

**ENDING THE WAR ON TERRORISM
ONE TERRORIST AT A TIME:
A NONCRIMINAL DETENTION MODEL
FOR HOLDING AND RELEASING
GUANTANAMO BAY DETAINEES**

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Several years after the September 11, 2001 terrorist attacks, the United States continues to detain as “enemy combatants” hundreds of persons captured in Afghanistan or Pakistan during the war on terrorism.¹ Many of those detainees have languished in the detention facility at the U.S. naval base at Guantanamo Bay, with no apparent prospect for release, particularly because this military conflict does not involve an enemy sovereign with whom peace can be negotiated. In addressing this problem, there are two dangers. Continuing to detain persons who are no longer threats to the United States is undesirable and is unlikely to persuade the rest of the world of our good intentions. On the other hand, releasing persons who in fact intend to commit mass violence against the United

1. See News Release No. 935-04, Office of the Asst. Sec’y of Def. (Pub. Aff.), Transfer of Detainees Completed (Sept. 22, 2004), available at <http://www.dod.gov/releases/2004/nr20040922-1310.html> [hereinafter News Release No. 935-04].

States or to rejoin the ranks of those fighting our military is also undesirable.²

The Bush Administration has not given consistent signals about the future of the Guantanamo detainees. Early on, it seemed as if the detainees would be held indefinitely. Then-Deputy Assistant Attorney General John Yoo said forthrightly in a speech in late 2002, “Does it make sense to ever release them if you think they are going to continue to be dangerous, even though you can’t convict them of a crime?”³ The administration also suggested, drawing upon the rhetoric of the “war on terrorism,” that the detainees would be released when the “war” was over.⁴ In a sense, the administration’s position that the detainees will be released when the war on terrorism is over is tantamount, as critics have charged, to saying that we will hold them for the rest of their lives.⁵

Then, in October 2004, the deputy commander of the detention facility said that “the majority of [the detainees] will either be released or transferred to their own countries.”⁶ The deputy commander’s superior quickly repudiated that statement.⁷ And at the beginning of 2005, the *Washington Post* cited unnamed administration officials as pondering “long-term solutions”

2. According to the U.S. government, at least seven persons who were released from detention at Guantanamo Bay have returned to fight against the United States in Afghanistan. Vanessa Blum, *U.S. Building New Prisons for Terrorists*, LEGAL TIMES, Oct. 4, 2004, at 1; Matt Moore & John J. Lumpkin, *Some Detainees Have Returned to Terrorism*, HOUSTON CHRON., Oct. 18, 2004, at A3.

3. Henry Weinstein, *Prisoners May Face “Legal Black Hole,”* L.A. TIMES, Dec. 1, 2002, at A1.

4. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 540 (2004) (Souter, J., concurring) (“The Government asserts a right to hold Hamdi under these conditions indefinitely, that is, until the government determines that the United States is no longer threatened by the terrorism exemplified in the attacks of September 11, 2001.”).

5. See, e.g., Joseph Lelyveld, “*The Least Worst Place*”: *Life in Guantanamo*, in THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM 100, 101–02 (Richard C. Leone & Greg Anrig, Jr. eds., 2003) (interpreting President Bush’s statement regarding the detainees as a willingness “to hold the lot of them at Guantanamo until the distant day, if it ever comes, when Islamic terrorist networks have been universally uprooted”); David Luban, *The War on Terrorism and the End of Human Rights*, in THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY 219, 228 (Mark Tushnet ed., 2005) (“It follows, then, that the war on terrorism will be a permanent war, at least until the United States decides to abandon it.”).

6. John Mintz, *Most at Guantanamo to Be Freed or Sent Home, Officer Says*, WASH. POST, Oct. 6, 2004, at A16.

7. *Id.*

that included "indefinitely imprisoning suspected terrorists whom they do not want to set free or turn over to courts in the United States or other countries."⁸ The administration has already begun to lay the groundwork for such long-term solutions by building new prison facilities at Guantanamo Bay.⁹

The war on terrorism has exposed some cracks in the foundation of the law of armed conflict and, as a result, in U.S. domestic law as well. The problem arises because terrorism, even on the scale of the 9-11 attacks, can either be treated as a criminal matter to be handled by civilian courts, or an armed attack warranting response under the law of armed conflict. Prior to 9-11, the United States treated terrorism, including that sponsored by al Qaeda, as a criminal matter; thus, the United States criminally prosecuted the terrorists who bombed the World Trade Center in 1993,¹⁰ the Murrah Federal Building in Oklahoma City in 1995,¹¹ and the U.S. embassies in Kenya and Tanzania in 1998.¹² In contrast, Congress and the President chose to treat the 9-11 attacks as an armed attack, and Congress authorized the President to use military force against those persons responsible for the attacks.¹³

Neither of these approaches, however, fits the 9-11 attacks perfectly. Meaningful criminal prosecution of al Qaeda terrorists would have required that the United States gain physical custody of them. At the time of the 9-11 attacks, most of the al Qaeda leadership was living in Afghanistan, sheltered by that country's Taliban leaders. The United States, like most other countries, had no diplomatic relations with the Taliban, and therefore extradition of suspected terrorists was not an option.

8. Dana Priest, *Long-Term Plan Sought for Terror Suspects*, WASH. POST, Jan. 2, 2005, at A1. Senators from both political parties immediately condemned the plan to hold detainees indefinitely. *Lugar Condemns Plan to Jail Detainees for Life*, WASH. POST, Jan. 3, 2005, at A2 (quoting Senators Richard Lugar (R., Ind.) and Carl Levin (D., Mich.)).

9. See *infra* Part.I.C.

10. See *United States v. Salameh*, 261 F.3d 271 (2d Cir. 2001); *United States v. Salameh*, 152 F.3d 88 (2d Cir. 1998).

11. See *United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998); see generally LOU MICHEL & DAN HERBECK, *AMERICAN TERRORIST: TIMOTHY MCVEIGH & THE OKLAHOMA CITY BOMBING* (2001) (detailing the indictments stemming from the Oklahoma City bombing).

12. See *United States v. bin Laden*, 92 F. Supp. 2d 225 (S.D.N.Y. 2000).

13. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

In fact, military force may have been the only possible approach for capturing the would-be defendants. The law of armed conflict, on the other hand, does not appear to have anticipated the use of military force against nonstate actors, making it difficult to determine when to release detainees captured during such a military conflict. Thus, much of the post-9-11 debate has concerned whether the terrorist attacks constituted criminal acts to be addressed through international cooperation and the criminal justice system, or acts of war by nonstate actors to be met with military force and direct application of the laws of armed conflict, with al Qaeda substituted as the equivalent of the enemy nation-state.¹⁴

What is needed in this age of military action against nonstate terrorist groups such as al Qaeda is a new subcategory of the law of armed conflict. For the purposes of American law, this new subcategory would be triggered by the appropriate invocation of military force, whether by congressional authorization or by the President's commander-in-chief power to repel sudden attacks.¹⁵

In developing this new subcategory, there are several issues that, while relevant, are beyond the scope of this Article. First, this Article assumes that the detainees either have been properly accorded prisoner-of-war (POW) status or have been properly denied that status. As of this writing, the appropriate status of the detainees remains a hotly contested matter;¹⁶ the

14. The war-versus-law-enforcement dilemma presented by al Qaeda has prompted much scholarship. See, e.g., M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARV. INT'L L.J. 83 (2002) (arguing for development of international cooperation in criminal law enforcement of terrorism); Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT'L L. 1 (2003) (arguing for armed conflict); Ronald J. Sievert, *War on Terrorism or Global Law Enforcement Operation?*, 78 NOTRE DAME L. REV. 307 (2003); Greg Travalio & John Altenburg, *State Responsibility for Sponsorship of Terrorist and Insurgent Groups: Terrorism, State Responsibility, and the Use of Military Force*, 4 CHI. J. INT'L L. 97, 98 (2003) (noting the two approaches of criminal law and law of armed conflict); John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VA. J. INT'L L. 207, 209–15 (2003) (arguing for armed conflict); Harold Hongju Koh, Op-Ed., *We Have the Right Courts for Bin Laden*, N.Y. TIMES, Nov. 23, 2001, at A39 (arguing for law enforcement).

15. See, e.g., *The Prize Cases*, 67 U.S. (2 Black) 635 (1862).

16. See, e.g., Omar Akbar, Note, *Losing Geneva in Guantanamo Bay*, 89 IOWA L. REV. 195, 215–20 (2003) (analyzing POW status of both al Qaeda and Taliban detainees under the Geneva Convention); Lawrence Azubuike, *Status of Taliban and Al Qaeda Soldiers: Another Viewpoint*, 19 CONN. J. INT'L L. 127, 143–154 (2003) (examining the POW status of Taliban and al Qaeda detainees).

Bush Administration contends that neither al Qaeda nor Taliban detainees are entitled to POW status,¹⁷ but various human rights groups have argued that the Taliban detainees do qualify for such status.¹⁸ This Article also assumes that the detainees have been properly classified as combatants, as opposed to noncombatant civilians;¹⁹ that assumption, however, also may be a contested matter at present.²⁰ These assumptions are relevant because they relate to matters of *status*, which are not insurmountable; the United States could address these objections and still assert authority to continue indefinite detention of the detainees until “the end of the war on terrorism.”

Analysis of the potentially indefinite detention of persons in the course of the war on terrorism raises three related questions. First, has military force been properly authorized against an ascertainable group of nonstate actors? If there is no ascertainable group of nonstate actors against whom military force can be authorized, then detention cannot be justified as incident to military action. Second, is the detainee in question actually a member of that ascertainable group? In the current war on terrorism, this question asks whether a given detainee is indeed a combatant under the terms of the military force authorization. If a particular detainee is demonstrably not a combatant, then detention cannot be justified, even if military force has been properly authorized. Arguably, the Combatant Status Review Hearings established by the Department of Defense shortly after the Supreme Court issued its decision in *Rasul v. Bush*²¹ resolve this question by providing an annual

17. See, e.g., Donald Rumsfeld, U.S. Sec’y of Def. & Gen. Richard Myers, Chairman, Joint Chiefs of Staff, Pentagon Briefing (Feb. 8, 2002), available at <http://usinfo.state.gov/regional/nea/sasia/afghan/text/0208dod.htm> [hereinafter Rumsfeld Pentagon Briefing].

18. See, e.g., Amnesty Int’l, Memorandum to the US Government on the Rights of People in US Custody in Afghanistan and Guantanamo Bay (Apr. 15, 2002), available at <http://web.amnesty.org/library/index/engamr510532002>; Human Rights Watch, Background Paper on Geneva Convention and Persons Held by U.S. Forces (Jan. 29, 2002), available at <http://hrw.org/backgrounder/usa/pow-bck.htm>.

19. Cf. Tung Yin, *Procedural Due Process to Determine “Enemy Combatant” Status in the War on Terrorism*, 73 TENN. L. REV. (forthcoming 2006) (proposing procedures to properly classify combatants).

20. See, e.g., *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005).

21. 542 U.S. 466 (2004).

forum in which to reevaluate the combatant status of each detainee.²² Finally, even if the individual's initial detention as a combatant was proper, is continued detention still justified? Put another way, when military force is employed against non-state actors, particularly ones for whom there may be no equivalent to a nation-state with which to negotiate an armistice or peace treaty, is the detaining nation-state entitled to hold such prisoners for the rest of their lives? If not, when should the detaining nation-state be obligated to release the prisoners?

The focus of this Article is on the third question. Part I provides a review of the detainees at Guantanamo Bay: who are they, why were they captured, and in what conditions are they being held? Part II contrasts criminal law with the law of armed conflict. While there is some overlap between the two areas of law (in a broad sense, both aim to protect society), they serve distinct purposes. Criminal law sets forth the substantive elements required for society to *punish* an individual, whereas the law of armed conflict regulates the *detention* of enemy soldiers.²³ Because criminal law is concerned with punishment, it sets a high bar for detention. It is too high a bar to reach many al Qaeda members, even the high-level architects of the 9-11 attacks who are in U.S. custody in undisclosed locations.

Part III surveys a number of situations in which the Constitution permits noncriminal detention, where society is allowed to detain a person involuntarily for reasons other than proof beyond a reasonable doubt of culpable conduct. There are four such situations: pretrial detention of persons facing indictment, civil commitment of mentally ill persons, civil commitment of violent sexual predators who have completed their criminal sentences, and quarantine or isolation of persons infected with dangerous, contagious diseases.

Part IV synthesizes common elements from the examples of noncriminal detention identified in Part III to come up with a model for noncriminal detention of persons captured during

22. For more analysis of the Combatant Status Review Hearings and *Rasul*, see Tung Yin, *The Role of Article III Courts in the War on Terrorism*, 13 WM. & MARY BILL RTS. J. 1035, 1046–56, 1074–89 (2005).

23. Punishment under the law of armed conflict exists when soldiers violate specific rules of conduct governing warfare, but even absent such violations, a nation-state is entitled to incapacitate captured soldiers via detention.

military conflicts against nonstate actors. The goal of this model is to create a procedure for determining when the need to detain individual nonstate actors ends. There is such a need in military conflicts with nonstate actors precisely because there is no enemy sovereign with which to negotiate an end to the conflict. The model would be used only where dealing with the use of military force against nonstate actors; in the case of a traditional nation-state conflict, the Geneva Convention rules would apply. The key features of this new model are that individual nonstate actors may be detained where the government can demonstrate (a) that they fall within the class of persons identified by Congress as the appropriate targets of military force; and (b) that they continue to pose a danger to the United States. The government would bear the burden of proving that the detainee remains dangerous, and in such proceedings, which would be held annually (circumstances permitting), the detainee would be entitled to counsel. Finally, this Article compares this model to the Administrative Review Hearings currently in use at Guantanamo Bay and concludes that the Administrative Review Hearings are flawed in a number of respects, and that they should be reconstituted to address those flaws.

I. DETENTION AT GUANTANAMO: WHO, WHY,
AND IN WHAT CONDITIONS?

On September 11, 2001, nineteen terrorists hijacked four airplanes: two departing from Boston, one from Washington, D.C. (Dulles), and one from Newark, New Jersey.²⁴ The hijackers, foreign nationals from Saudi Arabia (fifteen), the United Arab Emirates (two), Egypt (one), and Lebanon (one), killed the pilots and crashed two of the planes into the World Trade Center towers and the third into the Pentagon; the fourth flight was intended for either the U.S. Capitol or the White House, but the passengers and flight attendants fought back and forced the terrorists to crash the plane in a remote area in Pennsylvania.²⁵ Less than a week later, Congress authorized the President to

24. THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 1-14 (2003) [hereinafter 9-11 REPORT].

25. *Id.* at 1-14, 433-38.

use military 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.”²⁶ By then, President Bush had already publicly blamed the terrorist group al Qaeda for the attacks.²⁷

A. Al Qaeda

The 9-11 attacks were far from the first efforts by al Qaeda to harm the United States. By 1997, the Central Intelligence Agency found evidence that al Qaeda was linked to “attacks on U.S. troops in Aden and Somalia in 1992 and 1993.”²⁸ There was also evidence linking al Qaeda to the so-called 1994–1995 “Manila air plot,” in which Ramzi Yousef, one of the masterminds of the 1993 World Trade Center bombing, planned to blow up a dozen jumbo jets over the Pacific Ocean;²⁹ Philippine authorities learned of the plot and foiled it after torturing a suspected terrorist for sixty-seven days.³⁰ Al Qaeda may also have had links to the 1996 truck bomb attack on the Khobar Towers housing complex in Saudi Arabia, which killed 19 Americans and wounded 372 others.³¹

26. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

27. See David S. Cloud et al., *Faint Trail: It's Surprisingly Tough to Pin Terror Attacks on the "Prime Suspect,"* WALL ST. J., Sept. 19, 2001, at A1 (“By the standards of the Old West, President Bush has good reason to declare Osama bin Laden wanted in last week’s terrorist attacks, ‘dead or alive.’”); David S. Cloud & Neil King, *Terrorists Destroy World Trade Center, Hit Pentagon in Raid With Hijacked Jets,* WALL ST. J., Sept. 12, 2001, at A1 (“One U.S. official said intelligence agencies already had gathered ‘strong information’ linking Mr. bin Laden to the attacks”); Doyle McManus & Robin Wright, *Broad New U.S. Strategy Emerging to Fight Terror,* L.A. TIMES, Sept. 16, 2001, at A1 (“The administration has not yet compiled conclusive proof that Bin Laden ordered Tuesday’s attack But they believe they are assembling a circumstantial case that will justify U.S. action to capture the terrorist chief”); Robin Wright & John Daniszewski, *U.S. Asks Pakistan for Help to Track Down Bin Laden,* L.A. TIMES, Sept. 14, 2001, at A26 (“Bin Laden has emerged as the primary focus of the U.S. investigation”).

28. 9-11 REPORT, *supra* note 24, at 109.

29. *Id.* For more information on the Manila air plot, see SIMON REEVE, *THE NEW JACKALS: RAMZI YOUSEF, OSAMA BIN LADEN AND THE FUTURE OF TERRORISM* 77, 90–91 (2001).

30. See ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS* 137, 249 n.10 (2002) (citing newspaper accounts).

31. 9-11 REPORT, *supra* note 24, at 60.

In early 1998, Osama bin Laden issued a *fatwa* calling “for the murder of every American, anywhere on earth, as the ‘individual duty for every Muslim who can do it in any country in which it is possible to do it.’”³² Al Qaeda’s involvement became more apparent in ensuing attacks. On August 7, 1998, al Qaeda operatives set off massive truck bombs nearly simultaneously against the U.S. embassies in Kenya and Tanzania.³³ On October 12, 2000, al Qaeda operatives rammed a small boat loaded with explosives into the *U.S.S. Cole* while that destroyer was docked in Yemen; the blast killed seventeen American sailors and wounded forty.³⁴ Bin Laden directly supervised this attack by picking the target and the suicide attackers, and by paying for the explosives and other equipment.³⁵

During this time, al Qaeda established camps in Afghanistan for the purpose of training fighters and terrorists. In mid-2002, CNN aired footage from videotapes recovered from a suspected al Qaeda location in Afghanistan; some footage showed “mock kidnappings by masked men swiftly intercepting a vehicle on a dusty road, assassinations from the back of a motorcycle and instructions in the use of a surface-to-air missile launcher capable of blasting an airliner out of the skies.”³⁶ Another videotape showed a white dog exposed to a lethal biological or chemical agent; within minutes, the dog was on its back, howling in agony.³⁷ One antiterrorism report in 2003 estimated that approximately 20,000 men passed through the training camps, only 2,000 of whom have been captured or killed, leaving 18,000 at large, ready to be mobilized against the United States.³⁸

B. *The United States’s Response to the 9-11 Attacks*

The World Trade Center towers were still smoldering when President Bush demanded that the Taliban rulers of Afghani-

32. *Id.* at 47.

33. *Id.* at 115.

34. *Id.* at 190.

35. *Id.*

36. Mark Jurkowitz, *Tapes Show Array of Terrorist Activities*, BOSTON GLOBE, Aug. 20, 2002, at A12.

37. Robert Russo, *Al-Qaeda Tapes Show Gassing of Dogs*, EDMONTON J., Aug. 20, 2002, at A4.

38. See Barry Renfrew, *Al Qaeda Ranks Boosted by War on Terror, Iraq*, WASH. TIMES, May 26, 2004, <http://washingtontimes.com/world/20040525-0937488557r.htm>.

stan stop protecting al Qaeda and turn the group's leaders over to the United States.³⁹ Whether because of the intransigence of the Taliban or poor negotiating on the part of the United States,⁴⁰ the Taliban refused to turn over the al Qaeda leaders. As a result, on October 7, 2001, the United States, aided by the United Kingdom, launched missile and air strikes against the Taliban and al Qaeda. By October 19, a small number of U.S. soldiers began fighting on the ground with the Northern Alliance. By November, the Taliban forces were in retreat, often withdrawing from major cities without a fight.

Over the course of the fighting, the United States and its allies captured about 10,000 persons believed to be either al Qaeda or Taliban fighters.⁴¹ According to the Department of Defense, most of the 10,000 were either detained in Afghanistan or were released outright.⁴² Approximately 1,000 were sent to the U.S. naval base on Guantanamo Bay, Cuba,⁴³ to be detained as enemy combatants. These 1,000 persons were identified by individual interviews conducted by teams composed of

39. Jeanne Cummings & David Rogers, *Bush Says "Freedom and Fear Are at War,"* WALL ST. J., Sept. 21, 2001, at A3 ("In an address before a joint session of Congress, Mr. Bush explicitly demanded that the Taliban regime that runs Afghanistan turn over all members of the terrorist group led by Osama bin Laden, close its camps, and release all foreign nationals 'unjustly imprisoned.'").

40. Taliban leaders might have been prepared to turn over Osama bin Laden and his lieutenants, but needed some concessions to save face. On September 20, 2001, a meeting of one thousand high level Muslim clerics in Afghanistan resulted in "an edict that said Osama bin Laden should be persuaded to leave the country," though the United States quickly rejected the suggestion, which may have prompted Taliban leaders also to reject the decree. See John F. Burns, *Afghans Coaxing bin Laden, but U.S. Rejects Clerics' Bid*, N.Y. TIMES, Sept. 21, 2001, at A1.

41. Bill Dedman, *U.S. to Hold Most Detainees at Guantanamo Indefinitely*, BOSTON GLOBE, Apr. 25, 2004, at A1. Some of the 10,000 were probably wrongly identified. There are reports that the Northern Alliance was collecting cash bounties from the United States for each suspected al Qaeda or Taliban fighter turned over. See, e.g., *id.*

42. *Id.* at A24.

43. The United States has maintained a naval base on Cuba at Guantanamo Bay pursuant to a lease entered in 1903 and ratified in 1934. See Agreement Between the United States and Cuba for the Lease of Lands for Coaling or Naval Stations, U.S.-Cuba, Feb. 16-23, 1903, T.S. 418; see also Treaty Between the United States of America and Cuba Defining Their Relations, U.S.-Cuba, May 29, 1934, 48 Stat. 1682; Agreement Between the United States of America and Cuba for the Lease of Coaling or Naval Stations, U.S.-Cuba, July 2, 1903, T.S. No. 426.

Justice Department attorneys, Army personnel, Central Intelligence Agency officers, or a combination thereof.⁴⁴

The government selected Guantanamo Bay for at least two reasons. Located on the other side of the globe from Afghanistan and surrounded by water, it provided a secure location to hold combatants, with a low risk of escape or rescue.⁴⁵ Perhaps more importantly, lower federal courts had almost uniformly held that they lacked territorial jurisdiction to hear claims arising from the military base, as it was deemed “outside” U.S. territory.⁴⁶ Based on such precedent, the government no doubt believed that its actions there would be free from judicial review.⁴⁷

C. *Camp X-Ray and Camp Delta*

The first detainees transported to Guantanamo Bay were kept in a facility known as Camp X-Ray, a hastily assembled collection of wire cages, which a visiting human rights attorney described as “dog-run-like cages.”⁴⁸ Detainees were kept inside these wire cages for as many as twenty-three and a half hours a

44. See Rumsfeld Pentagon Briefing, *supra* note 17; see also Ruth Wedgwood, Op-Ed., *War Comes to Court*, WALL ST. J., Apr. 20, 2004, at A20 (noting that these decisions followed “an intricate multilevel review process involving lawyers, intelligence officers and field commanders”).

45. See, e.g., Scott Higham et al., *A Holding Cell in War on Terror*, WASH. POST, May 2, 2004, at A23 (noting that Guantanamo Bay was more attractive than detention facilities in Asia, which were deemed vulnerable); Tania Branigan & Vikram Dodd, *The Bitterest Betrayal*, GUARDIAN WEEKEND, July 19, 2003, at 27 (“Guantanamo Bay, located on the south-eastern tip of Cuba, is reachable only by a US military flight: its remoteness adds to its security.”).

46. See *Cuban Am. Bar Ass’n v. Christopher*, 43 F.3d 1412, 1425 (11th Cir. 1995) (“The district court here erred in concluding that Guantanamo Bay was a ‘United States territory.’”); *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1513–15 (11th Cir. 1992) (noting in statement of facts that Haitian refugees were “detained outside United States” on naval ships and at Guantanamo Bay); *Bird v. United States*, 923 F. Supp. 338, 340–42 (D. Conn. 1996) (holding that Guantanamo Bay fell within the “foreign country” exception to the Federal Tort Claims Act); *Fed’n for Am. Immigr. Reform, Inc. v. Reno*, 897 F. Supp. 595, 598 (D.D.C. 1995) (noting in statement of facts that Haitian refugees were denied entry to the United States and instead sent to Guantanamo Bay or Panama).

47. See *Rasul v. Bush*, 542 U.S. 466, 497–98 (2004) (Scalia, J., dissenting) (“Today, the Court springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal courts even though it has never before been thought to be within their jurisdiction—and thus making it a foolish place to have housed alien wartime detainees.”).

48. MICHAEL RATNER & ELLEN RAY, *GUANTANAMO: WHAT THE WORLD SHOULD KNOW* 36 (2004).

day, leaving them exposed to the hot Cuban sun during the days and to the elements during the nights.

On April 28, 2002, the Administration opened Camp Delta, a more permanent detention facility. Constructed for approximately \$10 million, Delta uses prefabricated steel containers, originally designed for international shipping, to create individual cells measuring six feet, eight inches by eight feet.⁴⁹ Three of the steel sides are cut out and replaced with steel mesh, allowing a detainee to see and communicate with detainees to either side and across.⁵⁰ The cells at Camp Delta provide floor-level toilets—an improvement over Camp X-Ray, where detainees had to use buckets.⁵¹ In a typical week, each detainee is allowed out of his cell for a total of one hour, absent “rewards” or interrogation.⁵² Camp Delta is divided into separate camps: 1, 2, 3, 4, Echo, Iguana, and others. Camps 1, 2, and 3 are rated maximum security; Camp 4 is rated medium security. Camp Echo is the facility largely designated to hold detainees who will be tried in military tribunals; it too is maximum security, and the detainees are kept in solitary confinement.⁵³

While the similarity between much of Camp Delta and maximum-security prisons (both state and federal) is striking, “in many ways, Camp Delta is harsher.”⁵⁴ At just over fifty-three square feet, the cells at Camp Delta are smaller than the typical cells for death row inmates.⁵⁵ In terms of recreational time, with the exception of detainees at Camp 4, the one hour every other day that Guantanamo detainees are allowed pales

49. Lelyveld, *supra* note 5, at 110.

50. *See id.* at 110–11; *see also* Ted Conover, *In the Land of Guantanamo*, N.Y. TIMES MAG., June 29, 2003, at 43.

51. Lelyveld, *supra* note 5, at 111.

52. *Id.*; Conover, *supra* note 50, at 43.

53. RATNER & RAY, *supra* note 48, at 37; Kathleen T. Rhem, *Detainees Living in Varied Conditions at Guantanamo*, ARMED FORCES PRESS SERVICE, Feb. 16, 2005, available at http://www.defenselink.mil/news/Feb2005/n02162005_2005021604.html; Carol Rosenberg, *War Crimes Sessions Are Shut Down*, MIAMI HERALD, Nov. 13, 2004, at 3A.

54. Conover, *supra* note 50, at 43; *see also* Carlotta Gall & Neil A. Lewis, *Tales of Despair From Guantanamo*, N.Y. TIMES, June 17, 2003, at A1.

55. *See, e.g.*, *Soering v. United Kingdom*, 11 Eur. H.R. Rep. 439, 459 (1989) (describing Mecklenburg Correctional Facility in North Carolina as providing a three meter by three meter (ninety-seven square feet) cell); Lelyveld, *supra* note 5, at 111 (noting that Camp Delta cells are “slightly smaller” than the death row cells in Texas).

in comparison to the six to seven hours a week allowed to death row inmates.⁵⁶ At Camp 4, so-called “Level 1 detainees,” those who are “compliant and willing to follow camp rules,” are allowed seven to nine hours a day of access to exercise yards, are provided board games and playing cards, are allotted white uniforms instead of the orange jumpsuits given to other detainees, and are allowed to eat meals together.⁵⁷ To help Level 1 detainees endure the heat, Camp 4 provides electric fans and twenty-four-hour ice water.⁵⁸

In addition to putting up with the harsh conditions at Camp Delta, detainees also endure severe abuse, if allegations by released detainees are accurate. Numerous former detainees have claimed that they suffered beatings, interrogations under gunpoint or while chained “like dogs,” sexual humiliations, dousing with chemical solvent, and other abuses.⁵⁹ Of course, the complainants might be exaggerating, if not fabricating, their allegations, out of anger at the United States.⁶⁰ On the other hand, after Camp Delta’s commander, General Geoffrey Miller, took over the Abu Ghraib prison facility in Iraq, similar allegations were documented at Abu Ghraib,⁶¹ providing some reason to believe that abuses occurred in Guantanamo Bay.

Camp Delta came with a lifespan projection of five years, which expires in 2007. During Delta’s existence, the Pentagon

56. See Vanessa Blum, *U.S. Building New Prisons for Terrorists: Construction of Guantanamo Jails Signals Long-Term Plans for Base*, LEGAL TIMES, Oct. 14, 2004, at 1; Rhem, *supra* note 53.

57. Rhem, *supra* note 53.

58. *Id.*

59. See RATNER & RAY, *supra* note 48, at 41; Matthew Hay Brown, *Freed U.S. Detainees Claim Abuse, The Allegations Could Stir up Anti-American Sentiment, Already at a Fever Pitch in Islamic Nations*, ORLANDO SENTINEL, Mar. 17, 2004, at A1; Neil A. Lewis, *Frequent Prisoner Coercion Alleged; Guantanamo Personnel Detail Regular Abuse of Those Held at Base*, HOUSTON CHRON., Oct. 17, 2004, at 23; Carol Rosenberg, *3 GIs Punished for Detainee Abuse, Mistreated Inmates at U.S. Military Prison at Guantanamo Bay*, PITTSBURGH POST-GAZETTE, Nov. 12, 2004, at A11; Charlie Savage, *Ex-Detainees Detail Alleged Abuse at US Base*, BOSTON GLOBE, Aug. 5, 2004, at A1; Paul Waugh, *My Torture Hell in Camp Delta Cage*, EVENING STD., Aug. 3, 2004, available at <http://www.thisislondon.com/news/articles/12320351>.

60. For example, one news story described a former detainee’s complaint of suffering through forty-five days of sleep deprivation. *Freed Afghans Say U.S. Captors Abusive; Beatings Alleged at Guantanamo*, CHICAGO TRIB., Mar. 17, 2004, § 1, at 12.

61. See ANTHONY R. JONES, AR-15 INVESTIGATION OF THE ABU GHRAIB PRISON AND 205TH MILITARY INTELLIGENCE BRIGADE, Aug. 23, 2004, available at http://www.globalsecurity.org/intell/library/reports/2004/intell-abu-ghraib_ar15-6.pdf.

has constructed a new camp, known as Camp 5, and has also asked for \$25 million to construct Camp 6.⁶² Camp 5 is another “supermax” facility designed to hold one hundred inmates and intended to be a permanent structure. Camp 6 will be a medium security facility designed to hold more cooperative detainees.⁶³

Not all detainees face indefinite detention; the United States has periodically announced releases of detainees, totaling 256 as of November 2005.⁶⁴ At least fifty-six of those detainees were repatriated for further detention, while the remainder were simply released to their home nations.⁶⁵ Nevertheless, as of November 2005, the United States continued to hold five hundred detainees at Guantanamo Bay.⁶⁶ Although these remaining detainees might be released in the future as a result of the Administrative Detainee Hearings, the existence of Camp 5 and the plans for Camp 6 suggest that the government intends to detain *some* prisoners indefinitely.

II. CRIMINAL LAW VERSUS THE LAW OF ARMED CONFLICT

One of the main criticisms of the Bush Administration’s detention of prisoners at Guantanamo Bay is that the detainees are kept in a lawless environment where they face indefinite detention with no prospect of release. The establishment of Combatant Status Review Hearings, charged with evaluating whether each detainee is in fact an enemy combatant, has done little to blunt this criticism.⁶⁷ Similarly, the administration’s Administrative Review Hearings, which examine whether each detainee continues to pose a threat to the United States, have also failed to satisfy critics. Instead, these critics call for either criminal prosecution of the detainees or outright release.⁶⁸ This

62. See Carol Rosenberg, *Permanent Jail Set for Guantanamo*, MIAMI HERALD, Dec. 9, 2004, at 1; Blum, *supra* note 56 at 1.

63. See Blum, *supra* note 56, at 1.

64. *Id.* See News Release No. 1151-05, Office of the Asst. Sec’y of Def. (Pub. Aff.), Detainee Transfer Announced, Nov. 5, 2005, available at <http://www.defenselink.mil/releases/2005/nr20051105-5073.html> [hereinafter News Release No. 1151-05].

65. Blum, *supra* note 56, at 1.

66. See News Release No. 1151-05, *supra* note 64; News Release No. 935-04, *supra* note 1.

67. See Yin, *supra* note 23, at 1100.

68. See, e.g., Duncan Campbell, *Isolated, Strictly Supervised and Deprived of Rights: How Camp Delta Treats Inmates*, GUARDIAN, July 5, 2003, at 4; Press Release,

Part of the Article considers the different goals of criminal law and the law of armed conflict and analyzes the adequacy, or lack thereof, of the former with regard to protecting the nation from the threat posed by terrorism suspects detained at Guantanamo Bay.

A. Different Focuses and Purposes

At a broad level of generality, criminal law and the law of armed conflict serve the same purpose: to protect society from persons who would do it harm. In the case of criminal law, the harm may have already occurred (though not necessarily, given inchoate crimes such as conspiracy and attempted murder), but punishing the criminal nevertheless is justified, in part to protect society by incapacitating the offender.⁶⁹ In the case of the law of armed conflict, which is governed largely by the 1949 Geneva Convention relative to the Treatment of Prisoners of War,⁷⁰ the harm justifying intervention includes potential future harm; detention of captured enemy soldiers is justified purely on preventative incapacitation grounds.

Beyond the broad generality of protecting society, however, there are significant differences between criminal law and the law of armed conflict.

	Criminal Law	Law of Armed Conflict
Focus	Individual culpability	Group status
Purpose of Confinement	Retribution (punishment)	Prevention (incapacitation)
Length of Confinement	Set by judicial sentence	Duration of the armed conflict
Stigma Imposed	Yes	No

Amnesty Int'l, Detainees From Afghan Conflict Should Be Released or Tried (Nov. 1, 2002), <http://web.amnesty.org/library/index/ENGAMR511642002>.

69. See *infra* Part II.A.2.

70. Geneva Convention Relative to the Treatment of Prisoners of War art. 12, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention (III)].

1. Focus

The first difference identified above is that criminal law focuses on individual culpability, whereas the law of armed conflict focuses on group status. Put simply, criminal law punishes the defendant because of what he has done in the past; the law of war detains an enemy soldier because of what that person may do in the future, because of that person's membership in the armed forces of an enemy nation.

To justify incarceration of an individual pursuant to criminal law, the government must prove beyond a reasonable doubt that the person violated some substantive law for which the prescribed punishment includes imprisonment.⁷¹ Additionally, the crime must require that the defendant act with a culpable mental state. (The rare crimes that do not require any particular mental state⁷² are regulatory crimes that do not carry the threat of imprisonment.) On the other hand, under the law of armed conflict, it is the detainee's status as a member of a group, not his past conduct, that justifies detention as a prisoner of war. The key concept here is "combatant." Combatants are defined primarily as persons who are "[m]embers of the armed forces of a Party to the conflict" or "other militias or volunteer corps" who follow a chain of command, openly carry arms, have a fixed and distinctive sign (for example, a uniform), and conform to the laws of war.⁷³ Once captured by an enemy state, a combatant can be detained lawfully for the duration of active hostilities, even if the combatant has committed no crimes under either the law of the enemy state or international law, and even if the combatant in fact harbors no intention or desire to fight the detaining state. The laws of war allow such detention because of a presumption of inherent dangerousness of enemy soldiers.

2. Purpose of Confinement

A second difference between criminal law and the law of armed conflict is the theoretical justification for confinement of

71. See, e.g., *In re Winship*, 397 U.S. 358, 364 (1970).

72. See, e.g., *United States v. Park*, 421 U.S. 658, 670–71 (1975).

73. Geneva Convention (III), *supra* note 70, art. 4. Other combatants entitled to prisoner of war status when captured include those who "spontaneously take up arms" when invaded, provided they carry arms openly and comport with the laws of war. *Id.*

prisoners. Imprisonment typically serves one or more classic purposes: retribution, deterrence, rehabilitation, and incapacitation.⁷⁴ The relative significance of these purposes has certainly shifted over time,⁷⁵ but almost all justifications of punishment involve one or more of these concepts. Detention of enemy prisoners of war, however, satisfies only the goal of incapacitation: By detaining enemy prisoners of war, a country protects itself and its soldiers from being attacked by those prisoners, who presumably would be pressed back into service if released.⁷⁶

It is difficult to see how detention of prisoners of war could satisfy any other purpose of imprisonment. Consider, for example, H.L.A. Hart's definition of retribution: "the application of the pains of punishment to an offender who is morally guilty."⁷⁷ Under the law of armed conflict, an enemy soldier comporting with the laws of war is not morally guilty of anything, because that soldier is entitled to combatant immunity.⁷⁸ An act that would ordinarily be considered murder—for example, deliberately shooting another person with intent to kill—is not a crime when the shooter and target are soldiers

74. See, e.g., MICHAEL S. MOORE, *LAW AND PSYCHIATRY: RETHINKING THE RELATIONSHIP* 233–38 (1984).

75. Before the Revolutionary War, rehabilitation was not a recognized goal, which may explain why death was the usual punishment for felonies. See, e.g., *United States v. Scroggins*, 880 F.2d 1204, 1206 (11th Cir. 1989). By the 1800s, however, rehabilitation came into favor with the belief that offenders could be "cured." *Id.* (citing ARTHUR W. CAMPBELL, *LAW OF SENTENCING* § 2 (1978)). The desire to rehabilitate offenders brought indeterminate sentences, where the amount of prison time served by an offender was based on a parole board's determination of when the offender was ready to return to society. See *id.* at 1206–07. By the 1970s, rehabilitation had lost significant support, largely because rehabilitating criminals proved difficult and often unsuccessful. See *Mistretta v. United States*, 488 U.S. 361, 365–66 (1989); ANDREW VON HIRSCH ET AL., *THE SENTENCING COMMISSION AND ITS GUIDELINES* 3–4 (1987).

76. See, e.g., *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946).

77. H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 9 (1968).

78. See, e.g., Waldemar A. Solf & Edward R. Cummings, *A Survey of Penal Sanctions Under Protocol I to the Geneva Conventions of August 12, 1949*, 9 *CASE W. RES. J. INT'L L.* 205, 212 (1977); see also *Johnson v. Eisentrager*, 339 U.S. 763, 793 (1950) (Black, J., dissenting) ("[L]egitimate 'acts of warfare,' however murderous, do not justify criminal conviction . . . [I]t is no 'crime' to be a soldier." (citing *Ex parte Quirin*, 317 U.S. 1, 30–31 (1942))); *United States v. Valentine*, 288 F. Supp. 957, 987 (D.P.R. 1968) ("Mere membership in the armed forces could not under any circumstances create criminal liability." (citing *Ford v. Surget*, 97 U.S. 594, 605–06 (1878))).

during a military conflict. This is true even if the war itself is deemed illegal under international law (for example, a war of aggression), because the law of armed conflict has evolved to draw a distinction between *jus ad bellum* ("justice of war," or the reason for military action) and *jus in bello* ("justice in war," or the conduct of military action in a war).⁷⁹ Thus, even though Germany and Japan were deemed to have started an aggressive war (World War II), earning many of the top political and military leaders death sentences at the International Military Tribunals at Nuremberg and Tokyo, the only individual soldiers prosecuted for war crimes were those who committed individual atrocities. No German or Japanese soldiers were prosecuted solely on the basis of having fought in an aggressive war.

Of course, there are instances where a nation seeks to exact retribution against an enemy soldier by prosecuting that soldier in a military trial.⁸⁰ Some notorious examples from World War II include at least eighteen Japanese soldiers convicted for mutilating dead Allied soldiers by bayoneting or eating them, as well as Max Schmid, a German medical officer convicted of maltreating the corpse of an unknown U.S. soldier by severing the head, boiling away the flesh, bleaching the skull, and keeping it on his desk for months.⁸¹ Conviction of enemy soldiers results in punishment ranging from incarceration for a term of years to death. These instances of punishment, however, involve war crimes in violation of established international law.⁸²

79. MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 21 (2d ed. 1992).

80. Recent war crimes prosecutions are those in the International Military Tribunals for the Former Yugoslavia, Rwanda, and Sierra Leone. See Statute of the International Tribunal for Rwanda, Nov. 8, 1994, 33 I.L.M. 1598; Statute of the International Tribunal for Yugoslavia, May 25, 1993, 32 I.L.M. 1203; Statute of the Special Court for Sierra Leone (Aug. 14, 2000), <http://www.sc-sl.org/scsl-statute.html>; see also Tara Lee, *American Courts-Martial for Enemy War Crimes*, 33 U. BALT. L. REV. 49, 66 (2003) (arguing that the United States should exercise the power given by Congress to court-martial enemy soldiers for war crimes against American soldiers, with specific reference to war crimes committed by Iraqi soldiers during the 1991 Gulf War).

81. See PHILIP R. PICCIGALLO, *THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE EAST, 1945–1951*, at 78, 128–29, 190 (1979); *TRIAL OF MAX SCHMID*, XIII LAW REPORTS OF THE TRIALS OF WAR CRIMINALS 151, 151–52 (1949).

82. For example, the mutilation crimes discussed above violated Article 3 of the 1929 Geneva Convention and Article 3 of the 1906 Geneva Convention, both predecessors to the 1949 Geneva Convention.

Detention of soldiers probably will not serve a deterrence function. The individual soldiers who face the possibility of being captured and detained as prisoners of war are unlikely to be specifically deterred. As Michael Walzer notes, the laws of war “assume that [soldiers] all fight unwillingly.”⁸³ Even in the United States military today, which is comprised exclusively of volunteers, soldiers fight because they are so ordered, not because they so choose.⁸⁴ Furthermore, the fact that some U.S. soldiers seek injunctive relief in an attempt to avoid being sent on military missions suggests an unwillingness of soldiers to fight.⁸⁵ Thus, the prospect of being detained as a prisoner of war if captured is unlikely to have any significant deterrent effect upon an individual soldier’s decision to fight.⁸⁶ As for general deterrence, the only relevant parties who can be deterred are the political and military leaders who decide to engage in military conflict. Such leaders are unlikely to be deterred by the prospect of detention of captured soldiers, however, because the leaders are themselves generally not in danger of being detained as prisoners of war.

83. WALZER, *supra* note 79, at 35. As further support for Walzer’s contention that soldiers fight unwillingly, consider that American soldiers who fire their weapons without having been ordered into conflict (and not in self-defense) would generally violate rules of engagement and face punishment, including possible court-martial. See generally Mark S. Martins, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 3, 36–37, 50, 57 (1994).

84. The increasing use of professional contractors to perform duties for the Defense Department may call this assumption into question. One scholar estimates that there are up to 20,000 civilians working as contractors in Iraq, earning up to \$200,000 per year. See Jonathan Turley, *Shadow Army Casts a Pall*, FT. WORTH STAR-TELEGRAM, Sept. 20, 2004, at B11; see also Mark McDonald, *Afghans to Try U.S. Mercenary Operated Freelance Prison, Torture Chamber*, PITTSBURGH POST-GAZETTE, July 21, 2004, at A5 (discussing trial of Jonathan Idema, an American who went to Afghanistan seeking to capture bin Laden for the \$50 million bounty).

85. See, e.g., *Doe v. Rumsfeld*, No. Cir. 5-04-2080 FDC K, 2004 WL 2753125, at *1 (E.D. Cal. Nov. 5, 2004) (denying injunction sought by U.S. military reservist to keep him from being sent back to Iraq). In other instances, American soldiers have simply refused to be deployed in an effort to avoid being sent off to fight. See, e.g., Russ Bynum, *War Veteran Refuses 2nd Iraq Deployment*, ASSOCIATED PRESS, Jan. 13, 2005, available at http://www.truthout.org/docs_05/011405W.shtml (discussing examples).

86. There might be some lesser specific deterrent effect on the soldier in the sense of making the soldier more reluctant to expose himself to the possibility of battlefield capture, which might result in less effective fighting. Another possibility is that soldiers who face capture may, depending on the reputation of prisoner of war camps, decide to fight to the death rather than face capture.

Finally, rehabilitation is not a goal when a nation detains enemy prisoners of war. Rehabilitation presupposes that the defendant has a flaw or defect of some sort to be remedied; a violent criminal, for example, would be “cured” of his violent tendencies. Under the law of armed conflict, however, an enemy prisoner of war has no defect or flaw of which to be cured save his national allegiance.

Article 110 of the Geneva Convention supports the conclusion that the law of armed conflict allows detention of enemy prisoners of war solely to prevent them from engaging in further conflict against the detaining state. Article 110 requires that the following class of prisoners be repatriated directly: (1) “Incurably wounded and sick whose mental or physical fitness seems to have been gravely diminished”; (2) “Wounded and sick who, according to medical opinion, are not likely to recover within one year, whose condition requires treatment and whose mental or physical fitness seems to have been gravely diminished”; and (3) “Wounded and sick who have recovered, but whose mental or physical fitness seems to have [been] gravely and permanently diminished.”⁸⁷ The underlying rationale of article 110 is that enemy prisoners of war who no longer pose any threat to the detaining State—whether because of incurable wounds, long-term injuries, or other mental or physical impairment—should be repatriated. During the Korean War, almost 7,000 North Korean and Chinese prisoners of war were exchanged for 684 United Nations soldiers under this provision.⁸⁸

Under criminal law, on the other hand, there is no such general release of prisoners whose physical or mental conditions have deteriorated to the point where they no longer pose any future threat to society. On occasion, prisoners falling into such categories have been granted compassionate release, but there has been no obligation on the part of the government to do so.⁸⁹

Notice also the difference in treatment of prisoners who are recaptured after successfully escaping confinement. In the case of prisoners of war, the Geneva Convention holds that such

87. Geneva Convention (III), *supra* note 70, art. 110.

88. LAW OF WAR WORKSHOP DESKBOOK 88 (Brian J. Bill ed., 2004).

89. See generally Marjorie P. Russell, *Too Little, Too Late, Too Slow: Compassionate Release of Terminally Ill Prisoners: Is the Cure Worse than the Disease?*, 3 WIDENER J. PUB. L. 799, 819–32 (1994) (surveying state practices).

escapees "shall not be liable to any punishment in respect of their previous escape."⁹⁰ Even a prisoner of war who unsuccessfully attempts to escape from the prisoner of war camp may be subject only to "disciplinary punishment."⁹¹ Such disciplinary punishment is limited to fines taken out of earnings (for no more than thirty days), loss of discretionary privileges (those not required by the Geneva Convention), "fatigue duties," or confinement.⁹² A civilian prisoner who escapes or attempts to escape, on the other hand, may generally be prosecuted for having committed a criminal act.⁹³ Thus, the law of armed conflict recognizes a norm whereby prisoners of war may try to escape from POW camps with minimal consequences if they fail, and none if they succeed and are subsequently recaptured. Criminal law, however, does not recognize such a norm among civilian prisoners.

3. *Length of Confinement*

Under the law of armed conflict, prisoners of war may be detained until the "cessation of active hostilities"; once active hostilities have ended, the prisoners of war "shall be released and repatriated without delay."⁹⁴ Prisoners convicted under criminal law, on the other hand, serve a sentence that is set by the judge (though in some instances, the sentence might be shortened through parole or commutation).

Of course, the term "cessation of active hostilities" does not submit to any categorical definition. Obviously, a formal peace treaty that resolves the underlying dispute and reinstates peace would constitute the cessation of active hostilities. However, there need not be a formal peace treaty in place for active hostilities to be deemed over. The state of war between the United States and Germany during World War II did not end formally until 1951,⁹⁵ but the obligation to repatriate arose much sooner,

90. Geneva Convention (III), *supra* note 70, art. 91.

91. *Id.* art. 92.

92. *Id.* art. 89.

93. See, e.g., 18 U.S.C. § 751 (1994); ARIZ. REV. STAT. ANN. § 13-2503 (2001); CAL. PENAL CODE § 4530 (2000).

94. Geneva Convention (III), *supra* note 70, art. 118.

95. Pub. L. No. 82-181, 65 Stat. 451 (1951).

given Germany's surrender in 1945.⁹⁶ One commentator notes, "It is the practical application of the Parties and the way they *construct* a particular agreement on the cessation of hostilities which will operate toward the termination of hostilities . . ."⁹⁷ Still, unlike the prisoner imprisoned under a criminal sentence, the prisoner of war detained under the law of armed conflict faces a term of confinement that is of uncertain duration.

4. *Stigma of Having Been Convicted Versus Having Been Held as a POW*

A final difference between criminal law and the law of armed conflict is the perception that the general public may have about a person convicted of a crime, compared to that of a person captured and held as a prisoner of war, as well as the loss of privileges and rights stemming from such conviction.

Convicted persons, in addition to being subjected to the usual penalties of incarceration, are often subjected to public shame. One stigma that accompanies a conviction is that in subsequent civil or criminal court proceedings, a convict who testifies can be impeached by the mere fact of his prior conviction,⁹⁸ including convictions in foreign jurisdictions.⁹⁹ This is an exception to the general rule of inadmissibility of so-called "character evidence."¹⁰⁰ The underlying rationale for such an exception is grounded in the idea that a person who has been previously convicted of a felony (including ones that do not involve dishonesty) will be disposed to lie under oath.¹⁰¹ Also, because there is a common reluctance to hire felons, a con-

96. Still, the United States held some German POWs until the middle of 1947, almost two years after Germany had surrendered to the Allied Powers. See ARNOLD KRAMMER, NAZI PRISONERS OF WAR IN AMERICA 249 (1979).

97. CHRISTIANE SHIELDS DELESSERT, RELEASE AND REPATRIATION OF PRISONERS OF WAR AT THE END OF ACTIVE HOSTILITIES: A STUDY OF ARTICLE 118, PARAGRAPH 1 OF THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 97 (1978).

98. See FED. R. EVID. 609.

99. See, e.g., *United States v. Wilson*, 556 F.2d 1177, 1178 (4th Cir. 1977) (per curiam) (rejecting appeal based on the use of a rape conviction in Germany to impeach the defendant).

100. See FED. R. EVID. 404(a).

101. The logic of this rationale has not gone unchallenged. See, e.g., H. Richard Uviller, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale*, 42 DUKE L.J. 776, 813 (1993).

victed felon is likely to face difficulty in finding employment.¹⁰² Federal law also prohibits convicted felons from owning firearms,¹⁰³ evincing a societal belief that such persons are not to be trusted with deadly weapons, even after they have served their terms of imprisonment and even if the original crime of conviction was not a crime of violence.¹⁰⁴ Felons are not the only ones who suffer from this disability; the others—who include fugitives from justice, illegal aliens, dishonorably discharged soldiers, and Americans who have renounced their citizenship—are also ones viewed, rightly or wrongly, with suspicion by society.¹⁰⁵

Persons detained as prisoners of war, on the other hand, generally are not subject to such stigmas. The long list of persons who are prohibited from possessing firearms does not include persons who served as prisoners of war in American POW camps, even though such persons may have raised, if not fired, weapons against Americans. Likewise, prisoners of war are not subject to impeachment at trial. Finally, there is scant evidence of any reluctance to hire former enemy POWs.¹⁰⁶

5. Summary

Although criminal law and the law of armed conflict serve the same general purpose of protecting society from those who would do it harm, they accomplish this goal in distinctly different ways. Criminal law stigmatizes offenders as wrongdoers who deserve the imposition of punishment, whereas the law of

102. See, e.g., Walter Matthews Grant et al., *Special Project—The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 1229–30 (1970) (quoting JOINT COMM'N ON CORR. MANPOWER AND TRAINING, THE PUBLIC LOOKS AT CRIME AND CORRECTIONS 15 (1968)); see also Kevin Osborne, *Second Chance Summit Goal*, CINCINNATI POST, Mar. 11, 2004, at A13.

103. 18 U.S.C. § 922(g) (2000).

104. A felon is prohibited from “possess[ing] in or affecting commerce, any firearm” so long as the crime of conviction is punishable by more than a year of imprisonment. *Id.*

105. See *id.* §§ 922(g)(2), (5)–(7). Sections 922(g)(3)–(4) also prohibit anyone “who has been adjudicated as a mental defective or who has been committed to a mental institution” or who is a drug addict from possessing a firearm. Those are categories of persons who might not be viewed in the same light as felons, dishonorably discharged soldiers, and the like.

106. Indeed, considering that such persons may have been inducted involuntarily into fighting, one could argue that discrimination against them would be a form of discrimination based on national origin in violation of Title VII. 42 U.S.C. § 2000e-2(a) (2000).

armed conflict justifies the detention of enemy soldiers (who may indeed be viewed as honorable) for the sole purpose of incapacitating them. With regard to detainees, those on whom we seek to inflict punishment should, of course, be dealt with through substantive criminal law (whether in civilian or military court). However, just as not all enemy soldiers in a nation-state war are “punished,” it also may be the case that not all Guantanamo detainees are to be punished. Criminal law may not be the appropriate set of rules to apply to them if the goal is preventative incapacitation based on their status as members of an organization declared by Congress to be belligerent.

At the same time, there is a major problem with the application of the law of armed conflict to the Guantanamo detainees, for the law of armed conflict presumes that enemy soldiers are inherently dangerous because of loyalty to or coercion by their national government. That is, the only event (apart from incapacitating injury) that ends their inherent dangerousness is the end of military conflict between the detaining nation-state and the enemy nation-state; until that happens, there is no need even to inquire into the individual soldier’s dangerousness. With the Guantanamo detainees, however, application of that same presumption of inherent dangerousness leads to the troubling possibility of endless detention, for there may never be a clear end to the military conflict between the United States and al Qaeda.

B. *Criminal Law and the War on Terrorism*

While criminal law and the law of armed conflict can thus be said to serve different purposes, there is an undeniable area of overlap with regard to certain al Qaeda members. Already, the government has prosecuted a number of defendants for violating federal laws.¹⁰⁷ Other high-level al Qaeda suspects currently in custody, such as Khalid Sheikh Mohammed and Ramzi Binalshibh, could presumably face criminal charges in the near future. To the extent that our goal is to inflict *punishment* on such persons, criminal law, with its procedural stan-

107. See, e.g., *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002) (refusing to dismiss the indictment of American citizen who joined and provided material support to the Taliban); *United States v. Reid*, 214 F. Supp. 2d 84 (D. Mass. 2002) (upholding pretrial detention of defendant charged with attempting to detonate a bomb on a transatlantic flight).

dards, is the appropriate vehicle. Yet, constitutional and statutory requirements may prevent us from prosecuting certain detainees.

1. *Murder, Conspiracy, and Other Common Law-Based Crimes*

Almost 3,000 people were killed in the 9-11 attacks in New York, Washington, D.C., and Pennsylvania.¹⁰⁸ The al Qaeda members responsible for planning and executing the attacks could theoretically be prosecuted for numerous counts of murder, conspiracy, and other such crimes, though, of course, the direct perpetrators of the 9-11 attacks, the nineteen hijackers, all died. But persons who aided and abetted the attacks can be punished as if they were principals,¹⁰⁹ so long as the prosecution proves that the aider and abetter intended to facilitate the crime and took some affirmative action toward doing so.¹¹⁰

Binalshibh, for example, was a key member of 9-11 leader Mohammed Atta's "cell" in Hamburg, Germany, and, in 1999, the entire cell (consisting of Binalshibh, Atta, Ziad Jarrah, and one other) ended up in Afghanistan after being recruited by an al Qaeda member.¹¹¹ There, Atta, Binalshibh, and Jarrah allegedly pledged loyalty to bin Laden, after which they were assigned by bin Laden's deputy, Mohammed Atef, to a "highly secret mission" that involved flight training.¹¹² Not only did Binalshibh allegedly receive the same instructions that 9-11 hijackers Atta and Jarrah did on blending in with Americans, he also researched flight schools in Europe.¹¹³ According to the government, Binalshibh probably would have been one of the hijackers but was unable to obtain a visa to enter the United States; he stayed behind and "provide[d] critical assistance from abroad to his co-conspirators."¹¹⁴ Among other things, Binalshibh supposedly wired money to Atta, passed along a status report from Atta to al Qaeda, and conveyed instructions

108. 9-11 REPORT, *supra* note 24, at 311.

109. *See, e.g.*, 18 U.S.C. § 2 (2000) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.").

110. *See, e.g.*, United States v. Dolt, 27 F.3d 235, 238 (6th Cir. 1994).

111. 9-11 REPORT, *supra* note 24, at 164–66.

112. *Id.* at 166.

113. *Id.* at 167–68.

114. *Id.* at 168; *see also id.* at 225 (noting that Binalshibh had even sent a deposit to a flight school in the United States).

from bin Laden to Atta to carry out the attacks as soon as possible, as well as bin Laden's preference for the White House as an attack target.¹¹⁵ It is hardly surprising that the 9-11 Commission described Binalshibh as a "key player" in the 9-11 attacks.¹¹⁶ If the government is correct, he helped the 9-11 hijackers by making funds available so that they could stay in the United States, obtain flight training, and test airline security systems; he also served as a conduit of information between Atta and bin Laden.

Khalid Sheikh Mohammed allegedly conceived of using hijacked airplanes as weapons back in 1995, at a time when bin Laden and his deputy Atef were still limited to thinking about blowing planes up.¹¹⁷ In 1999, bin Laden approved the "planes operation" and created a list of targets with Atef and Mohammed; bin Laden insisted on the White House and the Pentagon, while Mohammed pushed for the World Trade Center.¹¹⁸ Mohammed taught some of the 9-11 hijackers English, familiarized them with various aspects of Western culture so that they could better blend in,¹¹⁹ and gave them advice on obtaining "clean" passports to enter the United States.¹²⁰ The 9-11 attacks were a scaled-down version of Mohammed's brainchild. Despite bin Laden's overall leadership role, Mohammed was essentially the master criminal who directed the underlings. The federal prisons are full of criminal masterminds serving time for playing similar roles in their criminal enterprises.¹²¹

But even when we narrow our focus to Mohammed, Binalshibh, and Abu Zubaydah (another high-level al Qaeda member in custody who was involved in the 9-11 attacks), there are still barriers ranging from minor to significant in the use of criminal law as the basis for their continued detention. First, as a matter of jurisdiction, federal murder prosecutions would be limited to a subset of all murders, such as murders of federal

115. *Id.* at 225, 227, 243–44.

116. *Id.* at 160.

117. *Id.* at 153–54. Mohammed's original plan involved hijacking as many as ten planes, striking the 9-11 targets as well as six others in New York, D.C., California, and Washington, and then landing the tenth plane to deliver a speech denouncing the United States for supporting Israel. *Id.* at 154.

118. *Id.* at 155.

119. *Id.* at 157.

120. *Id.* at 235.

121. *See, e.g.,* *United States v. Gigante*, 166 F.3d 75, 78 (2d Cir. 1999).

officers and employees;¹²² foreign officials, official guests, and “internationally protected persons”;¹²³ or murders within the special maritime and territorial jurisdiction.¹²⁴ Although most of the 9-11 victims killed when American Airlines Flight 77 crashed in the Pentagon fit within at least one of those categories (federal employees), most of the other victims do not. Thus, while a federal prosecution is feasible, the United States would be unable to hold Mohammed, Binalshibh, and Zubaydah accountable for all 2,973 murders.¹²⁵

A more serious obstacle to successful prosecution lies in the manner in which the government learned of the roles allegedly played by Binalshibh, Mohammed, Zubaydah and others. Information provided by Mohammed about his role in the 9-11 attacks has likely been procured through un-Mirandized and coercive interrogation. One unnamed U.S. intelligence officer stated shortly after Mohammed’s capture that “[s]ome al Qaeda just need some extra encouragement [to talk],” which the officer defined as “a little bit of smacky-face.”¹²⁶ There was also speculation that the United States could use two of Mohammed’s children who were captured along with him as leverage against him.¹²⁷ As for Zubaydah, who was reportedly shot three times during the firefight in which he was captured, there are unconfirmed reports that U.S. personnel withheld painkillers from him in an effort to coerce him into giving in-

122. 18 U.S.C. § 1114 (2000).

123. *Id.* § 1116.

124. *Id.* § 1111(b).

125. Of course, it seems quite unlikely that it would make a difference in terms of sentencing whether they were convicted of murdering 29 persons or 2,973. But we should not be so quick to discount the symbolic value of criminal prosecutions and convictions. After the 1995 Oklahoma City bombing, the United States prosecuted Timothy McVeigh and Terry Nichols. McVeigh was sentenced to death and Nichols was sentenced to life imprisonment. *See United States v. Nichols*, 169 F.3d 1255, 1260 (10th Cir. 1999); *United States v. McVeigh*, 153 F.3d 1166, 1179 (10th Cir. 1998). Subsequently, an Oklahoma prosecutor indicted Nichols on 160 counts of first-degree murder. Although one survey showed that a majority of Oklahomans thought that a state trial would be a waste of money, a family member of a victim who favored a trial explained that “[o]ne hundred sixty people never had their loved one’s name on an indictment.” Ralph Blumenthal, *Another Oklahoma City Bomb Trial, and Still Questions Remain*, N.Y. TIMES, Mar. 16, 2004, at A18.

126. Jess Bravin & Gary Fields, *How Do U.S. Interrogators Make a Captured Terrorist Talk?*, WALL ST. J., Mar. 4, 2003, at B1; *see also* Mark Bowden, *The Dark Art of Interrogation*, ATLANTIC MONTHLY, Oct. 2003, at 51, 53–56.

127. Bravin & Fields, *supra* note 126, at B1.

formation.¹²⁸ Further inculpatory evidence against other al Qaeda members might likewise be inadmissible under the rules of evidence. For example, as Ruth Wedgwood noted in arguing in favor of military tribunals, “bin Laden’s telephone call to his mother, telling her that ‘something big’ was imminent, could not be entered into evidence if the source of information was his mother’s best friend.”¹²⁹ Thus, the very acquisition of much of the evidence against detainees disqualifies it from use in traditional criminal prosecution.

The difference between the post-capture treatment of Mohammed and John Walker Lindh is illustrative of the different treatment afforded in a criminal context. Lindh, the so-called “American Taliban,” converted to Islam in his teens and later traveled to Afghanistan to fight in support of the Taliban. He was captured by the Northern Alliance in November 2001 and turned over to the United States in December 2001.¹³⁰ FBI agents interrogated Lindh, and while there is a question of whether federal agents violated the no-contact ethics rule given that Lindh’s father had retained a lawyer to represent Lindh,¹³¹ the agents apparently did advise Lindh of his *Miranda* rights and obtain a waiver of those rights.¹³² Even the potential ethical violation was of concern to Department of Justice lawyers, who fretted about whether Lindh’s confession to an FBI agent would have to be sealed for use only for national security purposes.¹³³

The very paradigm of criminal investigation is largely inapposite in the context of the war on terror. Just as confessions or admissions by detainees obtained through torture or coercion may be inadmissible in criminal trials,¹³⁴ physical evidence gathered during the war on terrorism may also be inadmissi-

128. See Michelle Shephard, *Informant Likely Tortured, Harkat Defence Tells Hearing*, TORONTO STAR, Oct. 27, 2004, at A9 (noting allegation by lawyer for an Algerian man facing deportation by Canada).

129. Ruth Wedgwood, Op-Ed., *The Case for Military Tribunals*, WALL ST. J., Dec. 3, 2001, at A18.

130. *United States v. Lindh*, 212 F. Supp. 2d 541, 545–47 (E.D. Va. 2002).

131. Michael Isikoff, *The Lindh Case E-Mails*, NEWSWEEK, June 24, 2002, at 8.

132. See Richard Willing & Toni Locy, *Case Built on Walker’s Own Words*, USA TODAY, Jan. 16, 2002, at A3.

133. Isikoff, *supra* note 131. Lindh’s waiver of his *Miranda* rights reduced the issue to whether he was coerced into making the waiver.

134. See *Rogers v. Richmond*, 365 U.S. 534, 540–41 (1961).

ble. Fundamentally, a criminal investigation is usually conducted with an eye toward prosecution:¹³⁵ police officers can seek warrants to conduct lawful searches,¹³⁶ and they are trained to maintain a chain of custody over evidence that they discover. The chain of custody is procedurally significant because it allows the prosecution to authenticate physical evidence presented at trial.¹³⁷

When soldiers gather physical evidence, however, criminal procedure is not their chief concern. First and foremost, any evidence-gathering by soldiers is incidental to their main purpose, which is to capture or kill enemies of the United States. There may not be time to process the physical evidence.¹³⁸ Second, during operations outside the United States, it may not be practicable to seek a search warrant.¹³⁹ Third, law enforcement personnel can reasonably expect to be called into court to testify in connection with their investigations, but military soldiers may well be unavailable to testify in criminal trials.¹⁴⁰

Thus, while some of the likely barriers to murder prosecutions of suspected al Qaeda members are self-imposed, others result from the different operational goals of criminal investigation versus warfare. Regardless of the source of these problems, it seems likely that, absent some new exception to the current constitutional criminal procedure doctrines, the federal government may well be unable to prosecute Mohammed, Binalshibh, and Zubaydah. One could plausibly argue that the government's inability to prosecute these architects of the 9-11

135. *But see* *Dombrowski v. Pfister*, 380 U.S. 479 (1965) (allowing federal court injunction to issue against state prosecution where plaintiffs showed that prosecution was aimed not at securing conviction but rather at harassing them and preventing them from helping vindicate the constitutional rights of African-Americans).

136. One of the advantages to seeking a search warrant is that even if the warrant turns out to be defective, any evidence obtained as a result of the search will not be excluded unless the warrant was facially defective. *See United States v. Leon*, 468 U.S. 897, 922–23 (1984).

137. *See* FED. R. EVID. 901(a).

138. Weapons, for example, might be destroyed outright rather than collected and retained.

139. Admittedly, however, the Court has recognized this problem and held that an alien who has no voluntary connection with the United States has no Fourth Amendment rights relating to searches that take place outside the United States. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 274–75 (1990).

140. Indeed, U.S. soldiers on active duty may still be posted overseas, or they may have been killed in subsequent military action.

attacks is a simple consequence of constitutional limitations on the government, and that circumventing those limitations in the interest of expediency is a cure worse than the disease. One could thereby conclude that we cannot *punish* these men, regardless of the heinousness of their actions, but it seems to go too far to suggest that we must therefore either release them outright or repatriate them to their home countries and hope that they can be detained there.

The discussion has thus far focused on high-level detainees not held at Guantanamo Bay, whose involvement in the 9-11 attacks is relatively well documented. With other detainees, we may know little more than that they were captured in Afghanistan fighting against the United States or the Northern Alliance and that they continue to see themselves as at war with us. Even if we have more information, such as whether they participated in terrorism training at the al Qaeda camps in Afghanistan, we may have no evidence of their participation in the 9-11 attacks. Indeed, they may have had no role in the 9-11 attacks. As with high-level detainees, we may lack the legal basis to punish them under the criminal law, but that does not necessitate releasing them and thereby permitting them to continue their war against us.

2. *Recent Antiterrorism Statutes: 18 U.S.C. §§ 2339A, 2339B*

After the 1993 bombing of the World Trade Center, Congress recognized new terrorism-related crimes such as 18 U.S.C. § 2339A. Section 2339A makes it a federal crime to provide “material support or resources” knowing that such material support or resources will be used to carry out terrorist acts.¹⁴¹ After the 1995 bombing in Oklahoma City, Congress enacted 18 U.S.C. § 2339B. A person who “knowingly provides material support or resources to a foreign terrorist organization” violates section 2339B and faces up to ten years in prison.¹⁴²

As drafted, section 2339A suffers from a severe limitation that cripples its use as an antiterrorism tool. To convict a defendant under this provision, the government must prove that the defendant provided material support or resources that

141. 18 U.S.C. § 2339A(a) (2000).

142. *Id.* § 2339B(a)(1).

were used for a *particular* act of terrorism. The 9-11 Commission described this requirement as “a practical impossibility.”¹⁴³

Section 2339B, on the other hand, has been a mainstay of post-9-11 terrorism prosecutions. Notable defendants prosecuted after 9-11 under this provision include John Walker Lindh,¹⁴⁴ the “Lackawanna Six,”¹⁴⁵ and Earnest James Ujaama.¹⁴⁶ Section 2339B has helped federal prosecutors, because its prohibitions are susceptible to broad interpretation; persons who traveled to Afghanistan and trained with al Qaeda can be convicted of providing personnel (themselves) to a designated terrorist group.¹⁴⁷ Yet its potential for broad interpretation has also resulted in a number of successful constitutional vagueness challenges to the statute. For example, in *United States v. Sattar*,¹⁴⁸ the government attempted to prosecute criminal defense attorney Lynne Stewart, among others, for violating section 2339B. Part of the prosecution’s theory was that Stewart and her co-defendants provided “material support” in the form of “personnel” when they made themselves available to their client, convicted terrorist Omar Ahmad Ali Abdel Rahman, to communicate his messages to the Islamic Group.¹⁴⁹ Stewart allegedly delivered a statement by her client to the press; the government contended that the statement was a message from Rahman to his terrorist group to commit additional violent acts. The district court dismissed this count of the indictment on vagueness grounds: “[T]hese terms and concepts applied to the prohibited provision of personnel provide no

143. See John Roth et al., Staff Report to the National Commission on Terrorist Attacks upon the United States, Monograph on Terrorist Financing, at 31–32 (2004) http://www.9-11commission.gov/staff_statements/911_TerrFin_Monograph.pdf. Notwithstanding the 9-11 Commission’s interpretation of section 2339A, the United States recently convicted criminal defense attorney Lynne Stewart of violating the provision without any allegation in the indictment of a particular act of terrorism to which the material support (defined as providing Stewart’s client access to his followers in Egypt by disseminating a statement) was tied. See *United States v. Sattar*, 272 F. Supp. 2d 348 (S.D.N.Y. 2003).

144. See *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002).

145. See *United States v. Goba*, 220 F. Supp. 2d 182 (W.D.N.Y. 2002).

146. See Mike Carter, “Unusually Light” Prison Sentence Given to Ujaama, SEATTLE TIMES, Feb. 14, 2004, at B1.

147. See, e.g., *Goba*, 220 F. Supp. 2d at 194.

148. 272 F. Supp. 2d 348.

149. *Id.* at 354–57. Rahman was convicted in 1995 of a number of crimes, including the 1993 World Trade Center bombing. *Id.* at 354.

notice to persons of ordinary intelligence”¹⁵⁰ Similarly, in *United States v. Khan*,¹⁵¹ a district court held that a defendant did not violate section 2339B despite an intent to fight for the Taliban; while the defendant’s action would have benefited al Qaeda indirectly, it did not constitute “material support or resources” to al Qaeda.¹⁵²

Recent amendments to section 2339B make clear that Congress intended for the statute to cover situations where a person knowingly “provides” himself to a designated foreign terrorist organization.¹⁵³ Even so, section 2339B’s usefulness in the war on terrorism is subject to an important jurisdictional limitation built into the statute: The statute’s prohibition applies only to conduct “within the United States or subject to United States jurisdiction.” Thus, while section 2339B remains a potent tool for federal prosecutors to use against U.S. residents, it does not cover conduct by the Guantanamo detainees, who are being held for acts they allegedly committed in Afghanistan or Pakistan.

3. War Crimes

Strictly speaking, war crimes fall within the ambit of the law of armed conflict, not civilian criminal law. Nonetheless, it is logical to discuss war crimes prosecutions here, because the goal of war crimes prosecutions is to punish those who violate the law of armed conflict. Thus, under U.S. law, enemy persons convicted of war crimes may be imprisoned past the end of hostilities,¹⁵⁴ whereas mere prisoners of war must be repatriated.¹⁵⁵

On November 13, 2001, President Bush issued an executive order that authorized military tribunals to prosecute appropriate al Qaeda and Taliban suspects “for violations of the laws of war and other applicable laws.”¹⁵⁶ In July 2004, the United States had designated fifteen detainees for military prosecu-

150. *Id.* at 359.

151. 309 F. Supp. 2d 789 (E.D. Va. 2004).

152. *Id.* at 821.

153. See Pub. L. No. 108-458, §§ 6602–03 (2004); 118 Stat. 3638, 3761–64.

154. See, e.g., *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

155. See *supra* Part II.A.3.

156. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) [hereinafter Military Tribunal Executive Order].

tion,¹⁵⁷ the first of which involved the alleged personal driver to Osama bin Laden. A district court blocked the military tribunals from proceeding on the ground that their composition was unconstitutional,¹⁵⁸ but the D.C. Circuit reversed,¹⁵⁹ prompting the detainee to seek certiorari from the Supreme Court. In November 2005, with 450 law professors having signed a letter urging the Court to accept review,¹⁶⁰ the Supreme Court granted certiorari.¹⁶¹

In any event, war crimes trials suffer from the same general lack of reach present in criminal trials. For some of the detainees, there may be insufficient evidence to tie them to any past crimes, even though there is evidence that they are members of al Qaeda or the Taliban and that they present a threat of dangerousness. Furthermore, war crimes trials are reserved for those enemy combatants who violate the laws of war. The United States held millions of POWs of the Axis Powers at the end of World War II, but only a few thousand were prosecuted for war crimes. Lack of evidence of past crimes may well preclude prosecution, and hence punishment, but the inability to prosecute does not mean that protective detention is similarly unavailable.

III. NONCRIMINAL DETENTION

The notion that the Guantanamo detainees must either be charged with crimes or released is simply inconsistent with U.S. law. It is true that, as a general rule, a "finding of dangerousness, standing alone, is ordinarily not a sufficient ground on which to justify indefinite involuntary confinement."¹⁶² Yet

157. See *Bush Selects 9 More to Face Tribunals*, KAN. CITY STAR, July 8, 2004, at A8.

158. See *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004). The court did not hold that military tribunals were per se unconstitutional; thus, if the district court's ruling is ultimately upheld, the government would still be able to prosecute detainees in properly constituted military tribunals.

159. See *Hamdan v. Rumsfeld*, 415 F.3d 33, 43 (D.C. Cir. 2005).

160. Statement of 450 Professors of Law on *Hamdan v. Rumsfeld* (Oct. 26, 2005), http://www.law.yale.edu/outside/html/Public_Affairs/666/professorstatement.pdf; Signatures of October 26, 2005 Letter, http://www.law.yale.edu/outside/html/Public_Affairs/666/stmts/signatures.pdf.

161. 74 U.S.L.W. 3287 (U.S. Nov. 7, 2005) (No. 05-184). See also Linda Greenhouse, *Justices to Rule on a Challenge to U.S. Tribunals*, N.Y. TIMES, Nov. 8, 2005, at A1.

162. See *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997).

we confine persons against their will for reasons other than punishment in a variety of circumstances: criminal defendants yet to stand trial are sometimes held without bail, sex offenders and mentally ill persons who pose a danger to society can be civilly committed in appropriate circumstances, and those with virulent and contagious diseases have been forcibly quarantined.¹⁶³

A. Pretrial Detention

The first category of noncriminal detention is pretrial detention of persons awaiting trial. Under the Bail Reform Act of 1984,¹⁶⁴ a federal district court judge is empowered to deny the option of bail and order the detainment of persons facing indictment (but not yet convicted) when, upon a hearing, the judge “finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community.”¹⁶⁵

In *United States v. Salerno*, the Court held that the Constitution does not categorically prohibit the detention of criminal defendants who are awaiting trial, even though the defendants have not yet been convicted of any crime.¹⁶⁶ The justifications for such detention are that the defendant, having been “indicted or held to answer for a serious crime, presents a demonstrable danger to society,”¹⁶⁷ and that the defendant’s liberty interest is outweighed by society’s “greater needs.”¹⁶⁸ Key to the Court’s opinion is the distinction between regulatory and penal objectives. If Congress does not indicate explicitly that it intends for detainment to be punitive, then such detainment may be seen as regulatory if there is an “alternative purpose to which [it] may rationally be connected” and if it is not “excessive in relation to the alternative purpose.”¹⁶⁹

163. The purpose here is not to engage in a normative analysis of such detentions, but rather to note first, the circumstances under which detention is constitutionally permissible and, second, the procedural and substantive requirements to effect detention under those specified circumstances.

164. Pub. L. No. 98-473, 98 Stat. 1976 (codified at 18 U.S.C. §§ 3141–3156 (2000)).

165. *Id.* § 3142(e).

166. 481 U.S. 739 (1987).

167. *Id.* at 750.

168. *Id.* at 751.

169. *Id.* at 747 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963)).

The legislative history of the Bail Reform Act demonstrates that Congress did not consider pretrial detention to be punitive. The maximum length of pretrial detention is limited by speedy trial requirements,¹⁷⁰ and therefore cannot be indefinite.¹⁷¹ In addition, pretrial detention contains procedural requirements aimed at protecting the detainee's liberty interest. For example, the defendant facing potential pretrial detention is entitled to the presence of counsel, may testify and present other evidence, and is entitled to cross-examine adverse witnesses.¹⁷²

B. *Civil Commitment of the Mentally Ill*

The second form of involuntary noncriminal detention is civil commitment of the mentally ill. Constitutionally, a state may use its police powers to protect its citizens "from the dangerous tendencies of some who are mentally ill,"¹⁷³ but only when the factual predicates of mental illness and dangerousness are established by at least clear and convincing evidence.¹⁷⁴ Similarly, when a criminal defendant is acquitted by reason of insanity, with mental illness and dangerousness having been determined in the trial, the state is entitled to detain that person in a mental health hospital until the person regains his sanity.¹⁷⁵

A number of courts have held that indigent persons facing involuntary civil commitment must be appointed counsel to represent them.¹⁷⁶ The detainee's lawyer plays an important

170. *See id.* at 747; 18 U.S.C. § 3161 (2000).

171. Moreover, *Salerno* emphasized the milder conditions of detention, including the requirement that pretrial detainees be housed separately from convicted criminals. 481 U.S. 739. In practice, however, that requirement has not been enforced, and therefore it would be difficult to justify pretrial detention on the basis of a difference in the conditions of confinement.

172. 18 U.S.C. § 3142(f) (2000).

173. *Addington v. Texas*, 441 U.S. 418, 426 (1979); *see also* Donald H.J. Hermann, *Barriers to Providing Effective Treatment: A Critique of Revisions in Procedural, Substantive, and Dispositional Criteria in Involuntary Civil Commitment*, 39 VAND. L. REV. 83, 92 (1986) (noting that most states have adopted rules requiring findings of mental illness and dangerousness).

174. *Addington*, 441 U.S. at 433.

175. *See, e.g., Jones v. United States*, 463 U.S. 354, 366 (1983).

176. *See e.g., Heryford v. Parker*, 396 F.2d 393, 396 (10th Cir. 1968); *Dorsey v. Solomon*, 435 F. Supp. 725, 733 (D. Md. 1977); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1098 (E.D. Wis. 1972); *see also Specht v. Patterson*, 386 U.S. 605, 610 (1967).

and often complicated role in the commitment proceedings: “The attorney’s role is to challenge the basis of the application for involuntary admission and elicit facts and opinions challenging the need for hospitalization. In addition, the attorney should advocate that a less restrictive form of intervention is consistent with the welfare and safety of the individual.”¹⁷⁷

C. Civil Commitment of Sex Offenders

A number of states currently have laws that permit the government to seek civil commitment of sex offenders who suffer from mental abnormalities or personality disorders that render them likely to engage in future violent sex crimes.¹⁷⁸ These laws permitting civil commitment of violent sex offenders arose largely during the 1990s and differ from earlier such laws in that the more recent crop is justified in terms of preventative detention, rather than rehabilitation.¹⁷⁹

Kansas’s sexual predator law, at issue in *Kansas v. Hendricks*,¹⁸⁰ provides an example of this sort of law. The state must satisfy two substantive requirements in order to commit a person under this law. First, the person facing commitment must have been convicted of a violent sexual offense, or been found not guilty of a violent sexual offense by reason of insanity or mental defect or disease, or been charged with a violent sexual offense but found incompetent to stand trial.¹⁸¹ Second, the person must have a mental abnormality or personality disorder, which is defined as a “congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree” that makes the person a “menace to the health and safety

177. Donald H. Stone, *Giving a Voice to the Silent Mentally Ill Client: An Empirical Study of the Role of Counsel in the Civil Commitment Hearing*, 70 U. MO. KAN. CITY L. REV. 603, 614 (2002).

178. See, e.g., ARIZ. REV. STAT. ANN. §§ 36-3701, -3702, -3704 to -3709, -3712 (2003); CAL. WELF. & INST. CODE §§ 6600–6608 (2001); KAN. STAT. ANN. §§ 59-29a01 to -29a15 (2004); MINN. STAT. ANN. § 253B.185 (2003); N.J. STAT. ANN. § 30:4-82.4 (1997); WASH. REV. CODE ANN. §§ 71.09.010–.092 (2002); WIS. STAT. ANN. §§ 980.01–.13 (1998).

179. See, e.g., Eric S. Janus, *Sex Offender Commitments: Debunking the Official Narrative and Revealing the Rules-in-Use*, 8 STAN. L. & POL’Y REV. 71, 72 (1997); Peter C. Pfaffenroth, *The Need for Coherence: States’ Civil Commitment of Sex Offenders in the Wake of Kansas v. Crane*, 55 STAN. L. REV. 2229, 2233–42 (2003).

180. 521 U.S. 346 (1997).

181. KAN. STAT. ANN. §§ 59-29a03(a), 22-3221 (2004).

of others.”¹⁸² If those conditions are proven to the court, the person can be ordered into confinement subject to further periodic review.

A person faced with civil commitment as a violent sexual predator, like one who faces civil commitment or pretrial detention, has the right to counsel, as well as the rights to call on witnesses, to cross-examine the government’s witnesses, and to review documents.¹⁸³ In addition, an indigent detainee has the right to an examination by mental health professionals and the right to the assistance of counsel at public expense.¹⁸⁴ Despite the procedural protections, the net effect of these statutes is to provide a mechanism for what is “essentially indefinite” detention during the time that the detainee continues to suffer from a mental defect, which may be congenital, that renders him or her dangerous.¹⁸⁵

D. Medical Quarantines

Although quarantines have been long accepted as a public health measure to control the spread of infectious diseases, they have not been used on a widespread basis in the United States for at least eighty years.¹⁸⁶ In an old case that has not been revisited in the last hundred years, the Court upheld a Louisiana board of health decision that forbade the *S.S. Britannia*, carrying 408 immigrants from Italy, to dock at major ports in the state.¹⁸⁷ The ship owners argued that the decision vio-

182. *Id.* § 59-29a02(b).

183. *Hendricks*, 521 U.S. at 353 (citing KAN. STAT. ANN. § 59-29a06-07 (1994)).

184. *Id.* (citing KAN. STAT. ANN. § 59-29a06 (1994)).

185. Eric S. Janus, *The Use of Social Science and Medicine in Sex Offender Commitment*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 347, 349 (1997).

186. See Joseph Barbera et al., *Large-Scale Quarantine Following Biological Terrorism in the United States: Scientific Examination, Logistic and Legal Limits, and Possible Consequences*, 286 J. AM. MED. ASS’N 2711, 2712 (2001). The possibility of an outbreak of pandemic influenza, especially in light of the current “avian flu” crisis, has the White House at least talking about quarantines as among potentially necessary steps. See HOMELAND SECURITY COUNCIL, NAT’L STRATEGY FOR PANDEMIC INFLUENZA 8 (Nov. 2005) <http://www.whitehouse.gov/homeland/nspi.pdf> (“In support of our containment strategy, we will . . . [w]here appropriate, use governmental authorities to limit non-essential movement of people, goods and services into and out of areas where an outbreak occurs.”).

187. *Compagnie Francaise de Navigation a Vapeur v. State Bd. of Health*, 186 U.S. 380, 382 (1902). The state board also ruled that if the *Britannia* were to try to dock in a place adjacent to the listed ports, that area would also be declared off-limits. *Id.* at 382.

lated the Fourteenth Amendment by depriving them of their property without due process of law, a contention that the Court rejected on the ground that it, if accepted, would “strip the government . . . of all power to enact regulations protecting the health and safety of the people.”¹⁸⁸ In a subsequent case upholding a Massachusetts mandatory vaccination law, the Court reasoned that “in every well-ordered society . . . the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint . . . as the safety of the general public may demand.”¹⁸⁹ The quarantine cases that have arisen since these early cases have generally been restricted to special circumstances, such as the quarantining in prisons of prisoners who suffer from AIDS¹⁹⁰ or of persons who suffer from tuberculosis.¹⁹¹

Under federal law, the Surgeon General may enforce quarantines to prevent the “spread of communicable diseases from foreign countries into the States . . . or from one State . . . into any other State.”¹⁹² Detention of any persons under this statute must, however, be limited to “such time and in such manner as may be reasonably necessary”¹⁹³ for “the purpose of preventing the introduction, transmission, or spread of such communicable diseases” specified by presidential executive orders.¹⁹⁴

As it is believed that al Qaeda has sought biological, chemical, radiological, and nuclear weapons for use against the United States,¹⁹⁵ the possibility of a breakout of a lethal infectious disease such as smallpox cannot be discounted. In the event of an outbreak of smallpox, the Centers for Disease Con-

188. *Id.* at 393.

189. *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905).

190. *See e.g.*, *Harris v. Thigpen*, 941 F.2d 1495, 1512 (11th Cir. 1991); *see also Jicarilla Apache Tribe v. United States*, 601 F.2d 1116, 1135 (10th Cir. 1979) (upholding the power of states to enforce quarantine laws on Indian reservations).

191. *See e.g.*, *Moore v. Draper*, 57 So. 2d 648 (Fla. 1952).

192. 42 U.S.C. § 264(a) (2000).

193. *Id.* § 264(d)(1).

194. *Id.* § 264(b). The current list of such communicable diseases includes cholera, diphtheria, tuberculosis, plague, smallpox, yellow fever, viral hemorrhagic fevers (such as Ebola and Marburg), and SARS. Exec. Order No. 13,295, 68 Fed. Reg. 17,255 (Apr. 4, 2003).

195. *See, e.g.*, Rahimullah Yusufzai, *Conversation with Terror*, TIME, Jan. 11, 1999, at 39 (statement of Osama bin Laden) (“Acquiring weapons for the defense of Muslims is a religious duty. If I have indeed acquired these [chemical and nuclear] weapons, then I thank God for enabling me to do so.”).

trol (CDC) call for “ring vaccinations” of the exposed population, coupled with “concentric levels of quarantine to restrict movement of individuals and conveyances between communities.”¹⁹⁶ The goal is to vaccinate those persons who may have been exposed to smallpox to protect them from contracting it, while isolating those who have begun to exhibit the symptoms of the disease until they are no longer contagious.¹⁹⁷ Generally, a person who contracts smallpox is contagious from the time that he develops a rash (twelve to fourteen days after exposure) to the time that the scabs resulting from lesions separate from the skin (five to six weeks after exposure), although the degree of infectiousness decreases once the lesions scab.¹⁹⁸ Thus, in the event of an outbreak of smallpox, an infected person could face quarantine of up to a month.

Such quarantine is, of course, different from imprisonment. Quarantined persons would still be allowed caregivers so long as the caregivers could be vaccinated against smallpox.¹⁹⁹ Moreover, in the event that an entire community was quarantined, there would be no need to isolate persons in their own homes. Still, despite these relatively humane touches, quarantine is a liberty-restricting tool in which the crucial decisions about whom and how long to isolate are made by medical professionals, not judicial personnel.

IV. NONCRIMINAL DETENTION IN THE WAR ON TERRORISM

As the previous Part demonstrated, noncriminal detention arises in a number of different situations where the detainee is not criminally culpable but does pose some potential danger to society. The danger is tied to some specific trigger, such as a mental defect, indictment, or infectious disease, as opposed to a

196. CENTERS FOR DISEASE CONTROL SMALLPOX RESPONSE PLAN AND GUIDELINES, GUIDE C, PART 2: QUARANTINE GUIDELINES 7 (2003), <http://www.bt.cdc.gov/agent/smallpox/response-plan/files/guide-c-part-2.pdf>.

197. See CENTERS FOR DISEASE CONTROL SMALLPOX RESPONSE PLAN AND GUIDELINES, GUIDE B: VACCINATION GUIDELINES FOR STATE AND LOCAL AGENCIES 5–6 (2003), <http://www.bt.cdc.gov/agent/smallpox/response-plan/files/guide-b-part1of3.pdf> (“Vaccination within 3 days of exposure will prevent or significantly lessen the severity of smallpox symptoms in the vast majority of people.”).

198. See CENTERS FOR DISEASE CONTROL SMALLPOX RESPONSE PLAN AND GUIDELINES, EXECUTIVE SUMMARY 1–2 (2003), <http://www.bt.cdc.gov/agent/smallpox/response-plan/files/exec-sections-i-vi.pdf>.

199. See *id.* at 4.

general propensity for criminality. Without such limiting factors, the utilitarian calculus of protection of society would overwhelm individual liberties in virtually every instance where the government could prove that an individual poses a danger to society; thus, the police are not empowered to round up and detain gang members indefinitely, even though they may well present a danger to their local community. The limiting factor also provides a basis from which to determine the end of the justification for detention, which occurs when the person no longer suffers from that limiting factor (even if the person remains dangerous). Thus, the Constitution does not forbid noncriminal detention when there is some appropriate limiting factor (or trigger) and the detainee is shown to be a danger to society. These two requirements—limiting factor and dangerousness—help to articulate a model for detention of nonstate actors captured during a military conflict.

A. War or Military Force as the Limiting Factor

1. Defining the Class of Persons to be Detained

The limiting factor with respect to the Guantanamo detainees is the status of the military conflict itself. First, it is important to distinguish the rhetoric of the “war on terrorism” from the congressional authorization for military force (and the attendant dimensions of that military conflict). A war (or military conflict) with the objective of defeating “terrorism” is, as many others have noted, of potentially never-ending duration, and it is against a relatively large class of undefined persons. On the other hand, the Authorization for Use of Military Force that Congress passed on September 14, 2001, specifies that the President may “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 . . .”²⁰⁰ Whatever other targets may be encompassed when the President refers to the global war on terrorism, the entities that Congress has designated to be the subject of military force are limited to those that either played a

200. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

role in planning or carrying out the 9-11 attacks or sheltered those responsible.²⁰¹ We may also be in the position of not knowing when *this* war is over, for it is possible for us to capture or kill every person who fits within the statutory definition of the “enemy,” but that is a different problem from not knowing when we have defeated a *concept* such as terrorism.

The current war on terrorism, as defined by the Military Force Authorization, thus differs from other rhetorical wars, such as the “war on poverty” and the “war on drugs.” The war on poverty involved no use of military force or assets, so we need not spend any more time analyzing it.²⁰² The war on drugs, on the other hand, presents a more challenging question, since U.S. military forces have been involved in interdicting the illegal drug trade. As early as 1981, Congress relaxed the Posse Comitatus Act,²⁰³ which forbids the military from engaging in domestic law enforcement, to allow the Department of Defense to provide indirect assistance to domestic law enforcement agencies in the form of information, training, equipment, and advice.²⁰⁴ In 1989, Congress directed the Department of Defense to further assist local authorities in stopping the flow of illegal drugs.²⁰⁵ That same year, President Bush “authorized sending a small number of U.S. Special Forces troops to Colombia to train its police and military in rapid-strike tac-

201. See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2107–09 (2005). But see Ryan Goodman & Derek Jinks, *Replies to Congressional Authorization: International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653, 2654–58 (2005) (arguing that Bradley and Goldsmith overstate the category of persons subject to the congressional military force authorization).

202. John Hart Ely has commented on whether Congress would do something as outrageous as authorize the use of military force against an abstract concept such as poverty: “It is an entirely legitimate response . . . to note that it couldn’t pass and refuse to play any further. In fact it can only deform our constitutional jurisprudence to tailor it to laws that couldn’t be enacted” JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 183 (1980). But see Luban, *supra* note 5, at 222 (discussing a hypothetical in which members of the Mafia are declared enemy combatants).

203. Ch. 1041, § 18(a), 70A Stat. 626 (1956) (codified as amended at 18 U.S.C. § 1385 (2000)).

204. See 10 U.S.C. §§ 371–375 (2000); see also Peter M. Sanchez, *The “Drug War”*: *The U.S. Military and National Security*, 34 A.F. L. REV. 109, 122 (1991) (suggesting that Congress merely “legalize[d] an existing practice”).

205. See National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, § 1104, 102 Stat. 1918, 2042–47 (1988) (codified at 10 U.S.C. §§ 371–380).

tics.”²⁰⁶ While there has yet to be an instance of the U.S. military capturing and detaining persons as enemy combatants in the war on drugs, the United States did use military force in Operation Just Cause to capture General Manuel Noriega of Panama and bring him to stand trial on his indictment for drug trafficking and money laundering. The assault, which started on December 20, 1989, involved 24,000 American soldiers tasked with capturing Noriega, overthrowing Noriega’s party (the Panamanian Defense Force), and protecting American lives and property in Panama;²⁰⁷ by January 3, 1990, it was over, with Noriega in military custody on his way to be handed over to the Drug Enforcement Agency.²⁰⁸ A federal jury subsequently convicted Noriega, and he received a sentence of forty years.²⁰⁹ Still, the Noriega example is not one where the law of armed conflict was used to justify *military* detention of a person captured in the “war on drugs”; rather, it was a situation of using military force to apprehend a person, who was then brought to stand trial in federal court.

The Military Force Authorization is, to be sure, something of an imperfect trigger: It broadly defines its key term—“enemy”—as “those . . . organizations [that] planned, . . . committed, or aided” the 9-11 attacks, as well as “nations, organizations, or persons who harbored” them.²¹⁰ An executive branch, bent on expanding the scope of the war on terrorism, could exploit that broadness to include persons who do not reasonably fit within the statutory definition. Consider, for example, that President Bush’s order establishing military tribunals to prosecute al Qaeda suspects for war crimes also allows for their use against

206. MARK BOWDEN, *KILLING PABLO: THE HUNT FOR THE WORLD’S GREATEST OUTLAW* 64–65 (2001).

207. See PETER HUCHTHAUSEN, *AMERICA’S SPLENDID LITTLE WARS: A SHORT HISTORY OF U.S. MILITARY ENGAGEMENTS: 1975–2000*, at 117, 121 (2003); see also Sanchez, *supra* note 204, at 134 & n.235.

208. HUCHTHAUSEN, *supra* note 207, at 126. In August of that same year, U.S. Special Forces soldiers were prepared to storm a Panamanian home where Colombia drug lord Pablo Escobar was rumored to be hiding; like Noriega, Escobar was under federal indictment. The plan called for Delta Force soldiers to capture Escobar and turn him over to DEA agents. However, the assault was called off when the military determined that Escobar was still in Colombia. See BOWDEN, *supra* note 206, at 65.

209. See *United States v. Noriega*, 117 F.3d 1206, 1210 (11th Cir. 1997).

210. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

persons who have “engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy.”²¹¹ The class of persons who face potential military tribunals under President Bush’s executive order is thus significantly broader than the class of persons fitting within the terms of Congress’s Military Force Authorization.

On the other hand, the definition might also be too restrictive, in that al Qaeda may, at this point, be little more than a symbolic threat to us; the real danger may come from various Islamic terrorist groups that are not technically part of al Qaeda but that share the same goals.²¹² A strict reading of the Military Force Authorization might well preclude the President from using military force against such groups, even though the members of such groups may have similar training and intentions as members of al Qaeda. This latter problem is troubling, but at least there is a clear solution: Unless an attack by such groups is imminent, in which case the President could respond by invoking the “repel doctrine,” the President should go to Congress and seek a broader authorization for the use of military force that would encompass such groups.

Unlike civil commitment of the mentally ill or of violent sexual predators, where the detainee is unable to control his dangerous tendencies, an enemy combatant does not necessarily lack volitional control over his actions. That is, the mentally ill person facing commitment has been selected for the commitment proceeding because of his mental illness, which in turn is what causes him or her to be dangerous in a way that he cannot control. The military conflict, on the other hand, need not

211. Military Tribunal Executive Order, *supra* note 156, at 57834.

212. See Syed Saleem Shahzad, *The Remaking of Al-Qaeda*, ASIA TIMES, Feb. 25, 2005, available at <http://www.atimes.com/atimes/South-Asia/GB25Df04.html>. This may be a more serious problem than was initially apparent, given the mutation of al Qaeda after the destruction of its training bases in Afghanistan. Al Qaeda may exist more as an inspirational entity than an operational one; yet, as other violent terrorist groups seek to replicate al Qaeda’s goals, might the President charge that such other groups are “part” of al Qaeda? Consider, for example, that Abu Musab al-Zarqawi, the leader of the insurgency in Iraq, declared his loyalty to Osama bin Laden and al Qaeda in late 2004. *Al-Zarqawai Group Threatens to Kill Japanese Hostage*, CNN.com, Oct. 27, 2004, available at <http://www.cnn.com/2004/WORLD/meast/10/16/Iraq.main>.

cause the detainee to be dangerous in a way that he cannot control; indeed, the Guantanamo detainees, if they are members of al Qaeda, voluntarily joined that organization. Thus, war or authorization of military force might not seem to be a trigger analogous to other triggers of noncriminal detention, which incapacitate those who cannot control their own dangerousness (as opposed to those who choose not to do so).

There are two responses to that difference. First, not all types of noncriminal detention require that the limiting factor actually cause the detainee to lose volitional control; pretrial detention, for example, is predicated upon the detainee's indictment for a serious crime, and yet the indictment itself is not even admissible in trial as evidence of wrongdoing and certainly does not cause the defendant to become dangerous. Second, under the law of armed conflict as applied to traditional nation-state conflicts, captured enemy soldiers can be detained because of their status as members of enemy forces; the implicit assumption is that their status as the enemy makes them dangerous, either because of their national loyalty to or coercion by their home government, or both.²¹³

Another issue to consider is that this trigger would not foreclose the executive branch from being able to detain persons captured on U.S. soil, so long as it could plausibly classify them as persons who "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." The persons who "committed" the attacks are, of course, dead, and those who "planned" the attacks are either dead (the suicide hijackers) or detained (Khalid Sheikh Mohammed, Ramzi Binalshibh) or obvious high-level al Qaeda members still at large (Osama bin Laden). However, there may well be persons who "aided" the 9-11 attacks in this country.²¹⁴

Like the 9-11 hijackers, the German saboteurs in *Ex parte Quirin*²¹⁵ were helped by at least fourteen Americans—friends

213. Indeed, that presumption explains why we do not need to hold hearings on whether enemy POWs are dangerous.

214. 9-11 REPORT, *supra* note 24, at 215 ("We believe it unlikely that [Nawaf al] Hazmi and [Khalid al] Mihdhar—neither of whom . . . had any prior exposure to life in the West—would have come to the United States without arranging to receive assistance from one or more individuals informed in advance of their arrival.").

215. 317 U.S. 1 (1942).

or family members who served as contacts—offered the use of their homes as hideouts, and concealed illicit cash brought by the saboteurs for use in their mission.²¹⁶ The federal government convicted six of the fourteen, obtaining death sentences against two men and twenty-five-year prison sentences against four women.²¹⁷ But the fact that the civilian criminal justice system was capable of handling these aiders and abettors need not have foreclosed the possibility of using the law of armed conflict to handle them.

Finally, it is not obvious that requiring that detention occur pursuant to authorized use of military force actually imposes a significant obstacle to the President's ability to detain persons indefinitely. Recent history, which one might think of as coincident with the rise of congressional "authorization to use military force" in place of formal declarations of war, suggests that the President is able to persuade, cajole, or otherwise coerce Congress into giving him the authority to use military force.²¹⁸ What if the President were to seek to militarize further the "war on drugs" such that U.S. military forces would be involved in fighting, killing, or capturing persons involved in producing cocaine to be smuggled into the United States? Could the President order that Colombian drug lords be detained as "enemy combatants"?

If Congress were to authorize the President to use military force against a defined set of drug lords, then the military would presumably be entitled to detain persons captured during ensuing military conflicts. To be sure, the potential for such an outcome might give one pause about the thesis concerning military force authorizations as the trigger for detentions. However, the discomfort lies in the political determination that such nonstate actors—drug lords in this hypothetical—must be dealt with through military force, rather than extradition and prosecution. That is, one may question seriously whether drug

216. See ALEX ABELLA & SCOTT GORDON, *SHADOW ENEMIES: HITLER'S SECRET TERRORIST PLOT AGAINST THE UNITED STATES* 222–28 (2002).

217. *Id.* at 229. The convictions were reversed on appeal on the ground that the defendants' confessions were obtained involuntarily. See *United States v. Haupt*, 136 F.2d 661, 671 (7th Cir. 1943). The government successfully retried one of the six (the father of one of the eight saboteurs); two others pleaded guilty to lesser charges. ABELLA & GORDON, *supra* note 216, at 231.

218. *Use of Force in Iraq* (2003): House, 296-133; Senate, 77-23; *Use of Force in Afghanistan* (2001): House, 420-1; Senate, 98-0.

lords are appropriate targets for military action.²¹⁹ After all, if they are, then presumably the military would be able to capture and detain domestic drug dealers (who would be the equivalent of foot soldiers).²²⁰ The prevention of such a spectacle lies in Congress's political accountability, rather than any hard and fast rule restricting the scope of military force to nation-states.²²¹ The Constitution commits the power to declare war to Congress, and the determination of whether particular nonstate actors (whether al Qaeda or drug lords) should be dealt with through military force is therefore left to the political

219. *But see* DEFENSE POLICY PANEL & INVESTIGATIONS SUBCOMM. OF THE H.R. COMM. ON ARMED SERVS., 100TH CONG., REPORT ON NARCOTICS INTERDICTION AND THE USE OF THE MILITARY: ISSUES FOR CONGRESS 8 (Comm. Print 1988) (quoting Congressmen Les Aspin and Bill Nichols as saying that "international drug trafficking is a national security matter"); BOWDEN, *supra* note 204, at 65 (quoting President George H.W. Bush as saying that "[t]he rules have changed," and that "[w]hen requested, we will for the first time make available the appropriate resources of America's armed forces"); Michael Isikoff, *Drug Plan Allows Use of Military*, WASH. POST, Sept. 10, 1989, at A20 (noting Presidential National Security Decision Directive stating that illegal drugs are a "national security" threat).

220. Nor would the Posse Comitatus Act be a barrier to such a result, for that law only forbids the military from being used for civil law enforcement purposes. See 18 U.S.C. § 1385 (2000). In this hypothetical, the military would be fighting the "enemy," who just happened to be on U.S. soil. Certainly, if the United States were invaded by a foreign military force, the Posse Comitatus Act would not bar the Marines from acting to capture or kill the invaders.

221. Under international law (as opposed to domestic law), there may not be a barrier to the invocation of the law of armed conflict against nonstate actors. See, e.g., Michael Novak, *Just Peace and the Asymmetric Threat: National Self-Defense in Uncharted Waters*, 27 HARV. J. L. & PUB. POL'Y 817, 828-29 (2004) ("[T]here have occasionally been precedents for making war on nonstate actors, such as organizations of pirates preying upon international shipping lanes."); Yoo & Ho, *supra* note 14, at 207-15 (arguing that al Qaeda's actions on September 11, 2001 were acts of war); John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1197 (2004) (arguing that the four Geneva Conventions "make it plain that the laws of armed conflict may apply to intense levels of hostilities conducted by a nonstate actor," and that "Al Qaeda members do not escape the laws of war because they are nonstate actors"). *But see* AMNESTY INT'L, YEMEN: THE RULE OF LAW SIDELINED IN THE NAME OF SECURITY 23 (2003) ("Under existing international humanitarian law, it is not possible to have an international armed conflict between a state on the one hand and a nonstate actor on the other, should the armed group not form part of the armed forces of a Party to the Geneva Conventions."), available at [http://web.amnesty.org/library/pdf/MDE310062003ENGLISH/\\$File/MDE3100603.pdf](http://web.amnesty.org/library/pdf/MDE310062003ENGLISH/$File/MDE3100603.pdf); Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1342 (2004) ("[A]ny conflict between the United States and al Qaeda as such cannot amount to war or trigger application of the laws of war.").

branches. Indeed, any bright-line rule restricting the use of military force to nation-states, as opposed to nonstate actors in appropriate circumstances, would be not only unworkable but probably also unconstitutional. Consider the often-cited *Prize Cases*,²²² in which the Court held that when the President recognizes a threat grave enough to the nation to require immediate military action to repel, the President is entitled—indeed, obligated—to act even in the absence of congressional authorization. It hardly makes sense to require the President to ascertain that an imminent attack is indeed brought by a nation-state, as opposed to nonstate actors, before repelling it. One might argue that repelling an armed attack by using military force is not the same as authorizing the use of military force, and that military force should be authorized against only nation-states, even if there would be an exception to allow such force to be used against nonstate actors to repel an imminent attack. But that argument is ultimately incoherent: If a group of nonstate actors has mounted an armed attack sufficient to warrant repulsion through military force, why should Congress be unable to authorize the President to pursue the group and destroy it before it mounts another attack?

2. *Application to the War on Terrorism*

In the domestic examples of noncriminal detention, one way in which a person may escape detention is to show that the limiting factor is no longer applicable to him or her. Thus, a person who recovers from a mental illness may seek release from a mental hospital, and a criminal defendant who is no longer under indictment (through either acquittal at trial or dismissal of the indictment) must be released from pretrial detention. In the latter example, detention is not permissible even if the government could show that the defendant remains dangerous.²²³

Because the limiting factor in the terrorism circumstance is (generally) membership in an organization deemed by Congress to be belligerent to the United States, a detainee should theoretically be able to show that the limiting factor no longer applies to him because he has renounced membership in that

222. 67 U.S. 635, 668 (1862).

223. Imagine, for example, that the judge dismisses the indictment due to expiration of the statute of limitations or suppression of key evidence due to a constitutional violation.

organization. Because of the nature of this particular issue, the burden should be placed on the detainee to make the showing. Unfortunately, it is nearly impossible to detail how the detainee would make such a showing beyond noting that the adjudicative factfinder would have to make a judgment on the believability of the detainee's renunciation of the organization. One might expect willingness to take a sworn oath and explanation of the detainee's change of heart to be among the factors evaluated by the factfinder.²²⁴ The appropriate forum in which to allow the detainee the opportunity to make this showing would be the Combatant Status Review Hearings, since those hearings are aimed at determining the detainee's status, in which the detainee would be alleging a change.

A more troubling situation arises where the detainee was incorrectly classified as a combatant at the outset and that mistake is not rectified until after potentially brutal conditions have enraged or radicalized the detainee. While one might be uncomfortable releasing such a person, he simply did not—and does not—fit within the scope of the persons, organizations, or nations deemed by Congress to be appropriate targets of military force. The closest analogy in support of continued detention of the person would consider what would be done in the ordinary criminal justice system with such a person. If this wrongfully detained individual out of anger and frustration from continued mistaken confinement commits a crime while in prison, the subsequent crime would be sufficient to justify continued detention. Absent such a derivative offense, however, the detainee, while angry and dangerous, cannot be detained further on that ground alone, as dangerousness alone is not enough to warrant involuntary detention.

B. Proving Dangerousness

The examples of noncriminal detention all require the government to prove dangerousness. That dangerousness can be proven in different ways depending on the context and justification for detention. According to the Court, conviction of a

224. While it might be difficult for a detainee to make this showing, a detainee is much more likely to be released under the second prong (dangerousness). The only instance in which this problem is likely to arise as a practical matter would be the unlikely event in which a detainee still wanted to inflict harm on the United States but no longer wanted to be a member of al Qaeda.

felony, including nonviolent felonies, is one way of proving dangerousness.²²⁵ In the situation of pretrial detention, Congress specified that dangerousness would be determined based on factors such as “the nature and seriousness of the charges, the substantiality of the Government’s evidence against the arrestee, the arrestee’s background and characteristics, and the nature and seriousness of the danger posed by the suspect’s release.”²²⁶ There is, of course, no guarantee of proving dangerousness with absolute certainty, but one endures that degree of uncertainty about the provability of future dangerousness in other circumstances. As Justice Stevens noted in 1976, “[t]he fact that such determination [of dangerousness] is difficult, however, does not mean that it cannot be made.”²²⁷ Not only do federal judges have to make findings on future dangerousness in deciding whether to grant bail, so also do state judges presiding over civil commitment proceedings.²²⁸ In addition, in some death penalty jurisdictions, juries at the penalty phase are charged with determining, as a potential aggravating factor, “whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.”²²⁹

This is not to say that there are no problems with these other instances of factfinders who must determine future dangerousness. There is a reason to believe, for example, that psychiatric experts cannot correctly predict the future dangerousness of death penalty defendants better than one time in three,²³⁰ which is good for baseball hitters but not for the criminal justice system. To minimize the negative consequences of the uncertainty, the system often relies upon the burden of proof and the standard of proof; thus, for both pretrial detention and civil commitment, the court must find dangerousness by clear and

225. *Lynch v. Overholser*, 369 U.S. 705, 714 (1962).

226. *United States v. Salerno*, 481 U.S. 739, 742–43 (1987) (citing 18 U.S.C. § 3142(g) (1982)).

227. *Jurek v. Texas*, 428 U.S. 262, 274–75 (1976).

228. See *supra* Part III.B–C.

229. See *Jurek*, 428 U.S. at 269 (quoting TEX. CODE. CRIM. PROC. ANN. art. 37.031 (Supp. 1975–1976)).

230. See *Barefoot v. Estelle*, 463 U.S. 880, 900 & n.7 (1983) (citing sources).

convincing evidence.²³¹ Nevertheless, it cannot be denied that the system is imperfect.

Still, our nation's historical experience with repatriating German soldiers after the end of World War II suggests that it is not impossible to distinguish enemy soldiers who are hardened enemies from ones who are not. In 1945, with the end of the war in sight, the U.S. War Department determined that "German noncommissioned officers and incorrigible Nazis will be the last to be released from a prisoner of war status."²³² In an eerie parallel to current circumstances, activists in 1945 demanded that the United States immediately repatriate German POWs, a position rejected by the American military.²³³

Some of the relevant factors in determining dangerousness in this context of detention of suspected al Qaeda and Taliban fighters might include, nonexclusively, the amount of terrorism training that the detainee has received, the detainee's expressed willingness to engage in terrorism and the type of terrorist attack contemplated, and the prior violent conduct of the detainee. The 9-11 attacks demonstrated how the level of terrorist training can greatly increase a terrorist's dangerousness; for example, the leaders of the 9-11 hijackings had received training on blending into American society to better evade detection, which enabled them to engage in pre-9-11 plotting, such as testing airport and airline security. Similarly, the more devastating a terrorist attack in which a detainee is willing to take part (regardless of whether such an attack has reached the stage of a criminal attempt), the more likely it should be to conclude that the detainee is dangerous and will remain dangerous for a longer period of time. Prior violent conduct, even if not a war crime, would be further evidence of dangerousness, though overreliance on prior violent conduct would probably

231. 18 U.S.C. § 3142(f) (2000) (stating clear and convincing evidence as standard for pretrial detention); *Addington v. Texas*, 441 U.S. 418, 433 (1979) (holding clear and convincing evidence as standard for civil commitment proceedings).

232. See KRAMMER, *supra* note 96, at 231 n.11 (quoting Memorandum for Planning Comm., War Dep't., Status and Employment of Italian and German PWs on Collapse of Germany (Feb. 19, 1945)).

233. See *id.* at 230–32.

result in over- and underinclusiveness.²³⁴ A final relevant factor might be the age of the detainee.²³⁵

Additionally, we might ask detainees to take an oath not to attack the United States or American interests abroad. Some detainees may agree to do so and others may refuse. Unwillingness to take the oath would be almost (if not absolutely) dispositive evidence of continued dangerousness.²³⁶ On the other hand, a detainee's willingness to take the oath would be evidence, though not conclusive, of nondangerousness, as a detainee might take the oath with no intention of honoring it. Presumably, the government would also be able to gather helpful evidence from monitoring conversations between detainees at Camp Delta.

Finally, experts may have a role in the dangerousness hearings. One terrorism expert sees commonalities in the way that terrorists view the world: "They are extremely sensitive to slights and humiliations inflicted on themselves or on members of social groups to which they belong or with which they identify themselves."²³⁷ Another terrorism researcher believes that terrorists tend to share seven characteristics: (1) "oversimplification of issues"; (2) "frustration about an inability to change society"; (3) "a sense of self-righteousness"; (4) "a utopian belief in the world"; (5) "a feeling of social isolation"; (6) "a need to assert his own existence"; and (7) "a cold-blooded willingness to kill."²³⁸ A third commentator observes that "Islamic extremists mount their jihad, construed as self-defense against tyrannical, decadent infidels who seek to enslave the Muslim

234. See Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventative Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1450 (2001). Robinson was concerned with prior record, which is not exactly the same as prior violent conduct; prior criminal conduct has further predictive value because criminals have "'thumb[ed their] nose[s]' at the justice system." *Id.* at 1436.

235. *Id.* at 1451 ("Evidence suggests that criminality is highly age-related.").

236. In rare circumstances, a detainee might distrust the U.S. government and fear that taking the oath would be tantamount to confessing to some misdeed, but every effort should be made to persuade the detainee that the oath is only to agree to refrain from attacking the United States.

237. Paul B. Davis, *The Terrorist Mentality*, in POWERWEB: VIOLENCE AND TERRORISM, 36, 36 (Thomas J. Badey ed., 6th ed. 2003) (citing Frederick Hacker, *Dialectical Interrelationships of Personal and Political Factors in Terrorism*, in PERSPECTIVE ON TERRORISM 24-25 (Lawrence Freedom & Yonah Alexander eds. 1983)).

238. *Id.* at 37 (citing Rushworth M. Kidder).

world," a view that allows them to "redefin[e] the morality of killing, so that it can be done free from self-censuring restraints."²³⁹

Psychiatric expertise, however, may be of limited use in this situation. As noted earlier, the ability of psychiatrists to opine accurately as to future dangerousness in death penalty cases is disputed, perhaps no better than one time in three chances,²⁴⁰ though the predictive ability increases when there is a consistent history of violent behavior. Similar doubts have arisen as to the ability of psychiatric experts to opine accurately in civil commitment proceedings. Compounding the matter is the fact that "[p]sychological pathology does not seem to be present in higher rates among terrorism perpetrators than it is among members of the general public."²⁴¹ If true, the lack of pathology would render psychiatric expertise of even less use here than in civil commitment proceedings. We may not even need psychiatric experts to opine about a particular detainee's dangerousness. Trained military interrogators could interview each detainee with an aim toward eliciting the detainee's attitudes toward the West, toward violence against civilians, and other such matters outlined above.²⁴² Because the close-knit nature of terrorist cells tends to reinforce the self-defensive, oppressed worldview, detention in a facility such as Camp Delta may, over a period of time, mute such attitudes and reduce the detainee's dangerousness.

Thus, drawing upon the previous examples of pretrial detention, civil commitment, and others, one can build a model for detaining persons captured in military conflicts against non-state actors. Assuming that such persons have been correctly

239. Albert Bandura, *The Role of Selective Moral Disengagement in Terrorism and Counterterrorism*, in UNDERSTANDING TERRORISM: PSYCHOSOCIAL ROOTS, CONSEQUENCES, AND INTERVENTIONS 121, 124–25 (Fathali M. Moghaddam & Anthony J. Marsella eds., 2004).

240. See *supra* note 230 and accompanying text.

241. See Audrey Kurth Cronin, *Sources of Contemporary Terrorism*, in ATTACKING TERRORISM: ELEMENTS OF A GRAND STRATEGY 19, 24 (2004); see also PHILIP JENKINS, *IMAGES OF TERROR: WHAT WE CAN AND CAN'T KNOW ABOUT TERRORISM* 68 (2003).

242. An interesting question arises if a detainee refuses to be interviewed, thus denying the United States the opportunity to gather evidence of continued dangerousness. Such refusal to be interviewed could be viewed as evidence of non-cooperation and thus potential dangerousness; it should not, however, be conclusive evidence of dangerousness.

classified as within the ambit of the military force authorization,²⁴³ continued detention would depend on the government's ability to demonstrate the detainees' dangerousness, subject to the following procedural requirements.

1. *Counsel*

The first feature of the model permits detainees to be represented by counsel. The majority of the examples of noncriminal detention discussed earlier—pretrial detention, civil commitment of the mentally ill, and civil commitment of violent sexual predators—allow detainees to seek counsel, and, in the case of indigent detainees, provide counsel at the state's expense.²⁴⁴ The reasoning underlying the provision of counsel in those instances varies depending on the nature of the detention. At minimum, it is based on the importance of the individual's stake in the matter: his liberty. The classic example of the right to counsel arises in criminal prosecution, where the Court has interpreted the Sixth Amendment to require that indigent defendants who cannot afford to hire attorneys be provided them at public expense.²⁴⁵ As other situations demonstrate, however, the right of indigents to be provided counsel is not limited to criminal defendants.

To be sure, not all instances of potential loss of liberty require the allowance or provision of counsel. In *Wolff v. McDonnell*,²⁴⁶ the Court held that prison inmates facing disciplinary proceedings were not entitled to legal counsel at their hearings.²⁴⁷ *Wolff* noted that allowing counsel into such proceedings "would inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals."²⁴⁸ If the purpose of noncriminal detention of al Qaeda and Taliban fighters is to rehabilitate them so that they no longer seek to attack the United States, *Wolff* might seem applicable. Nevertheless, *Wolff* is ultimately less persuasive as an

243. See *supra* Part IV.A.

244. See *supra* Part III.

245. *Gideon v. Wainwright*, 372 U.S. 335 (1963); see also *Johnson v. Zerbst*, 304 U.S. 458 (1938) (requiring that counsel be provided to indigent defendants in federal criminal trial).

246. 418 U.S. 539 (1974).

247. *Id.* at 570.

248. *Id.*

analogy than *Salerno* and the Bail Reform Act, in part because *Wolff* dealt with a disciplinary process to punish criminals for whom there was no dispute that imprisonment was proper. Here, the hearings inquire whether the detainee remains dangerous and subject to continued detention, not whether an incremental restriction on already limited liberty is justified.

Clearly, lawyers would be useful in this model. As trained advocates, they can help present the affirmative case of non-dangerousness (should the detainee testify or present witnesses and evidence) as well as test the government's showing of dangerousness. As the Court explained in *Powell v. Alabama*, even an "intelligent and educated layman . . . lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one," and without counsel, "he faces the danger of conviction because he does not know how to establish his innocence."²⁴⁹ Here, of course, it is not innocence that is at issue, but dangerousness; nevertheless, the point remains that the nonlawyer may not be trained to *argue* for a particular outcome.

Elsewhere, this author has considered the argument that the Combatant Status Review Hearings, used to determine if each detainee was properly classified as a combatant, could prohibit detainees from obtaining counsel on the ground that the factual question to be determined was one where detainees could be as effectively assisted by nonlawyer military officers:

[T]his is not to deny that lawyers would be able to help the detainees present more effective cases. However, it does suggest that the marginal gain in accuracy from having lawyers present is measured from a different baseline than in the criminal cases: there are not complex rules of litigation to contend with, the issue to be resolved is relatively simple and factual, and to the extent there are complexities in the definition of "combatant," the personal representative should have the training to assist the detainee.²⁵⁰

Although the government interest in excluding counsel in the Combatant Status Review Hearings was outweighed by the marginal benefits that counsel would offer, given that there were lawyers who were willing to represent individual detain-

249. 287 U.S. 45, 68–69 (1932).

250. Yin, *supra* note 22, at 1086.

ees,²⁵¹ counsel might yet be excludable upon a sufficient showing of national security needs. That possibility, however, rests in large part on the fact that the personal representative assigned to the detainee—a military officer—would necessarily be trained to make the determination of “combatant” status, because the laws of war require that soldiers be able to distinguish combatants, who are legitimate targets, from noncombatants, who are not legitimate targets.²⁵² Whether one’s views on the necessity of counsel in the Combatant Status Review Hearings, the argument against counsel seems much weaker in this context, where military officers cannot be assumed to have the training to assist a detainee in arguing nondangerousness. To a military officer, all members of enemy forces are presumed dangerous, and hence are legitimate targets for killing or capturing. That presumption is entirely reasonable on the battlefield, but it begs the question that the dangerousness hearings are meant to resolve.

One important qualification remains. In order to provide counsel to represent the detainees in dangerousness hearings that would take place on Guantanamo Bay, the government might be able to draw only from a limited pool of lawyers who possess the appropriate security clearances, both to set foot on the base and to see classified information.²⁵³ If the number of detainees were to increase dramatically, the government might be temporarily unable to provide enough lawyers to represent detainees. In such an event, the frequency of the hearings might have to be scaled back.²⁵⁴

2. Periodic Evaluations

Another feature of the model is periodic reevaluation of the dangerousness of each detainee. This reevaluation system is also a feature of the civil commitment of the mentally ill and of violent sexual predators, where the state must, on at least an annual basis, prove that the confined person remains danger-

251. *Id.* at 1087–88.

252. *Id.* at 1084–85.

253. *See id.* at 1087–88.

254. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319 (1976). Perhaps *Eldridge* could be read as requiring the government to provide more lawyers, rather than cut the number of hearings. At the same time, it seems like that the courts would defer to the executive branch’s military judgment about the feasibility of allocating more military lawyers and officer to staff the additional hearings.

ous.²⁵⁵ In upholding the constitutionality of such confinement, the Court relied on the fact that the detention was only “potentially” indefinite: “If Kansas seeks to continue the detention beyond that year, a court must once again determine beyond a reasonable doubt that the detainee satisfies the same standards as required for the initial confinement.”²⁵⁶ The detainees, on the other hand, face potentially endless detention. True, a few of the Guantanamo detainees are slated for prosecution in military tribunals,²⁵⁷ but they may remain in detention even if they are acquitted. Thus, the military tribunals will not, in themselves, end detention so much as provide an opportunity for the government to inflict punishment in addition to preventative detention.

In a traditional nation-state conflict, enemy POWs may also face potentially endless detention; certainly, during World War II, German and Japanese POWs died in captivity before the end of the war. For enemy POWs in traditional nation-state wars, the event that terminates their captivity—the end of the conflict—is one that is out of their hands. As long as a state of military conflict exists between the U.S. and the nation state of the enemy POWs, those POWs are considered belligerents who would be ordered to fight us against if released. Nevertheless, in traditional conflicts, there is an entity (the enemy nation) that continues to exist and that can negotiate an end to the conflict. It may not be the same entity, but it is the same sovereign. Some military conflicts, such as the 1991 Gulf War, have limited objectives that do not involve changing the enemy national government; others, such as the recent conflicts in Iraq and Afghanistan, as well as World War II, have a goal of replacing a sovereign’s government, but not the sovereign itself. That is, before World War II had ended, we ousted the Nazi government of Germany, but Germany as a sovereign remained intact, with a new government installed by the Allied Powers.

When military force is applied against nonstate actors such as al Qaeda, the continuing existence of such an entity is much less clear, as is the ability of such entity to negotiate an end to the conflict. Al Qaeda is not, and never was, a sovereign. The goal of the military conflict against al Qaeda is not to replace its

255. *See supra* Part III.B–C.

256. *Kansas v. Hendricks*, 521 U.S. 346, 364 (1997).

257. *See supra* note 156.

“government” with another, but rather to destroy al Qaeda. In a very real sense, the war has become individual to each detainee. Accordingly, the possibility exists that a given individual will decide that he no longer wishes to fight against the United States.²⁵⁸ If the detainee reaches such a decision, he is by definition no longer dangerous, and further detention is not necessary. Requiring the government to demonstrate continued dangerousness on an annual basis would presumably result in the release of detainees who have decided that they no longer want to fight the United States. Necessarily, the frequency of hearings would also depend on other factors, including the number of detainees. Annual hearings that would be feasible for five hundred detainees might well be impossible for five thousand detainees, given the demand for ten times as many lawyers, decisionmakers, and expert evaluators (not to mention physical space for the hearings).

3. *Choice of Forum*

Finally, it is necessary to consider the type of forum in which these hearings should take place. Should it be a federal judge who determines whether the government has shown that a particular detainee remains dangerous? Should it be a so-called Article I judge? Or should it be a panel of neutral military officers?

Certainly, there are non-frivolous arguments that, as a matter of policy, such hearings should take place before Article III judges. The attributes of Article III status, life tenure and protection from salary diminution,²⁵⁹ are intended to provide federal judges with independence from the political branches and from the public.²⁶⁰ In this context, a federal judge charged with determining whether a particular Guantanamo detainee is dangerous can theoretically do so strictly based on the merits of the matter, without fear of the consequences of second-guessing by superiors. Decisionmakers who are military officers, on the other hand, may feel, rightly or wrongly, that they need to rule

258. The reasons for reaching such a decision could vary from fearing the military power of the United States to rethinking the *jihad* to wishing to return home to one's family.

259. U.S. CONST. art. III, § 1; *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59–60 (1982).

260. See THE FEDERALIST NO. 78 (Alexander Hamilton).

against the detainees in close cases or suffer negative career consequences.²⁶¹

Thus, the advantages of Article III judges over other decisionmakers who lack life tenure are undoubtedly real. However, there are many adjudicative decisionmakers, ranging from state court judges to administrative law judges to military judges who lack life tenure but who make judgments on questions of federal law. Potentially indefinite detention raises serious liberty concerns. Death penalty cases, however, raise even more serious liberty concerns, and no constitutional impediment exists to having non-life-tenured judges presiding over capital cases, even though a state judge who must stand for reelection or reelection may feel pressure (again, rightly or wrongly) to steer the jury toward conviction of a notorious defendant. The mere superiority of life-tenured decisionmakers, however, does not translate into a requirement of life-tenured judges. Due process merely requires that the decisionmaker be free from actual bias.²⁶²

Moreover, use of non-Article III decisionmakers may provide the government with a degree of flexibility and the detainees with a degree of process that might not be available with the limited resource of federal judges. Neutral or unbiased military officers would be the most convenient decisionmakers, given that the detainees are being held on a military base outside the United States; having an Article III judge conduct the dangerousness hearings would require that either the judge be transported to the military base or the detainee be transported to the United States. The former imposes not insignificant burdens on federal judges, particularly if the detainees are held far from the United States. The latter imposes security demands on the military and on federal courts.

C. *A Note on the Conditions of Detention*

Conditions of confinement were important factors in other confinement situations detailed above. In *Salerno*, for example,

261. Cf. Yin, *supra* note 22, at 1075–78 (discussing unlawful command influence and other due process issues relating to the staffing of the Combatant Status Review Hearing panels by military officers).

262. Cf. Ann Althouse, *Tapping the State Court Resource*, 44 VAND. L. REV. 953, 960–61 (1991) (arguing that the relevant question is whether “the state courts are good enough, even if they fall short of parity”).

the Court, in upholding the constitutionality of pretrial detention, placed some weight on its belief that pretrial detainees would be confined in separate facilities from convicted criminals.²⁶³ Similarly, in 1945, the American Psychiatric Association issued a committee report outlining minimum standards for mental health hospitals, including the conditions of confinement, which included housing “either in single rooms or in small dormitories.”²⁶⁴ Furthermore, the conditions of prisoner-of-war camps as mandated by the Geneva Convention are consistent with a nonpunitive purpose.²⁶⁵ A tremendous chasm exists, however, between theory and practice. For example, *Salerno’s* observation that pretrial detainees should be housed separately from convicted criminals has been routinely ignored on the grounds of expedience and necessity. Some mental health hospitals are criticized for substandard or even inhumane living conditions. This gap between theory and practice in these other examples of noncriminal detention demonstrates the futility in setting forth rules about the conditions of confinement.

D. *Comparison to the Bush Administration’s
Administrative Review Hearings*

On September 14, 2004, Navy Secretary Gordon England issued a directive establishing “administrative review procedures for enemy combatants detained” at Guantanamo Bay.²⁶⁶ Even before this date, the government had periodically re-

263. *United States v. Salerno*, 481 U.S. 739, 747–48 (1987).

264. See ALBERT DEUTSCH, *THE MENTALLY ILL IN AMERICA* 452–53 (1949); see also *Youngberg v. Romeo*, 457 U.S. 307, 315, 324 (1982) (holding that a civil commitment detainee must be provided with safe conditions and “reasonably nonrestrictive confinement conditions”).

265. See Geneva Convention (III), *supra* note 70, art. 25 (“Prisoners of war shall be quartered under conditions as favourable as those for the forces of the Detaining Power who are billeted in the same area. . . . The premises provided for the use of prisoners of war individually or collectively, shall be entirely protected from dampness and adequately heated and lighted, in particular between dusk and lights out.”).

266. Memorandum from Gordon England, Sec’y of the Navy, to Sec’y of State (Sept. 14, 2004), <http://www.defenselink.mil/news/Sep2004/d20040914adminreview.pdf> [hereinafter England Memorandum]; News Release No. 905-04, Office of the Asst. Sec’y of Def. (Pub. Aff.), *Administrative Review Implementation Directive* (Sept. 15, 2004), available at <http://www.defenselink.mil/releases/2004/nr20040915-1253.html>.

leased detainees from Camp Delta,²⁶⁷ through apparently less formal procedures. The Administrative Review Hearings are held before a panel of three military officers and will take place annually for each detainee.²⁶⁸ The panel will determine “whether [the detainee] represents a continuing threat to the U.S. or its allies” by “consider[ing] all relevant and reasonably available information.”²⁶⁹ The burden of proof is not stated explicitly, in part because the Navy Secretary has described the proceedings as “non-adversarial”;²⁷⁰ however, the implementing document could be read as presuming either the need for continued detention or the need for release.²⁷¹

Although the detainee is entitled to testify at this hearing, the detainee has no right to call other witnesses.²⁷² If the detainee wants family members or officials from his national government to help establish his lack of dangerousness, he can do so only by presenting written statements from those persons.²⁷³ The detainee is not allowed counsel but is provided an “Assisting Military Officer” to help prove his non-dangerousness.²⁷⁴

The establishment of formal hearings to review annually the justification for continued detention is undoubtedly a welcome step, and the focus on long-term dangerousness is appropriate. The actual procedures used in the hearings, however, fall well short of those suggested in this Article. The combination of lack of counsel and the unclear burden of proof is particularly troublesome. While either of those provisions alone might be reasonable, it would be the presence of the other provision that remedies the absence of the first. As William Buss has noted in the context of disciplinary measures in public schools, where the right to cross-examination is denied, “participation by a lawyer becomes even more imperative to reveal weaknesses in

267. See *supra* notes 64–67 and accompanying text.

268. England Memorandum, *supra* note 266, enclosure (3) para. 2.

269. See *id.* at 2 para. 1(c).

270. *Id.*

271. Compare *id.* enclosure (3) para. 1(a) (“This process will provide an annual review to determine the need to continue to detain enemy combatants [T]he ARBs shall conduct such proceedings as necessary to make a written assessment of . . . whether there are other factors bearing upon the need for continued detention.”) with *id.* (“This process will . . . explain why the enemy combatant’s release would otherwise be appropriate.”).

272. *Id.* enclosure (3) para. 3(d).

273. *Id.*

274. *Id.* enclosure (3) para. 2(c).

hostile testimony and to identify weaknesses in the testimony that cross-examination might have exposed."²⁷⁵ Here, a lay person who must prove his lack of dangerousness may be at a loss to do anything other than to proclaim his own peacefulness.

Placing the burden of proof on the detainee, as the implementing memorandum may do, presents other problems when combined with the prohibition on presenting live testimony (other than the detainee's). Written statements from family members or officials of the detainee's national government will most likely be able to opine only on matters relevant to the detainee's personal history, as opposed to the detainee's present and future intentions. Yet, it is the latter (combined with the detainee's status as an enemy combatant within the terms of the Congressional authorization for the use of military force) that is indicative of whether the detainee still poses a threat to the United States.

Thus, the Administrative Review Hearings should be reconstituted so that detainees are provided counsel to represent them at the hearings. Furthermore, the burden of proof should be clarified as being on the government to show continuing dangerousness.

V. CONCLUSION

The perhaps inaptly named war on terrorism has exposed a gap between criminal law and the law of armed conflict. During the middle of the Twentieth Century, when the 1949 Geneva Convention was adopted, only nation-states were capable of inflicting the level of damage that would plausibly be seen as a warlike act; individuals committed crimes and were dealt with through the civilian criminal justice system. Even before September 11, 2001, however, the crime-war distinction had begun to disintegrate. Had the 1993 World Trade Center bombing been successful from the standpoint of its intended outcome, it would be remembered as the first instance of megaterrorism in the United States.

Yet simply because military force might be reasonably directed against nonstate actors under domestic and international

275. Cf. William G. Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U. PA. L. REV. 545, 610 (1971).

law,²⁷⁶ it does not follow that the law of armed conflict can be transferred seamlessly into this new context. Detention of enemy soldiers for the duration of a traditional nation-state conflict is premised upon the assumption that such soldiers, if released prior to the end of the conflict, would be ordered back into the conflict by their home nation. With nonstate actors, however, the same assumption might not be valid. Therefore a new method must be developed to determine how long nation-states may detain persons captured by them when military force is applied against such nonstate actors.

By synthesizing common elements from domestic forms of noncriminal detention, the proposed model creates a process whereby nonstate actors captured during authorized military campaigns can be detained for as long as the United States can demonstrate their continued dangerousness. The burden of proving such dangerousness rests with the United States, and the detainee is to be provided counsel to assist him in defending himself at the hearing. This approach is consistent with the nature of the detention pursuant to military force, and it is more flexible than the “prosecute or release” mindset. It also provides a measure of process above the government’s current Administrative Review Hearings that presumably will lead to more confidence in the hearing determinations.

This Article focused on domestic law in creating a model for noncriminal detention of nonstate actors captured during authorized uses of military force. In this day and age, however, international law cannot be wholly ignored. Members of the international community, notably Western European nations, may object that certain aspects of the noncriminal detention model violate international law, such as the Universal Declaration of Human Rights,²⁷⁷ the International Covenant on Political and Civil Rights,²⁷⁸ and the Body of Principles for the Protec-

276. *See supra* Part IV.A.

277. Universal Declaration of Human Rights, G.A. Res. 217A art. 9, U.N. Doc. A/810 (Dec. 10, 1948) (“No one shall be subject to arbitrary arrest, detention, or exile.”); *id.* at art. 10 (“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”).

278. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI) art. 9(4), 21 U.N. GAOR, Supp. No. 16, U.N. Doc A/6316 (Dec. 16, 1966) (“Anyone who is deprived of his liberty by arrest or detention shall be entitled to take

tion of All Persons under Any Form of Detention or Imprisonment,²⁷⁹ by, among other things, not providing for direct judicial determination of the detainee's dangerousness.

The United States has an opportunity here to engage in a dialogue with the international community about how international law should treat detention of nonstate actors against whom a nation-state has authorized the use of military force. If this Article's analysis is persuasive—that is, if conventional criminal law is insufficient to address the conduct of such nonstate actors but the traditional law of armed conflict does not translate perfectly either—then the model proposed herein may be a start toward reconciling military force and criminal prosecution into a coherent international-law framework for the problems presented by nonstate belligerents.

proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”).

279. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173 Principle 11(1), 43 U.N. GAOR, Supp. No. 49, U.N. Doc. A/43/49 (Dec. 9, 1988) (“A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority. A detained person shall have the right to defend himself or to be assisted by counsel as prescribed by law.”); *id.* at Principle 11(3) (“A judicial or other authority shall be empowered to review as appropriate the continuance of detention.”).