

# INDEFINITE DETENTION UNDER THE LAWS OF WAR

Chris Jenks\* & Eric Talbot Jensen\*\*

## INTRODUCTION

While campaigning for the Presidency in 2007, then-candidate Barack Obama stated, “I have faith in America’s courts and I have faith in our JAGs. As president, I’ll close Guantanamo, reject the Military Commissions Act, and adhere to the Geneva Conventions. Our Constitution and our Uniform Code of Military Justice provide a framework for dealing with the terrorists.”<sup>1</sup> Almost immediately after entering office, now-President Obama issued three Executive Orders intended to carry out these campaign promises.<sup>2</sup>

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\* Lieutenant Colonel, U.S. Army Judge Advocate General’s Corps. Presently serving as the Chief of the International Law Branch, Office of The Judge Advocate General, Washington D.C. The views expressed in this Article are those of the author and not The Judge Advocate General’s Corps, the U.S. Army, or the Department of Defense.

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1. Barack Obama, Address at The Woodrow Wilson Int’l Center for Scholars (Aug. 1, 2007), *available at* [http://www.cfr.org/publication/13974/obamas\\_speech\\_at\\_woodrow\\_wilson\\_center.html](http://www.cfr.org/publication/13974/obamas_speech_at_woodrow_wilson_center.html), quoted in Michael D. Shear & Peter Finn, *Obama to Revamp Military Tribunals*, WASH. POST, May 16, 2009, at A1.

2. According to recent reports, the Obama Administration is set to release an additional Executive Order concerning indefinite detention in early 2011. *See* Dafna Linzer, *White House Drafts Executive Order for Indefinite Detention*, PROPUBLICA, Dec. 21, 2010, *available at* <http://www.propublica.org/article/white-house-drafts-executive-order-for-indefinite-detention>. Following completion of this article, on March 7, 2011, the White House issued an Executive Order (EO). EXECUTIVE ORDER, PERIODIC REVIEW OF INDIVIDUALS DETAINED AT GUANTANAMO BAY NAVAL STATION PURSUANT TO THE AUTHORIZATION FOR USE OF MILITARY FORCE, *available at* <http://www.whitehouse.gov/the-press-office/2011/03/07/executive-order-periodic-review-individuals-detained-guant-namo-bay-nava>. Timing unfortunately precludes a review of the procedures the EO describes compared to those recommended by this article. Suffice to say, while the EO references “law of war detention” nowhere in the standard for continued detention, or timing and conduct of the reviews, is there a specific reference to the relevant LOAC upon which the reviews are purportedly based. *Id.*

The first was Executive Order 13491, Ensuring Lawful Interrogations.<sup>3</sup> This order required that all interrogations by any federal “officer, employee, or other agent of the United States Government”<sup>4</sup> comply with Army Field Manual 2–22.3<sup>5</sup> and Article 3 of the 1949 Geneva Conventions.<sup>6</sup> The second was Executive Order 13492, Review and Disposition of Individuals Detained At the Guantanamo Bay Naval Base and Closure of Detention Facilities.<sup>7</sup> This order created two task forces to conduct “a prompt and thorough review of the factual and legal bases for the continued detention of all individuals currently held at Guantanamo, and of whether their continued detention is in the national security and foreign policy interests of the United States and in the interests of justice,”<sup>8</sup> and ordered the terrorist detention facility at Guantanamo be closed within a year.<sup>9</sup> President Obama stated that the task forces were intended to

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3. Exec. Order 13491, 74 Fed. Reg. 4893 (Jan. 27, 2009) (Executive Order 13491 also revoked Executive Order 13440, 72 Fed. Reg. 40,705 (July 20, 2007)).

4. *Id.*

5. HEADQUARTERS, DEP'T OF THE ARMY, 2-22.3 (FM34-52), HUMAN INTELLIGENCE COLLECTOR OPERATIONS (Sept. 2006) (hereinafter FM 2-22.3).

6. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention for Wounded in Field]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention for Wounded at Sea]; Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention for Prisoners]; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention for Civilians].

The text of Common Article 3 states:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular, humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

*Id.*

7. Exec. Order 13492, 74 Fed. Reg. 4893 (Jan. 27, 2009).

8. *Id.* § 2(g).

9. *Id.* § 3.

provide him “with information in terms of how we are able to deal [with] the disposition of some of the detainees that may be currently in Guantanamo that we cannot transfer to other countries, who could pose a serious danger to the United States.”<sup>10</sup> The third was Executive Order 13493, Review of Detention Policy Options.<sup>11</sup> This order also established a task force, this one to provide an overall review of the U.S. detention policies and then issue a report within 180 days.<sup>12</sup>

In response to Executive Order 13492, the two task forces issued their respective reports. One of the task forces, charged with reviewing the conditions of confinement at Guantanamo,<sup>13</sup> issued what is commonly referred to as the Walsh Report.<sup>14</sup> The other task force was charged with “select[ing] lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice” for the disposition of those detainees for whom neither transfer nor prosecution was envisioned.<sup>15</sup> This task force recommended that “nearly 50 of the 196 detainees at the U.S. military prison at Guantanamo Bay, Cuba, should be held indefinitely without trial under the laws of war.”<sup>16</sup> The recommendation for indefinite detention governed “under the laws of war” is significant. Though there are numerous proposals for eventual disposition of the Guantanamo detainees,<sup>17</sup> some of which contemplate various forms of legal detention and confinement,<sup>18</sup> none have proposed indefinite detention under the laws of war, as recommended by

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10. *Obama Signs Order to Close Guantanamo Bay Facility*, CNN.COM (Jan. 22, 2009), <http://www.cnn.com/2009/POLITICS/01/22/guantanamo.order/index.html>.

11. Exec. Order 13493, 74 Fed. Reg. 4901 (Jan. 27, 2009).

12. *Id.*

13. Exec. Order 13492, 74 Fed. Reg. at 4893 § 6.

14. DEP'T OF DEFENSE, REVIEW OF DEPARTMENT COMPLIANCE WITH PRESIDENT'S EXECUTIVE ORDER ON DETAINEE CONDITIONS OF CONFINEMENT (2009) [hereinafter Walsh Report].

15. Exec. Order 13492, 74 Fed. Reg. at 4893 § 4.

16. Peter Finn, *Justice Task Force Recommends About 50 Guantanamo Detainees Be Held Indefinitely*, WASH. POST, Jan. 22, 2010, at A1; Peter Finn & Del Quentin Wilber, *Obama Hamstrung on Guantanamo; Closure Plan Put in Doubt*, WASH. POST, Jan. 29, 2010, at A3.

17. Senator Graham recently proposed S. 3707, titled the Terrorist Detention Review Reform Act which would modify the habeas corpus review process “for certain unprivileged enemy belligerents” as well as modify the definitions applicable to detainees and the scope of detention authority. The Bill is still in Committee. *See S. 3707: Terrorist Detention Review Reform Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=s111-3707> (last visited Feb. 16, 2011).

18. *See* INTER-AMERICAN COMM'N ON HUMAN RIGHTS, REPORT ON TERRORISM AND HUMAN RIGHTS, § III(B)(1) ¶ 124 (2002), *available at* <http://cidh.org/Terrorism/Eng/part.d.htm>; Benjamin Wittes and Jack Goldsmith, *Ghailani Verdict Makes Stronger Case for Military Detentions*, WASH. POST, Nov. 19, 2010, at A21, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/18/AR2010111805020.html>; Jack Goldsmith, *Don't Try Terrorists, Lock Them Up*, N.Y. TIMES, Oct. 8, 2010, at A21, *available at* <http://www.nytimes.com/2010/10/09/opinion/09goldsmith.html>.

the task force.<sup>19</sup>

The law of war, or law of armed conflict (LOAC) as it is often called and set forth in both customary and conventional law such as the Geneva Conventions, provides a clear framework for detention for the duration of hostilities.<sup>20</sup> Historical practice has generally involved detention for much shorter periods of time than many at Guantanamo have already been detained. There are some notable exceptions, however, including Israel,<sup>21</sup> Malaysia,<sup>22</sup> Algeria<sup>23</sup> and Morocco,<sup>24</sup> where fighters were detained for extended periods of time, including more than twenty years in the case of Morocco.<sup>25</sup> However, the

19. *But see* Linzer, *supra* note 2.

20. *See* Geneva Convention for Prisoners, *supra* note 6 at art. 75 stating that “the repatriation of prisoners shall be effected as soon as possible after the conclusion of peace.” However, in that same article, the Geneva Convention for Prisoners also accommodates longer periods of detention for some prisoners by stating “[p]risoners of war who are subject to criminal proceedings for a crime or offence at common law may, however, be detained until the end of the proceedings, and, if need be, until the expiration of the sentence.”

21. *See* Suzanne Goldenberg, *Lebanese Detainees Yet to Smell Freedom*, THE GUARDIAN, May 30, 2000, available at <http://www.guardian.co.uk/world/2000/may/30/israel1>; Tracy Wilkinson, *Activists Assail Israel's 'Legal Hostage-Taking'*, L.A. TIMES, Mar. 6, 1998, available at <http://articles.latimes.com/1998/mar/06/news/mn-26125>; Robert J. Caldwell, *Israel's Harsh Occupation Hasn't Defeated the Two-year-old Intifada, the Palestinian Revolt in the West Bank and the Gaza Strip*, SAN DIEGO TRIB., Nov. 12, 1989, at C1.

22. Alfred de Zayas, *Human Rights and Indefinite Detention*, 87 INT'L REV. OF THE RED CROSS 15, 22-23 (March 2005).

23. AMNESTY INT'L CHARITY LIMITED, REPORT AND FINANCIAL STATEMENTS FOR THE YEAR ENDED 31 MARCH 2009, 5 (2009).

24. *Morocco: Prisoners of War Released*, N.Y. TIMES, Aug. 19, 2005, at A6, available at <http://query.nytimes.com/gst/fullpage.html?res=9904EEDE103EF93AA2575BC0A9639C8B63>; *Morocco: Rebel Group Frees Prisoners*, N.Y. TIMES, September 3, 2003, at A11, available at <http://www.nytimes.com/2003/09/03/world/world-briefing-africa-morocco-rebel-group-frees-prisoners.html>; *World Briefing*, N.Y. TIMES, December 15, 2000, at A12, available at <http://www.nytimes.com/2000/12/15/world/world-briefing.html?pagewanted=2&src=pm>; Barbara Crossette, *2 Diplomats Rescue 185 Imprisoned by Sahara*, N.Y. TIMES, Dec. 8, 1995, available at <http://www.nytimes.com/1995/12/08/world/2-diplomats-rescue-185-imprisoned-by-sahara.html>; Zayas, *supra* note 22.

25. There are also numerous examples of “indefinite” detentions in the domestic practice of states. *See* Adam Liptak, *Extended Civil Commitment of Sex Offenders is Upheld*, N.Y. TIMES, May 17, 2010, at A3 (where the Supreme Court upheld the continued incarceration of sex offenders until they are no longer dangerous); Griffe Witte & Karen DeYoung, *Pakistan Holding Thousands in Indefinite Detention, Officials Say*, WASH. POST, April 22, 2010, at A1 (discussing Pakistan’s practice of holding suspected militants in indefinite detention rather than turning them over to the court system); HUMAN RIGHTS WATCH, *ABDICATION OF RESPONSIBILITY: THE COMMONWEALTH AND HUMAN RIGHTS 36* (1991) (discussing the Malaysian Internal Security Act that allows the government to arrest individuals without warrant and hold them for up to 60 days—renewable without charge or review); *Egypt: Submission to the UN Universal Periodic Review: Seventh Session of the UPR Working Group of the Human Rights Council, February 2010*, AMNESTY INTERNATIONAL (Sept. 1, 2009), <http://www.amnesty.org/en/library/info/MDE12/008/2009/en> (discussing Egyptian legislation that allows for indefinite

vast majority of detentions have been for much shorter durations. Surprisingly, considering the number of armed conflicts that have involved detention, there is no common international practice concerning long-term or indefinite detention upon which states may rely.

For those at Guantanamo held after criminal prosecution, or for whom prosecution won't occur, and who have unsuccessfully petitioned for a writ of habeas corpus (or not submitted a petition at all), the question then becomes, assuming that long-term and potentially indefinite detention of unlawful enemy combatants (or unprivileged enemy belligerents)<sup>26</sup> will be governed by the law of war, what should that detention look like? This Article argues that the basic provisions and safeguards currently extant in the LOAC are sufficient to establish a legitimate indefinite detention paradigm. Though many of these provisions are under-utilized or ineffective in the current detention framework, the current structure could be adapted to provide a LOAC detention model that accounts for a contemporary view of individual rights, protections, and privileges. Such an adapted paradigm would be appropriate for the indefinite detention of the up to fifty detainees designated by the U.S. government to be held at Guantanamo, and would provide appropriate safeguards and ensure the overall security necessary for that detention until the conflict is over or until the detainees no longer pose a security risk.

Here, there is no intent to "put [enemy aliens] in a more protected position than our own soldiers."<sup>27</sup> Rather, this analysis is designed to demonstrate that the LOAC rules on detention are sufficiently flexible and comprehensive to provide worthwhile and meaningful individual protections the Administration can apply to those who are detained indefinitely.

Part I of this Article reviews the history of LOAC detention and the formulation of the current framework. Part II discusses the law that applies to detention generally and sets the stage for the analysis in Part III of specific LOAC provisions that are either under or ineffectively utilized in the current detention paradigm. If properly applied, these provisions provide a model for indefinite detention under the LOAC. Finally, we propose a revised framework

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administrative detention).

26. On October 28, 2009, President Obama signed the 2010 National Defense Authorization Act, which included a section entitled the Military Commissions Act of 2009. The new law replaces the Bush administration military commissions legislation known as the Military Commissions Act of 2006. The Act defines the term unprivileged enemy belligerent as:

an individual (other than a privileged belligerent) who (A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the alleged offense under this chapter.

National Detainee Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84 (Westlaw 2011).

27. *Johnson v. Eisentrager*, 339 U.S. 763, 783 (1950).

for LOAC-based indefinite detention that accounts for a contemporary view of individual rights and protections.

## I. THE LAW OF ARMED CONFLICT DETENTION PARADIGM

The power to detain has always been considered incident to the conduct of military hostilities.<sup>28</sup> This principle was confirmed in modern practice in the *Hamdi* case before the United States Supreme Court.<sup>29</sup> This section will first provide a brief historical perspective on detention and then analyze the current LOAC detention paradigm.

### A. History

From the earliest records of armed conflict, captives have been at the mercy of their conqueror. Though there are examples of captors who showed mercy,<sup>30</sup> this was not considered a requirement by law or custom. In the medieval world, rich knights or nobles were often detained as a means of extracting ransom.<sup>31</sup> With the emergence and expansion of professional armies, detaining captives as a means of facilitating prisoner exchanges became more common,<sup>32</sup> but was still not recognized as a legal or customary requirement. The Lieber Code, which was not only used in the American Civil War but also had a great impact on European law of war practice, reflects the changing attitude toward victims of armed conflict.<sup>33</sup> This change is also reflected in the first Geneva Convention of 1864 where treatment of detainees first took on a legal obligation.<sup>34</sup>

This legal obligation continued to be enshrined and expanded in various instruments until it achieved full fruition in the 1949 Geneva Conventions and the subsequent Additional Protocols. Many of the specific elements of the detention regime will be analyzed below in Part II, but it will suffice to say here

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28. Stephen I. Vladek, *The Detention Power*, 22 YALE L. & POL'Y REV. 153, 186 (2004).

29. *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004).

30. Sun Tzu states, "[t]reat the captives well, and care for them . . . [g]enerally in war the best policy is to take a state intact; to ruin it is inferior to this." SUN TZU, *THE ART OF WAR* 76 (Samuel Griffith trans., Oxford Univ. Press 1963).

31. Scott R. Morris, *The Laws of War: Rules by Warriors for Warriors*, 1997 ARMY LAW. 4, 4 (Dec., 1997) (where the author states, "[t]he practice of not killing one's captives, however, was rooted in fiscal reasons, not humanitarian reasons," Thomas C. Wingfield, *Chivalry in the Use of Force*, 32 U. TOL. L. REV. 111, 116-17 (2001)).

32. Gary D. Brown, *Prisoner of War Parole: Ancient Concept, Modern Utility*, 156 MIL. L. REV. 200, 202 (1998).

33. FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD, General Order No. 100 art. 20-25 (1863) [hereinafter Lieber Code], available at <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument>.

34. See Geneva Convention for Wounded in Field, *supra* note 6.

that the Geneva Conventions established two different detention regimes—one for members of the armed forces and one for civilians.<sup>35</sup>

By the simplest reading of the Geneva Conventions, members of the armed forces were detainable at all times and could be held, with few exceptions, until the end of hostilities.<sup>36</sup> Their detention was based on their status as members of the armed forces of the opposing nation<sup>37</sup> and was designed to prevent them from returning to the fight.<sup>38</sup> In contrast, civilians could only be detained if they presented an imperative security risk.<sup>39</sup> Their status was to be reviewed regularly, at least every six months, to determine if the civilian detention needed to continue.<sup>40</sup>

The detention regime detailed in the Geneva Conventions is widely accepted by states and is now considered customary international law.<sup>41</sup> This regime was in place when al-Qaeda attacked the United States on Sept. 11, 2001. Furthermore, the provisions of the Geneva Conventions concerning detention had been implemented by the U.S. military in Army Regulation 190-8.<sup>42</sup>

#### B. Current LOAC Detention Paradigm

The start point (and possibly the end point according to the Executive Order 13492 Task Force which considered disposition) for the current paradigm is the Authorization for the Use of Military Force (AUMF), passed by Congress following the September 11th attacks.<sup>43</sup> Under the AUMF the

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35. Geneva Convention for Prisoners, *supra* note 6; Geneva Convention for Civilians *supra* note 6.

36. Geneva Convention for Prisoners, *supra* note 6, at art. 118.

37. Article 5 of the Geneva Convention for Prisoners mandates a process to determine, in the case of doubt, whether a detainee is a member of the armed forces and entitled to the privileges and protections of the Convention. It states:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

*Id.* at art. 5.

38. Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 25-26 (2006); Thomas Bogar, *Unlawful Combatant or Innocent Civilian? A Call to Change the Current Means for Determining Status of Prisoners in the Global War on Terror*, 21 FLA. J. INT'L L. 29, 70 (2009).

39. Geneva Convention for Civilians, *supra* note 6, at art. 78.

40. *Id.*

41. See generally Jean-Marie Henckaerts, *IRRC Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV RED CROSS 175 (2005).

42. Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8 (1997).

43. Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat 224

President has broad power to detain:

[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.<sup>44</sup>

The constitutionality, and scope, of the AUMF's grant of detention authority was first tested in 2004 in *Hamdi v. Rumsfeld*.<sup>45</sup> In a plurality opinion, the Court clarified that there are some narrow circumstances in which a broad power to detain is necessary:

[I]t is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of necessary and appropriate force, Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.<sup>46</sup>

In response to Hamdi's argument that the AUMF did not authorize indefinite detention, the plurality explained that "indefinite detention for the purpose of interrogation is not authorized" but that under "longstanding law-of-war principles" and the AUMF, the Executive Branch possessed authority to detain "individuals legitimately determined to be Taliban combatants" for the duration of the conflict.<sup>47</sup>

The Court also stated that if the current conflict proved entirely unlike those that informed the law of war, that the authority to detain "may unravel."<sup>48</sup> So while the Court in *Hamdi* clarified the AUMF's grant of authority to detain, it did so predicated on a determination of combatant status and U.S. involvement in active combat, such as Hamdi's case in Afghanistan.<sup>49</sup> Following *Hamdi*, the Department of Defense created Combatant Status Review Tribunals to determine whether individuals detained were enemy combatants.

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(2001).

44. *Id.*

45. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Hamdi, a U.S. citizen captured in Afghanistan in late 2001, challenged his detention without charge and the manner of review he was afforded.

46. *Id.* at 519.

47. *Id.* at 521.

48. *Id.*

49. That predicate existed in 2004 during *Hamdi*, and not only has remained, but increased since. See Ernesto Londoño, *Helicopter Crash, Bombing Kill 10 NATO Troops in Afghanistan*, WASH. POST, Sept. 21, 2010, at A10, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/21/AR2010092100096.html> (describing an increase in U.S. and NATO casualties in Afghanistan each year since the *Hamdi* decision. By September 21, 2010, U.S. fatalities for 2010 already exceeded those of 2009, making 2010 the deadliest year to date for the U.S. in Afghanistan.).

The same day as *Hamdi*, the Court issued its ruling in *Rasul v. Bush*, establishing that the federal habeas corpus statute provides U.S. federal courts jurisdiction over challenges by foreign nationals detained at Guantanamo.<sup>50</sup> “As a result, federal judges could now address both the substantive scope of the executive branch’s authority to employ military detention and the nature of the process to be employed in determining whether any particular individual falls within the scope of that authority.”<sup>51</sup>

The combination of *Hamdi* and *Rasul* prompted a Congressional response in the form of the Detainee Treatment Act of 2005 (DTA).<sup>52</sup> The DTA amended the federal habeas statute to exclude from its jurisdiction applications for the writ filed on behalf of an alien detained at Guantanamo.<sup>53</sup> Instead of habeas review, the DTA created jurisdiction in the U.S. Court of Appeals for the District of Columbia to review “the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.”<sup>54</sup>

The Supreme Court, however, thought otherwise in a case involving Osama Bin Laden’s former driver, Salim Hamdan.<sup>55</sup> Hamdan petitioned for a writ of habeas corpus in federal court prior to the DTA’s enactment which raised the issue of the DTA’s applicability to already existing petitions. On its face, the DTA is silent on the issue. The Court was not persuaded by the Government’s argument that the DTA immediately repealed federal jurisdiction of both future habeas actions and those currently pending.

One important aspect of Hamdan is that the level, type, and amount of judicial review required stemmed in large part from the government seeking to

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

51. Benjamin Wittes, Robert Chesney & Rabea Benhalim, *The Emerging Law of Detention: The Guantanamo Habeas Cases as Lawmaking*, BROOKINGS, Jan. 22, 2010, at 9, [http://www.brookings.edu/papers/2010/0122\\_guantanamo\\_wittes\\_chesney.aspx](http://www.brookings.edu/papers/2010/0122_guantanamo_wittes_chesney.aspx).

52. Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001–1006 (2005).

53. *Id.* § 1005(e)(1), which provides that:

(e) Judicial Review of Detention of Enemy Combatants—(1) IN GENERAL— Section 2241 of title 28, United States Code, is amended by adding at the end the following:

(e) Except as provided in section 1005 of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider—  
(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or  
(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—

(A) is currently in military custody; or  
(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the Detainee Treatment Act of 2005 to have been properly detained as an enemy combatant.’

*Id.*

54. *Id.* § 1005(e)(2).

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

criminally punish Hamdan, in addition to detaining him. As the plurality concluded the opinion:

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. But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.<sup>56</sup>

The *Hamdan* decision led to another Congressional response, the Military Commissions Act of 2006 (MCA 2006).<sup>57</sup> The MCA 2006 reprised the DTA's jurisdictional stripping provisions, only now rendering them clearly applicable to pending habeas petitions.<sup>58</sup> Two years later the Supreme Court reviewed the constitutionality of the MCA 2006 in *Boumediene*.<sup>59</sup> The Court found that a designation of enemy combatant and presence at Guantanamo did not bar detainees from seeking a writ of habeas corpus. The Court also held that the MCA 2006 was not an adequate and effective substitute and thus an unconstitutional suspension of the writ.

*Boumediene* prompted the latest Congressional response, the Military Commissions Act of 2009 (MCA 2009), which amended the MCA 2006.<sup>60</sup> The MCA 2009's reach was very broad, from definitional changes (unprivileged enemy belligerent instead of enemy combatant), to reworked triggers for the definitions, modified evidentiary standards (resulting in a 281 page procedure guide), and increased defense resources.<sup>61</sup>

This merely marks the current status quo between the executive, legislative, and judicial branches on detention. Detainee litigation continues to work its way through the federal courts and there will undoubtedly be future cases of import and perhaps additional legislative measures.<sup>62</sup> Yet, the

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56. *Id.* at 635. Following his conviction for material support of terrorism, Hamdan was sentenced to 66 months of confinement but received credit for 61 months already served. The United States transferred Hamdan to Yemen to serve the last month of his sentence, thus avoiding the question of continued, law of war based detention following the criminal sentence. See Josh White and William Branigin, *Hamdan to be Sent to Yemen: Bin Laden Driver Spent 7 Years at Guantanamo*, WASH. POST, Nov. 25, 2008, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/24/AR2008112403159.html> (quoting a Department of Defense official as saying that "[l]egally, we absolutely have a right to hold enemy combatants, but politically is [Hamdan] the guy we want to fight all the way to the Supreme Court about? . . . no.").

57. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

58. *Id.* § 7(a); Arsalan M. Suleman, *Military Commissions Act of 2006*, 20 HARV. HUM. RTS. J. 325, 330-31 (2007). The MCA 2006 also attempted to remedy the Supreme Court's criticisms from Hamdan by providing statutory authority for military commissions by adding a chapter to Title 10 of the U.S. Code, which covers the U.S. armed forces.

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

60. Military Commissions Act of 2009, Pub. L. 111-84, 123 Stat. 2190 (2009).

61. *Id.*

62. See Wittes, Chesney & Benhalim, *supra* note 51, at 9.

considerable time, effort, and expense devoted to litigating and legislating all things detainee has thus far largely avoided the category of detainees for whom both transfer and prosecution have been ruled out—those to be held indefinitely under the law of war. The litigation does provide the knowledge that the Obama administration, and the Bush administration before it, envisions indefinite detention for some detainees currently at Guantanamo. The litigation also provides insight that the Supreme Court recognizes, with qualification, the Executive Branch's authority to detain, based on the law of war, for the duration of conflict to prevent a return to the battlefield

As the Obama administration continues its efforts to transfer<sup>63</sup> and prosecute<sup>64</sup> detainees, the relative significance of those to be held indefinitely will only increase. According to the Defense Department, as of September 16, 2010, there are one hundred and seventy-four detainees at Guantanamo Bay<sup>65</sup> and of those, up to fifty, or roughly twenty-eight percent, are to be held indefinitely.

Yet years into that detention, and despite (or perhaps because of) the litigation, little else has been established or clarified. The first step in developing a law of war based indefinite detention paradigm is to establish the applicable law.

## II. APPLICABLE LAW

The focus of this Article is to advocate the development of a law of war based indefinite detention model. To analytically reach the discussion, however, on how the law of war could, and we submit should, govern detention, requires both explanation and qualification at the outset. This summary addresses which aspects of the law of war would apply to an indefinite detention system, and why.

As discussed above, a baseline predicate for this proposed framework is the task force recommendation, and subsequent announcement by President Obama, that a group of detainees currently at Guantanamo Bay will be indefinitely held based on the laws of war. That answers a broader question of which normative construct—the laws of war, or say human rights law—will govern detention, but it does not by itself clarify which parts of the law of war would apply, let alone how.

We submit that based on appropriate analogy,<sup>66</sup> stated U.S. policy,<sup>67</sup> and

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63. Press Release, Office of the Assistant Sec'y of Def., U.S. Dep't of Def., Detainee Transfer Announced (Sept. 16, 2010), *available at* <http://www.defense.gov/releases/release.aspx?releaseid=13884> (detailing the transfer of two detainees from Guantanamo to Germany).

64. The first contested military commission, of Canadian Omar Khadr, began in August, 2010, applying the Military Commissions Act of 2009.

65. Press Release, *supra* note 63.

66. For persuasive arguments for applying the law of international armed conflict to

the Supreme Court decisions already discussed, applying law of war detention rules amounts to applying the rules governing International Armed Conflicts (IAC) to those persons detained at Guantanamo.<sup>68</sup> To be clear, not only does our proposal result in IAC law applying to those detainees at Guantanamo, but we then apply distinct areas of IAC, notably the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention for Prisoners) and Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention for Civilians) to individuals who as a matter of law would otherwise not clearly qualify for the protections of one or the other Convention. As discussed above, the Geneva Convention for Prisoners informs on the treatment of prisoners of war while the Geneva Convention for Civilians does so with respect to civilians. As will become apparent later, our formulation largely entails applying detention conditions from the Geneva Convention for Prisoners and the review procedures from the Geneva Convention for Civilians to the same individuals, who, particularly in the case

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non international armed conflict, particularly in the area of detention, see Marco Sassòli & Laura M. Olson, *The Relationship Between International Humanitarian and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflict*, 90 INT'L REV. RED CROSS 599 (2008) and Ryan Goodman, *The Second Annual Solf-Warren Lecture in International and Operational Law*, 201 MIL. L. REV. 237 (2009).

67. See U.S. DEP'T OF DEF., DIRECTIVE NO. 2311.01E, DOD LAW OF WAR PROGRAM ¶ 4.1 (2006) (stating that it is Department of Defense policy that “[m]embers of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.”). The directive defines the law of war as “encompass[ing] all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.” *Id.* ¶ 34.1; see also Respondents’ Memorandum Regarding the Government’s Detention Authority Relative To Detainees Held At Guantanamo Bay, *In re Guantanamo Bay Detainee Litig.*, No. 08-442 (D.D.C. Mar. 13, 2009) (describing United States authority to detain as informed by the law of war, including the Geneva Conventions and customary international law). But the U.S. approach has also built-in flexibility. Under the Army’s Field Manual 27-10, *The Law of Land Warfare*, individuals “definitely suspected of or engaged in activities hostile to the security of the State” are “not entitled to claim such rights and privileges under *GC* as would, if exercised in favor of such individual person, be prejudicial to the security of such State.” DEP’T OF THE ARMY, FM 27-10, *THE LAW OF LAND WARFARE* ¶ 248 (July 1956).

68. The proposition to apply the full panoply of the LOAC, essentially applying the law governing IAC to detention in a NIAC seems ripe for attack. From there, conflating aspects of IAC seemingly only increases that vulnerability. One immediate criticism would be that IAC is status based (“prisoner of war” for example) which is inapposite to NIAC. Yet at its essence, the concern for applying the status based IAC to NIAC detention revolves around the combatant immunity which flows from that status. Applying IAC by analogy or policy does not confer status to which the individuals would not otherwise possess or be entitled. See Sassòli & Olson, *supra* note 66, at 624. And combatant immunity is immunity from prosecution, which is not a problem in the first place for the detainee population at issue, those who the U.S. can neither transfer nor prosecute. Instead, application by analogy of IAC to NIAC detention is “the closest fit or closest approximation . . . for questions of who may be detained and what types of activities on the part of civilians are subject to detention.” Goodman, *supra* note 66, at 241.

of those who directly participate in hostilities or perform a continuous combat function, may not qualify as either a prisoner of war or a civilian in the strict sense.<sup>69</sup>

This is not to say that there is no distinction between a civilian detained as a security threat and a civilian who either directly participated in hostilities or performed a continuous combat function. But the review process we envision could account for those differences and how they impact the assessment of the detainee as a security threat. Nor is there a question of whether reviewing detention under the Geneva Convention for Civilians affords an unprivileged belligerent protections, procedural or otherwise, to which they would otherwise not be entitled. There is no review mechanism under the Geneva Convention for Prisoners, detention is authorized for the duration of hostilities. Difficulties in categorizing the nonstate actors engaged in the current conflicts solely under the Geneva Convention for Prisoners or the Geneva Convention for Civilians, the nature of the conflicts, and uncertainty as to their end suggest that rigid application of the Geneva Conventions will not be (and has not been) productive. Yet these difficulties, particularly in categorization, may also lend support to the proposition that detention be informed by aspects of both of these Conventions.<sup>70</sup>

Those who would deconstruct the law of war as applied to detention stemming from armed conflict with non state actors may achieve victory, but in an academic, and, practically speaking, pyrrhic sense. Arguing that the Geneva Conventions for Prisoners and Civilians do not, on their face, apply to members of al-Qaeda or the Taliban may be correct, and in more than one way. But in so

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69. Somewhat oddly, the Geneva Convention for Civilians, while devoted to civilians never defines the term. Not until Additional Protocol I did a definition of civilians emerge, a negative one, that “a civilian is any person who does not belong to” the Geneva Convention for Prisoners. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3 at art. 50(1) [hereinafter Protocol Additional]. This suggests that essentially everyone on the battlefield is either a prisoner of war under the Geneva Convention for Prisoners, or, if not, then they are considered a civilian under the Geneva Convention for Civilians. However, as the International Committee of the Red Cross commentary to Additional Protocol I notes, “things are not always so straightforward.” *Id.* art. 45 § 1761. Elsewhere in that portion of the commentary, the International Committee of the Red Cross discusses the circumstance by which an individual who did not qualify as a matter of law as a prisoner of war would be still be treated as such. *See id.* § 1736.

70. This approach may be useful to the United States for more than just the very near term. As discussed above, the Supreme Court in *Hamdi* recognized the inherent authority of U.S. forces to detain individuals in Afghanistan while the area is still essentially an active combat theatre. And as discussed, unfortunately Afghanistan has been all too active. But at some point, whether through effective counter insurgency efforts or troop withdrawals, the situation will not be so easily classified as active combat while the need for detention continues. This could raise the spectre of the “unraveling” of the detention authority alluded to by the *Hamdi* plurality. A law-of-war-based system may provide for alternative detention arguments in that event. Specifically, the Geneva Convention for Civilians provides for the detention of security threats.

arguing, the deconstructionist approach removes a large portion of internationally recognized and accepted provisions for regulating detention associated with armed conflict—the Geneva Conventions—while leaving the underlying question of how to govern detention unanswered. At some point, even the deconstructionist must shift to positivism and propose an alternative, an alternative we submit would inevitably resemble that which is already extant in the law of war. Moreover, while there has been discussion about the strained application of the Geneva Conventions and Additional Protocols to states combating transnational terrorism, attempts at a new convention have gained little traction.

Our approach is more an attempt at pragmatism than radicalism—there are individuals currently detained, purportedly indefinitely and under the law of war. Yet despite years of such detention, two administrations have provided little if any information on what exactly such detention means, how and by what it is governed, and if and how it ends. Conflating aspects of internationally recognized law of war conventions allows for a transparent process that could be promulgated now. Whether for the up to fifty or so individuals currently detained at Guantanamo or for those who may be detained in the future, we posit that the law of war provides a legitimate model for indefinite detention.

And, as the Walsh Report recognized,<sup>71</sup> the longer detainees are held, the more concern for their individual situations must be given. We therefore analyze the complete protections provided by the law of war and advocate that all of them, over time and to varying degrees, be applied to the detainees in Guantanamo. In this way, detention under the laws of war can provide a humane system of indefinite detention that strikes the right balance between the security of the nation and the rights of individuals.

#### A. Detention Basis and Review

The law of war recognizes authority to detain a broad spectrum of individuals; the more commonly known being members of the armed forces and organized militias of a party to the conflict.<sup>72</sup> Lesser known, but increasingly prevalent in today's conflicts involving non-state actors and asymmetric warfare, are law of war provisions which govern detention of those who directly participate in hostilities, perform a continuous combat function for an organized armed group, or otherwise pose a security risk or threat. This section identifies those provisions.

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71. "The concept of humane treatment requires the examiner to look at various factors in a continuum to assess whether what is humane today, is or will be humane over a longer period of detention." Walsh Report, *supra* note 14, at 72.

72. Geneva Convention for Prisoners, *supra* note 6, art. 4.

### 1. Entitlement to Periodic Review of Status as a Security Risk

The law of war recognizes the authority to intern individuals where the security situation renders such internment “absolutely necessary.”<sup>73</sup> The decision to intern is subject to an initial review “as soon as possible by an appropriate court or administrative board” designated by the detaining power and at least semi-annual review thereafter.<sup>74</sup>

Therein lies the flexibility afforded by the law of war—judicial review is not required. However, “where the decision is an administrative one, it must be made not by one official but by an administrative board offering the necessary guarantees of independence and impartiality.”<sup>75</sup>

While the timing of the initial review is as soon as possible, even that seems more flexible than the self-imposed and seemingly arbitrary “96 hour rule” by which the International Security Assistance Force in Afghanistan turns over detainees to the Afghan government after their capture.

Perhaps more significant within the context of Guantanamo Bay, the periodic reviews are automatic and are conducted “at least twice a year” and “with a view to favourably amending the initial decision if circumstances permit.”<sup>76</sup>

### 2. Rights During Review

Neither the Geneva Convention for Prisoners nor the Commentary provides detail about the conduct of the review other than the semi-annual frequency and the presumption to favorably amend the detention. The test is whether the review “offer[s] the necessary guarantees of independence and impartiality” and is conducted with “absolute objectivity and impartiality.”<sup>77</sup>

The question then becomes what rights do or should the detainee have during the periodic review? We propose looking elsewhere within the Geneva Conventions in order to identify internationally recognized rights. Admittedly, these rights on their face apply to civilians subject to criminal prosecution. While that is not directly applicable to the situation here, as will be discussed in Part III, the rights are essentially the same as would be available during administrative proceedings within the U.S. military. Yet incorporating by policy those same rights from the Geneva Convention for Civilians both maintains a law of war footing and limits the vulnerability of the framework to criticism given the universal acceptance of the Geneva Conventions.

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73. Geneva Convention for Civilians, *supra* note 6, at art. 42.

74. *Id.* at art. 43.

75. OSCAR M. UHLER ET AL., INT'L COMM. OF THE RED CROSS, COMMENTARY, IV GENEVA CONVENTIONS RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 260 (Jean S. Pictet ed., Maj. Ronald Griffin & C.W. Dumbleton trans., 1958).

76. UHLER ET AL., *supra* note 75, at 260-62.

77. *Id.* at 260-61.

Referencing the Geneva Convention for Civilians would incorporate the following rights into, and provide transparency to the periodic review:

Accused persons shall have the right to present evidence necessary to their defence and may, in particular, call witnesses. They shall have the right to be assisted by a qualified advocate or counsel of their own choice, who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defence. . . . Accused persons shall, unless they freely waive such assistance, be aided by an interpreter, both during preliminary investigation and during the hearing in court. They shall have at any time the right to object to the interpreter and to ask for his replacement.<sup>78</sup>

## B. Conditions of Detention

As the United States prepares for the indefinite detention of certain detainees at Guantanamo, it is important to note that the LOAC provides ample and adequate provisions concerning the conditions of detention.

This part of the Article describes some of the current conditions of detention together with the provisions of the LOAC that are directly applicable to those conditions. Each topic is divided into two subsections. The first identifies and lists the provisions of the LOAC that apply to the specific condition of detention. The second draws on the Army Regulation on detention,<sup>79</sup> the recent Walsh Report,<sup>80</sup> and other sources to detail the current practice, if any, for those detained at Guantanamo.

It is worth noting that currently there is a range of permitted detainee conditions based on a system of rewards and consequences for detainee behavior as initially outlined in the 2003 Camp Delta Standard Operating Procedure Manual.<sup>81</sup> Although the rules governing detainee treatment have changed significantly in the years since this manual was written, a system of rewards and consequences to incentivize good detainee behavior is still in effect. The Walsh Report states, “[w]ith humane treatment as the baseline, the Joint Detention Group leadership organizes camp operations around a compliance model, through the means of incentive-based options to encourage compliance. The options available to the Joint Detention Group only contribute to the quality of detention for the detainee; they cannot affect the length of

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78. Geneva Convention for Civilians, *supra* note 6, at art. 72.

79. Army Regulation 190-8, *supra* note 42.

80. Walsh Report, *supra* note 14. It is important to note that the standard against which the Walsh Report compared current practices for compliance with the LOAC was Common Article 3, not the Geneva Conventions generally. However, the report draws attention to the provisions of the Geneva Conventions that apply to each section, and descriptions of current practice are easily compared to the requirements of the full LOAC.

81. DEP'T OF DEF., CAMP DELTA STANDARD OPERATING PROCEDURES § 8-7 (2003), <http://www.comw.org/warreport/fulltext/gitmo-sop.pdf> (“The Detainee Classification System is a five level system of rewards based on the premise that a detainee’s behavior determines the privileges they are allowed. As the detainee adapts to the rules of the camp, his conduct will earn him more privileges.”).

detention.”<sup>82</sup> There are several instances where the provisions discussed below are used to incentivize good behavior by detainees. In those cases, the incentives used are generally additions to the minimum provisions guaranteed by the LOAC.

### 1. Physical and Mental Health Care

a. The LOAC requires that the wounded and sick be treated humanely and cared for by the Party to the conflict in whose power they may be, without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria.<sup>83</sup> All care and order of treatment will be based only on urgency of medical needs.<sup>84</sup> Every camp shall have an adequate infirmary where detainees may have the attention they require, as well as appropriate diet.<sup>85</sup> Detainees suffering from serious disease, or whose condition necessitates special treatment, a surgical operation or hospital care, must be admitted to any military or civilian medical unit where such treatment can be given, even if their repatriation is contemplated in the near future.<sup>86</sup> Special facilities shall be afforded for the care to be given to the disabled, in particular to the blind, and for their rehabilitation, pending repatriation.<sup>87</sup> Detainees “may not be prevented from presenting themselves to the medical authorities for examination”<sup>88</sup> and should be examined at least monthly to ensure they are in good health.<sup>89</sup> The LOAC does not include any specific reference to mental health care for detainees.

b. Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, currently governs detention operations for all the military services.<sup>90</sup> Sections 3-4(i) and 6-6 require the military to treat detainees in compliance with the previously stated provisions and also contain details on how health care is to be provided.<sup>91</sup> Similar to the LOAC, there is no specific mention of mental health issues, except to say that those suffering from mental health issues will be separated from other detainees.<sup>92</sup> The regulation requires, however, that all detainees with “serious disease, or whose condition necessitates special treatment, surgery, or hospital care” be

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82. Walsh Report, *supra* note 14, at 10.

83. Geneva Convention for Wounded in Field, *supra* note 6, at art. 12.

84. *Id.*

85. Geneva Convention for Prisoners, *supra* note 6, at art. 30; Geneva Convention for Civilians, *supra* note 6, at art. 91.

86. *Id.*

87. *Id.*

88. *Id.*

89. Geneva Convention for Prisoners, *supra* note 6, at art. 31; Geneva Convention for Civilians, *supra* note 6, at art 92.

90. Army Regulation 190-8, *supra* note 42, § 1-1.

91. *Id.* §§ 3-4(i), 6-6.

92. *Id.* §§ 3-4(i)(2).

admitted to a medical facility and given appropriate medical treatment.<sup>93</sup>

The Walsh Report details the medical capabilities to which the detainees have access at Guantanamo.<sup>94</sup> There is medical input to the meals.<sup>95</sup> Medical facilities include extensive medical care units and a behavioral health unit. Detainees have twenty-four hour access to medical care, including surgical care, and non-Department of Defense medical organizations are allowed access to the detainees for independent medical evaluations. Those with amputations have been given prosthetics. Regular inspections occur. As for mental health, the behavioral health unit provides mental health evaluations and care, including monthly screening for certain detainees. Only eight percent of detainees are currently demonstrating active symptoms of mental disorders.<sup>96</sup>

The Walsh Report concluded that: "Conditions are in compliance with Common Article 3 of the Geneva conventions. No prohibited acts were found and conditions are humane."<sup>97</sup> Along with encouraging the continuation of current practices, they strongly recommended that the military "[e]xpand detainee access to dedicated linguists to assist with medical evaluation and treatment evening and weekend hours, to enhance detainee trust in the role of medical providers and to improve the quality of medical care."<sup>98</sup>

## 2. Personal Effects

a. The LOAC mandates that "all effects and articles of personal use," including those "used for their clothing or feeding" shall remain with the detainee, unless taken "for reasons of security."<sup>99</sup> This is particularly true of items with "personal or sentimental value,"<sup>100</sup> which do not include money. Any such items that are taken must be receipted to the detainee and returned upon the end of detention.<sup>101</sup> Several examples of personal items are listed in the Conventions, but no single definition is provided. The Commentaries to the Conventions provide a helpful list based on the Conference of Government Experts.<sup>102</sup>

b. Army Regulation 190-8, paragraphs 2-1 and 6-3 fully comply with the

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93. *Id.*

94. Walsh Report, *supra* note 14, at 13-15.

95. *Id.* at 23.

96. *Id.* at 51-53.

97. *Id.* at 53.

98. *Id.*

99. Geneva Convention for Prisoners, *supra* note 6, at art. 18.

100. *Id.*; Geneva Convention for Civilians, *supra* note 6, at art. 97.

101. Geneva Convention for Prisoners, *supra* note 6, at art. 18; Geneva Convention for Civilians, *supra* note 6, at art. 97.

102. JEAN DE PREUX ET AL., INT'L COMM. OF THE RED CROSS, COMMENTARY, III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 166 n.2 (Jean S. Pictet ed., A.P. de Heney trans., 1960); *see also* UHLER ET AL., *supra* note 75, at 420.

LOAC and implement the requirements on treatment of personal effects, including initial documentation upon detention, catalogue and receipt of personal effects, and return at the appropriate time.<sup>103</sup>

The Walsh Report does not comment on personal effects, though it does state that detainees are able to keep personal items, such as family pictures and mail, once they have received them.<sup>104</sup>

### 3. Association with Others

a. The LOAC mandates that detainees should be interned together with other members of the force with which they were fighting, unless they consent otherwise. Nationality, language and customs should also be used as criteria to determine detainee housing,<sup>105</sup> with nationality being the most important of these.<sup>106</sup> Many of the other conditions of detention, such as requirements for “intellectual, educational, and recreational pursuits . . . amongst” detainees are intended also to provide detainees with opportunities for association with each other.<sup>107</sup> Detainees should be free to organize committees that create a “system of mutual assistance amongst themselves.”<sup>108</sup>

b. Army Regulation 190-8 incorporates the LOAC provisions on association with others in paragraphs 3-4 and 6-7.<sup>109</sup> The Walsh Report found that most detainees are allowed to exercise or socialize in groups between four and twenty-two. Some detainees spend the entire day in a “communal environment.”<sup>110</sup> The Walsh Report encouraged the completion of planned changes that will allow increased opportunities for socialization amongst a broader population of detainees.<sup>111</sup>

### 4. Quarters and Living Space

a. The LOAC clearly states that detention is not a punishment. Hence, detainees are not allowed to be housed in penitentiaries, unless it is in the interest of the detainee.<sup>112</sup> Rather, they are to be detained in a manner as favorable as the forces of the detaining power, who shall make allowance for

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103. Army Regulation 190-8, *supra* note 42, §§ 2-1, 6-3.

104. Walsh Report, *supra* note 14, at 37.

105. Geneva Convention for Prisoners, *supra* note 6, at art. 22.

106. DE PREUX ET AL., *supra* note 102, at 184.

107. Geneva Convention for Prisoners, *supra* note 6, at art. 38.

108. Geneva Convention for Civilians, *supra* note 6, at art. 103; UHLER ET AL., *supra* note 75, at 441.

109. Army Regulation 190-8, *supra* note 42, §§ 3-4(b), (d), 6-7(a)(1).

110. Walsh Report, *supra* note 14, at 27-28.

111. *Id.* at 28.

112. Geneva Convention for Prisoners, *supra* note 6, at art. 22.

the habits and customs of the detainee. This would apply particularly to things such as size of the quarters, bedding and blankets, access to light and heat, healthful conditions, and access to sanitary facilities. Where men and women are detained in the same camp, they are to have separate dorms and facilities.<sup>113</sup>

b. Army Regulation 190-8, section 3-2 explicitly states that internment facilities for detainees who are prisoners of war are “governed by the Geneva Conventions.”<sup>114</sup> The army regulation provides significant detail as to how compliance is to be achieved for detainees.<sup>115</sup>

The Walsh Report details current living conditions,<sup>116</sup> including a listing of various square footage measurements.<sup>117</sup> The living quarters are one of the key tools to incentivize compliance. Approximately sixty percent live in individual cells.<sup>118</sup> Detainees are never put in solitary confinement or isolation.<sup>119</sup> However, despite NGO recommendations, there is no ability for detainees to do their own laundry except in Camp Iguana.<sup>120</sup>

The Walsh Report finds that quarters and living space meet the requirements of Article 3 of the Geneva Conventions but recommends that some current cells be modified to allow for more space.

#### 5. Canteens and Money

a. Under the LOAC, canteens are to be established in order to provide food, hygiene items, and other articles for purchase by detainees for daily use.<sup>121</sup> They are to operate for the detainees’ benefit, and this applies additionally to any profits they produce.<sup>122</sup> Detainees may request particular items to be stocked at the canteen<sup>123</sup> and items in canteens are to be sold to detainees at “local market prices.”<sup>124</sup> Thus, the canteen provides detainees with an opportunity to acquire a specific item that may not already be supplied by the Detaining Power, such as a particular type of soap.<sup>125</sup> In addition to

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113. *Id.* at art. 25; Geneva Convention for Civilians, *supra* note 6, at art. 85.

114. Army Regulation 190-8, *supra* note 42, § 3-2.

115. *Id.* §§ 3-4e, 6-1b.

116. Walsh Report, *supra* note 14, at 10-12, 17-19, 21, 32-33, 45.

117. *Id.* at 17-19.

118. *Id.* at 19.

119. *Id.* at 45.

120. *Id.* at 21.

121. Geneva Convention for Prisoners, *supra* note 6, at art. 28; Geneva Conventions for Civilians, *supra* note 6, at art. 87 (canteens are not required where “other suitable facilities are available”). *See* DE PREUX ET AL., *supra* note 102, at 203 for examples of “ordinary articles in daily use.” *Id.*

122. Geneva Convention for Prisoners, *supra* note 6, at art. 28; Geneva Convention for Civilians, *supra* note 6, at art. 87.

123. Geneva Convention for Civilians, *supra* note 6, at art. 87.

124. Geneva Convention for Prisoners, *supra* note 6, at art. 28.

125. UHLER ET AL., *supra* note 75, at 389.

providing goods, one of the main purposes of the canteen is to sustain the morale of the detainees.

The LOAC also provides for an individual monetary account to be set up for each detainee, in which they may deposit and save money.<sup>126</sup> This includes money they receive from outside the camp<sup>127</sup> as well as regular allowances which they are to receive from the Detaining Power<sup>128</sup> that should be paid into the detainee's individual account for use as he or she desires. Detainees should also have the ability to send money out of the camp to outside sources such as family.<sup>129</sup>

b. Current military doctrine requires each detention facility commander to comply with the aforementioned provisions of the Geneva Conventions by creating personal accounts and making monthly payments into those accounts.<sup>130</sup>

Current practice, as evidenced by the Walsh Report, does not appear to

126. Geneva Convention for Prisoners, *supra* note 6, at art. 64; Geneva Convention for Civilians, *supra* note 6, at art. 98 (art. 97 allows civilian internees to maintain small amounts of pocket money).

127. Geneva Convention for Prisoners, *supra* note 6, at art. 63; Geneva Convention for Civilians, *supra* note 6, at art. 98. The detaining power, however, may limit the amount of money detainees can receive in the interest of safety.

128. Geneva Convention for Prisoners, *supra* note 6, at art. 60; Geneva Convention for Civilians, *supra* note 6, at art. 98. There is some doubt as to the applicability of this provision to detainees at Guantanamo; under article 60 of the Geneva Convention for Prisoners, the money given to a prisoner of war by the Detaining Power is made on behalf of the prisoner's government, and is subject to reimbursement from the prisoner's government. The commentary makes this clear:

Unlike the 1929 text, the present Convention speaks not of "pay" but of "advances of pay."

This term was introduced by the 1949 Diplomatic Conference and it seems well justified, for it indicates more clearly the nature of the payment to be made by the Detaining Power. Payment is made by one person to another in respect of labor or services, and pay cannot therefore be due by the Detaining Power to prisoners of war. At the same time it is and remains due to them by the Power on which they depend. Of this amount due, an "advance" is paid by the Detaining Power in order to enable prisoners to improve their lot during captivity, but subject to reimbursement by the Power on which they depend. Reimbursement is to be made at the close of hostilities, in accordance with the provisions of Article 67.

DE PREUX ET AL., *supra* note 102, at 305.

Because those detained at Guantanamo are not representatives of any government, there would be no anticipation of repayment and therefore, no obligation to provide advances of pay. In contrast, payments made to civilian internees under the GCC are paid by the Detaining Power, and not on behalf of another government. In the case of civilian internees, the commentary states:

[T]he first paragraph of Article 98 lays down that the Detaining Power is to pay them regular allowances, which, although modest, will enable the poorest among them to purchase at least the minimum considered necessary to sustain their morale and enable them to preserve their personal dignity. Those who have private means will also draw the allowances, since it was thought better not to draw attention to differences in the financial position of different internees by treating them differently.

UHLER ET AL., *supra* note 75, at 425.

129. Geneva Convention for Prisoners, *supra* note 6, at art. 63; Geneva Convention for Civilians, *supra* note 6, at art. 98.

130. Army Regulation 190-8, *supra* note 42, §§ 3-3a(8), (15).

include the establishment of individual accounts or payments to individuals. It is unclear whether this is an oversight or based on an interpretation of the LOAC.<sup>131</sup> In Camp Iguana the detainees share a \$100 monthly stipend from which they can have guards purchase requested items from the naval station exchange.<sup>132</sup>

## 6. Food and Meal Preparation

a. The LOAC requires that daily meals “be sufficient in quantity, quality and variety” to prevent nutritional deficiencies and maintain a good state of health for all detainees. Habitual or customary dietary needs are to be taken into account. The LOAC also mandates that, in so far as possible, detainees shall be given the opportunity and means to be “associated” with the preparation of their own meals, including access to “means by which they can prepare” food for themselves.<sup>133</sup> The detaining power must supply sufficient drinking water and allow the use of tobacco.<sup>134</sup>

b. Army Regulation 190-8<sup>135</sup> follows the requirements of the Geneva Conventions and requires meals to be prepared in accordance with the LOAC. Paragraph 6-5b(2) requires that facilities be available for Civilian Internees to be able to prepare their own meals from additional foodstuffs they may have received.<sup>136</sup>

As detailed in the Walsh Report, current practice at Guantanamo does not provide the opportunity for personal meal preparation. In terms of meal selection, detainees select from a menu with six options and can modify the menu every two weeks. The hospital nutritionist reviews meal selections and adjusts the diet as necessary.<sup>137</sup>

## 7. Educational Opportunities

a. The LOAC requires the Detaining Power to encourage intellectual and educational pursuits and provide the necessary means for the detainees to participate.<sup>138</sup> Examples used in the Commentary include providing musical instruments, theater accessories, books, language courses, religion courses, and instruction.<sup>139</sup> The Commentary emphasizes that the intent of this provision is

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131. See Walsh Report, *supra* note 14, at 28.

132. *Id.* at 25-26.

133. Geneva Convention for Civilians, *supra* note 6, at art. 89.

134. Geneva Convention for Prisoners, *supra* note 6, at art. 26; Geneva Convention for Civilians, *supra* note 6, at art. 89.

135. Army Regulation 190-8, *supra* note 42, §§ 3-4f, 6-5b.

136. *Id.* § 6-5b(2).

137. Walsh Report, *supra* note 14, at 23.

138. Geneva Convention for Prisoners, *supra* note 6, at art. 38.

139. DE PREUX ET AL., *supra* note 102, at 237.

to guarantee detainees have “mental and physical relaxation.”<sup>140</sup> The Detaining Power should promote educational opportunities, including those from certified outside educational institutions, subject to censorship.<sup>141</sup> Furthermore, subject to security requirements, representatives of relief organizations should be able to visit the detainees for educational purposes.<sup>142</sup>

b. Current doctrine, as described in Army Regulation 190-8, accords with the LOAC, though it does not mandate the details contained in the Commentary.<sup>143</sup> When discussing education of certain detainees, the regulation allows not only for the equipment required for educational programs, but also requires consideration of education in basic courses such as reading, writing, geography, and other basic skills.<sup>144</sup>

The Walsh Report details the current educational conditions for the detainees at Guantanamo. The detainees have access to a library with over thirteen thousand books, nine hundred magazines, three hundred DVDs—all covering the eighteen native languages of the detainees. They also have access to newspapers, board games, puzzles, playing cards, and other forms of intellectual stimulation and entertainment. The detainees have access to beginner, intermediate, and advanced level language classes in Arabic and Pashtu, as well as classes in the humanities and arts.<sup>145</sup>

For security purposes, soft leg restraints are used when in the classrooms, movie rooms, and communal rooms for the safety of instructors,<sup>146</sup> but the Walsh report did not find that this inhibited the detainees’ ability to take advantage of the opportunities provided. There was no evidence of choice or offerings based on detainees wishes. While the report found that the current practice was in compliance with the LOAC, it recommended expanding intellectual programs to provide wider detainee access.<sup>147</sup>

## 8. Religious Practices

a. The LOAC affords detainees great freedom in the practice of religion. The LOAC states that detainees shall enjoy complete latitude in the exercise of their religious practices, including attendance at the service of their faith, on the condition that they comply with the disciplinary routine prescribed by the military authorities.<sup>148</sup> Detainees should have access to religious material,

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140. *Id.* at 236.

141. Geneva Convention for Civilians, *supra* note 6, at art. 94.

142. Geneva Convention for Prisoners, *supra* note 6, at art. 125.

143. Army Regulation 190-8, *supra* note 42, §§ 3-3a(4); 3-5m, n; 6-5c.

144. *Id.* §§ 6-7c.

145. Walsh Report, *supra* note 14, at 34.

146. *Id.* at 44.

147. *Id.* at 35.

148. Geneva Convention for Prisoners, *supra* note 6, at art. 34; Geneva Convention for Civilians, *supra* note 6, at arts. 38, 58, 93; Protocol Additional, *supra* note 69, at art. 5.

including books,<sup>149</sup> and are permitted to correspond with religious leaders, subject to censorship.<sup>150</sup> Adequate premises shall be provided where religious services may be held,<sup>151</sup> and appointment of outside religious representatives is allowed if necessary to meet the needs of the detainees so desire.<sup>152</sup> Representatives of religious organizations should have access to visit detainees, subject to security requirements,<sup>153</sup> but radical religious correspondence may be censored.<sup>154</sup>

b. Army Regulation 190-8 provides little detail on the exercise of detainees' religious practices, though it does make it clear that such freedom exists and deals specifically with the issue of obtaining clergy for detainees.<sup>155</sup>

The Walsh Report discusses the steps taken to ensure the personal religious practice of detainees, including individual copies of religious texts and religious items such as prayer beads. These are personal items that are not removed from the detainee, regardless of disciplinary status. Detainees select prayer leaders, and all detainees are allowed to pray in groups, except a small number in one camp where prayer is conducted individually due to security concerns. The Walsh Report recommended that this situation change so that these detainees could participate in group prayer as well.<sup>156</sup>

The Walsh Report makes no reference to any outside religious involvement. There is no evidence that detainees are receiving any religious instruction or input from any outside sources. There is no evidence of allowed visits from outside clergy or access to detainees from outside religious representatives or organizations.

## 9. Physical Exercise and Social Interaction

a. As mentioned above, the LOAC requires the Detaining Power to encourage intellectual and recreational pursuits, sports and games amongst detainees.<sup>157</sup> Materials such as books, games, and other recreational equipment should be provided by the Detaining Power but may also come from relief agencies, family, donors, or purchases by the detainees. The Detaining Power should provide the detainees with space and time to participate in these activities,<sup>158</sup> though participation is ultimately at the discretion of the

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149. Geneva Convention for Civilians, *supra* note 6, at art. 58.

150. *Id.* at art. 93.

151. Geneva Convention for Prisoners, *supra* note 6, at art. 34.

152. Geneva Convention for Civilians, *supra* note 6, at art. 93.

153. Geneva Convention for Prisoners, *supra* note 6, at art. 125.

154. Geneva Convention for Civilians, *supra* note 6, at art. 93.

155. Army Regulation 190-8, *supra* note 42, §§ 3-3a(4), 6-7d.

156. Walsh Report, *supra* note 14, at 25-26.

157. Geneva Convention for Prisoners, *supra* note 6, at art. 38; Geneva Convention for Civilians, *supra* note 6, at art. 94.

158. *Id.*

detainee.<sup>159</sup> In addition, the LOAC provides that, subject to security requirements, representatives of relief organizations should be able to visit the detainees, specifically to assist in organizing social and physical events.<sup>160</sup>

b. Army Regulation 190-8 requires that detainees be provided with “morale, religious, intellectual, educational, social, physical and recreational activities”<sup>161</sup> and states that detainees will be “encouraged to take part in intellectual, educational, and recreational activities.”<sup>162</sup> The regulation also requires detainees to have access to recreational facilities and may include concerts, plays, music, movies, and other activities and provides that delegates from the International Committee of the Red Cross may assist in selection of recreational and welfare activities.<sup>163</sup>

The Walsh Report finds that recreation periods for Guantanamo detainees vary based on where detainees live. All detainees, however, have at least a daily two-hour minimum period of recreation and general access to books, televisions, DVDs and games. The vast majority of detainees have opportunities for social interaction with fellow detainees and many live in a communal environment.<sup>164</sup> All but those under the strictest disciplinary controls are allowed to make phone calls to family at least quarterly.<sup>165</sup> The Report recommends increased social interaction, particularly for those in the strictest discipline settings. Additionally, the Report agrees with the recommendations of various NGOs to allow video-teleconferences and visits from family.<sup>166</sup>

#### 10. Detainee Representatives

a. The LOAC allows for detainees to elect a personal representative, or representative committee. The Detaining Power must ensure no undue influence is asserted in the elections, either by itself or the detainees. Detainees of different nationalities, language, or customs may have their own detainee representative.<sup>167</sup> The detainee representative must be approved by the Detaining Power, but this approval cannot be a source of manipulation.<sup>168</sup>

The detainee representatives are to have access to the Detaining Power to

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159. Geneva Convention for Civilians, *supra* note 6, at art. 94.

160. Geneva Convention for Prisoners, *supra* note 6, at art. 125.

161. Army Regulation 190-8, *supra* note 42, §§ 3-3a(4).

162. *Id.* §§ 3-4d.

163. *Id.* §§ 6-7e.

164. Walsh Report, *supra* note 14, at 27-28.

165. *Id.* at 47.

166. *Id.* at 27-28.

167. The International Committee of the Red Cross recommended the use of committees because this would allow for each nationality or “group” of detainees to be represented on the committee. *See* UHLER ET AL., *supra* note 75, at 438.

168. Geneva Convention for Prisoners, *supra* note 6, at art. 79; Geneva Convention for Civilians, *supra* note 6, at art. 102.

forward and discuss complaints concerning conditions of detention. All complaints from the detainees should go through the detainee representatives. The detainee representatives also have the right to communicate directly through mail to the International Committee of the Red Cross and the Protecting Power, subject only to censorship,<sup>169</sup> and to represent the detainees to any other organization which might assist them.<sup>170</sup> The International Committee of the Red Cross and the Protecting Power can interview detainee representatives without witnesses or representatives of the Detaining Power present.<sup>171</sup>

b. Army Regulation 190-8 implements the above rules,<sup>172</sup> including a provision granting the detainee representative access to “postal and telegraph facilities” for use by the detainee representative in communicating with the Detaining Power, International Committee of the Red Cross, Protecting Power, or other aid organizations.<sup>173</sup> There is no evidence that any of these LOAC provisions have been implemented at Guantanamo. The Walsh Report is silent on this issue.

## 11. Right to Petition on Conditions of Detention

a. Detainees shall have the right to present to the Detaining Power any complaints or requests concerning the conditions of detention. Detainees may choose to do this through the detainee representative discussed above, or directly to the Protecting Power. Such complaints and petitions are limited to the conditions of detention.<sup>174</sup> The procedure for such complaints is determined

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169. Geneva Convention for Prisoners, *supra* note 6, at art. 78. The Commentary makes clear that the right to censorship of the Detaining Power cannot be used as a tool to obscure complaints on the conditions of detention. On this issue, the Commentary states:

The problem is to reconcile the Detaining Power's own security requirements with the need to ensure that the right of complaint can be effectively exercised. For reasons of security, the Detaining Power must obviously make sure that prisoners of war do not use it as a means of communication with the outside world. The Conference of Government Experts therefore rejected the suggestion that the words “without amendment” should be added to the obligation to transmit complaints.

Such an addition would have resulted in doing away with censorship, and the Detaining Power could not agree to that. The authors of the Convention considered, however, that matters concerning only the “conditions of captivity” could be mentioned without restriction, and the wording adopted seemed best suited to take into account both the interests of the prisoners of war and the Detaining Power's own security requirements.

DE PREUX ET AL., *supra* note 102, at 384.

170. Geneva Convention for Prisoners, *supra* note 6, at art. 79.

171. *Id.*

172. Army Regulation 190-8, *supra* note 42, §§ 3-4.

173. *Id.* §§ 3-4c(8)(c), 6-4f.

174. Geneva Convention for Civilians, *supra* note 6, at art. 101; UHLER ET AL., *supra* note 75, at 435.

by the Detaining Power.<sup>175</sup> These petitions and complaints sent to the Protecting Power are to be transmitted forthwith and without alteration (except for security concerns), and even if recognized to be unfounded, they may not occasion any punishment. Detainee representatives may submit periodic reports on the conditions of confinement to the Protecting Powers.<sup>176</sup>

b. Current doctrine follows the LOAC completely and implements all the measures contained above, including the safeguards for communications with the Protecting Power.<sup>177</sup>

As with provisions on detainee representatives, there is no evidence of a formalized complaint system or procedure at Guantanamo, and the Walsh Report is silent on the issue.

## 12. Information Bureau

a. The LOAC requires each Detaining Power to establish and operate an information bureau for receiving and transmitting information about detainees.<sup>178</sup>

Complete information should be provided to the Information Bureau on each detainee, including full name, place and date of birth, nationality or citizenship and other pertinent identifying information. Some information such as health issues and place of confinement should be provided directly to the detainee's family.<sup>179</sup> Additionally, some information may be protected at the detainee's request, such as when the detainee accepts parole.<sup>180</sup>

b. Army Regulation 190-8 requires the establishment of the National Prisoner of War Information Center (NPWIC) to comply with the LOAC requirements of the information bureau.<sup>181</sup> It also establishes a branch Prisoner of War Information Center in the theater of operations<sup>182</sup> that would

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175. UHLER ET AL., *supra* note 75, at 434.

176. Geneva Convention for Civilians, *supra* note 6, art. 101.

177. Army Regulation 190-8, *supra* note 42, §§3-5b, e; 3-16; 6-8i(3); 6-9.

178. Geneva Convention for Prisoners, *supra* note 6, at art. 122; Geneva Convention for Civilians, *supra* note 6, at art. 136. Concerning the establishment of the bureau, the Commentary states:

At the Preliminary Conference of National Red Cross Societies, held at Geneva in 1946, the majority of the participants recommended that the Societies should undertake the work defined in the present paragraph. The Conference of Government Experts, however, did not think it advisable to make any stipulation in this regard and preferred to leave the Governments free to select an organization to be responsible for establishing Information Bureaux.

DE PREUX ET AL., *supra* note 102, at 574. *See also* UHLER ET AL., *supra* note 75, at 523.

179. Geneva Convention for Prisoners, *supra* note 6, at art. 122.

180. DE PREUX ET AL., *supra* note 102, at 577.

181. Army Regulation 190-8, *supra* note 42, §1-7.

182. The U.S. Department of Defense defines *theater of operations* as:

An operational area defined by the geographic combatant commander for the conduct or support of specific military operations. Multiple theaters of operations

accomplish these same tasks in the area of conflict where the detainees were detained and their families are likely to be located.<sup>183</sup>

Though information concerning the detainees in Guantanamo has been released to the public by several different U.S. government agencies and departments, there is no evidence that the U.S. government has established a central bureau in accordance with Army Regulation 190-8 to act as a clearinghouse for all information concerning detainees and as a central point for contact by families and others interested in the detainees.<sup>184</sup>

### 13. Use of the Protecting Power

a. The LOAC establishes the role of a Protecting Power which accepts the duty “to safeguard the interests of the Parties to the conflict with respect to detainees.” Subject to the agreement of the Parties to the conflict, a willing state takes on the role of the Protecting Power, and the Parties to the conflict agree to facilitate the work of the representatives or delegates of the Protecting Power.<sup>185</sup> The Protecting Power, however, need not be a state. An organization such as the International Committee of the Red Cross may also fill the role as Protecting Power if agreed to by the Parties to the conflict.<sup>186</sup> Once agreed to by the Parties, representatives of the Protecting Power shall have freedom of movement to visit detainees.<sup>187</sup>

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normally will be geographically separate and focused on different missions. Theaters of operations are usually of significant size, allowing for operations in depth and over extended periods of time.

JOINT EDUCATION AND DOCTRINE DIVISION, J-7, JOINT STAFF, JOINT PUBLICATION 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS (2010), [http://www.dtic.mil/doctrine/dod\\_dictionary/index.html](http://www.dtic.mil/doctrine/dod_dictionary/index.html) (last amended Dec. 31, 2010).

183. Army Regulation 190-8, *supra* note 42, §1-8.

184. Continuing problems with government record-keeping and information-sharing concerning Guantanamo detainees have been well noted. See Karen DeYoung and Peter Finn, *Guantanamo Case Files in Disarray*, WASH. POST, Jan. 25, 2009, at A5, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/24/AR2009012401702.html>. While some information concerning Guantanamo detainees has been made available to the public via the Department of Defense website, including a list of detainee names and information on detainee transfers, there does not seem to be one source where all pertinent information on individual detainees is compiled. See detainee information on the Department of Defense website, [http://www.defense.gov/home/features/Detainee\\_Affairs/](http://www.defense.gov/home/features/Detainee_Affairs/). The Washington Post, International Committee of the Red Cross, and other organizations offer limited personal details on individual Guantanamo detainees. See the Washington Post detainee list, WASH. POST, <http://projects.washingtonpost.com/guantanamo/search/> (last visited Feb. 13, 2010). Cf. *Australians in Guantanamo Bay*, PARLIAMENTARY LIBRARY, PARLIAMENT OF AUSTRALIA, [http://www.aph.gov.au/library/pubs/online/Australians\\_GuantanamoBay.htm](http://www.aph.gov.au/library/pubs/online/Australians_GuantanamoBay.htm) (last visited Feb. 13, 2010) (where Australia has published detailed information regarding the case of David Hicks).

185. Geneva Convention for Prisoners, *supra* note 6, at art. 8.

186. *Id.* at art. 10.

187. *Id.* at art. 126.

b. Current military doctrine recognizes the potential role of a Protecting Power and acknowledges that “a neutral state or an international humanitarian organization such as the International Committee of the Red Cross, may be designated by the U.S. government as a Protecting Power.”<sup>188</sup> In the event that such designation occurs, Army Regulation 190-8 tasks the Army Deputy Chief of Staff for Operations and Plans with providing necessary coordination with and assistance to the Protecting Powers.<sup>189</sup> The regulation then provides for the Protecting Power to fulfill its obligations under the LOAC.<sup>190</sup>

The Walsh Report does not discuss Protecting Powers, and there is no indication that the United States has designated any state or international organization as a Protecting Power for the detainees at Guantanamo. Nevertheless, the International Committee of the Red Cross has had continual access to detainees at Guantanamo and has conducted regular private visits with them. The Walsh Report recommends granting non-governmental and international organizations access to the detainees, consistent with security concerns.<sup>191</sup>

#### 14. Relations with the Outside World – Means of Communication

a. The LOAC grants detainees the right to communicate with their families and maintain relations with the exterior.<sup>192</sup> The Detaining Power may not limit relations with the outside world as a form of punishment.<sup>193</sup> The right to communicate with the outside world is to include the opportunity for detainees to inform their families of their location.<sup>194</sup> Further, the Detaining Power should not charge for communication to or from detainees that accrue from the transit of its territory, including necessary communications via telephone, telegram, etc.<sup>195</sup> Such communication, both into and out of the place of detention, may be censored,<sup>196</sup> but the process of censorship must be as expeditious as possible.<sup>197</sup>

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188. Army Regulation 190-8, *supra* note 42, §§1-5e.

189. *Id.* §1-4c(5).

190. *See id.* §§1-8g(7), (8); 3-4c(1)(b); 3-5b, e; 3-6; 3-7i(2); 3-8d-i; 3-12; 3-14, 3-16; 5-1(a)(5); 6-4c, f; 6-9; 6-10; 6-11b(4); 6-13; 6-16.

191. Walsh Report, *supra* note 14, at 64-65.

192. Geneva Convention for Prisoners, *supra* note 6, at arts. 70-71; Geneva Convention for Civilians, *supra* note 6, at art. 107.

193. Geneva Convention for Civilians, *supra* note 6, at art. 70; DE PREUX ET AL., *supra* note 102, at 347.

194. Geneva Convention for Prisoners, *supra* note 6, at art. 48.

195. Geneva Convention for Prisoners, *supra* note 6, at art. 74. The Commentary understands this provision to also include territories under the Detaining Power’s control. DE PREUX ET AL., *supra* note 102, at 363-65.

196. Geneva Convention for Prisoners, *supra* note 6, at arts. 70-71.

197. Geneva Convention for Prisoners, *supra* note 6, at art. 71. The Commentary to article 76 states on the topic of censorship:

Detainees have the right to receive individual and collective shipments containing relief items, including foodstuffs, clothing, medical supplies, and articles of religious, educational and recreational nature.<sup>198</sup> These donations may come from any outside source, including anonymous sources.<sup>199</sup> Any examination of goods (not books and correspondence) required by the Detaining Power should be done in the presence of the detainee.<sup>200</sup> These individual and collective relief shipments should also be free of transit charge within the territory of the Detaining Power.<sup>201</sup>

Detainees also have a right to legal consultation on personal matters such as wills and powers of attorney.<sup>202</sup> Transmission of personal legal matters may still be censored but should be done by a legal professional.

b. Army Regulation 190-8 allows detainees to correspond with their families and receive relief shipments,<sup>203</sup> and contains extensive provisions on correspondence that generally complies with the LOAC provisions above.<sup>204</sup> This includes the provisions on legal documents as well, though there is no provision on legal consultation.<sup>205</sup>

The Walsh Report finds that compliant Guantanamo detainees have no mail limits. Detainees in a discipline status are limited to one hour a day to write mail. All mail is censored, except legal mail. Censoring takes an average of seventeen days.<sup>206</sup> Many detainees are allowed phone calls with family.<sup>207</sup> The Report provides no information on individual or collective relief shipments.

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Some authors have considered that delays caused by censorship should not exceed two weeks, but the drafters of the Convention gave no ruling on the matter. In the event that the Protecting Power is unable to appoint extra censors, it must determine whether there is need for a reduction in the volume of correspondence sent by prisoners of war.

DE PREUX ET AL., *supra* note 102, at 375-76.

198. Geneva Convention for Prisoners, *supra* note 6, at art. 72; Geneva Convention for Civilians, *supra* note 6, at arts. 38, 62, 108; Protocol Additional, *supra* note 69, at art. 5. *See also* DE PREUX ET AL., *supra* note 102 at 355-56 (where the commentary argues for a broad interpretation of the kinds of goods allowed to be received by detainees).

199. Geneva Convention for Prisoners, *supra* note 6, at art. 72; DE PREUX ET AL., *supra* note 102, at 353.

200. Geneva Convention for Prisoners, *supra* note 6, at art. 76.

201. Geneva Convention for Prisoners, *supra* note 6, at art. 74. The Commentary understands this provision to also include territories under the Detaining Power's control. DE PREUX ET AL., *supra* note 102, at 363-65.

202. Geneva Convention for Prisoners, *supra* note 6, at art. 77. The Commentary acknowledges that the Detaining Power may still desire to censor these documents but argues that this censorship should be done by legal professionals. DE PREUX ET AL., *supra* note 102, at 363-65.

203. Army Regulation 190-8, *supra* note 42, §§ 3-3a(6).

204. *Id.* §§ 3-5, 6-8.

205. *Id.* §§ 3-5d(1); 3-5f(2).

206. Walsh Report, *supra* note 14, at 36-37.

207. *Id.* at 34.

## 15. Relations with the Outside World – Expanded Relief Agency Visits

a. Subject to security requirements, the LOAC provides that representatives of relief organizations, particularly the International Committee of the Red Cross, should be able to visit detainees.<sup>208</sup> The Detaining Power is required to provide facilities for meetings and to “facilitate in every possible way” the work of the International Committee of the Red Cross and other relief agencies,<sup>209</sup> including organizations committed to distribution of religious, educational, physical, sport, and entertainment goods and services, etc.<sup>210</sup>

b. In addition to the provisions on seeking assistance through the detainee representatives, Army Regulation 190-8 allows for direct application for assistance to the “Protecting Powers, the International Committee of the Red Cross, approved religious organizations, relief societies, and any other organizations that can assist.”<sup>211</sup>

The Walsh Report finds that the International Committee of the Red Cross has had continual access to detainees at Guantanamo and has conducted regular private visits with detainees.<sup>212</sup> There is no evidence that other NGOs or relief agencies have been granted access. The Walsh Report recommends access by non-governmental and international organizations to the detainees. Such access would have to be subject to security issues.

## 16. Relations with the Outside World – Receive Visitors

a. Subject to imperative reasons of security, detainees should be permitted to receive visitors, particularly family members.<sup>213</sup> The Commentary relies on historical examples to argue that monthly or bimonthly visits for one to three days are reasonable. In exceptional circumstances, a detainee might be allowed to make visits outside the detention camp, such as when there is a death in the family.<sup>214</sup>

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208. Geneva Convention for Prisoners, *supra* note 6, at arts. 9, 125; Geneva Convention for Civilians, *supra* note 6, at arts. 142, 143; Protocol Additional, *supra* note 69 at arts. 5, 81. The Commentary draws attention to the provision that any limitations on the number of societies providing relief should not hinder the effective operation of relief to detainees. DE PREUX ET AL., *supra* note 102, at 355-56.

209. Geneva Convention for Prisoners, *supra* note 6, at art. 142; Protocol Additional, *supra* note 69, at art. 81.

210. Geneva Convention for Prisoners, *supra* note 6, at art. 125.

211. Army Regulation 190-8, *supra* note 42, § 5-1a(5).

212. Walsh Report, *supra* note 14, at 64-65. According to their website, the International Committee of the Red Cross has been visiting Guantanamo detainees since January 2002 and, as of October 2009, has carried out sixty-nine visits at the detention facility. See INTERNATIONAL COMMITTEE OF THE RED CROSS, <http://www.icrc.org/web/eng/siteeng0.nsf/html/united-states-detention> (last visited Feb. 13, 2011).

213. Geneva Convention for Prisoners, *supra* note 6, at arts. 142, 143.

214. UHLER ET AL., *supra* note 75, at 475-76.

b. Army Regulation 190-8 allows certain detainees to receive visitors and to leave the camp under certain circumstances, all subject to reasons of security and theater policy.<sup>215</sup>

As previously discussed, the Walsh Report documents the right of the International Committee of the Red Cross to visit detainees at Guantanamo.<sup>216</sup> Detainee lawyers may also make visits.<sup>217</sup> David Hicks, the Australian who pled guilty and was convicted at trial in Guantanamo, was able to talk with his family<sup>218</sup> and eventually have a visit from them.<sup>219</sup> However, there is no evidence of other family members visiting detainees or of detainees being allowed to depart Guantanamo for any reason other than release or repatriation.<sup>220</sup>

### 17. Punishment During Detention

a. The LOAC allows for punishment for acts both before and during detention and contains detailed provisions concerning punishable offenses and rights that accrue before punishment can be levied.<sup>221</sup> Judicial punishments can include all potential penalties normally adjudicated by the particular forum before which the trial occurs, including the death penalty in limited circumstances.<sup>222</sup> Disciplinary punishments can include fines, revocation of privileges, labor, and confinement.<sup>223</sup>

In both judicial and disciplinary proceedings, the LOAC requires that the detainee be given information regarding the offences of which he is accused, and an opportunity to provide a defense, including calling witnesses, producing evidence, and the use of an interpreter.<sup>224</sup> Further, “[a] record of disciplinary punishments shall be maintained by the [commandant of the place of

215. Army Regulation 190-8, *supra* note 42, §§ 6-7b.

216. Walsh Report, *supra* note 14, at 64-65.

217. *Id.* at 64-65.

218. Penelope DeBelle, *Hicks Family Enjoys Phone Chat as US Prison Lifts Gag*, SYDNEY MORNING HERALD, Dec. 17, 2003, available at <http://www.smh.com.au/articles/2003/12/16/1071336961108.html?from=storyrhs>.

219. *Emotional Reunion for Hicks Family*, BBC NEWS, Mar. 27 2007, available at <http://news.bbc.co.uk/2/hi/asia-pacific/6498443.stm>.

220. See earlier reports by international organizations asserting that detainees were denied visits from family members, AMNESTY INTERNATIONAL, <http://www.amnestyusa.org/document.php?id=ENGAMR510512007&lang=e> (last visited Feb. 13, 2011).

221. See generally Geneva Convention for Prisoners, *supra* note 6 at arts. 83-108; Geneva Convention for Civilians, *supra* note 6, at arts. 64-76, 100, 118-28.

222. Geneva Conventions for Prisoners, *supra* note 6, at art. 100; Geneva Convention for Civilians, *supra* note 6, at art. 75, 100, 118-28.

223. Geneva Convention for Prisoners, *supra* note 6 at art. 89; Geneva Convention for Civilians, *supra* note 6, at art. 119.

224. Geneva Convention for Civilians, *supra* note 6 at art. 123; see also Geneva Convention for Prisoners, *supra* note 6, at art. 96.

internment] and shall be open to inspection.”<sup>225</sup>

b. Paragraphs 3-6 to 3-8 and paragraphs 6-10 to 6-12 of Army Regulation 190-8 catalogue the current military doctrine concerning punishment during detention. The provisions are in compliance with the LOAC, many being direct quotes from the Geneva Conventions.<sup>226</sup>

The Walsh Report does not discuss judicial punishment but does outline the disciplinary paradigm at Guantanamo. The detention facility accepts as its standard the requirement of humane treatment in disciplinary punishment found in article 100 of the Geneva Convention for Civilians. Camp rules are read to every detainee in his native language upon arrival and also posted in public areas in Arabic and English. Further, disciplinary measures are based on a published matrix, ensuring standardized, non-discriminatory punishments. Acceptable punishments include reduced recreation periods, increased time in the detainee’s cell, and reductions in extra comfort items and privileges (minimum privileges and comfort items are never decreased).<sup>227</sup>

### C. Transfer, Parole and Termination

The LOAC allows three distinct ways in which detention can come to an end: transfer to some other state, parole or some other form of release under conditions, and termination or release. Each will be considered below from a historical perspective and also from the perspective of current doctrine.

#### 1. Transfer – Release to the Custody of Another Power

a. Under the LOAC, detainees may be transferred to another Power, so long as that Power is also Party to the Geneva Conventions.<sup>228</sup> The Power to which the detainees are transferred incurs the obligations of proper treatment. However the initial Detaining Power still must monitor to ensure the detainees are being treated in compliance with applicable law.<sup>229</sup>

b. Army Regulation 190-8 outlines current military doctrine on transfers of detainees. The regulation includes detailed requirements concerning the method

225. *Id.*

226. Army Regulation 190-8, *supra* note 42, §§ 3-6 – 3-8, 6-10 – 6-12.

227. Walsh Report, *supra* note 14, at 30-31.

228. Geneva Convention for Civilians, *supra* note 6, at art. 45. In terms of the debate over closing Guantanamo Bay, under the Geneva Convention for Civilians security internees “shall not in any case be transferred to penitentiary establishments (prisons, penitentiaries, convict prisons, etc.) to undergo disciplinary punishment therein.” *Id.* at art. 124; Geneva Convention for Prisoners, *supra* note 6 at art. 97.

229. Geneva Convention for Prisoners, *supra* note 6, at art. 12; DE PREUX ET AL., *supra* note 102, at 136-37 (makes it clear that the intention of the parties was to place “full and complete responsibility” on the Receiving Power when a transfer is made. It also makes clear, however, that “it was never the intention of the authors of the Convention thereby to relieve the transferring Power of all responsibility with regard to the prisoners transferred.”).

of transfer, even the minimum amount of weight each detainee is allowed, and reinforces that transfers can only happen between Parties to the Geneva Conventions.<sup>230</sup> The regulation is silent on any continuing responsibility for the detainee after the transfer.

The Walsh Report describes current practice for the detainees at Guantanamo. Prior to any transfer or repatriation, detainees are questioned by both the Joint Task Force Staff Judge Advocate and separately by the International Committee of the Red Cross to ensure there are no reasons to prevent the repatriation or transfer, such as fear of poor treatment. If the detainee has an attorney, he can also discuss the matter with his attorney. Additionally, detainees are screened by medical professionals who also provide input on the transfer decision. In the event that the transfer does occur, the medical professionals also provide the detainee with at least ninety days of existing medications and a complete medical summary which are given to the flight crew for delivery to the Receiving Power.<sup>231</sup>

## 2. Transfer – Medically or Mentally Impaired

a. Those who are incurably injured or those who will not recover within one year should be repatriated or transferred to a neutral third country. Additionally, those who have recovered from injury or illness but whose physical or mental fitness has been “gravely or permanently diminished” should also be repatriated or transferred.<sup>232</sup> This option is reserved for those who are seriously wounded or seriously sick.<sup>233</sup>

b. Current military doctrine creates a Mixed Medical Commission that evaluates detainees who may be eligible for repatriation under this provision of the LOAC. Decisions of the Mixed Medical Commission cannot be amended or altered to the detriment of the detainee. Mixed Medical Commission decisions are to be carried out within three months of the decision being given.<sup>234</sup>

The Walsh Report does not discuss transfers for solely medical or mental issues. As stated above, every detainee is given a complete medical screening prior to transfer, including at least ninety days of required medications. The screening and medications travel with the detainee and are given to the Receiving Power government.<sup>235</sup>

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230. Army Regulation 190-8, *supra* note 42, §§ 3-11, 6-15.

231. Walsh Report, *supra* note 14, at p. 70.

232. Geneva Convention for Prisoners, *supra* note 6, at art. 110.

233. DE PREUX ET AL., *supra* note 102, at 136-37.

234. Army Regulation 190-8, *supra* note 42, § 3-12.

235. Walsh Report, *supra* note 14, at 70.

### 3. Parole or Release on Conditions

a. Parole is the “promise[] given the captor by a prisoner of war to fulfill stated conditions, such as not to bear arms or not to escape, in consideration of special privileges, such as release from captivity or lessened restraint.”<sup>236</sup> Parole has a long history in the LOAC, beginning at least as early as the Punic Wars.<sup>237</sup> In these early instances, parole was mostly a vehicle for ransom or prisoner exchanges. Medieval knights were bound by the rules of parole as long as they were being properly treated.<sup>238</sup> Medieval parole breakers “offend[ed] God and Man.”<sup>239</sup> Instances of parole continued throughout the American War of Independence, the Napoleonic Wars, the War of 1812, the early stages of the American Civil War, the Boer Wars, and World War I.<sup>240</sup>

This early practice was supported by international law. Early scholars such as Grotius, Vattel, and Pufendorf endorsed the idea of parole.<sup>241</sup> The Lieber Code, which was not only used in the American Civil War, but also had a great impact on European law of war practice,<sup>242</sup> allowed parole and set out detailed rules for its use. The 1874 Brussels Declaration and the 1899/1907 Hague Convention also allow parole. Finally, the Geneva Convention for Prisoners also authorizes parole in article 21. The article states:

Prisoners of war may be partially or wholly released on parole or promise, in so far as is allowed by the laws of the Power on which they depend. Such measures shall be taken particularly in cases where this may contribute to the improvement of their state of health. No prisoner of war shall be compelled to accept liberty on parole or promise. Upon the outbreak of hostilities, each Party to the conflict shall notify the adverse Party of the laws and regulations allowing or forbidding its own nationals to accept liberty on parole or promise. Prisoners of war who are paroled or who have given their promise in conformity with the laws and regulations so notified, are bound on their personal honor to scrupulously fulfill, both towards the Power on which they depend and towards the Power which has captured them, the engagements of

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236. Training and Education Measures Necessary to Support the Code of Conduct, U.S. Dept. of Def., Dir. 1300.7 encl. 2, para. B(3)(a)(5) (Dec. 23, 1988). This Directive was cancelled and replaced by a similarly named Directive that is dated December 8, 2000. The newer Directive, however, does not contain a definition of parole. Parole is also defined as “the agreement of persons who have been taken prisoner by an enemy that they will not again take up arms against those who captured them, either for a limited time or during the continuance of the war.” 2 BOUVIER’S LAW DICTIONARY 2459 (1914).

237. See generally 59 HOWARD S. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT *in* NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES (1977); Brown, *supra* note 32, at 200; William Bradford, *Barbarians at the Gates: A Post-September 11 Proposal to Rationalize the Laws of War*, 73 MISS. L.J. 639, 720-24 (Winter, 2004).

238. Brown, *supra* note 32, at 203.

239. THEODOR MERON, HENRY’S WARS AND SHAKESPEARE’S LAWS 167 (1993), *quoted in* Brown, *supra* note 32, at 203.

240. Brown, *supra* note 32, at 203-08.

241. *Id.* at 208-10.

242. Lieber Code, *supra* note 33.

their paroles or promises. In such cases, the Power on which they depend is bound neither to require nor to accept from them any service incompatible with the parole or promise given.<sup>243</sup>

b. While the U.S. has a history of granting parole to enemy prisoners of war as late as World War II,<sup>244</sup> the current Code of Conduct prohibits U.S. service members from seeking or accepting parole.<sup>245</sup> Army Regulation 190-8 does not discuss parole as an option for current detainees, and the Walsh Report also does not mention parole.

#### 4. Termination of Detention

a. The LOAC requires the Detaining Power to release detainees either upon the determination that either the detainee is no longer a security risk or at the end of the conflict during which they were detained.<sup>246</sup> Release should not be delayed for a formal peace treaty or armistice.<sup>247</sup> Detainees may petition to be repatriated to a different country than their country of capture or country of origin in a case where they might be the subject of unjust measures. Such measures affect their life or liberty, especially on grounds of race, social class, religion, or political views, and that consequently repatriation would be contrary to the general principles of international law for the protection of the human being. Detainees may also request repatriation to another country for personal reasons.<sup>248</sup>

On release or repatriation, detainees shall be given all articles, monies, or other valuables and personal effects taken from them during detention.<sup>249</sup>

b. Army Regulation 190-8 mandates the release of detainees upon the cessation of hostilities<sup>250</sup> or “as soon as the reasons for their internment are determined . . . to no longer exist.”<sup>251</sup> Upon release, the Detaining Power will return all personal items that can be released to the detainee.<sup>252</sup>

As mentioned above, the Walsh Report documents current practice at Guantanamo, including the opportunities for detainees to provide input on their potential repatriation and to raise any fears related to repatriation or transfer.

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243. *Id.*

244. Brown, *supra* note 32, at 214.

245. Code of Conduct for Members of the Armed Forces of the United States, Exec. Order No. 10,631, 20 Fed. Reg. 6,057 (1955), as amended by Exec. Order No. 12,017, 42, Fed. Reg. 57,941 (1977) and Exec. Order No. 12,633, 53 Fed. Reg. 10,355 (1988).

246. Geneva Convention for Prisoners, *supra* note 6, at art. 118; Geneva Convention for Civilians, *supra* note 6, at art. 132.

247. Geneva Convention for Prisoners, *supra* note 6, at art. 118.

248. *Id.*

249. *Id.* at art. 18.; Geneva Convention for Civilians, *supra* note 6, at art. 97.

250. Army Regulation 190-8, *supra* note 42, § 3-13.

251. *Id.* §§ 5-1g, 6-16.

252. *Id.* §§ 3-14, 6-16.

Any such fears are considered by the U.S. government before a final decision is made. The detainee's medical situation is also considered as part of the process. If transferred or repatriated, all personal items are returned to the detainee.<sup>253</sup>

#### IV. ADAPTING THE CURRENT PARADIGM TO CONTEMPORARY DETENTION

The previous section summarized the major provisions on detention in the LOAC as well as the current U.S. doctrine and practice. In most areas, the current practice and doctrine is in full compliance with the LOAC and will require little, if any, adjustment to indefinitely detain certain individuals at Guantanamo.

The previous section, however, also highlighted several areas where there are gaps in current doctrine or practice. Additionally, as a practical matter, there are provisions where changes in technology or capabilities need to be translated into more modern applications of the law. The section below suggests modifications to the current paradigm that responds to these concerns.

Underlying these proposals is an assumption that underlies many of the concerns about indefinite detention without trial, and also seems to underlie the Walsh Report and recommendations: The longer an individual is detained without a criminal trial, the more liberal his conditions of detention ought to become. Of course, this increasing liberality must be balanced against legitimate security concerns, thus some of the proposals below highlight areas where increased liberality should not cause undue security risks.

The proposals will be presented in four categories. Part A contains proposals the Government should initiate now for all detainees that are not specific to indefinite detention, though they will have a significant benefit to indefinite detainees. Part B proposals are specific provisions that can be implemented immediately upon the decision to detain indefinitely. Part C proposals apply to the initial stages of indefinite detention and represent a menu of options that can be implemented over time. Part D proposals detail some options for the actual termination of detention.

##### A. Actions to be Taken Now

The review above has identified several areas where the U.S. government is not in compliance with Geneva Conventions.<sup>254</sup> These proposals include things the U.S. government can do now to bring detention procedures in to compliance with the LOAC that would benefit all detainees, including those who are determined to be detained indefinitely.

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253. Walsh Report, *supra* note 14, at 70.

254. It is important to note that the Walsh Report only analyzed compliance with Common Article 3 as its standard, not with the entire LOAC, though the Report does make reference to various other LOAC provisions.

### 1. Establishment of an Information Bureau

As was demonstrated above, the LOAC requires the establishment of an information bureau to act as a central clearing house for detainee information. Army Regulation 190-8 concurs. As has also been discussed above, however, no such bureau currently exists. There is no single place where family members or other interested parties can go to find out even basic information on detainees. Much information can be gleaned through visits to numerous varied web sites that each have a piece of information, but there is no equivalent of the LOAC mandated information bureau. The U.S. government should form a bureau and consolidate all detainee information. This would have to be supported by policies, guidelines and programs for information sharing amongst government agencies that would facilitate this process. The bureau could then make general information, such as that required by the LOAC, available to the public, unless such information would be detrimental to the detainee or would create a security risk.

### 2. Revitalization of the Protecting Power.

The LOAC mandates the selection of a state or organization such as the International Committee of the Red Cross to be designated by the belligerents as the Protecting Power.<sup>255</sup> The Protecting Power can play a vital role for detainees in dealing with the outside world, as well as responding to complaints and facilitating requests.<sup>256</sup> Just as seeking the services of a Protecting Power is mandatory for belligerent states, taking on the role of the Protecting Power is also obligatory for any Party to the Geneva Conventions, if asked.<sup>257</sup> Having a Protecting Power in place would provide another layer of consideration for the detainees, which would benefit all detainees, and particularly those who are to be indefinitely detained. It would also provide a neutral third party that can

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255. Geneva Convention for Prisoners, *supra* note 6, at art. 8. The commentary states the requirement to have a Protecting Power is not optional, but obligatory:

This is a command. The English text, which is authentic equally with the French, makes this absolutely clear. The command is addressed in the first instance to the Parties to the conflict. They are bound to accept the co-operation of the Protecting Power; if necessary, they must demand it. In the course of the discussion, there was ample evidence of the desire of those participating to establish a stricter control procedure and to make it obligatory.

DE PREUX ET AL., *supra* note 102, at 98. Similar language is found in UHLER ET AL., *supra* note 75, at 86-87.

256. See DE PREUX ET AL., *supra* note 102, at 98, n.8 (where the commentary lists more than thirty articles that reference the Protecting Power); UHLER ET AL., *supra* note 75, at 86-87 (where the commentary references thirty-seven articles that reference the Protecting Power).

257. DE PREUX ET AL., *supra* note 102, at 98 n.8 (where the commentary states “the command is also addressed to the Protecting Power, if the latter is a party to the Convention. The Protecting Power is obliged to participate, so far as it is concerned, in the application of the Convention.”).

speak to conditions of detention and confirm the legality and humanity of the Detaining Power's practices.

### 3. Formation of Detainee Committee or Election of Detainee Representative

As with the Protecting Power, the LOAC does not make the appointment of detainee representatives optional,<sup>258</sup> and there is no evidence that this provision is currently complied with at Guantanamo. To comply with the previously reviewed LOAC provisions, each "group" within the population of indefinite detainees should elect representatives who may desire to form a committee. The representatives or committee must have access to the International Committee of the Red Cross, the Protecting Power, and be able to advocate to the Detaining Power on behalf of the detainees. While this improvement is important for all detainees, it is vitally important for those who will be kept indefinitely.

### 4. Formalization of procedure for complaints and petitions.

Initiation of personal representatives will do much to alleviate this need, but the LOAC guarantees detainees the right to make grievances known, and Army Regulation 190-8 requires camp commanders to inform detainees of the process for making complaints and petitions. There is no evidence that such processes are in place in Guantanamo and this would be especially important for indefinite detainees. The formalization of complaint/petition procedures through clear instructions to detainees should be required at Guantanamo.

## B. Upon Determination of Indefinite Detention

Through whatever procedure used, at some point, the U.S. government will, and arguably has already, determine that a detainee is going to be detained indefinitely. Once that decision has been made, certain actions should immediately occur.

### 1. Notification

After the U.S. government has decided to detain a detainee indefinitely, the detainee should be immediately notified of the decision and any rights to appeal or contest the decision. The International Committee of the Red Cross and Protecting Power (if one exists) should be immediately notified of the decision and provided with the detainee's identity and an opportunity to talk with the detainee. The detainee should be granted the ability to personally contact

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258. *Id.* at 389.

family and other interested parties to inform them of the change in his situation.

## 2. Relocation

Indefinite detainees should be separated from the other detainees, such as those approved for transfer/release/repatriation and those awaiting trial, and held with other detainees designated for indefinite detention. Unless it is specifically requested by the detainee and it is determined to be in the detainee's best interest, indefinite detainees should not be housed and fed with detainees who are not similarly situated. Detainees are currently separated at Guantanamo, mostly for disciplinary or security reasons. Those who are soon to be repatriated or returned to their home state are housed separately from other detainees.<sup>259</sup> As the population of Guantanamo continues to decrease, facilities should be made available for separate housing facilities for those who will be indefinitely detained.

## C. As Indefinite Detention Begins

Once the detainee is informed of his indefinite detention, his conditions should be liberalized in accordance with the requirements of security. The LOAC provides a number of options for liberalizing the conditions of detention from those currently existing at Guantanamo. These can be carefully crafted to ensure that they do not create security risks. These might be initiated over time or installed immediately.

### 1. Quarters

As well as being separated from others who are not similarly situated, the actual quarters allocated for indefinite detainees should be modified. Currently, detainees have no place that they can consider a permanent residence. They can be moved from one camp or room to another based on status or compliance.<sup>260</sup> Once a detainee is determined to be an indefinite detainee, he should be moved into permanent individual quarters. This does not preclude temporary relocation for disciplinary purposes if necessary, but when his temporary relocation is over, he should return to his assigned quarters.

The LOAC makes it clear that detainees should be quartered "under conditions as favorable as those for the forces of the Detaining Power who are billeted in the same area."<sup>261</sup> These quarters will become the "permanent" home for the indefinite detainees. Separate "dorm" rooms are the standard for new

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259. Walsh Report, *supra* note 14, at 12-13.

260. *Id.* at 32-33.

261. Geneva Convention for Prisoners, *supra* note 6, at art. 25.

military barracks construction.<sup>262</sup> Therefore, under the LOAC guidelines, indefinite detainees should be provided with quarters that are similar.

These individual quarters ought to be made out of brick and mortar or other similarly permanent materials. They should provide adequate sunlight, have sufficient square footage including storage space, provide access to recreation areas and to common areas, have separate or shared kitchen facilities for personal meal preparation, and provide laundry facilities.<sup>263</sup>

## 2. Increased Association with Others

Detainees at Guantanamo currently have disparate levels of social interaction, mainly for disciplinary and security reasons. Many are able to participate in social games, gatherings, religious activities, sports, etc.<sup>264</sup> Discipline concerns with association may still remain after the initiation of indefinite detention, but security concerns should dwindle significantly. If these detainees are going to be at Guantanamo indefinitely (presumably until the conflict is over or they are no longer a security risk), increased association with others similarly situated would present a decreased risk.

## 3. Increased Ability to Collect Personal Effects

In conjunction with personalized quarters, indefinite detainees should be allowed to collect personal effects and maintain them in their possession. This ability would still have to be balanced against any potential security risks, but could include items such as books, computers, games, pictures, clothing, and food items. Any personal items that were taken from the detainee and are currently being held should be returned unless they pose a security risk.

## 4. Visits from the Outside World

Currently, detainees only have regular visits from the International Committee of the Red Cross. Indefinite detainees should be allowed increased rights to visitors. This would include visits from the Protecting Power, once it is selected, but also other relief agencies and religious organizations/representatives. As discussed below, this should even include

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262. See HOUSING POLICY, U.S. ARMY, <http://www.armyg1.army.mil/hr/housing/> ("The DOD Housing Manual (DOD 4165.63M) is the foundation for Army Regulation (AR 420-1), Army Facilities Management, dated 2 November 2007. This regulation replaced the previous Army Housing Management directive (AR 210-50). The other military services also base their housing regulations on the DOD Manual."); DEPARTMENT OF DEFENSE MANUAL: 4165.63-M, DEP'T OF DEF., Enclosure 3, 1.d(4)(e.).

263. Access to personal laundry facilities was a recommendation in the Walsh Report from the NGOs who provided input. Walsh Report, *supra* note 14, at 21.

264. *Id.* at 34.

family members. Such visits, except those with the International Committee of the Red Cross and Protecting Power, could be subject to censorship or other security measures if necessary.

#### 5. Access to the Outside World

The LOAC provides for interaction with the outside world, including telegraph and mail.<sup>265</sup> These provisions should be technologically modernized to include access via telephone and the Internet. There is no doubt that such technologies could present security risks but any contact would be subject to censorship if needed for security purposes. For example, Internet access could be completely monitored and limited to certain websites or services. Rather than mail, an indefinite detainee could be allowed to have e-mail capability, subject to the same censorship requirements.

Computer access would also provide greatly increased access for social and educational advancement. Indefinite detainees could enroll in online courses, vastly expanding their educational opportunities compared to those available under the current system.

#### 6. Contact with Family

Under certain circumstances, the LOAC provides for familial contact. Telegrams are specifically mentioned as a resource the Detaining Power should make available to detainees in special circumstances.<sup>266</sup> As mentioned above, modernizing this principle would include telephone calls and potentially videoconferencing or other modern means of communication, such as e-mail. Of course, all communications, including contact with family could be subject to necessary forms of censorship. This could easily be accomplished through time delay or other technological means.<sup>267</sup> Some measures along these lines have already been initiated. The International Committee of the Red Cross is facilitating a video-telephone call (VTC) program launched in October 2009 which enables relatives of Guantanamo detainees to connect with their loved ones.<sup>268</sup>

In cases where family members (or others) do not have e-mail access, the U.S. government could create communication points in the countries where the

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265. Geneva Convention for Prisoners, *supra* note 6 at art. 71; Geneva Convention for Civilians, *supra* note 6, at art. 107.

266. Geneva Convention for Prisoners, *supra* note 6 at art. 71; Geneva Convention for Civilians, *supra* note 6, at art. 107.

267. But see current practice in Army Regulation 190-8, *supra* note 42, at ¶ 3-51 (which does not allow detainees to make phone calls).

268. See *Pakistan: Helping Families Connect with Loved Ones in Guantanamo*, INTERNATIONAL COMMITTEE OF THE RED CROSS (Dec. 29, 2009), <http://www.icrc.org/web/eng/siteeng0.nsf/html/pakistan-feature-091229>.

detainees are citizens to ease personal communications and relief shipments. Items for detainees could be dropped off at these points and should be shipped to the detainee at no charge. These points could also contain telephone and Internet sites where family members (or others) could call or access the Internet to communicate with the detainee free of charge.

The LOAC even allows for personal visits under certain circumstances which should also be potentially possible under strict security requirements. The International Committee of the Red Cross or a representative of the Protecting Power may be used to monitor the visit if necessary. Security would obviously be a major consideration, but over time even the need for censorship or monitored visits may decrease.

#### 7. Individual and Collective Relief Shipments

History has shown how important relief supplies are to detainees. The drop-off points mentioned above could be used generally by interested parties who want to provide assistance to detainees. Additionally, the U.S. could create drop-off points in other military installations worldwide (rather than just where the detainees' families are located) and allow shipments at no charge within U.S. territory or territory under U.S. control. Likewise, detainees should be able to make shipments out of Guantanamo under similar circumstances to family and others.

#### 8. Library and Educational Services

Detainees currently have access to a large number of books and classes,<sup>269</sup> but there is no evidence that they have any input as to which books are available and which classes are offered. Indefinite detainees should have input as to the education program by suggesting courses of interest. Access to the Internet as described above should assist in providing a wider variety of course options. Indefinite detainees should also have access to the interlibrary loan system so they can receive books by request, subject to reasonable censorship.

#### 9. Religious Services

The LOAC requires detainees to have access to outside religious representatives under certain circumstances.<sup>270</sup> There is no evidence that such access is currently provided, but there also seems to be no reason why it could not be provided. Indefinite detainees ought to be allowed correspondence with outside religious representatives, including visits from outside religious representatives, subject to security concerns, such as limitations on radical

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269. Walsh Report, *supra* note 14, at 34.

270. Geneva Convention for Civilians, *supra* note 6, at art. 58.

religious views.

#### 10. Entertainment

Morale is an important component of the health of detainees. This is potentially even more true in the case of indefinite detainees. Detainees should have access to multiple forms of entertainment of their choosing. Movies and music should be made reasonably available upon request. Other multimedia should be allowed and provided, though it may be censored.

#### 11. Money

The LOAC requires the establishment of personal accounts where detainees can put money aside for personal purposes.<sup>271</sup> There is no evidence that such accounts have been established for detainees at Guantanamo.<sup>272</sup> The U.S. government should consider doing so for indefinite detainees.

Even if the U.S. government does not provide indefinite detainees with a personal allowance, detainees are authorized to receive money from outside sources and can send money to outside sources. Therefore, personal accounts are still necessary. Additionally, in the modern technological era, these accounts ought to include a debit card for Internet and other similar transactions. Of course, such purchases and receipt of purchased goods would be subject to censoring and inspection upon arrival.

#### 12. Canteens

There are currently no canteens organized for the benefit of detainees at Guantanamo, though one camp does have access to some goods through U.S. service members. In compliance with the LOAC, canteens should be established where detainees can request—perhaps through the detainee representatives—and then purchase specific items. The canteen should include at least foodstuffs, drinks, supplies for correspondence, necessary toilet articles, and supplies for personal effects, such as buttons. It should also include miscellaneous items such as flashlights, batteries, string, handkerchiefs, and other desired personal items, subject to security concerns. Such purchases should be allowed from the detainee's personal account, and any profits should be used to better the lives of the detainees.

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271. *Id.*, *supra* note 6, at art. 98.

272. *See generally* Walsh Report, *supra* note 14, at 34.

### 13. Medical Services

The medical services provided to the detainees are quite extensive.<sup>273</sup> However, as detainees remain indefinitely in detention, both physical and mental health issues will continue. Routine mental and physical exams must continue and the results must be monitored, particularly in connection with potential termination of detention options discussed below. At some point, the medical or mental condition of some detainees may outstrip the services provided at Guantanamo, such as cancer treatment or more involved medical care, and provisions will have to be made to provide this care. Consideration should also be given to repatriation or parole for medical reasons in such situations.

### 14. Legal Services

As with medical services, the longer an individual is detained, the more likely he will need legal services. Personal legal issues, such as wills, powers of attorney, family issues, and financial issues, will require legal assistance. While almost all of these detainees will have legal representation on the issue of their continued detention, such legal teams may be ill suited to perform other personal legal matters. Detainees should have reasonable access to attorneys to assist with these personal issues. They should also have the ability to meet with a personal attorney over the phone or by videoconference.

### 15. Review of Detention

As outlined above, the process by which indefinite detention is reviewed must be automatic. In order to avoid judicial review, "it must be made not by one official but by an administrative board offering the necessary guarantees of independence and impartiality."<sup>274</sup> The requirement of a board, and more so, of independence and impartiality, may require changes in Guantanamo's processes. But such changes could occur. The U.S. military, with military judiciary and defense counsel, and inspectors general (IG), establishes separate chains of command to ensure that those entities are, and are perceived to be, independent and, in the case of the judiciary and IG, impartial.

The reviews would be held semi-annually and the detainee provided an attorney, an interpreter, and the ability to call witnesses and to present evidence. As previously discussed, the Geneva Convention for Civilians provides such rights, as do both the United States military justice and administrative separations processes.<sup>275</sup> While under this model the reviews

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273. *Id.* at 13-15.

274. UHLER ET AL., *supra* note 75, at 260-62.

275. See Linzer *supra* note 2 (detailing an expected new Executive Order which will "offer detainees in this category a minimal review every six months and then a more lengthy

may occur more frequently than at present, the scope of the review would be more limited—whether the individual poses a continued and imperative security risk.<sup>276</sup>

The composition of the board would be that referenced in Army Regulation 190-8, a “board of officers.”<sup>277</sup> Critical to the viability of this board is a better explanation by the Department of Defense of why military officers should be considered independent or impartial and the review “absolute[ly] objective.” To accomplish this, the Department of Defense should ensure that board members are not in the same direct chain of command as the authority which convenes the periodic review.

Further, periodic review of indefinite detention should incorporate aspects of the process by which the United States Army conducts administrative separation boards. These boards consider whether an enlisted member of the Army should be discharged.<sup>278</sup> When the administrative board recommends that the soldier be retained in service, “no separation authority will direct discharge.”<sup>279</sup> Applied to the periodic reviews, this would mean that the convening or appointing authority could not reverse aspects of an administrative board decision favorable to the detainee, including release or parole.

The standard by which the board would review the detention would be that a majority vote in favor is needed for continued detention. The decision should be reduced to writing.

One significant change to the current review process would be the application of the burdens and presumptions from the Geneva Convention for Civilians. Continued detention could result, indeed indefinitely so, but the presumption is with “a view to favourably amending” the decision to detain and after that the conditions of that detention.<sup>280</sup> So the burden is on the Detaining Power to articulate a particularized rationale for continued detention at all and where that burden is met, for any enhanced detention conditions.

The review process must provide the detainee a meaningful opportunity to challenge the government’s case. Another concern is the standard of evidence the board will consider. The evidentiary standard should reflect—and require—

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annual review. Detainees will have access to an attorney, to some evidence against them and the ability to challenge their continued detention.”).

276. While the law of war is silent on the burden of proof, in the habeas litigation “judges uniformly hold or assume that the government must prove eligibility for detention by a preponderance of the evidence.” WITTES ET AL., *EMERGING LAW OF DETENTION*, BROOKINGS 23 (2009) (discussing the varied approaches by the federal judiciary to the question of whether a relationship with a terrorist organization can be vitiated). With that frame of reference, we propose a similar threshold for the review of indefinite detention.

277. Army Regulation 190-8, *supra* note 42, at ¶ 5-1(g).

278. *See* Active Duty Enlisted Administrative Separations, U.S. DEP’T OF ARMY, Reg. 635-200 (Apr. 27, 2010).

279. *Id.* at ¶ 2-6d.

280. UHLER ET AL., *supra* note 75, at 260-62.

both reliability and voluntariness.

One difficulty in the reviews, and one currently faced in the detainee litigation, is to what extent changed circumstances, notably vitiating an underlying relationship with al-Qaeda or the Taliban, should be incorporated into the review process? This is one area where the law of war provides little insight. Of potential use is the Geneva Convention for Prisoners provision recognizing members of a force who “profess allegiance to an authority not recognized by the Detaining Power.”<sup>281</sup> To the extent that the law is willing to recognize sworn allegiance, it should be willing to recognize renunciation.

Some will forecast that every detainee being indefinitely held will falsely claim that they have “seen the light” and severed ties with al-Qaeda or the Taliban in an effort to secure their release. While that possibility does exist, it is not a new challenge, and rivals that faced by parole boards considering self-described “former” gang members.

Another issue will be how the review process interprets the end of hostilities and even where that inquiry should focus. Consider a Yemeni captured in Afghanistan. Which conflict would the review process consider? The specific armed conflict in which the Yemeni was captured? Conditions in Yemen? A broader conflict against terrorism or al-Qaeda? Here, the review should primarily consider the current status of the conflict in which the detention occurred and the conditions in the country to which the detainee would be released. Whether or not conflicts still exist in those areas, whether the conflict involves the group to which the detainee was associated, and of course whether the detainee is viewed as likely to rejoin that group could all be considered. Continued membership (or not) in a group like al-Qaeda and the presence (or absence) of armed conflicts between the United States and al-Qaeda could still be considered, but at a factual or specific level. Broadly sweeping, but generalized, assertions about a war on terror would not suffice, or more accurately would carry little weight, in the review process.

Finally, while the presumption heading into the review is one of release, such an outcome is required only “if circumstances permit.” This provides the Detaining Power some flexibility. The Detaining Power would also be assisted by considering a more expansive view of, and options for, the end of detention.

#### D. End of Detention

Despite the determination that some current detainees in Guantanamo will be detained indefinitely, this does not foreclose the option of release if circumstances change. The LOAC requires release in certain circumstances and

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281. Geneva Convention for Prisoners, *supra* note 6, art. 4(A)(3) 120-21. The commentary to this provision reveals its origins were concerns over the treatment and status of the “Free French” forces, which continued to fight Germany in World War II after France surrendered. DE PREUX ET AL., *supra* note 102, at 61-63.

strongly suggests release in others. The following proposals should be considered by the U.S. government as potential options over time.

### 1. Release, Transfer and Repatriation

As discussed above, the LOAC sets out at least three instances where detention should end. While Army Regulation 190-8 provides for each of these instances, there is no current statement by the U.S. government that these provisions will apply to even those who are to be indefinitely detained. This should be remedied. These circumstances for release, transfer, and repatriation are uncontroversial and, if detention is truly “under the laws of war,” would undoubtedly apply to all detainees. The U.S. government should make explicit the circumstances under which a detainee may be released, transferred, or repatriated explicit and conduct its detention reviews with these principles in mind.

### 2. Parole

As has been demonstrated earlier, parole has a long history but is practically moribund at this point, at least for those detained by the U.S. government. Parole has been used in non-state conflicts in the past,<sup>282</sup> and now is the time to reinvigorate the principle as a method of ending detention for some of those scheduled to be indefinitely detained.

It is important to note that parole is a much broader principle than just releasing a detainee on his honor to not return to the fight. It is about making an agreement that includes certain assurances that allow a detainee to leave detention with sufficient guarantees that he will remain out of the conflict, both physically and mentally. The specifications of the parole can be whatever is necessary to accomplish the purpose of excluding the paroled detainee from having any involvement in the conflict.

For the indefinite detainees in Guantanamo, modern parole would certainly include advanced technological means of monitoring the paroled detainee. Such monitoring could include a combination of visual and electronic means,<sup>283</sup> such as already in use in the United States for paroled sex offenders,<sup>284</sup> and as anti-

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282. Brown, *supra* note 32, at 207-08.

283. A similar suggestion appears to have been made by Saudi King Abdullah who is reported to have proposed to White House counterterrorism advisor, John Brennan, “implanting detainees with an electronic chip containing information about them and allowing their movements to be tracked with Bluetooth.” *US Embassy Cables: Saudi King’s Advice for Barack Obama*, GUARDIAN.CO.UK, Nov. 28, 2010, available at <http://www.guardian.co.uk/world/us-embassy-cables-documents/198178>.

284. See Graeme Wood, *Prisons Without Walls*, ATLANTIC MONTHLY (Sep. 2010), available at <http://www.theatlantic.com/magazine/archive/2010/09/prison-without-walls/8195/1/>.

terrorism measures in Australia and the United Kingdom.<sup>285</sup> These measures could be combined with geographic restrictions and even close confinement.<sup>286</sup> It might also include a guarantor, whether a government, organization or an individual, who would guarantee that the paroled detainee would remain compliant with the terms of the parole agreement. A guarantor system has been used before with some effectiveness, though not specifically in conjunction with parole.<sup>287</sup>

It is clear that some previously released Guantanamo detainees have returned to the fight.<sup>288</sup> Historically, a parolee who violated the terms of his

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285. Bronwen Jagers, *Anti-terrorism Control Orders in Australia and the United Kingdom: a comparison*, PARLIAMENTARY LIBRARY, PARLIAMENT OF AUSTRALIA, available at <http://www.aph.gov.au/library/pubs/rp/2007-08/08rp28.pdf> (detailing measures such as curfew at a particular address, wearing of an electronic monitoring tag, restrictions on use of telecommunications, and regular reporting to police).

286. Brown, *supra* note 32, at 203.

287. Press Release, Government of Iraq, *MNF-I Launch Joint Venture to Expand Detainee Reintegration Programs, Conduct Sp* (Aug. 27, 2007), available at [http://www.usf-iraq.com/?option=com\\_content&task=view&id=13635&Itemid=128](http://www.usf-iraq.com/?option=com_content&task=view&id=13635&Itemid=128).

288. It has been reported that the number of former Guantanamo detainees who have returned to the fight has continued to rise. That number was twenty percent in early 2010, up from the fourteen percent recidivism rate released the previous Spring. The first Pentagon report released to the public in December, 2008 showed a recidivism rate of eleven percent among former Guantanamo detainees. See, e.g., Luis Martinez, *Gitmo Recidivism Rate Rises to 20 Percent Confirmed to ABC*, ABC NEWS, Jan. 6, 2010, <http://blogs.abcnews.com/politicalpunch/2010/01/gitmo-recidivism-rate-rises-to-20-percent-confirmed-to-abc.html>.

The difficulties inherent to reporting accurately the recidivism rates in the war on terror generally have been well noted. This is largely due to differing statistical criteria in different locations and by groups with different interests in reporting such information. According to Vice Admiral Robert Harward, the terminology used by the U.S. military in Afghanistan is “recapture” as opposed to “recidivism.” DOD News Briefing with Vice Adm. Harward from Afghanistan, Nov. 30, 2010, available at <http://sharing.govdelivery.com/bulletins/GD/USDOD-10D743>. This rate takes into account those who have been recaptured and returned to the detention facility in Parwan, but does not consider those who may have returned to the battlefield and were killed rather than recaptured. These rates are much lower than reported recidivism rates in other locations. In a statement, Vice Admiral Hayward stated that:

Now, I can't give you the recidivism, because maybe someone went back to the fight and was killed and we can't capture that. So he wasn't recaptured. But it's hard because the battlespace owners can't always clearly identify some of those combatants killed in the battlespace, in an airstrike or that - so there's - there may be more out there that I can't specifically prove. But I can give you the facts on those who are recaptured and returned to the Detention Facility in Parwan. And for this year, that's been less than 1 percent.

Press Release, Dep't of Def., Vice Admiral Harward from Afghanistan (Nov. 30, 2010), available at <http://sharing.govdelivery.com/bulletins/GD/USDOD-10D743>; see DEPARTMENT OF DEFENSE, REPORT ON PROGRESS TOWARD SECURITY AND STABILITY IN AFGHANISTAN 61 (2010), available at [http://www.defense.gov/pubs/pdfs/Report\\_Final\\_SecDef\\_04\\_26\\_10.pdf](http://www.defense.gov/pubs/pdfs/Report_Final_SecDef_04_26_10.pdf). The report states that the current recidivism rate in Afghanistan is 1.2 percent.

While no one would argue these statistics are acceptable, it is insightful to compare them with domestic recidivism rates. The Bureau of Justice Statistics conducted two studies

parole was punished with death.<sup>289</sup> Any parole agreement would have to clearly specify what the punishment for violation of parole would be, including potential limitations on due process guarantees. At the very least, it must be clear that the Detaining Power can revoke parole for good reason and if that occurs, then paroled detainee must return.<sup>290</sup>

### 3. Rehabilitation

There is no evidence that any of the current programs at Guantanamo are attempting to rehabilitate detainees. However, some states have initiated rehabilitation programs for returning or released Guantanamo detainees. Saudi Arabia's program has garnered a great deal of attention and has had success.<sup>291</sup> The United States needs to look seriously at the potential benefits of a rehabilitation program for the indefinitely detained, particularly in conjunction with a system of parole.

### 4. Withdrawal

Another potential method for early release from indefinite detention is if the detainee decides to withdraw from his prior membership and affiliation. Withdrawal would be one of the factors considered in the detention review and, if verifiable, may provide an avenue for early release.<sup>292</sup> This may be particularly effective in conjunction with a reinvigorated parole system.

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on recidivism rates in the United States in 1983 and 1994. According to the most recent study in 1994, "released prisoners with the highest rearrest rates were robbers (70.2%), burglars (74.0%), larcenists (74.6%), motor vehicle thieves (78.8%), those in prison for possessing or selling stolen property (77.4%), and those in prison for possessing, using, or selling illegal weapons (70.2%)." Furthermore, "the 272,111 offenders discharged in 1994 had accumulated 4.1 million arrest charges before their most recent imprisonment and another 744,000 charges within 3 years of release." PATRICK A. LANGAN AND DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, *RECIDIVISM OF PRISONERS RELEASED IN 1994* 1 (2002), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf>.

289. Lieber Code, *supra* note 33, at art. 124.

290. See Brown, *supra* note 32, at 203 (citing this as a widely used historical parole practice).

291. Terence Henry, *Get Out of Jihad Free*, THE ATLANTIC, June 2007, available at <http://www.theatlantic.com/magazine/archive/2007/06/get-out-of-jihad-free/5883/>; *Saudis Offer Detainee Reintegration Program* (National Public Radio broadcast Dec. 10, 2007), available at <http://www.npr.org/templates/transcript/transcript.php?storyId=17097161>; *Saudi Government Tries To Rehabilitate Former Guantanamo Prisoners, Jihadists* (60 minutes broadcast May 3, 2009), available at <http://www.cbsnews.com/stories/2009/04/30/60minutes/main4980766.shtml>.

292. But see Benjamin Wittes, *Peter Margulies on S. 3707 and Future Dangerousness*, LAWFARE BLOG, (Sept. 6, 2010, 2:49 PM), <http://www.lawfareblog.com/2010/09/peter-margulies-on-s-3707-and-future-dangerousness/> (where Margulies discusses the proposed Senate bill and its position that post-capture withdrawal is not a relevant reason for change of status for detainees at Guantanamo).

Verification of withdrawal would be a necessary consideration, but the principle of withdrawal should be an option.

#### 5. Return of Personal Effects

At the point that an indefinite detainee is to be released, transferred, or repatriated, the presumption is that his personal effects would be returned. This may be limited by a parole agreement but should otherwise be considered required.

#### 6. Death

Finally, though not technically falling under release, transfer, or repatriation, if a detainee dies while in detention, the LOAC contains specific provisions concerning the treatment of the body and personal effects.<sup>293</sup> Current military doctrine complies with the LOAC,<sup>294</sup> though with modern transportation methods, transferring the body to the detainees home and family may be possible and appropriate.

### CONCLUSION

In May, 2010 the White House issued the National Security Strategy, which included the conduct of prolonged or indefinite detention.<sup>295</sup> Under that strategy:

[D]etainees who cannot be prosecuted – but pose a danger to the American people – we must have clear, defensible, and lawful standards. We must have fair procedures and a thorough process of periodic review, so that any prolonged detention is carefully evaluated and justified. And keeping with our Constitutional system, it will be subject to checks and balances. The goal is an approach that can be sustained by future Administrations, with support from both political parties and all three branches of government.

Despite the ongoing indefinite detention of 48 individuals at Guantanamo, the strategy remains aspirational. That need not and would not be the case if the Administration were to match rhetoric with action and adopt a law of war based model.

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293. Geneva Convention for Prisoners, *supra* note 6, at arts. 120-21; Geneva Convention for Civilians, *supra* note 6, at arts. 129-31.

294. Army Regulation 190-8, *supra* note 42, §§3-10, 6-14.

295. The White House, *National Security Strategy*, (May, 2010), available at [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf).

