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THE COLLISION BETWEEN COMMON ARTICLE THREE AND THE CENTRAL INTELLIGENCE AGENCY

A. John Radsan*

My story has two important dates. On July 11, 2006, several days after the Supreme Court's decision in *Hamdan v. Rumsfeld*,¹ Dana Priest called me. Dana is a *Washington Post* reporter with a Pulitzer Prize for the stories she has pried loose from the intelligence community.² Her past reports described a comprehensive covert action program since 9/11³ and a set of secret prisons, run by the Central Intelligence Agency (CIA), in Eastern Europe.⁴ That day, she asked me to comment on the CIA's reaction to the *Hamdan* decision concerning military commissions in Guantanamo Bay, Cuba. As many times before, she was ahead of the day's news, more plugged into CIA headquarters than most CIA veterans.

Deputy Secretary of Defense Gordon England had just announced that all Defense Department activities would comply with Common Article 3 of the Geneva Conventions.⁵ That was one response to *Hamdan*, the Supreme Court's ruling that President Bush's version of military commissions did not comply with Common Article 3 or the Uniform Code of Military Justice (UCMJ).⁶ The Bush administration seemed on the verge

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1. 126 S. Ct. 2749 (2006).

2. See Dana Priest: 2006 Pulitzer Prize Winner in Category of Beat Reporting, <http://www.washingtonpost.com/wp-dyn/content/linkset/2006/04/17/LI2006041700530.html> (last visited Apr. 1, 2007).

3. Dana Priest, *Covert CIA Program Withstands New Furor*, WASH. POST, Dec. 30, 2005, at A1.

4. Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1.

5. Memorandum from Gordon England, Deputy Sec'y of Def. (July 7, 2006) (on file with Catholic University Law Review) (regarding the application of Common Article 3 of the Geneva Conventions to the treatment of detainees in the Defense Department).

6. *Hamdan*, 126 S. Ct. at 2759; see Uniform Code of Military Justice, 10 U.S.C. §§ 801-946 (Supp. IV 2004). Common Article 3 was enacted as part of the 1949 Conventions. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick

of accepting a sweeping conclusion that Common Article 3 applied to many other fronts in the conflict with al Qaeda, far beyond military commissions.⁷

Dana Priest and other observers wanted to know whether an acceptance of Common Article 3 would be limited to the Defense Department, or whether it would apply across the board to all United States agencies. The White House press secretary, Tony Snow, caught up in the busy preparations for the G-8 Summit in Moscow, had led some observers to believe that the Bush administration, as a matter of new policy or as a new interpretation of the law, had finally accepted the broadest application of Common Article 3.⁸

Dana said that senior officials at the CIA were scrambling, concerned about the impact that Common Article 3 would have on their activities. The implications were huge. Not claiming to be an expert on international humanitarian law, I asked Dana what Common Article 3 prevented that the Detainee Treatment Act (DTA) of 2005,⁹ or the McCain Amendment, did not already prevent. She paused. "You are the lawyer," her silence seemed to say, "You tell me." As Dana moved on to report on another story,¹⁰ I decided to come up with a better answer to her question.

The second date to my story occurred less than two months after my conversation with Dana Priest. On September 6, 2006, President Bush

in *Armed Forces in the Field* art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]. All references to Common Article 3 herein are cited to Geneva Convention III.

7. See *Hamdan*, 126 S. Ct. at 2795-96; News Release, Press Briefing by Tony Snow (June 29, 2005), <http://www.whitehouse.gov/news/releases/2006/06/20060629-6.html> [hereinafter Press Briefing]. Justice Stevens' opinion disagreed with the D.C. Circuit "that the war with al Qaeda evades the reach of the Geneva Conventions." *Hamdan*, 126 S. Ct. at 2795 (citing *Hamdan v. Rumsfeld*, 415 F.3d 33, 41-42 (D.C. Cir. 2005)).

8. Press Briefing, *supra* note 7 (stating that "we need to go ahead and bring to justice those who are at Guantanamo in a manner consistent with law and with our obligations to human rights"); see also Mark Mazzetti & Kate Zernike, *White House Says Terror Detainees Hold Basic Rights*, N.Y. TIMES, July 12, 2006, at A1.

9. Pub. L. No. 109-148, 119 Stat. 2739 (to be codified in scattered sections of 10, 28, and 42 U.S.C.). The Act prevented any person in United States custody from being subjected to cruel, inhuman, or degrading treatment as defined by the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution. 42 U.S.C.A. § 2000dd (West Supp. 2007).

10. See Charles Babington & Michael Abramowitz, *U.S. Shifts Policy on Geneva Conventions*, WASH. POST, July 12, 2006, at A1 (noting Dana Priest's assistance in developing the article).

acknowledged for the first time that the CIA had been running a program of secret facilities for the detention and interrogation of high-level terrorism suspects.¹¹ Days before the five-year anniversary of 9/11, presidential staffers had assembled a group of relatives of the victims of 9/11 to hear President Bush's dramatic speech from the East Room of the White House.¹² Although President Bush confirmed the broad lines of the secret prison program, he did not specify how the interrogations were conducted.¹³ He explained: "I cannot describe the specific methods used—I think you understand why—if I did, it would help the terrorists learn how to resist questioning and to keep information from us that we need to prevent new attacks on our country."¹⁴

President Bush also announced that fourteen suspected members of al Qaeda were being transferred to the Defense Department facility in Guantanamo.¹⁵ Among them was Abu Zubaydah, one of America's early catches after the war on terror was taken to al Qaeda's Afghan sanctuary.¹⁶ Zubaydah, a coordinator of the Hamburg cell that included a number of the 9/11 hijackers, was captured in March 2002.¹⁷ Zubaydah's capture, President Bush detailed, led to the capture of Khalid Sheikh Mohammed (KSM), the alleged mastermind of the 9/11 plot.¹⁸

In explaining the transfer of Zubaydah, KSM, and twelve other prisoners from secret facilities, President Bush noted the Supreme Court's *Hamdan* decision: "[T]he Supreme Court's recent decision has impaired our ability to prosecute terrorists through military commissions and has put in question the future of the CIA program."¹⁹ President Bush, however, made clear that he was keeping open the CIA's secret detention and interrogation program.²⁰ In the President's words, "having a CIA program for questioning terrorists will continue to be crucial to getting life-saving information."²¹

11. Remarks on the War on Terror, 42 WEEKLY COMP. PRES. DOC. 1569, 1570 (Sept. 6, 2006).

12. *Id.* at 1569.

13. *Id.* at 1570-71.

14. *Id.* at 1571.

15. *Id.* at 1573.

16. *Id.* at 1571; see also Michael R. Gordon, *New Confidence U.S. Has a Qaeda Leader*, N.Y. TIMES, Apr. 1, 2002, at A13.

17. *White House Was Flight 93 Target*, CBS NEWS, May, 23, 2002, <http://www.cbsnews.com/stories/2002/05/20/attack/main509535.shtml>.

18. Remarks on the War on Terror, *supra* note 11, at 1571. Ron Suskind states that, although the Zubaydah information was helpful to the CIA, KSM was captured as a result of an informant who sought the twenty-five million dollar bounty that had been placed on KSM's head. RON SUSKIND, *THE ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA'S PURSUIT OF ITS ENEMIES SINCE 9/11*, at 204 (2006).

19. Remarks on the War on Terror, *supra* note 11, at 1574.

20. *Id.*

21. *Id.*

As further explanation for the transfer of Zubaydah and company, President Bush referred to Common Article 3 of the Geneva Conventions.²² Bush said that Common Article 3 created two basic problems for the CIA's program of secret detention and interrogation.²³ First, he claimed that Common Article 3's terms were "vague and undefined."²⁴ Second, he noted that those American officers involved in the detention and interrogation of the suspects "could now be at risk of prosecution under the War Crimes Act."²⁵ This was unusual bluntness, especially on the second point, for an administration that has cloaked itself in secrecy.

Transferring the CIA's prisoners, by itself, did not eliminate any vagueness to the Common Article 3 standards and did not immunize intelligence officers for their past conduct. However, at that moment in the fall of 2006, President Bush was turning to Congress, behind a political curtain, for the clarity and the immunity he claimed was necessary for the CIA program. By throwing Zubaydah and KSM into the Guantanamo mix, President Bush increased the chances that Congress would accede to his demands on counterterrorism. Zubaydah and KSM, truly the worst of the worst, were far more important to American law and politics than Osama bin Laden's chauffeur.

As a delayed answer to Dana Priest, this Article attempts to answer what really worried the CIA about Common Article 3. From the September 6, 2006 announcement to the present, many clues have come straight from the President, the President's advisors, and congressional leaders. Those clues, as detailed below, lead to a simple conclusion that the CIA was worried that its officers would be exposed to civil and criminal liability for past actions and that aggressive tactics could no longer be used for future interrogations of suspected terrorists.

Although the CIA reviewed this Article to make sure that I did not reveal anything classified, it has neither confirmed nor denied that my conclusion is accurate. Based on my experiences as a former CIA lawyer, I offer a parallel path into what truly went on (and goes on) at the CIA.

The collision between Common Article 3 and the CIA that resulted from the *Hamdan* decision is significant for historical and analytical reasons. This collision relates more broadly to whether and how international humanitarian law should be adjusted so that American intelligence services, with justice and effectiveness, may counter the threat of international terrorism. This collision is significant even though Congress and the President, responding to *Hamdan*, passed the Military Commissions

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 1574-75. Exposure to criminal and civil penalties is an obvious concern to CIA officers. Although I left the CIA before the *Hamdan* decision, I heard more than one officer ask, "What do we do when we get a Hillary Clinton Justice Department?"

Act of 2006 (MCA).²⁶ The MCA, precluding the widest application of Common Article 3, is just one example of how American law has been adjusted to the current realities of American counterterrorism.²⁷

The law can easily change. If any aspect of the MCA is deemed unconstitutional, a broader application of Common Article 3 could spring back into effect. In any case, the MCA should keep scholars and the courts busy for years to come. Some question the breadth of the MCA's definition of enemy combatant.²⁸ Some question the extent to which the prisoners have been stripped of access to the courts.²⁹ And even if these constitutional challenges do not succeed, Congress, in an unlikely scenario, could choose to repeal the MCA—overriding what would likely be a veto by President Bush—to restore Common Article 3's wide scope from the *Hamdan* decision. Alternatively, with the MCA in place, the President may choose to specify—through an Executive order or some other finding—why military commissions must depart even further from Common Article 3 or why Common Article 3 should not apply at all to interrogations of suspected terrorists.³⁰ That is, to reduce Common Article 3's effect even further than the MCA, the President may assert or seek additional powers. For example, if what is left of Common Article 3 under American law impedes how aggressive the President would like to be in

26. See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

27. See, e.g., Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of 8, 10, 12, 15, 18, 20, 21, 22, 28, 31, 42, 49, and 50 U.S.C.).

28. See, e.g., R. Jeffrey Smith, *Detainee Measure to Have Fewer Restrictions*, WASH. POST, Sept. 26, 2006, at A1; HUMAN RIGHTS WATCH, Q AND A: MILITARY COMMISSIONS ACT OF 2006, at 5-6 (2006), <http://hrw.org/backgrounder/usa/qna1006/usqna1006web.pdf>; Posting of Marty Lederman to Balkinization, <http://balkin.blogspot.com> (Sept. 26, 2006, 02:58 EST). The MCA defines enemy combatant as “a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces).” 10 U.S.C.A. § 948a(1) (West Supp. 2007).

29. See 152 CONG. REC. S10,354-69 (daily ed. Sept. 28, 2006) (debating and rejecting Sen. Specter's amendment to strike the provision regarding habeas review). In *Boumediene v. Bush*, the D.C. Circuit ruled that the MCA, in limiting the detainees' access to domestic courts through habeas petitions, does not violate the Suspension Clause of the Constitution because “the Constitution does not confer rights on aliens without property or presence within the United States.” *Boumediene v. Bush*, 476 F.3d 981, 991 (D.C. Cir.), cert. denied, 127 S. Ct. 1478 (2007). *Boumediene* also reaffirmed the holding in *Johnson v. Eisentrager* that there is nothing in the Constitution or any statute that extends the right to common law habeas to “an alien enemy who, at no relevant time and in no stage of his captivity, has been within [the United States'] territorial jurisdiction.” *Id.* at 990 (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 768 (1950)). Even so, *Boumediene* is probably not the last word on this topic.

30. See 18 U.S.C.A. § 2441 note (Implementation of Treaty Obligations) (giving the President authority to interpret the meaning and application of the Geneva Conventions).

interrogating the next round of high-level terrorists, he might attempt to assert his commander in chief power to override the MCA or other pertinent aspects of American law. In short, Common Article 3 still matters to American counterterrorism.

This Article, combining history with analysis, is divided into five parts. In Part I, as prelude to the MCA, I summarize two references concerning interrogations of suspected terrorists: the Detainee Treatment Act of 2005 and Common Article 3.³¹ Second, I distill the Supreme Court's view of Common Article 3 from the *Hamdan* decision.³² Third, I identify interrogation tactics and activities that the CIA is reported to have used since 9/11.³³ Fourth, I analyze how those tactics are affected, if at all, by an application of Common Article 3.³⁴ Fifth, I offer observations about the retroactive wrinkle to the *Hamdan* decision and the potential that CIA officers, without the MCA fix, could have been charged with war crimes for their activities.³⁵

I. LEGAL REFERENCES

Several steps are relevant. After World War II, in 1955, the United States ratified the four Geneva Conventions, including Common Article 3. In 1990, the United States ratified the Convention against Torture.³⁶ In 1996, the United States passed a federal statute against war crimes, which were defined to include violations of Common Article 3.³⁷

After a change in administration and after the attacks on 9/11, the United States put itself on a war footing. Early in 2002, the Bush administration concluded that the Geneva Conventions did not apply to America's conflict with al Qaeda.³⁸ So for years after 9/11, the CIA, relying on legal advice from Justice Department and CIA lawyers, operated a secret program of aggressive interrogation.³⁹ Then, at the end of 2005, the McCain Amendment, resisted by the CIA, precluded the cruel, inhuman,

31. See *infra* Part I.

32. See *infra* Part II.

33. See *infra* Part III.

34. See *infra* Part IV.

35. See *infra* Part V.

36. See 136 CONG. REC. S17,486, S17,491-92 (1990); see also Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 [hereinafter CAT].

37. War Crimes Act of 1996, Pub. L. No. 104-192, § 2, 110 Stat. 2104 (1996) (current version at 18 U.S.C.A. § 2441 (West Supp. 2007)).

38. Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel, Dep't of Def. 1-2, 9-11 (Jan. 22, 2002) (on file with Catholic University Law Review) [hereinafter January 2002 Memo].

39. See Posting of Marty Lederman to Balkinization, <http://balkin.blogspot.com> (Dec. 16, 2005, 23:27 EST).

and degrading treatment of prisoners.⁴⁰ By the summer of 2006, *Hamdan* overruled the Bush administration's 2002 conclusion that Common Article 3 did not apply to the conflict with al Qaeda.⁴¹

From the beginning, the Bush administration has always said that it does not use torture in its counterterrorism policies.⁴² The administration reiterated this claim when an Office of Legal Counsel memorandum on interrogation standards⁴³ leaked to the public in 2004.⁴⁴ This memorandum, substantially retracted in a December 30, 2004 memorandum,⁴⁵ was quite stingy in its definition of torture, equating torture with the pain related to, among other things, "organ failure."⁴⁶

The Bush administration's stated policy against torture is consistent with the Constitution and with state and federal statutes.⁴⁷ Even so, for several years after 9/11, a loophole may have allowed the CIA to conduct interrogations that were severe but short of torture—according to the administration's definition. This loophole depended on a distinction between "torture" and "cruel, inhuman, and degrading treatment" (CID), two related concepts from the Convention Against Torture.⁴⁸ Even before torture was made a federal crime, under the Constitution and other statutes, both torture and CID were illegal for interrogations within the United States.⁴⁹ The federal statute, which was passed after the United

40. 42 U.S.C.A. § 2000dd (West Supp. 2007).

41. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2795-96 (2006).

42. See, e.g., News Release, Interview of the President by Laurence Oakes, Channel 9 TV (Oct. 14, 2003), <http://www.whitehouse.gov/news/releases/2003/10/20031018-4.html> (responding to inquires from Australian press by stating: "We don't torture people in America. And people who make that claim just don't know anything about our country.").

43. Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), in MARK DANNER, *TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR* 115 (2002) [hereinafter August 2002 Memo].

44. Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, WASH. POST, June 8, 2004, at A1.

45. Memorandum from Daniel Levin, Acting Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, to James B. Comey, Deputy Attorney Gen., U.S. Dep't of Justice (Dec. 30, 2004) (on file with Catholic University Law Review) [hereinafter Levin Memo].

46. August 2002 Memo, *supra* note 43, at 119-20.

47. See Levin Memo, *supra* note 45; see also U.S. CONST. amends. V, VIII, XIV; 18 U.S.C. § 2340A (2000); 18 U.S.C.A. § 2441 (West Supp. 2007); 28 U.S.C. § 1350 (2000) (codifying the Torture Victims Protection Act of 1991).

48. CAT, *supra* note 36, arts. 1, 16. The United States signed the Convention Against Torture and provided its own interpretations of and reservations from its obligation. See Office of the United Nations High Comm'r for Human Rights, *Ratifications and Reservations: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, <http://www.ohchr.org/english/countries/ratification/9.htm> (last visited Apr. 1, 2007).

49. CAT, *supra* note 36.

States ratified the Convention Against Torture, applies to torture outside the United States, making it a crime if the offender is a United States national, or is present in the United States.⁵⁰ This statute does not mention CID.⁵¹ Therefore, in interrogations that the CIA conducted on non-U.S. citizens outside the United States, CID may have continued past the December 2004 Office of Legal Counsel memorandum.⁵² The CIA, unlike the Defense Department, is not controlled by the strict standards of the Uniform Code of Military Justice.⁵³ As a result, the CIA may have operated in a gray zone below its definition of torture but beyond what the criminal justice system permits in the questioning of suspects and defendants. For a while, the CIA may have felt safe to use CID, but not torture, on suspected terrorists who were afforded fewer rights than American citizens.

By the time of the *Hamdan* decision in 2006, at least two sources of law had the potential of restricting CIA practices in the intermediate zone of aggressiveness: the McCain Amendment and Common Article 3. I analyze each of these sources in turn.

A. The McCain Amendment

The McCain Amendment, signed into law at the end of 2005 and then made part of the Detainee Treatment Act, tried to close the CID loophole.⁵⁴ The DTA prevents anyone in the custody or physical control of the United States from being “subject to cruel, inhuman, or degrading treatment or punishment.”⁵⁵ Waterboarding, in which a prisoner is made

50. 18 U.S.C. § 2340A.

51. *Id.*

52. Levin Memo, *supra* note 45. In footnote 8, Levin states: “While we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office’s prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum.” *Id.*

53. *See* 10 U.S.C. § 802 (2000).

54. 42 U.S.C.A. § 2000dd (West Supp. 2007). This Article does not explore the possibility that the President could override the McCain Amendment through his commander in chief powers. President Bush’s written statement upon signing the DTA, of course, left open this possibility. Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918, 1919 (Dec. 30, 2005) (“The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President . . . of protecting the American people from further terrorist attacks.”).

55. 42 U.S.C.A. § 2000dd(a).

to feel that he is about to drown or suffocate, was said to stop.⁵⁶ The definition of CID, however, was explicitly tied to American constitutional standards. In step with the United States reservations to the Convention Against Torture, the McCain Amendment took CID to mean the treatment or punishment that the Fifth, Eighth, and Fourteenth Amendments prohibited.⁵⁷ To the extent the American standard on CID differed from international standards, the former controlled.⁵⁸

Tying CID's definition to an American standard related to an existing debate on whether, or the extent to which, non-U.S. citizens who have resided completely outside the United States have any due process or other constitutional protections.⁵⁹ In this regard, the secret detainees, being further away from American jurisdiction, may have a more tenuous claim than the Guantanamo detainees to constitutional protection. In fact, there has been some suggestion that the secret detainees do not have any rights under due process or "shock the conscience" standards.⁶⁰ In any event, whether or not the detainees have protections beyond those of the Constitution itself, the primary source of law for the DTA is American law.

As of July 11, 2006, the date of Dana Priest's inquiry, international law could have factored into the judicial distillation of the standards for interrogating suspected terrorists. That is, international law could have been a

56. See, e.g., Posting of Marty Lederman, *supra* note 39 (writing that the McCain Amendment presumably prohibits waterboarding).

57. 42 U.S.C.A. § 2000dd(d).

58. See *id.* § 2000dd(c).

59. See, e.g., David Luban, Op-Ed., *Torture, American-Style*, WASH. POST, Nov. 27, 2005, at B1.

One clue concerning due process rights comes from dicta in *Rasul v. Bush*. There, the Supreme Court hinted that the claims of non-U.S. citizens at Guantanamo of excessive detention without counsel or charge implicated the Due Process Clause. *Rasul v. Bush*, 542 U.S. 466, 483 n.15 (2004). That footnote has been fodder for varying views within the legal academy on the due process rights of non-U.S. citizens. For the perspective that non-citizens are not entitled to due process abroad, see J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 469-70 (2007) ("[T]he Constitution does not protect the individual rights of noncitizens abroad whatsoever."). For a contrary view, see Elizabeth Sepper, *The Ties That Bind: How the Constitution Limits the CIA's Actions in the War on Terror*, 81 N.Y.U. L. REV. 1805, 1811 ("[C]ertain fundamental constitutional provisions limit the authority of an executive agency such as the CIA to act against non-citizens abroad.").

60. See, e.g., *To Continue to Receive Testimony on Military Commissions in Light of the Supreme Court Decision in Hamdan v. Rumsfeld: Hearing Before the S. Comm. on Armed Services*, 109th Cong. (2006) (statement of Neal Katyal, Professor of Law, Georgetown University). The decision in *Boumediene* made clear that according to the D.C. Circuit, at least, due process does not exist for non-citizens outside of the United States. "The law of this circuit is that a 'foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.'" *Boumediene v. Bush*, 476 F.3d 981, 992 (D.C. Cir.), *cert. denied*, 127 S. Ct. 1478 (2007) (quoting *People's Mojahedin Org. of Iran v. U.S. Dep't of State*, 182 F.3d 17, 22 (D.C. Cir. 1999)).

secondary source for American courts that interpreted the DTA, even as it was tethered to American constitutional standards. In contexts other than CIA interrogations, the Supreme Court has considered foreign law to decide what constitutes “cruel and unusual punishment” under the Eighth Amendment.⁶¹ Plus, it has been part of the Supreme Court’s canon to interpret American statutes, to the extent reasonable, in line with customary international law, including treaties and conventions.⁶²

Even if the DTA’s standards on interrogation are somewhat murky, the statute’s effective date, several years into the post-9/11 era, is clear.⁶³ As to interrogation standards, the McCain Amendment is not retroactive.⁶⁴ Indeed, once those who lobbied against the McCain Amendment realized that the Senator had the votes for change, they insisted on legal protection for United States personnel who, upon the “[g]ood faith reliance on advice of counsel,” engaged in aggressive interrogations.⁶⁵ In addition, those who were on the CIA’s side in Congress succeeded in giving the government the option of paying the legal fees for any United States personnel who became the subject of a criminal or civil suit.⁶⁶ Accordingly, Congress moved in the direction of immunizing and reimbursing CIA officers for their questionable work in the CID territory.

B. Common Article 3

Common Article 3, so named because it is present in all the Geneva Conventions, tries to establish a minimum level of decency toward all persons caught up in armed conflicts “not of an international character.”⁶⁷ Prisoners of war, a special category under the Conventions, are entitled to even more protections.⁶⁸

61. *Roper v. Simmons*, 543 U.S. 551, 575-78 (2005) (considering international opinion in determining whether juvenile death penalty is cruel and unusual punishment).

62. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *see also* JORDAN J. PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* 70, 99, 120, 124 n.2 (2d ed. 2003).

63. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(h), 119 Stat. 2739, 2743 (taking effect upon the date of enactment, December 30, 2005).

64. 42 U.S.C.A. § 2000dd-1(a) (West Supp. 2007).

65. *Id.* Vice President Richard Cheney and then Director of Central Intelligence Porter Goss tried to convince Senator McCain to withdraw his amendment. Eric Schmitt, *President Backs McCain on Abuse*, N.Y. TIMES, Dec. 16, 2005, at A1.

66. *See* 42 U.S.C.A. § 2000dd-1(b) (“The United States Government may provide or employ counsel, and pay counsel fees, court costs, bail, and other expenses incident to the representation of an officer, employee, member of the Armed Forces, or other agent described in subsection (a) of this section, with respect to any civil action or criminal prosecution arising out of practices described in that subsection . . .”).

67. *See* Geneva Convention III, *supra* note 6, art. 3; *see also* 3 COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 34-35 (Jean S. Pictet ed., 1960) [hereinafter OFFICIAL COMMENTARY].

68. *See* Geneva Convention III, *supra* note 6, art. 3.

The International Committee for the Red Cross (ICRC), accepted as an authoritative interpreter of the Conventions, considers Common Article 3 a “great step forward” in international law because the obligation of decency applies “automatically,” even if the other party to the conflict—another state or a guerrilla group—is not a signatory to the Convention.⁶⁹ The signatories to the Geneva Conventions place conditions on themselves regardless of the conduct of their adversaries.⁷⁰ Even if their adversaries stoop to barbarism, and even if they are unlikely to be called to account in the party’s courts or before international tribunals, the signatories will, in effect, fight with one hand tied behind their backs. That one tied hand represents some decency and humanity.

Despite the noble motives behind the Geneva Conventions, the rule of law has not graced all conflicts on our planet. For every letter of the alphabet, there seems to be a conflict that violates the Geneva Conventions: Abkhazia, Bosnia, Chechnya, Darfur, and Eritrea, to name a few. Those who trumpet international law might reply that the whole point is to set high standards so that, even after some slippage, everyone and everything will not sink into the muck. Yet, the labels of “bandits” or “anarchists” or “brigands” for those who do not reciprocate Common Article 3, do not fully convey the horrors of the modern international terrorist.⁷¹ A band of pirates in the eighteenth century might take a few ships hostage. A band of terrorists in the twenty-first century can take entire nations hostage.

One way to prevent a discussion of Common Article 3 from becoming too abstract is to ask how al Qaeda would treat a captured CIA case officer. Members of al Qaeda, to be sure, are not gentle. Al Qaeda was behind the ambush, torture, and execution of Daniel Pearl, a *Wall Street Journal* reporter who covered events in Pakistan and Afghanistan.⁷² Al Qaeda inspired the bombing of United Nations offices in Iraq.⁷³ And, Abu Musab al-Zarqawi, the former head of al Qaeda operations in Iraq, had a nasty habit of beheading people who had come to Iraq to do good deeds.⁷⁴ Surely a CIA officer, a representative from the tip of the sword in America’s global struggle against terrorism, would be treated more

69. OFFICIAL COMMENTARY, *supra* note 67, at 35, 37 (stating that Common Article 3 is “applicable automatically, without any condition in regard to reciprocity”).

70. See, e.g., Geneva Convention III, *supra* note 6, art. 2.

71. See OFFICIAL COMMENTARY, *supra* note 67, at 36-38 (referring to civil disturbances as acts of “banditry,” and to people that fail to apply Common Article 3 as anarchists and brigands).

72. See *Fallen Journalist: Daniel Pearl Is Dead, Abducted in Pakistan and Killed by Captors*, WALL ST. J., Feb. 22, 2002, at A1.

73. See Dexter Filkins & Richard A. Opper Jr., *Scene of Carnage: Bomb in Cement Truck—Dozens Hurt and Many Are Missing*, N.Y. TIMES, Aug. 20, 2003, at A1.

74. See Jeffrey Gettleman, *Abu Musab al-Zarqawi Lived a Brief, Shadowy Life Replete With Contradictions*, N.Y. TIMES, June 9, 2006, at A10.

harshly than journalists, international civil servants, and relief workers. The CIA officer, besides being a prominent symbol, might have useful information about CIA operations against al Qaeda. The CIA officer, pried loose of this information, could lead al Qaeda to other CIA officers. Would Zarqawi or someone of his ilk pause to consider international humanitarian law in treating the captured CIA officer? Would Zarqawi consult lawyers on the finer points of Common Article 3? If, by a miracle, Zarqawi had had the least interest in international law, he could have argued that because the CIA officer was not wearing a military uniform, he was not entitled to prisoner of war status.⁷⁵

To paraphrase former British Prime Minister Tony Blair, the battle between the United States and international terrorism is not a conflict of civilizations.⁷⁶ It is a conflict for civilization. In this conflict, our respect for the law maintains support from our public and from our allies. Even so, respect for the rule of law is a necessary but insufficient tool against the terrorists. Success requires other tools such as diplomacy, security measures, military operations, intelligence, and covert action.

In reality, the Geneva Conventions have had only a modest effect in preventing barbarism in places like Sarajevo, Kampuchea, and Rwanda.⁷⁷ In the treaty books, articles other than Common Article 3 regulate interstate warfare, while Common Article 3 draws in intrastate warfare.⁷⁸ As to Common Article 3, the ICRC assumes that the armed conflicts are for control of, or secession from, a government.⁷⁹ For the ICRC, those who do not comply with Common Article 3—rebels—merit the opprobrious labels of bandit, anarchist, or brigand.⁸⁰ The fact that the ICRC does not

75. Common Article 3, of course, is a separate question from whether POW protections apply during the conflict between the United States and al Qaeda.

76. Janet Stobart, *Blair Defends Foreign Policy of Intervention*, L.A. TIMES, Mar. 22, 2006, at A3 (quoting Prime Minister Blair as stating that the war on terror is not “a clash between civilizations. It is a clash about civilization. It is the age-old battle between progress and reaction, between those who embrace and see opportunity in the modern world and those who reject its existence.”).

77. See *Calling for Forgiveness, Serbia Leader Apologizes to Bosnia for War*, N.Y. TIMES, Nov. 14, 2003, at A3 (“[M]ore than 10,000 people died during [the] siege by Serbian forces that lasted for three and a half years . . .”); Elizabeth Becker, *Lon Nol Pleads for Cambodia Help*, WASH. POST, Sept. 22, 1978, at A22 (“Since the communist government of Democratic Kampuchea was established, an estimated 1 million people have been executed or have died of starvation . . .”); James C. McKinley Jr., *Rewriting Burundi’s Brutal Past*, N.Y. TIMES, Aug. 14, 1997, at A8 (explaining that the Hutu-led genocide of the Tutsi in Rwanda ended in the death of more than 500,000 people).

78. See Geneva Convention III, *supra* note 6, art. 3 (applying to conflicts “not of an international character occurring in the territory of one of the High Contracting Parties”).

79. See OFFICIAL COMMENTARY, *supra* note 67, at 36 (noting that Common Article 3 applies to civil disturbances).

80. See *id.* at 37-38 (“If an insurgent party . . . does not apply [Common Article 3] it will prove that those who regard its actions as mere acts of anarchy or brigandage are right.”).

recognize that anarchy or disorder could become complete, without any government in charge, suggests, in part, that the Conventions are not adjusted to the modern era.⁸¹ The Conventions do not anticipate failed states whereby areas of the globe are controlled by thugs and warlords.

Common Article 3, however, does provide some specificity in what is prohibited. Most relevant to CIA practices are the various subsections within the first section on the treatment of all persons.⁸² First, “violence to life and person, . . . mutilation, cruel treatment and torture” are prohibited.⁸³ Second, the “taking of hostages” is banned.⁸⁴ Third, “outrages upon personal dignity, in particular, humiliating and degrading treatment” are also banned.⁸⁵ Fourth, judicial proceedings related to the persons must provide all “guarantees which are recognized as indispensable by civilized peoples.”⁸⁶

These provisions, as the ICRC concludes, boil down to an obligation of “humane treatment.”⁸⁷ Such treatment is laudable, but the generality of this phrase makes it difficult for legal counsel to provide specific advice to policymakers—at the CIA and elsewhere—who choose to approach the line of legality without crossing into illegality. Perhaps the generality of the Geneva Conventions is intended to preclude such line-drawing.

When the lines between conventional and unconventional warfare are blurred, perhaps a focus on one Article of the Geneva Conventions provides a more concrete service than a broad statement about the paradox of regulating warfare. Common Article 3, for an international text, is relatively short. To some extent, Common Article 3 overlaps with the DTA in precluding “cruel” and “degrading” treatment.⁸⁸ But, because Common Article 3 precludes more than the DTA does,⁸⁹ it has an increased potential for adjusting the practices of American counterterrorism. Torture, certainly, is off limits under both Common Article 3 and

81. See Robert J. Delahunty & John Yoo, *Statehood and the Third Geneva Convention*, 46 VA. J. INT’L L. 131, 163 (2005) (concluding that because the President could have considered Afghanistan a failed state at the initiation of the Afghan campaign, “the President could have concluded that the Third Geneva Convention was no longer in effect as between the United States and Afghanistan”).

82. See Geneva Convention III, *supra* note 6, art. 3(1)(a)-(d) (providing specific prohibitions that are offered in contradistinction to “humane” treatment).

83. *Id.* art. 3(1)(a).

84. *Id.* art. 3(1)(b).

85. *Id.* art. 3(1)(c).

86. *Id.* art. 3(1)(d).

87. See OFFICIAL COMMENTARY, *supra* note 67, at 39 (stating that the Conventions chose not to undertake the difficult task of defining “humane treatment,” but instead chose to enumerate things that are incompatible with it).

88. Compare 42 U.S.C.A. § 2000dd (West Supp. 2007), with Geneva Convention III, *supra* note 6, art. 3.

89. Compare 42 U.S.C.A. § 2000dd, with Geneva Convention III, *supra* note 6, art. 3.

the DTA.⁹⁰ Yet, Common Article 3 may cover more of the CID territory than the DTA does because the Geneva Conventions, unlike the DTA, are not tied to American constitutional standards.⁹¹ Further, Common Article 3, as part of the Geneva Conventions, may go beyond the concept of CID, which stems from the Torture Convention.⁹² For example, pushing a prisoner may not qualify as either torture or CID under the Torture Convention but might qualify as a violation of Common Article 3 as an “outrage[] upon personal dignity.”⁹³

Early into the global struggle against terror, the Bush administration recognized the potential importance of Common Article 3. The Office of Legal Counsel (OLC), in its memorandum concerning the application of international treaties and federal laws to al Qaeda and Taliban detainees, concluded in January 2002 that the United States was not required to treat al Qaeda members consistent with Common Article 3.⁹⁴ In doing so, OLC rejected the *Prosecutor v. Tadic* decision from the International Criminal Tribunal (ICT) for the Former Yugoslavia.⁹⁵ OLC criticized the ICT “view that common article 3 applie[d] to all armed conflicts of *any* description other than those between state parties.”⁹⁶ OLC suggested that the better view limited Common Article 3 “to internal conflicts between a State and an insurgent group.”⁹⁷ Alberto Gonzales, as White House counsel, supported OLC’s conclusions and conveyed them to President Bush.⁹⁸ As a result, in February 2002, President Bush announced that, although terrorism “detainees [would] be treated humanely,” neither Common Article 3 nor any other part of the Geneva Conventions would apply except to the extent “appropriate and consistent with military necessity.”⁹⁹ Although the CIA Director was included in the list of officials who received the President’s memorandum, its operative language was directed, not to the CIA, but to the United States Armed Forces.¹⁰⁰

Prior to the Supreme Court’s decision in *Hamdan*, Common Article 3 did not seem to interfere with the actions of the Defense Department, the CIA, and other American agencies in countering terrorism. In addition,

90. See 42 U.S.C.A. § 2000dd; Geneva Convention III, *supra* note 6, art. 3(1)(a).

91. See 42 U.S.C.A. § 2000dd; Geneva Convention III, *supra* note 6, art. 3.

92. Compare CAT, *supra* note 36, art. 1(1), with Geneva Convention III, *supra* note 6, art. 3.

93. Geneva Convention III, *supra* note 6, art. 3(1)(c).

94. January 2002 Memo, *supra* note 38, at 1.

95. See *id.* at 8-9.

96. *Id.* at 8.

97. *Id.*

98. See Memorandum from Alberto R. Gonzales, Counsel to the President, to George W. Bush, U.S. President (Jan. 25, 2002), in DANNER, *supra* note 43, at 83.

99. See Memorandum from George W. Bush, U.S. President (Feb. 7, 2002), in DANNER, *supra* note 43, at 83.

100. See *id.* at 106.

as the public's attention was diverted to the abuses (and the perception of abuses) at Guantanamo and Abu Ghraib,¹⁰¹ both of which are Defense Department facilities, the CIA avoided some scrutiny of its own practices.

An important day of reckoning for all agencies involved in counterterrorism came more than four years after 9/11 when the Supreme Court heard *Hamdan v. Rumsfeld*.¹⁰² As far as Common Article 3 was concerned, the Bush administration hoped that the Supreme Court would accept the OLC's logic in the same way as the Court of Appeals for the D.C. Circuit.¹⁰³ The new Chief Justice, John Roberts, who was part of the D.C. Circuit's decision, recused himself from the case in the Supreme Court.¹⁰⁴ So, to start, one vote was lost for the Bush administration.

II. *HAMDAN* ON COMMON ARTICLE 3

Salim Ahmed Hamdan, a Yemeni national, had been captured in Afghanistan during American operations after the 9/11 attacks.¹⁰⁵ Eventually, he was transferred to Guantanamo and designated an enemy combatant.¹⁰⁶ This designation, in accordance with the Court's decision in *Hamdi v. Rumsfeld*,¹⁰⁷ was confirmed through a Combatant Status Review Tribunal (CSRT).¹⁰⁸

For some reason, the Bush administration chose not to let Hamdan languish in limbo. Perhaps the administration wanted to show the public, at home and abroad, that it could convict some al Qaeda members, even if those convictions did not occur within the criminal justice system.¹⁰⁹ Unlike the case of David Hicks, in which the Australian government

101. See, e.g., Josh White, *Abu Ghraib Dog Tactics Came From Guantanamo*, WASH. POST, July 27, 2005, at A14 (describing similarities in prisoner mistreatment at the two facilities).

102. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

103. See *Hamdan v. Rumsfeld*, 415 F.3d 33, 40-42 (D.C. Cir. 2005) (dismissing Hamdan's Geneva Convention challenge on three independent grounds: (1) the Geneva Conventions were not judicially enforceable; (2) Hamdan was not entitled to their protections; and (3) even if he was entitled to their protections, the abstention rule set forth in *Schlesinger v. Councilman*, 420 U.S. 738 (1975), was appropriate), *rev'd*, 126 S. Ct. 2749 (2006).

104. *Hamdan*, 126 S. Ct. at 2749.

105. *Id.* at 2759.

106. *Id.* at 2759, 2761.

107. 542 U.S. 507, 533 (2004) (plurality opinion) (holding that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker").

108. *Hamdan*, 126 S. Ct. at 2761.

109. Zacarias Moussaoui's conviction in the Eastern District of Virginia is one example where an al Qaeda member was convicted in the criminal justice system. See Jerry Markon, *Moussaoui Pleads Guilty in Terror Plot*, WASH. POST, Apr. 23, 2005, at A1.

pushed for this Australian prisoner in Guantanamo to receive justice,¹¹⁰ there is little evidence that the Yemeni government pushed for Hamdan's trial.

Under the presumed authority of President Bush's order of November 13, 2001, which established the military commissions,¹¹¹ Hamdan was charged with violating the laws of war.¹¹² Hamdan was suspected of being Osama bin Laden's driver and bodyguard, and of transporting weapons and personnel on behalf of al Qaeda.¹¹³

Hamdan challenged the legality of the military commission that had been created to try him, not his designation as an enemy combatant.¹¹⁴ The military commission that was to try Hamdan did not provide him with as many protections as courts-martial under the UCMJ.¹¹⁵ The rules of evidence were less stringent.¹¹⁶ The commission permitted "any evidence that, in the opinion of the presiding officer, would have probative value to a reasonable person."¹¹⁷ Arguably, this loose standard was needed to protect the CIA's sources and methods and to slip in evidence that was obtained through coercion. In addition, Hamdan could be—and was—excluded from portions of the trial.¹¹⁸ Hamdan argued that, because Congress had not authorized the military commission, these departures from usual procedures violated the UCMJ and Common Article 3.¹¹⁹

Justice Stevens, writing for himself and three other members of the Court, as well as Justice Kennedy, who concurred in most of the judgment, agreed with Hamdan.¹²⁰ Justice Stevens rejected the government's argument that Congress had authorized the military commissions through the Authorization for Use of Military Force, passed soon after 9/11, or through the Detainee Treatment Act, passed years later.¹²¹ Justice Ste-

110. Neil A. Lewis, *Australian Pleads Not Guilty to Terrorism Conspiracy*, N.Y. TIMES, Aug. 26, 2004, at A14.

111. See Military Order of Nov. 13, 2001, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

112. *Hamdan*, 126 S. Ct. at 2760-61.

113. *Id.* at 2761.

114. *Id.* at 2759 (noting that Hamdan's "objection is that the military commission the President has convened lacks authority" to try him).

115. *Id.* at 2786.

116. *Id.* at 2786-87.

117. *Id.* at 2786.

118. *Id.* at 2786, 2788.

119. *Id.* at 2787, 2793.

120. *Id.* at 2798. Since Justice Kennedy viewed the military commissions as a violation of the UCMJ, passed by Congress, he disagreed with Justice Stevens that it was necessary to discuss the specifics of whether the military commissions complied with Common Article 3's notion of a "regularly constituted court" or whether the conspiracy charge against Hamdan comported with Common Article 3. *Id.* at 2809 (Kennedy, J., concurring).

121. *Id.* at 2774-75 (majority opinion).

vens, in broad brushes, stated that the President had not adequately demonstrated why the procedures for the military commissions needed to deviate from the UCMJ.¹²²

As to military commissions, Hamdan was allowed judicial enforcement of international law, including the Geneva Conventions.¹²³ Under the UCMJ, if the United States charges a violation of the laws of war, it must follow international law in its procedures for the military commissions.¹²⁴ In other words, Justice Stevens gave Hamdan and other suspected terrorists a sort of shield—but not a sword. When the administration did not receive Congress' blessing on the commissions, Justice Stevens said the Geneva Conventions were incorporated into the procedures used to prosecute violations of the laws of war.¹²⁵ Otherwise, Justice Stevens did not go any further in allowing suspected terrorists to have judicial enforcement of the Geneva Conventions.

In *Hamdan*, Justice Stevens did not address whether al Qaeda detainees are entitled to protections beyond Common Article 3.¹²⁶ The majority's conclusion that Common Article 3 applied to Hamdan was deemed enough to support a ruling that Hamdan's military commission did not comply with American law.¹²⁷ The Court rejected the government's argument that Common Article 3 did not apply to the conflict with al Qaeda.¹²⁸

In effect, by applying Common Article 3 to all conflicts that were not between states, Justice Stevens rejected OLC's argument that Common Article 3 was essentially limited to civil wars. Further, Justice Stevens said it was irrelevant under Common Article 3 that al Qaeda was not a signatory to the Geneva Conventions.¹²⁹ He suggested that Common Article 3 is the baseline for everyone, regular or irregular combatant, caught up in the conflict between the United States and al Qaeda.¹³⁰

122. *Id.* at 2797-98 (plurality opinion) (requiring some showing of "evident practical need" to justify deviations from UCMJ).

123. *Id.* at 2796 (majority opinion).

124. *Id.* at 2786.

125. *Id.* at 2795-97.

126. *See id.* at 2795-96, 2798.

127. *Id.* at 2794-95 ("[R]egardless of the nature of the rights conferred on Hamdan, [the Geneva Conventions] are . . . part of the law of war. And compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted." (citations omitted)).

128. *Id.* at 2795.

129. *See id.* at 2796 ("Common Article 3 . . . affords some 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.").

130. *See id.* (stating that the scope of Common Article 3 must be interpreted as broadly as possible).

It is not clear whether the Court's view is limited to Hamdan's military commission because it was not a "regularly constituted court," the strict holding of the case,¹³¹ or whether the Court's view extends toward many other practices in the conflict with al Qaeda. The disdainful tone toward the executive, including references to executive "whim,"¹³² and the summary dismissal of the government's arguments about inherent presidential powers,¹³³ open up the expansive view of the decision. Even so, as Justice Stevens made explicit, the *Hamdan* decision did not overrule the executive's prerogative to hold Hamdan for the duration of the conflict as an enemy combatant.¹³⁴ Absent congressional authorization, Hamdan simply could not be tried by procedures that fell short of the court-martial system.¹³⁵

Justice Stevens gave Common Article 3 the broad interpretation that OLC had earlier rejected as an amendment of the Geneva Conventions without the consent of the signatories.¹³⁶ Perhaps Common Article 3, under the broadest reading of *Hamdan*, was in effect before 9/11, on 9/11, and after 9/11 for all al Qaeda detainees, not just those in Guantanamo. If Common Article 3 has thus applied to all fronts in the United States conflict with al Qaeda, the perceived loophole for some CIA interrogations between torture and what is permitted in the criminal justice system may have been an illusion. The DTA, Senator McCain's valiant effort, may thus be described as superfluous, as a softer reminder of Common Article 3's prohibitions, or as extra insurance for humane practices in American counterterrorism.

The Defense Department's loss on its version of military commissions in *Hamdan* may have caused a broader setback for all American agencies engaged in counterterrorism. Once upon a time, the CIA could hide its problems behind the Defense Department's problems, or the CIA could hide secret detainees behind the prisoners in Bagram, Guantanamo, and Abu Ghraib.¹³⁷ After *Hamdan*, in the scrambling that Dana Priest detected, the Defense Department's setback became the CIA's setback.

131. *Id.* at 2796-97 (quoting Geneva Convention III, *supra* note 6, art. 3(1)(d)).

132. *Id.* at 2797 n.65.

133. *See id.* at 2791-93.

134. *Id.* at 2798 ("It bears emphasizing that Hamdan does not challenge, and we do not today address, the Government's power to detain him for the duration of active hostilities in order to prevent such harm.").

135. *Id.* at 2791-93, 2798.

136. *Id.* at 2795 (defining "conflict not of an international character" as any armed conflict that is not between two nations (quoting Geneva Convention III, *supra* note 6, art. 3)).

137. *See* Dana Priest & Scott Higham, *At Guantanamo, a Prison Within a Prison*, WASH. POST, Dec. 17, 2004, at A1 (identifying secret CIA prisons within Guantanamo Bay, "on an off-limits corner of the Bagram air base in Afghanistan, on ships at sea and on Britain's Diego Garcia Island in the Indian Ocean"); *see also* Dana Priest & Joe Stephens,

Those who applaud the *Hamdan* decision, of course, will reject negative descriptions of that case as a “loss” or a “setback.” For them, *Hamdan*, a landmark decision, was a giant step forward in applying the rule of law. As they would describe, all that changed was that American agencies were reminded that they must treat prisoners humanely.¹³⁸ In neutral terms, whether *Hamdan* is a loss or a gain, it now seems clear that the Supreme Court caused the CIA to reassess its practices significantly.

III. CIA PRACTICES

For my purposes here, I assume that to the extent any non-U.S. citizens have been (or are) in CIA custody, they are connected to al Qaeda and were captured outside their countries of residence.¹³⁹ That assumption corresponds with the public record about the CIA detainees, and comports with *Hamdan*’s focus on al Qaeda rather than the Taliban.¹⁴⁰ According to *Hamdan*, even if full Geneva protections do not apply to the “conflict with al Qaeda,” Common Article 3, at a minimum, does apply.¹⁴¹

The CIA has taken custody of terrorism suspects through various means. Some suspects were captured by the Defense Department or other United States agencies and then transferred to the CIA.¹⁴² Some, especially in the early days of the American ground offensive in Afghanistan, had been turned over to the United States by Afghan warlords and other bounty hunters.¹⁴³ And some suspects were captured by the intelligence services and military wings of foreign governments.

A joint American-Pakistani operation is said to have resulted in Abu Zubaydah’s capture in March 2002.¹⁴⁴ Zubaydah, described as an al Qaeda lieutenant, seems to have been the first significant capture.¹⁴⁵ According to the press, the FBI and the CIA had an impassioned debate

Secret World of U.S. Interrogation, WASH. POST, May 11, 2004, at A1 (identifying secret CIA prison at Abu Ghraib, whose prisoners were referred to as “ghost detainees”).

138. See Linda Greenhouse, *Military Panels Found to Lack Authority—New Law Possible*, N.Y. TIMES, June 30, 2006, at A1.

139. Otherwise, the Geneva Conventions restrict occupying powers in ways that go beyond Common Article 3. See Geneva Convention III, *supra* note 6, art. 2. The American presence in Iraq is a case in point.

140. *Hamdan*, 126 S. Ct. at 2795.

141. *Id.*

142. See Jane Mayer, *A Deadly Interrogation*, NEW YORKER, Nov. 14, 2005, at 44 (discussing the CIA’s interrogation of Department of Defense capture Manadel al-Jamadi).

143. See Joel Brinkley & Eric Lichtblau, *U.S. Releases Saudi-American It Had Captured in Afghanistan*, N.Y. TIMES, Oct. 12, 2004, at A15 (discussing capture of Yaser Hamdi); Raymond Bronner, *Australia Uneasy About U.S. Detainee Case*, N.Y. TIMES, Apr. 10, 2005, § 1, at 10; Neil A. Lewis, *U.S. in Talks to Return Scores Held At Cuba Site*, N.Y. TIMES, Dec. 1, 2003, at A7 (discussing the capture of detainees by bounty hunters).

144. SUSKIND, *supra* note 18, at 88-89.

145. See David Johnston, *At a Secret Interrogation, Dispute Flared Over Tactics*, N.Y. TIMES, Sept. 10, 2006, § 1, at 1.

about how Zubaydah, a terrorist facilitator and a logistics person, should be interrogated.¹⁴⁶ The FBI, based on a criminal justice model with a goal of preserving the possibility that the suspect's statements could eventually be used in court, advocated establishing rapport with the suspect.¹⁴⁷ The CIA, probably convinced that Zubaydah had been trained in counterinterrogation tactics, advocated harsher tactics.¹⁴⁸ The CIA seems to have won that debate, closer to 9/11, when the risks seemed higher than today that there would be follow-on attacks from al Qaeda.

During Zubaydah's interrogation, pain medication may have been withheld from him, and other harsh tactics may have been used, including depriving him of sleep, bombarding him with loud music, forcing him to remain in "stress positions," dousing him with cold water, and keeping the temperature to his cell uncomfortably hot or cold.¹⁴⁹ Thus, the Zubaydah interrogation went far beyond what would be permitted within the criminal justice system. The Bush administration, having read Common Article 3 out of this context, seemed to have operated on the assumption that these techniques did not violate Zubaydah's due process rights, if he had any. Zubaydah, the record shows, is a non-U.S. citizen and the interrogations were conducted outside the United States.¹⁵⁰

A year later, another joint American-Pakistani operation resulted in KSM's capture.¹⁵¹ KSM, called the mastermind of the 9/11 plot, was a bigger capture.¹⁵² KSM is reported to have been waterboarded, a practice that involves either strapping wet towels over the suspect's face or dunking him under water while attached to a board.¹⁵³ Under either variation, the objective is to frighten the suspect into thinking that he is about to drown or suffocate.¹⁵⁴ Thus, KSM's interrogation also went far beyond the criminal justice system.

Besides Zubaydah and KSM, the CIA captured some suspects on its own. Of these, some were snatched from less than traditional battlefields. For example, the CIA is alleged to have snatched Abu Omar, a

146. *Id.*

147. *See id.*

148. *See id.*

149. *Id.*; SUSKIND, *supra* note 18, at 115.

150. *See* Johnston, *supra* note 145 (reporting that the interrogations took place in Thailand).

151. *See* Jonathan F. Lenzner, Note, *From a Pakistani Stationhouse to the Federal Courthouse: A Confession's Uncertain Journey in the U.S.-Led War on Terror*, 12 CARDOZO J. INT'L & COMP. L. 297, 297 & n.2 (2004).

152. Remarks on the War on Terror, *supra* note 11, at 1571-72.

153. Dan Eggen, *Cheney's Remarks Fuel Torture Debate*, WASH. POST, Oct. 27, 2006, at A9.

154. *Id.*

radical Muslim cleric, from the streets of Milan on February 17, 2003.¹⁵⁵ Other suspects were taken from traditional battlefields such as Afghanistan.¹⁵⁶ Finally, the CIA is said to have kept “ghost detainees” at Abu Ghraib—prisoners whom the CIA convinced the Defense Department not to place on official rolls.¹⁵⁷

Although President Bush claimed on September 6, 2006 that all prisoners from CIA facilities were being transferred to Guantanamo, he retained the option of putting future captures into the secret program.¹⁵⁸ While he answered some questions about the program, he left many aspects a mystery. He confirmed that “alternative” techniques had been used but refused to provide any specifics.¹⁵⁹ By the President’s claim, such specifics would provide dangerous tips to al Qaeda for training its operatives in counterinterrogation.¹⁶⁰ Moreover, the administration has not confirmed where the CIA facilities were or are located, when the program began, or how many suspects have been in the program.¹⁶¹

For political and legal reasons, the CIA’s secret prisons must be outside the United States. Although a few CIA prisoners may have been mixed into known Defense Department facilities at Bagram Air Force Base in Afghanistan, Abu Ghraib prison in Iraq, or Guantanamo Bay, Cuba,¹⁶² the bulk of CIA prisoners must have been held somewhere else because holding them at known locations would contradict the CIA’s asserted need for secrecy. Thailand, Poland, and Romania have been mentioned as sites.¹⁶³ Estimates from outside the administration put the total for the program at about one hundred different persons over several years, with thirty to forty persons usually held at any time.¹⁶⁴ Moreover, one journalist speculated to me, in private, that after Dana Priest broke her story about secret CIA prisons in Eastern Europe, the CIA rounded up the

155. A. John Radsan, *A More Regular Process for Irregular Rendition*, 37 SETON HALL L. REV. 1, 1-2 (2006); Craig Whitlock, *Europeans Investigate CIA Role in Abductions*, WASH. POST, Mar. 13, 2005, at A1.

156. SUSKIND, *supra* note 18, at 55 (describing then CIA Director George Tenet’s concerns with holding CIA captures in Afghanistan).

157. Josh White, *Army, CIA Agreed on ‘Ghost’ Prisoners*, WASH. POST, Mar. 11, 2005, at A16.

158. Remarks on the War on Terror, *supra* note 11, at 1573-74.

159. *Id.* at 1570-71.

160. *Id.* at 1570.

161. *Id.*

162. Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A1; Priest & Higham, *supra* note 137; White, *supra* note 157.

163. Brian Ross & Richard Esposito, *Sources Tell ABC News Top Al Qaeda Figures Held in Secret CIA Prisons*, ABC NEWS, Dec. 5, 2005, <http://abcnews.go.com/WNT/Investigation/story?id=1375123>.

164. See Dana Priest, *CIA Holds Terror Suspect in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1.

prisoners and transferred them all to Mauritania. By this theory, KSM and company, without much of a change in external temperature, were eventually transferred from Mauritania to Cuba.

Keeping track of secret prisoners is a difficult task for scholars, human rights organizations, and other outside observers. Sometimes terrorism suspects were jointly controlled by the United States and foreign jurisdictions. Sometimes they were transferred into United States custody from foreign jurisdictions. Sometimes they were transferred between United States agencies. Sometimes they were jointly controlled by more than one United States agency. Sometimes they were transferred to foreign jurisdictions. Over and over, a prisoner could have been recycled from one set of hands to another. The transfer to foreign jurisdictions, usually described as “extraordinary rendition,” has been roundly criticized, along with many other Bush administration policies, since the public perception is that rendition facilitates coercive interrogations that would not be possible (or legal) in United States territory or under United States control.¹⁶⁵

As noted, secret prisoners, under the designation of “enemy combatants,” may be held for the duration of the American conflict with international terrorism—perhaps indefinitely.¹⁶⁶ Nothing in the *Hamdan* decision challenges that possibility. However, before the transfer to Guantanamo, there is no indication that KSM and company were given anything close to the process that the Supreme Court in *Hamdi* determined was necessary for a United States citizen, that is, “a fair opportunity to rebut the Government’s factual assertions before a neutral decision-maker.”¹⁶⁷ While the CIA has made errors in identifying terrorists from other countries, confusing a good Khaled El-Masri with a bad one in a rendition from Macedonia,¹⁶⁸ the CIA apparently did not provide much process to confirm that the secret CIA prisoners were actually the bad guys they were suspected to be. The CIA expects us to take these things on trust.

So far, despite President Bush’s claim that the terrorists will be brought to justice, none of the secret prisoners has been tried by a military commission. In many respects, they are still outside the rule of law. After being transferred to Guantanamo, KSM has gone through the CSRT.¹⁶⁹

165. Jane Mayer, *Outsourcing Torture*, NEW YORKER, Feb. 14, 2005, at 106, 106 (“Critics contend that the unstated purpose of such renditions is to subject the suspects to aggressive methods of persuasion that are illegal in America—including torture.”).

166. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2798 (2006).

167. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (plurality opinion).

168. David Johnston, *Rice Ordered Release of German Sent to Afghan Prison in Error*, N.Y. TIMES, Apr. 23, 2005, at A3.

169. See Josh White, *Alleged Architect of 9/11 Confesses to Many Attacks*, WASH. POST, Mar. 15, 2007, at A1.

The CSRT, which confirms his enemy combatant status, is not a trial, however. Before his transfer, his home government was apparently not pushing for transparent justice for him. Although the other Guantanamo detainees have had advocates, fewer people spoke up on behalf of KSM when he was in CIA custody.¹⁷⁰ By contrast, David Hicks, one of the original Guantanamo detainees slated for trial by military commission along with Hamdan, has had the Australian government and others looking out for him.¹⁷¹

The secret prisoners, while in the CIA program, were sealed off from the world. They were not provided the benefits that go along with prisoner of war status, and only after they were transferred to Guantanamo, was the International Committee of the Red Cross allowed to visit them.¹⁷² In the secret program, their only interactions appear to have been with interrogators. They did not have access to lawyers, family, or friends.

IV. A TEXTUAL ANALYSIS

Based on the public record about CIA activities, one might narrow the questions concerning the CIA's collision with Common Article 3. First, may the prisoner be held in a secret facility? Second, may the prisoner be prevented from having access to people other than the interrogators? Third, may the prisoner be held without trial? Fourth, may the prisoner be interrogated, and, if so, how aggressively?

Common Article 3, although vague, provides some sort of response to these questions.¹⁷³ Further, the ICRC commentary provides some help.¹⁷⁴ Beyond that, there has been very little analysis of how Common Article 3 should be applied to the practices of intelligence agencies in combating international terrorism.

Besides the terms of Common Article 3, an important source in interpreting the basic obligations to international terrorists is Article 75 of

170. Human Rights Watch and Amnesty International did write reports about him. HUMAN RIGHTS WATCH, *THE UNITED STATES' "DISAPPEARED": THE CIA'S LONG-TERM "GHOST DETAINEES"* 36-38 (2004), <http://www.hrw.org/backgrounder/usa/us1004/iraq1005.pdf>; Press Release, Amnesty Int'l, USA: Interrogation Techniques Amount to Torture (May 13, 2004), <http://web.amnesty.org/library/Index/ENGAMR510812004>.

171. See, e.g., Media Release, Attorney-Gen.'s Dep't, Australian Government, Briefing on David Hicks (July 28, 2006), http://www.clrc.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases (follow "Media Releases" hyperlink; then follow "145/2006—28 July 2006—Briefing On David Hicks" hyperlink).

172. Josh White, *Red Cross Meets with 14 Moved to Guantanamo Bay*, WASH. POST, Oct. 13, 2006, at A23.

173. For the narrow purposes of this Article, I do not fully explore other provisions from the Geneva Conventions, such as prisoner of war protections, as possible analogies.

174. See generally OFFICIAL COMMENTARY, *supra* note 67.

Additional Protocol I to the Geneva Conventions.¹⁷⁵ Although the United States has not signed this protocol, many consider it part of customary international law.¹⁷⁶ Article 75 states, among other things, that the prisoners must be told the reasons they are being held, must be “treated humanely in all circumstances,” and, unless they have committed criminal offenses, must be released as soon as circumstances allow.¹⁷⁷ Once again, though, the standards are general; they call for humanity and decency.

Although I boil down Common Article 3 to a requirement of humane treatment, I recognize that a longer and more detailed analysis could explore nuances among particular terms in that one Article. For example, I have not analyzed whether what distinguishes cruel treatment from torture is (a) the severity of the pain the prisoner feels (such that torture is an extreme form of cruelty), or (b) the purpose to the treatment such that cruel treatment automatically becomes torture if it is connected to interrogation.¹⁷⁸ Such nuances are not so important to my general conclusions.

A. Secret Prisons

Common Article 3 is not explicit about secret prisons. Secrecy can be a problem under Common Article 3 to the extent it constitutes abuse of a prisoner or increases the chances for abuse. Not everything, however, was kept secret from CIA prisoners. They witnessed their own detentions, and they must have soon realized that they were suspected of some connection to international terrorism. They may not have known, of course, who suspected them or the reasons for the suspicion.

It is possible that the CIA, keeping the prisoners guessing, did not tell them where they were being held. Or the CIA, in a false flag operation, may have misrepresented to them where they were held. KSM, for example, may have been more anxious if he had been led to believe he was

175. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 75, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

176. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2797 (2006) (plurality opinion) (“Although the United States declined to ratify Protocol I, its objections were not to Article 75 thereof.”); William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT’L L. 319, 322 (2003) (“While the United States has major objections to parts of Additional Protocol I, it does regard the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.”).

177. Protocol I, *supra* note 175, art. 75.

178. Compare August 2002 Memo, *supra* note 43, at 115, 119-25 (stating that torture is at the extreme end of cruel, inhuman, or degrading treatment), with Jennifer Moore, *Practicing What We Preach: Humane Treatment for Detainees in the War on Terror*, 34 DENV. J. INT’L L. & POL’Y 33, 49 n.62, 49-50 (2006) (arguing that torture is no more severe than inhuman treatment but differs only in that it is used for the purpose of extracting information).

in Egyptian hands. Or the CIA may have been straight with the prisoners about where they were held. Yet, under all three scenarios, the public was not told—and has not been told—where the prisoners were held.¹⁷⁹ That much is secret.

There are many explanations for keeping a prisoner's location a secret. First, secrecy may help protect the host governments from any domestic or international backlash.¹⁸⁰ A country may agree to house CIA prisoners only if the United States keeps that country's cooperation in confidence. Second, secrecy adds to security.¹⁸¹ It is close to impossible for al Qaeda to break KSM out of captivity if it does not know where he is held. Third, for the maximum effectiveness of American operations, secrecy keeps in the dark those al Qaeda members who have not been captured. Fourth, and related to the third explanation, secrecy eliminates or reduces communications between the captive and the outside world.

Secret or not, so many of the standards on detention and interrogation are relative. Those who take hostages could be called criminals, CIA officers, or both. No matter the label, those who take hostages usually do not advertise the locations because that would facilitate rescue of the hostages and would defeat the hostage-takers' purpose of extracting a ransom.¹⁸²

Often, a sense of invisibility facilitates crime. For example, a driver on a California highway is most likely to exceed the posted speed limit if he knows there are no patrol cars, no police airplanes, and nothing else in the form of surveillance. Very few people follow the law strictly, and even fewer follow the law, whether it is a speed limit or an international standard, when there is no chance for enforcement. Although Common Article 3 does not mention anything about secrecy or secret detention, the activities it does mention (i.e., torture, hostage-taking, and humiliating treatment) are more likely to occur in darkness than in the light of day.

179. See Priest & Higham, *supra* note 137 (providing one of the first accounts of the existence of the CIA's secret prison program to the public).

180. See Priest, *supra* note 4 (disclosure of prison locations might disrupt counterterrorism efforts in host countries and make them possible targets of terrorist attacks).

181. Remarks on the War on Terror, *supra* note 11, at 1570 ("Many specifics of [the CIA prison] program, including where these detainees have been held and the details of their confinement, cannot be divulged. Doing so would provide our enemies with information they could use to take retribution against our allies and harm our country.")

182. If a state has taken hostages, the stakes are different. When the Iranians took hostages in the American embassy in Tehran, they generally acknowledged where the hostages were being held. See John Kifner, *Teheran Leader Says Riots May Have Been Incited as Part of Mission*, N.Y. TIMES, Apr. 27, 1980, § 1, at 1. They dared the American Government to do something through diplomatic or military channels. After an aborted rescue attempt, however, the hostages were moved to secret locations. *Id.*

By necessity, many intelligence activities must be secret. A typical human source or an "asset" will not betray her country, handing over important information to the CIA, unless she is confident the CIA will protect her. If she is revealed as a spy, she will be imprisoned, tortured, or killed in her home country. But the secrecy that is essential to gathering foreign intelligence and conducting covert action also contains the seeds of abuse. How do we give spymasters enough discretion to do their jobs but not so much that they eat away at our democracy? That is the conundrum. Intelligence officers, inclined to think they know best for national security, will push their activities into darker shades of gray, not completely accountable to oversight committees, to the courts, or to a public that has only a partial view of their activities.

When the CIA takes on the task of jailing suspected terrorists, the problems that stem from secrecy are acute. Prisons, no matter where they are located, always have the potential for abuse. Some interrogators and some guards, like some drivers on California highways, will follow the rules no matter what. But some interrogators and guards will be tempted to abuse their power to extract sexual, financial, and other favors from the prisoners. The relationship of master to slave, whether in a CIA facility or a federal penitentiary, cannot be defined away.

The CIA's lack of experience in handling prisoners accentuates the potential for abuse. The CIA is not the Bureau of Prisons when it comes to long-term detention. Sometimes spies who have walked into an intelligence agency's control are held against their will while the agency checks their bona fides to make sure they are "true" spies, not "dangles," "doubles," or "provocations." This process of checking is part of classic espionage. But after the bona fides are checked, the false spy is sent back without instructions, or the true spy is sent back as an "agent in place." In either scenario, false or true, the detention is short. Now, holding suspected terrorists for months and years is part of a different and dangerous era in espionage.

Another negative to secret detention is that other agencies, inside or outside the American government, are not allowed into the facilities to monitor CIA activities. Although the CIA may point to the possibility of internal oversight, there is no evidence that the CIA's Office of Inspector General or the CIA's Office of General Counsel, has inspected any of the CIA's facilities or has interviewed any of the prisoners to determine whether they have been tortured. If any oversight has occurred, it is in the national interest for the CIA to disclose it.

One part of Common Article 3 provides for outside inspections of detention facilities. The last subsection states that "[a]n impartial humanitarian body, such as the International Committee of the Red Cross, may

offer its services to the Parties to the conflict.”¹⁸³ Yet, nothing in Common Article 3 says that a party, including the United States, must accept the offer.¹⁸⁴ In other places, the Geneva Conventions impose clear requirements on the parties. Indeed, the preceding part of Common Article 3 is absolute: “[T]he following acts are and shall remain prohibited at any time and in any place whatsoever”¹⁸⁵ In short, the difference between “may” and “shall” is quite significant. As long as the CIA can handle the prisoner’s medical care, the CIA is free to choose whether or not it wants to include the ICRC.¹⁸⁶ When the prisoners were at secret sites, the CIA chose not to include any humanitarian bodies.¹⁸⁷

Most in the human rights community are opposed to secret prisons.¹⁸⁸ Isolation, by itself, may be inhumane. Captors, in a different context, are not allowed to place prisoners of war in solitary confinement; a POW is given the right to mix with other POWs.¹⁸⁹ Although nothing in Common Article 3 refers to isolation or solitary confinement, the basic spirit of decency and humanity that pervades the article may preclude secret prisons. On the other hand, other parts of the Geneva Conventions provide for isolating a prisoner. For example, if a protected person is detained as a “spy or saboteur,” he can “be regarded as having forfeited rights of communication.”¹⁹⁰ Therefore, if a terrorist is the modern equivalent of a spy or a saboteur, isolation may not be inhumane.

183. Geneva Convention III, *supra* note 6, art. 3.

184. *See id.*

185. *Id.*

186. *See* Jennifer R. White, Note, *IEEPA’s Override Authority: Potential for a Violation of the Geneva Conventions’ Right to Access for Humanitarian Organizations?*, 104 MICH. L. REV. 2019, 2019-21 (2006) (stating that Common Article 3 creates an obligation for parties to the conflict to provide care, which can be delegated to impartial humanitarian bodies); *see also* OFFICIAL COMMENTARY, *supra* note 67, at 42 (“The Parties to the conflict may, of course, decline the offer [of the impartial humanitarian body’s assistance] if they can do without it.”).

187. *See* Priest, *supra* note 4 (noting that “[n]o one outside the CIA is allowed to talk with or even see” the approximately top thirty al Qaeda prisoners held in the CIA prison program).

188. *See* Priest, *supra* note 3.

189. *See* Geneva Convention III, *supra* note 6, art. 103 (“A prisoner of war shall not be confined while awaiting trial unless a member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offence, or if it is essential to do so in the interests of national security.”); *see also* OFFICIAL COMMENTARY, *supra* note 67, at 480 (stating that solitary confinement is not allowed under Article 103 for prisoners of war awaiting trial). Article 71 further provides prisoners of war with right to send and receive letters, cards, and telegrams. Geneva Convention III, *supra* note 6, art. 71.

190. Geneva Convention IV, *supra* note 6, art. 5 (“Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.”).

Such questions do not have easy answers. There is just too much unknown space between CIA practices and Common Article 3 to make a definitive call on secret prisons.

B. No Access to Friends, Family, or Lawyers

Preventing prisoners from having access to friends, family, or lawyers relates to the secrecy of the prison. Some at the CIA might say that secrecy and denied access are the same issue, if not two sides of the same coin. Even so, it is conceivable for the prisoners to have some access to their friends, family, or lawyers while the CIA maintains general secrecy about the facility. The visitor, in exchange for access to a prisoner, could be required to sign a (largely symbolic) secrecy agreement.¹⁹¹ The visitor could be taken to the facility under a blindfold, and other CIA officers could perform surveillance to ensure that the visitor abides by an agreement to keep everything secret.

In other words, although secrecy does not always lead to complete isolation, denied access is really just a synonym for isolation. Therefore, the answer about secret prisons sets the floor for the answer about denied access: such CIA practices may not comply with Common Article 3's expectation of humane treatment. Once again, the facts about CIA activities are thin, and the legal standards are vague.

At least one international tribunal has determined that isolation alone can constitute inhumane treatment.¹⁹² Although a few people might side with Jean-Paul Sartre that hell is being with others, most agree that it is painful to be cut off from friends and family. Humans do better in groups than on their own.¹⁹³ That much we know about humanity.

C. No Trials

The question about putting off trials is the easiest.¹⁹⁴ Common Article 3 does not require judicial proceedings against the persons being held in the armed conflict. If these persons are charged with violating the laws of war, as Hamdan was, Common Article 3 sets the minimum procedures.

191. How such an agreement could be enforced, whether through courts or arbitration, against U.S. citizens and non-U.S. citizens, is left open.

192. Velásquez Rodríguez Case, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 156 (July 29, 1988).

193. Joe Tomaka et al., *The Relation of Social Isolation, Loneliness, and Social Support to Disease Outcomes Among the Elderly*, 18 J. AGING & HEALTH 359, 382 (2006) ("Overall, the data show that favorable social conditions, such as low loneliness and high support from family, friends, and social groups are important predictors of disease outcomes, both in Hispanic and in Caucasian samples.").

194. This is a different question from determining, as noted above, how much process the secret prisoners are due in contesting their designation as enemy combatants. Holding that factor constant, I assume that the designation was lawful to allow me to study the trial variable.

Military trials are possible as long as they are done by “regularly constituted court[s] affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”¹⁹⁵ Nothing in Common Article 3 prevents such persons from being held for the duration of the conflict.¹⁹⁶ In *Hamdan*, the Supreme Court came close to conceding this point: “It bears emphasizing that Hamdan does not challenge, and we do not today address, the Government’s power to detain him for the duration of active hostilities in order to prevent such harm.”¹⁹⁷ The harm the Court was referring to is the death or serious injury to innocents caught up in al Qaeda plots.

What Justice Stevens does not make explicit in *Hamdan* is that the Supreme Court has already examined, in some detail, the issue of putting off trials. That examination took place in the *Hamdi* case.¹⁹⁸ Neither *Hamdi* nor Common Article 3 permits civilians to be held without any process.¹⁹⁹ Under international humanitarian law, the captors in an armed conflict are given a reasonable opportunity to separate those persons who are dangerous—combatants—from those who are not—noncombatants.²⁰⁰ As soon as the captors confirm that someone is a civilian, for example, a missionary or a journalist at the wrong place at the wrong time, they should release him or her if that is safe and reasonable.²⁰¹ Yet, many people caught up in armed conflict are not innocent civilians. For example, the Geneva Conventions presume that members of armed forces who have laid down their arms will be dangerous if they are not detained.²⁰² The same applies to the sick and the wounded from the armed forces because, after they receive medical treatment, they could return to battle.²⁰³ For these reasons, prisoners of war can be held

195. Geneva Convention III, *supra* note 6, art. 3.

196. *See id.*

197. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2798 (2006).

198. *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004) (plurality opinion) (“It is a clearly established principle of the law of war that detention may last no longer than active hostilities.”); *see also* Geneva Convention III, *supra* note 6, art. 118 (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”).

199. *See* Geneva Convention III, *supra* note 6, art. 3; *Hamdi*, 542 U.S. at 520 (plurality opinion).

200. *See* Geneva Convention III, *supra* note 6, art. 5 (“Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”).

201. *See id.*

202. *See id.* art. 3(1) (affording protections to “members of armed forces who have laid down their arms”).

203. *See id.*; *Hamdi*, 542 U.S. at 518 (plurality opinion) (“The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again.”).

for the duration of the conflict.²⁰⁴ By extension, those persons who receive the lowest protection under international humanitarian law—al Qaeda and other international terrorists—should not expect any better treatment from Common Article 3.

Yaser Hamdi, like Salim Hamdan, was captured during American actions against the Taliban and al Qaeda in Afghanistan after 9/11.²⁰⁵ The Executive branch designated Hamdi an “enemy combatant,” or someone who “was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there.”²⁰⁶ At the time of the Court’s decision, Hamdi was a United States citizen by virtue of his birth in Louisiana.²⁰⁷ Justice O’Connor, writing for the plurality, relied on Congress’ Authorization for Use of Military Force to rule that Hamdi could be held as an enemy combatant.²⁰⁸ She viewed Hamdi’s detention, preventing him from returning to the battlefield, as a “fundamental incident of waging war.”²⁰⁹ In addition, splitting the difference between civil libertarian and executive supremacy camps, she made clear that the process for designating Hamdi as an enemy combatant had to include more than the President’s determination, and more than the “some evidence” standard, to pass constitutional muster.²¹⁰

Hamdan, who never was a United States citizen, does not deserve more protections than Hamdi did as a United States citizen. The same logic applies to Abu Zubaydah and KSM. Provided the process to their designations as enemy combatants has been sufficient, they may be held for the duration of the conflict with al Qaeda. If tried and convicted by a military commission, they may be held longer if the term of their sentences exceeds the conflict.²¹¹

Although the government was not seeking the death sentence in Hamdan’s case, a death sentence is not per se inconsistent with Common Arti-

204. See Geneva Convention III, *supra* note 6, art. 118 (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”).

205. *Hamdi*, 542 U.S. at 510 (plurality opinion).

206. *Id.* at 516 (citation and internal quotation marks omitted).

207. *Id.* at 510.

208. *Id.* at 517.

209. *Id.* at 519 (“Because detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war, in permitting the use of ‘necessary and appropriate force,’ Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.”).

210. *Id.* at 537 (“Any process in which the Executive’s factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short.”).

211. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2798 (2006) (stating that the U.S. government can hold Hamdan for the duration of conflict without trying him, but in order to subject Hamdan to criminal punishment that exceeds the duration of the conflict, the executive must comply with all relevant rules of law).

cle 3. Indeed, Common Article 3 concedes in clear terms the possibility of “carrying out of executions.”²¹² In sum, during an armed conflict with international terrorism, the CIA’s secret prisoners do not need to face trials. If they are tried, the process needs to be fair, and death sentences may be part of that fair process.

D. Aggressive Interrogations

The question about interrogation tactics is the most difficult. CIA lawyers or other administration lawyers who advise on these practices are privy to the classified facts. Those outside the inner sanctum are left to speculate. In this regard, we are all indebted to Dana Priest and other excellent investigative reporters who dig up secrets for us from the CIA.

Even when Common Article 3 is condensed to a duty of humane treatment, at least three clusters of subsidiary questions about interrogations tactics still present themselves. In the first cluster, what is the relevant perspective? Is it a particular prisoner’s perspective? Or, is it the perspective of a reasonable prisoner? For example, CIA interrogators might refer to prisoners by their last names, and most prisoners may react to this as a sign of respect. Yet, this reference, a last name without “Mr.” attached, may cause a particular prisoner to feel humiliated, a humiliation so deep that, for several months, he cannot express it to anyone else, not to the interrogators or the other prisoners. Would this particular reaction result in a violation of Common Article 3? If that is not enough, even an objective standard will be laden with ambiguity. Is the standard tied to the average al Qaeda member? The average terrorist? Or the average prisoner?

In answering such questions within the first cluster, international tribunals have done little more than provide circular definitions. For example, the International Criminal Court, in providing elements to the crime of humiliation and degradation, purported to offer an objective standard: “The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity.”²¹³ Generally recognized by whom? And in what context? More specific guidance is necessary.

In the second cluster of questions, is the CIA interrogator’s intent at all relevant in determining whether a violation of Common Article 3 has occurred? Whether in the interrogation room or elsewhere, sometimes our actions hurt or humiliate someone despite our best intentions. In other words, is Common Article 3 a strict liability provision in which in-

212. Geneva Convention III, *supra* note 6, art. 3.

213. INT’L CRIMINAL COURT, OFFICIAL JOURNAL OF THE INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES art. 8(2)(c)(ii)(2) (2002) available at http://icc-cpi.int/library/about/officialjournal/Element_of_Crimes_English.pdf.

tent is irrelevant? Or is negligence the standard? Or gross negligence? If some intent is necessary, how specific must it be? That the interrogator's purpose was to violate Common Article 3? Or general awareness that the interrogator's actions could result in something within the scope of Common Article 3?

For example, the CIA interrogator may propose to shave a prisoner's beard to treat an infestation of lice, but the prisoner may prefer lice over the indignity he feels in not having a beard consistent with his cultural and religious norms. The clash of civilizations thus affects the most basic encounters between interrogator and prisoner; not all cultures accept the same values or give the same weight to shared values. Even if the CIA interrogator consults a CIA physician who agrees that the prisoner's beard should be shaved, will the shaving constitute a violation of Common Article 3 because of the prisoner's strong protests, complete with tears and threats to go on a hunger strike? And if the prisoner does go on a hunger strike, will the physician's forced feeding result in another violation? In all, there seem to be more questions than answers.

To be sure, such issues of negligence and intent create uncertainty under American tort law and criminal law. These issues, however, create even more uncertainty under the less developed jurisprudence of Common Article 3. To the CIA officers who operate under these standards, these ambiguities are difficult to handle. In figurative terms, it is unfair to ticket CIA officers for speeding if the posted limits can be changed, at the whim of the police, from miles per hour to kilometers per hour. Across differences in geography, the posted speed limits should be consistent and reasonable.

In the third cluster of questions, does Common Article 3 permit any sort of cost-benefit analysis between the harshness of the CIA's interrogation tactics and the expected gains from the prisoner's information? Here, to be clear, I am not considering torture to defuse a ticking bomb.²¹⁴ I am considering much less severe tactics such as speaking in a loud voice to a prisoner. In the United States, tort law and criminal law consider the costs and the benefits to actions. For civil or criminal sanctions, often the line is quite thin between an American officer being guilty of an assault on a suspect or being innocent because of reasonable

214. See REPORT OF THE COMMISSION OF INQUIRY INTO THE METHODS OF INVESTIGATION OF THE GENERAL SECURITY SERVICE REGARDING HOSTILE TERRORIST ACTIVITY (1987), reprinted in 23 *ISR. L. REV.* 146, 167-76 (1989) (containing excerpts from Israel's 1987 Landau Commission, which discussed the "ticking time bomb" scenario); see also ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 131-65 (2002) (examining the "ticking time bomb" scenario in the war on terror).

self-defense.²¹⁵ When considering a totality of circumstances, so much depends on the apparent risks to the officer and the dangers of inaction.²¹⁶ Quite simply, does it make sense to give a CIA interrogator more leeway under Common Article 3 during the interrogation of KSM than in the interrogation of a lower-level member of al Qaeda?

While I do not claim to have answers to all these questions, I have not descended into nihilism in my analysis of Common Article 3. By raising so many questions, I suggest that any analysis against the existing standards must be modest, humble, and tentative. I suggest that much of what has been said and written about the interrogation of suspected terrorists, no matter the legal standards, has been political posturing at the extremes. One side is too righteous, insisting that all the old rules must apply to the new conflict with international terrorism. The other side, just as bad, goes too easily toward the most aggressive tactics in all situations.

Despite the exaggerations, some clear boundaries exist. In some areas, Common Article 3 is specific about what may not be done to prisoners. Mutilation, for example, is prohibited.²¹⁷ Therefore, some practices are obviously illegal. Cutting off a prisoner's finger to extract information is mutilation and torture. At the other extreme, providing a stack of *National Geographic* magazines is an act of kindness. Between the extremes are many possibilities and many ambiguities. Providing *Penthouse* magazines to a devout Muslim, for example, may not be so kind. And *Playboy* may be somewhere else on the continuum of kindness. To narrow down the possibilities, I have tried to focus on sleep deprivation, bombarding the prisoner with loud music, and keeping the temperature uncomfortably hot or cold in the prisoner's cell.²¹⁸

The precedents on what constitutes cruel, inhuman, or degrading treatment, or what constitutes a violation of Common Article 3, are slim. For example, in 1978, the European Court of Human Rights (ECHR) assessed tactics the British government used in battling terrorism in Northern Ireland.²¹⁹ These tactics included forcing suspects to stand on their toes, using hoods and loud music on the suspects, and depriving

215. See, e.g., *Saucier v. Katz*, 533 U.S. 194, 206 (2001) (recognizing the “hazy border between excessive and acceptable force” (quoting *Priester v. Riviera Beach*, 208 F.3d 919, 926-27 (11th Cir. 2000))).

216. See, e.g., *Graham v. Connor*, 490 U.S. 386, 396 (1989) (noting that the determination of reasonableness of force “requires careful attention to the facts and circumstances of each particular case, including . . . whether the suspect poses an immediate threat to the safety of officers and others”).

217. Geneva Convention III, *supra* note 6, art. 3.

218. These are among techniques commonly reported to have been used. See Brian Ross & Richard Esposito, *CIA's Harsh Interrogation Techniques Described*, ABC NEWS, Nov. 18, 2005, <http://www.abcnews.go.com/WNT/Investigation/story?id=1322866>.

219. See *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 9-10, 40-58 (1978).

them of food, water, and sleep.²²⁰ While the court did not rule the tactics to be torture, it did rule that the combination of tactics was cruel, inhuman, and degrading treatment.²²¹ It is possible that one of these tactics, by itself, might not have been enough to constitute CID for the ECHR. They were bundled in the ECHR's analysis.²²² Even so, they create a presumption against such tactics being ordinary and acceptable.

Later cases from the ECHR and from other tribunals are not much more helpful. The ECHR defined degrading treatment of prisoners as "feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical and moral resistance."²²³ Moreover, the International Criminal Tribunal for Rwanda defined degrading and humiliating treatment as "[s]ubjecting victims to treatment designed to subvert their self-regard."²²⁴ Such definitions from court cases do not surpass what is available in standard dictionaries. The Oxford Dictionary defines "degrading" as "causing a loss of self-respect; humiliating."²²⁵ "Humiliation" is defined as to "make (someone) feel ashamed and foolish by injuring their dignity and self respect, esp. publicly."²²⁶ And "inhumane" is defined as "without compassion for misery or suffering; cruel."²²⁷

Given the elasticity of Common Article 3's terms, both sleep deprivation and playing loud music may be precluded. They are arguably outrages on personal dignity or humiliations or degradations. Each of these two tactics, if taken to extremes, could cross into torture. Weeks of sleep deprivation would cause the CIA prisoners to suffer, and playing the music too loud could cause permanent damage to their hearing. Whether the temperature to the prisoner's cell or the interrogation room violates Common Article 3 is as delicate as the thermostats to the rooms. Adjustments of a few degrees hotter or colder are fine, but extremes, whether hotter or colder, could constitute a violation. These are close calls under Common Article 3. For this reason, President Bush was justified to complain about the vagueness of this international standard.

220. *Id.* at 41.

221. *Id.* at 66-67.

222. *Id.*

223. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 39 (1989) (quoting *Ireland*, 25 Eur. Ct. H.R. at 66).

224. *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgment and Sentence, ¶ 285 (Jan. 27, 2000).

225. OXFORD AMERICAN COLLEGE DICTIONARY 360 (2002).

226. *Id.* at 654 (drawing on the definition of "humiliate").

227. *Id.* at 687.

E. President Bush's Reaction to Common Article 3

The *Hamdan* decision must have been a blow to President Bush. The Supreme Court, in a disdainful mood, did not share his view of the world since 9/11. The legality of sleep deprivation and playing loud music, not to mention harsher tactics, was called into question under a resurrection of Common Article 3. Perhaps lawyers from the CIA, the Justice Department, and the White House made this clear in confidential communications they shared with the President after the *Hamdan* decision. Their analysis, if any, of the continuing legality of the CIA program must have been filled with the hedges and caveats that annoy black-and-white thinkers.

Striking back at the Supreme Court, President Bush appealed to the public and to Congress on September 6, 2006, for "clarity" on what tactics the CIA and other interrogators could use on suspected terrorists.²²⁸ The President pleaded: "I'm asking that Congress make explicit that by following standards of the Detainee Treatment Act, our personnel are fulfilling America's obligations under Common Article Three of the Geneva Conventions."²²⁹ Unstated was an additional advantage of linking the standard to the DTA: the DTA's primary reference is to the U.S. Constitution, whereas *Hamdan* allows more room for international law and foreign decisions to affect an American court's assessment of Common Article 3. Later, in an echo, Director of Central Intelligence Michael Hayden stated that the CIA could not continue its detention and interrogation program unless something was done about *Hamdan*.²³⁰ That was a strong step back toward the categorical.

Further, the clarity the President sought included, by way of a proposed bill, an amendment to the War Crimes Act so that only serious violations of Common Article 3—rather than all violations—would serve as predicate acts.²³¹ Explaining the reason for this amendment, the President said, "I'm asking Congress to list the specific, recognizable offenses that would be considered crimes under the War Crimes Act so our personnel can know clearly what is prohibited in the handling of terrorist enemies."²³²

All in all, President Bush, on September 6, 2006, offered many more clues to what was going on at the CIA after *Hamdan* than I did in my conversation with Dana Priest on July 11, 2006. *Hamdan* had gone far beyond stating the allowable procedures for trying a chauffeur before a

228. See Remarks on the War on Terror, *supra* note 11, at 1575.

229. *Id.*

230. See Charles Babington & Jonathan Weisman, *Senators Defy Bush on Terror Measure*, WASH. POST, Sept. 15, 2006, at A1.

231. H.R. 6166, 109th Cong. § 6(b)(1) (2006).

232. Remarks on the War on Terror, *supra* note 11, at 1575.

military commission. *Hamdan* was a major challenge to the legality of the harsh techniques the CIA had reportedly used on KSM and company. After *Hamdan*, the President and the CIA must have doubted that the secret detention and interrogation program could be run with the harshness—and the level of comfort for American officers—they believed was necessary to disrupt terrorist plots and to save innocent lives. In sum, *Hamdan* was worse for the CIA than the McCain Amendment, creating trouble for the past and the future.

V. RETROACTIVE EFFECTS

The Supreme Court, in *Hamdan*, brushed aside what the Bush administration considered a strong argument based on the President's inherent powers. After the *Hamdan* decision, the administration's lawyers did not make any public attempt to limit *Hamdan*'s reach through stingy interpretations; instead, accepting the rebuke, they took *Hamdan* at face value for the time being. But, as time would tell, neither the President nor the CIA was permanently resigned to Common Article 3 haunting their past and their future.

A. *The Reasons for Fear*

Those who were most worried about Common Article 3 were probably in the National Clandestine Service or the Directorate of Operations (DO) at the CIA. The officers who conducted the interrogations on the secret prisoners were most likely from that Directorate or contracted by that Directorate. For several years after 9/11, DO management and officers, including the Director of Central Intelligence and the Deputy Director, may have been lulled into a false sense of security about their legal exposure. They had received secret guidance from CIA lawyers and Justice Department lawyers.²³³ *Hamdan*, so they learned, caused Common Article 3 to boomerang back on them.

After the *Hamdan* decision, senior officials at the CIA may have returned to their lawyers in great distress to discuss the CIA's exposure. Dana Priest had detected something, and other parts of the media picked up on the CIA's concern, noting interest by CIA officers in obtaining insurance from private companies.²³⁴ This insurance may pay for legal expenses connected to Inspector General investigations, congressional hearings, administrative actions, and criminal investigations. However, this insurance cannot immunize officers from criminal exposure.

233. See George Washington University National Security Archive, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/> (last visited Apr. 1, 2007) (listing numerous declassified memoranda from the Justice Department regarding interrogation policies).

234. R. Jeffery Smith, *Worried CIA Officers Buy Legal Insurance*, WASH. POST, Sept. 11, 2006, at A1.

Dana Priest knew before many others that the CIA was concerned about Common Article 3. With *Hamdan* in effect, CIA officers must have seen the possibility that they could be charged with “war crimes” under a federal statute if their treatment of secret prisoners violated international law. A war crime, of course, is much more serious than a charge of assault (or battery) under special maritime and territorial jurisdiction.²³⁵ At the time *Hamdan* was decided, a war crime was defined in several ways. Under one subsection, it was a “grave breach” of any of the Geneva Conventions and their protocols.²³⁶ Under another subsection, it was conduct identified in certain articles of the Fourth Hague Convention.²³⁷ Elsewhere, it was a violation of the international protocols against the use of landmines and booby traps that resulted in death of, or serious injury to, civilians.²³⁸ Of most concern to the CIA had to be the subsection that defined a war crime—without any further limitation—as a violation of Common Article 3.²³⁹

As of July 11, 2006, deciding what constituted a war crime may have seemed less ambiguous than deciding what constituted “torture” under other criminal statutes.²⁴⁰ The ambiguity under the War Crimes Act was one level removed: any violation of Common Article 3 was clearly mentioned, but, deciding what constituted “humane treatment” involved the same interpretative problems as distinguishing cruel, inhuman, and degrading treatment from torture. The words were general, the factual variations endless.

If the summer framework for the law had stayed in place, an aggressive prosecutor might have been tempted to look back in anger on CIA activities and press criminal charges. A war crime could have been charged for each separate interrogation tactic that went beyond Common Article 3, and a conspiracy charge could have drawn in the people who ordered the interrogations.

235. David Passaro, a CIA contractor, was convicted of such charges in federal court in Raleigh, North Carolina, under 18 U.S.C. § 7(9)(A) special maritime and territorial jurisdiction. See Andrea Weigl, *Passaro Convicted of Assaulting Afghan*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 18, 2006, at 1A, available at 2006 WLNR 14316102. While in Afghanistan, Passaro allegedly struck a prisoner with a flashlight and punched and kicked him. *United States v. Passaro*, No. 5:04-CR-211-1 (E.D.N.C. June 17, 2004), available at <http://news.findlaw.com/hdocs/docs/torture/uspasaro61704ind.html> (containing the indictment of Passaro). This abuse resulted in the prisoner’s death. *Id.*

236. 18 U.S.C. § 2441(c)(1) (2000).

237. *Id.* § 2441(c)(2).

238. *Id.* § 2441(c)(4).

239. *Id.* § 2441(c)(3), amended by Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(b)(1), 120 Stat. 2600, 2633.

240. See, e.g., 42 U.S.C.A. § 2000dd (West Supp. 2007) (defining cruel, inhuman, or degrading treatment).

B. *The Reasons for Comfort*

During the hot summer after *Hamdan*, the lawyers at the CIA may have told the CIA officers not to worry.²⁴¹ Despite reports, before *Hamdan*, that the CIA's Office of Inspector General had made referrals to the Justice Department for criminal investigations into some CIA interrogations,²⁴² the lawyers may have promised that everything would be fine. Very few people, if anyone at all, have been prosecuted in American courts for war crimes. If charged, the CIA officers could claim that the criminal statute was void for vagueness. Or they could say they did not have criminal intent. Their defense could be that they were acting under the advice of counsel. For this defense to work, they would have to show that it was reasonable to rely on that advice.²⁴³ To bolster themselves, as Defense Exhibit #1, they could refer to the Office of Legal Counsel memorandum, which had stated that Common Article 3 did not apply to al Qaeda.²⁴⁴

The lawyers might have identified other factors in the CIA's favor. The prosecutors, beyond dealing with potential defenses, might have problems of proof concerning the CIA interrogations. In a highly secretive program, the witnesses are few. And there is no evidence from the public record that the interrogations were videotaped or photographed. Because suspected terrorists are not appealing victims, the prosecutors would also have to deal with the possibility that the jury would nullify verdicts that were otherwise supported by the evidence.

Even if prosecutors can gather the evidence, and even if they can avoid jury nullification, their cases might be complicated or eventually abandoned because they would tread on matters of national security. The executive branch, after all, has the prerogative to decide what is classified and what stays classified. The Classified Information Procedures Act (CIPA)²⁴⁵ does not resolve the so-called "disclose or dismiss" dilemma to prosecutions that are connected to classified information. Rather than have these activities revealed to the public, the Director of Central Intelligence (DCI) and the Director of National Intelligence (DNI) might

241. A most ethical CIA lawyer, recognizing that her loyalty extended to the CIA as an entity rather than to individual officers may not have said anything or, at most, might have recommended that the CIA officers obtain private counsel.

242. Douglas Jehl & David Johnston, *Within C.I.A., Growing Fears of Prosecution*, N.Y. TIMES, Feb. 27, 2005, § 1, at 1 (describing the CIA's internal review of interrogations of terrorism suspects, which one official called the Agency's "robust effort . . . to ensure that its conduct had been proper," and noting that some of the reviewed cases have been referred to the Justice Department).

243. In a different context, for example, a bank robber could not successfully defend himself by saying that a lawyer advised him that he could use a machine gun to demand money from the teller.

244. See January 2002 Memo, *supra* note 38.

245. See 18 U.S.C. app. 3 §§ 1-16 (Supp. IV 2004).

convince the Attorney General to drop any prosecution. In so doing, their arguments might focus on protecting intelligence sources and methods rather than admitting in candor that they were covering up for errant CIA officers. In whatever way the DCI and the DNI frame their arguments, the result would be the same: no prosecution of CIA officers.

Prosecutors have the discretion not to indict even when the proof is there and even when CIPA complications can be resolved through summaries and substitutions of classified evidence. The Justice Department reports to the President, the statute for an independent counsel is gone, and the White House might resist pressures for a special counsel. To be sure, under the Bush administration, a federal prosecutor would not go far—in the case or in her career—with a war crimes prosecution. The prosecutors in the Eastern District of Virginia, where CIA headquarters are located, have not been in a rush to bring charges against a popular CIA. As a cautionary tale, they might look to another terrorism prosecutor, Patrick Fitzgerald, to remind themselves of how politics can sully the best of reputations.²⁴⁶

CIA officers, even reassured by CIA lawyers, may have continued to worry about Common Article 3 to the extent they realized that war crimes do not have a statute of limitations.²⁴⁷ A Democrat or a true Republican maverick, they may have said, could be elected President. A resilient CIA lawyer, however, might have countered that it is unlikely that a new Justice Department would dig into interrogation practices that took place after 9/11. Such digging, by Democrats or Republicans in either branch, would set them up for the charge of being weak in combating terror. That charge, in the politics after 9/11, seems far more damaging than any interrogations that went beyond Common Article 3.

Despite the pleas of some human rights organizations, very few people were clamoring for an investigation into what the CIA did to KSM, Abu Zubaydah, or Ramsi bin al-Shibh. The sad truth is that before President Bush announced their transfer to Guantanamo, the high-level prisoners garnered little interest from the rest of the public.

C. *The Political Fix*

Even without the support of lawyers, the CIA's officers did not need to fret too much about Common Article 3. They know that at the CIA the

246. Fitzgerald was a high-profile prosecutor in the Southern District of New York. See Peter Slevin, *The Prosecutor Never Rests*, WASH. POST, Feb. 2, 2005, at C1. One of his cases related to al Qaeda's bombings of the United States embassies in Kenya and Tanzania. *Id.* Later, as United States attorney in the Northern District of Illinois, Fitzgerald investigated the "outing" of CIA officer, Valerie Plame. *Id.* His investigation resulted in the indictment of "Scooter" Libby, Vice President Cheney's former chief of staff, and a host of negative comments. *Id.*

247. See 18 U.S.C.A. § 2441 (West Supp. 2007).

dice are often loaded in their favor. CIA officers are protected, as they should be, when they follow the law. And even if they break the law, they may be protected by the cloak of secrecy, the cover of darkness, and the benefit of legislative favors. The CIA has strong support at the White House, allies who do not allow too bright a light to shine on intelligence activities, friends who can deal with troublesome decisions from the Nation's highest court, and operators who know how to make things happen on Capitol Hill. Out in the open, the Director of Central Intelligence, Michael Hayden, lobbied for changes to the law.²⁴⁸ Various representatives and senators agreed with President Bush that changes in the law were necessary to permit the CIA's secret detention and interrogation program to continue.²⁴⁹ Waving the American flag, they all played up the CIA's importance to national security.

Thus, more than five years after 9/11, the President and a Republican-controlled Congress finally started to sort out some of the details of the interrogations of terrorism suspects and of the military commissions used to try these suspects. After a series of back-room meetings between Bush's National Security Adviser, Stephen Hadley, and Senators Lindsey Graham, John McCain, and John Warner, all Republicans, the President and Congress settled on a compromise.²⁵⁰ With the Democrats on the sidelines, the President got most of what he wanted concerning terrorism suspects and military commissions. On October 17, 2006, with some of the CIA's allies, friends, and operators looking on, President Bush signed the Military Commissions Act of 2006 into law.²⁵¹ It was a victory for the Republicans, about a month before their losses in the mid-term elections.

In tandem with the President, the CIA officers got what they wanted overall—if not more. The MCA took care of problems that stemmed from *Hamdan* and gave the CIA protections that went beyond those of the McCain Amendment.

In this story, the CIA converted a judicial setback into a legislative triumph. First, the War Crimes Act was amended and limited to a list of "grave breaches" of Common Article 3.²⁵² Second, this amendment of the War Crimes Act was made retroactive to 1997.²⁵³ Third, except for grave breaches, the Act authorizes the President to issue "authoritative" regu-

248. Babington & Weisman, *supra* note 230 (quoting a CIA spokesman as saying Hayden "'wants to protect the people who work for him' and who take risks to 'help keep all Americans safe'").

249. See, e.g., 152 CONG. REC. S10,362-63 (daily ed. Sept. 28, 2006) (statement of Sen. Bond).

250. Kate Zernike, *Top Republicans Reach an Accord on Detainee Bill*, N.Y. TIMES, Sept. 22, 2006, at A1.

251. Remarks on Signing the Military Commissions Act of 2006, 42 WEEKLY COMP. PRES. DOC. 1831 (Oct. 17, 2006).

252. 18 U.S.C.A. § 2441(c)(3), (d) (West Supp. 2007).

253. *Id.* § 2441 note (Effective and Applicability Provisions).

lations on the scope of Common Article 3.²⁵⁴ Parts or all of this guidance on permitted tactics in CIA interrogations may be classified and hidden from the public.²⁵⁵ Fourth, American courts are precluded from using foreign or international law to interpret the list of grave breaches of Common Article 3 that serve as definitions in the War Crimes Act.²⁵⁶ Fifth, instead of having the option of paying for legal fees for CIA officers, as provided in the McCain Amendment, the government is now required to pay such fees.²⁵⁷ This requirement goes beyond a “prosecution,” and is extended to even an “investigation.”²⁵⁸ In all, the CIA had to be pleased, since the MCA prevented Common Article 3 from crashing into the CIA the way some officers had feared.

For some, the story has a happy ending. The CIA personnel who were involved in the aggressive interrogations of KSM and company are crossing their fingers that the MCA will hold. With the MCA, CIA personnel are safer from criminal suits and freer from the restrictions of Common Article 3 than they were on July 11, 2006. The anxiety that was heightened by a Supreme Court decision in the summer was alleviated by an act of the elected branches in the fall. As the leaves started to change around the Nation’s capital, Dana Priest moved on to other stories and the CIA returned to the shadows.

254. *Id.* § 2441 note (Implementation of Treaty Obligations).

255. *See* 42 U.S.C.A. § 2000dd-0(3) (West Supp. 2007) (not requiring the publication of the President’s regulations).

256. 18 U.S.C.A. § 2441 note (Implementation of Treaty Obligations).

257. 42 U.S.C.A. § 2000dd-1(b).

258. *Id.*

