

Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy

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*Detention operations, while critical to successful counterinsurgency operations, also have the potential to become a strategic liability for the U.S. and ISAF. . . . Because of the classification level of the [Bagram Theater Internment Facility] and the lack of public transparency, the Afghan people see U.S. detention operations as secretive and lacking in due process.*¹

I. Introduction

United States detention operations in Afghanistan have been criticized by international law scholars, human rights organizations, and the citizens of Afghanistan on a number of fronts, from abusive physical treatment to harsh enhanced interrogation techniques.² This article does not address

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¹ Letter from General Stanley A. McChrystal, Commander, U.S. Forces–Afghanistan/Int'l Sec. Assistance Force, Afg., to the Honorable Robert M. Gates, Sec'y of Def., subject: COMISAF's Initial Assessment, annex F, at F-1 (Aug. 30, 2009) (Detainee Operations, Rule of Law, and Afghan Corrections) (on file with author) [hereinafter General McChrystal Assessment]. In December 2009, the Bagram Theater Internment Facility (BTIF) was closed and the new \$60 million Detention Facility in Parwan (DFIP) opened. See Willy Stern, *Nothing to Hide*, WKLY. STANDARD (Jan. 4 & 11, 2010), at 20. Parwan is the name of the Afghan Province slightly northwest of Kabul Province. Bagram airfield is in Parwan Province. General McChrystal was the International and Security Assistance Force (ISAF)/U.S. Forces–Afghanistan (USFOR-A) Commander from 15 June 2009 through 23 June 2010. See *infra* note 88.

² There has been extensive scholarship in this area that provides insight and analysis on the problems that emerged as a result of flawed legal opinions provided in the former administration.

Well known is the storm of criticism that erupted over the initial US government position that the Geneva Conventions—and, presumably, customary law of armed conflict—provided no legal guarantee of minimum treatment standards for enemy combatants captured in OEF. Many critics have attributed detainee abuses in Afghanistan to these foundational legal decisions.

Matthew C. Waxman, *The Law of Armed Conflict and Detention Operations in Afghanistan*, THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS, 85 INT'L L. STUD. 346 (Michael N. Schmitt ed., 2009) (referring to President Bush's 7 February 2002 memorandum on humane treatment of al Qaeda and Taliban detainees). *Id.* See also Memorandum from President

those issues given that significant legal developments over the past five years have made them less pressing.³ Rather it focuses on a different aspect of treatment: “due process” afforded to detainees under international and U.S. domestic law.⁴ In recent years, lack of such substantive and

George W. Bush to Vice President et al. on Humane Treatment of Al Qaeda and Taliban Detainees (Feb. 7, 2002), reprinted in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 134 (Karen J. Greenberg & Joshua Dratel eds., 2005) [hereinafter Bush February 2002 Humane Treatment Memorandum]; Dick Jackson, *Interrogation and Treatment of Detainees in the Global War on Terror*, in THE WAR ON TERROR AND THE LAW OF WAR: A MILITARY PERSPECTIVE 148–49 (Geoffrey S. Corn ed., 2009) (“These amorphous standards were susceptible to abuse, resulting in numerous subsequent investigations of misconduct toward detainees in Afghanistan.”); JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 115 (2007) (“The press, scholars, human rights groups, the International Committee of the Red Cross, and American Allies balked loudly at decisions that in World War II would have been commonplace. The unusual nature of the war and extensive changes in the legal culture made previously uncontroversial wartime practices seem very controversial, illegal, even radical.”); LOUIS FISHER, THE CONSTITUTION AND 9/11: RECURRING THREATS TO AMERICA'S FREEDOMS 215 (2008) (“After 9/11, there were widespread reports, often confirmed by U.S. agencies, of detainees being kicked, punched, slammed into walls, and subjected to cruel, inhuman, and degrading treatment.”).

³ All three branches of the Government took action in the 2005–06 timeframe and those efforts have continued to the present to ensure the practical implementation of the improvements in treatment and interrogation practices are maintained. Congress passed the Detainee Treatment Act (DTA) in 2005. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2742–44 [hereinafter DTA]. The DTA contained provisions requiring all Department of Defense (DoD) personnel to limit their treatment and interrogation techniques to those listed in the U.S. Army Field Manual, *Intelligence Interrogation*. DTA, *supra*, § 1402 (referring to U.S. DEP'T OF ARMY, FIELD MANUAL 34-52, INTELLIGENCE INTERROGATION (28 Sept. 1992) later republished as U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS (Sept. 2006) [hereinafter FM 2-22.3]). In 2006, the Supreme Court held that the minimum humane standard treatment of Common Article 3 applied in the global war on terror. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). Also in 2006, the DoD issued two directives, one for its Detainee Program and one for its Law of War Program, each stating that the law of war and its humane treatment standard was applicable to all detainees in the war on terror. U.S. DEP'T OF DEF., DIR. 2311.01E, DOD LAW OF WAR PROGRAM (May 9, 2006) [hereinafter DOD LAW OF WAR PROGRAM]; U.S. DEP'T OF DEF., DIR. 2310.01E, DOD DETAINEE PROGRAM (Sept. 5, 2006). See also *infra* note 6 for a description of the actions that continued through 2009.

⁴ The author's use of the term “due process” in this article is not a reference to the U.S. concept of due process as derived from the U.S. Constitution and applied to U.S. citizens. Rather, the author uses “due process” as a more generic term to describe the application of substantive and procedural protections to non-U.S. citizen (unlawful) combatants detained on a foreign battlefield, specifically, all detainees in U.S. custody in Afghanistan. As demonstrated below, this article suggests that any basic concept of “due process”—a system with notice provisions accompanied by the detainee's ability to appear and meaningfully challenge his detention before an

procedural protections has garnered significant attention from a wide audience,⁵ including our own Government.⁶

That no person shall be deprived of life, liberty, or property without “due process of law”⁷ is a concept fundamental to all U.S. citizens. However, “due process” is mostly an American term and the concepts of due process as applied to U.S. citizens are certainly not applicable to non-U.S. citizens detained on the battlefield overseas. This article examines the process of review—primarily the procedural and substantive protections—afforded to those detained in combat operations in Afghanistan. Specifically, how does a detainee challenge his (potentially indefinite) internment in a meaningful manner? Before describing the current Detainee Review Board (DRB) process, this article briefly reviews the history of detention review and protections within that system in Afghanistan. This look at the past—from 2002 through 2009—is relevant background to the development of the more robust new DRB process.

impartial review board—was, for years, essentially ignored when it came to detainees in Afghanistan.

⁵ As with the physical aspects of detention (interrogation and treatment), there have also been numerous scholarly articles providing critical insight on the detention policy flaws, or more appropriately, lack of a policy delineating a procedural regime for the review of detention. See Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1108–16 (2008) (providing an in-depth analysis on the due process, or lack thereof, afforded to detainees, including a comparative chart of the procedural safeguards available in various models). *Id.* app. A, at 1133. See also BENJAMIN WITTES, *LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR* 44–71 (2008) (discussing the Executive branch’s failure to work with Congress soon after 11 September 2001 to create a proscribed set of rules for detention and later Congress’s failure to adopt a comprehensive detention regime when enacting legislation in 2005 and 2006); Waxman, *supra* note 2, at 343 (reviewing the detention adjudicatory process); James A. Schoettler, Jr., *Detention of Combatants and the Global War on Terror*, in *THE WAR ON TERROR AND THE LAW OF WAR: A MILITARY PERSPECTIVE* 103–23 (Geoffrey S. Corn, ed., Oxford Univ. Press, 2009) (reviewing the policies and decision of the three branches of the U.S. Government). For critiques by human rights organizations, see *Undue Process: An Examination of Detention and Trials of Bagram Detainees in April 2009*, HUM. RTS. FIRST (Nov. 2009) [hereinafter *Undue Process*] (on file with author); *Fixing Bagram: Strengthening Detention Reforms to Align with U.S. Strategic Priorities*, HUM. RTS. FIRST (Nov. 2009) [hereinafter *Fixing Bagram*] (on file with author).

⁶ Recognition by our Government has come through Supreme Court litigation, executive orders, and congressional action. For an excellent, concise review of the federal litigation over detainee due process rights, see Schoettler, *supra* note 5, at 101–22 (analyzing *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 517 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene v. Bush*, 553 U.S. 723 (2008); *Maqaleh v. Gates*, No. 09-5265, 2010 U.S. App. LEXIS 10384 (D.C. Cir. May 21, 2010). See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 [hereinafter *MCA 2006*]; Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2474 [hereinafter *MCA 2009*]. See also Exec. Order No. 13,491, 74 C.F.R. 4893 (2009) (ensuring lawful interrogations); Exec. Order No. 13,492, 74 C.F.R. 4897 (2009) (Review and Disposition of Individuals Detained at Guantanamo Bay Naval Base and Closure of Detention Facilities); Exec. Order 13,493, 74 C.F.R. 4901 (2009) (Review of Detention Policy Options). The congressional action included the DTA, *supra* note 3, and the Military Commissions Acts of 2006 and 2009.

⁷ U.S. CONST. amends. V and XIV § 1.

Understandably, even with the implementation of new procedures in September 2009, many may still wonder, has the process come far enough? Then consider the perspective of U.S. forces involved in deadly combat operations in Afghanistan, and the question may be, has the process gone too far?

When discussing what substantive and procedural protections should be afforded to non-U.S. citizens, in particular, detainees captured on a foreign battlefield, the starting point is what law applies—U.S. law, the Law of Armed Conflict (LOAC), International Human Rights Law (IHRL), or some combination of the three? This article examines all three, and ultimately concludes that U.S. law and policy, as informed by the LOAC, and Common Article 3, provide the basis for the most robust set of substantive and procedural rules ever afforded to detainees in armed conflict. Additionally, this article supports the U.S. position that IHRL is not applicable to U.S. combat operations in Afghanistan.

Under a traditional law of armed conflict (LOAC) analysis, the process afforded to combatants captured in international and non-international armed conflict is guided by the Geneva Conventions⁸ and, for the United States, implementation of any such process is further guided by policy and implementing regulations.⁹ Finally, despite years of training within this paradigm prior to 11 September 2001, the United States determined that detainees in Afghanistan

⁸ See generally GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 149–67 (2010) (providing an in-depth analysis on the framework for the law of war with respect to international and non-international armed conflicts); Charles Garraway, *Afghanistan and the Nature of Conflict*, *THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS*, 85 INT’L L. STUD. 157–80 (Michael N. Schmitt ed., 2009) (U.S. Naval War College International Studies); Geoffrey S. Corn, *What Law Applies to the War on Terror?*, in *THE WAR ON TERROR AND THE LAW OF WAR: A MILITARY PERSPECTIVE* 1–36 (Geoffrey S. Corn ed., 2009). While Common Article 3 of the four 1949 Geneva Conventions provides the baseline for humane treatment in a non-international, or internal, armed conflict (such as the current conflict in Afghanistan), only one paragraph within Common Article 3 addresses due process: “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 all civilized peoples.” Geneva Convention Relative to the Treatment of Prisoners of War art. 3, para. (1)(d), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter *GC III*]. By comparison, provisions in Additional Protocols I (art. 75) and II (art. 6) of 1977 provide considerably more due process protections. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I) art. 75, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter *AP I*]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II) art. 6, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter *AP II*], *reprinted in* INT’L & OPERATIONAL L. DEP’T, *THE JUDGE ADVOCATE GEN.’S SCH., U.S. ARMY, LAW OF WAR DOCUMENTARY SUPPLEMENT* 208–10, 228 (2009) [hereinafter *LAW OF WAR DOC. SUPP.*].

⁹ DOD LAW OF WAR PROGRAM, *supra* note 3. See also U.S. DEP’T OF ARMY, REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES (Oct. 1, 1997) [hereinafter *AR 190-8*].

would not be afforded prisoner of war status under the Third Geneva Convention.¹⁰ The law (not policy) governing the type and level of due process to be afforded to detainees in Afghanistan is difficult to determine today, let alone in 2002 when commanders and legal advisors on the ground were told to act in a “manner consistent with”¹¹ Geneva (policy), but not “in accordance with” Geneva (law).

As further discussed, the Chief Executive (and thus the Department of Defense) has a legal basis to detain persons during armed conflict. The detaining authority has an international obligation to review the circumstances of detention and provide a procedural review of such detention to the detainee.¹² The detaining authority must decide what administrative process will be used to determine if a person should remain interned. Once that process is implemented (as it has been and will be described in this article), will it pass the test of fundamental fairness sufficient to withstand the scrutiny of the international community and U.S. courts? Between 2001 and mid-2009, the system of detention review in Afghanistan did not survive such scrutiny and was fairly characterized as a “strategic liability.”¹³ Scrutiny by Article III courts is ongoing, with mixed results thus far at the district court and appellate court levels.¹⁴ This article examines the new review process directed in July 2009 and implemented in September 2009 and suggests that it can and

will survive such scrutiny and emerge as a legitimate process so long as it is (and continues to be) implemented in a robust and transparent manner.

While “detention” is a broad topic, the focus here is narrow: procedural and substantive protections afforded to LOAC detainees. To properly assess the current status of the detention review process in Afghanistan, it is appropriate and instructive to critically assess past review procedures and acknowledge the deficiencies in those processes. As the federal litigation over the issues with the Guantanamo detainees revealed flaws in the Combatant Status Review Tribunals (CSRTs),¹⁵ recognition of the “undue process”¹⁶ afforded to detainees in U.S. custody in Afghanistan gave way to gradual changes in the system.¹⁷

What follows is a critical look at the past, but more importantly, a cautiously optimistic look at the current and future state of the new DRBs in Afghanistan. Part II briefly describes the history of detention in Afghanistan and then examines the policies and procedures for review of detention between 2002 and mid-2009. Because notable scholars and commentators have provided numerous, in-depth analyses of the actions (and reactions) of the Article III courts, Congress, and the Executive pertaining to detainee rights,¹⁸ this article need not retread that ground and thus only contains brief references to the relevant cases, legislation, and executive orders or directives for contextual purposes.

Based on the history, President Obama made some immediate strategic policy decisions and ordered a review of all detention operations in January 2009. As a result of that review, the Secretary of Defense ordered new procedures for review boards and the creation of a new task force to take over detention operations in July and September 2009, respectively. Part III focuses on the improvements in the detention review procedures in Afghanistan and Joint Task Force (JTF) 435, the task force charged with running all detention operations in Afghanistan, and more specifically, the Legal Operations Directorate of JTF 435, the team responsible for the daily operations of the DRBs. A description of those new procedures—and the personnel charged with implementing them—reveals a process designed to ensure that due process protections are afforded to the detainees housed at the new Detention Facility in Parwan (DFIP).

¹⁰ Bush February 2002 Humane Treatment Memorandum, *supra* note 2. See also *infra* note 47 (discussing President Bush’s determination that Taliban and al Qaeda detainees did not qualify for prisoner of war status).

¹¹ Bush February 2002 Humane Treatment Memorandum, *supra* note 2, para. 5.

¹² Virtually all legal scholars agree that the current conflict in Afghanistan is a Common Article 3 conflict—a non-international armed conflict. See generally THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS, 85 INT’L L. STUD. (Michael N. Schmitt ed., 2009) (U.S. Naval War College International Studies); THE WAR ON TERROR AND THE LAW OF WAR: A MILITARY PERSPECTIVE (Geoffrey S. Corn ed., Oxford Univ. Press, 2009). Since the application of GC III (for prisoners of war) is not applicable to the current detainees in Afghanistan as a matter of law. Even so, practitioners always default to the principles of the Geneva Conventions when searching for an analogous legal framework. In this regard, rather than the “prisoner of war” terminology from GC III, the general legal framework currently applied in Afghanistan uses civilian security internee concept from the Fourth Geneva Convention. See Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]. Under article 78 of GC IV, if the detaining authority “considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most subject them to assigned residence or to internment.” *Id.* art. 78. Article 79 of GC IV then states that protected persons shall not be interned except in accordance with the provisions of articles 41, 42, 43, 68, and 78. *Id.* art. 79. Initial internment “may be ordered only if the security of the Detaining Power makes it absolutely necessary. *Id.* art. 42. Once an initial internment decision is made article 43 of GC IV requires, among other provisions, a court or administrative board to review the initial decision at least twice yearly. *Id.* art. 43. Finally, article 68 distinguishes between internment and imprisonment with the former only authorized to deprive the detainee of liberty. *Id.* art. 68.

¹³ General McChrystal Assessment, *supra* note 1.

¹⁴ Chesney & Goldsmith, *supra* note 5, at 1110–17. See also Schoettler, *supra* note 5, at 117–23.

¹⁵ See *infra* note 38.

¹⁶ *Undue Process*, *supra* note 5.

¹⁷ While the author cannot point to specific mandates to change the review process for the Afghanistan detainees between 2002 and July 2009, history shows that slight adjustments were made over time. See Part II *infra*.

¹⁸ See, e.g., FISHER, *supra* note 2; Chesney & Goldsmith, *supra* note 5; Schoettler, *supra* note 5.

Part IV reviews the criticisms of the new DRB process, primarily those made by human rights organizations. To put such criticisms in context, the section provides a brief history of such organizations and the role of international human rights law. In February 2010, a petition for writ of habeas corpus was filed in the U.S. District Court for the District of Columbia on behalf of two Bagram detainees. The timing of this petition, when put into context with the overall timeline detailed in this article, provides an excellent illustration of the rapidly evolving process, including examples of complaints rendered moot by the DRB procedures. Finally, the section considers what principles under customary international law meet the baseline due process requirements for detainees captured and interned in Afghanistan, an active theater of combat.

Part V concludes that the new detention review paradigm initiated in Afghanistan sets the conditions for a fair and transparent review process when implemented in a robust manner. The DRBs—officially stood up by Combined Joint Task Force–82 (CJTF-82) in September 2009 and taken over by JTF 435 in January 2010—remain a work in progress. As personnel continue to flow into the Legal Operations Directorate and best operating practices are refined, there is potential for policymakers to adjust the policy as necessary to improve the system. Along with a review of the current scholarship and debate on the topic of detention review comes an acknowledgment that legal scholars and the international community may not agree that the new procedures provide the appropriate level of procedural protections. However, as this article suggests, the DRB process—a process currently guided by Common Article 3 as supplemented by U.S. policy—provides more procedural protections afforded to combatants than are required by law, international or domestic. Finally, what should be revealed, even to the critics of the new process, is an undisputed improvement from past practices and the notion that the DRBs have made progress in the battle to transform what was once a strategic liability for the United States into a symbol of legitimacy for the Afghan people and a new model for security detention review processes for the world.

II. A Brief History of Detention in Afghanistan

A. September 11, 2001, and the Authorization to Use Military Force

After the terrorist attacks against the United States on 11 September 2001, Congress passed legislation—the Authorization for the Use of Military Force (AUMF)—authorizing the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or

aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”¹⁹

On 7 October 2001, the U.S. Air Force started bombing Taliban forces in Afghanistan.²⁰ Later, on 19 October, Soldiers from the 5th Special Forces Group, fighting alongside Afghan General Abdul Rashid Dostum and his tribesmen, saw the first ground combat action against the Taliban militia south of Mazar-i-Sharif, Afghanistan.²¹ By 24 November 2001, detention operations began.²² While the earliest detention of Taliban militia and al Qaeda terrorists at the Qali-i-Janga fortress near Mazir-i-Sharif was under the control of the Northern Alliance, U.S. personnel were involved.²³ As U.S. forces gained a foothold in Afghanistan, field detention sites controlled by U.S. forces began to emerge around Afghanistan.²⁴

¹⁹ See RICHARD F. GRIMMETT, CRS REPORT FOR CONGRESS, AUTHORIZATION FOR USE OF MILITARY FORCE IN RESPONSE TO THE 9/11 ATTACKS: LEGISLATIVE HISTORY (updated Jan. 16, 2007), available at <http://fas.org/sgp/crs/natsec/RS22357.pdf>. After the Senate passed Joint Resolution 23 on 14 September 2001, the President signed the legislation into law on 18 September 2001. Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter AUMF]. Section 2(a) of the AUMF reads:

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

Id.

²⁰ See DOUGLAS STANTON, HORSE SOLDIERS: THE EXTRAORDINARY STORY OF A BAND OF U.S. SOLDIERS WHO RODE TO VICTORY IN AFGHANISTAN 46 (2009). See also Stephane Ojeda, *U.S. Detention of Taliban Fighters: Some Legal Considerations*, THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS, 85 INT’L L. STUD. 358–59 (Michael N. Schmitt ed., 2009) (U.S. Naval War College, International Law Studies).

²¹ Captain Mitch Nelson, Team Leader, Operational Detachment–Alpha 595, 3d Battalion, 5th Special Forces Group, called in a B-52 airstrike on Taliban militia near the village of Chapchal, Afghanistan. STANTON, *supra* note 20, at xiii–xiv, 144–58.

²² *Id.* at 289–99 (describing the combined actions of the 5th Special Forces Group and Central Intelligence Agency Paramilitary Officers, including Mike Spann who, on 25 November 2001, became the first person killed in the war on terror during a Taliban and al Qaeda uprising at the Qali-i-Janghi Fortress). *Id.* at 10–11.

²³ See generally *id.* at 289–33.

²⁴ GOLDSMITH, *supra* note 2, at 107 (describing the makeshift prisons, including the Qali-i-Janghi Fortress, a prison at Shirbarghan, at Kandahar airbase, and other U.S. bases around Afghanistan, and naval ships in the Arabian Sea).

Once the Executive Branch decided to use Guantanamo Bay (GTMO), Cuba, to house personnel captured in the Global War on Terrorism,²⁵ as early as January 2002, many suspected Taliban and al Qaeda terrorists, as well as those suspected of associating with and supporting them, were transferred from U.S. detention sites in Afghanistan to the U.S. internment facilities at GTMO.²⁶ Some other detainees remained in Afghanistan. In February 2002, the Center for Constitutional Rights filed its first motion challenging the legality of detention at GTMO in the case of *Rasul v. Bush*.²⁷ While it took more than two years to reach the Supreme Court, in June 2004, the Court opened the door for federal litigation by holding “the federal courts have jurisdiction to determine the legality of the Executive’s potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing.”²⁸

On the same day it released the *Rasul* opinion, the Court released a separate opinion on the issue of the President’s (and therefore, U.S. forces’) authority to detain. In *Hamdi v. Rumsfeld*,²⁹ the Government asserted two bases for detention of enemy combatants: the President’s authority under Article II of the U.S. Constitution and the AUMF. A plurality of the Court in *Hamdi* held the AUMF constituted “explicit congressional authorization for the detention of individuals”;³⁰ however, the Court purposefully did not address the Government’s argument that the President had

lawful authority to detain enemy combatants under his war powers derived from Article II.³¹ Four years after *Hamdi*, the Supreme Court reaffirmed that the AUMF provides a lawful basis for detention in *Boumediene v. Bush*.³²

While U.S. forces had the legal authority to detain enemy combatants,³³ the question of continued internment—or indefinite detention—in Afghanistan was overshadowed early on by other shocking events, namely the abuses at Abu Ghraib in Iraq, the use of harsh interrogation techniques by U.S. personnel at various detention sites, and the death of

²⁵ *Id.* at 108. At some point in December 2008, the Executive Branch decided to use Guantanamo Bay as a detention site. After the decision to use military commissions as a forum to try the detainees, the Office of the Legal Counsel (OLC) rendered a legal opinion to the Department of Defense Gen. Counsel on the Habeas implications of using GTMO. See Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, reprinted in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 25–28 (Karen J. Greenberg & Joshua L. Dratel eds., Cambridge Univ. Press, 2005); Memorandum from Patrick L. Philbin & John Yoo, Deputy Assistant Attorneys Gen. to William J. Haynes, II, Gen. Counsel, Dep’t of Defense, Possible Habeas Jurisdiction Over Aliens Held in Guantanamo Bay, Cuba (Dec. 28, 2001), reprinted in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 29–37 (Karen J. Greenberg & Joshua L. Dratel, eds., Cambridge Univ. Press, 2005).

²⁶ Ojeda, *supra* note 20, at 358. See also Joint Task Force Guantanamo: Safe, Humane, Legal Transparent 2 (Jan. 27, 2010) (on file with author). Joint Task Force 160 was reactivated in December 2001 and “Camp X-Ray [was] prepared as a temporary location for detention operations.” In January 2002, “[t]he first detainees are brought to Guantanamo Bay and housed in Camp X-Ray. The International Committee of the Red Cross visits six days later.” *Id.*

²⁷ 542 U.S. 466 (2004). See Center for Constitutional Rights, *Rasul v. Bush*, <http://ccrjustice.org/ourcases/past-cases/rasul-bush> (last visited Apr. 1, 2010) (providing a synopsis of the organization’s early involvement with the first detainees sent to Guantanamo Bay).

²⁸ *Rasul*, 542 U.S. at 485.

²⁹ 542 U.S. 507 (2004). See also Memorandum Opinion from John Yoo, Deputy Assistant Attorney Gen. to Timothy Flanigan, Deputy Counsel to the President, The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them (Sept. 25, 2001), reprinted in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 3–24 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

³⁰ *Hamdi*, 542 U.S. at 517.

³¹ “The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution. We do not reach the question whether Article II provides such authority, however, because we agree with the Government’s alternative position, that Congress has in fact authorized Hamdi’s detention, through the AUMF.” *Id.* at 516–17. The Government has also asserted Executive authority under the AUMF and Article II in other areas after 11 September. Notably, with respect to the Terrorist Surveillance Program (TSP), the Bush Administration’s authorization for the National Security Agency (NSA) to eavesdrop on citizens and non-citizens within the United States without a court-approved warrant was premised on AUMF and Article II authority. See FISHER, *supra* note 2, at 292. In a 2006 case challenging the Administration’s statutory and constitutional defense of the TSP, the Sixth Circuit Court of Appeals rejected both Government arguments. *Id.* at 304–09; see also Am. Civil Liberties v. Nat’l Sec. Agency, 438 F. Supp. 2d 754 (E.D. Mich. 2006)).

³² 128 S. Ct. 2229 (2008). “In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), five members of the Court recognized that detention of individuals who fought against the United States in Afghanistan “for the duration of the particular conflict in which they were captured, is so fundamental and accepted as incident to war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.” *Id.* at 2240–41 (writing for 5–4 majority in *Boumediene*, Justice Kennedy quoted the plurality opinion of Justice O’Conner in *Hamdi*, 542 U.S. at 518). It should also be noted that numerous international law scholars agree with the lawful authority of the United States to detain lawful and unlawful combatants in the war on terror. See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2083 (May 2005) (The authors build on the AUMF analysis undertaken by the *Hamdi* Court and provide their own extensive analysis and comparison to prior authorizations for the President to use force and conclude: “[t]he AUMF should . . . be interpreted to as conferring full congressional authorization for the President to prosecute a war against nations, organizations, and persons that he determines have the requisite connections to the September 11 attacks.”). See generally GEOFFREY S. CORN ET AL., THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE (Geoffrey S. Corn ed., 2009) (containing stand alone chapters, albeit with a common theme, drafted by six notable international law scholars, on various aspects of the war on terror. Despite the variety of topics, such as targeting, detention, interrogation, and punishment of terrorists, as Professor Corn, writing for all of the authors, notes “there is no doubt that the United States has and will continue to invoke the law of war as a source of authority for military operations to destroy, disable, capture, and incapacitate terrorist enemies.”). *Id.* at xvi. See also THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS, 85 INT’L L. STUD. pts. I–IV (Michael N. Schmitt ed., 2009) (U.S. Naval War College International Law Studies). In the first four parts of this volume, fourteen international law scholars examine various aspects of the war in Afghanistan, and although critical of certain policies and procedures in various facets of the war, each implicitly, if not explicitly by their subject matter, acknowledges the fundamental authority of the U.S. to detain personnel in Afghanistan. See also Major Robert E. Barnsby, *Yes We Can: The Authority to Detain as Customary International Law*, 202 MIL. L. REV. 53 (2010) (proposing that detention is part of customary international law).

³³ AUMF, *supra* note 19.

abused prisoners at Bagram.³⁴ Additionally, after grappling with the habeas litigation and military commissions³⁵ for a number of years, in 2008, in *Boumediene v. Bush*,³⁶ the Supreme Court opined that the initial review boards for GTMO detainees—the Combatant Status Review Tribunals—provided insufficiently robust procedural protection and held that the Detainee Treatment Act (DTA)³⁷ review of the CSRTs did not provide an adequate substitute for habeas corpus.³⁸ Moreover, while the Supreme Court has heard numerous cases for the GTMO detainees, the threshold issue of access to Article III courts for habeas review for detainees currently held in Afghanistan is currently making its way through the U.S. federal courts.³⁹

³⁴ See *supra* note 2. See also Tim Golden, *In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. TIMES.COM, May 20, 2005, <http://www.nytimes.com/2005/05/20/international/asia/20abuse.html>.

³⁵ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

³⁶ 553 U.S. 723 (2008).

³⁷ DTA, *supra* note 3, § 1005(e). After providing a detailed history and explanation of the Writ of Habeas Corpus, the *Boumediene* Court holds that the Suspension Clause of the Constitution has full effect at GTMO, thus providing the GTMO detainees a Constitutional right to the writ. *Boumediene*, 128 S. Ct. at 2262. With the holding that the detainees are entitled to the privilege of habeas corpus, the Court next addresses the issue of whether Congress, through the DTA § 1005(e) has provided an adequate substitute to the writ. *Id.* at 2262–63. While the Court normally would have remanded such an issue to the Court of Appeals, because of “[t]he gravity of the separation-of-powers issues . . . and the fact that these detainees have been denied meaningful access to a judicial forum for a period of years render these cases exceptional,” the Court takes on the task itself. *Id.* at 2263. In doing so, the Court does “not endeavor to offer a comprehensive summary of the requisites of determining an adequate substitute[, but does] consider it uncontroversial . . . that the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to [an erroneous application] of relevant law. (citation omitted). And the habeas court must have the power to order the conditional release of an individual unlawfully detained . . .” *Id.* at 2266. The Court found that Congress, through the DTA, did not authorize an adequate review of the CSRTs. *Id.*

³⁸ The Court continued its examination of the overall process of review, specifically the CSRTs stating “the necessary scope of habeas review in part depends upon the rigor of any earlier proceedings accords with our test for procedural adequacy in the due process context.” *Id.* at 2268. In assessing “the CSRT process, the mechanism through which the [detainees]’ designation as enemy combatants became final,” the Court addressed the “myriad deficiencies” in the CSRTs, primarily, “the constraints upon the detainee’s ability to rebut the factual basis for the Government’s assertion that he is an enemy combatant.” *Id.* at 2269. Specifically, the Court notes the detainee’s limited means to find or present evidence to challenge the Government’s case; no assistance of counsel; unaware of the most critical allegations against him; access only to unclassified information; and can only confront witnesses that testify, yet unlimited hearsay. *Id.* Interestingly, while taking the extraordinary step to address the issues of review in detail, the Court “make[s] no judgment as to whether the CSRTs, as currently constituted, satisfy due process standards,” yet the Court agrees with the detainees’ position even when all parties “act with diligence and good faith, there is considerable risk of error in the tribunal’s findings of fact [when the process] is ‘closed and accusatorial.’” *Id.* at 2270.

³⁹ See *Maqaleh v. Gates*, No. 09-5265, 2010 U.S. App. LEXIS 10384 (D.C. Cir. May 21, 2010).

In May 2010, the D.C. Circuit Court of Appeals, in *Maqaleh v. Gates*,⁴⁰ dismissed the habeas petitions of three non-Afghans. While the time period has not expired for the petitioners in *Maqaleh* to file a writ of certiorari,⁴¹ if the same litigation pattern emerges for the Afghanistan detainees, then it follows that the detention review procedures in Afghanistan will receive the same scrutiny as the CSRTs. Consider the *Boumediene* Court’s concerns about the inadequacies of the CSRTs and the *Maqaleh* Court’s holding in May 2010 in the following section’s

⁴⁰ This case began with four detainees, all captured outside Afghanistan and later transferred to Bagram. Three are non-Afghans (Fadi al Maqaleh and Amin al Bakri are Yemeni citizens who were captured in the United Arab Emirates (UAE) and Thailand, respectively; Redha al Najjar is a Tunisian citizen who was captured in Pakistan; and Haji Wazir, an Afghan citizen, was captured in Dubai). On 2 April 2009, Judge John D. Bates of the District of Columbia District Court ruled that the three non-Afghans captured outside Afghanistan and brought to Bagram have a constitutional right to habeas corpus and can challenge their detention in U.S. article III courts. Judge Bates dismissed the petition of Wazir, the Afghan, to avoid “friction with Afghanistan.” When commenting on the review process afforded to the detainees in Bagram, Judge Bates stated that they were less sophisticated than the CSRTs at GTMO, fall well short of what the *Boumediene* Court found was inadequate at GTMO, and were provided the detainee no opportunity to meaningfully rebut the Government’s assertion. *Maqaleh v. Gates*, Civ. Action No. 06-1669, mem. op. (D.D.C. Apr. 2, 2009) (Bates, J.). See also *Fixing Bagram*, *supra* note 5, at 16. See also BENJAMIN WITTES ET AL., *THE EMERGING LAW OF DETENTION: THE GUANTANAMO HABEAS CASES AS LAWMAKING* (2010) (Brookings Inst.). The Government appealed the decision on the remaining three detainees and it was argued at the D.C. Circuit Court of Appeals on 7 January 2010 and on 21 May 2010, that court dismissed the petitions. In the Court of Appeals decision, Chief Judge Sentelle concluded that “the right to habeas relief and the protection of the Suspension Clause does not extend to aliens held in Executive detention in the Bagram detention facility in the Afghan theater of war. *Maqaleh*, 2010 U.S. App. LEXIS 10384, at *39. In making its determination, the Court of Appeals addressed the adequacy of the process used to determine the detainee’s status. *Id.* at *27-28. While the appellate court disagreed with the district court on a number of points, on this one—the adequacy of the review process used at Bagram at the time the detainees were held—the higher court concurred that the Unlawful Enemy Combatant Review Board (UECRB) had fewer procedures than the CSRTs. *Id.* at *30. In a footnote, the court notes that the Government urged the court to consider the “new procedures that [have been] put into place at Bagram in the past few months for evaluating the continued detention of individuals.” *Id.* at *30–31. The court declined to consider the new DRBs and relied on the process in place at the time the detainees were held. *Id.*

⁴¹ When this article was submitted, it was still within the ninety days the petitioners had to file a Writ of Certiorari with the Supreme Court (approximately 21 August 2010). See RULES OF THE SUPREME COURT OF THE UNITED STATES R. 13.1, at 9 (16 Feb. 2010). Haji Wazir, the Afghan detainee whose case was dismissed by Judge Bates, was released as a result of his DRB in February 2010. For the three non-Afghan detainees involved in the *Maqaleh* case, all entered the Bagram Collection Point (as the detention facility was called at the time) in 2004: al Bakri and al Najjar on 20 May 2004 and al Maqaleh on 10 September 2004. See *infra* note 82. Since all three have been detained since 2004, they have all been through each type of review procedure at Bagram (all are described in detail below), and they remain in the DFIP. Each has been through the new DRB process, which is the main subject of this article: al Maqaleh had his initial review on 9 December 2009 and a subsequent six-month review on 12 June 2010; al Bakri had his initial review on 10 February 2010; and al Najjar had his initial review on 2 December 2009 and a subsequent six-month review on 12 June 2010. For all three, the DRB recommended continued internment. See *infra* notes 82 and 128 (all data was compiled from the “Super Tracker” during the author’s June 2010 trip to Afghanistan).

overview of the detainee review boards in Afghanistan between 2002 and mid-2009.

B. Detainee Review Boards (2002 through September 2009)

*We need to marvel at the depths from which we have come and dream of the heights to which we are yet to achieve.*⁴²

As noted above, detention operations began in Afghanistan as early as November 2001.⁴³ Initially, the primary detention site was Kandahar, an open-air site with tents. By May 2002, the Bagram Collection Point (BCP) became the primary detention facility in Afghanistan.⁴⁴ Located at Bagram Airfield (Bagram), a large coalition military base north of Kabul, the BCP was contained in a large Russian-built airplane hangar, a remnant of the Soviet occupation of Afghanistan from 1979–1989.⁴⁵ The BCP became the focal point of detention operations when CJTF-180 became the operational level headquarters in Afghanistan in May 2002. Around the same time, Combined Task Force–82 (CTF-82) took over as the tactical-level headquarters from the 10th Mountain Division. Control of detention operations by CJTF-180 included the dual mission of care and custody of detainees (by the Military Police (MPs)) and intelligence gathering operations (by Military Intelligence personnel (MI))—all under the same roof at the BCP.⁴⁶ The blurring of responsibilities of MPs and MI has been thoroughly criticized and need not be repeated here; however, the overlap likely resulted in an early system of detention review dominated by MPs and

MI—obviously interested parties—that had the responsibility to determine a detainee’s fate.⁴⁷

⁴⁷ It is worth a brief detour at this point to remind the reader why Article 5 tribunals under GC III were not implemented as a matter of course early on in Afghanistan to determine if Taliban or al Qaeda forces qualified for prisoner of war status. GC III, *supra* note 8, art. 5. As a starting point, GC III (and its provisions to determine who is entitled to prisoner of war status) is only applicable in Common Article 2 international armed conflicts (as was the situation “early on” in Afghanistan). Yet, as described in note 12 above, the current status of the armed conflict in Afghanistan is a Common Article 3 non-international, or internal, armed conflict, which means that GC III and its provisions do not apply and, thus, an insurgent in the internal armed conflict cannot get PW status. A brief explanation of the changing nature of the armed conflict in Afghanistan follows. Through 7 October 2001, Afghanistan was embroiled in an internal armed conflict; the parties to the conflict were the *de facto* Taliban-led Government of Afghanistan versus the insurgent Northern Alliance. At the time, only three of 194 nations (Pakistan, Saudi Arabia, and the United Arab Emirates) recognized the Taliban as the lawful, or *de jure*, Government of Afghanistan. Regardless, because the Taliban controlled eighty to ninety percent of Afghanistan, they were the *de facto* government pre-11 September 2001. The United States gave the Taliban Government an ultimatum to turn-over the al Qaeda terrorists who had safe-haven in Afghanistan. The Taliban Government refused. When the United States attacked Afghanistan on 7 October 2001, the international armed conflict involved the United States and its allies versus the Taliban-led Government of Afghanistan and its al Qaeda allies. It is undisputed that this was a Common Article 2 international armed conflict, thus triggering the full body of the law of war, including of course, GC III and its prisoner of war provisions. Exactly when the Common Article 2 conflict ended is a matter of debate (e.g., when the Taliban surrendered Kandahar, their seat of government, on 9 December 2009; when the Bonn Agreement was signed on 20 December 2001; or when President Hamid Karzai was elected on 13 June 2002); however, few dispute that after Karzai was appointed by the Loya Jirga in June 2002, the armed conflict clearly became an internal armed conflict. For purposes of this brief description, the author will assume June 2002 as the point the armed conflict changed in characterization from an international to an internal armed conflict: the Karzai-led Government of Afghanistan and its U.S. and coalition allies versus the insurgent Taliban and its terrorist al Qaeda allies. If GC III applied during this period of international armed conflict (October 2001 through June 2002), then why didn’t the United States implement Article 5 procedures to determine the status of Taliban and al Qaeda forces captured on the battlefield? The answer, while subject to much criticism over the years, is simple: President Bush, based on the advice of his lawyers, made two policy decisions on this exact matter: (1) that under no circumstances do any of the Geneva Conventions apply to al Qaeda, and (2) with respect to the Taliban, while GC III applies, there was no doubt as to their status. Taliban detainees were not Prisoners of War, but, rather unlawful combatants who did not comply with the laws of war; therefore, no article 5 tribunals were required to determine their status. See generally GOLDSMITH, *supra* note 2, at 118–19 (appropriately criticizing the Bush administration’s decision “to take a procedural shortcut with respect to the Geneva Conventions. While it was appropriate to deny al Qaeda and Taliban soldiers POW rights, there was a big question as to whether the people at Guantanamo were in fact members of the Taliban or al Qaeda.”); Waxman, *supra* note 2, at 347–49; John F. Murphy, *Afghanistan: Hard Choices for the Future of International Law*, in *THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS*, 85 INT’L L. STUD. 79, 84–88 (Michael N. Schmitt ed., 2009); Bush February 2002 Humane Treatment Memorandum, *supra* note 2, at 134–35 (presenting President Bush’s determination that “the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva”). In the memorandum, President Bush further stated, “I note that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.” *Id.* at 135. See also Memorandum from Jay S. Bybee, Assistant Attorney General to Alberto R. Gonzales, Counsel to the President on Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949 Humane Treatment (Feb. 7, 2002), *reprinted in THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 136–43 (Karen J. Greenberg & Joshua Dratel eds., 2005).

⁴² Interview with Lieutenant Colonel (LTC) Michael Devine, Deputy Dir., Legal Operations Directorate, JTF 435, in Bagram, Afg. (Feb. 1, 2010) [hereinafter Devine February Interview]. The author conducted a “continuous interview” with LTC Devine from 25 Jan. through 4 Feb. 2010 to learn everything possible about the DRBs in Afghanistan.

⁴³ While the legal basis for detention is discussed in detailed above, on a practical level detention during the early phases of combat operations were based on classified criteria. In general, the classified criteria, contained in classified rules of engagement (ROE) described persons belonging to certain categories (status-based detention based primarily on intelligence) as well as those who could be detained based on their conduct (conduct-based detention based on coalition forces’ observation of traditional hostile acts or hostile intent).

⁴⁴ Based on the author’s experience as Chief, Operational Law (including duties as Legal Advisor to the BCP, Legal Advisor to the Detainee Review Board, and International Committee of the Red Cross (ICRC) Liaison), Combined Joint Task Force 180 (CJTF-180), Bagram, Afghanistan, from 12 Nov. 2002 through 5 June 2003). Such experience includes general knowledge of detention operations in 2002 prior to my arrival based on reports read and transition with my predecessor. The primary unit comprising the staff of CJTF-180 was XVIII Airborne Corps, including a relatively small legal contingent from the Corps Office of the Staff Judge Advocate (the Staff Judge Advocate (SJA), Deputy Staff Judge Advocate (DSJA) (Forward), Chief of Operational Law, three captains, and three noncommissioned officers).

⁴⁵ Stern, *supra* note 1, at 19.

⁴⁶ See *supra* note 44.

C. Detainee Review Boards (Summer 2002–Summer 2005)

The first Detainee Review Boards (as they were originally called) began soon after CJTF-180 assumed control of detention operations and detainees were transferred from Kandahar and other outlying temporary holding facilities throughout Afghanistan to Bagram. These early DRBs continued in form and substance for approximately three years from the summer of 2002 through the summer for 2005. The composition of the DRB was approximately ten personnel, including MI, MPs, the members of the Criminal Investigative Task Force (CITF), and a judge advocate legal advisor. The DRB was chaired by the CJ2 (lead intelligence officer for CJTF-180) and included three or four other MI personnel from the CJ2 section (located in the Joint Operations Center (JOC)) and from the BCP. One MP officer from the detention facility was on the DRB as well as the CJTF-180 Provost Marshal. An investigator from CITF was also assigned to the DRB. The DRB met twice weekly in the JOC, the first session being a “pre-meeting” to review the files prepared by the MI personnel in more detail. This initial session was the appropriate time for the DRB members to discuss issues and work out any discrepancies at the action officer level prior to presenting the cases to the CJ2 in the regular session. In both sessions, MI analysts were responsible for preparing the files and presenting the cases to the DRB, highlighting the factors relevant to the detention criteria.⁴⁸

During the first two years of the DRBs at Bagram, specifically the period when detainees were still being transferred from Afghanistan to GTMO (the last transfers were in September 2004),⁴⁹ the primary determination of the DRB was whether or not a detainee met the (classified) criteria to be transferred to GTMO. To make that determination, the DRB had to resolve the threshold issue of whether the detainee was an enemy combatant. All available information—whether sparse “evidence packets” from the capturing units or packets built by interrogators in the BCP—was brought before the DRB to assess the criteria. If the detainee did not appear to meet even the threshold determination of being an enemy combatant due to the lack of evidence, as a courtesy (not a requirement), a designated DRB member would contact the capturing unit after the pre-meeting to inform the commander of the detainee’s likely release recommendation if no further information was provided. In general, this revelation would often prompt units to send representatives to the DRB to “testify” about the circumstances of capture and provide relevant evidence on the detainee’s acts, if any, to make a case for continued detention.

As a detainee’s case was presented, the members of the DRB would form a consensus regarding whether the

detainee met the criteria of an enemy combatant.⁵⁰ If the consensus was that there was not enough evidence, a recommendation for release would be made, and the detainee would be placed on a “release list” to be approved by the Commander, CJTF-180. If the detainee was determined to be an enemy combatant, the next question was whether the detainee met the criteria to be sent to GTMO. Intelligence gathering, at least through the *Hamdi* decision in mid-2004 (and perhaps beyond),⁵¹ was very much a basis for

⁵⁰ See also UPDATE TO ANNEX ONE OF THE SECOND PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE COMMITTEE AGAINST TORTURE pt. One § 2(D)(2) (May 2005), available at <http://www.state.gov/g/drl/rls/55712.htm> [hereinafter 2005 COMMITTEE AGAINST TORTURE REPORT].

Detainees under DoD control in Afghanistan are subject to a review process that first determines whether an individual is an enemy combatant. The detaining Combatant Commander, or designee, shall review the initial determination that the detainee is an enemy combatant. This review is based on all available and relevant information available on the date of the review and may be subject to further review based upon newly discovered evidence or information. The Commander will review the initial determination that the detainee is an enemy combatant within 90 days from the time that a detainee comes under DoD control. After the initial 90-day status review, the detaining combatant commander, on an annual basis, is required to reassess the status of each detainee. Detainees assessed to be enemy combatants under this process remain under DoD control until they no longer present a threat. The review process is conducted under the authority of the Commander, U.S. Central Command (USCENTCOM). If, as a result of the periodic Enemy Combatant status review (90-day or annual), a detaining combatant commander concludes that a detainee no longer meets the definition of an enemy combatant, the detainee is released.

Id. See also *Fixing Bagram*, *supra* note 5, at 5 and note 23.

⁵¹ In *Hamdi*, Justice O’Connor stressed the point that while detention was clearly authorized under the AUMF, the “purpose of detention is to prevent captured individuals from returning to the field of battle and talking up arms once again.” *Hamdi*, 542 U.S. at 518. Justice O’Connor cites many examples to support her premise, and in response to Hamdi’s argument that the AUMF does not authorize indefinite detention, she states: “Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized.” *Id.* at 521. Prior to the *Hamdi* decision in June 2004, as noted in the text, interrogation and intelligence gathering was very much as part of the decision-making process for continued internment. After the *Hamdi* decision, recognition that holding a detainee solely, or even primarily, for intelligence gathering purposes made its way to the field through the practices implemented at the review boards as described in this section. Beginning with the Enemy Combatant Review Boards in the summer of 2005, the board focus shifted to whether the detainee met the enemy combatant status criteria and away from the detainee’s intelligence value. See *infra* notes 65–66. See also U.S. DEP’T OF ARMY, FIELD MANUAL 3-24 & U.S. MARINE CORPS WARFIGHTING PUB. 3-33.5, COUNTERINSURGENCY para. 7-40 (15 Dec. 2006) (discussing information and intelligence-gathering as a basis for detention).

Individuals suspected of insurgent or terrorist activity may be detained for two reasons:

- To prevent them from conducting further attacks.
- To gather information to prevent other insurgents or terrorists from conducting attacks.

⁴⁸ See *supra* note 44.

⁴⁹ See *infra* note 61.

continued internment, whether at the BCP or GTMO. Considering that MI analysts presented the cases to the DRB, the intelligence value of the detainee was a prime factor in the decision-making process. If the detainee met the criteria for GTMO, then he would be placed on the “GTMO list” with a recommendation for transfer that the CJ2 would present to the Commander, CJTF-180.

All detainees had an initial ninety-day review and then an annual review.⁵² If a detainee was designated as an enemy combatant at the ninety-day review, but did not meet the more stringent requirements to be sent to GTMO, then the MI analysts would present a case for continued detention, if the detainee still had intelligence value or the detainee was a security threat. In such cases, the detainee’s file went back with the analyst until the detainee’s case was presented at an annual review before a DRB composed entirely of new personnel (based on personnel rotations in theater).⁵³ Although there was no known policy requiring the DRB to inform the detainee that a board actually convened to determine his status, it is possible that MI personnel advised those who were reviewed of the recommendation for continued detention at the BCP.

Because the DRB process itself was classified, the DRB legal advisor, at least during the period from late November 2002 through early June 2003, could not specifically advise the International Committee of the Red Cross (ICRC) that a review board had met or what the results were, although the ICRC was apprised of the general concept of a ninety-day and annual reviews. The results (transfer, release, or continued internment) would be self-evident based on the list of all detainees with Internment Serial Numbers (ISNs) provided to the ICRC during their recurring visits to the BCP every seven to ten days. The list had comments such as “pending transfer to GTMO” or “release” (once the final decision was approved by the CJTF-180 commander).⁵⁴

As noted, usually within days of the pre-meeting, the actual DRB was convened and chaired by the CJ2. Although the meeting followed no formal script, the legal

advisor to the DRB would officially convene the DRB, conduct a roll call, and remind the members of their responsibilities, primarily to determine enemy combatant status and to examine whether the criteria for transfer to GTMO had been met. The DRB members would listen to the same MI analysts who presented at the pre-meeting make their case to the CJ2. During this presentation, the consensus recommendation was usually not disputed because matters of significance would have already been discussed. Certainly, any major objections would be noted for the CJ2, but the previously determined, non-binding recommendation was essentially provided unaltered to the CJ2.

Once the CJ2 decided the case, the detainee could be annotated on the appropriate list for release or transfer to GTMO. The CJ2 would then present the recommendations to the CJTF-180 commander for approval.⁵⁵ Not making either list meant continued internment for another year unless new matters potentially affecting the detainee’s status were presented in the interim. This default—continued internment for another year—did not require approval; rather, the detainee’s file was simply annotated by MI and sent back into the queue for a future review.⁵⁶

Between May 2002 and June 2003, based on the CJTF-180 commander’s guidance, the maximum number of detainees in the BCP never exceeded one hundred. While the overall detainee population, which included the Kandahar detention facility and other temporary detention sites, was much larger, only those detainees at the BCP went through the DRB process. During this first year, anywhere from ten to fifteen detainee files were reviewed each week with each DRB session to review and discuss detainee files with the CJ2 lasting up to two hours. With the constant flow of detainees in and out of the BCP, the number of files reviewed was simply a calculation to process the ninety-day reviews.⁵⁷ In the summer of 2003, the maximum number of detainees authorized in the BCP doubled to two hundred; consequently, the number of files reviewed at each DRB rose accordingly.

Except for the changes in headquarters,⁵⁸ the DRB process described above remained relatively unchanged for

These reasons allow for two classes of persons to be detained and interrogated:

- Persons who have engaged in, or assisted those who engage in, terrorist or insurgent activities.
- Persons who have incidentally obtained knowledge regarding insurgent activity and terrorist activity, but who are not guilty of associating with such groups.

Id. See also Ryan Goodman, *Rationales for Detention: Security Threats and Intelligence Value*, in *THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS*, 85 INT’L L. STUD. 371, 375–77 (Michael N. Schmitt ed., 2009).

⁵² See 2005 COMMITTEE AGAINST TORTURE REPORT, *supra* note 50.

⁵³ See *supra* note 44.

⁵⁴ *Id.* (based on the author’s experience as the CJTF-180 Liaison to the ICRC).

⁵⁵ *Id.* See also 2005 COMMITTEE AGAINST TORTURE REPORT, *supra* note 50.

⁵⁶ See *supra* note 44 (this particular comment about the default position not requiring the commander’s approval is based on the author’s best recollection).

⁵⁷ *Id.*

⁵⁸ In May 2002, CJTF-180 became the operational level headquarters and assumed control of detention operations from the 10th Mountain Division, the tactical level headquarters. In May 2003, CTF-82 merged into CJTF-180. After months of planning, the downsizing and consolidation of the tactical-level headquarters (82d Airborne Division) into the operational level headquarters (XVIII Airborne Corps) resulted in a month period where the elements of the 82d Airborne Division headquarters assumed control of CJTF-180 and closed down CTF-82. Then, in June 2003

the next three years through the summer of 2005.⁵⁹ Throughout the transitions in the headquarters from the 82d Airborne Division to the 10th Mountain Division to the 25th Infantry Division,⁶⁰ the control of detention operations by the tactical-level headquarters, which also served as the operational-level headquarters, continued until JTF 435 assumed control of detention operations in January 2010.

In September 2004, after the Supreme Court's June 2004 rulings in *Rasul* and *Hamdi*, it appears that a policy decision was made to stop transferring detainees from Afghanistan to GTMO.⁶¹ The end of the transfers to GTMO amidst on-going combat operations in Afghanistan caused the number of detainees in Bagram to rise to five hundred detainees by 2006.⁶² In the summer of 2005, the name of the Bagram Collection Point was changed to the Bagram Theater Internment Facility (BTIF),⁶³ the name the facility retained until it was closed in December 2009.⁶⁴

(through May 2004), the 10th Mountain Division headquarters transitioned with the 82d Airborne Division to assume control of CJTF-180. With this change in June 2003, control of detention operations switched back to a headquarters now responsible for tactical control of the battle in addition to operational control. Each reference to the named units includes substantial augmentation from sister services, reserve personnel, civilian agencies, and coalition partners to make up the Combined Joint Task Force. *See supra* note 44.

⁵⁹ Interviews with Major Patrick Pflaum, former Chief, Detention Operations and DRB Legal Advisor, CJTF-180 (with 10th Mountain Division, June–Dec. 2003), in Charlottesville, Va. (Mar. 29, 2010); Major Irene Hanks, former Detention Operations Legal Advisor, CJTF-76 (with 25th Infantry Division, Apr.–Sept. 2004), in Charlottesville, Va. (Mar. 29, 2010) [hereinafter Hanks Interview].

⁶⁰ From May 2004 through May 2005, the 25th Infantry Division (Light) assumed control of the tactical and operational level headquarters and renamed CJTF-180 to CJTF-76. Hanks Interview, *supra* note 58.

⁶¹

On September 22, 2004, the Department of Defense announced that it had transferred 11 detainees from Guantanamo Bay, Cuba to Afghanistan for release. This transfer brought the number of detainees who have left Guantanamo Bay to 202 and the number of detainees held there at approximately 539 detainees. That same day, the Department of Defense issued another release in which it announced that it had transferred 10 detainees from Afghanistan to Guantanamo Bay, Cuba. This transfer increased the number of detainees held there to approximately 549 detainees.

GlobalSecurity.org, Guantanamo Bay Detainees, http://www.globalsecurity.org/military/facility/guantanamo-bay_detainees.htm (last visited Apr. 4, 2010) (compiling data from the U.S. DoD, Office of the Assistant Sec'y of Def. (Pub. Affairs)). The last news release announcing a transfer to GTMO was 22 September 2004. *Id.*

⁶² Tim Golden & Eric Schmitt, *A Growing Afghan Prison Rivals Bleak Guantanamo*, N.Y. TIMES.COM, Feb. 26, 2006, <http://www.nytimes.com/2006/02/26/international/26bagram.html> (last visited Apr. 2, 2010). Tim Golden has reported extensively on the detention conditions at Bagram.

⁶³ As the number of detainees grew, so did the BTIF. The BCP was within the old Russian hangar in one building, but the

BTIF was actually two facilities enclosed in one space behind walls and concertina wire. The larger

D. Enemy Combatant Review Boards (Summer 2005–January 2007)

In the summer of 2005, the name and composition of the review board process also changed. The name of the boards changed from Detainee Review Boards to Enemy Combatant Review Boards (ECRBs).⁶⁵ Also, the boards were reduced to five military officers, specified by position: the Deputy G2, the MI Battalion Commander in charge of intelligence operations at the BTIF, the MP Battalion Commander in charge of Military Police operations at the BTIF, the Military Police Brigade Deputy Commander, and a judge advocate legal advisor. The five officers would vote to determine if the detainee met the criteria for enemy combatant status. The ECRBs still convened to conduct initial ninety-day and yearly paper reviews, and detainees had yet to personally appear before a DRB in Afghanistan.⁶⁶

In February 2006, the 10th Mountain Division headquarters returned for its third rotation in Afghanistan and assumed command of CJTF-76. During the division's one-year tour through January 2007, the boards continued to be called ECRBs and were still composed of the five officer duty positions noted above.⁶⁷ Other than the name change and the alteration in board composition, the procedures were similar to those dating back to 2002; detainees could not appear in person before the boards, nor did they have a personal representative (PR). The ECRBs met once per week, but instead of holding pre-meetings like the ones that met in the 2002–2005 timeframe, the board members were provided detainee packets in advance and then convened to discuss the packets and vote on whether the detainee met the criteria for enemy combatant status. The only oral evidence presented at the ECRB was still given by the MI personnel who prepared the detainee packets. If the capturing unit had an interest, for either detention or release, they could send a

of the two facilities, inside the former Soviet hangar, held two matching sets of 16 groups cells (detainees sleep about 20 to a cell), as well as interrogation booths, and medical facilities. Prisoners lived in open cages with wire mesh tops for easy inspection by guards.

Stern, *supra* note 1, at 22.

⁶⁴ The timing of the name change came when the U.S. Army Southern European Task Force (SETAF) assumed command of CTF-76 in Afghanistan from the 25th Infantry Division. Hanks Interview, *supra* note 58 (noting that the name of the facility was still the BCP during her tour); Interview with Major James Hill, former Detention Operations Attorney, CTF-76 (with SETAF, May 2005–Jan. 2006) in Charlottesville, Va., Mar. 30, 2010 [hereinafter Hill Interview] (The name of the facility changed to the BTIF in the summer of 2005.).

⁶⁵ *See Fixing Bagram*, *supra* note 5, at 16 n.22 (referencing a November 2005 affidavit submitted by Colonel Rose Miller, Commander of Detention Operations at the BTIF).

⁶⁶ Hill Interview, *supra* note 64.

⁶⁷ Interview with Major Robert Barnsby, former Detention Operations Legal Advisor, CJTF-76 (with 10th Mountain Div. (Feb. 2006–Jan. 2007)), in Charlottesville, Va. (Mar. 30, 2010).

representative to the board to argue their position.⁶⁸ While transfer to GTMO was no longer an option, the ECRB could recommend release or continued detention in certain categories based on the level of threat. In an important step forward in both the Rule of Law and counterinsurgency realms, new options for the ECRBs were explored such as transfer to the Afghan authorities for prosecution or repatriation programs. These developments were still in the initial planning stages and were not executed during the 10th Mountain Division's tour.⁶⁹

E. Unlawful Enemy Combatant Review Boards (February 2007–September 2009)

Beginning in February 2007 and continuing through the implementation of the new DRBs in September 2009, the review boards experienced their second transformation in name and composition, as well as other changes in procedure and substance. The Enemy Combatant Review Board became the Unlawful Enemy Combatant Review Board (UECRB), and the board composition decreased from five to three officers: the CJTF Provost Marshal, the BTIF Commander, and the Chief of Interrogations. During this thirty-three-month period, there was three headquarters, CJTF-82 (February 2007–January 2008), CJTF-101 (February 2008–April 2009), and then CJTF-82 again (April 2009–May 2010).⁷⁰

The first major change—and major step in the right direction—was official notification to the detainee of his UECRB, which became standard beginning in April 2008. For the first time in Afghanistan, detainees could actually appear before their board and make a statement.⁷¹ Under the new procedures, the detainee “was notified of the general basis of his detention within the first two weeks of in-processing.”⁷² The initial review was conducted within seventy-five days (down from the ninety-day initial review) and then reviewed every six months (down from one year).⁷³

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ During CJTF-82's second tour during this period, from April 2009 through May 2010, they had control of detention operations through December 2009, including implementation of the initial DRBs under the new July 2009 procedures from 17 September 2009 through 7 January 2010 when JTF 435 assumed full control over detention operations and the DRB process. See *infra* notes 110–13 and accompanying text.

⁷¹ Interview with Ms. Tracey Ruppel, Intelligence Analyst, Contractor, U.S. Navy Reserve, Detainee Assessment Branch (DAB), in Bagram, Afg. (Jan. 26, 2010) [hereinafter Ruppel Interview]. The DAB stood up in 2007 to assist with the new UECRB process.

⁷² See *Fixing Bagram*, *supra* note 5, at 16 n.23 (citing Declaration of Colonel Charles A. Tennison (Sept. 15, 2008)). Colonel Tennison was CJTF-101's Commander of Detention Operations in 2008.

⁷³ *Id.*

Detainees whose detentions were being reviewed for the first time could appear at their initial “first look” seventy-five-day review and make a statement. For each subsequent review, the detainee could provide a written statement.⁷⁴ The UECRB reviewed information from a variety of sources, including classified information, testimony from personnel involved in the capture, and interrogation reports. A majority vote would determine the detainee's status and provide that recommendation—release or continued detention—to the Commanding General.⁷⁵

Similar to all past reviews, MI analysts would brief the UECRB panel, primarily, if not solely, basing their recommendation on the intelligence value of the detainee. The analysts would advocate for continued detention (based on a need for further interrogation) or transfer the case file to the Detainee Assessment Branch (DAB) to review and prepare for recommendations of further prosecution by the Afghan authorities. Because the board members had copies of the files, the analyst needed only to read a few sentences to the board and make a recommendation. Because of the volume of cases and the analysts' in-depth knowledge of their case files, the UECRB relied heavily on, and rarely disagreed with, the analyst's recommendation. The first look review was normally the detainee's best chance for release due to lack of evidence.⁷⁶

The UECRBs met in a room off the main floor in the BTIF to accommodate the detainees, who could now appear at their initial board. There was no formal script, even for the first look seventy-five-day reviews. The board president would inform a detainee that the board was reviewing his case without any discussion or description of the allegations and then ask the detainee if he wanted to make a statement. There was no PR to assist the detainee. There was no questioning of the detainee. The detainee either made a statement or not and was then escorted from the room.⁷⁷

The panel of three officers also had the responsibility of dividing the detainees into separate categories: High Level Enemy Combatant (HLEC); Low Level Enemy Combatants (LLEC); and Threat only. Those who were to be released were categorized as No Longer Enemy Combatant (NLEC).⁷⁸ As the UECRB worked its way through the six hundred detainees in the BTIF, the files of all detainees assessed as LLECs were transferred to the DAB. The DAB, comprised of military intelligence analysts and military criminal investigators, assessed the detainee files for

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Ruppel Interview, *supra* note 71.

⁷⁷ *Id.*

⁷⁸ *Id.*

potential transfer to Afghan authorities for prosecution.⁷⁹ To support the Rule of Law mission, the DAB would only recommend transfer of cases for prosecution if there was solid evidence.⁸⁰ Those detainees not recommended for transfer remained interned until their next review in six months.

As described above, the initial 2002 review process evolved slightly over seven and a half years from the DRBs to the ECRBs to the UECRBs, to include the appearance of detainees at their boards.⁸¹ Yet, the description of the various boards reveals minimal procedural protections for the detainee. Justifiable criticism has persisted for years, but more importantly, recognition of that criticism has prompted much needed changes in the detainee review system in Afghanistan.

III. The New Detainee Review Policy⁸²

Time will tell whether these reforms will be implemented effectively and can resolve

⁷⁹ In addition to detainees from Bagram, detainees from GTMO designated as LLECs were also transferred to Afghan authorities under this process. The transfers to Afghan custody went specifically to the “U.S.-built Afghan National Defense Facility in Pul-e-Charkhi prison for prosecution.” *See Undue Process*, *supra* note 5, at 21 (providing an in-depth critique of the trials of U.S. transferred detainees in the Afghan criminal justice system). *Id.* at 21–24. As of April 2009, about 200 of the transferred detainees had been convicted by the Afghan courts. *Id.*

⁸⁰ Ruppel Interview, *supra* note 71. *See also Undue Process*, *supra* note 5, at 22. While the United States may transfer a “solid” case file, this paper file is usually all the Afghan court has available to base its determination on—not live prosecution witnesses, not sworn statements, and little or no physical evidence—and yet, convictions result from this process. *Id.* at 21.

⁸¹ *See app. A* (providing a general description of the three types of review boards prior to the new DRBs).

⁸² Much of Part III draws on this experience, observations, and numerous interviews conducted by the author in Afghanistan from 24 January through 5 February 2010, and then again from 15 through 24 June 2010, during the 1st and 2d Detainee Review Board Short Courses. *See Appendix B* for a more detailed description of the short courses, including the creation of the courses and the participants during each course. *See also Memorandum from Vice Admiral Robert S. Harward, Commander, Joint Task Force 435 to U.S. Military Forces Conducting Detention Operations in Afghanistan*, at 6 (Mar. 6, 2010) [hereinafter JTF 435 Detainee Review Board Policy Memorandum] (classified version on file with author). One procedural rule within the otherwise unclassified sixteen-page document remains at the SECRET/NOFORN level. Paragraph 10, Training, provides:

a. Each Recorder and Personal Representative will complete a 35-hour Detainee Review Board Training Course prepared by and primarily taught by Professors from the US Army Judge Advocate General’s Legal Center and School. Each PR and Recorder will also complete basic and refresher training on a weekly basis.

b. The JTF 435 Legal Directorate is responsible to train Board Members on their duties and responsibilities prior to sitting as a member of the DRB.

Id.

*the underlying problems of arbitrary and indefinite detention, mistaken captures, and lack of evidence for legitimate prosecutions in Afghan courts.*⁸³

On 22 January 2009, President Obama signed three Executive Orders with the goal of correcting past deficiencies in detainee operations, including one intended to specifically review detention policy options.⁸⁴ A Special Interagency Task Force was created to “identify lawful options for the disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations.”⁸⁵ On 13 March 2009, in the *Guantanamo Bay Detainee Litigation* case before the D.C. District Court, documents submitted by the Attorney General’s Office referenced this “forward-looking multi-agency effort . . . to develop a comprehensive detention policy” and noted “the views of the Executive Branch may evolve as a result.”⁸⁶ Perhaps the most significant information contained in the 13 March 2009 memorandum was the new definitional framework for who could be detained:

The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks.

The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.⁸⁷

⁸³ *Fixing Bagram*, *supra* note 5, at 1.

⁸⁴ Exec. Order 13,493, 74 C.F.R. 4901 (2010) (Review of Detention Policy Options). *See supra* note 6 (listing of all three executive orders).

⁸⁵ Exec. Order 13,493, § 1(a).

⁸⁶ *In re: Guantanamo Bay Detainee Litigation*, Respondent’s Memorandum Regarding the Government’s Detention Authority Relative to the Detainees Held at Guantanamo Bay 2 (Mar. 13, 2009). One exhibit attached to the Respondent’s Memorandum was the Declaration of Attorney General Eric Holder, which also emphasizes the on-going work of the task force directed by the President.

⁸⁷ *Id.* at 2. It should also be noted at this point that this definitional framework is essentially the same as the one used by the Bush Administration, with one exception: the insertion of the word “substantially” with respect to the level of support to the Taliban, al Qaeda, or associated forces. The prior definition just required “support,” and not “substantial support.” While the authority to detain was established in the

These definitions are now the foundation of a unit's lawful authority and substantive grounds to detain a person on the battlefield. If this threshold determination is not met on the battlefield, then a unit has no authority to detain. Once a person is detained on the battlefield, these exact criteria, which are used in the new detainee review board procedures set forth in the Secretary of Defense's July 2009 policy, are the criteria upon which the initial detention and continued internment decisions are based.

A. Combat Operations in Afghanistan ISAF/NATO and U.S. Forces–Afghanistan/OEF

Because the 2 July 2009 detention policy is explicit in its application, it is informative to describe the units operating in Afghanistan. On 30 June 2010, General David Petraeus was confirmed by the U.S. Senate as the dual-hatted Commander of U.S. Forces–Afghanistan (USFOR-A) and the International and Security Assistance Force (ISAF).⁸⁸ Although they fall under the same commander, USFOR-A and ISAF operate under two different detention

AUMF, the original definition for “enemy combatant” appeared in the Secretary of the Navy's July 2004 order establishing the CSRTs.

For purposes of this Order, the term “enemy combatant” shall mean an individual who was part of or supporting Taliban or al-Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of such enemy armed forces.

Memorandum from Paul Wolfowitz to the Secretary of the Navy on Order Establishing Combatant Status Review Tribunal (7 July 2004). In the Military Commissions Act of 2006, the term “unlawful enemy combatant” was defined, in part, as “a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces).” See MCA 2006, *supra* note 6, para. 948a(1)(i). The concept of substantial support, as described in the phrase “purposefully and materially supported” was carried through in the Military Commissions Act of 2009 which changed the term “unlawful enemy combatant” to “unprivileged enemy belligerent” and slightly altered the definition to: “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.” See MCA 2009, *supra* note 6, para. 948a(7) (internal quotation marks omitted).

⁸⁸ Petraeus Confirmed as New U.S. Afghan Commander, CNN.com, June 30, 2010, available at <http://www.cnn.com/2010/POLITICS/06/30/petraeus.confirmed/?hpt=Sbin>. Following controversial comments made to a *Rolling Stone* magazine reporter, General McChrystal resigned on 23 June 2010 during a meeting with President Obama. That same day, the President nominated General Petraeus, and he was unanimously confirmed in 30 June 2010. See Shaun Waterman, *McChrystal Resigns Afghan Command*, WASHINGTONTIMES.COM, June 23, 2010, available at <http://www.washingtontimes.com/news/2010/jun/23/mcchrystal-leaves-white-house-wa-r-meeting/>. See also Michael Hastings, *The Runaway General*, ROLLINGSTONE.COM, June 22, 2010, available at <http://www.rollingstone.com/politics/news/17390/119236>.

paradigms. As described in detail below, the 2 July 2009 policy for the new DRBs only applies to USFOR-A/OEF units. This section provides a brief explanation of the ISAF detention policy, which is separate and distinct from the USFOR-A detention policy.

The majority of U.S. forces in Afghanistan (78,430 out of approximately 95,000) are assigned to ISAF, which operates as part of the North Atlantic Treaty Organization (NATO) mission in Afghanistan.⁸⁹ The remaining 17,000 or so U.S. troops fall under USFOR-A and continue to operate under the authority of Operation Enduring Freedom (OEF). Currently, USFOR-A is made up of U.S. Special Operations Forces (the capturing units), Joint Task Force 435, which runs all detention operations in Afghanistan (discussed in detail below), and other critical enablers, such as route clearance and Palladin units. The 2 July 2009 detention policy does not apply to roughly 80% of U.S. troops operating in Afghanistan.

As described later, USFOR-A can send captured personnel to the DFIP whereas ISAF units (including the U.S. forces assigned to ISAF) cannot. Since December 2005, all ISAF units have been required to turn captures over to the Afghans within ninety-six hours of capture.⁹⁰ In early 2010, complaints from U.S. units (assigned to ISAF) surfaced over this relatively short time period to turn captured personnel over to Afghan authorities. In March 2010, in response to these complaints, the Secretary of Defense extended the period to fourteen days, thus authorizing the U.S. caveat to the ninety-six-hour rule for U.S. forces assigned to ISAF. The ninety-six-hour rule is still in effect for non-U.S. ISAF units.⁹¹

All insurgents captured by ISAF troops must be turned over to the Afghan National Security Directorate (NDS), either within ninety-six hours for non-U.S. ISAF units or fourteen days for U.S. ISAF units. The NDS is

⁸⁹ See International Security Assistance Force: Troop Contributing Nations (7 June 2010), available at <http://www.isaf.nato.int/images/stories/File/Placemats/100607Placemat.pdf> [hereinafter ISAF Troops]. There are currently forty-six troop contributing nations to ISAF and not surprisingly, with 78,430 U.S. troops, the United States provides the majority (66%) of the 119,500 total coalition troops. *Id.* See also Anne Gearan, *More U.S. Troops in Afghanistan than Iraq*, MSNBC.com, May 24, 2010, available at http://www.msnbc.msn.com/id/37324981/ns/us_news-life/ (revealing that in late May 2010, there were 94,000 U.S. troops in Afghanistan and 92,000 in Iraq with troop levels in Afghanistan expected to rise to 98,000 during the summer).

⁹⁰ See Ashley Deeks, *Detention in Afghanistan: The Need for an Integrated Plan*, Ctr. for Strategic & Int'l Stud. (13 Feb. 2008), available at http://csis.org/files/media/isis/pubs/080213_deeks_afghanistan.pdf. Prior to 2005, NATO forces turned over detainees to U.S. forces. Since 2005, due to the controversy surrounding Abu Ghraib, NATO forces began a policy of transferring detainees to Afghan authorities within ninety-six hours of capture. *Id.*

⁹¹ Abbie Boudreau & Scott Zamost, *U.S. to End 96-hour Rule for Afghan Detainees*, CNN.com, Mar. 17, 2010, available at http://www.cnn.com/2010/WORLD/asiapcf/03/17/Afghanistan.nato.detainees/index.html?eref=ib_top_stories.

Afghanistan's domestic intelligence agency with jurisdiction over all insurgent and terrorist activity.⁹² In essence, the NDS has the right of first refusal to accept the transfer of captured personnel believed to be insurgents or terrorists. In addition to the personnel that might be expected to make up an intelligence agency, the NDS also has a staff of investigators that specifically work to prepare cases for prosecution within the Afghan criminal justice system. Currently, a team of Afghan prosecutors and judges with special expertise are temporarily assigned to work exclusively with the NDS to coordinate this effort to try suspected insurgents and terrorists under the appropriate Afghan criminal laws within the Afghan criminal justice system. Each province in Afghanistan has at least one judge and several prosecutors assigned to work on NDS cases.⁹³

B. From Capture Through a DRB—An Overview⁹⁴

United States forces operating under OEF in Afghanistan have clear authority to detain individuals on the battlefield consistent with the laws of war. When they do, within seventy-two hours, the commander, with advice of a judge advocate, must determine if that individual meets the criteria for continued internment and transfer to the DFIP. Even critics understand that this initial determination by the combat commander is not going to be perfect. Between capture and transfer, the detainee should, under normal circumstances arrive at the DFIP within two weeks.

Once in the DFIP, the detainee is administratively segregated for the first fourteen days of his internment. This has been the process since 2002. After fourteen days at the DFIP, the detainee is assigned an Internment Serial Number (ISN) and the ICRC is allowed access to the detainee. In this same time period, the detainee is notified of the DRB process and the date of the initial DRB, which must occur

⁹² Interview with COL Richard Gross, Legal Advisor to Commander, ISAF and SJA, USFOR-A, in Kabul, Afg. (June 22, 2010).

⁹³ *Id.* Assuming success means conviction of a suspected terrorist, anecdotally, the success rate of NDS prosecutions has not been high. While no specific statistics were available, one has to further assume that as the Afghan criminal justice regains a foothold, the situation will improve. While not the subject of this article, there is a huge effort in Afghanistan (similar to efforts that were undertaken in Iraq) to help build and train an ethical-based judiciary free from corruption. Of course, this is easier said than done, but there is a multitude of coalition initiatives, both military and civilian, geared toward this specific issue. Currently, however, the NDS remains the most viable option for ISAF troops who must relinquish control of captured terrorists to Afghan authorities. The alternate—village elders or local police—is not as reliable. Anecdotally, such transfers usually find their way back to the battlefield within a number of days. The information in this footnote was generally gathered over the course of numerous conversations during the author's June trip to Afghanistan. While not specifically attributable to any one source, the author's curiosity on the topic led to many conversations with people who had varying degrees of knowledge, whether personal or anecdotal.

⁹⁴ The following section provides an overview of the Detainee Review Board process without footnotes. Subsequent sections provide detailed descriptions of each step in the process with footnotes.

within sixty days of the detainee's arrival at the DFIP. This notification is documented and later entered as an exhibit at the detainee's DRB hearing. Within thirty days of the detainee's arrival at the DFIP, a PR meets with the detainee, informs him again, this time in more detail, of the DRB process, and reviews with the detainee the unclassified summary of specific facts supporting the detainee's initial detention and potential continued internment (this is also documented and later entered as an exhibit). During this initial meeting, the PR has an incredible challenge of gaining the trust and confidence of the detainee while at the same time explaining a truly foreign process to him through an interpreter. During this initial meeting, the PR also hopes to gather enough information to be able to contact family members or others that may either appear in person, testify by telephone or video teleconference (VTC), or provide a statement on behalf of the detainee at the initial board. This is particularly critical in the case of mistaken identity. Prior to the board, the PR typically meets with the detainee at least two more times to gather more witness leads and to prepare the detainee for his statement at the board. During this period, the PR will also access all databases, classified and unclassified, containing data on the detainee to assist in his representation of the detainee at the board.

A day or two prior to the actual DRB, the PR, recorder, analysts, and other DFIP personnel, as necessary, meet in a "pre-board" session to discuss each case scheduled before a DRB that week. During this session, the PR and recorder attempt to resolve disputes so a neutral, non-adversarial case can be presented to the DRB. While recorders must remain neutral, PRs must act in the best interest of the detainee. These unique roles, coupled with the ability of the detainee to participate in the hearing with the assistance of the PR seek to balance the scales of the process in favor of the detainee. Regardless, all information, including exculpatory evidence, must be presented to the DRB. The language on the "baseball card" (a one to three page synopsis of the facts surrounding the detainee's capture); the unclassified intelligence collected on the detainee prior to capture (if any); summaries of any interrogation reports; summaries of the detainee's activities in the DFIP; and a behavioral threat assessment are all distilled down to a few pages to be presented to the board to aid in its internment determination.

Like any complex administrative proceeding, prior coordination is essential for smooth, efficient, and professionally run boards. The administrative staff of the Legal Operations Directorate is responsible for notifying all parties, primarily the board members and DFIP personnel, to include the MPs, of the hearings scheduled. On the scheduled day, all parties know in advance how many cases a particular panel is going to hear that day. The DRB hearing room has seats for spectators, and all personnel with access to the DFIP are welcome to observe the proceedings.

The board members, recorder, PR, legal advisor, reporter, and interpreter gather in the DRB hearing room, and the president convenes the DRB and goes through the

preliminary portion of the script, which includes the swearing of the parties. The first detainee is called, and the president continues through the script by informing the detainee of the purpose of the board and reminding the detainee of his rights at the board. The board president also discusses and admits the Detainee Notification Worksheet and Detainee Initial Interview Checklist as exhibits, thus confirming and adding to the record clear evidence that the detainee received prior notification and assistance prior to his hearing.

After the president's initial colloquy with the detainee, the recorder reads an unclassified summary of information, which includes the circumstances of capture and evidence against the detainee. While the board president follows the script, the exact order of statements and questioning is left to the president's discretion. Regardless of the exact order, the detainee is provided the opportunity to make a statement to the board. The statement may be made in a question and answer format with the assistance of the PR, or the detainee may simply make a statement, which has been the primary practice in the past. Alternatively, the statement may combine both of these methods. In the end, the PR's determination of the most effective format should prevail.

After the detainee's statement, the board members and recorder may ask the detainees questions—as does the PR if he has not already done so. Again, although the recorder is neutral, he may question the detainee to ferret out additional information to assist the board in making its findings and recommendations. After the recorder's questions, board presidents generally allow the PR to follow up. The amount of back and forth (direct examination, cross-examination, re-direct, and re-cross) is left to the discretion of the president.

When witnesses or documents are presented during the open, unclassified portion of the hearing, the president controls the presentation of the evidence, to include the questioning of live witnesses. Capturing units, battle space owners, and other interested staff members may appear before a board or present documentary information in support of a particular position so long as it is relevant to the board's determination. Testimony, for or against the detainee, may be presented live, via telephone or VTC, or in writing as a sworn or unsworn statement. Since March 2010, the inclusion of Afghan witness testimony has had a noticeable impact on the DRB process, not only in terms of logistics, but also in the frequency of releases for detainees supported by witness testimony. The considerable effort made to bring live witnesses to the DRBs, at least anecdotally, has also spread the word throughout Afghanistan that the DRB process is fair and legitimate and, perhaps more importantly in light of past missteps, that the treatment of the detainees in the new DFIP is exceptional.

The rules of evidence that apply in a criminal court do not apply at a DRB, which is an administrative hearing. The board may consider any information offered that it deems relevant and non-cumulative. Also, the board may consider

hearsay evidence in the form of classified and unclassified reports, threat assessments, detainee transfer requests, targeting packets, disciplinary reports from the DFIP guards, observation reports from the behavior science assessment teams, photographs, videos, sound recordings, and all forms of sworn and unsworn statements and letters. While admissibility is very broad, the board must still apply its judgment to determine the trustworthiness and appropriate weight of the information.

The rules described above apply equally to inculpatory and exculpatory information. For example, the concept of authentication is (or at least was) non-existent. If a detainee provides a cell phone number for a supporting witness, the witness is called and asked to identify himself. The witness is not sworn and there is no way to verify the person's credentials; however, as PRs learn, the questioning of detainee-requested witnesses can backfire when the witnesses have not been interviewed prior to the hearing. The only other restriction, and perhaps the most important in the proceedings, is the prohibition on the use of any statement obtained by torture or through cruel, inhuman, or degrading treatment, except against a person accused of torture as evidence that the statement was made.

Once all of the unclassified evidence has been presented, the detainee is allowed a final opportunity to make another statement to the board. Here again, preparation in consultation with the PR ensures the detainee does not squander this valuable opportunity by reiterating something said earlier or contradicting (perhaps indisputable) evidence the PR knows will be offered during the classified portion of the hearing. When the detainee completes his statement, he is excused from the room.

The recorder then opens the classified portion of the hearing by presenting documentary evidence or calling witnesses that possess classified information. The board members and PR can also question the witnesses. Once all of the classified information is presented, the recorder and PR may, at the board president's discretion, provide brief closing comments on the state of the evidence; however, they must refrain from making personal recommendations to the board. The PR can reiterate a detainee's request to be released.

After the president adjourns the board, the president and two other board members move to closed session deliberations to discuss the hearing, but they must include their individual findings and recommendations on the worksheet provided. The legal advisor collects the three sheets and records the majority vote on a consolidated worksheet, which the president must sign. Within seven days, a report of the proceedings, including a transcript and any exhibits admitted for a particular case, must be forwarded to the approval authority (the convening authority), and within fourteen days after that, the detainee must be notified in writing, in the detainee's language, of the approval authority's decision.

The increase in resources—primarily personnel—flowing into the Legal Operations Directorate has resulted in longer, more robust hearings. In September 2009, two recorders and one PR conducted twenty-six boards per day, once per week. The average time of a hearing was forty minutes and no Afghan witnesses were called. Beginning in March 2010 and continuing to the present, the Legal Operations Directorate convenes ten boards per day—split between two separate panels in two hearing rooms—five days per week. Hearing times have increased from an average of forty minutes to between ninety minutes and four hours per hearing, resulting in a more robust proceeding.

Since JTF 435 assumed control of the DRBs in January 2010, DRB personnel have continually worked to improve the system from an efficiency perspective and, more importantly, a transparency perspective. The documents that assist the participants are constantly improved, to include modifications to the findings and recommendations worksheet and the script, which assist the board members, and the PR's checklist, which aids both the PR and the detainee. The addition of Afghan witnesses and the ability of human rights organizations to view the process have gone a long way to increasing transparency. Overall, in the few short months since the DRBs have been operating under JTF 435, the task force has indisputably made considerable progress in the implementation of the procedures.

Although the details are best left for a future article, the integration of Afghan judges, prosecutors, and investigators into the Legal Operations Directorate of JTF 435 between April and May 2010 marks the start of the transition process to “phase II” of the operation. With a stated goal of turning detention operations over to the Government of the Islamic Republic of Afghanistan in 2011, the presence of the judicial team in the DFIP provides a safe and legitimate location to begin Afghan prosecutions under Afghan law run by Afghan personnel, which enhances and advances the rule of law in Afghanistan in support of the COIN strategy.

C. The Secretary of Defense's 2 July 2009 Memorandum

In July 2009, the Deputy Assistant Secretary of Defense for Detainee Policy provided the Chairman of the Senate Armed Services Committee a six-page unclassified policy letter entitled Detainee Review Procedures at Bagram Theater Internment Facility (BTIF),⁹⁵ Afghanistan. The

⁹⁵ See Letter from Mr. Phillip Carter, Deputy Assistant Sec'y of Def. for Detainee Policy, to Senator Carl Levin, Chairman of the Senate Armed Servs. Comm. (July 14, 2010) [hereinafter Carter Letter], available at <http://www.wcl.american.edu/nimj/documents/addendum.pdf?rd=1> (including Mr. Carter's two-page letter dated 14 July 2009 and the six-page 2 July 2009 Detainee Review Procedures enclosure [hereinafter Detainee Review Procedures]). This two-page letter has a six-page enclosure that, although undated, is referenced in Mr. Carter's opening line: “Please find enclosed a copy of the policy guidance that the Deputy Secretary of Defense approved on 2 July 2009, modifying the procedures for reviewing the status of aliens detained by the Department of Defense at the [BTIF], and related policy

document contains the new policy and procedures to be implemented at the new DRBs.

The enhanced detainee review procedures significantly improve the Department of Defense's ability to assess whether the facts support the detention of each detainee as an unprivileged enemy belligerent, the level of threat the detainee represents, and the detainee's potential for rehabilitation and reconciliation. The modified procedures also enhance the detainee's ability to challenge his or her detention.⁹⁶

The six-page Detainee Review Procedures policy covers the authority of USFOR-A operating under Operation Enduring Freedom (OEF) to detain and intern; the capturing unit's review and transfer requests;⁹⁷ the initial detainee notification;⁹⁸ DRB procedures, which comprise more than half of the document;⁹⁹ and finally a description of the role of the PRs.¹⁰⁰ Before discussing the specifics of the new procedures, a description of the new detention facility where the new detention task force holds the DRBs can provide context.

D. The Detention Facility in Parwan

*It's clear that the authorities looked back at lessons learned from eight years of blunders and abuse in designing the new lock-up facility.*¹⁰¹

guidance regarding the criteria for assessing the threat such aliens represent, and regarding the authority to transfer and release such aliens from the BTIF.” *Id.* Even though the 2 July 2009 policy refers to the BTIF, it is understood that this policy is applicable to the new DFIP.

⁹⁶ Carter Letter, *supra* note 95, para. 1.

⁹⁷ Detainee Review Procedures, *supra* note 95, at 2–3. While the current rules are classified, the initial unclassified procedures required OEF units to complete the initial review process within seventy-two hours of capture before that detainee could be transferred to the DFIP, or the detainee had to be released. The capturing unit commander had to receive a judge advocate's legal advice to assess whether the person met the criteria for detention and transfer to the DFIP for continued internment. Within seventy-two hours, the commander then had to forward a request to the DFIP Commander to transfer the detainee from the field detention site to the DFIP. The DFIP Commander, also with the advice of a judge advocate, could then approve the transfer and accept the detainee at the DFIP. The capturing unit commander's request, the DFIP commander's response, and the actual transfer from the capturing unit to the DFIP was required to occur within fourteen days of capture. *Id.* at 1–2. It is important to distinguish that the detention paradigm for OEF captures differs from ISAF captures that must be turned over to Afghan authorities and do not go to the DFIP.

⁹⁸ *Id.* at 2.

⁹⁹ *Id.* at 2–5.

¹⁰⁰ *Id.* at 5–6.

¹⁰¹ Jonathan Horowitz, *The New Bagram: Has Anything Changed?*, HUFFINGTON POST (Jan. 15, 2010), available at <http://www.huffingtonpost.com>.

The new \$60 million Detention Facility in Parwan (DFIP) covers forty acres near the Bagram airfield. The new DFIP is about a five mile drive around the airfield from the old BCP/BTIF. Five miles in actual distance, but an immeasurable distance from the stark conditions in the old Russian hangar that housed the detainees through the end of 2009. One of the primary complaints of the detainees held at the BCP/BTIF was the physical conditions of the facility, which had no windows and no natural light. All of that has changed at the new DFIP where complaints about the facility itself have essentially ceased due to huge cells with plenty of natural light.¹⁰² As of 18 June 2010, the DFIP had close to 900 detainees with a maximum capacity of 1,344.¹⁰³ Although the United States has funded and built the DFIP, the intent is to transfer the facility to the Government of Afghanistan in one year.¹⁰⁴

A recent tour of the state-of-the-art detention facility revealed surveillance cameras, computer systems to track detainees, and integrated locking doors in the cell block areas.¹⁰⁵ Task Force (TF) Protector, a Military Police brigade, and its subordinate battalion, TF Lone Star, were the units in charge of the care and custody of the detainees during the transition from the BTIF to the DFIP. The military police orchestrate the complex tasks of organizing and coordinating the detainees' daily schedule, from medical appointments to meals, interrogations to DRB appearances, and everything in between, including rehabilitation and reintegration programs,¹⁰⁶ vocational training, literacy programs, ICRC visitation, and outside recreation.¹⁰⁷ The detainees regularly play soccer in a large recreation yard which has basketball hoops at either end. There is a large vocational training area, and the officer-in-charge of rehabilitation programs is implementing practical programs

com/ jonathan-horowitz/the-new-bagram-has-anythi_b_365819.html. Mr. Horowitz is a consultant to the Open Society Institute and he participated in the DRB Short Course training. See app. B.

¹⁰² See *infra* note 105.

¹⁰³ On 18 June 2010, the DFIP had 893 detainees. When the DFIP opened in December 2009, its capacity was listed at 1050; however, the capacity is now listed at 1,344. E-mail from Lieutenant Colonel Michael Hosang, DRB OIC, Legal Operations Directorate, Bagram, Afg. to author (6 July 2010, 12:33 EST) (on file with author).

¹⁰⁴ Interview by Dep't of Def. Bloggers Roundtable with Vice Admiral Robert Harward, Commander, Joint Task Force 435, in Afghanistan (Jan. 27, 2010), available at http://www.defense.gov/Blog_files/Blog_assets/20100127_Harward_transcript.pdf [hereinafter Harward Transcript].

¹⁰⁵ At the direction of BG Martins, MAJ Barkei and the author were provided an in-depth tour of the entire DFIP by personnel from TF Protector on 31 January 2010 [hereinafter DFIP Tour].

¹⁰⁶ From the opening of the DFIP, JTF 435 has been working diligently to establish effective rehabilitation and reintegration programs, separating the accidental guerillas from the hardcore insurgents. The programs include literacy skills and other skills that will help the detainees reintegrate back into society. Harward Transcript, *supra* note 104, at 2-3.

¹⁰⁷ DFIP Tour, *supra* note 105. See also Stern, *supra* note 1, at 23 (stating that reintegrating includes meetings with moderate mullahs that come into the facility and meet with groups of detainees).

such as tailoring, baking, farming, and artistry that will benefit the detainees upon release. The covered walkways between the various cell and administrative wings are very long and wide. For ease and speed of detainee movement around the huge DFIP, guards use wheelchairs to transport the detainees to various appointments.¹⁰⁸ The DFIP's medical section has expensive state-of-the-art medical and dental equipment such as optometry and X-ray machines, and no chances are taken with any detainee: every actual or imagined ailment is immediately tended to by the medics, doctors, and dentists on station at the facility. Detainees with medical emergencies that cannot be handled at the DFIP are transported to the larger hospital on the main Bagram base.¹⁰⁹

E. Joint Task Force 435

On 18 September 2009, Defense Secretary Robert Gates created JTF 435.¹¹⁰ The purpose of the task force is "to provide care and custody for detainees, oversee detainee review processes and reconciliation programs, and to ensure U.S. detainee operations in Afghanistan are aligned effectively with Afghan criminal justice efforts to support the overall strategy of defeating the Taliban insurgents."¹¹¹

The first member of JTF 435 was BG Mark S. Martins,¹¹² who was appointed in September 2009 and deployed in command of the fledging task force until November 2009 before assuming the role of Deputy Commander. The Commander of JTF 435 is Vice Admiral (VADM) Robert S. Harward, who assumed command from BG Martins in late November 2009 following confirmation by the Senate. The task force was formed as a new command subordinate to U.S. Forces-Afghanistan. It's structure was built rapidly, and it reached its initial operating capability on 7 January 2010. In an interview in January

¹⁰⁸ DFIP tour, *supra* note 105.

¹⁰⁹ *Id.*; see also Stern, *supra* note 1, at 23.

¹¹⁰ Mark Seibel, *Task Force Created to Combat al Qaida in Afghan Prisons*, Oct. 1, 2009, available at <http://www.mcclatchydc.com/2009/10/01/76424/task-force-created-to-combat-al.html>.

¹¹¹ *Id.*

¹¹² Prior to his assignment to JTF 435, BG Martins had been appointed to serve as Chief Judge, U.S. Army Court of Criminal Appeals and Commander of the U.S. Army Legal Services Agency. Brigadier General Martins had served as "one of two executive secretaries of a commission President Barack Obama appointed on his first day in office to determine what legal options exist for the detention of suspected terrorists. The commission issued a preliminary report in July—signed by [BG] Martins and Brad Wiegmann, the principal deputy attorney general for national security—that called for the use of both traditional federal courts and military commissions to try suspected terrorists." Press Release, U.S. Central Command, Joint Task Force 435 Press, New Task Force Assumes Control of Detainee Operation in Afghanistan (Jan. 8, 2010), available at <http://www.centcom.mil/news/new-task-force-assumes-control-of-detainee-operations-in-afghanistan> (last visited June 28, 2010) [hereinafter JTF 435 Press Release].

2010, VADM Harwood gave the following synopsis of the task force's vision:

[Maintaining] the legitimacy of detention . . . requires that we demonstrate our commitment to transparency, the rule of law, and to individual human dignity, and that we empower the Afghan government to take responsibility for its citizens.

[In] President Karzai's inaugural address, . . . he clearly reiterated that detention operations in Afghanistan should fall under the sovereignty of the government of Afghanistan, and the desire to move in that direction. [There was a] recent memorandum of understanding signed by seven Afghan ministers that codified the transition through the Ministry of Defense. [JTF 435 has] initiated a plan, a one-year plan [to] move that transition of U.S. detention operations through the Ministry of Defense to the government of Afghanistan, leaving the door open for further transition to the Minister of Justice [at some point in the future].¹¹³

This is a challenging mission to be sure considering a disturbing, but not surprising, phenomenon called "insurgents in the wire," which refers to the radical detainees currently in U.S. custody and other criminals incarcerated in Afghan prisons: "There are more insurgents per square foot in corrections facilities than anywhere else in Afghanistan. Unchecked, Taliban/Al Qaeda leaders patiently coordinate and plan, unconcerned with interference from prison personnel or the military."¹¹⁴ In mid-2009, it was estimated that of approximately 14,500 inmates in the Afghan corrections system, 2500 were presumed to be Taliban and al Qaeda fighters seeking to radicalize non-insurgent inmates.¹¹⁵ The DFIP is no exception, where an estimated one in five of the 800 lawfully-detained insurgents are assumed to be extremists who, if "unchecked," may seize on the opportunity to use the circumstances of detention to recruit with impunity from within the facility.¹¹⁶

¹¹³ Harward Transcript, *supra* note 104.

¹¹⁴ General McChrystal Assessment, *supra* note 1, at F-1. *See also* Stern, *supra* note 1, at 21 (citing the same quote from General McChrystal, Stern continues, "Detainees have cell phones, money and influence. They control wide swaths of Afghan prisons today and they are radicalizing the other inmates.").

¹¹⁵ General McChrystal Assessment, *supra* note 1, at F-1.

¹¹⁶ JTF 435 Press Release, *supra* note 112.

"JTF 435, along with Afghan partners, will essentially be conducting counterinsurgency behind the wire," working with Afghan partners in deradicalization efforts, as well as reintegration—helping detainees who no longer pose a threat with

To combat this insurgency from within the DFIP, JTF 435 is organized to partner with multiple organizations, the most important of which is the Government of the Islamic Republic of Afghanistan. Seven Directorates comprise JTF 435, each following a Line of Operation set out in Annex F of General McChrystal's Assessment: (1) the U.S. Detention Operations Task Force, which consists of an MP Brigade (Task Force Protector) responsible for the care and custody of the detainees, prevention of insurgency inside the wire, and facilitating family visitation; (2) the Theater Intelligence Group, which is responsible for actionable intelligence collection and analysis; (3) the Biometrics Task Force, which is responsible for confirming identities and tracking recidivism; (4) the Afghanistan Detention and Corrections Cell, which is responsible for coordinating with the Afghan Central Prisons Directorate and sharing best practices with the Afghans to help them implement COIN in their prisons; (5) the Engagement and Outreach Cell, which is responsible for using strategic communications as a proactive tool to protect the truth about U.S. detention and interrogation practices and to enhance and advance the Rule of Law in Afghanistan; (6) the Reintegration Directorate, which is focused on rehabilitation and de-radicalization of those prone to the enemy's insurgent efforts with a view toward their successful reintegration into Afghan society; and (7) the Legal Operations Directorate, which is responsible for the DRBs and improving evidence packets for those cases transferred to the Afghan criminal courts.¹¹⁷

While the synchronization of this massive effort is a daunting task and no single directorate can be marginalized in the overall JTF 435 mission, the Legal Operations Directorate, as discussed below, plays a vital role in the fate of each detainee.

F. The Detainee Review Boards (17 September 2009 through 6 January 2010)

The July 2009 policy directed the new procedures to be effective within sixty days.¹¹⁸ Despite the sweeping changes required to transform the UECRBs to the new DRBs in just two months, the concomitant increase in the number of personnel to fully implement the changes lagged far behind. In light of these personnel shortages, the DRB commenced on 17 September 2009, in a "rolling-start" mode,

reading and writing and vocational skills that will help them be peaceful and productive citizens upon release. [Vice Admiral] Harward stressed the importance of the vocational training programs currently being offered at the U.S. Detention Facility in Parwan. "By providing an environment that's conducive to rehabilitation and reintegration programs, as well as vocational training," Harward said, "we are offering detainees a viable option other than returning to the insurgency." *Id.*

¹¹⁷ General McChrystal Assessment, *supra* note 1, at F-3 to F-4.

¹¹⁸ Carter Letter, *supra* note 95, at 2.

implementing additional substantive and procedural detainee protections mandated by the new policy as more personnel were added to the operation. Considering the number of personnel in the Legal Operations Directorate as of 1 May 2010 (about fifty), starting the early DRB efforts within the mandated timeframe with only twelve personnel was a considerable achievement.¹¹⁹

In July 2009, CJTF-82 still had control of detention operations and was responsible for implementing the transition from the UECRBs to the DRBs in the BTIF.¹²⁰ Captain Andrea Saglimbene, the Detention Operations Attorney for CJTF-82, was responsible for the day-to-day legal advice and coordination for all aspects of the review boards for MP and MI personnel in the BTIF.¹²¹ She was also the legal advisor to the UECRBs and became one of the first recorders (along with Major Jeremy Lassiter) for the new DRBs, presenting cases to the new board members.¹²² Having a judge advocate present the case to the board was one of the major changes from the prior review boards when MI analysts presented the detainee packets to board members.¹²³ Lieutenant Christopher Whipps, an intelligence

officer in the U.S. Navy, served as the first PR.¹²⁴ Additional recorders and PRs arrived in late October and November, respectively, but until they did, with some help from paralegals and analysts and investigators from the Detainee Assistance Branch (DAB), Captain Saglimbene, Major Lassiter, and Lieutenant Whipps conducted over 150 new DRBs in September and October.¹²⁵

As the sixty-day clock rapidly ticked down on implementation of the July 2009 policy, some initial logistical questions had to be decided. First, the command decided to implement the new DRB procedures on 17 September 2009 (the old UECRBs were held on Thursdays so that battle rhythm was maintained). The next question was how many detainee cases would be heard per day or week to cover the initial sixty-day reviews and subsequent six-month reviews for the more than 600 detainees in the BTIF.¹²⁶ It was determined that the board for any detainee in the BTIF on 16 September or earlier would be scheduled for six months from the date of their last UECRB, and these detainees would not have a sixty-day initial review under the

¹¹⁹ The initial twelve personnel assigned to the DRBs included two recorders, one personal representative, one legal advisor, seven paralegals, and an operations officer. As of 1 May 2010, fifty personnel are assigned to the DRBs, including twelve recorders and eleven PRs, along with numerous paralegals, interpreters, analysts, and investigators. E-mail from Lieutenant Colonel Michael Devine, Deputy Dir., Legal Operations Directorate, Bagram, Afg., to author (29 Apr. 2010, 15:15 EST) (on file with author) [hereinafter Devine e-mail].

¹²⁰ All detainees were not transferred from the BTIF to the DFIP until 16 December 2009. See *infra* note 126. The creation of JTF 435 was not even announced until 18 September 2009. See *supra* note 110.

¹²¹ Interview with Captain Andrea Saglimbene, Detention Operations Attorney for CJTF-82, in Bagram, Afg. (Jan. 29, 2010) [hereinafter Saglimbene Interview].

¹²² Under the new policy, recorders serve a neutral role in the process. They do not advocate on behalf of the Government or the detainee. Recordors are responsible for presenting all information reasonable available that is relevant to the board's findings and recommendations on the issues of internment, to include exculpatory information and information regarding the detainee's potential for rehabilitation, reconciliation, and eventual reintegration into society. See *infra* note 144 and accompanying text for additional discussion of the recorder's role.

¹²³

It was time for judge advocates to get more involved in the process of presenting cases to the boards, to include preparing the 'baseball card'—the one page information sheet that serves as a comprehensive summary of all pertinent biographic data, facts surrounding the reason for detention and assessments for the detainee. This meant it was the time for MI personnel to be removed from the process of making recommendations to the board members, which understandably focused on whether or not continued detention was required for intelligence gathering purposes.

Rupple Interview, *supra* note 71. Intelligence gathering remains an essential role in the overall COIN effort; however, intelligence value alone is no longer an authorized criterion for continued internment, and this fact is specifically highlighted to the new DRB members. During the early stages of the DRBs when CPT Saglimbene was the sole judge advocate recorder,

MI analysts (acting in compliance with the rules) assisted by serving as recorders on some cases. The MI analysts remained with the Detainee Assistance Branch (DAB), performing the critical two-prong role of assisting in the preparation of packets for both the recorders and PRs and continuing to assess and prepare files for prosecution in the Afghan criminal justice system. Due to this expertise, the DAB was included in the Legal Operations Directorate and remained part of the overall DRB team; however, MI personnel were phased out of the "recorder" role and replaced by judge advocates. *Id.* Four new recorders, all judge advocates, arrived in Bagram on 18 October 2009 and began the transition with CPT Saglimbene, observing boards on 22 October 2009 and then presenting cases (with supervision) at the next board session 29 October 2009. Interview with Captain Shari Shugart, Chief Recorder, Recorder Cell, Legal Operations Directorate, in Bagram, Afg. (Jan. 26, 2010) [hereinafter Shugart Interview]. Captain Shugart is a reserve judge advocate with the 78th Legal Services Organization, Los Alamitos, California, who deployed to Kuwait on 28 June 2009 in support of a U.S. Central Command mission, Task Force FOIA. When that mission was completed ahead of schedule, on 18 October 2009, along with five others, CPT Shugart volunteered to continue her deployment in support of the new DRB mission.

¹²⁴ Under the new policy, personal representatives (PRs) are non-judge advocate military officers assigned to assist detainees prepare and present their cases. Detainee Review Procedures, *supra* note 95, at 2, 3, 5. See *infra* notes 145–55 and accompanying text for additional discussion of the PR's role.

¹²⁵ Saglimbene Interview, *supra* note 121. In September, a FRAGO went out to units in Afghanistan to task officers (non-lawyers) to serve as PRs. Because PRs had to meet with the detainee at least thirty days prior to appearing before the board with the detainee, the four new PRs did not appear before boards until late November 2009. Shugart Interview, *supra* note 123. See also Detainee Review Procedures, *supra* note 95, at 6 ("The personal representative shall be appointed not later than thirty days prior to the detainee's review board.")

¹²⁶ On 17 September 2009, there were 639 detainees in the BTIF. Interview with Sergeant Charles Sonnenburg, Court Reporter, 16th Military Police Brigade (Airborne), Fort Bragg, N.C., in Bagram, Afg. (Jan. 29, 2010) [hereinafter Sonnenburg Interview]. By 16 December 2009, the last day the BTIF housed detainees, all 753 detainees were transferred from the BTIF to the DFIP. *Id.*

new DRB system.¹²⁷ The initial DRB for all detainees entering the BTIF (and then DFIP) after 17 September would be scheduled sixty days after the detainee's entrance to the facility. Based on those parameters, the initial DRB schedule had twenty-six boards per day once a week.¹²⁸

The challenge early on was balancing between conducting a meaningful review and processing over 600 detainee reviews in a timely manner—all with limited resources. From September through early November, when the board sessions were held once per week, an average daily session went for sixteen hours from 0800 until midnight, sometimes going later into the following morning. By necessity, the individual hearings were scheduled every forty minutes so the BTIF guards had a schedule for the movement of the detainees within the facility. While there was no timer going during the boards and the board members knew they could take the necessary time to be comfortable with their decisions, all parties were cognizant of the fact that the boards had to stay on some semblance of a schedule to keep the process moving.¹²⁹ As part of the overall evolution of the DRBs, the goal has been to allot more time per hearing as more personnel joined the Legal Operations Directorate and more facility space was made available.

G. The Detainee Review Boards (7 January through June 2010)

Soon after JTF 435 assumed control of all detention operations in Afghanistan and effective control of the DRB process, the number of personnel assigned to the Legal Operations Directorate to work on the DRBs increased exponentially from a few people assigned to various units to a starting staff of approximately thirty-five on 7 January 2010 when JTF 435 took over. This increase in personnel allowed boards to expand from one day per week to three days per week in January 2010 and then to five days a week in March 2010. Beginning on 15 March 2010, with the expansion to two simultaneous boards operating five days per week, capacity now exists for fifty DRBs per week—ten boards per day, five days per week. Holding boards five days per week, coupled with the opening of a second DRB hearing room in March, has resulted in the average number of cases per board per day decreasing from twenty-seven to

¹²⁷ This decision meant that detainees who appeared before the last UECRBs on 10 September 2009 would have their first DRB in early March 2010. Saglimbene Interview, *supra* note 121.

¹²⁸ Sergeant Sonnenburg had the task of analyzing the data to determine how many boards had to be held per week to provide six-month reviews for all detainees in the facility prior to 16 September 2009 and allocate time for anticipated new arrivals. He created a "Super Tracker" to compile and maintain the data. Sonnenburg Interview, *supra* note 126. The raw data in the chart at Appendix C was compiled from a review of the DRB Super Tracker from 17 September 2009 through 18 June 2010 (unclassified notes on file with author). See app. C.

¹²⁹ Saglimbene Interview, *supra* note 121.

five, thus allowing substantially more time to develop and examine each individual case.¹³⁰ The time allotted per hearing has increased significantly from an initial average of forty minutes to between ninety minutes and three hours per hearing.¹³¹

Finally, another factor driving the number of boards held per week is the number of detainees in the DFIP.¹³² As discussed above, only USFOR-A/OEF captures get transferred to the DFIP. The primary capturing units within USFOR-A are Special Operations Forces.¹³³ While the units and their operations remain classified and cannot be discussed here, for those with experience in Iraq and Afghanistan (and even those without such experience), it is not difficult to imagine or appreciate the nature of such operations, which take place at night, and generally involve nefarious bad actors that make their way to the DFIP. Based on new captures by OEF units (almost 600), since the DRB process started on 17 September 2009, the number of overall detainees in U.S. custody has steadily increased from 639 to 893 through 18 June 2010 despite a significant number of detainees ordered released (160) or transferred (168) through the DRB process.¹³⁴

H. The Detainee Review Board Personnel

In addition to a large administrative staff that contributes to the efficient operation of the DRBs, the personnel who actually participate in the DRBs include the recorder, the PR, the detainee, the board members, the legal

¹³⁰ See app. C. When the boards were held one day per week, there was an average of twenty-seven cases on that one day. When the boards expanded to two days per week, there were twenty cases each day. When the boards expanded to three days per week, there was an average of fifteen cases each day. Finally, when the boards expanded to five days per week, the average dropped to eight cases per day. As of late June 2010, typically no more than five hearings per board are held simultaneously each day in each of the two available hearing rooms, for a total of ten hearings per day, five days per week. The actual number of DRB hearings each week is mathematically driven by the detainee population and the number of initial sixty-day and subsequent six-month DRB requirements. Devine e-mail, *supra* note 119.

¹³¹ Devine February Interview, *supra* note 42.

¹³² See *supra* note 128.

¹³³ See *supra* note 89.

¹³⁴ The following chart reflects the number of detainees interned at the end of each month since the DRB process began. As of 18 June 2010, there were 893 detainees in the DFIP. The data in the text and chart was compiled from the Super Tracker during author's June visit to Afghanistan. See also app. B. The reason for any differences in the numbers of releases and transfers is due to the fact that there is a three- to four-week period between board recommendations and approvals by the convening authority.

BTIF (Sep–Dec 2009)				DFIP (Jan–May 2010)				
Sep.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	Apr.	May
639	670	707	753	794	790	791	812	842

advisor, and the reporter. The convening authority also plays a critical role in appointing the board members, reviewing the proceedings and recommendations, and making the final determination on the detainee's status.

The Commander, U.S. Central Command, has designated BG Martins to serve as the convening authority for the review boards.¹³⁵ In this capacity, BG Martins chooses DRB members from nominations submitted by USFOR-A and ISAF. The nominees are U.S. field grade officers, and, because of the strategic importance of the DRB mission, the members must possess certain qualifications such as "age, experience, and temperament, [and the ability] to exercise sound judgment and have a general understanding of combat operations and the current campaign plan to assess threats in theater and further the counterinsurgency mission [through] their participation on the board."¹³⁶ Additionally, to "ensure the neutrality of the review board, the convening authority shall ensure that none of its members was directly involved in the detainee's capture or transfer to the [DFIP]."¹³⁷

A DRB is composed of three field grade officers with the senior member acting as the board's president. The president is responsible for reading the script¹³⁸ and informing the detainee of his rights once the proceedings begin. The president determines if witnesses not serving with the U.S. forces are reasonably available.¹³⁹ In a closed

session, by a majority vote, using preponderance of the evidence as the burden of proof, the board must determine whether the detainee meets the criteria for internment and, if so, whether continued internment is necessary to mitigate the threat the detainee poses. If a majority of the board determines the detainee does not meet the criteria for internment, the detainee must be released from Department of Defense custody as soon as practicable. The decision to release cannot be changed by the convening authority. If a majority of the board determines the detainee does meet the criteria for internment, then they must also make a recommendation for an appropriate disposition to the convening authority. The possible recommendations include the following:

- Continued internment at the DFIP if necessary to mitigate the threat posed by the detainee.
- Transfer to Afghan authorities for criminal prosecution.¹⁴⁰
- Transfer to Afghan authorities for participation in a reconciliation program.
- Release without conditions.
- In the case of non-Afghans and non-U.S. third-country nationals, transfer to a third country for criminal prosecution, participation in a reconciliation program, or release.¹⁴¹

¹³⁵ Detainee Review Procedures, *supra* note 95, at 2. In early July 2010, BG Martins was selected to serve as the Commander of the new Rule of Law Field Force-Afghanistan (ROLFF-A). It is not yet clear how BG Martins's selection to serve as Commander, ROLFF-A, will impact his role as the convening authority for the DRBs. E-mail from BG Mark Martins, Deputy Commander, JTF 435, Parwan, Afg., to author (3 July 2010, 05:45 EST) (on file with author).

¹³⁶ Memorandum from Vice Admiral Robert S. Harward, Commander, JTF 435 to U.S. Military Forces Conducting Detention Operations in Afghanistan (Feb. 1, 2010 unclassified draft) (on file with author). *See also* JTF 435 Detainee Review Board Policy Memorandum, *supra* note 82 (the unclassified February 2010 draft memorandum was revised into the March 2010 classified version, retaining an unclassified annex, Annex E, called the DRB Policy Memorandum).

¹³⁷ Detainee Review Procedures, *supra* note 95, at 2.

¹³⁸ Legal Operations Directorate, DRB Hearing Script (as of June 2010) (on file with author). The script is maintained by the Deputy Director, Legal Operations Directorate. Devine February Interview, *supra* note 42. One big change from the script used in February and the script used in June was the addition of a brief exchange between the President and the detainee to acknowledge two important documents being admitted and appended to the transcript of the review: the Detainee Notification Worksheet and the Detainee Initial Interview Checklist. (Copies of both are on file with author.) These documents (each signed by the detainee or marked with a thumbprint) and the acknowledgment of them at the opening of the hearing serves the dual-purpose of confirming notification and building a more robust board packet. Interview with Lieutenant Colonel Michael Devine, Deputy Dir., Legal Operations Directorate, JTF 435, in Bagram, Afg. (June 16, 2010) [hereinafter Devine June Interview]. The author conducted a "continuous interview" with LTC Devine from 16 June through 22 June 2010 to discuss all changes to the DRB process since February.

¹³⁹ *Id.* at 4.

¹⁴⁰ Transfers to the Afghan authorities from criminal prosecutions advanced significantly between the author's February and June 2010 trips to Afghanistan. In the February timeframe, recommendations from the DRB to transfer the detainee to the Afghans for criminal prosecution meant that the case file (and detainee) would be transferred to the Afghan National Detention Facility (ANDF) located in Kabul, Afghanistan. The ANDF is co-located with the Pul-e-Charkhi Prison which is run by the Afghan Ministry of the Interior. By contrast, although co-located on the same premises, the ANDF is a completely separate facility located in Block D, fenced off from its sister prison, and it is run by the Ministry of Defense (MoD) (until such time as the security environment allows for the Ministry of Justice to assume control of the facility). For now though, the Afghan National Security Forces (under the MoD), comprised of the Afghan National Army (ANA) and Afghan National Police (ANP), guard the ANDF. With the ANDF secured, judges from the Afghan Supreme Court, prosecutors from the Afghan Attorney General's office and investigators from various agencies can work safely on cases transferred from the DFIP among others. The ANA and ANP have considerable coalition partnership, and this mentorship has been critical as the Afghan criminal justice system builds momentum by working on these cases within the secure confines of the ANDF. *See generally Arbitrary Justice: Trials of Bagram and Guantanamo Detainees in Afghanistan*, HUM. RTS. FIRST (Apr. 2008) [hereinafter *Arbitrary Justice*] (on file with author). Beginning in June 2010, as part of the overall plan to transition detention operations to the Afghans by January 2011, the first Afghan criminal trial took place within the DFIP. The Afghan court convened within the DFIP (as it would have at the ANDF) to hear a case transferred through the DRB process. The Afghan judges have a goal of holding upwards of 300 trials in the DFIP by the end of 2010. While the specifics are outside the scope of this article, the fact such a process has begun is one huge step in advancing the Rule of Law in Afghanistan. Devine June Interview, *supra* note 138.

¹⁴¹ *Id.* The following chart contains all of the board recommendations compiled for the new DRBs from 17 September 2009 through 18 June 2010. It is important to note that these are board recommendations that

Each board member individually weighs the information presented, and once all of the information has been presented, the members deliberate in a closed session.¹⁴² Upon conclusion of deliberations, each member records his or her recommendations on a findings and recommendations worksheet.¹⁴³ Other than a decision to release due to a lack of information demonstrating the detainee has met the detention criteria, the board's recommendations are not binding on the convening authority. For example, even if the board finds the detainee meets the criteria for internment, that finding is not binding on the convening authority, who could decide to release the detainee. Alternatively, the board could recommend continued internment in the DFIP, and the recommendation is similarly not binding on convening authority, who could decide to transfer the detainee to the Afghan authorities.

As discussed above, the recorders are judge advocates; however, their mandate from JTF 435 is to perform their role in a non-adversarial, neutral manner.¹⁴⁴ Recorders are non-

must be approved by the convening authority. The only exception to the need for convening authority approval is that when the board recommends release, the recommendation is binding on the convening authority.

OPTION	TOTAL	%
Continued Internment	877	64%
Release	194	14%
Afghan National Defense Forces (ANDF) Transfer	156	11%
Peace Through Strength (PTS)	118	9%
Repatriation	9	1%
Third country prosecution	12	1%
Combined Total	1366	100%

¹⁴² Between 17 September 2009 and 14 March 2010, board members did not always close to deliberate on the findings and recommendations; however, as of March 15, 2010, this requirement for closed session deliberations is now strictly adhered to. Devine e-mail, *supra* note 119.

¹⁴³ To record the matters above, each board member fills in a findings and recommendations worksheet. This worksheet contains all of the relevant findings as well as spaces for the members to write in their rationale for particular decisions. "The review board's recommendation regarding disposition shall include an explanation of the board's assessment of the level of threat the detainee poses and the detainee's potential of rehabilitation, reconciliation and eventual reintegration into society." Detainee Review Procedures, *supra* note 95, at 5. The threat assessment includes classified criteria that each member must consider to determine whether, based on the facts, the detainee is an "Enduring Security Threat," a threat classification reserved for the highest-threat detainees. The board must also assess the detainee's potential for rehabilitation, reconciliation, and eventual reintegration into society. To make this assessment, the board can consider the detainee's behavior in the DFIP, including participation in rehabilitation and reconciliation programs. *Id.*; see also Detainee Review Board Report of Findings and Recommendations (Feb. 4, 2010) [hereinafter Findings and Recommendations Worksheet] (unclassified portion on file with author).

¹⁴⁴ JTF 435 Detainee Review Board Policy Memorandum, *supra* note 82, at 6. Judge advocates are familiar with the role of the recorder in administrative board proceedings, which operate in accordance with Army Regulation 15-6. Those who have acted as a recorder at an administrative board or observed such proceedings will concur that at times, administrative boards can be just as adversarial as courts-martial proceedings. The JTF 435 Legal Operations Directorate makes great effort in training and oversight to emphasize and enforce the concept that recorder's maintain

voting members that prepare the evidence packets for the voting board members, including any exculpatory evidence if it exists. The recorder's role is different than it is at an administrative proceeding against a Soldier where they represent the command's interests. The DRB recorders represent the Government, but they do not recommend or advocate for release, transfer, or continued internment. Recorders compile all inculpatory information from the capturing units and MI analysts and present the information in a neutral manner to the boards. If a recorder is unsure about a particular fact, he or she has an obligation to make that known.

Although performing their role in a non-adversarial manner, recorders are not prohibited from "cross-examining" a detainee or a detainee's witness. Recorders should also bring forward witnesses that can offer relevant information to the board members to assist in their determination: for example, a forensics expert to discuss fingerprints, a capturing unit member to describe the circumstances of capture or impact on operations if the detainee is released, or an MI analyst to describe the insurgent threat in the detainee's home region. Overall, the recorders have the challenge of ensuring all information comes before the board so the board can make the best possible determination in the case, even when that duty requires assisting and working with the PR to do so.

The PRs have perhaps the most challenging role in the DRB process. The PRs are non-lawyer, professional officers. The PR "shall be a commissioned officer familiar with the detainee review procedures and authorized access to all reasonably available information (including classified information) relevant to the determination of whether the detainee meets the criteria for internment and whether the detainee's continued internment is necessary."¹⁴⁵ They participate in a one-week training course prepared and taught by instructors from the Judge Advocate General's Legal Center and School and other instructors.¹⁴⁶ They also receive additional weekly training with other DRB personnel to hone their representational and advocacy skills. With a few exceptions, the detainee may waive the appointment of a PR,¹⁴⁷ however, to date, no detainee has waived his PR.¹⁴⁸

their neutral role. See generally U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS para. 5-3 (Oct. 2, 2006) [hereinafter AR 15-6] (describing the role of the recorder at administrative boards).

¹⁴⁵ Detainee Review Procedures, *supra* note 95, at 5.

¹⁴⁶ See JTF 435 Detainee Review Board Policy Memorandum, *supra* note 82, at 6.

¹⁴⁷ *Id.* (stating that detainees cannot waive their PR if they are under eighteen years of age or they suffer "from a known mental illness, or [they are] determined by the convening authority to be otherwise incapable of understanding and participating meaningfully in the review process").

¹⁴⁸ While no detainee has appeared before a board without a PR, two detainees did limit their PRs' representation by requesting that their PRs not speak. Another detainee requested a different PR; however, that request was denied. E-mail from Lieutenant Colonel Michael Hosang, Acting

More importantly, the PR must act “in the best interests of the detainee.”¹⁴⁹

To that end, the [PR] shall assist the detainee in gathering and presenting the information reasonably available in the light most favorable to the detainee. The [PR’s] good faith efforts on behalf of the detainee shall not adversely affect his or her status as a military officer (e.g., evaluations, promotions, future assignments).¹⁵⁰

Prior to the new DRBs, one of the primary complaints of the detainees (and the ICRC) was the lack of notice or information about the reasons for their detention and their ability to challenge their detention.¹⁵¹ These concerns were eliminated by the new process because the PRs have the task of explaining the process to the detainees, to include their own role as the detainee’s representative.¹⁵² Now the detainees are apprised of when their board will convene, what to expect at the board, and the potential outcomes of the board. Additionally, the PR can assist a detainee to prepare a statement and answer questions at the board, as well as assist the detainee in gathering documents or arranging for a witness to speak on the detainee’s behalf—all rights afforded to detainees by the new process.¹⁵³ The PRs cannot disclose classified information to the detainee, and the detainee is excluded from the classified portion of the hearing, but the PR does have full access to classified information relevant to the case. The PRs are instructed, through the DRB Policy Memorandum, the PR Appointment Memorandum, and training, that they are bound by a non-disclosure agreement not to communicate information gleaned from discussions with the detainee that might be harmful to the detainee’s case.¹⁵⁴ The PRs explain this protection to the detainee. Conversely, PRs are understandably prohibited from disclosing classified information to the detainee.¹⁵⁵

Deputy Dir., Legal Operations Directorate, Bagram, Afg., to author (10 Apr. 2010, 02:28 EST) [hereinafter Hosang e-mail] (on file with author). See also Devine e-mail, *supra* note 119.

¹⁴⁹ Detainee Review Procedures, *supra* note 95, at 6.

¹⁵⁰ *Id.*

¹⁵¹ See *id.* This anecdotal information was discussed during the ICRC representative’s class during the 1st DRB Short Course in February 2010. See app. B.

¹⁵² Detainee Initial Session Checklist (21 June 2010) [hereinafter Detainee Checklist] (on file with author). This detailed checklist contains more than twenty-five areas for the PR to cover with the detainee. If followed, it serves as a failsafe measure to ensure the detainee has no doubt as to what will transpire at his DRB.

¹⁵³ *Id.* at 3–4.

¹⁵⁴ Devine e-mail, *supra* note 119.

¹⁵⁵ *Id.*

The role of the legal advisor is similar to the role of review board legal advisors in the past. As a non-voting member, the legal advisor sits through the entire board and is available to answer questions from board members. The board president can discuss any disputes over the criteria or admission of evidence, and other issues, with the legal advisor. The legal advisor also collects the findings and recommendations worksheets completed by the members and records the majority vote. The legal advisor typically reviews the hearing and the findings and recommendations of the board and provides a legal review of the proceedings.¹⁵⁶

A record of the proceedings must be prepared within seven days.¹⁵⁷ A reporter is present during the hearing compiling a summarized transcript of each DRB. The transcript, along with any exhibits that were offered to the board and the findings and recommendations, become the record of the board that is presented to the convening authority for a decision on final disposition. In all cases, the legal advisor reviews the file for legal sufficiency, and a senior judge advocate will conduct a second legal review when continued internment is recommended.¹⁵⁸ The detainee is then notified of the results within seven days of the sufficiency review.¹⁵⁹

Between 2002 and April 2008, detainees did not appear at their review boards, and likely did not even know such a board was proceeding in their absence. Between April 2008 and 10 September 2009, detainees appeared at their first UECRBs, but without the assistance of a PR and with no real opportunity to challenge the evidence against them. The detainees now have numerous protections at the new DRBs:

¹⁵⁶ *Id.*

¹⁵⁷ Detainee Review Procedures, *supra* note 95, at 5.

¹⁵⁸ *Id.* For cases where the board recommends continued internment, the July 2009 policy requires that the record be “forwarded to the first Staff Judge Advocate in the BTIF’s chain of command.” *Id.* It is understood that references in the policy to the old BTIF now mean the new DFIP, and the other factor that makes this precise language slightly inapplicable is the fact that JTF 435 now has complete control of detention operations. From September 2009 through early January 2010, when CJTF-82 still ran the DRBs, the first legal review was conducted by a judge advocate from the BTIF (the judge advocate from TF Protector) and the second legal sufficiency review was completed by a lawyer from the Office of the Staff Judge Advocate (OSJA) of the unit in charge of the BTIF (the DSJA from the CJTF-82 OSJA). The July 2009 policy further states, “The record of every review board proceeding resulting in a determination that a detainee meets the criteria for internment shall be reviewed for legal sufficiency when the record is received by the office of the Staff Judge Advocate for the Convening Authority.” *Id.* Since JTF 435 assumed total control of detention operations in January 2010, the process of two legal reviews has evolved. Now, the initial legal review is conducted by the legal advisors that are assigned to the OSJA and detailed as legal advisors to the DRB. In those cases where continued internment is recommended, the second legal review is conducted by the JTF 435 Director of Legal Operations.

¹⁵⁹ *Id.*

- First, the detainee is allowed to be present at all open sessions.
- The detainee has the assistance of a PR.
- Within two weeks of arriving at the DFIP, a member of the Detainee Criminal Investigative Division (DCID) notifies the detainee of his initial hearing within sixty days of arriving at the DFIP.
- The detainee can testify or provide a statement to the DRB; however, the detainee cannot be compelled to testify.
- The detainee can present all reasonably available evidence relevant to the board's determination of whether the detainee meets the criteria for internment and whether continued internment is necessary.¹⁶⁰

While the detainees have numerous protections under the new policy, they are, of course, meaningless unless the detainee can exercise those rights in a meaningful manner. Of the protections described above, the PR becomes the essential link between the detainee and the review proceedings. The PR helps prepare the detainee for his testimony before the board, both the direct testimony and responses to anticipated questions from the board members and recorder. If the detainee requests testimony or statements from family members or a tribal elder, the PR assists in this process as well. With the roles of the various personnel now described, how those personnel implement the procedures at the actual board will be discussed below.

I. The Detainee Review Board Procedures

The review boards follow the ten procedures prescribed by AR 190-8, paragraph 1-6e,¹⁶¹ as supplemented by the

¹⁶⁰ *Id.* While coalition criminal investigators have been part of the Legal Operations Directorate since its inception, they were formerly part of the DAB; however, as of June 2010, the team of investigators is now split off into their own section called the Detainee Criminal Investigative Division and their primary function is to assist the Afghan partners in preparing cases for prosecution within the Afghan criminal justice system. See also *supra* note 140 and Hosang e-mail, *supra* note 148.

¹⁶¹ See AR 190-8, *supra* note 9, para. 1-6e (listing ten procedures that tribunals must follow).

(1) Members of the Tribunal and the recorder shall be sworn. The recorder shall be sworn first by the President of the Tribunal. The recorder will then administer the oath to all voting members of the Tribunal to include the President.

(2) A written record shall be made of proceedings.

(3) Proceedings shall be open except for deliberation and voting by the members and testimony or other matters which would compromise security if held in the open.

sixteen procedures outlined in the July 2009 policy.¹⁶² Ten of the sixteen procedures in the 2009 policy are substantially the same as the ten listed in paragraph 1-6e.¹⁶³ The additional six procedures that appear in the 2009 policy, but not in paragraph 1-6e, include the following requirements:

(1) for the convening authority to appoint a personal representative to assist each detainee;

(2) for U.S. military personnel to conduct a reasonable investigation into any

(4) Persons whose status is to be determined shall be advised of their rights at the beginning of their hearings.

(5) Persons whose status is to be determined shall be allowed to attend all open sessions and will be provided with an interpreter if necessary.

(6) Persons whose status is to be determined shall be allowed to call witnesses if reasonably available, and to question those witnesses called by the Tribunal. Witnesses shall not be considered reasonably available if, as determined by their commanders, their presence at a hearing would affect combat or support operations. In these cases, written statements, preferably sworn, may be submitted and considered as evidence.

(7) Persons whose status is to be determined have a right to testify or otherwise address the Tribunal.

(8) Persons whose status is to be determined may not be compelled to testify before the Tribunal.

(9) Following the hearing of testimony and the review of documents and other evidence, the Tribunal shall determine the status of the subject of the proceeding in closed session by majority vote. Preponderance of evidence shall be the standard used in reaching this determination.

(10) A written report of the tribunal decision is completed in each case. Possible board determinations are:

(a) EPW.

(b) Recommended RP, entitled to EPW protections, who should be considered for certification as a medical, religious, or volunteer aid society RP.

(c) Innocent civilian who should be immediately returned to his home or released.

(d) Civilian Internee who for reasons of operational security, or probable cause incident to criminal investigation should be detained.

Id. at 2-3.

¹⁶² Detainee Review Procedures, *supra* note 95, at 3-5.

¹⁶³ Compare AR 190-8, *supra* note 9 (the procedures contained in subparagraphs 1-6e (1)-(9)), with Detainee Review Procedures, *supra* note 95, at 3 and 4 (the unnumbered fourth through eleventh bullets correspond to subparagraphs 1-6e(1)-(8) and the thirteenth bullet corresponds to 1-6e(9)). Subparagraph 1-6e(10) is similar in form; however, understandably, the substance is substantially different with 1-6e(10) relevant for Enemy Prisoner of War determinations while the fourteenth bullet of the 2009 policy is relevant to internment determinations.

exculpatory information offered by the detainee;

(3) for the board to follow a written procedural script to provide the detainee a meaningful opportunity to understand and participate in the proceedings;

(4) for the board to allow the detainee to present reasonably available documentary evidence relevant to the internment determinations;

(5) for the board to make an assessment of the detainee's threat level and an assessment of the detainee's potential for rehabilitation, reconciliation, and eventual reintegration into society; and

(6) for a written report of the review board determinations and recommendations to be prepared in each case.¹⁶⁴

The detainee review procedures outlined in the Secretary of Defense's six-page July 2009 policy have been supplemented by a sixteen-page Detainee Review Board Policy Memorandum published by the JTF 435 commander in March 2010. The March 2010 implementing policy fills in gaps, clarifies the roles, both primary and supporting, of the numerous personnel and organizations involved in the overall DRB process, and provides guidance on specific implementing procedures.¹⁶⁵ By comparison, paragraph 1-6e of AR 190-8 has ten procedures, the July 2009 policy lists sixteen procedures (including the ten from AR 190-8), and the March 2010 policy lists a total of forty-two procedures (including the sixteen from the July 2009 policy). Paragraph 12 (Detainee Review Board Procedures) specifically states that "Detainee Review Boards shall follow the procedures prescribed by [AR 190-8] paragraph 1-6.e., as supplemented below" and goes on to list the forty-two procedures.¹⁶⁶ In addition to the procedures described above, some of the paragraph 12 additions include the following:

(1) Members of the board and the recorder will be sworn;

(2) Proceedings shall be open, except for deliberations and voting by members and testimony or other matters that would compromise national or operational security;

(3) The detainee shall be advised of the purpose of the hearing, his opportunity to present information, and the consequences

of the board's decision, at the beginning of the hearing;

(4) The detainee shall be allowed to attend all open sessions (with an interpreter), but will not attend classified portions of the board, but the PR will be present;

(5) The detainee can call reasonably available witnesses and present reasonably available documentary information (in this paragraph and its sub-paragraphs, the policy describes in detail the rules for the presentation and exclusion of evidence, to include the criteria for determining relevance, whether a witness is reasonably available, alternate means to testimony, and the admissibility of various forms of hearsay);

(6) The detainee can testify, but not be compelled to testify;

(7) Units and personnel with interest can provide input and attend the hearing, including capturing units, battle space owners or other staff sections, to include the guard force.¹⁶⁷

One of the critical additions to the July 2009 policy in the March 2010 policy worth highlighting is an exclusionary rule. In one of his first acts as Commander of the new JTF 435 in October 2009,¹⁶⁸ BG Martins immediately implemented a prohibition on the use of statements obtained through torture or cruel, inhuman, or degrading treatment. Initially an oral edict adhered to by the personnel participating in the DRBs, this prohibition made its way into an early draft DRB standard operating procedure in February 2010, just after the JTF 435 assumed control of detention operations and the DRBs, and now the use of such statements is proscribed in the March 2010 policy:

Excluded information. No statements obtained by torture or cruel, inhuman, or degrading treatment will be considered by a DRB. Statements obtained through such coercive conduct will not be considered by a DRB, except against a person accused of torture as evidence that the statement was made.¹⁶⁹

As discussed above, there are open and closed sessions of the board proceedings. Because portions of the DRB proceedings are classified SECRET/NOFORN, the overall

¹⁶⁴ See Detainee Review Procedures, *supra* note 95, at 4-5 (unnumbered first, second, third, twelfth, fifteenth, and sixteenth bullets).

¹⁶⁵ See JTF 435 Detainee Review Board Policy Memorandum, *supra* note 82; Detainee Review Procedures, *supra* note 95.

¹⁶⁶ JTF 435 Detainee Review Board Policy Memorandum, *supra* note 82, at 6-12.

¹⁶⁷ *Id.* paras. 12d, f, g, and i-m.

¹⁶⁸ See *supra* note 112. E-mail from BG Mark Martins, Deputy Commander, JTF 435, Parwan, Afg., to author (29 Apr. 2010, 22:42 EST) (on file with author).

¹⁶⁹ JTF 435 Detainee Review Board Policy Memorandum, *supra* note 82, para. i(4).

classification of the DRB is SECRET/NOFORN. However, as part of the overall concept of transparency, JTF 435 and its Legal Operations Directorate, led by Captain Greg Belanger, U.S. Navy, are striving to ensure as much of the process as possible remains unclassified and takes place in the presence of the detainee. The DRB remains a bifurcated hearing consisting of an unclassified session, where the detainee is present, and a classified portion, where the detainee is excluded but his personal representative remains to hear, present, and challenge information on the detainee's behalf. Many of the remaining procedures described in paragraph 12 of the March 2010 policy contain the specific rules for making, recording, and processing board determinations that are discussed elsewhere in this article.

J. "Shura Rooms" and COIN¹⁷⁰

April 2008 was the first month a Bagram detainee personally appeared before a review board. Two years later, in March 2010, the first Afghan witnesses began to appear in person before DRBs. As a major step in progressing General McChrystal's COIN effort, just three months after assuming control over all detainee operations in Afghanistan, JTF 435 and its Legal Operations Directorate began inviting Afghan witnesses to appear in person before the DRBs to present live testimony. Managing the expectations of Afghans who travel to the DFIP to testify is critical to furthering the COIN effort.

In the Afghan culture, when village elders gather for a shura, or meeting, the village elder at the top of the tribal hierarchy commands the respect and attention of the entire gathering. The village elder dispenses advice and resolves disputes. Given the deference shown to such a leader, it would be natural for the village elder to think his support for a detainee would result in release. The reality is that two of every three detainees remain interned. The potential for the opposite negative effect is large if the village elders were to return to their communities disillusioned by the DRB process, especially if the detainees they vouched for are interned for an additional six months. The DRB leadership works to prevent such scenarios.

When the plan to include Afghan witnesses in the DRB process was implemented, recognition of cultural

¹⁷⁰ In a seminar during the 2d DRB Short Course in June 2010, the question of whether the testimony of Afghan village elders could potentially be more harmful than useful to the COIN effort—because of the stronger probability that detainees will remain interned or transferred to the Afghan authorities (currently only 14% of detainees get released)—was raised. The discussion focused on the premise that a village elder's word is essentially law within his village. If a village elder were to travel to the DFIP to personally vouch for a detainee and guarantee the detainee's productive, terror-free future, then presumably, the detainee should be released. And if the detainee is not released, the village elder must explain to his community that the Americans would not listen to him. This section captures how the DRB personnel are attuned to this potential negative effect and how such situations are handled.

sensitivities resulted in the creation of two "shura" rooms within the DFIP. Two offices were cleared out and transformed into comfortable waiting rooms for Afghan witnesses. Filled with Afghan-appropriate "furniture," such as large pillows arranged on the floor around the sides of the room and large comfortable couches, Afghan witnesses feel welcome from the start. The essential part of the visit, however, is the initial meeting with the Director and/or Deputy Director of the Legal Operations Directorate. In addition to welcoming the witnesses, one of the leaders discusses the process that will follow. All witnesses are informed that their presence (and potential testimony) is critical to the process but that their presence or testimony will not guarantee release. By explaining the process in detail up front, witnesses' potential for dissatisfaction with the overall process is minimized. This does not guarantee that witnesses will not be upset over a specific result; however, by observing and participating in the process, witnesses can appreciate the United States' attempt to offer their family or tribal member a fair, transparent, and robust hearing. This is the critical message that must get back to the villages.¹⁷¹

An example from 23 March 2010 illustrates this point.¹⁷² Three DRB hearings were scheduled for 23 March 2010, and the Legal Operations Directorate hosted eleven Afghan witnesses from the villages of three detainees. Two Afghan Government officials also attended the DRB sessions, as well as three human rights advocates.¹⁷³ The markedly positive feedback collected from the Afghan nationals was most telling. "Both the government officials and villagers were overwhelmed by the day's events. They were incredibly appreciative of the treatment they received, the care and custody US forces are providing the detainees, and the DRB process."¹⁷⁴ Notable comments during a post-DRB shura included the following statements:

¹⁷¹ The observations described in the text are based on LTC Mike Devine's description of the Afghan witness process during the seminar. See *supra* note 170.

¹⁷² Legal Operations Directorate, After Action Report—23 March 2009 DRB Hearing [hereinafter DRB Witness AAR] (on file with author). This three-page AAR was drafted by LTC Mike Devine.

¹⁷³ *Id.* at 1. The two Afghan Government officials were the Provincial Council and Deputy Provincial Council from Logar Province. The Human Rights Organizations' representatives were Jonathan Horowitz (Open Society Institute), Andrea Prasow (Human Rights Watch) and Candace Rondeaux (International Crisis Group—Afghanistan Office). See also the "Promise and Problems" section in Part IV, below, which discusses Mr. Horowitz's follow-up article reflecting on his observations of the DRB process in March 2010.

¹⁷⁴ *Id.* at 2. Also noted in the DRB Witness AAR are the "less favorable" comments from the human rights representatives. Despite never being allowed access to the old BTIF, the personnel were allowed access to observe five DRB hearings. In the end, the concerns noted were the use of non-attorneys as PRs and the use of non-native Pashto speakers as interpreters. *Id.*; see *infra* Part IV (discussing Human Rights Organizations).

“I have been astonished by this whole day.”

“I would never have believed you had such great procedures.”

“I cannot believe how well we were treated.”

“The shura listened to us, asked good questions, and respected us.”

“Each [detainee] told us how well they are treated here—the food, the medical care, the religion, the respect.”

“We will carry the messages of this day to all of our villages.”¹⁷⁵

Since the introduction of Afghan witnesses to the DRB process on 6 March 2010, 411 live witnesses and 125 telephonic witnesses have testified through 30 June 2010.¹⁷⁶ Although not definitive on the topic, the data reveals that detainees who do not call witnesses have a higher rate of continued internment than those detainees who have witnesses speak on their behalf. During roughly the same period—6 March to 18 June 2010—a total of 581 DRBs were conducted. In the 404 cases where no witnesses appeared, the board recommended continued internment in 55% of the cases. In the remaining 177 cases, which involved either live or telephonic witnesses, the continued internment rates were considerably lower: 43% and 48%, respectively.¹⁷⁷ Comments such as those provided by the Afghan nationals who participated in the DRB process in March, combined with the empirical data, reveal a process that is clearly working to win over the population in support of the COIN effort in Afghanistan.

¹⁷⁵ *Id.*

¹⁷⁶ In addition to telephonic and live witnesses, Afghan nationals have submitted 347 letters of support on behalf of detainees. In total, since the Legal Operations Directorate began tracking witness support on 1 February 2010, there have been 1,163 witness appearances or letters of support. This total includes the 411 live Afghan witnesses, the 125 Afghan witnesses who testified telephonically or by VTC, and the 347 letters of support. It also includes 280 coalition witnesses such as Battle Space Owners, capturing units, or forensic witnesses who have testified either for or against the detainee. E-mail from Lieutenant Colonel Michael Devine, Deputy Dir., Legal Operations Directorate, Bagram, Afg., to author (6 July 2010, 11:52 EST) (on file with author).

¹⁷⁷ DRB Recommendations with Afghan Witnesses (1 Mar.–18 June 2010) (on file with author). This document also analyzes the data through a different lens: the number of detainees recommended for release or reintegration when supported by either live or telephonic witnesses. Only one-third of detainees are recommended for release or reintegration when no witnesses testify at their hearing, yet half of the detainees who are supported by a live or telephonic witness are recommended for release or reintegration. While the premise that witness testimony influences the board members may be challenged due to the myriad of factors in each DRB, the data clearly demonstrates that those detainees who have witnesses speak on their behalf are released at a higher rate than those who do not.

IV. Lingering Criticism

*Today the Court strikes down as inadequate the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants The Court rejects them today out of hand, without bothering to say what due process rights the detainees possess*¹⁷⁸

A. Human Rights Organizations

Until Congress enacts a law specifying the legal framework for battlefield detention review for terrorists—or, as the current trend has gone, until the Executive’s current DRB procedures are specifically commented on by the federal courts—the main question will remain: What procedural protections should be afforded to detainees captured on a foreign battlefield at an administrative hearing to determine their status and grounds for continued internment in U.S. custody? The new DRBs have gone far beyond what is currently required by the U.S. military under LOAC. An important policy determination was made to supplement Common Article 3 with more clear guidance on the procedural protections, yet despite the sweeping changes and the addition of procedures that go beyond what the law requires, areas of concern to outsiders looking in remain. Perhaps the most vocal critics of the DRB process are human rights organizations. A brief discussion of the development of human rights organizations (HRO) and their application of international human rights law (IHRL) to armed conflict helps put their criticism of the DRB process in context.

The LOAC and “international humanitarian law” (IHL) have essentially the same meaning: they are rules that attempt to mitigate the human suffering caused by armed conflict.¹⁷⁹ Separate and distinct from LOAC and IHL is international human rights law (IHRL). Prior to World War II, human rights law was regarded as a domestic matter addressing how states treat their own citizens. After World War II, however, based on the atrocities states committed against their own citizens, the internationalization of human

¹⁷⁸ *Boumediene v. Bush*, 128 S. Ct. 2229, 2279 (2008) (Roberts, C.J., dissenting).

¹⁷⁹ See GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 22–23 (2010) (describing the emergence of the phrase “international humanitarian law” (IHL) to encompass “the body of international legislation that applies in situations of armed conflict” and “that body of treaty-based and customary international law aimed at protecting the individual in times of international armed conflict”). *Id.* at 23. Generally, military personnel use the term LOAC while academics and influential groups, such as the ICRC, use the term IHL.

rights laws emerged to regulate how states treat their citizens within their own borders.¹⁸⁰

The modern international human rights movement began with the United Nations (U.N.) Charter in 1945.¹⁸¹ Early conventions such as the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Civil and Political Rights that were clearly applicable in peacetime were advanced by the international community to also apply during both internal and international armed conflict.¹⁸² While non-governmental organizations (NGOs) with a humanitarian focus can be traced back to the origins of the ICRC, the proliferation of human rights NGOs coincided with the development of IHRL after World War II.¹⁸³ In 1945, article 71 of the U.N. Charter specifically authorized the U.N Economic and Social Council to consult “with non-governmental organizations which are concerned with matters within its competence.”¹⁸⁴ By 1948, when the Universal Declaration of Human Rights was finalized, there were forty-one NGOs with consultant status with the Economic and Social Council.

Today, there are over 3,000 with that status and thousands of additional organizations doing similar work. Large, influential and internationally-known human rights organizations, such as Amnesty International (“AI”) and Human Rights Watch (“HRW”), sit beside hundreds of smaller, often single-issue, NGOs in UN forums, where they can exert considerable influence on the course of proceedings.¹⁸⁵

¹⁸⁰ See generally INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 41 (2009) [hereinafter OPLAW HANDBOOK].

¹⁸¹ U.N. Charter, reprinted in LAW OF WAR DOC. SUPP., *supra* note 8, at 1-15. One of the purposes of the United Nations is to promote and encourage “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.” *Id.* art. 1(3).

¹⁸² See SOLIS, *supra* note 179, at 25; OPLAW HANDBOOK, *supra* note 180, at 42; see also Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948), reprinted in RALPH STEINHARDT, PAUL HOFFMAN & CHRISTOPHER CAMPONOVO, INTERNATIONAL HUMAN RIGHTS LAWYERING: CASES AND MATERIALS DOCUMENTS SUPPLEMENT 389-402 (2009); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR], reprinted in LAW OF WAR DOC. SUPP., *supra* note 8, at 454-64. See generally RALPH STEINHARDT ET AL., INTERNATIONAL HUMAN RIGHTS LAWYERING: CASES AND MATERIALS 1-22 (2009) [hereinafter IHR LAWYERING] (providing a detailed history of the evolution of IHRL).

¹⁸³ IHR LAWYERING, *supra* note 182, at 849-50.

¹⁸⁴ U.N. Charter art. 71.

¹⁸⁵ IHR LAWYERING, *supra* note 182, at 849 (footnote omitted). “Today, Amnesty International has nearly two million members in more than 150 countries throughout the world.” *Id.* at 850.

Interestingly, while the presence of NGOs within the U.N. is beneficial to facilitate negotiations among nations in the human rights arena, the huge number of NGOs has also become problematic for the U.N. as participation of all NGOs is simply impractical. Often the views of smaller NGOs in underdeveloped countries, perhaps where they are most needed, are not represented by the views of the larger NGOs with consultative status under article 71.¹⁸⁶ In general, human rights NGOs work within the U.N. system to advocate adherence to human rights norms through regional enforcement mechanisms. Other methods include gathering information through fact-finding investigations and reporting violations to the world community.

Human rights organizations have long used the tactic of shaming to embarrass governments into ending human rights abuses in their jurisdiction. To be effective, human rights organizations must move quickly to channel information to media outlets, distribute action alerts to organization members, and lobby politicians to shine a spotlight on human rights violators.¹⁸⁷

A critical distinction between the ICRC and the numerous human rights NGOs described above is that the ICRC is the only international organization specifically named in the 1949 Geneva Conventions.¹⁸⁸ Established in 1863 by Henri Dunant, the ICRC maintains its neutrality as an impartial, independent organization with an exclusive humanitarian mission to protect the dignity of victims of armed conflict.¹⁸⁹ The ICRC is the only organization authorized to visit detainees in the DFIP, and the essence of their effectiveness comes from the fact that they keep all of their communications confidential. This is the primary factor that distinguishes the ICRC from human rights NGOs. The close working relationship between the ICRC and the detaining authority plays a critical role in the overall detention process. Detainees communicate directly with the ICRC, and through the ICRC, detainees can communicate with their families through an exchange of incoming and outgoing notes.¹⁹⁰ This interaction with detainees in U.S.

¹⁸⁶ *Id.* at 852.

¹⁸⁷ *Id.* at 856.

¹⁸⁸ See e.g., GC III, *supra* note 8, arts. 9 & 10. Article 9 of GC III states “[t]he provisions of the present convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may . . . undertake for the protection of prisoners of war and for their relief.” *Id.* art. 9.

¹⁸⁹ See International Committee of the Red Cross (ICRC), The Mission, <http://www.icrc.org> (follow “The mission of the ICRC” hyperlink) (last visited 10 June 2010).

¹⁹⁰ Generally, during each ICRC visit, the ICRC provides notes from families to detainees to the detaining authority to screen. During each visit, the ICRC gathers out-going notes from detainees to their families and passes those to the detaining authority as well. The detaining authority has all of the notes screened by qualified analysts. At the next ICRC visit, the

custody and ability to inspect U.S. detention facilities is generally not available to other NGOs.

Central to the debate and criticism of U.S. detention policies in Afghanistan is the question of what body of law is applicable: LOAC/IHL or IHRL, or both. “The U.S. view is that LOAC generally prevails on the battlefield, to the exclusion of [I]HRL.”¹⁹¹ This view is based on the premise that the United States considers the LOAC to be a *lex specialis*—the exclusive and specialized body of law that applies during times of armed conflict.¹⁹² Human rights organizations acknowledge LOAC/IHL as one body of law applicable during armed conflict, but those organizations do not doubt that IHRL also applies. For one human rights scholar, it is not a matter of if IHRL applies during armed conflict, but a matter of when.

Two branches of international law govern attack and detention: international humanitarian law (IHL) (or the law of armed conflict) and international human rights law (IHRL). For both branches, first, a question of applicability arises: IHRL applies in every circumstance and to everyone. . . . Second, when applicable, for both IHL and IHRL the question arises as to when they allow (or rather, do not prohibit) international forces to deprive enemies of their life or their liberty. Third, if both branches apply and lead to differing results on the two issues, we must determine which of these two prevail.¹⁹³

Human rights advocates rely primarily on two International Court of Justice (ICJ) opinions to contest the U.S. view that IHRL does not apply during armed conflict.¹⁹⁴ In 2004, the ICJ provided an advisory opinion on the three possible relationships between IHL and IHRL during armed conflict: some rights may be exclusively matters of IHL, some may be exclusively matters of IHRL,

and some may be both.¹⁹⁵ “Thus, IHRL always applies, but IHL may modify how it applies based on IHL’s status as a *lex specialis*.”¹⁹⁶ This concept of complementarity (simultaneous application of IHL and IHRL) is accepted by the ICJ, human rights organization, and the vast majority of the international community.

Because they apply IHRL to armed conflict, it is understandable that detention is a focal point for human rights organizations. Additionally, when it comes to due process for detainees, human rights organizations can point to “the fundamental human rights” of AP I contained in Article 75, the “essential guarantees of independence and impartiality” of AP II contained in Article 6,¹⁹⁷ and the premise that “arbitrary deprivation of liberty is prohibited” is accepted as customary international law.¹⁹⁸ Additionally, the 2005 ICRC study on customary international humanitarian law points to three procedures required to prevent arbitrary deprivation of liberty:

- (i) an obligation to inform a person who is arrested of the reasons for arrest;
- (ii) an obligation to bring a person arrested on a criminal charge promptly before a judge; and
- (iii) an obligation to provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention (i.e., the writ of habeas corpus).¹⁹⁹

Though the concepts described in the ICRC study are not specifically applicable to the DRBs in Afghanistan, they inform the perspective of human rights advocates. Two such perspectives are discussed below. The first is from a human rights advocate who participated in the DRB training in February 2010 and personally observed five DRBs in March 2010, and the second is from a Petition for Writ of Habeas Corpus filed in late February 2010 for two detainees interned at the DFIP.

detaining authority returns all screened note cards to the ICRC for distribution. The in-coming cards go to the detainees and the ICRC delivers the out-going cards to the families. See *supra* note 44.

¹⁹¹ See SOLIS, *supra* note 179, at 25.

¹⁹² OPLAW HANDBOOK, *supra* note 180, at 42.

¹⁹³ Marco Sassoli, *The International Legal Framework for Stability Operations: When May International Forces Attack or Detain Someone in Afghanistan?*, in THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS, 85 INT’L L. STUD. 431, 431–32 (Michael N. Schmitt ed., 2009) (U.S. Naval War College, International Law Studies).

¹⁹⁴ See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).

¹⁹⁵ Stephen Pomper, *Human Rights Obligations, Armed Conflict and Afghanistan: Looking Back Before Looking Ahead*, THE WAR IN AFGHANISTAN: A LEGAL ANALYSIS, 85 INT’L L. STUD. 525, 530 (Michael N. Schmitt ed., 2009) (U.S. Naval War College, International Law Studies) (citing Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 178 (July 9)).

¹⁹⁶ Major Jeremy Marsh, *Rule 99 of the Customary International Humanitarian Law Study and the Relationship Between the Law of Armed Conflict and International Human Rights Law*, ARMY LAW., May 2009, at 18.

¹⁹⁷ See AP I, *supra* note 8, art. 76; AP II, *supra* note 8, art. 6.

¹⁹⁸ JEAN-MARIE HEINCKAERTS & LOUISE DOSWALD BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOLUME I: RULES 344 (2005) [hereinafter RULES]. Rule 99 of the 161 rules of customary international law discussed in this study simply states, “Arbitrary deprivation of liberty is prohibited.” See also Marsh, *supra* note 196.

¹⁹⁹ RULES, *supra* note 198, at 349; see also Marsh, *supra* note 196, at 21.

B. Promise and Problems

To aid in the development of an open, transparent process for the new DRBs, BG Martins invited Mr. Jonathan Horowitz, a human rights investigator from the Open Society Institute, to participate in the DRB training in February 2010 and share his viewpoints.²⁰⁰ For the initial training session in February, Mr. Horowitz participated by video-teleconference from Washington, D.C. When addressing the audience, Mr. Horowitz expressed his concerns with the challenges of declassifying information, the production of available witnesses, the education of U.S. personnel on Afghan culture, and how to best achieve transparency and legitimacy in the process.²⁰¹ Interestingly, after observing the DRBs in person a little over a month later, Mr. Horowitz was generally pleased with what he observed, but his concerns remained.

In March 2010, Mr. Horowitz traveled to Afghanistan and observed five DRBs in person. Following his visit, in a balanced article, he reported the “promise and problems” he observed with the new DRBs.²⁰² In comparing the new DRBs to the problems with the old UECRBs,²⁰³ Mr. Horowitz noted that the DRBs were an improvement over the UECRBs, but “the improvements are relative and the bar was set very low to begin with.”²⁰⁴ Before previewing the “promise” of the new DRBs, he stated, “It remains to be seen, however, whether the United States has the right combination of procedures to build a fair process that can make an accurate determination relating to a person’s detention and freedom.”²⁰⁵ Mr. Horowitz acknowledged that the DRB hearing is not a criminal trial, yet he noted that the rules (for the administrative hearing) are a “far cry from the regular system of courtroom checks and balances.”²⁰⁶ Mr. Horowitz welcomed the addition of PRs who “are obligated to act in the ‘best interest’ of the detainee, felt free to advocate on behalf of [the] detainee, challenge the factual record, and ensure the detainee understood the procedures.” He also highlighted the prohibition over information obtained under torture, a rule not required for the UECRBs,

and that in four of the five DRBs he observed, witnesses were called. The witnesses testified to either dispute the information presented against the detainee or to vouch for the character of the detainee.²⁰⁷

After describing his opinion of the promising aspects of the DRBs, Mr. Horowitz discusses his perspective of what he describes as the “[s]erious problems [that] continue to damage the credibility of the new system.”²⁰⁸ Some of the problems noted by Mr. Horowitz seem to have “easy” solutions—for example, increasing the size of the DRB staff; improving the quality of translators; and enhancing DRB personnel’s knowledge of Afghan history and culture.²⁰⁹ If any of Mr. Horowitz’s claims of an undermanned staff, poor translators, and a lack of knowledge by U.S. personnel of Afghan history and culture are valid, then the DRB staff can address these deficiencies. Another issue addressed by Mr. Horowitz is much more challenging—that is, training Afghan legal personnel in the rule of law so they can assume responsibility of the detention process.²¹⁰ This is certainly much more time consuming and complex; however, this critical undertaking is necessary to ensure the smooth transition of the DRB process to the Afghan Government.

Of the problems Mr. Horowitz cites, the one he views as the most serious is the U.S. reliance on classified information presented outside the presence of the detainee, which makes challenging the veracity of the information nearly impossible. He had this concern both before and after observing DRBs. Interestingly, this concern goes to the core of one of the three procedures cited in the ICRC study’s discussion of Rule 99, specifically, the “obligation to provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention.”²¹¹ Having identified a problem, Mr. Horowitz offers a viable solution—which, if ignored, could result in a bleak outcome:

[T]he U.S. military and intelligence agencies need to end their culture of over-classification and give greater priority to improving their evidence gathering capacity, as opposed to their intelligence gathering capacity. Without a shift from reliance on secret sources to greater transparency, U.S. detention operations and its detainee review system are doomed.²¹²

²⁰⁰ See app. B.

²⁰¹ Author’s notes of Mr. Horowitz’ oral presentation to 1st DRB Short Course students (Feb. 1, 2010) [hereinafter Horowitz Notes] (on file with author). Interestingly, prior to his March 2010 visit to Afghanistan to observe DRBs, Mr. Horowitz expressed concern over the assignment of non-lawyers as PRs, yet, after his visit, as demonstrated by his article, he was not critical of this policy decision. Based on his article after his visit, it appears Mr. Horowitz was impressed by the representation provided by the PRs. See *infra* note 202.

²⁰² Jonathan Horowitz, *New Detention Rules Show Promise and Problem*, HUFFINGTON POST (Apr. 20, 2010), available at http://www.huffingtonpost.com/jonathan-horowitz/new-detention-rules-show_b_544509.html.

²⁰³ See *supra* notes 70–81 and accompanying text.

²⁰⁴ Horowitz Notes, *supra* note 201.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* (citing testimony of village elders assuring the panel that the detainee would not pose a threat if released and the detainee would find gainful employment).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ See *supra* note 199 (referring to point iii).

²¹² Horowitz Notes, *supra* note 201. Mr. Horowitz also notes that such a cultural change is not unprecedented and cites the order to ISAF soldiers to

The use of classified information at the DRBs—or better stated, the detainee’s lack of a meaningful way to challenge or even know about classified evidence presented against him—is a challenge for JTF 435. The classified portion of the board, which occurs outside the presence of the detainee, directly contradicts the goal of transparency. This is a flaw in the system, but considering the criticality of transparency to the overall process, it is a flaw that must be minimized. The Legal Operations Directorate has implemented two aspects of the overall DRB process to remedy this issue: increased use of unclassified information in the presence of the detainee and perhaps more importantly, allowing the PR equal access to classified information and the ability to meaningfully challenge such information in the classified portion of the board.

The obvious and most transparent process would be a totally unclassified hearing. While this is not likely to occur in the near term, a culture change such as the one suggested by Mr. Horowitz—evidence gathering rather than intelligence gathering—is a method that units could adopt. If capturing units operate from this perspective, then evidence collected for detention and prosecution purposes should not be classified at the outset. Additionally, information collected by MI personnel that focuses on the belligerent or criminal acts of the detainee should also remain unclassified. Such efforts would help avoid the laborious process of declassifying information after the fact. Such a paradigm shift, while challenging, would enhance the overall transparency of the process.

Once the information is compiled and made part of the detainee’s file, it is incumbent on the recorders to present as much unclassified information as possible at the DRBs. Observations of more than thirty DRBs in early February revealed concerted efforts by recorders to do so.²¹³ Prior to the DRBs convening, the recorders, with the assistance of analysts, spent considerable time extracting unclassified information from the detainee’s file resulting in boards where detainees were apprised of the majority of the evidence against them and had the opportunity to challenge that evidence.

If DRB personnel, particularly the board members, expect the recorder (and capturing units) to produce more unclassified information as a basis for their internment decision, then the trend to provide unclassified evidence in detainee packets will become the norm. In turn, as units and supporting agencies learn what the board members expect the use of unclassified information will improve. Finally, the overall mission to transition detention operations (and

improve their evidence collection procedures. Because ISAF soldiers must turn captured personnel over to Afghan authorities within ninety-six hours for potential criminal prosecution in Afghan courts, it is in ISAF’s best interest to turn over the detainee along with evidence sufficient to warrant continued detention in the Afghan system. *Id.*

²¹³ See app. B.

potentially the review board process) to the Afghan authorities, remains a strong incentive to logically drive the process to focus on unclassified information.

As the process evolves, the boards remain a bifurcated process and classified information presented outside the presence of the detainee remains a reality. This is where the addition a PR working in the best interest of the detainee is a critical addition to the overall process. While the detainee is not physically present in the room during the classified portion of the boards, his interests certainly are. By extension, the PR is there to meaningfully challenge the evidence on the detainee’s behalf. At an administrative hearing in a non-adversarial setting, military officers serving as PRs have the requisite expertise and experience to represent the detainee on par with judge advocates. When the process is broken down to its basic level, it is about a person captured in a combat environment under stressful combat conditions by personnel trained in military matters. Military line officers are perhaps more capable than most judge advocates of understanding these circumstances. Additionally, all line officers understand and usually have considerable experience in briefing superiors. Thus, the concept of a non-lawyer PR briefing a board on the facts and information surrounding a detainee’s capture on the battlefield—all with the detainee’s best interest in mind—cannot be overlooked. Human rights advocates will continue to question whether a detainee has a meaningful opportunity to challenge information when he is excluded from the classified portion of his hearing, but the fact remains that a trained PR is present to challenge the information on behalf of the detainee to mitigate any concerns raised by the detainee’s absence.

The discussion above highlights the abilities of non-lawyers serving as PRs. Skeptical human rights critics may argue that PRs should be lawyers. Beyond the practical examples discussed, the LOAC that governs U.S. military action in Afghanistan has no precedent for lawyers to be appointed to represent an interned person at this early administrative review of detention. Even paragraph 1-6 of Army Regulation 190-8,²¹⁴ the U.S. military’s implementing procedures for Article 5 Tribunals, does not require a PR, let alone a lawyer. With the policy decision made, the training and implementation is essential to ensure the proceedings remain non-adversarial. The supervisors within the Legal Operations Directorate bear the responsibility of continuously training the recorders and PRs to work within the mandated framework. In the end, though, it will be the daily interaction, prior to and in front of the DRBs that will determine if such a process can work effectively. Early observations revealed that professional military officers can perform their roles at a high level of expertise given the proper training and resources.

²¹⁴ See AR 190-8, *supra* note 9.

Overall, Mr. Horowitz provides a balanced human rights perspective on the promises and problems with the DRB process as of March 2010. Mr. Horowitz was invited back to address the students of the 2d DRB Short Course in June by VTC. During this presentation, he shared his personal observations of the five DRBs held in March. Because many of his prior concerns have been addressed as the DRB process has evolved, Mr. Horowitz focused his June comments on the strategic vision of transferring detention operations to the Afghans. A sub-part of that strategy centers on the need to strengthen the Afghan criminal justice system so that such operations are transferred to a viable, fair system. This latter vision is a challenge, and the details of implementation still have to be worked out.²¹⁵ Additionally, the prospect of bribery and corruption is ever present and represents a huge factor that could hinder the transition. The solution to these issues—increased training and education—is essential and, as noted above, the Legal Operations Directorate has already begun the process of integrating judges, prosecutors, and investigators into the DFIP. Thus far, one Afghan criminal trial has been held in the DFIP (in mid-June) with many more to follow.²¹⁶

While silencing the critics on every aspect of the new DRBs will be virtually impossible, acknowledgment of the areas of concern ensures the DRB participants are continually seeking to improve the process. Opening the DRB process to human rights organizations fosters a climate of transparency and provides the DRB participants with a different perspective. Valid concerns must be analyzed and proposed solutions must be explored and implemented through practice on the ground in Afghanistan.

C. *Wahid v. Gates*²¹⁷

In February 2010, attorneys from the American Civil Liberties Union and International Justice Network filed suit in the U.S. District Court for the District of Columbia on behalf of two detainees interned at the DFIP.²¹⁸ The Petition for Writ of Habeas Corpus is demonstrative of human rights attorneys' complaints about the DRB process in

Afghanistan.²¹⁹ The Petition also highlights the fact that the process has evolved so rapidly that some of the specific complaints have been rendered moot. It is important to note that in May 2010, prior to the Court of Appeals for the D.C. Circuit's opinion, the Government filed an unopposed motion to stay all proceedings in the Wahid case pending the outcome of *Maqaleh v. Gates*. Of course, on 21 May 2010, the Court of Appeals held that constitutional habeas rights did not extend to aliens detained in Bagram, Afghanistan. Despite the uncertainty of the exact status of the Wahid case at this time, the February petition is informative for its attacks on the DRB process.

Not surprisingly, the petitioners rely on the premise that IHRL is applicable, and consequently, human rights principles are woven throughout their petition. The introductory paragraphs of the Petition parallel the ICRC study's three procedural requirements that should follow a deprivation of liberty: notice of the charges, access to a court, and a meaningful opportunity to challenge their detention.²²⁰ In their "Statement of Facts," the petitioners' analysis of the legal framework applicable to U.S. detention operations in Afghanistan is based on the premise that the U.S. Constitution, IHL, and IHRL are all applicable.²²¹

After the general assertion that essentially all laws apply in a non-international armed conflict, whether the process is a judicial or administrative one, the petitioners claim that all individuals detained are entitled to:

- (1) the assistance of counsel;
- (2) meaningful notice of the basis for their detention;
- (3) a meaningful opportunity to see the evidence against them;
- (4) a meaningful opportunity to rebut that evidence;
- (5) the opportunity to present all witnesses and evidence in their favor;
- (6) a meaningful opportunity to see relevant exculpatory information in the Government's possession;
- (7) the opportunity to have the detention determination made by a fair, independent, and impartial body; and

²¹⁵ Author's notes of Mr. Horowitz' oral presentation to 1st DRB Short Course students (June 18, 2010) (on file with author).

²¹⁶ Devine June Interview, *supra* note 138.

²¹⁷ Petition for Writ of Habeas Corpus, *Wahid v. Gates* (No. 10-CV-320) (D.C. Cir. Feb. 26, 2010). The three respondents were all sued in their official capacities as Secretary of Defense; Acting Commander of Detention Operations, Bagram Air Base and Custodian of Petitioners; and President of the United States. The petitioners were Haji Abdul Wahid, Zia-Ur-Rahman, and Haji Noor Saeed.

²¹⁸ Mr. Wahid and Mr. Rahman are the two detainees. Haji Noor Saeed is the cousin of Mr. Wahid and the "cousin's grandson" of Mr. Rahman, who filed suit as the Next Friend of the detainees. *Id.* at Exhibit A.

²¹⁹ Mr. Wahid and Mr. Rahman are both Afghan citizens who were captured in Afghanistan. *Id.* at 3, 4. In *Maqaleh v. Gates*, Judge Bates of the D.C. District Court granted the petitions of three non-Afghan citizens detained by the United States in Afghanistan, but he dismissed the petition of Haji Wazir, who like Wahid and Rahman, was also an Afghan citizen detained in Afghanistan. *See supra* note 40.

²²⁰ Petition for Writ of Habeas Corpus, *Wahid*, No. 10-CV-320, at 1–2 (claiming that neither detainee has been informed of their reasons for detention, neither has been allowed to meet with a lawyer, neither has been allowed to see the evidence against them, and neither has been afforded a meaningful opportunity to challenge their detention).

²²¹ *Id.* at 4–6.

(8) a meaningful opportunity to appeal the decision determination to a court of other judicial or administrative body.²²²

Against this human rights paradigm, the petitioners assert their understanding of “the process afforded Bagram prisoners to challenge their detention.”²²³ While acknowledging the assignment of PRs and the role of the three-officer panel for each DRB, the petitioners claim the lack of assignment of lawyers to represent the detainees and a judge or independent and impartial tribunal to make the status determination violate the detainees’ rights.²²⁴ The petitioners also assert facts that have changed since they filed their Petition or that are simply incorrect. For example, the petitioners state that the PRs have no duty of confidentiality to the detainees and no ethical duty to zealously advocate on the detainees’ behalf.²²⁵ These assertions are unfounded. While there is no strict rule of confidentiality, the PRs are bound by a non-disclosure agreement that, for all practical purposes, serves the same function. Similarly, the non-lawyer military officers assigned to these positions understand their obligation to act in the best interest of the detainee, which, by analogy, equates to a duty to zealously advocate on the detainee’s behalf.²²⁶

Two additional statements made by the petitioners—that “DRBs may rely on evidence obtained through torture or coercion” and that “[t]he military has no obligation to disclose relevant exculpatory information to the detainee or his personal representative”—are simply not true.²²⁷ The remaining petitioners’ “facts,” if read out of context, are intended to portray the DRBs in a negative light; however, the reality is that the procedures discussed earlier are designed to ensure a fair and transparent process. For example, the petitioners’ statement of facts asserts detainees are not allowed access to classified information;²²⁸ however, the petitioners fail to acknowledge that the PRs are entitled to equal access as described above.

The petitioners have three claims for relief, and like their statement of facts, some claims have been rendered moot or have already been resolved. The first claim, “Unauthorized and Unlawful Detention,”²²⁹ will not be addressed here as the lawful authority to detain has been

covered in a substantial fashion above. The second and third claims are illustrative of the human rights complaints based on the IHRL principles described above. The second claim states quite clearly, in the petitioners’ view, that denial of access to the courts, a fair and meaningful hearing by an impartial judicial tribunal, and assistance of counsel are “inconsistent with IHRL” and in violation of the Fifth Amendment of the U.S. Constitution.²³⁰ The third claim is similar. The petitioners first acknowledge that DRBs could be considered administrative, rather than judicial, proceedings, and then they replace the word “judicial” in the second claim with the word “administrative” to fashion the third claim.²³¹ In addition to making unfounded assertions, the claims also presume the rights described, even if founded, exist because IHRL applies and the U.S. Constitution applies extraterritorially.

Whether the petitioners in *Wahid v. Gates* will pursue their case in the D.C. District Court in light of the 21 May 2010 *Maqaleh* decision is uncertain at this time. Just as uncertain is whether the petitioners in *Maqaleh v. Gates* will file a Writ of Certiorari with the Supreme Court. What is certain, however, is that the substantive issue at the heart of this article—whether or not the DRBs provide adequate due process protections to detainees interned by U.S. forces in Afghanistan—has yet to be resolved by the federal courts. The fact that it may never be resolved makes the work of the DRBs that much more critical to ensuring the practitioners on the ground continue to ensure a fair, robust, and transparent hearing for all battlefield captures currently detained in Afghanistan.

D. Due Process During On-going Combat Operations

*Afghanistan remains a theater of active military combat. The United States and coalition forces conduct an on-going military campaign against al Qaeda, the Taliban regime, and their affiliates and supporters in Afghanistan.*²³²

Following the text quoted above, in the 21 May 2010 *Maqaleh* opinion, Chief Judge Sentelle described the combat situation in Bagram noting a March 2009 suicide bomber’s attempt to breach the gates at Bagram Airfield and a June 2009 Taliban rocket attack that killed two U.S. servicemembers and wounded six other personnel.²³³ With

²²² *Id.* at 6–7 (the eight sub-parts listed in the text above appear in paragraph 26 of the petition).

²²³ *Id.* at 10–12.

²²⁴ *Id.* at 11 (Paragraph 49 of the Petition discusses the role of the PR and paragraph 50 discusses the role of the DRB panel.).

²²⁵ *Id.*

²²⁶ See *supra* notes 145–50 and accompanying text.

²²⁷ See *supra* note 169.

²²⁸ Petition for Writ of Habeas Corpus, *Wahid*, No. 10-CV-320, at 11–12.

²²⁹ *Id.* at 16–17.

²³⁰ *Id.* at 17–18.

²³¹ *Id.* at 18–19.

²³² *Maqaleh v. Gates*, No. 09-5265, 2010 U.S. App. LEXIS 10384 (D.C. Cir. May 21, 2010).

²³³ *Id.* See also 2 *U.S. Soldiers Killed in Bagram Attack*, CBSNEWS.COM, June 21, 2009, available at <http://www.cbsnews.com/stories/2009/06/21/terror/main5101364.shtml>.

more than 100 deaths, June 2010 was “the deadliest month to date in the nine-year war.”²³⁴

There should be no doubt that Afghanistan is an active theater of war. Additionally, as reflected by the number of captures since September 2009—close to 600²³⁵—it should be self-evident that units, scattered throughout remote and dangerous areas in Afghanistan, are in harm’s way. To get a sense of what units operating in Afghanistan face on a daily basis, there are numerous books detailing small unit tactics against the insurgents.²³⁶ Understanding combat operations allows the critics of the DRB process to appreciate the nature of such operations and the challenges of gathering information on the battlefield to be used against an insurgent at a subsequent DRB hearing. While many critics have traveled to Afghanistan and fully understand the contemporary operating environment, it does not deter them from calling for more rights for detainees.

It is against this backdrop that this final section considers the DRB due process procedures required for persons captured and interned by U.S. forces in Afghanistan and compares them with the due process provisions considered customary international law for administrative detention review. Two points, emphasized throughout this article, are essential to the analysis: first, the DRBs are administrative hearings and not judicial hearings, and second, the hearings determine whether detainees should be interned for security purposes and not for punishment purposes. Another important point, seemingly disregarded by human rights advocates, is the premise that professional military officers are competent and capable of performing the roles they are assigned, whether as impartial board members or zealous personal representatives acting in the best interests of the detainee. These two points, combined with the fact that Afghanistan is still an active combat zone, puts the concept of due process in the combat zone into perspective.

This article has discussed the various sources of U.S. and international law and policy that prescribe due process

provisions, including the U.S. Constitution,²³⁷ decisions and policies from all three branches of the U.S. Government,²³⁸ LOAC/IHL,²³⁹ IHRL,²⁴⁰ and customary international law.²⁴¹ Setting aside the debate over what specific body or bodies of law apply to international and non-international armed conflict, the question becomes what fundamental guarantees of due process apply to administrative detention review procedures?

Without conceding the applicability of IHRL to armed conflict, it is difficult to dispute two fundamental concepts: (1) that no one should be detained indefinitely without some periodic review process; and (2) that no one should be arbitrarily deprived of their liberty.²⁴² For each proposition, based solely on moral principles without regard to specific laws, it is hard to imagine arguments in support of these concepts. On the other hand, for example, in addition to citing human rights treaties to support Rule 99 as customary international law, the ICRC study also relies on several Geneva Conventions provisions to support its position.²⁴³ Of course, the United States is not arbitrarily detaining

²³⁷ See *supra* note 7.

²³⁸ See *supra* notes 19–39.

²³⁹ See *supra* notes 8 and 12.

²⁴⁰ See *supra* notes 181–200.

²⁴¹ See *supra* note 198. For an in-depth study and research project suggesting the due process norms to be afforded to detainees, see *The Lexington Principles on the Rights of Detainees: A Transnational Legal Process Approach to Due Process* (R. Brooke Lewis, Project Chair, the Lexington Principles Project, Apr. 1, 2009), available at <http://law.wlu.edu/>

debtimages/The%20Lexington%20Principles%20Project/lexingtonprinciples09.pdf. The Lexington Principles Project produced a 176-page response to “the 9/11 Commission Report’s recommendation regarding the development of a universal approach to the treatment of detainees. *Id.* at 16 (citing THE 9-11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 380 (W.W. Norton & Co. ed., 2004) (authorized edition), available at http://www.9-11commission.gov/report/911Report_Ch12.htm (last visited May 4, 2010)). The Lexington Principles are forty-five principles focused on the Fundamental Right to Physical Liberty and Due Process of Law (Principle 1). Part I: General Provisions contains Principles 1–10 (Principles 2–4, Scope of Application; Principles 5–8, State Responsibility; Principle 9, International Obligation; and Principle 10, Relationship to Other Laws); Part II: Procedural Due Process contains Principles 11–21 (Principles 11–13, General Statement of Procedural Rights; Principles 14–15, Notice; Principles 16–19, Opportunity to be Heard; and Principles 20–21, Fair and Impartial Decision Maker); and Part III: Substantive Due Process contains Principles 22–45 (Principle 22, General Statement of Substantive Rights; Principles 23–25, Prohibition of Arbitrary Deprivations of Physical Liberty; Principles 32–39, Prohibition of Incommunicado Detention; and Principles 40–45, Prohibition of Offenses to Personal Welfare and Human Dignity). *Id.* at 12–13. The majority of the forty-five Lexington Principles are implemented within the overall detention policy of JTF 435. For example, Principle 33—the Right to Communicate with Relatives; Principles 44—the Right to Adequate Healthcare, Nutrition, and Exercise; and Principle 45—the Right to Religious Observance, to name a few, are all implemented within the DFIP.

²⁴² RULES, *supra* note 198, at 344 (discussing Rule 99 of the ICRC’s Customary International Humanitarian Law study).

²⁴³ *Id.* at 344–46 (referring to Rule 99).

²³⁴ Jonathan Adams, *Deadliest Month Yet for NATO in Afghanistan*, CSMMONITOR.COM, June 29, 2010, available at <http://www.csmonitor.com/World/terrorism-security/2010/0629/Deadliest-month-yet-for-NATO-in-Afghanistan>. The statistics in the article are attributed to icasualties.org. There were 101 deaths in June 2010, compared to 51 in May 2010. Overall, for 2010, there have been 320 deaths compared to 520 for all of 2009. Since the war in Afghanistan began in 2001, there have been 1890 total deaths (including 1149 U.S. deaths). See Operation Iraqi Freedom and Operation Enduring Freedom Casualties, <http://icasualties.org/> (last visited 30 June 2010).

²³⁵ See *supra* note 134 and accompanying text.

²³⁶ See SEBASTIAN JUNGER, *WAR* (2010); CRAIG MULLANEY, *THE UNFORGIVING MINUTE* (2009); DOUGLAS STANTON, *HORSE SOLDIERS* (2009); JON KRAKAUER, *WHERE MEN WIN GLORY* (2009); SEAN NAYLOR, *NOT A GOOD DAY TO DIE* (2004). Additionally, the author recommends AHMED RASHID, *TALIBAN* (2001) as required reading for anyone deploying to Afghanistan.

anyone—it is only detaining those that meet the 13 March 2009 definitional framework²⁴⁴—yet, the provisions cited in the Rule 99 study are instructive. Comparing all of the relevant provisions for security internees and due process the United States considers customary international law,²⁴⁵ in combination with U.S. laws, regulations, and policies, four general concepts emerge:

- (1) prompt notice to the detainee of the reasons for the detention;
- (2) prompt opportunity to be brought before an impartial tribunal;
- (3) meaningful opportunity to challenge the basis for detention; and
- (4) assignment of a qualified representative to assist with (1) through (3).

Additionally, in June 2005, Jelena Pejic, an ICRC Legal Advisor, published an informative article²⁴⁶ describing five general principles²⁴⁷ and the following twelve procedural safeguards for internment or administrative detention:

²⁴⁴ See *supra* notes 86 and 87.

²⁴⁵ See Memorandum from W. Hays Parks et al., to Mr. John H. McNeill, Assistant Attorney Gen. (Int'l), Office of the Sec'y of Def., 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications (May 9, 1986), reprinted in LAW OF WAR DOC. SUPP., *supra* note 8, at 223 (recognizing art. 75, AP I, as customary international law).

²⁴⁶ Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INT'L REV. OF THE RED CROSS 375-91 (June 2005). Pejic “proposes a set of procedural principles and safeguards that should—as a matter of law and policy—be applied as a minimum to all cases of deprivation of liberty for security purposes.” *Id.* at 375 (noting that the author’s opinions in the article are not necessarily those of the ICRC). Pejic bases her proposal on a number of legal sources, all of which are discussed in this article, and highlights the fact that the existing bodies of law do not “specify the details of the legal framework that a detaining authority must implement” when interning a person for security purposes. *Id.* at 377. The applicable law that serves to inform the Pejic’s proposal includes GC IV, article 75 of AP I, Common Article 3, articles 5 and 6 of AP II, customary IHL, and human rights law (as a complementary source to the law of armed conflict). *Id.* at 377. See also *supra* notes 8 and 12 (discussing AP I, AP II, and GC IV). When applying the principles derived from these numerous legal sources, Pejic acknowledges situations of internment in non-international armed conflict where GC IV and AP I would not be applicable per se. See Pejic, *supra*, at 380-81.

²⁴⁷ The five general principles applicable to internment/administrative detention include the following:

- (1) internment/administrative detention is an exceptional measure
- (2) internment/administrative detention is not an alternative to criminal proceedings
- (3) internment/administrative detention can only be ordered on an individual case-by-case basis, without discrimination of any kind
- (4) internment/administrative detention must cease as soon as the reasons for it cease to exist
- (5) internment/administrative detention must conform to the principle of legality.

Pejic, *supra* note 246, at 380–83.

- (1) Right to information about the reasons for internment/administrative detention;
- (2) Right to be registered and held in a recognized place of internment/administrative detention;
- (3) Foreign nationals in internment/administrative detention;
- (4) A person subject to internment/administrative detention has the right to challenge, with the least possible delay, the lawfulness of his or her detention;
- (5) Review of the lawfulness of internment/administrative detention must be carried out by an independent and impartial body;
- (6) An internee/administrative detainee should be allowed to have legal assistance;
- (7) An internee/administrative detainee has the right to periodical review of the lawfulness of continued detention;
- (8) An internee/administrative detainee and his or her legal representative should be able to attend the proceedings in person;
- (9) An internee/administrative detainee must be allowed to have contacts with—to correspond with and be visited by—members of his or her family;
- (10) An internee/administrative detainee has the right to the medical care and attention required by his or her condition;
- (11) An internee/administrative detainee must be allowed to make submissions relating to his or her treatment and conditions of detention; and
- (12) Access to persons interned/administratively detained.²⁴⁸

²⁴⁸ *Id.* at 384–91. These twelve procedural safeguards are taken verbatim from the article. Each safeguard includes a detailed analysis, describing the purpose and legal support for the rule. While most are self-explanatory based on the descriptive titles of the safeguards, a few require additional comment here. For the third rule regarding foreign nationals, the national authorities of the person interned must be informed, unless the person concerned does not want his country informed. If there are diplomatic relations, the foreign government must be allowed to communicate and visit with their nationals. *Id.* at 385. The fifth rule regarding review by an “independent and impartial body” garnered the longest analysis by the author, and her discussion focused on whether such a body should be a court or an administrative board. Using a GC IV analysis, the author concludes that in an international armed conflict, either is authorized; however, there is a strong preference for a judicial proceeding over an administrative one. *Id.* at 386–87. While GC IV provides an option in an international armed conflict (court or administrative board), the author is quite precise in her opinion that in a non-international armed conflict, there is no option—that is, human rights law “unequivocally require[s] that challenges to the lawfulness of internment/administrative detention be heard by a court.” This opinion is based on Article 9 of the ICCPR that requires proceeding before a court. *Id.* at 387. See also ICCPR, *supra* note 182, art. 9(4). Another point made by the author, when considered in conjunction with Rule 99 of the ICRC Customary International Humanitarian Law

As detailed and described earlier in this article, the new DRBs require all four of the procedures listed after the discussion of Rule 99 above. Also, with two exceptions—the appointment of a lawyer and having a judicial body make the initial determination—the DRBs also comply with virtually all twelve of the procedural safeguards listed in Jelena Pejic’s paper. The July 2009 policy directs the implementation of procedures to ensure these fundamental guarantees are provided.²⁴⁹ In March 2010, JTF 435 further supplemented the July 2009 policy by including more procedural due process protections to the detainees.²⁵⁰ When considering the totality of the protections afforded by the DRBs in an active theater of combat, and in light of the two authoritative ICRC studies discussed above, it becomes apparent that the DRBs substantially adhere to all safeguards that could be considered customary international law and even those advanced by human rights advocates.

Yet, despite the addition of numerous procedural safeguards described throughout this article, human rights advocates aware of the new procedures remain critical.²⁵¹ One particular criticism of the DRB process is a comparison to the CSRT process. In particular, in November 2009, Amnesty International (AI) posted an article on its website stating that the new DRB guidelines (from the July 2009 policy) were “unnervingly reminiscent of the Guantanamo [CSRTs], which are farcical at best.”²⁵² While the federal courts have determined the CSRT process was inadequate,²⁵³ and comments were made on the system of review in Afghanistan prior to the DRBs,²⁵⁴ AI’s direct comparison of

study, is that if the body that hears the case orders a release, then the person must be released and continued internment or detention after a release order is considered to be a case of arbitrary detention. Pejic, *supra* note 246, at 387. The references in the sixth (legal assistance) and eighth (legal representation) rules listed in the text contemplate a lawyer to fill these roles. In the analysis following the sixth rule, the author immediately highlights the fact that “[n]either humanitarian nor human rights treaty law explicitly provide for the right to legal assistance for persons interned or administratively detained (that right is guaranteed to persons subject to criminal charges).” *Id.* at 388. The author then notes, however, that the “right to effective legal assistance is thus considered to be an essential component of the right to liberty of person.” *Id.* Similar comments are made with respect to the eighth rule. *Id.* at 389. Finally, for the twelfth rule, the ICRC must be allowed access to the detainees, and in some limited circumstances, the U.N. Commission on Human Rights must also be allowed access to places of detention. *Id.* at 391.

²⁴⁹ Detainee Review Procedures, *supra* note 95.

²⁵⁰ JTF 435 Detainee Review Board Policy Memorandum, *supra* note 82.

²⁵¹ See, e.g., *Undue Process*, *supra* note 5; *Fixing Bagram*, *supra* note 5 (two articles submitted by Human Rights First in November 2009 after the DRB process was initiated in accordance with the July 2009 policy).

²⁵² *The “New” Bagram Unveiled: But Will There Be Change?*, Nov. 23, 2009, available at <http://www.amnesty.org.au/hrs/comments/22159/> [hereinafter *The “New” Bagram*].

²⁵³ *Boumediene v. Bush*, 128 S. Ct. 2229, 2269 (2008). For a full discussion of the *Boumediene* Court’s analysis of the CSRTs, see *supra* note 38.

²⁵⁴ *Maqaleh v. Gates*, No. 09-5265, 2010 U.S. App. LEXIS 10384, at *30 (D.C. Cir. May 21, 2010). For a full discussion of the *Maqaleh* court’s analysis of the CSRTs in comparison to the UECRBs in place in

the DRBs to the CSRTs was an uninformed analogy. In addition to a premature, inaccurate assessment that evidence derived from torture or cruel, inhuman, or degrading treatment could be used at the DRB hearing, another element of sharp criticism was directed at the detainee’s ability to call witnesses, which claimed (again prematurely) that “it has become apparent in similar circumstances, such as those who have gone through the [GTMO CSRTs], that three quarters of all requests were denied.”²⁵⁵

Amnesty International, one of the world’s leading human rights organizations, has unfairly compared the DRBs to the CSRTs. On the two important points mentioned above, first, evidence derived from torture or cruel, inhuman, or degrading treatment is prohibited at the DRBs,²⁵⁶ and second, witness involvement, particularly Afghan witness participation, is flourishing at the DRBs.²⁵⁷ On the latter point, with respect to Afghan witnesses, consider item nine in Jelena Pejic’s list of procedural safeguards described above: that an internee/administrative detainee must be allowed to have contacts with—to correspond with and be visited by—members of his or her family.²⁵⁸ The fact that more than 400 Afghan witnesses have appeared in person to participate in the DRBs between March and June 2010 clearly distinguishes the DRBs in Afghanistan as a much-improved process from the CSRTs at GTMO. Interestingly, the safety of GTMO, far removed from the battlefield, essentially negated the appearance of family members from the CSRTs. Yet, despite the dangers posed by the insurgency in Afghanistan, the close connection to the community, in time and location, has facilitated the presence of hundreds of witnesses at the DRB hearings. As JTF 435 continues to operate the DRB hearings in an open and transparent manner, including the invitation of human rights organizations to observe the boards, perhaps those commentators will realize that their comparisons to the CSRTs have been misplaced.

While much attention has been given to human rights organizations and the question of whether the DRBs have gone far enough to protect the rights of detainees, there is always the perspective of those who, after reading this article, may ask: Has the process gone too far? The death toll of coalition forces has been documented here (more than 100 in June 2010),²⁵⁹ as well as the number of detainees released through the DRB (approximately 14%, or 194 individuals, between mid-September 2009 and mid-June

Afghanistan as the system of review for the *Maqaleh* petitioners, see *supra* note 40.

²⁵⁵ *The “New” Bagram*, *supra* note 252.

²⁵⁶ See *supra* note 169.

²⁵⁷ See *supra* note 176.

²⁵⁸ See *supra* note 248 and accompanying text.

²⁵⁹ See *supra* note 234.

2010).²⁶⁰ There are difficult questions at the heart of this discussion: What if one bad actor gets released because the process has gone too far? Are there costs to applying these more stringent procedures in the combat zone during a time of on-going hostilities? How much risk is acceptable when that risk could result in the death of U.S. or coalition servicemembers or innocent Afghan civilians? Because empirical data indicating how many of the 194 detainees that were released have returned to the fight is not available, this article does not attempt to answer these difficult questions on acceptable risk.

In a counterinsurgency campaign, such as the one being waged in Afghanistan, it is commonly assumed that troops are inherently at more risk. Does the DRB process contribute to or decrease this risk? As part of its efforts to separate rumor from fact on questions of recidivism, in June 2010, JTF 435 hosted its first “post-release shura” for detainees in the eastern provinces that had been reintegrated by JTF 435 through DRBs. Detainees answered questions about whether they had been approached by insurgent groups, whether they had found jobs, whether mentors or family continued to support them, and whether government assistance had been made available. It is one indicator of DRBs’ contribution to COIN that 51 former detainees of the 120 reintegrated to that point by JTF 435 came to the shura on only three days’ notice. Although JTF 435 provides payments to defray the expenses of attendance, travel can present a hardship for former detainees, who sometimes cross multiple provinces to participate in such events. Joint Task Force 435 continues to track the activities of other former detainees and plans to hold a similar shura in the south to facilitate attendance by those captured and released in the southern provinces of Helmand, Kandahar, and Zabul.²⁶¹

In *Boumediene v. Bush*, Chief Justice Roberts described the CSRT procedures as “the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants.” Appreciating the fact that Chief Justice Roberts’s quote came in the dissent, it would be interesting to hear the Chief Justice’s thoughts on the protections afforded by the DRBs. When the four concepts described after Rule 99 above are implemented in a robust and transparent manner, and the twelve procedural safeguards described in the Pejic article are substantially complied with, the validity of the overall DRB process can withstand the scrutiny of the international community, human rights advocates who apply IHRL to detention operations in Afghanistan and perhaps, someday, the United States Supreme Court.

²⁶⁰ See *supra* note 141.

²⁶¹ E-mail from BG Mark Martins, Deputy Commander, JTF 435, Parwan, Afg., to author (7 July 2010, 01:24 EST) (on file with author). See also *supra* note 141.

V. Conclusion

The relatively short history of review boards in Afghanistan from May 2002 through July 2009 reveals that detainees interned by U.S. forces severely lacked due process protections by any standard. As a result, detention operations developed into a strategic liability for U.S. forces. However, as Vice Admiral Harward noted,

[It is] important, if you look at detention operations over the last eight years, they’ve been in support of a [counter-terrorism] strategy, a CT campaign. [W]e’re shifting to a COIN strategy. [D]etention operations will support that strategy and [they are] in line with [the COIN] objective in the campaign plan.²⁶²

Recognition that a change was needed to support the COIN strategy resulted in a major transformation of the detention review paradigm in Afghanistan. Beginning with President Obama’s January 2009 Executive Order to review detention policy and the creation of the special task force through the Secretary of Defense’s new Detainee Review Procedures mandated in July 2009, the conditions were set to establish a new and improved fair and transparent review process.

With the baseline procedural and substantive rules established, the next critical phase was the rapid implementation of those rules by September 2009. During the fall of 2009, while a new detention facility and new task force were being created and built to take over all U.S. detention operations in Afghanistan, a small group of individuals got the new DRBs up and running in less than 60 days from notification.

Although without a full complement of required personnel, JTF 435 commenced operations in January 2010 in the new DFIP. Several of the detainees’ primary complaints were immediately resolved: living conditions and notification. The \$60 million DFIP solved the former, and appointment of PRs and an established notification process solved the latter. In a continuous self-assessment process since it stood up in January, the Legal Operations Directorate has constantly sought ways to improve its internal processes. The focus has been, and remains, making the DRBs a robust and transparent process, while maintaining efficiencies despite the need to conduct sixty-day or six-month review boards for the nearly 900 DFIP detainees.

As new personnel continue to flow into the Legal Operations Directorate, the continuing need for training competes with the seemingly endless stream of DRBs.

²⁶² Harward Transcript, *supra* note 104, at 10.

Despite these challenges, the DRB leadership and staff continue to execute the mission. The board results reflect that fact that the process is far from a “rubber-stamp.” Approximately one-third of all DRB cases have resulted in a recommendation for release or transfer to the Afghan Government for prosecution or reconciliation.²⁶³ Professional officers, lawyers, and non-lawyers understand and apply the criteria to ensure the appropriate decisions are made in each case.

A survey of the current scholarship on detention review only highlights the fact that reasonable minds will differ on a controversial topics such as detention and due process in the Global War on Terrorism. Until Congress enacts a legal framework for detention review in Afghanistan, or until the Supreme Court rules definitively on the issue of due process for detainees in Afghanistan, the U.S. military is guided by the Executive Branch’s policies as defined by the Secretary of Defense’s July 2009 Detainee Review Board Procedures and JTF 435’s March 2010 Detainee Review Board Policy Memorandum, both of which are informed by (but also go well beyond what is required by) the LOAC and Common Article 3.

The numerous protections provided DFIP detainees before and during the DRB, an administration review of detention, have established a new precedent in the realm of “due process” in the combat zone. With the assistance of a PR, detainees are now afforded more substantive and procedural safeguards than a potential prisoner of war would

receive in an international armed conflict. Operating in a COIN environment, all personnel involved in the process are incentivized to ensure no detainee is wrongly interned or interned any longer than necessary to mitigate the threat.

Detainee Review Boards are, and continue to be, a work in progress. Progress will be made as long as the DRBs are implemented in a robust manner with particular care to present more unclassified evidence to the board in the presence of the detainee. While criticism will undoubtedly persist due to the controversial nature of the subject matter, the DRBs are an undisputed improvement over the review boards that operated from 2002 through mid-2009. Greater transparency and stronger due process protections are slowly transforming the former strategic liability of detention operations into a legitimate practice worthy of respect by the Afghan people and by fair-minded observers from the many countries with a stake in Afghanistan’s future.

²⁶³ See *supra* note 141.

Appendix A

YEARS	REVIEW BOARD	VOTING MEMBERS	TYPE OF REVIEW	AVERAGE NUMBER OF DETAINEES IN BAGRAM
May 2002–May 2005 Bagram Collection Point (BCP)	Detainee Review Board (DRB)	Total: 10 (approx.). <ul style="list-style-type: none"> • CJ2 • MI • MP • CITF • Legal Advisor 	File review to determine if: Enemy Combatant; Transfer to GTMO (until Sep.22, 2004); Intel Value 90-day and annual reviews in JOC	100 (2002–03) 200 (2003–04) 300 (2004–05) *Transfers to GTMO stopped in Sep. 2004
June 2005–Jan. 2007 Bagram Theater Internment Facility (BTIF)	Enemy Combatant Review Boards (ECRBs)	Total: 5. <ul style="list-style-type: none"> • Deputy G2 • BTIF MI Bn Cdr • BTIF MP Bn Cdr • MP Bde Dep Cdr • Legal Advisor 	Meet Enemy Combatant criteria; consider intel value and threat level 90-day and annual reviews in JOC	500 (2005–06) 600 (2006–07)
Feb. 2007–16 Sept. 2009	Unlawful Enemy Combatant Review Board (UECRB)	Total: 3. <ul style="list-style-type: none"> • CJTF Provost Marshal • BTIF Cdr • Ch, Interrogations 	2/3 vote for release or continued detention; categorize detainees as HLEC, LLEC, NLEC LLEC files to DAB for review Detainee is notified and can appear at initial board (as of April 2008) 75-day & 6-month reviews in BTIF	600 (2007–09) 639 (16 Sep. 2009)
17 Sept. 2009–present Detention Facility in Parwan (DFIP) opened on 16 December 2009	Detainee Review Board (DRB)	Total: 3. <ul style="list-style-type: none"> • Neutral field grade officers detailed by Convening Authority 	2/3 vote for meets criteria and continued internment Procedures detailed in article Afghan witnesses first appear in April 2010 60-day review and 6-month review	753 detainees transferred to DFIP (15 Dec. 2009) (last day in BTIF) 892 (18 June 2010)

Appendix B

The DRB Short Courses

In November 2009, the leadership of the U.S. Army Judge Advocate General's Corps approved a concept for The Judge Advocate General's Legal Center and School (LCS) to assist in training personnel assigned to the new Detainee Review Boards. After initial discussions, it was determined that two faculty members from the LCS would coordinate with JTF 435 and the Legal Operations Directorate to create a thirty-five-hour "short course" to cover the full spectrum of detention operations, with a focus on the procedures of the actual DRBs. In creating this course, the faculty members, the author, and Major (MAJ) James Barkei, Associate Professor, Administrative and Civil Law Department, received guidance from Brigadier General Martins and then coordinated and consulted with LTC Mike Devine, Deputy Director, JTF 435 Legal Operations Directorate; personnel from the Office of Secretary of Defense (OSD) Detainee Policy Branch (Mark Stamilio and Olivia Armenta); and the Open Society Institute (OSI) (Jon Horowitz) to ensure the course captured multiple perspectives. The end result was the 1st DRB Short Course conducted in Afghanistan over the course of three and a half days from 1 February to 4 February 2010.

The target audience was DRB recorders, personal representatives (PRs), and legal advisors. These personnel made up about half of the total audience of approximately thirty-five students. Additional students included board (court) reporters, intelligence analysts, investigators, detention facility personnel, and one board member. Non-TJAGLCS instructors (who combined to provide approximately eighteen hours of instruction) included personnel from: the International Committee of the Red Cross (ICRC); the Office of the Secretary of Defense (Policy) (via SVTC); Open Society Institute (via VTC); Office of Administrative Review of Detained Enemy Combatants (OARDEC); forensics experts (from the Combined Explosives Exploitation Cell (CEXC) and the Joint Expeditionary Forensics Facility (JEFF) labs at Bagram); Afghan legal counsel; intelligence analysts; interrogators; interpreters; investigators; battle space operators; polygraphists; behavioral sciences experts; and members of TF Protector (MP Brigade prison personnel).²

The LCS instructors combined to provide seventeen hours of instruction on topics ranging from LOAC to administrative board procedures to basic advocacy. Local instructors also included personnel experienced in the DRB process, such as Captain Andrea Saglimbene, a current recorder (CPT Paul Arentz), and the Officer-in-Charge (OIC) of the Personal Representatives (MAJ Todd Tappe). The training included tours of the DFIP and the CEXC and JEFF labs.

In June 2010, the author returned to Afghanistan for the 2d DRB Short Course, which was conducted over five days from 17 June to 21 June 2010. With a few caveats, the curriculum for the 2d DRB Short Course was substantially similar to the 1st DRB Short Course. The LCS taught sixteen of the thirty-five hours of instruction. Once again, utilizing current practitioners as instructors was vital to the course's success. Expert instruction was provided by Captain Kathy Denehy, Recorder Cell OIC; Captain Kim Aytes, Senior Recorder; and Lieutenant Commander Shane Johnson, Detainee Assistance Cell OIC. The June course had the same target audience as the February course; however, the number of attendees doubled from about thirty-five to seventy. The same non-LCS presenters noted above participated, and one very well-received block of instruction—Constitutional and Statutory Framework for Detention—was presented via video teleconference (VTC) by Professors Matt Waxman and Trevor Morrison of Columbia Law School, New York. As part of the rule of law effort and goal of transitioning the DFIP to Afghan authorities in 2011, one big change to the course was the addition of Afghan partners—judges, prosecutors, investigators, and Afghan Army personnel—who sat through fourteen hours of instruction, lead primarily by two instructors from the Defense Institute of International Legal Studies (DIILS): Mr. John Phelps and Major Christian Pappas. Although some classes were combined classes—including Detainee Litigation in the U.S Federal Courts, which was taught by the author, Afghan Law and Due Process, which was taught by an Afghan attorney, and a class presented by the DFIP personnel in charge of Reintegration Programs—the majority of classes for the Afghan participants were held in a separate classroom due solely to translation issues. The separate Afghan partner classes included Human Rights Law, Internal Armed Conflict and Terrorism, the Law of Armed Conflict, and the Rules for the Use of Force taught by DIILS. The author also had an opportunity to lead a Comparative Law class on investigations with the judges and prosecutors.

² Lieutenant Colonel Jeff Bovarnick & Major James Barkei, Detention Review Board (DRB) Recorder and Personal Representative Training: Executive Summary (9 Feb. 2010) (on file with author).

Appendix C³

September		October		November		December	
17 Sep	26	1 Oct	28	5 Nov	27	2 Dec	16
24 Sep	26	8 Oct	26	11	20	3 Dec	14
		15 Oct	27	12 Nov	20	9 Dec	16
		22 Oct	26	18 Nov	19	10 Dec	15
		29 Oct	27	19 Nov	19	16 Dec	16
				25 Nov	20	17 Dec	16
				27 Nov	20	23 Dec	15
						24 Dec	13
						30 Dec	15
						31 Dec	16
TOTA	52		134		145		152

January		February		March 2010		April 2010		May 2010		June 2010	
6 Jan	16	6 Feb	15	1 Mar [†]	10	1 Apr	5	1 May	6	2 Jun	8
7 Jan	15	9 Feb	15	2 Mar	3	3 Apr	5	3 May	8	3 Jun	9
13 Jan	15	10	15	3 Mar	10	5 Apr	8	4 May	8	5 Jun	9
14 Jan	15	11	15	4 Mar	8	6 Apr	11	5 May	8	7 Jun	10
20 Jan	16	16	15	6 Mar	10	7 Apr	4	6 May	6	9 Jun	10
21 Jan	16	17	14	8 Mar	9	8 Apr	8	8 May	5	10 Jun	10
25 Jan [†]	15	18	15	10 Mar	10	10 Apr	7	10 May	10	12 Jun	10
28 Jan	15	23	15	11 Mar	9	12 Apr	7	11 May	6	14 Jun	10
30 Jan	15	24	15	13 Mar	10	13 Apr	9	12 May	7	15 Jun	10
		25	15	15 Mar [§]	6	14 Apr	7	13 May	10	16 Jun	10
				16 Mar	7	15 Apr	10	15 May	7	17 Jun	2
				17 Mar	9	17 Apr	10	17 May	7		
				18 Mar	10	19 Apr	7	18 May	6		
				20 Mar	7	20 Apr	5	19 May	5		
				22 Mar	5	21 Apr	7	20 May	8		
				23 Mar	10	22 Apr	9	22 May	4		
				24 Mar	9	24 Apr	4	24 May	8		
				25 Mar	10	26 Apr	7	25 May	7		
				27 Mar	9	27 Apr	5	26 May	5		
				29 Mar	10	28 Apr	5	27 May	6		
				30 Mar	6			29 May	9		
								31 May	7		
TOTA	13		149		187		140		153		98

Overall total of DRBs from 17 September 2009 through 8 June 2010 = 1344. Beginning on 17 March 2010 (six months after the start of the DRBs), there have been ninety-two “second look” DRBs where a detainee has now appeared before a DRB twice.

* DRBs are held two days per week

† DRBs are held three days per week

‡ DRBs are held five days per week

§ Two separate DRB panels

³ See app. A. All data is compiled from the “Super Tracker.”