Unprivileged Belligerents, Preventive Detention, and Fundamental Fairness: Rethinking the Review Tribunal Representation Model

Geoffrey S. Corn
Peter A. Chickris

Follow this and additional works at: http://digitalcommons.law.scu.edu/scujil

Recommended Citation
Available at: http://digitalcommons.law.scu.edu/scujil/vol11/iss1/4

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Journal of International Law by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.
Unprivileged Belligerents, Preventive Detention, and Fundamental Fairness: Rethinking the Review Tribunal Representation Model

Geoffrey S. Corn* & Peter A. Chickris**

* Presidential Research Professor of Law, South Texas College of Law; Lieutenant Colonel (Retired), U.S. Army Judge Advocate General’s Corps. Prior to joining the faculty at South Texas, Professor Corn served in a variety of military assignments, including as the Army’s senior law of war advisor, supervisory defense counsel for the Western United States, Chief of International Law for U.S. Army Europe, and as a tactical intelligence officer in Panama.

** J.D., South Texas College of Law. Mr. Chickris began his involvement on this project as a research assistant, but in light of the significance of his contributions his role evolved into that of co-author.
# TABLE OF CONTENTS

I. Introduction ................................................................. 102

II. The Lawyer Ethos and Zealous Representation .......... 106

III. Terrorism, Armed Conflict, and Preventive Detention ........................................................................... 110

   A. Detention of Combatants and the Global War on Terror ........ 110

   B. The U.S. Legal Foundation for Preventive Detention of Enemy Belligerents ............................................ 113

      1. The Substantive Foundation ........................................ 116

      2. Extending the Traditional Legal Basis to Terrorist Detainees ........................................................................ 121


IV. Powell v. Alabama and the Significance of Value-Based Legal Representation ................................................. 132

V. Extending Legal Representation to the Long-Term Detention Process ................................................................. 139

   A. Adopting a Punitive/Administrative Divide in the War on Terror ........................................................................ 139

   B. Questioning the Efficacy of Non-Legal Representation ........ 150

   C. The Potential Benefits of Legal Representation ................. 154

VI. But Is It Feasible? ......................................................... 164

   A. Added Complexity .......................................................... 164
B. Precedential Impact? ................................................................. 165

C. Resource Drain? ................................................................. 166

VII. Conclusion................................................................. 166
I. Introduction

Since the United States initiated its military response to the terrorist attacks of September 11, 2001, law and respect for legal rights has remained a focal point of legitimacy. No single issue, however, has dominated the legal debate. Instead, like Republican candidates for the presidential nomination, different issues have risen to discourse dominance, only to recede as other issues displace them. Was the invasion of Afghanistan justified? What was the status of captured Taliban and al-Qaeda operatives? What techniques were permissible to interrogate these detainees? Did the detainees have a right to judicial review? Was the invasion of Iraq justified? Was the response to detainee abuses in Iraq sufficient? What was the scope of the armed conflict with al-Qaeda, and who was included within the scope of that conflict? What were the limits on the use of remotely piloted drones to attack alleged terrorist operatives? Could that attack authority extend to U.S. citizens?

All of these issues have involved the complex intersection of national security policy and domestic and international law, and many of them continue to vex policy makers. However, almost like the constancy of Mitt Romney, the one issue that has maintained consistent prominence throughout this period is the legality of long-term preventive detention of alleged enemy belligerents. Indeed, the detention facility established at Guantanamo Bay, Cuba was from inception and remains to this day a lightning rod of legal controversy.

The most recent manifestation of this controversy came in the form of the long-term detention provisions of the 2012 National Defense Authorization Act (NDAA 2012). While much ink has been spilt on the fundamental question of preventive detention of U.S. citizens brought to the surface by these provisions, the procedural mandates included within the provisions received less attention. Leaving aside the basic question of substantive detention authority, the provision for a right to legal representation for individuals subjected to detention is perhaps the most profound shift in detention policy since September 11, 2001. Since the inception of the U.S. preventive detention program, there has been an ongoing effort to enhance the detention review process. Some of these enhancements have been motivated by the Supreme Court’s detainee jurisprudence; others most likely from the recognition that it is ultimately counterproductive to detain individuals who may have been captured in a broad net but who in fact pose no significant threat to the United States or coalition partners. Regardless of the motivation, it is simply beyond dispute that the process utilized today to review the detainability of captured personnel is far more protective than that originally adopted by the United States (which, to be fair, is in part the result of the bare minimalist approach originally implemented by the Bush Administration).

One procedural protection has, however, been consistently absent from this progression: provision of legal representation for the detainee review process. Ostensibly based on an analogy to the tribunal provided to individuals contesting their designation as prisoners of war (the so-called “Article 5 Tribunal”), detainees are instead provided with a lay military officer to serve as their personal representative; in contrast, since the Secretary of Defense first ordered the creation of the Combatant Status Review Tribunal in 2004 to review the
status of Guantanamo detainees, the government has always been represented by military attorneys, or JAG officers.1

This lay-representation paradigm has finally been called into question. The extremely controversial provisions of the NDAA 2012 authorizing preventive military detention of U.S. and alien terrorist operatives includes, for the first time, a mandate to provide detainees with legal representation during detention review proceedings. The Act, signed into law by President Obama on December 31, 2011, provides that the Secretary of Defense must submit to Congress within ninety days of enactment a report “setting forth the procedures for determining the status of persons detained pursuant to the Authorization for Use of Military Force for purposes of section 1021.”2 The law then provides, inter alia, that an “unprivileged enemy belligerent may, at the election of the belligerent, be represented by military counsel at proceedings for the determination of status of the belligerent.”3

It is not yet clear at what point in the detention process this military counsel requirement will become operative. According to the Conference Report on this provision of the NDAA 2012:

The Senate amendment contained a provision (sec. 1036) that would require the Secretary of Defense to establish procedures for determining the status of persons captured in the course of hostilities authorized by the Authorization for Use of Military Force (Public Law 107-40), including access to a military judge and a military lawyer for an enemy belligerent who will be held in long-term detention.

The House bill contained no similar provision.

The House recedes with an amendment clarifying that the Secretary of Defense is not required to apply the procedures for long-term detention in the case of a person for whom habeas corpus review is available in federal court.

Because this provision is prospective, the Secretary of Defense is authorized to determine the extent, if any, to which such procedures will be applied to detainees for whom status determinations have already been made prior to the date of the enactment of this Act.

The conferees expect that the procedures issued by the Secretary of Defense will define what constitutes “long-term” detention for the purposes of subsection (b). The conferees understand that under current Department of Defense practice in Afghanistan, a detainee goes before a Detention Review Board for a status

2. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1024(a), 125 Stat. 1298, 1565 (2011) (citations omitted). Section 1021 of the NDAA 2012 “affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force includes the authority . . . to detain covered persons . . . pending disposition under the law of war.” Id. § 1024(a) (citations omitted). Persons who may be detained under section 1021 include persons “who planned, authorized, committed, or aided . . . or harbored those responsible” for the attacks occurring on September 11, 2001, as well as “person[s] who [were] a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.” Id. § 1021(b).
3. Id. § 1024(b)(2).
determination 60 days after capture, and again 6 months after that. The Department of Defense has considered extending the period of time before a second review is required. The conferees expect that the procedures required by subsection (b) would not be triggered by the first review, but could be triggered by the second review, in the discretion of the Secretary.4

Thus, legal representation will now turn on the definition of “long-term.” Nonetheless, this is an important step forward in the procedural protections afforded individuals subjected to wartime preventive detention; and, in the opinion of the authors, long overdue. Whatever the ultimate triggering point definition that emerges, the detention review process will undoubtedly be enhanced by this provision. While no amount of process will ameliorate the concerns of critics of the fundamental concept of applying wartime preventive detention to counter-terror operations, even the most ardent of such critics must acknowledge that providing representatives trained in the lawyer ethos of zealous representation is a marked improvement to the lay representation model utilized prior to the enactment of the NDAA 2012.

This provision, and the fact that it has taken a decade to impose such a representation requirement, calls into question the legitimacy of subjecting non-traditional captives to preventive detention without legal representation. Can a detention review system that relies on lay military officers to represent the interests of alleged belligerent operatives ever be considered legitimate? While it is clear that the Sixth Amendment right to counsel jurisprudence of the Supreme Court is inapposite to these non-criminal detention proceedings, it is the thesis of this Article that the underlying rationale of that jurisprudence indicates that the answer to this question is no, and that the imposition of a legal representation requirement is long overdue.

The Supreme Court’s right to counsel jurisprudence has focused primarily on U.S. criminal justice (although as noted the Court has also recently addressed the significance of legal representation in the context of non-punitive detentions). However, since September 11, the preventive detention of alleged terrorist operatives and other unprivileged enemy belligerents in the context of what President Bush labeled the Global War on Terror has become the most significant focal point in the debate over the balance between government interests and individual liberty. Almost immediately after the United States unleashed its military power to detect and disable the terrorist threat, an entirely new preventive detention regime emerged: the detention of alleged unprivileged belligerents captured in the ongoing armed conflict with al-Qaeda and other associated forces. This detention regime has generated perhaps more controversy than any other aspect of the ongoing struggle against the transnational terrorist threat, triggering an abundance of legal scholarship, commentary, and debate. It has also involved ongoing internal government efforts to refine the process for assessing which captives should be subjected to what is essentially indefinite detention. These efforts have been punctuated by judicial challenges and several critical Supreme Court decisions, as well as legislative efforts to provide greater clarity in the balance between government detention authority and individual interests. The net result has been both an

endorsement of the government’s invocation of armed conflict-based preventive detention authority and imposition of limitations on the President’s authority to manage the detention process.

All of this has resulted in two undeniable realities: first, the assertion of authority based on the law of armed conflict to preventively detain captured terrorist belligerents is now firmly entrenched and unlikely to be reconsidered any time soon; second, the ever-growing recognition that this invocation will result in what Justice Kennedy characterized as generational detention has and will continue to produce pressure on the United States to ensure the accuracy and legitimacy of detention decisions. To this end, the government has made substantial advances in the process for assessing when a captured individual should be committed to indefinite military detention. These advances have impacted not only the several hundred detainees in Guantanamo Bay, Cuba, but also the thousands of detainees held by the United States in Afghanistan.

These efforts to revise and improve the preventive detention process have produced significant modifications intended to protect captives from erroneous detention decisions. However, the lack of legal representation for detainees subject to the detention review process has remained unaltered since the initiation of the Global War on Terror. The United States’ refusal to provide captives assistance of counsel when proceedings may result in indefinite detention can rely on a variety of justifications, including, inter alia, the fact that not even lawful enemy combatants are afforded assistance of counsel to challenge their preventive detention under the Geneva Conventions and that because the nature of the detention is not punitive and in no way implicates the Sixth Amendment of the U.S. Constitution or any analogous right necessitating the assistance of defense counsel. Instead, in an obvious analogy to the process for determining prisoner of war (POW) status pursuant to the Geneva Convention Relative to the Treatment of Prisoners of War and the Army Regulation implementing that treaty, a non-legal representative is provided to assist the captive in contesting the legitimacy of the unlawful belligerent status determination and the preventive detention resulting from that characterization.

This Article will question whether denying these captives legal representation is justified in light of the interests at stake in the detention review process. In so doing, it will consider the fundamental balance between the risks and consequences of error and the feasibility of providing such assistance implicated by the preventive detention process, and how this balance influences the ongoing conclusion that lay representation by a military officer is justified by the nature of the preventive detention process. While acknowledging that wartime preventive detentions fall outside the scope of precedents like Powell and Gideon, the Article will draw from underlying principles reflected in these decisions to question whether the lay representation by military officers is sufficient to effectively advance the interests implicated in this non-punitive preventive detention process. Finally, the Article will

5. See Boumediene v. Bush, 553 U.S. 723, 785 (2008) (identifying the risk that “detention . . . may last a generation or more”).
address probable objections to providing legal representation to detainees, including the feasibility of doing so.

The Article will begin, in Part II, with a discussion of the ethos of zealous representation and its significance in the U.S. legal culture. Part III of this Article will discuss the extension of traditional armed conflict based preventive detention to terrorist operatives following the September 11 terrorist attacks. Part III will then trace the evolution of detention procedures and the most recent efforts to improve the detention review process in Afghanistan. Part IV will discuss the theoretical foundation for the Sixth Amendment right to counsel. Part V will critically analyze the existing personal representative concept, and suggest why this concept is insufficient to render meaningful the procedural protections established to minimize the risk of erroneous detention decisions. Part VI will consider the feasibility of providing legal representation to individuals subject to indefinite detention as the result of being classified as unprivileged belligerents, and consider the inevitable objections to such a concept. Part VI will also consider how such representation may potentially impact subsequent judicial review required pursuant to the Supreme Court’s decision in Boumediene v. Bush, as well as how it might contribute to limiting any extension of that decision to other detention environments. The Article will conclude by suggesting that the balance of interests involved in the provision of legal representation should lead to a careful reassessment of the logic of clinging to the current detention review representation paradigm.

II. The Lawyer Ethos and Zealous Representation

In 1932, the Supreme Court decided Powell v. Alabama, a case that arose out of one of the most disgraceful incidents in the sordid history of the Jim Crow-era segregation in the southern United States. Nine African-American men had been summarily tried in a Scottsboro, Alabama courtroom for the alleged rape of two Caucasian women: Ruby Bates and Victoria Price. Unsurprisingly, all were convicted based only on the testimony of the two alleged victims—testimony that would be seriously discredited in subsequent proceedings. Defendant Powell was sentenced to death. The Alabama Supreme Court affirmed the conviction and sentence, although one justice dissented as he recognized that the result was a total failure to afford the defendants due process of law.

8. 287 U.S. 45 (1932).
9. Powell v. State, 141 So. 201, 214–15 (Ala. 1932) (Anderson, C.J., dissenting), rev’d, 287 U.S. 45 (1932). In his dissent, Chief Justice Anderson of the Alabama Supreme Court stated that the ultimate guilt or innocence of the defendants was immaterial if they were not afforded the process they were due at trial, and that the trial court should have ordered a new trial once public outrage had died down to ensure that the defendants had received a fair trial:

   Under the statute, the defendants being unable to employ counsel, it was the duty of the trial judge to appoint counsel . . . . The court did not name or designate particular counsel, but appointed the entire Scottsboro bar, thus extending and enlarging the responsibility, and, in a sense, enabling each one to rely upon others. . . .

   . . . [While] we can appreciate the position of a lawyer appointed to defend an indigent defendant whom he may feel is guilty and as against whom public sentiment is at fever heat, the record indicates that the appearance was rather pro forma than zealous and active and which is indicated by a declination on the part of counsel to argue the case, notwithstanding the solicitor insisted upon the right to open and close, and the state did, in
The United States Supreme Court granted certiorari to determine whether Powell had been denied due process of law in violation of the Fourteenth Amendment to the United States Constitution. Powell attacked the Alabama trial process on three grounds: he argued first, that the summary nature of the process resulted in a denial of due process; second, that the exclusion of members of his race from the jury violated due process; and third, that Alabama’s failure to provide meaningful assistance of counsel violated due process.10

In an opinion read today by virtually every law student at the outset of the study of federal criminal procedure, the Supreme Court struck down Powell’s conviction.11 The Justices coalesced around a clear and compelling premise: the trial without meaningful assistance of counsel fatally infected the proceedings and resulted in a violation of Powell’s constitutional right to due process. This one flaw in the trial process was of such magnitude that it rendered moot Powell’s alternate attacks, which the Court did not even address. The implication was clear: even if Powell was correct that the summary process and exclusion of African-Americans from the jury violated due process, denial of zealous representation of counsel produced a pervasive infection to the entire process of such a magnitude that any other error would have been superfluous. Nor had the general “assistance of the bar” come even close to

---

11. Id. at 65.
protecting Powell’s rights. Thus, the Supreme Court emphasized a simple yet compelling premise: that a lawyer for the defense, devoted to the cause of the client and committed to zealously represent that cause, is the true *sine qua non* of ensuring fundamental fairness and a just outcome in the criminal adjudicatory process. *Powell*, however, was limited to capital cases, a holding confirmed two decades later in *Betts v. Brady*.

Three decades later the Court would once again address the relationship between zealous legal representation and fair process. In *Gideon v. Wainwright*, Petitioner Clarence Gideon challenged his conviction and incarceration resulting from a trial at which his request for an appointed defense counsel had been denied based on Florida law. Gideon had, of course, been afforded the right to secure his own attorney, but when he informed the court that he was indigent and could not afford counsel, he was told that he would have to defend himself against the District Attorney. However, Gideon was not facing capital punishment, and, as a result, *Powell’s* holding did not require Florida to appoint counsel for Gideon (at the time, Florida and several other states did not provide indigent defendants with counsel in non-

12. *Id.* at 56. The Supreme Court noted that while the trial court called for the local bar to assist the defendants, any such assistance rendered fell short of the defendants’ constitutional right to legal representation:

   ... [U]ntil the very morning of the trial no lawyer had been named or definitely designated to represent the defendants. Prior to that time, the trial judge had “appointed all the members of the bar” for the limited “purpose of arraigning the defendants.” Whether they would represent the defendants thereafter if no counsel appeared in their behalf, was a matter of speculation only, or, as the judge indicated, of mere anticipation on the part of the court. Such a designation, even if made for all purposes, would, in our opinion, have fallen far short of meeting, in any proper sense, a requirement for the appointment of counsel. How many lawyers were members of the bar does not appear; but, in the very nature of things, whether many or few, they would not, thus collectively named, have been given that clear appreciation of responsibility or impressed with that individual sense of duty which should and naturally would accompany the appointment of a selected member of the bar, specifically named and assigned.

13. 316 U.S. 455, 464 (1942) (considering “whether due process of law demands that in every criminal case, whatever the circumstances, a State must furnish counsel to an indigent defendant” and whether “the furnishing of counsel in all cases [is] dictated by natural, inherent, and fundamental principles of fairness”), *overruled by Gideon v. Wainwright, 372 U.S. 335* (1963). The Court held that the Sixth Amendment possesses no “inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.” *Id.* at 473. The Supreme Court thus declined to fully incorporate the Sixth Amendment against the States, preferring to allow each State to legislate which situations guarantee a right to appointed counsel and which do not.


15. The following exchange occurred at the trial court and was memorialized in the Supreme Court’s opinion:

   “The COURT: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case.

   “The DEFENDANT: The United States Supreme Court says I am entitled to be represented by Counsel.”

*Id.*
capital criminal trials). The Supreme Court received Gideon’s petition in forma pauperis, and the Court appointed Abe Fortas to advocate Gideon’s cause.\(^{16}\)

The issue presented to the Court was more significant than the right to be represented by counsel; the issue was whether the failure of the government to provide such representation to indigent defendants fatally undermined the legitimacy of the criminal adjudicatory process and thereby violated Gideon’s Fourteenth Amendment right to due process. During his argument before the Court, Fortas noted:

> Without [counsel], how can a civilized nation pretend that it is having a fair trial under our adversary system, which means that counsel for the State will do his best within the limits of fairness and honor and decency to present the case for the State and counsel for the defense will do his best similarly to present the best case possible for the defendant and from that clash there will emerge the truth. That is our concept. And how can we say? How can it be suggested that a court is properly constituted, that a trial is fair, unless those conditions exist.\(^ {17}\)

Gideon prevailed on his challenge, and the Court’s decision extended Powell’s logic to any criminal defendant.\(^ {18}\) Once again, the message was clear: the zealous legal representation for an accused is essential to ensuring the fundamental fairness of criminal process.

---


\(^{18}\) See Gideon, 372 U.S. at 344–45; Argersinger v. Hamlin, 407 U.S. 25, 40, 47 (1972) (holding that counsel must be appointed in any case resulting in a sentence of actual imprisonment absent the defendant’s knowing and intelligent waiver). The Court declined to create different rules for felonies, misdemeanors, and petty offenses, noting that the “requirement of counsel may well be necessary for a fair trial even in a petty-offense prosecution,” and reasoning that:

> ... legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are [not] any less complex than when a person can be sent off for six months or more.

> ... We must conclude, therefore, that the problems associated with misdemeanor and petty offenses often require the presence of counsel to insure the accused a fair trial. ... Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts.

_Id. at 33–40 (citations omitted). But see Scott v. Illinois, 440 U.S. 367 (1979) (holding that counsel does not need to be appointed if the defendant was convicted but not sentenced to any term of imprisonment). The Court, noting a distinction between imprisonment as an authorized and threatened possible penalty and imprisonment actually assessed as a penalty, concluded that

> ... the central premise of Argersinger—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel. ... We therefore hold that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.

_Id. at 373–74.
In a subsequent decision, the Supreme Court held that the *Gideon* right to counsel, provided at government expense, is triggered by any sentence that includes even one day of incarceration.\(^{19}\) Rejecting a misdemeanor-felony dichotomy and drawing a trigger point at the sentences to incarceration, and not at the nature of the offense, the Court indicated its recognition that it is the consequence of government action, and not necessarily the label, that implicates this fundamental right.\(^{20}\) In another line of decisions, the Court also held that even when a defendant is represented at trial, failure of counsel to provide effective representation results in constitutional error.\(^{21}\) It has therefore become axiomatic that zealous representation of counsel is an essential component to the criminal adjudication process. Nor has the importance of counsel been limited to the criminal incarceration context. In *United States v. Salerno*, the Supreme Court upheld the preventive detention authority established by Congress in the Bail Reform Act of 1984,\(^{22}\) relying in large measure on the Act’s provision for an adversarial hearing in which the suspect is entitled to be represented by counsel.\(^{23}\)

### III. Terrorism, Armed Conflict, and Preventive Detention

#### A. Detention of Combatants and the Global War on Terror

Since the inception of what President Bush called the “Global War on Terror,” it has become apparent that the United States considers the preventive detention of captured enemy belligerents a fundamental incident of armed conflict authorized by customary international law.\(^{24}\) This is a clear departure from the law of peace.\(^{25}\) While U.S.

---

19. *See* *Argersinger*, 407 U.S. at 40.
20. *Id.*
21. *See* *Strickland* v. *Washington*, 466 U.S. 668, 685 (1984) (the fact that “a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command”). The Court held that the Sixth Amendment “envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.” *Id.* *Strickland* also set down the requirements for a successful ineffective assistance of counsel claim. *See generally id.* at 689-96 (discussing the elements for holding that counsel provided ineffective assistance and thereby effectively denied the defendant his constitutional right to counsel).
22. *See* 18 U.S.C. § 3142(e) (2006) (allowing a judicial officer, after a hearing, to order the detention of the accused before trial if “no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community”). Section 3142(f) provides the circumstances under which a hearing must be held and lists the rights of the accused at that hearing, which include “the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed.” *Id.* § 3142(f).
23. *United States v. Salerno*, 481 U.S. 739, 755 (1987) (holding that “the provisions for pretrial detention in the Bail Reform Act of 1984 fall within the carefully limited exception [of detention prior to trial or without trial] because the Act’s detention authority requires an adversary hearing showing that the accused poses a threat to the safety of individuals or to the community which no condition of release can dispel” and that the Act requires “numerous procedural safeguards” at the adversarial hearing before the accused can be detained).
jurisprudence has established several very limited situations in which preventive detention is
lawful outside the context of armed conflict, due process normally requires prompt charge
and trial to justify a deprivation of liberty outside the armed conflict context. In the armed
conflict context, however, preventive detention is an action justified by the principle of
military necessity, a customary international law norm that permits belligerents to take all
measures not otherwise prohibited by international law necessary to bring about the prompt
submission of an opponent.

Depriving captured enemy belligerents of the opportunity to return to hostilities is
certainly necessary to defeat an enemy. Nonetheless, there is contemporary debate related
to whether preventative detention authority is the same in both international and non-
international armed conflicts. Several treaties, including most importantly, the Geneva
Convention Relative to the Treatment of Prisoners of War (GPW) (which regulates the
treatment of certain categories of detained combatants and civilians acting on behalf of
enemy States in an international armed conflict), are clearly founded upon an international
consensus that States have the legal authority to detain such individuals. However, neither
customary nor treaty law involving the law of armed conflict (LOAC) provide clear authority
related to the detention of enemy belligerents in the context of non-international armed
conflicts. As a result, some experts assert that domestic statutory authority is required to
legally justify preventive detention in this context, even while conceding such detention is
consistent with the principle of military necessity. Pursuant to this legal interpretation,

25. See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War, art. 118, Aug. 12, 1949,
and repatriated without delay after the cessation of active hostilities.”).

26. Id. at 755 (holding that post- indictment, pretrial preventive detention under the Bail Reform Act
does not violate the Due Process Clause of the Fifth Amendment or the Excessive Bail Clause of the
challenge his classification as an enemy combatant must receive notice of the factual basis for his
classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral
decisionmaker.”).

27-10].

28. See, e.g., al-Marri v. Pucciarelli, 534 F.3d 213, 216 (4th Cir. 2008), vacated sub nom. by
al-Marri v. Spagone, 555 U.S. 1220 (2009) (holding that while Congress may have given the President the
authority to detain petitioner as an enemy combatant, petitioner had been given insufficient process
to challenge his detention).

government’s status-based detention scheme as well as its authority to preventatively detain in a
non-international armed conflict (NIAC):

Petitioners ... insist[] that detention based solely on membership in an organization such as
al Qaeda is completely antithetical to the law of war. Such an approach is prohibited by the
law of war, the argument goes, because it represents detention based on status rather than
conduct, which is impermissible in the context of the current non-international armed
conflict. Petitioners also contend that status-based detentions ignore the distinction between
combatants and civilians in traditional international armed conflicts. In their view, that
distinction—which is fundamental to the law of war—leads to the conclusion that the only
preventive detention of a non-state belligerent absent such domestic statutory authority is inherently arbitrary.31

persons who are detainable in the current armed conflict are “individuals who were lawful combatants under Article 4 of the Geneva Conventions (members of an armed force of a State or other militia as described in Article 4), and civilians who become unlawful combatants by reason of their direct participation in hostilities as that standard is understood in international law.” As a practical matter, then, the only individuals who would be detainable under petitioners’ framework are civilians who directly participate in hostilities (i.e., individuals who would be detainable based upon their conduct, not their status), because by definition no “lawful combatants” fight on behalf of the enemy in the current non-international armed conflict.

Id. at 70–71 (footnote omitted) (citations omitted). While the D.C. Circuit rejected several of these claims (citing the Geneva Conventions), it did state that the line beyond which the government could not detain legally under either international law or the AUMF was demarcated by the difference between membership in associated forces and providing “substantial support” to those forces:

In addition to members of al Qaeda and the Taliban, the government’s detention authority also reaches those who were members of “associated forces.” For purposes of these habeas proceedings, the Court interprets the term “associated forces” to mean “co-belligerents” as that term is understood under the law of war. . . .

. . .

. . . [However,] [d]etaining an individual who “substantially supports” such an organization, but is not part of it, is simply not authorized by the AUMF itself or by the law of war. Hence, the government’s reliance on “substantial support” as a basis for detention independent of membership in the Taliban, al Qaeda or an associated force is rejected.

Id. at 74–76.

31. See generally Robert Chesney & Jack Goldsmith, Terrorism and the Convergence of Criminal and Military Detention Models, 60 STAN. L. REV. 1079, 1084–87 (2008) (discussing the Geneva Convention criteria applicable to finding that a detainee deserves POW treatment, and asserting that while the “laws of war also provide for military detention or preventive internment during non-international armed conflicts (NIACs),” there are no explicit detention criteria for NIACs (as opposed to those for IACs), and the only bright-line rule applicable to NIAC detainees appears in Common Article 3, and in certain articles of the First and Second Additional Protocols to the Geneva Conventions) (footnote omitted). However, because the United States is not a party to the Additional Protocols, any authority thereby would be customary international law or non-binding on the United States. See also Jody M. Prescott, Detention Status Review Process in Transnational Armed Conflict: Al Maqaleh v. Gates and the Parwan Detention Facility, 5 U. MASS. ROUND TABLE SYMP. L.J. 34, 54–55 (2010). Prescott describes the U.S. policy decision to apply a domestic military regulation, AR 190-8 to all detainees regardless of the type of conflict they were captured in, and considers the concern that even this step, which grants protections to so-called unlawful enemy combatants, still falls short of the humanitarian baseline encouraged by some critics of U.S. detention policy:

For detainees held in non-international armed conflicts, Common Article 3 of the 1949 Geneva Conventions sets the baseline for physical treatment but does not specify how detainee status should be determined or reviewed. As a matter of implementing U.S. policy, the decision to apply AR 190-8 to all detainees regardless of the nature of the conflict provides for an expansion in the humanitarian treatment afforded by Common Article 3. Practically, this is consistent with the aim of the theory of transnational armed conflict, but some might argue that this expands the scope of armed conflict beyond what international humanitarian treaty law, and possibly customary law, allows. Accordingly, some might argue that the process afforded under AR 190-8, although greater than that expected under international law in cases of international armed conflict, is not sufficient from an international human rights law perspective for the detention of individuals who are believed to be a part of al Qaeda.

Id. (footnotes omitted).
The United States follows a different interpretation of the law, relying on the customary LOAC principle of military necessity to justify the detention of enemy belligerents in any armed conflict, even absent a treaty or statute expressly authorizing preventive detention.\textsuperscript{32} This legal basis for the entire unprivileged belligerent detention regime is based on a seminal World War II era Supreme Court precedent—the principal authority relied on by the Supreme Court when it endorsed President Bush’s invocation of preventive detention authority to incapacitate captured al-Qaeda and Taliban personnel.\textsuperscript{33}

B. The U.S. Legal Foundation for Preventive Detention of Enemy Belligerents

The 1942 Supreme Court decision \textit{Ex parte Quirin} reviewed the legality of the trial by secret military commission of nine German saboteurs.\textsuperscript{34} The defendants had been arrested by the FBI after landing on Long Island and Florida, and dispersing to cities in the United States.\textsuperscript{35} Selected by the German intelligence service because of their proficiency in English and U.S. dialects, the defendants were all members of the German armed forces trained to conduct sabotage missions.\textsuperscript{36} After coming ashore from a German U-Boat, they immediately discarded their uniforms and proceeded to various locations within the United States, ostensibly to execute their sabotage missions.\textsuperscript{37}

All of the saboteurs were quickly apprehended by the FBI. Although the Department of Justice began the process to bring them to trial in federal court, President Roosevelt chose instead to order trial by a secret military commission on war crimes.\textsuperscript{38} The commission was convened by order of the President, and the saboteurs were all charged with violations of the laws and customs of war, including espionage and operating as unlawful belligerents.\textsuperscript{39} The German defendants challenged the legality of trial by military commission by writ of habeas corpus to the Supreme Court.\textsuperscript{40} In a \textit{per curiam} opinion, the Court denied the writ

\begin{itemize}
\item \textsuperscript{32} Francis Lieber defined military necessity as “those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.” \textsc{U.S. War Dep't, Instructions for the Government of Armies of the United States in the Field}, General Orders No. 100 art. 14 (prepared by Francis Lieber) (1863). More recently, the United States has defined military necessity as “that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.” \textsc{FM 27-10, supra} note 28, ¶ 3(a).
\item \textsuperscript{33} See \textit{Hamdi v. Rumsfeld}, 542 U.S. 507 (2004).
\item \textsuperscript{34} \textit{Ex parte Quirin}, 317 U.S. 1 (1942).
\item \textsuperscript{35} \textit{Id.} at 21.
\item \textsuperscript{36} \textit{Id.}
\item \textsuperscript{37} \textit{Id.}
\item \textsuperscript{38} See \textit{id.} Roosevelt ordered trial by military commission because he “feared that [the saboteurs] would not be punished severely enough in an Article III court.” Carlissa Carson, \textit{Yes We Can Revise the Current Military Commission System, but Why?}, 25 \textsc{Conn. J. Int'l L.} 389, 399 (2010).
\item \textsuperscript{39} See \textit{Quirin}, 317 U.S. at 22–23.
\item \textsuperscript{40} See \textit{id.} at 18–19. The German defendants argued that
\end{itemize}
and held that the military commission had lawful jurisdiction to try the saboteurs. The Court held that, as enemy belligerents, the defendants were subject to the law of war. More importantly, the invocation of this law was justified by the state of war between Germany and the United States, providing the source of authority for the capture, detention, and trial of the defendants.

Although the Quirin decision focused primarily on the legality of trial by military commission, it also addressed preventive detention authority. According to the Court:

By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.

The Supreme Court therefore did not consider statutory detention authority necessary to justify the preventive detention of captured enemy belligerents, and instead relied on the customary law of war. Perhaps even more important for the events that transpired after September 11, 2001, the Court clearly considered this authority applicable to captured enemy belligerents irrespective of whether they qualified as “lawful” combatants (captured enemy belligerent personnel qualified for status as prisoners of war pursuant to the Geneva Convention Relative to the Treatment of Prisoners of War).

Soon after initiation of American military action against Taliban and al-Qaeda forces in Afghanistan following the terror attacks of September 11, the U.S. military began detaining Taliban and al-Qaeda operatives. Many captives were subsequently transferred to the newly established Military Detention Facility at Guantanamo Bay Naval Base in Cuba. Military Order No. 1, issued by President Bush in November 2001, included a directive to establish this facility for the detention of “unlawful alien enemy combatants.” Accordingly, U.S. nationals were excluded from the category of captured personnel subject to detention at Guantanamo; however, they were not excluded from the broader scope of unlawful combatant...
detention. The United States soon discovered that one captive who had been transferred from Afghanistan to Guantanamo, Yaser Esam Hamdi, had been born in the United States and was therefore a U.S. citizen. This knowledge did not result in his release or transfer to civilian custody for purposes of trial by federal court. Instead, his preventive detention continued, but only after he was immediately transferred to a military confinement facility within the United States.

Hamdi’s father successfully petitioned the courts by writ of habeas corpus filed as a “next friend” on behalf of his son. The challenge culminated with the Supreme Court decision of *Hamdi v. Rumsfeld*.46 Invoking *Quirin*, the Supreme Court endorsed Hamdi’s continued preventive detention as an enemy belligerent.47 Although the Court also held that Hamdi was entitled to more meaningful procedural protections than had been afforded by the executive branch, it rejected the assertion that Hamdi’s detention was unlawful because he had not been captured in the context of a formally declared war against a state enemy. Instead, because Hamdi had been captured in the context of an armed conflict prosecuted by the President with the statutory support of Congress (in the form of the 2001 Authorization for Use of Military Force (AUMF) against those responsible for the terror attacks of September 11, 2001),48 and had been engaged in hostilities against U.S. and Coalition forces, Hamdi was legally indistinguishable from the defendants in *Quirin*.49 According to the Court:

In light of these principles, it is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war, in permitting the use of “necessary and appropriate force,” Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.50

Earlier in the opinion, the Court emphasized that the “principles” and customs it referenced in the extract quoted above were the principles derived from the law of war permitting the preventive detention of captured enemy personnel.51 According to the Court, Congress implicitly invoked these principles when it authorized the President to use all “necessary and appropriate” force against “nations, organizations, or persons associated with

---

47. *Id.* at 519 (“There is no bar to this Nation’s holding one of its own citizens as an enemy combatant . . . [c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of . . . the law of war”) (quoting *Ex parte Quirin*, 317 U.S. at 37–38).

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

*Id.*, § 2(a).
49. *Hamdi*, 542 U.S. at 516–17 (“The threshold question before us is whether the Executive has the authority to detain citizens who qualify as ‘enemy combatants’ . . . [w]e find that regardless of whether the President could order detention without Congressional authority, in this situation Congress has in fact authorized Hamdi’s detention, through the AUMF.”).
50. *Id.* at 519.
51. *Id.*
the September 11th terrorist attacks.52 In short, the AUMF authorized the President to invoke the same principle of military necessity that had been central to the Quirin Court's endorsement of preventive detention of the German saboteurs in 1942.

The Hamdi opinion laid a legal foundation that continues to be built upon today. By extending the Quirin holding to armed conflict against individuals, organizations, and nations associated with the terrorist attacks of September 11, the Court endorsed the application of the armed conflict legal framework to the struggle against transnational terrorism.53 However, by condemning the summary process relied upon by the executive branch to determine that Hamdi fell into the category of detainable enemy belligerent, the Court also set in motion a procedural revision process that continues to this day.54 Thus, the preventive detention of terrorists pursuant to the law of armed conflict involves two distinct legal questions. First, from a substantive perspective, who falls within the scope of this preventive detention authority? Second, to what process are individuals alleged to fall within that scope entitled?

1. The Substantive Foundation

As significant as Hamdi's extension of the Quirin precedent was to the "war on terror,"55 the Court addressed only what it characterized as the narrow question of whether a U.S. citizen falling into an accepted core definition of enemy combatant could be preventively detained.56

Concluding that Hamdi's detention did not violate substantive due process was accordingly unremarkable. Instead, it was based on the narrow underlying conclusion that preventive detention of an enemy combatant in an armed conflict is legally authorized, even if, as in the case of Hamdi, the combatant is a U.S. citizen.57 (This conclusion perforce means

52. See id. at 518.
54. See, e.g., BENJAMIN WITTES ET AL., THE EMERGING LAW OF DETENTION: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING 76 (2010), available at http://www.brookings.edu~/media/Files/rc/papers/2010/0122_guantanamo_wittes_chesney/0122_guantanamo_wittes_chesney.pdf ("[W]hile the detainees are asking the Court of Appeals to adopt a stricter standard of proof, the government is asking it to force the lower court judges to lighten up.").
55. The authors use this term to generally define the operations against al-Qaeda and Taliban operatives occurring primarily in Afghanistan, with the recognition that some operations occur in other countries or parts of the world.
56. The Court acknowledged that the issue before it was

whether the Executive has the authority to detain citizens who qualify as “enemy combatants.” There is some debate as to the proper scope of this term, and the Government has never provided any court with the full criteria that it uses in classifying individuals as such. It has made clear, however, that, for purposes of this case, the “enemy combatant” that it is seeking to detain is an individual who, it alleges, was “part of or supporting forces hostile to the United States or coalition partners” in Afghanistan and who “engaged in an armed conflict against the United States” there... [w]e therefore answer only the narrow question before us: whether the detention of citizens falling within that definition is authorized.

Hamdi, 542 U.S. at 516.
57. See id. at 532–33.
Unprivileged Belligerents, Preventive Detention, and Fundamental Fairness

that such authority exists with respect to alien enemy combatants, given that aliens enjoy no more constitutional protections than U.S. citizens.) This conclusion is based on a law of armed conflict axiom: the authority of states to kill enemy combatants implies the authority of states to detain them to prevent their return to hostilities.

We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the “necessary and appropriate force” Congress has authorized the President to use.

The *Hamdi* opinion therefore explicitly validated the legality of preventive detention of enemy combatants; however, it did not provide a comprehensive definition of the term “enemy combatant.” Instead, the Court expressly left the definitional process to the lower courts: “The legal category of enemy combatant has not been elaborated upon in great detail. The permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them.” Subsequent U.S. practice, judicial decisions, and congressional action in this field have exposed how laced with ambiguity this term is in the context of counter-terror operations.

The *Hamdi* Court apparently expected greater clarity would result from decisions related to subsequent habeas corpus petitions from Guantanamo detainees. However, Congress quickly responded to *Hamdi* (and the Supreme Court’s decision in *Rasul v. Bush*) that the...
federal habeas statute, 28 U.S.C. § 2241, applied to detainees in Guantanamo)\textsuperscript{61} by restricting the access of Guantanamo detainees to habeas corpus review. These restrictions were set forth in the Detainee Treatment Act (DTA), which, \textit{inter alia}, amended the habeas statute to effectively reverse the decision in \textit{Rasul} and instead provided for an alternative form of review by the D.C. Circuit Court of Appeals.\textsuperscript{62} Then, in response to the Supreme Court’s determination in its 2006 \textit{Hamdan v. Rumsfeld} decision, which held that the DTA did not apply retroactively (this permitting statutory habeas challenges to go forward so long as they were pending at the time Congress passed the DTA),\textsuperscript{63} Congress enacted the Military Commissions Act (MCA) of 2006,\textsuperscript{64} which, \textit{inter alia}, amended the statute so that it was clear that the restrictions imposed on statutory habeas access by the DTA applied both prospectively and retrospectively.

The foregoing series of judicial decisions and countermanding statutory amendments set the stage for \textit{Boumediene v. Bush}.\textsuperscript{65} \textit{Boumediene} involved the questions of (1) whether non-resident aliens detained outside the territory of the United States at the Guantanamo detention facility were entitled to the constitutional privilege of habeas corpus; and, if so, (2) whether the DTA as amended by the MCA provided an adequate substitute for that privilege.\textsuperscript{66} Justice Kennedy wrote for the five-justice majority which held that the unique

\begin{quote}
Application of the habeas statute to persons detained at [Guantanamo] is consistent with the historical reach of the writ of habeas corpus. At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm, as well as the claims of persons detained in the so-called “exempt jurisdictions,” where ordinary writs did not run, and all other dominions under the sovereign’s control . . . .

In the end, the answer to the question presented is clear: Petitioners contend that they are being held in federal custody in violation of the laws of the United States. No party questions the District Court’s jurisdiction to issue the writ, then it had the power to do so:

§ 2241, by its terms, requires nothing more. We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners’ habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base.
\end{quote}

\textsuperscript{61} Rasul v. Bush, 542 U.S. 466 (2004). The Supreme Court, in considering whether detainees at Guantanamo could seek relief under the federal habeas statute, noted the historical applications of the writ of habeas corpus and determined that if the issuing court had jurisdiction to issue the writ, then it had the power to do so:

\textsuperscript{62} DTA.

\textsuperscript{63} Hamdan v. Rumsfeld, 548 U.S. 557 (2006). The Government’s first challenge to the federal courts exerting habeas jurisdiction over Guantanamo detainees was based on an argument that the DTA applied retroactively to cases pending at the time of the statute’s enactment. See id. at 574–75. The Court analyzed other provisions of the DTA and found language which applied the DTA to pending cases; however this language was absent from the jurisdiction-stripping provisions. Id. at 578–79. The Court rejected the retroactively-applied jurisdiction-stripping argument, holding that “a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute” and determining that “Congress’ rejection of the very language that would have achieved the result the Government urges here weighs heavily against the Government’s interpretation.” Id. at 577–80.

\textsuperscript{64} MCA.


\textsuperscript{66} U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”). The Constitution does not actually grant any right to habeas corpus; the Suspension Clause merely

\textsuperscript{Id. at 481–83 (footnotes omitted) (citations omitted).
situation of these detainees—detained by the federal government in an area outside the territorial sovereignty of the United States but subject to the exclusive control of the United States, with no viable alternative access to challenge the legality of their detention; facing a genuine prospect of generational deprivation of liberty; and far removed from the battlefield point of capture—required extension of constitutional habeas access to allow them to challenge their detention. Furthermore, the Court concluded that review in the U.S. Court of Appeals for the District of Columbia, authorized by the DTA and MCA, was an inadequate substitute for habeas review by a court, as required by the U.S. Constitution.

As a result of this decision, the process anticipated by Justice O’Connor in her Hamdi opinion, by which lower courts would add the proverbial “flesh to the bones” of the term “enemy combatant” finally began in earnest. Since the Boumediene decision, the federal courts in the District of Columbia Circuit have entertained numerous habeas petitions filed by Guantanamo detainees challenging the legality of their continued detention. Many of these challenges have required the courts to engage in the process of determining, first, how to define “enemy combatant” and second, which petitioners have been properly designated by the government as enemy combatants subject to lawful preventive detention.

states the situations under which Congress may suspend the writ. Thus, in American law, the right to constitutional habeas relief both predates the Constitution of the United States and should be assumed to be available unless Congress has enacted legislation under the Suspension Clause to strip away rights to access the writ. Constitutional habeas rights should not be confused with statutory habeas rights. The United States Code provides the procedure for applications of statutory habeas corpus. See 28 U.S.C. §§ 2241–54.

67. Contra Boumediene, 553 U.S. at 768–69 (discussing how Johnson v. Eisentrager declined to extend full constitutional protections to territories temporarily controlled by the United States (such as the territories temporarily occupied and administered by the United States following the German surrender in 1945) but asserting that “Guantanamo Bay . . . is no transient possession. In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States”) (citing Rasul v. Bush, 542 U.S. 466, 480 (2004) (“By the express terms of its agreements with Cuba, the United States exercises ‘complete jurisdiction and control’ over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses.”) (citation omitted)). In his Rasul concurrence, Justice Kennedy also emphasizes this point:

Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities. . . . In a formal sense, the United States leases the Bay; the 1903 lease agreement states that Cuba retains “ultimate sovereignty” over it. At the same time, this lease is no ordinary lease. Its term is indefinite and at the discretion of the United States. What matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay. From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the “implied protection” of the United States to it.

Rasul, 542 U.S. at 487 (Kennedy, J., concurring) (citation omitted) (citing Johnson v. Eisentrager, 339 U.S. 763, 777–78 (1950)).

68. See, e.g., Boumediene, 553 U.S. at 729 (discussing a concern in the CSRT process and identifying that “the consequence of error [in a CSRT tribunal] may be detention for the duration of hostilities that may last a generation or more”).

69. See id. at 770–71, 797 (noting that “[s]ome of these petitioners have been in custody for six years with no definitive judicial determination as to the legality of their detention” and, as a result, determining that “[t]heir access to the writ is a necessity to determine the lawfulness of their status, even if, in the end, they do not obtain the relief they seek”).

70. See id. at 791–92.

71. Between 2004 and 2009, a total of 581 CSRTs were held; of those, 539 detainees were determined to be properly classified as enemy combatants, 39 were found to no longer be classified as enemy
The contours of the definition that is gradually emerging from this litigation process are sketchy at best. As a result, it is useful to conceptualize the LOAC preventive detention authority for terrorist operatives through the following analytical model.

First, as the courts have recognized that the AUMF is the basis for the authority to preventively detain in the present conflict, the courts have focused their analysis on defining the groups that fall within the scope of the AUMF, i.e., the Taliban, al-Qaeda, and associated forces.72

Second, in order to apply AUMF detention authority, the courts have adopted a working definition of an “unlawful enemy belligerent” (the term adopted by President Obama as a substitute for the original “unlawful enemy combatant” used by President Bush),73 as more fully discussed below.

Third, in applying the authority and definition in individual cases, the reviewing courts have sought to determine (1) whether the government, by a preponderance of the evidence, has alleged conduct by the detainee that is sufficient to bring the detainee within the definition of “unlawful enemy belligerent;” and (2) whether the government has provided sufficient evidence to support its allegations.74 An affirmative finding with respect to both

72. Hamlily v. Obama, 616 F. Supp. 2d 63, 70 (D.D.C. 2009) (holding that because the AUMF authorized the use of “all necessary and appropriate force” against the non-state organizations involved in the 9/11 attacks, the AUMF also implicitly authorized the use of such force, including detention, against the members of those organizations and non-member supporters, regardless of whether they directly participated in hostilities or not).


74. See WITTES, supra note 54, at 13 citing In re Guantanamo Bay Detainee Litigation, Misc. No. 08-442, (D.D.C., Nov. 6, 2008) (case management order citing Boumediene to establish “[t]he

combats, and 2 tribunals were held in suspension. DEP’T OF DEF., COMBATANT STATUS REVIEW TRIBUNAL SUMMARY (Feb. 10, 2009), available at http://www.defense.gov/news/csrtsummary.pdf. The Administrative Review Board records made public show that a total of approximately 707 ARBs had been held between 2006 and February 2008, and approximately 95 detainees were designated to be transferred. See generally DEP’T OF DEF., ADMINISTRATIVE REVIEW BOARD SUMMARY: ARB-2 (Apr. 25, 2006), available at http://www.defense.gov/news/arb2.pdf (reporting that out of 330 detainees eligible for an ARB review during the period of April 25, 2006 to February 20, 2007, 330 ARBs were held, 55 detainees were designated to transfer and 273 detainees were designated to continue detainment, with 2 decisions not yet finalized by the Designated Civilian Officer (DCO)); DEP’T OF DEF. ADMINISTRATIVE REVIEW BOARD SUMMARY: ARB-3, available at http://www.defense.gov/news/arb3.pdf (reporting that out of 253 detainees eligible for an ARB review during the period of January 30, 2007 to March 2008, 253 ARBs were held, 33 detainees were designated to transfer and 195 detainees were designated to continue detainment, with 25 decisions not yet finalized by the DCO). As of January 2, 2011, 67 habeas petitions filed by Guantanamo detainees had been considered by federal district courts in the D.C. Circuit. See generally Lyle Denniston, Boumediene: The Record So Far, SCOTUSBLOG (Jan. 2, 2011, 11:44 PM), http://www.scotusblog.com/2011/01/boumediene/. Of 38 granted writs of habeas corpus, the United States did not appeal 29 and did appeal 9; 2 of those appealed by the United States were vacated or reversed. See id. Table 1. Of the 29 detainees whose writs were granted and not appealed, all but 5 detainees had been transferred to other countries as of January 2011. Id. For a discussion of the various detainability definitions employed by the D.C. federal district courts and D.C. Circuit Court of Appeals, see infra note 184.
inquiries results in the denial of habeas relief and continued preventive detention, at least until the executive chooses to release the detainee through the Periodic Review Board process,75 which will be discussed in more detail below. A negative finding on either of these inquiries results in granting habeas relief and an order to release the detainee (which does not result in actual release until the U.S. government has identified a nation willing to take the detainee).

This case-by-case approach to each detainee who wishes to challenge his detention is the focus of a process of complicated and time-consuming habeas litigation before the U.S. District Court for the District of Columbia. Developing a workable definition of “unlawful enemy belligerent” involves a complex synthesis of existing LOAC principles related to preventive detention of enemy belligerents and the realities of counter-terror operations. It is impossible to ignore the reality that the U.S. government has struggled as a result of the absence of express LOAC authorities applicable to combating transnational terrorism. Combined with the operational challenges of conducting effective counter-terrorism operations, this has made it difficult to develop a logical and clearly legitimate approach to preventive detention of transnational terrorist operatives. As a result, the courts have been called upon to intervene to clarify the scope of preventive detention authority, and are now decisively engaged in rendering decisions that ostensibly will provide clearer guidance on the scope of this authority. Whether such clarity will emerge, and, if so, whether it will be operationally rational, remain open questions.

2. Extending the Traditional Legal Basis to Terrorist Detainees

Continuing uncertainty aside, it is clear that the Hamdi Court’s holding—that detention of enemy belligerents was a necessary incident of war—provided an important foundation for subjecting terrorists to preventive detention.76 Hamdi, having been captured on the field of battle after engaging U.S. and Coalition forces in combat, fell into the core of any definition that could be adopted. The United States, however, would extend the detention authority endorsed in Hamdi well beyond that core.

President Bush defined the category of individuals subject to wartime detention in his Military Order No. 1 directing the detention of captured terrorists at Guantanamo. That Order included the following definition of individuals subject to preventive detention:

(a) The term “individual subject to this order” shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:

   (i) there is reason to believe that such individual, at the relevant times,

   (i) is or was a member of the organization known as al Qaida;

76. See Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004) (“Because detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war, in permitting the use of ‘necessary and appropriate force,’ Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.”).
(ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or

(iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and

(2) it is in the interest of the United States that such individual be subject to this order.77

This definition was broader than the category of enemy belligerent analyzed by the Hamdi Court.78 Nonetheless, it provided the initial scope of detention authorization relied on by the United States. Of particular significance is that it included within its scope not only actual terrorist operatives captured during the planning, preparation, or execution of hostilities, but also individuals who provide assistance to such operatives.79 Additionally, a determination of membership in al-Qaeda—whatever the basis for that determination—would itself be sufficient to trigger preventive detention authority.80

Although President Bush attempted to prohibit judicial review of the legality of the preventive detention regime established in Military Order No. 1, it soon became clear that the federal courts were unwilling to acquiesce to his effort. In Rasul v. Bush,81 the Supreme Court rejected the President’s attempt to shield the Guantanamo detention operations from judicial scrutiny by interpreting the federal habeas corpus statute to run to the Guantanamo Naval Base.82 However, on the same day, the Court in Hamdi indicated that judicial review of detentions might not be necessary should the executive provide the type of minimal procedural protections that the Court indicated were required for U.S. citizen detainees.83

77. Military Order No. 1, supra note 45, § 2(a). While detention is authorized under Military Order No. 1, few detainees were actually designated as subject to the Military Order for purpose of detention. See Jennifer K. Elsea & Michael John Garcia, CONG. RESEARCH SERV., RL 33180, ENEMY COMBATANT DETAINEES: HABEAS CORPUS CHALLENGES IN FEDERAL COURT 9 n.59 (2010). Rather, such detention generally occurs under the authority granted in the AUMF, which courts have interpreted to include the right to detain.

78. See Hamdi, 542 U.S. at 521 (2004). If the record establishes that United States troops are still involved in active combat in Afghanistan, those . . . are authorized).

79. See Military Order No. 1, supra note 45, § 3(a).

80. See id.


82. Id. at 480 (discussing how the terms of the Guantanamo lease state that the United States “exercises ‘complete jurisdiction and control’ over the Guantanamo Bay Naval Base,” and as the petitioners are under the exclusive custody of the United States, a United States district court has jurisdiction to hear habeas corpus challenges from the petitioners under the federal habeas statute).

83. See Hamdi, 542 U.S. at 533–34.
response to the suggestion, the Department of Defense implemented a new procedure for assessing the belligerent status of individuals transported to Guantanamo.84

The process implemented by the Department of Defense involved two review tribunals for all individuals initially designated by the executive branch as subject to Military Order No. 1. The first tribunal was designated as a Combatant Status Review Tribunal (CSRT). This CSRT would make the initial determination of whether an individual transported to Guantanamo should continue to be detained preventively as the result of being an unlawful enemy combatant (the predecessor term to the currently-used “unprivileged enemy belligerent”).85 The procedures adopted for the CSRT were based loosely on the procedures provided for in Army Regulation (AR) 190-8,86 which itself provided the procedures for conducting a review hearing required by the Geneva Prisoner of War Convention when the POW status of a detainee is uncertain; however, the CSRT provided additional procedural protections that were not set out in AR 190-8.87 In the context of POW determinations, these tribunals are known as Article 5 Tribunals (referring to the article in the Geneva Prisoner of War Convention that requires a tribunal to determine POW status when a captive's status is “in doubt”).88


85. See CSRT Order, supra note 84, pmbl. (stating that the CSRT Order applied only to foreign nationals held at Gunatanamo).

86. DEP’T OF THE ARMY, ARMY REGULATION 190-8: ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES § 3-15(b) (1997) [hereinafter AR 190-8].

87. See CSRT Order, supra note 84, ¶¶ (g)–(h).

88. GPW, supra note 25, art. 5 (“Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”). The referenced Article 4 defines prisoners of war as:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and . . . other volunteer corps . . . provided that such [organizations] fulfill the conditions . . . of being commanded by a person responsible for his subordinates; . . . having a fixed distinctive sign recognizable at a distance; . . . carrying arms openly; . . . [and] conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof . . . provided that they have received authorization from the armed forces which they accompany . . . .

(5) Members of crews . . . of the merchant marine and . . . civil aircraft of the Parties to the conflict . . . .

(6) Inhabitants of non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into
However, because President Bush determined that the individuals subjected to detention at Guantanamo could not qualify as POWs (eliminating any doubt that they might qualify for POW status), a different characterization was adopted for use in the CSRTs. Instead of determining whether they were entitled to POW treatment, a CSRT would determine whether detainees were unlawful enemy combatants. If an individual was designated as an unlawful enemy combatant, detention would be authorized indefinitely subject to an annual review to assess the continued detention justification. This annual review would be conducted by a second tribunal, which had been established prior to, and possibly in anticipation of, the Rasul and Hamdi decisions, known as the Administrative Review Board (ARB).

The CSRTs would obviously need a standard to apply to determine who would remain in preventive detention and who had been improperly detained and transported to Guantanamo. The Secretary of Defense’s order directing the Secretary of the Navy (presumably because the Navy operates Guantanamo) to establish the CSRT provided the following definition:

> regular armed units, provided they carry arms openly and respect the laws and customs of war.

*Id.* art. 4. Subsection (B) defines two additional categories of persons who are treated as POWs under the Prisoner of War Convention. In his commentary to the Third Convention, Jean S. Pictet (who served as an editor for the 1949 Geneva Conventions) describes the intent leading up to the adoption of the second paragraph of Article 5:

> At Geneva in 1949, it was first proposed that for the sake of precision the term “responsible authority” should be replaced by “military tribunal[,]” This amendment was based on the view that decisions which might have the gravest consequences should not be left to a single person, who might often be of subordinate rank. The matter should be taken to a court, as persons taking part in the fight without the right to do so are liable to be prosecuted for murder or attempted murder, and might even be sentenced to capital punishment. This suggestion was not unanimously accepted, however, as it was felt that to bring a person before a military tribunal might have more serious consequences than a decision to deprive him of the benefits afforded by the Convention. A further amendment was therefore made to the Stockholm text stipulating that a decision regarding persons whose status was in doubt would be taken by a “competent tribunal”, and not specifically a military tribunal.

INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 77 (Jean S. Pictet ed., 1952) (internal citations omitted). It is clear that from the beginning of the codification of proper treatment for any detained enemy combatants, whether lawful combatants entitled to POW status or unlawful combatants not entitled thereto, that the military tribunal might not be the proper forum in which the status determination should be made. However, it is telling that those who drafted and edited the 1949 Conventions did not truly imagine a world where combatants would truly be owned by no nation: in the first sentence of his commentary on paragraph 2 of Article 5, Pictet writes: “This [paragraph] would apply to deserters, and to persons who accompany the armed forces and have lost their identity card.” *Id.*


**Unprivileged Belligerents, Preventive Detention, and Fundamental Fairness**

**Enemy Combatant.** For purposes of this Order, the term “enemy combatant” shall mean an individual who was 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. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces. Each detainee subject to this Order has been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense.92

This definition did seem to establish the requirement for a more direct link between the detainee and the conduct of combat operations than that in Military Order No. 1. However, by also including within the definition of detainable captives those individuals who provided support to al-Qaeda or the Taliban, it produced no significant difference between the controlling standard to be applied by the CSRTs and the President’s initial definition.

Another definition that emerged in response to the initial detainee decisions by the Supreme Court was included in the Military Commissions Act of 2006 (MCA).93 This law was enacted by Congress in response to the Supreme Court’s decision in *Hamdan* striking down the military commission ordered established by President Bush in Military Order No. 1.94 Congress enacted the MCA to both cure the procedural defects that had doomed that original military commission and to ensure that unlawful enemy combatants detained at Guantanamo would in fact be subject to trial by military commission. Accordingly, it was necessary for Congress to provide its own definition of who fell within MCA jurisdiction—a definition that by implication also indicates who may be preventively detained. According to 10 U.S.C. § 948a, the persons subject to the MCA include:

(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or

(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.95

What is most significant about both the definition adopted by the Department of Defense for purposes of the CSRTs, and the definition enacted by Congress in the 2006 MCA, is that each indicates that persons who materially support a terrorist group need not actually commit belligerent acts in order to be treated as enemy combatants.

This broad definition would remain the basis for U.S. detentions for as long as the detention process remained outside judicial scrutiny. Accordingly, the United States could, and often did, subject captured aliens, believed to be part of or to have provided support to

92. CSRT Order, supra note 84, ¶ (a).

93. MCA, supra note 64.

94. Hamdan v. Rumsfeld, 548 U.S. 632 (2006) (holding Common Article 3 of the Geneva Conventions applicable to the armed conflict against al-Qaeda and further holding that the military commissions did not constitute “regularly constituted courts” as required by Common Article 3).

95. 10 U.S.C. § 948a (2006) (as enacted by the MCA, supra note 64, § 3), amended by Pub. L. 111-84, tit. XVIII, 123 Stat. 2190 (2009). To be subject to trial by military commission, a person meeting the definition of unlawful enemy combatant also must be an alien (i.e., not a U.S. citizen). Id.
al-Qaeda, to detention without charge or trial. The CSRTs did provide a limited check on this process, but only in relation to the weight of the evidence supporting the characterization and not in relation to the definition itself. Nor did the limited judicial review of CSRT decisions subsequently authorized in the Detainee Treatment Act provide detainees with a viable opportunity to challenge the scope of the enemy combatant definition; it merely authorized judicial review of whether the CSRT had followed its own procedures.

In June 2008, the efforts of the President and Congress to limit judicial review of preventive detention of Guantanamo detainees were nullified by the Supreme Court’s decision in Boumediene v. Bush. In a 5–4 decision, the Court held that (1) the detainees enjoyed a constitutional privilege to petition the federal courts for habeas corpus; (2) the review procedures in the CSRTs and the Detainee Treatment Act were not an adequate substitute for this privilege; and (3) the detainees could challenge their continued detention as a violation of both substantive and procedural due process. This decision cleared the way for detainees to challenge not only the process they had been afforded to authorize their preventive detention, but perhaps more importantly the scope of the definition of enemy belligerent itself—the definition pursuant to which they were detained. The response by both the executive branch and the courts that began to decide these challenges is ongoing at the time of this writing, although the trend seems to be toward strengthening the link between the LOAC principle of military necessity and the definition that justifies preventive detention. By opening the door to federal court review, Boumediene placed Guantanamo detainees in what is in actuality an enviable position.


While many of the Supreme Court opinions related to detainment have issued from suits filed by detainees held in Cuba, the Bagram Collection Point (BCP) near Kabul, Afghanistan has been the primary detention facility for terrorist operatives captured in Afghanistan since May 2002. From Bagram, some detainees were transferred to Guantanamo, while others remained detained in Afghanistan. It was at Bagram that the first detainee review boards...
occurred, wherein personnel from several different military offices reviewed detainee files and applied the classified criteria that might require the detainee to be transferred to another facility, such as Guantanamo. From 2002 to the present, the detainee review boards conducted at detention facilities have undergone multiple iterations in name, form, and procedure.

The first set of detainability review meetings were conducted by Detention Review Boards (DRBs) making assessments from 2002 until 2005. In September 2004, transfers between Bagram and Guantanamo ceased, in large part due to the Supreme Court’s rulings in *Rasul v. Bush* and *Hamdi v. Rumsfeld* three months prior. During the initial two years of DRBs at Bagram, detainees were still being transferred from Bagram to Guantanamo; thus, “the primary determination of the DRB was whether or not a detainee met the (classified) criteria to be transferred to GTMO.” Additionally, a major determinant of whether a detainee
would be transferred to Guantanamo was the potential of gathering further intelligence from the detainee.\textsuperscript{105} If the DRB determined that the detainee was an enemy combatant but did not meet the Guantanamo transfer requirements, Military Intelligence would make a determination as to whether the detainee had future intelligence value or presented a continued security threat; if so, the detainee would continue to be held. At no point in the DRB process was the detainee informed that the DRB was occurring; additionally, only those individuals actually detained at the BCP underwent the Detention Review Board process, even though the BCP itself housed far fewer detainees than the total number of individuals detained in Afghanistan.\textsuperscript{106}

In 2004, Bagram was re-designated as the Bagram Theater Internment Facility (BTIF) and in 2005, the DRBs changed to Enemy Combatant Review Boards (ECRBs). The 2005 policy change would remain in effect until January 2007.\textsuperscript{107}

In February 2007, the boards’ name changed again, to Unlawful Enemy Combatant Review Boards (UECRB). Accompanying the name change were changes to composition (i.e., reduction in the number of officers on the Board from five down to three) and procedure

detainee was determined to be an enemy combatant, the next question was whether the detainee met the criteria to be sent to GTMO.

\textit{Id.} (footnote omitted).

\textsuperscript{105}. \textit{Id.} at 17.

\textsuperscript{106}. \textit{Id.} Bovarnick describes the state of affairs for DRBs from 2002–2005 in the following manner:

Between May 2002 and June 2003, based on the . . . commander's guidance, the maximum number of detainees in the BCP never exceeded one hundred. While the overall detainee population, which included the Kandahar detention facility and other temporary detention sites, was much larger, only those detainees at the BCP went through the DRB process. During this first year, anywhere from ten to fifteen detainee files were reviewed each week with each DRB session to review and discuss detainee files with the CJ2 [the lead intelligence officer] lasting up to two hours. With the constant flow of detainees in and out of the BCP, the number of files reviewed was simply a calculation to process the ninety-day reviews. In the summer of 2003, the maximum number of detainees authorized in the BCP doubled to two hundred; consequently, the number of files reviewed at each DRB rose accordingly.

\textit{Id.} (footnote omitted).

\textsuperscript{107}. \textit{Id.} at 18–19. Bovarnick notes that the process remained very similar to the 2002–2005 DRB review but points out one positive change in transferring some detainees to local authorities for prosecution:

Other than the name change and the alteration in board composition [reducing the number of military officers sitting on the Boards], the procedures were similar to those dating back to 2002; detainees could not appear in person before the boards, nor did they have a personal representative (PR). The ECRBs met once per week, but instead of holding pre-meetings like the ones that met in the 2002–2005 timeframe, the board members were provided detainee packets in advance and then convened to discuss the packets and vote on whether the detainee met the criteria for enemy combatant status. The only oral evidence presented at the ECRB was still given by the MI personnel who prepared the detainee packets. If the capturing unit had an interest, for either detention or release, they could send a representative to the board to argue their position. While transfer to GTMO was no longer an option, the ECRB could recommend release or continued detention in certain categories based on the level of threat. In an important step forward in both the Rule of Law and counterinsurgency realms, new options for the ECRBs were explored such as transfer to the Afghan authorities for prosecution or repatriation programs.

\textit{Id.} (footnote omitted).
which would last until September 2009. The first and most important change was a standard, implemented in April 2008, of officially providing a detainee with notice of a pending UECRB. This notice provided a detainee with information as to the “general basis of his detention” and allowed the detainee to appear before the board and make a statement.

In January 2009, President Obama signed three executive orders related to the interrogation of detainees and procedures to be followed at detainment centers. Significantly, Order 13,493 included the following definition of who could be detained:

The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.

Additional to the Board’s duties were categorizing the detainees based on relative intelligence value and threat level, and also determining the viability of local prosecution:

[Detainees were divided] into separate categories: High Level Enemy Combatant (HLEC); Low Level Enemy Combatants (LLEC); and Threat only. Those who were to be released were categorized as No Longer Enemy Combatant (NLEC). As the UECRB worked its way through the six hundred detainees in the BTIF, the files of all detainees assessed as LLECs were transferred to the DAB [Detainee Assessment Branch, which made recommendations of prosecution to the local Afghan legal authorities]. The DAB, comprised of military intelligence analysts and military criminal investigators, assessed the detainee files for potential transfer to Afghan authorities for prosecution. To support the Rule of Law mission, the DAB would only recommend transfer of cases for prosecution if there was solid evidence. Those detainees not recommended for transfer remained interned until their next review in six months.

Id. at 19–20 (footnotes omitted).

*HUMAN RIGHTS FIRST*,

**FIXING BAGRAM: STRENGTHENING DETENTION REFORMS TO ALIGN WITH U.S. STRATEGIC PRIORITIES** 16 n.23 (2009) (citing Declaration of Colonel Charles A. Tennison (Sept. 15, 2008)).
Order 13,493 thus establishes the legal framework for a unit to detain an individual on the battlefield: “If this threshold determination is not met on the battlefield, then a unit has no authority to detain.” At the same time the President issued this Executive Order, the Secretary of Defense was preparing to implement new board procedures and the creation of the Afghanistan and Joint Task Force—the task force “charged with running all detention operations in Afghanistan, and more specifically, the Legal Operations Directorate of JTF 435, the team responsible for the daily operations of the DRBs.” Notably and as discussed below, the Secretary of Defense’s July 2009 detention policy does not apply to approximately 80% of American troops operating in Afghanistan.

An important note is that the 2009 procedures established by the President and Department of Defense are applicable only to the U.S. Forces-Afghanistan/Operation Enduring Freedom (USFOR-A/OEF), not the International and Security Assistance Force (ISAF); while forces of USFOR-A/OEF have all the power given by the President to detain individuals in Afghanistan, ISAF follows a different detainment policy. The major difference in detention authority between USFOR-A/OEF and ISAF is that “USFOR-A can...”

113. Bovarnick, supra note 100, at 21. Once detained, the review board applies the procedures set forth in July 2009 by the Secretary of Defense in making initial detention decisions as well as during the regular review process. See id.

114. Id. at 11 (explaining that the changes to the board process were “designed to ensure that due process protections are afforded to the detainees housed at the new Detention Facility in Parwan (DFIP”). Unfortunately, the D.C. Circuit’s May 2009 decision in Al Maqaleh v. Gates—which occurred after President Obama’s Executive Order but prior to the implementation of the Secretary of Defense’s new policies—did not analyze or discuss “the new procedure . . . put in place [at Parwan, and thus] the issue of how much process Parwan detainees should be afforded in their status hearings remains to be seen.” Id. at 48.

115. The 2009 policy change applies only to USFOR-A, which is composed of “U.S. Special Operations Forces (the capturing units), Joint Task Force 435, which runs all detention operations in Afghanistan . . . , and other critical enablers, such as route clearance and Palladin units.” Id. at 21. The remaining 80% plus of U.S. troops are deployed as part of the international ISAF mission; their very different detainment policy is discussed infra at note 117. This arrangement is further explained by Prescott:

The status of military personnel who are part of Operation Enduring Freedom (OEF), the original U.S. mission in Afghanistan, is set out in an exchange of diplomatic notes between the U.S. and Afghanistan. Under this arrangement, Afghanistan agrees to waive criminal jurisdiction over these personnel, and to allow U.S. personnel and equipment freedom of movement into and within Afghanistan to conduct operations without the need to pay taxes and duties or to obtain visas. Specifically, U.S. personnel are “accorded a status equivalent to that accorded to the administrative and technical staff” of the U.S. Embassy, and are immune to Afghan criminal jurisdiction. The Parwan Detention Facility is considered an OEF mission. The other legal regime governing the presence of U.S. personnel is found in the Military Technical Agreement (MTA) between the International Security Assistance Force (ISAF) and Afghanistan. The majority of U.S. forces in Afghanistan, and almost all of the international forces, are covered by the MTA. Under its terms, Afghanistan has waived criminal, tax and customs jurisdiction over ISAF forces and has afforded them complete freedom of movement across its borders and within the country.

Prescott, supra note 31, at 41–42 (footnotes omitted).

116. See Bovarnick, supra note 100, at 21. The ISAF is part of the NATO mission in Afghanistan, and roughly 83% of U.S. forces in Afghanistan (nearly 76,500 out of 95,000 personnel) are assigned to ISAF. Id. The roughly 17,000 U.S. troops not assigned to ISAF fall under USFOR-A and continue to operate under the authority of Operation Enduring Freedom (OEF). Id.
send captured personnel to the DFIP [Detention Facility in Parwan] whereas ISAF units (including the U.S. forces assigned to ISAF) cannot.”

In March 2011, President Obama signed an executive order related to the continuing status review of Guantanamo detainees. This order established Periodic Review Boards (PRBs) for all detainees and mandated an initial review for each detainee to occur no later than March 7, 2012. The greatest changes to the detainment review process included in the order include the right of detainees to be assisted by private counsel (although counsel will not be appointed or provided by the Government and thus must be retained privately by the detainee) and for the detainee himself to make an oral or written statement to the PRB, present information, answer the PRB's questions, and call witnesses on his own behalf. If the PRB determines that the detainee should not be released, the Order states that “continued detention . . . shall be subject to subsequent full reviews and hearings by the PRB on a triennial basis.” Additionally, continued detainment will be “subject to a file review every 6 months in the intervening years between full reviews” and the detainee is not permitted to verbally address the PRB conducting a file review but may “make a written submission in connection with each file review.” The order provides that the file review will include any relevant new information about the detainee collected and compiled since the previous review and that “[i]f, during the file review, a significant question is raised as to whether the detainee’s continued detention is warranted . . . the PRB will promptly convene a full review.”

The detainment assessment and review process has undergone drastic changes between its inception in 2002 and President Obama’s 2011 Executive Order. Where initial determinations were made primarily on the basis of future intelligence gathering, recent changes have provided increasing amounts of traditional due process to detainees not only in

117. Id. The policy for individuals captured by ISAF on the battlefield is as follows:

All insurgents captured by ISAF troops must be turned over to the Afghan National Security Directorate (NDS), either within ninety-six hours [the general time frame since 2005] for non-U.S. ISAF units or fourteen days for U.S. ISAF units [the U.S.-specific time frame since March 2010]. The NDS is Afghanistan’s domestic intelligence agency with jurisdiction over all insurgent and terrorist activity. In essence, the NDS has the right of first refusal to accept the transfer of captured personnel believed to be insurgents or terrorists. In addition to the personnel that might be expected to make up an intelligence agency, the NDS also has a staff of investigators that specifically work to prepare cases for prosecution within the Afghan criminal justice system. Currently, a team of Afghan prosecutors and judges with special expertise are temporarily assigned to work exclusively with the NDS to coordinate this effort to try suspected insurgents and terrorists under the appropriate Afghan criminal laws within the Afghan criminal justice system. Each province in Afghanistan has at least one judge and several prosecutors assigned to work on NDS cases.

Id. at 21–22 (footnotes omitted).


119. Id. § 3.

120. Id. § 3(a)(2)–(3).

121. Id. § 3(b).

122. Id. § 3(c).

123. Id.
Guantanamo, but in Afghanistan—where detainees do not currently have the power to challenge their detentions with habeas corpus.  

**IV. Powell v. Alabama and the Significance of Value-Based Legal Representation**

When the Supreme Court struck down the convictions in the first round of the Scottsboro trials, the standards of zealous advocacy were customary at best. Unlike today, lawyers were not bound to ethical codes of conduct that imposed this duty. Nonetheless, representation of a criminal defendant by an individual inculcated in the lawyer ethos of zealousness was central to the Court’s decision. The Alabama Supreme Court had rejected Powell’s claim of denial of meaningful representation based on the events occurring on the day of his trial. When the cases were called, the trial judge noted that the defendants desired counsel, but did not have counsel. In response, he called upon the local bar to fill the void. Two lawyers apparently answered the call. This aspect of the trials was noted by the United States Supreme Court. However, for that Court, the fatal flaw around which all of the Justices coalesced was the unavoidable conclusion that whatever representation the defendants had received was at best *pro forma*, and did not comport with the customary standards of zealousness central to the lawyer ethos.

Zealous commitment to the interests of a client, even when disagreeing with the client’s cause or conduct, is indeed central to the lawyer ethos, and a fundamental foundation of meaningful representation. It is also central to the ethical obligations of a lawyer acting as an advocate, as indicated by the American Bar Association Model Rules of Professional Conduct, which charges lawyers to “zealously assert[] the client’s position under the rules of the adversary system.”

---

124. See Al-Maqtal Al-Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010) (holding that the Military Commissions Act’s invocation of the Suspension Clause precludes detainees at Bagram, located outside the *de jure* sovereignty of the United States, from challenging their detention in federal district court using habeas corpus).

125. See generally MODEL RULES OF PROF'L CONDUCT (1983).

126. See Powell v. Alabama, 287 U.S. 45, 53–56 (1932) (noting the casualness with which two attorneys, one of whom was from Tennessee and not a member of the Alabama Bar but nevertheless offered to assist in the defense, became counsel of record for the Scottsboro Boys on the day of trial). In criticizing the failure of the trial court to specifically appoint counsel, the Court noted: “Until the very morning of the trial no lawyer had been named or definitely designated to represent the defendants.” *Id.* at 56. The Court then held that the trial court’s designation of the entire local bar as “counsel” for the defendants, an appointment made strictly for the purpose of arraignment, “even if made for all purposes, would, in our opinion, have fallen far short of meeting, in any proper sense, a requirement for the appointment of counsel.” *Id.*

127. *Id.* at 58 (“The record indicates that the appearance was rather pro forma than zealous and active . . . .”) Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense. To decide otherwise would simply be to ignore actualities."

128. MODEL RULES OF PROF'L CONDUCT, pmbl. § 2. However, the Preamble is purely aspirational, not a binding rule upon attorneys. Rule 1.3 states: “A lawyer shall act with reasonable diligence and promptness in representing a client.” *Id.* R. 1.3. While Rule 1.3 does not explicitly discuss a “zealous representation” requirement for attorneys, commentary to the Rules express the intent of the Rule’s drafters. In Comment 1 to Rule 1.3, the Model Rules state:

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are
Unprivileged Belligerents, Preventive Detention, and Fundamental Fairness

The duty of zealousness is not something created by the Model Rules. Well before jurisdictions even began to codify ethical standards for the legal profession, commitment to a client’s cause and zealous advocacy of that cause have been at the core of the legal profession. One early and profoundly compelling example of this was John Adams’s representation of the British soldiers accused of murder for their part in the Boston Massacre. Adams risked the scorn of his community to fulfill his obligation to his clients, who were all acquitted. The history of American law is replete with other examples equally inspiring. In fact, one of those examples was part of the sordid story of the Scottsboro trials.

After the Supreme Court overturned the original convictions, all of the defendants were retried. One of them, Haywood Patterson, was represented by Sam Leibowitz. Leibowitz, a lawyer from New York who immigrated to the United States with his family as a young boy, was hired by the International Labor Defense (a group associated with the Communist Party of America) to represent Patterson. Leibowitz threw himself into a truly hostile environment in the Alabama community of Decatur. Having amassed a remarkable record of seventy-seven acquittals in seventy-eight first degree murder trials, Leibowitz devoted the next four years of his life to Patterson’s defense. Neither the urgings of his friends and family nor the routine threats to his life deterred him from his duty.

Ultimately, Leibowitz fell short in his efforts, and Patterson was again convicted; Patterson was incarcerated until his successful escape in 1947. He died five years later of cancer while in a Michigan prison for an unrelated manslaughter conviction.

Nevertheless, Leibowitz’s commitment to perhaps the most vilified client in Alabama history stands to this day as a model of legal professionalism. Similar stories, although perhaps less dramatic, play out every day in the American legal system. The ability to distinguish the advocacy of a client’s legal cause from embracing that cause is a core aspect of zealous advocacy, and one of the most difficult concepts for new law students to understand. “How can anyone defend the guilty?” is a question most criminal law professors encounter required to vindicate a client’s cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.

Id. R. 1.3 cmt. 1. Similar Rules appear in customized State Rules of Professional Conduct. For example, Texas’s Disciplinary Rules of Professional Conduct state:

[A] lawyer should act with competence, commitment and dedication to the interest of the client and with zeal in advocacy upon the client’s behalf. A lawyer should feel a moral or professional obligation to pursue a matter on behalf of a client with reasonable diligence and promptness despite opposition, obstruction or personal inconvenience to the lawyer.

TEX. DISCIPLINARY RULES OF PROF'L CONDUCT, R. 1.01 cmt. 6 (1989).


130. Leibowitz ultimately represented all of the Scottsboro Boys. Patterson’s trial was the second of four total. Ozie Powell, whose name appears in the style of cause for Powell v. Alabama, was tried with four of the other Boys after Patterson; Patterson was convicted within minutes of the Powell trial beginning.


early in a student’s career. The clear answer appears in the pre-amble to the American Bar Association Model Rules of Professional Responsibility for Lawyers: “[A] lawyer zealously asserts the client’s position under the rules of the adversary system.”

Lawyers understand that this zealous advocacy, even when on behalf of an individual accused of the most heinous crime, ultimately contributes to justice and the rule of law because:

[A] lawyer’s responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.

It is unlikely that the average non-lawyer understands the significance of this lawyer ethos. Few laypersons can reconcile the concept of justice with the effective representation of those who appear obviously guilty. But lawyers are educated on (and ostensibly understand) the true meaning of the presumption of innocence, and how zealous representation ensures individuals accused by the government are afforded the process they are due before that legal presumption is rebutted. Convicting the guilty is unquestionably important, but it is zealous representation of a defendant in the adversarial process that ensures the credibility of these convictions. As Justice Scalia famously wrote on the notion that ensuring all process due completely supersedes the interest in merely obtaining convictions in criminal charges, “[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.”

The relationship between zealous representation and legitimate criminal justice process has been central to the Supreme Court’s jurisprudence. In its landmark opinion of Gideon v. Wainwright, the Court held that the Sixth Amendment (applied to the States through the Fourteenth Amendment as a component of fundamental due process rights) required more than merely the right to be represented; it required that the state provide for representation of indigent criminal defendants. The motivation for this decision was not merely the credibility of the criminal justice process. Instead, it was protection of individuals from post-conviction incarceration without meaningful process. Because all of these concerns were inextricably intertwined in Gideon’s challenge, the Court explicitly addressed only the right to

134. Id. at § 8.
136. The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right to... have the Assistance of Counsel for his defence [sic].” U.S. CONST. amend. VI. The Fourteenth Amendment provides that no State shall “deprive any person of life, liberty, or property, without due process of law...” U.S. CONST. amend. XIV § 1. Through selective incorporation, the Supreme Court has held the Sixth Amendment right to counsel applicable against the States through the Fourteenth Amendment Due Process Clause. Gideon v. Wainwright, 372 U.S. 335, 342 (1963) (holding that “a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment” and that the right to counsel is one of those fundamental and essential rights) (citing Betts v. Brady, 316 U.S. 455, 465 (1942), overruled by Gideon, 372 U.S. 335).
137. See Gideon, 372 U.S. at 344–45.
counsel in the criminal justice process. However, the Court's subsequent jurisprudence determining the scope of the *Gideon* right to counsel indicates that protection of the liberty interest, and not merely protection from false conviction, is the dominant interest related to this right.

*Gideon* did not clearly delineate situations that trigger the right of government provided counsel to indigent criminal defendants. In *Scott v. Illinois*, the Supreme Court held that the *Gideon* right to counsel applied whenever an individual was charged with a crime that resulted in conviction and even a single day of criminal incarceration. The Court rejected the proposal to use the felony-misdemeanor dichotomy as the trigger for the right; however, the Court also rejected the proposal to extend the right to any individual charged with a criminal offense. Instead, it was the combined effect of a criminal charge and incarceration that created a sufficient interest to justify imposing a burden on the government to provide counsel to indigent defendants. Referring to an earlier decision that was less emphatic on the issue, the Court concluded:

In *Argersinger*, the Court rejected arguments that social cost or a lack of available lawyers militated against its holding, in some part because it thought these arguments were factually incorrect. But they were rejected in much larger part because of the Court’s conclusion that incarceration was so severe a sanction that it should not be imposed as a result of a criminal trial unless an indigent defendant had been offered appointed counsel to assist in his defense, regardless of the cost to the States implicit in such a rule.

This incarceration trigger remains in effect to this day. Accordingly, even defendants charged with minor misdemeanor offenses are entitled to free representation in the event that their sentence includes any confinement. In contrast, a defendant charged with a serious felony would not have a similar right in the odd event that the judge’s punishment did not include confinement.

It is of course true that criminal adjudication is the only context in which this incarceration standard applies. However, the Supreme Court’s focus on incarceration as the trigger for the right of representation is indicative of perhaps a broader principle: zealous representation is an essential safeguard to protect the interests of individuals subjected to incarceration. Although not cast in terms of the Sixth Amendment right to counsel, this principle was a significant element in one of the rare Supreme Court decisions addressing the constitutionality of non-punitive preventive detention. In *United States v. Salerno*, the Court

---

138. *Scott v. Illinois*, 440 U.S. 367, 367 (1979) (holding that a court is not required “to appoint counsel for a criminal defendant . . . who is charged with a statutory offense for which imprisonment upon conviction is authorized but not [actually] imposed?”).

139. See id. at 373–74 (“[T]he Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense” after determining that “actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment . . . [and thus an actual sentence of imprisonment is the proper] line defining the constitutional right to appointment of counsel.”).

140. Id. at 372–73 (citations omitted).

141. See id. at 373. See also *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972) (“Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel.”).
assessed the constitutionality of a preventive detention provision included within the Bail Reform Act of 1984. Salerno, an alleged high-level mafia leader, was pending trial for serious federal criminal offenses. Pursuant to the authority provided by Congress in the Bail Reform Act, Salerno was subjected to preventive pretrial detention. The basis for this detention was not that Salerno represented a flight risk or danger to the judicial process (the traditional bases for depriving an individual charged with an offense of liberty prior to trial), but that he presented a threat of serious future criminal misconduct, proven by a preponderance of the evidence.

Salerno challenged the statute, asserting that the authorization for preventive pretrial detention based on risk of future criminal misconduct was inconsistent with the presumption of innocence and due process. The Court rejected Salerno's challenge, holding that the Act did not contravene the Due Process Clause of the Constitution. The Court's holding was based on both a substantive and procedural foundation. From a substantive due process perspective, the Court concluded that the normal process associated with criminal adjudication is triggered only when an individual is subjected to punitive detention, and not administrative detention. By characterizing the preventive detention authorized by the Bail Reform Act as non-punitive, the court effectively exempted the detention from the normal due process standards associated with incarceration. However, the Court

142. United States v. Salerno, 481 U.S. 739 (1987). See also 18 U.S.C. § 3142(e)(1) (“If, after a hearing . . . the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.”); id. at (e)(2)–(3) (stating conditions that, if applicable to the instant case, create “a rebuttable presumption . . . that no condition or combination of conditions will reasonably assure the safety of any other person and the community”).

143. Specifically, Salerno and a codefendant were charged with twenty-nine violations of the Racketeer Influenced and Corrupt Organizations Act (RICO). Salerno, 481 U.S. at 743.

144. The Bail Reform Act provided that “[i]f, after a hearing . . . the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, he shall order the detention of the person prior to trial.” 18 U.S.C. § 3142(e)(1). The Act also set forth criteria for the judicial officer to consider in making a pretrial detainment decision, including the types of crimes to which the Act applied, as well as a number of other factors: “the nature and seriousness of the charges, the substantiality of the Government’s evidence against the arrestee, the arrestee’s background and characteristics, and the nature and seriousness of the danger to any person or to the community posed by the suspect’s release.” Salerno, 481 U.S. at 742–43 (citing 18 U.S.C. § 3142(g)).

145. Salerno, 481 U.S. at 750–51 (“[I]n circumstances where the government’s interest is sufficiently weighty, [the individual’s strong interest in liberty may] be subordinated to the greater needs of society.” In application, “[w]hen the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat.”).

146. See id. at 764 (comparing Salerno’s post-indictment pretrial administrative detention to lawful pre-indictment administrative detention occurring prior to a probable cause hearing and determining that “a period of administrative detention may occur before the evidence of probable cause is presented to a neutral magistrate”) (citing Gerstein v. Pugh, 420 U.S. 103 (1975)).

147. See id. at 746 (“[T]he mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment.”).
emphasized the importance of providing for a meaningful adjudicative process before an individual may be subjected to non-punitive detention.148

The Court concluded that the process established for authorizing preventive detention pursuant to the Bail Reform Act met this process. That process included both an adversarial hearing and a right to counsel. The Court emphasized the significance of this process, and the ability of an individual subjected to preventive detention to test the government’s allegation in this adversarial process. Salerno therefore bolsters the assumption that it is the risk of incarceration, and not necessarily the punitive purpose for the incarceration, that implicates the critical importance of zealous representation.

The United States also recognizes a right to effective assistance of counsel in limited non-criminal, non-detention circumstances. The preeminent example occurs in immigration removal proceedings, where a noncitizen faces deportation from the United States. While this right was questioned in 2009, years of U.S. immigration policy support the notion that aliens facing removal are entitled to the effective assistance of counsel, and that ineffective assistance of counsel at removal proceedings entitles an alien to reopen the proceeding under certain circumstances.149 The reversal of policy occurred in January 2009, just days before Barack Obama took office, when then-Attorney General Michael Mukasey determined that “[a]liens in removal proceedings have no right to counsel, including Government-appointed counsel, under the Sixth Amendment...[or] under the Fifth Amendment.”150 Mukasey’s decision reversed over twenty years of immigration law precedent.151 While Mukasey acknowledged that aliens facing deportation “have a statutory privilege to retain private counsel,” he determined that as “removal proceedings are civil in nature,” they do not trigger the Sixth Amendment right to counsel because the Sixth Amendment “applies only to criminal proceedings.”152 Mukasey further determined that removal proceedings also do not implicate any right to counsel under the Fifth Amendment Due Process Clause because although “the Fifth Amendment applies to removal proceedings, its guarantee of due process

148. Id. at 751–52 (discussing the process required by the Bail Reform Act to justify a preventative detention). See also 18 U.S.C. § 3142(f)(2)(B) (2008). The Bail Reform Act required a number of safeguards at the hearing, even if the hearing did not need to abide by federal evidence admissibility rules:

At the hearing, such person has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed. The person shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise.

Id.

149. See Lozada, 19 I. & N. Dec. 637 (B.I.A. 1988). Lozada held that

[a]ny right a respondent in deportation proceedings may have to counsel is grounded in the fifth amendment guarantee of due process. Ineffective assistance of counsel in a deportation proceeding is a denial of due process only if the proceeding was so fundamentally unfair that the alien was prevented from reasonably presenting his case. One must show, moreover, that he was prejudiced by his representative’s performance.

Id. at 638 (citations omitted). This framework was affirmed in 2003. See Assaad, 23 I. & N. Dec. 553, 556 (B.I.A. 2003).


151. See Lozada, 19 I. & N. Dec. at 637.

152. See Compean, 24 I. & N. Dec. at 710.
does not include a general right to counsel, or a specific right to effective assistance of counsel."153

Six months later, Eric Holder, President Obama’s Attorney General, reversed Mukasey’s decision.154 While Holder did not explicitly recognize a right to appointed counsel in deportation cases, he did direct the Board of Immigration Appeals and immigration judges to “apply the pre-Compean standards to all pending and future motions to reopen based upon ineffective assistance of counsel,” and made an interim determination that the Board of Immigration Appeals has discretion “to reopen removal proceedings . . . to consider claims of ineffective assistance of counsel based on conduct of counsel that occurred after a final order of removal had been entered.”155 Thus, Holder recognized that aliens facing deportation have some right to counsel, as the ineffective assistance of even private counsel in immigration proceedings could result in a deprivation of the alien’s constitutional due process rights.

Under the paradigms of pretrial incarceration and deportation, it is clear that the government recognizes that effective assistance of counsel is necessary to safeguard due process interests. The courts and even the executive branch have realized that the process due to a person facing incarceration or removal from the country involves some degree of constitutionally-sufficient representation, regardless of whether the defendant or removal respondent is entitled to appointed representation or must privately secure a lawyer. Zealous representation thus represents something so closely related to due process as to be nearly inseparable; when a person faces the risk of incarceration or deportation and that person is

---

153. Id. Mukasey elaborated that the Fifth Amendment “is violated only by state action, namely, action that can be legally attributed to the Government. Lawyers privately retained by aliens in removal proceedings are not state actors for due process purposes. Accordingly, there is no Fifth Amendment right to effective assistance of counsel in removal proceedings.” Id. The basis of Mukasey’s argument was Supreme Court jurisprudence on the claim of ineffective assistance of counsel:

The Supreme Court has recognized constitutional claims for ineffective assistance of counsel only where a person has a constitutional right to a Government-appointed lawyer. In contrast to a defendant in a criminal case, an alien has no right—constitutional or statutory—to Government-appointed counsel in an administrative removal proceeding. . . .

. . .

. . . [T]he Constitution does not confer a constitutional right to effective assistance of counsel in removal proceedings. The reason is simple: Under Supreme Court precedent, there is no constitutional right to effective assistance of counsel under the Due Process Clause or any other provision where—as here and as in most civil proceedings—there is no constitutional right to counsel, including Government-appointed counsel, in the first place. Therefore, although the Fifth Amendment’s Due Process Clause applies in removal proceedings, as it does in any civil lawsuit or in any administrative proceeding, that Clause does not entitle an alien to effective assistance of counsel, much less the specific remedy of a second bite at the apple based on the mistakes of his own lawyer.

. . .

. . . It is well established that, as a general matter, there is no constitutional right to counsel, and thus no constitutional right to effective assistance of counsel, in civil cases. Instead, the rule is that counsel’s errors are imputed to the client who chose his counsel, and that the client’s sole remedy is a suit for malpractice against counsel and not a litigation do-over.

Id. at 712, 714, 718 (citations omitted) (footnotes omitted).


155. Id. at 3.
denied effective assistance of counsel in defending against the risk, the government cannot say that the defendant received all the process due under the Constitution.

V. Extending Legal Representation to the Long-Term Detention Process

A. Adopting a Punitive/Administrative Divide in the War on Terror

Providing counsel for an individual subjected to the risk of punitive incarceration is also a central component of the legitimacy of the U.S. military justice system. In fact, the Uniform Code of Military Justice (UCMJ) exceeds the requirements of the Sixth Amendment by requiring defense counsel for any individual charged for trial by court-martial that may result in a federal criminal conviction. Even defendants who are not sentenced to punitive incarceration are entitled to the assistance of detailed military counsel, irrespective of their ability to pay for their own representation.

When President Bush issued the order for the creation of a military commission to try captured unlawful enemy combatants following the September 11th terrorist attacks, he adopted the same right to counsel rule applicable to courts-martial. That order included the requirement that military counsel be detailed to defend any individual charged for trial by military commission. Although this order and the military commission it created became the subject of substantial criticism and ultimate invalidation by the Supreme Court, the provision of legal representation was one bright spot in the commission process. The experienced and highly competent military defense lawyers detailed to this duty threw themselves into the task of defending their clients and identifying every conceivable flaw in

156. The accused has the right to be represented by counsel during an investigation and at trial. Article 27 provides the qualifications for trial counsel and defense counsel. Article 32 provides the right of an accused to be represented by counsel at investigation, and Article 38 provides the same right at trial. See 10 U.S.C. §§ 827(a), 832(b), 838(b) (2006). Under the UCMJ, an accused does not have a right to be represented at a summary court-martial. However, these courts do not issue federal criminal convictions. Further, a defendant at a summary court-martial is provided free counsel to prepare for and appeal the results of the court-martial. See 10 U.S.C. §§ 838(b)(1), (c).

157. See generally id.

158. See DEPT. OF DEF., MILITARY COMMISSION ORDER NO. 1 § 4(C) (Mar. 21, 2002). In Section 4(C)(2), the Department of Defense provides for defense of an accused at a military commission trial:

[T]he Chief Defense Counsel [defined in section 4(C)(1)] shall detail one or more Military Officers who are judge advocates of any United States armed force to conduct the defense for each case before a Commission ("Detailed Defense Counsel"). The duties of the Detailed Defense Counsel are:

(a) To defend the Accused zealously within the bounds of the law without regard to personal opinion as to the guilt of the Accused; and

(b) To represent the interests of the Accused in any review process as provided by this Order.

Id. § 4(C)(2)(a)–(b). Defendants in military commission trials were also given the right to replace their Detailed Defense Counsel with a different JAG lawyer, and could retain the services of a civilian attorney meeting certain defined qualifications. Id. § 4(C)(3). While a defendant could replace one JAG defense attorney for another, the Order did not give defendants the right to proceed without any JAG defense counsel at all. See id. § 4(C)(4) ("The Accused must be represented at all relevant times by Detailed Defense Counsel.").
the commission process. Their efforts were applauded by virtually all critics of the military commission, and ultimately resulted in not only successful challenges on behalf of their clients, but also to recognition by the American Civil Liberties Union.159

For experts in military law, the efforts of these defense lawyers were unsurprising. Military lawyers, like their civilian counterparts, are taught to embrace the ethical obligation to zealously represent their clients, even when those clients are extremely unpopular. Within each military service, the Judge Advocate General (the senior legal officer for the service) has established a separate military defenders office. Military lawyers assigned to these organizations operate under a chain of command distinct from that of their prosecution counterparts, and are constantly reminded of the importance of their independent and zealous commitment to their clients.160

For observers outside the military, however, the commitment of the military lawyers representing Guantanamo defendants charged with engaging in heinous acts of terror against the United States seemed surprising. How could members of an institution charged with the responsibility of engaging in combat against these individuals devote themselves to such representation? The answer to this question is inherent in the concept of zealous representation. The lawyers assigned to these duties understood intuitively that by

159. 2007 Roger N. Baldwin Medal of Liberty Award, ACLU, http://www.aclu.org/2007-roger-n-baldwin-medal-liberty-award (last visited Nov. 23, 2012) (listing the five JAG officers, at least one from each branch of the armed forces, who received the award in 2005 for their defense of Guantanamo detainees).

160. See DEPT. OF THE ARMY, MILITARY JUSTICE: ARMY REGULATION 27-10 § 6-3 (Nov. 16, 2005), available at http://www.apd.army.mil/pdffiles/r27_10.pdf. Chapter 6 of AR 27-10 describes the United States Army Trial Defense Service (USATDS), which provides counsel to defendants in Army courts-martial. Id. Section 6-3 describes the ultimate command structure of USATDS as follows: USATDS counsel are supervised, managed, and rated solely by their respective USATDS supervisory chain. Staff judge advocate and installation support responsibilities for TDS [Trial Defense Service] counsel apply, regardless of the TDA [table of distribution and allowances] or modification table of organization and equipment (MTOE) authorization that the individual TDS counsel occupies. The Commander and Commandant, TJAGLCS [The Judge-Advocate General’s Legal Center and School], provide professional control and supervision of USATDS and its counsel, including UCMJ authority. The Commander, USALSA [U.S. Army Legal Services Agency], exercises other command functions for USATDS counsel.

Id. § 6-3. The USATDS as a whole is overseen by a Chief, designated by the Judge-Advocate General of the Army (TJAG). Id. § 6-3(a). Below the Chief are the Regional Defense Counsel (RDC), who is “[r]esponsible for the performance of the USATDS mission within a region [and is] [t]he supervisor of all senior defense counsel within the region.” Id. § 6-3(c)(1). A region is “the major subordinate supervisory and control element of USATDS . . . encompass[ing] a geographical area designated by TJAG.” Id. § 6-3(b). Below the RDC is the senior defense counsel, who is “responsible for the performance of the USATDS mission within the area serviced by a field office” as well as “the direct supervisor of all trial defense counsel within a field office,” including its subsidiary branch offices. Id. § 6-3(f)(1). At the bottom of the hierarchy are trial defense counsel, whose job is “to represent Soldiers in courts-martial, administrative boards, and other proceedings and act as consulting counsel as required by law or regulations.” Id. § 6-3(g). The USATDS is therefore fully self-contained, and not subject to the supervisory control of a base commander, unlike JAG prosecutors; trial defense counsel and their superiors effectively report only to TJAG himself. This separate command structure is crucial to trial defense counsel’s ability to zealously represent defendants at courts-martial.
Unprivileged Belligerents, Preventive Detention, and Fundamental Fairness

advocating on behalf of their clients they in no way endorsed the causes of their clients. Instead, like all professional defense lawyers they recognized that their efforts would ultimately contribute to the credibility and legitimacy of justice dispensed by the military commission.

The critical role of zealous representation in the military commission process would, ironically, be central to the downfall of the President’s commission. In *Hamdan v. Rumsfeld*, the Supreme Court struck down the legality of the military commission convened pursuant to Military Order No. 1. The issue that brought the case before the Court was a challenge to the rule permitting the exclusion of the defendant from the proceeding. While defendant’s counsel would be present for all proceedings, the rule prohibited defense counsel from disclosing to the excluded client what transpired in his absence. The Supreme Court held that this rule violated both the minimum standards for fair process included within the Geneva Conventions and the procedural requirements of the Uniform Code of Military Justice applicable to military commissions.

Congress responded to the *Hamdan* decision with the Military Commissions Act of 2006, its statutory resurrection of the military commission. Congress, like the President, provided for the appointment of military counsel for any individual charged for trial by the new commission. However, unlike the original commission, the MCA did not permit exclusion of the accused from court proceedings (except for good cause, such as disruption of the proceedings). Congress even added a right to a “learned” defense counsel for all capital cases. Like their pre-MCA counterparts, the military counsel detailed to defend unlawful enemy combatants at the military commission continue to embrace the highest standards of ethical performance.

The provision of legal representation for individuals captured in the context of the Global War on Terror has, however, been restricted to the criminal prosecution context. No analogous provision had, prior to the NDAA 2012, been extended to individuals subject to non-criminal preventive detention. Nonetheless, non-criminal detentions account for the vast majority of individuals subjected to wartime indefinite detention power. And, as former

161. Acceptance of this understanding permeates legal training at all levels. See, e.g., AIR FORCE RULES OF PROF’L CONDUCT R. 1.2(b) (2005) (“A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s economic, social, or moral views or activities.”).


163. See id. at 630–31, 634–35 (finding Common Article 3 of the Geneva Conventions applicable to the conflict with al-Qaeda, and thus requiring Hamdan to be tried under a court constituted as Common Article 3 required). Additionally, the Court held that there was no “evident practical need” for military commission procedure to deviate from procedures applicable to courts-martial under the UCMJ. Id. at 634 (quoting Justice Kennedy’s concurrence). See also GPW, supra note 25, art. 3(1)(d) (prohibiting “the passing of sentences and the carrying out of executions [against people who are hors de combat in armed conflicts not of an international character] without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples”) (emphasis added).


165. As of January 2012, 171 detainees remained at Guantanamo, while about 600 had been transferred out; thus about 771 individuals have been detained at Guantanamo since 2001. See Carol Rosenberg, *Why Obama Hasn’t Closed Guantanamo Camps*, MIAMI HERALD (Jan. 7, 2012), www.miamiherald.com/2012/01/07/v-fullstory/2578082/why-obama-hasnt-closed-guantanamo.html
Secretary of Defense Rumsfeld noted when use of military commissions was initially announced, an acquittal by these tribunals would not necessarily result in release of detainees.166 Instead, it was more probable that an acquitted detainee would simply be returned to non-punitive preventive detention.167

166. During a news briefing on March 28, 2002, Secretary of Defense Donald Rumsfeld made the following statements regarding detainee acquittal before a military commission and possible release following acquittal:

There have been some murmurs in the media about detainees held at Guantanamo Bay, and specifically whether if one who is tried by a military commission and, if acquitted, whether they would then be released or whether they would still be detained. . . .

. . . .

. . . If one were to be acquitted by a commission of . . . a specific criminal charge, that would not necessarily change the fact that that individual remains an enemy who was captured during an armed conflict, and therefore one who could reasonably be expected to go back to his terrorist ways if released. . . . In some cases it might not be possible to establish beyond a reasonable doubt that an individual committed a particular crime, and therefore he might be acquitted of that crime. However, it does not change the fact that he is an enemy combatant. He may be guilty of other crimes, but at the minimum he is someone to be kept off the battlefield. . . .

Even in a case where an enemy combatant might be acquitted, the United States would be irresponsible not to continue to detain them until the conflict is over. Detaining enemy
The almost inevitable reality of indefinite detention has, however, spurred a credible effort to enhance to the preventive detention process. This effort first focused on Guantanamo—initially in response to the Supreme Court’s extension of habeas jurisdiction to Guantanamo detainees and the Court’s suggestion that enhanced process might eliminate the necessity for judicial review. The Court would ultimately backtrack on this suggestion when it held in *Boumediene v. Bush* that the process implemented by the President did not sufficiently protect the rights of Guantanamo detainees, who were therefore constitutionally entitled to challenge their detention by writ of habeas corpus. However, by that time, the process established by order of the Secretary of Defense had been endorsed and enhanced by Congress in the form of the Detainee Treatment Act (as supplemented by the Military Commission Act).

The combined effect of executive, legislative, and judicial action led to a military detention review hearing to determine who qualifies for indefinite detention at Guantanamo (the Combatant Status Review Tribunal), an annual review by military authorities to determine whether continued detention at Guantanamo remains justified (called the Annual Review Board until March 2011), and judicial review of military detention decisions by the District of Columbia District and Circuit Courts. While this process has resulted in the reclassification

---

combatants for the duration of a conflict is universally recognized as responsible and lawful. This is fully consistent with the Geneva Conventions and other war authorities. News Briefing, Dep’t of Def., Donald Rumsfeld, Sec’y of Def. (Mar. 28, 2002, 1:30 PM), available at http://www.defense.gov/transcripts/transcript.aspx?transcriptid=3380.

167. See id.

168. See Hamdi v. Rumsfeld, 542 U.S. 507 (2004). A plurality of the Court held that Hamdi, as an American citizen, had a right to challenge his detention; however, the Court limited the resources due to Hamdi in making such a challenge while noting that at least some core constitutional protections must be preserved and made available to citizen enemy combatants:

> [W]hile the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting, the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen’s core rights to challenge meaningfully the Government’s case and to be heard by an impartial adjudicator.


> [a]pplication of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus. At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm, as well as the claims of persons detained in the so-called “exempt jurisdictions” where ordinary writs did not run, and all other dominions under the sovereign’s control.

*Id.* at 481–82 (citations omitted). See also 28 U.S.C. §§ 2241(a), (c)(3) (granting federal district courts statutory authority to hear habeas claims asserted by any person “within their respective jurisdictions” who claims to be held “in custody in violation of the Constitution or laws or treaties of the United States”).

of a number of detainees, legal representation is provided only when cases reach Article III judicial review on writs of habeas corpus. Prior to the President’s March 2011 Executive Order, no legal representation was provided to detainees before either the CSRT or the ARB. Instead, in an apparent analogy to the procedures established by the Geneva Convention Relative to the Treatment of Prisoners of War for resolving uncertainty as to whether a captive qualifies as a prisoner of war, detainees were provided with a U.S. military officer to serve as a non-legal representative at the CSRT (the ARB was a “paper” review so no representation was provided). An analogous evolution of detention review procedure has occurred at the U.S. detention facility in Bagram, Afghanistan. Ironically, while Guantanamo has been the focal point of the majority of scrutiny, the Bagram-Parwan operation accounts for the vast majority of individuals who have been and continue to be subjected to preventive detention by the United States. However, a serious effort to revise the detention process in order to mitigate the risk of invalid detentions has only recently been implemented. As will be explained in the next section, this effort resulted in a process analogous to the CSRT process at Guantanamo. This process has undoubtedly improved the credibility of the U.S. detention operation in Afghanistan and added substantial protections to potential detainees; however, as at Guantanamo, the Department of Defense did not provide legal representation to Afghanistan detainees as part of this revision. Instead, an approach analogous to the ‘prisoner’s representative’ approach in the GPW was extended to Afghanistan.

170. See COMBATANT STATUS REVIEW TRIBUNAL SUMMARY, supra note 71; Stuck in Guantánamo, N.Y. TIMES (Apr. 21, 2006), http://www.nytimes.com/2006/04/21/world/americas/21iht-gitmo.html (stating that as of April 2006, the ARBs had determined that while three detainees could be released and 107 could be repatriated to the custody of their home countries, all still remained detained in Guantanamo at that time).

171. See GPW, supra note 25, art. 5 (granting detainees whose POW status is in question “the protection of the present Convention until such time as their status has been determined by a competent tribunal”).

172. See CSRT Order, supra note 84, ¶ (c) (describing the nature of the detainee’s non-legal personal representative). See generally CSRT Procedures, supra note 1, encl. (1); ARB Procedures, supra note 91, encl. (3)–(4). See also GPW, supra note 25, art. 5 (“Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”).

173. See discussion supra Part III.B.3.


175. The term “prisoners’ representative” is used in several articles of the Third Geneva Convention. Prisoners’ representatives under the Prisoner of War Convention are appointed in one of the following ways: (1) if the detainment camp consists solely of officers or a mix of officers and non-officers, the “senior officer among the prisoners of war shall be recognized as the camp prisoners’ representative”; or (2) if there are no officers among the POWs, “the prisoners shall freely elect by secret ballot, every six months, and also in case of vacancies, prisoners’ representatives.” GPW,
Before turning to an overview of the revisions to the detainee review process, a brief discussion of the flaw in the GPW analogy is in order. As one of the authors has previously written, while it is common to invoke the limited process afforded to prisoners of war pursuant to the GPW as a justification for limiting the procedural rights of unprivileged belligerents, this argument is fundamentally flawed. A POW and an unprivileged belligerent do share the common consequences of their belligerency and capture: preventive detention for the duration of hostilities. However, beyond this the analogy between these two categories of wartime detainees dissipates. POW status is defined by treaty, and therefore the procedural protections established by the GPW for POWs are premised on the underlying assumption that the individuals accorded those protections fall into a clearly defined category. As a result, these protections are not focused primarily on resolving the complex question of whether a captive should or should not be subjected to preventive detention, but

\[supra\] note 25, art. 79. The duty of the prisoner representatives is to “represent[] [prisoners] before the military authorities, the Protecting Powers, the International Committee of the Red Cross and any other organization which may assist them,” and to ensure that the representative actually represents the interests of the relevant group, a prisoner representative must “have the same nationality, language and customs as the prisoners of war whom he represents.” \[Id.\]

176. \[See Geoffrey S. Corn, Enemy Combatants and Access to Habeas Corpus: Questioning the Validity of the Prisoner of War Analogy, 5 SANTA CLARA J. INT’L L. 236, 249 (2007).\] The relevant portion of this article discusses the process for POW determination: POW determinations under the Prisoner of War Convention are made pursuant to an Article 5 tribunal applying the POW status qualification criteria established by Article 4, but Article 4 is itself unreachable unless Common Article 2 applies to the armed conflict in which the individual was captured. \[See id. See also GPW, supra note 25, art. 2 ("the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them") (emphasis added). As the author describes, Common Article 2 applicability—the predicate requirement for applying Article 4 POW criteria at an Article 5 status tribunal, and the predicate for even requiring such a tribunal in the first place—requires an "inter-state dispute[] involving the intervention of armed forces. Accordingly, Article 4 is never applicable in any other kind of armed conflict." Corn, supra, at 248 (citations omitted). As the author noted, the fact that the United States is not in an armed conflict with another sovereign nation, but instead is combating a transnational non-state entity, is the principal basis for the United States’ determination that captured al Qaeda warriors are conclusively presumed to be excluded from POW status. Although the armed conflict that the United States asserts exists between this transnational organization and the United States is international in scope, there is not even a credible argument that al Qaeda satisfies the requirements necessary to be considered a state. While it is plausible that such personnel might have been associated with the armed conflict between the United States and Afghanistan during the initial phases of Operation Enduring Freedom, so long as the United States persists in treating the armed conflict with al Qaeda as distinct from armed conflicts with sponsoring states, the predicate requirement of "right kind of conflict" cannot be satisfied. Accordingly, personnel captured in association with this armed conflict do not benefit from the provision of the Prisoner of War Convention. Assuming, however, that the initial "right kind of conflict" requirement is satisfied, the second requirement that individuals captured during such a conflict meet the Article 4 POW qualification criteria, or that the individual detainee is the "right kind of person," still must be met.

\[Id. at 248–50 (citations omitted).\] The author continues in asserting that Article 4 criteria have not be met by al-Qaeda forces in the past, because their organizational structure, lack of a fixed distinctive sign or emblem, failure to openly carry arms and, arguably most important, disregard for conducting their operations in accordance with the laws and customs of war, prevent such warriors from being classified as POWs under the Third Geneva Convention. \[See id. at 250–52. See also GPW, supra note 25, art. 4 (setting forth criteria which, if met and proved at an Article 6 hearing, require a captured individual to continue to receive POW status).\]
instead on ensuring that the rights established by the treaty are respected by the Detaining Power. Even Article 5 of the GPW—the only provision of the treaty addressing a status determination procedure—reflects this reality. The function of the Article 5 tribunal is to merely apply the established Article 4 status qualification criteria. As a result, it is intended to be a summary, non-adversarial process. The role of the prisoner’s representative in an Article 5 tribunal is therefore not to serve as an advocate for the detainee subjected to the status determination, but instead to monitor the proceeding in order to facilitate the raising of concerns about the process to the Protecting Power—the entity responsible for monitoring compliance with the treaty and bringing alleged violations to the attention of the Detaining Power.

Beyond the analogous preventive detention consequence of their belligerency, the situation of an unprivileged belligerent is fundamentally distinct from that of a POW. Unlike the POW, there is no internationally accepted definition of this status, and certainly no treaty-based definition. In fact, it is unclear whether consensus on such a definition even exists between the three branches of the U.S. government. From the inception of the U.S. war on terror

177. The Prisoner of War Convention defines the following individuals as POWs:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and... other volunteer corps... provided that such [organizations] fulfill the ] conditions [of]... being commanded by a person responsible for his subordinates... having a fixed distinctive sign recognizable at a distance... carrying arms openly... [and] conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces [professing] allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof... provided they have received authorization from the armed forces which they accompany... .

(5) Members of crews... of the merchant marine and... civil aircraft of the Parties to the conflict... .

(6) Inhabitants of non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

GPW, supra note 25, art. 4(A). Two other classifications of individuals are also treated as POWs. See id. art. 4(B).

178. See id. art. 79, 80 (“[P]risoners’ representatives [are] entrusted with representing [the prisoners they represent] before the military authorities, the Protecting Powers, the International Committee of the Red Cross and any other organization which may assist them”; “[p]risoners’ representatives shall further the physical, spiritual and intellectual well-being of prisoners of war.”).

179. See David L. Franklin, Enemy Combatants and the Jurisdictional Fact Doctrine, 29 CARDOZO L. REV. 1001, 1032–33 (2008) (discussing how the Supreme Court noted the internationally-accepted distinctions between lawful and unlawful combatants in Quirin and recognized spies and saboteurs as combatants typically ineligible for POW status, and further considering that the Supreme Court in Hamdi “observed that there is disagreement about the appropriate scope of the term ‘enemy combatant,’ and noted that ‘the government has never provided any court with the full criteria that it uses in classifying individuals as such’”) (citations omitted). However, despite the Hamdi Court accepting an “as-applied” definition of “enemy combatant” for Hamdi and Congress broadly defining “enemy combatant” in the MCA, there has been no international consensus on “the precise boundary between combatants and civilians... in the present context of terrorism and asymmetrical warfare.” Id.
preventive detention practice, the definition of who may properly be subjected to preventive
detention has vexed the government. At the outset, the definition adopted by the President
was similar to the “you know it when you see it” definition of pornography. For individuals
subjected to detention in the early months of the Global War on Terror, the definition was in
effect “you know it when President Bush sees it.” The Department of Defense then adopted its
own definition when it established the CSRT. Subsequently, Congress adopted a slightly
different definition by implication when it defined who could be subjected to trial by military
commission as the result of being an unlawful enemy combatant. In addition to these
various definitions, the judiciary has developed its own definition for purposes of habeas
corpus litigation. None of these definitions, however, reflect the clarity of the Article 4

180. See WITTES, supra note 54, at 16–17. The positions of the Bush and Obama Administrations are
somewhat different, but arguably the Obama Administration’s decision to cease justifying detention
authority on inherent Article II powers is, in part, due to the courts’ unwillingness to recognize
inherent Article II detention powers broader than the powers described by the AUMF:

The Bush administration asserted that both Article II of the Constitution and the
September 18, 2001, Authorization for Use of Military Force (“AUMF”) gave it the power to
detain for the duration of hostilities both members and supporters of entities—including Al
Qaeda, the Taliban, and “associated forces”—that are engaged in hostilities against the
United States or its allies. The Supreme Court partially upheld this claim in Hamdi. A
plurality of the Court determined in that case that the AUMF implicitly conferred the
“traditional incidents” of lawful warfare on American operations, that these incidents
included the power to detain enemy fighters in at least some circumstances, and that this
authority would apply at least to a person who bore arms for the Taliban in Afghanistan.
This holding obviously left open the question of whether the AUMF (or Article II, for that
matter) similarly provided for such non-criminal detention of persons captured in other
circumstances. Less obviously, it also left open a set of difficult issues concerning what it
means to be a “member” or “part” of any of these organizations, at least some of which are
better characterized as loose associational networks than as hierarchical organizations.

. . . In March 2009, however, the Obama administration filed a brief in the Hamdi habeas
litigation that departed only in three relatively-minor ways from the Bush administration’s
earlier approach. First, the new administration asserted that henceforth its claim to
detention authority would rest on the AUMF, rather than on any claim of inherent Article II
power, and that its AUMF-based authority ought to be construed in accordance with the
laws of war. Second, the Obama administration dropped the label “enemy combatant” in
favor of the less provocative practice of referring simply to persons detainable pursuant to
the AUMF. These moves, notably, have not generated particular controversy among the
district court judges. Those who have explicitly addressed the source-of-authority issue
appear to accept that the proper frame of reference is indeed the AUMF. And no judge thus
far has suggested that the government may have broader authority by virtue of any
inherent Article II arguments. Nor has any expressed doubt that the AUMF provides at
least some form of detention authority.

Id. (citations omitted).

181. See generally CSRT Order, supra note 84 (establishing the procedure of the CSRT hearing and the
qualifications, roles, and responsibilities of the hearing officers, reporter, and detainee personal
representative, and outlining the manner in which the detainee could participate in the CSRT
process).


183. See WITTES, supra note 54, at 17–21. As noted in the article, there are up to four distinct judicial
definitions of detainability, three of which have been espoused by district court judges and one of
which was presented by the D.C. Court of Appeals. The most widely-accepted detainment position is
based on Hamdi and, summarized, states that while the “AUMF confers authority on the executive
branch to detain members of Al Qaeda, the Taliban, and associated forces . . . independent support—
even if substantial—cannot provide a distinct ground for detention.” Id. at 18 (citing Hamdi v.
Obama, 616 F. Supp. 2d 63 (D.D.C. 2009)). However, the judge in Hamdi emphasized “that there
are ‘no settled criteria’ for identifying formal membership in Al Qaeda” and thus “courts must be open to proof of functional membership.” WITTES, supra note 54, at 18 (quoting Hamily, 616 F. Supp. 2d at 75–76). The judge in Hamily thus noted that “[t]he ‘key inquiry,’ in all events, is ‘whether the individual functions or participates within or under the command structure of the organization—i.e., whether he receives and executes orders or directions.’ ” Id. (quoting Hamily, 616 F. Supp. 2d at 75). This position has received the most support among the district judges in the D.C. Circuit, but other judges have reinterpreted even this “most widely-accepted” definition. To summarize the Hamily definition and describe a reinterpretation:

Hamily . . . precludes detention of entirely-independent actors who happen to provide support to Al Qaeda, but it considers acts of support to be relevant evidence of functional membership as long as the government can establish an element of direction and control in the relationship between the group and the individual. Subsequently, at least four other judges—Hogan, Robertson, Kollar-Kotelly, and Lambeth—have expressly adopted this interpretation.

A fifth judge—Urbina—likewise has expressly adopted the Hamily definition, but his actual application of the test suggests that he may have in mind something more restrictive than the other judges. In Hatim v. Obama, Judge Ricardo Urbina adopts the Hamily standard but then goes on to address the sufficiency of the government’s attempt to satisfy that standard by proving that the detainee had attended Al Qaeda’s Al Farouq training camp. In that context, he states that even if the government could prove that the petitioner attended that camp and that he understood that he thereby became part of the “al-Qaida apparatus,” the government’s burden would still require it to present evidence to the effect that he had actually received and executed orders from Al Qaeda and thereby “participated” in its command structure, rather than simply received its training. It may be that the other judges subscribing to Hamily would take the same view, but it seems more likely that this entails a degree of engagement beyond what most or all of them have in mind under the heading of functional membership.

Id. at 18–19 (citations omitted) (quoting Hatim v. Obama, 677 F. Supp. 2d 1, 13 (D.D.C. 2009)). The second definitional position, from Gherebi, tracks the Administration’s support for the notion that “either membership or substantial support can trigger detention authority” but that the authority “encompass[es] only individuals who were members of the enemy organization’s armed forces, as that term is intended under the laws of war, at the time of their capture.” Id. at 19 (quoting Gherebi v. Obama, 609 F. Supp. 2d 43, 70–71 (D.D.C. 2009)). The article notes that “[w]hether this approach truly differs from the Hamily approach depends, of course, on whether one thinks that the concept of membership under the laws of war would encompass the ‘functional membership’ scenario.” Id. The third position, first expressed in the Boumediene case on remand from the Supreme Court, is simply Judge Leon’s express adoption of the Bush Administration’s detainability definition, which allows detention of “both members and supporters of Al Qaeda, the Taliban, and associated forces.” Id. at 20 (quoting Boumediene v. Bush, 583 F. Supp. 2d 133 (D.D.C. 2008)). However, when presented with the Obama Administration’s more limited definition, Judge Leon has yet to “subsequently confront[] a petition that would require him to accept or reject the government’s continuing claim of authority to detain on grounds of support alone”; Judge Leon even appeared to “express[] some degree of impatience with the effort by the Obama administration to narrow modestly the scope of its detention authority.” Id. (quoting Al Ginco v. Obama, 626 F. Supp. 2d 123, 127 (D.D.C. 2009)). Finally, the fourth position, first presented by a 2–1 panel of the D.C. Circuit in Al Bihani, “construes the AUMF to support not just the narrower support ground the Obama administration favors, but also the original Bush administration variant—in which support did not necessarily have to qualify as substantial” in order for the support to justify detention. Id. (citing Al Bihani v. Obama, 590 F.3d 866, 871 (D.C. Cir. 2010)). While the petitioner argued that an interpretation of the AUMF allowing for military commission trials and detention of persons materially supporting hostilities stands in conflict with the detention authority of the law of armed conflict, the majority stated that the law of armed conflict was “not a source of authority for U.S. courts’ and cannot be construed as extra-textual limiting principles for the President’s war powers under the AUMF.” Id. at 21 (citing Al Bihani, 590 F.3d at 872).
POW definition. Terms like “materially” or “substantially supported” involve a high degree of subjective interpretation, and the scope of detention authority continues to this day to be an area of uncertainty.

This definitional uncertainty undermines the legitimacy of a broad-based analogy to the GPW when assessing the extent of procedural protections that should be provided to unprivileged belligerent detainees. For these detainees, belligerent status determinations involve far more complexity than the determination of prisoner of war status. As noted above, the standard pursuant to which they will be detained is less clear than that applicable to POWs. This in turn leads to a very different evidentiary equation. For individuals brought before an Article 5 tribunal to determine whether they qualify as POWs, the evidentiary focus is almost exclusively on indicia of connections to a defined enemy armed force. Thus, information related to uniform, equipment, and capture in the proximity of clearly identified enemy personnel is what provides significant probative value. In contrast, the evidentiary focus for determining unprivileged belligerent status is often much more nuanced. Information related to associations, activities, and state of mind is normally far more significant than uniform or other traditional indicia of belligerent status. As a result, simply extending the procedural construct of the GPW—or, and more specifically, of the Article 5 tribunal—to status determinations that will result in indefinite detention of unprivileged enemy belligerents is both unjustified and inefficient. Instead, as reflected by the lessons learned in the decade since the United States began detaining individuals based on this status, a hybrid process is needed to balance the legitimate interests of preventive detention with the equally legitimate liberty interest of individuals improperly swept up in an overzealous point of capture detention effort.

This lesson has recently been manifested in the U.S. revision of the detention review process in Parwan, Afghanistan. As a work in progress, this effort has produced a substantial improvement in the overall detention operation in Afghanistan. As will be summarized in the next section, these revisions established a quasi-adversarial process and recognized the importance of providing detainees with representation in that process. However, the individuals assigned with this responsibility are not lawyers, but instead lay U.S. military officers, calling into question the effectiveness of the overall revision effort.

184. See generally GPW, supra note 25, art. 4 (specifically defining categories of persons to be considered prisoners of war and thus protected under the Third Geneva Convention).

185. An Article 5 hearing under the Third Convention occurs solely to determine whether any of the Article 4 definitions apply to the subject of the hearing; if one does not, the subject should not be considered a POW and will not be protected by the Third Convention. See GPW, supra note 25, art. 4. Note that under Article 5, a detaining Power must presume that and act as if a captured belligerent qualifies as a POW protected by the Third Convention unless and until the Article 5 tribunal finds otherwise (i.e., that the individual does not fit into any Article 4 category). Id. (“persons . . . [who] hav[e] committed a belligerent act and hav[e] fallen into the hands of the enemy . . . shall enjoy the protection of the present Convention until such time as their status [under Article 4] has been determined . . . .”).
B. Questioning the Efficacy of Non-Legal Representation

Referencing Supreme Court right to counsel jurisprudence in no way suggests that the authors propose extending that right to unprivileged enemy belligerents. Such a proposal would ignore the unquestionable fact that only initiation of formal adversarial criminal process triggers that right, a trigger not implicated by preventive wartime detentions and unaffected by detainee nationality. Instead, this reference is intended to highlight an underlying tenet of this jurisprudence: the indelible link between protecting individuals facing the risk of a deprivation of liberty and the lawyer ethos of zealous representation. That risk permeates the punitive and preventive detention process, a risk that justifies questioning the wisdom of legal representation limited to only one of these contexts.

Detention hearings, regardless of where they occur, have been criticized by third-party human rights groups for allegedly failing to provide true due process to detainees—in effect, denying them the ability to effectively challenge their detention. The main criticism stems from lack of trained legal representation for the detainees; the criticism is based not only in the lack of zealous advocacy, but also lack of trust between PR and detainee and the very limited training given to PRs resulting, to an extent, of PR ignorance or impotence in knowing how to truly assist the detainee.186 Because of these and other factors, several detainees have criticized their PRs for providing what they perceived to be little or no assistance,187 and

186. DAPHNE EVIATAR, HUMAN RIGHTS FIRST, DETAINED AND DENIED IN AFGHANISTAN: HOW TO MAKE U.S. DETENTION COMPLY WITH THE LAW 13 (Gabor Rona et al. eds., 2011) [hereinafter “DETAINED AND DENIED”]. In one portion of its report criticizing DRBs, Human Rights First emphasized that [a]ccess to legal representatives, who prioritize client representation and are trained and encouraged to assess and respond to factual assertions and allegations of wrongdoing, are necessary for a legitimate, fair, and accurate detainee review process . . . [because appointment as a PR does not require an officer to learn the local language or undergo linguistic or cultural training,] the detainee has little reason to trust the representative. Many of the former detainees we interviewed, all of whom had experienced a DRB, told us that they did not trust the P.R.—who to them appeared as simply another uniformed American soldier—to truly represent their interests.

Id. Further, stark contrasts were drawn between PRs, who (at the time) owed no duty at all to their detainee, and lawyers, who “have an obligation to respect the interests of their clients and ensure their clients’ confidentiality.” Id.

187. See id. at 13–16. One detainee, J.I. from Khost Province, reflected on his experience with a DRB hearing: “[the Board was] not answering my questions about where is the evidence in court. The Personal Representative just sat, he did not talk. He didn’t do anything.” Id. at 13. Similar comments were made by Gul Alai, who allegedly “owned a compound where IED-making material was found.” Id. at 14. In his DRB, Gul Alai stated that he did not own the entire compound he was captured in (and within such compound, a house was found to contain IED materials), that he simply owned a house which contained no bomb-making materials. Id. The DB presented no evidence of who owned the house that contained the discovered weapons “or any forensic evidence that might indicate how long the weapons had been buried there . . . [or] how long the detainee had lived in the house,” and Gul Alai’s PR neither “demand[ed] that such evidence be presented, nor did he present any evidence himself . . . [the PR asked only if] the detainee knew his neighbors and could see over their wall, and how he had been treated by the U.S. military” and presented no evidence or other statements during the hearing’s unclassified portion. Id. Another detainee, Nasrullah, was detained after weapons were found near the area where he lived, though he tested negative for explosive residue. Id. at 14–15. No evidence was produced of who owned the house that contained the discovered weapons “or any forensic evidence that might indicate how long the weapons had been buried there . . . [or] how long the detainee had lived in the house,” and Nasrullah’s PR simply “asked the detainee whether he owned any weapons . . . [or] knew the other people arrested with him.” Id. at 15. In a third case, the detainee, who wished to remain anonymous in the report, was accused of planting IEDs along
human rights organizations criticize the United States for not providing counsel despite no international law requirement to do so.\textsuperscript{188}

With regard to lay representation, the roles of personal representatives before a CSRT (convened for detainees at Guantanamo) and personal representatives before a DRB (convened for detainees at Bagram-Parwan) are largely identical. In both CSRTs and DRBs, at any session that the detainee is not permitted to be present (for example, a classified portion of the Board), his PR would nevertheless be allowed to attend.\textsuperscript{189} The role of the PR in
each hearing is to “assist” the detainee in preparing for the hearing, but a major change has occurred recently vis-à-vis the amount of “privilege” with which the PR must treat information told to him by the detainee: the PR in the DRB context now has some affirmative duty to the detainee that more closely resembles the duties which a lawyer owes to his client.\textsuperscript{190}

The Supreme Court’s right to counsel cases reveal two important principles: First, lawyers, by virtue of their ethical obligation and professional culture, possess a unique capacity to zealously represent even the most reviled objects of societal scorn; second, bringing that zealfulness to bear is essential to protect the interests of individuals subjected to confinement.\textsuperscript{191} While our legal culture normally associates such confinement with the criminal process, recent decisions of the Court have extended the requirement of zealous legal

representative remains to hear, present, and challenge information on the detainee’s behalf.” Bovarnick, supra note 100, at 32–34; cf. Jennifer K. Elsea, Cong. Research Serv., RS 22173, Detainees at Guantanamo Bay 3 (last updated July 20, 2005), available at http://www.fas.org/sgp/crs/natsec/RS22173.pdf (describing the role of the PR at the CSRT and stating that while the PR “may view classified information and comment on it to the tribunal to aid in its determination . . . (the PR) does not act as an advocate for the detainee”).

\textsuperscript{190} See Respondent’s Motion to Dismiss Amended Petitions for Writs of Habeas Corpus at 22–23, Al Maqaleh v. Gates, 620 F. Supp. 2d 51 (No. 06-cv-01669), available at http://www.lawfareblog.com/wp-content/uploads/2012/01/64-main.pdf. In its motion, the Government draws a clear distinction between the “loyalty” PRs owe their detainees at CSRTs as opposed to those at DRBs:

Whereas the CSRT personal representative had no confidential relationship with the detainee and there was no requirement that he act and advocate for the detainee, the DRB personal representative is bound by a non-disclosure policy, which prohibits him from disclosing information “detrimental to the detainee’s case that was obtained through communications with the detainee” as well as “adverse information discovered by the personal representative’s independent investigatory efforts.”


\textsuperscript{191} See Powell v. Alabama, 287 U.S. 45 (1932). The Supreme Court discussed how the opportunity for a defendant to be heard is meaningless without the opportunity to be represented by a person trained in the law, and that such a denial amounts to a denial of constitutionally-mandated due process:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

\textit{Id.} at 68–69.
representation beyond that context to situations of preventive non-punitve detention and immigration removal proceedings.192

These two vectors—a limited trigger for the right to counsel and the significance of liberty interest implicated by any form of confinement—create a gray area for any meaningful analysis of the protections that should be afforded to individuals subject to wartime preventive detention as unprivileged belligerents. Wartime captives have not historically been provided legal representation in the detention determination process. Instead, as noted earlier in this Article, assistance has traditionally come in the form of a layman prisoner’s representative. This history arguably supports the practice of providing lay representation for detainees. However, the consequence of the status determination made by the review tribunals established to assess detainability of alleged unprivileged belligerents clearly implicates the same concerns implicated by the Sixth Amendment right to counsel, and the extension of that right to the non-punitve detention processes the Supreme Court has recently endorsed. In fact, the consequence of a wartime detention decision is potentially more profound than that related to punitive incarceration.193 Unlike the criminal context, the detention of unprivileged belligerents is not for a defined period, but is as close to indefinite detention as in any other imaginable context.194

It is clear that this perceived consequence of indefinite detention was a significant motivation for the important and credible revisions to the detention review process implemented to date. It is equally clear that Congress has recognized the importance of legal representation for individuals subjected to this process. Collectively, these developments confirm that individual representation is an important component in mitigating the risk of erroneous status determinations, thereby increasing the probability of factually justified detention decisions. What is less clear is whether the consequence of relying on non-lawyers to provide this representation has been adequately assessed or critiqued.195 Ultimately, the

192. See, e.g., United States v. Salerno, 481 U.S. 739, 742, 751–52 (1987) (holding constitutional the 1984 Bail Reform Act’s provisions regarding pretrial preventive detention, in part because of the Act’s procedural safeguards, including a right to counsel at the administrative detention hearing); United States v. Comstock, 130 S.Ct. 1949, 1954 (2010) (holding constitutional the Adam Walsh Child Protection and Safety Act, which in part authorizes a federal district court to order the civil commitment of a mentally ill and sexually-dangerous federal prisoner beyond the date the prisoner would otherwise be released from incarceration; the statute provides that at the commitment hearing, the prisoner “shall be represented by counsel.”); Compean, 25 I. & N. Dec. 1, 2 (BIA 2009) (stating that the Board of Immigration Appeals has discretion to reopen removal proceedings “to consider claims of ineffective assistance of counsel based on conduct of counsel,” even when allegedly ineffective conduct of counsel “occurred after a final order of removal had been entered”).

193. See Boumediene v. Bush, 553 U.S. 723, 785 (2008) (discussing the process due under a CSRT and stating that “[a]lthough we make no judgment whether the CSRTs, as currently constituted, satisfy due process standards, we agree . . . that, even when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal’s findings of fact”).

194. See, e.g., Hamdi v. Rumsfeld, 542 U.S. 507, 520 (2004) (“If the Government does not consider this unconventional war won for two generations, and if it maintains during that time that Hamdi might, if released, rejoin forces fighting against the United States, then the position it has taken throughout the litigation of this case suggests that Hamdi’s detention could last for the rest of his life.”).

195. See Boumediene, 553 U.S. at 767, 787 (noting that a detainee’s personal representative is not a lawyer and explicitly not even a lay advocate, and while discussing how General Yamashita and the defendants in Quirin were provided with legal representation, also stating that those proceedings
shift away from the lay representative model reflected in the NDAA 2012 implicates potentially significant cost/benefit considerations. It is to these considerations the Article will now turn.

C. The Potential Benefits of Legal Representation

Lawyers play a unique role in any adversarial or quasi-adversarial process. In many ways, that role mirrors the role of the soldier on the field of battle. Both the soldier and the lawyer are inculcated with an ethos of aggressive execution of the mission. For the soldier, this is reflected in the values of duty and selfless service. For the lawyer, it is reflected in the ethical duty of zealousness. Irrespective of the label placed on the duty, the effect is the same. Both the soldier and the lawyer perform their duties on behalf of a “client;” both the soldier and the lawyer are expected to execute their duties tirelessly and aggressively within the limits of the rules that regulate their respective battles; and both the soldier and the lawyer understand that it is not their role to question the mission assigned by the client, but instead to fight within the limits of the rules to accomplish that mission.196

This last aspect of the analogy between the soldier and the lawyer is perhaps most significant to truly understand the importance of the zealous representation ethos. Lawyers possess a unique ability to embrace their duty on behalf of the most vilified objects of state action.197 Exemplified by the likes of John Adams,198 Sam Leibowitz,199 and Kenneth Royall,200 this ability is central to the credibility of the adversarial process. The defense bar were adversarial in nature, where Boumediene’s CSRT was considered an administrative proceeding, not an adversarial proceeding).

196. See MODEL RULES OF PROF’L CONDUCT R. 1.2 (1983). Rule 1.2 concerns the scope of representation and demarcates the sharing of authority between the attorney and client:

[A] lawyer shall abide by a client’s decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Id. at 1.2(a). A common axiom is that the client makes strategic decisions (e.g., what plea to enter) while the lawyer makes tactical decisions (e.g., determining the order of witnesses called, deciding what evidence to offer). However, this is not entirely accurate, as the lawyer’s tactical decision making is tempered by the client’s overall strategic control (e.g., the client may tell the lawyer not to call a certain witness or not to offer certain evidence; the lawyer must abide by these decisions).

197. This acceptance of duty is sometimes codified into rules of professional conduct, perhaps in part to remind lawyers that no matter their personal disagreements with their clients' lifestyles, that everyone is entitled to zealous representation. See, e.g., AIR FORCE RULES OF PROF’L CONDUCT R. 1.2(d) (2005), available at http://www.caaflog.com/wp-content/uploads/AirForceRulesofProfessionalConduct.pdf (“A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s economic, social, or moral views or activities.”).

198. See Adams’s Defense Speech, supra note 129.

199. Id.

200. Kenneth Claiborne Royall was a colonel in the United States Army during World War II. In 1942, he was appointed by President Roosevelt to defend the Nazis captured during Operation Pastorius—also known as the defendants in Ex parte Quirin. Though Royall was ordered to defend the Nazis before a military tribunal, he believed that the President did not have the authority to
Unprivileged Belligerents, Preventive Detention, and Fundamental Fairness

prides itself on its unapologetic commitment to individuals who although legally presumed innocent are often obviously factually guilty. Accepting the approbation of the public—a public that is often incapable of truly understanding either the nature of the lawyer’s duty or its contribution to legitimacy—is an integral part of their obligation. Lawyers understand that without that zealous commitment to the client, the adversarial system cannot properly function, and as the Supreme Court reminds us periodically, the distortion produced by an absence of such representation fundamentally undermines the entire concept of justice.201

Ensuring a balanced adversarial process that produces a credible result therefore requires more than merely competing representatives; it requires representatives fully committed to the adversarial competition. The assumption that lay representatives are capable of such commitment is highly questionable in the abstract, and even more so in the context of a review process charged with determining whether to release an individual alleged to be an enemy belligerent. In the abstract, asking a layperson to embrace the cause of target of state accusation—even in relation to a non-punitive allegation—is inconsistent with the normal assumption that accusation suggests guilt.202 In the detainee status context, the difficulty is exponentially increased.

convene a secret military court to try his clients, and appealed to the federal courts, arguing that the military commission was unconstitutional. Royall represented the defendants at the Supreme Court, and though the Court held in favor of the President’s order, he had succeeded in obtaining independent civilian judicial review for his clients. Royall later served as the last Secretary of War in 1947, and then as the first Secretary of the Army until 1949. See Nathan Williams, What Happened to the 8 Germans Tried by a Military Court in World War II, HISTORY NEWS NETWORK (July 8, 2002), http://hnn.us/articles/431.html; Kenneth Claiborne Royall, U.S. ARMY CENTER OF MILITARY HISTORY, http://www.history.army.mil/books/Sw-SA/Royall.htm (last visited Oct. 21, 2012). See also Ex parte Quirin, 317 U.S. 1 (1942).201

201. See Strickland v. Washington, 466 U.S. 668, 684–86 (1984) (“[T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. . . . [T]he Court has recognized that ‘the right to counsel is the right to the effective assistance of counsel.’ ”) (citations omitted). In its jurisprudence, the Court has enumerated the requirements for a fair trial and repeatedly emphasized that, with regard to the right to counsel,

a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the “ample opportunity to meet the case of the prosecution” to which they are entitled.

Id. at 685.

202. That this assumption is normal is reflected in the universal admonition to jurors in criminal cases that they may not consider the accusation of a defendant as evidence of guilt. See Carter v. Kentucky, 450 U.S. 288, 289 (1981) (holding that the trial court’s refusal to instruct the jury that “[t]he defendant is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way” was fundamental error and that a defendant had a right to such an instruction under the Fifth and Fourteenth Amendments). The Court noted that while “[n]o judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation,” a judge must, at the defendant’s request, “use the unique power of the jury instruction to reduce that speculation to a minimum” and that “the failure to limit the jurors’ speculation on the meaning of . . . [a defendant’s] silence, when the defendant makes a timely request that a prophylactic instruction be given, exacts an impermissible toll on the full and free exercise of the privilege [against self-incrimination].” Id. at 303–05 (alteration in original).
Zealous representation of detainees by lay military officers requires commitment to the protection of the interests of an alleged enemy operative. This in itself is problematic. How can a member of the U.S. armed forces be expected to embrace the interests of an individual captured by his colleagues and detained based on an initial determination of belligerent conduct? It is difficult to imagine a more unattractive “client.” Exacerbating this problem are the obvious stakes implicated by the outcome of the review process. Drawing stark distinctions between representation by counsel and representation by personal representative, a report conducted on the role of the personal representative at CSRT proceedings revealed that, on numerous occasions, PRs did very little in the hearing to help their assigned detainee and some PRs actively advocated against their detainee and for the Government. At the same time, it is entirely unrealistic to expect the representative to ignore the possibility that effectively performing the representation duties could result in an enemy operative being returned to the battle-space. The obvious consequence of such an outcome would include the death or injury of other members of U.S. or coalition armed forces. It is far more realistic to assume that these considerations will inevitably compromise the representative zeal essential to effectuate the purpose of the quasi-adversarial process.

It is unlikely that the Department of Defense was ignorant to this risk when it developed the detainee review process for both Guantanamo and Parwan. Instead, it is far more likely that the decision to rely on lay representatives was based on three primary considerations. First, an analogy to the GPW Article 5 process almost certainly influenced this decision. As noted earlier, on the surface the objective of both the CSRTs and the Article 5 process are analogous. Accordingly, it is somewhat logical that those responsible for developing the CSRT process would adopt the Article 5 model. However, as it was also explained earlier, because the analogy between the POW and the unprivileged belligerent is limited, this assumption cannot justify a wholesale importation of Article 5 process for the unlawful belligerent detention determination.

203. See David J.R. Frakt, The Myth of Divided Loyalties: Defending Detainees and the Constitution in the Guantanamo Military Commissions, 43 CASE W. RES. J. INT’L L. 545, 554 (2011) (“Contrary to what some non-lawyers might believe, there is no conflict of interest for a military lawyer in representing an individual whose interests may be, in some sense, adverse to the U.S. government or the U.S. military, at least as defined by the rules of professional responsibility.”). Obviously, legal training emphasizes the nature of zealous representation, even of a client one might find personally abhorrent; unfortunately, lay representatives are not steeped in the sort of training and ethos as lawyers are, potentially resulting in the internal conflict described above.


[t]he detainee’s personal representative was totally silent in 12% of the hearings, and in only 52% of the hearings did the personal representative make substantive comments. However, sometimes the substantive comments of the personal representative advocated for the Government and against the detainee. At the end of the hearing, the personal representative had a last opportunity to make comments, but 98% of the time the personal representative explicitly chose not to do so.

Id. at 6. See also supra note 188 (describing the comments of a number of Bagram detainees regarding the efficacy of their PRs during DRB hearings).
Second, it is likely that reliance on lay representatives was based in part on the assumption that tactical and technical proficiency is the *sine qua non* of effective representation. This assumption is supported by the efforts devoted to training these representatives. This is a flawed assumption. Effective representation of individuals accused of conduct so contrary to the interests of the state that it warrants incarceration—either punitive or preventive—requires more than tactical or technical proficiency in the process established to make the detention determination. The true *sine qua non* is the far more intangible element of zealousness. As noted earlier, this clearly forms the foundation of the Supreme Court's right to counsel jurisprudence, and is central to the ethical obligation of lawyers. To suggest that expertise in the process alone renders representation of such an individual truly effective is inconsistent with the American tradition of representation.

Of course, it is virtually impossible to prove this premise with anything close to empirical certitude. However, several considerations provide inferential support. First, consider the analogy to the soldier. Like the lawyer, tactical and technical proficiency are essential to the soldier's effectiveness. However, military leaders intuitively understand that this is not the key element in producing a truly effective soldier. A truly effective soldier is an individual who has been transformed from "civilian" into "soldier." This transformation involves far more than the development of tactical and technical proficiency; it involves inculcating the recruit with the warrior ethos and the value set that defines military service. This is a major component not only of initial training, but also of a soldier's entire professional development. This is what accounts for the transformation from individual to member of a team committed to mission accomplishment. Soldiers are immersed in a culture of duty, loyalty, selfless service, and a sense of pride in being part of an organization that places mission accomplishment above self-interest. Without that intangible element, the transformation is fundamentally incomplete.

This analogy is indeed ironic in the context of the detainee representation process. The Department of Defense has essentially adopted an approach to this process that is inconsistent with its own understanding of the relationship between tactical and technical proficiency and the role of zealous advocacy in effective representation.

---

205. See Bovarnick, *supra* note 100, at 20 n.82, 30 (discussing the initial training and periodic refresher training requirements of board members, recorders, and personal representatives).

206. See *Strickland*, 466 U.S. at 685 (discussing the Sixth Amendment right to counsel and holding that "a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding"). Further, the Court reinforced the notion that access to legal representation "plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Id.* (citation omitted).

proficiency and professional ethos. Taking the analogy to its logical conclusion, relying on lay advocates to represent suspected unprivileged enemy belligerents in the detention review process is analogous to relying on an experienced hunter to perform the mission of an infantryman on the field of battle. Such a suggestion is of course ludicrous. However, it reveals the significance of professional ethos in relation to the warrior’s execution of the challenging duty entrusted to him. In the adversarial system, it is the advocate who serves as the warrior, and in that system, the significance of professional ethos is no less profound.

The third consideration that likely contributed to the lay representative approach is feasibility. A simplistic assessment of the cost-benefit equation might suggest that providing lay representation for suspected unlawful enemy belligerents is logical. The numbers and availability of non-legal military officers capable of being trained in representation duties is inherently more extensive than the narrower sub-set of available military legal officers. Judge Advocates are also a finite resource already involved in the support of military operations in unprecedented numbers. Providing a military lawyer for every captive facing an indefinite detention hearing would create an additional burden on this finite pool of military lawyers. If the focal point of satisfying the representation requirement is technical aptitude, then the availability of an alternate source of officers to perform these duties would seem an attractive and logical alternative.

Even assuming arguendo that technical competence is the appropriate focal point of cost/benefit analysis (an assumption challenged throughout this Article) there are three additional considerations that undermine the continuation of the lay representative approach. First, the second order benefit to the habeas litigation process. Second, the overall enhanced credibility of the U.S. detention process. Third, enhanced efficiency in the process to determine who should continue to be detained. Each of these considerations favor representation by individuals imbued with the legal professional ethos. This conclusion is based on the assumption that legal representation would improve the quality of the detention review process by producing more comprehensive review tribunal records and mitigating the risk of detaining individuals without legitimate cause, a conclusion that apparently motivated Congress to impose this requirement on the Department of Defense.208

208. Legal counsel would be able to note the flaws of the CSRT process, and move to challenge them, just as appointed-JAG defense attorneys pointed out flaws with the 2006 MCA military commission trials. See Frakt, supra note 203, at 563 (“The efforts of both military defense counsel and prosecutors highlighted the many flaws of the MCA of 2006. This, in turn, led to dramatic improvements in the MCA of 2009.”). Frakt, himself a Lieutenant Colonel in the U.S. Air Force Reserve JAG Corps, also notes that in his experience, JAG attorneys do not feel as if representing detainees is harming their country; rather, many see it as a way to defend the Constitution and American values:

The ultimate allegiance of the military lawyer is to the U.S. Constitution. Military defenders not only saw no conflict with their oath to defend the Constitution, but viewed the representation of detainees as being in total harmony with this duty. Military lawyers are also deeply committed to the laws of war and the rule of law generally. The substantive law of the military commission, as well as the rules and procedures developed by the Pentagon, were inconsistent with the laws of war and violated basic principles of due process. Many JAGs viewed the entire legal regime as an affront to military justice and to basic American values and were eager to reveal its shortcomings.

Id. at 558.
The first of these considerations—the impact on the habeas litigation process—could produce two important benefits. First, it is logical to assume that representation by a skilled lawyer will enhance the review tribunal quasi-adversarial process. Improvements might include exposing evidentiary deficiencies, identifying and presenting otherwise overlooked probative evidence, subjecting presented evidence to more robust testing, and more effectively summarizing the evidence and legal standards applicable to the decision-maker. This enhancement will result in a more comprehensive record of the status determination process. If and when these determinations are subject to federal judicial review, the enhanced quality of these records should logically result in enhanced reliance on the detainability determination by reviewing courts. The importance of this potential benefit is highlighted by the government’s habeas litigation track record. After Boumediene opened the door to consideration of evidentiary insufficiency, the review process became a major focal point of reviewing courts. Improved representation should mitigate this problem. Of course, the value of this benefit is now restricted to the Guantanamo CSRTs. Whether habeas review will ultimately be extended to other detention venues, like Afghanistan, is yet to be determined conclusively. This improved process could, however, reduce the risk of such extension in

---

209. See id. at 555 (noting that CSRT findings “were largely discounted by defense attorneys . . . [as] [t]he Tribunals were viewed as unfair and deeply flawed”); Parhat v. Gates, 532 F.3d 834, 850 (D.C. Cir. 2008) (rejecting the Government’s contention that “it can prevail by submitting documents that read as if they were indictments or civil complaints, and that simply assert as facts the elements required to prove that a detainee falls within the definition of enemy combatant” and requiring the government to demonstrate the reliability of its evidence).

210. See WITTES, supra note 54, at 77–80. Two of the major evidentiary issues are hearsay and so-called “mosaic evidence”—primarily circumstantial evidence that the Government claims should be considered as a whole, as opposed to judicial consideration of each individual piece of evidence by itself. With regard to hearsay:

[b]oth government and habeas counsel are also pushing the appeals courts to redirect the lower court concerning the use of hearsay evidence, with a particular focus on the admissibility of and weight to be accorded such evidence . . . In Al Adahi, the government argues that Judge Kessler flyspecked its evidence way too closely, looking at each piece of evidence individually and applying scrutiny to it that, “far from acknowledging the realities of the wartime military setting and the weight and sensitivity of the government’s interests. . . [applied a] heightened standard of proof for the government.” In one instance, the government argues, Judge Kessler “searched for reasons, including mistaken reasons, to discredit the government’s witness, and refused on legally erroneous grounds to even consider the evidence that corroborated the witness’s statements.” The proper approach, it urges the D.C. Circuit, “is to recognize the distinct nature of the intelligence information and other sources on which the military must rely, and to accord appropriate deference to the inferences that expert military personnel draw from such material based on the insights they derive from their military operations and experience.

Id. at 77 (citations omitted).

211. Although the District of Columbia’s District Court extended habeas review to a detainee held in Bagram who had been initially captured outside of Afghanistan, this decision was subsequently reversed by the D.C. Circuit Court of Appeals. Al Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010) (holding that the district court lacked jurisdiction to consider petitioners’ writs of habeas corpus, as petitioners were held outside the de jure sovereignty of the United States and thus previous statutory invocations of the Article I, Section 9 Suspension Clause served to deny the district court jurisdiction over petitioners’ habeas petitions). This indicates that it is unlikely the courts will extend habeas review beyond the limits of Guantanamo detainees. However, as with so many other issues related to detentions of unprivileged belligerents in the war on terror, it is truly impossible to predict how this issue will ultimately evolve.
the future by providing important indicia of credibility to the existing approach to assessing detainability.

Even assuming habeas review is never extended beyond Guantanamo detainees, improving the quality of other detention review proceedings will enhance the credibility of the overall detention process for unprivileged belligerents. Although the primary focal point of criticism of the U.S. detention practices since September 11th has been maltreatment of detainees (an issue that arose early in the war on terror and is now widely considered moot as the United States has recognized a universal humane treatment obligation for all detainees), an important underlying criticism has always been the prima facie illegitimacy of detention outside the framework of the Geneva Prisoner of War and Civilian Conventions.212 While

212. See, e.g., Jules Lobel, Preventive Detention: Prisoners, Suspected Terrorists and Permanent Emergency, 25 T. JEFFERSON L. REV. 389, 389 (2003). Lobel argues that detaining against future conduct rather than punishing past offenses “threatens to undermine fundamental principles of both constitutional law and international law which prohibit certain government action based on mere suspicion or perceived threat” and is especially concerned about such detention being employed against U.S. citizens, and draws strong historical parallels when arguing that

[t]he use of indefinite administrative detention against citizens for security purposes represents a profound shift in our constitutional order which generally prohibits detaining people for [a] substantial period without charging them with a crime. Despite the Constitution’s proscriptions, the American government has responded to perceived or contrived security threats in the past by detaining or authorizing the detention of disfavored groups: anarchist aliens during the Palmer Raids after WWI, Japanese Americans during WWII, suspected communists during the Cold War, and now suspected terrorists labeled as “enemy combatants.”

Id. at 397–98. See also Alec Walen, Criminalizing Statements of Terrorist Intent: How to Understand the Law Governing Terrorist Threats, and Why It Should Be Used Instead of Long-Term Preventive Detention, 101 J. CRIM. L. & CRIMINOLOGY 803, 810–11 (2011). Walen adopts a moral or principled approach, rather than a pragmatic approach, to the issue of long-term detention, asserting that

One might respond to the claim that the government can prosecute suspected terrorists (STs) who threaten to commit terrorist acts by saying that that option, helpful as it might be, is not as helpful as also having the option of subjecting STs to long-term preventive detention (LTPD). I have argued at length against that position, and in favor of the view that respect for the dignity of autonomous individuals requires the government to release and police, after (at most) a short period of preventive detention, its own citizens who it cannot convict of a crime for which long-term punitive detention is a fitting punishment.

Id. at 810 (footnote omitted). Walen’s position revolves around the dichotomy of short-term detention and observation followed by prosecution or release and further observation, and in all instances, long-term detention is inappropriate unless and until the suspect is actually convicted of a crime. Walen makes stark distinctions between what he considers to be justifiable short-term detention (which, if applied against a citizen may arguably still violate his or her constitutional right to liberty) and long-term detention, which is only justifiable in a punitive context or very specific preventive contexts. However, at no time does he believe that long-term preventive detention for alleged terrorist operatives is appropriate for future intelligence-gathering purposes:

Those who can be detained fall into two basic categories: those subject to punitive detention and those subject to preventive detention. Punitive detention respects autonomy because it is based on a person’s autonomous choice to commit a crime. Those subject to preventive detention can be detained in the short-term for the sake of security because even innocent people can be expected to make small sacrifices for the sake of the greater welfare. People may be subject to long-term preventive detention (“LTPD”), however, only if they fall into one of four categories: (1) they lack the normal autonomous capacity to govern their own choices; (2) they have, in virtue of one or more criminal convictions, lost their right to be treated as autonomous and accountable; (3) they have an independent duty to avoid contact with others because such contact would be impermissibly harmful (e.g., those with
contagious and deadly diseases), and LTPD simply reinforces this duty; or (4) they are incapable of being adequately policed and held accountable for their choices. Importantly, traditional combatants and some suspected members of groups like al-Qaeda fall under this last category, and thus their detention can be accounted for in this AR Model. If, however, a given suspected member of a group like al-Qaeda—a suspected terrorist (“ST”)—does not fall under this last category (or any of the former three categories), then he must be released and policed like any criminal defendant who is acquitted at trial if he is not tried and convicted of a crime.

Alec Walen, *Transcending, but Not Abandoning, the Combatant-Civilian Distinction: A Case Study*, 63 RUTGERS L. REV. 1149, 1163–64 (2011) [hereinafter *The Combatant-Civilian Distinction*]. In considering his point, Walen discusses the *al-Marri* case in which the Fourth Circuit’s holding was ultimately vacated as moot. Al-Marri, a Qatari citizen arrested in December 2001 in connection to the 9/11 attacks, was criminally charged with possessing fraudulent credit card numbers in 2002 and with making false statements to the FBI in 2003. Pleading not guilty, al-Marri was set for trial until President Bush determined that al-Marri was an enemy combatant associated with al-Qaeda and was transferred to military detention in South Carolina. Al-Marri v. Spagone, 555 U.S. 1220 (2009), *vacating as moot* al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008). Al-Marri filed for habeas relief and while the Fourth Circuit held that he could be detained as an enemy combatant, it also held that he had not been provided with sufficient process to challenge that determination. The Supreme Court granted certiorari, but vacated the Fourth Circuit’s decision when the Government opted to release al-Marri from military detention and prosecute him in federal district court. *Al-Marri*, 555 U.S. at 1220. Walen laments the Government’s dismissal, because the Court had never addressed a citizen or legal resident alien being arrested and detained on U.S. soil, far from any battlefield:

The Court had already determined, in *Hamdi v. Rumsfeld*, that U.S. citizens can be held as enemy combatants. But that case based its holding at least in part on the assumption (to be verified by a fair hearing) that Hamdi was captured while fighting with the Taliban in what was a traditional international armed conflict, a conflict in which the United States was and remains actively engaged. This left the question whether a U.S. citizen or a legally resident alien, who was not captured on a traditional battlefield and had not even taken up arms against the United States on behalf of an enemy nation, could likewise be detained as an enemy combatant.

The *Combatant-Civilian Distinction*, supra, at 1153. Walen’s argument was that such a determination, made far from the battlefield and in a context where civilian law enforcement was operating effectively and could capably dispose of the issue, “threatens to strip the protections of the criminal law and its highly protective due process framework from people who any civil libertarian would think deserve to benefit from them.” *Id.* at 1158. In a similar vein, other scholars asserted that generational detention without charge, under any justification, is inconsistent with American constitutional jurisprudence and international human rights law. As early as 2002, one Canadian scholar considered the implications to American constitutional law:

The Pentagon’s top lawyer has gone further, to suggest that even terror suspects who are tried and acquitted may be held in indefinite detention. A senior aide to former president George Bush Sr. is worried: “Would I be comfortable keeping them in Guantanamo for 20 years on the theory that the war on terrorism is still going on? Probably not.” I would remove the “probably”. No principle of international or American law can be invoked to permit indefinite preventive detention.

Stephen J. Toope, *Fallout from 9-11: Will a Secure Culture Undermine Human Rights?*, 65 SASK. L. REV. 281, 289 (2002). In the ten years that have passed since 9/11, America and the world continue to struggle with the legal effects of the GWOT and the effect of detaining persons in an armed conflict that transcends borders and traditional battlefields. While criticism began at the same time the original detention plan was implemented, today concerns seem to stem from the duality of looking back a decade and looking into the future indefinitely. Critics of long-term detention also focus on the relative inefficiency of trials by military commission—a handful charged and even fewer convicted and sentenced—despite the immense public support. A common theme in modern criticism is that the “law of war detention is not an alternative to prosecution—the central focus of both POW detention and civilian detention for security reasons under the Fourth Geneva Convention is not criminal prosecution but protective and preventive detention.” Laurie R. Blank, *A
there is substantial dispute on the international legal basis for such detentions, one thing is certain: no humanitarian law treaty provides express authority to detain captives based on this categorization. This has led many critics of U.S. detention practices to condemn the legal rationale for preventive detentions.

For purposes of U.S. practice, it is clear that the authority to detain unprivileged enemy belligerents has been legally sanctioned by both the Supreme Court and Congress (originally by implication and now expressly pursuant to the NDAA 2012) as an exercise of national war powers.\(^{213}\) It is equally clear, however, that this legal basis is most robust in relation to individuals designated as unprivileged belligerents as the result of their participation in combat operations against U.S. or coalition military forces.\(^{214}\) The definition of unprivileged belligerent (originally unlawful enemy combatant) has, however, never been restricted to such individuals. Instead, from the inception of the war on terror it has included individuals who associate with al-Qaeda or who provide support (qualified at various times as material or substantial) to belligerent forces or to international terrorist groups. This expansive definition of a detainable captive has undoubtedly contributed to the overall criticism leveled at the United States.

Providing captives with assistance of counsel during their detention hearings will obviously not impact the scope of asserted detention authority. However, assuming counsel will enhance the quality of representation—an assumption at the core of this Article—it will mitigate the over-breadth inherent in the current definition of unprivileged belligerents subject to preventive detention. Perhaps more importantly, this mitigating effect will likely bear an inverse relationship to the perceived legitimacy of the different categories of captives.

\(^{213}\) See, e.g., Authorization for Use of Military Force, Pub.L. 107-40, 115 Stat. 224 (2001) (authorizing the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons”). By implication, “all necessary force” includes the detaining persons believed to be planning or aiding in past or future terror attacks against the United States.

\(^{214}\) Hamdi v. Rumsfeld, 542 U.S. 507, 534 (2004). In her plurality opinion, Justice O’Connor recognized that both Hamdi and the Government “agree that initial captures on the battlefield need not receive the process we have discussed here [i.e., the right to challenge detention]; that process is due only when the determination is made to continue to hold those who have been seized.” Id.

*Square Peg in a Round Hole: Stretching Law of War Detention Too Far,* 63 RUTGERS L. REV. 1169, 1189 (2011). Taken a step further, the argument against indefinite detention is becoming and will remain that “suggest[ing] that the United States can either prosecute detainees or hold them in indefinite detention is equivalent to suggesting that detention is another form of punishment.” Id. On another level, even the federal courts most sympathetic to the government’s national security concerns are critical of the potential indefinite detention scheme. Considering generational detention at facilities in Afghanistan and detainees’ inability to challenge such detention using habeas, Judge John Bates wrote:

It is one thing to detain those captured on the surrounding battlefield at a place like Bagram, which respondents correctly maintain is in a theater of war. It is quite another thing to apprehend people in foreign countries—far from any Afghan battlefield—and then bring them to a theater of war, where the Constitution arguably may not reach. Such rendition resurrects the same specter of limitless Executive power the Supreme Court sought to guard against in Boumediene—the concern that the Executive could move detainees physically beyond the reach of the Constitution and detain them indefinitely.

Unprivileged Belligerents, Preventive Detention, and Fundamental Fairness

detainable unprivileged belligerents. Individuals captured on what is best described as a traditional field of battle after having engaged in hostilities against U.S. or coalition forces—the type of individual most analogous to a traditional enemy prisoner of war and therefore most justifiably subjected to wartime preventive detention215—would be unlikely to garner much benefit from assistance of counsel. In contrast, captives alleged to be subject to preventive detention as the result of a tenuous association with al-Qaeda or for providing support to belligerent forces or terrorist operations—the aspect of the unprivileged belligerent definition most attenuated from the traditional enemy prisoner of war definition and therefore most susceptible to criticism—would garner the most benefit from assistance of counsel. The weight of evidence, credibility of witnesses and statements, and inferences derived from circumstantial evidence is most critical in relation to these captives, all aspects of the detention review process that implicate the core competency of effective legal representation.216

The third potential benefit that would likely flow from provision of counsel to captives facing preventive detention would be a more efficient culling of justified versus unjustified detentions. Because this will serve the interests of captives and the military, this benefit may in fact be the most significant. It is utterly false to assume that the military benefits from an overly broad swath of detention authority. On the contrary, detaining individuals without legitimate justification consumes limited resources unnecessarily, detracts from the allocation of effort focused on individuals legitimately subject to detention, alienates local populations, and undermines the overall credibility of the detention operation. However, it is difficult to ignore the reality that soldiers at the point of capture have an incentive to err on the side of caution and initially detain individuals even when the justification is uncertain. At this point in the detention process, soldiers lack the clarity of careful evidentiary assessments and lack the time and space to consider the totality of the circumstances related to their decision. As a result, the military itself has a strong interest in an efficient yet effective process to cull from the group of captive individuals subject to long-term preventive detention whose initial detention is determined to have been unjustified (a consideration obviously recognized by Congress when it exempted point-of-capture detention decisions from the legal representation provision of the NDAA).

215. See Ex parte Quirin, 317 U.S. 1, 31 (1942) (“Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but, in addition, they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.”); Hamdi, 542 U.S. at 518, 521 (holding that detention of “individuals falling into the limited category [defined by the AUMF], for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use” and that “the United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants.”). So long as American forces are engaged in combat in Afghanistan, the Court held that if the United States proves that the person was “‘engaged in an armed conflict against the United States’ . . . [the] detentions [would be] part of the exercise of ‘necessary and appropriate force’ . . . authorized by the AUMF.” Id.

216. This consideration may justify a limited provision of counsel, triggered only when a captive is subjected to detention for conduct that did not occur in the context of combat operations.
Enhancing the quality of the fact-finding and review process would contribute to a more efficient allocation of detention resources and mitigate the very real risk of unjustified detentions. Assuming provision of counsel for detainees would provide such an enhancement, the benefit of a more effective continued detention determination would clearly be within the interest of U.S. forces. The more complex the status determination, the more significant this benefit becomes. This provides a rational basis to distinguish between true GPW Article 5 tribunal processes and detention review proceedings related to unprivileged belligerents. As discussed above, identifying those captives who should be detained by virtue of their status as unprivileged belligerents in the context of the war on terror is far more complex than analogous determinations in the context of an armed conflict against a traditional state-armed force. This provides a logical explanation for why providing assistance of counsel for unprivileged belligerents does not necessitate an analogous extension of this protection to suspected POWs brought before an Article 5 tribunal.

All of these potential benefits are of course only one aspect of the decision-making equation. Any extension of legal representation for wartime detention determination must account for the costs of such provision. These costs fall into three broad categories. First, the resource allocation cost, or more specifically, the burden imposed on the military legal community to allocate the manpower to satisfy this requirement. Second, the transaction cost produced by injecting legal representation for detainees at status determination proceedings—the adversarial instincts of lawyers will almost inevitably influence the nature of these proceedings, making them potentially more cumbersome and complex. Finally, the precendential cost of providing counsel as a matter of policy absent a clear legal obligation to do so. No matter how vigorously the government emphasizes the gratuitous nature of such a policy (which should be a central aspect of implementing the NDAA mandate), future detention operations would almost certainly be impacted by a perceived need to replicate the policy, even in situations without analogous justification. It is to these costs that this Article now turns.

VI. But Is It Feasible?

Congress obviously concluded that none of these concerns justified the continuation of the pure lay representative model. However, this does not render them irrelevant. Instead, they will almost certainly influence the definition of the long-term trigger, and should be at least considered in order to place this development into wider strategic and operational context.

A. Added Complexity

Making a review process more complex as a result of more effective representation may be inevitable. However, this cost will be offset by the benefit of this complexity: improved accuracy. Accuracy is certainly the ultimate objective of any detention review process, for it not only protects the individual captive from unjustified deprivation of liberty, but also protects the detaining power from releasing captives who should be subjected to continued detention. Compromising accuracy in the interest of efficiency is simply not defensible,
especially when the consequence of erroneous decisions is as profound as that associated with
the wartime preventive detention process.

B. **Precedential Impact?**

The risk that providing legal representation to individuals subjected to wartime preventive detention will be leveraged in future conflicts to press for extending this protection to more traditional enemy captives is a much more significant concern. Since the end of World War II, there has been a steady and increasing pressure to extend human rights principles to the context of armed conflict.\footnote{217} During this same period, it has also become commonplace for U.S. (and other) armed forces to supplement with policy the range of individual protections required by law during military operations. The combination of these two factors—the ever increasing emphasis on protecting individual human rights during military operations and the practice of implementing protections often not required by law—has increasingly blurred the line between law and policy.

Military practitioners are cognizant of this risk, and as a result it is almost inevitable that it will influence assessments of the wisdom of adopting gratuitous human rights protections during armed conflict. However, this risk does not sufficiently offset the potential benefits of providing legal representation as a matter of policy. Instead, it necessitates a clear and constant emphasis that it is indeed policy, and not a sense of legal obligation, motivating this modification to the existing practice.

Unfortunately, Congress does not seem to have been cognizant of the importance of this emphasis. The NDAA 2012 legal representation provision in no way indicates whether it was adopted as a matter of national policy or in order to satisfy a perceived international legal obligation. Indeed, the precedential impact of this provision of the NDAA 2012 is almost

\footnote{217. See Geoffrey Corn, *Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict*, 1 J. INTL. HUMANITARIAN L. STUD. 52, 57, 59–61 (2010) (attributing this pressure, in part, to the decrease in long-term military operations in the increase of so-called “peace operations”). The article refers specifically to military operations that did not involve sustained armed hostilities and therefore were almost universally considered as failing outside the LOAC regulatory framework. One aspect of these operations was that while participating armed forces were always prepared to engage in combat like hostilities, use of force was normally restricted to response to actual or imminent threat. As a result, the operational legal focus tended more towards issues related to interacting with and treatment of the local civilian population than with the application of combat power in a manner analogous to such application during armed conflict. *Id.* at 59 (footnotes omitted). Other law of war scholars have observed that From an empirical perspective . . . there has been a convergence between the international humanitarian law detention review standards and processes that one would find in international armed conflict, and the human rights-oriented detention review standards and processes that one would find in domestic or even international criminal law proceedings. This convergence has been incremental, and responsive in large part to international politics and litigation in U.S. courts. This convergence is more than a question of politics and judicial decisions on the reach of executive power—treaty and customary international law provide little detail as to what the standards and processes for detention review are, and therefore allow states a significant degree of latitude in fashioning their own measures. Prescott, *supra* note 31, at 17 (footnotes omitted).}
certainly more uncertain because it took the form of a statute and not a Department of Defense policy. Because of this, any implementing regulations should emphasize the gratuitous nature of this provision, and that it does not indicate that the United States considers legal representation an international legal requirement.

C. Resource Drain?

Another significant consideration related to providing legal representation during the preventive detention process is personnel impact on the military legal community. Military lawyers, or JAGs, are a finite resource in any operational context. Furthermore, the emphasis on rule of law and legally compliant operations has imposed a greater demand on these lawyers today than ever before, a burden that will almost certainly become even more demanding in the future. As a result, imposing an additional requirement on this finite pool of lawyers should not be done casually.

Because detainee representation duties are not currently assigned to JAGs, it is impossible to dispute the fact that this change in policy will impose a significant new responsibility on these military lawyers. However, this responsibility will provide a valuable opportunity for these lawyers to engage in a function that hones core advocacy and operational competencies. It may also be logical to leverage the already existing military trial defense services to assume this duty, perhaps with augmentation from reserve components activated on a rotational basis to represent detainees. Like all missions in the military, once it is prioritized there is simply no question that it will be effectively accomplished.

VII. Conclusion

Indefinite preventive detention is an inevitable necessity of armed hostilities. Some see this as unfortunate, others as mission essential, and still others as wholly illegitimate. These reactions, while understandable, simply do not diminish the reality that preventive detention will be a continued aspect of the U.S. struggle against international terrorism. Like all wars before and those to come in the future, preventing captured belligerent operatives from returning to the fight is logical and necessary to achieve tactical, operational, and strategic success.

There is, however, another aspect of this preventive detention process that is equally undeniable: the unconventional nature of the struggle against terrorism and the operatives that form the ranks of this enemy. This reality creates a risk of erroneous detention and unjustified long-term deprivation of liberty that is exponentially more significant than the risk associated with conventional or “traditional” armed conflicts. This endangers not only the liberty interest of innocent individuals erroneously suspected of being agents of terrorists groups, but also the strategic interests of the United States by eroding the precious perception of legitimacy.

Providing legal representation to individuals brought before administrative detention review proceedings is an important aspect of mitigating this risk. No process can guarantee complete accuracy in the outcomes of each of these proceedings; however, providing extensive process without representatives devoted to the ethos of zealous representation seems
remarkably hollow. As American law students learn through the Sixth Amendment jurisprudence of the Supreme Court, it is the zealous devotion to the client that effectuates the process erected to protect individuals from government accusation.

The recent inclusion of a military legal representation provision in the NDAA 2012 is an important development in this area. While it is unclear why Congress included this provision, it nonetheless reflects a judgment that the current lay-representation approach derived from the Prisoner of War Convention Article 5 Tribunal process is insufficient to address the interests of war-on-terror detainees. How this provision will be implemented is yet to be seen, but perhaps the Department of Defense should embrace the logic of entrusting lawyers with this responsibility early in the detention review process. While the gratuitous nature of this protection should absolutely be emphasized, the potential benefits that will flow from this change sufficiently outweigh the costs and warrant abandoning the current approach.