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3-5-2009

# Unraveling Guantánamo: Detention, Trials and the "Global War" Paradigm

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## Recommended Citation

Schulhofer, Stephen, "Unraveling Guantánamo: Detention, Trials and the "Global War" Paradigm" (2009). *New York University Public Law and Legal Theory Working Papers*. Paper 117.

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# *Issues in Legal Scholarship*

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NEW DIRECTIONS FOR THE DEPARTMENT OF JUSTICE

2009

*Article 1*

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## Unraveling Guantánamo: Detention, Trials and the “Global War” Paradigm

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# Unraveling Guantánamo: Detention, Trials and the “Global War” Paradigm\*

Stephen J. Schulhofer

## Abstract

Closing Guantánamo presents a daunting challenge, both politically and practically. The detainees cannot be transferred readily to other locations abroad, and yet many commentators insist that they are too dangerous to be held within the United States. Under current law the detainees cannot continue to be held unless they are charged with crimes; yet the existing military commission system is unsustainable, and many detainees allegedly are impossible to prosecute in traditional courts without jeopardizing classified information. These immediate issues are also symptoms of a more basic problem – the concept of a “global war on terror.” Clear thinking about solutions to Guantánamo cannot begin in the absence of clear thinking about the legitimacy of the global war paradigm.

The immediate need to address Guantánamo and the broader imperative to find a sustainable framework for the future can both be met by a straightforward principle – the unqualified acceptance of pre-9/11 rules of international law and domestic due process. The difficulties attributed to that traditional approach are not wholly imaginary, but they have been misunderstood and shamelessly exaggerated. Familiar rules and institutions, properly managed, possess ample resources to cope with the challenges of modern terrorism.

**KEYWORDS:** classified information, enemy combatants, international humanitarian law, law of war, national security, national security court, prisoners of war, preventive detention, terrorism, war on terror

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Among the many mega-headaches facing the incoming administration, Guantánamo poses unique dangers, symbolically and operationally. By detaining hundreds of prisoners there, without access to lawyers or to the courts, we have neutralized dangerous terrorists and acquired useful intelligence, but we have also tarnished our international reputation, damaged relationships with allies, and fomented hatred against the United States that may be creating many new enemies for every violent extremist we ever held there. During the election campaign, both candidates and President Bush himself expressed the desire to shut Guantánamo down – if possible.

The world is now waiting to see how President Obama will bring change to this notorious symbol of American hubris. Part of the American public is equally impatient to see us return to traditional rule-of-law values, while others are watching nervously to see whether President Obama will fulfill the dark predictions of those who tried to paint him as soft on terrorism.

Even without these political pitfalls, the president-elect faces a daunting challenge. Transferring the detainees to a different location abroad would simply recreate, under a different name, the mess we now call Guantánamo. Yet many in Congress insist that the detainees cannot be brought to the United States, because no American community will tolerate a domestic Guantánamo anywhere nearby. If an appropriate location can be found to confine them within our borders, other difficulties will arise. Under current law detainees normally cannot be kept in custody unless they are charged with crimes. And many allegedly are impossible to prosecute without jeopardizing classified information or compromising the evidentiary standards of domestic criminal courts. Others aren't dangerous but cannot be returned to their home countries because they face abusive treatment there.

These immediate difficulties, though hard enough, are merely symptoms of a more basic problem – the underlying concept of a “global war on terror.” One reason that Guantánamo debates often seem unsatisfying is that typically they either take the notion of “global war” as an obvious fact, or dismiss it as an indefensible invention, in each case begging a host of hard questions.

The president-elect will no doubt be tempted to tackle first the discrete problem of the Guantánamo detainees, avoiding decisions about more sweeping, abstract issues. Yet clear thinking about solutions to Guantánamo cannot begin in the absence of clear thinking about the legitimacy and proper reach of the global war paradigm: the Bush administration doctrine that the struggle against terrorism is not just a law enforcement matter but an armed conflict governed by the international laws of war.

That many consider the notion of global war inapt or counterproductive is hardly news. But after seven-plus years of constant repetition, that formula cannot easily be erased from the public mind, especially by a President who will be watched closely for signs of anything that can be portrayed as weakness.

Thus, the new Administration will find itself in a rhetorical bind: Overt renunciation of “global war” could be politically perilous; yet it is the *talk* of “global war” that inflicts much of the damage associated with this way of thinking. The fact that many of the smartest and toughest European counter-terrorism experts denounce war-talk and urge us to do the same<sup>1</sup> will not insulate President Obama from the venomous political backlash such a step could engender.

Despite these difficulties, the new administration must do *something*, and quickly too. But with the right mix of boldness and caution, the dilemmas of Guantánamo can be navigated successfully. A distinctive approach can be put in place from the outset, with enormous pay-off for our international standing, for due process values, and for effectiveness in our struggle against terrorism.

### **A. The Basic Framework**

The principle that should guide the new administration is straightforward and by no means new. It is simply a complete, unqualified return to established, pre-9/11 rules of international law and domestic due process, in particular the Geneva Convention governing the treatment of prisoners of war, the obligation to refrain from using military force against civilians, and the right of all individuals facing detention to contest the allegations against them in a court, with the assistance of counsel. Of course, most decent people have long favored this approach *where possible*. The worry centers on its feasibility and costs. The difficulties are not wholly imaginary, but they have been misunderstood and sometimes shamelessly exaggerated. Familiar rules and institutions, properly managed, possess ample resources to cope with the challenge of international terrorism while adhering fully to traditional conceptions of due process.

Operationally, returning to the traditional framework means first, and most obviously, closing Guantánamo forthwith. And the clearest way to signal a break with past mistakes is to transfer the remaining detainees to the United States. Second, in managing those transfers, the administration should rely exclusively on pre-9/11 mechanisms and institutions – the criminal justice system, immigration law detention for deportation, and traditional courts-martial under the Uniform Code of Military Justice, with the choice among these options governed by pre-9/11 legal principles applied to each detainee on a case-by-case basis.

Looking to the future, the new administration once again can and should rely exclusively on pre-9/11 mechanisms and institutions, avoiding the political minefield of controversial legislative initiatives such as a preventive detention

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<sup>1</sup> See Raymond Bonner, “2 British Antiterror Experts Say U.S. Takes Wrong Path,” N.Y. Times, October 22, 2008.

statute or a new national security court. The apprehension and detention of terrorism suspects must – and can – be managed successfully within the traditional legal framework that predates 9/11. In international terrorism cases, the existing criminal justice system operates with no geographical limits; it can reach terrorist activity and suspects around the globe.

Restoring that well-established framework has broad strategic importance. The United States cannot sustain a credible commitment to due process values if it simultaneously claims the right to deploy military weaponry and the prerogatives of warfare against shadowy enemies who live among civilians throughout in the world. The new administration must announce a counter-terrorism strategy that respects the legitimate domains and distinct competencies of the Central Intelligence Agency and the Departments of State, Defense, Justice and Homeland Security.

This approach need not mean an end to U.S. reliance on either the laws of war or the operational capabilities of our military. But it does require recognition that military deployments are often justified where the legal framework of warfare is not. We use military assets and personnel to deliver earthquake relief and to apprehend fugitives from civilian justice when conventional international assistance is unavailing, as in the seizures of General Manuel Noreiga and the terrorists responsible for hijacking the *Achille Lauro*.

Over the past seven years we have lost sight of two simple points. First, the propriety of using military tools and the propriety of invoking the laws of war against individuals are separate questions. And second, even where the laws of war apply, their organizing principle requires a scrupulous distinction between combatants – those who bear arms – and civilians – those who typically support their side’s war effort but do not actually fight.

Iraq and Afghanistan remain military theaters, of course. The law of armed conflict rightly applies there, and enemy fighters captured in battle are justifiably treated as combatants under traditional principles. In contrast, terrorists and their sympathizers and supporters living among civilians are not combatants in any sustainable sense. It was only the Bush administration’s innovative verbal maneuver – extending combatant status to any person who at any time “supported” al Qaeda or similar groups – that transformed most Guantánamo detainees from suspected criminals into enemy soldiers and thus made the broader “global war” legally possible. Yet that claim, if accepted, would render the law of war utterly incoherent, because Rosie the Riveter, her World War II German counterpart, and Japanese citizens who purchased their government’s war bonds all would become combatants. Indeed the Bush criteria would make them *unlawful* combatants because their acts in support of their side’s war effort occurred while they were not wearing a visible, distinctive insignia, as required for combatants by the Geneva Conventions.

Restoring due process principles therefore does not mandate a complete repudiation of the warfare framework. It requires only the more modest move of reinstating the demarcation between combatants and civilians that remains fundamental even where the law of war applies. Apprehending, detaining and prosecuting civilian terrorism suspects is a responsibility that belongs to the Department of Justice, though as always it can be supported as necessary by the military, diplomatic and technical resources of other agencies.

Many national security professionals nonetheless insist on the inadequacy of pre-9/11 institutions. Some seem determined to salvage a kernel of legitimacy for the Bush administration instincts that gave us Guantánamo. If that regime goes, they say, the country must replace it with some other form of detention – a Guantánamo with oversight, under the auspices of some newly created institution such as a national security court.

Few have recognized, however, that this supposed remedy papers over far more problems than it solves. Any proposal requiring new legislation is sure to a trigger a costly Congressional battle. And once enacted, the new detention framework would, from day one, present large problems of workability and legitimacy.

The long-term dangers are even more serious. President Bush did much to weaken the fabric of American civil liberties, but his most worrisome actions were at best extra-legal and therefore, at the very least, dubious and exceptional. To confer the imprimatur of law upon a permanent national security court would perpetuate the psychology of unending emergency that has proved so harmful to domestic liberties, to our international integrity and to the “soft” power of our ideals. The consequences for individuals, citizens and foreigners alike, are unknown but potentially disastrous.

New preventive detention powers and a national security court are, above all, unnecessary. Existing, pre-9/11 tools and procedures afford a safe, practicable way to confront the challenges of international terrorism and still honor traditional due process requirements – without qualification or exception.

## **B. Implementation**

As always, the devil is in the details. Closing Guantanamo and, more broadly, committing to be governed by pre-9/11 conceptions of due process, raises complicated practical questions. Most frequently mentioned are the logistics of providing secure custody for dedicated al Qaeda fighters, the puzzle of prisoners who should be released but have no place to go, the complexity of captures in combat, the potentially wide scope of the modern “battlefield,” and the supposed difficulty in terrorism cases of adhering to pre-9/11 procedures for detention, interrogation and trial. These concerns are prominent in discussions of Guantánamo, and long after the status of every Guantánamo detainee is resolved,

similar issues will continue to arise. The point often missed, however, is that established institutions have abundant means to accommodate security needs successfully without sacrificing transparency, accountability or individual rights.

*1. Logistics.* Though often asserted with great force, concerns about where to move the Guantánamo population are utterly specious. In a recent *Wall Street Journal* op-ed, two alumni of the Justice Department in the administration of the first President Bush insisted on the need to keep Guantánamo open and dared members of Congress to “offer[.] their states or districts as a suitable alternative.”<sup>2</sup> Defense Secretary Robert Gates has said, “We have a serious ‘not in my backyard’ problem. I haven’t found anybody who wants these terrorists to be placed in a prison in their home state.”<sup>3</sup> Last year the Senate, by a vote of 94-3, adopted a resolution opposing the transfer of Guantánamo detainees “into facilities in American neighborhoods.” But of course no one is proposing to put a terrorist detention camp right next to civilian homes, schools or playgrounds. The Naval Consolidated Brig on a base north of Charleston has been used to hold al Qaeda suspects Jose Padilla, Ali al-Marri and Yaser Hamdi. (South Carolina’s congressional delegation was not asked to give its approval.) The U.S. Disciplinary Barracks, a maximum security military prison on the grounds of Fort Leavenworth, Kansas, is likewise secure and safely located; its death row currently holds eight convicted murderers.

In the civilian justice system, confinement of extremely dangerous prisoners is a familiar mission. Since 9/11, federal courts have tried more than a hundred terrorism suspects, including many alleged associates of al Qaeda or the Taliban (Padilla, Zacharias Moussaoui, Richard Reid).<sup>4</sup> During their prosecutions, these one hundred-plus defendants were securely held near federal courthouses and then brought for trial at locations in downtown Miami, New York and elsewhere; Moussaoui was tried at the federal building in a densely populated neighborhood of Alexandria, Virginia. In all cases, security was successfully maintained,<sup>5</sup> and all the convicted defendants have since been assigned to secure civilian facilities.

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<sup>2</sup> David B. Rivkin and Lee A. Casey, *After Guantánamo*, *Wall Street Journal*, July 2, 2008, p. A13.

<sup>3</sup> Andrew Gray, “US Efforts to Close Guantanamo at a Standstill – Gates,” *Reuters*, May 20, 2008.

<sup>4</sup> Richard B. Zabel & James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts 35-52* (Human Rights First 2008), available at <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf>.

<sup>5</sup> See *id.* In the Embassy Bombings prosecution prior to 9/11, there was an outbreak of violence in the courtroom and a nearly fatal attack on a corrections guard. *Id.* at 141. But federal courts often handle exceedingly dangerous defendants, and non-terrorism cases have seen many violent incidents; in one episode the mother and husband of a federal judge were murdered by a

The federal super-max prison at Florence, Colorado – an employer enthusiastically welcomed by the surrounding community – currently holds over four hundred of the most dangerous federal inmates. Its roster reads like a who's who of atrocity: notorious domestic terrorists (Oklahoma City bomber Terry Nichols, Unabomber Ted Kaczynski, Olympic Park bomber Eric Rudolph) and many extremists identified with radical Islam (Padilla, Moussaoui, Reid, 1993 World Trade Center bombing conspirators Omar Abdel-Rahman and Ramzi Yousef, 1998 embassy bombings conspirator Wadhi el-Hage). At last report the super-max had unused capacity of 20 open beds. If necessary, more space could no doubt be created elsewhere or at the extensive Colorado site, where four prisons of varying security levels together make up the vast Florence Federal Correctional Complex.

*2. Prisoners who should be freed but have no place to go.* Of the roughly 250 prisoners still held at Guantánamo, some sixty reportedly have been cleared for release but cannot be returned to their home countries because they face persecution or torture there. And to date the Bush State Department has been unable to find other countries willing to accept them.

The character of this problem will change dramatically on January 20, 2009. After the Bush administration's years of hectoring our allies and insisting on a my-way-or-the-highway approach to foreign relations, other nations naturally have been unwilling to take on the costs of our mistakes. The reluctance is all the more understandable in the context of negotiations which merely nibble at the edges of the problem, while the Bush emissaries continue to insist that Guantánamo must remain open even after part of its current population is released and resettled. With a new administration committed to a different tone and with a desire to demonstrate good will on all sides, more helpful responses can be expected. A new administration will have many ways to encourage such cooperation, especially if its efforts are coupled with a commitment to end *all* detentions at Guantánamo and to resettle some of the released group in the United States. Meanwhile, pending deportation or relocation, American immigration law permits these detainees to be released on a form of intensive-supervision parole, and where that alternative is unworkable, they can be held in U.S. detention facilities for renewable six-month periods, under the jurisdiction of Homeland Security's Bureau of Immigration and Customs Enforcement.<sup>6</sup>

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disgruntled litigant in a civil lawsuit. In any event, with the heightened security measures put in place in the wake of 9/11, there has been no recurrence of such incidents in post-2001 terrorism prosecutions. *Id.* at 141-45.

<sup>6</sup> See *Clark v. Martinez*, 543 U.S. 371 (2005); *Zadvydas v. Davis*, 533 U.S. 678 (2001); USC §1226a (2008).

3. *The combat objection.* A constant refrain for defenders of Guantánamo is that traditional due process safeguards such as access to counsel and the right to an adversary hearing before a judge are unwarranted because the detainees were seized in combat. Defending President Bush's October 2008 decision to keep Guantánamo open, White House spokesperson Dana Perino explained that "[w]hen you pick up people off the battlefield that have a terrorist background, it's not just so easy to let them go."<sup>7</sup> Texas Senator John Cornyn concurred, insisting that it would be a "colossal mistake . . . to give foreign terror suspects captured on the battlefield the same legal rights and protections as American citizens accused of crimes."<sup>8</sup> In the *Wall Street Journal*, David Rivkin and Lee Casey object that "[c]ollecting [forensic] evidence on the battlefield will cost lives and impair combat effectiveness."<sup>9</sup> Justice Scalia, dissenting from the Supreme Court's decision, last June, to permit judicial review of the detentions, complained that "in a foreign theater of operations . . . the environment does not lend itself to rigorous evidence collection."<sup>10</sup> At a Senate Judiciary Committee hearing on Guantánamo, former Attorney General William Barr said that the detentions there raised matters concerning "foreign persons captured by American forces on the battlefield," "military operational judgments," and "circumstances of the initial encounter on the battlefield [with] our frontline troops."<sup>11</sup> At the same hearing, Arizona Senator John Kyl echoed the identical talking point, declaring that "[w]e're talking, first of all, about people who have been captured on the battlefield right after they have been shooting at our soldiers."<sup>12</sup>

Several ideas seem to be involved here – the assumption that these foreign nationals don't deserve scrupulous safeguards, that their combatant status is self-evident, or that it's simply too dangerous in a combat environment to meet judicial standards for gathering evidence.

These seemingly plausible points, however, have almost no bearing on the Guantánamo problem, for the simple reason that virtually none of the current detainees were "captured on the battlefield right after they have been shooting at our soldiers." Most are not alleged to have been captured in battle at all, or even in non-combat circumstances that arguably suggest belligerency, such as

<sup>7</sup> See Press Briefing by Press Secretary Dana Perino, Nov. 10, 2008, available at <http://www.whitehouse.gov/news/releases/2008/11/20081110-2.html>.

<sup>8</sup> Quoted in Matt Apuzzo and Lara Jakes Jordan, "Obama Plans Terror Trials," *Washington Times*, Nov. 11, 2008.

<sup>9</sup> David B. Rivkin and Lee A. Casey, "After Guantánamo," *Wall Street Journal*, July 2, 2008, p. A13.

<sup>10</sup> *Boumediene v. Bush*, 128 S. Ct. 2229, 2295 (2008) (Scalia, J., dissenting).

<sup>11</sup> U.S. Senate, Committee on the Judiciary, Hearing on Detainees, June 15, 2005, Testimony of the Honorable William P. Barr (Prepared Statement), 1, 4, 9, 10.

<sup>12</sup> U.S. Senate, Committee on the Judiciary, Hearing on Detainees, June 15, 2005, Transcript of Proceedings, 62 (emphasis added).

“traveling . . . in the company of senior al Qaeda figures.”<sup>13</sup> Rather, by the government’s own account, the great majority (more than three-quarters, in a West Point analysis commissioned by the Pentagon<sup>14</sup>) were arrested far from any zone of combat – at airports, homes and other civilian settings in the cities of Pakistan, Europe, Africa and elsewhere.

The “battlefield” claim is largely inapt even for detainees seized in or near the combat zones of Afghanistan. Few of the detainees still held at Guantánamo (perhaps none of them) ever confronted American combat troops. In more than 500 declassified transcripts, there was *only one case* involving a detainee allegedly seized by a U.S. soldier during a combat engagement. Less than 5% were captured directly by U.S. personnel,<sup>15</sup> and most of these were not taken prisoner in combat but were spotted by U.S. soldiers in ambiguous but arguably belligerent situations (“traveling in the company of senior al Qaeda figures”). Eighty percent of those captured in Afghanistan or in the Afghanistan/Pakistan border region never encountered an American until Northern Alliance troops, militias or Afghan villagers accused them of hostile actions and turned them over to us,<sup>16</sup> usually in exchange for payment of a promised bounty. And official records now reveal bounties in the range of \$5000 per suspect,<sup>17</sup> a staggeringly attractive sum for residents of the region. In situations like these, the risk of false accusation or mistaken identity runs high, and there is no “heat of battle” problem to excuse our personnel from carefully recording the facts available when the detainees are taken into American custody.

Although the battlefield “tail” should not be wagging the Guantánamo “dog,” several residual concerns remain relevant. First, much of the information relating to the detainees remains classified. We do know that battlefield captives are the exception at Guantánamo, but a comprehensive solution must provide for cases of this sort. Second, even if there are no battlefield captives at Guantánamo now, such cases will no doubt arise in the future; a plan to close Guantánamo must explain how they will be handled. Third, a sticky evidentiary problem persists even when American forces do not gain custody of a prisoner in the heat of combat. Take the common case in which an ally (perhaps an Afghan warlord)

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<sup>13</sup> Benjamin Wittes, *Law and the Long War* 81-82 (2008).

<sup>14</sup> Joseph Felter & Jarret Brachman, CTC Report: An Assessment of 516 Combatant Status Review Tribunal (CSRT) Unclassified Summaries 13 (United States Military Academy, Combating Terrorism Center, July 25, 2007) (hereinafter cited as West Point analysis); accord, Wittes, *supra*, at 78-82.

<sup>15</sup> Mark Denbeaux, et al., *The Meaning of “Battlefield”*: An Analysis of the Government’s Representations of “Battlefield” Capture and “Recidivism” of the Guantánamo Detainees (Seton Hall Center for Policy and Research) (Nov. 2006); accord, West Point analysis, at 12.

<sup>16</sup> *Id.* at 12-13.

<sup>17</sup> See *In re Guantanamo Bay Detainee Litigation*, 2008 WL 4539019 (D.D.C., Oct. 9, 2008), at \*2.

responds to our bounty offer and brings in alleged al Qaeda militants, claiming to have captured them “on the battlefield right after they have been shooting at [his] soldiers.” The allegation might be the false product of perverse incentives or it might be true and important. Either way, it is undoubtedly hearsay, and the warlord will not be available for cross-examination in any ordinary American court. Situations like these are one reason why so many are alarmed at the prospect of imposing conventional due process requirements on the detention and trial of suspected terrorists.

Yet the answer to this concern is surprisingly straightforward, because there is nothing new or distinctively “post-9/11” about battlefield seizures. They have been a common occurrence in all American wars, and our military has long dealt with them through a prompt, informal military hearing that satisfies the Geneva Conventions. In the heat of battle, the process for determining enemy combatant status is justifiably simplified – no sensible person disagrees. It hardly follows, however, that broad military powers suited to combat situations are also defensible (or even tolerable) for the detection and apprehension of suspected terrorists living among civilians throughout the world.

The response to the recurrent “battlefield” talking point is therefore two-fold. First, the concern simply has no application to most suspects seized in the “global war on terror.” Second, for cases where it does apply – suspects captured during actual combat operations – the appropriate solution is not Guantánamo or some other newly invented regime but rather the well-settled procedures our military has always used for such cases. For combat seizures, the short answer is simply to let the Army be the Army.

The uncontroversial pre-September 11 regime for informal battlefield hearings (U.S. Army Regulation 190-8<sup>18</sup>) is similar to procedures followed in other armies throughout the world. Adhering to it is entirely practicable and, moreover, will protect against perceptions that the United States is concocting new rules of its choosing in order to create legal black holes in which inconvenient constraints can be obliterated.

*4. Enemy combatants on the broader “battlefield.”* Once we accept flexible procedures for combatants captured in battle in Afghanistan, it’s only a small step, the Bush administration has insisted, to recognize that cities and industrial plants everywhere are now potential targets too. In this “new kind of war,” terrorists apprehended anywhere in the world should therefore be treated like combatants seized on a conventional battlefield. The administration invoked this approach to justify military custody, without access to the counsel or the courts, not only for non-battlefield detainees at Guantánamo, but also for Jose Padilla, an

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<sup>18</sup> “Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees,” Army Reg. 190-8 (1997).

alleged “enemy combatant” who is a U.S. citizen arrested at O’Hare airport, and Ali al-Marri, a lawful resident alien arrested in Peoria, Illinois, where he was living with his family.

The theory of a broadened “battlefield,” with “enemy combatants” who are living among civilians, has yet to be definitely tested in post-9/11 cases. In *Hamdi*, the Supreme Court upheld the general concept of enemy combatant detention but expressly confined its analysis to a narrow version of that category – individuals who “[supported] forces hostile to the United States or coalition partners in Afghanistan *and who engaged in an armed conflict against the United States there*.”<sup>19</sup> Al-Marri’s case, a far-reaching example of the broader concept, is now before the Supreme Court, and he remains at the Charleston naval brig after more than six years in military custody.<sup>20</sup> Any long-term resolution of the Guantánamo problem must come to grips with this broad “enemy combatant” theory, which is an essential underpinning for the military approach to the apprehension and detention of terror suspects worldwide. How should the theory be assessed?

The move beyond the combat environment is not simply a minor enlargement or logical extension of the military model. To be sure, everyone understands that terrorists may strike indiscriminately and with great destructive force, at any time or place. But even if O’Hare airport is now similar *in that respect* to a conventional battlefield, there are obvious differences. Equating the two, as the Bush administration has sought to do, carries momentous implications, because that step, once accepted, legitimates military powers in circumstances where law enforcement constraints would otherwise apply. Extending military authority from combat situations to civilian settings therefore cannot follow automatically from a partial analogy between the two contexts. We also need to consider the differences.

The differences, of course, are dramatic. Lethal force and summary procedures are much more dangerous when suspects purporting to be civilians are found living in the midst of a law-abiding community outside the zone of combat.

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<sup>19</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004) (plurality opinion) (internal quotation marks omitted) (emphasis added).

<sup>20</sup> See *al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008), cert. granted December 5, 2008. In Padilla’s case, the government sought to remain within the narrower definition approved in *Hamdi*. Dropping its original theory (that Padilla had been arrested because he was planning to attack sites in America with a radioactive “dirty bomb”), the government alleged instead that Padilla “took up arms against United States forces in [Afghanistan] in the same way and to the same extent as did Hamdi”; the Court of Appeals then concluded that those allegations (disputed by Padilla) would be sufficient to place him in the category of “an ‘enemy combatant’ as that term was defined for the purposes of the controlling opinion in *Hamdi*.” *Padilla v. Hanft*, 423 F.3d 386, 391 (4th Cir. 2005). Subsequently, the government abandoned its attempt to hold him as an enemy combatant and transferred him to the civilian courts, where he was convicted for criminal conduct pre-dating 9/11.

The importance of split-second responses and “military operational judgments” decreases as we move away from the heat of battle. Non-military alternatives, such as conventional law enforcement, are non-existent in combat but are usually available elsewhere. And the facts needed to identify an “enemy combatant” are directly observable on the battlefield but are inevitably more elusive and circumstantial in the case of suspected enemies who blend in with the civilian population. Outside the combat environment, informal proceedings carry greatly diminished justification but far greater risk of error.

For some, however, the case for military flexibility rests on more than the tactical imperatives of combat. In wartime, mass casualties or even national survival may be at stake. And where decisions depend on the subtleties of military intelligence, there is greater need for professional military expertise.

But these attractions of the military model have never (before 9/11) been considered sufficient to extend its reach. Because the permissive rules of armed conflict displace ordinary limits on detention and the use of deadly force, they alter for any society, the defining framework of government itself.<sup>21</sup> And because the executive authority cannot be left free to confer on itself the powers of detention and summary killing that warfare permits, both domestic and international law have long resisted efforts to enlarge the domain where the rules of war apply. Both traditions insist that any extension of the warfare framework be justified by strict necessity, not simply by credible references to analogous military needs.<sup>22</sup> Accordingly, both domestic and international law tightly confine the prerogatives of warfare – by limiting the circumstances that qualify as “war” and by limiting the classes of individuals who are subject to military powers *even* in times of war.<sup>23</sup>

Three ideas too often get entangled – war, the battlefield, and combatant status. At a stretch, the first two are arguably applicable to worldwide anti-terror operations, but combatant status cannot be. If we keep in mind the difference between these ideas, it becomes clear that the Bush administration’s innovative “enemy combatant” theory is not just flimsy but utterly incoherent.

To apply the concept of war to a struggle against a non-state entity which does not control discrete territory is a relatively recent notion in international

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<sup>21</sup> See *Duncan v. Kahanamoku*, 327 U.S. 304, 322 (1946).

<sup>22</sup> See, e.g., *Duncan v. Kahanamoku*, *supra*; *Ex parte Milligan*, 71 U.S. 2 (1866).

<sup>23</sup> See, e.g., *Public Comm. Against Torture v. State of Israel*, 46 I.L.M. 375, 391-92 (Isr. S. Ct. 2007).

law.<sup>24</sup> It is also strategically self-defeating as applied to al Qaeda, a marginal movement that only gains stature when we accept its claim to be treated as the global adversary of a great power.<sup>25</sup> Nonetheless, as a strictly legal matter, the argument for invoking the warfare regime is not wholly indefensible.<sup>26</sup> And if a state of war exists, the extent of its “battlefield” is no longer decisive, because there is ample precedent for applying the laws of armed conflict to spies and saboteurs caught in civilian areas behind the battle lines.<sup>27</sup> The more important flaw underlying Guantánamo and the entire legal apparatus of “global war” is narrower, but it is irrefutable – the untenable conception “enemy combatant” status that these approaches require.

The distinction between combatants and civilians is no fine-spun technicality. It is the organizing principle of the law of war, and its terms determine the authority and responsibilities of governments in situations of armed conflict.

An enemy combatant, under the Bush administration theory, is any individual who is “part of *or supporting* Taliban or al Qaeda forces, *or associated forces* that are engaged in hostilities against the United States or its coalition partners.”<sup>28</sup> This standard includes, of course, detainees (the minority of those now at Guantánamo) who fought with Taliban or al Qaeda units and were captured during armed engagements. The standard is broader, however, because it also covers, and was clearly intended to cover, the more typical Guantánamo detainee – the individual seized far from the battlefield who allegedly vowed allegiance to Osama bin Laden, expressed willingness to travel to Afghanistan for training, or contributed money to a terrorist front organization.<sup>29</sup> And if such

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<sup>24</sup> Traditionally, in order to trigger the special rules applicable in warfare, there must be either an armed conflict between States or a conflict involving an organized military force that controls territory within a state. See, e.g., International Committee of the Red Cross, Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field 49 (Jean Pietet ed. 1952); Law of War Workshop Deskbook 31-32 International and Operational Law Dept., Judge Advocate General's School, U.S. Army, 2000), available at <http://www.au.af.mil/au/awc/awcgate/law/low-workbook.pdf>.

<sup>25</sup> See Stephen Holmes, *The Matador's Cape* (2006); See Decca Aitkenhead, *Free Agent*, *The Guardian*, Oct. 18, 2008 (recounting interview with Stella Rimington, former chief of the British intelligence service MI5).

<sup>26</sup> See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 *Harv. L. Rev.* 2047 (2005).

<sup>27</sup> *Ex parte Quirin*, 317 U.S. 1 (1942); see Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas and Saboteurs*, 28 *BRIT. Y.B. INT'L L.* 323 (1951).

<sup>28</sup> See *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005) (emphasis added).

<sup>29</sup> See *In re Guantanamo Detainee Cases*, *supra*, 355 F. Supp. 2d at 475. In that case, the administration asserted that even unwitting support would be sufficient. Putting that extravagant

individuals are enemy combatants, they become *unlawful* combatants automatically because they do not satisfy the obligations incumbent on combatants under the law of armed conflict, such as carrying their arms openly and wearing “a fixed distinctive emblem recognizable at a distance.”<sup>30</sup>

This broad conception of the enemy combatant category builds on the plausible intuition that support for terrorist activity should be unlawful, as of course it is. But as a conception of *combatant* status, it verges on the absurd, because it obliterates the distinction between civilians and combatants that is fundamental to the law of war. Rosie the Riveter and her World War II German counterpart did not become unlawful combatants when they went off to work without wearing a distinctive emblem recognizable at a distance. If captured, they could not have been convicted of a war crime on that basis. Indeed they were not combatants in any sense; they remained civilians – unambiguously so – despite their allegiance to their respective nations and their employment in important armaments plants. The same is true of elderly Japanese and German citizens who purchased war bonds to assist their respective governments. Swiss bankers who helped transfer money to Nazi bank accounts may have committed civilian crimes, and they are certainly not to be admired, but just as surely, they were not combatants who could lawfully be shot on sight, and they did not become war criminals when they committed their acts while wearing civilian clothes.

A major purpose of the law of war is to insure that individuals in cases like these are treated *not* as combatants but as protected civilians. The law of war achieves that result by specifying that any individual not part of the organized military of a sovereign State normally qualifies for protected civilian status. And he loses that protected status and becomes a combatant only when he *participates in hostilities*, and only when that participation is “*active*” or “*direct*.”<sup>31</sup> These requirements are defined restrictively, and they cannot lightly be relaxed. They *must be* defined restrictively, because the law of war becomes incoherent if it equates combatant status with any sort of allegiance or support. Thus, in international law the hostilities requirement can be met only when an individual’s actions “are intended to cause actual harm to the personnel and equipment of the

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claim aside, there is no doubt that the enemy combatant definition applied at Guantánamo detainees is intended to encompass anyone who knowingly provides material support.

<sup>30</sup> Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 4, 6 U.S.T. 3316 (1949).

<sup>31</sup> Common Article 3 of the Geneva Conventions defines protected civilians as those “taking no active part in the hostilities.” Geneva Convention III, *supra*, at art. 3(1). Additional Protocol I to the Geneva Conventions, 1125 U.N.T.S. 3 (June 8, 1977), though not ratified by the United States, refers at art. 51(3), to “direct” participation in hostilities. The terms “active” and “direct” are considered to have identical content. See Public Comm. Against Torture v. State of Israel, 46 I.L.M. 375 at ¶34 (Isr. S. Ct. 2007); Prosecutor v. Akayesu, International Criminal Tribunal for Rwanda case no. ICTR-96-4-T (1998)).

[opposing] armed forces."<sup>32</sup> Merely helping to feed and clothe one's own troops cannot count as *participating* in hostilities.

Participation must also be *direct*. The person who helps build a fighter plane is taking steps "intended to cause actual harm to the personnel and equipment" of the opposing side, and he can therefore be viewed as participating in hostilities. But if the law is to avoid the absurdity of classifying a large share of the adult population as combatants, participation of this sort cannot be sufficient; protected civilian status must be retained until participation becomes much more immediate.

A line between the "direct" and the "indirect" can always be blurred, of course, and commentators differ about many details.<sup>33</sup> But maintaining that line nonetheless remains essential for separating civilian status from belligerency in modern warfare, and there is wide agreement on its main parameters. "Direct" participation extends beyond actually firing weapons in combat; it is generally understood to include such active assistance as collecting intelligence on the opposing army or transporting combatants to a place where hostilities will occur. At the opposite pole, there is likewise broad agreement. As the Israeli Supreme Court recently reaffirmed, "a person who sells food or medicine to an unlawful combatant is not taking a direct part . . . in the hostilities. The same is the case regarding a person who aids the unlawful combatants by general strategic analysis, . . . grants them logistical, general support, including monetary aid[,] distributes propaganda supporting those unlawful combatants. . . . [or is employed] in the armaments industry."<sup>34</sup>

U.S. military law before 9/11 was in complete accord on these points and even used much the same language. The Army "Deskbook" setting forth the U.S. understanding of the laws of war states that protected civilian status is not lost in the absence of "acts of war which by their nature and purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces . . . . [G]eneral participation in the war effort" is not sufficient.<sup>35</sup> The Navy and Air

<sup>32</sup> See Y. Sandoz et al. Commentary on the Additional Protocols 618 (1987).

<sup>33</sup> Direct Participation in Hostilities under International Humanitarian Law, Report Prepared by the International Committee of the Red Cross (2003).

<sup>34</sup> Public Comm. Against Torture, *supra*, at ¶ 35; see Dieter Fleck, ed., Handbook of Humanitarian Law in Armed Conflicts (1995), at 232, ¶¶ 517, 518. A number of commentators fault the Israeli Supreme Court decision for improperly *expanding* the traditional conception of "direct participation." See, e.g., Comment, Kristen E. Eichensehr, On Target? The Israeli Supreme Court and the Expansion of Targeted Killings, 116 Yale L. J. 1873 (2007). But even in the context of its arguably overbroad definition, the court made clear that general logistical support and work in an armaments factory cannot qualify as direct participation; with respect to those matters, which the court placed *outside* the scope of direct participation, its analysis is not controversial.

<sup>35</sup> Law of War Workshop Deskbook 128-29 (International and Operational Law Dept., Judge Advocate General's School, U.S. Army, 2000), available at

Force manuals set forth the identical standard, limiting combatant status to those who “take a direct part in the hostilities.”<sup>36</sup> And this is precisely the line the Supreme Court has drawn in *Milligan* and *Quirin*, its leading decisions on military power to detain and try alleged combatants.

In *Quirin*,<sup>37</sup> the court upheld military jurisdiction over German naval personnel who landed ashore in the United States and then buried their uniforms in preparation for acts of sabotage against American factories. The *Quirin* defendants were not by any stretch civilians, and they were not merely individuals helping the German cause or expressing allegiance to it. Rather, as undisputed, full-time members of the armed forces of an enemy nation (“admitted enemy invaders”), they were clearly combatants, and they became unlawful combatants by infiltrating behind our lines, *pretending* to be civilians.

The *Milligan* facts, if viewed through the lens of the broad combatant theory, seem almost identical – the prisoner was accused of equally serious “support” for the enemy. Yet the Court took a more discriminating approach and reached the opposite result. The government argued that Milligan should be considered a prisoner of war because he allegedly had aided the Confederacy by plotting to seize federal munitions and to free Confederate prisoners. The accusation – if true – would have made Milligan an “enemy combatant” as the Bush Defense Department defines the term, and the accusation had been found true by the military commission that tried and convicted Milligan. Indeed the Court acknowledged that Milligan stood accused of “an enormous crime [during] a period of war [and] within . . . the theatre of military operations.”<sup>38</sup> Yet the Court treated the “prisoner of war” argument as frivolous and took it to be obvious that Milligan was “a civilian.” His alleged support for Confederate troops, though a grave wartime offense, was a matter to be resolved by jury trial in the Indiana civilian courts.<sup>39</sup>

By these settled standards, which frame the essential distinction between combatants and civilians, Guantánamo detainees who “support[ed]” al Qaeda or planned to give it assistance are not “direct participants” and cannot be considered “enemy combatants” subject to the law of war. When alleged terrorist involvement is indirect, the suspects must be pursued in the ordinary criminal courts, with the safeguards which that process affords even to those accused of brutal crimes.

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<http://www.au.af.mil/au/awc/awcgate/law/low-workbook.pdf>.

<sup>36</sup> U.S. Air Force Pamphlet 110-31, §5-3(a)(1)(c) (1976) (“Civilians enjoy the protection afforded by law unless and for such time as they take a direct part in the hostilities.”); accord, Dept. of the Navy, Commander’s Handbook on the Law of Naval Operations, §11.3 (1995).

<sup>37</sup> *Ex parte Quirin*, 317 U.S. 1, 19-20 (1942).

<sup>38</sup> *Milligan*, 71 U.S. at 7, 130.

<sup>39</sup> *Milligan*, 71 U.S. at 122, 127.

This need to rely on the civilian trial process after seizure is distinct from the President's power to use the military *in support of* civilian law enforcement. Throughout our history, Presidents have used military force abroad for various purposes, some of which involved "armed conflict" within the meaning of international law, and some of which did not. These deployments do not inevitably bring the law of war into play, nor do they inevitably displace criminal procedure. Our invasion of Panama in the 1980s is a clear example. The President used military force, not conventional law enforcement, to capture General Manuel Noreiga. But once he was seized, he was brought to the United States and tried on criminal charges in a federal court.<sup>40</sup> The C.I.A. and the military will therefore retain important roles in the struggle against worldwide terror networks, but these will be supporting roles in aid of law enforcement led by the Department of Justice.

5. *Due process requirements for detention, interrogation and trial.* The most serious concern, of course, is that the distinctive challenges of international terrorism make civilian conceptions of due process unworkable, unacceptably dangerous or even rigid to the point of farce.

This is a common but badly distorted impression. The reality is that established legal principles and institutions are far more supple than their detractors allow. Due process requirements do not and should not give way to every claim of government necessity. But the military and civilian procedures in place before 9/11 afford ample tools for addressing the Guantánamo mess and for meeting the continuing terrorist threat. Some detail will correct misconceptions on this point and fill out the specifics that can enable us to safely restore traditional legal principles. Two situations need to be addressed: battlefield captives and suspects seized outside the zone of combat.

a) *Battlefield captives.* Regulation 190-8, adopted in accordance with Article 5 of the Third Geneva Convention, provides for military tribunals (often called Article 5 tribunals) to resolve any doubts about the status of individuals captured or held by the U.S. armed forces.<sup>41</sup> Though not used in connection with military operations in Afghanistan since September 11, 2001, tribunals of this type were routinely deployed in prior conflicts. Approximately 1200 of these tribunals were convened during the 1991 Gulf War.

Under this system, a panel of three commissioned officers considers sworn testimony and written statements in a proceeding that is open to the detainee and others, except when doing so would compromise security. The detainee has no

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<sup>40</sup> See *United States v. Noreiga*, 746 F. Supp. 1506 (S.D. Fla. 1990).

<sup>41</sup> "Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees," Army Reg. 190-8 (1997).

right to counsel, but he has the rights to remain silent, to testify if he wishes, to call witnesses if reasonably available and to question witnesses called by the tribunal. Reg. 190-8 does not establish a timeframe for the status-determination proceeding, but contemporary standards clearly require a “prompt” hearing - - ordinarily not more than eight days after a challenge to status is made.<sup>42</sup>

The Article 5 tribunal can make three possible determinations: that the detainee is entitled to prisoner of war status (and thus to all the protections of the Third Geneva Convention); that he is an innocent civilian who must be “immediately returned to his home or released”; or that he is a detainee not entitled to prisoner of war status, for example because he is a combatant considered to have violated the laws of war.<sup>43</sup> For detainees considered ineligible for prisoner of war protections, Reg. 190-8 establishes a critically important principle: they “may not be executed, imprisoned or otherwise penalized without further proceedings to determine what acts they have committed and what penalty should be imposed.”<sup>44</sup> Thus, before POW privileges can be withdrawn, the traditional regime requires a two-stage process - - an Article 5 tribunal must initially find a basis for denying those privileges and that finding must be confirmed by a subsequent, more formal proceeding that meets conventional due process standards, either in local civilian courts or in a court-martial under the Uniform Code of Military Justice (UCMJ).<sup>45</sup>

These procedures reflect basic requirements of fundamental fairness and do not depend on whether the opposing enemy forces have signed the Geneva Conventions or complied with its terms. Indeed, Reg. 190-8 itself specifies that its protections of due process and humane treatment apply to “[a]ll persons captured . . . or otherwise held in U.S. Armed Forces custody . . . from the moment they fall into the hands of U.S. forces . . . .”<sup>46</sup> The Army’s longstanding approach, in short, reflects the view that it is wise to follow Reg. 190-8 regardless of whether the 1949 Geneva Conventions apply.

Though they carry important safeguards, Article 5 tribunals are extraordinarily flexible. They allow rules of evidence and other procedural norms

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<sup>42</sup> See *Marab v. IDF Commander on the West Bank*, H.C. 3239/02, 57 P.D. 349, ¶¶ 26, 27, 46 (Israel S. Ct. 2003); see Stephen J. Schulhofer, *Checks and Balances in Wartime*, 102 Mich. L. Rev. 1906, 1928-30 (2004).

<sup>43</sup> “Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees,” Army Reg. 190-8, § 1-6(e)(10) (1997).

<sup>44</sup> *Id.*, § 1-6(g).

<sup>45</sup> *Id.* § 1-5 (3) (“punishment of [detainees] known to have, or suspected of having, committed serious offenses will be administered [in accordance with] due process of law and under . . . the Uniform Code of Military Justice . . .”).

<sup>46</sup> *Id.* § 1-5 (a) (1). Similarly, §1-5 (a) (2) requires that all detainees “be provided with the protections of the [Third Geneva Convention] until some other legal status is determined by competent authority.”

to be adapted to battlefield conditions, including any needs to protect classified information. Their relative informality is appropriate because they lead only to non-punitive outcomes - - either release or internment with full POW privileges, which preclude all “inhumane treatment,” including “sensory deprivation, . . . degrading treatment, . . . insults, [and] all threats or acts of violence.”<sup>47</sup> That said, the application of this approach to current and future detainees requires further comment.

*Current detainees seized in combat.* Detainees now at Guantánamo were not afforded the prompt battlefield hearing contemplated by Reg. 190-8, and they were not accorded the privileges and protections that Reg. 190-8 and the Geneva Conventions envisage for prisoners of war. Instead, they were moved directly into the category of *unlawful* combatants and treated as such, though neither part of the customary two-step process of informal and formal proceedings was ever initiated.

Starting some three to four years later, all the detainees received at least one hearing in the newly established system of Combatant Status Review Tribunals (CSRTs). The CSRTs are not remotely comparable to the second-stage adversarial proceedings that Reg. 190-8 contemplates in the case of detainees who are to be denied full POW privileges. But if full POW privileges are now extended to them, it might be thought that a bare-bones Article 5 proceeding, or a fortiori the more elaborate CSRT hearing, provides an adequate basis for continuing detention, even under scrupulous pre-9/11 standards.

That answer might once have been plausible, but at this late date it cannot suffice. These detainees have endured long periods of incommunicado confinement, and in public pronouncements the Vice President and the Secretary of Defense emphatically condemned them en masse (“the worst of the worst”). Indeed, the CSRT implementation guidelines state at the outset that “[e]ach detainee whose status will be reviewed by a Tribunal has previously been determined, since capture, to be an enemy combatant through multiple levels of review by military officers and officials of the Department of Defense.”<sup>48</sup> These circumstances preclude reliance on military proceedings in which detainees lack the assistance of counsel and face a tribunal answerable to the civilian leadership of the Defense Department;<sup>49</sup> they require instead a forum with rigorous safeguards and demonstrated independence from the executive branch. Indeed, the *Boumediene* decision accepts as a constitutional imperative the need for Article III courts to determine the factual basis for detention in an adversarial

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<sup>47</sup> Id. §§ 1-5 (a) (4) – (5).

<sup>48</sup> See Combatant Status Review Tribunal Process, encl. (1), §B (Secretary of the Navy, July 29, 2004).

<sup>49</sup> Id. at encl. (1), §A; encl. (3), § D.

*habeas corpus* proceeding.<sup>50</sup> As a practical matter, therefore, it is far too late to contemplate an alternative decision mechanism for these individuals. And *habeas* courts are well-equipped to hear such cases and to fashion appropriate procedures in the exercise of their equitable discretion.<sup>51</sup>

*Future battlefield detainees.* According to customary practice, prisoners of war, once classified as such, are held until the end of hostilities, without further process. Guantánamo and related abuses have fueled widespread unease about this approach, and the Department of Defense, in belated recognition of the concerns, has established an administrative mechanism to review the ongoing need for detention at least once a year.<sup>52</sup>

These Administrative Review Boards (ARBs) offer only limited reassurance, however. They afford the detainee no right to counsel, and their hearings are described as “non-adversarial.”<sup>53</sup> Moreover, ARB members are not independent; instead of being designated in the same way as military judges under the UCMJ,<sup>54</sup> they are selected by and report to a political appointee in the Department of Defense.<sup>55</sup> And the standard for determining whether to release the detainee is wholly open-ended,<sup>56</sup> rather than being tethered to the only

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<sup>50</sup> *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

<sup>51</sup> Though these cases can proceed smoothly even in the absence of legislation, Congress could make them more manageable in two respects. First, the Classified Information Procedures Act, 18 U.S.C., app. 3, currently is triggered only upon the filing of an indictment or information. CIPA could be amended to provide that its mechanisms may also be invoked upon the filing of a *habeas* petition. Second, detainee litigation is likely to put pressure on the security clearance process for counsel. Congress could authorize the Administrative Office of United States Courts to establish a permanent corps of pre-cleared counsel. See Serrin Turner & Stephen J. Schulhofer, *The Secrecy Problem in Terrorism Trials* 27 (Brennan Center for Justice, 2005).

<sup>52</sup> U.S. Dept. of Defense, Order: Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at the Guantánamo Bay Naval Base, Cuba (May 11, 2004).

<sup>53</sup> *Id.* ¶3.A.

<sup>54</sup> See, e.g., 10 U.S.C. §826(c) (officer may act as a military judge “only when he is assigned [by] and directly responsible to the Judge Advocate General.”).

<sup>55</sup> *Id.* ¶2.B.1.a. This lack of independence contravenes long-recognized rule-of-law principles that govern military justice in the armed forces of our allies. See, e.g., *De Jong, et al. v. The Netherlands*, 8 Eur. H.R. Rep. 20 ¶ 47 (1984); *Findlay v. United Kingdom*, 24 Eur. H.R. Rep. 221 ¶¶ 76-77. See generally *Armed Forces Act, 1996*, c. 16 (Eng.); *European Military Law Systems* (Georg Nolte, ed., 2003). A related weakness is that the review board prepares only a non-binding recommendation; the actual decision whether to detain or release the prisoner is made by a Defense Department political appointee. ARB Procedures, ¶ 3.E.(v).

<sup>56</sup> The review board and the ultimate civilian decision-maker are instructed to order continued detention if the detainee “remains a threat to the United States and its allies . . . or if there is any other reason that it is in interest of the United States and its allies for the enemy combatant to remain in the control of DoD.”

justification accepted as legitimate under the laws of war – the need to prevent return to the battlefield.<sup>57</sup>

Even so, periodic review was rarely if ever provided in any form to conventional prisoners of war. So if the ARBs extend protections never previously granted under similar circumstances, it would seem churlish to quibble over their failure to mirror every safeguard of the modern criminal trial.

But traditional POW detention, supported only by a rudimentary Article 5 determination, was designed for a different sort of prisoner in a different sort of conflict. The *Hamdi* plurality was sensitive to a piece of this problem. Though it noted the “possibility” that the Army’s informal Article 5 hearing might satisfy due process for detainees captured on battlefields in Afghanistan,<sup>58</sup> it signaled that the understanding on which that approach depended “may unravel” if armed conflict and the associated need for continuing detention threatened to drag on indefinitely.<sup>59</sup> The caveat is important, but beyond this point which the Court noted, the circumstances to which the Article 5 approach applies differ fundamentally, and not just in degree, from those encountered in the battle against terrorism.

The potentially unlimited duration of the struggle is commonly mentioned, but there have been many long wars (the Hundred Years’ War lasted 116 years). The unique feature of the fight against terrorism is that an end to this conflict may not even be *possible*. No opposing nation can surrender, and global terrorism has no discrete territory that our troops can overrun. As Benjamin Wittes writes, we don’t even know “what the end of hostilities might look like.”<sup>60</sup> Indeed, if we were able to capture and disarm every potential terrorist throughout the world, still we could not declare victory because “[r]eleasing detainees then would only reignite the conflict.”<sup>61</sup>

The prisoners’ alleged conduct aggravates this problem. In conventional armed conflict, service in the armed forces of one’s country is a duty of citizenship, not a badge of dishonor or criminality. Unless they have violated the laws of war, enemy soldiers should not be held in contempt, and they are entitled to be well-treated, with the sole proviso that they cannot be permitted to return to

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<sup>57</sup>See, e.g., Third Geneva Convention, art. 118 (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”); *Hamdi*, at 2641 (plurality opinion) (collecting authorities and stating that “It is a clearly established principle of the law of war that detention may last no longer than active hostilities.”). One of the justifications that the ARB Order implicitly endorses - - that release could be denied because of a detainee’s continuing intelligence value - - was firmly and explicitly rejected by the *Hamdi* plurality. *Id.* (“Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized.”).

<sup>58</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004) (plurality opinion).

<sup>59</sup> *Id.* at 521 (plurality opinion).

<sup>60</sup> Benjamin Wittes, *Law and the Long War* 49 (2008).

<sup>61</sup> *Id.*

the battlefield while hostilities continue. In contrast, al Qaeda and Taliban fighters are not simply law-abiding citizens following legitimate orders; they are seen as individuals who are self-motivated to commit unpardonable crimes.<sup>62</sup> Any determination that they are combatants at all implies that they are *unlawful* combatants. Respectful treatment and the full gamut of POW privileges are all but unthinkable. Indeed there may be solid moral and practical justification for deploying stern measures against them, provided they are who we think they are. The problem is one of insuring the appropriate level of confidence in that assessment. The informal first-stage proceeding that suffices to confer the status of an honorable POW is far too haphazard to support a determination that carries such severe stigma and the intrinsic potential for harsh consequences.

In this light, due process analysis calls for far different procedural safeguards from those appropriate to conventional POW determinations. Under traditional, pre-9/11 standards, it is the second stage of the 190-8 regime – the adversarial procedures of the UCMJ and the civilian justice system – that properly governs any long-term status determination of alleged “enemy combatants,” even when they are seized and initially classified in a battlefield setting.

b) *Suspects not captured in combat.* For detainees seized on streets and in homes far from any zone of combat, the risk of false accusation or mistaken identity is especially high; traditional adversary proceedings are therefore essential to determine whether there is a valid basis to hold them. And there is no practical obstacle to making that determination with the full set of traditional due process safeguards. The federal courts have jurisdiction over international terrorist activity and over defendants captured abroad,<sup>63</sup> even when forcible abduction is used to bring them to the United States.<sup>64</sup> Courts-martial under the Uniform Code of Military Justice have comparable jurisdiction, and their rules of evidence and proof take full account of the complexities of military operations, while providing safeguards that are largely identical to those of civilian courts.<sup>65</sup> The Guantánamo problem accordingly can be solved with conventional tools of well-established legitimacy.

Objections to these traditional due process approaches take several forms. Opponents claim that ordinary trials will fail if prisoners seized abroad were not given *Miranda* warnings, that judges will require classified evidence to be presented in open court, and that dangerous terrorists may be difficult to convict

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<sup>62</sup> Wittes, *supra*, at 49 makes this point nicely.

<sup>63</sup> Zabel & Benjamin, *supra.*, at 35-52

<sup>64</sup> E.g., *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

<sup>65</sup> The principal differences in procedure are that under the UCMJ the independent judges are military officers designated by a Judge Advocate General, and the defendant has no right to jury trial. See Turner & Schulhofer, at 49-51.

of civilian crimes when we catch them before they “violate some specific law.”<sup>66</sup> Some argue that evidence gathered in the rough-and-tumble of overseas operations won’t meet the strict chain-of-custody and authentication requirements imposed in civilian courts,<sup>67</sup> that hearsay evidence will have to be excluded, and that “criminal trials in the federal system give defendants a bonanza of procedural opportunities to gouge sensitive information from the government.”<sup>68</sup>

If true, these claims would suggest that our laws suffer from a staggering absence of common sense. Legislators and judges worry about crime and terrorism just like the rest of us, and they are not utterly out of touch with reality. Portrayals of federal trial procedure as rigid and impractical are grossly misinformed.

Contrary to the pervasive mythology, *Miranda* warnings are not required on the battlefield<sup>69</sup> or when foreign authorities conduct the questioning.<sup>70</sup> Far from being inflexible, the rules for authentication of evidence use a flexible standard and are met by any reasonable evidence of authenticity;<sup>71</sup> there is no indication that they have ever posed a barrier to prosecution in a terrorism case.<sup>72</sup> Similarly, the rule against using hearsay is qualified by a host of exceptions; co-conspirator hearsay, statements that implicate the speaker himself in wrongdoing, and a wide range of other out-of-court statements are routinely admitted in criminal trials.<sup>73</sup> Classified evidence never has to be presented in open court (though it does sometimes have to be shared with security-cleared defense counsel, under strict safeguards).<sup>74</sup> And for several decades, the Classified Information Procedures Act has been used successfully, in a wide range of cases, to block fishing expeditions and protect sensitive information while providing redacted summaries sufficient to meet legitimate defense needs.<sup>75</sup> Our laws against conspiracy and “material support” for terrorism reach far back into the

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<sup>66</sup> Wittes, *supra*, at 159; David B. Rivkin, Jr. & Lee A. Casey, The Gitmo Distraction, *Wall Street Journal*, July 9, 2007; Page A15.

<sup>67</sup> Harvey Rishikof, Is it Time for a Federal Terrorist Court?, 8 *Suffolk J. Trial & App. Advoc.* 1, 12-13 (2003); David B. Rivkin, Jr. & Lee A. Casey, After Guantanamo, *Wall Street Journal*, July 2, 2008, p. A13

<sup>68</sup> Wittes, *supra*, at 159, 171.

<sup>69</sup> U.S. Army Field Manual, The Law of Land Warfare 27-10.

<sup>70</sup> *United States v. Yousef*, 327 F.3d 56, 145 (2d Cir. 2003). Compare *United States v. Bin Laden*, 132 F. Supp.2d 168, 173-79 (S.D.N.Y. 2001) (*Miranda* does apply when U.S. officials conduct the questioning).

<sup>71</sup> Fed. R. Evid. 901(a).

<sup>72</sup> Zabel & Benjamin, *supra*, at 126.

<sup>73</sup> *Id.* at 128.

<sup>74</sup> See Turner & Schulhofer, *supra*, at 17-22, 25-32.

<sup>75</sup> *Id.*, at 22-25; Zabel & Benjamin, *supra*, at 97-118.

earliest stages of terrorist planning and assistance, so far back that no one mildly involved in terrorist activity can escape their reach.<sup>76</sup>

These conclusions (unlike the widespread but distorted media portrayals) reflect extensive experience with the details of law and practice in terrorism prosecutions in the traditional military and civilian justice systems. A 2005 Report based on dozens of interviews with prosecutors, defense counsel and judges, explains in depth the reasons for confidence that Article III courts and courts-martial under the Uniform Code of Military Justice have the tools needed to try cases fairly and efficiently without prejudice to national security.<sup>77</sup> More recently, after reviewing dozens of potential pitfalls, along with actual experience in well over a hundred recent terrorism cases, two former federal prosecutors conclude that our existing court system is workable and effective as it stands, “capable of bringing terrorists to justice through procedures that are fair, and are seen to be fair, while protecting vital national security interests.”<sup>78</sup>

*Effective questioning.* Another claim is that once suspects fall under civilian jurisdiction, questioning (even non-coercive questioning) will be prohibited and valuable intelligence will be lost. Many writers assume that the *Miranda* rules preclude questioning a suspect in criminal justice custody. Benjamin Wittes suggests as soon as a suspect is represented by counsel, all questioning without his lawyer’s permission becomes impermissible; he writes that “the criminal process can remove interrogation from the table. . . . Indeed, rules of legal ethics affirmatively *prohibit* lawyers from contacting people known to be represented by lawyers but require instead that attorneys go through one another in negotiating with clients.”<sup>79</sup> But these supposed restrictions far exceed any limit U.S. law has ever imposed, even in a conventional law enforcement setting.

Neither *Miranda* nor any other rules constrain interrogation for intelligence gathering purposes. Under the “public safety” exception to *Miranda*, officials attempting to avert imminent danger can interrogate a suspect without giving any warnings at all.<sup>80</sup> Even outside the boundaries of that exception, failure to warn a suspect or failure to honor his request to remain silent only prevents police from using the resulting statements *against him*; *Miranda* and the Fifth Amendment are concerned with *self*-incrimination and pose no obstacle to

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<sup>76</sup> Zabel & Benjamin, *supra*, at 36-44, 64-66.

<sup>77</sup> See Turner & Schulhofer, *supra*.

<sup>78</sup> Zabel & Benjamin, *supra*.

<sup>79</sup> Wittes, *supra*, at 173 (emphasis in original). Although Wittes’ correctly describes this rule as a constraint on *lawyers*, he incorrectly implies that it would prohibit questioning by military investigators and C.I.A. agents; it does not.

<sup>80</sup> *New York v. Quarles*, 467 U.S. 649 (1984); *United States v. Khalil*, 214 F.3d 111, 121-22 (2d Cir. 2003).

using unwarned questioning and non-abusive pressure to investigate or prove crimes involving others. The right-to-counsel rules are similarly limited. They permit police to interrogate an indicted suspect, even over his lawyer's express objection, when seeking information about other suspects<sup>81</sup> or other crimes that are technically distinct from the original accusation.<sup>82</sup>

*The burden of proof.* Traditional due process standards in both civilian and military courts preclude conviction absent proof beyond a reasonable doubt. Many worry that ordinary courts might have to acquit detainees when the evidence against them, though strong, did not rise to the required level of certainty. In this area a real dilemma could arise, at least in theory. Some might reasonably think that our laws should afford a way to keep custody over these sorts of detainees, for example by permitting conviction on a lower standard or preventive detention without conviction.

At this point, however, the most we can say is that the need to take any such step remains unknown. Though Bush administration officials (recently echoed by Justice Scalia) have made repeated public statements claiming that up to thirty detainees released from Guantánamo have since been "captured or killed the battlefield,"<sup>83</sup> government evidence offered to support that contention presents a far different picture. The Pentagon document ostensibly substantiating it points only to fifteen former inmates and claims only that they had "returned to the fight," a loose accusation described as encompassing "anti-coalition militant activities."<sup>84</sup> Three of the former detainees cited as examples are individuals now living lawfully in Britain, and their "anti-coalition militant activities" consist of public appearances and interviews describing in very negative terms their confinement and interrogation at Guantánamo. Other alleged recidivists similarly were not "captured or killed" but at worst were guilty of lawful speech critical of America or ambiguous activity while living lawfully in allied countries. Of more than 500 detainees released from Guantánamo to date, the government has identified only one who was subsequently captured or killed on a battlefield.<sup>85</sup>

No one should suggest, of course, that due process requirements will never result in discharging a dangerous person. But there is no risk-free solution to this problem. A legal regime with a diluted standard of proof can conceivably reduce

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<sup>81</sup> See, e.g., *Massiah v. United States*, 377 U.S. 201 (1964).

<sup>82</sup> See, e.g., *Texas v. Cobb*, 532 U.S. 162 (2001); *McNeil v. Wisconsin*, 501 U.S. 171 (1991); cf. *Hoffa v. United States*, 385 U.S. 293 (1966) (approving use of undercover informant to get statements from a represented defendant during his trial, where aim of the investigation was to obtain information on other criminal conduct by the defendant).

<sup>83</sup> See Denbeaux, at 16, 19-24 collecting more than 40 administration statements to this effect; Boumediene, 128 S. Ct., at 2294-95 (Scalia, J., dissenting) ("At least thirty of those prisoners hitherto released from Guantánamo Bay have returned to the battlefield.")

<sup>84</sup> Dept of Defense, press release, June 2007, cited in Denbeaux at 6.

<sup>85</sup> Denbeaux, *supra*, at 5-13.

the number of erroneous releases of individuals who are in fact dangerous. But its perceived lack of safeguards can also generate world-wide animosity, potentially drawing more recruits to extremism and potentially leaving us to face an even more numerous corps of new enemies. Although for years we have heard alarming assertions that large numbers of Guantánamo detainees are demonstrably dangerous but technically unconvictable, to date no such situation has come to light, and many of the cases long cited as examples, such as those involving Salim Hamdan and Lakhdar Boumediene, instead on examination proved flimsy by any measure.

Hamdan, bin Laden's driver, was accused of conspiracy to support the 9/11 attacks. But a military commission with access to all the classified evidence acquitted him of that charge, convicted him only of a relatively minor "material support" offense, and sentenced him to a term only a few months longer than the time he had spent at Guantánamo. Soon thereafter the government, having previously labeled him one of the "worst of the worst," decided to permit his release and return to his native Yemen.<sup>86</sup>

Boumediene, a typical detainee from the purely metaphorical "battlefield," was originally arrested by police in Bosnia, but he was ordered released when the Bosnian Constitutional Court found insufficient evidence to warrant his detention. As he emerged from jail in Sarajevo, American agents seized him and flew him to Guantánamo, where he remained in detention incommunicado for seven years, ostensibly because our own sensitive intelligence established his connection al Qaeda. His Combatant Status Review Tribunal concurred in that assessment, finding him to be an "enemy combatant." Nonetheless, when the classified contents of his file were finally made available for review in *habeas corpus* proceedings, the judge (Richard J. Leon, an appointee of George W. Bush) determined that the case against Boumediene rested entirely on the uncorroborated accusation of an unidentified informant, an insufficient basis for a domestic search warrant or even a foreign intelligence wiretap. Judge Leon ordered that Boumediene, along with four compatriots seized and held under the same circumstances, be released "forthwith," stating that "[s]even years of waiting for our legal system to give them an answer to a question so important is, in my judgment, more than plenty."<sup>87</sup>

For the time being, the asserted need to dilute traditional standards of proof rests only on speculation, abstract theory and self-serving government allegations that have repeatedly failed to withstand examination. In contrast, the dangers of diluting traditional safeguards have been demonstrated far too concretely and far too often.

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<sup>86</sup> U.S. Sending a Convict Back to Yemen, N.Y. Times, Nov. 25, 2008.

<sup>87</sup> Boumediene v. Bush, \_\_\_ F. Supp. 2d \_\_\_ (D.D.C.) (Leon, J., Memorandum Order, Nov. 20, 2008).

*A national security court?* Public discussion of Guantánamo nonetheless continues to be dominated by those who find one or another reason for dissatisfaction with the pre-9/11 legal structure. Many fail to appreciate the adaptability of the traditional justice system, are intellectually attracted to the challenge of crafting an innovative legal architecture, or see little harm in creating a novel, gap-filling regime, just in case it might prove useful. For some the attraction may be ideological – a chance to reaffirm the core Bush-Chaney worldview that 9/11 requires an entirely new balance between liberty and security. Others, in a more measured assessment, suggest that the problem is “not that [traditional trials] can’t be done, but that they can’t be done easily enough to make them worth the marginal benefit they promise.”<sup>88</sup>

These instincts bring together a substantial body of experts, from across the political spectrum, who now urge creation of a “comprehensive system of preventive detention that is overseen by a national security court.”<sup>89</sup> Unfortunately, their focus on the problems such a court might (ideally) solve has obscured the enormous new headaches it would create. A new court would, from day one, present large problems of workability and legitimacy. Its long-term dangers are even more serious.

The point of a special national security court, of course, is to avoid the perceived shortcomings of conventional tribunals. But if the new court limits transparency and defense privileges, it will invite a new public relations disaster. If instead it seeks international legitimacy by affording reasonable safeguards, it will lose most or all of the procedural benefits that a special tribunal supposedly confers.

Either way, defense counsel and human rights groups will not applaud a new system simply because it was President Obama who endorsed it. Any proposal for new legislation is sure to trigger a bitter Congressional battle that will quickly divert energy and political capital that the new administration needs for high priority economic and national security initiatives. And any regime that emerges will invite protracted litigation over details large and small. If we learned anything from the military commissions fiasco, it was that new frameworks take years to implement, time better spent processing detainees in conventional courts and promptly punishing the guilty among them. Almost any attempt to fill in specifics will end in problems of workability, legitimacy or both.

A national security court, apart from its practical difficulties and inevitable start-up glitches, will plant the seeds of fundamental, long-lasting damage to the national well-being. We have never had a “comprehensive system of preventive detention,” and such a system, once instituted, will be difficult to contain. The problem is not just that its legal boundaries are almost certain to

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<sup>88</sup> Wittes, *supra*, at 173.

<sup>89</sup> Jack L. Goldsmith and Neal Katyal, “The Terrorists’ Court,” *New York Times*, July 11, 2007.

creep outward over time. More fundamentally, a permanent new detention regime and a permanent national security court will entrench a psychology of permanent danger, with the paradox of permanent need for emergency powers. To be sure, judicial oversight of any sort will be an improvement over the unchecked presidential power the Bush administration so nearly succeeded in amassing. But to establish a special court with “national security” detention powers unavoidably legitimates a concept of judicial oversight with vastly diminished transparency and accountability. The long-term effect on America’s political culture, in particular our conception of liberty and limited government, is unpredictable but, to say the least, unimaginably risky. This is not a move to make in the absence of clearly demonstrated necessity.

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Sometimes, despite the complexity of a problem, the simplest solution is best. The many conundrums of Guantánamo and the broader “global war” can be solved quickly, economically, and above all most effectively with tools of well-established legitimacy. That approach means restoring the domestic and international principles traditionally applicable to armed conflict: preserving law-of-war powers in regard to ordinary combatants but reinstating and fully respecting the customary and essential distinction between combatants and civilians. That approach, in short, means relying without qualification or exception upon the pre-9/11 institutions of military and civilian justice and the long-settled understandings of the rule of law.