<sup>57</sup> Even if one rejects the full breadth of these claims, the notion is certainly correct that all elements of prevention listed above feature in any sensible counter-terrorism strategy.

The main reason for restricting the class liable to detention is that every expansion comes at a price—one reason among many to carefully consider strategic priorities in detention. The policy calculus must include consideration not just of the general dangers attached to enacting any new detention regime but also the marginal dangers that come from expanding the size and shape of the susceptible class. A full discussion of all of those dangers is beyond the scope of this paper, but it is worth highlighting a few because they bear on its broader thesis, namely that the ultimate policy merits of administrative detention will turn at least as much on the tough issue of defining the substantive class as fashioning the right procedures. Moreover, U.S. experience since 9/11 as well as that of our allies in combating terrorism in the past offer lessons for how to narrow the class.

Debates about administrative detention are usually cast in terms of liberty versus security. But administrative detention—both its use as well as its mere enactment—carries risks to both liberty and security. Experience since September 2001 suggests that those costs are unlikely to be mitigated even by robust procedural protections without also constraining tightly the substantive detention criteria.

Opponents and skeptics of administrative detention rightly point out that creating new mechanisms for detention with diluted procedural protections (compared to those granted criminal suspects) potentially puts liberty at risk. The most obvious liberty concern is that innocent individuals will get swept up and imprisoned—the “false positive” problem. Civil libertarians rightly worry too that beside the specific risk to particular individuals, any expansion of administrative detention (and I say “expansion” because, as noted earlier, it already exists in some non-terrorist contexts in American law) risks more generally eroding checks on state power. To some, the idea of administrative detention for suspected terrorists is the kind of “loaded gun” that Justice Robert Jackson worried about at the time of Japanese internment.<sup>58</sup> Even if we are satisfied that the U.S. government can use administrative detention responsibly, there are many unsavory foreign regimes that will not. We need, therefore, to be cautious about justifying principles that might be exploited pretextually by less-democratic regimes to crack

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<sup>57</sup> In the course of the Padilla argument, for example, the government advanced each of these justifications. See Brief for Petitioner, *Rumsfeld v. Padilla*, at 28-38.

<sup>58</sup> In response to Jack Goldsmith and Neal Katyal's proposal, *see supra*, for example, Center for Constitutional Rights President Michael Ratner wrote that “[p]reventive detention cuts the heart out of any concept of human liberty.” Letter to the Editor, *N.Y. TIMES*, July 16, 2007.

down, for example, on dissidents it might label “terrorists” or “national security threats.”<sup>59</sup>

In considering these liberty risks, one usually thinks about the procedural protections afforded suspects (such as access to an opportunity to rebut evidence) or the burdens of proof placed on the government (beyond-reasonable-doubt, probable cause, etc.). But the substantive definition of the detention class is key to managing these risks as well, and a narrow definition can help mitigate them. Some relatively restrictive definitions—say, those who commit certain acts—might generally be provable to great certainty, whereas some very broad conceptions—say, those who harbor devotion to a hostile ideology—may be impossible to prove with high confidence. A very broad definition of conduct or dangerousness justifying detention will also likely result in scooping up many individuals who will not actually have engaged in terrorist conduct. Indeed, that a broad substantive definition of the detention class can overwhelm even the most robust procedural protections is reflected in criticisms that recently-expanded criminal liability for providing “material support” to terrorist organizations or engaging in terrorist conspiracies has netted many individuals who were actually unlikely to engage in serious acts of terrorism.<sup>60</sup> Finally, as to the international dimension, a narrow set of definitional criteria—requiring, for example, a showing of certain specific acts or a linkage to specific plots—stands a better chance of winning legitimacy among allies and averting over-expansive interpretation among other countries. Although creating any new category of administrative detention risks chipping away at international norms generally demanding criminal prosecution to lock away bad actors, the more narrowly such a carve-out is defined the less prone it will be to political manipulation or to further stretching to deal with other types of public policy problems.

Besides these liberty risks, administrative detention may sometimes be counterproductive from a security standpoint, and again the substantive criteria of detention law may help mitigate these risks. Historically, detention practices—especially those viewed as overbroad—have proven ill-suited to combating terrorism and radicalization, and the strategic matrix of administrative detention should include these dangers. The British government learned painfully that internment of suspected Northern Ireland terrorists was viewed among Northern Irish communities as a form of collective punishment that fueled violent nationalism, and detention helped dry up community informants.<sup>61</sup> And in Iraq and Afghanistan, though exceptional because combat still rages there, detention has played an important role in neutralizing threats to coalition forces but has also contributed to anti-coalition radicalization, especially when perceived as applied overbroadly.<sup>62</sup>

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<sup>59</sup> See Human Rights First, *Behind the Wire* 24-25 (2005).

<sup>60</sup> See COLE & LOBEL, *supra*, at 49. Human Rights Watch has expressed similar concern that France’s criminal laws against “criminal associating in relation to a terrorist undertaking” have been used to net large numbers of people who pose little threat and with little evidence against them. See Human Rights Watch, *supra*, at 1.

<sup>61</sup> See DAVID BONNER, EXECUTIVE MEASURES, TERRORISM AND NATIONAL SECURITY, 87-96; Tom Parker, *Counterterrorism Policies in the United Kingdom*, in PHILIP B. HEYMANN & JULIETTE N. KAYYEM, PROTECTING LIBERTY IN AN AGE OF TERROR 119, 125-28 (2005).

<sup>62</sup> See Carlotta Gall, *U.S.-Afghan Foray Reveals Friction on Antirebel Raids*, NEW YORK TIMES, July 3, 2006; Alissa Rubin, *U.S. Remakes Jails in Iraq, but Gains Are at Risk*, NEW YORK TIMES, June 2, 2008. The new U.S.

One role that well-crafted definitional criteria can play is mitigating an executive's propensity to over-detain. Observers from both the right and the left worry correctly that in the face of terrorist threats the Executive is likely to push detention powers to or even past their outer bounds in order to prevent catastrophe as well as head off accusatory political backlash for having failed to take sufficient action.<sup>63</sup> Such overbroad detention sweeps risk further radicalizing and alienating communities from which terrorists are likely to emerge or whose assistance is vital in penetrating or discerning extremist groups. Moreover, several important studies of counter-terrorism strategy have emphasized the need to target coercive policies (including military and law enforcement efforts) narrowly and precisely to avoid playing into Al Qaeda propaganda efforts to aggregate local grievances into a common global movement.<sup>64</sup> These problems are fundamentally policy, not legal ones, and will require sound executive judgments no matter what the legal regime looks like. But once the role of detention is firmly situated in a broader counter-terrorism strategy that seeks to balance the many competing policy priorities, a carefully-drawn administrative detention statute can help constrain this propensity to over-reach in the short-term to long-term strategic detriment.

Returning to the preventive purposes outlined above, the process of narrowing the class subject to proposed administrative detention laws should begin by excluding deterrence or information-gathering as the dominant strategic driver. As for deterrence, virtually any very dangerous terrorist or terrorism-supporter the government could target with a deterrence detention strategy would either be deterred already by the threat of criminal prosecution or military attack or would be sufficiently committed to violent extremism as to render the marginal deterrent threat of administrative detention negligible.<sup>65</sup> As for information-gathering, an administrative detention law premised on detaining individuals with valuable knowledge independent of an individual's nefarious activities sets a precedent too easily abused or overused at home or abroad. Information gathering (including through lawful interrogation) will no doubt be a strong motivating objective behind almost any administrative detention scheme, and an individual's knowledge about terrorist operations or planning could be a reason not to release someone otherwise validly detained on other independent grounds.<sup>66</sup> But using a person's suspected knowledge alone as the basis for detention and completely delinking detention from an individual's voluntary and purposeful actions cuts even deeper than most other administrative

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military counterinsurgency manual offers similar cautions. See DEPARTMENT OF THE ARMY, FM 3-24 COUNTERINSURGENCY (2007), at paras. 7-38, 7-40, 8-42.

<sup>63</sup> See, e.g., BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK* 44-51 (2006); JACK L. GOLDSMITH, *THE TERROR PRESIDENCY* 116, 189-90 (2007).

<sup>64</sup> See, e.g., Audrey Kurth Cronin, *How al-Qaida Ends*, 31 *INTERNATIONAL SECURITY* 7 (2006); David Kilcullen, *Countering Global Insurgency*, 28 *JOURNAL OF STRATEGIC STUDIES* 597 (2005).

<sup>65</sup> Also, in upholding Israel's Unlawful Enemy Combatant statute, the Israeli Supreme Court noted that deterring others from committing acts is not a legitimate purpose of administrative detention. *Anonymous v. State of Israel*, Cr. App. 6659/06 (S. Ct. Israel, June 11, 2008), at para. 18.

<sup>66</sup> Opponents of administrative detention will argue that detention, outside of criminal prosecution, even based on activities or threat is still too broad and prone to abuse. See COLE & LOBEL, *supra*, at 47-50.

detention into traditional civil liberties principles and safeguards.<sup>67</sup> A detention law that allows incarceration based on knowledge might also perversely deter individuals with important information from coming forward voluntarily to the government.

The more promising strategic bases for new detention laws are incapacitation and disruption, though, as just mentioned, information-gathering is likely to be an important secondary benefit. As noted earlier, opponents of administrative detention argue that criminal law and other non-detention tools are adequate to incapacitate or disrupt the activities of most individuals whom the government would reasonably feel compelled to target, and proponents of administrative detention insist that the risk is too high of some terrorists slipping through that net. Much of this debate comes down to differing assessments of the marginal danger posed by that remainder, but, importantly, even opponents of new administrative schemes acknowledge that stopping an individual from carrying out a terrorist attack (as opposed to merely acquiring information or to instill fear) is a legitimate purpose of detention. The dispute is over what factual predicate is required and by what standards and processes the state must substantiate it.<sup>68</sup>

Narrowing the strategic focus of proposed new detention rules to incapacitation or disruption still leaves the question of how, more precisely, Congress should define the susceptible detention class. The ultimate merits of various definitional approaches (including membership, past acts, future dangerousness, or some combination thereof) depend heavily on the processes and standards of proof with which they are paired. Recent experience and some judgments about the future threat of terrorism, however, can help further narrow the range of sensible choices.

The previous section offered some models drawn from other countries with long histories of combating terrorism and from other legal contexts based on incapacitation. An incapacitation strategy points naturally toward a future dangerousness approach to defining the class, though proxies such as past acts might form part of the inquiry.<sup>69</sup> Indeed, requiring some showing of an individual's past terrorist activity in addition to indications of future dangerousness has the advantage of tying detention more tightly with individual moral culpability.<sup>70</sup> If one thinks that the number of (or danger posed by) terrorists who cannot be prosecuted in criminal trials is high, an incapacitation strategic rationale of administrative detention makes sense. But the U.S. experience at Guantanamo, for example, casts some doubt on the ability of the government to

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<sup>67</sup> Cf. *Hamdi*, 542 U.S. at 521 (noting that, with respect to Congress's 2001 Authorization for the Use of Military Force, "[c]ertainly we agree that indefinite detention for the purpose of interrogation is not authorized").

<sup>68</sup> An additional worry among administrative detention critics is that building a detention system outside the criminal justice system with reduced evidentiary and procedural requirements might dramatically undercut the incentive for the government to use prosecution. This concern is valid, though the benefits of justice and finality as well as bureaucratic interests might mitigate it. An administrative detention regime might also build in a requirement that the government show that prosecution is impracticable.

<sup>69</sup> Much scholarship has focused on the use of individual dangerousness assessments in American criminal law, and the limitations of the government's ability to predict it accurately. See Jeffrey Fagan & Martin Guggenheim, *Preventive Detention and the Judicial Prediction of Dangerousness for Juveniles: A Natural Experiment*, 86 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 415 (1996); Norval Morris & Marc Miller, *Predictions of Dangerousness*, 6 CRIME & JUSTICE 1 (1985); Jonathan Simon, *Reversal of Fortune: The Resurgence of Individual Risk Assessment in Criminal Justice*, 2005 ANNUAL REVIEW LAW & SOCIAL SCIENCE 397.

<sup>70</sup> Though this carries the disadvantage of intruding more directly into the traditional province of criminal law.

assess dangerousness accurately: on the one hand it brought many supposedly-dangerous individuals to Guantanamo who were then released because they were believed not to pose much threat after all; on the other hand, some of those released have turned out to be quite dangerous, and have re-engaged in terrorist activity.<sup>71</sup> A central question for Congress to probe in considering new administrative detention proposals is whether accurate dangerousness assessments are realistic, and what would be necessary to improve them.

A disruption strategy points naturally toward including a “but for” standard of dangerousness: the government would have to show that unless the individual is detained, a terrorist attack is likely. Such an approach might effectively limit the detainable class to individuals who are either tied to specific plots or are highly central to a terrorist organization’s planning. An advantage of this approach is that it would probably be less prone to false positives or overbroad detention than would a more general dangerousness standard (depending, of course, on exactly how each standard is drawn); it would, after all, be limited by intelligence—specifically, the ability to link individuals to plotting or specific plots in advance. The skeptic might then ask, however: why, if the government is so confident it knows who is about to perpetrate a terrorist scheme, cannot it simply arrest and prosecute the plotters? This approach makes sense if one believes there exists a significantly dangerous set of individuals for whom the government is likely to have sufficient information to link them to such plotting or plots yet insufficient admissible evidence to support timely use of the criminal justice system to stop them.

Note that both of these definitional approaches—detention based on individual dangerousness or a showing that an attack is likely to occur absent detention—look very different from the one based on enemy combatancy, certainly as the government has interpreted and used it since 2001. Indeed, once freed from the need to cast detention in terms of the law of war and traditional war powers, past experience and the logic underlying most administrative detention proposals at least caution against defining the class heavily based on “membership” in or “support” of a particular enemy organization or set of organizations.

A definitional approach based on mere membership or support to a particular enemy like Al Qaeda is simultaneously too broad and too narrow. The main reason modern forms of terrorism might necessitate new detention powers, after all, is because the catastrophic harms of attacks require recalibrating the balance struck by criminal law between security and protection of innocents. A “membership” or “support” to certain groups approach to administrative detention has already proven prone to over-use against individuals who, while perhaps individually dangerous, pose little or low threat of a major terrorist attack. An agency requirement—does the individual operate under the effective control of an organization?—makes more sense, and actually has more in common with traditional notions of traditional enemy combatancy than does

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<sup>71</sup> On releases from Guantanamo following later determinations that an individual was not an “enemy combatant,” see Secretary of the Navy England Briefing on Combatant Status Review Tribunal, July 9, 2004, available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2777>. For a specific example of an allegedly mistaken detention at Guantanamo, see Carol D. Leonnig, *Evidence of Innocence Rejected at Guantanamo*, WASHINGTON POST, Dec. 5, 2007, at A01. On detainees released from Guantanamo later returning to terrorism, see Former Guantanamo Detainees Who Have Returned to the Fight, U.S. Department of Defense, July 12, 2007, available at <http://www.defenselink.mil/news/d20070712formergtmo.pdf>.

mere membership.<sup>72</sup> At the same time, if the ultimate concern is stopping major terrorist attacks, it seems odd to restrict the targeting of administrative detention powers to intended perpetrators who are affiliated with groups involved in the September 2001 attacks. This is especially true if Al Qaeda and other terrorist organizations are likely to become less centralized and more organizationally dispersed.<sup>73</sup>

In the end, whether it aims primarily at long-term incapacitation or immediate-term disruption, an effective definitional approach would tie the detainable class quite directly to the specific strategic aim by including a relatively high substantive standard of prospective or “but for” dangerousness, including proxy indicators likely to improve the accuracy of adjudications.<sup>74</sup>

### **How to Administratively Detain**

Along with narrowing the substantive definition of the detention class, a final reason to ground any consideration of administrative detention statutes in a careful analysis of strategy and a firm conception of “why detain?” is that such reasoning will inform significantly the logic of procedural design.

I noted above an emerging consensus among advocates of administrative detention reform around a set of minimum procedural elements. These elements, common to most administrative detention proposals, include judicial review, adversarial process, and transparency. After *Boumediene*, it is also fairly clear that robust judicial review and a meaningful opportunity to contest the legal and factual basis for detention are also constitutionally required, at least for detainees held inside the United States or at Guantanamo.<sup>75</sup> Beyond identifying such minimum elements, however, it is difficult to work out the secondary details of procedural design without knowing more precisely what the scheme aims to achieve and whom it is built to detain. Greater strategic clarity and a clearer idea of how we mean to define the substantive detention class might help shed light on this procedural debate.

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<sup>72</sup> Judge Wilkinson adopts a similar interpretation of “enemy combatant” in *Al-Marri v. Pucciarelli*, No. 06-7427, slip op. at 179 (4th Cir. *en banc*, July 15, 2008) (concurring in part and dissenting in part), when he reasons that to be classified as an enemy combatant a person must “(1) be a member of (2) an organization or nation against whom Congress has declared war or authorized the use of military force, and (3) knowingly plans or engages in conduct that harms or aims to harm persons or property for the purpose of furthering the military goals of the enemy nation or organization.”

<sup>73</sup> An alternative approach could have Congress designate on an ongoing basis which terrorist organizations pose sufficient threat that their members—or, better, its agents—are subject to the administrative detention statute. Some might argue that the 2001 Authorization of the Use of Military Force did just that, with respect to Al Qaeda, and Congress could pass additional resolutions to take account of new threats or repeal resolutions to take account of diminished ones.

<sup>74</sup> Besides these definitional standards themselves, there are other ways to restrict the class of individuals susceptible to new administrative laws. Detention of an individual might require an additional showing of prior terrorism-related acts, or it might require showing that less-coercive means than detention could not alleviate the risk. The more such protections are added, however, the less useful administrative detention becomes over other legal tools like criminal prosecution.

<sup>75</sup> *Boumediene v. Bush*, *supra*.

Consider first the issues of judicial review and adversarial process. Whatever the test or factual predicate used to justify detention as part of a counter-terrorism strategy (dangerousness, for example, or proximity to a plot, knowledge of terrorist activities, or some other criterion), effective administrative detention ought to involve adjudicative mechanisms likely to produce accurate and fair determinations of that factual predicate. If the dominant strategic purpose of detention is the incapacitation of suspects and the critical detention test is therefore dangerousness, for example, we should strive for hearings designed to assess and predict future behavior, with adjudicators who have access to information relevant to that inquiry and processes that effectively test the quality of that information. True, regular federal judges make similar determination based on adversarial hearings all the time (as in the example cited above of bail conditions pending trial). But terrorist dangerousness is different from criminal dangerous in kind and degree<sup>76</sup> and requires understanding not just an individual's probable activities and the magnitude of their threat but how they relate to activities of fellow terrorists. If the dangerousness test includes a further inquiry of whether less liberty-restrictive means can mitigate the threat (as the British Law Lords have held to apply in the case of recent British counter-terrorism laws),<sup>77</sup> courts would further need to understand and assess the effectiveness of an array of government tools, including monitoring and surveillance and international cooperative efforts. These inquiries would be better-suited to a specialized court (perhaps a "national security court"), so that judges could accumulate experience and expertise in these technical and operational matters.<sup>78</sup>

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

The strategic purpose of administrative detention and the corresponding definition of the substantive class will also guide discussion of other aspects of institutional design, including how long individual detentions ought to last. If administrative detention focuses on incapacitation, and therefore defines the class according to dangerousness or some proxy for it, individual detentions would logically last as long as that condition exists—that is, as long as the individual

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<sup>76</sup> Those who believe that terrorism should be treated as crime may disagree with this point, but other ways in which terrorist dangerousness generally differs from criminal dangerousness include its strategic purpose, individual motivation, and long-term as well as short-term consequences.

<sup>77</sup> House of Lords, *A(FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*, [2004] UKHL 56, paras. 30-43.

<sup>78</sup> See Goldsmith & Katyal, *supra*; Kenneth Anderson, *Law and Terror*, POLICY REVIEW, Oct. 2006, at 1. Some analysts credit the success of France's counterterrorism efforts in part to its development of a specialized, centralized terrorism court; this court's magistrates became "the type of expert on the subject of terrorism that is difficult to create within normal judicial institutions." Jeremy Shapiro & Benedicte Suzan, *The French Experience of Counter-Terrorism*, 45 SURVIVAL 67-78 (2003).

poses that danger, presumably with periodic reassessment along the way.<sup>79</sup> By contrast, a disruption-based administrative detention system could be effective with very short-term detentions; indeed, merely arresting, then releasing, a terrorist plot member might cause his collaborators to stand down.<sup>80</sup> And relatively short-term detentions might satisfy most information-collection requirements, but would provide little deterrent threat to would-be terrorist collaborators.

Finally, the manner in which we define our strategic purposes and, consequently, the subject class of individuals also drives the logic of decision-making transparency. An incapacitation strategy is compatible with high levels of public scrutiny, since there will usually be little reason to hide (and indeed much to gain from disclosing openly) the underlying justification for a detention. Such transparency may be critical to deterrence, at least if detention aims to dissuade individuals from certain specific conduct. But the transparency of disruption is trickier, since the government may not wish to tip off other plot collaborators or scare the public. And information-collection detention may require high levels of secrecy to avoid disclosing sensitive intelligence or tipping off the targets of possible stings. In any of these contexts the government will likely need to safeguard sensitive intelligence information from public dissemination, but in the latter cases (systems emphasizing disruption or information-gathering) the government might also need to shield the very proceedings themselves, at least temporarily, from disclosure, and therefore they may have greater need for closed or perhaps even *ex parte* hearings than they would in a system emphasizing incapacitation or deterrence. As a related matter, the nature of information used to prove or disprove the imperative need for detention in a disruption or information-gathering regime might also be better understood and handled by a dedicated bar of specialist attorneys with clearance and access to highly-sensitive intelligence, whereas the need for restricting attorney choice in a comparatively transparent incapacitation regime will likely be lower.

On the whole this analysis interestingly points toward a very different design for an incapacitation administrative detention regime than a disruption regime, the two most promising strategic objectives for administrative detention outlined above. An incapacitation system could feature generalist judges and lawyers conducting relatively open and transparent hearings to regulate long-term detention. A disruption system, by contrast, might require specialized courts and lawyers operating with greater secrecy to regulate short-term detentions. The legislature may therefore need to choose between strategic approaches in fashioning a new law, or need to consider a bifurcated system to handle two distinct types of detention.

The broader point is that effective procedural design is not independent of strategic purpose or the issue of substantive scope. It depends heavily on both.

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<sup>79</sup> See Goldsmith & Katyal, *supra*; Wittes & Gitenstein, *supra*; see also Waxman, *Detention as Targeting*, *supra*.

<sup>80</sup> The Spanish government, for example, uses criminal investigatory detention powers—sometimes for very brief periods—in similar ways. See Victoria Burnett, *After Raids, 14 Held in Spain on Suspicion of a Terror Plot*, NEW YORK TIMES, Jan 21, 2008, at A3.

## Conclusion

The precarious step of legislating an administrative detention regime for suspected terrorists carries many risks to both liberty and, especially over the long-term, security. Most of the debate about whether these risks outweigh the marginal strategic utility of administrative detention and about how to mitigate the risks moves too quickly to procedural design. This quick move overlooks a major piece of the puzzle: the scope and definition of the detention class and the substantive criteria by which any new procedural machinery will make individual decisions.

Any consideration of administrative detention legislation or, more generally, the need for legal innovation in this area should begin with a hard look at the key purposes such tools aim to fill. This hard look should help guide discussion of the substantive class. From the other end of the cost-benefit matrix, the way the substantive class is defined can exacerbate or mitigate the policy risks of administrative detention, and experience since September 2001 supports narrowing that definition, even at the expense of executive operational flexibility. The more focused and narrowed the strategic purpose and substantive definition of the target class of individuals, the better able we will be to consider procedural mechanisms for carrying out and applying them.

There will be a natural temptation for those considering new detention laws to take as a starting point existing enemy combatant detention policies and to build onto them more robust and refined procedural protections. This analysis suggests that temptation is misguided. Congress should first decide whether the strategic priority of proposed new administrative detention laws is incapacitation, disruption, or both; only then can the details of detention proposals be intelligently developed and evaluated.