IMMIGRATION AND NATIONAL SECURITY LAW: CONVERGING APPROACHES TO STATE POWER, INDIVIDUAL RIGHTS, AND JUDICIAL REVIEW

PONENCIA

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Since the September 11, 2001, terrorist attacks, national security law has exploded as a field of study. The past decade has seen exponential growth in scholarship, course offerings, conferences, and programs focused on U.S. national security policies.[1] At the same time, hot-button issues such as the detention, treatment, and trial of terrorism suspects has attracted the attention of scholars from across the domestic and international spectrum. Much of the literature in this area focuses on the "exceptional" nature of the policies implemented after 9/11, explaining why and how those policies represent a significant, if not radical, break from past behavior and norms.[2]

Some, however, have questioned the separateness of national security law as a discipline. Aziz Huq, for example, argues against "national security exceptionalism," explaining instead that judicial responses to national security emergencies instead more closely resemble transubstantive trends in public law and judicial re-

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[1] *See, e.g.*, Joseph Margulies & Hope Metcalf, *Terrorizing Academia*, 60 J. Legal. Ed. 433, 440-41 (2011) (discussing the trend).

[2] *See Id.* at 440 ("A review of the post-9/11 legal literature reveals a scholarship obsessed with the exceptional."); Judith Resnik, *Detention, The War on Terror, and the Federal Courts*, 110 Colum. L. Rev. 579, 595-96 (2010) (describing expansion of the coverage of "war on terrorism" cases in a leading federal courts casebook).

sponses to non-security emergencies.[3] In a similar vein, Judith Resnik has stressed the continuities between post-9/11 "war on terrorism" jurisprudence and the United States' treatment of criminal defendants, convicted prisoners, and immigrants,[4] while James Forman has emphasized the parallels between the treatment of "enemy combatants" at Guantánamo and that of indigent defendants in the United States.[5]

Scholars also have discussed how the increased emphasis on national security has impacted immigration law and policy since 9/11. Jennifer Chacon, for example, describes how national security rhetoric has distorted the debate around immigration and crime control.[6] Kevin R. Johnson and Bernard Trujillo have explained how national security concerns have come to dominate discussion over comprehensive immigration reform.[7] As these scholars argue, a myopic focus on terrorism has not merely led to increasingly draconian deportation and detention measures; it has also created a gap between the rhetoric of security and the reality of diminished protections for immigrants without any security gains.

This Article pursues similar themes but from a different perspective. The Article examines how concepts that originally developed in the immigration law context have resurfaced in post-9/11 national security jurisprudence and helped shape the United States' approach to the detention and treatment of terrorism suspects. At first blush, the constellation of post-9/11 national security issues may appear distinct from immigration law. Trials by military commission, the imprisonment of enemy combatants, and the targeted killing of terrorism suspects, for example, may appear distinct from the detention and removal of noncitizens under immigration law. The former are subject to military, not civilian, jurisdiction and decisionmaking, implicate the executive's wartime powers, and are justified under law-of-war principles, among other differences.

Yet, as this Article explains, important similarities exist. These linkages illustrate how concepts of rights and membership in the polity inform the United States' response to the treatment of terrorism suspects. They also provide a window into some larger forces shaping the America's response to national security concerns.

Part I will describe several areas of overlap between immigration and national security law. These include the use of narratives that pit the rights of others (whether defined as immigrants or terrorism suspects) against the public safety; the develop-

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[3] Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 Sup. Ct. Rev. 225 (2009).

[4] Resnik, *supra* n. 2, at 577-78.

[5] James Forman, Jr., *Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible*, 33 N.Y.U. Rev. of Law & Soc. Change 331 (2009). For a similar perspective, based on her years of representing capital defendants in Louisiana, see Denny LeBoeuf, *From the Big Easy to the Big Lie*, in *The Guantánamo Lawyers: Inside a Prison outside the Law* (Mark Denbeaux & Jonathan Hafetz, eds. 2010).

[6] Jennifer M. Chacon, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 Conn. L. Rev. 1827 (2007).

[7] Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security after September 11, and the Future of North American Immigration*, 91 Minn. L. Rev. 1369, 1373 (2007).

ment of a two-tiered adjudicatory systems legitimized by the government's classification of the nature of the liberty-deprivation; restrictions on access to the courts and limitations on judicial review; and the use of security as a proxy for other agendas. Part II examines how President Obama's failed attempt to close Guantánamo highlights how U.S. immigration policy and jurisprudence continues to inform and shape the United States' approach the detention and trial of terrorism suspects.

I. The Immigration Law Influence on National Security Policy

After 9/11, U.S. counter-terrorism policy moved in a new direction, away from a law enforcement paradigm and towards a military, law-of-war-based model. Central to this approach were the detention of terrorism suspects as "enemy combatants," the use of military commissions to prosecute terrorist crimes, and, at least initially, the use of harsh interrogation methods that bordered on, and in some instances amounted to, torture.[8] In implementing these policies at Guantánamo and other off-shore prisons, the United States sought to avoid any legal protections under domestic or international law and to deny prisoners access to the courts. Although these policies marked a significant break with the past—part of what the Bush administration termed a "new kind of war"—they bear important similarities to the United States' approach to immigration and the treatment of noncitizens generally.

A. Framing the Debate: Trading Rights for Security

Immigration law rests principally on a dichotomy between citizens and noncitizens, as it regulates the right of noncitizens to enter and remain in the United States. Immigration law, however, has long served as a vehicle for expressions of broader xenophobic sentiments that transcend questions of border regulation. During the late nineteenth century, for example, racist attitudes towards the Chinese helped spark passage of the Chinese Exclusion Act and laid the groundwork for other racially motivated laws that followed.[9] The Supreme Court tied the government's efforts to stem the "vast hordes of Chinese citizens" seeking entry to the United States to the government's power to ensure the country's security and stability.[10] Following the Palmer Raids of 1919-1920, foreigners were portrayed as dangerous to the public safety to justify harsh immigration restrictions and removal policies. The trend continued throughout the Cold War, and was manifested by, for example,

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[8] For an overview of these developments, see Jonathan Hafetz, *Habeas Corpus after 9/11: Confortinh America's New Global Detention* System (New York University Press 2011).

[9] *See* Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 U.C.L.A. L. Rev. 1, 12-15 (1998).

[10] Chacon, *supra*, n. 6, at 1833-34.

the exclusion of noncitizens based on political viewpoints deemed inimical to the country's security.[11] The conflation of immigration control and national security has increased steadily since the mid-1990s, especially with the post-9/11 focus on combatting global terrorism.[12]

In immigration law, the debate is typically framed as a zero-sum contest between security on the one hand, and the rights and welfare of immigrants, on the other. The more concerns about global terrorism permeate that debate, the sharper that line becomes. Fears about terrorism raise the stakes, as public officials, lawmakers, and commentators create and sustain a narrative in which the country's safety depends on restricting the rights of noncitizens both inside and outside America's borders.

A similar narrative has taken root in the post-9/11 national security law context. "War on terrorism" measures such as the detention of "enemy combatants," the use of military commissions, and reliance on harsh interrogation methods to gather intelligence all rely on the assumption that terrorism suspects—or at least noncitizen terrorism suspects—should not be accorded the same protections as other individuals. On one level, these measures may be viewed from a "state of exception" perspective: that mortal threats to the polity create pressures to depart or seek exemptions from ordinary norms. Following 9/11, this theory justified exceptions to established rules, practices, and due process protections embodied by through the adoption of military, law-of-war-based approach to counter-terrorism policy.[13] Yet, various "war on terror" policies—especially those allowing the government to detain terrorism suspects without a federal criminal trial—have impacted noncitizens almost exclusively, even though citizens can pose, and often have posed, an equivalent terrorist threat as noncitizens. Further, these policies are justified not as temporary or shared sacrifices to meet an imminent danger but as necessary and potentially permanent limitations warranted by the inferior legal status of noncitizens, who do not share the same rights as American citizens.

In short, the framing used in prior efforts to restrict immigrants' rights by pitting those rights against the country's security has continually resurfaced in the construction of a post-9/11 national security narrative that depends on curtailing noncitizens' rights. The most significant difference between the immigration and "war on terrorism" narratives is ultimately one of scope: whereas immigration law focuses on the United States, counter-terrorism measures focus both domestically

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[11] *See* Timothy Zick, *Territoriality and the First Amendment: Free Speech at—and beyond—Our Borders*, 85 Notre Dame L. Rev. 1543, 1552-54 (2010) (discussing the ideological exclusion provisions of the McCarren-Walter Act).

[12] *Id.* at 1834; David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War Terrorism* (The New York Press 2003).

[13] *See* Kim Lane Scheppele, *Law in Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. Pa. J. Const. L. 1001 (2004) (discussing the temptation to view the United States' response to 9/11 through a "state of exception" framework).

and externally, providing basis to restrict non-citizens' rights not only in the United States but also at overseas detention centers like Guantánamo.

B. The Development of Two-Tiered Adjudicatory Structures

Another important way "war on terror" cases echo immigration law is in their creation of alternative forms of adjudication that provide significantly fewer legal protections than the criminal process when depriving an individual of his or her liberty. More than a century ago, the Supreme Court held that deportation was "not punishment for a crime" but rather "a method of enforcing the return to his own country of an alien who has not complied with . . . conditions" for his continuing residence in the United States.[14] Defining deportation as a civil, rather than a criminal, offense helped justify denying immigrants facing removal from the country the same constitutional protections afforded those facing conviction for a crime, including the right to a jury trial and the prohibition on ex post facto laws.[15] The detention of noncitizens has been characterized as part of deportation, which avoids triggering the full panoply of constitutional protections, so long as the liberty-deprivation is tied to the immigration removal process. This view of deportation as civil rather than criminal in nature has persisted for more than a century, despite the Supreme Court's acknowledgment that deportation's effects can be extremely harsh, akin to banishment or exile.[16] Thus, while the Court has required that deportation proceedings satisfy procedural due process, those proceedings are significantly less robust than those afforded defendants facing criminal prosecution. Moreover, the characterization of immigration as civil—and thus outside the protections of the criminal justice system—has helped sustain the government's broad and largely unreviewable authority to remove aliens from the country under the so-called plenary power doctrine.[17]

The military detention and trial of suspected terrorists after 9/11 has followed a similar pattern, with the development of alternative adjudicatory mechanisms designed to provide fewer protections than the criminal justice system. The U.S. government has asserted the authority to detain individuals indefinitely without charge based on their classification as "enemy combatants."[18] The Supreme Court

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[14] *Fong Yue Tong v. United States*, 149 U.S. 698, 730 (1893).

[15] See Daniel Kanstroom, *Deportation*, *Social Control, and Punishment: Some Thoughts about Why Hard Laws Make Bad Cases*, 113 Harv. L. Rev. 1889, 1899-1906 (2000).

[16] *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481-82 (2010); *Galvan v. Press*, 347 U.S. 522, 530 (1952) noting that deportation may "deprive a man of all that makes life worth living" quoting *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) internal quotation marks omitted; *Galvan*, 347 U.S. at 530 comparing deportation to banishment or exile.

[17] *See generally, e.g.*, Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 U.C.L.A. L. Rev. 1 (1998).

[18] Although the Obama dropped the label "enemy combatant," it has asserted similar (if more limited) authority to detain individuals indefinitely as "unprivileged enemy belligerents" if they are part

generally endorsed this approach in *Hamdi v. Rumsfeld*,[19] holding that the detention of enemy fighters to prevent their "return to the battlefield" is a fundamental and accepted incident of waging war.[20] Under this form of detention, the prisoner need not be tried but may be held indefinitely without charge. He must however, at least if a U.S. citizen, receive due process. But this process can be provided in properly constituted military tribunal and, even if it takes the form of a federal court hearing, it must take into account the government's national security concerns through, for example, lax restrictions on hearsay and a lower burden of proof than in a criminal proceeding. Although the Court in *Hamdi* cautioned against expanding this paradigm beyond the parameters of a prisoner seized on the battlefield (in Hamdi's case, in Afghanistan), the concept of a global "war on terror"—and, by extension, detention authority that extends more broadly than battlefield captures—has continued to gain acceptance among courts, legislators, and the public.

In theory, both citizens and noncitizens may be detained as "enemy combatants." Hamdi, of course, was a U.S. citizen.[21] In practice, however, the "enemy combatant" detention power has been used almost exclusively against noncitizens, while suspected citizen-terrorists have been prosecuted, if at all, in federal court.[22] President Obama's top counter-terrorism advisor has stated that the administration would not seek to detain U.S. citizens outside the criminal justice system (*Hamdi* notwithstanding).[23] For detainees facing prosecution in a military commission for war crimes, the dichotomy between citizens and noncitizens has long been explicit: President Bush's November 13, 2001 executive order establishing military commissions,[24] and the Military Commissions Acts of 2006 and 2009 that succeeded it, apply expressly to noncitizens only.[25] The commissions were originally

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of or substantially supported al Qaeda, the Taliban, or associated forces. *See* In re Guantánamo Bay Detainee Litigation, Respondents Mem. Regarding The Government's Detention Authority Relative to Detainees Held at Guantánamo Bay, No. 08-442, at 1 (March 13, 2009), available at http://www.scotusblog.com/wp-content/uploads/2009/03/doj-detain-authority-3-13-09.pdf.

[19] 542 U.S. 507 (2004).

[20] *Id.* at 519.

[21] *Id.*; *Padilla v. Hanft*, 423 F.3d 386 (4th Cir. 2005).

[22] Only two American citizens have been detained as "enemy combatants" in the "war on terror": Yaser Hamdi and Jose Padilla. By contrast, several thousand non-citizens have been held as "enemy combatants," excluding those detained in Iraq.

[23] *See* Remarks by John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, at Brennan Center for Justice at NYU School of Law Symposium, Mar. 18, 2011, available at http://www.brennancenter.org/content/resource/remarks_by_john_brennan_at_brennan_center_symposium/.

[24] In 2006, the Supreme Court invalidated the Bush's executive order, finding that the military commissions he created lacked congressional authorization. *See Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). The Court did not, however, reject the creation of new military commissions or commission that again applied only to noncitizens, as the Military Commissions Acts of 2006 and 2009 both do.

[25] Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) ("MCA of 2006"); Military Commissions Act of 2009 (MCA), Pub. L. No. 111-84, 123 Stat. 2190 (2009) ("MCA of 2009"); 10 USC 948a.

created to try terrorism suspects without the protections of the criminal justice system. Although the current commissions now provide more safeguards than prior incarnations, they still do not afford defendants the same protections they would receive in a federal trial.[26]

If a noncitizen is charged with a crime, even a terrorism offense, he is entitled to the same Fifth and Sixth Amendment rights as a citizen facing prosecution.[27] However, since noncitizens may also be detained outside the criminal justice system, these protections are provided at the government's discretion, depending on whether it elects to proceed under a law-of-war framework, at least with respect to the category of cases that framework covers. In short, post-9/11 law-of-war detention and military commission prosecutions context serve a similar function as classification of deportation in the immigration removal context: creating an alternative and less rights-protective forum for adjudicating the rights of noncitizens facing severe deprivations of liberty.

C. Restricting Access to the Courts and the Scope of Judicial Review

Since the late nineteenth century, the political branches have repeatedly tried to restrict federal court review over administrative decisions to deport or exclude noncitizens from the United States. Although courts have generally maintained some form of judicial review, particularly over deportation decisions, that review has focused on preserving procedural rather than substantive rights.[28] Moreover, those procedural protections, grounded in the Due Process Clause, have often been limited in scope and intensity.[29] Both the civil nature of deportation and the government's plenary power over immigration have justified limitations on the rights of noncitizens facing removal from the United States.[30]

Congressional measures during the last two decades focused on "criminal aliens" follow this general pattern. In 1996, for example, the Antiterrorism Effec-

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[26] The commissions, for example, provide fewer safeguards against the use of hearsay evidence. *See* Hafetz, *supra*, n. 8, at 241-42.

[27] *See, e.g.*, *Wong Wing v. United States*, 163 U.S. 228 (1896). Fourth Amendment protections, however, may vary between citizens and noncitizens, at least if the seizure occurs outside the United States. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274-75 (1990).

[28] *See* Kanstroom, *supra* n. 15, at 1903; Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates For Substantive Constitutional Rights*, 92 Colum. L. Rev. 1625 (1992); *see also* Lenni B. Benson, *Back to the Future: Congress Attacks the Right to Judicial Review of Immigration Proceedings*, 29 Conn. L. Rev. 1411 (1997).

[29] For example, in the first case where the Supreme Court held that noncitizens facing deportation were entitled to due process, the Court also held that the deportation hearing in question satisfied due process even though the noncitizen claimed that she received only informal notice of her hearing and did not understand either the language of the proceeding or the nature of the charges against her. See *Yamataya v. Fisher*, 189 U.S. 86, 101-02 (1903). See generally, Chacon, *supra* n. 6, at 1868-69.

[30] See generally Gerald L. Neuman, *Habeas Corpus, Executive Detention, and Alien Removal*, 98 Colum. L. Rev. 961 (1998).

tive Death Penalty Act ("AEDPA")[31] and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA")[32] both purported to deprive federal courts of jurisdiction to review the removal of noncitizens convicted of certain crimes. At the same time, Congress broadened significantly the category of noncitizens who could be removed, including for relatively minor offenses or very old crimes,[33] while eliminating a critical form of discretionary relief from deportation whereby a judge was empowered to grant a waiver of deportation based on individualized consideration of humanitarian concerns, such as the noncitizen's length of time in the United States, family connections, and community ties.[34]

In June 2001, the Supreme Court held that eliminating all judicial review of deportation decisions, including *habeas corpus* review, would raise serious constitutional problems under the Suspension Clause and accordingly construed the 1996 acts not to eliminate *habeas* review.[35] The Court also concluded that the provision eliminating discretionary waivers of deportation did not apply retroactively to noncitizens who had pled guilty to a criminal offense and who would have been eligible for a discretionary waiver of deportation at the time of their plea under the law then in effect.[36] While Congress has continued to limit judicial review over removal decisions through the REAL ID Act, some judicial review remains.[37] This review, however, has done little to alter the increasingly harsh legal consequences imposed on noncitizens due to the criminalization of immigration violations, expansion of removable offenses, and restrictions on discretionary relief. As before, judicial interventions have been directed primarily at ensuring procedural protections rather than addressing broader policies. Last term, for example, the Supreme Court held

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[31] Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 15, 18, 19, 21, 22, 25, 28, 40, 42, 49 U.S.C.).

[32] Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 3, 6, 7, 8, 13, 16, 26, 29, 30, 31, 32, 33, 40, 41, 42, 43, 44, 45, 46, 47, 48 of U.S.C.).

[33] See Chacon, *supra* n. 6, at 1844-45 (discussing expansion of "aggravated felony" category and other changes).

[34] IIRIRA eliminated waivers of deportation pursuant to former section 212(c) of the Immigration and Nationality Act ("INA"), and replaced it with a much narrower form of relief known as "cancellation of removal" under INA section 240A. See IIRIRA § 304(b); 8 U.S.C. § 1129b(a)-(b); *see also* Chacon, *supra* n. 6, at 1845-46 (discussing the changes brought by the 1996 immigration acts). During the five-year period prior to 1996, authority to grant discretionary waivers had been exercised to prevent the deportation of more than 10,000 noncitizens. See *Padilla*, 130 S. Ct. at 1480.

[35] *INS v. St. Cyr*, 533 U.S. 289, 301 (2001).

[36] *Id.* at 326.

[37] *See* Nancy Morawetz, *Back to the Future: Lessons Learned from Litigation over the 1996 Restrictions on Judicial Review*, 51 N.Y.L. Sch. L. Rev. 113, 123-29 (2006-07) (describing how the REAL ID Act both streamlines and curtails judicial review of various issues in deportation cases); Aaron G. Leiderman, Note, *Channeling the Constitution's Most Important Human Right: Judicial Review of Mixed Questions under the Real ID Act*, 106 COLUM. L. REV. 1367, 1373-76 (2006)(describing how the REAL ID Act threatens to restrict judicial review by channeling review in the court of appeals).

in *Padilla v. Kentucky* that Sixth Amendment right to counsel applies to advice given by criminal defense attorneys to noncitizens regarding the immigration consequences from a criminal conviction.[38] Although *Padilla* may help mitigate the impact of laws that impose draconian immigration consequences for often minor criminal convictions, it will not materially affect the overall direction of immigration policy.

Judicial decisions involving detainees in the "war on terror" have followed a similar trajectory, with courts resisting efforts to eliminate judicial review and providing some basic procedural safeguards, but failing to challenge substantive policies limiting the rights of noncitizens in the name of national security. In January 2002, the United States started bringing prisoners to its naval base at Guantánamo Bay, Cuba. The government consistently resisted any effort by the prisoners there to seek *habeas corpus* review of their detention. It argued that, as noncitizens held outside the sovereign territory of the United States, Guantánamo detainees had no right to judicial review of their confinement. Thus, from the beginning, citizenship status, in conjunction with territorial location, served as the basis for denying foreign nationals access to U.S. courts.

In each of its three Guantánamo "enemy combatant" decisions, the Supreme Court has maintained federal *habeas corpus* jurisdiction over the detentions. In *Rasul v. Bush*[39] and *Hamdan v. Rumsfeld*,[40] its first two Guantánamo detainee decisions, the Court upheld *habeas* jurisdiction on statutory grounds; in *Boumediene v. Bush*,[41] the third decision in the trilogy, the Court ruled that Congress' effort to strip the courts of jurisdiction violated the Constitution's Suspension Clause. Since *Boumediene* was decided more than three years ago, district courts have issued sixty *habeas* decisions in the Guantánamo detainee cases and the D.C. Circuit has issued thirteen opinions, addressing an array of issues concerning the legality of detaining noncitizens at Guantánamo.[42]

In general, the Guantánamo detainee *habeas* litigation has yielded some baseline procedural protections for detainees, including the right to a hearing before a federal judge, the right to present evidence in their defense and to contest the government's evidence, and access to counsel.[43] These procedural safeguards, however, have been limited in important respects. The government has been permitted

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[38] *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

[39] 542 U.S. 466 (2004).

[40] 548 U.S. 557 (2006).

[41] 553 U.S. 723 (2008).

[42] *See* Jonathan Hafetz, *Calling the Government to Account:* Habeas Corpus *in the Aftermath of* Boumediene v. Bush, 57 Wayne L. Rev. (forthcoming 2012) (manuscript at 17–18) (on file with the *Columbia Law Review*).

[43] *Id.* at ____ (describing post-*Boumediene habeas* process); Stephen I. Vladeck, *The D.C. Circuit After* Boumediene, 41 Seton Hall L. Rev. 1451 (2011) (same); Baher Azmy, *Executive Detention, Boumediene and the New Common Law of Habeas*, 95 Iowa L. Rev. 445, 460-61 (2010) (same).

to rely extensively, often exclusively, on hearsay; denied detainees access to information; and been held only to a preponderance of the evidence standard, a lower standard than in other non-criminal matters where individuals are deprived of their liberty.[44] Several decisions by the D.C. Circuit, moreover, have taken a particularly narrow view of detainees' *habeas* rights, requiring deference to the government's evidence and advocating an even lower standard of proof than preponderance.[45] Post-*Boumediene habeas* rulings, moreover, have upheld the president's authority to detain noncitizens at Guantánamo indefinitely in military custody, without charge or trial.[46] Notably, courts have refused to confine the president's military detention authority to the battlefield[47], expanding the authority recognized in *Hamdi* to justify a *de facto* system of preventive detention at Guantánamo that allows for detention based on an individual's alleged membership in or association with al Qaeda or associated groups. The past decade of "enemy combatant" jurisprudence at Guantánamo thus resembles the past century of immigration law in its basic outlines: preserving limited access to the courts and due process protections while sustaining the government's broad power over the liberty of noncitizens.

D. Security as Proxy for Other Aims

Security has long been invoked as a rationale for immigration restrictions. Since the mid-1990s, terrorism and migration have been increasingly conflated. President Clinton, for example, exploited the "terrorization of America" by foreigners to justify increased border control.[48] Although prompted by the 1993 Oklahoma City bombings—a terrorist attack committed by American citizens—AEDPA became a vehicle for the passage of various anti-immigrant measures, including provisions facilitating the expedited removal of noncitizens.[49] Following the 9/11 attacks, Con-

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[44] See *Addington v. Texas*, 441 U.S. 418 (1979) (requiring clear and convincing evidence to support civil commitment); *Woodby v. INS*, 385 U.S. 276 (1966) (requiring clear and convincing evidence to support deportation).

[45] See, e.g., *Al-Adahi v. Obama*, 613 F.3d 1102, 1103 (D.C. Cir. 2010); see also *Esmail v. Obama*, No. 10-5282, 2011 WL 1327701, at *3 (D.C. Cir. Apr. 8, 2011) (Silberman, J., concurring) (noting that a judge will not and should not order the release of a Guantánamo detainee if he or she believes it "*somewhat likely* that the petitioner is an al Qaeda adherent or an active supporter") (emphasis added).

[46] See, e.g., *Uthman v. Obama*, 637 F.3d 400, 405 (D.C. Cir. 2011) (evidence of association with other al Qaeda members can itself be probative of al Qaeda membership); *Al-Adahi*, 613 F.3d at 1108 (concluding that circumstantial evidence, such as having stayed at an al Qaeda guesthouse, is "powerful," if not "overwhelming" evidence that an individual is "part of" al Qaeda and thus detainable under the AUMF).

[47] See, e.g., *Salahi v. Obama*, 625 F.3d 745 (D.C. Cir. 2010) (reversing and remanding district court grant of *habeas* corpus to a petitioner seized in Mauritania and who concededly was never on a battlefield or took part in hostilities against U.S. or allied forces during the U.S. armed conflict against al Qaeda).

[48] See President William Jefferson Clinton, Press Conference, July 27, 1993.

[49] See Chacon, *supra* n. 6, at 1852.

gress enacted the USA PATRIOT Act, which contained several provisions targeting noncitizens, including by broadening the grounds for removal based on a person's support for terrorist activity and permitting the indefinite of suspected alien terrorists who could not be removed from the country.[50] The REAL ID Act continued this trend, including by enlarging the definition of "terrorist organization" to sweep in more criminal conduct unrelated to terrorism.[51]

These measures appear to have little actual bearing on national security. Only a tiny fraction of removals each year are based on security grounds—and this number has decreased since 9/11.[52] Despite how much security-based rhetoric drives immigration policy, removal remains a tool used principally for noncitizens who have committed immigration violations or removable criminal offenses.[53] The past two decades of immigration law thus highlights the degree to which national security provides as a proxy for measures that restrict the rights of noncitizens without serving the ends of security.

The post-9/11 treatment of "enemy combatants" illustrates a similar disconnect. After 9/11, for example, the United States brought hundreds of prisoners to Guantánamo for interrogation and continued detention.[54] Early on, military and intelligence officials recognized that many of the prisoners at Guantánamo neither presented a threat to the United States nor had valuable information. "[I] n many cases, we had simply gotten the slowest guys on the battlefield. We literally found the guys who had been shot in the butt," commented one Pentagon official responsible for helping establish the first war crimes tribunals at the naval base.[55]

Bush administration officials justified the detentions by labeling the prisoners the "worst of the worst" and claiming that Guantánamo was vital to America's security.[56] These explanations, however, often masked other reasons for the detentions, including hostility to prosecuting prisoners in federal court, difficulties in returning prisoners to their home countries or repatriating them to third countries,

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[50] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, §§ 376, 411, 115 Stat. 272 (2001) ("USA PATRIOT Act") (expanding definition of "material support for terrorism" to include, for example, actions that involve the use of any "dangerous device" for any purpose other than "mere personal monetary gain"); *Id,* § 412 (authorizing the indefinite detention of suspected alien terrorists under specified circumstances).

[51] REAL ID Act of 2005, Pub. L. No. 109-13, § 103, 119 Stat. 302, 308 (as amended at 8 U.S.C. § 1103).

[52] See Chacon, *supra* n. 6, at 1860.

[53] *Id.* at 1861.

[54] More than 775 prisoners in total were brought to Guantánamo; 171 still remain.

[55] Joseph Margulies, *Guantánamo and the Abuse of Presidential Power* 70 (Simon & Schuster 2006) (quoting Lieutenant Colonel Thomas Berg).

[56] Hafetz , *supra*, n. 8, at 134.

and a desire to appear tough on terrorism. Meanwhile, Guantánamo came under withering criticism both at home and abroad.[57]

Eventually, a political consensus emerged around closing Guantánamo. During the 2008 presidential campaign, candidates from both major parties said Guantánamo should be closed.[58] (President Bush had previously expressed a desire to close the prison if possible).[59] As explained below, the Obama administration's subsequent failure to close Guantánamo highlights the gap between the rhetoric and reality of security. It also provides a window into how themes from immigration law continue to resurface in the public and legal debate over the "war on terrorism."

II. The Failure to Close Guantánamo

Following his inauguration, President Obama issued a directive ordering the closure of the Guantánamo Bay detention facility within one year. In explaining his decision, Obama underscored the importance of upholding constitutional principles and human rights in the fight against terrorism. Moreover, Obama observed, any benefits Guantánamo provided were outweighed by the harms it caused, both to America's security and values. "[T]he existence of Guantánamo likely created more terrorists around the world than it ever detained," he remarked.[60]

More than two years into his administration, Obama's plan to close Guantánamo is in shambles. Since taking office, only sixty-eight prisoners have been transferred from Guantánamo, sixty-seven to their home country or a third country, and one (Ahmed Ghailani) to face criminal prosecution in the United States; 171 prisoners still remain at the base.[61] More importantly, legislation now prevents the president from transferring Guantánamo detainees to the United States and restricts his ability to transfer them to third countries. In light of these developments, Defense Secretary Gates has acknowledged that the prospects for closing Guantánamo are "very, very low."[62] To put it more bluntly, the United States is, as a practical matter, much further from closing the detention center now than when Obama took office.

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[57] See *Id.* at 155 (citing criticisms); Johan Steyn, *Guantánamo Bay: The Legal Black Hole*, FA Mann Lecture, British Institute of International and Comparative Law, Nov. 25, 2003, available at http://www.oslaw.com/itow/source_files/Steyn%20speech.pdf.

[58] Carol Rosenberg, *What to do about Guantánamo vexes both Obama, McCain*, McClatchy (July 13, 2008).

[59] *Bush: I Would Like to Close Guantánamo*, Associated Press (May 8, 2006).

[60] See The White House, *Remarks by the President On National Security*, National Archives, Washington, D.C. (May 21, 2009).

[61] See *The Guantánamo Docket*, N.Y. Times, available at http://projects.nytimes.com/guantanamo?ref=guantanamobaynavalbasecuba (last visited July 14, 2011). In addition, three prisoners at Guantánamo have died since Obama took office. *Id.*

[62] Charley Keyes, *"Gates: Prospects for closing Guantánamo 'very, very low,"* CNN.com (Feb. 17, 2011) *available at* http://articles.cnn.com/2011-02-17/politics/senate.gates.gitmo_1_terrorists-detention-center-military-commissions?_s=PM:POLITICS.

Several factors help explain the unraveling of Obama's plan to close Guantánamo: Obama's own ambivalence about the broader policies underlying Guantánamo, including the indefinite detention of terrorism suspects and use of military commissions; a political backlash that has altered the public perception of Guantánamo and paved the way for legislation preventing the transfer of Guantánamo detainees to the United States; and court decisions narrowly interpreting the judiciary's role in reviewing the legality of and remedying the detentions. As described below, concepts from immigration law help explain each factor.

A. Guantánamo and the Differential Treatment of Noncitizens

Even as Obama vowed to close Guantánamo, he endorsed the two key features underlying the prison: the indefinite detention of terrorism suspects without charge and the prosecution of terrorism suspects in military commissions. In his May 2009 National Archives speech, Obama reiterated the importance of closing Guantánamo and expressed his administration's preference for trying Guantánamo detainees in federal court where possible. But Obama also defended the indefinite detention and military prosecution of Guantánamo detainees under the Constitution, federal statute, and the law of war.[63] Obama, in other words, did not plan to end the Guantánamo system so much as improve it: closing the detention facility but reforming rather than eradicating the legal architecture that supported it. The administration thus provided a more nuanced statement of the president's military detention powers under the AUMF, as informed by the law of war;[64] conducted an initial review of all detainee cases[65] and created a more permanent mechanism for further executive-branch review;[66] and helped secured the passage of new legislation that improved military commissions.[67] Meanwhile, the administration continued to defend aggressively many Guantánamo detentions in the federal court *habeas corpus* litigation.

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[63] President Barack Obama, *Remarks by the President on National Security at the National Archives*, Washington, D.C. (May 21, 2009) *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/.

[64] See Respondents' Mem. Regarding the Scope of the Govt's Detention Authority Relative to Detainees Held at Guantánamo Bay, *In re Guantánamo Bay Detainee Litigation*, Misc. No. 08-442, filed Mar. 13, 2009 (D.D.C.) (changing the status of detainees from "enemy combatants" to "unprivileged enemy belligerents" and requiring that a prisoner's support for al Qaeda, the Taliban, or associated forces, be "substantial" to justify his continued detention).

[65] *Final Report: Guantánamo Review Task Force*, Jan. 22, 2010, *available at* http://www.justice.gov/ag/Guantánamo-review-final-report.pdf.

[66] See Exec. Order No. 13,567, 76 Fed. Reg. 13277 (Mar. 7, 2011) (creating new "Periodic Review Boards" to review the cases of those prisoners approved for continued detention); *see also* Charlie Savage, *Detainee Review Proposal Is Prepared for Obama*, N.Y. TIMES (December 21, 2010), *available at* http://www.nytimes.com/2010/12/22/us/22gitmo.html

[67] MCA of 2009, *supra* n. 25 (amending Military Commissions Act of 2006). The 2009 MCA, for example, provided greater restrictions on the use of hearsay and evidence obtained by coercion. *See* HAFETZ, *supra*, n. 8, at 241-42 (discussing the MCA of 2009).

The president's retention of indefinite detention and military commissions, notwithstanding these reforms, has undermined his plan to close the prison. It maintained the legal structure that made Guantánamo feasible by perpetuating an alternative to the federal criminal prosecution of terrorism suspects. It also left an option to be exercised as political opposition to closing Guantánamo mounted. Had the president not maintained the possibility of indefinite detention or military commissions, it would have been more difficult, for example, for the administration to reverse Attorney General Eric Holder's original decision to prosecute Khalid Sheikh Mohammed and the other 9/11 co-conspirators in federal court.[68] The administration may initially have kept the indefinite detention/military commission option alive because it believed some cases would be too difficult to prosecute due to evidentiary or other legal problems. But it also exercised that option when some cases became too complicated to prosecute in domestic courts as a result of political pressure, even if there were no legal hurdles to obtaining a conviction.

Maintaining the Guantánamo paradigm has also made closure seem symbolic. What difference, commentators on both the Left and Right have asked, does it matter if prisoners continue to be held at Guantánamo rather than on U.S. soil if they are going to be subject to same military, law-of-war based legal framework? Detached from any major shift in policy, closing Guantánamo lost its sense of urgency, even necessity.

Obama's retention of indefinite detention and military commissions illustrates a theme endemic to immigration law: how the development of less rights-protective adjudicatory mechanisms for noncitizens can become normalized. More than a century of immigration law has entrenched the principle that noncitizens may be removed from the country without the same constitutional safeguards that accompany a criminal trial, despite the potentially draconian nature of the liberty deprivation. It has also helped perpetuate the view that noncitizens are less deserving of legal protections as citizens. Guantánamo has similarly witnessed the development of alternative adjudicatory structures for noncitizens that lack important constitutional protections, notwithstanding the extraordinary consequences for the individuals affected. As these structures have become institutionalized at Guantánamo, they have embedded the differential treatment of noncitizens, who, unlike American citizens, need not receive a trial when suspected of terrorist activity. They have also helped prevent the prison's closure by legitimizing another option to criminal prosecution for dealing with noncitizens detained by the United States in the course of counter-terrorism operations.

B. The Failure to Resettle Detainees in the United States

Any feasible plan to close Guantánamo required that the United States government resettle at least some detainees in the United States, partly to obtain the necessary diplomatic buy-in from other countries, especially in Europe, on whom the Unit-

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[68] Charlie Savage, *In Reversal, Military Trials for 9/11 Cases*, N.Y. Times (Apr. 4, 2011) *available at* http://www.nytimes.com/2011/04/05/us/05gitmo.html

ed States was relying to shoulder a large part of the resettlement burden.[69] The most obvious candidates for resettlement in the United States were the Uighurs, members of a Turkic Muslim minority from northwestern China. The U.S. government had long ago conceded it had no basis to detain the Uighurs as "enemy combatants."[70] Although the Uighurs could not be safely returned to China, where they faced imprisonment and other persecution, substantial efforts had been made to resettle them in the United States and integrate them into an existing Uighur community there.

The Obama administration originally planned to bring several Uighurs to the United States as part of its effort to close Guantánamo. But the administration killed the plan at the first sign of protest.[71] It then failed to quell the political backlash, leading to a series of congressional appropriations measures barring the release of any Guantánamo detainee into the United States.[72] The lack of resistance emboldened Congress, which subsequently enacted legislation preventing the president from transferring Guantánamo detainees to the United States for *any* purpose, including for continued detention or criminal prosecution.[73] In the face of this legislation, plan to bring some Guantánamo detainees to a facility in the United States for further law-of-war based confinement under the AUMF fizzled, while efforts to prosecute other Guantánamo detainees in Article III courts were abandoned in favor of military commission prosecutions at Guantánamo.

The backlash to resettling the Uighurs or other Guantánamo detainees in the United States reflects the association between immigrants and terrorism that long pre-dates 9/11. The Uighurs, as the government conceded, presented no national security threat to the United States. Moreover, equitable concerns weighed strongly

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[69] See Justin Blum, *Some Chinese Guantánamo Detainees Likely to Be Released in U.S.*, BLOOMBERG, June 3, 2009 (quoting former State Department legal advisor John Bellinger III that it would be "impossible to get European counties to agree to resettle any detainees unless [the United States] take[s] some"); See also *Proposed Budget Estimates for the Fiscal 2009 War Supplemental: Hearing before the S. Appropriations Comm.*, 111th Cong. (2009) (statement of Robert M. Gates (noting difficulty State Department will face resettling detainees if the United States does not take any detainees itself).

[70] *Qassim v. Bush*, 382 F. Supp. 2d 126, 127-28 (D.D.C. 2005) (noting the CSRT's finding that Uighur detainees could not continue to be held as "enemy combatants").

[71] Jane Mayer, *The Trial: Eric Holder and the Battle over Khalid Sheikh Mohammed*, The New Yorker (Feb. 15, 2010).

[72] See 2009 Supplemental Appropriations Act, Pub. L. No. 111-32, 123 Stat. 1859; Department of Homeland Security Appropriations Act, 2010, Pub .L. No. 111-83, 123 Stat. 2142; National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat. 2190; Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, Pub. L. No. 111-88, 123 Stat. 2904; Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, 123 Stat. 3034; Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, 123 Stat. 3409. See also Anna C. Henning, Cong. Research Serv., R 40754, Guantánamo Detention Center: Legislative Activity in the 111th Congress 2 (2010).

[73] See Ike Skelton National Defense Authorization Act for Fiscal Year 2011, H.R. 6523, 111th Cong. § 1031 (2010).

in their favor: the Uighurs did not come to the United States seeking admission but were instead forcibly brought to Guantánamo and imprisoned there; they were going to be released in the United States only because they could not be safely repatriated to their home country. The Uighurs nevertheless became the focal point for broader sentiments associating migrants with terrorism. They were portrayed as dangerous foreigners whose presence on American soil would jeopardize the country's safety. Indeed, the association between migrants and terrorism has proven so powerful that it has helped drive legislation barring the transfer of any Guantánamo detainee to the United States, even for continued detention. One impulse behind this legislation is the fear that a court, exercising its constitutionally mandated *habeas* jurisdiction under *Boumediene*, might more easily order the release of a prisoner who was unlawfully detained in a U.S. facility (after being transferred from Guantánamo) than if the prisoner were still being held at Guantánamo. Closing Guantánamo was thus portrayed as undermining the United States' ability to exclude foreign nationals in the name of national security by opening the door to their entering the United States—a fear that previously motivated immigration legislation aimed at the exclusion and deportation of noncitizens to protect against terrorism.

C. The Plenary Power Doctrine and Guantánamo Habeas Litigation

Judicial decisions addressing a court's power to order the release of detainees from Guantánamo into the United States similarly reflects the influence of doctrines and concepts rooted in immigration law. In *Kiyemba v. Obama*, the district judge ordered the release of seventeen Uighur detainees from Guantánamo into the United States, under terms to the set by the court, after determining their continued detention was illegal.[74] The exercise of its *habeas* jurisdiction, the district court reasoned, must include the power to remedy unlawful imprisonment by crafting an appropriate release order.[75] The D.C. Circuit reversed. In a divided ruling, the appeals panel held in *Kiyemba v. Obama* that judges could not order a Guantánamo detainee's release into the United States, even if there was no alternative remedy and the detainee would remain confined at Guantánamo as a result.[76]

The D.C. Circuit relied on immigration cases for the proposition that the political branches have plenary power to exclude individuals from the United States.[77] Under *Kiyemba*, the political branches' immigration-based power to exclude trumps a district court's remedial power to grant relief in a Suspension Clause-based *habeas*

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[74] *In re Guantánamo Bay Detainee Litigation*, 581 F. Supp. 2d 33 (D.D.C. 2008).

[75] *Id.* at 42-43.

[76] *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009).

[77] *Kiyemba*, 555 F.3d at 1025-26 citing, *inter alia*, *The Chinese Exclusion Case*, 130 U.S. 581 (1889).

corpus challenge. The D.C. Circuit analogized the Uighurs' plight to that of the petitioner in *Shaughnessy v. United States ex rel. Mezei*, who remained confined at Ellis Island following his exclusion on national security grounds when no other country was willing to accept him.[78] Like Mezei, the appeals court reasoned, Guantánamo detainees have no right to enter the United States, temporarily or otherwise, absent express legislative authorization, even if their exclusion results in their indefinite, potentially permanent, imprisonment. As construed by the D.C. Circuit in *Kiyemba*, the federal government's immigration power sharply curtails, if not potentially negates, the judicial role recognized in *Boumediene*. A judge may be authorized under the Constitution's Suspension Clause to exercise *habeas* review and invalidate a petitioner's confinement, but it cannot override the prerogatives of the political branches by ordering the petitioner into the United States as a form of relief. The concurring opinion in *Kiyemba* resisted this conflation of national security and immigration, explaining that a federal *habeas* judge had the remedial power to order the prisoners into the United States, but that the lower court should first have ascertained whether the government had an alternate basis for detaining the petitioners under immigration law before ordering their release.[79]

The Supreme Court has, to be sure, exhibited some skepticism of the D.C. Circuit's approach. The Court initially granted certiorari in *Kiyemba*, but declined to hear case on merits after the government presented new facts showing that it had found other countries where the petitioners could be relocated.[80] On remand, the D.C. Circuit held that these new facts did not alter its prior ruling, concluding again that the judiciary had no power to order the release of a Guantánamo detainee into the United States under any circumstances, absent express legislative authorization.[81] This time, the Supreme Court denied certiorari. A separate statement signed by four Justices concurring in the denial emphasized the continued possibility of release in a third country.[82] Thus, while the Court may not share the D.C. Circuit's view that a judge cannot order the release of a Guantánamo detainee into the United States under any circumstances, given the political branches' immigration power, it likely views a judge's remedial power as more limited where there is some other country to which the detainee can be transferred and continued detention at Guantánamo is not the only alternative. In any event, the D.C. Circuit's decision

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[78] 345 U.S. 206 (1953).

[79] *Id.* at 1032 (Rogers, J., concurring).

[80] *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (per curium) (vacating the D.C. Circuit's decision and remanding to the appeals court to reconsider its prior ruling in light of these new facts).

[81] *Kiyemba v. Obama*, 605 F.3d 1046 (D.C. Cir. 2010).

[82] *Kiyemba v. Obama*, 131 S. Ct. 1631 (2011) (statement of Breyer, J., joined by Kennedy, Ginsburg, and Sotomayor, J.J., respecting the denial of the petition for certiorari) (noting that the petitioners had previously received offers of resettlement (at least one of which could be renewed); that there was no evidence that the petitioners' acceptance of these resettlement offers would have put them at risk of torture or other mistreatment; and that the government continued to seek other resettlement options). Justice Kagan recused herself due to her prior involvement in the case as Solicitor General.

in *Kiyemba* remains the law, and judges have no authority to order the release of a Guantánamo detainee into the United States even if there is no other remedy.

III. Conclusion

Nearly a decade after 9/11, national security policies like the indefinite detention and military prosecution of terrorism suspects no longer seem aberrational, but have become permanent features of the legal landscape. Part of a "new normal," they have been adopted by two administrations, endorsed by Congress, and largely sanctioned by the courts. In its broad features, the United States' treatment of terrorism suspects shares important similarities its treatment of immigrants, and rests on the acceptance of an alternative adjudicatory framework for adjudicating the rights of noncitizens.

Rather than waning over time, practices associated with the "war on terror" are threatening to expand in new, even radical ways. Recent legislative proposals, for example, would not merely affirm in express terms the presidents' authority to detain noncitizens indefinitely in connection with the armed conflict against al Qaeda, the Taliban, and associated forces, which the AUMF did only by implication.[83] They also would *require* the military detention of noncitizen terrorism suspects, subject to a waiver by the Secretary of Defense that military detention was not in the interests of national security.[84] The proposals would sweep in at least some noncitizens arrested in the United States, threatening an unprecedented extension of domestic military detention authority[85] and erosion of a noncitizen's right to a criminal trial if imprisoned by the government.[86] By contrast, the proposals categorically exclude citizens from mandatory military detention.[87] Such measures not only illustrate how policies underlying Guantánamo are expanding internally as they become institutionalized. They also suggest how counter-terrorism policies that expand the government's detention authority, restrict the rights of noncitizens, and create a two-tiered justice system resemble the United States' longstanding approach to immigrants generally.

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[83] *See* S. 1253, 112th Cong., 1st Sess., § 1031. The proposals provide more limited authority to detain citizens as well as legal permanent residents in the same conflict. *Id.* § 1031(d) (stating that the military detention authority under the statute "does not extend to the detention of citizens or lawful resident aliens of the United States on the basis of conduct taking place within the United States except to the extent permitted by the Constitution of the United States").

[84] *Id.* § 1032(a).

[85] See generally *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (describing the constitutional limits of domestic military jurisdiction).

[86] See *supra* n. 27 and accompanying text.

[87] S. 1253, *supra* n. 83, § 1032(b).