

Preventive Detention in the Law of Armed Conflict: Throwing Away the Key?

Diane Webber*

INTRODUCTION

Since 9/11 the U.S. government has been wrestling with the problem of how to deal with the terrorist threat on U.S. soil from al Qaeda and its affiliates. Many aspects of this problem, such as means of capture or targeted killing of suspected terrorists, interrogation techniques, and surveillance methods have been widely debated elsewhere. Here the focus is on the issue of preventive detention, which for the purposes of this article means detention of individuals suspected of being terrorists in order to forestall attacks in the post-9/11 era. Preventive detention is relevant to what used to be called “the Global War on Terror” and is now termed as “Overseas Contingency Operations”¹ or efforts to “counter violent extremism.”²

A. Preventive Detention

Preventive detention (also referred to as preventative, security, or administrative detention) is not a new phenomenon. It has existed in several forms in the United States for years in several contexts. These include wartime detention powers to detain lawful and unlawful combatants, pre-trial detention in criminal trials, detention pursuant to material witness laws, immigration law detention of aliens awaiting deportation, the detention of the seriously mentally ill and convicted sex offenders when they pose a danger to themselves or the general public, and the quarantine of people with communicable diseases.³ This article discusses preventive detention as a tool to prevent terrorist attacks.

* Solicitor of the Senior Courts of England and Wales; LL.B. (Hons.), University of London; LL.M., Georgetown University; S.J.D. Candidate, Georgetown University.

1. Scott Wilson & Al Kamen, *‘Global War on Terror’ Is Given New Name*, WASH. POST, Mar. 25, 2009, at A4.

2. Mark Ambinder, *The New Term for the War on Terror*, THE ATLANTIC, May 20, 2010, <http://www.theatlantic.com/politics/archive/2010/05/the-new-term-for-the-war-on-terror/56969/>.

3. See, e.g., David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CAL. L. REV. 693, 695 (2009); Adam Klein & Benjamin Wittes, *Preventive Detention in American Theory and Practice*, 2 HARV. NAT’L SECURITY J. 85, (2011); BENJAMIN WITTES, DETENTION AND DENIAL: THE CASE FOR CANDOR AFTER

B. The Framework Problem

Much debate has focused on the appropriate legal framework for preventive detention.⁴ Should terrorists be treated as criminals, involving traditional criminal law methods of detection, interrogation, arrest, and trial? By contrast, should suspected terrorists be treated as though they were involved in an armed conflict, which would involve detention and trial according to a completely different set of rules and procedures? How should those two models be balanced?

In traditional wars between states with finite ends, the choice of law is likely to be fairly clear cut. As the United States battles to counter violent extremism, it seems that neither model is a perfect fit to deal with twenty-first century asymmetric terrorism.

C. Core Issues

Other than the framework problem, other core issues about the Law of Armed Conflict (LOAC) model include questions relating to duration of the conflict, including how to define the point when conflict ends, the process of status adjudication, and release, location of capture, and nationality of detainees.

This article focuses on the LOAC model of preventive detention and analyzes the legal framework, duration of LOAC detention, procedures for challenging that detention, and evolution of those procedures in the last ten years. Most of the attention of the courts has been directed at detainees at Guantánamo Bay, but this article also examines the status of some detainees at Parwan, Afghanistan (formerly held at Bagram) and in Iraq, and questions the suitability of the current LOAC model for the United States to detain suspected terrorists in the future, both within and outside of Guantánamo, on or off the battlefield.

Part I analyzes the legal framework for preventive detention in accordance with the LOAC. Part II discusses duration of detention. Part III examines problems relating to challenging detention in the context of some recent cases of detainees at Guantánamo Bay. Part IV discusses detention in Iraq and Afghanistan and focuses on the case of Fadi al Maqaleh,⁵ currently detained at Parwan. Part V discusses sections of the National Defense Authorization Act of 2012 (NDAA) dealing with detainee

GUANTANAMO 35 (2011).

4. See, e.g., Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1080 (2008); Cole, *supra* note 3, at 697-698; Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 40 CASE W. RES. J. INT'L. L. 593, 595 (2009).

5. *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010)

detention.⁶ This article concludes that over a decade after 9/11, the law dealing with detention is still unclear, the current state of the LOAC does not provide an adequate blueprint to deal with future detention challenges, and the NDAA does not resolve all the problems it aims to fix. The form of preventive detention of suspected terrorists that is deemed necessary by the U.S. government does not fit within the current domestic U.S. criminal law framework or the U.S. Constitution; hence the reliance on the LOAC. However, the way forward should not lie in trying to make a framework out of a LOAC that does not serve as a totally appropriate model to detain suspected terrorists. Using the LOAC as a framework does not rectify the inadequacies of the LOAC in the terrorism context. It is time for a fresh look at the entire issue.

I. THE LEGAL FRAMEWORK FOR PREVENTIVE DETENTION IN ACCORDANCE WITH THE LOAC

A. *Comparisons with the United Kingdom: Northern Ireland and Beyond*

The United States is not alone in encountering choice of law framework problems. The United Kingdom has had to grapple with this issue in connection with attacks on British soil by both Islamist and Irish terrorists.⁷ The United Kingdom's decision to deal with Islamist terrorists as criminals solely in accordance with the criminal law model is partly based on a long held view that terrorists are criminals. This view is reinforced by the U.K. experience of combating Irish terrorism, an experience that does not cover the British with glory. The history of the conflict both on domestic soil and in Northern Ireland and the legal measures taken have been extensively described and analyzed elsewhere.⁸

Relevant to this discussion, however, is a summary of the use of the British army in Northern Ireland to see how the military model interacted with the criminal model. Terrorist activity occurred in Northern Ireland from 1921 through 1998. In history and literature, this terrorist activity is referred to with enormous understatement as "The Troubles" with various permutations of the Irish Republican Army (IRA). One of the prime

6. National Defense Authorization Act of 2012, Pub. L. No. 112-81, §§1021-1034, 125 Stat. 1298, 1562-1573.

7. Discussion of how the British dealt with insurgents and terrorists in former British territories and colonies, such as India or Malaysia, is beyond this article's scope.

8. See, e.g., LAURA K. DONOHUE, COUNTER-TERRORIST LAW AND EMERGENCY POWERS IN THE UNITED KINGDOM, 1922-2000 (2001); LAURA K. DONOHUE, THE COST OF COUNTERTERRORISM 35-57 (2008); COMBATING TERRORISM IN NORTHERN IRELAND (James Dingley ed., 2009).

reasons for the many years of violence derives from ethnic nationalism and the question of whether Northern Ireland should belong to the United Kingdom or Eire.⁹ Even after the peace agreement of 1998, the United Kingdom has faced, and continues to face, a threat on the mainland United Kingdom from Irish terror groups.¹⁰

Over the period there have been waves of particularly prolonged serious violence in Northern Ireland, as well as sporadic terrorist attacks on the mainland (most recently in 2001),¹¹ necessitating the enactment of legislation both in Northern Ireland and in the United Kingdom to maintain order. In various periods between 1922 and 1975 the Northern Ireland government was able to preventively detain indefinitely anyone suspected of “being about to act in a manner prejudicial to the preservation of peace and the maintenance of order,” and was able to restrict the movement of people who were not detained.¹² Between 1922 and 1972, 940 people were interned in Northern Ireland.¹³

In 1968 there was a renewed onslaught of serious violence, escalating to such an extent that the police in Northern Ireland were unable to control the situation. The British government decided to intervene and, in August 1969, dispatched the British Army to Northern Ireland to restore order. Their role was to “support the civil authority, not usurp it.”¹⁴ The British government regarded the situation as terrorism, not war,¹⁵ despite the fact that the “conflict reached almost civil war like proportions.”¹⁶ Internment was authorized again, special courts were established without jury trial for dealing with IRA terrorist activity, and brutal interrogation practices were introduced. The military strategy has been described as disastrous,¹⁷ because the combination of the above-mentioned practices was the spur for

9. James Dingley, *Northern Ireland and the “Troubles,”* in *COMBATING TERRORISM IN NORTHERN IRELAND* 11, 12 (James Dingley ed., 2009).

10. Mark Townsend & Henry McDonald, *New Irish Terror Groups Are Threat to UK, Warn Police*, *THE GUARDIAN*, Apr. 24, 2011, <http://www.guardian.co.uk/uk/2011/apr/23/terrorism-threat-uk-northern-ireland>.

11. *Id.*

12. LAURA K. DONOHUE, *THE COST OF COUNTERTERRORISM*, *supra* note 8, at 37.

13. Richard B. Finnegan, *What Lessons Can Be Learned from a Sui Generis Case?*, in *COURTS AND TERRORISM: NINE NATIONS BALANCE RIGHTS AND SECURITY* 72, 75 (Mary L. Volcansek & John F. Stack Jr. eds., 2011).

14. James Dingley, *Introduction*, in *COMBATING TERRORISM IN NORTHERN IRELAND* 1, 4 (James Dingley ed., 2009).

15. *Id.* at 6; *see also* PHILIPPE SANDS, *LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES* 151 (2005) (stating that the British government consistently refused to treat IRA prisoners as POWs because they considered there to be no armed conflict).

16. Peter R. Neumann, *The Government’s Response*, in *COMBATING TERRORISM IN NORTHERN IRELAND* 137, 141 (James Dingley ed., 2009).

17. *Id.* at 140 (stating that, initially, “the security forces were told to avoid any confrontation, and they failed to establish a presence in dangerous areas, and also ignored all signs of the emerging threat.”).

an increase in violence in Northern Ireland itself as well as in terrorist attacks on mainland United Kingdom throughout the 1970s and 1980s.¹⁸ The practices also generated much litigation in the European Court of Human Rights.¹⁹

The police in Northern Ireland, known as the Royal Ulster Constabulary, have certain unique features that developed in response to the need to deal with a lethal terror threat since the 1920s. They evolved into a formalized military security force, and had to perform a full range of normal policing duties as well as policing with paramilitary features.²⁰ After the abolition of the Northern Ireland Parliament in 1972 and institution of Direct Rule from the United Kingdom, the British government re-evaluated its political and military strategy, and it adopted a policy of “police primacy” in 1976.²¹ The aim of the new strategy was to delegitimize Republican violence and render the activities of the IRA simply criminal.²² “Police primacy made a clear statement that the government did not regard the situation as a war but a matter of law and order (that terrorists were criminals not combatants).”²³

This attitude has continued in the British response to Islamist extremist activity in the United Kingdom. Since 2000 there has been a raft of anti-terror legislation in the United Kingdom. Terrorist activity is treated as something to be dealt with squarely in the criminal law system. Preventive detention is permitted. Since 2006 suspected terrorists could be held for up to twenty-eight days without charge,²⁴ but since January 25, 2011, the maximum number of days for detention without charge in terrorist cases has been reduced to fourteen.²⁵ Although indefinite detention of suspected alien

18. Finnegan, *supra* note 13, at 84.

19. See, e.g., *Lawless v. Ireland*, 3 Eur. Ct. H.R. (ser. A) (1961) (detention without trial); *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1976) (treatment of internees); *Brogan v. United Kingdom*, 145 Eur. Ct. H.R. (ser. A) (1988) (emergency arrest and detention powers); *Brannigan & McBride v. United Kingdom* 258 Eur. Ct. H.R. (ser. A) (1993) (on derogation from European Convention on Human Rights).

20. Neil Southern, *The Royal Ulster Constabulary and the Terrorist Threat*, in *COMBATING TERRORISM IN NORTHERN IRELAND* 177 (James Dingley ed., 2009).

21. *Id.* at 179-180.

22. *Id.* at 180.

23. Sir Alistair Irwin & Mike Mahoney, *The Military Response*, in *COMBATING TERRORISM IN NORTHERN IRELAND*, *supra* note 20 at 198, 218.

24. Terrorism Act, 2006, ch. 11, §23 (Eng.). For a description of the U.K. law on detention, see Diane Webber, *Extreme Measures: Does the United States Need Preventive Detention To Combat Domestic Terrorism?*, 14 *TOURO INT'L L. REV.* 128 (2010).

25. SECRETARY OF STATE FOR THE HOME DEPARTMENT, *REVIEW OF COUNTER-TERRORISM AND SECURITY POWERS: REVIEW FINDINGS AND RECOMMENDATIONS*, 2011, Cm. 8004 at 14, ¶28.i (U.K.) [hereinafter *REVIEW FINDINGS AND RECOMMENDATIONS*]; *28 Day Detention Order To Expire*, *THE INDEPENDENT*, Jan 20, 2011, <http://www.independent.co.uk/news/uk/crime/28-day-terror-detention-order-to-expire-2189737.html>.

terrorists pending deportation was specifically struck down by the House of Lords²⁶ (now called the Supreme Court) for violating Article 5 of the European Convention on Human Rights,²⁷ there has been no human rights challenge to detention without charge for twenty-eight days.

In 2005, a system of “control orders” was introduced.²⁸ A control order is an order that may be made against an individual imposing obligations connected with preventing or restricting involvement by that individual in terrorism-related activity by, for example, house arrest or curfews.²⁹ Since its inception the control order regime has been greatly criticized by “controlees” and civil libertarians, because orders were made using classified evidence to which controlees were not privy.³⁰ In February 2009, the European Court of Human Rights ruled that it was essential that as much information about the allegations and evidence against the controlee should be disclosed, without compromising national security or the safety of others.³¹ Then in June 2009, the U.K. House of Lords acknowledged the requirement to give the controlee sufficient information to enable him to give effective instructions to his lawyer in court proceedings. It is necessary to know the “essence of the case.”³²

The U.K. Home Office has conducted annual reviews of various counterterrorism measures, including control orders, and the most recent was published in January 2011.³³ In the wake of all the criticism, the British Home Secretary has recommended the introduction of a new control order regime starting in 2012, dubbed “T-Pims” (Terrorism Prevention and Investigation Measures).³⁴ The new regime is meant to be “more focused and flexible” but critics say it is “little more than ‘control orders lite.’”³⁵

26. *A (F.C.) and Others (F.C.) v. Secretary of State for the Home Department*, [2004] UKHL 56 (Eng.); *A and Others v. The United Kingdom*, App. No. 3455/05, Eur. Ct. H.R. (2009).

27. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, C.E.T.S. No. 5, 213 U.N.T.S. 222, amended by Protocol No. 3, June 5, 1963, E.T.S., No. 45; Protocol No. 5, Jan. 20, 1966, E.T.S. No. 55; Protocol No. 8, Mar. 19, 1985, E.T.S. No. 118; Protocol No. 11, Nov. 5, 1994, E.T.S. No. 155.

28. Prevention of Terrorism Act, 2005, ch. 2 (Eng.), sets out the control order regime. See §1(4) for examples of obligations that may be imposed.

29. See Webber, *supra* note 24, at 152-157.

30. *Id.*

31. App. No. 3455/05, *supra*, note 26.

32. *Secretary of State for the Home Department v. AF (FC)* [2009] UKHL 28, ¶65 (Eng.).

33. REVIEW FINDINGS AND RECOMMENDATIONS, *supra* note 25.

34. *Id.* at 41-43; *Theresa May: Control Orders To Be Replaced*, B.B.C. NEWS, Jan. 26, 2011, <http://www.bbc.co.uk/news/uk-12287074> [hereinafter *Theresa May*]; Dominic Casciani, *U.K. Counter-Terror Review Explained*, B.B.C. NEWS, Jan. 26, 2011, <http://www.bbc.co.uk/news/uk-12289294>.

35. *Theresa May*, *supra* note 34.

Curfews will be reduced from a maximum of sixteen hours a day to between eight and ten hours a day.³⁶

Thus the United Kingdom has settled on a model that is not drawn from the LOAC, but is based on domestic criminal law. The United Kingdom appears to have established a preventive detention regime that sits, although perhaps not too comfortably, within the framework of the European Convention on Human Rights.

B. The U.S. Legal Framework

The United States has “almost singularly asserted the authority to detain non-battlefield terrorism suspects”³⁷ in accordance with the LOAC. This break from the traditional approach to terrorism³⁸ may have occurred for several reasons. The Fourth Amendment of the U.S. Constitution,³⁹ other than in very few limited situations, does not permit arrest absent probable cause that a crime is being or has been committed,⁴⁰ and suspects arrested without warrant must be brought before a magistrate within forty-eight hours of arrest to ensure that there is probable cause for the arrest.⁴¹ There are other needs that may not be adequately addressed by U.S. domestic criminal law, such as incapacitation of terrorists, disruption of terror plots, and gathering information.⁴²

In the 1990s, the United States adopted various approaches to deal with terrorist attacks on U.S. property outside the country. For example, in response to the 1998 car bomb attacks outside U.S. embassies in Kenya and Tanzania, four approaches were taken:⁴³ 1) Bin Laden was indicted; 2) civil sanctions were imposed on his funds and companies; 3) the United States continued to work on multilateral anti-terrorist conventions; and 4) it “engag[ed] in a dramatic use of military force” by bombing “targets associated with the bin Laden network in Afghanistan and the Sudan.”⁴⁴

36. *Id.*; Casciani, *supra* note 34.

37. Hakimi, *supra* note 4, at 626.

38. Allison M. Danner, *Defining Unlawful Enemy Combatants: A Centripetal Story*, 43 TEX. INT'L L. J. 1, 8 (Fall 2007).

39. U.S. Const. amend. IV.

40. *Gerstein v. Pugh*, 420 U.S. 103 (1975) (holding that “the standard for arrest is probable cause, defined in terms of facts and circumstances sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense”).

41. *County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991).

42. Matthew C. Waxman, *Administrative Detention of Terrorists: Why Detain, and Detain Whom?* 3 J. NAT'L. SECURITY L. & POL'Y 1, 14 (2009).

43. Ruth Wedgwood, *Responding to Terrorism: The Strikes Against Bin Laden*, 24 YALE J. INT'L L. 559, 560-563 (1999).

44. *Id.* at 559.

Prior to 9/11, the United States treated terrorism on U.S. soil as criminal activity.⁴⁵

Immediately after the attacks “the Bush Administration rushed to the judgment that America’s old approach to fighting terrorism, which treated it as a crime like any other, was inadequate for the post 9/11 world. Almost without discussion, it was agreed that a new kind of enemy required new tactics.”⁴⁶ The Administration immediately went onto a war footing.

It is instructive to look at a time line of events in order to analyze the development of the legal framework. On September 12, the U.N. Security Council passed a resolution recognizing the right of the United States to self-defense in response to the attacks, which it described as a “threat to international peace and security.”⁴⁷ On September 18, Congress passed the Authorization for Use of Military Force (AUMF), which authorized the President to:

use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.⁴⁸

Al Qaeda was quickly deemed the organization that had masterminded the terror. They were believed to be based in Afghanistan, harbored by the Taliban.⁴⁹ On October 7, the United States invaded Afghanistan,⁵⁰ where efforts were directed against the Taliban, who at that time were regarded as the de facto government. By December 2001, the Taliban were defeated, and the United States and allies joined forces with the Northern Alliance, who gained control of the country. But the war continues against both the Taliban as an internal rebel group and al Qaeda in Afghanistan.

The LOAC derives primarily from two sources. The first source is international treaties. One such treaty is the Hague Convention,⁵¹ which

45. See, e.g., Richard Bernstein, *Trade Center Bombers Get Prison Terms of 240 Years*, N.Y. TIMES, May 25, 1994, at A1.

46. JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* 34 (2008).

47. S.C. Res. 1368, ¶1, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

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

49. David Glazier, *Playing by the Rules: Combating Al Qaeda Within the Law of War*, 51 WM. & MARY L. REV. 957, 988 (2009).

50. *Oct. 7, 2001: U.S. Attacks Afghanistan*, ABC NEWS, <http://abcnews.go.com/Archives/video/oct-2001-us-attacks-afghanistan-9245206>.

51. Second Hague Peace Conference Convention Regarding the Laws of and Customs of Land Warfare, Oct. 18, 1907, pmbl., 36 Stat. 2277, 3 Martens (3d) 461, *reprinted in* 2 AM. J. INT’L L. 90, 91-92 (Supp. 1908) [hereinafter Hague Regulations].

deals with matters such as command responsibility, obedience to orders, and the concepts of distinction and military necessity.⁵² The other main set of treaties is the Geneva Conventions (GCs) and their Additional Protocols (APs).⁵³ Their purpose is to protect the sick and wounded, POWs, and civilians.⁵⁴ Gary Solis notes that the “Hague law has so fully mixed with Geneva law that it is pointless to continue the distinction.”⁵⁵ The second source is customary international law.⁵⁶

There are differing opinions as to the extent of the application of human rights law. Europeans, the International Committee of the Red Cross, the International Court of Justice, and human rights activists maintain that human rights law “*always* applies, hand in hand with the LOAC on the battlefield.”⁵⁷ The U.S. view is that human rights law does not, or should not, apply on the battlefield. In the event of overlap, the U.S. view is that the LOAC trumps international human rights law (IHRL),⁵⁸ and on the battlefield (in international armed conflicts) the LOAC will apply to the exclusion of IHRL.⁵⁹ However, in non-international armed conflicts where the LOAC mainly does not apply, IHRL prevails. For example, IHRL principles are found in GC IV.⁶⁰ When there are gaps in treaty law, customary international law applies.⁶¹

52. GARY D. SOLIS, *THE LAW OF ARMED CONFLICT* 83 (2010).

53. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War, 12 Aug. 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Jun. 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

54. SOLIS, *supra* note 52, at 82.

55. *Id.* at 83; *see also* The Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, July 1, 1996, 35 I.L.M. 809, 827, ¶75 (stating that “these two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law.”).

56. SOLIS, *supra* note 52, at 12.

57. *Id.* at 24

58. *Id.*

59. *Id.* at 25.

60. *Id.* Solis notes that Europe holds the contrary view.

61. Glazier, *supra* note 49, at 963.

In order to discuss the legal basis for detaining terror suspects after 9/11, it is first important to decide the status of the conflict. Conflicts arising between two or more of the parties to the GCs are known as international armed conflicts⁶² and the rules of the GCs and AP I apply, as they did during the brief period of the war in Afghanistan between October and December 2001.

Thereafter, the status has generally not been that of an international armed conflict, other than the first stages of the conflicts in Afghanistan and Iraq. Although some of the later stages of U.S. presence in Afghanistan and Iraq can fit into the traditional understanding of a non-international armed conflict, with the United States supporting the respective current governments in their fight against insurgents, waging a “war on terror” or “countering violent extremism” around the world wherever al Qaeda may be, does not.⁶³ As terrorist attacks led or inspired by al Qaeda are not carried out by states (and parties to the GCs), the attacks cannot be classified as international armed conflicts either.

Terrorist attacks may in some specialized circumstances be considered non-international armed conflicts, as will be discussed later in this article. However, mainly they are merely criminal acts.⁶⁴ David Glazier believes that the conflict with al Qaeda should be characterized as a “transnational conflict.” His view is that although many law of war treaties might not govern such a conflict, customary international law of war rules should apply, which now include many, if not most, of the provisions of the GCs.⁶⁵ In non-international armed conflicts, only Common Article 3 (so named because the same article appears in all four GCs in the same place) and perhaps AP II apply.⁶⁶ Common Article 3 is a relatively short statement prescribing humane treatment and listing a number of prohibited acts.⁶⁷

The Bush administration contended that the GCs did not apply to al Qaeda or the Taliban.⁶⁸ The Administration maintained that view until they were disabused of it by the Supreme Court in *Hamdan*, which held that Common Article 3 applied to the conflict with al Qaeda, i.e. treating the conflict as a non-international armed conflict.⁶⁹ It seems that despite denying the applicability of the GCs to the terrorists, the Administration wanted to treat the conflict as an international armed conflict for the

62. GCs, *supra* note 53, at art 2.

63. SOLIS, *supra* note 52, at 106.

64. *Id.* at 157.

65. Glazier, *supra* note 49, at 994-995.

66. SOLIS, *supra* note 52, at 153.

67. GCs, *supra* note 53, at art 3.

68. Memorandum from John C. Yoo & Robert Delahunty for Alberto R. Gonzales, Counsel to the President Re: Treaties and Laws Applicable to the Conflict in Afghanistan and to the Treatment of Persons Captured by U.S. Armed Forces in that Conflict (Nov. 30, 2001), available at <http://www.justice.gov/olc/docs/aclu-ii-113001.pdf>.

69. *Hamdan v. Rumsfeld*, 548 U.S. 557, 629-630 (2006).

purposes of picking up and detaining terror suspects. The Administration believed that they would then have the authority to hold the suspects until the cessation of hostilities – a power normally applicable to POWs.⁷⁰

Yet, for reasons discussed more fully below, terror suspects cannot be classified as POWs,⁷¹ principally because in order to be a POW, there has to be a war between two states, and a non-international armed conflict is not such a war. Furthermore, the person captured must by definition be a lawful combatant in an international armed conflict, i.e. a member of one of the participating armed forces or a civilian who is directly participating in hostilities in that conflict.⁷²

Terrorists, who are essentially civilians, may call themselves guerillas, but to qualify as POWs in an international armed conflict, they would have to fulfill the requirements of GC III Article 4A,⁷³ which they do not. Taliban fighters picked up in Afghanistan between October 7 and December 2001, while the Taliban were the de facto government of Afghanistan, could not qualify as POWs because they did not wear uniforms or any fixed signs.⁷⁴ Additionally, even if 9/11 is viewed as an act of war, al Qaeda cannot meet the requirements of GC III Article 4A.⁷⁵

Much of the analysis of the preventive detention issue has been confused by different views as to the status of terrorists. The categorization is important because it controls issues of duration of detention, obligations owed to detainees, and rights of detainees. On the battlefield – that is, in an international armed conflict – there are only two categories of individuals – combatants and civilians. Note, however, that a combatant can become *hors de combat* by choice through laying down arms and surrendering, or through circumstances such as getting wounded, sick, or shipwrecked.⁷⁶ Therefore, by definition, off the actual battlefield, in non-international armed conflicts, there are only civilians. In terrorist attacks the civilians happen to be criminals.

There is much discussion of a sub-category of civilians: unlawful combatants. Ryan Goodman says that civilians “effectively become ‘unlawful combatants’ for illegally taking up arms.”⁷⁷ Gary Solis describes

70. GC III, *supra* note 53, at art. 118.

71. GC III, *supra* note 53, at art. 4.

72. SOLIS, *supra* note 52, at 187.

73. GC III Art. 4A. (The conditions to be fulfilled are: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war).

74. SOLIS, *supra* note 52, at 213.

75. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 56 (2010).

76. SOLIS, *supra* note 52, at 188-189.

77. Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT’L L.

unlawful combatants as civilians who directly participate in hostilities. Irrespective of whether they are captured in an international or non-international armed conflict situation, they are criminals, not because they are unlawful combatants per se, but because they committed unlawful acts while unlawful combatants. They are not POWs, although they are entitled to Common Article 3 protection, and can be tried in domestic or military courts.⁷⁸ The term enemy combatants has also been used by the International Committee of the Red Cross (ICRC) and the U.S. government and courts.⁷⁹

Highlighting the impropriety of the combatant status, James Schoettler notes that “determining that terrorists are combatants who can be detained under the law of war . . . is the foundation of the military paradigm being used in the G[lobal] W[ar] O[n] T[error].”⁸⁰ Another commentator, David Glazier, believes that treating al Qaeda as combatants (i.e. as participants in an international armed conflict) might be advantageous to the United States for several reasons, including that it would justify preventive detention for the duration of hostilities and would not require linking detainees with hostile acts or showing specific intent to commit such acts, silencing critics of U.S. detainee policy.⁸¹ Although it may be advantageous, it is an incorrect classification, because al Qaeda is not participating in an international armed conflict.

The Bush administration distilled the concepts of unlawful combatant and enemy combatant into “unlawful enemy combatant” to include individuals supporting the Taliban and al Qaeda or associated forces who engaged in hostilities against the United States.⁸² As Ryan Goodman comments, this definition “sweeps up civilians,” and subjects all security detainees to a uniform process and standard of treatment, irrespective of whether they have directly or indirectly participated in hostilities.⁸³

The Obama administration has adopted a different label – that of “unprivileged enemy belligerents.”⁸⁴ The current definition still includes an

48, 51 (2009).

78. SOLIS, *supra* note 52, at 219.

79. *Id.* at 226; *see also* Danner, *supra* note 38, at 14; Jack M. Beard, *The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counterterrorism Operations*, 101 AM J. INT'L L. 56, 59-60 (Jan. 2007).

80. James A. Schoettler, Jr., *Detention of Combatants and the Global War on Terror*, in *THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE* 67, 78 (Michael W. Lewis ed., 2009).

81. Glazier, *supra* note 49, at 1001, 1014.

82. SOLIS, *supra* note 52, at 227.

83. Goodman, *supra* note 77, at 73-74.

84. Military Commissions Act of 2009, Pub. L. 111-84, §1802, 123 Stat. 2574 (2009) (codified in scattered sections of 10 U.S.C.) (“The term ‘unprivileged enemy belligerent’ means an individual (other than a privileged belligerent) who –

(A) has engaged in hostilities against the United States or its coalition partners;

(B) has purposefully and materially supported hostilities against the United States or its

individual who is a part of al Qaeda or who has purposefully and materially supported hostilities against the United States – a definition that has generated much discussion in habeas corpus petitions of detainees, as discussed below. It does, however, move away from the notion of combatants with its connotation of participation in an international armed conflict.

II. DETENTION AND ITS DURATION

Where does the power to detain come from? Where are the rights, obligations and procedures found in the law? How long may detention last? The AUMF does not mention detention, but in 2004, in *Hamdi v. Rumsfeld*, which concerned a U.S. citizen who had been detained for two years on U.S. soil as an enemy combatant, a plurality of the Supreme Court held that the AUMF authorized the detention of U.S. citizens.⁸⁵

The Obama administration adopted a new standard for the government's authority to detain in early March 2009. Instead of relying on the Commander-in-Chief authority, the Administration claimed to “draw on the international laws of war.”⁸⁶ That standard was set out in a filing with the District Court for the District of Columbia, and was still tied to the perpetrators of the 9/11 attacks, as well as persons “who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces.”⁸⁷ It seems, however, that grounding the definition of an unprivileged enemy belligerent (essentially a civilian) in the international laws of war does not work so well in the context of providing support to terrorists as it does not square with the LOAC definition of direct participation in hostilities.

Gary Solis sets out the essence of the ICRC's Interpretive Guidance,⁸⁸ which gives three criteria that a civilian must meet to constitute direct

coalition partners; or

(C) was a part of al Qaeda at the time of the alleged offense under this chapter.”).

85. *Hamdi v. Rumsfeld*, 542 U.S. 507, 517 (2004).

86. Press Release, Department of Justice, Office of Public Affairs, Department of Justice Withdraws “Enemy Combatant” Definition for Guantanamo Detainees (Mar. 13, 2009), available at <http://www.justice.gov/opa/pr/2009/March/09-ag-232.html>. The phrase “draw on the international laws of war” has changed subtly in various documents. For example, Executive Order 13,567 of March 10, 2011 defined detention authorized by the AUMF “as informed by the laws of war,” and the National Defense Authorization Act of 2012 refers to detention “under the law of war.” See Marty Lederman & Steve Vladeck, *The NDAA: The Good, the Bad, and the Laws of War – Part II*, LAWFARE (Dec. 31, 2011), <http://www.lawfareblog.com/2011/12/the-ndaa-the-good-the-bad-and-he-laws-of-war-part-ii/>.

87. Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantánamo Bay, *In re: Guantánamo Bay Detainee Litigation*, Misc. No. 08-442 (TFH) (D.D.C. Mar. 13, 2009).

88. Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, reprinted in 90 INT'L REV. RED CROSS

participation: threshold of harm, direct causation, and belligerent nexus.⁸⁹ It should be noted, however, that a number of scholars, including some of the experts involved in the formulation of the document, are extremely critical of the Interpretive Guidance⁹⁰ on grounds that “it repeatedly takes positions that cannot possibly be characterized as an appropriate balance of the military needs of states with humanitarian concerns.”⁹¹ Further, and more importantly for this discussion, the Interpretive Guidance is “not meant to have any bearing on the status of direct participants in detention situations.”⁹² There are many acts of support which would not be regarded as direct participation, such as cooking, disseminating propaganda and supportive financial transactions, and aiding humanitarian causes,⁹³ but those same acts might be treated as support in the context of prosecuting material support.⁹⁴

In the case of *Al Bihani v. Obama*, the panel noted that the Military Commissions Act (MCA) of 2006⁹⁵ lists persons who materially supported hostilities as being subject to trial by military commission. The court went on to state that “any person subject to a military commission trial is also subject to detention, and that category of persons includes those who are part of forces associated with al Qaeda or the Taliban or those who purposefully and materially support such forces.”⁹⁶ The continued use of “purposefully and materially support” thus appears to conflict with the standard of “substantial support” set by the Obama administration.

Jelena Pejic states that the basis for and standards of detention are governed by AP I, Common Article 3, AP II and customary international law, but these provisions do not set out the rights sufficiently.⁹⁷ In

991-1047 (2008).

89. SOLIS, *supra* note 52, at 203-205. As Solis notes, the date of the journal is 2008, although the guidance was released in 2009.

90. See, e.g., Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT'L L. & POL. 697 (2010); Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL. 641 (2010); Bill Boothby, *“And For Such Time As”: The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. INT'L L. & POL. 741 (2010); W. Hays Parks, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 769 (2010).

91. Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SECURITY J. 5, 44 (2010).

92. *Id.* at 14.

93. See, e.g., Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010).

94. SOLIS, *supra* note 52, at 203.

95. Military Commissions Act of 2006, Pub. L. No. 109-366, §3, 120 Stat. 2600 (2006) (codified as amended in scattered sections of 10, 18, and 28 U.S.C.) amended by Military Commissions Act of 2009, *supra* note 84.

96. *Al-Bihani v. Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010).

97. Jelena Pejic, *Procedural Principles and Safeguards for Internment /Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INT'L REV. RED CROSS

reviewing the standards for preventive detention under the name of “internment” or “administrative detention” of members of armed groups, the ICRC discusses the rights of unlawful combatants, as well as participants in non-international armed conflicts. Although the United States has not ratified AP I, it accepts that much of AP I has become part of customary international law.⁹⁸ AP I merely provides for humane treatment “as a minimum,”⁹⁹ and gives detainees the right to be informed promptly of the reasons for detention, and the right, except where the detention is for “penal offences,” to be released as soon as possible, or at least “as soon as the circumstances justifying the . . . detention . . . have ceased to exist.”¹⁰⁰ Pejic points to AP I Article 72, which states that the provisions of AP I are additional to GC IV and international human rights law.¹⁰¹

In the case of non-international armed conflicts, Common Article 3 contains no language to assist regulation of detention, other than the guiding principle of humane treatment. It does not mention duration. Nor does AP II (which the United States has also not ratified, but which President Obama hopes soon will be).¹⁰² AP II provides for humane treatment, as a minimum,¹⁰³ and the preamble reminds readers that human rights laws and treaties offer a basic protection for individuals.¹⁰⁴ Yet it seems that the fundamental provisions of GC III are replicated in Common Article 3 and AP II.¹⁰⁵

As to human rights treaties, the International Covenant on Civil and Political Rights (ICCPR),¹⁰⁶ which has been ratified by the United States, gives little help. Article 9 affirms the right to liberty and security of the person but states: “No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”¹⁰⁷ Derogation from Article 9 is permitted “in time of public emergency which threatens the life of the nation and the existence of which

375, 377 (2005).

98. SOLIS, *supra* note 52, at 134-135.

99. AP I, *supra* note 53, at art. 75.

100. *Id.* at art. 75(3).

101. Pejic, *supra* note 97, at 378.

102. Press Release, The White House, Office of the Press Secretary, Fact Sheet: New Actions on Guantánamo and Detainee Policy (Mar. 7, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy>.

103. AP II, *supra* note 53, at arts. 2, 4, 5, 6.

104. Pejic, *supra* note 97, at 378-379.

105. EMILY CRAWFORD, THE TREATMENT OF COMBATANTS AND INSURGENTS UNDER THE LAW OF ARMED CONFLICT 79 (2010).

106. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

107. *Id.* at art. 9.

is publicly proclaimed.”¹⁰⁸ States may detain in accordance with this article provided the measures are not inconsistent with their obligations under international law.¹⁰⁹ Detainees must be told why they are being detained,¹¹⁰ must be entitled to challenge their detention before a court, which must adjudicate “without delay,”¹¹¹ and detainees must be treated humanely, but no actual procedure is set out.¹¹²

In two places, GC IV deals with the rights of detaining civilians. Article 42 allows for internment “if the security of the Detaining Power makes it absolutely necessary.” Article 43 sets out a procedure for prompt review after detentions, followed by a minimum of twice yearly further reviews. Article 78 authorizes internment if an “Occupying Power” considers it necessary for “imperative reasons of security.” There is a right of appeal and periodic further reviews.

ICRC experts comment that imperative reasons of security do not include information gathering, nor must detention be used as an alternative to criminal prosecution.¹¹³ They found that there is a power to capture persons deemed to pose a serious security threat, and such persons may be detained as long as they continue to pose a threat.¹¹⁴ They argue that neither the LOAC nor international human rights law provide an explicit legal basis for internment in non-international armed conflict – states should look to their own domestic law, provided it complies with the LOAC and international human rights law.¹¹⁵

Commentator Ashley Deeks asserts that detention in non-international armed conflict is governed “almost exclusively” by a state’s domestic law.¹¹⁶ Some commentators believe that the procedures relating to international armed conflicts should apply to non-international armed conflicts. For example, Deeks argues that the core procedures in GC IV provide an excellent basis for detention.¹¹⁷ Ryan Goodman also comments favorably about GC IV, contending that it contains the most closely analogous rules concerning the detention of civilians, and that GC IV “constitutes the best approximation of IHL rules when interpretive gaps

108. *Id.* at art. 4.1.

109. *Id.*

110. *Id.* at art. 9.2.

111. *Id.* at art. 9.4

112. *Id.* at art. 10.1.

113. Chatham House & Int’l Comm. of the Red Cross, *Expert Meeting On Procedural Safeguards for Security Detention in Non-International Armed Conflict*, 91 INT’L REV. RED CROSS 859, 866 (2009).

114. *Id.* at 863.

115. *Id.* at 870.

116. Ashley S. Deeks, *Administrative Detention in Armed Conflict*, 40 CASE W. RES. J. INT’L L. 403, 405 (2009).

117. *Id.* at 434.

arise.”¹¹⁸ Yet GC IV does not address the problem of duration of detention, particularly in the context of the conflict with al Qaeda, and the rules relating to international armed conflicts “do not address the full range of detention issues in conflicts with nonstate actors.”¹¹⁹

According to Yoram Dinstein, unlawful combatants may be subjected to “administrative detention without trial.”¹²⁰ He does not discuss duration specifically other than to refer to the case of *Quirin*.¹²¹ This case states that unlawful combatants may be treated in the same way as lawful combatants who are detained as POWs. This could imply detention for the duration of hostilities. However, Dinstein does not accept that al Qaeda merits the POW status.¹²²

Pejic states that in all the above cases detention must cease when the individual ceases to pose a real threat to state security, and that the requirement for this is even more stringent in cases where Common Article 3 governs, in non-international armed conflicts, where human rights law proscribes indefinite detention.¹²³ She sets out twelve recommended procedural rules to safeguard detainees.¹²⁴ None address the problem that the United States has asserted its wish to detain for the duration of hostilities, even though there is no visible end to hostilities with al Qaeda – which could last for decades.

Alec Walen and Ingo Venzke believe that in *Hamdi*¹²⁵ (where a U.S. citizen was captured on the battlefield during the international armed conflict in Afghanistan, for allegedly taking up arms with the Taliban) the Supreme Court misapplied the LOAC to justify “indefinite, possibly perpetual, preventive detention in the ‘war on terror.’”¹²⁶ Although the capture took place during the international armed conflict phase, the commentators believe that the Court was discussing “the war on terror” generally.¹²⁷ They note that the Court held that “indefinite detention for the

118. Goodman, *supra* note 77, at 50.

119. John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflict: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J INT’L L. 201, 209 (2011).

120. DINSTEIN, *supra* note 75, at 38.

121. *Id.* at 36 (quoting *Ex parte Quirin*, 317 U.S. 1, 31 (1942) (“Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention.”)).

122. DINSTEIN, *supra* note 75, at 56.

123. Pejic, *supra* note 97, at 382.

124. *Id.* at 384-391.

125. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

126. Alec Walen & Ingo Venzke, *Detention in the “War on Terror”: Constitutional Interpretation Informed by the Law of War*, 14 ILSA J. INT’L & COMP. L. 45, 54 (2007).

127. *Id.* at 53.

purpose of interrogation is not authorized” in the AUMF,¹²⁸ and “[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities.”¹²⁹ They also highlight language indicating that the Court’s understanding of the laws of war “may unravel” if “the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war.”¹³⁰

There are two misapplications of the LOAC. The first is the reference in the judgment to cessation of “active hostilities” in the context of the “war on terror.”¹³¹ The Court cited GC III Article 118 in support, but that provision is only applicable in international armed conflicts.¹³² The second misapplication involves the treating of detainees in the “war on terror” as though they were combatants.¹³³ This again relied on GC III Article 118 (which permits the detention of POWs in international armed conflicts for the duration of hostilities), but applied it to unlawful combatants, who would not have GC III rights. Walen and Venzke are right to point out that “the appeal to GC III cannot justify detentions until the end of the ‘war on terror,’”¹³⁴ and that using it in another context (such as a non-international armed conflict) “strips” the principle “from its normative foundation.”¹³⁵

Duration of detention authority has been vigorously debated in the D.C. District Court, but the current final judicial word comes from the 2010 D.C. Circuit Court’s decision in *Awad v. Obama*. This affirms that “*Al-Bihani* makes plain that the United States’ authority to detain an enemy combatant is not dependent on whether an individual would pose a threat to the United States or its allies if released but rather upon the continuation of hostilities.”¹³⁶ Although the courts now appear to agree on this point, it is still a nebulous standard in the context of “countering violent extremism.”

III. CHALLENGING DETENTION: RECENT D.C. CIRCUIT CASES INVOLVING GUANTÁNAMO DETAINEES

Many cases have focused on the meaning of membership and support of al Qaeda, but often these concepts are intertwined. Also judges have been greatly exercised on the question of the required standard of proof in habeas cases.

128. *Id.* at 51 (quoting *Hamdi*, 542 U.S. at 521).

129. *Id.* (quoting *Hamdi*, 542 U.S. at 520-521).

130. *Id.*

131. *Id.* at 54.

132. *Id.* at 55, (quoting *Hamdi*, 542 U.S. at 520).

133. *Id.* at 56.

134. *Id.* at 55.

135. *Id.*

136. *Awad v. Obama*, 608 F.3d 1, 11 (D.C. Cir. 2010).

A. “Member of,” “Part of,” and “Support of” Al Qaeda

What does it mean to be a “member of” or “part of” al Qaeda or the Taliban? Using membership as a criterion seems to be tricky. Matthew Waxman argues that using membership or support is both “too broad and too narrow” an approach. He considers that this approach has proven “prone to overuse against individuals who, while perhaps individually dangerous, pose little or no threat of major terrorist attack.” He suggests instead an agency requirement, which has more in common with traditional definitions of enemy combatancy than mere membership or support. For him, the question should be “does the individual operate under the effective control of an organization?”¹³⁷

David Mortlock, who has described some of the cases, concludes that the word “members” does not mean individuals providing “mere support.”¹³⁸ In *Gherebi v. Obama*,¹³⁹ Judge Reggie B. Walton applied a combination of standards he deemed consistent with Common Article 3 and AP II to permit detention of anyone who is a “member of the armed forces” (defined in accordance with AP I) “of an organization that the President ‘determines planned, authorized, committed or aided’ the 9/11 attacks, as well as any member of the ‘armed forces’ of an organization harboring”¹⁴⁰ such members. Judge Walton did not reject outright the substantial support standard, except to determine membership of an organization.¹⁴¹

In *Hamlily v. Obama*¹⁴² Judge John D. Bates rejected the concept of substantial support as an independent basis for detention saying that it was “beyond what the law of war will support,”¹⁴³ but he did accept it as a criterion for membership. He cited with approval Judge Walton’s statement in *Gherebi*, that the key question was “whether the individual functions or participates within or under the command structure of the organization, i.e. whether he receives and executes order or directions.”¹⁴⁴

In *Al-Bihani v. Obama*¹⁴⁵ the petitioner had been a cook with a militia brigade associated with the Taliban. He claimed that although he carried a weapon, he never used it. The court ruled that he could be detained as a member of a force associated with the Taliban who had provided support to

137. Waxman, *supra* note 42, at 31.

138. David Mortlock, *Definite Detention: The Scope of the President’s Authority To Detain Enemy Combatants*, 4 HARV. L. & POL’Y. REV. 375, 389-404 (2010).

139. *Gherebi v. Obama*, 609 F. Supp. 2d 43 (D.D.C. 2009).

140. Mortlock, *supra* note 138, at 390 (quoting *Gherebi*, 609 F. Supp. 2d at 68-70).

141. Mortlock, *supra* note 138, at 390.

142. *Hamlily v. Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009).

143. Mortlock, *supra* note 138, at 391 (quoting *Hamlily*, 616 F. Supp. 2d at 76).

144. *Id.*, at 391 (quoting *Hamlily*, 616 F. Supp. 2d at 75).

145. *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010).

the force.¹⁴⁶ Morton states that as the court had decided that al-Bihani could be detained for being a member, the finding as to support is merely a non-binding dictum.¹⁴⁷

The meaning of membership continues to be a moveable feast. Robert Chesney notes that even judges still do not agree on what conduct counts as membership, nor do they agree whether detention may be used in the distinct situation in which a non-member provides support to “clandestine non-state actors with indistinct and unstable organizational structures.”¹⁴⁸ In *Bensayah v. Obama*, the government abandoned its claim that the petitioner’s detention was lawful because of support rendered to al Qaeda, and the claim rested on membership alone. The court decided that the government’s authority to detain extends to individuals who are “functionally part of” al Qaeda, but remanded the case to the district court to determine the issue.¹⁴⁹ They did not deal with the issue of whether, as the government contended, the authority extended to individuals who “substantially supported Taliban or al Qaeda forces or associated forces.”¹⁵⁰ The court concluded that it was “impossible to provide an exhaustive list of the criteria for determining whether an individual is ‘part of’ al Qaeda.”¹⁵¹ A case-by-case, functional individualized approach was necessary to determine that question.¹⁵² Cases such as *Al Adahi v. Obama*¹⁵³ and *Salahi v. Obama*¹⁵⁴ emphasize the necessity of viewing all the evidence collectively in its entirety. In *Uthman v. Obama*, the D.C. Circuit confirmed that each piece of evidence should not be weighed in isolation, but all the evidence must be considered as a whole.¹⁵⁵

There is no greater clarity about the meaning of support. In their analysis of Guantánamo habeas cases, Benjamin Wittes, Robert Chesney, and Rabea Benhalim highlight that there have been “as many as four distinct positions” of interpretation of the meaning of support taken by different district judges.¹⁵⁶ At one end of the spectrum is *Hamlily*, where

146. Mortlock, *supra* note 138, at 392-393 (quoting *Al-Bihani*, 590 F. Supp. 3d, at 872-873).

147. Mortlock, *supra* note 138, at 393.

148. Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769, 772 (2011).

149. *Bensayah v. Obama*, 610 F.3d 718, 720 (D.C. Cir. 2010).

150. *Id.* at 722.

151. *Id.* at 725.

152. *Id.*

153. *Al Adahi v Obama*, 613 F.3d 1102 (D.C. Cir. 2010), *cert. denied*, 131 S.Ct. 1001 (2011).

154. *Salahi v. Obama*, 625 F.3d 745, 752 (D.C. Cir. 2010).

155. *Uthman v. Obama*, 637 F.3d 400, 407 (2011).

156. BENJAMIN WITTES, ROBERT CHESNEY & RABEA BENHALIM, *EMERGING LAW OF DETENTION 17-21* (2010) [hereinafter *EMERGING LAW OF DETENTION*]; BENJAMIN WITTES, ROBERT CHESNEY, & LARKIN REYNOLDS, *THE EMERGING LAW OF DETENTION 2.0: THE GUANTANAMO HABEAS CASES AS LAWMAKING 24* (2011) [hereinafter *EMERGING LAW OF*

Judge Bates did not think that support was a ground for detention in its own right, but acts of support can be relevant evidence of functional membership, provided that the government can show some direction and control in the group/individual dynamic.¹⁵⁷ At the other end of the spectrum there are variations of the notion of keeping support a separate ground for detention.¹⁵⁸ The authors argue that the difference between the two approaches is critical in cases involving “independent actors who provide financial and other support services to Al Qaeda.”¹⁵⁹

B. Burden of Proof

Benjamin Wittes highlights how the approaches of district and appellate courts continue to differ on several fundamental matters, including on the burden of proof.¹⁶⁰ In a concurring judgment in *Esmail*,¹⁶¹ Judge Laurence H. Silberman relied on his interpretation of the Circuit Court opinion in *Al-Adahi v. Obama*¹⁶² that “in a habeas corpus proceeding the preponderance of evidence standard that the government assumes binds it, is unnecessary – and unrealistic.”¹⁶³ In fact, in *Al-Adahi*, Judge A. Raymond Randolph said, in answer to the question of what factual showing the government has to make, that “the question is open. . . . [W]e have yet to decide what standard is required.”¹⁶⁴ He noted that other courts have adopted the preponderance standard, but “their rationale is unstated.”¹⁶⁵ He stated that that standard was not the norm in habeas cases, and he doubted “that the Suspension Clause requires the use of the preponderance standard.”¹⁶⁶ In *Al-Adahi*, the petitioner agreed that the preponderance of evidence standard applied, so the court assumed it “*arguendo*.”¹⁶⁷

DETENTION 2.0].

157. EMERGING LAW OF DETENTION *supra* note 156, at 18 (quoting *Hamilly*, 616 F. Supp. 2d at 76).

158. EMERGING LAW OF DETENTION, *supra* note 156, at 21-22.

159. *Id.*

160. WITTES, *supra* note 3, at 81, 84.

161. *Esmail v. Obama*, 639 F.3d 1075 (D.C. Cir. 2011).

162. *Al-Adahi v. Obama*, 613 F.3d 1102, 1104-1105 (D.C. Cir. 2010).

163. *Esmail*, 639 F.3d, at 1078.

164. *Al-Adahi*, 613 F.3d, at 1103.

165. *Id.* at 1104.

166. *Id.* at 1104-1105.

167. *Id.* at 1105.

IV. DETENTION AT PARWAN, AFGHANISTAN, AND IN IRAQ

A. Background

All the cases discussed above relate to detentions in the United States or Guantánamo Bay. It is useful to summarize briefly how the detainees were able to challenge detention. The detainees were granted a right to claim habeas corpus relief through a series of Supreme Court cases that distinguished the precedent in *Johnson v. Eisentrager*¹⁶⁸ that enemy aliens held beyond the sovereign territory of the United States had no constitutional right to claim habeas corpus relief. In *Eisentrager*, the petitioners were German nationals who had been taken into custody by the U.S. military in China for continuing to take military action against the United States after Germany had surrendered. They were convicted of violations of the law of war by a U.S. military commission in China, and were sent to serve their sentence in a prison in Germany under U.S. control. In denying the applicability of habeas corpus, the Court highlighted the fact that the petitioners were not at any relevant time “within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.”¹⁶⁹

In *Rasul v. Bush*,¹⁷⁰ statutory¹⁷¹ habeas corpus protection was extended to detainees held at Guantánamo Bay. The Court distinguished *Eisentrager* on the grounds that the petitioners, who were two Australian and twelve Kuwaiti citizens, were “not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.”¹⁷²

Congress then passed the Detainee Treatment Act of 2005¹⁷³ (DTA), which appeared to proscribe jurisdiction to hear claims of Guantánamo detainees. *Hamdan*¹⁷⁴ held that the DTA did not preclude federal courts from hearing habeas petitions that were pending at the date the Act was passed. A further attempt to prevent federal courts from hearing habeas petitions was set out in the Military Commissions Act (MCA) of 2006.¹⁷⁵

168. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

169. *Id.* at 778.

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

171. Pursuant to 28 U.S.C. §§2241-2243.

172. *Rasul*, *supra* note 170, at 476.

173. Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (2005).

174. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

175. Military Commissions Act of 2006, *supra* note 95.

Finally, in *Boumediene*,¹⁷⁶ the Court held that the procedures in the MCA were not an adequate or effective substitute for habeas corpus, so Section 7 of the MCA “operate[d] as an unconstitutional suspension of the Writ.”¹⁷⁷ This means that detainees held in Guantánamo have the right to challenge their detention by claiming the constitutional privilege of habeas corpus in a federal court. The Court highlighted a number of factual differences to the situation in *Eisentrager*. For example, in *Boumediene*, the petitioners had not been convicted by a military commission;¹⁷⁸ they were challenging their status as enemy combatants. In *Eisentrager*, the United States did not have “absolute and indefinite” control over the German prison,¹⁷⁹ whereas Guantánamo is “within the constant jurisdiction of the United States.”¹⁸⁰

B. Afghanistan

Despite this result for detainees held in Guantánamo, many detainees continue to be held elsewhere. In January 2010, there were said to be 750 detainees in Parwan, the majority of whom are Afghans and the rest are foreigners accused of fighting with the Taliban.¹⁸¹ A report in January 2011 estimated that there were about 1,400 detainees in Parwan,¹⁸² but in March 2012 that number was assessed at 3,200,¹⁸³ of which about fifty are thought to be non-Afghans.¹⁸⁴ The United States was due to begin the transition process of handing the detention facility over to the Afghan government in January 2011, a process that was likely to take at least a year. Although the current U.S. aim is for detainees to be re-integrated into society and then released, or prosecuted in Afghan courts, the United States has not ruled out the possibility of keeping some detainees under U.S. control.¹⁸⁵ Indeed, “a senior U.S. official reportedly told *The Los Angeles Times* that the Obama administration wants to detain and interrogate non-Afghan terrorism suspects captured in countries outside Afghanistan in a section of Bagram

176. *Boumediene v. Bush*, 553 U.S. 723 (2008).

177. *Id.* at 732.

178. *Id.* at 767.

179. *Id.* at 768.

180. *Id.* at 769.

181. Alissa J. Rubin & Sangar Rahimi, *Bagram Detainees Named by U.S.*, N.Y. TIMES, Jan. 17, 2010, at A6.

182. Rajiv Chandrasekaran, *Afghan Officials Seeking Ability To Prolong Detentions*, WASH. POST, Jan. 27, 2011, at A7.

183. Alissa J. Rubin, *U.S.-Afghanistan Talks Falter Despite Leeway on Detention Facilities*, N. Y. TIMES, Mar. 5, 2012, at A4.

184. Rod Norland, *U.S. and Afghanistan Agree on Prisoner Transfer as Part of Long-Term Agreement*, N. Y. TIMES, Mar. 10, 2012, at A9.

185. News Transcript, U.S. Department of Defense, DoD News Briefing with Vice Adm. Harward and Ambassador Klemm from Afghanistan (Aug. 5, 2010), available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptID=53002>.

prison, even after it turns the prison over to Afghan control.”¹⁸⁶ However, on March 9, 2012 the United States agreed to transfer all of its imprisoned insurgents to Afghan government control, with immediate effect. During the six-month transition period, the United States will maintain day to day control, and whilst they remain in Afghanistan, they will retain a veto over who may be released.¹⁸⁷

One significant concern is that many of the remaining 3,200 may be released and return to fighting, both because of the difficulty of prosecuting them under Afghan law, and because Afghan law does not appear to permit indefinite detention for national security reasons.¹⁸⁸ Another concern is that some detainees could be held indefinitely in Parwan (or the section of Bagram referred to above), either by the United States or Afghans without any judicial oversight.¹⁸⁹ At first blush it might appear from documents produced by military authorities at Bagram as a result of a lawsuit brought by the American Civil Liberties Union (ACLU) that there was some sort of process for challenging detention. However, the reality is that some detainees have been held “for as long as six years without access to counsel or a meaningful opportunity to challenge their imprisonment.”¹⁹⁰ The ACLU did file petitions in February 2010 on behalf of four detainees,¹⁹¹ but on May 21, 2010, the U.S. Court of Appeals for the District of Columbia ruled in *Al Maqaleh v. Gates* that jurisdiction to hear habeas petitions of detainees did not extend to those held at Bagram.¹⁹²

The *Al Maqaleh* court noted that the *Boumediene* Court “only told us that ‘at least three factors’ are relevant”¹⁹³ to ascertain the reach of the Suspension of the Writ clause: “(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.”¹⁹⁴

The *Al Maqaleh* court reasoned that if the *Boumediene* Court had wanted to limit its understanding of the reach of the Suspension Clause to

186. William Fisher, *Concerns Grow over Bagram’s Prison within a Prison*, IPS NEWS June 10, 2010, <http://ipsnews.net/news.asp?idnews=51784>.

187. Norland, *supra* note 184.

188. Rubin, *supra* note 183.

189. Chandrasekaran, *supra* note 182 (“Afghan justice and security officials want to adopt the U.S. practice of detaining suspected insurgents indefinitely without trial.”).

190. *Bagram FOIA*, AMERICAN CIVIL LIBERTIES UNION (July 14, 2011), *available at* <http://www.aclu.org/national-security/bagram-foia>.

191. *ACLU Files Habeas Petitions on Behalf of Four Bagram Detainees*, AMERICAN CIVIL LIBERTIES UNION (Feb. 26, 2010), *available at* <http://www.aclu.org/national-security/aclu-files-habeas-corpus-petitions-behalf-four-bagram-detainees>.

192. *Al Maqaleh v. Gates*, 605 F.3d 84, 99 (D.C. Cir. 2010).

193. *Id.* at 98.

194. *Boumediene v. Bush*, *supra* note 176, at 766.

2012] PREVENTIVE DETENTION IN THE LAW OF ARMED CONFLICT 191

territories where the United States exercised de facto jurisdiction, it would not have needed to refer to the three factors mentioned above.¹⁹⁵ The court specifically rejected the fact of U.S. control of Bagram under its lease of the military base to trigger the extraterritorial application of the Suspension Clause. It did so on the grounds that this would “seem to create the potential for the extraterritorial extension of the Suspension Clause to noncitizens held in any United States military facility in the world, and perhaps to an undeterminable number of United States-leased facilities as well.”¹⁹⁶

The court reached its conclusion by applying the three *Boumediene* factors to the facts of this case. Despite noting that the Unlawful Enemy Combatant Review Board process at Bagram afforded the petitioners even less protection than the Combatant Status Review Tribunal that the *Boumediene* petitioners complained about, the court concluded that analysis of the second and third factors referred to above weighed more heavily in favor of the United States.¹⁹⁷ The court ruled that “the writ does not extend to Bagram confinement in an active theater of war in a territory under neither the *de facto* nor *de jure* sovereignty of the United States and within the territory of another *de jure* sovereign.”¹⁹⁸ It seems that this holding would apply to the case of any detainees remaining in U.S. custody in Iraq, but what about suspected terrorists captured in the future? The petitioners in *Al Maqaleh* moved to amend their petitions on grounds that there is new evidence that would undermine the D.C. Circuit decision. On February 15, 2011, Judge Bates granted the motion, although he expressed doubts that the new evidence would significantly impact the analytical framework of *Boumediene*.¹⁹⁹

In its May 2011 report following a visit to Afghanistan, Human Rights First stated that although there was a slight improvement in the process used during the Bush administration, the Detainee Review Boards still failed to provide detainees with adequate opportunity to defend themselves against charges of collaboration with insurgents and threatening the United States, and thus did not comply with international law.²⁰⁰ There was no access to legal counsel; instead detainees may have “personal representatives” who were U.S. soldiers with no legal training,²⁰¹ and there were serious problems relating to the evidence that may be used against the

195. *Al Maqaleh v. Gates*, 605 F.3d 84, 95 (D.C. Cir. 2010).

196. *Id.*

197. *Id.* at 97.

198. *Id.* at 98.

199. *Al Maqaleh v. Gates*, 2011 WL 666883, at *2 (D.D.C. Feb. 15, 2011).

200. Daphne Eviatar, *Detained and Denied in Afghanistan 2*, HUMAN RIGHTS FIRST (May 2011).

201. *Id.* at 3.

detainees, as well as to the evidence that may be used in defense.²⁰² Looking to the future, in his signing statement for the NDAA,²⁰³ President Obama said that his Administration “will interpret section 1024 as granting the Secretary of Defense broad discretion to determine what detainee status determinations in Afghanistan are subject to the requirements of this section.”²⁰⁴ This suggests that the status review procedures in Guantánamo are very likely to be made applicable to detainees in Afghanistan.

C. Iraq

Reports currently available suggest that there were over 6,000 detainees held in Iraq in January 2010. Most of these were due to be handed over to the Iraq government by August 2010, with fewer than 100 detainees remaining in U.S. custody.²⁰⁵ It is interesting to note that despite the fact that many of those detained were associated with al Qaeda, the United States did not choose to adopt the “unlawful enemy combatant” model that is the hallmark of Guantánamo and Afghanistan detentions.²⁰⁶ Robert Chesney describes how the U.S. military has held approximately 100,000 individuals in custody without charge over a seven-year period. According to Chesney, one of the most significant lessons to be drawn from the Iraq detention model is that it demonstrates that holding detainees outside the United States without military charge “as a practical matter will decay over time” and that in future long-term incapacitation will require a criminal conviction.²⁰⁷

In March-April 2003 the United States was in a state of international armed conflict. Thus the Geneva Conventions applied, with two possible models for detention without charge: POW detention pursuant to GC III for the duration of hostilities, or non-criminal detention for imperative reasons of security under GC IV.²⁰⁸ The procedures for challenging detention decisions were minimal, even though the GC III and GC IV provisions were slightly enhanced by Regulation 190-8 in the U.S. Army Manual.²⁰⁹ During the phase of occupation from April 2003 to June 2004, the legal framework regarding POW detention and security detention remained unchanged.

202. *Id.* at 3-4.

203. National Defense Authorization Act of 2012, *supra* note 6.

204. Press Release, The White House, Office of the Press Secretary, Statement by the President on H.R. 1540 (Dec. 31, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/12/31/statement-president-hr-1540>.

205. Lindsay Wise, *Mission for Some: Watch over Detainees*, HOUSTON CHRONICLE, Jan. 10, 2010, at A1.

206. Robert M. Chesney, *Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War, 2003-2010*, 51 VA. J. INT'L L. 549, 565, 575 (2011).

207. *Id.* at 553.

208. *Id.* at 559-560.

209. *Id.* at 560-562.

“Early in the occupation, the United States made clear that GC IV security internment system would function as the central tool of detention policy at least in the short term.”²¹⁰ Additionally, “[a]t the same time the U.S.-controlled Coalition Provisional Authority (CPA) took steps to establish an alternative track for incapacitating insurgents, in a reformed Iraqi criminal justice system”²¹¹ by referring detainees for prosecution.

The model for detention used during the mandate period of July 2004 through December 2008 is the most interesting. Despite the end of the occupation and the consequent collapse of the legal framework for security detention because GC IV could no longer apply, security detention continued, but in very singular circumstances, by way of “an unusual and little-noticed combination of bilateral negotiations between the United States and Iraq and multilateral positive lawmaking by the UN Security Council.”²¹²

On June 8, 2004, the Security Council passed Resolution 1546, which provided that “the multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution expressing, *inter alia*, the Iraqi request for the continued presence of the multinational force and setting out its tasks.”²¹³ One such letter by U.S. Secretary of State Colin Powell authorized the multinational force to take certain steps, including combat operations and “internment where this is necessary for imperative reasons of security.”²¹⁴ A second letter by the Iraqi Prime Minister requested the Security Council to issue a mandate to the multinational force to carry out tasks specified in Secretary Powell’s letter.²¹⁵ The CPA issued a memorandum on detention issues that set a timeframe for review to be agreed to jointly by U.S. and Iraqi officials, and authorized an initial eighteen month period of detention for adults, followed by further periods of internment for specified periods, but with no time limit specified as to the end date.²¹⁶ At the same time the prosecution track continued.²¹⁷

210. *Id.* at 565.

211. *Id.* at 563-564. Chesney describes the Iraqi criminal justice system at 567-570.

212. *Id.* at 575.

213. Chesney, *supra* note 206, at 575 (quoting S.C. Res. 1546, ¶10, U.N. Doc. S/RES/1546 (June 8, 2004)).

214. Chesney, *supra* note 206, at 575.

215. S.C. Res. 1546, Annex, U.N. Doc. S/RES/1546 8 (June 8, 2004) (Text of letters from the Prime Minister of the Interim Government of Iraq Dr. Ayad Allawi and U.S. Secretary of State Colin L. Powell to the President of the Council), *quoted in* Chesney, *supra* note 206, at 575.

216. Chesney, *supra* note 206, at 576. Chesney gives a full description of the review process and its problems at 576-590.

217. *Id.* at 590-597.

From the end of 2008 to December 2011, the United States formally abandoned the security internment process in favor of a law enforcement support track, but some detainees in the Iraqi criminal justice system did not receive trials and existed in a de facto state of security internment administered by the Iraqis.²¹⁸ In 2011, the United States was still holding approximately two hundred dangerous, but difficult to charge, individuals in security detention in Iraq “pursuant to an ‘all deliberate speed’-style caveat to the obligation to either release detainees or transfer them to the Iraqis for prosecution.”²¹⁹ However, now that the United States has withdrawn all its troops from Iraq,²²⁰ they will no longer be able to hold any detainees.²²¹ All of the detainees were either released or transferred to Iraqi custody,²²² including Ali Mussa Daqduq, a Hezbollah agent who is believed to be responsible for the capture, torture, and murder of a number of U.S. soldiers.²²³ Thus, even though some of the above-mentioned detainees were associated with al Qaeda, the United States will not be able to hold them “for the duration of hostilities” as that phrase has been construed with respect to those detained at Guantánamo.

V. DETENTION PURSUANT TO THE NDAA OF 2012

On March 7, 2011, President Obama signed Executive Order 13,567, *Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force*.²²⁴ It set out a scheme of periodic review for persons detained in Guantánamo who had already been “designated for continued law of war detention” or “referred for prosecution, except for those detainees against whom charges are pending or a judgment of conviction has been entered.”²²⁵ At the same time, the White House Press Office issued an accompanying fact sheet, which

218. *Id.* at 598.

219. *Id.* at 598-599.

220. Tim Arango & Michael S. Schmidt, *Last Convoy of American Troops Leaves Iraq, Marking a War’s End*, N. Y. TIMES, Dec. 19, 2011, at A6.

221. Chesney, *supra* note 206, at 599.

222. Robert Chesney, *Plan Ahead for the End of Afghan Detention Operations*, LAWFARE (Jan. 6, 2012), <http://www.lawfareblog.com/2012/01/plan-ahead-for-the-end-of-afghan-detention-operations/>,

223. Robert Chesney, *Daqduq Transferred to Iraq*, LAWFARE (Dec. 16, 2011), <http://www.lawfareblog.com/2011/12/daqduq-transferred-to-iraq/>. Chesney notes in a later post that the Office of Military Commissions swore out charges against Daqduq a couple of weeks after his transfer to military custody. See Robert Chesney, *Might Daqduq Face a Military Commission One day After All?*, LAWFARE (Feb. 24, 2012), <http://www.lawfareblog.com/2012/02/might-daqduq-face-a-military-commission-one-day-after-all/>.

224. Exec. Order No. 13,567, *Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force*, 76 Fed. Reg. 13,277 (Mar. 7, 2011).

225. *Id.* at §1(a).

emphasized, among other things, the continued determination to “complete the difficult challenge of closing Guantánamo.”²²⁶ However, Congress has continued to block the transfer of Guantánamo detainees into the United States, either for prosecution or long-term detention. Most other issues in the Executive Order have been addressed in the legislation that followed but one other matter remains. In the White House fact sheet, under the heading of “Support for a Strong International Framework,”²²⁷ the Administration urged the Senate to approve the adoption of AP II (which has detailed humane treatment standards and fair trial guarantees in non-international armed conflicts) and stated that the U.S. government chooses “out of a sense of legal obligation” to treat the principles set forth in Article 75 of AP I as applicable to any person it detains in an international armed conflict, and it expects all other nations to adhere to these principles as well.²²⁸

A rash of bills relating to detention²²⁹ followed swiftly after the Executive Order, and after much heated debate and many amendments to the sections concerning detention,²³⁰ the National Defense Authorization Act (NDAA) of 2012²³¹ was signed into law on December 31, 2011. The discussions were so heated that in November 2011 it had even been

226. Press Release, The White House, Office of the Press Secretary, Fact Sheet: New Actions on Guantánamo and Detainee Policy (Mar. 7, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy>.

227. *Id.*

228. This subject generated scholarly debate due to the fact that the White House statement purports only to refer to international armed conflicts, yet in *Hamdan* the Supreme Court determined that the U.S. conflict with al Qaeda is a non-international armed conflict. *See, e.g.*, John Bellinger, *Obama's Announcements on International Law*, LAWFARE (Mar. 8, 2011), <http://www.lawfareblog.com/2011/03/obamas-announcements-on-international-law/>; Jack Goldsmith, *Why I Think the Obama Administration Did Not Extend Article 75 to Terrorists*, LAWFARE (Mar. 11, 2011), <http://www.lawfareblog.com/2011/03/why-i-think-the-obama-administration-did-not-extend-article-75-to-terrorists/>; John Bellinger, *Further Thoughts on the White House Statement About Article 75*, LAWFARE (Mar. 13, 2011), <http://www.lawfareblog.com/2011/03/further-thoughts-on-the-white-house-statement-about-article-75/>.

229. H.R. 968, 112th Cong. (2011) and H.R. 1540, 112th Cong. (2011), introduced by House Armed Services Committee Chairman Howard “Buck” McKeon (the latter was the bill that became law after much debate and many revisions); S. 1253, 112th Cong. (2011), introduced by Senator Carl Levin; S. 551, 112th Cong. (2011), introduced by Senator John McCain; and S. 553, 112th Cong. (2011), introduced by Senator Lindsey Graham (whose bill replaced an earlier version, S. 3707, that he had introduced in the 111th Congress.).

230. *See, e.g.*, H.R. REP. NO. 1540-8915 (2011) (Conf. Rep.), *available at* <http://www.lawfareblog.com/wp-content/uploads/2011/12/House-NDAA-Conference-Report-Debate-Dec-14-2011.pdf>; S. REP. NO. 1867-8632 (2011) (Conf. Rep.), *available at* <http://www.lawfareblog.com/wp-content/uploads/2011/12/Senate-NDAA-Conference-Report-Debate-Dec-15-2011.pdf>.

231. National Defense Authorization Act of 2012, *supra* note 6.

suggested that the President might veto the bill,²³² but that threat (which was repeated by John Brennan, Assistant to the President for Homeland Security and Counterterrorism),²³³ receded after the final revisions.²³⁴ Nonetheless, President Obama's signing statement indicated his "serious reservations with certain provisions that regulate the detention, interrogation and prosecution of suspected terrorists,"²³⁵ and some members of Congress continue to express concerns about certain provisions in the NDAA.²³⁶

In general, the NDAA still prevents the President from closing Guantánamo in 2012,²³⁷ and proscribes the transfer of detainees to the United States,²³⁸ and the spending of money on proposed detention facilities in the United States for the detainees.²³⁹ It will still be difficult to transfer Guantánamo detainees overseas, but there may be a little more flexibility in the certification requirement.²⁴⁰ One significant process improvement is that status review procedures are to be issued with respect to all detainees who are ineligible to make habeas applications in a federal court (such as those in Afghanistan), and this group of detainees is now entitled to be represented by military counsel in status determination proceedings before a military judge.²⁴¹ Periodic review for detainees at Guantánamo²⁴² is discussed below. In his signing statement, President Obama said, "Sections

232. Statement of Administration Policy, Executive Office of the President, Office of Management and Budget, S.1867 – National Defense Authorization Act FY 2012 (Nov. 17, 2011), available at http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saps1867s_20111117.pdf.

233. Brennan Discusses Defense Authorization Bill, NATIONAL PUBLIC RADIO (Dec. 9, 2011), <http://www.npr.org/2011/12/09/143462913/brennan-discusses-national-defense-authorization-bill>.

234. Josh Gerstein, *Defense bill Revised in Bid To Avoid Veto*, POLITICO (Dec. 12, 2011), <http://www.politico.com/blogs/under-the-radar/2011/12/defense-bill-revised-in-bid-to-avoid-veto-107179.html>; David Cole, *A Bill of Rights for Some*, NYRBLOG (Dec. 16, 2011), <http://www.nybooks.com/blogs/nyrblog/2011/dec/16/bill-rights-some/?printpage=true>.

235. Press Release, The White House, *supra* note 204.

236. On March 8, 2012, Sen. Mark Udall and Rep. Adam Smith introduced a short bill entitled the Due Process and Military Detention Amendments Act, together with a fact sheet, to amend the NDAA in two respects. First, the bill amends the definition of disposition under the laws of war (described below) to mean that detainees may only be tried in a United States federal or state court. Second, the bill removes the requirement for military custody by repealing Section 1022 of the NDAA. See S. 2175, 112th Cong. (2012); H.R. 4192, 112th Cong. (2012); U.S. Senate & U.S. House of Representatives, Fact Sheet: The Due Process and Military Detention Amendments Act (Mar. 8, 2012), http://democrats.armedservices.house.gov/index.cfm/files/serve?File_id=3c356893-509d-4b72-8303-53985f7ecc24.

237. National Defense Authorization Act of 2012, *supra* note 6, at §1027.

238. *Id.*

239. *Id.* at §1026.

240. *Id.* at §1028; Benjamin Wittes & Robert Chesney, *NDAA FAQ: A Guide for the Perplexed*, LAWFARE (Dec. 19, 2011), <http://www.lawfareblog.com/2011/12/ndaa-faq-a-guide-for-the-perplexed/>.

241. National Defense Authorization Act of 2012, *supra* note 6, at §1024.

242. *Id.* at §1023.

1023-1025 needlessly interfere with the executive branch's processes for reviewing the status of detainees."²⁴³ It remains to be seen whether the imminent report containing procedures will bring clarity.

The detention provisions in the NDAA have been subjected to an excellent and thorough scrutiny by a number of commentators.²⁴⁴ In Section 1021, Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the AUMF "includes the authority ... to detain covered persons ... pending disposition under the law of war."²⁴⁵ The definition of "covered persons"²⁴⁶ replicates the definition adopted by the Administration in 2009.²⁴⁷ As Martin Lederman, Stephen Vladeck,²⁴⁸ and David Cole²⁴⁹ point out, the federal courts have been upholding the detention of persons who are part of, or members of al-Qaeda. This law now "puts Congress's stamp on a dubious – and untested – interpretation of military detention authority" by leaving undefined what is meant by "substantial support" and "associated forces," and raises the question of whether detention of people in these two categories is permitted under LOAC.²⁵⁰

Four alternatives are listed as to "disposition under the law of war."²⁵¹ These are trial by military commission, trial by an alternative court or

243. Press, Release, The White House, *supra* note 204.

244. See, e.g., Wittes & Chesney, *supra* note 240; Benjamin Wittes, *Raha Wala Writes His Own FAQ*, LAWFARE (Dec. 20, 2011), <http://www.lawfareblog.com/2011/12/raha-wala-writes-his-own-faq/>; Steve Vladeck, *President Obama Signs NDAA Into Law...*, LAWFARE (Dec. 31, 2011), <http://www.lawfareblog.com/2011/12/president-obama-signs-ndaa-into-law/>; Marty Lederman & Steve Vladeck, *The NDAA: The Good, the Bad, and the Laws of War – Part I*, LAWFARE (Dec. 31, 2011), <http://www.lawfareblog.com/2011/12/the-ndaa-the-good-the-bad-and-he-laws-of-war-part-i/>; Lederman & Vladeck, *supra* note 86.

245. National Defense Authorization Act of 2012, *supra* note 6, at §1021. For a discussion about the meaning of "under the laws of war," see Lederman & Vladeck, *supra* note 86.

246. National Defense Authorization Act of 2012, *supra* note 6, at §1021(b): a covered person is any person who is:

- (1) A person who planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.
- (2) A person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.

247. Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantánamo Bay, *supra* note 87.

248. Lederman & Vladeck, *supra* note 244.

249. Cole, *supra* note 234.

250. *Id.*

251. National Defense Authorization Act of 2012, *supra* note 6, at §1021(c).

tribunal having lawful jurisdiction (which could be a federal court),²⁵² transfer to the detainee's country of origin or any other country, or detention without trial until the end of hostilities. Yet, linking the duration of detention to the end of hostilities (which is derived from GC III Article 118 and thus is normally applicable in international armed conflicts) is a difficult fit with the cessation of terrorist attacks. This article suggests that Jelena Pejic's proposal,²⁵³ based on AP I Article 75.3, offers a more appropriate, though still not perfect, principle of the law of war to use. AP I Article 75.3 provides that detention should end as soon as the circumstances justifying the arrest, detention, or internment have ceased to exist. As AP I Article 75 is accepted as part of customary international law, it would neatly fill the gap in the law relating to detentions in non-international armed conflicts. However, even that definition does not really assist in the context of ongoing and sporadic terrorist attacks worldwide, which are hard to classify as armed conflicts.

Section 1021(d) of the NDAA affirms that nothing in the section is intended to limit or expand the authority of the President or the scope of the AUMF.²⁵⁴ Commentators are divided as to whether the legislation changes existing law. For example, Benjamin Wittes and Robert Chesney think that the detention authority is not expanded. Their view is that the D.C. Circuit courts have in fact articulated a broader standard than the NDAA's "substantial support" category on the basis that the court permits detention of those who "purposefully and materially support"²⁵⁵ the enemy. The wording in the NDAA may result in a narrower approach by the courts.²⁵⁶ Raha Wala of Human Rights First disagrees, fearing that the authority has been expanded, although he is not sure that there is any practical difference between "material and purposeful" support and "substantial" support.²⁵⁷ It is, however, unclear what all of these qualifying words actually mean,²⁵⁸ so it is not obvious how much actual support is required to merit detention.

Section 1021(e) states that nothing in the section shall affect existing law relating to the detention of United States citizens, lawful permanent resident, or anyone else captured or arrested in the United States.²⁵⁹ Yet the law relating to detention is not settled. Although in *Hamdi* a plurality of the Supreme Court held that the AUMF authorized the detention of U.S. citizens,²⁶⁰ *Hamdi* was a U.S. citizen captured outside the United States

252. Wittes & Chesney, *supra* note 240.

253. Pejic, *supra* note 97, at 382.

254. National Defense Authorization Act of 2012, *supra* note 6, at §1021 (d).

255. See Part III *supra* for discussion about support.

256. Wittes & Chesney, *supra* note 240.

257. Wittes, *supra* note 244.

258. Lederman & Vladeck, *supra* note 86.

259. National Defense Authorization Act of 2012, *supra* note 6, at §1021(e).

260. *Hamdi v. Rumsfeld*, 542 U.S. 507, 517.

during an international armed conflict. The issues raised in the cases of U.S. citizen Padilla²⁶¹ and U.S. resident al-Marri,²⁶² who were arrested inside the United States, are still unresolved.²⁶³ Therefore it is still unclear whether the AUMF gives a future President²⁶⁴ the authority to place a citizen or permanent resident of the United States, who is arrested *inside* the United States, in long-term military detention.²⁶⁵

Section 1022 provides for military custody until “disposition under the laws of war” (as described in Section 1021) of covered persons. A covered person is one who: (i) is authorized to be detained pursuant to Section 1021; and (ii) has been captured “in the course of hostilities” (as defined in Section 1021); and (iii) has been determined to be “a member of, or part of al-Qaeda, or an associated force that acts in coordination with or pursuant to the direction of al-Qaeda;” and (iv) has been determined “to have participated in the course of planning or carrying out an attack or attempted attack against the United States or its coalition partners.”²⁶⁶ Section 1022 does not apply to U.S. citizens at all or to lawful permanent residents with respect to conduct inside the United States, except to the extent permitted by the U.S. Constitution.²⁶⁷

Military custody for this group of people is mandatory unless the President issues a waiver that must be certified to be in the national security

261. Jose Padilla, a U.S. citizen, was initially detained in the United States in May 2002 as a material witness to grand jury proceedings investigating the attacks on 9/11. After being detained as a material witness for a month with access to counsel, he was designated an enemy combatant and detained for three and a half years in military custody, initially with no access to counsel. He was then returned to civilian custody (just days before the government was due to respond to Padilla’s petition for certiorari to the Supreme Court), and tried and convicted of conspiracy to murder, maim and kidnap persons overseas, *United States v. Padilla*, 2007 U.S. Dist. LEXIS 26077 (S.D. Fla. Apr. 9, 2007). See the line of cases claiming habeas corpus commencing with *Padilla v. Bush*, 233 F. Supp. 2d. 564 (S.D.N.Y. 2002), culminating in *Padilla v. Hanft*, 432 F.3d. 582 (4th Cir. 2005).

262. Ali Saleh Kahlal al-Marri, a U.S. resident, was initially detained in the United States in December 2001 as a material witness to grand jury proceedings investigating the attacks on 9/11. Two months later he was charged with fraud related offenses. Further fraud charges were added a year later. These charges were dismissed in June 2003 and al-Marri was designated an enemy combatant and he was transferred to military custody, with no access to counsel for a year. He applied for habeas corpus and the denial was appealed all the way to the Supreme Court, but his case was dismissed as moot, because in February 2009, President Obama ordered him to be transferred to civilian custody to face criminal charges. See the line of habeas cases commencing with *Al-Marri v. Rumsfeld*, 360 F.3d. 707 (2004).

263. See, e.g., Lederman & Vladeck, *supra* note 244; Brian Michael Jenkins, *The NDAA Makes It Harder To Fight Terrorism*, FOREIGN AFF., Feb. 1, 2012, <http://www.foreignaffairs.com/print/134333>.

264. President Obama has issued a waiver in respect of U.S. citizens and lawful permanent residents in PPD-14.

265. Lederman & Vladeck, *supra* note 86.

266. National Defense Authorization Act of 2012, *supra* note 6, at §1022(a).

267. *Id.* at §1022(b).

interests of the United States.²⁶⁸ However, military detention is limited to certain categories of persons. One such category includes foreign persons captured inside or outside the United States. Another category covers lawful permanent residents captured inside or outside the United States in the course of AUMF authorized hostilities whose conduct took place outside the United States (that is, against U.S. interests abroad), provided that such persons are either members or part of (but not providing support to) al-Qaeda or an associated force working with or directed by al-Qaeda and that such persons participated in planning or carrying out an attack or attempted attack against the United States or its coalition partners. Note that the section does not cover persons who are part of the Taliban or its associated forces, nor, it seems, to arrests in the United States made by the FBI or other law enforcement agencies.²⁶⁹ Indeed, it is made clear that nothing in the section will affect the authority of existing domestic law enforcement agencies, even if the person is held in military custody.²⁷⁰

As Benjamin Wittes and Robert Chesney point out, mandatory military detention cannot occur until the government has made a determination that a person is in the relevant category.²⁷¹ This can take a long time, particularly as the NDAA provides that it is not required to make a status determination until any ongoing interrogation – which does not appear to be subject to any time limit – has been concluded.²⁷²

On February 28, 2012, President Obama issued a set of procedures for the implementation of Section 1022 (PPD-14),²⁷³ together with a fact sheet.²⁷⁴ In these procedures the President addressed some of the concerns he expressed in the signing statement for the NDAA.²⁷⁵ He issued seven waivers to the requirements of Section 1022(a)(1), including one with respect to lawful permanent residents of the United States arrested inside the United States on the basis of conduct taking place in the United States.²⁷⁶ He also gave authority to the Attorney General, in consultation with other national security officials, to issue further general and individual waivers in appropriate circumstances.²⁷⁷

268. *Id.* at §1022(a)(4).

269. Wittes & Chesney, *supra* note 240.

270. National Defense Authorization Act of 2012, *supra* note 6, at §1022(2)(d).

271. Wittes & Chesney, *supra* note 240.

272. National Defense Authorization Act of 2012, *supra* note 6, at §1022(c)(2)(C).

273. Memorandum, The White House, Office of the Press Secretary, Presidential Policy Directive – Requirements of the National Defense Authorization Act, Presidential Policy Directive/PPD-14 (Feb. 28, 2012).

274. The White House, *Fact Sheet: Procedures Implementing Section 1022 of the National Defense Authorization Act for Fiscal Year (FY) 2012* (Feb. 28, 2012).

275. Press Release, The White House, *supra* note 204.

276. Memorandum, The White House, *supra* note 273, at §IIB.3.

277. *Id.* at §§IIC, IID.

PPD-14 purports to clarify some key phrases in the NDAA, notably of “covered persons” and “attack or attempted attack.” The former clarification sets out wording that is all but identical to the wording in Section 1021.²⁷⁸ The latter defines “attack” as the “completion of an act of violence or the use of force that involves serious risk to human life.”²⁷⁹ An “attempted attack” is defined as “an overt act or acts beyond a substantial step when (a) performed with specific intent to commit an attack; and (b) no further step or act by the individual would be needed to complete the attack.”²⁸⁰ This seems to be a rather narrow definition of attempt,²⁸¹ as it requires overt acts *beyond*, that is, more than, a substantial step. What does this mean? What type of act is envisaged? Sub-paragraph (b) posits that “no further step or act would be necessary to complete the attack.” So if a gunman pointed a gun at a person, but did not pull the trigger, or if a bomber stood holding a detonator, but did not press it, would these actions be attempts as defined here? Also, the clarification of covered persons in PPD-14 IB(2)(b) covers planning, but does not cover acts of preparation, which could be overt acts made with specific intent, but not sufficiently substantial to qualify as attempts. Surely these types of acts would be more proximate than mere planning?

If a law enforcement (as opposed to military) arrest takes place, the Attorney General must be notified if the arresting authority believes that there is probable cause that the detainee is a covered person,²⁸² and a screening process will take place as soon as practicable to establish whether there is such probable cause.²⁸³ The finding has to be made on the basis of “clear and convincing evidence.”²⁸⁴ Absent that evidence, or if a waiver applies, “no further action shall be required under section 1022(a)(i) of the NDAA or the procedures,”²⁸⁵ meaning that the detainee shall not be

278. *Id.* at §IB.

279. *Id.* at §IC.1.

280. *Id.* at §IC.2.

281. *See, e.g.*, 21 AM. JUR. 2D *Criminal Law* §154 (2012): “An attempt consists of: (1) an intent to engage in crime; and (2) conduct constituting a substantial step towards commission of the crime. To prove attempt, therefore, the government must show that a defendant intended to commit the substantive offense and that he or she took a substantial step toward its commission. A substantial step, as required to show attempt, is something more than mere preparation, but less than the last act necessary before the actual commission of the substantive crime. To qualify as a “substantial step” toward the commission of a crime, as necessary to establish attempt, the alleged conduct must strongly corroborate the defendant’s alleged criminal purpose. An alternative formulation is that an attempt is composed of two elements: intent to commit a crime; and an overt act toward its commission.”

282. Memorandum, The White House, *supra* note 273, at §III.A.

283. *Id.* at §III.B.

284. *Id.* at §III.C. 3.

285. *Id.*

transferred to military custody. It is also notable that the list of laws with which PPD-14 is required to be consistent does not include the ICCPR.²⁸⁶

Section 1023 deals with procedures (to be issued within 180 days of the signing of the Act) for the periodic review of detainees held at Guantánamo.²⁸⁷ One of the stated aims of the procedures is to “make discretionary determinations whether or not a detainee represents a continuing threat to the security of the United States.”²⁸⁸ What does continuing threat mean? How serious does this threat have to be? The continuing threat approach to detainee review in the NDAA differs from the test set out in the Executive Order of necessity to “protect against a significant threat to the security of the United States.”²⁸⁹ Civil libertarians may be less comfortable with “continuing threat” as opposed to “significant threat,” as the former suggests a lower threshold for the government.

This article argues that the guidelines governing duration of detention are still unclear. The NDAA test for review of continuing threat is nebulous, and the test for detention authority of continuing hostilities is open-ended and uncertain in the context of the type of conflict. No new assistance is given to discern when detention may end. Duration of detention is still indefinite, and is confused by the introduction of evaluating individual threat levels for detainee review, at the same time as retaining the continuation of hostilities test for detention authority. One can envisage a situation where hostilities end yet the individual remains a threat, or where the individual is no longer a threat but hostilities continue. Thus it is not clear how the evaluation of a continuing threat test will work within the continuation of hostilities authority framework set out in the NDAA. Perhaps more light will be shed on this conundrum by the contents of the imminent report setting out relevant procedures. Thus, we are no closer to working out whether detention will last for months, years, decades, or longer.

CONCLUSION

There remain many unanswered questions concerning preventive detention in the LOAC. The law is still unclear as to what detention policies apply to unprivileged enemy belligerents on the battlefield as well as individuals captured off the battlefield, particularly nationals of countries not at war with the United States.²⁹⁰ Petitioners in *Al Maqaleh* questioned

286. ICCPR, *supra* note 106.

287. National Defense Authorization Act of 2012, *supra* note 6, at §1023(a).

288. *Id.* at §1023(b)(1).

289. Exec. Order No. 13,567, *supra* note 224, at §2.

290. Schoettler, *supra* note 80, at 70-71. *See also* Jules Lobel, *Preventive Detention and Preventive Warfare: U.S. National Security Policies Obama Should Abandon*, 3 J. NAT'L SECURITY L. & POL'Y 341, 357-358 (2009) (querying whether preventive detention is

whether the United States could “evade judicial review of Executive detention by transferring detainees into active conflict zones, thereby granting the Executive the power to switch the Constitution on or off at will.”²⁹¹ Would the holding in *Al Maqaleh* apply in places where the United States is in occupation, on a peace-keeping mission, or in other situations that are not deemed to be active theaters of war? Would it apply if the United States captured a suspected terrorist in Pakistan or Yemen and then held the suspect in a U.S. military base in Germany? Would this problem be addressed by Section 1024 of the NDAA?²⁹²

There are still open questions relating to who may be detained. The definitions for “part of” and “substantial support” are not clear. The authority for detention is still currently related to an attack committed by the Taliban, al Qaeda, and “associated forces” (the present standard adopted by the Obama administration).²⁹³ But what does associated forces mean? Does this include groups such as Lashkar-i-Taiba? What if the threat diversifies to other terrorist groups with no connection at all to al Qaeda? What if a suspected terrorist is inspired by jihad but acting alone?²⁹⁴

John Bellinger has suggested that the AUMF should be updated because it may not adequately cover terrorist groups that may have no connection with the perpetrators of the 9/11 atrocity.²⁹⁵ For example, now that the Libyan conflict is resolved and NATO is no longer involved, if Libyan terrorists commit a terrorist attack on U.S. property or persons in retaliation for the killing of Colonel Gaddafi’s son by NATO,²⁹⁶ then there

applicable to al Qaeda and Taliban terrorists. Lobel contends that the applicability of preventive detention to such terrorists is undermined and cites a passage in *Boumediene v. Bush*: “Because our Nation’s past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury.”).

291. *Al Maqaleh v. Gates*, 605 F.3d 84, 98 (D.C. Cir. 2010).

292. National Defense Authorization Act of 2012, *supra* note 6, at §1024(c) deals with status review of persons that are not entitled to habeas review in a federal court.

293. Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantánamo Bay, *supra* note 87.

294. See, e.g., Maria Glod, Jeremy Markon & Tara Bahrapour, *Md. Man Accused of Attempted Bombing*, WASH. POST, Dec. 9, 2010, at A8, A9 (Antonio Martinez, a U.S. citizen who converted to Islam and changed his name to Muhammad Hussain, was charged with plotting to blow up a military installation. He was allegedly acting alone, “without direction from any outside terrorist group” but was obsessed with jihad and called Anwar al-Aulaki his “beloved sheikh.” His case and others like it surely fall squarely within the criminal law, not LOAC paradigm. However, not every case is as clear cut as this).

295. John B. Bellinger III, *An Outdated Terrorism Law*, WASH. POST, Nov. 26, 2010, at A21; Benjamin Wittes, *More from John Bellinger*, LAWFARE (Nov. 28, 2010), <http://www.lawfareblog.com/2010/11/more-from-john-bellinger/>.

296. Frederick Pleitgen, *One of Gadhafi’s Sons Killed in NATO Air Strike, Libyan Official Says*, CNN WORLD, Apr. 30, 2011, <http://articles.cnn.com/2011-04-30/world/libya>.

would not appear to be a legal framework for the United States to detain the perpetrators preventively without trial.

In 2010 commentators opined that it had been left to the judges of the D.C. District Court and the D.C. Circuit Court of Appeals to formulate the law of detention, and there are many open questions for them to resolve relating to boundaries of the President's detention power, burden of proof, and the type of admissible evidence that can be used in habeas proceedings.²⁹⁷ There are still different approaches among the judges, causing uncertainty in the law.²⁹⁸ The denial of certiorari by the Supreme Court in a number of detainee cases, including *Al-Adahi*,²⁹⁹ *Al-Odah*, *Ameziane*, *Al-Bihani* and *Awad*³⁰⁰ suggested to some commentators that the Supreme Court has "no appetite for getting involved in the nitty gritty of the writing of the rules that will govern detention."³⁰¹ However, there are eight cases currently pending for the Court's initial consideration, of which five concern the definition of government power to detain at Guantánamo,³⁰² so perhaps this trend will change.

We are still no closer to discerning the end point of detention. By continuing to link the duration of detention to the continuation of hostilities, the NDAA has not taken matters much further, other than adding more processes to review continued detention. The test for review of detainees of "continued threat" is nebulous, although this may be clarified when procedures are issued. It is not clear how the threat evaluation tests work within the cessation of hostilities framework. Does detention end when hostilities have ceased or when the individual is no longer a "continuing" threat to the security of the United States? Does the "continuing threat" test trump continuation of hostilities, or vice versa? Does the threat evaluation only come into play after the end of hostilities?

It is problematic to try to define the duration of detention with abstract concepts, such as continuation of hostilities, continuing threats, indefinite war, war on terror (that is not a war in the true sense of the word), or (the even more open-ended) countering violent extremism, particularly if hostilities are infrequent terrorist attacks or atrocities occurring in different countries.

gadhafi.son.killed_1_libyan-population-moammar-gadhafi-nato-airstrike?_s=PM:WORLD.

297. EMERGING LAW OF DETENTION, *supra* note 156, at 64-65.

298. EMERGING LAW OF DETENTION 2.0, *supra* note 156, at 3.

299. *Al-Adahi v. Obama*, 613 F.3d 1102 (2010), *cert. denied*, 131 S.Ct. 1001 (2011).

300. Larkin Reynolds, *Supreme Court Denied Cert. in Three More Gitmo Cases*, LAWFARE (Apr. 4, 2011), <http://www.lawfareblog.com/2011/04/supreme-court-denies-cert-in-three-more-gtmo-cases/>.

301. Benjamin Wittes, *David Remes on Al Adahi Cert Denial*, LAWFARE (Jan. 18, 2011), <http://www.lawfareblog.com/2011/01/david-remes-on-al-adahi-cert-denial>.

302. Benjamin Wittes, *Lyle Deniston on Guantánamo Cert Petitions*, LAWFARE (Mar. 14, 2012), <http://www.lawfareblog.com/2012/03/lyle-denniston-on-guantanamo-cert-petitions/>.

There are claims that military detention without trial for an indefinite period addresses the problems of trying suspected terrorists in either federal courts or military commissions.³⁰³ It does not. It merely avoids the issue of having to decide an appropriate mode of trial. Nor does it alter the fact that indefinite detention for terrorists does not sit comfortably in the LOAC paradigm.

Over a decade after 9/11, when the “clear legal framework for handling alleged terrorists” promised by President Obama in 2009 is still relatively undeveloped³⁰⁴ and the country continues to hold suspects indefinitely, it is time that these questions and issues are addressed.

The form of preventive detention of suspected terrorists that is deemed necessary by the U.S. government does not fit within the current domestic U.S. criminal law framework or the U.S. Constitution; hence the reliance on the LOAC. However, the way forward should not lie in trying to make a framework out of a LOAC that does not provide quite the right model to detain terrorists or violent extremists. Using the LOAC as a framework does not rectify the shortcomings of the LOAC in the terrorism context. It is to be hoped that the enactment of the NDAA will spur Congress to debate and clarify the entire detention issue.

303. See, e.g., Benjamin Wittes & Jack Goldsmith, *Ghailani Verdict Makes Stronger Case for Military Detentions*, WASH. POST, Nov. 19, 2010, at A21.

304. Editorial, *Look in the Mirror: The Administration's Passive Terrorist Detention Policy*, WASH. POST, Dec. 13, 2010, at A18.