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Combatant Status Review Tribunals and the Unique Nature of the War on Terror

Robert A. Peal

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Combatant Status Review Tribunals and the Unique Nature of the War on Terror

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I. INTRODUCTION

On September 11, 2001, terrorists¹ attacked the United States, killing 2,973 innocent civilians. This was the largest loss of life on U.S. soil due to a hostile act in the nation's history.² Al Qaeda, an international terrorist organization, claimed responsibility for the act.³ Al Qaeda had been systematically targeting U.S. civilians and service members for at least the previous nine years.⁴ In response to the attacks, the United States conducted a series of military and legal actions that were highly controversial and unprecedented. As part of these actions, the executive branch claimed the authority to detain indefinitely individuals it labeled as "enemy combatants."⁵

This Note examines the procedures currently used by the United States to determine whether an individual qualifies as an enemy combatant. It then assesses the legitimacy of this process in light of the law of armed conflict, the history of military tribunals, the special characteristics of the war on terror, and practical necessity. This Note concludes that the current procedures, although technically

1. "[T]errorism is a concept 'easier to condemn than to define . . . or a box with a false bottom.' . . . Generally, the term includes the indiscriminate use of violence—particularly against civilians—to further a political aim." Harvey Rishikof, *Is it Time for a Federal Terrorist Court? Terrorists and Prosecutions: Problems, Paradigms, and Paradoxes*, 8 SUFFOLK J. TRIAL & APP. ADVOC. 1, 6 (2003) (quoting Adam Roberts, *Can We Define Terrorism*, OXFORD TODAY FEATURES, available at http://www.oxfordtoday.ox.ac.uk/archive/0102/14_2/04.html). Various definitions of "terrorism" can be found in both federal and international law. One such example is as follows:

[T]he term "terrorism" means activity, directed against United States persons, which—

(A) is committed by an individual who is not a national or permanent resident alien of the United States;

(B) involves violent acts or acts dangerous to human life which would be a criminal violation if committed within the jurisdiction of the United States; and

(C) is intended—

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by assassination or kidnapping.

18 U.S.C. § 921(22) (2005).

2. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 311 (2004) [hereinafter 9/11 COMMISSION REPORT], available at <http://www.gpoaccess.gov/911/pdf/fullreport.pdf>.

3. See *id.* at 59-61 (stating that al Qaeda unsuccessfully attacked U.S. forces in Somalia in 1992, trained the insurgents who shot down the Black Hawk helicopters in Somalia in 1993, attacked a joint Saudi Arabian-U.S. facility in November 1995, detonated a truck bomb at the Khobar Towers residential complex for U.S. Air Force personnel in Dhahran, Saudi Arabia in June 1996, and may have been involved in both the 1993 bombing of the World Trade Center and the 1995 Manila air plot to blow up a dozen U.S. airliners over the Pacific).

4. *Id.*

5. This Note will only examine non-citizen combatants, as defined by Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001) [hereinafter Military Order], discussed *infra*.

legal, must be refined by Congress in order to address the many shortcomings therein.

II. THE LAW OF ARMED CONFLICT

The law of armed conflict is designed to “offer a proven, durable mode of imposing principled constraints on organized violence.”⁶ The law of war today can be generally described as falling into two categories:⁷ Hague Law,⁸ which addresses the methods of conducting warfare, and Geneva Law,⁹ which deals with the protection of the victims of war. The recent international debate concerning U.S.

6. Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT’L L. 1, 2 (2003) [hereinafter Jinks, *Laws of War*].

7. William K. Lietzau, *Old Laws, New Wars: A Strategy for Developing International Law During the Global War on Terrorism* 91 (unpublished manuscript, on file with the author). LtCol. Lietzau is a United States Marine Corps Judge Advocate General Officer who has served as Special Advisor to the General Counsel of the Department of Defense (“DoD”), as the Office of Military Commissions first Acting Chief Prosecutor until May 2003, as head of the Law of Armed Conflict Branch in the International and Operational Law Division for the Judge Advocate General of the Navy, and as Deputy Legal Counsel to the Chairman of the Joint Chiefs of Staff, handling, among other things, arms control and law of war issues. LtCol. Lietzau’s biography is available at www.defenselink.mil/news/May2003/d20030522liet.pdf (last visited Oct. 31, 2005). His input on this Note is extremely appreciated. Certain portions of LtCol. Lietzau’s manuscript have been published. The intro largely exists in: *Combating Terrorism: The Consequences of Moving from Law Enforcement to War*, in NEW WARS, NEW LAWS: APPLYING THE LAWS OF WAR IN 21ST CENTURY CONFLICTS 31 (David Wippman & Matthew Evangelista, eds., forthcoming) and in *Combating Terrorism: Law Enforcement or War?*, in TERRORISM AND INTERNATIONAL LAW: CHALLENGES AND RESPONSES 75 (Michael N. Schmitt & Gian Luca Beruto eds., 2005). The jus ad bellum section is largely published in: *Old Laws, New Wars: Jus ad Bellum in an Age of Terrorism*, in 2004 MAX PLANCK YEARBOOK U.N. L. (MAX PLANCK INSTITUTE FOR COMPARATIVE PUBLIC LAW AND INTERNATIONAL LAW) 383 and in *The Role of Military Force in Foreign Relations, Humanitarian Intervention and the Security Council*, 64/2 ZEITSCHRIFT FÜR AUFLÄNDISCHES ÖFFENTLICHES RECHT UND VOLKERRECHT (HEIDELBERG J. INT’L L.) 281 (2004).

8. Hague law is set forth in major part in the Hague Regulations annexed to the Hague Conventions of 1907. See Lietzau, *supra* note 7, at 91; S. EXEC. DOC. NO. 357, at 2269 (1907); Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, T.S. No. 539.

9. Geneva law is set forth in major part in the four Geneva Conventions of 1949 and the two Additional Protocols of 1977. See Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, July 27, 1929, 47 Stat. 2074, 118 L.N.T.S. 303; Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; 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 [hereinafter GC IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II]; see also U.N. CHARTER.

enemy combatant detainees has almost exclusively focused on Geneva Law.¹⁰ The starting point, however, for any legal discussion of the rights of an enemy in the field is the well-established rule that combatants are legally entitled to kill adversary combatants.¹¹ This default rule forms the baseline from which we can measure the due process rights of captured adversaries.¹² Likewise, the law of armed conflict gives opposing parties the authority to detain adversaries.¹³

A. *Is the War on Terror an "Armed Conflict?"*

There has been extensive debate as to whether any of the laws of war under the Geneva Conventions apply to the "war on terror" led by the United States. Specifically, does the current conflict rise to the level of armed conflict described in the Conventions? Although originally designed for *de jure* declared wars between nations, the laws of war also cover *de facto* armed conflicts.¹⁴ Pursuant to the Geneva and Hague Conventions, the September 11 attacks did not initiate an "international armed conflict" because al Qaeda did not act on behalf of a foreign state.¹⁵ Common Article III of all Geneva Conventions, however, also "explicitly regulate[s] internal armed conflicts—that is, conflicts between states and non-state armed groups."¹⁶ The difficult question, therefore, is determining the point at which an internal disturbance crosses the threshold and becomes an "armed conflict" under international law.¹⁷

10. See, e.g., Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT'L L.J. 367, 371-72 (2004) [hereinafter Jinks, *Declining Significance*] (discussing the applicability of Geneva POW protection to Guantanamo detainees).

11. See Lietzau, *supra* note 7, at 119 n.277 (listing authority for combat immunity); MICHAEL BOTHE ET. AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, 243 (1982) ("[Combatant immunity] provides immunity from the application of municipal law prohibitions against homicides, wounding and maiming, or capturing persons and destruction of property, so long as these acts are done as acts of war and do not transgress the restraints of the rules of international law applicable in armed conflict.").

12. *Hamdi v. Rumsfeld*, 542 U.S. 507, 508 n.2 (2004) (holding Mr. Hamdi, as a U.S. citizen, is entitled to due process under the Constitution, but purposefully not addressing whether any treaty guarantees access).

13. GC III, *supra* note 9, art. 21, 6 U.S.T. at 3334-35, 75 U.N.T.S. at 153-54; *Hamdi*, 542 U.S. at 2640 ("The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incidents of war.'") (quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1942)).

14. Jinks, *Laws of War*, *supra* note 6, at 10. A *de jure* war is a traditional declared war, such as World War II, while *de facto* armed conflict is open conflict undeclared, and thus, untraditional in the legal sense. See *id.*

15. *Id.* at 12.

16. *Id.* at 10.

17. *Id.*

The drafters of the Geneva Conventions sought to define internal armed conflicts broadly by applying a limited set of substantive principles.¹⁸ Common Article III provides:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.¹⁹

The first clause of this provision imposes the above regulation, by its express terms, on all parties to a conflict, even non-signatories.²⁰

The difficulty defining the term “armed conflict” stems from the vagueness of the actual phrase: “No one can say with assurance precisely what meaning [the words ‘armed conflict not of an international character’] were intended to convey.”²¹ Despite the broad definition of the term “armed conflict” under the Conventions, the war on terror does not appear to be a classic internal armed conflict (like a civil uprising) because “al Qaeda neither controls, nor seeks to control territory in the United States.”²² Furthermore, al Qaeda is neither challenging the legal authority of the United States within its territory, nor is it suggesting that the United States exercises illegal dominion over some other territory. Therefore the conflict is not a “war of national liberation.”²³

18. *Id.* at 16-17.

19. GC I, *supra* note 9, art. 3, 6 U.S.T. at 3518-20, 75 U.N.T.S. at 136-38.

20. Jinks, *Laws of War*, *supra* note 6, at 18.

21. *Id.* at 23 (quoting Tom Farer, *Humanitarian Law and Armed Conflicts: Toward a Definition of “International Armed Conflict”*, 71 COLUM. L. REV. 37, 43 (1971)).

22. *Id.* at 20.

23. *Id.*

Other sources—including the International Committee on the Red Cross Commentaries, Protocol II to the Geneva Conventions, the judgment of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Tadic*,²⁴ and the statute establishing the International Criminal Court—all attempt to further refine the definition of “internal armed conflict.”²⁵ Unfortunately, these attempts provide little clarity.

Because there is a lack of clarity, we must turn to other considerations to determine what qualifies as an “armed conflict.” To this end, “two important sets of considerations pertain[:]. . . (1) the intensity of the violence; and (2) the capacity and willingness of the parties to carry out sustained, coordinated hostilities.”²⁶ Additionally, if the state party to the hostilities interprets the situation as an “armed conflict,” it will be understood as such, regardless of the criteria.²⁷ As discussed below,²⁸ the United States characterizes the war on terror as a war and is carrying out a comprehensive international military effort in response. The war on terror, therefore, should be considered an armed conflict and the protections of Common Article III should apply.

B. Article V Determination of POW Status

A common criticism of the way the Bush Administration has handled enemy combatants is that he has failed to provide an Article V determination as to whether the detainees should be classified as prisoners of war (“POWs”) under the Geneva Conventions.²⁹ The 1949 Third Geneva Convention Relative to the Treatment of Prisoners of War (GC III) defines prisoners of war as:

[P]ersons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members 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.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias

24. 35 I.L.M. 32 (1996).

25. Jinks, *Laws of War*, *supra* note 6, at 25-32.

26. *Id.* at 31.

27. *Id.* at 32.

28. See *infra* Part III.

29. Cf. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 173 (D.D.C. 2004) (“[U]ntil a competent tribunal determines that Hamdan is not entitled to POW status, he [must be treated as a POW].”), *rev'd*, 415 F.3d 33 (D.C. Cir. 2005).

or volunteer corps, including such organized resistance movements, fulfill the following conditions:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting their operations in accordance with the laws and customs of war

....³⁰

This Convention speaks of the applicability of POW protection to certain groups found on the battlefield; however, it was designed to apply only to the states that signed it: the "High Contracting Parties." Its terms "shall apply to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties."³¹ The Convention binds the parties to the terms of the treaty in any conflict with a "Power," even a non-signatory one, if that "Power" accepts the Convention and applies its provisions.³² The drafters of the Geneva Conventions intended the word "Power" to mean a state.³³ As the Rapporteur of the Special Committee noted, "the obligation to recognize that the Convention be applied to the non-contracting adverse *State*"³⁴

The Fourth Geneva Convention affords protections to civilians similar to the protection extended to POWs under GC III.³⁵ The term "civilians" under this Convention is defined very broadly.³⁶ Civilian

30. GC III, *supra* note 9, art. 4, 6 U.S.T. at 3320-22, 75 U.N.T.S. at 138-40.

31. *Id.* art. 2, 6 U.S.T. at 3318, 75 U.N.T.S. at 136. High Contracting parties are Switzerland, Yugoslavia, the Principality of Monaco, Liechtenstein, Chile, India, Czechoslovakia, the Holy See, Lebanon, Pakistan, Denmark, France, Israel, Norway, Italy, Guatemala, Spain, Belgium, the Republic of the Philippines, Mexico, Egypt, El Salvador, Luxembourg, Austria, Syria, Nicaragua, Sweden, Turkey, Cuba, the Union of Soviet Socialist Republics, Rumania, Bulgaria, the Byelorussian Soviet Socialist Republic, Hungary, the Netherlands, the Ukrainian Soviet Socialist Republic, Ecuador, Poland, Finland, the United States of America, the Hashemite Kingdom of Jordan, the Union of South Africa, Japan, San Marino, Vietnam, Liberia, the Federal Republic of Germany, and Thailand. *Id.*

32. *Id.* ("Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.")

33. Lietzau, *supra* note 7, at 136 n.326.

34. JEAN DE PREUX, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 22 (Jean S. Pictet ed., 1960) (emphasis added) (quoting 2-B FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949 108).

35. See GC IV, *supra* note 9, (establishing the protection of civilians during times of war in the hands of enemies and under any occupation by a foreign power).

36. GC IV, *supra* note 9, art 4, 6 U.S.T. at 3520, 75 U.N.T.S. at 290 ("Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find

protections include “due process rights . . . ; the right to humane treatment; freedom from coercive interrogation; freedom from discrimination; the right to repatriation . . . ; the right to internal camp governance; and the prohibition on attacks directed against civilian objects (including . . . hospitals and other facilities providing essential services . . .).”³⁷ Again, this Convention only applies to the parties who signed it.³⁸

There is significant debate as to whether these civilian protections apply to every captured person who is not a POW, or only to those who take no part in the fighting.³⁹ The ICRC and many other human rights organizations hold the former view.⁴⁰ First, they argue that the text appears to support this view, as it defines persons protected as “those who, at a given moment and in any manner whatsoever, find themselves . . . in the hands of a Party . . . of which they are not nationals.”⁴¹ Furthermore, given the detailed definition of protected categories found elsewhere in the Conventions, some feel the broadness of this definition signals that it was meant to serve as a catch-all provision.⁴² The drafting history of the Convention also provides some support for this view.⁴³

The contrary view, that civilian protections only apply to those who take no part in the fighting, uses nearly the same evidence to support its position. This view posits that the articles defining protected persons are written very finitely and that none contains an

themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”).

37. Jinks, *Declining Significance*, *supra* note 10, at 381.

38. *Id.* (“Nationals of a State which is not bound by the Convention are not protected by it.”). Of course, Common Article 3 does still apply as explained above. *See supra* Part II.A.

39. *Compare id.* at 381-86 (arguing that these civilian protections “apply to all enemy nationals – including unlawful combatants – not protected by other Conventions”) with F. Kalshoven, *The Position of Guerrilla Fighters under the Law of War*, 11 REVUE DE DROIT PENAL MILITAIRE ET DE DROIT DE LA GUERRE (MIL. L. & L. OF WAR REV.) 55, 70-71 (1972) (adopting view that combatants who do not fall into any GC III, art. 4 category were not taken into account in drafting GC IV).

40. *See* International Committee of the Red Cross, *International Humanitarian Law and Terrorism: Questions and Answers*, <http://www.icrc.org/Web/eng/siteeng0.nsf/html/5YNLEV> (last visited Oct. 31, 2005) (“Civilians detained for security reasons must be accorded the protections provided for in the Fourth Geneva Convention. Combatants who do not fulfil [sic] the requisite criteria for POW status (who, for example, do not carry arms openly) or civilians who have taken a direct part in hostilities in an international armed conflict (so-called ‘unprivileged’ or ‘unlawful’ belligerents) are protected by the Fourth Geneva Convention provided they are enemy nationals.”).

41. GC IV, *supra* note 9, art. 4, 6 U.S.T. at 3520, 75 U.N.T.S. at 290.

42. Jinks, *Declining Significance*, *supra* note 10, at 383-84.

43. *See id.* (listing supportive history).

explicit “all other” clause, so a catch-all cannot be implied.⁴⁴ Additionally, the text of Protocol I discusses minimum procedures for those who neither qualify for POW status, nor are entitled to “more favourable treatment in accordance with the Fourth Convention.”⁴⁵ Drafting history also supports the position that unlawful combatants are not protected.⁴⁶

Under the Fourth Geneva Convention, even if enemy combatants are protected as “civilians,” they can still be detained indefinitely for security reasons.⁴⁷ This condition appears in the so-called “derogation provision,” which provides:

Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.⁴⁸

The “derogation provision” has several limitations. First, the text suggests that this article only applies in occupied territory or in the territory of the detaining state.⁴⁹ Second, the article only applies when the detaining state has “good reason to suspect that a particular individual has engaged in hostile acts.”⁵⁰ Third, the Convention may only be suspended, and only for such time as necessary, to preserve

44. See Lietzau, *supra* note 7, at 153 n.372 (“The Senate Foreign Relations Committee observed the same during their ratification hearings. ‘[A] new Convention [GC IV] was drawn up at the Geneva Convention in 1949, which spells out to a degree never before attempted the obligations of the parties to furnish humanitarian treatment to two broad categories of civilians: enemy aliens present within the home territory of a belligerent, and civilian persons found in territory which it occupies in the course of military operations.’”) (quoting S. EXEC. REP. No. 84-9, at 2).

45. Protocol I, *supra* note 9, art. 45, para. 3, 1125 U.N.T.S. at 24.

46. Lietzau, *supra* note 7, at 152; see, e.g., Vol. IIA FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949 622 (“although the two conventions might appear to cover all the categories concerned, irregular belligerents were not actually protected.”).

47. GC IV, *supra* note 9, art. 5, 6 U.S.T. at 3520-22, 75 U.N.T.S. at 290-92.

48. *Id.*

49. Jinks, *Declining Significance*, *supra* note 10, at 388.

50. *Id.* at 389. Presumably, most Guantanamo detainees would satisfy this low threshold.

security.⁵¹ Finally, the protections provided in the last paragraph, that the detained shall be treated humanely and provided with the rights of a fair and regular trial, cannot be suspended, regardless of any security concerns.⁵²

The drafters of these Conventions did not anticipate the unique nature of the war on terror; for that reason, the Conventions do not apply neatly to this type of conflict. It seems illogical that a group of organized combatants engaging in sustained or systematic combat activities should receive nearly the same protection as innocent civilians detained incident to combat. The Conventions prohibit the intentional or reckless killing of civilians,⁵³ and yet, belligerents have the undisputed authority to kill adversary belligerents.⁵⁴ These provisions appear to conflict; classifying captured al Qaeda adversary belligerents as civilians would mean that, prior to capture, U.S. armed forces were intentionally targeting and killing these civilians. Al Qaeda members can be considered “unlawful combatants” because they take up arms against another armed force without lawful authority to do so under the laws of war.⁵⁵ However, “[b]ecause the law of war encourages distinguishing between combatants and noncombatants when using force, there is a corollary principle that protected noncombatants may not take up arms against the armed force that is presumably respecting their protected status.”⁵⁶ If combatants were permitted to take advantage of the United States’

51. *Id.* at 390.

52. *Id.* at 391.

53. See, e.g., Mark David Maxwell, *The Law of War and Civilians on the Battlefield: Are We Undermining Civilian Protections?*, MILITARY R., Sept.-Oct. 2004, at 17-18 (“During the 20th century, the Hague Regulations and Geneva Conventions and their additional protocols ‘explicitly confirm[ed] the customary rule that innocent civilians must be kept outside hostilities as far as possible and enjoy general protection against danger arising from hostilities.’”) (citing COMMENTARY TO THE FIRST PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICT 615 (Yves Sandoz, et al. eds., 1977)).

54. See *supra* note 11 and accompanying text.

55. See JUDGE ADVOCATE GENERAL’S SCHOOL (United States Army), OPERATIONAL LAW HANDBOOK 22 (2003), available at <http://www.jagcnet.army.mil/JAGCNET/Internet/Homepages/AC/TJAGSAWeb.nsf/Main?OpenFrameset> (stating that “persons who commit hostile acts against U.S. forces or serious criminal acts and are captured do not meet the legal criteria for [prisoner of war status] under [GC III]. These persons may be termed ‘detainees’ instead of [prisoners of war].”).

56. Lietzau, *supra* note 7, at 148-49 & n.355 (citing BOTHE, *supra* note 11, at 243, and stating that “[c]ivilians who participate directly in hostilities, as well as spies and members of the armed forces who forfeit their combatant status, do not enjoy that privilege, and may be tried, under appropriate safeguards, for direct participation in hostilities as well as for any crime under municipal law which they might have committed”).

compliance with the laws of war,⁵⁷ it would be increasingly difficult to distinguish between combatants and noncombatants, and perhaps prompt countries to ignore the laws of war.⁵⁸

The Geneva Conventions provide procedures for determining whether a particular individual or group belongs to any of the categories mentioned above. Article V of the Geneva Convention allows for this determination to be made by a tribunal: “*Should any doubt arise as to whether persons . . . belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.*”⁵⁹ The mechanism the United States uses to make these Article V determinations is the AR 190 tribunal.

C. The AR 190 tribunal

Joint regulation AR 190-8 details the mechanics of the “competent tribunal” referenced in GC III.⁶⁰ The tribunal, commonly referred to as the AR 190, is composed of three commissioned officers.⁶¹ The AR 190 regulation gives specific instructions regarding the following tribunal procedures: the oath,⁶² the record,⁶³ the openness of the proceedings,⁶⁴ the right to an interpreter,⁶⁵ the presence of the detainee,⁶⁶ the rules regarding witnesses,⁶⁷ the right to

57. For example, in Iraq many insurgent use mosques, hospitals, and other protected targets as strongholds because they know the rules of war prohibit targeting these structures outright.

58. Lietzau, *supra* note 7, at 149.

59. GC III, *supra* note 9, art. 5, 6 U.S.T. at 3322-24, 75 U.N.T.S. at 140-42 (emphasis added).

60. *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees*, Army Regulation 190-8, OPNAVINST 3461.6, AFJI 31-304, MCO 3461.1, available at <http://www.au.af.mil/au/awc/awcgate/law/ar190-8.pdf> (Oct. 1, 1997) [hereinafter AR 190].

61. *Id.* ¶ 1-6c. There is no requirement that any of these officers have legal training, although “[a]nother non-voting officer, preferably an officer in the Judge Advocate General Corps, shall serve as the recorder.” *Id.*

62. *Id.* ¶ 1-6e(1) (“Members of the Tribunal and the recorder shall be sworn.”).

63. *Id.* ¶ 1-6e(2) (“A written record shall be made of the proceedings.”).

64. *Id.* ¶ 1-6e(3) (“Proceedings shall be open except for deliberation and voting . . .”).

65. *Id.* ¶ 1-6e(4) (“Persons whose status is to be determined . . . will be provided an interpreter if necessary.”).

66. *Id.* ¶ 1-6e(5) (“Persons whose status is to be determined shall be allowed to attend . . .”).

67. *Id.* ¶ 1-6e(6) (“Persons whose status is to be determined shall be allowed to call witnesses if reasonably available . . .”).

testify,⁶⁸ the prohibition on compulsion to testify,⁶⁹ and the burden of a preponderance of the evidence.⁷⁰ The AR 190 tribunal determines which among the following categories a detainee belongs to:

EPW [Enemy Prisoner of War]

Recommended RP [Retained Personnel], entitled to EPW protections, who should be considered for certification as a medical, religious, or volunteer aid society RP.

Innocent civilian who should be immediately returned to his home or released.

Civilian Internee who for reasons of operational security, or probable cause incident to criminal investigation, should be detained.⁷¹

The regulation is broad enough to allow a tribunal determination that a detainee belongs in any of the above categories. Missing from the list, notably, is the term “unlawful combatant.”

III. THE CURRENT PROCEDURES

On November 13, 2002, President Bush issued a military order establishing that non-citizens⁷² captured either domestically or abroad would be transferred immediately to the control of the Secretary of Defense to be tried by a military tribunal for violations of the laws of war and other applicable laws.⁷³ The order has broad application, applying to individuals if

there is reason to believe that such individual, at the relevant times,

(i) is or was a member of the organization known as al Qaida;

(ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, 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 [above]. . . .⁷⁴

Individuals who meet these criteria are designated “enemy combatants”⁷⁵ and will be detained “until hostilities cease.”⁷⁶ An

68. *Id.* ¶ 1-6e(7) (“Persons whose status is to be determined have a right to testify . . .”).

69. *Id.* ¶ 1-6e(8) (“Persons whose status is to be determined may not be compelled to testify . . .”).

70. *Id.* ¶ 1-6e(9) (“Preponderance of the evidence shall be the standard . . .”).

71. *Id.* ¶ 1-6e(10).

72. Although much of the current debate and casework has focused on detained citizens, the order expressly reads that “[t]he term ‘individual subject to this order’ shall mean any individual who is not a United States citizen . . .” Military Order, *supra* note 5, at 57834.

73. *Id.*

74. *Id.*

additional, and very important, criterion for finding that a detainee is an “enemy combatant” is his intelligence value.⁷⁷ A given detainee must either pose a severe threat to security, await trial for violations of the laws of war, or possess some informational value to the United States that justifies moving him from a prison in the country of capture⁷⁸ to Camp X-Ray in Cuba.

The intersection of law of war and traditional criminal law informs the debate over the appropriateness of moving detainees. The law of armed conflict suggests that the United States should detain combatants until the end of active hostilities regardless of any trial or charges,⁷⁹ yet U.S. criminal law norms suggest that combatants be granted the usual protections provided to criminal defendants by the U.S. Constitution.⁸⁰ As discussed below, the Bush Administration decided not to apply traditional Geneva Convention norms and created two unique procedures: the Combat Status Review Tribunal (“CSRT”) and the Administrative Review Board (“ARB”).

A. *The Bush Administration’s Decision*

In regards to the war in Afghanistan, the Bush Administration initially decided that *no one* on the battlefield complied with the requirements of Article IV; thus it eliminated any doubt as to possible

75. Originally, the Administration planned on using the *Quirin* “unlawful belligerent” rhetoric, but “[d]ue to the public confusion generated by the use of the ‘unlawful combatant’ moniker at several Department of Defense press conferences the modifier ‘unlawful’ was subsequently replaced with the word ‘enemy.’ This substitution clarified that the legal authority to detain had nothing to do with presumed culpability (*i.e.*, authority to detain was a function of status as an ‘enemy,’ not a *per se* claim that the enemy had acted unlawfully).” Lietzau, *supra* note 7, at 147-48.

76. GC III, *supra* note 9, art. 118, 6 U.S.T. at 3406, 75 U.N.T.S. at 224 (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”).

77. News Release, U.S. Dep’t of Defense, Transfer of Detainees Completed (Sept. 22, 2004), available at <http://www.dod.mil/releases/2004/nr20040922-1310.html> (“The decision to transfer a detainee to Guantanamo is based on their further intelligence value to the United States and whether they continue to pose a threat to the United States.”).

78. Prisons still exist and are used to detain enemy combatants in both Iraq and Afghanistan. See, e.g., *U.S. Frees 80 Prisoners in Afghanistan*, BIRMINGHAM POST, Jan. 17, 2005, at 9, available at 2005 WL 56477089 (“The US military was still holding 300 prisoners in Afghanistan late last year . . .”).

79. See GC III, *supra* note 9, art. 118, 6 U.S.T. at 3406, 75 U.N.T.S. at 224 (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”).

80. See, e.g., *United States v. Colombo*, 616 F. Supp. 780, 784 (E.D.N.Y. 1985) (“The length of time the defendant will be incarcerated before trial is not a factor listed in the statute. It cannot, however, be ignored without running afoul of constitutional due process and bail provisions.”), *rev’d by* 777 F.2d 96, 100 (2d Cir. 1985).

application of the protections of the Conventions.⁸¹ The Administration then justified the denial of POW status to al Qaeda members because, it argued, the Geneva Convention did not apply in its entirety as al Qaeda is not a High Contracting Party.⁸²

1. Criticism of the Administration's Position

Some critics argue that the denial of POW status (or, at the very least, an Article V determination), violates established military procedures.⁸³ This argument, however, is only partially correct. Although the default military policy is to treat all captives as POWs, the AR 190 regulation provides for POW status treatment only "until some other legal status is determined by competent authority."⁸⁴ The term "competent authority" does not appear to be a term of art. The Commander-in-Chief is a "competent authority" who can make such decisions about the groups on the ground *ex ante*.⁸⁵ Therefore, even though the "doubt" referred to in GC III is arguably an objective one, the final decision must rest with the executive.⁸⁶ Everyone captured on the battlefield will be treated humanely in accordance with Common Article III, but not everyone will receive the increased protections of POW status.⁸⁷

81. See Ari Fleischer, Statement by the Press Secretary on the Geneva Convention (May 7, 2003), available at <http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html> ("Under Article 4 of the Geneva Convention . . . Taliban detainees are not entitled to POW status.").

82. See *id.* ("Al Qaeda is an international terrorist group and cannot be considered a state party to the Geneva Convention. Its members, therefore, are not covered by the Geneva Convention, and are not entitled to POW status under the treaty.").

83. See, e.g., Evan J. Wallach, *Afghanistan*, [Quirin], and [Uchiyama]: *Does the Sauce Suit the Gander?* ARMY LAWYER, Nov. 2003, at 18 ("This policy is grounded in long standing ideals. For over 220 years, our nation's founding principles have extolled the values of human life, and they form the basis for humane treatment of enemy prisoners of war. National ideals demand it, international law requires it . . . [T]he U.S. Army's honor and reputation depend on firm but humane POW treatment . . ." (quoting Walter R. Schumer et al., *Treat Prisoners Humanely*, MIS. REV., Jan.-Feb. 1998, at 83)).

84. See AR 190, *supra* note 60, ¶ 1-5a(2) ("All persons taken into custody by U.S. forces will be provided with the protections of the GPW until some other legal status is determined by competent authority.").

85. Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 100 n.9 (2004) ("In 2002, a top legal advisor in the Justice Department told the White House that 'the President enjoys complete discretion in the exercise of his Commander-in-Chief authority.'").

86. *Id.*

87. See Geoffrey S. Corn & Michael L. Smidt, *To Be or Not to Be, That is the Question* Contemporary Military Operations and the Status of Captured Personnel, ARMY LAWYER, June 1999, at 1 ("As Executive Agent, the Secretary of the Army's policy is that all persons 'captured, detained, interned, or otherwise held in U.S. Armed Forces custody during the course of conflict will be given humanitarian care and treatment from the moment they fall into the hands of U.S. forces until final release or repatriation.' Moreover, all persons taken into custody are to be

Additional criticism rests on theories that seem plausible at first glance, yet ultimately have no basis in international law.⁸⁸ For example, some suggest that al Qaeda members in Afghanistan could qualify as members of the Taliban armed forces or as members of its integral militia.⁸⁹ Alternatively, they could be considered members of a volunteer militia or⁹⁰ possibly members of a *levee en masse*.⁹¹ These arguments, however, fail for two reasons: (1) al Qaeda did not represent the government of Afghanistan, and (2) the Bush Administration's decision that Taliban members did not qualify as POWs.

Al Qaeda was in no way subordinate to the Taliban.⁹² Bin Laden, the leader and founder of al Qaeda, initially moved into a portion of Afghanistan controlled by rival warlords, and, even after the Taliban cemented its control, he often had strained relations with the Taliban.⁹³ The relationship between the Taliban and al Qaeda appears to be limited to shared ideology and financial symbiosis.⁹⁴ Bin Laden even considered moving his base to other countries, including Saddam Hussein's Iraq.⁹⁵ Furthermore, no evidence exists proving that al Qaeda members were part of the Taliban National Guard or subordinate militia. Even if al Qaeda were considered a militia of some sort, it does not meet the demands of GC III, article 4(2), especially subparts (b) and (d).⁹⁶ Hence, "[m]aking no effort to distinguish themselves from the civilian population or to identify

afforded the protections of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (GPW) *until their legal status is determined by competent authority.*") (emphasis added) (quoting AR 190, *supra* note 60, at ¶ 1-5 a(1)).

88. See, e.g., Wallach, *supra* note 83, at 21-27 (arguing that Taliban members could qualify for Article IV treatment under a number of theories).

89. *Id.* at 22-26.

90. *Id.* at 26-27.

91. *Id.* at 27.

92. See 9/11 COMMISSION REPORT, *supra* note 2, at 63-67.

93. *Id.*

94. *Id.*

95. *Id.* at 66.

96. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting their operations in accordance with the laws and customs of war.

GC III, *supra* note 9, art. 4(2), 6 U.S.T. at 3320, 75 U.N.T.S. at 138.

themselves as a military unit, al Qaeda's entire *raison d'être* appears to be killing and terrorizing innocent civilians."⁹⁷

President Bush's argument against extending POW status to the Taliban is less tenable than his decision regarding al Qaeda. The apparent justification for his position is that because Taliban fighters did not comply with GC III, article 4(2)⁹⁸ (they did not have distinctive uniforms, carry arms openly, etc.), they did not qualify for POW protection.⁹⁹ This analysis is flawed because under article 4(1),¹⁰⁰ Taliban members may qualify as members of the regular Afghanistan army. The fact that the United States did not recognize the Taliban as the legitimate government of Afghanistan is irrelevant; article IV(3) allows for "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power." The question essentially becomes "whether the Taliban represent[ed] the armed forces of Afghanistan" even though they never claimed such status.¹⁰¹

Unlike in Afghanistan, in Iraq, the Administration decided captured enemies may qualify for POW status.¹⁰² In the Administration's opinion, groups existed in Iraq that fell under GPW Article IV protections; therefore U.S. forces did conduct normal EPW procedures.¹⁰³ Despite this determination, however, coalition troops captured unlawful combatants on the battlefield (such as the Saddam

97. Lietzau, *supra* note 7, at 144.

98. See *infra* text accompanying note 166.

99. Fleischer, *supra* note 81 ("Under Article 4 . . . however, Taliban detainees are not entitled to POW status. To qualify as POWs under Article 4, al Qaeda and Taliban detainees would have to have satisfied four conditions . . . The 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."); see also John Yoo, Commentary, *Terrorists have no Geneva Rights*, WALL ST. J., May 26, 2004, at A16 (stating that Taliban fighters lost the protections of POW status "by failing to obey the standards of conduct for legal combatants"). Professor Yoo wrote the article to defend the advice he gave the President in his former role as a member of the Office of Legal Counsel in the Department of Justice. *Id.*

100. "Members 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." GC III, *supra* note 9, art. 4(1), 6 U.S.T. at 3320, 75 U.N.T.S. at 138.

101. Lietzau, *supra* note 7, at 145. The argument, not resolved here, is whether Article IV(1) stands alone or is subsumed by the four-part test in Article IV(2). See *id.* at 145 n.346.

102. See Yoo, *supra* note 99, at A16 ("It is important to recognize the differences between the war in Iraq and the war on terrorism. The treatment of those detained at Abu Ghraib is governed by the Geneva Conventions, which have been signed by both the U.S. and Iraq. President Bush and his commanders announced early in the conflict that the Conventions applied.").

103. See News Briefing, Dep't of Defense, ASD PA Clarke and Maj. Gen. McChrystal, Mar 24, 2003, available at http://www.defenselink.mil/transcripts/2003/t03242003_t0324asd.html ("We are treating all of the POWs in accordance with the Geneva Conventions, with dignity and respect, and they will soon have access to the Red Cross.").

Fedayeen, for example),¹⁰⁴ and detained them as civilian internees.¹⁰⁵ The AR 190 tribunal was presumably available to hear the facts of a detained individual's case, determine into which of the predetermined groups this individual fell, and treat him in accordance with the law of armed conflict as applied to his particular group. The tribunal, however, would only be conducted if doubt existed as to which group the detainee belonged. The Administration's decision in Iraq demonstrates that even in the war on terror, certain instances may arise that justify the use of traditional law of war norms.

Some criticize¹⁰⁶ the Administration's treatment of captured enemies as it did not provide an Article V "competent tribunal" to assign an appropriate classification to the detainees.¹⁰⁷ This criticism, however, evinces a misreading of the law of war.¹⁰⁸ The "competent tribunal" is only used to determine the facts of the detainee's status "[s]hould any doubt arise" as to the detainee's status.¹⁰⁹ It follows, then, that if there is no doubt as to a detainee's status, the Article V tribunal is unnecessary.¹¹⁰

104. See Q&A: *What is the Fedayeen Saddam?*, <http://www.nytimes.com/cfr/international/backgroundiraq2032503.html> (last visited Oct. 31, 2005) (stating that the Fedayeen fighters are "[m]ostly young men aged 16 and up. They are armed with machine guns, rocket-powered grenade launchers, and truck-mounted artillery. Fedayeen reportedly dress in civilian clothes in order to confuse coalition forces. Pentagon officials said March 24 that the Fedayeen, who are considered very loyal to the regime, act as enforcers in regular army units, threatening to kill soldiers who try to surrender."). By dressing irregularly and killing surrendering soldiers, this group would probably not qualify for POW status. See GC III, *supra* note 9, art. 4(2), 6 U.S.T. at 3320, 75 U.N.T.S. at 138.

105. See Roberto Iraola, *Enemy Combatants, the Courts, and the Constitution*, 56 OKLA. L. REV. 565, 569 n.18 (2003) ("In connection with this war, it appears that Iraqi prisoners will be treated as prisoners of war unless the U.S. government deems them unlawful combatants, in which case the government may send them to Guantanamo Bay or other holding facilities.").

106. See *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004), *rev'd*, 415 F.3d 38 (D.C. Cir. 2005).

107. GC III, *supra* note 9, 6 U.S.T. at 3322-24, 75 U.N.T.S. at 142.

108. Ruth Wedgwood, *Judicial Overreach*, WALL ST. J., Nov 16, 2004, at A24, available at 2004 WL-WSJ 98741622 ("In this case, the district judge's ruling is either wordplay, or a misunderstanding of the role of status review panels under the Third Geneva Convention.").

109. GC III, *supra* note 9, art. 5, 6 U.S.T. at 3324, 75 U.N.T.S. at 142.

113. The decision in *Hamdan v. Rumsfeld*,¹¹⁰ which held that the decision to detain based on a CSRT was unlawful because of a lack of an Article V determination, has been widely criticized:

Adam Roberts, professor of international relations at Oxford, makes a suggestion that a district judge might note. "In a struggle involving an organisation that plainly does not meet the criteria" of lawful combatants, he wrote in 2002, "and especially where, as with Al Qaeda, it is not in any sense a State, it may be reasonable to proclaim that captured members are presumed not to have PoW status." The judge may equally wish to take account of the advice of British law-of-war authority Col. GIAD Draper, who wrote in 1970 that "the Detaining Power seems to be the sole arbiter, in good faith, of whether a doubt occurs as to the status of the individual concerned." Francophone scholar Ameer

Article V tribunals make factual determinations while the detaining power, in this case the United States, makes the legal decisions. The Administration ruled as a matter of law that none of the groups the United States encountered, outside of Iraq, merit POW status. Additionally, the relief sought by many detainees bringing suit—an AR 190 hearing—seems inappropriate. It is unwise to have numerous panels of three commissioned officers, possibly nonlawyers, determining that certain groups should be protected under the Geneva Conventions, when the Administration, with its superior resources and legal staffing, has already made the determination that the Conventions do not apply. These three officers should not be given the unilateral authority to make (potentially inconsistent)¹¹¹ policy decisions with global ramifications. This is not the purpose for which the AR 190 was designed; the AR 190 should examine the particular facts and circumstances of a captured individual and determine to which group he belongs. This seems to be a disagreement with the Bush Administration's policy, albeit a very understandable one, masquerading as a legal argument.

In sum, despite the fact that the disagreements with the Administration's decision that none of the Taliban qualified for POW status or an Article V tribunal are thoughtful, well-articulated, and founded on moral grounds, these disagreements are fundamentally unsound. Even assuming that the Administration's actions do violate international law, the proper forum in which to correct these violations does not seem to be domestic courts. The Geneva Convention is not a "self-executing" document:¹¹²

"Courts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide a private right of action." *Goldstar (Panama) v. United States*, 967 F.2d 965, 968 (4th Cir.1992). The Geneva Convention evinces no such intent. Certainly there is no explicit provision for enforcement by any form of private petition. And what discussion there is of enforcement focuses entirely on the vindication by diplomatic means of treaty rights inhering in sovereign nations . . . We therefore agree with other

Zemmali, now with the Red Cross, takes the same view in his scholarly work. Wedgewood, *supra* note 111.

111. Secretary of the Navy Gordon England discussed possible inconsistencies in the structurally similar CSRTs. See Gordon England, Special Defense Department Briefing on Statute of Military Tribunals [hereinafter Secretary England Briefing], available at <http://www.dod.gov/transcripts/2004/tr20041220-1841.html> ("Now we've set a pretty high standard, and we have an independent board. So we have a board with—we've given broad instructions in terms of what to consider. And I will tell you these are judgmental calls. I mean, a different board could come out with a different answer, just like a jury or a judge can come—different judges or different juries can come out with different answers.").

112. *Hamdi v. Rumsfeld*, 316 F.3d 450, 468 (4th Cir. 2003), *rev'd on other grounds*, 124 S. Ct. 2633 (2004) ("This argument [that Article 5 of the Geneva Convention 'requires an initial formal determination of his status'] falters also because the Geneva Convention is not self-executing.").

courts of appeals that the language in the Geneva Convention is not “self-executing” and does not “create private rights of action in the domestic courts of the signatory countries.”¹¹³

Therefore, if there has been a violation of international law, the high-contracting parties must settle the issue by resorting to diplomacy. Not only is this result proper under the law of war, it is sound for pragmatic reasons as well. For example, imagine an unwilling guest of the “Hanoi Hilton” attempting to challenge the treatment he was then receiving at the hand of his captors while a POW by bringing suit in a Vietnamese court.¹¹⁴

2. Defenses of Bush’s Policy

The fact that some detainees receive only a hearing to ensure they are not innocent civilians is sufficient. For the most part, either the theater they were captured in did not rise to the level of armed conflict described in GC III or the current adversaries did not qualify for a hearing under Article IV. Even if detainees did receive an AR 190 hearing, and even if the hearing ruled that they were POWs, little would change in terms of their treatment. Again, the detainees would still be held until the end of hostilities, tried in front of the established military commissions, and questioned. Therefore, policy justifies the Administration’s decision as well.

Continued questioning of detainees and POWs is permissible as long as Common Article III is not violated. Article III requires that questioning cannot rise to the level of “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture,” nor can it encompass “outrages upon personal dignity, in particular, humiliating and degrading treatment.”¹¹⁵ The Abu Ghraib prison abuses violated this standard. Abu Ghraib, hopefully, was an

113. *Id.* at 468-69.

114. The “Hanoi Hilton” was an infamous POW facility located in North Vietnam, noted for its mistreatment of American servicemen. For example, Senator John McCain spent over five years as a POW in North Vietnam after the A-4 Skyhawk he flew was shot down by a surface-to-air missile. He, like other American POWs in the “Hanoi Hilton,” was tortured nearly every day. See John McCain, *How the POWs Fought Back*, U.S. NEWS & WORLD REP., May 14, 1973, available at <http://www.freerepublic.com/focus/f-news/1084711/posts> (“They bounced me from pillar to post, kicking and laughing and scratching. After a few hours of that, ropes were put on me and I sat that night bound with ropes. Then I was taken to a small room. For punishment they would almost always take you to another room where you didn’t have a mosquito net or a bed or any clothes. For the next four days, I was beaten every two to three hours by different guards. My left arm was broken again and my ribs were cracked.”).

115. GC III, *supra* note 9, art. 3(1)(a), (c), 6 U.S.T. at 3320, 75 U.N.T.S. at 138.

aberration caused more by a breakdown in military leadership and a chaotic environment than any policy of torture.¹¹⁶

As far as trial by military commission is concerned, although many argue that anything other than a court martial would violate the Geneva Conventions, “[t]he important point is that the *procedures* utilized in criminal proceedings must comport with the increasingly robust, increasingly precise body of international standards—irrespective of whether the tribunal is a ‘military court martial,’ ‘military commission,’ ‘national security court,’ or ‘federal district court.’”¹¹⁷ The procedures established by the military commissions¹¹⁸ almost certainly meet the requirements enumerated in common Article III, which requires “a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”¹¹⁹ As Professor Derek Jinks explains, “[t]he conferral of POW status [to Guantanamo detainees] would not alter significantly the international legal duties owed the war detainees . . . [and] no pressing policy matters turn on the choice between the potentially applicable protective schemes.”¹²⁰

The only advantage of POW status is that it would grant the detainees combat immunity. This would be of little help, however, because combat immunity does not protect terrorist acts, and, furthermore, it does not appear that any of the detainees will be tried for actions they took in regular combat.¹²¹ It is extremely unlikely that combatants taken on the battlefield will be denied combat immunity (for example, a Taliban soldier would not be tried as a murderer for shooting an adversarial U.S. soldier on the battlefield), because “sound policy rationales [exist] for prosecuting only those captured combatants who have committed acts that violate the laws of war.”¹²² Again, killing the enemy is not an automatic violation of the law of war. Denying unlawful combatants combat immunity for true combat actions would weaken Bush’s position. Regardless, only a very small percentage of detainees will ever see a trial. Whether they are

116. See Heather MacDonald, *How to Interrogate Terrorists*, CITY JOURNAL, Winter 2005, at 24, available at http://www.city-journal.org/html/15_1_terrorists.html (describing the techniques used in investigating Afghani detainees and asserting that the abuses at Abu Ghraib had nothing to do with interrogation techniques at Guantanamo).

117. Jinks, *Declining Significance*, *supra* note 10, at 435 (emphasis added).

118. See Department of Defense, Military Commission Order No. 1: Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism [hereinafter “MCO 1”], available at <http://www.dtic.mil/whs/directives/corres/mco/mco1.pdf>.

119. GC III, *supra* note 9, art. 3(1)(d), 6 U.S.T. at 3320, 75 U.N.T.S. at 138.

120. Jinks, *Declining Significance*, *supra* note 10, at 439.

121. See *id.* at 440.

122. *Id.*

POWs, enemy combatants, or civilians, the detainees are being held because, in the view of the executive, they are a threat to national security.

3. Aftermath of the Bush Decision

Following the Bush Administration's policy decisions not to apply traditional law of war norms, the Department of Defense quickly established military commissions at Camp X-ray, located within Naval Station Guantanamo Bay, Cuba. Individuals subject to military tribunals were transferred to Camp X-ray, both from the battlefield and from within the United States.¹²³ Initially, the orders establishing the tribunals dealt primarily with the mechanics of trying enemy combatants for crimes.¹²⁴ The orders were notably silent on how to decide whether, in fact, the detainee was subject to the tribunal at all.¹²⁵ The Supreme Court decision in *Hamdi v. Rumsfeld* changed that, however, forcing the government to conduct fact-intensive inquiries to determine if a citizen-detainee was justly held.¹²⁶

The current procedures establish three separate tribunals: (1) the CSRT¹²⁷; (2) ARB¹²⁸; and (3) the Military Commissions.¹²⁹ The CSRTs employ the most debated procedures. As discussed above, the law of armed conflict arguably allows indefinite detention to protect U.S. forces by preventing enemies from returning to the fight¹³⁰ before

123. See, e.g., *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2715-16 (2004) (detainee suspected of terrorism seized when he disembarked plane in Chicago and was transferred from federal to military custody); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2635-36 (2004) (detaining citizen allegedly found engaged in active combat against U.S. forces).

124. See, e.g., MCO 1, *supra* note 118.

125. See Secretary England Briefing, *supra* note 111 ("As you will recall, CSRTs were largely put together in direct response to the Supreme Court ruling . . .").

126. See *Hamdi*, 124 S. Ct. at 2648-52.

127. See Deputy Secretary of Defense, Order Establishing Combatant Status Review Tribunals [hereinafter "CSRT Order"], available at <http://www.dod.gov/news/Jul2004/d20040707review.pdf> (establishing tribunals and applicable procedures).

128. See Dep't of Defense Memorandum, Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay [hereinafter ARB Implementation Memo], available at <http://www.dod.gov/news/Sep2004/d20040914adminreview.pdf> (establishing an annual review of detainees designated enemy combatants to determine whether detention is still authorized).

129. See MCO 1, *supra* note 118, at 2 (establishing commissions that "shall have jurisdiction over violations of the laws of war and all other offenses triable by military commission").

130. Dep't of Defense, Guantanamo Detainees, <http://www.dod.gov/news/Apr2004/d20040406gua.pdf> (last visited Oct. 31, 2005) [hereinafter Guantanamo Detainees] ("Detention of enemy combatants in wartime is not an act of punishment. *It is a matter of security and military necessity.* It prevents enemy combatants from continuing to fight against the U.S. and its partners in the war on terror. Releasing enemy combatants before the end of the hostilities

the cessation of hostilities, or, alternatively, by detaining civilians if releasing them would “be prejudicial to the security of such State.”¹³¹ The ARB serves to mitigate the severity of this process by annually determining whether detention is still justified, even if hostilities have not ceased.¹³²

Although much discussion has focused on the legality of trying detainees by the Military Commissions instead of granting them a normal criminal trial,¹³³ the reality is that many of the detainees deemed to be enemy combatants will never see trial.¹³⁴ They are not being detained because they have committed any specific crimes. Instead, they are being detained because the Administration believes that if they were freed, they would attack the United States. Due to the indefinite nature of such detention, however, the government must conduct a painstaking balancing act, weighing security concerns against individual rights.

B. CSRT Procedures

The CSRT is nearly identical in appearance and function to the AR 190 tribunals used by the U.S. military to make the so-called “Article V determination” regarding the Geneva Convention class to which a detainee belongs.¹³⁵

Prior to any CSRT hearing or detention in Guantanamo, however, a detainee must go through a six-stage vetting process.¹³⁶ First, “[a]t the time of capture and based on available information,

and allowing them to rejoin the fight would only prolong the conflict and endanger coalition forces and innocent civilians.”)

131. See GC IV, *supra* note 9, art. V, 6 U.S.T. at 3522, 75 U.N.T.S. at 292.

132. See Lietzau, *supra* note 7, at 183-191 (discussing the inherent difficulty in determining the end of this war against religious zealotry and ideology).

133. There have been literally hundreds of articles written about this. See, e.g., Michal R. Belknap, Essay, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 CAL. W. L. REV. 433, 447-80 (2002) (discussing past uses of military tribunals); Amanda Schaffer, Comment, *Life, Liberty, and the Pursuit of Terrorists: An In-Depth Analysis of the Government's Right to Classify United States Citizens suspected of Terrorism as Enemy Combatants and Try Those Enemy Combatants by Military Commission*, 30 FORDHAM URB. L.J. 1465, 1467 (2003) (discussing distinctions in military proceedings and criminal trials); David Stoelting, *Military Commissions and Terrorism*, 31 DENV. J. INT'L L. & POLY 427, 428 (2003) (stating that “permitting military commissions to try terrorists is a radically different approach”).

134. Of the 550 detainees currently in Guantanamo, only 15 had been slated to go before the Military Commission for trial as of July 7, 2004. Secretary England Briefing, *supra* note 111; Dep't of Defense, Guantanamo Detainee Processes, <http://www.dod.gov/news/Dec2004/d20041217detpro.pdf> (last visited Oct. 31, 2005).

135. See *infra* Part II.E. (discussing the AR 190 tribunal).

136. Guantanamo Detainees, *supra* note 130, at 5.

combatant and field commanders determine whether a captured individual was part of or supporting forces hostile to the United States or coalition partners, and engaged in an armed conflict against the United States.”¹³⁷ Second, the immediate commander, after “a period of initial detention,” must decide whether to send the detainee to a centralized holding area.¹³⁸ Third, “[a] military screening team at the central holding area reviews all available information . . . [w]ith assistance from other U.S. government officials on the ground . . . and considering all relevant information . . . the military screening team assesses whether the detainee should continue to be detained and whether transfer to Guantanamo is warranted.”¹³⁹ Fourth, a general officer appointed by the combatant commander reviews the screening team’s assessment.¹⁴⁰ Fifth, an internal Department of Defense (“DOD”) team in Washington reviews the detention before transfer.¹⁴¹ Finally, immediately upon arrival at Guantanamo, further reviews of the detainee’s status are made prior to the CSRT hearing.¹⁴² According to the DOD, 10,000 individuals were screened and released prior to their arrival in Guantanamo,¹⁴³ and over 200 were released from Guantanamo prior to their trial before the CSRT or ARB.¹⁴⁴

Once the detainees arrive in Guantanamo, they are required to appear before a CSRT.¹⁴⁵ The CSRT Order dictates the composition of the tribunal, and applies “only to foreign nationals held as enemy combatants in the control of the Department of Defense at the Guantanamo Bay Naval Base, Cuba.”¹⁴⁶ The CSRT consists of “three neutral commissioned officers of the U.S. Armed Forces, each of whom possesses the appropriate security clearance and none of whom was involved in the apprehension, detention, interrogation, or previous determination of status of the detainee.”¹⁴⁷ Each detainee is appointed a “personal representative,” a military officer with the appropriate security clearance, to assist him through the review

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 6.

143. *Id.*

144. Secretary England Briefing, *supra* note 111, at 3.

145. See CSRT Order, *supra* note 127, at 1 (“Within 30 days after the detainee’s personal representative has been afforded the opportunity to review . . . a Tribunal shall be convened to review the detainee’s status as an enemy combatant.”).

146. CSRT Order, *supra* note 127, at 1.

147. *Id.* at 1-2.

process.¹⁴⁸ This officer is typically not a lawyer. The officer is allowed to view all evidence entered against the detainee, and is permitted to share the unclassified portions of the evidence with the detainee.¹⁴⁹ The detainee then has advance notice of the unclassified factual basis for his designation as an enemy combatant, is allowed to attend the proceedings,¹⁵⁰ and is provided with an interpreter if necessary.¹⁵¹

The CSRT Order lays out the specific procedure to be followed by the CSRT as well. Members of the Tribunal, including the Recorder, shall be placed under oath.¹⁵² The Record will include "all the documentary evidence presented to the Tribunal," a summary of witness testimony, "a written report of the Tribunal's decision, and a recording of the proceeding"; it will exclude, however, all record of the deliberations and the votes of the members.¹⁵³ The detainee will be allowed to call witnesses if "reasonably available,"¹⁵⁴ and to question any witnesses presented against him.¹⁵⁵ If witnesses are not reasonably available, "written statements, preferably sworn, may be submitted and considered as evidence."¹⁵⁶ The detainee shall have the right to testify, but may not be compelled to do so, and he may introduce any relevant documentary evidence.¹⁵⁷

The Tribunal is not bound by ordinary rules of evidence.¹⁵⁸ The Tribunal "shall be free to consider any information it deems relevant and helpful . . . [F]or example, it may consider hearsay evidence, taking into account the reliability of such evidence in the circumstances."¹⁵⁹ Admissibility is based on how probative a particular piece of evidence is.¹⁶⁰ This policy recognizes the inherent differences between combat and law-enforcement operations.¹⁶¹

148. *Id.* at 1.

149. *Id.*

150. Except during deliberation and voting of the tribunal or where his presence would "compromise national security." *Id.* at 2. His presence is not mandatory. *See id.*

151. *Id.*; *see also* Jess Bravin, *War-Crimes Defense Lawyers Say They Lack Resources*, WALL ST. J., Aug. 9, 2004, at B1 (listing various problems encountered at Guantanamo, including a scarcity of qualified interpreters).

152. CSRT Order, *supra* note 127, at 2.

153. *Id.*

154. Members of the U.S. Armed Forces are not considered reasonably available if their commanders determine their presence at the hearing would affect combat or support operations. *Id.* at 2-3.

155. *Id.* at 2.

156. *Id.* at 3.

157. *Id.*

158. *Id.*

159. *Id.*

160. CSRT Order, *supra* note 127, at 3.

161. *See* Lietzau, *supra* note 7, at 215-17.

Furthermore, a plurality of the Supreme Court has implicitly approved the relaxed rules of evidence used by the CSRT in *Hamdi*, allowing tailored proceedings.¹⁶²

The CSRT must use the preponderance of the evidence standard of proof,¹⁶³ which is the “traditional legal standard for status determinations.”¹⁶⁴ Additionally, the government enjoys a rebuttable presumption of evidence in its favor.¹⁶⁵ Again, the Court discussed the relaxation of this standard in *Hamdi*.¹⁶⁶ These procedures appear to have worked to some extent, as evidenced by the release of a handful of detainees.¹⁶⁷

The facial similarity between the CSRT and the AR 190 has created considerable confusion. The AR 190 tribunal and the CSRT both employ the following procedures in an identical manner: the oath,¹⁶⁸ the record,¹⁶⁹ open proceedings,¹⁷⁰ the right to an interpreter,¹⁷¹ the presence of the detainee,¹⁷² the rules regarding witnesses,¹⁷³ the right to testify,¹⁷⁴ the prohibition on compulsion to testify,¹⁷⁵ and the burden of a preponderance of the evidence.¹⁷⁶ In fact, much of the language in the CSRT Order and the AR is virtually identical.¹⁷⁷ Furthermore, the AR 190 uses the same probative versus reliability standard of evidentiary admissibility.¹⁷⁸

162. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2649 (2004) (“[E]nemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding.”).

163. CSRT Order, *supra* note 127, at 3.

164. Wedgewood, *supra* note 108.

165. CSRT Order, *supra* note 127, at 3.

166. *Hamdi*, 124 S. Ct. at 2649 (“[T]he Constitution would not be offended by a presumption in favor of the Government’s evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided.”).

167. As of December 20, 2004, 230 CSRTs have released their determinations: 228 detainees were determined to be enemy combatants and 2 were determined not to be enemy combatants and subsequently released. Secretary England Briefing, *supra* note 111.

168. AR 190, *supra* note 60, ¶ 1-6e(1) (“Members of the Tribunal and the Recorder shall be sworn . . .”).

169. *Id.* ¶ 1-6e(2) (“A written record shall be made of the proceedings.”).

170. *Id.* ¶ 1-6e(3) (“Proceedings shall be open except for . . .”).

171. *Id.* ¶ 1-6e(5) (“[W]ill be provided an interpreter if necessary . . .”).

172. *Id.* ¶ 1-6e(5) (“Persons whose status is to be determined shall be allowed to attend . . .”).

173. *Id.* ¶ 1-6e(6) (“[S]hall be allowed to call witnesses if reasonably available . . .”).

174. *Id.* ¶ 1-6e(7) (“[H]ave a right to testify . . .”).

175. *Id.* ¶ 1-6e(8) (“[M]ay not be compelled to testify . . .”).

176. *Id.* ¶ 1-6e(9) (“Preponderance of the evidence shall be the standard . . .”).

177. *Compare id.* ¶ 1-6e(6) (“Persons whose status is to be determined shall be allowed to call witnesses if reasonably available, and to question those witnesses called by the Tribunal. Witnesses shall not be considered reasonably available if, as determined by their commanders,

There are, however, two significant differences between the CSRT and the AR 190. First, unlike the CSRT, the AR 190 does not expressly mandate a rebuttable presumption against the detainee. Second, the only issue determined by the CSRT is enemy combatant status, resulting in detention or release; the AR 190, however, allows for classification in other categories.¹⁷⁹ Regardless of these differences, the two tribunals are remarkably similar.

One can only speculate as to why the government chose to write the statutes in such similar language. One obvious possibility is that the Supreme Court plurality encouraged doing so in *Hamdi*, expressly mentioning that the AR 190 may sufficiently balance the interests of the United States and the detainee.¹⁸⁰ Another reason is the ease of administration. The government may have been caught off-guard by the decision in *Hamdi* and decided to minimize delay by modeling the CSRT after the Commissions and the ARB, which were proven forums by this point.

C. *The ARB*

The United States uses the ARB to “determine annually if enemy combatants detained by the Department of Defense at . . . Guantanamo . . . should be released, transferred, or continue to be detained.”¹⁸¹ The procedures used by the ARB are fairly straightforward. First, the detainee is notified of his upcoming ARB review via a boiler-plate notification form.¹⁸² The notification form tells

their presence at the hearing would affect combat or support operations. In these cases, written statements, preferably sworn, may be submitted and considered as evidence.”), *with* CSRT Order, *supra* note 127, at 2-3 (“The detainee shall be allowed to call witnesses if reasonably available, and to question those witnesses called by the Tribunal. . . . If such witnesses are from within the U.S. Armed Forces, they shall not be considered reasonably available if, as determined by their commanders, their presence at a hearing would affect combat or support operations. In [these cases], written statements, preferably sworn, may be submitted and considered as evidence.”).

178. *See supra* Part II.C.

179. *Id.*

180. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2651 (2004) (“There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal. Indeed, it 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.”).

181. ARB Implementation Memo, *supra* note 128, at 1. The order defines enemy combatants as “an individual who was part of or supporting Taliban or al Qaida 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.” *Id.* at n.1.

182. For example, “A Combatant Status Review Tribunal (CSRT) has determined that you are an enemy combatant. Because you are an enemy combatant, the United States may continue

detainees, “[i]f you believe you do not pose a threat to the United States or its allies, we recommend you immediately gather any information that you believe will prove that you are no longer a threat and why you should be released from detention.”¹⁸³ An “American officer (called an Assisting Military Officer)” is appointed to help detainees prepare their case, if they so desire.¹⁸⁴ The ARB will not hear any witness testimony, but will review the CSRT record, the detainee’s testimony if he chooses, and any “written statements from family members or other persons who can explain why [the detainee] [is] no longer a threat.”¹⁸⁵ The detainee’s presence is at his option; if he chooses not to attend, the ARB review will be held in his absence.¹⁸⁶ Notably, the notification form also informs detainees of the procedures they must follow to file for a writ of habeas corpus,¹⁸⁷ a right recently extended to Guantanamo detainees by the Supreme Court.¹⁸⁸

The ARB is *sui generis* and not required by any body of law.¹⁸⁹ Still, the existence of the ARB mitigates the harshness of indefinite detention—that is, detention until the cessation of hostilities—which is allowed under the CSRT. However, whether the ARB will have any impact on detainees will take time to determine. The first ARB was held on December 14, 2004; four have been held at the time of this writing, and none of the results have yet been released.¹⁹⁰ Lengthy incarceration would seemingly minimize an individual’s opportunity to rejoin an elusive terrorist network, thereby increasing his chances for

to detain you.” Department of Defense, Notifications, <http://www.dod.mil/news/Dec2004/d20041209ARB.pdf> (last visited Oct. 31, 2005).

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* (“You may ask a civilian judge to look at the lawfulness of your detention through a process called a *petition for a writ of habeas corpus*. You may ask a friend or family member or a lawyer to file such a petition with the court. If you do not have a lawyer or a family member or friend who could file this petition for you, you may file your own petition. According to prior court rulings, petitions may be sent to [the District Court]. If you do not wish to file a petition, you do not have to do so. However, a court will only consider your case if you file a petition.”).

188. See *Rasul v. Bush*, 124 S. Ct. 2686, 2691-92 (2004) (reversing the Court of Appeals’ determination that the litigation privilege does not reach aliens in military custody). Shafiq Rasul was a British citizen captured in Afghanistan who actually was repatriated and subsequently released before the Supreme Court heard his case. *Id.* at 2690 n.1.

189. Secretary England Briefing, *supra* note 111 (“Recognize and remember, the Administrative Review Board’s purely voluntary. That is, there’s no Geneva requirement, there’s no precedent for this type of process. This is a process we instituted to assess whether an enemy combatant continues to pose a threat to our country or to our allies or whether there’s other factors that might be reasons for continued detention.”).

190. News Release, U.S. Department of Defense, Defense Department Conducts First Administrative Review Board (Dec. 14, 2004), available at <http://www.defenselink.mil/releases/2004/nr20041214-1830.html>; Secretary England Briefing, *supra* note 111.

release. A detainee's opportunity to regain contact with his cell lessens in time, due to the secretive nature of terrorist organizations. However, the possibility of released detainees rejoining the fight is not imaginary: of the 200 detainees released from Guantanamo, 12 "have indeed returned to terrorism."¹⁹¹

IV. PROBLEMS WITH THE CURRENT PROCEDURES

A. *Soft Power and Negative World Opinion*

The current procedures, even if well-thought out and thoroughly litigated, exhibit serious defects. The most pressing issue is public opinion around the world, particularly in Muslim countries, the so-called "breeding grounds"¹⁹² of terrorists. The United States should address the negative public opinion in these countries if for no other reason than to promote its own self-interest. Joseph Nye, Dean of Harvard's Kennedy School of Government argues that we cannot "win the war on terror without attracting moderates and thereby denying the extremists new recruits."¹⁹³

Arguably, while United States' hard power is at an all-time high, its soft power is reaching an historic low.¹⁹⁴ Soft power is defined as the ability of a country to achieve its goals by attracting and persuading others to adopt the same goals.¹⁹⁵ It differs from hard power—the ability to use the "carrots and sticks" of economic and military might to make others follow.¹⁹⁶ Both hard and soft power are important in the war on terrorism. However, soft power is much less expensive than coercion, and is therefore an asset that must be nourished.¹⁹⁷

The military should have a "greater sensitivity to the opinions of others" when forming policies in this new war on terrorism.¹⁹⁸ No

191. *Id.*

192. A tired expression that seems to appear in the newspapers daily. *See, e.g.*, Opinion, *Priorities for a New President*, THE KITCHENER-WATERLOO RECORD, Nov. 3, 2004, at A12 ("[V]icious and seemingly endless conflict . . . continues to make the Middle East an area of instability and a breeding ground for terrorists.").

193. Lietzau, *supra* note 7, at 14.

194. *Id.*

195. Joseph S. Nye, Jr., Opinion, *Propaganda Isn't the Way: Soft Power*, Int'l Herald Trib., Jan. 10, 2003, at 6 [hereinafter Nye, *Propaganda*].

196. *Id.*

197. *Id.*

198. *Id.*; *see also* Joseph S. Nye, Jr., Editorial, *A Dollop of Deeper American Values; Why "Soft Power" Matters in Fighting Terrorism*, WASH. POST, Mar. 30, 2004, at A19 [hereinafter Nye,

matter how appropriate the CSRT procedures may be under various legal regimes, if public opinion views the practice in a negative light, the United States will lose its ability to influence people in other countries. Additionally, the United States has often prided itself on adopting the moral high ground. Even if the CSRT procedures are justifiable under the law, few could argue that they comply with commonly accepted notions of morality. The United States, in order to increase its soft power, should use methods more easily justified by morality. It is clear that the United States' treatment of detainees in Guantanamo is unpopular, particularly in the Muslim world.¹⁹⁹ Regardless of how many hearings the Secretary of the Navy holds, foreign citizens, particularly Muslims,²⁰⁰ will protest the very existence of the Guantanamo detention center.²⁰¹ Though public opinion should not be the Administration's top concern, the United States must account for the erosion of its soft power if it truly wants to prevail in the long-term. Furthermore, by not taking the moral high ground in regards to the treatment of its captives, the Administration may inadvertently be on the path to condoning the unfettered abuse of any individual it feels threatens the security of the country.

B. Informational Security Concerns

The required secrecy of the CSRTs creates a dilemma for the United States. The CSRT requires that all information be handled in

Soft Power] ("When someone in the audience asked Rumsfeld for his opinion on soft power, he replied, 'I don't know what it means.'").

199. See Nye, *Soft Power*, *supra* note 198 ("Long before the recent bombings in Madrid, polls showed a dramatic decline in the popularity of the United States, even in countries such as Britain, Italy and Spain, whose governments had supported us. And America's standing plummeted in Islamic countries from Morocco to Southeast Asia. In Indonesia, the world's largest Islamic nation, three-quarters of the public said they had a favorable opinion of the United States in 2000, but within three years that had shrunk to 15 percent.").

200. Olivia Ward, *Religious Extremism is Back; Moral Ground is Shifting at Record Speed; Followers are Motivated by Fear, Expert Says*, TORONTO STAR, Jan. 2, 2005, at A13 ("The Sept. 11 attacks on the United States have fuelled apocalyptic visions even among mainstream believers. The phrase 'clash of civilizations,' created by Harvard professor Samuel Huntington, has become a real fear throughout the world. Huntington's theory, that the next great battle would not be ideological but cultural - a sweeping term that includes religion and philosophy - haunts those who see polarization of the West and Islam as inevitable.").

201. See, e.g., Elaine Cassel, *They Say They Can Lock You Up for Life Without a Trial*, <http://www.cageprisoners.com/articles.php?id=4526> (last visited Oct. 31, 2005) ("Military officials, supported by legions of lawyers at the Department of 'Justice,' are thwarting at every opportunity efforts of lawyers to represent prisoners at Guantanamo Bay, Cuba, prisoners the Court said are entitled to legal representation and judicial review of their detentions. Is the Supreme Court going to force the Pentagon's hand and find Rumsfeld in contempt? I don't think so!").

accordance with Executive Order 12958.²⁰² This order details how sensitive information is handled by the government.²⁰³ CSRT procedures currently require members of the tribunal to possess TOP SECRET clearance or higher.²⁰⁴ However, it is expensive for the government to investigate individuals for security clearance. TOP SECRET clearance requires, at a minimum, a background investigation (BI);²⁰⁵ more likely, however, due to the sensitivity of the information heard at the CSRTs, a participant would need to obtain a TOP SECRET/SCI²⁰⁶, requiring a more intensive “special” background investigation (SBI).²⁰⁷ DOD expressly limits the number of positions, or “billets,” that have TOP SECRET access.²⁰⁸ Generally, an average military lawyer (Judge Advocate General or JAG) is not in a sensitive billet requiring TOP SECRET clearance. While more billets can always be created, the process takes time. Although some JAGs could be given interim clearance, a lack of cleared military lawyers may encourage the military to use officers in the CSRT tribunals who, due to the nature of their military occupational specialty, already have clearance. The “assisting officers” provided to detainees and 2 of the 3 panel members at ARBs and CSRTs, as they are not required to be

202. CSRT Order, *supra* note 127. Executive Order 12958 was amended on March 25, 2003, and gives general procedures for the handling of classified information. See Exec. Order No. 12958, Classified National Security Information (Mar. 25, 2003), available at <http://www.whitehouse.gov/news/releases/2003/03/20030325-11.html>.

203. CSRT Order, *supra* note 127.

204. *Id.* TOP SECRET information is “information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security that the original classification authority is able to identify or describe.” Exec. Order No. 12958, *supra* note 202, § 1.2(1).

205. Dep’t of Defense, Personnel Security Program § C2.3.5, http://www.dtic.mil/whs/directives/corres/pdf/52002r_0187/p52002r.pdf (last visited Oct. 31, 2005) [hereinafter Personal Security Program] (“The BI is the principal type of investigation conducted when an individual requires TOP SECRET clearance or is to be assigned to a critical sensitive position. The BI normally covers a 5-year period and consists of a subject interview, NAC, LACs, credit checks, developed character references (3), employment records checks, employment references (3), and select scoping as required to resolve unfavorable or questionable information.”).

206. “SCI” stands for “Special Compartmented Intelligence.” See Marine Corps Law Enforcement Manual, MCO P5580.2, at I-14(Oct. 23, 1998) available at [http://www.usmc.mil/directiv.nsf/6c683984fd1e09cc85256c75006e6395/59fe216b966f89a6852568500064342d/\\$FILE/MCO%20P5580.2A.pdf](http://www.usmc.mil/directiv.nsf/6c683984fd1e09cc85256c75006e6395/59fe216b966f89a6852568500064342d/$FILE/MCO%20P5580.2A.pdf).

207. *Id.* § DL1.1.26 (An SBI is “[a] personnel security investigation consisting of all of the components of a BI plus certain additional investigative requirements The period of investigation for an SBI is the last 15 years or since the 18th birthday, whichever is shorter, provided that the last 2 full years are covered and that no investigation will be conducted prior to an individual’s 16th birthday.”).

208. *Id.* § C3.1.5.1. (“To standardize and control the issuance of Top Secret clearances within the Department of Defense, a specific designated billet must be established and maintained for all DoD military and civilian positions requiring access to Top Secret information. Only persons occupying these billet positions will be authorized a Top Secret clearance.”).

lawyers, probably are not lawyers.²⁰⁹ Arguably, having a nonlawyer represent the detainees increases the probability of an incorrect status determination.

C. *Lack of Arabic Interpreters*

Military lawyers in Guantanamo have publicly commented on the lack of trained Arabic interpreters available to them.²¹⁰ A scarcity of security-cleared military interpreters is a significant problem around the world.²¹¹ In fact, Arabic-speaking, natural-born U.S. citizens are relatively rare.²¹² Naturalized U.S. citizens, of course are used as interpreters, but they are a finite resource. Although the military often contracts with foreign nationals to provide services,²¹³ a non-citizen can never have interim access to TOP SECRET information.²¹⁴ There is a very real security threat from foreign-born translators in Guantanamo.²¹⁵ These interpreters would have to be

209. See CSRT Order, *supra* note 127.

210. See Bravin, *supra* note 151 (“[T]he lawyers [of one detainee], Army Maj. Mark Bridges and Navy Lt. Cmdr. Philip Sundel, say they lost their first Arabic interpreter months ago and haven’t received a replacement. ‘Without being able to communicate with our client, how can we possibly represent his issues?’ says Maj. Bridges.”).

211. See Gail Gibson & Scott Shane, *Contractors Act as Interrogators Control: The Pentagon’s Hiring of Civilians to Question Prisoners Raises Accountability Issues*, BALTIMORE SUN, May 4, 2004, at 1A (“At an October Senate hearing, a Pentagon official said that staffing shortages, particularly of Arabic linguists, had forced the Department of Defense to hire contractors not only as interpreters but for interrogation work as well. ‘We do use contractors as a means to hire linguists and interrogators,’ said Charles Abell, principal deputy undersecretary of defense for personnel and readiness.”).

212. See Edward M. Eveld, *Interest in Arabic Growing Among College Students: Reasons for Interest Upset Some Instructors*, ST. PAUL PIONEER PRESS, Nov. 3, 2004, at A28 (describing shortage of Arabic speakers in United States).

213. See ABC News, *Lack of Arabic Translators Hurting U.S.*, <http://www.campus-watch.org/article/id/882> (last visited Oct. 31, 2005) [hereinafter *Lack of Arabic Translators*] (“A recent Army report on intelligence-gathering in Iraq found the military relying on translators who had been ‘convenience store workers and cab drivers’ in the United States.”). The CIA is also reportedly actively recruiting Arab-Americans. *Id.*

214. “[C]ompelling reasons may exist to grant access to classified information to an immigrant alien or a foreign national. Such individuals may be granted a ‘Limited Access Authorization’ (LAA) in those rare circumstances where a non-U.S. citizen possesses a unique or unusual skill or expertise that is urgently needed in pursuit of a specific DoD requirement involving access to specified classified information for which a cleared or clearable U.S. citizen is not available.” Personnel Security Program, *supra* note 205, § C3.4.3.1. However, “LAAs may be granted only at the SECRET and CONFIDENTIAL level. LAAs for TOP SECRET are prohibited.” *Id.* § C3.4.3.3.1.

215. See *Lack of Arabic Translators*, *supra* note 213 (“At Guantanamo Bay, Cuba, where hundreds of suspected terrorists are held, the arrests of three translators on spying charges prompted the military to re-evaluate some interrogations. ‘If somebody from Syria comes in and says, ‘I want to join the FBI,’ you’ve got to think twice about that,’ said James Carafano, who studies defense issues at the Heritage Foundation, a conservative think tank.”).

thoroughly investigated which, again, is time-consuming and expensive. Training new interpreters to speak Arabic competently is even harder.²¹⁶

D. The Confusing Similarity Between CSRTs and AR 190s

As mentioned in Section III.B., the CSRT is facially similar to the AR 190, most likely because it was quick and easy to implement, and because of the Supreme Court's reference to the AR 190 in *Hamdi*.²¹⁷ The similarity between the two tribunals is problematic, however, because critics conflate the determinations of the two tribunals and then protest the Administration's departure from the historically employed procedures. The Administration has been slow to respond to these critics and should develop a coherent public relations response. Again, the law of armed conflict, developed only *after* world-changing wars, does not appear broad enough to encompass the current war on terror's blend of combat and law enforcement.

An additional problem caused by the similarities stems from the fact that in *Hamdi* the Court arguably only hinted that an AR 190-like tribunal would be appropriate for factual circumstances specific to Hamdi's case. In this case, plaintiff Hamdi was caught in a zone of active combat, the fields of Afghanistan, and allegedly fought actively against U.S. forces.²¹⁸ Ironically, no one likely would have protested had Mr. Hamdi been shot or bombed during active combat; yet his legal detention spurred emotional rhetoric and extensive debate. In any case, Hamdi was captured on the battlefield. The AR 190 was designed to be a battlefield tribunal, and, if needed, would have been employed relatively soon after Hamdi's capture.

The AR 190 regulation gives detailed instructions regarding how to deal with individuals captured during active combat. After the initial search and detention, the captured individual will be sent to the appropriate prison camp (or "internment facility" as per the AR

216. *Id.* ("Arabic and other languages of the Middle East are very different from English. It can take non-native speakers several years to learn and speak it comfortably. 'It's easier to train someone to fly an F-14 than it is to speak Arabic,' said Kevin Hendzel, a spokesman for the American Translators Association.")

217. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2651 (2004) ("There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal. Indeed, it 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.")

218. *See id.* at 2642 (discussing that Hamdi was captured in Afghanistan in combat, carrying a weapon against U.S. and allied forces).

190): civilians detained for security reasons will go to one place, and POWs to another. This procedure happens relatively quickly as sending the detainees to several centralized locations limits the manpower needed to guard them. The AR 190 procedure occurs after capture but before internment, assuming a doubt arises as to which camp the detainees should be sent.

The CSRT procedures, on the other hand, should be completely different. First, there is less urgency in Guantanamo. Further, the CSRT procedures must be broad enough to encompass individuals captured in places where a Geneva-recognized conflict does not exist, like the Horn of Africa. The CSRT should also look different, not only for public relations reasons, but because an erroneous CSRT determination would do more damage than a faulty AR 190 determination. In an AR 190, the detainee will likely be sent to one of many prison camps. An erroneous determination would simply mean someone is in the wrong camp. By contrast, the cost of error in a CSRT is potentially huge. If the situation requires it, as in Iraq for example, the Army could still establish AR 190 tribunals to make the POW determination. Going through both an AR 190 and the structurally similar CSRT is quite inefficient, but, unfortunately, that is what the current practice appears to require

V. ANALYSIS AND RECOMMENDATIONS

A. *Balancing Test*

In *Hamdi*, the Supreme Court struck a balance between the interest of the detainee and the interest of the United States by using the balancing test developed in *Mathews v. Eldridge*.²¹⁹ The Court explained, “*Mathews* dictates that the due process required 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.”²²⁰ Applied to the case at hand, the interest of the detainee is clear: it “is the most elemental of liberty interests—the interest in being free from physical detention by one’s own government.”²²¹ Although the language in

219. 424 U.S. 319 (1976).

220. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2646 (2004) (quoting *Mathews*, 424 U.S. at 335).

221. *Id.*

Hamdi, repeatedly refers to the rights of a U.S. citizen,²²² the personal liberty interest of a non-citizen detainee is identical. An additional factor that must be placed on the detainee's side of the scale is public opinion. Again, the United States should only consider public opinion to the extent that a positive shift in world opinion would help it obtain its objectives.²²³

The *Mathews* test also dictates that one must next consider the risk of an erroneous decision.²²⁴ In the case of trying a detainee, the chance of erroneous deprivation of freedom is relatively high. The detainee's considerable burden of proof and the relaxed admissibility standard could possibly allow an innocent prisoner to be indefinitely detained. Furthermore, prolonged detention of even a friendly individual probably guarantees lifelong animosity to the United States, especially if coercive interrogation techniques are employed.

Additionally, unconventional factors weighing on the defendant's side should be considered. The United States must anticipate how U.S. service members will be treated if they are captured incident to hostile action. It is important to keep in mind that, "Obedience to Geneva rules rests on another bedrock moral principle: reciprocity. Nations will treat an enemy's soldiers humanely because they want and expect their adversaries to do the same."²²⁵ While the United States is arguably doing its best to comply with international law in the war against terrorism, it is foreseeable that in the future a hostile country could use our enemy combatant procedures against U.S. soldiers who rigidly comply with the Geneva Convention and deserve the protection afforded by POW status.

On the other side of the *Mathews* equation, one must consider "the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States."²²⁶ Of the approximately 200 detainees released from Guantanamo, the United States has confirmed that at least twelve have returned to participate in actions hostile to the United States.²²⁷ The fact that al Qaeda used four to five man teams to hijack each airplane on September 11 demonstrates

222. See, e.g., *id.* at 2647 ("We reaffirm today the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law.")

223. See *supra* Part IV.A.

224. See *Mathews*, 424 U.S. at 343 ("An additional factor to be considered here is the fairness and reliability of the existing pretermination procedures, and the probable value, if any, of additional procedural safeguards.")

225. MacDonald, *supra* note 116.

226. *Hamdi*, 124 S. Ct. at 2647.

227. Secretary England Briefing, *supra* note 111, at 2.

that a single terrorist could theoretically play a key role in a devastating attack on the United States.²²⁸ If a released detainee later successfully attacked the United States, the American people would likely not agree that liberty interests of that detainee should have outweighed their interest in national security. For example, the FBI and CIA were harshly criticized for the way they handled the investigation of Zacarias Moussaoui.²²⁹ A detailed investigation into Moussaoui's activities might have uncovered the entire 9/11 plot.²³⁰

Similarly, detainees are important sources of information that could be used to prevent future attacks. If a detainee turns out to be a major source of intelligence, he may be entitled to less process. This is an easy economic calculus, albeit an unfeeling one. Regardless, the possibility of obtaining information from a detainee that would prevent a catastrophic attack *must* be taken into account in the balancing test, although potential life imprisonment cannot be justified exclusively by informational value.²³¹ At some point, however, especially in the complex and covert world of underground terrorism cells, the information that the detainee might be able to provide will become stale, and its weight in the balance will decrease.²³²

An additional factor to weigh when considering the due process rights of a detainee is the possibility that providing increased process will create an incentive to kill rather than capture the enemy. For example, if an innocent civilian is accidentally killed in the confusion of battle, a determination of his status is irrelevant as "what happens in the fog of battle comes to light on only rare occasions—few take interest in the rights of those who are already dead."²³³ A modern day

228. 9/11 COMMISSION REPORT, *supra* note 2, at 1-4.

229. Moussaoui, the so-called "Twentieth Hijacker," was in FBI custody before the September 11th attacks and, had he been questioned thoroughly, perhaps could have uncovered the whole plot. See Dan Eggen, "FBI Assailed for 9/11 'Failure,'" St. Paul Pioneer Press, June 10, 2005, at 1A.

230. See *id.* at 273-74 ("The agents in Minnesota were concerned that the U.S. Attorney's Office in Minneapolis would find insufficient probable cause of a crime to obtain a criminal warrant to search Moussaoui's laptop computer. Agents at FBI headquarters believed there was insufficient probable cause. Minneapolis therefore sought a special warrant under the Foreign Intelligence Surveillance Act to conduct the search To do so, however, the FBI needed to demonstrate probable cause that Moussaoui was an agent of a foreign power, a demonstration that was not required to obtain a criminal warrant but was a statutory requirement for a FISA warrant. The case agent did not have sufficient information to connect Moussaoui to a "foreign power," so he reached out for help, in the United States and overseas.").

231. See *Hamdi*, 124 S. Ct. at 2646-48 (weighing Hamdi's liberty interests against the Government's interests).

232. The ARB is an excellent mechanism to annually review the informational value of detainees. The ARB must therefore be retained and used in good faith.

233. Lietzau, *supra* note 7, at 128.

example of the preference for killing over capture exists in Colombia. For political reasons, the Uribe government treats captured insurgent Marxist guerillas as criminals rather than combatants, thereby mandating a requirement that captured “guerillas be taken to a prosecutor for presentation before a magistrate almost immediately subsequent to capture,” no matter how remote the fighting locale.²³⁴ “Consequently . . . , there are extremely few captures of [Marxist] combatants.”²³⁵ Similarly, the current debate in the war on terrorism does not address the killing of combatants in Afghanistan or Iraq, but rather the detention of individuals. Again, the default treatment of one’s enemy in combat is destruction.

Overly-restrictive procedures may also give the United States an incentive to allow allied countries with considerably less concern for individual rights to detain and interrogate suspected terrorists. International law disallows the transfer of suspects to countries if the transferring country has reason to believe the receiving country might use torture. The United States, however, uses the technique of “rendition,” returning a detainee to his native country.²³⁶ It is relatively easy for the United States to transfer the detainee either to his native government or the government which captured him (the newly-formed governments of Iraq or Afghanistan, for example). Unfortunately for the captive, these governments may be more tolerant of human exploitation.²³⁷ In fact, at the time of this writing, one detainee was currently suing in federal court to block his return to his native Egypt because he fears that he will be tortured upon return.²³⁸ If the CSRT procedures become too restrictive, it is easy to imagine a results-driven (if not Machiavellian) bureaucrat taking advantage of rendition.

B. The Need for International Discourse

The United States must begin an international public discourse about the need for change under international law. Historically, the law of war has only changed after world-changing conflict. Now is the time for the United States to take the lead and begin a discourse on new treaty negotiations to supplement the law of war. An objective

234. *Id.* at 128 n.301.

235. *Id.*

236. Neil A. Lewis, *Detainee Seeking to Bar His Transfer Back to Egypt*, N.Y. TIMES, Jan. 6, 2005, at A24.

237. See David Beatson, *Afghanistan: What Are We Fighting For?*, THE INDEPENDENT, Aug. 10, 2005, at 2005 WLNR 12486568 (detailing human rights abuses by state forces).

238. *Id.*

discussion involving Muslim nations could help repair the United States' tarnished image, thus increasing its reserve of soft power. Additionally, it is possible that other countries will actually participate in these discussions and help create a law of war that applies to the unique mix of law enforcement and combat that counter-terrorism entails. Michael Chertoff, former head of the Justice Department's Criminal Division, agrees, stating that it is time we take a more "systematic" and "universal" approach to the problem of enemy combatants.²³⁹

C. Congress Must Take Action

Congress must break its silence and begin deliberation on what procedures should be used to identify, detain, and interrogate enemy combatants. The U.S. Constitution provides, "Congress shall have Power . . . To define and punish . . . Offenses against the Law of Nations; [and] . . . To declare War . . . and *make Rules concerning Captures on Land . . .*"²⁴⁰ Despite this seemingly nonoptional constitutional mandate, Congress has remained silent on how to proceed with captured enemies. In fact, it has not fulfilled its constitutional duties in this respect since the 1940s. Congress "has displayed no stomach for grappling with constitutional questions that have no obviously popular answers."²⁴¹

Even Bush officials privately express their frustration with Congress's avoidance of the enemy combatant debate.²⁴² Of course, the Administration, probably purposefully, has never asked Congress to act. Regardless, in these "uncharted waters in [the] war against terror," Congress must have the fortitude to begin the legislative process about how we should identify and detain enemy combatants.²⁴³ An open, public legislative debate would legitimize the process, as well as allow for a suitable compromise which takes into account the aforementioned *Mathews* factors. Since much of the leeway given to the President by the Supreme Court relies upon the Authorization for the Use of Force, Congress clearly has the power to

239. See Susan Schmidt, *Bipartisan Debate on Patriot Act Is Urged: Legal Tools to Fight Terrorism at Issue*, WASH. POST, Nov 14, 2003, at A11.

240. U.S. CONST. art. I, § 8 (emphasis added).

241. Opinion, *Fill the Legal Void: Responses to Terrorism Raise Important Legal Questions, and it's Up to Congress to Determine How to Answer Them*, THE PLAIN DEALER, Jan. 11, 2005, at B8.

242. See Siobhan Gorman, *What's Next for Enemy Combatants?*, 36 NAT'L J. 2107, 2107 (2004) ("[S]ome members of Congress, as well as some former Bush administration officials, say that it's up to Congress . . .").

243. *Id.* (quoting former Assistant Attorney General Viet Dinh).

modify the terms of its delegation. Congressional silence in this case is forcing the judiciary into the dangerous and untenable position of having to decide “matters relating to exercise of war-making powers . . . the most fundamental of ‘political questions.’”²⁴⁴

D. CSRTs Should Not Resemble AR 190s

In order to avoid confusion, the CSRT procedures themselves should be changed so as to eliminate their quasi-AR 190 appearance. A change in appearance, even if arguably cosmetic, would stress the difference between the two courts to the international community. The tribunal should consist exclusively of legally-trained judges, either military or civilian. The forum should not resemble a criminal court or a court martial; it should be *sui generis*, much like the ARB, reflecting the unique nature of the war on terror. The government must acknowledge that, because of the potentially indefinite detention of the suspected terrorists, this tribunal should not be analogized to a magistrate’s probable cause hearing; nor, however, should it be analogized to a complete trial. As this tribunal will take place far from the battlefield and time is no longer of the essence, the tribunal’s work should not be analogized to an AR 190. The new tribunal must carefully mix law enforcement and law of war norms in both appearance and operation. One academic, Professor Harvey Rishikof, has tried to spark debate on the possibility of creating a Federal Terrorist Court, tailor-made to the unique problems of the war on terror.²⁴⁵ While his proposal has some shortcomings,²⁴⁶ it is a thoughtful contribution and an example of the beginnings of intelligent rather than emotional discourse.

E. Recommended Changes to Specific CSRT Procedures

While the overall structure of the CSRTs should remain, changes need to be made to some of the specific procedures. For

244. *El-Shifa Pharm. Indus. Co. v. United States*, 55 Fed. Cl. 751, 773 (2003) (dismissing a Sudanese pharmaceutical plant owner’s claim of a ‘taking’ by the United States for its 1998 cruise missile strikes). As of the final edit of this note, the Senate has begun hearings on detainee procedures including CSRTs. See *Military Justice and Detention Policy in the Global War on Terrorism: Hearing of the Personnel Subcomm. of the S. Armed Servs. Comm.*, 109th Cong. (2005).

245. Rishikof, *supra* note 1, at 29-38.

246. See Lietzau, *supra* note 7, at 210 (“One also could say that the Rishikof proposal leads us to the edge of a slippery slope in both bodies of law. On the civilian side, it permits a derogation of well-established due process standards based only on the nature of the offense. On the law of war side, it crosses a line that would make a return very difficult.”).

practical reasons, the probative standard of admissibility should be retained, including hearsay.²⁴⁷ Much of the information will be derived from human intelligence, or “HUMINT,”²⁴⁸ which, by definition, is often hearsay. Additionally, soldiers or government agents still actively involved in combat operations should not be expected to attend the CSRT in Cuba. Such a requirement would be unnecessarily expensive and would ultimately add little value. The probative admission standard, which weighs probative value and reliability of evidence—and which is approved by both the Supreme Court and, in other settings, the international community—must be retained.²⁴⁹

The burden of proof on the detainee in the CSRT, however, should be changed. In order to truly blend law of war and law enforcement norms, the burden, too, should be some combination of both. The “proof beyond a reasonable doubt” standard clearly does not meet the *Mathews* test, yet placing on the detainee the burden of proving the matter by the “preponderance of the evidence” does not seem appropriate either. I suggest only a modest change: retain the standard of the preponderance of the evidence, but shift the burden to the United States. The government should have to show concrete facts with specificity that the particular detainee before the CSRT deserves (possible) lifetime detention. The ARB must be retained, as the scales of the *Mathews* test often shift over time. The ARB will periodically review cases to prevent wrongful lifetime imprisonment.

Detainees should also be provided with a trained Judge Advocate General to represent them throughout the process. Furthermore, the tribunal should consist of three law-trained military judges, as opposed to the minimum of one currently prescribed. Although there may be a lack of cleared lawyers and interpreters, providing legally-trained personnel and a more deliberate process would help improve the global image of the United States, thus increasing its soft power.

The United States should also consider permitting limited appeals to a court with the required security clearance (perhaps the

247. See *supra* Part III.B.

248. “HUMINT is the intelligence derived from information collected from people and related documents, using passively and actively acquired human sources to gather information to answer intelligence requirements and to cross-cue other intelligence disciplines. HUMINT tasks include but are not limited to: Source operations using tactical and other developed sources; Liaison with host nation officials and allied counterparts; Debriefing of civilian populace; Interrogation of enemy prisoners of war and detainees; and Exploitation of adversary and open-source documents, media, and material.” GlobalSecurity.org, Military Intelligence: Always Out Front, <http://www.globalsecurity.org/military/agency/army/mi.htm> (last visited Oct. 31, 2005).

249. See *supra* Part III.B.

Foreign Intelligence Surveillance Act (“FISA”) Court),²⁵⁰ to allow for a limited review of the facts justifying detention. A special court with streamlined procedures could improve the legitimacy of the CSRT and provide a better appellate process than the habeus corpus procedure that is rife with forum-shopping problems.²⁵¹

The CSRTs should become open to the maximum extent allowed by security. While the substance of any given tribunal must remain secret for obvious reasons, better disclosure of the exact procedures should be provided. The current method of publishing orders on the web with no explanation is insufficient. The executive does not necessarily owe anyone an explanation for measures taken in wartime, but a more transparent process may improve public opinion.

The danger in changing the CSRT procedures is, of course, the possibility of public confusion as to which regime rules: the law of war or traditional criminal law enforcement. The correct answer, simultaneously, is both and neither. The procedures must be carefully designed to be something unique. Above all, the Administration must better articulate the reasons behind the current procedures if they remain unaltered, or explain any future changes in the procedures. While it may be difficult to clarify the procedures, the public perception of Guantanamo as a “legal black hole”²⁵² must be corrected. The Administration must explain, in laymen’s terms, that the war on terror is something new and different. This is not a “desperate times call for desperate measures” argument, but rather a statement that the current situation is not covered by international law. The world has changed since the Geneva Conventions conceived of the types of conflict it needed to cover, and traditional criminal law mechanisms are no longer sufficient to prosecute global terrorists. A reference to the recommendations of the 9/11 Commission concerning improved

250. See 50 U.S.C. § 1803(a) (2005) (“The Chief Justice of the United States shall publicly designate 11 district court judges from seven of the United States judicial circuits of whom no fewer than 3 shall reside within 20 miles of the District of Columbia who shall constitute a court which shall have jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States under the procedures set forth in this chapter.”).

251. See *Rasul v. Bush*, 124 S. Ct. 2686, 2711 (2004) (Scalia, J., dissenting) (“[U]nder today’s strange holding Guantanamo Bay detainees can petition in any of the 94 federal judicial districts. The fact that extraterritorially located detainees lack the district of detention that the statute requires has been converted from a factor that precludes their ability to bring a petition at all into a factor that frees them to petition wherever they wish—and, as a result, to forum shop. For this Court to create such a monstrous scheme in time of war, and in frustration of our military commanders’ reliance upon clearly stated prior law, is judicial adventurism of the worst sort. I dissent.”).

252. See, e.g., Nat Hentoff, Editorial, *Tribunals are Defying a U.S. Supreme Court Decision that These Prisoners Must Get Due Process – Basic Fairness*, CHICAGO SUN-TIMES, Dec 5, 2004, at 38 (quoting Jameel Jaffer, an ACLU attorney).

cooperation between the CIA and FBI seems particularly apt: military regimes and traditional law enforcement regimes must cooperate because the counter-terrorism effort requires forays into both fields.

The goal of the new CSRT procedures should be broad enough to encompass cases at both extremes of the spectrum between law enforcement and armed conflict: a *mujahidin*,²⁵³ actively engaged in combat against U.S. forces in foreign lands with AK-47 in hand, and a non-citizen "sleeper"²⁵⁴ who aided and abetted terrorism within the United States and was arrested by law enforcement personnel. Improved procedures and justifications could forge a Tribunal that was not only broad enough to cover both types of detainees, but specific enough to silence critics who erroneously rely on traditional law.

VI. CONCLUSION

In response to the attacks on September 11, the Bush Administration fundamentally changed its method of conducting counterterrorism. The war on terror is a new and unique embodiment of both law of war and law enforcement norms. While the Geneva Convention does apply to this armed conflict, it does not cover sufficiently the battle against non-nation groups like al Qaeda. Improving the CSRTs would be a workable compromise and would adequately balance the competing concerns of national security and the rights of detainees, especially considering the review provided by ARBs. Clearly, however, they should be improved.

253. "*Mujahidin*," Arabic for "holy warrior," was first introduced into the American parlance to describe Islamic Afghan guerrillas fighting against invading Soviet forces. Marine Corps Institute, *Afghanistan: An Introduction to the Country and People*, available at http://www.mci.usmc.mil/downloads/pdf/afghanistan_2004.pdf.

254. See Sonni Efron, *U.S. Options Few in Feud With Iran; Alarmed at Tehran's Nuclear Ambitions, Washington for Now Can Only Watch and Wait*, L.A. TIMES, Dec. 13, 2004, at A1 ("Several American officials have said they believe Hezbollah has 'sleeper' cells raising money in at least five major U.S. urban areas.").

Finally, the United States must better articulate its legal reasoning behind the new procedures and reverse the erosion of its soft power. Congress must fulfill its obligations and begin to legislate as to how the military should determine a detainee's status. The CSRTs should be changed to avoid facial similarity to the AR 190. The admissibility of hearsay and preponderance standard should be retained, but the government should bear the burden. To the extent that it can do so, and still retain classified information, the Administration should also make the proceedings as transparent as possible.

*Robert A. Peal**

* Captain, United States Marine Corps; JD Candidate, Vanderbilt University Law School, 2006; BS, U.S. Naval Academy, 1996. The remarks contained herein are personal reflections and do not necessarily represent the position of the U.S. Marine Corps or the Department of Defense.