

## MILITARY TRIBUNALS: A CRITICAL ASSESSMENT

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## INTRODUCTION

This Childress Lecture, devoted to contemporary justice systems and stimulated by Judith Resnik's focus on "Invention and Challenges in Democratic Courts," invites us to think about experiments in adjudication and implications for democratic government. Such a Symposium very appropriately includes a panel on military tribunals. Since the turn of this century, few areas of adjudication have been the site of as much expansion and innovation as tribunals operating within the domain of national security. It is time to review contemporary practice and to clear a way forward.

My assessment of military tribunals in contemporary practice is based on several premises. The first is that war against an untraditional non-state actor—an adversary not bound by the territorial ties of statehood yet still exercising globally—posed a special challenge in containment. The second is that detention became one of many practices the United States developed to contain such an adversary. The third is that tribunals became a key institution in practices of detention, integral to the emerging national security assemblage. In tribunals, the U.S. government has projected institutions of justice into the theater of combat and adapted their forms, practices, and conventions to the demands of war. This Article seeks to reflect on the decade of fraught experimentation the United States has conducted in using tribunals for a war against a non-state foe.

I write for two audiences. One audience is the current-day public and the decision-makers who are still dealing with the "mess" of detentions,<sup>1</sup> including 169 remaining detainees at the Guantánamo Bay facilities,<sup>2</sup> more at Bagram Air Force Base facilities in Afghanistan,<sup>3</sup> and a fraught legacy of policies and case-law precedents. The second audience to whom this Article is addressed is

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1. Referring to the jumble of policy justifications, ad hoc decision-making, extensions of executive power, and bodies and lives interned at Guantánamo that he inherited from his predecessor—specifically the 240 detainees that sat in Guantánamo detention when his Administration took office—President Obama diagnosed the problem in just those words, as "a mess." President Barack Obama, Remarks by the President on National Security (May 21, 2009) [hereinafter President's National Archives Speech], available at [http://www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-On-National-Security-5-21-09/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/) ("We're cleaning up something that is, quite simply, a mess . . .").

2. *The Guantánamo Docket*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo> (last updated Apr. 19, 2012).

3. Detainees in Afghanistan were scattered among different facilities until U.S. forces consolidated theater detention operations at Bagram Air Force Base. See Matthew C. Waxman, *The Law of Armed Conflict and Detention Operations in Afghanistan*, in 85 INTERNATIONAL LAW STUDIES, THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS 343, 344 (Michael N. Schmitt ed., 2009). As of March 10, 2012, the United States reportedly held 3200 detainees at the Bagram facility. Rod Nordland, *U.S. and Afghanistan Agree on Prisoner Transfer as Part of Long-Term Agreement*, N.Y. TIMES, Mar. 10, 2012, at A8.

a future public who may have to grapple with other adversaries or with future flexing of U.S. executive power. This Article is primarily addressed to the latter. It requests present readers to step out of the frame of what today seems endless conflict, war without end, and to imagine what today seems hard to imagine: imagine it's over. Imagine peace. Imagine the Administration has declared the war against al Qaeda and its affiliates over. As we reflect on military tribunals and experiments, I want to take up that reflection from the imagined standpoint of the day after. This Article is composed as a letter to the future, a future not spent in indefinite war but in peace.

The situation that tribunals are meant to remediate remains a mess, notwithstanding years of effort at getting them right. One stumbling block that I identify is that the standard understanding of military tribunals is inadequate for U.S. practice since 9/11. That inadequate understanding has short-circuited reform attempts. To address this shortcoming, in this Article I propose a broader definition of military tribunal to account for the diversity of U.S. government practice in the "war on terror." (That is why, although the Childress Lecture designated our panel as a "Military Commissions" panel, I write instead about tribunals more broadly.) A second goal is to put forth some proposals for innovation in law and policy that use tribunals to manage a variety of forms of detention. This Article is motivated by my concerned observation that those in the U.S. legal community have at times been talking passed those working in national security after September 2001. Without trying to anticipate the outcome of ongoing legislative or diplomatic deliberations,<sup>4</sup> this Article seeks to address part of the gap between legal

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4. As this Article goes to press, Congress has reformed the law governing detention in armed conflicts which takes tribunals as a mode of intervention. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2011). A concerted attempt was made to keep prosecution of war-on-terror suspects out of U.S. federal courts. *See* National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. § 1039 (as passed by House, May 26, 2011) (restricting the Executive from prosecuting detainees in U.S. federal courts); *id.* § 1036 (substituting a new system of review for the system established by the President's March 7, 2011 Executive Order); *id.* § 1040 (restricting transfers of detainees to foreign countries). President Obama's senior staff promised to recommend a veto if a final bill presented to the President for his signature contained those provisions. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY, H.R. 1540 – NATIONAL DEFENSE AUTHORIZATION ACT FOR FY 2012, at 2–3 (2011), *available at* [http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/sap1540r\\_20110524.pdf](http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/sap1540r_20110524.pdf). Congress amended some of the proposed provisions and dropped the requirements contained in sections 1036 and 1039. *See* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2011). The President did, in the end, sign the bill in order to approve defense appropriations, but with his signature he issued a "signing statement" expressing the Administration's reservations to provisions regarding detainee treatment. Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2012, 2011 DAILY COMP.

practitioners and national security practitioners and to contribute to present and future decisions regarding tribunals used in the conduct of war. As a matter of method, the proposals I urge are based on observation of state practice, in order to account for national security motivations that currently drive policy, on the assumption that reforms acknowledging the diverse motivations that bring agents of an executive power to detain are more apt to meet with compliance.

The Article will proceed through the following steps. Part I summarizes some of the ways that the pre-existing conceptualizations of military tribunals fall short. Part II relates some of the legal contours of the present context and describes some of the tribunals actually operating therein. First, it lays out the definitional distinctions international law provides between international and non-international armed conflict and some of the consequences of those classifications. It then gives some description of tribunals operating within a variety of forms of detention in the national security context, suggesting that expanding the context under consideration allows for critique and reform of tribunals beyond formally constituted military commissions. Part III calls for release of detainees held in preventive detention at the cessation of hostilities and makes a few modest concluding proposals, based on recent experience, in regard to the work of tribunals in three forms of detention outlined in Part II.

## I. TOWARDS A MORE ENCOMPASSING DEFINITION OF TRIBUNALS

### A. *The Inadequacy of Current Conceptualizations*

Legal experts who have worked to influence U.S. government conduct in the “war on terror” have been informed by a baseline understanding that military tribunals exist to try suspects for violations of martial law and the laws of war.<sup>5</sup> That definition of a tribunal revolves around a function—to conduct a

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PRES. DOC. 978, at 1 (Dec. 31, 2011) (explaining that the President signed the bill in order to appropriate funds for military operations “despite having serious reservations with certain provisions that regulate the detention, interrogation, and prosecution of suspected terrorists”). The Administration subsequently reiterated those objections and reasserted executive authority to try terrorism suspects in Article III courts. *See* Presidential Policy Directive on Procedures Implementing Section 1022 of the National Defense Authorization Act for Fiscal Year 2012, 2012 DAILY COMP. PRES. DOC. 136, at 4 (Feb. 28, 2012). On a parallel track, this Article goes to press as states party to the Geneva Conventions concluded their quadrennial review, which included detention on the agenda. *See* INT’L COMM. OF THE RED CROSS, STRENGTHENING LEGAL PROTECTION FOR VICTIMS OF ARMED CONFLICTS 8–12 (2011), *available at* <http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-strengthening-legal-protection-11-5-1-1-en.pdf>.

5. This standard definition is found in a wide variety of sources. *See, e.g.*, BLACK’S LAW DICTIONARY 1082 (9th ed. 2009) (defining “military commission” as “[a] court, usu. composed of both civilians and military officers, that is modeled after a court-martial and that tries and decides cases concerning martial-law violations”); *see also* Myron C. Cramer, *Military*

trial. It assumes two definitional qualities about the person who is the object of the trial process: he is 1) one suspected of violating martial law or the law of war, who is 2) in custody of a state party to a conflict.

Work on military tribunals, their reform, or their abolition, accordingly, has largely been confined to reflecting on the military commission system set up to try detainees at Guantánamo Bay, Cuba. Legal action pursued by U.S. civilian and military lawyers in U.S. courts on behalf of detainees has focused on getting the military commissions process right: on securing federal jurisdiction for detainees at Guantánamo,<sup>6</sup> on re-securing federal habeas jurisdiction over Guantánamo,<sup>7</sup> and on filing habeas petitions for detainees at Guantánamo<sup>8</sup> or refining the military commissions before whom charged

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*Commissions, Trial of the Eight Saboteurs*, 17 WASH. L. REV. & ST. B. J. 247, 248 (1942) (“Military Commissions are primarily war courts. They may sit in conquered territory . . . or, in domestic territory over which, because of war conditions, we have taken military control . . . . They may also sit and try cases for violations of the law of war.”).

6. See, e.g., *Rasul v. Bush*, 542 U.S. 466, 480–81 (2004) (holding that the U.S. federal courts have habeas jurisdiction over foreign nationals held at the U.S. Navy facility at Guantánamo Bay, Cuba, under the authority of federal statute, 28 U.S.C. § 2241), *superseded by statute*, Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739.

7. After Supreme Court stipulations in *Rasul v. Bush*, *id.*, were superseded by the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739, habeas jurisdiction was re-clarified in *Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (holding that petitioners, Guantánamo detainees, had a constitutional right to habeas review).

8. For background, see generally JENNIFER K. ELSEA & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL 33180, ENEMY COMBATANT DETAINEES: *HABEAS CORPUS* CHALLENGES IN FEDERAL COURT 37–38 (2010). For a sample of habeas petitions filed, see, for example, *Uthman v. Obama*, 637 F.3d 400, 402 (D.C. Cir. 2011) (reversing the district court’s judgment and denying Uthman’s petition for a writ of habeas corpus); *Bacha v. Obama*, 653 F. Supp. 2d 32, 33 (D.D.C. 2009) (noting the case was for habeas relief of a Guantánamo Bay detainee); *Al Gincio v. Obama*, 626 F. Supp. 2d 123, 124–25, 130 (D.D.C. 2009) (granting the habeas petition of Guantánamo Bay detainee Abdulrahim Abdul Razak Al Gincio); *Ahmed v. Obama*, 613 F. Supp. 2d 51, 52 (D.D.C. 2009) (granting the habeas petition of Guantánamo Bay detainee Alia Ali Bin Ali Ahmed); *Basardh v. Obama*, 612 F. Supp. 2d 30, 31 (D.D.C. 2009) (explaining the reasons the court granted Basardh habeas relief at his previous hearing); *Hammamy v. Obama*, 604 F. Supp. 2d 240, 244 (D.D.C. 2009) (denying the habeas petition of Guantánamo Bay detainee Hedi Hammamy); *Al-Adahi v. Obama*, 597 F. Supp. 2d 38, 40–41 (D.D.C. 2009) (considering three case management order provisions in habeas cases for Guantánamo Bay detainees); *el Gharani v. Bush*, 593 F. Supp. 2d 144, 149 (D.D.C. 2009) (granting the habeas petition of Guantánamo Bay detainee Mohammed el Gharani); *Al Alwi v. Bush*, 593 F. Supp. 2d 24, 29 (D.D.C. 2008) (denying the habeas petition of Guantánamo Bay detainee Moath Hamza Ahmed Al Alwi); *Sliti v. Bush*, 592 F. Supp. 2d 46, 51 (D.D.C. 2008) (denying the habeas petition of Guantánamo Bay detainee Hisham Sliti); *Al Bihani v. Bush*, 588 F. Supp. 2d 19, 20 (D.D.C. 2008) (ordering the procedure that would govern the habeas corpus proceedings of Guantánamo Bay detainee Ghaleb Nassar Al Bihani).

detainees would appear to ensure a modicum of due process.<sup>9</sup> Lawyers have scored some significant successes in particular cases,<sup>10</sup> but overall their narrow conceptualization of tribunals has limited the scope of their reform efforts and reduced the relevance for practitioners and policymakers.

The starting observation my research yields is that the U.S. executive branch has in fact produced different tribunals to generate and deal with different kinds of detainees in the current conflict. Each tribunal may serve multiple functions or different tribunals may operate simultaneously, serving different functions in regard to the same person.<sup>11</sup> Thus, the apparently simple statement that a tribunal exists to ascertain guilt or innocence of a detained suspect belies a much more complicated reality. For clarity, I propose that executive branch authorities in the United States practice at least three different modes of detention in the “war on terror.” In the first detention context, which I refer to as “criminal detention,” authorities may conduct an investigation, assess possible culpability, and hold a suspect for trial. The current conceptualization of “tribunal” applies only to the criminal detention context, and even then, only to a subset of adjudication within it. The second and third modes of detention are both practiced within the frame of “national security detention,” which may be for one of two purposes: 1) to stop a combatant from returning to the battlefield, a suspected accomplice from aiding terrorism, or a suspected terrorist from committing acts of terrorism (preventive detention) or 2) to question a possible informant (interrogative detention). As my catalogue of some of the tribunals the United States has used in the hostilities against al-Qaeda will demonstrate, not all military tribunals exist “to try” a suspect, in the sense of ascertaining guilt or innocence through an adversarial process in order to sentence the guilty or free the innocent. Some current tribunals do not take “the accused” as their object. This Article focuses on all those tribunals that take “the detainee,” who may or may not be accused, as their object.

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9. See, e.g., *Lebron v. Rumsfeld*, No. 11-6480, 2012 WL 213352, at \*8–9 (4th Cir. Jan. 23, 2012) (noting Congress’s “active engage[ment] with . . . what process was due enemy combatant detainees”); see also Faiza W. Sayed, *Challenging Detention: Why Immigrant Detainees Receive Less Process than “Enemy Combatants” and Why They Deserve More*, 111 COLUM. L. REV. 1833, 1844–48 (2011) (discussing the “active back and forth discussion between the Executive, Congress, and the Courts” regarding detainee rights). See generally Nicholas Stephanopoulos, Comment, *Solving the Due Process Problem with Military Commissions*, 114 YALE L.J. 921 (2005) (discussing looming constitutional issues with “the due process problem” in military commissions).

10. See, e.g., cases cited *supra* notes 6–7.

11. See Brian C. Baldrate, *The Supreme Court’s Role in Defining the Jurisdiction of Military Tribunals: A Study, Critique, & Proposal for Hamdan v. Rumsfeld*, 186 MIL. L. REV. 1, 9–10 (2005) (discussing the overlapping purposes of military tribunals).

Historically, criminal detention and national security detention have intersected when national security detainees have been subject to trial for possible culpability as war criminals, often after hostilities have ceased.<sup>12</sup> “Trial,” typically reserved for criminal detainees, is used when national security detainees (either prisoners of war (“POWs”) or enemy combatants) become subject to assessment for crimes against the laws of war.<sup>13</sup> Courts or military commissions, then, adjudicate cases of those subject to criminal detention, or the subset of instances when those subject to national security detention have been charged with war crimes.<sup>14</sup>

Efforts to create, reform, or abolish military tribunals have focused almost exclusively on formally constituted bodies trying suspects held in criminal detention. This narrow framing of the discussion of military tribunals, I propose, misses most of the action related to the U.S. government’s practices in the “war on terror.” Measured by numbers of detainees, most deliberation and decision-making has happened without any connection to the military commissions system. Seven hundred and seventy-nine detainees are known to have been sent to Guantánamo since 2002.<sup>15</sup> Of those, 730 have not (and, barring a change in policy, will never) face a military commission. This figure is extrapolated from the following: Under both the Bush and Obama Administrations, military commissions have dealt with only sixteen detainees, convicting seven, charging six more, and sentencing three who plead guilty.<sup>16</sup> Obama Administration tribunals have designated thirty-six detainees as eligible for trial before the military commission (including three who have pleaded guilty and have already been sentenced by the military commission).<sup>17</sup> In sum, barring a change of policy by a future Administration, under the most expansive scenario by current plans the military commissions will have dealt with approximately forty-nine of a known Guantánamo detainee population of

12. See, for example, the Nuremberg trials of Nazi officers and officials, recorded in TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL (1947) (publishing the trials of the major German war criminals, tried after the cessation of German hostilities) or the Tokyo trials of Japanese imperial officials, recorded in United States v. Araki, Judgment of the International Military Tribunal for the Far East (Nov. 4–12, 1948), reprinted in 1 THE TOKYO JUDGMENT: THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (I.M.T.F.E.) 29 APRIL 1946 - 12 NOVEMBER 1948 (B.V.A. Röling & C.F. Rüter eds., 1977) (indicting and trying Japanese officials after Japan’s surrender). But see *Ex parte Quirin*, 317 U.S. 1 (1942) for a military commission that operated while hostilities were ongoing.

13. See, e.g., *In re Yamashita*, 327 U.S. 1, 11 (1946).

14. See *Ex parte Quirin*, 317 U.S. at 31 (describing that those detained are subject to adjudication by military tribunals).

15. *The Guantánamo Docket*, *supra* note 2.

16. *By the Numbers*, MIAMI HERALD, <http://www.miamiherald.com/2007/11/27/322461/by-the-numbers.html> (last updated Apr. 24, 2012).

17. *Id.*

779. Furthermore, these numbers do not include the over 3,000 detainees held over ten years of conflict at the Bagram Theater Internment Facility at a U.S. Air Force base in Afghanistan (now succeeded by the newly built nearby Parwan facility, which is still commonly referred to as the Bagram facility).<sup>18</sup> None of the Bagram detainees have had a hearing before a formal military commission.<sup>19</sup> As this summary shows, narrow consideration of military commissions covers only a fraction of the total detainees considered by some U.S. tribunal.

Framing discussion of military tribunals by the narrow category of formally constituted courts and military commissions not only misses most detainees held by the United States, it also excludes the majority of tribunals that have overseen review of continued detention or decided detainees' initial detention. It excludes tribunals set up to review cases of those already detained: the Combatant Status Review Tribunals ("CSRTs")<sup>20</sup> that the Bush Administration set up in response to the Supreme Court's rebuke of the military commissions process in *Rasul* and *Hamdi*;<sup>21</sup> the Task Force for reviewing each of those detained at Guantánamo that the Obama Administration put in place when it took office;<sup>22</sup> the Periodic Review Boards ("PRBs") that the Obama Administration set up to ensure regular review of continued detention at Guantánamo;<sup>23</sup> or the Detainee Review Boards at Bagram. A narrow framing around formally constituted commissions also leaves out the bodies that select individuals for detention. For example, it

18. Andy Worthington, *Bagram: Graveyard of the Geneva Conventions*, ANDY WORTHINGTON (May 2, 2010), <http://www.andyworthington.co.uk/2010/02/05/bagram-graveyard-of-the-geneva-conventions/>.

19. *Bagram Detainee Transfers Would Strengthen Broader Military Mission in Afghanistan*, HUM. RTS. FIRST (Jan. 24, 2012), <http://www.humanrightsfirst.org/2012/01/24/bagram-detainee-transfers-would-strengthen-broader-military-mission-in-afghanistan/>. The U.S. military established procedures under which the grounds for a person's detention at Bagram [Parwan] is reviewed within sixty days of his arrival at the detention center and re-reviewed every sixty days thereafter. Lisa Daniel, *Task Force Ensures Fair Detainee Treatment, Commander Says*, U.S. DEP'T OF DEF. (Aug. 6, 2010), <http://www.defense.gov/news/newsarticle.aspx?id=103004>. The review is conducted without lawyers or judges by a three-person panel of U.S. military officers. See Seth Doane & Phil Hirschhorn, *Bagram: The Other Guantanamo?*, CBS NEWS (Nov. 15, 2011), [http://www.cbsnews.com/8301-18563\\_162-57323856/bagram-the-other-guantanamo/](http://www.cbsnews.com/8301-18563_162-57323856/bagram-the-other-guantanamo/) (noting the three-officer review panel for Bagram detainees).

20. *Combatant Status Review Tribunals*, U.S. DEP'T OF DEF. 1 (Sept. 26, 2006), <http://www.defenselink.mil/news/Oct2006/d20061017CSRT.pdf>.

21. *Id.*; see also *Hamdan v. Rumsfeld*, 548 U.S. 557, 570 (2006), *superseded by statute*, Military Commission Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

22. Exec. Order No. 13,493, 3 C.F.R. 207 (2009) (creating the Special Interagency Task Force on Detainee Disposition); see also President's National Archives Speech, *supra* note 1 (describing the process of dealing with detainees at Guantánamo).

23. Exec. Order No. 13,567, 74 Fed. Reg. 13,277 (2011).



excludes those military screening teams that scoured Northern Alliance prisons after the United States and allies commenced military action in Afghanistan against the Taliban beginning in October 2001, teams tasked with locating and taking into U.S. custody possible sources of intelligence regarding the threat posed by al Qaeda or useful for planning military actions against al Qaeda and the Taliban.<sup>24</sup> More generally, treating tribunals as synonymous with formal military commissions ignores the *fora* and processes by which the executive branch generates and manages detention beyond the narrow category of criminal detention.

### B. *Proposal for Expanded Consideration of Tribunals*

I propose an expanded conception of a military tribunal. Instead of a narrow focus on a body that conducts trials, this expanded conception would encompass the basic function<sup>25</sup> that all of the tribunals used by the United States in the “war on terror” have served, namely, to process detainees. By “processing” detainees, I mean, basically, “to sort.” (I describe processing as “sorting” to indicate something potentially different than “trying.”) This discussion, then, will cover not just military commissions formally constituted, but the range of tribunals we have deployed to sort out this “mess.”<sup>26</sup> Working from a functional approach to defining, I consider a “military tribunal” to include any body convened to consider known facts, within categories preset by law or policy, to decide the disposition of a particular person in the context of the United States’ war against al Qaeda and its allies.

There are several common attributes of the tribunals I take up in this analysis. Most obviously, they have in common their object, i.e., on whom they are working: those deprived of liberty and held by the U.S. government in the conflict against al Qaeda and its allies.<sup>27</sup> These tribunals also have in common their agents, employees of the U.S. executive branch. Like the formal

24. See Declaration of Michael H. Mobbs, Exhibit 1 Attached to Respondents’ Response to, and Motion to Dismiss, the Petition for a Writ of Habeas Corpus ¶¶ 3–5, 8–9 *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527 (E.D. Va. 2002) (No. 2:02-CV-439) [hereinafter Declaration of Michael H. Mobbs], available at <http://www.cbsnews.com/htdocs/pdf/hamdimobbs2.pdf>.

25. I focus on function as an adaptive design feature. In this case, the adaptation is undertaken by executive branch officials (largely political appointees, meaning those who hold office temporarily, rather than over the course of a civil service career, by virtue of appointment by elected officials), redesigning some small portion of an executive branch agency and personnel to new functions or functions normally reserved under the U.S. Constitution for other branches of government. The core function that I identify is the common function of “sorting.” Their job, as I discuss in subsequent text, is to sort detainees.

26. President’s National Archives Speech, *supra* note 1.

27. For the purposes of this Article, it is taken as a truism that Saddam Hussein, late President of Iraq, was not an ally of al Qaeda.

military commissions, these tribunals are not necessarily creatures of the judicial branch and do not reflect a three-branch approach to governance, nor do they assume the protections of built-in checks and balances between executive, legislative, and judicial branches.<sup>28</sup> Instead, executive, legislative, and judicial functions may be collapsed into executive branch bodies.<sup>29</sup> These tribunals' functions may be subject to vigorous discussion from within different offices of the executive branch (reflecting the Obama Administration's position that "due process" does not demand "judicial process"),<sup>30</sup> but they largely do not face checks from other branches of power. (There are exceptions in which the judicial branch has checked exercises of executive power in executive branch tribunals—for example, federal judicial holdings in regard to the formal military commissions).<sup>31</sup>

The foregoing section briefly outlined the inadequacy of our conceptualization of tribunals, framed around formally constituted military commission proceedings and proposed an expanded consideration of tribunals. The next section describes some of the functions that tribunals serve at different phases of various forms of detention in actual practice by the executive branch.

## II. ACTUAL PRACTICE OF U.S. TRIBUNALS IN THE PRESENT CONFLICT

This Part explores the functions of tribunals employed by U.S. executive branch practitioners in the war against al Qaeda and allied forces since September 2001. In this discussion, I seek to explore answers to the underlying question: What role do tribunals play in the function of detention? My understanding of detention and the role of tribunals in it is informed by French social scientist Arnold van Gennep's analysis of *rites de passage*.<sup>32</sup> The first and last phases "detach ritual subjects from their old places in society

28. Louis Fisher, *Military Commissions: Problems of Authority and Practice*, 24 B.U. INT'L L.J. 15, 16 (2006).

29. *Id.*

30. Eric Holder, U.S. Att'y Gen., Address at Northwestern University School of Law (Mar. 5, 2012), available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

31. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006) (holding that military commissions established by President Bush for trial of detainees held at Guantánamo "lack[] [the] power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions"), *superseded by statute*, Military Commission Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

32. ARNOLD VAN GENNEP, *THE RITES OF PASSAGE* 2–3, 11 (Monika B. Vizedom & Gabrielle L. Caffee trans., 1960). By *rite de passage*, van Gennep meant a ritual process that accompanies change of place, state, and social position (such as a wedding, funeral, or, I add, trial). *Id.* For Victor Turner's influential interpretation of van Gennep's work, see also VICTOR TURNER, *BLAZING THE TRAIL: WAY MARKS IN THE EXPLORATION OF SYMBOLS* 48–49, 132–33 (Edith Turner ed., 1992).

and return them, inwardly transformed and outwardly changed.”<sup>33</sup> The middle, or liminal, phase (taking its name from the Latin term “limen,” literally meaning a “threshold”)<sup>34</sup> by definition is located between established politico-jural states.<sup>35</sup> As an illustration, consider ordinary criminal procedure as a right of passage: a crime occurs (or is alleged to have occurred); an investigation identifies suspects; an accusation turns “a suspect” into “an accused”; a trial turns “an accused” into a person adjudged guilty or not guilty. Accusation casts a person into the liminal state and verdict at trial ends the liminal state, returning the person to a stable social status associated with the verdict of either guilty or not guilty.

#### A. *Tribunals and the Initiation of Detention*

What roles do tribunals play in the liminal state of detention? First, in every category of detention that I am considering in this Article—criminal, preventive, or interrogative detention—initiation of the liminal state is triggered by a tribunal. We see from the evidence we have in battlefield memoirs, press reports, fact statements from pleadings in habeas cases, that initiation is by tribunal,<sup>36</sup> if we consider a tribunal under the expanded functional definition I propose. A group of executive branch employees, normally either in a military or intelligence capacity, is convened—to work either simultaneously in person, or to work consecutively by drafting and signing off on memos—to decide to subject a person to detention.<sup>37</sup>

#### B. *Tribunals and the Termination of Detention*

Thus, tribunals initiate the liminal state of detention, detaching the liminal subject from a stable state. Do they play any further role? The answer to this question depends on which kind of detention is at issue. Considering criminal detention first, look at the goals: criminal detention is practiced in order to bring someone to trial. The moment of accusation casts a suspect into a

33. TURNER, *supra* note 32, at 48–49.

34. *Id.* at 49, 132.

35. *Id.* at 49.

36. A military screening team, such as the one that selected U.S. citizen Yaser Hamdi for detention, acted as a “tribunal” by classifying Hamdi as an enemy combatant and determining his status. Declaration of Michael H. Mobbs, *supra* note 24. *See generally*, JONATHAN MAHLER, THE CHALLENGE: HOW A MAVERICK NAVY OFFICER AND A YOUNG LAW PROFESSOR RISKED THEIR CAREERS TO DEFEND THE CONSTITUTION—AND WON (2009) (describing the work of U.S. military screening teams as they select detainees from among those offered by Northern Alliance field commanders, prison operators, and bounty hunters).

37. *See, e.g.*, 10 U.S.C. § 948d (2006) (providing that the jurisdiction of military commissions includes both the determination that a person is an unlawful enemy combatant and whether such person violated the law).

liminal state, which a trial verdict terminates. Military commissions serve the function of providing the exit process from the liminal state of detention, for ending the limbo, by rendering a verdict of “guilty” or “not guilty.”

Because of belief in a certain process (adversarial trial) for the production of truth (held even by those unsympathetic to detainees in U.S. custody), the emphasis by civil liberties advocates in the U.S. legal community on fair trials<sup>38</sup> was not misguided per se. It was, however, aimed at a set of protections that would only serve a small fraction of U.S. detainees, only those intended for trial.

### C. *Tribunals and Preventive Detention*

Military commissions, providing a clear exit to the liminal state of criminal detention, have proved to be the road less travelled, as described in Part I. In contrast to those held for criminal detention, some detainees were treated more like traditional war detainees, wherein detention is aimed at getting combatants off the battlefield, meant to render a combatant *hors de combat*. I term this form of detention “preventive detention.”<sup>39</sup> This is allowed, even encouraged, under the international law of war.<sup>40</sup>

The law of armed conflict (also referred to as the law of war, or international humanitarian law) recognizes two kinds of conflicts: international armed conflicts, meaning those conflicts between states,<sup>41</sup> and non-

38. See Jack Goldsmith & Cass R. Sunstein, Comment, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 284 (2002) (noting the commitment of the legal world to a high degree of civil liberties over the past sixty years and discussing the evolution of civil liberties in wartime).

39. The Obama Administration has referred to this as “law of war detention.” See, e.g., Exec. Order No. 13,567, *supra* note 23, § 1(a).

40. See INT’L COMM. OF THE RED CROSS, 31ST INTERNATIONAL CONFERENCE OF THE RED CROSS AND RED CRESCENT: INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 16–17 (2011) [hereinafter INTERNATIONAL HUMANITARIAN LAW], available at <http://www.icrc.org/eng/assets/files/red-cross-crescent-move/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf> (noting that it is “generally uncontroversial” that a detaining state detain a POW without any type of review “as long as active hostilities are ongoing, because enemy combatant status denotes that a person is *ipso facto* a security threat”).

41. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), arts. 1(4), 96(3), June 8, 1977, 1125 U.N.T.S. 3. Pursuant to Common Article 2 of the 1949 Geneva Conventions, the legal category of “international armed conflict” applies to all cases of declared war or to “any other armed conflict which may arise” between two or more states party to the Geneva Conventions even if the state of war is not recognized by one of them. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked

international armed conflicts, between a state and a non-state actor (or between non-state actors).<sup>42</sup> The last ten years' hostilities have encompassed both of these forms.<sup>43</sup> International law would categorize the U.S.'s war against Iraq as an international armed conflict, pitting forces of the government of the United States against forces of an Iraqi government headed by the late President Saddam Hussein.<sup>44</sup> The consensus among the international legal community is that in Afghanistan, the United States and the International Security Assistance Force ("ISAF") of its NATO allies are engaged in non-international armed conflict.<sup>45</sup> There is a lack of consensus regarding hostilities the United States is conducting elsewhere in the name of defeating al Qaeda. What's at stake in this distinction? If non-international armed conflict can transcend borders, then U.S. lethal drone attacks in Yemen, for example, are incident to the war in Afghanistan and are a lawful use of force under international law.<sup>46</sup> If not, then U.S. drone attacks are murder and assassination and, therefore, are unlawful. The U.S. government in fact asserts the former.<sup>47</sup> Other governments and legal experts reject that assertion,

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Members of Armed Forces at Sea, art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

42. First Geneva Convention, *supra* note 41, art. 3; Second Geneva Convention, *supra* note 41, art. 3; Third Geneva Convention, *supra* note 41, art. 3; Fourth Geneva Convention, *supra* note 41, art. 3. For an expert opinion on what counts as "armed conflict" under international law of war, see Int'l Comm. of the Red Cross, *How Is the Term "Armed Conflict" Defined in International Humanitarian Law?* (Mar. 17, 2008), available at <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

43. See Derek Jinks, *The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts*, PROGRAM ON HUMANITARIAN POL'Y AND CONFLICT RES. 4, 8 (June 2004), <http://www.hpcrresearch.org/sites/default/files/publications/Session3.pdf>.

44. See Yoram Dinstein, *Concluding Observations: The Influence of the Conflict in Iraq on International Law*, in 86 INTERNATIONAL LAW STUDIES, THE WAR IN IRAQ: A LEGAL ANALYSIS 479, 481 (Raul A. Pedrozo ed., 2010).

45. For an authoritative U.S. legal opinion on the categorization of the Afghanistan hostilities, see *Hamdan v. Rumsfeld*, 548 U.S. 557, 630–32 (2006), *superseded by statute*, Military Commission Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600. For representative views of the international community, see INTERNATIONAL HUMANITARIAN LAW, *supra* note 40, at 10.

46. Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law*, in LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM 346, 357–59 (Benjamin Wittes ed., 2009).

47. See, e.g., Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Keynote Speech at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm> ("[A] state that is engaged in an armed conflict or in legitimate self-defense is not

however, and consider hostilities outside the territory of Afghanistan to be beyond the scope of that conflict, outside of any category of hostilities allowed under or regulated by international law of war.<sup>48</sup>

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required to provide targets with legal process before the state may use lethal force. . . . [U]nder domestic law, the use of lawful weapons systems—consistent with the applicable laws of war—for precision targeting of specific high-level belligerent leaders when acting in self-defense or during an armed conflict is not unlawful, and hence does not constitute ‘assassination.’”).

48. INTERNATIONAL HUMANITARIAN LAW, *supra* note 40, at 22 (“Pursuant to other views, which the ICRC shares, the notion that a person ‘carries’ a NIAC [non-international armed conflict] with him to the territory of a non-belligerent state should not be accepted.”).

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*MILITARY TRIBUNALS*

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1. International Armed Conflict

These categorizations set the legal parameters for the tribunals that deal with detainees. In an international armed conflict, a POW<sup>49</sup> may legally be interned<sup>50</sup> and the “detaining state is not obliged to provide [judicial] review . . . of POW internment as long as active hostilities are ongoing, because enemy combatant status denotes that a person is *ipso facto* a security threat.”<sup>51</sup> Civilians may be interned “only if the security of the Detaining Power makes it absolutely necessary.”<sup>52</sup> Unlike POWs or civilian combatants, an interned civilian has the right to challenge her detention before a court or tribunal and to automatic review of the need for her continued detention at least twice per year.<sup>53</sup> Whether soldier, insurgent, or civilian, under international law, a person’s detention ends with combat hostilities.<sup>54</sup> This is true even if insurgency survives state-to-state combat.<sup>55</sup>

49. Any member of opposing forces that surrenders or is captured is classified as a prisoner of war. See Third Geneva Convention, *supra* note 41, art. 4 (defining prisoners of war in an international armed conflict).

50. The facility in which a POW is held can be a closed-perimeter camp. *Id.* art. 21. The facility may not, however, be a penitentiary. *Id.* art. 22. The United States, like other states party to the Third Geneva Convention Relative to the Treatment of Prisoners of War, has bound itself to guarantee certain conditions of food, medical services, clothing, and sanitation in facilities in which it interns POWs. *Id.* arts. 25–38. Treatment of a prisoner of war is also governed by the minimum standard guarantees of Common Article 3 of the four Geneva Conventions of 1949. See First Geneva Convention, *supra* note 41, art. 3; Second Geneva Convention, *supra* note 41, art. 3; Third Geneva Convention, *supra* note 41, art. 3; Fourth Geneva Convention, *supra* note 41, art. 3. In addition to treaty law, U.S. statutory law codified standards for treatment of prisoners of war in legislation passed in 1996. War Crimes Act of 1996, 18 U.S.C. § 2441(c)–(d) (2006).

51. INTERNATIONAL HUMANITARIAN LAW, *supra* note 40, at 17.

52. Fourth Geneva Convention, *supra* note 41, art. 42. International legal experts consider it uncontroversial that civilians who directly participate in hostilities—such as some of the “insurgents” in Iraq who were not members of the regular Iraqi military—fall into the category of posing an immediate threat and may, under the law of war, be detained. INTERNATIONAL HUMANITARIAN LAW, *supra* note 40, at 17. Other civilians, non-combatants, may in narrowly construed circumstances also legally be subject to “assigned residence” or internment. *Id.*

53. Fourth Geneva Convention, *supra* note 41, art. 43 (“Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.”).

54. See, e.g., Third Geneva Convention, *supra* note 41, art. 118 (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”); Fourth Geneva Convention, *supra* note 41, art. 46 (internment of civilians must cease as soon as the reasons that necessitated it no longer exist, and in any event must end “as soon as possible after the close of hostilities”).

55. *Al-Jedda v. United Kingdom*, 2011-LIII Eur. Ct. H.R. 789, 847–48, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=887954&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (holding a



## 2. Non-international Armed Conflict

By contrast with the very clear guarantees made in regard to detainees in international armed conflicts, international law is less specific in regard to requirements for tribunals and review of detention during hostilities categorized as non-international armed conflict. A fighter for a non-state actor against a state is not considered a “lawful enemy combatant,” and if detained, is not considered a POW.<sup>56</sup> How should such a detainee be treated?

Although the Geneva Conventions’ Common Article 3 guarantees minimum standards for material conditions of detention and for detainee treatment whether the conflict is an international armed conflict or not,<sup>57</sup> it does not provide any procedural guarantees of a court or tribunal to review the

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state could not hold combatants in preventive detention after state-to-state hostilities had ceased, even if an insurgency still raged).

56. See INTERNATIONAL HUMANITARIAN LAW, *supra* note 40, at 16 (“POWs are essentially combatants captured by the adverse party in an IAC [international armed conflict].”).

57. Common Article 3 provides:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

First Geneva Convention, *supra* note 41, art. 3; Second Geneva Convention, *supra* note 41, art. 3; Third, Geneva Convention, *supra* note 41, art. 3; Fourth Geneva Convention, *supra* note 41, art. 3.

detention of a combatant or a non-combatant.<sup>58</sup> Likewise, it does not provide a way for a person to challenge their categorization as a threat, terrorist, or accomplice, nor does it supply any other procedural safeguards for persons detained in a non-international armed conflict.<sup>59</sup> Additional Protocol II to the Geneva Conventions explicitly provides guidance for treatment of those in detention and internment<sup>60</sup> (thus implicitly confirming that deprivation of liberty is acceptable practice during a non-international armed conflict), but like Common Article 3, it fails to list legally acceptable grounds for internment or other procedural rights of detainees.<sup>61</sup>

While these important limits are all not specified under existing international law, international law is clear on the maximum possible length of legal detention, holding a uniform standard for international and non-international armed conflicts. Detention or internment, whether of a civilian or a combatant, ends when hostilities end.<sup>62</sup>

### 3. What's New, and Why It's a Problem

What makes matters most complicated here is the potential for indefinite detention, something not normally foreseen under the international law of war regulating preventive detention. In a typical international armed conflict, war, as a formal legal state, has a clear beginning with a state's declaration of war and a clear end with its offer or acceptance of surrender. The current hostilities against al Qaeda and its allies, however, are different. The U.S. government's operating assumption was that hostilities could continue indefinitely, and

58. See Ashley S. Deeks, *Administrative Detention in Armed Conflict*, 40 CASE W. RES. J. INT'L L. 403, 413 (2009).

59. Gabor Rona, *An Appraisal of US Practice Relating to 'Enemy Combatants,'* in 10 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 232, 241 (Timothy L.H. McCormack & Jann K. Kleffner eds., 2007).

60. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 5, June 8, 1977, 1125 U.N.T.S. 609.

61. INTERNATIONAL HUMANITARIAN LAW, *supra* note 40, at 17.

62. See, e.g., Third Geneva Convention, *supra* note 41, art. 118 (providing that, in an international armed conflict, a prisoner of war "shall be released and repatriated without delay after the cessation of active hostilities"); Fourth Geneva Convention, *supra* note 41, art. 46 (stating that internment of civilians in a non-international armed conflict must cease "as soon as possible after the close of hostilities"); Hague Convention (II) with Respect to the Laws and Customs of War on Land, art. 20, July 29, 1899, 32 Stat. 1803 (requiring release of detainees as soon as possible after "the conclusion of peace"); Hague Convention (IV) Respecting the Laws and Customs of War on Land, art. 20, Oct. 18, 1907, 36 Stat. 2277 ("After the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible."); see also Third Geneva Convention, *supra* note 41, arts. 85, 99, 129.

therefore its legal position was that preventive detention could continue indefinitely.<sup>63</sup> The liminal state, the limbo status, could extend into perpetuity.

The possibility of the U.S. government practicing indefinite detention was even recognized by the Supreme Court in what might be considered the limit case of restraints on executive power to detain; the case of the U.S. government holding an American citizen without charge.<sup>64</sup> *Hamdi* requires a few procedural guarantees to an American citizen detained pursuant to hostilities conducted under the auspices of Congress's 2001 Authorization for the Use of Military Force.<sup>65</sup> Those guarantees are: that the government provide an American citizen detainee with notice of a categorization (like "enemy combatant") upon which detention is based; that the government provide an American citizen detainee the chance to rebut that categorization; and that the government provide a "neutral decision maker" before which an American citizen detainee can challenge the categorization that serves as the basis for his detention.<sup>66</sup> (The "neutral decision-maker" does not have to be an official of the judicial branch nor a formally constituted body like a court-martial.<sup>67</sup> Supreme Court jurisprudence thus confirms a wider understanding of tribunal beyond the judiciary or the formally constituted.)

The reality for non-Americans is bleaker. The admittedly cold comfort of *Hamdi*'s procedural safeguards, providing the parameters under which a detainee may challenge his categorization as an enemy combatant, extend only to the very small category of American citizens held in preventive detention in the war.<sup>68</sup> Informal tribunals in such situations play an even more important role. For non-Americans held at the Guantánamo Bay Naval Station, the Obama Administration instituted a system of PRBs to conduct an "initial review" of the information relevant to determining whether each detainee's detention is "necessary to protect against a significant threat to the security of

63. Waxman, *supra* note 3, at 344 (quoting U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Second Periodic Reports of States Parties Due in 1999, Addendum (United States of America) Annex 1, at 47, U.N. Doc. CAT/C/48/Add.3 (May 6, 2005), available at <http://www.unhcr.org/refworld/pdfid/441182dc0.pdf>).

64. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518–21 (2004) (recognizing potentially indefinite detention under the executive branch's authority to detain enemy combatants captured in Afghanistan pursuant to the Congressional Authorization for the Use of Military Force), *superseded by statute*, Military Commission Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

65. *Id.* at 521, 533. See generally Authorization for the Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)) (defining the scope of hostilities broadly).

66. *Hamdi*, 542 U.S. at 533.

67. See *id.* at 538.

68. See *id.* at 509 (stating that the Court's holding only applies to American citizen detainees held in the United States).

the United States.”<sup>69</sup> At the initial review, each detainee may introduce additional or mitigating information relevant to determining whether the facts of their case warrant continued preventive detention.<sup>70</sup> The procedures for the initial review at times fail to make sense under the rationale of criminal procedure in an adversarial process. For example, the Secretary of Defense, in coordination with intelligence and other agencies, shall compile *all* information relevant to the determination of whether the standard for continued detention has been met.<sup>71</sup> In other words, the process relies on the “prosecution” to gather and submit evidence that could exculpate the “defendant.” While this looks counter-intuitive from the perspective of criminal law, in which the prosecution’s goal is to convict, it makes more sense in the national security domain, in which the goal is to accurately assess a threat and protect the United States as efficiently as possible. That would mean the “prosecution’s” goal is to release any detainee whose continued detention does not protect against a significant threat to U.S. national security.

In any event, Guantánamo detainees should make the most of their initial review hearings: if the PRB finds that their continued preventive detention meets the standard of protecting the United States against a significant threat, each detainee is thereafter entitled only to a biannual file review and a triennial full review and PRB hearing.<sup>72</sup>

Thanks to the Obama Administration’s formulation of procedures for review and publication of those procedures in open-access sources, we have some information about the rules regulating the informal tribunals that review the continued preventive detention of those held at the Guantánamo Bay facility. We have far less information about the procedures for review of continued preventive detention of those held at the Bagram facility in Afghanistan, in which the United States holds many more detainees.<sup>73</sup> Most of the little public information we have comes from court filings in habeas actions brought by Bagram detainees,<sup>74</sup> although the Obama Administration has

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69. Exec. Order No. 13,567, *supra* note 23, §§ 2–3(a).

70. *Id.* § 3(a).

71. *Id.* § 3(a)(4).

72. *Id.* § 3(b)–(c). The twice-per-year regularity meets the standard that the Fourth Geneva Convention sets out for review of continued internment of a civilian during armed conflict. Fourth Geneva Convention, *supra* note 41, art. 78.

73. See Waxman, *supra* note 3, at 344, 350; see also *supra* notes 18–19 and accompanying text.

74. See Waxman, *supra* note 3, at 350. Procedures described are those used after 2006; those used before are even less publicized and more murky.

recently sought to shed more light on these procedures.<sup>75</sup> Each individual brought to theater detention facilities for long-term confinement has his case reviewed by an Enemy Combatant Review Board, a five-officer panel that recommends by majority vote whether the detainee be held in continued detention.<sup>76</sup> We can infer that each person's continued detention is reviewed once every six months because Waxman, formerly a Bush Administration Department of Defense official with some purview over detainee affairs, goes on to write:

Although the US government maintains that the Fourth Geneva Convention is inapplicable as a matter of law to Afghanistan detainees because that Convention applies to civilians, not combatants, the processes US forces eventually put in place roughly track the requirements of [the Fourth Geneva Convention] Article 78, which calls for, among other things, regular processes and periodic review (at least every six months) for security internees.<sup>77</sup>

#### D. *Tribunals and Interrogative Detention*

Criminal prosecution and prevention are only two of the factors motivating U.S. practices of detention in the “war on terror.” The U.S. government and its allies detained others as the equivalent of witnesses, detained for what they might know.<sup>78</sup> Intelligence analysts now construct a picture of the threat environment, as one court described, by fitting “[t]housands of bits and pieces of seemingly innocuous information . . . into place to reveal with startling clarity how the unseen whole must operate.”<sup>79</sup> With the mosaic theory of intelligence,<sup>80</sup> detainees might not even know that they know something

75. See, e.g., William Lietzau, U.S. Deputy Assistant Sec’y of Def. for Rule of Law & Detainee Policy, Address at the London School of Economics and Political Science Department of Law: Detention of Terrorists in 21st Century Armed Conflict (May 3, 2012).

76. Waxman, *supra* note 3, at 350 (citing Declaration of Colonel James W. Gray ¶¶ 11–13, *Al Maqaleh v. Gates*, No. 06-CV-01669 (JDB) (D.D.C. Mar. 3, 2007) (discussing review process for detainees in Afghanistan); Declaration of Colonel Rose M. Miller ¶¶ 10–12, *Ruzatullah v. Rumsfeld*, No. 06-C-01707 (GK) (D.D.C. Nov. 19, 2006) (discussing detention procedures and review process for enemy combatants detained in Afghanistan)).

77. *Id.*

78. See FIONA DE LONDRAS, DETENTION IN THE ‘WAR ON TERROR’: CAN HUMAN RIGHTS FIGHT BACK? 2–3 (2011) (noting the “models of . . . interrogative detention introduced in the US and the UK primarily—although not exclusively—under the leadership of George W. Bush and Tony Blair” during the “War on Terror”).

79. *Halkin v. Helms*, 598 F.2d 1, 8 (D.C. Cir. 1978).

80. *N. Jersey Media Grp., Inc. v. Ashcroft*, 308 F.3d 198, 219–20 (3d Cir. 2002) (citing the “information mosaic” as a reason for judicial deference); *Halkin*, 598 F.2d at 8 (likening foreign intelligence gathering in an age of computer technology to the construction of a mosaic). The Department of the Navy, in its Freedom of Information Act (“FOIA”) regulations, thus defines the theory as “[t]he concept that apparently harmless pieces of information when assembled

useful. Some detainees who may be useful in this context have been held for questioning, even if they are not criminal suspects. Those doing the holding are practicing interrogative detention.

States may have an even greater incentive to practice interrogative detention against a non-state global adversary, such as the one the United States has confronted in the present conflict, than they had in previous wars. Unlike a traditional international armed conflict between states, the adversary does not sit in a capital, with an intelligence headquarters, National Security Council, or Politburo. There are no intelligence headquarters to bug, no one set of battle-plan blueprints to photograph. The intelligence “headquarters” of an adversary like al Qaeda might be a laptop. When facing a flexible and fluid adversary, human sources of information about the networks, redundancies, motivations, and strategies become even more significant for discerning the enemy.

Against this background of heightened demand for interrogative detention, I propose that the U.S. legal and human rights community pinned false hopes on criminal procedure. Early efforts focused on securing federal jurisdiction over Guantánamo detainees, and then the writ of habeas corpus for Guantánamo detainees.<sup>81</sup> Later, U.S. lawyers worked on securing due process for those detainees referred to the Guantánamo Military Commission for trial.<sup>82</sup> These efforts, involving hundreds of volunteers and hundreds of thousands of pro bono hours over dozens of lawsuits, scored many successes.<sup>83</sup>

Why then do I refer to the emphasis on securing domestic criminal procedure guarantees for detainees as a pursuit of false hopes? Because many detainees likely were kept for purposes of prevention or interrogation, not trial.<sup>84</sup> A lawsuit securing criminal procedure guarantees for a detainee or category of detainees, such as barring information obtained by torture from admission into evidence at trial, will shape the treatment of those in criminal detention. However, such guarantees are meaningless if the government never intends to try a detainee, or if the government never suspects nor accuses the detainee of an act already committed or a conspiracy already formulated.

I have proposed that U.S. executive branch tribunals have operated in different phases of three different detention contexts in the hostilities against al

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together could reveal a damaging picture.” 32 C.F.R. § 701.31 (2011). For a discussion of the mosaic theory of intelligence and its role in FOIA jurisprudence, see generally David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628 (2005).

81. See *supra* notes 6–8 and accompanying text.

82. See *supra* note 9 and accompanying text.

83. See *supra* notes 6–10 and accompanying text.

84. See President’s National Archives Speech, *supra* note 1 (emphasizing that any detainees who might endanger Americans would not be released).

Qaeda over the last ten years: criminal detention, preventive detention, and interrogative detention. While U.S. civil libertarians focused on securing habeas rights and criminal procedure protections for detainees, those efforts failed to address the legal justification and national security rationale motivating interrogative and preventive detention.<sup>85</sup> Thus, efforts to reform criminal procedure for detainees were germane only to tribunals working with a small minority of the detainees the U.S. government held. Evidentiary battles and criminal procedure victories would not regulate tribunals that were never intended to conduct trials. I argue that the last ten years of executive branch conduct has shown demonstrable gaps in international law and domestic regulation of tribunals operating outside of the end phase of the criminal detention context. In the next section, I propose ways to address this gap.

### III. PROPOSALS

#### A. *Tribunals in Criminal Detention*

Regarding those concerned about processing detainees held for criminal detention, I would remind them that we have a robust set of alternative tribunals. Violations of U.S. criminal law can be tried in U.S. civilian courts. Deliberations in Congress over a Senate proposal automatically to preclude foreign terrorists' prosecution in U.S.-based civilian courts<sup>86</sup> runs directly counter to the intention of the Bush Administration when President Bush originally authorized military commissions for terrorist suspects in November 2001.<sup>87</sup> The Administration's representative in the December 4, 2001 hearings before the Senate Judiciary Committee on Military Commissions stated the Administration's position was, clearly, to add and not subtract prosecution options for the executive branch.<sup>88</sup>

85. See President's National Archives Speech, *supra* note 1; *supra* notes 6–10, 39–40, 78–80 and accompanying text.

86. National Defense Authorization Act for Fiscal Year 2012, S. 1867, 112th Cong. § 1032 (as passed by Senate, Dec. 1, 2011).

87. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism § 1(e)–(f), 3 C.F.R. 918, 918 (2001), *reprinted in* 10 U.S.C. § 801 (2006).

88. *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 144 (2001) (statements of Sen. Jeff Sessions, Member, S. Comm. on the Judiciary & Hon. Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues).

Senator SESSIONS. . . . If he [the President] thought a trial could be tried in civil district court, he could allow it to go there? Or he could send it to a military tribunal? Is that your understanding of the Order [the Executive Order authorizing military commissions]?

In addition to trying suspects in U.S. federal court, violations of martial law and laws of war can be tried in courts-martial, a venue in which Congress prescribes the substantive law but the executive itself establishes procedure.<sup>89</sup> Courts-martial show both the limits of a two-branch system of government (wherein executive branch employees staff both the prosecution, the defense, the jury pool, and the judiciary—and in some cases face informal pressures to indict or not, convict or not, sentence harshly or leniently)<sup>90</sup> and the triumphs of an ethic of zealous advocacy. If for some reason the federal courts and the courts-martial are found to be inadequate, an administration can set up military commissions to try violations of laws of war.<sup>91</sup> The last ten years' experience shows that military commissions may, however, be a costly and time-consuming alternative whose advantages to existing tribunals are not obvious and whose utility should be considered with a skeptical eye. Finally, U.S. legal experts and authorities would be advised to consider under what circumstances the United States could benefit from adjudication by an international tribunal and invest in the development of such a tribunal ahead of time.

#### B. *Tribunals in Preventive Detention*

My proposal regarding those held in preventive detention in the present conflict follows the undisputed precedent of international law for international armed conflict. At the end of active combat hostilities against al Qaeda, the United States and its allies should release all of those remaining in preventive detention or charge detainees with war crimes and try them.<sup>92</sup> To be specific, detainees held in Guantánamo, each of whose case has been reviewed by an Obama Administration tribunal since 2009, should either be released or charged and tried when the Administration ends hostilities in the theater in which the detainee was taken into custody. For most, that means when the war in Afghanistan ends, they should be tried and if found guilty, incarcerated and if not, released. Detainees that the United States is holding in preventive detention in Bagram facilities in Afghanistan should likewise be formally

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Ambassador PROSPER. That is absolutely correct, and I think, again, one thing that I would like to highlight here is what the President has done is created an option. He has not ruled out the Federal courts or the Article III courts. He is creating an option. So at the time that a particular case comes to his desk, he will balance the interests of the country and make the appropriate decision at that time.

*Id.*

89. See 10 U.S.C. § 817 (2006).

90. See *id.* §§ 825(a)–(c), 826(a), 827(b).

91. See *id.* § 948b(b).

92. See War Crimes Act of 1996, 18 U.S.C. § 2441 (2006); Third Geneva Convention, *supra* note 41, art. 118 (providing that, in an international armed conflict, a prisoner of war “shall be released and repatriated without delay after the cessation of active hostilities.”).



charged with crimes and tried before an international or Afghan tribunal or released when hostilities the United States is conducting there cease.

In preparation for future conflicts, effort should be made to examine the existing laws of war for international armed conflict in order to identify those areas in which those laws do not work for non-international armed conflict. U.S. lawyers should also use their experience of the present conflict to examine the limitations of habeas jurisprudence. The U.S. government should publicize the criteria and procedures of tribunals like the PRBs, both in the interest of the accountability that transparency brings and in the interest of making procedures and decisions open to suggestion.

### C. *Tribunals in Interrogative Detention*

Tribunals work at several points in interrogative detention. The initial screening or sorting of detainees for interrogation often happens on the fly, in combat or afterwards.<sup>93</sup> Mass “sweeps” of civilians to hold for interrogation violates the international legal principle of distinction (which limits attacks to military objects and which should be analogized to inform military activities beyond attacks) and proportionality (which prohibits military actions which might be excessive in relation to the military advantage gained).<sup>94</sup> From the point of view of the detaining power, moreover, too many sources of less relevant information actually may harm intelligence and military efforts. If the United States government intends to practice interrogative detention in future conflicts—a conclusion it need not reach—at least it should systematically examine recent experience and formulate guidelines for the intake, seizure, and battlefield screening of the kind that has taken place in this conflict on such a wide scale.

Finally, the United States also needs to evaluate the procedures and practices used to review the continued detention of those held for questioning. We need to establish procedures for tribunals to review those kept for interrogative detention in order continually to ascertain if the information a given person may have had has passed its shelf-life, and if so, release the detainee.

### CONCLUSION

It is time for the U.S. legal community to grapple with the challenges posed by all tribunals that have operated in the “war on terror” with the same intense focus that has been brought to scrutinizing formally constituted

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93. See, e.g., Declaration of Michael H. Mobbs, *supra* note 24, ¶¶ 4–6.

94. For discussion of these two principles and the United States’ commitment to them, see, for example, Koh, *supra* note 47, at 14–15.

tribunals like military commissions. Over the past decade, informal tribunals, I have argued here, have assumed an importance unprecedented in U.S. experience of armed conflict because of structural features inherent to a conflict against non-state actors with global reach. While the U.S. legal community has concentrated on the procedures that govern the formal trials that bring criminal detention to an end, I contend that in this conflict, the U.S. executive branch has mostly practiced detention for other reasons, most prominently preventive detention and interrogative detention. The tribunals used in preventive and interrogative detention are overdue for the level of scrutiny that military commissions have garnered.

The U.S. government under the Obama Administration initiated a review of its detention procedures.<sup>95</sup> The Administration and the U.S. legal community should subject the range of tribunals used in this war to the same systematic scrutiny. The goal should be to refine the law and standards that guide tribunal administrators' work so that in the next war, tribunals may help achieve the bottom-line principle of the law of war—namely, to end hostilities as quickly and humanely as possible.

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95. See Exec. Order No. 13,493, *supra* note 22.