In 1944, in *Korematsu v. United States*, the United States Supreme Court made a major error in judgment. It ruled that the executive may forcibly remove over 110,000 Japanese Americans, including Japanese American citizens, from their homes and relocate them in American detention camps. In the following years, federal courts have backpedaled from this decision. In two recent Supreme Court cases, *Hamdi v. Rumsfeld* and *Hamdan v. Rumsfeld*, the court made similar errors in judgment by accepting the administration’s term “enemy combatant.” The Supreme Court’s errors were compounded when Congress passed the Military Commissions Act of 2006 in October, 2006. The act codified for the first time the term enemy combatant by statutorily defining it. By acknowledging the term enemy combatant, the court and the Congress gave this and future administrations permission to deprive people of their internationally recognized rights and protections.
Prior to 9/11, there were only two universally recognized categories of combatants: lawful and unlawful. Although the protection differed in kind, both categories of combatants were protected under international law.

Enemy combatant did not and does not exist under international law. Enemy combatant was nothing more than a generic term until February 2002, when the administration imbued it with a new and particular meaning that was designed to circumvent the Geneva Conventions and international human rights laws. In using the term, officials in the administration cited to a 1942 Supreme Court case, *Ex Parte Quirin.* In *Quirin,* the term was used in a case involving Nazi saboteurs who challenged the legitimacy of the military tribunals that tried them. The definition that the current administration applies to the term enemy combatant is not supported in any way by its use in *Quirin.* A full discussion of how the term is used in Quirin and its comparison to how it is used by the administration today is discussed in Part Three, Section C.

Detainees designated as enemy combatants are denied basic human rights and protections. In 2002, the administration classified two American citizens, Yaser Hamdi and Jose Padilla as enemy combatants. The next year it classified lawful resident Ali Al Marri as an enemy combatant. As enemy combatants, all three were held for over two years incommunicado and in total isolation in a Charleston, South Carolina naval brig, without access to lawyers. Had Hamdi, Padilla and al Marri been classified as lawful combatants, unlawful combatants or mere criminals, they would have been afforded more rights and protections.

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7 Occasionally, commentators will use the terms “protected” combatants and “unprotected” combatants or “privileged” combatants and “unprivileged” combatants, but the most common terminology is “lawful” and “unlawful.” For purposes of this article, I will use the most common distinction: lawful and unlawful combatants.

8 *Ex Parte Quirin,* 317 U.S. 1 (1942).
In addition, by designating over six hundred detainees as enemy combatants in Guantanamo Bay, the administration -- unconstrained by, and in violation of, international laws and norms -- subjected these detainees to cruel, humiliating and degrading treatment, as well as to torture.9. Salim Hamdan, the petitioner in the Hamdan case is one such Guantanamo Bay detainee.

Although the deprivation of the rights of people labeled as enemy combatants does not impact as many people as the number of people implicated in Korematsu, the degree of human rights violations of people classified as enemy combatants is more severe.

Someday, our nation’s courts will backpedal on the validity of the term enemy combatant. But we cannot wait a generation or longer, as we did following Korematsu, for the error to be corrected. In breathing life into this artificial classification, no member of the Supreme Court seriously questioned whether the government’s proposed definitions10 had any historical legitimacy in American constitutional law or international law. By accepting the term enemy combatant in two separate circumstances, the Supreme Court gave the administration a license for further government sanctioned abuse. By legislating the term enemy combatant into law, the Congress further endorsed the administration’s license for abuse. That license needs to expire.

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10 The definition of enemy combatant cannot be pinned down to any one precise meaning. The Supreme Court gave it one meaning in Hamdi and another meaning in Hamdan. The Military Commissions Act of 2006 codified another definition. Generally, enemy combatants include members of Taliban, al Qaeda and other forces that engaged in or supported hostilities against the United States or its coalition partners. The term enemy combatant has had a range of other definitions in Department of Defense documents, memoranda, and reports and in executive statements and memoranda. See Part Three, including section (E) for the definition as applied to Hamdi, Section (G) for the
The creation of the term enemy combatant was not an accident. What could be more convenient for the administration than to create a new term that avoids international law scrutiny; a new term that could be used to sidestep the application of international law, thereby shielding the administration’s behavior and treatment of the detainees; a new term where government officials may bestow or withdraw the rights and protections of the detainees at whim; a new term that deliberately confuses issues and facilitates sound-bites and hair-splitting, rather than legal reasoning; a new term that the administration alone has defined; and a new term that provides legal cover from unlawful behavior and, as former Attorney General John Ashcroft\textsuperscript{11} and White House Counsel Alberto Gonzales\textsuperscript{12} articulated, shelters the individual members of the administration from being charged with war crimes?

How could this happen in our American system of government? How did the administration succeed in patently ignoring international and American constitutional law, norms and standards? This article is a cautionary tale. Even if everything was righted today, we still must look back at an executive that deliberately disregarded existing law and treated detainees with cruelty and, at times, with inhumanity. In the future, when the executive seeks to expand presidential powers by disregarding existing law, the Supreme Court and the Congress must provide meaningful oversight mechanisms and rein him in.

\textbf{Part One} looks at the law pre 9/11 and describes the internationally recognized universe of combatants: lawful combatants, those entitled to prisoner of war status, and unlawful...
combatants, those not so entitled but nevertheless entitled to certain legal protections. Enemy combatants did not exist as a recognized subset pre 9/11. This part explains how the Third and Fourth Geneva Conventions had set out the norms, standards, rights and protections for the treatment of all combatants. Part One also considers how the Additional Protocols to the Geneva Conventions as well as international human rights laws protect unlawful combatants to a significant extent, even though they are not as fully protected as lawful combatants by the Geneva Conventions.

Part Two looks at the transition to post 9/11 and how international humanitarian law, as expressed by the Geneva Conventions, was unilaterally redefined by the administration to avoid the protections for lawful and unlawful combatants through the use of the new designation enemy combatant. This part begins by reviewing President Bush’s memo denying lawful and unlawful status to Taliban and al Qaeda combatants. This part also identifies several of the administration’s motives and justifications for adding the generic term enemy combatant into the lexicon of the law of war. Part Two further reveals the circumstances of the administration’s actions by comparing the harsh, illegal and Kafkaesque treatment of two American citizens and one lawful United States resident classified as enemy combatants with that of three other individuals not designated as enemy combatants.

Part Three focuses on the specific evolution and chronology of the term enemy combatant and the administration’s inconsistent definitions, beginning with the introduction of the term in 2002. This part reviews letters and memoranda issued by Pentagon Counsel William

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\(^{11}\) See Part Two (E).
\(^{12}\) Id.
Haynes Jr., documents and publications issued by the Department of Defense and reports, orders and statements issued by the administration. Part Three argues that the administration’s stated reliance on the 1942 Supreme Court case *Ex Parte Quirin*\(^\text{13}\) as justification for the term is false. This part also shows how the Supreme Court had the opportunity to make a significant constitutional impact on the legitimacy and application of the term enemy combatant in both *Hamdi*\(^\text{14}\) and *Hamdan*,\(^\text{15}\) but failed to do so. It closes with a section on the Military Commissions Act of 2006 that, for the first time, statutorily defines enemy combatant.

**Part Four** looks forward. It concludes that the government conceived the term enemy combatant in order to make an end-run around the accepted norms and standards of international law and constitutional law. We cannot command respect for the rule of law elsewhere in the world when we ourselves flout existing law. As long as the term enemy combatant remains in the constitutional lexicon of the Supreme Court, we cannot be certain that this executive or a future executive will not abuse the rule of law by designating someone as an enemy combatant. Hopefully the United States Supreme Court will soon be provided the opportunity to revisit, address and reject the term enemy combatant. In the meantime, Congress would do well to curb the executive’s exploitation of the term.

**PART ONE – THE TRADITIONAL UNDERSTANDING OF AND THE RIGHTS AND PROTECTIONS AVAILABLE TO THE UNIVERSE OF COMBATANTS: PRE 9/11**

\(^{13}\) *Ex Parte Quirin*, 317 U.S. 1 (1942).  
Until September 11, 2001, the universe of combatants consisted of two: lawful combatants -- those entitled to Prisoner of War status -- and unlawful combatants-- those not so entitled. In February, 2002, the United State government created a new and extralegal subset of combatants, designated as “enemy combatants” and outside the known universe of combatants. As the administration saw it, any person detained by the Americans in the war on terror and designated as an enemy combatant fell outside the protections of the law.

At the time the administration introduced enemy combatant into the public arena, the term had no specific legal meaning, nor was it a term of art. Before 9/11, enemy combatant was nothing more than a generic term identifying those combatants who had taken up arms against the United States. Since there were no international laws established for the treatment of enemy combatants, the administration had gratuitously given itself the license to treat the newly classified enemy combatants in any manner it chose, including, when necessary, in a cruel, humiliating and degrading manner. Even torture was seemingly permissible in this “new kind of war,” where enemy combatants were excluded from the application of existing international law, particularly humanitarian law as expressed by the Geneva Conventions.

The Geneva Conventions were designed to create a legal framework for the treatment of combatants and civilian detainees. Common article 2, (common to all four Geneva Conventions) provides that the conventions apply to “all cases of declared war or of any other armed conflict

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which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them,” as well as in “all cases of partial or total occupation of the territory of a High Contracting Party.” Both the United States and Afghanistan had signed the conventions and were High Contracting Parties on 9/11. Al Qaeda was not a High Contracting Party, having not signed the conventions.\(^\text{18}\)

The conventions specifically recognize one class of combatants -- those known as lawful combatants. Lawful combatants have the right to participate in hostilities and military operations and are entitled to Prisoner of War status.\(^\text{19}\) Implicit in that recognition is the creation of a second class of combatants -- unlawful combatants. Unlawful combatants are not entitled to take direct part in hostilities and therefore are not entitled to prisoner of war status.\(^\text{20}\) Lawful combatants have license to kill on the battlefield, unlawful combatants do not.\(^\text{21}\)

Generally, there are two types of unlawful combatants in international hostilities: (1) spies, saboteurs and mercenaries, i.e. people who are not authorized by the laws of war as combatants;\(^\text{22}\) and (2) civilians who have taken a direct part in hostilities on their own without being integrated into the regular armed forces or into other militias or volunteer corps that meet the conditions required for lawful combatants under the Third Geneva Convention.\(^\text{23}\)

\(^{15}\) See also Letter from President George Bush on the Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002) in Part Two (B)(1).


\(^{20}\) Id. at 46.

\(^{21}\) Id. at 45-46.

\(^{22}\) Id. at 50.

\(^{23}\) Id. at 47. Article 4A of the Third Geneva Convention sets out the conditions required for lawful combatants entitled to prisoner of war status.
The International Committee of the Red Cross (ICRC), which abhors a black hole, argues that all combatants fall within either the Third Geneva Convention Relative to the Treatment of Prisoners of War (GC3) that covers lawful combatants as Prisoners of War, or the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC4) that addresses the rights of civilians and also, implicitly, unlawful combatants. “Every person in enemy hands must have some status under international law…. There is no intermediate status; nobody in enemy hands can be outside the law.” By creating a new unauthorized class of enemy combatants that was outside international recognition and protection, the administration was attempting to circumvent the application of the Geneva Conventions.

A. Rights Available to Lawful Combatants as Prisoners of War

Lawful combatants are defined and protected in the Third Geneva Convention Relative to the Treatment of Prisoners of War (GC3). Article 4 of this convention sets out the requirements for a combatant to be classified as a prisoner of war:

“A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict as well as members of militias or

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See, Knut Dörmann, The legal situation of “unlawful/unprivileged combatants”, 49 INT’L REV. OF THE RED CROSS 45 (2003), where he writes that persons not protected by the Third Geneva Convention are protected by the Fourth Geneva Convention, provided that they meet certain criteria re nationality. See discussion regarding nationality issues, infra this Part (B)(2).
26 ICRC Commentary, Id. at 51.
volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of
organized resistance movements, belonging to a Party to the conflict and operating in or outside
their own territory, even if this territory is occupied, provided that such militias or volunteer
corps, including such organized resistance movements, fulfill the following conditions:
(a) that of being commanded by a person responsible for his subordinates;
(b) that of having a fixed distinctive sign recognizable at a distance;
(c) that of carrying arms openly;
(d) that of conducting their operations in accordance with the laws and customs of war.”

Although the first paragraph of Article 4 reads that prisoners of war are “persons
belonging to one of the following categories,” there are disagreements among international law
commentators, scholars and governments as to whether members of the armed forces are, by
virtue of being members of the armed forces, as defined by subsection (1) prisoners of war, or
whether they must also meet all four of the criteria under subsection (2) to qualify as prisoners of
war. Historical context and treaty language seem to support the view that members of the
regular armed forces are entitled to protection without regard to the four criteria. “State practice
does not appear to support the conclusion that the armed forces of states … have been

27 Article 4 of GC3 includes additional paragraphs as to who qualifies as prisoners of war. These lawful combatants
include: members of armed forces who profess allegiance to a government not recognized by the detaining power
(paragraph 3), people who accompany the armed forces without being members thereof, such as civilian members,
contractors and correspondents (paragraph 4); members of the merchant marine (paragraph 5) and inhabitants of a
non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces
categorically denied eligibility for POW status on the basis that the army did not comply completely with the law of war.  

However, countries unfortunately change their stance when it serves their interest, and there is no definitive interpretation of whether the four criteria are also required of members for the armed forces.

When captured, a lawful combatant or POW is only obligated to reveal his name, rank, date of birth and serial number. Otherwise, the prisoner has the right to remain silent and cannot be coerced to speak. The government has argued that it needs to interrogate its detainees, and cannot abide by a requirement that limits its interrogations. However, there is no prohibition in the conventions on questioning a prisoner, even a POW, on any subject. Thus, the need to interrogate does not justify a circumvention of Geneva. For purposes of security, the detaining nation may intern combatants and civilians until the end of hostilities.

Of course, if the government believes that the POW may have committed a war crime or a crime against humanity, prior to his capture as well as during internment, the POW may be

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29 Id. at 9. See also George Alrich, The Taliban, al Qaeda, and the Determination of Illegal Combatants, 4 HUMANITÄRES VÖLKERRECHT 202, 204 (2002), available at http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/5MYJ5E/$FILE/George+Aldrich_3_final.pdf?openelement (last visited Aug. 8, 2006) (commentary by former administration lawyer and human rights scholar George Aldrich, noting that the Taliban were the effective government of Afghanistan).
31 Id.
tried and punished. However, the POW must be afforded a fair trial.\textsuperscript{35}

\section*{B. Rights Likely Available to Unlawful Combatants}

Since lawful combatants are accorded the most privileged status as combatants and prisoners of war, the issues that concern most commentators revolve around the rights and privileges of unlawful combatants. Professor Derek Jinks\textsuperscript{36} and others have argued that unlawful combatants have rights and protections that are moving in a direction similar to those rights accorded lawful combatants. One could argue that enemy combatants have rights equal to those accorded unlawful combatants. However, by deliberately creating the new and unauthorized category of enemy combatants, the administration made it clear that it intended to distinguish enemy combatants not only from lawful combatants but also from unlawful combatants.

What follows is a brief review of the basic rights and protections arguably provided all unlawful combatants under the Geneva Conventions and international human rights laws. The administration has resisted applying these protections to those detainees classified as enemy combatants in Guantanamo Bay, as well as to those American citizens and legal residents designated as enemy combatants and held in a naval brig in Charleston, South Carolina.

\subsection*{1. Common Article Three of the Geneva Conventions}

Common Article 3 (common to all four Geneva Conventions) provides that detainees be treated humanely. It applies to all armed conflicts occurring in the territory of one of the High


Contracting Parties “not of an international character.” Thus the protections of the Conventions would apply to the treatment of combatants in Afghanistan, since Afghanistan is a High Contracting Party, a signatory to the Conventions. Since al Qaeda is not a signatory, commentators had disagreed on whether Common Article 3 (CA3) protections would apply to al Qaeda combatants. The disagreement largely focused on whether Common Article 3 had become customary law and thus would apply universally.

The dispute as to the reach of Common Article 3 was put to rest in June, 2006, when the Supreme Court in Hamdan ruled that Common Article 3 applies minimum protections to all combatants. The court understood Common Article 3 to afford minimal protection “to individuals associated with neither a signatory nor even a nonsignatory ‘Power’ who are involved in a conflict ‘in the territory of’ a signatory.” Al Qaeda fighters in Afghanistan would thus be covered by CA3 post 9/11. Of course, if CA3 were applied to all enemy combatants, these enemy combatants would not be entitled to the rights and protections under GC4, because CA3 applies to hostilities “not of an international character,” and GC4 applies to international disputes. But since this Part is focused on the law pre 9/11, the analysis and effect of Hamdan will be addressed later.

Specifically, Common Article 3 requires that all parties taking no active part in the hostilities “hors de combat” “shall in all circumstances be treated humanely.” “To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever….”

40 See Part Three (G) for a more complete description of the Hamdan decision.
(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”

The administration has been accused of treating detainees designated as enemy combatants with cruel, humiliating and degrading treatment, even torture, presumably in violation of Common Article 3.

2. Protection of Civilian Persons in Time of War -- The Fourth Geneva Convention:

The Fourth Geneva Convention (GC4) addresses the Protection of Civilian Persons in Time of War. Combatants are authorized to be on the battlefield, and to kill and be killed. Civilians, on the other hand, are not authorized to be on the battlefield but they are protected from being attacked by combatants as long as they do not take up arms. That is why combatants must distinguish themselves as combatants and separate themselves from civilians. Civilians who take up arms illegally, would, however, be included as protected persons in the

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43 See POW requirements, supra Part One (A).
Fourth Geneva Convention, although they would be described as “unlawful combatants.”

As noted earlier, there are two types of unlawful combatants: (1) spies, saboteurs and mercenaries, i.e. people who are not authorized as participants; and (2) civilians who have taken up arms on their own against the enemy without any leadership from the state.

Spies and saboteurs are included under GC4, Article Five. Mercenaries are not directly mentioned in the Geneva Conventions, but are addressed and protected in the Additional Protocols. However, given that the IRCR abhors a black hole, it is likely that mercenaries, although foreign, were intended to be included in the Fourth Geneva Convention as civilians, even if as civilians they committed a war crime. Thus, under this policy of inclusiveness, even foreign nationals who do not meet nationality requirement as “nationals of co-belligerent states and neutral states” would be covered by the Fourth Geneva Convention.

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44 ICRC interpretation in Part One (C) and see Jennifer K. Elsea, Treatment of “Battlefield Detainees” in the War on Terrorism (updated Mar. 27, 2006) (RL 31367) at 20.
45 Supra p. 6.
46 See following section, Part One (B)(2)(a).
49 See Brief of Amicus Curiae International Human Rights Organizations Center for Constitutional Rights, Human Rights Watch, and International Federation for Human Rights in Support of Petitioner at 17, Hamdan v. Rumsfeld,)126 S. Ct. 1606 (2006) (No. 05-184) (citing ICRC Commentary IV, ICRC, Aug. 12, 1949, Convention (IV) relative to the Protection of Civilian Persons in Time of War, Art. 4 Commentary, at 51. available at http://www.icrc.org/ihl.nsf/COM/380-600007?OpenDocument (last visited Aug. 8, 2006)). “Under the Geneva Conventions, every person seized in the zone of military hostilities ‘must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, [or] a civilian covered by the Fourth Convention. There is no intermediate status; nobody in enemy hands can be outside the law.’ Every individual captured amidst the conflict between the United States and Afghanistan is therefore entitled to the protection of the Geneva Conventions and thus also the customary international humanitarian law principles they reflect.”
50 See HELEN DUFFY, THE “WAR ON TERROR” AND THE FRAMEWORK OF INTERNATIONAL LAW 403 (Cambridge University Press, 2005). “To the extent that persons held in Guantanamo were arrested for their allegiance, or perceived allegiance, to ‘enemy’ forces, and are not US nationals, they fall into the group that GC IV was intended
acted on their own without supervision, would also be protected.\textsuperscript{51}

**a. Article Five of the Fourth Geneva Convention**

Article Five of the Fourth Geneva Convention provides protections for spies, saboteurs and other unlawful combatants. It specifically states that spies, saboteurs, “or as a person under definite suspicion of activity hostile to the security of the Occupying Power,” may have his rights of communication forfeited. However, the following paragraph continues, “such persons shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention.” In addition, these persons “shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power…..” One can certainly question how long the United States can maintain its position that the security of the State is in issue. Even the United States Supreme Court has noted that there would be problems if the administration maintained that the war on terror will continue for generations.\textsuperscript{52} In any case, what is most important here is that Article Five provides minimal protections for unlawful combatants, protections that, according to the administration, are not necessarily guaranteed to people designated as enemy combatants.

**b. Article Thirteen of the Fourth Geneva Convention**

Part II, Article Thirteen of the Fourth Geneva Convention would also protect unlawful


\textsuperscript{52}See also, Derek Jinks, The Declining Significance of POW Status, 45 Harv. Int’l L.J. 367, 425-426 (2004), suggesting that “the nationality requirements have been relaxed,” as the result of the decisions of several international (ICTY) cases.
combatants because it covers “the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war.”

c. Article Thirty-One of the Fourth Geneva Convention

Article 31 of the Fourth Geneva Convention would similarly protect unlawful combatants since it bars a country from using physical or moral coercion to obtain information from persons protected under the Fourth Geneva Convention.

C. Interpretation of the Geneva Conventions by the International Committee of the Red Cross

The International Committee of the Red Cross [ICRC] is the protective body as well as the foremost interpreter of the Geneva Conventions. According to the ICRC, the “basic principle of IHL [international humanitarian law is] that persons fighting in armed conflict must, at all times, distinguish between civilians and combatants….”53 This “Principle of distinction” is the “cornerstone of IHL.”54

According to this official interpretation, a person is either a combatant protected by the Third Convention as a Prisoner of War or a civilian Protected by the Fourth Convention. There are no “black holes.” For example, if the United States attacks Afghanistan, and a person in Afghanistan shoots a member of the invading forces, the shooter, under the Geneva Conventions as interpreted by the ICRC would be either a combatant with the right to shoot or a civilian

54 Id.
committing a criminal act because he did not have the right to shoot.\textsuperscript{55} The combatant, having the right to kill, would be entitled to Prisoner of War status under GC3. If the act is by a civilian, and not a combatant, the civilian is considered an unlawful combatant and his act is a crime covered by GC4.\textsuperscript{56} Only combatants can lawfully use force. A civilian cannot. Section III, Article 68, covers what the occupying power can do in this situation. The occupying power, in this case the United States, can either apply its laws or the laws of Afghanistan (the occupied territory).\textsuperscript{57}

In a document that the ICRC issued in answer to some of the most frequently asked questions about international humanitarian law and terrorism,\textsuperscript{58} the IRCR wrote, “[f]rom an IHL perspective, the term ‘combatant’ or ‘enemy combatant’ has no legal meaning outside of armed conflict.” The ICRC continues, “[t]o the extent that persons designated ‘enemy combatants’ have been captured in international or non-international armed conflict, the provisions and protections of international humanitarian law remain applicable regardless of how such persons are called. Similarly, when individuals are captured outside of armed conflict their actions and protection are governed by domestic law and human rights law, regardless of how they are

\textsuperscript{55} Id. and conversation with international law expert and former prosecutor of Chilean dictator Augusto Pinochet, Carlos Castresana on Apr. 6, 2006.

\textsuperscript{56} “Civilians detained for security reasons must be accorded the protections provided for in the Fourth Geneva Convention. Combatants who do not fulfill the requisite criteria for POW status (who, for example, do not carry arms openly) or civilians who have taken a direct part in hostilities in an international armed conflict (so-called “unprivileged” or “unlawful” belligerents) are protected by the Fourth Geneva Convention provided they are enemy nationals.” International humanitarian law and terrorism: questions and answers, available at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5ynlev?opendocument (last visited Aug. 8, 2006).

\textsuperscript{57} Id. Finally, under Section III, Article 76, of the Fourth Geneva Convention, civilians cannot be transported. Thus, the movement of people from Afghanistan to Guantanamo Bay violates the convention.

called.’  

D. The Additional Protocols to the Geneva Conventions

Since 1977, over one hundred and sixty countries have adopted the two Additional Protocols to the Geneva Conventions. They Additional Protocols were intended to fill the gaps left open by the Geneva Conventions. Although the United States signed the Additional Protocols, it is one of only a handful of nations who have not ratified. Accordingly, the United States government does not subscribe to the position that the Additional Protocols apply to its actions. However, because nearly all nations have ratified the Protocols, it is thought that certain provisions of the Additional Protocols have become binding on all nations as customary international law. In addition, the United States abides by these protocols when it sends its forces under United Nations command. In fact, because of the wide-reaching effect of the protocols, Professor Derek Jinks argues that because of the Additional Protocols and certain provisions human rights laws, particularly sections of the International Covenant on Civil and Political Rights (ICCPR), the protections for unlawful combatants now closely approach the protections afforded lawful combatants.

Because the Protocols have been ratified by nearly all nations, the ICRC also regards

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59 Id.
64 Part One (D).
many of the sections within the Protocols as customary law, that is, law that reaches and is applicable to all nations.\textsuperscript{65} Included in customary law is Article (12), \textsuperscript{66}referring to “the obligation to respect the fundamental guarantees of civilians and persons hors de combat.” The Additional Protocols were designed to respond to combatants engaged in newer conflicts and hostilities such as “fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination….”\textsuperscript{67}

As noted above, the Additional Protocols are sets of rules that do not add new law, but rather clarify the Geneva Conventions. The protocols confirm that the Geneva Conventions were intended to define the universe of combatants as either combatants entitled to Prisoner of War status or as “civilians,” a term of art. Civilians necessarily include unlawful combatants, \textsuperscript{68} spies, saboteurs and mercenaries. Spies and saboteurs, as well as mercenaries, are specifically addressed in the Additional Protocols.\textsuperscript{69}

Article 45 refers to the “Protection of persons who have taken part in hostilities.” It establishes significant protection for every combatant by creating the presumption that every combatant who is captured shall be presumed to be a prisoner of war. It requires that where doubt arises as to whether the combatant is a prisoner of war, “he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as


\textsuperscript{66}Id. at 188.

\textsuperscript{67}Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 1(4), June 8, 1977, 1125 U.N.T.S. 3. Also, for example, if someone were a combatant but left off his uniform, would he be a combatant or non-combatant?

\textsuperscript{68}See supra This Part p. 8.

\textsuperscript{69}Article 46 (Spies) and Article 47 (Mercenaries).
his status has been determined by a competent tribunal.” Unlike under the Geneva Conventions, where the President can apparently make the determination without a tribunal, a tribunal hearing is reaffirmed here.

Article 45 also provides that if spies are captured while engaging in espionage, they shall not have the right to prisoner of war status. Article 46 of the First Additional Protocol indicates that a mercenary does not have the right to be a combatant or a prisoner of war.

The article’s third paragraph reads that any person who is not entitled to prisoner of war status and who does not benefit from more favorable treatment under the Fourth Convention, “shall have the right at all times to the protection of Article 75 of this Protocol. In occupied territory, any such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention.”

E. Article 75 of the First Additional Protocol

Article 75 of the first Additional Protocol is the catch-all provision that applies to every combatant in Geneva law for fundamental fairness and humanitarian protection. It identifies the minimum rights of those who are not accorded more favorable treatment under the Geneva Conventions or the Additional Protocols I and II. The rights include: impartial trials by regularly constituted courts, the presumption of innocence, the right to counsel, the right to be

70 Bush memo in Part Two (B)(1). (President’s statement declaring that Taliban and al Qaeda are not covered by the Geneva Convention).
71 Supra Part One (B)(2)(a).
72 Id.
74 Also according to Jinks, Id., who covers unlawful combatants. See also Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 6, June 8, 1977, 1125 U.N.T.S. 609.
present at trial, the right to call witnesses, the right to be informed of the charges, the right to public judgment and the right for defendants not to testify against themselves.\textsuperscript{76} Essentially, all persons are to be treated “humanely in all circumstances.” Violence to the health or physical or mental well-being of the combatants; murder; torture (whether physical or mental); corporal punishment; mutilation; outrages upon personal dignity including humiliating and degrading treatment; as well as threats to commit the above acts are all prohibited.

Even if the entire Additional Protocol I (API) is not binding as customary law, there is a strong belief among nations that Article 75 of this Protocol is customary law.\textsuperscript{77} Indeed, twenty years ago, in 1987, Michael J. Matheson, the Deputy Legal Advisor of the United States Department of State in explaining the position on the correlation between customary international law and the Additional Protocols and in arguing that the US did not view the protocols in \textit{toto} as customary law, agreed that Article 75 was customary law.\textsuperscript{78} He wrote,

> We support in particular the fundamental guarantees contained in article 75, such as the principle that all persons who are in the power of a party to a conflict and who do not benefit from more favorable treatment under the Conventions be treated humanely in all circumstances and enjoy, at a minimum, the protections specified in the Conventions…\textsuperscript{79}

At least four of the justices in \textit{Hamdan} seemed to confirm that the United States recognizes the

\textsuperscript{76} \textit{Id}.
\textsuperscript{77} Jennifer K. Elsea, U.S. Treatment of Prisoners in Iraq: Selected Legal Issues (May 24, 2004) (RL32395) at CRS-6 n.15. It notes that article 75 is widely considered to be universally binding as customary international law.
\textsuperscript{79} \textit{Id.} at 427.
universality of Article 75.  

F. Rights Accorded Unlawful Combatants under Human Rights Law

Although unlawful combatants do not necessarily have all the rights accorded POWs, they have certain minimal fundamental rights under humanitarian law and also under human rights law. Although the argument is not accepted by the administration, an argument could be made that enemy combatants are guaranteed certain minimum rights and protections under international human rights laws, since these laws should apply to every nation that has ratified the International Covenant on Civil and Political Rights and the Convention against Torture. The United States has ratified both of them, as have nearly all countries.  

1. The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights provides human rights protections for all persons, whether covered by the Geneva Conventions or not. Article 7 requires that no one “shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Article 9 provides that “[e]veryone has the right to liberty and security of person” and that “[n]o one shall be deprived of his liberty except on such grounds and in
accordance with such procedure as are established by law."\textsuperscript{86}

In addition, Article 9 provides that “[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that a court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”\textsuperscript{87} Article 10 adds that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”\textsuperscript{88}

The United Nations Human Rights Committee in 2004,\textsuperscript{89} suggested that the ICCPR applies to all state actions where the state has effective control over the person.\textsuperscript{90}

2. The Convention Against Torture

As a signatory to the Convention Against Torture (CAT),\textsuperscript{91} the United States is obligated not to torture any of its detainees, whether they are foreign nationals held in the detention center at Guantanamo Bay or the two American citizens, Yaser Hamdi and Jose Padilla, and the legal resident Ali Al Marri, all once held in isolation in a naval brig in South Carolina. In May, 2006, the Committee Against Torture’s “conclusions and recommendations regarding nations” declared that the detainees at the Guantanamo Bay detention center had been subjects of torture by noting that “[d]etaining persons indefinitely without charge constitutes per se violation of the

\textsuperscript{86} Id. art. 9, subsection 1.
\textsuperscript{87} Id. art. 9, subsection 4.
\textsuperscript{88} Id. art. 10, subsection 1.
\textsuperscript{90} See, however, Sosa v. Alvarez-Machain, 542 U.S. 692, 735 (2004), noting that although the ICCPR binds the United States as a matter of international law, it is not “self executing and so did not itself create obligations enforceable in the federal courts.”
\textsuperscript{91} Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 1465 U.N.T.S. 85.
Convention”. There have also been rumors that the three men while held in isolation at the Naval Brig were tortured.

3. Universal Declaration of Human Rights

The United Nations General Assembly adopted certain fundamental freedoms and human rights in its Universal Declaration of Human Rights (UDHR). UDHR is a resolution, not a treaty, but many of its provisions are deemed to be customary law. The resolution prohibits cruel, inhuman and degrading treatment and torture, as well as arbitrary arrest and detention.

G. The Rights Accrued American Citizens and American Resident Under the United States Constitution

As noted in Part Two, by classifying American citizens Yaser Hamdi and Jose Padilla and resident alien Ali al Marri as enemy combatants, the administration took it upon itself to deny these men access to the basic rights under our constitution: a presumption of innocence; right of notice of the charges against them; right to an attorney; right to confront their accusers and the evidence used against them; right not to be confined without charges; right to a hearing to contest the charges; right against self-incrimination; right to remain silent; right to a speedy trial and right to trial by jury. All these rights are guaranteed to all Americans. By holding them

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93 See Part Two (F)(1). During the oral argument in the Padilla case, a Supreme Court Justice asked the government how the Court can be certain that interrogators are not abusing the detainees. Deputy Solicitor General Paul Clement responded that the Court will have to “trust the executive to make the kind of quintessential military judgments that are involved in things like that.” Transcript of Oral Argument at 20, Rumsfeld v. Padilla, 542 U.S. 426 (2004) (No. 03-1027).
in isolation and incommunicado for years in a naval brig, without charges and without access to an attorney or to their families, the administration has become prosecutor, judge and jury all in one. If these men had been designated unlawful combatants, they would have had more rights and protections, as evident by the universal rights and protections available to all combatants, whether lawful or unlawful, as described in this Part.

PART TWO: THE TRANSITION FROM THE TRADITIONAL LAWFUL/UNLAWFUL DISTINCTION TO THE APPLICATION OF ENEMY COMBATANT, AS CREATED AND DEFINED BY THE ADMINISTRATION

Since the time that enemy combatant was first introduced post 9/11, scholars, commentators, reporters and others have adopted the administration’s enemy combatant term;\(^98\) conflated the terms enemy combatant and unlawful combatant as one and the same;\(^99\) or have combined the terms into some convoluted formulation such as “unlawful enemy combatant.”\(^100\) However, given the approach that the administration has taken in defining and applying the term enemy combatant to certain detainees, it was clearly not the administration’s intent that the words unlawful and enemy be synonymous. Had the administration intended to remain within

\(^{97}\) Id. art. 9.

\(^{98}\) Although, they seem to adopt the term, a few newspapers and periodicals have placed quotation marks around the term. Occasionally, a writer will add a questioning remark such as “so-called enemy combatants.” See Scott Shane, *Behind Power, One Principle*, N.Y. TIMES, Dec. 17, 2005, at A1, available at (LEXIS, News Library, NYT File), 2005 WLNR 20368106.


the reach of the Geneva Conventions and humanitarian law, it would have, at a minimum, chosen the term unlawful combatant to describe the detainees it was holding. The term unlawful combatant is -- and has been since the early twentieth century -- understood by the community of international law scholars, as the other class of combatants, the class that are not lawful (POW) combatants.  

By depicting the attack of 9/11 as a new kind of war, Presidential Counsel Alberto Gonzales and the administration set the foundation for justifying the creation of the new subset of enemy combatants. As Gonzales wrote in a memo to the President, “this new paradigm [of war] renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions…” In effect, he was saying that the Geneva Conventions no longer govern warfare post 9/11, and we may now unilaterally, and without needing approval from any international body, disregard Geneva’s requirements. However, the Geneva Conventions never intended for any captured combatants to be outside the reach of international law. As indicated in Part One, the universe of combatants was lawful and unlawful. A captured combatant was one or the other.  

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101 See, Part One, Introduction.
103 Id.
104 It is believed that David Addington, along with John Yoo (See infra note 227) wrote this section as well as most, if not all, of this memo. Jane Mayer, A Deadly Interrogation, NEW YORKER, Nov. 14, 2005, at 47. See also Daniel Klaidman & Michael Isikoff, Cheney in the Bunker, NEWSWEEK, Nov. 14, 2005, at 30. Addington was counsel to Dick Cheney at the time that he wrote the memo. He became Cheney’s Chief of Staff in 2006 after Lewis Libby stepped down in the wake of the federal investigation on the release of CIA agent Valerie Plame’s name. Interestingly, the Justice Department’s Office of Legal Counsel issued an opinion that it would apply the Geneva Conventions to people captured in Iraq. Mayer, supra.
105 There are a few narrow exceptions based on nationality. See supra Part One (B)(2).
and is not a recognized category. It is nowhere to be found in international law.

However, if the administration had applied the term unlawful combatant rather than enemy combatant to its detainees, it would have had to recognize the application of humanitarian law and human rights law, as well as American constitutional law, and provide unlawful combatants with certain minimum rights and protections as identified in Part One. Since the term enemy combatant had no meaning in international law, the administration could profess that no minimum rights and protections were available to enemy combatants except through the administration’s largesse.

The administration’s application of enemy combatant to its detainees has been anything but consistent. In one application, enemy combatant is nothing more than a generic term for all combatants, whether lawful or unlawful, who are working for the enemies of America. In a second application, the term enemy combatant is synonymous with unlawful combatant. And in a third application, the definition focuses on an entirely new kind of combatant identified by the administration post 9/11 and intended to be outside the embrace of the Geneva Conventions. 106 One wonders whether this hodgepodge of definitions was a result of administrative confusion or was a deliberate attempt by the administration to confuse. But over the years, a certainty has evolved. The administration is intent on establishing a subset of combatants that circumvents the international humanitarian law, international human rights law and American constitutional law.

A Application of the Geneva Conventions to Taliban Soldiers

The Taliban soldiers fought for Afghanistan, a high contracting party to the

106 See Part Three, infra.
Convention. The simple argument is that the soldiers were members of Afghanistan’s armed forces and thus should have been classified as lawful combatants and accorded prisoner of war status. However, those scholars who believe that all four criteria set out in subsection (2) of Article 4 must also be met, argued that the Taliban soldiers did not qualify for POW status because they did not wear a fixed distinctive sign or uniform or lacked command structure. Thus, by arguing that the Taliban were outside the protections of the Geneva Conventions, the administration could then designate the Taliban soldiers as enemy combatants.

### B. Application of the Geneva Conventions to Al Qaeda Forces

A larger number of commentators agreed with the President that the al Qaeda forces were not protected as lawful combatants by the Geneva Conventions. Their position was that the al Qaeda forces were neither the armed forces of a High Contracting Party, nor did they meet the four Geneva requirements for militias. Al Qaeda soldiers did not wear distinctive fixed signs and

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107 For an excellent analysis of the status of the detainees captured in Afghanistan see Jennifer K. Elsea, Treatment of “Battlefield Detainees” in the War on Terrorism (Mar. 27, 2006) (RL 31367).
108 Id. at 8-9.
109 Id. at 33. See also, Lawrence Azubuike, in Status of Taliban and al Qaeda Soldiers: Another Viewpoint, wrote about the Taliban, “Its forces were at least rudimentarily organized in military fashion, had a rank structure, received varying but recognizable degrees of military training and were empowered by a government-in-being to exercise duties compatible with those of a historically denominated national military force.” 19 CONN. J. INT’L L. 127, 148 (2003). See also, Secretary of Defense Donald H. Rumsfeld & General Richard Myers, Department of Defense News Briefing, (Feb. 8, 2002), in DEP’T DEF. NEWS, available at http://www.defenselink.mil/transcripts/2002/t02082002_t0208sd.html.
110 On the four criteria, and your description of why you believed the Taliban forces did not meet the criteria for POW status – you talked about lack of differentiation from civilians, no proper unit, no real hierarchy – but I wish we all had a dollar here for every briefing we heard during Enduring Freedom when we were told that we were attacking Taliban command and control, we were attacking identifiable Taliban forces, and that these were clearly differentiable by our Special Forces from civilians. Those seem to be rather different from your entire statement.” Rumsfeld: “Well of course it’s because it’s of a different order. The kinds of things that the Geneva Convention talks about are the kinds of things you see when you’re standing right next to a person looking at how they’re handling themselves.”
111 See discussion regarding Bush memo infra Part Two (B)(1).
did not conduct operations in accordance with the laws of war. However, there are three countervailing arguments:

The first is that since the al Qaeda forces fought alongside the Taliban soldiers, they should have been seen as members of the armed forces of Afghanistan to the extent that the Taliban soldiers were members of the armed forces. William H. Taft, IV, who was a legal advisor to the Department of State advanced this position by advancing the argument that if the conventions apply to the conflict, then the conventions apply to all persons caught up in the conflict.

The second argument in favor of both the Taliban and al Qaeda soldiers as POWs is this: the additional protocols to the Geneva Conventions, adopted in 1977 by nearly all the nations in the international community, provide the Taliban and al Qaeda soldiers something very close to lawful combatant status. This issue was addressed earlier. But since the United States is not a party to the protocols, the argument exists that the additional protocols -- although largely accepted by the international community as customary law do not apply to the United States.

There is also the argument that if the United States does not recognize the al Qaeda forces

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114 In Part One (D).
as members of the international community under the Geneva Conventions, the al Qaeda forces
are essentially criminal outlaws who would then be prosecuted in the American criminal justice
system and, accordingly, be provided protections under American criminal and constitutional
law.\textsuperscript{116} That argument certainly did not receive a sympathetic ear from the administration.

1. Bush Memorandum

In a memorandum,\textsuperscript{117} dated February 7, 2002 and directed to the Vice President, the
Secretary of State and others, the President denied POW status to the Taliban and al Qaeda
fighters. As Bush described it, the war on terrorism ushered in a “new paradigm” which
“requires new thinking in the law of war, but thinking that should nevertheless be consistent with
the principles of Geneva.” Although recognizing that he has the authority to “suspend Geneva as
between the United States and Afghanistan,” he declined to exercise that authority and
determined that Geneva applies “to our present conflict with the Taliban.

Nevertheless, although Geneva applied, Bush concluded that none of the combatants had
POW status. “I determine that the Taliban detainees are unlawful combatants and, therefore, do
not qualify as prisoners of war under Article 4 of Geneva.” Nowhere in this memorandum does
Bush classify any of the combatants as enemy combatants. That term enemy combatant is not
officially used by the administration to describe the detainees at Guantanamo Bay until months

\textsuperscript{115} Id.
\textsuperscript{116} Elsea, Treatment of “Battlefield Detainees” in the War on Terrorism (updated Mar. 27, 2006) (RL 31367) at 10 &
16.
8, 2006), and in MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERRORISM 105
(The New York Review of Books 2004) (where Bush says that high contracting parties “can only be states”).
later.\footnote{Infra Part Three.} The inconsistency between Bush’s letter and later classifications has never been officially acknowledged.

In addition, Bush continued, “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.” Bush determined that the Geneva Conventions do not apply to al Qaeda because, “among other reasons, al Qaeda is not a High Contracting Party to Geneva.”\footnote{Id.} Although Bush explained why he does not apply the conventions to al Qaeda, nowhere did he explain why the Taliban were unlawful rather than lawful combatants.

Ari Fleisher, the President’s spokesman, said in a meeting with reporters on that same date of February 7, 2002, that the “detainees in Guantanamo” did not meet the requirements of the Third Convention because they “did not wear uniforms,” and thereby they were “not visibly identifiable”, and “[t]hey don’t belong to a military hierarchy.” Presumably, he was referring to the Taliban, since Bush had determined that the Geneva Conventions do not apply to al Qaeda, but never explained why the conventions did not apply to the Taliban. Fleisher continued, “[a]ll of those are prerequisites under Article 4 of the Geneva Convention, which will be required in order to determine somebody is a POW.”\footnote{Id.}

Obviously, Fleisher’s statement confused several issues. As discussed above, the Taliban were the armed forces of Afghanistan and should have qualified on that alone.

In his memorandum, Bush also wrote that “our values as a Nation…call for us to treat detainees humanely, including those who are not legally entitled to such treatment.” “As a
matter of policy, the United States Armed Forces shall continue to treat detainees humanely… in a manner consistent with the principles of Geneva.”

Although people point to Bush’s statement as an indicator of the grandness of our nation in that we will provide humane treatment even to those “who are not legally entitled to such treatment,” there is another way to interpret his words. In effect, Bush was saying that the United States could, at any time, withdraw our humane treatment of the detainees, since there was no legal entitlement to such treatment. The administration’s attitude that it had a license to ignore international laws and protections when convenient was reaffirmed in a letter that Bush wrote in September, 2002. In his letter to the Speaker of the House and to the Senate Pro Tem, he stated that “to the extent appropriate and consistent with military necessity,” he would treat the detainees in a manner consistent with the conventions.\footnote{Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Sept. 20, 2002), available at \url{www.whitehouse.gov/news/releases/2002/09/20020920-4.html} (last visited Aug. 8, 2006). However, see Part Three (G) regarding a memo written two weeks after the Hamdan decision by Deputy Defense Secretary Gordon England saying that Common Article 3 applies as a matter of law to al Qaeda detainees, and the White House response to his memo.}

2. Failed State Argument

A memo to President Bush, signed by Alberto Gonzales\footnote{Memorandum from Alberto Gonzales on the Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban to President George Bush (Jan. 25, 2002), in \textit{MARK DANNER, TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERRORISM} 83 (The New York Review of Books 2004).} although written in part by John Yoo,\footnote{See Jane Mayer, \textit{The Memo}, NEW YORKER, Feb. 27, 2006, at 32; see also description of John, \textit{infra} notes 197 (Frontline Interview) and 227.} suggested that there was another reason why the Taliban should not be recognized by the government as lawful combatants. His position was that because the Taliban did not

\[\text{\footnotesize{\cite{120, 121, 122, 123}}\text{}}\]
control the entire country, and “was not recognized by the international community,” Afghanistan was a “failed state.” In fact, the Northern Alliance warlords controlled only five to ten percent of the country, “mostly in the northeastern corner stretching from the border with Tajikistan to a line about 30 miles north of Kabul.” Attorney General John Ashcroft also referred to the failed state argument in his letter of 2/01/02. However, although the failed state concept had been recognized by international law scholars, even our own military seems to maintain a presumption against failed states.

In 2001, Afghanistan was a member of the United Nations, and three states officially recognized Afghanistan. In May of that same year, the United States, apparently understanding that the Taliban were in control of the country, provided a forty-three million

124 See Memorandum from John Yoo, Deputy Assistant Attorney General & Robert Delahunty, Special Counsel, to William J. Haynes II, General Counsel, Department of Defense on the Application of Treaties and Laws to Al Qaeda and Taliban Detainees (Jan. 9, 2002), in THE TORTURE PAPERS, THE ROAD TO ABU GHRAIB 38-39 (Karen J. Greenberg & Joshua L. Dratel eds., Cambridge University Press 2005). In the memo, Yoo and Delahunty describe the Taliban government as a “failed state.”


127 The United States military guide’s definition of failed state would not include Taliban controlled Afghanistan in 2001. Failed state is defined as, “a dysfunctional state which also has multiple competing political factions in conflict within its borders, or has no functioning governance above the local level... If essential functions of government continue in areas controlled by the central authority, it has not failed.” U.S. ARMY TRAINING AND DOCTRINE COMMAND, A MILITARY GUIDE TO TERRORISM IN THE TWENTY-FIRST CENTURY, Aug. 15, 2005, at Glossary-4, available at http://www.au.af.mil/au/awc/awcgate/army/guiderr/glossary.pdf (last visited Aug. 8, 2006) and http://www.au.af.mil/au/awc/awcgate/army/guiderr/glossary.pdf (last visited Aug. 8, 2006). See also IAN BROWNLEE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (Oxford University Press 2003), where he notes that “the Montevideo Convention on Rights and Duties of States provide: ‘The state as a person or international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.’” Afghanistan under the Taliban in 2001, met these criteria.

dollar new humanitarian assistance grant to the Taliban government.130 In the previous year, the United States provided about $114 million in aid.131 Secretary of State Colin Powell announced the granting of the 2001 aid by pledging, “We will continue to look for ways to provide more assistance for Afghans.”132 Somalia, which had been without a government from 1991 until the time of this writing,133 may fulfill the concept of failed state. But Afghanistan, when unmistakably and openly ruled by the Taliban in 2001, was not.

Although various members of the administration referred to the failed state theory in memoranda,134 the administration seemingly never relied on the theory of a failed state when it issued public statements as to why the Geneva Conventions did not apply to the Taliban. Nothing was said by either Bush or Fleisher regarding the failed state theory. However, during the run-up to the presidential election in 2003, Dick Cheney and others referred to the failed state argument when talking about Afghanistan.135 It was not clear whether failed state became over time an official position of the government or whether Cheney and others were merely talking about something they had recalled, without fully comprehending the context.

131 Id.
132 Id.
134 See, e.g., Memorandum from John Yoo, Deputy Assistant Attorney General & Robert Delahunty, Special Counsel, to William J. Haynes II, General Counsel, Department of Defense on the Application of Treaties and Laws to Al Qaeda and Taliban Detainees (Jan. 9, 2002), in THE TORTURE PAPERS, THE ROAD TO ABU GHRAIB 38-39 (Karen J. Greenberg & Joshua L. Dratel eds., Cambridge University Press 2005). In the memo, Yoo and Delahunty describe the Taliban government as a “failed state.”
C. Practical Concern Regarding Applying GC3 to the Detainees

Of course, among the arguments on whether the Taliban should be accorded lawful combatant status, there was the very practical argument raised by the United States State Department. Members of former Secretary of State Colin Powell’s office argued in memoranda that if the United States does not accord the Taliban POW status, other nations may use the action of the United States to justify their own refusal to grant United States soldiers captured in a war zone POW status. By recognizing the Taliban as lawful combatants entitled to POW status, we not only uphold international laws but help to assure the protection of our soldiers in the future.136

D. When in Doubt as to Combatant Status: Article Five of the Third Geneva Convention

Article Five of the Third Geneva Convention provides that until a competent tribunal decides otherwise, the combatant shall be deemed a lawful combatant and accorded POW status. President Bush, on the advice of then Presidential counsel Alberto Gonzales and others, declared that none of the detainees qualified as prisoners of war,137 thus impliedly indicating that no hearings were necessary as to their status.138 However, under the GC3, the executive or military

137 Bush memo, supra Part Two (B)(1).
cannot make this decision. Only a legitimate tribunal may.\textsuperscript{139}

There are questions as to what is a competent tribunal under the GC3. A military court similar to a court martial that tries American soldiers for crimes would be considered competent. A military tribunal, which offers fewer rights than a military court, might also qualify if legally constituted, although there are some commentators who question the legality of military tribunals as official arbiters of a combatant’s status. But the three member military panels established by the United States Government, the Combatant Status Review Tribunals, to hear the arguments of the combatants held in the detention center at Guantanamo Bay do not meet the minimum requirements.\textsuperscript{140} They are convened only to determine whether a detainee is an enemy combatant as defined by the administration.\textsuperscript{141} The tribunals do not consider whether a detainee should be accorded POW status since that had been already determined by President Bush.

Many of the people captured claimed that they were never on the battlefield, but were

\textsuperscript{139} See HELEN DUFFY, THE “WAR ON TERROR” AND THE FRAMEWORK OF INTERNATIONAL LAW 400 & 407 (Cambridge University Press, 2005). See also, John Mintz, Debate Continues on Legal Status of Detainees, WASH. POST, Jan. 28, 2002, at A15, available at (LEXIS, News Library, WPOST File), where Secretary of Defense Rumsfeld “turned aside” objections saying that ‘there is no ambiguity in this case,’ “meaning these prisoners are plainly ineligible for POW standing.” “It’s possible Rumsfeld or Bush, acting as a tribunal, could simply declare [the detainees] barred from POW status,” a senior official declared.

See also William J.Haynes, Jr., General Counsel of the Department of Defense, in his memo to ASIL – Council on Foreign Relations, infra Part Three (D), where he says that the “determination of enemy combatant status has traditionally resided with the military commander who is authorized to engage the enemy with deadly force. In this regard, the task ultimately falls within the President’s constitutional responsibility as Commander in Chief to identify which forces and persons to engage or capture and detain during an armed conflict.” However, Haynes notes that the president is not obligated to make such determinations personally, and that “the task is normally a function of the military command structure.”

See also Additional Protocol I Art. 75, supra Part One (E). Gonzales’ memo was consistent with the the memo of Presidential power that empowered the administration then and still does today. For example, John Yoo wrote a memorandum dated September 25, 2001, contending that no Congressional statute “can place any limits on the president’s determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing and nature of the response.” Memorandum Opinion from John Yoo for Timothy Flanigan, Deputy Counsel to the President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them (Sept. 25, 2001), in THE TORTURE PAPERS, THE ROAD TO ABU GHRAIB 3 (Karen J. Greenberg & Joshua L. Dratel eds., Cambridge University Press 2005).

\textsuperscript{140} See Part Three (F).
civilians protected under Article Four of the convention as people caught up in the throes of war. Many claimed that they were sold to the American authorities by the Northern Alliance. In fact, Yaser Hamdi maintained that he was sold to the Americans for $20,000. Certainly, these detainees should have had a right under international law to prove that they were victims of Northern Alliance warlords’ greed and an equally anxious American military that wanted to verify to the world that they had captured “dangerous” combatants.

**E. Interpreting the Geneva Conventions as Self-Serving Protections**

Apparently, behind the administration’s refusal to grant POW combatant status to the captured soldiers in Afghanistan stood a motivation seemingly impelled less by an interpretation of the Geneva Conventions and largely driven by the motivation of self-protection. Rather than provide the detainees with the rights to which they were entitled under the Geneva conventions, several powerful administration officials suggested that by denying the detainees the rights under the conventions, the administration officials will be protected from the possibility that prosecutors in the future may want to charge these officials for committing war crimes. In an in-house memorandum, former Attorney General John Ashcroft wrote: “[A] Presidential determination against treaty applicability would provide the highest assurance that no court would subsequently entertain charges that American military officers, intelligence officials, or

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141 *Id.*

142 Elliot Blair Smith, *U.S. set to release Pakistani detainees, report says*, USA Today, Sept. 6, 2004, at 08A, available at (LEXIS, News Library, USA TDY File); 2002 WLNR 4531520 (“those who remained alive were sold to the U.S. for $20,000 to $30,000 per head.”).

law enforcement officials violated Geneva Convention rules relating to field conduct, detention conduct or interrogation of detainees.” He continues later that an interpretation that says that the Geneva Conventions apply to the Taliban, but that the Taliban are unlawful combatants “does not accord American officials the same protection from legal consequences. … If a court chose to review for itself the facts underlying a Presidential interpretation that detainees were unlawful combatants, it could involve substantial criminal liability for involved U.S. officials.”

The War Crimes Act of 1996 prohibits war crimes committed by or against a member of the United States armed forces or United States national. War crimes include a grave breach of the Geneva Conventions, including Common Article 3. Punishment for violation of a war crime under the act includes the death penalty. Ashcroft was, undoubtedly, looking out for all the number ones.

Alberto Gonzales, the White House Counsel, wrote on January 25, 2002, a similar self-serving statement to the President regarding the protecting of administration officials. “The

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144 Ashcroft advertises himself as a man of integrity, now that he is a lobbyist and head of his “Ashcraft group.” Leslie Wayne, John Ashcraft Sets Up Shop As Well-Connected Lobbyist, N.Y. TIMES, Mar. 17, 2006, at C1, available at (LEXIS, News Library, NYT File).


148 Id. § 2441(a).

consequences of a decision to adhere to what I understand to be your earlier determination that the GC3 does not apply to the Taliban” … “[s]ubstantially reduces the threat of domestic criminal prosecution under the War Crimes Act.”

Gonzales explained that some of the language such as “outrages upon personal dignity” and “inhuman treatment” in the conventions was “undefined… and it is difficult to predict with confidence what actions might be deemed to constitute violations of the relevant provisions of GC3.” He was further concerned that,

it is difficult to predict the motives of prosecutors and independent counsels who may in the future decide to pursue unwarranted charges based on Section 2441. Your determination [that GC3 does not apply] would create a reasonable basis in law that Section 2441 does not apply, which would provide a solid defense to any future prosecution.150

Gonzales’ fear was well-justified. After the Supreme Court ruled in Hamdan that Common Article 3 applied to the treatment of detainees,151 Gonzales contacted Republican lawmakers. He asked them to pass legislation that would shield United States personnel from detainee lawsuits or other possible prosecutions that would seek to enforce Common Article 3

violations through the War Crimes Act. The Military Commissions Act of 2006 included a provision, drafted by the administration that retroactively protects American officials from prosecution under the War Crimes Act for any crimes that they may have committed post 9/11, including certain “cruel, inhuman or degrading treatment,” that may have been crimes under the earlier version of the act.

F. Citizens Yaser Hamdi and Jose Padilla and Legal Resident Ali Al Marri

After 9/11, for the first time in American history, two American citizens, Yaser Hamdi and Jose Padilla, were placed in complete isolation for nearly three years in a naval brig. The citizens were neither permitted to speak to their families nor to counsel. The administration’s justification for the treatment of these citizens was that the citizens were enemy combatants in the war on terror. By classifying Hamdi and Padilla as enemy combatants and holding them incommunicado for years, the administration took it upon itself to deny these men access to the basic constitutional rights guaranteed all Americans.

Even if these two men had been designated unlawful combatants, they would have had more rights than what they were afforded. If this were a criminal action, the administration would have violated Hamdi’s and Padilla’s due process rights under the 5th Amendment. In addition, their 5th and 6th Amendment rights of the presumption of innocence; the right to counsel; the right to confront witnesses and to challenge all evidence used against them; the right to notice of the charges; right to contest the charges; the right not to testify against themselves;

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right to remain silent; the right to speedy trial, and the right to be heard before a jury would have been violated. Of course, to the extent that either man was treated cruelly, degradingly or inhumanely, or perhaps even tortured – which presumably we will never know, the entire justice system and the system upon which our country proudly displays to the world would be painfully blackened.

It is true that to the extent that we are in a state of war, the administration has the right to treat Hamdi and Padilla as detainees in the war. In addition, under international law combatants may be held until the end of hostilities. But the right to hold them does not permit profound violations of international law and American constitutional law. The administration’s classifying them as enemy combatant in 2002 did not, by the creation of the term alone, justify the administration’s intolerable treatment of them.

1. Yaser Hamdi

Yaser Hamdi was an American citizen. He had been born in Louisiana of Saudi parents. At the age of two, Hamdi returned with his parents to Saudi Arabia. He lived there until he was twenty, when, according to the United States government, he joined the Taliban in July or August, 2001, to fight the Northern Alliance in northeast Afghanistan. Hamdi was captured

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154 Note supra Part One.
155 However, see infra re allegations that Hamdi may have been tortured.
156 Justice O’Connor noted the government’s position suggesting that should the war on terror continue for generations, “Hamdi’s detention could last for the rest of his life.” Hamdi v. Rumsfeld, 542 U.S. 507, 520 (2004).
by the Northern Alliance in Afghanistan in December, 2001, along with John Walker Lindh (the American Taliban).  

While in Afghanistan, Hamdi was interviewed by an American interrogation team. He identified himself as a Saudi citizen who had been born in the United States.  

Hamdi was sent to the detention center at Guantanamo Bay in February, 2002, with other captives. In April, he was flown to the naval brig in Norfolk Virginia. Eighteen months later, he was transferred to a naval brig in South Carolina. In both brigs, he was held incommunicado without access to a lawyer or his family and with no charges filed. Interestingly, when Hamdi was first flown from Guantanamo Bay to the continental U.S., his plane landed on the tarmac at Dulles Airport. Frank Dunham, the federal public defender who represented Hamdi, suggested that Hamdi was headed to Virginia where he was to be criminally charged as John Walker Lindh had been. But after sitting on the tarmac for an hour, the plane took off with Hamdi still aboard, and headed for the naval brig in Virginia. Hamdi was then classified as an enemy combatant.

Dunham believed that the government either did not have enough evidence to prosecute Hamdi successfully or did not want to reveal its sources of evidence. It was assumed that some

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160 Hamdi and Lindh were captured together after an uprising at Qala-i-Janghi, the fortress near Mazar-e-Sharif that was controlled by notorious warlord chief General Rashid Dostrum and the Northern Alliance. Tony Bartelme, *Born in Louisiana, captured in Afghanistan, jailed in Hanahan Yaser AH: Hamdi travels long, strange road*, POST AND COURIER (CHARLESTON, SC), Mar. 7, 2004, at 1A. The uprising broke out between the detainees and the Northern Alliance guards. For seven days, Hamdi, Lindh and others were holed up in the fortress, deep inside a building known as the “pink house.” Approximately, eighty captives survived from an initial number of around four hundred. Hamdi and Lindh were two of the survivors. *See* Jane Mayer, *Lost in the Jihad*, NEW YORKER, Mar. 10, 2003, at 50.


162 Katherine Q. Seelye, *Threats and Responses: The Detainee; Court to Hear Arguments in Groundbreaking Case of U.S. Citizen Seized With Taliban*, N.Y. TIMES, Oct. 28, 2002, at 13, available at (LEXIS, News Library, NYT File); also Interview by Joanna Woolman [*see* Joanna Woolman, *Enemy Combatants: The Legal Origins of the Term*]
of the evidence may have been brutally obtained from certain al Qaeda figures who were being held in other parts of the world through the government’s “extraordinary rendition” program. Because the administration did not want to be personally involved in torturing any of the captives (known as “ghost detainees”), the administration whisked the detainees abroad to countries that were known to torture its prisoners. It was never clear whether American agents stood by while the detainees were tortured in these countries, or whether the agents were only recipients of the information obtained through the torture.163

There were also murmurings among members of the legal community164 that Hamdi himself may have been tortured. 165 It was easier for the government to place Hamdi in isolation, without charges, and hold him for as long as necessary as an enemy combatant, rather than provide him with a trial where the tainted evidence, as well as the government’s treatment of certain detainees held in foreign countries under our extraordinary rendition program, would be exposed.

Frank Dunham argued the case through the District Court for the Eastern District of Virginia and the Court of Appeals for the Fourth Circuit several times. With extraordinary persistence, dedication and a passion one does not always see in representation, he eventually

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163 The three men held in the extraordinary rendition program who were most likely to have provided evidence would have been Khalid Shaikh Muhammad, Abu Zubaydah and Ramzi bin al Shibh. A description of the extraordinary rendition program and these detainees can be found in HUMAN RIGHTS WATCH, THE UNITED STATES’ “DISAPPEARED” THE CIA’S LONG-TERM “GHOST DETAINES” (Oct. 2004), available at http://www.hrw.org/backgrounder/usa/us1004/ (last visited Aug. 8, 2006).

164 This information is from attorneys who represented defendants post 9/11

165 During the oral argument in the Padilla case, a Supreme Court Justice asked the government how the Court can be certain that interrogators are not abusing the detainees. Deputy Solicitor General Paul Clement responded that the Court will have to “trust the executive to make the kind of quintessential military judgments that are involved in things like that.” Transcript of Oral Argument at 20, Rumsfeld v. Padilla, 542 U.S. 426 (2004) (No. 03-1027).
brought Hamdi’s plight before the Supreme Court. It was in the Supreme Court, in June, 2004, that Justice O’Connor accepted the government’s definition of the term enemy combatant as it applied to Hamdi. 166

Speaking for a divided court, Justice O’Connor wrote that Hamdi was entitled to procedural due process as provided by “notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”167 Hamdi had also asked the court to rule that the Fourth Circuit erred in denying him immediate access to counsel upon his detention.168 However, after the court granted certiorari, the government provided Hamdi with access to his lawyer, thereby successfully mooting the issue. Unfortunately, it is very possible that the Hamdi case can be read as allowing the government to continue to hold persons as enemy combatants for some extended period of time incommunicado, in isolation and without access to counsel. Certainly, the court did not say otherwise.169

Within four months after the Supreme Court issued its opinion requiring the government to provide Hamdi with a hearing to challenge his status, the government released him and sent him back to Saudi Arabia. Pursuant to his plea agreement, he agreed to renounce his American citizenship and agree never to travel to Afghanistan, Iraq, Israel, Pakistan, Syria, the Palestinian West Bank or Gaza.170 Since the time that he has returned to Saudi Arabia, there has been little

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166 See infra, Part Three (E).
168 Id. at 539.
written about him.\textsuperscript{171} Although the agreement obligates him to remain in Saudi Arabia for five years and to notify the United States embassy of any plans to travel outside Saudi Arabia, one wonders whether the administration knows where he presently is. Not without irony, the government’s reason for holding him as an enemy combatant was so that he could not return to the battlefield until the hostilities ceased.

2. Jose Padilla

Jose Padilla, the other American citizen who was held in isolation for nearly three years in a naval brig in South Carolina, was not captured on the battlefield as Hamdi had been. Padilla was arrested in May, 2002, at the Chicago O’Hare International Airport after returning from Pakistan. The government had alleged that he was planning to detonate a radioactive “dirty bomb.” Padilla was held on a material witness warrant and placed in federal criminal custody in New York. On June 9\textsuperscript{th}, President Bush declared Padilla an enemy combatant. Padilla was whisked out of federal prison in New York and delivered to the naval brig in Charleston, South Carolina. His lawyer did not find out about the move until she showed up in court to argue his material witness case.

For nearly two years, his lawyers tried to obtain access to Padilla without success. Padilla did not meet his lawyers until March, 2004, after the Supreme Court granted certiorari in his case in the United States Supreme Court. The government allowed him access to his lawyers

\textsuperscript{171} Hamdi was interviewed in a phone interview from Saudi Arabia in the spring of 2006 on a story about John Walker Lindh. Tom Junod, \textit{American Taliban}, ESQUIRE MAGAZINE, July 2006, at 113,135.
at that time for the same reason that the government allowed Yaser Hamdi access – to moot the issue of right to an attorney before the Supreme Court was to hear the case. In a five to four ruling, the Supreme Court held that Padilla’s lower court habeas petition was inappropriately filed in the Federal District of the Southern District of New York and that the petition needed to be refiled in Federal District Court in South Carolina.\textsuperscript{172} In 2005, the Federal District Court in South Carolina\textsuperscript{173} held that Padilla was unlawfully held in detention in the brig and must be released within 45 days. The United States Court of Appeals for the Fourth Circuit reversed,\textsuperscript{174} and the case was set for appeal to the United States Supreme Court.

In November, 2005, after the United States Supreme Court agreed to hear Padilla’s petition, the President retracted Padilla’s designation as an enemy combatant. Padilla was transferred into the criminal justice system as a common criminal defendant.\textsuperscript{175} He was charged in the federal district court for the Southern District of Florida with conspiracy, as part of a North American cell that supported jihad causes overseas.\textsuperscript{176} He was not charged with the crimes that the federal government had earlier alleged: planning to detonate a dirty bomb, and using natural gas lines to blow up apartment buildings.\textsuperscript{177} Apparently, the evidence that would have been used to prosecute Padilla on these charges was obtained through “harsh questioning of two senior

\textsuperscript{172} Rumsfeld v. Padilla, 542 U.S. 426 (2004).
\textsuperscript{174} Padilla v. Hanft, 423 F.3d 386 (2005).
\textsuperscript{175} Memorandum from President George Bush on the Transfer of Detainee to Control of the Attorney General to the Secretary of Defense (Nov. 20, 2005).
\textsuperscript{176} Neil A. Lewis, \textit{Terror Trial Hits Obstacle, Unexpectedly}, \textit{N.Y. TIMES}, Dec. 1, 2005, at A30, \textit{available at} (LEXIS, News Library, NYT File), 2005 WLNR 19319840. The Justice Department said that he was part of a “terrorist cell that supported violent acts overseas.”
members of Al Qaeda,” and the evidence would likely not have been admissible in court and could have exposed classified information.

In concurring with the decision of the United States Supreme Court to deny certiorari, Justice Kennedy wrote on April 3, 2006 that “[e]ven if the Court were to rule in Padilla’s favor, his present custody status would be unaffected” since he was now charged in a civilian court. However, Kennedy made it clear that if the government reverses its course and reclassifies Padilla as an enemy combatant, the district court “would be in a position to rule quickly on any responsive filings submitted by Padilla.”

Kennedy also noted that, Padilla maintains the right to seek habeas in the Supreme Court.

Commentators and scholars had hoped that the court would hear Padilla’s case. They feared that until the Supreme Court ruled on the issues, the government retained the power to classify Padilla or any other American citizen as an enemy combatant and hold him for an indefinite period of time in isolation. Transferring Padilla to the criminal justice system did

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178 Adam Liptak, In Terror Cases, Administration Sets Own Rules, N.Y. TIMES, Nov. 27, 2005, at 11, available at (LEXIS, News Library, NYT File). The two detainees held in secret prisons by the CIA and mentioned as likely sources for the information on Padilla are Khalid Shaikh Mohammed and Abu Zubaydah. Douglas Jehl & Eric Lichblau, Shift on Suspect is Linked to Role of Qaeda Figures, N.Y. TIMES, Nov. 24, 2005, at A1, available at (LEXIS, News Library, NYT File). In an article on Zubaydah, after he was transferred to Guantanamo in September, 2006, the New York Times reported that “Zubaydah dismissed Mr. Padilla as a maladroit extremist whose hope to construct a dirty bomb…was far-fetched.” David Johnston, At a Secret Interrogation, Dispute Flared Over Tactics, N.Y. TIMES, Sept. 10, 2006, at 1.

179 Id.


181 Id.


183 In March, 2002, William Haynes had said that, “If we had a trial this minute, it is conceivable that somebody would be tried and acquitted of that charge but may not necessarily automatically be released.” Katherine Q. Seelye,
not moot the issue, they argued. Justice Ginsburg agreed in her dissenting opinion. “Nothing the Government has yet done purports to retract the assertion of Executive power Padilla protests. Although the Government has recently lodged charges against Padilla in a civilian court, nothing prevents the Executive from returning to the road it earlier constructed.”

But the United States Supreme Court deferred the issue to another day.

3. **Ali Saleh Kalah al Marri**

Ali Saleh Kalah al Marri, a Qatari national, entered this country with his wife and children on September 10, 2001. He had arrived in America to enroll in a masters program at Bradley University in Peoria, Illinois. He had previously obtained a BA from Bradley. Al Marri was not an American citizen, but a legal resident.

Similarly to Padilla, al Marri was also first arrested on a material witness warrant. That arrest was in December, 2001. In the following months, he was charged with counterfeiting, credit card fraud, making false statements on bank statements and making false statements to the FBI. He was scheduled for trial in July, 2003. However, in June of that year, President Bush declared al Marri to be an enemy combatant. Al Marri was moved from his cell in Peoria, where he was awaiting trial, and placed in isolation in the same Charleston, South Carolina naval brig that held Hamdi and Padilla.

Prosecutors had accused al Marri of setting up fake bank accounts and fake email

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184 *Padilla*, 126 S. Ct. at 1651.

accounts. The prosecutors also claimed that they found speeches of Osama bin Laden and photos of the World Trade Center on al Marri’s computer, and that al Marri was connected to Khalid Sheikh Mohammed, the presumed mastermind behind 9/11. Mohammed is currently being held in a secret location abroad, having presumably been tortured by water boarding,\(^{187}\) under America’s extraordinary rendition program as a ghost detainee.\(^{188}\)

If this were a criminal case, the Fifth and Sixth Amendments under the United States constitution would apply to al Marri as they would to citizens Yaser Hamdi and Jose Padilla. The administration contends that since al Marri is not a citizen, he does not have the same rights as Hamdi and Padilla have as citizens detained as enemy combatants. District Court Judge Henry Floyd agreed.\(^{189}\) At the time of this writing, the case is still idling, while al Marri continues to spend his life in the naval brig in Charleston, South Carolina. He has not spoken to or seen his wife and five children, nor has he had contact with anyone in the outside world except his attorneys, since he was designated an enemy combatant. As his attorney explains it, “everything is a privilege.”\(^{190}\)

\(^{187}\) According to Richard Ross and Richard Espositor of ABC News, Water Boarding is where “The prisoner is bound by an inclined board, feet raised and head slightly below the feet. Cellophane is wrapped over the prisoner’s face and water is poured over him. Unavoidably, the gag reflex kicks in and a terrifying fear of drowning leads to almost instant pleas to bring the treatment to a halt.” According to CIA sources, “Khalid Sheik Mohammed won the admiration of interrogators when he was able to last between two and two-and-a-half minutes before begging to confess.” Apparently, the average is “14 seconds before caving in.” ABC News (ABC television broadcast Nov. 18, 2005).
\(^{189}\) Al Marri, 378 F. Supp. 2d at 674. See also, Al Marri ex rel. Berman v. Wright, 443 F. Supp. 2d 774, 778 (D. S.C. 2006), where the court ruled that there is a “presumption in favor of the Government’s evidence,” and that “once the Government puts forth credible evidence that the habeas petitioner meets the enemy -combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence…”
\(^{190}\) Id. Telephone call August 4, 2006 to Jonathan Hafetz, one of al Marri’s attorneys (August 4, 2006), who works at The Brennan Center at NYU. Jonathan.hafetz@nyu.edu.
G. Comparing Three Other Criminal Defendants

Interestingly, three other criminal defendants who have been alleged to be connected to the War on Terror, the Taliban, al Qaeda or the 9/11 plot, have all remained in the justice system and have not been classified as enemy combatants. John Lindh, the “American Taliban,” was captured at the same time as Hamdi.\textsuperscript{191} Lindh was flown to America and initially indicted with ten counts connected to joining the Taliban. Attorney General Ashcroft accused him of training with al Qaeda and led by Osama bin Laden.\textsuperscript{192} Lindh faced the possibility of multiple life sentences plus an additional ninety years in prison.

A year later when trial was approaching and a suppression hearing on the admissibility of statements that Lindh had made in Afghanistan after his capture and in military custody, his lawyers and the government struck a deal. Lindh agreed to plead guilty to violating the anti-Taliban economic sanctions imposed in a 1999 executive order. He also agreed to a weapons charge that he had carried a rifle and two grenades while serving as a soldier in the Taliban military. All of the other counts in the indictment were dropped, including charges of terrorism and the charge of conspiracy to commit murder in the death of CIA agent Michael Spann. Spann had been killed in an uprising at Qala-i- Jhangi fortress on the outskirts of Mazar –i-Sharif in Afghanistan. Lindh had been present at the scene, after he been taken prisoner with four hundred other Taliban soldiers by the Northern Alliance notorious warlord, General Abdul Rashid Dostrum. Lindh was given two consecutive ten year terms for a total of a twenty year

\textsuperscript{191} Tony Bartelme, \textit{Born in Louisiana, captured in Afghanistan, jailed in Hanahan Yaser AH: Hamdi travels long, strange road}, POST AND COURIER (CHARLESTON, SC), Mar. 7, 2004, at 1A.
Although Lindh was never classified as an enemy combatant, the government threatened to classify him as an enemy combatant at certain points in the negotiation. In addition, Lindh’s lawyers believe that at any time, including after he is released from federal prison, the government may still classify him as an enemy combatant. Lindh’s plea agreement has a provision in it that says, that although the government foregoes any right to treat Lindh as an enemy combatant based on conduct alleged in the indictment, should the government determine that the defendant has engaged in certain proscribed offenses “the United States may immediately invoke any right it has at that time to capture and detain the defendant as an unlawful enemy combatant.”

Richard Reid, the “shoe bomber,” who had planned to blow up a bomb on an American Airlines flight from Paris to Miami in December, 2001, was also prosecuted through the criminal justice system. He pled guilty to eight counts, including attempted use of a weapon of mass destruction and attempted homicide. In spite of the fact that his act was dastardly, and closer in style to that of the 9/11 attacks, the government never classified him as an enemy combatant. He was sentenced to life imprisonment on three counts, to consecutive twenty year terms on four counts and to a thirty year term on the final count.

193 Id.
194 James Brosnahan, Lindh’s lead attorney, said that, “there was a suggestion that even if we got an acquittal that he could be declared an unlawful [did Brosnahan mean enemy?] combatant.” Adam Liptak, In Terror Cases, Administration Sets Own Rules, N.Y. TIMES, Nov. 27, 2005, at 11, available at (LEXIS, News Library, NYT File).
197 Id.
Finally, Zacarias Moussaoui, a French national, was arrested on immigration violations one month before 9/11 after a flight school notified the FBI that he was seeking training to fly a Jumbo 747 and was otherwise acting suspicious and evasive. At one time, he was thought to have been the twentieth hijacker, although now the administration believes that another man detained in Guantanamo Bay is the twentieth. Moussaoui was never classified as an enemy combatant. He pled guilty to conspiring in the 9/11 attacks. His courtroom antics and statements mirrored the mind of someone who was delusional. At his penalty phase, he claimed that he and Richard Reid were making preparations to fly a plane into the White House on 9/11. Later, FBI agents admitted that it was “highly unlikely” that Reid knew of the 9/11 attacks in advance or that he had planned to participate with Moussaoui in such an operation. Moussaoui pled guilty, and in May, 2006 the jury sentenced him to life imprisonment.

One questions the logic that the government uses in deciding whether to classify someone as an enemy combatant or not. The decisions seem arbitrary. The administration believes that it alone should decide which detainees are the dangerous enemy combatants deserving of intense isolation and denied access to their family and their lawyers, and which detainees are the criminal defendants entitled to the protections of the United States constitution. With no clear

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200 Adam Liptak, In Terror Cases, Administration Sets Own Rules, N.Y. TIMES, Nov. 27, 2005, at 11, available at (LEXIS, News Library, NYT File), writes, “[N]o one outside the administration knows just how the determination is made whether to handle a terror suspect as an enemy combatant or as a common criminal, to hold him indefinitely without charges in a military facility or to charge him in court.”
201 See Memorandum Opinion from John Yoo for Timothy Flanigan, Deputy Counsel to the President on The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them (Sept. 25, 2001), in THE TORTURE PAPERS, THE ROAD TO ABU GHRAIB 3 (Karen J. Greenberg & Joshua L. Dratel eds., Cambridge University Press 2005).
rational standards made available to the public, how are Americans going to respect the government’s actions and hold their government accountable?\textsuperscript{202} If American citizens like Hamdi and Padilla can be picked up and placed in isolation and held incommunicado for over two years in a naval brig, without charges, what can stop the administration from doing the same to any of its citizens? Our rights are only as secure as any other American’s.

\textbf{PART THREE: THE EVOLUTION AND CHRONOLOGY OF THE TERM ENEMY COMBATANT POST 9/11}

When the prisoners were first sent to Guantanamo Bay in December, 2001 and January 2002, they were initially described in internationally understood terms such as “unlawful combatants,”\textsuperscript{203} in generic terms such as captives, prisoners, fighters or detainees, and in more colorful and disparaging terms such as killers and terrorists.\textsuperscript{204} Apparently, by February, 2002, when it became increasingly difficult for the administration to justify its harsh treatment and isolation of the detainees, someone decided to politically refine the terminology. It is in this context that the administration introduced the term enemy combatant as a newly designed

\textsuperscript{202} John Yoo said that the “main factors that will determine how you will be charged are one, how strong your link to Al Qaeda is and, two, whether you have any actionable intelligence that will prevent an attack on the United States.” Adam Liptak, \textit{In Terror Cases, Administration Sets Own Rules}, N.Y. TIMES, Nov. 27, 2005, at 11, \textit{available at} (LEXIS, News Library, NYT File).

A justice department spokesman indicated that the factors are “national security interests, the need to gather intelligence and the best and quickest way to obtain it, the concern about protecting intelligence sources and methods and ongoing information gathering, the ability to use information as evidence in a criminal proceeding, the circumstances of the manner in which the individual was detained, the applicable criminal charges, and classified-evidence issues.” \textit{Id.} However, in reading between the lines, what these statements amount to is that the executive should be provided exclusive discretion in its decision-making process concerning these matters.


\textsuperscript{204} \textit{Id.}
classification for the captives, in the hope that this new classification would deflect accusations that the administration was holding the detainees in violation of the Geneva Conventions.

A. The Term Enemy Combatant Is Officially Introduced by the Government

Although the government has been calling the detainees enemy combatants since February, 2002, the term, surprisingly, did not appear in the Department of Defense Dictionary of Military and Associated Terms until some time after April 6, 2004, nearly two and one-half years after 9/11. The first time that the term enemy combatant officially appeared in a government document was in a February 2002 federal district court decision. In Coalition of Clergy v. Bush, Los Angeles federal Judge A. Howard Matz dismissed a habeas petition filed by clergy, lawyers, journalists and professors that sought to identify the detainees at Guantanamo. In holding that the plaintiffs did not have standing, Judge Matz noted that the detainees were “aliens” and “enemy combatants.” It is not clear exactly where Judge Matz found the term enemy combatant to use in his opinion. A search of the documents filed in the case failed to reveal any document that used the term enemy combatant to describe the detainees. The government described the detainees as “enemy aliens,” but not as enemy combatants. Perhaps,

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207 Id at 1048.
the judge’s clerks or even the judge himself had decided to use the term since it was present in the zeitgeist at that time, including the local popular press.208

A month later, on March, 21, 2002, William J. Haynes, Jr. General Counsel to the Department of Defense used the term in a Pentagon briefing. He indicated that “we may hold enemy combatants for the duration of the conflict” even if the detainees were tried and acquitted in a military tribunal.209

The term enemy combatant next prominently appeared when President Bush designated Jose Padilla as an enemy combatant on June 9, 2002.210 A month later, the United States Report to the Inter-American Commission on Human Rights (IACHR), dated July 15, 2002,211 used the term throughout the document with statements like, “[t]he unchallenged state practice of detaining enemy combatants in time of armed conflict is not subject to review by the Commission.”212 Two days after, on July 17, the DOD issued “News About the War on Terrorism,” featuring a member of the Coast Guard whose job it was to “patrol waters around Guantanamo Bay, Cuba, to support Joint Task Force 160.” The Joint Task Force was “a

208 Using a Nexis search, the first time that the term enemy combatant appeared in the press was in the Chicago Daily Law Bulletin on September 20, 2001, page 6, in, “Rules of Engagement” by Douglass W. Cassel, Jr. Three days later, the Los Angeles Times used the term enemy combatant in, “Let Military Panels Punish Terrorists,” by Neal A. Richardson and Spencer J. Crona, page 7. The first time that the case of Ex Parte Quirin was tied together with the term enemy combatant in the press was on October 5, 2001 in, “Criminal or Military Justice for Captured Terrorists?” by Philip Allen Lacovara in the Legal Backgrounder, Vol. 16. No.43. On November 23, 2001, the San Diego Union-Tribune published “Terrorists should face military justice,” by Joseph Perkins, page B-7, which also discussed Ex Parte Quirin and enemy combatants. It is certainly likely that Judge Matz and/or his clerks could have found these and similar articles.


210 Bush memo to the Secretary of Defense. Redacted.


212 Id. at 1009.
multiservice command in charge of detention operations here of captured enemy combatants.”

Donald D. Woolfolk, Deputy Commander of the Joint Task Force in Guantanamo, and serving as Acting Commander, identified Hamdi as an enemy combatant in his declaration of June 12, 2002. A little more than a month later, Michael Mobbs, Special Advisor to the Under Secretary of Defense for Policy, also identified Yaser Hamdi as an enemy combatant in his declaration. It was in the fall of that year that the Pentagon issued memoranda defining the term enemy combatant with the aim of creating an accepted description of the detainees held by America.

B. Letter from DOD General Counsel to United States Senators

On November 26, 2002, William J. Haynes Jr., General Counsel to the Department of Defense, responded to a letter from Senator Carl Levin, Chair of the Senate Armed Services Committee, and Senator Russ Feingold inquiring as to the designation of enemy combatants. Haynes submitted that the operative definition of enemy combatant “is an individual who, under the laws and customs of war, may be detained for the duration of the armed conflict.”

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217 Molly Ivins in her column, *Bushies Deliver Blows to Our Land*, CHI. TRIB., Apr. 1, 2004, at 25, wrote that Haynes was the architect of the term Enemy Combatant. When I checked with her researcher, her researcher could not identify the source for the statement. Although I have no proof, I suspect that Haynes was probably not the
same letter, Haynes also wrote that “The United States may detain enemy combatants throughout
the conflict (and thereafter if they are convicted of war crimes or other criminal offenses).”

Haynes’ definition is largely meaningless. Since both lawful and unlawful combatants
may be held until the cessation of hostilities pursuant to the Geneva Conventions, the
definition applies to all combatants. Haynes’ definition certainly does not justify the
administration’s creation of a new term and, implicitly, a new category, of combatants.

C. The Application of Ex Parte Quirin to the origination of the term Enemy Combatant

However, Haynes continues by noting the relationship between his definition of enemy
combatant and that used by the 1942 United States Supreme Court decision Ex Parte Quirin.

In Ex Parte Quirin, Nazi saboteurs had come ashore in a submarine at Amagansett, Long
Island, New York, and in Ponte Vedra, near Jacksonville, Florida. They buried their uniforms
and boxes of explosives, donned civilian attire, and proceeded on their mission to destroy
railroads, factories, bridges and other strategic targets in the United States. Fortunately for the
Americans, one of the German saboteurs contacted the FBI when he came ashore, revealing the
plot and the participants. Within two weeks, the saboteurs were captured. All were German
citizens, although one may have been a naturalized American. They were tried and convicted

originator of the term. See infra Part Four, for a longer discussion regarding the author of the enemy combatant.

218 See Geneva Convention Relative to the Treatment of Prisoners of War art. 21, Aug. 12, 1949, 6 U.S.T. 3316 and
Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 5 & 42, Aug. 12, 1949, 6
U.S.T. 3516. See also Jennifer K. Elsea, Treatment of “Battlefield Detainees” in the War on Terrorism (updated
Mar. 27, 2006) (RL 31367) at 17.

219 Ex Parte Quirin, 317 U.S. 1 (1942).


221 Id. at 2.

222 Id. at 1.

223 Id. at 3-4.

224 Ex Parte Quirin, 317 U.S. 1, 20 (1942).
by a military tribunal.\textsuperscript{225} Six of the men were sentenced to death. The defendants’ case in the Supreme Court challenged the president’s authority to order trial by military tribunal. They contended that they were entitled to a trial in Article III courts, which included the right to a jury trial. Eight days later, in a per curium decision, the court concluded that the defendants were properly tried. The six defendants sentenced to death were executed.\textsuperscript{226} Three months after the execution, the court issued its full-length opinion.\textsuperscript{227}

To buttress his position that the term originates with \textit{Quirin}, Haynes quotes the passage from \textit{Quirin} that reads, “Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are \textbf{enemy belligerents} within the meaning of the Hague Convention and the law of war.” To the extent that American citizens may be included in the term, Haynes continues, “There are no criteria for designating enemy combatants that are unique to United States citizens.”\textsuperscript{228} (emphasis added).

As identified by the emphasis, Haynes is quoting a sentence that uses the term enemy belligerents, not enemy combatants. If enemy combatant is a term of art, why is enemy belligerent an acceptable substitute? This imprecise use of language is actually not only apparent in Haynes’ statements, but also in the \textit{Quirin} case itself, as indicated in the discussion of the

\begin{footnotes}
\footnote{\textsuperscript{225} FBI Director J. Edward Hoover had preferred a military trial because it did not want it made public that the U boats had reached American shores undetected and that one man had turned himself in and assisted in apprehending the others. In addition, the government was not sure it could prevail on a charge of sabotage in a civil court, since the men had not actually committed any act of sabotage. Louis Fisher, Military Tribunals: The \textit{Quirin} Precedent (Mar. 26, 2002) (RL 31340) at 3-4.}
\footnote{\textsuperscript{226} \textit{Id.}}
\footnote{\textsuperscript{227} \textit{Ex Parte Quirin}, 317 U.S. 1 (1942).}
\footnote{\textsuperscript{228} Letter from William Haynes, General Counsel to the Department of Defense, to United States Senators (Nov. 26, 2002).}
\end{footnotes}
Quirin case below.

In addition, the phrase, “[c]itizens who associate themselves with the military arm of the enemy government” is nothing more than a generic description of all enemy soldiers and does not create a category of combatants outside from the universally recognized categories of lawful and unlawful combatants. Moreover, to the extent that the second part of the definition that refers to entering “this country bent on hostile acts” is critical to the definition, the people in Guantanamo Bay designated as enemy combatants did not “enter this country bent on hostile acts.” In fact, they did not enter this country willingly at all. They were captured in Afghanistan on the battlefield and brought, often severely bound and blindfolded, to the detention center at Guantanamo. One fails to see how Haynes’ quote taken from Quirin – a quote that is addressing the Nazi saboteurs who were captured on American soil -- is applicable to the people at Guantanamo.\footnote{See also, Knut Dörmann, The legal situation of “unlawful/unprivileged combatants”, 85 INT’L REV. OF THE RED CROSS 45, 59 (2003), where he notes that since Quirin predates the Geneva Conventions, particularly the Fourth Convention protecting unlawful combatants, “the issue was simply not specifically regulated in any instrument of international humanitarian law before the adoption of GC IV….”}

Finally, and most ironically as noted above, the term enemy combatant does not even appear in the quote that Haynes cites from the Quirin case. In fact, the term enemy combatant appears only once in Stone’s entire decision, and the term is used interchangeably with other terms designating unlawful combatants. It is not a term of art in the decision. The term appears in the following sentence:

“The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are
generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.\textsuperscript{230} (emphasis added).

The term enemy combatant is used in \textit{Quirin} to identify someone without uniform who comes secretly through the lines for the purpose of waging war by destruction of life or property as someone not entitled to prisoner of war status. It essentially provides another description of a saboteur, or unlawful combatant. The term was obviously intended to describe the defendants in \textit{Quirin} who landed on America’s shores via submarine, and assure the government that they would not receive POW status.

Stone’s opinion identifies those combatants who are on the opposing side and not entitled to POW status with many different labels. They are not only enemy combatants, but also “enemy aliens” and “enemy belligerents.” Throughout the opinion, Justice Stone uses such language as, “without being lawful belligerents,” “war criminals,” “armed prowlers,” “unlawful belligerents” and “unlawful combatants.” It is apparent that enemy combatant is just one more nonspecific term describing unlawful combatants who are not entitled to POW status. One can only surmise that Justice Stone had an aversion to using the same term when a synonymous term was available.

Justice Stone’s interchangeable use of all these terms counters the administration’s argument that the term enemy combatant uniquely defines a distinctive set of combatants, outside the known universe of lawful and unlawful combatants. Rather, Stone’s opinion fully bears out the counterargument that the term enemy combatant had no intrinsic meaning in the \textit{Quirin} case. The \textit{Quirin} decision is an example of accidental, if not careless, use of language.

\textsuperscript{230} \textit{Ex Parte Quirin}, 317 U.S. 1, 31 (1942).
To the extent that the administration relies on the *Quirin* decision, Justice Stone’s penchant for synonymous terms has come back to haunt us.

To confirm that the term enemy combatant had no intrinsic meaning prior to its invention by the administration post 9/11, a commentator researched the use of the term enemy combatant post *Quirin* up to 9/11.\(^\text{231}\) She could find no case that gave legal definition to the term enemy combatant.\(^\text{232}\) Indeed, no case has ever cited to *Quirin* for the proposition that *Quirin* gave the term enemy combatant intrinsic meaning. Neither the Supreme Court in *Hamdi* nor the Supreme Court in *Hamdan* referred to *Quirin* when acknowledging the term enemy combatant.\(^\text{233}\) The truth is that no court has ever understood that *Quirin* breathed new life into the generic term enemy combatant.

Why did the government look to *Quirin* and not to the Geneva Conventions for its terminology? Near the end of the letter, Haynes writes that the “DOD has not changed its policies regarding treatment of individuals who qualify for a particular status under the Geneva Conventions of 1949.” If that were true, then again, why did the administration not look to the Geneva Conventions for its choice of words? One cannot help but wonder whether the administration found the ill-focused, if not sloppy, use of language in *Quirin* to its advantage in citing to it as justification for employing the term enemy combatant.

Administration officials other than Haynes have cited to *Quirin* in support of the use of the term enemy combatant. One such prominent person who cites to *Quirin* in justification of the


\(^{232}\) Woolman noted that each of the cases she found used the term enemy combatant in “surprisingly varied contexts,” thus signifying that “there was no uniform meaning.” She noted that the term “was not a legal term of art.” *Id.*
term enemy combatant is John Yoo. In a conversation with the author, Berkeley Law Professor John Yoo who had worked as Deputy Assistant Attorney General in the Department of Justice’s Office of Legal Counsel the years immediately following 9/11, confirmed that, as he understood it, the origin of the term enemy combatant arose out of Chief Justice Stone’s opinion in Quirin. Apparently, the administration must have believed that if members of the administration repeated the term enemy combatant frequently, and cited to Quirin when pressed for legal authority for the term, the media and the public would eventually believe that the term

233 Hamdi and Hamdan discussions infra Part Three (E) & (G).
234 Sept. 29, 2005.
235 John Yoo was the Deputy Assistant Attorney General in the Department of Justice’s Office of Legal Counsel at the time of 9/11. He was one of the most forceful proponents of granting the executive plenary power, especially in times of war. Yoo even believed that if Congress tried to tie the president’s hands when it came to limiting the executive’s ability to direct the military to participate in cruel, inhuman and degrading treatment, if not torture, the law would be an unconstitutional interference with the executive’s power under Article Two of the Constitution. Similarly, Yoo advocated that the federal courts must completely defer to the president on these military matters. Yoo was one of the foremost promoters in support of the executive’s power to hold enemy combatants for as long as the government needed, and to hold the combatants in isolation without access to lawyers and family, and without any charges filed. Yoo believed this, even if the detainees were American citizens [see supra note 148]. Much of Yoo’s beliefs are drawn from memoranda that Yoo wrote while working for the OLC on administration policy following the days post 9/11. See Yoo memos: Memorandum from John Yoo, Deputy Assistant Attorney General & Robert Delahunty, Special Counsel, to William J. Haynes II, General Counsel, Department of Defense on the Application of Treaties and Laws to Al Qaeda and Taliban Detainees (Jan. 9, 2002), in THE TORTURE PAPERS, THE ROAD TO ABU GHRAIB 38-39 (Karen J. Greenberg & Joshua L. Dratel eds., Cambridge University Press 2005) and Memorandum Opinion from John Yoo for Timothy Flanigan, Deputy Counsel to the President on The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them (Sept. 25, 2001), in THE TORTURE PAPERS, THE ROAD TO ABU GHRAIB 3 (Karen J. Greenberg & Joshua L. Dratel eds., Cambridge University Press 2005).

Yoo is most prominently known as one of the principle authors, if not the principle author, of the administration’s support for a macabre definition of torture. That definition consigned torture to acts that brought on organ failure or death. Anything less was not torture. Although an article with the same date that defined torture in this kind of ghastly detail was signed by Assistant Attorney General Jay Bybee, the belief is that Yoo actually wrote the memo for Bybee to sign. Jane Mayer, The Memo, NEW YORKER, Feb. 27, 2006, at 32. David Addington, helped draft the memo. David Milbank, In Cheney’s Shadow, Counsel Pushes the Conservative Cause, WASH. POST, Oct. 11, 2004, at A21. See also Mayer, supra. It was not until two years later that the administration distanced itself from this interpretation of torture, presumably because the memorandum had become public. Id. It was quietly repudiated by Acting Assistant Attorney General Daniel Levin and replaced on the administration’s website on December 30, 2004 with a revised memo. http://www.humanrightsfirst.com/us_law/etn/gonzales/index.asp (last visited Aug. 8, 2006). The change occurred just weeks before Alberto Gonzales was to appear before the Senate Judiciary Committee, which was to consider his appointment as the United States Attorney General.

236 Author’s conversation with John Yoo during debate at the University of San Francisco, School of Law on Sept. 29, 2005. However, a search of his published articles and memoranda does not reveal any statement to this effect.
had validity.

D. Haynes Memorandum to ASIL—Counsel on Foreign Relations Roundtable

On December 12, 2002, Haynes wrote a memorandum to Members of the American Society of International Law (ASIL) --Council on Foreign Relations Roundtable. The memo is similar to the letter he wrote to Senators Levin and Feingold in the previous month. However, here Haynes expands his definition of enemy combatant: “‘Enemy Combatant’ is a general category that subsumes two sub-categories: lawful and unlawful combatants. See Quirin.” He then indicates that the President has determined that al-Qaeda members and Taliban detainees are “unlawful combatants” who “do not receive POW status and do not receive the full protections of the Third Geneva Convention.”

Once again, we have a confusion of terms. If enemy combatant subsumes the two sub-categories of lawful and unlawful combatants -- with the odd reference to Quirin -- then again all we have here is a generic term for all combatants, not a new category of combatants. However, by referring to al Qaeda and Taliban detainees as unlawful, Haynes is allowing that some of the enemy combatants could necessarily be lawful. But, of course, the administration has never intended that any of their enemy combatants be lawful combatants entitled to POW status. The confusion of terms and definitions has continued over the years.

E. Enemy Combatant as Defined by the United States Supreme Court in Hamdi v. Rumsfeld

237 Memorandum from William Haynes on Enemy Combatants to members of the ASIL-CRF Roundtable (Dec. 12, 2002).
238 Id.
239 Id.
Not only were the Guantanamo Bay detainees designated as enemy combatants, but so were American citizens Yaser Hamdi and Jose Padilla, and legal resident Ali al-Marri. In June, 2004, the United States Supreme Court adopted the government’s definition of enemy combatant as it applied to Yaser Hamdi.\textsuperscript{240} Hamdi was an American citizen armed with an AK-47 and captured in Afghanistan. He was first brought to Guantanamo Bay, but was moved to a naval brig when it was discovered that he was a citizen of the United States.\textsuperscript{241} Hamdi spent nearly three years in isolation in the naval brig, without access to his attorney or his family. In her plurality opinion, Justice O’Connor recognized that “[t]here is some debate as to the proper scope of this [enemy combatant] term, and the Government has never provided any court with the full criteria that it uses in classifying individuals as such.”\textsuperscript{242}

O’Connor deferred, however, by adopting the government’s definition in this situation.

“[F]or purposes of this case, the ‘enemy combatant’ that it [the United States] is seeking to detain is an individual who, it alleges, was ‘part of or supporting forces hostile to the United States or coalition partners’ in Afghanistan and who ‘engaged in armed conflict against the United States’ there.”\textsuperscript{243}

With the blessing of the United States Supreme Court, enemy combatant, a term that was invented by the administration now had legs in American jurisprudence. Although one can argue that the term was limited to one individual, nevertheless the court gave birth and legitimacy to a new subset of combatants. In fact, O’Conner additionally specifies that “[t]here is no bar to this Nation’s holding one of its own citizens as an enemy combatant.”\textsuperscript{244}

\textsuperscript{241} See Brief for the Respondents on writ of Certiorari at 10, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696). See also, Part Two, Section (F)(1) supra.
\textsuperscript{242} Hamdi, 542 U.S. at 516.
\textsuperscript{243} Id.
\textsuperscript{244} Id. at 519.
It could be argued that O’Conner’s recognition of the term enemy combatant did not necessarily provide a mantle of broad constitutional approval for the term, but that she was doing little more than permitting the government to use the term as it applied specifically to Yaser Hamdi, an American citizen.

In response, one could argue that by acknowledging the term enemy combatant, Justice O’Conner imbued the term with constitutional power and legitimacy. After all, O’Connor had the opportunity to put on the brakes by questioning the administration’s application of the term to Hamdi. She could have written that she did not need to review the administration’s designation of Hamdi as an enemy combatant in order to assess and resolve his case, and that the term was not under the court’s review or consideration. Had she so acted, she could have also implicitly drawn attention to the infirmities of the term. At best, she engaged in an act of omission, when she had the opportunity to resist the administration’s aggressive use of a term that had no legally recognized meaning.

The Supreme Court’s acceptance of the term in *Hamdi* made it easier for the term enemy combatant to evolve and broaden over time. And sure enough, the term did evolve. Two years after the *Hamdi* decision, the court in *Hamdan* expanded the breadth of the term by applying it to detainees in Guantanamo Bay. But before reviewing the Supreme Court’s acceptance of the definition of enemy combatant in *Hamdan*, we need to understand the administration’s creation of its Combatant Status Review Tribunals in Guantanamo Bay, and the definition of enemy combatant as it applied to people who appeared before these tribunals.

245 See infra Section G.
F. DOD Order Establishing Combatant Status Review Tribunals (CSRT)

In response to the *Hamdi* and *Rasul* decisions requiring hearings for the detainees to determine whether they are lawfully detained, and building on a March 3, 2004 draft administrative review process memorandum, the administration created Combatant Status Review Tribunals (CSRT). These tribunals were seemingly designed to establish whether the detainees at Guantanamo Bay were justifiably held as enemy combatants. Trials were to be heard before “three neutral commissioned officers.” The detainees were permitted a personal representative, but not a lawyer.

Although the government had defined the term enemy combatant as applied to Hamdi, this was the first time that the Department of Defense officially defined enemy combatant as it specifically applied to Guantanamo Bay detainees:

> [T]he term ‘enemy combatant’ shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in

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246 Rasul v. Bush, 542 U.S. 466 (2004). Rasul held that the Guantanamo Bay detainees had the right to file habeas petitions in federal district court to challenge the legality of their detentions.

247 On March 3, 2004, the DOD issued a draft administrative review process memorandum that “would establish an administrative review process to reassess at least annually the need to continue to detain each enemy combatant in the control of the Department of Defense at Guantanamo Bay Naval Base, Cuba.” News Release, Department of Defense, DOD Announces Draft Detainee Review Policy (Mar. 3, 2004), in DEP’T DEF. NEWS, available at http://www.defense.gov/releases/2004/nr20040303-0403.html (last visited Aug. 8, 2006). The policy provided that “each enemy combatant would have the opportunity to explain to an administrative review board of three military offices why he should no longer be detained.” Three months later, the DOD officially established the Combatant Status Review Tribunals.


249 Id.

250 Id.

hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces. Each detainee subject to this Order has been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense.  

Since a “person who [commits] a belligerent act” can easily include a lawful combatant under the Third Geneva Convention (GC3), the DOD’s definition necessarily includes both lawful and unlawful combatants. Under the GC3, lawful combatants are, of course, entitled to POW status. Again, the definition used here in defining enemy combatants for purposes of CSRT trials is contrary to the statement by President Bush on February 7, 2002, where he officially determined that the Taliban and Al Qaeda detainees were unlawful combatants. (emphasis added).

Equally significant is the appearance of the word “support.” How should we define a person “supporting Taliban or al Qaeda forces” or a person who “has directly supported hostilities in aid of enemy forces?” Would providing funds or other material goods fall within the definition of support? The word support also appears in the critical definitions of enemy combatant found in the Hamdan decision as well as in the Congressional Military Commissions Act of 2006.

In addition, the CSRT are inconsistent with Article 5 requirements of the GC3, in that

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253 See Bush memo in Part Two (B)(1).

254 See infra Sections G and J.
Article 5 requires that a competent tribunal make the decision as to status. In addition, the decision making power of the CSRT panel members is limited to whether the detainees are enemy combatants. That is, and this is critical, the panel members are not given the authority to determine whether any of the combatants are lawful combatants and thereby POWs. As noted, according to the administration, President Bush on February 7, 2002, pre-determined that none of the detainees has POW status.

G. Enemy Combatant Definition as Accepted by the United States Supreme Court in Hamdan v. Rumsfeld

Two years after the Hamdi decision, the Supreme Court decided the case of Hamdan v. Rumsfeld. Salim Hamdan was a Yemeni national held as a captive in Guantanamo. The government identified him as Osama bin Laden’s bodyguard and personal driver. Hamdan had been captured in November, 2001 and turned over to American forces. He was transferred to Guantanamo Bay in June, 2002. Subsequently, Hamdan was charged with conspiracy, and President Bush declared him eligible for trial by military tribunal. In its decision, the Supreme Court concluded that the military tribunal lacked power to proceed because the tribunal violated both the Uniform Code of Military Justice and the Geneva Conventions, particularly Common Article 3.

By ruling that Common Article 3 was applicable to al Qaeda detainees like Hamdan, the court held that Hamdan had the right to a trial before a “regularly constituted court affording all

255 See Article 5 discussion in Part One (B)(2)(a). See also, the United Nations Commission on Human Rights (UNCHR) which says that the CSRT are not competent under Article 9 of the ICCPR. See Part One (F)(1), supra re Article 9.
256 See Bush memo in Part Two (B)(1).
the judicial guarantees which are recognized as indispensable by civilized peoples." The court interpreted “‘regularly constituted’ tribunals to include ‘ordinary military courts,’” i.e. courts martial, and excluded “all special tribunals,” i.e. the military commissions that were currently in force at the time of the decision.

Significantly, what the court may or may not have realized when it issued its decision that CA3 applied to Hamdan and other detainees, is that it necessarily implied that Hamdan was captured in a conflict that was “not of an international character,” as the wording of CA3 requires. GC3 and GC4, which apply to international conflicts, would thereby not apply to Hamdan and company. Consequently, none of the captives to whom CA3 apply could ever be determined to be POWs under GC3-- although many people have argued that the Taliban, as soldiers for the state of Afghanistan, qualify as POW soldiers. In addition, since more rights and protections are available under GC4 than under CA3, even combatants who do not qualify as POWs under GC3 would have more protections as unlawful combatants (“civilians”) under GC4, than under CA3.

Because Common Article 3 requires that all parties be treated humanely, a strong argument can be made that the Hamdan decision had essentially put a stop to the cruel and degrading treatment, possibly even torture, of enemy combatants post 9/11. However, it is not clear how broadly one can read the Supreme Court decision. The White House and the Pentagon have issued conflicting statements since the Hamdan decision. Two weeks after the Hamdan

258 Id. at 2753. See Part One (B)(1) supra for a discussion of Common Article 3.
259 Id. at 2751 (citing 6 U.S.T. 3320).
260 Id. at 2796-2797.
261 See supra Part Two (A).
262 See Part One (B)(1).
decision, Deputy Defense Secretary Gordon England wrote a memorandum acknowledging that Common Article 3 “applies as a matter of law to the conflict with Al Qaeda.”\(^{263}\) This was in direct contradiction to the Bush Memorandum of February 7, 2002 that said that Article 3 did not apply to al Qaeda or Taliban detainees.\(^{264}\)

Following the *Hamdan* decision, the administration, urged Congress to pass legislation that would limit the rights granted to detainees.\(^{265}\) The administration feared that if Common Article 3 were applied to the treatment of the detainees, American troops could be prosecuted for violations of the War Crimes Act for their harsh interrogation tactics.\(^{266}\) There was also the possibility that upper level people in the administration could be prosecuted under the War Crimes Act for approving of the illegal interrogation tactics. Apparently, John Ashcroft and Alberto Gonzales were prescient when they expressed their concerns about the ramifications of applying the Geneva Conventions to the detainees in Guantanamo Bay back in early 2002.\(^{267}\) The administration had its wish granted when the Congress passed the Military Commissions Act of 2006. One provision retroactively protects American officials from prosecution under the War Crimes Act for any crimes that they may have committed post 9/11, including certain “cruel, inhuman or degrading treatment,” that may have been crimes under the earlier version of the act. \(^{268}\)

Arguably, the Supreme Court did not directly address the rights of all enemy combatants


\(^{264}\) Bush memorandum, Part Two (B)(1).


\(^{266}\) *Id.* See also Part Two (D) and R. Jeffrey Smith, *Detainee Abuse Charges Feared, Shield Sought from ’96 War Crimes Act*, WASH. POST, July 28, 2006, page A1.

\(^{267}\) See Part Two (E) *supra*.
in Guantanamo. The court applied its Common Article 3 analysis specifically to *Hamdan* and other al Qaeda detainees who were not covered as Parties to the Convention. The court did not directly address the Taliban combatants in Afghanistan\textsuperscript{269} although they too are enemy combatants in Guantanamo. This distinction may be significant since we cannot be precisely sure as to what extent the court intended to provide minimum protections under CA3 for all detainees designated as enemy combatants, whether held in Guantanamo Bay or elsewhere. Perhaps, the court in a future decision will rule that the Taliban combatants are protected by more than CA3, and fall, in fact, within GC3 as prisoners of war.

In addition, American citizens and American residents who are held as enemy combatants are likely to have protections greater than those provided by CA3. It is arguable that these enemy combatants are not within the ambit of the decision since they are not presently in Guantanamo Bay. In addition, as noted by the *Hamdi* decision, American citizens classified as enemy combatants are provided certain limited rights by the United States Constitution.

In writing for the majority, Justice Stevens accepted the government’s definition of enemy combatant as it applied to those detainees held in Guantanamo. The court noted that a Combatant Status Review Tribunal\textsuperscript{270} had determined that Hamdan’s continued detention was warranted because he was an enemy combatant. Although the *Hamdan* court used the term enemy combatant in a context different from that used in *Hamdi*, Justice Stevens and the court validated this definition of enemy combatant as well. Citing to the definition of the term enemy combatant.

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\textsuperscript{269} See Part One.
\textsuperscript{270} As noted in Section F of this Part, Combatant Status Review Tribunals contravene requirements of the Geneva Conventions since these tribunals do not determine whether someone is a POW, but only determine whether someone is an enemy combatant.
combatant as used in Combatant Status Review Tribunals, the court in footnote 1 wrote as follows:

An “‘enemy combatant’ is defined by the military order as ‘an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners.’”

The Hamdan court’s acknowledgment, without reflection, of the term enemy combatant was much more problematic that it was in Hamdi. Hamdi, as an American citizen, had other sources of rights on his side, particularly the American constitution. Hamdan and the other detainees in Guantanamo Bay did not have the United States constitution in their corner. They had to look to the Geneva Conventions and human rights laws for their sources of rights. Thus, since the term enemy combatant applied to detainees in Guantanamo, Justice Stevens and the court should have fully considered and addressed the impact of their adopting and applying the term enemy combatant. The court had the opportunity in Hamdan to examine the term enemy combatant and to conclude that the term did not exist as a term of art in international or constitutional law. It was the perfect time for the United States Supreme Court to inform the executive that the administration could not lawfully designate someone as an enemy combatant, and that the executive must adhere in his actions to international and constitutional law and norms.

Moreover, even if the court was going to accept the term enemy combatant as a

legitimate designation of the detainees, it still had the obligation to address the application of the term directly. It could have considered whether Common Article 3 applied to all the enemy combatants in Guantanamo Bay, including the Taliban soldiers -- who arguably qualified for the more protective status of being prisoners of war under GC3 -- or only to al Qaeda detainees.

The court could have also examined how the word “support” is used in the definition. What exactly does it mean to support Taliban or al Qaeda soldiers or associated forces that are engaged in hostilities against the United States? Would providing financial support be sufficient, or must it be military support? This issue of defining support has become even more significant since October, 2006, when the Military Commissions Act of 2006 was passed. See this Part Section J.

Because courts tend to defer to the executive, it is often difficult to bring Article II issues before a federal court. Here was an opportunity for the United States Supreme Court to stand tall and employ its most precious possession of judicial review in analyzing the impact of the administration’s use of a term that did not exist in international law. Instead, the court merely acknowledged the term as if it were a classification with little or no consequences. As in Hamdi, none of the justices seriously questioned whether the government’s proposed definition had any historical legitimacy in American constitutional law or in international humanitarian or human rights laws. The court’s major error in judgment will haunt us for years.

Fortunately, at least four of the justices in Hamdan confirmed that the United States

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272 As noted in Section (F), supra the definition used by the CSRT includes the following sentence as well, “This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.”
recognizes the universality of Article 75. Justice Stephens wrote, “it appears that the Government ‘regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.’” Stevens further noted that “the principles, articulated in Article 75 and indisputably part of the customary international law” include the right of the accused to “be present for his trial and must be privy to the evidence against him.” Hopefully, a future court will directly apply Article 75 to the treatment of the detainees.

H. Other DOD Documents

1. Military Doctrine Joint and National Intelligence Support to Military Operations

Three months after the decision in *Hamdi*, the DOD further defined enemy combatant in its Joint Publication 2-01, *Military Doctrine Joint and National Intelligence Support to Military Operations.* This publication serves as a guide for providing intelligence support to military operations. In a section on “Responsibilities,” the publication bafflingly reads that “[s]ervice component interrogators collect tactical intelligence from EPWs [Enemy POWs] and ECs [enemy combatants] based on joint force J-2 criteria.” This statement seems to imply that there are only two categories: enemy POWs (EPWs), who presumably are lawful combatants, and enemy combatants (ECs), who presumably would be unlawful combatants. Thus, here enemy combatants are seemingly equated with unlawful combatants.

However, in the Glossary section of this document, enemy combatant is defined in the same general terms as those which appear in the Department of Defense’s Dictionary of Military

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273 *See* Part Three (G).
275 *Id.* at 2798.
and Associated Terms: “[a]ny person in an armed conflict who could be properly detained under
the laws and customs of war.”

This definition embraces all combatants, whether lawful or
unlawful. One again wonders whether the inconsistencies in the various Department of Defense
documents are deliberate, or are the result of people not communicating with each other..

2. DOD Publications Regarding Enemy Combatant -- Joint Publication 3-63

In March, 2005, the Pentagon issued a draft set of guidelines in Joint Publication 3-63,
entitled, Joint Doctrine for Detainee Operations, (JP3-63) for detainee classification. True to
form, JP3-63 mirrored other DOD documents in being inconsistent in language to that used to
define enemy combatant in earlier statements issued by the administration. The document
identified enemy combatant within the “laws and customs of war” and yet also defined the term
as a “new category of detainee.”

Page 1 of the Introduction to JP 3-63 states: “Following the events of September 11,
2001, a new category of detainee, enemy combatant (EC), was created for personnel who are not
granted or entitled to the privileges of the Geneva Convention.” The glossary section of JP3-
63 defines enemy combatant in the same terms as the glossary section in JP2-01: “Any person in
an armed conflict who could be properly detained under the laws and customs of war. Also
called EC.”

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276 Joint Chiefs of Staff, Joint and National Intelligence Support to Military Operations (Oct. 7, 2004),

277 See, Joint Chiefs of Staff, Department of Defense Dictionary of Military and Associated Terms
(Apr. 12, 2001 as amended through Apr. 14, 2006), available at
Combatant). See this Part, Section (A) on how the term enemy combatant never appeared as a term in its Dictionary
of Military and Associated Terms in JP 1-02, until after April 6, 2004. According to the Internet Archive saved on
Feb. 4, 2005, the Department of Defense included its first definition of enemy combatant in its dictionary on Nov.
30, 2004. The definition, the same as that which appears in the glossary above, reads: “Any person in an armed
conflict who could be properly detained under the laws and customs of war. Also called EC.”
Aug. 8, 2006).

278 Dated March 23, 2005. Still in draft form. Final publication is anticipated on May 31, 2006 pending approval
from the DOD. As of June 21, 2006, JP3-63 has not been replaced with a revised version.

279 Same definition as in previous glossary.

76
Several pages into the introduction, JP3-63 further defines enemy combatant as,

Any person that US or allied forces could properly detain under the laws and customs of war. For purposes of the war on terror an enemy combatant includes, but is not necessarily limited to, a member or agent of Al Qaeda, Taliban, or another international terrorist organization against which the United States is engaged in an armed conflict.\textsuperscript{280}

Later on in the document, JP3-63 sets out four categories of detainees protected under the Geneva Conventions: (1) Enemy Prisoner of War; (2) Civilian Internees; (3) Retained Persons; and (4) Other Detainees. It then refers to an “Additional Classification,” of enemy combatant. The Pentagon guidelines attempt to clarify this additional classification by adding, “In reference to the Global war on Terror there is an additional classification of detainees who, through their own conduct, are not entitled to the privileges and protections of the Geneva Conventions. These personnel, when detained, are classified as enemy combatants.”\textsuperscript{281}

A reader who seeks to delve further into the DOD morass on enemy combatants will find that the Detainee Classification section of JP 3-63 provides that “guidance should be obtained from higher headquarters.” Presumably, higher headquarters is a bureaucratic term for high level generals or, more likely, the executive. In fact, the Detainee Classification section provides definitions of enemy combatant solely by reference to Executive Order 13224, which applies to “[a]nyone detained that is affiliated with” [terrorists and terrorist groups identified under this order].\textsuperscript{282}


\textsuperscript{281} JP3-63, \textit{Id.} at 1-11.

\textsuperscript{282} Located at \url{www.treas.gov/ofac/}. In continuing to expand the definition of enemy combatant, this section adds, “[f]urthermore, there are individuals that may not be affiliated with the listed organizations that may be classified as an EC. On these specific individuals, guidance should be obtained from higher headquarters” presumably by
The Pentagon, in bureaucratic jargon, also identifies and defines five sub-categories of enemy combatants, including, (1) Low Level Enemy Combatant; (2) High Value Detainee; (3) Criminal Detainee [note that this category may also apply to Civilian Internees – see below paragraph]; (4) High Value Criminal; and (5) Security Detainee. Given that enemy combatant has several meanings, including not only those issued above in JP3-63, but also issued by JP 2-01, by the military dictionary in JP 1-02, by Haynes’ through his many statements, by the CSRT, and by the Hamdi and Hamdan Supreme Court decisions, one wonders what further legal significance these sub-classifications have. Could it be that these additional terms are nothing more than the ramblings of a bemused mind seeking to create more levels of bureaucracy?

Human rights organizations criticized JP 3-63 because it contravened the Geneva Conventions and formalized a “new category of detainee.” This, apparently, resulted in the DOD’s removing the document from its website. The DOD indicated that it will post a reference to the Deputy Secretary of Defense global screening criteria. In the Deputy Secretary of Defense global screening criteria, Feb. 20, 2004, EC is defined as:

“Any person that U.S. or allied forces could properly detain under the laws and customs of war. For purposes of the war on terror an enemy combatant includes, but is not necessarily limited to, a member or agent of Al Qaeda, Taliban, or another international terrorist organization against which the United States is engaged in an armed conflict. This may include those individuals or entities designated in accordance with references E”, which includes a “Comprehensive list of Terrorists and Terrorist Groups Identified Under Executive Order 13224.” Updates at www.treas.gov/ofac (last visited Aug. 8, 2006); and Reference G which provides “Patterns of Global Terrorism.”

Department of State 2002. Updates at www.state.gov/s/ct/rls/pgtrpt/ (last visited Aug. 8, 2006) “as identified in applicable Executive Orders approved by the Secretary of Defense.”


284 See Letter from Kenneth Roth on the Joint Doctrine for Detainee Operations to Secretary Rumsfeld (Apr. 7, 2005). The letter has been removed from the DOD website but is available from Human Rights Watch at http://hrw.org/english/docs/2005/04/07/usdom10439.htm (last visited Aug. 8, 2006).

285 See Id. for a copy of the document. Human Rights Watch kept a copy before the DOD removed it from its own website.
I. Second Periodic Report of the United States of America to the Committee Against Torture

Two months after the DOD issued JP3-63, the administration released its “Second Periodic Report of the United States of America to the Committee Against Torture.” The United States submitted this document on May 6, 2005. In the report, the administration wrote:

After the President’s decision [not to grant POW status to the Taliban and al Qaeda detainees] the United States concluded that those who are part of al-Qaeda, the Taliban or their affiliates and supporters, or support such forces are enemy combatants whom we may detain for the duration of hostilities; these unprivileged combatants do not enjoy the privileges of POW’s (i.e., privileged combatants) under the Third Geneva Convention.

What was astounding about this statement was that the government was using enemy combatant and unprivileged combatant interchangeably, thus reverting to its earlier position that an enemy combatant is the same as an unlawful or unprivileged combatant. This is again inconsistent with other administration actions, including statements by Secretary Haynes, DOD definitions in JP2-01 and JP1-02, and in JP3-63.

286 In another Pentagon document, a two-page PDF dated Sept. 8, 2005, the DOD added that: “[e]nemy combatant is defined as an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.” Here too, we have a generic term that seemingly includes any person who is working for the enemy forces, thereby necessarily including lawful and unlawful combatants. Guantanamo Detainee Processes, available at http://www.pentagon.mil/news/Sep2005/d20050908process.pdf (last visited Aug. 8, 2006).


288 The President’s decision that is referred to above is the February 7, 2002 memo from President Bush, in Part Two (B)(1), to his national security advisors concerning the application of the Conventions to the war in Afghanistan Press Briefing, White House Counsel Judge Alberto Gonzales, DoD General Counsel William Haynes, DoD Deputy General Counsel Daniel Dell’Orto & Army Deputy Chief of Staff for Intelligence General Keith Alexander (June
Had the administration been consistent in its characterization of the detainees and applied the term enemy combatant as meaning nothing more than a generic term embracing all combatants, whether lawful or unlawful, this article would not be necessary. The detainees would then be considered protected persons. They would then either be protected under the GC3 as Prisoners of War or protected under the GC4 as unlawful combatants and/or civilians.\footnote{Obviously, not everyone agrees that the Taliban and al Qaeda fighters should be classified as unlawful combatants. As noted in Part One (A)(1), there were several arguments in support of the Taliban as lawful combatants and entitled to prisoner of war status. Similarly, there were some, albeit fewer, arguments favoring POW status for al Qaeda fighters as well.} Common Article, 3, the International Convention for Civil and Political Rights and the Customary Law portions of the Additional Protocols to the Geneva Conventions would also apply to our treatment of the detainees.\footnote{Part One (D) & F(1).} But the administration has not consistently equated enemy combatant with unlawful combatant.

\section*{J. The Military Commissions Act of 2006}


The definition for a lawful enemy combatant tracks the definition of lawful combatant, or prisoner of war, under GC3, although the language is not identical.\footnote{See Part Two (A) for the exact language under GP3. The wording of Lawful Enemy Combatant in the MCA reads: “(A) a member of the regular forces of a State party engaged in hostilities against the United States; available at http://www.whitehouse.gov/news/releases/2004/06/20040622-14.html (last visited Aug. 8, 2006).} However, the definition in
the MCA includes the operative word “or” between paragraphs (B) and (C). This seemingly indicates that the administration defines a member of the armed forces as a lawful enemy combatant even though the person does not meet all four requirements under (B). The administration took the opposite position when it argued that the Taliban did not qualify as lawful combatants because they did not meet the four requirements.293

Necessarily, the term lawful combatant is not the same as lawful enemy combatant for the simple reason that the word enemy does not appear in both terms. There is no reason for the United States to have added the word “enemy” if the administration intended for the two terms to be identical in meaning. By adding the word enemy to the term, the administration is denying that GC3 automatically applies to captured lawful combatants. A member of the regular forces of a state party engaged in hostilities against the United States could be defined as a lawful enemy combatant under the MCA, rather than as a lawful combatant under GC3. If so, he would not necessarily be granted prisoner of war status under the conventions.

An even more serious problem arises with those captives designated as unlawful enemy combatants under the MCA. This first of two paragraphs in the definition of unlawful enemy combatant reads:

“(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant under the MCA, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or

(B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or


293 See Part Two (B)(1) and also Part One (A) and Part Two (A).
combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)\textsuperscript{294}

Under this definition, a person who “purposefully and materially support[s] hostilities” is an enemy combatant. A person who sends money to al Qaeda or feeds an al Qaeda member, may fall within this definition, even though he never engaged in hostilities as a combatant.

The second paragraph of the definition is potentially more threatening to civil liberties. It reads: “(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.”

This paragraph allows for a person to be designated an enemy combatant by any “competent tribunal” created by the secretary of defense or the president-- whether or not the person has engaged in hostilities or has supported hostilities. Citizens as well as aliens fall within this definition. No standards are provided in determining who can be designated unlawful enemy combatants by these tribunals, nor are there any standards for determining what a competent tribunal is. There is also no time limitation as to how long the combatant may be held. Finally, no mention is made in the statute as to whether the nation must be in a time of war for the act to apply.

Section 7 of the MCA deprives all alien enemy combatants of the right to file habeas corpus petitions.\textsuperscript{295} Lawful and unlawful enemy combatants, who are foreign nationals, are covered by this definition. Moreover, the enemy combatant may be detained in the United States


\textsuperscript{295}
as well as abroad. Thus, if a foreign national who is designated as an enemy combatant is not
given a trial, but is merely detained without trial, he has no recourse to challenge his detention
under the MCA. He can, seemingly, be held indefinitely. At the time of this writing, the law has
just been signed. 296 Presumably, this section, along with other sections of the MCA, will be
challenged in court. 297 An enemy combatant who is a citizen retains the right to file a habeas
petition. However, he cannot invoke the Geneva Conventions or any protocols in his petition or
in any other civil action or proceeding in which the United States is a member. 298

In its most lethal form, the MCA is more insidious than the internment of the Japanese
Americans during WWII. The Japanese Americans had the right to trial and appeal in the United
States Supreme Court. Under the MCA, alien detainees live in a legal limbo outside the criminal
justice system and outside the Geneva Conventions. Not only is there no way for the detainees
under the MCA to challenge their detention, but their treatment can also not be challenged.

What protections are there for a foreign national who is treated cruelly, inhumanely or
degradingly, or even tortured, without the opportunity to seek relief through habeas?

PART FOUR. Looking Forward

In doing research for this article, I tried to identify the architect of the term enemy
combatant. My inquiries failed. I could not pinpoint the person. Knowing the person would be

alien need not have been determined to be an enemy combatant. As long as he is “awaiting such determination,” he
is covered by the provision.
296 October 17, 2006.
297 The Congress may only suspend the writ of habeas corpus “unless when in Cases of Rebellion or Invasion the
public Safety may require it.” U.S. CONST. art. I § 9, cl.2.
helpful in providing us with a clearer understanding as to whether the use of the term enemy combatant was an accident or part of a larger administration policy to expand the power of the executive and avoid the application of the Geneva Conventions. Molly Ivins wrote that William Haynes, Jr., Counsel to the Secretary of Defense, was the “author of the ‘enemy combatant doctrine.’” I checked with her researcher. She could not identify the source for the statement.

Although I have no proof, I suspect that Haynes was not the originator of the term. A staff member in one of the Congressional offices agreed that it was probably someone other than Haynes. Apparently, Haynes was not intimately involved in the creation of the policy regarding the application of the conventions to the captured detainees.

More likely, as criticism mounted against the administration’s treatment of the detainees in Guantanamo Bay, another very smart person in the administration cleverly thought of transforming the generic term enemy combatant into a new term of art. He probably acted

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300 There was also a New York Times editorial during that time that confirmed that “The ‘enemy combatant’ doctrine was developed on Mr. Haynes’s watch and it is one of the most dangerous legal developments in years.” The editorial pointed out that one of Haynes’ “most significant” cases was where his team “argued that bombing an island in the Northern Marianas did not violate the Migratory Bird Treaty Act” because the “bombing can enhance bird watching.” People “get more excitement spotting a rare bird than they do spotting a common one,” Haynes’s team said. Editorial, *An Injudicious Nominee*, N.Y. TIMES, Mar. 23, 2004, at A22, available at 2004 WLNR 5468883.
301 Jane Mayer, *The Memo*, NEW YORKER, Feb. 27, 2006, at 32. However, Haynes was involved in the creation and approval of the “counter-resistance techniques” to aid in the interrogation of the Guantanamo Bay detainees. See Memorandum from William J. Haynes, General Counsel on Counter-Resistance Techniques to the Secretary of Defense (Nov. 27, 2002) in *THE TORTURE PAPERS, THE ROAD TO ABU GHRAIB* 237 (Karen J. Greenberg & Joshua L. Dratel eds., Cambridge University Press 2005).
302 From the beginning, there were many interested officials, scholars and others who believed that the United States was doing what it could to circumvent the application of international law to the captured detainees. See, eg., Neil A. Lewis, “A series of Justice Department memorandums, written in late 2001 and the first few months of 2002, were crucial in building a legal framework for U.S. officials to avoid complying with international laws and treaties on handling prisoners, lawyers and former officials say.” Neil A. Lewis, *U.S. officials sought ways to avoid POW laws*, INT’L HERALD TRIB., May 22, 2004, at 3, available at 2004 WLNR 5200404.
without any fanfare as he inserted the term into the administration’s briefs that opposed challenges to the administration’s detainee policies. He also, presumably, coolly advised all high-level administration officials, including Haynes, to adopt the term in all future correspondence, documents and reports.

Of all the people I contacted, no one wanted to take credit, give credit, or, at least, disclose the architect to me. One former member of the White House Counsel’s office told me that he believed that the term enemy combatant “grew organically,” and that there was no “eureka” moment where someone at a meeting suggested using the term. According to him, there was never any debate or discussion of the term among the white house counsel.

As this former white house counsel understood at that time, the administration did not want to employ the lawful-unlawful designations for obvious reasons. The administration feared that if it classified the detainees as lawful combatants, it would have had problems interrogating them. It further believed that if it classified them as unlawful combatants, international experts would complain that the administration was in violation of the Geneva Conventions by not holding Article 5 hearings before determining the status of the detainees. Thus, he believed that the administration was in search of a more neutral term, an “objective description” or “umbrella term” for this category of combatant. Likely, the person who first thought of using the term did not care to discuss his thinking process with others.

So where are we today? After the Supreme Court decisions in Hamdi and Hamdan, and given the administration’s statements over the past five years, the following is possible:

1. There is no standard as to who is an enemy combatant. The term is vague and
overbroad, and can be applied arbitrarily. It has been applied to some people and not to others, and one cannot always tell the difference. For example, why was American citizen Yaser Hamdi designated an enemy combatant but American citizen John Walker Lindh, who was captured with Hamdi in Afghanistan, not classified as an enemy combatant?

2. In the future, if the executive classifies any person including an American citizen as an enemy combatant, that person can be held incommunicado for some indefinite period of time without access to a lawyer.

3. If any person, whether classified as an enemy combatant or not, is tried and acquitted, the government can intervene, classify him as an enemy combatant and hold him for an indefinite period of time in isolation. For example, if Jose Padilla is tried and acquitted on the criminal charge of conspiracy and related charges, the administration can nevertheless pick him up, reclassify him as an enemy combatant and return him to the naval brig, where he would be held in isolation.

4. The same is true for anyone whose term of imprisonment ends. The administration can immediately declare him to be an enemy combatant, pick him up and hold him for an indefinite period in isolation. For example, when John Walker Lindh, the “American Taliban,” completes his twenty year sentence, the administration argues that it has the power to stop him at the prison gates, classify him as an enemy combatant and remove him to a naval brig.

5. The administration argues that it can hold an enemy combatant for his entire life, should the war on terror extend for as long as he lives.

6. The administration argues that a non-citizen but legal resident can be held incommunicado as an enemy combatant, without contact with his family or anyone else other
than his lawyers, for a longer period of time than the government can hold an American citizen as an enemy combatant.

7. By applying CA3 to the detainees in Guantanamo, the Hamdan court effectively removed the application of GC3 and GC4 to the detainees. Both GC3 which protects lawful combatants as prisoners of war and GC4 which protects unlawful combatants as “civilians” provide more protections to captives than does CA3.

8. Until the reach of the Hamdan decision on the rights of detainees is determined by Congress or future Supreme Court decisions, some people classified as enemy combatants -- whether held in Guantanamo Bay, in a naval brig or in any other location -- can possibly still be subjected to cruel, humiliating and degrading treatment, and possibly even procedures that may approach torture. The Military Commissions Act of 2006 seems to allow such treatment, especially by CIA agents who hold detainees. Because they are held in isolation, the public is unlikely to ever know of their treatment.

We Americans have always prided ourselves on our role in pursuing justice and in upholding the rule of law. We assert to the world that we are the role model for human rights, and that all nations would do well to follow our lead.

Yet here we are in the first decade of the 21st century losing our footing. Our moral stance is rapidly sinking beneath us. The torture of the Iraqi prisoners at Abu Ghraib has revealed to us that we are not above torturing combatants. We have yet to know the full extent of the administration’s harsh treatment of the detainees at Guantanamo. We also have yet to know how American citizens Yaser Hamdi and Jose Padilla, and American legal resident Ali al
Marri were treated while in prolonged isolation in a naval brig.

Have we treated all our enemy combatants humanely? As noted earlier, President Bush said that although the enemy combatants are “not legally entitled to such treatment”\textsuperscript{303} we will provide humane treatment “to the extent and consistent with military necessity.”\textsuperscript{304} Has our “military necessity,” trumped humanity in this war on terror? What abuse have we wrought upon those we have arbitrarily designated as enemy combatants? And, as written in the Introduction, even if we reversed policy today, who can say what would happen tomorrow?

As long as we in America label captives as enemy combatants and thereby circumvent the Geneva Conventions, particularly GC3 and GC4, we cannot demand that other nations treat our soldiers any differently. If we want our soldiers who are captured in other countries to be treated as POWs, we must treat soldiers that we capture with the same respect. Other nations take our lead when we adhere to the rule of law. They also take our lead when we do not.

Enemy combatant is neither a term of art nor a legitimate term of constitutional law or international law. It is nothing more than a fiction that the administration has perpetrated in order to confuse the public and circumvent existing law. Until we acknowledge the illegitimacy of the term enemy combatant and the sanctioned abuse that we have caused, and may continue to cause in its name, we cannot expect the international community to regard us as the moral leaders we once were.

When the United States Supreme Court is next given the opportunity to revisit and address the term enemy combatant, the court must, in its wisdom, reject the term. In the

\textsuperscript{303} Bush memo in Part Two (B)(1).
\textsuperscript{304} Id.
meantime, the United States Congress would do well to revisit its Military Commissions Act of 2006 and eliminate some of its most disturbing provisions, including its definition of lawful and unlawful enemy combatants. The Congress has an obligation to both curb the executive’s exploitation of the term and to take the lead in moving us forward to a position of moral authority in the global society.