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Robert Chesney & Jack Goldsmith

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Robert Chesney* and Jack Goldsmith**

* Associate Professor of Law, Wake Forest University School of Law.

** Henry L. Shattuck Professor of Law, Harvard Law School. We thank Curtis Bradley, Daniel Meltzer, Eric Posner, Carol Steiker, Matthew Waxman, and Adrian Vermeule for comments.

INTRODUCTION

Six years after the 9/11 attacks, U.S. policy concerning the detention of alleged terrorists remains legally uncertain and politically contested. The Bush administration has used three different mechanisms—traditional civil trials, military commissions, and military detentions—to justify the detention of terrorists, and not always in an obviously principled or coherent fashion. Congress has legislated with respect to military commissions in the Military Commissions Act of 2006.[1] But despite numerous reform proposals, Congress has declined to address the more consequential issue of military detention without trial in any detail or to address the proper relationship among the three detention mechanisms.[2] The Supreme Court has continued its biannual consideration of detention issues by granting certiorari in *Boumediene v. Bush*, a case challenging the Military Commissions Act of 2006.[3] But there is little prospect that *Boumediene* will lay the detention debate to rest.

Potential models for terrorist detention span from the pure model of military detention at one extreme to the pure model of civilian criminal trial at the other, with military commissions somewhere in the middle, possessing features of both models. These detention models have traditionally differed

1. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

2. Congress did not expressly address the issue of detention in the September 18, 2001, Authorization for Use of Military Force, *see* Pub. L. No. 107-40, 115 Stat. 224 (2001), although that authorization has been deemed to authorize at least some forms of traditional military detention. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 517 (2004). The Intelligence Reform and Terrorism Prevention Act of 2004 included provisions expanding the scope of federal criminal law relating to terrorism, but did not purport to address detention policy per se. *See* Pub. L. No. 108-458, 118 Stat. 3638. In the Detainee Treatment Act of 2005 (DTA), Congress crafted a framework for judicial review of military detention at Guantanamo but said little about the procedures and substantive standards the military should employ in making detention decisions. *See* Pub. L. No. 109-148, 119 Stat. 2739. The Military Commissions Act of 2006 reaffirmed the DTA framework for judicial review, but did not further address detention procedures and standards. *See* Pub. L. No. 109-366, 120 Stat. 2600.

3. Boumediene v. Bush, 127 S. Ct. 3078 (June 29, 2007) (vacating earlier order and granting certiorari). The court previously engaged detention issues in *Hamdi v. Rumsfeld*, 542 U.S. 507, and *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

along two dimensions: detention criteria (i.e., what the government must prove to detain someone) and procedural safeguards (i.e., the rights and procedures employed to reduce the risk of error in making detention determinations). The military detention model is the least demanding, traditionally requiring a showing of mere group membership in the enemy armed forces and providing alleged detainees with relatively trivial procedural protections. At the other extreme, the civilian criminal model is the most demanding, tending to require a showing of specific criminal conduct and providing defendants with a panoply of rights designed to reduce the risk of erroneous convictions.

Neither model in its traditional guise can easily meet the central legal challenge of modern terrorism: the legitimate preventive incapacitation of uniformless terrorists who have the capacity to inflict mass casualties and enormous economic harms and who thus must be stopped before they act. The traditional criminal model, with its demanding substantive and procedural requirements, is the most legitimate institution for long-term incapacitation. But it has difficulty achieving preventive incapacitation. Traditional military detention, by contrast, combines associational detention criteria with procedural flexibility to make it relatively easy to incapacitate. But because the enemy in this war operates clandestinely, and because the war has no obvious end, this model runs an unusually high risk of erroneous long-term detentions, and thus in its traditional guise lacks adequate legitimacy.

The main goal of this Article is to show how the two systems have moved to rectify their inadequacies and, in doing so, have converged on procedural and especially substantive criteria for detention. During the past five years, the military detention system has instituted new rights and procedures designed to prevent erroneous detentions, and some courts have urged detention criteria more oriented toward individual conduct than was traditionally the case. At the same time, the criminal justice system has diminished some traditional procedural safeguards in terrorism trials and has quietly established the capacity for convicting terrorists based on criteria that come close to associational status. Each detention model, in short, has become more like the other. Despite convergence, neither model as currently configured presents a final answer to the problem of terrorist detention. But the convergence trend does identify areas of consensus about detention criteria and procedural safeguards and highlights the outstanding issues that any serious detention reform must face.

We begin this Article in Part I by establishing baseline accounts of the criminal and military detention models as they have been traditionally understood, including a discussion of why these models have employed distinct detention criteria and procedural safeguards. Part II describes pre-9/11 developments that anticipated post-9/11 convergence, as well as the theoretical grounds for departing from both traditional models. Part III documents the resulting convergence of the two models along the dimensions of both detention criteria and procedural safeguards. Part IV uses the lessons of

convergence to outline the task facing would-be reformers.

I. THE TRADITIONAL SEPARATION OF CRIMINAL AND MILITARY DETENTION MODELS

The traditional models for military and criminal detention have distinct theoretical foundations. Military detention aims to incapacitate in order to prevent future harm in battle, but it in no way implies condemnation of those detained.[4] Criminal punishment, by contrast, aims to condemn, to punish, to provide retribution for specific past conduct, and to deter future bad conduct.[5] Not surprisingly, the legal frameworks for detention under each model differs along two dimensions: the criteria defining those persons who are subject to detention and the procedural safeguards that serve to reduce the risk of a mistake in determining that a particular person satisfies those criteria. This Part summarizes those differences.

A. *Detention Triggers: Conduct Versus Status*

Associational status and individual conduct each play some role as detention criteria in both the criminal and military contexts. Military detention traditionally emphasizes status more than conduct, however, while the reverse is true in the criminal justice system.

1. *Criminal prosecution and individual conduct*

In the American legal tradition, criminal sanctions typically attach to one's conduct and not one's status or associations. There have long been limited exceptions to this rule. For example, Continuing Criminal Enterprise (CCE)[6] and Racketeer Influenced and Corrupt Organizations Act (RICO)[7] offenses involve a form of associational liability. These statutes criminalize participation in organizations that conduct illegal activity. But mere association is not enough for liability to attach in either case; for both CCE and RICO liability, prosecutors must demonstrate the defendant's commission of certain predicate criminal acts.[8] Criminal conspiracy, by contrast, requires no predicate criminal

4. *Hamdi*, 542 U.S. at 518 (citing Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 84 INT'L REV. RED CROSS 571, 572 (2002)). Military detention also makes possible the law-of-war prohibition against denial of quarter.

5. *See, e.g.*, HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 9-13 (1968); FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME 18-25 (1995); Christopher Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. 121, 129 (2005).

6. 21 U.S.C. § 848 (2000).

7. 18 U.S.C. §§ 1961-1968 (2000).

8. *See* 18 U.S.C. § 1962(c) (making it unlawful to participate in the affairs of a

act. But it does require proof that the association took the form of an agreement to commit an offense, and hence can be distinguished from broader approaches to associational liability—at least as traditionally construed.[9]

An even closer brush with pure membership liability can be found in the Alien Registration Act of 1940 (Smith Act).[10] The Act is best known for its speech-related provisions that were frequently invoked during the Cold War.[11] A handful of Cold War prosecutions, however, turned on the membership ban in section 2(a)(3) of the Act, which made it a felony:

> to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.[12]

The Supreme Court upheld a prosecution under this provision in 1961 in *Scales v. United States*.[13] It reasoned that criminal punishment can be based on status as a group member as long as the government proves that the defendant (i) was an "active" rather than merely "nominal" member of the group (arguably making Smith Act liability more demanding than conspiracy liability) and (ii) specifically intended to further the group's unlawful ends.[14] *Scales* thus left open the door to further status-based prosecutions predicated on association, at least subject to a relatively strict mens rea requirement. Nonetheless, though section 2(a)(3) remains on the books today as the third paragraph of 18 U.S.C. § 2385, it rarely has seen action and remains best understood as an exception to the general rule in which criminal liability hinges on one's conduct rather than

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racketeering enterprise by means of either a pattern of racketeering activity or collection of unlawful debt); *id.* § 1961(1) (defining "racketeering activity" to include a range of indictable offenses); *id.* § 1961(5) (defining "pattern of racketeering activity" to mean "at least two acts of racketeering activity"); 21 U.S.C. § 848(c) (2000) (requiring proof of the defendant's violation of felony offenses listed in subchapters I and II of Chapter 13 ("Drug Abuse Prevention and Control")).

9. Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 451-53 (2007). As we discuss in more detail below, one way that criminal liability has changed in response to terrorism involves a broadening conception of conspiracy liability. *See infra* Part III.A.1.b.

10. 18 U.S.C. § 2385 (2000). Congress enacted the Smith Act in the summer of 1940 against the backdrop of widespread concern about the potential presence in the United States of subversive individuals and groups supporting the violent overthrow of the government. *See* ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 439-43 (1941); RICHARD W. STEELE, FREE SPEECH IN THE GOOD WAR 69-81 (1999).

11. *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 110-29 (1970); TED MORGAN, REDS: MCCARTHYISM IN TWENTIETH-CENTURY AMERICA 313-20, 375 (2003).

12. Smith Act of 1940, 54 Stat. 670-71, tit. I, § 2(a)(3) (codified at 18 U.S.C. § 2385 (2000)).

13. 367 U.S. 203 (1961). For a fuller analysis of the decision in *Scales*, see Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 66-68 (2005).

14. 367 U.S. at 226-29.

one's associations.

2. *Military detention and associational status*

The Supreme Court explained in a 2004 opinion upholding the detention of Yaser Hamdi that military detention until the cessation of hostilities, without charge or trial, is a "fundamental and accepted . . . incident to war" designed "to prevent captured individuals from returning to the field of battle and taking up arms once again."[15] But who precisely is subject to this rule? The laws of war traditionally emphasize pure associational status as the primary ground for detention; individual conduct provides only a secondary, alternative predicate.

The point is clearest with respect to international armed conflicts, as that phrase is defined in Common Article 2 of the Geneva Conventions of 1949.[16] Article 21 of the Third Geneva Convention (GC III) authorizes parties to such a conflict to detain during hostilities any individual who qualifies as a prisoner of war (POW).[17] GC III Article 4(A) in turn specifies six categories of persons who fall under that heading.[18] Four of these categories are defined exclusively with reference to associational status: membership in enemy armed forces, membership in an armed force that professes allegiance to an unrecognized government, persons authorized to accompany such forces, and those who crew merchant marine vessels or civilian aircraft.[19] A fifth category blends an associational element (membership in a militia, volunteer corps, or organized resistance movement not incorporated into a party's armed forces) with a conduct criterion (compliance with a set of specific conduct norms including "being commanded by a person responsible for his subordinates; . . . having a fixed distinctive sign recognizable at a distance; . . . carrying arms openly; [and] conducting their operations in accordance with the laws and customs of war").[20] Only one category—the relatively obscure *levee en masse*—defines POW eligibility purely in conduct rather than membership terms.[21] In short,

15. Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004).

16. An international armed conflict refers to all cases of armed conflict, whether or not declared, "between two or more of the High Contracting Parties" to the Conventions. Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]. The phrase also applies "to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." *Id.* That another participant in the conflict is not a party to the Conventions has no bearing on the obligation of High Contracting Parties to obey Convention strictures as between one another. *See id.*

17. *See id.* arts. 21, 118.

18. *See id.* art. 4.

19. *See id.* arts. 4(A)(1), 4(A)(3)-(5).

20. *See id.* art. 4(A)(2).

21. *See id.* art. 4(A)(6) (covering those who are inhabitants of unoccupied territory if "on the approach of the enemy," they "spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war").

membership in a specific group is a necessary condition for POW status in five out of six scenarios, and for the most part, it is a sufficient condition as well. Associational status in that sense is the primary triggering condition for military detention during international armed conflict.

The Fourth Geneva Convention (GC IV) governs the treatment of some persons in an international armed conflict who do not qualify as POWs but who nonetheless "find themselves . . . in the hands of a Party to the conflict or Occupying Power of which they are not nationals."[22] GC IV recognizes the state's authority to intern such persons on security grounds in at least some contexts but does not purport to restrict the substantive criteria for determining who in particular may be detained.[23] The Commentary to the GC IV provisions makes clear, in fact, that the substantive grounds for internment decisions are left to the discretion of the detaining state and that the drafters anticipated internment on the basis of "membership" in dangerous organizations.[24]

The foregoing discussion concerned international armed conflicts. Some have questioned whether the laws of war also provide for military detention or preventive internment during non-international armed conflicts (NIACs).[25] We

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22. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 4, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]. Such status does not extend, however, to those who are "[n]ationals of a neutral state who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State" so long as their state "has normal diplomatic representation in the State in whose hands they are." *Id.*

23. *See id.* art. 27 (authorizing "measures of control and security in regard to protected persons as may be necessary as a result of the war"); *id.* art. 42 (addressing internment in territory of Detaining Power); *id.* art. 43 (providing for review of necessity of continued internment); *id.* art. 78 (addressing internment in occupied territory); *see also* OSCAR M. UHLER ET AL., IV COMMENTARY: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 207 (Jean S. Pictet ed., Maj. Ronald Griffin & C.W. Dumbleton trans., 1958) (construing Article 27 to include internment).

24. *See* UHLER ET AL., *supra* note 23, at 257-58. Some have suggested that non-POWs cannot be detained for preventive purposes except insofar as they are captured while directly participating in hostilities. *See, e.g.*, Brief for National Institute of Military Justice as Amicus Curiae Supporting Petitioners at 16-23, Boumediene v. Bush, 127 S. Ct. 3078 (2007) (No. 06-1195). This argument builds from the premises that non-POWs are civilians, and that civilians may only be targeted with lethal force while directly participating in hostilities. *See id.* at 16-17. Even if we accept these premises, it does not follow that civilians are free from detention in the context of armed conflict except insofar as they can be linked to direct participation in hostilities (unless one defines direct participation broadly to include membership simpliciter as a detention criterion). A contrary conclusion would require that a "direct participation" requirement be superimposed on the quite different standards of civilian internment in GC IV even though nothing in the text or drafting history of GC IV supports this conclusion.

25. *See* Brief for National Institute of Military Justice as Amicus Curiae Supporting Petitioners, *supra* note 24, at 20 n.22; John Cerone, *Jurisdiction and Power: The Intersection of Human Rights Law & the Law of Non-International Armed Conflict in an Extraterritorial Context*, 40 ISR. L. REV. (forthcoming 2008) (manuscript at 17, on file with authors) (contending that the law of war provides no affirmative authority to kill or detain combatants in the NIAC context); *cf.* JENNIFER K. ELSEA, CRS REPORT FOR CONGRESS: TREATMENT OF "BATTLEFIELD DETAINEES" IN THE WAR ON TERRORISM, CRS-40, No. RL31367 (Jan. 23,

think it clear that they do. Common Article 3 of the Geneva Conventions of 1949 expressly refers to the fact that its protections extend to persons (including members of armed forces) who have become *hors de combat* as a result of any cause, including "detention." The drafting history of the Conventions confirms this conclusion.[26] Additional Protocol II (AP II) treats the issue similarly. Article 5, for example, specifies a variety of protections for any "persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."[27] As explained in the commentaries to AP II, this language was intended to "cover[] both persons being penally prosecuted and those deprived of their liberty for security reasons, without being prosecuted under penal law."[28] Consistent with these readings, state practice in the post-1949 era provides numerous examples in which international armed conflict-style detention frameworks have been used during NIAC.[29] It does not follow that the laws of war contemplate the use of any

2007) (stating that in a NIAC a party must be accorded "belligerent" status before the law of war's detention model may be applied). Some have argued that the laws of war are silent on the question of military detention during NIAC, permitting states to employ military detention in that context insofar as domestic legal authorities so provide (subject to international human rights law norms governing detention). *See, e.g.*, *Hearing on the U.S. Detention Facility at Guantanamo Bay Before the United States Commission on Security and Cooperation in Europe (Helsinki Commission)* (testimony of Gabor Rona, Int'l Legal Dir., Human Rights First) (June 21, 2007), http://www.humanrightsfirst.info/pdf/07621-usls-rona-testimony-full.pdf. Given the existence of the AUMF, which expressly authorizes the use of all necessary and appropriate military force against the entity responsible for the 9/11 attacks (i.e., al Qaeda) and those who harbor it (i.e., the Taliban), it is not clear that this claim differs in substance from the position we describe in the text. *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2091 (2005) (observing that the AUMF—a domestic statute—"should be read as authorizing the President to do what the laws of war permit," absent special circumstances suggesting otherwise).

26. At the Diplomatic Conference that led to the Geneva Conventions, the Czechoslovakian delegate had objected to the draft of what would become Common Article 3 on the ground that it did not expressly state that prisoners of war, as such, would be within its protections. *See* IIB FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 334 (2004). The Swiss delegate responded that the draft did in fact encompass prisoners of war in that it referred to "members of the armed forces who have laid down their arms," emphasizing that the draft at least ensured minimum standards of treatment for such persons even if it failed to incorporate additional POW benefits familiar from the GC III context such as pay. *See id.* at 336. *See generally* LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT 60 (2002). Both delegates appeared to assume that military detention would exist in at least some NIACs.

27. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 5(1), June 8, 1977, 1125 U.N.T.S. 609, 16 I.L.M. 1442 [hereinafter AP II].

28. CLAUDE PILLOUD ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1386 (Yves Sandoz et al. eds., 1987); *see also* AP II, *supra* note 27, art. 6(5) (calling for amnesty at the conclusion of hostilities for those who have been "interned or detained").

29. The case studies reported by the Civil War Project established by the American Society of International Law in 1966 provide numerous examples. *See* Kathryn Boals, *The*

particular detention criteria during NIAC. On that issue, the laws of war seem silent, leaving the matter in the discretion of the state subject to any other applicable legal considerations.

B. *Procedural Safeguards*

The criminal and military models of detention traditionally have differed sharply with respect to the procedural safeguards each offers for determining whether a given person is subject to detention.

The criminal justice system invests defendants with very generous rights, including the requirement of proof beyond a reasonable doubt;[30] relatively strict evidentiary rules;[31] the Sixth Amendment Confrontation Clause;[32] the prohibition against ex parte evidence;[33] the requirement that the government dismiss its indictment in the event that a criminal defendant cannot receive a fair trial without having access to classified information that the government is not willing to share;[34] the requirement that the government disclose evidence in its possession that would tend to exculpate the accused[35] or impeach the government's witnesses;[36] the Sixth Amendment right to compulsory process to assist the defendant in obtaining witnesses and evidence;[37] the Fifth Amendment privilege against self-incrimination and other limitations on the

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Relevance of International Law to the Internal War in Yemen, *in* THE INTERNATIONAL LAW OF CIVIL WAR 196 (Richard A. Falk ed., 1971) (discussing the detention of prisoners by both France and the FLN); Arnold Fraleigh, *The Algerian Revolution as a Case Study in International Law*, *in* THE INTERNATIONAL LAW OF CIVIL WAR, *supra*, at 315 (discussing the detention of prisoners in Yemen); Donald W. McNemar, *The Postindependance War in the Congo*, *in* THE INTERNATIONAL LAW OF CIVIL WAR, *supra*, at 264 (discussing the detention of prisoners in the Congo); *see also* ALLAN ROSAS, THE LEGAL STATUS OF PRISONERS OF WAR: A STUDY IN INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 196 (1976) (observing that during the Nigerian Civil War (1967-1970) the "number of military prisoners seems to have amounted to several thousand").

30. *See In re* Winship, 397 U.S. 358, 362 (1970).

31. *See* FED. R. EVID. 403 (limiting admissibility of unfairly prejudicial evidence); *id.* 404(a) (prohibiting character evidence to prove conforming conduct of a criminal defendant, except in rebuttal should the defendant open the door with respect to a relevant trait). In general, of course, the rules of evidence restrain the efforts of both prosecution and defense.

32. *See* Crawford v. Washington, 541 U.S. 36 (2004) (establishing inadmissibility of testimonial statements); Davis v. Washington, 126 S. Ct. 2266 (2006) (clarifying meaning of "testimonial" to bar admission of victims' written statements in an affidavit given to a police officer).

33. *See* FED. R. CRIM. P. 43 (requiring defendant's presence in courtroom at "every trial stage").

34. *See* Jencks v. United States, 353 U.S. 657, 672 (1957) ("The burden is the Government's . . . to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession.").

35. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963).

36. *See* Giglio v. United States, 405 U.S. 150, 154 (1972).

37. *See* United States v. Cooper, 4 U.S. (4 Dall.) 341 (C.C. Pa. 1800).

criminal interrogation process;[38] the right to discovery of documents and other information in the government's possession if material to the defense, intended to be used at trial, or taken from the defendant;[39] the right to discovery of relevant statements previously made by the government's witnesses;[40] the right to a trial that is open to the public;[41] the right to a grand jury indictment;[42] the right to trial before "an impartial jury of the State and district wherein the crime shall have been committed";[43] the right to a unanimous verdict;[44] the right not to be subjected to double jeopardy;[45] the right to due process of law;[46] relatively extensive opportunities for direct and collateral judicial review in the event of a conviction;[47] and, critical to all of the above, the right to counsel.[48]

Taken together, these rights reflect a systematic commitment to minimizing the rate of wrongful conviction. They operationalize the idea that it is better for some guilty persons to go free than for one innocent person to be convicted of a crime.

No such norm applies to military detention during armed conflict, and, for many reasons, the traditional military detention process provides fewer procedural protections. The exigencies of traditional armed conflict render many procedural safeguards difficult to implement in practice. Soldiers on the battlefield are not law enforcement officers and in most instances lack the time, resources, or training to collect evidence with an eye toward eventual use in court proceedings. Nor would we wish them to focus on such matters when engaged in combat operations. Relatedly, the error rate of relatively casual procedures in a traditional war is thought to be relatively low because captured soldiers are likely to be in uniform. Nor would there normally be any need to use classified information—let alone information capable of revealing the

38. *See* 18 U.S.C. § 3501 (2000) (specifying factors concerning voluntariness of confession); Miranda v. Arizona, 384 U.S. 436 (1966).

39. *See* FED. R. CRIM. P. 16(a)(1)(E).

40. *See* 18 U.S.C.A. § 3500 (West 2007).

41. U.S. CONST. amend. VI.

42. *Id.* amend. V.

43. *Id.* amend. VI.

44. *See, e.g.*, United States v. Ferris, 719 F.2d 1405, 1407 (9th Cir. 1983) (construing Sixth Amendment to require unanimity on the factual elements of the charged offense).

45. U.S. CONST. amend. V.

46. *Id.*

47. *See, e.g.*, 28 U.S.C.A. § 2254 (West 2007) (habeas review of state convictions); *id.* § 2255 (habeas review of federal convictions); Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1 (1994) (discussing the scope and limits of appellate rights in criminal cases).

48. *See* FED. R. CRIM. P. 44; Gideon v. Wainwright, 372 U.S. 335 (1963). Note that the list includes neither Fourth Amendment search-and-seizure restraints nor the manifold statutory and administrative restraints on the investigative process. By and large, these measures serve privacy values and are not directed toward increasing the accuracy of the fact-finding process; indeed, at times they may serve the former value at the expense of the latter.

sources and methods of intelligence collection—to establish the grounds for detention in a traditional armed conflict. In addition, the desire to obtain the benefits of POW status ordinarily would encourage captured soldiers to concede their associational status, not deny it. Finally, an unduly burdensome procedural system that resulted in erroneous releases of enemy forces might undermine morale among the armed forces and create unwanted incentives for the denial of quarter.

For these and other reasons, law of war treaties mandate very few procedural protections for military detention.[49] GC III and GC IV do not address the question of how to determine whether a captured person is in fact someone subject to detention rather than an innocent civilian detained by mistake. The closest they come is in GC III Article 5, which specifies that a "competent tribunal" must resolve "doubt" as to whether a person who has committed a "belligerent act" warrants POW status, but does not explain what constitutes a "competent tribunal" or what procedures the tribunal must employ.[50] Additional Protocol I (AP I) also requires a "competent tribunal" to resolve POW status doubts, and additionally creates a rebuttable presumption that the detainee is in fact a POW.[51] But it says nothing about the tribunal or (with the exception of the rebuttable presumption) its procedures.[52] AP I also

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49. Some commentators have interpreted this silence to signify an intent to leave the question of process within the discretion of the detaining state. *See* Naqvi, *supra* note 4, at 582.

50. ROSAS, *supra* note 29, at 409. The ICRC Commentary explains that the original language proposed by the ICRC on this issue called for a determination by "some responsible authority," but that this language drew an objection on the ground that "decisions which might have the gravest consequences should not be left to a single person, who might often be of subordinate rank." JEAN DE PREUX ET AL., III COMMENTARY: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 77 (Jean S. Pictet ed., A.P. de Heney trans., 1960). The phrase "military tribunal" was considered as a replacement, but rejected on the ground that compelling such a proceeding "might have more serious consequences than a decision to deprive [the detainee] of the benefits afforded by the Convention." *Id.* (citing FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, *supra* note 26, at 270). The drafters of GC III settled on "competent tribunal" as an acceptable alternative. *See id.* During the drafting of Additional Protocol I, which contains a comparable provision at Article 45(1), the drafters noted that the tribunal may be "administrative in nature." XV OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS: GENEVA (1974-1977), at 392 (1978) [hereinafter OFFICIAL RECORDS].

51. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1) art. 45(1), June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1390 [hereinafter AP I].

52. One delegate to the AP I negotiations, observing the absence of specific procedural safeguards for tribunal hearings, noted that the matter should be determined by the tribunals themselves as "we would be ill-advised if we tried to set up rules of evidence with regard to the question of how to prove that one belongs to an organization." XV OFFICIAL RECORDS, *supra* note 50, at 472 (Mar. 19, 1975). Another delegate objected, arguing that it would be better to specify "in precise terms the guarantees of protection that the competent tribunal could and should offer." *Id.* at 485 (Mar. 20, 1975). Among other things, he suggested, the draft should include (i) a requirement that the tribunal be a "properly constituted, non-

specifies that persons subject to arrest, detention, or internment have a right to be informed promptly "of the reasons why these measures have been taken," and that such persons should be released as soon as possible once the circumstances justifying such treatment have ceased.[53] But although AP I specifies a variety of procedural safeguards for those who are prosecuted for offenses, it does not provide procedures for detention and internment determinations. Similarly, the GC IV provisions authorizing internment of civilians for security purposes prescribe no particular safeguards other than periodic review of internment decisions.[54]

No universal practice supported by *opinio juris*—and thus no customary international law—has emerged to fill these gaps.[55] U.S. practice, for example,

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political military court," (ii) a prohibition on "moral or physical coercion" used to induce an admission of non-POW status, (iii) a right to call witnesses, (iv) a right to an interpreter, and (v) the right to be informed in advance of the nature of the allegations against him. *Id.* Ultimately these suggestions were rejected, and the final version of AP I remained silent on the question of tribunal procedures. *Cf.* ROSAS, *supra* note 29, at 409 ("[The tribunal] may be an administrative board of officers, determining the status of a captured person in a rather summary fashion immediately upon capture.").

53. AP I art. 75(3). According to the Commentary to Article 75, "Internees will . . . generally be informed of the reason for such measures in broad terms, such as legitimate suspicion, precaution, unpatriotic attitude, nationality, origin, etc. without any specific reasons being given." PILLOUD ET AL., *supra* note 28, at 875; *see also* Ashley S. Deeks, *Administrative Detention During Armed Conflict*, 40 CASE W. RES. J. INT'L L. (forthcoming 2008) (discussing limited specification of procedural safeguards).

54. Article 27, which provides general authority for necessary security measures such as internment, says nothing specifically about process. *See* GC IV, *supra* note 22, art. 27. Article 43, dealing with internment of persons located in the detaining state's own territory, specifies a right to have "such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose," on at least a twice-yearly basis. *Id.* art. 43. The ICRC commentary correctly notes that the "safeguard provided [by this provision] is an *a posteriori* arrangement," with "a great deal [left] to the discretion of the State of residence in the matter of the original internment." UHLER ET AL., *supra* note 23, at 260; *see also id.* at 261 (concluding that "[t]he procedure provided for in the Convention is a minimum," and encouraging states to go further) Article 78, which deals with internment in occupied territory, states that internment decisions "shall be made according to a regular procedure . . . [that] shall include the right of appeal," and that such determinations "shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power." GC IV, *supra* note 22, art. 78. The ICRC commentary concludes that beyond this requirement "[i]t is for the Occupying Power to decide on the procedure to be adopted." UHLER ET AL., *supra* note 23, at 368. The drafters of GC IV, in sum, were more concerned with mandating humane conditions of treatment for those who are interned than with attempting to regulate the process of determining who should be interned in the first place. *See generally* Deeks, *supra* note 53 (summarizing state practice).

55. Notably, the ICRC's study of the customary law of war does not discuss state practice with respect to procedural safeguards in the international armed conflict context (beyond noting the treaty provisions discussed in the text above), though it does note that detention in accordance with GC III and IV does not violate the customary norm against arbitrary deprivation of liberty. *See* 1 Jean-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL LAW 344 (2005).

has varied considerably over the years. During the Vietnam War, the U.S. military's detention process was governed by "MACV Directive 20-5," promulgated by Headquarters, United States Military Assistance Command, Vietnam.[56] This regulation specified relatively elaborate procedural safeguards to be employed during the detention screening process, including a right to "reasonably available" counsel (including an appointed JAG counsel if necessary) and a right to be present other than during the tribunal's deliberations.[57] After Vietnam, however, the military adopted detention screening regulations that did not include comparable rights. The most recent iteration of those rules, Army Regulation 190-8 (AR 190-8), expressly contemplates the ex parte presentation of sensitive information and contains no right to be represented by an attorney.[58]

The practices of other states seem to vary as well. Canadian practice closely conforms to the AR 190-8 framework just described,[59] while British practice appears to track MACV Directive 20-5 by permitting representation by counsel and precluding the use of ex parte procedures.[60] Israeli practice, in the form of a 2002 statute known as the Incarceration of Unlawful Combatants Law, lies between these poles. Under this framework, a person may be detained by the military upon a finding by the Chief of the General Staff that there is "reasonable cause to believe that [he or she] is an unlawful combatant and that his release will harm State security."[61] The statute provides a rebuttable presumption that the person's release would harm state security if he or she "is

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56. Military Assistance Command Vietnam Directive No. 20-5 (Sept. 21, 1966, as amended Mar. 15, 1968), *in* 62 AM. J. INT'L. L. 765, 768 (1968) [hereinafter MACV Dir. 20-5]. These directives appear to be the first efforts to implement Article 5 in writing. *See* ELSEA, *supra* note 25, at CRS-29.

57. MACV Dir. 20-5, *supra* note 56, at 768, 771-73 (Annex A(7)(c), (8), and (14)(l-n)).

58. *See* Army Regulation 190-8, § 1-6(e)(3), (5) (1997), *available at* http://www.usapa.army.mil/pdffiles/r190_8.pdf.

59. *See* Prisoner-of-War Status Determination Regulations, SOR/91-134 § 15 (1991) ("(1) A tribunal may hear evidence in camera and in the absence of the detainee where the tribunal considers it necessary to do so in the interest of national security. (2) The tribunal shall give the detainee an oral or a written summary of any evidence heard in the absence of the detainee that, in the opinion of the tribunal, would not be injurious to national security.").

60. *See* Naqvi, *supra* note 4, at 588. Naqvi relies on the Prisoner of War Determination of Status Regulations, attached as the First Schedule to the 1958 Royal Warrant Governing the Maintenance of Discipline Among Prisoners of War and promulgated as Appendix XVII of the 1958 British Manual of Military Law. Paragraph 5 of the Regulation does indeed call for provision of these rights, though only "so far as is practicable." *Cf.* Gordon Risius, *Prisoners of War in the United Kingdom*, *in* THE GULF WAR 1990-91 IN INTERNATIONAL AND ENGLISH LAW 297 (Peter Rowe ed., 1993) (describing—with respect to suspected members of Iraq's armed forces located in the United Kingdom itself during the Gulf War—the decision not only to permit legal representation but, also, to provide that representation at public expense for detainees unable to afford their own counsel).

61. Incarceration of Unlawful Combatants Law, 5762-2002 § 3(a) (Isr.), *available at* http://www.jewishvirtuallibrary.org/jsource/Politics/IncarcerationLaw.pdf.

a member of a force perpetrating hostile acts against the State of Israel."[62] That rule applies also to nonmembers who have participated, either directly *or indirectly*, in such a force's hostile activity.[63] Detainees are entitled to representation by counsel after no more than seven days, and have the right to review of the detention order by a district court judge within fourteen days.[64] A judge is not bound by the rules of evidence in conducting this review—except that coerced testimony is precluded—and is specifically authorized to receive evidence on an ex parte basis (including exclusion of detainee's counsel).[65]

The variability of these frameworks—depicted graphically in Appendix A—belies any claim that a specific set of procedural safeguards is mandated by the customary laws of war. Indeed, it would be difficult to show that any particular set of procedures used in actual practice reflects *opinion juris* rather than practical or political expediency.

II. EVOLUTIONARY PRESSURES

This Part outlines the evolutionary pressures on the traditional criminal and military models. It first describes pre-9/11 trends that presaged post-9/11 convergence, and then explains post-9/11 problems with both traditional criminal and military detention models that accelerated these trends toward convergence.

A. *Pre-9/11 Developments*

The post-9/11 convergence in military detention and criminal punishment had its roots in three pre-9/11 developments.

1. *Criminal justice and the preventive state*

Long before 9/11, prevention had become a significant goal of the criminal justice system. In the latter part of the twentieth century, a variety of legal developments—including the punishment of gang membership and recruitment, civil commitment schemes, habitual-offender statutes, laws permitting more juveniles to be tried as adults, community notification rules for sex offenders, and stricter sentencing regimes—created what some scholars described as a prospectively oriented "preventive state" that contrasted with the traditional

62. *Id.* § 7. If the Minister of Defense determines in writing that a force engages in hostile acts, this finding is presumed to be correct unless the detainee can prove otherwise. *Id.* § 8.

63. *See id.* § 7.

64. *See id.* §§ 5(a), 6(a). The detainee may appeal the District Court's determination to a judge of Israel's Supreme Court. *See id.* § 5(d).

65. *See id.* § 5(e).

retrospection-oriented "punitive" state.[66] Why this trend took hold when it did is not entirely clear, though public perceptions of heightened crime rates no doubt played a central role in creating the political conditions for passage of prevention-oriented legislation (just as political imperatives may have led politicians to direct the public's attention to issues of criminal law and policy).[67] Whatever its causes, the turn toward prevention in criminal justice provided a hospitable legal climate for the adoption of new statutes, or the creative interpretation of existing statutes, designed to facilitate early intervention for purposes of terrorism prevention.

2. *Laws of war and human rights*

The detention framework under the laws of war has always been oriented toward prevention. But in the thirty years prior to 9/11, the traditional military detention system came under pressure. A range of actors including scholars and the International Committee of the Red Cross argued that the more demanding standards of international human rights law (IHRL) should apply during armed conflict, especially in the context of non-international armed conflicts.[68] They argued in particular that relatively robust IHRL procedural safeguards applied to detentions in the NIAC context and were not displaced by the *lex specialis* of the laws of war.[69] At the same time, human rights considerations prompted reform movements within the law of war itself, as seen in the 1977 Additional Protocols to the Geneva Conventions. Among other things, the Additional Protocols extended legal protections to persons who take part in hostilities without qualifying for POW status under the terms of GC III Article 4(A). In particular, Protocol I gave POW status or other legal protections of the laws of war to members of "resistance" or "guerrilla" movements who purposefully do not distinguish themselves from the civilian population except when actually engaged in attack (and at times not even then).[70] The United States sharply

66. *See* Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1429-32 (2001); Carol S. Steiker, *Forward: The Limits of the Preventive State*, 88 J. CRIM. L. & CRIMINOLOGY 771, 771-76 (1998).

67. *See, e.g.*, Robinson, *supra* note 66, at 1433.

68. *See generally* Cerone, *supra* note 25; Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000); Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INT'L REV. RED CROSS 375 (2005). *But see* SECOND AND THIRD PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE UNITED NATIONS COMMITTEE ON HUMAN RIGHTS CONCERNING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS ¶ 130 (Oct. 21, 2005)), *available at* http://www.state.gov/g/drl/rls/55504.htm (explaining the United States position that the International Covenant on Civil and Political Rights does not apply in armed conflict).

69. As a general rule, *lex specialis* establishes that law of war principles control when both bodies of law apply simultaneously. *See, e.g.*, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 256-57 (July 8).

70. *See* George H. Aldrich, *Guerilla Combatants and Prisoner of War Status*, 31 AM.

resisted Protocol I and declined to ratify it in part for this reason. But most other nations ratified the treaty, and its enhanced legal protections for irregular fighters came widely to be viewed in some circles—though not within the U.S. government—as the baseline of legitimacy in the laws of war.

3. *Terrorism and the crime versus war debate*

Prior to the 1990s, terrorism was addressed primarily through the lens of criminal law.[71] Terrorist acts were criminal acts, subject to prosecution by whichever state might obtain custody of the perpetrators and assert jurisdiction over their conduct. This focus made sense at the time. Terrorists were thought to pose a relatively limited threat that did not rise to the front rank of strategic concerns. Conventional wisdom held that terrorist self-interest limited the scope of violence they might attempt to inflict. It was widely believed that terrorists aiming to draw attention to their cause—what Walter Laqueur describes as "propaganda of the deed"[72]—worried that going too far would alienate targeted constituencies. And state-sponsored terrorists were kept under control by national leaders who wanted to avoid retaliation. The harm that terrorists inflicted for the most part occurred outside the United States, moreover, thus reducing the domestic political salience of the issue.

As early as 1983, however, awareness that states were using nonstate actors as proxies to inflict significant harm on U.S. personnel overseas led some in the U.S. government to question a pure criminal law model and to endorse military modes of response to terrorism as an alternative.[73] The U.S. government used military force against terrorists in the 1980s, though not with an eye toward military detention by U.S. authorities of captured individuals or any other form of sustained engagement.[74] By the 1990s, experts and policymakers began to question the criminal law focus of U.S. counterterrorism

U. L. REV. 871, 871-74 (1982) (reviewing the debate concerning protected status for guerrilla fighters in connection with the drafting of the Additional Protocols, and defending the protective approach reached in Additional Protocol I); W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 84 (1990) (describing nature of the disagreement concerning protection for guerrilla fighters); *cf.* John B. Bellinger, III, *Introductory Remarks*, 38 GEO. WASH. INT'L L. REV. 501, 506-07 (2006) (discussing grounds for U.S. opposition to extending POW status to persons who do not comply with GC III Article 4(A)(2) criteria).

71. *See generally* TIMOTHY NAFTALI, BLIND SPOT (2005).

72. WALTER LAQUEUR, A HISTORY OF TERRORISM 49 (2d prtg. 2002).

73. *See, e.g.*, GEORGE P. SHULTZ, TURMOIL AND TRIUMPH: MY YEARS AS SECRETARY OF STATE (1995) (discussing disputes in the Reagan Administration concerning the propriety of resorting to military force in response to terrorist attacks). For a useful pre-9/11 criticism of the criminal law model, see Spencer J. Crona & Neal A. Richardson, *Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism*, 21 OKLA. CITY U. L. REV. 349 (1996).

74. Examples include the shelling of hills outside Beirut after the bombing of the Marine barracks in 1983, and the 1986 air strikes in Libya.

policy more aggressively.[75] The 1993 World Trade Center bombing, the sarin gas attacks carried out by Aum Shinrikyo in Tokyo, and related developments indicated that at least some groups and individuals hoped to cause harm on a massive scale, and not merely to use a calibrated degree of violence for propagandistic effect. A few people in the government began to worry that al Qaeda in particular represented a new and lethal phenomenon in strategic affairs: a transnational private entity with a demonstrated desire to inflict mass casualties on civilian populations, and at least some reasonable prospect of matching that desire with the requisite means.[76]

Worries about these growing threats resulted in a further embrace of the armed-conflict model of response to terrorism in the 1990s. At about the same time that the U.S. Attorney's Office in the Southern District of New York was unsealing a criminal indictment of bin Laden and other al Qaeda figures, the Justice Department's Office of Legal Counsel issued a determination that al Qaeda's actions constituted aggression that in turn triggered the right of the United States to use armed force in self-defense, up to and including the use of lethal force to kill bin Laden.[77] The Clinton Administration made plans to capture and, if necessary, kill bin Laden in reliance on this armed conflict rationale.[78] The rendition program that began under the Clinton Administration was probably premised on a similar "armed conflict" rationale.[79] And of course self-defense under the U.N. Charter—a law of war concept, not a criminal law concept—was the basis for missile strikes on an al Qaeda facility in Afghanistan and a pharmaceutical plant in Khartoum in response to the 1998 East African embassy bombings.[80]

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75. *See, e.g.*, RICHARD A. CLARKE, AGAINST ALL ENEMIES: INSIDE AMERICA'S WAR ON TERROR (2004); Crona & Richardson, *supra* note 73.

76. *See* MICHAEL SCHEUER, IMPERIAL HUBRIS: WHY THE WEST IS LOSING THE WAR ON TERROR (2004); MICHAEL SCHEUER, THROUGH OUR ENEMIES' EYES: OSAMA BIN LADEN, RADICAL ISLAM, AND THE FUTURE OF AMERICA (2006); LAWRENCE WRIGHT, THE LOOMING TOWER: AL-QAEDA AND THE ROAD TO 9/11 (2007).

77. *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT, 128, 132 & n.123 (2004); *see also* STEVE COLL, GHOST WARS: THE SECRET HISTORY OF THE CIA, AFGHANISTAN, AND BIN LADEN FROM THE SOVIET INVASION TO SEPTEMBER 10, 2001, at 427-28 (2004).

78. *See* COLL, *supra* note 77; JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 106 (2007); THE 9/11 COMMISSION REPORT, *supra* note 77, pts. 4, 6 (2004).

79. *See* GOLDSMITH, *supra* note 78, at 106; *see also Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlantic Relations: J. Hearing Before the Subcomm. on International Organizations, Human Rights and Oversight and the Subcomm. on Europe of the H. Comm. on Foreign Affairs*, 110th Cong. 13 (2007) (statement of Michael Scheuer, Former Chief, Bin Laden Unit, Central Intelligence Agency) (stating that Justice Department lawyers required rendition to be limited to persons constituting a "threat to the United States and/or its allies"); Michael Scheuer, *A Fine Rendition*, N.Y. TIMES, Mar. 11, 2005, at A23.

80. *See* THE 9/11 COMMISSION REPORT, *supra* note 77, pt. 4.2.

B. *Post-9/11 Problems with the Traditional Models*

These three pre-9/11 trends—the rise of prevention in the criminal law system, the importation of human rights law standards into the laws of war, and the growing realization that modern terrorism warranted military responses based on military authorities—were the seeds of the post-9/11 convergence of the criminal and military detention models. But they do not by themselves explain the convergence of the models that resulted when 9/11 generated a powerful political imperative for a more assertive, prevention-oriented approach to terrorism. The main reason for convergence after 9/11 was that the assumptions of the traditional criminal and military detention models did not match up with the new threat posed by al Qaeda. The adaption of each model to the new threat brought them closer together.

1. *Criminal model*

Before 9/11 the criminal justice system obtained many convictions of terrorists. But as the 9/11 attacks themselves demonstrate, these convictions were an ineffective response to al Qaeda and the emerging problem of mass-casualty terrorism.

The traditional criminal approach has several deficiencies besides its obvious failure to deter. It is often hard to apprehend individuals outside the United States. When the United States seeks to prosecute an individual located overseas, its practical alternatives for securing the defendant are limited. It may seek extradition if a treaty basis for doing so exists (though other states may be unwilling to comply in cases involving terrorism, as illustrated by Italy's cold reception to an American extradition request in connection with the *Achille Lauro* hijacking);[81] it may persuade the host country to render the individual into U.S. custody without formal extradition procedures;[82] or it may use trickery or force to seize the individual directly.[83] In the case of Osama bin Laden and a large number of other al Qaeda leaders and operatives known to have been in Afghanistan, however, none of these methods were effective prior to 9/11. Diplomatic efforts to induce the Taliban to give up bin Laden and his colleagues went nowhere, and attempts to spirit them out of Afghanistan with the assistance of local forces working with the CIA were equally fruitless.[84]

81. *See* Gerald P. McGinley, *The Achille Lauro Affair—Implications for International Law*, 52 TENN. L. REV. 691, 693 (1985).

82. *See U.S. Counter-Terrorism Strategy: Hearing Before the S. Judiciary Comm.*, 106th Cong. (1998) (statement of Louis J. Freeh, Director, Federal Bureau of Investigation) (describing renditions of terrorism suspects to the United States).

83. *See, e.g.*, United States v. Yunis, 924 F.2d 1086, 1089 (D.C. Cir. 1991) (describing Operation Goldenrod, in which a terrorism suspect was lured out of Lebanon to the high seas and there taken into U.S. custody).

84. *See* GEORGE TENET WITH BILL HARLOW, AT THE CENTER OF THE STORM: MY YEARS AT THE CIA 112-21 (2007); THE 9/11 COMMISSION REPORT, *supra* note 77, at 119-35, 141-42,

Such difficulties, combined with awareness of the potential consequences of failing to incapacitate—or at least disrupt—al Qaeda members, created tremendous pressure even prior to 9/11 to employ noncriminal modes of intervention, including the use of lethal military force.[85]

The substantive scope of criminal liability also presented a difficult question with respect to terrorism in the pre-9/11 context. Insofar as the defendant could be linked to a particular violent act, such as the attack on the World Trade Center in 1993 or the subsequent plot to destroy bridges, tunnels, and landmarks in New York, of course, there would be ample grounds for prosecution. But what of al Qaeda members or associates who could not be so linked? Prosecutors in New York had begun articulating a broad conception of conspiracy liability that might remedy this problem as early as the mid-1990s trial of Sheik Abdel Rahman[86]—an early sign of the convergence trend—but had not been obliged to put this theory to the test in light of their ability to link Rahman and others to specific violent plots. Prior to 9/11, therefore, it was far from clear that a successful prosecution could be brought based merely on proof of membership in al Qaeda (let alone mere involvement in the broader extremist jihad movement).

A third issue concerned modes of proof in court and related procedural concerns. Information that may be sufficient for inclusion in intelligence reports, and hence as a basis for government action in other contexts, is not necessarily admissible during a criminal trial in light of the battery of procedural safeguards described above. Many forms of hearsay are excluded under the Federal Rules of Evidence, for example, and the Sixth Amendment Confrontation Clause in any event precludes admission of all testimonial statements made outside of court without an opportunity for cross-examination. Disclosure rules may oblige the government to reveal information such as the identity of unindicted co-conspirators, as occurred in the Rahman trial.[87]

182-83, 187-89, 205-07.

85. For further discussion of the limited reach of criminal prosecution during the pre-9/11 era, see Andrew C. McCarthy & Alykhan Velshi, We Need a National Security Court 6 (2006) (unpublished manuscript), *available at* http://www.defenddemocracy.org/usr_doc/Court.doc (noting that prosecutors obtained convictions in each pre-9/11 case, but that such prosecutions included fewer than three dozen individuals while entailing tremendous expenditures of time and money).

86. The indictment in the "day of terror" bomb plot described the conspiracy both in terms of specific targets and in terms of a general desire to inflict harm on American civilians wherever they might be found. *See* Chesney, *supra* note 9, at 457-58. The latter allegations, standing alone, are similar to the conspiracy charge that prosecutors ultimately would pursue—successfully—against Jose Padilla in a case that epitomizes the convergence trend. *See infra* Part III.A.1.b.

87. *See* Andrew C. McCarthy, *Terrorism on Trial: The Trials of al Qaeda*, 36 CASE W. RES. J. INT'L L. 513, 520 (2004) (explaining that shortly after disclosure of the co-conspirator list to the defendants in the Rahman trial, the list was in bin Laden's hands in Khartoum); Michael B. Mukasey, Editorial, *Jose Padilla Makes Bad Law*, WALL ST. J., Aug. 22, 2007, at A15 (describing the same incident).

Complicating matters, inculpatory information may have been provided to the United States by a foreign intelligence agency under a use agreement that forbids its introduction in a public criminal proceeding. By the same token, even U.S. intelligence agencies may be reluctant to permit prosecutors to use certain information, out of fear that important sources or methods may be exposed.[88]

Such pressures can be mediated by the Classified Information Procedures Act (CIPA), but not resolved by it.[89] CIPA encourages judges to approve the use of redaction, substitution and other methods meant to reconcile a defendant's rights with the government's obligation to preserve the secrecy of sensitive information. Where those interests cannot be reconciled, however, the government is left with the stark choice of either permitting use of the information or else facing sanctions that can include dismissal of an indictment. As a result, the government may possess evidence that strongly suggests that an individual poses a particular terrorist threat, but may not be able to pursue a criminal prosecution.

The practicalities of obtaining custody, the limited capacity of substantive criminal law for prevention-oriented prosecutions, and the restraints imposed by the procedural safeguards of the criminal trial process all combined to limit the efficacy of the conventional criminal prosecution model as a mode of response to terrorism. Convictions could still be won, of course, as demonstrated by the impressive successes recorded by the U.S. Attorney's Office for the Southern District of New York during the 1990s.[90] But however successful those prosecutions were, the fact remains that difficulties of apprehension, liability, and proof sharply limited the options that federal prosecutors had prior to 9/11.[91] Changing perceptions regarding the magnitude

88. *See* Mukasey, *supra* note 87 (noting that testimony during the trial of Ramzi Yousef may have tipped off certain individuals as to the government's capacity to monitor their phone calls, resulting in the loss of that source of intelligence).

89. *See* 18 U.S.C.A. app. 3 §§ 1-16 (West 2007). The CIPA process itself can lead to difficult issues in connection with terrorism prosecutions. In *United States v. Bin Laden*, for example, Wadih El-Hage contended that his Sixth Amendment confrontation right was violated by a CIPA process in which defense counsel—but not the defendant himself—had access to classified information for purposes of making a CIPA § 5 designation (indicating that the defense would seek to disclose the information at trial, thus necessitating further CIPA review). United States v. Bin Laden, No. 98-CR-1023, 2001 WL 66393 (S.D.N.Y. Jan. 25, 2001). The court rejected the argument despite El-Hage's contention that his counsel was not in as good a position as he was to determine the significance of the information at issue. *See id.* at *5. That ruling foreshadowed the greater procedural tensions that would arise later in the Moussaoui prosecution.

90. Attorney General Michael Mukasey, formerly of the United States District Court for the Southern District of New York, has drawn attention to the additional question of resources, observing that terrorism-related cases "have strained the financial and security resources of the federal courts near to the limit." *See* Mukasey, *supra* note 87. If the problem were limited to resources, however, budgetary solutions could suffice to cure it.

91. As an illustration of other procedural issues that complicate the use of the criminal model with respect to transnational terrorist groups such as al Qaeda, Andrew McCarthy and

of the threat al Qaeda posed in the wake of 9/11 thus could be expected to manifest in pressure to increase the flexibility of the prosecutorial model as well as enhanced interest in the military alternative.

2. *Military detention model*

Convergence pressure in the military context stems less from efforts by government officials to make the detention criteria and procedural safeguards of the conventional military model more flexible than from efforts by a range of actors to make them more rigorous and demanding.[92] Such efforts are a predictable response to the awkward fit between the conventional military model and the particular features of al Qaeda and comparable entities.

The traditional model's emphasis on associational status as a detention trigger is difficult to apply to an amorphous clandestine network such as al Qaeda. Beyond the leadership core, it is difficult to determine what degree of association with al Qaeda suffices to warrant status-based detention even if the facts can accurately be determined.[93] The difficulty drops away if the suspect can be shown to have acted for al Qaeda on particular occasions, and where the person concedes his membership.[94] But the interest in prevention dictates that the government will wish to detain persons even before they can be linked to particular actions, and such persons frequently will deny the alleged connection. In such cases, the traditional detention criteria and weak procedural safeguards are both tempting and problematic.

In addition, al Qaeda's comprehensively clandestine nature subverts the considerations that ordinarily justify the minimal procedures afforded by the traditional military detention model. Even though the main criterion for military detention was some form of associational status, erroneous detentions were rare when the traditional scheme was applied to captured soldiers who wore uniforms and were usually keen to obtain POW status. Al Qaeda, however, confounds those assumptions.[95] First, its members are not citizens of any state at war with the United States; indeed, many are citizens of allies, and some are U.S. citizens.[96] Second, with the possible exception of al Qaeda units

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Alykhan Velshi note that uncertainty regarding the scope of the Fifth Amendment in the context of overseas investigations of noncitizens by U.S. officials nearly led to the suppression of the confession of one defendant personally involved in the 1998 bombing of the U.S. embassy in Nairobi, Kenya. *See* McCarthy & Velshi, *supra* note 85, at 8 n.10.

92. There are, to be sure, targeted efforts to make traditional military detention rules more flexible. Most notably, the CSRT process is distinct from the AR 190-8 process in that CSRT appears to tolerate use of at least some forms of coerced testimony.

93. *See* Bradley & Goldsmith, *supra* note 25, at 2113-16 (pointing out that the AUMF sheds no light on this issue, but noting that the law of war does provide some guidance).

94. *See id.* at 2113-14 & n.302 (giving the example of Richard Reid).

95. *See id.* at 2113.

96. *See* Raffi Khatchadourian, *Azzam the American: The Making of an al-Qaeda Homegrown*, THE NEW YORKER, Jan. 22, 2007, at 50.

that may have operated on the battlefield against the Northern Alliance in Afghanistan, al Qaeda leaders and operatives do not bear arms openly or wear uniforms or other distinguishing insignia, and in fact reject any obligation to distinguish themselves from civilian populations even when carrying out attacks. Third, many al Qaeda operatives purposefully hide among the civilian population. Fourth, a captured al Qaeda operative would have little incentive to admit to such an association, as there would be little or no prospect of thus obtaining POW status; on the contrary, such persons have every incentive to insist that a mistake has been made (a claim that would be facilitated by the clandestine nature of al Qaeda operations, all the more so where the person is captured in a civilian rather than a combat setting).

All of these factors make it much more likely that the traditional military detention process will result in erroneous detentions. The costs of such erroneous detentions are also higher in this war. The war against al Qaeda and affiliates has an endless quality in the sense that there is little or no prospect for negotiations leading to an agreed end to hostilities or an unconditional surrender. Even if the conflict can be terminated in practical terms through the suppression or elimination of al Qaeda, moreover, there is reason to believe the conflict could span generations. The same seemed theoretically possible in the midst of traditional conflicts, of course, but in this war there is an unusually high risk that preventive detention may prove indefinite.[97]

III. POST-9/11 CONVERGENCE

The criminal and military detention models have converged significantly in response to the pressures described above. Prosecutors in terrorism-related cases have interpreted federal criminal laws in a manner that approximates the status-based model associated with traditional military detention. The recent conviction of Jose Padilla epitomizes that trend. And a broad coalition of attorneys, scholars, interest groups, and others have employed a combination of litigation, lobbying, public relations, and diplomacy to challenge the government's post-9/11 use of military detention. The final result of these efforts is uncertain, but the government already has been forced to adopt many additional procedural safeguards, and there is reason to believe further changes lie ahead in light of the *Boumediene* litigation in the Supreme Court and the D.C. Circuit's *Bismullah* opinion[98] construing the scope of that court's authority to conduct review of military determinations of combatant status. As a result of these developments, the outlines of a hybrid detention system involving some form of associational status as a detention trigger,

97. *Cf.* Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (observing that the prospect of indefinite detention in an unorthodox conflict might "unravel" the assumptions underlying the traditional military detention model).

98. Bismullah v. Gates, 501 F.3d 178 (D.C. Cir. 2007), *amended by* Nos. 06-1197, 06-1397, 2007 WL 2851702 (D.C. Cir. Oct. 3, 2007).

complemented by relatively robust procedural safeguards, already lies in view.

A. *Criminal Prosecution Moves in the Direction of Greater Flexibility*

The convergence trend finds expression in the criminal context primarily with respect to the detention criteria of federal criminal law. With limited exceptions, this development has not required new legislation. Instead, prosecutors have responded to the prevention mandate with creative interpretations of existing statutes to establish criminal liability for those who can be shown to have joined foreign terrorist organizations or even the extremist jihad movement, irrespective of whether they can be linked to any particular plot. The traditional procedural safeguards of the criminal process have experienced less change, but even in that context convergence pressures have had some effect.

1. *Criminalizing membership in terrorist groups or movements*

Some post-9/11 terrorism prosecutions are comparable to their pre-9/11 predecessors in focusing on specific conduct by the defendant directly relating to particular acts of violence.[99] Others pursue the prevention goal by targeting defendants who are not themselves dangerous but who enhance the danger others pose by providing them with money, equipment, and the like.[100] The most notable category of cases, however, are those in which the defendant *is* thought to be personally dangerous because of his association with terrorist groups or individuals, but cannot yet be linked to any particular violent plan or act. This scenario pits the prevention imperative against the criminal justice system's traditional commitment to predicating liability on an individual's specific conduct. In a small but important set of post-9/11 cases, federal prosecutors have resolved this tension by pursuing a form of membership-based liability, akin to the traditional military detention criteria.

a. Section 2339B and group membership liability

Several statutes play important roles in this prevention regime. One is 18 U.S.C. § 2339B, a statute making it a felony to provide "material support or resources" to a designated foreign terrorist organization (FTO), so long as the defendant has knowledge of the recipient's identity and is aware either that the group has been designated as an FTO or at least that the group engages in

99. *See, e.g.*, United States v. Moussaoui, 382 F.3d 453 (4th Cir. 2004); United States v. Reid, 211 F. Supp. 2d 366 (D. Mass. 2002).

100. *See, e.g.*, United States v. Lakhani, 480 F.3d 171 (3d Cir. 2007) (affirming conviction for attempting to sell a surface-to-air missile to undercover agents posing as terrorists); *see also* Chesney, *supra* note 13, at 44-46 (collecting cases).

terrorist activity."[101] Section 2339B was enacted in 1996, in the midst of growing concern about the problem of terrorism (its passage was helped considerably by the 1995 Oklahoma City bombing).[102] On its face it functions as an embargo statute, reducing the ability of FTOs to raise funds or receive other support.[103] This is how it has been employed both prior to 9/11 and since.[104] Critically, however, the definition of forbidden "material support or resources" includes the word "personnel."[105] After 9/11, the Justice Department began to construe this term to include not only recruiting activities but also the provision of one's *own self* to an FTO, and in 2004 Congress amended the definition in a way that expressly adopts that construction.[106]

The most significant example of the personnel theory in action involves the so-called Lackawanna Six.[107] That case concerned a group of men from Lackawanna, New York who spent several weeks at an al Qaeda training camp in Afghanistan during the summer of 2001.[108] The FBI learned of this, and watched the men closely upon their return.[109] Time passed without indication that they planned or intended to commit any particular violent or otherwise unlawful act.[110] Yet in light of their training and association with al Qaeda, investigators and analysts understandably viewed them as a potential sleeper cell.[111] The question of whether and how to incapacitate the men received attention at the highest levels of government.[112] The military option offered a relatively clear basis for detention: the men's apparent association with al Qaeda would satisfy status-based detention criteria irrespective of what they

101. *See* 18 U.S.C.A. § 2339B(a)(1) (West 2007).

102. The origins of § 2339B are discussed in Chesney, *supra* note 13, at 4-18.

103. *See, e.g.*, United States v. Hammoud, 381 F.3d 316 (4th Cir. 2004) (affirming material support conviction of defendants who gave profits from black market cigarette traffic to Hezbollah), *vacated on other grounds*, 543 U.S. 1097 (2005).

104. *See* Chesney, *supra* note 13, at 19 (describing the nature of four pre-9/11 prosecutions under § 2339B); *id.* at 45 (describing comparable prosecutions after 9/11). Between September 2001 and July 2007, 108 separate defendants have been charged with at least one count of directly violating § 2339B or attempting or conspiring to violate § 2339B. *See* Robert M. Chesney, *Federal Prosecution of Terrorism-Related Offenses: Conviction and Sentencing Data in Light of the "Soft Sentence" and "Data Reliability" Critiques*, 11 LEWIS & CLARK L. REV. 851, 884 (2007).

105. *See* 18 U.S.C.A. § 2339A(b)(1) (West 2007). Section 2339B incorporates the § 2339A definition by reference. *See id.* § 2339B(g)(4).

106. *See* 18 U.S.C. § 2339A (2000) (amended by Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638); JEFF BREINHOLT, COUNTERTERRORISM ENFORCEMENT: A LAWYER'S GUIDE 284 (2004) (explaining that § 2339B could be used in this manner).

107. *See* Chesney, *supra* note 13, at 39-44 (citing sources).

108. *See id.* at 40.

109. *See id.* at 41.

110. *See id.*

111. *See id.* at 41-42.

112. *See id.* at 41-43.

planned to do going forward.[113] Thanks to the "personnel" provision in § 2339B, however, federal prosecutors could pursue a criminal indictment on precisely the same basis. That view prevailed, and the defendants subsequently entered guilty pleas to these and other charges.

It is not clear how often the personnel approach to § 2339B liability has played a role in other cases. Material support indictments frequently do not specify the particular aspect of the material support definition upon which prosecutors are relying, and the cases often terminate prior to trial through plea agreement.[114] The John Walker Lindh prosecution appears to have relied at least in part on this theory insofar as the § 2339B charge in that case was concerned,[115] however, and the prosecution of Mohamed Warsame for providing material support to al Qaeda does so expressly.[116] Other possible examples include the prosecutions of Mahmoud Yousseff Kourani,[117] Jeffrey Leon Battle and his codefendants,[118] Iyman Faris,[119] and Randall Todd Royer and his codefendants.[120] At least some of these cases differ from the Lackawanna paradigm in that the indictments include a range of other counts as well as allegations linking defendants to plans for particular violent acts. But the important point is that they endorse the principle of status-based liability as a tool for incapacitating suspected terrorists.

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113. *See* Michael Isikoff & Daniel Kladiman, *The Road to the Brig*, NEWSWEEK, Apr. 26, 2004, at 26.

114. Of the sixty-two individual defendants facing § 2339B charges since 9/11, forty-five have had the charge resolved without proceeding to trial. *See* Chesney, *supra* note 104, at 885 tbl.6 (reporting disposition data).

115. *See* United States v. Lindh, 212 F. Supp. 2d 541, 569-70 (E.D. Va. 2002) (observing, in the course of rejecting freedom of association challenge, that Lindh had joined a group that carries out violence, that "those who join [such groups], at whatever level, participate in the groups' acts of terror, violence, and murder," and that "the First Amendment's guarantee of associational freedom is no license to supply terrorist organizations with resources or material support in any form, including services as a combatant").

116. *See* United States of America's Bill of Particulars at 2, United States v. Warsame, No. CR-04-29 (D. Minn. Mar. 16, 2007) (elaborating that the § 2339B charge rests on personnel theory, as well as training and financial elements of the material support definition); Defendant's Brief Addressing the Bill of Particulars and the Constitutionality of Section 2339B as Applied at 2-5, *Warsame*, No. CR-04-29 (Apr. 9, 2007) (contesting adequacy of government's bill of particulars).

117. Indictment, United States v. Kourani, No. 03-CR-81030 (E.D. Mich. Nov. 19, 2003), *available at* http://news.findlaw.com/cnn/docs/terrorism/uskourani111903ind.pdf. The indictment against Kourani specified his membership in Hezbollah, but also alleged recruiting activities.

118. United States v. Battle, No. 02-CR-399 (D. Or. Dec. 1, 2003).

119. United States v. Faris, No. 03-CR-189 (E.D. Va. Oct. 28, 2003).

120. United States v. Royer, No. 03-CR-296 (E.D. Va. Apr. 9, 2004).

b. Conspiracy liability and the global jihad movement

Section 2339B has one significant limitation: it applies only where the defendant can be linked to an organization that the Secretary of State already has formally designated as an FTO.[121] Where a suspected terrorist cannot be so linked, prosecutors have turned to other statutes to establish a comparable capacity for intervention.

The most striking example involves Jose Padilla, an American citizen held by the military for three years on the belief that he was an al Qaeda agent who had reentered the United States in order to carry out either a "dirty bomb" plot or some other type of bombing. As the prospect of Supreme Court review drew close, the government elected to transfer Padilla from military to civilian custody in order to stand trial on criminal charges. In theory, Padilla might have been charged with conspiring to carry out a bombing campaign. But because the information inculpating Padilla in such a plot appeared to stem mostly if not entirely from the coercive interrogation of captured al Qaeda members, such a charge was never a realistic possibility. Whatever charges might be brought against Padilla would instead have to rely on evidence that would be admissible in light of the Federal Rules of Evidence, the Confrontation Clause, and due process.

This gave prosecutors relatively little with which to work. They had proof that Padilla's fingerprints appeared on a July 2000 "mujahideen recruitment form" used during the enrollment process at a militant jihad training camp in Afghanistan. Prosecutors also had wiretaps of conversations in the late 1990s in which Padilla seemed to speak in code about traveling to Afghanistan in connection with the jihad movement. Other evidence suggested that Padilla had been recruited, guided, and financed in this effort by individuals (including eventual codefendant Adham Amin Hassoun) who themselves seemed involved in encouraging participation in jihad. There was no other admissible evidence concerning Padilla's actions and intentions, and certainly nothing linking Padilla to any plans to commit any particular act of violence.

Based on this evidence, Padilla was charged with and convicted of violating 18 U.S.C. § 956(a), a statute that imposes up to a life sentence for

121. 18 U.S.C.A. § 2339B(g)(6) (West 2007). One statute that extends at least some degree beyond the scope of § 2339B is 50 U.S.C.A. § 1705 (West 2007), which imposes criminal liability for willful violations of blocking or sanction orders promulgated by the executive branch pursuant to the International Emergency Economic Powers Act (IEEPA). In practical terms, § 1705 closely tracks § 2339B in that it imposes a transactional embargo upon specific designees. 50 U.S.C.A. § 1702(a)(1)(A), (B) (West 2007). Though the IEEPA framework does not expressly prohibit the provision of one's own self as "personnel" in the service of a blocked entity, the statute has been construed by the executive branch to allow for executive orders that prohibit the provision of "services" to designated entities. *See, e.g.*, Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001). Thus § 2339B and § 1705 frequently are charged in tandem. But § 1705 is capable of broader reach because IEEPA permits designation of individuals as well as groups, whereas § 2339B extends only to FTOs.

conspiracies to commit acts of murder or kidnapping in a foreign country.[122] The superseding indictment in that case defined the conspiracy in terms of the global jihad movement writ large, emphasizing its general embrace of "physical violence, including murder, maiming, kidnapping, and hostage-taking."[123] When one defendant moved for a bill of particulars detailing the "actual or intended victims of the alleged conspiracy," the government responded with a more detailed but still sweeping account of the global jihad movement as a single conspiracy.[124] The defendants, prosecutors elaborated, "were part of a larger radical Islamic fundamentalist movement that waged 'violent jihad.'"[125] Their actions "supported violence, including murder, maiming, and kidnappings, committed by mujahideen groups operating in various jihad theaters around the world . . . [including] Egypt, Algeria, Tunisia, Libya, Somalia, Afghanistan, Tajikistan, Chechnya, Bosnia and Lebanon."[126] The court agreed, stating in the jury instructions that the government was not obliged to "prove the identity of any specifically contemplated victim of the conspiracy . . . or the specific location outside the United States where the [harm] was to occur."[127]

Because Padilla had been so publicly linked to the dirty bomb plot in connection with his days in military detention, it is perhaps easy to look past the extraordinarily expansive conspiracy with which he was charged. Simply put, Padilla was charged with a murder conspiracy based on nothing more than his attempt to become part of the global jihad movement. Padilla and his codefendants ultimately were convicted on this charge, and now face potential life sentences as a result.[128] By successfully equating membership (or even

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122. *See* 18 U.S.C.A. § 956(a) (West 2007). *See generally* Chesney, *supra* note 9, at 459-64 (reviewing origins and evolution of § 956). Prosecutors probably considered charging Padilla with providing himself to al Qaeda as personnel, in violation of § 2339B. Ultimately they chose not to do so, however, perhaps as a result of uncertainty as to whether the evidence described would suffice to show that Padilla understood he was joining al Qaeda as such as opposed to the broader extremist movement of which al Qaeda is but a part.

123. Superceding Indictment ¶ 2, United States v. Hassoun, No. 04-CR-60001 (S.D. Fla. Nov. 17, 2005).

124. *See* Defendant Hassoun's Motion for Bill of Particulars and Incorporated Memorandum of Law at 27, *Hassoun*, No. 04-CR-600001 (Feb. 13, 2006); Letter from Russell R. Killinger, Assistant U.S. Att'y, to Kenneth Swartz & Jeanne Baker (July 7, 2006) (attached to Defendant Hassoun's Motion for Clarification of Court's Ruling as to What Government Must Particularize Regarding the "Manner and Means" of the Conspiracy, *Hassoun*, No. 04-CR-60001 (July 25, 2006)).

125. Letter from Russell R. Killinger, *supra* note 124.

126. *Id.*

127. Jury Instructions at 21, *Hassoun*, No. 04-CR-60001 (Aug. 14, 2007).

128. Padilla and his codefendants also were convicted of violating 18 U.S.C.A. § 2339A (West 2007), which criminalizes the provision of material support to anyone so long as the defendant knew or intended that the support would facilitate commission of one of the particular criminal acts listed in that statute. In this case, the support included Padilla providing himself as personnel, and the predicate offense was the § 956(a) conspiracy. For a

attempted membership) in the movement with conspiracy to commit murder and other violent acts, the Padilla prosecution in substance establishes a form of associational liability like the one under § 2339B, but without the requirement of a link to a specific FTO. Conspiracy liability in that respect is more capacious than the personnel-based theory of material support liability.[129]

2. *Managing defendants' access to sensitive information*

The procedural safeguards available in criminal trials for terrorists have not changed significantly, with one notable exception: procedural rights associated with access to sensitive information. These important rights include the right to gather exculpatory evidence (including evidence held by the government) with the assistance of compulsory process, the right to confront the government's witnesses, and the right not to be prosecuted on the basis of ex parte evidence. These rights create a dilemma when information held by the government is both relevant to the charge at issue and tends to reveal sensitive collateral information, such as the fact that a particular individual is cooperating with the government or that the government has a particular capacity for collecting information through technical means. Public disclosure of this classified information might entail significant harms.

This dilemma is hard to avoid. Where classified information is relevant because it is inculpatory, the prosecution must balance its capacity to convict against the long-term harm that disclosure might cause. When the costs are too great, the prosecution may have to proceed without the evidence. Unlike the military detention process, which under Army Regulation 190-8 specifically contemplates the government's use of ex parte evidence, the dilemma cannot be circumvented in criminal cases by presenting the evidence to the jury outside the presence of the defendant or, in the case of testimonial statements, without an opportunity for cross examination. This dilemma may be especially likely to arise, moreover, where the sensitive information is not actually controlled by prosecutors to begin with, but instead is in the hands of another department or agency such as the CIA. In that circumstance, the decision is not the Justice Department's to make. And where the information at issue was provided by a foreign intelligence service subject to express restrictions against its use in any

full discussion of § 2339A liability as another mode of expanding the scope of substantive criminal law in terrorism-related cases, see Chesney, *supra* note 9, at 474-92.

129. In contrast, conspiracy liability at first blush appears narrower than material support liability with respect to the distinct question of mens rea. Whereas conspiracy requires a showing of intent on the part of the defendant, § 2339B ordinarily requires merely a showing of knowledge (i.e., proof that the defendant knew the identity of the recipient of the support, and either knew of the recipient's designation as an FTO or at least knew that the recipient engaged in terrorism). 18 U.S.C.A. § 2339B(a)(1) (West 2007). Where the material support charge depends upon the self-provision of "personnel," however, *Scales* at least arguably requires proof of intent in addition to knowledge. *See* Scales v. United States, 367 U.S. 203 (1961); *supra* note 13 and accompanying text.

public forum, the prospects for disclosure despite offsetting concerns are all the more dim.

Where such information instead is exculpatory and thus affirmatively required to be disclosed to the defense, the dilemma is worse because the government may not have the option of simply proceeding without sharing the information. In the criminal context, the government—not the defendant—bears the burden when the need to preserve secrecy cannot be reconciled with a defendant's procedural rights, a burden that in practical terms may require dismissal of the indictment.[130] Congress enacted CIPA in significant part to ensure that the government is not put to this stark choice unless absolutely necessary. But as noted above, CIPA does not actually resolve that tension so much as provide a framework in which the risk of the tension arising will be brought to the court's attention in systematic fashion, and in which the court will be encouraged to search for compromise measures to reconcile the competing interests.[131]

In the typical criminal case, these dilemmas rarely arise. But terrorism prosecutions—particularly those involving al Qaeda—are not typical. The U.S. government as a whole possesses a vast amount of classified information about al Qaeda and other terrorism threats. Much of that information is held by the various components of the intelligence community, and some subset of that information is provided to the United States by foreign governments on conditions that may preclude its use in court. In any given case, it may be that most or all of the relevant information concerning a particular defendant can in fact be shared or disclosed without presenting the dilemmas described above. It will not always be so, however, as illustrated by the troubled prosecution of accused 9/11 co-conspirator Zacarias Moussaoui.

Volumes could be written about the problems encountered in the course of prosecuting Moussaoui, but our concern has to do with his effort to depose al Qaeda members such as Khalid Sheikh Mohammed who were known to be in U.S. custody in undisclosed overseas locations.[132] Moussaoui anticipated that these men could testify that he was not part of the 9/11 conspiracy itself, notwithstanding his conceded membership in al Qaeda. The government was unwilling to permit this, however, as it wished to prevent any intrusion into its ongoing interrogation efforts with those detainees. The district court concluded that Moussaoui's compulsory process right trumped such concerns, and directed the establishment of a videolink so that Moussaoui's counsel could depose Mohammed and others. The Fourth Circuit reversed that order, directing the court to consider whether a CIPA-like procedure might produce a

130. Jencks v. United States, 353 U.S. 657, 672 (1957) ("[T]he burden is the Government's . . . to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession.").

131. *See* 18 U.S.C.A. app. 3 §§ 1-16 (West 2007).

132. *See* United States v. Moussaoui, 382 F.3d 453 (4th Cir. 2004).

compromise that would preserve the government's interests while satisfying Moussaoui's rights. In response, the government offered to produce summaries of relevant information culled from its interrogation reports. The district court viewed that proposal as insufficient, at least in part because of concerns about the reliability of the interrogations themselves. The Fourth Circuit again reversed, however, making clear that such summaries could pass constitutional muster at least in theory, even if they did require some revisions to be adequate.[133] Moussaoui's compulsory process right, in other words, had to give way to some degree in order to accommodate the government's security interests.

The prosecution of Jose Padilla provides a smaller-scale example of this phenomenon, and illustrates how protected information can complicate otherwise run-of-the-mill cross-examinations in a terrorism case. Prosecutors had called terrorism expert Rohan Gunaratna to testify concerning the nature of violent Islamic extremism in general and al Qaeda in particular. Gunaratna's testimony in part was based on live interviews he had conducted with detained al Qaeda members. On cross-examination, he acknowledged that he conducted at least some such interviews on behalf of governments. The court sustained objections to the defense's effort to learn which governments had sponsored such efforts and what circumstances attended the interviews.[134] In similar fashion, federal courts have recently sanctioned the use of disguises and pseudonyms to shield the true identity of Israeli security agents providing testimony in connection with material support prosecutions, despite limits this might place on the efficacy of cross-examination and tension with the defendant's Confrontation Clause rights.[135]

B. *Military Detention Becomes Proceduralized*

In the six-year period since the 9/11 attacks, the traditional military model of detention has come under intense pressure as a result of litigation, legislation, and political and diplomatic considerations. Academic critics, litigants, and judges have focused most of their attention on the paucity of traditional procedural safeguards in military detention, but they have also

133. The Fourth Circuit directed the district court on remand to supervise an "interactive process" in which the defense would first propose quotations from the interrogation summaries that it wished to use, followed by objections from the prosecution or suggestions for additional language to be included. *Id.* at 479-80.

134. *See* Curt Anderson, *Padilla Defense Questions Terror Expert*, ABC NEWS, July 2, 2007, http://abcnews.go.com/US/WireStory?id=3338938.

135. *See* Greg Krikorian, *Anonymous Testimony Pushes Limits: Defense Lawyers Say Justice Isn't Served if They Can't Know the IDs of Israeli Agents*, L.A. TIMES, Dec. 26, 2006, at 1 (discussing approval for such procedures in a material support prosecution in Chicago); Jason Trahan, *More Anonymity in Terror-Linked Holy Land Case*, DALLAS MORNING NEWS, Aug. 16, 2007, at 8B (discussing approval for such procedures in material support prosecution in Dallas).

questioned the use of associational status as a military detention criterion, notwithstanding the criminal justice system's simultaneous but less obvious embrace of membership-based liability.[136] The government has responded to these pressures by incorporating into the military detention model many of the procedural constraints associated with the criminal justice system.

1. *The original post-9/11 detention regime and questions of process*

The first serious challenge to the government's post-9/11 military detention framework, *Hamdi v. Rumsfeld*, involved a U.S. citizen who was designated an "enemy combatant" on the ground that he had trained with and fought for the Taliban.[137] The Supreme Court did not question this use of associational status as a detention criterion. But the Court was concerned about whether the government had provided Hamdi with sufficient process in the course of determining his status.[138] The plurality rejected the proposition that the Fifth Amendment Due Process Clause required the use of procedures approximating those associated with the criminal prosecution system.[139] It concluded, however, that due process required that Hamdi "receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker," all in a "meaningful time and in a meaningful manner."[140] The plurality approved the use of hearsay, a rebuttable presumption in favor of the government's evidence, and use of a tribunal procedure akin to that described in Army Regulation 190-8.[141] But since Hamdi had not received basic notice and opportunity to be heard, the case

136. *See* Ryan Goodman & Derek Jinks, *International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653, 2654-58 (2005) (arguing that "enemy combatant" should encompass only lawful combatants (i.e., those qualified for POW status if captured) and civilians who directly participate in hostilities, and that mere membership without conduct is not enough for an al Qaeda member to be placed in the latter category).

137. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 512-13 (2004). In an order issued in November 2001, President Bush had authorized detention of individuals on status-based grounds—i.e., upon a determination of membership in al Qaeda, without requiring proof of any particular conduct—as well as on conduct grounds (authorizing detention of any person who had engaged in, assisted, or conspired to commit acts of international terrorism against the United States, or who had harbored such persons or any al Qaeda member).

138. *Id.* at 524-25.

139. *Id.* at 528, 532.

140. *Id.* at 533; *see also id.* at 537-38 (noting that a citizen-detainee must have the opportunity to challenge the government's factual assertions). This conclusion is in tension with the plurality's approving reference to AR 190-8, *id.* at 538, which as noted previously expressly contemplates the use of ex parte evidence.

141. *See id.* at 533-34. The opinion expressly approves of a scenario in which a "knowledgeable affiant" would merely summarize the contents of "documentation regarding battlefield detainees" that "already is kept in the ordinary course of military affairs," so long as the detainees then has a fair chance to offer rebuttal before a neutral decisionmaker. *Id.* at 534.

was remanded.[142]

2. *Combatant status review tribunals*

Hamdi had little direct impact because its holding was technically limited to U.S. citizens and the United States at the time detained only two U.S. citizens as enemy combatants. But the Supreme Court's 2004 decision in *Rasul v. Bush*, which held that the federal habeas corpus statute applied to noncitizens held at Guantanamo Bay, opened the door for similar procedural challenges to be raised by a far larger group of detainees.[143]

The Defense Department responded to *Hamdi* and *Rasul* by instituting a more formal detention screening process called a Combatant Status Review Tribunal (CSRT). CSRTs aim to determine whether a detainee had properly been classified as an "enemy combatant," a term defined as follows:

> An "enemy combatant" for purposes of this order shall mean an individual who was part of *or supporting* Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.[144]

The government thus must prove one of three distinct detention criteria in order to satisfy the CSRT standard: (i) associational status (i.e., membership in al Qaeda, the Taliban, or other forces engaged in hostilities against the United States or its cobelligerents); (ii) engaging in a belligerent act against the United States or its cobelligerents; or (iii) engaging in "support" for enemy forces.

The CSRT system gives each detainee the right to present evidence to the tribunal, including his own testimony, subject to the tribunal's determination of relevance.[145] The detainee may not be represented by counsel before the tribunal,[146] however, and the tribunal's information-gathering framework is

142. *See id.* at 537-39.

143. Rasul v. Bush, 542 U.S. 466 (2004).

144. Combatant Status Review Tribunal Process § B (attached to memorandum from Gordon England, Sec'y of the U.S. Navy, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba (July 29, 2004)) [hereinafter 2004 CSRT Procedures], *available at* www.defenselink.mil/news/Jul2004/d20040730comb.pdf (implementing memorandum from Paul Wolfowitz, Deputy Sec'y of Def. to Sec'y of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004), *available at* www.defenselink.mil/news/Jul2004/d20040707review.pdf (emphasis added)). CSRT procedures were reissued in July 2006, without substantive change insofar as the issues discussed in the text above are concerned. *See* Combatant Status Review Tribunal Process § B (attached to memorandum from Gordon England, Deputy Sec'y of Def., to Sec'ys of the Military Dep'ts et al., Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba (July 14, 2006)), *available at* http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf.

145. 2004 CSRT Procedures, *supra* note 144, §§ F(6)-(7), G(7).

146. *Id.* § F(5). The detainee does receive assistance from a "personal representative,"

limited in important respects. The tribunal can compel the testimony of U.S. military personnel, subject to a commander's determination that personnel cannot travel to attend a session without adversely impacting operations.[147] The tribunal may request the appearance of civilian witnesses, but only if they are "reasonably available."[148] The tribunal also may ask other government entities to produce relevant information, subject to two exceptions. First, the tribunal is entitled only to information that is "reasonably available," and even that information may be withheld if the originating agency offers a substitute or issues a certification that the information would not have been exculpatory.[149] Second, originating agencies may simply decline to produce classified information, in which case the information is automatically deemed "not reasonably available."[150] The government, for its part, has the right to use ex parte procedures when classified information is presented to the tribunal in a context where disclosure to the detainee would harm national security.[151] At the conclusion of the evidence, the tribunal is to resolve the question of combatant status pursuant to the preponderance of the evidence standard,[152] subject to a rebuttable presumption that the government's evidence is "genuine and accurate."[153]

These procedures go far beyond what the Geneva Conventions, including the Protocols, require. But they still provide far fewer procedural protections than criminal prosecution, most notably because they reject a right to counsel, accept ex parte evidence, and permit government agencies to withhold information altogether on security grounds.[154] The CSRT procedures are

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but that person is not an advocate for the detainee in any sense.

147. *Id.* §§ E(2), G(9)(a).

148. *Id.* §§ E(2), G(9)(b).

149. *Id.* § E(3).

150. *Id.* § D(2).

151. *Id.* § F(3).

152. *Id.* § G(11).

153. *Id.*

154. In addition to the CSRT process, the Defense Department in 2004 instituted a separate, annually recurring review process called an Administrative Review Board (ARB). The ARB's task is not to reconsider the CSRT's determination of eligibility for detention. Rather, as originally formulated, the ARB considers whether the United States should continue to hold a detainee or instead release or transfer the person to another country based on whether the person "remains a threat to the United States and its allies in the ongoing armed conflict against al Qaeda and its affiliates and supporters or if there is any other reason that it is in the interest of the United States and its allies" to keep the detainee in custody. Paul Wolfowitz, Deputy Sec'y of Def., Order: Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at Guantanamo Bay Naval Base, Cuba 3 (May 11, 2004), *available at* http://www.defenselink.mil/news/May2004/d20040518gtmoreview.pdf. When the ARB procedures were revised in July 2006, the standard was elaborated to require consideration of (i) whether the detainee "continues to pose a threat to the United States or its allies," (ii) "the likelihood that the enemy combatant may be subject to trial by military commission," and (iii) "whether the enemy combatant is of continuing intelligence value." Administrative Review Board Process § 3(f) (attached to

similar to, but somewhat less demanding than, Army Regulation 190-8.[155] The two regimes differ primarily with respect to their limitations on the introduction of coerced statements; AR 190-8 arguably forbids the use of such evidence during a tribunal proceeding, while the CSRT process appears to tolerate it in at least some contexts.[156]

3. *Convergence pressure in public opinion and the courts*

The CSRT system did not prevent development of a powerful "erroneous-detention" narrative about Guantanamo among academics, journalists, and other elites. Nor did it prevent the emergence of a separate line of criticism challenging the use of associational status as a detention trigger. On the contrary, the heightened transparency of the CSRT process has provided grist for the mill for such arguments.[157] One widely circulated report analyzed the unclassified summaries of evidence that the military provided to detainees prior to their CSRT appearances.[158] The report maintained that many detainees are not alleged to have taken specific hostile actions against the United States, but instead appear to be detained merely on the basis of associational status, a basis that the authors implicitly deem insufficient.[159] The report further concluded

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Memorandum from Gordon England, Deputy Sec'y of Def., to Sec'ys of the Military Dep'ts et al., Revised Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba (July 14, 2006)), *available at* http://www.defenselink.mil/news/Aug2006/d20060809ARBProceduresMemo.pdf. The ARB process is particularly important in light of language in the *Hamdi* plurality warning against indefinite detention just for the sake of intelligence-gathering and against detention without end in an unorthodox conflict.

155. *See* Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Reg. 190-8, para. 1-6 (1997), *available at* http://www.usapa.army.mil/pdffiles/r190_8.pdf.

156. The AR 190-8 provision specifying tribunal procedures does not speak to the question of whether coerced evidence is admissible, *see id.*, though it does specify that the detainee cannot be compelled to testify at the proceeding itself, *see id.* para. 1-6a(8). A separate section of AR 190-8 does prohibit coercive interrogation of prisoners, however. *See id.* para. 2-1a(1)(d). Other differences between CSRTs and AR 190-8 bear less directly on fact-finding accuracy. AR 190-8 processes are presumed to occur soon after capture and in theater, for example, whereas CSRTs take place substantially later and at Guantanamo itself. CSRTs and 190-8 proceedings also differ in that the latter are empowered to confer POW status on a detainee, but the CSRTs are not. *Id.* para. 1-6.

157. A combination of Freedom of Information Act (FOIA) litigation, habeas proceedings, and its own initiative has caused the Defense Department to make public the unclassified portions of the record used in connection with each CSRT proceeding. A collection of these records is available at http://www.dod.mil/pubs/foi/detainees/csrt_arb/index.html.

158. Mark Denbeaux & Joshua Denbeaux, *Report on Guantanamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data* (Seton Hall Pub. Research Paper No. 46, 2006), *available at* http://ssrn.com/abstract=885659. Professor Mark Denbeaux is counsel to two Guantanamo detainees.

159. *See id.* at 2. After observing that the government's summaries divide the evidence

that "[t]here are only a very few individuals who are actively engaged in any activities for al Qaeda and for the Taliban" (at least based on the available, unclassified information), and that "[m]any of the detainees held at Guantanamo were involved with the Taliban unwillingly as conscripts or otherwise."[160] The report closed with the blanket condemnation that "[t]he detainees have been afforded no meaningful opportunity to test the Government's evidence against them."[161]

In the meantime, the habeas litigation unleashed by *Rasul* began to make its way through the federal courts and soon produced an opinion that was critical of both the substantive criteria and procedural safeguards associated with the CSRT system. In *In re Guantanamo Detainee Cases*,[162] Judge Green held that noncitizens at Guantanamo were entitled to assert Fifth Amendment due process rights by virtue of the extensive control the United States exercises over Guantanamo, and thus that CSRT procedures must be reviewed for constitutionality pursuant to the *Hamdi* model.[163] She also determined that CSRTs violated the due process clause because they tolerated ex parte evidence and denied the right to counsel.[164] Finally, Judge Green held that it would be unconstitutional for a tribunal to rely upon information obtained through torture or coercion. Judge Green's reference to criminal justice standards of coercion imply that even relatively uncontroversial interrogation methods would fall short of such a standard.[165]

Judge Green did not limit her critique to procedural safeguards. She also questioned the government's position that the law of war permits military detention based on associational status even absent proof of individual belligerent conduct. As the court understood it, the detainees were invoking *Scales*, to support the proposition that the use of associational status as a detention trigger in the CSRT definition of enemy combatant "violates long standing principles of due process by permitting the detention of individuals based solely on their membership in anti-American organizations rather than on

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against a detainee into a section concerning associational ties and a section concerning commission of specific hostile acts, Denbeaux et al. emphasize that "[m]ore often than not the Government finds that the detainees did not commit the hostile or belligerent acts." *Id.* at 8. The report does indicate that evidence links eighty-nine percent of the detainees to al Qaeda, the Taliban, or both. *See id.* at 8 fig.1, 9 fig.2. It also indicates that forty-five percent of detainees actually committed hostile acts of some description, even if not directly against U.S. forces. *Id.* at 11 fig.7.

160. *Id.* at 16.

161. *Id.* at 22.

162. 355 F. Supp. 2d 443 (D.D.C. 2005).

163. *Id.* at 454-68. Judge Green did not entirely foreclose the possibility that *ex parte* evidence could be used consistent with due process. Rather, she held that such evidence constitutionally could be used only if the detainee were represented by counsel who would be given access to the materials, thus reconciling the government's legitimate security interests with the minimum requirements of adversariness. *See id.* at 471.

164. *See id.* at 468-72.

165. *See id.* at 472-74.

actual activities supporting the use of violence or harm against the United States."[166] Though *Scales* concerned domestic criminal law, and though the Supreme Court in that case did ultimately approve of membership liability subject to certain conditions, Judge Green stated that this was at least a viable argument against the CSRT detention criteria. Given that the CSRT definition of enemy combatant also included a specific-conduct test as an alternative detention predicate, though, she held that the objection would have to be addressed on a case-by-case basis going forward.[167]

In re Guantanamo Detainee Cases thus reinforced the convergence trend in two respects. First, by extending due process protections to noncitizen detainees, the court rejected the sufficiency of procedural safeguards that otherwise conformed to the traditional military detention model. Second, the court called into question the propriety of using the traditional associational-status criterion for military detention in light of constitutional considerations derived directly from criminal law. The Fourth Circuit recently reached a similar conclusion through an interpretation of the laws of war when it held that the military could not lawfully detain Ali Saleb Kahlah al-Marri, a citizen of Qatar who entered the United States legally but was arrested shortly after 9/11 and eventually placed in military custody on the ground that he is a member of al Qaeda.[168] Among other things, the panel concluded that during NIACs, there are no combatants, but rather only civilians who may be subjected to military force solely during the time in which they directly participate in hostilities.[169] According to the panel, the government thus would have no authority under the laws of war to subject al-Marri to military detention even if he freely confessed his status as an al Qaeda operative.[170]

4. *The Detainee Treatment Act and constitutional habeas corpus*

Although it has been three years since *In re Guantanamo Detainee Cases* was decided, the decision's analysis of detention criteria and procedural safeguards remains very much an issue. The government had appealed *In re Guantanamo Detainee Cases*, while other detainees had appealed the contemporaneous decisions in *Khalid v. Bush* and *Boumediene v. Bush*, in

166. *Id.* at 475. As noted in Part I.A, *supra*, the Supreme Court in *Scales* actually upheld the constitutionality of criminalizing membership in dangerous organizations, subject to proof of active membership and intent to facilitate the unlawful ends of the group.

167. *See id.* at 475-76.

168. *See* al-Marri v. Wright, 487 F.3d 160 (4th Cir. 2007), *reh'g en banc granted*, No. 06-7427 (Aug. 22, 2007) (holding that the president lacks authority to hold petitioner in military detention within the United States).

169. *Id.* at 185 & n.13.

170. *Id.* at 195. This conclusion is not the last word on this issue; the Fourth Circuit recently granted en banc review, and the Supreme Court may grant certiorari in the case whichever way the en banc court goes. It is also possible that al-Marri will be transferred to civilian or foreign custody before the Supreme Court has the opportunity to rule in his case.

which Judge Green's colleague, Judge Leon, held that noncitizen detainees at Guantanamo have no constitutional or other judicially enforceable rights.[171] Before the D.C. Circuit could rule on those cases, however, Congress enacted the Detainee Treatment Act of 2005 (DTA).[172]

The DTA eliminated statutory habeas jurisdiction for Guantanamo detainees, replacing it with a framework in which the D.C. Circuit would have exclusive jurisdiction to consider challenges to the CSRT process.[173] Eventually, however, the Supreme Court in *Hamdan v. Rumsfeld* concluded that the DTA simply did not apply to pending petitions insofar as challenges to military commission procedures were concerned.[174] *Hamdan* did not specify whether the same would be true with respect to a CSRT challenge, but the point soon became moot as the decision prompted Congress to legislate again on the subject. The resulting statute—the Military Commissions Act of 2006 (MCA)—restated the DTA's provision for exclusive D.C. Circuit review (this time without respect to the locus of detention), making clear that it applied to pending cases.[175]

The DTA requires the D.C. Circuit to review CSRT procedures to determine whether they comport with the "Constitution and laws of the United States," insofar as the detainees have substantive rights to particular procedures.[176] It also permits the court to review the manner in which those procedures actually were applied to a particular detainee, including whether the CSRT's determination of combatancy in fact is "supported by a preponderance of the evidence."[177] The DTA does not resolve a range of related questions, however, including, in particular (i) whether the scope of the court's review should be limited to the record created by the CSRT itself, as opposed to being based on all relevant information in the government's possession or even permitting detainees to present new evidence, or (ii) whether a detainee's counsel should be given access to the classified portions of the record.

In the first opinion to emerge from the DTA review process, *Bismullah v. Gates*, the D.C. Circuit ruled that both these issues must be resolved, to some

171. *See* Khalid v. Bush, 355 F. Supp. 2d 311 (D.D.C. 2005) (consolidated with *Boumediene v. Bush* for purposes of that opinion).

172. Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2680, 2739 (to be codified at 42 U.S.C. § 2000dd).

173. *Id.* § 1005(e)(2)(A). The utility of that review is colored, of course, by the presumption of accuracy that applies to the government's evidence under the CSRT rules, a presumption that the DTA endorses. *See id.* § 1005(a)(1)(A).

174. 126 S. Ct. 2749 (2006). *Hamdan* also appeared to confirm that the conflict with al Qaeda is a non-international armed conflict, though the opinion was at pains not to be clear on that point. *See id.* at 2756-57.

175. Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635-36 (to be codified at 28 U.S.C. § 2241(e)) (referring to section 1005(e)(2) and (3) of the DTA).

176. Detainee Treatment Act § 1005(e)(2)(C)(ii).

177. *Id.* § 1005(e)(2)(C)(i).

degree, in favor of the detainees.[178] The court held that the DTA required review based on a record consisting of all the information a CSRT would have been authorized to obtain and consider, not just the information that it actually obtained and included in its record.[179] Though the ruling did not go so far as to recognize a right on the detainees' part to submit their own evidence as to combatancy, it was a victory for detainees because the court refused to confine its review to the actual record compiled during the CSRT session. Detainees fared better on the question whether ex parte procedures would continue to be used even during the D.C. Circuit's review. The court held that in order for its review to be "meaningful," it is necessary for detainees' attorneys—albeit not the detainees themselves—to have access to the classified portions of the record.[180] Though the court held open the possibility that the government still might "withhold from counsel highly sensitive information, or information pertaining to a highly sensitive source,"[181] the ruling marks a significant break with the usual toleration for ex parte proceedings in the military screening process.[182] Many questions about the nature of DTA review remain unresolved. But the D.C. Circuit's first construction of its statutory authority already has resulted in the adoption of significant modifications to the CSRT process that further contribute to procedural convergence between military detention and criminal models.

This convergence will likely continue, moreover, regardless of how the Supreme Court decides *Boumediene v. Bush*. In its current posture, that case raises the question whether the MCA's abrogation of statutory habeas jurisdiction over Guantanamo detainee claims violates the Constitution's Suspension Clause.[183] If the Court holds that habeas corpus extends to

178. 501 F.3d 178 (D.C. Cir. 2007).

179. *Id.* at 180 ("We therefore hold that . . . the record on review consists of all the information a Tribunal is authorized to obtain and consider, . . . defined . . . as 'such reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant . . . .'"). The benefits of the ruling may be somewhat illusory, however, and not just because the government is seeking en banc review of the ruling. As noted previously, CSRT procedures impose significant limits on the obligation of other government agencies to provide information to the CSRT process, including explicit authority to withhold classified information. *See supra* notes 145-53 and accompanying text.

180. *Bismullah*, 501 F.3d at 180.

181. *Id.* at 187.

182. *See also* Bismullah v. Gates, Nos. 06-1197, 06-1397, 2007 WL 2851702 (D.C. Cir. Oct. 3, 2007) (discussing, in the course of denying petition for rehearing by panel, the extent to which the government might withhold classified information even from detainees' attorneys).

183. *Boumediene* arises out of the combined appeals from the habeas decisions by Judge Green and Judge Leon, described at *supra* note 171. A divided panel of the D.C. Circuit held with respect to both decisions that the MCA had validly abrogated habeas jurisdiction over all Guantanamo detainee claims, and thus that the detainees could continue only to challenge their CSRT determinations pursuant to the DTA. Boumediene v. Bush, 476 F.3d 981, 994 (D.C. Cir. 2007). This raised the question whether the MCA violated the

Guantanamo in the absence of legitimate suspension, two convergence-related results may follow. First, the habeas remedy might—notwithstanding the relatively sparse procedural rights recognized for U.S. citizens in *Hamdi*—become the fount of expanded procedural rights for detainees, either as an interpretation of the Constitution or the international laws of war.[184] Second, the Court could go further and also address substantive detention criteria in a manner hostile to the use of associational status rather than specific conduct.[185] Even if the Court instead takes the government's view, agreeing that Congress can eliminate statutory habeas corpus jurisdiction in this context, convergence is still likely. For the Court likely will only reach this conclusion about habeas by reading the combination of CSRT and DTA-based judicial review broadly as a functional substitute for the habeas remedy. At a minimum, therefore, the Court's decision will entrench the existing degree of convergence embodied in the CSRT/DTA process.

5. *Military commissions*

We have said little thus far about an institution that in some sense falls in the middle of the spectrum between traditional military detention and traditional criminal punishment: military commissions. Military commissions conduct criminal trials, during and after armed conflict, in connection with war crimes and other crimes that take place during armed conflict.[186] In one form or another, and in various contexts, the United States has used military commissions in most of the major wars in its history.[187]

Because military commissions were designed to punish criminal offenders and potentially to extend punishment beyond the armed conflict (or to impose the death penalty), they traditionally required a showing of bad conduct (as opposed to mere associational status), and they traditionally gave defendants more significant procedural rights than the military detention procedures described above.[188] However, because commissions were designed to be used

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Constitution's Suspension Clause. A majority of the D.C. Circuit panel ruled that it did not. *Id.* at 991-93.

184. The essence of petitioners' claim is that DTA review of CSRT screening decisions is not adequate and that courts exercising habeas jurisdiction should conduct a de novo fact-finding process. *See* Brief for the *Boumediene* Petitioners at 26-33, Boumediene v. Bush, No. 06-1195 (U.S. Aug. 24, 2007); *see also* Brief of Professors of Constitutional Law and Federal Jurisdiction as Amici Curiae in Support of Petitioners, *Boumediene*, No. 06-1195 (Aug. 24, 2007) (arguing for robust habeas review).

185. *See* Brief for the *Boumediene* Petitioners, *supra* note 184, at 40-43 & n.44.

186. *See* David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT'L L. 5 (2005).

187. *See* Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2d 249, 250-52 (2002).

188. *See* Glazier, *supra* note 186 (describing the evolution of military commission jurisdiction and procedures). Most notably, perhaps, a detainee tried before a military commission traditionally has the right to counsel (albeit not necessarily the detainee's

in the midst of war, and sometimes even on the battlefield, these procedures fell far short of those provided in civilian criminal trials.[189] The commission that tried eight Nazi saboteurs in 1942, for example, was conducted in secret, without a jury, with relaxed rules of evidence, and with very few formal written trial and appellate procedures.[190]

Contemporary military commissions reflect many of the same convergence pressures as the other models we have discussed. With regard to substantive detention criteria, for example, the commission system has emulated convergence-related developments in the civilian criminal justice system. Consistent with the traditional approach of criminal law, the commission system has defined a range of specific violent acts as triable offenses, including denial of quarter, hostage taking, and attacks on civilians and civilian objects.[191] But commission jurisdiction is not limited to such offenses. Commissions also may try offenses that can be viewed as attaching liability as much to one's status or associations as to one's specific conduct, including conspiracy and—as of 2006—the provision of material support.[192] Whether the courts ultimately will permit commissions to try such offenses remains to be determined.[193] The more important point for now, however, is that the commission process has closely tracked the civilian criminal justice system in the manner in which its substantive detention criteria have become progressively more flexible and prevention-oriented.

Convergence pressures also have affected the procedural side of the

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counsel of choice). *See, e.g.*, Appointment of a Military Commission, 7 Fed. Reg. 5103 (July 2, 1942) (appointing defense counsel in connection with military commission trial of accused German saboteurs during World War II).

189. *See* Glazier, *supra* note 186 (describing emergence of commissions as wartime fora for criminal trials).

190. *See* LOUIS FISHER, NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW (2d ed. 2005); Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59 (1980); Robert E. Cushman, Ex parte *Quirin* et al—*The Nazi Saboteur Case*, 28 CORNELL L.Q. 54 (1942); David Danelski, *The Saboteurs' Case*, 1996 J. S. CT. HIST. 61; Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261 (2002); *see also Ex parte* Quirin, 317 U.S. 1 (1942) (upholding use of commissions in that instance).

191. *See* 10 U.S.C.A. § 950v (West 2007) (listing offenses made triable by military commission according to section 3 of the Military Commissions Act of 2006); Dep't of Def., Military Commission Instruction No. 2, ¶ 6 (Apr. 30, 2003) (providing the Defense Department's original list of offenses triable by commission), *available at* http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf.

192. *See* 10 U.S.C.A. § 950v(b)(25) (material support); *id.* § 950v(b)(28) (conspiracy). Material support was not an offense in the military instruction pursuant to which the Defense Department first set forth the list of offenses to be tried by commission. *See* Dep't of Def., *supra* note 191.

193. Four justices in *Hamdan* would have held that conspiracy is not an offense triable by commission; Justice Kennedy did not join Part V of the majority opinion by Justice Stevens. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2775-86 (2006).

military commission system, though to opposite effect. By the time President Bush issued his Military Order in November 2001 establishing a military commission for the war on terrorism, background principles of constitutional and military procedural law had become much more progressive than was the case during World War II.[194] Perhaps not surprisingly, then, Bush's commission structure contained many more formal and defendant-protecting procedures than had Roosevelt's initial commission system.[195] But the November 2001 Commission order nonetheless proved controversial because of its departures from standard civilian and military procedural justice, and in particular because of its relatively lax rules of evidence, its provisions for excluding the defendant from the proceeding during the presentation of sensitive information, its rules for conviction, and its review procedures within the Article II hierarchy (ending with the President's review, with no Article III judicial involvement).[196] When the Supreme Court in *Hamdan* eventually concluded that the commissions did not comport with congressional restrictions in the UCMJ, Congress then enacted a new commission structure in the Military Commission Act of 2006.[197] The present-day commissions still depart in some particulars from civilian trials,[198] but provide considerably greater safeguards than had President Bush's original framework in that they have more demanding rules of evidence,[199] they preclude ex parte presentations of evidence,[200] and they provide an explicit process of appeal to federal courts.[201]

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194. *See* Glazier, *supra* note 186, at 57-66 (noting the evolution of criminal procedure in the court-martial context, in historical context with the scope of commission procedures); Goldsmith & Sunstein, *supra* note 190.

195. For a comparative survey of the procedural features of the original Bush administration commission system and the system as it stands today as a result of the Military Commissions Act, see JENNIFER K. ELSEA, CRS REPORT FOR CONGRESS: THE MILITARY COMMISSIONS ACT OF 2006: ANALYSIS OF PROCEDURAL RULES AND COMPARISON WITH PREVIOUS DOD RULES AND THE UNIFORM CODE OF MILITARY JUSTICE (Sept. 27, 2007), *available at* http://www.fas.org/sgp/crs/natsec/RL33688.pdf.

196. *See, e.g.*, Brief for Petitioner at 21-23, *Hamdan*, 126 S. Ct. 2749 (Jan. 6, 2006) (cataloguing departures from contemporary court-martial standards); *see also* ELSEA, *supra* note 195, CRS-42 tbl.1, CRS-46 tbl.2 (comparing commission and UCMJ standards).

197. Pub. L. No. 109-366, § 3, 120 Stat. 2600, 2600-30.

198. *See, e.g.*, 10 U.S.C.A. § 948r (West 2007) (forbidding the admission of evidence obtained via torture, but permitting the admission of evidence obtained by coercive methods short of torture in at least some circumstances).

199. *Compare* Dep't of Def., Military Commission Order No. 1, § 6(D)(1) (Mar. 21, 2002), *available at* http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf (specifying a general rule of admitting all evidence that "would have probative value to a reasonable person"), *with* MILITARY COMMISSION RULES OF EVIDENCE, *available at* http://www.defenselink.mil/pubs/pdfs/Part%20III%20-%20MCREs%20(FINAL).pdf (specifying a broad range of evidentiary rules).

200. *Compare* Dep't of Def., Military Commission Order No. 1, §§ 4(A)(5)(a), 5(K), 6(B)(3) (permitting removal of the defendant during presentation of evidence in order to preserve secrecy or to serve other national security interests), *with* 10 U.S.C.A. § 949d(e) (West 2007) (permitting exclusion of the defendant only for disruptive or dangerous conduct).

The procedural safeguards of the commission system, in short, have grown closer to those found in civilian trials.

IV. CONVERGENCE AND DETENTION REFORM

The convergence trend reflects a belief by the Executive, the Congress, and the Courts that the traditional trial and military detention models cannot accomplish the goal of incapacitating members of al Qaeda and its affiliate terrorist organizations.[202] The problem of modern terrorism demands anticipatory or predictive forms of liability, and may demand a lower rate of erroneous acquittals than the traditional criminal system would tolerate. The traditional civilian criminal trial model has adjusted to meet these pressures. At the same time, the problem of modern terrorism demands more careful consideration of the scope of group-membership liability than the traditional military detention model permits, and it plainly calls into question the theoretical justifications for providing only minimal procedural safeguards in that context. The military detention model has gone some way towards addressing those problems as well.

Despite convergence, the current framework for terrorist incapacitation is not ideal. Even with post-9/11 adjustments, criminal trials almost certainly cannot be the exclusive basis for incapacitation. Relatively strict evidentiary and procedural rules make it very hard, and sometimes impossible, for the government to prosecute some terrorists that it has good reason to think may be very dangerous. A variety of other factors—risks to judges, jurors, and other court personnel; potential revelation of nonclassified information helpful to the enemy; legitimate interrogation aims; and the enormous resource demands of terrorist trials—make criminal trials unattractive as a comprehensive, exclusive solution.[203] Further reforms of the trial process to address these hurdles to incapacitation are unlikely to succeed, for the Constitution creates a floor of substantive and procedural protections below which reformers cannot easily go, and we are probably near that floor.[204] Military commissions theoretically

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201. *Compare* Dep't of Def., Military Commission Order No. 1, § 6(H)(4) (contemplating review by a panel appointed by the Secretary of Defense and tasked with making recommendations to that official), *with* 10 U.S.C.A. §§ 950f, 950g (West 2007) (permitting appeal to the Court of Military Commission Review (comprised of appellate military judges) and beyond that to the D.C. Circuit Court of Appeals (and thence to the Supreme Court)).

202. The trend has begun to manifest itself overseas as well, albeit in more limited ways. *See* Jack Goldsmith, Comment, *The Global Convergence on Terror*, FIN. TIMES, Aug. 1, 2007, at 11 (discussing the extent to which European officials have begun to explore the need for new approaches to the problem of terrorism).

203. McCarthy & Velshi, *supra* note 85.

204. Substantive criminal law developments relating to conspiracy and material support liability already have pushed the boundaries of preventive prosecution. *See supra* Part III.A.1. Questions of extraterritorial jurisdiction also complicate the question of whether

present a little more room for reform that would better serve the function of incapacitating terrorists. But commissions are bogged down in questions about their legitimacy, and it is unclear if they will ever be up and running, and if so, how well they can achieve incapacitation goals.

This leaves some form of non-trial preventive detention as the primary basis for incapacitation. Such detention should not be controversial in zones of ongoing combat operations such as Afghanistan and Iraq, where tens of thousands of U.S. soldiers on a daily basis are directly engaged in hostilities and as a result are routinely capturing individuals in circumstances arising directly out of combat.[205] Where non-trial detention becomes controversial, and where it is presently viewed by many as inadequate, is in the context of long-term detentions off the battlefield, such as occur in Guantanamo Bay. This is the context in which there are the loudest calls for reform, and the greatest number of reform proposals.[206] It is also the context in which there is the greatest room for reform, since there is in theory no upper legal limit on the type of substantive and procedural modifications that could be made to the current military detention process. And it is the context in which reform will most likely occur, either as a result of the Supreme Court's decision in *Boumediene*, or congressional intervention, or both (perhaps one followed by

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it is desirable to pursue the criminal model with respect to the overseas conduct of non-citizens. *See* Chesney, *supra* note 13, at n.323 (noting difficulty of applying § 2339B—which prior to 2001 did not entail extraterritorial jurisdiction—to conduct of non-citizen in Afghanistan); John B. Bellinger III, Legal Advisor, U.S. Dep't of State, Address to the London School of Economics: Legal Issues in the War on Terrorism (Oct. 31, 2006), *available at* http://www.lse.ac.uk/collections/LSEPublicLecturesAndEvents/pdf/20061031_JohnBellinger.pdf (discussing inability to assert criminal jurisdiction over certain Guantanamo detainees due to limited state of then-applicable extraterritorial jurisdiction).

205. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (upholding status-based detention until end of hostilities for U.S. citizen Taliban captured in Afghanistan).

206. *See, e.g.*, PHILIP B. HEYMANN & JULIETTE N. KAYYEM, LONG-TERM LEGAL STRATEGY PROJECT FOR PRESERVING SECURITY AND DEMOCRATIC FREEDOMS IN THE WAR ON TERRORISM 19-21, 34-50 (2004), *available at* http://www.mipt.org/pdf/Long-Term-Legal-Strategy.pdf (distinguishing captures made in zones of combat operations from other captures, and offering proposals for legislative reform); Kenneth Anderson, *Law and Terror*, POL'Y REV., Oct.-Nov. 2006, at 3, 16, 21-23; Kenneth Anderson, *U.S. Counterterrorism Policy and Superpower Compliance with International Human Rights Norms*, 30 FORDHAM INT'L L.J. 455, 478-80 (2007); Amos N. Guiora, *Where Are Terrorists to Be Tried: A Comparative Analysis of Rights Granted to Suspected Terrorists*, 56 CATH. U. L. REV. 805, 834-35 (2007) (proposing legislation to permit the Foreign Intelligence Surveillance Court to conduct criminal trials); A. John Radsan, *A Better Model for Interrogating High-Level Terrorists*, 79 TEMP. L. REV. 1227, 1276-82 (2006) (discussing desirability of legislative reform); Glenn M. Sulmasy, *The Legal Landscape After* Hamdan*: The Creation of Homeland Security Courts*, 13 NEW ENG. J. INT'L & COMP. L. 1 (2006); Benjamin Wittes, *Terrorism, the Military, and the Courts*, POL'Y REV., June-July 2007, at 21, 37-41; McCarthy & Velshi, *supra* note 85; *cf.* John B. Bellinger III, Legal Advisor, U.S. Dep't of State, Prisoners in War: Contemporary Challenges to the Geneva Conventions, Address at the University of Oxford (Dec. 10, 2007), *available at* http://london.usembassy.gov/ukpapress72.html (discussing the open questions regarding substantive detention criteria and procedural safeguards relating to military detention during NIAC).

the other). Our aim in what follows is to inform the coming detention reform debate by drawing on the experience of convergence to identify the most salient substantive and procedural issues to be resolved.

A. *Detention Criteria*

Most discussions of detention reform are preoccupied with calibrating procedural safeguards. We will address this important topic below. But the first, most fundamental, and in some senses most difficult task is to define the set of persons who are so dangerous that they ought to be detained in the first place. If that set is defined too broadly, detention will be easy to accomplish even if the system adopts robust procedural safeguards. Conversely, if the set is defined in unduly narrow terms, procedural safeguards are less significant. Careful calibration of detention criteria, in short, should be a central goal of the reform process.

The least controversial criterion for detention is membership in the command structure of al Qaeda and its co-belligerent terrorist organizations. It is least controversial as a criterion for detention because if there is a group of people who are highly likely to be dangerous, it is the group formed by those who voluntarily associate themselves with the command structure of a terrorist organization whose aim is to kill Americans. While there is disagreement today about whether such membership suffices as a detention criterion under current law, the disagreement is relatively mild compared to other detention issues, and is easily bridgeable by congressional reformers.

The case for detention authority under current law begins with Congress's authorization to the President to use force "against those . . . organizations" responsible for "the terrorist attacks that occurred on September 11, 2001," a descriptor that expressly includes members of al Qaeda, and under traditional principles of co-belligerency includes al Qaeda's affiliated terrorist organizations.[207] *Hamdi* held that the authorization to use force entails authorization to detain in an international armed conflict, and the plurality's hesitation about extending this rationale to the war against al Qaeda concerned the indefiniteness of detention, and not whether "force" entailed detention authority in that context.[208] Independent of the Authorization for the Use of Military Force (AUMF), the command structure criterion is, we believe, consistent with traditional detention understandings in non-international armed conflicts, which the Supreme Court has deemed the conflict with al Qaeda to

207. *See* Bradley & Goldsmith, *supra* note 25.

208. *See Hamdi*, 542 U.S. at 519-21 ("[W]e understand Congress' grant of authority for the use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.").

be.[209]

The status-based "command structure" criterion is also consistent with some understandings of the "direct participation in hostilities" standard that some critics of the post-9/11 military detention policy have urged as a detention criterion in the war on terrorism.[210] This standard originated as a targeting rule, not a detention rule. It identified circumstances in which a civilian—ordinarily immune from being made the object of an attack—may be targeted with lethal force.[211] In some armed conflict contexts, the authority to detain plainly is not limited by the boundaries of the authority to target.[212] For these reasons, and because of the AUMF's clear directive, it is easy to dispute the relevance of the direct participation standard as the only relevant criterion for detention in a non-international armed conflict.[213] But the important point for present purposes is that reliance on the direct participation standard as a guide to the boundaries of detention authority would not necessarily preclude use of status in the command structure as a detention trigger.

Direct participation is a contested concept in at least two respects.[214] The

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209. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2795-96 (2006); *supra* Part I.A.2.

210. *See, e.g.*, Brief for the *Boumediene* Petitioners, *supra* note 184, at 39-43 (arguing for use of a "direct participation" standard to define the scope of eligibility for detention); *see also* Goodman & Jinks, *supra* note 136; *supra* note 24.

211. For a thorough overview of the direct participation concept, see the trio of reports following from expert meetings on the subject jointly convened by the International Committee of the Red Cross and the TMC Asser Institute: NILS MELZER, THIRD EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES (2005) [hereinafter MELZER, THIRD EXPERT MEETING], *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2005_eng.pdf; NILS MELZER, SECOND EXPERT MEETING: DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2004) [hereinafter MEZLER, SECOND EXPERT MEETING], *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2004_eng.pdf; INT'L COMM. RED CROSS, DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2003), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct%20participation%20in%20hostilities-Sept%202003.pdf.

212. In an international armed conflict, for example, the Geneva Conventions plainly contemplate security detention of civilians who cannot necessarily be targeted. *See supra* Part I.A.2.

213. *See* Curtis A. Bradley & Jack L. Goldsmith, *Rejoinder: The War on Terrorism: International Law, Clear Statement Requirements, and Constitutional Design*, 118 HARV. L. REV. 2683, 2688-89 (2005). This in fact is the U.S. government's position. It maintains that the members of nonstate armed groups such as al Qaeda are combatants rather than civilians, and thus that the direct participation question is not relevant. *See, e.g.*, Brief for the Respondents at 64-66, Boumediene v. Bush, No. 06-1195 (U.S. Oct. 9, 2007); *cf.* MELZER, THIRD EXPERT MEETING, *supra* note 211, at 41 (stating that "IHL applicab[ility] in [non-international armed conflict with private armed groups] remains unclear as to whether members of organized armed groups are 'civilians'—and thus subject to direct attack only for such time as they directly participated in the hostilities—or whether they can be directly attacked according to the same principles as members of state armed forces, that is to say, irrespective of their individual direct participation in hostilities").

214. *See* sources cited *supra* note 211.

first concerns the substance of direct participation. All agree that the concept applies to persons who literally engage in violence, such as firing a rifle or setting off an explosive device. But uncertainty arises as we move beyond those paradigm cases to persons whose connections to violence are less direct. Does one directly participate in hostilities by ferrying ammunition to persons who are firing weapons, or by constructing IEDs to be used by others? Second, experts also disagree about the temporal boundaries of direct participation. When can a person be said to have ceased to directly participate in hostilities?[215] In this regard, some have expressed concern about a revolving-door interpretation enabling civilians to contribute to violence but then immediately reacquire their protected status before facing a military consequence.[216]

One proposition that potentially bridges both questions is that mere membership in an armed group, without more, constitutes an ongoing form of direct participation. This proposition has been the subject of much debate among law of war experts.[217] Some prominent law-of-war experts have argued that membership in an armed group engaged in hostilities constitutes direct participation for so long as the person actually remains involved with that entity.[218] This view is shared by advocates for some of the Guantanamo detainees themselves.[219] But others—including the Fourth Circuit in its panel opinion in *al-Marri*—take a different view, endorsing a far narrower approach to direct participation.[220]

The truth is that there is little clear legal guidance from the laws of war,

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215. *See, e.g.*, HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Israel [2005], *available at* http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf (broadly construing the temporal element of direct participation in the context of members of terrorist organizations); MELZER, THIRD EXPERT MEETING, *supra* note 211, at 59-68 (discussing the temporal component of the direct participation inquiry).

216. *See, e.g.*, Parks, *supra* note 70, at 118-20.

217. *See* MELZER, SECOND EXPERT MEETING, *supra* note 211, at 20-21 (reporting conflicting viewpoints); MELZER, THIRD EXPERT MEETING, *supra* note 211, at 44, 48-51, 53-58 (same).

218. *See, e.g.*, A.P.V. ROGERS, LAW ON THE BATTLEFIELD 11-12 (2d ed. 2004).

219. The petitioners in *Boumediene*, for example, acknowledge that a direct participation approach would permit detention of both al Qaeda leadership figures such as Osama bin Laden and perhaps also those persons who constitute members subject to al Qaeda's direction and control. Brief for the *Boumediene* Petitioners, *supra* note 184, at 41.

220. Concerning *al-Marri*, see *supra* Part III.B.3. *See also* MELZER, SECOND EXPERT MEETING, *supra* note 211, at 20-21 (reporting conflicting viewpoints); MELZER, THIRD EXPERT MEETING, *supra* note 211, at 44, 48-51, 53-58 (same). Ryan Goodman and Derek Jinks appear to take an intermediate position. They argue that membership simpliciter does not suffice to establish direct participation, and that one must go further to ask what *role* the individual plays within the entity. *See* Goodman & Jinks, *supra* note 136, at 2657. On their analysis, a member responsible for "local intelligence, intermediate logistics, recruiting, [and] training" would not be engaged in direct participation. *Id.* (quoting W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW., Dec. 1989, at 4, 9 app. C). This implies that members whose roles more directly pertain to violence—including commanders and operators—could be viewed as direct participants on the basis of that status.

and even less clear state practice, that would allow courts to definitively resolve this dispute, or to resolve the logically prior dispute whether "direct participation" (as opposed to an explicit group-based standard) is even a relevant criterion here. But given these uncertainties and the powerful arguments in favor of an explicit group-based test, Congress and the President acting together would clearly have the authority to choose the "direct participation" standard as the sole criterion for detention, and to define the standard to include or not to include group membership. Whether they should do so, of course, is a hard normative issue. If the goal of detention is preventive incapacitation, then both traditional military model and the post-9/11 criminal model suggest that at least some form of status-based detention criteria is appropriate. The harder question is where precisely to draw the line in defining a status-based detention trigger. Not all uses of status are equally contested. There may be little dispute about making al Qaeda leadership figures detainable without respect to specific conduct, and there may be relatively little dispute with respect to subordinate al Qaeda personnel who occupy an operational role, along the lines of Mohammed Atta. Matters may grow more controversial for lower-level operatives and potential sleeper cell members.[221]

Of course, many suspected al Qaeda associates may serve the organization in ways that do not fall under a chain of command, but who nonetheless associate with terrorist organizations in ways that indicate individual dangerousness or that promote the terrorists' dangerous goals. For example, individuals outside of the al Qaeda command structure might receive weapons training in an al Qaeda camp, or give logistical support related to a particular act of violence (e.g., by creating an improvised explosive device to be used by someone else), or provide logistical support on a more generalized basis (e.g., by raising funds to be used for violent activity).[222] A status-based approach in this context is much harder to design, and reformers might reach logistical-support and other such non-operational personnel instead through conduct-based tests. In the criminal prosecution context, the material support concept is used to reach support personnel of this kind, albeit without any need to show a particular mens rea or actual membership in or allegiance to the group in question. It may be that consensus in favor of a similar approach for preventive

221. We note, however, that Goodman and Jinks, who view the "direct participation" to be a relatively demanding standard, also think that the "dirty bomb plot" allegations against Jose Padilla sufficed to trigger the direct participation standard. *See* Goodman and Jinks, *supra* note 136, at 2658 n.32.

222. A military judge on the U.S. military commission recently ruled that Salim Hamdan, Bin Laden's driver and sometimes-bodyguard who swore *bayat* to Bin Laden and who sometimes delivered weapons to the Taliban and other jihadist fighters at Bin Laden's request, "directly participated" in hostilities against the United States for purposes of the Military Commission Act of 2006. *See* United States v. Hamdan (Dec. 19, 2007), *available at* http://www.defenselink.mil/news/Dec2007/Hamdan-Jurisdiction%20After%20Reconsideration%20Ruling.pdf (order denying motion to dismiss for lack of jurisdiction on reconsideration).

detention can be achieved either by requiring a showing of conduct plus membership, conduct plus illicit intent, or both. The table below illustrates how these various concepts both overlap with and differ from one another:

Table 1. Detention Criteria in Comparative Perspective

	Direct Participation	*Conspiracy* (as seen in *Padilla*)	*Material Support* (18 U.S.C. § 2339B)
Membership coupled with military-type training	Disputed	Yes, but only with evidence of intent to commit unlawful acts (no need to specify the acts)	Yes, but only with evidence of knowledge of the group's identity and nature
Membership alone	Disputed	Unclear	Yes
Providing support in the form of explosives	Disputed	Yes	Yes
Providing support in the form of financing or logistics, with particular violent conduct in mind	Disputed	Yes	Yes
Providing support in the form of financing or logistics, without knowing or intending that violence occur	No	No	Yes

There is no single obviously right way to choose among these approaches. In the final analysis, the proper calibration of detention criteria turns on how much and what kind of risk the nation's leaders want to assume. This policy choice will also, of course, be informed by the procedural safeguards associated with each substantive determination. Tighter safeguards may warrant broader detention criteria, and vice versa. It is to those procedures that we now turn.

B. *Procedural Safeguards*

Procedural safeguards in the context of military detention have increased markedly in recent years, as compared to the baseline of the traditional military detention model. Whatever their failings, today's combination of status hearings and judicial review pursuant to the DTA are much more robust than anything required by the Geneva Conventions. The system still falls far short of the procedural protections conferred on defendants in civilian or military criminal trials, of course, and for a variety of reasons remains subject to significant pressure to further reduce the risk of erroneous detentions it entails. The task for reformers, then, is to identify those safeguards which can and should be ratcheted upward further, and to figure out just how far such changes

can go without unduly deterring the government from using the system in the first place.[223]

As with substantive detention criteria, the convergence experience can help reformers grappling with the topic of procedural safeguards by flagging certain issues as ripe for consensus and by outlining the scope for choice with regard to other issues. Certain procedural safeguards associated with the criminal process, for example, do not appear to be serious candidates for inclusion in a more robust detention screening process (unless of course one's goal is in fact to conform all detention systems to the criminal standard). In particular, jury-related rights such as the right to have a jury of peers serving as the fact-finder or to have an indictment only upon presentment to a grand jury have played no role in the convergence debates, and one would not expect to see either appended to a non-criminal detention system. A beyond-a-reasonable-doubt standard of proof would also be unrealistic. On most procedural issues, however, there is room for considerable negotiation and creativity. The precise choices to be made involve large normative and policy questions that are beyond our present ambition. As with the question of substantive detention criteria, our aim is simply to make plain to policymakers their range of options.[224]

1. *Counsel rights*

In contrast to the criminal justice model, the traditional military detention model does not as a matter of law require provision of counsel in connection with detention eligibility determinations.[225] But certainly it can be done as a matter of policy, and in fact it has been done in the past both by the U.S. and its allies.[226] One of the most important questions facing reformers is whether to do

223. Some might assume that if the government chose not to continue to use military detention because of unduly enhanced procedural safeguards, it would instead revert to a pure criminal-prosecution model. But the consequences may be more complex and less compatible with human rights concerns, as illustrated by the emergence in the 1990s of the rendition program as a mechanism to incapacitate terrorists who could not be prosecuted in the United States.

224. Reformers also must grapple with the overarching question of whether to apply a single detention-screening model in all circumstances, or instead to adopt a more nuanced approach in which detention criteria and safeguards may vary depending on the locus and circumstances of capture. *See* HEYMANN & KAYYEM, *supra* note 206, at 20-21, 44-45 (advocating a nuanced approach designed not to impose undue restrictions on captures made in zones of combat operations). For an outline of detention-screening procedures employed in Iraq in 2005, as a contrast to the DTA-CSRT framework, see U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Second Periodic Report of the United States of America, annex I, pt. 2, § II, U.N. Doc. CAT/C/48/Add.3 (June 29, 2005), *available at* http://www.state.gov/g/drl/rls/45738.htm#additional (describing internal military review process).

225. *See supra* Part I.B.

226. *See id.*

the same now.

Provision of counsel at the CSRT stage (or its equivalent in a revised system) would provide numerous benefits. Counsel would subject the government's basis for detention to true adversarial testing, and would have a reasonable ability to assemble a contrary record for presentation on the detainee's behalf. The presence of counsel also might provide a basis for cutting through some of the more difficult procedural safeguard issues discussed below, such as the problem of ex parte evidence. In any event, the use of counsel to introduce true adversariality into the long-term detention screening process might go far toward enhancing its accuracy and perceived legitimacy, both of which should be matters of great interest from the government's perspective (not to mention the detainee's).

Provision of counsel would have its costs, of course, both literally and figuratively. Particularly when counsel come into possession of sensitive information—a matter we address below—questions arise about information security. Counsel also might advise detainees to avoid making inculpatory statements (or otherwise being cooperative) in their interrogations. On the other hand, these concerns can be addressed in the reform process by such measures as limiting the class of eligible counsel to JAG defense attorneys and delaying access to counsel for a certain period after the initial capture in order to facilitate short-term interrogation. Insofar as provision of counsel at the CSRT stage might hasten the moment at which the detention decision becomes truly final, moreover, the government's interest in long-term interrogation may actually favor such a step. The fact of the matter is that, as a result of convergence pressures, detainees *already* have counsel (largely of their own choice) throughout the protracted process of pursuing DTA or habeas review. A procedurally robust initial screening process in which detainees are represented by counsel may prove to be a much briefer process in the end. Reformers thus can calibrate the provision of counsel in ways that would minimize its impact on the interrogation process.

2. *Access to information*

Many of the most difficult procedural questions can be clustered under the heading of access to information.

First, consider the question of whether the government should continue to be able to establish the factual predicate for detention by presenting evidence on an ex parte basis. That practice is consistent with the traditional military model, but it also pertains directly to the suggestions of inaccuracy and illegitimacy that have burdened the CSRT system. This approach does serve the compelling government interest in preserving the secrecy of sensitive intelligence information, of course, a consideration that must be kept in mind when considering alternative approaches. Not all alternatives require complete disclosure to the detainee, however. Insofar as reformers opt to provide counsel

to a detainee, a middle-way solution becomes available: allow the counsel to remain during presentation of classified evidence, introducing adversariality to that stage of the proceedings for the first time. Some will object to this approach because the counsel would be limited in his or her ability to contest such evidence without sharing it with the detainee, and others will object that it introduces new information security concerns. It is worth noting, however, that as a result of convergence and the ongoing evolution of the DTA review process, it appears that detainee attorneys already are going to have access to at least some portions of the classified record upon appeal.[227] Given that status quo, it may give up little—and gain much—to adopt a similar system on the front-end of the process.

A second difficult information access question concerns what can best be described as the government's disclosure obligations. In the criminal context, a variety of constitutional and statutory rules oblige the government to disclose significant amounts of information to defendants.[228] Under the current DTA framework, the analogous system involves the Recorder's obligation to assemble the "government information" from military and other sources.[229] As noted above, questions have arisen about the manner in which that non-adversarial approach to disclosure operates in actual practice.[230] Thus the problem of disclosure may entail both a substantive component (i.e., which agencies have an obligation to disclose information, and what should be the nature of that obligation) and a procedural component (i.e., who should have responsibility for enforcing disclosure obligations, and what mechanism should there be—if any—for seeking to compel disclosure when necessary). This arguably is one of the most important issues reformers must address, but it has received little attention thus far.[231] Again, it may be the case that creative approaches to the use of counsel may help to finesse the tensions inherent in this matter. In terms of process solutions, moreover, CIPA may provide a useful starting point for discussion.

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227. *See supra* Part III.B.4.

228. *See supra* Part I.B.

229. Bismullah v. Gates, 501 F.3d 178, 181 (D.C. Cir. 2007) (describing CSRT procedures).

230. *See supra* Part III.B.4.

231. Indeed, questions about the scope of disclosure obligations vis-à-vis information held by the military or the Intelligence Community have received relatively little attention even in the context of criminal prosecutions in terrorism cases. That may change soon, however, in light of the ongoing effort by one recently convicted defendant to obtain a new trial on the ground that the government failed to disclose *Brady* material in the form of warrantless NSA wiretaps allegedly conducted under the rubric of the Terrorist Surveillance Program. *See* Jerry Markon, *Government Secrecy May Lead to New Trial in Va. Terror Case*, WASH. POST, Nov. 21, 2007, at A8.

3. *Limits on use of the fruits of interrogation*

Few matters are as sensitive as those touching upon the interrogation process. Unfortunately, the topic cannot entirely be avoided when discussing detention reform, given that in many instances the government's basis for detention will consist of information provided by others (or even the detainee himself) based on interrogation (by the U.S. or by others). The possibility that detention has been based on testimony obtained via methods that some view as unlawful has been a problem for the legitimacy of the existing process. Given the fractious debate over interrogation methods, reformers might consider process-oriented solutions in this area (in addition to existing substantive prohibitions on the use of information obtained in various unlawful ways). One such solution, for example, would involve crafting rules that provide a reasonable opportunity to seek to impeach such information by emphasizing the manner in which it was obtained (something that can more effectively and securely be done with an appropriate detainee counsel, of course, than if it must be attempted by the detainee himself).

4. *Publicity*

Public proceedings are an important spur to accountability, and hence both to legitimacy and to effectiveness. Some phases simply cannot be public. Even in the criminal prosecution context we close courts to the public from time to time in order to preserve security interests.[232] The same will be true for any reformed detention system. But insofar as the goal of reform is to enhance the legitimacy of the system and thus ensure its long-term effectiveness, reformers should consider options for maximizing public access to detention proceedings. Among other things, reformers might consider incorporating the rules currently employed in the military commission context with respect to permitting at least some forms of media presence and coverage.

As a corollary to the effort to enhance perceived legitimacy through greater openness to the public, reformers also should consider whether there are ways to encourage a greater percentage of the government's case for detention to be declassified. If the majority of pro-detention information is kept classified, after all, then opening the proceeding to the public or the media during the unclassified stage may have little impact, or even prove counterproductive. One possibility for incentivizing such change would be to craft rules that would enable the detainee's counsel—who would be privy to the information either way—to challenge the need for keeping particular items classified. This might serve as a deterrent against overclassification on the front end, as well as

232. *See, e.g.*, United States v. Marzook, 412 F. Supp. 2d 913, 919 (N.D. Ill. 2006) (closing court to public during suppression hearing involving testimony from undercover Israeli agents).

producing the occasional disclosure on the back end. Reformers will have to tread carefully here, of course, so as not to create an undue risk to information security relating to sources and methods.

5. *Institutions of review*

A final set of complex questions concern the preferable identities and responsibilities of decision-makers at the various stages of the reformed detention process.

Consider first the question of who should make the initial long-term detention determination. As things currently stand, the primary fact-finding body in the CSRT-DTA system—the body that decides whether to detain in the first instance—consists of a panel of military officers. Some have questioned the independence of these bodies, raising allegations of command influence.[233] Whatever the reality of such allegations, the appearance of impartiality in the fact-finder is a crucial component of legitimacy. The question therefore arises whether fact-finding responsibility should be shifted to a judicial figure, either in the form of a military judge or federal district judge sitting by designation (akin to the Foreign Intelligence Surveillance Court).

Under the DTA, of course, federal judges (in the form of the D.C. Circuit Court of Appeals) already have an appellate role insofar as they are to exercise sufficiency-of-the-evidence review of CSRT determinations.[234] There is a genuine prospect, moreover, that convergence pressures will lead to forms of judicial review that more directly supplant the function of the CSRT fact-finder. According to detainees in the *Boumediene* litigation (asking the Supreme Court to provide detainees with habeas rights), as well as detainees in the *Bismullah* litigation (asking the D.C. Circuit to interpret its authority under the DTA as broadly as possible), federal judges acting under the habeas rubric can and should conduct entirely de novo evidentiary hearings to determine eligibility for detention on an individual basis, without any deference to the underlying military process. That solution would be far from ideal, as the CSRT stage would then become a superfluous yet time-consuming and criticism-generating component of the process. Anticipating that undesirable state of affairs, it might be preferable for reformers to consider inserting a judicial decision-maker at the front end of the process, thus improving the argument for any subsequent review to be limited, deferential, and expeditious.

Notably, most of the debate regarding judicial review has been framed entirely in terms of attempts by detainees to contest adverse decisions. But similar questions also arise in connection with the *government's* interest in

233. *See, e.g.*, Brief Amicus Curiae of Retired Military Officers in Support of Petitioners at 10-11, Boumediene v. Bush, Nos. 06-1195 & 06-1196 (U.S. Aug. 24, 2007) (alleging command influence).

234. *See supra* Part III.B.4.

contesting rulings against it at the initial stage. This issue has a strong connection to the larger issue of legitimacy, particularly in light of accusations that the government in the past has pressured CSRTs informally to reassess adverse decisions on the ultimate question of detainee status.[235] The issue also is likely to arise more often in the future insofar as reform produces a more adversarial process, in connection with such matters as pre-decision disputes regarding the government's disclosure obligations. In both contexts, reformers may find that it is appropriate to give the government a formal capacity to appeal adverse decisions, while at the same time shielding against inappropriate pressures to reconsider such decisions.

Finally, there is the question of periodic reconsideration of whether a person should continue to be detained. Comporting with the spirit of the traditional military model, the current system provides such review via the Annual Review Board (ARB) process, and a substantial number of detainees have been transferred out of Guantanamo as a result.[236] Whether reform is required in this context is much less clear, though in the course of making other changes it will at least be important to preserve the ARB's current function.

CONCLUSION

There is no easy answer to the incapacitation problem for terrorists. Many commentators continue to argue that we should abandon the entire slew of post-9/11 innovations in favor of a strict criminal justice approach, while others urge that we rebuff efforts to restrain the military detention model and instead embrace the flexibility traditionally associated with the military model. The experience of convergence over the past six years strongly suggests that neither of those polar options is viable or desirable. Convergence itself has helped flesh out the contours of a more appropriate model, but the grinding, ad hoc, and ultimately unpredictable nature of the convergence process is no recipe for the sustainable reform now required.

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235. *See, e.g.*, William Glaberson, *Military Insider Becomes Critic of Hearings at Guantanamo*, N.Y. TIMES, July 23, 2007, at A1 (describing claims of pressure made by former tribunal officer).

236. *See, e.g.*, Administrative Review Board Summary: ARB2, http://www.defenselink.mil/news/arb2.pdf (reporting determinations between summer 2006 and winter 2007 to transfer fifty-five detainees out of Guantanamo). In addition to the ARB process, it is possible in the current system to request a second CSRT review based on new evidence. A May 2007 instruction promulgated by the Defense Department confirms that a detainee, or person lawfully acting on behalf of a detainee, may seek a new CSRT proceeding on the basis of newly-discovered evidence pertaining to "enemy combatant" status. Memorandum from Frank Sweigart, Dir. of the Office for the Admin. Review of the Det. of Enemy Combatants, OARDEC Instruction 5421.1: Procedure for Review of "New Evidence" Relating to Enemy Combatant (EC) Status (May 7, 2007), *available at* http://www.defenselink.mil/news/May2007/New%20Evidence%20Instruction.pdf.

APPENDIX A: COMPARISON OF PROCEDURAL SAFEGUARDS AVAILABLE IN VARIOUS MODELS

	Army Regulation 190-8	*Combatant Status Review Tribunals (CSRT)*	*MACV Directive 20-5 (Vietnam-era U.S. regulation)*	*Israel's Incarceration of Unlawful Combatants Law, 5762-2002*	*U.S. Domestic Criminal Prosecution*
Initial post-detention review conducted by judge or jury?	No	No	No	Yes	Yes
Right to counsel?	No	No	Yes	Yes	Yes
May detainees introduce evidence?	Yes	Yes[237]	Yes	Yes	Yes
May detainees have the assistance of process in obtaining evidence?	Unclear	Limited to witnesses and evidence reasonably available	Unclear	Unclear	Yes
Is ex parte evidence prohibited?	No—expressly authorized	No—expressly authorized	Yes	No—expressly authorized	Yes
Is coerced testimony prohibited?	Yes[238]	No	Unclear	Yes	Yes
Do the Federal Rules of Evidence, or comparable rules, apply?	No	No	No	No	Yes
Can the detainee appeal decisions to a judicial body?	No	Yes, pursuant to the DTA	No	Yes	Yes
Is the detainee entitled to periodic reassessment of the grounds for detention?	No	Yes, before an Administrative Review Tribunal	No	Yes, before a judge	No

237. Detainees have questioned the extent to which this right is honored in practice. *See* Brief for *Boumediene* Petitioners, *supra* note 184, at 5 (alleging that tribunals "in practice" denied detainees the ability to introduce reasonably available evidence).

238. This characterization may be open to dispute. *See supra* note 156.