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# Addressing the Guantanamo “Legacy Problem”: Bringing Law-of-War Prolonged Military Detention and Criminal Prosecution into Closer Alignment

Norman Abrams\*

*Remarks of President Barak Obama at the National Defense University, May 23, 2013:*

*“The AUMF is now nearly twelve years old. The Afghan war is coming to an end. Core al Qaeda is a shell of its former self . . . . [I]n the years to come, not every collection of thugs that labels themselves al Qaeda will pose a credible threat to the United States . . . . I look forward to engaging Congress and the American people in efforts to refine, and ultimately repeal, the AUMF’s mandate . . . . This war, like all wars, must end. Now, even after we take these steps one issue will remain—just how to deal with those GTMO detainees who we know have participated in dangerous plots or attacks but who cannot be prosecuted—for example because the evidence against them has been compromised or is inadmissible in a court of law . . . . [O]nce we commit to a process of closing GTMO, I am confident that this legacy problem can be resolved, consistent with our commitment to the rule of law.”*

*Remarks of President Barack Obama on National Security at the National Archives, May 21, 2009:*

*“First, whenever feasible, we will try those who have violated American criminal laws in federal courts – courts provided for by the United States Constitution . . . . The second category of cases involves detainees who violate the laws of war and are therefore best tried through military commissions . . . . They are an appropriate venue for trying detainees for violations of the laws of war . . . . Now, finally, there remains the question of detainees at Guantanamo who cannot be prosecuted yet who pose a clear danger to the American people. And I have to be honest here – this is the toughest single issue that we will face. We’re going to exhaust every avenue that we have to prosecute those at Guantanamo who pose a danger to our country . . . . Let me repeat: I am not going to release individuals who endanger the American people . . . . Having said that, we must recognize that these detention policies cannot be unbounded . . . . We must have clear, defensible, and lawful standards for those who fall into this category. We must have fair procedures so that we don’t make mistakes. We must have a thorough process of periodic review, so that any prolonged detention is carefully evaluated and justified.”*

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*Justice O'Connor writing for a plurality of the Court in Hamdi v. Rumsfeld, 542 U.S. 507 (2004):*

*"Certainly we agree that indefinite detention for the purpose of interrogation is not authorized. Further, we understand Congress' grant of authority for the use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel . . . ."*

#### INTRODUCTION

It is commonplace that a war against a terrorist organization, such as al Qaeda, has the following three characteristics. First, it has certain elements of a traditional war: there is a defined enemy; attacks are made by the enemy against both military and civilian targets, both in this country and abroad; and the goal of the enemy is to destroy or defeat us as a nation. Second, it contains elements of criminal behavior by a criminal organization because the hostile actions allegedly engaged in by the members and supporters of the criminal organization are usually considered crimes either under the law of war or domestic U.S. law, or both.<sup>1</sup> And finally, it may turn out to be a war without an end date.<sup>2</sup>

1. The criminal behavior feature of this kind of "war" has led some to argue that the criminal law provides adequate tools to address the problem. Rather than relying solely on the criminal law, or the law of war, the dual nature of the efforts used against al Qaeda should be seen as providing the basis for an approach involving both. See generally Robert Chesney, *Terrorism, Criminal Prosecution, and the Preventive Detention Debate*, 50 S. TEX. L. REV. 669 (2009), which, inter alia, involves an assessment of the capacities of the criminal justice system to deal with terrorism cases.

2. Will it truly be a war without an end date? Individuals who are members of an enemy force are detainable for the duration of the conflict, but which is the relevant conflict: the war against the Taliban or the war against al Qaeda? Many of the detainees still at Guantanamo were directly involved in the ongoing war against the Taliban. Under the holding in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and under the authority of the congressional joint resolution, Authorization for the Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001), the detainees can be held for the duration of the active battlefield conflict with the Taliban. But the conflict with the Taliban may be brought to some kind of closure in 2016, with almost all U.S. troops withdrawn from Afghanistan by then. The U.S. military is arguing in favor of retaining a small force in the country. If any force is maintained there, the question will be whether that conflict has, indeed, ended. See ROBERT CHESNEY ET AL., BROOKINGS INST., *THE EMERGING LAW OF DETENTION 2.0: THE GUANTANAMO HABEAS CASES AS LAWMAKING* 39-40 (2012) [hereinafter CHESNEY, *EMERGING LAW OF DETENTION*]. If the Taliban war is deemed to have ended, justification for continued detention of the Taliban cohort of Guantanamo detainees will likely be sought in the theory that the war against al Qaeda continues, and the detainees have sufficient links to that organization. President Obama indicated, however, in his May 2013 address at the National Defense University that he would work with Congress to refine and "ultimately" repeal the AUMF. See Barack Obama, U.S. President, Address at the National Defense University (May 23, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>. Were repeal to happen, unless another legal charter were substituted, the legal foundation for waging war against al Qaeda would be withdrawn, and the duration-of-the-conflict legal rationale undermined for holding any remaining Guantanamo detainees who are not destined to be prosecuted. It seems overly optimistic, however, to expect repeal of the AUMF anytime soon.

Given the fact that most of the hostile acts of the enemy in this war against the United States are crimes, the Obama administration has made criminal prosecution of the Guantanamo detainees, where feasible, a high priority. Incarceration upon conviction for those detainees who are prosecuted provides a legal basis for continuing imprisonment, at least for the length of the sentence. But for various legal reasons such as statute of limitations violations or non-extraterritoriality of the relevant statute, it is not feasible to successfully prosecute many of the detainees, even though they, too, have allegedly engaged in criminal behavior. As described in the President’s remarks at the National Archives, the current approach for dealing with persons captured in the war against al Qaeda includes: (1) a preference for criminal prosecution of as many of the detainees as possible (in most cases, after the detention has been determined to be lawful through habeas corpus petitions by detainees); (2) release or transfer of many of them; and (3) prolonged detention of “a number,” subject to periodic review of their continuing dangerousness.<sup>3</sup>

The possibility that any person, even someone who engaged in serious terrorist acts, might be detained indefinitely in military custody, possibly for a lifetime, without having been convicted of a crime sets off alarm bells in a society such as ours. Long-term detentions without criminal trials often have been a hallmark of a despotic government. Of course, there are instances in our legal system where, even without a criminal conviction, there is provision for long-term, possibly indefinite deprivation of an individual’s liberty in an institutionalized setting, based on the presence of certain conditions – for example, civil commitment of a person who suffers from a mental disorder and is proved to be a danger to himself/herself or others.

Justice O’Connor, speaking for a plurality of the Court in *Hamdi v. Rumsfeld*,<sup>4</sup> expressed concern about indefinite, conceivably lifetime, detention based on a rationale of preventing the detainee from returning to the “battlefield.”<sup>5</sup> Significantly, she stated that if the duration of the conflict can be indefinite, the law-of-war understanding – detention for the duration of the conflict – may

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3. See Editorial, *Corrosive Detention*, L.A. TIMES, June 7, 2009, at A27 (reacting to President Obama’s statements in his May 2009 address regarding the need to continue to detain some of the Guantanamo detainees who cannot be prosecuted). There is an extensive post-9/11 detention literature relating to the detainees at Guantanamo. See, e.g., STEPHANIE COOPER BLUM, *THE NECESSARY EVIL OF PREVENTIVE DETENTION IN THE WAR ON TERROR: A PLAN FOR A MORE MODERATE AND SUSTAINABLE SOLUTION* (Cambria Press ed., 2008); David Cole, *Out of the Shadows: Preventative Detention, Suspected Terrorists, and War*, 97 CAL. L. REV. 693 (2009); Madeline Morris, Frances A. Eberhard & Michael A. Watsula, *After Guantanamo: War, Crime, and Detention*, 3 HARV. L. & POL’Y REV. ONLINE 1 (2009); Tung Yin, *Ending the War on Terrorism One Terrorist at a Time: A Non-Criminal Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J.L. & PUB. POL’Y 149 (2005); Gregory S. McNeal, *The Status Quo Bias and Counterterrorism Detention*, 101 NW. J. CRIM. L. & CRIMINOLOGY 855 (2011). For a general analytical treatment of the issues in preventive detention, see Adam Klein & Benjamin Wittes, *Preventive Detention in American Theory and Practice*, 2 HARV. NAT’L SEC. J. 85 (2011).

4. 542 U.S. 507 (2004).

5. *Id.* at 521 (plurality opinion).

unravel.<sup>6</sup> Justice O'Connor in her enigmatic phrasing seemed to be saying that "[t]he law-of-war understanding is not based on conflicts of indefinite duration"; it did not contemplate detention for a lifetime." Through the "unravel" statement, Justice O'Connor put a big, if ambiguous, question mark on the idea of prolonged, potentially lifetime detention based on a law-of-war rationale in the context of a war against a terrorist organization.

Despite the weightiness of the concerns about such prolonged detentions, both Presidents Bush and Obama acknowledged the need for the exercise of such a power in a limited number of cases. And under both presidents, the exercise of such authority was tempered somewhat by the establishment of a process of regular review of the cases of the detainees to determine whether they continued to be dangerous and, if not, providing for their release.<sup>7</sup> Nevertheless, a substantial number of Guantanamo detainees – probably on the order of several dozen – seem likely to continue to be detained for a lengthy, indefinite period.<sup>8</sup>

In his May 2013 remarks, President Obama described the continuing detention of these individuals as the "legacy problem," that is, prolonged detention cases leftover from the post-9/11 period, and he stated as one of his goals the resolution of the "legacy problem . . . consistent with our commitment to the rule of law." The purpose of this paper is to move the legacy problem<sup>9</sup> forward by taking into account the fact that it is likely that most of the long-term detainees, both those against whom prosecution is infeasible as well as those who can be prosecuted, can be said to have engaged in culpable criminal activity. A primary goal is to reduce the inequality of treatment between the two paths – criminal prosecution or prolonged military detention – by bringing law-of-war detention and criminal prosecution into closer alignment.

Under the present system, these two paths appear to involve differential treatment that runs counter to a sense of justice, that is, the imposition of a fixed-term sentence (assuming that it is not a life sentence or the equivalent) for

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6. *Id.*

7. President Obama established the Periodic Review process by Exec. Order No. 13,567, 76 Fed. Reg. 13,277 (Mar. 7, 2011). Under President Bush, the Administrative Review ("ARB") process was established through Department of Defense regulations. See discussion *infra* Part I.B.1.

8. In November 2013, it was reported that the U.S. government was negotiating with Yemen to establish a detention facility there to which Yemeni detainees could be transferred. Even if this were to occur, there would still remain a significant number of non-Yemeni detainees in prolonged U.S. military detention. Also, depending on the nature of the arrangement negotiated with Yemen, the issues of whether those individuals detained in Yemen would still remain in a form of U.S. custody might be raised. See David S. Cloud, *U.S. holds talks about Yemen detention center for Guantanamo inmates*, LA TIMES (Nov. 6, 2013), <http://articles.latimes.com/2013/nov/06/world/la-fg-yemen-gitmo-20131107>.

9. For a sampling of others who have written on the prolonged detention issue at Guantanamo, see authorities cited, *supra* note 3. The continuing nature of the "legacy problem" – i.e., the detention of dozens of the existing Guantanamo detainees, possibly indefinitely – warrants the development of a proposal designed to heed this concern. Further, the same problem could arise in the future if additional al Qaeda fighters, or members of organizations with similar characteristics in wartime settings, are captured.

those who are convicted versus what looks like something worse: an indefinite period of detention in military custody for the other cohort (subject to the possibility of release through the periodic review process).<sup>10</sup> What is different about the Guantanamo two track-system is that an individual who cannot be successfully prosecuted – for example, because he has a statute of limitations defense – may not gain a benefit thereby but rather may be shifted into what may be a much harsher outcome, indefinite detention. This type of outcome should be seen as unacceptable

A revised approach, while paying heed to national security interests, should not only decrease this apparent difference in treatment but also increase the chances that most of the detainees in indefinite detention might be released short of a lifetime in custody, thus giving them some reasonable hope that their detention may end at some particular point. The revised approach should also reduce the possibility that the decision whether prosecution is feasible in each case might be influenced by tactical considerations.<sup>11</sup> Steps should be taken to ensure that these decisions are made strictly based on legal considerations, uninfluenced by other factors.

Progress toward these closely related goals can be achieved by adding to the current approach, taking into account the aforementioned special features of a war against a terrorist organization. It is contemplated under the proposal described in this paper that the essential elements of the present system would be continued. The basic decision to detain would continue to be reviewed in habeas proceedings, and the periodic review process would continue to be applicable. Additional elements would, however, need to be inserted into the periodic review process.

One additional element would deal with the question of whether a detainee who has been prosecuted may afterwards be returned to indefinite detention. On a number of occasions,<sup>12</sup> government sources have claimed that the government has the authority to return a prosecuted detainee to military detention after he has served his sentence or even after he has been acquitted. A way to begin to bring the two tracks into closer alignment is formally to introduce a structured approach to the possibility of returning to military custody those who are prosecuted, after the prosecution–imprisonment track has come to closure,

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10. Normally, when there are two defendants otherwise similarly situated and one is prosecuted, convicted and serves a sentence, and the other is freed because, for example, of a statute of limitations defense, the difference in outcome does not offend one's sense of justice. There are sound policy reasons for recognition of a statute of limitations defense, and, if a result of implementing those policies is the freeing of some defendants who have engaged in criminal conduct, it is viewed as an acceptable cost.

11. For a general treatment of tactical considerations that may influence the prosecutorial choice between federal and state prosecution, see NORMAN ABRAMS, SARAH SUN BEALE & SUSAN RIVA KLEIN, *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 77-84 (4th ed. 2006). For an excellent article presenting a cost analysis of having redundant forums that present a choice of forum in terrorism cases, see Aziz Z. Huq, *Forum Choice for Terrorism Suspects*, 61 DUKE L.J. 1415 (2012).

12. See discussion *infra* Part II.A.2.

although that outcome would be unlikely in most cases. This can be done by taking national security concerns into account via a rebuttable presumption procedure and the application of a stringent standard.

A second new element to insert into the periodic review proceeding would address directly the fact that those whom it is infeasible to prosecute may be held indefinitely. This can be done by attaching legal significance to the culpable criminal conduct engaged in by those whom it is infeasible to prosecute – not by using this conduct as a basis for punishment, but rather as a way to derive a presumptive limit on the length of detention – making the fact that a crime had been committed a relevant element of proof in the first (or an early) Periodic Review Board (“PRB”) review. In the same proceeding, an approximation should be made of the sentence that each unprosecuted, long-term detainee would likely have received, had it been feasible to prosecute him for the indicated offense(s). This putative sentence can then be used as a presumptive – but not certain – limit on the length of prolonged military detention in any particular case. A rebuttable presumption procedure and a stringent standard would then be used to determine whether the detainee should continue in detention past the period of the approximated sentence.

Introducing into the indefinite detention track a flexible application of some fixed-term criminality attributes while adding to the criminal prosecution/fixed-term imprisonment track a possibility of return to military custody would move the two tracks into closer alignment and reduce the inequality between them. This can be done without compromising or departing from the essential justification underlying each track.

Finally, a related step would introduce a process intended to ensure that the decision to prosecute is, to the extent possible, made based on all of the proper legal elements, in order to minimize the chances that the decisionmakers tilt toward one track or the other because of tactical considerations.

A detailed review of the current approach and a fleshing out of the elements of the revised system contemplated under the proposal, is presented, along with a more detailed explanation of its rationale, in the remainder of this paper. Specifically, Part I describes the Obama administration’s current approach, including the standard and process for determining the lawfulness of military detention, the periodic review process, and the implications of the Administration’s preference for criminal prosecution. Special attention is given in this part to the 2010 Report of the Guantanamo Review Task Force. Part II describes and explains in detail the elements of the proposal for bringing the two tracks – prolonged military detention and criminal prosecution – into closer alignment. Finally, Part III considers the fact that the PRB process is officially described as involving an exercise of discretion, and then discusses how the proposal relates to this discretionary process and the law of war.

## I. THE OBAMA ADMINISTRATION’S CURRENT APPROACH

In general terms, how are we currently dealing with terrorists linked to

al Qaeda who have been seized abroad? How are the cases of those who are still detained at Guantanamo being handled? It should be noted that up until now these cases have not gone smoothly, quickly, or efficiently. Under both the Bush and Obama administrations, the process has been slow and there have been far too many delays. This part will primarily summarize elements of the Obama administration’s approach regarding detainees who are still being held in detention or have been or are to be prosecuted.

*A. Detention of Enemy Belligerents in the War against  
al Qaeda – Determination of the Lawfulness of Detention*

Initially, in response to the *Hamdi* decision, a determination of whether Guantanamo detainees had been lawfully detained was made in a military administrative process before administrative bodies called Combatant Status Review Tribunals (“CSRT”).<sup>13</sup> The standard applied before those tribunals, promulgated in a Department of Defense memorandum issued in the wake of the *Hamdi* decision in 2004, defined enemy combatant (and thus a person subject to lawful military detention) as

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.<sup>14</sup>

After the decision in *Boumediene v. Bush*,<sup>15</sup> most of the detainees took advantage of the opportunity to file habeas corpus actions<sup>16</sup> in federal court in the District of Columbia. The standard applied by the courts in the habeas

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13. See *Boumediene v. Bush*, 553 U.S. 723 (2008). In *Boumediene*, the Supreme Court, inter alia, considered whether the Combatant Status Review Tribunal (“CSRT”) process, with its accompanying judicial review, was sufficiently protective of the interests of the detainees so that that access to habeas review was not needed. The court concluded that the CSRT procedures did not provide sufficient protection of detainee interests to satisfy the Suspension Clause.

14. *Khalid v. Bush*, 355 F. Supp. 2d 311, 315 n.2 (D.D.C. 2005) (citing Memorandum from Deputy Sec’y of Def. Paul Wolfowitz for the Sec’y of the Navy, *Order Establishing Combatant Status Review Tribunal* (July 7, 2004)). In addition to the CSRT review, Administrative Review Boards (“ARBs”) were established to determine through a follow-up annual review whether an individual, who had previously gone through the CSRT review, continued to pose a threat or had valuable intelligence information. In 2011, the Obama administration, by executive order, effectively substituted another process for the ARBs, the Period Review Board (“PRB”) process, which also focuses on the continuing threat issue and provides somewhat greater procedural protections to the detainee than the ARB process.

15. 553 U.S. 723.

16. For a detailed treatment of the habeas cases through approximately 2012, see CHESNEY ET AL., *EMERGING LAW OF DETENTION*, *supra* note 2, at 7-11. See also Robert M. Chesney, *Who May Be Held? Military Detention through the Habeas Lens*, 52 B.C. L. REV. 769 (2011). As described in CHESNEY, *EMERGING LAW OF DETENTION*, *supra* note 2, the district courts have granted many of the petitions and denied some. In some cases where the petitions were granted, the government did not appeal and some of these detainees have already gained release and transfer, while the release of other detainees has been delayed because of the problem of finding an appropriate country or for other reasons. Generally, where

actions<sup>17</sup> evolved through several judicial decisions, finally culminating in a formulation enacted by Congress in the National Defense Authorization Act for Fiscal Year 2012. The several formulations were recently summarized in *Ali v. Obama*.<sup>18</sup>

This Court has stated that the AUMF authorizes the President to detain enemy combatants, which includes (among others) individuals who are part of al Qaeda, the Taliban, or associated forces . . . .<sup>19</sup>

The court then proceeded in a footnote to state:

As this Court has explained in prior cases, the President may also detain individuals who substantially support al Qaeda, the Taliban, or associated forces in the war. The National Defense Authorization Act for Fiscal Year 2012 expressly permits military detention of a “person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners.”<sup>20</sup> And our earlier cases, citing the Military Commissions Act of 2009, permit military detention of a person who was part of or “purposefully and materially” supported al Qaeda, the Taliban, or associated forces in the war.<sup>21</sup>

As can be seen, the standard only changed in limited ways from its original formulation in 2004. While the legal standard for detention did not change very

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the government has opposed release, the detainees have not been successful on appeal. *But see Kiyemba v. Obama*, 130 S. Ct. 1235 (2010).

17. The courts in considering these habeas petitions have looked to the Authorization for the Use of Military Force (“AUMF”), Pub. L. No. 107-40, 115 Stat. 224 (2001), and the law of war as the sources of legal authority to detain the individuals involved. The AUMF provides in part “[t]hat 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.” *Id.* at § 2(a). Identification of al Qaeda and the Taliban, as engaged in hostilities against the United States and further specification of the relationship to al Qaeda or the Taliban forces, has appeared in various formulations including the President’s military order issued in the wake of 9/11, the Military Commissions Acts (“MCA”) of 2006 and 2009, various government briefs and legal memoranda, post-*Boumediene* habeas corpus decisions and, finally, as previously mentioned, the National Defense Authorization Act for Fiscal Year 2012 (“2012 NDAA”). The original military order issued by President Bush addressed both military detention and trial before military commissions, although most of the attention paid to it focused on the military commissions provisions. The MCA of 2006, which supplanted the military order, dealt only with military commissions proceedings, not military detention. Similarly, the successor MCA, enacted at the behest of the incoming Obama administration in 2009, also dealt only with the military commissions and not with detention. The enactment of military custody provisions in the 2012 NDAA was thus the first time a statute had provided an express formula on which military custody could be based in terrorism cases, which had been lacking in any formally promulgated form since the invalidation of the military order by the Supreme Court in *Hamdan*.

18. 736 F.3d 542 (D.C. Cir. 2013).

19. *Id.* at 544.

20. 2012 NDAA, Pub. L. No. 112-81, § 1021, 125 Stat. 1298, 1562 (2011).

21. *Ali*, 736 F.3d at 544 n.1.

much,<sup>22</sup> the detainees were given significantly more procedural protections in the habeas proceedings than they had received in the earlier administrative CSRT hearings. Most importantly, they were represented by counsel.

While some of the issues relating to the legal basis for detaining the remaining Guantanamo detainees have been resolved by the district courts and circuit court of the District of Columbia, some of the relevant issues have not received definitive answers. Apart from *Hamdi*, the Supreme Court has barely addressed the issue of the standard to be applied. In addition to the question of the applicable legal formula warranting military detention, there are many other issues involved in the habeas hearings that affect whether the government’s efforts to uphold detention in individual cases are successful, including issues relating to burden of proof and evidence admissibility. And, important interpretative issues exist regarding the military custody provisions of the 2012 NDAA.<sup>23</sup>

For purposes of this article, we will generally assume that there is a proper legal basis for the detention of the remaining detainees under the applicable preponderance standard. In particular cases, if it were to turn out that there is not such a basis, the detainee should be released. Of course, the goal in the habeas hearings has been simply to determine whether these individuals have been lawfully detained, not how long they can continue to be held.

A final point in addressing the legal basis for these detentions: Given the definitions being applied, it would seem that if the minimal legal basis for detention is present, the conduct involved would generally be covered by the substantive definition of one or more crimes under either the domestic criminal

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22. While there is a general core area of agreement about the standard that governs whether an individual can be detained in military custody in reliance on the authority of the AUMF, there have been some uncertainties, which may or may not have been resolved by the 2012 NDAA legislation – thus, the core formulation of a sufficient involvement under the AUMF and the law of war was described in *al-Bihani v. Obama*, 590 F.3d 866, 870 (D.C. Cir. 2010), as being “[p]art of or supporting Taliban or al Qaeda forces, or associated forces engaged in hostilities against the United States or its coalition partners.” The panel majority in *al-Bihani* went further, stating that being part of or a member of the specified groups is not necessary and that providing independent support is sufficient on account of the fact that the MCAs of 2006 and 2009 included such individuals as persons who could be tried before the military commissions. *See id.* at 866-82. While subsequent cases have generally restated this position, reportedly there has been some disagreement within the government regarding the issue. For example, there is a debate whether a non-member of al Qaeda who, far from the battlefield, provides support by facilitating the travel of would-be fighters to Afghanistan can be detained in prolonged military custody. *Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010), seemingly presented the issue, but the government avoided relying on it, instead arguing that the detainee was functioning as a member of al Qaeda. Some cases have relied on staying at an al Qaeda guesthouse and/or attending an al Qaeda training camp as evidence of membership. *See generally* CHESNEY ET AL., EMERGING LAW OF DETENTION, *supra* note 2. The Chesney paper further delineates which issues appear to be settled and which are still in flux. Other circuit decisions have rejected the view expressed in some district court cases that participation in the organization’s chain of command is a necessary condition for a finding of membership in al Qaeda.

23. For a brief description of some of these interpretative issues, see NORMAN ABRAMS, ANTI-TERRORISM AND CRIMINAL ENFORCEMENT 76-77, 87 (Supp. West Acad. Pub., 4th ed. 2013); *see also* *Hedges v. Obama*, 724 F.3d 170 (2d Cir. 2013).

law of the United States or the Military Commissions Act of 2009.<sup>24</sup> This is not to say that the criminal conduct in every case could be successfully prosecuted. As mentioned previously, the conduct involved may be culpable; yet it may not be legally feasible to prosecute. The subject is more fully discussed, *infra*, in section I.C.

*B. The PRB Process – Continuing Significant Threat to the Security  
of the United States*

1. Introduction

Review processes established under both the Bush and Obama administrations for dealing with the Guantanamo detainees have included reviews aimed at determining whether the detained individual continues to be a threat, and if not, whether that individual qualifies for release and transfer.<sup>25</sup> In addition to the CSRT process, the Bush administration established Administrative Review Boards (“ARBs”), to provide an annual review of whether a detainee should continue in detention.

In March 2011, President Obama established a successor process to the ARB reviews through an Executive Order.<sup>26</sup> The purpose of these successor panels, titled Periodic Review Boards (“PRBs”), is to determine whether the detainee warrants continued detention. The applicable standard set forth in section 2 of the order is “if it is necessary to protect against a significant threat to the security of the United States.” Following issuance of the executive order, the operational beginning of the PRB process was long delayed. At first, it took a long time to issue the implementing guidelines, but even after they were issued, there was a further significant delay. The system finally became operational in the late fall of 2013.<sup>27</sup>

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24. Thus, for example, the conduct involved would often likely meet the *actus reus* definition of criminal conduct under: (1) the material support offenses, 18 U.S.C. § 2339A or § 2339B; (2) the provision criminalizing receiving military training from a foreign terrorist organization, 18 U.S.C. § 2339D; or (3) a theory of being an accomplice to one of those provisions. For a reading of the military custody provisions of the NDAA of 2012 in light of criminal material support provisions, see Rachel Van Landingham, *Meaningful Membership: Making War A Bit More Criminal*, 35 CARDOZO L. REV. 79 (2013). Of course, to successfully prosecute, there must also be proof of the requisite *mens rea*.

25. The Administrative Review Board (“ARB”) process established by the Department of Defense also included as a standard whether the individual continues to possess intelligence.

26. See Exec. Order No. 13,567, 76 Fed. Reg. 13,277 (Mar. 7, 2011) [hereinafter Exec. Order 13,567].

27. After the passage of approximately three years from the issuance of Exec. Order No. 13,567, the first PRB review was completed. The first person reviewed, Mahmud Mujahid, was determined to be eligible for transfer in January 2014, because he was not a continuing significant threat to U.S. security. However, because he is a Yemeni, when his actual release and transfer will occur is uncertain. Unstable conditions in that country have limited the transfers of prisoners to that country. See *Detained Yemeni Could Rejoin Al Qaeda If Freed, US Warns*, ASSOCIATED PRESS (Jan. 28, 2014), <http://www.foxnews.com/us/2014/01/28/detained-yemeni-could-rejoin-al-qaida-if-freed-his-lawyer-says-has-business>. In the second case reviewed, involving a detainee named Abdel Malik al-Rahabi, the reviewing board, after a hearing on January 28, 2014, recommended continued detention under the applicable standard. The

The Periodic Review Boards differ from the ARB process in a number of key respects. First, they have been established by a presidential executive order which both formalizes and elevates their status and importance. Second, the PRB process provides more procedural protection for the detainee than had been provided under the ARB process, including the fact that he can be represented by private counsel at no expense to the government – a right that had not been available under the earlier process. Additionally, all information relied upon by the government must be provided to the detainee’s representative and private counsel, except where necessary to protect the national security. In the latter case, sufficient substitutes or summaries may be provided. A sufficient substitute or summary must provide a meaningful opportunity to assist the detainee.<sup>28</sup> And finally, all relevant mitigating information must be provided to the PRB.

## 2. The Obama PRB Approach – A Significant Threat to the Security of the United States

While adhering to the notion that a cohort of Guantanamo detainees can be held for the duration of the conflict with al Qaeda, based on their having been part of or having substantially supported al Qaeda, both the Bush and the Obama administrations established systems that loosely link up with the justification for holding them until the conflict ends to prevent them from returning to the fray and insofar as the justification under the PRB process for prolonged detention includes as a key element being a continuing significant threat to the security of the United States, it arguably connects to the rationale for continuing detention under the law of war, as applied to a war against a terrorist organization. Deciding that a person captured in the war and determined to be an enemy belligerent, if released, would continue to be a significant threat to U.S. national security is the rough equivalent to concluding that, if released, he is likely to return to the fray by engaging or participating in terrorist actions against the United States.

Of course, under the traditional law-of-war approach, as applied in conflicts of limited duration, an *individualized* determination of the risk of the individual

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board indicated that it would take another look at his case in six months and “hoped to see continued positive engagement and constructive leadership in detention.” See Charlie Savage, *Panel Says Yemeni Man Should Stay in Detention*, N.Y. TIMES (Mar. 12, 2014). Of course, how stringently the standard of significant threat to the security of the U.S. is interpreted will determine how many detainees will remain to be dealt with through prolonged detention or criminal prosecution. See discussion *infra* Part I.B.

28. The Implementing Guidelines provide that “[i]f, in the determination of the originating agency or department, an adequate and meaningful substitute cannot be prepared, the originating agency or department shall advise the PRS of that fact and the information shall be withheld from consideration by the PRB.” DEPUTY SEC’Y. OF DEF., DEP’T OF DEF., DTM 12-005, IMPLEMENTING GUIDELINES FOR PERIODIC REVIEW OF DETAINEES HELD AT GUANTANAMO BAY PER EXECUTIVE ORDER 13567 Attach. 3, § (6)(c)(4)(b), at 13 (2012), available at <http://www.dtic.mil/whs/directives/corres/pdf/DTM-12-005.pdf> [hereinafter DTM 12-005] (incorporating change 2, Nov. 4, 2013).

returning to the fighting is not ordinarily made. That risk is deemed implicit in the status of the individual as an enemy soldier captured during wartime. What the PRB process does, in the context of an open-ended war and the resulting possibility of prolonged detention, is elevate this issue (the threat that the individual poses to the security of the United States) to be expressly addressed in regard to the specific characteristics of the individual and not based simply on the person's status as an enemy soldier.

In making the determination whether the individual continues to be a threat to the security of the United States, the decision process focuses attention on whether the detainee continues to be dangerous. Does the combination of the determination made in the habeas proceeding, regarding the lawfulness of the detention of the individual, and the determination made in the PRB process, regarding whether he continues to be a significant threat to U.S. national security – provide sufficient justification for prolonged continuing detention?<sup>29</sup> Do these two kinds of determinations, for example, adequately respond to the concern expressed by Justice O'Connor through her "unraveled understanding" comment in the *Hamdi* case?<sup>30</sup> In answering that question, it will be helpful first to examine the guidelines promulgated to implement the PRB process.

### 3. The Implementing Guidelines

Guidelines for implementing the PRB process, issued under the authority of the 2011 executive order, spell out in detail factors that may bear on whether the detention is "necessary to protect against a continuing significant threat to the security of the United States."<sup>31</sup> The determination of the danger that the individual poses includes information relating to prior acts of terrorism in which the detainee engaged, his level of terrorism-related training and skills, his links to other terrorists or terrorist organizations, the detainee's behavior during detention, rehabilitative efforts, and his physical and psychological condition. These and similar factors are deemed to bear on the likelihood that, if released or transferred, the detainee would pose a significant threat to the security of the United States.

Although the implementing guidelines are very helpful insofar as they target specific categories of facts that are useful in making the required determination, the ultimate standard applied – "significant threat to the security of the United

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29. Two important details regarding the PRB process should also be mentioned. First, although there is no express provision in either the relevant Executive Order or the Implementing Guidelines allocating or prescribing the requisite burden of proof in PRB hearings, it seems likely that the burden of proof, like that in the habeas proceedings, is on the government and by a preponderance of the evidence. Second, the entire PRB process is expressly referred to in all of the relevant documents as discretionary – that is, not a process established as a matter of law or legally required to be established. The significance of the discretionary underpinning of the process is discussed *infra* Part III.A.

30. See *Hamdi*, 542 U.S. at 521.

31. On May 9, 2012, the deputy secretary of defense issued a memorandum to relevant officials and departments in the Department of Defense setting forth Implementing Guidelines for the Periodic Review Board process. See DTM 12-005, *supra* note 28.

States” – is a broad general formula which by itself provides very little specific guidance or limitation as to what kind or degree of threat is sufficient to meet the standard. The key word, “significant,” leaves much to the judgment of the decisionmaker(s). While it is difficult to imagine articulating a standard bearing on these issues that would provide a greater degree of guidance basing such an important decision – continuing indefinite detention or release – without more, on such a broad standard is troubling.

The same point can be made in slightly different terms: The issue of sufficient or “significant” dangerousness is inherently one that involves a continuum or gradations. Determining the point on the continuum that establishes a sufficient degree of danger to warrant continuing an indefinite detention is an exercise fraught with uncertainty. While there may be some clear cases, many of the cases to be litigated in the PRB hearings are likely to fall into the realm of indeterminacy.

Further, a determination of continuing “significant threat to the security of the United States” is a prediction as to the future danger posed by an individual based on past conduct, existing capabilities and relationships, current behavior, and ultimately the subjective intent of the individual. Trying to make an accurate prediction regarding the future conduct of a particular individual is always an extremely difficult exercise, filled with the potential for making mistakes. And this assumes that the decision makers will be accurately able to determine the facts. In matters such as these, there is an ever-present risk of dissembling by the detainees and efforts to mislead the decision makers. Awareness of that possibility will often tend to skew the decisions that are made.

While, if the issue is correctly resolved, and if detention is continued, the underlying logic strengthens the case for that result, the fact that its resolution presents serious fact-finding difficulties makes it, by itself, an inherently weak foundation upon which to justify continuing, a prolonged detention. Indeed, even when combined with the original basis for detaining the individual – that the person has been determined to be a member of al Qaeda or one of its associated forces or has fought with or provided substantial support to the organization – it is a weak basis for making important decisions about whether an indefinite military detention should be continued, possibly for many, many years.

Based on U.S. law that implements other instances of long-term preventive detention without a criminal trial, the conclusion that such detention is justified is deemed to have a stronger foundation when it is tied to some additional circumstance. See, for example, *Zadvydas v. Davis*,<sup>32</sup> a leading Supreme Court decision, in which various examples of preventive detention were discussed by the Court. In the course of its opinion, the majority indicated that, at least in a domestic, civilian law context, where preventive detention can

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32. 533 U.S. 678 (2001).

also be potentially indefinite, “the dangerousness rationale [must] be accompanied by some other special circumstance, such as mental illness, that helps to create the danger.”<sup>33</sup>

There is no exactly comparable “special circumstance . . . that helps to create the danger” involved in the detainee cases.<sup>34</sup> Given that fact, there are grounds for paying special attention to the criteria, process, and procedures governing the prolonged detention of detainees for whom criminal prosecution is infeasible and who are deemed not to be appropriate candidates for release or transfer. The subject is further addressed in Part II, *infra*.

The *Zadvydas* opinion, to be sure, also mentioned, “terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.”<sup>35</sup> But while that statement suggests the possibility of “special arguments” for preventive detention for terrorists, it gives no indication as to what the standard should be to justify such detention and provides little support for the notion that a possible lifetime in military detention could be based primarily on findings of continuing dangerousness.

### C. The Preference for Criminal Prosecution

#### 1. In General

The preference for criminal prosecution of al Qaeda terrorists was articulated by President Obama in his remarks at the National Archives in 2009, which was quoted in the epigraph at the beginning of this article. In those remarks, he stated that those who have violated American criminal laws should be tried “whenever feasible.” And he restated the policy more forcefully when he said: “We’re going to exhaust every avenue that we have to prosecute those at Guantanamo who pose a danger to our country.”

While there appears to be some continuity between the Bush and Obama administrations’ approach on the issue of criminal prosecution, there are important differences. The Bush administration did not forcefully state a preference for criminal prosecution, although it did initiate prosecutions of some of the Guantanamo detainees before military commissions. It did not prosecute any of the Guantanamo detainees in civilian court,<sup>36</sup> a point that contrasts with the Obama administration’s approach. The Obama administration, while willing to use the military commission process, has seemed more inclined to bring criminal prosecutions of al Qaeda-linked persons who have been detained at Guan-

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33. *Id.* at 691.

34. While some of the detainees may be religious zealots, that status does not rise to the level of a factor, like a settled mental disorder, that, combined with dangerousness, can be taken into account as a basis for preventive detention.

35. *Zadvydas*, 533 U.S. at 696.

36. The Bush administration did prosecute a number of al Qaeda-linked individuals in federal court, e.g., John Walker Lindh, Richard Reid, Jose Padilla, and Yaser Saleh al Marri.

tanamo to the U.S. district courts.<sup>37</sup> However, when political resistance developed to certain of the administration's plans in this regard, it backed away from them.<sup>38</sup>

Why this strong emphasis on criminal prosecution even of persons seized abroad, linked to al Qaeda, who are identified by and treated by the Obama administration as enemy belligerents captured under the law of war and thus subject to detention for the duration of the conflict? As previously mentioned, what makes criminal prosecution an available option in a large percentage of the cases in the war against al Qaeda is the fact that the kind of actions that members of this organization engage in are often generally violations of our domestic criminal laws, as well as, in many instances, being crimes under the law of war.<sup>39</sup> For example, providing aid to a terrorist organization is a crime under U.S. domestic law; another example in the circumstances of this war is that the killing of an American soldier or a member of an allied force by the Taliban on the battlefield is a crime under the law of war.

Criminal prosecutions, of course, may involve a number of different outcomes upon conviction of the defendant: a death sentence, life imprisonment with or without the possibility of parole, or a term of years which may be relatively short (say, five, ten or fifteen years or less) or relatively long (thirty to fifty years). And pursuing criminal prosecution also takes the chance that the defendant will be acquitted or some other non-conviction or no-sentence-to-be-served disposition will be reached.

Implementing criminal prosecution in this context involves differences in the rationale(s) relied upon and could involve differences in the conditions of incarceration. Comparisons can also be made between criminal prosecution of detainees and ordinary criminals. There are obvious differences in the rationales for prolonged military detention and serving a sentence after criminal convic-

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37. Another difference is that there was the direct, visible involvement of the President in the public articulation of the Obama administration policies as reflected not only in presidential public speeches, but also in executive orders emanating from the White House. The Bush approach to similar issues was largely implemented through actions by the Department of Defense and the Department of Justice, without the direct public connection to the President. There was also much less of a tendency to articulate policy in general statements made to the public; in many instances, one could only infer the Bush policy from the actions of the government. Of course, the Bush administration, arguably, was developing its approach "on the fly;" it was dealing with a new and different set of problems for which there were few modern precedents. The Obama administration had the benefit of and was in a position to build upon the earlier administration's work and handling of the problems. Further, the Obama administration articulated a commitment to greater transparency, which in some contexts, though not all, it has managed to achieve.

38. For a brief review of this history, see NORMAN ABRAMS, *ANTI-TERRORISM AND CRIMINAL ENFORCEMENT* 619-22 (West Acad. Pub., 4th ed. 2011).

39. There are, however, legal obstacles to prosecuting some of them, as previously mentioned. For fuller discussion of some of these legal obstacles, see discussion *infra* Part I.C.3. It seems likely that some of those released or transferred, both under the aegis of the Bush and Obama administrations, might have also been prosecuted criminally. Why were these detainees not prosecuted if there was a basis for doing so? We can only speculate that the offenses they committed were not deemed serious enough and that, as an exercise of prosecutorial discretion, an alternate disposition was chosen.

tion. There also some differences between the kinds of individuals typically subject to incarceration after conviction in ordinary crime cases and those detainees who are convicted and sentenced. Finally, general comparisons can be made between the physical aspects and other features of incarceration after conviction for ordinary criminals and the incarceration conditions applicable in prolonged law-of-war military detention for detainees.

Imprisonment for crime is viewed as punishment and, of course, justified on the basis of retributive and/or utilitarian considerations. The utilitarian considerations include the incapacitation of crime-prone individuals for a period of time, as a means of crime prevention, as a general and specific deterrent, and as offering opportunities for rehabilitation. The retributive basis for punishment has been explained in various ways including as vengeance on behalf of the community and the individual victims, as theories of just deserts and notions of quid pro quo, and as an expression of societal condemnation of the conduct and stigmatization of the perpetrators. Prosecution of a detainee for his alleged criminal conduct invokes these kinds of justifications.

Of course the rationale for prolonged detention in military custody contains none of these penal justifications or themes. Rather, it refers to the previously mentioned law-of-war rationale justifying the detention of enemy combatants captured during the war against a terrorist organization, for the duration of the conflict, in order to prevent them from returning to battle. It is also, therefore, a preventative rationale, but not a prevention of crime, rather only prevention of a return to the battle.

There are notable differences between the individuals captured in this war, enemy soldiers captured in a traditional war, and persons who are apprehended for ordinary crimes. Whereas most captured enemy soldiers in a traditional war are not usually viewed as akin to criminals, those apprehended in this war on terror may be religious zealots and reasonably can be viewed in many instances as very dangerous. Indeed, we tend to fear them and their potential to do us harm perhaps *even more* than ordinary criminals.<sup>40</sup>

Useful comparisons can also be made regarding the conditions of imprisonment for these several categories of individuals, following from the observations made about the types of individuals in each category, although generalization is risky. Conditions of imprisonment for crime vary both by jurisdiction and by the seriousness of the crime(s) and sometimes by the profiles of the individuals. But it can be said that, in general, where serious crimes are involved, the conditions of imprisonment are stringent. While the conditions for enemy combatants detained in a traditional war are not likely to be luxurious, generally they are not as harsh as imprisonment for serious crimes. The Guan-

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40. Thus, while the resistance in Congress to closing Guantanamo and bringing the remaining detainees to the U.S. mainland to be incarcerated in maximum security prisons is undoubtedly grounded in part in partisan politics, it may also reflect an underlying fear of the great harms that they could cause if they were to escape, and an unwillingness to take any risk of this occurring.

tanamo Bay facility constitutes our most direct experience with detention facilities in a war on terror. The conditions at Gitmo appear to be at least as stringent as those imposed on serious felons, perhaps even more so, and certainly more stringent than those applied to prisoner-of-war camps in the United States during recent past wars.<sup>41</sup> Given the concerns about the perceived dangerousness and fanaticism of many of the al Qaeda-linked detainees, this should not be surprising.

In summary, while there are marked differences in the rationales for incarceration and detention, the motivations and the attitudes of the individuals captured in this war make them seem in some respects more criminal-like, although their criminal behavior is hardly deterrable. Overall, the long-term detainees in the war on terror seem more similar to persons imprisoned for serious crime than military detainees in a traditional war.

In preferring criminal prosecution, the President has chosen a traditional, acceptable basis for incarcerating individuals.<sup>42</sup> Imprisoning people for lengthy or stringent sentences – possibly life in prison or the death penalty – after trial and conviction, with the sentence calibrated to the seriousness of the crime(s), is part of our legal and historical tradition. That tradition also includes an adversarial criminal trial, where the defendant is represented by counsel and is given the benefit of the full panoply of rights required by due process, including proof beyond a reasonable doubt. Generally, the outcomes of such cases conducted with such a process do not offend our sense of justice and avoid the concerns that arise from indefinite detentions in a free democratic society.<sup>43</sup>

The factors underlying the concern expressed by Justice O’Connor – the unraveling of the understanding under the law of war – provide strong grounds for trying to limit the number of instances of prolonged military detentions without a criminal prosecution. For as long as the individual prosecuted is serving a criminal sentence after a normal criminal trial, his incarceration is justifiable under the traditional rationale for criminal imprisonment. Stated

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41. See, e.g., Dan Barry, *For Some a Relic Stings as a Shrine to Nazism*, N.Y. TIMES (Apr. 1, 2014) (describing the World War II detention of German prisoners in a camp in Charleston, S.C., as “comfortable, considering”).

42. In so doing, the president has opted for fixed-term outcomes for most of the cases. These terms would very often be expected to be very lengthy. In contrast, the current system of indefinite detention for those for whom prosecution is deemed infeasible involves a detention that, under the existing system, is limited only by the possible ending of the al Qaeda conflict, or by a determination through the periodic review process that the detainee is no longer a significant threat to national security.

43. Such a system also has some weaknesses. Suppose the convict reaches the end of his term and is thought still to be a dangerous individual, i.e., a continuing threat to national security. What should be done? The issues raised thereby are further discussed in this text. See discussion *infra* Part II.A. Are we prepared to return the individual at that point to prolonged military detention? Does criminal prosecution become a less attractive option if the likely term will be too short to significantly reduce the risk that a dangerous person might be released? There is also not always a close correlation between the seriousness of the crimes committed and the perceived dangerousness of the individual because there may be sources of information and circumstances indicating dangerousness apart from the crimes actually committed by the individual.

another way, the fewer the number of persons subjected to prolonged detention without criminal trial and conviction, the better. The preference for criminal prosecution thus can be viewed, in part, as a response to Justice O'Connor's concerns. It does not eliminate controversial, indefinite military detentions, but it can serve to significantly reduce their number. For those instances where continuing indefinite detention is still imposed, Justice O'Connor's concerns and President Obama's "legacy problem" remain relevant.

## 2. Implementing the Preference for Criminal Prosecution

Under the existing approach, implementing the preference for criminal prosecution translates into a choice between two tracks – prosecution or continuing military detention<sup>44</sup> – with the choice of the former seen as turning on whether prosecution is legally feasible. An important question is whether, in making that choice, government officials can also exercise a degree of discretion. Or is legal feasibility the only criterion?

It might have been thought that, given President Obama's public statements on the issue, if it is legally feasible to prosecute an individual, he would be prosecuted – that no discretion is involved. Even if an element of discretion in making that decision is not expressly acknowledged, however, there is leeway when considering whether it is legally feasible to prosecute to allow, *sub silentio*, for the exercise of some discretionary choices. Given the presidential edict on the matter, however, and the fact that incarceration after criminal conviction may be a more defensible way to protect the national security, it seems desirable to introduce changes into the existing system that will serve to ensure, to the extent possible, that prosecution is pursued whenever it is legally feasible.<sup>45</sup>

## 3. Criminal-Prosecution-not-Feasible Categories: The 2010 Guantanamo Review Task Force Report (GRTF)

*a. Introduction.* In 2009, President Obama appointed the Guantanamo Review Task Force ("GRTF"), which, among its varied tasks, reviewed the facts

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44. It is noteworthy that the characteristics of these two tracks are unique, as compared with the type of choice-between-tracks found elsewhere in our legal system. For example, in a civil-criminal enforcement context, the IRS or SEC or other administrative agency may decide whether to pursue a case in a civil mode or refer it for criminal prosecution. In many contexts, it is not uncommon for a federal prosecutor to decide whether to prosecute a case in federal court, refer it for civil disposition, or to send the case over to the state system. Many factors may influence that choice, including the applicable penalties in each system. For a detailed treatment of such issues, see NORMAN ABRAMS ET AL., *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 77-84 (West Acad. Pub. 5th ed. 2009). But none of these other two- or three-track situations include a non-criminal prosecution track like that involved in Guantanamo detainee cases. In the other choice-of-track situations, the criminal track is always the one with the potentially more serious or, at least, equally serious consequences for the individual. In the Guantanamo detainee cases, both tracks may be likely to result in incarceration or detention, but it is arguable that choice of the non-criminal track – i.e., prolonged detention – may have the more serious consequences for many of the individuals who end up on that track.

45. See discussion *infra* Part II.C.

underlying the detention of each of the 242 individuals then detained at Guantanamo. The Task Force issued a final report in January 2010,<sup>46</sup> which identified the individuals who it was concluded could not be successfully prosecuted, grouping them into categories and providing an explanation for why prosecution for each category was not feasible.

The report and its treatment of the prosecution-infeasible categories is a valuable source. First, examination of the grounds that the drafters of the report relied upon to conclude that prosecution is infeasible indicates that the task force may have been over-cautious in some of its conclusions regarding infeasibility. In this section, some of the grounds for infeasibility that the task force reported are assessed, and a couple of alternative legal theories and arguments are suggested that, if pursued, might possibly increase the number of successful detainee prosecutions. Of course, were this to occur, it would further the president’s preference for criminal prosecution of the detainees and have the salutary effect of reducing the number of detainees who are held in prolonged, indefinite military detention without prosecution.

Second, in reviewing the report’s statement of grounds for infeasible prosecution, it becomes clear that, for most of the categories of infeasibility, the fact that individuals cannot be successfully prosecuted does not detract from the conclusion that the detainees engaged in criminal misconduct.<sup>47</sup> That observation serves as a crucial foundation for the proposal made here to bring the system of criminal prosecution and prolonged law-of-war detention into closer alignment.

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46. GUANTANAMO REVIEW TASK FORCE, FINAL REPORT (2010) [hereinafter GRTF REPORT]. As of the date of this writing, there are 149 remaining detainees at Guantanamo. Of these, a number have been approved for release, but an appropriate and acceptable receiving country with proper conditions has not yet been found. Undoubtedly, the government has an incentive to reduce the number of those who cannot be prosecuted and must be detained indefinitely to as small a number as possible. Accordingly, it can be expected that a significant number of the remaining detainees will be approved for release through the periodic review process. Additionally, a different and new basis for release was invoked on May 31, 2014, when five senior Taliban detainees at Guantanamo were exchanged for U.S. Sergeant Bowe Bergdahl, who had been a prisoner of the Taliban for five years. See Brian Knowlton, *Administration Defends Swap with Taliban to Free U.S. Soldier*, N.Y. TIMES (June 1, 2014). Finally, as discussed throughout the paper, of those that remain in detention who are not approved for release, some may be prosecuted. Taking into account those who are already approved for release, those who are likely to be approved over the course of the next several years, and those who will be prosecuted, the number who remain, i.e., those who are scheduled for prolonged detention, will likely be small. Accordingly, there might be skepticism about the development of a fairly elaborate procedure to deal with what will likely be a small group of detainees. There are two responses: First, even if the group to whom the proposed procedure is to be applied turns out to be small, it is highly desirable to have as defensible a system as possible in place. Second, the procedures described herein will also be relevant not only with respect to the current detainees but also, in a context to be discussed, see discussion *infra* Part II.A, with respect to those who are prosecuted. See also *infra* Part II.D. Finally, the proposal will be relevant to any individuals captured in the future. See discussion *infra* Part III.C, describing aspirations regarding the proposal.

47. This point is more fully developed *infra* Part I.C.3.b. But this fact about persons in the particular category – i.e., that despite the fact that they cannot be successfully prosecuted, they have engaged in criminal misbehavior – is noted at appropriate points in this section.

*b. The GRTF's List of Factors Affecting the Feasibility of Prosecution.* In its final report, the task force recommended criminal prosecution for thirty-six detainees.<sup>48</sup> Forty-eight detainees were approved for continued detention under the AUMF on the grounds that transfer or release was not considered appropriate<sup>49</sup> and prosecution was deemed infeasible. The final report stated:

[T]he Guidelines provided that a detainee should be considered eligible for continued detention under the AUMF only if (1) the detainee poses a national security threat that cannot be sufficiently mitigated through feasible and appropriate security measures; (2) prosecution of the detainee by the federal government is not feasible in any forum; and (3) continued detention without charges is lawful.

Because each set of reasons the task force relied upon to conclude that prosecution is infeasible essentially denote a category of infeasibility, a careful examination of each of these categories is warranted.<sup>50</sup> Of course the drafters of the report were perhaps conservative in some of their conclusions because the government may not be willing to risk failure in prosecuting these cases due to its concern about the impact of such a failure on public perceptions of the military detention system. In a couple of instances, detailed below, additional arguments are presented that can be used in support of prosecuting those cases. If such arguments are not successful in the end, it would still be possible to implement prolonged detention of these individuals.<sup>51</sup> Generally, it is submitted that the need to “exhaust every avenue” for criminal prosecution, as stated by the President, should trump concerns about the fallout from a possible failed prosecution.

### *1) Feasibility of Prosecution of the Material Support Offenses*

The report concluded that in many of the cases, material support charges under 18 U.S.C. §§ 2339A and 2339B were the only charges available<sup>52</sup> and that there were legal barriers to the use of those provisions.

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48. See GRTF REPORT, *supra* note 46, at 9-10.

49. As of June 2014, several of those detainees originally scheduled for prolonged detention without criminal prosecution have been approved for transfer through the periodic review process and only one of the four individuals whose periodic review has been completed has been determined to continue in detention. Three have been approved for release, and there are five others whose cases are at one stage or another in the review process. See Periodic Review Secretariat, *Full Review*, U.S. DEP'T. OF DEFENSE, <http://www.prs.mil/ReviewInformation/FullReviewpage.aspx>.

50. The determination of the infeasibility of prosecution appears simply to be one that the task force staff made informally in reviewing the cases at hand and not a formal process that was based on the making of a formal record.

51. This is especially so if the other recommendations in this paper are implemented.

52. “In many cases, even though the Task Force found evidence that a detainee was lawfully detainable as part of al-Qaida . . . [no] evidence [was found] that the detainee participated in a specific terrorist plot . . . While the federal material support statutes have been used to convict persons who

*a) Extraterritorial Issues*

One of these legal barriers, according to the report, was the fact that these two statutes did not apply extraterritorially at the time that many of the detainees engaged in the relevant misconduct which was committed abroad. Thus, the report stated:

[T]he two relevant [federal material support] statutes – 18 U.S.C. §§ 2339A and 2339B – were not amended to expressly apply extraterritorially to non-U.S. persons until October 2001 and December 2004, respectively. Thus, material support may not be available as a charge in the federal system unless there is sufficient evidence to prove that a detainee was supporting al-Qaida after October 2001 at the earliest.<sup>53</sup>

This language seems to imply that neither section 2339A nor section 2339B had extraterritorial application, or possibly that they did not have extraterritorial application to non-U.S. persons prior to 2001 and 2004, respectively. This statement appears to be accurate with respect to section 2339A,<sup>54</sup> but the legal picture regarding section 2339B is more complicated.

Contrary to the quoted statement in the report, it can reasonably be argued that section 2339B had some extraterritorial application prior to 2004 and even prior to 2001. Thus, any legal analysis regarding the extraterritorial effect of § 2339B should take into account that, as originally enacted in 1996, section 2339B provided in pertinent part:

(a) PROHIBITED ACTIVITIES. –

(1) UNLAWFUL CONDUCT. – Whoever, within the United States or subject to the jurisdiction of the United States, knowingly provides material support . . . to a foreign terrorist organization shall be fined . . . or imprisoned . . . .

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have merely provided services to a terrorist organization . . . there are potential limitations to pursuing such a charge.” GRTF REPORT, *supra* note 46, at 22.

53. For some of the detainees, the conduct in question had been engaged in prior to 2001.

54. Section 2339A was originally enacted in 1994. Prior to the enactment of the USA PATRIOT Act in October 2001, section 2339A could be charged only where material support was provided “within the United States.” The quoted phrase was then deleted by the PATRIOT Act. The argument that the purpose of the deletion of the phrase in 2001 was to enable the use of section 2339A to prosecute extraterritorial conduct seems persuasive. Accordingly, the Task Force conclusion regarding the extraterritorial application of 2339A appears to be sound. *See* 18 U.S.C. § 2339A (2006). A question can, however, be raised regarding the inclusion of the reference, “were not amended to expressly apply extraterritorially to non-U.S. persons . . .” in regard to section 2339A. *Id.* The October 2001 amendment of section 2339A did not speak at all to the extraterritorial application to non-U.S. persons. If that was an issue, it was an issue only with respect to section 2339B.

(d) EXTRATERRITORIAL JURISDICTION. – There is extraterritorial Federal jurisdiction over an offense under this section.<sup>55</sup>

The express language of subsection (d), which is found in the original statute, makes clear that 2339B had extraterritorial application from the time it was enacted in 1996. Note that the drafters of the GRTF report did not expressly take note of the extraterritorial provision in subsection (d) of the statute. But the existence of this express extraterritorial jurisdictional provision does not entirely settle the extraterritorial issue raised by the report. The question remains: what was the scope of this original extraterritorial jurisdiction under the statute? It may reasonably be asked whether the extraterritorial application was limited to U.S. persons, and whether it was only extended to foreign nationals abroad by the 2004 amendments.

As originally enacted, section 2339B contained two jurisdictional provisions that initially seem contradictory: the previously mentioned subsection which provided generally for extraterritorial application of the section; and the language which provided that the offense was applicable to conduct “within the United States” or “subject to the jurisdiction of the United States.” The “within the United States” wording might initially seem to contradict the extraterritorial provision, but these provisions can be reconciled by viewing them as complementary provisions and the statute as applying to both conduct within the United States and conduct that occurred extraterritorially.

What about “subject to the jurisdiction of the United States?” A plausible reading is that this language is in fact a reference to the extraterritorial reach of the statute – that it imposes a limit on that jurisdiction, by requiring a jurisdictional nexus to the United States. Under this reading, extraterritorial conduct which is “subject to the jurisdiction of the United States” could plausibly be interpreted to mean conduct that, at a minimum, does or could harm U.S. persons or interests or U.S. government functions – which is part of the classic basis for criminal jurisdiction that a country has under international law.<sup>56</sup> If this is the correct reading of the phrase, then, from the time of its enactment, section 2339B applied both extraterritorially and to non-U.S. persons. Accordingly, the statute could be applied to post-1996 conduct abroad of the Guantanamo detainees, or more precisely, to post-October 1999 conduct<sup>57</sup> which harmed or could harm U.S. persons, interests, or governmental functions. Surely, the conduct of the involved detainees would meet that standard.

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55. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 303, 110 Stat. 1214 (2006).

56. See, e.g., *United States v. Mostafa*, 96 F. Supp. 2d 451 (S.D.N.Y. 2013).

57. To violate section 2339B, material support must have been provided to a designated foreign terrorist organization (“FTO”). 18 U.S.C. § 2339B (2006). The organization in question would be al Qaeda, which was designated as an FTO on October 8, 1999.

The other reading of section 2339B is the one that the drafters of the GRTF Report seemed to have been relying on – namely, that the “subject to the jurisdiction of the United States” phrase refers to U.S. persons.<sup>58</sup> If that definition applies to section 2339B as a limitation of the statute in its pre-2004 version, it would mean that from 1996 until 2004, the express extraterritorial jurisdiction feature of section 2339B was restricted only to use abroad against U.S. persons. The notion that Congress would intend to restrict the express extraterritorial application of the statute to U.S. person perpetrators seems odd. By designating the organization as a “foreign terrorist organization” the United States makes it clear that it has a significant interest in preventing the provision of material support to that organization. So why would it, at the same time, restrict the application of the statute abroad to U.S. perpetrators?

As a result of the 2004 amendments, section 2339B now reads as follows:

(a) PROHIBITED ACTIVITIES

(1) UNLAWFUL CONDUCT. – Whoever knowingly provides material support . . . to a foreign terrorist organization shall be fined . . . or imprisoned . . . .

d) EXTRATERRITORIAL JURISDICTION. –

(1) In general. – There is jurisdiction over an offense under subsection (a) if –

- (A) . . . [offender is a national of the United States] . . . ;
  - (B) . . . [offender a stateless person whose habitual residence is in the U.S.] . . . ;
  - (C) . . . [an offender is brought into or found in the United States, even if the conduct . . . occurs outside the United States];
  - (D) . . . [offense occurs . . . within the United States];
  - (E) . . . [offense occurs in or affects interstate or foreign commerce];
- or

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58. See CHARLES DOYLE, CONG. RESEARCH SERV., MATERIAL SUPPORT OF TERRORISTS AND FOREIGN TERRORIST ORGANIZATIONS: SUNSET PROVISIONS 7 (2005) (stating “[a] person ‘subject to the jurisdiction of the United States’ arguably referred to American citizens, residents of this country, and entities organized under our laws.”). In support of this interpretation, the CRS report cites a case, *United States v. Brodie*, 403 F.3d 123, 128 (3d Cir. 2005), which applies a definition of “person subject to the jurisdiction of the United States,” to refer to those subject to the prohibitions of the Trading with the Enemy Act (“TWEA”). That definition, of course, was drafted in a different context and for a very different purpose, and *Brodie* is a decision under the TWEA. Accordingly, the phrase in question may have an entirely different meaning in a criminal statute than when used in a regulatory statute such as a statute barring persons subject to the jurisdiction of the United States from trading with the enemy or regulating engaging in foreign transactions. See 50 U.S.C. § 1702 (2006). There is also an important difference in the grammatical uses of “subject to the jurisdiction of the United States.” In the TWEA, the key language is an adjectival phrase modifying *person* and clearly refers to the “person.” In section 2339B this phrase is arguably adverbial, modifying the predicate verb, and is thus susceptible to the alternative reading.

Still another usage for the phrase is when it directly refers to places or things “subject to the jurisdiction of the United States.” See, e.g. *United States v. Tinoco*, 304 F.3d 1088 (11th Cir. 2002) which involves possession of cocaine on board “a vessel subject to the jurisdiction of the United States.”

(F) . . . [offender aids or abets any person over whom jurisdiction exists . . . or conspires with any person over whom jurisdiction exists . . . .]

(2) EXTRATERRITORIAL JURISDICTION. – There is extraterritorial Federal jurisdiction over an offense under this section.

What light does the 2004 amendment of section 2339B throw on the pre-2004 interpretation of the statute? Note that the express general language providing for extraterritorial jurisdiction contained in the original statute was retained in the 2004 amendment of the section in 2339B(d)(2), while specific categories of facts on which jurisdiction (including extraterritorial jurisdiction) could be based were listed in section 2339B(d)(1). How do (d)(1) and (d)(2) relate to each other? It has been suggested, regarding the fact that Congress retained the original general provision and added a descriptive series of specific provisions, that “[t]he inclusion of both suggests Congress intended extraterritorial application in any situation that falls within either provision.”<sup>59</sup>

Enactment of the amendments of 2339B in 2004 can be argued simply to have clarified and reaffirmed the existing application of the statute, making clear, *inter alia*, that it applied to foreign nationals while also listing various other specific grounds on which jurisdiction could be based.<sup>60</sup> The contrary argument is that one of the purposes of these amendments was to effect a

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59. See CHARLES DOYLE, CONG. RES. SERV., TERRORIST MATERIAL SUPPORT: AN OVERVIEW OF 18 U.S.C. § 2339A AND § 2339B, at 16-17 (2010). Note that this is the same legal analyst who wrote the 2005 report, *supra* note 58.

60. An argument can be made that a recent case, *United States v. Mostafa*, 96 F. Supp. 2d 451 (S.D.N.Y. 2013), can be cited for the proposition that, as originally enacted, 2339B applies to pre-2004, and even pre-2001 conduct abroad engaged in by a non-U.S. national, even though the court did not address that issue in direct terms. The case arose on a pre-trial motion to dismiss, which was denied. The facts included pre-2004 conduct abroad, and, with respect to certain section 2339B charges, post-1999 conduct abroad. While the court did not expressly note that fact, Mostafa was not a U.S. national. See *Profile: Abu Hazma*, BBC News (May 9, 2014), <http://www.bbc.com/news/uk-11701269>. Four counts of the indictment were related to section 2339B. Two of these counts directly involved conduct in the United States and involved a co-conspirator who was a U.S. citizen while the other two of the section 2339B counts related mainly to conduct abroad. The fact that the co-conspirator was a U.S. national who also contributed to the activities abroad and that the indictment with respect to these counts included allegations of conduct within the United States may detract from the significance of the case on the extraterritorial issues. The court nonetheless discussed the last two counts without referring to the fact that allegations of conduct within the U.S. or actions of the co-conspirator–U.S. national were also involved in these counts. The principal thrust of the court’s discussion of the extraterritorial effect of section 2339B related to the jurisdictional nexus required – namely, harm to U.S. persons or U.S. interests – which the court asserted was adequately alleged in this case. A prosecution that could have been used to test these extraterritorial issues was recently pursued in March 2014, in the case of Abu Ghaith, son-in-law of Osama Bin Laden. In this instance, the government failed to try to test the extraterritorial reach of section 2339B regarding conduct engaged in prior to 2004. The defendant was charged, *inter alia*, under a superseding indictment with violations of section 2339A. As discussed in the text, the extraterritorial application of section 2339A, post–October 2001, is clear, and the indictment alleged facts covering this period. The government could also have taken the opportunity to test the extraterritorial application of section 2339B, since, even if the court rejected the section 2339B application, the 2339A jurisdiction would have stood.

substantive change in the statute by extending its reach on this point and that the statute did not apply to foreign nationals operating abroad until the 2004 amendments were enacted.

An alternative, reasonable interpretation of section 2339B has been presented here at unusual length and detail to show that a less conservative approach to prosecution under section 2339B than was presented in the GRTF report is plausible. Resolution of this issue of statutory interpretation – whether section 2339B reaches conduct engaged in abroad by foreign nationals prior to 2004 and even prior to 2001 – may be crucially important with respect to whether a cohort of detainees, who cannot be prosecuted for any other offense, can be prosecuted at all. Depending on the nature of the detainees’ conduct, in some instances section 2339B may be<sup>61</sup> the only offense that can be used to prosecute them if the criminal conduct they engaged in abroad occurred prior to 2001.

*b) Material Support Charges in Military Commission Proceedings*

Whether the material support offenses, 18 U.S.C. §§ 2339A and 2339B, can be successfully used for prosecuting Guantanamo detainees in civilian federal courts will be largely determined by the resolution of the statutory interpretation issues regarding extraterritoriality discussed in the previous subsection. But there are also material support offenses provided for in the Military Commissions Acts of 2006 and 2009, which govern military commission proceedings. Is an alternative approach to pursue such charges in military commission proceedings? As noted in the GRTF report, “the legal viability of material support as a charge in the military commission system has been challenged on appeal in commission proceedings.”<sup>62</sup>

Indeed, in the years since the report was written, a dark cloud has been cast over the legal feasibility of charging material support offenses in military commission proceedings. In *Al Bahlul v. United States*,<sup>63</sup> the U.S. Court of Appeals for the District of Columbia, sitting en banc, appeared to sound the final death knell for such charges.

While the *Al Bahlul* court focused most of its attention on whether the crime of conspiracy was a crime triable before a military commission, it also unanimously concluded that material support was not triable before military commissions. The reasons for that conclusion were that: (1) the material support offense was not a crime under international law of war and there was insufficient evidence that it had been historically tried in military commission proceedings; and (2) *Al Bahlul*’s conduct had taken place before the relevant statute (the

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61. See *infra* note 63. For a discussion whether the material support offenses contained in the Military Commissions Act of 2009 may be available for this purpose, see discussion *infra* I.C.3.b.1.b.

62. GRTF REPORT, *supra* note 46, at 22 n.21.

63. No. 11-1324, 2014 WL 3437485 (D.C. Cir. July 14, 2014).

Military Commissions Act of 2006) had been enacted. The court also assumed, without deciding the question, that the protections of the Ex Post Facto Clause are available to the detainees, and that there was no basis for curing al Bahlul's *ex post facto* objection. Accordingly, the D.C. Circuit concluded that the material support charge could not be prosecuted before the military commission.

As a starting point for its analysis, a majority of the court found that, in enacting the Military Commissions Act of 2006, Congress intended that the offenses listed in the Act could be used to prosecute conduct that occurred prior to 2006. The court then concluded, applying a plain error standard of review (the majority deemed the defendant to have forfeited the normal standard of review by not raising the legal issues involved at trial), that on two alternative, independent grounds, it was not plain error to prosecute a conspiracy charge before the military commission. First, it is not plain error to conclude that the crime of conspiracy was an offense under the law of war triable before the military commissions. And second, "[it] is not 'plain' that it violates the *Ex Post Facto* Clause to try a pre-existing federal criminal offense in a military commission and any difference between the elements of that offense and the conspiracy charge in the 2006 MCA does not seriously affect the fairness, integrity or public reputation of judicial proceedings."<sup>64</sup>

The court went on briefly to consider the same type of argument relied upon for the conspiracy charge in connection with the offense of providing material support for terrorism. The court concluded that charging material support before the military commissions, even under plain error review, could not be sustained. Relying on the government's concession of the point, the court concluded that "material support is not an international law-of-war offense,"<sup>65</sup> without closely examining the question itself.<sup>66</sup> The court also found that there was little historical evidence that material support has been an offense historically triable by military commission. And, the majority opinion also rejected the second alternative form of argument that it had relied upon with respect to the crime of conspiracy, stating in footnote 23 of the majority opinion:

Unlike with conspiracy, the Government has not identified a pre-existing federal criminal statute that might cure any *ex post facto* aspect of Al Bahlul's material support conviction. The Government cites 18 U.S.C. § 2339A, which criminalizes providing material support or resources knowing they are to be used in a violation of section 2332, but that offense was not made extraterritorial until October 26, 2001. *See* Pub. L. No. 107-56, § 805(a)(1)(A), 115 Stat. 272, 377. Although Al Bahlul was not captured until December 2001, nearly

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64. *Id.* at \*11.

65. *Id.* at \*18.

66. *Hamdan v. United States (Hamdan II)*, 696 F.3d 1238, 1249-53 (D.C. Cir. 2012).

all of the conduct of which he was convicted took place before September 11, 2001.<sup>67</sup>

Given the conclusion of a unanimous en banc court that material support cannot be used to prosecute offenses before the military commissions for conduct that occurred prior to 2006, it may seem a bit quixotic to discuss any possible arguments in support of a contrary position. But it is possible that the issue is still barely alive, although only on life support. Eventually, one or both of the parties is likely to seek certiorari review in the Supreme Court and it remains to be seen on what issues. The MCA of 2006’s material support offense covers two forms of material support offenses – providing material support for acts of terrorism and providing material support to an international terrorist organization.<sup>68</sup> The en banc court only addressed the first type of material support offense in its consideration of the second alternative ground, concluding that 18 U.S.C. § 2339A could not be relied upon as a pre-existing federal statute that might cure the ex post facto concern because it lacked extraterritorial application at the time in question.

In its opinion, the en banc court did not take into account the possibility of relying on the other material support offense, 18 U.S.C. § 2339B, providing material support to a designated terrorist organization, an offense formulation that is found in nearly identical form in the second part of the MCA material support provision.<sup>69</sup> Invocation of § 2339B in the appeal of al Bahlul may have seemed highly problematic, and the government did not raise the possibility, probably reasoning that there may not have been an adequate basis in the trial record for invoking that provision on appeal. While surely, as far as the facts that could be proved were concerned, the MCA’s material support-of-an-international terrorist organization could have been one of the offenses proved at al Bahlul’s trial, the government not unreasonably may have chosen not to rely on it at trial since this offense probably had even a lesser claim to being either an international-law-of-war offense or one historically tried before military commissions. Also, there is an extra-territorial concern regarding this particular form of the material support offense. Of course, as it turns out, and, as discussed in the previous subsection of this paper, there is an interpretation of that statute that plausibly might have been argued to respond to the extraterritorial application concern. Had there been an adequate basis in the record, it could have been argued that, at least on plain error review,<sup>70</sup> there is a pre-existing

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67. *Al Bahlul v. United States*, 767 F.3d 1, 30 n.23 (D.C. Cir. 2014).

68. 10 U.S.C. § 950v(b)(5).

69. *Id.* at § 950v(b)(25).

70. There was sharp disagreement on the court regarding the use of plain error review. Thus Judge Kavanaugh stated: “Like Judge Brown (as well as Judge Rogers), I too disagree with the majority opinion’s use of a plain error standard of review. To begin with, Bahlul did not forfeit his ex post facto objection, so he is legally entitled to de novo review of that issue and does not have to meet the high bar of showing plain error. Bahlul raised an ex post facto issue when he pled not guilty and, among

federal offense that might have cured an *ex post facto* challenge to Al Bahlul's military commission conviction for material support.<sup>71</sup>

There is also an argument to be made regarding the court's conclusion that material support of terrorist acts is not an offense under the international law of war. In addressing whether material support was an offense under the law of war as applied before U.S. military commissions, the court applied a specific offense approach: "[N]one of the cited orders charges *the precise offense* alleged here – providing material support for terrorism."<sup>72</sup> In addition to other lines of argument, the government might consider the possibility of arguing, in the alternative, for a different approach to the issue by proposing reliance on a generic offense rather than a specific offense approach, in deciding whether material support is an offense under international law. Under a generic approach, the question would be whether material support fits within a category of offense viewed generically – that is, a crime category under the law of war. As the court of appeals in *Hamdan II* noted, "[T]o be sure, there is a strong argument that aiding and abetting a recognized international-law war crime such as terrorism is itself an international-law war crime."<sup>73</sup> The issue may thus be characterized as whether material support of terrorism is sufficiently and generically related to aiding or abetting terrorism. The court of appeals noted specific differences between material support and aiding and abetting, but they did this using a specific offense approach.<sup>74</sup>

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other things, posed to the Military Judge a "legal question": "Does the law here start from before, during, or after?" Al Bahlul, 767 F.3d at 78 (Kavanaugh, J. concurring in part, dissenting in part, and concurring in the judgment).

71. Of course, an argument based on a pre-existing federal crime is itself problematic. At least three judges of the en banc court thought so. Thus Judge Kavanaugh stated,

Moreover, like Judge Brown (as well as Judge Rogers), I too respectfully have serious doubts about the majority opinion's suggestion that the Ex Post Facto Clause may allow military commissions to *retroactively* prosecute crimes that were previously triable as federal crimes in federal court even when they were not previously triable by military commission. Can Congress, consistent with the Ex Post Facto Clause, really just pull out the federal criminal code and make offenses *retroactively* triable before military commissions?

*Id.* at 77-78 (Kavanaugh, J., concurring in part, dissenting in part, and concurring in the judgment).

While a majority of the court was willing to rely on the pre-existing federal crime argument in the context of plain error review, would they similarly have been willing to do so if ordinary review standards were applicable?

72. See *Al Bahlul*, 767 F.3d at 28.

73. 696 F.3d 1238, 1252 (D.C. Cir. 2012).

74. Application of a generic approach still leaves much room for argument. As pointed out by the *Hamdan II* court, there are differences between material support for terrorism before the military commissions and aiding and abetting terrorism under the law of war. Material support is a separate offense with its own non-derivative penalty. It provides for a *mens rea* of knowledge, not purpose, and it can be committed even if the primary offense has not been committed. Nevertheless, the essential core element of both offenses is providing aid to terrorism conduct. In that respect, the core *actus reus* of the conduct involved, material support of terrorism, has a great deal in common with aiding or abetting terrorism. Material support can be viewed as a specialized form of aiding and abetting, using the basic concept of aiding and abetting and fashioning it into a separate offense with its own penalty. Under a specific offense approach, it is hard to conclude that they are the same. But under a generic

A generic approach may not hitherto have been used in determining whether a particular crime is an offense under the law of war, but it is an approach that the Supreme Court has used in domestic law contexts involving a similar kind of issue – whether a crime under the law of one jurisdiction (e.g., state law) fits within a crime category under U.S. federal law. For example, in *United States v. Nardello*,<sup>75</sup> the Court looked to crimes under the law of a state, viewed generically, to determine whether the offense in question fit within a particular federal statutory crime category.

The argument for using a generic approach can be buttressed with the following practical observation: offenses tend to be formulated differently in different jurisdictions even though they deal with essentially the same kind of harmful conduct. When the law of one jurisdiction creates a crime whose viability is dependent on whether it is also a crime under the law of another jurisdiction, if a narrow, specific crime approach is adopted, one must ask: “does that exact crime appear in the law of that jurisdiction?” Inevitably, this question may be dependent on the fortuity of how the particular offense is defined. A generic approach that rather takes into account whether both jurisdictions have defined offenses *aimed at the same type of harm* gives the courts greater flexibility in relating the laws of the two jurisdictions to each other. This approach would emphasize that it is the degree of similarity of the harms that the two jurisdictions target that should be the decisive factor.

In the end, it is hard to be optimistic that arguments such as those recounted here would succeed – arguments in support of the conclusion that material support charges may be used in the military commissions. But until now, some of these arguments do not appear to have been advanced by the government. If the case ends up in the high court, at the least, these are arguments that deserve to be made.

If material support is not usable in the military commissions, the crime might still be prosecuted in the federal courts, depending on how the previously discussed issues relating to extraterritoriality are resolved. And if material support is neither usable as a basis for prosecution of detainees in the federal courts nor before the military commissions, it may not be feasible to prosecute a

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approach, the question would be whether they are sufficiently related. Another form of the argument: In contexts where the primary offense has not been committed, material support also has something in common with the classic inchoate offense, attempt to commit a crime. Thus, under the prevailing approach, attempts can be founded on conduct that is fairly remote from completion of the object crime. The main requirements are that a substantial step be taken and that there be adequate proof of the *mens rea*. Material support can be viewed as the substantial step. True, attempt traditionally requires purpose or specific intent, but the relative culpability of knowledge as the requisite *mens rea* is not that different from purpose. Once again, using a generic approach would focus attention on the harm at which the offense is targeted. The question would be whether, under a generic approach, material support is close enough to either aiding and abetting similar terrorist harms or attempting such harms. See generally, Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 J. NAT’L SECURITY L. & POL’Y 5 (2005).

75. 393 U.S. 286 (1969).

number of the detainees. For that group, however, it would still be arguable that they engaged in criminal misconduct and would therefore be subject to the terms of the proposal made in this paper for handling individuals subject to prolonged military detention. For a treatment of the issues raised thereby, see generally Part II, *infra*.

## 2) *The Statute of Limitations Barrier*

The statute of limitations is one of the legal barriers that must be surmounted for many of these prosecutions to proceed forward. The GRTF report stated, “[T]he statute of limitations for these offenses is typically eight years . . . which may bar prosecution for offenses that occurred well before the detainee’s capture.”<sup>76</sup>

Prosecutors often try to counter a statute of limitations defense by showing overt acts within the limitations period in the furtherance of an underlying conspiracy. Especially, since terrorism offenses often involve group activity continuing over an extended period of time, the possibility of using overt acts to show a continuing conspiracy may be a useful way to respond to a claimed statute-of-limitations bar to the prosecution.<sup>77</sup> Of course, if the prosecution is before a

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76. GRTF REPORT, *supra* note 46, at 22 n.21.

77. A case involving reliance on an overt act in furtherance of the conspiracy to meet a statute-of-limitations defense in a prosecution under 18 U.S.C. § 2339A (providing material support in aid of terrorist offenses) is *United States v. Abdi*, 498 F. Supp. 2d 1048 (S.D. Ohio 2007), where the court ruled:

The question then remains: given that the Government may prove (a) overt acts other than those alleged in indictment and (b) overt acts that fall outside of the statute of limitations, does an indictment only satisfy the statute of limitations if it includes an overt act that falls within the statute of limitations? This Court concludes that the answer is no. The Sixth Circuit in *United States v. Smith*, 197 F.3d 225 (6th Cir. 1999), rejected the claim that the limitations period is only measured from the latest overt act alleged in the indictment. There, as here, the indictment was filed more than five years after the date of the last event alleged as an overt act in the indictment. The court noted, however, that the purpose of giving notice – which is usually satisfied through overt acts and statute of limitations – was satisfied by the allegation that the conspiracy ran to a date that fell within the five-year period before the indictment, and that timely acts in furtherance of the conspiracy were alleged in the substantive counts.

*Id.* at 1083.

*Abdi* also involved an additional timing issue with regard to the charge of providing material support to a designated foreign terrorist organization (18 U.S.C. § 2339B). *Id.* at 1051. The conspiracy was alleged to have begun before the date in 1999 on which al Qaeda was designated as a foreign terrorist organization, and the defendant raised various issues based on this fact. The court responded that “although a conspiracy to provide material support to al Qaeda would not have been an offense under § 2339B on April 27, 1999, because it had not yet been designated an FTO, Defendant may still have provided material support to al Qaeda knowing that the organization engaged in terrorism or terrorist activity, regardless of its designation of an FTO.” *Id.* at 1065. Thus the court concluded that,

[W]hile the jury will be instructed that in order to find Defendant guilty of Count Two it must find that the conspiracy existed after al Qaeda’s designation, the overt act predating the date of designation is admissible to demonstrate the formation of the conspiracy, its nature and scope, and Defendant’s intent and purpose in participating in it.

military commission, the use of a conspiracy charge may not be feasible in some cases. Use of conspiracy as a charge in the federal courts requires an object crime and, for some of the detainees, the only crime available for this purpose may be section 2339A or section 2339B which raises the questions previously discussed regarding prosecution of those offenses.

### 3) *Inadmissible Evidence*

The GRTF report listed one of the categories of infeasible prosecution as involving instances where “accurate and reliable . . . intelligence may not be admissible evidence,” and further commented on it as follows:

While the intelligence about them may be accurate and reliable, that intelligence, for various reasons, may not be admissible evidence in either a military commission or federal court . . . . [F]or many of the detainees, there are no witnesses . . . available to testify . . . .

Notably, the principal obstacles to prosecution in the cases deemed infeasible by the Task Force typically did not stem from concerns over protecting sensitive sources or methods from disclosure, or concerns that the evidence against the detainee was tainted. While such concerns were present in some cases, most detainees were deemed infeasible for prosecution based on more fundamental evidentiary and jurisdictional limitations . . . .<sup>78</sup>

The report made clear that the evidentiary problems that made prosecution infeasible very often arose from the fact that most of the detainees were captured in active battle zones where evidence was not gathered with a view to criminal prosecution.<sup>79</sup>

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*Id.* For another case involving reliance on act in furtherance of the conspiracy in a prosecution under 18 U.S.C. § 2339A, see *United States v. Awan*, No. CR-06-0154, 2007 WL 749739, at \*5 (E.D.N.Y. Mar. 7, 2007):

“The limitations period for violations of 18 U.S.C. § 2339A, the statutory basis for Counts One and Two, which is eight years, not five. While 18 U.S.C. § 3282 provides a five-year limitations period for most non-capital crimes, 18 U.S.C. § 3286(a) provides an eight-year limitations period for any offense “listed” in 18 U.S.C. § 2332b(g)(5)(B), such as 18 U.S.C. § 2339A. However, even if the statute of limitations was only five years, the government has, as discussed above, introduced evidence which supports a finding that the defendant continued to provide financial services to the KCF into the summer and fall of 2001, well within five years period prior to March, 2006. Evidence of the attempt to recruit Harjit in 2003 alone supports the conclusion that the defendant acted in furtherance of the conspiracy within the limitations period.”

78. GRTF REPORT, *supra* note 46, at 23.

79. The previous quoted statement is especially noteworthy since it contradicts the widespread perception that the major problem in being able to prosecute many of the detainees is the fact that the evidence available against them would be inadmissible because obtained by torture. It is worth comparing President Obama’s statement on this subject that “there may be a number of people who cannot be prosecuted for past crimes, in some cases because evidence may be tainted.” Barack Obama,

This particular ground for a conclusion of infeasibility of prosecution highlights: (1) the differences between the rules of the courtroom and the approach of the intelligence community in regard to the kind of evidence relied upon and how it is weighed; and (2) the difference in the burdens of proof and the rules of evidence applied in the two kinds of settings, namely, a criminal trial, and the proceeding to decide whether military detention of the individual is lawful. Once again, while criminal prosecution may be infeasible in such cases, that fact does not negate the criminality of the conduct engaged in by the detainee.

#### *4) Satisfaction of the Criminal Burden of Proof*

The GRTF report included as one of the categories where criminal prosecution was infeasible instances where “accurate and reliable . . . intelligence may not be admissible evidence . . .” That there is insufficient evidence to prosecute, of course, does not necessarily mean that there is insufficient evidence to continue to detain the individual.<sup>80</sup> Prosecutors are accustomed to making judgments as to whether there is sufficient evidence to prosecute, and varying tests are applied. Is there enough evidence, in the judgment of the prosecutor, to withstand a motion to dismiss or is there enough evidence to constitute proof beyond a reasonable doubt?

There should be a careful review of the assessments made regarding this issue of proof. Once again, the fact that there is sufficient evidence to meet the burden of proof for continuing to detain the individual and that evidence also demonstrates that the detainee engaged in criminal conduct (albeit with not sufficient evidence to prosecute) would bring the detainee under the umbrella of the proposal advanced in this paper.

#### *5) Infeasibility Based on Sentence Concerns*

Among the categories of infeasible prosecutions cited by the GRTF report, the drafters noted that “the statutory maximum sentence for material support is 15 years (where death does not result from the offense) [and] sentencing considerations may weigh against pursuing prosecution in certain cases.”<sup>81</sup>

This is the most interesting of the reasons set forth by the task force as a ground for concluding that prosecution is infeasible. Of course, the reason offered here – sentencing considerations – is not truly an adequate ground for concluding that criminal prosecution is *infeasible*. Rather, it seems to represent or at least to imply a discretionary judgment call that if the potential sentence is not lengthy enough, criminal prosecution is not seen as a viable option. Of

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U.S. President, Remarks by the President on National Security (May 21, 2009), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09>.

80. See discussion *infra* Part II.B.

81. GRTF REPORT, *supra* note 46, at 22 n.21.

course, this leads to a number of questions: If the potential of a fifteen-year sentence is not enough, what is? A lifetime sentence? And even if the potential maximum sentence is “long enough,” the prosecutor takes the risk – whether in the U.S. district court or before a military commission – that the sentence imposed will be less than the maximum.

More significantly, if sentencing considerations are enough to conclude that a prosecution is “infeasible,” it implies something about the whole purpose of criminal prosecution as the preferred option to pursue. It may be hinting that the preference for criminal prosecution is operative where that option will put the detainee away effectively for as long as prolonged detention might last without criminal prosecution which is, in many cases for life, or for so long that it is effectively for life.

It is recommended that the GRTF approach on this issue should be rejected. If there is a reasonable basis for a felony criminal prosecution, the prosecution should be pursued, irrespective of the relevant maximum sentence. Otherwise, criminal prosecution loses its special force as an appropriate way for society to punish and express its condemnation of certain kinds of conduct. It should not be utilized *only* as a more acceptable way to incarcerate a dangerous individual for a sufficient time period. Rather, it should be seen as a marker for the seriousness and gravity of the conduct engaged in by the detainee.

The concern underlying the GRTF view undoubtedly was that a light sentence would not adequately protect the nation against a dangerous detainee because he would be released too soon. While that is an appropriate concern, it can be achieved in a different manner; the problem can arise in a number of different contexts and needs to be directly and separately addressed.<sup>82</sup>

*c. Implications of the GRTF Report: Prosecution before Military Commissions or in Federal Civilian Court*

The GRTF report contemplates that some of the Guantanamo cases would be prosecuted before military commissions and some in federal court, while expressing a preference for the latter. Accordingly, in addressing the infeasibility of prosecution issues, the report intermixes conclusions and recommendations under military commissions law and under the law applicable in civilian district court criminal cases. Thus, it mentions concerns about using conspiracy or material support charges before the military commissions, while it also cites concerns about the use of § 2339A and § 2339B of Title 18 because of concerns about the extraterritorial application of these two statutes. As discussed above, a number of questions raised by the report have not as yet been finally resolved, and it is recommended that in case of doubt (for example, which exists regarding the extraterritorial use of § 2339B), consideration be given to pursuing prosecutions in order to test whether the concerns voiced in the report are

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82. See *infra* Part II.A.

valid.

Further, it also makes sense for the government to proceed with the charges, military commissions, or civilian federal trials, that have the best chance of success.<sup>83</sup> For example, if it turns out that material support and conspiracy are not usable in military commissions cases, but that the Title 18 versions could be used in federal court, the latter should be pursued. In comparison, if § 2339B was the only available charge in federal court and could not be used because of the extraterritorial issue, but the Military Commissions Act version of material support was chargeable before the military commissions, the latter should be pursued. In sum, the choice of the proper forum should take into account the legal validity of the charges in the particular forum.

This suggests that there are likely to be contexts where, to increase the likelihood of a successful prosecution, it may be better to proceed with charges against Gitmo detainees in federal district court rather than before the military commissions.<sup>84</sup>

## II. BRINGING THE TWO TRACKS INTO CLOSER ALIGNMENT

### A. *Criminal Prosecution: What Should Happen When the Criminal Process Comes to Final Disposition?*

#### 1. Introduction

Under the current two-track system, many of those detainees who are criminally prosecuted, if convicted, can look forward to term sentences with the presumed expectation<sup>85</sup> of release at the end of their sentences. While prosecution, conviction, and sentence in such circumstances serve proper criminal justice purposes, they have certain vulnerabilities. The detainee-defendant who is prosecuted was originally detained as part of the law-of-war/duration-of-the-

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83. The conviction in U.S. district court of Sulaiman Abu Ghaith, a son-in-law of Osama bin Laden, in March 2014, renewed the debate on whether alleged al Qaeda terrorists should be held in military custody and prosecuted before military commissions or shifted to civilian custody and prosecuted in U.S. district court. See Benjamin Weiser, *Conviction of Bin Laden's Son-in-Law Doesn't Halt Debate Over Terror Trials' Venue*, N.Y. TIMES (Mar. 27, 2014).

84. The focus here is on the legal validity of the possible charges in the particular forum – whether in the military commissions or the U.S. district court. Other legal considerations, for example, the differences in the evidentiary and procedural rules may also affect the likelihood of success in one forum or the other. The fact that in some cases there may be a greater chance of successful prosecution in the district court is a conclusion that may surprise those members of Congress who are adamantly opposed to any civilian court prosecutions of the Guantanamo detainees.

85. See, e.g., Ramzi Kassem Op-Ed., *A View from Gitmo*, N.Y. TIMES (June 7, 2014) (stating “[i]n the absurd history of the detention camp, it is not uncommon for inmates among the handful who have been convicted by the military commissions to be the ones who are released. Questionable though their legitimacy and fairness may be, the military commissions can at least determine a finite term for internment at Guantánamo, one that the American government has chosen to honor so far.”). But see the discussion *infra* Part II.A.2, where government officials have publicly claimed authority to return detainees to military detention after they have served their criminal sentence or, even after an acquittal of the criminal charge(s).

conflict system, and it is arguable that the criminal prosecution should not be allowed to trump the premises of that system. It might be claimed that, by prosecuting him, the U.S. has taken him out of the law-of-war/duration-of-the-conflict frame of reference and accordingly forfeited the possibility of returning him to military detention after he has served his sentence.<sup>86</sup> The opposite contention would be that the individual was in military custody and was prosecuted so as to address his crimes, but that the prosecution did not negate the need to prevent his return to the fray after serving his criminal sentence and to protect national security during an ongoing conflict.

The formal logic of the law-of-war system thus requires detention until the end of the conflict, and pragmatic logic suggests that just because individuals have served their criminal sentence does not mean they are no longer dangerous. Accordingly, *automatic* release after criminal prosecution, conviction, and a term of imprisonment seems inconsistent with the premises and the rationale for the original detention.

For ordinary crimes, concern about the possibility of a continuing propensity to commit crimes after serving the criminal sentence is typically addressed by subjecting the released convict to supervised parole for a number of years. That kind of system is largely inappropriate for law-of-war detainees who have been convicted but are still considered to be very dangerous at the time they are to be released after serving a fixed-term sentence. Conceivably, one might consider the possibility of sending them to another country<sup>87</sup> under some kind of supervised release conditions, but depending on how dangerous they are deemed to be, that may also be an inappropriate disposition. It would shift the risk of their perpetrating catastrophic terrorist events to another country. It may also be difficult to find a country willing to accept them.

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86. See *Padilla v. Hanft*, 547 U.S. 1062 (2006) (Kennedy, J., concurring in the denial of certiorari).

87. It has been suggested that release under parole-like conditions in the U.S. should be considered as a possible option. See Jonathan Hafetz, *Detention without End? Reexamining the Indefinite Confinement of Terrorism Suspects Through the Lens of Criminal Sentencing*, 61 UCLA L. REV. 326 (2014). That seems a very undesirable alternative. If the individual, a foreign national who has been convicted of a terrorism-related crime, is deemed dangerous enough to require limiting conditions, release into the United States under any conditions should not be available as an option. Professor Hafetz's proposed handling of the issue of detention without end, at first glance, may seem somewhat similar to the proposal set forth in this paper, since it also looks to the criminal process, i.e., to the principles of criminal sentencing, as a source for addressing the problem. There are important and basic differences, however. He fails to take into adequate account the fact that many of the detainees have been or are on the way to be prosecuted, although admittedly that process has been very slow; consequently, he addresses only the prolonged detention track. But the existence of *two* tracks is the essential core of the system that has been created, and the relationship between the two tracks should be seen as a central concern. Even more significantly, he would introduce into prolonged military law-of-war detention criminal law sentencing principles, including such notions as just deserts and proportionality, which compromises the underlying rationale for detention, i.e., prevention of return to the conflict, and which undermines its law-of-war justification. See *id.* A key principle of the Obama administration's approach to the detainees has correctly been to retain the law-of-war justification for military detention to the extent possible. While, under the proposal made here, a criminal law length-of-comparable-sentence gloss would be added to the prolonged detention process, it would be accomplished only as a

It has been suggested that proceeding thus, that is, returning a person to military detention after he serves his sentence or after acquittal, would undermine confidence in the rule of law.<sup>88</sup> Perhaps, but given its goals and rationale, criminal prosecution in such cases serves important functions, and the rationale for continuing to detain the individual after the sentence has been served or even after acquittal, is entirely different from the rationale for the criminal prosecution. The justification for any continued detention after the individual has been convicted in a criminal proceeding and served his sentence or acquitted should be limited to concerns about protecting the national security.

Of course, while there is a logical basis for distinguishing between the justifications for the two types of incarceration and thereby justifying further military detention after having served a criminal sentence, the reaction of those who would oppose this possibility is understandable. Perhaps, the claim for further detention after sentence may seem less objectionable, however, when viewed against the background of a somewhat analogous situation: the possibility exists in many jurisdictions for sending a person into an immediate civil commitment proceeding following completion of the criminal proceedings, on the ground that he is a danger to himself or others and suffers from a mental disorder.<sup>89</sup>

Retention of the authority to return a Gitmo detainee who has been criminally prosecuted back to military detention makes sense,<sup>90</sup> even though its exercise

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presumptive basis for action and under the controlling law-of-war justification, permitting release only with due attention to the dangers posed by the detainee. Further, the rationale for adding such a gloss is the need to reduce inequality in the treatment of those prosecuted and those in prolonged military detention.

88. See Adam Serwer, *The Dilemma of Post-Acquittal Detention*, THE AMERICAN PROSPECT (July 9, 2009), [prospect.org/article/dilemma-post-acquittal-detentions](http://prospect.org/article/dilemma-post-acquittal-detentions).

89. A similar authority is now being exercised in some states regarding sex offenders. See, e.g., Jeslyn A. Miller, *Sex Offender Civil Commitment: The Treatment Paradox*, 98 CAL. L. REV. 2093, 2094 (2010) (noting “[l]aws prescribing civil commitment for sexually violent predators identify those . . . who are the most likely to recidivate and provide a mechanism whereby, upon completion of their criminal sentences, they can be isolated until they are no longer a threat to society.”). There are, of course, some important differences. The criminal incarceration/civil commitment distinction is arguably sharper (i.e., civil commitment has fewer of the attributes of imprisonment for crime) than that between criminal incarceration and military detention as terrorists (i.e., enemy belligerents). Further, the Guantanamo detainees have been held in detention for lengthy periods followed in some cases by long-delayed criminal prosecutions. While the principles underlying the situation may allow for further military detention following release after a criminal sentence, the way the overall situation has developed makes such further military detention a particularly unappealing outcome – to be imposed, if at all, only in extreme cases.

90. The discussion which follows is, however, not relevant to cases in which a person is sentenced to imprisonment for life or given a sentence of a term of years that in effect amounts to imprisonment for life, except to the extent that parole is a possibility and the “life-terminer” qualifies for release on parole at some point. If a life-terminer is paroled, his case should be treated the same as a person who has

would seem to be a harsh and unfair outcome after an individual served his criminal sentence or some other final criminal disposition has occurred. If such authority is to be utilized, it should be restricted to a narrow class of cases that pose special dangers.

## 2. Legal and Governmental Sources: The Political Controversy that Would Arise

In connection with the set of issues discussed in the previous subsection, there are a number of official legal sources that bear on the subject: There have been statements by Supreme Court justices in dicta, which, while not directly addressing the issues, have not rejected the authority in question. Also, various federal officials have publicly claimed that the U.S. government has the authority to return individuals to continuing law-of-war military detention after they have completed serving their criminal sentence.

In *Hamdan v. Rumsfeld*,<sup>91</sup> two Supreme Court justices made statements in their opinions arguably relevant to this subject and which, while not providing affirmative support for continued military custody after the criminal case against a detainee has come to rest, do not reject it. Thus, Justice Kennedy stated, “[R]egardless of the outcome of the criminal proceedings at issue, the Government claims authority to continue to detain him based on his status as an enemy combatant.”<sup>92</sup>

Similarly, Justice Stevens, writing for the plurality in *Hamdan*, stated,

We have assumed, moreover, the truth of the message implicit in that charge – viz., that Hamdan is a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians, and who would act upon those beliefs if given the opportunity. It bears emphasizing that Hamdan does not challenge, and we do not today address, the Government’s power to detain him for the duration of active hostilities in order to prevent such harm.<sup>93</sup>

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completed the sentence. A person who is paroled in such a situation is very unlikely to be returned to military detention. The parole determination would normally imply a finding that he is not deemed to be a continuing threat.

91. 548 U.S. 557 (2006).

92. *Id.* at 646 (Kennedy, J., concurring in part).

93. *Id.* at 635. While this statement does not speak expressly to detention after criminal prosecution has come to closure, it is not inconsistent with that possibility. It is also worth noting that Justice Stevens made the statement in a case involving the lawfulness of prosecuting Hamdan in military commission proceedings.

While these statements do not affirmatively support the possibility of post-criminal-disposition detention, it is telling that, in making statements that either touched upon or skirted close to that issue, neither justice reached out to express doubts about the government's claim of such authority. There is also more supportive authority that is more direct.

In at least one detainee prosecution, a term of the plea agreement, included by the government, was an acknowledgment by the detainee that the government had the legal authority to continue to detain him after he had served his criminal sentence.<sup>94</sup> Similarly, in another case, a government spokesperson, in addressing a specific detainee prosecution, asserted the government's authority to continue to detain the defendant after serving his sentence.<sup>95</sup>

Further, a high government official, in testimony before a Senate committee, expressly asserted a more extreme proposition: that the government has the authority under the law of war to continue to detain an individual even after he has been acquitted in a criminal prosecution before a military commission.<sup>96</sup>

Also of interest is the case of Abd al-Rahim Hussein Muhammed Abdu Al-Nashiri.<sup>97</sup> At the outset of his prosecution before a military commission, defense counsel made a motion to require the government to indicate whether

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94. See Charles "Cully" Stimson, *Majid Khan: Anatomy of a Terrorist's Plea Bargain*, HERITAGE FOUND. (Mar. 1, 2012) <http://www.heritage.org/research/reports/2012/03/guantanamo-detainee-majid-khan-anatomy-of-a-terrorist-plea-bargain> (reporting that a defendant-detainee acknowledged and agreed that the government has the legal authority, under the law of war, to continue to detain him even after he completes his criminal sentence of nineteen years). The relevant term of the plea agreement reads as follows: "I understand that the Convening Authority has no power to affect my status as an alien unprivileged enemy belligerent, and does not purport to do so by the terms of this agreement." See Lawfare Staff & Raffaella Wakeman, *Majid Khan Plea Agreement Documents*, LAWFARE (Feb. 29, 2012), <http://www.lawfareblog.com/wp-content/uploads/2012/02/Khan-AE012-PTA.pdf>. The implication of this acknowledgement by the defendant in the Plea Agreement was that the judicial authority underlying the military commissions prosecution did not include the authority to compel the United States to release Khan from detention as an alien unprivileged enemy belligerent.

95. See Carol Rosenberg, *'Indefinite' Defined: Even After Serving Sentence, US May Hold Detainee*, MIAMI HERALD (Feb. 15, 2011), <http://www.commondreams.org/headline/2011/02/15-4>. In response to a query, the Pentagon spokesperson, Army Lt. Col. Tanya Bradsher, stated, "Decisions regarding Mr. al Qosi's status after he serves his punitive confinement will be made by the detention authorities at that time . . . that . . . he could still be subject to 'detention under the law of war' as 'a belligerent during an armed conflict.'" *Id.* After completing his sentence, Mr. al Qosi was in fact released. See Charlie Savage, *Guantanamo Prisoner Is Repatriated to Sudan*, N.Y. TIMES (July 11, 2012).

96. The then-general counsel of the Department of Defense, Jeh Johnson, testified before the Senate Armed Services Committee that the government had the authority under the law of war to continue to detain an individual who had been acquitted in criminal proceedings and would use that authority in some cases. In particular, he stated that "[i]f, for some reason he is not convicted . . . then, as a matter of legal authority, I think it's our view that we would have the ability to detain that person." Serwer, *supra* note 88. This brief article lays out some of the relevant policy and political considerations that bear on this issue.

97. *USS Cole bombing suspect seeks release if acquitted*, THE NEW AGE (Oct. 25, 2011), [http://www.the.newage.co.za/33014-1020-53-USS\\_Cole\\_bombing\\_suspect\\_seeks\\_release\\_if\\_acquitted](http://www.the.newage.co.za/33014-1020-53-USS_Cole_bombing_suspect_seeks_release_if_acquitted) [hereinafter *USS Cole bombing suspect*].

the defendant, if acquitted, would nevertheless continue in military detention. In an exchange of legal memoranda regarding the motion, the defendant forcefully argued that it was entitled to an answer to this question, and the government, just as forcefully, responded that the answer to that question had nothing to do with the instant criminal proceeding.

Finally, in a number of detainee cases, charges were brought and then dismissed; in each of these cases, the detainee has continued in detention rather than being released.<sup>98</sup>

While government officials have thus claimed the authority to return a person to military detention after criminal proceedings been concluded, it is also true that the claimed authority has not yet clearly been exercised.<sup>99</sup> As the instances multiply in which some of the remaining Gitmo detainees are prosecuted before military commissions or in federal court, there is a possibility that cases will arise in which an effort will be made to exercise such authority. Undoubtedly, exercise of such authority will generate political controversy, and litigation over the issues involved would likely ensue.<sup>100</sup>

Consider, for example, how politically controversial it would be to return a convicted person who has just completed, let us say, a twenty-year year criminal

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98. For a list of cases currently on the military commissions docket, *see* Military Commissions OFFICE OF MILITARY COMM'NS, <http://www.mc.mil/CASES/MilitaryCommissions.aspx>. The list includes cases that were previously filed and then dismissed, mostly without prejudice, so there is a possibility that new charges will be re-filed. *See, e.g.*, Obaidullah (charges dismissed without prejudice on June 7, 2011) and Jabran Said Bin Al Qahtani (charges dismissed without prejudice on January 12, 2009, and October 20, 2008). *Id.* If so, the continuing military detention meanwhile probably does not qualify fully as post-dismissal detention so much as it resembles pre-charge detention. In a number of the cases, the dismissals may have resulted from the fact that the charges had originally been filed under the Military Commissions Act of 2006. The reason for the dismissal, accordingly, was the need to file under the later statute, the MCA of 2009. But in at least some of the cases, it appears that the dismissal also reflected the fact that the detainee or the person who was the source of the incriminating information against the detainee allegedly had been tortured to obtain the information. *See, e.g.*, Press Release, Center for Constitutional Rights, Mohammed Al Qahtani's Military Commission Charges Dismissed (May 13, 2008), *available at* <http://www.ccrjustice.org/newsroom/press-releases/mohammed-al-qahtani%2526%2523039%3Bs-military-commission-charges-dismissed> ("Military Commission charges against . . . Mohammed al Qahtani, were dropped. He had originally been charged as one of six in a 9/11 conspiracy . . . Mr. al Qahtani . . . was subject to the First Special Interrogation Plan, which consisted of a regime of aggressive interrogation methods that constitute torture personally approved by former Secretary of Defense Donald Rumsfeld."). Even in these cases, there is no way to know before it happens whether these detainees will be detained for a prolonged period, charges will be re-filed, or they will be released and transferred. Accordingly, the significance of these cases is uncertain – i.e., whether they qualify as examples of the government detaining individuals in prolonged military detention after dispositive dismissal of criminal charges against them.

99. Some of the dismissal cases cited *supra* note 98, could be exceptions to the statement in the text, depending on whether indefinite detention continues without a re-filing of the charges.

100. It is also possible that, at some point in the future, additional individuals might be seized or arrested, and, after they are placed in military custody, a sequence of events somewhat similar to that which transpired with the Gitmo detainees might occur. Were this to happen, hopefully it would occur over a more expeditious timeframe and when the government would be better prepared to deal with the issues that arise.

sentence, to military custody, with the prospect of further indefinite detention. Furthermore, would it be more controversial if the individual had been convicted in a civilian court and served his sentence in a federal prison? Suppose, for example, that the government were to propose to return Jose Padilla or Yaser Saleh al Marri to extended military detention after they finish serving their sentences in federal prison.<sup>101</sup>

While government officials have repeatedly claimed the indicated authority, as far as information available to the public is concerned, the government has not established any kind of framework, criteria, or standards for making decisions regarding such matters. If the government is serious about the possibility of returning individuals to military custody after results of a criminal prosecution have come to final conclusion, the details of a framework for dealing with such cases should be developed and made public.<sup>102</sup>

Further, one of the concerns raised about the existing process that needs to be addressed is the fact that detainees have little certainty about how long they will continue to be detained. Minimal fairness requires that an effort be made to reduce the degree of uncertainty in their situations,<sup>103</sup> even if it cannot be removed entirely. It would be better to address the issues involved directly by adopting a structured approach with appropriate standards and providing an explanation of the system's rationale. Because the issues vary somewhat depending on the nature of the final disposition, they are treated here in separate subsections according to the disposition.

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101. Padilla was originally sentenced to seventeen years in prison. The court of appeals concluded that the sentence was not adequate and remanded the case for resentencing. See *United States v. Jayyousi*, 657 F.3d 1085 (11th Cir. 2011). His resentencing postponed for a long period, but finally on September 9, 2014, he was resentenced to twenty-one years. Al Marri pled guilty in April 2009 and was sentenced to eight years in prison. Accordingly, completion of the sentence should occur within the next several years and it is possible that this question could be raised at that time. Regarding the question of returning Padilla to military custody, see *Padilla v. Hanft*, 547 U.S. 1062 (2006) (Kennedy, J., concurring in denial of Padilla's petition for certiorari at the time he was transferred from military to civilian custody for purposes of criminal prosecution).

102. Since criminal prosecutions of some of those who remain at Guantanamo are still in their initial stages, it may be thought by some in the administration that there is no urgent need to address these questions. Also, the administration may be disinclined to trigger the inevitable controversy that would be created by publicly promulgating guidelines on this subject, at least until it is absolutely clear that there will be cases in which it will exercise such authority. While the basis for this reluctance is understandable, questions regarding the existence and possible exercise of such authority continue to arise. On one level, the controversy has already begun. The *Nashiri* motion and response are illustrative.

103. There would, of course, be more certainty if the possibility did not exist of returning the individual to military detention after the criminal process came to closure. But if that possibility is to exist, structuring it and providing standards will at least let the individual know what he faces. Under the present situation, given the amorphous situation, the individual does not have such knowledge. Such is evidenced by Al-Nashiri's attempt to get information regarding this kind of issue. See *THE NEW AGE*, *supra* note 97.

### 3. The Possibility of Further Military Detention after Serving a Criminal Sentence

Suppose a Guantanamo detainee is prosecuted in a military commissions proceeding, convicted and sentenced to a twenty-year term. Both the Bush and the Obama administrations have purported to be operating under the law of war in such proceedings. As suggested previously, the fact that the individual was criminally prosecuted and served a criminal sentence may not terminate the law-of-war basis for his detention. If he is to be detained beyond the period of his criminal sentence, it would be based on law-of-war types of considerations and in a detention proceeding not inconsistent with the law of war.

What conditions, rules, and procedures should be applicable? The individual has served his sentence, but, at the end of the term, he is thought to still be dangerous, and the authorities believe that he should not be released or that, at least, the question of whether he constitutes a sufficient continuing threat should be the subject of inquiry.

The issue of the standard to be applied is a vexatious one. One could argue that a person who has served a significant criminal sentence merits release unless there are very strong reasons for not releasing him. This notion readily translates into a presumption in favor of release. Further, the balance of equities for someone who has served a lengthy criminal sentence and, not unreasonably, has an expectation of release following serving of the sentence, would seem to support a presumption that is strong and that should only be overcome by a showing of a very strong danger to national security. This reasoning readily translates into a system where there is a strong presumption in favor of release that can be rebutted, but only by a showing of extreme dangerousness<sup>104</sup> of the individual to national security.

The standard for returning an individual to military detention after he has served a criminal sentence thus would be different from that applied in the ordinary periodic review process. There the issue is formulated in terms of “a significant threat to the security of the United States.” Here, for the individual to be returned to military detention, the described presumption would be applicable and the government would need to make a showing of an extreme threat to the security of the United States.<sup>105</sup> The question of what type of proceeding

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104. The extreme dangerousness might, for example, be shown by the fact that the individual has special talents to initiate or contribute to the planning or committing of a terrorist event of catastrophic magnitude and remains strongly committed to engaging in such an action. While this would be a paradigmatic case, cases that could meet the standard need not involve exactly such elements. The concept of extreme dangerousness, as contemplated here, would involve both a high risk of danger and a danger of great magnitude.

105. As suggested earlier, *supra* Part I.B.3, the notion of threat or dangerousness (here treated as equivalencies) arguably has gradations and can be thought of as on a continuum. The difference between the two key terms – “significant” and “extreme” – is thus how far along the spectrum of danger the detainee must be thought to be. The extreme dangerousness formulation means exactly that:

should address the issue is treated in Part II.D, *infra*.<sup>106</sup>

#### 4. The Possibility of Further Military Detention Following Prosecution and Acquittal, or a Suspended Sentence or Dismissal of Criminal Charges

The possibility of further military detention if a detainee has been acquitted in a military commission trial or has been convicted but given a suspended sentence follows from the same logic and rationale for further detention of an individual who has served his criminal sentence. One difference, of course, is that the acquitted defendant has been found not guilty of the criminal charges, and the implications of that decision need to be taken into account. Another is that neither the acquitted nor the suspended-sentence and dismissal defendant has served a lengthy sentence.<sup>107</sup>

Recall that the government appears to claim the legal authority to further detain an individual who has been acquitted.<sup>108</sup> What significance should be attached to the fact of the acquittal? Assume, for example, that the acquittal occurred because the triers of fact concluded that the evidence did not add up to proof beyond a reasonable doubt. That is nevertheless not inconsistent with the conclusion that the record supports a finding of the lawfulness of his detention applying a preponderance standard, that is, the standard applied in the habeas cases. Of course, the triers may have disbelieved the key witnesses or found crucial evidence unreliable so that under their view, the evidence did not measure up even to the preponderance standard. The problem is that there may be no way to know the exact basis for the decision or the triers' assessment of the evidence. Under these circumstances, it will be up to the present decision-maker to decide whether there is sufficient evidence in the record to meet a preponderance standard regarding the lawfulness of further detention. If not, the individual should be released. In order to make that judgment, the proposed system should provide that the decision maker can take whatever steps are deemed necessary and appropriate to pursue further fact-finding in the matter.

Beyond consideration of the application of the preponderance standard, what other judgment(s) should be made in determining whether the acquitted defen-

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he must pose a danger of a very high order in order to warrant in this context his return to military detention, much more of a threat than is suggested by the "significant threat" formula. The words of the formula, however, can only carry us so far. The decision-makers in the relevant proceeding will need to make their judgments about how these formulas are to be applied.

106. In a case where an individual is returned to military detention after serving his criminal sentence, would he be reviewed periodically? Under what standard? It is recommended that the normal periodic review process would be applicable, including, in subsequent reviews, application of the normal PRB standard. If the proposal is adopted, a further question will need to be resolved: should the special standard and presumption apply, whatever the length of the sentence that has been served, or only where a sentence of some minimal length has been served?

107. Of course, the counter to that consideration is the fact that they have been detained without criminal conviction for a very long period.

108. See discussion *supra* Part II.A.2. As far as has been determined, government officials have not made similar public statements regarding persons convicted but given a suspended sentence. There seems to be little doubt, however, that such authority would likely also be claimed.

dant should be returned to detention in military custody? The question can be framed in the following terms: In making that decision, should the normal PRB standard be applied – if he no longer continues to be a significant threat to national security, should he be released? Or, should he be treated like the person who has served his criminal sentence, qualifying for a presumption in favor of release, only to be further detained if he constitutes an extreme threat to national security?

On the one hand, if a determination is made that, applying a preponderance standard, the evidence is still sufficient to continue him in detention, it would seem that, although acquitted, the individual is not significantly different from those in the infeasible-to-prosecute category viewed at the beginning of their detention. I will propose in Part II.B, *infra*, the infeasible-to-prosecute category should qualify for application of the presumption/extreme threat to U.S. security standard *after the passage of a putative sentence period*. Should the acquitted individual be treated the same way? That seems like an unjust result. Consider what would be involved: The individual has been acquitted of (a) crime(s), and nevertheless, his gaining access to a beneficial presumption and standard that favor his release is delayed until the passage of time amounting to a putative sentence for specified crime(s); but in this case, these are crimes of which he has in fact been acquitted. The balance of equities, in this instance, seems to favor application to the acquitted person immediately, without any deferral, of the presumption in favor of release and the special standard.

The person who has been prosecuted and convicted but whose sentence has been suspended should be treated similarly to the acquitted person. To treat him otherwise would mean that his access to the presumption/extreme threat to U.S. standard would be deferred for the period of the putative sentence for his offense(s), but in fact, the sentence for his offense(s) was suspended by the court. In that circumstance, it would be an odd result to apply to him the putative sentence deferral. Of course, in both of these cases, the determinations in question would be made immediately following the criminal process having come to closure, and in most cases should be likely to result in the individuals being released.

How the remaining category – individuals who have been prosecuted but their prosecution dismissed – should be handled should depend on the reason(s) for the dismissal. The mere fact of dismissal tells us little about the reason(s) for that action. If, for example, the explanation for the dismissal is that the case should not have been initiated because it was a matter that fell under one of the infeasible-to-prosecute headings, the case should be handled the same as if it had not been initiated because of an infeasibility judgment. Accordingly, the normal PRB standard should be applied to him until the passage of a period of time equal to the likely putative sentence for his offense(s). Only then, should the presumption/extreme threat standard be applied in determining whether he should be released. If the prosecution was dismissed because it was brought under the wrong statute, and the dismissal is without prejudice to refiling the

charges, the dismissal should not be taken into account in deciding the defendant's future. The responsibility for deciding the basis for the dismissal should rest with the decision makers after an appropriate inquiry.

*B. Criminal Prosecution Infeasible: Injecting Some Limits into the Prolonged Military Detention Process*

1. Introduction – Rationale for Injecting Culpable Criminality-Related Elements

As suggested above, bringing the two approaches – criminal prosecution or extended law of war military detention – into greater alignment makes some sense given the special nature of a war against a terrorist organization and the fact that many detainees who have engaged in equally harmful culpable criminal conduct are being treated differently because of extraneous criminal law rules. The system should be organized in a way that reduces the differences between the two paths – that is, moves the two paths in the direction of a rough equivalence. In the previous section, it was proposed that some limited possibility of indefinite military detention should be available after a convicted detainee has served his criminal sentence or been acquitted – with a view to protecting the national security against the most serious threats. Adoption of that proposal would reduce the differences between the two tracks. Is it possible to reduce the differences further still?

While one of the premises underlying this paper is that the detention processes should not be inconsistent with the law of war, the assumption has also been that additional procedures can be proposed to be added to the law-of-war process, as long as the modifications do not corrupt or contradict the law-of-war basis and rationale, and so long as they do not subtract from the basic protections afforded to enemy belligerents under the law of war. The process adopted must also provide adequate protection for the security of the nation.

The procedures established by the Obama administration appear to have proceeded on the same types of assumptions. Thus, the PRB review process does not subtract from the basic protections afforded under the law of war and serves to protect the national security. Long-term detainees can be released if they no longer pose a significant threat. It is contemplated that the reviews conducted under that process would be continued. Thus, apart from and in addition to the approach to be taken under the proposal, it is assumed that detainees would continue to have available the possibility of early release as a result of PRB review, if they meet the applicable standard.

Despite some possibility of early release, the prolonged detentions at Guantanamo still instill a sense of injustice. What is proposed here will not entirely eliminate that lingering sense, but it can be reduced. The justification offered for such continuing detentions is that the war on terror is continuing, and that these individuals can be held for the duration of the conflict as long as they continue to pose a significant threat. Effectively, these individuals are subject to pro-

longed custody because they are considered to be dangerous. Although dangerousness is a matter of serious concern, for the reasons previously discussed,<sup>109</sup> it is by itself a weak basis on which to hold people for decades or more. Arguably, that was what underlay Justice O'Connor's expression of concern in *Hamdi*.

As stated earlier, detaining people only on the theory that they are dangerous is a practice often found in countries with a despotic government. Too often, it has been a power that has been misused. In our own system, as *Zadvydas v. Davis*<sup>110</sup> teaches, dangerousness by itself is generally an insufficient basis for detaining or incarcerating a person for extended periods. That is why civil commitments are not based simply on a showing of dangerousness, but also require a showing of a special circumstance such as a mental disorder or other settled propensity. There is no exact equivalent for that kind of special circumstance in the prolonged law-of-war detentions in Guantanamo. What is needed is: (1) some kind of substitute that can ensure that application of a simple standard of significant dangerousness, by itself, is not the basis for potentially a lifetime in detention; and (2) a greater degree of equivalence how cases involving criminal prosecution of detainees and those involving prolonged military detention are handled.

The contemplated substitute to be added to the prolonged military detention process would consist of several elements, both substantive and procedural. First, it would involve proof of the culpable criminality of the detainee's behavior (even though he is not to be prosecuted), not primarily as a measure of the gravity of the conduct (although there would be an element of that, given the nature of the proof), but rather as a basis for determining the approximate sentence that would have been imposed had the case been prosecuted. This putative sentence would then be used as a flexible limit on the length of the detention. The primary goal would be to bring the likely length of incarceration, as measured by the culpable criminal conduct engaged in, for those prosecuted and those who cannot be prosecuted into closer alignment to reduce the degree of unequal treatment between them. This putative sentence would be flexible in the sense that it would be a likely, but not certain, limit on the period of detention.

The Guantanamo prolonged detention cases all have a characteristic which is presently not being taken into separate account and which, were it appropriately considered, might reduce the sense of discomfort with these cases. Most of these detainees have engaged in criminal conduct. While it is not feasible to prosecute some of them for crimes they have committed, proof of the criminality of their behavior as a basis for determining a putative sentence to be used as a flexible limit should serve to bring the cases somewhat more into accord with a sense of justice. They would thereby be transformed from simply being

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109. See *supra* Part II.A.

110. 533 U.S. 678 (2001).

enemy prisoners into also being individuals who have engaged in culpable criminal conduct, even though, admittedly, not criminally charged and proven guilty beyond a reasonable doubt in a criminal trial.

Where prosecution of a Guantanamo detainee may be infeasible for reasons extraneous to his culpability, taking account of that culpability as the basis for an approximate sentence that would have been imposed had criminal prosecution been feasible – all of this in a proceeding that protects essential constitutional rights (though not the equivalent of a criminal trial) – would strengthen the case for lengthy detention. Proof of such factors, even though only by a preponderance of the evidence, serves to show that, in addition to meeting the war-against-al-Qaeda basis for law-of-war detention, the detainee is a person generally similar in a most important feature to one who can be prosecuted, convicted, and incarcerated for a commensurate period of time.

A way to accomplish this is to make the putative criminality of the prior conduct engaged in by the detainee an explicit focus at some point in the military detention process and also to attach significance to the approximate putative sentence (that would have been imposed, had it been feasible to prosecute), as a kind of limitation on the length of the detention.

## 2. Details of This Part of the Proposal

The proposal under discussion here is more radical than that discussed in the previous subsection. There the proposal was simply to subject the exercise of an authority (imposition of further military detention after completion of the criminal process) that officials and other sources have represented the government possesses to a proposed framework and standards. That proposal would define the terms under which specific powers claimed by government officials would operate, insofar as it suggests a presumption and a standard to be applied. The proposal here is to add an entirely *new* limitation on a detainee's prolonged law-of-war military detention not previously suggested, based on his putative criminality. The nature of the limitation is described in more detail in the paragraphs that follow.

### *a. Taking into Account the Culpable Criminality of a Detainee*

It is proposed for those who are not going to be prosecuted and who are to be subjected to prolonged military detention that their prior culpable criminal conduct should, for a limited purpose, be taken into account. The phrase "culpable criminality" as used here refers to conduct that: (1) is culpable; (2) would be subject to criminal prosecution *but for* certain criminal law and procedure rules that prevent prosecution on the facts at hand; and (3) despite those rules, does not negate the culpability of the actors.

Taking into account the culpable criminality of those who are militarily detained is not intended to negate or undermine the traditional duration-of-the-conflict rationale for military detention, but rather to buttress it. Adding a

criminality underpinning to the calculus for this limited purpose is not intended to convert the prolonged detention process into a criminal process; it is not intended to introduce the traditional features of criminal convictions, namely, condemnation, punishment, just deserts, etc., nor is it contemplated that the traditional criminal process burden of proof would be applied. Rather, as envisaged here, it primarily bears on the length of time that the individual would be incarcerated; it will only work to the benefit of the detainee – as a basis for possibly limiting the length of time that the detainee would remain in detention.

*b. The Culpable Criminality of Each of the Infeasible-to-Prosecute Categories Described in the GRTF*

Beyond the broad notion of culpable criminality described above, the concept needs to be fleshed out. The concept can be further explicated by looking back to the discussion in Part I (dealing with the categories of infeasible-to-prosecute cases described in the GRTF Report). Two of the categories constitute paradigmatic cases of individuals who have engaged in culpable criminal conduct (but who cannot be prosecuted and convicted in the U.S. criminal justice system, civilian or military): a person who has engaged in criminal conduct as to which the statute of limitations has run, or a person against whom there is adequate reliable evidence to prove the crime, but where the evidence is inadmissible. Both of these cases share characteristics that link up with the justifications above. In each, assume that: (1) the individual has engaged in culpable conduct that is harmful or involves a serious risk of harm; (2) that conduct is currently made criminal by the law of the jurisdiction, but for reasons that do not negate his culpability, the individual cannot be convicted; and (3) the relevant criminal code provides a penalty for the conduct were it feasible to prosecute.

Other categories of infeasible prosecution discussed in Part I, *supra*, present slightly more problematic examples, but they, too, can be fitted into the same mold of instances where, even though culpable criminality is present, it is infeasible to prosecute. Thus, where the infeasibility results from the fact that the applicable crime does not have an extraterritorial reach and the relevant conduct was committed abroad, it still constitutes culpable criminal conduct because the extraterritorial aspect does not detract from the culpable and harmful nature of the conduct. At the same time, the conduct otherwise falls within the statutory definitions in the federal criminal code, to which a penalty attaches.

The most difficult application of the culpability concept is when the infeasibility of prosecution results from the fact that, at the time of the conduct, the criminal code or other source of law did not cover this conduct, but subsequently a statute is enacted that makes such conduct criminal. Once again, the conduct is arguably culpable in nature and ascribable to criminal code provisions with relevant penalties, albeit not in existence at the time the conduct was perpetrated.

Giving this kind of culpable criminality any kind of legal significance in a substantive context might be thought to violate the ex post facto prohibition, but the substantive use contemplated is not punishment of the individual for having engaged in the conduct. Rather, it would be used only as a shadow-ground for imposing a flexibly applied limit on a military detention that would otherwise continue without any end date (except for one that might possibly be provided through the PRB process).

These are four illustrative categories of cases derivable from the GRTF report where criminal prosecution is infeasible even though the individuals can be deemed to have engaged in culpable criminal conduct. This listing of categories should not, however, necessarily be seen as complete and final.<sup>111</sup>

*c. A Precedent for the Putative Culpable Criminality Inquiry – the Racketeer Influenced and Corrupt Organizations Statute.* It may seem rather odd to contemplate adding to the military detention process an inquiry into and proof of crimes that it is not feasible to prosecute, but there is at least one not exact precedent for such a procedure.

Instances of proving culpable criminal conduct where it is not feasible to prosecute the conduct involved can arise under the federal Racketeer Influenced and Corruption Organizations (“RICO”) statute.<sup>112</sup> The elements of a criminal RICO charge are conducting the affairs of a RICO enterprise through a pattern of racketeering activity. “Racketeering activity” involves the commission of at least two state or federal offenses within a ten-year period. The kinds of state offenses that can qualify as racketeering activity under the statute are any of a series of listed offenses “chargeable under state law.” There have been federal judicial decisions ruling that a state offense proved to have been committed may be proved as racketeering activity under the statute even when criminal prosecution is time-barred by the applicable statute of limitation.<sup>113</sup>

Even though it is not feasible to prosecute the state offenses in question, they may be proved as the racketeering activity elements in a RICO prosecution. While this interpretation is based on specific language in the statute, “chargeable under state law,” the example nevertheless illustrates how culpable criminal conduct, can be proven where criminal prosecution is infeasible but the proof of the conduct is relevant to the matter at hand and criminal prosecution is infeasible.<sup>114</sup>

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111. The categories are derived, after all, from the GRTF report that, in turn, is based on the specific cases that have arisen in the legal setting of Guantanamo. It is not implausible to anticipate that similar categories might be identified in some future legal context.

112. 18 U.S.C. §§ 1961 *et seq.* (2000).

113. *See, e.g., United States v. Davis*, 576 F.2d 1065 (3d Cir. 1978); *United States v. Forsythe*, 560 F.2d 1127 (3d Cir. 1977).

114. There are additional differences between the RICO example and the instant proposal. Under RICO, while the “racketeering activity” is not charged as an offense for which the defendant in the instant proceeding can be punished, it is alleged in the indictment as an element of the offense and consequently must be proved beyond a reasonable doubt. But the main point still holds: under both

*d. Using Culpable Criminality to Derive an Approximated Sentence*

Utilizing this culpable criminal conduct as the basis for determining the approximate sentence that the detainee would have likely incurred had the case been prosecuted is the most difficult of the matters to be inquired into; it involves an effort to determine what would have been likely to happen under specified circumstances. At best, this can only be a very rough approximation, but even rough approximation can be useful for the intended purpose. In trying to determine the sentence that would have been imposed, in addition to looking at the particular facts and conduct engaged in by the detainee, it would be useful and should be permissible to look to other cases, in particular, any prior criminal prosecutions involving similar conduct, in order to take note of the sentences that have been meted out in similar cases.<sup>115</sup>

The likely sentence that would have been imposed, in turn, can then be used to establish a presumptive, potential limit on the length of what might otherwise be indefinite, extended detention. The process used would retain the possibility of continued detention, through application of the presumption and a very stringent standard that serves to protect the national security from especially dangerous individuals. In most of the cases, however, the prolonged detention would very likely be brought to an end at the time the approximated sentence would have been completed.

The culpable criminality and putative sentence determinations would thus be utilized not to convert the process into a criminal process but rather as a way of bringing the two tracks into closer alignment. They would also serve to provide a likely, but not certain, end date for what would otherwise be an indefinite detention with no targeted end time.<sup>116</sup> Of course, in cases where the putative sentence is determined to be life imprisonment or a sentence so lengthy as to amount to the same thing, the detainee would not benefit from this process.<sup>117</sup>

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RICO and under the proposal, the prior culpable criminal conduct, though not prosecutable, can be proved because it is relevant to the matter at hand.

115. Additional questions that will need to be resolved are whether to take into account sentences meted out in civilian as well as military commission prosecutions, and, if civilian cases are to be considered, whether to use only cases of former Guantanamo detainees, only cases of persons seized abroad, or all cases involving serious terrorism acts, wherever the place of arrest or capture, or location of the acts perpetrated or planned. How many exemplar cases are available to be looked to will depend on which cohort(s) are utilized. Another issue with respect to use of sentences in civilian federal prosecutions is that the sentences involve the application of the federal sentencing guidelines, which are not applicable in the military commission processes. While some issues are raised by these types of considerations, it is believed that a fair approximation of the sentence that would have been imposed if the detainee had been prosecuted is achievable.

116. Although there may be no necessary correlation between the criminal conduct engaged in by a detainee and the danger he poses when released, the seriousness of the criminal conduct already perpetrated can provide a kind of rough index of the danger that the individual may represent. Putative sentences are likely, on average, to be longer for the more dangerous individuals, delaying the time when they may gain the benefit of the presumption and more stringent standard.

117. Thus the person whose culpable criminality would have likely led to a sentence of life imprisonment ends up, under the proposal, in prolonged detention without the hope of a presumptive

The standard applied in the existing periodic review process is whether the detainee continues to be a significant threat to the national security. No presumption is applied. It is proposed that in circumstances where the detainee has been detained for a period that is a rough approximation of the incarceration sentence he would have served if he had been criminally prosecuted, the standard and procedure should differ from the PRB process in two important respects. These two features would be essentially parallel to the standard to be applied to prosecuted individuals who have completed serving their criminal sentence.<sup>118</sup>

First, a presumption in favor of release should be applied; that is, there should be a higher burden on the government than in the normal periodic review to show that he should not be released. Second, the standard used should provide that the detainee is to be released unless the government makes a showing that he constitutes an extreme threat to national security.<sup>119</sup>

Applying this approach should be adequate to protect the national security against the risk of substantial terrorism acts by released detainees. By creating a presumption in favor of release at the end time of the approximate sentence he would likely have served had he been convicted, the two tracks for handling of the detainees would come closer to being in alignment.<sup>120</sup>

### *C. Reviewing the Infeasible-to-Prosecute Determination*

The final element of the proposal, though severable, is to establish a process for reviewing the decision of infeasible prosecution. A record should be made of the facts and/or legal rules that make prosecution infeasible. If the relevant decisionmakers in the process to be established<sup>121</sup> have any questions or doubts about the prosecutorial judgment on this issue, they can challenge it.

In a two-track system such as this one, where the President has articulated a strong preference for criminal prosecution, it behooves the government to ensure that the preference is implemented rigorously – ensuring to the extent possible that those who can be prosecuted are indeed prosecuted, and that consistent and proper criteria are applied in determining that prosecution is infeasible. This can be assured by including a process that ensures that the considerations bearing on the legal infeasibility of prosecution are placed on the record. As detailed above, since under this proposal, the culpable criminal

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date of release. The fact that, if he had been prosecuted, he would have likely been given a life sentence should, however, make us feel better about the absence of any potential limit on his indefinite detention. Of course, he would still qualify for the periodic review board process and the possibility that the war against al Qaeda might end someday.

118. See discussion *supra* Part II.A.

119. Regarding the standard of extreme dangerousness, see *supra* note 104.

120. The practicalities of adding a determination of criminal culpability and likely sentence to the military detention process as shadow elements can be accomplished by adding to the existing procedures of the PRB process. The choice of the PRB proceeding for this purpose is explained in the next section.

121. In section II.D below, it is recommended that these issues should be addressed in an expanded PRB process.

conduct engaged in by the detainee will be at issue in the proceeding for other reasons, making the infeasibility of prosecution also a subject will involve inquiry into facts closely related to issues already under consideration in the proceeding.

By placing the factors that make prosecution infeasible on the record, rather than treating the decision not to prosecute only as an internal, prosecutorial discretionary matter, the risk of mis-channeling cases can be reduced, and possibly avoided altogether.

On the surface, putting this matter on the record might appear to subject a discretionary decision to prosecute to a formal legal review. Discretionary decisions to prosecute or not to prosecute are generally not subject to judicial review in the U.S legal system, and the kind of procedure proposed here would be unusual. What makes the situation addressed here different from any ordinary criminal prosecutorial decision-making process is the fact that there is, alongside of the possibility of criminal prosecution, a military detention system that could in many instances have even more serious consequences for the individual than criminal prosecution does. Accordingly, it seems appropriate to build elements into the system to help ensure that the choice of the track proceeded on is made as objectively as possible and is not based on tactical considerations.<sup>122</sup>

#### *D. In What Type of Proceeding(s) Should These Issues Be Determined?*

##### *1. Introduction*

The goal of this paper is to offer a proposal to generally align the two approaches, one involving criminal prosecution and the other involving prolonged law-of-war detention. In what type of proceedings should all of the foregoing issues be determined for those detainees who are prosecuted and for those who are not prosecuted but continue in prolonged detention?

For the proposals that have been made in sections A, B, and C above, a series of choices would need to be made: In what proceeding should the feasibility of criminal prosecution be reviewed? Similarly, where it has been determined that criminal prosecution is infeasible, where should the inquiry occur regarding the culpable criminal conduct of the detainee or regarding the approximate sentence

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122. Under the current approach, a government decisionmaker who wishes to maximize the length of time that an individual stays incarcerated would be likely to lean in the direction of prolonged law-of-war military detention rather than criminal prosecution, unless, of course, there would be a strong likelihood of a life or life-equivalent sentence upon conviction. A consequence of adoption of the proposal could be reversal of that choice: The government decisionmaker, in order to maximize the incarceration period, would be likely to choose criminal prosecution rather than prolonged detention, unless the likely criminal sentence would be too short. Under the terms of this proposal, both options would have a likely outer limit – the indefinite period feature of prolonged detention would be modified. A preference for criminal prosecution to maximize the incarceration period would be based in the fact that the criminal prosecution option would not carry with it the possibility of early release through the PRB process.

that would likely have been imposed? Where should the decision be made about the possibility of release after detention for the period of the putative criminal sentence? Where should the decisions be made about the possibility of further military detention after the criminal sentence has been served, or a suspended sentence or acquittal or dismissal of the prosecution has occurred?

For those detainees not prosecuted, what rules of procedure and evidence should be used in these new processes? How detailed a fact-finding inquiry is contemplated? Would the addition of this kind of inquiry complicate and significantly add to the proceedings applicable to the detainees who are not to be prosecuted but are continued in detention? How does this proceeding (or proceedings) relate to or differ from the habeas proceedings carried on for the detainees? While the goal here is not to enter into all of the details of the procedures that will be added, at least a preliminary effort to address the more general issues regarding such matters is warranted.

Regarding all of these determinations, there are three principal alternatives to choose from: (1) add these issues to the habeas proceedings; (2) add them to the period review process; or (3) create an entirely new hearing procedure.

It is probably not desirable to add the mix of decisions being proposed to the habeas proceedings. Those proceedings are concerned with applying the existing law-of-war principles to the Guantanamo detainees. For most of the detainees, the habeas hearings have been completed, at least at the district court stage, and adding all of these new issues would dramatically change the nature of those proceedings. Creating an entirely new kind of proceeding, in addition to the periodic review boards, hardly seems worth the cost and effort. On balance, the best option would seem to be to adapt the PRBs to the task.

## 2. Expanding the Role of the Periodic Review Boards

The periodic review boards seem to be the most apt proceedings for considering all of the described issues.<sup>123</sup> Of course their mission would need to be broadened somewhat,<sup>124</sup> and their procedures would need to be reviewed for appropriateness,<sup>125</sup> given an expanded jurisdiction. Most of these changes could be accomplished by executive order, although it would be much better to do so

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123. The periodic review board is composed of senior officials from the following six federal departments and agencies: the Departments of State, Defense, Justice, and Homeland Security, the Office of the Director of National Intelligence, and the Chairman of the Joint Chiefs of Staff. *See* Exec. Order, 13,567, *supra* note 26.

124. Interestingly, as implemented, Executive Order 13,567 already contemplates that some elements that are discussed in the proposal would be considered by the periodic review boards. *See* DTM 12-005, *supra* note 28, Attach. III, § 2(c), at 6 (stating “[i]n the event an individual tried and sentenced by a military commission or any other competent tribunal is acquitted or completes his sentence, the matter will be referred to the Review Committee for consideration and appropriate action.”); *see also* Exec. Order 13,567, *supra* note 26, at § 6.

125. The existing PRB procedures and decision-making processes are characterized as discretionary or involving the exercise of discretion. The expanded jurisdiction under the proposal arguably may involve some legal issues. In view of this fact, consideration should be given to adapting the procedures to distinguish between the two kinds of issues and having subcommittees to handle different issues.

by congressional legislation. Clearly the courts acting on their own could not create this system.

For detainees who are to be continued in prolonged detention the PRBs can be adapted into forums, *inter alia*, to consider the feasibility of criminal prosecution for cases that have not already been referred for prosecution; to consider whether, even though prosecution is infeasible, there is adequate proof that the detainee engaged in culpable criminality and associated specific crimes;<sup>126</sup> and to determine the approximate sentence that would likely have been imposed.

The proposal to add an inquiry into criminality and likely sentence as an additional element to be determined in the detention process should be viewed not as a substitute for the significant threat inquiry, but rather as an important, confirming element to be inquired into. While the periodic review panels might be convened periodically to consider whether the detainee poses a continuing security threat, the new proposed set of initial issues would presumably be considered only the first time a detainee appears before the board.

One might object that adding these issues to the PRB hearings would duplicate what is already likely to have been addressed in a previous habeas corpus proceeding and could unduly lengthen and complicate the proceeding. The prior litigation of the facts, however, can be viewed as an advantage. If there has been a prior habeas proceeding for the detainee, many of the relevant facts at issue would already have been litigated, for example, the kind of conduct the detainee engaged in, the circumstances under which he engaged in the conduct, and the kind of defensive or exculpatory claims he made and tried to prove. The issues in the habeas hearing would not, however, have been litigated in terms of culpable criminality but rather through application of the relevant formula for deciding the lawfulness of military custody for the particular detainee.

Through these new issues to be adjudicated, the nature and seriousness of the specific criminal conduct of the detainee can be put on the record in the PRB hearing, based upon and largely drawn from the transcript of the previous habeas corpus action that would already have occurred in the federal courts. Of course, the decisionmakers in the PRB process, if there appears to be a need to do so, can make further inquiry and request that the parties develop these facts further.

Given the nature of the issues litigated in the previous habeas proceeding, one must assume that in the instant proceeding, the earlier fact-finding regarding these issues would usually be treated as *res judicata* on the underlying factual determinations – assuming the same standard of proof (a preponderance) is applied in both the habeas and the existing PRB proceedings. Accordingly, it

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126. Issues of *mens rea* as well as *actus reus* will need to be considered. Further, there may be some special cases where there is adequate evidence of dangerousness but insufficient reliable evidence of culpable criminality. Such exceptional cases will best be handled through exceptions to the rules governing the new process.

seems unlikely that the addition of these issues would significantly extend the fact-finding in the PRB proceeding or convert it into the equivalent of a full-blown, criminal, trial-like proceeding.

Similarly, in instances where a prosecuted detainee is acquitted, his sentence was suspended, or his case was dismissed, the issue of an individual's continued detainability would come before such a body. Presumably, these issues would only be considered at that first set of a detainee's hearings before the board, and if he is not released at this first hearing, these particular issues would not be reopened at a subsequent periodic convening of the board regarding the detainee. The detainee would then be subject to normal periodic reviews where the only issue before the board would be whether he continues to pose the required level of threat to the United States.

Later, very likely years later, in the case of post-sentence consideration of the possibility of release or a return to or continuation of detention (or post-putative sentence consideration, for those detainees not prosecuted), the same boards would likely be the appropriate tribunals to hear such matters, applying the presumption and standard previously described. Only if there is strong evidence that the individual is still dangerous and therefore merits continuing detention – enough to overcome the presumption in favor of release, would he be returned to or continue in detention. This detention, then, would also continue to be subject to the same kind of periodic review provided for under the original PRB executive order.

### 3. Symmetry in the Proposal

The decision-making framework described here can be characterized as making another type of change in the existing decision-making processes for the detainees. Under the present process, the *practical effect* of the habeas decisions (and the earlier CSRT decisions) is to commit the individual to prolonged detention. Under the structure proposed, it would become even clearer that the habeas decision only amounts to a decision that the individual is detainable under the law of war, and *not a decision for how long he may be detained*. The additional decisions proposed to be made in enhanced PRB proceedings would provide the foundation (or not) for detaining the individual for a prolonged period, subject only to the appropriate determination of continuing dangerousness, applying the relevant standard.

Treating both sets of detainees at a later point in time as presumptively releasable, subject to a specially applicable heightened requirement of dangerousness in order to continue the individual in detention, would bring the two paths into much closer alignment. There would still be some differences, however. The detainee who was criminally prosecuted would have served his, for example, twenty-year sentence in a criminal facility in a context of the criminal sentence, with its features of condemnation, just deserts, etc., and the determination to convict him would have been made using a standard of proof beyond a reasonable doubt. For the detainee whom it was not feasible to

prosecute, assuming similar misconduct, he would have been in law-of-war detention for a similar period, his detention having been decided using the standard of a preponderance of the evidence.

While significant, the difference in the standards results from the different premises and rationales of the two systems. More importantly, by weighing a special standard of requisite dangerousness against a presumption in favor of release after a criminal sentence served or a putative sentence to be applied, the system would introduce a stronger limit than currently exists on what could otherwise be a lifetime in military detention. It would still be a somewhat flexible limit, however, making release at a certain point in time a much more likely, but not certain, outcome. Making continued detention a less likely, but still possible, outcome is the only way to continue to pay heed to the ultimately controlling concern of protecting the nation against extremely serious threats to its security.

Also very important, both the convicted prisoner and the detainee would have a similar expectation to be released at the end of the term of imprisonment or the putatively similar period, unless the applicable standard of continuing extreme dangerousness is met. Such a system, while not providing complete certainty of outcomes, would provide a degree of hope for release at a time certain for the individual in prolonged detention – hope that he is not likely to have under the current system. Providing more certainty or, at least a basis for such hope, would be a meritorious element to add to the existing system.

In the end, the system described opens the door to the, albeit, unlikely possibility of prolonging detention for the individual who served his sentence in the criminal process and to the likely, but not certain, possibility of shortening the length of time a person continues in prolonged military detention, making each more equivalent to the treatment of the other. While not perfect, there is thus a kind of symmetry that attaches to the proposal.

#### 4. The Burden of Proof in the Modified PRB Proceedings under the Proposal

In the habeas hearings, the applicable burden of proof is a preponderance of the evidence, and the assumption is that the standard is essentially the same in the PRB hearings.<sup>127</sup> Given the preponderance standard applied in habeas proceedings and the assumed standard in PRB hearings, the same standard should be applicable in resolving the new issues proposed to be added for adjudication in the periodic review process.

Is proof by a preponderance too low a burden of proof when long-term

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127. Neither the executive order nor the implementing guidelines for the PRB hearings set forth a standard for the burden of proof, perhaps because the process of decision is characterized as involving an exercise of discretion. See discussion *infra* Part III.A. Note that section 1023 of the 2012 NDAA provides that the Secretary of Defense is to submit to the Congress a report containing procedures for implementing the periodic review process that clarifies that the purpose of the process is not to determine the legality of any detainee's law of war detention. In connection with any legislative enactment of the proposal, it will be necessary to amend this provision.

detention of an individual is at issue? Certainly, that claim resonates when the freedom of an individual is at risk, BUT the preponderance standard is nonetheless being applied in the habeas cases. An argument in support thereof is that where there is a risk of serious terrorism – possibly catastrophic terrorism – involved in the matter, society has a right to protect itself by not insisting on too high a burden of proof. Alternative possible standards would be “clear and convincing evidence” or “proof beyond a reasonable doubt.” Ultimately, it is a judgment call as to how to calibrate the balance between individual freedom, on the one hand, and protecting against the threat of terrorism on the other.

Further, given the preponderance standard applied in habeas proceedings, it would be awkward to establish a different standard of proof for the new related issues to be adjudicated in the PRB hearing. Accordingly, the several burden of proof issues should be handled as follows:

In deciding whether criminal prosecution is feasible, a judgment should be made whether there is sufficient admissible evidence to meet the “beyond a reasonable doubt” standard. If so, criminal prosecution should be pursued. If the BRD standard is not met, a determination should be made whether there is sufficient evidence of continuing dangerousness and criminal culpability (along with the likely putative sentence) to meet the preponderance standard. If the preponderance standard is met, the detainee would continue to be held in detention.

It follows from the foregoing that, under the proposed approach, where, inter alia, proof of culpable criminal conduct is required, the standard of proof regarding that element is less than is required in a criminal proceeding. While one of the goals of the proposal is to reduce the inequalities between the criminal prosecution route and the military detention route, as was expressed earlier, only a rough equivalence is achievable. There will continue to be differences between the two paths, and one of these is the difference between the burdens of proof.

### III. THE LEGAL STATUS OF THE TREATMENT OF THE DETAINEES: DISCRETIONARY FEATURES AND THE LAW OF WAR

#### A. *The PRB Process – The Obama Administration’s View: A Process Rooted in Discretion*

In adopting the PRB executive order and the implementing guidelines, the Obama administration expressly purported to go beyond the law of war. To that extent, the PRB process itself is a precedent for the more elaborate process proposed in this paper. As previously suggested,<sup>128</sup> one could argue that inquiry links up directly with the law-of-war rationale for detention. Clearly, however,

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128. See discussion *supra* Part I.B.2.

the administration has not relied on this as justification for the dangerousness inquiry. Rather, it has been at pains to make clear that the entire PRB process involves an exercise of discretion.

Thus, in both the executive order<sup>129</sup> that established the PRB process and in the implementing guidelines,<sup>130</sup> there is a strong emphasis on the discretionary nature of the process. Twice, section 1(b) of the executive order refers to its discretionary features:

This order is intended solely to establish, *as a discretionary matter*, a process to review on a periodic basis the executive branch’s *continued, discretionary exercise of existing detention authority* in individual cases. It does not create any additional or separate source of detention authority”

(emphasis added).

Further, in section 1023 of the NDAA of 2012, which was enacted after the promulgation of the aforementioned executive order, but prior to publication of the implementing guidelines, Congress instructed that the implementing procedures “shall, at a minimum . . . clarify that the purpose of the periodic review process is not to determine the legality of any detainee’s law of war detention, but to make *discretionary* determinations whether or not a detainee represents a continuing threat to the security of the United States” (emphasis added).<sup>131</sup>

Why this heavy emphasis on both the fact that the process is established as a matter of discretion and that the individual determinations are discretionary?<sup>132</sup> As to the latter, providing that the individual decisions involve an exercise of discretionary authority serves to protect those decisions against effective review by the civilian courts, were such review to be established. True, exercises of discretion typically can be reviewed for abuse of discretion, but such review tends to be deferential, would normally be very limited, and would not serve as an effective check on the administrative decisions being made.

Generally consistent with a reluctance to involve the courts in such issues in any significant way is the fact that Congress, by statute, established final authority for such decisions in the hands of a high level executive branch

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129. See generally Exec. Order 13,567, *supra* note 26.

130. See generally DTM 12-005, *supra* note 28.

131. Not surprisingly, there is an emphasis on the same theme in the implementing guidelines, where the discretionary features of the process are mentioned four times. Whereas the first three references appear to be to the process having been established as a matter of discretion, the fourth states, “[t]he process . . . makes discretionary determinations about whether or not a detainee represents a continuing significant threat to the security of the United States,” confirming that not only is the process established as a discretionary matter, but also that the individual determinations made in the course of the process involve exercises of discretion as well. See DTM 12-005, *supra* note 28, Attach. 3, § 4(a), at 8.

132. Initially it seems very unusual, even odd, to describe as discretionary the proceedings and the decisions made as part of those proceedings, when the outcome of those proceedings can and very often will result in the continued detention of a detainee for many years, even a lifetime, but see discussion *supra* Part II.A.

official, namely the Secretary of Defense, who, under section 1023(b)(2) of the 2012 NDAA, “is responsible for any final decision to release or transfer . . . [And] in making such a final decision, the Secretary shall consider the recommendation of a periodic review board . . . but shall not be bound by any such recommendation.”

It appears the finality clause in this provision is intended to serve two purposes. First, by describing the secretary’s decisions as “final,” Congress seems to have intended to preclude judicial review of the PRB decisions. Second, by treating the period review board decisions as recommendations, Congress revealed a concern about leaving the decision in these matters in the hands of the usual decision makers in the PRB processes. This reluctance could reflect an unwillingness fully to trust the PRB decision makers, or, more likely, Congress’s concern about the nature of the decisions being made, which have, in this context, the potential weaknesses previously described – namely, they are: made along a continuum applying a very general standard; predictive, with all the uncertainties that attach to trying to foresee the future; and inevitably involve the risk that the board might be fooled by some detainees.

As for treating the PRB process itself as established through an exercise of discretion, there are a number of plausible explanations for this approach. Thus, the PRB process can be viewed as a discretionary gloss on the law-of-war. Under the law of war, the detainees are determined to be lawfully detained and the implication is that they can be detained for the duration of the war against al Qaeda. The PRB process can be viewed as a proceeding to determine if there is a discretionary basis for terminating such detention – roughly the equivalent of a procedure for remitting a penalty or discretionary release through parole before the end of the sentence of a convicted felon.<sup>133</sup>

Still another way to explain the discretionary treatment of the PRB process is that both the president and Congress did not want to undermine the clarity and acceptability of relying on the law of war as the basis for the detention decision by muddying it up with an issue relating to whether a detainee is a continuing threat. By treating the law-of-war detention decision as a matter of law and the continuing threat as a matter of discretion, a bright line can be drawn between them.

Viewing the PRB decisional process this way also enables the exercise of any further administrative discretion regarding the process as needed and appropriate because it can be amended, changed, or rescinded, all through the exercise of discretionary authority.

#### *B. Discretion, the Law of War, and the Proposal*

The administration and Congress’s heavy reliance on the discretionary aspects of the PRB process and the fact that many of the features of the proposal

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133. See Savage, *supra* note 27.

can be viewed as a further extension and application of the PRB process suggest that, for present purposes, the proposal is likely to gain greater traction if it follows in the discretionary footsteps of the PRB process. Of course, treating the framework established under the proposal and many of the individual decisions to be made thereunder as involving exercises of discretion has implications for the possibility of judicial review and how the framework is viewed in relation to the law of war.

Until this point in the paper, the question of how these proposals relate to the law of war has not been addressed in any depth. First, some observations must be made. The proposal is clearly not part of the law of war today. While it has substantive links to law of war considerations, as previously argued, they are relatively weak and tenuous. It would be better to view the proposal as something that eventually could be added to the law of war, but that is not currently part of or derivable from it.

The proposal recognizes and emphasizes the fact that the war against al Qaeda has a criminal law enforcement dimension, and, given that special dimension, it would add a gloss on the traditional law-of-war approach that would take that special dimension into account. Arguably, the traditional law-of-war approach, by itself, without taking that special dimension into account, is not adequate for a war against a terrorist organization. And there is, therefore, a need for some additions that can be adopted without compromising the underlying law-of-war principles. The proposal made in this paper can be viewed as the beginning of such an effort.

### *C. Aspirations*

Though perhaps overly optimistic, the hope is that if the proposal is adopted through an executive order or by legislation enacted by the U.S. Congress to regulate the future treatment of the Guantanamo detainees, it might be emulated by other countries. The further hope is that the basic features of the proposal might eventually be incorporated into an international convention or come to be viewed, were it adopted by enough countries, as a part of customary international law.

### CONCLUSION

Adding issues relating to the infeasibility of criminal prosecution and the existence of criminal culpability to the periodic review proceeding underlines the fact that a war against a terrorist organization, while subject to the law of war, also involves a special instance of war – one in which war actions waged by enemy forces also violate our criminal laws.

Adding those issues to the detention calculus would have multiple positive consequences. It would reduce the current problematic inequality of treatment between those who are to be prosecuted and those destined for prolonged detention because, while they are criminally culpable, prosecution is infeasible.

It would take a step in the direction of aligning the treatment of this latter group with those who are criminally prosecuted. For all of those who are detained, it would attach some significance to the fact that they have engaged in criminal behavior.

It would also fit nicely into the Obama administration's view of the legal justification for the handling of prolonged detention issues, only adding a series of additional issues to existing procedures. It would build on the logic of the administration's strong preference for criminally prosecuting as many of the Guantanamo detainees as possible. It would also build on the logic of the PRB process established by the administration, adding to the basis for prolonging detention. Further, it would provide some assurance that the government will not inappropriately shift individuals into the prolonged detention category when prosecuting them is in fact feasible.

Most significantly, it would provide a way to establish a standard for imposing some limit on the length of prolonged military detention, albeit in the form of a presumption that can be overcome, at the end of the period of a putative sentence that would have been served, had criminal prosecution been feasible. Similarly, it would provide a framework for dealing, in a somewhat parallel fashion, with the issue of whether – following the final conclusion of criminal prosecution processes – a person can be returned to military custody. Overall it is consistent with President Obama's statement that "these detention policies cannot be overcome."

All of these consequences go beyond what is provided under the law of war. They can be viewed as hoped-for additions to that body of law, to be established under the domestic law of the United States, preferably by legislation, and perhaps someday to be added to the body of international law, whether through treaty, convention, or by becoming part of customary international law.

Ultimately, the described proposal can best be viewed as a means of addressing the "legacy problem" identified by the president and as a detailed response to the concerns expressed by Justice Sandra Day O'Connor. It provides a way to adapt principles and processes relating to the traditional law-of-war understanding to a different kind of war in order to prevent that understanding from unraveling.