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After Guantanamo: War, Crime, and Detention

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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 category 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 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 our 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 appended to this article.

Neither the law of war nor the criminal law, alone or in combination, provide an adequate legal structure for responding to the most serious threats posed by Al Qaeda and similar 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.

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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.

Several specific obstacles to the successful criminal prosecution of terrorism cases reflect this underlying incongruity. First, evidence that may be a highly reliable indicator of dangerousness may also be, in some instances, inadmissible in a criminal trial. Take, for example, corroborated hearsay. Imagine that three informants report hearsay statements indicating that the suspect is plotting a biological weapons attack. Although the three informants have not communicated with each other, the three statements contain identical details that could not be coincidental. There is also physical evidence that corroborates the hearsay statements. All of the hearsay statements, no matter how reliably they may indicate dangerousness, are inadmissible in a criminal trial, under the relevant rules of evidence. And the physical evidence, uninformed by the hearsay testimony, is meaningless (or, if not meaningless, then certainly not proof beyond a reasonable doubt). In this situation, prosecution is not a viable option—even though there may be sound basis to believe that the person is too dangerous to release.

A second problem frequently affecting terrorism prosecutions concerns classified information. The presentation of certain evidence at trial (by the prosecution or the defense) may compromise sensitive intelligence—or reveal the methods or sources used for gaining intelligence—with resultant damage to national security. Some commentators dismiss this problem, noting that many terrorism cases have been successfully prosecuted in federal courts.[2] But the relevant question is not whether some terrorism cases can be prosecuted successfully in

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[1] *See generally* RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN FEDERAL COURTS (May 2008) (analyzing terrorism prosecutions successfully brought in federal courts since the early 1990s); Robert Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1 (2005) (examining the application of federal criminal law in counterterrorism); Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008) (comparing criminal and military detention models).

[2] *See* Zabel and Benjamin, *supra* note 1 (relying on successfully prosecuted terrorism cases as support for the adequacy of federal courts for this purpose, without addressing occasions on which the government has declined to prosecute terrorism cases rather than to present the evidence required for conviction in those cases).

federal courts—clearly, some can—but, rather, whether some cannot. There is no publicly available list of the terrorism cases that were not prosecuted because of the national-security costs that would have been associated with disclosing the necessary evidence in those trials.

The third problem (and the one most 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 of proof 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.

The inadmissibility of evidence tainted by torture or coercive interrogation is an additional, and currently very prominent, problem. But it would be a mistake to view that as the primary obstacle to the successful prosecution of terrorism cases. A narrow category of terrorism suspects will be "too dangerous to release, but not appropriate to prosecute," even in the absence of coercive interrogations or otherwise tainted evidence.

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 response to armed attack by a transnational private actor such as Al Qaeda. Article 51 of the U.N. 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

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[3] S*ee, e.g.*, Kenneth Roth, *After Guantanamo: The Case Against Preventive Detention,* 87 FOREIGN AFFAIRS, May-June 2008; Jennifer Daskal, *A New System of Preventive Detention? Let's Take a Deep Breath*, 40 CASE W. RES. J. INT'L L. 561, 568-70; Improving Detainee Policy: Handling Terrorism Detainees Within the American Justice System: Hearing Before the S. Comm. on the Judiciary, 110th Cong. (2008) (testimony of Tom Malinowski, Washington Advocacy Director, Human Rights Watch), *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=3390&wit_id=7213.

[4] U.N. Charter art. 51.

[5] *See, e.g.*, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 (July 8); STANIMIR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 5-6 (1996). *See generally,* YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENSE (4th ed. 2004).

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*, which was designed for armed conflicts between states 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 *jus in bello*, 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

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[6] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004) ("[D]etention to prevent a combatant's return to the battlefield is a fundamental incident of waging war.").

[7] *See, generally,* Geneva Convention relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[8] *See, e.g.*, Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land art. 23, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 (prohibiting the wounding or killing of captured combatants); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts [hereinafter Protocol I] art. 41, June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts [hereinafter Protocol II] art. 45, June 8, 1977, 1125 U.N.T.S. 609.

[9] Common art. 3 to 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; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; 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"); 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 [hereinafter Geneva Conventions].

[10] *See, e.g.*, Protocol I, *supra* note 8, at art. 75; Protocol II, *supra* note 8, art. 4.

[11] Geneva Conventions of 1949, *supra note 9,* common art. 2.

reciprocity mechanism elicits, at best, imperfect compliance by states.[12] In a conflict between a state and private actors such as al-Qaeda and similar 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 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 provisions 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,[13] material witness detention,[14] "black sites,"[15] 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,[16] consistent with international law, and effective in preventing attacks. Preventive detention has long been used in the United States in circumstances involving mental illness,[17] contagious disease,[18] criminal prosecution,[19] and

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[12] *See* Eric Posner, *A Theory of the Laws of War*, University of Chicago Olin Law and Economics Program, Working Paper No. 160 (2002).

[13] *See, e.g.,* U.S. DEP'T OF JUSTICE, COUNTERTERRORISM WHITE PAPER 29-32 (2006).

[14] *See, e.g., id.* at 52-54.

[15] *See, e.g.,* AMNESTY INTERNATIONAL, "RENDITION" AND SECRET DETENTION: A GLOBAL SYSTEM OF HUMAN RIGHTS VIOLATIONS (2006); Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASHINGTON POST A01, November 2, 2005.

[16] *See generally,* Kansas v. Hendricks, 521 U.S. 346 (1997) (delineating constitutional standards for preventive detention).

[17] *See, e.g.,* Addington v. Texas, 441 U.S. 418 (1979) (involuntary commitment proceedings may apply a "clear and convincing evidence" standard of proof).

certain other categories of danger—including armed conflict.[20] 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 to adequately 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 for preventive detention, certain specific difficulties arise in designing a legal framework for detention in armed conflicts between states and transnational private entities. 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.[21]

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 these 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 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

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[18] *See, e.g.*, 42 U.S.C. § 264(b) (2009) (authorizing U.S. Surgeon General to prescribe and implement regulations for issuing isolation orders to prevent spread of contagious disease).

[19] *See, e.g.*, 18 U.S.C. § 3142 (2009) (bail); 18 U.S.C. § 3144 (2009) (material witness detention).

[20] *See, generally,* Mag. Gary D. Brown, *Prisoner of War Parole: Ancient Concept, Modern Utility* , 156 MILL. L. REV. 200, 203-8 (1998).

[21] The U.S. District Court for the District of Columbia grappled with this problem in its ruling on a motion to dismiss the habeas petition filed by individuals detained as "enemy combatants" at the U.S. Air Force Base in Bagram, Afghanistan. The court noted that the government defined "enemy combatant" to include "individuals who were part of, or supporting, forces engaged in hostilities against the United States or its coalition partners and allies." *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 219 (D.D.C. 2009). Ruling that the detainees were entitled to habeas review of their detention, the court stated: "Whatever the merits of such a broad definition . . . a necessary corollary is a robust process to ensure that only detainees who pose the kind of threat that warrants detention are designated as enemy combatants . . ." *Id.*

currently at Guantanamo and to other instances of counterterrorism detention, elsewhere or in the future.

V. OVERVIEW OF PROPOSED LEGISLATION: THE 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 in 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. Regardless of similarities in method, the purpose of the detention determination is to identify 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 that should 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 the 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.

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 a writ of 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 generally 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.[22]

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 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.

[22] 18 U.S.C. § 6002 (2008).

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),[23] 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.[24] Under the Act, no such constraint may be applied to the presentation of evidence by the named individual. Rather, the

[23] 18 U.S.C. App. 3 (2009).

[24] 18 U.S.C. App. 3 § 8 (2009).

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.[25]

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.[26] 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.[27]

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[25] *See, e.g.*, NAUREEN CHOWDHURY & ELLIE B. HEARNE, DERADICALIZATION AND DISENGAGEMENT FROM VIOLENT EXTREMISM (October 2008)

[26] Drake Bennett, *How to Defuse a Human Bomb*, BOSTON GLOBE C1, April 13, 2008.

[27] *See, e.g.*, RAND Initiative for Middle East Peace, *A Future for the Young: Positive Options for Helping Middle Eastern Youth Escape the Trap of Radicalization*, September 2005, available at

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 threat 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 for 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).

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http://www.rand.org/international_programs/cmepp/imey/hot/future_for_young.html (summarizing RAND conference discussing radicalization).

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 been 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 legislative draft appended below, set forth a legal framework for this purpose.

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.

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

SHORT TITLE.

This Act may be cited as the "Counterterrorism Detention, Treatment, and Release Act of 2009."

TABLE OF CONTENTS - The table of contents for this Act is as follows:

GENERAL PROVISIONS

Section 101 **Definitions**

In this Act:

(A) "Catastrophic armed attack" means an attack, or series of attacks, posing a substantial risk to the security of the United States.

(1) The Attorney General shall prescribe regulations specifying the indicia of "catastrophic armed attack," including indicia for attacks involving:

(a) biological agents or toxins, including but not limited to those defined in 18 U.S.C. 178;

(b) chemical agents, including but not limited to those defined in Schedule B of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993;

(c) nuclear or radiological materials, as defined in 18 U.S.C. 831(f);

(d) cyber technology;

(e) electromagnetic pulse;

(f) conventional agents or weapons; and

(g) other technologies, agents, or weapons.

(2) Such indicia shall be based upon the potential of such attack to cause harm, including:

(a) death, serious bodily injury, or damage to health, including effects of contagion, contamination, or genetic damage;

(b) property damage;

(c) environmental damage;

(d) damage to technology or infrastructure;

(e) economic harm; and

(f) other forms of harm, as appropriate.

(i) Estimation of potential harm under this paragraph shall take into account the efficacy and costs of available defensive measures to reduce the harm potentially caused by such attack.

(3) The Attorney General shall review regulations promulgated under this Section periodically, as necessary in light of emerging circumstances and technologies, and not less frequently than every two years.

(B) "An individual engaging" in catastrophic armed attack means an individual who:

(1) perpetrates or provides substantial support for the perpetration of catastrophic armed attack;

(2) prepares or conspires or attempts to perpetrate, or to provide substantial support for the perpetration of, catastrophic armed attack; or

(3) manages, directs, or supervises an organization engaging in catastrophic armed attack.

(a) "Provides substantial support" means:

(i) with intent to facilitate catastrophic armed attack, or

(ii) with knowledge or belief that such provision will significantly facilitate the preparation or perpetration of catastrophic armed attack,

(iii) contributes expertise, funding, or other goods or services to be used, or that he believes will be used, in the preparation or perpetration of catastrophic armed attack.

(b) "Prepares" means:

(i) for the purpose of perpetrating or providing substantial support for the perpetration of catastrophic armed attack,

(ii) plans;

(iii) solicits or collects funds or other resources; or

(iv) engages in other such preliminary acts.

(c) "Attempts" means:

(i) with intent to complete, or to provide substantial support for the completion of, catastrophic armed attack,

(ii) performs an act or an omission that constitutes a substantial step toward the perpetration, or toward the provision of substantial support for the perpetration, of catastrophic armed attack.

(d) "Conspires" means:

(i) with intent to complete, or to provide substantial support for the completion of, catastrophic armed attack,

(ii) agrees, explicitly or tacitly, with one or more persons to perpetrate, or to provide substantial support for the perpetration of, catastrophic armed attack.

(01)Proof of an overt act is not required.

(02)It shall not be a defense that an alleged co-conspirator, or person posing as a co-conspirator, feigned agreement.

(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.

(D) "Classified information" means any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security and any restricted data, as defined in paragraph r. of section 11 of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)).

(1) "National security" means the national defense and foreign relations of the United States.

Section 102 **Persons Subject to Detention under this Act**

(A) An individual engaging in catastrophic armed attack against the United States shall be subject to detention under this Act.

Section 103 **Jurisdiction of District Courts of the United States**

(A) The district courts of the United States shall have original jurisdiction over any action brought under this Act.

(1) A court that issues an Order of Detention under this Act shall retain jurisdiction for purposes of the enforcement, implementation, or modification of such order until such time as the individual subject to detention under the order may be released and any conditions of release terminated.

Section 104 **Rules of Evidence and Procedure**

(A) Proceedings in the courts of the United States under this Act shall be conducted in accordance with the Federal Rules of Evidence and the Federal Rules of Civil Procedure, except as specifically provided herein.

Section 105 **Appeal**

(A) Rulings and orders under this Act shall be subject to appeal in accordance with the Federal Rules of Appellate Procedure.

Section 106 **Functions of the Attorney General**

(A) The functions and duties of the Attorney General under this Act may be exercised by the Deputy Attorney General, the Associate Attorney General, or by an Assistant Attorney General designated by the Attorney General for such purpose and may not be delegated to any other official.

SUBCHAPTER II. ACCORDANCE WITH THE UNITED STATES CONSTITUTION AND STANDARDS OF HUMANE TREATMENT

Section 201 **Proceedings and Detention in Accordance with the Constitution**

(A) The Constitution of the United States shall be applicable in all proceedings under this Act and in the detention of any individual pursuant to this Act.

Section 202 **Conditions of Detention**

(A) Individuals detained or provisionally detained pursuant to this Act shall be afforded standards of treatment and conditions of detention no less favorable than those afforded to persons in the power of a party to an armed conflict under Common Article 3 of the Geneva Conventions of 1949 and Article 75 of Protocol I Additional to the Geneva Conventions of 1949.

Section 203 **Public Access to Proceedings under this Act**

(A) Proceedings under this Act shall be open to the public and the records of such proceedings shall be made publicly available, except as specifically provided herein.

Section 204 **Right to Counsel**

(A) An individual subject to proceedings under Subchapters V, VII, or VIII of this Act shall have the right to counsel of his choice for such proceedings and for an appeal of right from such proceedings, subject to subsection (1) of this paragraph.

(1) Such counsel shall have been determined to be eligible for access to classified information that is classified at the level Top Secret.

(B) If an individual who has a right to counsel pursuant to subsection (A) of this Section 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 205 **Privilege Against Self-Incrimination and Immunity of Witnesses**

(A) The provisions of Chapter 601 of Title 18 of this Code, concerning Immunity of Witnesses, shall apply in proceedings under this Act.

Section 206 **Habeas Corpus Review**

(A) An individual detained pursuant to this Act shall have the right to petition for a writ of habeas corpus.

Section 207 **Interrogation**

(A) An individual detained or provisionally detained pursuant to this Act may be interrogated in accordance with regulations prescribed by the Attorney General pursuant to this Act.

(1) Such regulations shall not authorize any method or condition of interrogation not authorized under __.

SUBCHAPTER III. PROBABLE CAUSE DETERMINATION AND PROVISIONAL DETENTION

Section 301 **Probable Cause Determination**

(A) The Attorney General of the United States may make application to a district court of the United States for a determination of probable cause to believe that a named individual is an individual engaging in catastrophic armed attack against the United States.

(1) An application under this section shall be submitted *ex parte* and *in camera*, and shall be filed under seal with the court.

(B) The court shall rule on such application for determination of probable cause as soon as reasonably possible, but in no case more than 24 hours after submission of the application.

(1) Such determination shall be issued in writing and shall state reasons for the determination.

Section 302 **Provisional Detention**

(A) If a court makes a determination of probable cause under Section 301 of this Subchapter, the court shall issue an Order for Provisional Detention of the named individual in the custody of the Attorney General pending a Detention Determination Hearing under Subchapter V of this Act.

(1) Upon issuance of an Order for Provisional Detention under this Section, the court shall issue, as appropriate, an order for remand of the individual to the custody of the Attorney General, or a warrant for the arrest of the named individual to a federal marshal or other officer authorized to execute the warrant.

Section 303 **Application of this Act to Persons Detained in a Theater of Hostilities Outside the Territory of the United States**

(A) An individual brought into U.S. custody in military operations outside the territory of the United States, in a theater of war in which U.S. military personnel are actively engaged in hostilities and for which the United States has designated detention or internment facilities, may be subject to detention or internment in such facilities for the duration of those hostilities, pursuant and subject to, and in accordance with, the provisions of Title 10 of this Code and regulations promulgated thereunder, including U.S. Army Regulation 190-8.

(B) If the commanding officer of such military detention or internment facility has reason to believe that an individual detained in such facility is an individual engaging in catastrophic armed attack against the United States, as defined in this Act, he shall promptly so inform the Attorney General of the United States and provide to the Attorney General all relevant information and evidence.

(1) Upon receipt of such information, the Attorney General may make application under Section 301(A) of this Subchapter for a determination of probable cause.

(a) If the court makes a determination of probable cause under Section 301(B) of this Subchapter, the named individual shall be committed in the custody of the Attorney General for provisional detention under Section 302 of this Subchapter, pending a Detention Determination Hearing under Subchapter V of this Act.

Section 304 **Application of this Act to Persons Detained Outside the Territory of the United States Not in a Theater of Hostilities**

(A) An individual taken into United States custody outside the territory of the United States, under circumstances other than those specified in Section 303 of this Subchapter, on suspicion that he has committed a terrorist offense subject to the criminal jurisdiction of the United States or is an individual engaging in catastrophic armed attack against the United States, shall, within # days from the first day of such U.S. custody, be:

(1) released from custody; or

(2) transferred to the custody of the country on whose territory he was taken into U.S. custody;

(3) transferred to the custody of a foreign country of which he is a citizen or national; or

(4) committed to the custody of the U.S. Attorney General for:

(a) prosecution under the criminal laws of the United States; or

(b) provisional detention under Section 302 of this Subchapter, pursuant to a determination of probable cause under Section 301 of this Subchapter, pending a Detention Determination Hearing under Subchapter V of this Act.

Section 305 **Application by the Attorney General for Continued Detention of the Named Individual**

(A) Within # days from the first day of provisional detention of the named individual under Section 302 of this Subchapter, the Attorney General shall make application to the court for:

(1) the discharge of the named individual; or

(2) the continued detention of the individual as a person engaging in catastrophic armed attack against the United States, pursuant to Section 102 of Subchapter I of this Act.

(a) Such Application for Continued Detention shall, on the same day, be served on the named individual's attorney of record.

Section 306 **Sealing of Records**

(A) Records of proceedings under this Subchapter shall be kept under seal of the court except as necessary for execution of a warrant or order issued under this Subchapter and as provided in Subchapters IV *et seq.* of this Act.

SUBCHAPTER IV. PROTECTION OF CLASSIFIED INFORMATION IN PROCEEDINGS UNDER THIS ACT

Section 401 **Proceedings Subject to the Provisions of this Subchapter**

(A) The provisions of this Subchapter shall apply in any proceeding under this Act, except as otherwise specified in this Act.

Section 402 **Procedural Conference**

(A) At any time after the filing of an Application for Continued Detention under Section 305 of Subchapter III of this Act, any party may move for a procedural conference to consider matters relating to classified information that may arise in connection with proceedings under this Act. Following such motion for a procedural conference, or on its own motion, the court shall promptly hold a procedural conference to establish the timing of requests for discovery, the provision of notice required by Section 407 of this Subchapter, and the initiation of the procedures established by Sections 404 and 408 of this Subchapter. In addition, at the procedural conference the court may consider any matters which relate to classified information or which may promote fair and expeditious proceedings under this Act.

(1) No admission made by the named individual or by counsel for the named individual at such a conference may be used against the named individual unless the admission is in writing and is signed by the named individual and counsel for the named individual.

Section 403 **Order for the Protection of Classified Information**

(A) Upon motion of the United States, the court shall issue an order to protect against the unauthorized disclosure of any classified information disclosed by the United States to any person in any proceeding under this Act.

Section 404 **Disclosure of Classified Information to a Named Individual Under this Act**

(A) The court, upon motion by the United States, may authorize the United States to:

(1) delete or redact specified items of classified information from documents, audio or video recordings, photographs, or other materials or information to be made available to the named individual through discovery under the Federal Rules of Civil Procedure or pursuant to the provisions of this Act, including information to be made available to the named individual in a video feed provided under Section 405 of this Subchapter; or

(2) substitute a summary of the information for such classified documents or materials; or

(3) substitute a statement admitting relevant facts that the classified information would tend to prove.

(B) Notwithstanding authorization by the court, under this Section, for the United States to delete classified information from, or to substitute summaries or statements for, documents or other materials or information to be made available to the named individual, the United States shall provide a full and unredacted version of such documents and other materials or information to counsel for the named individual.

(1) Counsel for the named individual shall not disclose to the named individual, or to any other unauthorized person, classified information made available to such counsel pursuant to subsection (B) of this Section.

(C) The court shall hold a hearing on any motion under this Section.

(1) A hearing held under this Section shall be conducted *in camera.*

(2) The named individual, including an individual who is representing himself *pro se*, may not be present at a hearing held under this Section but may be represented by counsel in accordance with Section 204 of Subchapter II of this Act.

(a) Counsel for the named individual shall not disclose to the named individual or to any other unauthorized person classified information made available to him pursuant to subsection (C)(2) of this Section.

(D) The court shall authorize a deletion or substitution under Subsection (A) of this Section if it finds that such deletion or substitution will not unduly compromise the ability of the named individual to make his case.

(1) As to each item of classified information, the court shall set forth in writing the basis for its determination.

(E) Where the United States' motion under this Section is filed prior to the relevant proceeding under this Act, the court shall rule prior to the commencement of that proceeding.

Section 405 **Access of the Named Individual to Proceedings**

(A) The named individual (including an individual representing himself *pro se)* shall have the right to observe proceedings by delayed video feed during the proceedings, subject to Section 404 of this Subchapter, and to communicate electronically with counsel; but he may not be present during proceedings in the room in which the proceedings are held, except at such time as he may testify.

(1) In the case of an individual representing himself *pro se*, the named individual shall be entitled to communicate electronically with the court.

Section 406 **Suspension of Video Feed**

(A) During the examination of a witness in a proceeding under this Act that is not held *in camera*, the United States may object to any question or line of inquiry that

may require the witness to disclose classified information that the court has not previously found to be disclosable.

(B) Video feed provided under Section 405 or Section 411 of this Subchapter shall be suspended immediately upon the statement of an objection under subsection (A) of this Section.

(C) As soon as possible after such suspension of video feed, and before further evidence is heard, the court shall take such suitable action to determine whether the response is disclosable as will safeguard against the compromise of any classified information.

(1) Such action may include requiring the United States to provide the court with a proffer of the witness' response to the question or line or inquiry and requiring the named individual to provide the court with a proffer of the nature of the information he seeks to elicit.

Section 407 **Notice of Intention of the Named Individual to Present Classified Information**

(A) If the named individual or counsel for the named individual reasonably expects to present or cause to be presented classified information in connection with a proceeding under this Act that is not held *in camera*, he shall, within the time specified by the court, notify the attorney for the United States and the court in writing. Such notice shall include a brief description of the classified information. Whenever a named individual or counsel for a named individual learns of additional classified information he reasonably expects to present or cause to be presented at any such proceeding, he shall notify the attorney for the United States and the court in writing as soon as possible thereafter and shall include a brief description of the classified information. No named individual or counsel for a named individual shall present or cause to be presented information known or believed to be classified in connection with any such proceeding until notice has been given under this Section and until the United States has been afforded a reasonable opportunity to seek a determination pursuant to the procedure set forth in Section 408 of this Subchapter, and until the time for the United States to appeal such determination under that Section has expired or any appeal by the United States under that Section has been decided.

(B) If the named individual or counsel for the named individual fails to comply with the requirements of subsection (A) of this Section, the court may preclude disclosure of any classified information not made the subject of notification and may prohibit the examination by the named individual or counsel for the named individual of any witness with respect to any such information.

Section 408 **Protection of Classified Information from Public Disclosure**

(A) The court, upon motion of the United States, may authorize the United States to:

(1) exclude specified items of classified information from the video feed to be made available to the public under Section 411 of this Subchapter; or
(2) delete or redact specified items of classified information from documents, audio or video recordings, photographs, or other materials included in public records of proceedings under this Act; or
(3) substitute a summary of the information for such classified materials; or
(4) substitute a statement admitting relevant facts that the classified information would tend to prove.

(B) The United States may, in connection with a motion under this Section, submit to the court an affidavit of the Attorney General certifying that disclosure of classified information would cause identifiable damage to the national security of the United States and explaining the basis for the classification of such information.

(C) The court shall hold a hearing on any motion under this Section.
(1) A hearing held under this Section shall be conducted *in camera.*
(2) The named individual, including an individual who is representing himself *pro se,* may not be present at a hearing held under this Section but may be represented by counsel in accordance with Section 204 of Subchapter II of this Act.
(a) Counsel for the named individual shall not disclose to the named individual or to any other unauthorized person classified information made available to him pursuant to subsection (C)(2) of this Section.

(D) The court shall authorize a deletion or substitution under this Section if it finds that such deletion or substitution will not unduly compromise the ability of the named individual to make his case or the public interest in access to legal proceedings.
(1) As to each item of classified information, the court shall set forth in writing the basis for its determination.

(E) Where a motion under this Section is filed prior to the relevant proceeding, the court shall rule prior to the commencement of that proceeding.

Section 409 **Notice**

(A) Before a hearing under Section 408 of this Subchapter, the United States shall provide counsel for the named individual with notice of the specific classified information that is at issue.

(B) The court, upon request of the named individual, may order the United States to provide counsel for the named individual, prior to the relevant proceeding, such details as to the portion of the application, notice, or motion at issue in the hearing as are needed to give the defendant fair notice to prepare for the hearing.

Section 410 **Reciprocity**

(A) Whenever the court determines pursuant to Section 408 of this Subchapter that classified information may be disclosed in connection with a proceeding under this Act, the court shall, unless the interests of fairness do not so require, order the United States to provide the named individual or the counsel for the named individual with the information it expects to use to rebut the classified information. The court may place the United States under a continuing duty to comply with its obligation under this Section.

(1) If the United States fails to comply with its obligation under subsection (A) of this Section, the court may exclude any evidence not made the subject of required disclosure and may prohibit the examination by the United States of any witness with respect to such information.

Section 411 **Access of the Public to Proceedings**

(A) Subject to Section 408 of this Subchapter, proceedings under this Act shall be made accessible to the public by delayed video feed during the proceedings, except as otherwise specified in this Act, but the room in which proceedings are held shall be closed to the public during the proceedings.

Section 412 **Interlocutory Appeal**

(A) An interlocutory appeal by the United States shall lie to a court of appeals from a decision or order of a district court under this Act authorizing the disclosure of classified information, imposing sanctions for nondisclosure of classified information, or refusing a protective order sought by the United States to prevent the disclosure of classified information.

(1) An appeal taken pursuant to this Section either before or during a proceeding shall be expedited by the court of appeals.

(a) Prior to the proceeding, an appeal shall be taken within ten days after the decision or order appealed from and the proceeding shall not commence until the appeal is resolved.

(b) If an appeal is taken during the proceeding, the court shall adjourn the proceeding until the appeal is resolved, and the court of appeals:

(i) shall hear argument on such appeal within four days of the adjournment of the proceeding;

(ii) may dispense with written briefs other than the supporting materials previously submitted to the court;

(iii) shall render its decision within four days of argument on appeal; and

(iv) may dispense with the issuance of a written opinion in rendering its decision.

(v) Such appeal and decision shall not affect the right of the named individual, in a subsequent appeal from a Detention Order, to claim as error reversal by the district court on remand of a ruling appealed from during trial.

Section 413 **Sealing of Records**

(A) The records of proceedings under this Subchapter shall be kept under seal by the court, except as provided in Section 506 of Subchapter V of this Act.

SUBCHAPTER V. DETENTION DETERMINATION HEARING

Section 501 **Commencement of Proceedings on Attorney General's Application for Continued Detention**

(A) A court that has issued an Order of Provisional Detention under Section 302 of Subchapter III of this Act, and has received an Application for Continued Detention of the named individual from the Attorney General under Section 305 of Subchapter III of this Act, shall commence proceedings under this Subchapter within # days from the first day of provisional detention of the named individual, except as provided in subsections (1) and (2) of this paragraph.

(1) If the named individual consents to an extension of time, and upon a showing of good cause, the court may extend the time limit under subsection (A) of this Section one or more times.

(2) If the named individual does not consent to an extension of time, the court may extend the time limit under subsection (A) of this Section only upon a showing that extraordinary circumstances exist and justice requires the delay.

Section 502 **Burden and Standard of Proof**

(A) In proceedings under this Subchapter, the burden shall be upon the United States to prove by clear and convincing evidence that the named individual is an individual engaging in catastrophic armed attack against the United States, as defined in this Act.

Section 503 **Presentation of the Government's Case in Chief**

(A) The government's case in chief shall be presented *in camera*.

(B) A video recording and transcript of the proceedings shall be maintained throughout the presentation of the government's case in chief**.**

(1) Such video recording and transcript shall be kept under seal of the Court, except as specified in Section 506 of this Subchapter.

Section 504 **Ruling on the Sufficiency of the Government's Case in Chief**

(A) Within # days following conclusion of the government's case in chief, the court shall, on its own motion, rule on whether the government's case in chief constitutes a *prima facie* showing under the standards specified in Section 502 of this Subchapter.

(1) If the court rules that the government has not made such *prima facie* showing:

(a) the court shall issue an Order for Discharge of the named individual in accordance with Section 505 of this Subchapter; and

(b) the case record shall be kept under seal of the court.

(2) If the court rules that the government has made such *prima facie* showing, the court shall complete the Detention Determination Hearing in accordance with Sections 506 *et seq*. of this Subchapter.

Section 505 **Order for Discharge**

(A) An Order for Discharge issued pursuant to this Act shall specify:

(1) the location of discharge, subject to subsection (B) of this Section; and

(2) the date and time at which the named individual shall be discharged, which shall be no sooner than 5:00pm on the second day following issuance of the Order for Discharge and no later than 5:00pm on the fifth day following issuance of the order.

(B) If, prior to the date and time for discharge indicated in an Order for Discharge, the named individual is charged with a criminal offense, he shall be discharged to the custody of a federal marshal or other authorized officer.

Section 506 **Access of the Public to Records of Proceedings under Subchapter IV and Government's Case in Chief**

(A) Within # days following issuance of a ruling of *prima facie* sufficiency by the court under Section 504 of this Subchapter, the public shall be provided access, subject to Section 408 of Subchapter IV of this Act, to:

(1) the records of proceedings conducted under Subchapter IV; and

(2) the transcript and video recording of the government's case in chief.

Section 507 **Ruling and Disposition**

(A) Within # days following conclusion of the Detention Determination Hearing, the court shall rule on the Application for Continued Detention.

(1) Such ruling shall be issued in writing and shall state the reasons for the ruling.

(B) If the court rules that the named individual is not subject to detention under this Act as an individual engaging in catastrophic armed attack against the United States, the court shall issue an Order for Discharge of the individual in accordance with Section 505 of this Subchapter.

(C) If the court rules that the named individual is subject to detention under this Act, the court shall issue an Order for Detention of the individual in the custody of the Attorney General.

SUBCHAPTER VI. PROGRAM FOR DERADICALIZATION

Section 601 **Prescription of Regulations by the Attorney General**

(A) The Attorney General shall prescribe regulations for the establishment of a deradicalization program to be made available to individuals detained under this Act, consistent with the provisions of this Subchapter.

Section 602 **Design and Implementation**

(A) Expertise from relevant disciplines and agencies, including data derived from analogous domestic programs and from deradicalization programs conducted abroad, shall be incorporated in the design of a program for deradicalization under this Section.

(1) Regulations establishing the program shall 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.

Section 603 **Program Components**

(A) The program shall include:

(a) civic education designed to foster critical thought;
(b) psychological counseling;
(c) medical and mental health services;
(d) chaplaincy services;
(e) family visitation;
(f) vocational counseling and training;
(g) other components, as appropriate.

Section 604 **Program Participation**

(A) A detained individual may choose or decline to participate in any or all components of the program.

SUBCHAPTER VII. PERIODIC REVIEW OF DETENTION

Section 701 **Regulations for Administrative Review**

(A) The Attorney General shall prescribe regulations for administrative review of detention in accordance with this Subchapter.

Section 702 **Period of Review**

(A) An administrative review of detention shall be completed within 180 days after issuance of an Order of Detention under Section 507 of Subchapter V of this Act, and every 180 days thereafter, until such time as the detainee may be released.

Section 703 **Administrative Review Panel**

(A) An administrative review under this Subchapter shall be conducted by a panel composed of no fewer than # persons, including [professions].

Section 704 **Criterion of Administrative Review**

(A) The Administrative Review Panel shall evaluate whether the detained individual would pose a significant risk of engaging in catastrophic armed attack against the United States, as defined in this Act, if released.

(1) Such evaluation shall take into account the potential for reduction of such risk through imposition of conditions of release pursuant to Section 802 of Subchapter VIII of this Act.

Section 705 **Administrative Review Procedures**

(A) In conducting a review under this Subchapter, the Administrative Review Panel shall:

(1) examine the materials designated in Section 706 of this Subchapter; and

(2) conduct an Administrative Review Hearing in accordance with Section 707 of this Subchapter.

Section 706 **Materials for Administrative Review**

(A) In a reasonable period of time prior to an Administrative Review Hearing, the members of the Administrative Review Panel shall be provided with access to:

(1) the records of all previous judicial and administrative proceedings in the case;
(2) all agency memoranda, reports, or other documents prepared for the administrative review;
(3) material submitted by or on behalf of the detained individual; and
(4) other materials designated by regulation.

(B) Counsel for the detained individual shall be provided with access to the materials specified in subsection (A) of this Section, and to any other materials provided to the administrative review panel relative to the detained individual, on the same date as such access is provided to the members of the administrative review panel.

(C) On that same date, the detained individual shall be provided with access to the materials made available to counsel under subsection (B) of this Section, subject to subsection (1) of this paragraph.
(1) The United States may file a motion with the court for the deletion, redaction, or substitution of specified classified information from such materials in accordance with the provisions of Section 404 of Subchapter IV of this Act.

Section 707 **Administrative Review Hearing**

(A) A detained individual shall have the right to be present at an Administrative Review Hearing at which his detention is reviewed, subject to subsection (1) of this paragraph.
(1) The United States may file a motion with the court, in accordance with Section 404 of Subchapter IV of this Act, requesting that the court order a closed Administrative Review Hearing session to protect specified classified information to be presented at that session.

(B) A detained individual shall have the opportunity to address the Administrative Review Panel at an Administrative Review Hearing at which his detention is reviewed.

Section 708 **Administrative Review Panel's Recommendation and Report to the Attorney General**

(A) Within # days from the date of the Administrative Review Hearing, the Administrative Review Panel shall submit to the Attorney General:
(1) a report providing an analysis and evaluation of whether the detained individual would pose a significant risk of engaging in catastrophic armed attack against the United States, as defined in this Act, if released.
(a) Such report shall include an evaluation of the potential for reduction of such risk through imposition of conditions of release pursuant to Section 802 of Subchapter VIII of this Act.

(b) The report shall accurately reflect points of agreement and disagreement among the panel members.

(2) a recommendation for the release or continued detention of the detained individual; and

(3) if release is recommended, a set of recommended conditions of release pursuant to Section 802 of Subsection VIII of this Act.

(B) A copy of such report and recommendations shall be provided to counsel for the detained individual on the same day as it is submitted to the Attorney General.

(C) A copy of such report and recommendations shall be provided to the detained individual no more than # days after they are provided to the Attorney General, subject to subsection (1) of this paragraph.

(1) The United States may file a motion for the deletion, redaction, or substitution of specified classified information from the materials to be provided to the detained individual, in accordance with Section 404 of Subchapter IV of this Act.

Section 709 **Filing of Notice of Continued Detention or Motion for Release by the Attorney General**

(A) Within # days from the date of the Administrative Review Hearing, the Attorney General shall file with the court:

(1) a Notice of Continued Detention; or

(2) a Motion for Release of the detained individual, which shall include a set of recommended conditions of release.

(a) The Attorney General shall append to such notice or motion the report and recommendations of the Administrative Review Panel, the record of the Administrative Review Hearing, and the materials provided to the panel pursuant to Section 706 of this Subchapter.

(B) Such Notice or Motion, and all accompanying materials filed with the court, shall be provided on that same day to counsel for the detained individual.

(C) A copy of such Notice or Motion, and all accompanying materials filed with the court, shall be provided to the detained individual no more than # days after they are filed with the court, subject to subsection (1) of this paragraph.

(1) The United States may file a motion for the deletion, redaction, or substitution of specified classified information from the copy of the Notice or Motion and accompanying materials to be provided to the detained individual, in accordance with Section 404 of Subchapter IV of this Act.

Section 710 **Review by the Court of Notice of Continued Detention**

(A) Within # days of receipt of a Notice of Continued Detention under Section 709 of this Subchapter, the court shall:

(1) affirm the Notice of Continued Detention; or

(2) on the motion of the detained individual or of the United States, or on its own motion, hold a hearing to determine whether detention should be continued, and
  (a) affirm the Notice of Continued Detention; or
  (b) issue an Order for Release of the detained individual in accordance with Section 712 of this Subchapter.

(B) The court shall affirm a Notice of Continued Detention under this Section if it finds, by a preponderance of the evidence, that the detained individual would pose a significant risk of engaging in catastrophic armed attack against the United States, as defined in this Act, if released.
  (1) The court, in making a determination under this paragraph, shall take into account the potential for reduction of such risk through imposition of conditions of release pursuant to Section 802 of Subchapter VIII of this Act.

Section 711 **Review by the Court of Motion for Release**

(A) Within # days of receipt of a Motion for Release under Section 709 of this Subchapter, the court shall:
  (1) issue an Order for Release of the detained individual, in accordance with Section 712 of this Subchapter; or
  (2) on the motion of the detained individual or of United States, or on its own motion, hold a hearing to determine whether the detainee should be released, and
    (a) issue an Order for Release of the individual in accordance with Section 712 of this Subchapter; or
    (b) order the continued detention of the individual.

(B) The Court shall grant a Motion for Release of the detained individual unless it finds, by a preponderance of the evidence, that the detained individual would pose a significant risk of engaging in catastrophic armed attack against the United States, as defined in this Act, if released.
  (1) The court, in making a determination under this paragraph, shall take into account the potential for reduction of such risk through imposition of conditions of release pursuant to Section 802 of Subchapter VIII of this Act.

Section 712 **Order for Release**

(A) An Order for Release of an individual detained under this Act shall specify:
  (1) the date on which the named individual shall be released;
  (2) the location of release, in accordance with Section 801 of Subchapter VIII of this Act; and
  (3) the conditions of release, in accordance with Section 802 of Subchapter VIII of this Act.

SUBCHAPTER VIII. RELEASE

Section 801 **Location of Release**

(A) An Order of Release issued under this Act may provide for the release of the detained individual 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.

Section 802 **Conditions of Release**

(A) Conditions of release may include requirements that the released individual:
- (1) report periodically, in person, to a designated supervising officer;
- (2) provide his residential address and workplace address, and promptly report any planned change of residential address or of workplace to such supervising officer;
- (3) permit visits to his home or workplace by such supervising officer or other authorized person;
- (4) permit the search of his person, or of any building, vehicle, or other area under his control by such supervising officer or other authorized person;
- (5) not leave specified geographic limits without the written permission of such supervising officer;
- (6) reside in specified housing or within a specified location or area;
- (7) remain at home during nonworking hours;
- (8) permit monitoring of his location by telephone or electronic signaling devices;
- (9) provide specified information, including financial information, to such supervising officer;
- (10) provide a DNA sample;
- (11) comply with all provisions of federal and relevant state criminal laws;
- (12) not associate with any person who is violating any law or who has a criminal record without the written permission of the supervising officer;
- (13) not possess a firearm, ammunition, or other dangerous weapon, substance or device;
- (14) participate in an employment training or assistance program;
- (15) receive mental health treatment or counseling; or
- (16) comply with other conditions as required for the national security of the United States.

(B) The Attorney General shall prescribe regulations under this Section for the implementation of conditions of release and the secure social integration of released individuals**.**

Section 803 **Protection Program**

(A) The Attorney General shall make provision for the protection of a released individual, or of persons associated with a detained or released individual, if such protection is necessitated by the cooperation or potential cooperation of the detained or released individual with the U.S. federal government or a state government or for another reason associated with the detention or release of the individual.

Section 804 **Modification of Conditions of Release**

(A) On motion of the United States or of the released individual, or on its own motion, the court may modify or terminate the conditions of release specified in an Order for Release.

(1) In ruling on the modification or termination of conditions of release under this Section, the court shall employ the standard set out in Section 711(B)(1) of Subchapter VII of this Act.

Section 805 **Violation of Conditions of Release**

(A) The supervising officer designated under Section 802 of this Subchapter shall notify the Attorney General and the court of any failure of the released individual to comply with conditions of release ordered pursuant to Section 802 of this Subchapter.

(B) Upon such notice, or upon other probable cause to believe that the person has failed to comply with the ordered conditions of release, the released individual may be arrested.

(C) Within one day following such arrest, the Attorney General shall file a motion with the court for the modification or revocation of the release order.

(D) The court shall hold a hearing on any motion under this Section.

(E) If the court finds by a preponderance of the evidence that the released individual has violated one or more conditions of release, the court may:

(1) modify the conditions of release as appropriate; or

(2) revoke the Order for Release.

(a) In ruling on the modification of conditions of release or revocation of a release order under this Section, the court shall employ the standard set out in Section 711(B)(1) of Subchapter VII of this Act.

Section 806 **Conditions of Release of a Detainee Released to a Foreign Country**

(A) The United States shall cooperate with the relevant foreign government to facilitate the implementation of appropriate conditions of release, social integration, and appropriate protection, if required, for a detainee released to a foreign country.

SUBCHAPTER IX. REPORTING

Section 901 **Reports to Congress**

(A) The Attorney General shall deliver to the appropriate committees of Congress reports concerning the operation and effectiveness of this Act and

including suggested amendments to this Act. For the first five years this Act is in effect, such a report shall be delivered each year. Thereafter, such reports shall be delivered as necessary.