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Preventive Detention: Prisoners, Suspected Terrorists and Permanent Emergency

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Central to the United States government's strategy after the September 11th attacks has been a shift from punishing unlawful conduct to pre-empting possible or potential dangers. This strategy threatens to undermine fundamental principles of both constitutional law and international law which prohibit certain government action based on mere suspicion or perceived threat. Rather, the law normally requires that the government wait until a person or nation has committed or is attempting to commit a criminal act before it may employ force in response.

Internationally, the Bush Administration's new National Security Strategy states that in this period the United States will rely more substantively on pre-emptive strikes against rouge nations that pose dangerous threats.[1] The first test of the doctrine is the United States' war against Iraq. The United Nations Charter, Article 2(4) and 51 prohibits the use of force by one nation against another except in self-defense. Article 51 of the Charter permits self-defense in response to an armed attack by another state.[2] Some scholars and governments argue that the Charter must be read to incorporate customary international law to permit self-defense in response to an imminent threat to attack.

The Administration's doctrine of preventive war undermines the Charter's norms in that such a war is conceived not in response to an attack by another country or even an imminent threat of attack, but in order to pre-empt such a threat from developing in the future. For example, the Administration did not claim that Iraq had attacked the United States or is imminently planning to attack the United States or any other country, but rather that it had the means and predilection to provide weapons of mass destruction to terrorists to attack us. It justifies this doctrine of preventive strike by invoking the emergency situation

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1. *See generally The National Security Strategy of the United States* (September 2002), *available at* www.whitehouse.gov/nsc/nss.pdf. *See also* Rowan Scarborough, *Striking First Can be Defense, Bush Says*, WASH. TIMES, Sept. 21, 2002, at A6.

2. U.N. CHARTER, art. 51.

created by the September 11th attacks, although the doctrine had been articulated and argued by a number of high level Administration officials for many years prior to 2001.

Domestically a centerpiece of the Administration's response to terrorism has been its use of prolonged preventive detention of suspected terrorists without judicial review. Through a myriad of mechanisms, none explicitly authorized by Congress, the Executive has detained people under harsh conditions on the mere suspicion that they may commit a crime, rather than any evidence that they've done so or will do so. These practices threaten to undermine our constitutional liberties.

The dangers inherent in a policy of preventive detention can be analyzed from a number of perspectives. Historians have studied the use of preventive detention in prior periods of war and emergency. The Japanese evacuation and internment during World War II and the Palmer raids in the aftermath of World War I expose the misuse of preventive detention in American history. Other scholars have viewed preventive detention in comparative perspective; the British and Israeli use of administrative (preventative) detention over the past three decades highlights the abuses inherent in the practice. This article analyzes preventative detention by comparing the current Bush Administration post September 11 policy of detaining suspected terrorists, with the widespread, but little reported or analyzed use of preventive detention as a means of control in American prisons. Prison administrators throughout the country have increasingly resorted to preventive detention to place inmates in long-term solitary confinement. This practice of long term administrative or preventative confinement of prisoners under draconian conditions has been fraught with difficulties and due process violations, and can be seen as a harbinger of the current anti-terrorism policy.

Part I of the article examines the preventive detention mechanisms the Bush Administration has utilized in its response to the terrorist threat. Part II examines the dangers of the use of prevention detention, by reviewing its use in American prisons, where over the past several decades, Administrative or preventive detention has become routinized. Part III argues that these "emergency" measures used both in prisons and in society at large threaten to become a permanent fixture, thus contradicting the very notion of "emergency" power.

I. PREVENTIVE DETENTION POST SEPTEMBER 11

In the months immediately following the September 11, 2001 attack, the government detained over 1,200, mostly Muslim, aliens in connection with its ongoing investigation into that attack.[3] Most of these were held for at least several months in jail, usually in solitary confinement, 23 hours a day, virtually incommunicado with the outside world. Some were shifted from prison to prison to avoid their lawyers, family or friends from contacting them.[4] The government refused to release the names of those detained, a policy the Attorney General justified by stating that "[w]hen the United States is at war I will not share valuable intelligence with our enemies."[5] Not one of those detainees arrested immediately after September 11 were charged with any offense related to the September 11 attacks.[6]

Many of the detainees were detained on the flimsiest of evidence. A Yemeni man was arrested after accompanying his American wife to her military base in Kentucky because his wife was wearing a hejab (the head scarf that many Muslim women wear), they were noticed speaking a foreign language—French—and they had in their suitcase box cutters which they had both used in their work.[7] He was held almost two months without any evidence ever being presented against him. His wife, who had

3. Amnesty International, *United States of America Amnesty International's Concerns Regarding Post September 11 Detentions in the USA*, *available at* http://www.aiusa.org/usacrisis/9.11.detentions2.rtf (Mar. 2002) ("By mid-February, 327 people picked up in the post 9.11 sweeps were reported to be still in INS custody"). *Cf.* Reuters, *Hundreds of Arabs Still Detained in U.S. Jails*, *available at* http://www.ccmep.org/hotnews/hundreds031302.html (Mar. 13, 2002) (Arab American Institute Chairman James Zogby believes that 327 detainees are from original detentions just after September 11, but that the real number of detainees as of March was as high as 2,000).

4. *See, e.g.*, Amy Goldstein, *"I Want to Go Home"; Detainee Tony Oulai Awaits End of 4-month Legal Limbo*, WASH. POST., Jan. 26, 2002, at A1. *See generally* Amnesty International, note 3 on conditions of detention.

5. Hanna Rosin, *Groups Find Way to Get Names of INS Detainees; Presentations on Rights Planned in NJ Facilities*, WASH. POST, Jan. 31, 2002, at A16.

6. Laura Parker, Kevin Johnson and Toni Locy, *Secure Often Means Secret*, USA TODAY, May16, 2002, at A1 (noting only one detainee Zaccarias Moussaoui, who had been detained prior to September 11, 2001, has been charged with an offense related to the September 11th attacks).

7. *See* Ali al-Maqtari, Testimony Before the Senate Judiciary Committee, *available at* http://judiciary.senate.gov/te120401F-al-Maqtari.htm (Dec. 4, 2001) (on file with author).

also been detained, accepted an honorable discharge from the Army.[8]

Other similarly harrowing stories of detention based on no evidence have emerged.[9] Indeed six months after September 11, the Justice Department continued to indefinitely detain at least eighty-seven aliens picked up on visa violations who had been given departure orders and simply wanted to be deported.[10] However, the government waited months for the FBI to complete background checks to clear them.[11] Instead of these aliens being accorded the usual presumption of innocence until the government had probable cause that they had committed some crime, they were detained until the government could assert that they were not guilty. Some of these detainees are being held pursuant to the government's "mosaic" theory, which argues that the investigation into international terrorism is "akin to the construction of a mosaic and the involvement of any one suspect cannot be ruled out until the entire picture is understood."[12]

Other clear misuses of preventative detention have been documented. A lawyer representing many of the post September 11 detainees stated that "[w]hen the feds no longer have any justification to keep detainees on immigration issues, they resort to criminal charges to keep them."[13] For example, Shakic Ali Baloch, a Canadian citizen, was held in a maximum security jail without charges or explanation for three and a half months. When his attorney filed a habeas corpus petition, he was immediately charged with the federal offense of illegally reentering the United States.[14]

The government did not rely on the newly minted USA Patriot Act for these detentions,[15] for the Act only provides the Attorney General with authority to detain suspected non-citizen

8. *Id.*

9. Amy Goldstein, *No Evidence in Pilot's Case; West African Still Held as Material Witness in Attack Probe*, WASH. POST, Feb. 2, 2002, at A20.

10. *See* Christopher Drew & Judith Miller, *Though Not Linked to Terrorism, Many Detainees Cannot Go Home*, N.Y. TIMES, Feb. 18, 2002, at A1.

11. *Id.*

12. Goldstein, *supra* note 9.

13. Karim Fahim, *Endgame*, VILLAGE VOICE, Mar. 12, 2002, at 28.

14. LAWYER COMMITTEE FOR HUMAN RIGHTS A YEAR OF LOSS, REEXAMINING CIVIL LIBERTIES SINCE SEPTEMBER 11, at 16 (2002).

15. *The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act*, Pub. L. No. 107-56, 115 Stat. 272, 345 (2000) [hereinafter USA PATRIOT ACT].

terrorists for as long as seven days without being charged with a crime and provides for judicial review. Instead the Administration relied on an extraordinary emergency interim regulation announced by the Attorney General on September 17, 2001 prior to the passage of the Patriot Act, which permits the INS, in times of "emergency or extraordinary circumstances" to detain an alien whom it believes may have violated the law "for a *reasonable* period of time" while it investigates the detainee.[16] Indeed, many detainees were held for many weeks prior to being charged with any violation whatsoever.[17]

The detention of more than a thousand non-citizens for months has been aided by another emergency regulation promulgated by the Attorney General. Ordinarily a person detained on immigration charges receives a hearing before an immigration judge in which the judge decides whether to release the alien on bond.[18] If the judge decides to grant bond then the person is released unless the INS can convince the Board of Immigration Appeals—the appellate review body within the INS—to stay the granting of bond.[19] Pursuant to an interim rule issued by the Department of Justice on October 26, 2001, the INS now obtains an automatic stay of bond pending appeal, which de facto keeps the alien detained for at least another year pending the disposition of the appeal.[20] One District Court has declared that the automatic stay rule violates the Constitution, holding that due process is not satisfied where an individualized custody determination is "effectively a charade."[21] Nonetheless, the INS continues to apply the automatic stay rule and the result has been prolonged periods of detention.[22]

These preventive detentions are contrary to international law as well as the U.S. Constitution. The Working Group on Arbitrary Detention of the United Nations Human Rights Commis-

16. Interim Rule with Request for Comment, 66 Fed. Reg. 48334 (Sept. 17, 2002) (to be codified at 8 C.F.R. § 287) (emphasis added).

17. Amnesty International, *supra* note 3, at 11 ("In 36 out of the 718 cases, the individuals were charged 28 days or more after their arrest.").

18. *See* Executive Office for Immigration Review; Review of Custody Determinations, 66 Fed. Reg. 54,910 (Oct. 31, 2001).

19. *Id.*

20. *Id.*

21. Almonte-Vargas v. Elwood, No. 02-CV-2666, 2002 U.S. Dist., Lexis 12387, at *16 (E.D. Pa. June 28, 2002), *quoted in* LAWYER COMMITTEE FOR HUMAN RIGHTS REPORT, *supra* note 14, at 18.

22. LAWYERS COMMITTEE FOR HUMAN RIGHTS REPORT, *supra* note 14, at 18.

sion is currently reviewing a filing by a U.S. human rights group claiming that these detentions violate the International Covenant on Civil & Political Rights (ICCPR) prohibition against arbitrary detention.[23]

The Administration has also used the Federal material witness statute, to detain aliens who are not charged with a crime for prolonged periods of time. This law is designed to ensure that a witness to a crime will be available to testify at trial. Despite the non-punitive nature of the law, the government has treated aliens detained as "material witnesses" as high security prisoners, holding them in solitary confinement, shackled and strip searched whenever leaving their cells. Such material witnesses are not permitted general visitors, are often unable to make telephone calls, and often pressured into confessing to crimes or making false statements.

For example, Abdallah Higazy, an Egyptian-born student, was arrested pursuant to a material witness statute because the FBI believed he had left a ground to air radio at a hotel near the World Trade Center. Higazy was detained for a month without charges. He was held in solitary confinement and denied telephone access to family and friends. He asked for a lie detector test, hoping it would show he wasn't lying. There was no test. The supposed examiner, an FBI agent, told Higazy over a period of three to four hours that it would be hopeless to try to pass the test without changing his story. "I began hyperventilating, my heart was racing, I had sweaty palms, I could feel my blood pressure going up," Higazy recalls. He made a false confession. Prosecutors thereupon charged him with lying to the FBI about the radio, citing the confession as evidence.[24]

Five days later the case collapsed. A pilot showed up at the hotel looking for the radio he had left in his room.

In another case, Judge Shira Sheindlien dismissed an indictment against a Jordanian student Osama Awadallah.[25] Awadallah, a lawful permanent resident attending school in San Diego was held in solitary confinement at the Metropolitan Correc-

23. Human Rights Clinic, Columbia Law School, *Background Paper for the U.N. Working Group on Arbitrary Retention Concerning the U.S. Detention of Arabs and South Asians Post-September 11*, Apr. 1, 2002.

24. John Riley, *Held Without Charge: Material Witness Law Puts Detainees in Legal Limbo*, NEWSDAY, Sept. 18, 2002.

25. United States v. Awadallah, 202 F. Supp.2d 55 (S.D.N.Y. 2002).

tional Center in New York for 20 days, based solely upon a material witness warrant. The government took no steps to take his testimony by deposition, instead questioning him and eventually accusing him of lying about a brief contact he allegedly had with one of the hijackers. The Court declared that

> Relying on the material witness statute to detain people who are presumed innocent under our Constitution in order to prevent potential crimes is an illegitimate use of the statute. If there is probable cause to believe that an individual has committed a crime or is conspiring to commit a crime, then the government may lawfully arrest that person, but only upon a showing.[26]

The government nonetheless continues to detain an undetermined number of people as material witnesses and another District Court has upheld its use of the statute.[27]

In yet another tactic, the government sought long prison terms for suspected terrorists who are charged with minor offenses. For example, a 21-year-old Egyptian man, Wael Abdel Rahman Kishk, was picked up after September 11, detained in a harsh form of solitary confinement, and eventually convicted in February 2002 of lying to the FBI about his plans to study aviation. The maximum sentence for his crime was 6 months, but the government sought a 5-year sentence for Kishk even though it agreed that there was no allegation or evidence that he was in any way connected to terrorism. Federal District Court Judge Sifton rejected the prosecution's request for what in substance amounted to preventive detention stating, "it will not do to prosecute people for a minor crime . . . and then ask us to punish them based on some suspicion that they may have committed some more serious offense.[28]

The Administration has also used the label "enemy combatant" to justify indefinite preventive detention. Over 600 alien prisoners captured in Afghanistan and elsewhere are being held in Guantanamo without according them rights as POWs under the Geneva Conventions, nor charging them with any crime under U.S. law. A number of the Guantanamo detainees were

26. *Id.* at 78.

27. LAWYER COMMITTEE FOR HUMAN RIGHTS REPORT, *supra* note 14, at 16.

28. William Glaberson, *A Nation Challenged: Trial in Brooklyn; Judge Rejects Long Prison Term for Arab Caught in Terror Sweep*, N.Y. TIMES, Feb. 16, 2002, at A8.

not captured on the battlefield in Afghanistan but came from as far away as Bosnia. Moreover, some had no connection to Al Qaeda or the Taliban, but were innocent civilians erroneously picked up. Nonetheless, the government has asserted that the Courts have no right to review any of these detentions, even to determine whether some of these men are being detained erroneously. Nor has the government accorded them the hearings to which they are entitled under the Geneva Convention Relative to Prisoners of War in order to determine whether they are legitimate POWs. Numerous International Organizations, including the Red Cross and the Inter-Human American Rights Commission have criticized the Bush Administration refusal to accord these prisoners rights under the Geneva Convention.

Two American citizens, Yaser Hamdi and Jose Padilla, are also being held indefinitely as "enemy combatants" in administrative detention in military brigs in the United States. The government refuses to allow these detainees access to attorneys or family. Hamdi, captured in Afghanistan by the Northern Alliance, has been accused of no crime. Moreover the government's affidavit merely claims that Hamdi was affiliated with a Taliban military unit, and received weapons training. As the District Court Judge noted, the government 2-page declaration never claims that Hamdi was "fighting for the Taliban, nor that he was a member of the Taliban."[29] The Fourth Circuit Court of Appeals has held that Hamdi may be detained indefinitely as an "enemy combatant" solely on the basis of the governments 2-page declaration stating that he was captured in Afghanistan.[30]

Jose Padilla's detention is even more troubling. Padilla was arrested in May 2002 at the Chicago airport in connection with an alleged conspiracy to create, build, and explode a radioactive "dirty bomb." Originally detained as a material witness in New York and represented by counsel, he was later transferred to military custody. District Judge Michael Mukasey has held that Padilla may be held indefinitely as an enemy combatant, with only a limited right to challenge the sufficiency of the Government's affidavit justifying his detention.[31]

Although the government bitterly fought this limited right, Judge Mukasey ruled that Padilla's lawyers had to have access to

29. LAWYER COMMITTEE FOR HUMAN RIGHTS REPORT, *supra* note 14, at 36-37.
30. Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003).
31. Padilla v. Bush, 233 F. Supp.2d 564 (S.D.N.Y. 2002).

him for the purpose of challenging the Government's affidavit justifying his detention. The government has appealed Mukasey's decision.

Secretary of Defense Rumsfeld has stated that these "enemy combatants" may remain in detention "for the duration of the conflict," a conflict he defined as ending "when we feel that there are not effective global terrorist networks functioning in the world." The war on terrorism, like the "war on drugs" is permanent, these American citizens and the aliens held in Guantanamo are facing potentially lifetime detention without any significant judicial review. This permanent Administrative detention is justified not as punishment but rather as a preventive; as Rumsfeld stated, "we are not interested in punishing" them, but in "finding out" what they know.[32] Judge Doumar, a veteran jurist appointed by Ronald Reagan who heard Hamdi's case, responded, "How long does it take to question a man? A year? Two years? Ten years? A lifetime? How long?"[33]

At this point only two American citizens are being held as enemy combatants. If, however, the Supreme Court affirms the Executive Branch's power to hold Hamdi and Padilla indefinitely the number may rise. *The Wall Street Journal* and *Los Angeles Times*[34] have reported that Padilla and Hamdi may soon have company: the Administration has broader plans to intern citizens indefinitely in camps or military prisons without charging them with crimes.

The use of indefinite administrative detention against citizens for security purposes represents a profound shift in our constitutional order which generally prohibits detaining people for substantial period without charging them with a crime. Despite the Constitution's proscriptions, the American government has responded to perceived or contrived security threats in the past by detaining or authorizing the detention of disfavored groups: anarchist aliens during the Palmer Raids after WWI, Japanese Americans during WWII, suspected communists during the Cold

32. U.S. Department of Defense, *Press Conference With Secretary of Defense Donald Rumsfeld Following His Meetings With Leaders in Qatar*, June 11, 2002.

33. Nat Henthoff, *George W. Bush's Constitution*, VILLAGE VOICE, Jan. 14, 2003, at 27.

34. Jonathan Turley, *Camps For Citizens: Ashcroft's Hellish Vision*, L.A. TIMES, Aug. 14, 2002, at B11; Jess Bravin, *More Terror Suspects May Sit in Limbo,* WALL ST. J., Aug. 8, 2002, at A4.

War, and now suspected terrorists labeled as "enemy combatants."

Recently, indefinite, prolonged administrative detention has been widely used against another disfavored group with virtually no public scrutiny whatsoever. Tens of thousands of prisoners held in State and Federal prisons have been dumped into long-term, sometimes permanent solitary confinement under draconian and often humiliating conditions. The mostly untold story of these prisoners, who are lawfully imprisoned after having been convicted of a crime, is of course different from the cases of suspected terrorists who are detained without having been convicted or even accused of a crime. Nonetheless, these two stories of preventive or administrative detention raise disturbing parallels, and the U.S. prison context demonstrates the dangers of preventive detention.

II. PREVENTIVE DETENTION IN PRISONS

Indefinite detention without charges and without trial has been practiced in United States prisons for more than a quarter century. In the past decade or so, the practice has been dramatically expanded and institutionalized in the construction of several dozen Super Maximum Security or "supermax" prisons. Prisoners confined in these facilities typically spend years alone for a minimum of twenty-three hours a day in a space about the size of a small bathroom or the parking space for a compact car. Across the nation, thousands of prisoners are being held in these isolated, miserable, subhuman conditions.

Prisoners assigned to supermax prisons are typically said to be in the "administrative detention," not disciplinary confinement. Prison officials state that such prisoners are not being punished for any specific act but are placed in indefinite solitary confinement as a preventive measure.

Just as the Administration now argues for the evisceration of judicial review for suspected terrorists labeled enemy combatants, prison officials have long argued that courts should not review the placement of suspected gang leaders or other supposed troublemakers in solitary confinement. In 1995 prison administrators won a major victory when the United States Supreme Court held that a prisoner could not ordinarily challenge his

transfer to solitary confinement in the courts.[35] Some Federal courts have read that decision to mean that even lengthy administrative detentions are not subject to court challenge.[36] As a consequence, arbitrary lengthy confinement in supermax prisons has skyrocketed in the past decade.

Gangs are to prisons, what terrorist groups are to the society at large. Gang members are routinely sent to virtually permanent solitary confinement; in the late 1990's in Texas if you had a Hispanic surname and came from San Antonio you were automatically placed "administratively" (without due process) in supermax isolation.[37] In many states the only method for an alleged gang member to be released from such "administrative detention" is to snitch on other gang members, thereby placing their owns safety in jeopardy.[38]

In Ohio, for example, prison officials built a new 500-bed supermax prison, OSP, in Youngstown that opened in 1998.[39] Prison officials transferred hundreds of inmates there without even the most minimal due process.[40] In its first four months of operation, more than a hundred prisoners were transferred to OSP without notice or hearing.[41]

A committee of the Ohio legislature later determined that no clear criteria were used for these transfers.[42] Some inmates were sent to OSP even though they had committed no infraction of prison rules, others were sent for minor violations. For example approximately sixty prisoners were transferred to the supermax for offenses that involved nothing more than conspiracy to convey or possess drugs. Several had been transferred to the supermax from minimum security prisons simply on violations involving marijuana. Several prisoners were sent to OSP although they had been acquitted by juries of the claimed offenses that were used to justify their transfer.

Suspected gang leaders or members were transferred to OSP on the basis of virtually no credible evidence. One prisoner was

35. Sandin v. Connor, 515 U.S. 472 (1995).
36. Jones v. Baker, 155 F.3d 810 (6th Cir. 1998).
37. Testimony of Chase Riveland, expert witness for defendants, in *Austin v. Wilkinson*, 189 F. Supp.2d 719 (N.D. Ohio 2002) (on file with author).
38. Koch v. Lewis, 216 F. Supp.2d 994, 998 (D. Ariz. 2001).
39. *Austin*, 189 F. Supp.2d at 723.
40. *Id.* at 726.
41. *Id.* at 731.
42. *Id.* at 727.

transferred to OSP after being hit over the head by another inmate in the chow line and not fighting back, an incident which led prison officials to conclude he had been targeted because he was a gang leader who had to be removed for preventive reasons.[43] A second prisoner was sent to OSP because he, (a) belonged to the Crips in his early teens while living in California; (b) once had a tattoo often associated with the Crips; (c) once wrote a letter using the letter "b" in a fashion sometimes used by Crips members to disrespect rival gangs, (d) and may have been present at a fight between gang members.[44] Neither of these prisoners was ever charged with any rule violation, they were simply administratively transferred without notice or any hearing.

Once at OSP, prisoners faced stark conditions not typically associated with normal prison life. Locked into small cells at least twenty-three hours a day with no fresh air, solid steel metal doors preventing almost all communication, prisoners are shackled and strip searched whenever they leave their cell and have very limited privileges.[45] They have no contact visits, few telephone calls, and no outdoor recreation. Prisoners do not participate in any prison-based work and have no educational programs beyond the GED level. Many prisoners at OSP have not been outdoors in the fresh air for over four years despite U.S. cases and international precedent that prisoners cannot be deprived of outdoor recreation for lengthy periods of time. These administrative detentions were reviewed only once a year by a committee of prison officials, but even when the committee determined a prisoner was ready for release, a higher official who was the same person that had sent them to OSP in the first place often overturned the committee's recommendation. Many prisoners at OSP, like the "enemy combatants" now in military prison, were in effect consigned a harsh, permanent solitary existence.

In response to a class action lawsuit by the prisoners, Federal District Court Judge James Gwin issued a pathbreaking decision holding that the "stark" conditions at OSP constituted an "atypical and significant hardship" amounting to a deprivation of prisoner's liberty.[46] Gwin also held that Ohio officials had trans-

43. *Id.* at 732-33.
44. *Id.* at 735.
45. *Id.* at 724.
46. *Id.*

ferred and retained prisoners at the supermax in violation of due process. He found that prisoners were being sent to OSP for many years with "essentially no evidence" that they had committed any infraction.[47] In addition, the court was "perplexed" by decisions to retain prisoners at OSP for many years, despite their excellent behavior at the supermax. Judge Gwin found that the decisions of the committee that recommended that a prisoner should be released from OSP were "often cursorily denied [by higher prison officials] for reasons the inmate never knew were at issue," and questioned the "adequacy of the justifications" used to retain prisoners at OSP.[48] At the time of trial approximately 200, or almost half of OSP prisoners had been there for more than three years, even though most of those had generally good behavior at OSP.[49] The Court was concerned about the indefinite confinement of prisoners at OSP and ordered that the Department not keep any prisoner (with the exception of someone who had killed or seriously injured someone while incarcerated) "at the OSP indefinitely once he has conformed to incarceration at the OSP by keeping free of major misconduct nor committing any violence for a period of years while at the OSP."[50]

State officials have appealed Gwin's decision to the Sixth Circuit Court of Appeals, and have vowed to take the case to the U.S. Supreme Court. The case has brought together white and black prisoners, Afro-American Muslims and members of White Supremist gangs such as the Aryan Brotherhood who despite their isolation and label as the "worst of the worst" have been able to collectively make decisions about legal tactics and strategy.

The situation at the Ohio supermax prison is not unique. For example, in Arizona a prisoner named Mark Koch sued after being placed in the Arizona supermax because he was a gang member. Prison officials relied on (a) a photograph taken at a prison rodeo event fifteen years earlier that depicts Koch posing with other inmates who were members of the Aryan Brotherhood [AB]; (b) four incident reports noting that Koch was associating with known AB members, and two lists seized from gang

47. *Id.* at 746.
48. *Id.* at 753.
49. *Id.* at 740.
50. Austin v. Wilkinson, July 12, 2002, order at p. 11 (on file with author).

members which purportedly largely (although unclear how largely) contained the names of known AB members. There was no evidence that Koch committed any overt acts of misconduct.[51]

Based on this evidence Koch was placed in the Arizona supermax. The District Court found that life in the supermax "is grim."[52] Koch was housed in a windowless 8 x 10 foot cell where he remained alone 165 out of 168 hours a week. For the three hours a week each prisoner is allowed out of their cells at the supermax, he is placed in restraints and allowed to walk twenty feet down the hall in one direction for an eight-minute shower and ten feet down the hall in the other direction to an empty exercise room. He is not allowed to interact with other prisoners or to participate in any educational, vocational or employment activities.[53]

Koch was essentially placed at the supermax for the rest of his life. Arizona Department of Correction Regulations provide that the only way out of supermax confinement is for an alleged gang member to renounce his membership and to submit to a debriefing process which requires him to provide names of other gang members. Koch refused to do so. However, even if Koch were to debrief he would be in a catch 22. Debriefers are targeted for execution by gang members and therefore, for their own safety, can not be transferred back to general population at a maximum security prison. Rather, a debriefer is retained at a similarly restrictive segregated supermaximum security facility under protective custody. Koch had no way out, and indeed spent 5½ years under these grim conditions until ordered released by a Federal District Court Judge. That order is, however, being appealed by the state to the Ninth Circuit Court of Appeals.

The use of preventive, administrative segregation based on vague standards such as gang membership is inherently suspect. As the court appointed monitor in a lawsuit against the California Department of Corrections for conditions at the Pelican Bay supermax prison reported: "gang membership . . . is inherently impossible to ascertain or discover with precision."[54] For this reason, some courts and commentators would require "docu-

51. *Koch*, 216 F. Supp.2d at 1003-04.
52. *Koch*, 216 F. Supp.2d at 997.
53. *Koch*, 216 F. Supp.2d at 1000.
54. Madrid v. Gomez, 889 F. Supp. 1146, 1272-73 n.221 (N.D. Cal. 1995).

mented assaultive or threatening behavior," in short—overt misconduct—before an inmate can be administratively transferred to supermax confinement.[55]

The perils confronting alleged gang members or other allegedly dangerous prisoners and suspected terrorists or "enemy combatants," while seemingly poles apart contain common elements and common lessons. Permitting the government to use "preventive" detentions of people who have not been charged with an offense and who have no access to independent, judicial review is a recipe for disaster. Ohio prison officials assured the Court that their professional judgment gleaned from years of expertise in prison administration would prevent arbitrary decisionmaking. Nonetheless, Judge Gwin found a pattern of arbitrary decisionmaking in which prisoners were unjustifiably placed at OSP on "essentially no evidence." So too the District Court Judge heading the *Hamdi* case termed the government's flimsy two-page declaration that sought to justify his detention "lacking in nearly every respect."[56] Of the more than 1,000 aliens "preventively" detained immediately after September 11 for questioning, not one has been charged with a terrorist crime.

Both situations—supermax imprisonment and the detention of suspected terrorists—demonstrate that preventive detention can begin as a temporary measure yet become permanent as perceived security needs persist. Moreover, what initially involves only a few people can become a much wider program when government officials grow accustomed to circumventing the normal and, to them, "burdensome" restraints of due process.

The aliens detained after September 11 were in fact placed in supermaximum confinement. And in a little noticed emergency regulation promulgated by the Department of Justice after the September 11 attacks, the authority of Federal prison officials to confine prisoners in supermaximum conditions was broadened. A number of political prisoners incarcerated for crimes unrelated to terrorism, such as the late Phil Berrigan, were transferred for a time to solitary confinement.

The convergence, indeed cloning involved in the Administration's anti-terrorism jurisprudence and the preexisting phe-

55. Jerry R. DeMaio, *If You Build it They will Come: The Threat of Overclassification in Wisconsin's Supermax Prison*, 2001 WIS. L. REV. 207, 229 (2001). *Koch*, 216 F. Supp.2d at 1005.

56. Henthoff, *supra* note 33.

nomenon of super-maximum security imprisonment is on display at Camp Delta in Guantánamo Bay, Cuba.

The current commander of Camp Delta—John VanNatta—is the former warden of a high security prison in Indiana.[57] As at OSP, prisoners are placed in solitary in small cells. The cells at Camp Delta are 8 by 6.8 feet. As at the Ohio State Penitentiary, the fixtures—bed, commode, table and chair—are immovable. The bed is a metal shelf at Camp Delta, a concrete slab at OSP. Camp Delta detainees sleep on "thin mattresses of a sort used in U.S. prisons."[58]

Both at Camp Delta and at the Ohio State Penitentiary, prisoners are shackled whenever they leave their living areas. Prisoners at Camp Delta are taken from their cells twice a week for fifteen or twenty minutes for recreations and a shower. It could be said with equal accuracy of each prison that it is a place "where the detainees are never allowed to congregate under any circumstances and where they are periodically shuffled from cell to cell to keep cliques from forming."[59]

Members of the National Guard at Camp Delta with previous experience in central Georgia prisons believe that confinement at Camp Delta would be considered appropriate for "high security" prisoners in the States, such as those held at the Ohio State Penitentiary.[60] Indeed both Camp Delta and supermax imprisonment violate international norms for decent treatment of prisoners.

The defining condition of confinement whether at Camp Delta or the Ohio State Penitentiary is that prisoners do not know how long they will have to be there, or how they can get out. Even the Nazi prisoners detained as "enemy combatants" during World War II whose status was reviewed by the United States Supreme Court in *Ex parte Quirin*,[61] "received rights denied to detainees at Camp Delta: the right to counsel, to a speedy trial, and to civilian review." For both supermax and Camp Delta prisoners, the government claims that the judiciary

57. Jim Lehrer, *The Detainees,* NEWS HOUR, *at* http://www.pbs.org/newshour/bb/military/jan-june03/detainees_1-22.html (Jan. 22, 2003).

58. Joseph Lelyveld, *In Guantanamo*, N.Y. REV. OF BOOKS (Nov. 7, 2002).

59. *Id.*

60. *Id.*

61. *Ex parte* Quirin, 317 U.S. 1 (1942).

has absolutely no jurisdiction to review either the placement of continued retention.

III. THE "PERMANENT" EMERGENCY

Both administrative detention at supermax prisons and preventive detentions of suspected terrorists are fundamentally grounded in the legal framework of emergency power. Both are premised on the view that the situation faced by government officials is extraordinary and calls for the suspension of the normal rules of constitutional law.

In the prison context, the "emergency" that triggered the proliferation of administrative detention over the past quarter century was prison riots. Indefinite segregation as a preventive measure was originated as a response to prison riots—at Attica, in Santa Fe, at various prisons in Pennsylvania, and in Columbus and Lucasville, Ohio. The construction of supermaximum prisons has institutionalized this practice.

For example, Ohio officials responded to an eleven-day prison riot at a maximum security prison in Lucasville in 1993 in which ten persons (including a guard) were killed by building OSP. Ohio Department of Rehabilitation and Correction ("ODRC") Director Reginald Wilkinson stated that it was one of the Department's "top priorities to develop a better response to emergencies."[62] OSP was constructed with the Lucasville Riot in mind: Wilkinson testified that the main reason the prison was built with no outdoor recreation yard was that the Lucasville riot began in the recreation yard. Similarly, the New Mexico Prison authorities responded to a riot in a prison by rounding up a group of 108 prisoners in the middle of the night and shipping them off to a supermaximum prison in Virginia.[63]

The Supreme Court's affirmation of the use of administrative detention with only minimal due process also occurred in the context of prison official's response to a prison riot. In *Hewitt v. Helms* the Court allowed prison officials to place a prisoner in solitary confinement after a riot occurred without any "elaborate procedural safeguards" because,

62. Reginald Wilkinson, *Stronger Prisons are Riot's Legacy*, THE PLAIN DEALER, June 2, 1994, at 7B.

63. Marianna Wertz, *Interview: New Mexico Attorney Charges Virginia Supermax Prison is "Concentration Camp,"* AMER. ALMANAC (May 29, 2002), *available at* http://www.prisontalk.com/forums/archive/topic/11968.html.

> In the volatile atmosphere of a prison, an inmate easily may constitute an unacceptable threat to the safety of other prisoners and guards *even if he himself has committed no misconduct*; rumor, reputation and even more imponderable factors may suffice to spark potentially disastrous incidents. The judgment of prison officials in this context . . . turns largely and purely subjective evaluations and on predictors of future behavior.[64]

Preventive detention of suspected terrorists as well as preventative, pre-emptive strike on rogue states is also justified by the perceived need in a time of war and national emergency. Domestically, the Bush Administration argues that the September 11 attacks put the United States at war requiring a reworking of the normal rules of constitutional law.

President Bush has stated, "[w]e believe in democracy and rule of law and the Constitution. But we're under attack."[65] President Bush, Attorney General Ashcroft and other governmental leaders have argued that in war, "the Constitution does not give foreign enemies rights,"[66] conveniently forgetting that the enemy in this war is amorphous and that our constitutional rights are important precisely to ensure that the Executive Branch is not the sole prosecutor, judge and jury of who is and is not an enemy terrorist. Internationally, the United States has invoked the September 11 attack to argue that the normal rules of international law that permit self-defense only in response to an actual or imminent attack are no longer applicable; and that the United States must be able to rely on pre-emptive attacks hitherto understood as illegal under international law.

Since September 11 the government has instituted a level of unfairness in the treatment of alleged offenders, that is seen only in wartime and justified only as being a wartime measure. The catastrophic nature of the World Trade Center and Pentagon attacks has led many liberal law commentators such as Harvard

64. Hewitt v. Helms, 459 U.S. 460, 474 (1983) (emphasis added).

65. President George W. Bush, Remarks by the President and Prime Minister Kjell Magne Bondevik of Norway in Photo Opportunity (Dec. 5, 2001) transcript, *available at* http://www.whitehouse.gov/news/releases/2001/12/20011205-11.html.

66. *Panel I of a Senate Judiciary Committee Hearing: Preserving Freedoms While Defending Against Terrorism*, FEDERAL NEWS SERVICE, Dec. 4, 2001 (comments of Senator Session), *also available at* http://judiciary.senate.gov/testimony.cfm?id=126&wit_id=67. Attorney General Ashcroft stated that "foreign terrorists who commit war crimes against the United States . . . are not entitled to and do not deserve the protection of the American Constitution." *Nightline* (ABC television broadcast, Nov. 14, 2001).

Law Professor Laurence Tribe to acquiesce in many of these departures from traditional American notions of fairness, reasoning that the enormity of the danger justifies restrictive, emergency measures.[67] Justice O'Connor was proven prescient when she noted after viewing Ground Zero, "[w]e're likely to experience more restrictions on our personal freedom than has ever been the case in our country."[68] As Oliver Cromwell pithily put it "[n]ecessity hath no law."[69]

However, the notion that necessity hath no law, or that the laws fall silent during war times, assumes that war or emergency is a distinct event, and when over, society will revert back to normalcy. The Constitution's framers assumed that peace would be the normal state of affairs for the new Republic: war or other emergency crisis would be aberrational.[70] And so it was with our early wars in the nineteenth century.

The twentieth century challenged the constitutional assumption of war and peace, emergency and non-emergency as discrete spheres in which peacetime/non-emergency would be the norm. The United States' first war of the twenty-first century threatens to obliterate those constitutional distinctions. War and emergency threaten to become a permanent, new normalcy.

The Cold War against Communism that commenced after World War II challenged the constitutional assumption that war and emergency were short, temporary exceptional departures from the normal rule of law. Emergency rule became permanent. Executive power became virtually boundless. The specter of Communism undergirding the Cold War was posed as an ongoing, continual threat to our very survival.[71] As Professor

67. Laurence H. Tribe, *Trial by Fury*, THE NEW REPUBLIC, Dec. 10, 2001, at 20 (arguing that it may be right, in normal times to allow a hundred guilty defendants to go free rather than convict an innocent one, but we must reconsider that arithmetic when one of the guilty may blow up the rest of Manhattan).

68. Linda Greenhouse, *In New York Visit, O'Connor Foresees Limits on Freedom*, N.Y. TIMES, Sept. 29, 2001, at B5.

69. Max Radin, *Martial Law & the State of Siege*, 30 CAL. L. REV. 634, 640 (1942) (quoting Oliver Cromwell).

70. *See* Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1389-91 (1989).

71. *See, e.g.*, DEAN ACHESON, THIS VAST EXTERNAL REALM 19 (1973) in which the former Secretary of State argued that our national survival was facing a grave danger from communism. President Kennedy also utilized the survival imagery in his Inaugural Address, when he asserted that "we shall pay any price, bear any burden, meet any hardship . . . to assure the survival and success of liberty." TO TURN

Gerhard Casper argued, this sense of emergency "fosters . . . a mentality which suggests that we live in a garrison state . . . we are in a state of alertness at all times. There is no such thing as normal times anymore."[72]

Every challenge to United States hegemony anywhere in the world began to be perceived as a threat to national security. Those perceived threats to United States power generated a profound sense of permanent crisis, leading many individuals such as Senator William Fullbright to argue that "the price of democratic survival in a world of aggressive totalitarianism is to give up some of the democratic luxuries of the past."[73]

The National Emergency that President Truman declared on December 16, 1950, in response to the developing Korean conflict remained in effect for almost twenty-five years.[74] That emergency proclamation triggered extraordinary presidential power over virtually every facet of American life.[75]

Not until the 1970s, after the disaster in Vietnam and the Watergate scandal, did Congress move to terminate the ongoing national emergency that had existed since 1950 and to control executive emergency powers. The Church Committee and a host of other congressional committees detailed the innumerable abuses that had been committed under the guise of emergency or war authority.[76] These committees criticized the ongoing, virtually permanent emergency.[77] Congress enacted a number of reform statutes—the War Powers Resolution in 1973,[78] the National Emergencies Act in 1976, which terminated all emergency authority based on the past presidential declarations of

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THE TIDE 6-7 (John W. Gardner ed., 1962) (quoting President Kennedy's Inaugural Address Jan. 20, 1961).

72. *Constitutional Questions Concerning Emergency Powers: Hearings Before the Senate Spec. Comm. on the Termination of the Nat'l Emergency*, 93rd Cong., 1st Sess. 83 (1973) (statement of Professor G. Casper).

73. J. William Fullbright, *American Foreign Policy in the 20th Century Under an 18th Century Constitution*, 47 CORNELL L.Q. 1, 7 (1961). *See also* ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 163-64 (1973).

74. Proclamation No. 2914, 15 Fed. Reg. 9029 (Dec. 19, 1950).

75. *See* S. REP. NO. 93-1170, at 2 (1974).

76. S. REP. NO. 94-755 (1976); H. REP. NO. 95-459 (1977); S. REP. NO. 94-1168 (1976).

77. OSCAR HAMMERSTEIN II, *Ol' Man River*, *in* SHOWBOAT (1927).

78. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (1994)).

emergency,[79] and the International Emergency Economic Powers Act.[80]

The end of the Cold War did lead to some relaxation of the feeling of perpetual crisis that had pervaded post World War II America. The awful, devastating attacks on September 11, however, wrought a new, legitimate sense of fear and danger. Terrorism replaced Communism as the overriding evil propelling America's relations with the world.

The post September 11 war against terrorism has taken on frighteningly similar aspects to the Cold War against Communism. The Bush Administration states that we will again be involved in a long-term, virtually permanent war.[81] The war against terrorism threatens to form a backdrop to an increasing garrison state authority evoking the shadowy war that forms the background to George Orwell's novel, *1984*.[82] This new, low level, but always prevalent "warm" war, has the potential to lead us back to the worst abuses of the Cold War.

There is, of course, no end in sight to the war against terrorism, and as the Administration has defined the war it is difficult to even foresee an end. First, it is unclear who the terrorist enemy is. As former C.I.A. Director R. James Woolsey pointed out immediately after the September 11 attacks, "It is clear now, as it was on December 7, 1941, that the United States is at war. The question is: with whom?"[83] That question remains unanswered. While we clearly are at war with the Taliban and Al Qaeda, that military action is only the opening salvo in a broader war against the new evil. Various government officials have pointed out that their objective is not merely to destroy the perpetrators, aiders

79. National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified at 50 U.S.C. § 1601 (1994)).

80. International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1625 (1977) (codified at 50 U.S.C. Supp. V § 1701 (1994)).

81. As Defense Secretary Donald H. Rumsfeld stated, the war against terrorism will be "a marathon . . . not a sprint." Defense Secretary Donald H. Rumsfeld, Department of Defense News Briefing (Sept. 20, 2001) transcript, *available at* http://www.defenselink.mil/news/Sep2001/t09202001_t920ruma.html. *See also* Rumsfeld's statement that, "This is not something that begins with a significant event or ends with a significant event. It is something that will involve a sustained effort over a good period of time." Defense Secretary Donald H. Rumsfeld, Department of Defense Briefing (Sept. 25, 2001) transcript, *available at* http://www.defenselink.mil/transcripts/2001/t09252001_t0925sd.html.

82. GEORGE ORWELL, 1984 (Harcourt, Brace 1949).

83. David Von Drehle, *World War, Cold War Won. Now, the Gray War*, WASH. POST, Sept. 12, 2001, at A9.

and abettors of the September 11 attacks, which is all Congress has authorized, but "more broadly to go after terrorism wherever we find it in the world."[84] Under the rubric of defeating terrorism, the Administration has sent troops to the Philippines, and Indonesia, and is contemplating a commitment of forces and monies to Georgia and Columbia. New military outposts for the extrusion of American power will be established throughout the world, most prominently for the moment in Central Asia.[85] International terrorism, like domestic murder will probably never be totally eliminated: it thus can justify continued emergency restrictions. Moreover, the Administration has now expanded the war on terrorism to include rogue states such as Iraq, Iran, North Korea and unnamed others—denoted the "axis of evil."[86] The war against Iraq was rationalized in large part by the supposed danger that the Iraqi government would supply weapons of mass destruction to Al Qaeda or other terrorists. Every insurgency around the globe can potentially be linked to international terrorism, as they formerly were associated with Soviet Communism—and states such as Cuba which have no connection to international terrorism, but are obstacles to U.S. policy, may also be so defined. The war on terrorism will be never-ending.

As with the Cold War, the new war on terror will probably not involve massive pitched battles, but a continuous "lukewarm" war involving an ongoing low level of hostilities and covert operations. The war against terrorism has been defined in the same terms as the war against Communism—between good and evil, freedom versus barbarism, and the "fight of the free world against the forces of darkness."[87] This war on terror threatens, under the guise of wartime, emergency regulations, to return our society to the permanent garrison state mentality of the Cold War, with its tragic and long term consequences for civil liberties. Indeed, we have already traveled a significant distance down that road.

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84. Robert S. Dudney, *Verbatim Special*, AIR FORCE MAG., Nov. 2001, at 42 (quoting Colin Powell, State Dep't Briefing, 9-12-01).

85. Bruce Cumings, *Reflections on "Containment,"* THE NATION, Mar. 4, 2002, at 19.

86. David Shribman, *State of the Nation Address*, BOSTON GLOBE, Jan. 30, 2002, at A1.

87. Herb Keinon, *Sharon Declares Day of Mourning*, JERUSALEM POST, Sept. 12, 2001, at 1.

The permanence of the current "emergency" can be most clearly seen in the indefinite confinement of enemy combatants. John Walker Lindt was tried pursuant to normal constitutional procedures and received a twenty-year sentence. Jose Padilla and Yasir Hamdi are being held as "enemy combatants" under the wartime authority of the President as Commander in Chief and are likely to be held for their entire lifetime.

Similarly, in the prison context, the perceived security needs in an emergency riot situation are being institutionalized and made permanent. Justice Stevens dissenting in the *Hewitt v. Helms* case understood the danger that emergency restrictions on liberty could become extended well after the immediate crisis is over:

> The Court of Appeals recognized that in the emergency conditions on December 3, 1978, prison officials were justified in placing respondent in administrative segregation without a hearing . . . . The Due Process Clause allows prison officials flexibility to cope with emergencies. But petitioners acknowledge that the disturbance was "quelled" the same day, and that, within a day or two after the December 3, 1978, prison riot, conditions had returned completely to normal. At that point the emergency rationale for administrative segregation without a hearing had expired.[88]

Prison officials have the same mentality of permanent war or emergency against a dangerous enemy that our top government officials portray after September 11. In that context emergency powers do not merely respond to the immediate crisis, but become indefinite, permanent, institutionalized responses.

The Ohio State Penitentiary is an example of a permanent crisis mentality. The construction of a 504-bed supermaximum prison in response to the April 1993 riot in the maximum security prison was an overreaction made permanent. It turns out that neither at the time of its completion in 1998, nor presently, does Ohio need a supermaximum prison—but it now has one—thus creating a permanent incentive to house prisoners there. As Judge Gwin found:

> The opening of the OSP has created too much capacity for the highest level of security. At the same time, Ohio lacks sufficient capacity at maximum security, the level of confinement below the OSP's high maximum security level. After a huge

88. *Hewitt*, 459 U.S. at 479 (J. Stevens dissenting).

> investment in the OSP, Ohio risks hearing 'because we have built it, they will come' mind set. As a result, the defendants consider inmates for placement at the OSP who do not need its level of restrictions.[89]

In response to a series of incidents at the maximum security prison, the warden of that prison sent approximately twenty prisoners to OSP. The warden later justified it as an emergency measure to remove suspected gang members for a potentially dangerous situation. As the Court found, "many of these inmates were transferred even though they had no current misconduct and the Department never made out or proved a rule violation associated with gang membership or other security threat group."[90]

Three years later, some of these suspected gang members were still at OSP, despite the fact that the "emergency" situation that allegedly provoked their transfer had long since dissipated. But for court intervention, these preventive detentions might well have become permanent.

The permanent emergency process is illustrated by other prison stories. The federal penitentiary at Marion was designed to house the most dangerous federal prisoners. In the late 1970s and early 80s violent activity increased at Marion culminating in an October 1983 incident in which two guards and an inmate were murdered. In response, Warden Miller declared a state of emergency and instituted a permanent lockdown in which inmates live in solitary confinement twenty-three hours a day.[91] The lockdown at Marion has never been lifted, and became the model for state supermax facilities around the country.[92]

Similarly some courts have allowed prison officials to use administrative detention of alleged gang members without any demonstration of an individual's dangerousness because prison officials "must be permitted to act before the time when they can compile a dossier on the eve of a riot."[93] The Court's rational was based on emergency, although the prisoners were then con-

89. *Austin*, 189 F. Supp.2d at 723.

90. *Id.* at 733.

91. Scott Tachiki, *Indeterminate Sentences in Supermax Prisons Based Upon Alleged Gang Affiliation: A Re-Examination of Procedural Protection and a Proposal for Greater Procedural Requirements*, 83 CAL. L. REV. 1114, 1122-23 (1995).

92. *Id.*

93. *In re* Long Term Admin. Segregation, 174 F.3d 464, 470 (4th Cir. 1999).

fined for over three years with no expectation of being released "in the foreseeable future."

IV. CONCLUSION

The United States' response to emergencies such as terrorist attacks or riots in prisons has been to suspend the normal procedures and assumptions of our Constitution and laws in targeting disfavored groups who are presumed dangerous. Society in general has not vigorously protested these measures. State and federal prison officials have used long-term solitary confinement against prisoners with little public outcry. Now federal officials have targeted mainly Islamic immigrants, aliens and citizens thought to be terrorists and the public has been largely silent. These "emergency" measures threaten to permanently undermine the fabric of our constitutional order that protects all Americans. The words of Martin Niemoeller, a German Protestant minister who at first supported the Nazis and later became an opponent of the regime and was arrested, are prophetic:

> They came for the communists, and I did not speak up because I was not a communist;
> They came for the socialists, and I did not speak up because I was not a socialist;
> They came for the union leaders, and I did not speak up because I wasn't a union leader;
> They came for the Jews, and I did not speak up because I wasn't a Jew.
> Then they came for me, and there was no one left to speak up for me.[94]

94. Martin Niemoeller, *quoted in* JOHN BARTLETT, FAMILIAR QUOTATIONS 684 (Justin Kaplan ed., 16th ed. 1992).