

ARTICLE

Beyond Guantanamo: Two Constitutional Objections to Nonmilitary Preventive Detention

Eric Sandberg-Zakian*

Abstract

Now that indefinite, unreviewable military detention at Guantanamo is no longer an option, policymakers will have to decide whether and how to detain suspected terrorists. One widely-supported proposal is the creation a nonmilitary preventive detention scheme that would empower the government to detain suspects who are potentially dangerous but cannot be shown to be proper targets of AUMF-authorized military force or proven guilty of criminal acts beyond a reasonable doubt. This Article identifies two major constitutional challenges — one under the Suspension Clause and the other under the Supreme Court’s decision in *Kennedy v. Mendoza-Martinez* — that no preventive detention proponent has heretofore addressed, because no preventive detention critic has yet articulated them. This Article concludes that both challenges are likely to be successful, and that any nonmilitary preventive detention scheme is therefore likely to be held unconstitutional.

* Covington & Burling, LLP, Washington, D.C. J.D. Yale Law School, 2010. B.A. Yale University, 2007. For their invaluable help, the author thanks Eugene R. Fidell, Joshua A. Geltzer, Linda Greenhouse, Robert Post, Pierre St. Hillaire, Reva Siegel, Laura Smalligan, and Roger Weiner. The author would also like to thank editors Jonathan Abrams, Matthew Bobby, Stephen Pezzi, Lindsay Schare, and their staff at the *Harvard National Security Journal* for their work on this article.

Introduction

For nearly a decade, the alleged terrorists detained at the U.S. Naval Station, Guantanamo Bay, Cuba, have been the subjects of one of America's most high-profile legal conflicts. These detainees, held by the U.S. military as enemy combatants,¹ have engaged the government in a series of court battles over the legality of their detention.² While the detainees have won the right to case-by-case review of the legality of their detention and several have been ordered released by federal district court judges in the District of Columbia, the government has at least been able to defend its power to hold individuals who it can prove were part of the Taliban or al-Qaeda.³ Thus, pursuant to Congress's 2001 Authorization for Use of Military Force (AUMF),⁴ the executive branch continues to detain alleged enemy combatants at Guantanamo.

Nevertheless, Guantanamo is unlikely to play a central role in future American counterterrorism efforts. The facility is frequently criticized on the grounds that it symbolizes alleged post-September 11th human rights abuses, tarnishing America's public image and feeding anti-American passions throughout the world,⁵ and the Obama administration has been

¹ The Obama Administration has stopped using the term "enemy combatant," Del Quentin Wilber & Peter Finn, *U.S. Retires 'Enemy Combatant,' Keeps Broad Right to Detain*, WASH. POST, Mar. 14, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/13/AR2009031302371.html>, and has advanced a slightly less expansive interpretation of its detention powers, *Gherebi v. Obama*, 609 F. Supp. 2d 43, 53 (D.D.C. 2009). But the Administration has not adopted a substitute term, so for brevity's sake I will continue to use "enemy combatant."

² See, e.g., *Boumediene v. Bush*, 533 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004).

³ See *Boumediene*, 533 U.S. at 733 ("In *Hamdi v. Rumsfeld*, five Members of the Court recognized that detention of individuals who fought against the United States in Afghanistan 'for the duration of the particular conflict in which they were captured is so fundamental and accepted an incident to war as to be an exercise of the necessary and appropriate force Congress has authorized the President to use.'" (internal citation omitted)); *Gherebi*, 609 F. Supp. 2d at 55 (memorandum opinion) ("Congress conferred upon the President all 'necessary and proper' authority to execute military combat against both . . . [the Taliban and al-Qaeda, including the authority to accomplish] the 'detention of individuals' . . .").

⁴ Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001).

⁵ See, e.g., Peter Baker & Charlie Savage, *Terror Attempt May Hinder Plans to Close Guantanamo*, N.Y. TIMES, Jan. 1, 2010, <http://www.nytimes.com/2010/01/01/us/politics/01terror.html>; Peter Finn, *Retired Military Officers Push to Close Guantanamo Prison*, WASH. POST, Sept. 30, 2009,

working to close the detention center entirely for some time now.⁶ Although congressional opposition has so far stymied the attempt to close Guantanamo,⁷ the Administration no longer brings new detainees there.⁸ Thus, it seems safe to assume that no matter what Congress, the courts, and the President ultimately decide to do with the facility's remaining prisoners, indefinite detention at Guantanamo will not be used to neutralize terrorist threats that emerge in the future.

Thus, despite the importance of the ongoing Guantanamo litigation to the shape of American foreign policy and national security law,⁹ the next questions about the use of detention against terrorist groups will not be answered in the courts, at least initially.¹⁰ Instead, they will be policy questions, answered by Congress and the executive branch. If the last decade is any guide, the political branches' policy choices will be scrutinized by the courts, but policymakers will first have to decide whether and how to detain suspected terrorists now that indefinite, unreviewable military detention at Guantanamo is no longer permitted.

Broadly speaking, there are three basic options for post-Guantanamo counterterrorism detention. First, the government can continue to rely mainly on military detention, closing Guantanamo but pursuing the same basic Bush-era strategy. This option requires a choice between two unpalatable options — accepting that many of the individuals

<http://www.washingtonpost.com/wp-dyn/content/article/2009/09/29/AR2009092903492.html>; Anne E. Kornblut & Dafna Linzer, *White House Regroups on Guantanamo*, WASH. POST, Sept. 25, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/24/AR2009092404893.html>.

⁶ Charlie Savage, *Plan to Move Guantanamo Detainees Faces New Delay*, N.Y. TIMES, Dec. 22, 2009, <http://www.nytimes.com/2009/12/23/us/politics/23gitmo.html>; Jack Healy, *Obama Says Guantanamo Won't Close by January*, N.Y. TIMES, Nov. 18, 2009, <http://www.nytimes.com/2009/11/19/us/19gitmo.html>.

⁷ *Hearing to Receive Testimony on the Defense Authorization Request for Fiscal Year 2012 and Future Years Defense Program: Hearing Before the S. Armed Servs. Comm.*, 111th Cong. 26 (2011) (statement of Robert Gates, Secretary of Defense).

⁸ *Id.*

⁹ *See, e.g.*, Brief of Petitioners, *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (No. 08-1234), 2009 WL 4709536.

¹⁰ Of course, the outcome of ongoing litigation between Guantanamo detainees and the United States will constrain the available options. *See, e.g.*, Brief for Respondents-Appellants, *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010) (No. 09-5265), 2009 WL 6043972. But the political branches must ultimately be responsible for crafting a new detention policy.

the executive branch may want to detain will go free because they do not fall within the scope of the AUMF as interpreted by Article III courts,¹¹ or continuing a detention policy premised on a broader interpretation of the AUMF by evading judicial review altogether, perhaps by keeping detainees in an active zone even if they were not captured there in order to take advantage of the fact that judicial review has yet to be extended to the battlefield.¹²

Second, the government can supplement a scaled-back, judicially-overseen military detention regime with a ramped up civilian prosecutorial effort to arrest, convict, and imprison would-be terrorists before they attack. A great many individuals who are not detainable under the AUMF have the potential to carry out horrific terrorist attacks. Such individuals — “lone wolves,”¹³ violent Shiite extremists,¹⁴ violent anti-abortion, anti-gay extremists,¹⁵ and any other potential terrorists who are not part of or affiliated with al-Qaeda or the Taliban¹⁶ — cannot be incapacitated by military detention under the AUMF, but are often guilty of certain inchoate

¹¹ See, e.g., *Basardh v. Obama*, 612 F. Supp. 2d 30 (D.D.C. 2009).

¹² See, e.g., Brief for Respondents-Appellants, *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010) (No. 09-5265), 2009 WL 6043972.

¹³ See Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 437 (2007) (discussing “lone wolves”).

¹⁴ See, e.g., ROBIN WRIGHT, *SACRED RAGE* 107–08 (2001) (noting that Hezbollah was responsible for the deadly 1983 bombing of the U.S. embassy bombing in Beirut).

¹⁵ See, e.g., Dan Eggen, *Rudolph to Plead Guilty to Bombings*, WASH. POST, Apr. 9, 2005, <http://www.washingtonpost.com/wp-dyn/articles/A37544-2005Apr8.html> (detailing Eric Rudolph’s guilt in multiple terrorist bombings aimed at homosexual individuals and abortion providers).

¹⁶ For the basic definition of who may be detained in the United States’ current armed conflict, see *Al-Bihani v. Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010) (“[The] category of persons [subject to detention under the AUMF] includes those who are part of forces associated with Al Qaeda or the Taliban or those who purposefully and materially support such forces in hostilities against U.S. Coalition partners.”); *Gherebi v. Obama*, 609 F. Supp. 2d 43, 71 (D.D.C. 2009) (“[T]he President has the authority to detain persons who were part of, or substantially supported, the Taliban or al-Qaeda forces that are engaged in hostilities against the United States or its coalition partners, provided that the terms ‘substantially supported’ and ‘part of’ are interpreted to encompass only individuals who were members of the enemy organization’s armed forces, as that term is intended under the laws of war, at the time of their capture.”). As the subtle but important differences between the *Al-Bihani* standard and the *Gherebi* standard indicate, there is some uncertainty over the kind of “support” of enemy forces that may give rise to detention authority under the AUMF. However, it is sufficient for our purposes merely to observe that even under a very broad view of who may be detained as part of military action against al-Qaeda and the Taliban, a great many dangerous potential terrorists are not subject to military detention.

criminal offenses such as conspiracy,¹⁷ attempt,¹⁸ or materially supporting terrorism.¹⁹ Thus, this strategy calls for preemptive identification and prosecution of potential terrorists for lesser offenses that precede violent attacks.

The shift from the first strategy — a preference for military preventive detention — to the second strategy — a preference for preemptive prosecution for minor or inchoate offenses — is a question of relative proportions and risk trade-offs. The second strategy seeks to prevent more attacks through prosecution and fewer through military detention. The second strategy also runs the risk that targets will pull off attacks before enough evidence to prosecute has been assembled. In contrast, the first strategy runs the risk that the combination of early apprehension, before a criminal case is viable, and judicial review of military detention will eventually lead to the release of the target.

The third policy option, creating a wholly new nonmilitary preventive detention system, aims to mitigate both of these risks. This option gives the executive branch authority to detain suspects who are potentially dangerous but cannot be shown to be proper targets of AUMF-authorized military force or proven guilty of criminal acts beyond a reasonable doubt.²⁰ Although the Obama administration has, for the time being, declined to pursue this policy choice,²¹ it is nonetheless worthy of serious consideration. It has drawn support from many prominent national security lawyers across the political spectrum, and has been proposed repeatedly by legal scholars²²

¹⁷ 18 U.S.C. § 371 (2006).

¹⁸ Most anti-terrorism statutes can be violated through attempt. *See, e.g., id.* § 2339A (2006).

¹⁹ *Id.* §§ 2339A, 2339B.

²⁰ Another potential benefit of such a system is that it would allow the government to hold dangerous detainees indefinitely, whereas the government can only hold persons convicted of criminal violations for the length of their sentences. Of course, this same policy outcome can be achieved in the criminal system by simply extending criminal sentences.

²¹ Peter Baker, *Obama's War Over Terror*, N.Y. TIMES, Jan. 4, 2010, <http://www.nytimes.com/2010/01/17/magazine/17Terror-t.html?pagewanted=all> (“[President Obama] was talking about seeking legislation that would permanently authorize such preventive detention . . . [b]ut then . . . reversed course . . .”).

²² *See, e.g.,* STEPHANIE COOPER BLUM, THE NECESSARY EVIL OF PREVENTIVE DETENTION IN THE WAR ON TERROR 5 (2008); Matthew Waxman, *Administrative Detention of Terrorists: Why Detain, and Detain Whom?*, 3 J. NAT'L SECURITY L. & POL'Y 1 (2009); Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 YALE J. INT'L L. 369 (2008); ALAN DERSHOWITZ, PREEMPTION 121 (2006); John Radsan, *A Better Model for Interrogating High-Level Terrorists*, 79 TEMP. L. REV. 1227 (2006);

Among proponents of domestic nonmilitary preventive detention, there exists a diversity of opinion about what an ideal system would look like.²³ Scholars have grappled with a number of difficult substantive²⁴ and procedural²⁵ questions. Nevertheless, the broad contours of each proposal follow a similar pattern. The government would have the power to detain individuals if it could prove — to some degree of certainty less rigorous than beyond a reasonable doubt and using evidence that might not be admissible

George J. Terwilliger, III, “Domestic Unlawful Combatants”: *A Proposal to Adjudicate Constitutional Detentions*, 7 *ENGAGE* 55 (2006); Bruce Ackerman, *The Emergency Constitution*, 113 *YALE L.J.* 1029 (2004); Michael B. Mukasey, Op-Ed., *Jose Padilla Makes Bad Law*, *WALL ST. J.*, Aug. 22, 2007, at A15; Neal Katyal & Jack Goldsmith, Op-Ed., *The Terrorists’ Court*, *N.Y. TIMES*, July 11, 2007, <http://www.nytimes.com/2007/07/11/opinion/11katyal.html>; Eric Posner, *Destructive Technologies Require Us to Re-Assess Civil Liberties*, *BOSTON REV.*, Dec. 10, 2008, <http://bostonreview.net/BR34.1/posner.php>. In addition, there is a growing body of work from counterterrorism law’s leading scholars that, while not explicitly advocating for the adoption of a nonmilitary preventive detention scheme, seems to be laying the intellectual groundwork for consideration of such a scheme. *See, e.g.*, Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 *STAN. L. REV.* 1079 (2008); Adam Klein & Benjamin Wittes, *Preventive Detention in American Theory and Practice*, 2 *HARV. NAT’L SECURITY J.* 85 (2011).

²³ To be clear, I use the term “nonmilitary preventive detention” to describe a policy under which non-combatants are incarcerated solely on the basis of their prospective dangerousness to the public or the state. This singular focus on preventing future violence distinguishes true preventive detention from other forms of incarceration that sometimes take dangerousness into account, like imprisonment pursuant to criminal sentencing, which is only imposed upon a finding of past wrongdoing, or civil commitment, which requires mental illness and is intended to protect the patient along with society. My definition thus differs materially from that of Adam Klein and Benjamin Wittes, who include detention intended to protect the detainee. *See* Klein & Wittes, *supra* note 22, at 90.

²⁴ For example, scholars have asked how long detainees should be held, *e.g.*, BLUM, *supra* note 22, at 211; Ackerman, *supra* note 22, whether the goal of detention should be preventing an imminent attack, *e.g.*, Terwilliger, *supra* note 22, at 58, disrupting long term terrorist planning, *e.g.*, Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 *NW. U. L. REV.* 1, 50 (2003), or obtaining the opportunity to interrogate members of terrorist networks, *e.g.*, Radsan, *supra* note 22, and whether the government should seek to detain only potential terrorist operatives, or also strategists, fundraisers, and scientists, *e.g.*, Waxman, *supra* note 22, at 21–28. For an exploration of many such substantive questions and the suggestion that their consideration has been inappropriately subordinated to focus on procedural issues, see Waxman, *supra* note 22.

²⁵ For example, scholars have considered who should serve as judges, *e.g.*, BLUM, *supra* note 22, at 209; Ackerman, *supra* note 22, at 1066–77; Terwilliger, *supra* note 22, at 59; Katyal & Goldsmith, *supra* note 22, what evidence should be admitted, *e.g.*, BLUM, *supra* note 22, at 209; Terwilliger, *supra* note 22, at 59, how high the burden of proof should be, *e.g.*, BLUM, *supra* note 22, at 210; Radsan, *supra* note 22, at 1264; and what degree of secrecy should be employed to safeguard proceedings, *e.g.*, Ackerman, *supra* note 22, at 1070–73; Terwilliger, *supra* note 22, at 59.

in a criminal trial — that they were likely to commit or facilitate future terrorist attacks. Such proposals hold a great deal of obvious policy appeal. We would almost certainly be safer if the government detained individuals who intended to carry out or facilitate violent attacks, regardless of whether those people were members of al-Qaeda or could be shown to have committed crimes.

On the other hand, just as the great benefits of a nonmilitary preventive detention regime are easy to see, so too are its costs. The potential for racial profiling, the imprisonment of the innocent, and the chilling of speech are all too apparent. More generally, the idea of culpability for predicted future conduct is a favorite subject of our cautionary science-fiction tales,²⁶ and many scholars worry that the preventive deprivation of liberty undermines the rule of law.²⁷ As David Cole and Jules Lobel argue, for example, “[o]ne of the rule of law’s most important implications is that the state may generally employ harshly coercive measures . . . only on the basis of past wrongdoing that has been established to a high degree of certainty by a fundamentally fair process.”²⁸

Proponents of nonmilitary preventive detention are well aware of the civil libertarian distaste for preemptive coercion. Consequentially, most preventive detention proposals in the literature are crafted with an eye towards constitutional objections. Almost without exception, their arguments anticipate criticisms that take issue with the particular process provided to detainees or the criteria used to determine who is detained.²⁹ However, there are two major constitutional challenges that no preventive detention proponent has addressed, because no preventive detention critic has yet articulated them. These two challenges will apply to any preventive detention system, regardless of the particularities of its substantive

²⁶ See, e.g., MINORITY REPORT (Twentieth Century Fox 2002).

²⁷ See, e.g., DAVID COLE & JULES LOBEL, LESS SAFE, LESS FREE 33–34 (2007); Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 15–19 (2008); Jules Lobel, *The Preventative Paradigm and the Perils of Ad Hoc Balancing*, 91 MINN. L. REV. 1407, 1413–36 (2007); Jules Lobel, *The War on Terrorism and Civil Liberties*, 63 U. PITT. L. REV. 767, 781 (2002).

²⁸ COLE & LOBEL, *supra* note 27, at 33. *But see* Klein & Wittes, *supra* note 22 (arguing that the U.S. government has regularly employed coercive preventive force throughout history in a variety of contexts and, accordingly, preventive detention should be regarded as consistent with established legal norms).

²⁹ See, e.g., Chesney & Goldsmith, *supra* note 22, at 1126–32; Radsan, *supra* note 22, at 1242–52; Katyal & Goldsmith, *supra* note 22. See generally *infra* notes 79–84 and accompanying text.

procedures, and they both raise serious doubts about the constitutionality of nonmilitary preventive detention.

This Article is the first to raise and consider these two constitutional objections to preventive detention, both of which have foundations in existing law. The first objection centers on a robust reading of the Suspension Clause³⁰ as an absolute prohibition on preventive detention of U.S. persons. This objection expands on Justice Scalia's *Hamdi v. Rumsfeld* dissent.³¹ The second objection relies on an unclear but important line of cases stemming from *Kennedy v. Mendoza-Martinez*³² and posits that any nonmilitary preventive detention scheme offering significant security gains would likely violate the Fifth and Sixth Amendments by imposing criminal punishment on detainees without providing constitutionally required criminal process. Indeed, although an out-and-out nonmilitary preventive detention scheme aimed at incarcerating non-combatants solely on the basis of their prospective dangerousness to the public or the state has never been attempted in the United States and thus would present a host of novel constitutional questions, the government has historically employed a number of measures that have a great deal in common with preventive detention.³³ The two objections raised in this Article are derived from the expansive bodies of law generated by constitutional challenges to those measures, particularly in the habeas corpus, civil commitment, and pretrial detention contexts.

These two objections have thus far gone unconsidered in the literature. Yet taken together, they suggest that any nonmilitary preventive detention scheme is likely to be unconstitutional. Those who would like to see nonmilitary preventive detention of U.S. persons³⁴ go from theory to reality must engage with and overcome these objections, or accept that,

³⁰ U.S. CONST. art. I, § 9, cl. 2 (“The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

³¹ 542 U.S. 507, 554–79 (2004) (Scalia, J., dissenting).

³² 372 U.S. 144 (1963).

³³ For a catalog of such measures, see Klein & Wittes, *supra* note 22, at 90–111.

³⁴ U.S. persons include American citizens, permanent resident aliens, and individuals physically located on U.S. soil. As a general matter, the term encompasses the group of people who can claim the protection of the U.S. Constitution, including the Suspension Clause and Fifth and Sixth Amendments. See Eric Sandberg-Zakian, *Counterterrorism, the Constitution, and the Civil-Criminal Divide: Evaluating the Designation of U.S. Persons Under the International Emergency Economic Powers Act*, 48 HARV. J. ON LEGIS. 95, 96 n.8 (2011).

without a constitutional amendment, post-Guantanamo counterterrorism policy cannot depend upon preventive detention outside of the traditional military context.

In Part I of this Article, I detail various nonmilitary preventive detention proposals and contextualize the widespread demand among policymakers and commentators for a preventive detention system. That demand, I explain, is part of a larger post-September 11th movement by the U.S. government to import foreign affairs powers for domestic use, a movement that has been driven by the adoption of a preventive counterterrorism strategy. In Part II, I argue that the U.S. Constitution's Suspension Clause implicitly prohibits nonmilitary preventive detention.

In Part III, I argue that even if a nonmilitary preventive detention regime proves constitutional under the Suspension Clause, it would still have to pass the *Mendoza-Martinez* test, another mechanism by which courts compel the political branches to honor the procedural guarantees in the Bill of Rights. Although neither proponents nor critics of nonmilitary detention appear to have anticipated a *Mendoza-Martinez* challenge, such a challenge may well be viable. In Part IV, I offer a brief conclusion, making the final and overarching point that proponents of nonmilitary preventive detention, who have heretofore been occupied by smaller questions of procedural particularities, must shift their focus and respond to these two major constitutional challenges.

I. The Importation of Foreign Affairs Powers

In the years since the September 11, 2001, terrorist attacks on the Pentagon, World Trade Center, and passengers and crew of four commercial airplanes, the U.S. government has made counterterrorism a primary undertaking. Citizens and policymakers responded to the infliction of violence and the feeling of vulnerability with a commitment to prevent such attacks in the future. In the words of the 9/11 Commission:

[T]he institutions charged with protecting our borders, civil aviation, and national security did not understand how grave this threat could be, and did not adjust their policies, plans, and practices to deter or defeat it We hope that the

terrible losses . . . can create something positive — an America that is safer, stronger, and wiser.³⁵

The new focus on preventing terrorism prompted innumerable government actions. From two foreign wars launched with widespread public support³⁶ and a targeted killing campaign waged in Yemen and Pakistan³⁷ to the clandestine approval of coercive interrogation techniques³⁸ to be used in secret CIA prisons on foreign soil,³⁹ the American government projected massive force around the world in an effort to kill, capture, or frighten terrorists and their sponsors.⁴⁰

At home, no less than abroad, the state turned its massive resources to preventing terrorist attacks. Just months after September 11th, for example, Congress had already overhauled the federal government's counterterrorism powers with the USA PATRIOT Act,⁴¹ the Department of Justice had announced that it would shift its focus from crime prosecution to terrorism prevention,⁴² and President George W. Bush had ordered the National Security Agency to conduct electronic surveillance of certain U.S. persons without first obtaining a court order, circumventing the Foreign Intelligence Surveillance Act.⁴³ Congress continued its restructuring of the executive branch's national security wing, creating the Department of

³⁵ NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT xvi (2004), *available at* <http://govinfo.library.unt.edu/911/report/911Report.pdf>.

³⁶ See COLE & LOBEL, *supra* note 27, at 70–92.

³⁷ See sources cited *infra* notes 102–103.

³⁸ *Id.* at 3–4, 29–30.

³⁹ *Id.* at 56–57, 125–27.

⁴⁰ See generally *id.* at 1–92; Lobel, *The Preventative Paradigm and the Perils of Ad Hoc Balancing*, *supra* note 27.

⁴¹ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

⁴² *Administration's Draft Anti-Terrorism Act of 2001: Hearing Before the H. Comm. on the Judiciary* 5, 107th Cong. (2001) [hereinafter *Expanding*] (statement of John Ashcroft, Att'y Gen. of the United States) (“The fight against terrorism is now the highest priority of the Department of Justice.”).

⁴³ David Cole & Martin S. Lederman, *The National Security Agency's Domestic Spying Program: Framing the Debate*, 81 IND. L.J. 1355 (2006); James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, <http://www.nytimes.com/2005/12/16/politics/16program.html>.

Homeland Security in 2002⁴⁴ and the Office of the Director of National Intelligence in 2005.⁴⁵

The government's new commitment to terrorism prevention was perhaps best articulated by Attorney General John Ashcroft in written testimony submitted to the House Committee on the Judiciary on September 24, 2001:

This new terrorist threat to Americans on our soil is a turning point in America's history. It is a new challenge for law enforcement. Our fight against terrorism is not merely or primarily a criminal justice endeavor — it is defense of our nation and its citizens. We cannot wait for terrorists to strike to begin investigations and make arrests. The death tolls are too high, the consequences too great. We must prevent first, prosecute second.⁴⁶

In the immediate aftermath of the September 11th attacks, Ashcroft had already identified two of the central ideas that would drive American counterterrorism policy during the Bush administration, and continue to do so today. The first idea is that the internal nature of the dangers posed by terrorist groups like al-Qaeda distinguishes it from the last century's national security threats posed by nation-states like Germany, Japan, China, and the Soviet Union. Of course, there are significant external elements to the threat, but a major attack is now as likely to be accomplished from within the United States than from without. As a consequence, the American response cannot be an entirely foreign-oriented endeavor. Though military might, diplomacy, and espionage continue to figure prominently, domestic-oriented agencies are now expected to shoulder a much greater share of primary responsibility for our national security. The second central idea is that, because the United States is now facing grave internal threats, domestic terrorism can no longer be addressed primarily through

⁴⁴ Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

⁴⁵ Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638.

⁴⁶ *Expanding*, *supra* note 42, at 4–5 (statement of John Ashcroft, Att'y Gen. of the United States).

deterrence.⁴⁷ Prevention of violence, rather than prosecution for inflicting it, is now regarded as all-important.⁴⁸

The new dedication to preventing catastrophic domestic attacks has resulted in an eagerness to put the traditional tools of foreign affairs to use at home. Although this consequence has received little attention from legal scholars,⁴⁹ it should not be surprising. Our government is now responsible for accomplishing at home that which it has formerly pursued abroad. Thus, in search of domestic security solutions, scholars and policymakers alike have turned to familiar techniques. Historically, the weapons of foreign policy — including unregulated surveillance, the blockade, prisoner-of-war detention, coercive interrogation, and war — were the government's prime methods of protecting the nation from catastrophic violence and ultimate destruction. Now, however, the most fear-inducing violent threat to the United States is internal rather than external. Even if terrorists like the September 11th hijackers start out in a foreign country, they generally come into the United States before initiating terrorist attacks. In short, the suitcase bomb is the new cruise missile. Accordingly, the government has begun to consider using, and in some cases actually begun to use, some of its foreign

⁴⁷ For sources debating the accuracy of these two ideas, see sources cited *infra* notes 49 and 68, and sources cited in Yoo, *infra* note 49, at 575 n.14, 576 nn.15–16.

⁴⁸ The widely-adopted vision of American national security typified by Attorney General Ashcroft's statement may or may not accurately describe the national security challenges we face. But the American public has largely accepted it and the American government has embraced it. See, e.g., Barack Obama, *Agenda, Homeland Security*, CHANGE.GOV, http://change.gov/agenda/homeland_security_agenda/ (last visited Apr. 8, 2011) ("We are here to do the work that ensures no other family members have to lose a loved one to a terrorist who turns a plane into a missile, a terrorist who straps a bomb around her waist and climbs aboard a bus, a terrorist who figures out how to set off a dirty bomb in one of our cities. This is why we are here: to make our country safer and make sure the nearly 3,000 who were taken from us did not die in vain; that their legacy will be a more safe and secure Nation.").

⁴⁹ The claim that terrorist groups are waging war on the United States not just abroad but also on our own soil is not novel or under-analyzed. It is asserted frequently by the more aggressive advocates of the preventive counterterrorism project and questioned just as often by its critics. E.g., Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1871 (2004); Mark A. Drumbl, *Victimhood in our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 1 (2002); John Yoo, *Courts at War*, 91 CORNELL L. REV. 573, 575–80 (2006); sources cited *infra* note 68. But I am describing here the underappreciated, under-examined importance of our own government's importation of its foreign affairs powers in response to the perceived need to prevent a threat within our borders. My point is that it is the foreignness of the foreign affairs powers that is especially important but under-analyzed.

affairs powers — not war, but several of the others — in the domestic context to prevent strikes launched from within the United States. Specifically, the government has already used warrantless surveillance⁵⁰ and the domestic blockade,⁵¹ and we have seen robust public debates over proposals for intelligence-seeking coercive interrogation⁵² and nonmilitary preventive detention.

In the past, these powers have usually been employed only against foreign states or aliens within those states. Accordingly, U.S. courts have had few opportunities to review their constitutionality, and no serious constitutional objections have been raised to the government's established practice of using them preventively.⁵³ Of course, this is not true of all foreign

⁵⁰ See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, <http://www.nytimes.com/2005/12/16/politics/16program.html>; see also David Alan Jordan, *Decrypting the Fourth Amendment: Warrantless NSA Surveillance and the Enhanced Expectation of Privacy Provided by Encrypted Voice Over Internet Protocol*, 47 B.C. L. REV. 1 (2006); John Cary Sims, *What NSA Is Doing . . . and Why It's Illegal*, 33 HASTINGS CONST. L.Q. 105 (2006); Editorial, *The Intelligence Cover-Up*, N.Y. TIMES, Mar. 16, 2008, <http://www.nytimes.com/2008/03/16/opinion/16sun2.html>; Ellen Nakashima & Dan Eggen, *Former CEO Says U.S. Punished Phone Firm*, WASH. POST, Oct. 13, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/12/AR2007101202485.html>; Letter from Michael B. Mukasey, U.S. Att'y Gen., & J.M. McConnell, Dir. Nat'l Intelligence, to Rep. Silvestre Reyes, Chairman, H. Permanent Select Comm. on Intelligence (Feb. 22, 2008), available at <http://www.justice.gov/archive/ll/docs/ag-dni-letter-to-chairman-reyes.pdf>; Cole & Lederman, *supra* note 43, at 1360–1425 (reproducing two letters from the Department of Justice defending the program and two letters from a group of constitutional law scholars criticizing it).

⁵¹ See Sandberg-Zakian, *supra* note 34, at 5–10 (detailing the use of the International Emergency Economic Powers Act as a “targeted blockade”).

⁵² I am distinguishing here between intelligence-seeking coercive interrogation and coercive interrogation that is confession-seeking or justified in terms of retribution. Though we have well-established case law limiting confession-seeking interrogation practices in the criminal investigation context, *e.g.*, *Mincey v. Arizona*, 437 U.S. 385 (1978); *Beecher v. Alabama*, 389 U.S. 35 (1967); *Reck v. Pate*, 367 U.S. 433 (1961); *Payne v. Arkansas*, 356 U.S. 560 (1958), as well as the use of torture as punishment for past crimes, *e.g.*, *Wilkerson v. Utah*, 99 U.S. 130 (1878), we lack precedent on whether the Constitution allows the political branches to prevent future terrorist strikes through the domestic, non-combat use of the sort of coercive interrogation tactics open to military interrogators. See Eric A. Posner & Adrian Vermeule, *Should Coercive Interrogation Be Legal?*, 104 MICH. L. REV. 671 (2006).

⁵³ The Constitution's procedural protections have generally not been extended to aliens outside territory over which America has sovereignty. See *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (ruling that a Mexican citizen living in Mexico was not protected by the Bill of Rights because he was not an American citizen and had not voluntarily associated with or entered the United States); *Johnson v. Eisentrager*, 339 U.S.

affairs powers. Surveillance, for example, has been officially and legally used domestically for quite some time;⁵⁴ accordingly, even if novel issues arise on occasion,⁵⁵ we know more or less the limits imposed by the Fourth Amendment.

In contrast to that relatively settled situation, we have little or no case law establishing constitutional limits on the domestic use of many other foreign affairs powers. In some isolated historical instances, these techniques may have been used at home.⁵⁶ But they have not previously been

763 (1950) (holding that the Bill of Rights does not protect non-resident aliens); *Kukatash Mining Corp. v. SEC*, 309 F.2d 647 (D.C. Cir. 1962) (denying Canadian corporation with no assets in the United States standing to sue the United States for the denial of constitutionally-guaranteed due process of law); *Berlin Democratic Club v. Rumsfeld*, 410 F. Supp. 144 (D.D.C. 1976) (denying a non-resident alien standing to sue U.S. military officials for harassment and intimidation); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 722 n. 16 (1987); Jose A. Cabranes, *Our Imperial Criminal Procedure: Problems in the Extraterritorial Application of U.S. Constitutional Law*, 118 YALE L.J. 1660, 1682–97 (2009) (listing the characteristics courts use to determine whether those outside the United States can claim constitutional criminal procedural protections). While *Boumediene v. Bush*, 553 U.S. 723 (2008), and the legal fight over Guantanamo has destabilized the legal landscape governing the extraterritorial application constitutionality, even *Boumediene* itself noted that courts have historically not extended constitutional protection to nonresident aliens or foreign states subject to U.S. military action. *See id.* at 770 (“It is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution. But the cases before us lack any precise historical parallel.”).⁵⁴ *See* *United States v. Katz*, 389 U.S. 347 (1967); *Olmstead v. United States*, 277 U.S. 438 (1928).

⁵⁵ *See, e.g., In re Directives Pursuant to Section 105B of the Foreign Intelligence Surveillance Act*, 551 F.3d 1004 (FISA Ct. Rev. 2008).

⁵⁶ There are a few scattered historical examples of domestic noncombatant preventive detention. *See, e.g.,* Harlan Grant Cohen, Note, *The (Un)favorable Judgment of History: Deportation Hearings, The Palmer Raids, and the Meaning of History*, 78 N.Y.U. L. REV. 1431 (2003). Similarly, at least once before, an arguably domestic version of the blockade has been utilized in the form of the Confiscation Act of 1862, a self-described “Act . . . to punish Treason and Rebellion” which authorized the confiscation of all of the property of anyone who had joined the Confederate government or armed forces. Act of July 17, 1862, ch. 195, § 5, 12 Stat. 589, 590. The Supreme Court upheld the Act as an exercise of the political branches’ war power, and thus did not reach the question of what procedural scheme was required. *Miller v. United States*, 78 U.S. 268, 308–14 (1870). The dissenters, however, would have struck down the act as a criminal punishment that failed to provide criminal procedural protections. *Id.* at 320–23 (Field, J., dissenting). *See generally* LEONARD W. LEVY, A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY 51–57 (1996); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb: A Constitutional History*, 121 HARV. L. REV. 941, 1010–16 (2008).

employed with explicit congressional authorization in situations in which the political branches cannot plausibly assert their war powers. Thus, when they are imported into the domestic context for preventive use in the United States against American citizens, unprecedented, first-impression review of their constitutionality will be required.

Proposals for the creation of nonmilitary preventive detention system represent one of the most high-profile examples of this movement to import foreign affairs powers whose domestic use is not obviously permitted by the Constitution. For centuries, the U.S. government has exercised the power to detain non-citizen enemy combatants in a foreign combat theater, without judicial process, as prisoners of war.⁵⁷ However, recent years have seen both vocal demand for, and strenuous objection to, the importation of this power to the domestic counterterrorism effort.⁵⁸

Under the Bush administration, the United States placed at least three U.S. persons in preventive detention as enemy combatants — citizens Jose Padilla (captured in Chicago, Illinois) and Yaser Hamdi (captured in Afghanistan) and permanent resident Ali Saleh Kahlah al-Marri (captured

⁵⁷ See *Boumediene*, 553 U.S. at 755–64 (2008) (detailing the United States long history of foreign engagement and discovering no instance in which non-citizen prisoners of war in a foreign country received judicial process); *id.* at 799 (Souter, J., concurring) (“Justice Scalia is thus correct that here, for the first time, this Court holds there is . . . constitutional habeas jurisdiction over aliens imprisoned by the military outside an area of de jure national sovereignty.”); *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (holding that German nationals convicted by a military commission in Germany had no right to the writ of habeas corpus to test the legality of their detention).

⁵⁸ The Bush administration did some early experimenting with preventive detention outside of the enemy combatant model in at least two instances: first, by using existing criminal and immigration laws to create a dragnet that appears to have been unsuccessful at disrupting terrorist activity, David Cole, *The Priority of Morality: The Emergency Constitution’s Blind Spot*, 113 YALE L.J. 1753, 1753–54 (2004); and second, by disingenuously holding some suspected terrorists as material witnesses. Laurie L. Levenson, *Detention, Material Witnesses & The War on Terrorism*, 35 LOY. L.A. L. REV. 1217 (2002). I have chosen not to address these actions here because, while they remain a reference point in scholars’ analysis of the Bush administration’s response to September 11, they do not figure prominently in the current debate about whether to continue expansive military detention, create a new statutory administrative detention policy, or return to the exclusive use of the criminal law to combat terrorism. I have also chosen to bracket, for brevity’s sake, the question of detention in the immigration context, though such detention undoubtedly poses interesting and important questions regarding the anti-preventive-deprivation principle specifically and preventive detention generally. See generally David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002); Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289 (2008).

in Peoria, Illinois).⁵⁹ A number of other U.S. persons were threatened with enemy combatant designation but agreed to plead guilty to criminal charges.⁶⁰

The designation and indefinite detention of U.S. persons was but one element⁶¹ in the outsized legal drama that engulfed the Bush administration's enemy-combatant detention policy and its high-level detainee prison at Guantanamo Bay, Cuba.⁶² The Guantanamo detainees and others similarly situated during the Bush administration, however, were not targeted by a fully domesticated preventive detention regime. Instead, President Bush and Secretaries of Defense Rumsfeld and Gates purported to be utilizing the familiar foreign affairs power to take prisoners of war.⁶³ Accordingly, the litigation generally focused on the procedural and substantive limits on the political branches' war powers, or on whether Congress had authorized certain detention practices.⁶⁴

Some commentators and policymakers have continued to focus on improving upon the Bush administration's expansive use of the military's

⁵⁹ BLUM, *supra* note 22, at 5.

⁶⁰ *Id.* (noting that John Walker Lindh, Iyman Faris, and six alleged terrorists in Buffalo, New York pled guilty after being threatened with designation).

⁶¹ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding that Hamdi, a U.S. citizen held as an enemy combatant, had the right to challenge his detention before a neutral decision-maker); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (presenting — but declining to answer — the question of whether the AUMF authorized indefinite military detention of a U.S. citizen as an enemy combatant).

⁶² *See, e.g., Boumediene*, 553 U.S. 723; *Hamdan*, 548 U.S. 557; *Rasul v. Bush*, 542 U.S. 466 (2004).

⁶³ *See, e.g., Boumediene* 553 U.S. at 734 (“Interpreting the AUMF, the Department of Defense ordered the detention of these petitioners, and they were transferred to Guantanamo. . . . Each . . . was determined to be an enemy combatant . . .”).

⁶⁴ *See* sources cited *supra* notes 61–62. Earlier prominent Supreme Court cases challenging the constitutionality of preventive detention also have turned on the scope of the political branches' war powers or on whether the detention was authorized by statute. *See Ex parte Endo*, 323 U.S. 283 (1944) (holding petitioners detention unlawful under the relevant statutes and executive orders and declining to reach the constitutional question); *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding petitioner's detention as a valid exercise of the political branches' war powers); *Hirabayashi v. United States*, 320 U.S. 81 (1943) (upholding the subjection of petitioner to a curfew as a valid exercise of the political branches' war powers); *Ex parte Quirin*, 317 U.S. 1 (1942) (concluding that American citizenship does not prevent an active member of the German military captured while attacking the United States during World War II from entering the military justice system as an enemy combatant).

power to incapacitate enemy combatants.⁶⁵ Many others have argued that, outside of traditional conflicts in which prisoners are captured on the battlefield during active combat, preventive detention should have virtually no place in the American counterterrorism project, citing a lack of security benefits, high social costs, and potential unlawfulness.⁶⁶ However, there remains considerable support for the implementation of an entirely domestic, non-combatant preventive detention scheme that allows the government to prevent attacks by detaining suspected terrorists, including U.S. persons, outside of the criminal process.⁶⁷

It is important not to underestimate the seriousness of that proposition. One of the appealing aspects of the military enemy-combatant detention model is that it is, at least theoretically, self-limiting. Our government may only use the model when it is fighting a foreign war or a domestic insurrection, and may only use it against enemy soldiers. But the

⁶⁵ Detention of Enemy Combatants Act, H.R. 1076, 109th Cong. (2005) (introduced by Rep. Adam Schiff (D-CA) but not enacted); BENJAMIN WITTES, *LAW AND THE LONG WAR* 151–82 (2008); BENJAMIN WITTES & MARK GITENSTEIN, BROOKINGS INST., *A LEGAL FRAMEWORK FOR DETAINING TERRORISTS* (2007), available at http://www.brookings.edu/~media/Files/Projects/Opportunity08/PB_Terrorism_Wittes.pdf; Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365 (2008); Tung Yin, *Ending the War on Terrorism One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J.L. & PUB. POL'Y 149 (2005); David Cole, *Closing Guantanamo: The Problem of Preventive Detention*, BOSTON REV., Jan./Feb. 2009, available at <http://bostonreview.net/BR34.1/cole.php>.

⁶⁶ See, e.g., SARAH E. MENDELSON, CTR. FOR STRATEGIC & INT'L STUDIES, *CLOSING GUANTANAMO* (2008), available at <http://www.csis.org/hrs/gtmreport/>; THE CONSTITUTION PROJECT, *A CRITIQUE OF "NATIONAL SECURITY COURTS"* (2008), available at http://www.constitutionproject.org/pdf/Critique_of_the_National_Security_Courts_Updated_Signers.pdf; RICHARD B. ZABEL & JAMES B. BENJAMIN, JR., *HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN FEDERAL COURT* (2008), available at <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf>; Jules Lobel, *The Preventative Paradigm and the Perils of Ad Hoc Balancing*, 91 MINN. L. REV. 1407 (2007); Katherine Nesbitt, *Preventative Detention of Terrorist Suspects in Australia and the United States: A Comparative Constitutional Analysis*, 17 B.U. PUB. INT. L.J. 39 (2007); Deborah Pearlstein, *We're All Experts Now: A Security Case Against Security Detention*, 40 CASE W. RES. J. INT'L L. 577 (2009); Joanne Mariner, *Criminal Justice Techniques Are Adequate to the Problem of Terrorism*, BOSTON REV. (Dec. 10, 2008), <http://bostonreview.net/BR34.1/mariner.php>; Stephen J. Schulhofer, *Prosecuting Suspected Terrorists: The Role of the Civilian Courts*, ADVANCE, Fall 2008, at 63, available at <http://www.acslaw.org/files/Prosecuting-Suspected-Terrorists.pdf>.

⁶⁷ See sources cited *supra* note 22.

detentions of Padilla and al-Marri demonstrate the difficulty in relying upon that limit when combating terrorism. Sooner or later, the government will almost certainly face a difficult choice between three tragic options — decline to detain individuals likely to carry out devastating attacks on the homeland; convince us to accept the idea that an infinite global war is being waged on our own soil against an unlimited number of individual enemies who do not belong to a particular terrorist group or foreign military;⁶⁸ or act unconstitutionally. This dilemma follows naturally from the new understanding of national security we have adopted in response to the September 11th attacks.⁶⁹ If the threat of catastrophic destruction is now inside our borders, then we must either prevent it or suffer the consequences.

Domestic, nonmilitary preventive detention offers a way out of this dilemma. It allows us to forego paying the costs to liberty that accompany living in a war zone or under a lawless government, while still detaining those who would seek to murder large numbers of civilians. It gives us a fourth option. We may ultimately conclude that nonmilitary preventive detention is not the most palatable of the four,⁷⁰ but we cannot reasonably deny that it holds some appeal.

⁶⁸ See Owen Fiss, *The War Against Terrorism and the Rule of Law*, 26 OXFORD J. LEGAL STUD. 235, 237 (2006) (“Padilla’s habeas petition struck a note of urgency. The government held him as an enemy combatant, but the war that the government had in mind was not the kind that had been fought in Afghanistan, and for which international law allows the belligerents to detain enemy combatants. Rather, it was the vast, ill-defined, and never ending ‘War Against Terrorism.’”); Jules Lobel, *The War on Terrorism and Civil Liberties*, 63 U. PITT. L. REV. 767, 776–77 (2002) (“The war against terrorism threatens to form a backdrop to an increasing garrison state authority evoking the shadowy war that forms the background to George Orwell’s novel, 1984. This new, low level, but always prevalent ‘warm’ war, has the potential to lead us back to the worst abuses of the Cold War.”); John Yoo, *supra* note 49, at 576–77 (“America waged previous conflicts on foreign battlefields, while the home front remained safe behind the distances of two oceans. In the present conflict, the battlefield can exist anywhere, and there is no strict division between the front and home.”).

⁶⁹ See *supra* notes 35–48 and accompanying text.

⁷⁰ Indeed, the Bush administration took the first steps toward expanding the war zone by labeling Padilla, a citizen captured in the United States, an enemy combatant. Moreover, there are those who, when faced with these four options, might choose to live under a lawless government, see, e.g., *Korematsu v. United States*, 323 U.S. 214, 242–48 (1944) (Jackson, J., dissenting); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011 (2003), or would elect to let potential attackers go free, see, e.g., sources cited *supra* note 66.

Among proponents of domestic nonmilitary preventive detention, there exists quite a diversity of opinion about what an ideal system would look like. Scholars have grappled with a number of difficult substantive questions.⁷¹ How long should U.S. persons be detained — for a short, finite length of time,⁷² or for as long as they pose a threat?⁷³ What should be the goal of detention — preventing an imminent attack,⁷⁴ incapacitating individuals likely to plan future attacks,⁷⁵ obtaining the opportunity to interrogate individuals with knowledge of terrorist networks,⁷⁶ reassuring panicked members of the public that the government is in control,⁷⁷ or some combination thereof? Who should be targeted for detention — high-ranking leaders of terror groups, frontline operatives who would actually carry out attacks, instructors who teach others terror tactics, skilled technicians like bomb makers or chemists, fundraisers and financiers, or all of the above?⁷⁸

Equally pressing are a number of procedural questions. Who should judge whether detention is permissible in any given instance?⁷⁹ What evidence should be admissible?⁸⁰ What is an appropriate standard of proof and who should bear the burden?⁸¹ Under what conditions should detainees be held and how should they be treated upon release?⁸² Should detainees have access to outside counsel?⁸³ What degree of secrecy should be employed to safeguard proceedings?⁸⁴

A great many factors will affect exactly how these questions are ultimately answered in any domestic nonmilitary preventive detention

⁷¹ For an exploration of the many substantive questions and the suggestion that consideration of substance has been inappropriately subordinated to focus on procedural issues, see Waxman, *supra* note 67.

⁷² *E.g.*, Ackerman, *supra* note 22.

⁷³ *E.g.*, BLUM, *supra* note 22, at 211.

⁷⁴ *E.g.*, Terwilliger, *supra* note 22, at 58.

⁷⁵ *E.g.*, Slobogin, *supra* note 22, at 48–58.

⁷⁶ *E.g.*, Radsan, *supra* note 22.

⁷⁷ *E.g.*, Ackerman, *supra* note 22.

⁷⁸ This question has been surprisingly neglected by the literature, though it is important and difficult. See Waxman, *supra* note 22, at 21–28.

⁷⁹ Compare, *e.g.*, Katyal & Goldsmith, *supra* note 22, with BLUM, *supra* note 22, at 209, with Terwilliger, *supra* note 22, at 59, with Ackerman, *supra* note 22.

⁸⁰ Compare, *e.g.*, BLUM, *supra* note 22, at 209, with Terwilliger, *supra* note 22, at 59.

⁸¹ Compare, *e.g.*, Radsan, *supra* note 22, at 1264, with BLUM, *supra* note 22, at 210.

⁸² Compare, *e.g.*, Radsan, *supra* note 22, at 1265, with Ackerman, *supra* note 22, at 1062–66.

⁸³ Compare, *e.g.*, Radsan, *supra* note 22, at 1263, with Terwilliger, *supra* note 22, at 59.

⁸⁴ See, *e.g.*, Radsan, *supra* note 22, at 1245–46; Terwilliger, *supra* note 22, at 59.

scheme. Indeed, it is possible that such a scheme will never be implemented at all. Politics, national security developments, technological advances, and litigation will all affect whether, and how, the United States adopts a domestic preventive detention regime. But the ultimate outcome will be shaped in large part by how we perceive our constitutional restraints, and it is with that notion in mind that I now turn to laying out two major constitutional challenges to any nonmilitary preventive detention scheme.

II. The Suspension Clause as an Implicit Prohibition of Preventive Detention

It is perhaps surprising that our first major challenge to the legality of nonmilitary preventive detention owes an intellectual debt to Justice Scalia. After all, he has been the Court's most outspoken critic of the extension of legal process and substantive rights to Guantanamo detainees, from its first terrorism-detention decision, *Rasul v. Bush*,⁸⁵ to its most recent one, *Boumediene v. Bush*.⁸⁶ Nonetheless, in his one pro-detainee opinion, *Hamdi v. Rumsfeld*, Justice Scalia provided a firm foundation for the argument that the Constitution absolutely prohibits nonmilitary preventive detention as such.⁸⁷

In *Hamdi*, the Supreme Court considered a habeas corpus petition from Yaser Hamdi, an American citizen held incommunicado for two years in the United States, allegedly after having been captured by the Northern Alliance on the battlefield in Afghanistan and turned over to the U.S. military.⁸⁸ The Court produced no majority opinion. The plurality opinion, written by Justice O'Connor and joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Breyer, found that Congress had authorized Hamdi's detention by authorizing the use of force against Afghanistan, but that the

⁸⁵ 542 U.S. 466, 489 (2004) (Scalia, J., dissenting) (criticizing the Court's decision for the detainees as "an irresponsible overturning of settled law in a matter of extreme importance to our forces currently in the field").

⁸⁶ 553 U.S. 723, 827–28 (2008) (Scalia, J., dissenting) (arguing that the Court's decision in favor of the detained petitioners "will almost certainly cause more Americans to be killed" which "would be tolerable if necessary to preserve a time-honored legal principle" but is in fact a "blatant abandonment of such a principle"); see also *Hamdan v. Rumsfeld*, 548 U.S. 557, 677 (2006) (Scalia, J., dissenting) (asserting that the pro-detainee injunction granted by the district court below "brings the Judicial Branch into direct conflict with the Executive" and that the Supreme Court should "exercise . . . equitable discretion to avoid such conflict" but, by finding for the detainees, "rushes headlong to meet it").

⁸⁷ 542 U.S. 507, 554–79 (2004) (Scalia, J., dissenting).

⁸⁸ *Id.* at 510, 540.

procedures the military used to determine that Hamdi was an enemy combatant violated the Due Process Clause.⁸⁹ Justice Souter, joined by Justice Ginsburg, would have held that Congress had not authorized the military to detain U.S. citizens as enemy combatants, but agreed with the plurality that the procedures used by the military to do so unconstitutionally denied Hamdi a hearing in front of a neutral adjudicator.⁹⁰

In contrast, Justice Scalia, joined by Justice Stevens, believed the non-criminal detention of a U.S. citizen captured at home to be categorically unconstitutional and would have ordered the government to bring criminal charges against Hamdi or release him immediately.⁹¹ Justice Scalia argued that the Court would render the right to habeas corpus meaningless unless it read the Suspension Clause's habeas corpus guarantee⁹² to implicitly prohibit non-criminal detention of U.S. persons. Justice Scalia wrote:

The Suspension Clause of the Constitution, which carefully circumscribes the conditions under which the writ [of habeas corpus] can be withheld, would be a sham if it could be evaded by congressional prescription of requirements *other than the common-law requirement of committal for criminal prosecution* that render the writ, though available, unavailing. If the Suspension Clause . . . merely guarantees the citizen that he will not be detained unless Congress by ordinary legislation says he can be detained; it guarantees him very little indeed.⁹³

Justice Scalia's interpretation of the Suspension Clause recognizes exclusivity as an important implication of procedural protections. If the government may escape a burdensome procedural regime simply by using slightly different means to achieve the same deprivation of liberty, the

⁸⁹ *Id.* at 509, 532–33 (plurality opinion).

⁹⁰ *Id.* at 553–54 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

⁹¹ *Id.* at 573, 575 (Scalia J., dissenting).

⁹² U.S. CONST. art. I, § 9, cl. 2 (“The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

⁹³ *Hamdi*, 542 U.S. 507, 575 (2004) (Scalia, J., dissenting).

procedural protections are rendered ineffectual.⁹⁴ Applying the logic of Justice Scalia's *Hamdi* dissent to the question of nonmilitary preventive detention, we begin to see an argument that such detention is categorically unconstitutional. That argument starts from the premise that the Constitution's limitations on the incarceration of U.S. persons assume that detention is accomplished through the criminal process. Those limitations become meaningless, the argument goes, if the state may circumvent them by articulating a motivation for detention — such as neutralizing general dangerousness or preventing specific future attacks — other than an allegation of criminal wrongdoing. Thus, the Constitution should be interpreted to prohibit preventive uses of force that impose deprivations of liberty functionally equivalent to those that follow a successful criminal prosecution.⁹⁵

⁹⁴ Professor Owen Fiss has suggested that a similar line of reasoning indicates that the Suspension Clause and the Due Process Clause of the Fifth Amendment enact “the principle of freedom.” Though Professor Fiss does not elaborate on this suggestion at length, it seems that his “principle of freedom” encompasses a qualified right against non-criminal detention similar to that identified by Justice Scalia. See Fiss, *supra* note 68, at 245.

⁹⁵ Of course, the commitment to exclusivity that is at the center of this Scalia-inspired account cannot be absolute. Some forms of nonmilitary detention outside of the criminal justice system are constitutional, most notably civil commitment and quarantine. Accounting for these detention practices while making an exclusivity argument is a tricky business, and the challenging question for both Scalia's dissent in *Hamdi* and the slightly more expansive argument I am making here is: why do civil commitment and quarantine not run afoul the exclusivity ultimatum — prosecute or release — just as true preventive detention does? Historical pedigree clearly plays an important role, as does the exact “purpose” of the detention. I examine the concept of “purpose” further in Part III's discussion of the *Mendoza-Martinez* test which courts use to determine whether a deprivation of liberty such as civil commitment is functionally equivalent to criminal punishment and so can only be constitutionally employed through the criminal justice process. But perhaps the most important distinguishing characteristic is the absence of personal responsibility. Individuals detained through civil commitment or quarantine are not personally responsible for the danger they pose to the community. In the eyes of the law, the mentally ill do not choose to commit antisocial acts. Likewise, it is the nature of communicable disease to spread despite the intentions of those infected, and transmission is not generally thought to be a result of intentional, volitional acts. Although true preventive detention on pure dangerousness grounds would not be strictly retributive — there would be no past bad act for which detention would serve as retribution — detainees would be incarcerated because they would be expected to commit volitional, intentional bad acts in the future. As I discuss further in Part III, personal moral responsibility is often said to be at the core of the criminal prosecution process, and a pure preventive detention system would trigger the prosecute-or-release exclusivity of that process precisely because it would intrude on the core territory of the criminal law — personal responsibility. Indeed, the Supreme Court's recent civil commitment decisions have “underscored the importance of distinguishing . . . [those] subject to civil commitment ‘from other dangerous persons who are perhaps more

In other words, the Suspension Clause guarantees the right of an imprisoned U.S. person to come before a court and argue that her detention is not lawful, perhaps because she had not received a trial by jury⁹⁶ or was prevented from confronting the witnesses against her.⁹⁷ That right would be drastically devalued, almost to the point of worthlessness, if the government could show up and confirm that no jury trial or witness confrontation had been permitted, and yet assert that no such protections were required because the petitioner had not been accused of a crime, let alone convicted of one. If we are truly to view habeas corpus as the great “bulwark of our liberties,”⁹⁸ we must interpret the Suspension Clause to prohibit incarceration without criminal conviction.

Of course, this argument comes with its own, obvious counterargument: the Court already rejected such a robust reading of the Suspension Clause in *Hamdi*.⁹⁹ Further reflection reveals the fatal weakness in that counterargument, however. The *Hamdi* Court declined to read the Suspension Clause as prohibiting enemy combatant detention,¹⁰⁰ but the question here is whether the Clause prohibits nonmilitary preventive detention of dangerous individuals who cannot be detained as enemy combatants in an existing conflict. The political branches’ war powers authorize the executive to take a host of actions undeniably unconstitutional in peacetime. In the 1860’s, for example, executive branch employees killed over seventy thousand American citizens on American soil in the absence of any individualized process, let alone criminal conviction and sentencing.¹⁰¹ Today, the targeted killing of Americans on the battlefield is rare, but not

properly dealt with exclusively through criminal proceedings” and has explained that constitutional civil commitment of dangerous individuals requires “proof of serious difficulty in controlling behavior . . . sufficient to distinguish the dangerous . . . offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.” *Kansas v. Crane*, 534 U.S. 407 (2002) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 360 (1997)).

⁹⁶ U.S. CONST. amend. VI (“[T]he accused shall enjoy the right to . . . an impartial jury . . .”).

⁹⁷ *Id.* (“[T]he accused shall enjoy the right to . . . be confronted with the witnesses against him . . .”).

⁹⁸ *Boumediene v. Bush*, 553 U.S. 723, 742 (2008) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *137).

⁹⁹ *See Hamdi v. Rumsfeld*, 542 U.S. 507, 523 (2004).

¹⁰⁰ *See id.*

¹⁰¹ U.S. DEP’T OF VETERANS AFFAIRS, AMERICA’S WARS (2010), available at www.va.gov/opa/publications/factsheets/fs_american_wars.pdf (last visited Apr. 1, 2011).

unheard of¹⁰² or constitutionally controversial.¹⁰³ Yet, no one believes that the Constitution permits the intentional killing of Americans in the United States outside of the criminal justice process in the absence of actual combat or other comparable public safety emergency.¹⁰⁴ Perhaps preventive detention is yet another war power available to the political branches on the battlefield, but otherwise off limits.¹⁰⁵

Surely, the Supreme Court would be called upon to decide the constitutionality of a nonmilitary preventive detention regime, and we cannot know how many members of the Court would conclude that the

¹⁰² See, e.g., Complaint for Declaratory and Injunctive Relief at 6, *Al-Aulaqi v. Obama*, No. 10-cv-01469, at 6 (D.D.C. Aug. 30, 2010) (“In June 2010, deputy National Security Advisor John Brennan responded to questions about the targeted killing program by stating, ‘If an American person or citizen is in Yemen or in Pakistan or in Somalia or another place, and they are trying to carry out attacks against U.S. interests, they will also face the full brunt of a U.S. response.’”).

¹⁰³ Indeed, even in the recent, high-profile litigation over the legality of the U.S. government’s use or potential use of targeted killings in Yemen, the plaintiff acknowledged that the government can constitutionally kill U.S. citizen combatants on the battlefield. The plaintiff argued that Yemen was not a combat zone and that the targeted individual was not a combatant. See *id.* at 11 (“[O]utside of armed conflict, the Constitution prohibits Defendants from carrying out the targeted killing of U.S. citizens . . . except in circumstances in which they present concrete, specific, and imminent threats to life or physical safety, and there are no means other than lethal force that could reasonably be employed to neutralize the threats.”); Opposition to Plaintiff’s Motion for Preliminary Injunction and Memorandum in Support of Defendant’s Motion to Dismiss at 11, *Al-Aulaqi v. Obama*, No. 10-cv-01469, at 11 (D.D.C. Sept. 25, 2010) (noting that “plaintiff challenges the alleged lethal targeting of Anwar al-Aulaqi on the grounds that ‘[t]he United States is not at war with Yemen or within it,’ [and] . . . that therefore any use of lethal force against a person in Yemen would allegedly be ‘outside of armed conflict’”) (first alteration in original).

¹⁰⁴ Sandberg-Zakian, *supra* note 34, at 130 n.198 (“The heated debate over the legality of targeted killing in certain circumstances has not obscured the fact that non-combat, extrajudicial execution of individuals protected by the Bill of Rights is undeniably illegal unless absolutely necessary. . . . Indeed, commentators who vehemently disagree about the legality of the Bush and Obama administrations’ targeted killing programs invariably conclude that such killings would not be constitutional if carried out in the United States in the absence of absolute public safety necessity.”); see also *Tennessee v. Garner*, 471 U.S. 1 (1985); Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT’L SECURITY J. 145, 160 (2010).

¹⁰⁵ Of course, pursuant to the Suspension Clause, Congress could suspend habeas corpus in the case of invasion or rebellion, but under such circumstances the government would also presumably be able to rely on its military preventive detention power. The question here is may the government constitutionally adopt a nonmilitary preventive detention scheme in the absence of a rebellion or invasion.

Suspension Clause prohibits such a regime. At the very least, the theory has one vote, from Justice Scalia.¹⁰⁶ The recent retirement of Justice Stevens removed a sure second vote from the Court. Whether four more can be found among the remaining eight justices is an open question. Nonetheless, the argument that the Suspension Clause prohibits nonmilitary preventive detention entirely is a formidable one, and must be countered by those who propose such detention as the solution to post-Guantanamo counterterrorism challenges.

III. The Case for a *Mendoza-Martinez* Challenge to Nonmilitary Preventive Detention

Even if a nonmilitary preventive detention regime proves constitutional under the Suspension Clause, it would still have to pass the *Mendoza-Martinez* test, another mechanism by which courts compel the political branches to honor the procedural guarantees in the Bill of Rights. Neither proponents nor critics of nonmilitary detention have anticipated a *Mendoza-Martinez* challenge, but such a challenge must be counted as the most viable strategy for proving nonmilitary, non-criminal detention unconstitutional.

The *Mendoza-Martinez* test is used to ensure that government action that constitutes criminal punishment is accompanied by the full panoply of protections promised to criminal defendants by the Constitution, including the presumption of innocence until proven guilty beyond a reasonable

¹⁰⁶ Note, also, that it is possible Justice Scalia would argue that a non-combatant preventive detention regime would be unconstitutional for U.S. citizens but permissible for non-citizen U.S. persons such as resident aliens, as his *Hamdi* dissent emphasizes the importance of Hamdi's status of a citizen. *Hamdi v. Rumsfeld*, 542 U.S. 507, 577 (Scalia, J., dissenting). However, he seems to be distinguishing between citizens on the one hand and *enemy* aliens on the other, *see id.* at 558–59 (“[The] plurality . . . asserts that captured enemy combatants (other than those suspected of war crimes) have traditionally been detained until the cessation of hostilities and then released. That is probably an accurate description of wartime practice with respect to enemy *aliens*. The tradition with respect to American citizens, however, has been quite different.”) (citations omitted) (emphasis in original), so it is unclear how exactly he would treat those who fall into a third, intermediate category. In any event, a non-combatant preventive detention regime that cannot target American citizens loses much of its promised security gains, which would come from detaining would-be attackers like Timothy McVeigh or Nidal Malik Hassan, both of whom were U.S. citizens.

doubt,¹⁰⁷ indictment by Grand Jury,¹⁰⁸ the right against self-incrimination,¹⁰⁹ a speedy, public jury trial in a district where the crime was allegedly committed,¹¹⁰ and the rights to confront and call witnesses.¹¹¹ Essentially, a court examines a deprivation of liberty or property imposed without such protections, and asks whether they should have been provided.

The test was originated in *Kennedy v. Mendoza-Martinez*, a 1963 case holding that a statute authorizing the revocation of draft evaders' citizenship unconstitutionally imposed criminal punishment without the requisite procedural protections.¹¹² The test looks to the following seven factors:

[1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of *scienter*, [4] whether its operation will promote the traditional aims of punishment — retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned¹¹³

Despite having been used in a variety of recent cases,¹¹⁴ the method by which the Court applies the *Mendoza-Martinez* test is confusing to the point of incoherence. This unfortunate reality has been noted by a number of commentators. Professor Wayne Logan, for example, has observed that “[d]espite [its] importance, the Court’s numerous decisions in the area have

¹⁰⁷ See *In re Winship*, 379 U.S. 358, 364 (1970) (“Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

¹⁰⁸ U.S. CONST. amend. V.

¹⁰⁹ *Id.*

¹¹⁰ U.S. CONST. amend. VI.

¹¹¹ *Id.*

¹¹² 372 U.S. 144, 186 (1963).

¹¹³ *Id.* at 168–69.

¹¹⁴ *E.g.*, *Smith v. Doe*, 538 U.S. 84, 86 (2003); *Kansas v. Crane*, 534 U.S. 407 (2002); *Hudson v. United States*, 522 U.S. 93, 99–100 (1997); *Kansas v. Hendricks*, 521 U.S. 346, 394 (1997); *United States v. Salerno*, 481 U.S. 739, 747 (1987); *Allen v. Illinois*, 478 U.S. 364, 369–70 (1986); *Schall v. Martin*, 467 U.S. 253, 269 (1984); *United States v. Ward*, 448 U.S. 242, 249 (1980).

amounted to an incoherent muddle. Indeed, one would be hard pressed to identify an area of constitutional law that betrays a greater conceptual incoherence.”¹¹⁵

Part of this incoherence is due to the fact that the Court has no systematic method for weighing the relative importance of the seven factors. This creates a problem because, as the Court itself has explained, the factors “often point in differing directions”¹¹⁶ and at times are even regarded by the Court as “helpful” but “neither exhaustive nor dispositive.”¹¹⁷ Thus, the outcome of the test is fact-dependent to the point of arbitrariness, rendering it almost impossible to predict whether the Court will view a specific statutory deprivation of liberty as actually imposing criminal punishment.

Moreover, in the context of preemptive deprivations of liberty like nonmilitary preventive detention, the test suffers from an even greater flaw.¹¹⁸ Specifically, the Court has not developed a sufficiently nuanced view of the purpose of criminal punishment, which makes it difficult to determine whether a particular preventive sanction has “an alternative purpose” (factor six) and whether the sanction’s severity is “excessive in relation to the alternative purpose” (factor seven).¹¹⁹ As a result, the Court lacks a principled method for deciding whether incapacitation of dangerous individuals likely to commit future violence constitutes a criminal punishment purpose or an alternative purpose.¹²⁰ The outcome of the test is thus especially unpredictable when applied to preventive deprivations of liberty.

¹¹⁵ Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1268 (1998); see also Thomas Colby, *Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 447 (2008) (quoting Logan’s criticism approvingly); Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 3 (2005) (“It is no exaggeration to rank the [Court’s doctrine of the civil/criminal] distinction among the least well-considered and principled in American legal theory.”); Logan, *supra*, at 1280 (“[T]he Supreme Court’s case law on the punishment question in recent times has been so inconsistent that it borders on the unintelligible, evidencing a decidedly circular, at times patently result-driven effort to distinguish whether a sanction is ‘civil’ or ‘criminal,’ ‘preventive’ or ‘punitive,’ ‘regulatory’ or ‘retributive.’”).

¹¹⁶ *Mendoza-Martinez*, 372 U.S. at 169.

¹¹⁷ *United States v. Ward*, 448 U.S. 242, 249 (1980).

¹¹⁸ For a more in depth discussion of this point, see Sandberg-Zakian, *supra* note 34, at 111–22.

¹¹⁹ *Mendoza-Martinez*, 372 U.S. at 168–69.

¹²⁰ Sandberg-Zakian, *supra* note 34, at 111–22.

Nonetheless, despite its shortcomings, the Supreme Court employs the test quite frequently,¹²¹ and has used it to invalidate a significant number of government actions.¹²² Moreover, the deprivation of liberty at stake in preventive detention — incarceration — is the paradigmatic criminal punishment and is certainly a good candidate for invalidation as a criminal punishment disguised as a civil government action. Thus, although any attempt to analyze the strength of a *Mendoza-Martinez* challenge to nonmilitary preventive detention must necessarily be tentative, such analysis is worth pursuing.

A. *The Test's First Five Factors*

When applying the *Mendoza-Martinez* test to a preemptive deprivation of liberty, dividing the test's seven factors into two discrete steps renders it more manageable. For our purposes — understanding the test and applying it to a proposed policy — the first five factors should be considered first, as they are relatively straightforward and easy to apply. The sixth and seventh factors require a bit more consideration, and are best analyzed together, separately from the first five.

In the case of nonmilitary preventive detention, all of the first five factors suggest that it imposes criminal punishment. First, incarceration is undeniably an affirmative disability or restraint. Indeed, it is the paradigmatic restraint. Second, and likewise, incarceration has indeed been historically regarded as punishment.

Third, an individual would only be subjected to nonmilitary preventive detention after a finding of *scienter*. Such a finding would in fact be the core justification for every detention. It would make no sense to preventively detain someone who was unknowingly contributing to the formation of a terrorist plot. It would be far cheaper and more effective to

¹²¹ See cases cited *supra* note 114.

¹²² See, e.g., *Kansas v. Crane*, 534 U.S. 407, 415 (2002); *Mendoza-Martinez*, 372 U.S. at 186. Cf. *Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 784 (1994) (holding a purportedly civil “tax” on marijuana was actually criminal punishment and could not be imposed without criminal procedural protections); *Foucha v. Louisiana*, 504 U.S. 71, 82 (1992) (holding that the state’s attempt to keep the petitioner in a mental facility because he was allegedly dangerous even though he was no longer mentally ill was unconstitutional because, *inter alia*, such incarceration should have been pursued “by the ordinary criminal processes involving charge and conviction, the use of enhanced sentences for recidivists, and other permissible ways of dealing with patterns of criminal conduct”).

simply warn them.¹²³ Accordingly, no proponent of nonmilitary preventive detention proposes detaining individuals who do not intend to participate in terrorist activities.

Fourth, nonmilitary preventive detention will promote one but not both of what the Court calls “the traditional aims of punishment.”¹²⁴ Specifically, it will promote deterrence, but not retribution. Would-be terrorists, especially those with a variety of possible target countries from which to choose, may determine that the possibility of early plot disruption and indefinite detention makes the United States an unappealing target. This deterrence aspect of preventive detention is especially important because the traditional timing of criminal punishment — after an attack has occurred — is unlikely to deter suicide bombers or other martyrdom-seeking terrorists. Thus, although nonmilitary preventive detention does not serve the goal of retribution (because detainees have yet to commit any bad acts), it turns out to be even more efficient at promoting deterrence than traditional post-attack incarceration or execution.¹²⁵ Indeed, proponents of preventive detention often present this reality as one of the main elements of the argument that criminal prosecution as it is traditionally structured is not sufficient to prevent acts of terrorism.¹²⁶ Accordingly, this factor weighs heavily in favor of concluding that nonmilitary preventive detention fails the *Mendoza-Martinez* test. After all, the entire purpose of the test is to uncover government actions that impose criminal punishment but circumvent criminal law procedural protections. Thus, we must strongly suspect that preventive detention may be, in effect even if not in intent, an end-run around constitutionally required procedures when we realize that preventive detention achieves the traditional criminal law goal of deterrence better than prosecution.

Fifth, it is likely that the vast majority of behavior that would trigger incarceration under a preventive detention regime is already criminalized. This is a rather difficult issue, because we can certainly imagine a preventive detention regime that would imprison individuals based on acts that are not

¹²³ For example, in practice the government would never detain a merchant selling fertilizer to someone who secretly intends to use it to build a bomb or a landlord unwittingly renting an apartment to an al-Qaeda cell.

¹²⁴ *Mendoza-Martinez*, 372 U.S. at 168 (listing “retribution and deterrence” as “the traditional aims of punishment”).

¹²⁵ As an absolute matter, it is still possible that it might have very little deterrence value, but the important point is that it has more than traditional prosecution.

¹²⁶ See, e.g., Slobogin, *supra* note 22, at 4.

criminalized. For example, the government might incarcerate as dangerous those who criticized secular democracy as inferior to a theocracy or who attended the same mosque or church as convicted terrorists. However, such measures would almost certainly be unconstitutional on First Amendment or Due Process grounds,¹²⁷ and no proponent of nonmilitary preventive detention has proposed such a regime.

Perhaps for this reason, virtually all of the nonmilitary preventive detention proposals in the literature¹²⁸ aim to achieve the detention of individuals who have already committed inchoate crimes like conspiracy, attempt, and, most notably, material support of terrorism.¹²⁹ According to proponents of such proposals, the policy advantage lies not in detaining individuals who have done nothing wrong, but rather those about whom the government has circumstantial or inadmissible evidence of terrorism-related wrongdoing that cannot be proven beyond a reasonable doubt in a criminal trial.¹³⁰ Indeed, from a policy perspective, it is difficult to imagine an individual, who does not intend to commit a violent terrorist attack, has not supported a designated terrorist organization, has not conspired to commit any act of violence or to support others who intend to commit such an act, and yet is still a good candidate for detention. In short, the most important policy gain promised by nonmilitary preventive detention is that the government will be able to detain individuals who have committed inchoate crimes, but who cannot be proven to have done so beyond a reasonable doubt. Thus, because the behavior that triggers the sanction is already criminalized, we have yet another indication that nonmilitary preventive detention fails the *Mendoza-Martinez* test.

In summary, all of the first five factors suggest that a nonmilitary preventive detention scheme would impose criminal punishment, and thus would be unconstitutional, unless preceded by a criminal trial replete with

¹²⁷ For a discussion of the critique that existing preventive counterterrorism laws already infringe on First Amendment freedoms, see generally Robert M. Chesney, *Civil Liberties and the Terrorism Prevention Paradigm: The Guilt by Association Critique*, 101 MICH. L. REV. 1408 (2003).

¹²⁸ The one notable exception of which I am aware is Ackerman, who imagines a preventive detention regime expected to detain many entirely innocent individuals. However, Ackerman proposes a regime built on a constitutional revolution and recognizes such change would require formal, Article V amendments. Ackerman, *supra* note 22, at 1062, 1077.

¹²⁹ 18 U.S.C. §§ 2339A, 2339B (2006).

¹³⁰ See *supra* notes 17–19.

the full range of constitutionally required protections. The *Mendoza-Martinez* test is a “totality of the circumstances” inquiry, and five factors pointing in one direction is significant indeed. Before even considering the final two factors, then, we can conclude that any preventive detention scheme may fail to survive a *Mendoza-Martinez* challenge. However, we have yet to take on the most important and most confusing factors in the test. It is those that we must now consider.

B. The Test’s Sixth and Seventh Factors

It is best to consider the last two *Mendoza-Martinez* factors — alternative purpose and excessiveness in relation to that purpose — together, because of their necessary interdependence. Such consideration quickly reveals that, when it comes to preventive deprivations of liberty, these two factors generate a great deal of uncertainty. When the Court asks for an “alternative purpose,” it means one that is “nonpunitive.” Unfortunately, however, the Court has failed to offer even a marginally coherent account of which purposes are punitive and which are not.

As I have argued elsewhere,¹³¹ the Court’s approach to the alternative purpose inquiry is so confused that it borders on the absurd. The Court has stated, in several *Mendoza-Martinez* cases, that “preventing danger to the community is a legitimate [nonpunitive] regulatory goal.”¹³² Yet the Court has not acknowledged the obvious fact that most criminal laws have, as their primary goal, preventing danger to the community. For example, a law that criminalizes murder and provides for the execution of those who commit it aims to prevent danger, but cannot reasonably be labeled nonpunitive. The Court has failed to face up to this obvious flaw in its logic, and has so far been unable or unwilling to create a more nuanced conception of punitive purpose.

As a practical matter, the Court clearly distinguishes between various danger-prevention purposes. For example, the Court has determined that government action has a nonpunitive purpose when it is meant to prevent danger to the community by involuntarily commitment and forcing treatment of individuals who are unable to care for

¹³¹ Sandberg-Zakian, *supra* note 34, at 111–17.

¹³² *United States v. Salerno*, 481 U.S. 739, 747 (1987); *see also* *Smith v. Doe*, 538 U.S. 84, 102–03 (2003); *Schall v. Martin*, 467 U.S. 253, 265 (1984).

themselves.¹³³ In contrast, the Court would never find a nonpunitive purpose in government action meant to prevent danger to the community by incarcerating wrongdoers and thereby deterring others who wish to avoid such sanctions.¹³⁴

Unfortunately, the Court has never explained what criteria it uses to accomplish this implicit distinction, which leaves the law uncertain and unpredictable. This problem is especially acute in cases that involve the same specific purpose as nonmilitary preventive detention: incapacitating dangerous individuals so that they cannot commit future violent acts. When considering this purpose, the Court has sent starkly conflicting messages.

On the one hand, the Court has repeatedly stated that incapacitation is a punitive purpose. In the 1965 case of *United States v. Brown*, the Court explained: “Punishment serves several purposes; retributive, rehabilitative, deterrent — and preventative. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.”¹³⁵

The Court has since reiterated this position. In 1992, the Court invalidated a civil commitment statute on the grounds that it was “only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law.”¹³⁶ Justice Kennedy would have upheld the statute, but in his dissent he too observed that incapacitation is a common goal of criminal punishment.¹³⁷ Most recently, in 2002, Justice Breyer, writing for a seven-member majority, explained that, in any civil commitment scheme, “the nature of the

¹³³ See, e.g., *Kansas v. Hendricks*, 521 U.S. 346 (1997).

¹³⁴ Because deterring crime by invoking fear of incarceration is a quintessential punitive purpose. See, e.g., *id.* at 362.

¹³⁵ 381 U.S. 437, 458 (1965); see also *Powell v. Texas*, 392 U.S. 514, 539 (1968) (Black, J., concurring) (“[I]solation of the dangerous has always been considered an important function of the criminal law.”).

¹³⁶ *Foucha v. Louisiana*, 504 U.S. 73, 83 (1992).

¹³⁷ *Id.* at 99 (Kennedy, J., dissenting); see also *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in the judgment) (“The federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation.”).

psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.”¹³⁸ Justice Breyer went on to commit the Court to the position that the Constitution does not “permit the indefinite confinement ‘of any convicted criminal’ after completion of a prison term.”¹³⁹

On the other hand, there is one major precedent that leans heavily in the opposite direction: *United States v. Salerno*.¹⁴⁰ In that 1987 case, the Court, in a six to three decision, upheld a federal pretrial detention statute that allowed district courts to deny bail to defendants charged with serious crimes who are shown by clear and convincing evidence to be too dangerous to release.¹⁴¹ Justice Marshall, joined in dissent by Justice Brennan, described the measure the court upheld as:

a statute in which Congress declares that a person innocent of any crime may be jailed indefinitely, pending the trial of allegations which are legally presumed to be untrue, if the Government shows to the satisfaction of a judge that the accused is likely to commit crimes, unrelated to the pending charges, at any time in the future.¹⁴²

Justice Marshall’s description of the statute may be especially uncharitable, but it puts the point clearly. *Salerno* came quite close to upholding preventive detention.

There were, however, significant differences between the statute at issue in *Salerno* and a full-scale preventive detention regime. First, the detainees were already in government custody, and would not have been guaranteed release in the absence of the statute. Rather, the statute denied them only the *possibility* of release offered by a bail hearing.¹⁴³ Second, because the detention power could only be used against individuals facing prosecution for serious crimes, the government had, by definition, already

¹³⁸ *Kansas v. Crane*, 534 U.S. 407, 413 (2002).

¹³⁹ *Id.* (citing *Foucha*, 504 U.S. at 82–83).

¹⁴⁰ 481 U.S. 739 (1987).

¹⁴¹ *Id.*

¹⁴² *Id.* at 755 (Marshall, J., dissenting).

¹⁴³ *Id.* at 752–55 (majority opinion).

proved probable cause and signaled its expectation that it could prove guilt beyond a reasonable doubt.¹⁴⁴ Third, and perhaps most importantly, the detention was not just temporary, but absolutely bounded by the firm constitutional backstop of the Speedy Trial Clause.¹⁴⁵ Of course, as a practical matter, the firm backstop of the Speedy Trial Clause may not always prove comforting to a criminal defendant, who sometimes waits for years before being brought to trial.¹⁴⁶ Nonetheless, it is crucial to recognize that the *Salerno* Court did not approve the constitutionality of indefinite detention on the basis of dangerousness. Under a true nonmilitary preventive detention regime, a detainee who remains dangerous will never be released. In contrast, under the statute at issue in *Salerno*, the Speedy Trial Clause guaranteed that detainees would be released from pretrial preventive detention, even if they were still dangerous. Indeed, the Court has subsequently observed that “[i]t was emphasized in *Salerno* that the detention we found constitutionally permissible was strictly limited in duration,” and has cautioned against reading *Salerno* to condone “substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law.”¹⁴⁷ Thus, the *Salerno* detainees faced far less severe, far less permanent sanctions than true preventive detention detainees who, even with periodic review, would face indefinite detention and would never be offered the opportunity to clear their name through an adversarial hearing in which their innocence was assumed.¹⁴⁸

Finally, it is vital to note that the *Salerno* Court spent only a few scant sentences on the alternative purpose inquiry of the *Mendoza-Martinez* test, simply accepting without comment that “preventing danger to the community” could serve as a sufficient alternative purpose.¹⁴⁹ As a result,

¹⁴⁴ *Id.* at 750.

¹⁴⁵ U.S. CONST. amend. VI (“[T]he accused shall enjoy the right to a speedy and public trial . . .”).

¹⁴⁶ *See, e.g.,* *Barker v. Wingo*, 407 U.S. 514 (1972) (holding that a five year delay did not violate the Speedy Trial Clause).

¹⁴⁷ *Foucha v. Louisiana*, 504 U.S. 71, 82–83 (1992).

¹⁴⁸ *Salerno* is problematic for other reasons as well. It appears that the case was already moot but was nonetheless decided by the majority, presumably because some members of the Court were impatient to hold the act constitutional. *See* *United States v. Salerno*, 481 U.S. 739, 758 (1987) (Marshall, J., dissenting); *id.* at 769 (Stevens, J., dissenting).

¹⁴⁹ *See id.* at 747 (majority opinion). It is deeply unfortunate that the Court chose to offer such cursory analysis of this issue, as it was the truly determinative one in the case.

Salerno does not actually hold that intending to incapacitate dangerous individuals is a nonpunitive purpose.¹⁵⁰

In the face of these conflicting signals, how do we determine whether incapacitating dangerous individuals likely to commit future violent acts serves a punitive purpose or an alternative, nonpunitive purpose? The Court has explicitly, repeatedly said that incapacitation is a classic, primary goal of criminal punishment — confirming our intuitions on the subject. Yet the Court’s most significant (though by no means definitive) holding on the issue comes from *Salerno*, which suggests that preventive detention passes the *Mendoza-Martinez* test.¹⁵¹

The alternative purpose inquiry undertaken through the sixth and seventh *Mendoza-Martinez* factors will continue to be completely unpredictable and incoherent until the Court adopts a more specific conception of the purposes of punishment.¹⁵² If we had a reasoned, nuanced account of what makes a purpose punitive or nonpunitive, we could determine whether or not government action meant to incapacitate dangerous individuals has an alternative purpose. Unfortunately, the Court has given no indication that clarity is forthcoming. Fortunately, the Court is not the only possible source of clarity. Though the law in this area will remain uncertain until the Court adopts a theory of punishment, we can at least examine the theories that have been developed by scholars, and are available to the Court.

Broadly speaking, there are three theories of punitive purpose that the Court could adopt should it finally feel ready to bring coherence to the *Mendoza-Martinez* test’s alternative purpose inquiry. They are (1) the multipurpose view; (2) the retributivist view; and (3) the modified retributivist view.¹⁵³ Each conception of punishment, if adopted by the Court, would cause our alternative purposes analysis of nonmilitary preventive detention to come out differently.

¹⁵⁰ *Id.* at 749 (holding that “preventing crime” generally, not incapacitation specifically, is a nonpunitive purpose).

¹⁵¹ The waters are further muddied by the fact that Justice Scalia, who has thus far been featured as preventive detention’s staunchest opponent, is the only remaining Justice from the *Salerno* Court, and was part of the six-member majority that upheld the temporary preventive detention scheme at issue.

¹⁵² For more on this point, see Sandberg-Zakian, *supra* note 34, at 25.

¹⁵³ For a more detailed analysis of these three possibilities, see *id.* at 17–38.

The multipurpose view, relying on close attention to precedent and history, contends that there is no single punitive purpose, and that punishment is whatever judges and lawmakers have made it. This view places special emphasis on the fact that, in addition to deterrence and retribution, criminal punishment has served a number of other goals, including, most notably, incapacitation of those likely to commit future dangerous acts. The multipurpose view has two major points in its favor. The first is its historical pedigree — it has been championed by major legal minds of the distant and not-so-distant past, including William Blackstone,¹⁵⁴ Oliver Wendell Holmes,¹⁵⁵ and John Hart Ely,¹⁵⁶ and it appears to have been a well-accepted presumption in early British legal practice.¹⁵⁷ The second is that incapacitation is, undeniably, the motivating belief behind the actual administration of the contemporary criminal justice system.¹⁵⁸ The proliferation of inchoate and possession offenses,¹⁵⁹ preemption-focused search-and-seizure doctrinal innovations,¹⁶⁰ and dangerousness-based sentencing regimes¹⁶¹ all strongly indicate that incapacitation of dangerous individuals is a central purpose of criminal punishment.

¹⁵⁴ 4 WILLIAM BLACKSTONE, COMMENTARIES *251–52 (“[I]f we consider all human punishments in a large and extended view, we shall find them all rather calculated to prevent future crimes, than to expiate the past . . .”).

¹⁵⁵ OLIVER WENDELL HOLMES, THE COMMON LAW 43–48 (1881) (“[P]robably most English-speaking lawyers would accept the preventive theory without hesitation. . . . Prevention would accordingly seem to be the chief and only universal purpose of punishment.”).

¹⁵⁶ John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1311 n.324 (1970) (“It would be archaic to limit the definition of ‘punishment’ to ‘retribution.’ . . . One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.”).

¹⁵⁷ See DERSHOWITZ, *supra* note 22, at 29–58.

¹⁵⁸ For a more detailed analysis of this point, see sources cited in Sandberg-Zakian, *supra* note 34, at 29 n.114.

¹⁵⁹ Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 855–927 (2001).

¹⁶⁰ *Id.* at 875–901, 908–10. As Dubber explains, the last century of federal constitutional law has made it increasingly easier for police officers to conduct searches designed to prevent serious crime by discovering minor possession offenses thought to precede violence. The area that can be searched has expanded, the situations in which searches can be conducted have multiplied, and the level of suspicion required to justify searches has been reduced.

¹⁶¹ Christopher Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. 121, 122 (2005).

If we accept the multipurpose view, it becomes starkly obvious that any nonmilitary preventive detention scheme fails the *Mendoza-Martinez* test. Once incapacitation is seen as an important goal of criminal punishment, then preventive detention has no alternative, nonpunitive purpose. Thus, on this view, the last two *Mendoza-Martinez* factors point in the same direction as the first five — preventive detention imposes criminal punishment without providing the requisite procedural protections, and is therefore unconstitutional.

The second possible conception of punishment that the Court could adopt — the retributivist view — produces a far different *Mendoza-Martinez* test result. Retributivism, which is more popular with contemporary scholars than the multipurpose view, argues that the imposition of criminal punishment is motivated entirely and exclusively by just one goal — retribution.¹⁶² In other words, we impose a criminal sanction upon a convict in order to condemn or blame her for a bad act that she, as an autonomous actor, chose to commit. From the retributivist position, criminal laws motivated by deterrence, incapacitation, or other policy goals are inappropriate because the law should impose punishment only as retribution. Retributivists reach this conclusion through a variety of paths. For example, some believe that the terminology and imagery of the criminal process is imbued with an element of moral condemnation that is constitutive and exclusive,¹⁶³ while others contend that the moral credibility of the justice system is undermined by criminal sanctions motivated by goals other than retribution.¹⁶⁴

¹⁶² See, e.g., Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1 (2007); Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429 (2001); Carol S. Steiker, *Foreword: The Limits of the Preventive State*, 88 J. CRIM. L. & CRIMINOLOGY 771 (1998); Carol S. Steiker, *Foreword: Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775 (1997); Donald Dripps, *The Exclusivity of the Criminal Law: Toward a “Regulatory Model” of, or, “Pathological Perspective” on, the Civil-Criminal Distinction*, 7 J. CONTEMP. LEGAL ISSUES 199 (1996); Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201 (1996).

¹⁶³ See, e.g., Steiker, *Foreword: Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, *supra* note 162, at 800–09.

¹⁶⁴ See, e.g., Robinson, *supra* note 162, at 1444 (2001). Dripps provides yet another possible justification for adopting retributivism, arguing that a retributivist Constitution prevents office-holders nefariously amassing power and subverting democracy. Dripps, *supra* note 162, at 205–06.

From the retributivist viewpoint, retribution is the one and only punitive purpose. Accordingly, retributivists would conclude that nonmilitary preventive detention's goal of incapacitating dangerous individuals to prevent future violence is an alternative, nonpunitive purpose. Thus, under retributivism, the last two *Mendoza-Martinez* factors point in the opposite direction as the first five.¹⁶⁵ The first five factors still suggest that any nonmilitary preventive detention regime unconstitutionally imposes criminal punishment without providing criminal procedural protections, but the crucial sixth and seventh factors suggest that it does not. Were the Court to adopt the retributivist view of punitive purpose, it could rely on the first five factors to strike down a nonmilitary preventive detention regime, or, alternatively, place greater weight upon the last two factors and uphold the regime.

Finally, we come to the third possible conception of punishment the Court could adopt. This theory, advanced by Justice Marshall in his dissent in *Salerno*,¹⁶⁶ is a form of modified retributivism. According to Marshall, the Bill of Rights offers a roadmap for imposing severe deprivations of liberty. The defendant's rights to be informed of the accusations against her, to be presumed innocent until proven guilty beyond a reasonable doubt, and to have a reasonable level of bail set so that she may avoid long-term incarceration until and unless she is convicted, all assume a retributivist sequence.¹⁶⁷ A bad act is committed, then a suspect is accused, then tried, and, if proven guilty, only then is she incarcerated. The rights that attach along the way are rendered meaningless if the government is allowed to deviate from the predetermined sequence and pursue incarceration through

¹⁶⁵ Once we accept that incapacitation of dangerous individuals is a nonpunitive purpose, we must conclude that the seventh factor is also satisfied. Certainly, indefinite incarceration, even if harsh, is not excessive in relation to the goal of preventing violent terrorist attacks.

¹⁶⁶ *United States v. Salerno*, 481 U.S. 739, 755–67 (1987) (Marshall, J., dissenting).

¹⁶⁷ *See* U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law”); U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”).

other means.¹⁶⁸ So, Justice Marshall concludes — following reasoning very similar to that applied to the Suspension Clause by Justice Scalia’s *Hamdi* dissent¹⁶⁹ — preventive detention must be unconstitutional. In short, Justice Marshall sees three mutually exclusive and collectively exhaustive categories — punitive purpose, nonpunitive alternative purpose, and forbidden purpose.

From this viewpoint, nonmilitary preventive detention is categorically unconstitutional. Not only does it lack a legitimate alternative purpose, its purpose is entirely forbidden. Thus, under Justice Marshall’s modified retributivism, the alternative purpose inquiry of the *Mendoza-Martinez* test is dispositive. Once we know that a government deprivation of liberty aims to incapacitate a dangerous individual thought likely to engage in future wrongdoing, we need not consult the other factors of the test (though, as it so happens, they buttress the conclusion that preventive detention is unconstitutional). If the Court adopts the modified retributivist view of punitive purpose, then nonmilitary preventive detention will be judged unconstitutional.

In sum, no matter which of three views of punitive purpose the Court adopts, nonmilitary preventive detention may fail the *Mendoza-Martinez* test. Under the multipurpose theory or Justice Marshall’s modified retributivist theory, all seven factors suggest that preventive detention is unconstitutional. Even under retributivism, five of the seven factors point towards invalidation. Of course, the *Mendoza-Martinez* test is highly unpredictable. Nonetheless, there is reason to believe that nonmilitary preventive detention would not survive a *Mendoza-Martinez* challenge.

Conclusion

The Government may constitutionally establish preventive detention for enemy combatants. As courts limit who may be detained as an enemy combatant, however, the political branches must determine whether and how to detain dangerous individuals who cannot be held in military detention. One proposed solution that has generated a great deal of support among commentators is nonmilitary preventive detention. Yet, methods readily available to the government in war may prove otherwise off-limits, and detention may well be one such method.

¹⁶⁸ *Salerno*, 481 U.S. at 763–65.

¹⁶⁹ See *supra* Part II.

As this Article has demonstrated, such detention faces immense constitutional hurdles, even putting aside the First Amendment and Due Process Clause considerations that may restrict the particular structure of a preventive detention regime. Any nonmilitary preventive detention regime would face possible invalidation under the Suspension Clause and likely invalidation under *Mendoza-Martinez*. Proponents of nonmilitary preventive detention must answer these challenges, or concede that nonmilitary preventive detention is unconstitutional.