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Guantanamo and Beyond: Reflections on the Past, Present, and Future of Preventive Detention

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Guantanamo and Beyond: Reflections on the Past, Present, and Future of Preventive Detention

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January 11, 2011 began the tenth year of existence of the detention center at the U.S. Naval Base at Guantanamo Bay, Cuba ("Guantanamo" or "GTMO"). In human-being terms, what this means is that large numbers of men have been detained by the U.S. military for almost a decade, in prison-like conditions, without trial. In a pre-9/11 world, a "Guantanamo" and the idea of "detention without trial" would have been seen as decidedly un-American and a violation of our democratic values.[1] Over the last decade, however,

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1. Recognizing that before 9/11 the United States has detained people without trial on the basis of dangerousness in cases of mental insanity, juveniles, sexual offenders, and other scenarios, this sentiment is not meant to imply that detention without trial did not exist prior to 9/11. *See generally* Paul H. Robinson, *Punish-*

"Guantanamo" and the practice of long-term detention without trial for terrorism suspects (or, "preventive detention"), have evolved into institutions of American society that are now perfectly acceptable, indeed desirable to some, and of little concern to many. Indeed, how did we get here, and where are we going? Will the Guantanamo detention center close down in the near future or remain open, housing men indefinitely in the war against terrorism? More significantly, will preventive detention continue its current trajectory, becoming a permanent fixture in America's national security landscape?

I. HOW DID WE GET HERE? (AN ABRIDGED HISTORY OF A DETENTION CENTER)

At the outset, I must confess that the story of Guantanamo and the fate of the men there have become somewhat personal, as I have represented Guantanamo detainees for close to nine years—almost as long as the detention camp has been around. Over these nine years, I played a part in the painfully long litigation journey that began in 2002 and paused briefly with *Rasul v. Bush*[2] in 2004, when the United States Supreme Court held that the Guantanamo detainees have a right to habeas corpus under the federal habeas statute.[3] Four more years of litigation resulted in *Boumediene v. Bush*[4] in 2008, when the Supreme Court held that the detainees have a right to habeas corpus under the U.S. Constitution.[5] I have witnessed Congress pass several bills in attempt to restrict the rights of the detainees, for example, by stripping them of the right to challenge their detention under the habeas statute, such as in the Detainee Treatment Act of

ing Dangerousness: Cloaking Preventive Detention as Criminal Justice, 114 HARV. L. REV. 1429 (2001).

2. 542 U.S. 466 (2004).

3. *Id*. at 483 (concluding that the detainees have a right to challenge their detentions under 28 U.S.C. § 2241 (2006)).

4. 553 U.S. 723 (2008).

5. *Id.* at 771 (concluding the detainees have a right to challenge their detentions under the Suspension Clause, Article One, Section 9, Clause 2, of the United States Constitution).

2005[6] and the Military Commissions Act of 2006.[7] I have seen numerous military commissions begin, only to falter due to the Supreme Court declaring them invalid or the executive branch halting them.[8] One of my clients, Omar Khadr—the young Canadian citizen picked up at age fifteen, imprisoned, and treated as an adult—faced no less than three different military commissions, each one operating under different rules.[9]

6. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (2005) (codified as amended in scattered sections of 10, 28, & 42 U.S.C.).

7. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified as amended in scattered sections of 10, 18, & 28 U.S.C.).

8. Hamdan v. Rumsfeld, 548 U.S. 557, 625, 634 (2006) (concluding that the President's establishment of the military commissions by his November 13, 2001 military order violated the U.S. Armed Forces' Uniform Code of Military Justice and Common Article 3 of the Geneva Conventions); *see* Press Release, The White House, Statement of President Barack Obama on Military Commissions (May 15, 2009), http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Military-Commissions; William Glaberson, *Obama Orders Halt to Prosecutions at Guantánamo*, N.Y. TIMES, Jan. 21, 2009, http://www.nytimes.com/2009/01/22/washington/22gitmo.html.

9. On November 7, 2005, Omar Khadr was charged under President Bush's military order of November 13, 2001. *See* Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833–36 (Nov. 13, 2001) [hereinafter Detention Military Order]; Charges, United States v. Khadr, (Military Comm'n Nov. 4, 2005), *available at* http://www.defense.gov/news/Nov2005/d20051104khadr.pdf; *see also* Alan Freeman & Jeff Sallot, *U.S. Won't Seek Execution of Khadr*, GLOBE AND MAIL (Nov. 9, 2005), http://www.theglobeandmail.com/news/world/us-wont-seek-execution-of-khadr/article919460. On April 5, 2007, new charges under the Military Commissions Act of 2006 were referred against Khadr. *See* Charge Sheet, Omar Ahmed Khard, U.S. Dept. of Defense (Apr. 24, 2007), *available at* http://www.defense.gov/news/Apr2007/Khadrreferral.pdf. After some delay due to the Administration halting the military commissions, Khadr's military trial resumed and was then also subject to the Military Commissions Act of 2009 and the new rules under the revised military commissions manual. Emergency Petition for Writ of Mandamus to the United States Court of Appeals for the District of Columbia, *In re* Khadr, 131 S. Ct. 44 (2010) (No. 10-5691); *see also* Spencer Ackerman, *Hours Before Khadr Hearing Begins, Gates Signs Manual for Military Commissions*, WASH. INDEP. (Apr. 27, 2010), http://washingtonindependent.com/83345/hours-before-khadr-hearing-begins-gates-signs-manual-for-military-commissions; Colin Perkel, *U.S. Supreme Court Asked to Stop Omar Khadr War Crimes Hearing*, THESTAR.COM (Aug. 3, 2010), http://www.thestar.com/special

Over the years, I have been to Guantanamo countless times to visit with my clients, most of whom had been there since early 2002. I have seen my clients on hunger strike, including one client who dropped to ninety-seven pounds before he chose quitting his strike over the restraint chair.[10] I have heard stories of attempted and successful suicides, as well as whispers of homicide, from my fellow habeas counsel. In fact, over the years, a total of six men have died at Guantanamo while in the custody of the United States.[11] By the end of President Bush's second term, it was not entirely surprising that over a majority of the American public favored closing the "legal black hole," a fifteen percent increase since 2005.[12]

When Barack Obama won the presidential election in November 2008, those who were in favor of closing Guantanamo cheered, as he had promised to close the detention center during his campaign.[13] But, in fact, John McCain had also supported closure during his campaign, and in 2006, George W. Bush likewise had suggested that

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sections/omarkhadr/article/843348--u-s-supreme-court-asked-to-stop-omar-khadr-war-crimes-hearing.

10. *See generally* Kristine Huskey & Stephen N. Xenakis, *Hunger Strikes: Challenges to the Guantanamo Detainee Health Care Policy*, 30 WHITTIER L. REV. 783 (2009) (discussing the hunger strikes at Guantanamo and related legal and ethical issues thereof).

11. William Fisher, *Families Sue Over Guantanamo Deaths*, INTER PRESS SERVICE NEWS AGENCY (March 16, 2010), http://www.ipsnews.net/news.asp?idnews=50733; Andy Worthington, *Guantanamo: The Definitive Prisoner List*, ALTERNET (Jan. 11, 2010), http://www.alternet.org/rights/145060/Guantanamo%3A_the_definitive_prisoner_list.

12. *See, e.g.*, *CNN Poll: Americans Split on Closing Guantanamo Bay Prison*, CNN (Jan. 21, 2009), http://politicalticker.blogs.cnn.com/2009/01/21/cnn-poll-americans-split-on-closing-Guantanamo-bay-prison. Guantanamo was aptly coined a "legal black hole" by Johan Steyn (judicial member of the House of Lords) at the Twenty-Seventh F.S. Mann Lecture delivered in London on November 23, 2003. *See* Johan Steyn, *Guantánamo: A Monstrous Failure of Justice*, INT'L HERALD TRIB. (Nov. 27, 2003), *available at* http://www.commondreams.org/views03/1127-08.htm.

13. *See* Jack Cloonan & Sarah Mendelson, *How To Close Guantanamo*, WASH. POST, Nov. 30, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/11/28/AR2008112802371.html; Elizabeth White, *Obama Says Gitmo Facility Should Close*, USA TODAY, June 24, 2007, http://www.usatoday.com/news/politics/2007-06-24-2596668182_x.htm.

the detention center should be closed.[14] But, saying it does not always make it so, especially for a politician. Thus, when President Obama boldly issued an executive order on January 22, 2009, just two days after his inauguration, which called for the closure of the detention center at Guantanamo within a year, even those in favor of such action were probably surprised at how quickly it came.[15] Obama's own party appeared to be surprised by the order as well, because shortly afterward, a Democrat-controlled Congress passed a supplemental appropriations bill that included several restrictions on transferring detainees to the United States and other countries.[16] This spending bill, introduced in May 2009, provided an opportunity to secure funding for the closure of Guantanamo; however, the Obama Administration had not come up with a plan for the closure. Ultimately, the Senate voted ninety to six against including in the bill the $80 million requested by the White House to close Guantanamo.[17]

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14. *See, e.g.*, Foon Rhee, *McCain Proposes: New Global Coalition*, BOSTON GLOBE, Mar. 27, 2008, at 17A; *President Bush Participates in Press Availability at 2006 U.S.-EU Summit*, WHITE HOUSE (June 21, 2006), http://georgewbush-whitehouse.archives.gov/news/releases/2006/06/20060621-6.html. General David Petraeus, head of U.S. Army Central Command, has also supported closing Guantanamo. Greg Bluestein, *Petraeus Supports Closure of Guantanamo*, ARMY TIMES (May 29, 2009), http://www.armytimes.com/news/2009/05/ap_petraeus_gitmoclosing_052909w/.

15. Executive Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 27, 2009).

16. Supplemental Appropriations Act, 2009, Pub. L. No. 111-32, 123 Stat. 1859 (2009). Section 1403 prohibited the release of any Guantanamo detainee into the United States, restricted the transfer of any detainee to the United States for prosecution or detention without submitting to Congress a plan, analysis, and justification regarding such transfer, and restricted the transfer of any detainee to a foreign country without submitting to Congress a risk assessment. *Id.* § 1403(a)–(e). Several amendments, such as S. Amdt. 1133, S. Amdt. 1136, S. Amdt. 1140, and S. Amdt. 1144, were introduced, some by Democrats, which were intended to severely restrict the ability to close Guantanamo or the rights of detainees. *See* Proposed Amendments to H.R. 2346, Supplemental Appropriations Act, 2009, GOVTRACK.US, http://www.govtrack.us/congress/bill.xpd?bill=h111-2346&tab=amendments.

17. *See, e.g.*, David M. Herszenhorn, *Funds to Close Guantánamo Denied*, N.Y. TIMES, May 20, 2009, http://www.nytimes.com/2009/05/21/us/politics/21detain.html?_r=1. On the vote, Senator Dick Durbin retorted that the Democrats were "being asked to defend a plan that hasn't been announced." *Senators*

Subsequent events only helped to grow and solidify opposition to shuttering the prison. In November 2009, Attorney General Eric Holder announced his intention to try Khalid Sheikh Mohammed and other alleged 9/11 conspirators in civilian court under federal criminal terrorism statutes.[18] A month later, the Administration announced plans to purchase and retrofit a corrections facility in Thompson, Illinois with the intent to transfer Guantanamo detainees there for trial and/or long-term detention.[19] Both announcements caused a flurry of protests and heated action by several members of Congress.[20] The backlash was so great that the planned 9/11 trials were put on hold and Congress made clear that it would not fund the Thompson facility.[21]

Another political firestorm erupted when the only civilian trial of a Guantanamo detainee to occur so far concluded with a surprising result in November 2010. Ahmed Ghailani, charged with 285 counts of various crimes, including murder, for the 1998 East African em-

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Reject Closing GTMO Without Plan, USA TODAY, May 19, 2009, http://www.usatoday.com/news/washington/2009-05-19-gitmo_N.htm.

18. *Attorney General Announces Forum Decisions for Guantanamo Detainees*, U.S. DEP'T OF JUST. (Nov. 13, 2009), http://www.justice.gov/ag/speeches/2009/ag-speech-091113.html (statement of Eric Holder) (last visited Feb. 22, 2011).

19. *See, e.g.*, Peter Slevin, *U.S. to Announce Transfer of Detainees to Ill. Prison*, WASH. POST, Dec. 15, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/12/15/AR2009121500095.html.

20. *See, e.g.*, Daphne Eviatar, *Protesters in New York City Rally Against 9/11 Trials, Call for Holder to Resign*, WASH. INDEP. (Dec. 5, 2009), http://washingtonindependent.com/69775/protesters-in-new-york-city-rally-against-911-trials-call-for-holder-to-resign; Mimi Hall & Judy Keen, *Plan to Move Gitmo Detainees to Illinois Sparks Concerns*, USA TODAY, Dec. 16, 2009, http://www.usatoday.com/news/nation/2009-12-16-illinois-prison-terrorists_N.htm; Kasie Hunt, *Senators Try to Block Khalid Sheikh Mohammed Trial*, POLITICO (Feb. 2, 2010), http://www.politico.com/news/stories/0210/32382.html; Tim Taliaferro, *GOP Moves To Block Gitmo Detainees From Coming to Illinois Prison*, HUFFINGTON POST (Nov. 16, 2009), http://www.huffingtonpost.com/2009/11/16/gop-moves-to-block-gitmo_n_359792.html.

21. *See, e.g.*, Stephanie Condon, *Holder: Politics Has Delayed KSM Trial*, CBS NEWS (July 11, 2010), http://www.cbsnews.com/stories/2010/07/09/ftn/main6662906.shtml; Charlie Savage, *Delay Expected on Illinois Plan for Detainees*, N.Y. TIMES, Dec. 23, 2009, at A1; Katherine Skiba & Peter Nicholas, *Funding Problems Delay Obama's Thompson Prison Plan*, L.A. TIMES, Dec. 24, 2009, http://articles.latimes.com/2009/dec/24/nation/la-na-prison-funding24-2009dec24.

bassy bombings, was ultimately convicted of only one count—conspiracy to damage or destroy U.S. property—and given a life sentence.[22] While some characterized the conviction as a victory for the American justice system and the rule of law, it seemed that the loudest viewpoint was that the one-count conviction was a travesty and that the verdict clearly demonstrated that trials of suspected terrorists, at least those detained at Guantanamo, should be by military commission on a Caribbean island.[23] Thus, the entire event served to further undermine the idea that detainees could or should be brought to the mainland for trial and imprisonment or detention. Indeed, the Ghailani conviction could be said to have provided a perverse incentive to *not* prosecute detainees at all—in federal court or military commission—when there exists a more efficient alternative bearing the same result: continued detention of the individual without charge or trial in the current long-term detention system at Guantanamo.

At the end of 2010—almost two years after President Obama issued the executive order that called for closing Guantanamo within a year—the detention center at Guantanamo remained open with no future date set for its closure, nor any plan evident in support of its closure.

The goal, however, of closing Guantanamo is something of a red herring. Entirely too much hysteria and rhetoric has erupted around whether the prison camp should stay open or close. Of greater significance is that the continued existence of Guantanamo has enabled "detention without trial" or, to use more precise language, *long-term military preventive detention*, to become entrenched, indeed institu-

22. *See, e.g.*, Geraldine Baum & Richard A. Serrano, *Terrorist Gets Life Sentence for Role in U.S. Embassy Bombings in East Africa*, L.A. TIMES, Jan. 25, 2011, http://www.latimes.com/news/nationworld/nation/sc-dc-0126-embassy-bombings-web-20110125,0,5584187.story?track=rss; Patricia Hurtado, *Ghailani Cleared of All But One Charge in African Embassy Bombings Trial*, BLOOMBERG (Nov. 17, 2010), http://www.bloomberg.com/news/2010-11-17/ghailani-found-guilty-of-conspiracy-in-embassy-bombings-cleared-of-murder.html; *see also Ghailani Verdict Complicates Bid to Close Gitmo*, CBS NEWS (Nov. 18, 2010), http://www.cbsnews.com/stories/2010/11/18/national/main7066595.shtml [hereinafter *Ghailani Verdict*].

23. *See, e.g.*, *Ghailani Verdict*, *supra* note 22; *The Ghailani Verdict*, N.Y. TIMES, Nov. 19, 2010, at A30.

tionalized, in our democratic society. Here, let us be clear about what this means: First, preventive detention is the indefinite detention of an individual who is believed to be too dangerous to release into society, but who will not be charged or prosecuted for any crime.[24] Second, the individuals at Guantanamo are detained by the U.S. military and, as asserted by the President, the detentions have been, and are, pursuant to wartime and justified by the laws of war.[25] Thus, the continued existence of Guantanamo is, more accurately, about continuing the existence of military preventive detention.

Closing Guantanamo is still a worthy goal for many reasons, but the hard question we should be asking is not simply whether the detention camp should close, but whether America can abide long-term military preventive detention as an ongoing institution in our civil society even when we no longer have troops on the ground in Iraq, Afghanistan, or elsewhere. With that query in mind, closing the prison is certainly important because of what it has come to stand for: Guantanamo, once a symbol for lawlessness, has become a symbol for indefinite preventive detention *under the law*.

II. WHERE ARE WE NOW? (A POLITICAL MAELSTROM AND A PREMONITION)

On December 22, 2010, a Democrat-controlled Congress passed the National Defense Authorization Act for Fiscal Year 2011

24. *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). *See generally* David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CAL. L. REV. 693, 700–03 (2009) (discussing different preventive-detention regimes and, particularly, preventive detention of terrorism suspects).

25. *See, e.g.*, Respondent's Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, Hamlily v. Obama, No. 05-CV-0763 (JDB) (D.D.C. Mar. 13, 2009) (relying on the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) with reference to international law principles); GUANTANAMO REVIEW TASK FORCE, FINAL REPORT 8–9 (2010) [herinafter FINAL REPORT]. *See generally* 115 Stat. 224; Boumediene v. Bush, 553 U.S. 723 (2008); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004); Detention Military Order, *supra* note 9.

("NDAA 2011"),[26] which is far more restrictive than any bill on Guantanamo passed to date and severely impedes the ability of the executive branch to transfer detainees out of Guantanamo. The NDAA 2011 essentially prohibits funds authorized by the Act to be used for the transfer or release of Guantanamo detainees to or within the United States (or its territories or possessions).[27] The Act also requires certification from a foreign country in order for any funds authorized by the Act to be used for the transfer of any Guantanamo detainee to the custody of that foreign country.[28] The foreign country must provide a whole host of assertions, including that it is not a sponsor of terrorism, has agreed to take steps to ensure that the individual will not take action to threaten the United States or its citizens or allies, has taken the steps that the Secretary of Defense determines are necessary to ensure that the individual cannot engage in terrorism, and has agreed to share information with the United States regarding the individual or his associates that could affect the security of the United States or its citizens or allies, among others.[29] The Act

26. Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, 124 Stat. 4137 (2010) [hereinafter NDAA 2011].

27. *Id.* § 1032. Section 1032 includes any detainee held on or after January 2009 at the United States Naval Station, Guantanamo Bay, Cuba, by the Department of Defense. *Id.* The section also specifically names Khalid Sheikh Mohammed as one such individual whose transfer with funds authorized by the Act is prohibited. *Id.*

28. *Id.* §1033(b).

29. *Id.* Section 1033(b) states in full:

> CERTIFICATION.—The certification described in this subsection is a written certification made by the Secretary of Defense, with the concurrence of the Secretary of State, that the government of the foreign country or the recognized leadership of the foreign entity to which the individual detained at Guantanamo is to be transferred—
>
> (1) is not a designated state sponsor of terrorism or a designated foreign terrorist organization;
>
> (2) maintains effective control over each detention facility in which an individual is to be detained if the individual is to be housed in a detention facility;
>
> (3) is not, as of the date of the certification, facing a threat that is likely to substantially affect its ability to exercise control over the individual;

also prohibits the use of funds to transfer *any* Guantanamo detainee to *any* country if there is a confirmed case of recidivism by a former Guantanamo detainee who was transferred to that country[30] and prohibits the use of Department of Defense ("DoD") funds to modify or construct facilities in the United States to house Guantanamo detainees for detention in the custody of the DoD.[31]

> (4) has agreed to take effective steps to ensure that the individual cannot take action to threaten the United States, its citizens, or its allies in the future;
>
> (5) has taken such steps as the Secretary determines are necessary to ensure that the individual cannot engage or reengage in any terrorist activity; and
>
> (6) has agreed to share any information with the United States that—
>
> (A) is related to the individual or any associates of the individual; and
>
> (B) could affect the security of the United States, its citizens, or its allies.

Id. The requirement for certification from a foreign country or entity does not apply to transfers of Guantanamo detainees by the Secretary of Defense which are to effectuate an order by a court or tribunal. *Id.* § 1033(a)(2). In other words, if a federal court grants a habeas petition to a Guantanamo detainee, which means the government no longer has the authority to detain him, the Secretary of Defense is not required to obtain certification from the foreign country or entity in order to transfer the detainee to his home country or other country, but must notify Congress of such court order. *Id*. For examples of cases in which federal courts granted habeas petitions to Guantanamo detainees, see *Abdah v. Obama*, 04-CV-1254 (D.D.C. May 26, 2010) and *Al-Rabiah v. United States*, 02-CV-828 (D.D.C. Sept. 17, 2009).

30. NDAA 2011, *supra* note 26, § 1033(c)(1). The prohibition on transfer in cases of recidivism does not apply to transfers of Guantanamo detainees by the Secretary of Defense which are to effectuate an order by a court or tribunal. *Id.* § 1033(c)(3).

31. *Id.* § 1034. Despite the restriction on the use of funds for a detention facility in the U.S. to house Guantanamo detainees, § 1034(d) also requires that the Secretary of Defense submit a report to the congressional defense committees on "the merits, costs, and risks of using any proposed facility in the United States, its territories, or possessions to house any [Guantanamo detainees] for the purpose of detention or imprisonment in the custody or under the effective control of the Department of Defense." The section cannot be referring to the Guantanamo detention center, as it is not located in the United States, its territories, or possessions. *See* Rasul v. Bush, 542 U.S. 466, 471 (2004).

In summary, the NDAA 2011 completely destroys the ability of the executive branch to transfer any detainees from Guantanamo to the United States for prosecution in a federal civilian court for terrorism crimes under federal statute.[32] The bill also makes it vastly more complicated for the President to transfer detainees to their home country or a safe third country due to the certification requirement, which effectively forces the receiving foreign country to give up sovereignty with respect to how it conducts internal affairs relating to terrorism and its own citizens and residents. Indeed, it is difficult to imagine the United States agreeing to share information about U.S. citizens and residents in the same broad terms that the NDAA 2011 provisions would require of other countries. In effect, the certification requirement would make foreign countries "answerable" to the United States on issues of their own national security.

Moreover, the bill's intrusion into executive authority and discretion is indisputably far reaching. It is generally the prerogative of the Department of Justice to determine who and where to prosecute for violations of federal criminal statutes, just as it is normally within the realm of the Department of State to determine when, where, and how to engage in foreign relations. Not surprisingly, the substance of the NDAA 2011 and its incursion into the executive domain caused great displeasure in the White House such that some advisors to the President were advocating that he declare certain provisions unconstitutional.[33] Certainly, an outright veto of the defense spending bill while there are still U.S. service members fighting in Iraq and Afghanistan was fairly out of the question. Further, it

32. There are at least nine federal crimes relating to terrorism for which a suspected terrorist, including a Guantanamo detainee, could be tried. *See, e.g.*, 18 U.S.C. § 2339(a)–(b) (2006); *see also* RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE, PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS 11–12 (2009).

33. *See* Dafna Linzer, *Administration Prepares to Defy Efforts to Limit Obama's Options for Guantanamo*, PROPUBLICA (Jan. 3, 2011), http://www.propublica.org/article/administration-prepares-to-defy-efforts-to-limit-obamas-options-for-guantan; Eyder Peralta, *Obama Signs Defense Bill that Limits His Options in Guantanamo*, NPR (Jan. 7, 2011), http://www.npr.org/blogs/thetwo-way/2011/01/07/132746183/obama-signs-defense-bill-that-limits-his-options-in-Guantanamo.

could have been viewed as overly confrontational by the new Republican majority in the House of Representatives.

Whether for the aforementioned reasons and/or due to other reasons, on January 7, 2011, President Obama signed the NDAA 2011 into law but issued a signing statement that specifically addressed two of the bill's provisions relating to Guantanamo: the restriction on transfer into the United States and the certification requirement from foreign countries.[34] The statement is a fairly strong denouncement of Congress' attempt to intrude on executive prerogative, asserting that the Act "represents a dangerous and unprecedented challenge to critical executive branch authority" and "interfere[s] with the authority of the executive branch."[35]

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34. Press Release, The White House, Statement by the President on H.R. 6523 (Jan. 7, 2011), http://www.whitehouse.gov/the-press-office/2011/01/07/statement-president-hr-6523 [hereinafter Signing Statement to NDAA 2011]. For an explanation of the constitutionality of presidential signing statements in the context of the War on Terror, see Robert Turner, *U.S. Constitutional Issues in the Struggle Against Terror*, *in* LEGAL ISSUES IN THE STRUGGLE AGAINST TERROR 105 (John Norton Moore and Robert F. Turner, eds., 2010).

35. Signing Statement to NDAA 2011, *supra* note 34. Specifically, the signing statement includes the following two paragraphs:

> Section 1032 represents a dangerous and unprecedented challenge to critical executive branch authority to determine when and where to prosecute Guantanamo detainees, based on the facts and the circumstances of each case and our national security interests. The prosecution of terrorists in Federal court is a powerful tool in our efforts to protect the Nation and must be among the options available to us. Any attempt to deprive the executive branch of that tool undermines our Nation's counterterrorism efforts and has the potential to harm our national security.
>
> . . . .
>
> [T]he restrictions on the transfer of detainees to the custody or effective control of foreign countries interfere with the authority of the executive branch to make important and consequential foreign policy and national security determinations regarding whether and under what circumstances such transfers should occur in the context of an ongoing armed conflict. We must have the ability to act swiftly and to have broad flexibility in conducting our negotiations with foreign countries. . . . Requiring the executive branch to certify to additional conditions would hinder the conduct of delicate

Notably, President Obama concluded the signing statement with the declaration that his Administration "will work with the Congress to seek repeal of these restrictions, will seek to mitigate their effects, and will oppose any attempt to extend or expand them in the future."[36] As a preliminary matter, it will be interesting to see exactly how the Administration will work with a Congress that now has a Republican majority in the House when even a Democrat-controlled Congress was not willing to close the prison camp.[37] As a substantive matter, the latter assertion—that the Administration "will oppose any attempt to extend or expand" the restrictions—could be interpreted to mean that the Administration genuinely intends to pursue the closure of Guantanamo. On the other hand, while the statement protests legislative intrusion into foreign policy and national security matters, it fails to address the *content* of the NDAA provisions, which virtually nullify, or at least greatly undermine, Obama's 2009 executive order to close Guantanamo. Simply put, the statement makes no claim to executive authority to close Guantanamo as a national security priority.[38]

Whether one wants to conclude that the Obama Administration still intends to close Guantanamo or that the Administration merely wishes to be *perceived* as still desiring its closure for symbolic reasons, one must recognize that the White House likely does not have the political support necessary to actually close it soon, if ever.

> negotiations with foreign countries and therefore the effort to conclude detainee transfers in accord with our national security.

Id.

36. *Id.*

37. *See, e.g.*, Jen DiMascio, *McKeon Vows to Keep Gitmo Open*, POLITICO (Jan. 18, 2011), http://www.politico.com/news/stories/0111/47761.html.

38. For comparison, the first half of the signing statement is explicit as to the Administration's wish to prosecute detainees in federal courts in the United States. Signing Statement to NDAA 2011, *supra* note 34. However, it does not have the same specificity with respect to closing Guantanamo; rather, it vaguely states that it must have flexibility in areas of foreign policy and "negotiations with foreign countries." *Id.* Nowhere does the statement indicate that the NDAA 2011 interferes with the previously claimed national security goal of closing the prison camp.

III. WHERE ARE WE GOING? (THE FUTURE OF GUANTANAMO AND PREVENTIVE DETENTION)

What does all this say about the future of Guantanamo and, concomitantly, preventive detention? It is clear that the Administration faces an uphill battle if it intends to pursue closure of the prison camp. In addition, there is no doubt that the Administration believes that the physical presence of Guantanamo is a national security concern and that it should at least keep stating publicly that the prison should close. As recently as December 2010, President Obama expressed the continued desire to close Guantanamo, saying it has "'become a symbol' and a recruiting tool for 'al Qaeda and jihadists.'"[39] At the same time, however, it has become increasingly clear (or, *clearer* in my opinion), that the Obama Administration has no intention of ending long-term preventive detention regardless of what happens to the Guantanamo prison. In the same speech in December, Obama also stated, "I think we can do just as good of a job housing [detainees] somewhere else."[40] Furthermore, recent reports of an impending executive order on preventive detention confirm that the Administration is actively considering the establishment of a detention regime beyond the current detention regime at Guantanamo.[41]

That the Obama Administration is set to officially condone the practice of indefinite military preventive detention should not come as a surprise, as I believe it does to many.[42] The clues have been

39. Peter Landers, *Congress Bars Gitmo Transfers*, WALL ST. J., Dec. 23, 2010, http://online.wsj.com/article/SB10001424052748704774604576036520690885858.html.

40. *Id.*

41. *See, e.g.*, Peter Finn & Anne E. Kornblut, *Indefinite Detention Possible for Suspects at Guantanamo Bay*, WASH. POST, Dec. 21, 2010, at A3; Charlie Savage, *Detainee Review Proposal Is Prepared for Obama*, N.Y. TIMES, Dec. 21, 2010, http://www.nytimes.com/2010/12/22/us/22gitmo.html.

42. Based on my experience of speaking about Guantanamo and preventive detention at various conferences and while on book tour in numerous cities, including Albuquerque, Anchorage, Austin, Boston, Minneapolis, New York, Philadelphia, and Washington, D.C., I realized that most people did not quite recognize that Obama's promise to shut Guantanamo down was not a promise to discontinue detaining people without trial in a preventive-detention regime. Indeed, those experiences were partially the impetus for writing this article.

there all along, even as the White House was fervently advocating for the closure of Guantanamo. First, the same 2009 executive order calling for closure retains the option of continued detention without trial on the table by specifically allowing the Guantanamo Review Task Force—newly established to review each detainee's case—to reach a determination for a "disposition" other than transfer or prosecution.[43] Second, just months later, in an important speech on national security, President Obama made it clear that detaining individuals without trial may be a necessary last-choice option, and, to that end, a preventive-detention regime was entirely acceptable:

> We are not going to release anyone if it would endanger our national security . . . . Where demanded by justice and national security, we will seek to transfer some detainees to the same type of facilities in which we hold all manner of dangerous and violent criminals within our borders -- namely, highly secure prisons that ensure the public safety.
>
> . . . .
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> Now, finally, there remains the question of detainees at Guantanamo who cannot be prosecuted yet who pose a clear danger to the American people. . . . We're going to exhaust every avenue that we have to prosecute those at Guantanamo who pose a danger to our country. But even when this process is complete, there may be a number of people who cannot be prosecuted for past crimes, in some cases because evidence may be tainted, but who nonetheless pose a threat to the security of the United States. . . .
>
> . . . Having said that, we must recognize that these detention policies cannot be unbounded. They can't be based simply on what I or the executive branch decide alone.

43. Specifically, § 4(c)(4) of Executive Order 13,492 allows for the interagency task force review to reach a "Determination of Other Disposition," that is, "[w]ith respect to any individuals currently detained at Guantanamo whose disposition is not achieved under paragraphs (2) [transfer] or (3) [prosecution] of this subsection, the Review shall select lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of such individuals." Executive Order No. 13,492, 74 Fed. Reg. 4897, 4899 (Jan. 27, 2009).

> That's why my administration has begun to reshape the standards that apply to ensure that they are in line with the rule of law. We must have clear, defensible, and lawful standards for those who fall into this category. We must have fair procedures so that we don't make mistakes. We must have a thorough process of periodic review, so that any prolonged detention is carefully evaluated and justified.[44]

Third, in January 2010, the executively created Guantanamo Review Task Force released its final report, indicating that there were almost fifty men at Guantanamo who could neither be tried nor released but who would be subject to detention and continuing "executive review."[45]

Now, recent reports confirm what has been quietly occurring all along: The White House has been preparing an executive order that sets forth a system of indefinite detention at Guantanamo and, potentially, elsewhere.[46] In short, this system would enable detainees to challenge their detention on a regular basis by requiring a minimal review every six months and then a more lengthy annual review before an executive 'parole-like' review board made up of officials from civilian and military agencies.[47] Further, the pending executive order envisions that the executive review board would have the authority to release a detainee if appropriate.[48] Of course, with the NDAA 2011 restrictions in place, the review board's authority to order the release of any detainee at Guantanamo would be severely restrained. It is important to note that such an executive review

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44. Press Release, The White House, Remarks by the President on National Security (May 21, 2009), http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09.

45. *See* FINAL REPORT, *supra* note 25, at ii ("[Forty-eight] detainees were determined to be too dangerous to transfer but not feasible for prosecution."). Pursuant to executive order, a task force made up of various agencies was established to make a prompt and comprehensive review and determination of disposition of each individual detainee at Guantanamo. *See* 74 Fed. Reg. at 4898–99.

46. *See, e.g.*, Finn & Kornblut, *supra* note 41.

47. Dafna Linzer, *White House Drafts Executive Order for Indefinite Detention*, PROPUBLICA (Dec. 21, 2010), http://www.propublica.org/article/white-house-drafts-executive-order-for-indefinite-detention. Detainees would also have access to an attorney to assist them in the process. *Id.*

48. *See id.*

process would not replace the habeas reviews required by the Supreme Court in *Boumediene*, but would supplement it.[49] In essence, the executive review would weigh the *necessity* of the detention rather than its *lawfulness*, which is what the federal courts have been doing in the ongoing habeas hearings pursuant to *Boumediene's* mandate.[50]

The fact of continuing habeas reviews of detainees leads us to face the reality on the ground: as of January 2011, there are approximately 173 men still detained at Guantanamo, many of who have been there since 2002.[51] Of the 173, a large number have been designated by the Guantanamo Review Task Force as eligible for release but remain at Guantanamo because of the White House-imposed moratorium on sending Guantanamo detainees back to Yemen on account of the "Christmas Bomber," who trained in Yemen.[52] Additionally, the Task Force designated almost forty-five men as appropriate for prosecution, though it is far from certain when such prosecutions will take place.[53] That still leaves a number

49. *Id.* An executive order could not override a right clearly granted by the Supreme Court, such as the right to seek habeas relief granted in Boumediene v. Bush, 553 U.S. 723, 795 (2008). *Cf.* Hamdan v. Rumsfeld, 548 U.S. 557, 575–84 (2006) (concluding that the President's military order establishing military commissions was invalid).

50. *See Boumediene*, 553 U.S. at 793–95. A habeas petition allows a detainee to challenge the government's authority to detain him. *Id.* Therefore, the habeas cases test whether the government can prove it has a legal and factual basis to detain the individual. *See, e.g.*, Obaydullah v. Obama, No. 08-1173 (RJL), 2010 WL 4116731, at *7 (D.D.C. Oct. 19, 2010); Hatim v. Obama, 677 F. Supp. 2d 1, 3–5 (D.D.C. 2009); Al-Odah v. Obama, 648 F. Supp. 2d 1, 17–18 (D.D.C. 2009). *See generally* HUMAN RIGHTS FIRST & THE CONSTITUTION PROJECT, HABEAS WORKS: FEDERAL COURTS' PROVEN CAPACITY TO HANDLE GUANTÁNAMO CASES (2010), *available at* http://www.constitutionproject.org/pdf/414.pdf.

51. *See* Peter Finn & Anne E. Kornblut, *President Decries Rules on Detainees*, WASH. POST, Jan. 7, 2011, at A2; *US: Act on Pledge to Close Guantanamo: Indefinite Detention Nine Years Later with No End in Sight*, HUM. RTS. WATCH (Jan. 10, 2011), http://www.hrw.org/en/news/2011/01/10/us-act-pledge-close-guantanamo.

52. *U.S. to Suspend Gitmo Detainee Transfers to Yemen*, FOX NEWS (Jan. 5, 2010), http://www.foxnews.com/politics/2010/01/05/suspend-gitmo-detainee-transfers-yemen/; *White House: No Detainees to Yemen for Now*, USA TODAY, Jan. 5, 2010, http://www.usatoday.com/news/world/2010-01-05-Yemen_N.htm.

53. FINAL REPORT, *supra* note 25, at ii.

of men who will continue with their detentions without being prosecuted for criminal acts. These men, however, have the right to challenge their detentions. Since 2008, *all* the men at Guantanamo have been entitled under *Boumediene* to challenge their detention in federal court through habeas corpus petitions.[54] Accordingly, the U.S. District Court for the District of Columbia has been holding habeas hearings for almost three years now. As of January 2, 2011, a tally of the completed habeas cases reveals that thirty-eight grants of habeas have been issued, nine of which the Department of Justice is appealing.[55] The government has won nineteen habeas cases, several of which have already been affirmed by the D.C. Circuit.[56] This means that in roughly thirty cases, a federal court determined that, under the Authorization for Use of Military Force, the government has the authority to continue to detain an individual because he either is "part of" al-Qaeda, the Taliban, or associated forces, or purposefully provided substantial or material support to such forces.[57] Thus, military preventive detention is already occurring at Guantanamo. It is not a question of whether there should be a preventive-detention regime but, rather, whether the current one is appropriate and what that means for any future regime.

As noted above, the detentions at Guantanamo exist within a military paradigm, that is, the detainees are in the custody of the U.S. military. The President, as well as many others, have claimed that the right to detain individuals without trial is justified by the existence of a "wartime" (*i.e.*, the current global war against al-Qaeda and associated forces) and by underlying principles of the laws of war.[58] The Guantanamo detentions, and whether such detentions are legal or appropriate under the laws of war and law of armed conflict

54. *Boumediene*, 553 U.S. at 797–98.

55. Lyle Denniston, Boumediene: *The Record So Far*, SCOTUSBLOG (Jan. 2, 2011, 11:44 PM), http://www.scotusblog.com/2011/01/boumediene.

56. *Id.* (follow "Table 2" hyperlink); *see also* Odah v. United States, 611 F.3d 8, 17 (D.C. Cir. 2010); Barhoumi v. Obama, 609 F.3d 416, 432 (D.C. Cir. 2010); Awad v. Obama, 608 F.3d 1, 12 (D.C. Cir. 2010); Al-Bihani v. Obama, 590 F.3d 866, 881 (D.C. Cir. 2010), *reh'g en banc denied*, 619 F.3d 1, 1 (D.C. Cir. 2010).

57. *See, e.g.*, Salahi v. Obama, 625 F.3d 745, 747 (D.C. Cir. 2010); Al-Adahi v. Obama, 613 F.3d 1102, 1103 (D.C. Cir. 2010); *Barhoumi*, 609 F.3d at 418, 432; *Al-Bihani*, 590 F.3d at 872.

58. *See supra* note 25 and accompanying text.

(called "international humanitarian law" or IHL), have generated an abundance of scholarship and commentary with divergent views.[59] For the purpose of this article, I do not propose to discuss the intricacies of these legal debates, such as whether the war against al-Qaeda is an international or non-international conflict or whether some or all of the Geneva Conventions or other IHL apply to the detainees. Rather, the point of raising the wartime paradigm and the laws of war with respect to detention at Guantanamo is a simple one—the war against al-Qaeda has no temporal or geographical boundaries, and, therefore, the military detention regime at Guantanamo is similarly without such boundaries. In other words, under the current preventive-detention regime, the President claims the authority to pick up any individual anywhere in the world and hold that individual in military detention without trial for as long as the United States is "at war" with al-Qaeda (or associated forces), provided that the individual is "part of" al-Qaeda, the Taliban, or associated forces or has purposefully provided substantial or material support to such groups.[60]

This proposition is neither exaggerated nor constrained to the unique cases of the Guantanamo detentions. First, it is well established that a number of Guantanamo detainees were not captured on any "battlefield" or even in Afghanistan.[61] Second, in the recent

59. *See, e.g.*, John B. Bellinger, III, *Legal Issues in the War on Terrorism*, 8 GERMAN L.J. 735 (2007), *available at* http://www.germanlawjournal.com/pdfs/Vol08No07/PDF_Vol_08_No_07_735-746_Developments_Bellinger.pdf; Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005); Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT'L L. 48 (2009); Laura M. Olson, *Practical Challenges of Implementing the Complementarity Between International Humanitarian and Human Rights Law—Demonstrated by the Procedural Regulation of Internment in Non-International Armed Conflict*, 40 CASE W. RES. J. INT'L L. 437 (2009); Gabor Rona, *A Bull in a China Shop: The War on Terror and International Law in the United States*, 39 CAL. W. INT'L L.J. 135 (2008); Gabor Rona, *Legal Frameworks to Combat Terrorism: An Abundant Inventory of Existing Tools*, 5 CHI. J. INT'L L. 499 (2005).

60. *See Salahi*, 625 F.3d at 747; *Al-Adahi*, 613 F.3d at 1103; *Barhoumi*, 609 F.3d at 418; *Al-Bihani*, 590 F.3d at 872.

61. *See Salahi*, 625 F.3d at 750 (petitioner was captured in Mauritania); Bensayah v. Obama, 610 F.3d 718, 720 (D.C. Cir. 2010) (petitioner and five other Algerian citizens were residing in Bosnia when they were turned over to U.S. au-

percolation of habeas cases, the D.C. Circuit has been unwilling to constrain the scope of the government's detention authority by geographical boundaries, as evidenced by *Salahi v. Obama* and *Bensayah v. Obama*. In *Salahi*, a Mauratanian citizen captured in Mauratania, who was not even alleged to be in combat in or near Afghanistan and, in fact, had not been to Afghanistan since 1992, was nevertheless alleged to be "part of" al-Qaeda at the time of capture.[62] In *Bensayah*, an Algerian citizen who was arrested in Bosnia was not alleged to have been in Afghanistan at all; rather, the government contended that he was planning to travel there to take up arms against the United States and allied forces.[63] In each case, the government claimed authority to militarily detain the petitioner because he was allegedly "part of" al-Qaeda, irrespective of where the petitioner was captured or whether he had engaged in actual combat or hostilities.[64] Furthermore, in neither case did the D.C. Circuit address the geographical factor. In terms of preventive detention, this failure to constrain the boundaries of the "armed conflict," much less recognize that such concepts exist under the law, does great disservice to IHL. More significantly, this failure by the D.C. Circuit illustrates the degree to which the courts are willing to accept the establishment of an indefinite preventive-detention regime based on a "war" that spans the globe.

Finally, another detention case involving detainees at the U.S. Bagram Air Base in Afghanistan further elucidates the geographically expansive detention authority to which the Obama Administration is laying claim. In *Al Maqaleh v. Gates*,[65] detainees at Bagram peti-

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thorities and transported to Guantanamo); MARK DENBEAUX & JOSHUA DENBEAUX, REPORT ON GUANTANAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA 14 (2006), *available at* http://law.shu.edu/publications/guantanamoReports/guantanamo_report_final_2_08_06.pdf (over sixty percent of the detainees brought to Guantanamo were picked up in Pakistan by non-U.S. authorities); Michele Norris, *All Things Considered: Documents Shed Light on Guantanamo Detainees*, NPR (Mar. 6, 2006), http://www.npr.org/templates/transcript/transcript.php?storyId=5248091 (radio broadcast interview with Corine Hegland, reporter for *The National Journal*).

62. *Salahi*, 625 F.3d at 746, 748–50.

63. *Bensayah*, 610 F.3d at 721.

64. *Salahi*, 625 F.3d at 746; *Bensayah*, 610 F.3d at 722.

65. 605 F.3d 84 (D.C. Cir. 2010).

tioned the U.S. District Court for the District of Columbia for relief from their confinement by the U.S. military.[66] One detainee, a Tunisian citizen, alleged that he was captured in Pakistan, and another, a Yemeni citizen, alleged that he was captured in Thailand.[67] Both detainees claimed that they were held in an unknown location before being brought to the U.S. detention camp at Bagram.[68] Although the issue before the court was not the scope of U.S. detention authority but rather the reach of the Suspension Clause, on appeal, the D.C. Circuit merely noted that the petitioners had been captured abroad.[69] The D.C. District Court, however, had previously addressed the site of apprehension with more caution, noting that the four petitioners claimed to have been captured outside of Afghanistan and rendered to Bagram to be detained by the United States and that they had no prior connection with Afghanistan.[70] The court then made the keen observation that:

> It is one thing to detain those captured on the surrounding battlefield at a place like Bagram, which respondents correctly maintain is in a theater of war. It is quite another thing to apprehend people in foreign countries—far from any Afghan battlefield—and then bring them to a theater of war, where the Constitution arguably may not reach. Such rendition resurrects the same specter of limitless Executive power the Supreme Court sought to guard against in *Boumediene*—the concern that the Executive could move detainees physically beyond the reach of the Constitution and detain them indefinitely.[71]

66. *Id.* at 87.
67. *Id.*
68. *Id.*
69. *Id.* at 96. Initially, there were four petitioners in the D.C. District Court who claimed they were captured in Pakistan, Dubai, Thailand and somewhere outside of Afghanistan, while respondents disputed only some of those claims. Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 209–210 (D.D.C. 2009), *rev'd*, 605 F.3d 84 (D.C. Cir. 2010).
70. *Al Maqaleh*, 604 F. Supp. 2d at 220.
71. *Id.*

Though the captures in *Al Maqaleh* were carried out during the Bush Administration, the case continued into the Obama Administration, which essentially sought to avoid federal court review of military detentions of individuals picked up well outside any active war zone.

Thus, the Obama Administration and the courts, by way of the Guantanamo habeas cases and other detention cases, are laying the foundation for an institutionalized system of military preventive detention at Guantanamo for sure, but perhaps at Bagram as well, and if President Obama is successful in his quest to close Guantanamo, potentially in U.S. locations also. The militarization of any processes in our civilian society should be viewed with caution. Furthermore, another factor, in addition to the lack of temporal and geographical boundaries, makes these types of detentions extremely problematic. Unlike previous armed conflicts where the enemy wore a uniform, in this "war" against al-Qaeda there is no perfect way to identify an "enemy" who does not wear a uniform. Thus, the current detention regime allows for U.S. forces or the CIA to pick up any individual (who is dressed as a civilian) anywhere, provided that the individual is suspected of being a member of al-Qaeda or associated forces—regardless of whether he engaged in hostilities—and detain him in military custody until the end of the "war" without bringing criminal charges or prosecuting him for a crime. Of course, this war may not have an end and, therefore, the detention could be indefinite. Finally, it is not at all clear what kind of access, if any, such a detainee would have to his family and to the outside world or, more generally, what the conditions of indefinite confinement might look like and whether they would be akin to conditions in federal prisons, which are penal in nature. This adds another layer of concern upon an already problematic detention regime.

The *Hamdi v. Rumsfeld*[72] case is often cited by courts and commentators alike for the proposition that preventive detention is permitted as an "incident to war."[73] Yet, the plurality was not making statements of generality and concluded merely that detention authority under the Authorization for the Use of Military Force at least extended to persons who engaged in a particular combination of past

72. 542 U.S. 507 (2004).
73. *Id.* at 518.

conduct and associational status: bearing arms as part of a Taliban military unit in Afghanistan.[74] The Court went on to caution that its understanding was based on longstanding law-of-war principles and that "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel."[75] Almost ten years after 9/11, with a military preventive-detention regime that has a capacity to reach globally and last indefinitely, we have surpassed that "unraveling" point. The question is whether we should be willing to accept the unraveling of our civilian democracy and its processes as easily as we seem to be accepting the institutionalization of military preventive detention.

74. *Id.* at 517–18.
75. *Id.* at 521.