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"INAPPOSITE" AND "AMORPHOUS": THE D.C. CIRCUIT'S REJECTION OF INTERNATIONAL LAW

Katherine Riley*

Abstract: Since the U.S. invasion of Afghanistan in 2002, the court system has been flooded with habeas corpus petitions from prisoners held at the U.S. naval detention facility in Guantanamo Bay, Cuba. These petitioners contest the President's authority to detain them and often rely on principles of law governing international war to support their arguments. A recent D.C. Circuit Court of Appeals decision rejected international law as an interpretive tool for U.S. courts, raising questions about the role of international law in the U.S. legal system. This Comment argues that international law, while not binding on the courts, provides useful guidance for interpretation.

Introduction

Ghaleb Nasser Al-Bihani is a Yemeni citizen who has been held in a U.S. naval detention facility in Guantanamo Bay, Cuba since 2002. From Guantanamo, Al-Bihani filed a petition for habeas corpus, contesting the U.S. government's authority to detain him and requesting review of his status. On January 28, 2009, the U.S. District Court for the District of Columbia denied Al-Bihani's petition.[1] He appealed the decision to the U.S. Court of Appeals for the D.C. Circuit, but the Court of Appeals affirmed the district court's ruling on January 5, 2010.[2] Al-Bihani's subsequent petition for a rehearing en banc was denied on August 31, 2010.[3] In affirming the lower court's decision, the Court of Appeals, perhaps attempting to chart a clearer path for Guantanamo detention review and offer guidance that the Supreme Court had not previously provided, firmly rejected Al-Bihani's contentions that his detention violated international laws of war and eliminated international

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[1] Al-Bihani v. Obama (*Al-Bihani I*), 594 F. Supp. 2d 35, 40 (D.D.C. 2009), *aff'd*, 590 F.3d 866 (D.C. Cir. 2010).

[2] Al-Bihani v. Obama (*Al-Bihani II*), 590 F.3d 866, 881 (D.C. Cir. 2010).

[3] Al-Bihani v. Obama (*Al-Bihani III*), 619 F.3d 1, 1 (D.C. Cir. 2010).

law as a potential limitation on executive authority and the authority of U.S. courts.[4]

Part I of this Comment provides background on *Al-Bihani v. Obama* and the Court of Appeals opinion. Part II examines Supreme Court precedent for habeas review for Guantanamo detainees, as well as the effect of the *Al-Bihani* decision on subsequent habeas petitions and on U.S. foreign policy. Part III analyzes whether or not U.S. detention policy, as it has currently evolved, is compatible with international laws of war and whether those laws, contrary to the Court of Appeals decision, have any binding effect on the United States and its actions abroad or domestically. Finally, the Comment explores the advantages and disadvantages of the United States' current policy.

I. Background

In early 2001, Al-Bihani traveled from Saudi Arabia through Pakistan to Afghanistan.[5] Throughout his travels, he stayed at guest houses that he acknowledged were affiliated with the Taliban.[6] Upon arrival in Afghanistan in 2001, Al-Bihani worked as a cook for the 55th Arab Brigade, a paramilitary group allied with the Taliban.[7] The group, which included al Qaeda members, fought against the Northern Alliance in Afghanistan.[8] Although Al-Bihani admitted to carrying a brigade-issued weapon, he claimed that he never fired it in combat.[9] In October 2001, forced to retreat by U.S.-led Coalition forces that invaded Afghanistan in response to the September 11, 2001 attacks, the Brigade surrendered to Northern Alliance forces.[10] The Northern Alliance forces kept Al-Bihani in custody until turning him over to Coalition forces in 2002.[11] Al-Bihani was then sent to Guantanamo Bay for interrogation and detention.[12]

In 2004, following the Supreme Court ruling that statutory habeas jurisdiction extended to Guantanamo Bay,[13] Al-Bihani filed his petition for a writ of habeas corpus challenging his detention under 28 U.S.C. § 2241(a).[14] The district court stayed the petition pending a Supreme

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[4] *See Al-Bihani II,* 590 F.3d at 871.
[5] Al-Bihani v. Obama (*Al-Bihani II*), 590 F.3d 866, 869 (D.C. Cir. 2010).
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Al-Bihani II*, 590 F.3d at 869.
[12] *Id.*
[13] *See* Rasul v. Bush, 542 U.S. 466, 483–84 (2004).
[14] 28 U.S.C. § 2241(a) (2006). Section 2241(a) provides that:

Court decision in *Boumediene v. Bush.*[15] In *Boumediene,* the Court found section 7 of the Military Commissions Act of 2006 (2006 MCA), which denied jurisdiction over habeas petitions filed by Guantanamo detainees, unconstitutional.[16] The Court acknowledged that the current procedures used to review a detainee's status under the Detainee Treatment Act of 2005 (DTA) were an inadequate substitute for habeas corpus, but did not require that "an adequate substitute . . . duplicate [section] 2241 in all respects."[17] Additionally, the Court neglected to specify the procedural requirements for constitutional detention review, explicitly stating that the opinion "does not address the content of the law that governs . . . [the] detention."[18]

Following the *Boumediene* decision, the district court issued a case management order that finalized the procedure to be used in conducting the review of Al-Bihani's detention, ruling that: 1) the government bore the burden of proving the lawfulness of Al-Bihani's detention by a preponderance of the evidence; 2) the government must share with Al-Bihani any evidence used to develop its case for his return, as well as any exculpatory evidence; 3) the court would determine whether any evidence offered by the government should be presumed accurate or authentic, and Al-Bihani would be permitted to rebut any such presumption; 4) the government would present its evidence first, followed by Al-Bihani, whose evidence the government would be able to subsequently rebut; and 5) relevant and material hearsay evidence would be admitted, which would allow the opposing party an opportunity to challenge the credibility and weight accorded to any such evidence.[19] After a day and a half of hearings, the district court ultimately denied Al-Bihani's petition, concluding that the government had the authority to detain anyone supporting the Taliban, al Qaeda, or associated forces and engaged in hostilities against the United States or Coalition forces, and finding that Al-Bihani's actions met that standard.[20] The court

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> Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

Id.

[15] Boumediene v. Bush, 553 U.S. 723, 798 (2008).

[16] *Id.* at 736, 792.

[17] *Id.* at 792.

[18] *Id.* at 798.

[19] *See* Al-Bihani v. Bush, 588 F. Supp.2d 19, 20–22 (D.D.C. 2008).

[20] *See Al-Bihani II,* 590 F.3d at 870.

based its ruling on the government's evidence that Al-Bihani, by his own admission, had stayed at al Qaeda-affiliated guest houses and had served in the 55th Arab Brigade.[21] It did not rely on evidence from admissions that Al-Bihani later retracted.[22]

Alleging substantive and procedural defects, Al-Bihani appealed the district court's denial under 28 U.S.C. § 2253(a).[23] Specifically, Al-Bihani challenged the detention by advancing four arguments based on international laws of war.[24] First, he contended that the district court's reliance on "support" for the Taliban or al Qaeda as an independent basis for detention violated international law, which required that a person have fired a weapon in combat in order to be detained.[25] Second, he argued that the Brigade did not have the opportunity to declare its neutrality in the fight against the United States.[26] Third, he asserted that the international war had ended when the Taliban lost control of the Afghan government and that Al-Bihani therefore should be released in accordance with the requirements of the Third Geneva Convention.[27] Finally, Al-Bihani argued that the United States had lost its authority to detain him when it failed to give him a prisoner-of-war status.[28] The Court of Appeals for the D.C. Circuit, however, affirmed the denial and ruled that: 1) Al-Bihani had been lawfully detained; 2) his continued detention was justified because the hostilities in Afghanistan had not ended; 3) the preponderance of the evidence standard adopted did not violate the Constitution; and 4) the district court had not improperly admitted U.S. hearsay evidence.[29] The court also explained that the President's war powers were in no way limited by international laws of war; therefore, international law could not serve as an authority for U.S. courts:

> [W]hile the international laws of war are helpful to courts when identifying the general set of war powers to which the AUMF [Authorization for the Use of Military Force] speaks . . . their lack of controlling legal force and firm definition

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[21] Al-Bihani v. Obama (*Al-Bihani I*), 594 F. Supp. 2d 35, 39–40 (D.D.C. 2009), *aff'd*, 590 F.3d 866 (D.C. Cir. 2010).

[22] *See id.* at 39.

[23] *Al-Bihani II,* 590 F.3d at 870.

[24] *See id.*

[25] *See id.* at 870–71.

[26] *See id.* at 871.

[27] *See id.* (citing Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135).

[28] *See id.*

[29] *See Al-Bihani II,* 590 F.3d at 872, 874–75, 878, 880–81.

render their use both inapposite and inadvisable when courts seek to determine the limits of the President's war powers.[30]

II. Discussion

A. *Supreme Court Precedent*

1. *Rasul v. Bush:* The Statutory Habeas Right

The Supreme Court first analyzed executive authority to detain designated "enemy combatants" at Guantanamo Bay in 2004.[31] On June 18, 2004, the Court decided both *Rasul v. Bush* and *Hamdi v. Rumsfeld*.[32] The petitioners in Rasul—two Australian citizens and 12 Kuwaiti citizens—were captured in Afghanistan and Pakistan during combat in late 2001 and subsequently turned over to U.S. custody.[33] They began their detention at the Guantanamo Bay naval base in early 2002 and, through relatives and friends, filed petitions with the U.S. District Court for the District of Columbia challenging their detention and denying any involvement in combat, or terrorist acts, against the United States.[34] In order to determine whether U.S. courts had jurisdiction over challenges to the detention of aliens incarcerated at Guantanamo Bay, the Supreme Court traced the history of the writ of habeas corpus, drawing comparisons between the detained prisoners and German citizens who were captured and incarcerated abroad during World War II.[35] In *Rasul,* the Court ultimately held that, because the petitioners could be reached by service of process, and because the United States has complete jurisdiction and control over the Guantanamo Bay naval base, section 2241 authorized detainees to bring habeas petitions.[36]

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[30] *Id.* at 871.

[31] *See* Rasul v. Bush, 542 U.S. 466, 485 (2004); Hamdi v. Rumsfeld, 542 U.S. 507, 539 (2004).

[32] *Rasul,* 542 U.S. at 485; *Hamdi,* 542 U.S. at 539.

[33] *Rasul,* 542 U.S. at 470–71, 472 n.4.

[34] *See id.* at 471–72.

[35] *See id.* at 473–79.

[36] *See id.* at 478–80, 484; *cf.* Johnson v. Eisentrager, 339 U.S. 763 (1950) (holding that German citizens captured by U.S. forces during hostilities in China and held in military custody outside of the United States did not have the right to the writ of habeas corpus under the U.S. Constitution).

2. *Hamdi v. Rumsfeld*: Detention Authority and Adequate Due Process

In *Hamdi v. Rumsfeld,* petitioner Yaser Esam Hamdi challenged the President's authority to detain him as an "enemy combatant" at Guantanamo Bay.[37] Hamdi, an American citizen, was captured in 2001 in Afghanistan by members of the Northern Alliance and turned over to the U.S. military.[38] He was transferred to Guantanamo Bay in January 2002.[39] In a plurality opinion, Justice O'Connor stated that the Authorization for the Use of Military Force (AUMF) contained a congressional grant of authority to the President to use "all necessary and appropriate force" against any individual or entity associated with the September 11, 2001 terrorist attacks, which included the detention of individuals known to be supporting those responsible for the attacks.[40] In response to Hamdi's argument that the AUMF did not authorize indefinite detention, Justice O'Connor explained that detention was authorized for the length of the conflict[41] and justified her assertion on international laws—including the Geneva Convention—stating, "[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities."[42] *Hamdi* is a clear example of the Court's adoption of an international legal principle to support the AUMF and the authority it confers on the President of the United States.[43] Additionally, the Court held that, as an American citizen, Hamdi was entitled to greater due process than that offered to him.[44]

3. *Boumediene v. Bush:* the Constitutional Habeas Right

Boumediene presented the Supreme Court with a new issue: whether alien detainees had the constitutional privilege of habeas corpus, and, if so, whether the review process provided under the DTA was adequate.[45] The ruling would affect section 7 of the 2006 MCA, which stripped federal courts of any jurisdiction to review the detention of an

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[37] *Hamdi,* 542 U.S. at 516.

[38] *Id.* at 510.

[39] *Id.*

[40] *See id.* at 518.

[41] *See id.* at 521.

[42] *Id.* at 520.

[43] *See Hamdi,* 542 U.S. at 520.

[44] *See id.* at 535 ("[W]hile the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting, the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator."); *Boumediene,* 553 U.S. at 792.

[45] *Boumediene,* 553 U.S. at 732–33.

alien designated as an "enemy combatant."[46] Once again tracing the history of the writ of habeas corpus, the Court ruled that: 1) aliens detained at Guantanamo Bay had a constitutional right to the writ of habeas corpus; 2) the MCA is not intended to be a de facto suspension of the writ; and 3) the detention-review procedures under the DTA were an inadequate substitute for habeas corpus.[47] The D.C. Circuit Court's response to Al-Bihani's petition brought international law to—and subsequently rejected it from—habeas corpus jurisprudence.

B. Al-Bihani II: *The Court of Appeals Decision*

Al-Bihani, a Yemeni citizen, contested his detention at Guantanamo Bay through a habeas petition brought pursuant to section 2241(a) of the U.S. Code.[48] The district court denied his petition for review, and Al-Bihani appealed, contesting his detention on four grounds and advancing both substantive and procedural challenges.[49]

First, Al-Bihani contended that reliance on his "support" of al Qaeda as the basis for detention violated international law, as independent citizens "must commit a direct hostile act, such as firing a weapon in combat," in order for the detention to be lawful.[50] The court determined that Al-Bihani's detention was lawful under section 2(a) of the AUMF and the Military Commissions Act of 2009 (2009 MCA).[51] The 2009 MCA authorized the trial of "unprivileged enemy belligerents"—those who "purposefully and materially supported hostilities against the United States or its coalition partners."[52] The court reasoned that anyone subject to a military commission trial was also subject to the resulting detention, and that, because the 55th Arab Brigade contained al Qaeda members who fought alongside the Taliban and against the United States, all members of the Brigade "purposefully and

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[46] *See id.* at 736–37. 28 U.S.C.A. § 2241(e) (West 2010) provided that:

> (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

Id.

[47] *See Boumediene*, 553 U.S. at 771, 792.

[48] Al-Bihani v. Obama (*Al-Bihani II*), 590 F.3d 866, 869 (D.C. Cir. 2010).

[49] *See id.* at 870–71.

[50] *Id.*

[51] *Id.* at 872–73.

[52] *Id.* at 872.

materially supported" those hostilities against the United States.[53] The court found statutory authorization for Al-Bihani's detention under both the 2009 MCA and the AUMF, which placed him squarely within the scope of the President's detention authority.[54]

Al-Bihani next argued that, in accordance with law of war principles, he should be released because the conflict with the Taliban had ended.[55] He offered the day Hamid Karzai was elected President as one of several dates that indicated an end to hostilities.[56] In the absence of a congressional declaration of termination of the war, the court deferred to the President's determination of whether the conflict had ended rather than forming its own opinion based on, for example, the nature of the conflict or the number of troops in Afghanistan.[57]

As a last resort, Al-Bihani contended that the government's failure to grant him prisoner-of-war (P.O.W.) status violated international law.[58] The court found Al-Bihani's argument moot because the statutory basis for his detention—the AUMF and 2009 MCA—did not depend on his designation as a P.O.W.[59] Additionally, the court pointed out that the 2009 MCA "explicitly precludes detainees from claiming the Geneva conventions . . . as a source of rights."[60]

In his final two arguments, Al-Bihani attacked the procedure afforded him during his detention review by contending that the habeas process did not meet the requirements of the Suspension Clause of the U.S. Constitution.[61] The court relied on the *Boumediene* holding that "habeas procedures for detainees 'need not resemble a criminal trial'" to rebut Al-Bihani's assertions.[62] The court acknowledged that, in this case in particular, the adequacy of habeas procedure turned on Al-Bihani's status as an alien, apprehended during hostilities in a foreign country, and therefore afforded him less process than a petitioner such as Hamdi.[63] Because the Supreme Court has not determined the standard of proof required in a habeas proceeding like Al-Bihani's, Al-Bihani proposed a reasonable doubt standard, which he justified based

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[53] *See id.* at 872–74.
[54] *Al-Bihani II,* 590 F.3d at 872–73.
[55] *See id.* at 874.
[56] *Id.*
[57] *See id.*
[58] *Id.* at 875.
[59] *See id.*
[60] *Al-Bihani II,* 590 F.3d at 875.
[61] *See id.* (citing U.S. CONST. art. I, § 9, cl. 2).
[62] *See id.* at 876 (quoting *Boumediene,* 553 U.S. at 783).
[63] *See id.* at 877–78.

on the possibility of an indefinite detention.[64] The court countered that the standard described in *Hamdi* mimicked a preponderance of the evidence standard and was therefore constitutionally appropriate.[65] It also noted that, because "it is constitutionally permissible to place [a] higher burden on a citizen petitioner in a routine case, it follows a priori that placing a lower burden on the government defending a wartime detention . . . is also permissible."[66]

Finally, Al-Bihani claimed that the governmental reports of his interrogation were hearsay and were therefore "improperly admitted absent an examination of reliability and necessity."[67] In reviewing the district court record, the Court of Appeals determined that the lower court properly assessed the reliability of the hearsay evidence and deferred to that assessment, pointing out that, according to the rules of process set forth in the case management order, Al-Bihani had the opportunity to rebut the evidence and undermine its credibility.[68]

Al-Bihani grounded his statutory arguments in international law.[69] Specifically, he claimed that principles of international law limited any executive detention authority granted in the AUMF.[70] He used Article 118 of the Third Geneva Convention[71] to support his contention that, because the war between the Taliban and the United States had ended and he had not been designated as a potential danger, the government had no authority to detain him.[72] Before responding to the substance of any of Al-Bihani's arguments, the court firmly rejected the idea that "the war powers granted by the AUMF and other statutes are limited by the international laws of war."[73] Rather than examining those principles and their potential compatibility with the AUMF and the 2009 MCA—the statutory authorizations for Al-Bihani's detention—the court unilaterally declared that international laws of war had not been incorporated into law and were therefore not a source of authority for U.S. courts, and that Congress had not intended international laws of war to limit execu-

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[64] *See id.* at 878.

[65] *See id.*

[66] *Al-Bihani II,* 590 F.3d at 878.

[67] *Id.* at 879.

[68] *See id.* at 880.

[69] *See id.* at 870.

[70] *See id.* at 871.

[71] Third Geneva Convention, *supra* note 27, art. 118. Article 118 begins: "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities."

[72] *See Al-Bihani II,* 590 F.3d at 871.

[73] *See id.*

tive war powers granted under the AUMF.[74] As the concurrence correctly pointed out, that statement undermined the reasoning in *Hamdi,* which derived authority for the President to detain "enemy combatants" for the duration of the hostilities from the Geneva Convention.[75]

Further, the court asserted that "the international laws of war are not a fixed code," and that "[t]heir dictates and application to actual events are by nature contestable and fluid."[76] Disregarding the Supreme Court's reliance on international law in *Hamdi,* the court firmly rejected any attempt to give international law a role in the habeas review process.[77] Moreover, the court declared that it has "no occasion . . . to quibble over the intricate application of vague treaty provisions and amorphous customary principles" and would only look to "the text of relevant statutes and controlling domestic caselaw."[78] The D.C. Circuit is the sole avenue for habeas review for Guantanamo detainees.[79] Therefore, the Circuit Court's interpretation of international law as inapplicable and lacking authority controls not only the lower court but consequently all future petition review, unless the issue appears before the Supreme Court.[80]

C. *The Aftermath of* Al-Bihani II

1. Subsequent Habeas Cases

The *Al-Bihani v. Obama* court's rejection of the principles of international war as an authoritative, extra-textual limitation on the authority of the war powers of the President, or on the powers of the U.S. courts, has been addressed only once since the decision was issued in January 2010.[81] In response to other habeas petitioners' argument that they had a cause of action under international law, the district court simply noted in a footnote that the D.C. Circuit "has rejected the argument that international law is precedential or binding on the courts," declining to address the substance of the issue.[82]

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[74] *See id.*
[75] *See id.* at 883 (Williams, J., concurring); *see also Hamdi*, 542 U.S. at 520.
[76] *Al-Bihani II,* 590 F.3d at 871.
[77] *See id.* at 871–72.
[78] *Id.*
[79] *Id.* at 881–82 (Brown, J., concurring) (citing *Boumediene*, 553 U.S. at 795–96).
[80] *See id.*
[81] *See id.* at 871; Al-Zahrani v. Rumsfeld, 684 F. Supp.2d 103, 115 n.8 (D.D.C. 2010).
[82] *See Al-Zahrani,* 684 F. Supp.2d at 115 n.8.

2. Can Domestic and International Law Coexist?

Judge Williams first pointed out that the Court of Appeals decision was difficult to reconcile with the Supreme Court's reasoning in *Hamdi,* but certain scholars, perhaps following his lead, have also taken notice.[83] Although international law currently has no controlling authority, especially within the D.C. Circuit, courts have not rejected it as an interpretive tool.[84] Additionally, in 2008 President Obama pledged to review all detainee laws and policies, yet the D.C. Circuit still controls those laws and policies, which are akin to those in force during the Bush administration.[85] While a common law on habeas may have developed, this common law does not provide clear guidance as to detention authority or the process due.[86] In fact, the Supreme Court seems to have avoided creating such guidelines.[87] Without any guidelines, and no longer required to observe the requirements of international law, is the United States violating international laws on human rights?[88] Can the country expect others to abide by international rules that our court has deemed "inapposite" and "amorphous" with regard to the detention of American citizens captured abroad during hostilities?[89]

III. Analysis

Affirming the rejection of Al-Bihani's habeas petition, the U.S. Court of Appeals for the D.C. Circuit declared that international law is neither an extra-statutory limitation on the President's war powers under the AUMF, nor a source of authority for the U.S. judiciary.[90] On appeal, Al-Bihani advanced four arguments, each premised on a long-standing principle of the international laws of war, to support the contention that his detention at Guantanamo violated those principles.[91] In addition to finding his detention authorized under the AUMF and

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[83] *See Al-Bihani II,* 590 F.3d at 883 (Williams, J., concurring); Gregory S. McNeal, *International Law and United States Policy Issues Arising from the United States' Conflict with al Qaeda,* 32 U. Ark. Little Rock L. Rev. 505, 505 (2010); *see also Hamdi,* 542 U.S. at 520.

[84] *Cf.* McNeal, *supra* note 83, at 509–11 (evaluating detention procedures under U.S. and international law).

[85] *See* John B. Bellinger, III, *Terrorism and Changes to the Laws of War,* 20 Duke J. Comp. & Int'l L. 331, 331–32 (2010); *see also Al-Bihani II,* 590 F.3d at 881–82 (Brown, J., concurring) (citing *Boumediene,* 553 U.S. at 795–96).

[86] *See Boumediene,* 553 U.S. at 798; *Al-Bihani II,* 590 F.3d at 871.

[87] *See Boumediene,* 553 U.S. at 792, 798.

[88] *See* Bellinger, *supra* note 85, at 336.

[89] *See id.* at 336–37; *see also Al-Bihani II,* 590 F.3d at 871.

[90] *See* Al-Bihani v. Obama (*Al-Bihani II*), 590 F.3d 866, 871 (D.C. Cir. 2010).

[91] *See id.* at 870–71.

2009 MCA, the court rejected international law as not only a limit on executive power and judicial interpretive authority, but also as a source of reasoning when assessing the legality of an individual's detention.[92]

The D.C. Circuit's unilateral rejection of international laws of war as even a source of interpretive guidance is incorrect and unwise.[93] Federal judicial authority extends not only to all federal laws, but also to all treaties—such as the Third Geneva Convention—which arise under the authority of the Constitution.[94] The Supreme Court frequently evaluates international laws of war such as the Third Geneva Convention in determining the legality of a detention or the sufficiency of detention review procedures under the relevant statutes.[95] Moreover, the 2009 MCA, which amended the 2006 MCA, reflected modifications consistent with congressional intent to integrate the Third Geneva Convention and its prisoner-of-war categorization scheme into statutory authorization for the trial of detainees.[96] The court should use the Geneva Convention as guidance to develop a comprehensive standard for classification of detainees and the process due for detention review, as the standards promulgated have been ratified by the United States and can offer direction in an area in which the Supreme Court has not yet provided guidance.[97]

A. *The Third Geneva Convention and "Prisoners of War"*

The Third Geneva Convention Relative to the Treatment of Prisoners of War was signed by the President of the United States on July 14, 1955, with the advice and consent of the Senate, and sets forth the obligations of signatories to one another during declared war or armed conflict.[98] In Article 4, the Treaty identifies eight categories of individuals eligible for classification of prisoners of war.[99] Article 5 requires that

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[92] *See id.* at 872–73.

[93] *See id.* at 883 (Williams, J., concurring).

[94] *See* U.S. Const. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.").

[95] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 520–21 (2004); *see also* Hamdan v. Rumsfeld, 548 U.S. 557, 628–35 (2006) (determining petitioner's status under the Third Geneva Convention in order to evaluate the suitability of the procedure afforded to him).

[96] 10 U.S.C.A. § 948a (West 2010). *Compare* 10 U.S.C. § 948a (2006) (definitions of "unlawful enemy combatant" and "lawful enemy combatant" absent any reference to the Third Geneva Convention).

[97] *See* Boumediene v. Bush, 553 U.S. 723, 792 (2008); *see also* Third Geneva Convention, *supra* note 27.

[98] *See* Third Geneva Convention, *supra* note 27.

[99] *See id.* art. 4.

persons that cannot be classified as prisoners of war according to Article 4 be afforded the protection of the Treaty until a competent tribunal determines their status.[100] The remainder of the Treaty lays out comprehensive guidelines for the treatment of prisoners of war, covering everything from general protection to religious, intellectual, and physical activities, penal and disciplinary sanctions, and release and repatriation at the close of hostilities.[101] Thus, the Convention's existing framework could serve as a procedural model for detainee status determination, whether the detainee is classified as a prisoner of war under Article 4 or not, or at least provide a base from which the courts could upwardly depart when analyzing the statutory authorization for such detention and detention review.[102]

B. *The 2009 MCA: the Love-Hate Relationship with the Third Geneva Convention*

The 2009 MCA amendments to the 2006 MCA incorporated Article 4's P.O.W. classification categories.[103] The 2009 MCA removed the term "lawful enemy combatant," which was defined in the 2006 MCA as a person who was:

> (A) a member of the regular forces of a State party engaged in hostilities against the United States;
> (B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State or party engaged in such hostilities, which are under responsible command . . . ; or
> (C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.[104]

The 2009 MCA replaces "lawful enemy combatant" with "privileged belligerent," defined as "an individual belonging to one of the eight categories enumerated in Article 4."[105] Consequently, "unlawful enemy combatant" became "unprivileged enemy belligerent," which encompasses individuals who were part of al Qaeda at the time of the alleged offense, but not necessarily individuals who were members of the Tali-

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[100] *See id.* art. 5.
[101] *See id.* arts. 12–16, 34–42, 118–119.
[102] *See* Third Geneva Convention, *supra* note 27.
[103] 10 U.S.C.A. § 948a.
[104] 10 U.S.C.A. § 948a(6); 10 U.S.C. § 948a(2).
[105] 10 U.S.C.A. § 948a(6); 10 U.S.C. § 948a(2).

ban, unless they were also engaged in hostilities against the United States or its coalition partners.[106] Members of the Taliban—the former government of Afghanistan and thus a "High Contracting Party" under the Third Geneva Convention—captured and detained during the conflict with the Taliban (prior to the establishment of the new democratic regime) would likely have been "prisoners of war" and subject to the Convention.[107] The amendment's distinction therefore brings the law into compliance with the Convention, and the explicit reference to the Convention implies both the validity and usefulness of its guidance for statutory interpretation.[108]

Section 948b(e)'s prohibition on an unprivileged enemy belligerent invoking a private right of action under the Convention conflicts with the Convention itself.[109] However, a habeas petition challenging detention under the 2009 MCA at least ensures that a competent tribunal—such as the U.S. District Court for the District of Columbia— reviews the detainee's determination as an unprivileged enemy belligerent and, if necessary, classifies him or her as a privileged belligerent, and thus as a prisoner of war able to invoke the Convention.[110] Additionally, this conflict does not prohibit courts from using international laws of war such as the Convention as interpretive tools when evaluating the legality of detentions pursuant to the 2009 MCA, or even the AUMF.[111]

Conclusion

The complete rejection by the Court of Appeals of the international laws of war, particularly the Third Geneva Convention, was unnecessary. Although international law is not binding unless Congress implements it, under the Constitution, the Court's authority extends to treaties. Additionally, the Supreme Court has made a practice of looking to international law as guidance for interpretation, specifically in habeas petition cases. The recent amendments to the 2006 MCA also

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[106] *See* 10 U.S.C.A. § 948a(7).

[107] *See Hamdan,* 548 U.S. at 628–29.

[108] *See* 10 U.S.C.A. § 948a.

[109] *See* 10 U.S.C.A. § 948b(e); *Al-Bihani II,* 590 F.3d at 875 ("[T]he MCA . . . explicitly precludes detainees from claiming the Geneva conventions—which include criteria to determine who is entitled to P.O.W. status—as a source of rights."); *see also* Third Geneva Convention, *supra* note 27, art. 5.

[110] *See* 10 U.S.C.A. § 948a.

[111] *See Al-Bihani II,* 590 F.3d at 883 (Williams, J., concurring); *see also* The Lottawanna, 88 U.S. 558, 572 (1874) ("In this respect [maritime law] is like international law or the laws of war, which have the effect of law in no country any further than they are accepted and reviewed as such.").

show that Congress relied on the Third Geneva Convention, as it incorporated the Convention almost entirely into the revised statute. Although the 2009 MCA denies appeal via the Convention to prisoners classified as "unprivileged enemy belligerents," thus violating the Treaty, it does not prohibit courts from relying on the Treaty for guidance when evaluating the legality of a detention or the process afforded. Allowing international laws of war to serve as an interpretive tool could provide a basis from which a clearer standard of habeas petition review could develop.