

## COMMENT

### Combatant Status Review Tribunals: Flawed Answers to the Wrong Question

Prisoners of war (POWs) enjoy special rights under the Geneva Conventions that “enemy combatants” detained in Guantánamo do not have, including the right to be tried in the same courts and according to the same procedures as members of the detaining power’s armed forces.<sup>1</sup> Under the Geneva Conventions, captured combatants are entitled to POW status until any doubt regarding their status has been properly adjudicated by a “competent tribunal.”<sup>2</sup> The U.S. government<sup>3</sup> and several commentators<sup>4</sup> have argued that the Combatant Status Review Tribunals (CSRTs), which were established to determine the enemy combatant status of Guantánamo detainees and which completed their work in March 2005, properly adjudicated the POW status of the detainees.<sup>5</sup>

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1. Geneva Convention Relative to the Treatment of Prisoners of War art. 102, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW].
  2. *Id.* art. 5.
  3. See Brief for the Respondents at 42 n.18, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184), available at <http://www.hamdanvrumsfeld.com/HamdanSGmeritsbrief.pdf>; Gordon England, Sec’y of the Navy, Defense Department Special Briefing on Combatant Status Review Tribunals (Mar. 29, 2005), <http://www.defenselink.mil/transcripts/2005/tr20050329-2382.html> (“Justice O’Connor . . . said [in *Hamdi v. Rumsfeld*] that one of the remedies she felt was to have a process like Army Regulation 190-8 [implementing Article 5]. So we have implemented that for all of the detainees. And as I said before, we’ve actually gone beyond that.”).
  4. See, e.g., Douglas W. Kmiec, *Observing the Separation of Powers: The President’s War Power Necessarily Remains “The Power To Wage War Successfully,”* 53 *DRAKE L. REV.* 851, 888 (2005); Paul Rosenzweig, *On Liberty and Terror in the Post-9/11 World: A Response to Professor Chemerinsky*, 45 *WASHBURN L.J.* 29, 38 (2005).
  5. The Supreme Court’s recent decision in *Hamdan v. Rumsfeld* did not reach the issue. *Hamdan* confirmed that Guantánamo detainees enjoy Geneva Convention protection but

This Comment argues that the CSRTs were not competent to deny POW status because they were charged only with identifying enemy combatants, a broad category that by its own terms includes many POWs. Given the substantial overlap between the definitions of “enemy combatant” and “POW,” a CSRT’s affirmative enemy combatant determination actually *supports* a detainee’s POW status. Thus, even after their enemy combatant status has been adjudicated by the CSRTs, Guantánamo detainees should still be treated as presumptive POWs.

Part I of this Comment discusses presumptive POW status and the historical role of tribunals in adjudicating that status. Part II explains how CSRTs depart from that tradition and why their enemy combatant determinations cannot be used to rebut the Geneva Conventions’ presumption of POW status. The Comment concludes by suggesting solutions to the dilemma posed by the overlapping definitions of “enemy combatant” and “POW.”

## I. PRESUMPTIVE AND CONCLUSIVE POW STATUS

The Geneva Convention Relative to the Treatment of Prisoners of War (GPW) governs the definition, classification, and treatment of POWs.<sup>6</sup> Under Article 5 of the GPW, captured combatants whose status is in doubt are entitled to POW status until a “competent tribunal” determines otherwise:

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 [defining POWs], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.<sup>7</sup>

Article 5 thus implicitly recognizes both presumptive POWs—detainees whose status is in question but who have not yet had an Article 5 hearing—and conclusive POWs, who have been expressly adjudicated as such.<sup>8</sup> Unless and until a competent tribunal determines otherwise, a detainee about whom any

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explicitly reserved judgment on whether Salim Ahmed Hamdan’s status as a “potential” prisoner of war had been properly adjudicated. 126 S. Ct. at 2795 & n.61.

6. GPW, *supra* note 1.

7. *Id.* art. 5.

8. I owe many thanks to Stephen Vladeck for encouraging me to address this issue and for clarifying my thinking on it.

doubt exists remains a presumptive POW entitled to the full panoply of GPW rights.

American military regulations and practice have historically recognized presumptive POW status. For instance, Army Regulation 190-8, which was “adopted to implement the Geneva Convention,”<sup>9</sup> echoes the language of Article 5:

A competent tribunal shall determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.<sup>10</sup>

During the Vietnam War, the Army implemented Regulation 190-8 by requiring an “Article 5 tribunal” to determine the POW status of each captured Viet Cong belligerent.<sup>11</sup> Consistent with the GPW’s recognition of presumptive POW status, the Army classified North Vietnamese and Viet Cong detainees as POWs until such a tribunal reached a contrary conclusion.<sup>12</sup> The United States continued to convene Article 5 tribunals to resolve doubts about the POW

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9. *Hamdi v. Rumsfeld*, 542 U.S. 507, 550 (2004) (Souter, J., concurring). Army Regulation 190-8 cites the Geneva Conventions as the basis for its interpretation. Army Reg. 190-8 § 1-1(b) (1997), available at [http://www.usapa.army.mil/pdffiles/r190\\_8.pdf](http://www.usapa.army.mil/pdffiles/r190_8.pdf).
  10. Army Reg. 190-8 § 1-6(b); see *Hamdi*, 542 U.S. at 538 (“[I]t is notable that military regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention.”). U.S. military field manuals also recognize presumptive POW status. See DEP’T OF THE ARMY, FIELD MANUAL NO. 27-10, THE LAW OF LAND WARFARE para. 71 (1956); see also DEP’T OF THE AIR FORCE, AIR FORCE PAMPHLET NO. 110-31, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS para. 3-3(c)(2) (1976) (“Upon capture any person, who does not appear to be entitled to [prisoner of war] status, but who had committed a belligerent act is required to be treated as a [prisoner of war] until his status is properly determined.”).
  11. 60 DOCUMENTS ON PRISONERS OF WAR 722-31, 748-51 (Howard S. Levie ed., 1979) (reproducing U.S. Military Assistance Command, Vietnam (MACV) Directive 381-46); *Contemporary Practice of the United States Relating to International Law*, 62 AM. J. INT’L L. 754, 768 (1968) [hereinafter *Contemporary Practice*] (reproducing a portion of MACV Directive 20-5).
  12. See *Contemporary Practice*, supra note 11, at 766-68 (reproducing MACV Directive 381-46, annex A). Like the Taliban, the Viet Cong were initially denied POW status. See Daryl A. Mundis, *The Use of Military Commissions To Prosecute Individuals Accused of Terrorist Acts*, 96 AM. J. INT’L L. 320, 326 (2002).

status of combatants captured during the conflict in Grenada<sup>13</sup> and the Persian Gulf War.<sup>14</sup>

## II. THE INTERSECTION BETWEEN ENEMY COMBATANT AND POW STATUS

At Guantánamo, the U.S. government has departed from its own long-held practice. Rather than convening Article 5 tribunals to verify detainees' POW status, the government has claimed that the CSRTs fulfilled Article 5's mandate. But Article 5 tribunals and CSRTs exist for different purposes and are charged with making different adjudications: whereas Article 5 tribunals exist to determine POW status, the CSRTs were created to classify enemy combatants.<sup>15</sup> The CSRTs did not—and were never asked to—determine detainees' POW status. Indeed, on at least one occasion, the Legal Advisor to the Combatant Status Review Tribunals upheld a CSRT's refusal to hear evidence relating to POW status because "Combatant Status Review Tribunals do not have the discretion to determine that a detainee should be classified as a prisoner of war—only whether the detainee satisfies the definition of 'enemy combatant.'"<sup>16</sup> Furthermore, as explained above, a process must dispel doubt of POW status in order to strip a detainee of protection as a presumptive POW.<sup>17</sup> Because the CSRTs made no findings that disproved, or even addressed, POW status, they were plainly insufficient to meet Article 5's mandate.

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13. See JENNIFER K. ELSEA, CONG. RESEARCH SERV., TREATMENT OF "BATTLEFIELD DETAINEES" IN THE WAR ON TERRORISM 37 (2006), available at <http://www.fas.org/sgp/crs/terror/RL31367.pdf>.

14. See DEP'T OF DEF., CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS 663 (1992), available at <http://www.ndu.edu/library/epubs/cpgw.pdf>. According to Department of Defense documents, nearly 1200 tribunals "were conducted to verify status" during the Persian Gulf War, 310 of which found that the detainee was entitled to conclusive POW status. *Id.*

15. See Vijay Sekhon, *More Questions than Answers: The Indeterminacy Surrounding Enemy Combatants Following Hamdi v. Rumsfeld*, 9 CAL. CRIM. L. REV. 1, 15 (2005); Neil A. Lewis, *Scrutiny of Review Tribunals as War Crimes Trials Open*, N.Y. TIMES, Aug. 24, 2004, at A12. The CSRTs were established as a direct response to the Supreme Court's June 2004 ruling in *Hamdi* that "a citizen held in the United States as an enemy combatant [must] be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker." 542 U.S. at 509.

16. Memorandum from James R. Crisfield Jr., Legal Advisor, to Dir., Combatant Status Review Tribunal 3 (Dec. 16, 2004), <http://wid.ap.org/documents/detainees/moazzambegg.pdf>.

17. See *supra* notes 6-8 and accompanying text.

When Guantánamo detainees and their lawyers raised this Article 5 issue in *Hamdan v. Rumsfeld*,<sup>18</sup> the government responded that the CSRTs had fulfilled Article 5's requirements as a byproduct of adjudicating enemy combatant status, and that detainees designated as enemy combatants thereby lost their presumptive POW status. In its brief, the government argued that the CSRT process "clearly discharges any obligation under Article 5."<sup>19</sup> Senator Lindsey Graham went even further, labeling the CSRTs "Article 5 tribunals on steroids."<sup>20</sup> The government<sup>21</sup> and the scholars who supported its position<sup>22</sup> focused on the procedural protections available to detainees appearing before the CSRTs. By doing so, they largely ignored a more fundamental point: because of the substantial similarities between the definitions of "enemy combatant" and "prisoner of war," classification as an enemy combatant by a CSRT actually supports, rather than precludes, a finding of POW status. Thus, the CSRTs could not strip detainees of their presumptive POW status simply by finding them to be enemy combatants.

The Bush Administration has defined an enemy combatant as anyone "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 definition includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces."<sup>23</sup> Courts have noted that this definition is "vague and overly broad."<sup>24</sup> In addition to covering a "little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities,"<sup>25</sup> the expansive definition includes persons clearly covered by Article 4 of the GPW, which defines prisoners of war.

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18. Reply Brief for the Petitioner at 18 n.36, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184), available at <http://www.hamdanvrumfeld.com/HAMDANFINAL.march15.reply.pdf>. The author worked as research assistant to Professor Neal Katyal, who represented Hamdan before the Supreme Court. The opinions expressed in this Comment are the author's alone and do not represent those of Professor Katyal or the *Hamdan* litigation team.
  19. Brief for the Respondents, *supra* note 3, at 42.
  20. 151 CONG. REC. S12,754 (daily ed. Nov. 14, 2005) (statement of Sen. Graham).
  21. Brief for the Respondents, *supra* note 3, at 42 n.18 ("The CSRT was patterned after the 'competent tribunal' described in Geneva Convention Article 5 and Army Regulation 190-8 . . . but provides more process.").
  22. See, e.g., Kmiec, *supra* note 4, at 888-89.
  23. Dep't of Def., Guantanamo Detainee Processes 2 (June 9, 2006), <http://www.defenselink.mil/news/Sep2005/d20050908process.pdf> [hereinafter Guantanamo Detainee Processes].
  24. E.g., *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 474 (D.D.C. 2005).
  25. *Id.* at 475 (alteration in original) (internal quotation marks omitted).

Article 4(A)(1) of the GPW extends POW status to “[m]embers of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.”<sup>26</sup> This definition covers both the Taliban—which the Bush Administration has acknowledged is protected by the Geneva Convention<sup>27</sup>—and units of al Qaeda, to the degree that they formed part of Taliban armed forces.<sup>28</sup> The Taliban’s reliance on shifting alliances with independent groups and warlords indicates that units or members of al Qaeda may have acted as part of the Taliban armed forces, bringing them within the plain language of Article 4(A)(1).<sup>29</sup> Indeed, the government has repeatedly recognized, and even argued, that the Taliban and al Qaeda were “tied tightly at the waist” and “functioned” together.<sup>30</sup> The second relevant POW category, defined in Article 4(A)(4), grants POW status to “[p]ersons who accompany the armed forces without actually being members thereof.”<sup>31</sup> This broad category appears to cover support personnel such as drivers or medics.<sup>32</sup> Moreover, Article 5 essentially extends the reach of these categories by granting POW status to detainees about whom any doubt exists.

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26. GPW, *supra* note 1, art. 4(A)(1).

27. Office of the White House Press Sec’y, Fact Sheet: Status of Detainees at Guantanamo (Feb. 7, 2002), <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html> (“[T]he Geneva Convention applies to the Taliban detainees.”); *see also* Katharine Q. Seelye, *In Shift Bush Says Geneva Rules Fit Taliban Captives*, N.Y. TIMES, Feb. 8, 2002, at A11.

28. In a memorandum circulated on July 7, 2006, Deputy Secretary of Defense Gordon England announced that the detainees at Guantánamo must be treated in accordance with Common Article 3 of the Geneva Conventions, but he noted that “aside from the military commission procedures,” which the Court had invalidated in *Hamdan*, “existing DoD orders, policies, directives, execute orders, and doctrine comply with the standards of Common Article 3.” Memorandum from Gordon England, Deputy Sec’y of Def., to Sec’y of the Military Dep’t et al. 1 (July 7, 2006), <http://jurist.law.pitt.edu/pdf/genevaconsmemo.pdf>. It appears, therefore, that the problems this Comment identifies with the CSRTs and Article 5 will not be addressed in the response to this most recent memorandum.

29. *See* Thom Shanker & Steven Lee Myers, *U.S. Special Forces Step Up Campaign in Afghan Areas*, N.Y. TIMES, Oct. 19, 2001, at A1 (discussing “alliances of convenience”). For example, al Qaeda reportedly aided the Taliban military in its struggle against the Northern Alliance. *See* ROHAN GUNARATNA, *INSIDE AL QAEDA* 58-60 (2002).

30. Donald H. Rumsfeld, Sec’y of Def., Remarks on Ferry from Air Terminal to Main Base, Guantanamo Bay, Cuba (Jan. 27, 2002), [http://www.defenselink.mil/transcripts/2002/to1282002\\_to127sd2.html](http://www.defenselink.mil/transcripts/2002/to1282002_to127sd2.html).

31. GPW, *supra* note 1, art. 4(A)(4).

32. Salim Ahmed Hamdan, the petitioner in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), was allegedly a driver for Osama bin Laden. *See* Andrew Zajac, *Free Hand Urged for Tribunal; Bin Laden Driver’s Case Could Affect Detainee Prosecutions*, CHI. TRIB., Apr. 8, 2005, at 20.

The newly created definition of “enemy combatant” fails to exclude these POW categories and, as a result, its application by the CSRTs cannot be used to justify denial of POW status. To take one clear example, the definition of “enemy combatant” includes any “individual who was part of or supporting Taliban or al Qaeda forces.”<sup>33</sup> By its plain terms, this would include even the most obvious example of a prisoner of war defined in Article 4(A)(1)— “[m]embers of the armed forces of a Party to the conflict.” Similarly, the broad definition of “enemy combatant,” including those “supporting Taliban or al Qaeda forces,” also covers Article 4(A)(4) POWs “who accompany the armed forces without actually being members thereof.” Though the administration has recognized that “the Geneva Convention applies to the Taliban detainees,”<sup>34</sup> it has simultaneously denied them POW status *based on* their membership in the Taliban, which the government says qualifies them as enemy combatants. In fact, Department of Defense documents show that fully 50% of detainees appearing before the CSRTs were alleged to be either Taliban or both al Qaeda and Taliban.<sup>35</sup> The CSRTs’ own publicized findings confirm that members of the Taliban were classified as enemy combatants based at least in part on their membership in the Taliban.<sup>36</sup>

Even if the CSRTs had been empowered to affirmatively grant POW status, the overlap between the definitions of “enemy combatant” and “prisoner of war” would have presented detainees with a paralyzing Catch-22. If a detainee treated the tribunal as an Article 5 proceeding and tried to establish POW status—by demonstrating membership in the Taliban armed forces, for example—he would simultaneously prove himself to be an

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33. Guantanamo Detainee Processes, *supra* note 23, at 2.

34. Office of the White House Press Sec’y, *supra* note 27.

35. Mark Denbeaux & Joshua Denbeaux, *The Guantanamo Detainees: The Government’s Story* 8, [http://law.shu.edu/news/guantanamo\\_report\\_final\\_2\\_08\\_06.pdf](http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf) (last visited Nov. 8, 2006). For the voluminous, though partially redacted, proceedings of the CSRTs, see U.S. Dep’t of Def., *Documents Concerning Combatant Status Review Tribunal (CSRT) Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba*, <http://www.dod.mil/pubs/foi/detainees> (last visited Nov. 8, 2006).

36. See *Unclassified Summary of Basis for Tribunal Decision*, at NOV00091, [http://www.dod.mil/pubs/foi/detainees/CSRT\\_JTF\\_GTMO\\_documents.pdf](http://www.dod.mil/pubs/foi/detainees/CSRT_JTF_GTMO_documents.pdf) (last visited Nov. 8, 2006) (“[T]his Detainee is properly classified as an enemy combatant and is a member of, or affiliated with, Al Qaeda and the Taliban.”); *id.* at NOV00100 (upholding an enemy combatant determination because, among other things, the “detainee voluntarily joined the Taliban” and “the detainee agreed to fight with the Taliban”); *id.* at NOV00115 (“[T]his detainee is properly classified as an enemy combatant and was part of or supporting Taliban and Al Qaeda forces.”); *id.* at NOV00147 (“[T]his detainee is properly classified as an enemy combatant and was part of or supporting Taliban forces, or associated forces that are engaged in hostilities against the United States or its coalition partners.”).

“individual who was part of or supporting Taliban or al Qaeda forces” and thus an enemy combatant, which, the government would argue, precluded POW status. Conversely, if a detainee treated the tribunal as a CSRT and tried to avoid the enemy combatant label—by denying involvement with the Taliban, for example—he would simultaneously give up the chance to establish POW status as a member of a hostile armed force. In effect, the only way out of the dilemma would be to deny any involvement with the Taliban or al Qaeda, even though membership in the former would entitle the detainee to POW status under both Article 4 and the Bush Administration’s own public statements.

## CONCLUSION

The CSRTs have completed their work and have been disbanded, but the impact of their findings remains unclear. This Comment has argued that irrespective of their procedural protections or the accuracy with which they identified “enemy combatants,” the CSRTs did not fulfill Article 5’s mandate. As a result, they did not and could not strip detainees of their presumptive POW status. Ironically, the CSRTs’ enemy combatant determinations actually provide a relatively solid basis for transforming presumptive POWs into *conclusive* POWs.

If the Bush Administration truly wants to vindicate Article 5, the solution is straightforward: disentangle the definitions of “enemy combatant” and “prisoner of war,” and establish tribunals to determine the latter. To separate the definitions, the simplest solution would be to narrow the ever-expanding definition of “enemy combatant” so that it would correspond with “unlawful combatant,” the term used in the GPW to refer to combatants who do not fall within any of Article 4’s categories. This change would obviate the need for separate tribunals and would boil the question down to the single inquiry contemplated by the GPW: whether a detainee was entitled to POW status under Article 4. Until competent tribunals answer this question in accordance with Article 5, the Guantánamo detainees remain presumptive POWs, and courts considering the post-*Hamdan* Guantánamo cases should treat them as such.

As Congress and the executive create new tribunals in Guantánamo, Iraq, or elsewhere, they must consider more than just the legislative authorization and procedural protections required by *Hamdan*. This Comment suggests that to give full effect to the Geneva Conventions, Congress must first disentangle the definitions of “enemy combatant” and “prisoner of war.” Procedural changes alone are not an answer when the tribunals begin with the wrong question.

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