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MILITARY DETENTION IN THE "WAR ON TERORISM": NORMALIZING THE EXCEPTIONAL AFTER 9/11

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INTRODUCTION

The decision to address terrorism through a war paradigm may represent the most significant change in U.S. national security policy in the decade following 9/11. While the United States still selectively treats terrorism as a criminal law enforcement matter,[1] it has developed an alternative, military-based approach, rooted in the language and logic of a global armed conflict against al Qaeda and associated terrorist organizations (otherwise known as the "war on terror"). This war paradigm, adopted by the Bush administration, has largely been continued by the Obama administration. It has been endorsed by Congress and sanctioned in many respects by the courts. Treating terrorism through the frame of armed conflict has affected various areas of national security policy, but none more deeply than the detention and prosecution of terrorism suspects.

Before 9/11, federal criminal prosecution represented the exclusive method for the long-term incapacitation of terrorism suspects in U.S. custody.[2] Since 9/11, the United States has established an alternative

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1. See, e.g., Indictment, United States v. Ferduas, 11-cr-10331 (D. Mass. Sept. 29, 2011) (indicting U.S. citizen who believed he was working with members of al Qaeda to create improvised explosive device (IED) components for use against American soldiers in Iraq and to carry out attack on Pentagon and U.S. Capitol); Indictment, United States v. Hasbajrami, No. 11-cr-623 (E.D.N.Y. Sept. 9, 2011) (indicting legal alien resident for providing material support to terrorists); Memorandum of Law in Support of the Government's Motion for a Permanent Order of Detention at 5, United States v. Hasbajrami, No. 11-cr-623 (E.D.N.Y. Sept. 9, 2011) (alleging Hasbajrami planned to travel to Federally Administered Tribal Areas of Pakistan to join radical jihadist group).

2. Although alien terrorism suspects could also be incapacitated under federal immigration law, this typically constituted short-term detention, pending the alien's removal from the United States. See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No.

system of military detention and prosecution. Although this alternative system is most commonly associated with the detention center at Guantánamo Bay, it is not confined to any specific prison facility, and includes individuals held by the United States at Bagram Air Base in Afghanistan as well as prisoners previously detained in secret CIA "black sites."[3] Among the features that distinguish this system from the criminal justice system are fewer procedural safeguards afforded to detainees, the significantly lower evidentiary burden imposed on the government, heightened secrecy, fewer constraints on interrogations, more limited judicial review, and the open-ended nature of the confinement itself.[4]

This piece examines the United States' development of a new framework of indefinite military detention and military prosecution after 9/11. It argues that the war on terror has served as the vehicle for normalizing expansive, emergency-type powers that facilitate the interrogation and long-term incapacitation of terrorism suspects. It further describes how employing a war paradigm has helped institutionalize these new detention powers, provided a framework for their future expansion, and shaped the actions of lawmakers and courts.

Part I examines the relationship between war and emergency powers, focusing on how war has helped legitimize an alternative to the criminal prosecution of terrorism suspects and created a new norm of military confinement. Part II describes the evolution of this new military detention system, from its origins after 9/11 to the present. In particular, it focuses on how courts have responded to—and largely accommodated—the government's military detention and prosecution of terrorism suspects. Part III describes some implications of the war paradigm and its long-term impact on U.S. national security policy. It explains, for example, how the war on terror has blurred the line between the normal and the exceptional, had spillover effects on the criminal justice system, and has altered the political discourse around counterterrorism policy.[5]

107-107-56, §§ 411–412, 115 Stat. 272, 345–52 (codified at 8 U.S.C. §§ 1182, 1189, 1226(a) (2006)) (supplying terrorism-related definitions and requiring detention of suspected terrorists); see also Zadvydas v. Davis, 533 U.S. 678, 690–91 (2001) (explaining purposes of immigration removal).

3. See generally Jonathan Hafetz, Habeas Corpus After 9/11: Confronting America's New Global Detention System 46–67 (2011) [hereinafter Hafetz, Habeas Corpus After 9/11] (describing detention of prisoners at Defense Department facilities such as Bagram in Afghanistan and at secret prisons run by CIA known as "black sites" as part of the United States' global war on terror).

4. See generally id. at 31–67.

5. Before proceeding, I offer a caveat regarding this piece's scope. Some aspects of the global war on terror, such as the United States' military interventions in Afghanistan and Iraq, unquestionably involved armed conflict. Others, including some non-battlefield seizures and detentions of terrorism suspects, pressed against, if not exceeded, the boundaries of armed conflict. This piece does not seek to resolve the debate about which exercises of military detention power were consistent (or inconsistent) with international humanitarian law. It focuses instead on how the adoption of a war paradigm has facilitated the exercise of new, and in many ways exceptional, detention powers.

I. WAR, DETENTION, AND EMERGENCY POWER

Times of crisis, both perceived and real, expose a tension at the heart of liberal constitutionalism. While democratic, rights-respecting regimes profess adherence to the rule of law, a crisis may pressure those regimes to act extraconstitutionally. The state, in other words, may feel the need to act outside the law to preserve the conditions necessary for legality to exist.[6] Such pressures inevitably give rise to what Carl Schmitt, along with other less controversial figures, has called states of exception or emergency.[7] States of exception not only provide a basis of departure from an existing norm; they also give meaning to the norm in the first instance by defining its bounds.[8] Various theories have been developed to account for states of exception and to provide a framework for the exercise of emergency powers.[9]

Modern constitutions often recognize the executive's authority to declare a state of emergency, but seek to cabin or regulate that power in some way. For example, Germany's Constitution requires legislative approval of the executive's declaration of a state of emergency, which may then continue indefinitely.[10] By contrast, South Africa's Constitution recognizes that the executive may declare a state of emergency, but it safeguards basic human rights and requires legislative review of relevant executive branch decisions.[11] The United States' eighteenth-century Constitution lacks any analogous provisions. While the U.S. Constitution does provide for the suspension of habeas corpus during certain, specified emergencies,[12] it does not recognize any general state of exception.[13] The

6. See Kim Lane Scheppele, Law in a Time of Emergency: States of Exception and the Temptations of 9/11, 6 U. Pa. J. Const. L. 1001, 1011 (2004) (explaining "state of exception is . . . the means for restoring the order necessary for legality to exist" and is invoked "when the possibility of restoring a field of order requires that the rules themselves do not apply to the means of restoration").

7. See generally Carl Schmitt, Dictatorship (1921).

8. See Scheppele, supra note 6, at 1011 ("The state of exception is, as a result, the means for restoring the order necessary for legality to exist.").

9. For a summary of various theories on emergency power, see generally Oren Gross, Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?, 112 Yale L.J. 1011 (2003).

10. Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGBI. I, art. 115a (Ger.); see also Bruce Ackerman, The Emergency Constitution, 113 Yale L.J. 1029, 1039 & n.23 (2004) (discussing safeguards in German emergency provisions); Scheppele, supra note 6, at 1070 n.281 (arguing "German constitution stands as a model for how a state of emergency may be legally regulated").

11. S. Afr. Const., 1996 § 37; see also Scheppele, supra note 6, at 1079 & n.298 (quoting section 37 of South African Constitution for its requirement of parliamentary review of executive decisions related to states of emergency).

12. See 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.").

13. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 650 (1952) (Jackson, J.,

U.S. Constitution has, nevertheless, consistently proven sufficiently flexible to accommodate the exercise of emergency powers.

In the United States, emergency powers have often been exercised during war, a state of affairs the Framers considered carefully and addressed in the Constitution, including by apportioning power between the President and Congress.[14] Commonly cited examples of the exercise of emergency powers include the passage of the Alien and Sedition Acts of 1798 during an undeclared naval war with France, Abraham Lincoln's suspension of habeas corpus during the Civil War, and the mass internment of Japanese Americans during World War II. These examples highlight the state's proclivity to curtail individual liberties in times of war. Judicial intervention has tended to occur after the war's conclusion, as with the Supreme Court's post-Civil War decision in *Ex parte Milligan*, which invalidated President Lincoln's use of military commissions to try civilians.[15] The Court has more typically deferred to the executive's assessment of what measures are necessary to protect the country's security while the conflict is ongoing. Perhaps the most notorious example of this is *Korematsu v. United States*, which upheld the internment of Japanese Americans during World War II.[16] Even *Youngstown Sheet & Tube v. Sawyer*,[17] a case in which the Court invalidated President Truman's seizure of steel mills during the conflict in Korea, has come to be understood as supporting fluid constitutional arrangements between Congress and the President rather than rigid legal dichotomies limiting executive power.[18] *Youngstown*, moreover, places the emphasis on preserving the proper separation of powers—through express or implicit legislative sanction, where possible—and not on any categorical preclusion of emergency powers.[19]

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concurring) ("Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis." (footnotes omitted)).

14. See, e.g., Louis Fisher, Presidential War Power, at xii (rev. 2d ed. 2004) (arguing Iran-Contra Affair was yet another "example of newly fashioned executive power operating without effective checks from Congress"); Harold Hongju Koh, The National Security Constitution: Sharing Powers After the Iran-Contra Affair 4 (1990) ("[The] National Security Constitution rests upon a simple notion: that the power to conduct American foreign policy is not exclusively presidential, but rather, a power shared by the president, the Congress, and the courts.").

15. 71 U.S. (4 Wall.) 2 (1866).

16. 323 U.S. 214 (1944) (upholding Japanese-American internments as necessary to the war effort).

17. 343 U.S. 579.

18. See Jules Lobel, Emergency Power and the Decline of Liberalism, 98 Yale L.J. 1385, 1412 (1989) (explaining "hazy middle zone" located "between emergency and normalcy . . . [which] has expanded to include most important executive exercises of foreign affairs power, resulting in broad, virtually unchecked presidential power").

19. This approach is best encapsulated by Justice Jackson's delineation in *Youngstown* of three categories of executive authority. See 343 U.S. at 635–38 (Jackson, J., concurring) (stating President has most power when acting pursuant to congressional authorization, less power when acting in an area of congressional silence, and least power when acting

One important wartime power involves the military detention of combatants for the duration of the conflict. Combatant detention represents an exception to the peacetime constitutional norm that individuals held by the state be charged and tried in regular civilian courts. While war triggers the exceptional power of detention without trial, it also serves a normalizing function by legitimizing military detention and supplying an alternative legal framework through application of the law of war.[20] Thus, no serious controversy arose during World War II over the internment of hundreds of thousands of German and Japanese prisoners of war, to whom the Constitution's criminal trial protections were understood not to apply. In the exceptional context of war, the military detention of combatants is a normal and accepted exercise of state power.

A related wartime power involves prosecutions in military commissions. Military commissions have historically been used to fill gaps in jurisdiction, such as on the battlefield or in occupied territory.[21] Military commissions have proven more controversial in domestic settings, particularly when no jurisdictional gap existed and no exigency necessitated their use.[22] In *Ex parte Quirin*, however, the Supreme Court upheld the use of a military commission during World War II to prosecute nine Nazi saboteurs (including one U.S. citizen) arrested in the United States for law of war violations even though the defendants could have been prosecuted in federal court.[23]

Before 9/11, these military detention and trial powers were typically exercised in international armed conflicts (i.e., armed conflicts between or

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against the will of Congress).

20. The international humanitarian law governing the treatment of prisoners today consists primarily of the 1949 Geneva Conventions, their two additional protocols, and customary international law. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (First Geneva Convention); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (Second Geneva Convention); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Third Geneva Convention) [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (Fourth Geneva Convention) [hereinafter Fourth Geneva Convention]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 (Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 (Protocol II).

21. See Hamdan v. Rumsfeld, 548 U.S. 557, 590 (2006) (describing military commissions as tribunals "born of military necessity"); see also Johnson v. Eisentrager, 339 U.S. 763, 791 (1950) (upholding conviction by military commission of German soldiers tried in Nanjing, China, and detained in Germany's Landsberg prison).

22. See Ex parte Milligan, 71 U.S. (4 Wall.) 2, 135 (1866) (holding military commission in Indiana during Civil War lacked jurisdiction over citizen of state not in rebellion who was unconnected to the military).

23. 317 U.S. 1, 48 (1942); see also Louis Fisher, Nazi Saboteurs on Trial: A Military Tribunal and American Law 102–06 (2003) (describing decision in *Quirin*).

among states) and were limited by the duration and scope of the conflict. Exercising such power outside those parameters—and without the normalizing function of war—would have been viewed as aberrational.[24] Thus, for example, Cold War-era legislation permitting national security detentions without criminal charge—unconnected with any armed conflict—specifically invoked the rationale of emergency powers.[25] Prior to 9/11, detaining terrorism suspects outside the criminal justice system would have rested on a similar rationale.[26]

II. THE POST-9/11 NORMALIZATION OF MILITARY DETENTION AND PROSECUTION

After 9/11, the United States insisted that it was engaged in a global armed conflict with al Qaeda, the Taliban, and associated forces. In connection with this conflict, the Bush Administration claimed the authority to detain individuals as enemy combatants. It relied on the joint congressional Authorization for Use of Military Force (AUMF), enacted days after the 9/11 attacks,[27] and the President's inherent authority as commander-in-chief under Article II of the Constitution.[28] Additionally, the Administration claimed the authority to prosecute suspected terrorists in military commissions for war crimes, initially under executive order[29] and subsequently pursuant to congressional legislation.[30] The category of individuals subject to this new military detention authority was broad. "War on terror" detention eschewed the prior hallmark of combatant status—affiliation with an enemy state—and rested instead on

24. Although the American Civil War cannot be classified as an international armed conflict (as it was waged between the U.S. government and rebel forces whom it did not recognize as a separate nation), President Lincoln considered the South sovereign for purposes of warfare. Michael Bahar, As Necessity Creates the Rule: *Eisentrager*, *Boumediene*, and the Enemy—How Strategic Realities Can Constitutionally Require Greater Rights for Detainees in the Wars of the Twenty-First Century, 11 U. Pa. J. Const. L. 277, 290 n.60 (2009).

25. Emergency Detention Act of 1950, Pub. L. No. 81-831, tit. II., §§ 102–103, 64 Stat. 1019, 1021, repealed by Act of Sept. 25, 1971, Pub. L. No. 92-128, § 2(a), 85 Stat. 347, 348 (1971). The law was never utilized before its repeal in 1971.

26. Cf. Zadvydas v. Davis, 533 U.S. 678, 696 (2001) (suggesting, in pre-9/11 immigration detention decision, that "terrorism or other special circumstances" might support arguments "for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security").

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

28. U.S. Const. art. II, § 2.

29. See Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,833–34 (Nov. 13, 2001) (stating policy for non-U.S. citizens who are either believed to be members of al Qaeda, to have participated in or attempted acts of international terrorism, or to have harbored terrorists "to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals").

30. See Military Commissions Act of 2006, Pub. L. No. 109-366, § 948c, 120 Stat. 2600, 2602 (codified in scattered sections of 10, 18, 28, 42 U.S.C. (2006)) (making "[a]ny unlawful enemy combatant . . . subject to trial by military commission").

membership in or ties to a terrorist group. Under the Bush Administration's elastic interpretation of this authority, the President could even detain as an enemy combatant a person who unwittingly provided financial assistance to a front for al Qaeda on the mistaken assumption he was sending money to a charitable organization.[31] This detention authority, moreover, was not limited by any geographical constraints.

Applying an armed conflict paradigm to terrorism suspects helped facilitate acceptance of novel military detention and trial powers. Framed as a "classic wartime" measure,[32] akin, for example, to the detention of German or Japanese prisoners of war during World War II, post-9/11 enemy combatant detentions helped normalize national security-related confinement outside the criminal justice system.

At the same time, the Bush Administration characterized the war on terrorism as a "new kind of war" and enemy combatants as a new kind of prisoner.[33] Unlike enemy soldiers held by the United States in prior conflicts, enemy combatants in the war on terror were deemed to fall outside the protections of the Geneva Conventions, including the baseline provisions of Common Article 3, which apply in non-international armed conflicts (i.e., conflicts not between two nation states).[34] Thus, at the same time the enemy combatant framework normalized new detention powers, it created exceptions from law of war constraints on the treatment of prisoners, creating a loophole for the use of torture and other abusive interrogation methods that became pervasive at U.S.-run detention centers, such as Guantánamo, Bagram, and CIA "black sites."[35]

While courts have resisted some aspects of this new paradigm, they have not, for the most part, challenged its underlying premise that holding terrorism suspects outside the criminal justice system is a legitimate exercise of wartime power. In its 2004 decision in *Hamdi v. Rumsfeld*, the Supreme Court held that the AUMF authorized and the Constitution permitted the military detention of a U.S. citizen seized during combat operations in Afghanistan.[36] The detention of such enemy combatants to prevent their return to the battlefield, the plurality said, is "a fundamental incident of waging war"[37] and consistent with "longstanding law of war

31. See In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 475 (D.D.C. 2005) (describing government's argument that executive may detain "[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities").

32. Brief for the Respondents at 20–21, 27, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696), 2004 WL 724020, at *20–*21, *27.

33. Mary L. Dudziak, Law, War, and the History of Time, 98 Calif. L. Rev. 1669, 1697 (2010).

34. Third Geneva Convention, supra note 20, at art. 3.

35. See generally Hafetz, Habeas Corpus After 9/11, supra note 3, at 31–67.

36. 542 U.S. 507, 509 (2004) (plurality opinion).

37. Id. at 519.

principles."[38] The plurality, to be sure, tread cautiously, explaining that it was addressing only the detention of an armed solider captured alongside Taliban forces on a battlefield in Afghanistan and not the permissible scope of the enemy combatant category generally.[39] But the same day it issued *Hamdi*, the Court issued *Rumsfeld v. Padilla*, where it avoided deciding the lawfulness of a far more expansive use of enemy combatant detention authority—the military imprisonment of a U.S. citizen arrested at Chicago's O'Hare International Airport on suspicion of plotting terrorist acts in the United States—by disposing of the case on technical procedural grounds.[40] As a practical matter, the Court's failure to issue a merits ruling in *Padilla*, together with its acceptance of the enemy combatant category in *Hamdi*, enabled the government to continue asserting sweeping military detention powers. The government simply took *Hamdi*'s rationale for holding enemy combatants—to prevent their return to the battlefield—and applied it to the global armed conflict against al Qaeda and associated terrorist groups. This rationale eviscerated any meaningful distinction between detaining a Taliban soldier seized on a battlefield in Afghanistan or an alleged al Qaeda agent arrested in the United States.

Two years later, in *Hamdan v. Rumsfeld*, the Supreme Court invalidated the military tribunals established by President Bush's executive order.[41] The Court, however, did not question Congress's power to authorize military tribunals for terrorism cases.[42] Further, by holding that Common Article 3 applies to all detainees in U.S. custody, including suspected al Qaeda terrorists,[43] *Hamdan* indirectly facilitated acceptance of military commissions by suggesting their permissibility if they complied with this basic international law requirement.

Since *Hamdan*, Congress has twice authorized the use of military commissions,[44] which continue to prosecute terrorism suspects for various offenses, including some, such as material support for terrorism,[45]

38. Id. at 521.

39. Id. at 522 n.1; see also id. at 521 (cautioning against expanding enemy combatant detentions beyond permissible law of war bounds). The Court also required that Hamdi be provided procedural due process in challenging the government's factual allegations. See id. at 533 (requiring Hamdi be provided notice of allegations and meaningful opportunity to be heard before neutral decisionmaker).

40. Rumsfeld v. Padilla, 542 U.S. 426, 430 (2004) (holding federal courts lacked jurisdiction to decide Padilla's habeas challenge because he had failed to bring suit against proper custodian or in proper jurisdiction—i.e., against commander of the navy brig in district of his present confinement).

41. 548 U.S. 557, 625 (2006) (holding president's military commissions failed to comply with Uniform Code of Military Justice and Common Article 3 of Geneva Conventions).

42. Id. at 594–613.

43. Id. at 629.

44. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, 42 U.S.C. (2006)); Military Commissions Act of 2009, Pub. L. No. 111-84, tit. xviii, 123 Stat. 2190.

45. 10 U.S.C. § 950v(25).

that are generally not recognized as war crimes under international law.[46] Despite providing defendants with more robust procedural protections, the current military commissions still contain laxer evidentiary rules and fewer safeguards than federal courts.[47] Military commissions, moreover, lack any speedy trial requirement,[48] thus bolstering the government's power of indefinite detention, as war on terror prisoners never have to be tried and afforded these improved procedures since they can simply be held without charge for the duration of the conflict. Like enemy combatant detentions, military commissions have facilitated the confinement of terrorism suspects outside the criminal justice system.

The Court's third and, to date, last enemy combatant decision, *Boumediene v. Bush*, established a constitutional requirement of judicial review over detainees held at Guantánamo based on the Suspension Clause.[49] *Boumediene* also rejected any bright-line rule for the exercise of habeas jurisdiction over extraterritorial detentions, positing instead a functional test that considers various factors, including the detainee's citizenship, the adequacy of any prior, nonjudicial process the detainee has received, and the practical obstacles to habeas review.[50] *Boumediene*, however, did not question the President's authority to hold terrorism suspects outside the federal criminal justice system, while noting that "[t]he law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to [America's] security."[51]

Since *Boumediene*, the D.C. Circuit and district courts have together issued more than eighty decisions in individual Guantánamo habeas cases.[52] In articulating a detention standard under the AUMF, these decisions have accepted that terrorism suspects may be confined

46. See David Weissbrodt & Andrea W. Templeton, Fair Trials? The Manual for Military Commissions in Light of Common Article 3 and Other International Law, 26 Law & Ineq. 353, 362 n.48 (2008) (noting that "providing material support for terrorism" is not considered a crime under international law).

47. See Hafetz, Habeas Corpus After 9/11, supra note 3, at 240 ("While Obama said he would reform the commissions, he never provided a coherent explanation of why commissions should still be used and ignored the harmful consequences of maintaining this tarnished second-class justice system."); Joanne Mariner, A First Look at the Military Commissions Act of 2009, Part Two, Findlaw (Nov. 30, 2009), http://writ.news.findlaw.com/mariner/20091130.html (on file with the *Columbia Law Review*) (discussing tighter hearsay rules in new law).

48. 10 U.S.C. § 948b(d)(1)(A).

49. 553 U.S. 723, 771 (2008).

50. Id. at 766.

51. Id. at 797.

52. To date, district courts have issued merits decisions in fifty-seven Guantánamo habeas cases, and the D.C. Circuit has decided sixteen appeals. Jonathan Hafetz, Calling the Government to Account: Habeas Corpus in the Aftermath of *Boumediene v. Bush*, 57 Wayne L. Rev. (forthcoming 2012) (manuscript at 17–18) (on file with the *Columbia Law Review*); see also Guantanamo Habeas Scorecard, Ctr. for Constitutional Rights, http://www.ccrjustice.org/files/2011-02-03%20Habeas%20SCORECARD%20Website%20Version.pdf (on file with the *Columbia Law Review*) (last updated Feb. 9, 2011).

militarily without trial if the government demonstrates that they were "part of" or "'purposefully and materially support[ed]'" al Qaeda, the Taliban, or associated forces.[53] The D.C. Circuit, in particular, has interpreted the government's detention authority broadly and eschewed any rigid test, such as one requiring the government to prove that the detainee received and executed orders within the enemy organization's command structure.[54] The D.C. Circuit, moreover, has construed the government's evidentiary burden as a limited one, freely admitted hearsay, limited detainees' ability to rebut the government's allegations, and warned district courts not to scrutinize the government's evidence too closely, citing the danger of interfering with the executive during wartime.[55] One D.C. Circuit panel, moreover, went so far as to rule that district judges must presume the accuracy of government intelligence reports unless rebutted by the petitioner,[56] prompting the dissenting judge to note that the ruling "comes perilously close to suggesting that whatever the government says must be treated as true."[57] With such a ruling, the dissent explained, "it is hard to see what is left of the Supreme Court's command in *Boumediene* that habeas review be 'meaningful.'"[58]

Boumediene does provide some check against arbitrary detention by establishing a constitutional right to judicial review for detainees at Guantánamo. But, as these lower court decisions suggest, the habeas process it engendered has helped institutionalize the military detention of terrorism suspects by recognizing it as a permissible form of noncriminal detention and by upholding detentions based on evidentiary standards and procedures that deviate substantially from those in the criminal justice system.

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53. Hatim v. Gates, 632 F.3d 720, 721 (D.C. Cir. 2011) (per curiam) (quoting Al-Bihani v. Obama, 590 F.3d 866, 872 (D.C. Cir. 2010), cert. denied, 131 S. Ct. 1814 (2011)). To date, lower courts have relied primarily on the "membership" prong, and none has relied solely on the "support" prong. Stephen I. Vladeck, The D.C. Circuit After *Boumediene,* 41 Seton Hall L. Rev. 1451, 1464 (2011).

54. See, e.g., Salahi v. Obama, 625 F.3d 745, 752 (D.C. Cir. 2010) ("The problem with the district court's decision is that it treats the absence of evidence that Salahi received and executed orders as dispositive."); Bensayah v. Obama, 610 F.3d 718, 725 (D.C. Cir. 2010) ("That an individual operates within al Qaeda's formal command structure . . . is not necessary to show he is 'part of' the organization . . . .").

55. See, e.g., Esmail v. Obama, 639 F.3d 1075, 1078 (D.C. Cir. 2011) (Silberman, J., concurring) (suggesting D.C. Circuit judge will not and should not order release of Guantánamo detainee if he or she believes it "somewhat likely that the petitioner is an al Qaeda adherent or an active supporter"); Al-Adahi v. Obama, 613 F.3d 1102, 1105–06 (D.C. Cir. 2010) (criticizing district judge for taking unduly atomized view of government's evidence), cert. denied, 131 S. Ct. 1001 (2011). Several D.C. Circuit judges have suggested that the government's evidence should be subjected only to a "some evidence" standard—a lower standard than the preponderance of the evidence standard that the government itself has urged. See id. at 1104–05 (describing government's lower evidentiary burdens in other habeas contexts).

56. Latif v. Obama, No. 10-5319, 2011 WL 5431524, at *5 (D.C. Cir. Oct. 14, 2011).

57. Id. at *30 (Tatel, J., dissenting) (internal quotation marks and citation omitted).

58. Id. (internal quotation marks and citation omitted).

The Obama Administration has contributed to the legalization and legitimation of war on terrorism detention. Although President Obama has said that terrorism suspects should be prosecuted in federal court "whenever feasible," he has accepted that they may be detained without trial or prosecuted in military commissions where appropriate.[59] In some instances, the government may lack the evidence to charge suspects in the regular civilian justice system or its evidence may be tainted by prior mistreatment of the detainee;[60] in others, criminal trials may prove politically unpopular. The latter consideration, for example, caused the administration to abandon its planned prosecution of alleged 9/11 mastermind Khalid Sheikh Mohammed and four coconspirators.[61] Compared to Bush, Obama has asserted a more nuanced statement of the President's enemy combatant detention authority and grounded this authority in the AUMF rather than in Article II's Commander-in-Chief Clause.[62] Like his predecessor, however, Obama has not invoked any emergency rationale for the military confinement and prosecution of terrorism suspects but argued instead that these practices are consistent with American tradition and the law of war.[63]

In short, the last decade has seen the institutionalization of a new legal framework for incarcerating terrorism suspects outside the criminal justice system. Framing post-9/11 detention powers in familiar terms—as the wartime confinement of combatants—has facilitated a process of public acceptance and judicial accommodation. It has also, however, helped mask differences between the war on terrorism and previous

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59. President Barack Obama, Remarks by the President on National Security (May 21, 2009), available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/ (on file with the *Columbia Law Review*). For an excellent discussion of the legal viability and utility of maintaining a hybrid approach combining law enforcement and military-based detention powers, see generally David S. Kris, Law Enforcement as a Counterterrorism Tool, 5 J. Nat'l Security L. & Pol'y 1 (2011).

60. See Dep't of Justice et al., Final Report, Guantanamo Review Task Force 19–23 (2010), available at http://www.justice.gov/ag/guantanamo-review-final-report.pdf (on file with the *Columbia Law Review*) (summarizing prosecution decisions).

61. Charlie Savage, In a Reversal, Military Trials for 9/11 Cases, N.Y. Times, Apr. 5, 2011, at A1.

62. The Administration, for example, replaced the label "enemy combatant" with "unprivileged enemy belligerent," relied expressly on the law of war, and required that a prisoner's support for al Qaeda, the Taliban, or an associated group be "substantial" to justify his detention under the AUMF. See Respondents' Memorandum Regarding the Scope of the Government's Detention Authority Relative to Detainees Held at Guantánamo Bay at 1–2, In re Guantánamo Bay Detainee Litig., Misc. No. 08-442 (TFH) (D.D.C. Mar. 13, 2009) (invoking law of war and stating President "has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners").

63. President Obama, supra note 59; see also John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011), available at http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an (on file with the *Columbia Law Review*) (addressing Obama Administration's policies on detention and targeted killing).

wartime detentions and obscured important consequences of this new detention power, several of which are addressed in Part III.

III. LONG-TERM IMPLICATIONS OF WAR ON TERROR DETENTIONS

The war on terror has impacted U.S. law and policy in various ways. The difficulty of defining the enemy in a transnational armed conflict against terrorist organizations has facilitated the conflict's continued expansion beyond its original scope. In addition, the development of an alternative military detention system has jeopardized protections afforded the accused under the criminal justice system, which remains under continual pressure to demonstrate how tough it is on suspected terrorists by restricting rights. This alternative system, moreover, has not only become institutionalized, but also increased its jurisdiction over spheres traditionally reserved for criminal law enforcement.

An armed conflict waged against terrorist organizations poses definitional issues that armed conflicts against opposing states do not. One such issue concerns the definition of the enemy and the scope and duration of the conflict. The Bush Administration rejected the imposition of any geographic or temporal limits on the war on terror.[64] While the Obama Administration has dropped the "war on terror" label, it has carved out a similar sphere for global military counterterrorism detentions, denying that the armed conflict against al Qaeda, the Taliban, or associated forces is limited to any particular country or area of active hostilities.[65] It has also refused to acknowledge any constraints on the length of the conflict. While armed conflicts are by nature of uncertain duration, the war on terror is different in that it lacks any objectively identifiable criteria to determine its endpoint, creating the potential for a more permanent form of military detention. In an international armed conflict, the Third Geneva Convention requires the prompt release and repatriation of prisoners of war following the cessation of active hostilities.[66] In a war against terrorist organizations, no such requirement

64. See, e.g., Rosa Ehrenreich Brooks, War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror, 153 U. Pa. L. Rev. 675, 725–26 (2004) (describing "breakdown of spatial boundaries" and "erosion of temporal boundaries" in war on terror).

65. See President Obama, supra note 59 (describing ongoing efforts against al Qaeda); Brennan, supra note 63 ("The United States does not view our authority to use military force against al-Qa'ida as being restricted solely to 'hot' battlefields like Afghanistan."); see also Scott Shane et al., U.S. Widens Covert Assault on Terror in Asia, Africa, N.Y. Times, Aug. 15, 2010, at A1 (describing "significantly increased military and intelligence operations" in "roughly a dozen countries").

66. Third Geneva Convention, supra note 20, at art. 118. The Fourth Geneva Convention, which governs the internment of civilians in international armed conflicts, contains a similar requirement. Fourth Geneva Convention, supra note 20, at arts. 132–33 (requiring release of interned person "as soon as the reasons which necessitated his internment no longer exist" or, at latest, "as soon as possible after the close of hostilities").

exists, and it is unrealistic to expect a state to declare a cessation of active hostilities if even sporadic terrorist attacks can be used to justify the continued existence of armed conflict. Since 9/11, the United States has relied on the continued existence of the armed conflict in Afghanistan to mask the broad implications of a global war on terror. But the U.S. decision to apply a war paradigm to al Qaeda and other terrorist groups will not terminate with the conflict in Afghanistan or with U.S. participation in that conflict. To the contrary, the United States' approach suggests that it will continue to apply a war paradigm to other regions, such as the Horn of Africa and Yemen, and to other "associated" organizations, such as Al Qaeda in the Arabian Peninsula (AQAP).[67] The risk is that the United States will claim it is in a perpetual state of armed conflict, with one terrorist organization replacing another as the enemy and one region supplanting another as the focus of operations.

The United States, to be sure, asserts that the current armed conflict is being waged against al Qaeda, the Taliban, and associated forces, and not against all terrorist groups. But the problem of cabining the government's detention authority remains.. One shortcoming lies in the diffuse, evolving, and informal organizational structure of nonstate actors such as al Qaeda,[68] particularly where the United States maintains that even those who provide support to the terrorist organization may be detained under the AUMF, if the support is deemed "substantial." Another problem lies in the concept of "associated force," whose members, the United States argues, may be detained under principles of co-belligerency.[69] Thus, the government contends, the President may detain under the AUMF individuals who are members or supporters of al Qaeda offshoots or affiliates operating around the globe. The Obama Administration, for example, relied on the AUMF to justify its two-month-long military detention of Ahmed Abdulkadir Warsame on a ship in the Gulf of Aden based on Warsame's alleged links to the Shabab in Somalia, before transferring him to the United States for criminal prosecution.[70] It

67. See Shane et al., supra note 65 (describing covert U.S. airstrikes in Yemen and elsewhere).

68. See Robert M. Chesney, Who May Be Held? Military Detention Through the Habeas Lens, 52 B.C. L. Rev. 769, 792 (2011) (describing al Qaeda's organizational structure).

69. See Peter M. Shane, The Obama Administration and the Prospects for a Democratic Presidency in a Post-9/11 World, 56 N.Y.L. Sch. L. Rev. 27, 36 (2011–2012) (citing government arguments); see also Curtis A. Bradley & Jack L. Goldsmith, Congressional Authorization and the War on Terrorism, 118 Harv. L. Rev. 2047, 2113 (2005) ("Terrorist organizations that act as agents of al Qaeda, participate with al Qaeda in acts of war against the United States, systematically provide military resources to al Qaeda, or serve as fundamental communication links in the war against the United States . . . are analogous to co-belligerents in a traditional war.").

70. See Charlie Savage & Eric Schmitt, U.S. to Prosecute a Somali Suspect in Civilian Court, N.Y. Times, July 6, 2011, at A1 (noting months-long government interrogation of Warsame aboard naval vessel prior to prosecution in civilian court). The Administration did not, however, state whether it had detained Warsame militarily because he was "part of" al Qaeda by virtue of his ties to al-Shabab and/or AQAP or because those groups constituted an AUMF-covered "associated force," or because of some combination of these factors. See

similarly invoked the AUMF to defend the targeted killing of Anwar al-Aulaqi, an alleged leader of AQAP in Yemen.[71] The indeterminacy that results from applying principles of co-belligerency to al Qaeda and other terrorist organizations[72] creates the potential for an elastic detention power, capable of expanding to cover any perceived threat as the United States' focus shifts from al Qaeda in Afghanistan to different terrorist organizations in other parts of the world.

Another long-term consequence of the war on terrorism is the threat that it poses to the integrity of the criminal justice system, whose protections for defendants may be circumvented by the government's ability to incarcerate terrorism suspects through an alternative system of military detention or trial by military commission. In prior armed conflicts, military detention operated in a sphere that domestic criminal law generally did not reach—whether because prisoners were detainable solely under the laws of war or because their prosecution in a military commission filled a jurisdictional gap when regular civilian courts were unavailable. By contrast, the military detention and prosecution of terrorism suspects creates significant overlap with the criminal justice system by providing another means of holding prisoners who can be prosecuted in civilian courts.[73] In other words, whereas a typical German soldier during World War II could be detained only as a prisoner of war, and was not subject to prosecution under domestic criminal law, a person held today for aiding al Qaeda may be prosecuted in federal court for providing material support for terrorism, held indefinitely in law-of-war detention under the AUMF, or prosecuted for a war crime in a military commission.[74]

Because this alternative military system provides fewer legal protections to detainees, it creates an incentive for the government to

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Robert M. Chesney, Ahmed Warsame and Law of War Detention, Lawfare (July 6, 2011, 3:31 PM) [hereinafter Chesney, Ahmed Warsame] http://www.lawfareblog.com/2011/07/ahmed-warsame-and-law-of-war-detention/ (on file with the *Columbia Law Review*) (discussing factors that potentially explain Administration's decision to detain Warsame).

71. See Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 10 (D.D.C. 2010) (noting evidence that Al-Aulaqi acted "for or on behalf of Al Qaeda in the Arabian Peninsula" and provided support for acts of terrorism, thus bringing him within scope of AUMF).

72. See Chesney, Ahmed Warsame, supra note 70 (discussing indeterminacy as to whether al Qaeda and al-Shabab are co-belligerents for purposes of AUMF). As some commentators have argued, the principle of nonbelligerency has no application in noninternational armed conflicts as a matter of international law. See, e.g., Kevin Jon Heller, The ACLU/CCR Reply Brief in Al-Aulaqi (and My Reply to Wittes), Opinio Juris (Oct. 9, 2010, 9:10 PM), http://opiniojuris.org/2010/10/09/the-acluccr-reply-brief-in-al-aulaqi-and-my-reply-to-wittes/ (on file with the *Columbia Law Review*) ("[C]o-belligerency is a concept that exists only in international armed conflict and has no place in non-international armed conflict.").

73. See Kris, supra note 59, at 58 (summarizing various terrorism statutes).

74. See 18 U.S.C. § 2339A (2006) (prohibiting providing material support to terrorists); id. § 2339B (prohibiting providing material support or resources to designated foreign terrorist organizations).

divert terrorism suspects there rather than trying them in federal court. Paradoxically, this incentive is greatest where the government's case is weakest and where civilian prosecution appears problematic as a legal, evidentiary, or political matter. For individuals who fall within the AUMF's scope of detention authority based on their relationship to or support for al Qaeda or associated groups, the safeguards provided the federal criminal justice system—above all, the right to be charged and tried under the Constitution—become a matter of discretion, triggered only when the government elects not to proceed with the military option. Conversely, maintaining this alternative military detention system forces the civilian criminal justice system to demonstrate its capacity to prosecute terrorism cases successfully—with success measured in terms of convictions obtained rather than in the fairness and integrity of the procedures. This creates pressure to limit criminal defendants' rights—a trend reflected by recent proposals to expand the "public safety" exception to *Miranda v. Arizona*[75] to deflect criticisms of prosecuting terrorism suspects in federal court.[76]

Additionally, the war on terror has created a framework for the institutionalization of military detention as well as its expansion into areas traditionally reserved for the criminal justice system. Following 9/11, the Bush Administration applied the enemy combatant label almost exclusively to individuals seized and held abroad.[77] The two instances in which it applied this label domestically proved highly controversial, prompting the government to criminally charge and transfer the prisoners to civilian court to avoid Supreme Court review.[78] Yet, the continued military confinement of terrorism suspects at Guantánamo and elsewhere outside the country has made this form of detention without trial seem less exceptional. Recent legislative proposals have sought not only to expressly authorize military detention—whereas the AUMF did so only by

75. 384 U.S. 436 (1966).

76. See Anne E. Kornblut, Should Terrorists Have Rights to Remain Silent? Obama Administration Looks into Modifying Miranda Warning Law, Wash. Post, May 10, 2010, at A10 (discussing Obama Administration's consideration of whether to expand "public safety exception" so officers could delay providing Miranda warnings to terrorist suspects). The "public safety" exception permits law enforcement officers to delay issuing *Miranda* warnings where officers need to obtain information quickly to prevent further crimes. See generally New York v. Quarles, 467 U.S. 649 (1984) (describing "public safety" exception).

77. The only two instances in which the AUMF was applied domestically—to detain individuals arrested in the United States—were the Padilla and al-Marri cases. Hafetz, Habeas Corpus After 9/11, supra note 3, at 73–78.

78. See Al-Marri v. Spagone, 129 S. Ct. 1545 (2009) (vacating lower court judgment upholding military detention of legal alien arrested in United States and remanding case with instructions to dismiss as moot following alien's transfer to civilian justice system for criminal prosecution); Padilla v. Hanft, 547 U.S. 1062 (2006) (denying certiorari to review domestic military detention of U.S. citizen arrested in United States following detainee's transfer to civilian justice system for criminal prosecution); see also Kris, supra note 59, at 56 n.155 (discussing "serious legal issues" and "lengthy litigation" arising out of government's detention of Jose Padilla and Ali Saleh Kahlah Al-Marri as enemy combatants within United States).

implication—but also to extend that authority to the domestic United States.[79] These proposals, moreover, would *require* the military detention of terrorism suspects who fell within its scope, thus creating a new presumption of military detention that can be overridden only through a waiver process.[80] While Congress ultimately enacted a more limited military detention measure in the 2012 National Defense Authorization Act,[81] such measures threaten to cement the transformation of post-9/11 military detention powers—created based on the premise of wartime exigency—into a permanent, default detention system for an elastic category of terrorism cases.

CONCLUSION

A chief legacy of the war on terror has been the institutionalization of a novel system of military detention and trial. In this process, the metaphor of classic combatant detention has served as something of a Trojan Horse: normalizing a new form of confinement outside the criminal justice system while avoiding the need for the government to rely on any claim of emergency powers. This system, moreover, has shown not only qualities of permanence, but also the capacity to expand in new and unforeseen ways.

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79. See Detention of Unprivileged Enemy Belligerents Act, S. 553, 112th Cong. § 2(b) (2011). While other proposals provide more limited authority to detain U.S. citizens and legal permanent residents, they suggest that both categories of individuals may be detained under appropriate circumstances, even if they are arrested inside the United States. See S. 1253, 112th Cong., § 1031(d) (2011) (stating President's detention authority in armed conflict against al Qaeda, Taliban, and affiliated forces "does not extend to the detention of [U.S.] citizens or lawful resident aliens . . . on the basis of conduct taking place within the United States except to the extent permitted by the Constitution of the United States").

80. Id. at S. 1253, § 1032(a) (requiring a waiver of mandatory military detention from the Secretary of Defense that such detention is not in the national interest).

81. National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. § 1022 (2011) (enacted) ("2012 NDAA") (establishing a requirement of military detention for certain non-citizen al Qaeda terrorism suspects, but allowing the President to waive this requirement by certifying that such waiver is in the national security interests of the United States). In addition to mandating military detention in specified circumstances, the 2012 NDAA codified the President's authority to detain, *inter alia*, individuals who were "part of" or who "substantially supported" al Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners. *Id.* § 1021.