On Liberty: Detention in New Forms of Armed Conflict

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I. War, Crime, and Detention

On September 11, 2001, al-Qaeda operatives attacked civilian and military targets on US territory, causing thousands of deaths and billions of dollars in economic loss. On September 12, the United Nations Security Council unanimously adopted Resolution 1368 characterizing the attack by al Qaeda as a "threat to international peace and security," and reiterating the right of states to use armed force in self-defense. On the same day, NATO, for the first time in its history, invoked the obligation of collective self-defense under Article 5 of the NATO Treaty. On September 14, the US Congress passed the Authorization for the Use of Military Force, authorizing the president to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks." Terrorism, conceived until then as crime, was reconceived—as war.

Much of the debate on US counterterrorism policy has centered on the appropriate roles of the law of war and the criminal law in the detention of individuals engaged in armed attacks against the United States. In fact, however, neither "war" nor "crime," alone or in combination, provides an adequate conceptual or legal model for responding to the threat currently posed by al Qaeda and its affiliates. The following sections identify the scope and limits of the criminal law and the law of war for these purposes, and then present a legal framework for counterterrorism detention that both integrates and supplements the two.

II. The Merits and Limits of the Criminal Law for Counterterrorism

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

A grounding premise of the criminal law is that a society can tolerate some rate of serious crime. There is, however, no tolerable rate of the most serious forms of terrorism, which may include catastrophic nuclear, biological, or chemical attack, or a concerted series of conventional attacks that is cumulatively catastrophic. Counterterrorism directed to the prevention of high-magnitude terrorist attacks, therefore, rests on a set of assumptions critically different from those of the criminal law. The question is one of the grounding premises of the enterprise. 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.

Well known evidentiary and procedural problems limit the value of prosecution for counterterrorism. 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 incompatibility should not be taken to mean that criminal justice is an inappropriate tool for counterterrorism. Terrorism is not monolithic. Only its most virulent forms warrant a departure—an inevitably costly departure—from the balance struck, and the safeguards afforded, by the criminal justice system.

III. The Law of War and Private Actors

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 use of force. *Jus ad bellum* clearly permits the use of force by a state in responding to armed attack by a transnational, private actor such as al-Qaeda. But *jus in bello* offers no definition of the category of individuals subject to such detention, and specifies no procedures for their identification.

A schematic examination of the law of war demonstrates how—and why—it is silent concerning the standards for identifying the private actors subject to detention in an armed conflict with a transnational private entity. The *jus ad bellum* right to detain private actors is plain. The UN Charter states: "Nothing in the present Charter shall impair the inherent right of . . . self-defence if an armed attack occurs against a Member of the United Nations." Consisting in a state's "inherent" right to defend itself from attack, the right 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 actor. Force is comprised of the dual prongs of violence and detention. Detention is not only an inherent incident of the use of force, as reflected in both US law and the international law of armed conflict, but it is, in some circumstances, an obligatory alternative to killing.

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 the use of force between a state and a transnational private entity. *Jus in bello* is composed of two parts: minimum standards of humane treatment applicable in all instances of use of force, and a set of additional and more specific rules applicable in armed conflicts between states. The former—minimum standards of humane treatment—are based on moral principles whose binding nature is not conditioned upon reciprocal conduct by the adversary. Those humanitarian standards constitute features of customary international law that are

embodied in Common Article 3 of the Geneva Conventions of 1949 and elaborated in subsequent treaties. By contrast, the specific rules governing inter-state conflicts, embodied in the entirety of the Geneva Conventions of 1949 (of which only Common Article 3 applies to non-"international" armed conflicts), are based on reciprocal agreements entered into by states for their mutual benefit. Those rules extend beyond fundamental moral imperatives to include additional obligations designed to further reduce suffering in armed conflicts. The law of international armed conflict 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. In a conflict with private actors such as "al-Qaeda and associated forces," a reciprocity mechanism for compliance should not logically be expected to function at all. By both its terms and its logic, then, the law of international armed conflict is inapplicable in the use of force against a non-state actor.

In sum, while the law of international armed conflict makes extensive provision for the treatment of detainees, only the minimum standards of humane treatment govern detention outside the interstate context. Most significantly, no law-of-war provisions define the class of private actors subject to detention or the procedures for identifying such individuals. Concerning the criteria for the detention of individuals in a use of force in self-defense against a transnational entity, and the procedures for identifying individuals fitting those criteria (however defined), the law of war is silent. This silence in the law should not be a cause for surprise; there has been, to date, little occasion and little incentive for the development of law on the topic.

IV. Counterterrorism Detention

We are left with a need for preventive detention, in a small set of cases in which the magnitude of the harm exceeds the limitations of the criminal law. The law of war recognizes the legality of such detention but provides virtually no parameters for its application.

This gap in the law has not prevented the application of preventive detention in practice. Preventive detention currently is used extensively for counterterrorism, through not only military detention but immigration detention, material witness detention, "black sites," and other mechanisms. Because preventive detention for counterterrorism is as unattractive as it is necessary, it is 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 central dilemma in conducting appropriate detentions in a conflict with private actors arises from the amorphous and, typically, clandestine nature of 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.

The domestic law enacted in the future for this purpose by the United States and other countries will inevitably contribute to the development of *jus in bello*, as international law responds to new facts and forms of armed conflict. The question, then, is the appropriate content of that domestic legislation.

A rigorous system of detention as part of a use of force in self-defense, if thoughtfully designed and carefully implemented, can be constitutionally sound, consistent with international law, and effective in preventing attacks. This will require not only careful definition of the grounds for detention, rigorous procedures for detention determinations, and appropriate conditions of detention, but also an innovative program to prepare detainees for release. What follows is a proposal for US legislation to govern the detention, treatment, and release of private

actors engaging in armed attack against the United States. The legislative framework addresses: 1) the definition of the category of persons subject to detention; 2) procedures for identifying individuals subject to detention; 3) conditions of detention; and 4) standards for and conditions of release.

Preventive detention is used routinely in the United States in circumstances involving mental illness, contagious disease, criminal prosecution, armed conflict, and certain other categories of danger. 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 following thumbnail sketch of a proposed legislative framework for counterterrorism detention is constructed to comport with the legal principles and safeguards developed in those existing and judicially-tested systems of preventive detention.

V. Legislative Proposal

COUNTERTERRORISM DETENTION, TREATMENT, AND RELEASE ACT OF 2009

A BILL

To provide for the detention, treatment, and release of individuals engaging in catastrophic armed attack against the United States, under the following limited conditions and in accordance with the following provisions, pursuant to the right of the United States to use force in self-defense against armed attack.

SUBCHAPTER I. GENERAL PROVISIONS

Section 101 **Definitions**

In this Act:

(A) "Catastrophic armed attack" means any attack, or series of attacks, including cyber attacks, foreseeably resulting, singly or as a series, in the death of, or grievous bodily injury to, # persons or in the destruction of property in excess of $#.

(B) "A person engaging" in catastrophic armed attack means an individual who:
(1)perpetrates or provides substantial support to the perpetration of such catastrophic armed attack;
(2)plans or attempts or conspires to perpetrate or to provide substantial support to the perpetration of such catastrophic armed attack; or
(3)manages, directs, or supervises an organization engaging in such catastrophic armed attack.

(C) "Against the United States" means against:
(1)a target within the territory of the United States;
(2)a facility owned or operated by the United States government outside the territory of the United States; or
(3)a national of the United States.

SUBCHAPTER II. PERSONS SUBJECT TO DETENTION

Section 201 **Persons Subject to Detention Under This Act**

(A) A person engaging in catastrophic armed attack against the United States shall be subject to detention in accordance with this Act.

(B) An individual detained by the United States in military operations outside the territory of the United States, in a theater of war in which US military personnel are actively engaged in hostilities and in which there exist US military detention or internment facilities, shall be subject to detention or internment in such facilities for the duration of those hostilities, in accordance with the provisions of Title 10 U.S.C. and regulations promulgated thereunder, including [AR 190-8].

(1)If the commanding officer of such military detention or internment facility has reason to believe that an individual detained in such facility is a person engaging in catastrophic armed attack against the United States, as defined in this Act, he shall convene a Preliminary Determination Tribunal to determine whether there is probable cause to believe that the individual is a person engaging in catastrophic armed attack against the United States, as defined in this Act.

(a) A Preliminary Determination Tribunal under this Subchapter shall be conducted in accordance with Army Regulation 190-8 except that:

(i) the sole determination to be made by the Preliminary Determination Tribunal shall be whether there is probably cause to believe that the individual is a person engaging in catastrophic attack against the United States, as defined in this Act; and

(ii) the personnel composing a Preliminary Determination Tribunal shall have top secret security clearance.

(b) If a Preliminary Determination Tribunal issues a finding of probable cause to believe that an individual is a person engaging in catastrophic armed attack against the United States, that individual may be transported to the territory of the United States and, thereupon, shall be subject to criminal prosecution or to detention in accordance with the provisions of this Act.

(C) An individual brought into the custody of the United States outside the territory of the United States, under circumstances other than those specified in subsection (B) of this Subchapter, who is suspected of commission of a terrorist offense subject to the criminal jurisdiction of the United States or of being a person engaging in catastrophic armed attack against the United States, shall be transported, within # days, to the United States and, thereupon, shall be subject to criminal prosecution or to detention in accordance with the provisions of this Act.

SUBCHAPTER III. DETERMINATIONS

Section 301 **Jurisdiction**

(A) The district courts of the United States shall have original jurisdiction over proceedings under this Subchapter.

Section 302 **Probable Cause Determination**

(A) Application by the Attorney General. The Attorney General of the United States may make application to the court for a determination of probable cause to believe that the named individual is a person engaged in catastrophic attack against the United States.

Section 303 **Provisional Detention.**

(A) Upon issuance of a determination of probable cause under section 302 of this Subchapter, the named individual shall be provisionally detained pending a detention hearing under section 304 of this Subchapter.

Section 304 **Detention Hearing**

(A) Expeditious hearing. A detention hearing shall be conducted under this section within X days of the date on which the individual was provisionally detained pursuant to section 303 of this Subchapter.

(B) Standard of Proof. The burden shall be upon the government to prove, by clear and convincing evidence, that the named individual is a person engaging in catastrophic attack against the United States.

(C) Rules of Procedure. The detention hearing shall be conducted in accordance with the Federal Rules of Civil Procedure, except as provided in Section 309 of this Subchapter.

(D) Rules of Evidence. The detention hearing shall be conducted in accordance with the Federal Rules of Evidence, except as provided in Section 309 of this Subchapter.

Section 305 **Appeal of Detention Order.**

(A) An order of detention issued under this Act shall be subject to appeal in accordance with the Federal Rules of Appellate Procedure.

Section 306 **Habeas Corpus Review**

(A) An individual detained under this Act shall have the right to petition for habeas corpus.

Section 307 **Periodic Review of Detention**

(A) An order of detention issued under this Act shall be subject to periodic administrative review, pursuant to the criteria and procedures delineated in subsections (B)-(E) of this paragraph.

Section 308 **Right to Counsel.**

(A) A person detained or provisionally detained under this Act shall have the right to counsel. . . .

(1) Such counsel must have top-secret security clearance.

(2) If a person detained or provisionally detained under this Act is unable, by reason of indigence, to obtain such counsel, he shall be entitled to the appointment of counsel by the Court at governmental expense.

Section 309 **Classified Evidence.**

(A) The Classified Information Procedures Act shall apply in any detention hearing under this Act, and in any appeal, administrative review, or habeas corpus review of detention under this Act , except as provided in subsection x of this paragraph.

SUBCHAPTER IV. CONDITIONS OF DETENTION

Section 401 **Accordance with the US Constitution and Applicable International Standards**

(A) Detention under this Act shall be conducted in accordance with the requirements of the Constitution of the United States and the standards of Common Article 3 of the Geneva Conventions of 1949, Article 75 of Protocol I Additional to the Geneva Conventions of 1949, and Article 4 of Protocol II Additional to the Geneva Conventions of 1949.

Section 402 **Interrogation.**

(A) A detainee may be interrogated during the period of detention in accordance with regulations promulgated under this Act.

(1)Such regulations shall not require or authorize any method or condition of interrogation that is not authorized under X.

Section 403 **Contact between detainees.**

(A) During provisional detention and for X days following the issuance of a detention order, the detainee shall have no contact with other detainees.

(B) Upon a determination, pursuant to section x below, that a detainee may have interaction with other detainees, such interaction will be conducted in accordance under the following conditions:

(1)Detainee interaction will be monitored by designated personnel.

(2)Detainee interaction may include social, educational, therapeutic, and vocational components.

(a) Should information become available at any time suggesting that the criteria for detainee interaction specified in section x below are not or are no longer fulfilled by a given detainee, the director may convene a contact determination proceeding in accordance with section x above to determine whether contact should be continued or suspended.

(i) If contact is suspended under (3) above, periodic contact determination procedures under section x shall be reinstituted.

SUBCHAPTER V. PROGRAM FOR DERADICALIZATION AND RELEASE

Section 501 **Program Purpose**

A program of deradicalization and preparation for release shall be designed, consistent with sections 502-504 of this subchapter, to reduce the danger posed by a detainee in the event of release, in order to facilitate such release consistent with the requirements of security.

Optional Nature of the Program

(A) The detainee may choose or decline any or all components of the program.

Section 502 **Program Administration.**

(A) The program will be administered by the Department of Justice.

Section 503 **Program Components**

(A) The program will include the following components, made available in appropriate sequence and combination:

(1)Civic education designed to engender critical thought;

(2)Psychological counseling;

(3)Chaplaincy services;

(4)Family visitation;

(5)Vocational counseling and training.

SUBCHAPTER VI. RELEASE

Section 601 Location of Release

(A) Upon issuance of an order terminating detention under this Act, the detainee shall be released within the United States or to his state of nationality or to a third state as appropriate based on the requirements of national security, the interests of the released individual, and the obligations of the United States under the UN Convention Against Torture.

Section 602 Conditions of Release

(A) Every paroled detainee is required to abide by the following conditions where appropriate:

(a) collection of a DNA sample;

(b) refraining from committing any Federal, State, or local crime;

(c) allowing [appropriate personnel] to conduct random searches of the paroled detainee's person, home, work, and car;

(d) reporting on a regular schedule, as deemed appropriate by the [Court], to [appropriate personnel]; and

(e) cooperating with a system of graduated levels of supervision, that uses, as appropriate and indicated:

(i) satellite tracking, global positioning, remote satellite, and other tracking or monitoring technologies to monitor and supervise such individuals in the community;

(ii) community correction facilities; and

(iii) home confinement

(2) restrictions on travel and movement;

(3) restrictions on associations with other alleged terrorists, convicted terrorists, or other individuals that the [Court], within the bounds of the Constitution, deems appropriate;

(4) restrictions on the ownership of weapons and the consumption of alcohol or other mind-altering substances;

(5) participation in a program of treatment, job training, or rehabilitation, as set out in Sections 704 and 705; and

(6) other restrictions, in line with the Constitution and laws of the United States, deemed necessary by the [Court] to the maintenance of the national security of the United States

(B) Modification of Conditions

(1) A paroled detainee may petition the Commission on his or her own behalf for a modification of conditions imposed under Section 703

Section 603 Aftercare – Job Training

Section 604 Aftercare – Mental Health Counseling

SUBCHAPTER VII. Protection of Detainees Upon Release and of Persons Associated With Detainees

Section 701 **Purpose**

(A) To provide for the protection of a released detainee, or persons associated with a detainee or released detainee, where such protection is necessitated by the cooperation or potential cooperation of the detainee with the US federal government or a state government or for another reason associated with the detention of the individual

II. **Conclusion**

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. Preventive detention–

duly legislated and scrupulously implemented–should be available for, and limited to, those high magnitude cases where nothing less will do.