

ESSAY

Detention

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I. Introduction

In a peculiar way, the still unresolved issues of seizure and detention of those suspected of alliances with terrorist groups and causes raise a set of fundamental jurisprudential questions.

First, international terrorism neither fits neatly into the practices and constraints of ordinary law enforcement nor does it justify the powers of a nation at war with a mighty foreign power. So don't we need new law here and, if so, what should be the range of activities to which it applies; and must it not be international to serve our needs?

Second, developing new international law would take a decade or more. In the meantime, which body of law should the United States apply to guarantee minimum standards of accuracy, fairness, and humanity at the same time as adequate security? Or would we be legally justified to choose to satisfy either, depending on the situation?

Third, if the literal language of the protections of the law of war or the law of crime — each having been written with a quite different situation in mind — doesn't meet these multiple needs for security, accuracy and fairness, does it at least make sense to insist that the obvious purposes of common protective provisions be honored during this interim period? If so, how would that work?

These questions, generally ignored, lie behind this paper.

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II. The Argument for Continuing Military Detention

No one now questions the necessity and therefore the propriety of temporary military detention, while armed combat continues, of those non-state forces committed to fighting against U.S. forces in combat zones such as Afghanistan, Iraq, or certain areas in Pakistan. The subject of detention, without criminal trials, of terrorists who are captured outside the battlefield, and not in an open conflict that will end, like other conflicts before it, within a very few years, has been far more contentious. Still, very recently, it has been addressed anew by a number of highly respected law professors and other scholars, who have all reached the conclusion that such military detention, reviewable on habeas corpus, is lawful and, on the whole, wise. Perhaps some would prefer a modified civil system, but the political support for its creation would be difficult to muster; its constitutionality an open question; and its precedent more sweeping and troublesome.

In a *Washington Post* op-ed, Professor Jack Goldsmith sees little point in changing from the present military detention system that is working, other than to legitimize and regularize it by finally grounding it in statutory authority.¹ Professor Rick Pildes of NYU argues, also in the *Washington Post*, that the indefiniteness of duration of military detention is inexcusable and should be replaced by limits based on the wrongfulness of the action and the depth of terrorist involvement of the detainee.² Alternatively, he would adopt a system of periodic review of the continuing need for detention. But, with these modifications, he finds military detention acceptable, as would Professor Robert Chesney. And, surprisingly, the position of Professor David Cole of Georgetown is equivocal. He may or may not be limiting his approval to battlefield captures when he says:

The categories of those who can be criminally tried and those who should be released are not exhaustive. There are likely to be prisoners who cannot be tried but may nonetheless be lawfully detained. Parties to armed conflict routinely capture and detain the enemy, and the law of war

¹ Jack Goldsmith, *A Way Past the Terrorist Detention Gridlock*, WASH. POST, Sept. 10, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/09/AR2010090905238.html>.

² Richard H. Pildes, *Terror Detentions Deserve Time Limits*, WASH. POST, Oct. 10, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/08/AR2010100806341.html>.

has long recognized that such detentions may last as long as the conflict does. . . . Thus, even if all of the abuse that has poisoned Guantanamo were acknowledged and rectified, some men would remain appropriately detained without trial — as prisoners of war in the ongoing war with Al-Qaeda and the Taliban in Afghanistan.³

Further supporting military detention, Adam Klein and Benjamin Wittes have written a fine and needed analysis of the several situations in which U.S. law permits detention without the state proving moral responsibility of the detainee for engaging in a previously defined offense and without proving it, beyond a reasonable doubt, to the satisfaction of an independent judge or jury using only quite reliable forms of evidence. The purpose behind these authors' efforts is to show that preventive detention "is not prohibited by U.S. law or especially frowned upon in tradition or practice."⁴ Their immediate focus is to show that no line of principle is crossed, no dangerous exception made to well-accepted practices, by the indefinite detention of those found to be associated with Al-Qaeda or the Taliban. Carefully designed and administered preventive detention is just a question of wise policy, they argue.

Perhaps more important than the views of these professors is the fact that the U.S. Congress in late 2010, once again prohibited the transfer of any detainees from Guantanamo for trial in the United States.

The military detention system, supplemented by habeas corpus review in federal courts, is, moreover, at least arguably consistent with the notion of legality that Professor Gabriella Blum and I argued for in our book, *LAWS, OUTLAWS, AND TERRORISTS*. Recognizing that international terrorism — like various other very dangerous transnational activities — presents risks and problems not anticipated in any nation's domestic criminal law and yet has been, in all the manifestations we have seen, less dangerous than — and difficult to assimilate to — a war between nations, we urged the need for a body of international law designed to deal with situations involving unusually dangerous private groups working on an

³ David Cole, *What to Do About Guantánamo?*, N.Y. REVIEW OF BOOKS, Oct. 14, 2010, <http://www.nybooks.com/articles/archives/2010/oct/14/what-do-about-guantanamo/>.

⁴ Adam Klein & Benjamin Wittes, *Preventive Detention in American Theory and Practice*, 2 HARV. NAT'L SECURITY J. 85, 86 (2011).

international scale. Besides international terrorism, a number of organized crime groups and pirates might well come to qualify.

International law, presumably in the form of treaties and other conventions, would be necessary because the organizations operate on a transnational basis, requiring cooperation among states as a response — at least unless the United States is to disregard international constraints on unilateral, military or law enforcement operations outside our borders. But development of new international law would take time, perhaps a decade; indeed, it might not be possible at all.

In the meantime, we argue, whatever system the United States adopts domestically for dealing with new practices to meet new types of threat should, so far as safety allows, recognize and respect the surprisingly similar protective arrangements or principles to guarantee fairness and accuracy that have long ago been built into both the law of war and the law of crime. We choose the word “principles” to describe the obvious protective purposes behind arrangements whose literal words were written with very different situations in mind. There is, in short, no case for designing policies and legislation around the highly specific words of laws written with very different contexts in mind. But is deference to the purposes behind laws made for different contexts workable? Addressing the issue of detention provides a good test.

III. To Which Body of Law Should a New Practice Be Assimilated?

Detention is recognized as necessary in appropriate cases by both the law of war and the rules of law enforcement: POW treatment in one case; detention pending criminal trial in the other. The protective concerns about detention — addressed by both systems (although not necessarily in the literal terms of each) — are intended to provide assurance with regard to five types of risks of unfairness by using procedures that both systems found consistent with our security. They can be described in terms of the following questions:

1. On what grounds can a person be detained?
2. Established by what processes, with what type of evidence, and to what level of probability?

3. Before what sort of tribunal?
4. Held under what conditions?
5. For how long?

Any concerns addressed in these five areas by both the law of war and the law of peace must be taken seriously in designing new practices. No nation should be free to ignore both the protective provisions and background understandings of the law of war dealing with one of these concerns and the protections assumed or demanded in the rules of law enforcement. Allies cannot be counted on to cooperate with a nation that claims complete freedom from the realm of law. Honoring the principles respected by each body of law is a needed and meaningful constraint.

The authors I have mentioned above, except for Professor Blum and me, call for an application of a modified law of war to detention. They see no reason to consider the rules or protective principles of law enforcement. But the practices allowed for detention by the law of war involve, in the context of a traditional war, protective conditions that are not present when the context changes to international terrorism. In at least two ways, the military detention scheme denies important protections mandated by the laws of war for prisoners of war. First, there is a much greater chance of mistake about affiliation to a hostile force; not only because affiliation is a loose and unclear standard but, particularly, because, unlike soldiers, these suspects dress and appear like ordinary civilians. Second, the duration of detention of terrorist suspects is, as a practical matter, likely to far exceed that contemplated for POWs in a conventional war.

The military detention system the professors generally endorse uses the law of war as a model and as a check on the misuse of the vague but extensive powers granted by Congress in the 2001 Authorization for the Use of Military Force. It works like this. Individuals can be detained if they are affiliated with Al-Qaeda or the Taliban or one of the organizations associated with either of these. In the case of a suspected terrorist, proof by other evidence substitutes for the assurance of allegiance to a hostile power that a uniform generally provides in combat. The process begins with a seizure by the military, or perhaps the CIA, followed by an administrative/military review of whether that triggering affiliation to Al-

Qaeda or the Taliban exists, followed in turn by a right of judicial review in a federal district court on habeas corpus.

In that judicial review, the government bears the burden of showing by a preponderance of the evidence, a conceptually ambiguous and factually obscure past association. In making the showing, the government can use comparatively loose standards for admissibility of hearsay. Detention can last for decades until these terrorist groups and their associates decide to end their militant jihad. These are serious, not technical, departures from the protections afforded, in context, by the law of war.

Law enforcement practices — like the law of war in its normal state-against-state context — comes much closer to honoring both the protection against mistakes and the protection against indefinite, perhaps lifetime, detention. If it could accommodate these protections only at the cost of significantly increasing the risk to our security, then there would be little reason to favor it. But in fact it can grant far more of all five protections each body of law assumes or requires, and it can do this without greatly increasing our risk, so long as military detention is still available for the tiny percentage of captures who can be shown to be far more dangerous than ordinary combatants — individuals who provide our enemies with irreplaceable, lethal capacities.

IV. An Alternative Model

What then is the case for shifting almost the entire focus of detention to a criminal justice model, leaving for military detention only an extremely narrow category of those detainees so dangerous to us that they would satisfy our (still secret) standards for targeted killing? The answer is that the shift would leave our national security about as well protected as it is now, with a far greater assurance of fairness in determining guilt and punishment as well as greater transparency, far more acceptance by our allies, and less risk of spreading a dangerous precedent. Let me illustrate.

1. First, although using traditional law, it would protect our security as fully as any of the new devices urged by Goldsmith, Pildes, Cole, or the other authors. Consider the answers that our domestic law gives to the five questions that describe the protections surrounding detention. They do not endanger us.

If we were instead to apply ordinary law enforcement procedures, such as those we use to prosecute terrorists in the United States, the answers to the previously referenced five questions that define protective provisions would, of course, be somewhat different. A suspect could only be detained for violating a statute, such as those prohibiting material support to terrorist organizations or to any other organization engaged in cooperative terrorist activities. That category is broader than the military definition of “association” in two ways. First, “providing material support to” a terrorist organization is probably broader than “being associated with” it. Second, the material support statute is not limited to Al Qaeda, the Taliban, and their associates. The processes used would be the familiar processes of arrest and then detention pending trial in any criminal case, followed by a criminal trial and, assuming a conviction, a sentence to be served.

At the first stage of arrest, and continuing as detention through the trial, hearsay and other evidence inadmissible at trial can be used and sources of information kept secret as in military detention. The judge must simply find the evidence reliable. The government bears the burden of showing: first, that arrest was justified by probable cause to believe the suspect had committed a crime; and, then, that he satisfies the statutory conditions for detention pending trial. All of these decisions are made by the federal district court. These standards are as permissive as those for military detention.

A significant difference from military detention first occurs at trial. More rigorous rules of evidence than those used in habeas corpus apply and the burden of proof on the government at trial is “beyond a reasonable doubt” as opposed to something much less for military detention. Confessions in violation of *Miranda* could be used at a criminal trial only if the *Quarles* emergency exception to *Miranda* is considered satisfied; and that would not include prolonged questioning beyond the period of a possible imminent attack. Otherwise, the product of prolonged questioning for strategic intelligence, without *Miranda* protections, could be used only for intelligence, not to prove the suspect’s guilt.

The length of detention after conviction is limited by the sentence set by the judge after considering the sentencing guidelines and must be within outer bounds set by the legislature. No one knows whether it is likely to be longer or shorter than a military detention that can last until the end of the armed conflict with these terrorist groups.

Thus, in terms of national security, detention as an incident of criminal trial and military detention are very similar for the period of time that it takes between arrest and a verdict in a criminal case. After that, the results differ in several ways. Because of the reduced burden of proof, the chance of releasing a dangerous terrorist is less in the military detention system, although it is hard to imagine a serious problem of acquittals by a unanimous jury. That has been a risk in only one case, *United States v. Ghailani*, of the many that have been tried. On the other hand, the reach of the criminal justice standard is preferable because it is not limited either to Al-Qaeda or the Taliban or its agents or to the events of September 11, 2001. While the procedures are slightly more favorable for the government in the case of military detention, they are not greatly so.

2. What about the fairness of each system and its acceptability to the allies we need? On this side, there are real advantages to the criminal justice approach. A person who tries, or manages, to commit a mass atrocity should not be released if and when the war with Al-Qaeda may end. He deserves a vigorous prosecution for a very serious crime. On the other hand, a person who has taken the first tentative steps of becoming affiliated with Al-Qaeda should not be detained for 25 years even if the conflict goes on that long. That sentence is too costly for all involved. Just as we need and presumably have, far stricter standards than “association” before anyone can be targeted for killing, we should have comparably strict standards for any prolonged detention.

If steps taken by the detainee aren’t enough to satisfy the criminal law as attempts or conspiracies, they shouldn’t be enough to warrant prolonged detention. If they would amount to an attempt or a conspiracy, a criminal trial will work and convey the condemnation the action deserves. We have used detention almost exclusively on those who are not U.S. persons, using criminal trials instead for U.S. persons. This distinction is not consistent with sound international relations. Whatever difference in procedures for a prolonged detention there may be, we should want almost identical procedures for a military detention that may be for as long as 20 years as we would want for a conviction with a maximum 20 year penalty. A mistake in one case is as bad as a mistake in the other, and we have made many mistakes in our detention decisions.

There are, in short, quite real differences in the care with which very important decisions are made and the resulting likelihood of mistake. There

is also a very real difference between the solidity and clarity of the conduct required for criminal conviction and the “membership” or “association” that triggers detention. Finally, there are differences in the standards warranting a longer period of detention. But there are not great differences in the extent to which our security is put at risk.

There is one exception to this, one special problem of security with a criminal trial, but it can be easily handled by a minor amendment to our statutes. If the only available evidence against a suspect would be unusable at a public trial (because its use would reveal sources and methods of intelligence gathering or the names of informants) or inadmissible in a criminal trial (because it was obtained in a way that is forbidden in law enforcement), then obtaining a conviction after a trial would require the government to find useable evidence (evidence that can safely be used at trial and untainted by prior unconstitutional acts) to replace the perhaps-highly-reliable evidence it could not use.

Although much the same problem might well undermine the government’s case at a habeas corpus hearing, Professor Blum and I thought that this clear difficulty at a criminal trial warranted allowing a federal judge to give the government a series of extensions of the Speedy Trial Act that would permit delay of trial for as long as four years, as is similarly permitted in France. The judge would have to find, say every 180 days, that there was strong reason to believe: that the defendant had committed the crime charged; that he was too dangerous to be released pending trial; that the basis for these conclusions could not be made public at a trial (“sources and methods”) or was inadmissible (an illegally obtained confession); and that the government was making an energetic effort to find substitute evidence. What about the constitutionality and practicality of this proposal?

Constitutionality. While Mr. Wittes believes there may be a potential Sixth Amendment speedy trial concern with this proposal, in its most recent ruling regarding the Sixth Amendment, *Vermont v. Brillon*, the Supreme Court emphasized that “the speedy-trial right is ‘amorphous,’ ‘slippery,’ and ‘necessarily relative.’”⁵ In a 7-2 decision, the Court found that a nearly three-year delay between arrest and trial did not violate the guarantee of a speedy trial.⁶ While the Court noted that the defendant had contributed to

⁵ *Vermont v. Brillon*, 129 S.Ct. 1283, 1290 (2009).

⁶ *Id.* at 1283.

the delay with his behavior, it cited language dating back to 1905 in reiterating that the speedy trial right is “consistent with delays and dependent upon circumstances.”⁷

Similarly, in *Barker v. Wingo*, the case in which the Court rejected a bright line, “inflexible,” time-period-based approach and established the balancing test applied in *Brillon*, the Court found that a five-year delay between trial and arrest did not violate the right to a speedy trial.⁸ Besides the length of delay, the Court stated that the reason for delay, the defendant’s assertion of his right, and prejudice to the defendant, should also be assessed.⁹ Out of the five years, the government only had a “strong excuse,” the illness of the investigating sheriff, for seven months.¹⁰ But, the prejudice was “minimal” as the accused only spent 10 months in jail before being released on bond and there was no claim that witnesses became unavailable in the interim.¹¹

Under these precedents, the Court could readily find that the circumstances surrounding the case of a terrorist merit the delay suggested in our proposal. While “deliberate delay to hamper the defense weighs heavily against the prosecution,” important reasons for delay have the opposite effect.¹² As the government would be required to demonstrate vigorous efforts to replace damning but unusable “sources and methods” evidence, and the defendant would have to be found dangerous by an Article III judge based on such evidence, the reasons for delay and detention are strong and clear. Indeed, the reason for delay in our case seems far stronger than others currently accepted, such as the Second Circuit’s acceptance of the government delaying trial to pressure a co-defendant to testify against the accused.¹³ Thus, for reasons similar to these, the Southern District of New York in *United States v. Ghailani* accepted a five-year delay before trial for a defendant held initially by the CIA and later by the military in Guantanamo.¹⁴ It found both that the justification was

⁷ *Id.* at 1290.

⁸ *Barker v. Wingo*, 407 U.S. 514, 529 (1972).

⁹ *Id.* at 530.

¹⁰ *Id.* at 534.

¹¹ *Id.*

¹² *Brillon*, 129 S.Ct. at 1290.

¹³ *United States v. Vassell*, 970 F.2d 1162 (2d Cir. 1992).

¹⁴ *See United States v. Ghailani*, No. S10 98 Crim. 1023, 2010 WL 2756546 (S.D.N.Y. July 12, 2010).

sufficient and that the delay did not involve the “significant prejudice of the sort that the Speedy Trial Clause was intended to prevent.”¹⁵

Practicality. In the best case, the government would, during the period of extended delay pending trial, find useable substitutes for what it knew but could not make public; and the defendant could then be convicted and sentenced appropriately. He would only have to be released if twelve jurors voted unanimously that there was no adequate evidence of his guilt; and in that case he should be released from jail, held for deportation, and allowed to depart from the United States whenever departure was feasible.

In the worst case, the defendant would be detained for as much as four years (or whatever maximum length of time was decided by legislation) and at the end of that period, the FBI would have to acknowledge that it could not find useable evidence. Again, the defendant could and would be held pending departure from the United States, but would have to be released when he could arrange that departure, after we had recorded identifying biological characteristics that would let us know if he ever tried to enter the United States again. Releasing an ordinary terrorist or would-be-terrorist would simply add one more person to the vast number of those in the band from Morocco to Malaysia who are full of hatred and too dangerous to ever be allowed across our borders.

But what if the terrorist, as to whom the FBI could not find useable evidence, was uniquely dangerous, such that if he were left free abroad he could and would be the subject of a targeted effort to kill him by the United States? The present system of military detention, perhaps refined and codified in legislation, should be maintained only for those on the list subject to targeted killing. (It would, of course, be far better if the basis for being on that list were made public and, after review, incorporated in the habeas standards applied by federal courts.) In that very rare case, military detention would be necessary, both for our security and to avoid the obvious folly of favoring execution over detention.

3. Finally, the precedent of military detention is dangerous despite the argument to the contrary by Wittes and Klein. Even the question these authors so carefully addressed — whether some line of principle well worth defending has been and would be crossed by detention of terrorists captured off the battlefield — involves looking to what now-rejected practices would

¹⁵ *Id.*, at *17.

become acceptable if we crossed the present line, rather than simply listing the more or less analogous practices that have already become accepted. If foreign members or associates of radical Islamic groups — groups that practice violence — can be detained administratively without the protections that have for centuries accompanied being charged with a crime, the same rationale could apply to Americans suspected of some affiliation with radical domestic militias that practice violence. The same rationale could also apply to suspected members of violent Mexican drug cartels or of the U.S. street gangs that battle to sell their products.

Congress could authorize the dangerous, domestic use of military force, including detention, against the members of any of these organizations without significantly expanding the recent precedent, now thankfully almost abandoned, of seizing and then detaining for indefinite periods individuals far from a conventional battlefield, who are suspected of belonging to groups affiliated with Al-Qaeda or the Taliban.¹⁶

Wittes and Klein might ask: “why not allow a carefully designed detention system for these additional groups as well?” The question can’t be usefully answered by arguments about whether the precedents they cite, and others that are listed in Article V of the European Convention of Human Rights, constitute an adequate precedent, or whether the analogy breaks down when applied to those detained for no more reason than the prospect that they will do something extremely dangerous or are affiliated with a group that plans to do something extremely dangerous.

It may or may not be important to detain such an expanded group of people rather than to try them. But it poses frightening changes accompanied by widespread insecurities. If the now-diminished practice of seizing suspected terrorists far from battlefields and detaining them indefinitely near or in the United States is necessary to our safety, then perhaps we should accept that necessity, even if it may become a precedent for far broader practices. But because acceptance of military detention carries with it a precedent-setting move to a system that involves increased

¹⁶ Our courts have now ruled that in each case continued detention would have to depend on satisfying a judge that, using relatively loose rules of evidence, it was more likely than not that the detainee had at least at one time been a “member” or supporter of such a group, and that the use of military force against the group has been authorized by Congress. But this is an authorization that could be plausibly applied to these other organizations and situations, at least if they threatened dangerous attacks on the United States.

risk of mistakes, unfairness, and resentment by our allies, such detention should be based on a strong argument as to its superiority to law enforcement in dealing with a perceived and grave danger, not on our ability or inability to distinguish it from the other situations the authors describe. It lacks that argument and fails that test.