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# Reality Check: Detention in the War on Terror

## Cover Page Footnote

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# REALITY CHECK: DETENTION IN THE WAR ON TERROR

*Monica Eppinger*[+]



In ten years of war against an agile non-state actor, its fluid franchises, and its outlier allies, the United States has experimented with a variety of means for containing the enemy. This adversary presented an unfamiliar combination of features: it was not bound by geographical trappings of statehood—capital, borders, territory—yet was capable of exercising global reach. Faced with such an adversary, the U.S. government concentrated on defining, locating, and pinning down a shifting threat. Detention became a primary tool in the task of introducing fixity to fluidity. The United States has now accrued a decade of experience in practicing detention during war against a non-state foe.

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Law on detention is not settled, and policy on detention and detainee treatment is still a matter of active wrangling between the legislative, executive, and judicial branches.[1] Political leaders and the public face a situation aptly described as a "mess" of detentions:[2] 166 remaining detainees at

1. In the last legislative year before this Article was published, Congress again reformed the law governing detention in armed conflicts. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, §§ 1021–1024, 125 Stat. 1298, 1562–66 (2011) (to be codified at 10 U.S.C. § 801 note). On September 12, 2012, the U.S. District Court for the Southern District of New York issued a permanent injunction against enforcement of one of the law's provisions, Section 1021(b)(2), which expanded the scope of activities and persons potentially subject to indefinite detention for activities understood to be opposed to the U.S. government in its war against al Qaeda and affiliates. Hedges v. Obama, No. 12 Civ. 331 (KBF), 2012 WL 3999839, at *45 (S.D.N.Y. Sept. 12, 2012), *injunction stayed by* Nos. 12-3176 (L), 12-3644 (Con.), 2012 WL 4075626 (2d Cir. Sept. 17, 2012) (staying the injunction only two days after the district court granted it). Litigation on the matter continues.

During the drafting process, several provisions of the 2012 Defense Authorization bill related to procedures for handling detainees had already met with administration objections. *See, e.g.*, National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. § 1036 (2011) (substituting a new system of review for the system established by Exec. Order No. 13,567, 3 C.F.R. 227 (2011)); *id.* § 1039 (preventing the Executive from transferring detainees to the United States for trial, imprisonment, or release if exonerated); *id.* § 1040 (restricting transfers of detainees to foreign countries). The White House officially registered its objections and threatened a veto if those provisions were included in the final bill. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 1540 – NATIONAL DEFENSE AUTHORIZATION ACT FOR FY 2012, at 2–3 (2011) ("If the final bill presented to the President includes these provisions that challenge critical Executive branch authority, the President's senior advisors would recommend a veto."). Congress removed some provisions, including sections 1036 and 1039, and amended others. The President signed the final bill to approve defense appropriations, but simultaneously issued a signing statement expressing the administration's "serious reservations" to some remaining provisions regarding detainee treatment. Statement on Signing the National Defense Authorization Act for Fiscal Year 2012, 2011 DAILY COMP. PRES. DOC. 978 (Dec. 31, 2011), *available at* http://www.gpo.gov/fdsys/pkg/DCPD-201100978/pdf/DCPD-201100978.pdf (explaining that the President signed the bill in order to appropriate funds for military operations "despite having serious reservations with certain provisions that regulate the detention, interrogation, and prosecution of suspected terrorists"). The administration subsequently reasserted executive authority to try terrorism suspects in Article III courts (i.e., to waive the transfer of suspected terrorists to military custody that the bill sought to require). *See* Directive on Procedures Implementing Section 1022 of the National Defense Authorization Act for Fiscal Year 2012, Presidential Policy Directive 14, 2012 DAILY COMP. PRES. DOC. 14 (Feb. 28, 2012) [hereinafter Presidential Policy Directive], *available at* http://www.gpo.gov/fdsys/pkg/DCPD-201200136/pdf/DCPD-201200136.pdf.

On a parallel track, states party to the Geneva Conventions have concluded their quadrennial review, which included international law regarding detention on its agenda, keeping the issue of detention in play in interstate diplomacy as well. *See* Int'l Committee of the Red Cross, Strengthening Legal Protections for Victims of Armed Conflicts Report, 31IC/11/5.1.1 (Oct. 2011).

2. Referring to the Guantanamo Bay facility, the 240 detainees interned therein when his administration took office, and the policies and practices that had produced them, President Barack Obama described the situation, stating: "We're cleaning up something that is, quite simply, a mess—a misguided experiment . . . ." Remarks at the National Archives and Records

the Guantanamo Bay facilities,[3] 3,200 more detainees at facilities in Afghanistan,[4] and a jumbled legacy of practice[5] and precedent[6] that itself remains to be sorted through. This Article is one of a series of projects motivated by concern over effective advocacy by a U.S. legal community confronting extensions of executive power after 9/11.[7] The aim of this Article is to reflect on these recent experiences with practices of detention and to propose changes to lawyerly strategy, national security policy, and international law in regard to detention and detainees with an eye toward future conduct.

Our conceptual vocabulary has not kept pace with experience. Although legal experts, the press, and the public rely on one generic term, "detention,"

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Administration, 2009 DAILY COMP. PRES. DOC. 388 (May 21, 2009) [hereinafter National Archives Speech], *available at* http://www.gpo.gov/fdsys/pkg/DCPD-200900388/pdf/DCPD-200900388.pdf.

3. *By the Numbers*, MIAMI HERALD, Nov. 27, 2007, http://www.miamiherald.com/2007/11/27/322461/by-the-numbers.html (last updated Dec. 24, 2012).

4. Detainees in Afghanistan were scattered among different facilities until U.S. forces consolidated theater detention operations at Bagram Air Force Base in Parwan province, Afghanistan. Matthew C. Waxman, *The Law of Armed Conflict and Detention Operations in Afghanistan*, 85 INT'L L. STUD. 343, 344 (2009). The facility, formerly called the Bagram Collection Point, was known as the Bagram Theater Internment Facility (BTIF) until its nearby successor, the Detention Facility in Parwan (DFIP), was constructed. As of March 2012, the United States reportedly held 3,200 detainees in Afghanistan. Rod Nordland, *U.S. and Afghanistan Agree on Prisoner Transfer as Part of Long-term Agreement*, N.Y. TIMES, Mar. 10, 2012, at A9. Currently, the planned transfer of the Parwan facility from U.S./ISAF to Afghan government control has been cast into doubt. *See infra* notes 48–56 (describing the transfer process and the glitch).

5. The legacy includes detainees, detention facilities, and detention practices in Iraq no longer under U.S. control that, while they were under U.S. government control, affected hundreds of Iraqi civilians as well as combatants. During the period when those facilities were under U.S. control, U.S. military, intelligence operatives, or contractors were found responsible in at least seventy-one cases of detainee abuse, including at least six deaths of Iraqis in U.S. custody. A.T. CHURCH, III, DEP'T. OF DEF., REVIEW OF DETENTION OPERATIONS AND INTERROGATION TECHNIQUES 12 (2005) [hereinafter THE CHURCH REPORT], officially redacted and released excerpts *available at* http://www.dod.mil/pubs/foi/operation_and_plans/Detainee/Church_Report_pp235and242.pdf. An unauthorized document purporting to be the unredacted *Church Report* is available at http://www.aclu.org/images/torture/asset_upload_file625_26068.pdf. The report is so-called after Naval Inspector General, Vice Admiral Albert T. Church, III, who headed the team that investigated and reported on U.S. interrogation practices in the global "war on terror" at the behest of Secretary Donald Rumsfeld, after photos of detainee abuse at the Abu Ghraib detention facility in Iraq became public.

6. "Legacy of precedent" refers not only to judicial precedent, which is significant in its own right, see *infra* Part II, but also to the jumble of policy justifications, ad hoc decision-making, extensions of executive power, bureaucracies and institutions, and the imprint on bodies and lives interned at U.S. government installations that the Obama administration inherited when it took office in January 2009.

7. *See, e.g.*, Monica Eppinger, *Military Tribunals: A Critical Assessment*, 56 ST. LOUIS U. L.J. 1153 (2012).

the U.S. executive branch has actually practiced at least three different modes of detention in the "war on terror": criminal detention, national security detention for the purpose of prevention (preventive detention), and national security detention for the purpose of interrogation (interrogative detention). Reliance on an overgeneralized term glosses over important distinctions with serious practical effects. When the general term "detention" in current usage is taken to mean only "criminal detention," it reflects a misunderstanding of what national security experts are actually working on. Framing the issue so narrowly leads to limited effectiveness in persuasion or diagnosis, insofar as it fails to take into account some of the organizational and ethical features of the domain of national security or results in misrecognition of some kinds of executive branch conduct. Reconceiving detention based on observation of its actual practice should yield clarity and specificity that will serve future advocacy efforts.

This Article has several goals. The first is to survey the modes in which the U.S. executive branch has practiced detention against non-state actors since 9/11. A second goal is to address part of that gap between legal practitioners and national security practitioners, particularly as it concerns detention in the "war on terror." This Article builds on the work of other scholars and advocates who have directed attention to preventive or interrogative detention[8] and is meant to augment work on the criminal paradigm.[9]

This gap, apparent among domestic practitioners, is less pronounced in international law. The international legal community has long made legal provision for preventive detention during combat under customary international law aimed at rendering fighters *hors de combat*.[10] However, even the international legal community, perhaps for tactical reasons, has declined to modify the international law that regulates interrogative detention.[11] Thus, a third goal of this Article is to put forth some proposals for innovation in the

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8. *See, e.g.*, Tyler Davidson & Kathleen Gibson, *Experts Meeting on Security Detention Report: International Committee of the Red Cross & the Frederick K. Cox International Law Center*, 40 CASE W. RES. J. INT'L L. 323, 372–73 (2009) (summarizing presentations made at a meeting of experts convened by the International Committee of the Red Cross and the Frederick K. Cox International Law Center at Case Western Reserve University devoted to legal and practical issues associated with "security detention"); John P. McLoughlin et al., *Security Detention, Terrorism, and the Prevention Imperative*, 40 CASE W. RES. J. INT'L L. 463, 492–503 (2009) (outlining likely characteristics of, and questions associated with, a new U.S. "security detention process"); *see also* Laura M. Olson, *Practical Challenges of Implementing the Complementarity Between International Humanitarian and Human Rights Law–Demonstrated by the Procedural Regulation of Internment in Non-International Armed Conflict*, 40 CASE W. RES. J. INT'L L. 437, 438–39 (2009).

9. *See generally* Eric M. Freedman, *Who's Afraid of the Criminal Law Paradigm in the "War on Terror?"*, 10 N.Y. CITY L. REV. 323 (2007).

10. *See infra* Part II.C (providing additional description).

11. Int'l Comm. of the Red Cross & Red Crescent [ICRC], *Background Document for the 31st International Conference of the International Red Cross and Red Crescent* 5–6 (2011), [hereinafter *ICRC Background Document*].

international law of war. These proposals are based on observation of state practice in regard to detention in an attempt to incorporate the diverse national security motivations that currently drive detention policy.

Part I of this Article reviews detention as practiced by the U.S. executive branch in the "war on terror." This review provides ground to propose an expanded conceptualization of detention. Part II examines the legal contours of the present context, reporting the source of law by which the executive justifies its practices of detention in the "war on terror." Part II also outlines the definitional distinctions that international law currently provides between international and non-international armed conflict and the consequences of those classifications. Part III proposes a framework for understanding the conceptual contours of detention and suggests that lawyers and human rights advocates turn greater attention to the two other forms of detention practiced by the executive branch in addition to that with which advocates are more familiar—criminal detention. Part IV calls for release of detainees held in preventive detention at the cessation of hostilities and makes proposals, based on recent experience, regarding tribunals in all three forms of detention outlined herein.

## I. THE STATUS QUO: WHY CRIMINAL PROCEDURE IS NOT ENOUGH

### *A. Detention in Practice*

#### *1. Guantanamo: From* Rasul *to* Stall

The vast majority of legal efforts on behalf of detainees held in the "war on terror" have concentrated on detainees at Guantanamo Bay, Cuba.[12] U.S. civilian and military attorneys strove to force the executive branch to accord Guantanamo detainees due process. This entailed disputing whether any process was due and then building procedure from the ground up. Attorneys sought first to secure federal jurisdiction for detainees at Guantanamo[13] and to file habeas corpus petitions for them.[14] Once the executive announced

12. *See, e.g.*, Waxman, *supra* note 4, at 343 (discussing the relative neglect by the U.S. legal community of commission trials or processing procedures for Bagram detainees). *But see* THE OPEN SOC'Y INST. & THE LIAISON OFFICE, STRANGERS AT THE DOOR: NIGHT RAIDS BY INTERNATIONAL FORCES LOSE HEARTS AND MINDS OF AFGHANS (2010) [hereinafter STRANGERS AT THE DOOR], *available at* http://www.opensocietyfoundations.org/sites/default/files/a-afghan-night-raids-20100222_0.pdf (for rights-advocates' study of U.S. and ISAF detention-related night raids in Afghanistan).

13. Rasul v. Bush, 542 U.S. 466 (2004) (holding that the federal habeas statute, 28 U.S.C. § 2241, authorizes U.S. federal courts' habeas jurisdiction over foreign nationals held at the U.S. Navy facility at Guantanamo Bay, Cuba); *see also* Boumediene v. Bush, 553 U.S. 723, 795 (2008) (holding that petitioners, Guantanamo detainees, had a constitutional right to habeas review).

14. *See generally* JENNIFER K. ELSEA & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL 33180, ENEMY COMBATANT DETAINEES: HABEAS CORPUS CHALLENGES IN FEDERAL COURT

formation of a military commission to try some detainees, attorneys filed actions seeking to address serious shortcomings with due process in the commission.[15] The actions do not affect detainees who are not American citizens; the executive branch transferred American-citizen detainees to U.S. military detention facilities in the United States, and attorneys there promptly filed habeas petitions on their behalf.[16] As a general matter, those representing detainees and others trying to influence U.S. government treatment of "war on terror" detainees focused their efforts on securing detainees a fair trial.[17]

When the Supreme Court held in *Rasul v. Bush* that U.S. civilian courts have jurisdiction to hear habeas corpus petitions from alien detainees held by the U.S. military at Guantanamo Bay,[18] criminal procedure seemed vindicated as a mode of ensuring humane treatment and fair review for detainees. Certainly, the Court's holding regarding federal jurisdiction together with subsequent cases regarding detainee rights to trial[19] prompted institutional innovation by the executive branch holding detainees and accelerated the institution of military commissions. In retrospect, however, it is clear that the habeas route did not fulfill all the hopes of detainees and their advocates.[20]

The scope of that failed promise is significant. For most detainees over the last ten years, detention has been the product of decisions made outside of the Military Commission system.[21] Since 2002, 779 detainees have been held at Guantanamo.[22] Under both the George W. Bush and Obama administrations, the Military Commission has only dealt with sixteen Guantanamo detainees,

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(2010), *available at* http://assets.opencrs.com/rpts/RL33180_20100405.pdf. For a sample of habeas petitions filed, see, for example, Uthman v. Obama, 637 F.3d 400 (D.C. Cir. 2011); Bacha v. Obama, 653 F. Supp. 2d 32 (D.D.C. 2009); Ahmed v. Obama, 613 F. Supp. 2d 51 (D.D.C. 2009); Basardh v. Obama, 612 F. Supp. 2d 30 (D.D.C. 2009); Hammamy v. Obama, 604 F. Supp. 2d 240 (D.D.C. 2009); El Gharani v. Bush, 593 F. Supp. 2d 144 (D.D.C. 2009); Al Alwi v. Bush, 593 F. Supp. 2d 24 (D.D.C. 2008); Sliti v. Bush, 592 F. Supp. 2d 46 (D.D.C. 2008); Al Bihani v. Bush, 588 F. Supp. 2d 19 (D.D.C. 2008); Al Ginco v. Bush, 588 F. Supp. 2d 16 (D.D.C. 2008); Al-Adahi v. Bush, 585 F. Supp. 2d 78 (D.D.C. 2008); and Khadar v. Bush, No. 04-1136 (JDB), 2006 WL 2666144 (D.D.C. Sept. 15, 2006), *superseded sub nom.* Hicks v. Bush, 452 F. Supp. 2d 88 (D.D.C. 2006).

15. Hamdan v. Rumsfeld, 548 U.S. 557 (2006). Note that *Hamdan* is exceptional in that Hamdan's lawyers petitioned for the writ of habeas corpus *and* for a writ of mandamus on his behalf. Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 155 (D.D.C. 2004).

16. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 511 (2004); Padilla v. Hanft, 423 F.3d 386, 390 (4th Cir. 2005).

17. *See supra* notes 13–15 and accompanying text; *see also, e.g.*, ELSEA & GARCIA, *supra* note 14.

18. Rasul v. Bush, 542 U.S. 466, 481–84 (2004).

19. *See, e.g.*, *Hamdan*, 548 U.S. at 557.

20. *See* ELSEA & GARCIA, *supra* note 14, at 2.

21. *See* Eppinger, *supra* note 7 (describing how most decisions regarding detention have happened outside of military commissions).

22. *The Guantanamo Docket*, N.Y. TIMES, http://projects.nytimes.com/guantanamo/ (last updated Dec. 11, 2012).

convicting seven, charging six, and sentencing three who plead guilty.[23] Obama administration review panels have designated thirty-six more detainees eligible for trial by the Military Commission.[24] To date, of a total number of 779 Guantanamo detainees, 763 have not faced a Military Commission, and of those, 727 never will.[25] Procedures other than trial have decided the fates of many, such as the Combatant Status Review Tribunals (CSRTs), which reviewed the cases of 581 Guantanamo detainees during the Bush administration (commencing July 30, 2004 and ceasing February, 10, 2009, within three weeks of President Obama's inauguration).[26] The CSRTs designated 578 of these cases "Civilian Authority Final Action," determining that 539 detainees had been properly classified as enemy combatants and that thirty-nine detainees—no longer classified as such—should be transferred from Guantanamo and thus out of the jurisdiction of the Military Commission.[27] Under the Obama administration, no detainees have been added to the population at Guantanamo. Twenty-one detainees have been ordered released by the courts,[28] and the Military Commission will have dealt with approximately forty-nine detainees of a known Guantanamo detainee population of 779.[29]

The limited reach of formal trial procedures to affect detention at Guantanamo is also reflected in the numbers of tribunals, besides formally constituted military commissions, that have determined initial detention or reviewed detainees' continued detention.[30] The Bush administration established the CSRTs[31] in response to the Supreme Court's rebuke in *Rasul*

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23. *Id.* Only three of these convictions occurred during the Bush administration. *Id.* The other thirteen are included in the thirty-six detainees identified by the Obama administration's tribunals. *Id.*

24. *By the Numbers*, *supra* note 3.

25. *Id.*; *The Guantanamo Docket*, *supra* note 22.

26. *Combatant Status Review Tribunal Summary*, OFF. ADMIN. REV. DETENTION ENEMY COMBATANTS, http://www.defense.gov/news/csrtsummary.pdf (last updated Feb. 10, 2009).

27. *Id.*; ELSEA & GARCIA, *supra* note 14, at 7–9 (noting that detainees not found to be an enemy combatant by a CSRT are either to be transferred to their country of citizenship or dealt with in a manner consistent with U.S. foreign policy, and thus are no longer under the jurisdiction of military commissions). The remaining three cases were the result of a temporary suspension of the Administrative Reviews for Guantanamo detainees. *Combatant Status Review Tribunal Summary*, *supra* note 26.

28. *See* National Archives Speech, *supra* note 2.

29. *By the Numbers*, *supra* note 3 (reporting that, at a maximum, totaling the number of detainees already convicted, those facing trial, and those eligible for trial, the commissions will have only heard forty-nine cases out of 779); *see also The Guantanamo Docket*, *supra* note 22.

30. *See, e.g.*, ELSEA & GARCIA, *supra* note 14, at 7–9, 47 (referencing a sample of additional tribunals that have the authority to make initial detention decisions or to oversee reviews for continued detention); Eppinger, *supra* note 7 (describing a range of informal tribunals as formal bodies tasked to make detention decisions).

31. *Combatant Status Review Tribunals*, U.S. DEP'T OF DEF. (Sept. 26, 2006), *available at* http://www.defense.gov/news/Oct2006/d20061017CSRT.pdf.

and *Hamdi v. Rumsfeld* of the administration's procedures for designating a detainee an "enemy combatant."[32] When President Obama took office, his administration created a task force to review the case of each Guantanamo detainee to assess the possibility of change, transfer, or release.[33] The Obama administration subsequently created Periodic Review Boards (PRBs) to conduct regular review of the justification for continued detention of each Guantanamo detainee.[34] These justifications are primarily based on national security considerations, not legal factors.

*2. Parwan*

The detainee counts of Guantanamo do not include the 3,200-plus detainees that have been held in Afghanistan, none of whom have faced a formally constituted military commission or other court. The United States and its allied forces hold detainees at the Detention Facility in Parwan (DFIP) or at field detention sites.[35] The population of the field detention sites, like their number and location, is not a matter of public record[36] and, in precise terms, may not even be known to U.S. authorities with command responsibility in Afghanistan on a daily basis.[37] From publicly available information, it appears that most detainees in Afghanistan have been held at the DFIP (or its predecessor, the Bagram Theater Internment Facility).[38]

None of the Afghanistan detainees have had formal hearings before a military commission, although other forms of tribunals have been introduced. Beginning in October 2001, when the United Statesand its allies commenced

32. *Id.*; *see also* Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

33. Exec. Order No. 13,493, 3 C.F.R. 207 (2009); *see also* Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, Speech at Annual Meeting of the American Society of International Law (March 25, 2010), *transcript available at* http://www.state.gov/s/l/releases/remarks/139119.htm. As the preceding recitation shows, most detainees continued in detention without change, transfer, or release.

34. Exec. Order No. 13,567, 3 C.F.R. 277 (2011) (Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Use of Military Force).

35. HUMAN RIGHTS FIRST, DETAINED AND DENIED IN AFGHANISTAN: HOW TO MAKE U.S. DETENTION COMPLY WITH THE LAW 7–8 (2011).

36. Dep't of Defense Bloggers Roundtable with Navy Vice Admiral Robert Harward, Commander, Joint Task Force 435, via Teleconference (Jan. 27, 2010) [hereinafter Dep't of Def. Roundtable], *available at* http://defense.gov/Blog_files/Blog_assets/20100127_Harward_transcript.pdf.

37. *Id.*

38. AMNESTY INT'L, AMNESTY INTERNATIONAL ANNUAL REPORT 2012: THE STATES OF THE WORLD'S HUMAN RIGHTS 56, 357 (2012), *available at* http://files.amnesty.org/air12/air_2012_full_en.pdf; Muhammad Lila, *U.S. to Hand over Afghan Prisons, Including Jail Where Korans Were Burned*, ABC NEWS (Mar. 9, 2012), http://abcnews.go.com/international/us-hand-afghan-prisons-including-koran-burning-prison/?id=15884015; Andy Worthington, *Bagram: The First Ever Prisoner List (The Annotated Version)*, ANDY WORTHINGTON, www.andyworthington.co.uk/bagram-the-first-ever-prisoner-list-the-annotated-version/ (last updated Apr. 3, 2011).

military action in Afghanistan, military screening teams were tasked with locating people who were possible sources of intelligence and taking them into custody.[39] Detention was part of the intelligence-gathering strategy in Afghanistan from the beginning of combat operations and may even have eclipsed combat operation at times. U.S. military teams conducted night raids and sweeps,[40] screening teams combed Northern Alliance prisons,[41] and roadblocks filtered mobile populations.[42]

Although intelligence was a primary goal, the vast majority and diverse sources of those in U.S. custody from the beginning of combat operations in Afghanistan meant that, initially and at many points during the conflict, U.S. authorities did not know who they held.[43] One Bush administration official recalls,

> Before we went in to Afghanistan [in September 2001], we expected to find Saudis plus a few Yemenis and Afghans [making up al Qaeda forces and camps]. That quickly turned out to be *much* more complicated. By the end, we had detainees representing 44 different countries. That's why this turned into a "Global War on Terror." Not necessarily because they were militarily active all over the world, but because they were *recruiting* all over the world. That shows you what we were up against.[44]

In this mélange and other complicated scenarios, the U.S. executive branch created groups tasked to process detainees encountered in criminal

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39. Hamdi v. Rumsfeld, 243 F. Supp. 2d 527, 534 (E.D. Va. 2002) (discussing the Mobbs Declaration and the military screening of Yaser Hamdi); *see also* JONATHAN MAHLER, THE CHALLENGE: HOW A MAVERICK NAVY OFFICER AND A YOUNG LAW PROFESSOR RISKED THEIR CAREERS TO DEFEND THE CONSTITUTION—AND WON 10–11, 93–94 (2009). For a more vivid and chaotic description of in-theater screening in the midst of combat operations among a civilian population, see, for example, *The Church Report*, *supra* note 5, at 14.

40. *See generally* STRANGERS AT THE DOOR, *supra* note 12.

41. MAHLER, *supra* note 39, at 93–94 (describing the work of U.S. military screening teams who selected detainees from among those offered by Northern Alliance field commanders, prison operators, and bounty hunters).

42. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (describing how Yasser Hamdi was apprehended at a road block by local forces and turned over to the U.S. military).

43. *See, e.g.*, Petition for Writ of Certiorari at Joint App. 148–50, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696), *available at* 2004 WL 1120871, at *148–50 ("Declaration of Michael Mobbs"); Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365, 1369–70 (2008).

44. Telephone Interview with the Honorable Pierre-Richard Prosper, former Ambassador-at-Large for War Crimes Issues, U.S. Dep't of State (Nov. 22, 2011).

investigations, combat operations, and intelligence work.[45] In Afghanistan, detainees were sorted in the field and at detention facilities.[46]

The facility in Parwan where most detainees are consolidated, the DFIP, is distinct enough in the situation of detainees, its management by U.S. authorities, and the legal issues it raises, that it deserves a brief, separate discussion. The DFIP was established to replace the hastily reconfigured Bagram detention facility that was poorly equipped to handle the number of detainees it received and that had developed a reputation for poor conditions and, in some respects, detainee abuse.[47] Given the schedule of announced timetables for the U.S. drawdown from Afghanistan, practically from its inception, the DFIP was intended for transfer to Afghan government authority.[48]

On March 9, 2012, the governments of the United States and Afghanistan signed a Memorandum of Understanding (MOU)[49] to transfer management of the DFIP "as soon as the Afghans appoint a commander of detention operations."[50] On March 28, 2012, that condition was satisfied when President Hamid Karzai named Major General Faroq Barekzai as the Afghan commander.[51] Notably, the MOU distinguishes management of the facility from custody of detainees, however, and specifies that the United States would transfer *management* of the facility as soon as the Afghan government appointed a commander of detention operations.[52] The MOU further specified that the United States would at that time "transfer *Afghan nationals* detained

45. RICHARD J. HUGHBANK & JENNIFER L. CURRY, THE DETAINEE PERSONAL IDENTIFICATION DATA COLLECTION PROCESS IN AFGHANISTAN (2002).

46. *See generally* INT'L SEC. ASSISTANCE FORCE, STANDARD OPERATING PROCEDURES: DETENTION OF NON-ISAF PERSONNEL, SOP 362 (4th ed. 2006), *available at* http://info.publicintelligence.net/ISAF-DetaineeSOP.pdf (outlining detention procedures for enemy combatants).

47. *See, e.g.*, Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. TIMES, May 20, 2005, at A1, A12; *U.S. Abused Detainees, Afghan Commission Claims*, ASSOCIATED PRESS, Jan. 8, 2012, http://www.cbc.ca/news/world/story/2012/01/08/afghanistan-detainee-abuse-bagram.html.

48. Richard Leiby, *U.S. Transfers Control of Military Prison to Afghan Officials*, WASH. POST, Sept. 11, 2012, at A10.

49. Memorandum of Understanding, Transfer of U.S. Detention Facilities in Afghan Territory to Afghanistan, U.S.–Afg., Mar. 9, 2012 [hereinafter MOU], *available at* http://www.isaf.nato.int/images/20120408_01_memo.pdf. General John R. Allen, ISAF Commander of both the U.S. and coalition forces in Afghanistan, represented the United States and Defense Minister Abdul Rahim Wardak represented Afghanistan. *Id.*

50. News Release, Int'l Sec. Assistance Force, U.S., Afghanistan Agree to Turnover Parwan Detention Facility (Mar. 9, 2012), *available at* http://www.isaf.nato.int/article/isaf-releases/u.s.-afghanistan-agree-to-turnover-of-parwan-detention-facility.html.

51. News Release, Int'l Sec. Assistance Force, USF-A Commander, U.S. Ambassador Congratulate New Parwan Facility Commander (Apr. 1, 2012), *available at* http://www.isaf.nato.int/article/news/usf-a-commander-u.s.-ambassador-congratulate-new-parwan-facility-commander.html.

52. MOU, *supra* note 49, at para. 6(a).

by U.S. forces at the Detention Facility in Parwan (DFIP) to Afghanistan"[53] but would retain "responsibility for the detainees held by . . . DFIP under the Law of Armed Conflict during the processing and transfer period, which is not to last more than six months."[54] Although the six-month period has expired, transfer of management of the DFIP has stumbled.

In any case, U.S. personnel will likely continue to play a decisive role in the fate of detainees whom it took into custody. The United States agreed to "continue its presence at the DFIP in order to provide advisory, technical and logistical support for a period of one year."[55] Afghanistan agreed to "consult with the United States before the release, including release prior to indictment, of the transferred detainees, and, if the United States provides its assessment that continued detention is necessary to prevent the detainee from engaging in or facilitating terrorist activity, Afghanistan is to consider favorably such assessment."[56] In short, although there are non-judicial bodies making decisions about U.S. detainees in Afghanistan, none of the thousands of detainees held there are bound for trial before a formally constituted tribunal. Very few were apparently held for the purpose of criminal detention. The outcomes for those initially apprehended by U.S. forces for U.S. national security purposes—prevention or interrogation—becomes even more unclear as the major detention facility switches to Afghan control.

### *B. Grounds for Re-Conceptualizing Detention*

The foregoing should inform advocates' agenda in that it demonstrates how limited criminal detention has been in the context of hostilities against a non-state foe. It attests to the inadequacy of a narrow focus on gaining access to civilian court, court martial, or a procedurally fair military commission—efforts that help only a fraction of all detainees and address only part of the executive branch bureaucracy that performs a sorting function. Advocates with a narrow agenda based on a criminal detention paradigm do a disservice to the majority of detainees excluded from the very framing of the problem.

If detainees are not bound for trial, what is the point of holding them? The U.S. executive branch has engaged in different modes of detention in the current conflict, conducting detention for varying purposes. One, "criminal detention," refers to detention of someone who authorities suspect may have already committed a hostile act.[57] Authorities hold the detainee to conduct an investigation, intending to bring a suspect to trial. Another mode of detention,

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53. *Id.* at para. 4 (emphasis added).

54. *Id.* at para. 6(c).

55. *Id.* at para. 6(e).

56. *Id.* at para. 9.

57. Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1082 (2008) (explaining that criminal punishment aims to condemn, punish, and/or provide retribution for past conduct).

practiced within a national security paradigm, may be for the purpose of preventing some future act from occurring: stopping a combatant from returning to the battlefield, a suspected accomplice from aiding terrorists, or a suspected terrorist from committing a hostile act. This is detention practiced as a mode of prevention.[58] Another purpose of detention may be questioning a possible informant and gathering information. This is detention practiced in a mode of interrogation.

Historically, criminal detention and national security detention have intersected when persons held in preventive detention have been subject to trial for crimes against the laws of war or for violations of martial law, often after hostilities have ceased.[59] Otherwise, the role of trial in wartime detention is limited. Detainee rights advocates, however, have at times used the concepts and language of criminal detention to critique the executive branch's other practices of detention.[60]

A narrow conceptualization of detention has significant consequences. Thinking of all detention as criminal detention collapses different modes of detention, conducted for different purposes, into one category. That, in turn, superimposes the motivations that regulate criminal detention—i.e., the search for truth in assessing guilt or innocence at trial—and the criminal procedures that have evolved in answer to those motivations onto other modes for which they are ill-suited. U.S. police forces do not torture suspects in custody because of professional ethics as well as legal constraints;[61] but those ethics have arisen, in part, out of the knowledge that obtaining information that cannot be introduced at trial defeats the purpose of holding a suspect in

58. *See, e.g.*, Stephanie Cooper Blum, *Preventative Detention in the War on Terror: A Comparison of How the United States, Britain, and Israel Detain and Incapacitate Terrorist Suspects*, HOMELAND SECURITY AFFAIRS, Oct. 2008, at 1, 3 (explaining that the purpose of preventive detention is to incapacitate a suspect when criminal charges are not feasible).

59. *See, e.g.*, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INT'L MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945 – 1 OCTOBER 1946, *available at* http://avalon.law.yale.edu/subject_menus/imt.asp; INT'L MILITARY TRIBUNAL FOR THE FAR EAST (1948), *available at* http://www.ibiblio.org/hyperwar/PTO/IMTFE/index.html. *But see Ex Parte* Quirin, 317 U.S. 1 (1942) (regarding a military commission that operated while hostilities were ongoing).

60. *See, e.g.*, STRANGERS AT THE DOOR, *supra* note 12, at 2 (arguing that night raids compound due process problems).

61. The law of evidence holds that information gained through involuntary confession is not admissible as evidence at trial. The so-called "exclusionary rule" is grounded in the Fourth and Fifth Amendments, though not explicitly stated in either. *See* U.S. CONST. amends. IV, V; *see also* Bram v. United States, 168 U.S. 532 (1897) (holding that self-incriminating testimony compelled in violation of the Fifth Amendment is inadmissible); Weeks v. United States, 232 U.S. 383 (1914) (holding that involuntary confessions are inadmissible as evidence in federal court); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (adopting the "fruit of the poisonous tree" doctrine); Mapp v. Ohio, 367 U.S. 643 (1961) (holding that the exclusionary rule is binding on the states through the Fourteenth Amendment).

criminal detention in the first place.[62] There is no reward for a police force that repeatedly loses cases because evidence was obtained in ways that render it inadmissible in court. The exclusionary rule keeps institutional incentives aligned.[63]

By contrast, an intelligence officer tasked with obtaining actionable intelligence or a combat soldier tasked with thwarting an attack by an adversary may initiate detention without ever intending to take a detainee to trial. For those practicing forms of detention outside of the criminal paradigm, due process protections are institutionally meaningless. Extending the norms and practices of U.S. criminal procedures designed to ensure fair trials is ineffectual at aligning institutional incentives to ensure humane treatment or prompt review of detainees in the context of interrogative or preventive detention.[64]

## II. LEGAL CONTOURS OF DETENTION IN THE PRESENT CONTEXT

### *A. Domestic U.S. Law*

The executive branch normally conducts criminal detention within the parameters of the Fifth and Fourteenth Amendments.[65] The executive branch bases its claims of legal authority for depriving persons of liberty in connection with its pursuit of the war against al Qaeda and affiliates on the Authorization for the Use of Military Force (AUMF) passed by Congress in the days following the 9/11 attacks.[66] On the basis of the AUMF, President Bush issued a Military Order on November 13, 2001, authorizing indefinite detention of

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62. *See* Comment, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. CHI. L. REV. 342, 357 (1967) ("Unlike many deterrent mechanisms the exclusionary rule does not achieve its effect by the infliction of sanctions, but rather by the removal of incentives." (footnote omitted)).

63. *See id.* (discussing how "the [exclusionary] rule encourages police to refrain from unreasonable searches not for fear of punishment, but simply because there is no reason for making them" (footnotes omitted)).

64. *See, e.g.*, U.S. DEP'T OF DEFENSE, IF-ASKED GUIDANCE: KEY POINTS ON DETAINEE TREATMENT 3 [hereinafter IF-ASKED GUIDANCE], *available at* http://www.dod.mil/pubs/foi/operation_and_plans/Detainee/10-F-0841-KeyPoints_onDetaineeTreatment.pdf ("There is broad authority under the laws and customs of war to detain enemy combatants, without any requirement to bring criminal charges while hostilities last. Criminal law provisions, whether in the U.S. or elsewhere, simply are not relevant here."); *see also infra* Part III.A (providing a discussion of detention modeled on U.S. criminal procedure).

65. U.S. CONST. amend. V (declaring that no person may "be deprived of life, liberty, or property, without due process of law"); U.S. CONST. amend. XIV, § 1 (stating "nor shall any State deprive any person of life, liberty, or property, without due process of law").

66. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)) (granting the President authority "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001").

anyone the President had "reason to believe . . . was a member of . . . al Qaida; ha[d] engaged in, aided or abetted, or conspired to commit, acts of international terrorism" against the United States, or had harbored any of the same.[67] The substance of that order has survived challenge, although the fate of Congress's latest attempt to expand the scope of the executive's detention authority, subject to pending challenge in the courts, is as yet unknown.[68]

### *B. Detention During International Armed Conflict: The POW Model*

The law of war, or international humanitarian law, recognizes two kinds of conflicts: international armed conflicts, meaning conflicts between states,[69] and non-international armed conflicts, meaning conflicts between a state and a non-state actor or between non-state actors.[70] The hostilities conducted under the "war on terror" have encompassed both conflicts.[71] International law

67. Military Order of November 13, 2001, 3 C.F.R. 918, 919 (2002).

68. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(b), 125 Stat. 1298, 1562 (2011) (to be codified at 10 U.S.C. § 801 note) (expanding the scope of activities and persons potentially subject to indefinite detention for activities opposed to the U.S. government in its war against al Qaeda and its affiliates). This attempt to expand the scope of the executive branch's detention authority beyond the basis provided by the AUMF has been successfully challenged as this Article goes to press, but the injunction granted by the Southern District of New York has since been stayed by the Second Circuit. *See* Hedges v. Obama, No. 12 Civ. 331 (KBF), 2012 WL 3999839, at *45 (S.D.N.Y. Sept. 12, 2012), *injunction stayed by* Nos. 12-3176 (L), 12-3644(Con.), 2012 WL 4075626 (2d Cir. Sept. 17, 2012); *see also supra* note 1.

69. Pursuant to Common Article 2 of the 1949 Geneva Conventions, the legal category of "international armed conflict" applies "to all cases of declared war or of any other armed conflict which may arise between two or more [states party to the Geneva Conventions] even if the state of war is not recognized by one of them." Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 2, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 3318, 75 U.N.T.S. 135, 136–68 [hereinafter Third Geneva Convention]; Convention Relative to the Protection of Civilian Persons in Time of War, art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]; *see also* Int'l Comm. of the Red Cross [ICRC], Opinion Paper, *How Is the Term "Armed Conflict" Defined in International Humanitarian Law?*, at 1 (Mar. 2008), *available at* http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf (describing one type of armed conflict under international humanitarian law as "international armed conflicts, opposing two or more States").

70. *See* Common Article 3, First Geneva Convention, *supra* note 69, at art. 3 (defining non-international armed conflicts); Second Geneva Convention, *supra* note 69, at art. 3 (same); Third Geneva Convention, *supra* note 69, at art. 3 (same); Fourth Geneva Convention, *supra* note 69, at art. 3 (same); *see also infra* note 92. Common Article 3 is so named because it appears in all four Geneva Conventions. For an expert opinion on what is considered "armed conflict" of any sort under international law of war, see ICRC, *supra* note 69, at 3–5.

71. *See, e.g.*, U.N. G.A. Rep. of the Human Rights Council, May 28, 2010, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Addendum, Study on*

would characterize the United States' war against Iraq (March 2003 to December 2011) as an "international armed conflict," in that U.S. government forces fought against Iraqi government forces.[72] International legal consensus is that, in Afghanistan, the United States and its NATO allies have been engaged in "non-international armed conflict."[73] Consensus breaks regarding hostilities in which the United States is engaged elsewhere in the name of combatting al Qaeda, with the U.S. government arguing that non-international armed conflict can transcend borders.[74] Other governments and legal experts, however, reject the notion that non-international armed conflict, such as the one in Afghanistan, can legally transcend borders. They consider hostilities outside the boundaries of Afghanistan to be beyond the scope of that conflict, thus outside any category of hostilities permitted or regulated by the international law of war.[75]

These categorizations set the legal parameters for detention. In an international armed conflict, a member of an adversary force who surrenders or is captured is classified as a prisoner of war (POW)[76] and may be subject to

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*Targeted Killings*, ¶¶ 50–54, U.N. Doc. A/HRC/14/24/Add.6 (2010), *available at* http://www2.ohchr.org/English/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf (distinguishing international armed conflicts from non-international armed conflicts and applying the principles of each to the isolated conflicts in Iraq and Afghanistan as well as the wider conflicts with the Taliban and al Qaeda); Diane Webber, *Preventive Detention in the Law of Armed Conflict: Throwing Away the Key?*, 6 J. NAT'L SEC. L. & POL'Y 167, 176 (2012) (characterizing the initial phases of the Afghanistan and Iraq conflicts as international armed conflicts, which transitioned out of this classification).

72. *See, e.g.*, ICRC, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, at 10, 31IC/11/5.1.2 (Oct. 2011).

73. For representative views of the international community, see *id.* at 10–11. The war in Afghanistan can be defined as "multinational armed forces . . . fighting alongside the armed forces of a 'host' state—in its territory—against one or more organized armed groups." *Id.* Therefore, it does not involve two or more opposing states and "must be classified as non-international." *Id.* For the Supreme Court's reflection on the categorization of the Afghanistan hostilities, see *Hamdan v. Rumsfeld*, 548 U.S. 557, 629–30 (2006) (leaving unresolved whether hostilities against al Qaeda members in Afghanistan are international in character, because Common Article 3 applies to signatories of the Geneva Convention when the conflict is "occurring in the territory of one of the High Contracting Parties," even when the conflict is "'not of an international character.'" (quoting Hamdan v. Rumsfeld, 415 F.3d 33, 41 (2005))).

74. The United States claims that it is involved in a non-international armed conflict with al Qaeda that transcends the borders of Afghanistan. *See* Eric Holder, Att'y Gen., U.S. Dep't of Justice, Attorney General Eric Holder Speaks at Northwestern University School of Law (Mar. 5, 2012), *available at* http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html. *But see* ICRC, *supra* note 72, at 10–11 (rejecting the claim "that a conflict of global dimensions is or has been taking place").

75. ICRC, *supra* note 72, at 22 ("Pursuant to other views, which the ICRC shares, the notion that a person 'carries' a NIAC [non-international armed conflict] with him to the territory of a non-belligerent state should not be accepted.").

76. *See* Third Geneva Convention, *supra* note 69, at art. 4 (describing POWs as individuals "belonging to a party to the conflict" and "who have fallen into the power of the enemy").

internment in a closed-perimeter camp facility.[77] POW camps are governed by the minimum standard guarantees of Common Article III of the four Geneva Conventions of 1949, which prohibits inhumane or degrading treatment of prisoners captured in war.[78] Like other states party to the Third Geneva Convention Relative to the Treatment of Prisoners of War, the United States has bound itself to meet certain conditions of food, medical services, clothing, and sanitation at facilities in which it interns POWs.[79] Further, with particular relevance to interrogative detention, the Third Geneva Convention permits a Detaining Party to question POWs but prohibits signatory parties from practicing coercion or intimidation while doing so.[80] In addition to treaty law, U.S. statutory law codifies standards for treatment of POWs.[81] Expert opinion holds that a "detaining state is not obliged to provide [judicial] review . . . of POW internment as long as active hostilities are ongoing, because enemy combatant status denotes that a person is *ipso facto* a security threat."[82]

Treaty law also provides rules regarding civilians during an international armed conflict. Civilians may be interned "only if security of the Detaining Power makes it absolutely necessary."[83] Some civilians who are not normally members of their country's armed forces may take up the fights as individuals or irregular units. International legal experts agree that civilians "who directly

77. *See id.* at art. 21 (stating that "[t]he Detaining Power may subject prisoners of war to internment. It may impose on them the obligation of not leaving, beyond certain limits, the camp where they are interned, or if the said camp is fenced in, of not going outside its perimeter"). Although the Third Geneva Convention permits internment in camp facilities, it does not permit internment in a penitentiary. *Id.* at art. 22 (stating that, "[e]xcept in particular cases which are justified by the interest of the prisoners themselves, they shall not be interned in penitentiaries").

78. *See* First Geneva Convention, *supra* note 69, at art. 3 (prohibiting inhumane treatment of prisoners including, among other things, "outrages upon personal dignity, in particular, humiliating and degrading treatment"); Second Geneva Convention, *supra* note 69, at art. 3 (same); Third Geneva Convention, *supra* note 69, at art. 3 (same); Fourth Geneva Convention, *supra* note 69, at art. 3 (same).

79. *See, e.g.*, First Geneva Convention, *supra* note 69, at arts. 26–29.

80. *Id.* at art. 17 ("Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information. If he willfully infringes this rule, he may render himself liable to a restriction of the privileges accorded to his rank or status. . . . No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind. . . . The questioning of prisoners of war shall be carried out in a language which they understand.").

81. Conduct by U.S. military personnel toward POWs is regulated by Article 93 of the Uniform Code of Military Justice, codified at 10 U.S.C. § 893 (forbidding "cruelty toward, or oppression or maltreatment of, any person subject to orders [or the accused] . . . ."). U.S. implementation of the Geneva Conventions with respect to POWs is found primarily in U.S. Army Regulation (AR) 190-8 (requiring humane treatment of "all persons captured, detained, interned, or otherwise held in U.S. Armed Forces custody during the course of conflict.").

82. ICRC, *supra* note 72, at 17.

83. Fourth Geneva Convention, *supra* note 69, at art. 42.

participate in hostilities"—such as some "insurgents" in Iraq who were not members of the regular Iraqi military—fall into the category of posing an immediate threat and may be detained in accord with the law of war.[84] Regarding other civilians who do not directly participate in hostilities, only in narrowly construed circumstances may non-combatant civilians legally be subject to "assigned residence" or internment.[85] Under treaty law, an interned civilian bystander, unlike a POW or a civilian combatant, has the right to challenge his or her detention before a court or tribunal and the right to automatic review of the need for his or her continued detention at least twice per year.[86] Whether soldier, insurgent, or civilian under international law regulating international armed conflict, an individual's legal detention ends when combat hostilities end,[87] even if insurgency survives state-to-state combat.[88] The law of war governing international armed conflict provides a clear legal framework for detainees.

### *C. Non-International Armed Conflict*

In contrast to the clear provisions regarding detention during international armed conflicts, international law is less specific with regard to detention during non-international armed conflicts.[89] An individual non-state actor, or one who acts against a state on behalf of a non-state grouping, is not considered a "lawful enemy combatant," and if detained, is not considered a

84. ICRC, *supra* note 72, at 17.

85. *Id.*

86.

> Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the [i]nternment or placing in assigned residence is maintained, the court or administrativ[]e []board shall periodically, and at least twice yearly, give consideration to his or her case with a view to the favourable amendment of the initial decision, if circumstances permit.

Fourth Geneva Convention, *supra* note 69, at art. 43.

87. *See, e.g.*, Third Geneva Convention, *supra* note 69, at art. 118 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities."); Fourth Geneva Convention, *supra* note 69, at art. 46 (stating that internment of civilians in a non-international armed conflict must cease "as soon as possible after the close of hostilities"); Hague Convention with Respect to the Laws and Customs of War on Land, art. 20, July 29, 1899, 32 Stat. 1803, 1817, 187 Consol. T.S. 429 (requiring the release of POWs as soon as possible "[a]fter the conclusion of peace").

88. *See, e.g.*, Al-Jedda v. United Kingdom, (No. 27021/08), 2011 Eur. Ct. H.R. 1092 (holding that a state could not hold combatants in preventive detention after state-to-state hostilities had ceased, even if an insurgency continued).

89. *See* ICRC, *supra* note 72, at 17–18 (acknowledging that Common Article 3 and Additional Protocol II do not enumerate grounds for detention or procedural rights in non-international armed conflict).

POW.[90] How are states obligated to treat such detainees? Common Article 3 of the Geneva Conventions still applies and provides minimum standards for treatment of any person detained by a state party to the treaty (such as the United States), whether the conflict is an international armed conflict or not.[91] Common Article 3 provides:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (I) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: *(a)* violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; *(b)* taking of hostages; *(c)* outrages upon personal dignity, in particular humiliating and degrading treatment; *(d)* the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.[92]

Past U.S. practice was to train its military forces up to the highest Geneva standards and to conduct detention accordingly, whether a conflict was an international armed conflict or not.[93] The rationale was to reduce confusion for U.S. soldiers. Instead of training to various standards for different kinds of conflicts or combatants, the U.S. military trained to one standard that would

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90. *Id.* at 16 ("POWs are essentially combatants captured by the adverse party in an IAC [international armed conflict].").

91. *See* Common Article Three, *supra* note 70. *But see* IF-ASKED GUIDANCE, *supra* note 64, at 2 ("[T]he United States Armed Forces have treated, and will continue to treat, all individuals detained at Guantanamo humanely and, to the *extent appropriate and consistent with military necessity*, in a manner consistent with the principles of the Third Geneva Convention, even though neither al-Qaida nor Taliban detainees are entitled to POW status. Even though the Guantanamo detainees are not entitled to POW rights and privileges, they are provided, as a matter of policy, *many privileges similar to POWs*." (emphasis added)).

92. Common Article Three, *supra* note 70.

93. *See, e.g.*, U.S. DEP'T OF THE ARMY, FIELD MANUAL 27-10: THE LAW OF LAND WARFARE 6–7, 165–80 (1956).

always conform with its Geneva commitments.[94] This eliminated the possibility, for example, that U.S. soldiers might have to make battlefield judgments about the identity—and hence treatment—of an enemy. It also reduced confusion for soldiers deployed to various conflicts or dealing with fluid situations. The Bush administration eliminated some bright-line distinctions in legal opinions issued at its highest levels,[95] resulting, it seems, in confusion among troops on the ground and, some propose, a consequent lowering of standards of detainee treatment.[96]

The Common Article III guarantees of minimum standards for material conditions of detention and detainee treatment do not include procedures for an individual to challenge categorization as a threat, terrorist, or accomplice; review of continued detention, whether a combatant or non-combatant;[97] nor other procedural safeguards for those detained in a non-international armed conflict.[98] Additional Protocol II to the Geneva Conventions explicitly provides guidance for treatment of those in detention and internment,[99] implicitly confirming that deprivation of liberty is acceptable practice in non-international armed conflict. However, like Common Article III, Additional Protocol II fails to provide legally acceptable grounds or limits for internment or to create other procedural rights for detainees.[100]

One last legally murky area deserves consideration: armed conflict against a non-state actor that crosses borders.[101] Could the United States legally detain suspected terrorists rounded up in Bosnia, Pakistan, Yemen, or elsewhere in operations against al Qaeda and affiliates? If non-international armed conflict can transcend borders, as the United States argues in the face of international disagreement, the United States may legally apprehend a suspected terrorist

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94. *See*, *e.g.*, *id.*; THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS § 6.2.5 (1995).

95. Memorandum from the Office of Legal Counsel, U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President 2–4 (Aug. 1, 2002) [hereinafter Torture Memo]; *see also Combatant Status Review Tribunals*, *supra* note 31; *infra* note 102 and accompanying text.

96. *See* MG ANTONIO M. TAGUBA, DEPUTY COMMANDING GEN. SUPPORT, COAL. FORCES LAND COMPONENT COMMAND, AR 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 12 (2004) [hereinafter TAGUBA REPORT], *available at* http://www.dod.mil/pubs /foi/operation_and_plans/Detainee/taguba/TAGUBA_REPORT_CERTIFICATIONS.pdf; *see also* Interview by Washington Media Associates with Maj. Gen. Thomas Romig (Nov. 19, 2007), *available at* http://www.gwu.edu/~nsarchiv /torturingdemocracy/interviews/thomas_romig.html; *infra* Part III.D.

97. ICRC, *supra* note 72, at 17.

98. Davidson & Gibson, *supra* note 8, at 337.

99. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 5, June 18, 1977, 1124 U.N.T.S. 609 [hereinafter Additional Protocol II].

100. ICRC, *supra* note 72, at 17.

101. *See supra* Part II.C (discussing non-international armed conflict that transcends borders).

outside of the zone of combat in Afghanistan and hold him or her in POW-like preventive detention. If not, such U.S. conduct could constitute kidnapping.[102]

Legally acceptable grounds for detention and how it may be imposed, challenged, or terminated during a non-international armed conflict are not specified under existing international law.[103] However, international law is clear on the maximum possible length of legal detention and holds a uniform standard for international and non-international armed conflicts. Detention or internment, whether of a combatant or civilian, ends with hostilities.[104]

### *D. Beyond Geneva: Other Law Informing U.S. Detention Practice*

Beyond the Geneva Conventions, other legal instruments shape U.S. practice of detention and the activities of its tribunals. With relevance to interrogative detention, reinforcing the prohibition on coercion or intimidation in questioning POWs,[105] the Convention Against Torture, Cruel, Inhuman, and

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102. U.S. legal opinion differs. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 738 (2004) (stating that kidnapping and detention may not be a violation of international norms). The U.S. government has extended the same argument regarding non-international armed conflict to assert the legality of targeted killing, outside of the Afghan theater. If non-international armed conflict can transcend borders, then U.S. lethal drone attacks in Yemen, for example, may be incident to the war in Afghanistan and permitted under international law; if not, then U.S. drone attacks in Yemen may constitute murder or assassination, and are unlawful. *See generally* Bill Roggio, *US Drones Strike Again in Yemen, Killing 6 AQAP Fighters near Capital*, THE LONG WAR JOURNAL (Jan. 23, 2013), www.longwarjournal.org/archives/2013/01/us_drones_strike_aga_5.php (reporting on recent drone strikes by the United States against al Qaeda fighters in Yemen and noting that "Obama administration officials have claimed . . . that the drones are targeting only [al Qaeda] leaders and operatives who pose a direct threat to the US homeland"). The Bush and the Obama administrations rest their claims of legality on the AUMF. Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)); *see also* Koh, *supra* note 33 (stating the Obama administration's position that "a state that is engaged in an armed conflict or in legitimate self-defense is not required to provide targets with legal process before the state may use lethal force. . . . [U]nder domestic law, the use of lawful weapons systems—consistent with the applicable laws of war—for precision targeting of specific high-level belligerent leaders when acting in self-defense or during an armed conflict is not unlawful, and hence does not constitute 'assassination.'"); Holder, *supra* note 74 (asserting that "legal" targeted killings during a borderless war are not assassinations).

103. ICRC, *supra* note 72, at 17.

104. *See* Third Geneva Convention, *supra* note 69, at arts. 85, 99, 129, 199; *see also supra* note 87.

105.

> Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information. If he willfully infringes this rule, he may render himself liable to a restriction of the privileges accorded to his rank or status.
>
> . . .
>
> No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of

Degrading Treatment (CAT), to which the United States is a party, erects an absolute bar to the practice of torture against detainees.[106] The U.S. ban on torture is incorporated into U.S. law by statute.[107]

However, Bush administration legal opinions blurred this bright-line renunciation of torture. As set forth in the "Torture Memos" promulgated by Bush appointees to the Department of Justice Office of Legal Counsel (OLC), the OLC introduced "specific intent" as an element of torture.[108] Thus, according to the OLC, inflicting pain on a detainee in U.S. custody would not amount to torture if the abuser's intent was to extract information rather than to mistreat.[109] Although subsequent Bush administration OLC appointees withdrew the OLC legal opinion expressed in these "Torture Memos,"[110] confusion persisted among front-line U.S. troops as to what standard was to guide treatment of detainees in their custody.[111] Just one day after his first inauguration, President Obama officially renounced torture, repudiated the previous OLC decisions, and reaffirmed the United States' commitment to Geneva Common Article 3 treatment for detainees.[112]

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> war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.
>
> . . .
>
> The questioning of prisoners of war shall be carried out in a language which they understand.

Third Geneva Convention, *supra* note 69, at art. 17.

106. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, art. 2, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 113 (entered into force June 26, 1987) [hereinafter CAT]; *see also* SENATE TREATY DOC. NO. 100-20, at 5–14 (1988) (expressing the United States' understanding of the CAT). 18 U.S.C. §§ 2340–2340A (2006). Congress enacted §§ 2340–2340A to carry out the United States' obligations under the CAT. *See* H.R. REP. NO. 103-482, at 229 (1994), *reprinted in* 1994 U.S.C.C.A.N. 398, 472.

107. *See supra* note 106.

108. Torture Memo, *supra* note 95, at 3–4. The OLC concluded that the statute's specific intent requirement meant that inflicting severe pain or suffering be the defendant's "precise objective," and acting with knowledge that such pain "was reasonably likely to result from his actions" did not satisfy specific intent. *Id.*, *repudiated by* Memorandum from the Office of Legal Counsel, U.S. Dep't of Justice to the Deputy Att'y Gen. n.27 (Dec. 30, 2004) [hereinafter Repudiation Memo] ("We do not reiterate that test here.").

109. Torture Memo, *supra* note 95 (specifying conduct for interrogation that, per the OLC, would be considered legal under the statutory prohibition of torture).

110. Repudiation Memo, *supra* note 108, at n.27.

111. *See infra* Part III.D.

112. Exec. Order No. 13,491, 3 C.F.R. 199, 201 (2010) ("From this day forward, unless the Attorney General with appropriate consultation provides further guidance, officers, employees, and other agents of the United States Government may, in conducting interrogations, act in reliance upon Army Field Manual 2-22.3, but may not, in conducting interrogations, rely upon any interpretation of the law governing interrogation . . . issued by the Department of Justice between September 11, 2001, and January 20, 2009."); *see also id.*, 3 C.F.R. 199, 200 ("Common Article 3 Standards as a Minimum Baseline. Consistent with the requirements of the Federal torture statute, 18 U.S.C. 2340-2340A, section 1003 of the Detainee Treatment Act of 2005, 42 U.S.C. 2000dd, the Convention Against Torture, Common Article 3, and other laws regulating the

Another provision guiding the treatment of detainees taken into U.S. custody, Article 3 of the CAT, bars the United States from deporting any person to a country that would subject that person to torture.[113] The CAT was formulated with the prevention of torture in mind, but has had the unintended effect of hampering the release of some Guantanamo detainees otherwise cleared by CSRTs or other tribunals, if deemed "more likely than not" to face mistreatment by their home government upon repatriation.[114]

## III. CONCEPTUAL CONTOURS OF DETENTION

Existing law and its gaps have informed U.S. experimentation with detention as a tactic in the fight against a non-state adversary since September 2001. A wide variety of practices have been tried out in a relatively short time span; more careful reflection on detention, based on observation of actual practice by the executive branch, is overdue. The discussion below is informed by the concept of the liminal phase, introduced by French social scientist Arnold van Gennep in his analysis of *rites de passage*.[115] By *rite de passage*, van Gennep meant a ritual process that accompanies change of place, state, and social position such as a wedding, funeral, or, in terms of detention, a trial.[116] Van Gennep identified three phases in a *rite de passage*: separation, liminality, and reattachment.[117] The first and last phases "detach ritual subjects from their old places in society and return them, inwardly transformed and outwardly changed."[118] The middle, or liminal, phase is by definition located between

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treatment and interrogation of individuals detained in any armed conflict, such persons shall in all circumstances be treated humanely and shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture), nor to outrages upon personal dignity (including humiliating and degrading treatment), whenever such individuals are in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States.").

113. CAT, *supra* note 106, at art. 3.1 (prohibiting state parties from expelling, or *refouling*, any person to a state "where there are substantial grounds for believing that he would be in danger of being subjected to torture").

114. United States Reservations to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, at II.(2) (Oct. 21, 1994), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV9&chapter=4&lang=en# ("[T]he United States understands the phrase, 'where there are substantial grounds for believing that he would be in danger of being subjected to torture,' as used in article 3 of the Convention, to mean 'if it is more likely than not that he would be tortured.'").

115. ARNOLD VAN GENNEP, THE RITES OF PASSAGE (Monika B. Vizedome & Gabrielle L. Caffee trans., Univ. Chi. Press 1960) (1909).

116. *See id.*

117. Victor Turner, *Variations on a Theme of Liminality*, *in* BLAZING THE TRAIL: WAY MARKS IN THE EXPLORATION OF SYMBOLS 48, 48 (Edith Turner ed., 1992) [hereinafter Turner, *Variations*]; *see also* Victor Turner, *Morality and Liminality*, *in* BLAZING THE TRAIL, *supra*, at 132, 133 [hereinafter Turner, *Morality*] (discussing van Gennep's work).

118. Turner, *Variations*, *supra* note 117, at 48–49.

established politico-jural states.[119] Those in the liminal phase "evade ordinary cognitive classification, too, for they are not this or that, here or there, one thing or the other."[120] Liminal subjects exist in a state of potentiality.

As illustration, consider ordinary criminal procedure as a right of passage: a crime occurs or is alleged to have occurred; an investigation identifies suspects; an accusation turns a "suspect" into an "accused;" a trial turns an "accused" into a person adjudged guilty or not guilty. In this schematic, detention is a liminal state. Conceptualizing detention as a liminal state allows for an analysis of its features under three categories of practice—criminal detention, preventive detention, and interrogative detention—that have emerged in the exercise of executive power since 9/11. One particular institution—the tribunal—has come to play a key role in this *rite de passage*. "Tribunal" refers to a set of decision-makers more broad than military Commissions or formally constituted courts. This Article uses "tribunal" to include any body convened to consider known facts, within categories set by law, to decide the disposition of a particular individual in the context of the United States' war against al Qaeda and its allies.[121] Detention does not start without a tribunal. For example, a group of executive branch employees, normally functioning either in a military or intelligence capacity, is convened. They may work simultaneously together, as in a night raid or CVITs conference call, or consecutively and apart by drafting, revising, and signing off on memoranda to decide to subject a person to detention. Tribunals initiate the liminal state of detention, detaching the liminal subject from a stable state. Do they play any further role? The answer to this question depends on which kind of detention is at issue.

### *A. Criminal Detention*

Taking up criminal detention first, consider its primary goal: to bring someone to trial. This common-sense point bears articulating because it stands in contrast to the other kinds of detention under consideration. Stated conversely, trial is the one recognized legitimate purpose of criminal detention. Accusation casts a suspect into a liminal state, which a trial verdict terminates. For a person in the liminal status of "the accused," a trial is the final step in a *rite de passage* for reattachment to a stable status. "Reattachment" does not have to mean a return to the person's former status, exonerated and free, restored to his or her former position in a social milieu. "Reattachment" can also mean attachment to a stable social status that is new for the person undergoing the *rite de passage*. The trial may end in an accused being pronounced guilty and incarcerated. The new, stable social status is one of

119. The liminal phase takes its name from the Latin term "limen," literally meaning a "threshold." *Id.* at 49.

120. *Id.*

121. *See generally* Eppinger, *supra* note 7, at 1162–73 (providing a more in-depth consideration of the role of tribunals in the three modes of detention).

"convict," and the new milieu is prison. Military commissions serve the function of providing the exit process from the liminal state of detention—for ending the limbo—by rendering a verdict of "guilty" or "not guilty." Civilian criminal courts could serve the same function if Congress were to allow the executive to transfer criminally accused detainees held outside of the United States to stand trial in the United States.

Whether bound for a trial by military commission trying war crimes or by a civilian criminal court, the goal of criminal detention is to hold suspects for trial. Those concerned with it are occupied with procedures for achieving "fairness" at trial. Even those unconcerned with protecting the civil liberties of suspected terrorists have an interest in fairness, acting in the belief that the criminal procedures devised to assure fair trials are also those that best allow the truth to emerge through an adversarial process. In other words, "fairness" need not be an end in itself; it may serve a function in the production of truth, which then helps to assure that the government has "got the right guy," a question of particular salience for those seeking to imprison conspirators in past or planned terrorist attacks. Because of this concern with fairness and belief in a certain process (adversarial trial) for the production of truth (held even by those unsympathetic to detainees in U.S. custody), the emphasis by civil liberties advocates in the U.S. legal community on fair trials was not misguided per se. It would, however, apply only to a small fraction of U.S. detainees, i.e., those intended for trial.[122]

### *B. Preventive Detention*

Criminal detention, where trial provides a clear exit to the liminal state of detention, has been the exceptional practice in war-on-terror detention. In contrast to the small proportion of detainees held for criminal detention, some were treated more like traditional POWs, a situation in which detention is meant to render a combatant *hors de combat*. For a side holding combatants it might otherwise face on a battlefield, the function served by detention in this case is prevention.[123] Preventive detention is allowed, and even encouraged, under the international law of war.[124] After all, the point of the law of war is to facilitate an end to hostilities in order to minimize suffering.[125] Removing combatants from the battlefield was seen as a means to that end, and over the course of the twentieth century, international law developed techniques to

122. *See supra* note 24 and accompanying text.

123. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 518–20 (2004) (stating that at least one acceptable rationale for detaining lawful and unlawful combatants is to remove them from the battlefield and thus prevent their return to battle).

124. The Obama administration has referred to this as "law of war detention." *See, e.g.*, Exec. Order No. 13,567, *supra* note 34.

125. *See* INT'L & OPERATIONAL LAW DEP'T, U.S. ARMY, LAW OF WAR HANDBOOK 4–5 (Keith E. Puls ed., 2005) [hereinafter LAW OF WAR HANDBOOK].

guarantee the minimum living standards for those held as POWs, in part, to encourage surrender in international armed conflict.

Several particular features complicate preventive detention in the present conflict. First, whereas the laws of war for preventive detention during international armed conflict are well developed, regulation of detention in non-international armed conflict is an undeveloped area of international law, as outlined above.[126] The classification of the conflict in Afghanistan as international or non-international armed conflict is itself disputed.[127] Given the different features of various war-fighting environments over the last decade of hostilities, the experience of U.S. soldiers and their detainees could differ widely between theaters. Detainees in U.S. custody during the war in Iraq, an international armed conflict, might be held subject to a well-developed body of regulation.[128] Even with widely accepted regulations and systems for monitoring compliance in place, detainee treatment suffered.[129] Detainees held as a result of the hostilities in Afghanistan, potentially categorized as a non-international armed conflict, lacked even that clarity.[130]

Complicating matters further in this conflict is the potential for indefinite detention.[131] The international law of war regulating preventive detention was not written with the possibility of endless war in mind. In a typical international armed conflict, war as a formal legal state has a clear beginning with a state's declaration of war and a clear end with its offer or acceptance of surrender.[132] The current hostilities against al Qaeda are different. The U.S. government adopted the position that hostilities could continue indefinitely and, therefore, preventive detention could also legally continue indefinitely.[133] The liminal state—the limbo status—could extend in perpetuity. Even American citizens could be held by their government without charge in

126. *See supra* Part II.C.; *see also, e.g.*, Waxman, *supra* note 4, at 344–49.

127. *See* LAW OF WAR HANDBOOK, *supra* note 125, at 84–86; *see also supra* notes 74–75 and accompanying text.

128. *See, e.g.*, Third Geneva Convention, *supra* note 69.

129. *See, e.g.*, TAGUBA REPORT, *supra* note 96. *Cf.* Scott Shane, *No Charges Filed in Two Deaths Involving C.I.A.*, N.Y. TIMES, Aug. 31, 2012, at A1, *available at* http://www.nytimes.com/2012/08/31/us/holder-rules-out-prosecutions-in-cia-interrogations.html?ref=abughraib (reporting the Justice Department's decision not to prosecute intelligence or military personnel involved in the deaths of two prisoners in Afganistan and Iraq that were the result of torture and inhuman conditions).

130. Third Geneva Convention, *supra* note 69; LAW OF WAR HANDBOOK, *supra* note 125, at 84–86.

131. Hamdi v. Rumsfeld, 542 U.S. 507, 519–21 (2004) (acknowledging the potential for indefinite detention in a theoretically indefinite war).

132. *See, e.g.*, LAW OF WAR HANDBOOK, *supra* note 125, at 4, 8–9.

133. U.N. Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Second Periodic Reports of States Parties Due in 1999, Addendum (United States of America) Annex 1, at 47, U.N. Doc. CAT/C/48/Add.3 (May 6, 2005), *available at* http://www.state.gov/documents/organization/62175.pdf, *cited in* Waxman, *supra* note 4, at 344.

perpetuity if the U.S. government satisfies certain preconditions for preventive detention of citizens.[134] The Supreme Court majority in *Hamdi* specified a few procedural guarantees to an American citizen detained pursuant to hostilities conducted under the auspices of Congress's AUMF,[135] but those guarantees should not obscure the bottom line on U.S. detention jurisprudence: *Hamdi* allows preventive detention for the duration of a conflict, following the established rule for POWs in international armed conflict, even in the case of a non-traditional conflict that could last indefinitely.[136]

Non-Americans face an even grimmer reality, unaided by the *Hamdi* procedures for challenging categorization as an enemy combatant that extend only to the small category of American citizens.[137] For non-Americans held in preventive detention at Guantanamo Bay, the Obama administration has instituted Periodic Review Boards (PRBs) to assess whether holding a detainee is "necessary to protect against a significant threat to the security of the United States."[138] At an initial PRB review hearing, each detainee has an opportunity to introduce additional information for the Board to weigh in determining whether the facts warrant continued preventive detention.[139] Subsequently, Defense officials, with input from intelligence and other agencies, may compile additional information and revisit whether it justifies continued detention.[140] This process highlights a new difference between criminal and preventive detention. It tasks the Detaining Power with gathering evidence that could exculpate the "defendant." Unlike practitioners in the criminal law domain who seek to ascertain a fixed truth and convict or exonerate accordingly, practitioners in the national security domain deal in fleeting truths. Their goal is to assess accurately the threat of a given moment and protect against it as effectively as possible, without wasting resources on

134. *Hamdi*, 542 U.S. at 518–21 (recognizing the potential for indefinite detention under the executive branch's authority to detain enemy combatants captured in Afghanistan under the auspices of the AUMF).

135. Authorization for Use of Military Force, Pub. L. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)) (defining the scope of the hostilities broadly, stating that "the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons" responsible for 9/11). Those guarantees are that the government provide an American-citizen detainee with: notice of a categorization like "enemy combatant" upon which detention is based; the chance to rebut that categorization; and a "neutral decision maker" to hear the challenge to the categorization. *Hamdi*, 542 U.S. at 533.

136. *Hamdi*, 542 U.S. at 519–21 (noting the possibility of indefinite, or perpetual, preventive detention of American citizens apprehended in Afghanistan).

137. *Id.* at 532–34 (limiting the holding to a citizen detainee). *See also* Boumediene v. Bush, 553 U.S. 723, 795–98 (2008) (holding that non-citizen detainees at Guantanamo may invoke the fundamental procedural protections of habeas corpus in order to pursue review by a civilian judge of the detainee's status as an enemy combatant, which, if upheld, justifies detention until the end of hostilities, per President Bush's Military Order of November 13, 2001, 3 C.F.R. 918 (2002)).

138. Exec. Order No. 13,567, *supra* note 34.

139. *Id.* § 3(a).

140. *Id.* § 3(a)(4).

bygones and has-beens. Risk—not retribution or justice—figures prominently in the rationale. Temporality is key. Preventive detention makes sense only against a present or future instigator of harm. However, under the present scheme, resources are not expended in continuous reassessment. A PRB conducts an initial review hearing to assess whether continued detention of a Guantanamo detainee meets the standard of protecting the United States against a significant threat, at that moment. While the risk that a particular detainee poses will change with rapidly changing facts on the ground, as well as the detainees own capacities and intentions, the PRB does not conduct another full hearing to assess the threat posed by the detainee for three more years. Between triennial hearings, the PRB merely reviews the detainee's file twice per year.[141]

Some information about review of the continued preventive detention at Guantanamo Bay has come into the public domain since the Obama administration formalized and published the procedures.[142] Far less is known about review of preventive detention at the DFIP facility in Afghanistan, where the United States holds many more detainees.[143] Some public information comes from court filings in Bagram detainee habeas actions.[144] An Enemy Combatant Review Board, a five-officer panel, reviews the case of each person brought to the DFIP for long-term confinement and decides by majority vote whether the detainee should be held.[145] Continued detention is reviewed every six months as at Guantanamo Bay.[146] Matthew Waxman, a former Bush administration Department of Defense official with some purview over detainee affairs, writes: "[T]he processes US forces eventually put in place [in Afghanistan] roughly track the requirements of [the Fourth Geneva Convention] Article 78, which calls for, among other things, regular processes and periodic review (at least every six months) for security internees."[147]

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141. *See id.* § 3(b)–(c). The biannual review interval meets the Fourth Geneva Convention's standard for review of continued internment of a civilian during armed conflict. Fourth Geneva Convention, *supra* note 69, at art. 78.

142. Exec. Order No. 13,567, *supra* note 34, § 3 (explaining the detainee review process).

143. Waxman, *supra* note 4, at 350 (providing information on Bagram review procedures used after 2006; those used before this period are even murkier).

144. *See id.* at 350 & 356 n.41 (citing Declaration of Colonel James W. Gray ¶¶ 11–13, Al Maqaleh v. Gates, No. 06-CV-01669 (D.D.C. 2007) (discussing the review process for detainees in Afghanistan); Declaration of Colonel Rose M. Miller ¶¶ 10–12, Ruzatullah v. Rumsfeld, No. 06-C-01707 (D.D.C. 2006) (discussing detention procedures and the review process for enemy combatants detained in Afghanistan)); *see also* Monica Eppinger, *Military Tribunals: A Critical Assessment*, 56 ST. LOUIS U. L.J. 1153, 1170–71 (2012).

145. *See, e.g.,* Eppinger, *supra* note 144, at 1170–71 ("Each individual brought to theater detention facilities for long-term confinement has his case reviewed by an Enemy Combatant Review Board, a five-officer panel that recommends by majority vote whether the detainee be held in continued detention. We can infer that each person's continued detention is reviewed once every six months. . . .").

146. *See* Waxman, *supra* note 4, at 350.

147. *Id.*

The agreement between the United States and Afghanistan over the transfer of the Parwan facility left two issues unresolved that illustrate gaps in international law regulating preventive detention. The first issue concerns third-country detainees. The MOU explicitly limits the transfer of detainees to "Afghan nationals."[148] During an August 5, 2010 news conference, Vice Admiral Robert Harward indicated that the United States would retain decisional authority over non-Afghan detainees, stating, "[o]ur first preference is to repatriate them back to their host countries; if not, prosecute them in the Afghan legal system."[149] Although Admiral Harward would not provide a precise number of third-country detainees, he indicated that "there [were] less than 50 [and that] [s]eventy-five percent come from Pakistan."[150] The non-governmental organization Human Rights First estimates that there are forty-one third-country non-Afghan detainees at the DFIP.[151] In January 2012, the United States was reportedly considering repatriation of the third-country detainees in anticipation of Afghan authorities lacking interest in practicing criminal or national security detention in their cases.[152] The ongoing interplay between risk calculations and desire to comport with treaty obligations, both part of the ethical formulation of national security practitioners, is evident: repatriation of third-country DFIP detainees is apparently predicated on successfully negotiating post-transfer monitoring and on securing diplomatic assurances that "detainees will not be abused when they return home."[153]

The second unresolved issue concerns decisional authority over detainee release. The MOU requires the government of Afghanistan to "consider favorably" any U.S. assessments that a detainee should not be released.[154] There is some question as to whether this gives the United States a de facto veto over Afghan release decisions.[155] The U.S. government reportedly believes that it can block the release of detainees as long as its forces are in

148. MOU, *supra* note 49, at para. 4.

149. Admiral Harward is the Commander of Joint Task Force-435, which operates the DFIP. *See DOD News Briefing with Vice Adm. Harward and Ambassador Klemm from Afghanistan*, U.S. DEP'T OF DEFENSE (Aug. 5, 2010), http://www.defense.gov/transcripts/transcript.aspx?transcriptid=53002 [hereinafter *DOD News Briefing*].

150. *Id.*

151. *See* HUMAN RIGHTS FIRST, DETAINED AND DENIED IN AFGHANISTAN: HOW TO MAKE U.S. DETENTION COMPLY WITH THE LAW 3 (2011).

152. Peter Finn & Julie Tate, *Some Held at U.S.-Run Prison in Afghanistan Could Return Home*, WASH. POST, Jan. 24, 2012, at A11. ("Afghan authorities are unlikely to have any interest in either continuing to hold [them] or [in] putting them on trial").

153. *Id.*

154. MOU, *supra* note 49, at para. 9.

155. Rod Nordland, *Detainees Are Handed over to Afghans, But Not out of Americans' Reach*, N.Y. TIMES, May 31, 2012, at A4 ("When asked whether that structure basically gave the Americans veto power on detainees releases, the [U.S.] official said, 'That's your word, not mine.'").

Afghanistan.[156] Alternatively, the Afghan DFIP commander does not believe that such a veto exists, as it would undermine Afghan sovereignty.[157] The ambiguity may be intentionally embedded. One U.S. official stated that the MOU was written thus "'because the U.S. in Kabul is speaking to two audiences with contradictory interests: Congress, which does not want Afghanistan to release anybody they want, and the Afghans, who want sovereignty.'"[158]

### *C. Interrogative Detention*

In a war in which detention has been so widely practiced, three motivating logics have emerged. Prosecution is dwarfed in comparison with prevention in both frequency and prominence. The widespread practice of preventive detention during this series of conflicts is consistent with twentieth-century experience in conventional war, although its importance as a war-fighting doctrine against "insurgency" and in war against non-state actors may have grown. What emerged in a new way during the "war on terror" was detention motivated by the prospect of gathering intelligence interrogative detention. Although certainly present in U.S. practices of detention in past conflicts, interrogative detention became prevalent—and in some manifestations, more openly acknowledged in this conflict than in any other since the 1929 Geneva Conventions.[159]

One reason stems from the inception of the war and the nature of the foe. 9/11 was diagnosed, in part, as a failure of intelligence, and the executive branch intelligence agencies sought to remedy that failure, in part, by gathering as much intelligence as possible.[160] The executive branch pursued individuals for interrogative detention in two different ways, in service of two different ends. First, after the surprise attacks of 9/11, the U.S. government and its allies reacted as if to a great crime scene, detaining many individuals, the equivalent of material witnesses detained for what they were expected to know.[161]

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156. *Id.* ("'Absolutely we have veto power.'").

157. *Id.* (stating that Afghan General Ghulam Farouq insisted that the United States did not hold veto power).

158. *Id.*

159. Convention Relative to the Treatment of Prisoners of War (Geneva Convention of 1929) (July 27, 1929) art. 5 (besides name and rank, stating that "no pressure shall be exercised on prisoners to obtain information regarding the situation in their armed forces or their country").

160. *See* NAT'L COMM'N ON TERRORIST ATTACKS ON THE UNITED STATES, THE 9/11 COMMISSION REPORT (2011), *available at* http://www.9-11commission.gov/report/911Report.pdf.

161. In at least one case, a detainee was originally held—literally—as a material witness. American citizen Jose Padilla was held as a material witness for the grand jury investigation into the 9/11 attacks from his detention at Chicago's O'Hare Airport on May 8, 2002, until his designation as an "enemy combatant" and transfer to a U.S. military detention facility on June 9, 2002. Padilla v. Hanft, 423 F.3d 386, 386, 390 (4th Cir. 2005).

Specific individuals were identified, sought, detained, and interrogated.[162] Although itself a matter of controversy, the practice of seeking information from war detainees was seen by some as an extension of accepted practice. The Department of Defense designated the Naval Station at Guantanamo Bay, Cuba, as a "strategic intelligence gathering center."[163] It instructed Combatant Commanders performing war-on-terror missions in Afghanistan, Iraq, or elsewhere not to view Guantanamo as a destination for those whom Combatant Commanders apprehended but considered "low-level Enemy Combatants who pose only a tactical force protection threat;" instead, the Guantano facility was intended for detainees considered to be of "high operational or strategic intelligence or law enforcement value."[164] The Department of Defense developed extensive guidelines outlining the division of labor between guards, military police, and interrogators at Guantanamo; even specifying conduct by interpreters thought to facilitate intelligence gathering.[165] Reviews were conducted to monitor that actual practice followed guidance.[166]

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162. The U.S. policy of seeking highly valued targets for intelligence gathering—formerly referred to as high payoff targets (HPTs)—predates the "war on terror." *See, e.g.*, DEP'T OF THE ARMY, FIELD MANUAL FM 34-52 INTELLIGENCE INTERROGATION 1-7 to 1-15 (1992), *available at* http://www.dod.mil/pubs/foi/operation_and_plans/Detainee/additional_detainee_documents/07-F-2406%20doc%2010.pdf. The U.S. military developed and vetted those interrogation techniques in an attempt to meet Geneva and other law-of-war standards as well as the Uniform Code of Military Justice (UCMJ). *Id.*

163. *See* Memorandum from Office of Assistant Sec'y of Def. for Special Operations/Low Intensity Conflict (ASDSO/LIC), Criteria and Guidelines for Screening and Processing Persons Detained by the Department of Defense in Connection with the War on Terror (Aug. 22, 2003), at 3 [hereinafter Criteria and Guidelines Memo], *available at* http://www.dod.mil/pubs/foi/operation_and_plans/Detainee/04-F-0269%20Criteria%20and%20Guidelines%20for%20Screening%20and%20Processing%20Persons%20Detained%20by%20the%20DoD%20in%20Connection%20with%20the%20War%20on%20Terrorism.pdf. The Memorandum was promulgated, for example, by cable to field command and detention facility commanders in Cable 632132 from the Office of the Joint Chiefs of Staff. Memorandum on Criteria and Guidelines for Screening and Processing Persons Detained by the DOD in Connection with the War on Terrorism (Mar. 3, 2004), at para. III.G, *available at* http://www.dod.mil/pubs/foi/operation_and_plans/Detainee/04-F-0269%20Global%20Screening%20Guidance.pdf.

164. *See supra* note 162.

165. JOINT TASK FORCE GUANTANAMO (JTF-GTMO), CAMP DELTA STANDARD OPERATING PROCEDURES sec. 4-20, at 4.3 (2003) [hereinafter GTMO SOP], *available at* http://www.dod.mil/pubs/foi/operation_and_plans/Detainee/CampDeltaSOP_dec07.pdf ("The purpose of the Behavior Management Plan is to enhance and exploit the disorientation and disorganization felt by a newly arrived detainee in the interrogation process."); *id.* sec. 15-10, at 15.5; *id.* sec. 15-11, at 15.5 (allowing interpreters to loiter in cell blocks outside of interrogation sessions and to make observations of such detainee behavior as "reverence toward other detainees," "cheering," "teachers," and to report observations to the Joint Detention Operations Group).

166. *See, e.g.*, VICE ADMIRAL A.T. CHURCH III, USN & BRIGADIER GEN. D.D. THIESSEN, USMC, BRIEF TO THE SECRETARY OF DEFENSE ON TREATMENT OF ENEMY COMBATANTS DETAINED AT NAVAL STATION GUANTANÁMO BAY, CUBA, AND NAVAL CONSOLIDATED BRIG CHARLESTON (2004) [hereinafter SEC. DEF. BRIEFING], *available at* http://www.dod.gov/pubs/foi

Although the bureaucratization of procedures and safeguards may promote the sense that interrogative detention of "high value detainees" in the "war on terror" amounts merely to the extension of prior military practice, other disclosures bar that conclusion. In this conflict, the U.S. government took the policy of seeking highly valued sources to new lengths. As one example, the U.S. government devised procedures for "extraordinary rendition": assumedly to avoid de jure violation of U.S. domestic and treaty law prohibitions on physical or psychological harm of detainees in its custody, the U.S. government targeted and seized persons it believed to have knowledge or information of national security significance and delivered those individuals to cooperative governments known to practice torture.[167] One credible source documented that at least 136 persons had thus been "rendered" by the U.S. government for torture.[168] At least two cases involved gross misidentification—one, a case of mistaken identity,[169] and another, a case of an innocent Canadian wrongfully characterized as having terrorist affiliations[170]—resulting in the torture of men who had no information to share. Civil suits or government inquiries have won compensation for some who were rendered and survived, though all such suits in the United States have been dismissed by the courts on procedural grounds such as state secrets privilege or judicial deference to the executive in matters of foreign policy.[171]

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/operation_and_plans/Detainee/may04church_secdef.pdf; Memorandum from Admiral J. Stavridis, U.S. Navy to Mr. Uldric L. Fiore, Jr., Assistant Inspector Gen. & Gen. Counsel, Office of the Inspector Gen., Dep't of Def. (Feb. 5, 2007), *available at* http://www.dod.gov/pubs/foi/operation_and_plans/Detainee/09-F-0049_BassettReport.pdf (detailing an investigation of allegations of detainee abuse stemming from off-duty bragging by Guantanamo personnel and finding no serious violations of procedure).

167. *See* Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER, Feb. 14, 2005, at 106 (providing an early report of "extraordinary rendition").

168. OPEN SOC'Y JUSTICE INITIATIVE, GLOBALIZING TORTURE: CIA SECRET DETENTION AND EXTRAORDINARY RENDITION 6 (2013), *available at* http://www.opensocietyfoundations.org /sites/default/files/globalizing-torture-20120205.pdf.

169. *See* Dana Priest, *Wrongful Imprisonment: Anatomy of a CIA Mistake*, WASH. POST, Dec. 4, 2005, at A1 (discussing the imprisonment of German citizen Khaled el Masri); *see also* Case of El-Masri v. The Former Yugoslav Republic of Macedonia, Eur. Ct. H.R., Application No. 39630/09, para. 205 (Dec. 13, 2012) ("The Court observes that on 23 January 2004 the applicant, handcuffed and blindfolded . . . and subjected to total sensory deprivation . . . was forcibly marched to a CIA aircraft."), *available at* http://hudoc.echr.coe.int/sites/eng/pages /search.aspx?i=001=115621.

170. *See* Mayer, *supra* note 167, at 106 (discussing the case of Canadian citizen Maher Arar); *see also* CANADIAN GOV'T COMM'N OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT ON THE EVENTS RELATED TO MAHER ARAR 9–10 (2006).

171. There are examples of successful civil suits in foreign courts or foreign governmental inquiries resulting in compensation. *See, e.g.*, Case of El-Masri, *supra* note 169; Press Release, Office of Prime Minister of Can., Prime Minister Releases Letter of Apology to Maher Arar and His Family and Announces Completion of Mediation Process (Jan. 26, 2007), *available at* http://pm.gc.ca/eng/media.asp?id=1509 (announcing that the Canadian government had issued an official apology and C$10.5 million plus legal costs in compensation to Arar, arising from the

Only in Italy have criminal prosecutions been brought against U.S. officials for kidnapping in connection with extraordinary rendition, resulting in convictions against all accused.[172]

In addition to extraordinary rendition, credible sources also report another extreme departure from past practice under the Bush administration's conduct of interrogative detention, namely the U.S. government's setting up so-called "Black Sites," secret facilities established for the interrogative detention of certain "high-value detainees."[173] Assumedly, these sites were not operated on U.S. soil.[174] They likely involved U.S. personnel as interrogators. U.S.

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Canadian government's information-sharing with U.S. intelligence agencies and thus the Canadian government's complicity with his rendition). U.S. courts have dismissed suits seeking redress for U.S. government renditions. *See* El-Masri v. United States, 437 F. Supp. 2d 530, 541 (E.D. Va. 2006) (granting motion to dismiss on an assertion of the state secrets privilege), *aff'd*, 479 F.3d 296 (4th Cir. 2007); *see also* Arar v. Ashcroft, 414 F. Supp. 2d 250, 287 (E.D.N.Y. 2006) (dismissing on several grounds), *aff'd*, 532 F.3d 157 (2d Cir. 2008), *vacated and aff'd en banc*, 585 F.3d 559 (2d Cir. 2009).

172. The Italian case involved the seizure of Nasr Osama Mustafa Hassan (known as Abu Omar), an Egyptian cleric who had been granted political asylum in Italy. Abu Omar was seized on the street in Milan while walking to his mosque, brought to the U.S. airbase in Aviano, flown to Ramstein, Germany, and thence to Cairo, Egypt, where he alleges he was tortured at an Egyptian facility. In 2009, an Italian court convicted, in absentia, twenty-three U.S. officials of Abu Omar's kidnapping, including Milan CIA station chief Robert Seldon Lady. For summary and analysis, see Tribunale de Milano (sez. IV pen.) 1° febbraio 2010 n. 12428, on International Law in Domestic Courts, OUP Reference: ILDC 1492 (IT 2010). Three other U.S. officials—CIA Rome station chief Jeffrey Castelli and CIA agents operating under diplomatic cover as First Secretary and Second Secretary at the U.S. Embassy in Rome—were acquitted at the 2009 trial, but only because they asserted diplomatic immunity. The convictions of the twenty-three Americans were upheld on appeal before Italy's highest court in 2012, and their sentences were increased (from seven to nine years in the case of Milan station chief Robert Seldon Lady, and from five to seven years in the cases of the other twenty-two). *See* Timothy Synhaeve, *Taking the War on Terror to Court: A Legal Analysis on the Right to Reparation for Victims of Extraordinary Rendition*, 5 VIENNA J. INT'L CONST. L. 439, 469–72 (2011) (describing procedural maneuvering over state the secrets privilege in the original trial). Due to a technicality, the Italian government will not seek extradition of any of the convicted.

On February 4, 2013, an appeals court vacated the acquittals of the other three who had claimed diplomatic immunity in 2009, convicting and sentencing Rome station chief Jeffrey Castelli to seven years and Americans Betnie Madero and Ralph Russomando to six years each. *See Italian Court Convicts Three Americans in Kidnapping Case*, N.Y. TIMES, Feb. 1, 2013, at A6; *see also* Elisabetta Povoledo, *High Court in Italy Backs Convictions for Rendition*, N.Y. TIMES, Sept. 10, 2012, at A5. The Italian court's convictions are the only criminal prosecutions to date for rendition. For an overview and summary of all twenty-six convictions, see Colleen Barry, *Milan Court Convicts Three Americans in CIA Kidnapping*, ASSOCIATED PRESS, Feb. 3 2013, http://www.law.com/jsp/article.jsp?id=1202586754294. The convictions in the Italian court are the only convictions of U.S. officials in connection with rendition, as yet.

173. *See* OPEN SOC'Y JUSTICE INITIATIVE, *supra* note 168, at 15–16 ("President Bush has stated that about a hundred detainees were held under the CIA secret detention program.").

174. However, details regarding the detention of a very small number of people at the Naval Consolidated Brig in Charleston, South Carolina, are hazy. *See* SEC. DEF. BRIEFING, *supra* note 166, at 15 (noting the "limited detainee population"). Not all identities, beyond now-convicted criminal Jose Padilla, of those held in interrogative detention at Charleston are available. *See*

government officials made extensive efforts to enlist the assistance of foreign governments, and in the end, fifty-four foreign governments have been documented as helping the U.S. government in carrying out extraordinary rendition or in operating "Black Sites."[175]

The practice of targeting particular sources thought to be especially knowledgeable for capture and interrogative detention was pronounced at the outset of hostilities and in the early years of war. Over a longer span, an increasing number of al Qaeda leadership had been taken into custody and were already held; killed in the course of hostilities; or captured, interrogated, and released. The usefulness of supposed knowledge waned with its timeliness. As war thinned the ranks of the operational leadership of the earlier organization, new recruits may have been operating as sympathetic bands rather than closely integrated affiliates. Information about the methods used to target particular sources gradually became public, and as such information spread, the public—or some subsections of it—began to object.[176] Some foreign prosecutors secured convictions of U.S. officials.[177] During the 2008 presidential campaign, then-Senator Obama campaigned against torture, and when President Obama took office in 2009, his administration renounced it as a matter of policy, and with it, rendition.[178] Likewise, the Obama administration ordered the CIA to close any detention facilities it was operating, i.e., the "Black Sites."[179]

Extreme measures involving high-value targets, although significant as indicators of the lengths the executive has gone to illicit information through detention, do not demonstrate its breadth. Targeting "high-value" individuals represents only a fraction of the interrogative detention practiced; although the United States has reduced the practice, a second way of pursuing sources of possible information, in service of a different kind of end, has come to the fore:

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OPEN SOC'Y JUSTICE INITIATIVE, *supra* note 168, at 5–6; Abby Goodnough & Scott Shane, *Padilla Is Guilty on All Charges in Terror Trial*, N.Y. TIMES, Aug. 17, 2007, at A1 (reporting that Padilla was held in the South Carolina brig in isolation for three and a half years). The use of the Charleston facility for interrogative detention that was not, as far as publicly available sources reveal, detention primarily for preventive or prosecutorial purposes; and the extent to which the government has shielded in secrecy its methods of interrogation, the agencies involved, and other details usually public regarding publicly funded institutions in the United States leads to speculation about whether to categorize Charleston as the only U.S.-based "Black Site." *See* SEC. DEF. BRIEFING, *supra* note 166, at 15–16 (mentioning Charleston interrogative detention).

175. *See* OPEN SOC'Y JUSTICE INITIATIVE, *supra* note 168, at 6.

176. For examples of information becoming more widely available, see OPEN SOC'Y JUSTICE INITIATIVE, *supra* note 168, at 29–30 (providing information that was released or uncovered about detainees subjected to post-9/11 secret detention and extraordinary rendition). *See also* Mayer, *supra* note 167, at 106–08; Priest, *supra* note 169, at A25.

177. *See supra* note 172 and accompanying text.

178. *See* Exec. Order No. 13,491, 3 C.F.R. 199, 201 (2009). Critics contend that the Obama administration policy now is merely to kill suspected terrorists instead of rounding them up for interrogation.

179. *Id.*

interrogative detention as mass practice. Detention in the "war on terror" has become particularly widespread because of an epistemological shift in the production of intelligence.

Intelligence analysts now construct a picture of the threat environment, as one court described, by fitting "thousands of bits and pieces of seemingly innocuous information . . . into place to reveal with startling clarity how the unseen whole must operate."[180] With this "mosaic theory" of intelligence, where the goal of those conducting the inquiry and investigation is to amass enough small bits of information to piece together a broader picture of the threats ahead or the perpetrators behind, a detainee might not even be aware that he or she knows something useful, or know what to divulge were he or she inclined to facilitate the process.[181] This departs from both the "grand criminal" (or war criminal) model and the high-value detainee model. Under the logic of this process, a "useful" detainee, i.e., one with information within the scope of relevance, may be held for questioning, even if not a criminal suspect, and, under a standard of a wide scope of relevance, the greater the number of detainees, the more sources of mosaic bits, and the more full the picture composed.[182]

In a news briefing, Admiral Harward provided a picture of the approach to mosaic composition, describing the information U.S. officials seek to obtain from detainees as follows:

> Q: Can you tell us what information you routinely seek from detained, suspected insurgents about where—the source of their money and what they intend to do with it?
>
> ADM. HARWARD: Well, I would tell you this, I wouldn't want to give exactly the information we're after.
>
> But we talk to every individual detained, through all portions of the life cycle, not only to identify funding sources, but also ties, and—be it in government, be it in the insurgency and all other—all other connections they have, to understand the human terrain and how it functions here in Afghanistan.

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180. Halkin v. Helms, 598 F.2d 1, 8 (D.C. Cir. 1978).

181. *Id.* (likening foreign intelligence gathering in an age of computer technology to the construction of a mosaic). The Department of the Navy, in its Freedom of Information Act (FOIA) regulations, thus defines the theory as "[t]he concept that apparently harmless pieces of information when assembled together could reveal a damaging picture." 32 C.F.R. § 701.31 (2005); David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628, 651–52 (2005) (detailing how national security information has become so heterogeneous that "we increasingly do not know what information matters, or who has it, or how to control it").

182. *See* McLoughlin et al., *supra* note 8, at 476–77 (explaining the concept of preventive detention and how some detainees are in fact criminals while "others may not have been accused of crimes").

> Q: Are you receiving enough of that information as part of the detainee interview process, or are you trying to get more?
>
> ADM. HARWARD: Well, we use all modes of intelligence to gather that information. Our strength is having a large population we have access to, that we can spend a lot of time talking to, and gaining more fidelity on how those systems and those individuals interact and how they function.[183]

In debates over interrogation in the "war on terror," much has been made of the "ticking time bomb," a situation where gaining information about a pending attack is of the utmost urgency. The perceived nature of the adversary may have at least as great an influence as instances of perceived urgency have on the spread of interrogative detention. In other words, states may perceive an even greater incentive to practice interrogative detention against a non-state global adversary such as al Qaeda. Unlike the adversary in a traditional international armed conflict between states, in this conflict, the adversary does not sit in a capital, with the fixed assets (and penetrable systems) of an intelligence headquarters, National Security Council, or Politburo; the "headquarters" of an adversary like al Qaeda might be located in something as nimble and malleable as a laptop.[184] Facing a flexible and fluid adversary, human sources of information about networks, redundancies, motivations, and strategies become even more significant for discerning the enemy.[185]

Against this background of heightened demand for interrogative detention, a lack of clarity surrounds international legal standards regarding interrogative detention.[186] In fact, the International Committee of the Red Cross (ICRC), the organization of experts who are guardians and promulgators of the international law of war, and some of the states party to the Geneva Conventions express reluctance to augment laws of war to regulate interrogation.[187] Perhaps the ICRC does not want to make any additions to the international law of detention that could blur the bright-line prohibition of torture.[188]

Interrogative detention is a practice area marked by several features. One is scant regulation in international law (besides the bright-line prohibition against

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183. *DOD News Briefing*, *supra* note 149.

184. *See* Jayshree Bajoria & Greg Bruno, *al-Qaeda (a.k.a. al-Qaida, al-Qa'ida)*, COUNCIL ON FOREIGN REL., http://www.cfr.org/terrorist-organizations/al-qaeda-k-al-qaida-al-qaida/p9126 (last updated June 6, 2012).

185. *See* Pozen, *supra* note 181, at 651–52.

186. *See, e.g.*, *ICRC Background Document*, *supra* note 11, at 4–6.

187. *See id.* at 5–6 (discussing a planned resolution for the 2011 Quadrennial Review to ensure better legal protection of persons detained for security reasons during non-international armed conflicts, but expressing the reservation of some States of the need to develop new treaty rules).

188. CAT, *supra* note 106.

torture) and thus the absence of legal liability for violating regulatory norms.[189] Another, a matter more of policy than of law, is an absence of procedures for evaluating the utility of interrogation and procedures for terminating the detention.[190] Under a mosaic theory of intelligence, the executive branch has a continued incentive to keep a detainee in custody, even if the detainee has no further apparent value for intelligence; for example, after his or her operationally significant knowledge would have been overtaken by events on the ground.[191] This is because, under a mosaic theory of intelligence collection, a detainee might have some background knowledge that could provide "missing piece" details to a larger picture that the intelligence community is trying to assemble.[192]

### *D. The Bleed*

Distinguishing between modes of detention provides conceptual clarity, but one should recognize that, in practice, executive branch authorities do not always keep these modes distinct from one another.[193] Authorities may take a detainee into custody for one purpose but continue detention for a different purpose,[194] or they may leverage the different modes of detention to coerce detainee cooperation.[195]

For example, three months after the inception of the war in Afghanistan and fifteen months before the war in Iraq, the Bush administration had formulated a plan to leverage the liminal state in order to encourage cooperation by detainees in U.S. custody.[196] The idea was to encourage detainees to provide

189. *See* Freedman, *supra* note 9, at 329–39 (opining that, because international human rights law for security detention is derived from many different texts, the regulations are vague, uncertain, or inconsistent).

190. For a concurring view, see Davison & Gibson, *supra* note 8, at 326–27, 371–72.

191. For commentary on this practice, see Ryan Goodman, *Rationales for Detention: Security Threats and Intelligence Value*, 85 INT'L L. STUD. 373, 375–79 (2009) (critiquing the recent trend of using security detainees for information gathering purposes, even though such practice conflicts with international human rights law). *See also* Pozen, *supra* note 181, at 630–31.

192. *See supra* note 182 and accompanying text.

193. *See* Criteria and Guidelines Memo, *supra* note 163, sec. 4, at 3 (directing combatant commanders to assess all those over whom he or she gains control for threat to the United States, for high operational or strategic intelligence, or for law enforcement value to the United States; a detainee could fit within any, all, or none of the categories).

194. *See Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 367–68 (2001) (statement of ACLU, Washington, D.C.) [hereinafter *Dep't of Justice Oversight Hearing*].

195. *See, e.g.*, GTMO SOP, *supra* note 165, sec. 29-1 (specifying procedures for moving a detainee between blocks within the Guantanamo facility of greater or lesser deprivation and strictness as part of the bureaucratization of leveraging differing standards of treatment to induce detainee cooperation with interrogation and other matters).

196. The plan outlined in this paragraph was explained in a telephone interview with former Ambassador-at-Large for War Crimes Issues Pierre-Richard Prosper. *See* Interview with

information by allowing a prisoner to "graduate" from one level to another: "Level 1" included high-level threats, meant to be tried by military commissions for war crimes; "Level 2" were mid-level threats, deemed to warrant detention and monitoring; and "Level 3" delineated low-level individuals who could be released.[197] This plan depended on the prospect of indefinite extension of the liminal state as a negative incentive. Note too that designation as a criminal or war-crimes suspect depended as much upon assessment of cooperation and future threat as measurement of past criminal acts; the scheme for Guantanamo depended on a conflation of preventive detention, interrogative detention, and criminal detention. As the prosecutions before the military commission were delayed by several years of litigation over their procedures, however, the Bush administration's plan unraveled.[198]

Engaging in different modes of detention, which entail different purposes, motivations, and practices, under one general umbrella concept can engender misrecognition, confusion, inappropriate conduct, or illegal detainee treatment.[199] At the Abu Ghraib facility in Iraq, for example, abuse started with confusion. After its invasion of Iraq, the United States used Abu Ghraib for criminal detention, preventive detention, and interrogative detention.[200] Six months after the invasion and start of occupation, Major General Miller, the commander who had overseen operations involving "high-value detainee" interrogations at Guantanamo Bay, Cuba, arrived in Iraq to assess U.S. interrogation operations there and to make proposals for improvement.[201] Miller drew a distinction between tactical interrogation operations (meant to elicit information useful in day-to-day war-fighting) and strategic interrogation

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the Honorable Pierre-Richard Prosper, *supra* note 44; *see also Dep't of Justice Oversight Hearing*, *supra* note 194, at 139–41 (statement of Ambassador Pierre-Richard Prosper before the Senate Judiciary Committee). The hearings were conducted to examine the constitutional and legal implications of the President's executive order to establish military commissions with respect to the detention, treatment, and trial of persons accused of terrorist activities. *Id.*

197. *See* GTMO SOP, *supra* note 165, for procedures; *see also* Telephone Interview with The Honorable Pierre-Richard Prosper, *supra* note 44. ("Detainees could move from level 1 to level 3, based on their own behavior, based on cooperation or sharing information. At the end of it detainees needed to see a process with an end. If level 3 becomes a black hole, then that leads to breakdown in cooperation and all kinds of other problems.").

198. Telephone Interview with the Honorable Pierre-Richard Prosper, *supra* note 44. *See generally* ELSEA & GARCIA, *supra* note 14.

199. For a description of how this mechanism works, and other examples of overgeneralized language or overextended metaphor leading to certain patterns of thought and actions with measurable outcomes, see Benjamin Lee Whorf, *The Relation of Habitual Thought and Behaviour to Language*, *in* LANGUAGE, CULTURE, AND SOCIETY 64, 65–66 (Ben G. Blount ed., 1995).

200. TAGUBA REPORT, *supra* note 96, at 10.

201. Major General Geoffrey Miller arrived with a team of interrogation and detention experts from Guantanamo on August 31, 2003, on a ten-day mission. MG GEOFFREY MILLER, ASSESSMENT OF DOD COUNTERTERRORISM INTERROGATION AND DETENTION OPERATIONS IN IRAQ (U) 2 (2003) [hereinafter MILLER ASSESSMENT], *available at* http://www.dod.mil/pubs/foi/operation_and_plans/Detainee/taguba/ANNEX_020_MG_MILLER_REPORT.pdf.

operations (to yield information about the organization, capabilities, and plans of al Qaeda and others threatening attacks against the United States). Transition to a new phase of operations in Iraq entailed an epistemological shift, in Miller's Assessment: "transition to strategic interrogation operations."[202] Although Army regulations and a different recent review of detention operations (the Ryder Report) specified that "military police 'do not participate in military intelligence [MI] supervised interrogations,'" Miller's team recommended that the "'guard force' be actively engaged in setting the conditions for successful exploitation of the internees."[203] The Taguba Report objects that misrecognition marks the Miller Team's read of the situation and that the Miller Assessment intentionally, but wrongly, extended Guantanamo interrogative detention procedures.[204] Procedures that might be considered appropriate in a facility with an emphasis on interrogative detention could be inappropriate elsewhere. Certainly, Taguba suggests, lower-ranking guards might have read the Miller Assessment recommendations as new or conflicting guidance: "While clearly the 800th MP Brigade and its commanders were not tasked to set conditions for detainees for subsequent MI (military intelligence) interrogations, it is obvious . . . this was done at lower levels."[205] Shortly after Major General Miller's recommendations were issued and promulgated, some numbers of the Military Police brigade guarding detainees at Abu Ghraib engaged in "incidents of sadistic, blatant, and wanton criminal abuses" against those in their custody.[206] Division of labor, training, and professionalization were called on as solutions to problems inhering to crossover motivations and practices resulting from a bleed between categories of detention and conduct considered more or less appropriate to each.

Information revealed in recent court records shows that the Obama administration has sought to leverage differences between types of detention in a different manner than the Bush administration had. For example, authorities conduct one set of interview procedures that do not include reading a detainee his *Miranda* rights, a so-called "dirty interview," which is meant to extract the maximum amount of actionable intelligence from a detainee, before turning the detainee over to a different set of questioners who observe the protocols

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202. *Id.* at 4.

203. TAGUBA REPORT, *supra* note 96, at 9.

204. *Id.* at 8 ("MG Miller's team recognized that they were using JTF-GTMO operational procedures and interrogation authorities as baselines for its observations and recommendations. There is a strong argument that the intelligence value of detainees held at JTF-Guantanamo (GTMO) is different than that of detainees held at Abu Ghraib (BCCF)," which includes a large number of Iraqi criminals but not those believed to be international terrorists or knowledgeable about international terrorist organizations).

205. *Id.* at 12.

206. *Id.* at 16. Note that although the Taguba Report condemns the abuse and sanctions by those it finds responsible, it does not challenge coercive interrogation as a practice. The message is, rather, to train some for work in preventive and criminal detention and to leave interrogation to the experts.

necessary to produce evidence admissible at trial, a so-called "clean interview."[207] The admissibility of evidence from a clean interview is currently being litigated in federal court.[208]

## IV. CONCLUDING PROPOSALS

### *A. Criminal Detention*

The handful of detainees categorized as criminal suspects should be bound for prosecution. To deal with those held in criminal detention, a robust set of alternatives already exists. Violations of U.S. criminal law can be tried in U.S. civilian court,[209] and using the courts to adjudicate these cases arguably strengthens the rule of law in the United States by using the judiciary for one of its constitutionally specified functions. A proposal in the 112th Congress to preclude foreign terrorists' prosecutions in U.S.-based civilian courts[210] runs directly against the intention of the Bush administration when President Bush originally authorized military commissions for terrorist suspects in November 2001.[211] Ambassador Pierre Prosper, the Bush administration's representative to a December 4, 2001, Senate Judiciary Committee hearing, stated clearly that the administration's position was to add military tribunals to the civilian court system, in other words, add, not subtract, prosecutorial options for the executive branch.[212] The Obama administration has also made clear that it

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207. *See, e.g.*, Benjamin Weiser, *Hearing on Terror Suspect Explores* Miranda *Warning*, N.Y TIMES, Dec. 13, 2011, at A31.

208. For a description of "dirty" and "clean" interviews, see generally Sealed Indictment, *United States v. Ahmed*, No. 10-cr-00131 (filed Feb. 22, 2010 S.D.N.Y.) (listing charges against Mohamed Ibrahim Ahmed, an alleged conspirator with al Shabab (an alleged affiliate of al Qaeda), who was apprehended by U.S. agents in Nigeria and brought to trial in the Southern District of New York) and Benjamin Weiser, *Interview Was 'Clean,' F.B.I. Agent Testifies*, N.Y. TIMES, Dec. 24, 2011, at A17.

209. *See supra* notes 18–20 and accompanying text.

210. The proposal survived in a compromise form in the FY 2012 Defense Authorization Act, in a provision diluting the Attorney General's prosecutorial discretion and directing the Attorney General to consult with the Director of National Intelligence and the Secretary of Defense about whether federal court or military commission would be a more appropriate venue for a detainee trial. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1029, 125 Stat. 1298, 1569–70 (2011) (to be codified at 10 U.S.C. § 801 note).

211. Military Order of November 13, 2001, 3 C.F.R. 918, 918–21 (2002).

212.

> Senator SESSIONS. . . . If [the President] thought a trial could be tried in civil district court, he could allow it to go there? Or he could send it to a military tribunal? Is that your understanding of [the Executive Order authorizing military commissions]?
> Ambassador PROSPER. That is absolutely correct, and I think, again, one thing that I would like to highlight here is what the President has done is created an option. He has not ruled out the Federal courts or the Article III courts. He is creating an option. So at the time that a particular case comes to his desk, he will balance the interests of the country and make the appropriate decision at that time.

considers any congressional action to preclude trying terrorists in U.S. federal courts counterproductive.[213]

In addition to trying criminal suspects in U.S. federal court, suspected violators of martial law and the laws of war can be tried in courts martial, a venue in which Congress prescribes the substantive law (although the executive establishes procedure). If the federal courts and the courts martial are found inadequate, an administration can establish military commissions to try violations of the laws of war,[214] as the United States has eventually done in this conflict. Ad hoc-ism has serious limits and costs, as the last decade's experience demonstrates. Military commissions may be a costly and time-consuming alternative whose advantages to existing tribunals are not necessarily obvious and the utility claims for which should be reviewed accordingly.[215] Finally, U.S. legal experts and authorities should reconsider the role of standing international courts, weighing under what circumstances the United States could benefit from adjudicating detainee cases in an international tribunal and investing in the development of such a tribunal ahead of time.

The bottom-line is that institutional options for prosecution are already familiar. Those subject to criminal detention should be identified and categorized expediently and prosecuted promptly.

### *B. Preventive Detention*

Preventive detention has been the object of long and serious thought by states party to the Geneva Conventions. Minimum standards for material conditions of wartime detainees, for example, are well elaborated. The United States and other states party to the Conventions developed military regulations around Geneva Standards. Sudden departures should be met with skepticism.

The obvious proposal regarding those held in preventive detention in the present conflict follows an undisputed precedent of international law for international armed conflict.[216] At the end of hostilities against al Qaeda, the United States and its allies should release detainees remaining in preventive detention, or charge and try detainees for war crimes. The features of war against a non-state actor and prosecuting conflict in multiple theaters require adapting the timing of the application of this rule. Detainees should be released, or charged and tried, when the administration ends hostilities in the theater in connection with which the detainee was taken into custody. That

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*Dep't of Justice Oversight Hearing*, *supra* note 194, at 144 (testimony of Ambassador Pierre-Richard Prosper).

213. *See, e.g.*, Holder, *supra* note 74 ("[W]e are not the first administration to rely on federal courts to prosecute terrorists, nor will we be the last.").

214. *See* Boumediene v. Bush, 553 U.S. 723, 798 (2008).

215. *See* Eppinger, *supra* note 7; *see also supra* notes 23–26 and accompanying text.

216. *See supra* note 87 and accompanying text (discussing the overarching principle that detention should cease when hostilities end).

would mean releasing or charging most Guantanamo detainees when the war in Afghanistan ends.[217] Detainees whom the United States is holding in preventive detention at the DFIP in Afghanistan would similarly be formally charged and tried or released when hostilities cease.[218] It is unclear whether plans to transfer management of the DFIP to Afghan government control would complicate such action (or expedite it under Afghan authority).

Second, serious consideration should be given to the low rates of recidivism by those held in preventive detention in Afghanistan. In 2010, Vice Admiral Harward, U.S./ISAF commander of detainee operations in Afghanistan, said that of a detainee population numbering over 3,000 in all the years of conflict in Afghanistan, he had documented only seventeen cases in which those released from preventive detention returned to the battlefield.[219] That is a recidivism rate of roughly one-half of one percent. Reasons for that astonishingly low rate of battlefield recapture need to be investigated and analyzed. Is the low rate because of treatment or training that took place during detention? Is it related to community guarantees extracted at the time of release? Is it because too many were detained in the first place, including wrong place/wrong time non-combatants? Or is the figure a result of under-reporting, understandably missing, in the fog of war, released detainees who did return to the battlefield? Reasons for the low rate of recidivism or, in the case of the wrongly detained, first-time fighting by released detainees should be carefully analyzed and lessons extracted for future conduct.

A third proposal is that the length of the conflict, or rather the potential for indefinite war, demands that rules regarding length of preventive detention be overhauled. By internationally accepted practice, in the current conflict, the United States may hold an adversary in preventive detention through hostilities lasting (thus far) twelve years. Could an adversary be held in preventive detention throughout a Thirty Years' War? A Hundred Years' War?[220] The Detaining Power should be obliged to undertake regular review of the need for, or utility of, detention. In addition, states should consider shifting the burden of proof so that, in a conflict of long duration, at some interval, say five years,

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217. *By the Numbers*, *supra* note 3; *The Guantanamo Docket*, *supra* note 22.

218. The Obama administration recently announced plans to transfer the Bagram facility to Afghan government control. *See* Nordland, *supra* note 4, at A9. If the administration declares hostilities concluded, detainees held in preventive detention should be released, not switched to detention under local authority. If the administration transfers authority over Bagram before the conclusion of hostilities, its agreement with the Afghan government should include provisions for release of any detainees taken into custody by U.S. or allied forces and held in preventive detention at the conclusion of hostilities, regardless of whether they are held in a U.S.- or Afghan-government-run facility.

219. Dep't of Def. Roundtable, *supra* note 36.

220. Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (confirming that the defendant's position could amount to authorizing perpetual detention, at least as to preventive detention—but explicitly not in regard to interrogative detention according to the state of the law of war at the time).

a detainee held in preventive detention is released unless the Detaining Power can establish continued military necessity.

Effort should be made to examine existing laws of war for international armed conflict in order to identify areas left unregulated by those laws or in which they are an ill fit for non-international armed conflict. U.S. lawyers should likewise use experience in the present conflict to reflect on the limitations of habeas jurisprudence. The executive branch should disclose information regarding the decisional criteria and procedures used by executive branch bodies that initially select individuals for detention. This murky, poorly understood, and nonpublicly regulated area should be public interest lawyers' target for greater transparency and accountability.[221]

Finally, work should begin on international agreements to facilitate transfers of detainees. The quadrennial review of the Geneva Conventions between November 28 and December 1, 2011, focused in part on the issue of detainee transfer.[222] The Copenhagen Process, an attempt to formulate rules and procedures for detainee transfer initiated by the Government of Denmark, may provide helpful ideas for U.S. efforts.[223]

### *C. Interrogative Detention*

Interrogative detention poses a multitude of uncomfortable challenges. One set of challenges lies in the mechanics and logistics of practice. Selecting detainees for interrogative detention often occurs ad hoc in the field or under exigent circumstances.[224] Mass "sweeps" of civilians to hold for interrogation, as conducted on some occasions in Iraq and Afghanistan, are an affront to the international legal principles of distinction and proportionality. The principle of distinction limits military attacks to military objects; it should be analogized to inform military activities beyond attacks such as interrogative detention. The principle of proportionality prohibits military actions that might produce excessive civilian losses in relation to the military advantages gained.[225]

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221. *See supra* notes 31–34 and accompanying text.

222. As this Article goes to press, official notices documenting resolutions and decisions resulting from the Quadrennial Review have yet to be issued. For agenda items, advance reports, and resolutions prepared by the International Committee of the Red Cross and Red Crescent for the Review, see Int'l Comm. of the Red Cross [ICRC], *Strengthening Legal Protection for Victims of Armed Conflicts Draft Resolution and Report*, 31IC/11/5.1.1 (Oct. 2011).

223. *See, e.g.*, The Handling of Detainees in International Military Operations, Non-Paper on Legal Framework and Aspects of Detention, Danish Ministry of Foreign Affairs (2007). For a report on other countries' experience, see generally Human Rights Inst., Columbia Law Sch., U.S. Monitoring of Detainee Transfers in Afghanistan: International Standards and Lessons from the UK & Canada (2010), *available at* http://www.law.columbia.edu/ipimages/Human_Rights_Institute/AfghanBriefingPaper%20FINAL.pdf.

224. U.S. DEP'T OF THE ARMY, HUMAN INTELLIGENCE COLLECTOR OPERATIONS, FIELD MANUAL NO. 2-22.3, at 6-3 to 6-6 (2006) [hereinafter FIELD MANUAL NO. 2-22.3].

225. For discussion of these two principles and the United States' commitment to them, see Koh, *supra* note 33.

Poorly discriminating sweeps that subject civilians to unnecessary detention and violate human dignity would, by analogy, offend the principle of proportionality. For the Detaining Power, moreover, too many sources of less relevant information flood the mosaic and distort the composition; this harms intelligence and military efforts. The United States needs to examine systematically its recent experiences with mass detention and re-evaluate intelligence gained against costs to counter-terrorism and other foreign policy goals. International law experts might reconsider their conceptualization of violence, to allow that violence can be perpetuated through detention as well as attack. That would raise practical questions, such as whether regulations concerning inducting people into detention should be more precisely drawn, to incorporate the principles of distinction and proportionality.

Rules for interrogation itself need to incorporate standards of conduct, with consequences for violation. The Obama administration took an important step in directing that no detainees be held in CIA facilities, eliminating the possibility of legally sanctioned "Black Sites," closing any pre-existing CIA facilities,[226] and ensuring that any person detained under the aegis of the ongoing conflict is held in a military-run facility open to Red Cross inspection[227] or, if criminally convicted, in prison. This is merely a start. More is needed.

Criminal procedure in the United States relies on the "exclusionary rule" to prevent misgotten evidence from aiding the prosecution at trial, thereby harnessing institutional incentives to prevent abuse by police and investigators.[228] Similarly, the United States needs to ensure that institutional incentives are aligned properly to ensure humane and lawful treatment of those in interrogative detention during war. For example, a bright-line rule could guarantee that no information gained from detainee mistreatment may be used as actionable intelligence for operations or used in intelligence estimates. Criminal liability could attach for any supervisor or implementer who violates standards of detainee treatment or any policymaker who formulates policies on the basis of information gained from torture. Best practices for non-coercive interrogation should be promulgated; procedures of U.S. domestic investigatory agencies like the FBI, developed under the discipline of

226. Exec. Order No. 13,491, § 4(a), 3 C.F.R. 199, 201 (2009) ("The CIA shall close as expeditiously as possible any detention facilities that it currently operates and shall not operate any such detention facility in the future.").

227. *Id.* § 4(b) ("All departments and agencies of the Federal Government shall provide the International Committee of the Red Cross with notification of, and timely access to, any individual detained in any armed conflict in the custody or under the effective control of an officer, employee, or other agent of the United States Government or detained within a facility owned, operated, or controlled by a department or agency of the United States Government, consistent with Department of Defense regulations and policies.").

228. *See supra* note 62 and accompanying text.

exclusionary rule jurisprudence, provide a useful starting point.[229] The U.S. military, both in the standards that it sets for treatment of detainees during questioning and in the discipline it imposes on its personnel to obey guidelines, provides a threshold to which the intelligence agencies should be held at law.[230]

Finally, procedures used to review the continued detention of those held for questioning are overdue for re-examination. The underlying principle of the laws of war—to set conditions for ending hostilities as humanely and quickly as possible—should inform legal standards for state practice. The standard for interrogative detention should be imminent tactical military utility rather than possible contribution of bits for a future intelligence synthesis. Although the mosaic may be a useful hermeneutic for intelligence work, it is not worth undermining a commitment to detaining as few people as possible, justified only by immediate military operation. The United States needs to establish continuous procedures to ascertain if the information a given detainee may have remains timely or justifies continued detention.

As a broader matter, rights advocates would be well advised to acknowledge some conclusions gained by empircal observations of state practice. Interrogative detention has become a widespread practice in the national security context. Criminal procedure is irrelevant outside of criminal detention and seeking its protections will not help detainees held in interrogative detention. Rights advocates would thus be better advised to engage military and intelligence counterparts in serious dialogue to formulate detainee safeguards that will work.

## V. CONCLUSION

Justice Sandra Day O'Connor, writing for the *Hamdi* majority in a case that set some of the conceptual parameters for detention in the "war on terror," reminded the executive branch "that a state of war is not a blank check" for the exercise of executive power.[231] It is time for a reality check about the variety of practices conducted under the broad heading of detention in the "war on terror." Over the past decade, detention assumed an unprecedented importance in modern U.S. war-fighting doctrine. The challenges of conflict against a non-state actor outstripped specifications in the law of war regarding non-international armed conflict. In areas where the law was silent or compliance poorly monitored, some gravely infelicitous experiments with detention ensued. Categories of detainees and protections blurred. The U.S.

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229. Carl A. Benoit, *Confessions and the Constitution: The Remedy for Violating Constitutional Safeguards*, FED. BUREAU INVESTIGATION, http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/april-2010/confessions-and-the-constitution (last visited Jan. 1, 2013).

230. *See, e.g.*, FIELD MANUAL NO. 2-22.3, *supra* note 224.

231. Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) ("[A] state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.").

legal community concentrated on the procedures that govern criminal detention and the formal trials that bring it to an end, while the U.S. executive branch mostly practiced detention for other reasons in the "war on terror," most prominently preventive detention and interrogative detention. The principles, law, and procedures regulating preventive and interrogative detention are overdue for the level of scrutiny that military commissions have garnered. Under the Obama administration, the U.S government initiated a review of its detention procedures.[232] The Administration should publicly release the review's findings, allowing public scrutiny and further evaluation of detention as practiced in the ongoing conflict. One goal of broad scrutiny is shared with other Articles in this series: to refine the law and standards that guide detentions practice so that, in future conflicts, a states' practice in dealing with a non-state actor may advance the fundamental purpose of the law of war, namely, to end hostilities as quickly and humanely as possible.

232. Exec. Order No. 13,493, 3 C.F.R. 207 (2009).