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Thomas L. Hemingway

WARTIME DETENTION OF ENEMY COMBATANTS: WHAT IF THERE WERE A WAR AND NO ONE COULD BE DETAINED WITHOUT AN ATTORNEY?

BRIGADIER GENERAL THOMAS L. HEMINGWAY*

I. BACKGROUND

On September 11, 2001, two aircraft hijacked by members of al Qaeda slammed into the World Trade Center in New York City. A third hijacked airliner hit the Pentagon, and a fourth plunged into a field in Pennsylvania after passengers attempted to regain control of the aircraft. Nearly 3000 innocent civilians were killed.

In the wake of this unprecedented attack, Congress reacted swiftly and issued the "Joint Resolution to Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States" (hereinafter AUMF) on September 18, 2001.[1] This resolution states, in part, that "the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001."[2] Soon after this resolution, U.S. and coalition forces commenced operations in Afghanistan against Taliban and al Qaeda forces, fighting non-traditional enemies in a decidedly new kind of war. Unlike in past wars, these enemies were not state actors, nor did they abide by the rules traditionally followed in war by combatants. This new kind of war also required a new approach to enemies captured and those who committed violations of the law of war.

President Bush responded to this new paradigm by issuing a Presidential Military Order in November 2001 authorizing the Department of Defense to establish military commissions to bring to justice those non-citizen members of al Qaeda and other terrorist organizations that threaten the security of America and its allies.[3] This Presidential Military Order marked the first time since World War II

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*Brigadier General Hemingway is the Legal Advisor to the Appointing Authority for Military Commissions, U.S. Department of Defense. The views expressed in this article are those of the author and are not intended as statements of policy by the U.S. Government or the Department of Defense. Neither the U.S. Government nor the Department of Defense, nor any of its components, endorses The University of Denver, Sturm College of Law, or the Denver Journal of International Law and Policy.

1. Joint Resolution to Authorize the Use of United States Armed Forces Against those Responsible for the Recent Attacks Launched Against the United States, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter AUMF].

2. *Id.*

3. Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001) [Hereinafter PMO] (issuing this Order pursuant to

that the President authorized military commissions to try enemy combatants for violations of the law of war.[4] The Presidential Military Order, § 2, defined those subject to the order as:

> [A]ny individual who is not a United States citizen with respect to whom [the President] determine(s) from time to time in writing that: (1) there is reason to believe that such individual, at the relevant times, (i) is or was a member of the organization known as al Qaeda; (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and (2) it is in the interest of the United States that such individual be subject to this order.[5]

Separate from the Order establishing Military Commissions, the administration embarked on a policy affecting the detention of certain enemy combatants. The AUMF authorized the President to detain enemy combatants engaged in hostilities against America. An "enemy combatant" is defined as:

> [A]n individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.[6]

The Department of Defense chose to detain at Guantanamo Bay, Cuba, (GTMO) some of these captured belligerents, not as criminals, but to prevent them from rejoining hostilities. Currently, over 500 enemy combatants are detained by the Department of Defense at GTMO.[7] The President has determined that a small subset of these detainees will face trial by Military Commissions for violations of the laws of war, a distinct set of offenses separate from traditional civilian offenses.[8]

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authority granted the Executive as Commander-in-Chief of the armed forces and statutory authority expressed in 10 U.S.C. § 821, 836.).

4. Elisabeth Bumiller & David Johnston, *Bush Sets Option of Military Trials in Terrorist Cases*, N.Y. TIMES, Nov. 13, 2001, at A3.

5. PMO, 66 Fed. Reg. 57,833.

6. *See* Memorandum from the Deputy Secretary of Defense, to the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal (July 7, 2004) [hereinafter TRIBUNAL ORDER], http://www.defenselink.mil/news/Jul2004/d20040707review.pdf; Memorandum from The Secretary of the Navy, Implementation of Combatant Status Review Procedures for Enemy Combatants at Guantanamo Bay Naval Base, Cuba, (July 9, 2004), http://www.dod.mil/news/Jul2004/d20040730comb.pdf. [hereinafter CSRT DIRECTIVE].

7. *Cf.* Scott McClellan, Press Briefing, White House (June 21, 2005), http://www.whitehouse.gov/news/releases/2005/06/20050621-4.html#n.

8. Bumiller & Johnston, *supra* note 4.

Not surprisingly, enemy combatant detainees, through friends of court, soon filed petitions for writ of habeas corpus in federal court to review the legality of their detention as enemy combatants.[9] Petitioners challenged their detentions with claims that they were not combatants and had not committed any offenses against the laws of war. They challenged the failure of the United States to charge them with any offense and to provide them with access to counsel and the courts.[10] The petitioners ran the gamut from U.S. citizens and non-citizens detained in the United States and GTMO, to non-citizens detained in Afghanistan and elsewhere.

The Supreme Court first weighed in on detainee-related issues stemming from the current war in *Hamdi v. Rumsfeld.* The Court in *Hamdi* addressed the question of whether U.S. citizens, as enemy combatants, could be detained by the United States, holding that U.S. citizens could be held as enemy combatants, but were entitled as a matter of right to a hearing that provided some minimal procedural rights as guaranteed by the Constitution.[11] Specifically, a detained enemy combatant who is a U.S. citizen is entitled to "notice of the factual basis for his classification, and a fair opportunity to rebut the government's factual assertions before a neutral decision maker."[12]

The Supreme Court then considered the ability to detain non-citizen enemy combatants in *Rasul v. Bush.* There, the court held that non-citizen enemy combatants could be detained until the end of hostilities. Rejecting claims by the government that detainees held at GTMO were not in U.S. territory and thus could not seek habeas relief, the Court held that detainees were entitled to seek a review of their detention under the federal habeas statute, 28 U.S.C. § 2241.[13] The Court did not examine whether non-citizen detainees were entitled to constitutional protections and did not discuss hearing rights of non-citizen detainees.

In response to the Supreme Court decision in *Hamdi*, the Deputy Secretary of Defense ordered the establishment of tribunals to determine the status of enemy combatants detained at GTMO.[14] On July 29, 2004, the Secretary of the Navy implemented the Deputy Secretary's Order by promulgating "Implementation of Combatant Status Review Procedures for Enemy Combatants at Guantanamo Bay, Cuba,"[15] as well as tribunals (Combatant Status Review Tribunals, or CSRTs) to "determine . . . whether the individuals detained by the Department of Defense at the U.S. Naval Base Guantanamo Bay, Cuba, are properly classified as enemy combatants."[16]

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9. *See, e.g.*, Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. Va. 2003), *vacated by* 542 U.S. 507 (2004); Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), *reversed by* 542 U.S. 426 (2004); Al Odah v. United States, 321 F.3d 1134 (D.C.Cir. 2003), *reversed by* Rasul v. Bush, 542 U.S. 466 (2004).

10. *See* Hamdi, 316 F.3d at 459; Padilla, 352 F.3d at 698; Al Odah, 321 F.3d at 1135.

11. *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

12. *Id.*

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

14. *See* TRIBUNAL ORDER, *supra* note 6; *see also* Bumiller & Johnston, *supra* note 4.

15. CSRT DIRECTIVE, *supra* note 6.

16. *Id.* at 1.

As a result of the Directive's implementation, all Department of Defense detainees presently at GTMO have been afforded an opportunity to challenge their status as enemy combatants before CSRTs.[17] Since implementation of the CSRT procedures, detainees have challenged their detention by writ of habeas corpus petitions filed in federal court. The response by the courts who have addressed these challenges to the CSRT processes reflects a fundamental misunderstanding of the nature and purpose of enemy detentions in the Global War on Terror and a tortured application of criminal law concepts to fundamentally humanitarian and law of war issues. Two decisions rendered by the U.S. District Court for the District of Columbia, and a decision rendered by the Unites States District Court for South Carolina, addressing the detention of enemy combatants underscore the difficulty of federal courts in addressing issues involving wartime enemy detainees.[18]

In the case of *In re Guantanamo Detainee Cases*, the U.S. District Court for the District of Columbia held that the Due Process requirements of the Fifth Amendment are applicable to all wartime detainees at GTMO and that the CSRT processes fail to meet these Constitutional requirements because wartime detainees are not provided counsel or limited access to classified materials.[19] A different judge from the same District Court reached the opposite result in *Khalid, et al. v. Bush*, holding that non-resident aliens captured and detained pursuant to the AUMF "have no viable constitutional basis to seek a writ of habeas corpus."[20] In addition to these rulings, the District Court for South Carolina reviewed the case of a U.S. citizen captured on U.S. soil and designated an "enemy combatant" by the President. That Court held in *Padilla v. Hanft* that the petitioner could not be detained unless criminal charges were brought against him.[21]

These District Court decisions, coupled with the perceived ambiguity of the Supreme Court decisions, are currently fueling the wartime detainee habeas petitions of unprecedented number and scope. At the present time, over two hundred detainees at GTMO have filed petitions for writ of habeas corpus challenging their detention.

The courts, by merging law of war concepts with those of criminal law enforcement, have inadvertently opened a Pandora's Box of endless litigation in the U.S. courts by those who are our enemies during a time of war and whom we

17. *Id.*

18. *See* Padilla v. Hanft, 389 F. Supp. 2d 678 (D.S.C. 2005); Khalid v. Bush, 355 F. Supp. 2d 311, 314 (D.C. Cir. 2005); Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 170 (D.C. Cir. 2004).

19. *See In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 472 (D.D.C. 2005) (holding that CSRT procedures deprived both U.S. and non-U.S. citizen detainees of U.S. Constitutional rights guaranteed under the Fifth Amendment, specifically, "In sum, the CSRT's extensive reliance on classified information in its resolution of "enemy combatant" status, the detainee's inability to review that information, and the prohibition of assistance of counsel jointly deprive the detainees of sufficient notice of the factual bases for their detention and deny them a fair opportunity to challenge their incarceration." The Court also held that some of the petitioner's claims under the Third Geneva Convention were cognizable as valid claims.).

20. Khalid, 355 F. Supp. 2d at 321.

21. Padilla v. Hanft, 389 F. Supp. 2d 678.

have detained to protect ourselves and our country. The law of war is a unique body of law formerly left within the discretion of the military and the President as Commander-in-Chief, subject to Congressional oversight. The law of war is unlike criminal law and the "law enforcement" methods employed to enforce that criminal law. The courts appear to have defaulted to a law enforcement paradigm to determine whether detention of enemy combatants is lawful – focusing on rights to counsel, access to information, a right to be heard and to rebut findings. These are rights afforded to those who are held pending criminal charges. Wartime enemy detainees at GTMO are not held on the basis of possible or pending criminal charges. Wartime enemy detainees are held to remove them from hostilities and to ensure that they do not return to fight against America by targeting innocent civilians. The courts, by focusing on criminal law concepts, requirements, and rights, have demanded far more of the military to justify the detention of wartime enemy combatants than ever required—or currently required—under the laws of war.

As the rights of citizens vis-à-vis their own state evolve and grow under the rubric of human rights law, the continued distinction between laws applicable in war and those applicable in peacetime is becoming increasingly more important. Laws applicable in peacetime involving detention based on criminal acts are often far removed from the laws of war applicable in times of armed conflict. Human rights advocates continue to urge that broad-reaching rights, such as the right to be free of arbitrary detention, are applicable at all times.[22] Although the right to be free of "arbitrary detention" is applicable in times of war and peace, those processes required to meet this requirement in peacetime may very well differ from those legally justifiable in times of war. In peacetime, an examination of whether detention is arbitrary is based on the law enforcement paradigm. In war, this paradigm is inapplicable. Those who fail to recognize the distinction between the law enforcement and law of war paradigms, and who urge that the two paradigms should be merged, expose the naiveté of individuals in the academic world (a world far removed from war and its horrors). The application of the law enforcement paradigm to determine if wartime detention is "arbitrary," or to determine if certain processes fail to provide Constitutional Due Process to those arguably entitled to Due Process, jeopardizes the fundamental principles of the law of war and undermines the ability of America to wage war effectively. Never before in America has the detention of wartime enemies been premised on a paradigm that assumes criminal charges must be brought against such detainees.[23]

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22. *See* INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, Dec. 16, 1966, 999 U.N.T.S. 171, S. Exec. Doc. E, 95-2 (1978),[hereinafter ICCPR] (stating no derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made in a public emergency which threatens the life of the nation; however, states may derogate from article 14, which sets forth "fair trial rights.") Of note, the ICCPR precludes only "arbitrary detention" and does not address specifically the detention of a wartime enemy. *Id.* at art. 9(1). The Geneva Conventions provide for and authorize the detention of those engaged in hostilities and thus, under *lex specialis*, the GC are controlling in matters of wartime detention.

23. *See* Thomas J. Lepri, *Safeguarding the Enemy Within: The Need for Procedural Protections for U.S. Citizens Detained as Enemy Combatants under Ex Parte Quirin*, 71 FORDHAM L. REV. 2565, n.

II. AMERICA IS AT WAR

A. A Real, not a Metaphorical, War

America is at war against al Qaeda and the Taliban. This is not a metaphorical war. This war is as tangible as the dust and rubble that littered the streets of New York City on September 11, 2001. The Taliban and al Qaeda waged a campaign of terror that started well before the 9/11 attacks. The events of 9/11 brought forth the recognition that these groups were engaged in a well-funded, long-term, organized, and systematic campaign to destroy the United States and its allies—the very abilities necessary to characterize their actions as acts of war.

In 1996, al Qaeda issued a "fatwa" or call to war against America.[24] In 1998, al Qaeda issued this fatwa anew, urging all Muslims to kill U.S. citizens and their allies everywhere—including civilians.[25] This fatwa predated the al Qaeda attacks on the U.S. embassies in Kenya and Tanzania on August 7, 1998 by a mere six months.[26] Over 200 individuals were killed and over 2,000 injured in those attacks.[27] The attack on the U.S.S. Cole in October 2000, resulting in the death of 17 and injuries to 39, is directly attributable to al Qaeda.[28] Other attacks directly attributed to al Qaeda include the 9/11 attacks (2001), Richard Reid's shoe-bombing attempt (2001), the death of Daniel Pearl (2002), the synagogue bombing in Tunisia (2002), the attack on a French oil tanker in Yemen (2002), U.S. casualties in OPERATION ENDURING FREEDOM (2001-05), and attacks in Bali, Saudi Arabia, Madrid, Jakarta, and Holland.[29] Most recently, on July 7, 2005, al Qaeda associates targeted, attacked, and killed innocent civilians in London.[30]

B. International Recognition of 9/11 Attacks as Acts of War

Lest there be any doubt that the characterization of the attacks against America on 9/11 is appropriately "acts of war," one need look only to the subsequent actions of the U.S. Congress, the United Nations (UN), the North Atlantic Treaty Organization (NATO), the Organization of American States (OAS), member states of the Inter-American Treaty of Reciprocal Assistance (Rio Treaty), and the Security Treaty Between Australia, New Zealand, and the United

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66 (2003)

24. *See* Osama bin Laden, Fatwa, *Declaration of War against the Americans Occupying the Land of the Two Holy Places*, AL QUDS AL ARABI, Aug. 1996, *available at* www.pbs.org/newshour/terrorism/international/fatwa_1996.htlm.

25. *See* Osama bin Laden, Fatwa, AL QUDS AL ARABI, Feb. 23, 1998 (stating "Kill[ing] the Americans and their allies--civilians and military . . . is an individual duty for every Muslim who can do it in any country in which it is possible to do it . . . .") *available at* http://www.mideastweb.org/osamabinladen2.htm.

26. *Timeline: Al-Qaeda*, BBC World News, Apr. 21, 2005, at 2, http://news.bbc.co.uk/1/hi/world/3618762.stm.

27. *Id.* at 2.

28. *Id.*

29. *Id.* at 2-8.

30. *Id.* at 9.

States of America (ANZUS treaty). The U.S. Congress passed the AUMF authorizing the use of force.[31] The UN Security Council passed Resolution 1368 condemning the acts as "threats to international peace and security" and recognizing the "inherent right of individual or collective self-defense in accordance with the [UN] Charter."[32] NATO invoked Article 5 of the Washington Treaty providing for collective self-defense.[33] The OAS issued a statement condemning the attacks,[34] and the parties to the Rio Treaty declared the attacks to be attacks against "all American States."[35] Finally, the Prime Minister of Australia declared the attacks sufficient to invoke the Article IV self-defense provisions of the ANZUS treaty.[36]

C. Detainee Recognition of 9/11 Attacks as Constituting Armed Conflict

Those detainees who allege their detention is unlawful have not challenged the characterization of the acts committed on 9/11 or those acts in support of 9/11 as outside the scope of an armed conflict. Rather, petitioners' writs for habeas corpus each assert that the individuals did not commit any belligerent acts and thus should not be detained. Further, many of the petitions assert the applicability of the Geneva Conventions (GCs), in part, as a legal foundation to their claims, implicitly accepting the characterization of the attacks of 9/11 as an armed conflict governed by the law of war.[37] The Supreme Court decisions affirmed the authority of the United States to detain enemy combatants in armed conflicts against the United States and characterized the acts of 9/11 as acts of war.[38]

III. WARTIME ENEMY COMBATANT DETENTION

A. Detention of Those Engaged in Hostilities is Based on the Law of War

Wartime detention of enemy combatants is unrelated to peacetime law enforcement principles. A nation's ability to detain enemies during wartime stems from the laws of war, as established in part by the GCs, which authorize detention of those engaged in hostilities until the end of hostilities.[39] Enemy combatants are detained during times of war to remove them from the battlefield and ensure that

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31. AUMF, *supra* note 1.

32. S.C. Res. 1368, U.N. SCOR, 56th Sess., U.N. Doc. S/RES/1368 (Sept 12, 2001) *available at* daccessdds.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf; *see also* S.C. Res. 1373, U.N. Doc. No. S/RES/1373 (Sept. 28, 2001 (determining that terrorism should be addressed by all States) *available at* daccessdds.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf.

33. North Atlantic Treaty Organization art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

34. Statement by the Organization of American States, General Assembly, (September 11, 2001) *available at* www.oas.org/Assembly2001/assembly/gaassembly2000/GAterrorism.htm.

35. *See id.*

36. Statement by John Howard, Prime Minister of Australia, "Application of ANZUS Treaty to Terrorist Attacks on the United States," (Sep. 14, 2001) (expressing shock and outrage at the attacks on the United States and invoking Article IV of the ANZUS Treaty as applicable to the terrorists attacks) *available at* http://www.pm.gov.au/news/media_releases/2001/media_release1241.htm.

37. *See e.g.*, Brief for Petitioners at 10, Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

38. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004).

39. *See* Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, art. 118, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III].

they do not return to take up arms.[40] "Captivity in war is 'neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war.'"[41] Although individuals who engage in acts that violate the laws of war may be held on the basis of pending law of war charges, enemy combatants can be held solely because of the combatant status itself. In short, in the law of war paradigm, an enemy combatant may be detained for as long as hostilities exist without being charged with a law of war violation.

The fundamental difference between civilian criminal law enforcement and the laws of war was recognized by the Supreme Court in *Hamdi v. Rumsfeld.* The Court upheld the detention of enemy combatants, including U.S. citizen combatants, until the end of hostilities[42] as authorized under the laws of war[43] and exercised by the President pursuant to powers granted by, and incident to, the AUMF.[44] The AUMF authorizes the President to use "all necessary and appropriate force against nations, organizations, or persons associated with the September 11, 2001 terrorist attacks."[45] The Supreme Court noted that detention of such individuals "is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use" against those individuals involved in the terrorist attacks of September 1, 2001.[46] "The Authorization for Use of Military Force (AUMF) is explicit congressional authorization for the detention of individuals in the narrow category of individuals who were allegedly part of or supporting forces hostile to the United States or coalition partners and who engaged in an armed conflict against the United States."[47] The uncertain duration of detention neither affects this authorization nor alters the principle that those involved in hostilities are subject to detention until the end of hostilities.

B. Rights of Wartime Detainees

1. Detainee Rights under the Geneva Conventions

The Geneva Convention Relative to the Treatment of Prisoners of War (GC III), authorizing detention of combatants until the end of hostilities,[48] makes no distinctions based on citizenship of combatants in authorizing such detention of those engaged in hostile acts.[49] GC III provides certain rights regarding the

40. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 788 (2nd ed. 1988).

41. Yasmin Naqvi, *Doubtful Prisoner-of-War Status*, 84 INT'L REV. RED CROSS 571, 572 (2002) (quoting the assertion in 1941 made by German Admiral Canaris, in protest against the regulations concerning Russian prisoners of war issued by the German army authorities, later approved as legally correct by the International Military Tribunal at Nuremburg).

42. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004).

43. *See* GC III, *supra* note 39, art. 118.

44. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004).

45. AUMF, *supra* note 1.

46. *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

47. *Id.*

48. GC III, *supra* note 39, at art. 118.

49. *See id.*

classification of detained individuals during an international armed conflict.[50] Individual detainees classified as prisoners of war are entitled to a full array of protections not otherwise available. If the status of an individual as a prisoner of war is in doubt, Article 5 of GC III provides that the status of such an individual shall be determined by a "competent tribunal."[51] Prisoner of war status does not apply to those who fall outside the protections of GC III.

The President has determined that the GCs are inapplicable to al Qaeda because non-state organizations fall outside the jurisdiction of the GCs, and the Taliban, although falling within the jurisdictional requirements of GC III, fails to meet the requirements set forth therein for those protections provided by the GCs to prisoners of war:[52]

> Under Article 4 of the Geneva Convention . . . Taliban detainees are not entitled to POW status . . . [T]he Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war . . . Al Qaeda is an international terrorist group and cannot be considered a state party to the Geneva Conventions. Its members, therefore, are not covered by the Geneva Convention, and are not entitled to prisoner of war (POW) status under the treaty.[53]

The courts have recognized that the President's determination is legally based[54] and that the GCs' protections do not apply to members of al Qaeda and the Taliban held as enemy combatants.[55]

More importantly, the GCs are not relevant to a determination of whether a detained individual is subject to detention. The GCs do not provide for a mechanism such as a hearing or a tribunal to determine if an individual is properly detained as an individual engaged in hostilities. Although the United States historically has utilized procedures to review and determine whether detainees in a war are innocent civilians inadvertently captured and detained on the battlefield,[56] these procedures are not mandated by any law, statute or treaty nor are they rights

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50. *See id.*, at art. 2.

51. *See id.*, at art. 5.

52. *See* Ari Fleischer, Press Release, White House, White House Press Secretary Announcement of President Bush's determination regarding legal status of Taliban and Al Qaeda detainees (Feb 7, 2002), *available at* http://www.state.gov/s/l/38727.htm.

53. *See id.*

54. *See* Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005).

55. *See id.*

56. *See* U.S. Dep'ts of the Army, the Navy, the Air Force, and the Marine Corps, Army Regulation 190- 8/OPNAVINST 3461.6/AFJI 31-304/MCO 3461.1, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (1997) [hereinafter AR 190-8] (providing for Article 5 hearings if the prisoner of war status of an enemy detainee is in doubt. As a matter of practice, U.S. military services have utilized the Article 5 model set forth in AR 190-8 to determine if a detainee is an innocent civilian inadvertently captured in the fog of war.).

held by the detainee.[57] These procedures were implemented in determining if an individual was an enemy combatant prior to detention at GTMO.[58]

Petitioners who argue that the GCs provide a basis to attack the legality of their detention do so by "bleeding" detention issues based on hostile acts as an enemy combatant with detention based on law of war criminal charges before military commissions – merging the law of war and law enforcement paradigms. Prisoners of war can be tried only by those courts providing the same rights as courts applicable to military members of the Detaining Power[59] and, thus, this "bleed" presents a cognizable argument at first glance. In the United States, military members are subject to trial by courts-martial[60] and are provided differing procedures than those applicable to military commissions.[61] Thus, if an enemy combatant detained at GTMO were to be detained solely on the basis of criminal charges before military commissions, the personal jurisdiction of military commissions might well be recognizable by the courts as an issue within the jurisdiction of a writ of habeas corpus. However, these facts are not before the courts. Indeed, if a writ of habeas corpus attacking the jurisdiction of the military commissions were successful, the remedy of release would be unavailable because the detainees, notwithstanding possible law of war violations, are also held as enemy combatants for whom there is no requirement that criminal charges be brought.

2. Detainee Rights under the Geneva Conventions are Unenforceable

Whether a private individual is entitled to the GCs' protections becomes moot in a court challenge if the law does not recognize that U.S. domestic law creates a judicially enforceable GC right. If the GCs are not judicially enforceable, the issue of whether al Qaeda or Taliban members are protected by the GCs is moot. Likewise mooted is the question of whether the GCs afford detainees certain rights upon which to base an argument of unlawful detention. The U.S. Court of Appeals for the District of Columbia in the case of *Hamdan v. Rumsfeld* recently held that there is no individual right of enforcement of the GCs.[62] In that case, petitioner detainees challenged the authority and procedures of military commissions by writs of habeas corpus, relying in large part on the argument that the Geneva Conventions create judicially enforceable rights. The Court noted that the obligations imposed by the GCs are obligations of a state to other states, not the obligations of states to individuals. Although the GCs require that states provide

57. *See Hamdan*, 415 F.3d 33, 40 (holding that the GC provide no individual right of enforcement).

58. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 518-19 (2004) (noting that certain processes were implemented to determine if Hamdi was an enemy combatant).

59. GC III, *supra* note 39, at art. 102.

60. Uniform Code of Military Justice, 10 U.S.C. § 802, art. 2. (2005) [hereinafter UCMJ].

61. For example, the UCMJ excludes hearsay falling outside scope of exceptions and imposes strict requirements for authenticating documents prior to admission into evidence. MIL. R. EVID. 901.

62. *Hamdan*, 415 F. 3d 33.

certain protections to those detained in war and those who are prisoners of war, these "rights" are not rights of individuals, they are treaty obligations of states.[63]

In a similar vein, the Fourth Circuit in *Hamdi* "rejected Hamdi's Geneva Convention claim, concluding that the convention is not self-executing and that, even if it were, it would not preclude the Executive from detaining Hamdi until the cessation of hostilities."[64] This decision underscores the idea that the GCs authorize the detention of those engaged in hostilities until the end of hostilities. Assuming that an individual enemy combatant possesses a private cause of action to enforce the GCs, only the cessation of hostilities could provide a basis for a determination that detention was unlawful. No petitioner has alleged that hostilities have ended. Furthermore, the Supreme Court determined in 2004 that hostilities were still ongoing in Afghanistan. With the recent bombings in London, a myriad of al Qaeda recruiting and training sites on the web, continued al Qaeda involvement in Iraq and Afghanistan, and continued public pronouncements by top al Qaeda leaders, a court would be hard pressed to determine that al Qaeda has ceased to engage in hostilities.

IV. REVIEW OF WARTIME ENEMY COMBATANT DETENTION

A. Availability of Writ of Habeas Corpus to Challenge Wartime Detention of Enemy Combatants

For the first time in history, the Supreme Court has entered an arena previously reserved for military commanders and those schooled in the nuances and exigencies of the war and the laws of war. The Supreme Court ruled in *Rasul* and *Hamdi* that certain wartime detainees who are not facing charges by military courts have a statutory right to challenge the legality of their wartime detention as enemy combatants by writ of habeas corpus.[65] These decisions launched U.S. courts into oversight of the wartime requirements and procedures for detaining enemy combatants. Previously, the detention of those engaged in hostilities resided solely within military authority, including the President as Commander-in-Chief, subject to Congressional oversight. Although Congress is empowered to act in this area,[66] it has not.[67]

The cases relied upon by the U.S. federal courts in determining the legality of detention rest on facts quite different from those before us. Specifically, the facts of those cases involved detention arising from pending criminal charges before military courts. In each instance, the petitioner was under military charges and alleged that the military court was without personal jurisdiction. These facts are distinguishable from those at hand involving the detention of enemy combatants

63. *See also* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, art. 100-104.

64. *See* Hamdi v. Rumsfeld, 316 F.3d 450, 468 (4th Cir. 2003).

65. *See* Rasul v. Bush, 542 U.S. 466, 552 (2004); Hamdi v. Rumsfeld, 542 U.S. 507, 580 (2004).

66. U.S. CONST. art. I, § 8, cl. 11.

67. *But see,* S. 1042, 109th Congress (2005) (providing for CSRT and proceedings of CSRTs, specifically, providing counsel to detainees at annual review boards that supplement CSRTs, subject to Presidential modification).

based on their status as enemy combatants - not pending criminal charges before military courts. Thus, each petitioner's attempts to conflate an analysis of the legality of detention with issues of military commission jurisdiction is misplaced. This merger of "detention" of combatants to prevent their return to hostilities with "detention" pending criminal prosecution has been argued successfully in some lower courts.[68]

B. Minimal Procedural Requirements for Wartime Detentions; A Two-Tiered System?

The Supreme Court decisions in *Hamdi* and *Rasul* distinguished between wartime detention of U.S. citizens and non-citizens as well as between those U.S. citizens captured on the battlefield and those captured elsewhere.[69] As the U.S. Court of Appeals for the District of Columbia Circuit noted in *Hamdan*, the Supreme Court in *Rasul,* regarding a non-U.S. citizen, "decided a . . . 'narrow' question: whether federal courts had jurisdiction under 28 U.S.C. § 2241 'to consider challenges to the legality of the detention of foreign nationals' at Guantanamo Bay."[70] The Supreme Court in *Hamdi* broadened this inquiry by considering challenges to detention by citizen detainees. Although the Supreme Court held that both citizens and non-citizens alike may be held as enemy combatants until the end of hostilities, the distinction between citizen and non-citizen detainees, and the differing rights afforded each, is significant.

1. Wartime Detention of U.S. Citizens

The distinction drawn by the courts between citizen and non-citizen enemy combatants is based, in part, on specific U.S. statutory law relating to detention of citizens[71] and Constitutional provisions embodying Due Process requirements that are arguably inapplicable to non-U.S. citizens. However, the Supreme Court's decisions in analyzing and applying U.S. statutory law intersperse law enforcement concepts into law of war considerations. The Non-Detention Act, 18 U.S.C. § 4001(a), requires "an Act of Congress" to support detention of a U.S. citizen.[72] The Supreme Court in *Hamdi* affirmed that the AUMF satisfies this underlying requirement of Congressional action under this statutory provision.[73] However, it appears that the Court sidestepped the underlying rationale for the Non-Detention Act. The legislative history of this act reveals that wartime detention of U.S. citizens as enemy combatants was neither raised nor considered. The basis of this statute was the law enforcement paradigm focusing on detention of those suspected of crimes. The failure of the courts to recognize the appropriate scope of the Non-Detention Act did not undermine the Court's conclusion as to the wartime

68. *See, e.g.*, Hamdi v. Rumsfeld, 316 F.3d 450, 467-468 (4th Cir. 2003).
69. Hamdi v, Rumsfeld, 337 F.3d 335, 344 (4th Cir. 2003); *see generally Rasul*, 542 U.S. 466.
70. *Hamdan*, 415 F.3d at 39 (quoting Rasul v. Bush, 542 U.S. 466 (2004)).
71. *See* 18 U.S.C. § 4001 (2005).
72. *Id.* at § 4001(a).
73. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 517 (2004).

authority of the President or the military in this instance. Nonetheless, the scope of this statute arguably was improperly characterized.[74]

In addition to holding that citizens could be held as enemy combatants, the Supreme Court also distinguished between those captured on the battlefield and those captured elsewhere. The Supreme Court did not venture to define the "battlefield" in *Hamdi*, holding only that "Congress . . . authorized detention [of enemy combatants] in the narrow circumstances considered here,"[75] that is, capture in Afghanistan during active hostilities in which the accused allegedly turned over his Kalashnikov upon capture with his Taliban unit. The Supreme Court did not address what, if any, differing standards might apply to the detention of those citizens captured outside the battlefield. In *Padilla*, the Supreme Court noted that Padilla was a U.S. citizen taken into custody at O'Hare Airport, initially under a protected witness warrant. He was later determined by the President to be an enemy combatant and subject to wartime detention. The Supreme Court held only that Padilla must file his petition for writ of habeas corpus in the appropriate district court.[76] The Supreme Court, while specifically noting that U.S. citizens were subject to detention as enemy combatants,[77] did not address the issue of the scope of wartime detention of U.S. citizens or the definition and impact of whether an individual was captured on the battlefield.

The *Hamdi* court also addressed the issue of whether the Constitution required specific processes to implement the AUMF vis-à-vis wartime detention of American citizens, an issue not addressed by the AUMF. Hamdi, a U.S. citizen, argued that the Fifth and Fourteenth Amendments were fully applicable to a determination of whether an individual has enemy combatant status, mandating the right to confrontation and counsel.[78] In determining which processes were constitutionally required by the Due Process Clause applicable to U.S. citizens, the Court commented: "Our resolution of this dispute requires a careful examination . . . of the Due Process Clause, which informs the procedural contours of that mechanism in this instance."[79] One court further noted:

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74. *Compare id.* at 515 (expressing "doubt as to Hamdi's argument that § 4001(a), which provides that '[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress,'" required express congressional authorization of detentions of this sort."); *with* Hamdi v. Rumsfeld, 316 F.3d 450, 468 (4th Cir. 2003) (stating "I[i]t is likewise significant that § 4001(a) functioned principally to repeal the Emergency Detention Act. That statute had provided for the preventive "apprehension and detention" of individuals inside the United States "deemed likely to engage in espionage or sabotage'" during "'internal security emergencies.'" H.R. Rep. 92-116, at 2 (Apr. 6, 1971). Proponents of the repeal were concerned that the Emergency Detention Act might, inter alia, 'permit a recurrence of the round ups which resulted in the detention of Americans of Japanese ancestry in 1941 and subsequently during World War II.' There is no indication that § 4001(a) was intended to overrule the longstanding rule that an armed and hostile American citizen captured on the battlefield during wartime may be treated like the enemy combatant that he is. We therefore reject Hamdi's contention that § 4001(a) bars his detention." (citation omitted).).

75. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004).

76. *See* Rumsfeld v. Padilla, 542 U.S. 426 (2004).

77. *See* Hamdi v. Rumsfeld, 542 U.S. at 516.

78. *See id.* at 524 – 25.

79. *Id.* at 525.

> Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.[80]

Justice O'Connor, writing on behalf of a plurality of the Court, applied the analysis set forth in *Mathews v. Eldridge* [81] and concluded that such hearings must provide "notice . . . and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker."[82] The Supreme Court in *Mathews* employed a balancing test to address the serious competing interests between the government and an individual "and for determining the procedures that are necessary to ensure that a *citizen* is not 'deprived of life, liberty, or property, without due process of law.'"[83] Justice O'Connor wrote:

> *Mathews* dictates that the process due in any given instance is determined by weighing "the private interest that will be affected by the official action" against the Government's asserted interest, "including the function involved" and the burdens the Government would face in providing greater process . . . . The *Mathews* calculus then contemplates a judicious balancing of these concerns, through an analysis of "the risk of an erroneous deprivation" of the private interest if the process were reduced and the "probable value, if any, of additional or substitute safeguards. (citation omitted).[84]

In *Mathews*, the Supreme Court examined the rights required by the Due Process Clause in administrative hearings potentially resulting in denial of disability benefits. The Court in *Mathews* noted that only one prior case required rights approximating a judicial trial and concluded that generally such hearings required only notice and the right of response or personal appearance at the hearing.[85] The cases relied upon in *Mathews* are distinguishable from the present enemy detention cases because the courts did not examine hearing rights applicable to detention and did not implicate the federal habeas statute. Thus, the courts in these cases did not examine the relationship between the Due Process Clause and the federal habeas statute.

The Supreme Court in *Hamdi*, applying the *Mathews* analysis in light of the federal habeas statute,[86] determined that two core elements of Due Process cannot

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80. *Id.* at 532.

81. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

82. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 533.

83. *Id.* at 528 (emphasis added).

84. *Id.*

85. *Mathews*, 424 U.S. at 333-34.

86. 28 U.S.C. § 2241(c)(3) (2005) (authorizing issuance of writ of habeas corpus if the detainee is "in custody in violation of the Constitution or laws or treaties of the United States."); 28 U.S.C. § 2243

be abrogated - the right to notice and a fair opportunity to rebut the government's factual assertions before a neutral decision maker. Both of these requirements are based on the law enforcement paradigm, as is evidenced by 28 U.S.C. § 2247, which provides that "[o]n application for a writ of habeas corpus documentary evidence, transcripts of proceedings upon *arraignment, plea and sentence* and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence."[87]

Separate and distinct from the *Mathews* analysis, the Supreme Court concluded that the application of 28 U.S.C. § 2241 to federal habeas review required the implementation of these two core "rights."[88] It is unclear how or why processes applicable to habeas review were held to be applicable to the requirements of the underlying detention procedures.

In further discussing the procedural requirements of a hearing to determine enemy combatant status, the Supreme Court in *Hamdi* opined that exigent circumstances may justify procedures admitting hearsay or implementing a rebuttable presumption in favor of the government's evidence.[89] The Supreme Court stated, "[t]here remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal,"[90] and referenced Article 5 tribunals' processes set forth in Army Regulation 190-8 (AR 190-8).[91] Article 5 tribunals under GC III are constituted to determine the status of a detainee as a Prisoner of War when doubt exists as to that status.[92] Prisoner of war status provides many protections otherwise unavailable to a detainee and generally is a sought-after status.[93] The only procedural right afforded a detainee by Article 5 of GC III is a hearing before a "competent tribunal."[94] Over time, America has expanded procedural protections afforded a detainee in Article 5 proceedings as a matter of policy. These expanded protections are found in AR 190-8 as well as other U.S. military directives and regulations governing Article 5 procedures.[95] Nonetheless, the Supreme Court specifically rejected the government's proposal that a declaration of statements

(2005) (calling for the court to "summarily hear and determine the facts, and dispose of the matter as law and justice requires.").

87. 28 U.S.C. § 2247 (2005).

88. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 525-26 (2004).

89. *Id.* at 533 (emphasis added).

90. *Id.* at 538.

91. *Id.*

92. GC III, *supra* note 39, at art. 5

93. *See id.*

94. *Id.*

95. *See, e.g.*, AR190-8, *supra* note 56.

obtained from the detainee in an interrogation setting[96] based on the "some evidence standard"[97] were sufficient to establish enemy combatant status.

2. Wartime Detention of Non-Citizens

The Supreme Court in *Rasul* did not discuss what process a non-citizen is entitled to in determining enemy combatant status. That portion of the *Hamdi* analysis based on 18 U.S.C. § 4001(a) is inapplicable to a non-citizen; this statute applies only to citizens.[98] Likewise, the Due Process Clause is arguably limited to citizens or those with significant U.S. contacts.[99]

The *Mathews* analysis is arguably inapplicable to non-citizens. However, the Supreme Court's importation of the habeas corpus procedures to the underlying hearing process to determine enemy combatant status does not appear to be impacted by citizenship. If the Court places reliance on this importation, which appears to be the case, the courts may require the government to afford non-citizen enemy combatants the same procedures as are afforded to citizens.

C. Combatant Status Review Tribunals

1. Background

In response to the Supreme Court decisions in *Hamdi* and *Rasul*, the Deputy Secretary of Defense ordered the establishment of tribunals to determine the status of enemy combatants detained by the Department of Defense at GTMO.[100] The Secretary of the Navy implemented this order by a directive establishing procedural and substantive guidance.[101] The purpose of the CSRT is to determine if the detained individual meets the definition of an "enemy combatant." "Enemy combatant" is defined as "an individual who was a part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners."[102] Between August 2004 and January 2005, detainees held by the Department of Defense at GTMO were provided the opportunity to challenge their detention and designation as enemy combatants.

2. Procedural Guarantees

CSRTs are similar to GC III, Article 5 tribunals as implemented and expanded upon in AR 190-8. CSRTs are composed of three officers and are assisted by a non-voting Recorder.[103] The standard of proof is preponderance of

96. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 526 (2004) (noting that "The Government recognizes the basic procedural protections required by the habeas statute, but asks us to hold that, given both the flexibility of the habeas mechanism and the circumstances presented in this case, the presentation of the Mobbs Declaration to the habeas court completed the required factual development. It suggests two separate reasons for its position that no further process is due.").

97. *Id.* at 537.

98. 18 U.S.C. § 4001(a) (2005).

99. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 514 (2004).

100. TRIBUNAL ORDER, *supra* note 6.

101. CSRT Directive, *supra* note 6, at Enclosure 1(B).

102. *Id.* at B.

103. *See id.* at C(1), C(2).

the evidence,[104] rather than the "some evidence" standard rejected by the Court in *Hamdi*. The detainee has the right to be advised of the reasons for detention, be assisted by a personal representative, receive summaries of unclassified evidence prior to the hearing, call reasonably available witnesses, present documents, question witnesses, address the tribunal, remain silent, and be present at all open sessions of the tribunal.[105] The Recorder is responsible for searching government files to determine if any information exists that is relevant to the detainee's position.[106] An interpreter is made available if required.[107] A written report is made of the decision, and this report is reviewed by the Staff Judge Advocate for legal sufficiency.[108] The CSRT Director (a two-star admiral) automatically reviews each report.[109] CSRT hearings have been attended by the media, the ICRC, and Non-Governmental Organizations (NGOs).[110]

3. CSRTs Provide a Detainee Significantly More Procedural Protections Than Those Afforded by GC III, Article 5, and AR 190-8

The procedural protections afforded a detainee by CSRTs exceed those required by GCIII, Article 5, or AR 190-8. GC III, Article 5 requires only a hearing before a "competent tribunal." A "competent tribunal" is not based on the law enforcement model; Article 5 tribunals are not courts.[111] The GCs set forth no other requirements for an Article 5 tribunal. Pursuant to GC III, Article 5 hearings are only provided a detainee if there is doubt as to his status; they were not envisioned to apply to all detainees. Relevant commentary addressed this issue and indicated that Article 5 would be applied only in limited circumstances.[112] Despite its anticipated limited use, the GCs afford a detainee the right only to a competent tribunal. GC III, Article 5 creates no right to counsel before the tribunal.

Article 5 hearings under AR 190-8 are held when the status of an individual as a prisoner of war is in doubt.[113] The rights afforded a detainee by CSRTs exceed those provided under AR 190-8. CSRTs authorize a personal

104. *Id.* at B.

105. *See id.* at F.

106. *See id.* at C(2).

107. *See id.* at C(57).

108. *See id.* at I(7).

109. *See id.* at I(5).

110. United States, SECOND PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE COMMITTEE AGAINST TORTURE, SUBMITTED BY THE UNITED STATES OF AMERICA TO THE COMMITTEE AGAINST TORTURE, CAT/C/48/Add.3May 6, 2005, Sec. IIC (May 6, 2005) stating "CSRTs are transparent proceedings. Members of the media, the International Committee of the Red Cross (ICRC), and non-governmental organizations may observe military commissions and the unclassified portions of the CSRT proceedings. They also have access to the unclassified materials filed in Federal court.").

111. *See* ICRC, Jean S. Pictet, The Geneva Conventions of 12 August 1949, Commentary, III Geneva Convention, Relative to the Treatment of Prisoners of War p. 77, 1960 (stating that the original term "responsible authority" was changed to "competent tribunal" because of the view that such a decision should not be left to a "single person, who might often be of subordinate rank." *There was a certain degree of opposition by several states who felt that the decision should be taken by a court. This position was rejected. Id.* at 563 (emphasis added)).

112. *See id.*, at art. 5.

113. *See* AR 190-8, *supra* note 56, ch. 1-6(a).

representative to assist the accused, who is provided access to classified information otherwise unavailable to the accused because of national security concerns.[114] The personal representative meets with the detainee prior to the hearing to determine if the detainee desires to present evidence or call witnesses.[115] The personal representative may present information relevant to the detainee's status.[116] Although the personal representative is not an attorney, he or she is an advocate for the detainee in the non-adversarial hearing. AR 190-8 does not provide a detainee the assistance of a personal representative, does not require a minimum of 30 days notice prior to the hearing, and does not allow for access to all evidence by the accused's representative[117] – all of which are provided by CSRTs.[118]

V. CURRENT DETENTION CASES

A. Background

Since the Supreme Court rulings in *Rasul*, *Padilla*, and *Hamdan*, over 200 detainees held by the Department of Defense at GTMO have filed petitions for habeas corpus. Subsequently, the U.S. District Court for the District of Columbia has issued two opinions addressing whether the detention of enemy combatants pursuant to procedures of CSRTs are lawful: *In re Guantanamo Bay*[119] and *Khalid v. Bush.*[120] In addition, the U.S. District Court for South Carolina addressed wartime enemy detentions in the cases of *Padilla v. Hanft*[121] and *Al-Marri v. Hanft.*[122] The U.S. Court of Appeals for the District of Columbia has not yet ruled on the appeals in the D.C. District Court cases which had oral argument in September and October 2005; however, oral argument was heard in *Padilla v. Hanft* on July 15, 2005, and a ruling is expected within a few months. The U.S. Court of Appeals for the District of Columbia in the case of *Hamdan*, a case raising the issue of jurisdiction of military commissions, issued an opinion on July 15, 2005, that impacts certain of those issues raised by petitioners in the detention cases and is instructive in that regard.

B. Specific Judicial Decisions Post-Supreme Court Rulings

In *In re Guantanamo Detainees*, a case that includes 11 consolidated habeas cases, Judge Joyce Hens Green, U.S. District Judge for the District of Columbia, held that the petitioners, including non-resident aliens, "stated valid claims under the Fifth Amendment to the U.S. Constitution and that the procedures implemented by the government to confirm that the petitioners are 'enemy combatants' subject

114. *See* CSRT Directive, *supra* note 6, at C(3).
115. *See id.*, at F(6) & G(2) and G(4).
116. *See* CSRT Directive, *supra* note 6, at C(3).
117. *See* AR 190-8, *supra* note 56.
118. *See* CSRT Directive, *supra* note 6.
119. *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 445 (D.D.C. 2005).
120. Khalid v. Bush, 355 F. Supp. 2d 311 314 (D.D.C. 2005).
121. Padilla v. Hanft, 423 F.3d 386 (D.S.C. 2005).
122. Al - Marri v. Hanft, 378 F. Supp. 2d 673, 673-74 (D. S.C. 2005).

to indefinite detention violate the petitioners' rights to due process of law."[123] The court also recognized claims of petitioners under GC III.

The court discussed the uncertain and indefinite nature of detention of "enemy combatants" and highlighted that many were not caught on the battlefield. The court noted that certain detainees face criminal charges and possibly life imprisonment and opined that enemy combatants might face the same plight – a life of detention – without any of those same rights afforded those charged with criminal violations of the law of war.[124] With this as a backdrop, the court determined that all detainees at GTMO must be afforded the rights of Due Process under the Fifth Amendment of the Constitution and held that the CSRT processes violated Due Process.

The court noted that the Supreme Court employed the *Mathews* analysis in the *Hamdi* case and, except for the fact that Hamdi is a citizen and none of the petitioners in the case before the court are U.S. citizens, *Hamdi* is the "starting point and core of this Court's consideration of what process is due to the Guantanamo detainees in these cases."[125] In holding that all detainees are entitled to the Constitutional protections of the Fifth Amendment, the court noted that the "American authorities are in full control in Guantanamo Bay, [and] their activities are immune from Cuban law."[126] The court focused on the liberty interest of detainees, the potential length of detention, and the government's national security interests in determining what procedural guarantees "ensure that innocents are not indefinitely held as 'enemy combatants.'"[127] The court held that the CRST processes failed to meet Due Process requirements because detainees are not provided counsel and are not permitted access to classified material.[128] In other specific situations, the court held that the CRST processes violated Due Process because of how allegations of torture were handled and the application of the term "enemy combatant."

The U.S. District Court for the District of Columbia also addressed the issue of wartime detention in *Khalid*, a case involving "non-resident aliens captured outside of Afghanistan."[129] In the Memorandum Opinion and Order of Judge Richard J. Leon, the court notes that the Petitioners "are asking this Court to do something no federal court has done before: evaluate the legality of the Executive's capture and detention of non-resident aliens, outside the United States, during a time of armed conflict." The court held that Congress authorized the Executive to capture and detain enemy combatants,[130] and that "no viable legal

123. *In re* Guantanamo Detainee Cases, 355 F. Supp 2d at 445.

124. *Id.* at 447, 465-66; DEPUTY SECRETARY OF DEFENSE, *supra* note 14, at c (finding detainees charged with criminal offenses are provided counsel, among other rights).

125. *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d at 466.

126. *Id.* at 463.

127. *Id.* at 466-67.

128. *See id.* at 468-69.

129. Khalid v. Bush, 355 F. Supp. 2d 311, 316 (D. D.C. 2005).

130. *See id.*

theory exists by which it (the court) could issue a writ of habeas corpus."[131] In reviewing the grounds asserted by the petitioners as a basis for relief, the court found that the AUMF authorized the President to capture and detain enemy combatants. Further, the court determined that non-resident aliens captured and detained outside the United States have no cognizable constitutional rights.[132] The court noted that the Supreme Court found in *Rasul* that the detainees at GTMO, including non-U.S. citizens, have a right to challenge the lawfulness of their detention though writ of habeas corpus. The Supreme Court in *Rasul* and *Hamdi* did not address the issue of whether wartime detainees are entitled to any constitutional, statutory, or treaty rights that might establish grounds for the court to grant the habeas petition.[133]

The U.S. District Court for the District of South Carolina, in the case of *Padilla v. Hanft,* examined the narrow issue of whether the Executive is authorized to detain U.S. citizens captured in the United States as enemy combatants.[134] The court in *Padilla* relied on Padilla's U.S. citizenship and determined that the President was without authority to hold Padilla as an enemy combatant. The court, in determining whether the AUMF authorized the President to detain an American citizen, stated "[it] must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used."[135] The court held that the AUMF did not meet the requirements of 18 U.S.C. § 4001(a), the Non-Detention Act, and that the executive was without authority to detain U.S. citizens as wartime detainees. The court further noted that Padilla could only be detained if he were charged with criminal offenses, relying solely on the criminal law paradigm to justify wartime detention of U.S. citizens engaged in acts of war against the United States.[136]

The U.S. District Court for the District of South Carolina also reviewed a case factually distinguishable from *Padilla.* The court, in *Al- Marri v. Hanft,*[137] addressed challenges to detention raised by a non-citizen, resident alien enemy combatant who was captured in the United States and detained at GTMO. The court distinguished the *Padilla* case on the basis of the citizenship of the detainee and held that "detention is proper pursuant to the AUMF."[138] Significantly, the court found that criminal charges brought against the detainee did not prevent his detention as an enemy combatant.[139]

131. *Id.* at 314.
132. *See id.* at 320-21.
133. *But see*, Rasul v. Bush, 542 U.S. 466 (2004).
134. *See* Padilla v. Hanft, 389 F. Supp. 2d 678 (D.S.C. 2005).
135. *Id.* at 689 (quoting Ex Parte Endo, 323 U.S. 283, 300 (1944)).
136. *See id.*
137. Al-Marri v. Hanft, 378 F. Supp. 2d 673, 677-78 (D.S.C. 2005).
138. *Id.* at 680.
139. *Id.* at 681.

VI. THE MILITARY'S ABILITY TO WAGE WAR AND DETAIN ENEMY COMBATANTS

A. Current Status of Military Detention Requirements

The Supreme Court held that U.S. and non-U.S. citizens are subject to wartime detention until the end of hostilities as authorized by the AUMF.[140] The court further held that U.S. citizen detainees are entitled under the Fifth Amendment of the Constitution to a wartime hearing in which the detainee must receive notice and in which the detainee must be afforded an opportunity to rebut the government's evidence and conclusions.[141] The Supreme Court rejected as insufficient the "some evidence" standard proposed by the government and also rejected hearsay evidence in the form of an affidavit summarizing the evidence establishing the detainee as an enemy combatant.[142] Although the Supreme Court opined that those processes set forth in AR 190-8, modeled on GC III, Article 5, hearings, might meet the wartime detention hearing requirements, the District Court for the District of Columbia, in *In re Guantanamo Cases*, held that the detainee was entitled to counsel and to review classified information, protections which far exceed those provided by AR 190-8 or GC III, Article 5.[143]

In addition to those cases raising the issues of unlawful detention as an enemy combatant, the petitioner in *Hamdan* raised the issue of detention on the basis of charges pending before military commissions.[144] In April 2004, Salim Ahmed Hamdan, a non-U.S. citizen detainee charged with offenses before military commissions, filed a petition of writ of habeas corpus challenging the legality of his detention pending criminal charges, the authority of the President to authorize military commissions, and the procedures of the military commissions.[145] On November 8, 2004, the U.S. District Court of the District of Columbia, in a decision by Judge Robertson, held that Hamdan could not be tried by military commission until such time as it was determined by a competent tribunal that he was not a prisoner of war and until such time as military commission procedures did not authorize hearings from which an accused could be excluded.[146] The court found that the GCs were enforceable and that Hamdan was presumptively a prisoner of war entitled to be tried by courts-martial rather than military commissions.[147] Implicit in its decision, the court found that the scope of habeas corpus extended to the jurisdiction and procedures of military commissions.[148] For the court to extend the scope of habeas to military commission jurisdiction and proceedings, out of necessity, the court was required to premise Hamdan's detention on criminal charges pending before military commissions rather than his status as an enemy combatant. The decision of the court was overturned by the

140. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 580 (2004).
141. *See, generally, id.*
142. *Id.* at 527-28.
143. *In Re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 472 (D.D.C. 2005).
144. *See* Hamdan v. Rumsfeld, 415 F.3d 33, 35-37 (D.C.Cir. 2005).
145. Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 155 (D.D.C. 2004).
146. *Id.* at 173.
147. *Id.* at 165.
148. *See id.*

U.S. Court of Appeals for the District of Columbia Circuit on July 15, 2005.[149] Nonetheless, the issue of whether the scope of a writ of habeas corpus may reach the jurisdiction of military commissions when such jurisdiction is not the basis for an enemy combatant's detention remains unaddressed.

B. Impact on U.S. War-fighting Capability

The decisions of the Supreme Court and lower courts that seemingly apply criminal law concepts to law of war issues adversely impact U.S. war-fighting capabilities.

Traditionally in war, those who fell into the hands of the enemy were at the mercy of the enemy. Over time, humanitarian laws developed to mitigate the effects of what is otherwise the most horrific activity on the face of this earth – war.[150] The courts, in ruling on wartime detention issues, determined that U.S. citizen detainees are entitled to hearing procedures that provide Due Process.[151] Although the Supreme Court, in addressing the right of writ to habeas corpus, stated that wartime detention hearings are required for the continued detention of U.S. citizen enemy combatants, it is unclear what procedural protections must be afforded detainees.

Capturing an enemy on the battlefield and disarming him is a routine combat activity. Once an enemy is detained and removed from the area of active hostilities, the soldier who captured the enemy remains on the front lines – fighting. The capturing unit is responsible for providing the date of capture, location of capture, capturing unit, and how the person was captured.[152] The pace of combat is brutal; there is little to no opportunity for a soldier to stop and fill out extensive questionnaires about how he came to capture an individual. Further, the information available to subsequent individuals who might review the status of the detainee is necessarily hearsay because the capturing soldier has returned to the font lines, been shipped home, or been killed or wounded. In many situations, hearsay is the only existing evidence establishing a reason to believe that the detained individual was involved in hostilities against the United States. Additional proof that a person engaged in hostilities against America may be impossible to obtain. As time passes, the government will not necessarily obtain additional extrinsic evidence against a detainee. Much additional information, if any, will have been obtained from the detainee or other detained individuals through questioning. The detainee's challenge to his detention will necessarily originate from the detainee during early questioning. AR 190-8's tribunal provisions, which were modeled after Article 5 GC III tribunals, account for these considerations and admit statements of a detainee.[153]

149. Hamdan v. Rumsfeld, 415 F.3d 33, 34 (D.C.Cir. 2005).

150. *See, e.g.* GC III, *supra* note 39; *See also* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

151. *See, e.g.* Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 173 (D.D.C. 2004).

152. AR 190-8, *supra* note 56, at 2-1(b).

153. *Id.* at 1.6.

Wartime detention hearings are not adversarial tribunals, administrative hearings, or courts. An Article 5 tribunal, as set forth by AR 190-8 and referenced by the Court in *Hamdi*, is a wartime tribunal; there are no parties, there are no "rights," there is no counsel, and there is no opportunity for the detainee to demand access to all the government's classified information.[154] The standard of proof is preponderance of the evidence.[155] The nature of the evidence to be considered is not limited, in recognition of the nature and complexity of war.

The court in *In re Guantanamo Detainee Cases* in focusing on indefinite detention did not simply focus on the length of detention; but also on the nature of the battlefield and the passage of time. These considerations by the court, if they withstand appellate scrutiny, could lead to implementation of processes that would otherwise be impossible or impracticable in a traditional war. The "new" battlefield raises the specter that perhaps the nature and mode of evidence available to review a detainee's status might differ from that of battlefield detainees of past wars. Nonetheless, rights available to wartime detainees cannot and should not be evaluated on the basis of specific facts under limited circumstances. The rules of war are designed to apply in times of war and hostilities. There are not separate laws for wars of differing duration, scope or intensity. Is the military to become obligated to document all facts surrounding a capture of an enemy, to document the basis for such capture, to produce soldiers to appear in an adversarial setting to be cross-examined by a detainee's counsel, and to provide the manpower and support necessary to conduct formal, legal hearings in all cases of wartime detention (such as those in GTMO that exceed three years duration)?[156] If so, America's war-fighting ability will be markedly and adversely affected if the duties of our soldiers as warriors are forced to compete with the obligation to act as investigators.

VII. CONCLUSION

Bad facts make bad law. When it comes to America's war fighting capability, there is no room for bad law. Detention of those who were taught to challenge their detention by raising claims of torture[157] and who have been detained for three

154. *Id.; see generally* Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

155. AR 190-8, *supra* note 56, at 1-6(9).

156. Press Release, United States Department of Defense, DOD Responds to ABA Enemy Combatant Report, No. 497-02 (Oct. 2, 2002) (*stating that* "Presidents have detained enemy combatants in every major conflict in the Nation's history, including the Gulf War, Vietnam Conflict, and the Korean War. During WW II, hundreds of thousands of individuals captured on the battlefield were subsequently held in the U.S. without trial or counsel. These detentions have always served the same purpose – to prevent individuals from returning to the battlefield and killing.")

157. *See* "Prisons and Detention Center," Lesson 18, The Al Qaeda Training Manual, http://www.usdoj.gov/ag/trainingmanual.htm (last visited Oct. 13 ,2004) (stating "1. At the beginning of the trial, once more the brothers must insist on proving that torture was inflicted on them by State Security [investigators] before the judge. 2. Complain [to the court] of mistreatment while in prison. 3. Make arrangements for the brother's defense with the attorney, whether he was retained by the brother's family or court-appointed. 4. The brother has to do his best to know the names of the state security officers, who participated in his torture and mention their names to the judge. These names may be obtained from brothers who had to deal with those officers in previous cases." *Id.* at Lesson 18, "Prisons and Detention Center.").

years does not give rise to the best facts. However, the only difference between these detainees and the prisoners of war during World War II is that the World War II POWs did not allege torture and there was a recognized method to end the war—surrender. Even absent the instances of inappropriate conduct at Abu Ghraib, the American public is circumspect about wartime detention that might last a lifetime. The U.S. District Courts for the District of Columbia and South Carolina arrived at differing solutions—provide full adversarial hearings with counsel for each detainee or release the citizen detainee unless charged with a crime, respectively—both of which are premised on the law enforcement model rather than the laws of war.

Never before in America's history has a non-resident alien been granted the full protections of the Fifth Amendment of the Constitution. It is ironic that this proposition has been put forth by petitioners and accepted by the courts at a time when America is at war and the issue is protections to be afforded those who have been detained during that war. America's criminal justice system is based on a belief that it is better that one guilty man go free than one innocent man be convicted. If this is the standard being used by the courts—and one might argue that this is indeed the case—the courts have adopted a law enforcement paradigm in a time of war. This is not the appropriate standard. Lest anyone support such a standard for wartime detention, it is best to remember how many of the detainees who were released returned to the fight to kill our husbands, our sons, our daughters, and our brothers and sisters. There is little room for error when the liberty of a person is at stake; nonetheless, in times of war, the error must be on the side of the nation's security and the security of its armed forces.

There is an elephant in the room. Most recently, a member of a British delegation identified the elephant and stated, "We do not believe America is at war. This is a law enforcement action." [158] It is clear from the movement of these cases from the lower courts through the appeals courts, and on to the Supreme Court, that the laws of war are based on exigencies and requirements separate and distinct from those of law enforcement. The writ of habeas corpus has thrust the courts into a domain previously reserved to the military—the authority, mode, and means of detaining enemy combatants. If the U.S. District Court rulings in *In re Guantanamo* and *Padilla v. Hanft* are upheld, our enemies' ability to wage war against us will know no bounds.

If indeed America's courts concur that detention of those engaged in acts of war against America is premised on and regulated by the law enforcement paradigm requiring adversarial hearings and those rights associated with the criminal law paradigm, we as a nation must be willing to abandon our ability to hold enemy combatants during times of war. Only those who engaged in acts subject to criminal charges can appropriately be characterized as being within the law enforcement umbrella. During time of war, many who engage in hostilities are not subject to criminal charges but are nonetheless detained as enemy combatants.

158. Sir Menzies Campbell, Q.C., Address at the Organization for Security and Co-operation in Europe (July 1, 2005).

Those detained at GTMO who have been charged with criminal offenses have been procedural safeguards that ensure a full and fair trial. Those who are not charged and who are detained on the basis of their status are governed by the laws of war and have not been provided protections that flow from the law enforcement paradigm. In war, the American courts must abide by the laws of war and avoid inappropriately corrupting them with law enforcement concepts and rights that render the law of war meaningless in future conflicts.