

## DETENTION AFTER THE AUMF

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On his second full day in office, President Obama issued an executive order expressing both his desire and his plan to close the detention facility at the U.S. naval base at Guantánamo Bay, Cuba.<sup>1</sup> Well over five years later, Guantánamo remains open—with a population that has slowly ebbed to 154 noncitizens<sup>2</sup>—“a continuing symbol not just of one of the United States’ more controversial post-September 11 counterterrorism initiatives, but of one of the Obama Administration’s more disheartening policy failures.”<sup>3</sup>

Closing Guantánamo has proven difficult for a host of reasons. For starters, returning those detainees who have been cleared for release to their home countries has been far more difficult than the Obama Administration initially anticipated, due to a combination of (1) diplomatic resistance on the part of those countries to which the detainees would be sent;<sup>4</sup> and (2) onerous restrictions on detainee transfers imposed by Congress in a series of appropriations bills beginning in 2011.<sup>5</sup> Even though the National Defense Authorization Act for Fiscal Year 2014 (NDAA) largely relaxed the foreign transfer restrictions,<sup>6</sup> that development has increased the pace of transfers out of Guantánamo only marginally<sup>7</sup>—and, as significantly, did

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1. Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities, Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009).

2. See Press Release, U.S. Dep’t of Def., Detainee Transfer Announced (Mar. 13, 2014), available at <http://www.defense.gov/releases/release.aspx?releaseid=16578>; see also *The Guantánamo Docket*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo> (last updated Dec. 31, 2013).

3. Stephen Vladeck, *How To Get Out of Gitmo—Now*, MSNBC.COM (Jan. 22, 2014, 4:43 PM), <http://www.msnbc.com/msnbc/how-get-out-gitmo-now>.

4. Cf. Editorial, *A Glimmer of Sense on Guantánamo*, N.Y. TIMES, Nov. 26, 2013, at A24.

5. See generally Recent Legislation, *National Defense Authorization Act for Fiscal Year 2013*, Pub. L. No. 112-239, § 1028, 126 Stat. 1632, 1914–17 (codified at 10 U.S.C. § 801 note (2012)), 127 HARV. L. REV. 835, 836 (2013) (summarizing the evolution of the detainee transfer restrictions).

6. See National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1035, 127 Stat. 672, 851–52 (2013).

7. At the time of publication, only nine detainees have been transferred since the NDAA was adopted. See *The Guantánamo Docket*, *supra* note 2.

not affect the continuing ban on transfers of detainees *into* the United States.<sup>8</sup>

The courts have also complicated matters. In different decisions, the D.C. Circuit has separately refused to (1) equate a right to habeas relief with a right to outright release from detention;<sup>9</sup> or (2) interpose any judicial safeguards on potentially unlawful transfers *out* of Guantánamo.<sup>10</sup> Militating somewhat in the other direction, the D.C. Circuit's rulings thus far with respect to the Guantánamo military commissions have dramatically *reduced* the number of prisoners whose cases can be resolved through *those* proceedings. The reduction in potential cases is illustrated by the court's decision in *Hamdan v. United States (Hamdan II)*, which held that the commissions cannot try offenses committed prior to the enactment of the Military Commissions Act of 2006 if they were not recognized as international war crimes at the time of the underlying conduct.<sup>11</sup> If that holding is affirmed,<sup>12</sup> it will create an additional subset of detainees with uncertain fates.<sup>13</sup>

But inasmuch as the “cleared-for-transfer” and “slated-for-trial” detainees pose difficult questions for the U.S. government going forward, the central obstacle to closing Guantánamo has been a third, core group of detainees—forty-five,<sup>14</sup> as of this writing—whom the government has designated as too dangerous to be released, and yet in each of whose cases an array of evidentiary or substantive roadblocks preclude a criminal trial, whether before a civilian court or a military commission.<sup>15</sup> So long as this group exists, closing Guantánamo was never going to be synonymous with *ending* military detention; even if other detainees could be sent overseas or

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8. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1034, 127 Stat. at 851.

9. See *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), *vacated and remanded per curiam*, 559 U.S. 131 (2010), *reinstated as modified per curiam*, 605 F.3d 1046 (D.C. Cir. 2010).

10. See *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009).

11. See, e.g., *Hamdan v. United States (Hamdan II)*, 696 F.3d 1238 (D.C. Cir. 2012).

12. On September 30, 2013, the D.C. Circuit, sitting en banc, heard oral argument on whether to revisit *Hamdan II* in *Al-Bahlul v. United States*, No. 11-1324, 2013 WL 297726 (D.C. Cir. Jan. 25, 2013), *vacated per curiam*, No. 11-1324, slip op. at 1–2 (D.C. Cir. Apr. 25, 2013) (providing the briefing and oral argument schedule for rehearing en banc). Its decision remained pending at the time this Article went to print.

13. See Jennifer Daskal, *Hamdan v. United States: A Death Knell for Military Commissions?*, 11 J. INT'L CRIM. JUST. 875, 895–98 (2013).

14. The original group identified by the task force that President Obama established to implement his executive order included forty-eight detainees. See Charlie Savage, *No Terror Evidence Against Some Detainees*, N.Y. TIMES, May 29, 2010, at A15. Two have since died. See Carol Rosenberg, *FOIA Suit Reveals Guantánamo's "Indefinite" Detainees*, MIAMI HERALD (June 17, 2013), <http://www.miamiherald.com/2013/06/17/3456267/foia-suit-reveals-guantanamos.html>. A third, Mahmoud Abd al-Aziz al-Mujahid, was recently recommended for release by a Department of Defense Periodic Review Board. See Julie Tate, *Panel: Yemeni Detainee Should Be Transferred Out of Guantanamo*, WASH. POST (Jan. 9, 2014), [http://www.washingtonpost.com/world/national-security/panel-yemeni-detainee-should-be-transferred-out-of-guantanamo/2014/01/09/ca5f81fe-7979-11e3-b1c5-739e63e9c9a7\\_story.html](http://www.washingtonpost.com/world/national-security/panel-yemeni-detainee-should-be-transferred-out-of-guantanamo/2014/01/09/ca5f81fe-7979-11e3-b1c5-739e63e9c9a7_story.html).

15. See GUANTANAMO REVIEW TASK FORCE, FINAL REPORT 22 (2010), available at <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>.

tried in the United States, there would still be the “unreleasable” forty-five detainees.<sup>16</sup>

Although it may not be obvious, it has been clear for some time that this group of detainees has been the elephant in the room in the debate over closing Guantánamo. What has been less clear, but is no less true, is that it is increasingly playing a role in another, larger, conversation: the growing legal and policy headaches caused by the increasingly outdated September 2001 Authorization for the Use of Military Force<sup>17</sup> (AUMF).

The AUMF, enacted in the immediate aftermath of the attacks of September 11, 2001, has increasingly been invoked in recent years as justification for uses of force against groups with no connection to the September 11 attacks—often with little transparency from the U.S. government as to who these groups are, or how they are connected to al Qaeda or the Taliban.<sup>18</sup> As for the *original* targets of force under the AUMF, President Obama has himself emphasized the decimation of al Qaeda’s “core,”<sup>19</sup> and the impending withdrawal of U.S. combat troops from Afghanistan—perhaps as early as the end of 2014—underscores the extent to which the conflict Congress authorized over twelve years ago is increasingly reaching its “tipping point.”<sup>20</sup>

Thus, although there are a number of competing proposals setting forth the legal paradigm that the United States should adopt with respect to uses of force against emerging terrorist threats *after* the AUMF,<sup>21</sup> the case for *preserving* the AUMF in its current form has little to do with continuing uses of force against al Qaeda and the Taliban, and everything to do with uses of force against *other* groups (arguably beyond the AUMF’s purview)—and with preserving detention authority for the current Guantánamo detainees.<sup>22</sup> Thus, inasmuch as these forty-five detainees have been the tail that has wagged the Guantánamo debate, they are also increasingly becoming the tail wagging the AUMF debate, as well.

In this Article, I argue that a legal and political solution for these forty-five detainees—and, therefore, a political solution for closing Guantánamo

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16. Indeed, that number may be even higher once the pending military commission appeals are resolved, since those cases may result in additional detainees whom the government previously *thought* it could try before a military commission.

17. Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)).

18. See generally Jennifer Daskal & Stephen I. Vladeck, *After the AUMF*, 5 HARV. NAT’L SECURITY J. 115 (2014).

19. President Barack Obama, Address at the National Defense University (May 23, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

20. Jeh Charles Johnson, Gen. Counsel, Dep’t of Defense, Speech at Oxford Union: The Conflict Against Al Qaeda and Its Affiliates: How Will It End? (Nov. 30, 2012), *available at* <http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/>.

21. See Robert M. Chesney, *Beyond the Battlefield, Beyond al Qaeda: The Destabilizing Legal Architecture of Counterterrorism*, 112 MICH. L. REV. 163, 212–24 (2013); see also Daskal & Vladeck, *supra* note 18.

22. See generally Gregory D. Johnsen, *60 Words and a War Without End: The Untold Story of the Most Dangerous Sentence in U.S. History*, BUZZFEED (Jan. 16, 2014, 11:52 PM), <http://www.buzzfeed.com/gregorydjohnsen/60-words-and-a-war-without-end-the-untold-story-of-the-most>.

and repealing the AUMF—is at least descriptively plausible. Indeed, as Part I explains, statutory authority could be modeled on (or take the form of a modest amendment to) section 412 of the USA PATRIOT Act of 2001,<sup>23</sup> which authorizes short-term detention of noncitizen<sup>24</sup> terrorism suspects. Although it has never been utilized, section 412 already provides a mechanism for the very detention that the government arguably seeks with regard to these men, along with robust procedural safeguards to ensure that they are only held for as long as they continue to pose a threat to the United States—as determined not by the executive branch, but by a federal judge.<sup>25</sup> Moreover, although section 412 *expressly* contemplates only seven days of noncriminal detention, Part I demonstrates that the statute clearly envisions a small class of cases in which, for security reasons, longer-term detention is justified.<sup>26</sup>

If one can argue that the Guantánamo cases can fall within the scope of the longer-term detention authority provided by section 412, then the far harder question becomes whether such an application of section 412 (or a comparable statute) would be constitutional. Part II turns to this question, assessing it against the backdrop of the U.S. Supreme Court’s jurisprudence regarding due process constraints on civil commitment. As Part II explains, the government must be required to make a series of showings concerning both the dangerousness of the detainee and the unavailability of alternative dispositions (on the periodic basis required by section 412). But so long as the government can substantiate these determinations, and so long as due process constraints (or the statute itself) limit the scope of such authority to these “legacy” cases, it is likely that such detention of a small group of noncitizens would be upheld by the Supreme Court—even without the AUMF. In short, section 412, or a comparable statute, would provide a compromise framework within which to allow for detention of many—if not most—of the forty-five detainees, not until the “cessation of hostilities,” but for as long as they continue to pose a threat to the United States. At the same time, the adoption of a solution for these cases should also clear the way for meaningful resolution of both the larger Guantánamo and AUMF debates.

To be sure, such an argument is unlikely to mollify any constituency. Those who have been among the most vocal critics of Guantánamo would be the last to endorse any “solution” that has at its core the continuing noncriminal detention of any group of the detainees—regardless of where or under what circumstances. All the more so if such a solution is perceived as potential authorization for *additional* detention going forward. On the flip side, those who believe that the government *should* have the

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23. Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 412, 115 Stat. 272, 350–52 (codified at 8 U.S.C. § 1226a (2012)).

24. For a host of reasons, noncriminal detention of U.S. citizens raises a far more difficult set of legal questions, at least partly due to the so-called Non-Detention Act, 18 U.S.C. § 4001(a).

25. *See* 8 U.S.C. § 1226a(b).

26. *See id.* § 1226a(a)(6).

power to detain these individuals indefinitely will certainly resist the stricter standards that application of the Due Process Clause will require, or the periodic review that may make it increasingly difficult for the government to *satisfy* such procedural and substantive rules.

But as this Article concludes, when backstopped by the appropriate due process considerations, a narrower detention authority such as section 412, while far from ideal, offers a least-worst solution to an increasingly intractable problem: with regard to new and future cases, the far greater availability of domestic criminal forums for trials of overseas terrorism cases (especially as compared to in the days and weeks after September 11) will make it far more difficult for the government to satisfy the due process concerns that Part II identifies. And with regard to legacy cases, section 412 would only authorize detention of a proper subset of the current Guantánamo detainee population, in civil—rather than military—detention, and with far more regularized judicial, as opposed to administrative, review.

At the same time, such statutory authority would remove the elephant in the room from the AUMF reform conversation, allowing Congress to resolve that issue on its own merits, rather than having to be dragged down by Guantánamo's baggage. Such a blueprint for compromise could thereby provide a better legal framework for the legacy cases, in exchange for repudiating the paradigm under which those cases were able to arise in the first place.

#### I. GUANTÁNAMO, THE AUMF, AND SECTION 412

To introduce the argument at the heart of this Article, Part I begins by surveying the current state of the law regarding the government's authority to detain the noncitizens held at Guantánamo, and explores how section 412 could fit into that framework.

##### A. *Detention Under the AUMF and NDAA*

At the heart of both Guantánamo detention policy and the broader current debate over the scope of the U.S. government's authority to use force against terrorist groups connected to al Qaeda is the AUMF.<sup>27</sup> Enacted one week after September 11, the operative provision of that statute authorizes 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 that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.<sup>28</sup>

The scope of the AUMF as applied to U.S. citizens, or to noncitizens arrested within the territorial United States, remains unclear today, and

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27. Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)).

28. *Id.* § 2(a).

controversially so.<sup>29</sup> But with regard to noncitizens captured outside the territorial United States, the National Defense Authorization Act for Fiscal Year 2012<sup>30</sup> confirmed that such individuals may be detained so long as they “planned, authorized, committed, or aided” the September 11 attacks or harbored those who did, or are

part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.<sup>31</sup>

While there are serious questions concerning the scope and viability of the “substantial support” prong for detention,<sup>32</sup> all of the cases to arise thus far have turned on the membership prong—with the government arguing that the detainee in question was “part of” al Qaeda or the Taliban.<sup>33</sup> And in a series of decisions that have been well documented elsewhere,<sup>34</sup> the D.C. Circuit has largely sided with the government in these cases, holding, among other things, that the government need only demonstrate membership by a preponderance of the evidence,<sup>35</sup> that courts should use “conditional probability analysis” in assessing that evidence,<sup>36</sup> that hearsay is generally admissible,<sup>37</sup> and that vitiation and/or lack of dangerousness are not relevant to the government’s continuing detention authority under the AUMF.<sup>38</sup> Thus, the law of the D.C. Circuit today appears to contemplate continuing authority to detain until the cessation of the hostilities Congress authorized in the AUMF—if not for some “wind-down” period thereafter, as well.<sup>39</sup>

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29. See, e.g., *Hedges v. Obama*, 724 F.3d 170 (2d Cir. 2013), *petition for cert. filed*, 82 U.S.L.W. 3385 (U.S. Dec. 16, 2013) (No. 13-758). See generally Marty Lederman & Steve Vladeck, *The NDAA: The Good, the Bad, and the Laws of War—Part I*, LAWFARE (Dec. 31, 2011, 4:43 PM), <http://www.lawfareblog.com/2011/12/the-ndaa-the-good-the-bad-and-the-laws-of-war-part-i>.

30. Pub. L. No. 112-81, 125 Stat. 1298 (2011).

31. *Id.* § 1021(b)(2), 125 Stat. at 1562.

32. Steve Vladeck, *What Hedges Could Have Said . . .*, LAWFARE (Sept. 18, 2012, 1:38 PM), <http://www.lawfareblog.com/2012/09/what-hedges-could-have-said>.

33. See *id.*

34. See, e.g., Jonathan Hafetz, *Calling the Government To Account: Habeas Corpus in the Aftermath of Boumediene*, 57 WAYNE L. REV. 99 (2011); Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 41 SETON HALL L. REV. 1451 (2011).

35. See *Al-Bihani v. Obama*, 590 F.3d 866, 878 (D.C. Cir. 2010).

36. See *Al-Adahi v. Obama*, 613 F.3d 1102, 1105 (D.C. Cir. 2010).

37. *Al-Bihani*, 590 F.3d at 879.

38. See, e.g., *Salahi v. Obama*, 625 F.3d 745 (D.C. Cir. 2010); *Al-Bihani*, 590 F.3d at 871. Although the petitioners in both cases argued that they were no longer subject to detention, the D.C. Circuit ignored this argument, holding that the only question was whether they were *ever* subject to detention under the AUMF.

39. Cf. *Ludecke v. Watkins*, 335 U.S. 160 (1948) (upholding the detention of German nationals under the Alien Enemy Act of 1798 despite the passage of time since the May 1945 unconditional surrender of the Nazi government, because the termination of war was a political determination unrelated to the cessation of hostilities).

*B. Detention and the AUMF's Looming "Tipping Point"*

At the same time, there appears to be little question that, as current Homeland Security Secretary Jeh Johnson has put it, we are reaching a "tipping point" in the conflict Congress authorized back in 2001.<sup>40</sup> Whatever the permissible scope of the AUMF as applied to affiliates or "associated forces" of al Qaeda and the Taliban, the Taliban has been removed from power; the core of al Qaeda has been decimated; and the United States is on the verge of removing combat troops from Afghanistan. All the while, the United States has largely scaled down its detention operations, with no new detainees sent to Guantánamo since before President Obama came to office; with efforts underway to turn all detention operations in Afghanistan over to that country's authorities; and with virtually each new overseas capture of a terrorism suspect by U.S. authorities, citizen or otherwise, culminating in a civilian trial in a U.S. federal court.<sup>41</sup>

These developments are relevant to the Guantánamo detainees in three respects: first, in its only decision to interpret the AUMF,<sup>42</sup> the Supreme Court tied its reading of the detention authority provided by the statute to the U.S. deployment in Afghanistan—and the state of armed conflict evidenced by such a deployment. As Justice O'Connor explained in her opinion for the plurality in *Hamdi v. Rumsfeld*, "[W]e understand Congress' grant of authority for the use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict."<sup>43</sup> And although "that understanding may unravel" if "the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war," Justice O'Connor invoked the status of U.S. forces in Afghanistan in support of the conclusion that "that is not the situation we face as of this date."<sup>44</sup> In light of this language, it is at least conceivable that, once combat troops are removed from Afghanistan, detainees may be able to relitigate the legality of their continuing detention, and the AUMF may lose at least some of its force.<sup>45</sup>

Second, given the shift in focus for uses of force by the United States from al Qaeda and the Taliban to groups with increasingly less of a connection to Afghanistan or the September 11 attacks, numerous proposals have emerged for a next-generation statutory framework to address what some have called "extra-AUMF" threats.<sup>46</sup> Although these proposals vary in their details, they have the same two propositions at their core: the groups that military force may be needed against today bear increasingly

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40. See Johnson, *supra* note 20.

41. See Daskal & Vladeck, *supra* note 18, at 130–31 & n.52.

42. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

43. *Id.* at 521 (plurality opinion).

44. *Id.*

45. See Stephen I. Vladeck, *Access to Counsel, Res Judicata, and the Future of Habeas at Guantánamo*, 161 U. PA. L. REV. PENNUMBRA 78, 85–87 (2012).

46. See, e.g., ROBERT CHESNEY ET AL., A STATUTORY FRAMEWORK FOR NEXT-GENERATION TERRORIST THREATS 8–11 (2013), available at <http://media.hoover.org/sites/default/files/documents/Statutory-Framework-for-Next-Generation-Terrorist-Threats.pdf>.

little resemblance—and relationship—to those that Congress believed it was authorizing force against back in 2001; and, as such, the AUMF is an increasingly problematic authority on which to base such uses of force. Whether these developments justify an outright repeal of the AUMF, as some have proposed, or rather its replacement with a use-of-force authorization more specifically targeted at these newer threats, there appears to be an emerging consensus that, once combat troops are removed from Afghanistan, the AUMF's days could—and should—be numbered.

Perhaps unsurprisingly, the problem that the AUMF debate has run into is Guantánamo. Whereas the president ostensibly has other sources of authority to use military force to respond to emerging and imminent terrorist threats,<sup>47</sup> there are no other domestic law authorities that would justify continuing long-term military detention without trial. And so discussions of AUMF reform often run headlong into Guantánamo—and the extent to which outright repeal of the AUMF would presumably vitiate any continuing military detention authority over the remaining detainees. Military detention under the laws of war requires war as a necessary antecedent. So long as there is a group of detainees—of any size—whom the government refuses to release or try, there will be enormous pressure on the political branches to leave the AUMF in place.

Third, the decisive shift away from the military detention paradigm since 2006 underscores the extent to which the disposition of the remaining Guantánamo detainees is a legacy problem—requiring only a backward-looking solution, rather than a neutral approach that could apply equally to past and future cases. The harder question is what such a solution might look like.

### C. A Section 412 Solution?

In a slightly different context, Congress has already grappled with this question—and come up with its own resolution. As part of the USA PATRIOT Act of 2001,<sup>48</sup> passed just six weeks after the September 11 attacks, Congress enacted section 412—codified at 8 U.S.C. § 1226a, and titled “Mandatory Detention of Suspected Terrorists, Habeas Corpus, Judicial Review.”<sup>49</sup> That provision authorizes *civil* detention of any noncitizen with the attorney general's certification that the noncitizen meets

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47. Although there is widespread debate over the scope of the president's inherent war powers, few question the existence of at least *some* Article II authority to act unilaterally to defend the nation from imminent attack. *Cf.* The Prize Cases, 67 U.S. (2 Black) 635, 668 (1863) (“If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority.”).

48. Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 412, 115 Stat. 272, 350–52 (codified at 8 U.S.C. § 1226a (2012)).

49. 8 U.S.C. § 1226a.



one of six different criteria for removability,<sup>50</sup> or “is engaged in any other activity that endangers the national security of the United States.”<sup>51</sup> The statute contemplates detention for up to seven days, after which the detainee must be charged with a crime, placed into removal proceedings, or released.<sup>52</sup>

Tellingly, though, section 412 contemplates that noncriminal detention may nevertheless continue if the attorney general pursues removal proceedings, emphasizing that a detainee “whose removal is unlikely in the reasonably foreseeable future, may be detained for additional *periods* of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person.”<sup>53</sup> In other words, and by design, section 412 authorizes potentially long-term civil detention of noncitizen terrorism suspects based upon a specific and individualized showing of dangerousness.<sup>54</sup>

That section 412 anticipates detention longer than seven days is also underscored by the judicial and legislative oversight the statute requires—oversight that would only be relevant in cases in which longer detention was sought.<sup>55</sup> To that end, section 412(b) creates specific procedures for review by habeas corpus of the initial determination that the individual was subject to detention, and of the dangerousness determination contemplated by subsection (a)(6).<sup>56</sup> The statute confers jurisdiction in such cases over the Supreme Court or any justice thereof, any D.C. Circuit judge, and any district court “otherwise having jurisdiction to entertain it.”<sup>57</sup> If filed initially in district court, the statute invests the D.C. Circuit with exclusive appellate jurisdiction<sup>58</sup> and purports to articulate as the rule of decision in all such cases “[t]he law applied by the Supreme Court and the United States Court of Appeals for the District of Columbia Circuit.”<sup>59</sup> Finally, the Attorney General must also provide Congress with reports on the use of this detention authority every six months,<sup>60</sup> which must include the number of

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50. *See id.* § 1226a(a)(3)(A). In particular, section 412 incorporates the ineligibility and removability criteria outlined in 8 U.S.C. §§ 1182(a)(3)(A)(i), (a)(3)(A)(iii), (a)(3)(B), 1227(a)(4)(A)(i), (a)(4)(A)(iii), (a)(4)(B).

51. *Id.* § 1226a(a)(3)(B).

52. *Id.* § 1226a(a)(5).

53. *Id.* § 1226a(a)(6) (emphasis added).

54. For an illuminating discussion of the provision’s origins, see *Al-Marri v. Wright*, 487 F.3d 160, 191 (4th Cir. 2007), *vacated en banc sub nom. Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008), *vacated sub nom. Al-Marri v. Spagone*, 555 U.S. 1220 (2009) (mem.).

55. Habeas petitions typically become moot—prudentially, if not jurisdictionally—upon the release of the detainee. *See, e.g., Gul v. Obama*, 652 F.3d 12, 16, 20 (D.C. Cir. 2011).

56. *See* 8 U.S.C. § 1226a(b)(1).

57. *Id.* § 1226a(b)(2)(A).

58. *Id.* § 1226a(b)(3).

59. *Id.* § 1226a(b)(4).

60. *Id.* § 1226a(a)(7).

noncitizens detained, the grounds for their detention, and the length of the detention, among other details.<sup>61</sup>

To be sure, section 412 appears to assume that long-term detention could only arise as an incident to removal proceedings—in which the government’s goal would ostensibly be the removal of the detainee from the country,<sup>62</sup> and not his continuing, long-term incapacitation.<sup>63</sup> Thus, as Judge Motz has explained, “no provision of the Patriot Act allows for unlimited indefinite detention.”<sup>64</sup> But in so providing, section 412 thereby authorizes *limited* and potentially indefinite detention in a hyperspecific class of cases—those in which a detainee’s removal from the country is not reasonably foreseeable, and in which the government can prove to a federal judge that release of the detainee “will threaten the national security of the United States or the safety of the community or any person.”<sup>65</sup>

Detention under section 412 and detention under the AUMF are thus based on fundamentally different models: military detention under the AUMF is tied to the laws of war, and the idea that *all* combatants can be incapacitated for the duration of hostilities regardless of their individual circumstances—because detention is preferable to more irrevocable forms of military incapacitation. Civil detention under section 412, in contrast, is a melding of two distinct concepts: short-term detention in anticipation of subsequent legal proceedings, and long-term detention of individuals who pose specific and identifiable risk to the safety of themselves or others. It is therefore not surprising that the government has invoked section 412 in *zero* cases to date; the authority it provides is far more modest—and subject to far greater scrutiny—than that which has thus far been available under the AUMF.

## II. CONSTITUTIONAL, PRACTICAL, AND POLITICAL CONSTRAINTS

That section 412 *could* be read to provide statutory authority for the continuing detention of those noncitizens currently held at Guantánamo who continue to pose a threat to U.S. national security raises a host of questions about the constitutional, practical, and political feasibility of such an approach. This Part seeks to address those questions in turn.

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61. Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 412(c), 115 Stat. 272, 352 (codified at 8 U.S.C. § 1226a note).

62. Indeed, section 412 only authorizes long-term detention of “[a]n alien . . . who has not been removed under [8 U.S.C. § 1231(a)(1)(A)], and whose removal is unlikely in the reasonably foreseeable future.” 8 U.S.C. § 1226a(a)(6).

63. With respect to the “unreleasable” Guantánamo detainees, this may be a distinction without a difference; for any number of reasons, it seems quite possible that the government would be unable to effectuate the removal of an individual who has publicly been identified as someone who is too dangerous to be released.

64. *Al-Marri v. Wright*, 487 F.3d 160, 191 (4th Cir. 2007), *vacated en banc sub nom. Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008), *vacated sub nom. Al-Marri v. Spagone*, 555 U.S. 1220 (2009) (mem.).

65. 8 U.S.C. § 1226a(a)(6).

### A. Constitutional Constraints

The most obvious objection to section 412—and one that has been leveled consistently since its enactment in 2001—is that the detention it authorizes would violate the Fifth Amendment’s Due Process Clause.<sup>66</sup> As Professor Sinnar argued in her 2003 *Stanford Law Review* student note,<sup>67</sup> the statute raises series procedural *and* substantive due process concerns, with the certification procedures implicating the former and the detention authority implicating the latter.<sup>68</sup> I completely agree with Professor Sinnar that the statute raises both sets of concerns; the critical point for present purposes is that, as explained below, neither concern would be implicated in cases in which section 412 was applied solely to the forty-five “unreleasable” Guantánamo detainees.

With regard to procedural due process, Professor Sinnar’s basic objection is that the statute fails to provide adequate procedures to protect against wrongful certification.<sup>69</sup> This argument is well taken. In cases in which the Attorney General erroneously certifies a noncitizen under section 412(a)(3), the only remedy the statute appears to contemplate is the habeas corpus review described above.<sup>70</sup> But the current law of the D.C. Circuit (which would govern in such a case)<sup>71</sup> provides that a habeas case generally becomes moot upon a detainee’s release from custody.<sup>72</sup> Thus, for detainees who are released within the seven days provided by the statute (or shortly thereafter), habeas review will presumably be unavailable. To be sure, *Bivens*<sup>73</sup> suits seeking damages after the fact *should* provide the necessary backstop in such cases,<sup>74</sup> but there, again, the D.C. Circuit’s current jurisprudence militates rather decisively against the availability of such relief.<sup>75</sup> And even if courts were inclined to look more favorably upon

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66. U.S. CONST. amend. V.

67. Shirin Sinnar, Note, *Patriotic or Unconstitutional?: The Mandatory Detention of Aliens Under the USA Patriot Act*, 55 STAN. L. REV. 1419 (2003).

68. *Id.* at 1421. Insofar as the detainees in question are noncitizens held outside the United States, the argument could be made that due process constraints are irrelevant, since such detainees are not protected by the Fifth Amendment’s Due Process Clause. *See, e.g.*, *Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C. Cir. 2009), *vacated and remanded per curiam*, 559 U.S. 131 (2010), *reinstated as modified per curiam*, 605 F.3d 1046 (D.C. Cir. 2010). In this Article, however, I assume that the Due Process Clause *does* apply in such cases, because (1) as explained below, section 412 appears to be specifically targeted toward detention *within* the territorial United States, which would arguably bring with it full due process protections; and (2) insofar as the Due Process Clause does *not* apply, the constitutional objections outlined above would be moot.

69. *See* Sinnar, *supra* note 67, at 1429–41.

70. *See* 8 U.S.C. § 1226a(b).

71. *See id.* § 1226a(b)(4).

72. *See* *Gul v. Obama*, 652 F.3d 12, 16 (D.C. Cir. 2011).

73. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). In *Bivens*, the Supreme Court held that, in certain cases, individuals could sue federal officers who violate their constitutional rights for damages directly under the Constitution, even in the absence of a statutory cause of action authorizing such relief. *Id.* at 397.

74. *See, e.g.*, Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. PA. L. REV. 509, 510–11 (2013).

75. *See, e.g.*, *Rasul v. Myers*, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009).

*Bivens* claims in this context, section 412 itself appears to foreclose such relief:

Judicial review of any action or decision relating to this section (including judicial review of the merits of a determination made under subsection (a)(3) or (a)(6) of this section) is available exclusively in habeas corpus proceedings consistent with this subsection. Except as provided in the preceding sentence, no court shall have jurisdiction to review, by habeas corpus petition or otherwise, any such action or decision.<sup>76</sup>

Thus, there *does* appear to be serious procedural due process concerns with section 412 in many—if not most—cases.

That said, it is difficult to understand the argument that a certification under section 412(a)(3) could be erroneous in the case of individuals who are, at the present, lawfully detained under the AUMF. Recall from above that detention under the AUMF is putatively based upon “membership” in al Qaeda or the Taliban.<sup>77</sup> One of the criteria for certification under section 412(a)(3) is that the noncitizen “is a member of a terrorist organization”<sup>78</sup> designated as a “foreign terrorist organization” (FTO) by the secretary of state.<sup>79</sup> Thus, being “part of” al Qaeda or the Taliban (or any other FTO, for that matter) automatically suffices to satisfy one of the grounds for certification under section 412. In other words, so long as a noncitizen is properly subject to detention under the AUMF, they *cannot* be erroneously certified under section 412(a)(3), thereby mooting the otherwise significant procedural due process concerns.

Similar analysis can be undertaken with regard to Professor Sinnar’s substantive due process objections—i.e., that “section 412 violates substantive due process by authorizing government detention of some aliens who pose neither a danger to the community nor a risk of flight.”<sup>80</sup> Again, I share Professor Sinnar’s view that, in many cases, section 412 *could* authorize noncriminal detention of such individuals; indeed, the *short-term* detention section 412 authorizes requires no individualized dangerousness finding whatsoever by the attorney general, and would therefore raise serious substantive due process concerns in cases in which the government could not make out such a showing.<sup>81</sup>

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76. 8 U.S.C. § 1226a(b)(1). And at least under the (controlling) law of the D.C. Circuit, *see id.* § 1226a(b)(4), there is no constitutional problem with a statute that forecloses federal jurisdiction over *Bivens* suits. *See* Al Janko v. Gates, 741 F.3d 136, 145–46 (D.C. Cir. 2014); Al-Zahrani v. Rodriguez, 669 F.3d 315, 319–20 (D.C. Cir. 2012).

77. *See supra* notes 31–33 and accompanying text.

78. *See, e.g.*, 8 U.S.C. § 1226a(3)(A) (authorizing certification of noncitizens who are “described” in § 1182(a)(3)(B)); *id.* § 1182(a)(3)(B)(i)(V) (identifying membership in a “terrorist organization” as a ground for inadmissibility); *id.* § 1182(a)(3)(B)(vi)(I) (defining “terrorist organization” to include organizations “designated under section 1189 of this title”).

79. *See id.* § 1189(a)(1).

80. Sinnar, *supra* note 67, at 1441.

81. The question would then arise whether substantive due process also prohibits certain *short-term* detention, and if so, how much. The Supreme Court has held that it does not violate the *Fourth* Amendment to detain a criminal suspect for up to forty-eight hours before

Recall, however, that the *long-term* detention authorized by section 412 *does* require a showing of dangerousness—i.e., that “release of the alien will threaten the national security of the United States or the safety of the community or any person.”<sup>82</sup> And unlike the attorney general’s certification decision, there is little question that meaningful judicial review of *that* determination is available; section 412’s habeas corpus procedures are designed specifically to provide such review.<sup>83</sup>

The harder question is whether *satisfaction* of the statutory requirement for long-term detention—that the “release of the alien will threaten the national security of the United States or the safety of the community or any person”—also satisfies substantive due process concerns. That question requires some parsing of the Supreme Court’s jurisprudence in this field.

In *United States v. Salerno*,<sup>84</sup> for example, the Court upheld the detention provisions of the Bail Reform Act of 1984,<sup>85</sup> which authorize pretrial detention of criminal defendants when the government showed by clear and convincing evidence that the safety of the community could not otherwise be guaranteed.<sup>86</sup> Writing for a six-to-three majority, Chief Justice Rehnquist held that the Due Process Clause requires that such detention be in furtherance of a “legitimate regulatory goal,”<sup>87</sup> such as community safety, rather than an impermissible punitive purpose, and that it not be “excessive in relation to the regulatory goal Congress sought to achieve.”<sup>88</sup> To be sure, the statute in *Salerno* only authorized detention for a finite period—until trial.<sup>89</sup> But the Court’s analysis did not appear to turn on a specific *duration*, all the more so given the varied lengths of pretrial detention to which criminal defendants could be subjected without violating the Act (or the Constitution).<sup>90</sup>

With these principles in mind, the Court in *Foucha v. Louisiana*<sup>91</sup> invalidated the civil commitment of a criminal defendant who had been found not guilty by reason of insanity, holding that such civil detention could only satisfy due process in cases in which the detainees are *both* mentally ill and dangerous—based upon specific and individualized criteria.<sup>92</sup> As Justice Thomas explained for the Court five years later in *Kansas v. Hendricks*,<sup>93</sup> “A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite

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presenting him before a neutral magistrate. *See* *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991).

82. 8 U.S.C. § 1226a(a)(6).

83. *See id.* § 1226a(b).

84. 481 U.S. 739 (1987).

85. Pub. L. No. 98-473, tit. II, 98 Stat. 1976 (codified as amended at 18 U.S.C. §§ 3062, 3141–3150).

86. *See* 18 U.S.C. § 3142(e).

87. *Salerno*, 481 U.S. at 747.

88. *Id.*

89. *See* 18 U.S.C. § 3142(i)(2).

90. *Salerno*, 481 U.S. at 751.

91. 504 U.S. 71 (1992).

92. *See id.* at 81–83.

93. 521 U.S. 346 (1997).

involuntary commitment. We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of *some additional factor*, such as a ‘mental illness’ or ‘mental abnormality.’”<sup>94</sup> And even then, the Court has “upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections.”<sup>95</sup>

Although *Foucha* and *Hendricks* suggest that the additional factor must be some mental incapacity on the part of the detainee, the Court’s 2001 decision in *Zadvydas v. Davis* at least hinted that unique national security considerations—in addition to dangerousness—might suffice.<sup>96</sup> After explaining why the Due Process Clause precluded continuing detention of removable noncitizens if their removal could not be effectuated (or was not reasonably foreseeable) within six months,<sup>97</sup> Justice Breyer included an express caveat for “terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.”<sup>98</sup> Taking these cases together, then, in the context of noncitizens who are being detained because of their connection to those groups directly responsible for the September 11 attacks, substantive due process may be satisfied upon an individualized showing of dangerousness and some additional limiting factor—perhaps one that underscores the unavailability of alternative means of incapacitation.

So construed, serious constitutional concerns with section 412 remain—even as applied to the Guantánamo detainees. The statute *does* require a dangerousness showing in order to justify long-term detention, but does not in its text contemplate any specific additional factors *beyond* dangerousness (the “specially dangerous” showing to which Justice Thomas referred in *Foucha*) that would provide sufficiently narrow limiting criteria to ameliorate the constitutional objections. On its face, then, the long-term detention authority provided by section 412 would appear to be inconsistent with the Supreme Court’s substantive due process jurisprudence.

But insofar as *Salerno* stressed that such civil detention must not be “excessive in relation to the regulatory goal Congress sought to achieve,” one answer may well be a judge-made rule that the government must also demonstrate the unavailability of any alternative means of disposition. That is to say, the government must demonstrate that the detainee cannot be tried for terrorism-related offenses by a civilian court or military commission and that he cannot be transferred or released without gravely jeopardizing national security.

At first blush, such a “least restrictive means” approach may seem unsatisfying, since the government could presumably find any number of grounds on which to argue that criminal prosecution is not a reasonably

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94. *Id.* at 358 (emphasis added).

95. *Zadvydas v. Davis*, 533 U.S. 678, 690–91 (2001).

96. *Id.*

97. *See id.* at 689.

98. *Id.* at 696.

available alternative. But in that regard, post-AUMF developments may actually militate in the other direction. In the same statute that created section 412, Congress also began expanding the territorial scope of the federal material support statutes—which make it a crime for any individual to provide various forms of assistance to groups they know or should have known to be designated FTOs<sup>99</sup>—to encompass conduct that takes place wholly overseas.<sup>100</sup> It was not until 2004 that the more sweeping material support statute—18 U.S.C. § 2339B—was extended overseas,<sup>101</sup> which is one of the most significant reasons why so few of the Guantánamo detainees, virtually all of whom were picked up based upon pre-2004 conduct, could ever be tried in a U.S. court.<sup>102</sup> From 2004 to the present, however, a wide range of “support” to designated FTOs, provided by anyone anywhere in the world, has sufficed to render that person liable to serious criminal charges within the United States.

Another significant development in this regard was the Supreme Court’s 2010 decision in *Holder v. Humanitarian Law Project*, in which the Court blessed the government’s expansive reading of the potential scope of the material support statutes, upholding them against First and Fifth Amendment challenges.<sup>103</sup> For better or worse, the “extraterritorialization” of these offenses, coupled with the *Humanitarian Law Project* decision, should dramatically increase the percentage of terrorism cases in which criminal prosecution in U.S. civilian courts is at least jurisdictionally possible.<sup>104</sup> Indeed, the fact that no new detainees have been sent to Guantánamo since before President Obama came to office only underscores this point.

To be sure, *how* the government demonstrates that other alternatives are unavailable is something of a sticky wicket. But the key for present purposes is that the burden would necessarily be *on* the government in such cases—to demonstrate both that the detainee continues to pose a serious threat to public safety (a burden that may prove difficult to surmount after as many as twelve years of detention at Guantánamo), and that no alternative avenues for his incapacitation exist through criminal prosecution, transfer to foreign custody, or otherwise. This burden should be easier to satisfy in the Guantánamo legacy cases than in any other instance. In new cases, for example, it would be difficult for the government to demonstrate how it has enough evidence to establish dangerousness, but not enough to bring a criminal prosecution under the material support statute. And in the cases of the other remaining Guantánamo detainees, it would be difficult for the government to

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99. See 18 U.S.C. §§ 2339A–2339B (2012).

100. See *Uniting and Strengthening America By Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. 107-56, § 805(a)(1)(F), 115 Stat. 272, 377 (amending 18 U.S.C. § 2339A(a)).

101. See *Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA)*, Pub. L. No. 108-458, § 6603(d), 118 Stat. 3638, 3763 (amending 18 U.S.C. § 2339B(d)).

102. See GUANTÁNAMO REVIEW TASK FORCE, *supra* note 15, at 22 n.21.

103. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2718–19 (2010).

104. See also Daskal & Vladeck, *supra* note 18, at 135–36.

demonstrate that individuals whom the *government* has cleared for release are nevertheless too dangerous to be released.

In other words, it is entirely *because* of the serious constitutional concerns that would otherwise arise that long-term detention authority under section 412 would be appropriately and strictly circumscribed to only encompass cases of current Guantánamo detainees who are too dangerous to be released, but against whom no criminal charges can be pursued. And even then, that population might be further reduced by the periodic habeas corpus review guaranteed by the same section—since the government would ostensibly have to re-prove its case every six months, as opposed to the one-off review currently required under the AUMF.

### B. Practical and Political Constraints

There is nothing romantic about the solution this Article contemplates. “In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”<sup>105</sup> In a perfect world, there would be no *need* for the government to have to subject any individuals to long-term detention without the full panoply of procedural protections attendant to a criminal trial. And although all three branches of the federal government have long since accepted the validity and legitimacy of such detention as part of the armed conflict Congress authorized against al Qaeda and its affiliates back in 2001, there are obvious reasons to cabin such authority to the unique context in which it has arisen, rather than provide a more general detention authority untethered to members of a specific group who are involved in a specific conflict. Given the winding down of combat operations in Afghanistan, those who oppose such detention as a categorical matter may be content to wait it out, and hope that the authority provided by the AUMF disappears without anything in its stead. Those with such a view will no doubt criticize (or outright dismiss) a solution along the lines sketched out above as far too great a violation of individual liberty to possibly be worth the hypothetical upside—for example, the ability to finally close Guantánamo, and the removal of the Guantánamo question from the larger debate over the future of the AUMF.

Nor are defenders of the status quo likely to find much in this approach worth supporting. This scheme could easily be criticized for greatly increasing the risk that detainees that the government decreed to be dangerous will eventually be released, whether because of the more contextualized focus on current and future dangerousness, the requirement that the underlying basis for detention be revisited every six months, or a combination of the two. And insofar as such release would presumably be *into* the United States, one can only imagine the uproar that would follow even though (1) release would necessarily be conditioned upon a judicial determination that the detainee in question no longer poses a threat to national security; and (2) the detainee would presumably still be subject to removal under U.S. immigration law.

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105. *United States v. Salerno*, 481 U.S. 739, 755 (1987).



There are also a host of practical obstacles that could get in the way of migrating the “unreleasable” Guantánamo detainees to a civil detention regime. For starters, section 412 appears to contemplate that the detention it authorizes will take place *within* the United States,<sup>106</sup> and yet Congress, in the NDAA, has continued to bar the transfer of detainees from Guantánamo *into* the United States.<sup>107</sup> Unless those restrictions could be sidestepped or confronted on constitutional grounds, they would presumably need to be repealed before such a policy could be adopted. And once a new statute is required to effectuate such a scheme, it is hard to believe that Congress would limit itself solely to repealing the transfer restrictions—without revisiting the carefully calibrated procedural and substantive standards it crafted over twelve years ago.

Relatedly, one might also criticize the above proposal on the ground that it would morph section 412 into a very different authority than what Congress sought to provide in 2001. That is, that the long-term detention Congress *actually* meant to authorize through section 412 was not in Guantánamo cases, but was only for cases such as *Zadvydas*, where a noncitizen initially arrested within the United States was detained pending deportation, and could not have his deportation effectuated within six months of his arrest.<sup>108</sup>

These are all genuine concerns, and ones for which there is no completely satisfying rejoinder. All that can be said in reply is that the alternative is the deeply unsatisfying status quo—in which a smaller group of detainees are hindering not only the U.S. government’s ability to close Guantánamo, but also Congress’s ability to have a debate over the future of U.S. counterterrorism policy that is not saddled by the weight of the unreleasable detainees. That is to say, if an unsatisfying civil detention scheme—that can be at least theoretically circumscribed to only encompass the legacy cases—is the price we must pay in order to close Guantánamo and repeal the AUMF, it seems at least possible that a majority of the American people, or, at least, their representatives in Congress, would be willing to foot the bill.

#### CONCLUSION

In one sense, there is a deep, perhaps tragic, irony in the possibility that section 412 could end up playing the role contemplated in this Article. During the habeas litigation surrounding the case of Ali Saleh Kahlah al-Marri, the one noncitizen arrested within the territorial United States who was detained as an enemy combatant (for nearly eight years before pleading guilty to civilian criminal charges), al-Marri routinely invoked section 412

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106. Such a conclusion can be inferred from section 412’s investiture of detention authority in the attorney general, who operates no overseas detention facilities, and in the underlying assumption that removal of the detainee *from* the United States is one of the dispositions the provision contemplates.

107. See National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1034, 127 Stat. 672, 851 (2013).

108. *Zadvydas v. Davis*, 533 U.S. 678, 685–86 (2001).

as evidence that Congress had *not* authorized his potentially indefinite detention. More to the point, that precise argument was at the core of Judge Motz's opinion for the original three-judge Fourth Circuit panel that held that the AUMF did *not* authorize al-Marri's detention—because Congress had provided a far more specific, and far more limited, detention authority in the case of noncitizens detained within the United States.<sup>109</sup> To turn around now and argue that section 412 could be read to provide *precisely* that authority, at least for those Guantánamo detainees who are too dangerous to be released and who are not subject to alternative means of incapacitation, appears to conflate the very distinction on which al-Marri—and the original Fourth Circuit panel in his case—relied.

But the differences in paradigm matter. Unless one is categorically opposed to all detention without trial, there is a lot more nuance in the long-term detention section 412 contemplates than in the detention authorized by the AUMF. Whereas the latter asks only if the detainee is, or even *was*, a member of al Qaeda or the Taliban, and allows such membership to be established through evidence that in some cases has been “gossamer thin,”<sup>110</sup> the former requires far more specific, individualized, heightened, and repetitive showings. The government must show that the detainee (1) meets certain criteria for detention; (2) poses an ongoing threat to public safety; and (3) cannot be incapacitated through other means. Indeed, long-term detention under section 412 simply would not have been available in al-Marri's case; even if the government could satisfy the first and second of these prongs, the availability of an alternative forum (as underscored by his subsequent criminal prosecution) necessarily precluded his potentially indefinite civil detention.

Legal formalities aside, such an approach to detention after the AUMF makes more sense as a normative matter, as well. An extreme measure, such as noncriminal detention, *should* be a last resort—limited to cases in which no alternative exists. And even then, it should only be justified if the government can demonstrate to a neutral magistrate judge that the detainee poses a continuing threat to public safety, even if the same evidence is insufficient to sustain a criminal indictment or produce a conviction—a prospect that is difficult to fathom given the current scope of the material support statutes. Especially when the United States is no longer in a position in which it is routinely capturing terrorism suspects on foreign battlefields (as it was in the weeks and months after the AUMF was enacted), we *should* expect the government to be able to prove on a retail basis that for which the laws of war effectively only require wholesale evidence.

These considerations do not change the fact that a solution grounded in—or even modeled upon—section 412 still raises a panoply of legal, political,

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109. *Al-Marri v. Wright*, 487 F.3d 160, 191 (4th Cir. 2007), *rev'd en banc sub nom. Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008), *vacated sub nom. Al-Marri v. Spagone*, 555 U.S. 1220 (2009) (mem.).

110. *Awad v. Obama*, 646 F. Supp. 2d 20, 27 (D.D.C. 2009), *aff'd*, 608 F.3d 1 (D.C. Cir. 2010).

and practical concerns. To paraphrase Churchill's famous quip about democracy,<sup>111</sup> however, such an approach may be the worst way forward for U.S. counterterrorism policy—except for all of the others.

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111. Sir Winston Churchill, Speech to the House of Commons (Nov. 1947), *reprinted in* THE INTERNATIONAL THESAURUS OF QUOTATIONS § 231(7), at 146 (Rhoda Thomas Tripp ed., 1970) (“Democracy is the worst form of government except all those other forms that have been tried from time to time.”).