THE UTILITY OF PREDICTING DANGEROUSNESS IN THE WAR ON TERROR

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INTRODUCTION

In the aftermath of the September 11, 2001 attacks, questions surrounding the use of power in many contexts confronted the United States in the new context of a War on Terror. These fresh inquiries centered primarily on the definitions and distinctions between "war" and armed conflict, the treatment of prisoners captured in the course of hostilities abroad, and the murky outer limits of executive authority in this new historical context. Nowhere did these pressing questions emerge more explicitly than in the cases brought by detainees held in Guantanamo Bay, Cuba.

The line of habeas corpus cases emerging from Guantanamo has trended towards a gradual expansion of the habeas doctrine, a doctrine still not fully developed in its application to non-state actors suspected or convicted of terrorism. From *Rasul* to *Boumediene*, the Supreme Court has progressively clarified that the writ of habeas does indeed apply to certain foreign individuals in some international contexts.[1] However, as the preceding qualifying language suggests, the way in which the writ manifests on behalf of those individuals remains a murkier question. Since *Boumediene*, the United States Court of Appeals for the D.C. Circuit has been the principal court to address this question, as the circuit charged with maintaining jurisdiction over the Guantanamo habeas appeals.

In its attempts to formulate an appropriate habeas process that both respects the government's interests in both security and secrecy while also

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1. Boumediene v. Bush, 553 U.S. 723, 771 (2008); Rasul v. Bush, 542 U.S. 466, 480 (2004) ("Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within the 'territorial jurisdiction' of the United States.") (citing Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)).

guarding the rights of detained individuals against excessive executive force, the D.C. Circuit has explored numerous procedural and substantive issues in the new light of international terrorism. Paradigmatically, the overarching struggle has remained whether and to what extent traditional notions of domestic criminal law and the international law of war should apply in the terrorism context. Scholars and political analysts have eagerly added their own opinions on the matter, opinions that run the spectrum from advocating for exclusively domestic criminal prosecutions[2] to a wholesale adoption of the law of war framework,[3] with others recommending the establishment of a new judicial branch to handle this class of cases.[4]

In this Note, I will draw on this broad debate to consider a narrower inquiry left underutilized in some D.C. Circuit opinions: future dangerousness. In its most basic form, the future dangerousness inquiry requires executive agents to make an evidentiary showing of individual-specific harmful conduct, or risk of harmful conduct, to the community such that a tribunal deems continued detention necessary to ensure the safety of the community. This inquiry could serve as a useful substantive approach to bridge some of the concerns between the domestic law advocates and the international law advocates; though, I also argue that the domestic criminal law version of the dangerousness inquiry is better suited to these cases. This individual-specific approach also better comports with our nation's historic values than the current approach used by the D.C. Court of Appeals.

To this end, Part I gives an abbreviated overview of the current debate surrounding Guantanamo detainees, laying out the relevant interests and principles that are at stake. Part II briefly outlines *Boumediene* and some relevant D.C. Circuit opinions. Part III then considers how the dangerousness inquiry in the terrorism context might play out, and why the domestic version of that inquiry is suited to the present context.

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2. *E.g.*, David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1 (2003).

3. *E.g.*, Ryan Goodman & Derek Jinks, *Replies to Congressional Authorization: International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653 (2005); *see also* Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT'L L. 1 (2003) [hereinafter Jinks, *September 11*].

4. Andrew C. McCarthy & Alykhan Velshi, *Outsourcing American Law: We Need a National Security Court* (Am. Enter. Inst. for Pub. Policy Research No. 156, 2006), *available at* http://www.aei.org/files/2009/08/20/20090820-Chapter6.pdf; *see also* Jack L. Goldsmith & Neal Katyal, Op.-Ed., *The Terrorists' Court*, N.Y. TIMES, July 11, 2007, at A19 (arguing for "a comprehensive system of preventive detention that would supplement the criminal process [and] would have greater legitimacy than our current patchwork system"); Jinks, *September 11*, *supra* note 3.

I. THE OVERARCHING INTERESTS AND FRAMEWORKS

The many debates surrounding the legal intricacies of the War on Terror are far too varied and nuanced for an in-depth survey in this Note. However, there is a more limited set of interests and principles that tend to propel the discussion in its many forms, and they are similarly present here. The overarching balancing inquiry is between the government's authority to detain, without trial, individuals it considers dangerous for national security purposes and an individual's interest in maintaining his personal liberty and autonomy (particularly if the individual is innocent of any wrongdoing). There remains the question of what legal framework best reconciles those interests in the terrorism context, acts of which have historically been dealt with as crimes, but which after September 11 have taken on a dimension more akin to acts of war.

The fact that the contested terrorism cases deal with preventive detention adds another layer of complexity. If the government's evidence establishes that a detainee committed war crimes or committed terrorist acts, it would be a familiar context both for the law of war and for general criminal law. Those frameworks would use detainment in its most commonly accepted role: punishment as condemnation of socially undesirable actions.[5] However, when the government's knowledge is not fully developed, when it cannot satisfy a standard of beyond a reasonable doubt, detention morphs into something quite different. Instead of a tool for punishment, detention primarily becomes a means for prevention of future harm. It is based on the government's belief that it has or will have enough information about the detainee to warrant concern about some future act of war or criminal undertaking, and the risk that that act might come to pass is simply too great to justify freeing the individual.[6] Therefore, the suspect is simply detained for what might become an indefinite period of time.[7] Both the law of war and criminal law have developed frameworks of preventive detention, though neither wholly fit the current paradigm, which factually lives halfway between both worlds.

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5. *See* Christopher Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. 121, 129 (2005).

6. *See* United States v. Salerno, 481 U.S. 739, 749 (1987) ("The government's interest in preventing crime by arrestees is both legitimate and compelling."). *But see generally* Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429 (2001) (discussing the dangers of a prevention-based criminal system).

7. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (noting the possibility of indefinite detention in a non-traditional conflict).

Deprivations of liberty by the government have long been accepted under international law as a normal incident of war.[8] However, this allowance has not diminished the belief that such detention constitutes an extraordinary act of government power.[9] The exertion of this extraordinary power, particularly in a democratic republic like the United States, usually relies on justifications unique to the context of war. The foremost justification is, of course, that the government has a duty to defend its people, and when that duty is in play, government power broadens significantly.[10] This line of reasoning has assumed particular importance in how U.S. courts have applied the laws of war. In one such case, *Johnson v. Eisentrager*, the U.S. Supreme Court found that German operatives captured abroad during World War II did not have access to habeas, the Supreme Court emphasizing the fact that the prisoners had actively worked against U.S. interests during the War.[11] Similarly, in *Ex parte Quirin*, addressing German saboteurs caught on U.S. soil, the Court again noted that times of war and national emergency create a different social and legal context than that of everyday life.[12]

However, there are limiting principles on this justification that traditionally circumscribe the exercise of government's heightened wartime powers. Namely, the traditional view was that enemy soldiers wear uniforms, making identification easy, that such soldiers have representative states that can negotiate through diplomatic channels for their fair treatment and eventual return, and that there is a definable and often definitive end-

8. *Hamdi*, 542 U.S. at 518 ("[D]etention of individuals falling into the limited category [of enemy combatants], for the duration of the particular conflict in which they were captured, is [a] fundamental and accepted . . . incident to war . . . .").

9. In its brief in *Hamdi*, the government made a concerted effort to present the issue of detainment as one potentially circumscribed to the context of war. *See* Brief for the Respondents at 14, *Hamdi*, 542 U.S. 507 (No. 03-6696), 2004 WL 724020, at *14 (noting that "the President's war powers include the authority to capture and detain enemy combatants in wartime, at least for the duration of a conflict"). *But see Hamdi*, 542 U.S. at 552 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (noting the "inadequacy" of the government's argument on this front).

10. *See* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936) (holding that there are "necessary concomitants of nationality" in the international context that authorize executive authority). *But see Salerno*, 481 U.S. at 766 (Marshall, J., dissenting) ("Grave public danger is said to result from what [the defendants] may be expected to do, in addition to what they have done since their conviction. If I assume that defendants are disposed to commit every opportune disloyal act helpful to Communist countries, it is still difficult to reconcile with traditional American law the jailing of persons by the courts because of anticipated but as yet uncommitted crimes. Imprisonment to protect society from predicted but unconsummated offenses is . . . unprecedented in this country and . . . fraught with danger of excesses and injustice . . . ." (ellipses in original) (quoting Williamson v. United States, 184 F.2d 280, 282 (2d Cir. 1950)).

11. Johnson v. Eisentrager, 339 U.S. 763 (1950).

12. Ex parte Quirin, 317 U.S. 1, 28-29 (1942).

point to a state of active war marked by surrender.[13] The presence of such criteria has been a mainstay of discussion and debate surrounding military authority in a time of war, serving as the countervailing interests against an otherwise unchecked national security interest. In essence, those traditional realities affirmed a measure of confidence that even if violations occur, their impact will be minimal.

There are two problems with applying the law of war framework to current U.S. operations. First, from a strictly formalist viewpoint, the U.S. is not in a state of congressionally declared war. Though some scholars are considerably troubled by this omission,[14] particularly since the U.S. has not been in a formal state of declared war since World War II,[15] the lack of a formal declaration is primarily a domestic constitutional issue, and does not alone trigger a distinct outcome under the international legal framework. Instead, that broader legal regime is more powerfully affected by the absence of those ameliorative criteria discussed above. Members of terrorist groups do not wear uniforms, do not have a nation-state to advocate for them, and the end of the War on Terror may eventually prove as ephemeral as that of the War on Drugs. As such, the potential for abuse and violations is much higher in some regards than in a typical war.[16] In particular, the temporal ambiguity of the conflict creates the possibility of a permanent ratchet of executive authority, something that goes against the understanding that war powers are extraordinary, and ought to be temporary.[17]

In the domestic criminal context, executive detention becomes a very different matter from its wartime counterpart. Any attempt to detain an individual must meet strict constitutional requirements, both procedural and substantive. Domestically, detainment is almost exclusively the province of the criminal process, with occasional forays by the civil system as well.[18]

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13. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2124 (2005).

14. *E.g.*, Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1871 (2004).

15. *See* RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RL 32170, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798-2006, at 15-39 (2007) (reporting no formal declarations of war by the United States after World War II).

16. Robert Chesney & Jack L. Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1100 (2008).

17. After all, the position of Caesar in ancient Rome was originally temporary, exemplified by Lucius Cincinnatus, who was dictator of Rome for sixteen days (long enough to save it from invasion) and then voluntarily gave up his power. 1 TITUS LIVIUS (LIVY), THE HISTORY OF ROME 170-73 (Ernest Rhys ed., Canon Roberts trans., E.P. Dutton & Co. 1912) (c. 25 B.C.E.).

18. David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CAL. L. REV. 693, 697 (2009) (referencing the civil commitment of mentally disabled persons,

The executive branch does not enjoy broad deference from the courts in this setting; instead, its reach is strictly circumscribed and judicial review of detention is high, both ex post (through the many doctrines governing prosecutions)[19] and ex ante (through the appellate process and habeas corpus review).[20] This is particularly true with preventive detention. The contexts in which the executive is allowed to preventively detain an individual are severely limited and are contingent on either a future or past trial in the criminal context.[21] Situations where the government may preventively detain someone include holding a material witness for future testimony,[22] detaining an accused individual who is deemed either a flight risk or danger to the community in the face of an upcoming trial,[23] and continuing to keep convicted sex offenders past their sentences upon a showing that they are still dangerous to the community.[24] In each of these situations, the government must make some kind of showing to a judge and receive a favorable ruling before the preventive detention is allowed.

But the majority of the detainees at Guantanamo have not been prosecuted under the available federal or state criminal statutes.[25] The nature of the terrorist organization—internationally based, bent on widespread destruction of entire societies—separates organizations like al Qaeda from the individuals and groups previously prosecuted under domestic statutes, and in response, both the current and previous presidential administrations have sought far-reaching detainment power.[26]

Without the promise of a future trial, the criminal law's framework for preventive detainment offers only limited guidance as to how courts should move forward. Additionally, there has been strong push-back by both scholars and judges, in addition to government lawyers, against an importation of domestic criminal law principles into the Guantanamo cases. The objections center primarily on two propositions: first, that if any

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immigration detentions for persons who are flight risks, and quarantines as examples of civil preventive detention).

19. *E.g.*, U.S. CONST., amend. IV; FED. R. CRIM. P.; FED. R. CIV. P.

20. JUDITH FARBEY, R.J. SHARPE, WITH SIMON ATRILL, THE LAW OF HABEAS CORPUS, 1, 21-23 (3d ed. 2011).

21. Cole, *supra* note 18, at 700.

22. 18 U.S.C. § 3144 (2006).

23. FED. R. CRIM. PRO. 32.1(a)(6).

24. *See* Kansas v. Hendricks, 521 U.S. 346, 369 (1997) (holding that post-conviction civil commitment of sex offenders does not violate the double jeopardy clause).

25. *The Guantanamo Docket*, NEW YORK TIMES, http://projects.nytimes.com/guantanamo (last updated Feb. 15, 2012) (showing that of the 779 detainees who have been held at Guantanamo, 600 have been transferred to other countries). *But see* U.S. v. Moussaoui, 282 F. Supp. 2d 480 (E.D.Va. 2003) (*cert denied* 125 S.Ct. 1670, Mar. 21, 2005).

26. *See* Hamlily v. Obama, 616 F. Supp. 2d 63 (D.D.C. 2009).

criminal law were imported, all of its procedures and doctrines would have to be carried over as well; and second, that the need to follow the accompanying evidentiary and procedural rules that mark domestic criminal cases would overly encumber government action charged with safeguarding national security. There is also an accompanying concern that the necessary relaxing of the criminal doctrines for terrorism cases would infect domestic cases as well, leading to an overall degeneration of domestic protections.[27]

Though there are strong government interests in preventive detention and sources of authority in both contexts—police power for criminal law and war powers for law of war—the countervailing interest in each situation is also particularly strong: personal liberty. In the United States, individual liberty from government interference and control unchecked by the restraints of due process remains an overriding concern of its Constitution and its people.[28] This is particularly true when the risks associated with erroneous detention are high, both in terms of the difficulty of correctly identifying an enemy who does not wear uniforms, and the devastating costs to the detainee in terms of potentially years of freedom lost. The question of whether a foreign national's personal liberty interest warrants rigorous review of the causes justifying his incarceration when detained on U.S. soil was resolved in the affirmative by *Boumediene*, discussed below. The ongoing question that the courts now face is where to strike the balance between the historic interests of freedom and security without a neatly applicable framework. I do not propose to resolve this debate here, but merely to support a doctrine I think has been erroneously excluded from the discussion.

II. SOME CASE HISTORY

Before discussing dangerousness, it is valuable to examine some of the case history of habeas review for aliens detained abroad. *Boumediene v. Bush* addressed the status of several foreign nationals "designated as enemy combatants and detained" at Guantanamo Bay.[29] The detainees had been held without formal charges and argued that they possessed a right to habeas corpus under the Constitution, a right not voided by their

27. *See* John Farmer, Op-Ed, *A Terror Threat in the Courts*, N.Y. TIMES, Jan 13, 2008, at A; *see also* Jack L. Goldsmith & Neal Katyal, Op-Ed, *The Terrorists' Court*, N.Y. TIMES, July 11, 2007, at A19; Michael B. Mukasey, Op-Ed, *Jose Padilla Makes Bad Law*, WALL ST. J., Aug. 22, 2007.

28. Palko v. Connecticut, 302 U.S. 319, 325 (1937) (saying that substantive due process stands to protect right "implicit in the concept of ordered liberty" from government interference).

29. 128 S.Ct. 2229, 2240 (2008).

designation as enemy combatants.[30] The Court agreed, holding that the government must provide sufficient evidence to justify continued detainment.[31]

In so deciding, the Court extended habeas review to individuals detained by the U.S. government on *de facto* U.S. territory, including Guantanamo.[32] However, the Court did not describe what habeas review for detainees entailed; it simply held that the review proceedings were inadequate as compared to the proceedings seen in previous cases.[33] Principally, the Court looked to *Eisentrager*, discussed earlier, noting that the Guantanamo processes did not have a comparable "rigorous adversarial process," falling "well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review."[34] However, the Court did not describe what mechanisms *would* sufficiently meet the requirements of habeas in the present context, leaving either the lower courts or Congress the responsibility of deciding the ultimate manifestation of judicial review for these cases.[35]

Congress has not acted to redefine habeas proceedings since *Boumediene*, so the various courts of the D.C. circuit have labored to erect some framework of analysis absent legislative guidance. Since 2008, the district courts have issued thirty-eight opinions on the issue, and the D.C. Circuit Court of Appeals has issued eleven decisions on appeal dealing with the issue.[36] These cases scrutinize government action under the Authorization for Use of Military Force (hereinafter referred to as AUMF), passed soon after the attacks of September 11. The relevant text of the AUMF authorizes the president to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided" those attacks in order "to prevent any future acts of international terrorism against the United States by such

30. *Id*. at 2277.

31. *Id*.

32. *Id*. at 2262.

33. *Id*. at 2259-60.

34. *Id*. at 2260 (The German operatives "were charged by a bill of particulars that made detailed factual allegations against them…were entitled to representation by counsel, allowed to introduce evidence on their own behalf, and permitted to cross-examine the prosecution's witnesses.").

35. *See* Chisun Lee, Op-Ed., *Their Own Private Guantanamo*, N.Y. TIMES, July 22, 2009, at A31 (discussing the disparate standards reached by courts for the government's detention authority and urging Congress' and the President's involvement to ensure consistency).

36. Ben Wittes, Robert M. Chesney & Larkin Reynolds, *The Emerging Law of Detention 2.0: The Guantanamo Habeas Cases as Lawmaking*, *in* THE BROOKINGS INSTITUTION 2 (2011), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2011/05_guantanamo_wittes/05_guantanamo_wittes.pdf.

nations, organizations or persons."[37] The AUMF does not contain a sunset provision, leaving no temporal cutoff for presidential action under its authority absent revocation by Congress. This raises questions about how long a person may be permissibly detained in furtherance of the broader goal of stamping out sources of terrorism, and what law should be applied in fleshing out the application of the AUMF more than a decade after its enactment, and after a series of Supreme Court decisions.[38]

This search for an applicable background framework was evident in *Al Bihani v. Obama*. There the government alleged that Al Bihani was affiliated with and militarily trained by al Qaeda, and supported the Taliban in a skirmish with U.S. military forces in Afghanistan.[39] Al Bihani countered that he was merely a cook, and denied that he had ever received military training or even pursued a relationship with al Qaeda.[40] Judge Leon found that Al Bihani's ties with al Qaeda were sufficient to establish membership within the organization and that serving as a cook was an act of support, enabling the government to satisfy habeas review.[41] On review, the D.C. Circuit Court of Appeals panel had a different idea. Judges Brown and Kavanaugh wrote explicitly that the international laws of war were irrelevant to the question of appropriate detention under the AUMF.[42] Instead, they reasoned that domestic law sources alone provided the appropriate tools for the court, and applied the Military Commissions Act of 2006 and its 2009 successor (collectively hereinafter referred to as MCA).[43] However, what might have been a settled issue became quickly unsettled. Al Bihani petitioned for *en banc* review; though it denied review, a majority of the *en banc* court stated that the panel's rejection of international law was dicta,[44] and a later case explicitly relied on international law.[45] At the end of this very public discussion in the D.C. Circuit, there still remains "the lingering disagreement regarding which bodies of law actually govern" the issues surrounding detention.[46]

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37. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

38. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2123-24 (2005); *see also* Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004).

39. Al Bihani v. Obama, 594 F. Supp. 2d 35, 38 (D.D.C. 2009).

40. *Id.*

41. *Id.* at 39.

42. Al Bihani v. Obama, 590 F.3d 866, 871-72 (D.C. Cir. 2010) (Judge Williams joined in the judgment but questioned this idea of the majority).

43. *Id.* at 872-73.

44. Al Bihani v Obama, 619 F.3d 1, 1 (D.C. Cir. 2010) (denial of petition for rehearing en banc).

45. See Al Warafi v. Obama, No. 10-5170, 2011 WL 678437 (D.C. Cir. Feb. 22, 2011).

46. Chesney & Reynolds, *supra* note 36, at 34.

In another case decided the same year as *Al Bihani*, the court in *Awad v. Obama* similarly followed the membership model for analyzing the government's justification for detention, finding evidence that the detainee was "part of al Qaeda in December of 2001."[47] Though the government provided a significant amount of evidence regarding Awad's alleged personal actions,[48] the court repeatedly emphasized the membership analysis used in *Al Bihani*.[49] These decisions are consistent with earlier terrorism cases in the circuit that held that the AUMF, consistent with international law, authorized detention based on membership.[50] What this has also meant is that individuals found to be supporting al Qaeda, but not actual members of the organization, do not fall within the scope of the AUMF under international law.[51]

III. FUTURE DANGEROUSNESS

A. International and Domestic Frameworks

The legal framework apparently adopted by the D.C. Circuit Court of Appeals is described as a "membership-based" method of analysis for detention. As discussed above, this is the model favored by the international legal framework. The simplest distinction between the artificially binary approaches to detention employed by international law and criminal law is that the former employs status-based determinations and the latter employs conduct-based determinations. Justification for detention under international law is primarily based on the group membership, or status, of an individual.[52] U.S. criminal law, however, focuses on the individual's conduct. Even when Judges Brown and Kavanaugh looked to the MCA for guidance,[53] they still employed a primarily international law perspective, because the MCA also bases its determinations on membership, most likely reflecting a desire to frame government action taken under the MCA as war.

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47. Awad v. Obama, 608 F.3d 1, 3 (D.C. Cir. 2010).

48. *Id.* at 4-5.

49. *See, e.g.*, *id.* at 1.

50. *See* Gherebi v. Obama, 609 F. Supp. 2d 43, 55 (D.D.C. 2009); Hamlily v. Obama, 616 F. Supp. 2d 63 (D.D.C. 2009).

51. *Gherebi*, 609 F. Supp. 2d at 63.

52. Chesney & Goldsmith, *supra* note 16, at 1084-85.

53. As a side note, the MCA does not provide a framework for legal analysis, merely a possible definition for individuals subject to detention. It simply states that military commissions may proceed against aliens who are members of AUMF-covered groups and those who provide support to those groups. Military Commissions Act of 2006, Pub. L. No. 109-366, § 3, 120 Stat. 2600, 2601-02 (codified as amended at 10 U.S.C. §§ 948a(1), 948c); Military Commissions Act of 2009, Pub. L. No. 111-84, § 18-2, 123 Stat. 2190, 2575-76 (codified as amended at 10 U.S.C. §§ 948a, 948b(a)).

International law considers detention primarily as an exercise of state power against a known enemy. The Geneva Conventions generally govern the rights and privileges surrounding detention incident to international war.[54] The relevant international law in the Guantanamo cases is Common Article 3 of the Geneva Convention—which regulates conflicts between a state and non-state actor—and Additional Protocol II, which also applies to non-international conflicts.[55] The difficulty in applying these sources of law is that neither Common Article 3 nor Additional Protocol II discusses the detention of prisoners. While Common Article 2 "exhaustively regulates" detentions and incorporates the entirety of the Geneva Convention,[56] Common Article 2 applies to conflicts between two nation-states, a context dissimilar to the War on Terror. This leaves the courts with the job of attempting to analogize Common Article 2, a non-applicable agreement, to Guantanamo detentions, or of supplementing in Common Article 3 and Additional Protocol II with general principles of international law. The D.C. Circuit courts do not seem opposed to these analytical processes, as they have twice indicated that international law encompasses both conflicts between two nation-states and asymmetric conflicts between one nation-state and a non-state actor.[57]

Looking to broad principles under the Geneva Convention, "membership in a specific group is a necessary condition for POW status in five out of six scenarios, and for the most part, it is a sufficient condition as well. Associational status in that sense is the primary triggering condition for military detention during international armed conflict."[58] Since most of international law up to this point has dealt with the interactions of nation-states,[59] the background understanding of the membership-framework largely depends on the existence of uniforms, an outmoded requirement

54. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 641-42 (2006).

55. Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, adopted June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

56. David Mortlock, *Definite Detention: The Scope of the President's Authority to Detain Enemy Combatants*, 4 HARV. L. & POL'Y REV. 375, 381 (2010).

57. Gherebi v. Obama, 609 F. Supp. 2d 43, 59 (D.D.C. 2011); Hamlily v. Obama, 616 F. Supp. 2d, 63, 73 (D.D.C. 2009).

58. Chesney & Goldsmith, *supra* note 16, at 1084-85.

59. *See* Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 1060 (1945) (describing the accepted sources of international law, all of which come from sovereign nations in some way).

imported into the terrorism context at the great expense of descriptive accuracy.

Both the Bush and Obama administrations have clearly expressed their belief that the appropriate source-material for detention inquiries lies in international law doctrine. "The [Obama] Administration has stated that, whether or not the various international agreements bind the United States, '[p]rinciples derived from law-of-war rules governing international armed conflicts' must inform any determination of detention under the AUMF."[60] This understanding is echoed by several district courts and scholars.[61] However, the traditional law of war framework is inextricably linked with an unwillingness to place a high burden of proof on the government's ability to detain suspected terrorists.

> The military model is the least demanding, traditionally requiring a showing of mere group membership in the enemy armed forces and providing alleged detainees with relatively trivial procedural protections. At the other extreme, the civilian criminal model is the most demanding, tending to require a showing of specific criminal conduct and providing defendants with a panoply of rights designed to reduce the risk of erroneous convictions.[62]

Yet concern about over-burdening the government should not foreclose an inquiry into whether criminal law might in fact prove a more workable framework for habeas review. While international detention analysis relies on notions of sovereignty and state actor reciprocity, criminal law detention finds its primary justification in the government's exercise of police power.[63] Moreover, the international law on these issues can be very opaque, leading to uncertainty in the judicial process.[64]

Contrary to the international law's membership model for detention, "[i]n the American legal tradition, criminal sanctions typically attach to one's conduct and not one's status or associations."[65] A future

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60. Mortlock, *supra* note 55, at 380-81.

61. *E.g.*, *Gherebi*, 609 F. Supp. 2d at 70-71; Bradley & Goldsmith, *supra* note 13, at 2091; Goodman & Jinks, *supra* note 3, at 2654-56.

62. Chesney & Goldsmith, *supra* note 16, at 1081.

63. *See generally* Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1 (2003).

64. *See* Al Warafi v. Obama, No. 10-5170, 2011 WL 678437 (D.C. Cir. Feb 22, 2011) (circuit remanded for further fact finding relating to parts of the Geneva Convention about detention of medical personnel).

65. Chesney & Goldsmith, *supra* note 16, at 1082. *But see* Continuing Criminal Enterprise (CCE) Statute, 21 U.S.C. § 848 (2006); Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. §§ 1961-68 (2006).

dangerousness review in criminal law looks to past conduct (alleged or otherwise) rather than status to determine whether an individual poses a future risk of harmful or obstructing conduct—uncontrollable violent or sexual behavior, a flight risk, etc.[66] In particular, the non-punitive models of criminal detentions are the best analogue to military detention; military detention is about preventing harm, not condemnation of individual actors, while criminal detention most frequently is meant to punish.[67]

Dangerousness determinations frequently occur in the course of non-punitive detention hearings.[68] Preventive detentions that have been upheld generally share three commonalities: a non-punitive nature, temporal limitation, and an individual-specific justification.[69] Non-punitive detention generally arises in three relevant domestic contexts: pre-trial detention, continued imprisonment for some mentally ill persons, and continued imprisonment for certain sex offenders. The dangerousness inquiry emphasizes the past conduct of an individual, and requires the government to meet a certain evidentiary bar before it can proceed. Though this can be a difficult task—predicting human behavior usually is—it is one the Supreme Court has found to be commonplace in American jurisprudence.[70] In many cases, the bar is that of clear and convincing proof, a lower standard that that required in a normal trial resulting in punitive detention.[71]

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66. However, the future dangerousness inquiry is not without controversy, *see, e.g.*, Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention As Criminal Justice*, 114 HARV. L. REV. 1429, 1432 (2001); *see also* Meghan Shapiro, *An Overdose of Dangerousness: How "Future Dangerousness" Catches the Least Culpable Capital Defendants and Undermines the Rationale for the Executions It Supports*, 35 AM. J. CRIM. L. 145, 200 (2008) (discussing the moral and evidentiary challenges to using future dangerousness in capital punishment cases).

67. Chesney & Goldsmith, *supra* note 16, at 1082.

68. For a more complete look at the Supreme Court doctrine of future dangerousness, *see* Kansas v. Hendricks, 521 U.S. 346 (1997) (civil commitment of mentally ill sex offenders); United States v. Salerno, 481 U.S. 739 (1987) (pretrial detention of dangerous adults); Schall v. Martin, 467 U.S. 253 (1984) (pretrial detention of dangerous juveniles); Addington v. Texas, 441 U.S. 418 (1979) (civil commitment of mentally ill); Humphrey v. Smith, 336 U.S. 695 (1949) (courts martial of American soldiers). For a description of the contexts in which dangerousness determinations play a role in the criminal process, *see* Christopher Slobogin, *Dangerousness as a Criterion in the Criminal Process*, *in* LAW, MENTAL HEALTH & MENTAL DISORDER 360-63 (Bruce Sales & Daniel Shuman eds., 1996).

69. *See* Cole, *supra* note 18, at 708.

70. Jurek v. Texas, 428 U.S. 262, 274-76 (1976) ("Prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system . . . [that task] is thus basically no different from the task performed countless times each day throughout the American system of criminal justice.").

71. *E.g.*, *Salerno*, 481 U.S. 739 (upholding preventive detention pending trial under a "clear and convincing" standard). However, the district courts of the District of Columbia and the D.C. Court of Appeals have been using a preponderance of the evidence standard in all of their evidentiary rulings against the government. Chesney & Reynolds, *supra* note 36, at 34, 12.

These sources may aid in providing a standard for reviewing the potential future dangerousness of detainees and weighing the executive's arguments for continued imprisonment. Moreover, this application would not be wholly foreign to the area of terrorism, which has historically been categorized as criminal acts as well as acts of war.[72]

B. The Potential Benefits of a Conduct-Based Dangerousness Inquiry

The future dangerousness inquiry as it manifests in the domestic context may prove more beneficial as a basis for detention *vis-á-vis* the status-based alternative, primarily because it requires a particularized showing of potential harm, a requirement comporting well with—and even emerging from—the values of accountability and procedural checks otherwise embraced in the American system. Such a showing need not necessitate that the government produce the full weight of its evidence—it certainly does not in the preliminary hearing context in federal domestic cases[73]—but such a requirement would constitute a burden higher than the government's mere assertions that unproven proximity or association necessitate detention. It is almost like having a good faith requirement for government action. Particularized evidence facilitates an individual-specific determination by the tribunal, placing courts in a better position to discharge their vital role as a neutral check on an executive whose overwhelming responsibility to ensure our national security may lead to over-detention.

This restraint on the executive is particularly important in the terrorism context. The individuals who are accused of terrorist activity do not have a state that will defend their interests or work to provide countervailing evidence on their behalf. Without that external backing, countervailing checks furnished by U.S. judicial processes, including access to counsel and judicial review, stands as the only systemic bulwark against potentially improper executive detention.

It may be that the majority of the detainees are indeed guilty, and perhaps still more would be justifiably detained pending a final judgment as to either guilt or innocence. We should hope that our intelligence agencies are that accurate. But "[c]onstitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty."[74] Nothing

72. John P. McLoughlin, Gregory P. Noone & Diana C. Noone, *Security Detention, Terrorism, and the Prevention Imperative*, 40 CASE W. RES. J. INT'L L. 463, 467-69 (2009).

73. *See Salerno*, 481 U.S. at 751 (upholding preventive detention pending trial under a "clear and convincing" standard).

74. *Ex parte Quirin*, 317 U.S. 1, 25 (1942).

about our history or the structure of the Constitution justifies or requires blind trust in the inherent but unproven accuracy of government assertions.

If habeas is to have any significance in the context of detainees in the War on Terror, there must be a meaningful review of the government's detention power. For there to be such a meaningful review, courts must actively engage with and scrutinize the evidence proffered by the government. This requires evidence to question, and a membership-based inquiry functionally cedes the court's supervisory ability to the executive; the evidence for membership offered in many of these cases has focused on the fact that the accused was picked up in the same location as other suspected terrorists.[75] In this way, the courts have been made to determine only whether the individual was sufficiently connected to an organization the government has labeled dangerous, missing the step of determining the individual's actual dangerousness.

Circumstantial association may be informative, but it should not stand in for an individual's particular propensity to engage in violent behavior on the level of deadly terrorist attacks. It would likely be the case that an individual affiliated with a terrorist organization would be considered dangerous, and a finding to that effect would certainly cut in favor of detention. However, requiring a particularized explanation of what individual detainees have done or said in the past, or even while detained, should also have a place in the habeas process surrounding the liberty interests of the detainees. This is particularly true with habeas review; as an inherently reactionary doctrine that gives a responsive power to individuals against government detainment, its purpose is to make the government give an account of its actions.[76]

Requiring this type of particularized showing also does less violence to our historic protection of individual autonomy. Though dangerousness inquiries are somewhat ephemeral and purport to predict and preempt future action, detention on that basis ought to at least arise from the actual

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75. *See* Al-Adahi v. Obama, 613 F.3d 1102, 1111 (D.C. Cir. 2010) ("Attendance at either an al-Qaida training camp or an al-Qaida guesthouse 'would seem to overwhelmingly, if not definitively, justify' detention." (citing Al Bihani v. Obama, 590 F.3d 866, 873 n.2 (D.C. Cir. 2010)); Al Bihani v. Obama, 594 F. Supp. 2d 35, 39-40 (D.D.C. 2009) (al Bihani was apprehended in same location as other terrorists); Al Alwi v. Bush, 593 F. Supp. 2d 24, 28 (D.D.C. 2008) ("[P] stayed at guesthouses closely associated with the Taliban and al Qaeda . . . .") (decision authorizing government detention affirmed by Al Alwi v. Obama, 653 F.3d 11 (D.C. Cir. 2011)); Gharani v. Bush, 593 F. Supp. 2d 144, 147-48 (D.D.C. 2009) (holding that the government failed to meet its burden of proof and granting el Gharani's habeas petition despite hearing the government's argument for detention partially because el Gharani "stayed at an al Qaeda-affiliated guesthouse . . . .").

76. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 646 (1952) (Jackson, J., concurring) (stating that civil rights, of which habeas review is one, "gives a private right that authority shall go no farther.").

words and actions of the individual to be detained, respecting his personal autonomy (even if the result of that inquiry results in punitive or non-punitive detention).[77] This practice would also conform better to an understanding of a government of constitutional restraints, limited necessarily and deliberately by the People who give it force.[78] In this way, requiring the government to hew more closely to the traditional expectations surrounding its exercise of detention power supports the rule of law.[79]

Though it may seem difficult to place such a high priority on the processes of law and government justification, particularly with regard to those accused of seeking our ultimate demise, our society has looked back with great disappointment at instances in which we have failed to give adequate weight to our principled view of limited government, even in the face of grave threats. As we saw in *Korematsu* and the McCarthy hearings, our country does not live up to its potential when we sacrifice skepticism of government power and adherence to constitutional limits for the latitude government claims is necessary to ensure national security.[80]

I do not believe that the argument in favor of future dangerousness inquiries in detainees' habeas review context necessitate a wholesale importation of domestic criminal law process. Just because the general framework is used does not require that all of the procedural safeguards and substantive rules need to be as stringent or present at all. Even in the domestic context, the Federal Rules of Criminal Procedure suspend the normal rules of evidence in some circumstances.[81] Indeed, the Supreme Court has emphasized that evidentiary rules regarding hearsay do not have to apply for there to be adequate habeas review.[82] The procedural benefit to

77. *See* Alec D. Walen, *Crossing a Moral Line: Long-Term Preventive Detention in the War on Terror*, 28 PHIL. & PUB. POL'Y Q. 15 (2008).

78. For a broader discussion of the extraterritorial application of the Constitution see generally Gerald L. Neuman, *The Extraterritorial Constitutional After* Boumediene v. Bush, 82 S. CAL. L. REV. 259 (2009).

79. *See* Kermit Roosevelt III, *Guantanamo and the Conflict of Laws:* Rasul *and Beyond*, 153 U. PA. L. REV. 2017, 2018 (2005).

80. Cole, *supra* note 2, at 3 ("In hindsight, these responses are virtually always considered mistakes. They invite excesses and abuses, as many innocents suffer without any evident gain in security. And most significantly, they compromise our most basic principles—commitments to equal treatment, political freedoms, individualized justice, and the rule of law.").

81. *See* FED. R. CRIM. P. 5.1. The advisory committee notes make clear that the rule allows preliminary hearings and grand jury investigations to rely on hearsay that would be inadmissible at trial for its decision. FED. R. CRIM. P. 5.1 advisory committee's note on 1972 adoption.

82. Hamdi v. Rumsfeld, 542 U.S. 507, 533-34 (2004) ("[T]he exigencies of the circumstances may demand that, aside from these core elements, enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.

using the dangerousness inquiry is that it is familiar and grounded. It can serve as a stabilizing argumentative process in what is a very fluid area of law at the moment, and can offer a way to make some of the unknowns of dealing with terrorists less mysterious. Since the future dangerous inquiry already entails some deference to the executive and a lowered burden of proof, it can easily carry over into the terrorism context, paying due respect to the national security interests at stake. Even if judges found that it needed to be altered and tailored in some way, the future dangerousness inquiry would still comprise a nearer fit than the traditional laws of war, which do not fit the reality of our current international status.

CONCLUSION

Criminal analysis for future dangerousness is based on the known conduct of the detainee, from before, during, and after the initial moment of detention. This type of focus, if used in Guantanamo habeas proceedings, could anchor the analysis of judges faced with these cases. It need not bring in the other indicia of criminal analysis, such as a clear and convincing burden of proof and evidentiary standards. Instead, it could serve as a familiar and helpful guide in a quickly changing world faced with circumstances yet unaddressed by international law.

Though some legal scholarship seems to support an international law approach, that support is not as strong as it may seem. Numerous arguments in favor of that framework frequently end up looking like a conduct-based approach. For example, one discussion of using a laws of war methodology argues that determinations of detainees' dangerousness "could be based on, among other things, the detainee's past conduct, level of authority within al Qaeda, statements and actions during confinement, age and health, and psychological profile."[83] Those are all factors that appear in the criminal dangerousness framework, and provide a glimpse into how the model of domestic criminal law can better inform and guide judicial review of detention in the War on Terror. Though that inquiry will at times be difficult, filled with the usual ambiguities and judgment calls that keep the law so interesting, "the fact that such a determination is difficult . . . does not mean that it cannot be made."[84] For the courts to play their constitutionally mandated role, as interpreted by the Supreme Court, a more rigorous review process should be embraced, one that requires a greater measure of proof on the part of the government in a manner more

Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding.").

83. Bradley & Goldsmith, *supra* note 13, at 2125.

84. Jurek v. Texas, 428 US. 262, 274-75 (1976) (Stevens, J.) (plurality opinion).

closely aligned with our constitutional values. Incorporating a future dangerousness inquiry into habeas review is one potentially useful method for achieving that goal.