# After Guantanamo: War, Crime, and Detention

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with

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## I. War, Crime, and Detention

Two days after taking the oath of office, President Barack Obama issued an executive order mandating the closure of the Guantanamo detention facility within one year. As President Obama indicated in his speech of May 21, 2009, the closure of Guantanamo will require the release of some detainees, the prosecution of others, and the preventive detention of yet a third group. However unattractive one may find any of those categories (and reasonable people may differ on which makes them most uneasy), each is necessary.

Legislation is required to structure a workable, fair, and constitutional legal framework for the closure of Guantanamo. That legislation can and should be constructed to apply with consistency across cases and across time—irrespective of the problems of tainted evidence particular to current detainees or of problems specific to Guantanamo. Such legislation can provide a sound and lawful basis for resolving the quandaries of Guantanamo in a principled manner, without the creation of *ad hoc* rules.

The legislation required must—and can—1) delineate principled criteria for the designation of cases for release, prosecution, or detention; and , 2) define a system of detention that honors our constitutional commitments, respects U.S. international obligations, comports with the law of war, and protects national security. This article proposes such a framework for the closure of Guantanamo and, more fundamentally, proposes a comprehensive legal structure for counterterrorism prosecutions and detentions. Draft legislation, operationalizing the proposed framework, is attached as Appendix A.

Neither "war" nor "crime," alone or in combination, provides an adequate legal structure for responding to the most serious threats posed by al-Qaeda and related groups. After identifying the limits of the criminal law and the law of war for these purposes, this essay examines what is required, by way of both integration and supplementation of those bodies of law, to complete a legal regime to govern the detention, treatment, and release of private actors engaging in armed attack against the United States, on U.S. territory and abroad, under battlefield and non-battlefield conditions.

## II. Criminal Law

Criminal justice is the appropriate legal vehicle for handling the bulk of terrorist activity.[1] The criminal law is not, however, the appropriate mechanism for preventing the most serious forms of terrorist attack, which threaten cataclysmic harm.

Criminal law is grounded on the premise that a society can tolerate some rate of serious crime. The premise is reflected in the substantive, evidentiary, and procedural law governing criminal justice. There is, however, no tolerable rate of the most serious forms of terrorism, which may include catastrophic nuclear, biological, chemical, or cyber attack, or a cumulatively catastrophic series of conventional attacks. While a Justice Department official might speak proudly of "the low rate of crime last year," he would not speak proudly of the "low rate of nuclear attack"—unless it were zero. The enterprise of preventing the most serious terrorist attacks thus rests on considerations critically distinct from those underpinning the criminal law.

The evidentiary and procedural problems posed by terrorism prosecutions are well known.[2] But the most fundamental problem—unpleasant to articulate—is the standard of proof. Criminal conviction requires proof beyond a reasonable doubt. That standard should not be eroded. Nor, however, should it be applied to the prevention of high-magnitude terrorism. Is it really smart to release an individual shown by "clear and convincing evidence" (the standard, one step below "reasonable doubt," often used in civil cases) to have attempted a nuclear attack or a release of smallpox virus? If the answer is no, then criminal law is not the right tool for preventing catastrophic terrorism.

This is not to say that criminal justice is, in general, an inappropriate tool for counterterrorism. Terrorism is not monolithic. Only its most virulent forms warrant a departure—an inevitably costly departure[3]—from the balance struck, and the safeguards afforded, by the criminal justice system.

## III. Private Actors and the Law of War

The law of war cannot rescue us here. Law of war is comprised of "*jus ad bellum*," governing resort to the use of force, and "*jus in bello*," governing conduct in the course of hostilities. *Jus ad bellum* clearly permits the use of force, including detention, by a state in responding to armed attack by a transnational private actor such as al-Qaeda. Article 51 of the UN Charter states: "Nothing in the present Charter shall impair the inherent right of . . . self-defen[s]e if an armed attack occurs against a [state]."[4] The "inherent" right of a state to use force in self-defense is not dependent on the source of the threat but, rather, applies equally to attack by a state or a transnational private entity.[5] The use of force necessarily entails both violence and detention. Detention is an inherent incident of the use of force, as reflected in both U.S. law[6] and the international law of armed conflict,[7] and is indeed an obligatory alternative to killing under certain circumstances.[8]

But *jus in bello*, designed for interstate armed conflicts and (to a lesser extent) for civil wars within states, is virtually devoid of content concerning conduct in the course of hostilities between a state and a transnational private entity. *Jus in bello* does delineate minimum standards of humane treatment applicable in all armed conflict. Those standards are embodied in Common

Article 3 of the Geneva Conventions of 1949[9] and elaborated in subsequent treaties.[10] But, beyond those minimum standards, the law of war is essentially inapposite.

A more elaborate set of rules, constituting the bulk of the law of war, applies only to conflicts between states. This body of additional, specific rules governing interstate conflicts is embodied in the entirety of the Geneva Conventions of 1949[11] (of which only Common Article 3 applies to "non-international" armed conflicts). Those more elaborated rules are based on reciprocal agreements entered into by states for their mutual benefit. This body of law relies for its enforcement on a logic of reciprocity: states comply (to the extent they do) to obtain the benefits of compliance by their adversaries. Given the power differentials between states, asymmetrical military tactics, and the opportunity to conceal violations, it is unsurprising that the reciprocity mechanism elicits, at best, imperfect compliance by states.[12] In a conflict between a state and private actors such as al-Qaeda and associated forces, a reciprocity mechanism for compliance should not logically be expected to function at all.[13] By both its terms and its logic, then, the law of interstate armed conflict—beyond its most basic humanitarian standards—is inapplicable in the use of force by a state against a transnational private entity.

> The law of interstate armed conflict makes detailed provision for the treatment of detainees. In non-interstate armed conflicts, by contrast, only the minimum standards of humane treatment apply. Most significantly, the law of war does not define the class of private actors subject to detention, and it delineates no procedures for identifying the individuals comprising such a class. This silence should not be a cause for surprise; there has been, until recently, little occasion and little incentive for the development of law on the topic.

## IV. A Proposal

This gap in the law has not prevented the application of preventive detention in practice. Preventive detention currently is used extensively for counterterrorism, by the U.S. and other countries, not only through military detention but through immigration detention,[14] material witness detention,[15] "black sites,"[16] and other mechanisms. Because preventive detention for counterterrorism is as unattractive as it is necessary, it has been conducted largely without political acknowledgment and, consequently, without legal structures tailored for the purpose. The resulting practices have been of limited efficacy and dubious legality.

The law enacted by the United States and other countries will inevitably contribute to the development of *jus in bello* in this area, as international law responds to the distinct characteristics of armed conflict between states and transnational private entities. The question, then, is the appropriate content of that domestic legislation.

A legal framework for counterterrorism detention, rigorously designed and carefully implemented, can be constitutionally sound,[17] consistent with international law, and effective in preventing attacks. Preventive detention has long been used in the United States in circumstances involving mental illness,[18] contagious disease,[19] criminal prosecution,[20] and certain other categories of danger—including armed conflict.[21] In each instance, the ordinary

legal inducements, civil liabilities, and criminal sanctions are, for reasons specific to that context, unlikely to elicit the degree of compliance necessary adequately to reduce the risk posed. The proposed legislative framework for counterterrorism detention is constructed to comport with and to build upon the legal principles and safeguards developed in those existing and judicially-tested systems of preventive detention.

In addition to the quandaries posed in constructing a legal framework for any system of preventive detention, certain specific difficulties arise in the construction of a legal framework for detention in an armed conflict between a state and a transnational private entity. The central dilemma for the United States—or any state—in conducting appropriate detentions in this context arises from the amorphous and, typically, clandestine nature of the transnational private entities that engage in armed attacks against states. The difficulty in determining the structure and membership of such organizations enormously complicates the identification of appropriate targets of force and subjects of detention. This, then, is the central burden in the design and implementation of a limited, just, and workable system of counterterrorism detention.[22]

The requirements for a suitable legal framework are further complicated by the fact that individuals subject to detention may be brought into U.S. custody in one of three distinct contexts: within the territory of the U.S., in a theater of hostilities outside the U.S., or on foreign territory not in a theater of hostilities. Each of those contexts entails its own requirements, constraints, and exigencies.

The legislation proposed below: 1) defines the category of persons to be subject to detention; 2) delineates procedures for identifying individuals falling within that category; 3) provides a system for the appeal and periodic review of detention determinations; 4) prescribes standards and conditions of detention; and, 5) specifies criteria for and conditions of release. It contains provisions for application of the Act in the territorial U.S. and abroad, in theaters of hostilities and otherwise.

The legislation comprises a comprehensive legal framework for counterterrorism detention, treatment, and release that is applicable equally to the disposition of the detainees currently at Guantanamo and to other instances of counterterrorism detention, elsewhere or in the future.

## V. Overview of Proposed Counterterrorism Detention, Treatment, and Release Act

The purpose of the Counterterrorism Detention, Treatment, and Release Act is to provide for the prompt incapacitation of those who would engage in catastrophic armed attack against the United States. The Act is designed to accomplish that purpose while scrupulously upholding constitutional principles, complying with the law of war, and safeguarding against erroneous detention. Its evidentiary provisions are designed to maximize governmental transparency while ensuring the protection of classified information.

The Act is grounded on the right of states to use force, including detention, in self-defense against armed attack. It is remarkably easy to lose sight of the fact that the detention authority in question arises from the *jus ad bellum* right to use force in self-defense. It is difficult, in an armed conflict with a clandestine private entity, to identify the individuals properly subject to

detention. The best and most accurate methods for making detention determinations will, in some respects, mirror the methods of criminal justice. This resemblance should not become a source of confusion. While the detention determination process is necessarily more complex in a conflict with a clandestine private entity than in a conflict with a state actor whose agents wear uniforms, the purpose of the processes is the same: to identify the individuals subject to detention under the law of war.

The potential for confusion is exacerbated by the fact that "armed attacks," from which a state has the *jus ad bellum* right to defend itself, also constitute *criminal* acts when carried out by a private actor. The fact that the same conduct constitutes, in that instance, both an armed attack under the law of war and a crime under the criminal law means that a state has two avenues of response legally available. It does not mean that the right to detain merges into the right to prosecute. The two options should not be conflated.

The first step, then, in constructing a legal framework for counterterrorism prosecution and detention is the articulation of policy distinguishing between situations to be handled through criminal justice and those to be approached through the law of war. For two reasons, the default position should be the criminal justice avenue.

The first reason for preferring criminal justice as a tool of counterterrorism is as much a matter of law as of policy: The *jus ad bellum* right to use force in self-defense against armed attack is consistently, and appropriately, understood to be triggered only by attacks or threatened attacks of a certain magnitude. There is no clear standard for this magnitude requirement; but, indisputably, terrorist acts below some threshold magnitude would not trigger the right to detain under the law of war. So, much—or most—terrorist activity cannot be addressed through law-of-war detention.

The second reason to rely largely on the criminal justice avenue is more purely a policy matter, involving the estimation and balancing of risks. The risk of erroneous detention is elevated in an armed conflict with a clandestine private entity. Where the risk of so grave a harm as erroneous detention is elevated, policies that would minimize that risk are clearly in order. The processes of criminal prosecution will be more effective in limiting the risk of erroneous detentions than would law-of-war detention procedures. Criminal justice processes are preferable in this way.

However, in those cases where terrorist activities threaten catastrophic harm, the balance of risks is shifted. Attacks threatening catastrophic harm exceed the scope of the risks that the criminal justice system is designed and equipped to handle. As discussed earlier, the criminal law is designed to reduce, but not entirely to prevent, the conduct that it proscribes. Here, *jus ad bellum* is the appropriate body of law to govern; catastrophic armed attack is precisely the subject matter for which the law of war was designed.

The implications of this analysis for disposition of the current detainees are, perhaps, counterintuitive. The detainees who pose the very most serious threat if released—those who are, likely, also the most culpable detainees—should *not* be among those prosecuted. For detainees whose release would pose a threat of catastrophic harm, the appropriate approach is detention—

pursuant to the recognized right of states to use force, including detention, in self-defense against armed attack. The detention of persons within this group is a principled application of the law of war, and is prudent and responsible policy.

The proper candidates for prosecution are those who, for standard criminal-justice reasons, should be subject to trial and punishment (even beyond their incarceration at Guantanamo), but whose acquittal would not pose a threat of catastrophic harm. If, within that group, there are some who cannot be prosecuted because the evidence against them has been tainted through coercion, or because their prosecution would require the disclosure of classified information that cannot be disclosed consistent with national security, then those detainees may be released rather than prosecuted—without engendering a threat of catastrophic harm. This is the kind of choice that is faced routinely by prosecutors—for instance, in organized crime cases involving classified evidence.[23]

The policy indicated, then, is reliance on criminal prosecution for counterterrorism except in instances of terrorist activity posing a threat of catastrophic harm, for which law-of-war detention is warranted. In keeping with this policy conclusion, the proposed "Counterterrorism Detention, Treatment, and Release Act" provides authority to detain only "individuals engaging in catastrophic armed attack against the United States." Each component of that classification is defined in Subchapter I of the Act.

The following paragraphs provide a summary of the proposed Act.

A. Constitutional and Structural Matters

The U.S. Constitution applies in all proceedings or detentions conducted pursuant to the Act. Individuals detained under the Act may petition for habeas corpus.

Based on institutional competencies and separation of powers principles—including the jurisdictional limits of Article I courts—the Act places original jurisdiction for proceedings under the Act in the district courts of the United States, subject to appellate review in accordance with the Federal Rules of Appellate Procedure.

The Federal Rules of Evidence and Procedure apply in proceedings under the Act, except under specific provisions for the protection of classified information, which are discussed below. Proceedings under the Act are open to the public, except under those same classified information procedures to be discussed shortly. Consistent with Supreme Court jurisprudence on the constitutionality of preventive detention statutes in other contexts, the Act recognizes a right to counsel in detention determination proceedings, appeals, and review procedures—including a right to court-appointed counsel for the indigent.

To protect the constitutional right against self-incrimination while also allowing the court in a detention proceeding to order the provision of evidence or testimony, the Act incorporates the federal statutory provision for use immunity, which states,

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding . . . and the [judge] communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.[24]

As to standards of detention, the Act states simply—without doing battle concerning the "combatant," or other, status of individuals detained under the Act—that any person detained pursuant to the Act "shall be afforded conditions of detention no less favorable that those afforded to persons in the power of a party to an armed conflict" under Common Article 3 of the Geneva Conventions.

B. Detention Proceedings under the Act

1. *Initiation of Proceedings: Probable Cause and Provisional Detention*

Detention proceedings are initiated under the Act by an application made by the Attorney General to a U.S. district court requesting a determination of probable cause to believe that the named individual is a "person engaging in catastrophic armed attack against the United States." The application is filed *ex parte* and *in camera*, to protect against disclosure of classified information and to avoid stigmatization of the named individual. If the court finds probable cause, the named individual is then provisionally detained in the custody of the Attorney General pending a Detention Determination Hearing. From this point onward, the named individual is entitled to representation by counsel.

The Act provides additional specification for cases in which the individual in question is located outside the United States, in a theater of armed hostilities or otherwise. Under the normal operation of U.S. law and the law of war, members of enemy forces will be detained in the course of hostilities in a theater of war. The Act provides that, if a commanding officer has reason to believe that a prisoner detained in his custody is "a person engaging in catastrophic armed attack against the United States," as defined in the Act, he shall so inform the Attorney General. The Attorney General may, thereupon, file in U.S. district court an application for a determination of probable cause and for provisional detention. Upon a finding of probable cause, the named individual is to be remanded to the custody of the Attorney General. The Act, in this way, leaves untouched the normal procedures for detention in military operations while also allowing for the operation of the Act relative to an individual coming within its intended scope, even if that individual initially comes into U.S. custody through regular military detention.

The Act provides that, where an individual is brought into U.S. custody outside the territory of the United States, *not* in a theater of hostilities, on suspicion that he has committed a terrorist offense subject to the criminal jurisdiction of the U.S. or is a person engaging in catastrophic armed attacked against the United States, he must be promptly: transferred to the custody of his state of nationality or that of the state on whose territory he was taken into custody; or, committed to the custody of the Attorney General for criminal prosecution or for provisional

detention in accordance with a probable cause determination and order of provisional detention issued by a district court under the Act. The Act authorizes neither the transfer of such an individual to the custody of a third state nor continued U.S. custody of the individual in the absence of either a criminal charge or the initiation of detention determination proceedings in accordance with the Act.

Within a specified number of days from the start of provisional detention, the Attorney General must file an Application for Continued Detention or release the individual. If an Application for Continued Detention is filed, the court is to conduct a Detention Determination Hearing and to rule on whether the individual is detainable under the Act,

2. *Protection of Classified Evidence*

Subchapter IV of the Act outlines rules for the protection of classified information in proceedings under the Act. The rules are modeled on the Classified Information Procedures Act (CIPA),[25] but with certain significant adaptations.

Most notably, the Act: 1) requires that counsel for the named individual have security clearance for access to information classified as top secret; and, 2) provides counsel access to full and unredacted versions of all materials to which the named individual would normally have access through discovery or otherwise, regardless of their classified status. This is a departure from CIPA, which does not require that defense counsel have security clearance and does not provide counsel with full access to classified materials but, rather provides, in some circumstances, for the deletion, redaction, or summarization of classified information from the discovery and trial materials made available to defense counsel.

Under the Act, counsel for the named individual may not disclose to that individual classified information that has been made available to counsel but not to the named individual. The Act provides for procedures similar to those of CIPA for the deletion, redaction, or summarization of classified information in materials to be made available to the named individual.

The Act provides that the named individual and the public will have access to certain proceedings via delayed video feeds. Those video feeds may be suspended to exclude specific items of classified information.

This arrangement resolves a number of the dilemmas confronted in criminal trials involving classified evidence. First, in a criminal trial under CIPA, a defendant may be prohibited from presenting certain classified evidence at trial.[26] Under the Act, no such constraint may be applied to the presentation of evidence by the named individual. Rather, the Act provides procedures for excluding from the public video feed (and public record) specific items of classified evidence that are presented to the court in proceedings under the Act.

The video feed arrangement also resolves a serious quandary that routinely confronts the prosecution in criminal cases involving classified evidence. Because evidence presented in proceedings under the Act may be excluded from the video feed (and from the public record), not all information presented by the government in a proceeding necessarily becomes public

information. The government therefore is not put to the choice, in a proceeding under the Act, of either disclosing classified evidence publicly or foregoing the use of that evidence.

The Act includes a number of such adjustments to the procedures applied in criminal trials under CIPA, in order to protect classified information maximally while also facilitating the full and effective use of all relevant information—classified or unclassified—by the parties and the court.

*3. The Detention Determination Hearing*

Subchapter V of the Act governs procedures specific to the Detention Determination Hearing. In this proceeding, the burden rests on the government to prove, by clear and convincing evidence, that the named individual is an individual engaging in catastrophic armed attack against the United States. If the court finds that the government has met that burden, it will issue an Order of Detention. If not, it will order the discharge of the individual. (Such discharge does not preclude a subsequent criminal prosecution.)

C. Detention and Deradicalization

One of the most disturbing features of detention in a conflict with Al-Qaeda and related groups is the potentially indefinite duration of such detention. The specter of indefinite detention arises from the fact that no "cessation of hostilities" is anticipated; indeed, the very concept of "cessation" requires rethinking in a conflict of this type.

Over the past several decades, programs have been developed for the purpose of calling into question and, potentially, changing the beliefs and allegiances of individuals associated with a variety of highly bonded and, usually, ideologically-committed groups. With some reported success, programs combining educational, psychotherapeutic, and vocational components have been employed to "deprogram" members of religious sects, "de-gang" gang members and, more recently, "deradicalize" terrorists.[27]

Deradicalization programs in Yemen and Saudi Arabia have had, at best, mixed results. A deradicalization program developed and implemented by General Douglas Stone for detainees held at the U.S. detention facility in Bagdad is reported to have borne positive results.[28] Systematic data on the efficacy, or potential efficacy, of such programs is largely lacking, though serious studies on the subject are underway at the Rand Corporation and elsewhere.[29]

Subchapter VI of the Act provides for the development and implementation of a deradicalization program—including components of civic education, chaplaincy services, psychological and mental health services, family visitation, and vocational counseling or training—to be made available to individuals detained under the Act. The benefits of such a program are uncertain. Perhaps a deradicalization program would, in fact, increase the prospects for the secure release of some number of individuals who might otherwise never be safely released. It would seem wise, and perhaps obligatory, to undertake such steps as are available, to make best efforts, to reduce the period of preventive detention—particularly in the current

context, where the specter of indefinite detention is real. It can hardly hurt to attempt such a program; and a great deal that is of value—for intelligence purposes, and otherwise—is likely to be learned in the process. The Act instructs the Attorney General, in prescribing regulations for establishment of a deradicalization program, to "provide for the ongoing study and measurement of the program's efficacy, and for appropriate development or alteration of the program as indicated by such study."

D. Periodic Review of Detention

Subchapter VII of the Act provides for the periodic review of detention. Twice per year, an Administrative Review Panel is to evaluate whether the detained individual, if released, would continue to pose a significant risk of engaging in catastrophic armed attack against the United States, taking into account the potential for reduction of that risk through the imposition of conditions of release (discussed further, below). The Administrative Review Panel, upon concluding its review, is to provide to the Attorney General a report analyzing the risk that would be associated with the release of the individual, and to make a recommendation as to the individual's release or continued detention. Informed, but not bound, by that report and recommendation, the Attorney General is then to file with the court a Notice of Continued Detention or a Motion for Release (specifying recommended conditions of release). Under the Act, the court shall continue detention if it finds, by a preponderance of the evidence, that the detained individual would, if released (even with conditions of release), pose a significant risk of engaging in catastrophic armed attack against the United States and, otherwise, shall release the individual.

E. Release

The Act provides that a detained individual may be released within the United States, or to a foreign country of which he is a citizen or national, or to a third country, as appropriate based on the requirements of national security, the interests of the detained individual, and the international obligations of the United States. If the individual is to be released in the United States, the Order for Release shall specify conditions of release. Those conditions may include monitoring requirements (such as periodic reporting to a supervising officer; electronic or GPS tracking; or the provision of a DNA sample); directly preventative requirements (such as associational restrictions or a prohibition on the possession of dangerous weapons or substances); and, social integration-based requirements (such as mental health or employment counseling).

The social integration, or reintegration, of the released detainee may, in some circumstances, require protection, akin, in extreme cases, to federal witness protection. The Act provides that the Attorney General will provide for the protection of a released individual, or those associated with him, if their safety would otherwise be jeopardized because of a detainee's cooperation, or potential cooperation, with the U.S. government or for other reasons arising from his detention or release.

A court that has issued an order for release retains jurisdiction for the enforcement, implementation, modification, or revocation of the release order until such time as all conditions of release may be terminated and the individual discharged. Where a detainee is to be released

outside of the United States, the court ordering the release retains far less control; it can neither impose nor enforce release conditions of the sort contemplated here. The Act therefore provides that, "the United States shall cooperate with foreign governments to facilitate the implementation of appropriate conditions of release, social integration, and appropriate protection, if required, for detainees released to foreign countries."

## VI. Conclusion

Disposition of the detainees at Guantanamo will require critical choices among unattractive options. In this, Congress bears both the responsibility to be circumspect and the duty to act.

In the long run, the threat of catastrophic terrorist attack will not be eliminated by preventive detention, criminal prosecution, or military operations, but through the delicate process of political change. In the meantime—probably a long time—the risk of catastrophic harm must be minimized and Constitutional commitments must be honored. The present article, and the appended legislative draft, set forth a legal framework for this purpose.