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The Guantanamo Three-Step

In a recent Response to my Comment,¹ Geoffrey Corn, Eric Talbot Jensen, and Sean Watts take an interesting stance in defense of the combatant status review tribunals (CSRTs).² Their Response does not dispute—and in fact seems to support—my central argument that CSRTs cannot serve as the “competent tribunals” required under Article 5 of the Third Geneva Convention.³ But Corn, Jensen, and Watts come to bury Article 5, not to praise it. They do so by recasting Article 5 as the third step in a three-part detainee-classification process whose first two steps are controlled entirely by the President. These two steps, they argue, render Article 5 tribunals unnecessary at Guantanamo. This reading raises thorny problems of executive power and undermines the purpose of Article 5.

I. ONE STEP FORWARD

My Comment was a response to the Bush Administration’s argument that the CSRTs discharged any duty the United States had under Article 5 of the Geneva Convention to provide “competent” tribunals to determine detainees’ prisoner of war (POW) status. I reasoned that the CSRTs could not fulfill this function because they classified detainees according to a categorization—that of “enemy combatant”—which is not coextensive with POW (or non-POW) status under Article 4.

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1. Joseph Blocher, Comment, *Combatant Status Review Tribunals: Flawed Answers to the Wrong Question*, 116 YALE L.J. 667 (2006).
 2. Geoffrey Corn, Eric Talbot Jensen & Sean Watts, *Understanding the Distinct Function of the Combatant Status Review Tribunals: A Response to Blocher*, 116 YALE L.J. POCKET PART 327 (2007), http://yalelawjournal.org/2007/04/11/corn_jensen_watts.html.
 3. Geneva Convention Relative to the Treatment of Prisoners of War art. 5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

Corn, Jensen, and Watts do not dispute this argument. Indeed, they agree that “the CSRTs did not have authority to make POW classifications”⁴ and that “the CSRTs were appropriately precluded from determining POW status.”⁵

If only everyone saw it our way. Unfortunately, many argue that a CSRT’s finding that a detainee *is* an enemy combatant is precisely equivalent to an Article 5 tribunal’s finding that he is *not* a POW. In its brief before the Supreme Court in *Hamdan v. Rumsfeld*,⁶ the government argued that the CSRT process “clearly discharges any obligation under Article 5”⁷ Secretary of the Navy Gordon England similarly claimed that the CSRTs went “beyond” the regulations implementing Article 5,⁸ and Senator Lindsey Graham put in an even higher bid, calling the CSRTs “[A]rticle 5 tribunals on steroids.”⁹ Legal scholars soon joined the chorus,¹⁰ claiming, for example, that “CSRTs more than fulfill the ‘competent tribunal’ called for under Article 5 of the Geneva Convention”¹¹ And then-Circuit Judge John Roberts, writing for the D.C. Circuit in *Hamdan v. Rumsfeld*, suggested that the military commission set up to try Salim Ahmed Hamdan—the same commission which the Supreme Court, of which Roberts was by that time Chief Justice, struck down a year later—was a “competent tribunal” under the army regulation implementing Article 5.¹²

Even as it struck down the military commissions, however, the Supreme Court explicitly reserved decision on whether Hamdan’s status as a POW had been properly adjudicated under Article 5.¹³ The issue of whether CSRTs fulfill Article 5’s mandate is thus unfortunately something of a live issue. Corn, Jensen, and Watts’s Response makes a positive contribution in this debate to the extent that it rejects the categorization of CSRTs as Article 5 tribunals.

4. Corn et al., *supra* note 2 at 327.

5. *Id.*

6. 126 S. Ct. 2749 (2006).

7. Brief for the Respondents at 42, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184).

8. 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>.

9. 151 CONG. REC. S12,754 (daily ed. Nov. 14, 2005) (statement of Sen. Graham).

10. Paul Rosenzweig, *On Liberty and Terror in the Post-9/11 World: A Response to Professor Chemerinsky*, 45 WASHBURN L.J. 29, 38 (2005).

11. 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).

12. *Hamdan v. Rumsfeld*, 415 F.3d 33, 43 (D.C. Cir. 2005) (Roberts, J.), *rev’d and remanded*, 126 S. Ct. 2749 (2006).

13. *Hamdan*, 126 S. Ct. at 2795 n.61.

Perhaps their Response, and my Comment, will help lay to rest the common misconception that CSRTs were the equivalent of Article 5 tribunals. Whether or not some other “competent tribunal” could have served the Article 5 function, the CSRTs did not. And yet it is *their* findings that have been used to justify the detentions at Guantanamo, and that have been compared—by scholars, legislators, and the government—to Article 5 tribunals. The purpose of my Comment was to show the error of that comparison, a critique which Corn, Jensen, and Watts seem to support.

II. TWO STEPS BACK

But Corn, Jensen, and Watts don’t try to rehabilitate CSRTs as “competent tribunals,” or argue that some other decisionmaker fulfilled Article 5’s requirements. They argue instead that the President’s unilateral characterizations of the conflict in Afghanistan, and the Taliban and al Qaeda forces there, removed any possible “doubt” about the POW status of *any* detainee at Guantanamo and thus rendered Article 5 tribunals unnecessary.

To reach this result, Corn, Jensen, and Watts argue that the classification of prisoners in wartime follows a three-step process. A “central command”¹⁴ must first determine that the conflict in which the prisoner was captured is covered by the Geneva Conventions. It must then “pre-approve[.]”¹⁵ the opposing forces as meeting the definitions laid out in Article 4. Finally, and only if these first two tests are met, Article 5 requires that a “competent tribunal” resolve any “doubt” about whether a particular detainee belongs to a protected group.

This characterization of the Geneva Convention rests on a controversial understanding of executive power that the authors acknowledge has spawned a “debate as to whether the President can rightfully make that determination under international law”¹⁶ Suffice it to say, law professors¹⁷ and courts¹⁸ have disputed Corn, Jensen, and Watts’s central argument that the President can rightfully make sweeping determinations regarding the proper

14. Corn et al., *supra* note 2 at 331.

15. *Id.* at 332.

16. *Id.* at 333 n.19.

17. See Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 113-15 (2004) (describing objections to the government’s interpretation of Articles 4 and 5).

18. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 480 (D.D.C. 2005), *vacated*, *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 2007 U.S. LEXIS 8757 (2007) (“Nothing in the Convention itself or in Army Regulation 190-8 authorizes the President of the United States to rule by fiat that an entire group of fighters covered by the Third Geneva Convention falls outside of the Article 4 definitions of ‘prisoners of war.’”).

classification of a conflict (the first step), or the parties thereto (the second step), as he has done with regard to the conflict in Afghanistan and to the Taliban and al Qaeda.¹⁹

Perhaps the most heavily criticized of these determinations was the President's declaration that the Taliban did not fall within Article 4(A)(1) despite the fact that the Taliban apparently served as the armed forces of Afghanistan, a signatory to the Convention, and despite the fact that Article 4(A)(1) makes no mention of the four conditions—hierarchy, insignia, open arms, and adherence to the laws of war—that the Administration claimed the Taliban failed to meet.²⁰ Corn, Jensen, and Watts's argument rests entirely on the legitimacy and accuracy of the President's novel reading of Article 4(A)(1). If Article 4(A)(1) does not incorporate these four conditions—they are not mentioned until Article(A)(2), and had previously been read as applying only there²¹—then the logic of the President's collective determinations falls out, even assuming he had the authority to make them in the first place. Because the Article 4 debate has been well-covered elsewhere, I focus here on the narrower question of whether the President's determinations have removed all “doubt” regarding the POW status of all the detainees at Guantanamo and thus rendered Article 5 moot.

The authors acknowledge that the President's “centralized and unitary mass appraisals might initially appear at odds with the individual adjudications prescribed by Article 5”²² Indeed, Article 5 refers specifically and repeatedly to “persons” who “shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”²³ Thus it is Article 5 tribunals, not the executive, who are the proper adjudicators of whether a particular group or individual captured in the course of a conflict belongs to any of the categories mentioned in Article 4.²⁴

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19. Memorandum from George W. Bush, President of the United States, to the Vice President, et al. (Feb. 7, 2002).
 20. Memorandum from Jay S. Bybee to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel of the Dep't of Def. (Jan. 22, 2002).
 21. Corn, Jensen, and Watts recognize that the Bush Administration's reading of Article 4 came as a surprise to “military and international lawyers.” The authors note that the President's determinations “required somewhat controversial adjustments to the course of instruction on POW classification at the U.S. Army Judge Advocate General's School. Instructors regularly encounter resistance to this reading of Article 4(A)(1) from students steeped in traditions of literal interpretation of treaty and statutory language.” Corn et al., *supra* note 2, at 330 n.10.
 22. *Id.* at 333.
 23. Geneva Convention Relative to the Treatment of Prisoners of War art. 5, *surpa* note 3.
 24. See Robert A. Peal, *Combatant Status Review Tribunals and the Unique Nature of the War on Terror*, 58 VAND. L. REV. 1629, 1639 (2005).

Moreover, Army Regulation 190-8,²⁵ on which the CSRTs themselves were patterned, was adopted to implement the Geneva Convention²⁶ and cites the Geneva Conventions for the basis of its interpretation.²⁷ Though Corn, Jensen, and Watts fail to mention the Regulation, it confirms that Article 5's focus is on *individual* classifications and that "doubt" cannot be erased by a unilateral, *ex ante* determination by "central command." The regulation specifies that "[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."²⁸

But we don't have to take the detainees' word for it. According to a 2006 study of newly released evidence from the CSRTs, even by the government's own count nearly one in five of the detainees "are not affiliated with either al Qaeda or the Taliban,"²⁹ the two groups the President has said do not fall within Article 4. Are these detainees to be automatically denied POW status unless and until "central command" determines that they are members of a "pre-approved" fighting force? Even of the detainees who are alleged to be somehow connected to al Qaeda or the Taliban, sixty percent are only "associated with" those groups, not "members of," or "fighting for" them.³⁰ Moreover, ninety-three percent of the detainees were *not* captured by the United States.³¹ Some were turned in by bounty hunters and reward seekers.³² These detainees might have simply been in the wrong place at the wrong time, or they might be members of the kinds of militias, military groups, and self-defense forces which are covered by Article 4 and which were, as the authors recognize,³³ entitled to Article 5 hearings and Article 4 protection in Vietnam. These are exactly the kinds of difficult, individual factual questions that

25. Brief for the Respondents at 42 n.18, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184) ("The CSRT was patterned after the 'competent tribunal' described in Geneva Convention Article 5 and Army Regulation 190-8 . . . but provides more process.")

26. *Hamdi v. Rumsfeld*, 542 U.S. 507, 550 (2004) (Souter, J., concurring).

27. Army Reg. 190-8 § 1-1(b) (1997), available at http://www.usapa.army.mil/pdffiles/r190_8.pdf.

28. *Id.*

29. MARK DENBEAUX & JOSHUA DENBEAUX, *THE GUANTANAMO DETAINEES: THE GOVERNMENT'S STORY 8*, available at http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf.

30. *Id.* at 9.

31. *Id.* at 14.

32. Jonathan Mahler, *The Bush Administration vs. Salim Hamdan*, N.Y. TIMES, Jan. 8, 2006, at 44.

33. Corn et al., *supra* note 2 at 332 n.16.

demand case-by-case adjudication by “competent tribunals.” And considering that the United States conducted nearly 1200 such tribunals in the Persian Gulf War,³⁴ adjudicating the status of the few hundred detainees at Guantanamo would not be prohibitively difficult.

Corn, Jensen, and Watts raise the possibility that Article 5 tribunals might reach “disparate and inconsistent results for captives even from the same fighting organizations.”³⁵ This possibility of “inconsistency” is no greater than in any other adjudicatory context, nor is it necessarily any more problematic. To the contrary, the unique circumstances of the war in Afghanistan—the shifting alliances, multiplicity of “fighting organizations,” and different levels of individual participation—actually reinforce the importance of individualized, fact-based determinations, rather than conflict- and group-wide determinations by central command. The “practical concern” with “inconsistent results” is less weighty than the problematic consistency that Corn, Jensen, and Watts propose: that all detainees, no matter the level of their involvement with the Taliban or al Qaeda, are to be denied POW status based on the President’s novel and questionable *ex ante* determinations.

The danger in Corn, Jensen, and Watts’s “three-step” characterization is that it threatens to further concentrate powers of classification in an already powerful executive and to eviscerate what the authors call the “third step”—the Article 5 tribunals that should actually be the first step of classification. If the President had power, under Article 4(A)(1), to invoke collective criteria and deny POW status to all opposing forces, the basic purpose of Article 5 would be defeated. Neither the Geneva Conventions nor the realities of the conflict in Afghanistan compel this result. Far from rendering these tribunals superfluous, the nature of the conflict in Afghanistan actually highlights the importance of Article 5 and the failure of the CSRTs to fulfill it.

In the past month, two military judges have ruled that a CSRT’s finding of enemy combatant status, even when coupled with the President’s determination that members of al Qaeda and the Taliban are unlawful combatants, is an insufficient basis for the military commissions to exercise jurisdiction.³⁶ And on June 29, in a reversal of its own earlier denial of

34. See DEP’T OF DEF., CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS 663 (1992).

35. Corn et al., *supra* note 2 at 332.

36. Disposition of Prosecution Motion for Reconsideration at 1, *United States v. Khadr* (June 29, 2007), available at <http://www.scotusblog.com/movabletype/archives/Khadr%20ruling%206-29-07.pdf> (finding that a CSRT’s finding of “enemy combatant” status was insufficient to grant jurisdiction under the Military Commissions Act of 2006, which requires a finding of “unlawful enemy combatant” status); Decision and Order — Motion To Dismiss for Lack of Jurisdiction, *United States v. Hamdan*, (June 4, 2007),

certiorari, the Supreme Court voted to hear argument on the rights of Guantanamo detainees to challenge their detention in federal courts.³⁷ Whether or not the Court finds that the military tribunals are an adequate substitute for federal habeas, it is increasingly clear that the CSRTs—whose enemy combatant determinations have been at the heart of that jurisdictional battle—did not, and could not, serve as the Article 5 tribunals the Geneva Conventions require.

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available at <http://www.scotusblog.com/movabletype/archives/Hamdan%20order%2006-4-07.pdf> (same).

37. *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 2007 U.S. LEXIS 8757 (2007).