ARTICLE

Meaningful Review and Process Due: How Guantanamo Detention is Changing the Battlefield

Adam R. Pearlman*

* Associate Deputy General Counsel, United States Department of Defense; Special Advisor, International and National Security Law Practice Group, The Federalist Society for Law and Public Policy Studies; Co-Editor, THE U.S. INTELLIGENCE COMMUNITY LAW SOURCEBOOK. B.A., UCLA; J.D., The George Washington University Law School; M.S., National Intelligence University. I am deeply indebted to the interviewees who shared their time and perspectives to assist with my research, as well as the National Intelligence University and Harvey Rishikof for their constant support. Thanks also to the Harvard National Security Journal editorial staff for their work on this Article and for their patience. I dedicate this Article to Amanda Porter, who endures my Socratic endeavors with remarkable aplomb. The views expressed in this Article are those of the author alone and do not necessarily reflect the official policy or position of the Department of Defense or the U.S. Government.

Table of Contents

Many people think the Bush administration [was] indifferent to wartime legal constraints. But the opposite is true: the administration [was] strangled by law, and since September 11, 2001, this war has been lawyered to death.

– Jack Goldsmith[1]

Introduction

Among the reasons President Bush chose to detain certain Operation Enduring Freedom (OEF) captives at Guantanamo Bay (GTMO) was the Administration's assessment that "holding captured terrorists on American soil could activate constitutional protections they would not otherwise receive."[2] This included certain protections given to criminal suspects, such as the right to remain silent and access to federal civilian courts. Most importantly, the Bush Administration was concerned about affording detainees the constitutional privilege to petition a court for a writ of habeas corpus. A habeas petition is the mechanism by which a detainee may challenge the lawfulness of his detention. If a judge finds an individual's detention to be unlawful, he will grant the writ and order the jailer (i.e., the appropriate official of the Executive Branch) to set the person free. Habeas corpus was so important to the Framers that they protected it in the Constitution itself, before the Bill of Rights was written.[3] Nevertheless, based on prior precedent and extensive legal discussions throughout the Executive Branch, the government for years argued that federal courts did not have jurisdiction to consider habeas petitions brought by GTMO detainees. After extensive litigation, the Supreme Court in 2008

---

[1] JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 69 (2007); *see also* JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 209 (2006) ("Lawyering is beginning to strangle our government's ability to fight and win the wars of the twenty-first century.").

[2] GEORGE W. BUSH, DECISION POINTS 165–66 (2010). The United States obtained possession of the Naval Station at Guantanamo Bay through a lease with Cuba after the end of the Spanish-American war in 1903. The terms of the lease maintained Cuban sovereignty over the territory, though it gave the United States "complete jurisdiction and control over and within" the base. Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval stations, U.S.-Cuba, art III, Feb. 23, 1903, T.S. 418. This lease was later continued via treaty in 1934. Treaty Between the United States of America and Cuba, U.S.-Cuba, art. III, May 29, 1934, T.S. 866.

[3] U.S. CONST. art. I, § 9, cl. 2. For a detailed history of the so-called "Great Writ" in United States law, see WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998).

determined that those detainees are constitutionally entitled to "meaningful review" of the basis of their detention.[4]

This Article examines the failure of the Executive Branch to successfully defend its position of holding Guantanamo detainees indefinitely without hearings in civilian courts, and the operational and policy consequences that have since become apparent. Part I will frame the analysis begun on September 11, 2001 and the days following, during which the government decided the military would be the plenary mechanism leveraged against al Qa'ida. Part II then briefly traces the history of habeas and military detention law that served as the basis for President Bush's strategy to detain terror suspects without habeas review. Part III summarizes the development of the law of counterterrorism detention and review after 9/11, and assesses the battlefield consequences of the GTMO habeas litigation. This section also analyzes some of the subsequent international law developments arguably spurred by U.S. detention policies and practices, which are examined in greater detail in Part IV. These policies and practices include the reported increased reliance on targeted killings and the development of the Copenhagen Process, an international document purporting to guide "detention authorities" on how to proceed with detention practices in non-international armed conflict and peacekeeping scenarios.

It is important to note at the outset that the United States' lawful ability to prosecute certain detainees is legally distinct from its authority to hold them. As discussed below, the government determined on 9/11 that the laws of war would apply to U.S. actions taken in response to the terrorist attacks. This body of law allows a warring country to detain enemy combatants for the duration of hostilities and comports with the classical purpose of detention: removing threats from the battlefield. Because merely being a combatant does not constitute a crime, the lawful authority to detain combatants does not rest upon whether any specific detainee has committed a crime. Nevertheless, the government fueled significant public debate about the propriety of this distinction by initially referring to GTMO detainees as "unlawful combatants," thereby implying that prosecution would be forthcoming.[5] Further, even as the Bush

---

[4] Boumediene v. Bush, 553 U.S. 723, 783 (2008).

[5] Author's interview with former Deputy Assistant Secretary of Defense for Rule of Law and Detainee Policy William Lietzau (June 26, 2012), who previously served as Special Adviser to the General Counsel of the Department of Defense; *see Ex parte* Quirin, 317 U.S. 1, 30–31 (1942) ("By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject

Administration clearly articulated its view that the United States was at war against al Qa'ida, President Bush spoke fervently about bringing the perpetrators of the 9/11 attacks "to justice," thereby creating expectations that those captured would be prosecuted.[6] Nevertheless, as a matter of law, detention and prosecution are distinct areas, and will be treated as such in this Article.[7]

I. September 11 and Choice of Law

Once it became clear that the United States was under attack on the morning of September 11, 2001, a myriad of legal analyses arose. The first of the novel legal questions that would have been triggered was related to the possibility that civilian airliners would need to be shot down. Even after the fourth hijacked plane (United Airlines Flight 93) crashed in Pennsylvania, the operating assumption needed to be that an attack was ongoing, including the possibility that there might be additional potential hijackers onboard grounded planes who had failed to carry out their missions; additional information suggested there may be bombers on trains,[8] and there was a fear among senior lawmakers that there could be gunmen on the Capitol grounds.[9] In recent years, sovereign U.S. territory had been subjected to attack on land (the 1998 embassy bombings) and sea (the bombing of the USS Cole in 2000); now the homeland was being directly hit from the air. "That morning," former Deputy Assistant Attorney General John Yoo recalled, "official Washington, D.C. evacuated in the face of a foreign attack for the first time since the British invasion in the War of 1812."[10] Under these circumstances, the ultimate question was what to do regarding people who are attacking the country. The clear answer at the time was that it was necessary to employ the might of the United States armed forces to defend the country from a foreign attack.

---

to trial and punishment by military tribunals for acts which render their belligerency unlawful.").

[6] *See* George W. Bush, President Bush's Address to a Joint Session of Congress and the Nation (Sep. 20, 2001), http://perma.cc/DSD6-JBNX.

[7] There is some conceptual overlap worth noting, in that convicted prisoners (in either civilian or military justice systems) may file habeas petitions to challenge the legality of their continued incarceration, much like uncharged GTMO detainees are permitted to do. The procedures and standards attendant to such petitions are very different, however, and do not affect this analysis. *See also* n. 115, *infra*.

[8] Trains especially are a fairly frequent target of attacks—primary examples include Aum Shinrikyo's attack with sarin gas on Tokyo's subway, and, after the 9/11 attacks here, the March 11, 2004 attack in Madrid and July 7, 2005 attack in London.

[9] TOM DASCHLE AND MICHAEL D'ORSO, LIKE NO OTHER TIME: THE 107TH CONGRESS AND THE TWO YEARS THAT CHANGED AMERICA FOREVER 111 (Crown, 2003).

[10] YOO, *supra* note 1, at 1.

The emergency circumstances allowed questions regarding the applicability of the Posse Comitatus Act[11] to be quickly disposed of[12]—although law enforcement played a role, the government determined the primary mission to be one of national defense. But this nevertheless presented issues of first impression for those who would need to determine the rules of engagement for the possibility of shooting down commercial aircraft, which would require unique analyses regarding the applicability of the Fourth and Fifth Amendments—not for the sake of the hijackers, but rather to protect the rights of the Americans onboard a still-hijacked aircraft who would lose their lives if the planes were fired upon. Other sources of law that were triggered include the Antihijacking Act of 1974[13] and even the Warsaw Convention,[14] which regulates liability for international commercial carriers, to determine other legal obligations of the United States. Finally, in the context of how to respond to the (perhaps ongoing) attacks, the government had to determine what it would do if it captured any at-large operators or co-conspirators, who would hold such individuals, and what questions could be asked of them.

Although many other issues would become cause for dissention within the ranks, in the minds of key lawyers and policymakers in the United States government there was never a doubt that the country was at war and, accordingly, that the laws of war applied. Although law enforcement played a role in the nation's overall counterterrorism strategy and adopted an aggressive posture to prevent future attacks in the United States,[15] a purely law enforcement-driven response would be inadequate. As such, adhering strictly to criminal law precepts was neither appropriate nor required. Abstracting for a moment from the various legal definitions of what constitutes war, John Yoo explains the associated pragmatic consideration in the minds of policymakers, "Necessity creates war, not a hovering zeitgeist called 'law.' If only the military has the capability to do

---

[11] 18 U.S.C. § 1385 (1994) ("Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.").

[12] *See* YOO, *supra* note 1, at 10.

[13] Antihijacking Act of 1974, Pub. L. No. 93-366, §§ 103 –104, 88 Stat. 409 (1974), *amended by* Pub. L. No. 103-272, 108 Stat. 1241 (codified as amended at 49 U.S.C. § 46502 (2006)). This law codifies the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft. *See* Hays Parks, *Words and Perspectives*, *in* THE LAW OF COUNTERTERRORISM viii (Lynne K. Zusman ed., 2011).

[14] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934).

[15] *See, e.g.*, Memorandum from John Ashcroft, Att'y Gen., U.S. Dep't of Justice, to All U.S. Att'ys, Anti-Terrorism Plan 1 (Sept. 17, 2001) (directing all United States Attorneys to prevent future terrorism by using "every available law enforcement tool" to arrest and detain terrorists and their supporters.), https://www.scribd.com/doc/17819245/T5-B61-AG-Anti-Terrorism-Plan-Fdr-9-17-01-Ashcroft-Memo-Anti-Terrorism-Plan-206.

what must be done, such as destroying enemy camps in Afghanistan, and it is sent to do it, then it is war."[16] As former Attorney General William Barr told Congress, "Our national goal in this instance is not the correction, deterrence and rehabilitation of an errant member of the body politic; rather, it is the destruction of foreign force that poses a risk to our national security."[17]

Of course, legal considerations cannot be, and certainly were not, ignored when adopting the war paradigm as the primary mode of combating al Qa'ida and associated groups. On September 17, 2001, Congress authorized President Bush to use "all necessary and appropriate force" against those involved with the 9/11 attacks.[18] Three days later, President Bush addressed a joint session of Congress, declaring that "an act of war [was committed] against our country."[19] By September 25, the Justice Department's Office of Legal Counsel had issued an opinion concluding that (1) 9/11 constituted a foreign attack, (2) the United States was at war, and (3) Article II of the Constitution granted the President full authority to destroy the enemy.[20]

At first, the international community generally agreed with this approach. The day after the 9/11 attacks, before even the appropriate bodies within the United States government could act, the United Nations Security Council passed a resolution finding "any act of international terrorism" to be a threat to "international peace and security" and expressing "readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism."[21] The North Atlantic Treaty Organization (NATO) also, for the first time in its fifty-two year history, invoked Article 5 of its charter, declaring that al Qa'ida's actions constituted an armed attack, and that an attack on one member nation is to be considered an attack on all.[22]

---

[16] YOO, *supra* note 1, at 10.

[17] William P. Barr, Testimony before the Committee on the Judiciary of the United States Senate, Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism (Nov. 28, 2001), http://perma.cc/TSE3-CJRC.

[18] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

[19] George W. Bush, Address to a Joint Session of Congress and the Nation (Sept. 20, 2001) http://perma.cc/K8M4-2J7Q.

[20] Memorandum from John Yoo, Deputy Assistant Attorney General, to the Deputy Counsel to the President (Sept. 25, 2001), http://perma.cc/4FU5-ZGKH.

[21] S/RES/1368 (2001).

[22] Statement by the North Atlantic Council (Sept. 15, 2001) ("The Council agreed that if it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all.") http://perma.cc/98YD-9P7Y; *see NATO and the Scourge of Terrorism: What is Article 5?* (Feb. 18, 2005), http://perma.cc/VDB7-5D2R

The war construct started to become controversial as time went on, however, as American academics and pundits began to ask whether the "War on Terror" was a metaphorical war akin to the Johnson-era "War on Poverty,"[23] and the Europeans voiced a preference for returning to the criminal law paradigm, which proved adequate for addressing their problems with domestic terrorism of the 1970s.[24] Nevertheless, as the U.S. military began detaining people in Afghanistan, there was never any serious discussion about bringing those captured to the United States,[25] and it was not long after the first detainees arrived at GTMO that critics began to call the facility a "law-free zone." Then-State Department Legal Adviser William Taft always disagreed with that characterization, however. Despite the Administration's determination, Taft held the view that the Geneva Conventions applied to the detainees.[26] Regardless, Taft has said that, as a matter of policy, the United States was "going to conduct ourselves in accordance with [the Conventions], as we always had," which meant that traditional law-guided practices would be observed, and even if the detainees did not possess legal rights, they would be given some basic privileges.[27]

II. Habeas and Military Detention Before 9/11

Habeas corpus, the procedure by which an individual may challenge a sovereign's basis for arresting or jailing him, was such a core principle to the Framers that they protected it in the original text of the Constitution, four years before the passage and ratification of the Bill of Rights. The Constitution's "Suspension Clause" provides: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[28]

(noting that the North Atlantic Council's September 12, 2001 invocation of NATO's Article 5 provisions was the first in the organization's history).

[23] *See, e.g.*, Louis Henkin, *War and Terrorism: Law or Metaphor*, 45 SANTA CLARA L. REV. 817 (2005).

[24] Author's interview with Ambassador Daniel Fried, former Special Envoy for Closure of the Guantanamo Detainee Facility (June 6, 2012).

[25] *Id.*

[26] Author's telephone interview with William H. Taft, IV, former Legal Adviser of the U.S. Department of State (Oct. 2, 2012). Mr. Taft also previously served as the General Counsel of the Department of Defense, and as Deputy Secretary of Defense.

[27] *Id.* Taft distinguishes this from High-Value Detainees held by the CIA, "who DOJ opined had no rights whatsoever," but Taft reports that he and his colleagues at State were not told of the program, and did not know where those detainees were held or how they were being treated.

[28] U.S. CONST. art. I, § 9, cl. 2. For further discussion about the history of the writ at common law (i.e., Anglo-American legal tradition at the time of the Constitution's adoption), see Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*,

The judicial writ of habeas corpus, often regarded as the "Great Writ,"[29] is a court's way of asserting its power to guard against arbitrary detention by the executive. Suspending the writ leaves open the possibility for the President to detain people (at least temporarily) without warrant or judicial process. Importantly, suspending the writ does not provide *authority* to detain, only the lawful ability to forego judicial review of the detention during the period of suspension.[30] Still, when the question of suspending the writ first arose in 1807 as a proposed measure to quell a brewing insurrection led by former Vice President Aaron Burr, then-Senator John Quincy Adams, who nevertheless favored suspension, understood such action to amount to staying "the great palladium of our liberties."[31] The suspension legislation passed the Senate but failed in the House, and Congress did not again take up the issue until the Civil War.[32] Even then, it was only after President Lincoln unilaterally suspended habeas in 1861 that Congress retroactively ratified his power to do so.[33]

---

125 HARV. L. REV. 901 (2012); Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575 (2008); JUDITH FARBEY ET ALL, THE LAW OF HABEAS CORPUS 1–18 (2d ed. 1989).

[29] *See, e.g.*, *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 95 (1807); SANDRA DAY O'CONNOR, OUT OF ORDER: STORIES FROM THE HISTORY OF THE SUPREME COURT 8 (2013).

[30] Suspension of habeas is also not necessarily tied to military detention, although the two issues are very much linked in this discussion. The military, for example, has the power to detain enemy prisoners of war for the duration of active hostilities without any *habeas* implications. As discussed further below, it was upon this principle that the government argued GTMO detainees could not petition for writs of habeas corpus—those detainees, it was argued, did not enjoy the "privilege of the Writ." *See* Brief for the United States in Boumediene v. Bush, 2007 WL 2972541 at *37. It should also be noted that this Article does not explore at any significant length the legal differences involved with detaining citizens of the United States. It is well known that, in what also was an issue of first impression for decision-makers in the early days of OEF, several U.S. citizens have been detained for their connections with al Qa'ida since 2001, on the battlefield in Afghanistan (e.g., John Walker Lindh and Yasir Hamdi) and inside the United States (e.g., Jose Padilla). Although these individuals may also be subject to military detention and trial by military commissions, they enjoy certain due process rights that may not be available to alien enemy combatants. *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Johnson v. Eisentrager, 339 U.S. 763, 769 (1950) ("our law does not abolish inherent distinctions recognized throughout the civilized world between citizens and aliens . . . . "). The role U.S. citizenship plays in the legal analysis is beyond the scope of the general legal principles that factor into GTMO detention as a strategic decision, although to the extent U.S. citizens were ever permitted to be sent to GTMO, the legal exposure this caused the government could be considered a failure that reaches the strategic level.

[31] *See* WILLIAM PLUMER'S MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE, 1803-1807 585 (Everett Somerville Brown ed., 1923).

[32] *See* Tyler, *supra* note 28, at 982–87.

[33] Notably, the Constitution is unclear as to who may suspend the writ. Although the Suspension Clause appears in Article I of the Constitution, that which enumerates the powers of Congress, the power to suspend is tied to war-time authorities arguably vested with the Commander-in-Chief. The academic debate over whether the President may take

The first major judicial opinion addressing suspension came in the interim: President Lincoln had already suspended habeas; Congress had not yet acted. The question arose in the case of John Merryman, a Maryland state legislator who had taken part in destroying Union railroads and telegraph lines in support of the Confederacy.[34] After Union forces detained Merryman, Chief Justice Taney ordered Merryman's military jailer to bring Merryman before the court. Operating under President Lincoln's suspension order, the commander refused, prompting Taney to rule that the President was acting unconstitutionally, and failing his constitutional duty to "take care that the laws," to wit, the court's habeas order, "shall be faithfully executed."[35] Lincoln stood firm, retaining Merryman in military custody. A month later, on July 4, 1861, in response to Taney's opinion, Lincoln rhetorically asked Congress, "Are all the laws but one to go unexecuted, and the Government itself go to pieces lest that one be violated?"[36]

Congress eventually passed suspension legislation—two years later. Thereafter, Lambdin Milligan, a civilian living in Indiana (a Union

---

unilateral action to suspend the writ continues today, even though, when the question first arose in the courts, then-Chief Justice Taney, riding circuit and not opining on behalf of the Supreme Court, "supposed it to be one of those points in constitutional law upon which there was no difference of Opinion . . . that the privilege of the writ could not be suspended, except by act of Congress." *Ex parte* Merryman, 17 F. Cas. 144, 148 (C.C.D. Md. 1861).

[34] For detailed discussions regarding the suspension(s) of the writ during the Civil War, see WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE (1998); Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 637–55 (2009).

[35] *Ex parte* Merryman, 17 F. Cas. at 149 ("The only power . . . the president possesses, where the 'life, liberty or property' of a private citizen is concerned, is the power and duty prescribed in the third section of the second article [of the Constitution], which requires 'that he shall take care that the laws shall be faithfully executed.' He is not authorized to execute them himself, or through agents or officers, civil or military, appointed by himself, but he is to take care that they be faithfully carried into execution, as they are expounded and adjudged by the co-ordinate branch of the government to which that duty is assigned by the constitution. It is thus made his duty to come in aid of the judicial authority, if it shall be resisted by a force too strong to be overcome without the assistance of the executive arm; but in exercising this power he acts in subordination to judicial authority, assisting it to execute its process and enforce its judgments. With such provisions in the constitution, expressed in language too clear to be misunderstood by any one, I can see no ground whatever for supposing that the president, in any emergency, or in any state of things, can authorize the suspension of the privileges of the writ of habeas corpus, or the arrest of a citizen, except in aid of the judicial power. He certainly does not faithfully execute the laws, if he takes upon himself legislative power, by suspending the writ of habeas corpus, and the judicial power also, by arresting and imprisoning a person without due process of law.").

[36] Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-1865 252–53 (Don E. Fehrenbacher ed., 1989).

state, but home to many Confederate sympathizers)[37] was arrested, held by the military, and tried by military commission on charges including aiding and comforting rebels, inciting insurrection, disloyal practices, and violations of the laws of war.[38] Milligan was convicted and sentenced to be hanged. On May 10, 1865, the day after the Civil War ended, Milligan filed a habeas petition, challenging, among other things, the military's power to hold him absent a state of war. The Supreme Court found that the laws of war "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed."[39] In fact, during Milligan's detention, the federal court in Indiana had been open, and its Grand Jury had convened and adjourned without charging him with a crime.[40] The Court thus granted Milligan's petition and ordered his release, but not without first recognizing that there is a power "somewhere" to suspend the writ[41] "when martial rule can be properly applied":

> If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society, and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course.[42]

Military detention and trial nevertheless won the approval of the Supreme Court during World War II in the case of eight Nazi would-be saboteurs, *Ex parte Quirin*.[43] The eight had come ashore in New York and Florida in June 1942, having traveled to the United States via German submarine. After one turned himself in to the FBI, the rest were arrested before the month was out.[44] On July 2, President Franklin Roosevelt ordered the men transferred to military custody for trial by military commission,[45] which found them guilty and sentenced them thirty-three days later, on August 4.[46] In the interim, the detainees filed habeas

---

[37] REHNQUIST, *supra* note 34, at 89.
[38] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 6 (1866).
[39] *Id.* at 121.
[40] *Id.* at 122.
[41] *Id.*
[42] *Id.* at 127.
[43] *See generally Ex parte* Quirin, 317 U.S. 1 (1942).
[44] *See* FBI, *George John Dasch and the Nazi Saboteurs*, http://perma.cc/88DX-BLUN.
[45] Proclamation 2561: Denying Certain Enemies Access to the Courts of the United States, 7 Fed. Reg. 5101 (July 7, 1942).
[46] FBI, *supra* note 46.

petitions, for which the Supreme Court heard arguments in a special session convened July 29 and 30. The following day, the Court issued a one-page holding denying the writs, finding the detainees to have been lawfully held and tried.[47] Six of the men were executed on August 8.

The Court more fully explained its rationale in an "extended opinion" handed down two and a half months later. In *Ex parte Quirin*, the Court recognized that, "An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war."[48] Deferring to the President's exercise of his constitutional powers as Commander-in-Chief, the Court wrote that the detention and military commission trial of the saboteurs could not be overruled "without the clear conviction that they are in conflict with the Constitution" or acts of Congress.[49] Finding that the saboteurs were enemy combatants who, "without uniform [came] secretly through the lines for the purpose of waging war by destruction of life or property," the Court deemed the eight to be "unlawful belligerents not entitled to" the protections accorded prisoners of war.[50] It therefore upheld the President's order to try them via military commission, and found no ground for habeas relief.

The scope of the Suspension Clause arose once again at the end of World War II when several German soldiers were caught fighting in China, in support of Japan, after Germany had already surrendered. They were tried by U.S. military commission and convicted for violations of the laws of war. They were then sent to a U.S. military prison in Germany to serve their sentences, and from there filed petitions for habeas corpus in U.S. federal court, arguing that their imprisonment violated, among other things, the Fifth Amendment's Due Process Clause, which provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."[51]

On these facts, the Supreme Court in *Johnson v. Eisentrager*[52] held that the Constitution "does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged

---

[47] *Ex parte* Quirin, 317 U.S. 1 (1942) (per curiam). All following *Quirin* citations in this Article are to Chief Justice Stone's subsequent extended opinion, which shares the *per curiam* opinion's citation.

[48] Quirin, 317 U.S. at 28–29.

[49] *Id.* at 25.

[50] *Id.* at 31, 35.

[51] U.S. CONST. amend. V.

[52] 339 U.S. 763 (1950).

in the hostile service of a government at war with the United States,"[53] and therefore refused to "invest these enemy aliens, resident, captured and imprisoned abroad, with standing to demand access to our courts."[54] At that time, there was "no instance where a court, in this or any other country where the writ [of habeas corpus] is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction."[55] A state of war, the Court reasoned, "exposes the relative vulnerability"[56] of alienage, and although the United States traditionally accorded to an alien "a generous and ascending scale of rights as he increases his identity with our society,"[57] it nevertheless had always been "the alien's presence within [the United States'] territorial jurisdiction that gave the Judiciary the power to act."[58] Non-resident enemy aliens, the Court concluded, "[do] not have even . . . qualified access to our courts,"[59] and thus did not have standing to file habeas petitions.[60]

For the following half-century, federal courts continued to hold that aliens could not rely on American law when outside the sovereign territory of the United States.[61] The most important of these rulings for present purposes was the Supreme Court's 1993 decision with respect to Haitian refugees residing in the very facility at Guantanamo Bay where the first OEF detainees would briefly be held.[62] In *Sale v. Haitian Centers Council,*

---

[53] *Id.* at 785.
[54] *Id.* at 777.
[55] *Id.* at 768.
[56] *Id.* at 771.
[57] *Id.* at 770.
[58] *Id.* at 771.
[59] *Id.* at 776.
[60] Denial of constitutional protections for non-resident aliens was never exclusive to U.S. law. For example, in Canada, "only at the moment that foreigners step on to Canadian soil are they subject to the various legal obligations and rights of Canadian law." Margaret A. Somerville and Sarah Wilson, *Crossing Boundaries: Travel, Immigration, Human Rights and AIDS*, 43 MCGILL L.J. 781, 823 (1998) (punctuation omitted), *quoting* J. Hucker, *Immigration, Natural Justice and the Bill of Rights*, 13 OSGOODE HALL L.J. 649, 682 (1975).
[61] *See, e.g.*, *In re* Li, 71 F. Supp. 2d 1052, 1061 (D. Haw. 1999) (individuals then on Midway Island, lacking any previous connection to the United States, denied from invoking habeas corpus or protections otherwise conferred by the Immigration and Naturalization Act (INA)); Romero v. Consulate of the United States, Barranquilla, Colombia, 860 F. Supp. 319, 323 (E.D. Va. 1994) (offshore aliens do not have a right to judicial review of consular decisions); *see also* Alison Leal Parker, *In Through the Out Door? Retaining Judicial Review for Deported Lawful Permanent Resident Aliens*, 101 COLUM. L. REV. 605, 621–22 (2001).
[62] For a brief history of the use of the Guantanamo Bay Naval base to house Haitian refugees in the 1990s, see Michael Ratner, *How We Closed the Guantanamo HIV Camp: The Intersection of Politics and Litigation*, 11 HARV. HUM. RTS. J. 187, 189–92 (1998).

Inc., the Supreme Court overruled a lower court's determination that the Fifth Amendment applied to the Haitian refugees.[63] The refugees, having been interdicted on the high seas, enjoyed neither the constitutional nor the statutory protections they argued; the fact that their first contact with the United States was with a civilian agency (the Coast Guard, then operating as part of the Department of Transportation) and that they were being held at a U.S. military facility did not sway the Court otherwise.[64]

III. After 9/11: The Executive, Congress, and the Courts

In light of this precedent, especially *Eisentrager*, and based on government arguments presented in court filings, when the first Operation Enduring Freedom detainees arrived at Guantanamo Bay in January 2002, it seems the government never expected that the detainees would be able to use U.S. federal courts to challenge the lawfulness of their detention.[65] In addition to the habeas jurisprudence already discussed, as a general matter the courts historically had practiced considerable deference to the Executive in matters of national security.[66]

Six and a half years after the first detainees arrived at GTMO, the Supreme Court ruled against the government's arguments for avoiding judicial review, holding that those who remain there have a constitutional right to challenge their detention in habeas corpus proceedings in U.S. federal court.[67] Expressly limiting its holding to the application of the Constitution's Suspension Clause,[68] the Court did not reach the detainees' claims that they maintain rights under the Fifth Amendment's Due Process Clause.[69] On one hand, the Court's ruling resolved years of jurisdictional

---

[63] 509 U.S. 155 (1993) (overruling *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1326 (2d Cir. 1992)).

[64] *See* Cuban American Bar Ass'n v. Christopher, 43 F.3d 1412, 1425–27 (11th Cir. 1995) (subsequent lower court case, holding that would-be Cuban migrants located at Guantanamo Bay could invoke neither the Constitution nor the INA in U.S. courts).

[65] As described further below, the Administration had already begun developing a system to try GTMO detainees for war crimes. As noted at the outset, however, the scope of the President's authority to detain enemy combatants and the availability of criminal mechanisms such as military commissions to try *unlawful* enemy combatants are two separate, though related, bodies of law.

[66] *See, e.g.*, Ludecke v. Watkins, 335 U.S. 160, 170 (1948); *see also* Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952) (Jackson, J., concurring) (the President's powers are at their apex when acting with explicit authorization from Congress).

[67] Boumediene v. Bush, 553 U.S. 723, 771 (2008).

[68] U.S. CONST. art. I, § 9 cl. 2.

[69] The government explicitly argued that enemy aliens detained at GTMO do not enjoy rights under the Fifth Amendment's Due Process Clause, *see, e.g.*, Brief for the United States in Boumediene v. Bush (No. 06-1195), at 45–46, 67–68, and the Court did not address the issue head-on. *See* Eisentrager, 339 U.S. at 783 ("If this Amendment invests

disputes concerning those detainees' access to civilian courts, but at the same time left entirely open the question of what exactly would constitute "meaningful review" of the legal basis for their detention.[70]

The United States Court of Appeals for the D.C. Circuit has since endeavored to define the contours of both the President's detention authorities[71] and Guantanamo Bay detainees' rights under the Suspension Clause.[72] At the same time, the Office of Military Commissions has been compiling criminal cases against some of those detainees, who, in addition to their belligerency against the United States, may have committed prosecutable war crimes. This section will first trace detention-related initiatives (executive orders, legal opinions, and legislation) undertaken between the September 11, 2001 attacks and the Supreme Court's 2008 ruling in *Boumediene*.[73] It will then outline the scope of the Executive's detention authority and, lastly, the procedures developed to effectuate detainees' (specifically GTMO detainees') rights pursuant to the *Boumediene* edict.[74]

---

enemy aliens in unlawful hostile action against us with immunity from military trial, it puts them in a more protected position than our own soldiers."); United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990) (confirming that *Eisentrager* "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States"); Kiyemba v. Obama, 555 F.3d 1022, 1026 (D.C. Cir. 2009) ("Kiyemba I"), *vacated and remanded*, 559 U.S. 131 (2010) (per curiam), *reinstated*, 605 F.3d 1046, 1051 (D.C. Cir. 2010) ("Whatever role due process and the Geneva Conventions might play with regard to granting the writ, petitioners cite no authority that due process or the Geneva Conventions confer a right of release in the continental United States when an offer of resettlement abroad in an 'appropriate' country is made . . . "). But former Assistant Attorney General Jack Goldsmith says that the Court at least implicitly did reach the Due Process issue in *Boumediene* and that, regardless of whether it did or not, as a practical matter, nothing seems to turn on that question anymore. Author's interview with Jack Goldsmith, Henry L. Shattuck Professor of Law, Harvard Law School (Mar. 6, 2013).

[70] *See* Boumediene, 553 U.S. at 783; *see also id.* at 798 ("our opinion does not address the content of the law that governs petitioners' detention").

[71] *See, e.g.*, al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010) (holding that the government may detain individuals who were part of or supported al Qa'ida, the Taliban, or associated forces); Awad v. Obama, 608 F.3d 1 (D.C. Cir. 2010) (holding that a detainee need not have been within any "command structure" of groups covered by the AUMF).

[72] *See, e.g.*, al-Adahi v. Obama, 613 F.3d 1102 (D.C. Cir. 2010) (courts are to view the record evidence as a whole, rather than test to see whether individual pieces of evidence are themselves sufficient to support detention); Latif v. Obama, 677 F.3d 1175 (D.C. Cir. 2012) (affording the government a presumption that the intelligence reports relied upon as evidence were created in the regular course of the intelligence collector's duties).

[73] 553 U.S. 723 (2008).

[74] Only GTMO detainees have the right to habeas review under *Boumediene*. *See* al Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010); *infra* Part IV.B.

A. Counterterrorism Detention until Boumediene

Just days after the September 11, 2001 attacks, Congress passed the Authorization for the Use of Military Force (AUMF), which has stood as the basis for the government's counterterrorism detention authority to this day.[75] The AUMF provides, in relevant part:

> [T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[76]

Operation Enduring Freedom commenced with air assaults on al Qa'ida camps in Afghanistan on October 7, 2001, and, on November 13, 2001, President Bush issued a Military Order authorizing the military detention of, *inter alia*, members of al Qa'ida and those who assisted or harbored them, "at an appropriate location designated by the Secretary of Defense . . . ."[77] Those detained were not to have access to federal civilian courts as a means of challenging their detention.[78]

The latter provision began to erode on June 28, 2004, when the Supreme Court decided its first two cases concerning the habeas rights of suspected terrorists detained pursuant to the President's authority as Commander-in-Chief. While on the one hand agreeing with its 1942

---

[75] Pub. L. No. 107-40, 115 Stat. 224 (2001). Throughout the Bush Administration, the government argued its detention authority as exercised in Operation Enduring Freedom was based in two independent sources of law: the AUMF as well as inherent authorities vested in the President as Commander-in-Chief by Article II of the Constitution. After President Obama took office, the Department of Justice ceased citing to Article II in detention-related court filings as an independent source of authority.

[76] Congress "affirm[ed]" the President's authorities under the AUMF in the National Defense Authorization Act of 2012 (NDAA), Pub. L. No. 112-81, 125 Stat. 1298 (2012), after much scholarly debate about the continued applicability of the AUMF over time. *See, e.g.*, Robert Chesney, *Are There Detention Scenarios for which We Need Some Form of AUMF Update?*, LAWFARE (May 27, 2011), http://perma.cc/LEP8-45TJ. The NDAA, however, has already faced significant legal challenges, one resulting in an injunction against its detention provisions for being constitutionally overbroad and overly vague. *See* Hedges v. Obama, 890 F. Supp. 2d 424 (S.D.N.Y. 2012), *vacated and remanded* by 724 F.3d 170 (2d Cir. 2013).

[77] Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57831 §§ 2(a), 2(b), 3(a) (Nov. 16, 2001). The first detainees arrived at Guantanamo Bay in January 2002.

[78] *Id.* at § 7(b)(2).

holding in *Quirin* that the detention function "is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use [via the AUMF],"[79] the Court nevertheless held that the federal habeas statute[80] afforded Guantanamo Bay detainees the ability to challenge their detention in federal civilian courts,[81] and that U.S. citizens detained and designated "alleged enemy combatant[s]" by the President nevertheless enjoyed Fifth Amendment Due Process protections.[82]

Within a week and a half, the Department of Defense took the first step to limit the effects of the *Hamdi* and *Rasul* holdings. Taking a cue from Justice O'Connor's plurality opinion in *Hamdi*,[83] the Department created the Combatant Status Review Tribunal (CSRT) process to allow Guantanamo detainees, with the assistance of "personal representatives" but not legal counsel, to "contest" their designation as enemy combatants.[84] Tribunals consisting of three military officers (including one Judge Advocate) would be convened to determine whether each detainee fits the "enemy combatant" definition: "[A]n individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners."[85] If a tribunal determined a detainee was no longer an enemy combatant, a

---

[79] Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (O'Connor, J. plurality opinion) (citing *Quirin*, 317 U.S. at 28, 30).

[80] 28 U.S.C. § 2241.

[81] Rasul v. Bush, 542 U.S. 466, 481 (2004) ("Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship. Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under [28 U.S.C.] § 2241.").

[82] Hamdi, 542 U.S. at 538 (O'Connor, J. plurality opinion).

[83] *See id.* ("There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal. Indeed, it is notable that military regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention.") (citation omitted). *See also* Gordon England (as Secretary of the Navy), *Defense Department Special Briefing on Combatant Status Review Tribunals* (Mar. 29, 2005), http://perma.cc/2PTQ-JPQJ.

[84] Deputy Secretary of Defense Memorandum for the Secretary of the Navy: Order Establishing Combatant Status Review Tribunal (July 7, 2004), at §b and §c.

[85] Deputy Secretary of Defense Memorandum, *supra* note 84. Subsequent to a CSRT's determining that a detainee was an enemy combatant and thus lawfully detained, separate Administrative Review Boards (conceived before the *Hamdi* decision) would annually evaluate whether the detainee was likely to pose a threat to the United States if released. *See* Deputy Secretary of Defense Order OSD 06942-04 (May 11, 2004); Deputy Secretary of Defense Memorandum: Revised Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba (July 14, 2006).

process would begin whereby the State Department would engage in efforts to transfer or release that individual.[86]

Congress and the Administration were also working to moot the Court's holdings with legislation, eventually passing the Detainee Treatment Act of 2005 (DTA).[87] The DTA both implicitly affirmed the CSRT process meant to cure the procedural defects that gave rise to the plurality's decision in *Hamdi*,[88] and amended the federal habeas statute to strip federal courts of jurisdiction over Guantanamo detainees' habeas petitions afforded by *Rasul*.[89] The Supreme Court soon struck that law down, however, in the famous case of Osama bin Laden's driver, Salim Hamdan. In *Hamdan v. Rumsfeld*,[90] the Court ruled that the DTA could not prevent full habeas hearings for any detainee who had filed his habeas petition before the DTA was enacted. In other words, for all detainees who filed writ petitions before Congress acted (nearly all of them), the DTA could not take away their right to challenge their detention under the habeas statute because the DTA did not expressly say it was doing so.[91]

Again, Congress attempted to legislate around the Court's holding and cure the deficiencies the justices found in the DTA. In the Military Commissions Act of 2006 (MCA),[92] Congress filled in the gap the Court had identified in *Hamdan*, and more clearly stated that federal courts did not have jurisdiction to address even those habeas petitions that pre-dated the DTA. Upon detainees' constitutional challenges to that provision, in June 2008 the Supreme Court issued its opinion in *Boumediene v. Bush*.[93] In *Boumediene*, the Court held that the jurisdiction-stripping provision of the MCA "operate[d] as an unconstitutional suspension" of habeas.[94] The

---

[86] Deputy Secretary of Defense Memorandum, *supra* note 84, at §i. In other words, the CSRTs were to determine whether a detainee was, or was *no longer* an enemy combatant, effectively operating under an irrebuttable presumption that the detainee was properly designated as an enemy combatant at all relevant times prior to the CSRT (from the point of capture through detention at GTMO). There was no mechanism by which the tribunal would review whether that detainee's designation was proper at all points prior to the completion of the CSRT.

[87] Pub. L. No. 109-148, div. A, tit. X, §§1001-1006, 119 Stat. 2680, 2739-44 (2005).

[88] *See id.* at § 1005(a).

[89] *See id.* at § 1005(e). This section did, however, vest the United States Court of Appeals for the District of Columbia Circuit with jurisdiction to review enemy combatant determinations by the CSRTs.

[90] Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

[91] *But see id.* at 672 (Scalia, J., dissenting) (Justice Scalia would have found that the Constitution's Exceptions Clause (Art. III § 2) "permits exactly what Congress has done here" in the DTA).

[92] Pub. L. No. 109-336, 120 Stat. 2600 (2006).

[93] Boumediene v. Bush, 553 U.S. 723 (2008).

[94] *Id.* at 733.

Court then took the extraordinary step of pre-empting further action by the political branches of government by interpreting the scope of the Suspension Clause, finding that "at least three factors are relevant in determining the reach of the Suspension Clause":

> (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made;
> (2) the nature of the sites where apprehension and then detention took place; and
> (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.[95]

Finding that balancing these factors weighed in favor of extending the protections of the Suspension Clause to GTMO detainees, the Court held that the aliens detained there had a *constitutional* right to habeas review in federal courts. That ruling, however, did not include guidance to the lower courts as to how they were to proceed with hearing the hundreds of habeas petitions that had been filed.

B. After Boumediene*: The President's Detention Authority*[96]

The *Hamdi* plurality's finding that detention is a "fundamental . . . incident to war,"[97] and *Boumediene's* hands-off approach to defining the scope of the power to detain while nevertheless suggesting that scope was limited by the application of the Suspension Clause, left the matter in the hands of the United States Court of Appeals for the District of Columbia Circuit.

The government originally argued in the habeas proceedings that it could, under authorities granted in the AUMF and per the President's constitutional powers as Commander-in-Chief, detain enemy combatants as defined in the CSRTs.[98] "However, less than an hour after the

---

[95] *Id.* at 766. For analytical clarity, these three factors may also be further broken down into six: "(1) the citizenship of the detainee; (2) the status of the detainee; (3) the adequacy of the process through which the status determination was made; (4) the nature of the site of apprehension; (5) the nature of the site of detention; and (6) the practical obstacles inherent in resolving the petitioner's entitlement to the writ." Al Maqaleh v. Gates ("Maqaleh I"), 604 F.Supp.2d 205, 215 (D.D.C. 2009).

[96] When discussing the authority to detain, "president" and "government" are used interchangeably here.

[97] Hamdi, 542 U.S. at 518.

[98] *See* text accompanying n. 95, *supra*. *Boumediene* acknowledged that "proper deference" should be given to the Executive in these matters. Boumediene, 553 U.S. at 796–97. The D.C. Circuit subsequently held in *al-Bihani* that the AUMF "grant[s] the

inauguration of President Obama [on January 20, 2009], the government requested a temporary stay of [pending habeas] hearings so that it could reassess its position on the scope of the President's authority to detain" the individuals held at GTMO.[99] The government articulated its "refin[ed]" detention standard in a March 13, 2009 memorandum of law to the United States District Court for the District of Columbia, omitting any reliance on the President's constitutional powers and stating that under the AUMF, as "informed by the principles of the laws of war":

> The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.[100]

The first cases to be litigated yielded mixed results as the trial judges of the United States District Court for the District of Columbia who conducted the merits hearings applied disparate criteria regarding what facts were legally sufficient to uphold the lawfulness of an individual's detention under the "March 13th" standard.[101] The scope of the government's detention authority began to take definitive shape once the D.C. Circuit issued its first appellate decision in the habeas case of Ghaleb Nassar al-Bihani, a Yemeni who had joined the al Qa'ida-led and Taliban-

---

government the power to craft a workable legal standard to identify individuals it can detain. . . . ." al-Bihani, 590 F.3d at 872.

[99] Gherebi v. Obama, 609 F.Supp.2d 43, 52–53 (D.D.C. 2009).

[100] Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 2, In re: Guantanamo Bay Detainee Litigation, Misc. No. 08-442, (D.D.C filed March 13, 2009), http://perma.cc/X3EV-5T7L. Removing reliance on the President's Commander-in-Chief powers has been attributed to a senior career official in the Department of Defense's Office of the General Counsel, in response to a policy speech President Obama made, in which he stated he would not rely on that authority for detention at GTMO. Author's interview with William K. Lietzau, former Deputy Assistant Secretary of Defense for Detainee Affairs (July 26, 2012). Michael Newton further notes that the removal of reliance on the President's Article II fundamentally altered GTMO's original strategic purpose of serving as an instrument of the President's powers as Commander-in-Chief. Author's telephone interview with Michael Newton, Professor of the Practice of Law, Vanderbilt Law School (June 13, 2012).

[101] *Compare* Gherebi, *supra* 99, *with* Hamlily v. Obama, 616 F.Supp.2d. 63 (D.D.C. 2009).

affiliated Fifty-fifth Arab Brigade to fight against the Northern Alliance. Al-Bihani admitted to serving with the Fifty-fifth Arab Brigade, but claimed he was merely a cook and never fired a weapon.[102]

One judge noted that "the question whether a person was a 'part of' an informal, non-state military organization like the Fifty-fifth Brigade overlaps significantly with the question whether that person 'supported' . . . the organization."[103] The court determined that, "the facts of this case show Al-Bihani was both part of and substantially supported enemy forces,"[104] and that each was an independent basis on which he could be lawfully detained.[105] In reaching its conclusion, the court considered the Military Commissions Acts of 2006 and 2009, each of which contains a provision providing for military commission jurisdiction over those who have "purposefully and materially supported hostilities against the United States or its [co-belligerents or coalition partners]."[106] The court explained:

> [T]he provisions of the 2006 and 2009 MCAs are illuminating in this case because *the government's detention authority logically covers a category of persons no narrower than is covered by its military commission authority*. Detention authority in fact sweeps wider, also extending at least to traditional P.O.W.s, and arguably to other categories of persons. But for this case, it is enough to recognize that *any person subject to a military commission trial is also subject to detention*, and that category of persons includes those who are part of forces associated with Al Qaeda or the Taliban or those who purposefully and

---

[102] *See* al-Bihani v. Obama, 594 F.Supp.2d 35 (D.D.C. 2009). The district court denied al-Bihani's habeas petition, holding, "It is not necessary . . . that petitioner actually fire a weapon against the U.S. or coalition forces in order for him to be classified as an enemy combatant . . . . Petitioner has not only admitted to serving under an al Qaeda military commander, but his close ties to Taliban and al Qaeda affiliated forces as a member of the Arab Brigade unit, albeit in a non-front-line capacity, is more than enough." *Id.* at 39.

[103] Al-Bihani, 590 F.3d at 884 (Williams, J., concurring). The text omitted from this quote mentions the concepts of "substantial" support and "material" support. Material support is a criminal law concept, prohibited by federal law (18 U.S.C. §2339) and also triable by military commission (10 U.S.C. § 821). *See* Hamdan v. United States (Hamdan II), 696 F.3d 1238 (holding that the Office of Military Commissions lacks jurisdiction to prosecute material support charges for acts occurring before the 2006 MCA took effect). What constitutes "substantial" support as providing a basis for detention has not yet been defined. *See infra* note 109.

[104] Al-Bihani, 590 F.3d at 873–74.

[105] *Id.* at 874.

[106] *Id.* at 872, *citing* 2006 MCA at § 948a(1)(A)(i); Military Commissions Act of 2009 (2009 MCA) Pub. L. No. 111-84, tit. XVIII, 123 Stat. 2190, 2575-76., sec. 1802, §§ 948a(7), 948b(a), 948c.

> materially support such forces in hostilities against U.S. Coalition partners.[107]

Regardless of the prong by which it seeks to detain, the government has taken upon itself a preponderance standard of proof as the proper showing to hold somebody under the AUMF. This policy reaches back to the CSRTs, and continues despite multiple suggestions from the D.C. Circuit that a lower evidentiary threshold is probably constitutionally permissible.[108]

The preponderance standard requires a finding that it is "more likely than not" that a detainee meets the detention standard.[109] This does not require a "conclusion about whether [a] proposition is actually true,"[110] but instead is a comparative judgment of the inculpatory evidence presented by the government and, if that evidence by itself is legally sufficient to establish the lawfulness of detention, any exculpatory

---

[107] Al-Bihani, 590 F.3d at 872 (emphasis added) (citation omitted). The transitive property of mathematics suggests that "substantially support[ing]" al Qa'ida, *et al.*, may embody a less substantial connection than the "purposeful and material support" outlawed in the criminal statutes. Analogies between legal principles and mathematics are used at times as illuminating principles. *See, e.g.*, al-Adahi v. Obama, 613 F.3d 1102, 1105 (D.C. Cir. 2010) (explaining the applicability of conditional probabilities as part of the process of weighing evidence). The contours of the "support" inquiry have not been fully litigated, however, and the government has "eschewed reliance" on that prong of its detention authority in some cases. *See* Bensayah v. Obama, 610 F.3d 718, 720 (D.C. Cir. 2010), *vacated on other grounds*, 1:04-cv-01166-RJL (D.C. Cir. Jan. 9, 2014).

[108] *See* al-Bihani, 590 F.3d at 866; al-Adahi, 613 F.3d at 1111; and Almerfedi v. Obama, 654 F.3d 1, 5 n. 4 (D.C. Cir. 2011); *see also* Boumediene, 553 U.S. at 787 ("The extent of the showing required . . . is a matter to be determined."); Uthman v. Obama, 637 F.3d 400, 403 n.3 ("Our cases have stated that the preponderance of the evidence standard is constitutionally sufficient and have left open whether a lower standard might be adequate to satisfy the Constitution's requirements for wartime detention.").

[109] Interestingly, the appellate courts have not been bothered by the sometimes lack of particularity or specificity of district court findings as to the basis for the lawfulness of a detainee's detention. For example, some judges have denied writs because it is more likely than not a detainee is "part of al-Qaeda or the Taliban." *See*, *e.g.*, Suleiman v. Obama, 670 F.3d 1311, 1314 (D.C. Cir. 2011). This lack of specificity is of particular import from a policy perspective—if hostilities are determined to have ended with one covered group before the other, cases in which it is ambiguous what group the detainee was a part of at the time of his capture may have to be re-litigated. The practical consequences may be felt elsewhere, as well, such as with targeting decisions under the AUMF, *see, e.g.*, *infra* Part IV.C., and with respect to authorities to engage and detain al Qa'ida offshoots and former affiliates. *See also* Karen DeYoung and Greg Miller, *Al-Qaeda's Expulsion of Islamist Group in Syria Prompts U.S. Debate*, WASH. POST (Feb. 10, 2014), http://perma.cc/4LAK-DZMD. The extent these concerns might be mitigated by the Executive's reassertion of his Article II authorities as Commander-in-Chief is outside the scope of this Article.

[110] Almerfedi, 654 F.3d at 5.

information the detainee proffers.[111] Such information may include an alternative explanation for his actions that would cause him to fall outside the government's detention standard and that is more likely to be true than the government's narrative,[112] or an affirmative defense to his otherwise detainable conduct, such as protected status under international law.[113]

In cases where the government is alleging the detainee is "part of" al Qa'ida, Taliban, or associated forces, it is required that the detainee was (or remained) "part of" the applicable force at the time of his capture.[114] This is a snapshot, point-in-time inquiry stemming from law of war principles that permit governments to hold enemy belligerents for the duration of hostilities.[115] The government is not required to make an additional showing that the detainee who met the detention standard when captured may pose a future threat to the United States, so long as hostilities are ongoing.[116] When hostilities end is generally considered to be a

---

[111] This is an important distinction from criminal proceedings, which require government prosecutors to prove each element of the charged crime beyond a reasonable doubt. *See also* Hamdi, 542 U.S. at 534 (discussing the permissibility of shifting the burden to the detainee to rebut the government's evidence "with more persuasive evidence that he falls outside the [detention] criteria."). In criminal cases, the defendant is not required to make any showing of innocence.

[112] *See* al-Adahi, 613 F.3d 1102; Khairkhwa v. Obama, 703 F.3d 547 (D.C. Cir. 2012) (former senior Taliban official detainee claimed, although he failed to establish, that he was a purely civilian official who had no military duties).

[113] *See, e.g.*, al-Warafi v. Obama, 716 F.3d 627 (D.C. Cir. 2013) (detainee claimed, although he failed to establish, that his service to the Taliban was as an exclusive and permanent medic, and that he therefore deserved special protections per the Geneva Conventions).

[114] A detainee asserting that he disassociated himself from the covered group(s) prior to capture likely bears the burden of proving so if the government first makes a prima facie case that he is lawfully detained. *See* Hamdi, 542 U.S. at 533–34; Alsabri v. Obama, 684 F.3d 1298 (D.C. Cir. 2012). *But see* Salahi v. Obama, 625 F.3d 745, 751 (D.C. Cir. 2010) (uncontroverted evidence that a detainee took an oath of loyalty to al Qa'ida in 1991 is, by itself, insufficient to shift the burden of proof to detainee captured in 2001).

[115] The government may continue to detain an enemy belligerent until the end of hostilities under the laws of war *even if* that person has been tried and convicted by a military commission, and completed his criminal sentence before hostilities have ceased. *See* Hamdan v. U.S., 696 F.3d 1238, 1244 (D.C. Cir. 2012) ("When [Hamdan's] sentence ended . . . the war against al Qaeda had not ended. Therefore, the United States may have continued to detain Hamdan as an enemy combatant."). Note, however, that this raises the possibility that al Qa'ida, Taliban, and associated forces detainees may all be treated differently if hostilities cease with one group but not the others. This issue is particularly important in the context of cases where an individual is found to be lawfully detained under the AUMF as a general matter, but where the judge fails to make specific findings about which group the detainee is part of or supporting.

[116] *See* Awad, 608 F.3d 1. Indeed, in the 2012 and 2013 National Defense Authorization Acts (NDAAs), Congress has required the Secretary of Defense to certify that a detainee slated for transfer or release is not a threat to the security of the United States before that detainee may be moved off-island. This provision was removed from the 2014 NDAA.

nonjusticiable political question[117] and, likewise, any administrative decision to transfer or release a detainee before hostilities are determined to have ended is a matter of policy that does not imply that the detention of that individual was in any way unlawful.[118]

Establishing that an individual fits within the scope of the government's detention authority is a functional test that "focus[es] upon the actions of the individual in relation to the organization."[119] Facts indicating that a detained individual functioned as part of al Qa'ida include, but are not limited to: (1) being recruited by associates of al Qa'ida,[120] (2) having travel facilitated by associates of al Qa'ida,[121] (3) traveling to Afghanistan (or Pakistan) via known terrorist routes,[122] (4) staying at an al Qa'ida guesthouse,[123] (5) receiving military-style training,[124] (6) fleeing Afghanistan along a route used by other jihadists,[125] (7) associating with other nefarious individuals at any relevant time,[126] and (8) providing interrogators with false stories to cover up any of the above facts.[127] Further, although it is unnecessary for a detainee to operate "within al Qa'ida's formal command structure" to be lawfully detained, evidence thereof would be "surely sufficient" to uphold detention.[128]

IV. Law on the Real Battlefield

The Supreme Court "[thought] it unlikely that . . . basic [due] process [for GTMO detainees] will have [a] dire impact on the central functions of warmaking . . . ."[129] The Court opined that "arguments that military officers ought not have to wage war under the threat of litigation lose much of their steam when factual disputes at enemy-combatant hearings are limited to the alleged combatant's acts. This focus meddles little, if at all, in the strategy or conduct of war, inquiring only into the appropriateness of continuing to detain an individual claimed to have taken

---

[117] Al-Bihani, 590 F.3d at 874–75.
[118] Awad, 608 F.3d at 11.
[119] Bensayah, 610 F.3d 718 at 725.
[120] Uthman, 637 F.3d at 404.
[121] *See* Barhoumi v. Obama, 609 F.3d 416 (D.C. Cir. 2010).
[122] Al-Adahi, 613 F.3d at 1110. Note that a detainee's having an innocent intent for traveling to Afghanistan or Pakistan is not exculpatory as to whether he was a part of al Qa'ida when captured. *See id.*
[123] Al-Bihani, 590 F.3d at 873 n.2.
[124] *Id.*
[125] Barhoumi, 609 F.3d at 427.
[126] Uthman, 637 F.3d at 405.
[127] Al-Adahi, 613 F.3d at 1107.
[128] Bensayah, 610 F.3d at 725.
[129] Hamdi, 542 U.S. at 534 (O'Connor, J., plurality opinion).

up arms against the United States."[130] A group of retired general officers felt differently, and filed an amicus brief with the Court prior to arguments in *Boumediene* citing "serious concerns that a decision recognizing Petitioners' habeas claims could compromise American military effectiveness."[131]

Some unclassified sources offer circumstantial evidence that lends credence to the retired officers' concerns. Three examples are described briefly below: (1) the evolution of the Detainee Review Board (DRB) process for detainees held in Afghanistan; (2) litigation related to habeas petitions filed by some of those in-theater detainees in U.S. federal court; and (3) reported increases in the use of lethal force against individuals who might otherwise be detained. This section concludes by examining the development of international legal and policy pronouncements (specifically the Copenhagen Process on the Handling of Detainees in International Military Operations) in light of U.S. detention policy and practices.

A. In-Theater Detainee Review

To be sure, detainees held in U.S. custody in Afghanistan (i.e., those not sent to Guantanamo), were subject to certain procedures early in the course of OEF designed to instill confidence that U.S. and coalition military commanders were properly detaining individuals who posed battlefield threats. U.S. detention operations in Afghanistan (which officially ended December 10, 2014)[132] began in November 2001; a primary detention site at Bagram Air Base was set up by May 2002; and the first Detainee Review Boards (DRBs) began reviewing case files that summer.[133] The first boards, consisting mostly of military intelligence personnel, were charged with determining whether detainees were, in fact, enemy combatants. If so, they would be evaluated to determine if they met the criteria to be transferred to Guantanamo.[134] Although transfers to Guantanamo from Bagram ended after the Supreme Court's *Rasul* and

---

[130] *Id.* at 534–35.

[131] *See* Brief of Retired Generals and Admirals, Washington Legal Foundation, Allied Educational Foundation, and the National Defense Committee as Amici Curiae in Support of Respondents, Boumediene v. Bush, 553 U.S. 723 (2008) (No. 06-1195), 2007 WL 2986451 at *10.

[132] *See* Lolita C. Baldor, *US Ends Control of Afghan Prison*, ASSOCIATED PRESS (Dec. 10, 2014), http://news.yahoo.com/apnewsbreak-us-ends-control-afghan-prison-203915282.html.

[133] *See* Jeff A. Bovarnick, *Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy*, 2010 ARMY LAW. 9, 15–16 (June 2010).

[134] *Id.* at 16. Those criteria remain classified.

Hamdi rulings in 2004,[135] Bagram-based reviews continued under different names and standards. By the summer of 2005, Enemy Combatant Review Boards were constituted to replace the first DRBs. These boards, with a somewhat different makeup of officers, "could recommend release or continued detention" in certain categories based on the level of threat.[136]

In February 2007, the review process changed again, as Unlawful Enemy Combatant Review Boards (UECRBs) came online to "recommend combatant status and disposition"[137] with further revised procedures that included significant notices to the detainee regarding the basis of his detention.[138] These were to be held within the first seventy-five days of the detainee's in-processing and repeated every six months thereafter.[139] Even if the board found, by a preponderance of the evidence,[140] that the detainee was an unlawful enemy combatant, the UECRB could also recommend whether the detainee should be selected to participate in a rehabilitation program.[141] Further, the detainee's intelligence value, by itself, was not a valid basis for detention.[142] In other words, the boards were only to continue to detain individuals who were unlawful combatants *and* who continued to pose threats. Even so, "the UECRB afford[ed] even less protection to the rights of detainees in the determination of status than was the case with the CSRT[,]"[143] which, of course, the Supreme Court had already found to be an inadequate substitute to habeas (at least in a case of a U.S. citizen with a right to seek the writ).[144]

The system changed again in July 2009, when the Deputy Secretary of Defense issued policy guidance that served as the foundation for new

---

[135] *Id.* at 18. These rulings also stalled the CIA's efforts to end that agency's role in long-term detention operations due to the Court's creating an uncertain legal landscape as to what rights might be given to detainees subsequently transferred to GTMO. *See* author's interview with John Rizzo, Acting General Counsel, CIA (Nov. 1, 2012).

[136] *See* Bovarnick, *supra* note 133, at 18–19.

[137] Department of Defense Chart: Comparison of Detainee Process Models (undated, on file with author); CJTF-101 Detainee Operations Standard Operating Procedures, Annex E: Unlawful Enemy Combatant Review Board § 4 (unknown date) [hereinafter Department of Defense Chart].

[138] CJTF-101 procedures, *supra* note 137, § 13.

[139] *Id.* §§ 3(c), 14.

[140] *Id.* § 5(d)(3).

[141] *Id.* § 4. Note that similar rehabilitation programs are not available to GTMO detainees. *See* author's interview with John Bellinger, former Legal Adviser of the U.S. Department of State (Dec. 19, 2012).

[142] CJTF-101 procedures, *supra* note 137, at § 5(c); *see also* Hamdi, 542 U.S. at 521 (O'Connor, J., plurality opinion) ("Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized.").

[143] Maqaleh II, 605 F.3d at 96.

[144] *See* Hamdi, 542 U.S. 507 (O'Connor, J., plurality opinion).

Detainee Review Boards,[145] which had authority to determine combatant status and recommend a disposition for the detainee.[146] Perhaps the most significant changes from the previous boards were the inclusion of personal representatives for the detainees, and the requirement that, for the first time, judge advocates serve as legal advisers to the boards, which would now be constituted of three field-grade officers as opposed to "at least" one.[147] The boards were to be convened within sixty days of the detainee's in-processing, and every six months thereafter, to match provisions in Army Regulation 190-8, the U.S. military's regulatory framework for implementing applicable requirements of the Geneva Conventions.[148] The boards also had five possible recommendations available to them, including: continued detention, transfer to Afghan authorities for either participation in a reconciliation program or for criminal prosecution, release without conditions, or similar parallel dispositions for non-Afghan and non-U.S. third-country nationals.[149]

B. In-Theater Detainees Petition for Habeas

Between 2006 and 2008, four Bagram detainees (one Afghan, one Tunisian, and two Yemenis) filed petitions for writs of habeas corpus in D.C. district court; two filed shortly after the Supreme Court's decision in *Hamdan* and the other two filed after *Boumediene*.[150] The four petitioners all claimed to have been captured outside Afghanistan and wished to challenge their respective designations as "enemy combatants" in U.S. federal court.[151] Applying *Boumediene*, the district court rejected the government's arguments that habeas review could have a detrimental impact on the military mission in Afghanistan, finding that (1) the United States exercises tight control over the Bagram base, (2) technological advances mitigate difficulties with respect to evidence gathering and access to counsel, (3) there had been a significant passage of time since these petitioners were detained, and (4) if any of the alleged practical obstacles to habeas review were of such concern to the United States, the court suggested, in a reference to Guantanamo, that the government could transfer these petitioners to a location outside an active warzone.[152]

---

[145] Deputy Secretary of Defense Memorandum: Policy Guidance on Review Procedures and Transfer and Release Authority at Bagram Theater Internment Facility (BTIF), Afghanistan (U) (July 2, 2009) [hereinafter "DepSecDef Memo 7/2/09"].

[146] *See* Department of Defense Chart, *supra* note 137.

[147] *See* Detainee Review Procedures at Bagram Theater Internment Facility (BTIF), Afghanistan (U), Attachment A to DepSecDef Memo 7/2/09, *supra* note 145.

[148] *See* Army Regulation 190-8 (Oct. 1, 1997), http://perma.cc/ZKN9-C6ZC.

[149] *Id.*

[150] *See* Maqaleh v. Gates (Maqaleh I), 604 F. Supp. 2d 205, 209 (D.D.C. 2009).

[151] *Id.*

[152] *Id.* at 227–31.

Determining that the three non-Afghan petitioners were "for all practical purposes, no different than the detainees at Guantanamo," the district court held that the Suspension Clause applied to those detainees, and that the court therefore had jurisdiction to entertain their habeas petitions.[153]

Disagreeing with the district court's minimization of the practical obstacles to extending the writ to these detainees, the D.C. Circuit reversed the ruling, placing a far greater emphasis on the fact that Afghanistan "remains a theater of war."[154] It did, however, leave open the opportunity for the petitioners to continue their litigation if they could show that the United States sent them to Bagram in a deliberative attempt to shield them from the court's jurisdiction.[155] Accepting the court's invitation, the detainees submitted additional declarations from, among others, former State Department Chief of Staff Lawrence Wilkerson, attesting that the United States had made decisions regarding where to house detainees based in part on the availability of extrajudicial detention.[156] The district court found those declarations to be inadequate, as they provided only general information not particular to these petitioners, and that nevertheless, the institution of the new DRBs at Bagram altered its application of the *Boumediene* factors.[157]

C. Exercising the Lethal Option

It has been alleged that there is a greater preference (or at least propensity) to kill suspected terrorists rather than capture them under the Obama Administration.[158] This reported practice is often attributed to the present Administration's confused (or missing) detention policy.[159]

---

[153] *Id.* at 230. The court reasoned that their detention was the functional equivalent of being detained at Guantanamo because (1) the detainees were in United States custody; (2) they were detained in facilities in a country where they were not citizens, and (3) they were not captured in the country where they were being held.

[154] Al Maqaleh v. Gates (al Maqaleh II), 605 F.3d 84, 97 (D.C. Cir. 2010).

[155] *Id.* at 98–99.

[156] *See also* author's interview with Lawrence Wilkerson, former Chief of Staff to Sec. Powell, U.S. Department of State (July 25, 2012).

[157] *See* Al Maqaleh v. Gates (al Maqaleh III), 899 F.Supp.2d 10 (D.D.C. 2012).

[158] For a general discussion on the legal principles surrounding targeted killings of terror suspects, see Adam R. Pearlman, *Legality of Lethality: Paradigm Choice and Targeted Killings in Counterterrorism Operations* (Mar. 23, 2010), http://perma.cc/T5AR-96YS. This section, like much of the rest of this Article, assumes the truth of public reporting on this subject. It is not to be read as any independent confirmation of any United States government practice or program.

[159] *See* Craig Whitlock, *Adm. McRaven: Obama Administration has no plan for captured terrorists*, WASH. POST (June 28, 2011), http://perma.cc/8AG6-HFKD; Catherine Herridge, *White House's New Anti-Terror Strategy: Kill the Suspects?*, FOX NEWS (July 4, 2011), http://perma.cc/Q9ML-PMXQ.

Although "options for where to keep U.S. captives have dwindled" since detainees are no longer sent to GTMO, technological improvements have greatly improved the precision of targeting suspects from stand-off positions.[160] Despite increased efficiency of kinetic operations, this dynamic poses alternative bad choices for operators: either letting a suspect go due to lack of resources and legal and policy guidance,[161] or killing him to remove the threat he poses, which foregoes any intelligence value he may have.[162] The opportunity costs of the respective options were well recognized during the Bush Administration, but, if these reports are correct, the policy calculus of drone strikes appears to have changed with the law (and politics) of detention.[163]

D. The Copenhagen Process

U.S. counterterrorism detention measures (including detention at GTMO) have provoked an uproar among academia and foreign partners. As a result, there have been numerous proposals to clarify ambiguities and fill gaps in relevant international law.[164] Perhaps the most comprehensive of these proposals is "The Copenhagen Process Principles and Guidelines" ("Copenhagen Process").[165] Concluded in 2012, the Copenhagen Process was a five-year undertaking spearheaded by the Danish government that included twenty-four countries from five continents, along with five international organizations in observer status, including the United Nations and the International Committee of the Red Cross.[166] The United States

---

[160] Karen DeYoung and Joby Warrick, *Under Obama, more targeted killings than captures in counterterrorism efforts*, WASH. POST (Feb. 14, 2010), http://perma.cc/Q88P-ZWBJ.

[161] *See* Herridge; Joel B. Pollak, *Terrorist Freed After Obama Admin Denies Gitmo Entrance*, BREITBART (Aug. 3, 2012), http://perma.cc/4GBH-AQXK.

[162] *See, e.g.*, Marisa L. Porges, Op-Ed., *Dead Men Share No Secrets*, N.Y. TIMES (Sept. 24, 2012), http://www.nytimes.com/2012/09/25/opinion/dont-kill-every-terrorist.html; *see also Featured Forum on Drones and US Strategy: Costs and Benefits*, PARAMETERS, vol. 42 n. 4/vol. 43 n. 1 (Winter-Spring 2013).

[163] *See Cheney: Gitmo holds "worst of the worst": Former vice president says killing suspects was only other option*, ASSOCIATED PRESS (June 1, 2009), http://perma.cc/Q2LQ-432B.

[164] *See, e.g.*, John B. Bellinger III and Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT'L L. 201, 203 (2011). In addition, a Westlaw search of its journals and law reviews database yields over 4,300 articles since 2002 that discuss Guantanamo detention.

[165] THE COPENHAGEN PROCESS ON THE HANDLING OF DETAINEES IN INTERNATIONAL MILITARY OPERATIONS; THE COPENHAGEN PROCESS: PRINCIPLES AND GUIDELINES (2012) [hereinafter "Copenhagen Process"], http://perma.cc/2NL8-N585.

[166] *See* John Bellinger, *Completion of Copenhagen Process Principles and Guidelines on Detainees in International Military Operations*, LAWFARE (Dec. 3, 2012),

was reportedly "initially concerned that the Process would simply become a forum to criticize U.S. detention practices,"[167] but nevertheless was one of the seventeen countries to officially "welcome" the resulting Principles; Russia, the only permanent member of the U.N. Security Council not to do so, nevertheless "welcomed the conclusion of the process and took note of the Principles."[168]

The Danish government noted that by the mid-2000s, "military forces were much more engaged in governance issues, including detaining people . . . ."[169] Six years after the 9/11 attacks and beginning of Operation Enduring Freedom, "the single most difficult legal, political and practical challenge has been—and still is—to firmly and clearly answer questions" related to detention.[170] Legal, political, and military related concerns were all part of the impetus to "identify applicable law and generally accepted principles for the treatment of detainees."[171] Copenhagen Process chairman Thomas Winkler cautioned that "legal ambiguity" as to the rules troops must apply when detaining enemy forces "may lead to operational

---

http://perma.cc/3WN5-VCTX. Despite its inclusiveness, Amnesty International (AI) called the proceedings a "quasi-secre[t]" process, "convened . . . outside of any established international organization . . . to retain the ability to exclude certain states and civil society . . . ." *Copenhagen 'Principles' on Military Detainees Undermine Human Rights*, AMNESTY INT'L NEWS (Oct. 12, 2012), http://perma.cc/BG23-4EFR. The Copenhagen Process' chair, Ambassador Thomas Winkler, explains that the non-public sessions allowed for a forum in which participants would be willing to openly share their concerns, practices, and solutions. *See* Bruce "Ossie" Oswald and Thomas Winkler, *Copenhagen Process Principles and Guidelines on the Handling of Detainees in International Military Operations,* 16(39) AMER. SOC. INT'L L. INSIGHTS (Dec. 26, 2012), http://perma.cc/VL5C-GHMZ. Canadian lawyer Craig Brannagan opined that although the Copenhagen Process was not a "perfect system of inclusivity and transparency," it was "nevertheless a meritorious development in the evolution of IHL [international humanitarian law] that should be supported by all those with an interest in preserving the dignity and well-being of those most deleteriously affected by the threats of warfare—the human beings on the ground." Craig A. Brannagan, *The Copenhagen process on the handling of detainees in international military operations: a Canadian perspective on the challenges and goals of humane warfare*, 15(3) J. CONFLICT & SEC. L., 501, 501–32 (2010).

[167] *See* Bellinger, *supra* note 166.

[168] *See* Jonathan Horowitz, *Introductory Note to the Copenhagen Process Principles and Guidelines on the Handling of Detainees in International Military Operations*, 51(6) INT'L LEGAL MATERIALS, (2012) http://perma.cc/65C8-ZL7N.

[169] *Id.* at 1.

[170] Thomas Winkler, *The Copenhagen Process on the Handling of Detainees in International Military Operations*, *in* INTERNATIONAL HUMANITARIAN LAW: HUMAN RIGHTS AND PEACE OPERATIONS 244, 245 (Gian Luca Beruto ed., 2008), http://perma.cc/SVP6-K8BY. (All further references to "Winkler" are to this piece unless otherwise noted.) "There was especially heightened concern around the issue of transferring detainees into the hands of another State where there is a risk of detainees being mistreated after transfer." Horowitz, *supra* note 168, at 1; *see infra* note 205.

[171] Oswald and Winkler, *supra* note 166.

uncertainty, which may hamper the efficiency of a given [UN]-mandated international military operation. It is in the interest of no one, not least the detained individual."[172] Although the law of war is clear on many aspects of detention in international armed conflicts (IAC), OEF, and especially the fight against al Qa'ida, is a non-international armed conflict (NIAC), for which detention rules have been unclear. "There are no procedural rules for internment, no rules regulating how a detaining authority can transfer a detainee to a third party, and the ICRC has no right to visit conflict-related detainees . . . ."[173] There was also a sense that "bilateral and sometimes ad-hoc solutions may lead to unacceptable difference[s] in the handling of individual detainees."[174] "It should not be so," Ambassador Winkler argued, "that the situation for an individual detainee, depends on who he was detained by."[175]

The Process aimed to "reach consensus among states and relevant international organizations on the international legal regimes applicable to taking and handling detainees in military operations; and agree upon generally acceptable principles, rules, and standards for the treatment of detainees."[176] This would include determining the legal basis for detention in "international military operations" (IMOs), standards of treatment and conditions of confinement, and legal standards and procedures for transferring detainees.[177] The first meeting of participating nations and observers was held in October 2007, where the parties agreed to formulate a "common platform" for handling detainees, "which all States participating in a given military operation will use regardless of the character of the operation."[178] Ambassador Winkler told delegates to an International Institute of Humanitarian Law conference that:

> Our ambition is to establish a common framework for all troop-contributing States in a given operation, and, when

---

[172] *See* Thomas Winkler, *The Copenhagen Process on Detainees: A Necessity*, 78 NORDIC J. INT'L L. 489, 489 (2009). Legal Advisor for The Netherlands' Ministry of Defence, Marten Zwanenburg, agreed that "a need is clearly felt for guidelines on this issue." Marten Zwanenburg, *Substantial Relevance of the Law of Occupation for Peace Operations in* INTERNATIONAL HUMANITARIAN LAW: HUMAN RIGHTS AND PEACE OPERATIONS 157, 163 (Gian Luca Beruto ed., 2008), http://perma.cc/SVP6-K8BY.

[173] Horowitz, *supra* note 168, at 2.

[174] *Id.*

[175] Winkler, *supra* note 170, at 246. The situation Ambassador Winkler describes is not a new one. At the end of World War II, for example, German soldiers knew they would fare better surrendering to the Western Allies than to the Soviets. *Cf.* Jacques R. Pauwels, *May 1945:"Operation Sunrise", Nazi Germany Surrenders, But…on May 7, 8, or 9?*, GLOBAL RESEARCH (May 8, 2013), http://perma.cc/W9A5-UVT4.

[176] Oswald and Winkler, *supra* note 166.

[177] *See* Winkler, *supra* note 170, at 246.

[178] Oswald and Winkler, *supra* note 166.

> appropriate, also for the host State. With the Copenhagen Process we aim to bridge the gap of understanding and practice which currently leaves it to individual troop-contributing countries to deal with the challenges involved on a bilateral or an ad hoc basis. We want to bridge the gaps between legal theory and reality on the ground . . . . The outcome of the Process will be a document setting out a common platform for the handling of detainees. Our ambition is for this document to be the basis of the actions and cooperation of troop-contributing States and host States with regard to detainees in any future [IMO].[179]

After five years, the Process yielded a statement of sixteen principles and guidelines that are non-binding and purport to apply only to NIACs and peace operations, *not* IACs or law enforcement matters.[180] The principles are accompanied by a chairman's commentary not endorsed by the Process' participants.[181] The collective document (principles, guidelines, and commentary) addresses, inter alia, grounds for and the review of one's detention, as well as the treatment of detainees, conditions of their confinement, and their transfer to third parties.[182] Former State Department Legal Adviser John Bellinger notes that "few of the principles are new or surprising . . . but they nevertheless provide greater specificity than the rules set forth in the Geneva Conventions, the ICCPR, or the [Convention Against Torture]."[183] Even so, although they purport to follow and not expand international humanitarian law (IHL), the Principles depart from the Geneva Conventions in at least one very basic way: there are "detaining authorities" rather than "detaining Powers."[184] "Authority" is defined as "an entity that is recognized as a matter of international law or

---

[179] Winkler, *supra* note 170, at 248.

[180] Copenhagen Process, *supra* note 165, at Preamble II, IX. The document expressly does not address international armed conflicts. *Id.* at Preamble IX. This distinction implicitly reaffirms the literal definition of "international" as referring to discourse between two or more nation-states, excluding what might be considered "transnational," or activity beyond or across national borders. *See* Oswald and Winkler, *supra* note 166 ("[T]he Principles and Guidelines apply only to military operations that have a cross-border component and are sometimes referred to as internationalized armed conflicts (e.g., where one state deploys military forces in the territory of another state to assist the latter in an internal armed conflict).").

[181] Participants were not asked to associate themselves with the commentary. *See* Thomas Winkler, 3RD CONF. ON THE HANDLING OF DETAINEES IN INTERNATIONAL MILITARY OPERATIONS, MINUTES (Oct. 18–19, 2012).

[182] Horowitz, *supra* note 168, at 4.

[183] *See* Bellinger, *supra* note 166.

[184] *Compare* Copenhagen Process, *supra* note 165, Principles 5, 8, 9, 11, 14, and 15 *with* Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

national law as an entity that may lawfully hold detainees,"[185] whereas the word "State" does not appear in the text of any of the principles until Principle 15. In the instances where the substance of the principles do appear to "go beyond what international humanitarian treaty law requires" in NIACs,[186] some have supposed those principles were agreed upon because the participating States could agree that they either: (a) represented customary IHL; (b) "were part of their pre-existing detention policy or domestic law;" or (c) "were part of their human rights obligations during armed conflict or peace operations."[187] It is thus noteworthy that the Process' participants failed to reach agreement on the relative application of international humanitarian law versus international human rights law to detention in relevant operations.[188]

As a threshold matter, and perhaps most relevant to the core of the controversy over U.S. detention policy since 2001, the principles affirm international recognition that "detention is a necessary and legitimate means in the conducting of military operations."[189] The Process also

---

[185] Copenhagen Process, *supra* note 165, at Commentary 15.1. Given the purpose of the document as concerning NIACs with non-state actors, it seems odd, if pragmatic, that "authorities" do not purport to include the command structures of those non-state actors, including terrorist groups. It is highly unlikely that such entities would ever adhere to the Principles, including, e.g., Principle 5's suggestion that standard operating procedures be implemented for detention operations, and it would be quite controversial to elevate such groups by deeming them to be "authorities" in a statement of international principles. But, especially for the proponents of the notion that human rights law is to apply universally and at all times, this seems to create a one-way, and therefore morality-based, obligation, rather than a comprehensive legal regime to be adhered to by all parties to a NIAC. This is not a shortcoming of the Process that Amnesty International has pointed out. *Cf.* Amnesty International, *supra* note 166.

[186] *See* Horowitz, *supra* note 168 at 4; discussion below on, among others, Principles 7, 8, and 10.

[187] Horowitz, *supra* note 168, at 4.

[188] *See* Copenhagen Process, *supra* note 165, at Preamble IV. The commentary accompanying Principle 4 does attempt to draw some lines with respect to the applicability of IHL versus international human rights law [IHRL]. Perhaps most notably, it implies that IHRL does not necessarily always linger in the background, as human rights groups advocate, but that IHL is and remains the *lex specialis* that defines States' obligations in the situations in which it applies. A key question remains, however, about what exactly constitutes or rises to the level of "armed conflict" that takes an operation out of the realm of law enforcement and triggers the appropriate body of international law. *Cf.* Ziv Bohrer and Mark Osiel, *Proportionality in War: Protecting Soldiers from Enemy Captivity, and Israel's Operation* Cast Lead – *"The Soldiers are Everyone's Children,"* 22 S. CAL. INTERDISC. L.J. 637 (2013).

[189] Winkler, *supra* note 170, at 247; *see* Hamdi, 542 U.S. at 518 (detention is a "fundamental and accepted an incident to war"); Copenhagen Process, *supra* note 165, at Preamble III ("Participants recognized that detention is a necessary, lawful and legitimate means of achieving the objectives of international military operations."); Zwanenburg, *supra* note 172, at 157, 164 ("If force may be used, then it is implied that the lesser tool of detention is also authorized.").

confirmed the international law norm that detention is not limited to people who have committed crimes—security reasons may constitute independent bases for detention beyond any criminal acts a detainee may have committed, and criminal process is not necessary to continued lawful detention of an individual who poses a threat.[190] Further, consistent with the D.C. Circuit's GTMO habeas jurisprudence, the Copenhagen Process chairman's commentary implies that one's participation in hostilities is sufficient, but not necessary, to render him detainable.[191] Finally, the commentary appears to affirm the use of personal representatives, as opposed to legal counsel, for security detainees, implicitly rejecting one of the Supreme Court's key reasons for deeming CSRTs to be constitutionally deficient in *Hamdan*.[192]

Nevertheless, especially if one considers the accompanying commentary to hold any interpretive weight, many of the Copenhagen Process principles burden "detaining authorities" to the exclusive benefit of detainees without any promise of reciprocity for the detaining powers' own forces by their non-state foes.[193] Commentary 2.3 discusses "psychological needs of the detainee" and "respect for [his] convictions . . . ." Commentary 5.3 suggests that standard operating procedures account for a detainee's local "traditions." Commentary 9.1 states, "Detainees are vulnerable by the very nature of their detention," language which arguably triggers certain further responsibilities in international human rights law (IHRL). Principle 14, although a well-intentioned measure to prevent the mistreatment of detainees, openly invites claims of abuse that make a detaining authority subject to open "lawfare," a concept discussed further below. Indeed, Commentary 14.1 could be considered a First Amendment for terrorists, "encourage[ing] detainees to express their complaints freely,"[194] and allows them to drain the detaining authority's resources by triggering investigations into their complaints. Similarly, Commentary 14.2 fails to note that an investigation into detainees' complaints may disprove the complaints' validity.

The principles do grant measurable discretion to detaining States in certain instances. Principle 5, for example, requires the adoption of standard operating procedures (SOPs) for detention facilities, without

---

[190] *Compare* Copenhagen Process, *supra* note 165, Principle 12 *with* Principle 13; *see id.* at Commentary 13.1.

[191] *See id.* at Commentary 1.3.

[192] *Id.* at Commentary 12.4. Commentary 13.4 affords criminal detainees access to counsel. *Id.* at Commentary 13.4.

[193] *See, e.g.*, Copenhagen Principles 2, 7, 8, 10, and 14.

[194] *Id.* at Commentary 2.3, 5.3, 9.1; Principle 14; *see* Oswald and Winkler, *supra* note 166 ("Detaining authorities are also responsible for investigating *any* complaints made by detainees.") (emphasis added).

dictating the terms of those procedures. Further, nothing suggests the SOPs must be made public, and Commentary 5.4 appears to endorse classified SOPs, noting that the procedures' implementation should be "periodically inspected by military authorities," and not an independent body. Moreover, detaining authorities may ignore detainees' "wishes" when the detainee would rather not have his detention reported to an international organization.[195] This latter notion comes with one corollary and one caveat, however. First, the detaining authority *must* "register" the detainee.[196] Second, the detaining authority has no discretion in abiding by the detainee's wishes as to whether to notify his family members of his detention.[197] Furthermore, in attempting to limit the isolation of detained persons, Commentary 10.3 cuts into otherwise standard operations in domestic prisons by providing that "[r]estrictions concerning contact with the outside world are not to be imposed for disciplinary purposes."[198]

Despite being overwhelmingly protective of detainees, the principles recognize the realistic need for force protection measures in a detention setting. Specifically, Principle 6 allows for some (necessary and proportionate) force with respect to detention, while forbidding force during interrogations. In addition, Commentary 9.5 appears to allow for the force-feeding of hunger-strikers, even though the practice has been very controversial with respect to GTMO detainees.[199]

The principles and commentary also venture into the legal quandary that is due process for military detainees. The requirements that individuals be "promptly informed of the reasons for their detention"

---

[195] *Id.* at Commentary 11.1.

[196] *Id.* at Principle 8. Nothing in Principle 8 nor its accompanying commentary, however, specifies with whom the detainee must be registered. Is documented internal registration with the detaining authority's own government or leadership sufficient to meet this measure, or must registration be with a neutral third-party? Reading Principle 8 in conjunction with Principle 11, it appears to be the latter, but the text is open to multiple interpretations. Similarly, Principle 10 requires that an individual be held in a "designated place of detention" without specifying how and to whom the location must be designated. *Id.* at Principle 10. Commentary 10.5 suggests that public acknowledgment of detention locations is implied by this principle, which advances the goal of eliminating "secret prisons." *Id.* at Commentary 10.5. However, Commentary 10.4 allows for ship-based detention, and further, it must be recognized that public acknowledgment of detention facilities can potentially turn those facilities into enemy targets, and Principle 9 calls for detainees to be protected "against the rigors of the climate and the dangers of military activities." *Id.* at Commentary 10.5, Principle 9.

[197] *Id.* at Commentary 11.2.

[198] *Id.* at Commentary 10.3

[199] *Id.* ("[M]edical actions to preserve the health of the detainee may be justified even where the detainee refuses to provide consent.").

(Principle 7) [200] and have their detention reviewed and "reconsidered periodically" (Principle 12) are arguably a departure from the requirements of the Geneva Conventions[201] and the classic status-based detention paradigm. Whereas the Geneva Conventions require a detainee's status to be formally brought before a tribunal *only if* a detainee's POW status is in doubt, and then *only to* determine whether the detainee is, in fact, a POW,[202] Principle 12 and its commentary suggest individualized review of the basis of detention is required by default. Further, the commentary accompanying Principles 12 and 13, which address review of security detainees and criminal detainees, respectively, calls for assessments of *both* the legality *and* propriety of continued detention.[203] This goes well beyond the scope of the habeas litigation in U.S. federal courts, wherein the judiciary is tasked only with the responsibility of determining whether an individual was lawfully detained at the time of capture. The commentary attempts to blend functions that have been kept in distinct judicial and policy spheres in the United States: administrative proceedings (such as Periodic Review Boards)[204] have been used to examine a detainee's future threat, while the political and policy considerations associated with transfer or release prior to the end of hostilities have been left to the senior ranks of the United States government.

Principle 15 embodies the Copenhagen Process' *non-refoulment* provision. It calls for State monitoring of transferred detainees, which both imposes upon a receiving State's sovereignty,[205] and presents an academic point of concern for those worried about post-transfer mistreatment. Among the group's many complaints about the Process, Amnesty International (AI) is concerned that the monitoring provisions will

---

[200] Oswald and Winkler go so far as to say that detainees in IMOs have a "*fundamental right* to be informed promptly of the reasons for detention." Oswald and Winkler, *supra* note 166 (emphasis added).

[201] *See* Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 5, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. Article 5 provides:

> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any [enumerated categories of combatants], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Specifically, these principles depart from the circumstances under which Article 5 tribunals are to be held, and the consequences of the tribunals' determinations.

[202] *See id.*

[203] Copenhagen Process, *supra* note 165, at Commentary 12.2, 13.2.

[204] *See* Exec. Order No. 13,567, 76 Fed. Reg. 13,277 (Mar. 7, 2011).

[205] Commentary 15.3 acknowledges the receiving State's sovereignty, however, even as the text of Principle 15 itself undermines it.

nevertheless be used to justify transfers that subject detainees to abusive conditions.[206] Jonathan Horowitz, the Legal Officer at the Open Society Justice Initiative, writes that "if post-transfer monitoring is required due to torture concerns, then the transfer should not occur in the first place."[207] Yet the system of diplomatic assurances that underpins detainee transfer and extradition treaties has been a staple of international law at least since the Geneva Conventions,[208] and the principle in question is meant to achieve exactly the type of "upward harmonization" of human rights norms that AI seeks.[209]

In response to AI's concerns regarding transfer and other matters, Ambassador Winkler and Professor and U.S. Institute of Peace senior fellow Bruce Oswald write that the broad language of the principles allows them to be interpreted in ways that comport to AI's human rights agenda. "[B]oth the mandatory registration of detainees and the holding of detainees in designated places should address concerns of enforced disappearances and secret detention facilities. Similarly, the broad language used to deal with security and criminal detention reviews should sufficiently diminish fears of indefinite detention without review."[210]

That the Process' participants never envisioned the principles to be a definitive restatement of detention law may simply reflect the constant tension in international law between political realities and allowing for operational flexibility, on the one hand, versus providing sufficient clarity and guidance on the other. Nevertheless, the Process concluded with a mandate to the ICRC to "further scrutinize detention policies," under the assumption that the principles "will influence the ICRC discussions and any other discussions or developments concerning detention that might arise . . . . In a similar vein, nothing in the Principles and Guidelines precludes states or organizations from further developing principles, rules, or guidelines concerning detention."[211]

To be fair to AI's criticisms, the range of potential interpretations of the principles highlights where the Process arguably fell short of its initial goals. At the outset of the process, Ambassador Winkler noted,

---

[206] *See* Amnesty International, *Outcome of Copenhagen Process on detainees in International Military Operations Undermines Respect for Human Rights* (Oct. 23, 2012), http://perma.cc/K5TZ-5FEM.

[207] Horowitz, *supra* note 168, at 5.

[208] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 45, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter "Geneva Convention IV"].

[209] *See* AMNESTY INTERNATIONAL NEWS, *supra* note 166.

[210] Oswald and Winkler, *supra* note 166.

[211] *Id.*

"[W]e need clarity. . . . Without clarity soldiers will either hesitate, or make mistakes. Both seriously hamper the efficiency of our military efforts . . . ."[212] What actually resulted was sometimes vague language that may alternatively reflect a desire to maintain sovereign prerogatives (e.g., Principle 13),[213] or simply the failure to reach agreements on certain matters, such as the relationship between IHL and IHRL (Principle 4).[214] Further, in its attempt to provide guidance in the latter area, the commentary also brings attention to the significant responsibilities of any detaining authority. An unintended consequence of this may be to subject otherwise well-intentioned States to criticism on multiple grounds. If the potential operational and political liabilities of detention outweigh the operational gains of detaining enemy forces (e.g., intelligence collection), all that is left to favor detention over the legitimate act of killing in war is the moral compass of commanders in the field.[215]

Jonathan Horowitz points out two implications of the Copenhagen Process that are especially significant to international law and, perhaps, the post-9/11 legal analysis engaged by U.S. government lawyers. First, in addition to the other participants, all five permanent members of the UN Security Council "recognized that gaps in detention law exist and that it would be useful to discuss ways to overcome the resulting problems."

---

[212] Winkler, *supra* note 170, at 246.

[213] *See* Horowitz, *supra* note 168, at 4.

[214] *See* Copenhagen Process, *supra* note 165, at Preamble IV. Oswald and Winkler write that this issue is "ripe for further analysis and development," admitting that "[d]uring the Process, states' different legal and policy approaches to the extraterritorial application of international human rights law proved to be a major hurdle in finding a consensus on the relationship between international human rights law and international humanitarian law." Oswald and Winkler, *supra* note 166. Similarly, they point out, "the participants agreed that it was not appropriate to extend the Principles and Guidelines to law and order operations such as counter-piracy operations." *Id.* This is especially noteworthy, as one of Denmark's primary concerns at the outset of the process was specifying rules of detention applicable to its counter-piracy operations. *Compare id. with* Winkler, *supra* note 170, at 245. Indeed, for fuller context of the sentence cited at *supra* note 170, Ambassador Winkler stated, "The most difficult challenge in [Danish counter-piracy] operations has not been to identify the legal basis for the operation, to obtain parliamentary approval or to get the necessary armed forces in place many thousands of kilometers away from Denmark. No, the single most difficult legal, political and practical challenge has been—and still is—to firmly and clearly answer questions arising from the potential detention by Danish naval forces of pirates." *Id.* On one hand, one can say this indicates the Process fell short of its goals; on the other, it is also a sign of a truly internationalized process that Denmark did not limit to its own national interests.

[215] *See, e.g.*, Copenhagen Process, *supra* note 165, at Commentary 5.6 ("States should ensure that they have the necessary resources to undertake detention operations in accordance with these principles"); 9.1 (listing numerous responsibilities of detaining authorities), 9.4 ("The detaining authority must also accept its responsibility to protect detainees from the dangers of any military activities that may put their lives or health at risk.").

Second, the fact that after five years of meetings, conferences, and negotiations, "States were unable to find the common ground required to bring the necessary specificity to an agreed upon and robust set of detainee handling procedures."[216]

Horowitz predicts the most likely outcome of the Copenhagen Process to be "that States entering into international military operations will reference those Principles that grant them significant detention powers when it suits them, whereas human rights groups and other critics will seek to marginalize the Principles, choosing instead to reference existing international law on how states must handle detainees."[217] Principle 5 and its associated commentary[218] potentially illustrate both outcomes: the principle affords States discretion in adopting standard operating procedures for detentions that may be kept confidential, but could also open the door to criticism from human rights groups that the SOPs should be made public and/or are not appropriately tailored to a given situation.

V. Strategic Impact of Law and Lawfare

Although it is widely recognized that the United States is conducting the most judicially-scrutinized armed conflict in history,[219] there is no "smoking gun" document in the public realm describing exactly how the Guantanamo habeas jurisprudence has impacted warfighters.[220] Strong anecdotal evidence of an effect on operations exists, however, via the evolution of detention procedures at Bagram, the *al-Maqaleh* litigation itself, and the D.C. Circuit's intuiting that at least some of the Bagram procedural changes were brought on by active litigation.[221] Relevant, too, is the supposed increase in lethal targeting of suspects which, if accurate, would seem to sacrifice potentially valuable human intelligence collection opportunities for the sake of limiting the resources necessary for detention operations, administrative reviews of detainees, and possible litigation. To be sure, the fact that the Department of Defense, over several years after *Boumediene*, significantly increased the capacity of certain detention

---

[216] Horowitz, *supra* note 168, at 5–6.

[217] *Id.* at 5.

[218] *See, e.g.*, Copenhagen Process, *supra* note 165, at Commentary 5.2, 5.3.

[219] *See* GOLDSMITH, *supra* note 1, at 69 ("[S]ince September 11, 2001, this war has been lawyered to death."); *id.* at 90 (noting "fiercely legalistic conception of unprecedented wartime constraints" on the President, and the judicialization of the laws of war).

[220] *See* author's interview with Sandra Hodgkinson, former Deputy Assistant Secretary of Defense for Detainee Affairs (Aug. 21, 2012).

[221] *See* al Maqaleh II, 605 F.3d at 96 n.4 ("The Government argues that in our analysis of this first [*Boumediene*] factor, we should consider new procedures that it has put into place at Bagram in the past few months . . ."); *see also* text accompanying *supra* note 95.

facilities in Afghanistan somewhat cuts against this last point.[222] Furthermore, even if killing suspects were to be considered a sound long-term policy option, at least in theory the target of lethal action would nevertheless have to meet detention criteria.[223] And although the *al-Maqaleh* litigation ultimately foreclosed the Suspension Clause's potential application to detainees held in Afghanistan, staving off the potential flood of thousands more habeas petitions to find their way onto the federal docket years before the DoD's detention mission ended there, that matter took nearly four years to litigate in even the fastest-moving of the consolidated cases, and DRBs were conducted every six months for detainees at held at Bagram, regardless.[224]

Many have argued that the *Boumediene* Court's view of the Suspension Clause is unfaithful to *Eisentrager* and other cases the Court cited as precedent.[225] Scholars will continue to debate the empirical truth of the matter, just as many Constitutional Law professors raise the specter that the Court is, at times, perhaps academically dishonest in the way it applies and distinguishes its prior holdings. But what is plainly clear is that the Court's conclusion that there exists a "common thread" in its jurisprudence providing for "the idea that extraterritoriality questions [of applications of the Constitution] turn on objective factors and practical concerns, not formalism,"[226] effectively transforms our Constitution, beyond our borders, into an instrument of equity rather than a source of law. However academically fanciful and intellectually engaging that may be, the constant, chief practical concern in the present context remains instant and true: the warfighter's ability to defend the United States is stymied by the need to engage in multistep equitable calculi instead of focusing efforts on defeating the enemy.[227] As *Boumediene* itself cautions,

---

[222] *See, e.g.*, Department of Defense News Briefing with Vice Adm. Harward from Afghanistan (Nov. 30, 2010), http://perma.cc/FNZ6-MGMA.

[223] *Cf.* Pearlman, *supra* note 158 (discussing general legal precepts for targeted killings).

[224] *See also* Benjamin Wittes, *Comments on Maqaleh and Hamidullah*, LAWFARE (Oct. 19, 2012), http://perma.cc/VAX6-PRZR.

[225] The first such critics in this regard were Chief Justice Roberts and Justice Scalia, in their dissenting opinion in the case. *See* Boumediene, 553 U.S. at 801 (Roberts, J., dissenting); 826 (Scalia, J., dissenting). Each joined the other's dissent, and both were also joined by Justices Thomas and Alito. *Id.*

[226] *Id.* at 726–27. *But cf.* Stephen I. Vladeck, Remarks at "The Guantanamo Detainees: What's Next?," Program on Law and Government and the National Institute of Military Justice Panel at American University Washington College of Law (Feb. 18, 2011) (hypothesizing that the Supreme Court's opinion in *Boumediene* amounted merely to an assertion of the Court's institutional authority than a substantive grant of rights to detainees); Stephen I. Vladeck, *The Passive-Aggressive Virtues*, 111 COLUM. L. REV. 122, 137 (2011).

[227] *See* Fred K. Ford, *Keeping Boumediene off the Battlefield: Examining Potential Implications of the* Boumediene v. Bush *Decision to the Conduct of United States Military Operations* (U.S. Army War College, Senior Service College Fellowship Project 2009).

"Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury."[228] It appears, then, that the full consequences of this litigation are yet to be realized, as terrorist plots abound, several attacks succeed, and some detainees have been at GTMO twice as long as they had been when the Court last weighed-in.

The drain on government resources, public distractions, and ultimate legal constraints imposed by detainee litigation present yet another challenge. Reporting (and sometimes sensationalizing or misrepresenting) information about U.S. detention programs and the treatment of detainees has allowed al Qa'ida to effectuate lawfare strategies against the United States, and has hampered several aspects of U.S. foreign policy. The term "lawfare" refers to the "strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective."[229] The concept has entered the dictionary as "the use of the law by a country against its enemies, esp[ecially] by challenging the legality of military or foreign policy."[230] Lawfare can be summarized as "legal recourse as a weapon in shaping the global battlefield,"[231] and has been discussed at length by senior policymakers. For example, as early as 2003, the Council on Foreign Relations (CFR) hosted *two* National Security Roundtable discussions dedicated to the concept, which, it says, is the result of "the intersection of globalization and the emergence of

---

[228] Boumediene, 553 U.S. at 797–98.

[229] Charles J. Dunlap Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT'L AFF. 146, 146 (2008). Indeed, an early understanding of what we now call lawfare is arguably the purpose for which the Founders provided for the suspension of habeas in the Constitution. The Supreme Court wrote in *Milligan*, "In the emergency of the times, an immediate public investigation according to law may not be possible; and yet, the period to the country may be too imminent to suffer such persons to go at large. Unquestionably, there is then an exigency which demands that the government, if it should see fit in the exercise of a proper discretion to make arrests, should not be required to produce the persons arrested in answer to a writ of habeas corpus." *Ex parte* Milligan, 71 U.S. 2, 125–26 (1866). More than eighty years later, the Court again suggested as such, making reference to the "litigation weapon," and writing that since at least 1813, it has been well recognized that an enemy alien's use of our courts could not " . . . fail to be helpful to the enemy." Johnson v. Eisentrager, 339 U.S. 763, 776, 779 (1950). Note a similar reason for Congress's divesting the courts of jurisdiction to hear cases litigating conditions of confinement at GTMO via the Military Commissions Act of 2006. Pub. L. no. 109-366, § 7(a)(2).

[230] COLLINS ENGLISH DICTIONARY (10th ed. 2009).

[231] Michael J. Lebowitz, *The Value of Claiming Torture: An Analysis of al-Qaeda's Tactical Lawfare Strategy and Efforts to Fight Back*, 43 CASE W. J. INT'L L. 357, 359 (2011).

international law," and its impact on U.S. operations.[232] As explained by the CFR:

> Each operation conducted by the U.S. military results in new and expanding efforts by groups and countries to use lawfare to respond to military force. Although not a symmetrical threat to American military power, lawfare can be used to undercut American objectives [by diverting military resources]. . . . In addition, lawfare can be used to goad American forces into violations of the Law of Armed Combat, which are then used against the United States in the court of world opinion. Armed combatants may conceal weaponry or themselves amongst civilians, encouraging attacks that can be used as propaganda against American forces. This can have a dramatic effect on the use of American air power, making commanders reticent to attack targets and dragging out the conflict. Too much concern over the legality of each and every decision can be harmful to soldiers involved in ground combat as well.[233]

Lawfare "is often used to fight a stronger opponent asymmetrically, targeting the opponent's vulnerabilities, such as domestic public opinion."[234] Al Qa'ida has successfully leveraged claims of torture at Guantanamo Bay as a lawfare tactic, and Guantanamo detainees' have often expressed unfounded claims of torture. The terror group's members were instructed to do so in the "Manchester Manual," which outlines sophisticated counter-interrogation and counterintelligence practices.[235] The Manual, first found in a 2000 police raid of an al Qa'ida member's home in Manchester, England,[236] reflects a legal savvy about Western courts that has effectively paralyzed certain intelligence and military operations, by allowing al Qa'ida to divert scarce government resources to rebut detainees' claims of torture and other similar allegations.[237] Many American lawyers outside of the government, knowingly or not, have been

---

[232] *Lawfare, the Latest in Asymmetries*, COUNCIL ON FOREIGN RELATIONS (Mar. 18, 2003), http://perma.cc/9FJ4-68SV.
[233] *Id.*
[234] *Lawfare, the Latest in Asymmetries - Part 2*, COUNCIL ON FOREIGN RELATIONS (May 22, 2003), http://perma.cc/AA95-VYBP.
[235] *See* Lebowitz, *supra* note 231. Lebowitz also cites to other articles that study detainees' lawfare tactics, including Tung Yin, *Boumediene and Lawfare*, 43 U. RICH. L. REV. 865, 880–84 (2009) (describing the manual's instructions that detainees should provoke action from guards).
[236] *See* Shanita Simmons, *Manchester Manual for the Code of Conduct for Terrorism*, JTF-GTMO PUBLIC AFFAIRS (Aug. 14, 2007), http://perma.cc/B2FJ-2GDF.
[237] *Id.*

a part of this strategy's success, encouraged, in part, by the media's coverage of the detainees.[238]

The most obvious examples of the diversion of resources caused by the successful practice of "lawfare" include the hiring or diverting of military and civilian lawyers to litigate those claims, and the use of federal courts to hear detainees' cases. But the lawfare successes of al Qa'ida have also affected battlefield operations, via changes in American warfighting units' standard operating procedures and rules of engagement.[239] Even those not forward-deployed have been affected by the perceived need to rebut allegations of torture and mistreatment, which are taken as true by many. For example, to rebut allegations in a 2006 motion that alleged torture through the use of a restraint chair to force-feed hunger-striking detainees, the commander of Joint Task Force Guantanamo, Navy Rear Admiral Harry Harris, ordered that the procedure be done on himself in an effort to convince critics of its safety.[240] In 2008, medical staff at Guantanamo repeated the procedure with Guantanamo's new commander, Navy Rear Admiral David Thomas, who reported that it was "neither harsh nor uncomfortable."[241] Nevertheless, charges that enteral feeding of hunger-striking detainees to save their lives constitutes torture were rampant during the large-scale hunger strike that began February 6, 2013,[242] and which led to additional litigation on whether "preventing suicide" was a legitimate interest of the United States government.[243] In

---

[238] *See* Judge Dennis Jacobs, Remarks at Lawyers at War: Remarks from the 10th Annual Barbara K. Olson Memorial Lecture (Nov. 19, 2010), http://perma.cc/L2NG-7QBL.

[239] In *Eisentrager*, the Supreme Court warned that, "[t]o grant the writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation of shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence. The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States." Eisentrager, 339 U.S. at 778–79.

[240] James G. Stavridis, *Strategic Communication and National Security*, 46 JOINT FORCES QUARTERLY 4, 4–5 (2007), http://perma.cc/9S9L-3JT6.

[241] Michael Melia, *New Gitmo Prison Camps Chief Shunning Detainees*, MIAMI HERALD (June 24, 2008), http://perma.cc/98JS-2X82.

[242] *See, e.g.*, Brett Wilkins, Op-Ed., *Torturing Guantanamo's Hunger Strikers*, DIGITAL JOURNAL (Apr. 23, 2013), http://perma.cc/T564-LHZ7.

[243] Aamer v. Obama, Nos. 04-2215, 05-1504, 05-2349, slip op. at 12 (D.D.C. July 16, 2013); *see* Dhiab v. Obama, No. 05-1457 (D.D.C. July 8, 2013). On appeal, the D.C.

short, backed by acknowledged U.S. practices of condoning limited instances of enhanced interrogation techniques (such as waterboarding),[244] lawfare tactics have "served to irreparably harm the image of the United States, removed the benefit of the doubt pertaining to government efforts to combat torture allegations, and consequently [impaired] the government's ability to effectively prosecute both a war and its accused war criminals."[245]

Further, the global media's reporting about Guantanamo Bay operations, combined with current and former detainees' claims of torture or other mistreatment as part of the extensive litigation, have had an adverse impact on U.S. international relations and have restricted foreign policy options. As far back as 2003, Philip Bobbitt, a Columbia Law School professor who previously served as Senior Director for Strategic Planning at the National Security Council, wrote, "we have entered a period in which strategy and law are coming together."[246] Although legal considerations clearly were significant in the formulation of GTMO-related policies, it appears clear that the legal dynamic has played out in a way other than intended. Lawfare works, Professor Jack Goldsmith says, precisely because "it manipulates something Americans value: respect for law."[247] Indeed, the government's inability to communicate coherent legal and policy rationales undermines the benefits to U.S. security interests that detaining terror suspects at Guantanamo Bay has achieved.

Circuit consolidated these cases (which covered four detainees), and reversed both district judges' rulings that the Military Commissions Act striped the courts of the circuit of jurisdiction over conditions of confinement claims. Aamer v. Obama, No. 13-5223 (D.C. Cir. Feb. 11, 2014). The Court of Appeals noted, however, that it was unlikely detainees would be able to prevail in their claims that force feeding constituted torture. *See id.*

[244] *Cf.* U.S. Senate Select Committee on Intelligence Study of the CIA's Detention and Interrogation Program, http://perma.cc/2PUA-EDGT.

[245] Stavridis, *supra* note 240, at 4–5.

[246] Philip Bobbitt, *Playing By the Rules*, THE GUARDIAN (Nov. 15, 2003), http://perma.cc/5XTN-RFB7.

[247] GOLDSMITH, *supra* note 1, at 58–59.