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WITHOUT UNNECESSARY DELAY: USING ARMY REGULATION 190–8 TO CURTAIL EXTENDED DETENTION AT SEA

Meghan Claire Hammond

ABSTRACT—This Note analyzes instances of U.S. detention of suspected terrorists while at sea as an alternative to Guantánamo, and how this at-sea detention fits in the interplay of U.S. statutory law, procedural law, and applicable international law. Of particular interest is the dual use of military and civilian legal regimes to create a procedural-protection-free zone on board U.S. warships during a detainee's transfer from their place of capture to the U.S. court system. The Note concludes that U.S. Army Regulation 190–8 contains language of which the purpose and intent may be analogized to the Federal Rules of Criminal Procedure requirements of presentment. The language of Army Regulation 190–8 has not been analyzed by scholars or courts in this context. This Note's analysis provides a check against extended detentions at sea by shortening the amount of time detainees spend in a procedural-protection-free zone while still allowing the government to obtain information crucial to national security.

AUTHOR—J.D., Northwestern University School of Law, 2016; B.A., University of Tennessee–Knoxville, 2006. I am grateful to Professors Stephen Vladeck, James Pfander, and Eugene Kontorovich for their helpful insight and commentary. Thanks to Professor Nadav Shoked for his sharp and salient advice, giving me the confidence I needed to get through law school, and tolerating my endless visits to his office. My eternal thanks to the members of the *Northwestern University Law Review*, particularly Kyle Voils, Richard Cipolla, Leigh Jahnig, Brenna Helppie-Schmieder, Micah Chavin, Jonathan Blevins, Mike Meneghini, and Sophia Baraiktaris. You have given me much more than I have given you. And finally, special thanks to Eric Conrad for still deciding to date me after I spent our first hour together talking about at-sea detention. All errors and omissions are my own.

INTRODUCTION

In recent years the United States government has struggled to balance the interests of liberty and national security.[1] Much of this debate was centered on the detainees at Guantánamo Bay in Cuba,[2] however, as the Obama Administration has made efforts to wind down the facility,[3] other detention procedures were employed by the Administration.[4] This Note will focus on one of those detention procedures, the holding of suspected terrorists on naval warships for questioning—otherwise known as detention at sea.

There have been several cases of suspected terrorists held on naval warships for questioning after capture since Obama took office: Ahmed

[1] David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 955 (2002).

[2] *See id.* at 954–55.

[3] *The Guantánamo Docket*, N.Y. TIMES, http://projects.nytimes.com/guantanamo/detainees [perma.cc/N83Z-TK4C] (noting that of the approximately 780 detainees only 91 remain at the time of this writing).

[4] *See, e.g.*, Robert Harward, Vice Admiral, Commander, Combined Joint Interagency Task Force 435, Department of Defense News Briefing (Nov. 30, 2010), http://archive.defense.gov/Transcripts/Transcript.aspx?TranscriptID=4727 [http://perma.cc/FNZ6-MGMA] (discussing an increase in capacity of detention facilities in Afghanistan). *But see* Emma Graham-Harrison, *U.S. Finally Closes Detention Facility at Bagram Airbase in Afghanistan*, THE GUARDIAN (Dec. 11, 2014 1:29 PM), http://www.theguardian.com/world/2014/dec/11/afghanistan-us-bagram-torture-prison [perma.cc/C9P6-KWNU].

Abdulkadir Warsame,[5] Abu Anas al-Libi,[6] and, most recently, Abu Khattalah.[7] International law scholars have written that detention at sea is barred by Article 22 of the Third Geneva Convention (GC III), which provides that prisoners of war be kept "on land."[8] Conversely, other commentators have argued for detention at sea as both a legally and politically feasible alternative to Guantánamo, as well as an easier way to transfer the accused into the United States court system.[9]

Analysis of detention-at-sea cases suggest the United States is moving to a strategic two-step system for detaining terrorists generally. The first step is to detain suspected terrorists on board a naval warship in military custody, and the second is to use the naval warship to transfer them into the civilian U.S. court system—interrogating them all the while. The increase in frequency of these operations suggests this method of detention may become a modus operandi for this and future administrations.

This Note explores how the U.S. government is using detention at sea to evade applicable law and expand the amount of procedural-protection-free interrogation time available for questioning terrorism suspects. Part I of this Note provides a brief historical background of detention at sea and the motivations for drafting Article 22 of the GC III. Further, this Part will summarize the relevant case law on at-sea detention.

Part II demonstrates how the United States is using detention at sea to evade three tiers of applicable law. The first tier, international law, is circumvented through the categorization of suspected terrorists as "unprivileged belligerents," rendering the prisoner-of-war protections of

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[5] Benjamin Weiser & Eric Schmitt, *U.S. Said to Hold Qaeda Suspect on Navy Ship*, N.Y. TIMES (Oct. 6, 2013), http://www.nytimes.com/2013/10/07/world/africa/a-terrorism-suspect-long-known-to-prosecutors.html?pagewanted=all [perma.cc/3LPX-PYB2].

[6] Gordon Modarai et al., *The Seizure of Abu Anas Al-Libi: An International Law Assessment*, 89 INT'L L. STUD. 817 (2013).

[7] Jonathan Hafetz, *Abu Khattalah and the Evolution of Ship-Based Detention*, JUST SECURITY (June 28, 2014, 12:53 PM), http://justsecurity.org/12395/abu-khattalah-evolution-ship-based-detention/ [perma.cc/4GST-2XGC].

[8] *See, e.g.*, John Bellinger, *Do the Geneva Conventions Apply to the Detention of al-Libi?*, LAWFARE (Oct. 7, 2013 11:21 AM), http://www.lawfareblog.com/2013/10/do-the-geneva-conventions-apply-to-the-detention-of-al-libi/ [perma.cc/Y2J4-RTNL]. Additionally, while the Third Geneva Convention and its commentary explicitly prohibit the internment of enemy combatants on naval vessels, the Second Geneva Convention Articles 12 and 16 provide authority for the detention and treatment of "wounded, sick, and shipwrecked" opposing forces. *See* Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea arts. 12, 16, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II].

[9] *See, e.g.*, Peter Margulies, *Al-Libi and Detention at Sea*, LAWFARE (Oct. 10, 2013 5:00 PM), http://www.lawfareblog.com/2013/10/al-libi-and-detention-at-sea/ [perma.cc/68DJ-MZJJ].

the Geneva Conventions inapplicable. The second tier, federal statutory law, demonstrates how the Executive is explicitly evading congressional intent by detaining suspected terrorists at sea. Finally, by detaining prisoners at sea, the Executive circumvents a third tier—constitutional procedural law. Specifically, the United States uses the dual regimes of military detention and civilian criminal prosecution to effectively create a procedural-protection-free site on the vessel in which the High-Value Detainee Interrogation Group (HIG) can question a suspected terrorist in transit.[10]

Part III analyzes the applicability of the heretofore underexplored Army Regulation (AR) 190–8 as a potential avenue to provide procedural protections to detainees. Because AR 190–8 is one of the only sources of law applicable to detainees at sea, this Note makes a textual argument that temporary detention on board naval vessels should be "limited to the minimum period necessary to evacuate [detainees] from the combat zone or to avoid significant harm that would be faced if detained on land."[11] Specifically, the "minimum period necessary" language of AR 190–8 is so close in meaning to the "without unnecessary delay" language of Federal Rule of Criminal Procedure 5(a)(1)(A)[12] that the Supreme Court's language in *Corley v. United States* should be applicable to detainees.[13] Consequentially, if a detainee is unnecessarily held for additional questioning rather than being presented before a magistrate judge, and thus held in violation of AR 190–8, a motion to suppress the detainee's statements per the *McNabb–Mallory* rule is applicable.[14] While these consequences may initially appear limited in today's context, this analysis

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[10] Charlie Savage & Benjamin Weiser, *How the U.S. Is Interrogating a Qaeda Suspect*, N.Y. TIMES (Oct. 7, 2013), http://www.nytimes.com/2013/10/08/world/africa/q-and-a-on-interrogation-of-libyan-suspect.html [perma.cc/HCH2-VX88]; *see also* Press Release, Dep't of Justice, *Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President* (Aug. 24, 2009), http://www.justice.gov/opa/pr/special-task-force-interrogations-and-transfer-policies-issues-its-recommendations-president [perma.cc/EVL9-K22V] (announcing the formation of the High-Value Detainee Interrogation Group, an interagency entity, to "improve . . . [the government's] ability to interrogate the most dangerous terrorists").

[11] Headquarters of Dep'ts of the Army, the Navy, the Air Force, and the Marine Corps, Army Reg. 190–8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* para. 2-1(f)(2)(b)(4) (1997), http://www.apd.army.mil/pdffiles/r190_8.pdf [perma.cc/C4LN-U33T] [hereinafter AR 190–8].

[12] FED. R. CRIM. P. 5(a)(1)(A).

[13] Corley v. United States, 556 U.S. 303, 308 (2009) ("[D]elay for the purpose of interrogation is the epitome of 'unnecessary delay.'").

[14] *See id.* at 316 ("As we explained before and as the Government concedes, *McNabb–Mallory* makes even voluntary confessions inadmissible if given after an unreasonable delay in presentment.").

should serve to protect against extended detentions at sea by shortening the amount of time detainees spend in a procedural-protection-free environment and ultimately serve the dual goals of obtaining information crucial to national security while complying with the law.

I. DETENTION AT SEA AND THE LAWS OF ARMED CONFLICT

A. Brief History of Detention at Sea

Detaining persons and prisoners of war on board naval warships[15] has been a part of United States history since the American Revolutionary War.[16] The United States continues to assert this authority in modern warfare as evidenced by the most recent operations in Iraq and Afghanistan.[17] Because of the tainted history of sea-based detentions, international human rights organizations and the United Nations have a heightened interest in monitoring detentions of persons on warships.[18] This Section will briefly outline that history under the Laws of Armed Conflict (LOAC) and the applicable rules for detention of prisoners of war, enemy belligerents, and civilians.

Detention at sea has always been a common occurrence in naval warfare. Britain detained over 11,000 American prisoners of war during the American Revolution.[19] In World War II (WWII), the Japanese imprisoned Americans on both merchant ships and warships.[20] Besides being forced to

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[15] United Nations Convention on the Law of the Sea art. 29, Dec. 10, 1982, 1833 U.N.T.S. 397, 408 [hereinafter UNCLOS] (defining a "warship" as "a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.").

[16] When the British captured New York City in 1776, so many American prisoners fell into British hands that when the jails filled, enemy prisoners were forced to live on board the HMS *Jersey* where abhorrent conditions resulted in their deaths. More Americans died as prisoners of the British during the Revolutionary War due to these types of conditions than died in battle. JOHN LEHMAN, ON SEAS OF GLORY: HEROIC MEN, GREAT SHIPS, AND EPIC BATTLES OF THE AMERICAN NAVY 15–18 (2002).

[17] *See generally* JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL31367, TREATMENT OF "BATTLEFIELD DETAINEES" IN THE WAR ON TERRORISM 1–10 (2007), http://www.au.af.mil/au/awc/awcgate/crs/rl31367.pdf [perma.cc/GJR2-XEM4].

[18] Major Winston G. McMillan, *Something More Than a Three-Hour Tour: Rules for Detention and Treatment of Persons at Sea on U.S. Naval Warships*, 2011 ARMY LAW. 31, 32 (2011).

[19] *Id.*

[20] *Id.* at n.13 ("In World War II, the Japanese interned American prisoners of war on warships and freighters dubbed 'Hell Ships.' On these ships, American POWs were made to perform slave labor and were exposed to harsh sanitary conditions. Additionally the POWs were placed in substantial risk of harm from attack by the American Pacific Fleet.").

do slave labor, the detainees encountered limited space on these ships, making for cramped conditions, increased incidents of disease, and a high onboard death toll.[21] In what was perhaps one of the greatest American tragedies of WWII, U.S. submarines misidentified these "Hell Ships" as being engaged in conflict and sank at least five of them, which resulted in thousands of American prisoner-of-war (POW) deaths at the hands of our own military.[22]

While the Second Geneva Convention (GC II) provides authority for detention and treatment of "wounded, sick and shipwrecked" enemy armed forces,[23] the extremely negative experience of the Japanese prison ships directly informed the climate in which Articles 22 and 23 of the GC III were drafted in 1949 after the war's conclusion.[24] Article 22 provides in part:

> Prisoners of war may be interned only in premises located *on land* and affording every guarantee of hygiene and healthfulness. Except in particular cases which are justified by the interest of the prisoners themselves, they shall not be interned in penitentiaries.[25]

Article 23 then goes on to protect prisoners of war from being detained in combat zones and stipulates that prisoners must have protections from other "hazards of war."[26] Thus, the text of the GC III makes apparent the international community was trying to avoid repeating these atrocities and any POW is not to be detained on board a U.S. naval warship. Furthermore, the Fourth Geneva Convention (GC IV)—while not

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[21] Gregory P. Noone et. al., *Prisoners of War in the 21st Century: Issues in Modern Warfare*, 50 NAVAL L. REV. 1, 22 (2004); *see also* GARY K. REYNOLDS, CONG. RESEARCH SERV., RL30606, U.S. PRISONERS OF WAR AND CIVILIAN AMERICAN CITIZENS CAPTURED AND INTERNED BY JAPAN IN WORLD WAR II: THE ISSUE OF COMPENSATION BY JAPAN 12–13 (2007), https://fas.org/man/crs/RL30606.pdf [perma.cc/E3PC-CGYR].

[22] Noone et. al., *supra* note 21, at 22.

[23] GC II, *supra* note 8, at art. 16.

[24] McMillan, *supra* note 18, at 32; *see also* Noone et. al., *supra* note 21, at 21 ("[Article 22] of the Geneva Conventions was most likely made explicit in [Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949] in response to the use of ships to intern prisoners of war during World War II.").

[25] Geneva Convention Relative to the Treatment of Prisoners of War art. 22, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III] (emphasis added).

[26] *Id.* at art. 23.

relating to naval vessels specifically—provides for limitations on the treatment of civilians at sea which will be discussed later in Part II.[27]

While several international laws apply to persons detained at sea during armed conflict, there is also the task of identifying the U.S. laws that govern these detentions. Fortunately, the authority for detention of enemy combatants under the laws of war is well-settled doctrine.[28] As Chief Justice Stone held in *Ex parte Quirin*:

> Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.[29]

However, while this detention authority also applies in international law, as discussed above, Article 22 of the GC III specifically prohibits detentions which do not occur "on land," therefore encompassing any detentions on board a naval war vessel.[30]

Despite the clear textual instruction, these types of detentions have taken place since the GC III was signed in 1949. Specifically, during the Falklands War in 1982, it became necessary for the safety and security of Argentine enemy prisoners of war to be interned on British naval vessels.[31] With winter fast approaching and thousands of prisoner tents lost during the sinking of the *Atlantic Conveyor*, the decision was made to create a neutral zone in which to intern the Argentines on board British warships prior to their repatriation.[32] The United States generally follows the tenets

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[27] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

[28] McMillan, *supra* note 18, at 33; *see e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 597 (2006) ("*Quirin* represents the high-water mark of military power to try enemy combatants for war crimes." (citing *Ex parte* Quirin, 317 U.S. 1 (1942))).

[29] *Ex parte* Quirin, 317 U.S. at 31.

[30] GC III, *supra* note 25, at art. 22.

[31] Noone et al., *supra* note 21, at 27–28 n.131 ("The dispute between Argentina and Britain regarding possession of the Falkland Islands dates back to the Argentine claim over the islands starting in 1820 and settlement of the islands in 1826. Britain never accepted Argentina's claim over the islands and began occupying the islands in 1833. This tension existed for many years, and the Falklands War erupted in April 1982 when Argentina invaded and took control of the islands. In 1980, the barren islands were home to a mere 1,813 inhabitants as stated by the census for that year. During the war, the British captured over 10,000 Argentine prisoners of war.").

[32] *Id.* at 28 ("The United Kingdom and Argentina orally agreed to create a 'Red Cross Box' on the high seas located to the north of the Falklands/Malvinas Islands. This informal agreement facilitated the helicopter transfers of wounded prisoners of war from hospital ship to hospital ship within the 'Red

of the Falklands example, citing humanitarian need under LOAC for the temporary detention of enemy prisoners of war at sea.[33]

However, since 2001, the United States has strayed from this humanitarian justification.[34] In 2002, several top al-Qaeda operatives were held and questioned on the U.S.S. *Bataan* before being transferred to the facilities at Guantánamo Bay, which were still being built at the time.[35] During Operation Iraqi Freedom, the U.S.S. *Dubuque* also served as a temporary detention facility for Iraqi enemy prisoners of war due to a lack of land-based facilities.[36] During the Falklands War, Argentina and Britain were two nation-states that had the capability to mutually agree on detention practices; this has not been the case for the United States and al-Qaeda.[37]

B. Detention at Sea in the Age of Terrorism

Whatever the historical justifications for detention at sea, the practice has clearly changed. This Section reviews the current cases of detention at sea to demonstrate how the process has gone from housing massive amounts of individuals to a few suspected terrorists. The question here is how do laws shaped by the historical events apply in the age of terrorism, if at all.

1. The Case of Jose Padilla (2002).—Jose Padilla, a U.S. citizen, was arrested at Chicago O'Hare International Airport in May 2002 for his alleged involvement in a terrorist plot to explode a radioactive "dirty bomb" in the United States in conjunction with al-Qaeda.[38] In early June 2002, President Bush issued a memorandum describing Padilla as an

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Cross Box' while enabling the hospital ships to stay in a fixed position in a neutral zone." (footnote omitted)).

[33] *Id.*

[34] *Id.*

[35] *See* Eric Schmitt & Erik Eckholm, *U.S. Takes Custody of a Qaeda Trainer Seized by Pakistan*, N.Y. TIMES (Jan. 6, 2002), http://www.nytimes.com/2002/01/06/international/asia/06DETA.html [https://perma.cc/AW9C-GVBA] ("Military and other government investigators are interrogating a total of 307 Taliban and Al Qaeda prisoners at three sites in Afghanistan and on the Bataan. The first group of detainees is scheduled to be flown under heavy guard later this month to a secure jail being built at the United States Navy base at Guantánamo Bay, Cuba.").

[36] McMillan, *supra* note 18, at 36.

[37] Noone et al., *supra* note 21, at 28.

[38] *See* Padilla v. Hanft, 423 F.3d 386, 388 (4th Cir. 2005) (summarizing the background of the case); Deborah Sontag, *Terror Suspect's Path from Streets to Brig*, N.Y. TIMES (Apr. 25, 2004), http://www.nytimes.com/2004/04/25/us/terror-suspect-s-path-from-streets-to-brig.html [perma.cc/WCV3-74NU].

enemy combatant against the United States and directed the Secretary of Defense to take Padilla into military custody.[39] The June memorandum cited both the U.S. Constitution and the Authorization for Use of Military Force Joint Resolution (AUMF) as authority for this action.[40] Padilla petitioned for a writ of habeas corpus in the Southern District of New York, claiming his detention violated the Constitution.[41] The Supreme Court held that Padilla's petition was improperly filed with the Southern District of New York and his case was dismissed without prejudice.[42]

Padilla was subsequently held in military custody in a naval brig outside of Charleston, South Carolina for three years until his case was brought before the Fourth Circuit.[43] During this three-year period of detention, Padilla was not charged with a crime and given only limited access to legal counsel.[44]

Padilla was finally indicted by federal authorities in November 2005.[45] At the time, some scholars theorized that the federal government sought the indictment against Padilla to avoid putting before the Supreme Court the issue of how long American citizens can be detained in military prisons.[46] Despite this, Judge Luttig of the Fourth Circuit Court of Appeals waded into the issue, upholding Padilla's status as an enemy combatant and subsequent detention by closely analogizing Padilla's case to that of *Hamdi v. Rumsfeld*, stating that the court "could discern no difference" between Hamdi and Padilla.[47] While Padilla's case was not a case of detention at

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[39] *Padilla*, 423 F.3d at 388**.**

[40] *Id.* at 389.

[41] *Id.* at 390.

[42] *Id.*

[43] *Id.*

[44] *See* Sontag, *supra* note 38 (explaining Padilla's status as of 2004, when he was detained as an enemy combatant, and his limited access to lawyers); *see also* Eric Lichtblau, *In Legal Shift, U.S. Charges Detainee in Terrorism Case*, N.Y. TIMES (Nov. 23 2005), http://www.nytimes.com/2005/11/23/politics/in-legal-shift-us-charges-detainee-in-terrorism-case.html [https://perma.cc/6ECB-DNYS].

[45] *See* David Stout, *U.S. Indicts Padilla After 3 Years in Pentagon Custody*, N.Y. TIMES (Nov. 22, 2005), http://www.nytimes.com/2005/11/22/politics/us-indicts-padilla-after-3-years-in-pentagon-custody.html [https://perma.cc/W44B-MBQT] ("The indictment, which was returned by a federal grand jury in Miami, said that Mr. Padilla had plotted with four co-defendants in South Florida and elsewhere from October 1993 to the fall of 2001 to promote terrorist activities overseas.").

[46] *Id.*

[47] *Padilla*, 423 F.3d at 391 ("Under the facts as presented here, Padilla unquestionably qualifies as an 'enemy combatant' as that term was defined for purposes of the controlling opinion in *Hamdi*."); *see* Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

sea,[48] Judge Luttig's decision began to pave the way for the United States to initially hold persons under military custody and later transfer them to civilian criminal courts.

2. The Case of Ahmed Abdulkadir Warsame (2011).—Warsame—a former military commander of the Somali terrorist group Shabab—was captured in 2011 off the Gulf of Aden, detained aboard a warship, and questioned for two months without being read his *Miranda* rights or given access to a lawyer.[49] This questioning was carried out in a two-step process alluded to in Justice Kennedy's separate concurring opinion in *Missouri v. Seibart*.[50] First, the military's High-Value Detainee Interrogation Group questioned Warsame for about two months.[51] After the initial questioning, he was given a few days to meet with a Red Cross representative.[52] When the questioning started up again, it was conducted by FBI agents who finally read Warsame his *Miranda* warnings.[53] After questioning, Warsame was brought to the United States and tried in the Southern District of New York.[54] In December 2011, mere months after his capture, Warsame entered a guilty plea.[55]

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[48] The U.S. Naval Consolidated Brig is located at the Charleston Naval Weapons Station in North Charleston. Charleston Visitor Information, NAVY PERSONNEL COMMAND (May 31, 2013 9:24 AM) http://www.public.navy.mil/bupers-npc/support/correctionprograms/brigs/charleston/Pages/VisitorInformation.aspx [https://perma.cc/2THN-ZYSE].

[49] Benjamin Weiser & Eric Schmitt, *U.S. Said to Hold Qaeda Suspect on Navy Ship*, N.Y. TIMES (Oct. 6, 2013), http://www.nytimes.com/2013/10/07/world/africa/a-terrorism-suspect-long-known-to-prosecutors.html?pagewanted=all [perma.cc/EC44-7WW2].

[50] In *Seibert*, a plurality of the Supreme Court struck down a two-step method of police questioning which would obtain a confession in the first step and, once the defendant had confessed, in the second step the authorities would read her *Miranda* rights, remind her of the earlier confession and obtain a second *Mirandized* confession. Missouri v. Seibert, 542 U.S. 600, 617 (2004). Justice Kennedy's concurrence applied a narrower test: "I would apply a narrower test applicable only in the infrequent case, such as we have here, in which the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning." *Id.* at 622 (Kennedy, J., concurring in the judgment).

[51] Norman Abrams, *Responses to the Five Questions*, 38 WM. MITCHELL L. REV. 1597, 1603 (2012).

[52] *Id.* at 1603–04.

[53] *Id.* at 1604; *see also* Letter to Judge Colleen McMahon, at 2 n.1, United States v. Ahmed Abdulkadir Warsame, No. 1:11-cr-0059-CM (S.D.N.Y. July 5, 2011), (describing the two-step process by which Warsame was first interviewed by officials "acting in a non-law-enforcement capacity" for approximately two months, given a four-day break, and then granted a *Mirandized* law enforcement interview).

[54] Plea Agreement, United States v. Ahmed Abdulkadir Warsame (Dec. 20, 2011), http://lawfare.s3-us-west-2.amazonaws.com/staging/s3fs-public/uploads/2013/03/Warsame-Ahmed-Abdulkadir-Plea-Agreement.pdf [perma.cc/ZR6T-2NW7].

[55] *Id.*

Detaining Warsame on board a warship provided a convenient legal route for the Obama Administration. Because the Administration was trying to close Guantánamo and did not want to send any new detainees to Cuba, it appears that the detention of Warsame on board a naval war vessel on the high seas (considered U.S. territory)[56] was a calculated decision meant to avoid Guantánamo and get Warsame into the federal court system quickly.[57] In fact, Warsame's case demonstrates a "calculated progression" on the part of the military to easily transition subjects from military custody into the civilian court system, as opposed to the previous haphazard path of the *Padilla* case.[58]

3. The Case of Abu Anas al-Libi (2013).—In October of 2013, U.S. forces captured and detained Abu Anas al-Libi in Tripoli, Libya.[59] Al-Libi was allegedly at one time a senior al-Qaeda operative with close ties to Osama bin Laden.[60] After only eight days of questioning on board the U.S.S. *San Antonio*, al-Libi was transferred to the United States to be tried in the Southern District of New York.[61] Al-Libi died in government custody on January 2, 2015 while awaiting trial.[62]

In an analysis of the legality of al-Libi's detention under international law, military law scholars dismissed the issue for two primary reasons: (1) the United States is not defined as being in an "armed conflict" with al-Qaeda, but rather a noninternational armed conflict and (2) despite the United States expressly incorporating the Geneva Conventions, al-Libi did

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[56] Under the law of the flag doctrine, ships—even merchant ships—are deemed to be under the territory of the sovereign whose flag they fly on the high seas. For a concise, modern description of this doctrine, see *United States v. Sanford Ltd.*, 880 F. Supp. 2d 9, 16 (D.D.C. 2012).

[57] Abrams, *supra* note 51, at 1601 ("Detaining Warsame on shipboard during the first period of interrogation was the administration's way of holding him in military custody for a period of time without sending him to Guantánamo or a military facility on the mainland. Because the administration is trying to close the Guantánamo detention facility, it avoids sending any new detainees there. Meanwhile, Congress has acted to prevent sending any new detainees to any military detention facility in the United States.").

[58] *Id.* at 1602 ("What arguably differentiates the Warsame case is the fact that, unlike Padilla and al-Marri, where the government appeared to have backed into the sequence of military detention followed by civilian prosecution, for Warsame, it seems to have been a calculated progression.").

[59] Modarai et al., *supra* note 6, at 817.

[60] *Id.*

[61] *Id.* at 817–18; Deborah Feyerick & Lateef Mungin, *Alleged al Qaeda Operative Abu Anas al Libi Pleads Not Guilty*, CNN (Oct. 15, 2013), http://www.cnn.com/2013/10/15/justice/al-libi-case/index.html [https://perma.cc/GHY3-A9Z80].

[62] Benjamin Weiser & Michael Schmidt, *Qaeda Suspect Facing Trial in New York Over Africa Embassy Bombings Dies*, N.Y. TIMES (Jan. 3, 2015), http://www.nytimes.com/2015/01/04/us/politics/qaeda-suspect-facing-trial-in-new-york-dies-in-custody.html [perma.cc/4TYB-9YHT].

not qualify as a POW under the Geneva Conventions and was therefore not afforded the protection of Article 22.[63] The merits of these categorizations will be explored in Part III.[64]

4. The Case of Ahmed Abu Khattalah (2014).—Ahmed Abu Khattalah—a suspect in the 2012 Benghazi attacks—was arrested in June of 2014 after a Libyan raid.[65] Khattalah's case differs somewhat from the cases of Warsame and al-Libi in that he did not have the requisite connection to al-Qaeda in order for the AUMF to apply (though, importantly, an al-Qaeda connection is not required for the new AUMF Obama proposed in his 2015 State of the Union Address).[66] He was detained and questioned, however, under the "public safety" exception of *Miranda* while the U.S. Naval vessel he was aboard sailed nearly two weeks from the Mediterranean to Washington, D.C.[67] As an indication that the interrogation team had not been able to retrieve all of the desired information from Khattalah, upon his arrival in the United States he was given the choice of whether to be presented before a judge or to continue the interrogation.[68] He chose the judge.[69]

These cases suggest a calculated progression on the part of military officials to strategically utilize detention at sea for the interrogation of

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[63] Modarai et al., *supra* note 6, at 833.

[64] *Id.* at 834 ("The absolutism of Article 22's prohibition against at-sea detention for prisoners of war has been questioned, even in the context of GC III. For example, the ICRC calls for the 'sensible interpretation' of Article 22. This is because historically the article had two motivations. First, during the Second World War prisoners of war had been held in ships in unsanitary and unsafe conditions, in particular by Japan. Second, belligerent ships (*a fortiori* warships) were at significant risk of enemy attack, potentially placing any prisoners in danger. These factors are now of less concern than they were at the time of Article 22's drafting." (footnote omitted)).

[65] Hafetz, *supra* note 7.

[66] *Id.*; *see also* Authorization for Use of Military Force against the Islamic State of Iraq and the Levant, Joint Resolution, THE WHITE HOUSE (Feb 11, 2015), http://www.whitehouse.gov/sites/default/files/docs/aumf_02112015.pdf [https://perma.cc/DK4D-ZM4Z] (defining "associated persons or forces" as "individuals and organizations fighting for, on behalf of, or alongside ISIL or any closely-related successor entity").

[67] Michael S. Schmidt & Eric Schmitt, *Suspect in Benghazi Attack is Arraigned in U.S.*, N.Y. TIMES (June 28, 2014), http://www.nytimes.com/2014/06/29/world/africa/libyan-suspected-in-benghazi-mission-attack-arrives-in-washington.html?_r=1 [https://perma.cc/Y7UN-MVWR]. Also of note is that, according to the *New York Times*, the sailing time of the vessel was extended due to "engineering issues." Michael S. Schmidt & Eric Schmitt, *Questions Raised Over Trial for Ahmed Abu Khattala in Benghazi Case*, N.Y. TIMES (June 25, 2014), http://www.nytimes.com/2014/06/26/world/africa/questions-raised-over-trial-for-ahmed-abu-khattala-in-benghazi-case.html[perma.cc/2AKB-MRBV].

[68] Schmidt & Schmitt, *Suspect in Benghazi Attack is Arraigned in U.S., supra* note 67.

[69] *Id.*

suspected terrorists. The *Padilla* case in 2002 marked the beginning of a more systematic practice of first detaining a suspect militarily and then transferring them into civilian criminal custody for prosecution. As it became more difficult for the Executive to transfer detainees from Guantánamo,[70] the Administration has resorted to the strategies used in the cases of Warsame, al-Libi, and Khattalah, first capturing the suspects overseas and then transferring them by warship into the hands of the civilian courts.[71] These cases also demonstrate that, as the Administration has moved away from Guantánamo for the purposes of interrogation, it has moved toward interrogating detainees on vessels.

II. THE HYDRAULICS OF LEGAL DETENTION

This Part will explore the factors at play in constitutional, federal statutory, and international law which rendered detention at sea a legally feasible alternative to Guantánamo. The hydraulic effect occurs, as this Part explores, that through the closing off of traditional legal channels, others emerged out of necessity.

A. Tier One: Geneva Conventions—An Issue of Categorization

The United States has signed and ratified each of the four Geneva Conventions.[72] However, to have the force of law in U.S. courts a treaty must be considered "self-executing"[73] or otherwise written into U.S. domestic law. For example, the Geneva Conventions are reflected in the

[70] *See infra* Part II.B.

[71] It is important to note that under the "*Ker-Frisbie* doctrine," reaffirmed by the D.C. Circuit in *United States v. Rezaq*, U.S. courts retain jurisdiction over persons brought to court by forcible abduction, with narrow exceptions only in cases of "torture, brutality, and similar outrageous conduct." 134 F.3d 1121, 1130 (D.C. Cir. 1998) (citation omitted).

[72] *Treaties and States Parties to Such Treaties*, INTERNATIONAL COMMITTEE OF THE RED CROSS, https://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesHistoricalByCountrySelected.xsp?xp_countrySelected=US [perma.cc/9ERJ-X6M8]; *see also* Noone et al., *supra* note 21, at 9 ("The four Geneva Conventions of 1949 provide protections for four different classes of people: the military wounded and sick in land conflicts; the military wounded, sick, and shipwrecked in conflicts at sea; military persons and civilians accompanying the armed forces in the field who are captured and qualify as prisoners of war; and civilian non-combatants who are interned, live in an occupied land, or are otherwise in the hands of a party to an armed conflict."). As ratified treaties, the Conventions are the supreme law of the land under the Constitution. *See* U.S. CONST. art. VI ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.").

[73] *See* Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760, 766–67 (1988) (characterizing self-execution doctrine as a judicial invention).

Uniform Code of Military Justice (UCMJ) and have also been expressly incorporated into certain U.S. military regulations.[74]

Under the Conventions, enemy POWs are afforded certain protections, which may be summarized as "conditions as favourable as those for the forces of the Detaining Power."[75] In essence, the Detaining Party may not treat POWs as criminals.[76] Common Article 3 of the Convention states:

> Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* [out of action] by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely . . . [and] wounded and sick shall be collected and cared for.[77]

Additionally, if certain persons are classified as POWs under the Conventions, they are entitled to added benefits.[78] Under international law, criminals do not receive the benefits of POW status.[79] The U.S. military argues—somewhat controversially—that POW status also does not apply to terrorists.[80] Even if this is so, Common Article 3 still applies to detained terrorists and they must therefore be treated in a humane manner.[81]

Whether the full protections of the Geneva Conventions apply will depend on how the detained persons are categorized. Upon their capture, "prisoners are initially called 'detainees' pending further determination as to whether they are an unlawful combatant fighting in violation of the international laws of war (*i.e.* criminals or terrorists), an innocent civilian, or a lawful combatant entitled to EPW status."[82] A detainee is afforded POW status until evidence to the contrary comes to the attention of the

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[74] *See e.g.*, 10 U.S.C. § 801 (2012); AR 190–8, *supra* note 11.

[75] GC III, *supra* note 25, at art. 25.

[76] Noone et al., *supra* note 21, at 11.

[77] GC III, *supra* note 25, at art. 3(1), (2) (emphasis added).

[78] Noone et al., *supra* note 21, at 15 ("To qualify for EPW [Enemy Prisoner of War] status, one must be a lawful combatant - a member of a regular armed force, or belong to forces of an unrecognized government, part of a levée en masse, or a member of a militia which meets the four required criteria of: a responsible chain of command; a recognizable, distinct, and visible insignia; open carriage of arms, and obedience to the laws and customs of armed conflict.").

[79] Noone et al., *supra* note 21, at 15–16.

[80] *Id.* at 16 n.72; *see, e.g.*, Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769, 791 (2011); Noman Goheer, *The Unilateral Creation of International Law During the "War on Terror": Murder by an Unprivileged Belligerent is Not a War Crime*, 10 N.Y. CITY L. REV. 533 (2007).

[81] Noone et al., *supra* note 21, at 16.

[82] *Id.* at 17.

Detaining Power.[83] If their status remains in question, proceedings before an Article Five tribunal may be appropriate.[84] This Section explains how the different statuses of persons may affect their detention under U.S. policy as it operates under international law.

1. Enemy Prisoners of War.—In certain situations—like the Falklands War—interning enemy POWs on board naval vessels cannot be avoided. While Articles 22 and 23 of the GC III prohibit any internment that is not "on land,"[85] Article 16 of the GC II still allows for the care of wounded, sick, and shipwrecked enemy combatants.[86] The commentary to the GC II notes that, when both the GC II and GC III apply to a person, the GC II should prevail.[87]

For example, in an instance where a U.S. naval warship strikes and sinks an enemy vessel, both the Second and Third Conventions would be applicable to the enemy sailors who survived the initial sinking.[88] Because the sailors are lawfully engaged in the conflict, they are classified as POWs under GC III and therefore the limitations to their internment on a naval warship would apply. However, because they have also been shipwrecked, the GC II tenets applicable to shipwrecked members of the armed forces would supersede GC III and necessarily obligate the U.S. warship to temporarily intern POWs at sea until more humanitarian measures become available, either on a hospital ship[89] or on land.[90]

This temporary detention of POWs on board naval vessels is also incorporated into AR 190–8, which allows for this type of detention in three scenarios. The first is where the POW has been recovered at sea and may be held on board as long as operational needs dictate.[91] The second

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[83] *Id.* at 17–18.

[84] *Id.*

[85] GC III, *supra* note 25, at art. 22–23.

[86] GC II, *supra* note 8, at art. 16.

[87] *See* INT'L COMM. OF THE RED CROSS, COMMENTARY: II GENEVA CONVENTION RELATIVE TO THE WOUNDED, SICK, AND SHIPWRECKED MEMBERS OF THE ARMED FORCES AT SEA 16 (Jean S. Pictet ed., 1960) [hereinafter Pictet GC II Commentary] ("It follows . . . that a wounded, sick or shipwrecked member of the armed forces who falls into the hands of an enemy party to the Second and Third Geneva Conventions will enjoy protection under both Conventions until his recovery, the Second Convention taking precedence over the Third where the two overlap.").

[88] Credit to Professor Eugene Kontorovich for suggesting this hypothetical.

[89] *See* Pictet GC II Commentary, *supra* note 87, at 113 (noting that hospital ships are not considered "warships" under the Geneva Conventions because they are "charitable vessel[s], placed outside the fighting").

[90] GC III, *supra* note 25, at art. 22.

[91] AR 190–8, *supra* note 11, at para. 2-1(f)(2)(b)(2).

permissible scenario is where the POW may be temporarily held on board during sea transit between land facilities.[92] Finally, detaining POWs at sea is permissible when it would "appreciably improve their safety or health prospects."[93] Thus, U.S. policy aligns with international law for the detention of POWs in limited situations where GC II applies and the detention is temporary.

2. Interned Civilians.—Temporary internment of civilians, or "protected persons" in the parlance of the GC IV, is a much simpler matter, legally speaking.[94] Article 78 of the GC IV allows for the assigned residence or temporary internment of protected persons for security reasons.[95] Protected persons also may not be removed from the occupied territory in which they reside unless security demands it.[96] Furthermore, if protected persons are to be interned, they must not be interned in areas exposed to the dangers of combat.[97] The location specifications for protected persons under the GC IV do not contain the same "on land" language requirements as is stipulated in the GC III. However, the commentary on the GC IV notes that the locations of internment for protected persons was written to be analogous to that of POWs.[98] What is perhaps more interesting is the U.S. classification of civilians who are not considered protected persons, but rather "unprivileged belligerents."

3. Unprivileged Belligerents.—The United States departs from the Geneva Convention vernacular by labeling individuals "unprivileged belligerents." Under the Conventions, if a person satisfies the requirements of a protected person under the GC IV, but "is definitely suspected of or engaged in activities hostile to the security of the State," he or she is not entitled to protected status as a civilian.[99] U.S. policies once classified these

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[92] *Id.* at para. 2-1(f)(2)(b)(3).

[93] Noone et al., *supra* note 21, at 24 (citing AR 190–8, *supra* note 11).

[94] GC IV, *supra* note 27, at art. 4. Protected persons are defined by the GC IV as those who, "at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of . . . a Party to the conflict or Occupying Power of which they are not nationals." *Id.* However, this does not include members of the armed forces or any of those persons that fall within the purview of the other three Conventions.

[95] *Id.* at art. 78.

[96] *Id.* at art. 49.

[97] *Id.* at art. 83.

[98] *See* INT'L COMM. OF THE RED CROSS, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 83 (Jean S. Pictet ed., Ronald Griffin & C.W. Dumbleton trans., 1958).

[99] GC IV, *supra* note 27, at art. 5.

individuals as "unlawful enemy combatants," but after heavy criticism, now term them "unprivileged belligerents."[100] The Military Commissions Act of 2009 (MCA 2009) defines an unprivileged belligerent as a person 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.[101]

The unprivileged belligerent is not afforded the protections under any of the Geneva Conventions and may be tried as a criminal under the laws of their captor.[102] The United States often categorizes terrorists as unprivileged belligerents and therefore subject to detention at sea under the Laws of Armed Conflict.[103] Because AR 190–8 applies to the detention of all civilians, and some civilians are unprivileged belligerents under the MCA 2009, detentions of such persons must still be temporary in nature, though the specific length of detention is not defined.[104] This categorization provides a convenient legal regime wherein the United States can detain suspected terrorists at sea in nearly any situation, whether or not the Geneva Conventions apply.

B. Tier Two: Evasion of Congressional Intent

With the passage of the 2011 National Defense Authorization Act (NDAA), Congress attempted to forbid the transfer of detainees into the

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[100] McMillan, *supra* note 18, at 35; *see also* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat 2600. The broad definition of unlawful enemy combatant in the Military Commissions Act of 2006 (MCA 2006) brought heavy criticism given the amount of discretion provided to Combatant Status Review Tribunals. After the Supreme Court ruled § 7 of the MCA 2006 unconstitutional in *Boumediene v. Bush*, Congress passed a revised version of the MCA in 2009 which changed the term and definition of "unlawful enemy combatant" to "unprivileged belligerent." 553 U.S. 723, 724 (2008).

[101] National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, 123 Stat 2190 (2009).

[102] McMillan, *supra* note 18, at 35–41 ("The U.S. Code defines the federal crime of terrorism by criminalizing certain activities, but there is not a specific crime of 'terrorism.'").

[103] *Id.* at 41.

[104] *See* AR 190–8, *supra* note 11, at para. 2-1(f)(2)(b).

federal court system.[105] Specifically, Congress harnessed its power of the purse to forbid the use of funds to transfer detainees from Guantánamo to the United States.[106] The 2013 NDAA imposed further restrictions on the President by inhibiting his "ability to transfer detainees to Yemen and similar high-conflict nations, and for the first time limited the government's ability to transfer non-Afghan citizens being held in Afghanistan—a provision that had been defeated in the prior year."[107] These provisions were relaxed somewhat in the 2014 NDAA[108]—easing restrictions on transferring detainees abroad—and the 2015 NDAA simply extended the 2014 NDAA provisions pertaining to detainees.[109] It is unlikely these restrictions will change before the 2016 presidential election.

These congressional decisions were primarily driven by two factors: (1) political motivation and (2) the desire for detainees to be tried under military tribunals.[110] First, it should come as no surprise these moves by Congress were politically motivated. Because the Obama Administration made closing Guantánamo a key part of the campaign platform, once Republicans took back control of the House after the 2010 midterm elections, there was a strategic move to make it nearly impossible for the Administration to transfer detainees from the facility into the federal court

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[105] Peter Landers, *Congress Bans Gitmo Transfers*, WALL ST. J. (Dec. 23, 2010 12:01 AM), http://www.wsj.com/articles/SB10001424052748704774604576036520690885858 [https://perma.cc/VQ4P-YVYK] ("The measure for fiscal year 2011 blocks the Department of Defense from using any money to move Guantánamo prisoners to the U.S. for any reason.").

[106] Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1032, 124 Stat. 4351; Janet Cooper Alexander, *The Law-Free Zone and Back Again*, 2013 U. ILL. L. REV. 551, 589 (2013) (The following year, Congress passed the 2012 NDAA, which placed even stricter regulations on the transfer of detainees).

[107] Alexander, *supra* note 106, at 593 (footnote omitted).

[108] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1034, 127 Stat. 672, 851 (2013).

[109] National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, §§ 1031–33, 128 Stat. 3292, 3491–92 (2014). While the lame-duck Democrat-controlled Senate version of the 2015 NDAA contained provisions that would have allowed for the transfer of detainees to civilian criminal courts, the House did not adopt these provisions. S. 2410, 113th Cong. § 1031(b) (2014).

[110] *See* Landers, *supra*, note 105. It is important to keep in mind that one of the early detainees tried in a federal court was acquitted by a federal jury of all but one charge. *Id.* Furthermore, conservative members of Congress did not believe foreign suspected terrorists should be entitled to the same rights as Americans in the criminal justice system. *See* Mike Levine & Justin Fishel, *GOP Slams Obama Administration for Bringing Somali Terror Suspect to U.S.*, FOXNEWS.COM (July 6, 2011), http://www.foxnews.com/politics/2011/07/06/gop-slams-obama-administration-for-bringing-somali-terror-suspect-to-us/ [perma.cc/H3JQ-FKXK] (quoting Rep. Lamar Smith from Texas saying, "Why is it so hard for President Obama to acknowledge what the majority of Americans already know: foreign terrorists are enemies of America . . . . They should not be tried as common criminals, but as terrorists in military commissions at Guantánamo Bay.").

system for criminal prosecution. Congressman Earl Blumenauer of Oregon noted this: "[e]mbarrassingly, this authorization contains two key provisions that continue to tie the President's hands by restricting his ability to transfer detainees to the United States for trial in Federal court and to release detainees to countries willing to take them."[111] Every year since, Congress has placed these restrictions on the Executive. Obama has issued signing statements noting these provisions defunding the transfer of detainees "interfere with the authority of the executive branch."[112] The Republican-controlled Congress gave the Obama Administration little choice but to leave the Guantánamo facility open and resort to other means of detaining and prosecuting suspected terrorists under the civilian criminal system rather than through military commissions.[113]

One of the ways to evade this congressional intent is to detain and question terror suspects at sea. The case of Warsame, outlined in Part I, presents a classic example of this tactic. The suspected terrorist is detained on board a U.S. flagged vessel, which falls entirely under U.S. jurisdiction in accordance with the United Nations Convention on Laws of the Sea (UNCLOS) and the doctrine of flag-state primacy.[114] The suspect is then questioned on board the vessel under military custody until arrival in the United States, where he or she is then transferred to the FBI and indicted.[115] In this way, the government circumvents any legislative restrictions imposed on the transfer of detainees and effectuates the Obama Administration's policy of transferring detainees to federal court.[116]

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[111] 157 CONG. REC. E987 (statement of Rep. Blumenauer).

[112] Press Release, The White House, Statement by the President on H.R. 6523 (Jan. 7, 2011), http://www.whitehouse.gov/the-press-office/2011/01/07/statement-president-hr-6523 [perma.cc/8AU6-3HKH]; *see also* Press Release, The White House, Statement by the President on H.R. 3304 (Dec. 26, 2013), http://www.whitehouse.gov/the-press-office/2013/12/26/statement-president-hr-3304 [perma.cc/PC82-3RLS] ("For the past several years, the Congress has enacted unwarranted and burdensome restrictions that have impeded my ability to transfer detainees from Guantánamo."). Interestingly enough, the question as to whether the 2013 and 2014 NDAAs were unconstitutional interferences by Congress into the President's control of foreign affairs was set forth before the D.C. District Court in *Ahjam v. Obama*, but the court dismissed for lack of standing. 37 F. Supp. 3d 273, 277 (D.D.C. 2014), *appeal dismissed* (Jan. 16, 2015).

[113] *See* Alexander, *supra* note 106, at 573–74 (providing a history of the Department of Justice policy under the Obama Administration to prosecute terrorists under civilian criminal regimes rather than military commissions).

[114] UNCLOS, *supra* note 15, arts. 91 and 92 ("Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.").

[115] Alexander, *supra* note 106, at 574.

[116] *Id.*

C. Tier Three: Expanding the "Magic Hour"[117]

What emerges from the cases discussed in Part I and the efforts of the Department of Justice to prosecute terrorists in civilian criminal trials rather than military commissions is a curious development on the part of U.S. counterterrorism strategy after the age of Guantánamo. By first detaining suspected terrorists at sea under the LOAC, the government avoids triggering any issues of criminal process such as *Miranda* rights and presentment requirements. Then, once the needed information is gleaned from the suspects, they are transferred into civilian criminal custody and to the U.S. federal court of choice for criminal prosecution. This effect—cleverly termed "cross-ruffing"[118] by Professor Stephen Vladeck—demonstrates how the United States is utilizing both the military and criminal law regimes to avoid, or "trump," protections of either side[119]:

> With regard to pretrial "cross-ruffing," the problem . . . is the possibility that the government might use its military detention authority (or at least the difficulty of remedying unlawful military detention) as a means of side-stepping procedural protections that would otherwise kick in soon after the arrest of a terrorism suspect.[120]

Vladeck points to several tools to potentially mitigate cross-ruffing, but the two most convincing are: (1) presentment and (2) the right to a speedy trial.[121]

Rule 5 of the Federal Rules of Criminal Procedure requires that a defendant be presented, "*without unnecessary delay* before a magistrate

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[117] "Magic hour" refers to a cinematography term wherein the crew and director have a very short amount of time—either at sunrise or sunset—to film outdoor scenes in nearly perfect light. Noam Kroll, *How to Shoot with Natural Light: 10 Tips*, INDIEWIRE (Oct. 7, 2013), http://www.indiewire.com/article/10-tips-for-using-natural-light-to-light-your-shoot [https://perma.cc/XY9Z-FC8J].

[118] Stephen I. Vladeck, *Terrorism Prosecutions and the Problem of Constitutional "Cross-Ruffing,"* 36 CARDOZO L. REV. 709, 710 n.2 (2014) ("The term comes from a strategy often used in contract bridge that allows a partnership to mitigate the weaknesses of each partner's hand by taking advantage of the trump cards held by the other. In hands where the declarer's hand and that of his partner are unevenly distributed, the declarer will use a numerical advantage in 'ruff' (trump) cards to strategically alternate taking tricks from his hand and from his partner's. Thus, after the declarer (or his partner) has claimed a trick, he will lead a weak non-trump card in a suit in which his partner is void, which the partner will then 'trump,' allowing the partnership to both claim the trick with the trump card and reduce the likelihood of losing tricks with weak non-trump cards later in the hand.") (citing FREDDIE NORTH, BRIDGE PLAY UNRAVELLED: RECOGNITION IS EVERYTHING 12 (2003)).

[119] *Id.* at 711.

[120] *Id.* at 725.

[121] *Id.* at 726.

judge."[122] Courts have construed Rule 5(a)'s "unnecessary delay" provision to impose a presumptive forty-eight-hour time limit on detentions "in the absence of a probable cause determination."[123] Furthermore, in 2009 the Supreme Court held—even within the forty-eight-hour time limit—the "delay for the purpose of interrogation is the epitome of 'unnecessary delay.'"[124] Both the detention at sea cases discussed in Part I and Vladeck's article point to an emerging trend: the military is detaining suspected terrorists on board naval vessels as well as utilizing these ships for their transfer to the U.S. (in lieu of air travel) specifically to *extend* the procedural-protection-free interrogation period, or the "magic hour."[125]

We can see the U.S. government responding to this concern slightly in the Abu Khattalah case: "Obama administration officials have suggested that the delay in transporting Khattalah was not 'unnecessary' because bringing him through international waters is easier than transporting him by helicopter to an airport in a country in Europe or North Africa, which would require the permission of the host country."[126] Yet, Vladeck demonstrates that U.S. courts are applying Rule 5(a) by only beginning to count down the forty-eight-hour period once the suspected terrorist is transferred from military custody into civilian custody.[127]

Vladeck also points to the Speedy Trial Clause of the Constitution as a potential mitigation tool against cross-ruffing.[128] In applying the Speedy Trial Clause in *Barker v. Wingo*, the Supreme Court outlined four factors—now known as the *Barker* factors—for considering whether the Clause had been violated: (1) the length of delay (five years being a "great time" for delay), (2) the governmental reasons for delay, (3) the responsibility of the defendant to assert their rights and, (4) any prejudice to the defendant.[129]

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[122] *Id.* at 725; FED. R. CRIM. P. 5(a)(1)(B) (emphasis added).

[123] United States v. Ayala, 289 F.3d 16, 19 (1st Cir. 2002).

[124] Corley v. United States, 556 U.S. 303, 308 (2009).

[125] *See generally* Vladeck, *supra* note 118.

[126] *See* Hafetz, *supra* note 7.

[127] *See* Vladeck, *supra* note 118, at 717 ("First—and perhaps most importantly—Rule 5 only applies to criminal arrests, and not arrests for purposes of non-criminal detention. And although no court has ever considered whether military detention constitutes non-criminal detention for purposes of Rule 5, that conclusion should follow from the fact that military detention is putatively civil, not criminal. Thus, the clock Rule 5 contemplates does not begin to run until the inception of criminal proceedings—and so would not run until after a terrorism suspect who is initially subjected to military detention had been transferred out of military custody and into civilian custody for purposes of prosecution.").

[128] *Id.* at 719–22.

[129] 407 U.S. 514, 530 (1972).

This issue was presented in the 2014 case, *United States v. Ghailiani*.[130] The court primarily focused on the second *Barker* factor and placed great weight on the government's national security interest in holding Ghailiani for greater than the five-year period.[131] This again demonstrates the difficulty detainees face in finding applicable law that pertains to them, because even in an instance that would normally be a clear violation of the *Barker* factors, the sensitivity of the case imbues the courts with great deference to the government and national security.

III. THE FINAL TIER: APPLYING ARMED FORCES REGULATIONS TO DETAINEES

Part II demonstrated how the United States utilizes legal categories to evade the Geneva Conventions with respect to detention of enemy prisoners of war, evade the intent of Congress by placing detainees at sea, and use the dual regimes of military and civilian law to expand the "magic hour" of procedural-protection-free interrogation time while detainees are transported to the United States. This Part analyses a heretofore unexplored source of detainee procedural protection, AR 190–8.

As Professors Robert Chesney and Jack Goldsmith have pointed out, the higher level of procedural protections in the civilian criminal code, as opposed to military detention in armed conflict, is primarily due to the difference in protected interests.[132] The civilian code is driven by an interest in protecting the innocent from wrongful conviction while military regulations are designed to be efficiently executed even in the fog of war.[133] But holding one suspected terrorist on board a naval warship can hardly be considered to be in the throes of combat, particularly when a military unit has sailed the vessel to the terrorist target on a mission to apprehend them. This—along with the subsequent interrogation—appears more like an extraterritorial arrest than war, especially when the primary purpose of

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[130] United States v. Ghailani, 733 F.3d 29, 43 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 1523 (2014).

[131] *Id.* at 49; *see also* Stephen Vladeck, *Ghailani: Constitutional "Cross-Ruffing," and Why I Worry. . .*, JUST SECURITY (Oct. 25, 2013 10:25 AM), http://justsecurity.org/2511/ghailani-hard-question-re-aumf-covered-terrorism-suspects/ [https://perma.cc/8YP2-T6RB].

[132] Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1088 (2008).

[133] *Id.* ("The exigencies of traditional armed conflict render many procedural safeguards difficult to implement in practice. Soldiers on the battlefield are not law enforcement officers and in most instances lack the time, resources, or training to collect evidence with an eye toward eventual use in court proceedings.").

detaining suspected terrorists under a military regime is to place them in the custody of civilian criminal courts.

If the interests between the civilian and military codes have begun to converge, so should the procedural protections.[134] It is conceivable that by reading the civilian criminal code and AR 190–8 *in pari materia*, the presentment protections of Rule 5 can be read into the army regulations, and therefore begin counting at the point of detention of the suspect, not simply when he or she is transferred into civilian criminal custody.[135] The pertinent language, "without unnecessary delay"[136] is also echoed in AR 190–8, which states the temporary detention at sea of enemy prisoners of war and civilians is to be "limited to the *minimum period necessary* to evacuate them from the combat zone or to avoid significant harm that would be faced if detained on land."[137]

Additionally, using the Supreme Court's reasoning from *Boumediene v. Bush*, these detainees are being held on naval warships where U.S. control is absolute and indefinite, meaning they have rights under the U.S. Constitution.[138] In holding that the Suspension Clause shall apply to noncitizens being held at Guantánamo, the Court reasoned that "[i]n every practical sense Guantánamo is not abroad; it is within the constant

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[134] In fact, the United States has had more strict military procedural protections in the past. *See* Chesney & Goldsmith, *supra* note 132, at 1091 ("During the Vietnam War, the U.S. military's detention process was governed by 'MACV Directive 20-5,' promulgated by Headquarters, United States Military Assistance Command, Vietnam. This regulation specified relatively elaborate procedural safeguards to be employed during the detention screening process, including a right to 'reasonably available' counsel (including an appointed JAG counsel if necessary) and a right to be present other than during the tribunal's deliberations."); *see also* Andrew Kent, *Disappearing Legal Black Holes and Converging Domains: Changing Individual Rights Protection in National Security and Foreign Affairs*, 115 COLUM. L. REV. 1029 (2015).

[135] This is in contrast to the excellent arguments made by Professors Jennifer Daskal and Steve Vladeck that "prompt presentment rules kick in" only once transferred into law-enforcement custody. Jennifer Daskal & Steve Vladeck, *The Case of Abu Anas al-Libi: The Domestic Law Issues*, JUST SECURITY (Oct. 10, 2013 9:00 AM) https://www.justsecurity.org/1850/case-abu-anas-al-libi-domestic-law-issues/ [https://perma.cc/ZZ5B-9S6K]. This Note argues the clock starts ticking earlier under AR 190–8's language, thus it would begin counting while the detainee is under military authority. However, the question of whether interrogation for intelligence gathering rises to the level of the interrogation referenced in *Corley v. United States* is still a question that remains unanswered. *Id.*

[136] FED. R. CRIM. P. 5(a).

[137] *See* AR 190–8, *supra* note 11, at para. 2-1(f)(2)(b)(4) (emphasis added).

[138] 553 U.S. 723, 768 (2008) (differentiating those prisoners in Guantánamo from those tried in a 1950 case, *Eisentrager*, where detainees were being held at Landsberg Prison in Germany, the Court noted, "Unlike its present control over [Guantánamo], the United States' control over the prison in Germany was neither absolute nor indefinite.").

jurisdiction of the United States."[139] The case that a U.S. naval warship is not abroad, even when on the high seas, is much stronger than that of Guantánamo because there is no de jure sovereign such as Cuba in between. Even if the vessel was not a warship and under the direct control of the U.S. government, the law of the flag doctrine would still provide that the vessel itself was the territory of the United States as long as it was flying the U.S. flag. Therefore, the full force of the Constitution would apply, including the right to a speedy trial.

A. Army Regulation 190–8—Expanded Applicability

U.S. AR 190–8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (AR 190–8), expressly incorporates the Geneva Conventions.[140] It must, therefore, seem controversial that U.S. policy allows for the internment of enemy prisoners of war at sea when Article 22 of the Geneva Conventions textually prohibits it.[141] However, the regulations allow for the temporary detention of enemy prisoners of war and civilians, "limited to the minimum period necessary to evacuate them from the combat zone or to avoid significant harm that would be faced if detained on land."[142] Recently, detainees have begun to present questions

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[139] *Id.* at 769.

[140] AR 190–8, *supra* note 11, at para. 1-1b. The name of AR 190–8 is misleading because it is the controlling regulation for *all* of the U.S. Armed Forces regarding detainees. *See* Aamer v. Obama, 58 F. Supp. 3d 16, 21 (D.D.C. 2014).

[141] Noone et al., *supra* note 21, at 25.

[142] *See* AR 190–8, *supra* note 11, para. 2-1(f)(2)(b), which outlines the special policy for detention on board naval war vessels:

> (1) Detention of EPW[Enemy Prisoners of War]/RP[Retained Personnel] on board naval vessels will be limited.
>
> (2) EPW recovered at sea may be temporarily held on board as operational needs dictate, pending a reasonable opportunity to transfer them to a shore facility, or to another vessel for transfer to a shore facility.
>
> (3) EPW/RP may be temporarily held aboard naval vessels while being transported between land facilities. They may also be treated and temporarily quartered aboard naval vessels incidental to their treatment, to receive necessary and appropriate medical attention if such detention would appreciably improve their health or safety prospects.
>
> (4) Holding of EPW/RP on vessels must be temporary, limited to the minimum period necessary to evacuate them from the combat zone or to avoid significant harm that would be faced if detained on land.
>
> (5) Use of immobilized vessels for temporary holding of EPW/RP is not authorized without SECDEF approval.

pertaining to AR 190–8 in court, presumably because, as discussed in Part II, there are few other sources of law available to them.[143]

Significantly, in a 2013 case, *Al Warafi v. Obama*, the D.C. Circuit held, despite Congress's explicit statement in the Military Commissions Act of 2006 (MCA 2006) that a detainee may not invoke the Geneva Conventions in a habeas proceeding, a detainee *may* invoke the Geneva Conventions through AR 190–8.[144]

There are some caveats. Specifically the decision read, "in a habeas proceeding such as this, a detainee may invoke Army Regulation 190–8 to the extent that the regulation explicitly establishes a detainee's entitlement to release from custody."[145] This "entitlement" language has been interpreted as a restriction by the D.C. District Court in *Aamer v. Obama*, which held that for a detainee to invoke AR 190–8 and the Geneva Conventions it incorporates, the detainee must first "explicitly establish" their "entitlement" to release from custody under the Regulation.[146]

Perhaps more importantly, these cases demonstrate a willingness by the D.C. Circuit to interpret AR 190–8 as domestic U.S. law that it "may and must analyze" in the context of detainee proceedings in federal court, not just as a rule for military commissions.[147] While some may focus on the explicit incorporation of the Geneva Conventions into this Regulation, this has limited effect due to the categorization of detainees as "unprivileged belligerents" as demonstrated in Part II. What may carry more weight is a duty of the courts to apply the procedural protections of AR 190–8 to detainees at sea.

B. Delay for Further Interrogation is the Epitome of Unnecessary Delay

As outlined above, AR 190–8 stipulates that the authority to hold POWs, Retained Personnel (RP), and "other detainees" is limited.[148]

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[143] *See, e.g.*, Al Warafi v. Obama, 716 F.3d 627 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 2134 (2014) (mem.); Aamer v. Obama, 58 F. Supp. 3d 16 (D.D.C. 2014); Ameziane v. Obama, 58 F. Supp. 3d 99, 102 (D.D.C. 2014).

[144] 716 F.3d at 629. Notably, while Section 7 of the Military Commissions Act of 2006 was invalidated in *Boumediene v. Bush* because the Supreme Court deemed it an unconstitutional suspension of the writ of habeas corpus, Section 5 remains unaffected. 553 U.S. 723, 792 (2008).

[145] *Al Warafi*, 716 F.3d at 629.

[146] *Aamer*, 58 F. Supp. 3d at 23 (citing *Al Warafi*, 716 F.3d at 629).

[147] *Al Warafi*, 716 F.3d at 629.

[148] AR 190–8, *supra* note 11, at para. 2-1(f)(2)(b) ("Special policy pertaining to the temporary detention of EPW, CI, RP and *other detained persons* aboard United States Naval Vessels.") (emphasis

Specifically, it is "limited to the *minimum period necessary* to evacuate them from the combat zone or to avoid significant harm that would be faced if detained on land."[149] This language is of course very similar to that of "without unnecessary delay" of Rule 5(a) of the Federal Rules of Criminal Procedure.[150] The temporal limitations of Rule 5(a) have often been discussed in criminal proceedings and any dispositive analysis merits another look.

The common interpretation is that Rule 5(a) establishes a forty-eight-hour time limit for criminals to be presented before a magistrate judge.[151] The Supreme Court discussed this temporal limit at length in *County of Riverside v. McLaughlin*.[152] The Court, in upholding the forty-eight-hour requirement of Rule 5(a), noted there may still be a violation even if the defendant was presented within forty-eight hours in cases where the defendant can prove he or she was delayed unreasonably.[153] The Court provided several examples of what constituted an unreasonable delay, including "delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake."[154] The Supreme Court reiterated this sentiment in *Corley v. United States* when Justice Souter wrote, "[D]elay for the purpose of interrogation is the epitome of 'unnecessary delay.'"[155] Strikingly, the entire purpose of detention at sea appears to be to prolong the "magic hour" interrogation period of detainees.

One may argue that placement of the detainee on board the vessel is simply a transport mechanism to bring the detainee to the custody of the United States, and that flying the detainee back is not feasible due to conflict or sovereign concerns in the countries nearby.[156] Indeed, the

added). That this section of AR 190–8 applies to other detained persons is particularly important because the D.C. Circuit places a stringent analysis on the categorization of persons to whom this law is applied. *See Al Warafi*, 716 F.3d at 629–32 (denying a petition for writ of habeas corpus because appellant could not establish he was "medical personnel" within the meaning of Article 24 of the First Geneva Convention because the Taliban did not issue him official identification as such).

149 *See* AR 190–8, *supra* note 11, para. 2-1(f)(2)(b) (emphasis added).

150 FED. R. CRIM. P. 5(a).

151 Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).

152 *Id.*

153 *Id.*

154 *Id.*

155 556 U.S. 303, 308 (2009).

156 *See* Hafetz, *supra* note 7; *see also* Michael S. Schmidt & Eric Schmitt, *Questions Raised Over Trial for Ahmed Abu Khattala in Benghazi Case*, N.Y. TIMES (June 25, 2014),

Supreme Court has noted that courts shall provide flexibility in the forty-eight-hour limitation for the purposes of transport.[157] However, nearly all naval warships contain at minimum a helicopter pad for transport, and it is entirely plausible that the detainee could be flown by helicopter to a friendlier country in the Northern Mediterranean with which the United States has an extradition treaty (e.g., Italy)[158] and then transported by air to the United States.

The specific definition of unreasonable delay for shipboard interrogation while being transported was provided by the D.C. Circuit in the 1988 case of *Yunis v. United States*.[159] The FBI arrested Fawaz Yunis—a suspect in a 1985 plane hijacking—in international waters off the coast of Cyprus.[160] While ultimately holding that the four-day interrogation on board the U.S.S. *Butte* was reasonable, the court made clear that—had it been able to make a factual determination that Yunis's journey was specifically scheduled to purposely create a delay—it may have held otherwise.[161]

This is not to say that an interrogation at this interval may be crucially important to national security, but courts should be aware that detention at sea becomes a de facto method of further interrogation in a procedural-protection-free zone under the guise of transport, and would violate *McLaughlin* and *Corley* under the civilian regime.[162]

C. Consequences of an Army Regulation 190–8 Violation

If a court determines that the interrogation of a detainee during transportation by sea is a violation of AR 190–8, it is necessary to determine what consequences apply. The most likely consequence would

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http://www.nytimes.com/2014/06/26/world/africa/questions-raised-over-trial-for-ahmed-abu-khattala-in-benghazi-case.html [https://perma.cc/H2JT-FTVS].

[157] *McLaughlin*, 500 U.S. at 56–57 ("Courts cannot ignore the often unavoidable delays in transporting arrested persons from one facility to another.").

[158] Bilateral Extradition Treaty, U.S.-Italy, Oct. 19, 1983, 1983 U.S.T. 421.

[159] 859 F.2d 953, 967–69 (D.C. Cir. 1988).

[160] *Id.* at 954.

[161] *Id.* at 968 ("To the extent the [trial] judge found that the trip via the Butte could have been made in less time, we accept the factual determination but disagree that the extra time in transit was not a 'reasonable' delay.").

[162] Many advocates will remember the untimely misstep of Paul Clement in arguing *Rumsfeld v. Padilla*, where he assured Justice Ginsburg that the Executive would not resort to torture mere hours before CBS broadcast the first photos of Abu Ghraib. Jason Zengerle, *The Paul Clement Court*, N.Y. MAG. (Mar. 18, 2012), http://nymag.com/news/features/paul-clement-2012-3/index2.html [perma.cc/A84Z-PMC2].

be a suppression of the detainee's statements made during the interrogation per the *McNabb–Mallory* rule. This rule renders confessions made during periods of detention that violate the presentment requirements of Rule 5(a) inadmissible.[163] In the case of *Yunis*, the court determined that "principal concern of the *McNabb–Mallory* rule" was absent from the case because a magistrate judge had issued a warrant prior to Yunis's arrest.[164] This is contrary to the recent cases of detention at sea where the person is first apprehended, held, and interrogated on board the ship, and only arrested upon their arrival in the United States.[165] Thus the principal concern of an investigatory arrest under *McNabb–Mallory* would apply.

While the suppression of statements may appear to be a weak remedy at first glance, the application of this rule is important because it would allow the U.S. government to weigh the consequences as to whether it is more important that the information be gleaned from the detainee in the interest of national security, or that the detainee's statements be admitted at trial.

Because military detention is primarily construed as civil detention and Rule 5(a) is a requirement in criminal proceedings, some may argue the two should not be read as analogous. However, as the First Circuit acknowledged in *United States v. Encarnacion*, "the difference between civil and criminal detentions may appear formalistic, and that in practical terms an unnecessarily long detention under civil law is no better for the detainee than one under the criminal law."[166] Even if the period of military detention may be considered civil, once it is clear the government's intent is to prosecute the detainee in the criminal system, any separation between the civil and criminal regimes becomes less distinct and requires the judicial system to cast a blind eye toward this reality in determining the language of Rule 5(a) is inapplicable.

CONCLUSION

The development of detention law has led to a hydraulic effect for the detention and interrogation of suspected terrorists, moving it out of

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[163] Corley v. United States, 556 U.S. 303, 303 (2009).

[164] *Yunis*, 859 F.2d at 969 (noting that because "[i]n the majority of criminal cases, police have no warrant for the arrest," presentment before a magistrate is essential so probable cause may be determined).

[165] *See, e.g.*, Letter to Judge Colleen McMahon, *supra* note 53, at 1–3 (noting that Warsame was apprehended on April 19, 2011, interrogated, and only arrested "on or about July 3, 2011").

[166] 239 F.3d 395, 399 n.4 (1st Cir. 2001).

Guantánamo and potentially on to the sea. As Professors Chesney and Goldsmith have alluded to, there is a convergence in the interests of detention between the civil and military regimes. To that end, AR 190–8 may constitute one of the only legal procedural protections on which detainees may rely. Because of the similarity in language and purpose of AR 190–8 and Rule 5(a), courts may read the two *in pari materia* and take into account Supreme Court language condemning additional delay for purposes of further interrogation. It is crucial to understand detention at sea not as transportation between facilities, but as a potential guise for extending procedural-protection-free interrogation of detainees to ensure that future administrations cannot abuse this law-free zone.