ASSESSING THE BUSH ADMINISTRATION'S DETENTION POLICY FOR TALIBAN AND AL-QAEDA COMBATANTS AT GUANTÁNAMO BAY IN LIGHT OF DEVELOPING UNITED STATES CASE LAW AND INTERNATIONAL HUMANITARIAN LAW, INCLUDING THE GENEVA CONVENTIONS

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"It would be sweet justice, wouldn't it, if the price on Osama's head turned out to be nothing more than a bag of greasy chicken nuggets and soggy French – pardon, Freedom – fries?" **

I. INTRODUCTION

In the wake of the September 11th attacks on the World Trade Center, American attitudes regarding terrorism quickly changed.[1] Whereas terrorist attacks had long been perceived as a remote possibility and punished as a crime, the new American approach escalated into a full-scale "War on Terrorism."[2] The United States has risked close international ties with traditional American allies in order to launch an offensive in Afghanistan and Iraq.[3] The fact that the September 11th attacks were immediately condemned as acts of war allowed and still allows the executive branch to justify the full extent of its military and intelligence operations, including the detentions at Guantánamo Bay.[4]

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** Daryl Lease, Editorial, *The Bush Team Goes Nuclear,* Sarasota Herald-Trib., Sept. 22, 2003, at A11. Ironically, that most American of institutions - the McDonald's Happy Meal - has been used as an interrogation incentive in Guantánamo in order to determine the whereabouts of Bin Laden, the holy grail of American intelligence operations.

1. *See* Note, *Responding to Terrorism: Crime, Punishment, and War*, 115 HARV. L. REV. 1217 (2002). On September 11, 2001, terrorists belonging to the al-Qaeda network – controlled by Osama bin Laden – hijacked two transcontinental commercial jetliners and flew them into the World Trade Center. Simultaneously, two other planes were hijacked: one crashed into a corner of the Pentagon and the other crashed into a field in western Pennsylvania. These horrific acts were immediately condemned as an act of war.
2. *Id*.
3. *Id*.
4. *Id*.

Guantánamo Bay is a 45 square mile United States military base located in eastern Cuba.[5] Frequently a port of call in Spanish colonial days, the bay was seized from the Spanish in 1898.[6] Cuba leased the base to the United States in 1903 at 2,000 gold coins[7] per year for an indefinite term, breakable only by mutual agreement.[8] The annual cost of the lease is currently valued at $4,085.[9] In the 1990s, Guantánamo Bay naval base housed Haitian and Cuban refugees, but has since been transformed into a detainment area for members of al-Qaeda and the Taliban captured in Afghanistan.[10] The detainees have been visited by members of the International Red Cross and diplomats from their home countries, and have been able to write to family and friends.[11] The day that the first group of al-Qaeda and Taliban detainees began arriving in Cuba, the U.S. Army issued a news release stating, "the holding conditions at Guantánamo will be humane and in accordance with the Geneva Convention."[12] In February of 2002, the White House outlined its policy with regard to the detention:

> 1) Al-Qaeda – a foreign terrorist group – is not a state party to the Geneva Convention; therefore the Geneva Convention does not apply to al-Qaeda detainees, and it follows that no POW status will be afforded al-Qaeda members;
> 2) Although the Taliban is not considered the legitimate Afghan government, Afghanistan is a party to the Geneva

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5. Ann Curry, *History of Guantánamo Bay, Cuba, Base, Where US Forces are Preparing Prison for Al-Qaeda and Taliban Prisoners*, NBC NEWS: TODAY, Jan. 10, 2002, *available at* 2002 WL 3317038.

6. M.E. Murphy, *The History of Guantánamo Bay, Volume I* (Jan. 5, 1953), http://www.nsgtmo.navy.mil/gazette/History_98-64/hischp2.htm. The territory around Guantánamo Bay is "semi-arid" with the annual rainfall around 25-30 inches. *Id.* at ch.2. U.S. forces stand ready to assume high alert, and have done so during two revolutions on the tumultuous island, in 1906 and 1959, as well as during the missile crisis in 1962, and after Castro's order to cut off the base's water in 1964. *Id.* at ch.4. The "water crisis" led to the building of a desalination plant, and now the base is fully self-sufficient. Recently declassified Pentagon documents suggest that the base has stored nuclear weapons – probably submarine-seeking depth bombs – since the 1962 crisis. John Pomfret, The History of Guantánamo Bay Volume II (Sept. 9, 1982), http://www.nsgtmo.navymil /gazette/History_64-82/CHAPTER%20I.htm.

7. Robert Little, *U.S. Outpost Gets a New Role*, BALT. SUN, Jan. 6, 2002, *available at* 2002 WL 3112510.

8. Curry, *supra* note 5.

9. Little, *supra* note 7.

10. Curry, *supra* note 5.

11. Coalition of Clergy, Lawyers, & Professors v. Bush, 310 F.3d 1153, 1157 (9th Cir. 2002).

12. Jim Garamone, *Joint Task Force Set Up in Cuba to Oversee Al-Qaeda Detainees*, American Forces Press Service (Jan. 11, 2002), *available at* http://www.defenselink.mil /news/Jan2002/n01112002_200201111.html.

> Convention. The Convention applies to the Taliban detainees; however, they do not qualify as POWs under the Third Convention.[13]

Despite some initial indication that they would be POWs,[14] those captured by American troops in Afghanistan were labeled "enemy combatants."[15] The Bush administration takes the position that the Third Geneva Convention, which regulates the treatment of prisoners of war ("POW") and confers benefits to those with POW status, does not apply because the United States does not regard the prisoners as soldiers for any sovereign nation.[16]

A. Conditions at the Guantánamo Bay Detention Site

International outrage followed the release of early photographs showing prisoners held in chain-link cells open to the sun and forced to wear hoods and shackles.[17] During transport and arrival of the detainees, pictures show that the

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[13] Office of the Press Secretary, *Fact Sheet - Status of Detainees at Guantánamo* , The White House (Feb. 7, 2002), *available at* http://www.whitehouse.gov/news/releases /2002/02/20020207-13.html. The Fact Sheet also states, "The United States is treating and will continue to treat all of the individuals detained at Guantánamo humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949." *Id*. Also,

> The detainees will not be subjected to physical or mental abuse or cruel treatment. The International Committee of the Red Cross has visited and will continue to be able to visit the detainees privately. The detainees will be permitted to raise concerns about their conditions and we will attempt to address those concerns consistent with security. *Id*.

14. Interestingly, a military news search pulled up an article headline, dated Jan. 15, 2002, which read "Guantánamo Bay receives more Taliban POWs." The actual article itself was not available to view. List of articles in the Operation Enduring Freedom News Archive, United States Army (Jan. 15, 2002), *available at* http://www.army.mil/enduringfreedom/newsarch.html.

15. Hamdi v. Rumsfeld 316 F.3d 450, 461 (4th Cir. 2003) (Hamdi III).

16. *Guantánamo Bay Suicide Attempts*, CBS NEWS (Aug. 15, 2002), *available at* http://www.cbsnews.com/stories/2002/08/15/attack/main518770.shtml. A "couple of dozen detainees" have chronic psychiatric problems, while some have reportedly cut themselves with plastic utensils and others bang their heads on the walls. *Id*. One military official argues that the men's actions reveal that they are "showing remorse" for their deeds as members of al-Qaeda and the Taliban. *Id*.

17. Caroline Overington, *Camp Delta Lacks Nothing but Freedom*, SYDNEY MORNING HERALD, May 29, 2003, *available at* 2003 WL 55387540.

military used restraints such as covered goggles, earmuffs, and face masks.[18] The United States Southern Command defended the restraints by claiming that they were not used while inmates were inside their cells.[19] Attorney General John Ashcroft also defended the prisoners' treatment, arguing that conditions at the base were necessary to protect troops stationed there.[20] In October of 2002, three released Afghan men – two of whom were believed to be in their 70s – described the conditions at the camp as "sweltering" but insisted they were not beaten.[21] One of the Afghans, Jan Mohammed, said he had no outside contact for eleven months and only received a letter from his family three days before his release.[22] He was also interrogated intensively for fifteen days.[23] The men were among the first released from the camp because they posed no security risk.[24]

The temporary, makeshift Camp X-Ray – set up during the first wave of arrivals – gave way to Camp Delta, with improvements such as flushing toilets.[25] Amid the criticism from human rights organizations that prisoners were being mistreated, the U.S. government has released a series of photos depicting the camps in a favorable light.[26] Some photos show dental facilities at the detainee hospital where inmates will presumably receive care.[27] According to the Defense Department, the detainees are given comfort items including a mattress, sheets, a blanket, prayer mat, two-piece orange suit, flip-flop shoes, prayer cap, washcloth and towel, and a salt packet.[28]

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18. *Inside Camp X-Ray: Introduction,* BBC NEWS (2002), http://news.bbc.co.uk/hi/english/static/in_depth/americas/2002/inside_camp_xray/default.stm.

19. Bob Franken et al., *Ashcroft Defends Detainees' Treatment*, CNN (Jan. 22, 2002), *at* http://www.cnn.com/2002/US/01/21/ret.detainees/?related.

20. *Id*.

21. *Afghans Tell of Guantánamo Ordeal*, BBC NEWS (Oct. 29, 2002), *at* http://news.bbc.co.uk/1/hi/world/south_asia/ 2371349.stm.

22. *Id*.

23. *Id*.

24. *Id*.

25. Katty Kay, *No Fast Track at Guantánamo Bay*, BBC NEWS: WORLD EDITION (Jan. 11, 2003), *at* http://news.bbc.co.uk/1/hi/world/americas/2648547.stm.

26. U.S. Department of Defense, Operations – "Operation Enduring Freedom," at http://www.defenselink.mil/photos/Operations/OperatiEndurinFreedo/page4.html.

27. *Id.* at http://www.defenselink.mil/photos/Dec2002/021203-A-7236L-011.html (last visited Mar. 23, 2005).

28. *Id.* at http://www.defenselink.mil/photos/Dec2002/021203-A-7236L-009.html (last visited Mar. 23, 2005); Office of the Press Secretary, *supra* note 13. In addition, the inmates also receive water, medical care, clothing and shoes, shelter, showers, soap and toilet articles, foam sleeping pads and blankets, towels and washcloths, the opportunity to worship, correspondence materials, the means to send mail, and the ability to receive packages of food and clothing, subject to security screening. *Id*. This is in contrast with many reports that the inmates have not had contact with family and friends for the entire duration of their detention. *Id*. The Fact Sheet also states that the detainees will not

The United States also provides carbohydrate-rich, "culturally sensitive" foods for the prisoners: the typical Guantánamo Bay breakfast consists of bread, cream cheese, orange, a pastry, a roll, and a bottle of water.[29] Lunch is cereal and cereal bars, peanuts, crisps, raisins, and water.[30] Dinner includes white rice, red beans, a banana, and bread.[31] On special occasions such as the Islamic holiday Eid al Adha, the Army military police served detainees a traditional meal of lamb and honey-soaked pastries.[32] Two fifteen-minute exercise breaks are allowed per week.[33] Signs near the cells point eastward so prisoners may pray in the direction of Mecca.[34]

B. Interrogation of Prisoners at Guantánamo Bay

The United States justifies the detainment at Camp Delta by the security threat posed by the detainees, as well as the large volume of intelligence gathered from the prisoners.[35] Testimony regarding their conditions has been taken from detainees both in Afghanistan and Guantánamo Bay.[36] The interrogations are often harsh. A British newspaper reported that a U.S. military coroner, Elizabeth Rowse, had ruled that two Afghan men died under interrogation by "homicide."[37] The men were being held at a secret CIA center at Bagram Air Force Base in

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have access to certain privileges afforded to those with POW status. *Id*. These privileges include access to a canteen to purchase food, soap, and tobacco products; a monthly advance of pay; the ability to have and consult personal financial accounts; and the ability to receive scientific equipment, musical instruments, or sports outfits. *Id*.

29. *Inside Camp X-Ray: Meals,* BBC News Online, *at* http://news.bbc.co.uk/hi/english/static/in_depth/americas/2002/inside_camp_xray/meals.stm (last visited Mar. 21, 2005).

30. *Id*.

31. *Id.*

32. Alphonso Van Marsh, *For Gitmo's Detainees, Spice is Nice* CNN: On the Scene (Apr. 2, 2002), *at* http://www.cnn.com/2002/WORLD/americas/04/02/marsh.otsc/index.html.

33. Kay, *supra* note 25.

34. Bob Franken et al., *supra* note 19.

35. Larry Luxner, *Camp Delta at 'Gitmo', Afghanistan Worlds Apart: Critics Deplore Detention There of Taliban, Al-Qaeda*, WASH. TIMES, Apr. 29, 2003, at A12, *available at* 2003 WLNR 757992. Quoting Major General. Geoffrey Miller, commander of Joint Task Force Guantánamo: "Every detainee in this camp is a threat to the United States . . . . We have already exploited quite a bit of intelligence. We are in the business of looking for golden threads and links, and every day we get something new." *Id*.

36. Audrey Gillan, *Torture Testimony 'Acceptable'*, THE GUARDIAN UNLIMITED (July 22, 2003), *at* http://www.guardian.co.uk/Guantánamo/story/0,13743,1003352,00.html.

37. *Id*.

Afghanistan.[38] Officials have also admitted to using "stress and duress" on prisoners: sleep deprivation, denial of medication, and forcing them to stand or kneel for hours on end.[39] At Guantánamo Bay, interrogators have turned to more creative methods of eliciting information.[40] Prisoners are now offered fresh fruit, cupcakes, Twinkies, and McDonald's Hamburger Happy Meals – complete with toy – in exchange for talking.[41] Since the program commenced in February, Major General Geoffrey D. Miller, commander of the overseeing task force, has seen captives volunteer five times more information than the previous months.[42]

Military officials usually do 300 interrogations a week.[43] When asked how much longer the "illegal combatants" may reside at Guantánamo, Captain Bob Buehn, former commander of the naval installation, replied, "This mission could last at least five years."[44] Widespread protest came in September 2003 when Secretary of Defense Donald H. Rumsfeld suggested that most of the prisoners held at Guantánamo Bay would never be formally tried by a court or military tribunal.[45] Rumsfeld indicated his plan is to keep prisoners locked up as long as the war on terrorism lasts – an open-ended estimate, to say the least – in order to prevent detainees from returning to battle.[46] Rumsfeld also indicated that it would be at least five years before most of those detained would have a clear idea of what would happen to them.[47] Despite calls by American ally Great Britain to end this "anomalous situation" and resolve the detainees' legal statuses, the United States is expanding the size of the Camp Delta compound and planning

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38. *Id*.

39. *Id*.

40. Daryl Lease, Editorial, *The Bush Team Goes Nuclear*, SARASOTA HERALD-TRIB., Sept. 22, 2003, at A11, *available at* 2003 WLNR 2729150. The reward program began in February, and is reported to be having a positive effect. Major General Geoffrey D. Miller, commander of the task force that oversees the prison camp, said the captives were growing more talkative. The Herald-Tribune editorial captured the irony of this in the following terms: "It would be sweet justice, wouldn't it, if the price on Osama's head turned out to be nothing more than a bag of greasy chicken nuggets and soggy French – pardon, Freedom – fries?" *Id*.

41. *Id*.

42. *Id*.

43. Gail Gibson, *General Links Detention and Interrogation*, BALT. SUN, May 5, 2004, http://www.baltimoresun.com/news/nationworld/iraq/bal-te.miller05may05,1, 2406727.story?coll=bal-nationworld-utility&ctrack=1&cset=true.

44. Luxner, *supra* note 35.

45. Christian Gysin & William Lowther, *Troops Seize Britons Suspected of Attacks on The Allies in Iraq*, DAILY MAIL, Sept. 17, 2003, at 4, *available at* 2003 WL 63952181.

46. *Id*.

47. *Id*.

to build a permanent compound.[48] In the twenty months since the inception of Camp Delta, more than thirty detainees have attempted suicide.[49]

C. The Administration Plans to Conduct a Full Military Commission to Try Captured Al-Qaeda and Taliban Prisoners

Labels are of paramount importance in this terrorism war. So far, the Bush Administration has declined to label soldiers who are suspected members of al-Qaeda, the terrorist network that executed the attacks of September 11th, as "prisoners of war;"[50] instead, these detainees are known as "unlawful" or "unprivileged" combatants.[51] Unprivileged or unlawful combatants may include guerillas, partisans, or members of resistance movements who may be out of uniform, blending in with the civilian population at times.[52] The suspected members of the Taliban, the Muslim fundamentalist government that had ruled Afghanistan until recently and had provided refuge for al-Qaeda, have been accorded regular combatant status, and the Bush Administration now considers them "prisoners of war" under the Third Geneva Convention.[53]

In a March 2002 document released by the Department of Defense entitled "Military Commission Order No. 1," the Bush Administration set forth guidelines for the creation of a military commission.[54] The Commission shall exercise jurisdiction over all individuals subject to the President's November 2001 Military Order and those alleged to have committed offenses that violated the laws of war and "all other offenses triable by military commission."[55] The Commission will consist of between three and seven members, drawn from the pool of commissioned officers of the United States armed forces.[56] The Chief Defense Counsel for the prisoners in the Military Commission will be a judge advocate

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48. *Detainees in Legal Limbo; U.S. Should Determine War Criminals, Release Others*, PATRIOT-NEWS, Jun. 13, 2003, at A12, *available at* 2003 WL 3204959.

49. Rupert Cornwell, *Guantánamo Man Charged With Spying*, Rupert Cornwell, THE INDEPENDENT (London), Sept. 24, 2003, at 1, *available at* 2003 WL 63838569.

50. *See* Manooher Mofidi & Amy E. Eckert, *"Unlawful Combatants" or "Prisoners of War": The Law and Politics of Labels*, 36 CORNELL INT'L L.J. 59, 79 (2003).

51. Robert K. Goldman & Brian D. Tittemore, *Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law*, The American Society of International Law Taskforce on Terrorism (Dec. 2002), p. 1, *available at* http://www.asil.org/taskforce/goldman.pdf.

52. *Id*. at 4.

53. Mofidi & Eckert, *supra* note 50, at 81.

54. Department of Defense, Military Commission Order No. 1, Mar. 21, 2002, http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf [hereinafter Military Commission Order No. 1].

55. *Id*. at Sec. 3.

56. *Id.* at Sec. 4.

from any branch of the United States armed forces, and the accused detainee may choose an alternate, available judge advocate; the detainee may not retain his own non-United States military counsel, however.[57] The charges against the accused detainee will be furnished "sufficiently in advance of trial to prepare a defense."[58]

II. DEVELOPING UNITED STATES CASE LAW REGARDING THE DETENTIONS

Seven days after September 11, 2001, Congress granted President George W. Bush sweeping power to "take action to deter and prevent acts of international terrorism against the United States."[59] Beginning January 11, 2002,[60] members of the "al-Qaeda terrorist network" began arriving in Cuba from Afghanistan.[61] In response to criticism by Amnesty International that prisoners at Guantánamo were being denied habeas corpus rights, President Bush's Press Secretary Ari Fleischer replied, "They're receiving far better treatment than they received in the life that they were living previously."[62] Regardless of the physical condition of the prisoners, litigation focusing on their political rights quickly emerged.[63]

A. Domestic Legal Challenges Mounted in Federal Courts

Soon after the inception of Camp X-Ray, the Coalition of Clergy, Lawyers, and Professors ("Coalition") filed a suit in the Central District of California challenging the detention of terrorist combatants captured in Afghanistan and requesting a Writ of Habeas Corpus based on next-friend standing.[64] Courts generally issue next-friend standing when a detained prisoner

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57. *Id*.

58. *Id*.

59. Authorization for use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001).

60. Van Marsh, *supra* note 32.

61. Coalition of Clergy v. Bush, 189 F. Supp. 2d 1036, 1038 (C.D. Cal. 2002).

62. Douglas Turner, *America Has No Right To Dilute Habeas Corpus*, BUFFALO NEWS, Jun. 2, 2003, at B6. The late Sen. Daniel Patrick Moynihan, D-N.Y., had enough respect for the law to protest the 1996 dilutions [of habeas corpus]. "If I had to choose between living in a country with habeas corpus without free elections or a country with free elections but without habeas corpus," Moynihan said, "I would choose habeas corpus every time." *Id*.

63. *Coalition of Clergy*, 189 F. Supp. 2d at 1038.

64. *Id*. at 1036. Writ of Habeas Corpus petitioned for pursuant to 28 U.S.C. 2241.

is himself unable to appear because of mental incompetence or inaccessibility.[65] In *United States ex rel. Toth v. Quarles*, the Supreme Court granted writ of habeas corpus to the sister of an American serviceman held in Korea and held he must be tried in a regular federal constitutional court.[66]

The Coalition argued that the detainees had been deprived of their liberty without due process of law, had not been informed of the nature and cause of the accusations against them, and had not been afforded the assistance of counsel.[67] Amnesty International also lists similar claims of detainees' treatment: "incommunicado detention, no access to legal counsel, indefinite detention" and no protection for those seeking asylum.[68] Critics have argued that 'Gitmo,' as American sailors call the base, will become a permanent dumping ground for anyone the Bush administration wishes to hold outside of judicial review.[69] Chairman emeritus of the International Commission of Jurists, Bill Butler, calls Camp Delta a veritable "Devil's Island,"[70] the notorious 19th century penal colony in South America where France sent its political prisoners.[71]

In a sense, Guantánamo Bay is a more useful and ingenious penal colony.[72] Just a brief two-hour plane ride from Jacksonville, Florida, legal teams

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65. Whitmore v. Arkansas, 495 U.S. 149, 162 (1990).

66. 350 U.S. 11, 13 (1955).

67. *Coalition of Clergy*, 189 F. Supp. 2d at 1038.

68. Amnesty International, *Treatment of Detainees held at Camp X-Ray, Guantánamo Bay and Other Prisoners in the USA*, *at* http://www.amnesty.org.uk/action/crisis/Guantanamo.shtml.

69. Luxner, *supra* note 35.

70. *Id*.

71. *Devil's Island*, Wikipedia, *at* http://en.wikipedia.org/wiki/Devil%27s_Island. There are interesting parallels between Guantánamo Bay and Devil's Island, used by the French in the 19th century:

> Devil's Island is a small rocky islet in the Atlantic Ocean just off the northern coast of French Guiana whose name is synonymous with a desolate, inescapable and horrific prison. First opened by Emperor Napoleon III, Devil's Island would become one of the most famous prisons in history. In addition to the prison on the island, prison facilities were located on the mainland at Kourou. Over time, they became known collectively as 'Devil's Island.' Used by France from 1852 to 1946, its residents were everything from political prisoners to the most hardened of thieves and murderers. A great many of the more than 80,000 prisoners sent to the harsh conditions at disease-infested Devil's Island were never seen again. Other than by boat, the only way out was through an impenetrable jungle; accordingly, very few convicts ever managed to escape. *Id*.

72. *See* Associated Press, *Brief History of Guantánamo Bay* (Dec. 28, 2001), *available at* http://www.foxnews.com/story/0,2933,41744,00.html. "The oldest U.S. overseas outpost has repelled enemies and welcomed refugees since 1898, when U.S.

participating in the planned military tribunals can easily arrive and depart from the base.[73] Yet, the Administration can argue that the base's offshore status conveniently immunizes any verdicts from appeal.[74] The base is secure: there are no entrances from the mainland, a formidable ring of cactus surrounds the base, and the Cuban military controls a twenty mile swath of land all around the base where access is prohibited.[75] The likelihood of prisoner escape is very low.[76]

The California district court judge ruled that the Coalition did not have next-friend standing to assert claims on behalf of the detainees, and even if the Coalition had standing, the court lacked jurisdiction to hear the claims.[77] The district court also ruled that no federal court would ever have jurisdiction over petitioners' claims.[78] In a subsequent Ninth Circuit appeal in the same case, the appellate court vacated the district court's determination that it lacked jurisdiction, and vacated the ruling that no other United States court may exercise jurisdiction to hear detainees' habeas corpus claims.[79] A petition for certiorari was denied.[80] Although the Ninth Circuit declined to rule on issues beyond that of the third-party standing inquiry, leaving the question of jurisdiction open,[81] the Coalition found cause for optimism.[82] Coalition attorney Stephen Yagman responded that the crux of the group's argument rested with the right of United States courts to hear cases regarding the Guantánamo detainees: the fact that the jurisdiction issue remained alive meant the coalition had "lost the battle, but won the war."[83]

When the Ninth Circuit vacated the case *Coalition of Clergy v. Bush* as to the question of jurisdiction, it nonetheless cited to principles found in the World War II case *Johnson v. Eisentrager* that appeared to deflate the optimism of Yagman's words.[84] In a footnote to that case, the court pointed out that, in *Johnson*, the Supreme Court emphasized the importance of giving the executive branch power to detain and try "enemy aliens" – the equivalent of "enemy

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Marines fighting the Spanish-American War established camp at the natural harbor on Cuba's southeast coast." Secretary of Defense Donald H. Rumsfeld described Guantánamo Bay as the "least worst place" for the prison. *Id*.

73. *Id*.

74. *Id*.

75. *Id*.

76. *See id*.

77. *Coalition of Clergy*, 189 F. Supp. 2d at 1039.

78. *Id*.

79. Coalition of Clergy, Lawyers, and Professors v. Bush, 310 F.3d 1153, 1164 (9th Cir. 2002).

80. Coalition of Clergy, Lawyers, and Professors v. Bush, 538 U.S. 103 (2003).

81. *Coalition of Clergy, Lawyers, and Professors*, 310 F.3d at 1164.

82. Agence France-Presse, *US Appeals Court Nixes Bid to Outlaw Guantánamo Detentions*, Agence France-Presse, Nov. 19, 2002, *available at* 2002 WL 23652479.

83. *Id*.

84. *Coalition of Clergy, Lawyers, and Professors*, 310 F.3d at 1164.

combatants" at that time – in military commissions and limiting the detainees' right to litigate in the United States.[85] The enemy aliens in *Johnson* were German armed forces intelligence officers taken into custody in China after the surrender of Germany on May 8, 1945, but before the surrender of Japan.[86] The petitioners' operations involved gathering intelligence on American forces and furnishing it to the Japanese military.[87] The petitioners were tried and convicted by an American military commission and jailed in Germany.[88]

On November 13, 2001, President Bush issued a "Notice on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism" in which he established a military commission for the purpose of conducting trials of foreign detainees.[89] According to the Bush Administration, the September 11th attacks on the United States constituted "acts of war" and were violations of the laws of war.[90] Potential penalties handed down by the commission include life imprisonment or death.[91] The President stated in the Order that "it is not practicable to apply in military commissions . . . the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."[92] Traditionally, military tribunals are wartime judicial proceedings used to try violations of the laws of war.[93] Although the United States has prosecuted past terrorist acts in American courts, such as the 1993 bombing of the World Trade Center by Sheik Omar Abdel Rahmen and the African embassy bombings, the scope and severity of the 9/11 attacks seems to place them in a separate "war" context.[94] Military tribunals have significantly more relaxed due process mechanisms versus a civilian court trial or a court-martial.[95]

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85. Hamdi v. Rumsfeld, 337 F.3d 335, 344 (4th Cir. 2003) (citing Johnson v. Eisentrager, 339 U.S. 763, 774 (1950)).

86. Johnson v. Eisentrager, 339 U.S. 763, 765-66 (1950).

87. *Id.* at 766.

88. *Id*.

89. *See* Press Release, The White House, Office of the Press Secretary, President Issues Military Order: Notice Detention, Treatment, and Trial of Certain Non-Citizens in the War on Terrorism (Nov. 13, 2001), http://www.whitehouse.gov/news/releases/2001/11/.

90. *Id*.

91. *Id*.

92. *Id*.

93. Anton L. Janik, Jr., *Prosecuting Al-Qaeda: America's Human Rights Policy Interests Are Best Served By Trying Terrorists Under International Tribunals*, 30 DENV. J. INT'L L. & POL'Y 498, 506 (2002).

94. JENNIFER ELSEA, CONGRESSIONAL RESEARCH SERVICE, TERRORISM AND THE LAW OF WAR: TRYING TERRORISTS AS WAR CRIMINALS BEFORE MILITARY COMMISSIONS 8 (Dec. 11, 2001), http://www.au.af.mil/au/awc/ awcgate/crs/rl31191.pdf.

95. K. Elizabeth Dahlstrom, Note, *The Executive Policy Toward Detention and Trial of Foreign Citizens at Guantánamo Bay*, 21 BERKELEY J. INT'L L. 662, 662-663 (2003).

The similarities are great between the circumstances surrounding Guantánamo Bay detainees and those detained in Germany at the end of World War II.[96] The Ninth Circuit foresaw the precedent set in *Johnson* as a "formidable obstacle" to the habeas corpus rights of the al-Qaeda and Taliban detainees.[97] Sure enough, in early 2003, the Court of Appeals for the District of Columbia ruled that aliens in military custody outside of United States territory did not have litigation privileges because they could not challenge alleged violations under the Constitution or treaties or federal law: "the courts are not open to them."[98] Judge Kollar-Kotelly stated that there was insufficient evidence to establish detainees as convicted "enemy combatants," but nonetheless the precedence of *Johnson* applied to deny jurisdiction.[99]

In view of the language in the Ninth Circuit opinion in *Coalition of Clergy, Lawyers, and Professors v. Bush*,[100] it seemed unlikely that that court would challenge the President's military order. However, the Ninth Circuit revisited the issue in late 2003 by taking the case of *Gherebi v. Bush*.[101] In *Gherebi*, a Central District of California judge had determined that hundreds of detainees at Guantánamo do not have the right to challenge their confinement in a United States federal court, in response to a writ of habeas corpus brought by Belaid Gherebi.[102] Belaid's brother, Falen, has been detained since January 2002.[103] In reaching its conclusion that federal courts have no jurisdiction, the district court wrote that it did so "reluctantly . . . because the prospect of the Guantánamo captives' being detained indefinitely without access to counsel, without formal notice of charges, and without trial, is deeply troubling."[104]

Belaid Gherebi filed a memorandum with the Ninth Circuit that stated what he sought in the petition: acknowledgment by the Bush Administration that Falen has been detained; the reason for his detention; and permission for Falen to be brought before a court on the charges that his detention violates the due process clause of the Fifth and Fourteenth Amendments, the cruel and unusual

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96. *Coalition of Clergy, Lawyers, and Professors v. Bush*, 310 F.3d 1153, 1164 (9th Cir. 2002).

97. *Id*.

98. Al Odah v. United States, 321 F.3d 1134, 1145 (D.C. Cir. 2003).

99. Joshua Rozenberg, *Why There are Two Sides to Every Picture as Captives are Paraded on TV, the Iraq Conflict has Highlighted Inconsistencies in the Depiction of Prisoners of War,* DAILY TELEGRAPH, Mar. 27, 2003, *available at* 2003 WL 15578950.

100. *Coalition of Clergy, Lawyers, and Professors*, 310 F.3d 1153, 1164.

101. Gherebi v. Bush, 352 F.3d 1278 (9th Cir. 2003).

102. Gherebi v. Bush, 262 F. Supp. 2d 1064, 1065-66 (C.D. Cal. 2003).

103. *Id.* at 1065.

104. *Id.* at 1066.

punishment[105] clause of the Eighth Amendment, and the equal access to counsel provision of the Sixth Amendment.[106]

By taking the *Gherebi* case, in which standing was not an issue, the Ninth Circuit directly confronted the issue of jurisdiction that the court did not address in *Coalition of Clergy v. Bush*.[107] In *Gherebi*, the Ninth Circuit held that:

> (1) the district court erred in holding that courts in the United States are precluded from exercising jurisdiction over petitioner in light of *Johnson v. Eisentrager*, and
> (2) the District Court for the Central District of California has jurisdiction to hear the writ because the custodians of the prisoners are within the jurisdiction of the court.[108]

Although the Ninth Circuit held that United States courts may have jurisdiction over cases brought on behalf of detainees held indefinitely at Guantánamo, the decision emphasized the fact that the Court was not deciding any substantive issues of constitutional inquiry.[109] In coming to its decision, the Court utilized strong language: "even in times of national emergency . . . it is the obligation of the Judicial Branch to ensure the preservation of our constitutional values and to prevent the Executive Branch from running roughshod over the rights of citizens and aliens alike."[110] The Ninth Circuit also contended that *Johnson* "neither requires nor authorizes" the government to imprison detainees indefinitely without permitting any kind of judicial recourse or right to counsel.[111] The court acknowledged that Gherebi and the other Guantánamo detainees – the "enemy combatants" – are indeed the equivalent of "alien enemies" in *Johnson*.[112] However, the court found that the dispositive issue dealt with the legal status of the physical Guantánamo base.[113] Later, the determination of Guantánamo's legal

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105. Conditions at Guantánamo Bay have been discussed earlier in this Note. *See* Gillan, *supra* note 36. A terror suspect recently freed from Guantánamo Bay also claims he was confined to "a small cell where the lights were always on and he was forced to listen endlessly to Bruce Springsteen." Hamed Abderrahman Ahmad, a Spaniard, recounts that he "spent a month in a cell two metres square that had a roof of sheet iron, with unbearable heat." Also, "All day they blared patriotic American music. It was *Born in the USA*. We had to put wet towels on our heads to be able to bear the heat and not hear the music… Later they put us in even smaller cells." *Bored in the USA*, HERALD SUN (Mar. 1, 2004), *available at* http://www.heraldsun.news.com.au/common/story_page /0,5478,8829953^2902,00.html.

106. Gherebi v. Bush, 352 F.3d 1278, 1282 n.5 (9th Cir. 2003).

107. *Id* at 1281-82.

108. *Id*. at 1282.

109. *Id*. at 1283.

110. *Id*.

111. *Gherebi*, 352 F.3d 1278, 1283.

112. *Id.* at 1285.

113. *Id*.

status by the Supreme Court resolved the question of whether or not foreign detainees are being held within the territorial or sovereign jurisdiction of the United States.[114]

B. The Supreme Court's Ruling in *Rasul v. Bush*: Jurisdiction of Federal Courts to Hear Petitions from Foreigners Held at Guantánamo Bay

On June 28, 2004, the United States Supreme Court issued three separate rulings establishing the scope of personal liberties for the detainees, both foreign and citizen.[115] Regarding foreign prisoners detained by the United States government at Guantánamo Bay, the Supreme Court ruled that the federal habeas statute conferred jurisdiction on federal courts to hear challenges brought by aliens.[116] In reaching its decision, the Court determined that the United States, by its own express terms, exercised "complete jurisdiction and control" over Guantánamo.[117]

Despite language in the 1903 lease agreement and a 1934 treaty stating that the United States holds complete "territorial" jurisdiction over Guantánamo, attorneys for the U.S. government argued that Guantánamo lies outside U.S. "sovereign" jurisdiction.[118] Both the Ninth Circuit and the Supreme Court disagreed with this assertion that an additional element – "sovereign jurisdiction"[119] – is required, in addition to territorial jurisdiction, to grant federal courts jurisdiction over the detainees.[120]

The government's sovereign jurisdiction argument hinged on an ambiguous legal concept.[121] Traditionally, a nation's sovereignty granted it powers such as maintaining exclusive jurisdiction over citizens residing in a state and the ability to create policies limited in the extent of impact upon other states or agreements with other states.[122] Some scholars have referred to this concept of

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114. *Id*.

115. David Stout, *In 3 Rulings, Supreme Court Affirms Detainees' Right to Use Courts*, N.Y. TIMES, June 28, 2004 [hereinafter *In 3 Rulings*], *available at* http://www.nytimes.com/2004/06/28/politics/28CNDSCOT.html?ex=1089455136&ei=1&en=b5f30beefd506d09.

116. Rasul v. Bush, 124 S.Ct. 2686, 2699, 159 L.Ed.2d 548 (2004).

117. *Id*. at 2689.

118. *Gherebi*, 352 F.3d at 1285-86.

119. *Id*. at 1286-87. The 1903 lease agreement and the 1934 continuance treaty cede "complete jurisdiction and control" over the base to the United States, while stating that the "continuance of ultimate sovereignty" lies in Cuba. *Id.* at 1296 n.9.

120. *Id.* Rasul v. Bush, 124 S.Ct. 2686, 159 L.Ed.2d 548 (2004).

121. Akash R. Desai, *How We Should Think About the Constitutional Status of the Suspected Terrorist Detainees at Guantánamo Bay: Examining Theories that Interpret the Constitution's Scope*, 36 VAND. J. TRANSNAT'L L. 1579, 1599 (2003).

122. *Id*.

"sovereignty" as "a bad word . . . in international law, it is often a catchword, a substitute for thinking and precision."[123] It was unavailing, therefore, for the United States to hinge its jurisdictional argument, and deny Constitutional rights to detainees, on the concept of "sovereign jurisdiction."[124]

The Supreme Court ruled that with respect to anyone detained within the territorial jurisdiction of the United States, the habeas statute – 28 U.S.C. §§ 2241(a) and (c)(3) – granted federal district courts "the authority to hear applications for habeas corpus by *any person* who claims to be held 'in custody in violation of the Constitution or laws or treaties of the United States.'"[125] Therefore, the habeas statute does not make a distinction between foreign detainees or American citizen detainees as long as the prisoner is held within the territorial jurisdiction of the United States.[126]

In reversing the lower court's decision that jurisdiction did not exist, the Supreme Court downplayed the application of *Johnson v. Eisentrager*, making a distinction between the current detainees and the WWII German spies:

> Petitioners in these cases differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression… they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.[127]

The Ninth Circuit had pointed out earlier in *Eisentrager* that the United States held neither complete territorial nor sovereign jurisdiction over Landsberg Prison in Bavaria, Germany where the German spies or "enemy aliens" were held.[128] Therefore, in *Eisentrager*, the American court system held no jurisdiction over the prisoners.[129] In the present case, where Guantánamo Bay is clearly under U.S. territorial jurisdiction and the United States has treated it as such during the

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123. *Id.*. Louis Henken believes that sovereignty is an essentially unnecessary concept in areas of international law and relations, and should be scrapped. *Id*. at 1600.

124. *Id*. at 1601.

125. Rasul, 124 S.Ct. at 2692 (emphasis added).

126. *Id*. at 2696.

127. *Id*. at 2693.

128. *Gherebi*, 352 F.3d at 1284, citing Landsberg Am Lech, *History of Landsberg Air Base*, *available at* http://www.furstytreemovers-landsbergbavarians.org/history_of_landsberg.htm.

129. *Id.* at 1284.

entire duration of occupation, the U.S. courts do extend jurisdiction over the base and its prisoners.[130]

C. The Issue of American Citizens in Detainment

Detainees with American citizenship have been quite troublesome for the government.[131] Perhaps the most furious debate in the War on Terrorism has centered on how far the Bush Administration may go in capturing and detaining United States citizens after the September 11th attacks under the umbrella of national security.[132] United States citizens John Walker Lindh, the American Taliban soldier, and Yasser Esam Hamdi, captured in Afghanistan and accused of being a soldier for al-Qaeda, have both been detained in the United States,[133] as well as Jose Padilla, who was arrested in Chicago on a flight originating from Pakistan for suspected involvement in a radioactive bomb detonation plot.[134]

Two of the three cases the Supreme Court handed down on June 28, 2004 involved the legal fate of citizens Hamdi and Padilla.[135] Yasser Esam Hamdi was captured in November of 2001 after the revolt in the fort at Mazar-I-Sharif, where he surrendered after allegedly fighting with the Taliban's northern army.[136] Despite boasting to reporters at the time of capture that he was American, it took four months to confirm Hamdi's origins.[137] Hamdi was first transported to Guantánamo Bay before the military determined he was born in Baton Rouge, Louisiana;[138] Hamdi was then sent to the Norfolk Naval Station Brig in Virginia.[139] In response to a writ of habeas corpus filed by Yasser's father Esam Fouad Hamdi, a federal district court ordered a public defender unmonitored access to Hamdi: the session was to be "private between Hamdi, the attorney, and the interpreter, without military personnel present, and without any listening or recording devices of any kind being employed in any way."[140] The Fourth Circuit Court of Appeals reversed the order and remanded the case, arguing that in the

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130. *Id.* at 1287-90. .

131. *Guantánamo Bay Suicide Attempts, supra* note 16.

132. David Stout, *U.S. to Allow 'Enemy Combatant' to See a Lawyer*, N.Y. TIMES, National (Feb. 11, 2004) [hereinafter Stout, *U.S. to Allow*], *available at* http://www.nytimes.com/2004/02/11/national/11CND-PADI.html?hp.

133. *Guantánamo Bay Suicide Attempts*, *supra* note 131.

134. Stout, *U.S. to Allow*, *supra* note 132.

135. Stout, *In 3 Rulings*, *supra* note 115.

136. Luke Harding, *Second US Taliban Fighter Held at Cuba Base*, THE GUARDIAN UNLIMITED (Apr. 5, 2002), http://www.guardian.co.uk/Guantanamo/story/0,13743,1002813,00.html.

137. *Id*.

138. *Guantánamo Bay Suicide Attempts*, *supra* note 16.

139. Hamdi v. Rumsfeld, 296 F.3d 278, 279 (4th Cir. 2002).

140. *Id*.

context of war and national security, the judicial branch must give appropriate deference to the President and Congress.[141] Despite this warning, District Judge Doumar ordered on remand that the government release the "screening criteria" officials at Guantánamo Bay used to determine Hamdi's classification status as an "enemy combatant."[142] The government presented evidence, dubbed the Mobbs Declaration, that purports to show the justification and review process for Hamdi's classification.[143] The court found the declaration falling short of minimal criteria for judicial review.

In writing the opinion, Judge Doumar ordered more access to government evidence, stressing that a "delicate balance" must be struck between executive authority and constitutionally provided procedural safeguards.[144] The Fourth Circuit again reversed this order of the district court, emphasizing the importance of national security post-9/11.[145] Although the court denied a petition for rehearing, Circuit Judge Wilkinson issued a lengthy concurring opinion on the denial of rehearing en banc.[146] In his discussion, Wilkinson analogized *Hamdi* to historical Supreme Court detention cases *Ex parte Quirin*, *Johnson v. Eisentrager*, *In re Yamashita*, and *Ludecke v. Watkins*.[147] All of these cases point to the great restraint judges must show towards executive branch powers during times of war.[148] In *Application of Yamashita* in 1946, the Supreme Court stated, "it must be recognized throughout that the military tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this Court."[149] The Court also emphasized that in a petition for Writ of Habeas Corpus, the question of guilt or innocence of the petitioners does not arise; the only concern is whether the Court may review the case.[150] Hamdi has now been allowed access to a lawyer.[151] The Pentagon issued a statement saying that interrogators had finished questioning him for intelligence.[152] In a recent decision, the Supreme Court held that although Congress passed the Authorization for Use of Military Force in order to "use all necessary and appropriate force" to go after the terrorists involved in the

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141. *Id*.
142. Hamdi v. Rumsfeld, 243 F. Supp. 2d 527, 528-29 (E.D.Va. 2002).
143. *Id.* at 533.
144. *Id*. at 530.
145. Hamdi v. Rumsfeld, 316 F.3d 450, 477 (4th Cir. 2003).
146. Hamdi v. Rumsfeld, 337 F.3d 335, 341 (4th Cir. 2003) (Wilkinson, J. concurring).
147. *Id*. at 344.
148. *Id.*
149. Application of Yamashita, 66 S.Ct. 340, 344 (1946).
150. *Id*.
151. *US Terror Suspect to Get Lawyer*, BBC NEWS, Dec. 3, 2003, http://news.bbc.co.uk/1/hi/world/ americas/3286371.stm.
152. *Id*.

September 11, 2001 attacks, due process required that a citizen of the United States held in the United States be given his day in court.[153]

The Supreme Court also agreed to consider the case of *Padilla v. Rumsfeld*[154] in which the Second Circuit in New York ruled that President Bush may not declare Padilla an enemy combatant and cannot hold him in indefinite military custody.[155] The Bush Administration asked the Court to expedite *Padilla* through the system so it may hear the case as quickly as possible.[156]

Before the *Padilla* ruling by the Supreme Court, the Pentagon issued a statement saying the Defense Department would allow Jose Padilla access to counsel after having been held incommunicado for nearly a year.[157] The Pentagon determined that giving Padilla access to counsel would not compromise national security nor interfere with intelligence gathering.[158] However, the statement warned that "[s]uch access is not required by domestic or international law and should not be treated as a precedent."[159] The Pentagon also asserted that Padilla's consultations with a lawyer would be "subject to appropriate security restrictions," which indicate that he may not get the full, private access to lawyers normally given to civilian defendants.[160] In the June 28, 2004 Supreme Court rulings, the Court disposed of Padilla's habeas corpus petition on the grounds that he should have filed in South Carolina rather than in the Southern District of New York.[161]

Harold Koh, dean of Yale Law School and an expert on international human rights and national security law, replies that "the Supreme Court case has

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153. Hamdi v. Rumsfeld, 124 S.Ct. 2633, 2642, 159 L.Ed.2d 578 (2004).

154. Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003). Jose Padilla, an American citizen, was arrested at Chicago O'Hare Airport after arriving from Pakistan via Switzerland on May 8, 2002. The administration charged him with closely associating with al-Qaeda and labeled him an "enemy combatant." The Second Circuit ordered Padilla be released from military custody within 30 days, and all constitutional protections extended to him, as any other citizen. Padilla was held in a Brig in Charleston for eighteen months and no contact with counsel or his family had been allowed. *Battle Over 'Dirty Bomb' Suspect*, BBC NEWS – UK EDITION (Jan. 17, 2004), *at* http://news.bbc.co.uk/1/hi/world/americas/3405239.stm. Padilla was also accused of involvement in plans to set off a radioactive weapon – a so-called "dirty bomb." He is believed to be the only U.S. citizen to be detained on presidential order since WWII.

155. Anne Gearan, *Supreme Court to Speed Up Case; Bush Seeks Decision on Keeping Terrorism Suspect in Custody*, CHARLOTTE OBSERVER, Jan. 24, 2004, at 8A, *available at* 2004 WL 56362906.

156. *Id*.

157. Stout, *U.S. to Allow*, *supra* note 132.

158. *Id*.

159. *Id*.

160. *Id.*

161. Stout, *In 3 Rulings*, *supra* note 115.

enabled people to question a policy that seems to have so little benefit and such a broad global cost."[162]

II. ONGOING INTERNATIONAL DEBATE REGARDING THE APPLICATION OF INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW, INCLUDING THE THIRD AND FOURTH GENEVA CONVENTIONS

The Hague Conventions of 1899 and 1907 regulate the laws and customs of land warfare, and recognize three categories of lawful combatants to which the rights and obligations of war apply – regular forces, "irregular" forces such as militia or volunteer corps, and the levee en masse.[163] Irregular forces not formally integrated into the armed forces must meet further requirements: be commanded by a person responsible for his subordinates, have a distinctive and recognizable emblem,[164] carry arms openly, and conduct operations in accordance with laws and customs of war.[165]

A. Does Humanitarian Law – Including the Geneva Conventions – Apply to "Enemy Combatants?"

International humanitarian law deals with the law of international conflict: acceptable forms of warfare, appropriate behavior of soldiers, and the treatment of prisoners of war.[166] The International Red Cross asserts that international humanitarian law's central purpose is "to limit and prevent human suffering in times of armed conflict."[167] Humanitarian law, represented

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162. Clare Dyer, *A Light Falls on Camp X-Ray*, THE GUARDIAN (Jan. 20, 2004), http://www.guardian.co.uk/Guantánamo/story/0,13743,1126959,00.html. Koh continues,

> The Anglo-American legal community is uncomfortable with the idea of a land without law and detention without habeas corpus. The view expressed in the briefs is that the administration's position is legally extreme and politically unnecessary to conduct a successful war against terrorism. *Id.*

163. Goldman & Tittemore, *supra* note 51, at 7-8.

164. *Id.* at 8. This requirement is met by uniforms, helmets, or headdresses.

165. *Id*.

166. Dahlstrom, *supra* note 95.

167. INTERNATIONAL RED CROSS, INTERNATIONAL HUMANITARIAN LAW (IHL), *at* http://www.icrc.org/Web/ eng/siteeng0.nsf/iwpList2/ Humanitarian_Law.

principally by the Geneva Conventions and two Additional Protocols,[168] co-exist with *human rights law*, including the International Covenant on Civil and Political Rights (the Covenant) and the American Convention on the Rights and Duties of Man (American Convention) in times of war.[169]

A lawful combatant is "a person authorized by a party to an armed conflict to engage in hostilities and, as such, is entitled to the protections encompassed in the 'combatant's privilege.'"[170] A lawful combatant is given prisoner of war status upon capture.[171] Under the Geneva Convention, prisoners of war are entitled to specific guidelines regarding the conditions of their detainment, including food, clothing, and living quarters.[172] More importantly, a prisoners of war receives immunity from criminal prosecution under the laws of the country that has captured him, as long as the detaining country would not prosecute its own soldiers for the same legitimate acts of war.[173] The United States has asserted that humanitarian law should only apply to ordinary, lawful detainees at Guantánamo Bay.[174]

The Third Geneva Convention states,

> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.[175]

Amnesty International points to comments by the International Committee of the Red Cross, authoritative interpreters of the Geneva Conventions, that reiterate the requirement that detainees be labeled as POWs until tribunal review.[176] Article Four of the Third Convention presents the definition of prisoner of war.[177] Factors that characterize POW status include "carrying arms openly" and "conducting operations in accordance with the laws and customs of war."[178] Judicial investigations must be conducted rapidly so that a POW may face trial as soon as

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168. *Id*.
169. Dahlstrom, *supra* note 95.
170. Goldman & Tittemore, *supra* note 51, at 2.
171. *Id*.
172. *See* Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 83-90, 6 U.S.T. 3316, 75 [hereinafter Third Geneva Convention].
173. *See* Goldman & Tittemore, *supra* note 51, at 3-4.
174. *Id*.
175. Third Geneva Convention, *supra* note 172, art. 5.
176. Amnesty International, *supra* note 68.
177. Third Geneva Convention, *supra* note 172, art. 4.
178. *Id*.

possible.[179] The detaining power must notify a POW of the specific charge or charges against him three weeks prior to instituting judicial proceedings.[180]

There does exist, however, evidence within the Geneva Convention and its application that suggests the United States has a textual basis for denying prisoner of war status to the detainees at Guantánamo.[181] The Third Geneva Convention, sub-paragraph (2) of Article 4A states: "Members of other militias and members of other volunteer corps – the so-called 'irregulars' under Hague Convention definitions[182] – including those of organized resistance movements, belonging to a Party to the conflict . . ." must fulfill the following conditions to attain POW status:

> (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.[183]

The requirement that the combatant belong to a Party of the conflict mandates that these combatants fight on behalf of a State Party engaged in international armed conflict.[184] The al-Qaeda forces fought in Afghanistan under the auspices of the ruling Taliban government, which was not recognized as a legitimate government by the vast majority of the international community.[185]

B. The United States' Argument that Humanitarian Law Applies, but that the Third Geneva Convention Guidelines for Treatment of Prisoners Does Not Apply

1. International Red Cross Interpretations of the Third Geneva Convention

The requirement that a Party to the conflict be recognized under international law is weak. The International Red Cross comments that the express

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179. *Id*.
180. *Id*.
181. *Id*.
182. Goldman & Tittemore, *supra* note 51, at 7-8 n.30.
183. Third Geneva Convention, *supra* note 172, art. 4.
184. Goldman & Tittemore, *supra* note 51, at 11.
185. *UAE Won't Recognize Taliban; U.S. Forces Move Toward Gulf Region*, ABC NEWS, Sept. 22, 2001, *at* http://abcnews.go.com/sections/us/DailyNews/WTC_MAIN010922.html.

or formalized authorization of that Party is not essential to establish a nexus with irregular forces.[186] Furthermore, the Diplomatic Conference on International Humanitarian Law Applicable in Armed Conflict of 1974-77 ("Diplomatic Conference") acknowledges the difficulty for many groups in qualifying for prisoner of war status under the stricter guidelines of the Geneva and Hague Conventions.[187] The Conference sought a compromise for irregular forces by stating in Article 43 that "the armed forces of a Party consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by the adverse Party."[188] In turn, Article 44 stipulates that "any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war."[189] The United States never ratified the compromises of this Diplomatic Conference, so it is not technically bound by it.[190] The International Committee of the Red Cross, however, has emphasized the value of the protocols[191] by pointing to the fact that all of the world's main powers took part in drafting the text and that more than 150 countries are Parties to the two Additional Protocols.[192] Jakob Kellenberger, President of the International Committee of the Red Cross states, "these treaties reflect the fabric or the core of International Humanitarian Law."[193] Given the level of universal acceptance of the Protocols and the emphasis that the ICRC – the interpreter of international humanitarian law – places upon them, their texts should influence the United States' treatment of combatants to some degree.

2. International Considerations of the United States Decision to Discriminately Apply the Geneva Convention Guidelines

The human rights organization Human Rights Watch claims that the "shortsighted transgression" – holding enemy combatants – on the part of the United States may come back to haunt its allied service members who are

186. Goldman & Tittemore, *supra* note 51, at 12.
187. *Id.* at 16-17.
188. *Id.* at 17.
189. *Id.* at 7-8.
190. *Id.* at 23.
191. Jakob Kellenberger, *The 25 Years of the Additional Protocols to the Geneva Conventions of 1949 – ICRC Statement*, INTERNATIONAL COMMITTEE OF THE RED CROSS, (June 6, 2002), *at* http://www.icrc.org/web/eng/siteeng0.nsf/iwpList133/896D73AEF8FE74D2C1256BD0005FD4AC.
192. *Id*.
193. *Id*.

captured by enemy forces in the current war on terrorism or in future wars.[194] The Inter-American Commission on Human Rights (IACHR) has asked the United States to "take the urgent measures necessary to have the legal status of the detainees at Guantánamo Bay determined by a competent tribunal" and has concluded that without a clear definition of the detainees' legal status, the detainees would not receive effective legal protection.[195] In response to the IACHR statements, the U.S. government argued that humanitarian law, not human rights law, governs the capture and detention of enemy combatants in armed conflict.[196] The government also argued that the IACHR, which interprets human rights law, lacks the jurisdictional competence to interpret and apply humanitarian law.[197] By definition, humanitarian law is only applicable in times of war.[198] International Humanitarian Law (IHL) is also known as the "law of armed conflict."[199] The Congressional Research Service claims that the use of the "armed conflict" terminology opens up the applicability of IHL to undeclared terrorist wars.[200]

Some scholars argue that the United States would strengthen its own ability to censure other nations for human rights abuses if the United States allowed international military tribunals to try al-Qaeda and Taliban detainees, instead of setting up its own military commission.[201] The interesting aspect of the United States' policies on the detentions in Guantánamo Bay, as pointed out by the Ninth Circuit in *Gherebi v. Bush*, is the fact that the Bush Administration's position is "at odds with the United States' longtime role as a leader in international efforts to codify and safeguard the rights of prisoners in wartime."[202] The Ninth Circuit argued that one of the most important achievements of the 1949 Geneva Convention is the requirement that a competent tribunal determine the status of captured prisoners.[203]

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194. Human Rights News, *U.S.: Growing Problem of Guantánamo Detainees*, HUMAN RIGHTS WATCH, May 30, 2002, *at* http://www.hrw.org/press/2002/05/Guantánamo.htm.

195. Inter-American Commission on Human Rights, *Detainees at Guantánamo Bay, Cuba – Pertinent Parts of Decision on Request for Precautionary Measures*, INTERNATIONAL LAW IN BRIEF, Mar. 12, 2002, *at* http://www.asil.org/ilib/ilib0503.htm#J2.

196. *Response of the United States to Request for Precautionary Measures – Detainees in Guantánamo Bay, Cuba*, INTERNATIONAL LAW IN BRIEF. Apr. 12, 2002, *at* http://www.asil.org/ilib/ilib0508.htm#r2.

197. *Id*.

198. Dahlstrom, *supra* note 95.

199. ELSEA, *supra* note 94 at 8.

200. *Id*.

201. Janik, *supra* note 93.

202. Gherebi v. Bush, 352 F.3d 1278, 1283 n.7 (9th Cir. 2003).

203. *Id*.

Professor Robert Goldman and Brian Tittemore, an attorney at the Inter-American Commission on Human Rights, suggest that there exists "no rule of international law that prohibits a government during internal armed conflicts from according members of dissident armed groups prisoner or war or equivalent status."[204] In fact, other governments involved in recent non-international[205] conflicts have followed a policy of adhering to the spirit of international law.[206] For example, the central government of Nigeria, embroiled in civil war with Biafran separatists in the 1960s, nonetheless accorded Biafran combatants prisoner of war status.[207]

3. The Nature and Inconsistency of Detainee Treatment Under the Fourth Geneva Convention.

Petitioners and scholars have repeatedly referenced the Third Geneva Convention's guidelines for classifying and treating prisoners as a challenge to the United States' detention policies.[208] Since the United States never formally ratified the Diplomatic Conference, which would have expanded the definition of POW status to include nonntraditional armed forces, some organizations such as the International Red Cross have inquired whether the Fourth Geneva Convention, with its broad language, could apply to those labeled "enemy combatant" instead.[209] The International Red Cross asserts that:

> (1) Protection for unlawful combatants under the Fourth Geneva Convention is most clearly realized in circumstances where they are in enemy hands in *occupied territory*.[210]

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204. Goldman & Tittemore, *supra* note 51, at 6.

205. *Id*. Where "non-international" refers to conflicts that involve at least one party that is not recognized as a legitimate nation or government.

206. *Id*.

207. *Id*. The Nigerian Army's code of conduct, July 1967: "Soldiers who surrender will not be killed, they are to be disarmed and treated as *prisoners of war*. They are entitled in all circumstances to humane treatment and respect for their person and their honor" *Id*. (Emphasis added).

208. Gherebi v. Bush, 352 F.3d 1278 (9th Cir. 2003). Belaid Gherebi filed an amended next-friend habeas petition on behalf of his detained brother, Faren. In his petition, Belaid alleges violations of the U.S. Constitution as well as the Third Geneva Convention. *Id.* Dahlstrom writes that the "Third Geneva Convention regarding the treatment of POWs and of civilians is the most relevant" to the present case of detainees at Guantánamo Bay. Dahlstrom, *supra* note 95.

209. Knut Dormann, *The Legal Situation of "Unlawful/Unprivileged Combatant,"* International Review of the Red Cross No. 849 at 45-74 (Mar. 31, 2003), *at* http://www.icrc.org.

210. *Id*.

(2) Protections are also relatively well developed for unlawful combatants in enemy hands in *enemy territory*.
(3) Protections are least developed for detention of unlawful combatants *on the battlefield*.[211]

Article Four of the Fourth Geneva Convention contains the dispositive nationality requirement. Persons protected by the Fourth Convention are those who find themselves "in the hands of a Party to the conflict or Occupying Power of which they are not nationals."[212] In addition, Nationals of a State not bound by the Convention are not protected by it.[213] As with the Third Geneva Convention, the Bush Administration has asserted that the Taliban government did not constitute a recognizable State bound by the Convention, and therefore the Geneva Conventions do not apply.[214] This view is not popular internationally, and even former Secretary of State Colin Powell urged Bush to reconsider the position, noting that the United Nations recognized Afghanistan as a state.[215] In addition, Powell urged that the Taliban troops be considered regular armed forces.[216] Many scholars supported Powell's views out of fear that the U.S. government might create a damaging precedent for U.S. servicemen and women who may be captured later in war.[217]

The current conflict between Israel and Palestine in the Occupied Territories is a clear example of enemy combatants captured and held in occupied territory – the category most universally accepted and broadly covered under the Fourth Geneva Convention. The international community fully supports Palestine in its view that the Fourth Geneva Convention is *de jure* applicable to Israel in the Occupied Territories.[218] Although the dynamics of the Israeli-Palestinian conflict are those of occupation and differ from the United States' current situation with detainees in Guantánamo Bay, in many other ways, the Bush Administration's detention of enemy combatants in Cuba is quite similar to Israel's program of "administrative detention."[219]

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211. *Id*.
212. Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 4, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].
213. *Id*.
214. Desai, *supra* note 121, at 1587.
215. *Id*. at 1588.
216. *Id*.
217. *Id*.
218. Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 HARV. INT'L L.J. 65, 98-99 (2003).
219. Amnesty International, *Israel and the Occupied Territories, Administrative Detention: Despair, Uncertainty and Lack of Due Process* (Apr. 30, 1997), *at* http://web.amnesty.org/library/index/ENGMDE150031997.

With regard to individuals within Israel and southern Lebanon, the Emergency Powers Law of 1979[220] allows the Israeli Minister of Defense to order detentions of prisoners suspected of endangering national or public security for six-month, indefinitely extendable periods.[221] The law allows for a few due process safeguards, such as requiring a detainee be brought before a judge within 48 hours and requiring a periodic three-month review.[222] Military Order 1229 of 1988 allowed military commanders in the volatile West Bank to apply administrative detention for six-month, indefinitely extendable periods.[223] However, in the Occupied Territories, prisoners are allowed no procedural safeguards.[224] According to Amnesty International, Israel has detained prisoners for months, sometimes years, without filing formal criminal charges or bringing detainees to trial.[225] The detainees are usually Palestinian or Lebanese citizens that Israel claims are "terrorists."[226] Administrative detention, says the Israeli government, is only used "where there is corroborating evidence that an individual is engaged in illegal acts which involved danger to state security and to the lives of civilians . . . ."[227] However, in some instances, the Israeli government has extended administrative detention to "prisoners of conscience" – those held for their exercise of freedom of expression or association. After Israeli citizen and Nobel Peace Prize nominee Mordechai Vanunu publicly exposed Israel's nuclear arsenal in 1986, he was detained for 18 years.[228] As his sentence comes to a close in 2004, some Israeli officials have considered extending Vanunu's imprisonment by administrative detention.[229] Human Rights Watch has also condemned Israel's detention policy and its failure to provide a legitimate status, such as "POW," to the detainees under international law.[230]

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220. B'Tselem - The Israeli Information Center for Human Rights in the Occupied Territories, *Israeli Law*, *at* http://www.btselem.org/English/Administrative_Detention/Israeli_Law.asp (last visited Apr. 5, 2005). The Emergency Powers Law pertaining to detentions only applies when the Knesset, the Israeli parliament, declares a state of emergency. *Id*. However, since the founding of the State of Israel, a state of emergency has been continuously in effect. *Id*.

221. *Id*.

222. *Id*.

223. *Id*.

224. *Id*.

225. Amnesty International, *supra* note 219.

226. Press Release, Human Rights Watch, HRW Condemns Israel's Detention of Twenty-One Lebanese for Years Without Charge (Oct. 14, 1997), *at* http://hrw.org/press98/july/lebn1097.htm.

227. Amnesty International, *supra* note 219.

228. Dan Ephron, *Leading 'a Quiet Life At First'*, NEWSWEEK, Jan. 12, 2004, at 9.

229. *Id*.

230. Human Rights Watch, *HRW Condemns Israel's Detention of Twenty-One Lebanese for Years Without Charge* (Oct. 14, 1997), *available at* http://hrw.org/press98/july/lebn1097.htm.

The International Red Cross has inquired whether the "unlawful combatants" held by the United States fall into the personal scope application of the Fourth Geneva Convention.[231] Phrases such as "combatant," "prisoner of war," and "civilian" are defined and used in international humanitarian law, but "unlawful combatant" is not.[232] Since a country can simply use semantics to manufacture a phrase that falls outside the list of definitions used in international law, activists and writers have looked to the Fourth Geneva Convention in determining if its broad scope can cover even a detainee characterized as an "unlawful or enemy combatant."[233]

The application of the Fourth Geneva Convention is defined in Article 4:

> Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find 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.[234]

Although this definition of persons covered under the Fourth Geneva Convention seems very broad, the scope of application is limited by the exclusion of certain individuals.[235] There are exceptions to coverage: "Nationals of a State which is not bound by the Convention" are not protected, nor are "nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State."[236] These exclusions hold less punch than they appear to since the Geneva Conventions are universally exclusive.[237] There is also language to indicate that the rights are not dependent on existence of normal diplomatic recognition,[238] as in the case of the Taliban or al-Qaeda.[239] If a nation's legislation provides for prosecution of combatants, unlawful combatants may be prosecuted for their mere participation in hostilities, even if they respect all the rules of international humanitarian law.[240] If unlawful combatants commit serious violations of international humanitarian law, they may be prosecuted for war

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231. Dormann, *supra* note 209, at 48.
232. *Id.* at 45-74.
233. *Id*.
234. Fourth Geneva Convention, *supra* note 212, art. 4.
235. Dormann, *supra* note 209, at 45-74.
236. *Id*.
237. *Id*.
238. *Id*.
239. ABC NEWS, *supra* note 185. Only Pakistan and Saudi Arabia continued to recognize the Taliban as the legitimate Afghan government after the September 11th attacks. *Id*.
240. Dormann, *supra* note 209, at 45-74.

crimes.[241] However, they are still entitled to fair trial under the Fourth Geneva Convention as long as they are not nationals of the Occupying Power.[242]

Some legal scholars do not believe the Fourth Geneva Convention applies to unlawful combatants at all.[243] Those scholars believe the Convention applies only to unlawful combatants who operate in occupied territory[244] – such as the case with Israeli forces in Occupied Palestinian Territory. However, the text of the Fourth Geneva Convention[245] suggests that certain legal protections apply to unlawful or alien combatants "in the territory of a party to the conflict," which would include Guantánamo Bay since the United States holds territorial jurisdiction there. Part III, Section II, Article 43 states that "any protected person" who is in the territory of a party to the conflict is entitled to have his internment reconsidered as soon as possible by a court or an administrative board designated by the Detaining Power for that purpose.[246] The definition of "protected persons" in the section that refers to enemy combatants in enemy territory comports with the definition for "protected persons" under Part II of the Fourth Convention that refers to enemy combatants in occupied territory.[247] These similarities suggest that the protections afforded enemy combatants are somewhat similar whether in occupied territory or enemy territory.[248] There are indications that the differing groups of delegates at the drafting of the Fourth Geneva Convention desired a somewhat lesser protection for unlawful combatants than POWs under the Third Geneva Convention – this is deduced in Article 5 of the Fourth Convention.[249]

C. Ulterior Motives in Determining that the Geneva Convention Does Not Apply

An internal memo dated January 25, 2002, unearthed by Newsweek magazine, revealed that then White House counsel Alberto Gonzalez, now the Attorney General, justified the Bush Administration's decision to declare the war in Afghanistan, as well as the detention of Taliban and al-Qaeda fighters, exempt

241. *Id*.
242. *Id*.
243. *Id*. The author contends that those who contest the application of the Fourth Geneva Convention to enemy combatants offer little legal justification for their opinions. Dormann believes the real issue lies in what spatial capacity the enemy combatant provisions apply – occupied territory, enemy territory, or battlefield? *Id*.
244. *Id*.
245. Fourth Geneva Convention, *supra* note 212.
246. *Id.* art. 43.
247. Dormann, *supra* note 209, at 45-74.
248. *Id*.
249. *Id*.

from application of the Third Geneva Convention.[250] The reasoning behind the memo is rooted in an obscure 1996 law called the War Crimes Act that authorizes punishment of U.S. officials who commit war crimes – including committing "grave breaches" of the Geneva Convention – by potentially applying the death penalty. Gonzalez was apparently concerned that future Justice Department prosecutors might apply the law to members of the Bush Administration.[251] He believed that if the Administration took the position that the Geneva Convention did not apply to detainees, Administration officials would be insulated from domestic prosecution under the Act.[252]

III. HISTORICAL BLUEPRINTS OF MILITARY COMMISSIONS FROM THE CIVIL WAR AND WORLD WAR II ERAS

Despite domestic and international criticism of the Bush administration policies toward the detainees,[253] the United States detention cases suggest that President Bush may have the authority to expand the scope of his military order to include American citizens within those subject to military commission. In his military order[254] issued November 13, 2001, President Bush defines the term 'individual subject to this order' as "any individual who is not a United States citizen."[255] However, in *Ex parte Quirin* and more recently, the case revisiting civil war-era military commissions *Mudd v. Caldera*, courts have indicated that U.S. citizens may be subject to the tribunals.

A. Military Commissions In the Civil War Context.

250. Michael Isikoff, *Memos Reveal War Crimes Warnings*, NEWSWEEK (May 19, 2004), http://www.msnbc.msn.com/id/4999734/site/newsweek/. The memo is written partly as a response to Secretary of State Colin Powell who urged the Administration to reconsider its determination that the Geneva Convention did not apply to Taliban or al-Qaeda prisoners.

251. *Id*.

252. *Id*.

253. Amnesty International, *supra* note 68.

254. Some legal scholars have questioned the constitutionality of this military order. In an article published in the Harvard Journal of Law and Public Policy, Orentlicher and Goldman argue that President Bush's military order poorly defines who exactly is suspected of terrorism, and shifts from one legal paradigm to another, suggesting certain aspects of the order are constitutionally flawed. Diane F. Orentlicher & Robert Kogod Goldman, *When Justice Goes to War: Prosecuting Terrorists Before Military Commissions*, 25 HARV. J.L. & PUB. POL'Y 653, 654-655 (2002).

255. Press Release, The White House, President Issues Military Order – Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (Nov. 13, 2001), *at* http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html.

1. *Ex parte Milligan*

The 1866 Supreme Court case *Ex parte Milligan* established that the Fifth and Sixth Amendments were violated when a civilian, not a member of the armed forces, was brought before a tribunal rather than a civilian federal court in an area where such a court was open and running.[256] In the case, Lamdin P. Milligan, a United States citizen and resident of Indiana, was arrested under a number of charges including conspiracy against the government, inciting insurrection, disloyal practices, and "violating the laws of war."[257] Milligan was found guilty of all charges by a military commission and sentenced to death by hanging.[258] Milligan appealed on the basis that the commission had no authority or jurisdiction over him.[259] Furthermore, while he was in military custody and more than twenty days after his arrest, a grand jury at the District of Indiana Circuit Court sat and adjourned his case without finding against Milligan.[260] *Milligan* stood for the idea that the Courts cannot be supplanted by military tribunals: "civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish."[261]

Scholars assert that *Milligan* does not put at issue the President's authority to carry out military tribunals "authorized by Congress," but rather, the President's independent authority to establish them.[262] Also, despite the fact that later cases regarding military tribunals have chipped away at the primary assertion in *Milligan*, it remains a very "definitive statement on the availability of martial law in peaceful areas."[263] At the time of the case, no Act of Congress, including the Habeas Corpus Act of 1863, had authorized the military commissions created by President Abraham Lincoln.[264] Justice Davis wrote that there may be some instances when emergency martial law may be imposed: foreign invasion or civil

256. Michal R. Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 CAL. W. L. REV. 433, 442 (2002).

257. *Ex parte* Milligan, 71 U.S. 2, 6-7 (1866) Essentially, Milligan was accused of joining and aiding, between the period of October 1863 and August 1864, a secret society calling itself the "Order of American Knights" or "Sons of Liberty" for the purpose of overthrowing the government and authorities of the United States. The members held communication with the enemy (the South, since this was during the period of the Civil War), conspiring to seize munitions and liberate prisoners of war, and resisting the draft.

258. *Milligan*, 71 U.S. at 7.

259. *Id*.

260. *Id*.

261. Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1292 (2002).

262. Stephen I. Vladeck, *The Detention Power*, 22 YALE L. & POL'Y REV. 153, 166 (2004).

263. *Id*.

264. *Id*.

war for instance, when the courts are physically closed and there is a breakdown in the ability to administer justice, then the military courts may take over.[265]

2. *Mudd v. Caldera*

Cases dealing with military commissions established during the civil war era may have ramifications for whether military tribunals may try U.S. citizens in the war on terrorism. The case *Mudd v. Caldera*, decided by a District of Columbia District Court, involved the issue of whether a military commission had jurisdiction over Dr. Samuel Mudd, who was convicted in 1865 as an accessory in the conspiracy to assassinate President Lincoln.[266] On the evening of April 14, 1865, President Lincoln was fatally shot while attending a benefit show at Ford's Theater.[267] The assassin, John Wilkes Booth, and his companion, David Herold, traveled to the tobacco farm of Dr. Samuel Mudd in Charles County, Maryland where, according to Dr. Mudd, the men told him that Mr. Booth had fallen from his horse.[268] Dr. Mudd set Booth's broken leg and gave the men food and shelter, as well as new horses.[269] Soon after, Attorney General Speed issued the opinion that a military commission would have jurisdiction to try the assassination conspirators, and President Andrew Johnson convened the nine-member Hunter Commission.[270] Dr. Mudd argued in his defense that the Hunter Commission lacked jurisdiction to try him, but the Commission rejected his argument.[271] Mudd was sentenced to life in prison in the Dry Tortugas islands off the coast of Florida,[272] but was later pardoned by President Johnson for his medical services in prison.[273]

In 1992, Dr. Mudd's grandson, Dr. Richard Mudd, filed an application with the Army Board for Correction of Military Records charging that the Hunter Commission lacked jurisdiction to try his grandfather.[274] Upon subsequent review by the Assistant Secretary of the Army, as well as subsequent judicial review by the District Court of Columbia, the Hunter Commission was deemed to have

265. *Id*. at 167.
266. Mudd v. Caldera, 26 F. Supp. 2d 113 (D.D.C. 1998); Mudd v. Caldera, 134 F. Supp. 2d 138 (D.D.C. 2001).
267. *Mudd*, 26 F. Supp. 2d at 115.
268. *Id*. at 116.
269. *Id*.
270. *Id*.
271. *Id*.
272. Shaughnessy, Volzer & Gagner, P.C., *The Case of Dr. Samuel Mudd*, *at* http://www.svg-law.com/Mudd/Mudd%20Pages.htm (last visited Apr. 5, 2005).
273. Mudd v. Caldera, 134 F. Supp. 2d 138, 140 (D. D.C. 2001).
274. *Id*.

jurisdiction over Dr. Samuel Mudd and denied Richard Mudd's request for relief.[275]

In arriving at its decision, the district court cited *Ex parte Quirin*:

> While the decision in *Quirin* clearly permits the exercise of jurisdiction by a military commission over those 'acting under the [express] direction of enemy armed forces,' it does not exclude the exercise of jurisdiction over those who are not under such direction.[276]

The court ruled that the Hunter Commission had jurisdiction over Dr. Samuel Mudd, even though he was a United States and Maryland citizen at the time and the civilian courts were available at the time of his trial.[277] In addition, *Mudd* allows military commissions to try U.S. citizens even after hostilities have ended.[278] This determination seems to reinforce the current situation in which the "War on Terrorism" has no projected end in sight.[279] Attorney Philip A. Gagner, counsel for the Mudd family in the most recent case, argues that the consequences of the *Mudd* decision may lead to a slippery slope of increasingly greater executive authority regarding the post-September 11th military tribunals.[280]

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275. *Id.* at 145.
276. *Id.* at 142.
277. *Id*.
278. The court argued that:

> the Supreme Court has also made clear that a military commission may be convened even 'after hostilities have ended to try violations of the law of war committed before their cessation, at least until peace has been officially recognized by treaty or proclamation of the political branch of the Government.'

Mudd, 134 F. Supp. 2d. at 146, quoting In re Yamashita, 66 S.Ct. 340 (1946). Although the Civil War was not formally over at the time of Lincoln's assassination, General Richmond had surrendered to Union forces and General Lee had surrendered to Ulysses Grant. *Id.* at 115.

279. *See* Ken Guggenheim, *No End in Sight in War on Terrorism*, Associated Press (Aug. 31, 2003), *available at* http://cnews.canoe.ca/CNEWS/World/2003/08/31/173422-ap.html.

280. Philip A. Gagner, *The Bush Administration's Claim that even Citizens Can be Brought before Military Tribunals, and Why it Should Never be Put Into Practice*, FindLaw's Writ (Dec. 26, 2001), *at* http://writ.news.findlaw.com/commentary/20011226_gagner.html.

> The Mudd family has always considered the conviction to be factually without basis and legally improper. Samuel Mudd, they argue, was a civilian not subject to military jurisdiction. The military tribunal, they

Gagner claims that if the opinion is expanded to its full extent, the power that the executive branch may glean from the *Mudd* case will render "the grand jury, the civil jury, courts, and the legislature" simply irrelevant.[281] So far, President Bush has not extended the military order to include U.S. citizens.[282]

B. Military Commissions in a World War II Context

The leading case on military commissions after World War II is *Ex parte Quirin*.[283] In *Quirin*, the petitioners, German spies, arrived on U.S. soil from two separate submarines between June 13, 1942 and June 17, 1942 – one in Long Island, New York and the other in Ponte Vedra Beach, Florida – in an effort to sabotage American war industries and facilities.[284] The saboteurs buried their German Naval Infantry uniforms upon landing, but all were caught by FBI agents in Chicago or New York before they had a chance to cause any damage.[285] President Franklin Roosevelt signed an order on July 2, 1942 that appointed a military commission to try the petitioners for offenses against the law of war and the Articles of War.[286] Attorney General John Ashcroft and other administration officials have testified before the Senate Judiciary Committee that President Bush relied upon the precedence of Roosevelt's military order when drafting his own.[287] Petitioners contended the government's claim that petitioners have no access to U.S. courts because they were "enemy aliens" or "enemy belligerents" and categorically denied access by the President's military order.[288] In *Quirin*, the Supreme Court pointed to the Articles of War, passed by Congress, that explicitly confers jurisdiction of "those charged with relieving, harboring or corresponding with the enemy and those charged with spying" to military commissions or other

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> argue, did not permit him to present evidence, and ignored any evidence that conflicted with its assassination theory. Dr. Richard Mudd, grandson of Samuel Mudd, succeeded in having the matter heard by the Army Board for Correction of Military Records, a body established by Congress to review past military actions. The Board decided unanimously in a 13 page opinion that the conviction should be overturned. The Army declined to overturn it, and this case followed.
>
> *Id.*

281. *Id*.

282. Press Release, *supra* note 255.

283. Maj. James R. Agar II, *Military Commissions and the War on Terror*, 66 TEX. B.J. 60 (2003).

284. *Ex Parte Quirin*, 63 S.Ct. 2, 7-8 (1942).

285. *Id* at 7.

286. *Id*. at 8.

287. John Dean, *Military Tribunals: A Long and Mostly Honorable History*, FindLaw's Writ (Dec. 7, 2001), *at* http://writ.news.findlaw.com/dean/20011207.html

288. *Quirin*, 63 S.Ct. at 9.

military tribunals.[289] The Court ruled that the President invokes the law of nations, or more specifically, the law of war, in establishing the tribunals.[290]

Quirin established the use of military commissions, but also addressed the issue of citizenship. One of the German saboteurs, petitioner Haupt, came to the United States when he was five years old and contends he became a citizen when his parents naturalized while he was still a minor.[291] Even if Haupt were a legitimate U.S. citizen (a fact that the Court never fully established), he would still be subject to military commission because citizenship does not relieve him of the consequences of unlawful belligerency.[292] The opinion almost seems to suggest that Haupt loses his rights as a citizen once classified as an enemy belligerent – an individual who associates himself with an enemy government's military and enter the country bent on hostile acts by the Hague Convention definitions.[293]

Despite consistent citation by the Circuit Courts to the case, some scholars suggest that *Ex parte Quirin* provides only limited support for President Bush's Military Order.[294] They contest the Order would only apply to those directly responsible for the September 11 attacks – analogous to the fact pattern in *Quirin* where the Germans actually invaded U.S. soil – and not subsequently captured combatants in Afghanistan.[295]

IV. CONCLUSION

The attacks on the World Trade Center Towers on September 11, 2001, propelled the United States into a new and unsettling area of war: a "War on Terrorism" that is neither temporally well-defined nor delineated by distinct national borders.[296] As a result of those horrific events, the Bush Administration has, understandably, tried almost every legal and military tactic available to ensure an attack such as 9/11 never occurs again. However, national security invariably comes at a price to personal freedoms of United States' citizens, as well as non-citizens captured in the context of this new war on terrorism who are not promised protection under the international Geneva Conventions governing treatment of prisoners during warfare.[297] Both the Third Geneva Convention and Fourth Geneva Convention appear to contain provisions protecting the so-called

289. *Id*. at 10.
290. *Id*. at 11.
291. *Id*. at 7.
292. *Id*. at 15.
293. *Quirin*, 63 S.Ct. at 15-16.
294. Orentlicher & Goldman, *supra* note 254, at 656-59.
295. *Id*.
296. *See* Note *Responding to Terrorism: Crime, Punishment, and War*, *supra* note 1, at 1222-1226.
297. Fourth Geneva Convention, *supra* note 212; Dormann, *supra* note 209, at 45-74.

"enemy combatants" detained at Guantánamo Bay.[298] However, the Bush Administration has stretched the language of the Conventions to mean that those detained barely fall outside the broad shadow of protection afforded by international humanitarian law.[299]

No real physical or military force can compel the United States to abide by the Geneva Conventions' guidelines. They are, for the most part, self-governing provisions.[300] There are other facets to this consideration, however: the United States' adherence, or lack thereof, to the International Law may reflect on the treatment of its own soldiers in enemy hands.[301] Many scholars have argued that if the United States wishes other countries to engage in fair treatment of its soldiers, then it should look to the general sentiment of the international community when making policy decisions.[302]

While the world waits to see what will become of the foreign captives at Guantánamo, those fortunate enough to have United States citizenship will at least have a chance to wrangle out their cases in federal courts across the country.[303]

298. Fourth Geneva Convention; Dormann, *supra* note 209, at 45-74.
299. Office of the Press Secretary, *supra* note 13.
300. *Id*.
301. Clare Dyer, *supra* note 162.
302. *Id*.
303. Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003).